

**SEPARATING PRIVATE MILITARY
COMPANIES FROM ILLEGAL MERCENARIES
IN INTERNATIONAL LAW: PROPOSING AN
INTERNATIONAL CONVENTION FOR
LEGITIMATE MILITARY AND SECURITY
SUPPORT THAT REFLECTS CUSTOMARY
INTERNATIONAL LAW**

MICHAEL SCHEIMER*

INTRODUCTION	611
I. BACKGROUND.....	614
A. HISTORY OF MERCENARIES	615
B. INTERNATIONAL LAW APPLYING TO MERCENARIES	616
C. EMERGENCE OF PRIVATE MILITARY AND SECURITY COMPANIES	618
D. COMPARATIVE DOMESTIC LAWS REGULATING PMCs	619
E. U.S. DOMESTIC LAW REGULATING PMCs	620
II. ANALYSIS.....	622
A. WHAT’S IN A NAME: PMCs CAN AVOID THE INTERNATIONAL DEFINITIONS OF “MERCENARY” UNDER INTERNATIONAL AGREEMENTS BECAUSE THE DEFINITIONS ARE CUMULATIVE	623

* J. D. Candidate, 2009, American University, Washington College of Law; B.A. Government, 2003, College of William and Mary. Michael Scheimer is a National Security Policy Analyst with a major defense contractor. The opinions expressed are those of the author alone. The author would like to thank his editor, Zahida Virani, the entire staff of the *American University International Law Review*, and Stephanie, for her patience and support of my second job as a night student.

1. PMCs Could Fall Under Some Provisions of the Article 47 Definition, but PMCs May Easily Avoid Other Provisions and Thereby Avoid the Entire Definition.....	624
a. Section (a) Only Applies to Fighting in Armed Conflicts, and Does Not Cover Support or Advisor Roles	624
b. Section (b) Requires a Direct Role in Actual Fighting, Which May Include PMCs Under a Broad Interpretation of “Direct”.....	626
c. Section (c) Requires Financial Motivation, Which is Difficult to Measure with PMCs.....	627
d. Sections (d), (e), and (f) Involving Foreign Nationals that Are Not Members of Any Armed Forces Could be Avoided by PMC Contract Language	628
2. The U.N. Convention Has Broader Language than Article 47, but is Nonetheless Limited by the Caveat that Mercenaries Must Undermine a State Government	629
B. PMCs ARE LEGITIMATE SUPPORT ORGANIZATIONS UNDER CUSTOMARY INTERNATIONAL LAW WHEN ACTING ON BEHALF OF A LEGITIMATE STATE AND REPRESENTING THAT STATE’S AUTHORITY	631
1. The Customary Law Has Greater Weight Because Article 47 and The U.N. Convention on Mercenaries are not Accepted International Law.....	632
2. PMCs Continuing Corporate Existence and Use by Only Legitimate States Distinguishes Them from the Illegitimate Mercenary	634
a. Investigations of the U.N. Special Rapporteur and the Working Group on Mercenaries Demonstrate that International Custom Accepts the Use of PMCs but Condemns Individual Mercenary Operators	635
b. State Practice and Laws Accept the Use of PMCs but Disavow Lone Operators.....	637
III. RECOMMENDATIONS.....	639

A. THE CREATION OF AN INTERNATIONAL CONVENTION ON PRIVATE MILITARY AND SECURITY ASSISTANCE WOULD HARMONIZE INTERNATIONAL CUSTOM AND SERVE AS THE BASELINE FOR DOMESTIC STANDARDS.....	640
1. The Convention Should Cover All Direct and Indirect Military and Security Assistance.....	640
2. The Convention Should Specifically Require PMCs to Adhere to the Laws of War.....	642
3. The PMC Convention Should Require Registration and Licensing for PMCs to Establish Legitimacy.....	642
4. The U.S. Must Champion the Initiative to Draft a PMC Convention.....	643
5. New Domestic Laws Should Stem from the New International Framework.....	644
CONCLUSION.....	646

INTRODUCTION

On September 16, 2007 the U.S. private military company (“PMC”) Blackwater engaged in a shootout in an Iraqi marketplace that left dozens of people dead.¹ The controversy resulting from the incident underlined the fact that although PMCs have operated in Iraq since the 2003 invasion, the laws applicable to their operations have never been clear.² Blackwater, for instance, is no stranger to

1. See Adam Zagorin & Brian Bennett, *Iraq Limits Blackwater's Operations*, TIME.COM, Sept. 17, 2007, <http://www.time.com/time/world/article/0,8599,1662586,00.html> (discussing the Iraqi government’s effort to suspend Blackwater’s license to operate in Iraq after the marketplace shooting).

2. See Alissa J. Rubin & Paul von Zielbauer, *The Judgement Gap In a Case like the Blackwater Shootings, There Are Many Laws but More Obstacles*, N.Y. TIMES, Oct. 11, 2007, at A1 (noting that the laws applying to private security contractors abroad are so convoluted that there have been no prosecutions of American contractors in Iraq for acts of violence). *But see* Michael R. Gordon, *U.S. Charges Contractor at Iraq Post in Stabbing*, N.Y. TIMES, Apr. 5, 2008, at A6 (reporting that a contractor with Canadian and Iraqi citizenship will be charged under U.S. law for the first time since 1968 representing that for the first time recently expanded military jurisdiction over contractors will be tested); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-966, REBUILDING IRAQ: DOD AND STATE DEPARTMENT HAVE IMPROVED OVERSIGHT AND COORDINATION OF PRIVATE SECURITY CONTRACTORS IN IRAQ, BUT FURTHER ACTIONS ARE NEEDED TO SUSTAIN IMPROVEMENTS 28 (2008) (reporting that on June 22, 2008, the contractor was tried under the UCMJ and sentenced to five months confinement).

controversy over its role in Iraq.³ At the time of the September incident, U.S. lawmakers had already proposed new laws to address the problems in holding U.S. private military companies like Blackwater accountable for their actions overseas.⁴ Yet weeks after the Blackwater shooting, guards working for Unity Resources Group, an Australian-run private security firm based in Dubai and registered in Singapore, killed two more Iraqi civilians.⁵ This second incident

3. See STAFF OF H. COMM. ON OVERSIGHT AND GOVERNMENT REFORM, 110th Cong., PRIVATE MILITARY CONTRACTORS IN IRAQ: AN EXAMINATION OF BLACKWATER'S ACTIONS IN FALLUJAH 4 (2007) (reporting on February 2007 Committee Hearings over the company's involvement in a widely-reported Fallujah incident that left four Blackwater employees dead); Staff of H. Comm. on Oversight and Government Reform, 110th Cong., *Memorandum: Additional Information about Blackwater USA*, 1-3 (2007) (providing background to the Committee before October 2007 hearings about Blackwater's actions in Iraq, including the U.S. government's failure to prosecute a drunken Blackwater employee who killed an Iraqi guard, and Blackwater's involvement in at least 195 shooting incidents since 2005). The memorandum also notes that Blackwater has at times joined coalition forces in military actions, including reinforcing machine gun positions, providing reinforcements for U.S. Army forces, and firing from helicopters. *Id.* at 8-9.

4. See generally Transparency and Accountability in Military and Security Contracting Act of 2007, S. 674, 110th Cong. § 3 (2007) (requiring federal agencies to provide details to Congress on PMCs operating in Iraq within ninety days after enactment of the Act); National Defense Authorization Act for Fiscal Year 2008, S. 1547, 110th Cong. (2007) (directing the Secretary of Defense to issue regulations for PMCs operating in a combat area); Transparency and Accountability in Military and Security Contracting Act of 2007, H.R. 369, 110th Cong. § 4 (2007) (extending the Military Extraterritorial Jurisdiction Act ("MEJA") to contractors working for any federal agency in the same area as military forces are operating); Iraq Contracting Fraud Review Act of 2007, H.R. 528, 110th Cong. § 2 (2007) (asking the Secretary of Defense to audit all Iraq contracts involving reconstruction or military support); New Direction for Iraq Act of 2007, H.R. 663, 110th Cong. § 204(c)-(d) (2007) (calling for an examination of contracts awarded by the U.S. government to conduct activities in Iraq for evidence of war profiteering); Iraq and Afghanistan Contractor Sunshine Act, H.R. 897, 110th Cong. § 2(a) (2007) (ordering federal agencies to provide copies of all Iraq and Afghanistan contracts over \$5 million to Congress); MEJA Expansion and Enforcement Act of 2007, H.R. 2740, 110th Cong. § 3 (2007) (extending the MEJA to contractors working for any federal agency in the same area as military forces are operating, and requiring the FBI set up a Theater Task Force to investigate any misconduct); Providing for Operation Iraqi Freedom Cost Accountability, H.R. Res. 97, 110th Cong. (2007) (establishing an ongoing commission to investigate contracts involving Iraq).

5. See Andrew E. Kramer & James Glanz, *U.S. Guards Kill 2 Iraqi Women in New Shooting*, N.Y. TIMES, Oct. 10, 2007, at A1 (reporting that the security

highlights the global nature of the private military and security industry and the international problem of holding PMCs accountable.⁶ This global issue demands an international regulatory framework to supplement domestic laws and hold foreign firms like Unity Resources accountable for acts of violence.

The international community has already attempted to define “mercenaries” with both Article 47 of the 1977 Protocol I Additional to the Geneva Conventions (“Article 47”)⁷ and the 1989 U.N. Convention on Mercenaries (“U.N. Convention”).⁸ However, it is not clear that the terms of Article 47 and the U.N. Convention can capture PMCs as “mercenaries, therefore PMCs continue to go unregulated.”⁹ The list of criteria under both international definitions is so long that one commentator has stated “any mercenary who cannot exclude himself from this definition deserves to be shot – and his lawyer with him.”¹⁰ Furthermore, while the use of PMCs is widespread and accepted in the international community, PMCs are only regulated, if at all, by domestic laws.¹¹ Thus, there is a pressing need for a new international convention focusing on private military and security assistance in order to truly address the global problem with private military firms.

company opened fire on a car, killing two women inside, as the vehicle approached a convoy). The security company, Unity Resources Group, worked for RTI International, which in turn was in Iraq on a U.S. State Department contract. *Id.*

6. Cf. FRED ROSEN, *CONTRACT WARRIORS: HOW MERCENARIES CHANGED HISTORY AND THE WAR ON TERRORISM* 143 (2005) (noting that a PMC will have offices in many different countries and openly advertise their ability to deploy to any global danger zone).

7. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 47, June 8, 1977, 1125 U.N.T.S. 3, *available at* <http://www.unhchr.ch/html/menu3/b/93.htm> [hereinafter Protocol Additional].

8. International Convention against the Recruitment, Use, Financing and Training of Mercenaries, G.A. Resolution 44/34, U.N. GAOR, 44th Sess., Supp. No. 43, U.N. Doc. A/RES/44/34 (Dec. 4, 1989) (entered into force Oct. 20, 2001), *available at* <http://www2.ohchr.org/english/law/mercenaries.htm> [hereinafter U.N. Convention].

