

# Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement

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E. L. Gaston\*

*In response to reports of frequent criminal misconduct, aggressive behavior, and human rights abuses committed with impunity by private contractors in Iraq and Afghanistan, some have argued that private military and security companies ("PMSCs") are no more than modern mercenaries, and that they should therefore be banned under the standing international prohibition on mercenarism. However, the existing instruments prohibiting mercenarism would be difficult to apply to most PMSCs, making it easy for states that want to continue to use these companies to evade such a ban. In contrast, given market forces pushing PMSCs to be more compliant and emerging state practices that favor regulation, coordinated international regulation of PMSCs might feasibly be enforced. This article proposes that many of the issues with private military and security companies could be addressed by creating an international humanitarian law ("IHL") principle that recognizes state use of PMSCs as a means of warfare. The availability of advanced, independent security and military capabilities-for-hire enables states or nonstate actors to get around political or resource constraints that otherwise might limit the use of force, and may undermine IHL enforcement. These threats might be addressed if IHL established a stronger state responsibility link between states and the PMSCs they hire. International humanitarian law should provide that states who outsource government security or military functions in support of any combat or humanitarian operations that would otherwise trigger IHL must establish internal oversight, accountability, and liability mechanisms to ensure that these actors comply with international and domestic legal norms and regulations.*

## I. INTRODUCTION

While the use of privatized force has been a longstanding feature of military campaigns, the boom in military and security outsourcing in Iraq and Afghanistan has attracted new attention to the status and role of privatized military and security actors under international law. Public attention has been focused on frequent reports of security contractors' impunity for any human rights abuses, criminal misconduct, or aggressive behavior while engaged in coalition operations.<sup>1</sup> Based on these negative reports, many have

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1. See, e.g., James Glanz & Alissa J. Rubin, *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*, N.Y. TIMES, Oct. 3, 2007, at A1 (describing the shooting of 17 civilians by a Blackwater security convoy); Farah Stockman, *Civilians ID'd in Abuse May Face No Charges*, BOSTON GLOBE, May 4, 2004, at A1 (noting the involvement of private contractors in the Abu Ghraib torture scandal); Andrea Weigl, *Passaro Will Serve 8 Years for Beating*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 14, 2007, at B1 (describing the prosecution of a former CIA interrogation contractor for beating an Afghan detainee to death); William

argued that private military and security companies (“PMSCs”) are no more than modern mercenaries,<sup>2</sup> and therefore should also be banned under the standing international prohibition on mercenarism.<sup>3</sup>

There are significant legal, policy, and practical reasons for treating PMSCs differently than mercenaries, however. The existing instruments prohibiting mercenarism would be difficult to apply to most PMSCs, making it easy for the many states that want to continue to use these companies to circumvent the standing international ban. Coordinated international regulations of PMSCs, by contrast, might feasibly be enforced. Market forces have been pushing PMSCs to be more compliant than mercenaries in the past with international and domestic legal regulations. This is particularly true of PMSCs seeking contracts from international actors and states that care about hiring reputable privatized forces. Emerging state practice favoring regulatory solutions for PMSC issues—particularly among those states that are most often the clients, host countries, or home countries of PMSCs—suggests that regulation of PMSCs would have more widespread support than a prohibition on mercenarism.

The availability of advanced, independent security and military capabilities for hire enables states or nonstate actors to get around political or resource constraints that otherwise might limit the use of force. Moreover, since independent PMSCs are not considered part of a state’s armed forces or supporting militias under international humanitarian law (“IHL”), states have weak legal responsibility for the functions they outsource to PMSCs and for the conduct of individuals carrying those functions out. States therefore have few incentives to develop accountability and control mechanisms that would prevent or redress the type of misconduct and international law violations that have been associated with private military and security companies in Iraq and Afghanistan.

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M. Arkin, *Blackwater and War Crimes: A Dangerous Equation*, Early Warning, Oct. 15, 2007, [http://blog.washingtonpost.com/earlywarning/2007/10/blackwater\\_and\\_war\\_crimes\\_a\\_da\\_1.html](http://blog.washingtonpost.com/earlywarning/2007/10/blackwater_and_war_crimes_a_da_1.html) (noting that the United Nations was investigating whether the Blackwater shooting could be classified as a war crime).

2. See, e.g., U.N. Econ. & Soc. Council [ECOSOC], 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*, ¶ 57, U.N. Doc. E/CN.4/2004/15 (Dec. 24, 2003) (prepared by Enrique Bernales Ballesteros) (equating modern PMSCs to mercenaries), available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/e6802d4a3d1ddbfc1256610002ee274/69ecaf81b3a74d8ac1256e5b00684da2/\\$FILE/G0317313.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/e6802d4a3d1ddbfc1256610002ee274/69ecaf81b3a74d8ac1256e5b00684da2/$FILE/G0317313.pdf); Press Release, United Nations, Private Security Companies Engaging in New Forms of Mercenary Activity, Says UN Working Group (Nov. 6, 2007), <http://www.unhcr.ch/hurricane/hurricane.nsf/0/AC7F341BE422A006C125738B0055C48C> [hereinafter U.N. Press Release]. South Africa has also treated private security firms and contractors as mercenaries in its domestic legislation. See, e.g., Regulation of Foreign Military Assistance Act 15 of 1998 (S. Afr.), available at <http://www.info.gov.za/gazette/acts/1998/a15-98.pdf>.

3. International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, adopted Dec. 4, 1989, 2163 U.N.T.S. 75 (entered into force Oct. 20, 2001) [hereinafter Convention Against Mercenaries]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 47, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; see also *infra* notes 55–57.

This article will propose that many of the issues with PMSCs could be addressed by creating an IHL principle that recognizes and regulates state use of PMSCs as a means of warfare. The threats created by PMSCs might be addressed in large part by IHL provisions providing that states who outsource government security or military functions in support of those combat or humanitarian operations that would otherwise trigger IHL must establish internal oversight, accountability, and liability mechanisms to ensure that these actors comply with international and domestic legal norms and regulations. In Part II, this article will first describe the development of the private security sector after the Cold War, the common types of privatized force, and the types of service they typically provide. Part III will then evaluate the claims that security contractors should be treated as mercenaries, and argue instead that the corporate form of private military and security companies, and the advanced independent capabilities enabled by that corporate form, not only distinguish them from mercenaries of the past, but may also create additional challenges to the international system that justify different treatment. Part IV will conclude by arguing that a regulatory approach to the PMSC problem is more likely to be collectively enforced than a ban, and by suggesting that an IHL provision recognizing outsourcing as a method of warfare and requiring states to regulate and assume responsibility for it accordingly may address many of the threats posed by PMSCs.

## II. THE EMERGING PRIVATE SECURITY SECTOR AND ITS ROLE IN MODERN WARFARE

The number of security contractors in Iraq is estimated to be 20,000 to 30,000 or greater,<sup>4</sup> making them the second-largest contingent in Iraq after U.S. forces.<sup>5</sup> There are an estimated 10,000 security contractors in Afghanistan, including local nationals, third-party nationals, and Afghan security companies.<sup>6</sup> The more prominent role of private security contractors in coalition operations and the involvement of some private security contractors in headline-grabbing incidents of human rights abuse have reignited policy discussions about security outsourcing and how international or domestic law might provide stronger accountability for these actors.<sup>7</sup> Before address-

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4. Toni Pfanner, *Editorial*, 88 INT'L REV. RED CROSS 445, 445 (2006). However, some define the term security contractors more broadly, including those that provide direct security and military assistance and those that provide indirect logistical and supply support. Based on this definition, the number could be as high as 180,000. See Debate between Doug Brooks, President of the Int'l Peace Operations Ass'n, and Jeremy Scahill, in New York, N.Y. (Sept. 18, 2007) (moderated by Amy Goodman), available at <http://www.democracynow.org/article.pl?sid=07/09/18/140201>.

5. See Edward Cody, *Contractor Immunity a Divisive Issue*, WASH. POST, June 14, 2004, at A1.

6. Fisnik Abrashi & Jason Straziuso, *Afghans Close 2 Security Firms; More Likely*, WASH. POST, Oct. 12, 2007, at A14 (citing estimates of as many as 10,000 security contractors in Kabul, with approximately 1,000 employed by the U.S. Department of Defense).

7. See, e.g., Heather Carney, *Prosecuting the Lawless: Human Rights Abuses and Private Military Firms*, 74 GEO. WASH. L. REV. 317, 333 (2006); Ellen L. Frye, *Private Military Firms in the New World Order: How*

ing some of these legal and policy concerns, however, it is important to identify the many different actors in the modern private security industry and how they are involved in modern humanitarian and conflict operations.

The origin of the modern private security industry dates roughly to the early 1990s. The military downsizing of traditional military powers after the Cold War and their disengagement from select zones of influence (particularly Africa) created a demand for greater privatized military and security options, while also flooding the market with an ample supply of former soldiers.<sup>8</sup> Globalization expanded opportunities for the growth of transnational business sectors like the private security industry, while neo-liberal trends toward outsourcing government functions to the private sector rationalized the outsourcing of military and security functions that previously had been guarded as the exclusive province of the state.<sup>9</sup>

While media coverage tends to lump all privatized security actors together, in practice the private security industry is composed of a wide range of corporate structures and job functions—from rent-a-cop-type security protection for nongovernmental organizations (“NGOs”) to guarding bases to engagement in covert operations.<sup>10</sup> For ease of description, private military and security companies might be loosely grouped into three categories—supply firms, private military firms, and private security companies.

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Redefining “Mercenary” Can Tame the “Dogs of War,” 73 *FORDHAM L. REV.* 2607 (2005); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 *B.C. L. REV.* 989, 999 & n.62 (2005); U.N. Press Release, *supra* note 2.

8. See, e.g., DEBORAH AVANT, *THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY* 30 (2005); P.W. SINGER, *CORPORATE WARRIORS* 49–54 (2003); JOANNA SPEAR, *FAFO, MARKET FORCES: THE POLITICAL ECONOMY OF PRIVATE MILITARY COMPANIES* 11–15 (2006), available at <http://www.fafno.no/pub/rapp/531/531.pdf>.

9. See SINGER, *supra* note 8, at 66–70 (arguing that the “privatization revolution” legitimized the outsourcing of military and security functions that previously had been “untouchable areas” of government); SPEAR *supra* note 8, at 14–16 (suggesting that neo-liberal theories about the efficiency of private-sector services fueled the growth of the private security sector).

