

CASUALTIES IN EVOLVING WARFARE: IMPACT OF PRIVATE MILITARY FIRMS' PROLIFERATION ON THE INTERNATIONAL COMMUNITY

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In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist. We must never let the weight of this combination endanger our liberties or democratic processes. We should take nothing for granted. Only an alert and knowledgeable citizenry can compel the proper meshing of the huge industrial and military machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together.

—Farewell Address to the Nation,
Dwight D. Eisenhower, 1961¹

I. INTRODUCTION

They were by far the most gruesome images of the Iraq war covered by the American media; visions of the blackened, mutilated bodies of four U.S.-employed civilians, dragged through the streets of Fallujah, came to represent the brutality of the insurgent enemy. The fate of these Blackwater USA security contractors inspired the American Fallujah offensive, effectively shifting the previous goal of reconstruction to a large scale Marine offensive on the city.² Only a few months later, startling images of

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¹ Dwight D. Eisenhower, Farewell Radio and Television Address to the American People (Jan. 17, 1961), in *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: DWIGHT D. EISENHOWER 1960-61* 1035, 1038 (1961).

² Rajiv Chandrasekaran, *Key General Criticizes April Attack In Fallujah*, WASH. POST, Sept. 13, 2004, at A17.

bound, naked Iraqi prisoners appeared in the international media.³ These prisoners had been abused by both U.S. soldiers and contractors working for the information technology firm CACI in U.S.-run Abu Ghraib prison.⁴ Later, the soldiers shown in the pictures would be held accountable for the abuses, while the private contractors involved were spared prosecution.⁵

This brutality and abuse, recorded on both sides, shared a common thread: the involvement of private contractors. All of these images alerted the world to the existence of private military firms (hereinafter “PMFs”) and to the expansion of U.S. military privatization. Although the horrors of war and the military’s employment of civilians are commonplace in international conflict, there is growing concern about increased reliance on the civilian employees of these private firms. As the utility of privatization expands, the need arises for an effective method of accountability and protection for these private military contractors (hereinafter “PMCs”) who are now on the front lines of quickly evolving warfare.

There are two potential characterizations of the phrase “privatization of warfare.” First, it may refer to the late twentieth-century increase in intranational conflicts, or internal conflicts, as opposed to the previous domination of large scale international conflicts.⁶ This characterization invokes the “public/private dichotomy” of the international community’s decision to abstain from intervention in intranational conflicts.⁷ Traditionally, international law defines this hands-off approach through the concepts of national sovereignty and domestic jurisdiction, and it therefore refers to the larger social science concept of public intervention in private state affairs.⁸ The second, more modern conception of the “privatization of warfare” has evolved

³ Mary H. Cooper, *Private Affair: New Reliance on America’s Other Army*, 62 CONG. Q. WKLY. 2186, 2186 (2004).

⁴ *Id.*

⁵ P.W. Singer, *Outsourcing War*, FOREIGN AFF., Mar. 1, 2005, at 127-28.

⁶ Dino Kritsiotis, *The Privatization of International Affairs: Mercenaries and the Privatization of Warfare*, 22 FLETCHER F. WORLD AFF., Summer/Fall 1998, at 11, 11.

⁷ *Id.*

⁸ *Id.*; see also U.N. Charter art. 2, para. 7.

alongside developing notions of global economic privatization.⁹ Within the realm of state control and administration, privatization generally refers to contracting for “responsibilities and services previously identified with, or provided by, the state.”¹⁰ While each individual state has its own limits on privatization, the shift from international to intranational conflicts, and the unwillingness of the great powers to intervene, is creating a market for private military firms.¹¹ In turn, it is forcing a concurrent shift from military power traditionally provided by the state to privately contracted military force.¹²

It may be surprising that, historically, private force has been the norm rather than the exception.¹³ There is an underlying tension between the utility of the standing public military force, as aligned with an established nation-state, and the continuing availability of private force.¹⁴ The factors that affect each side of the equation include the state of international relations and the specialization of weapons and warfare methods.¹⁵ The solidification of the nation-state, its concept of sovereignty, and the laws regulating its conflicts and interactions are relatively recent developments.¹⁶ It follows, therefore, that the present structure of international law is challenged when the sovereignty of the nation-state is challenged.¹⁷ However, it remains to be seen whether the new proliferation of PMFs will present such a challenge through an encroachment on the nation-state’s two-hundred-year-old monopoly on force.¹⁸

⁹ Kritsiotis, *supra* note 6, at 11.

¹⁰ *Id.*

¹¹ *Id.* at 12 (referencing the use of mercenaries in Papua New Guinea, Sierra Leone and Angola); see generally P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 49-70 (2003) (discussing the impact of the post Cold War vacuum on the demand for PMF military services).

¹² Kritsiotis, *supra* note 6, at 12; SINGER, *supra* note 11.

¹³ SINGER, *supra* note 11, at 19.

¹⁴ See generally *id.* at 19-29.

¹⁵ See *id.* at 22-29.

¹⁶ See *id.* at 29.

¹⁷ See Thomas K. Adams, *The New Mercenaries and the Privatization of Conflict*, PARAMETERS, Summer 1999, at 103, 105; U.N. List of Member States, <http://www.un.org/Overview/unmember.html> (last visited Nov. 2, 2005).

¹⁸ Adams, *supra* note 17, at 105; see SINGER, *supra* note 11, at 29-32.

It is especially important to distinguish between the function and impact of PMFs hired by a developed state with an effective state military, and the role of PMFs in the intrastate and interstate conflicts of developing states without effective state militaries. In the United States, for example, the government justifies the use of PMCs with an argument that highlights their efficiency, and their limited, non-combat scope of services.¹⁹ However, that scope may be expanding with evolving technology and methods of warfare. Performance concerns revolve around the application of the Law of Armed Conflict (LOAC) to situations in which PMCs are proximally closer to combat.²⁰ In addition, deficiencies in oversight and regulation may decrease overall efficiency.²¹

Finally, jurisdictional gaps and decentralized contracting procedures create accountability concerns. Civilians of the host country may find themselves without remedy for criminal acts if there is no effective jurisdiction over the individual contractor. Military force and mobilization on the open market may break the link between state and military actions, allowing the state to avoid public accountability. In addition, powerful multinational corporations, many with greater financial viability than the governments of their host countries, may hire PMFs for security.²² As non-state actors gain access to military capabilities, a new system of authorities may emerge as a byproduct of the evolution of expensive military mobilization into cheaper information warfare.²³ There is a profound importance to having military capabilities on the international open market, and historical evidence urges caution for the international community of nation-states in the face of PMF proliferation.

Parts II, III, and IV of this Comment will examine the history of private force and the traditional definition of mercenary activity while discussing what distinguishes mercenary activity

¹⁹ Cooper, *supra* note 3, at 2188.

²⁰ Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, 51 A.F. L. REV. 111, 113-20 (2001).

²¹ See generally Cooper, *supra* note 3.

²² UK GREEN PAPER, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION, Feb. 2002, at 14; SINGER, *supra* note 11, at 61, 81.

²³ SINGER, *supra* note 11, at 61.

from PMF activity. Next, Part V will look at increased U.S. reliance on PMF services, and the oversight and contracting problems that stem from this recent development. This will lead into a discussion about the jurisdictional gaps over the actions of the individual contractor in Part VI, and the impact on the Law of Armed Conflict in Part VII. The Comment will then address the international debate over the expanded role of PMFs in Parts VIII and IX, and will conclude by listing the concerns for the international community.

II. PRIVATE FORCE: A HISTORICAL PERSPECTIVE²⁴

To understand the conditions that have conspired to support the recent success of PMFs, it is necessary to look at the traditional definition of “mercenary” and to address international attempts at regulation. This background is useful in the debate over whether PMCs should be considered mercenaries, and therefore limited by international regulation, or whether they should be allowed to expand the scope of their services to providing U.N. peacekeeping forces.

The ordinary language definition of mercenaries is “individuals or organizations who sell their military skills outside their country of origin and as an entrepreneur rather than as a member of a recognized national military force.”²⁵ The utilization of mercenary forces in battle has been traced as far back as the battle of Kadesh in 1294 B.C., when the Egyptian Pharaoh Ramses II sent hired Numidian soldiers to fight the Hittites.²⁶ Civilian armies began to spring up in certain ancient Greek city-states, but due to the necessity of specialized skills in war, Alexander the Great and the Roman Empire continued to hire fighters with particular talents.²⁷ After the fall of the Roman Empire, and throughout the Middle Ages, mercenary forces continued to thrive under the feudal system.²⁸

There are a few theories that offer explanations for why mercenary force continued to thrive through this period. One

²⁴ This historical synopsis is largely taken from SINGER, *supra* note 11.

²⁵ Adams, *supra* note 17, at 104.

²⁶ Cooper, *supra* note 3, at 2196.

²⁷ *Id.*

²⁸ *Id.*

posits that traditional reliance on individual paid fighters created a fundamental power struggle between the feudal lords of Europe and the newly formed mercenary companies.²⁹ These companies traveled around the continent looking for employers of war.³⁰ Fearful of their inherent strength, kings were compelled to start campaigns abroad if only to keep the restless mercenary companies satisfied.³¹

A second theory postulates that the feudal system could not address the increasingly complex needs of a modernizing society, such as the protection of trade routes for merchants.³² Whether it was the threat of mercenary force subverting the feudal system or the superior efficiency of mercenary force in a developing world, highly specialized and effective mercenary armies found a profitable market in European instability by the end of the sixteenth century.³³ What followed was the entrepreneurship that led to the Thirty Years War in the early seventeenth century.³⁴ Powerful individuals raised mercenary armies and merged wealth and force under a business structure that resembles modern corporate structures.³⁵ The victors of these conflicts, fought almost entirely by hired forces, reaped the benefits of the ravaged lands. The devastation to local populations was such that the emergence of the state and the notion of sovereignty became the only effective defense.³⁶ In 1684, the Peace of Westphalia was declared, and so began the age of the modern nation-state and its monopoly over force.³⁷

Many factors, including market pressures, technology, and social change, combine to create demands on nation-states that

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Deborah Avant, *Mercenaries*, FOREIGN POL'Y, July-Aug. 2004, at 20, 20-21.

³³ Cooper, *supra* note 3, at 2196.

³⁴ *Id.*

³⁵ SINGER, *supra* note 11, at 29.

³⁶ *Id.*

³⁷ *Id.*

shape their method of military protection.³⁸ In the late seventeenth century, it was the inefficiency of unregulated, unconnected, and uncontrolled military force that helped to guarantee the triumph of the sovereign state and its monopoly over force. The invention of firepower decreased the need for specialized fighters, and the notion of sovereignty worked to feed into the growing enlightenment ideal of nationalism.³⁹ Ordinary citizens were now asked to fight for a nation.⁴⁰

While the birth of the modern nation-state is instructive on the ideal conditions for privatization, the closest historical approximation to current privatization trends may be found in the history of the charter company systems that existed between 1500 and 1800. The Dutch East India Company and the English East India Company were private companies that amassed enough wealth and power to rival their states of origin.⁴¹ They hired British, Swiss, and German mercenaries, as well as locals, to protect their business interests in India.⁴² This ability to contract force afforded each company enough sovereignty to “make peace and war at pleasure, and by its own authority.”⁴³ Charter companies grew through the exploitation of weak local governance through superior organization and technology, but in their quest for profit, they began to work against the political interests of the British and the Dutch governments.⁴⁴ As political relations between states solidified, the profit margin of war decreased, and the companies eventually went out of business, collapsing under the weight of power without the granted governmental authority.⁴⁵

The balanced relationship among public support, national interest, and force has shaped the rise of the civilian army in

³⁸ See Avant, *supra* note 32, at 20-21.

