
COMBATING IMPUNITY: THE PRIVATE MILITARY INDUSTRY, HUMAN RIGHTS, AND THE “LEGAL GAP”

NATASHA ARNPRIESTER*

UPDATE

Two important developments have taken place since the final edit of this paper. First, on July 20, 2017, the United Nations Working Group on the use of mercenaries submitted, to the Human Rights Council, the findings of a four-year global study on the national legislation on private military companies in sixty countries, finding that: national laws “were not strong or consistent enough” to properly regulate the private military industry;¹ “weak national legislation and enforcement mechanisms, along with ad hoc and fragmented industry self-regulation, cannot address human rights

* J.D., 2016, University of Pennsylvania Law School. Senior Editor, Volume 37, *University of Pennsylvania Journal of International Law*. Director, International Human Rights Advocates. Dean Jefferson B. Fordham Award, Professor C. Edwin Baker Award. The preparation of this piece has incurred many pleasant debts. I would like to thank Alka Pradhan for comments, guidance and encouragement on the original version of this paper, written for her International Human Rights Post-9/11 course in the spring 2015 semester. This piece is a revised and updated version of the original. I am also grateful to the scholars whose thoughtful and well-reasoned works I have cited. Additional thanks are due to the Journal’s editorial staff for their diligence and patience, particularly Anthony Paladino, Elizabeth Sahner, and Rose Kenerson, as well as the team of editors for their careful work and helpful comments. Finally, a special debt of gratitude is owed to Adam Glenn for his inexhaustible support and merciless editorial review. The usual caveats apply to any opinions, errors or omissions.

¹ *UN expert panel calls for new international standards on private military and security companies*, U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS (Sept. 15, 2017), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22081>.

concerns effectively;" and increasing reliance on the private military industry raises "serious questions about the legitimacy of the private use of force" and States' ability to provide accountability and effective remedies to victims of human rights abuses committed by private military contractors.² As such, the Working Group strongly reiterated the need for an international, legally binding convention to ensure adequate human rights protections for all affected by the activities of the private military industry. Second, on August 4, 2017, a federal appeals court vacated the murder conviction of a former Blackwater private military contractor and ordered resentencing for three others involved in the deadly 2007 Nisour Square tragedy that killed or injured at least 31 Iraqi civilians.³ As discussed below, the eventual convictions of these four individuals were considered anomalies as private military contractors have largely operated without legal oversight or consequences. This new ruling could result in significantly reduced sentences for the three contractors, and it is unclear what, if anything, will happen to the fourth. While these developments are notable, they do not change the analysis of this article, but instead support its conclusions and opinions.

² U.N. Human Rights Council, *Rep. of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of People to Self-Determination*, ¶ 62, U.N. Doc. A/HRC/36/47 (Jul. 20, 2017), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/218/09/PDF/G1721809.pdf?OpenElement>. This report provides a comprehensive overview of the human rights implications of the current inadequate and incomplete legal regime concerning the private military industry.

³ *United States v. Slatten*, 865 F.3d 767, 820 (D.C. Cir. Aug. 4, 2017) ("For the foregoing reasons, we vacate defendant Nicholas Slatten's first degree murder conviction and remand for a new trial. Further, we vacate defendant Evan Liberty's conviction for the attempted manslaughter of Mahdi Al-Faraji. The Court remands the sentences of Liberty, defendant Paul Slough and defendant Dustin Heard for resentencing consistent with this opinion. In all other respects, the Court affirms the judgment of the district court."); *see United States v. Slough*, *infra* note 11 (detailing the original convictions and sentencing of the four Blackwater contractors).

TABLE OF CONTENTS

1.	The Landscape of a Changing War, Human Rights, and the Utilization of Private Military Firms and Contractors	1192
2.	The Nature of Private Military Firms and Contractors	1201
3.	The Use of Private Military Firms and Contractors by the U.S. Post-9/11	1204
4.	The “Legal Gap” in which Private Military Firms and Contractors Operate	1209
	4.1. <i>International Law</i>	1209
	4.2. <i>U.S. Law</i>	1213
	4.3. <i>International Regulation</i>	1223
5.	State Responsibility and the Attribution of Liability	1228
6.	Filling the “Legal Gap” with an International Convention	1234
7.	Conclusion	1238

1. THE LANDSCAPE OF A CHANGING WAR, HUMAN RIGHTS, AND THE UTILIZATION OF PRIVATE MILITARY CONTRACTORS

On September 16, 2007, Ahmed Haithem Ahmed was driving his mother to a hospital to pick up his father.⁴ As they turned into Nisour Square, a busy, crowded traffic circle in Baghdad, four armored vehicles carrying private military contractors working for the U.S. State Department rounded the same circle. Within moments, the contractors fired a bullet through Ahmed's head, killing him instantly. With Ahmed's car continuing to move slowly forward as his foot remained pressed on the accelerator, the contractors unleashed a barrage of sniper fire, machine gun bullets and explosives, killing Ahmed's mother, and fifteen other innocent, unarmed Iraqi citizens, including young children.⁵ According to Blackwater USA, the private military firm ("PMF") that employed these contractors, their contractors were fired upon, and "responded appropriately."⁶ According to all witnesses, a consistent account was described: The attack by the contractors was unprovoked.⁷

At that time, Coalition Provisional Authority Order 17 ("CPA Order 17") provided private military contractors ("PMCs") operating in Iraq with immunity from prosecution under Iraqi law until the end of occupation.⁸ One year after this tragedy, the Blackwater contractors involved were indicted by a U.S. court on manslaughter charges.⁹ Charges were ultimately dismissed due to the government's mishandling of the case.¹⁰

⁴ James Glanz & Alissa J. Rubin, *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*, N.Y. TIMES (Oct. 3, 2007), <http://www.nytimes.com/2007/10/03/world/middleeast/03firefight.html?pagewanted=all> [<https://perma.cc/JJ6W-UTH3>] (describing the incident and subsequent investigations).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Coalition Provisional Authority, Order No. 17, *Status of the Coalition, Foreign Liaison Missions, their Personnel and Contractors*, CPA/ORD/26 June 2003/17.

⁹ *United States v. Slough*, 677 F. Supp. 2d 112, 128 (D.D.C. 2009). On December 4, 2008, the second grand jury returned an indictment against the defendants, charging them with voluntary manslaughter and weapons violations based on the Nisour Square incident. *Id.*

¹⁰ *See id.* at 144-66 (explaining his decision to dismiss, Judge Ricardo Urbina cited numerous instances in which crucial evidence and witnesses had been tainted by exposure to the defendants' early statements).

Seven years after the killing of these seventeen Iraqi civilians, four of the contractors were re-charged and eventually sentenced for these crimes.¹¹ The fifth contractor, who testified against his four ex-colleagues, pled guilty to manslaughter and received a one-year sentence with the possibility of early release.¹² Mohammed Hafedh Abdulrazzaq Kinani, an Iraqi citizen whose nine-year-old son, Ali, was killed in the Square that day, stated that Blackwater “was so powerful that its employees could kill anyone and get away with it . . . [they] ‘had power like Saddam Hussein.’”¹³ According to a State Department investigator, “Blackwater contractors saw themselves as above the law.”¹⁴

The United Nations Working Group on the use of mercenaries as a means of violating human rights (“Working Group on Mercenaries”) commended the Blackwater prosecutions but noted that, “such examples of accountability are the exception rather than the rule. The outsourcing of security to these companies by States create risks for human rights.”¹⁵ The expert body stressed the need for the

¹¹ See, e.g., *United States v. Slough*, No. 08CR360-1, 2015 WL 1872002, at *1 (D.D.C. Apr. 17, 2015) (judgment and sentence). For their roles, Nicholas A. Slatten, a sniper who the government stated provoked the massacre by firing the first shots, was sentenced to life in prison on one count of murder; Dustin L. Heard, Evan S. Liberty and Paul A. Slough, who used a machine gun during the attack, were sentenced to thirty years and one day each on multiple counts of manslaughter, attempted manslaughter, and weapons charges. Office of Pub. Affairs, *Four Former Blackwater Employees Sentenced to Decades in Prison for Fatal 2007 Shootings in Iraq*, DEP’T OF JUSTICE: NEWS (Apr. 13, 2015), <https://www.justice.gov/opa/pr/four-former-blackwater-employees-sentenced-decades-prison-fatal-2007-shootings-iraq> [<https://perma.cc/ZVY9-UUD4>].

¹² See Spencer S. Hsu, *Blackwater Guard Who Testified Against 4 Others Sentenced for 2007 Shootings*, WASH. POST (July 16, 2015), https://www.washingtonpost.com/local/crime/blackwater-guard-who-testified-against-4-others-sentenced-for-2007-shootings/2015/07/16/251056e6-2b5d-11e5-a250-42bd812efc09_story.html [<https://perma.cc/EB4Y-NKV2>] (describing how Judge Royce C. Lamberth, presiding judge in *Slough*, departed from sentencing guidelines and sentenced Jeremy Ridgeway to one year and a day in a minimum-security prison, with the possibility of early release for good behavior).

¹³ Matt Apuzzo, *Ex-Blackwater Guards Given Long Terms for Killing Iraqis*, N.Y. TIMES (July 31, 2015), https://www.nytimes.com/2015/04/14/us/ex-blackwater-guards-sentenced-to-prison-in-2007-killings-of-iraqi-civilians.html?emc=edit_th_20150414&nl=todaysheadlines&nid=46625794 [<https://perma.cc/EKE9-TY2M>].

¹⁴ Faiza Patel & Dan Stone, *A Primer on Legal Developments Regarding Private Military Contractors*, LAWFARE (July 18, 2014, 4:30 PM), <http://www.lawfareblog.com/2014/07/a-primer-on-legal-developments-regarding-private-military-contractors/> [<https://perma.cc/LX53-ZZCT>].

¹⁵ *Blackwater Convictions: “The exception, not the rule” – U.N. Expert Body Calls for Global Regulation of Private Security*, U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN

international regulation of PMFs' activities, stating that "[t]he difficulty in bringing a prosecution in this case shows the need for an international treaty to address the increasingly significant role that private military companies play in transnational conflicts."¹⁶

The Nisour Square tragedy committed by the PMCs of Blackwater (rebranded as Academi, after a brief rename as Xe) was unfortunately only one of numerous incidents involving PMCs committing serious human rights abuses. A Majority Staff memorandum prepared for a hearing before the U.S. House Committee on Oversight and Government Reform stated, "Blackwater's use of force in Iraq is frequent and extensive, resulting in significant casualties and property damage," and in an overwhelming majority of firearm discharges (eighty-four percent (84%)), Blackwater PMCs were "first to fire."¹⁷

A more infamous case of PMCs' misconduct was the 2004 Abu Ghraib incident, in which prison personnel committed a series of severe human rights violations against detainees, including torture, rape and murder. Several contractors of the PMFs, CACI and Titan (now known as L-3 Corporation), were implicated in perpetrating these abuses.¹⁸ It is reported that nearly half of the interrogators at Abu Ghraib were PMCs.¹⁹ While a few of the U.S. military officers

RIGHTS (Oct. 27, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15217> [https://perma.cc/TA67-PAXG].

¹⁶ *Blackwater Sentencing – U.N. Experts on Mercenaries Call for International Regulation of Private Security*, U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (Apr. 14, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15840&LangID=E> [https://perma.cc/5AK8-VQ6Y].

¹⁷ MAJORITY STAFF OF H.R. COMM. ON OVERSIGHT AND REFORM, 110TH CONG., MEMORANDUM ON ADDITIONAL INFORMATION ABOUT BLACKWATER USA 6, <http://graphics8.nytimes.com/packages/pdf/national/20071001121609.pdf> [https://perma.cc/H8EK-2JY3].

¹⁸ See Renae Merle, *CACI and Titan Sued over Iraq Operations*, WASH. POST (June 10, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A29564-2004Jun9.html> [https://perma.cc/WX5F-T84H] (reporting on lawsuit against CACI and Titan on behalf of Iraqi prisoners "accusing the government contractors of conspiring with U.S. officials to abuse Iraqi detainees and failing to properly supervise their own employees").

¹⁹ Scott Horton, *Can't Win with 'Em, Can't Go to War Without 'Em: Six Questions for P.W. Singer*, HARPER'S MAGAZINE: BROWSINGS, (Sept. 30, 2007, 12:02 AM), <http://harpers.org/blog/2007/09/cant-win-with-em-cant-go-to-war-without-em-six-questions-for-pw-singer/> [https://perma.cc/DCF9-Z6QB].

involved in the scandal were tried and convicted, none of the PMCs involved have been prosecuted.²⁰

Following the Abu Ghraib incident, in 2005 the “Trophy Video” appeared on a website linked unofficially to PMCs working for Aegis Defence Services, a PMF that was contracted by the U.S. Department of Defense (“DoD”) to conduct operations in Iraq.²¹ The video, with dubbed music of Elvis Presley, contained four separate clips of PMCs shooting indiscriminately at civilian cars.²² Despite this visual evidence, the U.S. Army determined that there was “no probable cause to believe that a crime was committed” and no one was charged or prosecuted.²³

In 2006, contractors employed by the PMF Triple Canopy were travelling to the airport, when one stated “I want to kill someone today.”²⁴ Unprovoked, he opened fired on Iraqis driving peaceably along the highway.²⁵ The PMCs did not stop to determine if casualties resulted, though all accounts suggest civilians died in this attack.²⁶ The contractor responsible was never charged.²⁷

²⁰ See *U.S. Defence Contractor Wants Abu Ghraib Lawsuit Scrapped*, AL JAZEERA AMERICA (Feb. 8, 2015), <http://www.aljazeera.com/news/2015/02/defence-contractor-abu-ghraib-lawsuit-scrapped-150208152855366.html> [<https://perma.cc/5HJK-2QQB>] (describing lawsuit against CACI and contractor’s response).

²¹ Sean Rayment, *‘Trophy’ Video Exposes Private Security Contractors Shooting up Iraqi Drivers*, THE TELEGRAPH (Nov. 27, 2005), <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/1504161/Trophy-video-exposes-private-security-contractors-shooting-up-Iraqi-drivers.html> [<https://perma.cc/UU7K-MJRR>].

²² Footage of the video. Lands Knecht, *Aegis Shooting Iraqis with Elvis Sound-track* (June 2, 2015), YOUTUBE, <https://www.youtube.com/watch?v=NzdVRfTDvso> [<https://perma.cc/W6ER-L46G>].

²³ Jonathan Finer, *Contractors Cleared in Videotaped Attacks*, WASH. POST (June 11, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/10/AR2006061001011.html> [<https://perma.cc/VNH3-LZ7C>].

²⁴ Steve Fainaru, *Hired Guns are Wild Cards in Iraq War*, CHI. TRIB. (Apr. 16, 2007), http://articles.chicagotribune.com/2007-04-16/news/0704160004_1_triple-canopy-security-contractors-shootings; [<https://perma.cc/9VNA-222P>].

²⁵ *Id.*; see also Scott Horton, *A Decision in the Triple Canopy Case*, HARPER’S MAGAZINE: BROWSINGS (Aug. 3, 2007, 7:40 AM), <http://harpers.org/blog/2007/08/a-decision-in-the-triple-canopy-case/> [<https://perma.cc/7JD3-9QFG>] (stating two Triple Canopy employees were fired for failing to immediately report incident).

²⁶ Fainaru, *supra* note 24.