10. The general lack of transparency within the industry only perpetuates this misunderstanding. See Jennifer Elsea & Nina M. Serafino, *Private Security Contractors in Iraq: Background, Legal Status, and Other Issues* (Cong. Research Serv., CRS Report for Congress, Order Code RL32419, updated July 11, 2007) at “Summary,” available at <http://www.fas.org/sgp/crs/natsec/RL32419.pdf> (“Transparency issues include the lack of public information on the terms of their contracts, including their costs and the standards governing their hiring and performance, as well as the background and training of those hired under contract.”); Minow, *supra* note 7, at 999 & n.62 (noting that PMSCs are immune from FOIA requests and other disclosure requirements). Many PMSCs refuse to talk to outside journalists, and some are bound under their contracts not to reveal the nature of their government contracts. See John M. Broder & James Risen, *Blackwater Mounts a Defense With Top Talent from Capital*, *N.Y. TIMES*, Nov. 1, 2007, at A1 (noting that confidentiality agreements with U.S. government agencies have prevented Blackwater from publicly discussing incidents); Telephone interview with former Blackwater executive (Apr. 7, 2007) (on file with author); Interview with U.S. Embassy Official, in Kabul, Afg. (Jan. 14, 2007) (on file with author). In preparation for this article, the author conducted extensive on-site interviews with representatives from various government agencies and private security contractors. The majority of these interviews could only be conducted upon the condition of interviewee anonymity. All interviews are on file with the author, but many are available only in redacted form to protect confidentiality.

However, it is often difficult to fit any one firm squarely into one category given the variety of services and projects each offers.<sup>11</sup>

At one end of the spectrum, supply firms like Halliburton or Kellogg, Brown & Root rarely, if ever, engage in direct combat. Instead, they provide the logistics, supplies, and technical and operational support for most modern military deployments, including the coalition operations of the United States, the United Kingdom, France, and other NATO countries.<sup>12</sup> This includes everything from food and service contracts to providing transport for troops and equipment to maintaining and operating complex surveillance and weapons systems.<sup>13</sup>

While supply firms may enable war fighting by providing more efficient support and supply functions, it would be difficult to distinguish activities like building military camps, delivering food and supplies, and maintaining communications and laundry services from the type of civilian support that has always been permitted under IHL and is particularly common to democracies. Therefore, the remaining analysis will focus on the other two categories: private military firms and private security companies.

At the opposite end of the spectrum from supply firms, private military firms (“PMFs”) offer combat capabilities, tactical analysis, and other direct military support.<sup>14</sup> For example, in 1993 the government of Sierra Leone paid the South African firm Executive Outcomes \$35 million to defeat advancing Revolutionary United Front rebels.<sup>15</sup> Executive Outcomes deployed a several-hundred-strong infantry battalion, supported by combat helicop-

11. This categorization tracks the “tip-of-the-spear” typology coined by P.W. Singer. Singer likens military provider firms, which may engage in direct combat or command and control functions as the “tip of the spear,” while those support firms providing logistics and other non-lethal services are at the base of the spear, and private security companies or “military consultant firms” fall somewhere in between. See SINGER, *supra* note 8, at 91–92.

12. Kellogg, Brown & Root provided such support to U.S. military operations in Kuwait, Somalia, Haiti, Bosnia, Rwanda, and Afghanistan. *Id.* at 136; see also ELKE KRAHMANN, CTR. FOR EUR. STUD., CONTROLLING PRIVATE MILITARY COMPANIES: THE UNITED KINGDOM AND GERMANY 10–13 (describing German outsourcing of information technology, military training, and logistics functions); SINGER, *supra* note 8, at 12–13, 142–46 (describing how the British military has outsourced the training, operation, and maintenance of nuclear submarines, its aircraft support unit, tanker transport unit, and its air-to-tanker refueling fleet); JAMES COCKAYNE, INT’L PEACE ACADEMY, COMMERCIAL SECURITY IN HUMANITARIAN AND POST-CONFLICT SETTINGS 1 (2006), available at [http://www.ipacademy.org/pdfs/COMMERCIAL\\_SECURITY\\_FINAL.pdf](http://www.ipacademy.org/pdfs/COMMERCIAL_SECURITY_FINAL.pdf) (noting the integration of PMSCs in French military interventions).

13. In the first Gulf War, the U.S. military contracted out operational support for TOW missiles, M1A1 tanks, Bradley fighting vehicles, and Patriot missiles. In the 2003 invasion of Iraq, contractors were involved in maintenance and operational support for the B-2 stealth bomber, the F-117 stealth fighter, the M-1 tank, the Apache helicopter, and some naval operations. AVANT, *supra* note 8, at 19. Contractors also operated many of the unmanned aerial surveillance vehicles, including the Global Hawk and Predator drones that were critical to U.S. military operations in Afghanistan and Iraq. P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT’L L. 521, 534 (2004).

14. See generally, SINGER, *supra* note 8, at 106–15 (detailing the history of the operations of Executive Outcomes, the most notorious PMF, as an example of the type of offensive action and tactical and military advisory services that PMFs provide); see also ROBERT YOUNG PELTON, LICENSED TO KILL: HIRED GUNS IN THE WAR ON TERROR 266–70 (2006).

15. SINGER, *supra* note 8, at 106–15.

ters, armored vehicles, and light artillery to contain and push back the Revolutionary United Front from the capital in a matter of weeks—an outcome far more successful and cost effective than the later U.N. peacekeeping operation.<sup>16</sup> In 1997, the Papua New Guinea government contracted the British firm Sandline for \$35 million to aid its army in defeating a secessionist movement. Although domestic political resistance eventually prevented it from fulfilling its contract, Sandline had agreed to train an elite strike force, provide intelligence and tactical analysis for the army, conduct independent offensive operations, and provide follow-up operational support.<sup>17</sup> These were not isolated incidents; PMFs like Executive Outcomes, Sandline, and others provided services for governments or rebel groups in Ethiopia, Angola, Zambia, Ghana, Algeria, Ivory Coast, Rwanda, Uganda, Croatia, Indonesia, and many other countries.<sup>18</sup>

The more prominent and controversial category of outsourced military work since 2001 has been performed by private security companies (“PSCs”). While PSCs have been active in border monitoring, civilian law enforcement, and refugee protection as part of U.N., NATO, and other multilateral humanitarian operations since the mid-1990s,<sup>19</sup> demand for this type of firm exploded with operations in Iraq and Afghanistan.<sup>20</sup> PSCs fall in between supply firms and PMFs on the combat-versus-support spectrum. Unlike PMFs, PSCs do not typically engage in direct combat, although some PSC employees are assigned duties likely to draw fire, including guarding U.S., British, or NATO military bases, embassies, checkpoints, or convoys.<sup>21</sup> PSCs do not focus on providing logistics, support, and supplies, although some of these services may be included within their broader contracts.<sup>22</sup> In addition, PSCs may be involved in policing and security protec-

16. *Id.*

17. PELTON, *supra* note 14, at 266–70.

18. SINGER, *supra* note 8, at 9–15. More than eighty PMFs provided their services during the conflict in Angola alone. *Id.* at 9.

19. See, e.g., SINGER, *supra* note 8, at 143–45 (describing the type and degree of PMSC involvement in peacekeeping operations in the Balkans, including logistical support for NATO troops, air support for the United States, refugee-camp operation, the construction and management of military bases, etc.); U.N. High Comm’r for Refugees [UNHCR], Exec. Comm., *Security and the Civilian and Humanitarian Character of Refugee Camps and Settlements*, U.N. Doc. EC/49/SC/INF.2 (Jan. 14, 1999); AVANT, *supra* note 8, at 202–03; Elsea & Serafino, *supra* note 10, at CRS–5 (noting use in landmine operations).

20. John M. Broder & David Rohde, *State Dept. Use of Contractors Leaps in 4 Years*, N.Y. TIMES, Oct. 24, 2007, at A1; *The Baghdad Boom*, ECONOMIST, Mar. 27, 2004, at 56.

21. In April 2004, Blackwater contractors protecting the Coalition Provisional Authority compound in Najaf were engaged in direct combat for more than twenty-four hours to hold off rioters attacking the compound. They were supported by Blackwater helicopters providing armed cover and evacuating the wounded. See PELTON, *supra* note 14, at 149–52. *But see* JEREMY SCAHILL, BLACKWATER: THE RISE OF THE WORLD’S MOST POWERFUL MERCENARY ARMY 122–32 (2007) (suggesting that Blackwater triggered the Najaf event by firing on the crowd); Scott Shane, *Chalabi Raid Adds Scrutiny to Use of U.S. Contractors*, BALTIMORE SUN, May 30, 2004, at 1A (describing the offensive DynCorp raid on Ahmed Chalabi’s compound and offices).

22. See Chris Tomlinson, *U.S. Hires Military Contractor to Back Peacekeeping Mission in Somalia*, ASSOCIATED PRESS, Mar. 7, 2007, available at <http://www.signonsandiego.com/news/world/20070307-1320->

tion services, covert operations,<sup>23</sup> or detention, interrogation, and intelligence functions.<sup>24</sup> PSCs may provide strategic advisory services, for example, capacity-building in the Afghan Department of Defense,<sup>25</sup> intelligence collection or analysis for coalition forces and other contractors, or strategic consulting on behalf of the NATO-supported International Security Assistant Force (“ISAF”) on how to win “hearts and minds” in Afghanistan.<sup>26</sup>

PSCs also have major contracts with nonmilitary U.S. agencies in Iraq and Afghanistan, including U.S.-funded drug eradication programs, local army and police training programs, and groups charged with the protection of U.S. personnel and important officials such as Paul Bremer, former U.S. presidential envoy to Iraq, and Afghan President Hamid Karzai.<sup>27</sup> PSCs are often subcontracted by the many construction, consulting, engineering, or other private companies fulfilling U.S. Agency for International Development (“USAID”), State Department and other foreign government contracts.<sup>28</sup> Finally, many PSCs have private-sector clients in Iraq and Afghanistan. For example, PSCs in Afghanistan provide security for movie directors, U.S. defense lawyers gathering evidence for detainee cases, and private sector telecommunication services, among others.<sup>29</sup>

A subset of PSC services that should be noted and set aside, if not considered as a separate category in and of itself, is private security protection or bodyguard services. Many PSCs (and some PMFs) have divisions within

somalia-us.html (noting a recent DynCorp contract to provide equipment and logistical support for African Union peacekeepers).

