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## Playing Catch-up: Proposing the Creation of Status-Based Regulations to Bring Private Military Contractor Firms Within the Purview of International and Domestic Law

Huma T. Yasin

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**PLAYING CATCH-UP: PROPOSING THE CREATION OF  
STATUS-BASED REGULATIONS TO BRING PRIVATE  
MILITARY CONTRACTOR FIRMS WITHIN THE PURVIEW  
OF INTERNATIONAL AND DOMESTIC LAW**

*Huma T. Yasin\**

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*The members of the [private military security] firm were polite and generally helpful, but the ambiguity between who they were and what they were doing always hung in the air. They were employees of a private company, but were performing tasks inherently military. It just did not settle with the way [Americans] tended to understand either business or warfare. However, there they were, simply doing their jobs, but in the process, altering the entire security balance of the region.*<sup>1</sup>

## INTRODUCTION

September 16, 2007, began as a typical hot day in Baghdad, Iraq.<sup>2</sup> Nisour Square, the once-upscale section of Baghdad, bustled with Iraqis commemorating the month of Ramadan, the holiest month of the Islamic calendar.<sup>3</sup> Shoppers bravely battled the oppressive heat to make preparations for a festive meal, signifying the end of the fast.<sup>4</sup> The usual midday traffic crowded the streets.<sup>5</sup> Around noon, armed members of a security-detail team entered Nisour Square in four large armored vehicles with 7.62-millimeter machine guns mounted atop.<sup>6</sup> They were armed with an SR-25 sniper rifle, M-4 assault rifles, M-240 machine guns, grenades, and grenade launchers, among other weapons.<sup>7</sup> The security convoy entered the congested intersection at Nisour Square, compelling Iraqi traffic police to stop local traffic abruptly and to allow the convoy to proceed.<sup>8</sup> Without warning, in the middle of the one-way street, the convoy made an abrupt U-turn and sped directly into oncoming traffic.<sup>9</sup> Suddenly, and seemingly without provocation, members of the security team opened fire upon unarmed civilians.<sup>10</sup> The team proceeded to

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<sup>1</sup> P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* vii (3d ed. 2008). This quote describes the privately contracted military firms' involvement in the Balkans in the 1990s. Over the last decade, we have made little progress in understanding and categorizing these entities.

<sup>2</sup> JEREMY SCAHILL, *BLACKWATER: THE RISE OF THE WORLD'S MOST POWERFUL MERCENARY ARMY* 3 (2008).

<sup>3</sup> *Id.* at 3–4.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 3.

<sup>7</sup> Government's Opposition to Defendant's Motion to Dismiss for Lack of Jurisdiction at 4, *United States v. Slough*, 677 F. Supp. 2d 112 (D.D.C. 2009) (No. 08-360) (RMU).

<sup>8</sup> SCAHILL, *supra* note 2, at 4.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

indiscriminately shower bullets upon women and children retreating to defensive positions.<sup>11</sup>

The operator of one vehicle targeted by the Wild West-style gun battle was a twenty-three-year-old medical student chauffeuring his mother.<sup>12</sup> The security team shot the unarmed civilians in the vehicle point-blank in the head and continued firing at least forty bullets upon the vehicle, causing it to explode.<sup>13</sup> The two bodies were left completely charred and unrecognizable. Dental records and the remains of one of the victim's shoes later confirmed their identities.<sup>14</sup> Additionally, Little Bird helicopters arrived to aid the convoys and began firing in like fashion on the cars.<sup>15</sup> The attack lasted fifteen minutes (despite the alarmed pleas of "cease fire!"), leaving seventeen Iraqis dead in the same streets which moments before buzzed with commerce.<sup>16</sup> A military review concluded there was not a single insurgent among the fatally wounded Iraqis,<sup>17</sup> who now lay scattered, falling wherever they lost their battle to reach a safe haven.

The security convoy conducting the mission was not an elite covert military unit; in fact, this security detail had no direct association with any state-sanctioned military force. The Nisour Square massacre was carried out solely by Blackwater, a privately owned security aide to the United States, in conjunction with a lucrative security and defense contract with the State Department.<sup>18</sup> While incidents of targeted violence against Iraqi civilians were neither unique nor isolated, this was the first widely reported shooting spree that was conducted on such a large scale against unarmed civilians, perpetrated exclusively by a privately contracted military firm ("PCMF").<sup>19</sup> The aftermath

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<sup>11</sup> *Id.* at 4–8.

<sup>12</sup> *Id.* at 4–6.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 8.

<sup>16</sup> *Id.* at 3–6.

<sup>17</sup> David Johnston & John M. Broder, *F.B.I. Says Guards Killed 14 Iraqis Without Cause*, N.Y. TIMES, Nov. 17, 2007, at A1.

<sup>18</sup> The fact that Blackwater was employed by the State Department and not the Department of Defense was at issue in the government's prosecution of the case. *See infra* Part I.

<sup>19</sup> *See, e.g.*, E.L. Gaston, Note, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement*, 49 HARV. INT'L L.J. 221, 229 (2008). PCMFs have been at the heart of many different small scale controversies involving criminal misconduct and human rights abuses. *Id.* In the 1990s, employees of DynCorp, a security company hired by the United States in Bosnia, were accused of a sex-trafficking scandal. *Id.* PCMFs were involved in the Abu Ghraib prison abuses. *Id.* Employees of Aegis, a British corporation, were videotaped arbitrarily shooting Iraqis. *Id.* In February 2007, a Central Intelligence Agency ("CIA") contractor was charged for beating an Afghan man to

following the incident catapulted PCMFs into the public spotlight, thereby opening a Pandora's box of legal questions.<sup>20</sup> Who were these armed, uniformed personnel rivaling a small army and performing quasi-military functions? Who—or alternatively, what state or entity—was responsible for such widespread and horrific crimes committed against unarmed civilians? What legal protections, if any, should these pseudo-soldiers be accorded?

As of March 2010, the Department of Defense (“DOD”) estimated there were 207,600 DOD contractors supporting troops in Iraq and Afghanistan.<sup>21</sup> This estimate does not include contractors employed by other U.S. agencies.<sup>22</sup> At least 60 different PCMFs are operating in Iraq,<sup>23</sup> hiring nationals of at least 30 different countries;<sup>24</sup> 26% of the contractor workforce is comprised of U.S. citizens,<sup>25</sup> 56% are third-country nationals,<sup>26</sup> and the remaining 18% of contractors are Iraqi citizens.<sup>27</sup> The DOD “increasingly relies upon contractors to support operations in Iraq and Afghanistan, which has resulted in a DOD workforce that has 19% more contractor personnel (207,600) than uniformed

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death during an interrogation. *Id.* This is by no means a comprehensive list of recorded abuses conducted by PCMFs; the actual number of abuses is unknown because each PCMF has a different internal mechanism of recording and punishing such behavior. See Laura A. Dickinson, *Military Lawyers, Private Contractors, and the Problem of International Law Compliance*, 42 N.Y.U. J. INT'L L. & POL. 355, 380–82 (2010). Furthermore, misconduct is frequently underreported to the government. *Id.*

<sup>20</sup> “An investigative team made up of officials from Iraq’s Interior, National Security, and Defense ministries said in a preliminary report that ‘the murder of citizens in cold blood in the Nisour area by Blackwater is considered a terrorist action against civilians just like any other terrorist operation.’” SCAHILL, *supra* note 2, at 14. Iraqi investigators were denied access to the Blackwater contractors, despite Iraq’s explicit statement of intent to prosecute the criminal acts. *Id.*

<sup>21</sup> MOSHE SCHWARTZ, CONG. RESEARCH SERV., R 40764, DEPARTMENT OF DEFENSE CONTRACTORS IN IRAQ AND AFGHANISTAN: BACKGROUND AND ANALYSIS 5 (2010).

<sup>22</sup> *Id.* Analysts have called the reliability of the DOD data into question. The Government Accountability Office revealed “that the DOD’s quarterly contractor reports were not routinely checked for accuracy or completeness.” *Id.* at 4. Further, the DOD did not start collecting contractor data until the second half of 2007, despite employing contractors from the onset of operations. *Id.* Additionally, keeping track of contractors is a tremendous challenge, as “contractors rotate in and out of theater more often than soldiers do.” DAVID ISENBERG, SHADOW FORCE: PRIVATE SECURITY CONTRACTORS IN IRAQ 11 (2009).

<sup>23</sup> ISENBERG, *supra* note 22, at 62.

<sup>24</sup> JENNIFER K. ELSEA, MOSHE SCHWARTZ & KENNON H. NAKAMURU, CONG. RESEARCH SERV., RL 32419, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 3 (2008). Contractors come from countries such as Bosnia, Britain, Nepal, Chile, Ukraine, Israel, South Africa, New Zealand, Australia, Fiji, India, Honduras, Peru, and Columbia. ISENBERG, *supra* note 22, at 37, 39–40.

<sup>25</sup> SCHWARTZ, *supra* note 21, at 9.

<sup>26</sup> *Id.* Many of the third-country nationals are not properly vetted; indeed “not everyone recruited had a military or even security background. One person recruited in El Salvador used to be a mason’s assistant.” ISENBERG, *supra* note 22, at 40. Furthermore, third-country nationals are often paid five to six times less than their American counterparts. *Id.* at 41.

<sup>27</sup> SCHWARTZ, *supra* note 21, at 9.

personnel (175,000).”<sup>28</sup> The United States is entangled in a pattern of unprecedented reliance upon PCMFs to conduct conflict resolution and nation-building. In fact, many analysts argue the DOD cannot execute large missions absent contractor support.<sup>29</sup> The increased number of PCMFs directly correlates with increased PCMF-related instances of misconduct.<sup>30</sup> The use of PCMFs poses many legal problems, resulting in the “blurring of lines between policing and combat and the general blending of roles that accompany operating in a combat zone.”<sup>31</sup> Nonetheless, international and domestic law have failed to recognize and affirmatively designate mechanisms to prosecute such misconduct.<sup>32</sup> Therefore, the paramount legal question is: What is the legal status of these entities?

Unfortunately, to date, there is a dearth of international and domestic law that concisely defines the legal status of a PCMF. The only existing legal certainty is that PCMFs are not state-based military actors.<sup>33</sup> Without according legal status to PCMFs, no coherent framework exists to analyze a host of legal issues, including, but not limited to, the following: which sovereigns can exercise jurisdiction to prosecute claims by or against PCMFs (criminal or civil);<sup>34</sup> the liability of contracting states for transgressions committed by PCMFs;<sup>35</sup> what body of law should govern wrongful conduct involving PCMFs;<sup>36</sup> and lastly, whether any legal protections extend to PCMFs.<sup>37</sup> This Article engages the legal abyss within which PCMFs operate, and in response proposes a comprehensive analytical framework for evaluating the status of PCMFs. Specifically, the proposal delineates categories, attaches status-based liability, and extends legal protection to PCMFs operating in conflict and post-conflict zones.

Part I of this Article analyzes the shortcomings of both international and domestic law regulating PCMF conduct through examining the Nisour Square massacre aftermath. Part II analyzes current international and domestic law to

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<sup>28</sup> *Id.* at Summary.

<sup>29</sup> *Id.* at 1.

<sup>30</sup> DEBORAH AVANT, *THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY* 8 (2008).

<sup>31</sup> *Id.* at 21.

<sup>32</sup> Francesco Francioni, *Private Military Contractors and International Law: An Introduction*, 19 *EURO. J. INT’L L.* 961, 963 (2008).

<sup>33</sup> *Id.* at 962.

<sup>34</sup> *Id.*

<sup>35</sup> See Carsten Hoppe, *Passing the Buck: State Responsibility for Military Companies*, 19 *EURO. J. INT’L L.* 989, 990 (2008).

<sup>36</sup> Francioni, *supra* note 32, at 962.

<sup>37</sup> *Id.* at 962–63.

determine whether PCMFs fit within an existing legal framework. In particular, Part II engages a brief historical analysis of the law of mercenarism, both drawing parallels and distinguishing between the legal definition of mercenaries and PCMFs. This analysis concludes that current international law cannot regulate PCMF conduct, rendering the term “mercenary” irrelevant in the PCMF context. This Part also analyzes the potential domestic jurisdictional statutes that arguably encompass PCMF misconduct. Again, the analysis concludes that domestic law is incapable of providing a comprehensive solution to the PCMF problem. Part III examines the convergence of three novel legal developments: (1) the ambiguous form of twenty-first century warfare, (2) the outsourcing of the state monopoly over the use of force, and (3) the rising influence of transnational corporations. Part IV provides a framework to categorize PCMFs, which exhibit both military and corporate characteristics. Part V discusses contemporary legal scholarship and analyzes recommendations to solve the PCMF accountability gap. This Part concludes that none of the recommendations, taken individually, solves the PCMF legal conundrum. Lastly, Part VI presents an alternative legal framework, concisely defining the status of PCMFs and delineating domestic and international mechanisms of liability and protection.

#### I. EXAMINING THE BLACKWATER PROSECUTION (OR LACK THEREOF)

On September 16, 2007, Blackwater employees opened fire on unarmed Iraqis in Baghdad’s Nisour Square, killing seventeen Iraqis and wounding twenty, many of whom were women and children.<sup>38</sup> The vast majority of eyewitnesses and forensic investigations stated that the massacre was unprovoked.<sup>39</sup> Victims and their families were denied legal recourse, and Blackwater contractors remained unaccountable.<sup>40</sup> A brief description of the events and policies implemented in post-war Iraq is necessary to appreciate the ambiguous status of PCMFs.

##### A. *CPA and Beyond: Limiting Iraq’s Jurisdictional Reach*

On May 1, 2003, President George W. Bush declared the end of major combat operations in Iraq.<sup>41</sup> Despite the proclamation of victory, the

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<sup>38</sup> See *supra* notes 2–18 and accompanying text.

<sup>39</sup> SCAHILL, *supra* note 2, at 33.

<sup>40</sup> See *infra* Part I.B.

<sup>41</sup> Jarrett Murphy, *Text of Bush Speech: President Declares End to Major Combat Operations*, CBS NEWS WORLD (May 1, 2003), <http://www.cbsnews.com/stories/2003/05/01/iraq/main551946.shtml>.

administration had vastly underestimated the cost and resources required for the ensuing occupation.<sup>42</sup> There was no coherent military or civilian strategy to counteract the vacuum of power that toppling Saddam Hussein's dictatorship created and, further, no mechanism to provide security and reduce sectarian-insurgent violence was contemplated.<sup>43</sup>

Shortly after President Bush's declaration of victory, the United States, lacking a long-term post-war plan, created the Coalition Provisional Authority ("CPA"), to aid and regulate the restructuring of the newly sovereign Iraq.<sup>44</sup> The United States unilaterally formed the CPA as the interim governing body of Iraq, appointing L. Paul Bremer III<sup>45</sup> as the head of the organization.<sup>46</sup> The CPA garnered tremendous criticism from Iraqis, as well as State Department officials, who questioned the legitimacy of the CPA's legal authority to govern Iraq.<sup>47</sup> Nonetheless, once the CPA came to power, Bremer issued decrees on property, persons, banking, and the press, to name a few, and ultimately delayed the establishment of a sovereign, Iraqi-led government.<sup>48</sup>

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<sup>42</sup> See generally *Frontline: Private Warriors* (PBS television broadcast June 21, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/>.

<sup>43</sup> *Id.*

<sup>44</sup> L. ELAINE HALCHIN, CONG. RESEARCH SERV., RL 32370, THE COALITION PROVISIONAL AUTHORITY (CPA): ORIGIN, CHARACTERISTICS, AND INSTITUTIONAL AUTHORITY 1 (2004).

<sup>45</sup> Bremer was previously a Foreign Service Officer who spoke no Arabic, had no prior experience in the Middle East or in post-war reconstruction, and never served in the military. *NO END IN SIGHT* (Magnolia Pictures 2007). He was called by Defense Secretary Rumsfeld ten days before taking the position of head of CPA. *Id.*

<sup>46</sup> It is worth noting that the Office of Reconstruction and Humanitarian Assistance ("ORHA") was created in January of 2003 under the Department of Defense. See, e.g., *Pre-war Planning for Post-war Iraq*, AIR UNIV., [http://www.au.af.mil/au/awc/awcgate/dod/postwar\\_iraq.htm](http://www.au.af.mil/au/awc/awcgate/dod/postwar_iraq.htm) (last visited Feb. 9, 2011). It was composed of many different offices of the U.S. government, coalition partners, and private sector stakeholders. *Id.* ORHA was formed for the express purpose of managing the distribution of humanitarian aid and "building the new Iraq both physically and politically." *Id.* ORHA prepared for a short transition period and the swift implementation of an interim government with full Iraqi sovereignty and expressly informed the Department of Defense as such. *Id.* However, much to the surprise of post-war Iraq strategists, ORHA was dismantled in favor of the CPA. *Id.* Faisal Al-Istrabidi, the Iraqi Ambassador to the United Nations, stated, "[The Iraqis] had expected, and I think I can say we had been promised, there would be a sovereign government virtually immediately." *NO END IN SIGHT*, *supra* note 45.

<sup>47</sup> HALCHIN, *supra* note 44, at Summary. "The lack of an authoritative and unambiguous statement about how this organization was established, by whom, and under what authority leaves open many questions, particularly in the areas of oversight and accountability." *Id.* Oddly, it is unclear what branch of government, or alternatively, under what statute or order, the CPA was created. *Id.* Indeed, there is no "authoritative and unambiguous statement about how this organization was established, by whom, and under what authority." *Id.*

<sup>48</sup> *Frontline: Truth, War, and Consequences* (PBS television broadcast Apr. 3, 2003), available at [http://www.pbs.org/wgbh/pages/frontline/shows/truth/view/?utm\\_campaign=viewpage&utm\\_medium=grid&utm\\_source=grid](http://www.pbs.org/wgbh/pages/frontline/shows/truth/view/?utm_campaign=viewpage&utm_medium=grid&utm_source=grid).

One week prior to the disbandment of the CPA and restoration of Iraq's limited sovereignty, the CPA issued Order No. 17,<sup>49</sup> which states, "Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto."<sup>50</sup> This order had not been officially overturned prior to the Nisour Square shootings.<sup>51</sup> More troubling, perhaps, is that Article 130 of the Iraqi Constitution states, "Existing laws shall remain in force, unless annulled or amended in accordance with the provisions of this Constitution."<sup>52</sup> Two months after the Nisour Square incident and in response to perceived PCMF immunity, on November 1, 2007, Iraq's Parliament drafted a bill to revoke PCMF's legal immunity previously granted by CPA Order No. 17; however, the bill was never formally passed.<sup>53</sup> On November 17, 2008, the United States

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<sup>49</sup> Coalition Provisional Auth. Order No. 17 of 2004 (Iraq), *reprinted as revised at* [http://www.iraqcoalition.org/regulations/20040627\\_CPAORD\\_17\\_Status\\_of\\_Coalition\\_Rev\\_\\_with\\_Annex\\_A.pdf](http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev__with_Annex_A.pdf) (2004) [hereinafter CPA Order No. 17].

<sup>50</sup> *Id.* Interestingly, Bremer, under whose supervision the order was drafted, stated, "The immunity is not absolute. The order requires contractors to respect all Iraqi laws, so it's not a blanket immunity." Alissa J. Rubin & Paul von Zielbauer, *News Analysis; The Judgment Gap in a Case Like the Blackwater Shootings, There Are Many Laws but More Obstacles*, N.Y. TIMES, Oct. 11, 2007, <http://query.nytimes.com/gst/fullpage.html?res=9E04E3D8123DF932A25753C1A9619C8B63&fta=y&scp=1&sq=%22the%20judgment%20gap%22&st=cse>. This further muddles whether the CPA Order No. 17 would apply to the Nisour Square shootings. The only other recourse Iraq could claim to exercise jurisdiction would be to have the United States expressly waive in writing the contractor's immunity from Iraqi legal process. "Requests to waive immunity for Contractors shall be referred to the relevant Sending State in relation to the act or acts for which waiver is sought. Such a waiver, if granted, must be express and in writing to be effective." CPA Order No. 17, *supra* note 49, § 5(3).

<sup>51</sup> The status of Order No. 17 became extraordinarily muddled:

Iraqi officials announced their intent to bring criminal charges against the Blackwater forces involved in the shooting, and the Iraqi ministries' report stated, "The criminals will be referred to the Iraqi court system." Abdul Sattar Ghafour Bairaqqdar, a member of Iraq's Supreme Judiciary Council, the country's highest court, declared, "This company is subject to Iraqi law, and the crime committed was on Iraqi territory, and the Iraqi judiciary is responsible for tackling the case."

SCAHILL, *supra* note 2, at 14–15. The CPA's authority, as an interim government, to hand out complete immunity to contractors came under scrutiny. Robert Nichols, *Iraq Reconstruction: Political Situations Creating Legal Risks for Contractors*, 5 INT'L GOV'T CONTRACTOR ¶ 63 (Aug. 2008), *available at* [http://www.crowell.com/documents/Iraq-Reconstruction\\_Political-Situations-Creating-Legal-Risks-for-Contractors.pdf](http://www.crowell.com/documents/Iraq-Reconstruction_Political-Situations-Creating-Legal-Risks-for-Contractors.pdf). How could an organization, which appeared to be illegitimate on its face, have the authority to cede Iraq's sovereignty in prosecuting claims occurring squarely in its own territory and affecting its nationals?

<sup>52</sup> Article 130, Doustour Jounhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005.

<sup>53</sup> *Iraqi Minister Council Removes Legal Immunity from Foreign Private Security Firms*, IRAQI NEWS MONITOR (Nov. 11, 2007), <http://iraqnewsmonitor.blogspot.com/2007/11/iraqi-minister-council-removes-legal.html>; ISENBERG, *supra* note 22, at 79. For the un-enacted draft bill, see *The Law of Subjecting Non-Iraqi Security Companies and Its Contractors to the Provisions of the Iraqi Law (2007)* (never enacted), *available at* [http://www.cbsnews.com/htdocs/pdf/draft\\_legislation.pdf](http://www.cbsnews.com/htdocs/pdf/draft_legislation.pdf).

and Iraq entered into a Status of Forces Agreement (“SOFA”), which remains in force today.<sup>54</sup> While the SOFA attempts to clarify status and jurisdiction of PCMFs, it created other jurisdictional ambiguities regarding PCMFs.<sup>55</sup> Further, it is unclear whether the SOFA extends jurisdiction *ex post facto*; Iraq has not prosecuted any PCMFs for conduct that occurred prior to the enactment of the SOFA.<sup>56</sup>

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<sup>54</sup> Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008 [hereinafter SOFA].

<sup>55</sup> Robert Nichols, *New U.S.-Iraq SOFA Lifts Contractor Immunity*, 5 INT’L GOV’T CONTRACTOR ¶ 103 (Dec. 2008), available at <http://www.crowell.com/documents/New-US-Iraq-SOFA-Lifts-Contractor-Immunity.pdf>. Essentially, the SOFA fails to regulate all contractors in Iraq, leaving a jurisdictional loophole. *See id.* The SOFA states, “Iraq shall have the primary right to exercise jurisdiction over United States contractors and United States contractor employees.” *Id.* “United States contractors” and “United States contractor employees” are defined as follows:

Non-Iraqi persons or legal entities, and their employees, who are citizens of the United States or a third country and who are in Iraq to supply goods, services, and security in Iraq to or on behalf of the *United States Forces* under a contract or subcontract *with or for the United States Forces*.

*Id.* (emphasis added). There are several ambiguities in the SOFA. First, “U.S. contractors operating in Iraq under contract to other U.S. departments/agencies are not subject to the terms of the SOFA.” R. CHUCK MUNSON, CONG. RESEARCH SERV., RL 40011, U.S.-IRAQ WITHDRAWAL/STATUS OF FORCES AGREEMENT: ISSUES FOR CONGRESSIONAL OVERSIGHT 7 (2009). This would again exclude firms such as Blackwater, which were operating under a State Department contract. *See* SCAHILL, *supra* note 2, at 13. Second, the SOFA distinguishes between contractors and the “civilian component” of the United States Forces, affording different jurisdictional rules. *See* MUNSON, *supra*, at 7–9. Article 2 of the SOFA states, “‘Member of the civilian component’ means any civilian employed by the United States Department of Defense.” SOFA, *supra* note 54, art. 2, ¶ 4. Therefore, the definitions do not clearly distinguish between a member of the civilian component and a contractor (assuming the civilian employees are working under a contract as opposed to at-will employees). One would assume that the difference between the two categories is that the “civilian component” includes individuals hired directly by the Department of Defense, while the “United States contractors” are employed by a separate company in conjunction with that company’s contract with the United States. However, this is neither stated nor immediately apparent from the definitional terms of the SOFA. The issue becomes significant because the two classes are treated differently with regard to jurisdictional rules. SOFA, *supra* note 54, art. 12. “Members of the civilian component” are essentially accorded the same status as the U.S. military, whereas “United States contractors” are subject to a distinct set of jurisdictional rules. *See id.*

<sup>56</sup> *See Legal News: Iraq Parliament Approves SOFA, Still Many Questions Unanswered*, FERALJUNDI.COM (Nov. 27, 2008, 1:31 PM), <http://feraljundi.com/2008/11/27/legal-news-iraq-parliament-approves-sofa-still-many-questions-unanswered/>. In *Munaf v. Geren*, the Supreme Court held that Iraq had jurisdiction to prosecute criminal charges against two American nationals where the crimes occurred in Iraq between 2002 and 2004 (before the enactment of the SOFA and partially during the period when CPA Order No. 17 applied). *Munaf v. Geren*, 553 U.S. 674, 677, 681 (2008). The facts in this case can be distinguished from any PCMF misconduct, because both petitioners voluntarily traveled to Iraq as ordinary American citizens with no special status (e.g., a contractor) and thus CPA Order No. 17 did not prevent them from being subjected to Iraqi prosecution. *See id.* at 677. Indeed, the petitioners did not even attempt to argue that CPA Order No. 17 preempted them from Iraqi justice—instead their argument (which did not persuade the Court) was based on the Due Process Clause of the U.S. Constitution and the Foreign Affairs Reform and Restructuring Act of 1998. *Id.* at 692.

Iraq's interim government publicly expressed its intent to prosecute the Blackwater operatives for the Nisour Square shootings, stating, "This company is subject to Iraqi law, and the crime committed was on Iraqi territory, and the Iraqi judiciary is responsible for tackling the case."<sup>57</sup> However, in keeping with the trend of legal immunity extended to PCMFs, the contractors were quickly escorted to the United States.<sup>58</sup> Further, CPA Order No. 17 ignored Iraqi sovereignty, granting Blackwater contractors complete legal immunity from Iraqi prosecution.<sup>59</sup>

### *B. Domestic Prosecution of Blackwater*

On December 4, 2008, the United States obtained a grand jury indictment against five Blackwater employees for their role in the Nisour Square shootings.<sup>60</sup> Specifically, the defendants were charged with fourteen counts of voluntary manslaughter, twenty counts of attempt to commit manslaughter, one count of "using and discharging a firearm during and in relation to a crime of violence," and one count of aiding and abetting.<sup>61</sup> The United States prosecuted the defendants under the Military Extraterritorial Jurisdiction Act ("MEJA").<sup>62</sup> The defendants argued the United States could not exercise jurisdiction under the MEJA,<sup>63</sup> which creates a status-based jurisdictional vehicle, by criminalizing offenses by members of the U.S. military and by persons employed by or accompanying the military outside the territory of the United States.<sup>64</sup> To fall within the parameters of the MEJA, the following

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<sup>57</sup> SCAHILL, *supra* note 2, at 14–15.

<sup>58</sup> *Id.* at 10. A PCMF operative explained that his employer, Triple Canopy, a security and defense provider, employed an off-the-record strategy for handling PCMF misconduct:

We were always told, from the very beginning, if for some reason something happened and they were trying to prosecute us under Iraqi law, they would put you in the back of a car and sneak you out of the country in the middle of the night. It was comforting. But we never saw nothin' on paper.