9. *See infra* Part II.

10. *See* GEOFFREY BEST, *HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICTS* 328 & 374-75 n.83 (1980) (discussing the inherent weaknesses in the international definitions of mercenaries).

11. *See infra* Part I (noting that PMCs operate worldwide, but few countries have laws specifically addressing them).

Part I of this Comment will discuss the history of mercenaries and the rise of PMCs, and the existing international agreements and customary international law. Part II will argue that PMCs can escape the international agreements on mercenaries because the requirements in the definitions are cumulative, so a PMC may escape the whole definition by virtue of avoiding just one clause. However, Part II will further argue that because the international agreements do not have worldwide support, other sources of international law are more significant. Part II will also examine practices among differing nations, and argue that PMCs have clearly defined roles as legitimate support entities distinct from mercenaries. Lastly, Part III will recommend a new international convention that better reflects international practice regarding PMCs. This Convention will create an international registry and a licensing system overseen by an international body. Simply leaving the problem to domestic laws, as the United States has done in the past, has failed to capture the truly multinational corporations.¹² Only through a global regulatory regime can the global problem be addressed.

I. BACKGROUND

The international community accepted the widespread use of mercenaries as auxiliary forces in the past, but there has been a shift against mercenaries in recent decades.¹³ In response to the destabilizing effects of mercenaries in Africa, some members of the international community condemned mercenaries for hindering the self determination efforts of emerging African states.¹⁴ However, while the international community wrestled with the problems of mercenaries, unregulated PMCs emerged on the world stage.¹⁵

12. See *infra* Part II (discussing the inability of U.S. domestic laws to touch foreign nationals working for PMCs in Iraq).

13. See LEONARD GAULTIER ET AL., THE MERCENARY ISSUE AT THE UN COMMISSION ON HUMAN RIGHTS: THE NEED FOR A NEW APPROACH 16 (2001) (noting that the international community had always accepted the legitimacy of mercenaries, at least until controversy erupted with the use of mercenaries by many sides during post-World War II decolonization in Africa).

14. See *id.* at 16-17 (describing U.N. efforts encouraging states to restrict the use of mercenaries through a number of Resolutions and the drafting of the U.N. Convention on Mercenaries).

15. See ROSEN, *supra* note 6, at 11 (noting that unlike temporary mercenary bands in Africa, PMCs continue to have a business identity long after a conflict is

A. HISTORY OF MERCENARIES

The traditional definition of a mercenary was one who accepts money or some benefit for military service.¹⁶ From the beginning of recorded history, mercenaries have supplemented military forces.¹⁷ Indeed, it was only relatively recently in human history that the state became the sole legal authority with a monopoly on armed force.¹⁸ Before the Peace of Westphalia in 1648, anyone with enough money could raise an army.¹⁹ However, after 1648 the concept of standing armies made up of citizens loyal to the nation-state developed.²⁰ Yet even in the modern state-based system, it remained customary to supplement national standing armies with hired support.²¹

over).

16. See JOHN KEEGAN, *A HISTORY OF WARFARE* 228 (1993) (describing mercenaries as military professionals who sell their services for money or other compensation such as property, citizenship, or preferential treatment).

17. See *id.* at 231-32 (describing the historical market system of mercenaries as far back as the Hellenistic Era, including the Peloponnese city states in the 4th Century B.C.E. and the armies of Alexander the Great); see also ROSEN, *supra* note 6, at 45-46 (noting the earliest description of mercenaries as Libyan warriors in the employ of the Egyptian dynasties ruling from 1100 to 664 B.C.E.). Following 664 BCE, the Egyptians began hiring Greek mercenaries. *Id.* at 46.

18. See MARTIN VAN CREVELD, *THE RISE AND DECLINE OF THE STATE* 158-61 (1999) (explaining the pre-1648 practice of raising an army on the ruler's behalf when needed in lieu of always maintaining a standing army in peace time).

19. See *id.* at 158 (describing the entrepreneur system in which a commander issued a commission to a recruiter to go out and hire soldiers).

20. See P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 30-31 (2003) [hereinafter SINGER, *CORPORATE WARRIORS*] (paralleling the development of the modern nation state with the creation of citizen armies instead of private forces); VAN CREVELD, *supra* note 18, at 160 (discussing the replacement of the entrepreneur system with permanently commissioned military officers and government run war ministries); see also Treaty of Westphalia; Peace Treaty Between the Holy Roman Emperor and the King of France and Their Respective Allies, arts. LXXVII-LXXIX, Oct. 24, 1648, available at <http://www.yale.edu/lawweb/avalon/westphal.htm> (detailing the terms of peace between all nations in Europe at the conclusion of the Thirty Years War, including disbanding all current armies and keeping only enough troops as considered absolutely necessary for national defense).

21. See JANICE E. THOMSON, *MERCENARIES, PIRATES, AND SOVEREIGNS: STATE-BUILDING AND EXTRATERRITORIAL VIOLENCE IN EARLY MODERN EUROPE* 31-32 (1994) (explaining that nationality was not the primary basis for determining service in armies from 1600-1800, but rather the skill of the soldier, irrespective of origin). The constant movement of professional soldiers across national boundaries was evident in the composition of state armies, often with twenty-five to sixty

B. INTERNATIONAL LAW APPLYING TO MERCENARIES

The international community's long history of customary use of mercenaries meant that there was no desire to challenge the traditional description of a mercenary²² until the latter half of the twentieth century.²³ In a largely political movement against the West, Nigeria led the charge of African nations pushing for a new definition of "mercenary" under international law.²⁴ However, the international community was split over the necessity for a definition of "mercenary".²⁵ In the end, a detailed definition of mercenary emerged as part of Article 47 of the 1977 Protocol I Additional of the Geneva Conventions.²⁶ This international definition expanded with

percent of an army composed of foreigners. *Id.* at 29.

22. *Id.* at 59 (arguing that mercenarism had flourished for hundreds of years, and that problems emerged not because of a backlash against using mercenaries, which many states were still happy to do, but rather because the mercenaries' home states began to be held accountable in the international community for their citizens' actions).

23. See DAVID SHEARER, PRIVATE ARMIES AND MILITARY INTERVENTION ADELPHI PAPER 316, INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES 15 (1998) (describing the predations of mercenaries in Africa during the 1960s and 1970s, and the view of African governments that these mercenaries represented the former colonial powers' efforts to thwart self-determination).

24. See *id.* at 16 (discussing the Nigerian representatives' insistence at the Diplomatic Conference on Humanitarian Law in Geneva in the 1970s for a new definition of mercenary).

25. See F. J. Hampson, *Mercenaries: Diagnosis before Prescription*, 22 NETH. Y.B. INT'L L. 3, 29 (1991) (commenting that the driving force behind the adoption of Article 47 came from Third World and socialist states acting in opposition to the West); Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1, 33-34 (2003) (remarking that the discussions surrounding Protocol I were divided along Cold War lines, with the Soviet Union supporting the Third World states).

26. See Protocol Additional, *supra* note 7, art. 47. The article provides the following:

Article 47. Mercenaries

1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. A mercenary is any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; (e) is not a member of the armed forces of a Party

the 1989 U.N. Convention on the Law of Mercenaries, which repeated the 1977 definition but also added language specifying that mercenaries were people undermining legitimate governments.²⁷ Consequently, the drafters created the Article 47 definition and the U.N. Convention in response to post-colonial conflict in Africa and had specific parties in mind when they drew up the extensive criteria for a “mercenary.”²⁸

In addition to international agreements, customary international law (“CIL”) is also relevant to the discussion of mercenaries and PMCs.²⁹ The U.N. Commission on Human Rights created the office of the Special Rapporteur on Mercenaries to continue to observe the global trends on mercenaries and decipher the customs among the states.³⁰ Following the Special Rapporteur’s work, the U.N. created a

to the conflict; and (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Id.

27. See U.N. Convention, *supra* note 8. In addition to repeating the Article 47 definition, the Convention adds the following language:

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

(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at: (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or (ii) *Undermining the territorial integrity of a State*; (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation; (c) Is neither a national nor a resident of the State against which such an act is directed; (d) Has not been sent by a State on official duty; and (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

Id. (emphasis added)

28. See Milliard, *supra* note 25, at 5 (arguing that the drafters designed these narrow definitions to cover only those forces acting against the interests of post-colonial African states). Milliard argues that as the mercenaries of the 1960s and 1970s evolved into modern corporate entities, today’s PMCs, the mercenary definitions have remained inadequately focused on the old African mercenary. *Id.* at 5.

29. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1) (2008) (listing international law as international agreements, customary law, and general principles recognized worldwide). Customary law is the “general and consistent practice of states followed by them from a sense of legal obligation.” *Id.* at 102(2); see also Charter of the United Nations and Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1033 (entered into force Oct. 24, 1945) (describing international law using the same terms as the Restatement, but also adding publications by qualified persons as an additional means for determining international rules).

30. See Office of the U.N. High Comm’r for Human Rights, Special

special U.N. Working Group on Mercenaries with the mandate to continue to monitor mercenary activity and the use of PMCs.³¹

C. EMERGENCE OF PRIVATE MILITARY AND SECURITY COMPANIES

As the Cold War wound down, PMCs and private security companies (“PSCs”) arrived on the world scene.³² Commentators place such companies on a scale ranging from actual armed combat support to advisor roles, security, and logistical support.³³ PMCs are

Rapporteur of the Commission on Human Rights on use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination, <http://www2.ohchr.org/english/issues/mercenaries/specialrap.htm> (last visited Apr. 22, 2008) [hereinafter Use of Mercenaries]; see also U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Report on the Forty-Third Session*, 7, E/CN.4/1987/60 Supp.5 (1987) (approving the creation of the position of Special Rapporteur by the Commission on Human Rights for an initial period of one year, renewable if necessary, and requiring the Rapporteur to submit ongoing reports to the Commission on Human Rights).

31. See Office of the High Comm’r for Human Rights, *The Use of Mercenaries As a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination*, Human Rights Resolution 2005/2, ¶ 11, U.N. Doc. E/CN.4/RES/2005/2 (Apr. 7, 2005), available at <http://www.unhcr.org/refworld/docid/45377c39c.html> [hereinafter Use of Mercenaries Resolution].

32. See HERBERT M. HOWE, *AMBIGUOUS ORDER: MILITARY FORCES IN AFRICAN STATES* 79-80 (2001) (commenting that the end of the Cold War flooded the world security market with both weapons and trained professionals); CHRISTOPHER KINSEY, *CORPORATE SOLDIERS AND INTERNATIONAL SECURITY: THE RISE OF PRIVATE MILITARY COMPANIES* 50-51 (2006) (arguing that at the same time as mercenaries operated in Africa in the 1960s and 1970s, private security companies were distancing themselves from such activities by focusing on providing security and protection to the commercial sector); SHEARER, *supra* note 23, at 13 (comparing the change in the world order at the end of the Cold War and the consequent draw down of standing armies which created a pool of trained military professionals for hire with a similar environment at the end of the Hundred Years War); see also SINGER, *CORPORATE WARRIORS*, *supra* note 20, at 66-70 (describing a privatization revolution by many governments in the 1990s that encouraged more military and private security outsourcing).