²⁷ *Id.*

In late 2013, a case was brought under the Trafficking Victims Protection Act and the Alien Tort Statute against former Halliburton subsidiary, Kellogg, Brown & Root ("KBR"), for labor trafficking twelve Nepali men.²⁸ These men were persuaded to accept employment by KBR under a false promise of work in hotels and restaurants in safe countries.²⁹ Instead, they were transported to Iraq to work on U.S. military bases.³⁰ En route, eleven of these men were captured and executed by Iraqi insurgents.³¹ A U.S. court allowed the case to proceed to trial, however a federal court granted summary judgment in favor of KBR, "notwithstanding its wholehearted sympathy with the victims and their families."³²

PMFs have also participated in covert operations, including clandestine raids and detention in Iraq and Afghanistan; the CIA's extraordinary rendition program, in which eight-five percent (85%) of the detention and interrogation positions were held by contractors;³³ the staffing and equipping of CIA black sites; and operation of the CIA's Predator drone program.³⁴ Based on its alleged involvement in the rendition program, a suit was brought against the PMF, Jeppesen DataPlan, on behalf of five individuals who were held at

²⁸ *Adhikari v. Daoud & Partners*, 994 F. Supp. 2d 831 (S.D. Tex. 2014).

²⁹ Steven M. Watt, *Court Rejects Military Contractor's Attempt to Avoid Trial for Human Trafficking*, ACLU: SPEAK FREELY (Aug. 26, 2013, 4:21 PM), <https://www.aclu.org/blog/court-rejects-military-contractors-attempt-avoid-trial-human-trafficking> [<https://perma.cc/Z5DN-LCWW>] (discussing the context of the case and the federal court's order that the case proceed to trial).

³⁰ *Id.*

³¹ *Id.*

³² *Adhikari v. Daoud & Partners*, 95 F. Supp. 3d 1013, 1015 (S.D. Tex. 2015), *aff'd*, *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184 (5th Cir. 2017).

³³ S. Select Comm. on Intelligence, *Committee Study of the CIA's Detention and Interrogation Program, Findings and Conclusions* 12 (Dec. 13, 2012) (declassified Dec. 3, 2014), <https://www.aclu.org/files/assets/SSCIStudyCIAsDetentionInterrogationProgramES.pdf> [<https://perma.cc/3MYQ-AM6C>].

³⁴ See, e.g., James Risen & Mark Mazzetti, *Blackwater Guards Tied to Secret C.I.A. Raids*, N. Y. TIMES (Oct. 10, 2009), <http://www.nytimes.com/2009/12/11/us/politics/11blackwater.html> [<https://perma.cc/VZ5Z-H4YJ>] (reporting on Blackwater guards' participation in C.I.A. raids, the transportation of detainees, and other secret operations); Eur. Parl. Ass., *Memorandum of Comm. on Legal Affairs and Hum. Rts., Alleged Secret Detentions in Council of Europe Member States*, Doc. AS/JUR (2006) 03 rev (analyzing secret detention in Council of Europe member countries); Human Rights Council, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Counter Terrorism*, U.N. Doc. A/HRC/13/42 (May 20, 2010) (describing secret detention practices in the "war on terror.").

various CIA black sites and subjected to severe physical and psychological torture.³⁵ The case was dismissed as a result of the government's use of the "state secrets privilege" doctrine, an evidentiary rule that permits the government to refuse to produce, or block discovery of, information that it deems would endanger national security.³⁶

The examples above represent only a small sample of the publicized cases in which human rights abuses have been perpetrated by PMCs. In the United States' most recent review before the United Nations Human Rights Committee, concern was advanced regarding:

the limited number of investigations, prosecutions and convictions of . . . agents of the United States Government, including private contractors, for unlawful killings during international operations, and the use of torture or other cruel, inhuman or degrading treatment or punishment of detainees in United States custody, including outside its territory, as part of the so-called "enhanced interrogation techniques."³⁷

Unfortunately, the Blackwater verdict was, as the Working Group on Mercenaries noted, an anomaly, albeit a welcomed one, in the course of holding PMCs to account.³⁸ Since its formation in 2006, the Working Group on Mercenaries has collected and reviewed

³⁵ *Mohamed v. Jeppesen DataPlan, Inc.*, 614 F.3d 1070 (9th Cir. 2010), *cert. denied*, 563 U.S. 1002 (2011).

³⁶ *Id.* at 1073. The court expressed its frustration with the use of the state secrets privilege in this case, which the dissent recognized by stating: "The majority concludes its opinion with a recommendation of alternative remedies. Not only are these remedies insufficient, but their suggestion understates the severity of the consequences to Plaintiffs from the denial of judicial relief." *Id.* at 1101 (Hawkins, C.J., dissenting). Further, the dissent argued "[a]rbitrary imprisonment and torture under any circumstance is a 'gross and notorious . . . act of despotism.' . . . But 'confinement [and abuse] of the person, by secretly hurrying him to [prison], where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.' . . ." *Id.* (alteration in original) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 556 (2004) (Scalia, J., dissenting)).

³⁷ U.N. Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the United States of America*, ¶ 5, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014).

³⁸ Matt Taylor, *Is the Blackwater Verdict the Beginning of the End for Private Military Contractors?* VICE (Oct. 24, 2014), <http://www.vice.com/read/is-the-blackwater-verdict-the-beginning-of-the-end-for-private-military-contractors-1024> [<https://perma.cc/E5UX-4AHS>].

"ample information which indicate the negative impact of the activities" of PMFs and PMCs and the "cluster of human rights violations" that they have perpetrated.³⁹ According to the Working Group's former chairperson, José L. Gómez del Prado, in this cluster "one can find: summary executions, acts of torture, cases of arbitrary detention; of trafficking of persons; serious health damages caused by their activities; as well as attempts against the right of self-determination."⁴⁰ Gómez del Prado also noted the violations that PMCs themselves experience as a result of PMFs' "search for profit," as PMFs often "do not provide their employees with basic rights, and put staff in situations of danger and vulnerability."⁴¹

"International law is based on the concept of the state. The state in its turn lies upon the foundation of sovereignty."⁴² As such, states have sovereign rights and responsibilities, such as security of the nation. However, the state, particularly the United States, has outsourced much of its national security efforts to the private sector. Now, instead of providing full military, security and intelligence services, governments are hiring private actors to carry out activities that have long been considered responsibilities of the state.⁴³ The United States has cited cost, quality, efficiency, and the need for additional personnel, as prime reasons for a shift to the private sector.⁴⁴

³⁹ José L. Gómez del Prado, *The Privatization of War: Mercenaries, Private Military and Security Companies*, THE CENTRE FOR RESEARCH ON GLOBALIZATION (July 1, 2014), <http://www.globalresearch.ca/the-privatization-of-war-mercenaries-private-military-and-security-companies-pmsc/21826> [https://perma.cc/4RAD-GM8P].

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² MALCOLM N. SHAW, *INTERNATIONAL LAW* 331 (4th ed. 1997).

⁴³ See Laura Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 147 (2005) (noting private actors are increasingly fulfilling states' foreign affairs functions).

⁴⁴ See MOSHE SCHWARTZ & JENNIFER CHURCH, CONG. RES. SERV., R43074, DEPARTMENT OF DEFENSE'S USE OF CONTRACTORS TO SUPPORT MILITARY OPERATIONS: BACKGROUND, ANALYSIS, AND ISSUES FOR CONGRESS, Summary (2013) (listing the benefits of using contractors such as "freeing up uniformed personnel to conduct combat operations; providing expertise in specialized fields . . . and providing a surge capability"). *Contra, e.g.*, MAJORITY STAFF OF H.R. COMM. ON OVERSIGHT AND REFORM, *supra* note 14, at 14 (footnotes omitted) ("According to contract documents obtained by the Committee, Blackwater bills the United States at \$1,222 per day for one individual Protective Security Specialist. On an annual basis, this amounts to \$445,891 per contractor. These costs are significantly higher than the costs that would be incurred by the military. The security services provided by Blackwater would typically be performed by an Army Sergeant, whose salary, housing, and subsistence

Some contend that the notion of the “state as the only legitimate holder of the monopoly on the use of force” is being eroded as a result.⁴⁵

The outsourcing of traditionally state functions to PMFs has distanced these functions from the supervision of both the state and the military chain of command. As a result, the lack of a watchful eye increases the risk that human rights abuses can be perpetuated with impunity. This largely unregulated environment has been said to incentivize states to outsource military and security functions to PMFs, in order to avoid both legal and public opinion accountability that would otherwise be in place if the state were the direct actor.⁴⁶

Modern warfare has evolved immensely and a staple feature of this evolution is the emergence of new non-state actors (i.e. PMFs, PMCs) “playing central roles” in conflicts,⁴⁷ and the legal status of these actors is difficult to determine within the existing regime of international law.⁴⁸ Some argue that the growth in the privatization of war has outpaced the evolution of international law, rendering it ineffective at regulating this new shift in warfare.⁴⁹ Despite efforts

pay range from approximately \$140 to \$190 per day, depending on rank and years of service. On an annual basis, the salary, housing, and subsistence pay of an Army Sergeant ranges from \$51,100 to \$69,350 per year. The amount the government pays Blackwater for these same services is approximately six to nine times greater.”).

⁴⁵ NICHOLAS TSAGOURIAS & NIGEL D. WHITE, *COLLECTIVE SECURITY: THEORY, LAW AND PRACTICE* 148 (2013).

⁴⁶ See Virginia Newell & Benedict Sheehy, *Corporate Militaries and States: Actors, Interactions and Reactions*, 41 *TEX. INT’L L. J.* 67, 91 (2006) (describing one commentator disclosed the strategy behind the United States’ decision to use PMFs in Sudan was to avoid congressional oversight); see also Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic and Strategic Problems With Privatizing War*, 82 *WASH. U.L.Q.* 1001, 1037 (2004) (noting when three American contractors were killed in Gaza the incident “did not become a serious media or diplomatic story”).

⁴⁷ Daphné Richemond-Barak, *Nonstate Actors in Armed Conflicts: Issues of Distinction and Reciprocity*, in *NEW BATTLEFIELDS, OLD LAWS: CRITICAL DEBATES ON ASYMMETRIC WARFARE* 106, 108 (William Banks ed., 2010).

⁴⁸ See *id.* (“Nonstate actors find themselves somewhere along the spectrum of the traditional ‘black-and-white’ civilian/combatant divide, though the laws of war contemplate not a spectrum but rather clear-cut criteria.”).

⁴⁹ See, e.g., Peter W. Singer, *War, Profits and the Vacuum of Law: Privatized Military Firms and International Law*, *COLUM. J. OF TRANSNAT’L L.* 522, 525–26 (2004) (“While private, profit-motivated military actors are as old as the history of organized warfare, the international laws of war that specifically deal with their presence and activity are largely absent or ineffective. Particularly with regard to PMFs, what little law exists has been rendered outdated by the new ways in which these companies operate. In short, international law, as it stands now, is too primitive in this area to handle such a complex issue that has emerged just in the last decade.”).

by multiple actors, including governments, PMFs, international organizations, and civil society, no legal regime exist that directly govern and oversees the actions of all PMFs and PMCs. Commentators note that efforts to regulate these entities “have been spectacularly unsuccessful,”⁵⁰ and that the “[PMF] industry, which deals with heavy weaponry in conflict zones[,] is less regulated than the toy industry.”⁵¹

As the number of conflict situations proliferate globally, clarification of the pertinent legal obligations of PMFs and PMCs is especially needed as their participation in war and conflict continues to increase. Until this happens, the lack of a clear legal framework in which to place PMFs and PMCs, allows them to operate in a “legal gap,” and as such, violations of human rights can occur without account or fair and proper remedy, as is required under international human rights law.⁵²

This paper proceeds by reviewing the existing international and domestic regimes relevant to PMFs and PMCs. Section 2 briefly discusses the nature of PMFs and PMCs; Section 3 reviews the development and use of the private military industry since September 11, 2001; Section 4 reviews the existing legal and regulatory frameworks in place that apply to PMFs and PMCs, using the United States as an exemplar; Section 5 analyzes the doctrine of state responsibility and PMCs’ actions as attributed to the state; Section 6 discusses the draft convention on PMFs and the need for an international legal regime to regulate the utilization of PMCs; Section VII concludes.

⁵⁰ Simon Chesterman, *Leashing the Dogs of War: The Rise of Private Military and Security Companies*, 5 CARNEGIE REP. 36, 39 (2008).

⁵¹ ‘Guns for hire’, U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS (Apr. 29, 2010), <http://www.ohchr.org/EN/NewsEvents/Pages/Gunsforhire.aspx> [https://perma.cc/XWJ4-QP22].

⁵² The right to an effective remedy is widely recognized under international human rights law. See, e.g., G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 8, (Dec. 10, 1948); International Covenant on Civil and Political Rights, art. 2(3) Dec. 16, 1966, U.N. Doc. Dec. 16, 1966, 999 U.N.T.S. 171; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14, Dec. 10, 1984, 1465 U.N.T.S. 85.

2. THE NATURE OF PRIVATE MILITARY FIRMS AND CONTRACTORS

Niccolò Machiavelli's *The Prince* (1532) proclaimed mercenaries to be "useless and dangerous," "disunited" and "treacherous."⁵³ Machiavelli believed that mercenaries lacked any moral reason to fight, as their motivation was purely financial gain. He wrote that "republics that possess their own armies are . . . successful, whereas mercenary armies . . . only cause harm."⁵⁴ Around the time of his writing, the employment of mercenaries became restricted, and by the nineteenth century a norm against their use developed due to "general moral objections to private military force," as it was believed that fighting should be motivated by love of country and not wealth.⁵⁵ By the twentieth century, these ideas were codified in the Additional Protocol I of the Geneva Conventions⁵⁶ and the United Nations International Convention against the Recruitment, Use, Financing and Training of Mercenaries.⁵⁷

As noted by Gómez del Prado, PMCs "have increasingly taken over the traditional activities carried out by mercenaries before."⁵⁸ However, while PMCs may carry out some of the same activities, PMCs largely fall outside the narrow definition of a mercenary as codified in international law. According to Article 47 of Additional Protocol I and Article 1 of the Convention against Mercenaries, a mercenary is defined as, *inter alia*, any person who:

is motivated to take part in the hostilities *essentially* by the desire for private gain and, in fact, is promised, by or on be-

⁵³ NICCOLÒ MACHIAVELLI, *THE PRINCE* 43 (Quentin Skinner & Russell Price eds. 1988).

⁵⁴ *Id.* at 44.

⁵⁵ JAMES PATTISON, *THE MORALITY OF PRIVATE WAR: THE CHALLENGE OF PRIVATE MILITARY AND SECURITY COMPANIES* 1-2 (2014).

⁵⁶ 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, Additional Protocol I].

⁵⁷ International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries, Dec. 4, 1989, 2163 U.N.T.S. 96 [hereinafter, Convention Against Mercenaries].

