

## Essay

# War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law

P.W. SINGER\*

*Over the last decade, a new global industry has arisen, made up of private firms that sell military services. These companies, known as “privatized military firms” (“PMFs”), sell everything from small teams of commandos to massive military supply operations. PMFs have operated in places as diverse as Sierra Leone and Iraq, and on behalf of many states, including the United States. The rise of PMFs signals an important new development in the way that war is now carried out. Unfortunately, the legal side has not yet caught up to these events. This article examines the applicability of present international laws and definitions to PMFs and finds a gap in effectiveness. It next looks at national attempts at legal regulation and the challenges that they face. Finally, it surveys some of the potential solutions that have been offered to this legal quandary, seeking to offer workable proposals for how the PMF industry might be brought under some standard of regulation.*

---

\* Peter Warren Singer is National Security Fellow in the Foreign Policy Studies Program at the Brookings Institution and Director of the Brookings Project on U.S. Policy Towards the Islamic World. He has a Ph.D. in Security Studies from Harvard University. His book, *CORPORATE WARRIORS* (2003) is the first overall survey of the privatized military industry. Dr. Singer has published in *Foreign Affairs*, *International Security*, *Survival*, and *World Policy Journal*, and has served as a commentator for ABC, BBC, CNN, Fox and al Jazeera. He also served in the Office of the Secretary of Defense, Balkans Task Force. He may be contacted at [psinger@brook.edu](mailto:psinger@brook.edu).

Frankly, I'd like to see the government get out of war altogether and leave the whole feud to private industry.

*Major Milo Minderbinder, CATCH-22*<sup>1</sup>

## I. INTRODUCTION

One of the most interesting developments in warfare over the last decade has been the emergence of a global trade in hired military services, better known as the “privatized military industry.” The businesses in this industry, known as “privatized military firms” (“PMFs”), range from small consulting firms, comprised of retired generals, to transnational corporations that lease out wings of fighter jets or battalions of commandos. These firms presently operate in over fifty countries. They have been the determinate actors in a number of conflicts, helping to win wars in Angola, Croatia, Ethiopia-Eritrea, and Sierra Leone. Even the U.S. military has become one of the prime clients of the industry. Indeed, from 1994-2002, the U.S. Defense Department entered into over 3,000 contracts with U.S.-based firms, estimated at a contract value of more than US\$300 billion.<sup>2</sup> PMFs now provide the logistics for every major U.S. military deployment, and have even taken over the Reserve Officer Training Corps (“ROTC”) programs at over two hundred U.S. universities; that is, private company employees now train the U.S. military leaders of tomorrow. In fact, with the recent purchase of Military Professional Resources Inc., a PMF based in Virginia, by the Fortune-500 corporation L-3, many Americans unknowingly own slices of the industry in their 401(k) stock portfolios.<sup>3</sup>

Perhaps no example better illustrates the industry's growing activity than the recent war against Iraq. Private military employees handled everything from feeding and housing U.S. troops to maintaining sophisticated weapons systems like the B-2 stealth bomber, the F-117 stealth fighter, the KC-10 refueling aircraft, U-2 reconnaissance aircraft, and numerous naval surface warfare ships.<sup>4</sup>

---

1. JOSEPH HELLER, *CATCH-22* 254 (Simon & Schuster 1961) (1955).

2. P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 14 (2003); Laura Peterson, *Privatizing Combat, the New World Order*, in *MAKING A KILLING: THE BUSINESS OF WAR* 5, 6 (2002), available at [http://www.icij.org/dtaweb/icij\\_bow.asp#](http://www.icij.org/dtaweb/icij_bow.asp#).

3. P.W. Singer, *Corporate Warriors*, 26 *INT'L SECURITY* 186, 199 (2001).

4. AM. FORCES INFO. SERV., U.S. DEP'T OF DEF., *IMPROVING THE COMBAT EDGE THROUGH OUTSOURCING* (1996), available at <http://www.defenselink.mil/speeches/1996/di1130.html>; Confidential Interviews with PMF-related individuals (1996-2003); SINGER,

Indeed, the ratio of private contractors to U.S. military personnel in the Gulf is roughly one to ten, ten times the ratio during the 1991 war.<sup>5</sup> *The Economist* even termed the conflict “the first privatised war.”<sup>6</sup> Private firms will play similar roles in the ensuing occupation period, as well as added roles, such as training the post-Saddam army, paramilitary, and police.<sup>7</sup> Indeed, many of the firms with strong footholds in the industry, such as Bechtel and Halliburton, gained the multi-billion dollar reconstruction contracts in part due to their prior security clearances.<sup>8</sup>

The rise of this new industry, however, raises a number of concerns regarding the relationship between public authorities and the military apparatus. Some firms have committed severe abuses in the course of their operations and have been employed by dictatorships, rebel armies, terrorist groups, and drug cartels.<sup>9</sup> The hire of others has led to a rise of internal tensions inside certain states and even military coups and mutinies.<sup>10</sup> Given the ultimate importance of the field in which they operate and the potential for serious abuses, a particularly worrying aspect is that the industry’s position in the legal sphere remains ambiguous.<sup>11</sup> While the industry includes several

---

*supra* note 2, at 3–17, 79.

5. Kenneth Bredemeier, *Thousands of Private Contractors Support U.S. Forces in Persian Gulf*, WASH. POST, Mar. 3, 2003, at E01.

6. *Military Industrial Complexities*, ECONOMIST, Mar. 29, 2003, at 56.

7. Confidential Interviews with PMF-related individuals (1996–2003); Alan Miller, *Wall Street Bullish on the Spoils of War*, CHRISTIAN SCI. MONITOR, Aug. 14, 2003, at 16.

8. Mike Gongloff, *Bechtel Wins Iraq Contract*, CNN.COM, Apr. 17, 2003, at <http://money.cnn.com/2003/04/17/news/companies/bechtel/>.

9. Mohamad Bazzi, *Training Militants British Say Islamic Group Taught Combat Courses in U.S.*, NEWSDAY, Oct. 4, 2001, at A5; Patrick J. Cullen, *Keeping the New Dogs of War on a Tight Leash*, CONFLICT TRENDS, 2000, available at <http://www.accord.org.za/>; Christopher Goodwin, *Mexican Drug Barons Sign Up Renegades from Green Berets*, SUNDAY TIMES (UK), Aug. 24, 1997, at A1; “Holy War” Website Shut Down, BBC NEWS, Oct. 4, 2001, at <http://news.bbc.co.uk/1/hi/uk/1578693.stm>; André Linard, *Mercenaries S.A.*, LE MONDE DIPLOMATIQUE, Aug. 1998, at 31, available at <http://www.monde-diplomatique.fr/1998/08/Linard/10806.html>; Xavier Renou, Promoting Destabilization and Neoliberal Pillage, Presentation at the Globalization & Sec. Conf., U. of Denver, Denver, Colo. (Nov. 11, 2000).

10. Sinclair Dinnen, *Militaristic Solutions in a Weak State: Internal Security, Private Contractors, and Political Leadership in Papua New Guinea*, 11 CONTEMP. PAC. 279 (1999).

11. For such an important and growing industry, it has received scant treatment from the analytic field as well. Indeed, as of this writing, only two legal journal articles have provided even a preliminary exploration of the legal side of the industry. Both articles focus on the legality of the industry and mainly examine two cases, Bosnia and Sierra Leone. David Kassebaum, Note, *A Question of Facts—The Legal Use of Private Security Firms in Bosnia*, 38 COLUM. J. TRANSNAT’L L. 581 (2000); Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Order*, 34 STAN. J. INT’L L. 75 (1998).

hundred companies and over US\$100 billion in annual global revenue, there still remain lingering questions that apply not only to its underlying legality, but also to how international law's legal protections and sanctions should apply to its employees.

