

HOW TO CLEAR UP BLACKWATER: BRINGING EFFECTIVE REGULATION TO THE PRIVATE MILITARY INDUSTRY

Peter Jenkins

I. INTRODUCTION

Headquartered in Moyock, North Carolina, Blackwater, USA¹ was founded in 1997 by former U.S. Navy SEALs.² Its staff includes former intelligence, law enforcement, and military personnel.³ After the attack on the World Trade Center on September 11, 2001, Blackwater's services were in high demand—by July 2006, approximately one thousand Blackwater employees were operating in Iraq.⁴ The company has provided a variety of protective services in Iraq, including protection for Coalition Provisional Authority (CPA) employees and visiting dignitaries.⁵ For example, Blackwater was contracted to protect Ambassador L. Paul Bremer, one of the highest-profile American targets in Iraq, at the cost of twenty-one million dollars.⁶ The United States' increasing reliance on civilian contractors has allowed Blackwater to grow quickly and make a great deal of money handling jobs that the military and government agencies once did themselves. This company represents a new phenomenon in warfare, and this phenomenon lacks effective regulation.

In the last decade, the development and growth of a global industry known as the privatized military has been one of the most interesting and controversial developments in modern warfare. Privatized military firms (PMFs) currently operate in over fifty countries, in forms ranging from small consulting firms made up of former military officers to large international corporations hiring out small armies.⁷ The U.S. government is among the leading countries involved in the PMF

1. In February 2009, the company changed its name to Xe citing a shift in business focus. See Dana Hedgpeth, *Blackwater Sheds Name, Shifts Focus*, WASH. POST (Feb. 14, 2009) at D01, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/02/13/AR2009021303149_pf.html. For the sake of clarity, this paper will refer to the company as Blackwater because that was the company's name at the time of the events being discussed.

2. JENNIFER K. ELSEA ET AL., CONGRESSIONAL RESEARCH SERVICE, CRS REPORT RL32419, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES (July 11, 2007, updated Aug. 25, 2008) at 7-8 [hereinafter PRIVATE SECURITY CONTRACTORS].

3. *Id.* at 8.

4. Bill Sizemore & Joanne Kimberlin, *Blackwater: On the Front Lines*, THE VIRGINIAN-PILOT, July 25, 2006, available at <http://hamptonroads.com/node/66271>.

5. PRIVATE SECURITY CONTRACTORS, *supra* note 2, at 7-8.

6. Sizemore & Kimberlin, *supra* note 4.

7. P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and*

market, having entered into over three thousand contracts with domestically-based firms, at an estimated value of more than \$300 billion from 1994-2002.⁸

The U.S. government's use of private military contractors has most notably taken place in Iraq following the deployment of stabilizing U.S. military forces, where the role of PMFs has grown from logistical support to providing security elements and accompanying conventional soldiers in combat operations.⁹ Like traditional soldiers, PMF employees incur the risk of injury and death from insurgents in Iraq. U.S. Army data indicates that an increasing proportion of PMF supply convoys has been attacked, rising from 5.5 percent in 2005 to 14.7 percent through May 2007.¹⁰ In response, PMF employees have increased their armaments and taken to firing on suspected attackers.¹¹ The increasing violence surrounding PMFs in Iraq has led to questions regarding the liability of these firms and their employees following instances of misconduct.¹² This paper will address the deficiencies in previous attempts to regulate operations conducted by private soldiers under international law and U.S. domestic law, and will suggest changes which would allow for more effective regulation.

The current problem is that PMFs are operating alongside traditional military forces, but without adequate regulation of their conduct while engaged in frontline operations.¹³ International law has attempted to address this problem by condemning the use of mercenaries.¹⁴ This has been ineffective because the terminology is vague, and difficult to apply to PMFs, which operate in a different fashion than previous generations of hired soldiers.¹⁵ Mercenaries, as defined by the Geneva Convention, are individuals fighting for profit in foreign conflicts not involving their native country.¹⁶ Today's PMFs are essentially corporate entities, operating under contract with traditional military or government intelligence agencies in a variety of roles. U.S. domestic law has also failed to address the problem exemplified in Iraq, because U.S. law has not been applied to private citizens employed by agencies such as the Central Intelligence Agency. One means of addressing the problem could be a rewording of the existing international law

International Law, 42 COLUM. J. TRANSNAT'L L. 521, 522 (2004) [hereinafter *War, Profits, and the Vacuum of Law*].

8. Laura Peterson, *Privatizing Combat, the New World Order*, MAKING A KILLING: THE BUSINESS OF WAR (2002), available at <http://projects.publicintegrity.org/bow/report.aspx?aid=148>.

9. Wm. C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction Over Civilian Contractor Misconduct in Iraq*, 2006 B.Y.U. L. REV. 367, 369.

10. Steve Fainaru, *Iraq Contractors Face Growing Parallel War*, THE WASHINGTON POST (June 16, 2007) at A12, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/15/AR2007061502602.html>.

11. *See id.*

12. *See* Peters, *supra* note 9, at 369.

13. *War, Profits, and the Vacuum of Law*, *supra* note 7, at 524.

14. *Id.*

15. *Id.*

16. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 47, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Additional Protocol art. 47].

regarding mercenaries, such as the Geneva Conventions, so that it applies to PMFs. U.S. domestic law, namely the MEJA and UCMJ, might also be changed in order to regulate private agents hired not only by the United States military, but also by other government organizations.

PMFs are operating alongside traditional military forces in Iraq, but without adequate regulation of their conduct while engaged in frontline operations. The domestic laws of Iraq are currently in transition and are hindered by the presence of U.S. military and government agencies in the Middle East. U.S. law regulating the conduct of soldiers and government agents in overseas operations is at best limited in its applicability to civilians serving alongside those traditional soldiers and agents. Furthermore, the PMF industry and the U.S. government “hastily executed” a majority of their contracts at the outset of U.S. operations in Iraq. This resulted in PMFs operating under only cursory government oversight, while maintaining an ambiguous legal status in terms of both criminal and civil liability.

Proposed solutions to this problem include a total ban on PMF activity, developing a licensing regime for PMF services, and allowing the PMF industry to establish a voluntary code of conduct. This paper argues that these proposed solutions will prove either impractical or ineffective, and that the logical solution is to modify existing international definitions of the term mercenary to include PMF operatives. This paper also argues that redefining the term mercenary will allow the international community to regulate PMF operations through international agreements such as the Geneva Convention and the UN’s International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

II. THE EVOLUTION OF THE PMF PROBLEM

Private security companies developed only recently in modern warfare. In fact, they are so recent that the international legal system has not yet caught up to the PMF trend. In early attempts to formalize laws of war, such as the Hague Convention in 1907, the international community distinguished the conduct of individuals from government action in the international sphere.¹⁷ This meant that individuals who contracted with a foreign nation were not liable for international crimes; instead, they were regarded as members of the traditional military representing their employer nation.¹⁸

The term “mercenary” gained prominence following the 1949 Geneva Conventions, which gave private military contractors the same rights to fair treatment when held as prisoners of war that were given to traditional soldiers as long as these mercenaries were integrated into a legally defined state military or warring party.¹⁹ Mercenary units became infamous for their role in a number of

17. Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V), Oct. 18, 1907, 36 Stat. 2310, 1 Bevans 654, available at <http://www.yale.edu/lawweb/avalon/lawofwar/hague05.htm>.

18. Garth Abraham, The Contemporary Legal Environment, in *The Privatisation of Security in Africa* 89 (Greg Mills & John Stremlau eds., 1999).

19. *War, Profits, and the Vacuum of Law*, *supra* note 7, at 526-527 (internal citation

violent coups in Africa during the 1960s and 1970s, prompting the United Nations (U.N.) to pass and codify a resolution condemning the employment of mercenaries in national liberation movements and obligating nations to prevent armed groups from staging incursions into other countries.²⁰ The Geneva Convention followed suit, rejecting mercenaries in its 1977 Additional Protocols in Article 47 of Protocol I,²¹ which defined a mercenary and stated that a mercenary shall not be given the rights of a legal combatant or prisoner of war.²²

Since the Geneva Convention does not present an obstacle to their growth, PMFs emerged as part of a global service industry, undertaking roles once occupied by the traditional military. The United States has increasingly employed PMFs since the end of the Vietnam War, beginning with the hiring of non-military contractors to fill gaps in logistical support operations in the mid-1980s.²³ Since that time, the scope of the interaction between PMFs and traditional U.S. military forces has broadened dramatically. Today, PMFs are involved in nearly every aspect of the U.S. Army's daily operations: they are responsible for the day-to-day operations of the Army Reserve Officer Training Corps programs; they write Army field manuals; they teach graduate-level courses in military strategy and staff planning to career Army officers; and they provide essential maintenance and repair in combat zones.²⁴ PMFs hired by other countries have gone so far as to take on actual combative roles, operating in countries such as Angola, Sierra Leone, Papua New Guinea, and Indonesia.²⁵

PMFs have relatively small infrastructures, allowing them to recreate or relocate themselves without much difficulty.²⁶ The nature of PMFs affords them a number of tactics that allow them to avoid domestic regulation. If its local government shows itself inhospitable to its business, a PMF can transfer its operation to a more receptive country.²⁷ If it chooses to remain in its present country, a PMF can merely adopt a new corporate structure or identity when presented with a legal obstacle.²⁸ The contracts between PMFs and the nations for which they work may also serve as a roadblock to holding them liable under domestic criminal law. In many instances, their contracts with hiring nations are bolstered by government orders permitting them a great deal of leeway in both

omitted).