23. See, e.g., Interview with human rights investigator, in Kabul, Afg. (Jan. 12, 2007) (on file with author) (stating that through human rights investigations, the interviewee was aware of PMSCs active in U.S. Central Intelligence Agency (“CIA”) and “other governmental agency”—i.e. covert operation—raids in the East and South of Afghanistan); Interview with former public affairs representative, Coalition Provisional Authority, in Cambridge, Mass. (Feb. 28, 2007) (on file with author) (stating that in the first few years of the Iraq and Afghanistan operations, the CIA needed stronger paramilitary forces for counter-terrorism task forces and often turned to PMSCs, for example in the unit in charge of tracking Saddam Hussein); PELTON, *supra* note 14, at 56–61; P.W. Singer, *Warriors for Hire in Iraq*, SALON.COM, Apr. 15, 2004, <http://dir.salon.com/story/news/feature/2004/04/15/warriors/index.html> (describing contractors engaged in the hunt for Bin Laden).

24. See, e.g., Mark Bowden, *How to Break a Terrorist*, THE ATLANTIC, May 2007, at 54 (describing contractors involved in the interrogation and intelligence mission surrounding Abu Musab al-Zarqawi); Victoria Burnett et al., *From Building Camps to Gathering Intelligence*, FIN. TIMES, Aug. 11, 2003, at 13; Interview with ISAF legal advisors, in Kabul, Afg. (Jan. 19, 2007) (on file with author) (suggesting that contractor involvement in interrogation and detention is ongoing).

25. Interview with PMSC Executive Officer, in Cambridge, Mass. (Apr. 6, 2007) (on file with author); Military Profl Res. Inc., Security Sector Reform Programs, <http://www.mpri.com/main/securitysectorreform.html> (last visited Nov. 19, 2007).

26. Interview with PMSC employee, in Kabul, Afg. (Jan. 11, 2007) (on file with author).

27. PELTON, *supra* note 14, at 110–11; Jeremy Scahill, *Bush's Shadow Army*, THE NATION, Apr. 2, 2007, at 2, available at <http://www.thenation.com/doc/20070402/scahill>.

28. See, e.g., SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION, FACT SHEET ON MAJOR U.S. CONTRACTORS' SECURITY COSTS RELATED TO IRAQ RELIEF AND RECONSTRUCTION FUND CONTRACTING ACTIVITIES 2 (2007), available at <http://www.sigir.mil/reports/pdf/audits/06-044.pdf>.

29. Interview with senior manager of British PSC, in Kabul, Afg. (Jan. 18, 2007) (on file with author); Interview with head of Afghan PSC, in Kabul, Afg. (Jan. 16, 2007) (on file with author).

their corporation that provide some of the same security services they might provide in Iraq or Afghanistan to private entities or government entities in other global hotspots or hostile operating environments. Examples include the tens of thousands of individuals working in bodyguard and protection services in countries like Russia, protecting oil companies' assets and personnel in countries like Nigeria, or protecting CEOs or other potential targets from kidnapping and ransom demands in countries like Colombia.<sup>30</sup> Despite the similarity between these services and some projects in Iraq and Afghanistan, this category of protection services takes place outside of a conflict zone and therefore will not be the focus of the below discussion on PMSCs and international humanitarian law.

As the above descriptions may suggest, it is often difficult to categorize one firm or one contractor as a PMF or a PSC. Therefore the remainder of this article will refer to both groups collectively as "private military or security companies." Any further analysis will be assumed to include both types of firms and services, although discussions of the threats that PMSCs pose may be geared more toward the type of PSCs active in Iraq and Afghanistan since this has been the predominant form of privatized force in recent years.

### III. CONTRASTING PMSCS AND MERCENARIES: AN ARGUMENT FOR A DIFFERENT TREATMENT

Much of the public attention and legal debates surrounding PMSCs have been focused on reports of serious criminal misconduct by "trigger-happy" private security contractors in Iraq and Afghanistan.<sup>31</sup> The negative reputation of PMSCs and their private sector status have led some commentators to compare PMSCs to mercenaries, and to suggest that they in turn should be banned under the existing international legal prohibition on mercenary activity.<sup>32</sup> However, the corporate form of private military and security companies, and the advanced independent capabilities that go with that corporate form, not only distinguish them from mercenaries of the past but may also create additional challenges for the international system. These significant differences make it a legal stretch for the standing mercenary definitions to be applied to these actors, and also counsel against treating

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30. KEVIN A. O'BRIEN, RAND EUROPE, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION 3 (2002), available at <http://www.fco.gov.uk/Files/KFile/pmcobrien.pdf>; SINGER, *supra* note 8, at 11; ArmorGroup Int'l plc, Latin America, <http://www.armorgroupamerica.com/globalreach/latinamerica> (last visited Nov. 19, 2007).

31. See, e.g., Editorial, *The Folly of Using Mercenaries in Iraq*, INT'L HERALD TRIB., Nov. 6, 2007, at 8 (critiquing American use of "trigger-happy bodyguards" and arguing that "gun-toting mercenaries . . . run around Iraq without any clear legal tether"); Sue Fleming, *Blackwater Involved in 195 Iraq Shootings*, REUTERS, Oct. 2, 2007, available at <http://www.reuters.com/articlePrint?articleId=USN2739989220071002> (noting public investigations uncovering evidence of PMSC misconduct against Iraqi civilians and their property).

32. See *supra* note 2.



security companies that pose a very different, and in many ways more significant, threat to the international system with the same legal solution that was applied to mercenaries of the past.

Much of the controversy surrounding PMSCs has been due to frequent reports of unpunished criminal misconduct, human rights abuses, and potential war crimes by PMSC personnel. In the 1990s, DynCorp employees hired to represent the U.S. contingent in the U.N. Police Task Force in Bosnia were involved in a sex-trafficking scandal.<sup>33</sup> During many of its operations in Africa, the private military firm Executive Outcomes was criticized for using cluster bombs and other military methods that were questionable under international humanitarian law.<sup>34</sup> In the context of PMSC involvement in Iraq, security contractors employed as interrogators by CACI International and Titan were involved in the Abu Ghraib prison abuses.<sup>35</sup> A few months after Abu Ghraib, a video surfaced on the Internet showing Aegis contractors on patrol in Iraq apparently arbitrarily shooting at Iraqi civilians.<sup>36</sup> In February 2007, a former CIA contractor named David Passaro was convicted in U.S. federal court for beating an Afghan prisoner to death.<sup>37</sup> In the fall of 2007, Blackwater contractors came under heavy fire for the apparently unjustified killing of 17 Iraqi civilians in September 2007 while they were providing mobile convoy protection for USAID employees.<sup>38</sup> Investigations spurred by this Blackwater incident revealed evidence of even more widespread, and perhaps unjustified, attacks against Iraqi civilians or Iraqi civilian property.<sup>39</sup>

Beyond these more serious incidents of abuse, many have argued that PMSC contractors in Iraq and Afghanistan generally treated local civilians disrespectfully and exacerbated local hostility to coalition operations.<sup>40</sup> As one journalist described it,

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33. See Robert Capps, *Crime Without Punishment*, SALON.COM, June 27, 2002, <http://dir.salon.com/story/news/feature/2002/06/27/military/index.html?pn=1>.

34. SINGER, *supra* note 8, at 116 (noting Executive Outcomes' use of napalm, cluster bombs, and fuel-air explosives); Nathaniel Stinnett, *Regulating the Privatization of War: How To Stop Private Military Firms from Committing Human Rights Abuses*, B.C. INT'L & COMP L. REV. 211, 215 (2005) (reporting that Executive Outcomes commanders gave orders to their pilots to "kill everybody" without regard to the civilian population).

35. See Stockman, *supra* note 1; Joel Brinkley & James Glanz, *Contract Workers Implicated in February Army Report on Prison Abuse Remain on the Job*, N.Y. TIMES, May 4, 2004, at A6.

36. See Sean Rayment, "Trophy" Video Exposes Private Security Contractors Shooting Up Iraqi Drivers, TELEGRAPH.CO.UK, Nov. 26, 2005, at 10, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2005/11/27/wirq27.xml&Sheet=/news/2005/11/27/ixworld.html>.

37. See Weigl, *supra* note 1.

38. See Glanz & Rubin, *supra* note 1.

39. See, e.g., Fleming, *supra* note 31.

40. Hamida Ghafour, *Afghans Are Fed Up with Security Firm: Residents of a Kabul Neighborhood Say They Feel They Are Under Occupation as DynCorp Barricades a Street and Conducts Searches*, L.A. TIMES, Sept. 27, 2004, at A3; Editorial, *The Folly of Using Mercenaries in Iraq*, *supra* note 31, at 8 (arguing that the United States' use of unaccountable "trigger-happy bodyguards" "wiped out whatever residual sense of legitimacy Iraqis may have still attached to the U.S. mission").

Blackwater's thugs with guns now push and punch Iraqis who get in their way: Kurdish journalists twice walked out of a Bremer press conference because of their mistreatment by these men. . . . [T]here is a disturbing increase in reports that mercenaries are shooting down innocent Iraqis with total impunity.<sup>41</sup>

In Afghanistan, the PMSC originally hired to protect Afghan President Hamid Karzai, DynCorp, was fired because of repeated incidents of disrespect or abuse to local Afghans.<sup>42</sup> The fact that DynCorp actually suffered some financial repercussions for misconduct on the Karzai contract is notable because for most incidents PMSCs and their employees have suffered no legal or financial consequences. Of the thousands of PMSC contractors that have served in Iraq and Afghanistan since 2001, only one has ever been prosecuted.<sup>43</sup>

The misconduct of some PMSC actors has led them to be compared with mercenaries.<sup>44</sup> Similarly negative historical connotations of mercenaries, and their association with widespread misconduct and abuse, led to the existing international law prohibition on mercenary activities. The use of "guns for hire" or other private actors has been longstanding practice in warfare and was traditionally unquestioned under international law.<sup>45</sup> No provisions explicitly prohibiting mercenarism existed in the Hague Conventions,<sup>46</sup> the original Geneva Conventions,<sup>47</sup> or in customary international humanitarian

41. Robert Fisk, *Saddam in the Dock: So This Is What They Call the New, Free Iraq*, INDEP. ON SUNDAY (London), July 4, 2004, at 12.

42. See Interview with senior political officer, UNAMA, in Kabul, Afg. (Jan. 18, 2007) (on file with author); Interview with a manager of an American PSC, in Kabul, Afg. (Jan. 14, 2007) (on file with author); Interview with two senior/commanding officers of an American PSC, in Kabul, Afg. (Jan. 12 & 14, 2007) (on file with author); Interview with legal affairs representative of an American PSC, in Washington, D.C. (Nov. 10, 2006) (on file with author).

43. Ned Parker, *U.S. Restricts Movement of Its Diplomats in Iraq; The Limits Come as a Shooting by a Convoy's Guards Is Investigated*, L.A. TIMES, Sept. 19, 2007, at A1 (noting that CIA contractor David Passaro is the only contractor convicted of civilian abuse in Iraq or Afghanistan).