The ultimate problem is that the legal and regulatory issues surrounding the new privatized military industry are by no means clear. PMFs are private entities selling military services. Under international law, individuals who sell these services on their own—better known as mercenaries—are generally thought to be prohibited. However, the very definitions that international law uses to identify mercenaries include a series of vague, albeit restrictive, requirements, such that it is nearly impossible to find anyone in any place who fulfills all of the criteria, let alone a firm in the PMF industry.<sup>12</sup> Additionally, the original anti-mercenary laws were designed not to prohibit trade in military services, but only to regulate it. Thus, the underlying legal concepts that would support any guiding parameters establishing the privatized military industry's place in the law are often of little assistance.

The same difficulties surround issues of enforcement. At the international level, even were the legal definitions not vague, there would remain few credible mechanisms to implement them. While regulation of the firms at the national level offers the hope of both superior legal definitions and enforcement, the very globalized nature of the privatized military industry argues against the full success of any one national approach. Moreover, all but a few states' domestic statutes currently ignore PMFs' very existence.

The result is that PMFs comprise one remaining industry whose behavior is dictated not by the rule of law, but by simple economics. The general absence of law within this critical realm stands as a clear challenge to the belief that legal norms underscore good behavior in the international arena. Moreover, it is also worrisome in that it presents a general test to the law. For if laws are absent, unclear, or seen as inappropriate, the respect for them and their resultant effectiveness certainly will be diminished.

The policy relevance of this vacuum is also troubling. It was recently demonstrated when the U.S. government hired DynCorp to reestablish the post-Saddam Iraq police system.<sup>13</sup> DynCorp is a PMF, based in Virginia, which has also carried out operations in Colombia,

---

12. Doug Brooks & Hussein Solomon, *Editorial*, CONFLICT TRENDS (2000), at <http://www.accord.org.za/>.

13. Antony Barnett, *Battle for Iraq: Scandal-Hit U.S. Firm Wins Key Contracts*, THE OBSERVER, Apr. 13, 2003, at 4.

Kosovo, and Afghanistan.<sup>14</sup> In at least two past DynCorp operations, several of its employees were accused of “engaging in perverse, illegal and inhumane behavior [and] purchasing illegal weapons, women, forged passports and [committing] other immoral acts.”<sup>15</sup> The criticized behavior included the firm’s Bosnia site supervisor videotaping himself raping two young women.<sup>16</sup> None of these employees were ever criminally prosecuted, in part because of the absence of law applicable to the industry. This same firm now has the task of training the new Iraqi police, a contract worth as much as US\$250 million.<sup>17</sup> In turn, three employees of California Microwave Systems were captured by Colombian rebels when their military intelligence plane (on a mission contracted by the U.S. government) crashed in rebel territory in February 2003. At the time of writing, they were still being held captive. Their legal status remains uncertain, as do the rights and responsibilities of the firms and governments involved.

This Essay attempts to initiate the process of filling this void. It begins by examining the international laws and definitions applicable to PMFs and explores their effectiveness. It next looks at national attempts at legal regulation and the challenges they face. Finally, it surveys some of the potential solutions that have been offered to this legal quandary and seeks to offer workable proposals for how the PMF industry might be brought under some standard of regulation.

## II. PRIVATE MILITARY ACTORS IN INTERNATIONAL LAW

While private, profit-motivated military actors are as old as the history of organized warfare, the international laws of war that specifically deal with their presence and activity are largely absent or ineffective. Particularly with regard to PMFs, what little law exists

---

14. *DynCorp’s Assignment: Protect Afghan Leader*, WASH. POST, Dec. 2, 2002, at E01.

15. John Crewdson, *Sex Scandal Still Haunts DynCorp*, CHI. TRIB., Apr. 19, 2003, at C3; see also Kelly Patricia O’Meara, *Broken Wings*, INSIGHT, Apr. 8, 2002, available at <http://www.insightmag.com/main.cfm/main.cfm/main.cfm/include/detail/storyid/229690.html>.

16. Antony Barnett & Solomon Hughes, *British Firm Accused in U.N. ‘Sex Scandal,’* THE OBSERVER, July 29, 2001, at 4; Robert Capps, *Outside the Law*, SALON, June 26, 2002, at <http://archive.salon.com/news/feature/2002/06/26/bosnia/>; *Kidnapped Americans Plead for Negotiations*, WASH. POST, Oct. 8, 2003, at A30.

17. David Isenberg, *There’s No Business Like the Security Business*, ASIA TIMES ONLINE, Apr. 30, 2003, at [http://www.atimes.com/atimes/Middle\\_East/ED30Ak03.html](http://www.atimes.com/atimes/Middle_East/ED30Ak03.html); see also Crewdson, *supra* note 15.

has been rendered outdated by the new ways in which these companies operate.<sup>18</sup> In short, international law, as it stands now, is too primitive in this area to handle such a complex issue that has emerged just in the last decade.

The earliest formalized international laws of war in the modern state system were the Hague Conventions, established at the turn of the twentieth century. The 1907 Hague Convention on Neutral Powers established certain legal standards for neutral parties and persons in cases of war.<sup>19</sup> However, it did not impose on states any obligation to restrict their own nationals from working for belligerents. In fact, any national who chose to hire themselves out to a foreign power had committed no international crime and was to be treated the same as any soldier serving in the indigenous force. The only proviso was that these individuals could not have it both ways; that is, anyone fighting in a war could not also claim the neutrality protections of their home state.<sup>20</sup> This reluctance to control the actions of individuals, even in the military field, was based on the philosophic distinction that held at the time: governments and individuals were considered to be two mutually exclusive spheres. This norm gradually disappeared in the following decades, as it soon became evident that the private actions of individuals could have a major influence on interstate relations and vice versa.<sup>21</sup>

The next major legal regime to deal with private military actors was set up by the 1949 Geneva Conventions.<sup>22</sup> Importantly, its purpose was to create conditions of fair treatment of prisoners of war ("POWs") and establish proper activities in war, not to ban or control private forces.<sup>23</sup> As long as the mercenaries were part of a legally defined armed force (which originally meant state militaries, but was later expanded to include any warring parties), they were entitled to

---

18. SAMIA K. AOUL ET AL., *TOWARDS A SPIRAL OF VIOLENCE?* (2000), available at <http://www.miningwatch.ca/documents/Memorandum-final.pdf>.

19. 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>.

20. Gath Abraham, *The Contemporary Legal Environment*, in *THE PRIVATISATION OF SECURITY IN AFRICA* 89 (Greg Mills & John Stremlau eds., 1999).

21. *Id.* at 90.

22. 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.ircct.org/instruments/intlhumanlaw.htm>.

23. Mark Malan & Jakkie Cilliers, *Mercenaries and Mischief: The Regulation of Foreign Military Assistance Bill*, INST. FOR SEC. STUD., Sept. 1997, available at <http://www.iss.co.za/Pubs/PAPERS/25/Paper25.html>.