³⁹ SINGER, *supra* note 11, at 30-31.

⁴⁰ See *id.* at 29-32.

⁴¹ *Id.* at 34.

⁴² *Id.* at 34-35.

⁴³ *Id.* (quoting MALACHY POSTLETHWAYT, THE UNIVERSAL DICTIONARY OF TRADE AND COMMERCE (4th ed. W. Strahan et al. 1774) (1751)).

⁴⁴ *Id.* at 35.

⁴⁵ *Id.* at 36.

democratic states. During the World Wars, which required massive manpower, and resulted in massive casualties, the utility of citizen armies eclipsed the utility of specialized private forces.⁴⁶ One might argue that when the quality mattered more than the quantity of force, mercenary activity was significantly higher.⁴⁷

If the use of large citizen armies is a historical anomaly, then the modern military is more vulnerable than popularly believed. It follows that if the style of war and international relations determine the form of force, either public or private, then the new increase in private military contractors signals a major move away from the concept of the sovereign nation-state's monopoly on the use of deadly force.⁴⁸ The theoretical conception of the role of government has always included debates over the privatization of services such as health care, utilities, and education.⁴⁹ Until now, the debate has never examined whether the force that protects society should be privatized, mainly because providing protection was conceived as one of the essential functions of government.⁵⁰ For the past two centuries, since the dissolution of the charter companies, there has been no cause to challenge the state's monopoly on force. The general consensus that military capabilities should fall primarily under state control has been fueled in part by the ever present threat of military privatization to the stability of the nation-state government.⁵¹

III. AN ELUSIVE MERCENARY DEFINITION IN MODERN WARFARE

Any advantage that standing citizen armies provided dissipated in the aftermath of the World Wars. In contrast to the international conflicts that called for citizen armies, the effects of European decolonization in Africa during the 1950s and 1960s created new utility for intranational mercenary forces.⁵² Markets for mercenary-supported coups expanded as colonial interests

⁴⁶ *Id.* at 29-30.

⁴⁷ *See, e.g., id.* at 38.

⁴⁸ *See Adams, supra* note 17, at 104-05.

⁴⁹ SINGER, *supra* note 11, at 7.

⁵⁰ *Id.*

⁵¹ *Id.* at 8.

⁵² *Id.* at 37; Kritsiotis, *supra* note 6, at 12.

took hold and weak governments became easy targets.⁵³ These high-profile private forces in developing countries like Africa and South America, as well as the anecdotal connection between mercenaries and racism, have subsequently stimulated international opinion against the use of private force in any capacity.⁵⁴

The 1977 Additional Protocol I to the Geneva Conventions “sought to codify disgust for mercenaries.”⁵⁵ Defining what a “mercenary” is has proven to be a formidable, and practically difficult, endeavor that has resulted in a very narrow definition.⁵⁶ Under the Geneva Conventions, Additional Protocol 1, Article 47 a mercenary is anyone who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.⁵⁷

Any person taking a direct part in conflict that fits this definition does not have the right to be a combatant under LOAC, or a prisoner of war (POW).⁵⁸ The right to POW status is important

⁵³ SINGER, *supra* note 11, at 37-38.

⁵⁴ *Id.* at 37.

⁵⁵ Adams, *supra* note 17, at 106.

⁵⁶ UK GREEN PAPER, *supra* note 22, at 6.

⁵⁷ Protocol Additional to the Geneva Conventions of 12 Aug. 1949 (Protocol I), art. 47, June 8, 1977, 1125 U.N.T.S. 3, 25.

⁵⁸ *Id.* art. 47, para. 1; for discussion on the status of combatants under LOAC, see *supra* Part VII.

because it confers immunity from prosecution for acts committed before capture.⁵⁹

The Geneva Convention definition introduces the conceptual difficulties in defining mercenary activity for modern warfare. In order to distinguish the mercenary from the soldier, “motivation” to take part in the hostilities is included as an element.⁶⁰ Critics have taken issue with the difficulty in assessing and proving an individual’s motivation to fight, and with the latitude such difficulty may afford an individual’s captors.⁶¹ Article 47 may also serve as a disincentive for mercenaries to comply with the law of war, due to the denial of POW protections.⁶²

With the International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries in 1989, the difficulty in definition frustrated attempts to effectively deter mercenary activity.⁶³ It is generally agreed that the additional requirements for regulation are vague and difficult to prove.⁶⁴ A British government report concluded that the flawed definitions meant that “to serve as a mercenary is not an offence under international law.”⁶⁵ The Convention’s effectiveness is further compromised by the exclusion of intranational conflicts and the unwillingness of the United States, as well as other militarily significant states, to sign either the Additional Protocol or the Convention.⁶⁶

Essentially, this Geneva Convention definition exhibits the competing interests at play in the international debate over the

⁵⁹ Guillory, *supra* note 20, at 114.

⁶⁰ UK GREEN PAPER, *supra* note 22, at 6.

⁶¹ Melysa H. Sperber, *John Walker Lindh and Yaser Esam Hamdi: Closing the Loophole in International Humanitarian Law for American Nationals Captured Abroad While Fighting with Enemy Forces*, 40 AM. CRIM. L. REV. 159, 196-97 (2003).

⁶² *Id.* at 195.

⁶³ G.A. Res. 44/34, U.N. Doc. A/RES/44/34 (Dec. 4, 1989).

⁶⁴ P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUMBIA J. INT’L L. 521, 531 (2004).

⁶⁵ *Id.* at 529 (quoting REPORT OF THE COMMITTEE OF PRIVY COUNSELORS APPOINTED TO INQUIRE INTO THE RECRUITMENT OF MERCENARIES, 1976, Cmnd. 6569, at 10).

⁶⁶ Singer, *supra* note 64, at 531.

legality of private force. In the amendments to Additional Protocol 1, the definition of mercenary is restricted to include mercenary activity only in international conflicts.⁶⁷ As an indication of how the U.N. and international law rely on the maintenance of sovereignty, this amendment was added by signatory states to allow for the use of mercenary force in intranational conflicts. However, while this hands-off approach to intranational conflicts protects the state from the international community, it also devalues any humanitarian concerns inherent in the construction of the Geneva Conventions. Intranational conflicts are presently the major market for truly dangerous mercenary activity, that is, those activities most likely to violate humanitarian norms.⁶⁸ This approach also provides evidence of the political considerations involved in the international debate on the use of mercenary force.

While global consensus has labeled the utilization of hired force in parts of Africa as dangerous mercenary activity, that type of activity is one extreme on a spectrum that involves multiple qualifying factors.⁶⁹ Currently, P.W. Singer offers one of the most complete definitions in his book *Corporate Warriors: The Rise of the Privatized Military Industry*.⁷⁰ Singer separates mercenary characteristics into six categories that restate the qualifications in the Geneva Convention definition, while adding certain procedural and organizational criteria.⁷¹

First, a “mercenary is not a citizen . . . of the state in which he or she is fighting.”⁷² Second, a “mercenary is not integrated . . . into any national force, and is bound only by the contractual ties of a limited employee.”⁷³ Third, a “mercenary fights for individual short-term economic reward, not for political or religious goals.”⁷⁴ Fourth, “mercenaries are brought in by circuitous ways

⁶⁷ SINGER, *supra* note 11, at 41.

⁶⁸ *See id.*

⁶⁹ Adams, *supra* note 17, at 103.

⁷⁰ *See* SINGER, *supra* note 11, at 40-50.

⁷¹ *Id.*

⁷² *Id.* at 43.

⁷³ *Id.*

⁷⁴ *Id.*

to avoid legal prosecution.”⁷⁵ Fifth, individual mercenaries usually function in “temporary and ad-hoc” groups, perhaps due to the black market nature of the business.⁷⁶ Sixth, mercenaries focus only on “combat service for single clients.”⁷⁷ Essentially, the most likely candidates for looting, pillaging, and human rights abuses are given the mercenary classification. The scope of their use is limited, and their expertise and specialization is questionable in most cases.⁷⁸

Recently, it has been rumored that both sides in the Kosovo war have utilized mercenary force, as have Latin American drug cartels.⁷⁹ While the black market nature of the mercenary trade leaves little information on the scope of involvement in any conflict, this same black market may work against the creation of any recognizable organization. While there is then less of a likelihood that a state or hiring party will become dependent on mercenary force, the potentially volatile nature of mercenary activity increases the need for effective international control.⁸⁰

IV. ARE PRIVATE CONTRACTORS MERCENARIES?

The stigma attached to the term “mercenary” is conspicuously absent from the term “private military contractor.” PMFs are publicly traded corporations—high profile, fully integrated firms that maintain ties to stockholders and relationships with their host state.⁸¹ PMFs provide a broad range of services, which allows for distance from those security services that may resemble mercenary activity.⁸² This organization and public acceptance distinguishes the role of PMFs in the international community from the mercenary classification.

Singer distinguishes PMF activity from mercenary activity across six different criteria.⁸³ Whereas mercenaries are illegal

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 44.

⁸¹ *Id.* at 46-47.

⁸² *Id.* at 46.

⁸³ *Id.* at 47.

and loosely organized bands of individuals fighting for personal economic gain, PMCs operate under an existing PMF corporate structure.⁸⁴ The profit goes to the corporation rather than the individual.⁸⁵ These corporations are legal, and services are provided on an open market.⁸⁶ Recruitment is public, and it allows for a greater degree of specialization.⁸⁷ There is also an undeniable link to the worldwide market, which arguably provides some market force regulation.

Proponents of PMFs argue that this corporate structure, built around the most basic of mercenary motivations, provides control over some inherent dangers.⁸⁸ There is transparency in the process of recruitment, and some employees have been mercenaries both before and after their employment as PMCs.⁸⁹ It is claimed, however, that because of the solid structure and different relationships, the overall impact of a privately hired force in any conflict is fundamentally different from the impact of mercenary force.⁹⁰

When looking at the broad range and scope of PMF offered services, the impact and relationship to any given conflict is substantial. Each PMF performs different functions in its scope of service. Over seventy PMFs are currently in operation, and they have been classified based on their primary services.⁹¹ There are multiple names, and subtle differences, for each classification. The “Tip of the Spear” typology, as outlined by Singer, is organized according to the level of services provided by the PMF at the international level.⁹² At the top are the “Military Provider Firms.” These firms, which include high-profile Sandline and Executive Outcomes, provide direct combat services such as line

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ UK GREEN PAPER, *supra* note 22, at 14.

⁸⁹ SINGER, *supra* note 11, at 46.

⁹⁰ *Id.*

⁹¹ *Id.* at 243 (Appendix I).

