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MERCENARIES, MYRMIDONS, AND MISSIONARIES

*Robert Bejesky**

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I. INTRODUCTION

The term “mercenary” evokes a virulent impression. With today’s private military contractors (PMCs) undertaking operations akin to those that led states to condemn the use of mercenaries over a century ago (and then again four decades ago),¹ it seems sensible to hold a jaundiced conception when no international laws decidedly apply and national laws may not be effective in regulating PMC undertakings.²

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1. Zoe Salzman, *Private Military Contractors and the Taint of a Mercenary Reputation*, 40 N.Y.U. J. INT’L L. & POL. 853, 874 (2008) (noting that “the term ‘mercenary’ carries an unflattering connotation that the private military industry has been keen to avoid—and with good reason: Closer examination reveals that the concerns with private contractors . . . closely resemble the concerns that led to the development of international law on mercenaries.”).

2. Kathrin Herbst, *Private Security Companies and Civil-Military Cooperation*, in PRIVATE MILITARY AND SECURITY COMPANIES: CHANCES, PROBLEMS, PITFALLS AND

With significant attention fixed on the Bush Administration's unprecedented reliance on PMCs during the Iraq War and occupation, the United Nations Special Rapporteur initiated an investigation and produced a report that proposed regulating the private security firm market and distinguishing PMCs from mercenary forces, but did not recommend banning PMCs.³ In November 2013, the U.N. Working Group on the use of mercenaries affirmed that "[p]roviding security is a fundamental human right and fundamental responsibility of the State" and emphasized that governments worldwide must participate in "robust international regulation of private military and security companies."⁴ Those concerns were voiced shortly after new criminal charges were brought in United States District Court in October 2013 against Blackwater personnel for their reported involvement in the Nisour Square massacre that killed 17 civilians in Iraq in 2007.⁵ The United States Department of Justice has much discretion in deciding whether to prosecute, but there were very few prosecutions of contractors in Iraq and Afghanistan.⁶

PROSPECTS 273, 284–85 (Thomas Jäger & Gerhard Kümmel eds., 2007). The lack of regulation over PMCs was recognized by the British government even before the Iraq War. FOREIGN AFFAIRS COMMITTEE, PRIVATE MILITARY COMPANIES, REPORT, 2001-02, H.C. 922 at 12–22, 29–40 (U.K.), available at <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmfaff/922/922.pdf>.

3. U.N. Econ. & Soc. Council, Comm'n on Human Rights, Rep. of the Spec. Rapporteur, *The Right of Peoples to Self-Determination and Its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation: Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, ¶¶ 60, 66, U.N. Doc. E/CN.4/2005/14 (Dec. 8, 2004).

4. Office of the High Comm'r for Human Rights, *UN Expert Group Calls for Robust International Regulation of Private Military and Security Companies*, U.N. HUM. RIGHTS (Nov. 4, 2013), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13940&LangID=E>.

5. Frederic J. Frommer & Eric Tucker, *Ex-Blackwater Contractors Face Fresh Charges in Iraq*, ASSOCIATED PRESS, (Oct. 17, 2013), available at <http://www.usatoday.com/story/news/nation/2013/10/17/blackwater/3004319/>. U.S. prosecutors did eventually indict five Blackwater guards on involuntary manslaughter charges in the D.C. District Court in January 2009. Indictment, *United States v. Slough*, No. CR-08-360 (filed D.D.C. Dec. 4, 2008), available at <http://news.findlaw.com/cnn/docs/iraq/blackwater-indictment1208ind.html>; see also John R. Crook, ed., *U.S. Congress and Administration Consider Responses to Excessive Uses of Force by U.S. Security Firms*, 102 AM. J. INT'L L. 161, 162 (2008); James Risen, *Guards Plead Not Guilty in '07 Killings in Baghdad*, N.Y. TIMES, Jan. 6, 2009, at A1, available at http://www.nytimes.com/2009/01/07/world/middleeast/07blackwater.html?_r=0. That case was dismissed. Frommer & Tucker, *supra*. Four guards were recently convicted. Matt Apuzzo, *Blackwater Guards Found Guilty in 2007 Iraq Killings*, N.Y. TIMES (Oct. 22, 2014), http://www.nytimes.com/2014/10/23/us/blackwater-verdict.html?_r=0.

6. Andrew Finkelman, *Suing the Hired Guns: An Analysis of Two Federal Defenses to Tort Lawsuits Against Military Contractors*, 34 BROOK. J. INT'L L. 395, 433 (2009).

Mercenaries are the forerunners of today's private military contractors⁷ and the U.N. Special Rapporteur's recommendation to differentiate PMCs from mercenaries is accordant with the controversy that flourished over whether U.S. security firms and PMCs might be defined as mercenaries.⁸ Former Assistant Secretary of State William Schaufele interpreted the problem by explaining that "[a] legally accepted definition of what constitutes a mercenary does not exist in international law."⁹ Clear-cut cases of mercenarism can be readily identified, but there are challenges to determining when private contractors should be considered mercenaries because PMC activities may circumvent narrow interpretations of mercenarism and elude calculated policies of impeding certain uses of force under international law.¹⁰ Simply stating that certain PMC operations do not meet the elements of mercenarism does not mean that PMC operations are necessarily licit.

To commence with the analysis of core elements that might be considered for a statutory framework or international convention governing the use of PMCs, Part II provides a brief chronology of the emergence of the sovereign system in relation to the preexisting use of mercenaries to emphasize

7. John S. Kemp, Note, *Private Military Firms and Responses to Their Accountability Gap*, 32 WASH. U. J.L. & POL'Y 489, 493 (2010).

8. See United Nations, Press Release, *Private Security Companies Engaging in New Forms of Mercenary Activity, Says UN Working Group*, (Nov. 6, 2007), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=5698&LangID=E>; Jonathan Finer, *Holstering the Hiring Guns: New Accountability Measures for Private Security Contractors*, 33 YALE J. INT'L L. 259, 259 (2008); Kristen McCallion, *War for Sale! Battlefield Contractors in Latin America & the 'Corporatization' of America's War on Drugs*, 36 U. MIAMI INTER-AM. L. REV. 317, 319 (2005); Montgomery Sapone, *Have Rifle With Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 CAL. W. INT'L L.J. 1, 2 (1999); Leslie Wayne, *America's For-Profit Secret Army*, N.Y. TIMES (Oct. 13, 2002), <http://www.nytimes.com/2002/10/13/business/america-s-for-profit-secret-army.html>.

9. Melysa H. Sperber, Note, *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, 194 (2003); See also Molly Dunigan, *A Lesson From Iraq War: How to Outsource War to Private Contractors*, CHRISTIAN SCI. MONITOR (Mar. 19, 2013), <http://www.csmonitor.com/Commentary/Opinion/2013/0319/A-lesson-from-Iraq-war-How-to-outsource-war-to-private-contractors> (stating that "[t]here are no clear-cut guidelines for [PMC] status under international law").

10. For example, the Protocol Additional to the Geneva Conventions defines a mercenary as an individual who is recruited to fight in armed conflict, takes direct part in hostilities with the motivation for private gain, and is not a national of or sent by a party to the conflict or a member of a party's armed forces. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977), art. 47, 1125 U.N.T.S. 3 [hereinafter Protocol Additional]. The motivation element is generally evident with PMCs, but the contractor's nexus to the sovereign state and its activities are critical because general international law principles require states to assume responsibility when they actuate combat operations, whereas individuals or groups that engage in international hostilities outside of sovereign rules can be viewed as illegal under either international law or domestic law, or both.

why premises underlying the sovereign system should prevail over efforts to inject technicalities into governing definitions of a mercenary. Part III employs a sliding scale of PMC operations and affixes offensive combat operations and unreasonable defensive combat operations as most suspect and tantamount to mercenarism. The analysis proposes that states produce a consensus on sanctioned PMC activities and recommends that the burden be placed on the state that hires PMCs to perform contestable operations; accordingly, should a PMC reasonably be deemed a mercenary, the hiring state would be responsible for the PMC's activities under international law and the PMC would be punished in a manner equivalent to that state's official armed forces.

II. HISTORICAL USE OF PRIVATEERING AND THE ABOLITION OF MERCENARIES UNDER INTERNATIONAL LAW

A. Mercenarism: The Historical Norm

Across the world and throughout recorded history, humans have fought for money, political causes, rulers, wealth, employers,¹¹ regional allegiances, family, honor,¹² and survival. Multiple reasons generated varying degrees of intensity for individuals to be willing to sell security services to another and to participate in offensive operations or conquest. For example, in 331 B.C., Alexander the Great hired tens of thousands of mercenaries to attack Persia.¹³ Professionally raised knights in England defended aristocrats and feudal landowners,¹⁴ samurai in Japan fought for honor and originated as a protector of wealthy landowners,¹⁵ and the Kshatriya in India served as the warrior and governance caste that enforced societal hierarchy and protected the landed elite.¹⁶ Feudalism was an intensely strong form of privatization¹⁷ and

11. Ellen L. Frye, *Private Military Firms in the New World Order: How Redefining "Mercenary" Can Tame the "Dogs of War,"* 73 *FORDHAM L. REV.* 2607, 2612 (2005).

12. Kevin H. Govern & Eric C. Bales, *Taking Shots at Private Military Firms: International Law Misses its Mark (Again),* 32 *FORDHAM INT'L L.J.* 55, 58–63 (2008).

13. C.W.C. OMAN, *AN ELEMENTARY HISTORY OF GREECE: FROM THE EARLIEST TIMES TO THE DEATH OF ALEXANDER THE GREAT* 224 (1899); Heather Carney, Note, *Prosecuting the Lawless: Human Rights Abuses and Private Military Firms,* 74 *GEO. WASH. L. REV.* 317, 321 (2006).

14. Edmund King, *Large and Small Landlords in Thirteenth-Century England: The Case of Peterborough Abbey,* in *LANDLORDS, PEASANTS AND POLITICS IN MEDIEVAL ENGLAND* 141, 143–44 (T.H. Aston ed., 2006).

15. STEPHEN TURNBULL, *THE SAMURAI: A MILITARY HISTORY* 18 (1977).

16. CRAIG A. LOCKARD, *SOCIETIES, NETWORKS, AND TRANSITIONS: A GLOBAL HISTORY* 46 (2nd ed. 2010); ASHWANI KUMAR, *COMMUNITY WARRIORS: STATE, PEASANTS AND CASTE ARMIES IN BIHAR* 10–12 (2008).

norms were upheld by collective violence, without which, feudal rule as a form of societal governance might have lost resilience.¹⁸ Centuries ago, it was the rule rather than the exception that local inhabitants, landowners, clans, and rulers, established communal and city arrangements to protect the status quo with hired force to defend against militants and rivals willing to raid or overturn existing conditions.¹⁹

During the sixteenth and seventeenth centuries, a lucrative private military market developed in Europe as mercenaries began fighting for employers who were willing to provide the most compensation.²⁰ Combatants plundered in offensive operations and victors appropriated spoils of war.²¹ Even the Thirty Years' War (1618–1648) was fought predominantly with mercenaries.²² By 1782, the British East Asian mercenary force employed over 100,000 soldiers from assorted countries to fight in colonial conquests.²³ Britain merged private military company operations with mercantilism when it constituted the English East India Company in India²⁴ and by establishing the Hudson Bay Company, which engaged in commercial transactions and fought rivals in Eastern Canada.²⁵ In South Africa, the British South Africa Company and the British South Africa Police also hired company soldiers to enforce colonialism.²⁶

17. Edward Rubin, Book Review, *The Possibilities and Limitations of Privatization: Government by Contract: Outsourcing and American Democracy*, 123 HARV. L. REV. 890, 894 (2010).

18. MARK IRVING LICHBACH, *THE REBEL'S DILEMMA* 130 (Univ. of Mich. Press 1995) (noting how peasants in France during the thirteenth and fourteenth centuries assembled for secret meetings to vote and decide whether to rebel with arms).

19. Avner Greif, *Self-Enforcing Political Systems and Economic Growth: Late Medieval Genoa*, in ANALYTIC NARRATIVES 23, 26–28, 53, 56, 59 (1998).

20. Sarah Percy, *Morality and Regulation*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 11, 11–12 (Simon Chesterman & Chia Lehnhardt eds., 2007).

21. P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 29 (2003); Mary H. Cooper, *Private Affair: New Reliance on America's Other Army*, 62 CONG. Q. WKLY. 2186, 2196 (2004).

22. RICHARD BONNEY, ESSENTIAL HISTORIES: THE THIRTY YEARS' WAR 1618–1648 68 (2002).

23. Frye, *supra* note 11, at 2618.

24. MICHAEL LEE LANNING, MERCENARIES: SOLDIERS OF FORTUNE, FROM ANCIENT GREECE TO TODAY'S PRIVATE MILITARY COMPANIES 36–37 (2005); SINGER, *supra* note 21, at 37. See generally PHILIP LAWSON, *THE EAST INDIA COMPANY: A HISTORY* (1993); K. N. CHAUDHURI, *THE TRADING WORLD OF ASIA AND THE ENGLISH EAST INDIA COMPANY*, 1160–1760 (1978).

25. JIM NOLES, *A POCKETFUL OF HISTORY: FOUR HUNDRED YEARS OF AMERICA—ONE STATE QUARTER AT A TIME* 190–91 (2008).

26. JOHN S. GALBRAITH, *CROWN AND CHARTER: THE EARLY YEARS OF THE BRITISH SOUTH AFRICA COMPANY* 121–22, 310–20 (1974).

Fighters from these early historical eras sometimes pledged an oath of allegiance to a political power,²⁷ but citizenship and sovereign-societal relations were relative concepts because the system for organizing soldiers was not fully established²⁸ and there was no large-scale legitimate consent from citizens based on national devotion.²⁹ For example, the American Revolution displays a transition from informal and ad hoc fighters to a system of self-determined governance. Settlers, many of whom were farmers rather than professional soldiers, took up arms as members of the Continental Army on their home soil in a war of liberation against England,³⁰ but the new nation provided for a congressionally-authorized national military, state militias, and informal privateers.³¹ The abolition of the latter became a universal norm under international law while the former two remained, subject to sovereign control.

Exchanging security and military services for financial compensation has a long history. Over the last 150 years, however, mercenarism has been challenged in three successive stages—with the growing hostility toward privateering and piracy, with the rise of state sovereignty and the concomitant understanding that governments raise military forces and have responsibility over the use of force, and with the opposition to attempts by colonial powers to retain influence in former colonies.

B. Illegal Private Forces Under International Law

1. *Stage I: Eliminating Privateering and Piracy*

Under the United States Constitution and as a means of self-defense, Congress issued Letters of Marque to authorize private citizens to use lethal

27. Won Kidane, *The Status of Private Military Contractors Under International Humanitarian Law*, 38 DENV. J. INT'L L. & POL'Y 361, 373 (2010).

28. SINGER, *supra* note 21, at 19–20.

29. C. E. MERRIAM, *HISTORY OF THE THEORY OF SOVEREIGNTY SINCE ROUSSEAU* 475 (Columbia Univ. Press 1900) (mentioning that some rights deriving from sovereignty include making “legislation, supreme jurisdiction, police power, conscription, and the taxing power”). The legitimacy of rights and obligations of citizens and the government would ostensibly be more justified and standardized after citizenship is granted and often enfranchisement.

30. ANDREW K. FRANK, *PERSPECTIVES IN AMERICAN SOCIAL HISTORY: AMERICAN REVOLUTION: PEOPLE AND PERSPECTIVES* 1 (2008) (“The American Revolution would not have happened without ordinary farmers. . . . [T]hey did the bulk of the fighting”); Stephen M. Blizzard & Marsha Kwolek, *Increasing Reliance of Contractors on the Battlefield: How Do We Keep From Crossing the Line?*, A.F. J. LOGISTICS 142, 144–145 (2004) (stating that even George Washington reportedly used contractors for providing carpentry, transportation, medical services, and food for the continental army).