20. Anthony Mockler, *NEW MERCENARIES* 62 (1985); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, 124, U.N. Doc. A/8082 (Oc. 24, 1970) [hereinafter Declaration on Principles].

21. Additional Protocol art. 47, *supra* note 16.

22. *Id.*

23. Peters, *supra* note 9, at 380.

24. P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 123-124 (2003) [hereinafter *CORPORATE WARRIORS*].

25. *Id.* at 93.

26. *War, Profits, and the Vacuum of Law*, *supra* note 7, at 535.

27. *Id.*

28. *Id.*

their freedom to operate and in what degree of force they may use in combat or policing situations, as seen during Blackwater's involvement in Iraq.²⁹

The role of PMFs operating alongside traditional U.S. military forces in Iraq has broadened since stabilizing forces entered the country in 2002. Prior to the United States beginning operations in Iraq, the United States primarily used PMFs to enhance logistical and transportation capabilities, but PMFs have since been authorized to provide operational functions as well.³⁰ PMFs have provided a variety of protective services in Iraq, including protection for CPA employees and visiting dignitaries.³¹ PMFs were assigned to armed convoy operations through hostile territory, including the organization of their own security details operating in conjunction with the transporters.³² Furthermore, heavily armed PMF employees serving as translators and interrogators have frequently been assigned to accompany traditional, active servicemen during actual combat operations.³³

Since entering these new roles, PMFs like Blackwater have been noted as fostering a "cowboy culture" in their work, and gaining a reputation for "trigger happy" behavior that has often resulted in strife between PMF employees and Iraqi civilians.³⁴ Violence between PMF employees and Iraqis has led to deaths on both sides.³⁵ On March 31, 2004 in Fallujah, Iraq, four American men employed by Blackwater were ambushed and killed, and their bodies were later mutilated and burned.³⁶ Days later, on April 4, 2004, Blackwater personnel reportedly fought an intense gun battle in Najaf in defense of a U.S. government headquarters.³⁷ On September 16, 2007 as many as seventeen Iraqi citizens were killed in a shooting attributed to Blackwater employees.³⁸ Groups in Iraq and other nations have gone

29. PRIVATE SECURITY CONTRACTORS, *supra* note 2 at 16.

30. See U.S. Dep't of Defense, Instruction 3020.41, Contractor Personnel Authorized to Accompany the Armed Forces para. 6.3.5 (Oct. 3, 2005), available at <http://www.dtic.mil/whs/directives/corres/pdf/302041p.pdf>.

31. PRIVATE SECURITY CONTRACTORS, *supra* note 2, at 7-8.

32. See Daniel Bergner, *The Other Army*, N.Y. TIMES, Aug. 14, 2005, at 28; Jonathan Finer, *Security Contractors in Iraq Under Scrutiny After Shootings*, WASH. POST, Sep. 10, 2005, at A1; Nathan Hodge, *Army Chief Notes 'Problematic' Potential of Armed Contractors on the Battlefield*, DEF. DAILY, Aug. 26, 2005; David Washburn & Bruce V. Bigelow, *In Harm's Way: Titan in Iraq*, SAN DIEGO UNION TRIB., Jul. 24, 2005, at A1.

33. See Washburn & Bigelow, *supra* note 32.

34. Steve Goldstein, *Iraqi victims' kin sue Blackwater*, THE PHILADELPHIA INQUIRER (Oct. 12, 2007), available at http://www.philly.com/inquirer/world_us/10498207.html [hereinafter Goldstein] (quoting Susan L. Burke, lead attorney in the suit against Blackwater).

35. See *id.* (stating that "[a] report by the Democratic majority staff of the House Committee on Oversight and Government Reform said Blackwater employees had engaged in nearly 200 shootings in Iraq since 2005 and frequently fired their guns from moving vehicles without stopping to count the dead or assist the wounded.").

36. See Sewell Chan, *U.S. Civilians Mutilated in Iraq Attack: 4 Die in Ambush; 5 Soldiers Killed by Roadside Blast*, WASH. POST, Apr. 1, 2004, at A1.

37. PRIVATE SECURITY CONTRACTORS, *supra* note 2, at 14.

38. Goldstein, *supra* note 34.

so far as to allege that PMFs like Blackwater are guilty of war crimes.³⁹ Recently, the Iraqi government has taken notice of the problem, and has ordered Blackwater out of the country.⁴⁰ However, this order may prove futile because when Blackwater entered Iraq, it did so while the CPA was in place.⁴¹ Under CPA orders civilian contractors, such as those working for PMFs, are exempt from Iraqi laws for actions related to their contracts.⁴² Blackwater has reportedly started training former Chilean commandos, some of whom are veterans of the Pinochet years in Chile, for duty in Iraq.⁴³

III. ATTEMPTS TO REGULATE PRIVATE MILITARY CONTRACTORS BY THE INTERNATIONAL COMMUNITY

Early articulations of international laws of war in the modern state system were devoid of regulations or prohibitions on the conduct of private military actors.⁴⁴ The 1907 Hague Convention imposed no obligation on sovereign states to restrict their citizens from offering their services to foreign, belligerent countries.⁴⁵ The only imposition set forth by the Hague Convention limited individuals fighting for pay on behalf of foreign nations from simultaneously claiming the neutrality protections of their native country.⁴⁶ This notion that individual persons are distinguished from their governments in the eyes of the international community made it possible for the private military contractor or “soldier of fortune” to earn a living fighting in other countries’ wars.⁴⁷

Later attempts under international law to regulate PMFs in the mid to late Twentieth Century include the Geneva Convention Protocol⁴⁸ and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.⁴⁹ The Geneva Convention openly condemned the mercenary practice

39. Anne Penketh, *Blackwater Faces War Crimes Inquiry After Killings in Iraq*, THE INDEPENDENT (Oct. 12, 2007).

40. See Steven R. Hurst and Qassim Abdul-Zahra, *U.S. talking to Iraq about firm’s ouster*, THE PHILADELPHIA INQUIRER (Oct. 15, 2007), available at http://www.philly.com/inquirer/world_us/10544747.html.

41. PRIVATE SECURITY CONTRACTORS, *supra* note 2, at 6.

42. See CPA Order 17, as amended June 17, 2004, available at http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf.

43. Barry Yeoman, *Need an Army? Just Pick Up the Phone*, Op-Ed, N.Y. TIMES, April 2, 2004.

44. See *War, Profits, and the Vacuum of Law*, *supra* note 7, at 525.

45. *Id.* at 526.

46. Garth Abraham, *The Contemporary Legal Environment*, in *The Privatization of Security in Africa* 89 (Greg Mills & John Strelau eds., 1999).

47. Soldiers of fortune are acknowledged as members of private militaries operating for any government, corporation, or individual willing to pay them for their services. See Ellen L. Fry, *Private Military Firms in the New World Order: How Redefining “Mercenary” Can Tame the “Dogs of War”*, 73 Fordham L. Rev. 2607, 2622 (2005).

48. See Additional Protocol art. 47, *supra* note 16.

49. International Convention against the Recruitment, Use, Financing, and Training of Mercenaries, Dec. 4, 1989, U.N. GAOR, 72nd plen. mtg., U.N. Doc A/Res/44/34 (1989),

in 1977 when it denied mercenaries the rights afforded prisoners of war.⁵⁰ The establishment of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries in 1989 is the United Nations' most recent attempt to bring regulation to the use of private soldiers; it opposes the use of foreign, non-traditional soldiers in national liberation movements and incursions into other countries.⁵¹ These legal regimes exemplify the sparse body of law that exists in regard to PMFs, a body of law which in its current state is ill-equipped to handle the complex issue presented by the rapid and recent growth of the PMF industry.

The Geneva Convention first addressed the presence of private military actors in the realm of organized warfare in 1949.⁵² The 1949 Convention provided for standardized fair treatment of prisoners of war (POW), and established a set of rules for proper wartime conduct.⁵³ The Convention did not attempt to control or ban private actors separately from the traditional military; as long as those private actors were integrated into a legally defined, traditional armed force they were entitled to the same POW rights and protections given to traditional soldiers.⁵⁴ Protection as a POW is important to all soldiers, whether traditional or private, because it gives the right-holder special treatment and privileges such as immunity from prosecution for normal acts of war.⁵⁵

The mercenary industry grew during the 1960s, and in response the Geneva Convention took the position that mercenaries are not legal combatants and are therefore not entitled to the rights afforded prisoners of war.⁵⁶ The 1977 Additional Protocols, Article 47 of Protocol I distinguished a "mercenary" from other combatants.⁵⁷

available at <http://www.un.org/documents/ga/res/44/a44r034.htm> [hereinafter International Convention].

50. Additional Protocol art. 47, *supra* note 16.

51. International Convention, *supra* note 49.

52. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *available at* <http://www.unhchr.ch/html/menu3/b/91.htm>.