⁹² *Id.* at 91-100.

units, combat pilots, and direct command of field units.⁹³ “Military Consultant Firms,” including the U.S.-based MPRI, Vinell, and Dyncorp, specialize in advising and training.⁹⁴ “Military Support Firms,” including Kellogg, Brown & Root (KBR), provide logistics, intelligence, technical support, supply, and transportation.⁹⁵

Similarly, the traditional U.S. Army classification of contractor support is organized “by the type of support that [PMCs] provide on the battlefield and, more importantly, by what type of contracting organization has authority over them.”⁹⁶ Contractor management and planning often differ significantly, depending on the “type of contractor support provided.”⁹⁷

According to the Army’s Field Manual, which instructs commanders on the ground about the role of PMCs, contractors on the battlefield are categorized as either “theater support contractors, external support contractors, or system contractors.”⁹⁸ “Theater support contractors provide goods, services, and minor construction . . . to meet the immediate needs of operational commanders.”⁹⁹ Usually, theater support contractors are encompassed by the term “contingency contractors.”¹⁰⁰

External support contractors provide a variety of combat and combat service support to deployed forces. They support the mission and “may include a mix of U.S. citizens, third-country nationals, and local national subcontractor employees.”¹⁰¹ A local national subcontractor is a contractor employee who is a citizen of the “host” country where the work is being performed.¹⁰²

⁹³ *Id.* at 93.

⁹⁴ *Id.* at 93, 95-96.

⁹⁵ *Id.* at 93, 97.

⁹⁶ HEADQUARTERS OF THE DEP’T OF THE ARMY, FM 3-100.21, CONTRACTORS ON THE BATTLEFIELD para. 1-7 (2003) [hereinafter ARMY FIELD MANUAL].

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at para. 1-8.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1-9 (acronyms not included).

¹⁰² U.S. GEN. ACCOUNTING OFFICE, MILITARY OPERATIONS: CONTRACTORS PROVIDE VITAL SERVICES TO DEPLOYED FORCES BUT ARE NOT ADEQUATELY ADDRESSED IN DOD PLANS, GAO-03-695, at 6 n.4 (June 2003) [hereinafter GAO-03-695].

Any employee who is not a citizen of the United States or the host country is termed a “third-country national.”¹⁰³

External support contracts include the Logistics Civil Augmentation Program (LOGCAP),¹⁰⁴ which the Army established in 1985 “as a means to (1) preplan for the use of contractor support in contingencies or crises and (2) take advantage of existing civilian resources in the United States and overseas to augment active and reserve forces.”¹⁰⁵ LOGCAP offers one of the most expensive U.S. logistics support contracts available.¹⁰⁶

System contractors provide support to “Army materiel systems under pre-arranged contracts.”¹⁰⁷

Supported systems include, but are not limited to, newly or partially fielded vehicles, weapon systems, aircraft, and command and control. System contractors may deploy with the force to both training and real-world operations.¹⁰⁸

They may provide either interim contracted support, which is initial temporary support of an Army system, or long-term support, which is referred to as contractor logistic support.¹⁰⁹ Contractor logistic support is said to produce a “habitual relationship” between the individual contractor and the individual soldier or unit.¹¹⁰ This classification indicates a level of trust necessary to employ system contractors in a critical scope of service, which may be one reason that the manual points out that employees are mostly U.S. citizens.¹¹¹

Of the three Singer classifications, employees of military provider firms are most likely to see combat operations.¹¹² Of the contractors included in the Army’s classification, most will be

¹⁰³ *Id.* at 6 n.3.

¹⁰⁴ ARMY FIELD MANUAL, *supra* note 96, at para. 1-9.

¹⁰⁵ GAO-03-695, *supra* note 102, at 6 n.2.

¹⁰⁶ U.S. GEN. ACCOUNTING OFFICE, MILITARY OPERATIONS: DOD’S EXTENSIVE USE OF LOGISTICS SUPPORT CONTRACTS REQUIRES STRENGTHENED OVERSIGHT, GAO-04-854, at 14 (June 2004) [hereinafter GAO-04-854].

¹⁰⁷ ARMY FIELD MANUAL, *supra* note 96, at para. 1-10.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at paras. 2-45, 2-14.

¹¹¹ *Id.* at para. 1-10.

¹¹² SINGER, *supra* note 11, at 92.

employees of military support and military consultant firms under Singer's classification.¹¹³ Military provider firms are more likely to be hired by the disintegrating governments, or opposing rebel factions, in states where one side has the means to buy training and troops for a quick advantage.¹¹⁴ In publicized cases, like Angola and Sierra Leone, the success of these firms has led to a certain amount of negative attention.¹¹⁵ In these cases, the firm in question dissolved and re-emerged under a different name in order to avoid potentially damaging external regulation.¹¹⁶ This fluidity of the military provider firm creates some problems. First, fluidity and easy restructuring places a certain amount of pressure on states to regulate in the absence of market force regulation. Also, in an attempt to distance themselves from military providers, firms may label their services to avoid connection with combat participation. "Security" and "guarding facilities" have different connotations than "tactical military services" and "soldier."¹¹⁷ However, proximity and participation in warfare are essentially the same.

V. RE-EMERGENCE OF PRIVATE FORCE IN THE UNITED STATES

A. THE POST-COLD-WAR VACUUM

The early twentieth century saw U.S. military expansion in times of war and a decrease in times of peace.¹¹⁸ For both World Wars, U.S. industry mobilized as needed, and then returned to peacetime production.¹¹⁹ In the Cold War environment, the government dismantled this reactionary system to allow for continuous readiness in peacetime.¹²⁰ The bipolar power struggle between the United States and the Soviet Union sent streams of

¹¹³ *Id.* at 91-100.

¹¹⁴ *Id.* at 92-95.

¹¹⁵ *Id.*; *infra* Part VIII.

¹¹⁶ *Id.* at 95.

¹¹⁷ *Id.*

¹¹⁸ Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 905 (2004).

¹¹⁹ *Id.*

¹²⁰ *Id.*

money into private military contracts to establish “military outposts around the globe, providing weapons, technology, intelligence, strategy, training and soldiers to dozens of less developed nations and resistance groups.”¹²¹ Along with the arms race, this development established a powerful private defense industry closely tied to the Department of Defense (DoD).¹²²

The collapse of the Cold War stalemate in 1991 left a vacuum of power in the territories previously occupied by the superpowers.¹²³ The scramble for power resulted in intranational conflicts not conducive to tanks, missiles, or large numbers of ground forces.¹²⁴ Tactically and politically, intervening in these conflicts was not a viable option for the United States or any other NATO country relying on massive civilian armies and technology for large-scale conflicts.¹²⁵

Besides the change in tactical warfare, demilitarization created a void within the civilian army that may have irreversibly opened the military to increased privatization.¹²⁶ Since 1970, the United States has cut the number of active duty troops in half, from 3 million to 1.4 million.¹²⁷ Military outsourcing of non-combat jobs began around the same time.¹²⁸ It is costly to maintain a standing army in times of peace, and there has been a massive economic benefit in outsourcing. Since 1988, the Pentagon has shut down major military installations and reduced personnel, with an initial savings of \$17 billion, and an additional \$7 billion annually.¹²⁹ During the Clinton-Gore years, under the larger motivation to “reinvent government,” it was agreed that promoting competition between corporations for military contracts would

¹²¹ *Id.*

¹²² *Id.* at 906.

¹²³ Cooper, *supra* note 3, at 2197.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* Otherwise known as the Base Closure and Realignment Commission Process (BRAC). See S. REP. NO. 106-50, at 423 (1999).

enhance “quality, economy, and productivity.”¹³⁰ The government took steps to streamline the corporate bidding process under the 1994 Federal Acquisition Streamlining Act.¹³¹

These developments have provided both supply and demand for PMF services. Civilian armies that have traditionally been comprised of young, inexperienced soldiers are now being out-serviced by experienced ex-military persons lured into the world of private security by offers of more than double their former military stipends.¹³² This money has been diverted from the training of new civilian soldiers, with the rationale that paying contractors saves training costs and maximizes the investment made training these fighters the first time.¹³³ When analyzing the immediate economic benefits, the U.S. decision to rely on PMF services seems like an unavoidable development.

B. THE EFFICIENCY ARGUMENT: PROBLEMS WITH U.S. CONTRACTOR OVERSIGHT

It may not be the choice to hire PMFs, but rather the extent of U.S. reliance on PMF services, that signals rapid evolution. The United States has the most successful military force in the world, but the argument for privatization is simple and effective: “Private companies are more efficient than governments. Private companies provide higher quality services at lower prices. They meet demands faster, more flexibly, more accurately, more completely, at lower prices. Everybody wins: Streets, prisons, and nations are safer, taxes are lower, and shareholders are richer.”¹³⁴

In any other balanced and competitive market, the above efficiency signifies a competitive and economically viable service. The chaotic circumstances surrounding war and international conflicts tend create a deviation from the ideal market, and the assessment of services that would normally accompany a public-private contract does not generally occur. Without enforced regulation and market force controls, the efficiency argument fails due to lack of oversight and limited competition.

¹³⁰ Cooper, *supra* note 3, at 2197.

¹³¹ *Id.*

¹³² *Id.* at 2192.

¹³³ *Id.*

¹³⁴ Rosky, *supra* note 118, at 929.

1. Acquisition and Procurement

Risk is increased through the haphazard contracting and monitoring procedures between the United States and PMFs. It is true that the United States has the longest-running licensing procedure for PMFs, which has increased transparency in the contracting process.¹³⁵ However, any problems with increasing reliance on a private institution in matters of national security are magnified by the utilization of no-bid contracts, the difficulty in assessing performance in a conflict situation, the distance between the U.S. government and the PMC, the lack of subcontractor knowledge, the absence of a centralized contracting system, the separation of the monitoring officer from combat, and the lack of standards for military and PMC interaction on the ground.¹³⁶

Under the U.S. Code, the Competition in Contracting Act of 1984 states that the federal government “shall obtain full and open competition through use of the competitive procedures in accordance with the requirements of this title and the Federal Acquisition Regulation [FAR].”¹³⁷ Under FAR, there are seven exceptions that allow the DoD to use less than open competition. These include:

1. There is only one responsible source available to fulfill the contract requirements.
2. The federal agency’s need for these goods or services is of such an unusual and compelling urgency that the federal government would be seriously injured if this contract were not awarded.
3. The federal government needs to ensure that suppliers are maintained in the event of a national emergency, or to achieve industrial mobilization, or to establish or achieve or maintain an engineering, development, or research capability.
4. The federal government has an international agreement to make this acquisition through means other than through full and open competition.

¹³⁵ UK GREEN PAPER, *supra* note 22, at 18.

¹³⁶ For a complete discussion see SINGER, *supra* note 11, at 151-68.

¹³⁷ 41 U.S.C. § 253 (a)(1)(A)(2000).

5. A statute specifically authorizes or requires that the contract be made through a specific source.
6. The use of full and open competition may compromise national security.
7. The public interest would be better served by use of other than full and open competition.¹³⁸

There is clearly no bright-line articulation of the standard used in awarding no-bid contracts. As an example of the DoD's broad discretionary power, the exception for national security was the rationale for closing bids from other countries for the Iraq reconstruction contracts.¹³⁹ There is also a loophole in continuing LOGCAP contracts. "LOGCAP contracts are 'costs-plus award fee,' meaning that there is a fee paid based on contract costs in addition to the potential for incentive fees based on performance."¹⁴⁰ After the initial contract is awarded, "task orders" may be determined by the base commander.¹⁴¹ Task orders are akin to small contracts awarded without competition.¹⁴² These "small" contracts may also be quite substantial. Three LOGCAP task orders given to Halliburton/KBR under one initial LOGCAP contract were each worth at least \$60 million.¹⁴³

Evidence of KBR accounting abuses in Iraq is slowly coming to the attention of legislators and the public.¹⁴⁴ Pentagon auditors reported more than \$100 million in questionable costs in one section of a massive, no-bid KBR fuel delivery contract.¹⁴⁵ Auditors also found \$1.8 billion in "unsupported costs" in a \$10.5 billion Army logistics competitive bid contract.¹⁴⁶ Even with these

¹³⁸ VALERIE BAILEY GRASSO, CONG. RESEARCH SERV., IRAQ: FREQUENTLY ASKED QUESTIONS ABOUT CONTRACTING CRS-2 (Mar. 1, 2005).