31. U.S. CONST. art. I § 8 cl. 11, 14, 16; STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877-1920* 23 (1982).

force against foreign people.³² Letters of Marque differed from operations involving non-state actors, such as mercenaries, who are generally not authorized by the state and do not share bounties with the United States.³³ The evils of privateering were recognized early in American history, and particularly after the Civil War;³⁴ the Lieber Code defined organized bands of belligerents who engaged in hostilities without state authorization as combatants who were not entitled to a privileged prisoner of war status.³⁵ More generally, during the nineteenth century private and state-sponsored commerce raiders posed a threat to all trading states because they attacked oceanic trade routes and plundered merchant vessels as prizes, but this practice was eventually condemned³⁶ as a form of piracy³⁷ subject to universal criminal jurisdiction under international law.³⁸ European countries renounced

32. THEODORE D. WOOLSEY, *INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW* 209 (5th ed. 1878).

33. See Matthew J. Gaul, Note & Comment, *Regulating the New Privateers: Private Military Service Contracting and the Modern Marque and Reprisal Clause*, 31 *LOY. L.A. L. REV.* 1489, 1510–12 (1998) (comparing the private contractor system to the marque and reprisal system and explaining that it should be Congress that has the ultimate authority over hiring contractors).

34. See *Reid v. Covert*, 354 U.S. 1, 24 n.43 (1957) (noting that George Washington warned “Mercenary Armies . . . have at one time or another subverted the liberties of almost all the Countries they have been raised to defend”) (quoting 26 *THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745–1799*, at 388 (John C. Fitzpatrick ed., 1944)).

35. A Prisoner of War status is granted to captured combatants who are (1) commanded by leaders, (2) wear recognizable combat insignia, (3) openly carry arms, and (4) obey laws of war. Geneva Convention Relative to the Treatment of Prisoners of War, Art. 4, Aug. 12, 1949, 6 U.S.T. 3316; FRANCIS LIEBER, *GEN. ORDER NO. 100: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD*, art. 82 (1863) (“Men, or squads of men, who commit hostilities . . . without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men . . . are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.”).

36. Nicholas Parrillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19 *YALE J.L. & HUMAN.* 1, 8–9, 16–19, 29 (2007); 1 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 92 (1826) (James Kent explained on the floor of Congress that “privateering, under all the restrictions which have been adopted, is very liable to abuse.”), available at http://www.constitution.org/jk/jk_000.htm.

37. Pirates raided on behalf of states. Parrillo, *supra* note 36, at 54–55; see also David Glazier, *Playing by the Rules: Combating Al Qaeda Within the Law of War*, 51 *WM. & MARY L. REV.* 957, 972–74 (2009) (emphasizing that nations granted legitimacy to their own sea warriors but deemed adversary-pirates subject to universal jurisdiction criminal offenses); H.W. Malkin, *The Inner History of the Declaration of Paris*, 8 *BRIT. Y.B. INT’L L.* 1, 30 (1927) (Queen Victoria remarking that “[p]rivateering is a kind of Piracy”).

38. Parrillo, *supra* note 36, at 31–32.

privateering, making it illegal pursuant to the Declaration of Paris in 1856,³⁹ but the U.S. Congress did not officially abolish naval prize money until the 1890s.⁴⁰

Private mercenary forces were common centuries ago⁴¹ and wars were not fought solely by sovereign states and their official standing armies.⁴² In fact, almost every U.S. military operation in history has involved some civilian assistance to the military,⁴³ but civilians who did accompany the military were subject to military jurisdiction for their actions.⁴⁴ It is also anachronistic to compare the provision of minor contract services during early periods, such as during the Civil War, with the most recent U.S. wars in which PMCs functioned more like military troops.⁴⁵ The menace of sanctioning PMCs to function like troops is coherent from the progression that made non-state combatants incompatible with the emergence of sovereignty.

39. Declaration Respecting Maritime Law, Apr. 16, 1856, art. 1, 115 Consol. T.S. 1, 2; Parrillo, *supra* note 36, at 50–52; WOOLSEY, *supra* note 32, at 212–13.

40. See Franklin Pierce, Second Annual Message to Congress (Dec. 4, 1854), available at <http://www.presidency.ucsb.edu/ws/?pid=29495> (noting the United States' isolationist position with other countries and the danger of agreeing to principles that other countries could breach and disadvantage the United States, emphasizing that the "bare statement of the condition in which the United States would be placed, after having surrendered the right to resort to privateers, in the event of war with a belligerent of naval supremacy will show that this Government could never listen to such a proposition"); see also Parrillo, *supra* note 36, at 11, 32, 50–51, 63–64, 69–76. Oddly enough, Congress introduced the Marque and Reprisal Act in 2001 that failed, but would have permitted issuing letters of marque and reprisal to permit private profiteering in mercenary actions. H.R. 3074, 107th Cong. (2001).

41. See LEONARD GAULTIER ET AL., THE MERCENARY ISSUE AT THE UN COMMISSION ON HUMAN RIGHTS: THE NEED FOR A NEW APPROACH 16 (2001) (contending general international acceptance of mercenary forces until relatively recently); Percy, *supra* note 20, at 12; SINGER, *supra* note 21, at 20; Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 148 (2005); J. Gregory Sidak, *The Quasi War Cases—And Their Relevance to Whether "Letters of Marque and Reprisal" Constrain Presidential War Powers*, 28 HARV. J.L. & PUB. POL'Y 465, 472 (2005).

42. Govern & Bales, *supra* note 12, at 58; Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1, 2 (2003) (writing that "[t]he sovereign's resort to mercenaries is as old as history itself").

43. Wm. C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 BYU L. REV. 367, 377–80 (2006); Jeffrey S. Thurnher, *Drowning in Blackwater: How Weak Accountability Over Private Security Contractors Significantly Undermines Counterinsurgency Efforts*, ARMY LAW. July 2008, at 67 (stating that U.S. military history has a "rich tradition of using contractors on the battlefield").

44. Geoffrey S. Corn, *Bringing Discipline to the Civilianization of the Battlefield: A Proposal for a More Legitimate Approach to Resurrecting Military-Criminal Jurisdiction Over Civilian Augmentees*, 62 U. MIAMI L. REV. 491, 495 (2008).

45. Katherine Jackson, *Not Quite A Civilian, Not Quite A Soldier: How Five Words Could Subject Civilian Contractors in Iraq and Afghanistan to Military Jurisdiction*, 27 J. NAT'L ASS'N ADMIN. L. JUD. 255, 283 (2007).

2. *Stage II: Establishing Sovereignty: Wars are Between States*

Technological development, the emergence of state sovereignty, nationalism, and social changes led to a system in which sovereign prerogative and respect governed international affairs.⁴⁶ Reciprocal state-citizen obligations and responsibilities induced a nation's citizens to voluntarily and involuntarily serve the state military, based on government decisions to assemble and use military force.⁴⁷ States began to formally and regularly raise organized militaries with citizens by the end of the eighteenth century.⁴⁸ As sovereignty and internal state administration became more solidified, private military forces diminished in use, which is a natural progression because only sovereign governments have a legal right to impose internal coercive rule⁴⁹—unauthorized attacks against others may be crimes, depending on how the law is defined and enforced, and militant organizations that collectivize and perpetrate aggressions against the government in power may be engaging in a form of terrorism.⁵⁰ Similarly, if a sovereign employs private combatants for operations in a foreign territory, this violates the sovereign rights of the target country.⁵¹

With the rise of official sovereignty, social contract theories ascribed the right to engage in warfare to the state, with citizens being parcel to that

46. Terence Turner, *Class Projects, Social Consciousness, and the Contradictions of "Globalization,"* in GLOBALIZATION, THE STATE, AND VIOLENCE 35, 41–42 (Jonathan Friedman ed., 2003).

47. SINGER, *supra* note 21, at 29–32.

48. *Id.* at 29–30.

49. Michael H. Hoffman, *Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law*, 34 CASE W. RES. J. INT'L L. 227, 227 (2002); Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879 (2004).

50. 28 C.F.R. § 0.85 (2004) (terrorism is “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives”).

51. States cannot direct mercenary groups to carry out aggressions in another sovereign territory. Case Concerning Military and Paramilitary Activities in and Against Nicaragua *Nicaragua v. U.S.*, 1986 I.C.J. 14, 110 (June 27, 1986) (discussing illegal aggression, which is the “sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to acts of aggression”). China even proposed this restriction as an explanation of a state's obligation to restrict aggression: “Provision of support to armed groups, formed within [a member state's] territory, which have invaded the territory of another state; or refusal, notwithstanding the request of the invaded state, to take in its own territory all the measures in its power to deprive such groups of all assistance or protection.” Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839, 841 (2001) (quoting *Tentative Chinese Proposals for a General International Organization* (Aug. 23, 1944), 1 FOREIGN RELATIONS OF THE UNITED STATES 718, 725).

action.⁵² Consequently, privatized military forces were perceived as immoral in light of social contract theories of citizen-government relations, particularly in the case of democratic governance because of the assumption that the populace indirectly sanctioned military operations.⁵³ Likewise, a foremost attribute of the deliberative element of state sovereignty is the authority to choose peaceful or non-peaceful relations with other sovereigns,⁵⁴ which has a cardinal constituent of rights and restrictions formed on public sovereign authority. This became thoroughly explicit after the United Nations Charter was adopted; there was no more decisive responsibility and obligation for states than to abide by the system of the use of force under international law, whereas the use of PMCs can weaken “states’ collective ability to monopolize violence in the international system.”⁵⁵

3. *Stage III: Targeting and Abolishing Mercenaries*

The third notable crackdown on the use of private military force unfolded with former colonies struggling to attain independence from colonial powers that employed state-sponsored terrorism to perpetuate influence over

52. ANDREW G. FIALA, *THE JUST WAR MYTH: THE MORAL ILLUSIONS OF WAR* 48 (2008) (“for modern liberals, war is best understood as an act of the general will authorized by the social contract”). Combatants are agents of the state, but those agents must also observe humanitarian protections. ADAM ROBERTS & RICHARD GUELFF, *DOCUMENTS ON THE LAWS OF WAR* 27 (3rd ed. 2004) (noting that “armed hostilities should as far as possible be between organized armed forces, not entire societies: hence the efforts to maintain a ‘firebreak’ distinguishing legitimate military targets from civilian objections and people not involved in armed hostilities.”); BRIAN OREND, *THE MORALITY OF WAR* 287–88 (2nd ed. 2013) (stating that combatants on one side become aggressors to the other side, which makes the aggressors subject to lethal retaliation under collective self-defense because of the status of affiliated combatants).

53. Simon Chesterman, *Leashing the Dogs of War: The Rise of Private Military and Security Companies*, 5 *CARNEGIE REP.* 37, 38 (2008). Consequently, individuals or groups wielding force without the authority of the state had no legitimacy at the domestic or international levels. The use of violence outside of state authorization is illegal because states should be held responsible for wrongs. Fighting for profit is not a valid justification. The concept of privatized military forces for war-making outside of state military responsibility has been eliminated from every angle because of its repulsiveness, but this does not mean that a minor use of private contractors for certain functions as an adjunct to the official military would be prohibited.

54. ARISTOTLE, *POLITICS*, bk. VI, at 69 (B. Jowett, trans., Oxford Univ. Press 1885); Hoffman, *supra* note 49, at 227 (stating that “non-state combatants . . . have almost no place legally in the structure of interstate conflict”). This interaction can further be theorized as two-level interactions between citizens and government at the domestic level and sovereign at the international level. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 *INT’L ORG.* 427, 460 (1988).

55. DEBORAH D. AVANT, *THE MARKET OF FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY* 264 (2005).

former colonies.⁵⁶ At a time when decolonization was the international norm, former colonial powers engaged in the unofficial use of force with mercenaries, and these transgressions hindered self-determination,⁵⁷ propped up amiable regimes to the highest bidder,⁵⁸ undermined humanitarian treatment for locals, and fostered covert means of control.⁵⁹ Elites and firms hired mercenaries to guard diamond mines and oil facilities⁶⁰ and hired privatized military forces to battle over control of natural resources.⁶¹ Corporate firms even funded mercenary employees by allocating payment for services from mining and oil concessions.⁶² Consequently, target countries and the international community revolted against the private military system⁶³ and sought to ban mercenaries during the 1960s.⁶⁴ At the same time, howev-

56. FRANS VILJOEN, *INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA* 275–77 (Oxford Univ. Press, 2nd ed. 2012).

57. SINGER, *supra* note 21, at 37; *see* LANNING, *supra* note 24, at 153–67.

58. SINGER, *supra* note 21, at 102–04; Sapone, *supra* note 8, at 2–3; Kevin Whitelaw, *Have Gun, Will Prop Up Regime*, U.S. NEWS & WORLD REP., Jan. 20, 1997, at 46–47.

59. LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 114 (2nd ed. 2000) (explaining that due to the “number of mercenaries who enrolled in colonial armies or were prepared to serve for pay in campaigns directed against national liberation groups, widespread agitation among third world states resulted in the condemnation” of mercenaries); SINGER, *supra* note 21, at 37 (emphasizing that mercenaries were working in weak states and for corporations, particularly during the 1950s and 1960s); Govern & Bales, *supra* note 12, at 62–63 (noting that the use of PMCs promoted Apartheid); Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1119 (2004) (stating that private contractors may “help prop up rogue regimes, resist struggles for self-determination, and contribute to the proliferation and diffusion of weaponry and soldiers around the world—axiomatically a destabilizing and thus undesirable phenomenon.”).

60. SINGER, *supra* note 21, at 158; Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT’L L. 75, 100 (1998); Frye, *supra* note 11, at 2620.

61. U.N. Econ. & Soc. Council, Comm’n on Human Rights, *The Right of Peoples to Self-Determination and its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation*, ¶ 26, U.N. Doc. E/CN.4/2002/20 (Jan. 10, 2002) (stating that there are still “grave crises threatening government stability and dogged struggles for the control of rich natural resources, including petroleum and mineral deposits” in Africa).

62. SINGER, *supra* note 21, at 109. The use of private contractors became highly criticized again in Sierra Leone in 1995 when Anthony Buckingham hired private military forces to protect diamond mine concessions that he was given by the government. *Id.* at 4, 112–13.

63. Adam Ebrahim, Note, *Going to War with the Army You can Afford: The United States, International Law, and the Private Military Industry*, 28 B.U. INT’L L.J. 181, 203 (2010).

64. Govern & Bales, *supra* note 12, at 63; Lindsey Cameron, *Private Military Companies, Their Status Under International Humanitarian Law, and Its Impact on Their Regulation*, 88 INT’L REV. RED CROSS 573, 580 (2006) (expressing that “the shameful character of mercenary activity” is the reason for condemning their use); Frye, *supra* note 11, at 2612 (“Mercenary activity is unsettling to a world organized by nation-states, as the image of a soldier of fortune loyal to no state disrupts the current state-oriented hegemony.”).

er, there was a subdued emergence of PMCs being employed to provide logistics services and covert and combat assistance to official state-sanctioned military operations.⁶⁵

A series of United Nations General Assembly resolutions further affirmed principles of sovereignty, as codified in the U.N. Charter. By a vote of 109 in favor and 0 in opposition, the United Nations General Assembly passed Resolution 2131 (1965), which states that “no State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”⁶⁶ In 1970, General Assembly Resolution 2625 pronounced that states have a “duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.”⁶⁷ In 1973, and with 83 votes in favor and 13 votes against, the General Assembly passed Resolution 3103, which affirmed that “[t]he use of mercenaries by colonial and racist regimes against national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals.”⁶⁸ In 1974, General Assembly Resolution 3314 was adopted with overwhelming assent and stated that U.N. Charter Article 2(4) should be read to consider “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries” an illegal use of force “against the territorial integrity or political independence of another State.”⁶⁹ In 1993, the General Assembly again called the use of mercenaries a threat to the peace under the U.N. Charter.⁷⁰ Resolution 3314 expressly sought to

65. Jackson Nyamuya Maogoto & Benedict Sheehy, *Private Military Companies & International Law: Building New Ladders of Legal Accountability & Responsibility*, 11 CARDOZO J. CONFLICT RESOL. 99, 104 (2009). At the same time this strong backlash began, the Pentagon employed tens of thousands of South Korean, Thai and Filipino soldiers to fight in the Vietnam War. Frye, *supra* note 11, at 2615 n.76. These were poor countries at the time, which may mean that the Pentagon could pay less and reduce negative fallout for increased U.S. death tolls.

66. Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131 (XX), ¶1, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/Res/2131 (Dec. 21, 1965); Edward McWhinney, Q.C., General Assembly Resolution 2131 (XX) of 21 December 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty 1 (2010), available at http://legal.un.org/avl/pdf/ha/ga_2131-xx/ga_2131-xx_e.pdf.

67. G.A. Res. 2625, U.N. GAOR 6th Comm., 25th Sess., Supp. No. 28, at 123, U.N. Doc. A/8/82 (1970).

68. Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes, G.A. Res. 3103 (XXVIII), art. 5, U.N. GAOR, 28th Sess., Supp. No. 30, at 142, U.N. Doc. A/9030 (Dec. 12, 1973).

69. Definition of Aggression, G.A. Res. 3314 (XXIX), Annex, U.N. GAOR, 29th Sess., Supp. No. 31, (U.N. Doc. A/9631), at 143, (Dec. 14, 1974).

70. G.A. Res. 48/92, pmbl. (Dec. 20, 1993).

define the term “aggression,” which is something that the Security Council has not done.⁷¹ This absence may not be surprising given the Cold War interventions by major powers during the era of decolonization⁷² and the privatization of the military services of the dominant powers after the Cold War ended.⁷³

4. *Stage IV: International Conventions*

International conventions also affirm that mercenaries have no place in modern armed conflict because *states* are required to assume responsibility for wrongs during combat and for war crimes, and official military troops are agents of the state and act in accordance with sovereign decisions. Pursuant to this relationship, which frames state militaries as principals and troops as their agents, only states can legally constitute military forces.⁷⁴ A state’s belligerents can kill or wound enemy forces in lawful combat or be killed or wounded in combat, and these acts in battle are not individual criminal offenses.⁷⁵ Apprehended combatants can be detained for the duration of hostilities, but several categories of Prisoners of War (POWs)⁷⁶ have privileges that prevent them from being prosecuted and punished for execut-

71. Anna Spain, *The U.N. Security Council’s Duty to Decide*, 4 HARV. NAT’L SEC. J. 320, 340 (2013).

72. Lawrence D. Freedman, Book Review, *The Global Cold War: Third World Interventions and the Making of Our Times*, 85 FOREIGN AFFS. 157, 457 (2006) (stating that the United States and Soviet Union “could claim impressive anticolonial credentials,” but “upheavals set in motion by decolonization [can be viewed] as an extension of their confrontation.”).

73. See *infra* Part III.A.

74. David B. Rivkin, Jr. & Lee A. Casey, *Leashing the Dogs of War*, NAT’L INTEREST, Fall 2003, at 57, 61; See Virginia Newell & Benedict Sheehy, *Corporate Militaries and States: Actors, Interactions, and Reactions*, 41 TEX. INT’L L.J. 67, 70 (2006) (stating that there “is the belief that the state should have a monopoly over the use of violence”).

75. See LIEBER, *supra* note 35, at art. 57; JOHN NORTON MOORE ET AL., NATIONAL SECURITY LAW 319 (1st ed. 1990); Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT’L L. 1, 9–10 (2004) (noting that as long as POWs have not engaged in conduct that is a war crime, detention is based on the duration of combat and not on individual criminal acts).

76. Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva POW] (granting protected POW status if they have “fallen into the power of the enemy,” which include: (1) members of an armed force; (2) militia members who wear an emblem and follow orders from a military leader; (3) armed force members who are not a member of a state to the conflict; (4) civilians providing services to the military; (5) civil air members of a party to the conflict; and (6) civilians who rise up to defend against an invading military force).

ing a state's orders to engage in combat because wars are conflicts among sovereign entities and not individuals.⁷⁷

Article 47 of the Protocol Additional to the Geneva Conventions in 1977 expressly denies POW status to mercenaries.⁷⁸ The Protocol Additional defines mercenaries as anyone who is recruited to fight in armed conflict, takes direct part in hostilities with the motivation for private gain, is not a national of a party to the conflict or a member of a party's armed force, and has not been deployed by a state that is not a party to the conflict.⁷⁹ The Protocol Additional does not by its terms treat PMCs as mercenaries,⁸⁰ but PMCs may have characteristics similar to mercenaries if there is a lack of state accountability.

Protocol I criminalizes the acts of "mercenaries . . . who participate directly in hostilities or in a concerted act of violence" and the actions of the person who "recruits, uses, finances, or trains mercenaries."⁸¹ To be considered a mercenary under Article 47, the individual in question must engage in combat⁸² that is either offensive or defensive in nature.⁸³ However, the need

77. KARMA NABULSI, TRADITIONS OF WAR: OCCUPATION, RESISTANCE, AND THE LAW 66 (1999) (Jean-Jacques Rousseau noting that "war is between nations," not between private individuals); Berman, *supra* note 75, at 9.

78. Protocol Additional, *supra* note 10, art. 47 ("A mercenary shall not have the right to be a combatant or a prisoner of war"). This is also logical because the use of mercenaries is illegal through conventions and General Assembly resolutions.

79. *Id.* art 47; Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, *Commentary—Mercenaries*, INT'L COMMITTEE RED CROSS, available at <http://www.icrc.org/ihl/1a13044f3bbb5b8ec12563fb0066f226/ffc84b7639b26f93c12563cd00434156?> ("[O]nly a combatant, and a combatant taking a direct part in hostilities, can be considered as a mercenary in the sense of Article 47.").

80. Michael Scheimer, Comment, *Separating Private Military Companies From Illegal Mercenaries in International Law: Proposing an International Convention for Legitimate Military and Security Support That Reflects Customary International Law*, 24 AM. U. INT'L L. REV. 609, 613 (2009). To automatically regard PMCs as mercenaries would seem to be inconsistent with classification in the 1949 Geneva Convention. Geneva POW, *supra* note 76, art. 4.

81. Ryan M. Scoville, *Toward an Accountability-Based Definition of "Mercenary,"* 37 GEO. J. INT'L L. 541, 550 (2006).

82. See INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 575 n.18 (Yves Sandoz et al. eds., 1987), available at http://www.loc.gov/tr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf.

83. Marina Mancini, *Private Military and Security Company Employees: Are They the Mercenaries of the Twenty-First Century?*, at 10 (Acad. of Eur. L., EUI Working Paper No. AEL 2010/5, 2010), http://cadmus.eui.eu/bitstream/handle/1814/14745/AEL_2010_05.pdf?sequence=4 (noting that "taking part in offensive combat operations qualified as direct participation in hostilities," that "[e]ngaging in defensive combat also constitutes direct participation in hostilities," and that "international humanitarian law does not draw a distinction between offensive and defensive operations").

to end colonialism was so imperative that Article 1 of Geneva Protocol I granted protections to nonstate belligerents when the justification is for “fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.”⁸⁴ This meant that state-sponsored private contractor activities might still receive a lawful combatant status predominantly due to an agency relationship between the state and the private contractor for specific functions.⁸⁵

To address regional concerns, in 1977 the Organization for African Unity adopted a Convention for the Elimination of Mercenarism in Africa, which defines mercenaries and bans them when employed to thwart “a process of self-determination, stability, or the territorial integrity of another State.”⁸⁶ In 1989, the General Assembly adopted the Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries⁸⁷ and the 1989 U.N. Convention on Mercenaries,⁸⁸ which per se ban the use of mercenaries. The U.N. Convention defines four mercenary activities that constitute a criminal offense; perpetrating mercenary activities, recruiting and training mercenaries, attempting to use mercenaries, and acting as an accomplice to mercenaries.⁸⁹ This Convention makes it a crime to engage in any mercenary activity, and requires member states to implement and enforce legislation that is consistent with those restrictions.⁹⁰ It became effective as a treaty in 2001,⁹¹ but only 33 countries are members and 17 states have signed; notably, no European Union or G8 members have signed.⁹²

84. Protocol Additional, *supra* note 10, art. 1(4).

85. Scoville, *supra* note 81, at 550.

86. Organization of African Unity Convention for the Elimination of Mercenarism in Africa, opened for signature on July 3, 1977, art. 1, 1490 U.N.T.S. 96, 97. The other telling factor is that the conventions were directed at violations of international law in the form of international conflicts. *See also* SINGER, *supra* note 21, at 41.

87. Rep., Ad Hoc Comm. on the Drafting of an Int’l Convention Against the Recruitment, Use, Financing and Training of Mercenaries, GAOR, Sixth Comm., U.N. Doc. A/44/766, (Nov. 22, 1989).

88. G.A. Resolution 44/34, U.N. Doc. A/RES/44/34 (Dec. 4, 1989) [hereinafter U.N. Mercenary Convention]; LINDSEY CAMERON & VINCENT CHETAIL, *PRIVATIZING WAR: PRIVATE MILITARY AND SECURITY COMPANIES UNDER PUBLIC INTERNATIONAL LAW* 75 (2013) (emphasizing that “recent General Assembly resolutions relating to the suppression of mercenary activity do not draw a bright line between private military and security companies and mercenaries under the UN Convention”).

89. *See* U.N. Mercenary Convention, *supra* note 88, arts. 2–4.

90. *See Id.* arts. 7, 9.

91. *See generally* Press Release, General Assembly, Mercenaries Often a Presence in Terrorist Attacks, Special Rapporteur Tells Third Comm. as it Begins Discussions on Self-Determination, U.N. Doc. GA/SHC/3650 (Oct. 31, 2001).

92. International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, Dec. 4, 1989, 2163 U.N.T.S. 75. (listing parties and signatories to The Convention). *See generally* Salzman, *supra* note 1, at 878–79 (noting the lack of interest among

III. CRITICAL ELEMENTS TO ASSESS LEGALITY OF PMCS

If one accentuates the core international law principles that sovereignty be respected, that the use of military force be justified, and that states assume responsibility for the illicit use of force, all privatized military combat operations might be construed as morally askew or illegal,⁹³ even if PMCs are not strictly defined as mercenaries under international law.⁹⁴ It is not exacting to appraise the lawfulness of private combatants at the extremes—private contractors engaging in armed combat operations without a connection to a government are likely illegal mercenaries, but private contractors employed to facilitate or sustain a non-combat mission for a state are likely engaging in legal operations within the parameters of existing international law. From the context of these extremes, it appears that proposed international and domestic level regulatory frameworks should ponder three critical elements in terms of contemporary circumstances.

The first element is whether the non-state actor is engaged in hostilities for financial gain that is substantially more than what a state would pay military troops, but as will be emphasized in the next section, there might be a nominal distinction between mercenaries and PMCs in this regard. The second element is the type of operation that the private contractor executes. The more that private military forces are engaged in offensive combat operations, defensive combat operations, and strategic activities that are typically the prerogative of a state's military, the more those private contractor operations should be suspect of mercenarism,⁹⁵ but these are precepts that should be formulated by the international community.

developed states); Chesterman, *supra* note 53, at 40 (referring to the long period of garnering signatures and noting that there were only twenty-two signatories by 1999 who were willing to abolish the use of mercenary forces under the Convention).

93. See Frye, *supra* note 11, at 2653 (noting opinion of Human Rights Watch fellow Montgomery Sapone); SINGER, *supra* note 21, at 37 (profiteer soldiers began to be viewed as illegitimate in the nation-state system).

94. Scheimer, *supra* note 80, at 633 (“[I]t is misleading to claim PMCs are not ‘mercenaries’ simply because they do not fall under Article 47 and U.N. Convention definitions.”); see Report on 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. Econ. & Soc. Council, Comm’n on Human Rights, ¶ 37, U.N. Doc. E/CN.4/2004/15 (Dec. 24, 2003) (“one of the greatest problems in combating mercenary activities is an absence of a clear, unambiguous and comprehensive legal definition of a mercenary.”); Frye, *supra* note 11, at 2613, 2637–38, 2656 (stating that the term “mercenary” has a controversial overtone and it is difficult to define); Newell & Sheehy, *supra* note 74, at 71, 93; Scoville, *supra* note 81, at 541–42.

95. Most commentators would likely agree that offensive operations should never be conducted by PMCs and there may be more division in opinion over the latter two categories. Alternatively, if PMCs are not armed and thereby cannot have a combat-related mission, the use of the military contractors should not raise the types of hazards that have historically been implicated by the use of mercenaries.

If the first two elements are met with an improper mission, an international agreement might impose a rebuttable presumption that the contractor possesses the attributes of a mercenary. If the PMC has a permissible or suspect mission, the third element requires the state to sustain the burden of proving that it assumes accountability for the private contractor's operations and imposes discipline in a manner sufficiently comparable to the responsibility over and disciplinary structure imposed on the state's official military forces, or the private contractors might be regarded as mercenaries.⁹⁶ Section A discusses the financial gain element, section B addresses types of contractor activities, and section C considers the level of control.

A. Financial Gain

Protocol I defines mercenaries as soldiers "specifically recruited . . . in order to fight in an armed conflict. . . [and] motivated to take part in the hostilities essentially by the desire for private gain."⁹⁷ The motivation underlying participation is exemplified by the fact that compensation paid to mercenaries is "substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party."⁹⁸ In the case of the Iraq War and occupation, contractors earned three to four times more than U.S. military troops.⁹⁹ A PMC employee could earn approximately

96. See Scoville, *supra* note 81, at 564–65 (defining a mercenary by including those who aid and abet what are criminal acts under international law and those who are not legally accountable to its own government); Milliard, *supra* note 42, at 87–93 (contending an international agreement is necessary and that the U.N. High Commissioner for Human Rights should administrate all transfers of private military forces). Some experts may find controversial the possibility that contractors could be considered mercenaries when employed by a state. See CAMERON & CHETAU, *supra* note 88, at 68 (citing a debate that states "An essential aspect of the definition of mercenaries when it comes to their 'use' or employment by states is that under any convention or by *legal* definition, a person is not a mercenary if he is incorporated into the state's armed forces. . . This fact is almost always been treated as a 'loop-hole' in the repression of mercenarism"). One can maintain that if a sufficient level of control, responsibility, and disciplinary structure does not exist, the private military forces are not incorporated into the armed forces.

97. Protocol Additional, *supra* note 10, art. 47(2)(a)–(c); JEAN-MARIE HENCKAERTS & LOUIS DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 393 (2005) (stating that many countries define mercenaries as hired combatants for private gain); JANICE E. THOMSON, MERCENARIES, PIRATES, AND SOVEREIGNS: STATE-BUILDING AND EXTRATERRITORIAL VIOLENCE IN EARLY MODERN EUROPE 26 (1994) ("one who fights for an employer other than his home state and whose motivation is economic").

98. Protocol Additional, *supra* note 10, art. 47(2)(c).

99. Finkelman, *supra* note 6, at 442–43; Congressional Budget Office, *Contractor's Support of U.S. Operations in Iraq*, at 14 (Aug. 2008), <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/96xx/doc9688/08-12-iraqcontractors.pdf> (acknowledging numbers confirming that private contractors can make nearly ten times more than U.S. troops but then rationalizing that these numbers represent the PMC's billing rate for each personnel, as op-

\$1,000 per day and enlisted U.S. troops earned between \$1,193 and \$5,054 per month.¹⁰⁰

There can be a catalyst for fighting that at an extreme includes historical private commerce raiders who were only motivated by the prize money produced from robbery¹⁰¹ or the more contemporary example of contractors who are privately compensated combatants in armed conflict.¹⁰² Alternatively, if a state hires contractors to participate in the state's mission or the contractors are authorized by the state, there is a potentially redeeming justification. However, if a private contractor is paid "significantly in excess" of the compensation allocated to a state's armed forces for similar functions and qualifications¹⁰³ and contractors would not participate without that additional compensation,¹⁰⁴ it should probably not perfunctorily be presumed that patriotic intentions and dedication to the state's mission are the foremost driving forces,¹⁰⁵ particularly when a significant percentage of PMC personnel are nationals of foreign countries.¹⁰⁶

posed to the individual PMC employee salary); See Michael N. Schmitt, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 515 (2005) ("Senior PSC personnel regularly earn in the \$20,000 a month range, sometimes more."); Jackson, *supra* note 45, at 288 ("Contractors are paid nearly five-to ten-times what a soldier makes doing the same job"); P.W. Singer, *Outsourcing War*, 84 FOREIGN AFFS. 119, 129 (2005) (stating private contractors earn two to ten times more than military soldiers).

100. Heather Carney, *supra* note 13, at 327–28; National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108–136, sec. 601(b), 1009, 117 Stat. 1392, 1495–98 (2003) (providing standards military pay grades).

