

Articles

Have Your Cake and Eat It Too: A Proposal for a Layered Approach to Regulating Private Military Companies

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*"It's a prestigious line of work, with a long and glorious tradition."*¹

GENOCIDE BEGINS. CNN breaks the news. Wheels turn. The United Nations ("UN") calls for investigations. Debates rage. Meanwhile, people die by the thousands. Action must be taken, but how? Who will go? An international force? A unilateral force? A private force? And if a force is sent, who will pay? Finally, the UN deploys a force but only after hundreds of thousands needlessly perish.

Elsewhere, insurgent forces threaten a legitimate government. The government attempts to quell the uprising, but its less than professional military fails and possibly exacerbates the country's unrest. The group uses extreme violence and soon closes in on the capital. Sensing the possible mayhem in the capital, countries evacuate personnel and embassies. All the while the UN, the United States, and the United Kingdom refuse to provide aid. The embattled government has no recourse. But then, the leader of the country remembers some magazine articles describing a company that might help. He places a call and, thanks to some financial help from local mining concerns, within a few weeks military aid arrives, the capital is saved, and the rebels are driven more than one hundred kilometers away. A year after the company's arrival, the rebels agree to negotiate for the

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1. THE PRINCESS BRIDE (MGM/United Artists 1987).

first time, and the country has enough stability to hold a “multiparty civilian presidential election.”²

In yet another part of the world, a country has been thrown into upheaval on all fronts. Establishing a new government may be the long term goal, but simpler, more immediate concerns, such as providing police, establishing rule of law, rebuilding infrastructure after war damage, and securing the country from external threats, are more pressing. During the reconstruction efforts, those brought in to aid in the reconstruction of the society commit heinous crimes—the very crimes they are there to prevent. Worse, the perpetrators are not subject to any law and, although fired, face no criminal prosecution for their acts.

At first glance, one might think the above abstractions are about events at the Abu Ghraib prison in Iraq and the genocide in Darfur. In a sense they are, but those familiar with the history of two companies, Executive Outcomes and DynCorp, know the abstractions are based on real events in Rwanda,³ Sierra Leone,⁴ and Bosnia⁵ in the 1990s. Groups, such as Executive Outcomes and DynCorp, have been called mercenaries, security consultants, civilian contractors, private military companies (“PMCs”), or even “hired guns.”⁶ Regardless of their title, these groups provide services ranging from consulting to logistical support to full-fledged armed divisions and are now undoubtedly a part of global politics and the global market. As the British House of Commons put it in analyzing how to regulate PMCs, “[g]iven the evident existence of—and likely growth in—a market for private military services, military companies will continue to exist.”⁷

2. P.W. SINGER, CORPORATE WARRIORS, THE RISE AND FALL OF THE PRIVATE MILITARY INDUSTRY 110–13 (2003).

3. For a detailed analysis of the failures in preventing the genocide in Rwanda see generally Samantha Power, *Bystanders to Genocide*, ATLANTIC MONTHLY, Sept. 2001, at 84, 84. See also SINGER, *supra* note 2, at 185–86 (noting Executive Outcomes proposal for Rwanda entailing deployment of 1,500 personnel within fourteen days of hire for a cost of \$600,000 as opposed to the slower responding UN force, which cost \$3 million per day).

4. See SINGER, *supra* note 2, at 110–13.

5. See Robert Capps, *Outside the Law*, SALON.COM, June 26, 2002, <http://www.salon.com/news/feature/2002/06/26/bosnia/> [hereinafter Capps, *Outside*] (detailing criminal activities of DynCorp employees in Bosnia).

6. Though this Article seeks to address some of the definitional questions related to the use of private military services for the sake of clarity the term “PMC” is used throughout to refer to any private company providing some level of military support across the spectrum of consulting to fielding active combat groups.

7. FOREIGN AFFAIRS COMMITTEE, PRIVATE MILITARY COMPANIES, NINTH REPORT OF SESSION 2001–02, H.C. 922, ¶ 102.

The above scenarios highlight the dilemma this Article seeks to investigate. PMCs can be useful and arguably provide excellent service while offering swift and needed aid to embattled regions. In addition, according to some analyses, they appear to do so at lower economic and political cost to the country or countries that choose to employ them.⁸ Still, recent events, such as those in Abu Ghraib and in Bosnia,⁹ raise questions about the privatization of force, including the necessity or wisdom of privatization at all.¹⁰

Nevertheless, because of the ever-increasing drive to privatize government services and the current entrenched use of PMCs, even if one believes private military force should never be used, its use will not likely soon disappear. Yet the same motivations that may lead one to argue PMC use should be banned also demand that the industry needs to be regulated. As such, this Article seeks to provide a starting point for changing the way in which PMCs behave so that transgressions are less likely to occur. And, if transgressions do occur, this Article suggests a means of prosecution so that those responsible for the

8. See SINGER, *supra* note 2, at 185–86 (noting Executive Outcomes proposal for Rwanda entailing deployment of 1500 personnel within fourteen days of hire for a cost of \$600,000 per day as opposed to the slower responding UN force, which cost \$3 million per day). See *infra* notes 133–138 and accompanying text. But see ANN MARKUSEN, *THE CASE AGAINST PRIVATIZING NATIONAL SECURITY*, at 2, 5–7 (2001), <http://www.gao.gov/a76panel/forthecord/amarkusenpaper.pdf> (last visited July 8, 2005) (noting potential for cost-saving but only when competition between bidders is present and controls on corruption are in place); Deborah Avant, *Privatizing Military Training*, 7 FOREIGN POL'Y: IN FOCUS, May 2002, <http://www.fpif.org/pdf/vol7/06ifmiltrain.pdf> (last visited June 20, 2005) (questioning whether privatizing military services reduces costs and citing Rand studies indicating a lack of savings unless competition for bids is in place).

9. See generally Seymour M. Hersh, *Torture at Abu Ghraib Prison*, NEW YORKER, May 5, 2004, at 42, available at www.newyorker.com/fact/content/?040510fa_fact (last visited June 23, 2005); Capps, *Outside, supra* note 5.

10. For an extended discussion of the philosophical questions surrounding the privatization of force, see generally Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force In Liberal States*, 36 CONN. L. REV. 879 (2004). For a perspective on the inherent difficulties in using PMCs in combat, see generally Maj. Joseph R. Perlak, *The Military Extraterritorial Jurisdiction Act: Implications for Contractor Personnel*, 169 MIL. L. REV. 92 (2001) (noting the operational and chain of command issues arising when employing PMCs); see also Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1, 6–9 (2003) (noting that the use of hired armies, though common throughout history, was feared, and that in the extreme, as seen in Italy under the *condotteieri*, such private armies had high influence on state affairs but did not have allegiance to anything other than the contract); Avant, *supra* note 8 (questioning whether privatizing military services reduces costs, warning that it “may actually weaken the U.S. military’s capacity for engagement,” noting its ability to avoid congressional and public debate over policy issues, and asserting that in some cases its use can hide the United States government’s actions in contravention of stated foreign-policy and/or UN policy).

transgressions may be brought into court. As a result, PMCs may not so easily escape justice and society would have a forum to better understand and assess the contours of PMC use. In addition, insofar as our country intends to continue employing PMCs, this Article is an invitation for the United States government and the PMC industry to fashion a workable system allowing for the use of PMCs, while still safeguarding important individual and governmental interests.

Part I of this Article provides a brief history of contracted military services and PMCs, including their evolution into the modern PMC, presents the context within which PMCs operate today, and examines the definitional problem accompanying any discussion of the PMC industry. Part II sets forth the current issues surrounding the regulation of the PMC industry, including rights abuses, liability, and governments' use of the industry to avoid legislative oversight of activities that may otherwise be prohibited. In addition, the section notes that despite concerns, governments, non-governmental organizations ("NGOs"), and corporations often employ PMCs with great effectiveness to provide necessary support functions, humanitarian aid, and field protection for otherwise vulnerable operations. Part III details the proposals and arguments supporting or opposing regulation of the PMC industry such as establishing large scale licensing and review systems. Part IV argues that a layered system combining contract control and legislation would work together to regulate the industry while still preserving it as a viable resource for governments, NGOs, and corporations. The first layer would be the proverbial carrot and the second layer, the stick. The contract solution, the carrot, offers governments and PMCs a role in fashioning a solution that fits their needs without a large-scale regulatory system dictating their behaviors or establishing an elaborate and cumbersome licensing system.

In addition, the proposed legislative changes would create a stick—or several sticks. Part of the legislative solution plugs the major loopholes that currently exist in the United States. These laws prevent Congress from having access to information regarding PMC contracts that are under \$50 million and prevent the government from exercising jurisdiction over violators of those laws. Another part of the proposed legislation provides a way for private actors to bring suit when the government fails to remedy violations by the PMCs. As such, all concerned would have additional incentive to adhere to the terms of the contract and the law. Failing to do so could result in large, public lawsuits that not only could threaten PMCs financially but also could

increase demands for acute regulatory systems—precisely what the government and PMCs wish to avoid.¹¹

Specifically, Part IV argues that market-makers are well suited to rein in and shape industry behavior by requiring certain specific contract provisions regarding human rights training requirements, choice of law, jurisdiction, and other pertinent issues. Turning to legislation, Part IV argues that the legislature must amend the Military Extraterritorial Jurisdiction Act of 2000 (“MEJA”)¹² so that all military contractors—not just ones working on Department of Defense (“DOD”) or Department of Justice (“DOJ”) projects¹³—are subject to the Act. Further, the legislature must amend MEJA to add a whistleblower statute similar to the one found in the Sarbanes-Oxley Act of 2002¹⁴ so problems may be reported without fear of reprisal. Finally, the section argues that new legislation creating a private right of action (with significant thresholds and a specific process for bringing such an action) should be enacted so that when it appears that PMC activity violates human rights, international criminal law, or defrauds the United States government through over-billing, watch dog groups may initiate lawsuits to remedy the situation—even when political will is lacking.

I. History

A. The Historical and Increased Current Use of PMCs Has Created a Need for Regulation

The tradition of states using private military services is an ancient practice that arguably has never gone away.¹⁵ For example, Ramses II, King David, Alexander the Great, Caesar, Justinian, William the Con-

11. Cf. Eric Engle, *Corporate Social Responsibility (CSR): Market-based Remedies for International Human Rights Violations?* 40 WILLAMETTE L. REV. 103, 120–121 (2004) (concluding that corporate social responsibility actions, such as shareholder and public shame, though not sufficient to prevent human rights abuses by themselves nonetheless can encourage higher standards, especially when combined with criminal and civil law).

12. Military Extraterritorial Jurisdiction Act of 2000 § 2, 18 U.S.C. §§ 3261–3267 (2000).

13. See *Enforcing U.S. Policies Against Trafficking in Persons: How is the U.S. Military Doing?: Joint Issue Before the H. Comm. on Armed Services and the Commission on Security and Cooperation in Europe (Helsinki Commission)*, 108th Cong. (2004) (testimony of Martina Vandenberg), available at <http://www.house.gov/hasc/Issue%20Forums/Helsinki%209-21-04/VandenbergStatement.pdf> (last visited June 12, 2005).

14. See Sarbanes-Oxley Act § 806, 18 U.S.C.A. § 1514A (2005).

15. See generally JAMES R. DAVIS, *FORTUNE'S WARRIORS*, 36–45 (2002); SINGER, *supra* note 2, at 19–39. For a general collection of essays on the history of mercenaries from 400 B.C. to the 1980s A.D., see *MERCES: THE STORIES OF MERCENARIES IN ACTION* (Bill Fawcett ed., 1999).

queror, princes of Italian city states, and the British Empire, all employed foreigners for combat military purposes.¹⁶ As some have put it, “[h]iring outsiders to fight your battles is as old as war itself,”¹⁷ and “[t]he sovereign’s resort to mercenaries is as old as history itself.”¹⁸ Even the quaint looking Swiss guards of the Papal State trace their history to the Swiss mercenary companies who dominated the market for hired military service for close to a century from the late thirteenth century to the early fifteenth century.¹⁹

Despite the enduring history of hired military services, they have often been regarded with distrust.²⁰ In recent history, the sensationalized images of PMCs during the 1950s and 1960s in Africa—daring, dangerous, and destabilizing—fueled distrust towards hired private military services.²¹ In addition, some saw European powers and local African governments as employing PMCs to hinder and arguably thwart liberation movements.²² The events culminated in an attempt to regulate “one type of mercenary, the indiscriminate hired gun who

16. See Milliard, *supra* note 10, at 2.

17. SINGER, *supra* note 2, at 19.

18. Milliard, *supra* note 10, at 2.

19. SINGER, *supra* note 2, at 26–28.

20. See NICCOLO MACHIAVELLI, *THE ART OF WAR* 13–14 (Peter Bondanella & Mark Musa eds. & trans., Penguin Books 1995) (1521) (discussing nature of professional soldiering as one needing wars and the ability to engage in “rapacious, fraudulent, violent” acts). “Washington warned that ‘Mercenary Armies . . . have at one time or another subverted the liberties of almost [sic] all the Countries they have been raised to defend . . .’” Reid v. Covert, 354 U.S. 1, 24 n.43 (1955) (omissions in original) (quoting 26 *THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES* 388 (John C. Fitzpatrick ed., 1944)). “Madison in *The Federalist*, No. 41 cautioned ‘(T)he liberties of Rome proved the final victim to her military triumphs; and . . . the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments.’” *Id.* (omission in original) (quoting *THE FEDERALIST* No. 41 (James Madison)). Accord Milliard, *supra* note 10, at 2–10 (tracing historical rise and societal responses to mercenaries).