POW protection.<sup>24</sup> POW protection is an important status, as it ascribes to the holder special protection and treatment, including immunity from prosecution for normal acts of war.<sup>25</sup>

As a result of the postcolonial experience, the general feeling towards mercenaries began to turn more negative. Mercenary units directly challenged a number of nascent state regimes in Africa, as well as fought against the U.N. in the course of the United Nations Operation in Congo (“ONUC”) from 1960 to 1964. The most notable of these were known by the nickname “Les Affreux” (“The Terrible Ones”) and included such “notorieties” as the Irish-born commando “Mad” Mike Hoare and Frenchman Bob Denard.<sup>26</sup> Denard would make coups his own cottage industry and later lead a series of violent coups in the Comoros Islands and the Seychelles from the 1970s on; his last coup attempt was as recent as 1995.<sup>27</sup>

In response to these episodes, international law sought to bring the practice of mercenarism under greater control. In 1968, the U.N. passed a resolution condemning the use of mercenaries against movements of national liberation. The resolution was later codified in the 1970 Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States (“1970 Declaration”).<sup>28</sup> The U.N. declared that every state has the duty to prevent the organization of armed groups for incursion into other countries. The 1970 Declaration represented an important transition in international law, as mercenaries became “outlaws” in a sense. However, it still placed the burden of enforcement exclusively on state regimes, failing to take into account that they were often unwilling, unable, or just uninterested in the task.<sup>29</sup>

The legal movement against private military actors was followed by a definition of mercenaries in the 1977 Additional

---

24. Abraham, *supra* note 20, at 90.

25. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 22, art. 85, 6 U.S.T. at 3384, 75 U.N.T.S. at 202.

26. ANTHONY MOCKLER, *NEW MERCENARIES* 62 (1985).

27. The reputation of this arch-mercenary, however, took a severe hit in the summer of 2000, when he was caught in a conspiracy to take over a number of profitable nudist colonies, this time by financial, rather than military, means. Henri Quetteville, *French Mercenary 'is Behind Nudist Coup,'* THE TELEGRAPH, Aug. 11, 2000, at <http://www.telegraph.co.uk>.

28. *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/8028 (1970).

29. Abraham, *supra* note 20, at 92.

Protocols to the Geneva Conventions.<sup>30</sup> Article 47 of Protocol I states that a mercenary shall not have the rights of a legal combatant or a prisoner of war. It defined a mercenary as any person who:

Is specially recruited locally or abroad in order to fight in an armed conflict;

Does, in fact, take a direct part in the hostilities;

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;

Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

Is not a member of the armed forces of a Party to the conflict; and

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.<sup>31</sup>

During the same period, regional treaty regimes began to apply to private military actors. The most important of these regional treaties was also adopted in 1977. It occurred in Africa, where the mercenary problem was most acute. The Organization of African Unity ("OAU") established the Convention for the Elimination of Mercenarism in Africa.<sup>32</sup> Article 1 of the Convention identified mercenaries directly by referring to the purpose of their employment, specifically if they were hired for the overthrow of governments or OAU-recognized liberation movements. The Convention declared their actions general crimes against the peace and security of Africa and was thus the most aggressive international codification of the criminality of mercenarism.

---

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

31. *Id.* art. 47.

32. Convention of the O.A.U. for the Elimination of Mercenarism in Africa, Jul. 3, 1977, O.A.U. Doc. CM/433/Rev. L. Annex 1 (1972), available at <http://www1.umn.edu/humanrts/instreet/1977e.htm>.



However, despite this seemingly forceful stance, the OAU Convention does not actually forbid the hire or employment of mercenaries for other purposes. That is, the drafters carefully constructed the Convention to allow African governments to continue to hire non-nationals, as long as they were used to defend themselves from “dissident groups within their own borders,” while disallowing their use against any other rebel groups that the OAU supported.<sup>33</sup> The result is a document whose bias is self-evident. For example, the South African government, which was outside the OAU at the time, was legally prohibited from hiring foreigners to fight against Nelson Mandela’s African National Congress (“ANC”), a liberation movement that the OAU supported. However, the OAU governments were still legally allowed to hire mercenaries for use against their own rebel groups, and many, such as Angola and Zaire, did so. Once again, there was no real enforcement mechanism; instead, the regime relied on regional compliance and local state decisions—both of which generally ignored the treaty.

An underlying problem of the treaty regimes is their focus on intent for identification of mercenaries, thereby making the regimes generally unworkable. The crux of their terms is that the motivation to fight is exclusively that of private gain. Unlike the intent requirement of felony offenses in the U.S., such as the intent to kill or the intent to distribute narcotics, the intent aspect in the case of mercenaries is focused on identifying a person’s criminal status, not their act. Moreover, this intent to fight exclusively for profit is often unknowable, and as it lacks good objective proxies, it is difficult to prove. A foreign soldier who was being paid to fight for a cause could argue that he or she was motivated by other factors, such as the rightness of the cause, a feeling of kinship with fellow fighters, or a simple search for adventure. In fact, a British government report on this aspect concluded that the international definition of “mercenary” based on the motivation of the combatant was not viable, as it is difficult to determine exact motivation in the legal realm. The report concluded that the flawed definitions meant that “to serve as a mercenary is not an offence under international law.”<sup>34</sup>

In 1989, the U.N. established the International Convention against the Recruitment, Use, Financing and Training of Mercenaries to ameliorate these problems.<sup>35</sup> It defined the actions in its title as

---

33. Zarate, *supra* note 11, at 129 (referring to the prevailing interpretation of Article 1).

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

35. International Convention against the Recruitment, Use, Financing, and Training of

offenses and set up extradition arrangements to deal with those who violated the Convention. The Convention has a lengthy definition to identify who falls under its reach. It states that a mercenary is any person who:

Is specially recruited locally or abroad in order to fight in an armed conflict;

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;

Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

Is not a member of the armed forces of a party to the conflict; and

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.<sup>36</sup>

A mercenary is also any person who, in any other situation:

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;

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;

Is neither a national nor a resident of the State against which such an act is directed;

Has not been sent by a State on official duty; and

Is not a member of the armed forces of the State on

---

Mercenaries, Dec. 4, 1989, U.N. GAOR, 72d plen. mtg., U.N. Doc A/Res/44/34 (1989).

36. *Id.* art. 1.

whose territory the act is undertaken.<sup>37</sup>

Unfortunately, the treaty had extremely poor timing. The document came out just as the private military trade began to transform, from only being made up of individual mercenaries to being dominated by private companies. Moreover, despite its intent to clarify matters, the 1989 Convention did little to improve the legal confusion over private military actors in the international sphere. 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.<sup>38</sup> In fact, the consensus is that anyone who manages to get prosecuted under “this definition deserves to be shot—and his lawyer with [him].”<sup>39</sup>

Indeed, because of these problems, the Convention did not receive the requisite twenty-two state ratifications for over a decade—Costa Rica became the twenty-second in September 2001. Moreover, the small number of signatories includes none of the major state powers. Instead, its ratifying powers are states like Angola, Congo-Brazzaville, Nigeria, Ukraine, and Zaire, each of whom either permitted or directly benefited from the mercenary trade. Combined with the fact that no one has been prosecuted under the law, the list of signatories acts almost as a form of *jus cogens* that runs counter to the treaty—in a sense, an “anti-customary law”—and further weakens the treaty’s legal impact.

The general result is that, contrary to common belief, a total ban on mercenaries does not exist in international law. More importantly, the existing laws do not adequately deal with the full variety of private military actors. That is, they are specifically aimed at only the individuals working against national governments or politically recognized movements of national liberation. The focus on the private monetary motivation also ignores the activities of so-called “confessional mercenaries,” who fight for both religious and economic rewards.<sup>40</sup> Thus, the Convention, for example, would not

---

37. *Id.*

38. Brooks & Solomon, *supra* note 12.

39. GEORGE BEST, HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICTS 328 n.83 (1980). Interestingly, this statement also was made by a PMF executive in a 2001 interview with the author, without any kind of attribution to another source, indicating that Best’s legal lessons have been internalized in the PMF industry.