STEVE FAINARU, *BIG BOY RULES: AMERICA'S MERCENARIES FIGHTING IN IRAQ* 19 (2008).

<sup>59</sup> See CPA Order No. 17, *supra* note 49. The immunity could only be waived by the sending state, which is the United States in this case. The United States has never waived contractor immunity, even in egregious cases of misconduct.

<sup>60</sup> Indictment at 1, *United States v. Slough*, 677 F. Supp. 2d 112 (D.D.C. 2009) (No. CR-08-360) (RMU).

<sup>61</sup> *Id.*

<sup>62</sup> See Government's Opposition to Defendant's Motion to Dismiss the Indictment Due to Misinstruction of the Grand Jury Regarding the Military Extraterritorial Jurisdiction Act at 1, *United States v. Slough*, 677 F. Supp. 2d 112 (D.D.C. 2009) (No. CR-08-360) (RMU).

<sup>63</sup> *Id.* at 13–19.

<sup>64</sup> Adam Ebrahim, Note, *Going to War with the Army You Can Afford: The United States, International Law, and the Private Military Industry*, 28 B.U. INT'L L.J. 181, 193 (2010).

elements must be met: (1) the offense must be punishable by more than a year; (2) the conduct must occur outside of the United States; (3) the offense must be committed by a member of the U.S. Armed Forces or a person accompanying the Armed Forces; and (4) the conduct must occur within the scope of the special maritime and territorial jurisdiction of the United States.<sup>65</sup> Congress amended the MEJA after the Abu Ghraib prison scandals revealed a gaping jurisdictional loophole as the statute “only applied to civilian contractors accompanying or employed by the Department of Defense.”<sup>66</sup> The 2004 amendment extended U.S. jurisdiction over all contractors employed by “any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas.”<sup>67</sup> Because the defendants’ contract was with the Department of State, defendants argued they were not supporting the Department of Defense’s contract and were therefore outside the scope of the statute.<sup>68</sup>

The D.C. District Court did not rule on the jurisdictional issues, stating that while the defendants’ jurisdictional arguments were strong, the issue of whether the Blackwater-State Department contract was “in support” of the Department of the Defense was subject to a jury determination when the prosecution presented its case.<sup>69</sup> The jury did not make a finding because the court found pervasive prosecutorial misconduct and dismissed the indictments against all the defendants.<sup>70</sup> The court of appeals, however, vacated the

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<sup>65</sup> Criminal Offenses Committed by Certain Members of the Armed Forces and by Persons Employed by or Accompanying the Armed Forces Outside the United States, 18 U.S.C. § 3261 (a)(1) (2000).

<sup>66</sup> Ebrahim, *supra* note 64, at 193.

<sup>67</sup> 18 U.S.C. § 3267 (1)(A)(i)–(iii)(II) (2004).

<sup>68</sup> Government’s Opposition to Defendant’s Motion to Dismiss the Indictment Due to Misinstruction of the Grand Jury Regarding the Military Extraterritorial Jurisdiction Act, *supra* note 62, at 6.

<sup>69</sup> Del Quentin Wilber, *Judge Refuses to Dismiss Charges Against Blackwater Guards*, WASH. POST, Feb. 18, 2009, at A5.

<sup>70</sup> *United States v. Slough*, 677 F. Supp. 2d 112, 115–16 (D.C.C. 2009). Specifically the court stated:

In their zeal to bring charges against the defendants in this case, the prosecutors and investigators aggressively sought out statements the defendants had been compelled to make to government investigators in the immediate aftermath of the shooting and in the subsequent investigation. In so doing, the government’s trial team repeatedly disregarded the warnings of experienced, senior prosecutors, assigned to the case specifically to advise the trial team on *Garrity* and *Kastigar* issues, that this course of action threatened the viability of the prosecution . . . In short, the government has utterly failed to prove that it made no impermissible use of the defendants’ statements or that such use was harmless beyond a reasonable doubt. Accordingly, the court must dismiss the indictment against all of the defendants.

*Id.* at 115–16. See also ISENBERG, *supra* note 22, at 83. Matt Apuzzo, *Iraq Dismayed by Blackwater Dismissal: Relative of Civilians Among 17 Killed by U.S. Contractors Calls Judge’s Decision to Dismiss*

judgment and remanded the case, holding that the misconduct did not taint the evidence presented to the jury in its entirety and that the district court, on remand, was to sift through the evidence and present any non-tainted evidence to the jury after a closer analysis.<sup>71</sup> Because there is no final judgment in the *Slough* case, jurisdiction over the Blackwater contractors under the MEJA remains questionable.<sup>72</sup>

## II. DO PCMFs FIT WITHIN AN INTERNATIONAL OR DOMESTIC REGULATORY FRAMEWORK?

This Part examines whether any existing international or domestic regulatory framework can regulate PCMFs. Specifically, this Part analyzes international definitions to determine whether they accurately describe the modern-day PCMF. Additionally, this Part investigates domestic criminal jurisdictional statutes to examine whether there is a comprehensive jurisdictional vehicle to encompass PCMF misconduct. The analysis concludes that both domestic and international law fail to provide either an adequate definition or jurisdictional mechanism for PCMF misconduct.

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*Charges a "Farce,"* CBS WORLD NEWS (Jan. 1, 2010), <http://www.cbsnews.com/stories/2010/01/01/world/main6044525.shtml>.

Ali al-Dabagh, the Iraqi government spokesman, said in a statement Friday that the government was dismayed by the court's dismissal of the case. "The Iraqi government regrets the decision," he said. "Investigations conducted by specialized Iraqi authorities confirmed unequivocally that the guards of Blackwater committed the crime of murder and broke the rules by using arms without the existence of any threat obliging them to use force."

*Id.*

<sup>71</sup> *United States v. Slough*, No. 1:08-cr-00360, 2011 WL 1516148 (D.C. Cir. Apr. 22, 2011). The court of appeals stated, "The district court erred by treating evidence as single lumps and excluding them in their entirety when at most only some portion of the content was tainted—it made no effort to decide what parts of the testimony or journal were free from taint."

<sup>72</sup> It is imperative to mention that victims of the Nisour Square shooting and their next-of-kin were dissatisfied with the terms of their settlement on the civil side. Liz Sly, *Iraqis Claim Coercion in Settlement of Blackwater Shooting Case, Try to Back Out*, CLEVELAND.COM (Jan. 10, 2010), <http://www.cleveland.com/world/index.ssf/2010/01/01/world/main6044525.shtml>. In fact, victims stated that "they were coerced into reaching settlements and demanded the Iraqi government intervene to have the agreements nullified." *Id.*

## A. *The International Framework*

### 1. *A Brief History and Definition of Mercenarism*

“As long as humanity has waged war, there have been mercenaries.”<sup>73</sup> Indeed, the reliance on mercenaries to bolster state militaries is not a modern phenomenon—it is as ancient as war itself.<sup>74</sup> “The earliest records of warfare include numerous mentions of outside fighters being employed to fight for ancient rulers.”<sup>75</sup> The first official historic reference to mercenaries dates back to 1094–2047 B.C.E., describing mercenaries who served in King Shulgi of Ur’s army.<sup>76</sup> Ranging from Ramses II in the Battle of Kadesh in 1294 B.C.E., to Alexander the Great fighting the Persians in 334 B.C.E., and even up to the British and the American colonies in the Revolutionary War, the use of professional forces which fight alongside states in exchange for monetary compensation has remained a consistent element of warfare throughout history.<sup>77</sup> In contrast to soldiers who often serve to prevent wars, mercenaries benefit from war and “harbor an open commitment to war as a professional way of life. That is, their occupation entails a certain devotion to war itself, in that their trade benefits from its existence . . . mercenaries *require* wars, which necessarily involves their casting aside a moral attitude toward war.”<sup>78</sup>

Mercenarism has been such a pervasive element in the history of war that it has been defined or referred to by the Hague Convention,<sup>79</sup> the Geneva Conventions,<sup>80</sup> Protocol I,<sup>81</sup> the OUA Convention for the Elimination of

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<sup>73</sup> Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT’L L. 75, 82 (1998).

<sup>74</sup> Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1, 2 (2003).

<sup>75</sup> SINGER, *supra* note 1, at 20.

<sup>76</sup> *Id.*

<sup>77</sup> Milliard, *supra* note 74, at 4; *see also* SINGER, *supra* note 1, at 20–39.

<sup>78</sup> SINGER, *supra* note 1, at 41.

<sup>79</sup> Convention between the United States and Other Powers Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land arts. 4, 5, 17, Oct. 18, 1907, 36 Stat. 2310 [hereinafter Hague Convention].

<sup>80</sup> *See generally* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter Geneva Convention IV].

Mercenarism in Africa,<sup>82</sup> and the United Nations (“UN”) Mercenary Convention.<sup>83</sup> Part III of Protocol I to the Geneva Convention defines a mercenary as any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in hostilities essentially for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.<sup>84</sup>

Thus, applying the definition of mercenary, as stated in part (a), an individual must be participating in an “armed conflict.”<sup>85</sup> Article 2 common to the Geneva Conventions of August 12, 1949 states that “the present Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”<sup>86</sup> Therefore, the Protocol I definition of mercenaries presupposes two criteria: (1) an armed conflict; (2) between two or more nations who are parties to the Geneva Convention.<sup>87</sup>

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<sup>81</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 47, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]. It is important to note that the United States is not a party to Protocol I, but the definition is still pervasive in international law and thus arguably included in customary international law usage. *See, e.g.*, Kevin H. Govern & Eric C. Bales, *Taking Shots at Private Military Firms: International Law Misses Its Mark (Again)*, 32 *FORDHAM INT’L L.J.* 55, 70 (2008).

<sup>82</sup> Convention of the Organization of African Unity for the Elimination of Mercenarism in Africa art. 1, O.A.U. Doc. CM/817(XXIX) Annex II (July 3, 1977).

<sup>83</sup> International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, G.A. Res. 44/34, U.N. Doc. A/RES/44/34 (Dec. 4, 1989).

<sup>84</sup> Protocol I, *supra* note 81, art. 47(a).

<sup>85</sup> *Id.*

<sup>86</sup> Geneva Convention I, *supra* note 80, art. 2; Geneva Convention II, *supra* note 80, art. 2; Geneva Convention III, *supra* note 80, art. 2; Geneva Convention IV, *supra* note 80, art. 2.

<sup>87</sup> Daniel P. Ridlon, *Contractors or Illegal Combatants? The Status of Armed Contractors in Iraq*, 62 *A.F.L. REV.* 199, 204 (2008).

## 2. *Mercenaries Distinguished from PCMFs*

While similarities between PCMFs and mercenaries admittedly exist in that PCMFs are not state parties to conflicts and are engaged purely for remuneration, there are many distinctions that render the term “mercenary” obsolete in reference to PCMFs. This is generally because war, armed conflict, combatants, and non-combatants are all legal terms which fail to encompass the violent reality of post-conflict zones.<sup>88</sup> Additionally, the most recent international “regulations, resolutions, and conventions [were passed] in response to the mercenary activities in Africa immediately following decolonization, an environment that no longer exists and only existed for a short time.”<sup>89</sup>

Indeed, it would be a legal stretch to attempt to apply the Protocol’s definition of mercenaries to PCMFs because, as previously mentioned, a precondition to applying the definition is an armed conflict between nations that are parties to the Geneva Convention.<sup>90</sup> PCMFs became a notable force in peace-keeping missions during the Serbian-Croatian conflict and remain in both Iraq and Afghanistan today as part of an ongoing process of peace-keeping and nation-building.<sup>91</sup> The Allied Forces’ military presence is not considered active warfare between two nations party to the Geneva Convention.<sup>92</sup> Because PCMF engagement in post-conflict zones does not rise to the level of “armed conflict,” PCMFs do not fit within the definition of a “mercenary.”

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<sup>88</sup> See discussion *infra* Part III.B–C and accompanying notes.

<sup>89</sup> Ellen L. Frye, Note, *Private Military Firms in the New World Order: How Redefining “Mercenary” Can Tame the “Dogs of War,”* 73 *FORDHAM L. REV.* 2607, 2639 (2005). The only category of PCMFs which could be defined as mercenaries is the Military Provider Firm (“MPF”) because they are hired specifically to take part in hostilities. See *infra* Part IV.A. Nonetheless, applying the current definition of mercenary to MPFs would still present a legal challenge because of the non-party state nationality element. Because MPFs are private corporations, rather than individuals serving independently, it is not difficult for them to change their nationality relatively quickly and seamlessly. As a result, MPFs could easily circumvent any “mercenary” regulation by simply registering the corporation in the same state in which the conflict is occurring, and thus being a national of a participating party. Therefore, for all practical purposes, the definition of mercenaries would not extend to PCMFs.

<sup>90</sup> See Ridlon, *supra* note 87 and accompanying text. Indeed, President Bush declared the end of all major military operations, standing in front of a “Mission Accomplished” banner in May 2003. NO END IN SIGHT, *supra* note 45.

<sup>91</sup> See Gaston, *supra* note 19, at 236–37, 221–23.

<sup>92</sup> Cf. Ridlon, *supra* note 87, at 229–30 (“[I]n the absence of specific provision or language preventing a differentiation between being recruited to fight in an armed conflict and being recruited to guard facilities or individuals, the PMFs would likely not qualify under this element of the definition.”).

Even assuming, *arguendo*, that an armed conflict exists, the majority of PCMFs would remain outside the spectrum of the Protocol's definition of mercenary. First, many PCMFs are not hired for the purpose of fighting in an armed conflict and have not participated in hostilities as required by parts (1) and (2) of the definition of mercenaries.<sup>93</sup> Second, a mercenary must participate in an armed conflict solely for private gain which requires proof of specific intent.<sup>94</sup> This evidentiary requirement presents a significant hurdle to prosecution because an individual can testify to a different motive.<sup>95</sup> Third, mercenaries cannot be nationals of a party in conflict, or a resident of a territory controlled by a party in conflict.<sup>96</sup> In the case of the operation in Iraq, this would exclude all American, British, and Iraqi PCMFs, which form a significant percentage of the total force.<sup>97</sup> Because the current internationally accepted legal definition of mercenaries fails to encompass the amorphous structure of PCMFs, it is essential to formulate a definition that accords PCMFs a concise legal status.<sup>98</sup>

### B. *Regulation or Extraterritorial Jurisdiction in the United States?*

Currently, no criminal or civil jurisdictional statute exists to comprehensively adjudicate PCMF activity.<sup>99</sup> As a result, Congress has repeatedly amended existing legislation to bring PCMFs within a regulatory framework.<sup>100</sup> There are three jurisdictional bases to potentially prosecute

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<sup>93</sup> Ebrahim, *supra* note 64, at 211. PCMFs are often part of a security mission or may be performing logistics and support functions. See discussion, *infra* Part III.C and accompanying notes.

<sup>94</sup> See Ridlon, *supra* note 87, at 249.

<sup>95</sup> *Id.*

<sup>96</sup> Protocol I, *supra* note 81.

<sup>97</sup> Ebrahim, *supra* note 64, at 211; see Filiz Zabci, *Private Military Companies: "Shadow Soldiers" of Neo-Colonialism*, 92 CAPITAL & CLASS 1 (2007), available at <http://n.privateforces.com/index.php/Miscellaneous/private-military-companies-qshadow-soldiersq-of-neo-colonialism.html>.

<sup>98</sup> Protocol I, *supra* note 81, art. 47(2). The United Nations has stated that private security guards are mercenaries and thus fit within the international legal definition because the contractors perform military duties. Alexander Higgins, *U.S. Rejects U.N. Mercenary Report*, WASH. POST, Oct. 17, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/17/AR2007101701701716.html>. Nonetheless, the majority of contractors are from Britain, the United States, and Iraq—and thus, would not be able to be prosecuted as mercenaries. Ebrahim, *supra* note 64, at 211; see Zabci, *supra* note 97.

<sup>99</sup> See John S. Kemp, Note, *Private Military Firms and Responses to Their Accountability Gap*, 32 WASH. U. J.L. & POL'Y 489, 507–08 (2010).

<sup>100</sup> See, e.g., Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, § 1088, 118 Stat. 1811, 2066 (codified as amended at 18 U.S.C. § 3267 (2006)) (amending the MEJA definition of a person employed by the Armed Forces outside the United States); USA PATRIOT Act, Pub. L. 107-56, § 804, 115 Stat. 272, 377 (codified as amended at 18 U.S.C. § 7 (2006)) (amending the geographic jurisdiction of the SMTJ).

PCMF misconduct: the Special Maritime and Territorial Jurisdiction Statute (“SMTJ”);<sup>101</sup> the Military Extraterritorial Jurisdiction Act (“MEJA”);<sup>102</sup> and the Uniform Code of Military Justice (“UCMJ”).<sup>103</sup> All three statutes suffer severe limitations in prosecuting PCMF misconduct and fail to provide a complete judicial remedy.

### 1. *Special Maritime and Territorial Jurisdiction Statute*

The SMTJ was originally passed in 1790 to cover eight specific areas of jurisdiction.<sup>104</sup> Amended in 2001 by the USA PATRIOT Act,<sup>105</sup> the SMTJ now contains a catch-all provision that extends jurisdiction to “any place or residence in a foreign state used by missions or entities of the U.S. government with respect to offenses committed by or against a national of the United States.”<sup>106</sup> The statute has been used successfully only once in the PCMF context,<sup>107</sup> to prosecute CIA contractor David Passaro, who beat an Afghan detainee over the course of two days with a flashlight at a military base in Afghanistan, causing the detainee’s death.<sup>108</sup> In this case, Passaro was in a foreign state (Afghanistan), on a U.S. military base, and Passaro, a U.S. national, violated the federal criminal assault statute.<sup>109</sup> While the SMTJ

<sup>101</sup> Special Maritime and Territorial Jurisdiction Statute, 18 U.S.C. § 7 (2006).

<sup>102</sup> Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261–67 (2006).

<sup>103</sup> Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 (2006).

<sup>104</sup> Anthony Giardino, *Using Extraterritorial Jurisdiction to Prosecute Violations of the Law of War: Looking Beyond the War Crimes Act*, 48 B.C. L. REV. 699, 715 (2007). The Special Maritime and Territorial Jurisdiction Statute of the United States defines the limits of its jurisdiction for PCMF misconduct:

(9) With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act—

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

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

18 U.S.C. § 7(9)(A)–(B) (2006).

<sup>105</sup> USA PATRIOT Act § 803.

<sup>106</sup> Giardino, *supra* note 104, at 715.

<sup>107</sup> *See, e.g.*, *United States v. Gleason*, 2009 WL 799645 (D. Or. 2009) (finding for the defense after an unsuccessful prosecution under the SMTJ).

<sup>108</sup> Giardino, *supra* note 104, at 722–23; *see also* Surabhi Ranganathan, *Between Complicity and Irrelevance? Industry Associations and the Challenge of Regulating Private Security Contractors*, 41 GEO. J. INT’L L. 303, 346 n.181 (2010).

<sup>109</sup> Giardino, *supra* note 104, at 722.

provided a jurisdictional vehicle to prosecute Passaro,<sup>110</sup> the statute cannot extend its jurisdictional reach over the Nisour Square incident. The SMTJ requires a relational nexus between: (1) the criminal misconduct; and (2) the territorial connection with U.S. sovereignty in the place where the conduct occurred.<sup>111</sup> Because the Nisour Square shootings occurred outside the territorial scope of the SMTJ (there was no military base, consulate, or other readily identifiable U.S. affiliated structure),<sup>112</sup> the misconduct would fall out of the purview of the SMTJ.

Additionally, the SMTJ only covers “offenses committed by or against a national of the United States.”<sup>113</sup> There are thousands of PCMF contractors in Iraq that are not U.S. nationals, but may be employed by a PCMF registered in the United States.<sup>114</sup> Again, the SMTJ would fail to regulate these individuals.

## 2. *Military Extraterritorial Jurisdiction Act*

The MEJA is also ill-equipped to prosecute PCMF misconduct. The MEJA creates a status-based jurisdictional mechanism by criminalizing offenses perpetrated by members of the Armed Forces and by persons either employed by or accompanying the Armed Forces outside the territory of the United States.<sup>115</sup> In order to fall within the parameters of the MEJA, the following elements must be met: (1) the offense must be punishable with a sentence of more than one year;<sup>116</sup> (2) the conduct must occur outside the United States;<sup>117</sup> (3) the offense must be committed by a member of the Armed Forces or a person accompanying or employed by the Armed Forces;<sup>118</sup> and (4) the conduct must occur within the scope of “the special maritime and territorial jurisdiction of the United States.”<sup>119</sup> Congress amended the MEJA in 2004 to close a jurisdictional loophole by including all contractors employed by “any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense

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<sup>110</sup> *Id.* at 722.

<sup>111</sup> See Special Maritime and Territorial Jurisdiction Statute, 18 U.S.C. § 7(9) (2006).

<sup>112</sup> See SCAHILL, *supra* note 2, at 3–9.

<sup>113</sup> 18 U.S.C. § 7.

<sup>114</sup> See SCAHILL, *supra* note 2, at 182–202 (detailing Blackwater’s recruiting operations in Chile).

<sup>115</sup> 18 U.S.C. § 3261 (2006); see Ebrahim, *supra* note 64, at 193.

<sup>116</sup> 18 U.S.C. § 3261(a).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

overseas.”<sup>120</sup> Nonetheless, the MEJA also suffers significant territorial limitations to prosecute PCMF misconduct, as it requires the same territorial link to the United States as the SMTJ.<sup>121</sup>

### 3. *Uniform Code of Military Justice*

Lastly, the UCMJ, as amended in 2006, includes prosecutorial jurisdiction over “persons serving with or accompanying an armed force in the field” occurring “[i]n time of declared war or a contingency operation.”<sup>122</sup> Thus, the UCMJ theoretically subjects PCMFs, who accompany armed forces in peace-keeping or nation-building missions,<sup>123</sup> to military justice. To date, the UCMJ has not been used to successfully prosecute any PCMFs in military court.<sup>124</sup> Furthermore, there is a persuasive argument that such a prosecution would not withstand constitutional scrutiny, as military law does not provide a Fifth Amendment right to indictment by a grand jury or a Sixth Amendment right to trial by jury.<sup>125</sup> The language of the amendment is vague and over inclusive; it fails to “differentiate among the various categories of civilians who might be

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<sup>120</sup> 18 U.S.C. §§ 3267(A)(i)(II), (A)(ii)(II), (A)(iii)(II). Following the Nisour Square incident,

the House of Representatives overwhelmingly passed a resolution that would apply the act to contractors “where the work . . . is carried out in an area, or in close proximity to an area (as designated by the Department of Defense), where the Armed Forces is conducting a contingency operation.”

Ebrahim, *supra* note 64, at 194 (omission in original). While this language would have extended jurisdiction beyond the U.S. foreign territorial nexus, the language of the House Resolution was not included in the MEJA amendment, and thus does not have a binding effect. *See id.* at 194–95. The House Resolution, MEJA Expansion and Enforcement Act of 2007, never became law and therefore is not binding. *See* H.R. 2740, 110th Congress (2007), available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-2740>.

<sup>121</sup> *See* 18 U.S.C. § 3261(a) (noting the use of “special maritime and territorial jurisdiction”). It is interesting to note that the Department of Justice attempted to prosecute Blackwater in the United States District Court of the District of Columbia. While the defendants, in their Motion to Dismiss for Lack of Jurisdiction, claimed that MEJA did not include the Nisour Square incident, the defendants based their argument solely upon the definition of “supporting the mission of the Department of the Defense.” *See* Memorandum of Points and Authorities in Support of Defendants’ Motion to Dismiss for Lack of Jurisdiction at 16, *United States v. Slough*, 677 F. Supp. 2d 112 (D.D.C. 2009) (No. CR-08-0360) (RMU). A much stronger argument would have been the territorial link required by the SMTJ. The Court did not address jurisdictional issues in any of its opinions. *See United States v. Slough*, 677 F. Supp. 2d 112, 115–16 (D.D.C. 2009).

<sup>122</sup> Uniform Code of Military Justice, 10 U.S.C. § 802(a)(10) (2006).

<sup>123</sup> Ebrahim, *supra* note 64, at 196.

<sup>124</sup> *See* Katherine Jackson, *Not Quite a Civilian, Not Quite a Soldier: How Five Words Could Subject Civilian Contractors in Iraq and Afghanistan to Military Jurisdiction*, 27 J. NAT’L ASS’N ADMIN. L. JUDICIARY 255, 279 (2007); Giardino, *supra* note 104, at 720.

<sup>125</sup> Jonathan Finer, *Holstering the Hired Guns: New Accountability Measures for Private Security Contractors*, 33 YALE J. INT’L L. 259, 262 (2008).

accompanying military forces, such as contractors and embedded journalists. Nor does it distinguish among the various provisions of the UCMJ, meaning military regulations about sexual orientation or disparaging the commander-in-chief could in theory be applied to civilians.”<sup>126</sup>

In April of 2008, the U.S. military charged Alaa Mohammed Ali with assault, for stabbing another contractor while working in Anbar Province, Iraq.<sup>127</sup> Previously, the Supreme Court had maintained that military courts could not extend jurisdiction to civilians in times of peace.<sup>128</sup> Because Ali entered a guilty plea, the court did not analyze any constitutional issues.<sup>129</sup> Due to the likelihood of a successful constitutional challenge,<sup>130</sup> the UCMJ does not provide a reliable mechanism to prosecute PCMFs.

### III. UNDERSTANDING THE PCMF ENTITY

This Part examines the convergence of three novel legal developments: (1) the ambiguous form of twenty-first century warfare; (2) the outsourcing of state monopoly over the use of force; and (3) the rising influence of transnational corporations. First, this Part analyzes the geo-political power vacuum which facilitated the creation of a privatized military force. Second, this Part discusses the factors which led to the growth of the industry. Third, the PCMF’s role in conflict and post-conflict zones is examined as part of a growing problem where legal lexicon fails to reflect the reality of warfare. Fourth, this Part discusses the problems inherent in outsourcing military operations and the larger issue of the privatization of traditional state roles. Fifth, there is an examination of the role of for-profit transnational corporations in conflict resolution and nation-building. Finally, this Part discusses the intersection of these novel issues creating the PCMF conceptual confusion.

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<sup>126</sup> *Id.*

<sup>127</sup> Ebrahim, *supra* note 64, at 197.

<sup>128</sup> *See Reid v. Covert*, 354 U.S. 1 (1957) (holding that the wife of a service member could not be tried by a military court for a capital crime committed during peacetime); *cf. United States v. Averette*, 19 C.M.A. 363, 364 (1970) (stating the court found “nothing in [O’Callahan v. Parker, 395 U.S. 258 (1969)] that causes us to conclude a civilian accompanying the armed forces in the field in time of a declared war is invulnerable to trial by military courts”). These fact patterns are distinguishable, but the same concerns for Fifth and Sixth Amendment protections remain applicable.

<sup>129</sup> Ebrahim, *supra* note 64, at 197–98.

<sup>130</sup> *Id.* at 196 (“[T]he modification appears ripe for a constitutional challenge on due process, vagueness, and over-inclusiveness grounds.”).

### A. *The Origins and Rise of PCMFs*

The modern PCMF industry emerged in the early 1990's<sup>131</sup> as a byproduct of the fall of the Soviet Union, which created a "geopolitical power vacuum."<sup>132</sup> During the Cold War, the two superpowers dominated the scene, intervening in local and regional conflicts and providing order and stability by strictly controlling trouble spots.<sup>133</sup> The Cold War disengagement catalyzed a complementary economic and military marriage, caused by: (1) an oversupply of military professionals and equipment; and (2) an increased demand for private security forces in weak or emerging states.<sup>134</sup> The private sector seized the opportunity to engage a truly global market, creating a quasi-military industry capable of deploying transnationally. The industry focused marketing to weak or failing states with little or no centralized military.<sup>135</sup> Over time, outsourcing both logistical support as well as military and security functions formed a highly lucrative burgeoning market.<sup>136</sup>

Currently, in Iraq and Afghanistan, the number of PCMFs is astonishingly greater than the number of troops.<sup>137</sup> As of March of 2009, contractors made up fifty-seven percent of the total force in Afghanistan<sup>138</sup> and, by September of 2007, there were approximately 180,000 contractors supporting 160,000 U.S. soldiers in Iraq.<sup>139</sup> These numbers do not provide a reliable estimate of the total number of contractors in Iraq, which is in fact much higher.<sup>140</sup> Between fiscal years 2003 and the first half of 2008, Congress had apportioned \$106 billion

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<sup>131</sup> Gaston, *supra* note 18, at 224.