21. See Milliard, *supra* note 10, at 43–57 (examining the Organization of African Unity activities in defining and outlawing the use of mercenaries in light of the growth of mercenary use in Africa); see also SINGER, *supra* note 2, at 37 (noting the era as the “heyday” of mercenaries and the notoriety of certain groups and individuals including Bob Denard who led several coups and attempted coups in Africa during the 1970s and an attempted one in 1995). This image persists and with some reason when figures such as Mark Thatcher, former British Prime Minister Margaret Thatcher’s son, are charged with and implicated in mercenary activity in South Africa and Equatorial Guinea. See Elliot Sylvester, Associated Press, *Mark Thatcher Pleads Guilty to Helping Finance African Coup Plot*, Jan. 13, 2005, 1/13/05 APALERTTX 12:42:25 (Westlaw).

22. See Milliard, *supra* note 10, at 4 (“The use of mercenaries by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and mercenaries should accordingly be punished as criminals.” *Id.* at n.16 (quoting G.A. Res. 3103, U.N. GAOR, 28th Sess., Supp. No. 30, at 142, U.N. Doc. A/9030 (1973)).

ran roughshod over African self-determination movements in the post-colonial period from 1960 to 1980.”²³ Appropriately, a PMC would not wish to be deemed a mercenary when the term carried such condemnation. Yet in other situations, PMCs have been seen as providing a valuable, “critical” service to military efforts, such as in Vietnam where the DOD hired civilian contractors to provide significant logistical support to the military ranging from trucking to port operation to construction and more.²⁴

In 1969 the United States Army (“Army”) reached the zenith of its PMC use in Vietnam with annual contracts totaling \$236 million and the United States Army Procurement Agency of Vietnam hiring 9000 civilian employees.²⁵ By 1985, the Army formalized procedures for outsourcing logistical support under the Logistics Civil Augmentation Program (“LOGCAP”), requiring contractors to be ready to provide logistical support on short notice and often with few set requirements until well after an engagement had begun.²⁶ The Army awarded its first LOGCAP contract to a company recognizable to some familiar with the Iraq War: Brown and Root Services Corporation (“Brown and Root”).²⁷

In the 1980s and 1990s PMCs were employed in a variety of capacities across the world. For example, corporations have hired PMCs to provide security for their investments in unstable regions, such as Mozambique.²⁸ Countries, such as Saudi Arabia, Hungary, Croatia, and Bosnia, hired PMCs to train and equip their forces.²⁹ In 1997 alone, Africa reportedly had some ninety different PMCs present and

23. See *id.*

24. See Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 233, 235 (2000); cf. Avant, *supra* note 8 (noting that in the 1950s and 1960s the British and United States governments used PMCs for “overt and covert military missions,” calling PMCs a “subset” of typical “mercenary activity” and acknowledging reports of contractors in Vietnam being involved in “illegal activit[y]”).

25. See Davidson, *supra* note 24, at 235.

26. See *id.* at 237 (noting that though the other branches of the military may use LOGCAP, the Navy and Air Force have developed their own systems for outsourcing).

27. *Id.* at 237–38.

28. See Sebastian Mallaby, Editorial, *Paid to Make Peace*, WASH. POST, June 4, 2001, at A19, (noting British company Lonrho’s hiring of a PMC outfit to secure and protect cotton field Lonrho had purchased).

29. See Avant, *supra* note 8; Matthew Quirk, *Private Military Contractors: A Buyer’s Guide*, ATLANTIC MONTHLY, Sept. 2004, at 39, 39, available at <http://www.theatlantic.com/doc/prem/200409/quirk>.

providing security to oil and mining companies³⁰—not to mention the PMCs to whom United States military training has been outsourced during the 1990s.³¹ In addition, the United States has spent \$1.2 billion a year using PMCs as part of the war on drugs in Colombia,³² and the UN has hired PMCs to provide security to their aid efforts.³³

B. Present Day Context: The Influence of PMCs Peaks

While one perception may be that the practice of paying people or companies in the private sector to aid or even conduct military operations is a new phenomenon, history shows that such practices are quite old. Likewise, the perception that such practices—especially when deemed mercenary—are uniformly reviled is not shown historically either. In addition, because it appears that today's PMC use is hitting a peak in terms of the quantity of contracts going to the industry *and* in terms of the wide range of projects for which they are hired, the current interest and concern regarding PMC use is merited. Furthermore, right now and for the near future it appears that wherever there is any level of military activity, PMCs will exist in large numbers and often handle large parts of a deployment's operation.³⁴ Thus, regulation is necessary.

Three factors have fueled the growth of the private military industry since the end of the Cold War: (1) large scale reduction of military forces after the Cold War, which created a surplus of trained military personnel without jobs; (2) the policy shift to privatizing government services whenever possible; and (3) an increase in regional conflicts.³⁵ As set forth below, these factors converged to create a PMC industry that operates in a new way with more money and more influence on

30. See David Isenberg, *Soldiers of Fortune Ltd: A Profile of Today's Private Sector Corporate Mercenary Firms*, CENTER FOR DEF. INFO. MONOGRAPH, NOV. 1997, available at http://www.totse.com/en/politics/us_military/armylove.html (last visited July 10, 2005).

31. See Avant, *supra* note 8.

32. See Nelson D. Schwartz & Noshua Watson, *The Pentagon's Private Army*, FORTUNE, Mar. 17, 2003, at 100, 103, available at 2003 WLNR 13891324 ("At least a half-dozen companies, including AirScan, Northrop Grumman, and DynCorp, receive up to \$ 1.2 billion a year from the Pentagon and the State Department to fly the planes that spray suspected coca fields and to monitor smugglers from remote radar sites"); see also Avant, *supra* note 8 (noting United States hiring of PMC use in war on drugs).

33. See SINGER, *supra* note 2, at 184–85.

34. Accord Rosky, *supra* note 10, at 912 (examining the evolution of the privatization of military force and concluding that "[b]y all accounts, the revival of PMCs has barely begun"); *infra* notes 42–44 and accompanying text.

35. See Schwartz & Watson, *supra* note 32, at 103.

how war is conducted than ever before, such that PMCs appear arguably indispensable in the current way the United States military operates.

The abundance of unemployed, trained military professionals has led to significant changes within the PMC industry. From 1989 to 2002, worldwide military forces shrank by seven million,³⁶ creating a surplus of unemployed military personnel. Concurrent with this, governments worldwide mandated increased outsourcing and privatization. The general shift towards privatization began with Margaret Thatcher, Prime Minister of the United Kingdom, in the 1980s and continued through the 1990s with the World Bank and International Monetary Fund. Additionally, privatized military forces were key to the transition of former Soviet bloc countries into liberal democracies.³⁷ In the United States this policy can be traced to a document called Circular A-76,³⁸ which was issued in 1983 by President Ronald Reagan's budget director David Stockman.³⁹ Circular A-76 simply and directly initiated privatization of United States government services by requiring that the United States government "rely on commercial sources to supply the products and services the Government needs."⁴⁰ Indeed, these policies took hold so fast that one commentator noted that the belief that free market privatization of United States government services "maximize[s] efficiency and effectiveness" and drove globalization and privatization such that "[b]y 1998, the rate of global privatization was roughly doubling each year."⁴¹

It is no surprise that the United States military followed this path. As one general, who later joined the boards of private military companies, put it, "I am unabashedly an admirer of outsourcing There's very few things in life you can't outsource."⁴² Applying this

36. See SINGER, *supra* note 2, at 53; see also Schwartz & Watson, *supra* note 32, at 104 ("Back in 1991, when American troops last faced down Saddam Hussein, the Army had 711,000 active-duty troops. Today it has 487,000—a 32% drop."); Isenberg, *supra* note 30 (noting worldwide force reduction from 28,320,000 personnel in 1987 to 23,500,000 in 1994).

37. See SINGER, *supra* note 2, at 66–67; see also Rosky, *supra* note 10, at 896–913 (tracing the shift towards privatizing the use of force).

38. See Dan Baum, *Nation Builders for Hire*, N.Y. TIMES, June 22, 2003, § 6 (Magazine), at 32.

39. *Id.*

40. See *id.*; OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-76 (1983), <http://www.whitehouse.gov/omb/circulars/a076/a076.html> (last visited June 20, 2005).

41. See SINGER, *supra* note 2, at 67.

42. See Baum, *supra* note 38, at 32 (quoting Army Gen. Barry McCaffrey from a 2000 *Dallas Morning News* interview).

principle has resulted in the United States military outsourcing kitchen patrol, laundry, and recruiting—in short, outsourcing “as many tasks as possible to enable the military . . . to focus on its core competency: fighting.”⁴³ This drive to outsource is so strong and prevalent that the head of DynCorp, one of the largest private military companies in the United States, summed up the relationship between the United States military and the private military industry as essentially welded together, “You could fight without us, but it would be difficult Because we’re so involved, it’s difficult to extricate us from the process.”⁴⁴ A stark example of the PMC industry’s intertwined relationship with the United States military is found in one company, Kellogg Brown & Root, Inc. (“KBR”), a subsidiary of Halliburton Company.

KBR has a history of profiting from United States government contracts. Today, the company has become familiar to the public through its activities in post-war Iraq and because of Vice President Cheney’s relationship to the firm as the former chairman of Halliburton.⁴⁵ This fact has led United States Representative Henry Waxman to wonder whether the government, based on Mr. Cheney’s relationship to the company, was giving KBR an “inside track”⁴⁶ on contracts to rebuild the Iraqi oil industry; contracts that could possibly be worth \$7 billion.⁴⁷ As one author points out, however, “[t]he reality is subtler: KBR didn’t need any help. It is by now so enmeshed with the Pentagon that it was able essentially to assign the contract to itself.”⁴⁸ KBR was given the Iraq contract based on its ability to meet the United States Army’s contingency plan for rebuilding Iraq; KBR prepared that contingency plan as part of its duties under the LOGCAP contract it won in an open-bidding process in 2001.⁴⁹

43. See Schwartz & Watson, *supra* note 32, at 102.

44. See *id.* (quoting Paul Lombardi, CEO of DynCorp).

45. See T. Christian Miller, *Worries Raised on Handling of Funds in Iraq*, L.A. TIMES, June 22, 2005, at A8, available at 2005 WLNR 9820777 [hereinafter Miller, *Worries*]; accord Sam Allis, *Facing Down Privatization of War*, BOSTON GLOBE, June 21, 2005, at E1 (noting \$12 billion in contracts to Halliburton, Vice President Cheney’s role in hiring Halliburton when he was Secretary of Defense, and Vice President’s Cheney’s tenure as CEO of Halliburton before joining President George W. Bush’s 2000 election ticket).

46. See Baum, *supra* note 38, at 32, 34.

47. See *id.*

48. See *id.*

49. See *id.* at 34 (noting LOGCAP “essentially turns KBR into a kind of for-profit Ministry of Public Works for the Army. Under Logcap . . . KBR is on call to the Army for 10 years to do a lot of the things most people think soldiers do for themselves—from fixing trucks to warehousing ammunition, from delivering mail to cleaning up hazardous waste. K.P. is history; KBR civilians now peel potatoes, and serve them, at many installations. KBR does

KBR is not alone in eyeing and receiving United States government contracts. Prior to the United States' invasion of Iraq, it was estimated that the Pentagon alone would have spent at least "\$30 billion—or 8% of its overall budget, on private military companies."⁵⁰ Accordingly, it is not surprising that Fortune 500 and S&P 500 companies have taken notice of the potential profits. For example, in late 2002 Computer Sciences Corporation purchased DynCorp for close to \$1 billion; a move that may have been spurred in part by L-3 Communications' 2000 purchase of another major United States based PMC, Military Professional Resources Incorporated ("MPRI"), for \$35 million.⁵¹

Thus, regardless of what opinion one has of the PMC industry, one thing is certain: it is growing and profitable. Indeed, even during the high flying 1990s stock market publicly held PMCs saw their stock grow at "twice the rate of the Dow Jones Industrial Average."⁵² In addition, the industry is not limited to mega-corporations. One company on the S&P small cap index, Cubic Corporation,⁵³ has focused on electronic defense systems and training to its great benefit. Cubic Corporation's profits "rose 41% in fiscal 2002," and its stock price tripled between 1999 and 2003.⁵⁴

What, then, is the size of the United States PMC industry market? Given that any one of numerous United States government agencies administer the contract, often with no requirement to notify Con-

the laundry. It fixes the pipes and cleans the sewers, generates the power and repairs the wiring. It built some of the bases used in the Iraq war."); *see also* Davidson, *supra* note 24, at 237–39 and surrounding explanation of LOGCAP.

50. *See* Schwartz & Watson, *supra* note 32, at 102.

51. *See id.* MPRI's price tag may reflect its claim to be able to call 12,000 military and law enforcement personnel to staff projects. *See* MPRI, Our Team, http://www.mpri.com/site/our_team.html (last visited June 23, 2005) ("MPRI maintains and draws its workforce from a carefully managed and current database of more than 12,500 former defense, law enforcement, and other professionals, from which the company can identify every skill produced in the armed forces and public safety sectors."). Of similar or perhaps greater value may be MPRI's more than 1500 permanent employees. *See* MPRI, About MPRI, <http://www.mpri.com/site/about.html> (last visited June 23, 2005). Indeed, one MPRI executive boasted "We've got more generals per square foot here than in the Pentagon"—likely a large benefit in obtaining lucrative government contracts. *See* Esther Schrader, *United States Companies Hired to Train Foreign Armies*, L.A. TIMES, April 14, 2002, at A1 (quoting Army Lt. Gen. Harry E. Soyster, Ret.).

52. *See* Avant, *supra* note 8.

53. *See* Cubic Corp. Home Page, <http://www.cubic.com> (last visited July, 11, 2005).

54. *See* Schwartz & Watson, *supra* note 32, at 102 (citing PITTSBURGH POST GAZETTE).

gress, the exact size of the market is difficult to determine.⁵⁵ Nonetheless, one study conducted in 1997 estimated the global market will grow “from \$55.6 billion in 1990 to \$202 billion in 2010.”⁵⁶ In addition, from 1994 to 2002 the United States DOD alone spent more than \$300 billion on more than 3,000 contracts.⁵⁷ Thus, despite the opacity of the industry and the process by which the United States government hires PMCs one can see that, even if the DOD alone spent the same amount for each year from 1994 to 2002, its portion of the world market would be \$33.3 billion—a large part of the estimated worldwide market even though the 1997 study could not include the recent increase in spending in Iraq and Afghanistan.