40. AOUL, *supra* note 18. For a discussion of the overlap of religious and economic motivations for combat, see JESSICA STERN, TERROR IN THE NAME OF GOD: WHY RELIGIOUS

be of assistance in dealing with the many Arab fighters employed on behalf of the Taliban in Afghanistan.

The shortcomings of the treaty regimes become even more apparent when applied to PMFs. In short, the privatized military industry lies outside the full domain of all of these existing legal regimes.<sup>41</sup> The various loose formulations of exactly who is a mercenary, as well as the absence of any real mechanism for curtailing mercenary activities, creates difficulties for anyone attempting to curtail PMF activity by use of international law. For example, the various regimes listed above focus their definition on the hiring of the private agent, with the assumption that the agent will be linked to a specific conflict. However, many military firms recruit employees for lengthy periods or work on contracts not tied to any one conflict. An example is the Executive Outcomes firm, which moved from fighting in Angola to Sierra Leone and then to the Democratic Republic of the Congo.<sup>42</sup> Despite fighting for pay in other nations' wars, personnel of Executive Outcomes would not meet the standard. Moreover, the majority of firms in the industry offer services that are inherently military in nature, but do not participate directly in hostilities. For example, military consultant firms offer military training and advisory services, and military support firms provide logistics and technical support.<sup>43</sup> These firms and their employees arguably would not fall under the authority of the regimes, as the exact legal threshold of what constitutes participation in the conflict is certainly open to question.

Another aspect of the legal definition open to debate is the exact nature of membership in armed forces. Employees of the firms are not acting as individuals, but are part of entities that organize their activities. Moreover, they are liable to their superiors, who are bound to their clients by formal contracts. Thus, arguably, the firms "represent quasi-state actors in the international arena, which takes them outside the mercenary concerns of the international community."<sup>44</sup>

Even if the argument that they constitute a new legal form of armed forces is not accepted, PMFs can use other methods to get around such definitions. For example, in a contract that the Sandline firm signed with Papua New Guinea in 1997 to help the state defeat a

---

MILITANTS KILL (2003).

41. Abraham, *supra* note 20, at 99.

42. SINGER, *supra* note 2, ch. 7.

43. *Id.*

44. Zarate, *supra* note 11, at 145.

local rebel army, its personnel were deputized by the government as “special constables.”<sup>45</sup> This appointment occurred despite the fact that they were non-citizens, and was instead a mechanism to ensure that the Sandline personnel were not liable under any international laws dealing with mercenaries. Even when such escape clauses are not used, citizenship is also something easily granted.<sup>46</sup> Or, if a firm gets the authorization of any government for its contract, even those governments outside the conflict, it can claim that the approval signifies that state’s official sanction and thus the PMFs actions do not fall under the regimes’ definitions. This safe harbor applies, for example, to American PMFs that receive licenses from the U.S. Department of State.<sup>47</sup>

State practice, which determines the development of customary international law, also clearly falls on the side of the PMFs. Not only have states been lax in enforcing any of the above international regimes against individual mercenaries, but the fact that PMFs operate in over fifty states, often on behalf of governments, suggests a basis for arguing a norm of their legitimacy and a general acceptance of the phenomenon.<sup>48</sup>

The result is that any legal condemnation of the private trade in military services on the international level is mostly veiled. There are no possibilities of threats of company fines or dissolution, as no international laws specifically recognize the existence of the firms. There is also no mechanism for dealing with clients who hire the firms. Louise Doswald-Beck writes:

Multinational or other industries who use such companies ought to be accountable in some way for their behavior; yet these clients are neither states nor parties to an internal armed conflict in any traditional sense of the word. The security companies concerned are in principle bound by the law of the state in which they function; in reality this will not have much effect

---

45. See CHALLENGING THE STATE: THE SANDLINE AFFAIR IN PAPUA NEW GUINEA (Sinclair Dinnen et al. eds., 1997); Peter Lewis Young, *Bougainville Conflict Enters Its Ninth Year*, JANE’S INT’L DEF. REV., June 1997.

46. AOUL, *supra* note 18.

47. Abraham, *supra* note 20, at 100.

48. For example, since 1939, despite the hundreds who are known to have served in Rhodesia, Angola, and the Latin American wars, only one person in the United States has been prosecuted under U.S. law for serving as a mercenary. He was an individual who fought with Castro. Larry Taulbee, *Myths, Mercenaries and Contemporary International Law*, 15 CAL. W. INT’L L.J. 339, 339–63 (1985).

if they actually engage in hostilities.<sup>49</sup>

In fact, the only real legal sanction available applies not to the firms, but only to their employees, and only in very limited circumstances. If individuals working for the firms are captured, they might lose their rights provided in the general laws of war. For example, in looking at U.S. military outsourcing to PMFs, the U.S. Air Force Judge Advocate General found that if the operators of unmanned aerial vehicles (remotely flown planes like the noted Predator drone and Global Hawk reconnaissance platform) are civilians, as most of them are, they risk losing the noncombatant status that civilians normally enjoy. While they may be civilian employees, they are operating weapons systems that are a critical node in overall combat operations. This means that if they are captured they could be considered unlawful combatants and thus liable to prosecution as war criminals.<sup>50</sup>

The end result is that the status of PMFs under international law is ambiguous in that there are no regimes that exactly define or regulate them. The current legal definitions designed for individual mercenaries are neither fully applicable to PMFs nor effective in and of themselves. Even Enrique Ballesteros, the U.N.-appointed expert on the subject, has acknowledged that defining mercenaries is extremely difficult, if not outright impossible, and certainly of no assistance in dealing with the PMF industry.<sup>51</sup> Moreover, existing international law neither regulates nor forbids the activities of mercenaries, but rather proposes a definition and specifies their legal status only under certain conditions.

### III. REGULATION FROM THE NATIONAL LEVEL?

The failure of international law to establish the exact legal status of privatized military firms effectively defers the problems to the national level. There are three fundamental problems with attempting to do so, each of which presently undermines any effective legal regulation of PMFs.

---

49. Louise Doswald-Beck, *Implementation of International Humanitarian Law in Future Wars*, 52 NAVY WAR C. REV. (1999), available at <http://www.nwc.navy.mil/press/Review/1999/winter/art2-w99.htm>.

50. STEVEN J. ZAMPARRELLI, CONTRACTORS ON THE BATTLEFIELD: WHAT HAVE WE SIGNED UP FOR? 26 (1999).

51. *Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, U.N. ESCOR, 53d Sess., Agenda Item 7, ¶¶ 85–86, U.N. Doc. E/CN.4/1997/24 (1997).

The first issue derives from the organizational form of military firms. Being service-orientated businesses that operate on the global level and often have small infrastructures, PMFs have the ability to transform in order to circumvent legislation or escape prosecution.<sup>52</sup> That is, there are specific firm tactics that have allowed PMFs to defeat local state regulation through recreating or relocating themselves. If the local government proves inhospitable or begins to target their contracting, PMFs can shift their bases of operation to more amenable areas. For example, at the time that South African legislation began to focus on his firm in the late 1990s, Eben Barlow, the founder of Executive Outcomes, expressed that he was not all that concerned. "Three other African countries have offered us a home and a big European group has even proposed buying us out."<sup>53</sup>

Another escape option is for firms simply to take on a new corporate structure or name whenever they are legally challenged. The Lifeguard firm, operating in Sierra Leone, was considered by many to be a spin-off from Executive Outcomes, which eventually closed in South Africa. Lifeguard was made up of many of Executive Outcomes' former employees, maintained some of its old corporate ties, and operated in its former contract zones. Similarly, the Capricorn Air firm was re-registered as Ibis Air in Angola and South Africa and later was reported to have shifted to Malta.<sup>54</sup> The result is not only that national legislation is a difficult long-term solution, but also that attempts to eliminate the firms tend only to drive them and their clients further underground, away from public oversight.<sup>55</sup>

The second problem with national regulation results from the often extraterritorial nature of possible enforcement. The real risk of gross misbehavior by PMFs is not during their operations in sound states like the United States, but rather the contracts they have in weak or failing states. The inherent problem is that local authorities in such areas often have neither the power nor the wherewithal to challenge these firms. For example, the weak central government of Sierra Leone could not control its own capital, let alone monitor and punish the actions of an outside military firm.<sup>56</sup> Thus, any true legal enforcement will usually have to be extraterritorial, emanating from

---

52. SINGER, *supra* note 2, chs. 14–15.

53. Zarate, *supra* note 11.

54. GUY ARNOLD, *MERCENARIES: THE SCOURGE OF THE THIRD WORLD* 120 (1999).

55. *Can Anyone Curb Africa's Dogs of War?*, *ECONOMIST*, Jan. 16, 1999, at 41.