⁵⁸ José L. Gómez del Prado, *Mercenaries, Private Military and Security Companies and International Law* 1 (UN Working Group on the Use of Mercenaries) (unpublished working paper) (on file with the University of Pennsylvania Journal of International Law) available at http://www.law.wisc.edu/gls/documents/gomez_del_prado_paper.doc [https://perma.cc/4RAD-GM8P].

half 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; [and]

is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict⁵⁹

Such a restrictive and highly particularized definition provides easy carve-outs and shields states from potential violations of international law in the course of employing PMCs—even in functions appearing quite similar to that of mercenaries.⁶⁰ For instance, an individual functioning in all capacities as a mercenary will be insulated from this definition, if she or he is a national of, or a resident in, a state party to the conflict in which such person is taking part. Additionally, the subjective nature of the definition, relying on the individual's motivation to take part in hostilities, rather than their role or function, adds another layer of protection. Proving that an individual is "essentially" motivated by financial gain is problematic, as many other motivating factors could simultaneously underlie one's motivation to fight (e.g., one's belief in a just cause). That no one has been prosecuted for serving as a mercenary since the Convention against Mercenaries came into force in 2001 might best demonstrate the difficulty in applying this definition to PMCs.⁶¹

While a strong international norm against mercenaries exists, the settled definition of a mercenary has created an ineffectual international law. Sarah Percy explained that states devised the definition of mercenary in a way that "differentiated mercenaries from

⁵⁹ Additional Protocol I, *supra* note 56, at art. 47(2)(c)-(d) (emphasis added); Convention Against Mercenaries, *supra* note 57, at art. 1(1)(b)-(c) (emphasis added). See also INT'L COMM. OF THE RED CROSS, *International humanitarian law and private military/security companies*, (Dec. 10, 2013), <https://www.icrc.org/eng/resources/documents/faq/pmsc-faq-150908.htm> [<https://perma.cc/3CGZ-3UD6>] ("The definition of mercenaries given by Article 47 of Additional Protocol I is very restrictive. To be a mercenary, an employee of a PMSC has to meet certain strict and cumulative criteria. For a start, no one who is a national of any of the parties to the conflict can be a mercenary. Furthermore, a person must be employed with the aim of being directly involved in combat and motivated by the desire for private gain, and then the person must actually be doing that to be considered a mercenary. As a result, most PMSC employees do not fall under the definition.").

⁶⁰ PATTISON, *supra* note 55, at 144.

⁶¹ *Id.* at 145.

other actors,” thereby creating easy loopholes for PMCs to fall outside of the definition.⁶² As Geoffrey Best famously stated, “any mercenary who cannot exclude himself from this definition deserves to be shot – and his lawyer with him.”⁶³

While states still heavily rely on their citizen militaries, primarily in outright combat roles, several tasks traditionally reserved for a state’s military are being outsourced to PMFs, including security, interrogation, intelligence, training forces, and logistical services. The United Nations defines PMFs as, “a corporate entity which provides on a compensatory basis military and/or security services by physical persons and/or legal entities.”⁶⁴ However, not all private firms “look alike, nor do they even serve the same markets.”⁶⁵ Peter Singer’s categorization of PMFs is often used in scholarship on this issue, categorizing PMFs into three groups, based on the services rendered: (1) Military Provider Firms, (2) Military Consultant Firms, and (3) Military Support Firms. *Military Provider Firms* are “defined by their focus on the tactical environment,” playing either an active combat role (e.g., combat pilot) or a defense role (e.g., security detail).⁶⁶ *Military Consultant Firms* “provide advisory and training services integral to the operation and restructuring of a client’s armed

⁶² Sarah Percy, *Mercenaries: Strong Norm, Weak Law*, 61 INT’L ORG. 367, 367–70 (2007).

⁶³ GEOFFREY BEST, *HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICT* 375 n.83 (Columbia University Press) (1980).

⁶⁴ U.N. Human Rights Council, *Annual report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, ¶ 5, U.N. Doc. A/HRC/27/50 (June 30, 2014). The Montreux Document, discussed *infra* Section 4.3., defines PMCs as “private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.” Switzerland Federal Department of Foreign Affairs and International Committee of the Red Cross, *The Montreux Document: On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*, at 9, ¶9a (Sept. 17, 2008), https://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf [<https://perma.cc/9Q6S-STGR>] [hereinafter *The Montreux Document*].

⁶⁵ PETER W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 88 (Cornell University Press ed. 2007) (2003).

⁶⁶ *Id.* at 92.

forces.”⁶⁷ *Military Support Firms* provide “logistics, intelligence, technical support, supply, and transportation.”⁶⁸

A PMC employed to perform one category of work, such as “support,” often needs to perform another category of work, such as “provider,” should they need to engage in the use of force if “they come under attack while performing [support] services.”⁶⁹ As illustrated, these terms cannot be perfectly applied in all cases, as some PMCs may show characteristics of more than one category simultaneously. Nevertheless, each category is unified by its basic function—offering “services that fall within the military domain.”⁷⁰ As such, this paper uses the collective term private military firm (“PMF”) and private military contractor (“PMC”) to encompass entities and individuals undertaking any of these functions, recognizing that PMCs “have the capacity to engage in hostilities, either offensively or defensively” even though the initial category of contracted service may not always dictate that at the outset.⁷¹

3. THE USE OF PRIVATE MILITARY FIRMS AND CONTRACTORS BY THE UNITED STATES POST 9/11

With the fall of the Berlin Wall and the collapse of the former Soviet Union, the U.S. defense budget was dramatically reduced, resulting in a massive downsizing of the country’s armed forces.⁷²

⁶⁷ *Id.* at 95.

⁶⁸ *Id.* at 97.

⁶⁹ Richard Morgan, *Professional Military Firms under International Law*, 9 CHI. J. INT’L L. 213, 216 (2008).

⁷⁰ SINGER, *supra* note 65, at 88.

⁷¹ Morgan, *supra* note 69.

⁷² See SINGER, *supra* note 65, at 49 (“[T]he end of the Cold War is at the heart of the emergence of the privatized military industry. . . . When the Berlin wall fell, an entire global order collapsed almost overnight. The resultant effect on the supply and demand of military services created a security gap that the private market rush to fill.”); see also Renae Merle, *More Civilians Accompanying U.S. Military*, WASH. POST (Jan. 22, 2013), https://www.washingtonpost.com/archive/politics/2003/01/22/more-civilians-accompanying-us-military/43ffec3d-e84a-4a02-a882-ef371b0a9ac7/?utm_term=.2d0f4859b4a5 [https://perma.cc/DR5W-MEM9] (“Starting after ‘91, you had the combination of the military being forced to downsize and this real push to privatize anything and everything.”); DEPARTMENT OF DEFENSE, *ACHIEVING A 21ST CENTURY DEFENSE INFRASTRUCTURE*, REPORT OF THE QUADRENNIAL DEFENSE REVIEW, iv (1997) (describing the change in America’s military policy and stating “[s]ince 1985, America has responded to the vast global changes by reducing its defense budget by some [thirty-eight] percent, its force

With thousands of former military personnel out of work, there was a surplus of individuals with military expertise and PMFs provided employment for those possessing such skills.⁷³ In the 1990s, the United States' use of PMCs was sparse, contracting PMCs primarily in Latin America for counternarcotic efforts, and in the Balkans during the prolonged unrest following the breakup of the former Yugoslavia.⁷⁴ However, the War on Terror and the conflicts related to it, created a new demand for military capacity. The United States, lacking a sufficient supply of soldiers to meet this demand, and without mandated military service, which was last used during the Nixon Administration, found that PMCs were there to meet the need.⁷⁵

For their interventions in Iraq and Afghanistan, the United States, as well as the United Kingdom, contracted with a conglomerate of PMFs on a mammoth scale. To illustrate, during the First Gulf War (1990–1991) there was roughly one PMC for every 100 soldiers; however, by 2008 that ratio had shifted to one for one.⁷⁶ In Afghanistan alone, the number of U.S.-contracted PMCs eclipsed the number of U.S. soldiers, with a ratio of 1.6 PMCs per soldier.⁷⁷

structure by [thirty-three] percent, and its procurement programs by [sixty-three] percent.”).

⁷³ See Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C.L. REV. 989, 997 (2005) (“Yet the downsizing of major military efforts at the end of the Cold War and the end of apartheid in South Africa created a supply of individuals with military training in this country and elsewhere who could market their services.”).

⁷⁴ Michaels, *supra* note 46, at 1020–21, 1024–26.

⁷⁵ See Minow, *supra* note 73, at 996–97 (“Private military companies—not merely individuals offering their services as mercenaries—have a long lineage, but never have been more central to the U.S. military strategy than in the deployment in Iraq. . . . Private military companies guard U.S. generals, essential military sites, and U.S. government compounds in Iraq.”); see also Sean McFate, *America’s Addiction to Mercenaries*, THE ATLANTIC (Aug. 12, 2016), <https://www.theatlantic.com/international/archive/2016/08/iraq-afghanistan-contractor-pentagon-obama/495731/> [<https://perma.cc/P4QY-272J>] (“As former Defense Secretary Donald Rumsfeld said in 2002, the Iraq War would take ‘five days or five weeks or five months, but it certainly isn’t going to last any longer than that.’ When these wars did not end in mere months, the all-volunteer force found it could not recruit enough volunteers to sustain two long wars. That left policymakers with three terrible options. First, withdraw and concede the fight to the terrorists (unthinkable). Second, institute a Vietnam-like draft to fill the ranks (political suicide). Third, bring in contractors to fill the ranks. Not surprisingly, both the Bush and Obama administrations opted for contractors.”).

⁷⁶ James Pattison, *The Ethics of a Mercenary*, Oxford University Press Blog (Nov. 2, 2014), <http://blog.oup.com/2014/11/mercenary-ethics-ukraine/> [<https://perma.cc/BCH8-23BW>] (last visited Mar. 19, 2017).

⁷⁷ *Id.*

By the end of 2008, there were over 266,600 PMCs working for the DoD in Iraq, Afghanistan, and surrounding regions (i.e. U.S. Central Command), of which 41,000 were U.S. citizens.⁷⁸ By 2016, there were approximately three U.S.-contracted PMCs to every U.S. soldier in Afghanistan, and nearly two to one, respectively, in Iraq.⁷⁹ These figures do not include PMCs employed by the CIA or other intelligence agencies.

Public opinion works against the deployment of U.S. troops to armed conflicts, however, augmenting the military force with PMCs can mask the number of individuals fighting (i.e. “boots on the ground”) on the behalf of a state when it decides to engage, or expand involvement, in a conflict. According to former U.S. Under Secretary of Defense Robert Hale, “[i]n my experience, [the DoD] sometimes uses contractors in order to satisfy political pressure to limit the number of federal civilians even though contractors can cost more than federal civilians.”⁸⁰ Similarly, former House Speaker Newt Gingrich contended that “given Americans’ reticence about using our troops,” the “best way to fight” is “by mercenaries.”⁸¹

In 2015, former U.S. President Barack Obama sent draft legislation to Congress requesting authorization to use military force against the Islamic State (also known as ISIL or ISIS), which would include approval for the “limited” use of ground troops.⁸² However,

⁷⁸ *Department of Defense Appropriations for 2010: Hearing before the H. Subcommittee of the Comm. on Appropriations*, 111th Cong. (statement of Gen. Ross Thompson, Military Deputy to the Acting Assistant Secretary of the Army for Acquisition, Logistics and Technology), <https://www.gpo.gov/fdsys/pkg/CHRG-111hhrg56232/html/CHRG-111hhrg56232.htm> [<https://perma.cc/R6V4-QE3Z>].

⁷⁹ Micah Zenko, *Mercenaries Are the Silent Majority of Obama’s Military*, FOREIGN POLICY (May 18, 2016), <http://foreignpolicy.com/2016/05/18/private-contractors-are-the-silent-majority-of-obamas-military-mercenaries-iraq-afghanistan/> [<https://perma.cc/E9YE-V4VB>].

⁸⁰ Robert F. Hale, *Business Reform in the Department of Defense*, CENTER FOR A NEW AMERICAN SECURITY (Nov. 30, 2016), <https://www.cnas.org/publications/reports/business-reform-in-the-department-of-defense> [<https://perma.cc/FSR4-RYAS>].

⁸¹ Robert Weiner & Daniel Wallace, *Military Contractors Belie Myth of U.S. Leaving Afghanistan and Iraq*, CLEVELAND (Apr. 24, 2015), http://www.cleveland.com/opinion/index.ssf/2015/04/military_contractors_believe_m.html [<https://perma.cc/V94Q-PUGU>].

⁸² Letter from Barack Obama, President of the United States, Letter from the President – Authorization for the Use of United States Armed Forces in connection with the Islamic State of Iraq and the Levant, to The Congress of the United States (Feb. 11, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection> [<https://perma.cc/P525-RECX>].

limited use of ground troops did not necessarily mean a limited ground force, and it was expected that a large number of PMCs would be hired to augment this force.⁸³ Additionally, President Obama implemented a no-ground troop policy in Yemen, yet reports indicate that the United States, as well as the United Kingdom, hired PMCs to assist in the conflict.⁸⁴ However, since the U.S. government is not transparent about its use of contractors, a figure of the number of PMCs utilized cannot be accurately determined.⁸⁵ This was not lost upon U.S. Senator John McCain who in a 2016 subcommittee hearing told acting Secretary of the Army Patrick Murphy, “[w]e look forward to the day you can tell us how many contractors are employed in the Department of Defense.”⁸⁶

⁸³ Eli Lake, *Contractors Ready to Cash in on ISIS War*, THE DAILY BEAST (Sept. 13, 2014), <http://www.thedailybeast.com/articles/2014/09/13/contractors-ready-to-cash-in-on-isis-war.html> [https://perma.cc/P525-RECX].

⁸⁴ Paul Rogers, *Saudi Arabia's Yemen Offensive is Bigger than Anyone Expected*, THE CONVERSATION (Apr. 2, 2015), <http://theconversation.com/saudi-arabias-yemen-offensive-is-bigger-than-anyone-expected-39706> [https://perma.cc/94TH-9ER9]; see also Finian Cunningham, *Pentagon Mercenaries: Blackwater, Al-Qaeda . . . What's in a Name?*, RT INT'L (Feb. 21, 2016), <https://www.rt.com/op-edge/333186-blackwater-yemen-mercenaries-pentagon/> [https://perma.cc/9VNA-222P] (“CIA-linked private ‘security’ companies are fighting in Yemen for the US-backed Saudi military campaign.”). There are also reports that the United Arab Emirates has sent Colombian mercenaries to fight in the conflict. See, e.g., Emily B. Hager & Mark Mazzetti, *Emirates Secretly Sends Colombian Mercenaries to Yemen Fight*, N.Y. TIMES (Nov. 27, 2015), <https://www.nytimes.com/2015/11/26/world/middleeast/emirates-secretly-sends-colombian-mercenaries-to-fight-in-yemen.html> [https://perma.cc/G8MS-J9GZ].

⁸⁵ Zenko, *supra* note 79 (“The first thing you learn when studying the role contractors play in U.S. military operations is there’s no easy way to do so. The U.S. government offers no practical overview, especially for the decade after 9/11. U.S. Central Command (CENTCOM) began to release data on contractors only in the second half of 2007 – no other geographic combatant command provides such data for their area of operations Moreover, the role, scope, and size of military contractors are never mentioned when there is a new announcement of a U.S. troop deployment to Iraq or Syria. Journalists rarely ask Pentagon spokespersons or military commanders how many contractors will be deployed alongside the troops. On the rare occasions they do, the military representative never has any estimates available.”)

⁸⁶ *Video: Army Force Posture and Readiness – Acting Army Secretary Patrick Murphy and Chief of Staff General Mark Milley’s Testimonies on Worldwide Threats and Challenges Facing the U.S. Army, its Operations and Structure* (C-SPAN, April 7, 2016), <http://www.c-span.org/video/?407828-1/hearing-us-army-posture&start=2052> [https://perma.cc/3XE7-ZFP7].

On March 16, 2017, President Donald Trump released his “America First” budget blueprint,⁸⁷ which requested \$639 billion for the DoD for the 2018 fiscal year – a \$52 billion increase from the previous year.⁸⁸ The budget proposal does not detail specifically how funding will be allocated; thus, it remains to be seen how President Trump’s foreign and military policies will interact with the PMF sector. However, based on many of his political appointees’ and advisors’ close ties to the PMF industry, America’s use of PMCs does not appear to be decreasing anytime soon.⁸⁹ And, as sectarian violence and wars continue across the Middle East region, there will be a constant growth of demand for weapons and military services, providing increased opportunities for PMFs.