44. See *supra* note 2.

45. See, e.g., SINGER, *supra* note 8, at 20–29, 33–34 (describing the historical hiring of mercenaries by ancient Greek and Roman armies, by the Italian city states to fight in the Crusades, by European monarchs and feudal lords from the Middle Ages through the Thirty Years' War, and by the British Empire in conflicts overseas, among others); 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, 377–81 (2006) (describing U.S. use of civilian contractors throughout its military history).

46. See Katherine Fallah, *Corporate Actors: The Legal Status of Mercenaries in Armed Conflict*, 88 INT'L REV. RED CROSS 599, 603–04 (2006) (noting that the Hague Conventions have no explicit provisions on mercenaries but that Hague Convention V may have implications for mercenaries by providing that individuals from neutral states who take up arms on behalf of a belligerent lose the privileges of neutrality).

47. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter Geneva POW Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217; Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114.

law prior to World War II.<sup>48</sup> Mercenaries were considered a legitimate means of warfare until post-World War II, when they became actively involved in many of the post-colonial struggles for independence.<sup>49</sup> In addition to being associated with severe human rights abuses and other war crimes in those post-colonial struggles, the use of mercenaries was increasingly delegitimized because it potentially prolonged certain conflicts and undermined international principles of self-determination.<sup>50</sup> As a result of this negative historical experience, the push for international provisions criminalizing mercenarism came primarily from post-colonial African states and often over the objection of Western states.<sup>51</sup> A series of regional African conventions and statements condemning mercenaries set the first legal precedents for a ban on mercenaries,<sup>52</sup> ultimately resulting in the 1989 U.N. Convention Against Recruitment, Use, Financing, and Training of Mercenaries (“U.N. Convention Against Mercenaries”), which went into effect in 2001.<sup>53</sup> In addition, African delegates to the negotiations on the additional

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48. Article 9 of the Brussels Conference of 1874, which represented customary international law at the time, incorporated mercenaries into the laws of war as irregular combatants. *See, e.g.*, Fallah, *supra* note 46, at 603–04; Bohunka O. Goldstein, *Mercenarism*, in 1 INTERNATIONAL CRIMINAL LAW 439, 445–46 (M. Cherif Bassiouni ed., 2d ed. 1999).

49. *See, e.g.*, Goldstein, *supra* note 48, at 445 (suggesting that mercenaries attracted by adventure and money joined whichever rebel group, foreign power, or government paid the most); LYAL S. SUNGA, THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW: DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION 183–85 (1997) (stating that European powers hired mercenaries to maintain influence over former colonies because it was taboo to retain direct influence after World War II).

50. *See* Goldstein, *supra* note 48, at 457 (arguing that the rise of mercenaries in Africa was a threat in part because mercenaries engaged in the killing and torturing of civilians and prisoners); OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, FACT SHEET NO. 28, THE IMPACT OF MERCENARY ACTIVITIES ON THE RIGHT OF PEOPLES TO SELF-DETERMINATION 7–11 (2002), available at <http://www.ohchr.org/english/about/publications/docs/factsheet28.pdf>.

51. *See, e.g.*, G.A. Res. 3103, ¶ 6, U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030 (1973) (condemning the use of mercenaries by “colonial and racist regimes” against the self-determination movements of former colonies); James Cockayne, *The Global Reorganization of Legitimate Violence: Military Entrepreneurs and the Private Face of International Humanitarian Law*, 88 INT’L REV. RED CROSS 459, 475–76 nn.48–49 (2006).

52. *See generally* Goldstein, *supra* note 48, at 442–43 (summarizing the international law developments leading to the creation of the United Nations Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination); Organization of African Unity, Convention for the Elimination of Mercenarism annex II, July 3, 1977, O.A.U. Doc. CM/817 (XXIX), reprinted in DOCUMENTS OF THE ORGANIZATION OF AFRICAN UNITY 58 (Gino J. Naldi ed., 1992); Riley Martin, *Mercenaries and the Rule of Law*, 17 REV. INT’L COMM’N JURISTS 51 (1977) (describing the June 1976 trial of thirteen British, American, and Argentinian citizens in Angola on grounds of mercenarism as a crime under customary international law); Organization of African Unity, Int’l Comm’n of Inquiry on Mercenaries, Draft Convention on the Prevention and Suppression of Mercenarism art. 4, Luanda, June 1976, reprinted in Paul W. Mourning, *Leashing the Dogs of War: Outlawing the Recruitment and Use of Mercenaries*, 22 VA. J. INT’L L. 589, 615 (1982) (seeking to deny mercenaries the status of lawful combatants).

53. Convention Against Mercenaries, *supra* note 3; *see also* Goldstein, *supra* note 48, at 443–44 (describing momentum toward and driving forces within the negotiations toward the Convention Against Mercenaries).

protocols to the Geneva Conventions pushed through a provision in Protocol I (article 47) that denied mercenaries the privileges of lawful combatants.<sup>54</sup>

Although the mercenary ban is firmly established in IHL,<sup>55</sup> it is one of the weaker provisions.<sup>56</sup> Outside of the community of African states that championed it, the mercenary ban has never received the type of widespread support that would make enforcement likely. In addition, the legal standards within these instruments are difficult to meet, and the enforcement provisions are themselves weak. To illustrate, the Protocol I provision on mercenaries does not make it a crime *per se* to be a mercenary, but simply permits the detaining party to deny any captured mercenary prisoner-of-war status as an unlawful combatant.<sup>57</sup> The U.N. Convention Against Mercenaries goes one step further and does make it a crime to be a mercenary, but enforcement of this crime depends on implementing legislation by the relevant state party.<sup>58</sup> Another important limitation on the effect of these instruments is that neither Protocol I nor the U.N. Convention Against Mercenaries has explicit provisions making state use of mercenaries an offense.<sup>59</sup> Although such provisions were proposed, Western states rejected them, arguing that states are incapable of controlling the actions of their nationals abroad.<sup>60</sup> Finally, many commentators have suggested that the reason the international mercenarism prohibition has been under-enforced is that the definition of a mercenary in these instruments is unworkable.<sup>61</sup> The

54. Protocol I, *supra* note 3, art. 47. This provision was included despite the objections of many Western states. See Fallah, *supra* note 46, at 604–05 (describing the origin of the provisions on mercenaries in the Additional Protocol I to the Geneva Convention); see also FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 90 (2003) (noting that article 47 was only included as a concession to African states); Edward Kwakwa, *The Current Status of Mercenaries in the Law of Armed Conflict*, 14 HASTINGS INT'L & COMP. L. REV. 67, 68 & n.7 (1990) (noting that one of the reasons the United States cited for not ratifying Protocol I was the provision on mercenaries).

55. See Lindsey Cameron, *Private Military Companies: Their Status Under International Humanitarian Law and Its Impact on Their Regulation*, 88 INT'L REV. RED CROSS 573, 579 & n.21 (2006) (noting that the International Committee for the Red Cross has found the Protocol I definition of a mercenary to be part of customary international law, although the United States has long rejected this view).

56. The crime of mercenarism was not included in the 1996 Draft Codes of Crimes adopted by the International Law Commission, largely because it was not considered widespread or severe enough to justify the status of a grave threat to peace and security. See Goldstein, *supra* note 48, at 444–45 nn.31–33 (noting the objections of Austria, the Netherlands, Norway, and the United Kingdom in particular to elevating mercenarism to the status of a “grave offense”). Under the Rome Statute, mercenarism is not listed as a crime. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

57. See Cameron, *supra* note 55, at 577–79.

58. The Convention Against Mercenaries, *supra* note 3, art. 3(1) (“A mercenary, as defined in article 1 of the present Convention, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence for the purposes of the Convention.”). Articles 7 and 9 of the Convention Against Mercenaries deal with the obligation of states parties to take necessary measures for the implementation of the Convention and to establish jurisdiction within its territory for offenses described in the Convention. *Id.* arts. 7, 9.

59. See Goldstein, *supra* note 48, at 454.

60. *Id.*

61. As one commentator famously noted, the definition of a mercenary in these instruments is so unworkable and riddled with loopholes that “any mercenary who cannot exclude himself from this defi-

definition is composed of six cumulative elements, including that the individual is not a national nor a resident of a party to the conflict, has not been sent by a state that is not a party to the conflict, has been “specially recruited” to fight in that conflict, has taken direct part in the hostilities, and is primarily motivated by a desire for “material compensation substantially in excess” of that paid to regular armed forces to the conflict.<sup>62</sup> The motive element renders categorization as a mercenary particularly problematic, since an individual found to meet all of the other five elements of the definition can easily claim some motivation other than money.<sup>63</sup>

This mercenary definition would be particularly difficult to apply to the majority of private security contractors.<sup>64</sup> For example, many of the private security contractors playing supporting or defensive roles may not meet the requirement that a mercenary be specifically recruited to and actually take “direct part” in the conflict.<sup>65</sup> The difficulty of drawing a clear distinction between when security contractors are engaged in direct combat activity and when they are not would make this element even more difficult to establish. It would also be difficult to establish that these contractors’ motivation was solely a desire for substantial financial gain;<sup>66</sup> many PMSCs are former soldiers with extensive service to their countries, and even if they are not actually motivated by a sense of patriotic duty, it may be difficult to prove otherwise. In the specific context of Iraq or Afghanistan, security contractors who are citizens of either the United States or coalition partners would be disqualified under the provision concerning nationals of a party to the conflict. Iraqi or Afghan nationals hired by these countries would similarly be disqualified under the provision excepting a resident to a territory controlled by a party to the conflict.<sup>67</sup>

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dition deserves to be shot—and his lawyer with him.” GEOFFREY BEST, *HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICT* 374 n.83 (1980); see also Sarah Percy, *Mercenaries: Strong Norm, Weak Law*, 61 *INT’L ORG.* 367, 369–70 (2007) (postulating reasons for which the prohibition on mercenaries might be so weak, including lack of support by powerful Western countries, a weak definition of mercenaries, and failure to address the PMSC problem). See generally Françoise Hampson, *Mercenaries: Diagnosis Before Prescription*, XXII *NETH. Y.B. INT’L L.* 3, 14–16 (1991) (arguing that the six-point definition of a mercenary is “unworkable”). Instead of relying on the rarely enforced ban on mercenarism, prosecutions have largely been based on domestic criminal laws. See, e.g., Fallah, *supra* note 46, at 611 & n.47 (citing the case of French mercenary Bob Denard who was ultimately convicted under French law of “belonging to a gang who conspired to commit a crime” for his part in aiding rebels to attempt a coup in the Comoros Islands).