¹³⁹ *Id.* at CRS-3.

¹⁴⁰ *Id.* at CRS-7.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See André Verlöy & Daniel Politi, *Windfalls of War: Halliburton Contracts Balloon*, CTR. FOR PUB. INTEGRITY, Aug. 18, 2004, <http://www.publicintegrity.org/wow/report.aspx?aid=366>.

¹⁴⁵ Griff Witte, *Pentagon Audit Questions Halliburton's Costs in Iraq*, WASH. POST, Mar. 15, 2005, at A4.

¹⁴⁶ *Id.*

audits and a “recommendation to withhold some of the payments,” Halliburton was paid “in full, plus performance bonuses.”¹⁴⁷

The “cost-plus award fee” is a product of the streamlining acquisition and procurement movement of the mid-1990s, under the larger policy to “reinvent government.”¹⁴⁸ These reforms worked to grant greater discretion to agencies in the decision to award individual contracts to private companies under blanket purchase agreements.¹⁴⁹ Under Division E of the Clinger-Cohen Act of 1996 (hereinafter “Clinger Cohen”), otherwise known as the Information Technology Management Reform Act, authority is given to the head of an executive agency “to acquire information technology” and to make a multi-agency contract for procurement of commercial items of information technology.¹⁵⁰ The purpose of the act was to eliminate bureaucratic paperwork and save money by “requiring agencies to develop and maintain an integrated system architecture” and move into the information technology age.¹⁵¹

In addition, the Federal Acquisition Streamlining Act (FASA) was passed in 1994 to make it easier for the Pentagon to purchase services from a more competitive private sector.¹⁵² FASA changed the laws that govern how agencies acquire almost \$200 billion of goods and services annually.¹⁵³ It streamlined the acquisition process by creating multiple-award task and delivery order contracts.¹⁵⁴ Both Clinger-Cohen and FASA may be used to enable blanket-purchase contracts between a PMF and an

¹⁴⁷ *Id.*

¹⁴⁸ Cooper, *supra* note 3, at 2197.

¹⁴⁹ *Id.* at 2190.

¹⁵⁰ 40 U.S.C. § 11314(a)(3) (2005).

¹⁵¹ Office of the Under Sec’y of Def. (Comptroller), Summary of the Clinger-Cohen Act of 1996, <http://www.dod.mil/comptroller/icenter/index.html> (follow “Information” hyperlink; then follow “Legislation and Reform Initiatives” hyperlink; then follow “Clinger-Cohen Act of 1996” hyperlink) (last visited Aug. 31, 2005).

¹⁵² Cooper, *supra* note 3, at 2197.

¹⁵³ GEN. ACCOUNTING OFFICE, 100TH CONG., REPORT TO CONGRESSIONAL COMMITTEES, ACQUISITION REFORM: REGULATORY IMPLEMENTATION OF THE FEDERAL ACQUISITION STREAMLINING ACT OF 1996 1 (1996), available at <http://www.gao.gov/archive/1996/ns96139.pdf>.

¹⁵⁴ Federal Acquisition Streamlining Act, Pub. L. No. 103-35, §§ 1004, 1054, 108 Stat. 3243 (codified in scattered sections of 10 U.S.C.).

agency that handles information technology, like the Department of the Interior, to cover contractor services that would otherwise be subject to public scrutiny and jurisdiction as an official DoD contract.¹⁵⁵

An example of this is the recent contract for PMC interrogation services, which was awarded to the information technology firm CACI.¹⁵⁶ The scope of these services was only discovered by the public after the abuses at Abu Ghraib came to light.¹⁵⁷ Because of the number of agencies involved in the contracting process, CACI was not listed as an Army contract.¹⁵⁸ A General Services Administration (GSA) contract, awarded by the Department of the Interior, led to the CACI Army-funded task order.¹⁵⁹ The original contract, awarded in 1998 with a \$500 million limit, was designed for information technology purchases.¹⁶⁰ “The GSA negotiates contracts with private companies, which then can be used throughout the government to acquire goods and services.”¹⁶¹ Perhaps more importantly, “work orders awarded through these GSA contracts do not have to be competitively bid.”¹⁶² “Interrogation services, however, were not among the items that agencies could purchase from CACI under this contract,” according to a report released by the Department of the Interior’s Inspector General.¹⁶³ The report went on to point out that only one of eleven CACI task orders was within the scope of the original contract.¹⁶⁴

What is essentially a loose and “streamlined” PMF contracting process has generated minimally regulated, and therefore potentially unreliable, contractor performance. To focus on the example of the CACI contract, 35 percent of the thirty-one

¹⁵⁵ André Verlöy & Daniel Politi, *Contracting Intelligence: Department of Interior Releases Abu Ghraib Contract*, CTR. FOR PUB. INTEGRITY, July 28, 2004, <http://www.publicintegrity.org/wow/report.aspx?aid=361>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

interrogators provided by CACI did not have any “formal training in military interrogation policies and techniques,” according to the Army Inspector General.¹⁶⁵ This training was supposed to have been provided by CACI.¹⁶⁶ According to the Inspector General, neither the Army nor the company required that contract interrogators receive “formal, comprehensive, military-specific interrogator training” prior to the Abu Ghraib scandal.¹⁶⁷ The training regulation failure and subsequent torture and abuse scandal may not be directly connected, but the flaws and problems in the contracting process should lead to serious questions about the validity of the efficiency argument.

2. Oversight

It is inherently difficult for the DoD to monitor contractor performance. A 2003 GAO Report noted that “[a]s early as 1988, DoD noted the lack of a central policy or an oversight mechanism for the identification and management of essential contractor services.”¹⁶⁸ In this 1988 DoD Inspector General report, the observation that emergency essential services could not be guaranteed through legal channels or enforcement powers led to the conclusion that contractor duties should be restricted to those that ensured continued mission performance in the face of contractor non-performance.¹⁶⁹ In 1990, DoD came out with DoD Instruction 3020.37, which “addresses the continuation of

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ GEN. ACCOUNTING OFFICE, 107TH CONG., REPORT TO THE SUBCOMMITTEE ON READINESS AND MANAGEMENT SUPPORT, COMMITTEE ON ARMED SERVICES, CONTRACTORS PROVIDE VITAL SERVICES TO DEPLOYED FORCES BUT ARE NOT ADEQUATELY ADDRESSED IN DOD PLAN 11 (2003).

¹⁶⁹ *Id.* A 1998 DoD Inspector General report noted that there was no mechanism to “ensure that the emergency essential services performed by contractors would continue during a crisis or hostile situation.” *Id.*; OFFICE OF THE INSPECTOR GEN., DEP’T OF DEF., AUDIT REPORT, RETENTION OF EMERGENCY-ESSENTIAL CIVILIANS OVERSEAS DURING HOSTILITIES (1988). The report also stated that there was “no central oversight of contracts for emergency essential services” GEN. ACCOUNTING OFFICE, 107TH CONG., *supra*; OFFICE OF THE INSPECTOR GEN., DEP’T OF DEF., *supra*.

essential contractor services during crisis situations.”¹⁷⁰ Contractor services are considered essential when “(1) DoD components may not have military or civilian employees to perform these services immediately, or (2) the effectiveness of defense systems or operations may be seriously impaired and interruption is unacceptable when those services are not available immediately.”¹⁷¹

This rather broad DoD language contains a dangerous proposition. Essential contractors may be placed in emergency military situations that must be immediately resolved.¹⁷² This definition inspires a discussion on the scope of PMC use and in turn, the applicability of the Laws of Armed Conflict. The DoD language allows for contractor authorization to perform military duties in emergency situations, which highlights the need for effective control and oversight. However, these problems with essential contractor oversight have already been noted by Government Accountability Office (GAO) 2003 report on DoD procedures.¹⁷³ The DoD has proven ineffective in monitoring contract compliance in the Balkans, despite established policies on how contracts, including those that support deployed forces, should be administered and managed.¹⁷⁴

There is also a certain amount of contracting oversight required on the ground. A contracting officer has the “responsibility for ensuring that contractors meet the requirements set forth in the contract.”¹⁷⁵ Unfortunately, most monitoring of contractor performance is performed by “representatives” rather than contracting officers.¹⁷⁶ These contracting officer representatives (COR) act as the “eyes and ears of the contracting officer and

¹⁷⁰ GEN. ACCOUNTING OFFICE, 107TH CONG., *supra* note 168, at 12.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *See generally* GAO-03-695, *supra* note 102.

¹⁷⁴ *See* U.S. GEN. ACCOUNTING OFFICE, DEFENSE BUDGET: NEED TO STRENGTHEN GUIDANCE AND OVERSIGHT OF CONTINGENCY OPERATIONS COSTS, GAO-02-450, at 2 (May, 2002) [hereinafter GAO-02-450].

¹⁷⁵ GAO-03-695, *supra* note 102, at 29.

¹⁷⁶ *Id.* “In Iraq, the Army CORs responsible for the orders for interrogation and other services performed limited surveillance of the contractor’s performance. Contractor employees were stationed in various locations around Iraq, with no COR or assigned representative on site to monitor their work.” U.S. GEN. ACCOUNTING OFFICE, INTERAGENCY CONTRACTING: PROBLEMS WITH DOD’S AND INTERIOR’S ORDERS TO SUPPORT MILITARY OPERATIONS, GAO-05-201, at 12-13

serv[e] as the liaison between the contractor and the contracting officer.”¹⁷⁷ The officers themselves may not be on the ground.¹⁷⁸

The size of the contracts determines the method of oversight.¹⁷⁹ For example, contracting officers for the Air Force Contract Augmentation Program (AFCAP), LOGCAP, and the Balkan Support Contract (BSC) use personnel from the independent Defense Contract Management Agency (DCMA) to oversee contractor performance.¹⁸⁰ As the GAO explains, “DCMA is responsible for making sure that supplies and services are delivered on time, within cost, and that performance requirements are met.”¹⁸¹

Cited problems included the lack of training and education on the scope of contractor use for the COR, and for the military commanders on the ground.¹⁸² A market-based regulatory proposition has come in the form of the DoD Civilian Acquisition Workforce Personnel Demonstration Project (known as “AcqDemo”).¹⁸³ This congressionally-mandated project is designed to show that the DoD Acquisition, Technology, and Logistics workforce can be improved by providing employees with a “more responsive and flexible personnel system” that rewards employee contribution and provides line managers with greater

(Apr. 2005) [hereinafter GAO-05-201]. In addition, “[a recent Army investigative] report noted that it is very difficult, if not impossible, to effectively administer a contract when the COR is not on site and that the Army needs to improve its oversight of contractors’ performance to ensure that the Army’s interests are protected.” *Id.* at 13.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ GAO-04-854, *supra* note 106, at 21.

¹⁸¹ *Id.*

¹⁸² *Id.*; “[A] recent Army investigative report showed that the military personnel on site were not given guidance on how to oversee the contractors. In fact, one of the military interrogators at Abu Ghraib prison indicated that the primary point of contact for the contractors was the contractor’s on-site manager, with no mention of the COR. The Army investigative report pointed to this lack of contractor surveillance at the Abu Ghraib prison as a contributing factor to the environment in which the prisoner abuse occurred.” GAO-05-201, *supra* note 176, at 12-13.