While states have been the largest user of PMCs, PMFs have expanded their clientele to include “opposition groups, national resistance movements, criminal organizations, multinational corporations, individuals, non-governmental organizations that carry out humanitarian activities, and even international intergovernmental

⁸⁷ Presidential Memorandum from Donald J. Trump, President of the United States (Jan. 27, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/28/plan-defeat-islamic-state-iraq> [<https://perma.cc/2VYQ-Y6MU>].

⁸⁸ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET BLUEPRINT OF THE UNITED STATES GOVERNMENT FOR THE FISCAL YEAR OF 2018 (2017) 15, https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf [<https://perma.cc/GMX6-CXAM>].

⁸⁹ Trump’s former national security advisor, Michael Flynn, had extensive dealings with PMFs through his company, Flynn Intel Group. David Kocieniewski, *Trump Security Aide Flynn Has Deep Ties to Defense Contractors*, BLOOMBERG, Dec. 16, 2016, <https://www.bloomberg.com/news/articles/2016-12-16/trump-security-aide-flynn-has-deep-ties-to-defense-contractors> [<https://perma.cc/2DEG-GB9V>]. Also, President Trump’s Secretary of Defense, General James Mattis, led Operation Vigilant Resolve, a battle started in part in retaliation for the killing of four Blackwater PMCs. Mike Dowling, *7 Things You Didn’t Know About the First Battle of Fallujah*, BUSINESS INSIDER (Apr. 8, 2015), <http://www.businessinsider.com/7-things-about-the-first-battle-of-fallujah-2015-4>. Furthermore, Blackwater founder, Erik Prince, reportedly advised the Trump transition team on intelligence and defense matters, including recommendations for positions to the Departments of Defense and State. Prince now heads a Hong-Kong-based PMF. Prince also has a close relationship with Trump’s former chief strategist, Stephen Bannon; is the brother of Besty DeVos, Trump’s Secretary of Education; and he and his family gave large sums of money to then-candidate Trump’s Super PAC. Jeremy Scahill, *Notorious Mercenary Erik Prince is Advising Trump from the Shadows*, THE INTERCEPT (Jan. 17, 2017), <https://theintercept.com/2017/01/17/notorious-mercenary-erik-prince-is-advising-trump-from-the-shadows/> [<https://perma.cc/TV7L-57YB>].

organizations such as the United Nations.”⁹⁰ Even a jihadi private military firm has recently emerged, providing services and support to help overthrow regimes and establish strict Islamic governments.⁹¹

Commentators have noted that it is becoming increasingly impossible to wage war without relying on a supplemental privatized military force,⁹² and the International Committee of the Red Cross (“ICRC”) has stated that “[p]rivate security firms are an established feature of the 21st century war landscape.”⁹³ As such, minimum standards must be established to regulate PMFs and the actions of their contractors.

4. THE “LEGAL GAP” IN WHICH PRIVATE MILITARY FIRMS AND CONTRACTORS OPERATE

4.1. *International Law*

There is considerable debate regarding how the current rules governing the conduct of war apply to PMCs. Presently there are

⁹⁰ Vanessa B. Moya, *The Privatization of the Use of Force Meets the Law of State Responsibility*, 30 AM. U. INT’L L. REV. 795, 807 (2015). For further discussion of how PMFs have spread across markets, see generally Mohamad Ghazi Janaby, *The Legal Status of Employees of Private Military/Security Companies Participating in U.N. Peacekeeping Operations*, 13 NW. U. J. INT’L HUM. RTS. 82 (2015) (discussing the questionable legal status of PMFs hired by the United Nations); Åse Gilje Østensen, *In the Business of Peace: The Political Influence of Private Military and Security Companies on U.N. Peacekeeping*, 20 INT’L PEACEKEEPING 33 (2013) (discussing the United Nations’ employment of PMFs); Deane-Peter Baker & James Pattison, *The Principled Case for Employing Private Military and Security Companies in Interventions for Human Rights Purposes*, 29 J. APPLIED PHIL. 1 (2012) (questioning the merits of using private military and security companies to remedy human rights violations).

⁹¹ Malhama Tactical is considered the world’s first known jihadi PMF, consisting of ten well-trained fighters. In recruiting materials, the PMF states that it is a “fun and friendly team,” which provides such benefits as vacation time and “one day off a week from jihad.” Christian Borys, Eric Woods, & Rao Komar, *The Blackwater of Jihad*, FOREIGN POLICY (Feb. 10, 2017) <http://foreignpolicy.com/2017/02/10/the-world-first-jihadi-private-military-contractor-syria-russia-malhama-tactical/> [<https://perma.cc/TJU5-KB4N>].

⁹² See, e.g., PATTISON, *supra* note 55, at 2.

⁹³ *The ICRC to Expand Contacts with Private Military and Security Companies*, INT’L COMM. OF THE RED CROSS (Aug. 4, 2004), <https://www.icrc.org/eng/resources/documents/misc/63he58.htm> [<https://perma.cc/269N-ATT5>].

no international laws or legal instruments that apply specifically to PMCs and their conduct. In addition to the lack of specific reference to PMCs in treaty law, there is neither consensus on their status, nor their activities under international law. The Working Group on Mercenaries has repeatedly raised the issue of this “legal gap” in which PMCs are able to operate.⁹⁴

International Humanitarian Law (“IHL”) sets forth the legal limits to conduct in war. As IHL was developing prior to the end of the Cold War, PMCs were not a significant part of warfare or the legal landscape, resulting in their status today being ambiguous and undefined.⁹⁵ As such, scholars disagree over how even the most basic tenant of IHL applies to PMCs, that of classifying an entity as either a civilian or combatant,⁹⁶ either of which demands a different standard of behavior.⁹⁷ The distinction between the two carries with it different obligations and protections, depending on one’s membership in either category. According to the ICRC, the only institution named under IHL as a controlling authority, the status of a PMC is determined “on a case-by-case basis, in particular according to the nature and circumstances of the functions in which they are involved.”⁹⁸ The ICRC notes that unless the PMC is “incorporated in

⁹⁴ See, e.g., U.N. Body Urges Support for Treaty Regulating Private Military, Security Companies, U.N. NEWS CENTRE (Apr. 30, 2010), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10000&LangID=E> [<https://perma.cc/3TDQ-WRVK>] (“It’s high time to close the legal gap for private military and security contractors . . .”).

⁹⁵ See Won Kidane, *The Status of Private Military Contractors Under International Humanitarian Law*, 38 DENVER J. INT’L L. & POL’Y 361, 364 (2010) (“In the post-Cold War era, the legal regulation of armed conflict has been complicated by the advent of a remarkable new player: the privatized military industry Because IHL took its current shape and form prior to and during the Cold War, the new players were not a significant part of the equation. As such, the status of today’s private military contractors is ambiguous at best.”).

⁹⁶ *Id.*; see also Nicholas Maisel, *Strange Bedfellows: Private Military Companies and Humanitarian Organizations*, 33 WIS. INT’L L.J. 639, 644 (2015) (“The principle of distinction – summarized in Article 48 of the First Additional Protocol (‘API’) as ‘the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives’ is the cornerstone of the laws of war.”).

⁹⁷ Maisel, *supra* note 96, at 644.

⁹⁸ *International Humanitarian Law and Private Military/Security Companies – FAQ*, INT’L COMM. OF THE RED CROSS (Dec. 10, 2013), <https://www.icrc.org/en/document/ihl-and-private-military-security-companies-faq> [<https://perma.cc/NL97-MFCU>] [hereinafter ICRC, FAQ].

the armed forces of a State or have combat functions for an organized armed group belonging to a party to the conflict," the PMC's status is that of a civilian.⁹⁹ However, should the PMC do something that would "amount to taking a direct part in hostilities," the PMC would lose civilian status and be considered a combatant.¹⁰⁰ Accordingly, PMCs are only considered combatants if they either (1) (a) are incorporated into the state's armed forces or (b) fight for a party to the conflict or (2) take a direct part in hostilities.

For the first element, since the second part (b) relates to fighting for a non-state entity (e.g., terrorist organizations, rebel groups), this will not be evaluated given its rare occurrence and the general inability to regulate such actors in the first place.¹⁰¹ For the first part of the first element, most commentators have argued the bar for incorporation of PMCs into a state's armed forces is quite high. This would make sense given that the entire purpose of privatization is to transfer to the private sector that which was previously under the purview of the government. Therefore, it would seem at odds with the point of outsourcing to maintain that PMCs were nevertheless members of the state's armed forces.¹⁰² Most commentators contend that for PMCs to be formally incorporated, they must be incorporated via domestic legislation.¹⁰³ Thus, PMCs are rarely considered combatants under this criterion. Notably, the United States does not

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See Michael Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 522 (2005) ("[R]ebel forces are unlikely to hire civilians or contractors."); Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, INT'L COMM. OF THE RED CROSS 23-25 (2009), <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> [<https://perma.cc/5P7V-M3LG>] (discussing the "meaning and significance of 'belonging to' a party to a conflict").

¹⁰² Lindsey Cameron, *Private Military Companies: Their Status Under International Humanitarian Law and its Impact on Their Regulation*, 88 INT'L REV. RED CROSS 573, 583 (2006).

¹⁰³ See Alice S. Debarre, *U.S.-Hired Private Military and Security Companies in Armed Conflict: Indirect Participation and its Consequences*, 7 HARV. NAT'L SEC. J. 437, 442, n.23 (2016) ("Proponents of the formal approach argue that to be combatants under Article 43 AP I, PMSC employees would have to be formally incorporated by the state in the armed forces, in compliance with relevant domestic legislation."). For further discussion, see generally Mirko Sossai, *Status of Private Military Companies' Personnel in the Laws of War: The Question of Direct Participation in Hostilities*, 5 (EUI Working Paper, AEL 2009/6) ("[W]hat is required is the formal incorporation by the State, in order to put the private contractors within the military chain of command and control. Therefore, membership in an armed force remains primarily regulated by domestic legislation.").

consider PMCs to be combatants, but “civilians authorized to accompany the force in the field.”¹⁰⁴

Since under this first element, the majority of PMCs are considered civilians, the important question becomes whether PMCs are directly participating in hostilities and therefore lose their civilian status. This too is subject to considerable legal debate and scholarship on what it means to take direct part in hostilities.¹⁰⁵ The ICRC has provided illustrative examples of “direct participation in hostilities” including “[g]uarding military bases against attacks from the opposing party, gathering tactical military intelligence and operating weapons systems in a combat operation.”¹⁰⁶ Unlike a soldier, who is always considered a combatant even if not directly participating in hostilities, a PMC’s status changes depending on what action the PMC is taking at the time of consideration.

The ICRC has taken note of how the use of PMCs has muddled the distinction between civilians and combatants.¹⁰⁷ Gómez del Prado emphasized that PMCs operate in “extremely blurred situations where the frontiers are difficult to separate.”¹⁰⁸ He explains that PMCs “carry and use weapons, interrogate prisoners, load bombs, drive military trucks and fulfill other essential military functions,” yet due to their status under the law, they evade accountability, whereas their military counterparts that carry out the same functions cannot.¹⁰⁹ That individuals serving in roughly the same functions, and taking almost identical actions, can be considered civilians – thereby falling outside of the military’s chain of command and the obligations and laws binding military action in similar cir-

¹⁰⁴ U.S. DEP’T OF ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD, ch. 1 (Jan. 2003), <http://www.globalsecurity.org/military/library/policy/army/fm/3-100-21/chap1.htm> [<https://perma.cc/GM8N-PQQA>].

¹⁰⁵ See, e.g., Stephen Pomper, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress Through Practice*, in NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY 181, 182 (Kenneth Watkin & Andrew Norris eds., 2012) (discussing when an individual loses protection from attack through membership in an organized armed group and related questions of what it means to take direct part in hostilities).

¹⁰⁶ ICRC, FAQ, *supra* note 98.

¹⁰⁷ *Direct Participation in Hostilities: Questions & Answers*, INT’L COMM. OF THE RED CROSS (June 2, 2009), <https://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm> [<https://perma.cc/C8S4-U2M9>].

¹⁰⁸ Gómez del Prado, *supra* note 39.

¹⁰⁹ *Id.*

cumstances—raises a very real legal inconsistency. This inconsistency was well-illustrated in the Abu Ghraib abuse incident, where military personnel were court-martialed and convicted, while their PMC counterparts escaped prosecution altogether. In its report to the United Nations Human Rights Council, the Working Group on Mercenaries noted that “[s]ome Governments appear to consider these [PMCs] as neither civilians nor combatants, though heavily armed; these individuals are the new modalities of mercenarism.”¹¹⁰

4.2. U.S. Law

The United States is the world’s largest consumer of private military services. As such, this Section only provides a review of U.S. law, while acknowledging that other states may have various domestic laws that relate to the use of PMCs, their services, and their violations of human rights.

After the Nisour Square tragedy, the Iraqi government insisted charges be brought against the PMCs who perpetrated the crimes.¹¹¹ Initially the United States refused to prosecute, and as discussed, it was not until seven years later that convictions were handed down to some involved. Convictions in this case were the exception, not the rule. For example, the PMCs involved in torture and other abuses at Abu Ghraib prison have never been prosecuted, despite the junior military officers being court-martialed for their joint participation.¹¹² Here, the PMCs could neither be court-martialed, as

¹¹⁰ U.N. Human Rights Council, *Rep. of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of People to Self-Determination*, ¶ 57, U.N. Doc. A/HRC/7/7 (Jan. 9, 2008), <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/100/75/PDF/G0810075.pdf?OpenElement>.

¹¹¹ Amanda Taub, *Blackwater’s Baghdad Massacre is a Reminder of how the US Became what it Hated in Iraq*, VOX (Apr. 15, 2015, 9:20 AM), <http://www.vox.com/2015/4/15/8419825/blackwater-iraq-war-failure> [<https://perma.cc/QSF4-T68B>] (“After the [Nisour Square] massacre, the Iraqi government demanded that the contractors stand trial in Iraq, but the US refused.”).

¹¹² *Id.* (“There were plenty of good reason why the [United States] didn’t agree to subject its personnel to the Iraqi justice system. And the [United States] justice system did eventually work in the Blackwater case.”).

they were not military personnel, nor could they be prosecuted under Iraqi law, given the immunity granted under CPA Order 17, which was in place at the time of these offenses.¹¹³

Such immunity agreements have been standard practice, based on the logic that states have their own accountability and reporting procedures (e.g., court-martial) that govern and discipline their state's military personnel. CPA Order 17, however, included immunity for PMCs as well, despite that they were not subject to equivalent procedures. Thus, PMCs were both immune from Iraqi law and exempt from the U.S. procedures that would traditionally govern individuals occupying the roles and undertaking the tasks for which PMCs were hired.

The rationale behind CPA Order 17 was that the Iraqi justice system was incapable of providing U.S. soldiers or PMCs with due process guarantees or safety in detention.¹¹⁴ The Working Group on Mercenaries noted "[t]he combined effect of the immunity clause contained in CPA Order 17 and the failure to prosecute [PMCs] . . . has led to impunity for human rights violations against Iraqi civilians . . ." and an "ongoing failure to hold accountable those involved in such violations and to provide an effective remedy . . ."¹¹⁵ Immunity was in place from 2003 through January 2009, at which time the United States and Iraq signed a Status of Forces Agreement ("SOFA") that removed immunity for contractors of the DoD,

¹¹³ See, e.g., Patel & Stone, *supra* note 14 ("Under rules issued by the U.S.-led Coalition Provisional Authority, contractors couldn't be prosecuted in Iraqi courts. While such immunity is standard for military personnel, it is also typically accompanied by a regular system of reporting and accountability for those who commit crimes. But military contractors in Iraq weren't subject to equivalent procedures and generally managed to escape prosecution.").

