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The Modern Day Gold Rush: Private Military Corporations

by Deirdre Kornhiser

A Thesis Submitted for Partial Fulfillment of the
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This thesis is dedicated to my Mom, who not only raised me while she worked and went to school to earn her PhD, but supported me throughout my graduate school endeavors.
Thanks Mom.

Abstract

Since wars have existed, there have been soldiers for hire. As the state evolved, originating during the peace of Westphalia, and matured, the definition and the business of mercenarism have gone through many mutations. Today, and particularly since the 1970s, mercenaries have banded together, incorporating themselves as private military firms, some of which are units of multinational corporations. Private Military Corporations (PMCs) offer expertise ranging from construction to logistics but a number of contractors have been accused of human rights violations, particularly in the current theatres of war in Iraq and Afghanistan. The theme of this thesis is that PMCs need to be regulated globally in order to prevent the prolongation of conflicts and the instability stemming from human rights violations. In considering this theme, this thesis employs three case studies of civil wars in which PMCs were heavily involved. It concludes that a variety of existing domestic, regional and international regulations can be expanded and strengthened in order to provide a robust regulative regime.

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Chapter 1

Rationale for Studying Private Military Contractors

For approximately ten years, the United States and its allies have been waging very expensive wars in Iraq and Afghanistan. In these theatres, there are over 200,000 employees of Private Military Corporations (PMCs). These are incorporated battalions of typically ex-military or law enforcement personnel who are contracted to fulfill the tasks normally done by a nation's armed services or institutions. With the rise of globalization, the PMCs have adopted many roles that used to be executed by a government or other private businesses. Thousands of these freelancers can be found working domestically or abroad in areas such as Africa, Yemen and Pakistan. It has been estimated that PMCs are a \$100 billion industry.¹ Their services include logistics, intelligence gathering, weaponry training, border patrol, regional and global police instruction, as well as less glamorous duties such as construction. They are equal opportunists as to their employers: clients include governments, insurgents, non-governmental organizations (NGOs), aid groups, such as animal conservationists and drug cartels. Most PMCs are based in the United States, the United Kingdom, Israel and Canada, but they have operated in most continents.

The proliferation of these military corporations has also fostered numerous incidents in which they have been accused of criminal or overzealous acts that led to civilian deaths. For example, they have been accused of sex trafficking in the United Nations' (UN) operations in the Balkans.² In Bosnia, a supervisor filmed himself raping

¹ Barry Yoeman, "Soldiers of Good Fortune," *Mother Jones*, May/ June 2003 issue.

² Tony Robson, "Bosnia: The United Nations, Human Trafficking and Prostitution," August 12, 2002, <http://www.wsws.org/articles/2002/aug2002/bosn-a21.shtml>.

two women.³ In neither instance has anyone been prosecuted. Instead the whistle blowers were fired. Allegedly, PMCs were the ring leaders in breaching of the Geneva Conventions and the War Crimes Act of 1996 in the infamous Abu Ghraib detention center's incidents of 2004.⁴ Furthermore, the PMCs stationed in Iraq have been accused of stealing from museums and banks. Again the PMC employees were never brought to justice.⁵ On September 16, 2007, Blackwater employees killed 17, and injured more than 20, Iraqi civilians in Nisour Square, Baghdad. Although there was a civil suit in the United States District of Columbia court, it was dismissed because of prosecutorial misconduct.⁶ In most of these cases, the PMCs settled out of court paying a pittance compared to what they might have if they had been tried.

There are few domestic, regional or international laws and regulations to which PMCs must adhere. Although the UN has made earnest attempts at defining and regulating "mercenaries," the task is difficult and the results have been ambiguous, that is they do not necessarily apply to the PMCs or their employees. As the UN Special Rapporteur concerning mercenaries submitted, "the need to review and update a legal definition [of mercenaries] would allow more effective action to eliminate mercenary activities and thus comply with the recommendations by the Commission on Human

³ Kevin M. Cahill, ed, "The Pulse of Humanitarian Assistance" (United States: The Center for International Humanitarian Cooperation, 2007), 72.

⁴ Paul R. Verkuil, *Outsourcing Sovereignty, Why the Privatization of Government Functions Threatens Democracy and What We Can do About it* (New York: Cambridge University Press, 2007), 27.

⁵ Tony Iyare, "Nigeria: Private Military Companies in the Niger Delta," *Pamazuka News*, March 13, 2009.

⁶ Charlie Savage, "Judge Drops Charges From Blackwater Deaths in Iraq," *The New York Times*, December 31, 2009.

Rights and [the] General Assembly.”⁷ In the United States, some regulatory bodies do exist but the PMCs may not be obligated to follow their advice. For example, if a government contract is less than \$50 million, it does not need Congressional approval. Therefore, one way to avoid this regulation is to dole out the money in increments less than \$50 million. The companies are also supposed to comply with the United States International Traffic of Arms Regulations but only eight out of sixty that are stationed in Iraq are signatories. They elude this restraint by not being directly contracted by the government.⁸ If they are hired by the United States and working near its armed forces, they are subjected to the Military Extraterritorial Jurisdiction Act (MEJA) which states that a civilian or employee accompanying the military overseas may be prosecuted. On September 1998, South Africa passed the Regulation of Foreign Military Assistance Act which seems to be more a serious attempt to oversee the dispensing of licenses to PMCs. The act is based on the principles of international law and prohibits military corporations from fighting in combat.

This thesis argues that if PMCs are not held accountable through international and domestic regulations, their operations will only contribute to insecurity and violence. There are existing laws, such as the Geneva Convention, that could be more stringently defined to include the modern day “mercenary”: the private military firms. The regional bodies that regulate the PMCs could also be held more culpable. International and

⁷ Submission of the UN Special Rapporteur on Mercenaries, Enrique Bernales Ballesteros, “The Rights of Peoples to Self-Determination and its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation,” United Nations, January 10, 2002, 24.

⁸ Frontline, “Private Warriors,” June 21, 2005, <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/faqs/>.

regional judicial systems should be strengthened to include trials of PMCs or their employees.

I have chosen this topic because the proliferation of PMCs is one of the instigating factors that is forcing the international community to analyze the concept of sovereignty and the handling of malcontent non-state actors ⁹ in the 21st Century. The modern day concept of the “state” is fluid and constantly evolving. Emerging is the notion of the “transnational state.” Post colonialism and imperialism, in addition to the civil wars that erupted in the aftermath of the Cold War have resulted in poverty and a growing population of refugees. The consequences of globalization are not only free trade but the dwindling of state sovereignty. Nations such as the United States frequently breach other states’ sovereignty, albeit under the cover of humanitarian rule. All of the above are fodder for uncivil non-state actors, giving them the impetus to strike-out at whomever to be the offender.

This study is significant because if the PMCs are not forced to adhere to laws that civilians and soldiers must follow, more incidents of various crimes and violence will ensue. First, data collected show that it is not unusual for a PMC employee to have a criminal background. Second, adding the element of a third party, particularly a military service provider, to a volatile situation further raises the odds of illegal infractions or deadly consequences. PMCs have been accused of not only igniting unnecessary episodes of violence but also prolonging peace processes.

⁹ For the purposes of this paper, “non-state actors” does not refer to non-violent groups such as NGOs.

Chapter 2

Research Design

Private Military Corporations (PMCs) are flourishing, and it is my opinion that the current regulations that they must adhere to are inadequate. If these laws are not strengthened and respected, then there will be an increase in state and global insecurity. It is therefore the goal of this thesis to examine the legal avenues and rules by which PMCs could possibly be held accountable. With respect to the latter, I will analyze domestic and international judicial systems and the ways they can be strengthened.

I will begin by detailing the history of the use of mercenaries and PMCs including the areas in which PMCs have been contracted, the various types of PMCs and their services and some of the problems associated with their use. I will then discuss the existing international and regional rules, laws and courts that apply to PMCs and the problems involved in the applications of such rules. I will end by suggesting ways to strengthen regulations. I will be using three countries as case studies: Angola, Sierra Leone and Iraq. Angola and Sierra Leone were chosen as premier examples of failed states in which PMCs also participated in a civil conflict. Iraq was chosen because of the prominent role that PMCs have played there.

Definitions

In order to describe PMCs, their history and the edicts that they must abide by, the term “mercenary” must be addressed. This expression has been used to define a hired soldier for centuries. However, the profession, their status in society and regulations forced upon these soldiers all changed with the times. The Merriam-Webster Dictionary

defines a mercenary as “one that serves merely for wages; especially...a soldier hired into foreign service.”¹

For centuries mercenaries have been hired for combat. Accounts of paid soldiers fighting in foreign regions can be found in the Bible or Ancient Greek writings such as those by Aristotle or Thucydides’ description of the Peloponnesian War (431-404 B.C.).

The earliest records of warfare include numerous mentions of outside fighters being employed to fight for ancient rulers. The first official historic reference is of mercenaries who served in the army of King Shulgi of Ur (ca. 2094-2047 B.C.E.). The battle of Kadesh (1294 B.C.E.) is the first great battle in history of which we have any detailed account. In this fight, where the Egyptians fought the Hittites, the army of Pharaoh Ramses II included units of hired Numidians. The rest of ancient history is replete with stories of hired, foreign troops. Even the Bible tells their tales. The Pharaoh chased the Israelites out of Egypt with an army that included hired foreigners, while David and his men (when they were on the run from Saul) were employed in the Philistine army of Achish.²

A career as a hired fighter was profitable during medieval times too. Their value as armies was debated in Sir Thomas Moore’s *Utopia* and Niccolo Machiavelli’s *The Prince*. Many regions’ mercenaries were lauded as preeminent, such as the Swiss (“mercenary work became something of a national industry for the Swiss”)³ and the Italians (“[t]hese mercenaries were first foreign but, later, Italian; in time the most famous and successful of the Italian mercenary leaders, the *condottieri* as they were

¹ Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/mercenary>.

² P.W. Singer, *Corporate Warriors, The Rise of the Privatized Military Industry* (Cornell University Press: New York 2002), 20.

³ *Ibid.*, 27.

called,... founded noble houses and became themselves rulers of states”).⁴ Many future states derived from feudal houses that acquired vast lands and armies consisting of hired soldiers. Some of these houses became the first mercenary *companies* hired by foreigners.

However as wealth accumulated, it became unseemly for an upper echelon in society to fight in battles. The rise of Christianity further fortified the view that warfare was indecorous. “The further states progressed from tribalism and the more civilized they became, the more, logically, they tended to use mercenary troops. The logic was simple and unanswerable: war being a barbaric pursuit, the citizens of a rich and flourishing state preferred to hire needy foreigners to fight for them rather than to have to interrupt their own rich and profitable lives.”⁵

A series of peace agreements in 1648 known as the Peace Westphalia marked the official origin of “the state” and the notion of sovereignty. Additionally:

[a]s the Enlightenment took hold, ideas of the social contract...provided a new way of thinking about the relationship of state to soldiers and citizenship to service...people were more willing to fight as citizens than as subjects. Those who fought for profit, rather than patriotism, were completely delegitimized under these new conceptions.... Although the domestic tradeoff was risky to their security as rulers, the adoption of a citizen army was seen as the internationally efficient and necessary outcome for those states that sought to survive....[R]egarding the impermeability of their borders....[t]hey had to be able to show they could defend themselves without having to hire external help.⁶

⁴ Anthony Mockler, *The New Mercenaries, the History of the Hired Soldier from the Congo to the Seychelles* (New York: Paragon House Publishers, 1985), 7.

⁵ *Ibid.*, 7.

⁶ Singer, 30-31.

Advancements in weapons were consequential in “the decline of mercenary warfare [which] coincided with the emergence of large armies as the scale of warfare began to increase.”⁷ Additionally, many powerful companies such as the Dutch East India Company and the English East India Company in the 16th and 17th Centuries conducted their affairs as sovereign entities. They had sovereign rights; they owned land and conscripted their own armies.⁸ “The English East India Company hired a mix of British, German, and Swiss mercenaries....[T]he company’s army was over 100,000 men, much larger than the British army at the time. The Dutch company also grew from its modest beginnings and soon had more than 140 ships and 25,000 men....”⁹

These conscripted armies began the age of the decline of the number of mercenaries, although they were used in various wars in the 18th, 19th and 20th Centuries, such as the American Revolution, Battle of Waterloo, World Wars I and II and Vietnam. Hired armed forces were used in governments’ covert operations during the 20th Century such as the Bay of Pigs or Congolese civil war. However, since the inception of the state and conscripted armies, freelancing soldiers were no longer vetted as they were in the past. It was not until the postcolonial transition that their numbers increased as in South Africa. The accounts of violence and instability forced the United Nations (UN) and some governments to address the definition of mercenaries and their legality.

In the early Geneva Conventions (1949), contracted military were not referenced. The only equivalent mention is a “supply contractor” who if captured did receive prisoner

⁷ Ibid.

⁸ Ibid., 35.

⁹ Ibid.

of war status. Geneva Convention III (1949), seemed to expand the prisoner of war status to include mercenaries or they could be held until a tribunal commenced to decide on their status. According to Geneva Convention IV (1949), a mercenary could claim to be a “protected person” as it refers to participating in combat in a foreign country (not including states not bound by the Geneva Convention). In 1977, the United Nations’ *Geneva Convention Protocol I* stated the prevailing stance on mercenaries: First, a mercenary does not have the right “to be a combatant or a prisoner of war”² Second, it defines a mercenary as:

2. A mercenary is any person who:
 - (a) is especially 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 to the conflict; and
 - (f) has not been sent by a [s]tate which is not a Party to the conflict on official duty as a member of its armed forces.³

² “Additional Protocol to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I),” Part III, Article 47, June 8, 1977.

³ Ibid.

Interestingly, neither the United States, Iraq nor India have ratified *Protocols I (1977) or II (1977)*. The United Kingdom and France have ratified all of the additional amendments.

Regulations

Since the 18th century the activities of mercenaries have been regulated. The first international policy that attempted to regulate mercenaries was the United States Neutrality Law (1794). This law forbade a United States (US) citizen from enlisting in another nation's army, using a citizen's ship to fight in another nation's war or enlisting others to fight for another nation, particularly an ally. "It was the United States that first attempted to specify a *universal* doctrine of neutrality and to institutionalize practices consistent with the doctrine...."⁴ Throughout the 19th Century, other nations soon followed the United States by passing neutrality laws. However, these laws were codified for reasons other than poaching soldiers:

[C]ontrols on mercenaries had less to do with neutrality than with enhancing state authority over people, In this period, states were attempting to form mass, national armies, a process that entailed the state's claim to a monopoly on its citizens' or subjects' military service. In short...[the] state claimed a monopoly on the authority to organize violence within its borders, even if it were organized for deployment beyond its borders. "The fundamental purpose of the Neutrality Act[s]...lay in strengthening the authority of the central government vis-à-vis its citizens, particularly with respect to warfare." [quoting Jules Lobel, "This Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in the United States Foreign Policy," *Harvard International Law Journal* 24:24-25 (Summer 1983)]. The act[s] were meant to secure the central state's exclusive authority to make war...

⁴ Janice E. Thompson, *Mercenaries, Pirates and Sovereigns* (New Jersey: Princeton University Press, 1994), 79 (emphasis in the original).

State leaders did not set out to eliminate mercenarism since most of them benefited from it. Instead, their common interest in building state power vis-à-vis society produced an international norm against mercenarism.⁵

The US passed the Pinkerton Act in 1893 which made it unlawful for the government to hire anyone, strictly interpreted, from a specific detective agency but in 1977 it was ruled that it might possibly extend to mercenaries. In 1819 and 1870 the United Kingdom codified the Foreign Enlistment Acts which prohibited a freelance soldier from fighting in a war against a British ally.