56. Al J. Venter, *Sierra Leone's Mercenary War*, *JANE'S INT'L DEF. REV.*, Nov. 1995; Alex Vines, *Mercenaries and the Privatisation of Security in Africa in the 1990s*, in *THE PRIVATISATION OF SECURITY IN AFRICA*, *supra* note 20, at 10.

the firms' home states.

Of course, few issues are more troublesome than an attempt by one state to exercise legal powers within another state's sovereign territory.<sup>57</sup> Even if the home state has the wherewithal, such regulation is always difficult. If the PMF decides to stay based in the original home state, companies can find other ways around restrictions. One option is running operations through subsidiaries registered elsewhere.

States also often lack the necessary eyes and ears on the ground in foreign states to discover violations abroad. In fact, the South African minister in charge of legislation that attempted to regulate the export of PMF services admitted that his nation would be dependent on journalists to help it enforce its law.<sup>58</sup> This is obviously not a sufficient legal instrument—i.e., the law lacked an enforcement mechanism. Moreover, as the publicity and protests over multinational corporations claiming good corporate behavior in the U.S. advertising market but secretly operating sweatshops abroad illustrates, it is often quite difficult to detect extraterritorial transgressions.<sup>59</sup>

The difficulty of doing so is particularly heightened with PMFs. For instance, their very realm of operation distinguishes the problem from similar structural concerns with attempts to regulate firms that engage in sweatshop operation or environmental degradation. PMFs work in a unique environment. War is a realm that even great military thinkers such as Clausewitz could only describe as a series of unique situations limited by numerous ambiguities.<sup>60</sup> That is, PMFs' business activity tends to take place "in the fogs of war that accompany state failure in obscure parts of Africa where no foreign state devotes large amounts of attention."<sup>61</sup>

The final weakness on the national level mirrors that of international law. The vast majority of domestic laws and ordinances across the globe either ignore the phenomenon of private military actors, deferring to the international level, or fall well short of any

---

57. See, e.g., *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990).

58. Malan & Cilliers, *supra* note 23.

59. STITCH AND THE MAQUILA SOLIDARITY NETWORK, WOMEN BEHIND THE LABELS: WORKER TESTIMONIES FROM CENTRAL AMERICA (2000); Tim Connor, *Still Waiting for Nike to Do It*, Global Exchange report 2001; Tracey A. Swift, *No Trust Without Verification*, HUM. RTS. & BUS. MATTERS, Autumn/Winter 2002, available at <http://www.amnesty.org.uk/business/newslet/autumn02/trust.shtml>.

60. CARL CLAUSEWITZ, ON WAR 119 (Peter Paret trans., Princeton U. Press 1976).

61. Jeffrey Herbst, *The Regulation of Private Security Forces*, in PRIVATISATION OF SECURITY IN AFRICA, *supra* note 20, at 126.



ability to define or regulate the industry.<sup>62</sup> U.S. law illustrates this failing. Under the Neutrality Act, U.S. law prohibits only the recruitment of mercenaries within the United States but not the sale of military services. In turn, the Uniform Code of Military Justice only covers transgressions committed by members of the U.S. military, but not any civilians accompanying the force overseas.<sup>63</sup> The 2000 Military Extraterritorial Jurisdiction Act was intended to fill in the gap, by applying the code to civilians serving in U.S. military operations outside the United States.<sup>64</sup> However, it only applies to civilian contractors working directly for the U.S. Department of Defense on U.S. military facilities, not to contractors working for another U.S. agency, such as the Central Intelligence Agency, nor to U.S. nationals working overseas for a foreign government or organization. Moreover, Major Joseph Perlak, a Judge Advocate with the U.S. Marine Corps, writes that the law itself still is not fleshed out and no one is quite sure how and when to apply it. “[T]here is a dearth of doctrine, procedure, and policy on just how this new criminal statute will affect the way the military does business with contractors.”<sup>65</sup>

Thus, if an American PMF employee commits any offense abroad, under the frequent conditions that do not meet the above standards, only the host nation may prosecute. However, for many likely areas of activity prosecution against a PMF or its individual employee is unlikely to occur. This result might be because the host state is unwilling to challenge the PMF, as was the case in Colombia (where the firm was carrying out the state’s dirty work). Or, the host state may be unable to challenge the PMF, as was the case in the failed states of Bosnia and Sierra Leone (where the legal system has simply crumbled). Or finally, the host government may have no control over the PMF because the PMF is fighting against the government. For example, during the Iraq war, an American PMF working on Iraqi soil could hardly have been expected to turn its employees over to the government of Saddam Hussein, if any were suspected of individual criminal activity. The result is “an environment where civilians are untouchable despite commission of what would be serious crimes within the United States . . . . A

---

62. Vines, *supra* note 20, at 19.

63. Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 (2000).

64. The Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261–67 (2000). The full text of the Act is available at [http://www.feds.com/basic\\_svc/public\\_law/106-523.htm](http://www.feds.com/basic_svc/public_law/106-523.htm).

65. Joseph R. Perlak, *The Military Extraterritorial Jurisdiction Act of 2000: Implications for Contractor Personnel*, 169 MIL. L. REV. 92, 95 (2001).

contractor, there to support the U.S. national interest, could murder, rape, pillage and plunder with complete, legal unaccountability.”<sup>66</sup>

This failing was demonstrated most recently in the international police contract held by one PMF in Bosnia and Kosovo. A number of employees of DynCorp, a firm fulfilling the U.S. government’s commitment to the U.N. peacekeeping operation in the region, were found to have committed statutory rape, abetted prostitution, and accepted bribes. None were ever prosecuted, as their employers pulled them out of the country before they could be arrested. Most worrisome is that the “whistleblowers” in the incidents, two employees who were not involved in the crimes but made the incidents public, were fired by the firm in retaliation.<sup>67</sup> The two then sued the firm, one in Britain and one in Texas, under the Racketeer Influenced and Corrupt Organizations (“RICO”) Act.<sup>68</sup> After losing the case in Britain, the company settled the Texas case. As mentioned earlier, this same company now has a similar contract to help run the new police force in Iraq, indicating that market and reputational forces do not always act to punish transgressions either. In turn, the firm’s plan for avoiding a repeat of these crimes consists of a requirement that employees sign a written statement that they understand that human trafficking and prostitution are “immoral, unethical, and strictly prohibited.”<sup>69</sup>

The problems continue with U.S. laws when they are applied to PMFs. Under the International Traffic in Arms Regulations (“ITAR”), there is limited licensing within the United States of PMFs in cases where their contracts also involve arms transfers. This minimal regulation provides official approval, which might supersede international regulation. But the licensing process itself is idiosyncratic.<sup>70</sup> As Professor Deborah Avant writes, “[t]he Defense and State Department offices that have input into the process vary from contract to contract, and neither the companies nor independent

---

66. Gordon Campbell, *Contractors on the Battlefield: The Ethics of Paying Civilians to Enter Harm’s Way and Requiring Soldiers to Depend upon Them*, Presentation at the Joint Services Conference on Professional Ethics, Springfield, VA (Jan. 27–28, 2000).