101. BENERSON LITTLE, *PIRATE HUNTING: THE FIGHT AGAINST PIRATES, PRIVATEERS, AND SEA RAIDERS FROM ANTIQUITY TO THE PRESENT* 9–10 (2010); HAROLD H. MARTIN & JOSEPH R. BAKER, *LAWS OF MARITIME WARFARE AFFECTING RIGHTS AND DUTIES OF BELLIGERENTS* 473 (1918) (contending that privateering's intention is "not fame or chivalric warfare, but plunder and profit."); CAPTAIN A.T. MAHAN, *SEA POWER IN ITS RELATIONS TO THE WAR OF 1812* 242 (1905).

102. Simon Chesterman, *Lawyers, Guns, and Money: The Governance of Business Activities in Conflict Zones*, 11 CHI. J. INT'L L. 321, 330 (2011) (stating that PMCs such as Blackwater, Triple Canopy, and others in Iraq might be called mercenaries, but PMCs do not fight wars for a fee, such as the case of the now defunct EO and Sandline International in Sierra Leone, Angola, and Papua New Guinea in the 1990s).

103. Protocol Additional, *supra* note 10, art 47(2)(c).

104. Scoville, *supra* note 81, at 556–58 (opining that the necessity of the private gain element could be challenged); Michaels, *supra* note 59, at 1099 ("Money after all is the reason contractors show up, and monetary considerations may skew the aims of the mission.").

105. JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* 499 (Harvard Univ. Press 1990) ("a mercenary's participation depends wholly or primarily on material benefits that can be provided by the authorities or the revolutionaries or both."). If national devotion is the foremost objective, PMC employees might remain in the military and perform similar tasks for less compensation.

106. Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 993 (2005) (referenc-

To further address the financial motive for PMC participation from a systemic perspective, consider the following: has global economic change intrinsically veiled the financial motivation element by imputing that the dominance of corporate and capitalist economic influences has exonerated PMC operations?¹⁰⁷ As indicated in Part II, extra-state fighting forces existed for hundreds of years and fell into disuse with the rise of the sovereign system, but the au courant arrangement is corporatization of private military firms,¹⁰⁸ which was a transition from the swelling military-industrial complex during the Cold War.¹⁰⁹

After the Cold War, the number of state-employed military forces substantially decreased,¹¹⁰ weapons and private mercenary forces were available for hire, privatized military enterprises proliferated,¹¹¹ and the private sector became substantially more enmeshed in military security services.¹¹² Both Britain and the United States substantially reduced the size of their active militaries.¹¹³ The United States cut defense spending by 26% after the Soviet

ing contracts with citizens of Bangladesh and the Philippines). Foreign recruitment not only obviates the prospect of possessing national loyalty for a foreign policy but may reduce PMC costs and increase profitability when personnel are recruited from developing countries with lower per capita incomes. As with mercenary firms, investors have a profit motive and PMC executives and personnel could be motivated by higher pay instead of patriotic allegiance to a mission.

107. Zarate, *supra* note 60, at 87 (“These independent mercenaries, hired outside the constraints of the twentieth century Nation-State system and seemingly motivated solely by pecuniary interests, were seen as shocking anachronism.”)

108. SINGER, *supra* note 21, at 19–20, 45.

109. See Dwight D. Eisenhower, U.S. President, *Farewell Address* (Jan. 17, 1961), available at http://avalon.law.yale.edu/20th_century/eisenhower001.asp; See also Christopher A. Preble, *The Founders, Executive Power, and the Military Intervention*, 30 PACE L. REV. 688, 699 (2010).

110. Maogoto & Sheehy, *supra* note 65, at 105 (stating that three years after the end of the Cold War, military forces decreased to seven million and former soldiers were unemployed and military arms, such as machine guns, grenades, and other heavy weapons were sold to the lowest bidder).

111. SINGER, *supra* note 21, at 44–50, 65–70; HERBERT M. HOWE, *AMBIGUOUS ORDER: MILITARY FORCES IN AFRICAN STATES* 79–85 (2001) (listing humanitarian disaster in many African countries as a result of the end of the Cold War and the easy access to weapons and private military forces for sale); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369 (2003) (speaking more generally about an American general trend, “[p]rivatization is now a national obsession.”).

112. John W. Straw, *Foreword* to PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION 4–5 (2002).

113. CARLOS ORTIZ, *PRIVATE ARMED FORCES AND GLOBAL SECURITY* 52–54 (2010); Kemp, *supra* note 7, at 496 (stating that in Britain, Margaret Thatcher began privatizing state-run facilities); See also Michael R. Gordon, *Military Services Proposing Slashes in Existing Forces*, N.Y. TIMES, May 12, 1990, at A1; Patrick E. Tyler, *Military Chiefs Detail Plans to Cut Troops, Weapons*, WASH POST, May 12, 1990, at A1.

Union dismantled¹¹⁴ and favored outsourcing and privatization¹¹⁵ consistent with the general trend of downsizing government.¹¹⁶ The size of the active U.S. military dropped from 3 million¹¹⁷ to 2,174,200 in 1989, and to 1,385,700 in 1999.¹¹⁸ As a result of these trends, the U.S. government employs about one-third of all private contract personnel in the world¹¹⁹ and the United States and Britain together account for more than 70% of annual global spending on private military companies.¹²⁰ From the mid-1990s until 2002, the Pentagon consummated over three thousand contracts with private contractors totaling an estimated value of \$300 billion.¹²¹ The shift from nearly complete reliance on state-employed military troops to a higher reliance of PMCs is displayed in the evolution of U.S. wars.

Private contractors comprised only 3% to 5% of U.S. personnel during World War II and the Korean War.¹²² PMCs comprised less than 1% during the Vietnam War¹²³ and 2% during the 1991 Gulf War. The number rose to 10% during the 1999 Kosovo conflict and the percentage has continued to escalate during later wars.¹²⁴ The number of PMCs in Iraq grew¹²⁵ to more

114. Preble, *supra* note 109, at 699.

115. Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 400 (2006); Minow, *supra* note 106, at 1001.

116. SINGER, *supra* note 21, at 1–17, 66–70.

117. Cooper, *supra* note 21, at 2197.

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

119. SINGER, *supra* note 21, at 69.

120. Jenny S. Lam, Comment, *Accountability for Private Military Contractors Under the Alien Tort Statute*, 97 CALIF. L. REV. 1459, 1460 (2009).

121. SINGER, *supra* note 21, at 14; Frye, *supra* note 11, at 2619.

122. Scott Horton, Adjunct Professor of Law, Columbia Univ., Prepared Statement, *War Profiteering and Other Contractor Crimes Committed Overseas: Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Security*, 110th Cong. 51–52 (2007).

123. MEREDITH H. LAIR, *ARMED WITH ABUNDANCE: CONSUMERISM AND SOLDIERING IN THE VIETNAM WAR* 25 (Univ. N.C. Press, 2011) (stating that approximately 2.5 million U.S. troops served in the Vietnam War); Peters, *supra* note 43, at 380 (estimating that 9,000 private contractors were used in the Vietnam War).

124. Chesterman, *supra* note 53, at 39; Dickinson, *supra* note 41, at 149; Anna Leander, *Globalization and the State Monopoly on the Legitimate Use of Force*, 7 POL. SCI. PUBLICATIONS 13, 15 (2004) (increasing privatization of U.S. military); Chris Lombardi, *Law Curbs Contractors in Iraq*, 3 A.B.A. J. E-REP., May 14, 2004, at 1 (estimating current contractors in Iraq are “about 10 times the ratio during the 1991 Persian Gulf conflict.”).

125. For chronological progression, see David Barstow, *Security Companies: Shadow Soldiers in Iraq*, N.Y. TIMES, Apr. 19, 2004, at A1 (about 20,000 private contractors); Carney, *supra* note 13, at 327 n.100 (June 2004 estimates were 25,000); Michaels, *supra* note 59, at 1004 (20,000 private contractors in mid-2004); Mary Pat Flaherty & Dana Priest, *Iraq: More Limits Sought for Private Security Teams*, WASH. POST, Apr. 13, 2004, at A15 (as estimated 20,000 private military contractors); Schmitt, *supra* note 99, at 512 (estimates in 2003 and 2004 were between twenty and thirty thousand); Renae Merle, *Census Counts 100,000 Contractors in Iraq*, WASH. POST, Dec. 5, 2006, at D01; John M. Broder & James Risen,

than 180,000 civilians working under private contracts in 2007—130,000 of whom were stationed at U.S. and Iraqi military bases—compared to some 160,000 U.S. troops.¹²⁶ In 2009, there were an estimated 190,000 to 210,000 PMC personnel from over 900 private firms in Iraq.¹²⁷ The ratio of private contractors to uniformed soldiers jumped from approximately 1:100 during the Gulf War, to 1:10 at the beginning of the 2003 attack on Iraq,¹²⁸ to over 1:1 during the later years of the occupation.¹²⁹ The Economist referred to this arrangement as “the first privatized war.”¹³⁰

Drawing a prediction, Senator Lindsey Graham called the use of military contractors “the way we are going to war in the future.”¹³¹ It is abundantly true that many governments have increased their reliance on PMCs to

Death Toll for Contractors Reaches New High in Iraq, N.Y. TIMES, May 19, 2007, at A1 (126,000 contractors).

126. T. Christian Miller, *Contractors Outnumber Troops in Iraq*, L.A. TIMES, (July 4, 2007), <http://articles.latimes.com/2007/jul/04/nation/na-private4>; JENNIFER K. ELSEA & NINA M. SERAFINO, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS AND OTHER ISSUES 3, CRS REPORT FOR CONGRESS (2007) (127,000 contractors); See also Jeffrey F. Addicott, *The Political Question Doctrine and Civil Liability for Contracting Companies on the “Battlefield,”* 28 REV. LITIG. 343, 344 n.3 (2008) (reporting that a January 2008 estimate placed the number at 133,196); Joshua S. Press, *Crying Havoc Over the Outsourcing of Soldiers and Democracy’s Slipping Grip on the Dogs of War*, 103 NW. U. L. REV. COLLOQUY 109, 111 (2008).

127. George R. Lucas, Jr., “*This is Not Your Father’s War*”—*Confronting the Moral Challenges of “Unconventional” War*, 3 J. NAT’L SECURITY L. & POL’Y 329, 331 (2009). In 2008, the Congressional Budget Office reported that the number of private contractors exceeded 190,000. Congressional Budget Office, *supra* note 99, at 1, 8; James Glanz, *Report on Iraq Security Lists 310 Contractors*, N.Y. TIMES, Oct. 28, 2008 (stating that more than three hundred private security companies received contracts granted by U.S. government agencies during the first five years of the war and occupation of Iraq).

128. Jeremy Joseph, Note, *Striking the Balance: Domestic Civil Tort Liability for Private Security Contractors*, 5 GEO. J.L. & PUB. POL’Y 691, 695 (2007).

129. Miller, *supra* note 126; Scott M. Sullivan, *Private Force/Public Goods*, 42 CONN. L. REV. 853, 855 (2010) (reporting on estimates that maintained the number of private contractors in Afghanistan was believed to outnumber official military troops by a two to one ratio); Maogoto & Sheehy, *supra* note 65, at 106 (explaining that the largest growth in PMCs was due to the invasion of Afghanistan and Iraq).

130. *Military Industrial Complexities*, ECONOMIST, Mar. 29, 2003, at 56; Dunigan, *supra* note 9 (noting that “the Iraq war might best be remembered as America’s most privatized military engagement to date”).

131. Govern & Bales, *supra* note 12, at 56; Simon Chesterman & Chia Lehnardt, *From Mercenaries to Market: The Rise and Regulation of Private Military Companies (Introduction)*, at 1, (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Research Paper Series Working Paper No. 07–09, May 2007) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=985837 (explaining that this trend of using commercial firms offering military services as an exception to the rule that legitimate violence is the exclusive domain of governments became one of the great schemas following the end of the Cold War and is likely to increase).

execute operations normally performed by the military.¹³² Although exogenous influences in the form of market mechanisms have the capability of commoditizing military force,¹³³ it does not follow that outsourcing choices should be regarded as legal. In fact, rather than inherently rationalizing how military contracting may be an example of how the law has not cogently adapted to practice, the privatization of military services can also serve as an example of how practice should not so readily transgress existing legal institutions, particularly when the origin of the shift demonstrates that the primary motivation of PMCs is pecuniary.

The private security industry has been a rapidly growing economic sector in the United States¹³⁴ and many PMCs are publicly traded companies with stock values that, during the 1990s, appreciated at double the growth rate of the Dow Jones Industrial Average.¹³⁵ The total value of the PMC market increased from \$33.6 billion in 1990 to \$202 billion in 2010¹³⁶ and the two hundred leading multinational PMCs recently received approximately \$100 billion in annual revenue.¹³⁷ In capitalist economies, investors risk funds under the assumption that companies will continue to profit, but the risk and potential profitability are dependent on foreign policy. In a democracy, foreign policy should derive from rational and volitional public will. To the extent that a government aims to impart an illusion of a lower number of troops in a wartime scenario,¹³⁸ perhaps because the government cannot persuade a commensurate number of nationals to enlist at the prevailing military wage structure, this may signal that something is drastically wrong with the mission.¹³⁹

132. SINGER, *supra* note 21, at 1–17, 120.

133. PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* 1–3 (2007) (emphasizing that while mercenarism diminished with the rise of state sovereignty, it grew again with privatization and globalization, which some may refer to as a trend that has weakened the power and authority of government).

134. SINGER, *supra* note 21, at 69.

135. AVANT, *supra* note 55, at 8.

136. Newell & Sheehy, *supra* note 74, at 83–84.

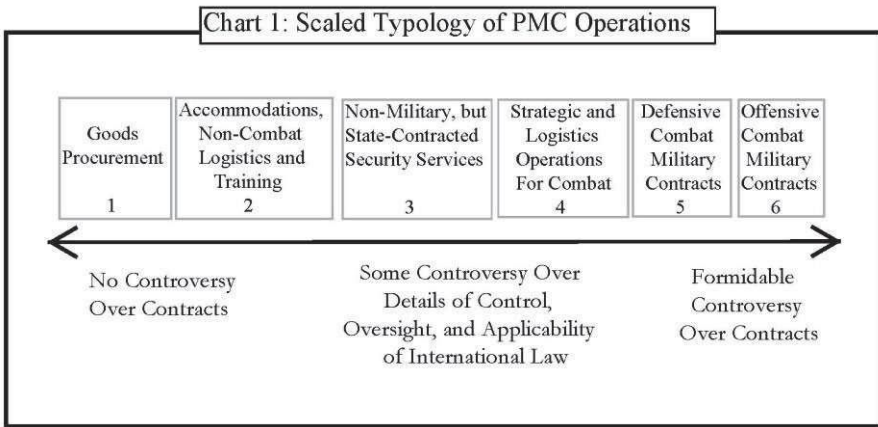
137. SINGER, *supra* note 21, at 78.

138. Charles Tiefer, *The Iraq Debacle: The Rise and Fall of Procurement-Aided Unilateralism as a Paradigm of Foreign War*, 29 U. PA. J. INT'L L. 1, 28 (2007) (pointing out that by using such a large number of contractors during the Bush administration, the military “ardently desired . . . to keep the illusion of a low number of troops”).

139. Robert Bejesky, *The Economics of the Will to Fight: Public Choice in the Use of Private Contractors in Iraq*, 44 CUMB. L. REV. (forthcoming 2014) (manuscript at 3–8, 56). Perhaps there are also concerns with delegating responsibility for recruiting, instilling patriotism, and failing to properly educate those who execute missions, which may unfortunately permit the military chain of command to later avoid responsibility.