53. MARK MALAN & JACKIE CILLIERS, INST. FOR SEC. STUD., *MERCENARIES AND MISCHIEF: THE REGULATION OF FOREIGN MILITARY ASSISTANCE BILL*, (1997), *available at* <http://www.iss.co.za/Pubs/PAPERS/25/Paper25.html>.

54. Garth Abraham, *The Contemporary Legal Environment*, in *The Privatization of Security in Africa* 90 (Greg Mills & John Stremlau eds., 1999).

55. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 52, art. 85, 6 U.S.T. at 3384, 75 U.N.T.S. at 202.

56. Additional Protocol art. 47, *supra* note 16.

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

The declaration that mercenaries essentially have forfeited their rights under the Geneva Convention's humanitarian laws can be viewed as a deterrent or punitive measure for those considering employment as private soldiers. However, its focus is not on prevention and punishment of those joining mercenary forces.⁵⁸ Instead, Protocol I focuses on defining who is and who is not eligible for humane treatment once captured by an opposing military force.⁵⁹

The UN first addressed the use of private soldiers in the 1970 Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States.⁶⁰ Under this Declaration, the UN obligated every state to prevent the organization of armed groups for incursion into other countries.⁶¹ In a sense, this outlawed the mercenary profession. However, because the UN left the responsibility of enforcing the Declaration solely with domestic state governments, the practical effect of the Declaration has been relatively weak.⁶² The rapid and recent growth of the PMF phenomenon has nearly rendered the Declaration moot.⁶³

The 1989 International Convention against Recruitment, Use, Financing, and Training of Mercenaries was a direct attempt to curb the use of private armed forces in the domestic affairs of foreign countries.⁶⁴ In what marks a step in the regulation movement, the International Convention's definition of "mercenary" was more expansive than the Geneva Convention's definition set forth an expansive definition of the term "mercenary."⁶⁵

The global community did not receive the Convention well, and analysts have criticized it for its lack of a monitoring system and vagueness.⁶⁶ The Convention

58. *Id.*

59. *Id.*

60. Declaration on Principles, *supra* note 20.

61. *Id.*

62. Abraham, *supra* note 18, at 92.

63. *Id.*

64. International Convention, *supra* note 49.

65. *Id.* at art. 1 §1-2 (stating in § 1 that a mercenary is any person who "(a) Is specially recruited locally or abroad in order to fight in an armed conflict; (b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party; (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; (d) Is not a member of the armed forces of a party to the conflict; and (e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces". In addition, Article 1 §2 states that "a mercenary is also anyone who, in other situation[s] (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at [o]verthrowing a Government or otherwise undermining the constitutional order of a State; or [u]ndermining the territorial integrity of a State; (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation; (c) Is neither a national nor a resident of the State against which such an act is directed; (d) Has not been sent by a State on official duty; and (e) Is not a member of the armed forces of the State on whose territory the act is undertaken").

66. *War, Profits, and the Vacuum of Law*, *supra* note 7, at 531 ("[T]he [International] Convention did not receive the requisite twenty-two state ratifications for over a decade—Costa

stumbled because it lacked a means of monitoring the mercenary activities which it defined. The definitions themselves also faced criticism, as their vagueness made it difficult to ascertain whether an individual or organization met the “mercenary” requirements. These problems delayed the ratification of the Convention until 2001.⁶⁷ Ratification requires twenty-two signatories; Costa Rica became the twenty-second nation to ratify the Convention in September 2001.⁶⁸ The Convention suffers not only from the long delay in ratification, but also from the lack of support from major international powers.⁶⁹ Those nations which ratified the Convention are relatively small and lack influence in the global community.⁷⁰ Moreover, many of those signatory countries benefited from the employment of mercenary forces in the past. When these problems are viewed in conjunction with the fact that not one person has been prosecuted under the Convention since its ratification,⁷¹ its legal impact has been negligible.⁷²

IV. PROBLEMS WITH INTERNATIONAL LAW

PMFs are relatively new entities; nevertheless, the concept of “fighting for hire” is an old and recognized concept.⁷³ International law has recognized that there are problems involved with the use of mercenaries by nations engaged in either foreign or domestic conflict, and has addressed the issue through resolutions, conventions, and the laws of war.⁷⁴ Both the Geneva Convention and the United Nations have taken positions on the matter, the Geneva Convention through additions to its laws of war regarding prisoners of war, and the UN through prohibitions on the recruitment of foreign, private soldiers.⁷⁵ However, current international law regarding “soldiers for hire” has shown itself to be either ineffective or inapplicable when discussed as an attempt to regulate today’s “incorporated” PMFs.

Rica became the twenty-second in September 2001. . . . Industry analysts have found that the Convention, which lacks any monitoring mechanism, has merely added a number of vague, almost impossible to prove, requirements that all must be met before an individual can be termed a mercenary and few consequences thereafter. In fact, the consensus is that anyone who manages to get prosecuted under ‘this definition deserves to be shot- and his lawyer with [him].’”).

67. *Id.*

68. FOREIGN AND COMMONWEALTH OFFICE, *MILITARY COMPANIES: OPTIONS FOR REGULATION*, HC 577 (2002), at 22 [hereinafter Green Paper].

69. *War, Profits, and the Vacuum of Law*, *supra* note 7, at 531.

70. *Id.*

71. The International Convention calls for extradition agreements between signatory countries, under which an individual who commit offenses under the International Convention would be prosecuted under the laws of his or her native country. *See* International Convention, *supra* note 49, at art. 9, art. 15.

72. *War, Profits, and the Vacuum of Law*, *supra* note 7, at 531.

73. *See, e.g., Id.* at 525 (stating that “private, profit-motivated military actors are as old as the history of organized warfare”).

74. *See, e.g.,* Additional Protocol *supra* note 16, art. 47; International Convention, *supra* note 49; Declaration of Principles, *supra* note 20.

75. Additional Protocol *supra* note 16, art. 47; International Convention, *supra* note 49.

These modern organizations do not find it difficult to avoid having the label of “mercenary” applied to them or their employees, even on an individual basis.⁷⁶ In fact, one PMF insider stated that anyone who is even prosecuted under existing laws “deserves to be shot and their lawyer beside them.”⁷⁷ Describing PMFs as mere soldiers of fortune or archetypal mercenaries ignores the fact that the PMF industry is actually a broad spectrum of companies. PMF services range from providing full-scale, fully armed combat personnel to entirely non-combat support roles.⁷⁸ International law does not adequately deal with this wide variety of private military actors.⁷⁹ Instead, it is aimed only at individuals working against national governments or those making incursions into other countries.⁸⁰

The organized, corporate entity known as the PMF represents a response to the international community’s intolerance of mercenaries. The Geneva Convention’s anti-mercenary language focuses on subjective intent in identifying mercenaries, thus, there is a lack of objective standards by which to prove a private foreign soldier’s intentions.⁸¹ According to the Geneva Convention, an individual is not a mercenary unless his/her intention is to enter a foreign country and fight, with his/her motivation being personal financial gain.⁸² Essentially, any foreign soldier contracted to fight for another nation can argue that he was motivated by some factor other than money, such as desire to help a nation in combat, thrill-seeking, or religious rewards.⁸³ Additionally, international treaties such as the Geneva Conventions assume that a private agent will be hired to fight in a specific conflict.⁸⁴ However, many PMFs contract their employees based on periods of time and transfer them from one area of operation to another during the length of the contract.⁸⁵ The ease with which one can avoid meeting the international legal standard of “mercenary” has led the British government to go so far as to conclude that “[serving] as a mercenary is not an offense under international law.”⁸⁶

76. CORPORATE WARRIORS, *supra* note 24, at 40.

77. *Id.* at 238 (citing private correspondence).

78. Deven R. Desai, *Have Your Cake And Eat It Too: A Proposal For A Layered Approach To Regulating Private Military Companies*, 39 U.S.F. L. REV. 825, 837 (2005).

79. *See War, Profits, and the Vacuum of Law*, *supra* note 7, at 531 (“the existing laws do not adequately deal with the full variety of private military actors”).

80. *See, e.g.*, Additional Protocol *supra* note 16, art. 47; International Convention, *supra* note 49; Declaration on Principles, *supra* note 60.

81. *See* Additional Protocol *supra* note 16, art. 47 (stating that a mercenary is any person who “is motivated to take part in the hostilities essentially by the desire for private gain”).

82. *Id.*

83. Memorandum from Samia K. Aoul et al. to The Special Rapporteur on the Use of Mercenaries of the Human Rights Comm’n of the United Nations, [The] Minister of Foreign Affairs and Int’l Commerce of Canada, and Canada’s Ambassador to the United Nations (Feb. 2000), available at http://www.er.uqam.ca/nobel/ieim/IMG/pdf/spiral_en.pdf; *see also* JESSICA STERN, *TERROR IN THE NAME OF GOD: WHY RELIGIOUS MILITANTS KILL* (2003) (discussing the overlap of religious and economic motivations for combat).

84. *See* Additional Protocol art. 47, *supra* note 16 (defining a mercenary as one who is “specially recruited...to fight in an armed conflict”).

85. *War, Profits, and the Vacuum of Law*, *supra* note 7, at 532.

86. REPORT OF THE COMMITTEE OF PRIVY COUNSELORS APPOINTED TO INQUIRE INTO THE RECRUITMENT OF MERCENARIES, 1976, Cmnd. 6569 at 10.