62. Protocol I, *supra* note 3, arts. 47.2(a)–(f). For a more detailed analysis, see Kwakwa, *supra* note 54, at 70–74.

63. Singer, *supra* note 13, at 529 (arguing that the motivation element of the definition of a mercenary makes it “unworkable” because the “intent to fight exclusively for profit is often unknowable, and as it lacks good objective proxies, it is difficult to prove”).

64. See, e.g., Emanuela-Chiara Gillard, *Business Goes to War: Private Military/Security Companies and International Humanitarian Law*, 88 *INT’L REV. RED CROSS* 525, 568–70 (2006) (discussing in depth the reasons for which many PMSCs would not meet the six-point cumulative definition of a mercenary).

65. See Protocol I, *supra* note 3, art. 47.2 (a)–(b); Convention Against Mercenaries, *supra* note 3, art. 1(a).

66. See Protocol I, *supra* note 3, art. 47.2(c); Convention Against Mercenaries, *supra* note 3, art. 1(b).

67. See Protocol I, *supra* note 3, art. 47.2(d); Convention Against Mercenaries, *supra* note 3, art. 1(c).

In addition to these legal enforcement issues, the differences between mercenaries and modern private security actors, as well as the unique threats posed by the latter, justify different treatment. While the ban on mercenarism was driven mostly by the historical experience of a few states, it is possible to extrapolate some doctrinal rationales for its criminalization. Cherif Bassiouni, a prominent scholar in the origins and classification of international criminal law, justifies the crime of mercenarism as an extension of the crime of aggression and a threat to international peace and security.<sup>68</sup> The crime of aggression usually refers to any use of force by states not justified by self-defense or authorized by the United Nations.<sup>69</sup> Since mercenaries are by definition those individuals who are not citizens of a party to the conflict, their participation may be construed as the participation of a neutral in an armed conflict, which may constitute a crime of aggression. The availability of mercenary actors for state action may also be considered a threat to the overall enforcement of international humanitarian law because many of the constraints on the use of force and on the conduct of hostilities are based on state-centered restrictions; to the extent that states can evade these restrictions by outsourcing to individuals who are at best ambiguously liable under the laws of war, the overall framework of enforcement may be weakened. The high incidence of human rights abuses and war crimes among mercenary armies historically may also make the practice of mercenarism a sufficiently significant threat to the international system.<sup>70</sup>

The corporatization of privatized force, as well as the advanced independent capabilities that go with that corporate form, has the potential to exponentially increase many of these threats. First, the corporate form and independence of PMSCs more seriously erode the monopoly on force than did mercenarism. Unlike PMSCs, mercenaries provided limited services—little more than additional manpower to existing combat operations.<sup>71</sup> Through the corporate form, though, PMSCs can independently provide sustained and complex operations, in-depth training and advisory services, and extensive logistical and operational support—capabilities that any amalgamation of individual mercenaries could never have achieved. Nonstate actors can now buy military force capabilities that previously might have been

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68. M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 144–45 (2003); see also G.A. Res. 48/92, pmbll., U.N. Doc. A/RES/48/92 (Dec. 20, 1993) (classifying use of mercenaries as a threat to peace).

69. BASSIOUNI, *supra* note 68, at 136–37; U.N. Charter art. 3935; Rome Statute, *supra* note 56, art. 5.2; Int'l Law Comm'n, *Second Session, Principles of International Law of the Charter and Judgment of the Nuremberg Tribunal*, 4 INT'L ORG. 714, 717–19 (1950) (Nuremberg Principles VI).

70. See Goldstein, *supra* note 48, at 457.

71. It is important to note that the traditional soldier-for-hire mercenaries are not extinct. During the Kosovo war, the Kosovo Liberation Army (“KLA”) hired mercenaries at \$4,000 a month. Mercenaries fighting on the Serbian side were compensated by being promised free rein to pillage any area territory they conquered. SINGER, *supra* note 8, at 42–44.

possible almost exclusively through a state-supported military.<sup>72</sup> Even where PMSCs are hired by state actors, the corporation itself usually retains immediate control and supervision of its contractors, thus reducing the control that states have over their own warfare and the overall level of state-based control over uses of force.<sup>73</sup>

The advanced capabilities of PMSCs may also enable state violence that would otherwise not have been possible because of political or resource constraints. Small or weak states that might otherwise not have been able to raise an army or to build certain advanced capabilities over time can instead buy such capabilities from PMSCs.<sup>74</sup> For example, in 1992, the weakened Sierra Leonean government could not defeat advancing Revolutionary United Front rebels on its own but was able to hire Executive Outcomes to do so.<sup>75</sup>

Even for states that do have advanced military capabilities, the availability of advanced capabilities in the private sector that can appear to operate independently of the state may enable it to get around certain domestic political constraints. Hiring PMSCs as force multipliers allows states to purchase additional manpower and capabilities without incurring political costs or having to raise support for citizen participation.<sup>76</sup> PMSCs often do not attract the same media attention and public scrutiny as enlisted soldiers or other state actors would. If a PMSC is killed in an operation overseas it does not garner the same headlines as if an enlisted soldier were killed. Deploying PMSCs, even large and sustained units of PMSCs, to train, assist, or advise foreign governments may not raise the same congressional or popular political checks that deploying an equivalent number of military or civilian officials would. For example, throughout the 1990s, the Clinton Adminis-

72. At least one commentator has already suggested that philanthropists like Bill Gates or George Soros should fund a PMSC intervention in Darfur—an idea that despite its good intentions may have troubling consequences for the state monopoly on force. Max Boot, *A Mercenary Force for Darfur*, WALL ST. J., Oct. 25, 2006, at A14.

73. See, e.g., Major Karen L. Douglas, *Contractors Accompanying the Force: Empowering Commanders with Emergency Change Authority*, 55 A.F. L. REV. 127, 135–36 (2004) (arguing that military field commanders have less control over the conduct of their force because contractors take orders only from their contracting company or from the contracting officer in Washington, D.C.); Minow, *supra* note 7, at 1008–13 (noting that extensive outsourcing, combined with under-supported oversight, makes it hard for governments to retain control of costs and management of projects).

74. United Nations Comm'n on Human Rts., *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, ¶¶ 116–17, U.N. Doc. E/CN.4/1994/23 (Jan. 12, 1994) (prepared by Special Rapporteur Enrique Bernales Ballesteros); see also SINGER, *supra* note 8, at 174–75 (noting that the availability of such force may also lead to more state conflicts by upsetting traditional power balances and deterrence effects).

75. See *supra* notes 15–16 and accompanying text.

76. AVANT, *supra* note 8, at 68 (“Through proxies, state leaders can affect conditions abroad without mobilizing broad support for troops or (sometimes) even money. Policy changes can be instituted with the input of a very few actors, circumventing the domestic institutional processes.”); Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L. Q. 1001, 1040–41 (2004); Clifford Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 939 (2004); Peter W. Singer, *Outsourcing War*, 84 FOREIGN AFF. 119, 125 (2005).

tration increasingly outsourced U.S. involvement in Colombian anti-narcotic campaigns to PMSCs in order to avoid congressional troop ceilings and other domestic constraints on U.S. involvement.<sup>77</sup> Moreover, because of their independent capabilities, PMSCs can provide extra manpower and resources without requiring the bureaucratic overhead or decisionmaking processes that might typically accompany such uses of force by democratic states. The thousands of private contractors in Iraq act as an important force multiplier for U.S. operations not only because they provide more manpower without the political costs of sending more troops but also because the U.S. government can manage these additional capabilities with fewer bureaucratic resources or institutional hurdles.

Hiring PMSCs to act in their place may also allow states to avoid political costs at an international level, thus unhinging some of the informal, normative restraints on uses of force. For example, during the conflict in the Balkans in the mid-1990s, the United States wanted to intervene to stop some of the immediate fighting but because of its role in peace negotiations, could not afford to lose the appearance of neutrality.<sup>78</sup> Instead, it engineered the hiring of U.S.-based Military Professional Resources Incorporated (“MPRI”) to help train Croat forces so that they could become a better counterweight against Serb aggression in the Krajina region.<sup>79</sup> While this use of PMSCs was arguably beneficial for the international community in that instance (because it stopped immediate fighting and loss of life), the ability of outside states to intervene in conflicts without international political costs is not a positive development. In many cases, the interference of outside actors, many of whom do not share the same interests as the warring parties or as those civilians caught in the conflict, may prolong the conflict or complicate peaceful resolution.

In addition to reducing checks on state uses of force, the independence of PMSCs may erode state responsibility for the conduct of war making and more generally weaken international humanitarian law compliance. Because of their independence from state militaries, most PMSCs are beyond the reach of international humanitarian law regulations. Article 43 of Protocol I suggests that an individual must be formally incorporated into the armed forces of a state before that state can be held legally responsible for that

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77. Thomas Catan et al., *Private Companies on the Frontline*, FIN. TIMES, Aug. 12, 2003, at A15 (suggesting that the United States’ Plan Colombia was politically feasible only because of a lack of press coverage of any PMSC deaths or incidents that arose); Michaels, *supra* note 76, at 1024–25 nn.58–59 and accompanying text (noting how the Clinton Administration increasingly used PMSCs like DynCorp and MPRI to evade congressional limitations and public criticism for counter-narcotic operations in Colombia).

78. SARAH PERCY, INT’L INST. FOR STRATEGIC STUD., REGULATING THE PRIVATE SECURITY INDUSTRY 12–13 (2006); Michaels, *supra* note 76, at 1025–29 nn.61–82 and accompanying text.