33. See KINSEY, *supra* note 32, at 13-18 (distinguishing between corporations as PMCs, which engage in military support and may operate alongside military forces, Private Combat Companies, (“PCCs”), which engage solely in combat operations, and Private Security Companies, (“PSCs”), which focus on activities such as guarding buildings and people, maintaining public order, and acting as security advisers); SINGER, *CORPORATE WARRIORS*, *supra* note 20, at 91-100 (analogizing the privatized military industry to a spear, with logistical support contractors out of the line of fire, and at the tip of the spear, armed contractors accompanying military forces and potentially engaging in combat).

commercial entities with a clearly defined business structure and they openly compete on the global market to provide services to states, other multinational corporations, international institutions, and even non-governmental organizations (“NGOs”).³⁴

D. COMPARATIVE DOMESTIC LAWS REGULATING PMCs

In 1976, the British government conducted an investigation into the role of British fighters in Angola, and concluded that existing domestic laws on mercenaries were ineffective.³⁵ Decades later, the British government further examined the role of PMCs during a series of hearings before the House of Commons Foreign Affairs Committee.³⁶ Although the Hearings Report proposed options for regulating PMCs, none of them have become law.³⁷

South Africa is notable for being the only nation with a broad law regulating foreign military assistance.³⁸ South Africa’s law on mercenaries covers far more activities than the international definitions, which focus solely on military conflict.³⁹ The South

34. See SINGER, *CORPORATE WARRIORS*, *supra* note 20, at 44-47 (explaining that the industry is made up of legitimate businesses recognized by their home states that are open about their services, in contrast to mercenaries who wish to remain outside the law); see also DEBORAH D. AVANT, *THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY* 7 (2005) (observing that every U.N. peace operation since 1990 has involved some use of PSCs).

35. See KINSEY, *supra* note 32, at 136 & 141-42 (explaining the Diplock Committee’s recommendation that the U.K. should replace its Foreign Enlistments Act of 1870 with new legislation that would allow the government to intervene when specific hiring parties sought to recruit U.K. individuals for military service).

36. See FOREIGN AND COMMONWEALTH OFFICE, HC 577 *PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION* 20 (2002) [hereinafter U.K. GREEN PAPER] (noting that even after the 1976 Diplock Report the U.K. still has no laws effectively governing PMCs).

37. *Cf. id.* at 22-26 (proposing six options, including a complete ban on military activity abroad or a complete ban on recruiting for military activity abroad, creating a licensing regime focused on military actions or a simpler registration regime, a general license for PMCs for a range of activities, or a voluntary code of conduct among PMCs).

38. See KINSEY, *supra* note 32, at 138 (remarking that South African law expressly forbids mercenary activity, and outlaws even military assistance, such as training and advice, without government authorization).

39. See Regulation of Foreign Military Assistance Act 15 of 1998 § 1(iii) (S. Afr.) (listing foreign military assistance as services including advice and training, logistical support, medical services, and any other actions that might further some military interest).

African statute actually outlaws mercenary activity and uses a more traditional, simplified definition of a mercenary in lieu of the complicated Article 47 and Convention language.⁴⁰ At the same time the South African law has a broad “foreign military assistance” definition, which covers a number of activities that PMCs typically engage in, and requires government approval to engage in such activities.⁴¹

E. U.S. DOMESTIC LAW REGULATING PMCS

The United States already has laws in place for regulating military services provided to foreign entities.⁴² The United States recently revised the Uniform Code of Military Justice (“UCMJ”), which previously applied only to members of the armed forces, to cover civilians accompanying military forces.⁴³ Before this expansion of

40. *See id.* § 2 (“No person may within the Republic or elsewhere recruit, use, or train persons for or finance or engage in mercenary activity.”). The regulation describes mercenary activity as “direct participation as a combatant in armed conflict for private gain.” *Id.* §1(iv).

41. *See id.* §3 (forbidding any person within South Africa from providing foreign military assistance to any state or state agency or group of persons without first receiving approval from the government of South Africa). Gaining government approval involves filing an application with the National Conventional Arms Control Committee, which will in turn make a recommendation to the Minister of Defense. *Id.* § 4(1)-(2).

42. *See* Arms Export Control Act of 1968, 22 U.S.C. § 2752 (2007) (regulating the export of military services and arms brokering by U.S. companies); International Traffic in Arms Regulations 22 C.F.R. §§ 120-130 (2002) (requiring U.S. companies to obtain export licenses from the State Department Office of Defense Trade Controls before providing military products or services to foreign nationals); *see also* Foreign Assistance Act, 22 U.S.C. § 2151 (2007) (prohibiting the provision of assistance to any country which has a history of violating human rights).

43. Uniform Code of Military Justice “UCMJ” §2(a)(10) as amended by § 552 of the John Warner National Defense Authorization Act for Fiscal Year 2007 Pub. L. No. 109-364, 10 U.S.C. § 802 (2006); *see* P.W. SINGER, CAN’T WIN WITH ‘EM, CAN’T GO TO WAR WITHOUT ‘EM: PRIVATE MILITARY CONTRACTORS AND COUNTERINSURGENCY 12 (Brookings Inst. 2007), *available at* <http://www.brookings.edu/papers/2007/0927militarycontractors.aspx> [hereinafter SINGER, CAN’T WIN WITH ‘EM] (noting that at the time of the Blackwater shootings in Nisour square, the Department of Defense (“DoD”) had still not issued guidance to military lawyers on how to apply the revised UCMJ in the field); Memorandum from Robert Gates, Secretary of Defense, UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During War and in Contingency

the UCMJ's jurisdiction, contractors working for the U.S. military were only accountable to the Military Extraterritorial Jurisdiction Act ("MEJA").⁴⁴ Since the MEJA and the extended UCMJ still only apply to personnel working for the Department of Defense ("DoD"), these laws fail to capture security contractors working for other government agencies, like Blackwater and Unity Resources, who provide armed security for the U.S. State Department.⁴⁵ While the United States may have the ability to prosecute American citizens working for PMCs under the UCMJ and MEJA, U.S. jurisdiction may not always extend to foreign nationals working in Iraq.⁴⁶

Operations (Mar. 10, 2008) (ordering all the military departments of the U.S. DoD to revise their guidance and regulations in accordance with the expanded UCMJ). The Memorandum implicitly authorizes U.S. Commanders to seize PMC operators by reminding Commanders they have the broad authority to apprehend anyone interfering with operations even when the identity of such persons is not immediately apparent. *Id.*

44. See Military Extraterritorial Jurisdiction Act ("MEJA"), Pub. L. No. 106-523, 114 Stat. 2488, 18 U.S.C. §§ 3261-67 (2000) (extending U.S. Federal jurisdiction over anyone employed by U.S. armed forces, including Department of Defense "DoD" contractors and their subcontractors); see also Jennifer K. Elsea et al., *Private Security Contractors in Iraq: Background, Legal Status, and Other Issues*, CONG. RESEARCH SERV. 25 (Aug. 25, 2008) (noting that only twelve persons have been charged under MEJA since its passage in 2000). *But see United States of America v. Paul Alvin Slough, Nicholas Abeam Slatten, Evan Shawn Liberty, Dustin Laurent Heard, Donald Wayne Ball*, No. CR-08-360 (D.C. Cir. filed Dec. 4, 2008) (arguing that the Blackwater employees involved in the Nisour Square incident fall under the MEJA because their employment was "related to supporting the mission" of the Department of Defense, even though their contract was with the State Department, and charging them with voluntary manslaughter and other crimes under U.S. law).

45. See RICHARD D. WALLWORK, OPERATIONAL IMPLICATIONS OF PRIVATE MILITARY COMPANIES IN THE GLOBAL WAR ON TERROR 50 (2005), available at <http://handle.dtic.mil/100.2/ADA436294> (arguing that PMCs avoid accountability under the MEJA by being hired by government agencies other than the DoD). For example, the Caci International Inc. contractors that became embroiled in the interrogation scandal at Abu Ghraib prison were on a contract for the Department of the Interior and thus did not fall under the DoD and the MEJA. *Id.* at 52. See SINGER, CAN'T WIN WITH 'EM, *supra* note 43, at 7 (noting that while the U.S. soldiers involved in the abuses at Abu Ghraib prison were brought before a court-martial, the United States has not prosecuted any of the private contractors that were involved).

46. See Elsea et al., *supra* note 44, at 24 (commenting that U.S. citizens can be prosecuted back in U.S. courts, but noting that Iraqi subcontractors would be exempt from the MEJA because the law does not cover nationals of the host nation).

Furthermore, until the passage of a Status of Forces Agreement (“SOFA”),⁴⁷ foreign nationals working for contractors were immune under Iraqi Law because of Coalitional Provisional Authority (“CPA”) Order 17, which meant that a foreign national working for a PMC was unaccountable under both U.S. and Iraqi law.⁴⁸ The United States also cannot exercise jurisdiction over a completely foreign firm, such as Unity, and is limited to severing its contractual arrangement.⁴⁹

II. ANALYSIS

Since PMCs are often called “mercenaries,” the threshold issue is whether they are accountable under the existing international law on mercenaries.⁵⁰ However, the international agreements that do address mercenaries are unwieldy instruments that PMCs can avoid by

47. See Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of U.S. Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008, art. 12 Jurisdiction ¶ 6, available at http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf (agreeing that the government of Iraq shall have the “primary right” to exercise jurisdiction over contractors supporting United States forces). However, the agreement does not define “primary right” and the clause is further limited to only contractors supporting the Department of Defense and still does not cover contractors supporting other U.S. agencies. See *id.* art. 2 Definitions (describing U.S. contractors as only those that support U.S. forces, and further defining “United States Forces” as only the Armed forces and their civilian components).

48. See Coalition Provisional Authority (“CPA”), *Status Of The Coalition Provisional Authority, MNF-Iraq, Certain Missions And Personnel In Iraq*, CPA Order No. 17, at sec. 4(3) (June 27, 2004), available at http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf; cf. Elsea et al., *supra* note 44, at 19 (noting that as of August 2008, the CPA Order 17 remained in effect and exempted all contractors from Iraqi laws while in the performance of their contracts).

49. See *Iraqi Reconstruction: Reliance on Private Military Contractors and Status Report: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 142 (2007) (statement of Alan Chvotkin, head of PMC trade organization) (noting that there are many PMCs in Iraq working for non-U.S. government parties, such as coalition allies and NGOS).