As mentioned previously, the Geneva Convention's (1949) only corresponding reference to a private soldier is a "supply contractor." It was not until the mid-1960s that soldiers for hire began to be considered an international problem. In 1968 the United Nations' General Assembly passed Resolution 2465 which stated that it was illegal for a mercenary to fight in another countries' civil war. Soon after, the United Nations reinforced this condemnation of freelance soldiers by defining a mercenary in the Geneva Convention's *Protocol I* in 1977, as previously discussed.

In 1989, the *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries* was passed. As of 2011, only sixteen countries are signatories of this treaty⁶; the countries where most PMCs reside including the United States and the United Kingdom are not members. This convention expanded the definition of mercenaries, as well as those that recruit and train them, and the states that contract them. Article 1 states:

For the purposes of the present Convention,

⁵ Ibid., 86-88.

⁶ Sourcewatch.org, <http://www.sourcewatch.org/index.php/>.

1. A mercenary is any person who:
 - (g) Is specially recruited locally or abroad in order to fight in an armed conflict;
 - (h) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
 - (i) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
 - (j) Is not a member of the armed forces of a party to the conflict; and
 - (k) Has not been sent by a [s]tate which is not a party to the conflict on official duty as a member of its armed forces.

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 [s]tate; or
 - (ii) Undermining the territorial integrity of a [s]tate;
 - (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 [s]tate against which such an act is directed;
 - (d) Has not been sent by a [s]tate on official duty; and
 - (e) Is not a member of the armed forces of the [s]tate on whose territory the act is undertaken.

ARTICLE 2

Any person who recruits, uses, finances or trains mercenaries, as defined in article 1 of the present Convention, commits an offence for the purposes of the Convention...

ARTICLE 3

1. A mercenary, as defined in article 1 of the present Convention, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence for the purposes of the Convention...

ARTICLE 5

1. States Parties shall not recruit, use, finance or train mercenaries and shall prohibit such activities in accordance with the provisions of the present Convention.

2. States Parties shall not recruit, use, finance or train mercenaries for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination, as recognized by international law, and shall take, in conformity with international law, the appropriate measures to prevent the recruitment, use, financing or training of mercenaries for that purpose.⁷

Since 1989, the office of the High Commissioner for Human Rights has sponsored a resolution, *The Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, expressing, in general, concern over the use of mercenaries, particularly in developing countries and urging all nations who have not done so, to ratify the 1989 convention discussed *supra*.

Literature

Since the emergence of the state at the Peace of Westphalia in 1648 and the subsequent period of Enlightenment, security has been seen as the essential provision of the natural contract between a state and its citizens. A state must secure its borders, protecting its inhabitants and its interests. "States exist...because they have proven themselves adept at protecting and promoting certain fundamental values. The values

⁷ United Nations, General Assembly, "International Convention Against the Recruitment, Use, Financing and Training of Mercenaries," A/RES/44/34 December 4, 1989.

that we most commonly look to the [s]tate to provide are order, rights, collective goods, and security from external threats.”⁸ International guidelines such as the UN Charter were developed in an attempt to maintain peace among the nations. Since civilians typically bear the brunt of wars, other conventions such as the Geneva Conventions and the International Criminal Court’s (ICC) Rome Statute have attempted to prevent odious crimes such as genocide or mass rapes. Conversely, the state or its institutions, such as its military, have sometimes been guilty of breaching the contract with its citizens by waging violence on them too:

The problem, of course, is that the state’s use of violence on behalf of security is subject to abuses of many kinds, including violations of the human rights of the state’s own citizens and aggression against other states, abuses are often rationalized as necessary to deal with security threats. The power of the state can be – and often has been a force for tremendous evil when it has not been subjected to adequate checks, when it has been wielded by unscrupulous rulers, and when it has been placed in the service of inhumane projects. ...[D]uring the twentieth century more people died at the hands of their own governments than were killed in all of the century’s wars combined.⁹

By the 1980s, non-state actors were gaining in importance, often posing a quandary for the state. As Dan Caldwell notes, the prevailing view has been that “[s]imply put, the state may kill; other actors may not. ...The way the world is organized, terrorists, criminal gangs, and disgruntled individuals have no right to employ violence. This is

⁸ Dan Caldwell and Robert E. Williams Jr., *Seeking Security in an Insecure World* (United States: Rowman & Littlefield Publishers Inc., 2006), 119.

⁹ Ibid.

what Hobbes had in mind in presenting Leviathan as the necessary substitute for the war of each against all.”¹⁰

In international relations theory, realism conceptualized society as anarchical; people are always in a state of conflict, warring over limited resources to survive. “Ultimately, conflict and war are rooted in human nature....”¹¹ According to Thomas Hobbes, to avoid a “poor, nasty, brutish and short,”¹² life, people had to renounce all of their freedoms and acquiesce to the laws of a state (“[d]uring the time men live without a common power to keep them all in awe, they are in that conditions called war; and such a war, as if of every man, against every man”).¹³ In return, the nation’s primary responsibility is protection.

In his piece, “War making and State Making as Organized Crime,” Charles Tilly makes the analogy that governments are simply “racketeers” who invoke fallacious fears and increase the military in order to give the appearance of protecting the citizens:

[C]onsider the definition of a racketeer as someone who creates a threat and then charges for its reduction. Governments’ provision of protection, by this standard, often qualifies as racketeering. To the extent that the threats against which a given government protects its citizens are imaginary or are consequences of its own activities, the government has organized a protection racket. Since governments themselves commonly simulate, stimulate, or even fabricate threats of external war and since the repressive and extractive activities of governments often

¹⁰ Ibid., 120.

¹¹ Scott Burchill, et al., *Theories of International Relations*, 3d (New York: Palgrave Macmillan, 2005), 31.

¹² Donnelly, 33.

¹³ Thomas Hobbes, Philosophy Paradise, Leviathan, <http://www.philosophyparadise.com/quotes/hobbes.html>.

constitute the largest current threats to the livelihoods of their own citizens, many governments operate in essentially the same ways as racketeers. There is, of course, a difference: Racketeers, by the conventional definition, operate without the sanctity of governments. How do racketeer governments themselves acquire authority? As a question of fact and of ethics, that is one of the oldest conundrums of political analysis. Back to Machiavelli and Hobbes, nevertheless, political observers have recognized that, whatever else they do, governments organize and, wherever possible, monopolize violence.¹⁴

Even though a government's claim of external threats may be fabricated, the constant threat of impending war is fundamental to realism. It not only meets the classical realist conception of human nature as being distrustful and on the defensive,¹⁵ but also war making is profitable. A bustling military industrial complex and ongoing wars increase a state's profits by manufacturing weapons, reaping the rewards of the victor and its chances of survival by protecting its borders: "[S]tates 'at minimum, seek their own preservation and, at maximum, drive for universal domination'.... [additionally] states seek wealth, advantage and flourishing...."¹⁶

PMCs have had numerous accusations of human rights violations made against them. However because of a combination of lack of regulations and the domestic political climate in sending counties, most allegations have either not been investigated or the PMC has quietly settled with the victims. Given the focus on state security, and the use of PMCs by states, it can be said that many states exhibit a tendency to prioritize

¹⁴ Charles Tilly, "War Making and States Making as Organized Crime," *In Bringing the State Back In*, Peter Evans, Dietrich Rueschemeyer and Theda Skocpol, eds. (Cambridge: Cambridge University Press 1985), 171.

¹⁵ "Even where one is not seeking gain, fear of others leads to defensive war, for 'there is no way for any man to secure himself so reasonable as anticipation'...." Donnelly, 33.

¹⁶ *Ibid.*, 42 (quoting Kenneth Waltz, *Theory of International Relations* (1979), 118).

states over people in this area. Donnelly quotes Hans Morgenthau, “‘The actions of states are determined not by moral principles and legal commitments but by considerations of interest and power.’”¹⁷

Post World War II, the advocates of realism, began to encourage waging wars (for example, the Vietnam War) in order to defend their nation. “[W]ar, not peace, is the norm in international relations.’ Diplomacy is a zero-sum power game in which the end is not international stasis but the [protection and] advancement of national interests....”¹⁸ Beginning in the 1980s, many of these same proponents began to promote clandestine, small wars such as in Latin America. Many of those who staged or helped train insurgents to fight these secret wars in Latin America and elsewhere had participated in Vietnam. They were:

precursors to the private defense contractors like DynCorp and Blackwater who today do security and logistical work for the [US] military and its allies in places like Iraq, Afghanistan, and Columbia....Just as [other] wars produced a generation of itinerant soldiers, many of them from the losing side, who put their energies into informally expanding [US] power in Central America and the Caribbean, Vietnam resulted in a legion of mercenaries who worked the trouble spots of the American empire.¹⁹

In the 1990s, the use of mercenaries grew as private contractors were hired to help governments defeat rebels in civil wars. The end of the Cold War removed the bipolar

¹⁷ Ibid., 48 (quoting Hans Morgenthau, *Truth and Power: Essays of a Decade, 1960-70* (New York:1970), 382).

¹⁸ Greg Grandin, *Empire’s Workshop, Latin America, the United States, and the Rise of the New Imperialism* (Metropolitan Books: New York, 2006), 70 (quoting The Committee of Santa Fe, *A New Inter-American Policy for the Eighties* (Washington, D.C.: Council for Inter-American Security, 1980),1).

¹⁹ Ibid., 143.

benefactors from states that already had weakened institutions. These states' already delicate institutions, such as their military, were made frailer when their foreign benefactors closed their coffers. Eliminating the super powers' political and economic support seemed to have caused numerous wars. "The incidence of civil wars has doubled since the Cold War's end and by the mid-1990s was actually five times as high as at its midpoint. The broader number of conflict zones (i.e., places in the world war) has roughly doubled."²⁰ International conflicts also arose. It was anticipated that the UN could attempt to fill the super powers' void by maintaining control of the weaker states but it lacked the funds. Subsequently, globalization brought rising poverty levels, and with it, rising class and ethnic conflict.

The theory of liberalism, can also be used in analyzing the current uses of PMCs. Based on the ideologies of the period of Enlightenment (spurred on by thinkers who were very critical of the sovereign states of their time, such as John Locke, Thomas Paine and Jean-Jacques Rousseau), liberalism posits that in order for a society to prosper, and to be peaceful, all that is necessary is democracy and free trade. "War was a cancer on the body politic....the 'disease' of war could be successfully treated with the twin medicines of *democracy* and *free trade*."²¹ Society will then be equipped to peacefully flourish.

Since the period of Enlightenment, many Western countries have used liberal economic policies, tinkering with them along the way. The 1980s brought a period of neo-liberalism which was also a time of extreme conservatism. This era was the inception of a thirty year trend of privatization. These policies were implemented and nurtured by

²⁰ Singer, 8.

²¹ Ibid., 59.

two leaders: President Ronald Reagan of the United States and Prime Minister Margret Thatcher of Britain. These partners began dismantling unions, such as the Air Traffic Controllers in the United States, deregulating the financial sectors, cutting government spending and in the United Kingdom's case, closing state owned corporations. During the 1990s, President Bill Clinton continued on the course of privatization by selling state corporations and contracts.

Globalization also reinforced privatization. "In sum, the 1990's saw unprecedented levels of privatization. By 1998, the rate of global privatization was roughly doubling each year. This 'privatization revolution' went hand in hand with globalization; both trends embraced the notion that comparative advantage and competition maximize efficiency and effectiveness."²²

Privatization continued under G.W. Bush's presidency (2001-2009). Other global leaders such as Prime Minister Tony Blair of Britain, followed suit. This had an effect on the military: the end of the Cold War resulted in the slashing of roughly 7 million soldiers from the global standing armies during the 1990s.²³ According to Scahill (quoting Dan Briody), "In his first year in office, Cheney reduced military spending by \$10 billion.... [H]e reduced the number of troops from 2.2 million to 1.6 million. ... The army

²² Singer, 67.

²³ Fred Schreier and Marina Caparini, *Geneva Centre for the Democratic Control of Armed Forces (DCAF)* "Privatising Security: Law, Practice and Governance of Private Military and Security Companies," Occasional Paper - №6, Geneva, March 2005, 3-4.

depended very little on civilian contractors in the early 1990s and Cheney was inclined to change that.”²⁴ Scahill continues:

[B]y late August 1992, the U.S. Army Corps of Engineers had selected Halliburton, soon to be run by Cheney himself, to do virtually all of the support work for the military over the next five years. That first Halliburton contract burst open the door for the rapid privatization that would culminate in the contracting bonanza in Iraq, Afghanistan and elsewhere ushered in by the war on terror.²⁵

To secure their investments from hostility abroad, MNCs began contracting private security forces:

The [US] State department lists 74 countries in which physical security is a problem of which 34 endure actual civil war or rebel insurgency. In many of these places national corporation facilities are often at the epicenter of conflicts. For example, oil industry facilities and pipelines are the focal point of fighting ranging from Algeria to Azerbaijan and mining corporation sites are contested in Congo, Sierra Leone, and Angola.²⁶

The rise of violent non-state actors has also increased the contracting of PMCs. The non-state actors, which also include the PMCs, have acquired the most advanced weapons. Thus, PMCs are hired with their panoply of weapons to potentially fight others who are similarly situated. As can be seen the realist state interest, the rise of liberalization and the effects of globalization have all contributed to the impetus for the contemporary proliferation of PMCs.

²⁴ Jeremy Scahill, *Blackwater, The Rise of the World's Most Powerful Mercenary Army* (New York: Nation Books, 2007), 28-29 (quoting Dan Briody, *The Halliburton Agenda: The Politics of Oil and Money* (John Wiley and Sons: New Jersey 2004), 195-196).

²⁵ *Ibid.*, 28-29.

²⁶ *Ibid.*, 80-81.

Chapter 3

Growth of PMCs, Pros and Cons

Reasons for Growth

For reasons elaborated in the last chapter, it has become the norm for governments and private entities to hire Private Military Corporations (PMCs). Governments posit that a standing army is too expensive to do the array of tasks that are called for post 9/11, such as fighting wars, clandestine projects that are conducted “to prevent terrorism” or necessary emergency assistance, such as the aftermaths of natural disasters. Since the 1980s, the invisible hand of liberal economics has extended its reach globally as well as domestically, resulting in increasing privatization and government cut backs. PMCs have supplanted workers from private enterprises or government employees.

As previously stated, the definition and view of mercenaries has changed over the centuries. At the turn of the 18th Century, many countries codified Neutrality Laws which prohibited fighting in a foreign military service or as a mercenary. In 1907, the Hague Convention stated that: “Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents.”¹ During the next few centuries, the role of mercenaries declined but they were involved in most wars up until and after WW II. It was the utilizing of “rogue” soldiers in Africa in the 1970s that led to the formulation of international protocols against employing hired guns. “Legal commentators expressly acknowledge that Article 47 of Additional Protocol I was inserted to appease African nations and was intentionally narrow in its scope of

¹ Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Art. 4, 2 A.J.I.L. Supp. 117, entered into force January 26, 1910.

application.”² As previously explained, *Protocol I* (1977), an addendum to the *Geneva Conventions of 1949*, defined mercenaries narrowly, stated that they are prohibited from participating in battle, and shall not be considered as prisoners of war. In general, the convention condemned the business of contracted soldiers.