<sup>132</sup> Zarate, *supra* note 73, at 76.

<sup>133</sup> *Id.*; see also SINGER, *supra* note 1, at 50.

<sup>134</sup> SINGER, *supra* note 1, at 49–53. Weak and emerging states include many African countries with unstable governments and diffuse unorganized militaries as well as the Balkan states, which are emerging through principles of self-determination. FRANCIS FUKUYAMA, *STATE-BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY 2* (2004).

<sup>135</sup> See Gaston, *supra* note 19, at 224.

<sup>136</sup> See *id.* at 225–26. Both state and non-state actors employ PCMFs in weak or failing states. See AVANT, *supra* note 30, at 37.

<sup>137</sup> James Glanz, *Contractors Outnumber U.S. Troops in Afghanistan*, N.Y. TIMES, Sept. 1, 2009, at A10; see also Jeremy Scahill, *Obama Has 250,000 "Contractors" in Iraq and Afghan Wars, Increases Number of Mercenaries*, REBEL REPORTS (June 1, 2010), <http://rebelreports.com/post/116277092/obama-has-250-000-contractors-in-iraq-and-afghan>.

<sup>138</sup> Glanz, *supra* note 137, at A10; see also Ridlon, *supra* note 87, at 202.

<sup>139</sup> SINGER, *supra* note 1, at 245. "Even this figure was thought by officials [at the Department of Defense] to be low, because a number of the biggest companies, as well as firms employed by the Department of State or other agencies or NGOs, were not included in the census." *Id.*

<sup>140</sup> *Id.*

for private contractors in Iraq and Afghanistan.<sup>141</sup> While these statistics are staggering, they reveal an inescapable reality: PCMFs are an indispensable component of modern warfare and nation-building; in other words, they are here to stay.<sup>142</sup> “[T]he fact that the US (with defense expenditures greater than the next twenty-four countries combined and roughly one percent of the Gross World Product, GWP) has embraced private security solutions guarantees strong state demand, demand that is increasingly joined by the UK and other western states.”<sup>143</sup>

Senator Lindsey Graham astutely predicted “the use of private contractors ‘is the way we are going to war in the future.’”<sup>144</sup> The data, even in its incomplete form, confirms his statement.<sup>145</sup> Those who argue that the PCMF industry should be comprehensively eradicated are ignoring the degree to which the military and PCMF industry are intertwined, to the extent that, in some cases, the military is completely reliant upon them.<sup>146</sup> Additionally, the reality is military training, knowledge, and in some cases combat itself, have become valuable commodities in modern warfare and can be readily bought and sold on the open global market.<sup>147</sup>

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<sup>141</sup> *Id.*

<sup>142</sup> See SCAHILL, *supra* note 2, at 159. Fainaru adds the following:

It had started small, a byproduct of all the mistakes at the beginning: not enough troops, ignoring the insurgency, starting the reconstruction prematurely. Soon they were everywhere: guarding the diplomats, the generals, military bases the size of small cities, and thousands of supply convoys filled with guns and ammunition and food. Suddenly no one and no thing could move around Iraq without them. Some human rights groups had mercs [mercenaries]. The media had mercs. The International Republican Institute, chaired by John McCain, and the National Democratic Institute, chaired by Madeleine Albright, used mercs to spread democracy. The Iraqi politicians had them full time and the American politicians had them whenever the delegations came through to find out how the war was going. The market was so hot it became known as the “Iraq Bubble.” The demand to be safe never stopped, so neither did the supply. The mercs came from the army, navy, air force, marines, from small-town police departments and the LAPD. And from other nations’ armies: the British SAS, the Australian Defence Forces, the Nepalese Gurkhas. One Peruvian I met swore that there were ex-members of the Shining Path in Iraq, the terrorists who had massacred thousands of peasants during the eighties and early nineties. Terrorists fighting terrorists.

FAINARU, *supra* note 58, at 22–23.

<sup>143</sup> AVANT, *supra* note 30, at 38.

<sup>144</sup> Govern & Bales, *supra* note 81, at 56 (quoting Lydia Gensheimer, *War Zone Crimes: Accountability MIA*, 66 CONG. Q. WKLY. 1230, 1232 (2008)).

<sup>145</sup> See Glanz, *supra* note 137, at A10.

<sup>146</sup> See SCAHILL, *supra* note 2, at 155–56.

<sup>147</sup> Montgomery Sapone, *Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 CAL. W. INT’L L.J. 1, 5 (1999).

### B. Factors Leading to the Growth of PCMFs in Iraq

Commentators who argue for the complete elimination of PCMFs neglect many pertinent facts. A core problem the United States faced in rebuilding Iraq was an insufficient number of troops.<sup>148</sup> While several potential political and military solutions were available, they were all discarded as “politically unpalatable.”<sup>149</sup> Because the U.S. Army, following an ongoing trend, failed to meet enlistment quotas, the military had to bridge the gap between forces available and forces required, short of calling for a mandatory draft.<sup>150</sup> PCMFs provided this “force surge” without the corresponding political cost.<sup>151</sup>

Furthermore, because the mission in Iraq was subject to great disdain by the American public, the U.S. government sought to reduce the number of military casualties in Iraq.<sup>152</sup> Contractor casualties are not included in the official death tolls of the military; in fact, the deaths of contractors have been approached as a “positive externality” that fails to publicly reveal the actual

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<sup>148</sup> NO END IN SIGHT, *supra* note 45. In February of 2003, one month prior to the invasion of Iraq, General Shinseki of the U.S. Army projected Operation Iraqi Freedom would require several hundred thousand troops. *Id.* This recommendation was basically unheeded by the administration. *Id.* To fill the gap, the administration began to outsource heavily all non-offensive military work. Steve Fainaru, *Iraq Contractors Face Growing Parallel War*, WASH. POST, June 16, 2007, at A11.

<sup>149</sup> SINGER, *supra* note 1, at 244.

<sup>150</sup> *Frontline: Private Warriors*, *supra* note 42.

<sup>151</sup> *Id.* Journalist Steve Fainaru aptly describes how the United States became so entangled with PCMFs:

A government launches a preemptive war predicated on a myth. Insurgents rise up to confront the occupiers. Lacking a sufficient fighting force, not to mention political will, the government rents itself a private army, piece by piece. Hundreds of companies form overnight, like mushrooms after a rainstorm, some with boards of directors and glass offices, others that are scarcely more than armed gangs. The companies hire from a vast pool of veterans and ex-cops, adrenaline junkies, escapees from the rat race, the patriotic, the greedy, the terminally and perpetually bored. They hire Americans and Brits, South Africans and Aussies, Fijians and Gurkhas. Peruvians who fought the Shining Path. Colombians fresh from the drug wars. They give them weapons (although many bring their own) and turn them loose on an arid battlefield the size of California, without rules, without laws, with little to guide them except their conscience.

Soon it's a \$100 billion industry, an industry of arms, with unions and lobbyists and its own tortured nomenclature: in newsprint and polite conversation, they are all “private security contractors.

FAINARU, *supra* note 58, at xiv–v.

<sup>152</sup> See Fainaru, *supra* note 148, at A11 (quoting a former U.S. director for logistics in Iraq as calling security contractors “the unsung heroes of the war,” saying “she believed the military wanted to hide information showing that private guards were fighting and dying in large numbers because it would be perceived as bad news”). In fact, a *New York Times* report in May 2007 reported that “for every four American soldiers who die in Iraq, a contractor is killed.” ISENBERG, *supra* note 22, at 12.

cost of war.<sup>153</sup> “The U.S. military has never released complete statistics on contractor casualties or the number of attacks on privately guarded convoys,” nor on PCMF misconduct.<sup>154</sup> Substituting PCMFs for military personnel allows the government to continue a politically unfavorable war without exposing the comprehensive human cost.<sup>155</sup>

Lastly, proponents of PCMFs use market efficiency arguments and proclaim a reduction in overall wartime spending.<sup>156</sup> Whether the use of PCMFs in warfare and nation-building is prudent on a policy level is irrelevant—it is clear that PCMFs have become inextricably linked with war and post-conflict, nation-building activities.<sup>157</sup> As the number of employed PCMFs rises, the potential for grave violations of international law increases, making it imperative to determine the legal status of PCMFs operating in these contexts.

### C. *Definitional Abysses*

The use of a twentieth century legal lexicon to define novel twenty-first century problems further compounds the inefficacy in regulating PCMFs. For example, “[i]nternational and domestic law take as a basic premise the notion that it is possible, important, and usually fairly straightforward to distinguish between war and peace, emergencies and normality, the foreign and the domestic, the external and the internal.”<sup>158</sup> The codification of international and domestic law of armed conflict began in the West in the nineteenth

<sup>153</sup> SINGER, *supra* note 1, at 245. “Bluntly put: if you are not on active duty in the U.S. military—even if you were for 10 to 20 years previously—and even if you are contributing to the war effort, nobody beyond your immediate family cares if you get killed.” ISENBERG, *supra* note 22, at 13.

<sup>154</sup> Fainaru, *supra* note 148, at A11. Furthermore, in July 2006, a federal judge held that the U.S. government “can keep secret the names of private security contractors involved in serious shooting incidents in Iraq.” ISENBERG, *supra* note 22, at 12.

<sup>155</sup> ISENBERG, *supra* note 22, at 12–14.

<sup>156</sup> See *Frontline: Private Warriors*, *supra* note 42. The statistical evidence shows that the opposite is true. PCMF contracts show case after case of mushrooming costs, corruption, and abuse due to lack of oversight. ALLISON STANGER, ONE NATION UNDER CONTRACT 3, 9 (2009). “[O]ne Iraqi former chief investigator testified before Congress in September 2008 that \$13 billion in reconstruction funds from the United States had gone walking.” *Id.* at 9.

<sup>157</sup> IRAQ FOR SALE (Brave New Films 2009). As of 2005, Halliburton had received a \$18.5 billion contract for reconstruction and troop support, Parsons had received a \$5.3 billion contract for engineering and construction, DynCorp International had received a \$1.9 billion contract for police training, Transatlantic Traders had received a \$5 million contract for surveillance aircraft, Titan received a \$2 billion contract, and CACI received a \$19.25 billion for translation services. *Id.* This is by no means a comprehensive list. In fact, “forty cents out of every dollar that Congress controls goes to contractors.” *Id.*

<sup>158</sup> Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 676 (2004).

century; however, in light of the “war on terrorism” and “preemptive wars,” these definitions fail to regulate the range of violent conflict that occurs in modern times.<sup>159</sup> Indeed, “globalization has complicated once-straightforward legal categories, but this is nowhere more apparent and more troubling than in the realm[] of armed conflict.”<sup>160</sup>

Global actors, traditional warfare, and temporal and geographic lines are all categories and terms the definitions of which have become undeniably hazy in the past decade:

The new threat environment has been heralded (from the right and the left) as bringing with it new forms of warfare and the merging of security with a variety of other economic and political forms. Thus, ‘national’ security has become difficult to distinguish from international or global security and the lines between internal and external security have blurred.<sup>161</sup>

Furthermore, as one commentator poignantly articulates:

The existence of reasonably clear boundaries between conflict and nonconflict, combatants and noncombatants, and “lawful” and “unlawful” belligerents is what allows us to determine which legal rules apply in different situations, and, even more critically, allows us to identify people and rights meriting protection. As traditional categories lose their logical underpinnings, we are entering a new era: the era of War Everywhere. It is an era in which the legal rules that were designed to protect basic rights and vulnerable groups have lost

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<sup>159</sup> *Id.* at 686–87. Specifically, in 1856, the Conference of Paris sought to formulate rules governing naval warfare. *Id.* at 688. In 1863, during the American Civil War, the U.S. Army issued military rules of engagement of the armed forces. *Id.* These rules were based on the recommendations of Francis Lieber and the Lieber Code, and “laid out basic rules concerning permissible and impermissible methods of warfare, including rules relating to the treatment of civilians.” *Id.* That same year, Swiss citizen Henry Dunant founded the International Committee of the Red Cross for the express purpose of providing humanitarian aid to those “wounded in wartime by [the] zealous.” *Id.* at 688–89. Dunant urged European states to codify acceptable and unacceptable conduct in warfare. *Id.* at 689. In response, in 1864, ten European states ratified the First Geneva Convention. *Id.* “[I]n 1899 and 1907, international peace conferences at The Hague led to the drafting and later entry into force of the various Hague Conventions on the laws and customs of war.” *Id.* at 689. In the interwar period, the United States and fourteen other nations entered into the Kellogg-Briand Pact making it illegal to wage “war for the solution of international controversies.” *Id.* After World War II, the UN Charter formally instituted “the prohibition on waging aggressive war.” *Id.* The process to define and constrain armed conflict has continued to modern time. *Id.* at 690. In 1974, the UN General Assembly defined “aggression” in the context of armed conflict, and in 1977 two Protocols Additional to the Geneva Convention were promulgated and widely ratified. *Id.* at 690.

<sup>160</sup> *Id.* at 677.

<sup>161</sup> *Id.*; AVANT, *supra* note 30, at 33.

much of their analytical force, and thus, too often, their practical force.<sup>162</sup>

Terms which have heretofore conveyed status and denoted privileges in times of war are no longer easily decipherable. Put another way, there have been conventions, treaties, declarations, and tribunals dedicated to regulating the law that governs armed conflict.<sup>163</sup> However, inherent in this regulation is something so obvious that many of us rarely pause to consider it: “it presupposes the idea that ‘armed conflict’ is definable and identifiable, and reasonably easily distinguishable from its opposite—nonconflict, or, in more common parlance, peace.”<sup>164</sup> In a time of armed conflict, so long as the armed conflict itself is legal, it is permissible to use offensive force to kill large numbers of human beings, which, absent the express denotation of “armed conflict,” would be considered mass murder.<sup>165</sup> It is only within this context that “[t]he principle of combatant immunity” arises.<sup>166</sup> “In peacetime, the willful killing of another human would normally lead to prosecution, trial, and possibly conviction for the crime of murder. During and after wars, however, soldiers cannot be prosecuted for killing enemy combatants; their deadly violence is legally immunized.”<sup>167</sup> Consequently, “the law of armed conflict provides that combatants taken prisoner by opposing forces may be detained until the cessation of hostilities, but they may not be subject to punishment by opposing forces for their legitimate wartime acts, and they must be released and repatriated when hostilities end.”<sup>168</sup> Furthermore, “[i]t is something of a truism that international human rights and humanitarian law does not generally bind non-state actors in most cases.”<sup>169</sup> The international community, in formulating the laws governing warfare and human rights over the last century, had not anticipated the creation and pervasiveness of the PCMF industry within both conflict and post-conflict zones (neither of which rise to the level of “armed conflict”), which has resulted in both a conceptual and corresponding legal abyss in providing for regulations and accountability standards for the industry.<sup>170</sup>

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<sup>162</sup> Brooks, *supra* note 158, at 681–82.

<sup>163</sup> See, e.g., Hague Convention, *supra* note 79.

<sup>164</sup> Brooks, *supra* note 158, at 702.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 692.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 161 (2005).

<sup>170</sup> *Id.* at 162–63.

Discussing the manner in which these categories should be re-conceived and redefined to better reflect modern realities is beyond the scope of this Article. Nonetheless, the issue certainly serves to illustrate the macrocosm of definitional problems plaguing modern-day warfare or conflict zones, which, in turn, is personified by its nebulous microcosm counterpart—the PCMF industry. PCMFs do not easily fit within the current framework of the well-developed body of laws regarding warfare and human rights because they are not soldiers, and typically engage in post-conflict zones.<sup>171</sup> While the scope of this Article is limited to defining a new international actor and establishing a framework for this industry alone, the definitional problem is noteworthy because the entire dialogue hinges on “[c]onfusing entities in the midst of a confusing form of war, in a confusing time” which necessitates “some attempt at establishing conceptual clarity.”<sup>172</sup>

#### D. Privatizing State Power

Renowned sociologist and philosopher Max Weber defines the state as “a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory.”<sup>173</sup> The implicit assumption in the Westphalian based international order recognizes states as the primary actors, particularly in the realm of the use of violence.<sup>174</sup> Nonetheless, the United States, following a trend of privatizing governmental tasks, has also extended outsourcing to traditional military functions.<sup>175</sup> “In the twentieth century, business and government were adversaries. Today, the wall between the two that may have once existed has become a revolving door, and both share common interests.”<sup>176</sup>

Originally introduced as a Bureau of the Budget Bulletin during the Eisenhower Administration, Office of Management and Budget Circular Number A-76 (“A-76”)<sup>177</sup> was created to identify non-essential governmental

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<sup>171</sup> ISENBERG, *supra* note 22, at 7, 29.

<sup>172</sup> KATERI CARMOLA, PRIVATE SECURITY CONTRACTORS AND NEW WARS: RISK, LAW AND ETHICS 11 (2010).

<sup>173</sup> STANGER, *supra* note 156, at 45.

<sup>174</sup> *Id.*

<sup>175</sup> *See id.* at 46–47. (“The U.S. government has itself played an active role in reconfiguring authority through its outsourcing, but the forces are much larger than government choice. No longer able to attain its objectives solely by armed force, the United States now relies heavily on private security companies to advance its interests.”).

<sup>176</sup> *Id.* at ix.

<sup>177</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR. NO. A-76 (Revised) (2003).

tasks and allow the private sector to compete with the government to do the job more efficiently.<sup>178</sup> A-76 was tabled during the Vietnam War, but revived as the fervor of privatization rose under the Reagan administration.<sup>179</sup> The 1983 A-76 revision stated:

In the process of governing, the Government should not compete with its citizens. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic strength. In recognition of this principle, it has been and continues to be the general policy of the Government to rely on commercial sources to supply the products and services the Government needs.<sup>180</sup>

Under President Reagan, “the privatization impulse also extended to foreign policy.”<sup>181</sup> Thus, when Congress stopped funding the rebel Contra movement in Nicaragua, Reagan’s National Security Council simply outsourced the job to private contractors, with “wholly disastrous consequences.”<sup>182</sup>

Privatization is a bipartisan phenomenon; in 1998, “[t]he Clinton administration promulgated the Federal Activities Inventory Reform (“FAIR”) Act,”<sup>183</sup> requiring “federal agencies to submit annual inventories of their commercial activities.”<sup>184</sup> Under the Act, agencies were tasked with identifying work that could be transferred to the private sector to “encourage smart outsourcing.”<sup>185</sup> This left agencies to determine which activities were core functions, or “inherently governmental,” and thus could not be outsourced, in contrast to peripheral functions which were “candidates for outsourcing to the private sector.”<sup>186</sup> “Inherently governmental” roles are defined as performing a “function that is so intimately related to the public interest as to require performance by federal government employees.”<sup>187</sup> Thus, agency officials were indirectly charged with examining the role of government and the private

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<sup>178</sup> STANGER, *supra* note 156, at 14–15.

<sup>179</sup> *Id.* at 15.

<sup>180</sup> *Id.*; OFFICE OF MGMT. & BUDGET, *supra* note 177.

<sup>181</sup> STANGER, *supra* note 156, at 15.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*; Federal Activities Inventory Reform Act, Pub. L. No. 105-270, 112 Stat. 2382 (1998).

<sup>184</sup> STANGER, *supra* note 156, at 15 (referring to Section 2a of the FAIR Act).

<sup>185</sup> Federal Activities Inventory Reform Act § 2(a)–(d); STANGER, *supra* note 156, at 15.

<sup>186</sup> STANGER, *supra* note 156, at 15.

<sup>187</sup> *Id.* at 16.

sector.<sup>188</sup> It is no surprise that the activities deemed “inherently governmental” have reduced significantly, leading to a blur of public and private roles.<sup>189</sup>

This blurring of lines is most apparent in the PCMF context. While the government has continued an increasing trend of outsourcing contracts to private corporations to provide and manage domestic services such as welfare, health care, education, and prison management, this trend has taken a strange, Orwellian turn with the unprecedented privatization of military power.<sup>190</sup> Economist Milton Friedman wrote, “[t]he basic functions of government are to defend the nation against foreign enemies, to prevent coercion of some individuals by others within the country, to provide a means of deciding on our rules, and to adjudicate disputes.”<sup>191</sup> Thus, the quintessential role of government is to fight wars; however, it is this very function that has been outsourced to the private sector by way of the PCMF industry. In an eerily foreshadowing speech, on September 10, 2001, the day before the 9/11 attacks, Defense Secretary Donald Rumsfeld, in a speech to 23,000 Pentagon employees, stated the following:

The topic today is an adversary that poses a threat, a serious threat, to the security of the United States of America. This adversary is one of the world’s last bastions of central planning. It governs by dictating five-year plans. From a single capital, it attempts to impose its demands across time zones, continents, oceans and beyond. With brutal consistency, it stifles free thought and crushes new ideas. It disrupts the defense of the United States and places the lives of men and women in uniform at risk.

Perhaps this adversary sounds like the former Soviet Union, but that enemy is gone: our foes are more subtle and implacable today. You may think I’m describing one of the last decrepit dictators of the world. But their day, too, is almost past, and they cannot match the strength and size of this adversary. The adversary’s closer to home. It’s the Pentagon bureaucracy. Not the people, but the processes. Not the civilians, but the systems. Not the men and women in uniform, but the uniformity of thought and action that we too often impose on them. . . .

Why is DOD one of the last organizations around that still cuts its own checks? When an entire industry exists to run warehouses efficiently, why do we own and operate so many of our own? At

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<sup>188</sup> *Id.* at 15.

<sup>189</sup> *Id.* at 16.

<sup>190</sup> Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT’L L. 383, 389 (2006).

<sup>191</sup> STANGER, *supra* note 156, at 26.

bases around the world, why do we pick up our own garbage and mop our own floors, rather than contracting services out, as many businesses do? And surely we can outsource more computer systems support.

Maybe we need agencies for some of those functions. Indeed, I know we do. Perhaps a public-private partnership would make sense for others, and I don't doubt at least a few could be outsized—outsourced altogether.<sup>192</sup>

In January of 2002, Rumsfeld demanded military leaders “to behave somewhat less like bureaucrats and more like venture capitalists.”<sup>193</sup> This military privatization ideology was then put into practice during and after the Iraq war.<sup>194</sup> The paramount challenge of outsourcing force is to reconceive “how international law is to function in a world where power has been privatized.”<sup>195</sup>

In democratic states such as the United States, “the People” are the ultimate sovereign, with “Congress and president [serving as] her agents.”<sup>196</sup> However, when the monopoly on the use of force is removed from direct state control, for example with PCMFs, there are two problems: (1) the lack of democratic accountability over the use of force, which is inseparable from the very concept of statehood; and (2) the regulatory and legal gap these non-state actors fall within create “the perfect conditions for all variants of corruption and abuse of power.”<sup>197</sup> Therefore, when states privatize the use of force, there must be some corresponding avenue to regulate and prosecute entities to account for the reduction in transparency and control.<sup>198</sup>

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<sup>192</sup> Donald H. Rumsfeld, Sec'y of Def., Dep't of Def., DOD Acquisition and Logistics Excellence Week Kickoff—Bureaucracy to Battlefield (Sept. 10, 2001).

<sup>193</sup> STANGER, *supra* note 156, at 86 (quoting Donald Rumsfeld, Sec'y of Def., Dep't of Def., Remarks at National Defense University (Jan. 31, 2002)).

<sup>194</sup> *Id.* at 87.

<sup>195</sup> *Id.* at 42.

<sup>196</sup> PAUL VERUKIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT 15 (2007).

<sup>197</sup> STANGER, *supra* note 156, at 18.

<sup>198</sup> See AVANT, *supra* note 30, at 48 (“[T]here are basic differences between profit-seeking contractors and civil servants: profit seekers, in exchange for a price, deliver a product; while civil servants, in exchange for a wage, agree to accept instructions. . . . [I]f the government cares about means and wants its agents to follow a set of guidelines for how to go about providing a service, civil servants—geared to follow instructions—are superior.”).

### E. *The Rise of Transnational Corporations*

The outsourcing of state functions coincides with the declining relevance of the nation-state and the rising impact of transnational corporations (“TNCs”) globally; indeed the role of a TNC in influence and effect has been likened to that of a state or NGO.<sup>199</sup> In fact, “the most recent figures [reveal that] 77,000 TNCs span the global economy today, with some 770,000 subsidiaries and millions of suppliers. . . . [TNCs] operate in more countries than ever before, and increasingly in socio-political contexts that pose entirely novel human rights challenges for them.”<sup>200</sup> Furthermore, “[t]he annual earnings of many transnational conglomerates (especially those in the energy, manufacturing, retailing, and information technology sectors) exceed the gross domestic product (GDP) of many nations in not just the developing world, but also the industrialized North.”<sup>201</sup> TNCs’ reach is not limited to economic or market forces, rather they “are able to engage in many of the activities and functions we associate with the traditional nation-state: market-making and regulation, intelligence gathering, social welfare programs (for their employees and other stakeholders), and even self-defense in the form of corporate security units.”<sup>202</sup>

PCMFs are organized as corporate structures, hiring employees globally, oftentimes with offices worldwide.<sup>203</sup> The corporate structure provides both fluidity and liability protection for the PCMF entity; they “can rapidly dissolve and recreate themselves as need be.”<sup>204</sup> PCMFs utilize subsidiaries and counterparts to avoid state regulation and move elsewhere, if required.<sup>205</sup> Thus, while PCMFs perform military-like functions associated with states, they maintain a highly fluid corporate facade. This again complicates the issue of how to define PCMFs, as they are organized entities, performing state

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<sup>199</sup> See generally Allison D. Garret, *The Corporation as Sovereign*, 60 ME. L. REV. 129 (2008) (discussing the implications of the corporation as a nation-state); David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT’L L. 931 (2004) (discussing the need for TNCs to be recognized on an international level for accountability reasons).

<sup>200</sup> John Ruggie, *Business and Human Rights: The Evolving International Agenda* 6–7 (John F. Kennedy Sch. of Gov’t, Harv. Univ., Corporate Soc. Responsibility Initiative, Working Paper No. 38, 2007), available at [http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper\\_38\\_ruggie.pdf](http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_38_ruggie.pdf).

<sup>201</sup> David J. Bederman, *Diversity and Permeability in Transnational Governance*, 57 EMORY L.J. 201, 208 (2007).

<sup>202</sup> *Id.*

<sup>203</sup> CARMOLA, *supra* note 172, at 30. See generally ISENBERG, *supra* note 22 (discussing the PCMFs in Iraq).

<sup>204</sup> AVANT, *supra* note 30, at 67.

<sup>205</sup> *Id.*

functions, rather than independent contractors working individually.<sup>206</sup> The paramount legal question is how to regulate private corporate entities, which provide state-based military functions. The clear answer is that there must be some framework which recognizes the unique attributes of the PCMF and accordingly attaches status and legal accountability thereto.

#### *F. The Convergence of Three Variables*

PCMFs are hybrid, polymorphous entities which are “protean” in nature, combining “the worlds of the military, the business world, and the humanitarian NGO in unfamiliar ways.”<sup>207</sup> PCMFs are difficult to conceptualize and regulate because they “combine organizational cultures that in many cases have defined themselves in opposition to one another.”<sup>208</sup> The military, for example, maintains a distinct separate culture in terms of its traditional hierarchical command and control, formalized ceremony, procedure, and regulation.<sup>209</sup> Indeed, “Supreme Court decisions have long ‘recognized [the military as a] specialized society separate from civilian society with laws and traditions of its own.’”<sup>210</sup> Within this disciplined environment, soldiers are trained to die and kill others, but under the formal direction of state-based civilian leadership.<sup>211</sup> The organizational characteristics of the military lay in stark contrast to those of private, for-profit corporations.<sup>212</sup> Private corporations are created and sustained by business models of production and profitability.<sup>213</sup> Corporations seek to maximize efficiencies, which in turn produce a profit, and thus are not beholden to public

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<sup>206</sup> *Id.* at 37–38 (discussing the difficulty inherent to defining transnational corporations).