Indeed, the events of September 11, 2001 have likely increased the market’s size. For example, through July 2004 the private military contracts awarded to United States companies for the Iraq and Afghanistan reconstruction are more than \$50 billion⁵⁸—with Halliburton’s contracts in Iraq alone amounting to more than \$10 billion.⁵⁹ Furthermore, lest one think that only states hire PMCs, non-state ac-

55. See SINGER, *supra* note 2, at 78 (noting lack of transparency in the industry and resulting difficulty in estimating its size); see also FOREIGN AFFAIRS COMMITTEE, PRIVATE MILITARY COMPANIES, NINTH REPORT OF SESSION 2001–02, H.C. 922, ¶ 17.

We conclude that the lack of centrally held information on contracts between Government Departments and private military companies is unacceptable. We recommend that the Government take immediate steps to collect such information and to update it regularly. We further recommend that in its response to this Report the Government publish a comprehensive list of current contracts between Government Departments and private military companies and private security companies.

Id.

56. Esther Schrader, *U.S. Companies Hired to Train Foreign Armies*, L.A. TIMES, Apr. 14, 2002, at A1, (citing 1997 study by Equitable Services Corp.); see also INTERNATIONAL ALERT, THE POLITICISATION OF HUMANITARIAN ACTION AND STAFF SECURITY 1, 2 (2001), www.international-alert.org/pdf/pubsec/Tuftrep.pdf (last visited June 15, 2005) (estimating growth to \$202 billion by 2010).

57. See Peter Singer, *Should Humanitarians Use Private Military Services?* HUMANITARIAN AFF. REV., Summer 2004, at 14–15, available at <http://www.humanitarian-review.org/upload/pdf/SingerEnglishFinal.pdf> [hereinafter Singer, *Humanitarians*] (last visited June 15, 2005).

58. See *The Center for Public Integrity, Post-War Contractors Ranked by Total Contract Value in Iraq and Afghanistan From 2002 Through July 1, 2004*, <http://www.publicintegrity.org/wow/resources.aspx?act=total> (last visited June 15, 2005).

59. See MINORITY STAFF OF H. COMM. ON GOV’T REFORM, 108TH CONG., FACT SHEET HALLIBURTON’S IRAQ CONTRACTS NOW WORTH OVER \$10 BILLION (2004), <http://democrats.reform.house.gov/Documents/20041209093532-66409.pdf> (last visited June 15, 2005); see also Minority Staff of H. Comm. on Gov’t Reform, 108th Cong., Media Spreadsheet for AFSC LOGCAP (2004), <http://democrats.reform.house.gov/Documents/20041209093914-57358.pdf> (listing, as of December 9, 2004, LOGCAP contracts in Iraq at more than \$9 billion) (last visited June 15, 2005).

tors, such as the UN, regional security groups, NGOs, and corporations, hire them as well.⁶⁰

In sum, the PMC industry can have several large companies providing a broad range of services and numerous small companies filling niche sectors of the market. Indeed, one large company, many small companies, or a combination of both may provide services on a single project, thus presenting additional difficulties in regulating the market. Are some activities simply to be banned? Does one establish a licensing regime? What happens when a company provides services across the spectrum of possible activities? What happens when a company hired to perform one task assumes another role because of the necessities of battle or a simple request by the field office for expanded services?⁶¹

These questions often have a general question latent in them: How does one define the industry and those in it?

C. Defining “Mercenary” Groups and Regulating “Mercenary” Activities Provides Inadequate Protection Against PMC Transgressions

If one merely perceives PMCs as soldiers of fortune or amoral mercenary groups, one misses the fact that the PMC industry consists of a spectrum of companies from those providing full scale, combat engaged personnel and services (including lethal ones) to those providing purely non-lethal, support functions. Indeed, given that mercenary services are banned under international law, no PMC would wish to be deemed mercenary under such laws.⁶² Accordingly, international organizations, states,⁶³ commentators, and members of the pro-

60. See SINGER, *supra* note 2, at 182.

61. See Peter W. Singer, *Outsourcing the War*, SALON.COM, Apr. 16, 2004, available at <http://www.brook.edu/views/articles/fellows/singer20040416.htm> (noting “[w]hen contractor units are attacked, they must deal with the situation” and that despite restrictions against carrying “heavy weaponry” some have taken to buying grenades and plan on acquiring other such weapons to protect themselves.) [hereinafter Singer, *Outsourcing*].

62. See International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, G.A. Res. 44/34, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49/Annex (Dec. 4, 1989), reprinted in 29 I.L.M. 89, 91 (1990); Organization of African Unity Convention for the Elimination of Mercenarism in Africa, art. 1 *opened for signature* July 3, 1977, 1490 U.N.T.S. 96, 96–97; see also Ellen Frye, *Private Military Firms in the New World Order: How Redefining “Mercenary” Can Tame the “Dogs of War,”* 73 FORDHAM L. REV. 2607, 2626–2631 (2005) (tracing customary law and UN actions affecting and commenting on mercenary use and noting that General Assembly Resolution 2465 was the first time the UN explicitly deemed mercenary activity criminal).

63. Australia, Canada, Denmark, Finland, Greece, Italy, the Netherlands, Norway, Portugal, Russia, South Africa, Switzerland, and the Ukraine have passed anti-mercenary

fession have sought to distinguish the different types of services available in the current industry as part of efforts to establish a regime to regulate it and/or create a method of distinguishing between mercenary and legitimate, non-mercenary activity. The section below examines the primary ways groups have defined mercenary by setting forth the rather detailed, intricate language the attempts have employed. The purpose of this examination is in part to demonstrate that the attempts yield complicated but unworkable or toothless restrictions that fail to provide meaningful parameters within which PMC services should operate.

International law provides a definition of mercenary and proscribes mercenary activities.⁶⁴ The British House of Commons report, *Private Military Companies: Options for Regulation* ("Report")—aimed at "outlining options for the control of private military companies which operate out of the [United Kingdom], its dependencies, and the British Islands"⁶⁵ found:

[T]he most widely used legal definition of a mercenary is very narrow. Article 47 of the First Additional Protocol of 1977 to the Geneva Conventions defines a mercenary as one who:

- (a) is specifically recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take 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

laws. See FOREIGN AFFAIRS COMMITTEE, *PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION*, 2001–02, H.C. 577, Annex B, at 39–43, <http://www.fco.gov.uk/Files/kfile/mercenaries,0.pdf> (noting "[f]ew countries have national legislation on PMCs" and detailing varying levels of state prohibitions, noting the rarity of prosecution under any of the countries' laws). Several United States Acts regulate the provisions of military services. The Arms Export Control Act ("AECA") of 1968 as implemented via the International Traffic in Arms Regulations ("ITAR") sets forth a license requirement for companies providing military advice, services, or sales to foreign countries and requires that sales of more than \$50 million be reported to Congress. See Arms Export Control Act, 22 U.S.C. § 2751 (2000); International Traffic in Arms Regulations, 22 C.F.R. § 120.8 (2004). The United States Foreign Relations Act, 18 U.S.C. § 958 (2000) prohibits anyone on United States soil from recruiting United States citizens for a foreign army when the United States is at peace with the country against which the foreign country is at war. Yet the United States does not have a distinct ban on mercenaries; accord Frye, *supra* note 62, at 2633–2636.

64. FOREIGN AFFAIRS COMMITTEE, *PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION*, 2001–02, H.C. 577, ¶¶ 4–16, <http://www.fco.gov.uk/Files/kfile/mercenaries,0.pdf> (examining PMC industry and possible regulatory systems including reviewing United Nations and Organization of African States laws regarding mercenaries); accord DAVIS, *supra* note 15, at 49–66.

65. FOREIGN AFFAIRS COMMITTEE, *PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION*, 2001–02, H.C. 577, ¶ 1.

- 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 the armed forces.

It should be noted that this definition is cumulative, i.e., a mercenary is defined as someone to whom **all** of the above apply.⁶⁶

The Report also notes:

An alternative definition is provided by the OAU Convention for the Elimination of Mercenarism in Africa. This defines a mercenary as anyone who is not a national of the state against which his actions are directed, is employed, enrolls [sic] or links himself willingly to a person, group or organisation whose aim is:

- (a) to overthrow by force of arms or by any other means, the government of that Member State of the Organisation of African Unity;
- (b) to undermine the independence, territorial integrity or normal working institutions of the said State;
- (c) to block by any means the activities of any liberation movement recognised by the Organisation of African Unity.⁶⁷

Though interesting, the international law definitions are not useful. As the Report notes, "A number of governments including the British Government regard [the Geneva Convention] definition as unworkable," because determining the motives of an actor is by its nature impractical, and one can easily devise a contract to place the contractor outside the definition.⁶⁸ The Organisation of African Unity ("OAU") definition has also been eschewed as biased and too narrow to address fully the range of activities that might be mercenary in nature.⁶⁹ Under one analysis, the laws against mercenaries are ineffective to the point that one PMC insider stated that anyone even prosecuted under such laws "deserves to 'be shot and their lawyer beside them.'"⁷⁰ Accordingly, some have tried to fashion a new definition, or

66. *Id.* ¶ 5 (emphasis in original).

67. *Id.* ¶ 7.

68. *Id.* ¶ 6 (noting Sandline International's use of the term Special Constables "in its aborted contract with Papua New Guinea" so "they would thus not have been classified as mercenaries since . . . they would have been members of the armed forces of a party to the conflict" and in "cases of foreign nationals providing military services who have been granted or have applied for local citizenship with the effect that . . . they could not be described as mercenaries.").

69. *Id.* ¶ 8; see also DAVIS, *supra* note 15, at 52–53.

70. SINGER, *supra* note 2, at 238 (citing private correspondence).

at least a framework from which to understand, categorize, and then regulate the industry.⁷¹

For example, Peter Singer, a senior fellow at the Brookings Institution and prolific author regarding the PMC industry,⁷² offers a categorization system that borrows the military's "tip of the spear" metaphor to define PMCs.⁷³ As Singer details, this system recognizes "three broad types of units linked to their location in the battle space: those that operate within the general theater, those in the theater of war, and those in the actual area of operations, that is, the tactical battlefield."⁷⁴ Following the military metaphor, Singer's system identifies three types of private military companies: (1) Military Provider Firms, at the frontline or tip of the spear and providing Implementation and Command services; (2) Military Consultant Firms, in the middle of the spear and providing Advisory and Training services; and (3) Military Support Firms, furthest away from the tip and providing Non-Lethal Aid and Assistance.⁷⁵

Singer is not alone in trying to distinguish among the types of companies and services available within the industry. James Davis, a professional within the industry, also offers a classification system. In trying to facilitate "a serious examination of who or what exactly constitutes a mercenary," Davis creates a system aimed at delineating between legitimate and illegitimate types of mercenaries.⁷⁶ According to Davis, "[t]he four legitimate, acceptable categories of mercenaries are the: 1. Regular Foreign Unit, 2. Auxiliary Foreign Unit, 3. Foreign Volunteer; and 4. Private Military Company."⁷⁷

Davis defines Regular Foreign Units as "long-serving regular formations that exist internally within a larger national military structure activity . . . [such as] the French Foreign Legion, the Gurkhas, and the Swiss Guards."⁷⁸ Auxiliary Foreign Units are units "formed during a conflict and then disbanded on an end to hostilities . . . [such as] the Flying Tigers."⁷⁹ Private Military Companies are "privately run mercenary organizations that conduct combat or combat support operations

71. See *infra* notes 72–83.

72. See Brookings Scholar: Peter W. Singer, <http://www.brookings.edu/scholars/fellows/psinger.htm> (last visited July 9, 2005).

73. SINGER, *supra* note 2, at 91.

74. *Id.*

75. *Id.*

76. DAVIS, *supra* note 15, at 74.

77. *Id.*

78. *Id.* at 68.

79. *Id.*

[who are] officially unaligned . . . [such as] Sandline International and the former Executive Outcomes.”⁸⁰ Foreign Volunteers are “foreign soldiers who are not formed specifically into foreign units but are incorporated into regular national formations . . . [such as the individuals who serve in] the British army, . . . the Israeli army, the Rhodesian army of the 1970s, and the American Army of the Vietnam era.”⁸¹

Davis sets forth a fifth category, Freebooters, as the illegitimate “really objectionable elements of the mercenary trade.”⁸² For Davis the distinction lies in seven conditions that the legitimate mercenary would meet and the Freebooter would not.⁸³ These distinctions are:

1. That the occupation of the mercenary must be directly linked with the occupation of soldier;
2. That the candidate must operate either in uniform common to a body of mercenary troops or in the recognized uniform of the client state’s armed forces, including insignias and rank;
3. That the candidate must be paid for his services;
4. That the candidate must conduct his operations in a nation other than that of his birth or naturalization regardless of changes in government to the home state;
5. That the candidate must take a direct role in either the conduct of combat operations or in supplying combat support . . . ;
6. That the candidate must be engaged by (a) an internationally recognized nation; or (b) in the event of a civil dispute, by a legitimate interim government that represents a significant portion of the population and has been recognized by a minimum of one foreign nation;
7. That the candidate must be seen to recognize and conduct himself by the Laws of War, the Geneva Conventions and the International Declaration of Human Rights and Freedoms.⁸⁴

For all the effort to define or classify who or what constitutes a mercenary, both Singer’s and Davis’ systems leave open the same issues identified by the report of the British House of Commons. In analyzing the PMC industry for possible regulation by the British Government, the Report examined the world of PMCs and found—just as Singer and Davis did—that one may break providers into several types (mercenaries, volunteers, servicemen enlisted in foreign armies, defense industrial companies, and private military companies) with each

80. *Id.*

81. *Id.* at 68–69.

82. *Id.* at 69.