B. TYPES OF PARTICIPATION

For the second element, the type of military participation is critical to determining whether the actor is a contractor with a legitimate mission, a mercenary with an illegal mission,¹⁴⁰ or a PMC with a mission straddling a zone of controversy. The more contractor operations are isolated from military combat, the less likely that contractors are engaging in controversial operations, in which case there is no need to proceed to the third element of whether the state assumes effective control over the contractor. Consider the following depiction of six types of operations with a progressively increasing level of controversy:



The first level of involvement is goods procurement. Governments today do not operate factories and will procure goods to attain the most effective and cost efficient product.¹⁴¹ Goods procurement does not raise concerns over mercenarism, although there have been apprehensions over the extent that interaction among politicians, the private sector, and military bureaucrats beget an “Iron Triangle” synergy that inclines military spending or foreign policy¹⁴² as President Eisenhower warned.¹⁴³ It is currently esti-

140. Geoffrey S. Corn, *Unarmed but How Dangerous? Civilian Augmentees, the Law of Armed Conflict, and the Search for a More Effective Test for Permissible Civilian Battlefield Functions*, 2 NAT'L SECURITY L. & POL'Y 257, 262 (2008) (agreeing that there should be a “participation test,” which permits some functions for civilian contractors and excludes others).

141. 41 U.S.C. § 50 (2012) (defining military contractors broadly and listing that contractors provide goods and services to the Department of Defense).

142. Dickinson, *supra* note 41, at 148.

143. See Eisenhower, *supra* note 109 (expressing to beware of the “military industrial complex”).

mated that 57% of Pentagon procurement involves services, rather than goods,¹⁴⁴ and that 30% of the military service is handled by contractors.¹⁴⁵

For the provision of services, private military companies are normally engaged in three types of activities for government or non-government entities—consulting, support, and security.¹⁴⁶ In the case of government procurement for services in the United States, one might deduce that dismay over mercenarism would be harnessed because Congress established a standard in 1998 that prohibited the government from hiring private contractors for an “inherently governmental function,” which is “a function that is so intimately related to the public interest as to require performance by . . . [g]overnmental employees.”¹⁴⁷ The Pentagon accepted the intrinsic government function standard.¹⁴⁸ While there may be some ambiguity and disagreement over the meaning of an “inherently governmental function,”¹⁴⁹

144. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-274, CONTRACT MANAGEMENT: OPPORTUNITIES TO IMPROVE SURVEILLANCE ON DEPARTMENT OF DEFENSE SERVICE CONTRACTS 1 (2005), <http://www.gao.gov/assets/250/245676.pdf> (citing \$118 billion).

145. Finkelman, *supra* note 6, at 400.

146. J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 A.F. L. REV. 155, 186 (2005); See SINGER, *supra* note 21, at 91 (classifying private military contractors into military combat, consultants, and support).

147. H.R. 4244, Federal Activities Inventory Reform Act: Hearing Before the Subcomm. on Gov't Mgmt., Info., & Tech. of the Comm. on Gov't Reform & Oversight, 105th Cong., 2d Sess. 1 (Aug. 6, 1998), 112 Stat at 2384 (1998), codified at 31 U.S.C § 501; See JOHN R. LUCKEY, VALERIE BAILEY GRASSO & KATE M. MANUEL, INHERENTLY GOVERNMENTAL FUNCTIONS AND DEPARTMENT OF DEFENSE OPERATIONS: BACKGROUND, ISSUES, AND OPTIONS FOR CONGRESS 8–9, CRS REPORT FOR CONGRESS (2009); Verkuil, *supra* note 115, at 437, 452, 454 (expressing that under OMB's Circular A-76 and potential restrictions under the Subdelegation Act, government services cannot be outsourced for “inherent” government functions).

148. U.S. DEP'T OF DEF., INSTR. 1100.22, GUIDANCE FOR DETERMINING WORKFORCE MIX, at ¶ 6.1.2 (Sept. 7, 2006), <http://www.dodea.edu/Offices/CSPO/upload/Guidance-for-Determining-Workforce-Mix.pdf>. Subcontracting has ostensibly expanded beyond this standard. Secretary of Defense Rumsfeld announced that the Pentagon should eliminate or shift to the private sector all activities that were not core defense operations. See Minow, *supra* note 106, at 1002; McCallion, *supra* note 8, at 319 (“contractors perform virtually every function essential to a successful military operation”); U.S. DEPT. OF DEF., QUADRENNIAL DEFENSE REVIEW REPORT 4 (Feb. 6, 2006), available at <http://www.defenselink.mil/qdr/report/Report20060203.pdf> (discussing procurement a demand-driven choice, “[t]he Total Force of active and reserve military, civilian, and contractor personnel must continue to develop the best mix of people equipped with the right skills needed by the Combatant Commanders.”). In what appears to be twisting words rather than focusing on substantive meaning, the report continues by noting that the NSPS “recognizes the importance of defense civilians and the support they provide for contingency operations. It enables civilians to perform inherently governmental functions, freeing military personnel to perform inherently military functions.” *Id.* at 81.

149. Minow, *supra* note 106, at 1015.

anything involving combat is a core military function¹⁵⁰ and national security is unquestionably an essential government function.¹⁵¹ Among the field of services, the second category does not raise concerns, whereas the third through sixth categories can progressively grate anxieties.

The second operation in the typology is contracts to administer accommodations, non-combat logistics support, and training. PMCs involved in training operations are not participating in actual combat, and a military assuredly has the prerogative to use private instructors.¹⁵² Other examples of privatized services that do not invoke concerns of mercenarism include firms that accompany the military into a foreign location and remain outside the zone of combat, such as firms that provide housing, accommodations, food, and medical services.¹⁵³ Under international law, PMC employees may also travel with the military to a location where there could be hostilities, in which case they are afforded “quasi-combatant status” and will have POW treatment, but cannot directly participate in hostilities.¹⁵⁴ Even if civilians do not participate in combat, it may still be prudent to require the state employer to assert reasonable control over contractors because the behavior of PMCs can impact the performance of the military¹⁵⁵ and reflect poorly on the hiring nation.¹⁵⁶

150. See Verkuil, *supra* note 115, at 449 (“In the military setting, privatization clearly challenges constitutional limits when inherent government functions (matters involving life and death and the exercise of discretion) are performed by private security firms on the front lines in Iraq and elsewhere . . .”).

151. See Memorandum from the Assistant Sec’y for the Army to the Assistant Deputy Chief of Staff for Intelligence (Dec. 26, 2000), <https://www.documentcloud.org/documents/239397-military-intelligence-exemption.html> (“[T]actical . . . intelligence . . . is an inherently Governmental function barred from private sector performance.”).

152. See Dickinson, *supra* note 41, at 150–51. The military would presumably aspire to retain expertise in-house, but outsourcing expert training is altogether logical if equipment and processes involve intellectual property and are inherently linked to the service, the training is intermittent, or the optimum skill level is possessed by those who have retired from active duty because of the present tenure and retirement parameters. For example, the firm Military Professional Resources Incorporated (MPRI) was founded by a group of former military officers in 1987 and expanded to engage in training, conducting ROTC training programs for the military around the country, educating U.S. forces, and participating in war gaming, but it also engaged in operations in Angola, Bosnia, Croatia, Equatorial Guinea, Nigeria, Saudi Arabia, and Sri Lanka; Gaul, *supra* note 33, at 1493 (calling MPRI a “primary player in private military service contracting”).

153. See Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT’L L. & POL. 697, 708–09 (2010); Robert W. Wood, *Independent Contractor vs. Employee and Blackwater*, 70 MONT. L. REV. 95, 102 (2009) (noting that the private contractor may provide housing, food, laundry, transportation, and housekeeping services for the military).

154. Guillory, *supra* note 118, at 115–16.

155. See John R. Crook, Brief Notes, *Contemporary Practice of the United States Relating to International Law*, 102 AM. J. INT’L L. 669, 669 (2008) (noting that in April 2008, the U.S. Army initiated court-martial proceedings against a civilian contractor who was charged

Categories three through six present the most consternation because contract terms have a significant impact on potential adversaries and the environment of operation. The third category is PMC operations that execute non-military security details. Non-military government employers and non-government employers throughout the world hire PMCs to conduct non-violent policing operations for businesses, malls, and various public and private organizations, but uncertainties materialize when PMC personnel are given weapons and orders to use the weapons. The legality of wielding weapons normally depends on existing laws and government approval in the country of operation. However, gray areas festered in Iraq.

While a crime committed in a foreign country would normally fall within the sovereign territorial jurisdiction of the location of the wrong, in the case of the occupation of Iraq, the U.S.-controlled Coalition Provisional Authority, immediately prior to its dissolution, issued Order 17 and bestowed civil and criminal immunity to PMCs.¹⁵⁷ For example, when an ap-

with stabbing another contractor in Anbar Province in Iraq); Angela Snell, Note, *The Absence of Justice: Private Military Contractors, Sexual Assault, and the U.S. Government's Policy of Indifference*, 2011 U. ILL. L. REV. 1125, 1136–37 (2011) (referencing abuse of women among co-workers within private contractor firms in Iraq); Amy Kathryn Brown, Note, *Baghdad Bound: Forced Labor of Third-Country Nationals in Iraq*, 60 RUTGERS L. REV. 737, 737–38 (2008) (stating that roughly 35,000 of the 48,000 contractors working for KBR in Iraq were from third-countries and that they had been recruited through deceptive practices); Cam Simpson, *Iraq War Contractors Ordered to End Abuses*, CHI. TRIB., April 24, 2006, at 1 (reporting that charges included “deceptive hiring practices, excessive fees charged by overseas job brokers who lure workers into Iraq, substandard living conditions once laborers arrive, violations of Iraqi immigration laws[,] and a lack of mandatory ‘awareness training’ on U.S. bases concerning human trafficking”).

156. See Frye, *supra* note 11, at 2643–45 (explaining that, in 1999 when DynCorp employees engaged in criminal acts in the former Yugoslavia, including rape and bribery, the personnel simply left the country and avoided criminal indictment); Michaels, *supra* note 59, at 1098; P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 525 (2004); SINGER, *supra* note 21, at 67. Perhaps more responsibility could be held inside the system of military contracting. Yet, the Department of State produced its annual Trafficking in Persons Report in 2006 and advised that legislation was necessary to target contractors in Iraq, but Army officials claimed these “are not Army issues” and that recruitment methods “should be directed to the subcontractor.” Brown, *supra* note 155, at 738–39, 761–63 (noting that the Alien Tort Claims Act could provide jurisdiction to federal courts over these contractor abuses, but the causal chain of responsibility seems to weaken any such case).

157. *Coalition Provisional Authority Order No. 17 (Revised)*, Status of the Coalition Provisional Authority, MNF - Iraq, Certain Missions and Personnel in Iraq, § 4(2)–(3) (June 27, 2004) [hereinafter *CPA Order 17*], http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf (“Contractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their Contracts Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto.”).

parently drunken Blackwater security employee¹⁵⁸ shot and killed Iraqi Vice President Mahdi's bodyguard in December 2006,¹⁵⁹ Blackwater fired the individual within thirty-six hours, flew him out of Iraq, and paid the decedent's family \$15,000.¹⁶⁰ The FBI investigated in Baghdad and sought to interview witnesses, but federal prosecutors were unable to support a case against the suspect.¹⁶¹ The United States possessed the prerogative to prosecute, but the Bush Administration apparently disfavored holding U.S. citizens responsible for crimes related to war.¹⁶²

On September 16, 2007, Blackwater security personnel, operating under a "personal protective services" contract on behalf of the U.S. Department of State,¹⁶³ fired at vehicles in Nisour Square, Baghdad, killing seventeen Iraqis and injuring twenty-four.¹⁶⁴ The Blackwater personnel were traveling in four armored vehicles and were not injured.¹⁶⁵ The security guards contended that they fired in self-defense, but an FBI investigation determined that the shootings were not provoked or justified¹⁶⁶ and that the victims were civilians who did not pose a threat to the safety of the guards.¹⁶⁷

158. Sabrina Tavernise, *U.S. Contractor Banned by Iraq Over Shootings*, N.Y. TIMES, Sept. 18, 2007, at A1 (noting reports of a Blackwater employee in 2006 who "had been drinking heavily in the Green Zone, . . . tried to enter an area where Iraqi officials live," and shot an Iraqi bodyguard).

159. Memorandum from the Majority Staff to the Comm. on Oversight and Gov't Reform, at 9 (Oct. 1, 2007) [hereinafter House Comm. on Oversight and Gov't Reform], <http://graphics8.nytimes.com/packages/pdf/national/20071001121609.pdf>; E.L. Gaston, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement*, 49 HARV. INT'L L.J. 221, 230 (2008) (noting that DynCorp was fired from the private security detail of Afghan President Hamid Karzai because of ill treatment of Afghans).

160. Eric Schmitt, *Report Details Shooting by Drunken Blackwater Worker*, N.Y. TIMES, Oct. 2, 2007, at A10.

161. James Risen, *Efforts to Prosecute Blackwater Are Collapsing*, N.Y. TIMES, Oct. 21, 2010, at A1 (noting that the State Department offered use immunity to PMC employees in both the Moonen case and the Nisour Square case, which then prohibited their statements from being used in a criminal case).

162. Anthony Giardino, *Using Extraterritorial Jurisdiction to Prosecute Violations of the Law of War: Looking Beyond the War Crimes Act*, 48 B.C. L. REV. 699, 731 (2007).

163. Christopher D. Belen, *Reining in Rambo: Prosecuting Crimes Committed by American Military Contractors in Iraq*, 27 PENN. ST. INT'L L. REV. 169, 173 (2008).

164. House Comm. on Oversight and Gov't Reform, *supra* note 159, at 6; Belen, *supra* note 163, at 172–73; *See also* Press, *supra* note 126, at 109–10 (noting that one of the targeted vehicles contained a mother and infant in the passenger seat).

165. David Johnston & John M. Broder, *F.B.I. Says Guards Killed 14 Iraqis Without Cause*, N.Y. TIMES, Nov. 14, 2007, at A1.

166. Ginger Thompson & James Risen, *Plea to Blackwater Guard Helps Indict Others*, N.Y. TIMES, Dec. 8, 2008, at A12.

167. Richard Frankel, *Regulating Privatized Government through § 1983*, 76 U. CHI. L. REV. 1449, 1450 (2009).

Americans and foreigners were outraged over the iniquity¹⁶⁸ and the Iraqi government called for Blackwater to be removed from Iraq,¹⁶⁹ but Blackwater returned to operations three days later.¹⁷⁰

The case illustrates some of the explicit and implicit concerns historically posed by mercenary forces, including sovereign territorial prerogatives, the lack of an adequate legal structure governing combatants, and the reasonableness of firepower of security personnel.¹⁷¹ The Blackwater guards in the Nisour Square massacre were not military contractors and were not subject to the Uniform Code of Military Justice,¹⁷² but the contractors were so heavily armed that they fired machine guns and launched grenades at perceived security threat targets.¹⁷³ Iraq's Ministry of the Interior could have revoked a PMC's license and the Iraqi government might have overturned CPA Order 17;¹⁷⁴ however, the U.S. Department of State persuaded the Iraqi government not to expel Blackwater, which was an instance of pressure that may connote a lack of sovereign equality. The massacre led the U.S. State Department to consider the issue of private contractors,¹⁷⁵ but inherent problems paralleled the lack of sovereign authority that was generally posed by mercenaries because the U.S. government struggled with the decision to bring charges even though at least 14 of the 17 killings were without

168. Belen, *supra* note 163, at 207 (noting that Arikat, the U.N. Mission spokesperson, maintained that “when you kill 17 people like that, it’s a crime against humanity if it is proven that it was done in cold blood”); Katarina Kratovac, *U.N. Questions Contractor Shootings*, ASSOCIATED PRESS (Oct. 11, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/10/11/AR2007101100384_pf.html.

169. Steven R. Hurst & Qassim Abdul-Zahra, *Iraqi Authorities Seek Blackwater Ouster*, WASH. POST (Oct. 9, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/08/AR2007100800832.html>.

170. Kim Sengupta & Charlie Gilmour, *The World of Private ‘Security’: Unleashed: The Fat Cats of War*, INDEP. (Oct. 26, 2007), <http://www.independent.co.uk/news/world/middle-east/the-world-of-private-security-unleashed-the-fat-cats-of-war-397935.html>.

171. *See supra* Parts II, III.B.

172. *Reid v. Covert*, 354 U.S. 1, 39–40 (1957) (addressing concerns of military law encroaching on civilian rights). *See generally* Press, *supra* note 126, at 110.

173. Andres Healy, Note, *The Constitutionality of Amended 10 U.S.C. § 802 (A)(10): Does the Military Need a Formal Invitation to Reign in “Cowboy” Civilian Contractors?*, 62 FLA. L. REV. 519, 522–23 (2010); Frommer & Tucker, *supra* note 5 (noting the use of machine guns and grenades).