It is difficult to determine what constitutes “participation” in a conflict under international law. PMF services include military training, consulting, logistics, and technical support.⁸⁷ Arguably, PMFs and their employees would not fall under the authority of mercenary-focused international treaty regimes when operating in these capacities because they do not involve direct participation in military conflicts.⁸⁸ Furthermore, the contractual status of PMFs and their employees makes it difficult to determine their level of participation. PMF employees do not act as individuals, rather they are part of the corporate entity which organizes their activities; they do not act independently because they are liable to their superiors, who ultimately report to the client.⁸⁹ PMFs are under a duty to their clients and bound by formal contracts, arguably making them “quasi-state actors in the international arena, [taking] them outside the mercenary concerns of the international community.”⁹⁰

The Geneva Conventions do not appear to forbid the use of PMF employees from acting in the role of civil police in occupied territories, a role in which they could be authorized to use force when necessary to defend people or property. Given the fluid nature of the current situation in Iraq, it can be difficult to discern PMF employees operating in law enforcement roles from those engaging in military combat operations. Determining the nature of the Iraq conflict is crucial because the status of PMF employees under the Geneva Conventions may be contingent on whether the situation in Iraq is deemed an armed conflict.⁹¹ If their participation constitutes combat in an armed conflict, then PMF employees would be considered lawful targets for enemy combat forces and could be held liable under the enemy’s criminal laws.⁹² However, if the Iraq conflict is viewed as a non-armed conflict within the meaning of Common Article 3 of the Geneva Conventions, customary international law will not distinguish between unlawful

87. See PRIVATE SECURITY CONTRACTORS, *supra* note 2, at 6-7.

88. See CORPORATE WARRIORS, *supra* note 24, at ch. 7.

89. Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT’L L. 75, 92 (1998).

90. *Id.* at 145.

91. See Capt. Daniel P. Ridlon, *Contractors or Illegal Combatants? The Status of Armed Contractors in Iraq*, 62 A.F. L. REV. 199, 204 (“If the conflict is considered an international armed conflict, then the entire elaborate system of International Humanitarian Law embodied in the Geneva Conventions and other relevant treaties apply to the conflict. If, on the other hand, the conflict is considered an internal armed conflict, the conflict is governed by a much less elaborate legal framework.”).

92. The Army discourages the use of contractors in roles that could involve them in actual combat. Major Brian H. Brady, *Notice Provisions for United States Citizen Contractor Employees Serving With the Armed Forces of the United States in the Field: Time to Reflect Their Assimilated Status in Government Contracts?*, 147 MIL. L. REV. 1, 62 (1995) (citing Department of the Army, AR 700-137, Army’s Logistics Civil Augmentation Program (LOGCAP) ¶ 3-2d(5)(1985) (stating that “[c]ontractors can be used only in selected combat support and combat service support activities. They may not be used in any role that would jeopardize their role as noncombatants”)).

and lawful combatants.⁹³ Therefore, PMF employees captured by enemy forces during combat would be entitled to Common Article 3's minimum standards of protection, but their right to engage in the hostilities would be determined based on the predominant local laws.⁹⁴ In the case of PMF employees operating in Iraq, this

would mean that Iraqi law, and CPA orders that have not been rescinded, would apply to cases involving PMF employees.⁹⁵

V. THE POSSIBILITY OF REGULATION UNDER IRAQI LAW

Civilian contractors have played an increasingly significant role in U.S. operations, including PMFs operating in front-line operations alongside standard military personnel.⁹⁶ International treaty regimes such as the Geneva Conventions and UN Resolutions regarding mercenaries have proven ineffective in regulating PMF activity in foreign countries, leaving the Iraqi government with the task of attempting to regulate PMF activity within its borders through its own domestic law. As a result, PMFs currently operating in Iraq have essentially been freed from liability under Iraqi law by the CPA.⁹⁷

The CPA was established after Saddam Hussein and the Baath Party were ousted by Coalition forces to help orchestrate the transition of power for the Iraqi people.⁹⁸ In 2003, the CPA proclaimed that under "relevant UN Security Council resolutions, including . . . the laws and usages of war," it would "exercise power of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability."⁹⁹ The CPA was given all necessary authority to achieve its

93. Common Article 3, which is expressly applicable only to conflicts "not of an international nature, has been described as "a convention within a convention" to provide a general formula covering respect for intrinsic human values that would always be in force, without regard to the characterization of the parties to a conflict might give it. See Jean Pictet, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 32 (1975). Common Article 3 does not provide for POW status. Its protections extend to all persons who are not or are no longer participating in combat, and does not distinguish between international and non-international armed conflicts.

94. PRIVATE SECURITY CONTRACTORS, *supra* note 2, at 13.

95. *Id.* at 18.

96. Details of such operations have been difficult to obtain, as the level of collaboration between PMFs and standard military units is often either unclear or unrevealed. See, e.g., Michael Duffy, *When Private Armies Take to the Front Lines*, TIME, Apr. 12, 2004, available at <http://www.time.com/time/magazine/article/0,9171,1101040412-607775,00.html> (discussing an incident during which four Blackwater operatives were killed in Fallujah and U.S. military officials were "fuzzy" about the nature of the mission).

97. James Cox, *Last-Minute Decisions in Iraq Confuse Contractors*, USA TODAY, June 29, 2004, at B1, available at http://www.usatoday.com/money/world/iraq/2004-06-28-contractors_x.htm.

98. See Coalition Provisional Auth. Reg. No. 1 §§ 1-3 (May 16, 2003), available at http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf.

99. *Id.*

objectives.¹⁰⁰ When established, the CPA kept all Iraqi laws in place that existed as of April 16, 2003, as long as those laws did not interfere with the obligations or rights of the CPA.¹⁰¹

The CPA entered Iraq under serious time constraints, as it had to quickly establish some form of legal stability in Iraq,¹⁰² therefore it used the existing Iraqi Penal Code as the foundation for a modern criminal legal system.¹⁰³ CPA Order Number 7 states that “[w]ithout prejudice to the continuing review of Iraqi laws, the Third Edition of the 1969 Iraqi Penal Code with amendments . . . shall apply.”¹⁰⁴ While it retained the Iraqi Penal Code, the CPA suspended some methods of justice used during the Baath regime, such as torture and inhuman treatment.¹⁰⁵ Under the Iraqi Penal Code, murder is punishable by life in prison or death, depending on the nature of the act.¹⁰⁶ For example, an individual can receive the death penalty under Iraqi law, if the “killing is premeditated” or “[i]f the offender intends to kill two or more people and does so as a result of a single act.”¹⁰⁷

Accordingly, it appears that both both Iraqi insurgents and PMF employees could be held liable for the deaths which have occurred during operations in Iraq. However, while the CPA limits who is authorized to carry weapons, the language of Order Number 3 permits not only Iraqi and Coalition security forces to do so, but also allows other groups and individuals that are “authorized to carry weapons by the [CPA].”¹⁰⁸ Additionally, Order Number 3 permits the Ministry of the Interior to license PMFs to possess and use firearms and military weapons in the course of their duties, including while in public places.¹⁰⁹

Since its revision on June 27, 2004, CPA Order Number 17 has exempted civilian contractors from Iraqi law for acts related to their contracts.¹¹⁰ Order Number 17 provides that “contractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their [c]ontracts.”¹¹¹

100. *Id.* §1.

101. *Id.* §2.

102. Michael M. Farhang, *Reconstructing Justice: The Coalition Provisional Authority Took Giant Steps to Guarantee Iraq a Functioning Criminal Justice System*, L.A. LAW., July-Aug. 2004, at 45-46.

103. *Id.*

104. Coalition Provisional Auth. Order No. 7 § 2 (June 10, 2003), available at <http://www.aina.org/books/cpapenalcode.htm>.

105. Farhang, *supra* note 102, at 46.

106. See Iraq Penal Code, No. 111 ¶ 223(1) (1969), available at [http://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/db616b3e179d6210285256d0a006391f1/Body/M2/iraqipenal0code0of01969\(americaneng\).doc?OpenElement](http://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/db616b3e179d6210285256d0a006391f1/Body/M2/iraqipenal0code0of01969(americaneng).doc?OpenElement).

107. *Id.* ¶ 406(1)(a),(f).

108. PRIVATE SECURITY CONTRACTORS, *supra* note 2, at 15.

109. *Id.*

110. *Id.* at 16.

111. See Coalition Provisional Auth. Order No. 17 (amended June 17, 2004), available at

Contractors also receive immunity from Iraqi legal processes for acts performed under their contracts.¹¹² It seems that the only limitation the CPA places on PMFs operating in Iraq is to prohibit them from conducting law enforcement activities, because annexes to CPA memorandums providing for registration and regulation of PMFs operating in Iraq prohibit PMF employees from conducting “law enforcement activities” and from joining traditional military forces in “combat operations” generally.¹¹³ But the CPA permits these same employees to “stop, detain, search, and disarm” Iraqi civilians where “the employees’ safety requires it or if such functions are specified in the contract,” and to join combat operations in “self-defense or in defense of persons as specified in their contracts.”¹¹⁴

The effects of the CPA on Iraqi law may soften in the near future, allowing the Iraqi government to exercise greater authority over PMF activity. The CPA signed its last Order on June 28, 2004, dissolving the CPA and fully transferring all governing authority to the Iraqi Interim Government.¹¹⁵ Following the CPA’s dissolution, the Iraqi Interim Government has been responsible for governing Iraqi affairs including security, welfare, national elections, and economic growth.¹¹⁶ It would appear that the Iraqi government is gaining a minimal level of authority over PMFs operating on its soil, as private contractors must now “show the Iraq Ministry of the Interior that they have adequate insurance; they must submit to semiannual audits; and they must satisfy a host of other requirements to prove they’re substantive, law-abiding businesses.”¹¹⁷ However, the Iraqi Interim Government was not allowed to enter into agreements that “alter the destiny of Iraq” or change the Transitional Administrative Law; this limitation meant that only elected officials were empowered to amend the law.¹¹⁸ In addition, the United States remains active in the country both in military force and through agencies such as the Project and Contracting Office, which oversees many resources allocated to the Iraq rebuilding efforts.¹¹⁹ Newly elected President Obama and his

http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf.