83. *Id.* at 74–75.

84. *Id.*

providing many types of services (advice, training, logistic support, monitoring personnel, and de-mining).⁸⁵ Yet the Report concluded:

The internationally agreed [upon] definitions have been shaped to suit the agendas of those drafting them and are not necessarily very useful. The fact is that there are a range of operators in this field who provide a spectrum of military services abroad. It is possible to devise different labels according to the activities concerned, the intention behind them and the effect they may have; but in practice the categories will often merge into one another.⁸⁶

In short, fixed definitions or categorizations systems may provide some guidelines and insight into the general way the PMC industry works, but because of the nature of PMCs, a precise definition cannot be found and will not instruct world bodies, international organizations, courts, and others how to regulate these major players on the world scene.

II. Practical Concerns Require a More Effective Solution

Though a hard and fast definition may not be attainable, the efforts to understand the industry and parse out the different aspects of the actors and their services reveal practical issues concerning how to protect human rights. What happens when a contractor commits crimes such as murder, rape, or theft but that do not violate international criminal laws? Who is accountable for PMCs' actions? What groups other than states hire PMCs? In addition, the potentially beneficial use of PMCs makes it difficult, if not absurd, to ban the use of PMCs outright. Accordingly, examining these issues, though not providing a definition of what PMC activities should be controlled, may reveal a way to regulate the industry and address the major practical concerns surrounding employment of PMCs.

A. Human Rights

The recent events at Abu Ghraib prison highlight the most severe and, in a sense, classic problems associated with outsourcing military functions to groups who might be deemed mercenaries: the extreme, unethical, and inhumane treatment of other human beings without proper accountability.⁸⁷ A report on the occurrences prepared by Major General Antonio M. Taguba detailed severe abuses including:

85. FOREIGN AFFAIRS COMMITTEE, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION, 2001-02, H.C. 577, ¶¶ 9-10, <http://www.fco.gov.uk/Files/kfile/mercenaries,0.pdf>.

86. *Id.* ¶ 16.

87. See generally Hersh, *supra* note 9, at 42.

Breaking chemical lights and pouring the phosphoric liquid on detainees; pouring cold water on naked detainees; beating detainees with a broom handle and a chair; threatening male detainees with rape; allowing a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell; sodomizing a detainee with a chemical light and perhaps a broom stick, and using military working dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee.⁸⁸

In analyzing how such abuses could have occurred, the report points to military personnel in charge of the prison, but it also points to civilian contractors who worked for CACI International, a PMC hired to provide interrogation services in Iraq and whose personnel were implicated in the Abu Ghraib prison abuse.⁸⁹ Other reports into Abu Ghraib have shown civilian contractors' presence and involvement in more than a third of the reports of abuse at the prison including rape and assault.⁹⁰

The Abu Ghraib incident is not the first time contractors have been tied to criminal behavior.⁹¹ Similar problems occurred when DynCorp, one of the largest private military firms, won a contract placing its employees in Bosnia to aid in the reconstruction efforts.⁹² Several DynCorp employees were implicated in the buying and selling of women and girls (one allegedly as young as twelve) as prostitutes.⁹³ DynCorp settled two wrongful termination suits where employees were allegedly fired for trying to report the problems.⁹⁴ Despite this negative history, DynCorp currently has a contract to train police in Iraq.⁹⁵

One striking similarity between the Abu Ghraib and Bosnia events is that the private military employees face no criminal charges.

88. *Id.* (quoting Hearing, Article 15-6 Investigation of the 800th Military Police Brigade (the "Taguba Report")).

89. *Id.*

90. See Peter W. Singer, *The Contract the Military Needs to Break*, WASH. POST, Sept. 12, 2004, at B03, available at <http://www.brook.edu/views/op-ed/fellows/singer20040912.htm> [hereinafter Singer, *Contract*].

91. See Capps, *Outside*, *supra* note 5.

92. *Id.*

93. *Id.*

94. See Robert Capps, *Sex-slave Whistle-blowers Vindicated*, SALON.COM, Aug. 6, 2002, <http://www.salon.com/news/feature/2002/08/06/dyncorp/> (last visited June 20, 2005) [hereinafter Capps, *Sex-Slave*].

95. See Andrea Mitchell, *The Cost of Training Iraqi Police*, MSNBC INTERACTIVE, Nov. 4, 2003, <http://msnbc.msn.com/id/3404605/> (last visited June 20, 2005) (noting DynCorp's contracts to screen and train police in Bosnia, Haiti, and Iraq and the initial Iraq contract value of \$50 million with expected training costs to reach \$800 million).

In Abu Ghraib, several military personnel will face military courts, but it appears that none of the civilian contractors will.⁹⁶ Similarly in Bosnia, the employees accused of wrongdoing were merely fired.⁹⁷

Other events implicating human rights have ended similarly.⁹⁸ For example, while working for the Central Intelligence Agency ("CIA") in Peru, Aviation Development Corporation downed a missionary plane mistaking it for a drug transport.⁹⁹ The event resulted only in a settlement with the family of the victims and their church with no admission of wrongdoing.¹⁰⁰ In 1998, AirScan,¹⁰¹ who had been hired by Occidental Petroleum to track rebels and protect its Colombian pipeline, was implicated in "plan[ning] and support[ing]" an attack by the Colombian military against a rebel group.¹⁰² The attack resulted in the bombing of the town of Santo Domingo where eleven adults and seven children were killed.¹⁰³ AirScan pilots who provided video surveillance of the area on the day of the bombing and

96. See Nonna Gorilovskaya, *Contracting Justice*, MOTHER JONES, June 11, 2004, www.motherjones.com/news/dailymojo/2004/06/06_513.html (last visited June 20, 2005); see Singer, *Contract*, *supra* note 90; accord Joseph Neff & Jay Price, *Courts to Resolve Military Contractors Deaths*, NEWS & OBSERVER (Raleigh) Jan. 9, 2005, at A1, 2005 WLNR 28225 (stating "[i]f there is any doubt that private contractors work in a legal limbo, compare the experiences of the military and the contractors when it comes to criminal charges. The military justice system has investigated and prosecuted hundreds of soldiers in Iraq, from alcohol-related charges to murder to the torture of inmates at the Abu Ghraib prison. But Singer and others say they can't find a single criminal charge filed against any of the 20,000 contractors working in Iraq over the past two years, even the six civilian contractors implicated in abuse at Abu Ghraib.")

In addition, Coalition Provisional Authority ("CPA"), the interim government of Iraq, explicitly granted immunity to contractors. See Coalition Provisional Authority Order 17 (Revised) (2004), § 4.3, available at www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf (last visited June 24, 2005).

97. See Capps, *Outside*, *supra* note 5; see also Robert Capps, *Crime Without Punishment*, SALON.COM, June 27, 2002, <http://www.salon.com/news/feature/2002/06/27/military/> (noting that forces deployed to Bosnia were not prosecuted either because local authorities did not believe they had jurisdiction to do so, and in the case of anyone working for the UN the personnel had immunity) [hereinafter Capps, *Crime*]; *Hopes Betrayed: Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina for Forced Prostitution*, 14 HUM. RTS. WATCH 1, 46–48 (2002).

98. See Capps, *Crime*, *supra* note 97.

99. See *id.*

100. See *id.*

101. AirScan offers aerial surveillance and security services. See Thomas Cattan, *The Oil Industry: Calmly Keeping the Wheels of Industry Oiled*, FT.COM, June 24, 2005, available at 2005 WLNR 10109079 (noting Airscan contracts in Iraq and Columbia). The AirScan web site simply displays the company's name, logo, and the words "Airborne surveillance and security services." See AirScan Inc., www.airscan.com (last visited on July 8, 2005).

102. See T. Christian Miller, *A Colombian Town Caught in the Crossfire*, L.A. TIMES, Mar. 10, 2002, at A1 [hereinafter Miller, *Columbian*]; see also Capps, *Crime*, *supra* note 97.

103. See Miller, *Columbian*, *supra* note 102, at A1; see also Capps, *Crime*, *supra* note 97.

could help resolve questions regarding the bomb's source have been unreachable because they no longer work for AirScan.¹⁰⁴ AirScan claims not to know the men's whereabouts.¹⁰⁵

Thus, despite any claims one could make about the benefits of hiring PMCs, one can see that in many circumstances hiring PMCs implicates serious human rights and criminal law issues that demand some greater level of accountability than is currently in place.

B. Accountability

When addressing human rights and criminal law concerns, the accountability of those who violate those rights and laws is a key issue. Accountability for such transgressions ensures that they are less likely to occur, and if they do, that punishment will be swift and just. Closely related to that type of accountability are the questions of who is accountable for hiring the PMC and who defines the parameters of their duties. Who provides oversight of the United States government's use of PMCs to take part in conflicts and activities to effect policies that the government otherwise could not pursue? What types of controls exist over these activities? For example, some argue that the United States hired MPRI in Bosnia in part to avoid congressional or public input on the matter.¹⁰⁶ PMC operations in Colombia are another excellent case of hiring PMCs to avoid congressional and public scrutiny. "Plan Colombia," a \$7.5 billion United States plan to eradicate the drug trade in Colombia, provides significant financial and military aid to the Colombian government in its efforts to stem the flow of drugs.¹⁰⁷ But the plan also contains distinct limits regarding soldiers: they may aid in counter-narcotic actions but not counter-insurgency actions.¹⁰⁸ Consequently, the United States executive branch has hired several PMCs to provide precisely the type of aid Congress proscribed in approving Plan Colombia.¹⁰⁹

A problem in creating accountability at either the individual or political institutional level lies in a large loophole in United States law that allows for gaps in congressional oversight of PMC activity. Much

104. See Miller, *Columbian*, *supra* note 102, at A1.

105. See *id.*

106. See generally Isenberg, *supra* note 30.

107. See SINGER, *supra* note 2, at 206.

108. *Id.*

109. See *id.* at 207–09 (detailing MPRI's involvement in drafting a review of the Colombian military and its involvement with three phases of Plan Colombia as well as DynCorp's use of helicopter gunships to carry out operations in Colombia including firing at rebels; all without having to advise or inform Congress of the activities).

of PMC activity is governed by the International Traffic in Arms Regulations ("ITAR"),¹¹⁰ which concerns the brokering or provision of "financing, transportation, freight forwarding, or taking of any other action that facilitates the manufacture, export, or import of a defense article or defense service," and is managed by the Department of State.¹¹¹ If the contract is for less than \$50 million, Congress need not be notified.¹¹² For many contracts, therefore, Congress is not notified about PMC action, and there is no government body overseeing their actions.¹¹³ By analogy, when the United Kingdom began investigating its own use of PMCs it found that records of how many contracts and to whom they went were conspicuously absent.¹¹⁴ In the United States, the Pentagon has said that it "has no idea how many PMC workers it actually employs."¹¹⁵ This lack of governmental knowledge shows that at the very least a system with increased accountability for PMCs will require improved methods and/or requirements regarding Congressional oversight of PMC use.

110. International Traffic in Arms Regulations, 22 C.F.R. § 120.8 (2005).

111. See SAMI MAKKI ET AL., PRIVATE MILITARY COMPANIES AND THE PROLIFERATION OF SMALL ARMS: REGULATING THE ACTORS 13, 17, http://www.international-alert.org/pdf/pubsec/Btb_brf10.pdf (last visited June 12, 2005).

112. See 22 U.S.C.A. § 2776(c)(1) (West 2005); accord Matthew J. Gaul, *Regulating the New Privateers: Private Military Service Contracting and the Modern Marque and Resprisal Clause*, 31 LOY. L.A. L. REV. 1489, 1518 (1998) ("The primary problem with the [Arms Export Control Act's] reporting provisions is that they require congressional review of military service contracts only when a contract exceeds \$50 million.") (citing 22 U.S.C.A. § 2776(c)(1) (West Supp. 1997)); see also Avant, *supra* note 8; Peter W. Singer, *War, Profits, and the Vacuum of International Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 539 (2004) [hereinafter Singer, *War*].

113. See Avant, *supra* note 8.

114. FOREIGN AFFAIRS COMMITTEE, PRIVATE MILITARY COMPANIES, NINTH REPORT OF SESSION 2001-02, H.C. 922, ¶ 15-17 ("We conclude that the lack of centrally held information on contracts between Government Departments and private military companies is unacceptable. We recommend that the Government take immediate steps to collect such information and to update it regularly.").

115. See Joshua Kurlantzick, *Outsourcing the Dirty Work*, 14 AM. PROSPECT, May 2003, at 17, 18, available at <http://www.prospect.org/print/V14/5/kurlantzick-j.html> (last visited June 20, 2005) ("PMCs that obtain Pentagon contracts worth less than \$50 million do not have to notify Congress, and the Pentagon has admitted it has no idea how many PMC workers it actually employs."); accord U.S. GEN. ACCOUNTING OFFICE, DEFENSE BUDGET: NEED TO STRENGTHEN GUIDANCE AND OVERSIGHT OF CONTINGENCY OPERATIONS COSTS, 20 (2002) (noting Department of Defense's lack of knowledge regarding number of contractors in the Balkans, nature of the contracted work, and "government obligations to . . . contractors under their contracts.").

C. Peacekeeping, Non-Governmental Organizations, and Corporations' Use of PMCs

The use of PMCs is not reserved for states. The UN, regional security organizations, and NGOs use PMCs to intervene in unstable situations all around the world.¹¹⁶ PMCs handle a range of tasks from protecting NGOs while they provide health and food aid, to protecting innocents during civil unrest to quickly deploying a strong force to stop genocide.¹¹⁷ Indeed, in some cases they may be able to handle their assigned task more efficiently and at less cost than when states send their own troops either unilaterally or as part of an international effort.¹¹⁸ In addition, rather than sending their own troops, countries can hire and send private, professional soldiers to conflict areas. In such situations, a country or a coalition's ability to exert force and sustain control over the situation may be less likely to suffer from the effects of diminishing home-front support that often ensues as soldier casualties increase.