50. See P.W. Singer, Essay, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 524 (2004) [hereinafter Singer, *War, Profits, and the Vacuum of Law*] (noting that PMCs are companies that sell military service, and under international law, an individual who does the same thing is a mercenary).

escaping any single clause.⁵¹ State practice tends to accept PMCs under customary international law in the wake of ineffective international agreements.⁵² Customary international law does place some limits on the proper roles of PMCs in the state-based international system.⁵³

A. WHAT'S IN A NAME: PMCs CAN AVOID THE INTERNATIONAL DEFINITIONS OF "MERCENARY" UNDER INTERNATIONAL AGREEMENTS BECAUSE THE DEFINITIONS ARE CUMULATIVE

PMCs are likely to argue that they are not "mercenaries" if they do not meet the specific criteria in the Article 47 and the U.N. Convention definitions.⁵⁴ If PMCs can avoid even one section of the international definitions of Article 47 and the U.N. Convention, then they can escape the coverage of the entire definition.⁵⁵ Therefore it is necessary to examine both Article 47 and the U.N. Convention

51. See *infra* Part II.A (illustrating that while some clauses can readily apply to PMCs, others are easier to escape, and thus the whole definition may not apply to PMCs).

52. See *infra* Part II.B (describing the trend of state use of PMCs by states that also condemn mercenaries).

53. See *id.* (emphasizing that PMCs are legitimate entities only when the hiring party is a legitimate actor in the international community; otherwise, the PMC is engaged in criminal activity by undermining traditional state sovereignty over the use of violent force).

54. See SHEARER, *supra* note 23, at 17-20 (commenting that PMCs argue they will only work for recognized governments, which does not make them mercenaries under the international definitions); see also *Hearing on Blackwater USA: Hearing Before the H. Comm. on Oversight and Government Reform*, 110th Cong. 134-35 (2007) [hereinafter *Blackwater USA Hearing*] (quoting Blackwater CEO Erik Prince as claiming that his American employees are not mercenaries according to the Oxford Dictionary definition of "mercenary," while admitting that Blackwater employs foreign nationals).

55. See U.K. GREEN PAPER, *supra* note 36, at 6 (explaining that a person is a mercenary only when all provisions in the definitions are met); ECOSOC, Comm'n on Human Rights, *Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, ¶ 86, U.N. Doc. E/CN.4/1997/24 (Feb. 20, 1997) (prepared by Enrique Bernales Ballesteros, Special Rapporteur) [hereinafter U.N. Special Rapporteur 1997 Report] (clarifying that Article 47 requirements are cumulative and it is difficult to prove that all the concurrent elements are met); SHEARER, *supra* note 23, at 18-19 (emphasizing that PMCs can avoid the cumulative criteria of these definitions by carefully wording their contracts with a client).

definitions in their entirety to determine whether all the clauses, or only some of them, capture PMCs.

1. PMCs Could Fall Under Some Provisions of the Article 47 Definition, but PMCs May Easily Avoid Other Provisions and Thereby Avoid the Entire Definition

PMCs could fall under sections (a) and (b) if a broad interpretation of direct participation in conflict is used.⁵⁶ PMCs are less likely to fall under section (c) because of difficulties in determining motivation.⁵⁷ PMCs could fall under other sections relatively easily, such as section (d), requiring mercenaries be foreigners.⁵⁸ However, unless a PMC fits within all the clauses, it will escape the coverage of the definition.

a. Section (a) Only Applies to Fighting in Armed Conflicts, and Does Not Cover Support or Advisor Roles

A PMC could fall under section (a) if hired specifically for an armed conflict.⁵⁹ PMCs that were hired specifically for operations in Iraq could fall under this section because the term “armed conflict” encompasses a range of possibilities from outright war to low intensity conflict.⁶⁰ However, someone would have to hire a person to actually “fight” in the armed conflict for that person to fall under section (a).⁶¹ Thus, if a party has hired a PMC for non-combat roles,

56. See International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Yves Sandoz et al., eds., Tony Langham et al., trans., 1987) ¶ 1806, available at <http://www.icrc.org/ihl.nsf/WebList?ReadForm&id=470&t=com> [hereinafter Protocol I Commentary] (noting that hired advisers and support personnel may meet all the other clauses in the mercenary definition, but avoid being labeled mercenaries so long as they stay out of combat).

57. See *id.* ¶ 1802 (emphasizing that despite the definitions in many provisions, the greatest factor in determining a mercenary is really their desire for monetary gain).

58. See *id.* (clarifying that mercenaries are only a subsection of the many foreign volunteers that augment modern military forces).

59. Protocol Additional, *supra* note 7, art. 47(2)(a).

60. See Protocol I Commentary, *supra* note 56, ¶¶ 62-65 (emphasizing that the provisions of the Convention will apply to any conflict involving recognized armed forces, regardless of scope and intensity).

61. See Protocol Additional, *supra* note 7, art. 43 (explaining that the right to direct involvement in combat is limited to legitimate combatants). However, the

even for a specific conflict, the PMC can escape this section because the personnel are non-fighters.⁶² If a party hires a PMC to provide security for people or installations, then the PMC was not hired specifically to fight, although the PMC may be drawn into the conflict by virtue of being on the scene.⁶³ Furthermore, a party may hire a PMC to provide security in a dangerous place, but not one that is currently involved in any “armed conflict.”⁶⁴ Even if such PMCs become involved in fighting when armed conflict erupts, they would not fall under section (a) because they were not hired for a fighting role.⁶⁵

definition of combatant is broad, and could certainly include PMCs if they take commands from a state party. *See id.* art. 43(1) (noting that armed forces include not only the military but any groups and units that are under the command of a Party to the Convention); *id.* art. 43(3) (allowing the incorporation of paramilitary and law enforcement units under the definition of armed forces); *see also* J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 A.F. L. REV. 155, 170-73 (2005) (explaining that even though the definition of combatant is broad, combatants are still readily identified by the requirement of carrying arms openly before any attack).

62. *See* Protocol Additional, *supra* note 7, art. 47(2)(a)-(b) (requiring that a mercenary be someone hired specifically for an armed conflict who actually participates in the conflict); SHEARER, *supra* note 23, at 18 (noting that the firms Military Professional Resources Incorporated and Executive Outcomes have always claimed that their personnel are advisers and trainers and therefore exclude themselves from the definition of mercenary). *But see* U.K. GREEN PAPER, *supra* note 36, at 11 (using the example of Executive Outcomes’ involvement in the Angolan conflict to caution that even non-combat support by PMCs can have a huge impact on war fighting ability).

63. *Cf. Iraqi Reconstruction: Reliance on Private Military Contractors and Status Report: Hearing Before the H. Comm. on Oversight and Government Reform*, 110th Cong. 121 (2007) (statement by Andrew Howell, General Counsel for Blackwater USA) (declaring that Blackwater is involved in protective security operations only and is not involved in combat operations).

64. *Cf. KINSEY, supra* note 32, at 17 (discussing security companies operating in dangerous areas of Angola and Colombia on behalf of the international oil, gas, and diamond industries).

65. *Cf. CHALMERS JOHNSON, THE SORROWS OF EMPIRE: MILITARISM, SECRECY, AND THE END OF THE REPUBLIC* 135 (2004) (describing Vinnell Corp. as retained since 1975 by Saudi Arabia for ongoing duties such as training the Saudi National Guard, running military academies, and writing Saudi military doctrine, and noting that at times Vinnell has engaged in combat support roles alongside Saudi Arabian forces).

b. Section (b) Requires a Direct Role in Actual Fighting, Which May Include PMCs Under a Broad Interpretation of "Direct"

Related to section (a), section (b) requires that a mercenary actually take direct part in the conflict.⁶⁶ Therefore, even if a party hires a PMC to fight in an armed conflict as required by section (a), the PMC could still escape section (b) if the PMC does not engage in any direct fighting.⁶⁷ However, the meaning of taking a "direct" part in fighting is to be interpreted quite broadly under the realities of modern conflict.⁶⁸ Because taking direct part in combat requires only a link between some action and harm to the enemy,⁶⁹ the reach of modern weapons means that a person physically far from a battlefield may be responsible for harm simply by pressing a button.⁷⁰ Thus, a broad interpretation of the meaning of "direct" could include a person who selects targets for attacks or fires a weapon remotely, because there is a causal link between that activity and harm to the enemy.⁷¹ Therefore under a broad meaning of direct participation, a PMC would likely fall under section (b), but this is not so under a narrow definition.

66. See Protocol Additional, *supra* note 7, art. 47(2)(b).

67. See JAMES R. DAVIS, *FORTUNE'S WARRIORS: PRIVATE ARMIES AND THE NEW WORLD ORDER* 195 (2000) (noting that the mercenary profession throughout history more often involved a hiring party using the intimidating presence of mercenaries as a deterrent rather than actually using them for fighting).

68. See U.K. GREEN PAPER, *supra* note 36, at 8 (noting that any distinction between combat and non-combat roles is unrealistic because support personnel are as much a vital part of a modern military operation as actual fighters).

69. See Protocol I Commentary, *supra* note 56, ¶ 1679 (stating that "[d]irect participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place").

70. See Heaton, *supra* note 61, at 179 (remarking that physical distance is irrelevant when determining direct participation, so long as the connection between an action and harm to the enemy are present).

71. See *id.* at 178 (observing that with modern technology, activities from a distance such as gathering intelligence and firing missiles can actually inflict just as much harm as activities closer to the enemy).

c. Section (c) Requires Financial Motivation, Which is Difficult to Measure with PMCs

The most likely section that applies to PMCs is section (c), which requires that material gain motivate a mercenary, and that the material compensation is greater than that of a Party's armed forces.⁷² One could consider PMCs mercenaries under section (c) because PMCs are primarily businesses interested in making money.⁷³ Also, PMC contracts with their personnel may indicate that PMCs pay more than states pay the members of their armed forces.⁷⁴ However, the requirement that private gain be the essential motivator of a mercenary is problematic because one could likely argue that private gain is only one of many factors motivating them.⁷⁵ Furthermore, the section requires that mercenary compensation be "significantly in excess" of that paid to members of the armed forces of "similar rank and function."⁷⁶ PMCs advertise their services as highly specialized and professional, and thus comparison costs should be between Special Forces operators and PMC employees.⁷⁷

72. See Protocol Additional, *supra* note 7, art. 47(2)(c).

73. See SHEARER, *supra* note 23, at 74 (arguing that PMCs are driven by the desire of their shareholders to make profits).

74. See U.N. Special Rapporteur 1997 Report, *supra* note 55, ¶ 41 (noting that South African PMCs could offer more than five times what military personnel were being paid); see also *Blackwater USA Hearing*, *supra* note 54, at 107 (statement by Rep. Duncan) (remarking that Blackwater pays its employees an excessive amount compared to U.S. military personnel).