174. The existing principle that granted supremacy to Order 17 was Regulation 1(3), which stated: “Regulations and Orders issued by the [CPA] Administrator shall take precedent over all other laws and publications to the extent that other laws and publications are inconsistent.” Coalition Provisional Authority Regulation No. 1, at § 3(1), May 16, 2003, available at http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf. CPA Order 17, *supra* note 157, § 16.

175. James Glanz & Alissa J. Rubin, *Blackwater Shootings ‘Murder,’ Iraq Says*, N.Y. TIMES, Oct. 8, 2007, at A6.

cause.¹⁷⁶ Prosecutors did eventually indict five Blackwater guards on involuntary manslaughter charges in the United States District Court for the District of Columbia in January 2009.¹⁷⁷ The court dismissed the case, but new charges were brought against the Blackwater personnel in October 2013 and four guards were convicted one year later.¹⁷⁸

With operations ending in Afghanistan and Iraq, PMC revenue sources would presumably be reduced, but some PMCs adapted and were broadening operations into maritime security, guarding businesses in Africa, and searching for operations in new markets.¹⁷⁹ As PMC activities were being scaled back in Iraq, the U.S. Navy encouraged merchant fleets to consider hiring private contractors to secure waterways that might be at risk for piracy.¹⁸⁰ The law regarding such operations remains ambiguous because the flag state of the vessel generally holds jurisdiction over acts committed aboard vessels and the International Maritime Organization has historically disfavored the use of force as a response to piracy.¹⁸¹ In the search for new opportunities, the founder of Blackwater remarked that he believes the new hot spot for PMC operations will be Africa where he is investing in security

176. Surabhi Ranganathan, *Between Complicity and Irrelevance? Industry Associations and the Challenge of Regulating Private Security Contractors*, 41 GEO J. INT'L L. 303, 352 (2010).

177. Indictment, *United States v. Slough*, No. CR-08-360 (filed D.D.C. Dec. 4, 2008), available at <http://news.findlaw.com/cnn/docs/iraq/blackwater-indictment1208ind.html>. See generally Crook, *supra* note 5, at 162; Risen, *supra* note 5, at A1; Apuzzo, *supra* note 5.

178. Frommer & Tucker, *supra* note 5.

179. Dunigan, *supra* note 9; Peter Apps, *As Iraq, Afghan Wars End, Private Security Firms Adapt*, REUTERS (Oct. 21, 2012), <http://www.reuters.com/article/2012/10/21/us-usa-arms-contractors-idUSBRE89K02B20121021> (stating that an industry executive stated that with the work drying up, “he expected an era of mergers and even bankruptcies”).

180. Katharine Houreld, *After Iraq, Security Firms Join Somalia Piracy Fight: Pirate Coast of Africa Offers New Frontier for Security Firms Looking Beyond Iraq*, ASSOCIATED PRESS (Oct. 26, 2008), http://www.usatoday.com/news/world/2008-10-26-2583935117_x.htm; Jerry Seper, *Blackwater Joins Fight Against Sea Piracy*, WASH. TIMES (Dec. 4, 2008), <http://www.washingtontimes.com/news/2008/dec/04/blackwater-joins-fight-against-sea-piracy/> (noting that Blackwater announced that it would be available to protect shipping companies with its new 183-foot vessel). Securing ships from the threat of piracy is a way of creating markets, which parallels the historical use of defense forces to thwart profiteering on the high seas.

181. There was a recent exception. See International Maritime Organization, *Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area*, at ¶ 1.1, May 12, 2012, available at <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Guidance/Documents/MSC.1-Circ.1405-Rev2.pdf> (specific to the new risk in some areas (e.g. “Somalia-based pirates”), the IMO noting that “whilst not endorsing the use of privately contracted armed security personnel (PCASP), understands that shipping companies may find it difficult to identify reliable, professional private providers of armed security”).

operations for energy companies.¹⁸² This sort of activity is not wholly inconsistent with the type of operations that led mercenaries to be banned in Africa over three decades ago, although the legality for security operations depends on government assent in the state of operation.

Another possibility that has been raised is whether an internationally sanctioned mission, such as a U.N. peacekeeping operation, might utilize PMCs.¹⁸³ This prospect opens a potential danger that once mercenary-like forces are sanctioned for specific operations, they could be abused or overused.¹⁸⁴ PMC operations have historically, and often controversially, been executed in locations across the world.¹⁸⁵ If international authorities begin granting generous discretion for PMC operations to utilize lethal force for security operations, perhaps this will relay an erroneous message about the validity of similar private operations in other countries and regions.

The fourth category consists of participating in strategic assistance for military operations without using weapons in combat. Being part of the logistics chain for combat has been interpreted broadly. For example, in *Public Committee Against Torture in Israel v. Government of Israel*, the Israeli Supreme Court held that those who take a “direct part” in hostilities include personnel who gather intelligence, transport troops to and from hostilities, operate weapons, or provide services to those operating weapons.¹⁸⁶ A British House of Commons report also construed the span of military combat operations comprehensively: “[t]he distinction between combat and non-

182. *Beyond Blackwater*, ECONOMIST (Nov. 23, 2013), <http://www.economist.com/news/business/21590370-industry-reinvents-itself-after-demise-its-most-controversial-firm-beyond-blackwater>.

183. U.N. Econ. & Soc. Council, Comm’n on Human Rights, *Civil and Political Rights, Including the Question of Independence of the Judiciary, Administration of Justice, Impunity, Draft Principles Governing the Administration of Justice through Military Tribunals*, ¶ 31, U.N. Doc. E/CN.4/2006/58 (Jan. 13, 2006) (“thought needs to be given to the situation of military and assimilated personnel, including civilian police taking part in peacekeeping operations and paramilitaries or private contractors taking part in international occupation arrangements.”); Straw, *supra* note 112, at 4 (mentioning that states with low institutional capabilities could benefit from an international intervention).

184. *Military Firm Seeks Taylor Bounty*, BBC (Dec. 11, 2003), <http://news.bbc.co.uk/2/hi/africa/3309203.stm> (explaining that a UK military firm was seeking an investor who could provide funding to kidnap former Liberian Charles Taylor and that the firm would split the \$2 million reward with the investor. This sounds like an advertisement for mercenarism.). Private contractors have also worked for Colombian and Mexican drug cartels. SINGER, *supra* note 21, at 14–15, 43.

185. Govern & Bales, *supra* note 12, at 64–65 (listing Africa (Algeria, Angola, Congo, Ethiopia, Kenya, and Uganda); Europe and Western Asia (Armenia, Azerbaijan, Bosnia, Chechnya, Croatia, Kazakhstan, and Kosovo); and the Middle East (Afghanistan, Iraq, Kuwait, and Saudi Arabia); and East Asia (Burma, Cambodia, Indonesia, Papua New Guinea, Philippines, Taiwan), and in Latin America (Columbia, Mexico, and Haiti)).

186. H CJ 769/02, *Pub. Comm. Against Torture in Isr. v. Gov’t of Isr.*, [2005] (Isr.); Schmitt, *supra* note 153, at 708–09.

combat operations is often artificial. The people who fly soldiers and equipment to the battlefield are as much a part of the military operations as those who do the shooting.¹⁸⁷ The U.S. military has encompassing definitions of participating in hostilities, which include administering logistics support and intelligence operations and participating as guards and surveillants.¹⁸⁸

PMCs in Iraq were conducting intelligence operations and interrogating detainees.¹⁸⁹ Investigations revealed that private contractors committed approximately 16 of the 44 acts of interrogation abuse at Abu Ghraib prison.¹⁹⁰ CACI and Titan were implicated in injustices at Abu Ghraib, and Blackwater was awarded a contract to design assassinations of al-Qaeda leaders.¹⁹¹ Not only are these activities that should not be contracted away, but assassinations and abusive interrogations should not even be conducted by government agencies because they are illegal under international law.¹⁹² If international law forbids governments from perpetrating specified acts, but states instead obscure the official directives and the command chain leading to agent execution, this appears to provide a mode for government leaders to avoid responsibility¹⁹³ or to engage in plausible deniability.¹⁹⁴

187. Minow, *supra* note 106, at 1015–16 (citing Response of the Secretary of State for Foreign and Commonwealth Activities, NINTH REPORT OF THE FOREIGN AFFAIRS COMM., PRIVATE MILITARY COMPANIES, SESSION 2001–2002, 4 (U.K.)).

188. Guillory, *supra* note 118, at 117–18; Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 1003 (2005) (reporting that private contractors were also involved in logistics and maintaining equipment, targeting, and surveillance in Afghanistan).

189. GEN. ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 26, 36 (2004). *See generally* Michaels, *supra* note 59, at 1019.

190. P.W. Singer, *The Contract the Military Needs to Break*, WASH. POST, Sept. 13, 2004, at B03.

191. *See* Chesterman, *supra* note 102, at 336.

192. *See* Geneva POW, *supra* note 76, at art. 17; Laws and Customs of War on Land (Hague II), art. 29, July 29, 1899, 32 Stat. 1803, T.S. 403 (if private contractors are engaging in work as spies to obtain information from the enemy, then they are considered criminals and are not afforded POW status); Robert Bejesky, *Sensibly Construing the “More Likely Than Not” Threshold for Extraordinary Rendition*, 23 KAN. J.L. & PUB. POL’Y 221, 228–30 (2014) (discussing controversy surrounding assassination and kidnapping).

193. Sandeep Gopalan, *Alternative Sanctions and Social Norms in International Law: The Case of Abu Ghraib*, 2007 MICH. ST. L. REV. 785, 788 (2007); Gaston, *supra* note 159, at 229 (writing that private contractors were involved in human rights abuses, criminal wrongdoing, and war crimes).

194. *See* Singer, *supra* note 190, at B3; McCallion, *supra* note 8, at 319, 340–41 (suggesting that the “current status of government accountability [in using PMCs] is merely ‘plausible deniability.’”); Eugenio Cusumano, *Regulating Private Military and Security Companies: A Multifaceted and Multilayered Approach*, at 18 (Acad. of Eur. L., EUI Working Paper No. AEL 2009/11, 2009) (contractors give states a “shield of plausible deniability”).

The fifth and sixth areas of concern involve tasking PMCs with fighting, or otherwise procuring services that are more analogous to those performed by mercenaries.¹⁹⁵ The fifth category encompasses defensive operations and the sixth consists of offensive operations. These services are particularly muddled under U.S. practice because the most prominent example of a function traditionally reserved for the military is “direct participation in hostilities,”¹⁹⁶ but the Government Accountability Office called the Iraq War the first time that private contractors were being hired in almost direct replacement for military troops, including by engaging in combat.¹⁹⁷ Moreover, dissension festers over whether there should or can be a realistic distinction between engaging in *offensive* operations and being placed into a *defensive* security position in which combat is likely.

Contractors in Iraq denied involvement in strategic military operations or offensive combat, but instead contended that they provided defensive services “concerned with the protection of people and premises.”¹⁹⁸ The Pentagon’s general order for contractors only permitted discharging weapons in self-defense.¹⁹⁹ A memo provided to the House Committee on Oversight and Government Reform indicated that over two and a half years in Iraq, Blackwater personnel were involved in 195 shooting incidents and investigations revealed that Blackwater personnel fired first in 84% of these events even though they were only allowed to fire in self-defense.²⁰⁰

195. There was a range of opinions on whether outsourcing of combat or security operations in Iraq should have been licit. See, e.g., Parrillo, *supra* note 36, at 2; Minow, *supra* note 106, at 1001–03; Dickinson, *supra* note 41, at 149; Schmitt, *supra* note 99, at 514; Jackson, *supra* note 45, at 283; Ariana Eunjung Cha & Renae Merle, *Line Increasingly Blurred Between Soldiers and Civilian Contractors*, WASH. POST, May 13, 2004, at A1; Dan Baum, *Nation Builders for Hire*, N.Y. TIMES, June 22, 2003 (former General remarking that “[t]here’s very few things in life you can’t outsource”).

196. Corn, *supra* note 140, at 263, 265.

197. U.S. GOV’T ACCOUNTABILITY OFFICE, REP. NO. 06-865T, REBUILDING IRAQ; ACTIONS STILL NEEDED TO IMPROVE THE USE OF PRIVATE SECURITY PROVIDER 9–10 (2006) (listing the gamut of security services, which by definition means wielding weapons).

198. Salzman, *supra* note 1, at 883 (further noting that many scholars also claim that the vast majority of private contractors do not provide combat services).

199. Josh Meyer, *Guards Defied Orders, U.S. Says*, L.A. TIMES (Dec. 9, 2008), <http://articles.latimes.com/2008/dec/09/nation/na-blackwater9>.

200. House Comm. on Oversight and Gov’t Reform, *supra* note 159, at 6; Laura Dickinson, *Military Lawyers, Private Contractors, and the Problem of International Law Compliance*, 42 N.Y.U. J. INT’L L. & POL. 355, 374 (2010) (quoting a JAG officer who called Blackwater employees “odd because they were like a paramilitary unit, comparable to mercenaries.”). For additional assessments of this investigation and other wrongdoing see also André M. Peñalver, Note, *Corporate Disconnect: The Blackwater Problem and the FCPA Solution*, 19 CORNELL J. L. & PUB. POL’Y 459, 461–62 (2010). See also Lam, *supra* note 120, at 1461; T. Christian Miller, *Private Security Guards in Iraq Operate With Little Supervision*, L.A. TIMES, Dec. 4, 2005, at A1; Jonathan Finer, *Security Contractors in Iraq Under Scrutiny After Shootings*, WASH. POST, Sept. 10, 2005, at A1.

In terms of laws of war, because combatants and civilians are the only clear labels in the law of armed combat, and because only members of the Armed Forces can decidedly be presumed to be legal combatants with a protected status,²⁰¹ private security personnel engaging in operations with varying degrees of participation in hostilities introduce uncertainty under international law classifications.²⁰² If PMCs do not meet the criteria to be considered legal combatants under international treaties,²⁰³ those involved in armed combat might be committing an illegal use of force and perpetrating crimes of aggression.²⁰⁴ Pursuant to international law, spies, mercenaries and other unlawful combatants all can be distinguished from the civilian category.²⁰⁵ Consequently, whether PMC personnel are granted a protected status under the Geneva Conventions, based on contract activities, should be essential to determining whether security personnel might embody the characteristics of a mercenary due to the policy intentions undergirding restrictions on privatized use of force under international law.

Apparent crimes were committed by security firms in other countries that should have imparted notice of the potential dangers of using private contractors in Iraq and of the need for adequate regulations.²⁰⁶ Whether the concerns are inflated relative to the depth of PMC participation,²⁰⁷ Iraqis did

201. Corn, *supra* note 140, at 268 (“All members of the armed forces are combatants, and only members of the armed forces are combatants. This should therefore dispense with the concept of ‘quasi-combatants.’”).

202. See e.g. Schmitt, *supra* note 99, at 525 (“unincorporated paramilitary and law enforcement agencies are civilian in nature for the purposes of humanitarian law. . . . For instance, paramilitary forces of the Central Intelligence Agency cannot be characterized as members of the armed forces absent incorporation and notification.”); W. Hays Parks, *Air Law and the Law of War*, 32 A.F. L. REV. 1, 132–33 (1990) (drawing a continuum between supporting a war effort and engaging in combat (depending on the contractor’s function)); Frye, *supra* note 11, at 2640–41.

203. Schmitt, *supra* note 99, at 529–31 (discussing classification concerns).

204. M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 144–45 (2003) (noting that in the Balkans, private military contractors were involved in sex trafficking, including by “purchasing young girls as sex slaves and . . . videotap[ing] rape,” but the penalty for the criminal acts was being fired and sent back to the United States); Jennifer S. Martin, *Adapting U.C.C. § 2-615 Excuse for Civilian-Military Contractors in Wartime*, 61 FLA. L. REV. 99, 138–39 (2009) (stating that if contractors engage in force, they are “combatants” and can lose protections, such as those afforded to civilians under the law of war).