¹¹⁴ See CHRISTOPHER KINSEY, PRIVATE CONTRACTORS AND THE RECONSTRUCTION OF IRAQ: TRANSFORMING MILITARY LOGISTICS 131 (Routledge 2009) ("The order was the result of the concern about the condition of the Iraqi justice system, which at the time could neither ensure the safety of foreign nationals nor guarantee due process.")

¹¹⁵ U.N. Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination, Addendum: Mission to Iraq*, ¶69, U.N. Doc. A/HRC/18/32/Add.4 (Aug. 12, 2011), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/154/62/PDF/G1115462.pdf?OpenElement>.

though contractors of other U.S. departments (e.g., State Department), retained immunity.¹¹⁶ Since the SOFA was signed, no U.S.-hired PMCs have been subjected to the Iraqi judicial system.¹¹⁷

In the aftermath of the Abu Ghraib and the Nisour Square incidents, the United States enacted reforms to its domestic laws as they related to PMCs.¹¹⁸ The Blackwater defendants were charged under the Military Extraterritorial Jurisdiction Act (MEJA),¹¹⁹ a statute that

¹¹⁶ SARAH K. COTTON, ET AL., RAND NAT'L SECURITY RES. DIVISION, HIRED GUNS: VIEWS ABOUT ARMED CONTRACTORS IN OPERATION IRAQI FREEDOM 15 (2010), http://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG987.pdf [<https://perma.cc/LD8H-7ZT6>]. For a discussion on Iraq's right to assert criminal and civil jurisdiction over the various contractors hired by different U.S. agencies, see R. CHUCK MASON, CONG. RESEARCH SERV., R40011, U.S.-IRAQ WITHDRAWAL/STATUS OF FORCES AGREEMENT: ISSUES FOR CONGRESSIONAL OVERSIGHT 7-10 (2009), <https://fas.org/sgp/crs/natsec/R40011.pdf> [<https://perma.cc/AP99-6KTR>] (discussing statutory and procedural schemes for jurisdictions and prosecutions).

¹¹⁷ CTR. FOR HUMAN RIGHTS & HUMANITARIAN LAW, AM. UNIV. WASH. COLL. OF LAW, MONTREUX FIVE YEARS ON: AN ANALYSIS OF STATE EFFORTS TO IMPLEMENT MONTREUX DOCUMENT LEGAL OBLIGATIONS AND GOOD PRACTICES 117 (Rebecca DeWinter-Schmitt et al. eds., 2013), <https://www.wcl.american.edu/hum-right/center/resources/publications/documents/YESMontreuxFv31.pdf> [<https://perma.cc/RKX6-G4W4>] [hereinafter MONTREUX FIVE YEARS ON] (“[S]ince the coming into force of the SOFA in 2009, Iraqi courts have been used only in one instance to convict a British PMSC employee found guilty of killing two other PMSC employees (one British and the other Australian) and injuring an Iraqi guard . . .”). This was the case of Daniel Fitzsimons, who was reported to have had a violent past and to have been suffering from post-traumatic stress disorder. *Id.* at 23. There were additional allegations that PMFs were not properly vetting those they employed. See Caroline Davies, *Briton Danny Fitzsimons Jailed in Iraq for Contractors' Murders*, GUARDIAN (Feb. 28, 2011, 12:23 PM), <https://www.theguardian.com/world/2011/feb/28/danny-fitzsimons-jailed-iraq-murders> [<https://perma.cc/LD6X-AM6A>] (“[Fitzsimons’s stepmother and father] called for legislation to help vet those hired by private security firms.”).

¹¹⁸ Charles Tiefer, *No More Nisour Squares: Legal Control of Private Security Contractors in Iraq and After*, 88 OR. L. REV. 745, 755-56 (2009) (footnote omitted) (“After Abu Ghraib, it became apparent that the statute did not apply to contractors that were not technically hired under DOD contract, even when they performed work with the military and the non-DOD was just a technicality. So, Congress amended the law to reach contractors ‘supporting the mission of the DOD.’”).

¹¹⁹ See 18 U.S.C. §§ 3261-3267 (2004) (providing criminal penalties for “offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States”); see also *New Charges in 2007 Blackwater Shootings in Iraq*, AL JAZEERA AM. (Oct. 17, 2013, 10:00 PM), <http://america.aljazeera.com/articles/2013/10/17/new-charges-in-blackwater-shootings.html> [<https://perma.cc/5FPH-PL3U>] (describing new grand jury indictment of Blackwater defendants after federal court of appeals reinstated); Erica Teichert, *Blackwater Case Tests DOJ Authority Over Contractors Abroad*, LAW360 (June 19, 2014), <https://www.law360.com/articles/549630/blackwater-case-tests-doj>

allows the government to prosecute specific government employees and certain PMCs for crimes committed abroad.¹²⁰ The MEJA covers PMCs working for U.S. agencies, but only to the extent that their employment is “related” to supporting the mission of the DoD.¹²¹ The jurisdiction of MEJA does not apply to PMCs whose employment is not considered “related” to the DoD’s mission.¹²²

Peter W. Singer reported that over the four years following the Iraq occupation, there were only 20 cases sent to the Department of Justice under the MEJA, with only one prosecution that time.¹²³ He noted that this was a peculiarly low number given the 160,000 PMCs that operated in Iraq over this period, and joked that either the

authority-over-contractors-abroad (“Under the Military Extraterritorial Jurisdiction Act, employees whose work internationally ‘relates to supporting the mission of the Department of Defense’ and who violate U.S. law while abroad can be tried in the [United States]. But the statute’s language is ambiguous and doesn’t provide criteria to determine when non-DOD contractors are supporting the agency’s mission.”).

¹²⁰ JENNIFER K. ELSEA, MOSHE SCHWARTZ & KENNON H. NAKAMURA, CONG. RESEARCH SERV., RL32419, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 23 (2008) (footnote omitted), <https://fas.org/sgp/crs/natsec/RL32419.pdf> [<https://perma.cc/XX3U-7VDT>] (“Persons who are ‘employed by or accompanying the armed forces’ overseas may be prosecuted under the Military Extraterritorial Jurisdiction Act (MEJA) of 2000 for any offense that would be punishable by imprisonment for more than one year if committed within the special maritime and territorial jurisdiction of the United States.”).

¹²¹ *Id.* at 23–24 (footnote omitted) (“Persons ‘[e]mployed by the armed forces’ is defined to include . . . , after October 8, 2004, civilian contractors and employees from other federal agencies and ‘any provisional authority,’ to the extent their employment is related to the support of the DOD mission overseas.”).

¹²² *Id.* at 24 (“Depending on how broadly DOD’s mission is construed, MEJA does not appear to cover civilian and contract employees of agencies engaged in their own operations overseas.”).

¹²³ Horton, *supra* note 19 (“Indeed, there are reportedly as many as [twenty] MEJA cases that have been handed off to the Department of Justice the last few years related to Iraq and we have not yet seen prosecutions on them except for one. That [twenty], though, seems an incredibly low count considering we are talking about a community of 160,000 over [four] years, in a relatively [sic] zone of impunity.”). It was noting that “[v]ery few successful prosecutions involving DOD contractors in Iraq under MEJA have been reported. A contractor working in Baghdad pleaded guilty to possession of child pornography in February 2007. Another contract employee was prosecuted for abusive sexual contact involving a female soldier that occurred at Talil Air Force Base in 2004. A contract employee was indicted for assaulting another contractor with a knife in 2007.” ELSEA, SCHWARTZ & NAKAMURA, *supra* note 118, at 25 (footnotes omitted).

United States “found the Stepford Village of Iraq . . . [o]r we have to admit we have a major problem.”¹²⁴

In 2007, Congress amended the Uniform Code of Military Justice (“UCMJ”) to subject PMCs to court-martial if they accompany the military in the field during times of counterinsurgency, or formally declared war—which has not happened since 1942.¹²⁵ The constitutionality of this change, however, has been debated. In the past, U.S. courts have held that trying civilians, as most all PMCs are classified, in military courts is a constitutional violation of both due process and the right to a trial by a civilian jury.¹²⁶ Additionally, for charges to be brought against a military officer, and thereby be court-martialed, it is the responsibility of a commanding officer. Such a command structure is not in place for PMCs.¹²⁷

The Civilian Extraterritorial Jurisdiction Act (“CEJA”), a bill that attempts to close the U.S. jurisdictional loophole for PMCs, has been introduced multiple times in the Senate by Senator Patrick Leahy.¹²⁸ While the MEJA provided the courts with jurisdiction over PMCs hired by the military, CEJA would expand jurisdiction over PMCs

¹²⁴ Horton, *supra* note 19.

¹²⁵ COTTON ET AL., *supra* note 116, at 15 n.9 (“U.S. Senator Lindsay Graham inserted an amendment to the UCMJ into the fiscal year (FY) 2007 National Defense Authorization Act, placing civilian contractors accompanying the armed forces in the field under court-martial jurisdiction during times of contingency operations, in addition to times of declared war.”); *see also* ELSEA, SCHWARTZ & NAKAMURA, *supra* note 117, at 26–28 (discussing potential constitutional challenges to court-martial for civilian contractors).

¹²⁶ ELSEA, SCHWARTZ & NAKAMURA, *supra* note 120, at 25–31 (footnote omitted) (“While the UCMJ offers soldiers procedural protections similar to and sometimes arguably superior to those in civilian courts, courts have been reluctant to extend military jurisdiction to civilians.”).

¹²⁷ *See* Marcus Hedahl, *Unaccountable: The Current State of Private Military and Security Companies*, 31 CRIM. JUST. ETHICS 175, 183–84 (2012) (“Soldiers are accountable to, and held accountable by, their commanding officer (CO)—that is a central point of the UCMJ A CO, in turn, is responsible for holding soldiers accountable Therefore, for members of PMSCs to be held individually and criminally accountable, there must be a clear and precise delineation of responsibility for PMSC individual criminal liability.”).

¹²⁸ *See, e.g.*, Civilian Extraterritorial Jurisdiction Act of 2015, S. 1377, 114th Cong. (2015), <https://www.congress.gov/114/bills/s1377/BILLS-114s1377is.pdf> [<https://perma.cc/P5GZ-SXCK>] (noting Senator Patrick Leahy introduced the bill on May 19, 2015); Civilian Extraterritorial Jurisdiction Act of 2014, S. 2598, 113th Cong. (2014), <https://www.congress.gov/113/bills/s2598/BILLS-113s2598is.pdf> [<https://perma.cc/6WLY-ZQ3Q>] (noting that Sen. Patrick Leahy introduced the bill on July 14, 2014).

hired by any U.S. department or agency.¹²⁹ Furthermore, it would remove the requirement that in order to be liable, the contractor's action took place in the course of providing support "related" to the mission of the DoD.¹³⁰ While this bill would help to close the legal gap, it has continuously failed to pass the Senate.

The United States is party to the United Nations Convention Against Torture and Cruel, Inhuman and Degrading Treatment ("CAT"), which requires countries to criminalize the use of torture within their own jurisdiction.¹³¹ The CAT is not self-executing,¹³² however the United States enacted the Federal Torture Statute in 1994,¹³³ implementing provisions of the convention relating to acts of torture not already established in domestic law. The statute criminalizes torture committed by "a national of the United States" or an "offender present in the United States, irrespective of the nationality of the victim or alleged offender."¹³⁴ In this way, the statute creates liability for an American national who commits torture abroad, or a non-national who is presently in the United States and has committed torture. No PMC has ever been convicted under this Statute. In fact, the only individual that has ever been prosecuted under this statute was "Chuckie" Taylor, Jr., the son of former Liberian President and warlord Charles Taylor, for committing torture in Liberia.¹³⁵

¹²⁹ HUMAN RIGHTS FIRST, THE CASE FOR THE CIVILIAN EXTRATERRITORIAL JURISDICTION ACT (CEJA): WHY U.S. NEEDS TO CLARIFY U.S. CRIMINAL JURISDICTION OVER U.S. CONTRACTORS FIELDED ABROAD 3 (2013), <https://www.human-rightsfirst.org/wp-content/uploads/pdf/CEJA-Fact-Sheet.pdf> [<https://perma.cc/MJZ6-QADE>] ("CEJA would extend U.S. criminal jurisdiction over federal government contractors and employees fielded abroad for serious crimes committed while employed by any U.S. department or agency other than the Department of Defense without impacting the conduct of U.S. intelligence agencies abroad.").

¹³⁰ *Id.* ("There would be no requirement that the contract support the mission of the Department of Defense.").

¹³¹ Convention Against Torture, *supra* note 52, at art. 4, ¶1 ("Each State Party shall ensure that all acts of torture are offences under its criminal law.").

¹³² S. Exec. Rep. No. 101-30, Sec. III(1) (1990), <https://www.congress.gov/treaty-document/100th-congress/20/resolution-text> [<https://perma.cc/AT3E-ZM3B>].

¹³³ 18 U.S.C. § 2340A (2015).

¹³⁴ *Id.* at § 2340A(b)(1)-(2).

¹³⁵ William J. Aceves, *United States v. George Tenet: A Federal Indictment for Torture*, 48 N.Y.U. J. INT'L L. & POL. 1, 10-11 (2015) (noting Chuckie Taylor was the first and only case ever brought under the Torture Statute). For the *Belfast* decision, see *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010).

The War Crimes Act imposes criminal liability on a U.S. national or a member of the U.S. military who commits a “grave breach” of the 1949 Geneva Conventions or specified violation of Common Article 3 to the conventions, including, *inter alia*, murder, sexual assault, torture, cruel and inhumane treatment, in the United States or abroad.¹³⁶ The Bush Administration limited the scope of the Act with the Military Commissions Act of 2006 (“MCA”),¹³⁷ which reinterpreted provisions of the conventions, and removed reference to “humiliating and degrading treatment,”¹³⁸ which is considered a grave breach under international law. The MCA was seen by many as retroactively rewriting the War Crimes Act to serve as a type of amnesty for crimes committed in the War on Terror.¹³⁹ To date, no one has been convicted under the War Crimes Act.

The USA PATRIOT Act amended the “special maritime and territorial jurisdiction of the United States” (“SMTJ”),¹⁴⁰ thereby extending the jurisdiction of federal courts over criminal offenses committed by U.S. nationals on the premises of U.S. diplomatic, military, or other entities in a foreign state.¹⁴¹ Only one PMC has ever been convicted under this Act, David Passaro, a contracted CIA interrogator who beat and tortured to death an Afghan detainee during an

¹³⁶ 18 U.S.C. § 2441(a)–(d) (2006).

¹³⁷ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 10 U.S.C. § 948 (2009).

¹³⁸ Michael Ratner, *The Uphill Battle for Habeas Corpus in George W. Bush's Washington, D.C.*, THE NATION (Oct. 4, 2006), <http://www.thenation.com/article/pushing-back-detainee-act/> [<https://perma.cc/V2YU-5JQT>] (“Moreover, the President is now free to abuse and even torture those detained, using the slippery language of this legislation And those who authorize or carry out torture techniques will have complete immunity from criminal prosecution.”).

¹³⁹ *Id.* (“Those who authorized the torture of detainees in the past will be granted retroactive immunity. When this was tried in Argentina and Chile during their ‘dirty wars,’ it was called an amnesty, and, in the end, did not work. War crimes cannot be amnestied.”).

¹⁴⁰ See 18 U.S.C. § 7 (2010) (providing definition for SMTJ).