PMCs grew over a span of a thirty year period. In the beginning they were recruited individually and typically, they were covertly utilized by governments. However many of the same players have existed throughout this period or are precursors to today’s PMCs. Since many of the mercenaries who were hired guns in bloody conflicts in African nations such as Angola, originally had their roots in apartheid in South Africa, the contracted, roving soldier became a vile vocation. It was not until the end of the Vietnam War that the contemporary version of this old profession began to be encouraged. Many nationalists vehemently believed they must wage or train others to fight covert wars in order to maintain their nation’s supremacy or security which they believed was being threatened by communists, or others. Private soldiers were hired to train battalions or to fight in these skirmishes. These advocates of war were the antecedents to the PMCs of today.

As mentioned in chapter 2, globalization escalated tensions between classes, and weakened some states aggravating social and ethnic division. Heightening the need for the PMCs was the cutbacks of millions in the global standing armies during the 1990s. In order to deal with civil strife, terrorists, or simply to maintain supremacy, some large powers turned to PMCs. It was during Operation Desert Storm that PMCs began to be

² Katherine Fallah, “Corporate Actors: the Legal Status of Mercenaries in Armed Conflict,” *International Review of the Red Cross*, Vol. 88, Number 863, September 2006, 605.

incorporated and hired in earnest. Additionally, the rise of aggressive non-state actors has also resulted in the contracting of PMCs. With the collapse of the communist regimes, weapons have become very accessible and affordable. Non-state actors who might be interested in weapons, such as PMCs or terrorists are able to acquire the most advanced weapons. “Now many private forces have the most sophisticated weapons systems available to them, including fighter aircraft and advanced artillery, and can even outgun state forces.”³ Consequently, to address increased violence the dominant states increasingly hire PMCs: “The result is that there has been an overall decay of state armed forces in developing regions. Given the increasing inadequacies of local military and security forces, compared to the rising challenges, it is no surprise that national and corporate leaders would choose to bring in help from whatever quarter is available, including even the private sphere.”⁴ In order to address civil wars or human rights violations, the United Nations (UN), which does not have a standing army and has a limited amount of resources, also hires PMCs: “Scattered across the continent, UN Peacekeeping missions, for instance, are a goldmine for PM[C]’s.”⁵ Often dominant states have objected to sending in their troops for other region’s conflicts, such as the genocide in Rwanda. Furthermore, PMCs are typically employed to protect the multinational corporations (MNCs) foreign investments (such as oil refineries) from disgruntled non-state actors.

³ P.W. Singer, *Corporate Warriors, The Rise of the Privatized Military Industry*, (Cornell University Press: New York 2002), 54.

⁴ *Ibid.*, 57

⁵ Shaun Randio, “Africa: The Next Boon for Private Military Firms,” *Young Professional in Foreign Policy*, February 4, 2009.

Pros and Cons of PMCs

The modern hired “soldier” differs from past soldiers in that the “PM[C]s are organized in business form” and are “driven by business profit rather than individual profit. PM[C]s function as registered trade units, not as personal black-market ventures for individual profit or adventure. As firms, they make use of complex corporate financing, ranging from stock shares to intra-firm trade, meaning a wider variety of deals and contracts can be worked out.”⁶

Many of the current PMCs are part of MNCs with ties to security or energy, such as Halliburton or Northrup Grumman. “By the end of 2001, Halliburton had a market capitalization of almost \$21 billion, with almost 80 percent owned by institutional holders. The Engineering and Construction Group (also known as Kellogg, Brown & Root)...comprised roughly 40 percent of this total revenue.”⁷ As Singer notes: “Such ties provide a whole new level of both legitimacy and connections for PM[C]s. In addition, they allow the firms greater access to financial capital and also have on call other corporate resources.”⁸ Presently, there are three types of PMCs: First are the military provider firms who do engage in battle. These are the firms that are most criticized because they hire and train soldiers to fight in wars. Many PMCs do not provide these services. Examples of these types of firms are Executive Outcomes and Sandline (these firms will be discussed in chapter 4). These two firms are no longer in existence.

⁶ Singer, 45-46.

⁷ Ibid.

⁸ Ibid., 47.

However similar groups such as the Olive Group, which offers training ranging from anti-piracy courses to “counter terrorist training,” have flourished.⁹

Another type of PMCs are the military consulting companies such as Aegis, Ardan or Military Professional Resources Incorporated, which are not hired to fight during armed conflicts but provide services which are necessary to wage war, such as training forces and strategic analysis. A third type are the military support firms such as Vinnell which provide non-fatal assistance, such as logistics, supplies or construction. “The military support sector is not only the largest in scope and revenue, but also the most varied in subsectors. Interestingly, it is also the sector least explored in the context of military privatizing.”¹⁰ PMCs (and therefore the security industrial complex) have permeated every arena imaginable.¹¹ In the United States (US), besides helping fight in the Iraq and Afghanistan wars, they have been contracted to build prisons, work in a nation’s top security agencies the National Security Agency and the Central Intelligence Agency, work in natural disaster relief, train both domestic and foreign police, and scout for movie locations in undesirable areas.

The Obama administration “has significantly increased military and intelligence operations, paying contractors to spy and training local operatives to chase terrorists [i]n roughly a dozen countries — from the deserts of North Africa, to the mountains of

⁹ The Olive Group, http://www.olivegroup.com/service_training.htm.

¹⁰ Singer, 97.

¹¹ “*The New York Times* recently published a series of articles that label contractors as the ‘Fourth Branch.’ of government.” Paul R. Verkuil, *Outsourcing Sovereignty, Why the Privatization of Government Functions Threatens Democracy and What We Can do About it* (New York: Cambridge University Press, 2007), 3.

Pakistan, to former Soviet republics crippled by ethnic and religious strife.”¹² In December 2009, many civilians were killed in Yemen during a covert mission run by the Central intelligence Agency, the Pentagon and private security contractors. “By [U.S.] law, covert action programs require presidential authorization and formal notification to the Congressional intelligence committees. No such requirements apply to the military’s so-called Special Access Programs, like the Yemen strikes.”¹³

Many promulgate the notion that PMCs are not only necessary but beneficial. Globally, there has been an increase in war while there have been cuts to the military. The United Nations does not have the resources to meet the demands of many theatres of war or peace keeping missions. It is “[t]heir essential belief ...that ‘[p]rivate companies...can do it faster, better, and much cheaper than the United Nations.’”¹⁴ The United States is spread too thin. William Reno argues that PMCs are agents by which the stronger states implement their post Cold War foreign policies to protect societies from emerging entities such as malevolent non-state actors. Reno suggests (as do others) that neither the United Nations nor the hegemonic states can fulfill the role of “international police.” Interfering in a state’s conflict is costly. Hiring a PMC may curb expenditures as well as allow the stronger states to clandestinely impose their foreign policies on the weaker states, while simultaneously shoring up the residual damage of colonialism. People who tout PMCs point to the money that is saved compared to the price of an army where a pension is one of the components of a soldier’s package. A PMC contractor is

¹² Scott Shane, Mark Mazzetti and Robert F. Worth, “Secret Assault on Terrorism Widens on Two Continents,” *The New York Times*, August 14, 2010.

¹³ *Ibid.*, 3.

¹⁴ Singer, 183.

only paid by the client for services rendered instead of states maintaining standing armed forces with pension plans.

Reno further speculates on the PMCs' roles in global relations during the 21st Century and the new notion of sovereignty. He does not refute Charles Tilly's idea of racketeer governments and instilling fear in their citizens. He refutes the idea that because a PMC can be vast, wealthy and acquire weapons, then in theory, similar to the Dutch East India and the English East India Companies in the 16th and 17th centuries, they could become a state. He does, however, agree that a PMC can aid in state building. Reno suggests that after the Cold War, the remaining strong states (particularly the United States and the United Kingdom) have hired the PMCs as a political instrument in their foreign policy kit. They employ the PMCs to implement their foreign policies, while simultaneously helping the weaker states resolve conflicts. Once conflict is resolved, the PMCs will have aided the fragile state in turning its attention to state building. "Thus private security has...had a role in reinforcing the international state system, especially in its periphery. It has helped shore up client regimes and bolsters their local control over and capacity to manage state-like functions on the diplomatic and economic margins of international society, especially when organized at the behest of officials in more powerful states."¹⁵

Reno also hypothesizes that because the PMCs enter a state at the "behest of" its officials, this may be a sufficient "excuse" for the core powers to interfere in a nation's conflict. Furthermore, this alleviates any debates concerning sovereignty. Nevertheless, it does not cover the incidents such as the Iraq war where PMCs (and standing military

¹⁵ William Reno, "Private Security and State Building," *Facets and Practices of State-Building*, Julie Raue and Patrick Sutter, eds. (Netherlands: Hotei Publishing, 2009), 234.

units) have been involved. This “preemptive” conflict was not sanctioned by the Iraqi leader, or the UN. Additionally, Reno conjectures that most of the PMCs come from the stronger states and that their employees are typically interconnected with their military institutions. Therefore, the PMCs are familiar with the customs and ideals that the core countries want to promote globally. He approves of the intervention of core countries in the peripheries because of the violence that a person or a group may wreak in society. If a weak state can not control its citizens, then to maintain international order, a PMC can be hired to do so.

PMCs also permit leaders to enter explosive situations without the public’s knowledge: “[a] private contractor helps keep things under the radar,”¹⁶ Many countries do not regulate PMCs properly and there are many loopholes that could be utilized. In this respect a leader can maintain deniability allowing “the government to achieve foreign-policy goals free from the need to secure [legislative] approval and safe in the knowledge that should a situation deteriorate, official...participation can be denied.”¹⁷ Furthermore, PMC casualties are often seen as less grievous than the death of soldiers in a country’s armed forces.

PMCs have many critics too. Many say that PMCs disrupt the contract between the state and its armed forces. The separation of the two branches provides a measure of balance with the army signing on to protect the state. “[T]he whole of civil-military

¹⁶ Jeremy Scahill, *Blackwater, The Rise of the World’s Most Powerful Mercenary Army* (New York: Nation Books, 2007), 173 (quoting Nathan Hodge, “After the Gold Rush,” Slate.com, <http://www.slate.com/id/2135362/>, February 9, 2006).

¹⁷ David J. Francis, “Mercenary Intervention in Sierra Leone: Providing National Security or International Exploitation,” *Third World Quarterly*, Vol.. 20, No. 2 (1999): 334.

relations theory, regardless of its viewpoint, sticks to this general assumption of a dualistic balance between soldiers and state. Presently, civil-military relations theory does not fully account for any potential role of external, third-party influences on this two-sided structure.”¹⁸ The critics claim that PMCs help further weaken institutions such as the armed forces and they possibly weaken an already frail state. The military unit of a nation is a vital, public institution. It is an entity whose members have been entrusted to protect citizens under the legal obligation to not usurp power or commit heinous acts during service.

Critics also point to potential conflicts arising between the military service providers and the armed forces when they are forced together in a theatre of conflict. The PMCs earn an exponentially larger sum than the soldiers do, which can result in fissures and resentment: “We were bigger than life to a lot of the military guys.’ said ex-Blackwater contractor Kelly Capeheart. ‘You could see it in their eyes when they looked at us – or whispered about us. A lot of them were very jealous. They felt like they were doing the same job but getting paid a lot less.’”¹⁹ Since the two entities do not typically train together, during precarious moments, dangerous incidents can arise.

Detractors of military contractors posit that if a PMC enters into a conflict in a frail nation, it can further weaken a possibly already failed state. If a PMC is hired to enter the fray, it may heighten and prolong the conflict:

The introduction of a third party into the mix, specifically private military firms, only further complicates the situation. Even in stable countries, where the risk of military coups or mutiny is relatively unthinkable, the rise

¹⁸ Singer, 196.

¹⁹ Scahill, 76.

of the privatized military industry raises concerns about the relations among public authorities and the military apparatus. PM[C]s not only reshape the institutional balance of regime and military, but can also have an almost shocking impact on civil-military relations.²⁰

Furthermore, a third party might harm foreign policy relations. Countries (even during times of war) continue to conduct affairs with one another. If another party commits acts that violate state sovereignty or human rights laws, this may ruin countries' long standing associations. Moreover, a PMC is typically viewed by the public as representing the country where it is based even the company was hired by a MNC. "When Western governments are unwilling to intervene in a domestic conflict, mercenary armies are covertly supported to do their 'dirty' jobs. ... '[T]hese mercenary companies are seen as an essential part of the new world order as developing countries are desperately trying now to establish stability and economic prosperity.'"²¹

Although some PMCs' websites state in their mission statements that they will not be contracted by revolutionary forces, most military companies go where the money takes them; their employees range from Non-Governmental Organizations to MNCs. If a contractor commits a heinous act, there are no clear laws to adjudicate them. Further complicating matters, PMCs are non-state actors therefore certain international laws that a state must abide by, such as human rights laws, do not affect them. The domestic, regional and international regulations concerning mercenaries are vague or not strictly administered, which results in a lot of non-compliance. Moreover, for an array of reasons

²⁰ Singer, 191.

²¹ Francis, 323 (quoting Christopher Hird, Channel 4, *Dispatches*, "The Business War," April 10, 1998).

that will be discussed later, domestic and international courts have been dilatory in giving opinions on PMCs.

Chapter 4

Case Studies

To further highlight the pros and cons of PMCs in the international arena, these cases, Angola, Sierra Leone and Iraq, are all described in this chapter.

Angola

The first incidence of mercenaries in Angola was rogue infantry men who joined the post-colonial fight that quickly turned into a Cold War battle. Beginning in 1975, after fighting the Portuguese for independence, the National Union for the Total Independence of Angola (UNITA) and the Popular Movement for the Liberation of Angola (MPLA) battled for control of the nation. It was an ideological war in which the United States and South Africa backed the UNITA and the Soviet Union and the Cubans supported the MPLA. The mercenaries who helped UNITA fight this war were individuals who came from all over the world, but were mostly Europeans. The United States Central Intelligence Agency covertly hired the mercenaries.

The MPLA won this leg of the civil war. The mercenaries that fought for UNITA were captured by the MPLA. Author Manuel Rui Monteiro said of the imprisoned freelance soldiers: ““You were a foreigner. You came to a country that was not your own from a land far away, you came voluntarily, you came with guns. What are guns for? For killing. You were paid for killing. You are a hired killer, a paid assassin, guilty of aggression and invasion, guilty of crimes against peace, guilty of the crime of mercenarism.””¹ Montiero was referring to the 1968 United Nations General Assembly’s Resolution 2465 which stated that it was prohibited for a mercenary to fight in another

¹ Anthony Mockler, *The New Mercenaries, the History of the Hired Solider from the Congo to the Seychelles* (New York: Paragon House Publishers, 1985), 210 (quoting Manuel Rui Monteiro, *Procurador Popular*, Luanda).

country's civil war. The mercenaries were indicted and put on trial. On the day of sentencing, the presiding judge noted that:

[A]ll the mercenaries had known exactly what they had been hired to do, with the complicity of their governments. They had “spread fear, shame and outrage, mangled children, laid bare the people with bayonets.” [According to him:] “Packs of dogs of war with bloodstained muzzles” could not claim prisoner-of-war status or protection of any conventions. For they were “foreigners with knives between their teeth who had come to spread dark wounds across the country” who had “silenced with bullets the clear laughter of the youth.”²

Some of the clan of armed soldiers were sentenced to death by firing squad, while others were given fifteen to thirty years in prison.