<sup>207</sup> CARMOLA, *supra* note 172, at 27.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 32.

<sup>210</sup> *Id.* (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975)).

<sup>211</sup> *Id.* at 33. Theoretically, the civilian leadership will restrain violence and thus only employ the military when thought completely necessary. *Id.* This provides democratic accountability and legitimizes force only in certain constrained situations. *See id.* at 32–33.

<sup>212</sup> FAINARU, *supra* note 58, at 33.

The military, for all its rigidity, was a culture of rules and accountability. That had been stripped away. In private security, Sheppard explained to me, “You got all the good things about the military—the camaraderie, the esprit de corps, you get to shoot things and blow things up—but with none of the other bullshit.” Schmidt said there were never any rules of engagement, the bedrock for determining whether a shooting was justified. . . . “The rules of engagement, the way they were briefed to me, was, ‘If you feel threatened, take a shot.’”

*Id.*

<sup>213</sup> CARMOLA, *supra* note 172, at 30–31.

opinion or public interest.<sup>214</sup> As such, corporations are responsible primarily to shareholders and to clients to provide the goods and services for which they were sought.<sup>215</sup> Corporate structures do not employ the formality or organizational hierarchy that militaries employ.<sup>216</sup> Lastly, humanitarian organizations define themselves in virtual diametric opposition to both military and business cultures.<sup>217</sup> The humanitarian culture aspires to achieve transnational goals.<sup>218</sup> “The ideals that guide the actions of the humanitarian organization and their members are often described in trans-political and universal terms: human security, human rights, and basic needs for shelter and healthcare.”<sup>219</sup> While the organizational qualities of militaries, businesses, and humanitarian groups are not entirely mutually exclusive, they are not conceptually complementary, resulting in conceptual disarray.<sup>220</sup> Prominent commentator Kateri Carmola summarizes the PCMF conundrum stating:

The combination of three entities—a profitable corporate business working as a military force-multiplier with a mission construed in humanitarian terms—exacerbates the conceptual confusion that surrounds [PCMFs]. In the legal realm, this conceptual confusion has serious consequences: the legal status of [PCMFs] and their contractors is hard to pin down, and efforts to regulate these companies fail to provide a recognizable, legal identity. The world of international and military law, which begins by dividing the battle space into combatants and non-combatants, soldiers and civilians, and inter-state or intra-state conflicts, is severely challenged when such complex organizations become major players in these zones.<sup>221</sup>

“The critical first step toward any successful policy is to broaden the understanding of the issue at hand. Heightened appreciation is required of the [PCMFs] potential and its underlying dynamics and challenges.”<sup>222</sup> Indeed, “[w]e do not know how to judge what we cannot understand, and existing categories of classification and judgment fall short. The fault here is with us, not them; we are stuck with outdated ways of seeing, and need to adapt.”<sup>223</sup>

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<sup>214</sup> *Id.* at 31.

<sup>215</sup> *Id.*

<sup>216</sup> *See id.* at 32 (describing the culture of the military and that of business as “diametrically opposed”).

<sup>217</sup> *Id.* at 34.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 37.

<sup>222</sup> SINGER, *supra* note 1, at 234.

<sup>223</sup> CARMOLA, *supra* note 172, at 12.

Therefore, in order to regulate PCMFs, this Article seeks to categorize and define the industry appropriately.

#### IV. DISTINGUISHING BETWEEN DIFFERENT TYPES OF PCMFs

The determination of which laws regulate an entity or a person requires a status-based definitional inquiry.<sup>224</sup> In the PCMF context, there is no scholarly consensus on even the most fundamental questions, such as a uniform terminology or nomenclature, further illustrating an underlying lack of conceptual clarity regarding the PCMF entity.<sup>225</sup> Originally, the industry used the term “private military firm,” but this became problematic, from a public relations point of view, as it highlighted offensive military capabilities.<sup>226</sup> Following this, the industry tried to rebrand itself as “private security companies” to downplay the military nature of their services.<sup>227</sup> Currently, many have used the term “private military security companies” (“PMSCs”), combining the elements of the other two names.<sup>228</sup> Industry leaders have tried to brand themselves as “peace and stability operators” in “contingency operations.”<sup>229</sup> This Article refers to the industry as “privately contracted military firms” to highlight the three essential, defining characteristics of the PCMF: the organizations are (1) privately held corporations; (2) employed under a contractual arrangement; (3) performing traditional military duties.<sup>230</sup>

PCMFs are not a homogenous group; they offer a wide range of services to the military. This Article creates an analytical framework for PCMFs by accounting for and analyzing the hybrid, quasi-public, quasi-private, corporate-military organizational, and institutional characteristics. Furthermore, this Article devises sub-categories of PCMFs based on the services offered. It is possible that a firm will provide an array of services allowing it to fit into the framework of multiple categories; categories are not mutually exclusive.<sup>231</sup> It must be acknowledged at the outset that classifying the PCMF industry has proved to be extremely complex. Scholars have attempted to categorize, but “few generally accepted definitions exist, even of the most basic terms.”<sup>232</sup>

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<sup>224</sup> *See id.* at 9–11.

<sup>225</sup> *Id.* at 11.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 10–11.

<sup>232</sup> SINGER, *supra* note 1, at 88.

Scholars have used the terms “active” and “passive” or “armed” and “unarmed” to provide parameters of classification, but these labels ignore the vast differences that exist between PCMFs in scope and objective.<sup>233</sup> Peter Singer, a leading scholar in the PCMF field, suggests recognizing the dual qualities of PCMFs, acknowledging both military and economic fundamentals that characterize PCMFs.<sup>234</sup> Therefore, the most effective way to structure the PCMF industry is by classifying the firm based on the range of services offered.<sup>235</sup> Employing a military analogy known as “tip of the spear,”<sup>236</sup> which differentiates units based on their proximity to actual fighting, proves most effective in categorizing PCMFs.<sup>237</sup> There are six basic broad services that PCMFs offer. Ordering firms from those performing functions most similar to a traditional military to the least, the classification is as follows: (1) Military Provider Firms;<sup>238</sup> (2) Military Security or Defense Firms;<sup>239</sup> (3) Military Intelligence Firms;<sup>240</sup> (4) Military Consultant Firms;<sup>241</sup> (5) Military Logistic Firms;<sup>242</sup> and (6) Military Support Firms.<sup>243</sup>

#### A. *Military Provider Firms*

Military Provider Firms (“MPFs”) are characterized by their complete tactical involvement in military operations on behalf of state or non-state actors.<sup>244</sup> These firms provide combat services such as engaging in actual

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<sup>233</sup> *Id.* at 89–90.

<sup>234</sup> *Id.* at 91.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> Peter Singer has identified three broad categories of PCMFs—the Military Provider Firm, Military Consultant Firm, and the Military Support Firm. *Id.* at 88–100. Singer’s book, *Corporate Warriors*, was first published in 2003 and detailed PCMFs that had mainly performed in the ‘90s in Africa and then later in the Balkans. PETER SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (1st ed. 2003). At that time, the PCMF industry had just arrived on the scene. SINGER, *supra* note 1, at vii. Since then, there has been significant development in the range of services PCMFs provide and the environment in which they operate. *Id.* As such, this Article seeks to identify and further refine the categories that should exist to determine legal status, and those which have already been created. Along these lines, it is also interesting to recognize that in less than a decade, PCMFs have both expanded and mutated in ways that were difficult to anticipate. *Id.* at 230–42. This provides even more of a rationale to use both international and domestic venues to aptly define these polymorphous bodies and attach legal statuses accordingly.

<sup>238</sup> *Id.* at 92–95.

<sup>239</sup> See *infra* notes 286–87 and accompanying text.

<sup>240</sup> See *infra* note 320.

<sup>241</sup> SINGER, *supra* note 1, at 95–97.

<sup>242</sup> See *id.* at 144.

<sup>243</sup> *Id.* at 97–100.

<sup>244</sup> *Id.* at 92.

fighting on the battlefield or directly commanding military units in battle.<sup>245</sup> MPFs can serve two possible functions: (1) as a comprehensive private military force; or (2) as a force multiplier.<sup>246</sup> In the first instance, “the firm provides the client a stand-alone tactical military unit.”<sup>247</sup> This type of MPF is uncommon, but has been sought and used in the PCMF marketplace.<sup>248</sup> The latter, more common type of MPF, or “force multiplier,” provides tactical advantages for ill-equipped militaries which engage in broad conflicts.<sup>249</sup> This MPF joins the client and participates in its conflicts by combining forces, thereby increasing the size of the total force.<sup>250</sup> Clients seek to employ force multipliers primarily for their “skills at battlefield assessment, management, and coordination.”<sup>251</sup> They perform the function of “mini-generals,” providing the expertise of former professional military commanders.<sup>252</sup> Additionally, the MPF often provides specialized services and equipment, such as flying advanced fighter jets or operating artillery control systems.<sup>253</sup> Because of this specialization in warfare and equipment, even clients with relatively strong militaries may hire MPFs in order to obtain a full-scale tactical advantage on all fields.<sup>254</sup> A primary example of a highly specialized MPF is Executive Outcomes (“EO”). EO is an MPF which was originally founded in 1989 by Eben Barlow, a former assistant commander of the 32nd Battalion of the South African Defence Force.<sup>255</sup> This elite strike force has been “accused of egregious human rights violations by the South African Truth Commission.”<sup>256</sup> The corporate structure was particularly crucial to EO’s operations and contracts; specifically, EO was a subsidiary of Strategic Resources

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<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 93.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 94.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* The modern MPF most closely resembles the definition of mercenary in international law. *See, e.g., id.* at 42, 92–95. MPFs embody the modern definition of a mercenary because of their focus on direct combat, use of units with smaller manpower, and more flexible “virtual structure.” *Id.* These MPFs, while not completely obsolete, seem to be highly uncommon. *See, e.g., id.* at 117–18. The climate in Africa in the 1990s, post-colonization, provided several variables simultaneously which necessitated a large-scale private military force, including weak central governments with effectively no military force coupled with a power vacuum. *See id.* at 102–14; Zarate, *supra* note 73, at 94–97 (describing how MPF Executive Outcomes was successful in Angola and Sierra Leone). Because these variables no longer exist in Africa, a full-scale private military would be looked upon unfavorably by the international community. *See Zarate, supra* note 73, at 138–39.

<sup>255</sup> SINGER, *supra* note 1, at 102.

<sup>256</sup> *Id.*

Corporation, “a larger South African holding company/venture-capital firm.”<sup>257</sup> Strategic Resources Corporation owned approximately twenty other subsidiary corporations, which assisted EO’s operations.<sup>258</sup> “These firms are essentially stay-behind asset protection companies;” while separate entities for legal purposes, in many ways, the firms operated as parts of a conjunctive whole.<sup>259</sup> This corporate umbrella provided a complex network of corporate interactions; indeed, as one commentator has noted, “EO forms part of a tangled, constantly shifting web of corporate interests organized under the Strategic Resources Group . . . includ[ing] mining, oil, infrastructure, air transport, hospital construction, demining, water purification, computer software, and other businesses, [that] feed off each other in symbiotic fashion.”<sup>260</sup> The close interaction and symbiotic relationships between various subsidiaries became transparent when another Strategic Resources holding, Branch Heritage Group, a mining and oil company with worldwide interests, won many lucrative investments “in almost all the areas where Executive Outcomes has conducted major operations.”<sup>261</sup>

EO recruited employees primarily from the South African Defence Force.<sup>262</sup> This cemented several tactical advantages, including common military training, pre-existing hierarchy amongst military ranks, and “extensive combat experience in low intensity conflict and counter-insurgency operations.”<sup>263</sup> In fact, the company boasted that its employees collectively maintained over five thousand years of combat experience, providing a tremendous competitive advantage.<sup>264</sup>

EO served as a total force provider in Sierra Leone in 1991. Sierra Leone was rife with civil war between a corrupt, weak, and decentralized government with virtually no cohesive standing military and a rogue, armed, and violent civilian group known as the Revolutionary United Front (“RUF”).<sup>265</sup> The RUF gained power as a result of the pervasive corruption in the national government.<sup>266</sup> However, the RUF quickly deteriorated into a brutally ruthless

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<sup>257</sup> *Id.* at 104.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> Zarate, *supra* note 73, at 100.

<sup>261</sup> SINGER, *supra* note 1, at 104.

<sup>262</sup> *Id.* at 102–03.

<sup>263</sup> *Id.* at 103.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 111.

<sup>266</sup> *Id.*

and violent organization which lacked “any clearly defined political agenda.”<sup>267</sup> Nevertheless, the RUF’s willingness to resort to violence against the regime was appealing to the dispossessed and alienated population of the post-colonial state.<sup>268</sup> “The RUF also built out its force by abducting children and forcing them to kill on its behalf.”<sup>269</sup>

Because the national government lacked an effective military,<sup>270</sup> the RUF was expected to overrun the government and take over control with little military opposition and without external intervention.<sup>271</sup> As a result, Sierra Leone employed EO to provide a stand-alone, private military force which conducted full-scale operations.<sup>272</sup> EO “deployed a battalion-sized unit on the ground, supplemented by artillery, transport and combat helicopters, fixed wing combat and transport aircraft, a transport ship, and all types of ancillary specialists.”<sup>273</sup> Within nine days of arriving in Sierra Leone, EO had succeeded in categorically repelling the RUF advance.<sup>274</sup> Prior to EO’s engagement, the RUF maneuvered road-side ambushes and quick withdrawals. EO, however, materially changed the tactical strategy by constantly pursuing and punishing the RUF at any point of contact.<sup>275</sup> EO “also made use of air and artillery assets and sought to engage the RUF in stand-up battles that the rebels were loathe to face. The firm ultimately pushed the RUF back to the border regions. Effectively defeated, the RUF agreed to negotiate with the government for the first time.”<sup>276</sup> After the RUF leader signed peace accords with the official Sierra Leone government, he “conceded that had EO not intervened, he would have taken Freetown and won the war.”<sup>277</sup> Therefore, by employing a full-

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<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* The RUF was depicted in the 2005 movie, *Blood Diamond. Blood Diamond*, CARNEGIECOUNCIL.ORG, <http://www.carnegiecouncil.org/education/002/film/reviews/0002.html/>.

<sup>270</sup> SINGER, *supra* note 1, at 111. Ironically, Siaka Stevens, the leader of post-colonial Sierra Leone, was responsible for intentionally weakening the military to prevent a military takeover of his government and thus solidify his power. *Id.* at 110. Unfortunately, it led to a power vacuum with the military untrained and unable to effectively quash violent rebel aggression. *Id.* at 111.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 112.

<sup>273</sup> *Id.* at 93–94 (parentheses omitted).

<sup>274</sup> *Id.* at 112–13.

<sup>275</sup> *Id.* at 113.

<sup>276</sup> *Id.*

<sup>277</sup> SINGER, *supra* note 1, at 114. Unfortunately, EO left Sierra Leone prematurely when the government terminated its contract early. *Id.* EO had predicted that their premature departure would lead to another coup within one hundred days. *Id.* Their prediction was surprisingly accurate—on the ninety-fifth day after EO’s departure, another bloody RUF coup was successfully executed. *Id.* The coup ultimately led Sierra Leone to contract with another PCMF, Sandline International. *Id.* at 115. Sandline was ultimately successful in quashing

scale private military force, Sierra Leone was able to thwart the nearly successful takeover of the government.

The government of Angola also employed EO to serve as a force multiplier in conditions similar to Sierra Leone.<sup>278</sup> In 1975, Angola became an independent state and its former colonial ruler, Portugal, abruptly evacuated.<sup>279</sup> Additionally, several hundred thousand Portuguese, who constituted virtually the entire educated population of Angola, followed, robbing the country of all valuable property—“including, in many cases, even taking their doorknobs.”<sup>280</sup> The result was a new Angolan state with few resources and no specialized military; a power vacuum and warring guerilla armies exacerbated the situation.<sup>281</sup> With no international military aid, Angola contracted with EO “to help train the state army and direct front-line operations. It was at this same time that most observers felt the government was teetering on the edge of defeat.”<sup>282</sup> EO provided Angola with tactical advice and served alongside Angola’s government forces, using EO’s military experience to exploit the opposition’s weaknesses and ultimately destroy morale by tactically overwhelming opposition forces.<sup>283</sup> Again, EO’s engagement prevented a government takeover.

EO also provided services to Uganda, Kenya, South Africa, Indonesia, Congo, and several other states.<sup>284</sup> In both Angola and Sierra Leone, “EO’s superior technology, skill, and collective experience proved crucial in forcing

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the RUF rebellion, using the same tactics that EO had employed previously. *Id.* However, Sandline’s intervention was not without its own issues—Sandline had reportedly violated the UN arms embargo with the knowledge and aid of Great Britain. *Id.*

<sup>278</sup> *Id.* at 107–08.

<sup>279</sup> *Id.* at 107.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 109.

<sup>283</sup> *Id.* Specifically, a rebel group known as the National Union for the Total Independence of Angola (“UNITA”) advanced and eventually took over Angola’s oil facilities and refused to relinquish control over to the government. *Id.* at 108–10. The oil resources and the revenues generated thereby were an “essential government source of finance,” without which, it would inevitably collapse. *Id.* at 108. EO’s presence was so significant, one UNITA soldier stated:

We used to know we could sleep well at night. In this recent war, new tactics meant that fighting continued at night and that light infantry units led by these Executive Outcomes guys would come deep behind our lines. We could no longer rest. It weakened us very much. It is the new tactics in which they trained the FAA [the Angolan government army] that made the difference. They introduced a new style of warfare to Angola. We were not used to this.

*Id.* at 110.

<sup>284</sup> *Id.* at 115.

the rebel movements in each country to negotiate respective settlements and in restoring social order.”<sup>285</sup> By tipping the tactical playing field in their clients’ favor, EO provided a valuable service in the PCMF market.

### B. *Military Security and Defense Firms*

Military Security and Defense Firms (“MSDFs”)<sup>286</sup> are the subject of the most criticism for lack of direct governmental oversight and accountability.<sup>287</sup> The MSDF is perhaps the most closely intertwined with the military, and in practical application, is difficult to conceptually distinguish therefrom.<sup>288</sup> The hallmark of the MSDF is the potential to engage in combat-like activities, contrasting with other types of firms.<sup>289</sup> MSDFs are defensive in nature; they provide security detail to high-level diplomats, supply convoys, and guard headquarters.<sup>290</sup> Because MSDFs perform their contractual duties in highly unstable conflict-ridden areas, they are heavily armed and expected to carry out their defensive security missions, using lethal means if necessary.<sup>291</sup> As a result, MSDFs are required to respond to potential threats in a manner that most closely resembles the military. Indeed, because of the state’s traditional monopoly on the use of force, MSDFs typically hire ex-military professionals to provide security in conflict and post-conflict zones.<sup>292</sup> MSDFs often possess equipment and weaponry that rival or surpass the technology of small state militaries.<sup>293</sup> Contemporary scholarship has strongly advocated extending the definition of mercenary to include exactly the type of firm services MSDFs offer.<sup>294</sup>

Blackwater, recently renamed as Xe, served as an MSDF. Blackwater is a private corporation which formally began operations in May 1998 in

<sup>285</sup> Zarate, *supra* note 73, at 94.

<sup>286</sup> Current scholarship has termed this type of PCMF “private military security companies.” *See, e.g.,* Emanuela-Chiara Gillard, *Business Goes to War: Private Military/Security Companies and International Humanitarian Law*, 88 INT’L REV. RED CROSS 525, 526 (2006).

<sup>287</sup> *See, e.g.,* SCAHILL, *supra* note 2, at 35–36.

<sup>288</sup> *See, e.g., id.* at 89 (calling Blackwater “the fifth branch of the U.S. military”).

<sup>289</sup> *See generally id.* at 3–48 (describing Blackwater’s violence on “Baghdad’s Bloody Sunday”). Blackwater provides a prototype for classifying a PMF as an MSDF because: (1) it is highly combative in nature; (2) its defensive nature is evident from its contract to keep U.S. officials protected in Iraq; (3) it maintains and trains an extensive, heavily armed private army; and (4) it employs ex-military professionals. *See id.* at 10, 16, 132–33, 442–46.

<sup>290</sup> *See, e.g., id.* at 16.

<sup>291</sup> *See id.* at 3–48.

<sup>292</sup> *See* SINGER, *supra* note 1, at 76.

<sup>293</sup> *See, e.g.,* SCAHILL, *supra* note 2, at 442–46 (describing Blackwater as a prototypical MSDF).

<sup>294</sup> *See infra* Part V.

North Carolina.<sup>295</sup> Formed as the brainchild of retired Navy SEAL Al Clark with the financial backing of billionaire Eric Prince, also a former SEAL, Blackwater was created to provide a private sector solution for the “inadequate training infrastructure” of the Navy.<sup>296</sup> Because both Clark and Prince were well connected with members of the Navy SEALs, the SEALs began using the Blackwater facility to discreetly train their forces.<sup>297</sup> After the success of Blackwater’s contract with the SEALs, Blackwater generated more business with state, federal, and even international agencies.<sup>298</sup> In February of 2000, Blackwater won a General Services Administration (“GSA”) contract, which facilitated the U.S. government purchasing products or services from Blackwater without having to evaluate and accept bids on the competitive market.<sup>299</sup> As a result, Blackwater’s business dealings with the U.S. government began to increase at an exponential rate.<sup>300</sup> The initial GSA contract was estimated at a value of \$125,000; when the contract was renewed in 2005, the projected value was \$6 million.<sup>301</sup> This estimate greatly undervalued the amount Blackwater was *actually* paid for services rendered; by 2008, Blackwater sales reached more than \$1 billion.<sup>302</sup> Blackwater’s growth since 2001 is a staggering 80,453%.<sup>303</sup>

In June of 2004, the State Department awarded Blackwater “one of the most valuable and prestigious U.S. government contracts on the market” through the Worldwide Personal Protective Service Program.<sup>304</sup> The contract described Blackwater’s services as diplomatic security and providing “Counter Assault Teams and Long Range Marksman teams.”<sup>305</sup> In this context, Blackwater operated as security detail for a variety of U.S. and high-level foreign officials wherever the need arose.<sup>306</sup> Employees are typically hired from various military installations worldwide because Blackwater’s services

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<sup>295</sup> SCAHILL, *supra* note 2, at 97.

<sup>296</sup> *Id.* at 89–90.

<sup>297</sup> *Id.* at 97–98.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* at 101–02. The GSA spokesman described the contract as a “multiple-award schedule [of] indefinite quantity [and] indefinite delivery.” *Id.* at 102.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 103.

<sup>303</sup> ISENBERG, *supra* note 22, at 76.

<sup>304</sup> SCAHILL, *supra* note 2, at 229.

<sup>305</sup> *Id.*

<sup>306</sup> *See id.*

most closely resemble traditional military operations.<sup>307</sup> Many have alleged that Blackwater recruits from state militaries known for their reckless disregard of human rights.<sup>308</sup>

Blackwater is one of the most notorious, and perhaps controversial, MSDFs operating in Iraq and Afghanistan.<sup>309</sup> It has access to the most sophisticated military equipment, including but not limited to: firearms, ammunition, grenades, helicopters, armored vehicles, and even fighter jets, further blurring the line between state-sanctioned military and a private mercenary firm.<sup>310</sup> Perhaps the sole distinguishing element between a state military and the MSDF is that the scope of the MSDF's duties are limited to purely defensive functions.<sup>311</sup> Therefore, MSDFs only use weapons in a defensive measure for fear of being labeled unlawful combatants if they use weapons in an offensive measure.<sup>312</sup>

On April 4, 2004, in conjunction with Blackwater's contract to protect CPA headquarters in Najaf, Blackwater employees engaged in an all-out battle with civilians during what began as a mere civilian protest.<sup>313</sup> While eyewitness accounts differ on how the battle began and who shot first, "once the shooting began, Blackwater's men . . . were unloading clip after clip, firing thousands of rounds and hundreds of 40 mm grenades into the crowd. They fired so many rounds that some of them had to stop shooting every fifteen minutes to let their gun barrels cool."<sup>314</sup> In fact, Blackwater used so much ammunition that three company helicopters flew in during the engagement to deliver more supplies.<sup>315</sup> One Blackwater employee began to make a video record of the conflict,<sup>316</sup> which is indecipherable from a military engagement. U.S. Marine

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<sup>307</sup> See *id.* at 245–73 (discussing Blackwater's recruiting operations in Chile, Columbia, Romania, and Honduras). A noteworthy distinction between Blackwater and both EO and Military Professional Resources Incorporation is that while the latter two firms also focused greatly on hiring ex-military, they hired almost solely from the hiring state's ex-military, which aided in uniform standards and training. See SINGER, *supra* note 1, at 103, 120. Blackwater does not maintain the same uniformity, hiring around the globe. SCAHILL, *supra* note 2, at 245.

<sup>308</sup> See SCAHILL, *supra* note 2, at 245.

<sup>309</sup> See ISENBURG, *supra* note 22, at 79.

<sup>310</sup> See SCAHILL, *supra* note 2, at 54–55.

<sup>311</sup> See Tom Gardner, *Defense Contractors vs. Private Military Contractors*, SEARCHWARP (Oct. 8, 2008), <http://searchwarp.com/swa382054.htm>.

<sup>312</sup> *Id.*

<sup>313</sup> SCAHILL, *supra* note 2, at 181–96 (describing the events of that day).

<sup>314</sup> *Id.* at 188. (footnotes omitted).

<sup>315</sup> *Id.* at 190. (footnotes omitted).

<sup>316</sup> *Id.* at 188. The Najaf battle was recorded by Blackwater contractors and is publicly available for viewing on YouTube. *U.S. Soldiers Repel Attack in Blackwater Najaf (Part 1)*, YOUTUBE, <http://www>.

Cpl. Lonnie Young, who had arrived to install communication equipment, was present during the conflict and was taking tactical orders from Blackwater employees during the “defensive” mission, blurring the chain-of-command.<sup>317</sup> Cpl. Young stated, “I gazed over the streets with straining eyes, only to see hundreds of dead Iraqis lying all over the ground.”<sup>318</sup> After the Najaf incident, senior Blackwater executive Patrick Toohey acknowledged, “This is a whole new issue in military affairs. Think about it. You’re actually contracting civilians to do military-like duties.”<sup>319</sup> Due to the MSDFs’ close resemblance to traditional military operations, MSDFs require their own distinct categorical framework.

### C. *Military Intelligence Firms*

Military Intelligence Firms (“MIFs”)<sup>320</sup> provide services such as procuring, interpreting, and analyzing intelligence in all forms. Traditionally, states performed all intelligence-based procurement and analysis due to the risk of revealing highly sensitive information.<sup>321</sup> Nonetheless, the current trend shows a greater reliance on intelligence acquired and analyzed by private firms.<sup>322</sup> Firms can provide a broad array of services, in both conflict and non-conflict zones, ranging from providing complete aerial surveillance to simply analyzing and processing intelligence data, which may be little more than providing a translation service.<sup>323</sup> There are three basic types of services MIFs offer—interrogation, surveillance, and intelligence analysis.<sup>324</sup> In order to qualify as

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youtube.com/watch?v=3Y2Z8aJDq0s (last visited Feb. 13, 2011); *U.S. Soldiers Repel Attack in Blackwater, Najaf (Part 2)*, YOUTUBE, <http://www.youtube.com/watch?v=kNXm-dld-30> (last visited Feb. 13, 2011).