¹⁸³ See Office of the Under Sec’y of Def. for Acquisition, Technology & Logistics, ACQDEMO, <http://www.acq.osd.mil/dpap/policy/acqdemo/index.htm> (last visited Nov. 8, 2005).

authority over personnel actions.¹⁸⁴ Also, in an effort to ensure performance, DoD recently awarded a contract to the rising PMF Aegis to provide other PMCs with training services.¹⁸⁵ Attendance was optional.¹⁸⁶ In essence, DoD is effectively contracting out the solution to a contracting problem. It remains to be seen if this attempt will succeed in providing adequate training and oversight.

3. Impact

In 2005, the Senate Armed Services Committee addressed the contracting process in their recommendation for the coming year's defense authorization bills.¹⁸⁷ Demilitarization and increased reliance on contractors for technical expertise were targeted as the biggest problems.¹⁸⁸ The report recommended increasing reporting, a 15 percent increase in the Defense acquisition staff, parallel treatment of military and civil service officials, and designation of certain civilian positions as critical.¹⁸⁹ The Committee also suggested establishing a Contract Support Acquisition Center for oversight, which would require federal inspectors to review the Pentagon's use of interagency contracts.¹⁹⁰ If these provisions are passed, one would hope that Pentagon

¹⁸⁴ *Id.*

¹⁸⁵ *Private Warriors*, FRONTLINE, June 21, 2005, <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/contractors>.

¹⁸⁶ *Id.*

¹⁸⁷ S. REP NO. 109-069, at 355-57 (2005).

The issues predominantly relate to the fact that, unlike Government employees, contractor personnel are not subject to a comprehensive set of ethics rules, yet they are often performing some of the Government's most sensitive and critical work. This disparity is true even when contractor personnel are working side-by-side with Government employees in the Federal workplace or on the battlefield, and, for all practical purposes, may appear to the public to be employees. The problem is most likely to occur when contractors perform work that historically was considered a federal function, as well as when contractors perform functions closely associated with inherently governmental functions.

Id. at 356-57.

¹⁸⁸ *Id.*

¹⁸⁹ Stephen Barr, *Defense Bills Push for Stricter Contract Procedures*, WASH. POST, May 30, 2005, at B2.

¹⁹⁰ *Id.*

procurement procedures will be tightened up, and contracting loopholes will be closed.¹⁹¹

Besides the problems in the office, there are multiple problems on the ground. The DoD has not established department-wide guidance providing consistent policies for contractor support of deployed forces.¹⁹² The Army has adopted an Army Field Manual (written by U.S. PMF MPRI)¹⁹³ to assist commanders in managing contractors on the ground, but there is little or no visibility of contractors or contracts at the command level. As a result, “contractors have arrived at deployed locations unbeknownst to the ground commander and without the government support they needed to do their jobs.”¹⁹⁴ Additionally, ground commanders have no oversight of the individual responsibility of each contractor, because each contract is written to include a different set of requirements. According to the 2003 GAO report:

Contracts may lack language to enforce policies pertaining to contractors in deployed locations. Army policy requires that contractors follow all general orders and force protection policies of the local commander. However, these requirements were not always written into the contract documents and thus may not be enforceable. . . . [O]fficials suggested that commanders should always be able to control contractor activities where matters of force protection are concerned. Several officials indicated that many of these issues could be addressed if DoD implemented a policy that required all contracts that support deployed forces to include language that applies the general orders and force protection policies of the local commanders to contractor employees.¹⁹⁵

The GAO report highlights the problems with individualized contracting in a field that relies on hierarchical command. It is not surprising that the officers suggested the implementation of a

¹⁹¹ *Id.*

¹⁹² GAO-04-854, *supra* note 106, at 21.

¹⁹³ Jonathan Werve, *Contractors Write the Rules*, CTR. FOR PUB. INTEGRITY, June 30, 2004, <http://www.publicintegrity.org/wow/report.aspx?aid=334>.

¹⁹⁴ GAO-03-695, *supra* note 102, at 20.

¹⁹⁵ *Id.* at 28.

DoD policy of contract standardization.¹⁹⁶ Depending on the individual contract, there may not be a guarantee of service or a determination of authority.

All of these structural oversight and contracting issues have wider implications for the individual U.S. soldier. If a military commander does not know who is a contractor, let alone the specific terms of the contract, there is also a potential chain of command problem. In addition, the cohesiveness of any unit may be compromised by the U.S. soldier's knowledge that the PMC is paid twice as much for the same job.¹⁹⁷ Soldiers will also be held accountable for their actions, while certain PMCs may fall into a substantial loophole that avoids military jurisdiction.

VI. ACCOUNTABILITY: JURISDICTION OVER THE INDIVIDUAL PMC

Military commanders are instructed that they have control over PMCs, but if there is no enforceability provision written into the contract, there is no recourse for order violations under the Uniform Code of Military Justice (hereinafter "UCMJ") except in a declared war.¹⁹⁸ Even PMCs who are providing emergency essential services, and potentially in close proximity to combat, do not fall under the UCMJ if Congress does not declare war.¹⁹⁹ Such a formal declaration is not only rare, but has been conspicuously absent since World War II. Implications for this lack of military jurisdiction include increased probability of PMCs abandoning their posts and lack of legal recourse for illegal actions. This enforceability problem is magnified as PMCs move closer to actual combat and as U.S. policy moves closer to accepting the role of the PMC as a combatant. In fact, the 2003 Army Field Manual *Contractors on the Battlefield* contains some ambiguous (and therefore troubling) language that appears to promote PMC use of force:

¹⁹⁶ *Id.*

¹⁹⁷ *Private Warriors*, *supra* note 185; Cooper, *supra* note 3, at 2192.

¹⁹⁸ SINGER, *supra* note 11, at 161; ARMY FIELD MANUAL, *supra* note 96, at para. 1-2.

¹⁹⁹ ARMY FIELD MANUAL, *supra* note 96, at para. 1-6. "Duties of contractors are established solely by the terms of their contract—they are not subject to Army regulations or the Uniform Code of Military Justice (UCMJ) (except during a declared war). Authority over contractors is exercised through the contracting officer." *Id.*

[Contractor support] is more than just logistics; it spans the spectrum of combat support (CS) and combat service support (CSS) functions. Contracted support often includes traditional goods and services support, but may include interpreter, communications, infrastructure, and other non-logistic-related support. It also has applicability to the full range of Army operations, to include offense, defense, stability, and support within all types of military actions from small-scale contingencies to major theater of wars.²⁰⁰

Keeping in mind that this manual was written by MPRI, a military consultant firm,²⁰¹ this guide to local commanders effectively expands the scope of traditional PMC duties to include potential combat. As civilian PMCs enter the combat zones of guerilla-style wars in Iraq and Afghanistan, accountability mechanisms for PMC actions need to be instituted. This may be accomplished through reclassifying emergency essential contractors, or by centralizing the contracting process and ensuring that PMF contract clauses effectively extend UCMJ jurisdiction.

One possible solution to extend jurisdiction to PMCs is the Military Extraterritorial Jurisdiction Act (MEJA) of 2000.²⁰² This act extends U.S. territorial jurisdiction to anyone employed by or accompanying the Armed Forces for any criminal act committed outside the United States that would have resulted in at least a year of imprisonment under U.S. law.²⁰³ The act even includes subcontractors and employees of contractors.²⁰⁴ While this appears to extend accountability for individual acts to PMCs, the ease of multi-agency contracting has rendered the MEJA toothless in practice.²⁰⁵ Under the definition of “employed by or accompanying the Armed Forces,” the person must either be employed by or residing with an employee of the DoD.²⁰⁶ This definition thus extends liability to Pentagon contractors, but not

²⁰⁰ *Id.* at para. 1-2.

²⁰¹ Werve, *supra* note 193.

²⁰² Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261(a)(1) (2000).

²⁰³ *Id.*

²⁰⁴ *Id.* § 3267(1)-(2) (2000).

²⁰⁵ Cooper, *supra* note 3, at 2194.

²⁰⁶ 18 U.S.C. § 3261(a)(1) (2005).

to other potentially-involved government employees like those of the Department of the Interior.²⁰⁷ In addition, subcontractors are not explicitly included.²⁰⁸ This leaves a large gap in MEJA jurisdiction over PMCs. In fact, “not one of the 20,000 private military contractors on the ground in Iraq has been tried under MEJA.”²⁰⁹

An alternative to ensuring U.S. jurisdiction over the activities of private contractors abroad is ensuring international jurisdiction under the International Criminal Court (ICC). With the ratification of the Rome Statute in 2002, the U.N. expressed its intention to institute international jurisdiction over atrocity crimes and to encourage national prosecution of individual perpetrators of genocide, crimes against humanity and “serious war crimes.”²¹⁰ In the early stages of negotiation to establish the ICC, the U.S. delegation under the Clinton Administration worked to preserve the right of the U.S. military to investigate and prosecute personnel according to the procedures already in place, and to maintain the legitimacy of the Status of Forces agreements (known as “SOFAs”) with foreign governments.²¹¹ The “sending state” language of Article 98(2) contained this protection, allowing for the legitimacy of bilateral non-surrender agreements between nations.²¹² Essentially, if nations are allowed to make agreements to preserve their own criminal prosecutions, the ICC would not have jurisdiction, at least according to the terms of the agreement.²¹³

In May 2002, the United States retracted its intention to become a party to the Rome Statute, stating, “The United States has no legal obligations arising from its signature on December

²⁰⁷ Cooper, *supra* note 3, at 2194.

²⁰⁸ *Id.*

²⁰⁹ *Id.* (quoting P.W. Singer).

²¹⁰ David Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 J. INT'L CRIM. JUST. 333, 335-36 (2005).

²¹¹ *Id.* at 338.

²¹² *Id.* U.N. Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court, June 15-July 17, 1998, *Rome Statute of the International Criminal Court*, art. 98(2), U.N. Doc A/CONF.183/9 (July 17, 1998) [hereinafter *Rome Stat.*].

²¹³ Scheffer, *supra* note 210, at 339.

31, 2000.”²¹⁴ Although the Bush Administration has asserted the United States’ status as a non-party state, the language of the ICC maintains jurisdiction over crimes committed on the land of party states.²¹⁵ A non-party state has no obligation to surrender an individual suspect, but under Article 89(1), a state party must surrender at the ICC’s request.²¹⁶ The non-surrender clause of 98(2) therefore takes on greater importance in extending immunity from ICC prosecution to the actions of U.S. nationals abroad. The recent Bush Administration’s translation of “sending State” extends the protection of bilateral Article 98(2) non-surrender agreements to private Americans, whose nationality provides the basis for concluding that they are “sent by the State.”²¹⁷ The bilateral agreements cover government officials, contractors, and nationals.²¹⁸

Any argument in favor of extending immunity from ICC prosecution through bilateral non-surrender agreements focuses on the potentially politically motivated nature of such prosecutions, though it seems that the real intent is to shield the actions of U.S. employees from prosecution.²¹⁹ When analyzed in light of the jurisdictional gaps already mentioned, there seems to be a developing policy of protection for the PMCs who are playing a larger role in U.S. military strategy. To close these gaps, the bilateral agreements should ensure criminal legal accountability for PMC actions in U.S. courts.²²⁰

When analyzing the subsequent treatment of both the U.S. soldiers and the CACI PMCs involved in the Abu Ghraib scandal, the accountability gap is particularly clear. All of the soldiers face prison for their actions, but the CACI-contracted

²¹⁴ Notes on the Rome Statute of the International Criminal Court, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp> (last visited Feb. 4, 2006).