¹⁴¹ MONTREUX FIVE YEARS ON, *supra* note 117, at 92 (“The USA PATRIOT Act of 2001 amended the . . . [SMTJ] and makes portions of the criminal code applicable for offenses committed by or against U.S. nationals on U.S. military bases and embassies located abroad as well as any place used by entities of the U.S. government.”).

interrogation.¹⁴² In fact, Passaro is the first, and only, CIA interrogator prosecuted for any post-9/11 abuse.¹⁴³ After serving six years, and despite an apparent lack of remorse, Passaro was released from prison.¹⁴⁴

Although these various U.S. laws have created some accountability for PMCs, the incredibly low number of prosecutions and convictions, despite continuing reports of violations, make clear that these provisions have not done enough to hold PMCs to account.

An additional obstacle to accountability is the need for classified evidence in order to prosecute these cases. On a number of occasions, the U.S. government has argued that the evidence needed may be at odds with national security, citing any number of legal justifications, including the state secrets privilege.¹⁴⁵ If a full review of evidence is deemed detrimental to national security, the Classified Information Procedures Act (CIPA) provides that a summary of the classified information may be entered instead as evidence.¹⁴⁶

¹⁴² U.S. Att'y Office for E.D.N.C., *Government Contract Employee Re-sentenced for Assault Charge*, DEP'T OF JUSTICE: NEWS (Apr. 6, 2010), <https://www.justice.gov/archive/usao/nce/press/2010/2010-apr-06.html> [<https://perma.cc/MF9P-W657>] ("The assault took place while [Passaro] was working as an independent contract on behalf of the . . . [CIA] at a forward operating base in Afghanistan. The case was the first charged under a provision of the Patriot Act which extended jurisdiction of United States District Courts to crimes committed by United States civilians on overseas installations. The victim was an Afghan male whom the defendant had been asked to interrogate. The victim died during the course of the interrogation.").

¹⁴³ *Convicted Former CIA Contractor Speaks Out About Prisoner Interrogation*, PBS NEWSHOUR (Apr. 20, 2015, 6:15 PM), <http://www.pbs.org/newshour/bb/convicted-former-cia-contractor-speaks-prisoner-interrogation/> [<https://perma.cc/NT24-8GVD>] ("The CIA told the NewsHour today that the agency stopped using contractors to do interrogations when President Obama ended the CIA's program in January 2009 As a result, Passaro's case may go down in history books as the first, and only, case in which a CIA interrogator has been prosecuted for abusing a prisoner.").

¹⁴⁴ *See id.* (stating Passaro served six years in prison). During his interview, Passaro stated "[a]nything that I did to Abdul Wali [the victim], none of that constitutes torture. In hindsight, I wouldn't have done anything different." *Id.*

¹⁴⁵ MONTREUX FIVE YEARS ON, *supra* note 117, at 94 ("The use of classified evidence may be another barrier. At times a defendant's constitutional rights may be at odds with national security."). CHARLES DOYLE, CONG. RESEARCH SERV., R94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 23-40 (2012), <https://fas.org/sgp/crs/misc/94-166.pdf> [<https://perma.cc/JY2F-BRTY>] ("Although a substantial number of federal criminal statutes have undisputed extraterritorial scope . . . , prosecutions have been relatively few. Investigators and prosecutors face legal, practical, and often diplomatic obstacles that can daunting.").

¹⁴⁶ DOYLE, *supra* note 145, at 40 ("The CIPA permits courts to approve prosecution prepared summaries of classified information to be disclosed to the defendant and introduced in evidence, as a substitute for the classified information.").

However a summary is unlikely to “be strong enough to prove guilt beyond a reasonable doubt”¹⁴⁷ Moreover, information regarding how the PMC’s employment *relates* to the mission of DoD may itself be classified, thereby precluding a charge under the MEJA in the first place.¹⁴⁸

Post-9/11, the U.S. government greatly expanded its use of the state secrets privilege. Not only to deny access to evidence, but also to entirely foreclose the adjudication of cases by having those cases dismissed in the preliminary stages on account of national security arguments.¹⁴⁹ An example is the case of *El-Masri v. Tenet*, in which a man was mistakenly detained through the U.S. rendition program, and subjected to severe torture, including beatings and sodomy at a CIA black site.¹⁵⁰ Despite his case being widely known worldwide, it was dismissed based on the government’s use of state secrets privilege.¹⁵¹

¹⁴⁷ MONTREUX FIVE YEARS ON, *supra* note 117, at 94.

¹⁴⁸ *Holding Criminals Accountable: Extending Criminal Jurisdiction for Government Contractors and Employees Abroad: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 4-5 (2011) (statement of Lanny A. Breuer, Assistant Att’y Gen., Criminal Division, Department of Justice), <https://www.judiciary.senate.gov/imo/media/doc/11-5-25%20Breuer%20Testimony.pdf> [<https://perma.cc/RZ8J-H3B8>] (“Furthermore, in some instances, the relevant information concerning a defendant’s employment and how it relates to the Defense Department’s mission may be classified. Although the Justice Department may use procedures set out under the Classified Information Procedures Act, such procedures may not be adequate to protect national security information and also establish to a jury beyond a reasonable doubt that a defendant is subject to MEJA. In practice, this means that certain civilian U.S. Government employees and contractors can commit serious crimes overseas without fear of U.S. prosecution.”).

¹⁴⁹ *State Secrets Privilege: Government Abuse of Power*, CTR. FOR CONSTITUTIONAL RIGHTS, https://ccrjustice.org/sites/default/files/assets/factsheet_stateSecrets.pdf [<https://perma.cc/97S5-MDDV>] (last modified Jan. 11, 2011) (“Previous uses of the [state secrets privilege] by the government have most commonly been at the discovery stage, asking the courts to deny people access to documents or witnesses. More recently – and more troublingly – the government has invoked the [state secrets privilege] in the very beginning of cases to dismiss them altogether.”).

¹⁵⁰ *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 533 (E.D. Va. 2006) (“Still blindfolded, [El-Masri] alleges he was led to a building where he was beaten, stripped of clothing, and sodomized with a foreign object When he regained his sight, he claims he saw seven or eight men dressed in black and wearing black ski masks. El-Masri contends that these men were members of a CIA ‘black rendition’ team, operating pursuant to unlawful CIA policies at the direction of defendant Tenet.”).

¹⁵¹ *See El-Masri v. Tenet*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/cases/el-masri-v-tenet> [<https://perma.cc/X2T2-3QNR>] (last updated June 1, 2011) (“A judge dismissed the case in May 2006 after the government intervened, arguing that allowing the case to proceed would jeopardize

Finally, the United States has entered into bilateral immunity agreements, or "Article 98 Agreements," with at least 100 countries,¹⁵² in which both countries agree not to surrender "employees (including contractors), or military personnel" to the jurisdiction of the International Criminal Court.¹⁵³ Nearly all agreements, with the exception of Israel, are signed with lesser developed countries.

The patchwork of U.S. laws and slack enforcement, among a myriad of other problems, have plagued meaningful prosecution of PMCs in the United States. Few individuals have been prosecuted under the provisions reviewed, indicating that the system for criminal accountability in the United States is likely not working effectively.¹⁵⁴ It has been reported that when human rights violations perpetrated by PMCs are dealt with, it is often as an administrative matter, instead of a criminal one.¹⁵⁵ Despite numerous publicly known incidents, lawsuits, and criticism, the United States has yet to establish an effective system of accountability and oversight for

state secrets, despite the fact that Mr. El-Masri's story was already known throughout the world. The ACLU appealed the dismissal in November 2006. The U.S. Court of Appeals for the Fourth Circuit upheld the lower court decision that denied MR. El-Masri [sic] a hearing in the United States. In October 2007, the United States Supreme Court refused to review Mr. El-Masri's case.").

¹⁵² See, e.g., *Countries that have Signed Article 98 Agreements with the U.S.*, GEORGETOWN LAW LIBRARY, <http://guides.ll.georgetown.edu/c.php?g=363527&p=2456099> [<https://perma.cc/33RU-BUVY>] (last updated Jan. 31, 2017) (listing countries with signed Article 98 Agreements).

¹⁵³ See e.g., Agreement Between the Government of the Transitional Islamic State of Afghanistan and the Government of the United States of America Regarding the Surrender of Persons to the International Criminal Court, Afg.-U.S., Sept. 20, 2002, <http://www.law.georgetown.edu/library/research/guides/upload/Afghanistan03-119.pdf> [<https://perma.cc/KSN6-Z6H9>].

¹⁵⁴ See MONTREUX FIVE YEARSON, *supra* note 117, at 90 ("To date there have been only a handful of successful convictions of PMSC personnel for criminal conduct. This would indicate that the system for criminal accountability is not working effectively considering the lack of prosecutions in known serious incidents of alleged human rights violations and anecdotal evidence in media . . ."); see also Whitney Grespin, *An Act of Faith: Building the International Code of Conduct for Private Security Providers*, DIPLOMATIC COURIER (July 19, 2012), <http://www.diplomaticcourier.com/news/topics/security/1233-an-act-of-faith-building-the-international-code-of-conduct-for-private-security-providers> [<https://perma.cc/9Q6S-STGR>] (discussing the effect of the ICoC on PMCs).

¹⁵⁵ See, e.g., PATTISON, *supra* note 55, at 147 ("It has been alleged that the [State Department] deliberately dealt with criminal charges against Blackwater for violations of U.S. export laws (including the illegal export of weapons to Afghanistan and offering to train troops in South Sudan) as administrative matters so that this was not precluded from hiring the firm again.").

the PMCs it employs. Yet, even if the laws were comprehensive enough, a review of the United States' use of these laws demonstrates a lack of will to prosecute. The reasons for this are varied; however, a prevalent one presumptively includes the desire to avoid an appearance of malfeasance, or to maintain the status quo, in order to have access to actors whose actions may fall outside the jurisdiction and accountability of legal regimes that constrain the United States.

4.3. International Regulation

States, civil society, and PMFs have undertaken efforts to regulate the industry through the creation of multi-stakeholder frameworks. Two prevailing characteristics of these frameworks are that they are entirely voluntary and legally non-binding.¹⁵⁶ A recent framework, created following a joint initiative of Switzerland and the ICRC, was the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies (2008) ("Montreux Document").¹⁵⁷ The stated purpose is to "promote respect for international humanitarian law and human rights law, whenever [PMFs] are present in armed conflicts."¹⁵⁸ The Montreux Document reiterates international legal obligations as they relate to humanitarian and human rights law and provides an outline of "good practices" with regards to the use of PMCs. The Montreux Document has been endorsed by several states, including the United States, the United Kingdom, Afghanistan, and Iraq, as well as the European Union, the

¹⁵⁶ See *The Montreux Document*, *supra* note 64, at 9, ¶¶ 3-4 ("That this document is not a legally binding instrument and does not affect existing obligations of States That this document should therefore not be interpreted as limiting, prejudicing or enhancing in any manner existing obligations under international law, or as creating or developing new obligations under international law"); INT'L CODE OF CONDUCT ASS'N, *International Code of Conduct for Private Security Service Providers*, at 6, ¶ 14, (Nov. 9, 2010), https://icoca.ch/sites/default/files/resources/ICoC_English.pdf [<https://perma.cc/HCR3-PCT8>] [hereinafter *Private Security Service Providers*] ("The Code itself creates no legal obligations and no legal liabilities on the Signatory Companies, beyond those which already exist under national or international law. Nothing in this Code shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law.").

¹⁵⁷ *The Montreux Document*, *supra* note 64.

¹⁵⁸ *Id.* at 31.

North Atlantic Treaty Organization (“NATO”), and the Organization for Security and Co-operation in Europe (“OSCE”).¹⁵⁹ Of the states that have signed the Montreux Document, Switzerland is the only one to have passed legislation attempting to place the Montreux guidelines into effect.¹⁶⁰

It is unclear whether, though unlikely that, the Montreux Document will have any meaningful impact on states’ behavior. The Initiative for Human Rights and Business conducted a five-year review of the Montreux Document and found that states had “mixed records of adhering to legal obligations and implementing the Good Practices[,]” which made “it is nearly impossible to assess whether or not the Montreux Document is having the desired impact of improving human rights protections for people and communities affected by [PMFs’] activities and ensuring accountability for misconduct of [PMFs] and their personnel.”¹⁶¹ Furthermore, the study concluded that “[i]f successful criminal convictions, civil suits, or other forms of remedy such as reparations are a measure of impact, then cause for concern remains.”¹⁶² The study used the United States as an example of this, noting that “there have been only a handful of criminal cases against [PMF] personnel that resulted in conviction—this is so despite the numerous allegations of misconduct . . . in Iraq and Afghanistan”¹⁶³

Building upon the Montreux Document, the International Code of Conduct for Private Security Services Providers (“ICoC”) was finalized in November 2010.¹⁶⁴ It was considered a more encompassing initiative that involved multiple stakeholders, including states,

¹⁵⁹ Switz. Fed. Dep’t of Foreign Affairs, *Participating States of the Montreux Document*, FDFA, <https://www.fdfa.admin.ch/eda/en/home/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html> [<https://perma.cc/95AW-ZFGK>] (last updated July 7, 2016) (providing participating states and organizations).

¹⁶⁰ See generally *Mercenary Services Outlawed by Parliament*, SWISS INFO (Sept. 24, 2013, 12:04 PM), <http://www.swissinfo.ch/eng/mercenary-services-outlawed-by-parliament/36968406> [<https://perma.cc/A72T-V5GB>] (“Private security contractors based in Switzerland will no longer be allowed to provide mercenaries and will have to report to the federal authorities any services they plan to supply beyond the country’s borders.”).

¹⁶¹ MONTREUX FIVE YEARS ON, *supra* note 117, at 157.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See generally Int’l Code of Conduct Ass’n, *History*, <https://www.icoca.ch/en/history> [<https://perma.cc/66PT-XQPB>] (last visited Feb. 26, 2017) [hereinafter ICoC, *History*] (stating the ICoC “was finalized in November 2010” and signed by fifty-eight PMFs).

civil society, and PMFs. Like the Montreux Document, the ICoC is a voluntary agreement with no binding force. Unlike the Montreux Document's focus on states' obligation, the ICoC is directed toward PMFs' obligations.¹⁶⁵ The ICoC lays out guidelines and international standards on human rights for PMFs operating in areas experiencing conflict and instability.¹⁶⁶ The ICoC was initially signed by 58 PMFs and grew to 708 by September 2013.¹⁶⁷ At that time, the ICoC Association ("ICoCA") was established as an oversight mechanism to monitor PMF compliance with the ICoC and process complaints regarding violations of the ICoC.¹⁶⁸ The ICoCA has 118 members, including 92 PMFs (e.g., Blackwater, Triple Canopy); 18 civil society organizations (e.g., Human Rights First, Human Rights Watch); and 7 states (e.g., United States, United Kingdom).¹⁶⁹

While such a framework is promising, it is worth maintaining appropriate caution. PMFs played a large role in the creation of both the ICoC and the ICoCA, and they are disproportionately represented as compared to the overall ICoCA membership. Such a disparity can undermine the ICoCA's independence as each member

¹⁶⁵ Stuart Wallace, Eur. Comm'n on Fostering Human Rights Among Eur. Policies [FRAME], *Case Study on Holding Private Military and Security Companies Accountable for Human Rights Violations*, 54, Deliverable No. 7.5 (Apr. 28, 2016), <https://globalcampus.eiuc.org/bitstream/handle/20.500.11825/80/25-Deliverable-7.5.pdf?sequence=1&isAllowed=y> [<https://perma.cc/S77L-289Q>] ("The ICoC is a spin off from the Montreux process. While the Montreux process was directed toward the States' obligations, the ICoC was directed toward the companies' obligations.").

¹⁶⁶ ICoC, *History*, *supra* note 164 ("The [ICoC] is the fruit of a multi-stakeholder initiative launched by Switzerland, with the over-arching objectives to articulate human rights responsibilities of [PMFs], and to set out international principles and standards for the responsible provision of private security services, particularly when operating in complex environments.").