112. *Id.*

113. Memorandum, L. Paul Bremer, Administrator of the Coalition Provisional Authority (CPA), Registration Requirements for Private Security Companies, 16-17 (June 26, 2004), *available at* http://www.iraqcoalition.org/regulations/20040626_CPAMEMO_17_Registration_Requirements_for_Private_Security_Companies_with_Annexes.pdf.

114. *Id.* at Annex A(5)(b), (6).

115. Coalition Provisional Auth. Order No. 100 § 1 (June 28, 2004), *available at* http://www.iraqcoalition.org/regulation/20040628_CPAORD_100_Transition_of_Laws_Regulations_Orders_and_Directives.pdf.

116. *See* Press Release, Iraqi Interim Government Announcement Ceremony Press Packet, *available at* www.cpa-iraq.org/government/press_packet.pdf.

117. John Helyar, *Fortunes of War: A Mercenary’s Dream at the Outset of the War, Iraq is Turning into a Difficult Market for Security Firms. Most of Their Problems Would be Familiar to Any Startup*, FORTUNE, July 26, 2004, at 80, *available at* http://money.cnn.com/magazines/fortune/fortune_archive/2004/07/26/377180/index.htm.

118. *Id.*

119. *See* Iraq Project and Contracting Office Website, http://iraq.usembassy.gov/iraq/iraq_pco.html.

administration have announced plans to withdraw U.S. combat troops from Iraq by August 2010,¹²⁰ and this will presumably include a withdrawal of PMF forces operating under contract with the United States. However, this plan also calls for a contingent of 30,000-50,000 troops to remain in Iraq to advise and train local security forces.¹²¹ In the meantime it is unlikely that the United States government will allow the emerging Iraqi government to gain authority over PMFs who are under contract with U.S. military and government agencies and operating on Iraqi soil.

VI. ATTEMPTS BY THE UNITED STATES TO REGULATE PMFS

In addition to the international community's attempts to regulate the use of privately hired soldiers through conventions,¹²² there have also been attempts at establishing regulation of PMFs, under the domestic laws of the United States.¹²³ The United States has followed the example of the international community in focusing on prohibiting mercenary activity, which in turn presents a problem similar to those the international community faced in regulating the use of private soldiers.¹²⁴ Current American legislation does not recognize or define the PMF industry; instead it focuses on preventing the recruitment and deployment of mercenaries and regulating the actions of members of the traditional U.S. military.¹²⁵ To date, American case law appears to be inconsistent when considering issues of military jurisdiction over civilians, making it unclear whether United States military courts have or will be given the authority over PMFs and their employees.¹²⁶

Under the Neutrality Act, the recruitment of mercenaries is prohibited, but not the sale of military services.¹²⁷ Furthermore, the Neutrality Act's jurisdiction does not extend to activities occurring outside of United States territory,¹²⁸ meaning that American citizens employed by PMFs could only be held liable for conduct in violation of the Neutrality Act taking place on U.S. soil.¹²⁹ Specifically, since the

120. Pamela Hess and Anne Gearan, *Officials: Most U.S. Troops Out of Iraq in 18 Months*, ASSOCIATED PRESS, Feb. 24, 2009, available at http://news.yahoo.com/s/ap/20090224/ap_on_go_pr_wh/iraq_withdrawal.

121. *Id.*

122. *See, e.g.*, Additional Protocol, *supra* note 16, art. 47; International Convention, *supra* note 49; Declaration on Principles, *supra* note 60.

123. *See* Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (2000) [hereinafter UCMJ]; *see also* Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261-67 (2000) [hereinafter MEJA].

124. *War, Profits, and the Vacuum of Law*, *supra* note 7, at 535.

125. *See* UCMJ, *supra* note 123; *see also* MEJA, *supra* note 122.

126. *See, e.g.*, *Toth v. Quarles*, 350 US 11, 23 (1995); *United States v. Burney*, 6 C.M.A. 776, 803 (C.M.A. 1956); *O'Callahan v. Parker*, 395 U.S. 258, 274 (1969); *Solorio v. United States*, 483 U.S. 435, 450-51 (1987) (discussed *infra*).

127. *War, Profits, and the Vacuum of Law*, *supra* note 7, at 537.

128. *Id.*

129. Neutrality Act, 22 U.S.C. §§ 401-465 (1917).

Neutrality Act does not apply to conduct occurring in foreign nations or territories it does not apply to PMFs like Blackwater.¹³⁰ Since, Blackwater and other PMFs are headquartered in the United States, but operate primarily in foreign countries, they can sell their military services without fear of violating the Neutrality Act.¹³¹

Members of the United States military are subject to the Uniform Code of Military Justice (UCMJ), which sets forth a range of guidelines and prohibitions on the conduct of United States soldiers operating abroad.¹³² At first blush, the UCMJ seems as though it could be a viable means of regulating private soldiers under U.S. law, since these soldiers serve alongside soldiers whose conduct is regulated by the UCMJ. However, while contract personnel may in some circumstances be subject to military prosecution under the UCMJ for conduct that takes place during hostilities in Iraq, any trial of a civilian contractor by court-martial is likely to be challenged on constitutional grounds. Thus, the UCMJ does not offer a solution because its scope is limited to military servicemen.

The United States government recognized this deficiency, and responded by passing the Military Extraterritorial Jurisdiction Act (MEJA) in 2000.¹³³ The MEJA applies the UCMJ to civilians working in U.S. military operations in foreign countries.¹³⁴ Individuals who are “employed by or accompanying the armed forces” overseas may be prosecuted under the MEJA for any offense that would be punishable by imprisonment for more than one year if the offense was committed within the special maritime and territorial jurisdiction of the United States.¹³⁵ MEJA’s definition of persons “employed by the armed forces” includes civilian employees of the United States Department of Defense (DOD), DOD contractors and their employees, and civilian contractors and employees from other federal agencies and “any provisional authority” (e.g. the CPA) to the extent that their employment is related to the support of DOD activities in overseas operations.¹³⁶

Criminal cases involving members of the U.S. military are generally heard by courts-martial.¹³⁷ Since PMFs have increasingly been engaged in operations alongside the traditional U.S. military, it would be logical to hold them liable to courts-martial for acts performed in these operations. However, the applicability of courts-martial to civilians and former servicemen has been controversial.¹³⁸ Case law has shown reluctance on the part of the United States Supreme Court to broaden the jurisdiction of courts-martial to non-military personnel, while military

130. *See Id.*

131. *Id.*

132. *See UCMJ, supra* note 123.

133. MEJA, *supra* note 123.

134. *Id.*

135. MEJA, *supra* note 123, at §§ 3261-67.

136. *See id.* at § 3267(1)(A) (amended by The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 § 1088, 118 Stat. 2066 (October 28, 2004)).

137. UCMJ, *supra* note 123, at §§ 816-21.

138. *See, e.g.,* *Toth v. Quarles*, 350 US 11, 23 (1955); *United States v. Burney*, 6 C.M.A. 776, 803 (C.M.A. 1956); *O’Callahan v. Parker*, 395 U.S. 258, 274 (1969); *Solorio v. United States*, 483 U.S. 435, 450-51 (1987).

courts have agreed to hear cases against both civilians and former servicemen.¹³⁹ In the 1955 case *Toth v. Quarles*, the Supreme Court held that a former serviceman, who has been honorably discharged and within the continental limits of the United States, is not subject to court-martial jurisdiction for offenses committed prior to his military discharge.¹⁴⁰ In reaching its conclusion, the *Toth* court found that Article 3(a) of the UCMJ, which purportedly conferred jurisdiction over former members of the military, was unconstitutional.¹⁴¹

In contrast, in 1956, the United States Court of Military Appeals held in *United States v. Burney* that a court-martial may try a civilian if that civilian is serving alongside military personnel.¹⁴² The *Burney* court reasoned that a United States Supreme Court holding that one severable section of the UCMJ was unconstitutional did not preclude them from holding a different section valid.¹⁴³ Thirteen years later, in *O'Callahan v. Parker*, the Supreme Court held that a soldier's crimes, if not connected to his military service, cannot be tried by a court-martial.¹⁴⁴ However, in 1987 the Supreme Court again addressed the issue of the scope of court-martial jurisdiction when, in *Solorio v. United States*, the Court held that a court-martial is properly convened in order to try a soldier who was a member of the armed forces at the time of the offense, notwithstanding a lack of connection to military service.¹⁴⁵ The *Solorio* Court found that the *O'Callahan* decision was confusing because the Court's analysis relied on the United States Constitution in historical context while court-martial jurisdiction should be determined through a plain-meaning analysis of applicable statutes.¹⁴⁶

U.S. case law suggests that it would be difficult to prosecute PMF employees operating in Iraq under the jurisdiction of courts-martial. The *Solorio* Court emphasized that courts should analyze court-martial jurisdiction through the plain meaning of applicable statutes.¹⁴⁷ MEJA focuses on civilian contractors working for the military or provisional authorities such as the CPA.¹⁴⁸ However, many PMF contracts are with agencies such as the CIA; therefore those PMF employees would not be subject to the MEJA.¹⁴⁹ Many other PMF contracts are with private companies working for the United States, essentially making them sub-contractors

139. See, *Toth v. Quarles*, 350 US 11, 23 (1955); *United States v. Burney*, 6 C.M.A. 776, 803 (C.M.A. 1956); *O'Callahan v. Parker*, 395 U.S. 258, 274 (1969); *Solorio v. United States*, 483 U.S. 435, 450-51 (1987).