205. Kidane, *supra* note 27, at 363–64.

206. Gail Gibson, *Prosecuting Abuse of Prisoners*, BALT. SUN, May 29, 2004, at A4; See also Singer, *supra* note 156, at 525; K. Elizabeth Waits, Note, *Avoiding the “Legal Bermuda Triangle”: The Military Extraterritorial Jurisdiction Act’s Unprecedented Expansion of U.S. Criminal Jurisdiction Over Foreign Nations*, 23 ARIZ. J. INT’L & COMP. L. 493, 493 (2006); Jackson, *supra* note 45, at 263 (reporting that contractors allegedly raped a teenage boy).

207. Ranganathan, *supra* note 176, at 308 (stating that people perceive a higher degree of risk with private military services because media hyperbole of incidents of wrongdoing serves as an availability heuristic that makes people perceive contractors with a bias). The significant media emphasis may be true, but the rationale for employing PMCs can be con-

portray anger over the impunity that Blackwater, Triple Canopy,²⁰⁸ Custer Battles²⁰⁹ and other PMCs were granted after killing and injuring Iraqis.²¹⁰ The Department of Defense recognized that private security firms were provoking confrontation with locals, including by firing on civilians,²¹¹ while attempting to fulfill the terms of their contracts.²¹² Arming and placing PMCs into positions where combat is likely to occur should call into question the legitimacy of the fifth and sixth categories and breed dubiety over

trovrsial when personnel undertake military missions (even if in self-defense) during an occupation of a foreign country.

208. Triple Canopy, a Virginia-based security company that also formed specifically for operations in Iraq, was involved in several indiscriminate attacks on civilians. Amanda Tarzwell, Note, *In Search of Accountability: Attributing the Conduct of Private Security Contractors to the United States Under the Doctrine of State Responsibility*, 11 OR. REV. INT'L L. 179, 200 (2009). Scandal erupted after two employees claimed that they had heard their supervisor Jacob Washbourne declare he was "going to kill someone today" and Washbourne was involved in two separate shootings that day, including firing several shots into the windshield of a taxi and a truck without provocation. Cara-Ann M. Hamguchi, *Between War and Peace: Exploring the Constitutionality of Subjecting Private Civilian Contractors to the Uniform Code of Military Justice During "Contingency Operations,"* 86 N.C. L. REV. 1047, 1047 (2008). Washbourne purportedly laughed as he fired on the taxi and told his team: "That didn't happen, understand?" Steve Fainaru, *Four Hired Guns in an Armored Truck, Bullets Flying, and a Pickup and a Taxi Brought to a Halt. Who did the Shooting and Why?*, WASH. POST, Apr. 15, 2007, at A01.

209. HUMAN RIGHTS FIRST, PRIVATE SECURITY CONTRACTORS AT WAR: ENDING THE CULTURE OF IMPUNITY 7–8 (2008), <http://www.humanrightsfirst.org/wp-content/uploads/pdf/08115-usls-psc-final.pdf> (noting that Custer Battles employees resigned in February 2004 after they were accused of firing into crowds of civilian teenagers).

210. Steve Fainaru, *Warnings Unheeded on Guards in Iraq*, WASH. POST, Dec. 24, 2007, at A1 (reporting that Iraqis were irate that "[t]he U.S. government disregarded numerous warnings over the past two years about the risks of using Blackwater Worldwide and other private security firms in Iraq, expanding their presence even after a series of shooting incidents showed that the firms were operating with little regulation or oversight, according to government officials, private security firms and documents.").

211. See generally Paul von Zielbauer & James Glanz, *Under Siege, Blackwater Takes on Air of Bunker*, N.Y. TIMES, Oct. 25, 2007, at A1; Steve Fainaru, *Guards in Iraq Cite Frequent Shootings*, WASH. POST, Oct. 3, 2007, at A1; Finer, *supra* note 200, at A1; Daniel Bergner, *The Other Army*, N.Y. TIMES (Aug. 14, 2005), <http://www.nytimes.com/2005/08/14/magazine/14PRIVATI.html?pagewanted=all>.

212. Frontline, *Interview with Marine Colonel Thomas X. Hammes (Ret.)*, PBS (Mar. 21, 2005). transcript available at <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/interviews/hammes.html> ("Blackwater's an extraordinary professional organization and they were doing exactly what they were tasked to do: protect the principal. The problem is in protecting the principal they had to be very aggressive, and each time they went out they had to offend locals, forcing them to the side of the road, being overpowering and intimidating, at time running vehicles off the road, making enemies each time they went out. So they were actually getting our contract exactly as we asked them to and at the same time hurting our counterinsurgency effort."); Sullivan, *supra* note 129, at 870 (citing a commentator who remarked that "[t]o my knowledge there is no compelling evidence that American private guards in Iraq have been likely to behave irresponsibly, cowardly, or use excessive force.").

whether these categories can be suitably differentiated. Perhaps the assumption under both of these types of operations should be that contractors possess the characteristics of mercenaries if PMCs are not operating under and subject to authorized state authority and control.

C. Effective Control

1. *Control to Assure Responsibility and Accountability*

If the first two elements are met, the third proposed element for distinguishing between a legal contractor and an illegal mercenary is whether a state embraces effective control over the subcontractor.²¹³ Any firm that employs organized lethal force without operating under the auspices of a government or in a manner that is consistent with the laws of the country of performance lacks legitimacy and might be deemed a mercenary, insurgent group, or even a terrorist force.²¹⁴ If a state employs PMCs for an extraterritorial mission without a convincing legal structure to govern, control, and discipline the PMC, or if the state does not assume responsibility for the PMC operations, perhaps there is only a negligible distinction between the mission and mercenary activities.²¹⁵ Finding otherwise could permit a state to outsource controversial or even illegal operations while avoiding responsibility and liability. If the same tasks were executed by uniformed military troops, the operations would perfunctorily be ascribed to the state, but with-

213. Corn, *supra* note 140, at 263 (opining that whether PMC functions should be considered legitimate should generally depend on the two key factors to indicate compliance with the law of armed conflict—whether there is command and discipline); Scoville, *supra* note 81, at 563–64 (maintaining that the key question of how non-state security forces should be treated should be whether they are accountable to a state).

214. Salzman, *supra* note 1, at 888–89 (recognizing the generalization is that mercenaries purportedly operate without a state’s consent, while private contractors are employed by a state). One might even view the legal status of terrorists today akin to that of privateers and pirates centuries ago. Harold Hongju Koh, *Preserving American Values: The Challenge at Home and Abroad*, in *THE AGE OF TERROR: AMERICA AND THE WORLD AFTER SEPTEMBER 11* 143, 158 (Strobe Talbott & Nayan Chanda eds., 2002) (“[P]irates, privateers and other early terrorists posed as great a threat to our nation as sovereign states bent on war.”).

215. Corn, *supra* note 140, at 258–60, 287 (explaining that a key question to determine the legitimacy of action under the international law of armed conflict is whether those “individuals who exercise discretion on the battlefield. . . are members of organized military units that operate within a military command, control, and disciplinary system” and further noting that “members of the armed forces are subject to responsible command, and they operate within a military hierarchy involving training, disciplines, and unitary loyalty. Therefore, they, and only they, should be permitted to perform tasks requiring the exercise of discretion that implicates the LOAC [Law of Armed Combat], because the discipline indelibly associated with the armed forces is expected to ensure compliance with this law.”).

out effective state control, a hired contractor could function like a mercenary without consequence.²¹⁶

In addressing a legal regime or implementation of standards for PMCs, if a government did not contract with a PMC, activities within the categories of non-military security services, strategic and logistics operations for combat, defensive combat military contracts, or offensive combat military contracts (categories three through six on the chart) might make the actor similar to a mercenary.²¹⁷ If a government does hire a PMC, the question is whether the state assumes effective responsibility over the contractor's particular activities. Rather than *per se* ascribing legality to the contractor's acts when there is control, activities falling toward non-military security services may be more legitimate and those falling toward offensive combat military contracts would be most suspect, but states should form a consensus on the legality of specific activities. If states resolve that particular PMC undertakings are sanctioned, it may also be sensible to mandate that the hiring state sustain the burden of proving that only endorsed activities are being conducted and that an irremissible level of control and responsibility over the PMCs are held, with the appropriate control intensifying at higher level activities to ensure consistency with the legitimate use of force under international law and to respect the sovereignty of the state of operation. If domestic law establishes parameters and enforcement mechanisms for rules to assure proper responsibility of military service firms,²¹⁸ there is a greater like-

216. Maogoto & Sheehy, *supra* note 65, at 102 (expressing the danger of states not placing effective checks on what is required of nationals, companies incorporated under their laws, and the services for which they contract, and explaining that "the ambiguous legal status and amorphous character of PMCs under existing international law offers leeway for countries to not only bend but breach their international obligations, thus tearing at the fabric of the international legal order.").

217. Even point 2 could be suspect because if combat training is being conducted without the intention of fulfilling a government-authorized or for the intention of undertaking a non-legal mission, there is preparation for an act that may be illegal. At an extreme, one might point to the pre-9/11 al-Qaeda training camps in Afghanistan. The intent of the non-government group was at issue. The U.S. government criminalized attendance of a terrorist training camp. See *U.S. v. Hamid Hayat*, 710 F.3d 875 (9th Cir. 2013), available at <http://cdn.ca9.uscourts.gov/datastore/opinions/2013/03/13/07-10457.pdf>; Kirk Semple, *Padilla Gets 17 Years in Conspiracy Case*, N.Y. TIMES, Jan. 23, 2008, at A14 (Jose Padilla was arrested and called an "enemy combatant" and Attorney General John Ashcroft said Padilla was a link in an "unfolding terrorist plot to attack the United States" with a radioactive bomb, but there was no evidence of this plot and he eventually was convicted in January 2008 and sentenced to 17 years in prison for attending an al Qaeda camp in Afghanistan in 2000).

218. Zarate, *supra* note 60, at 119 (contending that "transparency and . . . accountability" should be critical factors in distinguishing whether private military service firms should be legal).

lihood that the contracting state and the PMC are not undermining laws of war.²¹⁹

If the PMC's acts, pursuant to a government procurement contract, are illegal, the principle-agent relationship could ascribe war crimes responsibility on the contractor under international law, even when fulfilling a state's military-ordered mission,²²⁰ and on the contracting state for involvement with the PMC.²²¹ It is true that states are generally not responsible for actions of private organizations and citizens unless there is a basis to ascribe liability on the state,²²² but command responsibility can extend to those in non-military positions²²³ and private individuals can be *de facto* state organs when acting in conjunction with state authorities.²²⁴ Moreover, on their own, common organizations, entities, and corporations, have not traditionally been viewed as subjects of international law, but non-state entities do have some obligations.²²⁵ Recently, the United Nations expressed much interest in ensuring that transnational organizations comply with acceptable corporate

219. See Protocol Additional, *supra* note 10, art 43 (requiring combatants to be "subject to an internal disciplinary system"). International law restrictions affirm that governments cannot delegate away responsibility under international law, but instead must be responsible for the actions of contractors. Dickinson, *supra* note 41, at 162–63; ELSEA & SERAFINO, *supra* note 126, at 26 ("A lack of strict accountability in case of an abuse by a contractor could . . . incur liability on the part of the United States for a breach of its international obligations.").

220. See Richard Morgan, *Professional Military Firms Under International Law*, 9 CHI. J. INT'L L. 213, 218 (2008) (stating that it is possible that contractors could be held responsible under the Geneva Conventions, Protocol I, and the Hague Conventions).

221. Report of the Int'l Law Comm'n, 53d Sess., April 23–June 6, July 2–Aug. 10, 2010, U.N. Doc. A/56/10, at 63; GAOR, 53rd Sess., Supp. No. 10 (2001), available at www.un.org/documents/ga/docs/56/a5610.pdf ("Every internationally wrongful act of a State entails the international responsibility of that State."). There can be state responsibility for "conduct consisting of an action or omission [that]: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State." *Id.* at 68.

222. See Maogoto & Sheehy, *supra* note 65, at 109–10.

223. Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, ¶ 363 (Int'l Crim. Trib. for the Former Yugoslavia, Nov. 16, 1998), available at <http://www.icty.org/case/mucic/4>.

224. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 144 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) ("[P]rivate individuals acting within framework of, or in connection with, armed forces, or in collusion with State authorities may be regarded as *de facto* State organs. In these cases it follows that the acts of such individuals are attributable to the State, as far as State responsibility is concerned, and may also generate individual criminal responsibility."). PMC activities can be credibly expressed as being equivalent to traditional state activities of coercive force due to the frequent nexus with the sovereign mission and paramount international restrictions on the use of force.

225. See John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819, 820–21 (2007).

responsibility benchmarks, particularly when pursuits impact human rights.²²⁶

Without consummating internationally agreed upon standards for the employment of PMCs and for the objective enforcement of those standards, a state could shirk responsibility over reasonable duties to control private actors. The quandary is that international law imputes liability when there is a meaningful association between the state and a private actor;²²⁷ on the other hand, if the PMC is to have more legitimacy (and not be under suspicion of being a mercenary force), the state should have a tight degree of control over the PMC.²²⁸ This was the problem with the Iraq War. The Pentagon continued to contract with PMCs to execute what were arguably inherent military functions and assumed that it had no duty to impose heightened scrutiny of PMC operations,²²⁹ as in the case of general independent contrac-

226. See Subcomm. on the Promotion and Protection of Hum. Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 55th Sess., Aug. 13, 2003, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, at 2 (Aug. 26, 2003); David Weissbrodt, *International Standard-Setting on the Human Rights Responsibilities of Businesses*, 26 BERKELEY J. INT'L L. 373, 382 (2008).

227. The hesitancy of imputing liability on the state is exhibited in the ICTY case, which held that “the acts of a military or paramilitary group” can be attributed to the state when “the State wields overall control over the group” and its planning, and affirmed that the state can still be liable for the private group even if the state does not order “specific acts contrary to international law.” *Tadic*, Case No. IT-94-1-A at ¶¶ 131, 137 (“In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.”).

228. This consternation of being perceived as a private insurgency force without legitimacy is demonstrated in the International Court of Justice’s *Nicaragua v. U.S.* case, which held that liability for violations of international law could be imposed on the state when it has “effective control” over the private actor. *Nicaragua v. U.S.*, 1986 I.C.J. 14, 64–65, ¶ 115 (June 27, 1986). The Reagan administration funded, equipped, and trained the Contras, and arguments were made about acting in defense of contiguous states in opposing the Sandinista regime in Nicaragua, but liability was not assessed on the United States “because it did not have effective control of [the Contra’s] paramilitary operations.” *Id.*; VINCENZO RUGGIERO, *THE CRIMES OF THE ECONOMY: A CRIMINOLOGICAL ANALYSIS OF ECONOMIC THOUGHT* 163 (2013) (noting that private contractors trained the Contras in the Reagan Administration’s Iran-Contra scandal during the 1980s). What exists under general agency law, international law, morality, and logic, is that state liability should be assessed against the acts of private contractors, but there are frequent loopholes in domestic law that take away that responsibility. Mercenaries cannot carry out operations inside the United States. Why should it then be assumed that the Pentagon should be able to hire PMCs to carry out military operations in another country?

229. Bejesky, *supra* note 139, at 10–27. Events in Iraq led commentators to assert that the United States hired PMCs for mercenary activities and to elude responsibility. Traci Hukill, *Should Peacekeepers Be Privatized?*, 36 NAT’L J. 1526, 1527 (2004) (noting that David

tors (rather than employees), but the classification of task and interrelation with military planning and operations made the assumptions disconcerting.

2. *Proposals to Oversee Contractors*

Due to high profile PMC operations in Iraq, states and organizations initiated inceptive steps to tighten the effective state control over PMCs, including by adopting clearer and deeper domestic regulatory structures to facilitate more state control over contractors, by initiating state-led international efforts to deter the incidence of mercenary-like wrongdoing, and by improving PMC performance with self-regulatory bodies. The first approach provides the most coercive mechanisms because of the heightened efficacy of domestic enforcement mechanisms. The second approach is most effective for achieving uniformity in licit PMC operations, but it lacks coercive authority. The third option of introducing industry regulatory bodies could have some impact on reducing mercenary-like wrongdoing, but this self-interest approach does not directly address state obligations or implicate a broad-based international effort to determine which PMC activities might be more suspect.