The war over Angola continued into this century. What is interesting is that when mercenaries rejoined the battle, they were hired by the government to fight against UNITA. What is also intriguing is that the same group of mercenaries, a Private Military Corporation (PMC) called Executive Outcomes (EO) was utilized in both Angola and subsequently, Sierra Leone. Their back story is a common one with PMCs: they are typically subsidiaries or connected to either an energy multinational corporation (MNC) or a military industrial MNC. EO was founded in 1989 by many of the South African Defense Force (SADF) infantry from the notorious 32nd Battalion: “[k]nown as the ‘terrible ones’ by its opponents, the 32nd was honored at the time for having the highest kill ratio of any unit in the SADF but later accused of egregious human rights violations by the South African Truth Commission.”³ EO is a subsidiary of Strategic Resources

² Mockler, 229.

³ P.W. Singer, *Corporate Warriors, The Rise of the Privatized Military Industry*, (Cornell University Press: New York 2002), 102.

Corporation (SRC), which is connected to the Branch-Heritage Group (BHG). BHG “includes a number of mining and oil concerns...[and] has investments in almost all the areas where [EO] has conducted major operations.” BHG also has its own PMCs, Sandline International and Ibis Air.⁴

In 1993, UNITA factions seized an oilfield owned by BHG. The Angolan government (after years of civil war, now the Forças Armadas Angolanas [FAA]) hired EO. The EOs and the FAA retook control of the oilfield. This “demonstrated that a private firm could play an integral role in a conflict, by providing military services for hire to the highest bidder.”⁵ Consequently, EO left Angola and the UNITA recaptured the oil refinery once again. EO soon returned to successfully duplicate their efforts. In November of 1994, there was a peace agreement with the UNITA rebels which called for EO to leave Angola. EO stayed until President Clinton insisted that they leave the country in 1995 (allegedly, President Clinton wanted the American PMC, Military Professional Resources Incorporated, to be contracted in the oil rich region). Following EO’s departure, civil war erupted once again.

[This was] to become a recurrent theme with EO...Although some critics say [EO’s] success in Angola has been overstated, it is evident that it played a determinate role in ending that stage of war. The company’s arrival coincided with the exact turning point in the government’s war effort. It not only contributed training and tactical advice, but also played a critical active role in operations that exploited UNITA’s weakness and destroyed its morale. EO provided the Angolan army with

⁴ Ibid.,104-105.

⁵ Ibid.,108.

crucial military expertise that it lacked, giving it a distinct edge over its opponent.⁶

Additionally, the “series of military defeats suffered by UNITA thanks to EO’s direct military assistance forced the rebel movement to the negotiating table. ...,EO’s immediate strategic impact created the conditions for negotiations and a peace settlement, something which the UN. ...had not been able to achieve.”⁷

Sierra Leone

Immediately after the Angola conflict, EO entered an ongoing civil war in Sierra Leone in 1995. Sierra Leone’s history is extremely convoluted. It was originally founded for ex-slaves but it soon became a protectorate of Britain. Due to its mineral rich land (Sierra Leone has immense quantities of diamonds, rutile, titanium and bauxite), it attracted many miners. The influx of foreigners and the relocating of free slaves, in addition to the region’s original inhabitants of approximately thirteen tribes, all culminated in a disconnected population. However, it was a poor country. In 1985 “Sierra Leone’s GNP had dwindled...to one of the lowest in Africa. ...The levels of impoverishment, social and generational exclusion, had fuelled social unrest, and state repression had reached alarming proportions.”⁸ The climate was also ripe for corruption. By the time that the civil war broke out in 1991, Sierra Leone was a kleptocracy.

⁶ Ibid., 110.

⁷ David J. Francis, “Mercenary Intervention in Sierra Leone: Providing National Security or International Exploitation,” *Third World Quarterly*, Vol. 20, No. 2 (1999): 329.

⁸ Abdel-Fatau Musah, “A Country Under Siege: State Decay and Corporate Military Intervention in Sierra Leone,” *Mercenaries: An African Security Dilemma* (London: Pluto Press, 2000), 82-83.

Due to the array of mines, mercenaries were not an unusual entity in Sierra Leone. Many individual armed guards or burgeoning PMCs were contracted to guard the mines. In 1991, a civil war began between the government and the Revolutionary United Front (RUF). After a stint by one PMC, Gurkha Security Group, where one of its soldiers was eaten by the rebels,⁹ other PMCs declined to accept Sierra Leone's offer, except EO. Besides, "[i]t was also likely that EO was hired on the recommendation of ...[BHG] ...[which] had operations in Sierra Leone. The government could not afford to pay EO's startup fee, so [BHG's owner, Anthony Buckingham] agreed to bankroll the operation in exchange for future diamond mining concessions in the Kono region."¹⁰

After nine months of battle, EO pushed the RUF forces back into the jungle. The leader of the RUF "conceded that, had EO not intervened, he would have taken Freetown and won the war."¹¹ Peace agreements commenced with one of the demands being that the EO leave Sierra Leone. Subsequently, a general election was held where the Sierra Leone People's Party (SLPP) was the victor.

For this part of the war, "[t]he cash contract for EO from May to December 1995 was US\$13.5 million. Ahmad Tejan Kabbah, [SLPP's leader], convinced that EO's exit would definitely spell his demise, hurriedly renewed the latter's contract from April 1996 for 20 more months at a fee of US\$35.2 million."¹² In January 1997, President Kabbah

⁹ Singer, 112

¹⁰ Ibid.

¹¹ Ibid., 114.

¹² Abdel-Fatau Musah, 91.

ended the EO contract early.¹³ Three months after EO's withdrawal, the RUF staged a coup. In urgent need of money, Kabbah found an investor in a banker from Thailand, Rakesh Saxena. Many of these wars are financed by people or organizations to make a profit, and in Sierra Leone's case, typically, a cut of the diamond action. This allowed Kabbah to hire the PMC Sandline International. "It is unclear why EO was not brought back in, however, the same stock holders of the [BHG]/ SRC/ [EO] consortium stood to benefit."¹⁴ Like their predecessor, Sandline helped to regain control of Sierra Leone but that edge was lost when they left.¹⁵

Sierra Leone has yet to recover. The fighting continued on until the RUF collapsed under the combined pressure of a rebuilt Sierra Leone Army, incursions by the Guinean army, and a revitalized UN force. Elections were finally held again in 2002. "In the interim, however, roughly 10,000 civilians were killed by the same RUF organization that the [PMCs] had once defeated in a quick and easy fashion."¹⁶ Some believe that "the presence of external actors, who were able to sell their military wares to the warring factions, was one of the main stumbling blocks in forwarding the peace process."¹⁷

¹³ The ensuing years of the corruption and wars resulted in solidifying Sierra Leone as a failed state. Even though it boasts some of the richest resources in the world, the government could not afford to pay EO.

¹⁴ Singer, 115.

¹⁵ Also, due to the company's arms shipments, the British government was found to have been complicit in violating the United Nations (UN) arms embargo. The arms embargo is binding under the UN charter and additionally, many regions have domestic arms regulations that businesses, such as PMCs, must abide by, however, there are ways to circumvent these laws.

¹⁶ Singer, 115.

¹⁷ Duncan Campbell, "Marketing the New 'Dogs of War'," *The Irish National Caucus*, October 30, 2002.

However, Brigadier Julius Maada, a Sierra Leone soldier fighting with EO said: “EO ‘did a positive job....We didn’t consider them as mercenaries but as people bringing in some sanity.’”¹⁸ In her article, “Mercenaries,” Elizabeth Rubin writes:

Depending on how you tally the gains for Sierra Leone, EO’s intervention allowed over 300,000 refugees to return home. To keep the same number of people in squalid refugee camps in neighboring Guinea was costing the international community about \$60 million a year. Furthermore, the civilians trusted EO much more than they’d ever trust their own unreliable soldiers to keep order. On the other hand, the new civilian government owed millions to a company of ...mercenaries and was wholly dependent upon them to stay in power. As it turns out, the World Bank ordered the bankrupt civilian government to terminate their contract with EO. With no reliable national army or peacekeeping force, the country slid back into violent disarray.¹⁹

Iraq

The creation of Iraq was the result of imperialism. After Iraq won its independence from Britain, it experienced a period of instability. In 1968, the Baa’th rose to power. With this party’s emergence came the ascension of the dictator, Saddam Hussein. Iraq experienced years of war under his rule. For eight years they battled the Iranians, which plummeted Iraq into severe debt. These arrears seemed to have led Hussein to become exceedingly outspoken on the subjects of nationalized oil, the Organization of the Petroleum Exporting Countries (OPEC), the Gulf States’ elite families and Arab nationalism. Hussein accused his neighbor, Kuwait (to which, with the Saudi Arabians, Iraq owed 60 billion dollars) of siphoning oil from a shared oil field.

¹⁸ Francis, 329.

¹⁹ Elizabeth Rubin, “Mercenaries,” *Crimes of War*, <http://www.crimesofwar.org/thebook/mercenaries.html>.

Hussein was also forthright about the Palestinians' right to a nation. Increasingly, the Western powers, Israel and the elites of the Arab governments became uncomfortable. Hussein attacked and seized Kuwait in August 1990. The UN passed a resolution calling for trade embargoes on Iraq and Kuwait until Iraq's withdrawal from Kuwait. Iraq ignored the UN decree which resulted in a war between Iraq and the United States-led coalition forces (Operation Desert Storm). The allied forces pushed Iraq out of Kuwait shortly after the war began. Nonetheless, the war's consequential destruction was insurmountable.

On April 3, 1991, Iraq agreed to the UN resolution 687 which called for the destruction of all its chemical and biological weapons, UN inspections of military weapons factories and facilities, reparations to Kuwait and trade sanctions (including oil). These trade restrictions would be gradually lifted once all of the weapons were relinquished. At first, the Iraqis did not comply with the inspections but eventually they begrudgingly submitted. However, the UN did not entirely loosen the sanctions. These embargoes further destabilized an already fragile state.

During the Clinton administration, the United States and Britain annoyed Hussein by flying over "no-fly" zones. In 1998, after the Iraqis accused the UN inspectors of spying for the United States and deported UN inspectors from its country, the United States Congress passed the "Iraq Liberation Act," which called for the ousting of Hussein. Post 9/11, the United States began making claims tying Iraq to al Qaeda. In 2002, the United States further accused Iraq of hiding weapons of mass destruction and persuaded the UN to pass Resolution 1441, which demanded that the weapons inspections recommence (no weapons of mass destruction were ever found). Discounting

the UN resolution process, the United States proceeded to enact the *Joint Resolution to Authorize the use of United States Armed Forces Against Iraq*. They began to pressure the UN to authorize a “preemptive” invasion on Iraq. Having failed in that, the United States gave the Hussein family one last ultimatum: 48 hours to capitulate.

On March 18, 2003, the United States and its allies attacked Iraq. The war (Operation Iraqi Freedom) officially ended on May 1, 2003; however, as of 2011 troops remain in Iraq²⁰ as well as in the post 9/11 war’s other theatre, Afghanistan. The Obama administration’s new mission in Iraq is called Operation New Dawn (February 2010) and according to Stroud,

[T]he remaining 50,000 U.S. troops will no longer be fighting, but are instead entrusted with training, advising and assisting our Iraq brethren to run their own security...

We also leave behind [the] world’s largest embassy filled to the brim with non-military contractors and diplomats. The \$592 million embassy with operating costs of \$1.2 billion a year, occupies 104 acres, ...will be populated by 5,000 diplomats and 7,000 [PMCs] and military troops.In short, it does not sound like we’re leaving any time soon.²¹

This off-shoot of the war is “Operation New Dawn” where some United States coalition troops remain with brigades of PMCs.²²

²⁰ As of writing this paper, approximately 109,143 people have died, 80% of these deaths are estimated as civilian. April 5, 2011, Iraq Body Count, <http://www.iraqbodycount.org/analysis/numbers/warlogs/>.

²¹ Kandie Stroud, “The End of the Iraq War or the Continuation?,” *The Huffington Post*, September 16, 2010.

²² The fundamental concept is tantamount to Joe Torre, the New York World Series winning Yankee manager’s ploy in bringing in Mariano Rivera in the 9th inning: bringing in a fresh pitcher to finish the job. “It makes sense for the military not to keep its force at peak capacity, as to do so would build costly redundancies into the system.” Paul R. Verkuil, *Outsourcing Sovereignty, Why the Privatization of Government Functions*

One of the unusual components of this war is the enormous numbers of PMCs. There are over 196,000 PMCs in Iraq and Afghanistan. Iraq hosts thousands of PMCs which provide security for diplomats, feed the troops and construct buildings. According to one report,

From 2003 through 2007, U.S. government agencies awarded \$85 billion in contracts for work to be principally performed in the Iraq theat[re]. This amount accounts for almost 20 percent of the \$144 billion in funding for activities in Iraq from 2003 to 2007. Of the \$85 billion awarded in [US] contracts, 70 percent of those awards were for contracts performed in Iraq itself. The three leading [US] agencies that made contract awards are the Department of Defense (DoD), the [US] Agency for International Development (USAID) and the Department of State (DoS). The DoD awarded the majority of contracts totaling \$76 billion, while USAID and DoS obligated \$5 billion and \$4 billion, respectively, over the same period.²³

As with any soldier while serving, the entry into war has provided employees of PMCs and their families with provisions, such as an income, as well as hardships. As of 2007, the United States Department of Labor had 1,292 contractors listed as being killed, with 9,610 as injured. The Pentagon's figures were 3,954 dead.²⁴ Statistically, these are the second highest casualties; the contractors suffered more casualties than "all coalition forces combined and more than any single [US] Army division."²⁵ Like the United States soldiers who lacked the necessary equipment due to cost cutting, the PMCs were

Threatens Democracy and What We Can do About it (New York: Cambridge University Press, 2007), 26.

²³ Kristen A. Huskey and Scott M. Sullivan, "The American Way: Private Military Contractors and U.S. War after 9/11," *The Priv-War Report*, University of Texas Law School, April 30, 2009, 7.

²⁴ *Ibid.*, 6

²⁵ *Ibid.*

also ill prepared. PMCs have been criticized as being solely for profit organizations, where the owners and the shareholder make the money while the employers skimp on life saving equipment for the contractors. As will be discussed in the concluding remarks, statistics also show that many contractors are third world nationals, therefore racism as well as classism may come into play. In terms of the lack of equipment, for example, in Fallujah Iraq, on March 31, 2004, four PMC Blackwater contractors were trapped and killed. The lack of equipment was allegedly one of the root causes of their deaths.²⁶ Their bodies were burned, butchered and strung up on bridge. The families filed a law suit against Blackwater:

[Quoting the lawyer who filed the suit, Daniel Callahan, from the law firm of Callahan & Blaine]“What we have right now is something worse than the wild, wild west going on in Iraq.... Blackwater is able to operate over there in Iraq free from any oversight that would typically exist in a civilized society. As we expose Blackwater in this case, it will also expose the inefficient and corrupt system that exists over there”. The suit alleged that the men “would be alive today” had Blackwater not sent them unprepared on that fateful mission.... “[F]our Americans found themselves located in a high-risk, war-torn city of Fallujah without armored vehicles, automatic weapons, and fewer than minimum number of team members was no accident.... Instead, this team was sent out without the required equipment and personnel by those in charge at Blackwater.”²⁷

Blackwater settled with the contractors’ families out of court. On September 16, 2007, the same company’s employees shot and killed 17 civilians in an unprovoked shoot-out in Nisour Square. A lawsuit filed against the contractors was recently dismissed citing

²⁶ Scahill, 215 and 219.