79. PERCY, *supra* note 78, at 12–13; Michaels, *supra* note 76, at 1025–29 nn.61–82 and accompanying text.



individual as a combatant.<sup>80</sup> Although some contractors may be carrying out traditional military functions or be de facto integrated into the armed forces of a state, they are rarely, if ever, formally incorporated into the armed forces of a state as required by article 43. A second possibility is that PMSCs might be considered a militia or volunteer corps fighting on behalf of their state-client, under article 4(A) of the Third Geneva Convention.<sup>81</sup> However, it is unlikely that most PMSCs satisfy the requirement in article 4(A) that they carry arms openly and wear a fixed distinctive sign.<sup>82</sup>

As a result, many PMSC violations of international humanitarian law do not carry the same consequences for state clients as they would if carried out by a member of that state's military. After the United States hired MPRI to train Croat forces during the conflict in Bosnia, MPRI reportedly provided direct planning, assistance, and perhaps even engagement for one particularly bloody Croat advance that later raised charges of war crimes for the Croat commanders involved.<sup>83</sup> The United States received no criticism for helping one side to engage in further combat, much less for the potential human rights or war crimes that resulted from this assistance. Because they are less likely to be held responsible, states have fewer incentives to establish the same rigorous accountability and oversight measures that they use for their professional militaries and that may prevent many international humanitarian law violations. Where misconduct does occur, states have fewer incentives to enforce international humanitarian law provisions against those individuals. PMSCs hired by states essentially create a corporate shield against state liability for contractors' actions.<sup>84</sup> DynCorp employees hired to help provide the U.S. contribution for the International Police Task Force in Bosnia were found to be extensively involved in sex trafficking in 1998.<sup>85</sup> U.S. officials escaped with barely any criticism despite awareness by the Department of Defense of continuing violations as late as 2003.<sup>86</sup> With few, if any, legal consequences for the misconduct of these privatized parts of the

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80. See Protocol I, *supra* note 3, art. 43.3 ("Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict."); see also Cameron, *supra* note 55, at 583–84.

81. See Geneva POW Convention, *supra* note 47, art. 4(A)(2).

82. See *id.* art. 4(A)(2)(b)–(c). For a fuller discussion of whether some, but certainly not all, private security or military contractors could qualify as combatants under article 4(A)(2), see Cameron, *supra* note 55, at 584–87; Michael N. Schmitt, *War, International Law, and Sovereignty: Re-evaluating 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, 527–32 (2005).

83. See Michaels, *supra* note 76, at 1028.

84. See Singer, *supra* note 76, at 133 (noting that hiring PMSCs allows the United States to engage in activities that otherwise would not be politically feasible because it can always deny "direct participation" and engage without any "limiting public oversight or debate").

85. See, e.g., Capps, *supra* note 33.

86. See, e.g., DEP'T OF DEF. OFFICE OF THE INSPECTOR GEN'L, ASSESSMENT OF DoD EFFORTS TO COMBAT TRAFFICKING IN PERSONS: PHASE II—BOSNIA-HERZEGOVINA AND KOSOVO 20 n.14 (2003), available at [http://www.dodig.osd.mil/fo/foia/HT-Phase\\_II.pdf](http://www.dodig.osd.mil/fo/foia/HT-Phase_II.pdf) [hereinafter DoD Inspector General Report]; Capps, *supra* note 33; Robert Capps, *Outside the Law*, SALON.COM, June 26, 2006, <http://dir.salon.com/story/news/feature/2002/06/26/bosnia/index.html>.

force, states have fewer incentives to prevent and check any violations of international law than they would if this private outsourcing of legal liability was not possible. Although the increasing public criticism of the misconduct of many PMSCs in Iraq may reverse the trend, the initial lack of legal pressure for the United States to prevent and control PMSC misconduct may also have contributed to the lack of domestic prosecutions and weak contract oversight for PMSC activities in Iraq and Afghanistan.<sup>87</sup>

Finally, one additional, emerging threat that PMSCs may pose to the international system stems from a combination of the purposes for which they have been hired and from the accountability problems described above. The increasing use of PMSCs in post-conflict operations may undermine the long-term stability of the region or country in which they are operating—a threat to international peace and security that the individual mercenary did not pose. PMSCs are increasingly given extensive responsibilities in the reconstruction and stabilization of post-conflict environments, including protecting and helping to implement major infrastructure and construction projects, maintaining and operating refugee camps, or simply working with other international actors involved in reconstruction and development initiatives.<sup>88</sup> This means that many of the elements for establishing long-term stability in a country may be placed in the hands of actors whose profit motivations push them to focus more on short-term cost effectiveness than on the potential long-term consequences of their actions. For example, many PMSCs operating in a country resort to bribery or black-market trade as the most expedient means of getting the equipment and licenses they need.<sup>89</sup> A generous characterization of such practices would be that since PMSCs do not have the same privileges and immunities that the United Nations, the local government, or other foreign actors have in these countries, they often have little choice but to work within the existing rules and conditions. Within conflict or post-conflict zones with fragile to nonexistent legal struc-

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87. See Parker, *supra* note 43 (noting that only one contractor has been prosecuted for misconduct in Iraq or Afghanistan); Broder & Rohde, *supra* note 20 (noting past oversight issues in U.S. PMSC contracts and recent U.S. reform proposals).

88. See *supra* notes 19–30 and accompanying text.

89. For example, within Afghanistan, many PMSCs can get around domestic regulations by bribing Afghan officials. PMSCs often also work with local warlords to guarantee protection or to recruit local hires for their projects. See, e.g., U.S. INST. OF PEACE, ESTABLISHING THE RULE OF LAW IN AFGHANISTAN 117 (2004), available at <http://www.usip.org/pubs/specialreports/sr117.pdf> (exploring how bribery and corruption within the judiciary and other administrative agencies undermine the rule of law in Afghanistan); Interview with U.S. Embassy-Kabul official, in Kabul, Afg. (Jan. 14, 2007) (on file with author) (“It’s easy to circumvent any local regulations. The normal system [in Afghanistan] is more bribing than rule of law. . . . PSCs are in tight with Afghani officials.”); Interview with Deputy Special Representative in Afghanistan, Council of the European Union, in Kabul, Afg. (Jan. 15, 2007) (on file with author) (noting that the push for new Afghan regulations on PMSCs has been thwarted because enforcement is “highly subject to corruption . . . [It comes down to] buying off the right minister.”); Interview with Senior Political Officer, UNAMA, in Kabul, Afg. (Jan. 18, 2007) (on file with author); Interview with British PSC manager, in the Serena Hotel lobby, Kabul, Afg. (Jan. 18, 2007) (on file with author) (stating that PMSCs get around domestic regulations through the black market and that some Afghan officials have a financial interest in the black market).

tures, that often means operating extra-legally. Critics might argue that PMSCs do not care if they reinforce these negative elements so long as they can fulfill their contract with a higher profit margin. Whichever rationale is true, the effect is that PMSCs often are involved in other violations of international and domestic laws.<sup>90</sup> As a result, despite being hired to reinforce security and stability, their presence may inadvertently reinforce the criminal elements within that society.

A large-scale example of this phenomenon is the way that PMSC hiring practices and cooperation with local warlords have undermined the disarmament progress made in Afghanistan. Many of the large foreign PMSCs hire directly from local warlords. According to a senior political officer with the U.N. Assistance Mission in Afghanistan (“UNAMA”), this significantly undermined the multimillion-dollar disarmament process by allowing warlords to keep their militias active.<sup>91</sup> “They don’t have the same heavy weapons, but . . . you don’t need heavy weapons to terrorize neighbors, commit crimes, maintain control over an area.” Because the warlords are able to provide jobs—a scarce resource in Afghanistan—for those men loyal to them, they have an additional source of power.<sup>92</sup> The UNAMA official said this practice was particularly harmful when PMSCs hired large contingents of former militias in blocks, often under their same former commanders. The American PMSC hired to protect one of the largest road construction projects outside of Kabul, U.S. Protection and Investigations (USPI), has done this most extensively.<sup>93</sup> The UNAMA official described one incident in which the former Governor of Ghazni, who was closely affiliated with local warlords, “borrowed back” 200 men, along with their USPI equipment for two weeks to “settle a score.”<sup>94</sup>

From the perspective of USPI, making a deal with the local warlord may be the most effective (and cheapest) way to ensure the security of the construction company it is hired to protect. For a U.N. or NATO force on a peacekeeping or stabilization mission, long-term stability within the country and maintenance of peace and order are constraining factors that would limit such short-term solutions to a security problem. When short-term stability projects are outsourced, the state client loses control of these types of calculations and the PMSC is free to meet the short-term goal of the project without taking into account the long-term costs or consequences to the state

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90. Bribing local officials and associating with criminal gangs are both violations of international law. See BASSIOUNI, *supra* note 68, at 154, 158.

91. Interview with Senior Political Officer, UNAMA, *supra* note 89.

92. *Id.*

93. *Id.*; see also Barnett R. Rubin, *Saving Afghanistan*, FOREIGN AFF., Jan.–Feb. 2007, at 57, 68 (linking U.S. Protection and Investigations’ hiring practices to a warlord who was also reportedly fired from his Ministry of the Interior (MOI) job because he had another MOI official assassinated in January 2002).

94. Interview with Senior Political Officer, UNAMA, *supra* note 89.

or to international peace and security.<sup>95</sup> Such situations demonstrate that the current use of PMSCs as independent partners in implementing objectives critical to international security and stabilization may create additional problems for the international system. This issue is also obviously related to the problems concerning lack of state responsibility discussed above: if PMSC activities were more tightly controlled and monitored, the same long-term consequences or illegality might not result.

The corporate form of modern security actors and their independent capabilities present unique threats to the international system, particularly in the way that they undermine international and domestic controls on the use of force. At the same time, however, the corporate form and increasing legitimacy of many PMSCs present additional opportunities for regulation. The following section will discuss how a new IHL standard that requires client-states to take responsibility for PMSC compliance with IHL and other international and domestic legal obligations is not only feasible, but is also the best way to counter many of the threats posed by PMSCs.

#### IV. A BETTER REGULATORY APPROACH: INCREASING STATE RESPONSIBILITY FOR NONSTATE PARTNERS UNDER INTERNATIONAL HUMANITARIAN LAW

While the corporate form and advanced capabilities of PMSCs, together with recent state practice in using PMSCs, do pose significant threats to the international system, they may also create opportunities for effective regulation. Because many of these threats stem from the way that PMSCs can weaken state accountability for enforcing IHL and other international laws, the best way to address the threats posed by PMSCs may be to reinforce and strengthen the responsibility of states for the conduct of the private actors they hire. This last section will explore how creating a standard under IHL that openly recognizes the practice of outsourcing to PMSCs for what it is—a strategic tactic of warfare—and requires states to develop accountability and control mechanisms can address some of the threats posed by modern PMSCs.

Many of those states in which PMSCs are incorporated or from which they draw their personnel, notably South Africa, the United States, and the United Kingdom, have tried to tighten domestic regulations. However, even with stronger domestic regulations, accountability problems will still arise because of the transnational nature of the private security sector. PMSCs not only tend to work outside of the states in which they are incorporated, but they also often draw a significant amount of their personnel from third-party states that might not be within the reach of the domestic

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95. This is not to suggest that international actors or other foreign forces always prioritize or perceive long-term stability costs over short-term security needs; however, at the least, creating a sustainable security environment is a more common and prominent goal for these actors than for PMSCs.

regulation of the states in which they are incorporated. As a result, no matter how strict or well-designed a state's domestic regulation is, it likely will not be able to reach all of a PMSC's activities or personnel.