²¹⁵ Scheffer, *supra* note 210, at 336.

²¹⁶ *Rome Stat.*, *supra* note 212, art. 89(1).

²¹⁷ Scheffer, *supra* note 210, at 346.

²¹⁸ *Id.* at 345 (quoting PROPOSED TEXT OF ARTICLE 98 AGREEMENTS WITH THE UNITED STATES, July 2002, available at <http://www.iccnw.org/documents/declarationsresolutions/governments/USArticle98Agreement1Aug02.pdf>).

²¹⁹ Scheffer, *supra* note 210, at 346.

²²⁰ *Id.* at 352.

interrogators implicated in the abuses will, at most, be fired.²²¹ This indication that the U.S. PMCs may effectively avoid criminal jurisdiction has grave implications for the viability of the international Law of Armed Conflict.

VII. CHANGING THE RULES: PMCs AND THE LAW OF ARMED CONFLICT (LOAC)

Concern over this new expansion of private responsibility extends from the understandable perception that the expansion may blur the line between combatant and unlawful combatant for the purposes of protection under the international Law of Armed Conflict (LOAC).²²² This confusion is exacerbated by the international community's exclusion of mercenaries from both combatant and civilian protections and the lack of any clear mercenary definition or discussion of the role of PMCs.²²³

A majority of active PMCs are civilians who provide logistical support and, in a traditional war, would be exempt from status as combatants or lawful targets.²²⁴ In this way, contracting for services acts as a force multiplier by leaving the U.S.-trained military available for battle and by improving strategic response time.²²⁵ However, as the scope of PMC duties increases, the line between civilian non-combatant and civilian combatant becomes indistinguishable, essentially negating the effectiveness of the "recognized LOAC principle of discrimination, [which requires] attacks be focused only against military objectives."²²⁶ Once that distinction is lost, there will be no functional way to determine who is a lawful or unlawful combatant on the ground, placing civilians at greater risk. When civilian contractors, and other civilians accompanying the armed forces, lose that simply defined protection, the impact of LOAC is compromised.

²²¹ Cooper, *supra* note 3, at 2186.

²²² Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 28 (2001).

²²³ Protocol Additional to the Geneva Conventions of 12 Aug. 1949 (Protocol I), *supra* note 57, art. 47(2).

²²⁴ ARMY FIELD MANUAL, *supra* note 96, at 1-21.

²²⁵ *Id.* at paras. 1-2, 1-3.

²²⁶ Turner & Norton, *supra* note 222, at 26.

The emergence of a new civilian combatant role is antithetical to the purpose of LOAC. At its core, LOAC distinguishes between combatant and non-combatant persons for purposes of civilian protection in armed conflict.²²⁷ These protections are ensured by maintaining strict uniform requirements, and rules on “lawful military targets.”²²⁸ Theoretically, in a conflict where both sides abide by LOAC, civilian casualties are lower than they would be otherwise. With the introduction of a civilian employee on the battlefield who may be authorized to use force, and who may not be under military command, the line between civilian and combatant is blurred beyond realistic comprehension.

A combatant is a member of an armed force “who has the right under international law to participate . . . in . . . hostilities.”²²⁹ To be a member of an armed force one must comply with the following:

1. Be commanded by a person responsible for his subordinates;
2. Have a fixed distinctive emblem recognizable at a distance;
3. Carry arms openly; and
4. Conduct operations in accordance with the laws and customs of war.²³⁰

The arms and emblem requirements are important because, while combatants may be targeted by opposing forces during an armed conflict, they cannot be punished for any hostile acts committed pursuant to the law of armed conflict. One definition of hostile acts is “acts which, by their nature and purpose, are intended to cause actual harm to the personnel and equipment of the armed forces.”²³¹ If a combatant has complied with international law, he is entitled to be treated as a prisoner of war

²²⁷ Guillory, *supra* note 20, at 113.

²²⁸ Turner & Norton, *supra* note 222, at 24-25.

²²⁹ *Id.*; THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 269 (A.R. Thomas & James C. Duncan eds., supp., 1999).

²³⁰ Hague Convention No. IV Respecting the Laws and Customs of War on Land, annex 1, art. 1, regulations, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277.

²³¹ Guillory, *supra* note 20, at 117.

(POW).²³² Non-combatants are not extended POW status if they take part in hostile acts.²³³

The term “non-combatants” includes all civilians, who are generally considered unlawful targets, and former combatants who become prisoners of war or are wounded.²³⁴ Medical personnel and chaplains are also non-combatants.²³⁵ The civilian category that seems to skirt the edge of this classification is that of civilians accompanying the armed forces. Civilian government employees, civilian members of military aircraft crews, supply contractor personnel, contractor technical representatives, war correspondents, and members of labor units or civilian services responsible for the welfare of armed forces are all classified as “accompanying the armed forces.”²³⁶ Their work often places them closer to combat, and at greater risk of injury, death, and capture than the soldiers. For protection, these civilians are prohibited from wearing combat uniforms, must receive authorization from the armed forces that they accompany, and are given an identity card.²³⁷ These requirements provide them with what has been described as a “quasi-combatant status.”²³⁸ If they are captured, they are entitled to prisoner of war treatment, but they are “not authorized to *participate directly in hostile actions*. If they do, they are considered unlawful combatants or belligerents and may be prosecuted as criminals” under international law (emphasis added).²³⁹

There is a debate over the qualification of direct participation. Direct participation is described as “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”²⁴⁰ U.S. military officials promote a very expansive definition of direct

²³² Geneva Convention (III) Relative to the Treatment of Prisoners of War, *adopted* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

²³³ Guillory, *supra* note 20, at 114.

²³⁴ *Id.* at 115.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 116.

²⁴⁰ *Id.* at 117.

participation, as the scope of the term includes lookouts or guards.²⁴¹ Navy and Air Force officials have gone even further by tentatively including intelligence agents in this classification, while other commentators have suggested that logistics support roles may be considered direct participation.²⁴² An expansive definition would effectively restrict PMC roles on the battlefield by eliminating quasi-combatant protections in a greater number of situations.²⁴³ The quasi-combatant would not be criminally liable under the UCMJ, only under international law and LOAC, which would place them under the jurisdiction of the International Criminal Court.²⁴⁴ Already, growing tensions between military commanders and PMFs is evident.

Another challenge to LOAC is the unregulated contracting process and its effect on the fixed emblem and open arms requirement. Both the individual military division and the PMF promulgate varied uniform and arms policies, which seem to depend on the contractor's proximity to combat, and whether the PMF or PMC believes that military garb is helpful.²⁴⁵ This lack of consistency defeats the purpose of civilian protection by negating the impact of the LOAC requirements.

VIII. THE RELATIONSHIP BETWEEN PMFs AND DEVELOPING COUNTRIES: ANGOLA AND SIERRA LEONE²⁴⁶

The issues mentioned above are pertinent for developed countries, but shift when the conflict takes place in or between developing countries. Efficiency and accountability questions arise when nations like the United States and the United Kingdom hire PMFs to support established militaries. In contrast, the benefits and dangers of PMF involvement in the intrastate conflicts of the post-Cold War security vacuum take on new importance, as the scope of hired force grows to include direct combat. Because of this closer proximity to combat, the services provided

²⁴¹ *Id.*

²⁴² *Id.* at 117-18.

²⁴³ *Id.*

²⁴⁴ *Id.* at 132.

²⁴⁵ *Id.* at 129.

²⁴⁶ The summary of these case studies will primarily rely on the analysis found in SINGER, *supra* note 11, at 101-18.

more closely resemble traditional mercenary services.²⁴⁷ However, the proven effectiveness of PMFs in developing countries with impacted civilian populations creates an interesting dilemma. Is any danger to the authority of the government and its monopoly on force balanced by immediate relief for a civilian population?²⁴⁸

As one of the first military provider firms, Executive Outcomes (hereinafter “EO”) built a niche in the market for military services.²⁴⁹ Founded by apartheid-era veterans of the South African Defence Force (hereinafter “SADF”), EO publicly promoted the following services: “strategic and tactical military advisory services;. . . training packages in land, sea, and air warfare; peacekeeping . . . services; advice . . . on weapons selection; and paramilitary services.”²⁵⁰ It may seem strange that a group of ex-soldiers generally hated worldwide for participation in apartheid violence would find acceptance and success as a provider of military services. Not surprisingly, EO had been linked in a global corporate network under the larger South African holding company Strategic Resources Corporation (hereinafter “SRC”), which owns twenty other companies that provide security services in the same region that EO has operated.²⁵¹ There has also been evidence of a relationship, “though denied officially,” between SRC and the London-based Branch-Heritage Group, which employs SRC security in its mining operations.²⁵² Besides housing Branch-Heritage, England had the added benefit of lacking the anti-mercenary legislation that pervaded South African law, making registration there convenient for EO.²⁵³ This

²⁴⁷ Adams, *supra* note 17, at 104.

²⁴⁸ SINGER, *supra* note 11, at 101, 113-14. “[T]he fact that a force is private or foreign does not prevent it from being under the control of the state and although such arrangements may not be ideal they may be far less damaging to sovereignty than an unchecked rebel movement.” UK GREEN PAPER, *supra* note 22, at 15.

²⁴⁹ Adams, *supra* note 17, at 108-09.

²⁵⁰ SINGER, *supra* note 11, at 102, 104 (citing Executive Outcomes (EO) corporate webpage, no longer available).

²⁵¹ SINGER, *supra* note 11, at 104; Adams, *supra* note 17, at 108-09.

²⁵² SINGER, *supra* note 11, at 104; Adams, *supra* note 17, at 108-09.

²⁵³ SINGER, *supra* note 11, at 104.

close corporate relationship also enabled EO to supplement superior knowledge of guerilla warfare with arms and military aircraft.²⁵⁴

Initially, EO provided training to the SADF Special Forces unit, as well as security services or “gathering of market-related information and marketing warfare” to major corporate clients.²⁵⁵ In 1999, EO disbanded due to public knowledge of its activities and its inability to avoid the stigma attached to its founders.²⁵⁶ However, because of the fluid nature of the private security business, former employees have been absorbed into other security services and PMFs.²⁵⁷

EO’s history illustrates some of the concerns with allowing efficient military force on the open market. The two EO interventions in Angola and Sierra Leone were market-driven. Both of these countries had seen an explosion of violence after their respective abrupt independences, as they each have a wealth of natural resources in oil and diamonds.²⁵⁸

In 1975, Portugal withdrew from Angola, leaving the country without the skills or knowledge necessary to create a functioning state.²⁵⁹ Civil war erupted immediately, with the United States and the Soviet Union backing their respective guerrilla factions.²⁶⁰ The communist MPLA party was able to seize power in an U.N.-supervised election in 1992, while the United States- and South African-governments-backed Union for the Total Independence of Angola (UNITA) continued to fight as a rebel faction.²⁶¹ In 1992, EO was hired by the Angolan state oil company

²⁵⁴ *Id.* at 106.

²⁵⁵ *Id.* at 107 (citing EO, *supra* note 250).

²⁵⁶ *Id.* at 117.

²⁵⁷ Employees in Sierra Leone have begun working for a new firm called Lifeguard. In Angola, former Executive Outcomes employees are reportedly working for both the national government and the UNITA rebels that oppose it. Adams, *supra* note 17, at 109.