75. See Protocol I Commentary, *supra* note 56, ¶ 1809 (explaining that a person could be a mercenary under all other sections of the definition but be motivated by ideology rather than material gain); see also U.K. GREEN PAPER, *supra* note 36, at 7 (pointing out that it is hard to distinguish mercenaries from volunteers, such as Islamic militants in Afghanistan, who might be motivated just as much by payment as by their beliefs).

76. See Protocol Additional, *supra* note 7, art. 47(2)(c); see also Protocol I Commentary, *supra* note 56, ¶ 1807 (emphasizing that because all members of the armed forces receive pay for their services, only pay above and beyond that rate distinguishes a mercenary from a member of the armed forces).

77. See WALLWORK, *supra* note 45, at 29 (arguing that PMCs focus on recruiting from ex-Special Forces personnel so that some hiring countries are able to further utilize the training they have already invested in these people); see also Protocol I Commentary, *supra* note 56, ¶ 1810 (concluding that a person doing the same work and receiving the same pay as a military member is simply not a mercenary, even if the person is involved in combat alongside military forces).

However, it is hard to determine if PMC employees really receive wages in excess of the armed forces, because it is unclear whether outsourcing functions to PMCs saves money or costs more than the military doing the work itself.⁷⁸ Furthermore, because it would be difficult to confirm that compensation is the primary motivator, this section would likely not cover PMCs.⁷⁹

d. Sections (d), (e), and (f) Involving Foreign Nationals that Are Not Members of Any Armed Forces Could be Avoided by PMC Contract Language

Section (d) defines mercenaries as foreign nationals.⁸⁰ It is very likely that a PMC will have employees in a conflict zone that fall under section (d) because PMCs recruit people from all over the world.⁸¹ Furthermore, PMCs could very likely fall under section (e), which stipulates mercenaries act outside the armed forces.⁸² Yet if PMCs were taking orders directly from the armed forces, perhaps because a contract required it, then they would effectively be considered members of the armed forces and not mercenaries.⁸³ Such

78. Compare DAVIS, *supra* note 67, at 128 (remarking that while the U.N. observer force in Angola cost \$1 million a day, the contract between Angola and the PMC Executive Outcomes was a mere \$40 million a year), and WALLWORK, *supra* note 45, at 32 (describing the economic argument that PMCs save the military money because of the efficiency of the private sector), with Elsea et al., *supra* note 44, at 49 (noting that the cost advantage to the government of using PMCs may vary or disappear altogether, as it did with Blackwater, because of contract markups), and SINGER, CAN'T WIN WITH 'EM, *supra* note 43, at 4 (observing that an audit has estimated \$10 billion in unsupported costs from PMCs in Iraq).

79. See SHEARER, *supra* note 23, at 18 (stressing that the psychological element of motivation would be difficult to prove).

80. See Protocol Additional, *supra* note 7, art. 47(2)(d) (stating that a mercenary is not a citizen of any state involved in the conflict or from any territory belonging to a state involved in the conflict).

81. See SINGER, CAN'T WIN WITH 'EM, *supra* note 43, at 2 (remarking that there are about 180,000 private contractors in Iraq and they come from at least thirty different countries); Ashley Deeks, *Getting a Grip on Private Security Contractors*, DEFENSE NEWS, Jan. 7, 2008, at 21 (noting that PMC employees often come from countries with no connection to the state where the employee works).

82. See Protocol Additional, *supra* note 7, art. 47(2)(e) (providing that a mercenary is "not a member of the armed forces of a Party to the conflict").

83. See Singer, *War, Profits, and the Vacuum of Law*, *supra* note 50, at 532-33 (describing how the PMC Sandline worded its contract with Papua New Guinea so

a contract would also allow a PMC to escape the last clause of the Article 47 definition, section (f), which accepts the presence of armed forces from third parties.⁸⁴ While a PMC could fall under some sections more readily than others, the cumulative requirement of Article 47 means that it would be very difficult to find an armed conflict where a PMC is truly acting as a mercenary under all sections of Article 47. It is therefore necessary to look at the definition under the U.N. Convention for additional language that may capture PMCs where Article 47 does not.

2. The U.N. Convention Has Broader Language than Article 47, but is Nonetheless Limited by the Caveat that Mercenaries Must Undermine a State Government

The U.N. Convention uses the same language as Article 47 for its initial definition of a mercenary,⁸⁵ but also adds a second definition.⁸⁶ The second definition covers mercenaries outside of armed conflict by creating a wider net that covers any violent scenario.⁸⁷ This broader terminology indicates that a mercenary is not limited to an international conflict, but may appear in a civil or internal conflict.⁸⁸ The definition also lowers the threshold for material compensation because it does not compare the mercenary's payment to the wages of armed forces, but instead merely requires that some vague promise of payment entice the mercenary to act.⁸⁹

that its personnel were "special constables" for the government, so as to avoid the international laws on mercenaries); Protocol I Commentary, *supra* note 56, ¶ 1813 (remarking that even temporary enlistment in a state's armed forces just for the duration of the conflict will allow a person to escape the mercenary definition).

84. See Protocol Additional, *supra* note 7, art. 47(2)(f) (requiring that a mercenary is not someone "sent by a State which is not a Party to the conflict on official duty as a member of its armed forces").

85. See U.N. Special Rapporteur 1997 Report, *supra* note 55, ¶ 87 (noting that the U.N. Convention made no progress to a more effective definition of mercenary because it repeats the Article 47 definition).

86. See U.N. Convention, *supra* note 8, art. 1(2)(a).

87. See *id.* art. 1(2)(a) (declaring that a mercenary is a person involved in an act of violence targeted at a government).

88. See Protocol I Commentary, *supra* note 56, ¶ 1800 (emphasizing that Article 47, as part of the Protocol to the Geneva Conventions, covers only international armed conflict).

89. See U.N. Convention, *supra* note 8, art. 1(2)(b) (requiring that the mercenary be motivated by "the desire for significant private gain and is prompted

However, the definition also exempts situations where a state sends a person on official duty in contrast to Article 47, which only exempts members of the armed forces.⁹⁰ Lastly, the U.N. Convention's second definition only applies to situations that undermine the sovereignty of a state.⁹¹

The U.N. convention's broader coverage of acts of violence, instead of just armed conflicts, would cover PMCs because PMCs often provide security and support in countries not currently engaged in international armed conflict.⁹² Furthermore, a PMC responding to a threat with violent force would be engaging in an act of violence even though there is no international armed conflict.⁹³ However, because the U.N. Convention definition contains the provision that the violence must involve overthrowing a government, a PMC is likely to escape this section.⁹⁴

The broader requirement of the second definition, that material compensation "prompt" the mercenary into participation in the conflict, may cover PMCs because, unlike Article 47, there is no requirement to show that such material compensation is somehow excessive.⁹⁵ However, a PMC could escape this section, because it would be hard to determine if the motivating factor was private gain and not some combination of factors.⁹⁶ A PMC could find it easier to escape the language on compensation in the U.N. Convention than the similar clause in Article 47, because the U.N. Convention

by the promise or payment of material compensation").

90. Compare *id.* art.1(2)(d), (exempting those who "ha[ve] not been sent by a State on official duty"), with Protocol Additional, *supra* note 8, art. 47(2)(e) (exempting when "not a member of the armed forces of a Party to the conflict").

91. See U.N. Convention, *supra* note 8, art. 1(2)(a)(i) (defining as overthrowing a government or otherwise undermining the constitutional order of a State; or (ii) undermining the territorial integrity of a State").

92. See U.K. GREEN PAPER, *supra* note 36, at 16 (noting that PMCs are often active in dangerous areas on behalf of mineral extraction industries).

93. See SINGER, CORPORATE WARRIORS, *supra* note 20, at 89 (explaining that PMCs that protect installations can quickly move from a passive role to actively fending off attacks with combat action).

94. See U.N. Convention, *supra* note 8, art. 1(2)(a)(i)-(ii) (requiring that such violent acts be specifically targeted at the internal stability of a State).

95. See *id.* art. 1(2)(b).

96. See U.K. GREEN PAPER, *supra* note 36, at 7 (noting that some sort of payment may still motivate ostensibly idealistic volunteers and thus it is hard to decipher the primary form of motivation).

language allows for official duty on behalf of a state, not just as a member of the armed forces.⁹⁷ Therefore, a state agency may contract a PMC to perform an official duty for the state, rather than with the armed forces, to avoid the U.N. Convention.⁹⁸ Overall, the second definition in the U.N. Convention has broader language that could apply to PMCs where Article 47 does not, but in the end, the requirement that mercenary actions must involve undermining a government limits the entire definition.⁹⁹

Both Article 47 and the U.N. Convention have sections that could certainly apply to PMCs, but because PMCs could likely escape other sections, or parts of the definition, the overall utility of the definitions is limited. Because the definitions are cumulative, those few sections that PMCs are most likely to avoid become fatal to the entire definition. Recognizing the limitations of Article 47 and the U.N. Convention to adequately capture PMCs, the analysis must turn to other sources of international law.

B. PMCs ARE LEGITIMATE SUPPORT ORGANIZATIONS UNDER CUSTOMARY INTERNATIONAL LAW WHEN ACTING ON BEHALF OF A LEGITIMATE STATE AND REPRESENTING THAT STATE'S AUTHORITY

If PMCs can avoid the definitions of Article 47 and the U.N. Convention, then it would appear that they are not mercenaries under international law, which would leave their international status in a conflict unclear.¹⁰⁰ However, that is only part of the analysis. In addition to treaties, international law also consists of the customs and practices arising between states.¹⁰¹ If customary international law

97. See U.N. Convention, *supra* note 8, art. 1(2)(d).

98. Cf. KINSEY, *supra* note 32, at 110 (commenting that many government agencies worldwide, not just state militaries, now outsource their work to private firms).

99. See U.N. Convention, *supra* note 2, art. 1(2)(a)(i)-(ii).

100. See SHEARER, *supra* note 23, at 20 (discussing the U.S. laws on mercenary activity and concluding that the United States does not believe mercenaries should be denied the protections other combatants receive under international law). Shearer notes that Article 47(1) states that a mercenary shall not have the same rights of a prisoner of war, which is a complete reversal of the traditional laws of war. *Id.* at 19.

101. See JOHN F. MURPHY, THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS 36 (2004) (describing the widely held view that

covers PMCs, then PMCs cannot escape international accountability merely because they do not meet the definitions of mercenaries in Article 47 and the U.N. Convention.¹⁰²

*1. The Customary Law Has Greater Weight Because
Article 47 and The U.N. Convention on Mercenaries
are not Accepted International Law*

A nation that is a Party to the Geneva Conventions, but has not ratified the Additional Protocol, is not bound by the definition of mercenary in Article 47.¹⁰³ While the international community has agreed to the original Geneva Conventions, not all nations have agreed to these Additional Protocols, despite their publication over thirty years ago.¹⁰⁴ For example, the United States protested the Article 47 provisions on mercenaries, refusing to recognize the definition, or accept the Additional Protocols.¹⁰⁵ Therefore Article 47 is not a strong reflection of customary international law, because even after thirty years, not all of the parties to the Geneva Convention have approved the Additional Protocol that contains Article 47.

principles of customary international law (“CIL”) may be found by comparing legal systems worldwide and looking for fundamental trends).