<sup>317</sup> SCAHILL, *supra* note 2, at 186–87.

<sup>318</sup> *Id.* at 190 (quoting Cpl. Young). Cpl. Young was present at the Najaf battle. *Id.* at 186–87.

<sup>319</sup> *Id.* at 193–94.

<sup>320</sup> This category has not been distinguished from other PCMFs by contemporary scholarship, as the procurement of intelligence has previously been considered the primary domain of states. *See* Walter Pincus, *Increase in Contracting Intelligence Jobs Raising Concerns*, WASH. POST, Mar. 20, 2006, at A3. Additionally, the sensitive nature of obtaining intelligence from individuals increases the potential to commit violations of human rights. *See War Profiteer of the Month: CACI*, 23 WAR PROFITEERS’ NEWS (Apr. 14, 2010), <http://www.wri-irg.org/node/9927> (discussing the accountability of interrogators working for CACI as regards torturing detainees). For the purpose of this Article, there will be a separate category for these PCMFs.

<sup>321</sup> ISENBERG, *supra* note 22, at 117. Indeed, “[a]n Army policy directive published in 2000, and still in effect today, classifies any job that involves ‘the gathering and analysis’ of tactical intelligence as ‘an inherently governmental function barred from private sector performance.’” *Id.* (footnote omitted).

<sup>322</sup> Pincus, *supra* note 320.

<sup>323</sup> *See, e.g., About L-3*, L-3 COMM., <http://www.l-3com.com/about-13/> (last visited Feb. 13, 2011).

<sup>324</sup> *See, e.g., War Profiteer of the Month: CACI*, *supra* note 320 (discussing CACI’s history and current services).

an MIF, only one of the aforementioned services must be offered,<sup>325</sup> although many firms offer comprehensive intelligence packages.<sup>326</sup>

CACI is an example of an MIF. It is a publicly traded corporation that was formed in 1962 by Herb Karr, an entrepreneurial financier, and Harry Markowitz,<sup>327</sup> an economist who developed the first computer simulation programming language named SIMSCRIPT.<sup>328</sup> SIMSCRIPT “was designed to allow analysts to build computer representations of complex activities such as air traffic and war games.”<sup>329</sup> The company initially offered services in the field of simulation programming and provided training and support to users.<sup>330</sup> During the 1970s, CACI opened offices in Europe and began to offer information services both domestically and worldwide.<sup>331</sup> In the mid-1990s, CACI, like most PCMFs, took advantage of the post-Cold War downsizing and offered information technology to the federal government, and thus became one of the twenty-five largest federal primary contractors.<sup>332</sup> It sold simulation products to the Pentagon and document-handling systems to the Justice Department.<sup>333</sup> By 1998, CACI began acquiring several small intelligence-related firms, thus becoming a premier provider of information technology services.<sup>334</sup> “In 2006, CACI was one of seven contractors chosen by the U.S. Army to provide technology and engineering services worth as much as \$19 billion over a ten-year period.”<sup>335</sup>

CACI was heavily scrutinized after its involvement in the Abu Ghraib prison scandals in Iraq.<sup>336</sup> The U.S. government hired CACI to provide interrogation services and procure evidence for the counterinsurgency mission from Iraqi detainees.<sup>337</sup> As U.S. military commanders “sought operational intelligence, it became apparent that the intelligence structure was

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<sup>325</sup> ISENBERG, *supra* note 22, at 14.

<sup>326</sup> See, e.g., *About L-3*, *supra* note 323.

<sup>327</sup> *CACI History*, CACI, <http://www.caci.com/about/hist.shtml> (last visited Feb. 13, 2011).

<sup>328</sup> Profile of Harry Markowitz, QFINANCE: THE ULTIMATE FIN. RESOURCE, <http://www.qfinance.com/asset-management-thinkers/harry-markowitz> (last visited Feb. 13, 2011).

<sup>329</sup> *War Profiteer of the Month: CACI*, *supra* note 320.

<sup>330</sup> *CACI History*, CACI, <http://www.caci.com/about/hist.shtml> (last visited Feb. 13, 2011).

<sup>331</sup> *War Profiteer of the Month: CACI*, *supra* note 320.

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> See *id.*

<sup>335</sup> *Id.*

<sup>336</sup> Peter Beaumont, *Abu Ghraib Abuse Firms Are Rewarded*, OBSERVER (London), Jan. 16, 2005, <http://www.guardian.co.uk/world/2005/jan/16/usa.iraq>.

<sup>337</sup> *Id.* The U.S. contractor Titan was also involved in the Abu Ghraib torture allegations. *Id.*

undermanned, under-equipped, and inappropriately organized for counter-insurgency operations.”<sup>338</sup> MIFs filled the gaps where the military simply did not have the manpower or the infrastructure readily available to effectively perform this function. According to the U.S. Army’s report after the Abu Ghraib incident, military personnel acted as subordinates, obeying orders from CACI interrogators.<sup>339</sup> CACI employees participated in several human rights violations, including, but not limited to, using military dogs to threaten prisoners, repeatedly physically abusing detainees, and using sleep deprivation tactics.<sup>340</sup> The Abu Ghraib scandal highlighted concerns of PCMFs lacking a clear chain of command and accountability.<sup>341</sup>

At the time the Abu Ghraib scandal occurred, no extraterritorial jurisdictional statute existed with which the United States could prosecute the contractors or the company.<sup>342</sup> As a result, Congress amended the MEJA to include contractors “working in support of the military’s mission abroad” to eliminate the jurisdictional gap for contractors in the future.<sup>343</sup> Iraqi nationals and their next-of-kin filed a civil suit against CACI for torture under the Alien Tort Statute.<sup>344</sup> In *Saleh v. Titan Corp.*, the Court of Appeals for the District of Columbia held that the plaintiffs’ tort claims were preempted by the Supreme Court’s decision in *Boyle v. United Technologies Corp.*, which provided immunity to a civilian helicopter manufacturer from a manufacturing defect suit when the helicopter was manufactured for the Department of Defense.<sup>345</sup> The Court in *Boyle* held that even absent specific legislation providing immunity to an independent contractor for design defect, the issue was of

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<sup>338</sup> LTG Anthony R. Jones, AR 15-6 INVESTIGATION OF THE ABU GHRAIB PRISON AND 205TH MILITARY INTELLIGENCE BRIGADE 11, available at [http://www.npr.org/documents/2004/abuse/fay-jones\\_report.pdf](http://www.npr.org/documents/2004/abuse/fay-jones_report.pdf).

<sup>339</sup> *Id.* at 51.

<sup>340</sup> ISENBERG, *supra* note 22, at 119–20 (discussing a classic case of outsourcing going awry, involving CACI employee Steven Stephanowicz “who was trained . . . to inspect satellite pictures, not to be an interrogator. Yet he reportedly directed the abuse in one of the most infamous incidents captured on camera at Abu Ghraib: a prisoner in an orange jumpsuit being menaced with an unmuzzled dog. He was never charged with a crime.”) *Id.* at 120.

<sup>341</sup> *Id.* When Brigadier General Jani Karipinski, who was in charge of the 80th Military Police Brigade running Abu Ghraib, was interviewed regarding the military control over Titan translators, she was asked, “How does the chain of command work?” *Id.* She replied, “We had no control over them at all.” *Id.* at 126.

<sup>342</sup> *Saleh v. Titan Corp.*, 580 F.3d 1, 31 (D.C. Cir. 2009). The United States could have prosecuted CACI under torture statutes, but, probably because the burden of proof was too high, failed to do so. The government also did not pursue any civil contract claims against CACI. *Id.*

<sup>343</sup> Glenn Schmitt, *Hold Contractors Accountable*, ARMY TIMES, [http://www.armytimes.com/community/opinion/army\\_backtalk\\_contractors\\_071126/](http://www.armytimes.com/community/opinion/army_backtalk_contractors_071126/) (last visited Mar. 25, 2011).

<sup>344</sup> *See generally Saleh*, 580 F.3d 1.

<sup>345</sup> *Id.* at 5.

“uniquely federal concern” and thus the corporation was immune from suit.<sup>346</sup> The court in *Saleh* extended this reasoning to the Abu Ghraib scandal, stating, “We think that the following formulation better secures the federal interests concerned: During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor’s engagement in such activities shall be preempted.”<sup>347</sup> As a result, the plaintiffs were prevented from pursuing any civil claims arising out of the Abu Ghraib prison scandal.<sup>348</sup>

#### D. Military Consultant Firms

Military Consultant Firms (“MCFs”) provide advisory and tactical expertise training to militaries exclusively off of the battlefield.<sup>349</sup> While MCFs can reshape the strategic environment by restructuring and providing tactical military advantages, they do not directly participate in any combat operations alongside the client.<sup>350</sup> Despite MCFs’ noted absence from the battlefield, the value in their application of knowledge and training is substantial.<sup>351</sup> In modern warfare, the “brain trust” and expertise that MCFs provide potentially alters the landscape of the entire conflict.<sup>352</sup> MCFs include firms that provide pure technical analysis, as well as firms that offer consultation and physical training related to the analytical recommendations.<sup>353</sup> The distinguishing factor of MCFs from other PCMFs is that while MCFs provide consultation and training directly related to military combat, they are not present in the physical implementation on the battlefield.<sup>354</sup>

Military Professional Resources Incorporation (“MPRI”), an MCF, was founded and registered in Delaware in 1978 by eight former senior military officers.<sup>355</sup> The firm primarily recruits retired U.S. military personnel of various levels, maintaining a meticulously managed database that collectively

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<sup>346</sup> *Boyle v. United Tech. Corp.*, 487 U.S. 550 (1988).

<sup>347</sup> *Saleh*, 580 F.3d at 9.

<sup>348</sup> It is unclear whether the *Boyle* doctrine will be extended by other courts to encompass PCMFs. *See Martin v. Halliburton*, 618 F.3d 476 (5th Cir. 2010) (holding the district court’s ruling that *Boyle* did not provide immunity to federal contractor Halliburton for conduct which occurred in Iraq was not immediately reviewable under the collateral order doctrine).

<sup>349</sup> SINGER, *supra* note 1, at 95.

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* at 96.

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

<sup>355</sup> *Id.* at 119–20.

replicates “every single military skill.”<sup>356</sup> The firm has deep-rooted ties with the U.S. military; approximately ninety-five percent of its employee pool formerly served in the U.S. Army, and the twenty-three original founding members of MPRI collectively maintained over seven hundred years of military experience.<sup>357</sup> With uniform military training backgrounds, MPRI maintains tactical cohesion, which provides it with a tremendous advantage over other PCMF competitors.<sup>358</sup> Another noteworthy characteristic of MPRI is the close ties it has formed with high levels of the U.S. government.<sup>359</sup> This has led some commentators to question “whether MPRI is simply a private extension of the U.S. military.”<sup>360</sup>

MPRI became invaluable in the mid-1990s for its strategic expertise in warfare in the former conflict-ridden Yugoslavia.<sup>361</sup> When Croatia asserted independence from the former Yugoslavia, it had not developed a military that could effectively quash internal rebellion.<sup>362</sup> As a result, the Croatian army was ill equipped to respond to the minority Serbian rebellion, which was backed by the Yugoslav army.<sup>363</sup> In 1995, MPRI entered into two contracts with the Croatian government: the first was to provide “strategic long-term capabilities” to the Croatian Ministry of Defense, and the second was for MPRI to design a Democracy Transition Assistance Program, which purportedly “provide[d] for the classroom instruction in democratic principles and civil-military relations to officers previously accustomed to the Soviet model of organization.”<sup>364</sup> Neither contract *officially* provided for any direct tactical military training.<sup>365</sup>

By August of 1995, the effect of MPRI on the Croatian military was so pervasive that it took the entire international community by surprise.<sup>366</sup> In a massive offensive against rebel Serbs, “the Croat army revealed that it had transformed from a ragtag militia into a highly professional fighting force.”<sup>367</sup> While MPRI did not provide any tangible aid on the battlefield itself, the training and expertise the firm provided completely transformed the Croatian

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<sup>356</sup> *Id.* at 120.

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> *Id.* at 121.

<sup>361</sup> *Id.*

<sup>362</sup> *Id.* at 125.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.* at 125–26.

<sup>365</sup> *Id.* at 126.

<sup>366</sup> *Id.*

<sup>367</sup> *Id.*

army in a material manner.<sup>368</sup> Although MPRI publicly maintained that it had not provided any official tactical military assistance or training in the offensive against the Serbs, it is a commonly accepted belief that MPRI trained the Croatian army “in basic infantry tactics (such as covering fields of fire and flanking maneuvers), and medium-unit strategy and coordination as well.”<sup>369</sup> Indeed, after MPRI began training the army, there was a “dramatic organizational and attitudinal transformation,” which resembled a Western-style engagement, in contrast to outdated Soviet military strategies.<sup>370</sup> The issue of both training and weapon support and supply was of great significance because there was a contemporaneous 1991 UN Arms Embargo that categorically prohibited the sale of arms, military and tactical training, and advice.<sup>371</sup> The United States, as a permanent member of the UN Security Council, had voted to approve this embargo.<sup>372</sup> Thus, MPRI, performing as a PCMF, with close ties to the U.S. government, was able to provide services covertly to the Balkan region, in violation of the embargo. By many accounts, MPRI furthered U.S. interests in the region, without absorbing the same political and international condemnation that a state providing identical services would receive.<sup>373</sup> Many international observers believed that the United States tacitly approved, and even facilitated, MPRI’s covert tactics.<sup>374</sup>

Due in large part to the success of training the Croatian army, MPRI won a large contract with Bosnia that expressly included “official provisions for combat training.”<sup>375</sup> The structure of the contract was somewhat of an anomaly—the Bosnian government received all of the military training benefits from the contract, while Saudi Arabia, Malaysia, Kuwait, Brunei, and

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<sup>368</sup> *Id.*

<sup>369</sup> *Id.* at 127.

<sup>370</sup> *Id.*

<sup>371</sup> *Id.* at 125.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> *Id.* This belief is troublesome as

numerous reports of human violations surfaced in the wake of the offensive, including the murder of elderly Serbs who had stayed behind. The International War Crimes Tribunal has since indicted the Croat commanders of the offensive, who may or may not have received instruction and guidance from MPRI or Pentagon planners.

*Id.* at 126.

<sup>375</sup> *Id.* at 128.

the United Arab Emirates funded the payment of the contract.<sup>376</sup> Furthermore, an official at the U.S. State Department “administered both the program and the financial account into which the money was deposited.”<sup>377</sup> Critics of the contract pointed to the undue amount of “unofficial” government involvement and the fear that military training may have led to the creation of a Bosnian military that was much more powerful than its neighbors—and thus motivated to use offensive strategies to recapture lands previously lost.<sup>378</sup> Currently, in Iraq, several MCFs are training Iraqi police forces and the military in various capacities.<sup>379</sup> This type of PCMF provides a valuable resource in the postwar reconstruction of both Iraq and Afghanistan.

### *E. Military Logistics Firms*

Military Logistics Firms (“MLFs”) provide logistics support unrelated to direct combat operations, such as transportation, road repair, mail delivery, cargo handling and railhead operation, and refueling.<sup>380</sup> While MLFs provide ancillary support to either combat or nation-building, they often enter dangerous and unfriendly territory exposing them to lethal force in pursuance of their contractual obligations.<sup>381</sup> Particularly in the realm of transportation, MLFs have been confronted with a tremendous amount of violence on supply routes, resulting in a mounting death count of contractors serving MLFs in Iraq.<sup>382</sup>

Halliburton-KBR is an MLF operating in Iraq. In 1919, the Brown brothers, including brother-in-law and financier Dan Root, formed Kellogg, Brown & Root (“KBR”) in Texas.<sup>383</sup> The company developed expertise in construction and engineering and became financially successful by assuming

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<sup>376</sup> *Id.* This setup reveals a very important issue with regard to PCMFs that the law has not fully addressed—the extent to which states can fund private militaries to perform tactical or combat operations that serve the funding states’ interests.

<sup>377</sup> *Id.*

<sup>378</sup> *Id.* at 129–30.

<sup>379</sup> See, e.g., ISENBERG, *supra* note 22, at 67, 91–95. DynCorp, for instance, was hired to train Iraqi police enforcement. *Id.* at 91–95.

<sup>380</sup> SINGER, *supra* note 1, at 144.

<sup>381</sup> See, e.g., Aaron Walter, Fisher v. KBR—Fifth Circuit to Consider Jurisdiction Over Contractors in Iraq, DEF. BASE ACT BLOG (Mar. 7, 2008), <http://defensebaseactblog.com/2008/03/07/fisher-v-kbr-fifth-circuit-to-consider-jurisdiction-over-contractors-in-iraq>.

<sup>382</sup> *Id.*; see IRAQ FOR SALE, *supra* note 157 (claiming Halliburton knowingly placed civilian contractors in the Red Zone without proper security or defense forces and with no weapons for self defense).

<sup>383</sup> SINGER, *supra* note 1, at 137.

risky projects with the potential for large payouts.<sup>384</sup> In 1963, Halliburton, a global construction and energy services company, purchased KBR as a subsidiary corporation.<sup>385</sup> Halliburton officially separated from KBR forty-four years later, in April of 2007.<sup>386</sup> The Halliburton-KBR team has maintained long-standing ties with the government, dating back to KBR's somewhat dubious relationship with former President Lyndon B. Johnson,<sup>387</sup> through the Bush administration, as former Vice President Dick Cheney served as Halliburton's CEO from 1995 to 2000.<sup>388</sup> During Cheney's tenure at the firm, Halliburton-KBR received \$1.5 billion in government contracts, in contrast with the \$100 million government credit guarantees the company received prior to Cheney joining the firm.<sup>389</sup>

KBR's first military government contract, worth \$3.9 million, dates back to 1992, when the Department of Defense commissioned KBR "to produce a classified report detailing how private companies . . . could help provide logistics for US troops deployed into potential war zones around the world."<sup>390</sup> The report paved the way for KBR to win the governmental contract to provide logistics and support for the U.S. military in the ongoing humanitarian crisis in Somalia.<sup>391</sup> The firm's logistics and support effectively streamlined non-essential military functions, such as site maintenance and operations.<sup>392</sup> The contract's success led to the government awarding KBR more contracts for services in Rwanda, Haiti, and Kuwait.<sup>393</sup> With each subsequent contract, the scope of KBR's logistics and support services increased.<sup>394</sup> In 1995, KBR won a \$546 million contract to provide support to U.S. troops and NATO

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<sup>384</sup> *Id.*

<sup>385</sup> *Id.*

<sup>386</sup> *Halliburton, KBR Split Up*, REUTERS, Apr. 5, 2007, available at <http://www.reuters.com/article/idUSN0523848520070405>.

<sup>387</sup> Interestingly, in 1966, Donald Rumsfeld, then congressman of Illinois, condemned contracts between KBR and the government during the Vietnam War, stating, "Why this huge contract has not been and is not now being adequately audited is beyond me. The potential for waste and profiteering under such a contract is substantial." Pratap Chatterjee, *Halliburton's Army: The Way America Makes War*, Speech at Powell's City of Books (Feb. 18, 2009), available at <http://video.google.com/videoplay?docid=8853192868942769225&hl#>; see also RITA J. KING, *BIG, EASY MONEY: DISASTER PROFITEERING ON THE AMERICAN GULF COAST 6* (Brooke Shelby Biggs ed., 2006).

<sup>388</sup> See SINGER, *supra* note 237, at 137.

<sup>389</sup> *Id.* at 140.

<sup>390</sup> *Id.* at 142.

<sup>391</sup> *Id.* at 143.

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> *Id.*

peacekeeping forces in the Balkans.<sup>395</sup> KBR provided services ranging from engineering and construction, to food and laundry services, to transportation and vehicle maintenance.<sup>396</sup> In sum, KBR provided all of the contingency services required to operate a base without any of the offensive and defensive combat-related military functions.

KBR is one of the largest contractors providing logistics and support in Iraq.<sup>397</sup> Between 2003 and the summer of 2007, KBR had solidified over \$20 billion in logistics and support contracts.<sup>398</sup> To put this number into perspective, the amount paid to KBR alone is roughly *three times* what the U.S. government paid to fight the *entire* 1991 Persian Gulf War.<sup>399</sup> On March 2, 2010, the government awarded another comprehensive logistics contract to KBR.<sup>400</sup> In performance of the contract, KBR will provide air terminal operations, bulk fuel operations, bulk fuel transportation, maintenance and heavy equipment transportation, movement control functions, recovery operations, and comprehensive postal services, to name a few.<sup>401</sup> Because KBR operates under a cost-plus contract, many commentators have argued (and company whistleblowers have confirmed) that KBR intentionally engaged in wasteful spending and overcharged the U.S. government for services and materials provided.<sup>402</sup>

Much of the transportation KBR is contracted to perform will place it directly into hostile conflict zones where contractors may potentially face lethal force. In fact, many KBR contractors have been killed by insurgents as a direct result of transporting goods in conflict zones in Iraq.<sup>403</sup> The environment

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<sup>395</sup> *Id.*

<sup>396</sup> *See id.*

<sup>397</sup> Jackie Spinner, *For One Contractor, A Road Too Hard*, WASH. POST, Jan. 17, 2005, at A01.

<sup>398</sup> SINGER, *supra* note 1, at 247.

<sup>399</sup> *Id.*

<sup>400</sup> *KBR Awarded Major Task Order Under Logistics Civil Augmentation Program (LOGCAP) IV Contract*, KBR (Mar. 2, 2010), <http://www.kbr.com/Newsroom/Press-Releases/2010/03/02/KBR-Awarded-Major-Task-Order-Under-Logistics-Civil-Augmentation-Program-LOGCAP-IV-Contract>.

<sup>401</sup> *Id.*

<sup>402</sup> *See, e.g.*, Pratap Chatterjee, *New Halliburton Whistleblowers Say Millions Wasted in Iraq*, CORPWATCH (June 16, 2004), <http://www.corpwatch.org/article.php?id=11373>.

<sup>403</sup> *See, e.g.*, John Burnett, *The Trucker's War: On the Road to Iraq*, NPR (May 25, 2006), <http://www.npr.org/templates/story/story.php?storyId=5431088>. Many lawsuits have arisen out of these deaths. For instance, in *Martin v. Halliburton*, the plaintiffs sued Halliburton for negligence in maintaining safe conditions for truckers, which led to the death of one such trucker. *Martin v. Halliburton*, 601 F.3d 381, 385 (5th Cir. 2010), *superseded by* 618 F.3d 476 (5th Cir. 2010). The court dismissed the case for lack of subject matter jurisdiction. *Id.* at 393.

has proven to be so dangerous that KBR convoys have used private armed security for protection.<sup>404</sup>

### F. Military Support Firms

Military Support Firms (“MSFs”) perform non-lethal secondary tasks that are not a primary component of the core offensive or defensive military mission, but are nonetheless necessary to the maintenance of such operations.<sup>405</sup> MSFs are, by far, the largest of the five categories of PCMFs, in terms of both scope and revenue, performing tasks such as engineering, construction, food services, laundry operations, maintenance of military bases, and power generation to name a few.<sup>406</sup> MSFs provide services exclusively on base and thus are not involved in any strategic tactical or combat warfare. While historically all such support was conducted by the military, outsourcing support allows the military to expend manpower only in essential combat-related missions. The U.S. government awarded a contract unprecedented in size to KBR at the onset of the war in Iraq, arguing both military and market efficiencies.<sup>407</sup> Paul Cerjan, Vice President of KBR Worldwide Military Affairs, claimed that outsourcing logistics and support activities was significantly more economically advantageous to the government.<sup>408</sup> Cerjan revealed that in the summer of 2005, KBR had the equivalent of thirty battalions worth of support.<sup>409</sup> A battalion contains between 300 and 1000 troops, which would yield between 9000 contractors on the low end and 30,000 on the high end.<sup>410</sup> This number is most certainly significantly greater today; unfortunately, the exact number of contractors employed as MSFs has not been disclosed by the U.S. government.<sup>411</sup>

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<sup>404</sup> The U.S. government filed a lawsuit because KBR used private armed security forces and then billed the government in direct violation of KBR’s contractual terms. Delvin Barnett, *US Sues KBR: Iraq Charges from Contractor Were Improper*, HUFFINGTON POST (Apr. 1, 2010, 7:08 PM), [http://www.huffingtonpost.com/2010/04/02/us-sues-kbr-iraq-charges-\\_n\\_522707.html](http://www.huffingtonpost.com/2010/04/02/us-sues-kbr-iraq-charges-_n_522707.html).

<sup>405</sup> SINGER, *supra*, note 1, at 97.

<sup>406</sup> Ebrahim, *supra* note 64, at 185; *see* SINGER, *supra* note 1, at 144.

<sup>407</sup> *See* Michael Dobbs, *Halliburton’s Deals Greater than Thought*, WASH. POST, Aug. 28, 2003, at A01.

<sup>408</sup> *Frontline: Private Warriors*, *supra* note 42. This contention is highly debatable. Most recently, there have been allegations that KBR knowingly allowed contaminated food and water to be served and used by the U.S. military, causing many to become ill. *See* Kelly Kennedy, *Suit Claims Halliburton, KBR Sickened Base*, ARMY TIMES (Dec. 3, 2008, 7:00 PM), [http://www.armytimes.com/news/2008/12/military\\_kbr\\_lawsuit\\_121508w/](http://www.armytimes.com/news/2008/12/military_kbr_lawsuit_121508w/).

<sup>409</sup> *Frontline: Private Warriors*, *supra* note 42.

<sup>410</sup> *United States Army: Chain of Command (Organization)*, ABOUT.COM, <http://usmilitary.about.com/od/army/l/blchancommand.htm> (last visited Feb. 26, 2010).

<sup>411</sup> SINGER, *supra* note 1, at 245.

This Article distinguishes between logistics firms and support firms, but the majority of scholarship has categorized them together.<sup>412</sup> The two are distinguishable, as support activities occur almost exclusively on the military base, where there is very little potential for any combat or insurgent-related violence.<sup>413</sup> This characteristic distinguishes a logistics firm from a support firm since, by definition, transportation requires MLFs to leave military bases and travel through perilous areas that often lead to violent encounters. The environment in which MLFs operate is distinct from that of MSFs, resulting in significantly different expectations. As previously mentioned, a PCMF can provide services that place the firm in multiple categories.<sup>414</sup> Nonetheless, when delineating categories to devolve legal status, it is helpful to distinguish MLFs from MSFs, as the services and environment in which these firms operate are distinct. KBR is the largest support firm in Iraq, and its corporate structure and operations are discussed *infra* Part IV.E.

## V. A SURVEY OF MODERN THEORIES OF PCMF REGULATION

This Part briefly surveys various theories proposed by experts and commentators to regulate and prosecute PCMFs. All of these theories present viable steps in reforming the current system, but to date, no theory comprehensively addresses the legal accountability gap. Nonetheless, it is essential to discuss the theories that are currently in the market to determine what type of framework should be employed.

### A. *Extension of the Term Mercenary*

The current approach to defining and regulating mercenaries has focused on an archaic and outdated form of mercenarism.<sup>415</sup> As such, “mercenary,” as currently defined, does not adequately encompass the current structure and characteristics of the modern PCMF.<sup>416</sup> Some have suggested revisiting the definition of mercenary and expanding it to include PCMFs; alternatively, others have proffered a flexible interpretive approach, thereby extending the mercenary definition to PCMFs, taking into account that both PCMFs and

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<sup>412</sup> See, e.g., *id.* at 97–98.

<sup>413</sup> See *id.* at 91–93. This is not to say that contractors serving on the base are completely protected from violence; it is just not as likely. See, e.g., Michael Howard, *Insurgents Operate at Will in Mosul, US Says*, GUARDIAN (London), Dec. 24, 2004, <http://www.guardian.co.uk/world/2004/dec/24/iraq.michaelhoward>.

<sup>414</sup> See *supra* text accompanying notes 158–72.

<sup>415</sup> Milliard, *supra* note 74, at 76.