²⁵⁸ “It is striking that the countries in Africa most associated with the use of mercenaries and PMCs—Angola, Sierra Leone and Zaire—are those with readily available mineral resources. Observers have drawn attention in particular to Executive Outcomes’ links to extraction companies.” UK GREEN PAPER, *supra* note 22, at 16.

²⁵⁹ SINGER, *supra* note 11, at 107.

²⁶⁰ *Id.*

²⁶¹ *Id.*; UK GREEN PAPER, *supra* note 22, at 11.

Sonangol to secure the Soyo oilfield.²⁶² After the field was secured, EO withdrew, and by late 1993, UNITA had retaken Soyo. The Angolan government called on EO for immediate military services in an extended arms and training contract, reportedly worth \$40 million.²⁶³ EO employees, who had previously fought for UNITA as SADF soldiers, would now fight against UNITA for the MPLA government.²⁶⁴ In 1994, the UNITA rebels were beaten into a peace accord conditioned on the withdrawal of EO troops.²⁶⁵

Immediately after the situation in Angola, Sierra Leone's government collapsed due to a challenge by the Liberian Revolutionary United Front (RUF).²⁶⁶ RUF was a particularly brutal rebel organization, decapitating community leaders and abducting children to serve as soldiers.²⁶⁷ The Sierra Leone government, paralyzed by corruption, had never established a functioning military, and so they attempted to fight the rebel insurgency with criminals and children.²⁶⁸ As a result, RUF moved quickly through the country.²⁶⁹ First, the government hired the Gurkha Security Group.²⁷⁰ But, when the RUF rebels emasculated, killed, and ate Gurkha's leader, the security group skipped out of their contract and left the country.²⁷¹

In 1995, RUF was advancing on the capital.²⁷² All the embassies were evacuated, while the western powers and the U.N. ignored pleas by the government for intervention.²⁷³ The government's interim leader (the president had fled), hired EO under a \$15 million, one-year contract calling for the defeat of RUF.²⁷⁴ In

²⁶² UK GREEN PAPER, *supra* note 22, at 11.

²⁶³ *Id.*

²⁶⁴ SINGER, *supra* note 11, at 108.

²⁶⁵ *Id.* at 109; UK GREEN PAPER, *supra* note 22, at 11.

²⁶⁶ SINGER, *supra* note 11, at 110-11.

²⁶⁷ *Id.* at 111.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 112.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

just eleven days, with the help of “helicopter gunships,” EO had driven the rebels miles into the jungle interior.²⁷⁵ EO trained and improved the quality of the government’s forces, and it established an effective militia.²⁷⁶ EO then retook the diamond-rich eastern part of the country, which allegedly provided payment to their corporate funding firms.²⁷⁷ In late 1995, RUF signed a peace agreement that conditioned the withdrawal of EO.²⁷⁸

These examples show that one major benefit of PMF utilization is the potential for efficient resolution of a long or brutal conflict. However, when one digs deeper to see the corporate hands benefiting from a resolution, the actions of a PMF not only resemble those of a short-term stabilizing force, but a long-term security force with potential political interests. The corporate firms that funded EO in Angola “received payment in oil and mining concessions.”²⁷⁹ Without those concessions, the Angolan government would not have had the wealth necessary to hire EO. The government had essentially brokered a deal that gave up access to the country’s natural resources and only possible leverage as a sovereign nation-state to multinational corporations, in return for the power that otherwise would have been taken by the UNITA rebels.²⁸⁰

In the Angolan example, a weak government had the leverage over natural resources, allowing it to broker the country’s future to save itself. In a case like this, the nation’s government

²⁷⁵ Adams, *supra* note 17, at 108; SINGER, *supra* note 11, at 113.

²⁷⁶ UK GREEN PAPER, *supra* note 22, at 12.

²⁷⁷ SINGER, *supra* note 11, at 113. “Commentators have . . . drawn attention to the corporate connections between EO and various mining interests including Branch Energy, which acquired concessions in Sierra Leone. . . . [T]here is no evidence to support the allegation that EO was paid in concessions – though Branch Energy’s relationship with EO was a factor in its securing them.” UK GREEN PAPER, *supra* note 22, at 12.

²⁷⁸ UK GREEN PAPER, *supra* note 22, at 12.

²⁷⁹ SINGER, *supra* note 11, at 109.

²⁸⁰ Some commentators

argue that it is wrong for governments to pay for security by mortgaging future returns from mineral exploitation. Nevertheless if a government is faced with the choice of mortgaging some of its mineral resources or leaving them entirely in the hands of rebels, it may be legitimate for them to take the former course.

UK GREEN PAPER, *supra* note 22, at 16.

may continue to be dependent on PMF security, and a fluid corporate entity outside the boundaries of a nation-state could own the country's resources. For many weak governments, this is a false choice.²⁸¹ The market for PMFs extends to maintaining security in corporate mining and drilling operations in the newly stabilized region. Problems for the civilians will continue when the mining or drilling company hires its own private army to protect its investment.

What ultimately occurred in Sierra Leone is a case study of the current interaction between the international community and PMFs. In 1997, President Ahmed Tejan Kabbah, a former U.N. administrator elected the year before, terminated the EO contract early based on the disapproval of the international community and promises of U.N. peacekeeping forces.²⁸² With EO gone and no materialization of U.N. forces, RUF renewed its attack on the capital city.²⁸³ Government and U.N. officials sought protection from the SRC security company Lifeguard, which had stayed behind to protect mining interests.²⁸⁴ The civilian population had no such protection. President Kabbah was forced to hire Sandline International, a British PMF, to re-stabilize the country.²⁸⁵ This occurred with the full knowledge of the British Foreign Ministry, and it resulted in the "Sandline Affair" scandal, as shipping arms to the region was in violation of the U.N. arms embargo.²⁸⁶

The EO example also serves to show the competing interests at play when PMFs are hired by both governments and corporate interests. As employees of both the Sierra Leone government and a diamond mining company, EO employees secured a town and were then sent to secure the diamond fields according to commercial interest.²⁸⁷ This illustrates the problem of interest coordination and prioritization. There are two separate goals in any military action that has two separate beneficiaries. If a

²⁸¹ Adams, *supra* note 17, at 111.

²⁸² SINGER, *supra* note 11, at 114.

²⁸³ *Id.*

²⁸⁴ *Id.* at 114-15.

²⁸⁵ *Id.* at 115.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 158.

profit-motivated service industry separates ideological interests from material interests, and is employed by two clients in one conflict, there is a greater risk of an action against the hiring state's interest. Lifeguard went as far as to be employed on both sides of the Sierra Leone conflict, as they reportedly sold arms to the rebels and then acted as associates to Sandline International in protection of government officials.²⁸⁸

An argument that the importance of the PMFs' reputation will assist in market force regulation belies the fact that the PMF industry is fluid and mutative. EO no longer exists, but its employees have either joined other firms or formed spin-off firms that are located in more corporate-friendly countries under names without EO's stigma.²⁸⁹ A military provider firm primarily subsists off of recruiting connections, which cannot be efficiently tracked or regulated.²⁹⁰

The widespread use of PMCs is a testament to the reality that states are no longer willing or able to "meet the financial and political costs of maintaining their monopoly on the use of deadly force."²⁹¹ The U.N. criticizes African governments for hiring mercenaries and trading resource concessions.²⁹² Yet the U.N., as a result of restrictions on offensive or invasive support, has historically been unwilling or unable to provide effective protection to those governments faced with that choice. Essentially, the U.N.'s respect for state sovereignty has acted as a barrier to intervention.

IX. INTERNATIONAL PARTICIPATION: PMFs AS PEACEKEEPERS?

As the above example illustrates, U.N. peacekeeping forces have not always been effective.²⁹³ As of July 2004, the ten largest troop contributions to U.N. operations were from developing nations, while the number of troops from western nations averaged

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 118.

²⁹⁰ *Id.*

²⁹¹ Adams, *supra* note 17, at 111-12.

²⁹² *Id.*

²⁹³ SINGER, *supra* note 11, at 59-60.

less than six hundred each.²⁹⁴ U.N. Secretary-General Kofi Annan was reported to have considered hiring private security forces for U.N. peacekeeping missions as a way to avoid political obstacles to efficiency and reduce the troop burden on member states.²⁹⁵ The job of the humanitarian is becoming more dangerous, and the will of the western powers to assist in humanitarian operations is quickly fading.²⁹⁶ There is nothing PMFs would like more than to fill that gap by opening an internationally sanctioned market.²⁹⁷ With Annan's statement, it was reported in the London *Financial Times* that "at least one British security firm was building a database of some 5,000 former soldiers who would be available to work for the United Nations at short notice."²⁹⁸ The implications of the alliance between PMFs and the U.N. merit further discussion.

The debate is framed nicely through a comparison of the arguments presented by Special Rapporteur Enrique Bernales Ballesteros in his 1999 report to the U.N. Commission on Human Rights,²⁹⁹ and the British response in the 2002 U.K. Green Paper, *Private Military Companies: Options for Regulation* (hereinafter "U.K. Green Paper").³⁰⁰ Ballesteros reports human rights abuses in Sierra Leone by the same militia trained by EO and Sandline.³⁰¹ This lends support to his conclusion that the use of

²⁹⁴ Thalif Deen, *UN Rejects Private Peacekeepers*, INTER PRESS NEWS, Aug. 27, 2004, <http://www.globalpolicy.org/security/peacekpg/training/0827rejects.htm>.

²⁹⁵ *Id.* "The Secretary General has said 'When we had need of skilled soldiers to separate fighters from refugees in the Rwandan refugee camps in Goma, I even considered the possibility of engaging a private firm. But the world may not be ready to privatise peace.'" UK GREEN PAPER, *supra* note 22, at 19.

²⁹⁶ P.W. Singer, *Should Humanitarians Use Private Military Services?*, HUMAN. AFF. REV., Summer 2004, at 16, available at <http://www.humanitarian-review.org/upload/pdf/SingerEnglishFinal.pdf>.

²⁹⁷ See generally SINGER, *supra* note 11, at 182-90.

²⁹⁸ Deen, *supra* note 294.

²⁹⁹ U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights, *The Right of Peoples to Self-Determination and Its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation: Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, U.N. Doc. E/CN.4/1999/11 (Jan. 13, 1999) (submitted by Mr Enrique Bernales Ballesteros, Special Rapporteur, pursuant to Commission Resolution 1998/6).

³⁰⁰ UK GREEN PAPER, *supra* note 22.

³⁰¹ ECOSOC, *supra* note 299.

PMFs to put down violent rebellions is not a solution to any pre-existing structural problems and does not serve as a long-term stabilizing force.³⁰² He goes on to state that use of PMFs in this situation is unacceptable, but that this fact places more responsibility on the international community, through the action of the U.N., to maintain peace and human rights by establishing “effective regional and global collective security mechanisms.”³⁰³

Ballesteros also makes a definitive connection between mercenaries and PMFs. He equates mercenary activity with the role of PMFs in modern conflicts, and identifies certain PMF employees as mercenaries.³⁰⁴ The report makes the statement that: “[w]ithin the historical structure of the nation State, which is still the basis of international society, it is inadmissible for any State legally to authorize mercenary activities, regardless of the form they take or the objectives they serve.”³⁰⁵ This prohibition is supported by accepted international law against interference by one state in the activity of another, and against any imposition on the self determination of the people.³⁰⁶

In contrast, the U.K. Green Paper presents arguments for the widespread use of PMFs both by states and the U.N. In an attempt to break the connection between PMC action and mercenaries, the paper states that direct PMC participation in combat is infrequent, with the incidences in Sierra Leone and Angola cited as rare exceptions.³⁰⁷ The paper also notes that, under this broad definition, the U.N. already uses a type of mercenary force in its recruitment of peacekeeping forces from countries who contribute for “financial reasons.”³⁰⁸ This system of recruitment then results in poorly equipped and ineffective forces, a situation that could be remedied by the employment of PMFs for the same

³⁰² *Id.* ¶ 30. “Hiring private companies providing security and military assistance and advice is no substitute for maintaining a collective regional security system and genuinely professional national armed forces and security forces loyal to the democratic legal order. It is a false solution.” *Id.*

³⁰³ *Id.* ¶ 31.