102. See *id.* at 25 (noting that treaties and CIL have equal weight, and any gaps in international agreements may be filled by recourse to CIL).

103. See Protocol Additional, *supra* note 7, art. 95 (explaining that a state is only bound to the new Protocol six months after the state submits instruments of ratification).

104. See International Committee of the Red Cross (“ICRC”), *International Humanitarian Law - Treaties & Documents: 1949 Conventions & Additional Protocols*, <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView> (last visited Apr. 22, 2008) (listing 194 state parties to the four Geneva Conventions but only 168 parties to the Additional Protocol I). Furthermore, five states have signed, but not ratified the Protocol, including the United States. *Id.*

105. See Ronald Reagan, Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions (Jan. 29, 1987), available at <http://www.reagan.utexas.edu/archives/speeches/1987/012987B.HTM> (last visited Apr. 22, 2008) (requesting the Senate give advice and consent to the ratification of Protocol II but refuse to ratify Protocol I because it is fundamentally flawed); ROSEN, *supra* note 6, at 189 (noting that after the United States refused to sign the 1977 Protocols Additional to the Geneva Conventions, many other nations followed suit); Milliard, *supra* note 25, at 37 (reporting statements by the U.S. State Department legal office that the United States did not favor the provisions of Article 47 and furthermore did not consider them to be part of customary international law).

The search for customary international law now turns to international support for the U.N. Convention. Only those countries that sign the U.N. Convention are bound by it, so that definition only directly applies to activities in the signatory countries.¹⁰⁶ However, the U.N. Convention has garnered even less support than Article 47: it has taken decades to come into effect, and far fewer states have signed the Convention than ratified Article 47.¹⁰⁷

The lack of world wide support for Article 47 and the U.N. Convention demonstrates that they do not reflect the customary international law of nations.¹⁰⁸ Therefore, it is misleading to claim PMCs are not “mercenaries” simply because they do not fall under the Article 47 and U.N. Convention definitions, when those definitions are not even accepted by all nations as international law.¹⁰⁹ Such an argument simultaneously claims that these

106. See U.N. Convention, *supra* note 8, arts. 18-19 (specifying that states become parties to the Convention by ratification, and the Convention will only come into effect after twenty-two states have ratified it).

107. See ECOSOC, U.N. Comm’n on Human Rights, *Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, ¶ 49, U.N. Doc. E/CN.4/2004/15 (Dec. 24, 2003) (prepared by Enrique Bernales Ballesteros, Special Rapporteur) [hereinafter *U.N. Special Rapporteur 2004 Report*] (listing the twenty five countries that are signatories to the Convention on Mercenaries).

108. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(3) (1987) (“International agreements create law for the state parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted”); see also Singer, *War, Profits, and the Vacuum of Law*, *supra* note 50, at 531 (arguing that the Convention acts as anti-customary international law because the major state powers are not signatories, many of the signatories have benefited from the use of mercenaries, and no one has been prosecuted under the Convention).

109. See SHEARER, *supra* note 23, at 76 (observing that the Convention only has the support of a few states, and that under most domestic laws mercenary activity is only restricted but not outright criminalized); Milliard, *supra* note 33, at 66 (commenting that with only a handful of states actually signed on as Parties to the Convention, “[a]s an indication of states’ practices, this is not a ringing endorsement for the U.N. Mercenary Convention or its legal predecessors”); see also Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT’L L. 75, 140-41 (1998) (highlighting that the same African countries that originally proposed the international laws on mercenaries now have no qualms about employing private security companies such as Executive Outcomes).

definitions are the only international law on mercenaries and consequently, since PMCs do not meet those specific definitions, then there is no international law that applies to PMCs.¹¹⁰ But this argument ignores centuries of precedent, where a mercenary was simply someone who received payment for military service and was a legitimate actor.¹¹¹ Under the simpler, traditional definition of “mercenary” that predates Article 47 and the U.N. Convention, many of these firms are acting as mercenaries.¹¹²

*2. PMCs Continuing Corporate Existence and Use
by Only Legitimate States Distinguishes Them
from the Illegitimate Mercenary*

Because Article 47 and the U.N. Convention do not represent consensus among the international community, it is necessary to determine whether other customary international law on mercenaries better reflects the current attitudes among states.¹¹³ The U.N. Human Rights Commissioner set up an office to investigate global trends involving mercenaries and the increasing use of PMCs.¹¹⁴ These investigations can reveal whether there is some consistent practice

110. See Singer, *War, Profits, and the Vacuum of Law*, *supra* note 50, at 533-34 (arguing that since the international definitions focus only on individuals, there is no international mechanism for regulating firms or those who hire them).

111. See DAVIS, *supra* note 67, at 42 (reiterating that up until the latter half of the twentieth century, professional military support for hire was accepted in both domestic and international policy).

112. See Milliard, *supra* note 25, at 8 (commenting that the corporate model that PMCs use is really not that different from the Varangian Guard that protected the Byzantine Emperor for hundreds of years, the “free companies” of mercenaries in the Middle Ages, or the English Company of the Staple and Merchant Adventurers); Zarate, *supra* note 109, at 77, 91 (noting that many commentators consider PMCs just a more sophisticated group of mercenaries and remarking that PMCs are modern versions of mercenary business organizations, like the Italian *condottieri* and free companies).

113. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1) cmt. j (1987) (noting that while international agreements and CIL generally have equal weight, new rules of CIL can overtake prior international agreements); Manley O. Hudson, 2 Y.B. INT'L L. COMM'N 24, 26 U.N. Doc. A/CN.4/Ser.a/1950/Add.1. (June 6, 1957) (describing customary international law as some continual practice in international relations by a number of states over time, with acquiescence in the practice by other states, and a general sense that the practice is consistent with other international laws).

114. *Cf.* Use of Mercenaries, *supra* note 30.

among states.¹¹⁵ Furthermore, the behavior of states towards mercenaries and PMCs, and trends in domestic laws, can reveal customs in the international community.¹¹⁶

a. Investigations of the U.N. Special Rapporteur and the Working Group on Mercenaries Demonstrate that International Custom Accepts the Use of PMCs but Condemns Individual Mercenary Operators

The U.N. appointed the Special Rapporteur on Mercenaries to correct the deficiencies in Article 47 and the U.N. Convention by recourse to customary international law.¹¹⁷ The mandate of the Special Rapporteur included ferreting out the true customary international law because of the lack of encapsulation of customary international law by Article 47 and the U.N. Convention.¹¹⁸ The creation of a special working group indicates the view of the international community that Article 47 and the U.N. Convention do not reflect the real activities of mercenaries and PMCs.¹¹⁹ Furthermore, the call for new standards and a new definition of mercenaries both by the Rapporteur and the Working Group

115. *See id.* (describing the authority of the Special Rapporteur to explore the subject of mercenaries, including visiting areas of mercenary activity, and paying particular attention to the forms PMCs may take and any connections to mercenary activity).

116. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1) cmt. 1 (1987) (commenting that where there is no international agreement on point, general principles present in national systems are an appropriate source of international law, and may indicate customary international law through practice among states).

117. *See U.N. Special Rapporteur 2004 Report, supra* note 107, paras. 52-53 (explaining that while other mandates arise under international legal instruments, it is precisely because the international treaty law on mercenaries is unworkable that the Special Rapporteur is mandated to investigate the customary international law).

118. *See* ECOSOC, U.N. Commission on Human Rights, *Report Of The Second Meeting Of Experts On Traditional And New Forms Of Mercenary Activities As A Means Of Violating Human Rights And Impeding The Exercise Of The Right Of Peoples To Self-Determination*, ¶ 11, U.N. Doc. E/CN.4/2003/4 (June 24, 2002) (commenting that there is still no appropriate international legal definition of mercenary and that the definitions in Article 47 and the U.N. Convention are unworkable); *see also* U.N. Special Rapporteur 1997 Report, *supra* note 55, ¶¶ 77-79 (declaring there is a need to redefine customary international law on mercenaries and perhaps even revise existing treaty law).

119. *See* Use of Mercenaries Resolution, *supra* note 31, ¶ 17 (noting that mercenaries are continually taking on new forms of organization so the Working Group should pay close attention to the actions of PMCs).

demonstrates that the international community does not support the ability of PMCs to escape accountability merely because they can avoid the definitions in Article 47 and the U.N. Convention.¹²⁰ However, the Special Rapporteur and the Working Group revealed a distinction between legitimate PMCs and mercenaries by strongly emphasizing the criminal factor in mercenary activity.¹²¹ In contrast, PMCs are legitimate largely because they provide military and security assistance openly to recognized state parties.¹²² The PMC gains its legitimacy from the hiring party as long as the hiring party is sending the PMC on a legitimate mission.¹²³ Thus, investigations by the U.N. Special Rapporteur and the Working Group emphasize the difference between the legitimate use of PMCs¹²⁴ and the illegitimate lone operator that Article 47 and the U.N. Convention intended to categorize as a “mercenary.”¹²⁵

120. See Office of the U.N. High Comm’r for Human Rights, U.N. Working Group on Mercenaries; Methods of Work, ¶ 12, <http://www2.ohchr.org/english/issues/mercenaries/work.htm> (last visited Apr. 22, 2008) (demonstrating the similarities between individual mercenaries and PMCs by including in the Working Group’s mandate all mercenary and PMC activity); see also Milliard, *supra* note 25, at 56 (illustrating that PMCs are related to mercenary issues, but international agreements still do not address them).

121. See U.N. Special Rapporteur 1997 Report, *supra* note 55, ¶ 74 (commenting that it is only when a state hires persons to engage in operations that go against international law that the state has hired mercenaries and created a criminal alliance between the mercenary and the recruiting Party).

122. See *id.* ¶¶ 96, 107 (remarking that as of 1997, thirty-four countries were interested in hiring the PMC Executive Outcomes and noting that clearly defined military assistance missions by private companies are acceptable under international law); see also *Getting Boots Off the Ground*, THE ECONOMIST, Jan. 26-Feb. 1, 2008, at 59 (discussing the difficulty of getting member states to provide helicopters for U.N. peacekeeping operations in Africa, and that the U.N. is currently hiring private firms to provide helicopter transport).

123. See THOMSON, *supra* note 21, at 147 (explaining that the international system reinforces the state monopoly over violence by creating expectations in interstate relations that a true state will assert control over violence emanating from its territory); WALLWORK, *supra* note 45, at 46-47 (underscoring that in the state-based international system, states retain the legal authority for PMCs to take any action, as demonstrated by the fact that no PMC has ever operated against its home state).