140. *Toth*, 350 US at 23.

141. *Id.* at 22.

142. *Burney*, 6 C.M.A. at 803.

143. *Id.* at 802.

144. *O'Callahan*, 395 U.S. at 274.

145. *Solorio v. United States*, 483 U.S. 435, 450-51 (1987).

146. *Id.* at 450.

147. *Id.* at 450-451.

148. MEJA, *supra* note 123.

149. See PRIVATE SECURITY CONTRACTORS, *supra* note 2, at 9-11 (noting the abundance of PMF contracts with the State Department and Department of Defense).

of non-PMF companies working for the U.S. government rather than civilians employed by the U.S. military or working in military operations.¹⁵⁰

In December 2005, the DOD issued a set of proposed regulations for implementing MEJA, but those proposed rules have not yet gone into effect.¹⁵¹ Once in effect DOD Instruction 5525.11 implements policies and procedures pursuant to the MEJA and UCMJ.¹⁵² Under the Instruction, the DOD Inspector General is charged with informing the Attorney General whenever he or she has reasonable suspicion that a federal crime has been committed.¹⁵³ It also becomes the Inspector General's responsibility to implement "investigative policies" to carry MEJA into effect.¹⁵⁴ The Instruction notes that the Domestic Security Section of the United States Department of Justice Criminal Division has agreed to "provide preliminary liaison" with the DOD and other federal entities and to designate the appropriate U.S. Attorney's Office to handle a case.¹⁵⁵

Citizens of the United States working as contractors and PMF employees in Iraq are subject to the authority of U.S. courts under a number of circumstances.¹⁵⁶ Special maritime and territorial jurisdiction (SMTJ) extends jurisdiction of certain federal statutes to U.S. nationals working overseas at certain U.S. facilities.¹⁵⁷ In regards to crimes involving a U.S. citizen as either a victim or a perpetrator, SMTJ includes:

(A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and

(B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.¹⁵⁸

150. See PRIVATE SECURITY CONTRACTORS, *supra* note 2, at 7-8.

151. 70 Fed. Reg. 75, 998 (Dec. 22, 2005).

152. Instruction No. 5525.11, Department of Defense (DoD), Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members (March 3, 2005), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/552511p.pdf>.

153. *Id.* § 5.

154. *Id.*

155. *Id.*

156. See MEJA, *supra* note 123; see also UCMJ, *supra* note 123; 18 U.S.C. § 7(9)(a)(b) (discussing special maritime and territorial jurisdiction).

157. 18 U.S.C. § 7(9)(a)(b).

158. *Id.*

Criminal actions falling under SMTJ include maiming,¹⁵⁹ assault,¹⁶⁰ kidnapping,¹⁶¹ murder,¹⁶² and manslaughter¹⁶³. The United States Department of Justice (DOJ) is responsible for prosecuting crimes in this category, and has done so in at least one instance in which a CIA contractor was convicted for the assault of a detainee in Afghanistan.¹⁶⁴

Many U.S. federal statutes, such as the War Crimes Act of 1996,¹⁶⁵ call for criminal sanctions for offenses committed against or by U.S. nationals in foreign countries.¹⁶⁶ The War Crimes Act, amended by the Military Commissions Act (MCA) of 2006,¹⁶⁷ prohibits torture,¹⁶⁸ cruel or inhumane treatment,¹⁶⁹ murder of an individual not taking part in hostilities,¹⁷⁰ mutilation or maiming,¹⁷¹ intentionally causing serious bodily injury,¹⁷² rape,¹⁷³ sexual abuse or assault,¹⁷⁴ and taking hostages.¹⁷⁵ Under this statute, federal jurisdiction applies to these crimes when they are committed against or by U.S. civilians, servicemen, or servicewomen. Other crimes with extraterritorial reach include assaulting, killing, or kidnapping an internationally protected person¹⁷⁶, or threatening to do so.¹⁷⁷

159. 18 U.S.C. § 114 (punishing any individual who, within the SMTJ and with the intent to torture, maim, or disfigure, “cuts, bites, or slits the nose, ear, or lip, or cuts out or disables the tongue, or puts out or destroys an eye, or cuts off or disables a limb or any member of another person; or ... throws or pours upon another person, any scalding water, corrosive acid, or caustic substance . . .”).

160. 18 U.S.C. § 113 (prohibiting assault with intent to commit murder or a felony, assault with a dangerous weapon, assault “by striking, beating or wounding,” simple assault, and assault resulting in serious or substantial bodily injury).

161. 18 U.S.C. § 1201 (punishing “whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof . . .”).

162. 18 U.S.C. § 1111 (prohibiting the unlawful killing of a human being with malice).

163. 18 U.S.C. § 1112 (prohibiting the voluntary or involuntary unlawful killing of a human being without Malice).

164. Press Release, Dep’t of Justice, David Passaro Sentenced to 100 months imprisonment; First Amendment Civilian Convicted of Detainee Abuse During Wars in Iraq and Afghanistan, (Feb. 13, 2007), *available at* <http://charlotte.fbi.gov/dojpressrel/2007/ce021307.htm>.

165. Pub. L. No. 104-192, § 2(a), 110 Stat. 2104 (August 21, 1996)(codified as amended at 18 U.S.C. § 2441).

166. Charles Doyle, CRS Report 94-166, *Extraterritorial Application of American Criminal Law*.

167. Pub. L. No. 109-366 § 6, 120 Stat. 2632 (Oct. 17, 2006).

168. 10 U.S.C.A. §§ 950v(b)(11).

169. *Id.* at (b)(12).

170. *Id.* at (b)(1).

171. *Id.* at (b)(14).

172. *Id.* at (b)(13).

173. *Id.* at (b)(21).

174. 10 U.S.C.A. §§ 950v at (b)(22).

175. *Id.* at (b)(7).

176. “Internationally protected person” means a Chief of State or the political equivalent, President, Vice President, Prime Minister, Ambassador, Foreign Minister, or other officer of

U.S. federal jurisdiction exists over these crimes if either the victim or the offender was a U.S. national.¹⁷⁸

VII. PROBLEMS WITH UNITED STATES LAW

The UCMJ covers the transgressions of members of the United States military, and it has almost no applicability to civilians accompanying the Military in overseas operations.¹⁷⁹ Congress passed the MEJA in response to this, applying the UCMJ to civilians working in United States military operations in foreign countries.¹⁸⁰ The MEJA has not provided a complete solution, however, because it applies only to private contractors working directly for the DOD on U.S. military installations.¹⁸¹ The MEJA focuses on military operations, particularly those taking place on U.S. military bases and in front-line situations; it does not apply to civilians working for other, non-military U.S. agencies such as the Central Intelligence Agency, nor does it apply to U.S. citizens working for foreign governments or organizations.¹⁸²

Many PMF employees operating in Iraq are not under contract with the U.S. military or the DOD, rather they are under contract with intelligence agencies like the CIA or with private companies providing non-combat services to the U.S. government.¹⁸³ Consequently, the MEJA does not appear to cover civilians or contract employees of other government agencies engaged in their own overseas operations.¹⁸⁴ It also does not cover citizens of the host nation, or individuals who ordinarily reside in the host nation.¹⁸⁵ In fact, prosecutions under the MEJA are rare even for individuals to whom it applies.¹⁸⁶ It appears that only one successful prosecution of a DOD contractor has occurred under the MEJA: a contractor

Cabinet rank or above of a foreign government or the chief executive officer of an international organization, or any person who has previously served in such capacity, and any member of his family, while in the United States; and any person of a foreign nationality who is duly notified to the United States as an officer or employee of a foreign government or international organization, and who is in the United States on official business, and any member of his family whose presence in the United States is in connection with the presence of such officer or employee. 18 U.S.C. § 1116(b)(4).

177. 18 U.S.C. § 112(e) (assault); 18 U.S.C. § 1116(c) (killing); 18 U.S.C. § 1201(e) (kidnapping); 18 U.S.C. § 1203(a) (hostage-taking); 18 U.S.C. § 878(d) (threats).

178. *See* 18 U.S.C. § 2441.

179. UCMJ, *supra* note 123.

180. MEJA, *supra* note 123.

181. *Id.* at § 3261(a)(2).