²⁷ Ibid., 223

the United States Constitution's 5th Amendment (the PMC's personal statements made to the State Department were used as evidence).

These two incidents are probably the most commonly cited examples of the problems of using contractors in this war. As previously stated, the lack of regulations concerning these businesses have led not just to situations of violence against civilians, soldiers or the contractors themselves, but to more "petty" crimes such as theft or embezzling. PMCs have been criticized for being involved in an exorbitant amount of corruption and greed. For instance, the PMC Kellogg, Brown & Root (KBR), a subsidiary of Halliburton,²⁸ was hired to participate in most aspects of this war. They have been accused of over charging the government to the tune of millions of dollars.²⁹ Additionally, many point to the lack of competition for government contracts; a substantial number has been awarded to KBR or solely to PMCs whose countries supported the United States led-coalition's war:

"38 percent of federal contract dollars were awarded in 2005 without full and open competition,"³⁰ ...[o]pen ended contracts are the rule in Iraq. ...Some contracts have been cost-effective, but there are those that claim outsourcing actually increases [the Department of Defense's] expenditures. Currently over fifty contracts are being challenged by congressional overseers, who ask why, "instead of competition, the Administration has awarded monopoly cost-plus contracts to favored contractors like

²⁸ Kellogg, Brown & Root (known as Brown & Root at the time) was also contracted to take part in Operation Desert Storm.

²⁹ Glenn Minnis, "Halliburton: \$61M Overcharge?" CBS News, December 12, 2003, <http://www.cbsnews.com/stories/2003/12/12/politics/main588216.shtml>. (In the United States, 57 percent of federal spending is allotted to military expenditures).

³⁰ Verkuil, 147-148 (quoting Congressman Henry Waxman, Comm. on Governmental Reform, Min., Staff, Special Investigations Div., "*Dollars, Not Sense: Gov. Contracts Under the Bush Administration*," June 2006, discussion, n..2).

Halliburton” [quoting Waste Fraud and Abuse in US Gov. Contracting in Iraq, Comm. Hearing 109th Cong. (2005)]. There is little doubt that contracts permit or encourage fraud and abuse. Incompletely negotiated agreements can undermine the purpose of the contracting function. They are temptations in themselves, and they also lead to legitimate misunderstandings between contractor and government that take years to resolve. Iraq is an environment where, in the words of one experienced observer, it is often hard to tell whether the contractors are patriots or crooks, or perhaps “crooked patriots.”³¹

Conclusion

Angola, Sierra Leone and Iraq are typical examples of the wars that attract PMCs. All of these countries were fragile states with failed institutions, mounting economic costs from years of wars fought during post colonialism and post imperialism and lands containing a plethora of mineral wealth. These scenarios also have led others to promote regime changes. In 2002, both George Bush and Tony Blair called for regime change in Iraq. The effort to promote change is also alluring to PMCs: “the *raison d’etre* and *modus vivendi* of mercenaries is instability, and it is in their interest that a perpetual state of instability is maintained....[PMCs] [were] the surrogate state security apparatus. The so-called security and coercive stability provided was largely geared towards securing and protecting the economic exploitation of the conflict.”³² Others “argue in favor of privatization of security...mainly because of the strategic impact of mercenaries and the inability of the collapsed states to provide the most basic security needs for [the] citizens.”³³

³¹ Ibid., 147-148.

³² Francis, 332. PMCs “thrive on the absence of civility, consensus, law and order.” Ibid., 330.

³³ Ibid., 329.

The pros of the PMCs in these case studies are that initially they accomplish the short term task of pushing back the resistant forces. However, as we have seen in Angola and Sierra Leone, the cons of the PMCs presence might be that in the long run they exacerbated the conflicts by not completely shutting the warring factions down. They also contributed to further weakening frail countries by negotiating for some of the nation's mineral wealth as payment. Additionally, in Iraq, where the freelance security's presence is very much felt, there have been many alleged crimes and human rights violations committed by PMCs. Some incidents, like the Nisour Square shootings in 2007, occurred simply because of a third party's involvement in addition to the inadequate training of all the factions. Moreover, there is no definitive avenue of recourse for the victims of their supposed injustices. Another con concerning the PMCs as witnessed in Iraq, is their contribution to breaching a nation's right to sovereignty. With the United States-led forces, the PMCs are accomplices in the infringement of a nation's right to sovereignty. A PMCs ultimate goal is to make money, therefore, unlike permanent armed forces, they do not enter a conflict for reasons of defense, injustice or loyalty. In the case of Iraq, the war may have reached the ten year mark because the proliferation of PMCs made enacting a draft unnecessary. In the past, military conscriptions, and their subsequent casualties, typically were the reasons why civilians would eventually demand that a war end.

Chapter 5

Domestic Laws

There are few regulations and regulatory bodies that cover military contractors where they reside. The international community has issued its vague decrees which have also resulted in the military service providers being lackadaisical about obeying the existing rules. One of the main reasons for this is the complicated manner in which the Private Military Corporations (PMCs) are hired. Typically there is no linear route; it is one contractor who was hired by another and so on, and possibly a governmental department may be found at the end of that road. If no government agency is involved, then there are even fewer requirements that the military contracting industry must follow.

If the United States (US) government wants to procure a PMC to fill a post, then the request must go through the Office of Management and Budget. Once approved, various departments such as the Department of Defense (DOD) or the Federal Emergency Management Agency begin the “contract bidding.” However there is very little real competition. It is not the best company or offer that out bids its competitors. “Less than perfect competition in the market for military services makes this problem even more severe. Moreover, many contractors are relatively long-term, including lifetime support contractors. ...These contracts create an essential monopoly once signed, even if competitively bid.”¹ For example, Halliburton and its subsidiary Kellogg Brown & Root (KBR), have been infamous in over charging the American government during the recent

¹ P.W. Singer, *Corporate Warriors, The Rise of the Privatized Military Industry* (Cornell University Press: New York 2002), 155.

Iraq and Afghanistan wars.² Nonetheless, if a PMC is hired by the DOD, it must comply with the Defense Acquisition Regulation Supplement which oversees all facets of contract enforcement.

In the early years of the Iraq and Afghanistan wars there were very few policies that the PMCs from the United States had to respect. Until 2008, the military outworkers had immunity under the Coalition Provisional Authority 17 (CPA 17):

CPA 17 had provided a general grant of immunity to contractors and outlined the basic parameters in which such immunity would not attach or otherwise be made inapplicable. The general grant of immunity provided that: “Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto.”

However:

CPA 17 also established a waiver provision, which provided that a grant of general contractor immunity “is not for the individuals concerned” and “may be waived” by the United States, and thus, opened the possibility of a local trial for contractors accused of unlawful activity.³

After the CPA was compiled, the Private Security Company Association of Iraq (PSCAI) was founded. According to its website, it boasts twenty members, many of which are from the United Kingdom while approximately two are Iraqi owned (the Babylon Eagles/ TigerSwan, has Iraq proprietors but they are trained by veterans of the

² Glenn Minnis, “Halliburton: \$61M Overcharge?” CBS News, December 12, 2003, <http://www.cbsnews.com/stories/2003/12/12/politics/main588216.shtml>. (In the United States, 57 percent of federal spending is allotted to military expenditures).

³ Kristen A. Huskey and Scott M. Sullivan, “The American Way: Private Military Contractors and U.S. War after 9/11,” *The Priv-War Report*, University of Texas Law School, April 30, 2009, 18-19 (quoting Coalition Provisional Order 17, §4, as amended June 17, 2004).

United States Army's Delta Force⁴) and a few others are from the Middle East area.⁵ Basically the PSCAI is the liaison between the PMCs and the Iraq government, with the CPA 17 as its guideline.

In 2008 a Status of Force Agreement (SOFA) was passed which authorizes Iraq to prosecute military outworkers if necessary (PMCs still have immunity status in Afghanistan). Conversely, the military's Universal Code of Justice's (UCMJ) jurisdiction does not include the PMCs, making them exempt from being court-martialed. When Military Extraterritorial Jurisdiction Act (MEJA) was first issued (2000), it only included civilians that were hired by the DOD.

The events at Abu Ghraib led to a revision of MEJA 2000 in an attempt to close the above mentioned jurisdictional gaps. ...Because some of the people involved in Abu Ghraib were civilian contractors working for departments other than the DOD, such as the Central Intelligence Agency (CIA) and the Department of the Interior, they could not be prosecuted under MEJA 2000. ...To address the gap, Congress passed an Act amending MEJA 2000 "to extend its jurisdictional coverage to employees and contractors of other federal agencies," including "employees and contractors of 'any provisional authority.'"...Unfortunately, jurisdiction was limited to those engaged in employment related to the support of a "mission" of the DOD.⁶

Due to a DOD Authorization Act of Congress, a revised MEJA was passed in 2004. This extended the Act to include all contractors who not only work for the DOD but also those

⁴ Babylon Eagles/ TigerSwan, <http://www.bets-iraq.com/>.

⁵ Private Security Company Association of Iraq, <http://www.psc.ai.org/pscmembers.html>.

⁶ Thomas B. Harvey, "Wrapping Themselves in the American Flag: The Alien Tort Statute, Private Military Contractors, and U.S. Foreign Relations," https://law.slu.edu/journals/LawJournal/pdfs/Harvey_Article.pdf, February 26, 2009, 259 (quoting 18 U.S.C. § 3267(1)(A)(i)(II)).

who hold positions “to the extent such employment relates to supporting the mission of the Department of Defense.’...This includes aggravated assault, theft, unlawful killing, sexual abuse and other serious crimes.”⁷ After the well documented Blackwater shooting in Nisour Square in 2007, the House edited MEJA again to include work done: “while employed under a contract (or subcontract at any tier) awarded by any department or agency of the United States, where the work under such contract is carried out in an area, or in close proximity to an area (as designated by the Department of Defense), where the Armed Forces is conducting a contingency operation.”⁸ This version is deceptive because it seems to be more inclusive by including *all* contractors hired by the United States working overseas, but the freelancers need to be in a locale (selected by the DOD) near the Armed Forces. Of course this will exclude many PMCs. Moreover, only crimes that carry a penalty of more than a year can be investigated, which does not include low level assaults such as slapping a detainee or causing mental abuse during interrogations.⁹

There are other policies which PMCs must follow, such as the policy that if a contract is over \$50 million, the corporation must notify the Congress, but as stated previously, there are ways to avoid this by, for example, receiving the money in smaller increments. There are weapons regulations such as The United States Arms Export Control Act, whose regulatory body is the International Transfer of Arms Regulations,

⁷ Huskey and Sullivan, 21 (quoting 18 U.S.C. § 3267).

⁸ Harvey, 260.

⁹ Huskey and Sullivan, 22.

which grants licenses to those that meet the standards. There have been incidents where, to avoid disclosing arms transference, weapons are acquired in other countries:

In February 1998, the British private military company Sandline International shipped weapons from Bulgaria through Nigeria to Sierra Leone, in violation of an existing regional embargo. The Bulgarian government issued a denial of complicity, saying that the arms were sold to Nigeria for use by that nation's armed forces. The truth may never be established, but arms dealers based in one country can often avoid national controls and export restrictions by buying weapons in a second country for delivery in a third country.¹⁰

According to the United States Operational Law Handbook, PMCs contracted to act in a “life saving” (what some contractors refer to as personal security on their websites) context, where the use of force can possibly occur, are permitted to carry arms only after being approved.¹¹

In order to “clean up” the security industries’ image, the International Stability Operations Association (ISOA), formerly known as the International Peace Operations Association, was founded. Its PMC members agreed to abide by all of the existing international human rights doctrines, including the Montreux document, an initiative by the Red Cross and Switzerland to resolve the issues with military contractors (discussed later). Their list of members does not include many of the main players in the current theatres such as KBR or XE Services (formerly known as Blackwater). In 2007, XE Services withdrew from ISOA after they heard of their impending removal subsequent to the September 16th shooting in Nisour Square. Apparently ISOA was pressured by their

¹⁰ “Bulgaria’s Arms Trafficking: An Issue Yet to be Resolved,” *Center for Defense Information*, December 12, 1999, <http://www.cdi.org/program/issue/document.cfm?>.

¹¹ Huskey and Sullivan, 17.

member DynCorp whose employees were complicit in sex trafficking and rape during the United Nations peace keeping mission in Bosnia.¹² DynCorp only fired the accused employees, including the whistleblowers,¹³ and ISOA retained the firm as members.¹⁴ In November 2010, fifty-eight security providers signed onto the Code of Conduct which pledges that they will respect all human rights laws and rules of law in conflict zones.¹⁵

There are some laws in the US under which a security provider may be adjudicated. For instance, the War Crimes Act (passed in 1996 by President Bill Clinton) states that any United States national or a member of its armed forces can be tried for a war crime as defined under the Geneva conventions, with the punishment of death. Nevertheless, this act may not be applied in relation to a freelance military provider because such flagrant crimes rarely happen and if found guilty, then the United States would be linked with war crimes.¹⁶ Additionally, the Special Maritime Territorial Jurisdiction includes nationals and military that committed a crime or were victims of an offense on a United States military base. Needless to say, this authority does not include foreign contractors¹⁷ who make-up a large proportion of the PMC population. A military

¹² Bruce Falconer, "IPOA Smackdown: DynCorp vs. Blackwater," *MotherJones*, November 12, 2007, <http://motherjones.com/mojo/2007/11/ipoa-smackdown-dyncorp-vs-blackwater#>.

¹³ Peter Singer, "Should Humanitarians Use Private Military Services?" <http://smallwarsjournal.com/documents/petersinger.pdf>, 17.

¹⁴ International Stability Operations Association, <http://ipoaworld.org/>.

¹⁵ Associated Press, "Private Security Sign Code of Conduct," *FoxNews.com*, November 9, 2010, <http://www.foxnews.com/world/2010/11/09/private-security-companies-sign-code-conduct/#>.

¹⁶ Huskey and Sullivan, 23.

¹⁷ *Ibid.*, 21.

corporation can also be criminally liable for crimes committed by its personnel or the rehiring of a person who engaged in illegal conduct under the jurisdiction of Corporate Criminal Liability.

Most military corporations do not have strict hiring protocols. There are no regulations concerning background checks (during the vetting phase). The only “check” being made is if a PMC contractor is requesting permission to have a gun abroad. As the Iraq and Afghanistan wars have continued, and incidents that involved PMCs surfaced, the security companies are becoming more cognizant and diligent about employee screening. However, that may be all hyperbole. In *IPOA Smackdown: DynCorp vs. Blackwater* article, the CEO of DynCorp spoke at length about how strict they are in their hiring process and that there is zero tolerance for any alcohol consumption.¹⁸ However, many of these contractors are veterans who most likely have post traumatic stress disorder (PTSD). The PMCs do not provide insurance; instead, in the United States, they are covered through the Defense Base Act. For example, here is a case in Iraq:

Danny Fitzsimons, who worked for the British private security firm Armor Group, and who shot dead two colleagues after a drinking session in Baghdad’s Green Zone in August 2009, is said to be suffering from PTSD. He was reportedly diagnosed in January 2004 as suffering from PTSD, while still in the British army. Assessments by consultant psychiatrists in May 2008 and June 2009 reported that the symptoms had worsened. Despite this, he was hired in August 2009 by ArmorGroup and sent out to Iraq without undergoing a full medical assessment. Within 36 hours of his arrival, the incident took place in which two colleagues died and an Iraqi was injured...