Second, domestic regulation by individual states alone is not enough because of the difficulties in enforcing any regulations or legal liability against these highly mobile and transnational actors. Tougher domestic regulation (or prohibition) by individual states—but not by all states—may create a race to the bottom; because PMSCs can be based out of almost anywhere, they could easily move to the state with the least stringent domestic regulations with little disruption to their business. Further, unless states are able to coordinate their approach, PMSCs can easily evade those domestic legal regulations or liability mechanisms that do exist in their home states. For example, recent attempts by South Africa to ban its citizens or corporations from participating in PMSC work, or mercenarism, have been undermined because of a lack of support by other international actors, notably the United States and the United Kingdom. In 1998, South Africa passed legislation banning South African citizens from engaging in mercenary activity and placing strict licensing restrictions on other types of “foreign military assistance.”<sup>96</sup> An estimated 2,000 to 4,000 South African citizens are working for PMSCs in Iraq,<sup>97</sup> but without cooperation from U.S. or Iraqi authorities, South Africa has been unable to prosecute more than a handful.<sup>98</sup> Without coordinated effort, the home states and client countries cannot hope to constrain the misconduct of businesses that operate thousands of miles away in zones of weak legal accountability.

One possible approach would be for the international community to extend the ban on mercenaries to PMSCs; however, given the number of states that actively rely on PMSCs, there might not be enough political support for an international ban. As described in the section above, many powerful Western states originally opposed the criminalization of mercenarism and still refuse to take part in the relevant instruments prohibiting mercenarism.<sup>99</sup> Support for extending the mercenary ban to PMSCs is even less likely given their extensive use by many powerful countries and international actors, notably the United States, the United Kingdom, and other countries engaged in U.N. missions. Furthermore, with the exception of South Africa, those states that are most involved with PMSCs are already moving toward regulation rather than prohibition. The United Kingdom, the United States,

96. Regulation of Foreign Military Assistance Act 15 of 1998 §§ 2, 4 (S. Afr.).

97. Nathan Hodge, *Army for Hire*, SLATE, Aug. 31, 2006, <http://www.slate.com/id/2148608>.

98. Integrated Regional Information Networks (IRIN), *South Africa: Authorities Target Alleged Mercenaries*, Feb. 4, 2004, available at <http://www.irinnews.org/report.aspx?reportid=48441>.

99. See, e.g., Michael J. Matheson, *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 426 (1987) (establishing the U.S. position that the prohibition on mercenary activity found in article 47 to Protocol I is not a part of customary international law); *supra* notes 51, 56, 60 and accompanying text (describing instances of Western hostility to an international prohibition on the use of mercenaries).

and other NATO partners—many of whom have been both important client-states and often the home countries of PMSCs—have already been moving toward a regulatory approach and thus would be less likely to put up the type of resistance that Western states traditionally posed to the mercenarism ban.<sup>100</sup> Those states in which PMSCs frequently operate, including Iraq and Afghanistan, have also begun to impose regulations on PMSCs rather than banning them outright.<sup>101</sup>

Moreover, without such widespread state support, it would be easy for PMSCs to evade the terms of the ban on mercenarism. As discussed earlier, enforcement of the ban on mercenaries has been weak in the past because it is so easy for PMSCs to get around the definition of mercenaries.<sup>102</sup> For example, given that civilians have traditionally been involved in supporting militaries, where should the international community draw the line between providing food supplies and logistics, or helping provide maintenance and direct operating support to advanced weapons systems? Should PMSCs be permitted to protect a private airport or supply convoys in Iraq, even though they may be more likely to be attacked and thus more likely to be engaged in “defensive” combat, but not permitted to protect the inner line of a military compound or provide advanced intelligence analysis that might be more directly related to military activities but less likely to result in direct combat or IHL violations? If the international community tried to enforce a ban, such definitional ambiguity would make it easy for those states who want to continue using PMSCs to get around the prohibition. Given the number of states that are actively using PMSCs, there likely would be many states that would exploit this loophole, making a ban on mercenarism unlikely to work.

In addition, the fact that PMSCs operate as open corporations and that many seek contracts from international actors who care about their reputation may create opportunities for regulation. PMSCs engage in open recruiting and marketing of their services<sup>103</sup> and thus must comply with operating legal and regulatory regimes.<sup>104</sup> They are at least technically accountable to domestic legal regulations, even if the transnational nature of their business makes these regulations difficult to enforce. Over time, market segmenta-

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100. See generally, HANS BORN, MARINA CAPARINI & EDEN COLE, GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF ARMED FORCES (DCAF), POLICY PAPER NO. 20, REGULATING PRIVATE SECURITY IN EUROPE: STATUS AND PROSPECTS, 4–5, 7–11 (2007) (arguing for broader E.U.-wide regulation of PMSCs and describing some initial regulatory steps taken by E.U. bodies); PERCY, *supra* note 78, at 25–29, 32–33 (summarizing U.S. and British regulatory approaches); Broder & Rohde, *supra* note 20 (describing recent U.S. regulatory proposals).

101. *Id.*; see also Interview with Senior Political Officer, UNAMA, *supra* note 89 (describing efforts between UNAMA and Afghan ministries to develop Afghan regulations and registration procedures for PMSCs).

102. See *supra* notes 63–67 and accompanying text.

103. See, e.g., James Dao, ‘Outsourced’ or ‘Mercenary,’ *He’s No Soldier*, N.Y. TIMES, Apr. 25, 2004, § 4, at 3.

104. This is not to suggest that all PMSCs operate above-board or that all attempt to be perfectly compliant with the law.

tion and reputational incentives have generated a cadre of more credible PMSCs that take efforts to comply with international and domestic laws and regulations and to maintain credibility.<sup>105</sup> Given the opportunities for regulation to be successful and the political hurdles to making a ban effective, the international community should attempt to address the PMSC problem collectively through regulation rather than by extending the prohibition on mercenaries to PMSCs.

Given the role of PMSCs in modern peacekeeping and conflict operations, the most effective coordinated international approach is likely to be the creation of a principle under IHL. Outsourcing certain elements of the logistics, training, security, and technical support for contingency operations is as much a part of modern military strategy as the choice of weaponry, targeting, or other tactical issues. Openly recognizing this under IHL may be more workable than trying to identify PMSCs as mercenaries, combatants, civilians, or other categories that do not exactly describe their role in the international system. It also seems appropriate for the purposes of IHL. Other means and methods of warfare—from the level of restraint that militaries should exercise with regard to collateral damages to the particular type of weapons used to whether reparations should be made to any civilians in response to warfare—are regulated under international humanitarian law. Thus, one feasible solution to some of the issues with PMSC use would be to establish an IHL principle requiring states that used nonstate actors as complements to military operations to establish oversight and control mechanisms that would ensure their compliance with international and domestic laws to the extent possible.

An IHL principle requiring a degree of oversight over PMSCs would ensure that states take a more collective approach toward the global PMSC problem, but still allow states a degree of flexibility in regulating these nonstate actors under their domestic laws. An IHL principle that made it clear that PMSCs may be a lawful tool of warfare if used with appropriate oversight would eliminate some of the current inconsistencies among state approaches—with some states like South Africa trying to ban them and others like the United States and the United Kingdom trying to regulate them. Because the proposed IHL standard would require national interpretation and implementation, states would still have flexibility to provide oversight and regulation that worked with the unique contracting, outsourcing, and registration requirements of their own domestic laws.<sup>106</sup> This is not

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105. Benjamin Perrin, *Promoting Compliance of Private Security and Military Companies with International Humanitarian Law*, 88 INT'L REV. RED CROSS 613, 628–30 (2006) (noting that market segmentation is already creating a cadre of “good firms” and “bad firms”).

106. For an example of how such IHL regulations might be implemented nationally, see *National Implementation of International Humanitarian Law*, 88 INT'L REV. RED CROSS 197 (2006), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-861-p197/\\$File/irrc\\_861\\_Nat\\_Impl\\_DIH.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-861-p197/$File/irrc_861_Nat_Impl_DIH.pdf) (listing national implementing legislation and regulation for laws of war for all states from July to December 2005).

atypical for IHL regulations. IHL often sets out general principles for states to follow without specifying exactly how such principles should be implemented. For example, article 57.2 of Protocol I provides that states parties give “[e]ffective advance warning . . . of attacks which may affect the civilian population, unless circumstances do not permit,” but leaves to the discretion of states parties how to determine what effective advance warning would be in the circumstances of a conflict.<sup>107</sup> The proportionality principle of article 57.2 of Protocol I requires states to refrain from attacks that would result in a disproportionate loss of civilian life relative to the “concrete and direct military advantage anticipated.”<sup>108</sup> States have implemented this principle primarily by developing their own procedures for determining whether or not anticipated civilian casualties would be considered proportionate.

The fact that the international principles themselves are indefinite and leave implementation to states parties does not mean that they are not effective. One counterargument to the suggestion that an IHL principle might improve the accountability of PMSCs globally is that national implementation of IHL is often weak, particularly when it comes to more controversial or politically sensitive issues.<sup>109</sup> While this argument has some merit, an IHL provision may still be useful in driving the issue, solidifying emerging norms, and coordinating state approaches. First, as described above, a negotiated and adopted IHL provision may at least ensure that all states are taking the same approach of regulating rather than banning these actors. Second, an IHL standard at least forces states to consider the issue and to develop some greater level of compliance, even if weak, than if the regulation had not existed.<sup>110</sup> Further, this IHL standard would not be creating a new norm from scratch as much as it would be codifying and reinforcing an emerging state approach toward improving accountability for PMSCs. The trend among states—particularly the client states, home states, and states in which PMSCs operate that are most important to PMSC activities—to regu-

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107. Protocol I, *supra* note 3, art. 57.2.

108. *Id.*

109. For example, many domestic and international critics have argued that the United States has interpreted its obligations under the Convention Against Torture so narrowly as to make the prohibition on torture meaningless. *See, e.g.*, AMERICAN CIVIL LIBERTIES UNION, ENDURING ABUSE: TORTURE AND CRUEL TREATMENT BY THE UNITED STATES AT HOME AND ABROAD 1 (2006), available at [http://www.aclu.org/safefree/torture/torture\\_report.pdf](http://www.aclu.org/safefree/torture/torture_report.pdf) (decrying U.S. “selective interpretation” of its international obligations to justify interrogation techniques of terrorist suspects); *see also* INT’L COMM. OF THE RED CROSS, GENERAL PROBLEMS IN IMPLEMENTING THE FOURTH GENEVA CONVENTION (1998), <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JPF6> (describing some existing problems with the implementation of the Fourth Geneva Convention by states parties).