The UN especially is in need of a new solution to address an increasingly unstable world¹¹⁹ and in 2001 sought to raise its security budget 300 percent.¹²⁰ After the Cold War, militaries shrank, but in contrast, by 1993 UN peacekeeper deployment was at its peak with 82,000 troops stationed across the world.¹²¹ That number steadily declined to 1000 by 1999.¹²² Today, however, the demand for peacekeeping forces is high again with the projected levels of troops reaching 45,000, if mission estimates for Burundi, Haiti, Ivory Coast, and Sudan are met.¹²³ Enter the PMC.

During the 1994 genocide in Rwanda, Executive Outcomes offered to respond on short notice and at less cost than a multi-national

116. See Singer, *Humanitarians*, *supra* note 57, at 14–15.

117. *Id.* at 15; see also SINGER, *supra* note 2, at 185–86 (noting Executive Outcomes' proposal for Rwanda entailing deployment of 1500 personnel within fourteen days of hire for a cost of \$600,000 per day as opposed to the slower responding UN force, which cost \$3 million per day); see Traci Hukill, *Should Peacekeepers Be Privatized?* NAT'L J., May 15, 2004, 1526, 1526 (noting the PMC trade group, International Peace Operations Association ("IPOA"), offered to supply troops to address the genocide in Darfur).

118. See *infra* text surrounding notes 122–123.

119. See Eugene B. Smith, *The New Condottieri and U.S. Policy: The Privatization of Conflict and Its Implications*, PARAMETERS, Winter 2002–2003, at 104, 114 (noting projected increase in failing states).

120. SINGER, *supra* note 2, at 82.

121. *Id.* at 59.

122. *Id.*

123. See Hukill, *supra* note 117, at 1526.

force.¹²⁴ Kofi Annan, then UN Undersecretary General for Peacekeeping, considered that offer in part because of the UN's experience in Somalia a few years prior. The actions of soldiers—*not contractors*—in Somalia resulted in the United States, Canada, Belgium, and Italy investigating and, in some instances, prosecuting their own soldiers for atrocities committed during Operation Restore Hope.¹²⁵ As a result, countries were wary of sending their troops.¹²⁶

Yet when Annan faced his choice in Rwanda, he concluded “the world may not be ready to privatize peace.”¹²⁷ The current UN Undersecretary for Peacekeeping's position regarding use of PMCs reflects that sentiment: “It's not going to go anywhere. Forget about it.”¹²⁸ Nonetheless, despite this strong rejection by the office of peacekeeping, other UN organs have hired PMCs to provide security and military muscle in situations requiring rapid reactions¹²⁹ and to aid in demining.¹³⁰

It is not just the UN that requires additional security in providing humanitarian aid. NGOs, such as the International Committee of the Red Cross, World Vision, and World Wildlife Fund, have begun hiring PMCs for such services as well.¹³¹

In addition, PMCs have begun to recognize this large potential market for their services. De-mining operations alone, which the UN routinely outsources, has an estimated market of \$400 million.¹³² Another indication of the importance of this sector to the PMC indus-

124. See SINGER, *supra* note 2, at 185–86 (noting Executive Outcomes proposal for Rwanda entailing deployment of 1500 personnel within fourteen days of hire for a cost of \$600,000 as opposed to the slower responding UN force which cost \$3 million per day).

125. See Mark Gibney et al., *Transnational State Responsibility for Violations of Human Rights*, 12 HARV. HUM. RTS. J. 267, 280 (2000).

126. See Hukill, *supra* note 117, at 1526.

127. See *id.* at 1526.

128. See *id.* at 1527 (quoting David Wilmhurst, a spokesman in the office of the UN Undersecretary General for Peacekeeping Operations).

129. See SINGER, *supra* note 2, at 184–85.

130. See *id.* at 82.

131. See *id.*; see also Singer, *Humanitarians*, *supra* note 57, at 14–15 (stating “the International Committee of the Red Cross, and World Vision have used PMFs to protect their facilities and staff in hostile environments such as Sierra Leone and the Congo, while environmental groups like the World Wildlife Fund have dealt with the firms in seeking to protect endangered species from well-armed poachers.”); FOREIGN AFFAIRS COMMITTEE, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION, 2001–02, H.C. 577, ¶¶ 56–59 <http://www.fco.gov.uk/Files/kfile/mercenaries,0.pdf> (noting United Nations' use of PMCs in Sierra Leone for logistical support and suggesting that United Nations in one sense “employs . . . mercenary forces” as some countries send peacekeeping troops for “financial reasons”).

132. See *id.*

try's future can be seen in the establishment of the trade group, International Peace Operations Association ("IPOA"),¹³³ whose members include names familiar to the PMC industry: AirScan, Armor-Group, Blackwater U.S.A., and MPRI.¹³⁴ IPOA states that it "is a 501(c)(6) non-profit organization of companies, individuals, and non-governmental organizations who provide services related to conflict alleviation and avoidance, post-conflict reconstruction, and emergency humanitarian rescue worldwide."¹³⁵

Perhaps taking his cue from Executive Outcomes' proposal for Rwanda, around May 2004 IPOA President Doug Brooks contacted his constituents to develop a proposal for privatizing peacekeeping in Sudan.¹³⁶ The proposal was striking when compared to possible UN costs. One year of service in Sudan using "a combination of high-tech aerial surveillance equipment and a relatively low number (3000) of U.N. blue-helmet troops, \$30 million. Forty million dollars, if the firms handled the peacekeeping payroll."¹³⁷ While no hard number is in place for operations in Sudan, the African Union, which headed the efforts to supply troops to the area, indicated that 5000 troops could have been quickly sent but at the cost of hundreds of millions of dollars.¹³⁸ The projected \$418 million cost for a 5600 person peacekeeping mission in Burundi—a country the size of Maryland¹³⁹ as opposed to Sudan's 2,505,810 square kilometers¹⁴⁰—further highlights the gulf between the costs of PMC services and international organization run missions.

Thus, PMCs present a conundrum. On one hand, evidence shows PMCs are capable of human rights abuses and severe criminal acts with little or no recourse available to address the violations. This aspect of the PMC industry has led some to see PMCs as simply mercenaries who should not be employed or even considered as an option: "So you get a gang of mercenaries in there, basically. Who do they

133. See Int'l Peace Operations Ass'n, Background, <http://www.ipoaonline.org/background.htm> (last visited May 30, 2005).

134. See Int'l Peace Operations Ass'n, Members, <http://www.ipoaonline.org/background/members.htm> (last visited May 30, 2005).

135. See Int'l Peace Operations Ass'n, Background, <http://www.ipoaonline.org/background.htm> (last visited May 30, 2005).

136. See Hukill, *supra* note 117, at 1526.

137. See *id.*

138. See Edith M. Lederer, Associated Press, *African Force for Darfur Not Yet Ready*, Oct. 6, 2004 (Westlaw, AP Online Regional: Middle East, 10/6/04 APONLINE 06:49:59).

139. See Hukill, *supra* note 117, at 1526.

140. CENT. INTELLIGENCE AGENCY, WORLD FACTBOOK, <http://www.cia.gov/cia/publications/factbook/geos/su.html> (last visited June 20, 2005).

report to? Who controls them? It's a nonstarter."¹⁴¹ Yet, on the other hand, there is evidence showing that PMCs can provide useful services and fill gaps when traditional military help is unavailable. Indeed, after examining the use of PMCs and recognizing the problems inherent in hiring them, the British government concluded "that an outright ban on all military activity abroad by private military companies would be counterproductive."¹⁴²

III. Proposed Solutions

One solution regarding regulating PMCs embraces using international law and bodies to establish a system to license and rein in PMCs such that PMCs would face an international criminal court and/or a sort of excommunication from the marketplace if they worked for illegitimate clients or on illegitimate matters.¹⁴³ This position, though attractive in the abstract and perhaps a laudable, long-term goal, fails to address the immediate problems of regulating PMCs. Put simply, while the international community debates what this body would look like, its rules, and what constitutes legitimate as opposed to illegitimate work, PMCs will continue to be employed with no regulation in place. Indeed, given the difficulty in defining what a mercenary is,¹⁴⁴ the lack of support for the UN's International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries, and length of time it has taken to obtain even twenty-six ratifications of the Convention,¹⁴⁵ an international solution does not appear practical.¹⁴⁶

141. See Hukill, *supra* note 117, at 1527 (quoting David Wilmhurst, a spokesman in the office of the UN Undersecretary General for Peacekeeping Operations). Yet this position ignores the fact that even when the international community manages to cobble together a force, multi-national forces do not fare much better than PMCs and suffer from the same problems of command and control and in some cases human rights violations. See SINGER, *supra* note 2, at 59 (noting that the nature of the UN often results in under equipped, lowest common denominator military groups leading to inefficiency and instances of one group refusing to take orders from another); Gibney et al., *supra* note 125, at 279–280 (noting possible involvement of UN soldiers in human rights violations during Operation Restore Hope in Somalia).

142. FOREIGN AFFAIRS COMMITTEE, PRIVATE MILITARY COMPANIES, NINTH REPORT OF SESSION 2001–02, H.C. 922, ¶ 102.

143. Singer, *War*, *supra* note 112, at 544–46.

144. See *supra* Part I.C.; see also Eric Rosand, *The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?*, 28 *FORDHAM INT'L L.J.* 542, 573–76, & n.152 (examining the UN Security Council's ability to issue binding resolutions on all members absent non-Security Council members' input and/or vote and noting the International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries "took nine years to negotiate." *Id.* at 576 n.152).

145. See Shaista Shameem, Special Rapporteur on Mercenaries, Statement at the 61st Session of the Commission on Human Rights: The Use of Mercenaries As a Means of Vio-

In addition, given the United States' reluctance to submit to the International Criminal Court,¹⁴⁷ even if an international system were erected, one must question whether the United States would agree to join that system.

Rather than wait for an international solution some suggest that states are best situated to license and regulate PMCs.¹⁴⁸ Though likely a more viable solution in that a single state should be able to move more quickly to establish an internal regulatory system, an examination of this approach shows that how a given state tries to regulate PMCs determines the state's success in doing so. In short, when a state over-regulates the industry, the PMCs tend to pack-up and open shop in a more hospitable country,¹⁴⁹ or the regulating country's laws are so permissive that PMCs are able to operate with little to no oversight.¹⁵⁰ Nonetheless, examining international and state possibilities for PMC regulation provides insight in how to fashion a system to regulate the PMC industry.

A. International Licensing and Regulatory Bodies Will Not Cure the Problem

Peter Singer purports that "given the ability of PM[C]s to globalize and escape local regulation, [a system to regulate PMCs] must be international to be effective."¹⁵¹ Singer argues that an international

lating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination 4 (Mar. 18, 2005) in 61st Session of the UN Comm. On Human Rights, Web Monitoring & Documentation, <http://www.unchr.info/61st/docs/0318-Item5-SR%20Mercenaries.pdf> (last visited June 24, 2005) ("So far, only 26 States, most recently New Zealand, have ratified the International convention prohibiting the use of mercenaries. Movement on this issue has been disappointing.")

146. Even Mr. Singer, who is a strong proponent of international regulation of PMCs and offered his own analysis of how best to regulate the industry, though still maintaining that "the solution [to regulating PMCs] will require international involvement," has recently acknowledged that while "[p]roposals to update the international antimercenary laws and to create a UN body to sanction and regulate PM[C]s have already been made[,] . . . any such international effort will take years." See P.W. Singer, *Outsourcing War*, FOREIGN AFF., Mar. 1, 2005, at 119, 132.

147. See 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, 152 (1998); see also Gaul, *supra* note 112, at 1520–21 (arguing that new legislation to regulate PMCs must be drafted and should include a legislative veto provision, define regulated contracts based on type rather than dollar amount, and require ongoing quarterly reports by Congress).

148. *Id.*

149. See SINGER, *supra* note 2, at 118.

150. See *infra* Part III.C.

151. Singer, *War*, *supra* note 112, at 544.

registration process may initially be used to screen firms and establish “initial qualifications of firms.”¹⁵² Singer suggests that perhaps an international body operating, for example, under the auspices of the UN and informed by “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.”¹⁵³ The body would audit PMCs, thus giving them legitimacy and making them more attractive to non-UN clients.¹⁵⁴ A key part of Singer’s plan requires the body to review licensed PMCs’ contracts to assure that PMCs do not “work for unsavory clients or engage in contracts that are contrary to the public good.”¹⁵⁵

The body could also require operational oversight including appointing observers who would make sure the PMCs obey the laws of war and do not breach their contracts with the hiring body.¹⁵⁶ In addition, Singer suggests that the body impose more than market-based punishment so that it could address human rights violations.¹⁵⁷ One way to accomplish this goal entails the governing body requiring the PMC and its employees to agree to the jurisdiction of the host state, or “extradition to third party states that have universal jurisdiction laws” with an appropriate international legal body, such as the International Criminal Court (“ICC”) as the forum for the case.¹⁵⁸

As a simple matter, however, the ICC is not equipped nor is it designed to handle the full range of crimes that might arise, such as murder, drug dealing, extortion, or other common crimes. The ICC states:

The Court’s jurisdiction will be limited to the most serious crimes of concern to the international community as a whole. It will therefore have jurisdiction with respect to the crimes of genocide, crimes against humanity and war crimes, all of which are fully defined in the Statute and further elaborated by the Elements of Crimes.¹⁵⁹

In addition, some hold “the core of what international criminal trials seek to achieve [is] the attribution and calibration of individual

152. *Id.* at 545.

153. *Id.*

154. *Id.* at 545–46.

155. *Id.* at 546.

156. *Id.*

157. *Id.*

158. *Id.*

159. See Int’l Crim. Ct.: Jurisdiction, <http://www.icc-cpi.int/atagance/whatistheicc/jurisdiction.html> (last visited June 26, 2005).

responsibility for mass atrocities”¹⁶⁰ and note that “[e]xisting international criminal courts exclusively punish individuals (as opposed to other types of legal entities, such as states or corporations), and imprisonment constitutes the principal form of punishment imposed.”¹⁶¹ Thus, when dealing with a PMC’s violation of human rights or criminal law, the international criminal legal system has a void.