67. Barnett & Hughes, *supra* note 16, at 4; Colum Lynch, *Ex-U.N. Officer Sues US Firm over Dismissal*, WASH. POST., June 23, 2001, at A20; Colum Lynch, *Misconduct, Corruption by U.S. Police Mar Bosnia Mission*, WASH. POST., May 29, 2001, at A1; Kelly Patricia O’Meara, *DynCorp Disgrace*, INSIGHT, Jan. 14, 2002, available at <http://www.insightmag.com/main.cfm/include/detail/storyid/163052.html>.

68. O’Meara, *supra* note 15. The RICO lawsuit was *Johnston v. DynCorp Inc.* in the 17th District Court of the state of Texas.

69. Crewdson, *supra* note 15.

70. The ITAR regimes are detailed in the Defense Trade Controls website at <http://www.pmdtc.org/reference.htm>.

observers are exactly clear about how the process works.”<sup>71</sup> Additionally, under current U.S. law, as long as the contract amount is under US\$50 million, any U.S. military firm can work abroad with or without notifying Congress.<sup>72</sup> Many contracts naturally fall under this amount, while larger ones are easily broken up to do so. Finally, once a PMF receives a license, there are no specific follow-up oversight requirements to see how they carry out the contract in reality. U.S. embassy officials in the contracting country are charged with general oversight, but no official actually has a dedicated responsibility to monitor the firms or their activities. Instead, many see this as contrary to their job. An illustration of this problem is a 1998 incident in Colombia, when the employees of the Florida-based PMF Airscan coordinated an airstrike on a village that was a suspected rebel stronghold. Instead of killing rebels, this strike mistakenly killed eighteen unarmed civilians, including nine children. When asked whether the U.S. embassy would help the Colombian government pursue the PMF’s employees in the courts, a State Department official noted, “[o]ur job is to protect Americans, not investigate Americans.”<sup>73</sup>

The South African government has made the most direct domestic attempt to regulate the private military industry. Its reasons draw mainly from frustration the ANC government experienced with Executive Outcomes and other military firms, who provided a new business outlet for Apartheid-era military personnel. In 1997, the government passed the Regulation of Foreign Military Assistance Bill.<sup>74</sup> Under its provisions, any military firm based in South Africa is compelled to seek government authorization for each contract it signs, whether the operation is local or extraterritorial.<sup>75</sup>

However, the South African law is also highly problematic. First, by requiring the government to approve each contract, the law results in the official sanctioning of the contract. This sanction makes

---

71. Deborah D. Avant, *Privatizing Military Training*, FOREIGN POL’Y IN FOCUS, May 2000, available at <http://www.foreignpolicy-infocus.org/briefs/vol5/v5n17mil.html>.

72. These procedures are implemented by the Department of State’s Office of Defense Trade Controls (ODTC) under the Arms Export Control Act and the International Traffic in Arms Regulation, 22 C.F.R. §§ 120–30 (2001). See also Bruce D. Grant, *U.S. Military Expertise for Sale: Military Consultants as a Tool of Foreign Policy*, in NAT’L DEF. U., ESSAYS 1998, at 89 (1998).

73. Statement quoted in T. Christian Miller, *A Colombian Town Caught in a Cross-Fire*, L.A. TIMES, Mar. 10, 2002, available at <http://www.latimes.com/news/nationworld/world/la-031702swamp.story>.

74. Regulation of Foreign Military Assistance Bill, 1997, Bill 54D-97 (GG), available at <http://www.gov.za/gazette/bills/1997/b54-97.pdf>.

75. *Id.* arts. 4–6.

the home government responsible for the firm's actions, as it has licensed them, and thus allows the potential escape from international legal controls discussed earlier. Like the relevant international laws, it also has clear problems with definition. The drafters tried to cast the bill's legal net as widely as possible, seeking to control all forms of foreign military or security services, including "advice or training" to forces engaged in conflict.<sup>76</sup> The difficulty is that this wide definition brought in too extensive a realm of activity and actors, making it almost irrelevant. The sponsor of the bill later admitted that not just mercenaries and PMFs, but also individuals, universities, non-governmental organizations ("NGOs") involved in conflict prevention and dispute resolution, and workers for aid agencies would all fall under the bill's provisions.<sup>77</sup> The bill also raised issues of subverting parliamentary oversight. It turns over the contract sanctioning power to the Foreign Ministry, granting the executive branch broad discretionary powers, which are reminiscent of the Apartheid-era.

Regardless of its flaws, the response from the PMF industry illustrates the pitfalls with national enforcement, even if it had been perfect. The most controversial South African PMFs, such as Executive Outcomes, moved their base of operations elsewhere, illustrating the problem, discussed above, of uncoordinated national approaches to a globalized industry.<sup>78</sup>

Beyond the United States and South Africa, there is little domestic regulation of the privatized military industry. The British government has made the only other serious effort. It is presently pondering its own licensing approach towards PMFs and laid out a set of potential options in a "Green Paper."<sup>79</sup> The proposals essentially followed the setups previously described. However, this paper took two full years to craft and immediately came under fire from Parliament.<sup>80</sup> Labour party leaders attacked the proposal, calling it "repugnant," "deeply offensive," and "an abdication of the responsibilities of government" that the government would consider giving PMFs political cover.<sup>81</sup> Said one British minister, "[t]he whole

---

76. *Id.* art. 1(iii)(a)(i).

77. Malan & Cilliers, *supra* note 23.

78. SINGER, *supra* note 2, chs. 7, 15.

79. A "green paper" is essentially a policy paper that discusses the issues but makes no formal recommendations. U.K. FOREIGN & COMMW. OFF., PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION (2002), available at <http://www.fco.gov.uk/Files/kFile/mercenaries,0.pdf>.

80. Paul Waugh, "Mercenaries as Peacekeepers" Plan Under Fire, INDEPENDENT, Feb. 14, 2002, at 8.

81. *Peacekeeping "Role" for Mercenaries*, BBC, Feb. 13, 2002, at 83, available at

2004] *PRIVATIZED MILITARY FIRMS AND INTERNATIONAL LAW* 541

exercise has proved nightmarishly complex.”<sup>82</sup>

Thus, at the time of publication, it appears that the British plan has been kicked further down the road to be resolved later, while the industry continues its present activities, particularly in London, a hub for many PMFs.<sup>83</sup> Eventually, the British government likely will enact some regulatory scheme, ideally establishing far greater observation and transparency of UK-based and hired PMFs. Whatever the outcome, the government’s interests would be best suited by making sure it is widely disseminated and explained to British allies and other interested states.

In sum, the ability of states to control the privatized military industry at the national level is limited. The environs in which they work are often institutionally weak and, hence, there are limited means to monitor firms properly. This vacuum leaves regulation by their home states as a possible recourse. However, the very form of the PMF gives it the ability to defeat almost any attempts at strict legal controls at this level. Problems arising from the extraterritorial nature of their operations and the overall weakness of state ordinances also mitigate any efforts at establishing and regulating the legal status of firms at the domestic level.

#### IV. FACTORS IN DETERMINING POSSIBLE RECOURSES AND REGULATION

The difficulty of defining the legal status of PMFs is thus twofold. At present, “[n]o effective international norms or sanctions exist.”<sup>84</sup> Likewise, a turn to national statutes offers only limited guidance.