110. International legal scholarship is replete with theories of how treaty commitments can make an impact on state behavior, regardless of whether they produce direct enforcement of provisions or not. *See, e.g.*, Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT’L L. 171, 173–78 (2003); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1939 (2002); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2599 (1997) (book review).



late rather than ban PMSCs suggests there will be enough political support for this IHL principle to be implemented credibly.<sup>111</sup> Reinforcing this trend with an IHL principle may actually push those states that are already inclined to develop stricter regulations to be more proactive. For example, the United Kingdom has been debating domestic regulatory proposals since the late 1990s, resulting in a government-produced Green Paper in 2002, but it has yet to adopt any concrete legislation.<sup>112</sup> Given this underlying tendency toward a stronger accountability framework, an IHL requirement for stronger oversight and controls may have a real impact in improving domestic regulation.

Beyond the potential to harmonize the international community's approach and to strengthen and reinforce domestic regulatory initiatives, creating an IHL principle may also be important in terms of making it more difficult for states to outsource liability to these private actors. As discussed in the previous section, many of the more serious threats to international humanitarian law and human rights enforcement stem from the fact that states are able to deny accountability for any misconduct by PMSC nationals and have few incentives to prevent or enforce international legal crimes or IHL regulations against these actors. If such a principle were created under IHL and states followed through with implementing legislation or regulations, the act of establishing such controls and recognizing a relationship and a degree of responsibility for these actors may in itself trigger full state responsibility for PMSC actions. If a state is regularly monitoring and ratifying the actions of PMSCs in accordance with certain regulations of war, then if one of those private actors engages in misconduct, the state may be less able to deny responsibility.

The case of David Passaro, a CIA contractor who was successfully prosecuted in the United States for crimes committed while employed in U.S. operations abroad, will demonstrate how these IHL-based regulations and tighter state responsibility mechanisms might improve the accountability of PMSCs. Prosecutors charged Passaro with several counts of assault for beating an Afghan detainee during interrogation on a U.S. base in Afghanistan.<sup>113</sup> Despite the fact that Passaro had beaten the detainee to death, the prosecution could not assert a murder charge and was only able to prevail on one of the counts of felony assault.<sup>114</sup> With the scene of the crime, the witnesses, and other evidence thousands of miles away in a conflict zone, the prosecutor had to rely on other federal agencies with contacts and resources

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111. See, e.g., PERCY, *supra* note 78, at 25–29, 32–33. Additionally, The Afghan Ministries of Interior and Justice are in the process of promulgating regulations for the registration and licensing of all private security organizations, Afghan and foreign. See Copy of proposed regulation, “Law on Activity of Private Security Organizations in Afghanistan,” on file with author (current as of Aug. 2007).

112. See PERCY, *supra* note 78, at 32–33.

113. See *United States v. Passaro*, No. 5:04-CR-211-1 (E.D.N.C. June 17, 2004).

114. Telephone interview with individual involved in the *Passaro* prosecution (Apr. 18, 2007) (on file with author).

in Afghanistan, including those agencies that dispatched an investigator to the scene within 72 hours.<sup>115</sup> Even given these immediate and significant investigatory resources, the prosecution would not have been possible except that the key Afghan witness was willing and able to travel to the United States, and other witnesses who could testify as to the body (because there was no autopsy) were U.S. citizens who could be subpoenaed.<sup>116</sup> Although Passaro used methods that verged on torture or cruel and inhumane treatment,<sup>117</sup> prosecutors never considered charging Passaro with human rights or war crimes violations under the War Crimes Act.<sup>118</sup> This was in significant part due to the additional burdens of proof in these types of charges, such as whether there was an ongoing conflict, whether the victim was a prisoner of war, and whether the accused was acting as an agent of the U.S. government.<sup>119</sup>

Regulations enacted under an IHL principle might have prevented this type of crime by requiring a certain level of oversight and control within the military hierarchy surrounding Passaro. When the United States is party to international treaties regulating the means or methods of warfare, it incorporates the treaties' provisions and amendments into its domestic military or federal legal structure to the extent possible.<sup>120</sup> If a principle were adopted such that states parties must provide oversight and accountability for the PMSCs they employ in contingency operations, the U.S. military would respond by adopting its own interpretation of these standards in its own military code. To take the example of the Passaro case, this might have resulted in greater oversight and review of Passaro's behavior, even though he was not a uniformed service member. The four 82nd Airborne members who testified against Passaro assisted in restraining the detainee and then stood by as Passaro beat the detainee to death over the course of three days.<sup>121</sup>

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115. *Id.* (stating that other U.S. agencies dispatched investigators to the scene within 72 hours and provided significant investigatory resources and cooperation throughout the prosecution).

116. *Id.*

117. See Weigl, *supra* note 1 ("Prosecutors say Passaro created a 'chamber of horrors' for Wali, ordering soldiers not to allow him to sleep, limiting his access to food and water and subjecting him to two consecutive nights of interrogation and beatings. . . . [S]oldiers testified that Passaro kicked Wali in the groin hard enough to lift him off the ground and jabbed Wali in the abdomen with a flashlight.").

118. Telephone interview with individual involved in the *Passaro* prosecution, *supra* note 114.

119. Those close to the case also suggested this was part of the prosecution's strategy to deny Passaro any defense that he was acting under the color of the law. *Id.* To allege war crimes or human rights violations might have implied that Passaro was acting under some governmental authority. *Id.*

120. See, e.g., Dep't of Defense, Directive 5100.77 DOD Law of War Program, para. 5.3.1 (Dec. 9, 1998), available at <http://biotech.law.lsu.edu/blaw/dodd/corres/pdf2/d510077p.pdf> (last visited Nov. 19, 2007) (replaced by Dep't of Defense Directive 2311.01E, DOD Law of War Program, para. 4.1 (May 9, 2006), available at <http://www.dtic.mil/whs/directives/corres/rtrf/231101x.rtf> (last visited Nov. 19, 2007)) (establishing a Department of Defense Laws of War program to implement the laws of war to U.S. involvement in armed conflicts and to apply the "principles and spirit" of the laws of armed conflict in all other contingency operations); War Crimes Act, 18 U.S.C. § 2441 (2000) (making violation by U.S. nationals of the war crimes identified in the 1949 Geneva Conventions a crime under U.S. law).

121. See Andrea Weigl & Matthew Easley, *Passaro Trial Raises Issue of Soldiers' Roles*, NEWS & OBSERVER, Aug. 19, 2006, at A1 ("Not only could the four guards who assisted Passaro have been charged

Those involved in the case said that the U.S. soldiers were hesitant to question Passaro because he was a CIA contractor.<sup>122</sup> However, if the laws of war made a certain degree of oversight a standard of outsourcing critical military functions such as interrogating prisoners, Passaro might never have been given the unquestioned discretion to treat the detainee that way.

Depending on how the IHL principle was implemented in U.S. domestic or military law, it might have given the prosecutor additional tools to prosecute someone in Passaro's position. In the same way that domestic prosecutors sometimes resort to conspiracy or other easier-to-prove charges to convict criminals, proving that care had not been taken in oversight, or that the PMSC had engaged in banned functions, may be easier than establishing murder without an autopsy or necessary witnesses. The soldiers who stood by or higher-up officials who did not provide other oversight mechanisms may be charged with a violation of the laws of war under these newly incorporated IHL prohibitions. A few successful prosecutions on such charges would encourage militaries of countries like the United States—countries that do not like to have the bad press of war crimes accusations—to act more responsibly in terms of the scope and degree of outsourcing.

While this proposal could be effective over an important subset of PMSCs, it could not address all the issues raised by the PMSC phenomenon. First, while such regulation would likely have a significant impact on those PMSCs seeking projects with credible international actors, there will continue to be some unscrupulous PMSCs that will cater to less credible actors and will likely be unreachable by such regulations. Although beyond the scope of this paper, other regulatory initiatives could perhaps focus on amending other provisions of international law—whether those of mercenarism, of criminal gangs, or others—to address these threats. Secondly, regulation may only reach those PMSCs directly contracted by states. Depending on how the interpretation of these proposed IHL provisions develops, both domestically and internationally, state oversight, responsibility, and control could still be obscured by the many different layers of subcontracting. Regulation also may not address those PMSC projects that are encouraged by state actors but not directly funded by them. An example of this type of project is the thousands of PMSCs who are facilitating reconstruction and stabilization efforts in Iraq and Afghanistan but are hired by private actors under contracts or subcontracts.<sup>123</sup> Despite these limitations, the proposed principle would at the very least deal with the accountability issues of a large subset of PMSC activities, as well as address the weakness of IHL in capturing the significance of these nonstate actors in state uses of force. In addition, since many PMSCs concurrently work on projects both for govern-

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as accomplices, but all six of the guards who knew about the abuse could have been charged under military law with failing to report a crime, according to experts and witness testimony.”).

122. Telephone interview with individual involved in the *Passaro* prosecution, *supra* note 114.

123. See *supra* notes 28–29 and accompanying text.

mental and nongovernmental actors, in order to comply with the IHL principle on PMSC oversight and control, and those national regulations implementing this principle, PMSCs may have to enact across-the-board internal rules and practices that improve their overall conduct and compliance with international and domestic law, even for those projects lacking a nexus with a state actor.

## V. CONCLUSION

Actors in the modern security industry are not simply revamped mercenaries. Their resources and their increasingly prominent roles in humanitarian aid, contingency operations, and other military or security operations worldwide present unique and perhaps more troubling challenges for international peace and security. In particular, their corporate form brings with it advanced, independent capabilities that may disable domestic and international restraints on the use of force and may weaken the degree of state responsibility for holding those engaged in its military and security operations responsible for IHL and human rights violations. While these are significant threats to the international system, market forces have consistently been pushing these actors to operate openly and within the constraints of international and domestic law. This is particularly true for those PMSCs whose target clients are credible international actors who care about reputational costs and international legal compliance. Therefore, developing a principle under IHL that would require state clients to establish mechanisms for ensuring that any PMSC to which they outsource complies with international and domestic legal norms and regulations may significantly address the more serious threats posed by PMSCs.

The international community should attempt to define whether and to what extent it considers the private security industry to be a threat and develop a coordinated response. The current ambiguous status, lack of coordinated regulation, and outdated definitions of mercenarism only exacerbate the current threats posed by this industry. If IHL is not able to adapt to these threats by recognizing the role of these nonstate actors in state uses of force, then the availability of such advanced, independent force capabilities may seriously undermine much of the validity and effectiveness of the current state-centered mechanisms governing the use of force.