182. *War, Profits, and the Vacuum of Law*, *supra* note 7, at 537.

183. *See* PRIVATE SECURITY CONTRACTORS, *supra* note 2, at 24.

184. *Id.*

185. *Id.*

186. As of August 2008, only twelve individuals had been charged under MEJA, suggesting that in its current form MEJA will not lead to consistent prosecutions of civilian contractors. *See* Closing Legal Loopholes: Prosecuting Sexual Assaults and Other Violent Crimes Committed Overseas by American Civilians in a Combat Environment; Hearing Before the Senate Committee on Foreign Relations, 110th Cong. (Apr. 9, 2008) (statement of Sigal P. Mandelker) *available at* <http://foreign.senate.gov/hearings/2008/hrg080409a.html>.

working in Baghdad pleaded guilty to possession of child pornography in February 2007.¹⁸⁷

There have been no criminal prosecutions brought under the War Crimes Act since its enactment in 1996, and it appears that the chances of future criminal charges being filed are remote.¹⁸⁸ Under the Amendments set forth by the MCA, provisions of the War Crimes Act are inapplicable in cases of collateral damage and lawful attack, meaning that PMF employees operating alongside members of the traditional military are unlikely to be held liable under the Act.¹⁸⁹ Furthermore, amendments to the Act have been drafted which would narrow its scope to ten specific illegal acts, which limits the kinds of liable conduct.¹⁹⁰

Consequently, an American PMF employee who commits an offense while working abroad will in most cases only be liable for his/her actions under the laws of the host nation.¹⁹¹ However, most areas of PMF activity are unlikely to result in host nation prosecution against either the employee or the PMF,¹⁹² because the host either does not want to challenge the PMF, or is unwilling to do so.¹⁹³ In other cases the host nation has no control over the PMF, because the PMF is actually fighting against that particular host nation.¹⁹⁴

These problems are exacerbated by instances where the laws of the host countries apply to PMFs operating in Iraq, but their contracts with the U.S. Government include clauses exempting them from prosecution under U.S. law. U.S. law only requires limited licensing of PMFs involved in arms transfers.¹⁹⁵ Additionally, current U.S. law permits any PMF to operate abroad without notifying Congress as long as the contract amount is under fifty million dollars.¹⁹⁶ While this does not provide an explicit exemption from Congressional review for PMF contracts, it does offer these companies the chance to evade possible

187. Press Release, U.S. Attorney for the Eastern District of Virginia, Military Contractor Sentenced for Possession of Child Pornography in Baghdad (May 25, 2007), *available at* <http://www.usdoj.gov/usao/vae/Pressreleases/05-MaypdfArchive/07/20070525khannr.html>.

188. R. Jeffrey Smith, *War Crimes Act Changes Would Reduce Threat of Prosecution*, WASH. POST, Aug. 9, 2006, at A01, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/08/AR2006080801276.html>.

189. See Michael John Garcia, *The War Crimes Act: Current Issues*, CONG. RES. SERVICE, Jan. 22, 2009, at 5-8.

190. Smith, *supra* note 188.

191. *War, Profits, and the Vacuum of Law*, *supra* note 7, at 537.

192. *Id.*

193. *Id.*

194. *Id.*

195. International Traffic in Arms Regimes are explained in detail on the Federation of American Scientists' website, *available at* <http://www.fas.org/spp/starwars/offdocs/itar/p120.htm>.

196. International Traffic in Arms Regulation, 22 C.F.R. §§ 120.8 (2001) (defining Major Defense Equipment as "any item of significant military equipment. . . having a nonrecurring research and development cost of more than \$50,000,000 or a total production cost of more than \$200,000,000").

Congressional intervention when the contracts call for controversial activities.¹⁹⁷ Many PMF contracts naturally fall under fifty million dollars, and larger contracts can easily be broken up in order to fall under the statutory requirement.¹⁹⁸

Almost no information regarding contracts between PMFs and U.S. government agencies, namely the U.S. State Department and the Department of Defense, is available to the public. Even the Congressional Research Service has found it difficult to obtain details of PMF contracts:

Little information is publicly available on State Department and [Department of Defense] contracts for private security services in Iraq. The State Department has recently made available the names of the companies holding its primary contracts for such protective services and the numbers of security personnel serving directly and indirectly under those contracts. The State Department has not made public the names of the subcontractors who perform security services for those carrying out reconstruction activities under State Department contracts. The [Department of Defense] has not publicly released information on its contractors and subcontractors; information on these subjects must be compiled from secondary sources.¹⁹⁹

The lack of public information makes it difficult to use the business aspects of the PMF industry as a means of reviewing their contracts or regulating their activities. Furthermore, the U.S. government itself appears to have limited or incomplete information regarding the number of private military actors operating in Iraq:

House hearings...revealed that the U.S. government has not been aware of the extent to which contractors and subcontractors employ private security personnel, and of the broad network of subcontracts over which the U.S. government, according to some, has exercised little oversight.²⁰⁰

Blackwater is one of three major PMFs working under a Worldwide Personal Protective Services (WPPS) umbrella contract.²⁰¹ WPPS contracts are used in hiring bodyguards and guards for buildings and other infrastructure in Baghdad and other areas of Iraq.²⁰² The U.S. State Department has provided information on the number of people performing under these contracts and their nationalities.²⁰³ However, it has not released information regarding private military actors who have been hired by contractors providing other services, for example, private

197. *War, Profits, and the Vacuum of Law*, *supra* note 7, at 539.

198. *Id.*

199. PRIVATE SECURITY CONTRACTORS, *supra* note 2, at 6.

200. *Id.* at 11.

201. The Department of Defense was also employing DynCorp International, LLC and Triple Canopy, Inc. as of July 2007. *See id.* at 7.

202. *Id.* at 7.

203. *Id.* at 9.

guards hired by an engineering company under contract with the U.S. government.²⁰⁴ Furthermore, the U.S. State Department does not assign officials to monitor PMFs or their activities while in foreign countries, going so far as to state “[o]ur job is to protect Americans, not investigate Americans.”²⁰⁵

The DOD provides even less information than the U.S. State Department regarding its contracts with PMFs.²⁰⁶ In fact, it is unclear even how many PMFs are contracted with the DOD:

In 2004, CRS prepared a list of nine companies that public source information, primarily press reports and websites, described as providing security services to the Coalition Provisional Authority in Iraq, which may have indicated the existence of a DOD contract. A scan of the same sources this year yields much less information, with only four companies linked to recent and current DOD security contracts or subcontracts.²⁰⁷

While MEJA applies to PMF employees working under contract with the DOD, the difficulty in finding adequate information about the actual number of PMF employees operating in Iraq and the scope of their activities makes prosecution under the MEJA extremely difficult.

VIII. PROPOSED SOLUTIONS

One approach to solving the problems in regulating PMF activity is through licensing schemes or total bans on their use.²⁰⁸ Another approach is the modifications of existing treaties and laws to apply them to PMFs.²⁰⁹ These proposed solutions have both advantages and disadvantages which need to be considered by the international community. However, a plan should be implemented quickly in order to avoid further complications. Modification of existing treaties and law is likely to be the easiest solution to put into practice because it would not require ratification of new laws or agreements.

The United Kingdom has not yet passed any legislation regulating PMFs, but has commenced investigations into what type of legislation will be necessary in order to regulate PMFs through its own domestic law. Reports such as the Green Paper have proposed options for consideration, and have been the catalyst for discussions regarding the development and ratification of British law regulating PMFs employed by the U.K. military.²¹⁰ The Green Paper was prepared at the

204. *Id.*

205. T. Christian Miller, *A Colombian Town Caught in a Cross-Fire*, L.A. TIMES, Mar. 10, 2002, at A-1 (quoting a human rights group that was quoting an unnamed State Department official).

206. PRIVATE SECURITY CONTRACTORS, *supra* note 2, at 8.

207. *Id.*

208. *See, e.g.*, Green Paper, *supra* note 68, at 22-26.

209. *See, e.g.*, *War, Profits, and the Vacuum of Law*, *supra* note 7, at 547.

210. The Secretary of State for Foreign and Commonwealth Affairs stated in the

request of the Foreign Affairs Committee of the House of Commons for an examination of options for the regulation of PMFs.²¹¹ The authors of the Green Paper conclude that PMFs could enable the UN to respond more rapidly and effectively in times of crisis than with traditional troops.²¹² Additionally, the cost of employing PMFs for certain functions within UN operations could be much lower than that of traditional armed forces.²¹³ The Green Paper identified a number of paths to regulation of PMF conduct, made arguments for pursuing those paths, and identified difficulties in implementing each option.²¹⁴ The document was prepared for review by the United Kingdom with suggested options for regulation of PMFs under U.K. domestic law,²¹⁵ but many, if not all, of these options could also be adopted under U.S. domestic law to regulate PMFs like Blackwater.

The first option discussed by the Green Paper was a total ban on PMF engagement in military activity abroad.²¹⁶ This ban would be the most direct path to curtailing problematic PMF activity because it could list specific operations in which PMFs could not participate.²¹⁷ However, a total ban on military activity could present more definitional problems when activities such as training or advising are taken into consideration.²¹⁸ Additionally, the total ban approach eliminates any legitimate PMF services in conjunction with activities such as arms exportation.