¹⁸ Falconer, Bruce, “IPOA Smackdown: DynCorp vs. Blackwater,” *MotherJones*, November 12, 2007, <http://motherjones.com/mojo/2007/11/ipoa-smackdown-dyncorp-vs-blackwater#>.

Consider [ISOA], a major trade association for private military contractors. Section 6.2 of its Code of Conduct states:

“Signatories shall ensure that their personnel are medically fit and are appropriately screened for the physical and mental requirements for their duties according to the terms of their contract.”

Armor Group, which employed Danny Fitzgerald, is an [ISOA] member company. Yet it obviously failed to ensure he met the mental requirements for the job.¹⁹

The article continues to state that some security freelance organizations such as DynCorp and XE Services are addressing the discrepancy by providing adequate health care.²⁰

Domestic Laws with International Applicability

One of the ways in which the US legal community and the international legal field have been attempting to force regulations on the PMCs is through the American court system and the use of the Alien Torts Statute (ATS). In 1789 the Alien Torts Claims Act (now more commonly referred to as the Alien Torts Statute) was included in the United States First Congresses’ Judiciary Act. The ATS states that United States Federal district courts have the ““original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.””²¹ Even though this act was originally intended to deal with dilemmas involving piracy and diplomats, for the past three decades it has been cited in numerous human and

¹⁹ David Isenberg, “Mental Health and Private Military Contractors,” *The Cato Institute*, February 26, 2010.

²⁰ *Ibid.*

²¹ Ryan Micallef, “Liability Laundering and Denial of Justice. Conflicts Between the Alien Torts Statute and the Government Contractor Defense,” 71 *Brooklyn L. Rev.* 1375, 1375 n1 (2006)(quoting 28 USCS § 1350).

environmental rights cases. Since it was first resurrected two hundred years later, the debate has continued over Congress' intention in drawing up this act: was it to be simply limited to piracy and diplomatic quandaries or to "laws of nations" in the future? Albeit the dispute remains, the ATS has matured to fill a void in the international legal system that the international, and other domestic courts, leave unaddressed.

The first ATS case that set the stage for an array of other human rights lawsuits to be filed was *Filartiga v. Pena-Irala* (1980). This case was filed by a doctor whose son was beaten to death by a police officer in Paraguay. All of the parties were citizens of Paraguay. On the basis of the seldom utilized ATS, the case eventually made its way to the Second Circuit court of appeals where the court opined:

Upon ratification of the Constitution, the thirteen former colonies were fused into a single nation, one which, in its relations with foreign states, is bound both to observe and construe the accepted norms of international law, formerly known as the law of nations...

Construing this rarely-invoked provision, we hold that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.²²

Filartiga's importance was the court's jurisdictional acceptance of such lawsuits: "The *Filartiga* case was brought under the Alien Torts [Statute] ... and established that the [US] courts had jurisdiction over non-criminal abuses that occurred anywhere in the world, 'so long as the alleged wrong would violate international law.'"²³

²² *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir.1980).

²³ John Belton., "The Global Context of Human Rights Violations: The Impact of the Alien Tort Claims Act," *Journal of Business Systems Governance and Ethics*, 2008, Vol. 3, No 1, 20.

A complaint filed against Radovan Karadzic (*Kadic v. Karadzic*), the President of the self-proclaimed Bosnian-Serb republic of “Srpska,” by the victims of the Bosnian-Herzegovina War further advanced the ATS.²⁴ *Kadic* set a precedent in that the court ruled that non-state actors, individuals, as well as corporations, can be sued for breaches of international laws. The Second Circuit ruled that first:

[S]ome international law norms apply equally to private actors and to government officials. ...Second, *Kadic* recognized that a private person can be held liable for an international violation that does require state action in complicity with a state actor. These holdings make clear that a private corporation can be held liable under the [ATS] when it engages in one of the core international violations that do not require state action such as, genocide or slavery, or when it acts in complicity with a state actor committing any of the core violations.²⁵

Sosa v. Alvarez-Machain (2004) was another model court case primarily because it reached the Supreme Court level where the court reversed a lower court ruling in which a Mexican citizen was abducted by Mexican Nationals hired by the United States Drug Enforcement Agency. The court concluded that this kidnapping, and the resulting detainment, was not a breach of the laws of nations. Furthermore, the court decided that debates over claims like the ATS should be more defined by the legislative body. The court did not however reverse *Filartiga* but Stephens states:

[I]t’s possible to see the Court’s opinion as a glass only half full. [T]he Court stopped well short of foreclosing the use of the ATS to bring suits alleging violations of international law in federal courts without Congress’s explicit okay. To the contrary, rather than shut the door on “independent

²⁴ *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir.1995).

²⁵ Beth Stephens, “Upsetting Checks and Balances: The Bush Administration’s Efforts to Limit Human Rights Litigation” *Harvard Human Rights Journal*, Vol. 17, 171-172 (Spring 2004).

judicial recognition of actionable international norms,” [the] majorit[ies]’ opinion explicitly keeps the door “ajar” to future suits, albeit “subject to vigilant doorkeeping” by the federal courts. As explained by Hofstra University School of Law professor Julian Ku, Souter’s opinion “makes all the right noises about the dangers of unrestrained federal court international lawmaking, but it didn’t take that final step that would have restricted it in any meaningful way.” The Souter opinion acknowledges that “a decision to create a private right of action is one better left to legislative judgment in the great majority of cases,” yet allows federal judges to retain the discretion to recognize such causes of action themselves. In other words, federal courts may recognize novel causes of action alleging violations of international law absent congressional authorization in some limited, and undefined, set of cases. As Justice Scalia observed, by holding this door open for judges to “create rights where Congress has not authorized them to do so, the Court countenances judicial occupation of a domain that belongs to the people’s representatives.” Insofar as judges base such rights on international law, particularly on customary international-law norms or unratified treaties, they risk undermining the constitutional premise that all laws derive their legitimacy from the governed. While the spirit of Souter’s opinion is quite restrictive, there is little doubt that some lower courts - and many academics -will see the opinion as a green light to keep trying to bring ATS claims for all sorts of alleged international injustices.²⁶

Sosa is the controlling law of the land as it is the only ATS case thus far to be dealt with in the Supreme Court. One of the main commonalities of the ATS and PMCs are the disputes over characterizations and legal ambiguities. Both concepts are fairly new, so many concepts have yet to be defined and solidified. Many legal experts contend that because the ATS is involved with “laws of nations,” then it only encompasses states, not individuals or other non-state actors. The *Kadic* opinion addressed the quandary of individuals, as well as corporations: “From it’s incorporation into international law, the

²⁶ Jonathan Adler, “Sosa Justice,” *National Review Online*, July 21, 2004, <http://www.nationalreview.com/adler/adler200407210842.asp>, *passim*.

proscription of genocide has applied equally to state and non-state actors.”²⁷ However recently in *Kiobel v. Royal Dutch Petroleum Company* the majority decided that corporations can not be held for violations of laws of nations. The minority refuted this:

The majority...cite no authority in support of their assertion that a corporation is not a subject of international law and is therefore incapable of being a plaintiff or a defendant in an action based on a violation of the law of nations. And there is strong authority to the contrary.

As early as the Nuremberg trials, which represented the dawn of the modern enforcement of the humanitarian component of the law of nations, courts recognized those corporations had obligations under international law (and were therefore subjects of international law). In at least three of those trials, tribunals found that corporations violated the law of nations and imposed judgment on individual criminal defendants based on their complicity in the corporations’ violations.²⁸

Most ATS advocates cite *Sosa*, (the controlling law) to argue that the Supreme Court would not have written “whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual,”²⁹ if the court was disputing that the ATS jurisdiction could include non-state actors.

Proponents of the ATS argue that it should have jurisdiction over individuals or corporations which have been accused of committing egregious acts that are breaches of international edicts such as the Geneva Conventions, the Declaration of Human Rights, The European Convention on Human Rights and the Rome Statute of the International

²⁷ *Kadic*, 70 F.3d at 242.

²⁸ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 179-180 (2d Cir. 2010).

²⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004).

Criminal Court. Additionally advocates of the ATS allude to the more recent Rwandan and Yugoslavian Tribunals. According to Clapham, “the assumption that the crime of torture is confined to state officials has now been rebutted [and]...as the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia...has more recently confirmed, there is no need for a public official to be involved in order for a private individual to be responsible under international law for the international crime of torture.”³⁰

Some courts have opined that precedence has been set where a corporation has been proven as being complicit in aiding and abetting a state actor. As in *Kiobel*, many cite the Trials of War Criminals before the Nuremberg Military Tribunals: the Flick, the Farben and the Krupp war crimes tribunals where individuals, who either worked or owned corporations, were criminally tried and found guilty of war crimes. Those that refute that corporations can be tried civilly under ATS claims, point to the same trials, arguing that the Nuremberg Trials were criminal, not civil and individuals were tried, not the corporations. In *Kiobel*, Judge Leval argues:

If a corporation harms victims by conduct that violates the law of nations, imposition of civil liability on the corporation perfectly serves the objectives of civil liability. It compensates the victims for the harms wrongly inflicted on them and restores to them what is rightfully theirs. What is more, in all likelihood, the objectives of civil tort liability cannot be achieved unless liability is imposed *on the corporation*. Because the corporation, and not its personnel, earned the principal profit from the violation of the rights of others, the goal of compensation of the victims likely cannot be achieved if they have remedies only against the persons who acted on the corporation’s behalf -- even in the

³⁰ Andrew Clapham, “Human Rights Obligations of Non-State Actors in Conflict Situations,” *International Review of the Red Cross*, Vol. 88, No. 863, September 2006, 515.

unlikely event that the victims could sue those persons in a court which grants civil remedies for violations of international law. Furthermore, unlike the case with corporate criminal liability, which does not exist in many nations of the world, it is the worldwide practice to impose civil liability on corporations.³¹

Moreover, the Judge adds that “[w]hile the court [the International Court of Justice (ICJ)] does not exercise jurisdiction over private actors, [(Article 34(1) of the ICJ Statute)], its precedents involving awards of reparations paid by one state to another demonstrate that an award of damages against a juridical entity is familiar ground in international law.”³²

There are many other impediments that arise when referencing ATS claims in a complaint. The other obstacles are: statute of limitations (ten years), *forum non conveniens* (discussed below), and if the accused is a non-state actor, then aiding and abetting must be proven (mentioned below). Another impediment to ATS claims are political questions which includes foreign relations and the United States political branches, for instance, if a PMC is employed by the government, then defense may claim immunity. “[E]xclu[ed] from judicial review [are] those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to Congress or the Executive Branch.”³³ In the case of a non-state actor such as a PMC, defense can cite amongst other claims already alluded to above, the Federal Torts Claim Act (FTCA) which asserts immunity as a state agent:

The majority held that FTCA preempted all tort suits against service contractors “integrated and performing a common mission with the military,” in combat zones,

³¹ *Kiobel*, 621 F.3d at 169 (emphasis in the original).

³² *Ibid.*, at 171 n.24.

³³ *Japan Whaling Association v. American Cetacean Social*, 478 U.S. 221, 230 (1986).

because the policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield. ...And the policies of the combatant activities exception are equally implicated whether the alleged tortfeasor is a soldier or a contractor.³⁴

Private military firms' attorneys also refer to to the General Contract Defense where:

“uniquely federal interests” [are] at stake and that application of state law liability theories presented a significant conflict with federal policies or interests. The Supreme Court looked to the discretionary function exception in the FTCA, which maintains the government’s sovereign immunity for claims based upon the “exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved b[e] abused.” [quoting 28 U.S.C. §2680(a)].³⁵

Moreover, also cited by plaintiffs in these sorts of lawsuits is the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment which “obligates each [s]tate party to ‘ensure in its legal system that the victim of an act of torture...has an enforceable right to *fair and adequate compensation* including the means for as full rehabilitation as possible.’”³⁶

Plaintiffs also refer to domestic laws such as statute 42 U.S.C. § 1983 which asserts that a “state can be held responsible for the acts of private parties, private parties

³⁴ *Saleh v. Titan Corp.*, Consolidated Brief for Petitioners, Civ. No. 09-1313, filed on July 13, 2010, 14-15.

³⁵ Huskey and Sullivan, 35.

³⁶ *Kiobel*, 621 F.3d at 171 n.26 (quoting the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987) (emphasis in the original).

can also be held responsible for their acts under [US] law.”³⁷ Cited also is the Restatement (Third) of the Foreign Relations Law of the United States which declares that international law is the supreme law of the United States:³⁸ “the modern view is that customary international law in the United States is federal law.”³⁹ Many argue that domestic claims such as these should not be permitted when considering international norms, and therefore, not what the First Congress intended when creating the ATS.

Why the lengthy discussion of the ATS when discussing potential regulatory processes for the PMCs? First, thus far it may be the only redress a victim of human rights violations committed by a PMC contractor may pursue. Second, the United States is currently the only venue where such a civil tort can occur. With respect to the international platform, the United Nations (UN) judiciary system is comprised of three basic entities: the ICJ, the International Criminal Court (ICC) and ad hoc Tribunals. There is also the Permanent Court of Arbitration, which is not an official unit of the UN, but it is an international forum where a State or person can seek judicial recourse.

The ICJ only hears actions when the parties are nations. The ICC, as its moniker suggests, solely adjudicates criminal cases that involve individuals (sometimes damages or trusts are awarded). The tribunals have thus far been used only to adjudicate those believed to be responsible for war crimes.

³⁷ Jessica Priselac, “The Requirement of State Action in Alien Tort Statute Claims: Does *Sosa* Matter?”, 21 *Emory Int'l L. Rev.* 789 , 818, April 11, 2008.

³⁸ Restatement of the Law, Third, Foreign Relations Law of the United States, § 111 (1987).

³⁹ Benjamin Berkowitz, “*Sosa v. Alvarez-Machain*: United States Courts as Forums for Human Rights Cases and the New Incorporation Debate,” 40 *Harv. C.R.-C.L. L. Rev.* 289, 296 (Winter 2005).

Many may argue that it is apropos that the decision in *Kadic* has therefore extended the ATS' range to include suits against many multinational conglomerates where they are based: in the United States. Nonetheless, it is ironic that the corporate mecca of the universe is where these torts are filed; the United States legal system is a unique venue where these civil cases can be tried, and the victims are awarded large sums, thus forcing those culpable to pay compensatory damages. The primary reason why the United States judiciary system permits cases such as those that cite the ATS is that "our federal courts assert jurisdiction and apply [US] law as instructed by the Constitution and Congress, with no inherent limitations based on the relationship of the case to the forum. [US] federal courts thus have jurisdiction over international human rights cases because Congress, through [ATS] and related statutes, has instructed them to decide such cases."⁴⁰

Since its resurgence, the ATS has filled a necessary void that other regulations are not capable of, therefore solidifying the international legal system and decreasing human and environmental injustices. There are many obstacles that an ATS action must confront in order for a lawsuit to succeed. However this is not a negative aspect of this type of action; rather this has aided in strengthening international law.

For instance, in order for an ATS tort to survive, lawyers must prove that the jurisdiction where the action is filed is the paramount venue, otherwise the court could opine that it is *forum non conveniens*. It is rare that an ATS action does not include a long *forum non conveniens* battle. At first glance this may seem expensive and time

⁴⁰ Beth Stephens, "Translating Filartiga.: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations," 27 Yale J. Int'l L. 1, 5 (Winter 2002).

consuming; however it actually contributes to developing a sturdy legal argument with an emphasis on international law, decreases frivolous lawsuits and reinforces a respect for sovereignty. Short notes that:

Forum non conveniens, like the political question doctrine, the Act of State doctrine, and the Foreign Sovereign Immunities Act, serves an important gatekeeper function to ensure that only appropriate cases are heard by the federal courts, regardless of the nature of the substantive claim issue. *Forum non conveniens*, allows federal judges to avoid the inconveniences and difficulties associated with adjudicating a dispute with attenuated connections to the United States if an adequate alternative forum exists outside the United States and relevant interest factors support dismissal...