³⁰⁴ *Id.* ¶ 35.

³⁰⁵ *Id.* ¶ 36.

³⁰⁶ *Id.* ¶ 42.

³⁰⁷ UK GREEN PAPER, *supra* note 22, at 11.

³⁰⁸ *Id.* at 19.

U.N. operations.³⁰⁹ In response to this dilemma and Ballesteros' reference to the protection of the state from interference, the U.K. Green Paper addresses the potential violation of the state's right to self-defense under Article 51 of the U.N. Charter.³¹⁰ The availability of efficient military force potentially infringes on state sovereignty. However, when availability is restricted, there may be an imposition on the state's right to self defense.

The U.K. Green Paper also argues that a U.N.-hired PMF poses less of a threat to state sovereignty and to the state's resources than a state- or multinational-hired PMF.³¹¹ It also states that there would be "no difficulty in monitoring the performance and behaviour of a PMC employed by the U.N."³¹² These assumptions must be based on the institution of a U.N. global security system that proscribes the use of force and the democratic procedure for the decision to intervene.

In late 2004, the U.N. came out with recommendations for this decision that may have implications for the future use of PMFs. The report began by addressing the central argument between those who believe that the international community has a right to protect human rights through intervention and those who look to protect the sovereignty of the state from the actions of the Security Council through their Chapter VII powers to "maintain or restore international security."³¹³ The report concludes that the consideration made on whether to intervene is based on the state's "responsibility to protect [its] citizens."³¹⁴ By placing this affirmative duty on the sovereign state, the U.N. is expanding both the right of the international community to use force, and the power of the Security Council. The likelihood that the U.N. will hire PMFs is then dependent on the willingness of member states to send troops for collective security, and whether Security Council states will push for the hiring of *their* PMFs in future conflicts.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 15.

³¹¹ *Id.* at 20.

³¹² *Id.*

³¹³ High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 199, U.N. Doc. A/59/565 (Dec. 2, 2004).

³¹⁴ *Id.* ¶ 201.

The position articulated by Ballesteros is protective of the traditional conception of the nation-state's monopoly on force. This position foresees potential conflicts between member states and a break down of state accountability. On the other hand, it seems that the U.K. Green Paper supports the hiring of PMFs as a protection of state interests, with an argument in support of U.N. use of PMFs in peacekeeping operations to help legitimize and regulate the existence of the industry.

If the U.N. hires PMFs, their use would be implicitly sanctioned by the international community. While this would not lead to any change in the legal status of PMCs and mercenaries under international law, it could result in a revolutionary change in international relations. The legitimization of PMFs would necessitate regulation by the state and the international community, but any licensing or regulatory procedures would have to be supported by strict international contracting procedures. Even if these procedures were implemented, the nature of the service provided would inevitably lead to problems in transparency and accountability.

While the profit motive may be balanced by market-force regulation, any problems of regulation, transparency, and accountability would defeat this balance. Looking at the impact of the charter companies in the 1800s, PMFs have the ability, as unaccountable entities motivated by profit, to cloud the foreign policy objectives of the hiring state. The fact that the U.S. Army manual guiding the policy of commander and PMC interaction was written by MPRI is an example of how PMFs may already be guiding U.S. policy. In many ways, the nature of the service, and the fluid nature of the industry leads to difficulties in regulation, placing the hiring state at a disadvantage in fully achieving its interests. The PMF state of origin also runs the risk of being held politically accountable for the acts of the PMF, due to the assumption that the government approved the action.³¹⁵

The other side to the accountability problem is the potential benefit to the hiring state. In a system that cannot guarantee transparency, a state may comply with a treaty on its face, but hire a PMF to subvert the agreement.³¹⁶ For the same reason, it

³¹⁵ UK GREEN PAPER, *supra* note 22, at 21.

³¹⁶ SINGER, *supra* note 11, at 176.

will be more difficult for a state to decide which international alliances to join in any given conflict if the state or corporate backer of a PMF is not disclosed. The availability of PMF force may also disrupt the established dependency relationships between larger and smaller states that have evolved to provide mutual defense systems. These agreements seem more tenuous if the dependent state has the option of hiring protection when needed.

Having military capabilities on the open market also raises the possibility that a terrorist sect, or any other ideologically connected group, may hire a PMF. This concept runs counter to the idea that globalization and profit incentives have decreased the need for violent conflict. It seems that the rise of the PMF, a new kind of hybrid transnational corporation that feeds off conflict and combines profit with violence, signals the end of the hope that globalization would lead to the peaceful stability of economic warfare.³¹⁷ The competition for economic advantage may now be more directly translated into military strength.

Besides these broad possible consequences of U.N. legitimization, there are three direct options for the integration of PMF capabilities in humanitarian missions. The first is that the PMF provides security services for the humanitarian organization. At least seven U.N. bodies already use PMFs in security roles, with the potential to extend these services to peacekeeping missions.³¹⁸ The minimal role of the PMF, combined with the increased effectiveness of humanitarian operations, make this a good option for both parties. This first option lacks an offensive aspect.

The second option adds a PMF “Rapid Reaction Force” within the peacekeeping operation.³¹⁹ The Rapid Reaction Force would be ready to use its specialized skills to combat any threat while protecting the peacekeeping mission. This scenario, however, brings to mind the earlier LOAC problem. The possibility of a mobilized and dangerous force traveling with a humanitarian

³¹⁷ *Id.* at 174.

³¹⁸ *Id.* at 184.

³¹⁹ *Id.*

operation negates the peaceful intentions of the mission, and fundamentally changes the dynamics between the humanitarians and the threatening forces.

The third option is the most controversial, resembling the EO situation in Sierra Leone. Whenever states and the U.N. deny intervention in a humanitarian crisis, operations would be turned over to a PMF.³²⁰ In the Sierra Leone conflict, the government hired EO. In the hypothesized scenario, the U.N. would hire the PMF instead. In fact, this almost occurred during the Rwandan crisis in 1996. When the numbers were calculated, the PMF operation would have been a fraction of the price, and, purportedly, it would have saved hundreds of lives.³²¹

However, a PMF may lack the legitimacy required to provide peacekeeping and humanitarian services. As of 2004, these concerns were still paramount, and the U.N. Department of Peacekeeping Operations stated that privatization of U.N. peacekeeping was not on any agenda.³²² When asked about the existence of PMCs in peacekeeping operations, a representative said that they were “seconded for service” by member states.³²³

If the U.N. does decide to utilize PMFs, necessary controls would include “corporate independence” as a way to weed out alternate interests, mechanisms to ensure competition, “attachment of independent observer teams,” and a “requirement that firm personnel place themselves under the jurisdiction of international tribunals for any violations of the laws of war.”³²⁴ There is little likelihood, however, that these controls would be effective. First, if PMF use is condoned, the market for unregulated force will be larger than the U.N. humanitarian market. This may force the U.N. to either regulate the entire market and institute an enforcement mechanism, or drop the regulations. Second, these controls would institute a massive bureaucracy that may ultimately be ineffective at regulating such a difficult industry.

³²⁰ SINGER, *supra* note 11, at 185.

³²¹ *Id.* at 185-86.

³²² Deen, *supra* note 294.

³²³ *Id.*

³²⁴ SINGER, *supra* note 11, at 187.

X. CONCLUSION: THE DAWN OF THE PRIVATIZATION AGE

As President Dwight D. Eisenhower predicted in his famous 1961 “Military-Industrial Complex” speech, the domination of a military relationship with industry threatens democracy.³²⁵ While he may not have envisioned the PMFs of today, his speech called for “balance between the private and the public economy.”³²⁶ The common theme throughout this Comment has been the gradual separation of military capabilities from necessary accountability systems. If a fundamental component of a democratic state is accountability to the citizenry, then the proliferation of PMFs within the last twenty years signals the emergence of a major crossroads. On the value of accountability, Eisenhower commented, “Only an alert and knowledgeable citizenry can compel the proper meshing of the huge industrial and military machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together.”³²⁷ In a democratic state, accountability has been avoided through streamlined contracting procedures, and the citizenry now has the obligation to stay alert and demand centralized, transparent, and competitive hiring procedures, along with regulations on PMF contracts. The Military Extraterritorial Jurisdiction Act should apply to all PMCs to promote individual accountability and extend jurisdiction. Hiring states must learn to balance the benefits private industry has to offer while recognizing their responsibility to regulate and their role as smart clients and as public entities. “[F]ailure to [regulate] thus far has distorted the free market and caused a major shift in the military-industrial complex.”³²⁸

With the massive wave of privatization that is currently sweeping the United States under the Bush Administration, it is no surprise that the Iraq war has been called the “first privatized war.”³²⁹ The efficiency arguments made in favor of privatization

³²⁵ Eisenhower, *supra* note 1.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ Singer, *supra* note 5, at 120.

³²⁹ Singer, *supra* note 64, at 523.

should be re-evaluated in light of the impact of private involvement in an established military. What efficiency may be lost by challenging the integrity of the chain of command and weakening the nationalistic ideology? The development of the modern military structure has led to the UCMJ and international law protections, which are attempts to provide minimal structure and accountability to conflicts that, by nature, are brutal and chaotic.³³⁰ To lose this integrity and accountability through the introduction of profit motive and internal competition would be a major step backwards in the evolution of warfare.

Nonetheless, when one looks at the conditions that have conspired to create a market for PMFs, it may also be argued that PMFs have a positive impact in those instances of violent conflicts that have been abandoned by western states and the international community. PMFs may save civilian lives by providing efficient security and military services aimed at maintaining stability. The Sierra Leone example provides a glimpse of PMF potential, where the former apartheid soldiers whose expertise had previously targeted civilians was employed to protect those same civilians from the brutal RUF.³³¹ It has yet to be determined whether this protection is worth the rights to the state's resources. The problem for the state and its civilians then lies in the aftermath, when they are potentially beholden to a corporate interest.

Both the U.K. Green Paper and the Ballesteros report recognize the need for the international community and the U.N. to establish a comprehensive security plan, or a regulatory system for PMFs.³³² There must be a clarification of position on the legality of military provider firms under the Geneva Conventions, along with a classification of the types of services provided. This is especially true if the U.N. decides to use PMFs in peacekeeping missions. It must also address any revisions or updates of LOAC, as warfare evolves from nation-state conflicts to conflicts involving fluid sects of combatants fighting in a lawless arena over the rocky landscape of guerilla warfare. This is an uphill battle, requiring commitment from many of the powerful states

³³⁰ See *supra* Part VI.

³³¹ SINGER, *supra* note 11, at 103.

³³² UK GREEN PAPER, *supra* note 22; ECOSOC, *supra* note 299.

that may have an interest in maintaining minimal regulation. It remains to be seen whether the nation-state system of public services and militaries will fall to private industry, or whether this is the moment the modern state and international community will choose to fight for the state's monopoly on force.