The second option the Green Paper discussed was a ban on recruitment for military activity abroad.²¹⁹ This option allows the national government of the PMF's home country to intervene provided there are compelling reasons to do so,²²⁰ but would not prevent the use of PMFs in some military activities.²²¹ However, while a ban of this type would enable governments to prevent the worst kinds of mercenary incursions, it would still be difficult to prevent a company or country which recruited men for a permitted activity to transfer them to an impermissible activity.²²² Additionally, offshore and internet recruiting could allow PMFs to avoid bans under domestic law.²²³

introduction that "the Green Paper does not attempt to propose a policy. I believe that a wide debate on the options is needed." Green Paper, *supra* note 68, at 5.

211. *Id.* at 4.

212. *Id.*

213. *Id.*

214. Green Paper, *supra* note 68, at 22-26.

215. *Id.* at 4.

216. *Id.* at 22.

217. *Id.*

218. *Id.* at 23.

219. *Id.*

220. For example, a PMF being contracted to provide assassins would present a compelling reason for the PMF's home government to intervene whereas a PMF being contracted to provide drivers for supply trucks would not.

221. Green Paper, *supra* note 68, at 23.

222. *Id.*

223. *Id.*

The third option discussed by the Green Paper was the development of a licensing regime for military services.²²⁴ This option appears more viable than a total or partial ban, because it provides a national government with the opportunity to consider services on a case-by-case basis.²²⁵ The Green Paper also pointed out that this approach parallels existing licensing systems, such as those used in the export of military goods.²²⁶ The major problem associated with licensing is enforcement. It would be difficult to monitor whether PMFs were violating the terms of their licenses while operating abroad. Furthermore, if PMFs did not want to be subject to licensing they could move their base of operations to a country not employing such a regime.²²⁷

The Green Paper discussed alternatives to a specific, military licensing regime, namely registration for PMFs and general licenses.²²⁸ Registration is not as heavy-handed as licensing, because the national government would not review every PMF contract or activity. Rather, the government would retain the power to intervene if a PMF undertook an activity contrary to national interests or policy.²²⁹ A general licensing system permits governments to license companies for a variety of activities in a specific list of countries, rather than reviewing each activity undertaken by a PMF and each country in which that PMF would operate.²³⁰ The more relaxed nature of these options presents a difficulty for governments implementing them because they do little to establish a reputable PMF industry. Under this system, PMFs can avoid liability for specific conduct when licensed activity takes place abroad, because it would be difficult to prove whether the terms of the PMF's license were breached.²³¹

Finally, the Green Paper discussed establishing a system of self-regulation for the PMF industry. This would essentially consist of a voluntary code of conduct by which PMFs would abide, while simultaneously establishing a trade association that would assure the respectability of the PMF industry.²³² This option also faces difficulties in implementation because it leaves no room for the government to intervene should a PMF undertake a contract or action contrary to public policy or the code of conduct. Also, it fails to account for the complications that could arise if the trade association were to be called upon to discipline a powerful member.²³³

The United States has the opportunity to become a leader on the issue of PMF regulation, because of its involvement with the Blackwater firm is at the forefront of the issue. If PMFs are to remain a major component of front-line U.S. military

224. *Id.*, at 24.

225. *Id.*

226. *Id.*

227. Green Paper, *supra* note 68 at 24-25.

228. *Id.* at 25.

229. *Id.*

230. *Id.*

231. *Id.*

232. Green Paper, *supra* note 68, at 26.

233. *Id.*

operations, then bringing these companies within the jurisdiction of U.S. military courts is a solution to the need for PMF regulation when PMF forces operate alongside traditional U.S. military forces. Amending the UCMJ and MEJA statutes to broaden court-martial jurisdiction to private contractors employed by the DOD, and other U.S. government agencies such as the CIA, presents an authoritative set of rules for PMFs employed by the U.S. government that are not currently held liable to courts-martial for their actions.

In fact, Iraq may be a good testing ground for changes and developments in the use and regulation of PMFs. Clearly PMFs are going to play an increasing role in future armed conflicts and occupational situations, due to the downsizing of traditional militaries and the growing reliance on private contractors in military operations.²³⁴ How companies like Blackwater are handled by the countries involved in the current Iraq situation handle the problems will have a significant impact on how PMFs are used in the future. Regulating PMF activity will hold the industry accountable, making reputable companies more employable while marginalizing disreputable companies and individuals. Regulation also lays out guidelines for the PMF industry in terms of what is expected of them and what they are expected not to do.

The international community has the ability to address PMFs through changes to existing international agreements. Both the Geneva Convention and the United Nations have defined mercenaries as private soldiers motivated by the desire for personal, material gain.²³⁵ The international community could update these definitions to include the employees of PMF corporate entities. Today's PMFs circumvent the "mercenary" definitions by avoiding the admission that they are fighting solely for pay.²³⁶ By adapting the definition of mercenary, the Geneva Convention and the United Nations could make it impossible (or at the very least, more difficult) for PMFs to avoid the scope of their Protocols and Resolutions. If the definition of mercenary were altered to include civilians fighting for foreign countries who are motivated solely by significant personal gain, as well as all foreign nationals fighting for a country of which they are not natural or legal citizens, international protocols can then be applied much more broadly.

The Geneva Convention can deny PMF employees the rights of legal combatants as prisoners of war, just as it has the mercenaries of previous decades,²³⁷ as a means to deter the industry from growing. If PMF employees cannot benefit from POW protection, these agencies would be more likely to hesitate at the thought of sending them into front-line operations. Not only would they risk losing valuable assets, they would surely be held liable in civil suits from captured employees and their families for placing them in such hazardous situations.

234. George Cahlink, *Army of Contractors*, GOV'T EXECUTIVE MAG., Feb. 1, 2002.

235. See Additional Protocol, *supra* note 16, art. 47; International Convention, *supra* note 49.

236. See Report of the Committee of Privy Counsellors Appointed to Inquire into the Recruitment of Mercenaries, 1976, Cmnd. 6569, at 10.

237. Additional Protocol, *supra* note 16, art. 47.

In the past, the UN has adopted General Assembly Resolutions condemning the mercenary trade when used to make incursions into other countries or to take part in the upheaval of a national government. It might now adopt similar Security Council Resolutions condemning the current use of PMF forces in what have been called national liberation movements.²³⁸ An internationally recognized prohibition on the use of non-traditional soldiers in combat operations could solve the problem of being unable to hold them responsible for actions performed alongside traditional combat soldiers. If PMFs are no longer permitted to take part in operations that could involve the use of force, then their misuse of force in those situations would no longer be insulated from the reach of international law.

Reports have recently come out regarding the removal or departure of Blackwater from Iraq.²³⁹ We will see how this develops under the Obama Administration, and what impact it will have on the future of PMFs in military theaters of operation. It appears that modern warfare is going to become increasingly privatized, with PMFs taking up a large share of this new and rapidly developing market. With this in mind, it is important for the future well-being of the global community that effective regulation of the private military industry be established as quickly and efficiently as possible.

IX. CONCLUSION

The PMF industry has grown rapidly in the last forty years, and all signs indicate that the industry will continue to grow in the future. Therefore, solutions to the problems in regulation of PMF activity must be devised. The most efficient solution is redefining the term mercenary to include PMFs. Redefining a mercenary in such a way that it applies to PMFs would deny them the rights of POWs under Article 47 of the Geneva Convention, and would criminalize their actions under the UN's International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

PMFs would likely prefer to regulate themselves through an industry-created code of conduct. However, self-policing is ineffective because the PMF industry considers economic success as important as maintaining a voluntary code of conduct when faced with controversial issues. Without external regulation, the existing problems associated with the PMF industry are likely to either worsen, or at least continue in their current state.

A total ban on PMF activity is not the answer, because it is impractical in the scheme of modern warfare. Powerful countries like the United States favor the use of PMFs in today's world of reduced militaries, and would not sign an

238. It would be important for the UN Security Council to adopt prohibitive Resolutions, because Security Council Resolutions are binding on Member States whereas General Assembly Resolutions are not.

239. See, e.g., Elana Schor, *Blackwater to Leave Security Business Following Problems in Iraq*, GUARDIAN.CO.UK (July 22, 2008), available at <http://www.guardian.co.uk/world/2008/jul/22/usa.iraq>.

international agreement prohibiting their use because doing so would mean limiting their tactical options in military operations.

Effective regulation of PMFs must come from the international community because of the mobility of a PMF infrastructure.²⁴⁰ The vehicles for international regulation already exist in the form of international agreements, such as the Geneva Conventions, and UN Resolutions, but their narrow definition of mercenary makes them ineffective in their current state. Redefining the term mercenary in these international agreements serves as the most efficient means of regulating PMFs. This new definition should be broader than the existing definition, so that it includes any person a) taking direct part in military operations in a country or territory of which he or she is not a citizen; b) motivated by a desire for private economic gain; and c) acting independent of the obligations or orders of his or her native country. Under this definition, PMF employees would meet the definition of mercenary, surrendering the protections afforded POWs under the Geneva Conventions and falling under the prohibitions of the UN's International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

240. If a PMF's home nation enacts laws that are unfavorable to its business practices, it can move to another country without such laws. *See War, Profits, and the Vacuum of Law*, *supra* note 7, at 535.