Forum non conveniens serves a further gatekeeping role by helping to ensure, along with other jurisdictional doctrines mentioned above, that domestic litigation does not unnecessarily disrupt [US] foreign policy. Because ATS suits require a [US] court to sit in judgment of claims that often involve significant foreign governmental elements, they result in an increased likelihood of straining international relations...[F]orum non conveniens allows judges to exclude ... sensitive suits with overriding foreign components, thereby reducing the risk of disrupting international relations.⁴¹

An ATS action must also prove that “laws of nations” have been breached. As stated previously, the ATS suit *Filartiga* permitted such an action to be heard in United States Federal courts and (although currently debated) supported the view that what the founding fathers referred to as the “law of nations” would be today’s “customary international laws.” Customary international laws are not codified, but are peremptory norms (*jus cogens*). In order for such a law to become a “norm,” it has to be established

⁴¹ Aric K. Short, “Is the Alien Tort Statute Sacrosanct? Retaining *Forum Non Conveniens* in Human Rights Litigation,” 33 N.Y.U. J. Int'l L. & Pol. 1001, 1063-1064, (Summer 2001)(emphasis added).

by the global community as a norm from which no derogation is permitted. Examples of international norms are those against slavery, genocide, war of aggression, and crimes against humanity. The problem arises when trying to prove that a human or environmental violation on a “smaller,” less systematic scale is *jus cogens*. Most of these ATS cases rely on documents such as the Geneva Conventions, the Nuremberg Trials, the Universal Declaration of Human Rights, the European Convention on Human Rights, American Convention on Human Rights and the UN Charter where *jus cogens* are defined as egregious acts committed on a grand scale. Even though, “[h]uman rights are undergoing a stage of continuing evolution. Through a process of accretion, in which the repetition of the articulation and the assertion of certain norms in various resolutions and declarations and treaties play[] an important role, elements of state practice and *opinio juris* [an opinion of law or necessity] form new customary norms of human rights.”⁴² The human rights laws have yet to evolve and include the less immense crimes.

Another dilemma is the difficulty of demonstrating that the defendant *intentionally* violated international norms. This has become a major issue when suing multinational corporations for breaches of human rights or environmental laws. It is extremely difficult to prove without significant evidence that a corporation based in California had the knowledge of what its subsidiary in Nigeria was sanctioning. For instance, in a recent decision in the case *Bowoto v. Chevron*, the jury decided in favor of the defendants. The action involved Chevron’s sister auxiliary in Nigeria and a group of protesters who were challenging the companies’ appalling environmental and labor

⁴² Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, (Oxford: Oxford University Press, 1989), 99.

infringements. To ward off the demonstrators, Chevron's subsidiary hired Nigerian military, and:

[a]ccording to testimony, military personnel began shooting before their helicopters landed on the platform. Two protesters were killed and others were wounded. Many of the protesters were taken into custody and, according to court filings relating their trial testimony, were tortured and told they would be killed. These broad facts were never in dispute. Rather, the case turned on whether Chevron's Nigeria subsidiary...could be held liable.... The jury handed up a verdict that only the Nigerian Military, not Chevron or its affiliates, was responsible for the [mayhem].... Chevron said "It was never [the Companies'] intent that anyone on the platform be harmed, and we deeply regret the loss of life and injuries that occurred."⁴³

As mentioned previously, during the aftermath of World War II, it was well documented that individuals as well as business executives that benefited from crimes against humanity are just as culpable as the assailants.⁴⁴ "[I]nternational criminal responsibility of corporate executives as accomplices has long been recognized. ...Since Nuremberg there has been no question that accomplices, including those who aid and abet crimes, are responsible under international criminal law."⁴⁵ In 1996, the United Nations International Law Commission Draft Code of Crimes Against the Peace and Security of Mankind stated that it "would impose criminal responsibility for genocide, crimes against humanity and war crimes (as well as other crimes) on an individual who 'knowingly aids, abets or otherwise assists, directly and substantially, in the commission

⁴³ Russell Gold, "Chevron is Cleared Over Nigeria Killings," December 2, 2008, *Wall Street Journal*.

⁴⁴ Doug Cassel, "Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts," *NorthWestern University Journal of Human Rights*, Spring 2008, <http://www.law.northwestern.edu/ournals/jjhr/v6/n2/4/, 307>.

⁴⁵ Ibid.

of such a crime, including providing the means for its commission.”⁴⁶ Likewise, “[l]iability for aiding and abetting...should extend to all instances in which a corporation acts ‘in concert with’ a government carrying out a campaign of genocide or war crimes against humanity. ...A corporation so acts in concert with a government when it provides practical assistance with knowledge that the assistance will facilitate perpetration of a crime.”⁴⁷

Many of these ATS suits that named corporate defendants do not stay the course to trial for a variety of reasons (for example, as already stated: *forum non conveniens*). A modest percentage arrange a settlement. For instance, an ATS action against Chiquita Banana was settled for \$25 million.⁴⁸ Chiquita admitted to paying approximately \$1.7 million over a fifteen year period to paramilitary groups which had been accused of horrendous massacres financed by cocaine exports.⁴⁹ Even though a case such as this did not go to trial, it attracted much publicity and justice may have been served. Additionally, the precedents set by each of these ATS torts are imperative to helping shape international law.

It is not an anomaly that the Alien Torts Statute only exists in the US legal system. Typically in the United States, social change is accomplished through its legal

⁴⁶ Ibid (quoting United Nations *Draft Code of Crimes Against the Peace and Security of Mankind*, [1996] 2 Y.B. Int’l L. Comm’n., ch. 2, arts. 2(3)(d), 17, 18, 20, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part. 2)).

⁴⁷ Hannibal Travis, “Genocide in Sudan: The Role of Oil Exploration and the Entitlement of the Victims to Reparations,” *Arizona Journal of International and Comparative Law*, 2008, 70.

⁴⁸ Cary O’Reilly, “*Chiquita Brands Sued by Families of Murder Victims*,” Bloomberg, June 7, 2007.

⁴⁹ Ibid.

structure. Civil cases have continually been the means by which the United States dealt with its societal tribulations. Unlike other countries, the United States legal system also allows law firms and Legal Aid lawyers to take chances by filing pro bono human rights cases which may recoup large sums for their fees in the end. There is also “a vigorous network of public interest, nonprofit litigation offices, funded by tax deductible donations, that can litigate cases without fee.”⁵⁰

All of these factors - a legal tradition of impact litigation, the structure of attorneys’ fees and the availability of public interest litigators, default judgments, and discovery - combine to render civil litigation in [US] federal courts an attractive option for public interest litigators, as well as their private, fee-oriented colleagues. Combined with favorable jurisdictional rules that enable suit against individuals transitorily in the country or corporations doing business in the United States, the legal system offers a uniquely supportive framework for civil lawsuits seeking damages for international human rights abuses.⁵¹

Other countries do not have such legal structures. Even England’s judicial structure, the equivalent to the United States in legal formula, could not support such civil lawsuits. “[These results are not] a product of different views of international law. Instead, it is the result of domestic laws that differ in small but crucial details and render such litigation unlikely to succeed and financially risky. It also reflects sharply different attitudes toward civil litigation as a tool of legal reform.”⁵²

The damages awarded to the victim in other countries are paltry compared to the United States. In some instances, if the plaintiff loses a suit, he or she has to pay all of

⁵⁰ Stephens, “Translating Filartiga.: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations,” 6.

⁵¹ Ibid.,7.

⁵² Ibid.,18.

the fees. Some cultures find it strange to compensate victims of horrific crimes with money. Conversely, it could be argued that some human rights violations are:

difficult to explain without reference to economic motivations on the part of the dominant group to expropriate a foreign or minority population's land, natural resources, property, and uncompensated labor. These economic motivations become especially powerful when oil companies hold out the prospect of generous revenues to a regime willing to kill or displace any ethnic or religious groups that resist the government's effort to exploit the national wealth in a discriminatory fashion. Accordingly, the redistribution of stolen resources and wealth to the victim groups should take center stage in [human rights violations] prevention.⁵³

The concept of civil torts versus criminal is not even translatable in some societies. Certain societies are not as litigious as the United States. For example, many Asian nations prefer mediation to legal action. Other states' courts still:

reflect... roots in a hierarchal and bureaucratic colonial past. [For example, according to Joseph R. Thome, in Latin America] "[t]he judicial system ... was not really conceived as an institution to resolve the conflicts of the population at large, but rather as a component of the administration of [s]tate power, that is, as an instrument of social control." Despite the social upheaval of the past decades, the judiciary often remains a locus of routine bureaucratic decision-making..., rather than a forum for challenging the abuse of power.⁵⁴

Nevertheless, in the 2000s, the government of George Bush and numerous corporations banded together writing *amicus curiae* briefs to dissuade various courts from ruling in favor of the plaintiffs in ATS cases. The main reason voiced was that the

⁵³ Travis, 19.

⁵⁴ Stephens, "Translating Filartiga.: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations," 10 (quoting Joseph R. Thome, "Heading South But Looking North: Globalization and Law Reform in Latin America," 2000 Wis. L. Rev. 691, 705 (2000)).

judicial branch should not be deciding on such a topic: decreasing the executive branch's power. Moreover, an ATS case may interfere with foreign relations. For instance, China pressured the Bush administration to halt the legal action of Falun Gong Buddhists, stating "that the litigation would cause 'immeasurable' harm to relations between the United States and China."⁵⁵ Others argue that the ATS torts do not respect state sovereignty. Still, as Beth Stephens concludes:

Similarity ill-founded arguments about judicial misinterpretations of the [ATS] and the need to defer to executive branch foreign policy decisions have been asserted as pretexts to oppose judicial review of the human rights abuses of corporations and foreign governments. Although the Constitution clearly assigns the executive branch the leading role in foreign affairs, it also requires that the judicial branch review and decide questions properly brought before it. Where the Administration offers strained readings of federal statutes and implausible predictions about foreign relations, its views are not entitled to deference. Indeed, to defer to such views would be to permit the current administration to distort the proper balance of powers between the executive and judicial branches of our government.⁵⁶

The ATS might not be the best remedy for victims that have endured appalling human rights violations, but it does fill an international judicial abyss. Furthermore, even if one may disagree with the ATS statute's current use, it has forced the global business community to take a solemn look at its past partnership with the global community. "[ATS] operates on...three levels. ...:in the legal venue of the courtroom, in the marketplace of public opinion responding to allegations, and in the normative sphere where the ever-present threat of [ATS] encourages companies to improve their human

⁵⁵ Stephens, "Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation," 9.

⁵⁶ Ibid., 25.

rights policies and practices to avoid litigation. [According to Williams and Conley] ‘The risks to [a] business[es’] reputation from credible allegations of human rights abuses create incentives for companies and directors to consider these issues seriously, irrespective of whether an ultimate finding of liability is likely.’”⁵⁷

These forms of torts have also educated the public as to the abuses of human rights that exist worldwide. Obviously it is beneficial for individuals to know their rights, but as consumers we should know, as in the case of Chiquita, if the banana that we buy is grown in soil that is watered by blood.

Laws of Other Countries

The United Kingdom (UK) (which is home to the most affluent PMC in the world, G4S), has even fewer policies that a security company must follow. In 2002, the Green Paper entitled “*Private Military Companies Options for Regulations*” was compiled by the Rand Europe organization. This work calls for a ban on the recruitment or use of private military abroad, as well as self-regulation in the form of a voluntary code of conduct and the establishment of licensing systems. Moreover the Green Paper requests the formulation of an arms trafficking system modeled after the South African Arms Control Committee and the United States’ Department of State’s Export Control which would oversee International Transfer of Arms Regulations. The House of Commons Foreign Affairs Committee Ninth Report of Session 2001-2002 concurred with the Green Paper but stressed more licensing regulations and suggested that to help administer these conventions, a distinction be made between combat and non combat

⁵⁷ Bill Baue “To Avoid Risk of Alien Tort Claims Act Cases, Companies Must Improve Human Rights,” *SRI World Group*, 2 (quoting Profs. Cynthia Williams and John Conley, “Is There an Emerging Fiduciary Duty to Consider Human Rights?” University of North Carolina).

activities.⁵⁸ Additionally, the committee did find that it would be counterproductive to urge a ban on the use of private military organizations in as much as the companies would simply move to another country.⁵⁹ In February of 2006, the British Association of Private Security Companies (BAPSC) was formed as an approach to self-regulation. Although the ISOA is its American contemporary, their position statements are very different:

The purpose of the British Association of Private Security Companies (“the Association”) is to promote, enhance and regulate the interests and activities of UK-based firms and companies that provide armed security services in countries outside the UK and to represent the interests and activities of Members in matters of proposed or actual legislation.

In the context of this Charter, the term “Armed Services” is defined as any service provided by a Member of the Association that involves the recruitment, training, equipping, coordination, or employment, directly or indirectly of persons who bear lethal arms...

Provide security designed primarily to deter any potential aggressor and to avoid any armed exchange. This concept allows the use of weapons to protect clients or security personnel in a defensive mode and only where there is no other way to defend against an armed attack or to effect evacuation.⁶⁰

Even though the BAPSC does not sugar coat the reality of using weapons they (as does ISOA) do state their commitment to the doctrines and laws of human rights. Most of the

⁵⁸ Kerry Alexander and Nigel White, “The Regulatory Context of Private Military and Security Services in the UK,” Priv-War, Regulation Privatization of War, http://priv-war.eu/?page_id=49, June 30, 2009, 18-19.

⁵⁹ House of Commons Foreign Affairs Committee, “Private Military Companies,” Ninth Session, 2001-2002, 29.

⁶⁰ British Association of Private Security Companies, <http://www.bapsc.org.uk/default.asp>.

BAPSC members are also members of PSCAI, unlike the American based PMCs. In fact, the BAPSC worked with the authors of the Montreux doctrine (discussed later). The BAPSC support the doctrine and urge other British PMCs to be signatories too. Apparently many of the British private military firms tried to join the ISOA but were rejected. For instance, the contractor Aegis was denied membership due to it employees' behavior but "[n]evertheless, this has not prevented Aegis from being awarded ...[a] lucrative contract with the Pentagon, which gives the company considerable power and influence over the safety and effectiveness of the other [PMCs] including many ISOA members thereby undermining the [ISOA] initiative."⁶¹

In 2009, the Foreign and Commonwealth Office Public Consultations on PMCs submitted its proposals to the United Kingdom government. They suggested that in addition to self-regulation and licensing, there should be compiled a national and a international code of conduct akin to the Montreux Doctrine, discussed in the next section. Although its authority is only national, the British do have the Private Security Industry Act 2001 that was devised to curb criminality and raise the standards of their PMCs. This is accomplished through two agencies, the Security Industry Authority (SIA) and Approved Contractor Scheme (ACS).⁶² Even though the United Kingdom has a vast array of native PMCs, "[t]here is little regulation of the private military and security industry in the UK despite the widening scope of application of [PMCs] and increasing reliance on the industry by the UK Government."⁶³

⁶¹ Alexander and White, 21.