¹⁶⁷ *Id.* ("The ICoC was finalized in November 2010, at which time it was signed by [fifty-eight PMFs]. By September 2013, 708 companies had formally committed to operate in accordance with the Code of Conduct.").

¹⁶⁸ See Int'l Code of Conduct Ass'n, *Frequently Asked Questions*, <https://www.icoca.ch/en/frequently-asked-questions> [<https://perma.cc/6WMN-3YHQ>] (last visited Feb. 26, 2017) [hereinafter ICoC, *Frequently Asked Questions*] ("The principles for the responsible provision of private security services as contained in the Code can be broadly summarized in two categories: first, principles regarding the conduct of PSC personnel based on international human rights and humanitarian law standards; and second, management and governance principles.").

¹⁶⁹ See Int'l Code of Conduct Ass'n, *Membership*, <http://www.icoca.ch/en/membership> [<https://perma.cc/YYG5-H5BZ>] (last visited Feb. 26, 2017) (listing membership of PMFs, civil society organizations, and governments).

yields an equal vote on all matters, such as appointments to the Board of Directors, who in turn is responsible for monitoring PMFs' actions.¹⁷⁰ Thus, simply on account of consensus, PMFs hold significant weight in determining who is monitoring them and the decisions made about their own activities.

According to the ICoCA's Complaints Procedure, a complaint submitted to the ICoCA against a PMF or PMC working for a PMF, is first redirected to the PMF's own internal grievance mechanism.¹⁷¹ Available remedies for victims from the PMF must comply with paragraph 67 of the ICoC,¹⁷² of which the only punitive measure outlined in this paragraph is taking "appropriate disciplinary action, which could include termination of employment"¹⁷³ Where a complaint "involves allegations of criminal activity, and if it has taken place within a competent criminal jurisdiction, the matter will then be reported to the relevant authority for follow up."¹⁷⁴

If the complainant alleges that the PMF's grievance procedure is unfair or inaccessible, the ICoCA reviews the allegation.¹⁷⁵ If the ICoCA substantiates the allegation, the ICoCA either engages in dialogue with the complainant and the PMF to address the mechanism's inadequacies, or it may refer the complaint to another grievance procedure (e.g., mediation).¹⁷⁶ The ICoCA can suspend or terminate a PMF's membership if the Board considers that the PMF "has failed to take reasonable corrective action,"¹⁷⁷ however, the

¹⁷⁰ See Int'l Code of Conduct Ass'n, *Complaints*, <https://www.icoca.ch/en/complaints> [<https://perma.cc/GAW9-4JDF>] (last visited Feb. 26, 2017) [hereinafter ICoC, *Complaints*] (providing information on substantive and procedural process for filing complaints).

¹⁷¹ *Id.*

¹⁷² See generally Int'l Code of Conduct for Private Security Service Providers' Ass'n [ICoCA], *Articles Of Association* art. 13.2.3-5, https://icoca.ch/sites/default/files/resources/ICoC%20AoA_English.pdf [<https://perma.cc/ENP6-3R36>] [hereinafter, *Articles of Association*] (discussing compliance with ICoC's paragraph 67).

¹⁷³ *Private Security Service Providers*, *supra* note 156, at 15, ¶67(f).

¹⁷⁴ ICoC, *Complaints*, *supra* note 170.

¹⁷⁵ See *Articles of Association*, *supra* note 172, art. 13.2.3 ("If a complaint alleges that a grievance procedure provided by a relevant Member company is not fair, not accessible, does not or cannot offer and effective remedy, or otherwise does not comply with paragraph 67 of the Code, the Secretariat shall review that allegation.').

¹⁷⁶ See generally *id.* art. 13.2.4-5 (providing a mechanism for conducting complaint review).

¹⁷⁷ *Id.* art. 13.2.7.

ICoCA “shall not impose a specific award on the parties,”¹⁷⁸ meaning it cannot confer a remedy to the victim.

The ICoCA Complaint Procedure went into effect in September 2016, and according to the ICoCA, would begin accepting complaints in early 2017.¹⁷⁹ Although it is not yet possible to assess the efficacy of this procedure, the options available seem to provide little recourse to the victims of human rights violations at the hands of PMCs, as well as, punishment to those responsible. Due to the ICoCA’s reliance on other mechanisms to handle complaints, this procedure does not itself provide any meaningful remedy to a victim. Taking complaints to the PMF, or taking them to court, were always options that these victims had, so the ICoCA’s Complaint Procedure is of little additional benefit. The issue has always been that prosecution within the courts was difficult because of the legal gaps that exist, and PMFs have generally tried to avoid accountability for their bad actions. The new procedures do very little to remedy this problem.

Despite the shortcomings of the ICoCA process, the ICoCA is not absent of all disciplinary authority, as it can suspend or terminate a PMF’s membership, which potentially could have a negative effect on PMFs. For example, in 2012, the United Nations released a document requiring contract bidders to be members of the ICOC.¹⁸⁰ In 2013, the State Department expressed an intention to require ICoCA membership as a condition for bidding on security contracts with the department.¹⁸¹ However, review of a 2016 State Department audit appears to contradict this, as some contracted PMFs were

¹⁷⁸ *Id.* art. 13.2.5.

¹⁷⁹ See ICOC, *Frequently Asked Questions*, *supra* note 168 (“A Reporting, Monitoring and Assessing Performance Procedure (Article 12) was adopted by vote at the 2016 AGA, and forms the basis for monitoring operations, which are being introduced and increasingly used during 2017.”).

¹⁸⁰ U.N. Sec. Mgmt. Sys., Dep’t of Safety & Sec., *Security Management Operations Manual: Guidelines on the Use of Armed Security Services from Private Security Companies*, at 6, ¶25(a) (Nov. 8, 2012), <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/GuidelinesOnUseOfArmedSecurityServices.pdf> [<https://perma.cc/T3K3-F7SF>] (stating PMFs “must be a member company” to the ICOC).

¹⁸¹ See U.S. DEP’T OF STATE, MONTREUX DOCUMENT QUESTIONNAIRE 4, <https://www.state.gov/documents/organization/226402.pdf> [<https://perma.cc/AE3F-6REL>] (“The Department also plans to make membership in the International Code of Conduct Association (ICoCA) a requirement in the bidding process for the successor WPS contract, so long as the process moves forward as expected and the association attracts significant industry participation.”).

not ICoCA members.¹⁸² Also, the DoD, which utilizes PMFs on a much larger scale and spends considerably more money on their use, does not employ such a policy.¹⁸³

Since membership in the ICoCA is voluntary and obligations are directed at PMFs and not the states that employ them, only the PMFs that join the ICoCA are beholden to its oversight.¹⁸⁴ While the ICoCA seems a constructive attempt at overseeing PMF actions, without comprehensive changes to the international legal framework, including changes that provide direct accountability for human rights violations, PMFs and PMCs can continue to operate with impunity.

5. STATE RESPONSIBILITY & ATTRIBUTION OF LIABILITY

In addition to the need for reforms that create individual and corporate accountability in cases of human rights abuses committed by PMFs and PMCs, the role of states in creating the current situation cannot be ignored.¹⁸⁵ According to the ICRC, “States cannot absolve themselves of their obligations under international humanitarian law by contracting [PMCs]. They remain responsible for

¹⁸² See OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF STATE, AUD-MERO-16-30, AUDIT OF BUREAU OF DIPLOMATIC SECURITY WORLDWIDE PROTECTIVE SERVICES CONTRACT TASK ORDER 8 – SECURITY SERVICES AT U.S. CONSULATE ERBIL 2-4 (Mar. 2016), <https://oig.state.gov/system/files/aud-mero-16-30.pdf> [<https://perma.cc/K7ED-DT5S>] (discussing office's contract management and oversight without establishing ICoCA membership as precondition). For example, upon review of the State Department's 2016 audit of its Consulate in Erbil, Iraq, three contracted PMFs were not listed members on the ICoCA website: Global Integrated Security, International Development Solutions, and Torres International. *Id.*

¹⁸³ See Office of the Assistant Sec'y of Def. for Logistics & Materiel Readiness, *Private Security Companies*, U.S. DEP'T OF DEF., <http://www.acq.osd.mil/log/ps/psc.html> [<https://perma.cc/B27X-DTCC>] (last visited Feb. 26, 2017) (“DoD will not require signature to the ICoC or certification and oversight by the ICoC Association as a condition of any DoD contracts.”).

¹⁸⁴ See Gabor Rona, *A Tour de Horizon of Issues on the Agenda of the Mercenaries Working Group*, 22 MINN. J. INT'L L. 324, 341-42 (2013) (“[T]he voluntary nature of the Code of Conduct means that it cannot meet the goal of ensuring that all {PMCs} are covered.”).

¹⁸⁵ See generally José L. Gómez del Prado, *Impact on Human Rights of a New Non-State Actor: Private Military and Security Companies*, 18 BROWN J. WORLD AFF. 151 (2012) (discussing state responsibility and other factors contributing to impunity for human rights violations by PMFs and PMCs).

ensuring that the relevant standards are met and that the law is respected.”¹⁸⁶ The ICRC further notes that “[s]hould the staff of the [PMFs] commit violations of international humanitarian law, the State that has hired them may be responsible if the violations can be attributed to it as a matter of international law”¹⁸⁷

The doctrine of state responsibility governs the attribution to a state of violations of international law.¹⁸⁸ The rules of attribution are codified in the International Law Commission’s (“ILC”) Draft Articles on State Responsibility (“Draft Articles”).¹⁸⁹ The Draft Articles are the product of over half a century of work by the ILC¹⁹⁰ and were intended to influence the manifestation of the law of state responsibility through state practice and case rulings, rather than progressing into a convention.¹⁹¹ To determine attribution of PMCs’ actions to the state, three of the Draft Articles are particularly relevant, including Article 4, “Conduct of organs of a State;” Article 5, “Conduct of persons or entities exercising elements of governmental authority;” and Article 8, “Conduct directed or controlled by a State.”¹⁹²

¹⁸⁶ ICRC, *FAQ*, *supra* note 98.

¹⁸⁷ *Id.*

¹⁸⁸ See Int’l Law Comm’n, Rep. on Draft Articles on Responsibility of States for Internationally Wrongful Acts of Its Fifty-Third Session, U.N. Doc. A/56/10, at 43 (2001), <http://www.un.org/documents/ga/docs/56/a5610.pdf> [<https://perma.cc/HU3A-Q76H>] [hereinafter, ILC Draft Articles] (providing text of Draft Articles) (“Article 1: Every internationally wrongful act of a State entails the international responsibility of that State. Article 2: There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State.”).

¹⁸⁹ See generally *id.* at 43–59.

¹⁹⁰ See Alan Nissel, *The ILC Articles on State Responsibility: Between Self-Help and Solidarity*, 38 N.Y.U. J. INT’L L. & POL. 355, 356 (2006) (stating Draft Articles were the “product of over five decades of ILC work and the ILC’s most ambitious venture since the Vienna Convention”).

¹⁹¹ See James Crawford & Simon Olleson, *The Continuing Debate on a U.N. Convention on State Responsibility*, 54 INT’L & COMP. L.Q. 959, 971 (2005) (“[I]t may be expected that the position of the Articles as part of the fabric of general international law will be further consolidated and refined through their application by international courts and tribunals.”); see also Fernando Lusa Bordin, *Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law*, 63 INT’L & COMP. L.Q. 535, 541 (2014) (“[O]n the suggestion of Special Rapporteur James Crawford, the Commission recommended to the General Assembly that it take note of the Articles, which the Assembly did in Resolution 56/83 of 12 December 2001.”).

¹⁹² *Id.* at 44–45.

Article 4 codifies the principle that a state is liable for the acts of its organs, which are “person[s] or entit[ies] which [have] status in accordance with the internal law of the State.”¹⁹³ Such organs include government agencies, police forces, and the armed forces.¹⁹⁴ An entity that has separate legal personality from the state, such as a private corporation—i.e. PMF—is not characterized as an organ of the state according to the doctrine.¹⁹⁵ As such, it would be difficult to attribute actions of a PMF or PMC to the state under Article 4.

Article 5 regards situations where the “person or entity” concerned is not an organ of the state, but is still “exercis[ing] elements of governmental authority.”¹⁹⁶ Under this article, there are two elements that must be met to establish state attribution: the entity or person (1) is exercising elements of governmental authority and (2) was empowered by the state’s law to do so.

Examining the first element, the ILC Commentary states that “[b]eyond a certain limit, what is regarded as ‘governmental’ depends on the particular society, its history and traditions.”¹⁹⁷ While the Draft Articles do not provide a list of what constitutes an intrinsically state function, ILC Commentary has provided examples of entities exercising “government authority;” for example, “private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline”¹⁹⁸

¹⁹³ *Id.* at 44.

¹⁹⁴ *See, e.g., id.* at 84 cmt.1 (“[A]rticle 4 states that the first principle of attribution for the purpose of State responsibility in international law—that the conduct of an organ of the State is attributable to that State. The reference to a “State organ” covers all the individual or collective entities which make up the organization of the State and act on its behalf. It includes any organ of any territorial governmental entity within the State on the same basis as the central governmental organs of that State: this is made clear in the final phrase.”).

¹⁹⁵ *See* Oliver R. Jones, *Implausible Deniability: State Responsibility for the Actions of Private Military Firms*, 24 CONN. J. INT’L L. 239, 263 (2009) (footnotes omitted) (“An entity that has a separate legal personality from the State, even if wholly controlled and owned by the State, is not an organ. A private corporation, therefore, cannot be characterized as an organ of the State. As a result, the conduct of a PMF, as a corporation, cannot be attributed to the State under Article 4.”).

¹⁹⁶ ILC Draft Articles, *supra* note 188, at 44 (“The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”).

¹⁹⁷ *Id.* at 94 cmt.6.

¹⁹⁸ *Id.* at 92 cmt.2.

The second element of Article 5 requires that the entity in question be “empowered by the law of the state” to conduct the act in question.¹⁹⁹ Again, the Draft Articles provide no specific guidance regarding how to interpret the element, such as whether to construe it broadly or narrowly. James Crawford, former Special Rapporteur on state responsibility, commented that the “usual and obvious” approach to empowerment “will be a delegation or authorization by or under the law of the State.”²⁰⁰

Within the meaning of Article 5, and by guidance of the Commentary, it would appear that at least some PMFs and PMCs meet the first element of “governmental function.” For example, Titan and CACI’s guarding and interrogations of detainees at Abu Ghraib meet the Commentary’s example of “prison guards” and/or “powers of detention and discipline” that fall within the understanding of exercising “governmental authority.” The second element is satisfied by the fact that state actors, whether they are specific departments or branches of government, legally empowered through the acceptance or authorization of the President and Congress, are outsourcing and delegating their duties and responsibilities to PMFs and PMCs.

Article 8 is relevant in cases where a PMF or PMC does not fall within the definition of Article 5.²⁰¹ Under Article 8, “[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”²⁰² The degree of control required for a State to be liable has been a subject of considerable debate in international courts. In *Nicaragua v. United States*, the International Court of Justice (“ICJ”) applied a narrow agency test, holding that in order for the United States to be responsible for the acts of the Contra rebels in Nicaragua—which the United States had armed,

¹⁹⁹ *Id.* at 44.

²⁰⁰ James Crawford (Special Rapporteur), Int’l Law Comm’n, *First Rep. on State Responsibility*, Addendum, U.N. Doc. A/CN.4/490/Add.6, at 3 (1998), http://www.un.org/ga/search/view_doc.asp?symbol=A/CN.4/490/Add.6 [<https://perma.cc/8CEG-8Q8G>].