This vacuum in the law should thus be of concern not only to those who believe in the power of legal norms to shape good behavior, but also to those who seek to provide some order to the international security sphere. In fact, legal measures have been demonstrated to play an important role in dealing with non-state

---

<http://www.news.bcc.uk>.

82. Joshua Chaffin et al., *Foreign Office Faces Opposition to Regulation*, FIN. TIMES, Apr. 18, 2001, at 4.

83. In London alone, there are headquartered at least ten firms that have overseas contracts thought to be worth more than £100 million (roughly US\$160 million). Confidential Interviews with PMF-related individuals (1996–2003); Victoria Burnett et al., *From Building Camps to Gathering Intelligence*, FIN. TIMES, Aug. 11, 2003, at 13.

84. Herbert Howe, *Global Order and Security Privatization*, STRATEGIC F., May 1998.

threats to security in the past. For example, the elimination of piracy as a mass epidemic in the 1700s came about not through brute force, but through changes in domestic and international law.<sup>85</sup> Moreover, as noted earlier, the ambiguous status of PMFs also works to the disadvantage of the firms' employees. The laws of war are not just about regulating behaviour, but also about determining status and ensuring that soldiers receive their due rights. While they are still legally bound to follow the rules and customs of war, if they are captured, their uncertain status means that PMF employees risk not receiving the guaranteed protection of international humanitarian law and may even be tried as criminals.<sup>86</sup>

The obvious way to establish the legal status of the privatized military industry, in contrast to the unregulated status quo, is either to prohibit it completely or to regulate it. Unfortunately, neither option is simple.

There are five elements to consider in any attempt to either prohibit or regulate PMFs. These derive from experiences in attempting to bring comparable industries, such as the domestic security market, under legal controls.<sup>87</sup>

The first element consists of the objectives that drive the effort at legal prohibition or regulation. If the goals of the laws are unclear or seen as inappropriate, then the respect for them and their resultant effectiveness certainly will be diminished. In any potential structure, it must be made clear that the objective is public protection, without bias towards any one state, segment of the industry, or firm. Otherwise, the laws will be ignored or even actively undermined by those who see them as unfair.

The second element is to define who should fall under the definition. That is, who or what type of firms are to be proscribed or regulated? Obviously, there are varying definitions of the scope of the PMF industry, but whatever final definition is utilized must be sure to set clear and immutable parameters. The most workable proposal would be to focus on the nature of the services offered.<sup>88</sup> If the firm's services entail patently military type activity such as use of or aiding with weapons systems, takes place inside the conflict zone

---

85. JANICE E. THOMSON, *MERCENARIES, PIRATES, AND SOVEREIGNS: STATE-BUILDING AND EXTRATERRITORIAL VIOLENCE IN EARLY MODERN EUROPE* 148 (1994).

86. ANTHONY D'AMATO, *INTERNATIONAL LAW COURSEBOOK TO ACCOMPANY INTERNATIONAL LAW ANTHOLOGY* 100 (1994).

87. These five conditions drew from Jenny Irish, *Policing for Profit*, ISSS MONOGRAPH SERIES, 1999.

88. Singer, *supra* note 3.

or is intended to affect the process and outcome of conflict, then they would appear to fall under the jurisdiction of the laws of war.

The third element is establishing the specific activities of the industry that are to be prohibited or regulated. That is, placing every aspect of the industry under strict legal observation could raise concerns of over-regulation and prove unworkable.<sup>89</sup> However, there are clear areas that justify external legal instruction. These include the contract provisions and employee conduct in the field, specifically the compliance with already established international laws of war and human rights regimes.

The fourth element is determining what body would conduct the actual observation, regulation, and, if necessary, enforcement. Obviously, most PMFs oppose regulation from the outside and prefer a self-regulatory model. They believe that the market will reward or punish firms based on their performance and good behavior. If there is to be any formalized regulation, they believe it is the industry that is in the best position to take on this task. A nascent industry lobby group, the International Peace Operations Association, has recently created a voluntary code of conduct that may become the centerpiece of an industry-led approach for self-regulation.<sup>90</sup>

However, the market is not a regulatory institution, but simply a theoretic space in which trade takes place. To put it another way, the public good and private goods are not always perfectly aligned. The result is that, as has occurred in other industries such as oil and gas or clothing manufacturing, self-regulation is usually insufficient. The incentive structures run against a trade group acting as a strict enforcement and punishment agent for members of its own industry. The underlying *raison d'être* for PMFs is to make money, not to name and shame. Additionally, voluntary codes may provide a baseline for excoriating firms that break rules they have signed, but they are ultimately a weak mechanism. In short, they give the cover of prior untested compliance without any real commitment to punishment if the rules are broken.

The final element is that of costs. Who pays for any regime and its enforcement? While rarely discussed in the debates over regulation, this factor is critical in that it will influence directly the type of framework to be set up and its likelihood of success. The most likely model is a system financed by interested state parties and obligatory tariffs placed on firms that receive the sanction any official

---

89. TIM SPICER, *AN UNORTHODOX SOLDIER: PEACE AND WAR AND THE SANDLINE AFFAIR* 28 (1999).

90. IPOA Code of Conduct, June 2001, *available at* <http://www.IPOAonline.org>.

regulatory system would provide.

## V. A MODEST PROPOSAL

The essential aspect of any system embodying these elements is that, given the ability of PMFs to globalize and escape local regulation, it must be international in scope to be effective.

Presently, there are limited proposals for the absolute prohibition of the PMF industry. These plans focus on the military provider sector, i.e., those firms most akin to age-old mercenaries, which supply tactical military services.<sup>91</sup> The implementation of these proposals would require the expansion of the existing legal definitions of mercenaries to include PMFs and the enactment of enforcement mechanisms, such as fines and criminal sanctions for firm employees and clients.

It is unclear, however, where any attempt to ban PMFs would fit with states' rights to self-defense, codified in Article 51 of the U.N. Charter.<sup>92</sup> States are allowed to take unspecified measures to protect themselves against attack. Without a clear justification, any attempt to ban a new option for states to do so might be in contravention of this clause. Furthermore, the obvious enforcement and compliance problems still remain. These hurdles would have to be resolved before any type of ban could actually be enacted. Moreover, it is also important to remember that, as with the international narcotics trade, both supply and demand issues will have to be faced if the international community seeks to end the global military service trade. Many of the inherent dangers of PMFs derive from the failure of states, and thus, will not be solved unless large regions of instability no longer offer both clear markets and open areas of PMF basing and operation.<sup>93</sup> Finally, some states, including the United States and the United Kingdom, clearly support the industry, finding its activities to their advantage in many foreign policy activities. They are unlikely to back such a program to ban PMFs. As a result of all of these factors, efforts at legal prohibition appear to be a non-starter in the present context. Moreover, they would likely only repeat the past failures of the anti-mercenary laws.

In turn, a variety of systems for regulating the PMF industry

---

91. See generally ABDEL-FATAU MUSAH & J. KAYODE FAYEMI, *MERCENARIES: AN AFRICAN SECURITY DILEMMA* (2000).

92. U.N. CHARTER art. 51.

93. Vines, *supra* note 20, at 12.



have been put forth. In fact, many have been proposed by the firms themselves. A number of PMFs see regulation as the means to respectability and market dominance.<sup>94</sup> The president of Strategic Consulting International has stated that their willingness comes with an important proviso: “We would welcome some form of regulation and supervision, provided we have some say in what form this takes and it takes into account the realities of the world we live in.”<sup>95</sup>

It is a combination of these proposals, taking into account the previous considerations, that appears to hold the most promise. The general aspects that these plans have in common begin with the need for an international registration process that determines the initial qualifications of firms. They propose that some public international body would audit willing firms, evaluating them for compliance with fair business operating procedures and international military standards.