<sup>416</sup> *Id.* at 4–5.

mercenaries serve the same underlying purposes and are induced to participate in conflict primarily for remuneration.<sup>417</sup> These arguments are unpersuasive at first glance, because in order for the basic definition of “mercenary” to be relevant, the existence of an armed conflict is required. As previously discussed, the definitions of armed conflict and the distinctions between internal and international conflict are now obsolete in reference to the current PCMF debate.<sup>418</sup> Even if the “armed conflict” requirement were eliminated, the fundamental problem in applying the existing definition of “mercenary,” or even attempting to extend the definition to fit the PCMF dilemma would still exist—the PCMF, as a hybrid quasi-corporate, quasi-military organization, was not contemplated when the “mercenary” definition was formulated. As such, regulating PCMFs using an outdated, seemingly irrelevant framework (or a modification of the same) is intellectually dishonest and devoid of pragmatism. The PCMF industry provides an array of services so vast, as discussed in Part III, one single term would be incapable of accurately depicting and regulating PCMFs while taking into account the many nuances within the industry. Indeed, “even the U.N. Special Rapporteur for the Regulation of Mercenaries, Emanuel Ballesteros, spent five years trying to come up with a workable definition of a ‘mercenary,’ and the result was unworkable and laughably vague.”<sup>419</sup>

It is clear that because the current definition of “mercenary” is woefully inadequate in addressing PCMFs, a new legal status must be conceived which more aptly characterizes the modern day PCMF.<sup>420</sup> It is this Article’s contention that the most effective way to regulate PCMFs is to create a framework that takes into consideration the various nuances that the industry exhibits. Attempting to fit PCMFs into an existing analytical structure that was created for persons so conceptually distinct from PCMFs will be ineffective in regulating the industry in the long term. It is clear that governments are increasingly outsourcing the whole gamut of military functions to PCMFs, and therefore, it is far more pragmatic to regulate and define the industries using a

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<sup>417</sup> See, e.g., Zoe Salzman, *Private Military Contractors and the Taint of a Mercenary Reputation*, 40 N.Y.U. J. INT’L L. & POL. 853, 887–88 (2008); see also James Coleman, *Constraining Modern Mercenarism*, 55 HASTINGS L.J. 1493, 1494 (2004).

<sup>418</sup> See *supra* text accompanying notes 88–92.

<sup>419</sup> CARMOLA, *supra* note 172, at 15. Not surprisingly, PCMF industry heads also maintain that the term “mercenary” does not and should not apply to PCMFs. See Salzman, *supra* note 417, at 855. Their argument is perhaps motivated more by the political and etymological underpinnings that the term “mercenary” conveys.

<sup>420</sup> “Anyone [within the PCMF industry] who manages actually to get prosecuted under existing anti-mercenary laws actually deserves to ‘be shot and their lawyer beside them.’” SINGER, *supra* note 1, at 238.

framework that reflects the reality as it exists now, rather than extending the definition of “mercenary” to the current debate.<sup>421</sup>

### B. Corporate Self-Regulation

Many industry leaders have argued that corporate self-regulation can provide adequate accountability measures through the implementation of rigorous codes of conduct to be used throughout the industry, which will codify and embody human rights principles.<sup>422</sup> One author defines codes of conduct as “self-imposed corporate obligations for the adoption of normative, and therefore not necessarily legally enforceable, standards which are not part of the original core business objectives of the company.”<sup>423</sup>

A study performed to evaluate PCMF compliance standards in enforcing the protection of human rights by implementing internal codes of conduct, operating procedures, and other internal guidance mechanisms noted that six major PCMFs developed regulatory frameworks in anticipation of government regulation.<sup>424</sup> While the codes of conduct appear to cover all company employees, including senior management, suppliers, agents, and others, “these frameworks rarely appear to cover subcontractors.”<sup>425</sup> Ethics committees, human resources departments, or legal officials typically supervise and implement these regulations.<sup>426</sup> It is noteworthy that PCMFs that took an active role in implementing a code of conduct were “a minority in the industry.”<sup>427</sup>

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<sup>421</sup> It is also necessary to point out that international law disfavors mercenaries. As such, it is unlikely that states that employ PCMFs will agree to an extension of the mercenary definition to encompass PCMFs. Indeed, Protocol I denies mercenaries status as “combatants” and “prisoners of war,” potentially allowing for criminal prosecutions of acts, which state militaries are privileged to perform during war. *See* Govern & Bales, *supra* note 81, at 79–82.

<sup>422</sup> *See generally* JAMES COCKAYNE ET AL., BEYOND MARKET FORCES: REGULATING THE GLOBAL SECURITY INDUSTRY (2009), available at [http://www.ipinst.org/media/pdf/publications/beyond\\_market\\_forces\\_final.pdf](http://www.ipinst.org/media/pdf/publications/beyond_market_forces_final.pdf).

<sup>423</sup> NILS ROSEMAN, GENEVA CTR. FOR THE DEMOCRATIC CONTROL OF ARMED FORCES, OCCASIONAL PAPER NO. 15, CODE OF CONDUCT: TOOL FOR SELF REGULATION FOR PRIVATE MILITARY & SECURITY COMPANIES 5 (2008).

<sup>424</sup> COCKAYNE ET AL., *supra* note 422, at 45.

<sup>425</sup> *Id.* at 45–46. This is a huge problem, because much of the PCMF contract requires further subcontracting. *Id.* at 46.

<sup>426</sup> *Id.*

<sup>427</sup> *Id.* at 45. Unfortunately, most corporations, as profit-seeking entities, seek means of cutting costs and producing higher profits. Thus, codifications provide little more than lip service. Indeed, PCMFs have been known to neglect the safety and human rights of their own employees. For instance, several well-known PCMFs have circumvented safety protocols in dangerous areas to save money. ISENBERG, *supra* note 22, at 46. In one such instance, four Blackwater employees were sent to deliver kitchen equipment through Fallujah, Al

The Voluntary Principles on Security and Human Rights provide another international set of non-binding principles to delineate guidelines ensuring the respect of human rights by PCMFs operating in conflict zones.<sup>428</sup> Participants include the entire range of stakeholders: state governments, NGOs, organizations with observer status (such as the International Red Cross) and private corporations.<sup>429</sup> The effort is part of a larger movement to improve global corporate responsibility.<sup>430</sup> By definition, the principles are voluntary and must be implemented by corporations individually within their own corporate framework.<sup>431</sup> As such, the Voluntary Principles fail to provide any direct mechanism of accountability, but rather intend to assert aspirational principles.<sup>432</sup>

Additionally, the PCMF non-profit trade group, International Peace Operations Association<sup>433</sup> (“IPOA”), which currently boasts membership of fifty-five PCMFs,<sup>434</sup> provides a code of conduct to “ensure the ethical standards of [IPOA] member companies operating in conflict and post-conflict environments so that they may contribute their valuable services for the benefit of international peace and human security.”<sup>435</sup> IPOA states that its mission is to “promote high operational and ethical standards of firms active in the peace and stability operations industry.”<sup>436</sup> Despite the fact that the IPOA code includes “sections on transparency, ethics, and accountability” and provides for the dismissal of member companies if they fail to uphold the provisions of the code, the code “is not a binding document with any legal weight

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Anbar, Iraq, without adequate maps and the requisite number of people and trucks in a transport convoy. *Id.* at 54. As a result, insurgents killed the employees and publicly maimed and mutilated their bodies. *Id.*

<sup>428</sup> *Introduction*, VOLUNTARY PRINCIPLES ON SECURITY & HUM. RTS., <http://www.voluntaryprinciples.org/principles/introduction> (last visited Feb. 26, 2011).

<sup>429</sup> *Participants*, VOLUNTARY PRINCIPLES ON SECURITY & HUM. RTS., <http://www.voluntaryprinciples.org/participants/> (last visited Feb. 26, 2011).

<sup>430</sup> *Introduction*, *supra* note 428.

<sup>431</sup> COCKAYNE ET AL., *supra* note 422, at 46.

<sup>432</sup> *Id.*

<sup>433</sup> Scahill describes the name of the organization as “Orwellian” in that it denotes peace, and yet it actually profits from conflict. Jeremy Scahill, *US “Security” Companies Offer “Services” in Haiti*, REBELREPORTS (Jan. 18, 2010), <http://rebelreports.com/post/341031627/us-security-companies-offer-services-in-haiti>.

<sup>434</sup> *See ISOA Member Companies*, INT’L STABILITY OPERATIONS ASSISTANCE, <http://ipoaworld.org/eng/isoamembers.html> (last visited Feb. 16, 2011). Blackwater once was a member company, but after the Nisour Square shootings, Blackwater voluntarily withdrew its membership. SCAHILL, *supra* note 2, at 357.

<sup>435</sup> *ISOA Code of Conduct, 12–English*, INT’L STABILITY OPERATIONS ASSISTANCE, <http://ipoaworld.org/eng/codeofconduct/87-codecodeofconductv12enghtml.html> (last visited Feb. 13, 2011).

<sup>436</sup> *About ISOA*, INT’L STABILITY OPERATIONS ASSISTANCE, <http://ipoaworld.org/eng/aboutisoa.html> (last visited Feb. 16, 2011).

whatsoever.”<sup>437</sup> Furthermore, when Blackwater withdrew from IPOA following the Nisour Square incident, IPOA’s ability to regulate its membership proved impotent.<sup>438</sup>

The movement of the PCMF industry and other stakeholders to provide self-regulation that reflects human rights norms is generally laudable and certainly signifies a step in the right direction. However, it falls short of providing comprehensive solutions to the PCMF accountability gap, primarily because all conformity with international principles is purely voluntary. While this emerging trend may prevent human rights violations in the future, it provides no punitive solution to firms and contractors, should such a violation occur.

### C. *Incorporating International Law Against Corporations*

Recently, TNCs have utilized their power and influence to participate in international lawmaking settings that are traditionally reserved for nation-states, such as treaty negotiations and international institutions like the International Labor Organization.<sup>439</sup> Such participation demonstrates their positions as serious international actors that can effectively help formulate international law.<sup>440</sup> Furthermore, TNCs are increasingly developing binding international law norms through customary international law.<sup>441</sup> *Lex Mercatoria*, or the law between private merchants, has been recognized as enforceable by both domestic courts and international tribunals.<sup>442</sup> Commentators argue that because international law affords TNCs rights and privileges, it follows that TNCs should be equally responsible for ensuring accountability—particularly in the realm of international human rights.<sup>443</sup>

In response to the rising influence of TNCs, many have called for the direct international regulation of corporations. In 1998, the UN Sub-Commission on the Promotion and Protection of Human Rights established a working group on business and human rights.<sup>444</sup> The working group, which consisted of twenty-six independent experts, was commissioned to formulate regulations relating to

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<sup>437</sup> SCAHILL, *supra* note 2, at 358.

<sup>438</sup> ISENBURG, *supra* note 22, at 81.

<sup>439</sup> Bederman, *supra* note 201, at 209.

<sup>440</sup> *Id.*

<sup>441</sup> *Id.* at 209–10.

<sup>442</sup> *Id.* at 210.

<sup>443</sup> *Id.*

<sup>444</sup> Ruggie, *supra* note 200, at 3.

TNC activities to promote human rights.<sup>445</sup> In 2003, the working group produced the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (“Draft Norms”).<sup>446</sup> Despite the working group’s valiant effort, the international community failed to adopt and implement the Draft Norms.<sup>447</sup> In fact, to the contrary, the business community heavily criticized the proposed regulations.<sup>448</sup>

While the Draft Norms acknowledged that nation-states were the primary actors of international law, it recognized the growing global impact of TNCs and thus placed a heavy burden on corporations to ensure compliance with human rights. Accordingly, the Draft Norms stated, “Within their respective spheres of activity and influence, transnational corporations and other business enterprises have an obligation to promote, secure the fulfillment of, respect, ensure respect of and protect” both nationally and internationally recognized human rights.<sup>449</sup> The language essentially placed upon corporations a range of duties identical to those of states, so long as they were “[w]ithin their respective spheres of activity and influence.”<sup>450</sup> The only distinction the Draft Norms made between the state and the TNC is that the state’s duties were primary, while the TNC’s duties were secondary.<sup>451</sup>

John Ruggie, who was later appointed as the Special Representative of the Secretary General of the United Nations on Business to facilitate the development of human rights norms for TNCs, criticized the Draft Norms, stating, “Indeed, because corporations are not democratic public interest institutions they should be permitted to have such roles only in exceptional circumstances—for example, where they perform state functions.”<sup>452</sup> Carving out a narrow exception, Ruggie stated:

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<sup>445</sup> *Id.*

<sup>446</sup> *Id.*

<sup>447</sup> See Brittany T. Cragg, Comment, *Home Is Where the Halt Is: Mandating Corporate Social Responsibility for Transnational Corporations Through Home State Regulation and Social Disclosure*, 24 EMORY INT’L L. REV. 735, 746 (2010).

<sup>448</sup> Ruggie, *supra* note 200, at 4.

<sup>449</sup> United Nations, Econ. & Soc. Council, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

<sup>450</sup> Ruggie, *supra* note 200, at 9.

<sup>451</sup> *Id.* at 10.

<sup>452</sup> *Id.* at 11.

There are legitimate arguments in support of the proposition that it may be desirable in some circumstances for corporations to become direct bearers of international human rights obligations, especially where host Governments cannot or will not enforce their obligations and where the classical international human rights regime, therefore, cannot possibly be expected to function as intended.<sup>453</sup>

However, Ruggie provided no specific guidance as to what conditions would trigger such liability, the human rights laws to which TNCs specifically would be bound, and lastly, which forum would have jurisdiction to prosecute these violations (assuming the state where the violations occurred did not have the infrastructure or political will to do so).

It appears that theories advocating the direct regulation of corporations seem to be in their infancy or marginalized in legal academia. While this theory of regulation for PCMFs may be possible in the future, it appears that there is no current structure that would provide such direct legal accountability on corporations. As such, there is a need to develop a body that would adequately delineate PCMF responsibility for violations of human rights and delineate what state or international body would prosecute them.

#### *D. State Doctrines of Responsibility*

Many commentators have postulated extending doctrines of state responsibility to impute liability for human rights abuses by PCMFs to contracting states.<sup>454</sup> Both international and domestic law have long recognized the principle that states may be subject to violations of international law even where the state has not directly committed the violation.<sup>455</sup> The UN's International Law Commission, composed of thirty-four independent experts, formulated "a set of 'principles which govern the responsibility of States for internationally wrongful acts'" that were later codified in the Draft Articles on State Responsibility ("Draft Articles").<sup>456</sup> While the Draft Articles are not

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<sup>453</sup> *Ominous Outlook for the UN Norms*, EARTHRIGHTS INT'L (March 22, 2006, 7:52 AM), <http://www.earthrights.org/about/news/ominous-outlook-un-norms>.

<sup>454</sup> See, e.g., Oliver R. Jones, *Implausible Deniability: State Responsibility for the Actions of Private Military Firms*, 24 CONN. J. INT'L L. 239 (2009); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

<sup>455</sup> Ratner, *supra* note 454, at 449–90. The United States has also used the doctrine of attribution to hold Iran liable for the acts of a private corporation, where the court found there was sufficient state control over the corporation. See *McKesson v. Islamic Republic of Iran*, 52 F.3d 346 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1045 (1996).

<sup>456</sup> *Id.* at 489; see also Jones, *supra* note 454, at 272.

binding on the state, they may form customary international law. In fact, it was the intent of the international community to use the instrument to “‘influence the crystallization of the law of State responsibility through application by international courts and tribunals and State practice,’ rather than progressing to a Convention.”<sup>457</sup>

The Draft Articles divide state responsibility into two basic categories: primary and secondary rules.<sup>458</sup> “Primary rules are the substantive obligations of states in the myriad subject areas of international law, from the law of the sea to jurisdiction to the use of force.”<sup>459</sup> “Secondary rules . . . concern the attribution to the State of the violation of one of the obligations arising from the primary rules, regardless of its origin, nature, or object. These secondary rules apply to all international obligations and are generally characterized by the concept of ‘attribution.’”<sup>460</sup> Essentially, secondary rules place responsibility upon the states for acts committed by state agents.<sup>461</sup> Thus, the Draft Articles create a framework within which states may be liable for illegal actions that have been committed by another entity, so long as a nexus exists between the state and the acting agent.

Even though the Draft Articles may not be formally binding vis-à-vis a treaty or convention, imputing agent liability to states is becoming increasingly recognized in international law, as evidenced by decisions from international courts, authoritative resolutions of the General Assembly and Security Council, and state practice.<sup>462</sup> For instance, the International Court of Justice (“ICJ”) recognized the possibility of the United States being held liable for the acts of the Contras in their war against the Nicaraguan government, in *Nicaragua vs. United States*.<sup>463</sup> In its opinion, the ICJ stated:

In this respect, the Court notes that according to Nicaragua, the contras are no more than bands of mercenaries which have been recruited, organized, paid and commanded by the Government of the United States. This would mean that they have no real autonomy in relation to that Government. Consequently, any offences which they have committed would be imputable to the Government of the United

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<sup>457</sup> Jones, *supra* note 454, at 261.

<sup>458</sup> Ratner, *supra* note 454, at 489–90.

<sup>459</sup> *Id.* at 490.

<sup>460</sup> Jones, *supra* note 454, at 257–58 (emphasis omitted).

<sup>461</sup> Ratner, *supra* note 454, at 490.

<sup>462</sup> *Id.* at 501.

<sup>463</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

States, like those of any other forces placed under the latter's command. In the view of Nicaragua, 'stricto sensu, the military and paramilitary attacks launched by the United States against Nicaragua do not constitute a case of civil strife. They are essentially the acts of the United States.' If such a finding of the imputability of the acts of the contras to the United States were to be made, no question would arise of mere complicity in those acts, or of incitement of the contras to commit them.<sup>464</sup>

The ICJ held that the United States did not exert the amount of control necessary to trigger principles of attribution, requiring a showing that the United States had "effective control of the military or paramilitary operations in the course of which the alleged violations were committed."<sup>465</sup> In 1999, the International Criminal Tribunal for the former Yugoslavia ("ICTY") found that the Bosnian Serb army was a part of the larger Serbian armed forces and applied the rules of attribution, holding Serbia liable for the acts of the Bosnian Serb army.<sup>466</sup> The ICTY employed a less rigorous test and found attribution where the state "has a role in organising, coordinating or planning the military actions' of the group."<sup>467</sup> Thus, the ICTY reduced the evidentiary burden by not requiring proof of direct state control over operations of the agent to trigger attribution.<sup>468</sup> However, the court would impute liability only if the state issued "specific instructions concerning the commission of that particular act" or "publicly endorsed or approved ex post facto."<sup>469</sup> This additional element again requires a significant causal nexus between the state and agent in order to impute liability using the rules of attribution.

Professor Steven Ratner has advocated the extension of the rules of attribution to include violations by PCMFs in conflict or post-conflict zones, stating, "This theory asserts that corporate duties are a function of four clusters of issues: the corporation's relationship with the government, its nexus to affected populations, the particular human right at issue, and the place of individuals violating human rights within the corporate structure."<sup>470</sup> Essentially, using the rules of attribution, two avenues exist to impute liability to PCMFs. First, liability can be imputed if the corporate entity performs

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<sup>464</sup> *Id.* at 48.

<sup>465</sup> *Id.* at 49.

<sup>466</sup> Ratner, *supra* note 454, at 499.

<sup>467</sup> *Id.*

<sup>468</sup> *Id.*

<sup>469</sup> *Id.*

<sup>470</sup> *Id.* at 496-97.

functions traditionally considered to be so inherently governmental that the corporate entity should be considered an organ of the state.<sup>471</sup> If the activities of the corporation do not meet this burden, then the state may still be liable under the second avenue for imputation—if the state has “overall control” over the entity.<sup>472</sup> Thus, applying one of these methods of attribution, a state could potentially be liable for PCMF misconduct.

While using principles of attribution based on state responsibility may provide a potential means of accountability, the theory falls short of providing comprehensive regulation of PCMFs on several levels. First, the Draft Articles are not binding and are, in fact, expressly intended to be non-binding. As such, any legal argument based upon attribution must affirmatively demonstrate that the Draft Articles have become part of customary international law. Second, the international courts that have adjudicated claims involving state liability have employed the “overall control” test, which requires a high evidentiary burden of proof.<sup>473</sup> Third, there is no designated international body that monitors non-state actors, and although the International Criminal Court (“ICC”) may arguably exercise jurisdiction, the United States, as the largest PCMF employer, has expressly repudiated its jurisdiction.<sup>474</sup> Thus, it seems very unlikely that PCMF misconduct will be legally imputable to the employing state, and even assuming arguendo that liability were attributed, there is no enforcement mechanism, particularly in the case of the United States.

### *E. Contract Regulations*

Currently, there is a lack of transparency in the PCMF marketplace, resulting from failure to disclose contractual terms.<sup>475</sup> The majority of PCMF contracts are awarded on a no-bid basis, off the open market, while terms of the contract are kept confidential from the public, compounding layers of

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<sup>471</sup> Jones, *supra* note 454, at 269–70.

<sup>472</sup> *Id.* at 270. This would prevent states from claiming lack of knowledge of PCMF activity. Fainaru describes this institutional ignorance:

As the merc[enaries] expanded their presence, there was a kind of institutionalized ignorance that pervaded everything about them. It was as if the U.S. government desperately needed them to prosecute its failing war, but wanted to know as little as possible about who they were, what they did, and, especially, who was responsible for their actions.

FAINARU, *supra* note 58, at 24.

<sup>473</sup> *See id.*

<sup>474</sup> Jones, *supra* note 454, at 251.

<sup>475</sup> *See generally* Dickinson, *supra* note 190, at 192.

oversight and accountability issues.<sup>476</sup> In fact, only \$47 million in contracts were awarded to companies bidding on the open market, leaving billions of dollars of federal money awarded to PCMFs without any competition.<sup>477</sup> Furthermore, the Freedom of Information Act (“FOIA”)

does not apply to the actions of private contractors. Although FOIA does permit the public to request information about the terms of contracts, the contractors essentially have a veto over the release of contract terms if they contain “trade secrets and commercial or financial information obtained from a person and [are] privileged or confidential.” Thus, in many cases, the terms of the contracts are not publicly available.<sup>478</sup>

Additionally, even though requests to obtain military programs can be made, these requests are often refused under the FOIA’s national security exemption.<sup>479</sup>

PCMF contracts have taken two basic forms: “blanket purchase agreements” and “cost-plus” contracts.<sup>480</sup> Blanket purchase agreements, also known as “indefinite delivery or indefinite quantity (ID/IQ) contracts,” allow the procuring agency to enter task orders as the need arises, rather than requesting specific services when the parties form the contract, leading to open-ended, uncertain contractual terms.<sup>481</sup> The structure of these contracts obviates competitive bidding, resulting in monopolistic pricing practices.<sup>482</sup> Additionally, cost-plus contracts are “structured so that the government agrees to pay a fixed fee regardless of performance, which dramatically reduces or eliminates incentives either to provide effective performance or to control costs. Despite these serious problems with cost-plus contracts, they are widespread in military contracting.”<sup>483</sup> Because many of these contracts are awarded on a no-bid basis, resulting in the elimination of market-control

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<sup>476</sup> *Id.* The absence of transparency is so pervasive in the PCMF industry that even journalists have failed to adequately report on PCMFs, despite the sheer number of PCMFs exceeding their military counterparts. “In total, out of well over 100,000 stories dealing with the war over that period, PEJ [the Project for Excellence in Journalism] found only 248 stories dealing in some way with the topic of [PCMFs] . . . .” ISENBERG, *supra* note 22, at 13. Of these 248, twenty were op-eds, and many were the same story re-run on different outlets. *Id.*

<sup>477</sup> ISENBERG, *supra* note 22, at 21. Sadly, the twenty largest PCMF contractors “spent nearly \$300 million since 2000 lobbying and have donated \$23 million to political campaigns.” *Id.* at 20; *see also id.* at 65.

<sup>478</sup> Dickinson, *supra* note 190, at 192.

<sup>479</sup> *Id.* at 194.

<sup>480</sup> *Id.* at 200–04.

<sup>481</sup> *Id.* at 204.

<sup>482</sup> *See id.* at 201–05.

<sup>483</sup> *Id.* at 203 (emphasis omitted).

mechanisms, the potential for unscrupulous contracting practices rises tremendously.<sup>484</sup> Lastly, many contracts awarded to PCMFs are described as “black,” or completely confidential.<sup>485</sup> Not only does the public have no access to the terms of the contract, but in fact, the contract’s entire existence is off the record and there is no mechanism for any member of the public to procure information about the contract.<sup>486</sup> The problem is compounded by PCMFs further sub-contracting their duties, resulting in layers of contracts, escalating concerns of lack of accountability and oversight.<sup>487</sup>

Some commentators have advocated employing strict guidelines and requirements within contractual provisions that would directly incorporate public law values in the underlying contractual agreement.<sup>488</sup> Because contracts are the very instruments that facilitate the shift from the public realm (of military duties) to the private sector, it follows that the contract should codify the level of accountability to which a public actor would be subject.<sup>489</sup> Thus, states could use the contract as the mechanism for eliminating the disparity between the public and private spheres, by aligning interests and accountability.<sup>490</sup> In particular, one commentator, Laura Dickinson, has suggested employing comprehensive regulations through contracts:

Contracts could also require compliance with specific performance standards and include performance benchmarks, graduated penalties, oversight by contract managers or independent observers, and reporting requirements. Along with these front-end contractual terms to enhance accountability, contracts could also encourage back-end enforcement in the courts when these mechanisms fail. Contracts

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<sup>484</sup> See, e.g., *id.* at 192; SCAHILL, *supra* note 2, at 326–27.

<sup>485</sup> See Laura Rozen, *Black Contracts*, AM. PROSPECT (Dec. 10, 2005), <http://www.prospect.org/cs/articles?articleId=10719>.

<sup>486</sup> See *id.*

<sup>487</sup> Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 1010–11 (2005) (“At a Congressional hearing about Halliburton cost-overruns and inefficiencies, one of the witnesses, Marie deYoung, was an employee of Halliburton and a former army captain. Marie deYoung testified that Halliburton subcontracted to companies that in turn subcontracted, producing two or three layers of subcontracts. She concluded, “[w]e, essentially, lost control of the project and paid between four to nine times what we needed to fund that project.”).

<sup>488</sup> See, e.g., Dickinson, *supra* note 190, at 401–02. The term “public law,” as used by scholar Jody Freeman, refers to the imposition on the government, through the Constitution primarily, and by extension to entities to which the government outsources core government functions, “a host of obligations designed to render decisionmaking open, accountable, rational, and fair.” Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1302 (2003).

<sup>489</sup> Dickinson, *supra* note 169, at 199–200.

<sup>490</sup> *Id.*

could thus explicitly permit third-party beneficiary suits and even allow relevant interest groups to bring suit in some contexts.<sup>491</sup>

While Dickinson's suggestions offer an excellent step in the regulation of PCMFs, they still fall short of a comprehensive modality of accountability in several fundamental ways. First, according to PCMF expert David Isenberg, under the Worldwide Personal Protective Services contracts, the State Department employs stringent levels of qualification and vetting.<sup>492</sup> Nonetheless, despite the fact that performance standards exist, there was neither oversight nor any enforcement mechanism when PCMF misconduct occurred, demonstrating that contracts alone cannot regulate the industry.<sup>493</sup> Second, even assuming a high level of oversight and enforcement, contracts are still remain a source of civil law; therefore, any remedy owed as a result of a breach of contract will be limited to placing the parties in the same position they were prior to contract formation.<sup>494</sup> Criminal law, in contrast, is punitive and exists for the purposes of retribution, deterrence, incapacitation, and rehabilitation.<sup>495</sup> In the context of war and conflict, the potential for grave violations of human rights abuses exists, rendering contractual remedies patently inadequate. Third, using domestic contracts to regulate PCMF conduct ignores the uniquely transnational characteristic of PCMFs. Domestic contracts between the United States and a PCMF cannot provide a comprehensive solution to the problem as there are other states and non-state actors that would fall out of the purview of such a regulation.<sup>496</sup> PCMFs are hired by many different actors: the British government, the Iraqi government, and "a myriad of private firms."<sup>497</sup> Fourth, because PCMFs employ individuals worldwide, the PCMF may be unable to hold the individual contractor liable for even civil claims. Because PCMFs are not state actors, it is difficult to fathom how a PCMF would negotiate an extradition treaty or other instrument that would ensure the PCMF would be capable of producing the individual contractor. Fifth and finally, as Dickinson herself acknowledges, creating and using government agencies to perform audits, monitor performance benchmarks,

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<sup>491</sup> *Id.* at 171.