At the domestic level, some states have addressed the PMC problem, but rules exhibit stark contrast in ideology. Several countries have passed anti-mercenary laws²³⁰ and adopted regulations and licensing systems to curtail restricted PMC activities and to amend the functioning and oversight of security contractors.²³¹ Other countries have ignored the existence of PMCs²³² or have not effectively enforced rudimentary domestic laws.²³³ In the United States, after several years of hiring PMCs for expansive tasks while having ineffective legal restrictions, Congress adopted extensions under the National Defense Authorization Act of 2007 to apply the Uniform Code of Military Justice to PMC personnel “accompanying an armed force in the field” during a “time of declared war or in a contingency opera-

Wimhurst, spokesperson for the U.N. Undersecretary General for Peacekeeping Operations, discussed this concern about responsibility: “So you get a gang of mercenaries in there, basically. Who do they report to? Who controls them? It’s a nonstarter.”)

230. Frye, *supra* note 11, at 2636–37 (listing Australia, Canada, Denmark, Finland, Greece, Italy, the Netherlands, Norway, Portugal, Russia, South Africa, Switzerland, and the Ukraine); Milliard, *supra* note 42, at 41 (noting that the Soviet Union remarked during the Working Group activities to prohibit mercenaries: “We hope that this article . . . will provide an incentive to Government to adopt domestic legislation prohibiting . . . the use of mercenaries.”).

231. Chesterman & Lehnardt, *supra* note 131, at 5.

232. Singer, *supra* note 156, at 524, 535–37.

233. *Id.* at 547 (using the example of the United States).

tion.”²³⁴ Other states have stressed that privatization of military activities should be banned,²³⁵ imputing that attempts to regulate private contractors merely confers legitimacy when the system of security firm contracting should be abolished altogether.²³⁶

Discordant positions at the domestic level are particularly precarious because multiple countries, legal systems, ideologies, and interests can be implicated when PMCs are hired. If there is a state contractor, the jurisdictions include the military contractor’s home country, a PMC’s state of incorporation,²³⁷ and the country where the PMC operates, but there is also the indirect but inclusive international community interest that favors ensuring that situations of armed conflict are judiciously governed by the U.N. Charter and the Geneva Conventions.²³⁸ Fostering consonance at the international level on PMC standards could reduce the uncertainty and ad hoc responses under domestic law,²³⁹ but industry regulatory bodies can be mutually reinforcing with international approaches.

Industry associations have arisen in recent years and have offered standards that might be relevant to distinguishing between a mercenary and a legitimate security contractor, but it is uncertain whether private associa-

234. Uniform Code of Military Justice, 10 U.S.C. § 802(a)(10) (2007); *See* Bejesky, *supra* note 139, at 35–46 (describing the lack of governing restrictions for several years).

235. Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1295, 1300 (2003).

236. Caroline Holmqvist, *Private Security Companies: The Case for Regulation*, STOCKHOLM INT’L PEACE RES. INST. POLICY PAPER NO. 9, at 42 (2005), available at <http://books.sipri.org/files/PP/SIPRI09.pdf> (stating that many scholars advocate a total ban on private security firms because they are not legitimate actors, but further contending that a total ban is unrealistic).

237. Singer, *supra* note 156, at 535 (noting that if prosecution in the home country is the most viable alternative and if PMCs want to avoid prosecution in the parent country, they might just move their operations to another base of operation).

238. HANNAH TONKIN, *STATE CONTROL OVER PRIVATE MILITARY AND SECURITY COMPANIES IN ARMED COMBAT* 45 (Cambridge Univ. Press 2011) (expressing that there can be “a deep-seated opposition within the international community to the direct involvement of foreign, private military actors in civil strife” and that “PMSCs are only too aware that their survival depends upon the positive perceptions of their home states and of the international community”); GERRY J. SIMPSON, *LAW, WAR & CRIME: WAR CRIMES, TRIALS AND THE REINVENTION OF INTERNATIONAL LAW* 133 (2007) (noting that international lawyers made war and breaches in war illegal by the U.N. Charter and the Geneva Convention and Protocols). For example, presentiment can fester when there is both a weak target state that lacks regulations banning unlawful PMC activities or is unwilling or unable to enforce existing proscriptions and a dominant hiring state that lacks regulations, permits layers of contracting and subcontracting to weaken state control and oversight, or exhibits reluctance to extend jurisdiction over PMC activities executed in the target state of operation. All peripheral states may have some degree of interest in ensuring that fundamental U.N. system principles of sovereign equality and mutual respect for sovereignty are upheld.

239. Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 448 (2001).

tions can be effective as self-regulatory bodies,²⁴⁰ if they can assure adherence to international law without state intervention in enforcement, or whether the community of states assents to the private standards. For example, nearly fifty private security companies are members of the International Stability Operations Association (formerly the International Peace Operations Association), which requires members to abide by standards²⁴¹ that include upholding human rights norms, respecting human dignity, working for recognized governments and lawful organizations, operating with transparency, training employees on applicable law, ensuring that employees are of sound character, and accepting accountability for employee transgressions.²⁴² In addition to concerns raised over the organization lacking transparency and not having systems to ensure objectivity,²⁴³ there are no substantial coercive mechanisms to effect compliance. The self-enforcement system operates by publicizing potential wrongdoing of member companies.²⁴⁴

Two other industry associations include the Private Security Company Association of Iraq (PSCAI) and the British Association of Private Security Companies (BAPSC).²⁴⁵ Unfortunately, these agencies have potential transparency deficits, a lack of independence, uncertain and ostensibly feeble enforcement mechanisms, and an absence of explicit standards.²⁴⁶ With respect to the BAPSC and the fact that Britain is one of today's leading PMC employers, England did have a long history of and experience with using mercenary forces to enforce colonialism,²⁴⁷ however, that exposure lacks contemporary pertinence and unilateral home state-led supervision may not inspire global confidence. Iraq's ad hoc and circumstance-specific domestic level approach with the PSCAI may not be sufficiently reassuring from the perspective of an occupation that commentators contended was overrun by overpaid contractor firms fulfilling military-like operations²⁴⁸ and when Or-

240. Ranganathan, *supra* note 176, at 375–76.

241. *ISOA Code of Conduct*, INT'L STABILITY OPERATIONS ASS'N, <http://www.stability-operations.org/?page=Code> (last visited Mar. 9, 2014); *Membership*, INT'L STABILITY OPERATIONS ASS'N, <http://www.stability-operations.org/?page=Membership> (last visited Mar. 9, 2014).

242. Ranganathan, *supra* note 176, at 320–23.

243. James Cockayne & Emily Speers Mears, *Private Military and Security Companies: A Framework for Regulation*, INT'L PEACE INST., at 4 (2009), available at http://www.ipinst.org/media/pdf/publications/pmsc_epub.pdf.

244. *Id.*; See e.g. Chesterman, *supra* note 102, at 335 (noting that after the Nisour Square massacre, the Association investigated the events, Blackwater withdrew its membership in the organization and announced that it would be establishing its own monitoring organization, the Global Peace and Security Operations Institute).

245. Ranganathan, *supra* note 176, at 310.

246. *Id.* at 360–63.

247. *Id.* at 315–16.

248. See *supra* Part III.B.

der 17 usurped Iraq's ability to regulate and effectively enforce laws for several years.²⁴⁹

From the deficits in these self-regulatory associations, more permanent state-led approaches that embody a spectrum of interests would be favorable. The urgency is heightened by the fact that contractors, target states, employer states, and the international community all have interests. Even though a downturn in the military services market currently exists, there are those who emphasize that PMCs are here to stay, are searching for new market opportunities, and are the way that states will go to war in the future.²⁵⁰ This context makes being complacent and willing to assume that Iraq was an anomaly, unlikely to be repeated, perilous to the rule of law.

One recent state-led approach is the *Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*, which was sponsored by the International Red Cross and the government of Switzerland.²⁵¹ The *Montreux Document* was adopted in September 2008 with seventeen participating founding states, many of whom are the major users of PMCs, and thirty-three additional states have since joined.²⁵² There are no new international legal obligations, but the agreement sets forth suggestions to states when they choose to use private contractors,²⁵³ offers standards that impose obligations on military contractors to not engage in war crimes and other serious offenses,²⁵⁴ and reaffirms obligations in a context that oblige signatory states to control PMCs, particularly because the Document only applies to states engaged in armed conflict.²⁵⁵ There is a

249. See *CPA Order 17*, *supra* note 157, § 4.

250. Govern & Bales, *supra* note 12, at 56; *Beyond Blackwater*, *supra* note 182.

251. Switzerland & Int'l Comm. of the Red Cross, *The Montreux Document: On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*, U.N. Doc. A/63/467 (Sept. 17, 2008) [hereinafter *Montreux Document*], available at http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf.

252. Participating States of the Montreux Document, SWITZ. FED. DEP'T FOREIGN AFFS., <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html> (last updated Nov. 12, 2014).

253. James Cockayne et al., *Beyond Market Forces: Regulating the Global Security Industry*, INT'L PEACE INST. (2009), http://www.ipinst.org/media/pdf/publications/beyond_market_forces_final.pdf.

254. *The International Code of Conduct for Private Security Service Providers*, GENEVA ACAD., at ¶ 22 (2013), available at http://www.geneva-academy.ch/docs/publications/briefing4_web_final.pdf (affirming that military contractors will not "participate in, encourage, or seek to benefit from any national or international crimes including but not limited to war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labor, hostage-taking, sexual or gender-based crime, human trafficking, the trafficking of weapons or drugs, child labor or extrajudicial, summary or arbitrary executions.").

255. *Montreux Document*, *supra* note 251, at 3, 5.

lingering anxiety, however, that the original member states, including the United States, Afghanistan, and Iraq, exhibited the most significant interest in the agreement.²⁵⁶ Because this is a global issue, it might be favorable for other states to also voice how, whether, and to what extent they approve of PMC use, and to consider if more restrictions on operations are necessary.

In general, the self-regulatory bodies and industry standards can be constructed to encourage superior performance of legally authorized activities, particularly if mechanisms are objectively enforced so that powerful contractors and states do not capture the oversight process. However, defining legal activities in conjunction with the laws relating to the use of force, Geneva Convention rules on lawful combatants, and other international law standards is fundamental because states must enforce infractions as an effective deterrent. Allowing mercenary-like forces to execute operations because of the experience in Iraq and merely setting standards that permit states to unilaterally affirm that international laws will not be transgressed is an insufficient promise if states attempt to replace official state troops with contractors for the same activities.²⁵⁷

IV. CONCLUSION

The potential illicit use of PMCs has conjured much dismay because of the history of mercenarism and because of the general obligations of states under laws of war. Fighting for money dates back thousands of years,²⁵⁸ but privateering became illegal with the emergence of the nation-state system and mercenarism was condemned as an affront to countries seeking sovereign rights and independence during decolonization. Privatization of military and security services has recently flourished, but not because there was a newfound respect for mercenarism, a broad-based authorization of PMCs as legitimate actors under use of force rules, or a domestic populace sanction of the privatization of foreign policy, but because of the assumed benignity and effectiveness of market mechanisms. The United Nations' recent interest in addressing this issue is certainly warranted because outsourcing of military conflict can be viewed as a noxious aspect of globalization, "an affront to sovereign power,"²⁵⁹ and perhaps a defiance of the states' monopoly over the use of force.²⁶⁰

256. Participating States of the Montreux Document, *supra* note 252.

257. Also, tolerating when wealthy states hire security personnel from other countries, including developing countries with low per capita incomes, to execute a state's foreign policy and bypassing the fundamental concept of a public authorization in the employer state is another festering issue.

258. LANNING, *supra* note 24, at 1.

259. Winston P. Nagan & Craig Hammer, *The Rise of Outsourcing in Modern Warfare: Sovereign Power, Private Military Actors, and the Constitutive Process*, 60 ME. L. REV. 429,

This article discussed three contextually-derived inquiries as probative concerns for distinguishing between mercenaries and PMCs. First is the extent to which the contractor is motivated by pecuniary gain—profit drives the PMC industry. PMCs are business entities seeking profit (and sometimes maximization of stock value) and PMC personnel may forgo or exit military service to acquire substantially more compensation for similar obligations. The entity's quest for profit and the employee's desire for lucrative salaries may lead foreigners from countries with lower per capita incomes (and without national allegiance to a state that hires PMCs) to become part of a market for war. PMCs may increase profitability and taxpayers may be compelled to fund inefficient and costly PMC operations without adequate assent even if foreign policy questions are at stake and armed combat occurs.²⁶¹

Second, a typology of PMC operations was presented and it was suggested that states should negotiate and form a consensus over permissible PMC operations. Several categories of contracts do not raise concerns. For example, goods procurement is necessary because militaries do not operate factories; procurement that provides accommodations, training, and other civilian services does not result in combat; and non-military security details, which may include personnel who wield weapons, depend on the laws in the country of operation. PMC personnel who do not directly engage in combat, but undertake contractual obligations related to armed force in the field, such as services providing covert, logistic, or intelligence support to military troops can also be controversial functions because the Geneva Conventions protect non-combatant civilians, but services annexed to combat might be classified as engaging in combat.²⁶² Defensive combat operations and offen-

450 (2008); Salzman, *supra* note 1, at 860 (“The pervasive use of private military force threatens the democratic nation-state because it (1) undermines the state’s monopoly on the use of force; (2) increases the executive’s power to wage war without democratic accountability; and (3) prioritizes the private good over the public good.”)

260. See generally Leander, *supra* note 124.

261. If the state wants to employ PMCs for operations that are similar to military troops and award excess compensation, then another option to ensure transparent public will is to consider modifying wage structures and compensation of military service members and avoid the ambiguities that are generated with the use of PMCs.

262. Some of these activities are generally specified in the Geneva Conventions. Geneva POW, *supra* note 76, art. 4. Some authorities have considered PMC operations that are related to fighting to be involvement in armed combat. Schmitt, *supra* note 153, at 708–09; Minnow, *supra* note 106, at 1015–16. This possibility suggests that states might assess more detail about the status of this breed of PMC operations. Moreover, if military technology becomes more mechanized and less likely to place troops in combat (e.g. Predator drones strikes), the classification of the combatant can be further obscured. Dion Nissenbaum, *Blackwater’s Founder Blames U.S. for Its Troubles*, WALL ST. J. (Nov. 17, 2013), <http://online.wsj.com/news/articles/SB10001424052702304439804579203883470837874> (reporting that Blackwater “secretly armed and maintained drones in Pakistan”).

sive combat operations might, for all practical purposes, be indistinguishable and tantamount to mercenarism, depending on expectations for the zone of operation and whether there is adequate state control or responsibility assumed.

Depending on how the international community views itemized PMC operations, the third proposal is that the hiring state should be obliged to prove that control and responsibility are assumed over the PMC for suspect operations.²⁶³ There was much debate during recent conflicts about combatants hiding among civilians as a form of “cheating” on rules of warfare, but there may be parallels with states that hire PMCs and shirk responsibility²⁶⁴ because warfare invokes sovereign prerogative and obligations. The world should agree on whether enumerated military and security operations can legally be relegated and how states can ensure an adequate level of control and responsibility over operations. In this context, states should also address the legality of non-state entities hiring itemized private security operations as the basis for domestic guidelines to thwart dangers of mercenarism and to protect against dominant states coercing weaker states.

263. Whether that proof should be offered prior to contracting or upon a dispute, and to whom the evidence should be presented, such as to a U.N. agency, are questions that should be addressed.

264. Recent problems are that functions that have traditionally been performed by state actors have been transferred to private actors without expressing clear rights and responsibilities. Laura A. Dickinson, *Accountability of State and Non-State Actors for Human Rights Abuses in the “War on Terror,”* 12 TULSA J. COMP. & INT’L L. 53, 56 (2004). Private contractors have effectively permitted governments to avoid responsibility by hiding behind corporations. James R. Coleman, *Constraining Modern Mercenarism*, 55 HASTINGS L.J. 1493, 1493 (2004). PMCs have not been adequately regulated by the hiring state. Failing to recognize that the nation-state system prohibits the use of force by third-party non-sovereign interests and contending that there should be a loophole that permits private actors to execute missions typically carried out by the military, while also allowing states to avoid responsibility, is patently asinine. Just because a state hires the PMC should not in itself be exonerating if PMC operations involve fighting a war or carrying out sub-obligations of combat during occupation.