One potential compromise, which guards representative public interests, is that this public international body be formed under the auspices of the U.N. Secretary General’s Special Rapportuer on Mercenarism.<sup>96</sup> A task force of international experts, with input from all the stakeholders in the matter including governments, the academy, NGOs, and the firms themselves, could establish the parameters of the issues and lay out potential forms of regulation, evaluation tools, and codes of conduct. The findings of this task force ultimately could become the core of an international office designated to handle such issues on a normalized basis. It would help fill the present void in monitoring mechanisms.

This task force or office would perform audits of PMFs, which would make them sanctioned businesses. This process is akin to the creation of the present list of pre-approved companies that can work as contractors for the U.N. in non-military activities. These audits would include vetting executives and employee databases for past violations of human rights and establishing rules of transparency over

---

94. *Sandline International, Private Military Companies—Independent or Regulated?*, WHITE PAPER, Mar. 1998, at <http://www.sandline.com/site/index.html>; Howe, *supra* note 84; David Isenberg, *Soldiers of Fortune Ltd.: A Profile of Today’s Private Sector Corporate Mercenary Firms*, CTR. FOR DEF. INFO. MONOGRAPH, Nov. 1997; Doug Brooks, *Write a Cheque, End a War Using Private Military Companies to End African Conflicts*, CONFLICT TRENDS, July 2000, at <http://www.accord.org.za/publications/ct6/issue6.htm>; Global Coalition for Africa and International Alert, *The Privatization of Security in Africa*, Conference Report, Washington D.C., Mar. 12, 1999, at <http://www.gca-cma.org/eseurity.htm#0399>.

95. SPICER, *supra* note 89, at 20.

96. This is an amended approach of that suggested by Vines, *supra* note 20, at 19.

their owners and organizers. The incentive for the firms is that, as a sanctioned business, not only could they work on behalf of the U.N., but they would also be in a better position to gain contracts from many other clients. These potential clients range from humanitarian groups to large multinational companies that have been leery to work with PMFs because they are concerned about their image. The firms thus will be motivated to support this system in that it “clears” them for business with a lucrative and relatively untapped market sector.

The same body, armed with a right of refusal, would then review any contracts made with these firms. This process would help control any propensity of PMFs to work for unsavory clients or engage in contracts that are contrary to the public good. If it approved of the contract, the body would then have the option to provide operational oversight where it sees a need. In certain cases, the international body could send teams, made up of neutral and independent military observers, to ensure that the firm not only followed the laws of war, but also was not engaged in any breach of its operating obligations. These independent observer teams should have powers not only to monitor, but also certain powers to suspend payments or detain violating personnel, in order to establish their authority over the firm.

If the firm were found to be in violation of its contract terms or any laws of war, it would risk punishment. The exact nature of these sanctions is another area in dispute and is generally unexplored in the various plans. PMFs would prefer that sanctions be just market-based, with offending firms removed from the list of approved companies. While this may be appropriate for instances when firms commit contract violations with financial implications, it is clearly insufficient for more egregious violations in the human rights sphere. It is also not a sufficient deterrent for controlling actions by individual employees. A solution is the requirement that both firms and their employees agree in their original contract terms to face any legal sanction in host states. Or they could agree a priori to waive their opposition to extradition to third party states that have universal jurisdiction laws. Exploration should also be given to use of the International Criminal Court or another international legal body, such as an ad hoc tribunal, determined to be commensurable with their violations.<sup>97</sup>

---

97. Stephen Mbogo, *Mercenaries? No, PMCs*, W. AFR., Sept. 18, 2000, at 10–13.

## VI. SHORT-TERM MEASURES AND ULTIMATE CONCLUSIONS

While such a system of international regulation would certainly provide much greater transparency in the PMF industry, it fails to answer a number of concerns. These concerns range from the treatment of PMFs and clients that attempt to evade monitoring or stay outside the vetting system to the fact that any oversight system would, in effect, be a sanction of the industry. Such matters would all be issues for the international body to consider as it formulates its plans.

The biggest problem, however, is a lack of political will. Until a massive violation related to PMFs occurs, the likelihood of any international body being willing to take on this complex regulatory function is extremely limited. In response to this inertia, some PMFs have threatened to set up their own voluntary system with oversight provided by a body of their own choosing.<sup>98</sup> The concerns with any such system of industry self-regulation have already been discussed.

Thus, the privatized military industry exists in the grey areas of law and appears likely to stay there for the near future. However, until the overall legal and policy issues are settled, there are certain limited measures that could be taken in the short-term to help clarify matters and begin to respond to this new industry. Each has also been chosen for its feasibility.

The first step would be for the international community to expand the mandate of the U.N. Special Rapporteur on Mercenarism. It should include study of the PMF industry, thus allowing the international community to begin building a set of established findings. This would provide a common starting point for future modifications and legal approaches. Additionally, the international community might consider encouraging broader ratification of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries. That the treaty is highly problematic is indisputable. But, by assenting to the treaty, states would at least establish greater international legal concern on the topic and some minimal international standards. Expanding its makeup beyond the current parties would also help reverse the sense that it is simply a false document propped up by a mostly hypocritical signatory body.

A second, parallel step would be the improvement of national

---

98. SPICER, *supra* note 89, at 54.

legal measures applicable to privatized military services. Specifically, this measure would involve the adjustment of legislated controls of private military activity and the closing of current loopholes in national laws. For example, the South African legal code dealing with military assistance could be amended. It could focus the definition of its scope on the nature of the assistance, i.e., whether the service is military in content or not, rather than the destination of the service (a combat zone). Similarly, the U.S. Congress could establish a more consistent and transparent licensing process that specifies oversight of U.S.-based and/or employed PMFs and sets strict and public reporting requirements. The concern over the activities of certain PMFs in Colombia and Iraq could be used as a basis for building the political will to support such regulation. The current high monetary threshold for notification to Congress of pending contracts should also be lowered. This would make it more difficult for sizable military services to escape public monitoring.<sup>99</sup> Likewise, the Military Extraterritorial Jurisdiction Act could be expanded to include the activities of any American PMFs and/or American PMF employees working abroad, regardless of their client. Although such expansion of U.S. criminal law may be potentially unenforceable, it would at least establish concern and perhaps provide a legal backstop until international regulation is developed.

Finally, as these national standards become better suited for dealing with the legal complexities of the industry, leading states should assist the process of harmonization of national procedures.<sup>100</sup> For example, whatever the outcome of the British "Green Paper," its interests would be best suited by making sure it is widely disseminated and explained to British allies and other interested states. By setting common standards, prior coordination could help lay the basis for an eventual international approach.

In conclusion, the present legal void in dealing with the privatized military industry is unacceptable. These private firms offer services that are of inherent concern to the public. It is imperative that international law bridges the gap and responds to the new reality and new challenges that PMFs present. While this may only be possible in the long-term, there is nothing to prevent short-term preparations that will speed this outcome. A critical requirement will be the establishment of clear standards and conditions under which PMFs can operate with clear and effective sanctions to uphold them.

---

99. Avant, *supra* note 71.

100. Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept. 1997, at 183.

2004] *PRIVATIZED MILITARY FIRMS AND INTERNATIONAL LAW* 549

The old proverb used to be that “War is far too important to be left to the generals.” For international law in the 21<sup>st</sup> century, a new adage may be necessary: War is also far too important to be left to the C.E.O.s.