124. See ROSEN, *supra* note 6, at 17 (remarking that “legitimate” mercenaries voluntarily transformed into the corporate structure of PMCs and they do not appreciate any maverick operators disrupting the modern military and security support market).

125. See DAVIS, *supra* note 67, at 73-75 (separating the legitimate PMC employee, who is a professional soldier and works for a recognized government,

b. State Practice and Laws Accept the Use of PMCs but Disavow Lone Operators

The limiting effects of the restrictive definitions of Article 47 and the U.N. Convention frustrates the view of the international community that states retain the authority to use PMCs for specific tasks in the same way that auxiliary groups were permissibly used for hundreds of years.¹²⁶ Examining international practice, it is clear that many states employ PMCs,¹²⁷ but at the same time profess to discourage or even outlaw mercenaries.¹²⁸ States worldwide continue to seek legitimate military assistance from PMCs,¹²⁹ including states that strongly opposed mercenaries in the past.¹³⁰

The distinguishing factor is that the mercenaries in the 1960s, that gave rise to the Article 47 and U.N. Convention definitions, were a

from the “freebooter,” an international criminal that does not obey the laws of war, Geneva Conventions, and International Declaration of Human Rights and Freedoms); *see also U.N. Special Rapporteur 2004 Report, supra* note 107, ¶ 43(f) (proposing a new, narrower definition of mercenary as simply one who offers professional military services for criminal activity).

126. *See* DAVIS, *supra* note 67, at 68-71 (arguing that PMCs are private organizations with antecedents in many specialist groups for hire throughout history); SINGER, CORPORATE WARRIORS, *supra* note 20, at 172-73 (theorizing that modern warfare may become like the medieval era where certain tasks such as artillery and engineering were outsourced to specialists).

127. *See* U.K. GREEN PAPER, *supra* note 36, at 13, 19 (reporting that it has been, and will continue to be, British government policy to outsource defense functions, remarking on the increasing trend of governments to turn towards private assistance if U.N. intervention is not available and observing that even the U.N. and NGOs have used PMCs for logistics and security in dangerous regions); *see also* WALLWORK, *supra* note 45, at 22, 42 (commenting that the use of PMCs is becoming widely acceptable and pointing out that the Department of Defense 2001 Quadrennial Defense Review stated that the United States would continue to outsource functions to private firms).

128. *See* U.K. GREEN PAPER, *supra* note 36, Annex B (describing the laws of states across the world that cover the recruitment of mercenaries and criminal activity linked to mercenaries, but also noting that the only nations with laws specifically identifying PMCs are the United States and South Africa); U.N. Special Rapporteur 1997 Report, *supra* note 62, ¶ 78 (emphasizing that the General Assembly has repeatedly issued resolutions condemning mercenary activity).

129. *See* SINGER, CORPORATE WARRIORS, *supra* note 20, at 9 (observing that PMCs have operated on every continent except Antarctica).

130. *See* Zarate, *supra* note 109, at 140-41 (remarking that African states such as Angola, Nigeria, and Ghana that suffered predations from mercenaries in the 1970s, apparently do not consider today’s PMCs equivalent to mercenaries, and have said they are quite pleased with PMC services).

threat to stability because they were free from any constraining system.¹³¹ However, PMCs are constrained in their role as international businesses to engage in only legitimate business actions, at least if they wish to remain legally recognized corporations. Groups attempting to operate in the ad hoc manner of the mercenaries of the 1970s have consistently failed in the modern era.¹³² In contrast to temporary and informal mercenary groups, PMCs are distinguishable by their corporate structure, which requires registration in some origin state, and an ongoing public face.¹³³ Furthermore, PMCs gain their legitimacy from working only on legitimate contracts.¹³⁴

The general trend of domestic laws across the world demonstrates that states retain legal authority for the use of violence, and PMCs are only legitimate actors when authorized by a state.¹³⁵ A number of states have laws restricting their citizens from serving as mercenaries abroad, and prohibiting the recruitment of mercenaries on their territory.¹³⁶ Furthermore, states that do not have laws specifically

131. See generally U.N. Special Rapporteur 1997 Report, *supra* note 55, ¶ 77 (explaining that international law has sought to condemn mercenary activity as the procurement of criminal services that violate human rights).

132. See WALLWORK, *supra* note 45, at 58 (arguing that authorities are more vigilant today in guarding against the independent mercenary gangs that may thwart a state's stability, as demonstrated by the capture and conviction of a gang of mercenaries that sought to undermine the government of Equatorial Guinea in 2004).

133. See SINGER, CORPORATE WARRIORS, *supra* note 20, at 46 (remarking that PMCs are registered legal entities in their home state, unlike the temporary collection of individuals that made up mercenary bands in the 1970s, and that PMCs operate in the open, while mercenaries attempt to hide from the law).

134. See KINSEY, *supra* note 32, at 65 (emphasizing that PMCs have further distinguished themselves from the 1970s mercenary figure by only accepting legally constituted work from legitimate clients); Zarate, *supra* note 109, at 125 (arguing that a mercenary is really determined by the mission for which the mercenary is employed, and thus the legitimacy of a PMC is intact as long as the employer is legitimate and the mission does not conflict with the state-based international system).

135. See Zarate, *supra* note 109, at 134 (stressing that by the nineteenth century, over one third of states had enacted laws restricting private violence abroad, with the intention of separating the state from the actions of individuals, and thus PMC actions are only acceptable when state-sanctioned).

136. See U.K. GREEN PAPER, *supra* note 36, at 39-43 (providing an overview of domestic laws of different nations that directly regulate mercenary recruitment or mercenary service by their citizens, including laws in the United States, South

prohibiting “mercenaries” still require government approval for providing any military assistance abroad.¹³⁷ These laws solidify the central tenet of the modern state system that states hold the monopoly on armed violence, but may still act through agents such as PMCs.¹³⁸ States treat PMCs as legitimate business actors tied by a contract to a state and distinct from the independent mercenary who acts as a criminal by international standards.¹³⁹

III. RECOMMENDATIONS

The Article 47 and U.N. Convention terms for mercenaries are unworkable, tainted by Cold War political motivations, and states do not recognize them as international law applicable to PMCs.¹⁴⁰ Instead, customary international law demonstrates that states accept PMCs even while condemning the individual mercenary.¹⁴¹ The

Africa, Australia, Canada, Finland, Greece, Italy, the Netherlands, Norway, Portugal, Russia, Ukraine, and Switzerland with the sole exception of the Vatican Swiss Guard). A number of other states have laws that may apply to mercenary activities, at least in the context of actions by citizens that damage state neutrality, including Austria, Belgium, Denmark, and Sweden. *Id.* at 40-43.

137. *See Zarate, supra* note 109, at 140 (commenting that many states have legislation that merely requires governmental approval for military assistance abroad, which hardly indicates a global trend on banning such assistance).

138. *See THOMSON, supra* note 21, at 82-83 (observing that state neutrality laws, which emerged in the nineteenth and twentieth centuries, restricted only actions that were not authorized by the state, meaning that state authorization is an extension of state legitimacy). Furthermore, the very enactment of these laws underlines the state’s claim of authority in controlling and dictating the proper use of organized violence in the modern state system. *Id.*

139. *See* Milliard, *supra* note 25, at 5 (distinguishing the legitimate use of PMCs by sovereign states from the condemnation of the unaffiliated mercenary individual in Africa that sparked the creation of Article 47 and the U.N. Convention); *see also* THOMSON, *supra* note 21, at 107-08 (explaining that while state-sponsored piracy had been customary for hundreds of years, piracy only became illegitimate when states withdrew their authorization, thus emphasizing that the legitimate authority for violent acts rests solely with the state).

140. *See supra* Part II.B (discussing the impact of the global political environment at the time of the drafting of the international agreements on mercenaries); Part III.B.1 (remarking on the lack of worldwide support for the international agreements on mercenaries and the inconsistencies with actual state practice).

141. *See supra* Part III.B.2 (distinguishing the legitimacy of PMCs when authorized by a state from the unauthorized selling of military services that undermine the state-based international system).

international community should create a new international agreement that better reflects the practice of state use of PMCs, while keeping the illegitimate, criminal mercenary separate. As the United States becomes further embroiled in contingency operations in Iraq and Afghanistan, and in light of the revealed deficiencies in holding PMCs accountable there, the United States must lead the international community in developing a global regime for PMCs.

A. THE CREATION OF AN INTERNATIONAL CONVENTION ON
PRIVATE MILITARY AND SECURITY ASSISTANCE WOULD
HARMONIZE INTERNATIONAL CUSTOM AND SERVE AS THE
BASELINE FOR DOMESTIC STANDARDS

PMCs have escaped regulation under international agreements because PMCs can avoid the Article 47 and U.N. Convention definitions of mercenaries.¹⁴² The international community should create a new international convention on PMCs that codifies the practice of using PMCs for legitimate state support. The convention should include all types of private military and security support provided to a state, and not just contracts with a state's military.

*1. The Convention Should Cover All Direct and Indirect
Military and Security Assistance*

One American commentator has proposed a draft international convention that is similar to South African law, in that it focuses on certain activities rather than a person's status, and it defines the regulated activities broadly.¹⁴³ However, the proposed convention still suffers from the same failing as the South African law: it still does not cover security forces hired by a part of the government other than the military.¹⁴⁴ Because modern conflict blurs the support and combat roles, a new regime must regulate all PMC support

142. See *supra* Part III.A (analyzing the different clauses in the international definitions of mercenaries and how failure to meet all the requirements means the cumulative definition will not apply).

143. See Milliard, *supra* note 25, at 81-82 (using a broad definition of "military services" because combat and non-combat functions blend together in practice).

144. See *id.* at 80-83 (proposing that a licensed provider be allowed to contract with and provide services to a foreign armed force, but neglecting to include any provisions on contracting with other foreign agencies).

regardless of which government agency has hired the PMC.¹⁴⁵ Any regulation that focuses only on military assistance still ignores the use of private security forces as bodyguards on non-military contracts,¹⁴⁶ precisely the role played by Blackwater and Unity for the U.S. State Department in Iraq.¹⁴⁷ This distinction of protective security functions provided by PMCs like Blackwater from support to the military by other PMCs is practically meaningless on the ground.¹⁴⁸ Furthermore, the convention should recognize the complexities of modern conflict by covering any activity that contributes to inflicting harm on the enemy, regardless of the distance from a battlefield.¹⁴⁹ Thus, the convention should cover PMC personnel involved in operating remote weapon systems, intelligence gathering, and even logistics.¹⁵⁰ The convention should not prohibit PMCs from engaging in these activities, but require vetting by an international body to establish their legitimacy.

145. See Singer, *War, Profits, and the Vacuum of Law*, *supra* note 50, at 537 (commenting that the Military Extraterritorial Jurisdiction Act applies only to contractors with the Department of Defense, and not to PMCs working for intelligence agencies or even foreign governments and organizations).