²⁰¹ *Expert Meeting on Private Military Contractors: Status and State Responsibility for their actions*, Aug. 29–30, 2005, http://www.adh-geneve.ch/evenements/pdf/colloques/2005/2rapport_compagnies_privees.pdf at 23.

²⁰² ILC Draft Articles, *supra* note 188, at 45 (Conduct directed or controlled by a State).

trained, and financed – it would need to be proven that the United States had “effective control” of the Contras’ military operations.²⁰³ According to the Court, the “mere funding, organizing, training, supplying and equipping” of the rebels was not sufficient to establish state responsibility.²⁰⁴

In response, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) noted, in *Prosecutor v. Tadić*, that the ICJ’s “effective control” test was inconsistent with the logic of the law of state responsibility, stating:

Under this Article, if it is proved that individuals who are not regarded as organs of a State by its legislation nevertheless do in fact act on behalf of that State, their acts are attributable to the State. The rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility.²⁰⁵

As a result, the ICTY put forth its “overall control” test regarding state liability and attribution.²⁰⁶ The ICTY stated, “[t]he requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case.”²⁰⁷ The ICTY outlined examples of attribution to the state. In one it explained:

[W]hen a State entrusts a private individual (or group of individuals) with the specific task of performing *lawful* actions on its behalf, but then the individuals, in discharging that

²⁰³ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 115 (June 27), <http://www.icj-cij.org/docket/files/70/6503.pdf> [<https://perma.cc/238Z-5A8X>].

²⁰⁴ *Id.*

²⁰⁵ *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 117 (Int’l Crim. Trib. for the Former Yugoslavia Appeals Chamber July 15, 1999), <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> [<https://perma.cc/5LXT-8CXC>].

²⁰⁶ *See id.* at ¶ 120 (“Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.”).

²⁰⁷ *Id.* at ¶ 117.

task, breach an international obligation of the State (for instance, a private detective is requested by State authorities to protect a senior foreign diplomat but he instead seriously mistreats him while performing that task). In this case, by analogy with the rules concerning State responsibility for acts of State officials acting *ultra vires*, it can be held that the State incurs responsibility on account of its specific request to the private individual or individuals to discharge a task on its behalf.²⁰⁸

In response to the ICTY's ruling, the ICJ reaffirmed its "effective control test" in *Bosnia and Herzegovina v. Serbia and Montenegro*.²⁰⁹ The ICJ ruled "to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship [of] . . . 'complete dependence.'"²¹⁰

While determining which test should apply is debated, there are many cases where PMCs' actions could be attributable to the state via either test. For example, the "funding, organizing, training, supplying and equipping" of rebels in Nicaragua was not sufficient to meet the requirements of *Nicaragua's* effective control test, presumably because that did not bridge the gap between support of a group and the ability to direct its every action. However, the presence of a contract that sets out obligations and objectives of the PMF's activities, along with the prospect of terminating the contract if the obligations are not met, indicates a greater level of control than was present in *Nicaragua*. The "overall control" test is easier to apply; whereby, it seems that most PMCs, hired by states and operating in support of that state's military objectives, would fall within the meaning of control provided by the *Tadić* court. While this is only a very brief and cursory review of the state responsibility doctrine, cases of attribution are highly fact specific,²¹¹ and leave considerable wiggle room, as well as inconsistent determination. Overall, the understanding of the doctrine of state responsibility, as it currently ex-

²⁰⁸ *Id.* at ¶ 119.

²⁰⁹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 46 (Feb. 26).

²¹⁰ *Id.* at ¶ 393.

²¹¹ See, e.g., ILC Draft Articles, *supra* note 188, at 107-08, cmt.6 (discussing factual differences in prior international tribunal cases).

ists and applies to PMFs and PMCs, is unclear and, frankly, untested. Thus, states continue to reap the benefits of using PMFs when it is advantageous for them, while maintaining plausible deniability when it is not.²¹²

6. FILLING THE "LEGAL GAP" WITH AN INTERNATIONAL CONVENTION

In reviewing the existing laws applicable to PMCs, international and domestic law do not fill the legal gap in which PMFs and PMCs currently operate. This gap in the law, particularly with regards to human rights protections, makes it more likely that both human rights violations will occur and punishment for these violations will be avoided.²¹³

PMFs are inherently problematic to regulate on a domestic level, as they are transnational corporations "located in one country, recruit[ing] employees outside their home countries and deploy[ing] them in yet another country . . ." ²¹⁴ Thus, regulation by individual states is unlikely and has proved to be insufficient to properly oversee PMCs' activities and provide proper redress when human rights violations occur.²¹⁵ According to the Working Group on Mercenar-

²¹² See Morgan, *supra* note 69, at 239 ("First, states employing or hosting PMFs may choose to ignore the problem and adopt an ad hoc position of seeking to reap the benefits of the use and association with such firms when advantageous to state interests, while maintaining plausible deniability when it is not.").

²¹³ U.N. Secretary-General, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination*, ¶ 71, U.N. Doc. A/71/318 (Aug. 9, 2016), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/254/52/pdf/N1625452.pdf?OpenElement> [<https://perma.cc/6G87-6QP5>] ("All actors who use violence are accountable for their actions under international humanitarian law and international criminal law, regardless of their status. However, to the extent that mercenaries and foreign fighters use force outside the control of the sovereign State and, in particular, outside the relatively robust mechanisms for human rights protection in national military forces, they may be more likely both to violate human rights and to avoid punishment for doing so.").

²¹⁴ Rona, *supra* note 184, at 344.

²¹⁵ See *id.* at 343 ("In addition to the need to hold PMSCs and their employees accountable for their actions, victims of human rights violations involving PMSCs should be able to exercise their right to an effective remedy. Ideally, they should be able to do so locally. However, victims often live in countries with weak judicial systems. Even where victims are able to bring cases to the courts in the countries where PMSCs are established, such cases are rarely successful for the same reasons

ies, the fact that PMCs are not usually considered mercenaries, despite providing similar services, is a strong argument for the adoption of an international convention to clearly define and deal with this new type of actor.²¹⁶ In 2010, the Working Group on Mercenaries recommended to the U.N. General Assembly and the Human Rights Council, draft text for an International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies.²¹⁷ The result was a draft treaty that (1) defined “functions which are inherently State functions” and reiterated that these functions should not be “outsourced under any circumstances;” (2) reaffirmed States’ obligations to ensure respect for international humanitarian law and international human rights law by PMFs and PMCs; (3) created a registration and licensing mechanism for PMFs; (4) established a committee to oversee and monitor the implementation of the convention and PMFs’ activities; and (5) created a compensation system for victims of human rights violations committed by PMFs and their contractors.²¹⁸

Many U.N. member states support the idea of an international convention that would create a definitive set of laws for holding PMFs and PMCs, as well as those who employ them, accountable

that criminal prosecutions often fail (availability of witnesses, lack of evidence, etc.”).

²¹⁶ See, e.g., Gómez del Prado, *supra* note 185, at 163 (“The fact that PMSCs’ personnel are not usually ‘mercenaries’ is also a strong argument for the adoption of a new instrument to deal with a new type of actor. Contrary to the ‘dogs of war’ mercenaries of the past, private military and security companies are legally registered, and the definition used in international instruments—such as the one contained in Additional Protocol I to the Geneva Conventions and the one in the UN Convention on Mercenaries—typically does not apply to their personnel.”).

²¹⁷ See, e.g., José Luis Gómez del Prado (Chairperson/Rapporteur), U.N. Human Rights Council, *Rep. of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, U.N. Doc. A/HRC/15/25, annex, at 10, ¶ 32 (July 2, 2010), <http://www2.ohchr.org/english/issues/mercenaries/docs/A.HRC.15.25.pdf> [<https://perma.cc/Z9JJ-Q2FP>] (“The Working Group has repeatedly expressed its concern regarding the impact of the activities of PMSCs on the enjoyment of human rights. In its mission reports it has provided detailed information regarding grave human rights violations perpetrated by their employees, in particular when operating in conflict or post-conflict areas, and the lack of transparency and accountability of PMSCs.”).

²¹⁸ See *id.* at 13, ¶ 49. For further discussion of the convention, see Gómez del Prado, *supra* note 185.

for violations of human rights.²¹⁹ Other international bodies, including the Parliamentary Assembly of the Council of Europe, a statutory organization that oversees the European Court of Human Rights, have emphasized the need for an international legally binding instrument.²²⁰ However, the prime opposition for this sort of rule setting has been states like the United States and the United Kingdom, who have significant ties to, and make significant use of, PMFs.²²¹ As of 2008, eighty percent (80%) of PMFs were registered in these two countries alone.²²²

In the December 2016 interstate working session on the draft convention, states remained divided over the need for an international convention on this matter. The United States stated that its prosecution of the PMCs in the Nisour Square case “demonstrates the necessity of utilizing the force of domestic law to deliver accountability for wrongdoers and protect human rights. It does not demonstrate the need for new international law.”²²³ Instead, the

²¹⁹ See Gómez del Prado, *supra* note 185, at 164 (stating the majority of U.N. members, “upon considering the impact of PMSCs on human rights, assert the opinion that outsourcing functions related to the legitimate use of force to private contractors requires binding regulatory and monitoring mechanisms at the international level due to the transnational character of the industry.”).

²²⁰ See U.N. NEWS CENTRE, *supra* note 94 (“Support for a legally binding treaty has been expressed by regional bodies, such as the Parliamentary Assembly of the Council of Europe, citing concerns at the lack of transparency and accountability of private military and security companies.”).

²²¹ See, e.g., Laurence Juma, *Privatisation, Human Rights and Security: Reflections on the Draft International Convention on Regulation, Oversight and Monitoring of Private Military and Security Companies*, 15 L. DEMOCRACY & DEV. 182, 183–84 (2011), http://www.idd.org.za/images/stories/Ready_for_publication/juma-new.pdf [<https://perma.cc/DL4K-3PDE>] (“Whereas the Latin American, Asian and African countries have at least signified their support for some form of binding international framework for the regulation of PMSCs, Western nations, mainly the USA and the UK, have expressed serious doubts about the necessity of a multilateral regime of this kind.”).

²²² José L. Gómez del Prado, *Private Military and Security Companies and the U.N. Working Group on the Use of Mercenaries*, 13 J. CONFLICT & SEC. L. 429, 438 (2009) (“The new trends indicate that, in the twenty-first century, PMSCs are absorbing traditional mercenaries and experienced militaries from established armed forces. Some governments, in particular that of the United States and the United Kingdom, where it is estimated that [eighty percent] of all PMSCs operating worldwide are registered, have left the expansion and regulation of this new industry to the ‘invisible hand of the market.’”).

²²³ Fifth Session Open-Ended Intergovernmental Working Group on Private Military and Security Companies, *U.S. Government Delegation Closing Statement*, (Dec. 12–16, 2016), http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGMilitary/Session5/US_closing_statement.pdf [<https://perma.cc/U5PM-Y9UC>].

United States suggested that the interstate group should turn their efforts towards improving the existing international regulatory mechanisms, like the Montreux Document and the ICoCA.²²⁴

In opposition, states like India²²⁵ and South Africa²²⁶ argued the need for more robust international norms, including an international convention, to close the loopholes not addressed under current law and the regulatory mechanisms. Chairperson of the session, Ambassador Mxakato-Diseko, expressed her frustration for the stagnation of the convention, asking “how close are we towards convergence . . . and is this ever likely to happen? Is it possible ever for parties to find each other over this matter?”²²⁷

The absence of an effective legal framework that governs the conduct of PMFs and their contractors is highly problematic considering their prominence in modern warfare and their history of committing unpunished human rights violations. As entities, PMFs can exist anywhere in the world, meaning that a “global framework that

²²⁴ *Id.* (“To the contrary, the United States agrees wholeheartedly with the need for enhanced international and multi-stakeholder collaboration and coordination in this area. In fact, that is why the United States has been and is a strong supporter of the Montreux Document Forum and the International Code of Conduct Association. We believe that this Group should focus on developing an action plan for States to improve the regulatory framework for this industry.”).

²²⁵ Fifth Session Open-Ended Intergovernmental Working Group on Private Military and Security Companies, *Statement by India*, (Dec. 12–16, 2016), http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGMilitary/Session5/India_Statement_2016.pdf [<https://perma.cc/646E-SZLA>] (“At [the] international level, existing law and jurisprudence remind us that there are gaps in international law particularly in establishing proper mechanisms for accountability and effective remedies for the victims.”).

²²⁶ Fifth Session Open-Ended Intergovernmental Working Group on Private Military and Security Companies, *Statement Delivered by South Africa*, (Dec. 12, 2016), <http://www.ohchr.org/EN/HRBodies/HRC/WGMilitary/Pages/OEIWGMilitarySession5.aspx> [<https://perma.cc/J6KU-7REL>] (“The national and international regulatory frameworks outlined during the past four Sessions of the Working Group identified the clear normative and supervisory gaps and insufficiencies in the legal framework which has by and large been ineffective to ensure the minimal threshold of human rights and humanitarian law in the context of PMSCs’ activities.”).

²²⁷ Fifth Session of the Open-Ended Intergovernmental Working Group to Consider the Possibility of Elaborating an International Regulatory Framework on the Regulation, Monitoring and Oversight of the Activities of Private Military and Security Companies: *Concluding Remarks by Ambassador Mxakato-Diseko Chairperson-Rapporteur*, (Dec. 16, 2016), <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGMilitary/Session5/ConcludingRemarks5thIGWGChairpersonRapporteur.pdf> [<https://perma.cc/FDB3-C5VH>].

relies [solely] on national regulation may lead to a race to the bottom, where PMFs seek incorporation in the most permissive legal regime."²²⁸ By their very nature, PMFs will be taking action in theaters of war and conflict all over the world, each with different legal regimes and rules, and they will be acting on behalf of nations with different regulations than those applicable to either the nation of their incorporation or the area in which they are acting. PMFs are truly international actors, therefore, their regulation requires an internationally coordinated effort.

Adopting "a norm of incorporation" through "a new treaty regime" can draw on the strengths of domestic and international systems and establish needed standards and a means to hold PMCs, the firms that employ them, and the States that contract with them, to account for their actions.²²⁹ At a minimum, a convention should ensure that either states clearly incorporate their PMFs and PMCs into their armed forces so that they are conclusively subject to the laws of war and state attribution, or that if PMCs are not incorporated, ensure they are not exempt from civilian criminal law. Unfortunately, until an international consensus is reached regarding how to address the legal gap, human rights violations will continue to occur with impunity.

7. CONCLUSION

The years following the September 11th attacks have seen a seismic shift in the international landscape concerning the threats and dangers facing nations and the international community. This new dynamic has led to a paradigm shift in how wars are fought and the actors involved, including a dramatic increase in the use of PMCs. With the increasing privatization of war, it is necessary to clarify what legal regimes apply and the important legal obligations under the law, specifically international law.

Existing law is vague, conflicting, and incomplete regarding PMCs and their conduct, resulting in a "legal gap," whereby PMCs

²²⁸ Morgan, *supra* note 69, at 245.

²²⁹ *Id.* ("To this end, adoption of a norm of incorporation—either through reference to existing international law, a new treaty regime, or evolving customary international law—draws on the strengths of both systems: international legal and diplomatic consensus centered on a shared norm of state responsibility dovetailed with the functional capabilities of domestic legal regimes.").

can operate free from meaningful accountability and consequence. Therefore, while it is important to understand the present gaps in the law, it is imperative that States formulate comprehensive and effective tools to guarantee accountability and responsibility of PMFs, PMCs, and the states that utilize them. Although constructive attempts have been made at overseeing PMFs' and PMCs' actions, without changes to the international legal framework, PMFs and PMCs can continue to operate with impunity and without accountability to the detriment of human rights and justice.