<sup>492</sup> ISENBERG, *supra* note 22, at 30–32.

<sup>493</sup> *See id.*

<sup>494</sup> *See* MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 4 (6th ed. 2010). One proviso to this proposition is that a party may, in some circumstances, receive "expectation damages," which put a party in the position he or she would have realized had the contract been performed properly. *Id.*

<sup>495</sup> *See* SUE TITUS REID, CRIMINAL LAW 4–5 (5th ed. 2001).

<sup>496</sup> AVANT, *supra* note 30, at 7.

<sup>497</sup> ISENBERG, *supra* note 22, at 29.

appoint contract managers, and provide general, overall PCMF industry oversight would call for the creation of another complicated domestic bureaucracy—one that would effectively diminish the cost savings of outsourcing and thus eliminate the benefits of privatization.<sup>498</sup>

Dickinson concedes that her solution is not intended to be comprehensive, stating, “Though the use of agreements is certainly not a panacea, contracts are an under-explored tool for enforcing public law norms when the international functions of government are transferred to private actors.”<sup>499</sup> Having mentioned where the proposal falls short, it is essential to acknowledge that any system of comprehensive PCMF regulation must use contracts as *one* of the methods of accountability. This Article’s primary argument is that contract regulation, standing alone, cannot accomplish the type of international regulation of PCMFs that is necessary. As such, Dickinson’s proposal provides the framework for one of the essential components of PCMF regulation, but it must be used in conjunction with other methods to ensure the legal accountability gap is effectively closed.

#### F. Market Regulations

Industry leaders and commentators have also suggested using the open market to regulate PCMFs: if a PCMF does not perform its duties efficiently and legally, then it will either lose its contract with the government or will be unable to renew or win another contract.<sup>500</sup> Under this premise, commentators argue that the PCMF has an added incentive to guarantee it is performing under the highest ethical standards.<sup>501</sup> This method of regulation presumes the existence of an open, transparent, and fair market, which does not exist in the PCMF context. The unfortunate reality is that PCMF contracts are often awarded on a no-bid basis with ambiguous, indefinite terms.<sup>502</sup> As one military officer explains:

First, free market capitalism requires a competitive environment, yet over the last 5 years over 40% of DoD contracts have been sole source single bidder contracts. Second, free markets rely on numerous customers, yet the military in particular or the government

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<sup>498</sup> Dickinson, *supra* note 169, at 171–72.

<sup>499</sup> *Id.* at 181.

<sup>500</sup> See Peter Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT’L L. 521, 545–46 (2004).

<sup>501</sup> See *id.* at 542–44.

<sup>502</sup> See *supra* Part V.E.

in general is often the only customer. Finally[,] free market capitalism rests on the assumption that consumers cannot pass on economic inefficiencies, but the military can pass these losses to the federal government and eventually the taxpayers.<sup>503</sup>

Because traditional market forces do not govern PCMF contracts, it is difficult to fathom how the market will be capable of providing a reliable check or regulatory function. To further evidence this unfortunate truth, one need not look further than three glaring examples of how market regulations fail to provide accountability in the PCMF context. First, despite CACI's direct and proven involvement in the Abu Ghraib scandal, the government not only failed to revoke CACI's original contract, but actually *extended* the contract.<sup>504</sup> Furthermore, in March of 2010, CACI was awarded a \$588 million indefinite delivery and indefinite quantity contract to support the U.S. Navy's Space and Naval Warfare Systems Command's command and control operations.<sup>505</sup> Between 2004 and 2010, CACI was also awarded several multi-million dollar contracts with the U.S. military and other federal government branches.<sup>506</sup> Second, following the Nisour Square shootings in 2007, the State Department announced it was renewing its contract with Blackwater for an additional year in 2008, despite strong objections from the Iraqi government.<sup>507</sup> However,

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<sup>503</sup> ISENBERG, *supra* note 22, at 21 (quoting Marc O. Hedahl, *Outsourcing the Profession: A Look at Military Contractors and Their Impact on the Profession of Arms*, INT'L SOC'Y FOR MILITARY ETHICS, <http://www.usafa.edu/isme/JSCOPE05/Hedahl05.html> (last visited Feb. 26, 2011)).

<sup>504</sup> Dickinson, *supra* note 169, at 201–02.

<sup>505</sup> *CACI Awarded Prime Contract on \$588 Million, Multiple-Award Program with U.S. Navy's Space and Naval Warfare Systems Command*, DCTECHSOURCE.COM (Mar. 4, 2010), [http://www.dctechsource.com/caci\\_awarded\\_contract\\_on\\_navy\\_space\\_and\\_naval\\_warfare\\_systems\\_command.aspx](http://www.dctechsource.com/caci_awarded_contract_on_navy_space_and_naval_warfare_systems_command.aspx).

<sup>506</sup> See, e.g., Michael Cheek, *Contract Award—CACI—\$23 Million—Army*, GOVCON WIRE (Nov. 3, 2009), <http://www.govconwire.com/2009/11/contract-award-caci-23-million-army>; Jon Greenwood, *CACI Awarded \$38 Million Task Order from U.S. Army*, GOVCON WIRE (May 15, 2009), <http://www.govconwire.com/2009/05/caci-awarded-38-million-task-order-from-us-army>; Jack Mann, *Army Renews CACI U.S. Army Battle Command Systems Products for \$100M*, GOVCON WIRE (Jan. 7, 2010), <http://www.govconwire.com/2010/01/army-renews-caci-us-army-battle-command-systems-products-for-100m>; Jack Mann, *CACI Wins \$133 Million National Security, Intelligence Community Contract*, GOVCON WIRE (Aug. 5, 2009), <http://www.govconwire.com/2009/08/caci-wins-133-million-national-security-intelligence-community-contract>.

<sup>507</sup> James Risen, *Iraq Contractor in Shooting Case Makes Comeback*, N.Y. TIMES (May 10, 2008) <http://www.nytimes.com/2008/05/10/world/middleeast/10blackwater.html>. Indeed, the Iraqi government announced that Blackwater's license would be revoked and further banned it from operating in the country. SINGER, *supra* note 1, at 253. However, there were two problems:

Blackwater, which was one of the biggest firms operating in Iraq at the time, actually had no license with the Iraqi Interior Ministry for them to revoke (illustrating the complete lack of controls and mismanagement within this space), and kicking out the company would leave the U.S. State Department in Iraq without security in the middle of a war zone. It was a classic case of over-outsourcing. The U.S. government's diplomatic security force had been hollowed out at

because the Iraqi government denied Blackwater a license to operate as a contractor company, the U.S. government decided not to renew the contract after its expiration in May of 2009.<sup>508</sup> It is important to note that the decision to allow the contract to expire was out of respect for Iraq's sovereignty, as contrasted with market forces effectuating regulations. This is clear, as Blackwater is likely to receive another multi-million dollar contract in Afghanistan.<sup>509</sup> Third, despite repeated allegations of fraud and abuse—including a lawsuit filed by the U.S. government alleging overcharges<sup>510</sup> and negligence in the treatment of water<sup>511</sup> and the installation of electrical systems, which resulted in the electrocution and death of two U.S. servicemen<sup>512</sup>—the government awarded KBR a \$2.8 billion contract for support work in Iraq in March of 2010.<sup>513</sup> The facts are indisputable: market forces are simply ineffective to provide a regulatory function and are completely incapable of providing accountability—“[e]xcessive use of private contractors erodes checks and balances, and it substitutes market transactions, controlled by the executive branch, for traditional political mechanisms of accountability.”<sup>514</sup>

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the same time the need for it expanded . . . . The embassy was so reliant on the company that it had no back-up plan for what to do without them.

*Id.*

<sup>508</sup> *U.S. Nixes Blackwater Contract For Iraq*, CBS NEWS (Jan. 30, 2009), <http://www.cbsnews.com/stories/2009/01/30/iraq/main4764933.shtml>. Prior to 2009, the State Department had continued to employ Blackwater in Iraq, stating that the contract was between the U.S. government and Blackwater and thus did not require an Iraqi license. ISENBERG, *supra* note 22, at 79.

<sup>509</sup> Spencer Ackerman, *Systematic Failures May Give Blackwater Another Afghanistan Contract*, WASH. INDEP. (Mar. 8, 2010, 6:00 AM), <http://washingtonindependent.com/78537/systemic-failures-may-give-blackwater-another-afghanistan-contract>. Furthermore, there is evidence that there is a Blackwater presence in Pakistan as well. Declan Walsh & Ewen MacAskill, *Blackwater Operating at CIA Pakistan Base, Ex-official Says*, GUARDIAN.CO.UK (Dec. 11, 2009, 7:26 PM), <http://www.guardian.co.uk/world/2009/dec/11/blackwater-in-cia-pakistan-base>.

<sup>510</sup> Devlin Barrett, *US Sues Contractor KBR Over Iraq Bills*, ABC NEWS (Apr. 1, 2010), <http://abcnews.go.com/Business/wireStory?id=10263216>.

<sup>511</sup> Dana Hedgpath, *KBR Faulted on Water Provided to Soldiers*, WASH. POST (Mar. 11, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/10/AR2008031002487.html>.

<sup>512</sup> Kimberly Hefling, *KBR Gets \$35M Contract Despite Electrocutions*, ARMY TIMES (Feb. 7, 2009, 5:03 PM), [http://www.armytimes.com/news/2009/02/ap\\_kbr\\_contract\\_020709/](http://www.armytimes.com/news/2009/02/ap_kbr_contract_020709/).

<sup>513</sup> Sananda Sahoo, *Lucrative KBR Contracts Unaffected by Troop Drawdown*, IPS N. AM. (Apr. 7, 2010), <http://ipsnorthamerica.net/news.php?idnews=2978>.

<sup>514</sup> ISENBERG, *supra* note 22, at 21.

*G. Extension of the Military Extraterritorial Jurisdiction Act*

The MEJA was enacted in November 2000, granting the United States jurisdiction over members of the military for felonies committed abroad, punishable by incarceration for over a year, “if the conduct had been engaged in within the special maritime and territorial jurisdiction.”<sup>515</sup> As previously mentioned, the SMTJ limits extraterritorial jurisdiction to “any place or residence in a foreign state used by missions or entities of the U.S. government with respect to offenses committed by or against a national of the United States.”<sup>516</sup> Therefore, the conduct must occur on a military base or property owned or used by another recognizable U.S. entity.<sup>517</sup> In response to the jurisdictional gap over the contractors in the Abu Ghraib scandal, Congress amended the MEJA in 2004 to extend jurisdiction over those “accompanying the Armed Forces outside the United States,”<sup>518</sup> including civilian contractors directly employed by the Department of Defense or employed by another federal agency “supporting the mission of the Department of Defense overseas.”<sup>519</sup>

While the 2004 MEJA amendment attempts to include language to broaden the scope of U.S. extraterritorial jurisdiction, it still falls short in several fundamental ways. First, it is unclear what type of factual showing is necessary to demonstrate that contractors were employed in support of “the mission of the Department of Defense” where another federal agency has employed the PCMF.<sup>520</sup> Second, the stringent geographic limitations still exist, ignoring that many contractors engage in activities in zones outside of the SMTJ.<sup>521</sup> Third, extraterritorial jurisdiction is limited to those crimes which carry a punishment for a year.<sup>522</sup> Fourth, interestingly,

MEJA was never designed to apply to military/security missions or the context of conflict zones (its point of origin was a family abuse

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<sup>515</sup> 18 U.S.C. § 3261 (2006).

<sup>516</sup> Giardino, *supra* note 104, at 715; *see* Special Maritime and Territorial Jurisdiction Statute, 18 U.S.C. § 7 (2006).

<sup>517</sup> *See* Special Maritime and Territorial Jurisdiction Statute, 18 U.S.C. § 7 (2006).

<sup>518</sup> 18 U.S.C. § 3267(2) (2006).

<sup>519</sup> 18 U.S.C. § 3267(1)(A)(i)(II) (2006).

<sup>520</sup> *See* United States v. Gleason, 2009 U.S. Dist. LEXIS 24800 (D. Or. Mar. 23, 2009) (finding that the defendant’s employment was related to supporting the mission of the Department of Defense, but declining to lay out a test or enumerate specific factors to determine if the action supported the mission).

<sup>521</sup> *See* Craig Jordan, *Who Will Guard the Guards? The Accountability of Private Military Contractors in Areas of Armed Conflict*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 309, 319–20 (2009).

<sup>522</sup> 18 U.S.C. § 3261 (2006).

case at a US base in Germany) and has proven to be pretty much mythical in application to the contractor world (the only MEJA case activated was a domestic dispute at a base in Turkey).<sup>523</sup>

For these reasons, commentators have argued that MEJA, even in its amended form, is incapable of regulating PCMF conduct adequately.<sup>524</sup>

Some commentators have suggested amending MEJA to broaden the scope of extraterritorial jurisdiction.<sup>525</sup> This may be a viable option if implemented in conjunction with a broader international obligation to prosecute PCMF misconduct. Currently, the MEJA grants discretionary extraterritorial jurisdiction, but does not require prosecution.<sup>526</sup> Furthermore, due to poor governmental oversight over PCMFs and the lack of adequate reporting by PCMFs for misconduct, there is no mechanism for collecting data in order to prosecute.<sup>527</sup> The MEJA could be used as a vehicle for domestic jurisdiction, but not without significant changes. Further, there must be international commitments requiring prosecution of PCMFs by contracting states if the MEJA is to be effective.

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<sup>523</sup> Peter Singer, *Frequently Asked Questions on the UCMJ Change and its Applicability to Private Military Contractors*, BROOKINGS INST. (Jan. 17, 2007), [http://www.brookings.edu/opinions/2007/0112defenseindustry\\_singer.aspx](http://www.brookings.edu/opinions/2007/0112defenseindustry_singer.aspx). Specifically, MEJA was written after a man sexually abused his thirteen-year-old daughter on a military base in Germany. CARMOLA, *supra* note 172, at 114. The man was a civilian, and his conviction was overturned because U.S. courts lacked jurisdiction over crimes committed by civilians on U.S. bases abroad. *Id.* MEJA was established to enable “the prosecution of non-military family members on US bases by allowing investigators . . . and prosecutors to apply US criminal law outside of the territorial US.” *Id.*

<sup>524</sup> David Isenberg, *A Government in Search of Cover: Private Military Companies in Iraq*, in FROM MERCENARIES TO MARKET 82, 87–88 (Simon Chesterman & Chia Lehnardt eds., 2007). Peter Singer evaluates the problems with the MEJA, introducing the hypothetical case of a drunk contractor killing an Iraqi. Singer, *supra* note 523. While Singer calls this case hypothetical, a drunk Blackwater contractor actually did kill the Iraqi security guard of the Vice President of Iraq. See SCAHILL, *supra* note 2, at 10. Singer notes some of the difficulties associated with MEJA:

Some US attorney would have had to decide to prosecute the accused, even though the victim and accused wasn’t in his district, fly out to the base in Iraq multiple times, try to track down and depose witnesses (who most likely would have been deployed all over the place to avoid him), and then sell it to a jury back in the US, likely spending his entire yearly budget on one case when he is actually being judged by his bosses on his prosecutions of a lacrosse team, gang violence, or whatever. They would decide it’s a loser and most likely bury it in an “open file” somewhere. And this is if there were no political pressures, and the accused was actually in custody, which military folks haven’t been putting contractors in when they know of such events.

Singer, *supra* note 523.

<sup>525</sup> See generally Jordan, *supra* note 521.

<sup>526</sup> See SINGER, *supra* note 1, at 239.

<sup>527</sup> See generally *id.* at 152–54.

### H. *Creation of an International Body*

PCMF expert Peter Singer advocates the creation of an international body to regulate PCMFs.<sup>528</sup> He suggests gathering a body of international experts that would represent the interests of all stakeholders and convene “a special task force on the industry under the auspices of the UN Secretary General and his Special Rapporteur on Mercenarism.”<sup>529</sup> Further, the task force could provide overall regulatory functions by auditing and vetting PCMFs and thus implicitly designating them as “sanctioned businesses.”<sup>530</sup> Additionally, the task force could be charged with reviewing contracts and armed with the right of refusal—which would eliminate the possibility of PCMFs working for “unsavory clients or engag[ing] in contracts that are contrary to the public good.”<sup>531</sup> If PCMFs violated contractual terms, the task force could implement some measure of punishment.

Singer’s task force recommendation provides the first real step in regulating PCMFs. Because this Article recognizes that the PCMF issue is an international problem requiring an international solution, it follows that the regulation too must, on some level, be based on international consensus. The task force would serve as the underlying basis for this Article’s regulatory framework and would be the primary mechanism by which PCMF status would be explicitly designated and the corresponding legal obligations attached.

## VI. A STATUS-BASED FRAMEWORK THAT PROVIDES PCMF ACCOUNTABILITY AND PROTECTION

“Perhaps no function of government is deemed more quintessentially a ‘state’ function than the military protection of the state itself. Indeed, scholars of privatization in the domestic sphere have often assumed that privatization of the military is one area where privatization does not, or should not, occur.”<sup>532</sup>

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<sup>528</sup> *Id.* at 241.

<sup>529</sup> *Id.*

<sup>530</sup> *Id.*

<sup>531</sup> *Id.*

<sup>532</sup> Dickinson, *supra* note 169, at 147. *Washington Post* journalist Steve Fainaru described the PCMF situation on the ground as follows:

The mercs ran with M-4s and 9mm Glocks, the same caliber weapons used by U.S. troops. They occupied the same battle space as the military and ran the same bomb-seeded roads. But, unlike the troops, who operated under the Uniform Code of Military Justice, a legal framework dating back to the Second Continental Congress, the mercs were untouchable. None of the prevailing

This point becomes even more poignant when distinguishing PCMFs and the military's discipline and organizational cultures.<sup>533</sup> Militaries "have distinctive institutional cultures that can impose strong internal sanctions for wrongdoing. This institutional culture is very different from that found in [the PCMF industry]."<sup>534</sup> Furthermore, militaries are rigidly hierarchical organizations that transcend ordinary civilian or traditional business-model hierarchies.<sup>535</sup> The military possesses its own internal justice system, as codified by the UCMJ, to enforce the standards of conduct with stringent punitive measures, if necessary.<sup>536</sup> However, there is no parallel criminal or civil system with regard to PCMFs, which, in many ways, are serving the same function and performing the same tasks. Thus, military service people are prosecuted and punished for conduct identical to that of their PCMF counterparts, who are accorded complete immunity.<sup>537</sup> In essence, a privatized military force has been created, which, in practical terms, is unrestrained by the laws governing warfare and human rights, leading to the potential "to undermine the culture of institutional accountability that does exist."<sup>538</sup> The irony, therefore, is that the environment within which PCMFs operate is by-and-large identical to that of the military, yet PCMFs are not subject to any of the stringent regulations to which the

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laws—Iraqi law, U.S. law, the UCMJ, Islamic law, the Geneva Conventions—applied to them. Shortly after he was hired by Triple Canopy, Chuck Sheppard, a former Ranger, began to wonder what would happen if he shot someone. What if there was a dispute? What if an Iraqi tried to press charges? Sheppard said Triple Canopy executives reassured him. "We were always told, from the very beginning, if for some reason something happened and they were trying to prosecute us under Iraqi law, they would put you in the back of a car and sneak you out of the country in the middle of the night. It was comforting. But we never saw nothin' on paper."

FAINARU, *supra* note 58, at 19.

<sup>533</sup> This contrasts greatly with their military counterparts, who are subject to a strict code of conduct. The UCMJ has an extensive punitive code, establishing punishments from seemingly innocuous conduct, such as "disrespect toward superior commissioned," to more serious offenses such as burglary, rape, and murder. *See* Uniform Code of Military Justice, 10 U.S.C. §§ 889, 929, 920, 918 (2006). In contrast, civilian contractors are not subject to any specific code and have in fact escaped liability in cases identical to those in which military personnel have faced stringent penalties. *See* Singer, *supra* note 523.

<sup>534</sup> Dickinson, *supra* note 169, at 208. *See generally* Uniform Code of Military Justice, 10 U.S.C. §§ 801–926 (2006).

<sup>535</sup> Dickinson, *supra* note 169, at 208.

<sup>536</sup> *Id.* at 208–09.

<sup>537</sup> Scott Horton, *Security Contractors Immune from Torture Charges, Judges Rule*, HARPER'S MAG. (Sept. 14, 2009, 10:42 AM), <http://www.harpers.org/archive/2009/09/hbc-90005706> (discussing the civil and criminal immunity of CACI and Titan contractors for their misconduct in the Abu Ghraib prisons); *Prosecutions and Convictions: A Look at Accountability to Date for Abuses at Abu Ghraib and in the Broader "War on Terror,"* SALON.COM (Mar. 14, 2006, 4:03 AM), [http://www.salon.com/news/abu\\_ghraib/2006/03/14/prosecutions\\_convictions](http://www.salon.com/news/abu_ghraib/2006/03/14/prosecutions_convictions) (discussing the charges and convictions of members of the military in relation to the Abu Ghraib scandal).

<sup>538</sup> Dickinson, *supra* note 169, at 211.

military are subject. As PCMF expert David Isenberg noted, “[T]he difference between the private and public soldiers appears to revolve largely around the form of employment contract.”<sup>539</sup> Indeed, perhaps more disconcerting is that PCMFs often recruit directly from active military servicemen.<sup>540</sup> To date, the international community, through its failure to regulate, has simply ignored the growth and evolution of this industry, while contracting states have taken advantage of this rather fortuitous loophole.<sup>541</sup>

International and domestic law must adapt to bring PCMFs within the purview of a legal framework that would accord both accountability and protection based on assigning PCMFs a definitive legal status. The current legal no-man’s-land is neither tenable nor pragmatic—leaving crimes and torts committed by PCMFs unpunished only opens the floodgates for graver human rights violations. Further, the absence of any legal consensus regarding PCMFs results in uncertainties and inconsistent results. For example, which states have jurisdiction to prosecute, what laws govern misconduct, and to whom—or alternatively, to what—is the PCMF responsible? The international community must provide definitive answers to these looming questions. The PCMF conundrum is an international problem requiring an international solution analogous to the treaties, conventions, and declarations governing warfare and human rights. “Whatever the legal niceties, war in the final analysis comes down to the regulated use of force.”<sup>542</sup> PCMFs operate in conditions similar to warfare, with the potential for committing grave human rights, but fall within a

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<sup>539</sup> ISENBERG, *supra* note 22, at 16.

<sup>540</sup> *Id.* at 60. A retired U.S. Army officer wrote:

It’s fundamentally wrong to let contractors go head-hunting among our troops in wartime. . . . You get stuck with the training and security-clearance costs; the soldier lured to the private sector gets his salary doubled or tripled—then the contractor adds in a markup for his multiple layers of overhead costs and a generous profit margin, and bills the taxpayers.

*Id.* A U.S. Marine noted, “[T]he military is essentially buying out its most experienced soldiers and luring them out of the active ranks . . . with rich contracts, even as it desperately seeks new recruits.” *Id.* at 62.

<sup>541</sup> In 2007, Congressman Henry Waxman addressed the impunity issue with regard to Blackwater in a House of Representatives hearing, stating:

New documents indicate that there have been a total of 195 shooting incidents [in a two-year span] involving Blackwater forces since 2005. Blackwater’s contract says the company is hired to provide defensive services, but in most of these incidents it was Blackwater forces who fired first. We have also learned that 122 Blackwater employees, one seventh of the company’s current work force in Iraq, have been terminated for improper conduct.

CARMOLA, *supra* note 172, at 100.

<sup>542</sup> Charles Garraway, ‘To Kill or Not to Kill?’—Dilemmas on the Use of Force, 14 J. CONFLICT & SECURITY L. 499, 499 (2009).

loophole of accountability. Thus, it is crucial to implement an international regulatory framework coupled with a domestic enforcement mechanism.

The majority of scholarship regarding PCMFs attempts to include PCMFs in a pre-existing legal definition or body of law.<sup>543</sup> While all of these theories are helpful in understanding just how muddled the law governing PCMFs has become, none of them, taken individually, provides a holistic analytical approach. Unfortunately, the majority of the opinions try to fit a square into a circle by attempting to include the vast, relatively amorphous area of PCMFs into existing legal avenues of relief. Although this may provide an interim solution, it fails to create a reliable legal framework that will yield consistent results. Therefore, this Article argues for the creation of an entirely new framework, building upon many of the theories currently suggested to regulate PCMFs. In many ways, this framework is a conglomerate of existing theories, with the addition of clearly demarcated status-based definitional accountability. The distinguishing elements between this framework and existing theories are both the addition of defined legal statuses based on the specific functions PCMFs are performing, and the extent to which the framework will be internationally and domestically implementable. Admittedly, this framework will not and cannot address every possible legal issue that can arise involving PCMFs, but it will provide a holistic approach that can serve as a starting point for the implementation of a coherent body of law governing PCMFs. While one might object that these issues could be resolved using a scalpel, not a sledgehammer, based on the current schizophrenic legal approach addressing PCMFs, a systematic overhaul would be more logical and cohesive.

#### A. *Multilateral Treaty and Enforcement: Nuts and Bolts*

This Article suggests the creation of a comprehensive multilateral treaty that defines the status of PCMFs, delineates jurisdiction, and provides for mandatory domestic enforcement in response to any violations of the treaty norms that occur. Since PCMFs serve as gap-fillers for military operations, there must be a legal gap-filler that can adequately regulate the industry in the same way that state militaries self-regulate.<sup>544</sup> As previously discussed, Singer

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<sup>543</sup> See *supra* Part II.

<sup>544</sup> Such a gap-filler would eliminate the problem of PCMF accountability.

If you are a U.S. soldier and you hurt an Iraqi civilian and that becomes known, you will be court-martialed. But if you are a contractor and you kill an Iraqi civilian and that becomes

has proposed the creation of a public international body (“PIB”), “formed under the auspices of the U.N. Secretary General’s Special Rapporteur on Mercenarism.”<sup>545</sup> Ideally, the PIB could be created by formulating a multilateral treaty with a self-executing mechanism in signatory states. Building upon Singer’s proposal and supplementing theories postulated by others, this Article refines the role of the PIB and the corresponding state responsibilities. The PIB would be led by a task force that includes members from all of the various stakeholders: state actors, human rights NGOs, PCMFs themselves, as well as experts on international human rights law and humanitarian laws.<sup>546</sup> The task force would be responsible for: (1) creating status-based categories defining the type of PCMF; (2) determining codes of acceptable conduct, accountability, and protection relative to ascribed status; (3) registering, auditing, and providing ongoing oversight of PCMF activities; and (4) providing a mandatory requirement for contracting states to prosecute PCMFs in cases of misconduct.

### *B. Creating Categories Defining the Type of PCMF: Addressing Status*<sup>547</sup>

Any privately held corporation that performs either direct or ancillary duties in furtherance of warfare, nation-building, peace-keeping, or maintenance in a conflict-ridden area on behalf of either state or non-state actors would be covered generally as a PCMF. Therefore, to meet the general definition of a PCMF and trigger application of the treaty, a corporation must meet three elements: the corporation must be (1) a privately held corporation; (2) performing direct or ancillary duties; (3) in furtherance of the

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known, you will be sent home. And then you can come back the following week and work for a different contractor.