146. See SINGER, *CORPORATE WARRIORS*, *supra* note 20, at 240 (calling for oversight of PMCs to be a multi-agency affair because of the different government agencies that use PMCs).

147. See SINGER, *CAN'T WIN WITH 'EM*, *supra* note 43, at 1 (commenting that the State Department uses PMCs because they do not have enough Diplomatic Security personnel).

148. See *id.* at 6, 16 (commenting that particularly in contingency operations such as Iraq, there are no real frontlines, and any type of armed contractor support cannot be divided into defensive or offensive and noting that Iraqi citizens do not differentiate between PMCs and the American military); see also Elsea et al., *supra* note 44, at 13 (reporting that the PMC Blackwater's actions frequently undermine the relationships the U.S. military seeks to build with the Iraqis).

149. See AVANT, *supra* note 34, at 21-22 (arguing that in actual practice, even PMCs hired in Iraq for non-combat roles have found their work spilling over into other types of roles, making it difficult to distinguish these roles from combat, particularly in the midst of the insurgency).

150. See *id.* at 19 (noting that as modern weapon systems have become more complex, it has become common to find contractors actually accompanying armed forces in the field to support or even operate weapon and information systems themselves).

2. *The Convention Should Specifically Require PMCs to Adhere to the Laws of War*

The convention should explicitly require PMCs to adhere to the rules of the laws of war, humanitarian law, and international criminal law.¹⁵¹ Furthermore, the convention should require that PMCs only work for recognized governments or internationally accepted movements for self determination.¹⁵² Only association with a state or emerging state through contract marks a PMC as a legitimate actor.¹⁵³ A PMC that fails to obey the provisions of the convention should lose its approved PMC operator license.

3. *The PMC Convention Should Require Registration and Licensing for PMCs to Establish Legitimacy*

The licensing process should clearly distinguish the legitimate PMC from the lone mercenary in the eyes of the international community, by vetting the backgrounds of the PMC's employees.¹⁵⁴ The international community should shun any PMC that does not go through the licensing process,¹⁵⁵ although some countries may chose to ignore the requirements of international registration and hire non-

151. See U.K. GREEN PAPER, *supra* note 36, at 17 (noting that mercenaries are often charged with human rights abuses, but PMCs, as legally registered companies, must avoid such behavior or they will put themselves out of business); SINGER, CORPORATE WARRIORS, *supra* note 20, at 241 (noting that requiring PMCs to undergo human rights background checks will both enhance their legitimacy and ease the concerns of the U.N. and humanitarian groups when they need to hire PMCs for protection and logistics).

152. See Milliard, *supra* note 25, at 76 (noting that the real danger of mercenary activity lies in the unregulated transfer of military services, and that the only legitimate exchange of PMC services should be between states or a group that has legitimate international recognition).

153. See AVANT, *supra* note 34, at 66 (positing that the development of the modern state system made any non-state violence illegitimate); Milliard, *supra* note 33, at 77 (noting that selling military services without the backing of state legitimacy is an unlawful act because it upsets the state monopoly over organized violence).

154. See U.N. Special Rapporteur 1997 Report, *supra* note 55, ¶ 121 (noting that PMCs must be careful about who they hire, because the individuals may have been mercenaries in the past).

155. See AVANT, *supra* note 34, at 67 (emphasizing the market power of states to influence PMC behavior by hiring certain PMCs over others and thereby encouraging the PMCs to abide by regulatory controls in order to receive future work).

accredited PMCs at their peril.¹⁵⁶ But those states run the risk of becoming tainted by the actions of PMCs on their behalf that may reflect poorly on the state.¹⁵⁷ It is also in a PMC's interest to become internationally licensed so the PMC may present the license as a clear, international approval of the PMC, distinguishing it from the illegal operator.¹⁵⁸ Furthermore, if PMCs choose not to seek a license, the stigma of being an unaccredited PMC could have an impact on their global business.¹⁵⁹ It is also in the interest of the PMCs themselves to have a uniform, international standard rather than risk the uneven application of laws to their employees in different countries.¹⁶⁰

4. The U.S. Must Champion the Initiative to Draft a PMC Convention

The absence of U.S. support for the 1977 and 1989 definitions of mercenaries has only weakened the impact of the resulting international conventions.¹⁶¹ Since the flood of private military firms is a result of the build up of Cold War forces, and the consequent draw down of military forces during the 1990s, it is vital that the

156. *See id.* at 130 (contrasting the use of well established PMCs that draw employees from western military veterans and represent the social and international values engrained by western military training, such as respect for human rights and civilian oversight of the military, with the use of less professional PMCs). The hiring of less professional PMCs runs the risk of driving the real professionals from the market. *Id.* at 131.

157. *See* Milliard, *supra* note 25, at 77-78 (arguing that since PMCs derive their real authority in the international system from a state, any unlawful actions by PMCs can be tracked back to the state and cause the state embarrassment).

158. *See* Zarate, *supra* note 109, at 152-53 (noting that regulation of PMCs, by clearly isolating the illegitimate mercenaries, will allow PMCs to further distinguish themselves from those who give the industry a bad name).

159. *Cf.* SINGER, CORPORATE WARRIORS, *supra* note 20, at 236 (remarking that the sex crimes committed by the personnel of the PMC DynCorp while in the Balkans still continue to haunt that corporation's global image).

160. *See* Singer, *War, Profits, and the Vacuum of Law*, *supra* note 50, at 542 (commenting that without an international standard, a PMC employee may lose the protections of international humanitarian law and be tried as a criminal rather than a war combatant).

161. *See* Zarate, *supra* note 109, at 137 (criticizing the lack of political will in the United States to support laws on mercenary activity because it may lead to prosecution of U.S. citizens abroad). Zarate remarks that this must be why the United States has not prosecuted any private security companies. *Id.* at 137.

United States, its allies, and the former Soviet Bloc states take the forefront of revising international law.¹⁶² The U.S. failure to implement a strict domestic licensing and oversight regime regulating the PMCs accompanying military forces weakens the effect of any U.S. law.¹⁶³ In particular, the United States should take the lead in an international solution because of the highly visible problems in Iraq with private military firms that are working for U.S. government agencies.¹⁶⁴ Furthermore, the support of major state powers like the United States and its allies will ensure the new convention is speedily implemented, and does not sit idle for decades like the U.N. Convention.¹⁶⁵

5. New Domestic Laws Should Stem from the New International Framework

In the absence of solid international support for the Article 47 and U.N. Convention definitions to apply to PMCs, the only recourse for PMC regulation is domestic regimes.¹⁶⁶ Furthermore, because PMCs operate abroad in conflict areas, only domestic regulation with extraterritorial jurisdiction will affect them.¹⁶⁷ However, even U.S.

162. See AVANT, *supra* note 34, at 30-31 (arguing that not only did the drawdown of Cold War forces increase the supply side of the PMC market, but the demand side increased when other countries looked to PMCs to upgrade their militaries to join western institutions or when other regimes hired PMCs to make up for losing the support of their former Cold War patrons).

163. See SINGER, CORPORATE WARRIORS, *supra* note 20, at 238-39 (remarking that the only oversight applicable to PMCs in the United States is licensing under the International Traffic in Arms Regulations, but after a license is granted, there is no effective oversight of how the PMC operates on a daily basis).

164. See SINGER, CAN'T WIN WITH 'EM, *supra* note 43, at 15 (arguing that the controversies over PMCs in Iraq have undermined U.S. counter-insurgency efforts and damaged overall U.S. strategy in the region).

165. See KINSEY, *supra* note 32, at 156 (noting pessimistically that the 1989 Convention was drafted fourteen years after the mercenary incidents in Angola, and then took another twelve years to be ratified by enough signatory countries to come into effect in 2001).

166. See Singer, *War, Profits, and the Vacuum of Law*, *supra* note 50, at 536-37 (lamenting that the few domestic laws that even recognize the existence of PMCs just defer to the international level).

167. See *id.* at 535-36 (recognizing that the conflict-ridden nations PMCs operate in may lack the power to regulate a foreign company and so any regulation must come from the firm's home state). States often lack the sources on the ground to report on PMCs violating the laws of their home state. *Id.* at 556.

domestic law has been revealed to be insufficient, and the impact of the revised UCMJ is an open question because the legality, and indeed the constitutionality, of applying military law to U.S. civilians has yet to be tested.¹⁶⁸ It is questionable whether current U.S. domestic laws can hold PMC employees accountable for crimes committed in Iraq.¹⁶⁹

Any U.S. attempt to regulate PMCs in the wake of the Blackwater incident will only affect U.S. firms, which ignores the plethora of foreign PMCs in the world market.¹⁷⁰ A new international convention on PMCs will allow all states to base their new domestic laws on the baseline rules of PMCs included in the global instrument.¹⁷¹ Domestic laws can build upon the convention requirements of adherence to the laws of war, humanitarian law, and international criminal law with the addition of particular rules for that state.¹⁷² The convention should stipulate that domestic laws can only add to, not take away, from the rights and duties of PMCs. Therefore, the PMC employees will also be protected because they know state domestic laws will be relatively consistent worldwide.¹⁷³

168. See Elsea et al., *supra* note 44, at 26-27 (observing that subjecting U.S. civilians to military court martial may violate Constitutional due process).

169. *Cf. id.* at 19 (remarking that with CPA Order 17 granting immunity to PMCs from prosecution under Iraqi law, and in the absence of international laws on PMCs, U.S. domestic law is the only law potentially applicable to PMCs). The recently signed SOFA does not fully address these problems, as there are still loopholes regarding contractors who do not work for the military. See Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of U.S. Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, *supra* note 47.

170. See SINGER, CORPORATE WARRIORS, *supra* note 20, at 241 (arguing that a “globalized industry demands a globalized response”).

171. See Milliard, *supra* note 25, at 84 (arguing that no matter how strong a state’s domestic regulations are, without an international standard PMCs will always have some incentive to relocate to states with weaker regulations); see also KINSEY, *supra* note 40, at 139 (observing that one of the most controversial PMCs, Executive Outcomes, simply relocated outside of South Africa to avoid the impact of domestic laws).

172. See Elsea et al., *supra* note 44, at 16 (remarking that because of the legal uncertainty over PMCs operating outside the military chain of command, their employees may not be entitled to POW status, though they may meet all other criteria for a combatant).

173. *Cf.* KINSEY, *supra* note 32, at 155 (commenting that all governments have an interest in protecting their citizens working abroad for a foreign firm from prosecution under foreign laws).

CONCLUSION

PMCs are global businesses that demand a uniform, global standard. In light of the ongoing operations in Iraq, and the shooting of Iraqi civilians by PMCs that have revealed deficiencies in PMC accountability, the international community must finally create a standard language for dealing with these companies. The international community should establish an international body with licensing and oversight powers. As the nation is embroiled with PMCs in Iraq, the United States must lead this international initiative to give the global effort legitimacy.