To fill this gap, one solution is the establishment of a new international criminal court to handle such matters, or expansion of the ICC’s current mandate to include crimes addressed in this Article. Nevertheless, that solution will not change a practical matter. The United States is a prime, if not the prime, employer of PMCs. The United States, however, is not inclined to recognize or submit to the jurisdiction of international courts of justice.

Rather, the current United States Administration under President Bush is vehemently opposed to the ICC and has withdrawn the United States’ signature on the implementation treaty, pushed for bilateral agreements guaranteeing that other countries not hand over United States nationals to the ICC, and passed the American Servicemembers’ Protection Act.¹⁶² The Act prohibits the United States’ cooperation with the ICC, authorizes forces to free United States personnel held by the ICC, withdraws aid to certain countries supporting the ICC, and prohibits United States peacekeeping unless United States troops are granted immunity from the ICC.¹⁶³ Furthermore, lest one think that a different administration would have embraced the ICC, when pressed during his presidential campaign Senator Kerry stated, “I don’t believe the United States should join the International Criminal Court until our concerns are addressed and the Court develops a solid track record of fair prosecutions of the world’s

160. See Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 79 (2005).

161. *Id.* at 82 (citations omitted).

162. See HUM. RIGHTS WATCH, *THE UNITED STATES AND THE INT’L CRIM. CT.*, <http://www.hrw.org/campaigns/icc/us.htm> (last visited June 20, 2005); Marjorie Cohn, *How U.S. Opposition to International Court Jeopardizes U.S. Troops*, CNN.COM, Sept. 10, 2003, <http://edition.cnn.com/2003/LAW/09/10/findlaw.analysis.cohn.peacekeepers/> (last visited June 20, 2005). For a statement regarding the Bush Administration’s position regarding the ICC and its use of bilateral agreements, see generally John R. Bolton, Under Sec’y for Arms Control & Int’l Sec., Remarks to the Federalist Society: The United States and the International Criminal Court, (Nov. 14, 2002), <http://www.state.gov/t/us/rm/15158.htm> (last visited July 11, 2005).

163. See HUM. RIGHTS WATCH, *supra* note 162.

worst criminals.”¹⁶⁴ Therefore, regardless of which administration controls the United States, the basic principle is clear, the United States is not in favor of other tribunals or countries trying United States citizens for crimes.

Consequently, while establishing a system whereby PMCs are licensed and regulated has possibilities, the difficulties in forming and managing such a system show that it will be some time before such a system can be successfully put in place. Added to the operational and bureaucratic concerns is the fact that achieving the endorsement of significant international players, such as the United States and the United Kingdom, will be difficult. The United States will either categorically oppose the system or not consider joining such a system until after it is fully laid out. The United Kingdom has begun studying the issue but faced political opposition to its proposals to regulate the industry thus far.¹⁶⁵ For these reasons, a more practical, immediate solution is needed.

B. Single State Regulation and Licensing

A wrinkle on the licensing solution is the argument that a licensing regime for PMCs will work most efficiently if the PMCs are “tied to states” and that “[t]he best way of attaching [PMC] activity to state responsibility is for each [PMC] contract to be licensed by exporting [the] government.”¹⁶⁶ Similar to Singer’s solution, this position calls for legislation and oversight. As the author points out, the United States requires that defense companies wishing to export defense services must register with the Office of Defense Trade Controls, which then issues a license for the export.¹⁶⁷ The procedure allows for on-

164. See Joe Lauria, *Kerry Opposes Role in Tribunal*, BOSTON GLOBE, Oct. 5, 2004, at A10, available at http://www.boston.com/news/politics/president/bush/articles/2004/10/05/kerry_opposes_role_in_tribunal/ (last visited June 20, 2005).

165. See Stephen Fidler, *Private Security: Operating in a Troubled Vacuum*, FT.COM, May 6, 2005, available at 2005 WLNR 7125725 (“The UK has been reticent to introduce regulation. A 2002 government green paper discussing the arguments for and against a licensing regime for private security companies famously made no recommendations. This is partly because of the sensitivity of the ‘mercenary’ issue among Labour MPs.”).

166. Zarate, *supra* note 147, at 152; see also Gaul, *supra* note 112, at 1520–21 (arguing that new legislation to regulate PMCs must be drafted and should include a legislative veto provision, define regulated contracts based on type rather than dollar amount, and require ongoing quarterly reports by Congress).

167. Zarate, *supra* note 147, at 155–56.

going oversight during the term of the contract.¹⁶⁸ Israel follows similar procedures.¹⁶⁹

In at least one instance, however, that tactic, when applied to the PMC industry, has failed. South Africa, home to the former Executive Outcomes, passed legislation that closely regulated PMCs¹⁷⁰ and that some argued signaled the end of PMCs ability to offer "implementation and combat services."¹⁷¹ As a result, the PMCs disbanded and embraced the option of moving to a less restrictive country.¹⁷² In a sense, Executive Outcomes' corporate body died and reincarnated not in one new body, but in several new corporate forms in friendlier countries.¹⁷³

Hence, we are left with a problem. On one hand, a single state may be more effective or efficient in regulating PMCs, but PMCs can easily pick up and move to a new country whenever their host country places legislative controls on them that PMCs find unacceptable. On the other hand, international organizations can try and establish a system of registration and regulation. This solution, however, creates yet another international body, asks the United States and other countries to recognize the new body, and requires companies and their employees to submit to the jurisdiction of not only a foreign power but an international power. This is inadequate, however, as international bodies are not likely to exert jurisdiction over the United States or its companies in the near future.

C. Current United States Law Is Limited

Two acts, the Alien Tort Claims Act ("ATCA")¹⁷⁴ and MEJA, provide some recourse against PMCs. Yet both acts are severely limited in

168. *Id.* at 156.

169. *Id.* at 156-57.

170. See SINGER, *supra* note 2, at 118.

171. See *id.*; cf. *Can Anyone Curb Africa's Dogs of War?*, *ECONOMIST*, Jan. 16, 1999, at 41, 41 ("Last year [South Africa] passed a law banning mercenary activity by its nationals. On January 1st, Executive Outcomes ("EO"), South Africa's best-known mercenary firm, 'terminated' its operations. A swift success for high-minded legislation? Not really.")

172. See SINGER, *supra* note 2, at 118; accord *Can Anyone Curb Africa's Dogs of War?*, *ECONOMIST*, Jan. 16, 1999, at 41 (noting "EO's headquarters near Pretoria is still staffed. Former personnel are still available to provide their services elsewhere. Many former EO soldiers have turned up in Sierra Leone with a company called Lifeguard."). In addition, even if Executive Outcomes had not disbanded, apparently it would have been welcomed in other countries even under its old name. See Zarate, *supra* note 147, at 102 n.187 (noting three countries' offers to host Executive Outcomes).

173. See *id.*

174. See Tina Garmon, *Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under the Alien Tort Claims Act*, 11 *TUL. J. INT'L & COMP. L.* 325,

their reach. Some point to the ATCA and recent cases interpreting the ATCA as providing an appropriate and viable basis for prosecuting PMCs under international law.¹⁷⁵ Yet, as the Supreme Court's ruling regarding the ATCA makes clear, only foreign nationals may bring a suit under the ATCA, they must do so in the United States, and they can only do so for acts that violate a self-executing treaty signed by the United States or "the customs and usages of civilized nations."¹⁷⁶ Thus, the ATCA's reach and power is limited, and many common crimes are not subject to it.

In contrast, MEJA begins to provide some measure of assurance that PMC employees will be prosecuted for their crimes. Nonetheless, MEJA still has serious gaps in that it applies only to PMCs who contract directly with the DOD. After the Abu Ghraib prison events highlighted that some PMC employees not employed by the DOD did not fall under the purview of MEJA, members of Congress dutifully raced to fix this error by proposing the MEJA Clarification Act¹⁷⁷ and the similar Contract Accountability Act.¹⁷⁸ Both seek to expand the Act to include PMC personnel by removing the limitation that they have to be hired by the DOD; under the proposed acts any PMC personnel hired by any agency would come under MEJA *so long as their hiring was in support of a DOD mission*.¹⁷⁹ Neither of the bills, however, have yet been passed. Likewise an amendment to the Ronald W. Reagan Na-

339-343 (2003) (examining ways in which the ATCA might be used to hold PMCs accountable under United States law).

175. See *id.* at 349 (arguing that under the joint action test articulated in *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 28, 2002), courts could establish secondary liability for corporations violating international law). In addition, the Federal Tort Claims Act may provide a defense to any tort claim against PMCs. The problem, however, is that a PMC would have to show it was operating under direct orders or specifications of the government. Demonstrating such a link might be possible in cases such as those presented by Abu Ghraib but would not address situations such as those regarding DynCorp in Bosnia. See generally Anthony J. Sebok, *Assessing Possible Tort Claims by Iraqi Prisoners*, CNN.COM, May 19, 2004, <http://www.cnn.com/2004/LAW/05/19/sebok.iraq.prisoners.torts> (discussing the possible application of the ATCA to Iraqi prisoner claims and noting that under *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001) and its reading of *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the government contractor defense was not likely to apply to Federal Tort Claims Act claims).

176. See *Sosa v. Alvarez-Machian*, 542 U.S. 692, 124 S. Ct. 2739, 2756, 2766 (2004), (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

177. MEJA Clarification Act, H.R. 4390, 108th Cong. (2003).

178. Contract Accountability Act, H.R. 4387, 108th Cong. (2003).

179. See *Enforcing U.S. Policies Against Trafficking in Persons: How Is the U.S. Military Doing?: Joint Issue Before the H. Comm. on Armed Services and the Commission on Security and Cooperation in Europe (Helsinki Commission)*, 108th Cong. (2004) (testimony of Martina Vandenberg), available at <http://www.house.gov/hasc/Issue%20Forums/Helsinki%209-21-04/VandenbergStatement.pdf> (last visited June 12, 2005).

tional Defense Authorization Act for Fiscal Year 2005¹⁸⁰ extends jurisdiction over PMC personnel regardless of which agency has hired them but again states that they must be hired “in support of a Defense Department mission abroad.”¹⁸¹

For all the press spin about accountability, none of the proposed or passed changes to the law address the situations where the DOD is not involved. Furthermore, there are numerous missions in which the DOD is not involved, but where the United States should exert oversight and jurisdiction over PMCs.¹⁸² Thus, we are left with the question of how one can begin to regulate the PMC industry such that all contractors, not just those hired as part of a DOD endeavor, are held accountable for their actions.

IV. A Regulated PMC Industry

Two areas present ways the PMC industry may remain a useful, flexible tool for governments and NGOs while still being held accountable for, if not less prone to, human rights violations and criminal acts: contract control and legislation. By using both contract and statutory remedies, a system can be created that would allow the government and the industry to attempt a version of self-regulation, but should those efforts or political will falter, the public would have the opportunity to pursue PMC violations of the law.

180. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 375 118 Stat. 1811, § 1088 (to be codified at 18 U.S.C. § 3267); *accord Enforcing U.S. Policies Against Trafficking in Persons: How Is the U.S. Military Doing?: Joint Issue Before the H. Comm. on Armed Services and the Commission on Security and Cooperation in Europe (Helsinki Commission)*, 108th Cong. (2002) (testimony of Martina Vandenberg), available at <http://www.house.gov/hasc/Issue%20Forums/Helsinki%209-21-04/VandenbergStatement.pdf> (last visited June 12, 2005) (noting amendment approval and restriction to contractors working “in support of a Department of Defense mission abroad.” (quoting the Sessions and Schumer Amendment to the Fiscal Year 2005 defense authorization bill)); Jennifer K. Elsea, Congressional Research Service, *U.S. Treatment of Prisoners in Iraq: Selected Legal Issues*, RL32395, at CRS-18 (updated May 19, 2005).

181. *See id.*

182. It should be noted that the United States government is indeed trying to prosecute a civilian contractor under a provision of the Patriot Act that allows exercise of jurisdiction over the contractor if he or she was under the special maritime and territorial jurisdiction of the United States. The assertion of jurisdiction, however, is being challenged on the grounds that the contractor was not under such jurisdiction while contracted in Afghanistan. *See* William A. Holmes, Associated Press, *CIA Contractor Accused in Beating Claims U. S. Has No Jurisdiction*, Feb. 11, 2005 (Westlaw, AP Alert: Connecticut, 02/11/05 AP Alert - CT 18:01:35). This argument applies to situations where PMCs are hired by the United States government and to situations such as those described above. For example, DynCorp in Bosnia would not fall under this extension of jurisdiction in any event. As such, the need for further legislation to close the jurisdiction gap remains.

A. Contract Control

Governments, regional security groups, NGOs, and multi-national corporations are the main entities who need and can afford to hire PMCs for the types of activities that would give rise to the abuse issues. Of course, rogue groups could hire PMCs, but as long as those who can and need to hire PMCs firmly refuse to deal with PMCs who service rogue groups, PMCs working with rogue groups should not be a problem.¹⁸³ Given the size of the contracts and the preference for a steady flow of business, PMCs are apt to desire contracts with established legitimate concerns rather than test a prohibited market¹⁸⁴ and find themselves categorized as rogue or mercenary operations. Finally, and most importantly for this Article, given the United States' current market power, the United States alone can wield tremendous power in determining the way in which PMCs behave.¹⁸⁵

Contracts routinely contain choice of law, jurisdiction, and warranties and representations clauses. The United States government could easily mandate that all contracts for services, as defined under the ITAR, include clauses whereby the PMC and its employees agree that the law governing the contract will be United States law, the PMC and its employees agree to submit to the jurisdiction of the United States regardless of where the services are performed, and the PMC warrants and represents that it provides human rights and local law training and guidance to all personnel to be deployed under the contract. In addition, such training would be required to meet certain

183. See Zarate, *supra* note 147, at 148–150 (arguing in favor of market forces as limiting PMCs willingness to engage in mercenary behavior and stating “much of [PMCs’] revenue originates from their home governments, who are long-term clients; therefore, [PMCs] want to adhere to the policies and interests of their home states.”).