IRAQ FOR SALE, *supra* note 157; *see also* SCAHILL, *supra* note 2, at 22–23. The two military operatives involved in the Abu Ghraib scandal were sentenced collectively to eighteen years. IRAQ FOR SALE, *supra* note 157. The civilian contractors from whom the military had been receiving orders were not charged or penalized in any way. *Id.* Furthermore, a 2008 study conducted by Human Rights First found the following:

To date more than 60 military personnel have been court-martialed in the deaths of Iraqi citizens and more are under investigation. In contrast not one private contractor implicated in similar crimes in Iraq has been prosecuted . . . . The Justice Department’s neglect has created a ‘shoot first, ask questions later—or never’ attitude amongst some contractors.

CARMOLA, *supra* note 172, at 99 (citation omitted).

<sup>545</sup> Singer, *supra* note 500, at 545.

<sup>546</sup> *Id.* Being overly inclusive with the stakeholders ensures fairness, checks and balances, and transparency encompassing all countervailing interests. *See id.* at 545–46.

<sup>547</sup> It is essential to note that these categories have not been definitively defined in the current scholarship. This status-based definitional analysis has grown out of Singer’s descriptions of PCMFs.

aforementioned activities. Once a corporation meets the broad definition of a PCMF, the subcategory of the PCMF's legal status should be determined. As discussed at length in Part III of this Article, there are six general categories of PCMFs that should be defined as follows:

(A) Military Provider Firm: A firm that provides (a) direct engagement in (b) armed conflict between (c) states or non-state actors, (d) supplies weaponry or utilizes weaponry supplied by the employer, and (e) is physically present and actively combating in warfare.

(B) Military Security Defense Firm: A firm that provides (a) security and defense of (b) structures, vehicles (air, land, and sea), or persons, (c) has access to or is required to carry firearms, and (d) in furtherance of these duties, has a reasonable expectation of utilizing firearms, ammunition, or other weaponry in defense of the mission.

(C) Military Intelligence Firm: A firm that procures intelligence through (a) direct or indirect interrogation, (b) aerial or ground surveillance, or (c) decoding and analyzing data.

(D) Military Consultant Firm: A firm that provides (a) advice, expertise, analysis (b) directly related to offensive strategy or defensive security (c) covering intelligence, combat, or security (among other things), including both consultative and physical training and support, and (d) is not physically present in the implementation thereof.

(E) Military Logistics Firm: A firm that provides (a) logistical support including, but not limited to, transportation, cargo delivery, and supply delivery, (b) in support of military or peacekeeping operations, but (c) is not directly engaged in these operations, and (d) is on reasonable notice of potential lethal attacks or conflict-related violence.

(F) Military Support Firm: A firm that provides (a) ancillary support to the client's mission (b) including, but not limited to, construction, overall maintenance of facilities, and dining, (c) with no reasonable notice of being subject to conflict-related violence.

C. *Determining Codes of Acceptable Conduct, Accountability, and Protection*<sup>548</sup>

The PIB must codify legal accountability to ensure PCMF compliance with international law norms; it does not have to reinvent the wheel. In fact, it would be far more effective and efficient if the PIB were to simply incorporate established customary international law, conventions governing the laws of war, treaties regarding human rights law, and judgments by international criminal courts or tribunals on war crimes (such as judgments of the ICC). However, incorporation of the laws of war should include one caveat—while many of the laws of war are triggered only by the recognition of an “armed conflict,” in the case of the PCMF activity, this restriction should be lifted to better reflect the environment in which they operate.<sup>549</sup> This body of law will include law that is accepted and applied globally, essentially providing the comprehensive international law governing warfare and human rights. Ideally, the codification will also include provisions on safety, labor, and employment standards for the protection of the individual contractors of the PCMF.<sup>550</sup> Rather than building anew, the codification will simply reflect widely established international law, but it will apply the law appropriately to the PCMFs on the basis of status. Thus, the degree and range of accountability will be determined by the PCMFs’ assigned category.

In this context, it is helpful again to refer to the “tip of the spear” analogy. Those PCMFs engaging in traditional military combat should be bound to follow the same conduct required by states, as codified by international laws governing warfare and human rights, and should also enjoy “combatant” status if captured.<sup>551</sup> Thus, contractors would not be tried criminally for conduct that the military would be privileged to perform.<sup>552</sup> In fact, being accorded this status would protect contractors from violating “the law of war itself, because only combatants are lawfully allowed to engage in hostilities.”<sup>553</sup> MPFs,

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<sup>548</sup> Because to date, no status-based definitions exist, it follows that the accountability discussed in this Article has not been identified in contemporary scholarship. However, using Singer’s “tip of the spear” approach, this Author has chosen to assign legal accountability and liability to PCMFs based on their resemblance to state-based militaries.

<sup>549</sup> See generally Brooks, *supra* note 158.

<sup>550</sup> See ISENBERG, *supra* note 22, at 40–41 (discussing pay discrimination between employees working in industrialized nations and those working in developing nations).

<sup>551</sup> Ironically, the Labor Department does not distinguish between logistics and support contractors, and military security and defense contractors. *Id.* at 14.

<sup>552</sup> See Shawn McCormack, *Private Security Contractors in Iraq Violate the Laws of War*, 31 SUFFOLK TRANSNAT’L L. REV. 75, 98 (2007).

<sup>553</sup> *Id.*

MSDFs, and MIFs should also be bound by the same laws, since these operations are also traditionally associated with state militaries and because of the high likelihood of engaging in violent combat and discharging firearms or other weaponry. While MIFs may not be physically present during violent conflict per se, the capacity for violating human rights exists, as MIFs are capable of exerting complete control over those interrogated, and thus could potentially circumvent traditional rules of engagement for prisoners of war. MCFs, which provide off-the-field expertise, should be accountable for any training that would be a per se violation of human rights—such as teaching methods of torture, even if there were no reasonable belief that the client intended to employ torture. Additionally, MCFs should be subject to this scrutiny if any human rights violations result directly from the MCF training and a sufficient nexus exists between the training and the conduct complained of. This scrutiny would protect MCFs generally, because any military training could foreseeably result in a human rights violation. For instance, if a client sought training for the pursuit of a violation of human rights (such as ethnic cleansing or genocide) and the MCF had either actual or constructive knowledge of the client's underlying purpose, the MCF would be liable as a tacit participator for any violation of international humanitarian law. Willful ignorance would not provide an adequate defense.

Both MLFs and MSFs are treated significantly differently from the other firms because their roles are distinct from any conflict-related violence. Thus, neither MLFs nor MSFs should be subject to the laws governing warfare. However, because MLFs are performing their duties in inherently dangerous conditions, they should be afforded prisoner of war status and all associated protections.<sup>554</sup> Lastly, because MSFs are typically so distant, theoretically and practically, from the violence of conflict zones, they should simply be treated as civilians without any special accountability or protective mechanisms.

#### *D. Registering, Auditing, and Providing Ongoing Oversight and Assistance*

The PIB must require any company falling within the broad definition of a PCMF to register the corporation as such.<sup>555</sup> If a company fails to register itself as a PCMF and attempts to perform in that capacity, there should be a presumptive violation of the treaty's provisions. Furthermore, the contracting

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<sup>554</sup> This status is in contrast to mercenaries, who are offered no such protection. See Govern & Bales, *supra* note 81, at 80.

<sup>555</sup> Singer, *supra* note 500, at 544–49.

client should be held equally liable for contracting with an unregistered PCMF. Registration must include the names of the CEO, COO, Board of Directors, and all other material positions.<sup>556</sup> This will allow the PIB to properly vet any industry insider and guarantee that the PCMF is a legitimate corporation that respects human rights.<sup>557</sup> Additionally, vetting will prevent a corporation that has been barred from performing any PCMF activities from simply changing its name or reincorporating in a different state to rebrand itself.<sup>558</sup> This registration process will ensure a heightened level of transparency and accountability. The registration information must include a detailed description of the services the corporation is offering in the global PCMF market. Obviously, the PCMF cannot provide a comprehensive and thorough description of every service, given that this may impinge upon trade secrets or reduce competitive advantage. Nonetheless, the corporation should describe its services and request assignment to the corresponding category. If the PCMF wishes to exceed its scope, it must file an amendment to the registration. Without an amendment, a PCMF performing duties without requisite authorization will be penalized and potentially risk losing its privilege to perform as a PCMF.

One of the components of registration should be that PCMFs pay annual dues to maintain membership. This requirement would provide the necessary funding for the operational expenses of the PIB. A dues requirement is by no means an extraordinary measure; professional organizations (such as state bar associations and medical licensing boards) often require membership dues as a prerequisite to participating in any professional activity. Furthermore, serving partially in the scope of a professional organization, the PIB should ensure that

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<sup>556</sup> See *id.* at 545–46 (mentioning executives).

<sup>557</sup> *Id.* Regulation will also serve to regulate the corruption that has been pervasive between governments and the PCMFs. “Blackwater has recruited key individuals from the government and now Blackwater is getting key governmental contracts. You do the math.” IRAQ FOR SALE, *supra* note 157. A notorious firm, Custer Battles, was awarded a \$16 million contract to guard Baghdad’s airport. ISENBURG, *supra* note 22, at 87. The company essentially was a sham corporation with no experience in security, and which overcharged the government and was later sued for fraud. *Id.* at 87–91.

<sup>558</sup> Blackwater, in an attempt to rebrand itself from its bad publicity, renamed the company Xe and changed its logo. *Blackwater Changes Its Name to Xe*, N.Y. TIMES, Feb. 13, 2009, at A10; August Cole, *U.S. News: Blackwater Puts on a New Public Face*, WALL ST. J., Feb. 14, 2009, at A6. KBR moved its headquarters to Dubai and there is speculation that it will reincorporate there. Michelle Tsai, *Halliburton Says Salaam: How Much Will Halliburton Save in U.S. Taxes?*, SLATE (March 12, 2007, 6:46 PM), <http://www.slate.com/id/2161652>. Vetting a corporation means ensuring the PCMF is also vetting its employees, using uniform and stringent standards. Currently, “there is no uniform government requirement for vetting of contractors.” ISENBURG, *supra* note 22, at 106. There have been many instances of contractors being fired by one company in Iraq, only to be rehired by another, due to lack of proper vetting procedures. *Id.* at 141.

PCMFs: (a) are trained in the laws governing warfare and human rights; (b) have implemented corporate codes of conduct reflecting their legal obligations; (c) have stringent employment background checks to guarantee that the applicant has not worked for a state military for at least one year—reducing the potential for active military to leave for the private sector—and also ensure the applicant has not been convicted of any violent crimes or dishonorably discharged from the military; (d) have a system of reporting and investigating any alleged PCMF misconduct, both internally and externally, while ensuring whistleblower protection; and (e) have a clearly demarcated hierarchical chain of accountability and punishment for misconduct.

Once a company has been registered to operate as a PCMF, the company must submit any potential contract for authorization by the PIB.<sup>559</sup> In fact, the international community should not consider any contract valid unless and until it is authorized. Again, failure to follow proper protocol should result in penalties or loss of PCMF status. This contract authorization requirement would provide the following basic functions: first, the PIB can ensure that the PCMF is not contracting with questionable actors for a despicable purpose; second, the PIB can ensure that, within the contract, the PCMF has codified all of the international human rights norms; third, the PIB can allocate liability by requiring all contracts and subcontracts to be registered; and fourth, the PIB would be guaranteed that the PCMF is in fact capable of performing the services offered effectively.<sup>560</sup> Finally, and most importantly, this requirement will provide transparency and serve to effectively eradicate no-bid, GSA, or “black” contracts, and will provide oversight to dubious sub-contracts.<sup>561</sup>

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<sup>559</sup> SINGER, *supra* note 1, at 241–42. This will also provide an oversight mechanism, ensuring that PCMFs are actually capable of providing the services they are offering. *Id.* At the advent of the Iraq war, many PCMFs began popping up, marketing services that they were not equipped to provide using a reasonable standard of care. IRAQ FOR SALE, *supra* note 157. For instance, CACI and Titan, the two companies involved in the Abu Ghraib scandal, were hired to provide intelligence services. *Id.* The contractors were supposed to translate and interrogate. *Id.* In many cases, the contractors did not have a sufficient grasp of the Arabic language and thus were unable to effectively communicate with detainees. *Id.* The result was contractors who tortured detainees and provided incorrect military intelligence, which was later relied upon. *Id.*

<sup>560</sup> On March 30, 2004, four Blackwater contractors were killed and their bodies were mangled when they were attempting to transport kitchen materials from Baghdad to Fallujah. SCAHILL, *supra* note 2, at 162, 166–68. The contractors were not given appropriate directions to reach their destination, they were not adequately armed or manned, and their vehicles did not have any bulletproofing. *Id.* at 160–63. When the families of the Blackwater employees tried to sue for wrongful death, it became evident very quickly that Blackwater had entered into various layers of subcontracts to the extent that it was unclear from which entity Blackwater had actually received the authority to transport the goods. *Id.* at 155–68. If the PIB has authorized all of the contracts and subcontracts, investigations and prosecutions to determine liability will be much easier and more transparent.

<sup>561</sup> See *supra* Part V.E.

Additionally, the PIB should perform an auditing function to ensure that PCMFs are properly accounting for all their contracts and are not engaging in any improper conduct or off-the-record contracts.<sup>562</sup> Again, idiosyncrasies in accounting could lead to sanctions if there were grounds to suspect impropriety.<sup>563</sup> Generally, the PIB should provide overall oversight and also ongoing training, when necessary, to ensure that PCMF conduct rises to the level accepted by international norms, particularly in the area of human rights. The PIB is in a better position to provide overall oversight because it would not have a conflict of interest. In contrast, often times state governments will be beholden to certain corporate special interests and thus in less of a position to provide this function effectively.<sup>564</sup> Indeed,

[s]ometimes national governments, because of domestic political pressures, realize that international regulation of a transnational activity or the settlement of a cross-border dispute by a supranational authority (an international institution, tribunal, or private body) may offer superior outcomes. Elite associations in national jurisdictions (whether bureaucrats or interest groups) may favor the “elevation” of an issue or matter to an international mechanism precisely to avoid or subvert domestic legislative or judicial bodies that might have been “captured” by more parochial interests.<sup>565</sup>

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<sup>562</sup> Halliburton is currently under investigation for charging the government \$1.8 billion for meals and services it never provided. IRAQ FOR SALE, *supra* note 157. Also, KBR has charged the government exorbitant rates under a cost-plus contract—\$45 for a six-pack of soda and \$100 per bag of laundry. *Id.* Cost-plus contracts pay a contractor for all of its actual expenses and then allow an additional payment for the contractor to make a profit. *Defense Industrial Initiatives Current Issue: Cost Plus Contracts*, CTR. FOR STRATEGIC & INT’L STUD., [http://csis.org/files/media/isis/pubs/081016\\_diiig\\_cost\\_plus.pdf](http://csis.org/files/media/isis/pubs/081016_diiig_cost_plus.pdf) (last visited Apr. 1, 2011). Under the cost-plus contract, KBR has a perverse incentive to spend more, because it is guaranteed to be reimbursed for the actual cost plus a profit. The effect is alarming—KBR was charged with burning brand new computer equipment and vehicles because they did not fit certain specifications. IRAQ FOR SALE, *supra* note 157. An October 2007 report revealed that the State Department so terribly mismanaged “a \$1.2 billion contract for Iraqi police training that it [could not] figure out what it got for the money spent.” ISENBERG, *supra* note 22, at 95.

<sup>563</sup> See, e.g., ISENBERG, *supra* note 22, at 97. According to a 2006 audit, Erinys, a PCMF, “was paid \$104 million to train at least 14,400 guards. Government auditors could find evidence of only 11,400 guards who had been trained. They also could not determine the location of more than 6,000 AK-47s purchased for the guards.” *Id.*

<sup>564</sup> See Ken Silverstein, *Revolving Door to Blackwater Causes Alarm at CIA*, HARPER’S MAG. (Sept. 12, 2006), <http://www.harpers.org/archive/2006/09/sb-revolving-door-blackwater-1158094722> (discussing the revolving door between Blackwater and the government).

<sup>565</sup> Bederman, *supra* note 201, at 230–31. To illustrate this point, one can simply look at the domestic political situation regarding PCMFs in the United States. For instance, President Obama expressly stated during his 2007–2008 campaign for the presidency that he would ensure that the PCMF industry would be regulated more, contracts would be open to auditing, and that PCMFs would only be employed under necessary circumstances. *A 21st Century Military for America: Barack Obama on Defense Issues*,

### *E. Creating a Domestic Mechanism of Enforcement*

To be effective, the multilateral treaty must provide for mandatory domestic prosecution and civil remedies for PCMF misconduct by prosecuting states. Thus, analogous to the United States's incorporating the laws of war and human rights in the UCMJ, Congress must also pass statutes incorporating the treaty's provision into domestic law. While some have suggested amending the MEJA, it would be more prudent to create a statute specifically for PCMFs, providing the industry ample notice for potential prosecutions. Additionally, there is no viable jurisdictional vehicle for contractors to file civil suits in U.S. domestic courts, short of the Alien Torts Statute, the scope of which the Supreme Court significantly limited in *Sosa*.<sup>566</sup> Therefore, Congress should pass a criminal and civil jurisdictional vehicle to comprehensively cover all PCMF behavior where the United States is the contracting state or where the PCMF is a registered corporation in the United States.

There should be a limited exception to states exercising mandatory jurisdiction to prosecute. This exception should be limited to instances in which the state where the conduct occurred asserts jurisdiction or an international tribunal prosecutes the case. Unfortunately, it is a reality that PCMFs tend to operate in weak and failing states; therefore, these failing states' ability to provide an adequate judicial system may be questionable.<sup>567</sup> Indeed, "[a] weak state may also be forced, out of strategic necessity, to overlook human rights abuses committed by [PCMFs] in its effort to complete its military operation in the most efficient manner possible."<sup>568</sup> In cases where the host state will not prosecute, the contracting state should maintain a legal obligation to do so. Alternatively, if the host state is also the contracting state—as was the case with EO in Africa—and is unable or unwilling to

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BARACKOBAMA.COM, [http://www.barackobama.com/pdf/Defense\\_Fact\\_Sheet\\_FINAL.pdf](http://www.barackobama.com/pdf/Defense_Fact_Sheet_FINAL.pdf). In 2007, Obama stated, "We cannot win a fight for hearts and minds when we outsource critical missions to unaccountable contractors. To add insult to injury, these contractors are charging taxpayers up to nine times more to do the same jobs as soldiers, a disparity that damages troop morale." *Id.* (citation omitted). Also, acknowledging the rampant cavalier cowboy or renegade attitude that pervaded the PCMF industry, Obama stated, "Most contractors act as if the law doesn't apply to them. Under my plan, if contractors break the law, they will be prosecuted." *Id.* However, none of the proposed changes have been initiated since President Obama has taken office. Furthermore, defense spending on PCMFs has only continued to escalate under this administration, illustrating the need to rely on supranational authority to inform the limits of PCMF use. See Nick Baumann, *Barney Frank to Obama: Cut Military Spending*, MOTHER JONES (Feb. 24, 2009, 11:57 AM), <http://motherjones.com/politics/2009/02/barney-frank-obama-cut-military-spending>.

<sup>566</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732–33 (2004).

<sup>567</sup> Jones, *supra* note 454, at 251–52.

<sup>568</sup> *Id.* (citation omitted).

prosecute, the state should comply with the ICC's exercise of jurisdiction over PCMFs in the event of misconduct.

#### *F. Incentives for States to Participate*

Putting aside the rogue refusal of states to participate in the PIB or implement its suggestions, states stand to benefit considerably from the enactment of such an international body. First, the codification of statuses, rights, and liabilities stemming from the enactment will provide a marketplace with both notice and certainty. Second, states will be assured that they are contracting with a legitimate corporation for legitimate ends. As such, states may contract freely with registered PCMFs without risking liability under doctrines of state responsibility.<sup>569</sup> This relieves states of the significant onus of continued oversight and regulation over companies. The value of this effect cannot be overstated—if states are outsourcing primarily for market efficiencies, but have to perform an ongoing regulatory function, the value of this efficiency decreases substantially. Absent the regulatory mechanism of the PIB, a state arguably has an affirmative responsibility to ensure that the PCMF with which it is contracting is performing its contract in accordance with international law. States require a high ethical code of conduct from their militaries—if states employ PCMFs as military gap-fillers, then states should expect a corresponding level of ethical and legal compliance. With the PIB performing the regulatory and oversight procedures, the state can contract with clean hands, without having to maintain oversight—and remaining free of liability if the PCMF does in fact violate international law. Third, because the PIB is responsible for reviewing contracts prior to the contract going into force, states will have less of an opportunity to engage in corrupt no-bid contracts with political bedfellows. The transparency the PIB demands will necessitate contracts that are economically fair with actors who are qualified to perform the services sought.<sup>570</sup> Fourth, states employing PCMFs can ensure that the companies are not actively recruiting from the state's own military. Fifth, employing states can guarantee that PCMFs will receive the benefits and protections of "combatant" status, regardless of their nationality and allegiance to the military. Additionally, states can ensure that their nationals who serve

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<sup>569</sup> See Saad Gul, *The Secretary Will Deny All Knowledge of Your Actions: The Use of Private Military Contractors and the Implications for State and Political Accountability*, 10 LEWIS & CLARK L. REV. 287, 308–11 (2006).

<sup>570</sup> In 2008, the Deputy Undersecretary of Defense for Logistics and Material Readiness testified before Congress that the Bush Administration was "not prepared to manage the contractors' critical involvement in the American war effort in Afghanistan." ISENBERG, *supra* note 22, at 143.

PCMFs are adequately protected by the firm, with all security precautions that the performance of the contract would require. Sixth, victims of inappropriate PCMF conduct would have an avenue to redress their grievances and thus host nations would not be placed in untenable positions resulting in civil distress. Host nations, in turn, would be less reluctant to allow PCMFs to perform contracts in their territory. Seventh, in general, the PIB will be providing oversight and training and can thus ensure that PCMF conduct is not effectively undermining the overall mission of the state in conflict zones. Therefore, the PIB is in the best position to provide a comprehensive solution to the multifaceted problems created by PCMFs by providing transparency, accountability, and protection.

### CONCLUSION

It is clear that no coherent recourse currently exists, either domestically or internationally, that can hold PCMFs accountable for misconduct. In this environment, PCMFs operate in conditions that resemble war—although the conditions may not constitute an armed conflict as defined by the Geneva Conventions—performing functions that oftentimes blur the lines between civilian contractors and the military, without being restricted to the standard of conduct upheld by all military personnel.<sup>571</sup> PCMFs have received tremendous criticism because they are perceived as conducting quasi-military operations

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<sup>571</sup> In the Government's Opposition to the Defendants' Motion to Dismiss in the Blackwater indictment for the Nisour Square shootings, the Government stated:

[T]he defendants have themselves made public statements that appear calculated to blur the lines between the operations of Blackwater and the United States military, suggesting that the personal security services they performed in Iraq were related to the activities of the United States military. The defendants, for example, have recently established an internet web site for the purpose of soliciting financial contributions for their legal defense team on this case. The heading of each page on the web site is emblazoned with the caption "Raven 23" and a photograph of the official seals of each military branch of the Department of Defense, as well as a photograph of the United States Marine Corps War Memorial to the Battle of Iwo Jima. The "bios" section of the web site contains photographs of each defendant, wearing his military uniform.

Government's Opposition to Defendant's Motion to Dismiss for Lack of Jurisdiction at 9–10, *United States v. Slough*, 677 F. Supp. 2d 112 (2009) (No. CR-08-360) (RMU).

with relative immunity and impunity.<sup>572</sup> Even members of the Armed Forces have expressed significant disdain with the PCMF climate. Brigadier General Karl Horst stated, “These guys run loose in this country and do stupid stuff. There is no authority over them, so you can’t come down on them when they escalate force. They shoot people and someone else has to deal with the aftermath. It happens all over the place.”<sup>573</sup> It is painstakingly obvious that international and domestic law desperately needs to catch up with the PCMF legal conundrum.

Therefore, it is essential that international and domestic law address the gap that allows PCMFs to escape liability. The only way to comprehensively achieve this is to accord PCMFs a recognizable legal status. This can be done effectively by codifying definitions and statuses of PCMFs and according liabilities and protections on that basis. By using a multilateral treaty to create an international body that provides oversight and requiring states to implement enforcement mechanisms, the international community can ensure that no person or company is beyond the reach of the law. This type of accountability is absolutely imperative, given that militaries are becoming more reliant on PCMFs in both war and peace time, where the sheer number of PCMFs may overshadow a military presence. PCMFs, as Senator Graham predicted, appear to be the way that nations will war in the future.<sup>574</sup> “The old proverb used to be that ‘War is far too important to be left to the generals.’ For international law in the 21st century, a new adage may be necessary: War is also far too

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<sup>572</sup> Blackwater contractors have been subject to tremendous scrutiny for misconduct resulting in the death of Iraqi civilians. Indeed, according to a report prepared by Congressman Waxman’s staff, between 2005 and 2007, Blackwater operatives opened fire on at least 195 occasions, and in 80% of these instances, Blackwater fired first. SCAHILL, *supra* note 2, at 21. “These statistics were based on Blackwater’s own reporting. But some alleged the company was underreporting its statistics.” *Id.* Victims or victims’ families have no recourse, as Blackwater simply extracts the contractors from Iraq and, at most, terminates employment with the contractor and fines them. *Id.* at 183; T. Christian Miller, *Officials Balked on ’05 Blackwater Inquiry*, L.A. TIMES (Oct. 26, 2007), [http://www.latimes.com/technology/la-na-emails26oct26\\_0,2102897.story](http://www.latimes.com/technology/la-na-emails26oct26_0,2102897.story). At a congressional hearing, Congresswoman Maloney discussed one incident where an intoxicated Blackwater employee shot and killed a bodyguard to the Iraqi Vice President, stating, “If he was a member of our military, he would be under a court-martial. But it appears to me that Blackwater has special rules.” SCAHILL, *supra* note 2, at 22. Prince replied, “As a private organization, we can’t do any more. We can’t flog him, we can’t incarcerate him.” *Id.* Maloney then stated, “Well, in America, if you committed a crime, you don’t pack them up and ship them out of the country in two days.” *Id.*

<sup>573</sup> *Id.* at 23.

<sup>574</sup> Govern & Bales, *supra* note 81.

important to be left to the C.E.O.s.”<sup>575</sup> Therefore, it is essential that international law regulate this type of warfare.

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<sup>575</sup> Singer, *supra* note 500, at 549 (citation omitted). In 2005, during a speech by then-President Bush at John Hopkins University’s Paul H. Nitze School of Advanced International Studies, a student posed the question to President Bush, “My question is in regards to private military contractors. The Uniform Code of Military Justice does not apply to these contractors in Iraq. I asked your secretary of defense a couple of months ago what laws govern their actions. Mr. Rumsfeld.” George W. Bush, U.S. President, President Bush Discusses War on Terror at the Johns Hopkins University School of Advanced International Studies (Apr. 10, 2006) (transcript available at <http://www-cgi.cnn.com/TRANSCRIPTS/0604/10/lt.02.html>). President Bush interrupted, “I was going to ask him. Go ahead. Help!” *Id.* The student responded,

I was hoping your answer might be a little bit more specific. Mr. Rumsfeld answered that Iraq has its own domestic laws which he assumed applied to those private military contractors. However, Iraq is clearly not currently capable of enforcing its laws much less . . . over our military contractors. I would submit to you that in this case . . . privatization is not a solution.

Mr. President, how do you propose to bring private military contractors under a system of law?

*Id.* President Bush replied,

Yes, I appreciate that very much.

I wasn’t kidding. I was going to pick up the phone and say, “Mr. Secretary, I’ve got an interesting question.”

This is what delegation—I don’t mean to be dodging the question, although it’s kind of convenient in this case, but—I really will. I’m going to call the secretary and say you’ve brought up a very valid question, and what are we doing about it? That’s how I work.

I’m—thanks.

*Id.* The question was aired on CNN. *Id.*