184. See *id.*

185. For example, almost ninety-six percent of DynCorp’s business comes from one client, the United States government. Peter W. Singer, *Warriors for Hire*, SALON.COM, Apr. 15, 2004, available at <http://www.brook.edu/views/articles/fellows/singer20040415.htm>; see also Schwartz & Watson, *supra* note 32, at 102 (noting the Pentagon alone spends approximately \$30 billion on PMCs); CENTER FOR PUBLIC INTEGRITY: POST-WAR CONTRACTORS RANKED BY TOTAL CONTRACT VALUE IN IRAQ AND AFGHANISTAN FROM 2002 THROUGH JULY 1, 2004, <http://www.publicintegrity.org/wow/resources.aspx?act=total> (documenting approximately \$50 billion in PMC contracts for Iraq and Afghanistan alone) (last accessed June 15, 2005); accord FOREIGN AFFAIRS COMMITTEE, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION, 2001–02, H.C. 577, ¶ 12, <http://www.fco.gov.uk/Files/kfile/mercenaries,0.pdf> (noting that “most private military companies are not exclusively involved in business overseas. The largest PMCs, in the United States, provide a range of services principally for the US Government which include logistics services, drawing up specifications for equipment and testing it, training and strategic advice. For most of these companies activities abroad are a relatively small part of their business.”).

detailed criteria and training procedures (e.g., international, United States, and local laws to be covered; number of hours of training; minimum qualifications for trainers; etc.) as set forth by the United States government.

Additionally, the government could require that the corporation place attorneys, or even provide independent attorneys to be placed with the pre-deployed and post-deployed group to carry out the contract.¹⁸⁶ These attorneys would function as a private Judge Advocates General who would participate in the contract at all levels, including aiding in legal training or advising regarding the PMC's conduct in the field to monitoring activities that run afoul of the contract and/or the law. Despite the recent pressures on attorneys to provide yes-men answers as was the case in the so-called torture memos,¹⁸⁷ an independent, private attorney corps staffed by attorneys from groups such as Lawyers Without Borders,¹⁸⁸ would more successfully provide true counsel to those on the ground and not be as susceptible to manipulation.

By adhering to such precepts, the United States government would begin to influence the PMC industry such that any company within the industry would be better off instituting standards that meet or exceed the government standards as a way to demonstrate that it is fit to win the lucrative contracts the United States government is capable of executing. Indeed, the government could require that even before qualifying to bid on a contract, the PMC must attest to and verify its capacity to meet the minimum standards.

186. PMCs may consider instituting such practices on their own as gesture towards their commitment to protecting human rights.

187. See Mike Allen & Dana Priest, *Memo on Torture Draw Focus on Bush*, WASH. POST, June 9, 2004, at A3. In addition, as one member of the Judge Advocate's Office has noted, proper field supervision of contractors by contracting officers, with the power to negotiate the deal, influences compliance with MEJA and raises issues regarding chain of command. Commanders must have proper, ultimate control of personnel in battle to ensure that necessary military support services are in place at all times. See generally Maj. Joseph R. Perlak, *The Military Extraterritorial Jurisdiction Act: Implications for Contractor Personnel*, 169 MIL. L. REV. 92 (2001). Accordingly, the idea that attorneys with their duty to uphold the law and counsel clients regarding the best course of action should be involved in overseeing PMC contractors is arguably analogous to the military's use of contracting officers and the Judge Advocate General's Office for oversight of PMCs.

188. Lawyers Without Borders is a non-profit organization and claims to be the world's largest group of volunteer lawyers from around the globe who stand ready to offer pro bono service to worldwide projects and initiatives. [Its] goal is to provide legal support to Rule of Law projects and initiatives in the human rights and nation building sectors at low or significantly discounted cost.

Lawyers Without Borders: Crossing Borders to Make a Difference, <http://www.lawyerswithoutborders.org/> (last visited July 8, 2005).

Insofar as the civilian contractors were not or have not been prosecuted¹⁸⁹ for alleged crimes and human rights abuses in Bosnia, Peru, Columbia, and Abu Ghraib because the United States has claimed it did not have jurisdiction or there is a question regarding the law at issue, these requirements would begin to eliminate such scenarios and plug large holes in bringing to justice the perpetrators of rape, sex trade of women, and torture. To be clear, the government's prosecutorial discretion would remain intact, and it could easily choose not to act. Nonetheless, these provisions would reduce the government's ability to offer facile reasons as to why it has not acted when it ought to have.

B. Legislative Actions

1. Simple Fixes

The first steps in fixing legislation relating to the use of PMCs are clear: reduce, if not eliminate, the \$50 million requirement that triggers congressional notice.¹⁹⁰ MEJA and its proposed amendments do indeed try to provide a measure of control over PMCs. Nevertheless, MEJA and its proposed amendments are hindered by the narrow focus on the DOD.

Congress should expand MEJA so that it encompasses not just DOD related contracts, but contracts between any part of the government—e.g., between the State, Department of Justice, the CIA, the FBI and any PMC. For practical purposes, using the definition of contractor under the ITAR would address slippery slope arguments suggesting that all contracts by Homeland Security, for example, or some other large organ of the United States government currently exempt from MEJA, would be encompassed by the amendments. That said, it might be wise for the government to require heightened training and oversight for groups such as Transportation Security Administration, the entity responsible for protecting United States transportation systems, including screening people and baggage at airports.¹⁹¹

Simple legislative fixes are, however, only a starting point. If enacted they would, even without more action, begin to address the

189. See Perlak, *supra* note 187, at 93 (stating that “[i]n an unacceptable number of cases, these civilians have escaped prosecution altogether” (citing Department of Defense and General Accounting Office reports to the same effect and calling for legislation)).

190. See Avant, *supra* note 8; Gaul, *supra* note 112, at 1520–21; Singer, *War, supra* note 112, at 548.

191. See TSA.gov: About TSA, <http://www.tsa.gov/public/display?theme=7> (last visited June 24, 2005).

problems in an unregulated PMC industry. Still, if we are to address problems related to PMCs' field violations of the law, more complex legislation is required.

2. Whistleblower Protection

Additional creative legislative changes, such as to create whistleblower protections, would aid in preventing future abuses by PMCs and their employees. This is particularly so given that PMC contracts are carried out far from the United States, resulting in uninvestigated and unpunished problem situations in the absence of people on location willing to speak up. Indeed, if DynCorp's reaction to two whistleblowers in Bosnia is any indication, those seeking to bring abuses to light will have to overcome great fear of retribution if they are to do so. As such, MEJA should be amended to include a whistleblower provision similar to the one currently contained in the Sarbanes-Oxley Act ("Sarbanes-Oxley").¹⁹²

Indeed, much the same rationale behind the inclusion of the whistleblower provision in Sarbanes-Oxley applies to the argument for including such protection in MEJA, in part because of the parallels between the large corporations Sarbanes-Oxley seeks to govern and the PMC industry, which is made up of similar large corporate entities. In passing Sarbanes-Oxley, the Senate found that, although government employees are protected by current law when they "act in the public interest by reporting wrongdoing, there is no similar protection for employees of publicly traded companies who blow the whistle."¹⁹³ Further, the Senate stated that "[w]ith an unprecedented portion of the American public investing in these companies and depending upon their honesty, this distinction does not serve the public good."¹⁹⁴ Similarly, regarding the PMC industry, with an unprecedented portion of American military and international policy and ac-

192. See 18 U.S.C. § 1514A (2005). Though other whistleblower statutes exist, there is no overarching whistleblower protection in federal law, and as such specific legislation must be passed to address protection in specific situations, such as the one presented when considering how best to address the regulation of PMCs. See DARREN A. FEIDER, FEDERAL WHISTLEBLOWER AND RETALIATION LAWS, 1-2, <http://www.wkg.com/media/Feider%20article.pdf> (last visited June 20, 2005) ("There is, however, no single federal law prohibiting employers in general from retaliating against whistleblowers. There is instead a patchwork of statutes and regulations covering various areas of business and industry" and citing to more than twenty-five different statutes addressing whistleblower protection).

193. 148 CONG. REC. S7418-01, S7420 (daily ed. July 26, 2002) (statement of Sen. Leahy).

194. *Id.*

tion being implemented via PMCs, there needs to be protection for PMC employees who blow the whistle on PMCs.

The Senate also noted other concerns remedied by enacting Sarbanes-Oxley that similarly exist in the PMC industry context. First, the Senate indicated that without Sarbanes-Oxley, whistleblowers are subject to different laws depending on where they took the action.¹⁹⁵ Similarly, the PMC industry operates across numerous international boundaries easily setting up subsidiaries and using other legal forms to shield themselves from liabilities or prosecution.

Further, the Senate noted that "most corporate employers, with help from their lawyers, know exactly what they can do to a whistleblowing employee under the law."¹⁹⁶ A national whistleblower law would cut through the PMCs' ability to retaliate against whistleblowers, such as may have occurred in the DynCorp Bosnia situation, where two employees tried to bring to light other DynCorp employees' possible involvement in prostitution and operating a sex-slave ring; and yet rather than being rewarded for alerting their superiors to the possible violations of the law, they were fired and ended up bringing wrongful termination suits against DynCorp.¹⁹⁷ In addition, given that the acts often affect the United States government, either directly in its pocketbook or generally in its perception on the world stage, protecting whistleblowers at a federal level demonstrates that the government takes these issues seriously and intends to stop them. Regarding Sarbanes-Oxley, the Senate stated, "U.S. laws need to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies" and cited a letter from the National Whistleblower Center, the Government Accountability Project, and Taxpayers Against Fraud calling Sarbanes-Oxley "the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation's financial markets."¹⁹⁸ Similarly, "U.S. laws need to encourage and protect" PMC whistleblowers so that we have an "effective measure . . . to prevent recurrences of the [Abu Ghraib and Bosnia] debacle[s]."¹⁹⁹

Borrowing language from Sarbanes-Oxley,²⁰⁰ whistleblower protection in MEJA could be drafted as follows:

195. *Id.*

196. *Id.*

197. *See* Capps, *Outside*, *supra* note 5.

198. 148 CONG. REC. S7418-01, S7420 (daily ed. July 26, 2002) (statement of Sen. Leahy).

199. *Id.*

200. 18 U.S.C. § 1514A(a).

No company [subject to ITAR or MEJA], or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes²⁰¹

“conduct outside the United States that would constitute an offense punishable by imprisonment for more than [one] year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States”²⁰² and/or any provision of Federal law pertaining to fraud against the United States government or in the case of public companies fraud against shareholders.

Under the amended Act, employees “fil[ing], caus[ing] to be filed, testify[ing], participat[ing] in, or otherwise assist[ing] in a proceeding filed”²⁰³ could be protected as well.

Under Sarbanes-Oxley, an employee has ninety days from the occurrence of a suspect act to file an action,²⁰⁴ but in the PMC context, that may need to be extended to 180 days to account for the possibility that employees in remote regions could require more time to file an action. The remedies could include Sarbanes-Oxley’s provisions for reinstatement, back pay, compensation for special damages including litigation costs, expert witness fees, and reasonable attorney fees.²⁰⁵

Enforcement could also parallel Sarbanes-Oxley, so that, in the event of a retaliatory act, the employee would file a complaint with the Secretary of Labor who would have 180 days to issue a final decision. Otherwise, unless there is bad-faith on the employee’s part, the employee would be allowed to bring suit in federal district court regardless of the amount in controversy.²⁰⁶

Though there may be alternate ways to the one outlined to provide whistleblower protection, whistleblower protection in some manner combined with improved congressional oversight and an expanded definition of when PMCs are subject to MEJA, would provide a way to expand jurisdiction over PMCs and a way for those in the

201. 18 U.S.C. § 1514A(a). The term “lawful” is intended to prevent employees from using the act as way to disclose trade secrets. 148 CONG. REC. S7418-01, S7419 (daily ed. July 26, 2002) (statement of Sen. Leahy).

202. 18 U.S.C. § 3261(a) (2005).

203. *See id.* § 1514A(a)(2).

204. *See id.* § 1514A(b).

205. *See id.* § 1514A(c).

206. *See id.* § 1514A(b).

field to help monitor PMC actions that would require the exercise of such jurisdiction. Yet there is still one type of oversight available for creating a robust regulatory scheme for PMCs: a public interest cause of action.

3. Public Interest Cause of Action

The final and perhaps most powerful aspect of the legislative layer consists of a public interest cause of action. California's Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65" or "Act"), which addresses environmental concerns by allowing a public interest cause of action balanced against governmental interests in pursuing a case,²⁰⁷ provides a template from which this layer may be fashioned. In following Proposition 65 as a guide, this layer is related to a *qui tam* action under the False Claims Act of 1863,²⁰⁸ which allows "any person to prosecute a civil fraud—in the name of the United States—against any person who allegedly makes a false claim to the United States government."²⁰⁹

207. See generally CAL. HEALTH & SAFETY CODE § 25249.5–.13 (West 1999 & Supp. 2005).

208. See Julie Ann Ross, *Citizen Suits: California's Proposition 65 and the Lawyer's Ethical Duty to the Public Interest*, 29 U.S.F. L. REV. 809, 810 n.4 (1995) (noting relationship of *qui tam* to "modern day citizen suit"); accord Michael Ray Harris, *Promoting Corporate Self-Compliance: An Examination of the Debate Over Legal Protection for Environmental Audits*, 23 ECOLOGY L.Q. 663, 710, n. 317 ("A growing trend in environmental law is the use of the *qui tam* provisions of the False Claims Act of 1863 (FCA) to force corporations to abide by environmental reporting requirements."). The False Claims Act is codified at 31 U.S.C. §§ 3729–3732. It should be noted that the use of *qui tam* actions are subject to some debate and criticism. See Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 607–618 (2005) (examining private attorney general actions and noting pro arguments—"Private attorneys general are a cost-effective means of both pursuing the public welfare and returning power to the people themselves. For legislatures that value cheap, robust regulatory enforcement, private attorneys general may present an attractive option." *Id.* at 610. Con arguments include: private attorneys may be self-interested and motivated by financial gain, may free-ride by waiting to follow the government's lead for opportunistic litigation rather than being true investigators, may accept settlements too easily, and may undermine the provision of consistent agency or government enforcement. *Id.* at 607–619 (finding "no definitive resolution to the policy debate over private attorneys general" and that legislatures resolve the matter differently based on context.); John Beisner, et. al., *Class Action Cops: Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1457–1460 (2005) (comparing class action private attorney general actions to *qui tam* suits and noting that though *qui tam* actions may allow citizens to bring suits that abuse or are not part of the policy objectives behind the act enabling a given suit, as opposed to class actions, the legislature can alter the parameters of the enabling act to prevent such abuses).

209. Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 531 (2005) (examining the history of *qui tam* actions and the executive's final authority in such actions).

Following this model, this private action layer would examine what areas are to be subject to the public cause of action—from human rights laws to United States laws to specific fraud laws to current provisions of MEJA—and then provide for the ability to file suit and the procedure under which such a suit would be filed.

Using the Act as an exemplar, this layer blends government and private oversight by including injunctive remedies, specific and daily civil penalties of \$2500, detailed notice and minimum threshold requirements for private action, and time limits to allow a public monitoring function to exist while maintaining the government's ability to pursue cases.²¹⁰

The Act sets forth a balancing test the court is to consider when assessing civil penalties:

- (A) The nature and extent of the violation.
- (B) The number of, and severity of, the violations.
- (C) The economic effect of the penalty on the violator.
- (D) Whether the violator took good faith measures to comply with this chapter and the time these measures were taken.
- (E) The willfulness of the violator's misconduct.
- (F) The deterrent effect that the imposition of the penalty would have on both the violator and the regulated community as a whole.
- (G) Any other factor that justice may require.²¹¹

Either the Attorney General, a district attorney, or a city attorney for a city with a population of more than 750,000 people may bring a suit under Proposition 65.²¹² Government attorneys in smaller jurisdictions may bring suits provided they receive permission of their district attorney.²¹³

In addition, anyone may bring an action in the public interest provided certain requirements are met.²¹⁴ To bring a suit in the public interest, one must first give notice to the government attorney with jurisdiction over the potential case and to the alleged violator of the Act and wait sixty days before bringing the suit;²¹⁵ if the State has picked up the case and is "diligently prosecuting" it, the private action is no longer allowed.²¹⁶ In addition, when alleging that the potential violator is exposing the public to chemicals that cause cancer or re-

210. See generally CAL. HEALTH & SAFETY CODE § 25249.5–.13 (West 1999 & Supp. 2005).

211. *Id.* § 25249.7(b)(2).

212. *Id.* § 25249.7(c).

213. *Id.*

214. *Id.* § 25249.7(d).

215. *Id.* § 25249.7(d)(1).

216. *Id.* § 25249.7(d)(2).

productive toxicity, the person bringing the suit must provide a certificate of merit which:

[S]hall state that the person executing the certificate has consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the action, and that, based on that information, the person executing the certificate believes there is a reasonable and meritorious case for the private action. Factual information sufficient to establish the basis of the certificate of merit . . . shall be attached to the certificate of merit that is served on the Attorney General.²¹⁷

Significantly, the factual information on which the certificate is based is not discoverable unless it "is relevant to the subject matter of the action and is otherwise discoverable,"²¹⁸ presumably to protect potential whistleblowers. Nonetheless, after a case is over, the alleged violator may move for, or the court of its own volition may conduct, an *in camera* review of the certificate of merit and the legal theories of the plaintiff to see whether the basis was real.²¹⁹ If the court deems the basis to be false, it may bring sanctions for a frivolous lawsuit.²²⁰

A parallel statute for PMC regulation would maintain the injunction power, the daily civil penalty provisions, the required balancing test for the court, the notice period with the government's ability to trump the public interest suit, the certificate of merit requirement, the whistleblower protection, and the penalties for frivolous lawsuits. If necessary, a heightened pleading requirement or procedural limit, such as exhausting certain remedies, might be incorporated to limit further concerns regarding an explosion of suits. In addition, the statute could require a certain level of pattern and practice before such a suit would be allowed thereby preventing numerous small-scale, nui-

217. *Id.* § 25249.7(d)(1).

218. *Id.* § 25249.7(h)(1).

219. *Id.* § 25249.7(h)(2).

220. *Id.* (mandating "If the court finds that there was no credible factual basis for the certifier's belief that an exposure to a listed chemical had occurred or was threatened, then the action *shall be deemed frivolous* within the meaning of Section 128.6 or 128.7 of the Code of Civil Procedure, whichever provision is applicable to the action." (emphasis added)). Under California Code of Civil Procedure § 128.6(a), the court may order whomever brought the frivolous action to pay attorney's fees and reasonable expenses. CAL. CIV. PROC. CODE § 128.6(a) (West Supp. 2005). California Code of Civil Procedure § 128.7 provides authorization for the court to impose sanctions and punitive damages including but not limited to attorney's fees and expenses and has the stated goal of using sanctions as a deterrent: "It is the intent of the Legislature that courts shall vigorously use its sanctions authority to deter that improper conduct or comparable conduct by others similarly situated." CAL. CODE CIV. PROC. § 128.7(h) (West Supp. 2005).

sance suits and focusing on larger scale systemic issues, such as the ones that occurred in Bosnia and Abu Ghraib.

The advantage of such a system lies in the way in which the violations are defined. The statute can be written to include human rights violations, United States laws, specific fraud laws, or simply stay with the current MEJA provision that "an offense punishable by imprisonment for more than [one] year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States . . . shall be punished as provided for that offense."²²¹ The statute, however, would allow the public to aid in policing the contractors' actions.

Indeed, with the civil penalty provision and the recent questions regarding PMCs over-charging the government,²²² the statute ought to include fraud (perhaps limited by a high dollar amount) in the definition and thus rein in contractors and their ability to influence whether the government pursues or abandons a case. Further, following the model of Proposition 65,²²³ under the proposed PMC system, the office or person prosecuting the case would receive only a percentage of the penalty with the rest going to the harmed agency.

C. The Full System in Action

Assuming that the full system was in place with both contract and legislative changes implemented, how would it operate? In a likely future scenario, suppose the government has become involved with a peacekeeping or nation-building mission in the Middle East. PMC services are requested and most likely are an absolute necessity if the mission is to succeed because United States and international troops are scarce and are tasked with ongoing military activities. The PMC in question is hired for several services, ranging from laundry and food service, to protecting reconstruction and human aid groups, to guarding prisoners to aiding in interrogation.

Under the contract that the government would require, the PMC would undergo a baseline of training regarding the law of war, human

221. 18 U.S.C.A., § 3261(a) (2005).

222. See generally MINORITY STAFF OF H. COMM. ON GOV'T REFORM, 108TH CONG., FACT SHEET HALLIBURTON'S IRAQ CONTRACTS NOW WORTH OVER \$10 BILLION (2004), <http://democrats.reform.house.gov/Documents/20041209093532-66409.pdf> (last visited June 15, 2005) (noting overcharges and numerous contract violations).

223. CAL. HEALTH & SAFETY CODE § 25192(a)(2) (West 2005). To encourage litigation by private parties, 25% of all civil penalties collected in the action are paid to a private party who successfully obtains a judgment under California's Safe Drinking Water and Toxic Enforcement Act of 1986. *Id.* § 25192.12(d).

rights laws, and pertinent local law. To be clear, this baseline would be in place *for all personnel*, including those tending to laundry and food service. The reason being that privately contracted personnel may be hired initially to perform support functions, but in the course of a fluid war (or warlike) situation, the government employer may call upon the contractor to take up arms. Indeed, the contractors may take up arms to protect themselves regardless of whether their contract or their employer has asked them to do so.²²⁴

Further, the government would likely require that higher, more sophisticated levels of training be in place for those personnel performing functions whose nature necessarily involves difficult international law, law of war, and local law questions. Finally, the government would be able to demonstrate that it had indeed sought to protect human rights from the outset, and if the PMC in question deployed personnel who had not received proper training, the government could hold the PMC accountable rather than the government taking the blame.

In the same scenario, suppose that despite these contractual precautions, it was discovered that employees of a PMC used their position as border patrol to deal drugs. In addition, presume that the number of people involved and the amount of dealing was significant—not a Cali cartel drug ring, considered “one of the largest organized crime syndicates in modern history”²²⁵ but large enough that the Drug Enforcement Agency or a police force would take notice in the United States. With the legislative changes proposed above—whistleblower and public right of action statutes in place—the scenario could play out as follows:

One person, also on border patrol, sees the issue and is not willing to be part of the scheme. If the PMC or some organ of the government steps up and investigates, with whistleblower protection, she could cooperate with a reduced fear of reprisal. If, however, the PMC had not, or appeared unwilling to investigate the matter, she could report the violation to the Attorney General, her Representative, Senator, or other appropriate government entity with a greater sense of employment safety.

224. See Singer, *Outsourcing*, *supra* note 61 (noting “[w]hen contractor units are attacked, they must deal with the situation” and that despite restrictions against carrying “heavy weapons” some have taken to buying grenades and plan on acquiring other such weapons to protect themselves).

225. See Jack Dolan, *Judge: Drug Case at Risk*, MIAMI HERALD, May 30, 2005, at B1.

Nevertheless, what if after she reports the matter she finds that the investigation does not occur or that the PMC's close ties to the DOD have operated behind the scenes to squash the matter? Likewise, what if she does not know to whom to turn in the government? In either of these situations, the public right of action statute comes into play.

She could approach watchdog groups such as the Center for Constitutional Rights or even Public Citizen,²²⁶ provide them with information, and they in turn would be able to pursue the matter. In doing so, the watchdog group would be held to the high standard set forth above so that it could only bring suits regarding acts rising to a certain level of severity. In addition, the watchdog group would act as a screen for the government in that a single person would not be making a claim. An organization operating under, and subject to, a specific statute with penalties for false claims would be involved. In addition, if—even after being informed by the individual, the watchdog group, or both—the government inadvertently failed to pursue the action, stalled, or chose not to pursue the matter, there would be a viable means of pressing the issue, making it a matter of public concern and thus perhaps demonstrating to the government that the people do indeed care about the matter. Indeed, the potential of such an outcry would encourage the government and the PMC industry to avoid such an event lest a cumbersome licensing and regulatory system be deemed the only satisfactory solution.

In contrast, today groups such as at the Center for Constitutional Rights must pursue cases in Germany²²⁷ or try and shoe-horn cases under the ATCA, which only covers acts that violate a self-executing treaty signed by the United States or “the customs and usages of civi-

226. The Center for Constitutional Rights “is a non-profit legal and educational organization dedicated to protecting and advancing the rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights.” See Center for Const. Rights, About CCR, http://www.ccr-ny.org/v2/about/mission_vision.asp (last visited June 26, 2005); Public Citizen was founded in 1971 by Ralph Nader and is a consumer advocacy group that fights for, among other issues, “openness and democratic accountability in government.” See Public Citizen, About Public Citizen, <http://www.citizen.org/about/> (last visited June 26, 2005); See Public Citizen, Public Citizen 30 Years, <http://www.citizen.org/documents/pctimeline.pdf> (last visited June 26, 2005) (detailing milestones in Public Citizen’s history from its founding to 2000).

227. See CENTER FOR CONST. RIGHTS, CCR SEEKS CRIMINAL INVESTIGATION IN GERMANY OF UNITED STATES OFFICIALS FOR WAR CRIMES IN ABU GHRAIB TORTURE, <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=TCRIT9TuSb&Content=471> (last visited May 30, 2005).

lized nations.”²²⁸ For PMCs based in the United States and serving the United States government, with its reluctance to submit to international jurisdictions, this system would obviate the necessity of frustrated groups bringing claims outside the United States and reduce the demand for international criminal courts.

Conclusion

The PMC-related abuses, such as the events at Abu Ghraib, the United States government’s use of the PMC industry to implement illegal policies in South America, and the PMC industry’s ability to defraud the United States government of millions of dollars combined with the increased availability of numerous ex-military personnel in the private sector and with the United States’ policy choice of outsourcing as many government functions as possible, has created a situation where the PMC industry has exploded into a multi-billion dollar sector not likely to vanish soon. These factors demonstrate that some level of regulation of the PMC industry is required.

Several proposals have previously been offered to regulate the industry by establishing international or country-specific licensing and regulation schemes. These schemes fail to correct the perceived problems in the PMC industry and they would likely severely reduce PMCs’ efficacy and require submission to the jurisdiction of an international court. In addition, the schemes would face the difficulties inherent in trying to categorize the industry and possibly further constrain the industry by imposing imprecise or inappropriate categories and definitions to the industry as part of any proposed regulation scheme.

In contrast, this Article’s proposed system blends market-based self-regulation with the threat of serious criminal and/or civil litigation as a fail-safe. The system’s advantage to the United States government and to the PMC industry is that it maintains the flexibility of an unregulated, or, rather, a less-regulated industry, while addressing the serious and important concerns of those who see the lack of accountability and responsibility for serious violations of the law.

One way or another, regulation will come. The United States government and the PMC industry can, of course, continue with limited solutions that barely address the issues at hand, such as proposing amendments too limited in their reach and continuing to indicate to

228. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739, 2766–67 (2004) (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

the world that the United States will do as it pleases by not curbing or punishing abuses by companies it hires. Alternatively, the United States government could follow a system such as the one set forth in this Article that gives the government and the PMC industry the chance to show they can clean-up their act while providing meaningful avenues of recourse if they do not.