⁶² Ibid., 49-50.

⁶³ Ibid., 51.

The British do have some laws that may allow a citizen to seek redress in its courts, such as the Human Rights Act of 1998 that covers private companies inflicting abuses in detention centers. A private military firm can also be charged with breaching the International Criminal Court Act of 2001 if accused of crimes against humanity.⁶⁴

As stated above, all PMCs in Iraq and Afghanistan are under the authority of the CPA and if necessary, SOFA. However, the British also have State Immunity Act of 1978, where, in court, a PMC can claim to have immunity if employed by the sovereign. In some cases, British military law can incorporate a contractor too. Conversely, a corporation can be found liable for committing egregious acts under the UK Company Law.⁶⁵

Another European Country that is home to numerous military contractor firms is France. The French did not authorize the Iraq war but are part of the NATO forces in Afghanistan. In 2003 France passed an anti-Mercenary law which reworked the Additional Protocol to the Geneva Conventions Article 47 (1977):

On April 3, 2003, [a] few weeks after the beginning of the Iraq war, the French Members of Parliament, across party lines voted a new law prohibiting “active mercenary” activity. During the parliamentary debate, French Defense minister Michèle Alliot-Marie. ...declared: “Real war enterprises, often of Anglo-Saxon origin, have, in this context, appeared and fructify. ‘In hand’ war material is delivered by them to failing states and the means to achieve their ends is given to oppositions poorly respectful of any legal procedures. One has to note here, by the way, that we’re not talking about traditional mercenaries, as

⁶⁴ Ibid., 40-41

⁶⁵ Ibid., 41-45.

individuals, but about real commercial companies, the more...fearsome as they [display] ...powerful means.”⁶⁶

The French also have a law prohibiting private forces from fighting for the state. Additionally France has enacted regulations that PMCs within the state must respect too. For example, PMCs must obtain authorization from the Inter-ministerial Commission for the Study of War Materials Exports if a contract necessitates the use of arms. By French law, private military enterprises can also be charged under Corporate and Labor Law. Nonetheless:

The national framework regulating [PMCs] is insufficient. Their status, legitimacy, scope of action and range of services is not legally defined. Moreover, French law needs to be “polished” by further jurisprudence as thus far only one case has been prosecuted pursuant to the 2003 law against mercenary activities. It must be underlined too that the main purpose of the 2003 law is not to regulate security or private military companies.⁶⁷

Russia is also the host to many PMCs but its regulations are not as organized and extensive. The Private Detective and Security Activities law in Russia states that a company that provides protection must, for instance, protect citizens, property and provide security consultation. In January 2010 a new version of this law was passed which added the prohibition of the use of any private money in a private security operation.⁶⁸ It is mandatory for a PMC to apply for a license before beginning operations

⁶⁶ Karel Vereycken, “Mercenaries Without Borders, the 'Dogs of War' of Financial Globalization,” Thepeoplesvoice.org, October 4, 2007.

⁶⁷ V. Capdevielle, “The Regulatory Context of Private Military and Security Services in France,” *Priv-War, Regulation Privatization of War*, http://priv-war.eu/?page_id=49, May 21, 2009, 6.

⁶⁸ Russia, http://www.ustr.gov/sites/default/files/uploads/reports/2010/NTE/2010_NTE_Russia_final.pdf, 7.

and the contractors are permitted to carry guns. In Russia, there is a strict distinction between the state military and private security forces.

The use of mercenaries in post-colonial Africa was the impetus for most international and regional modern conventions discussing soldiers for hire.

Throughout the twentieth century, the international community further curtailed organized private armies. In particular, there was an extraordinary backlash against the individual, ad-hoc mercenaries, commonly known as *les affreux* (“the dreaded ones”), who threatened the stability of many mineral-rich, post-Colonial African regimes.

Indeed, during the 1960s and 70s, the governments of Zaire, Nigeria, Sudan, Guinea, Angola, Benin, the Comoro Islands, and the Seychelles were all seriously threatened by such mercenaries who usually hailed from these countries’ previous colonial occupiers. It is largely because of the abuses committed by these mercenaries and the significant threat they posed to post-Colonial independence that an international consensus developed condemning mercenarism.⁶⁹

The African colonies’ struggle for independence from Portugal, and the subsequent violence that ensued, prompted the United Nations to pass Resolutions 2395 and 2465. Both resolutions recognize the right of the colonial people to self-determination. The Resolutions further condemn the colonial powers and their allies for hiring mercenaries to fight against the liberation movements. These resolutions were fundamental to future edicts such as the declarations of Organization of African Unity (OAU) of 1972, 1977 and 1980 which argue for the overall condemnation of mercenaries in Africa. The preamble of *The Convention for the Elimination of Mercenaries in Africa* states that mercenaries are the root cause of Africa’s disunity and a continued menace to some

⁶⁹ Nathaniel Stinnett, “Regulating the Privatization of War: How to Stop Private Military Firms from Committing Human Rights Abuses,” <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1082&context=iclr>, 4.

African states' struggles for independence. However, there were three different versions of this convention in which the definition of mercenary was slightly altered. Due to the involvement of mercenaries in the Angolan civil war, the original version was edited and the *Luanda Draft Convention on the Prevention and Suppression of Mercenaries* was adopted by the OAU in 1977.

Considering Africa's past with mercenaries, the document's 1980 version defines these private soldiers as:

- (a) A mercenary is any person who:
- (b) is specially recruited locally or abroad in order to fight in an armed conflict;
- (c) does, in fact, take a direct part in the hostilities;
- (d) 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;
- (e) is neither a national of a Party to the conflict nor a resident of the territory controlled by a Party to the conflict;
- (f) is not a member of the regular armed forces of a Party to the conflict; and
- (g) has not been sent by a [s]tate which is not a Party to the conflict on official duty as a member of its armed forces.⁷⁰

The convention then states that it is a crime to be, train, equip or employ a mercenary. Furthermore, Article four explains that mercenaries are not lawful soldiers; therefore prisoner of war status is not to be extended to them. In 1998 the *South African Regulation of Foreign Military Assistance Act* declared that any foreign military aide

⁷⁰ Organization of African Unity, "The Convention for the Elimination of Mercenaries in Africa," 1980, Article 1.

(without authorization) or mercenarism is illegal and punishable by a fine and/ or imprisonment.⁷¹

International Regulations

There are very few international provisions that address hired contractors that are not part of a state's armed forces. According to Singer:

Public military forces have all manner of traditional controls over their activities of the military forces and its personnel, parliamentary scrutiny, public opinion, and numerous aspects of international law. PM[Cs], however are only subject to the laws of the market. Current international law only speaks to the role of individual mercenaries of the traditional sort and has been found inapplicable to the actions of the industry. There is also no agency or legislative oversight in the way there may be on traditional militaries. Other than its shareholders, there are no real checks and balances on the PM[Cs].⁷²

The existing international regulations are ambiguous in their classification of mercenaries which allows room for infractions. As stated previously, in the 1949 Geneva Convention mercenaries were not mentioned but listed instead were supply contractors that could be interpreted as such if declaring prisoner of war status. It was not until the civil wars of post colonial Africa, and the hiring of mercenaries to fight in these battles, that the United Nations felt pressured to pass Resolution 2465 (1968). Resolution 2465 states:

[T]hat the practice of using mercenaries against movements for national liberation and independence is punishable as a criminal act and that the mercenaries themselves are outlaws, and calls upon the Governments of all countries to enact legislation declaring the recruitment, financing and

⁷¹ *South African Regulation of Foreign Military Assistance Act*, No. 15 (1998).

⁷² P.W. Singer, *Corporate Warriors, The Rise of the Privatized Military Industry*, (Cornell University Press: New York 2002), 220.

training of mercenaries in their territory to be a punishable offence and prohibiting their nationals from serving as mercenaries.⁷³

The Geneva Convention's (1977) definition of a mercenary has been criticized for its loose characterization. As stated previously, a mercenary is one who is hired to fight in a conflict, whose *incentive* is financial gain. This of course does not include all of the scenarios that may apply to a mercenary or a PMC contractor. For example, it is very unlikely that a freelance security contractor will be hired to actually fight in a war, instead they may be hired to assist its client in some other affiliated manner. However, an individual can not be labeled a mercenary without meeting *all* of the requirements. In addition, the financial incentive of a contractor, is very difficult to prove.⁷⁴

In 1989, the *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries* was codified. More definitive than its predecessors, it still is not applicable to the corporate military organizations. It retains the 1977 Geneva Convention articles about mercenaries but adds sections concerning prohibiting the overthrowing of governments and the financing, recruiting or training of freelance soldiers. This regulation was also passed because of the outcomes of mercenaries participating in civil wars in Africa. In this regulation, there is still a lot of “wobble” room that the PMCs could use in their defense such as refuting that they are contracted to “fight in an armed conflict.” Furthermore, often these incorporated contractors are hired in the country in which they are citizens, sometimes under the auspices of assisting in

⁷³ United Nations, General Assembly, Twenty-Third Session, 5, ¶ 8 (December 20, 1968).

⁷⁴ Katherine Fallah, “Corporate Actors: the Legal Status of Mercenaries in Armed Conflict,” *International Review of the Red Cross*, Vol. 88, Number 863, September 2006, 605.

emergency efforts such as a devastating earthquake. Although this convention attempts to better define a mercenary, it fails to capture all the possible scenarios of such an occupation. Additionally, “there is a problem in policing the [behaviors] of individuals engaged in the above activities.”⁷⁵ Only seventeen countries have signed on to the 1989 convention.

In 1987, the United Nations appointed a Special Rapporteur on the use of mercenaries. This evolved into the Working Group (2005) whose mission is to:

- (h) To elaborate and present concrete proposals on possible complementary and new standards aimed at filling existing gaps, as well as general guidelines or basic principles encouraging the further protection of human rights, in particular the right of peoples to self-determination, while facing current and emergent threats posed by mercenaries or mercenary-related activities;
- (i) To seek opinions and contributions from Governments and intergovernmental and non-governmental organizations on questions relating to its mandate;
- (j) To monitor mercenaries and mercenary-related activities in all their forms and manifestations in different parts of the world;
- (k) To study and identify sources and causes, emerging issues, manifestations and trends regarding mercenaries or mercenary-related activities and their impact on human rights, particularly on the right of peoples to self-determination;
- (l) To monitor and study the effects on the enjoyment of human rights, particularly the right of peoples to self-determination, of the activities of private companies offering military assistance, consultancy and security services on the international market, and to prepare a draft of international basic principles that encourage respect for human rights by those companies in their activities.⁷⁶

⁷⁵ Christopher Kinsey, “International Law and the Control of Mercenaries and Private Military Companies,” *Cultures and Conflicts*, June 26, 2008, 6.

⁷⁶ The Office of the United Nation’s Commissioner for Human Rights, <http://www2.ohchr.org/english/issues/mercenaries/index.htm>.

In 2005, *The Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, reaffirms the UN Charter's principles, particularly people's right to self-determination. This document states further that the international community is "alarmed and concerned" about mercenary activities, predominantly in Africa. Moreover it reiterates that the hiring or training of mercenaries "are causes for grave concern to all states and violate the purposes and principles enshrined in the Charter of the United Nations..."⁷⁷ What is more, it recognizes that the current international climate of civil wars, covert operations and arms trafficking "encourage the demand for mercenaries on the global market."⁷⁸ This document concludes that for all of these reasons, the establishment of a Working Group that is dedicated to studying mercenaries is essential. As discussed in the next chapter, the Working Group annually releases reports calling for proposals concerning mercenaries. However it was not until 2010 that the Working Group compiles a more concerted and explicit report (discussed later).

One convention that seventeen states, including the United States and the United Kingdom, have signed and many PMC affiliated groups have endorsed is the Montreux Document (September 2008). This document is exceptional in that it characterizes the obligations of the home state, the territorial state, and the contracting state without attempting to define a mercenary.⁷⁹ Uniquely, it explicitly lists in what manner each of

⁷⁷ United Nations, *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 (2005), 2.

⁷⁸ *Ibid.*, 3.

⁷⁹ *Montreux Document*, United Nations, October 6, 2008.

these states are answerable for the private military organizations. In fact, the document suggests that collectively these states are absolutely responsible for these private firms. For instance, states are obligated to set legislation and regulations, as well as make sure that the PMCs are recognizing them and adjudicate any persons breaching human rights laws.⁸⁰

Furthermore, the doctrine is distinctive because it is written in two parts. The first half lists the general obligations of the states and the private military firms and the second lists “Good Practices” that all entities must follow.⁸¹ For example, when vetting a PMC, a contracting state must thoroughly investigate the firm: does the PMC screen its future employees (such as running a background check, including if they have ever been fired from another private security force), to see if the contractors are sufficiently trained, and inquire as to the firm’s practices concerning force and fire arms.⁸² The home states, for instance, would also oversee the above regulations including meticulously investigating a security company. Moreover, the home states would enforce the public disclosure of PMCs and impose sanctions on the businesses that are negligent in respecting the policy. For example, in the United States, information about private military organizations is currently not available via the Freedom of Information Act. To many, this is the key to regulating these businesses:

The firms must realize that they have to be open to a higher degree of scrutiny, including full disclosure of equity partners and client lists. Their current lack of full transparency has backfired, as it feeds concerns about

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

firms' ulterior motives and certainly bars any realization of full legitimacy.⁸³

The main obstacle to regulating the PMCs is the lack of conventions that clearly, but possibly separately, characterizes a mercenary from a PMC contractor. The classification needs to be recognized by all countries as well as their resident military contracting businesses and there should be a parallel organ capable of monitoring the military corporations. To further complicate the matter of fleshing out such regulations, employing PMCs may provoke concerns about state sovereignty and non- state actors. Left unaddressed, involvement of a private military firm can result in the further weakening of a tenuous state.

⁸³ Singer, 239.

Chapter 6

Toward Stronger Regulations of PMCs

There are a number of potential ways to ensure the supervision of the private military companies (PMCs). As already discussed, one such way is through the legal conduits of the United States courts. This can be beneficial but as mentioned, an Alien Tort Statute (ATS) claim can be a very lengthy process, and thus, expensive. Nonetheless, an ATS civil lawsuit can reap enormous monetary rewards. Other solutions are to persuade other nations to cultivate efficient judicial systems and strengthen their regional human rights laws. It is paramount for a state to be capable of resolving its own tribulations. In order for regulations on PMCs to be passed internationally, if possible the laws should derive from the states, from the inside out, thus creating international norms. This is also the only manner in which PMC regulations will work legally and financially. According to one report, “The development of effective domestic legal systems is critical to creating a global human rights regime that not only provides effective redress to victims, but also instills the necessary conditions for social stability and peace within developing countries.”¹ The strengthening of a nation’s domestic human rights laws would spill over, refining a global judiciary system. However, this would be very difficult. As mentioned previously, many nations would have to alter their cultures, as well as their legal systems.

¹ The Harvard Law Review, “The Alien Tort Statute, Forum Shopping, and the Exhaustion of Local Remedies Norm,” *Harvard Law Review* Vol. 121, June 2008 no.8, http://www.harvardlawreview.org/issues/121/_june08/notes/alien_tort_statute.pdf, 2110, 2129.

Many envision a world civil court like an expanded International Criminal Court (ICC). If victims can not seek retribution in their own nations, then an international court would be a preeminent solution. A world tort judicial system would then promote an earnest development of international law. Critics may point out that, “[a]llowing victims to bring claims against their governments in a foreign or international [venue] in the first instance may prevent countries transitioning from violence to peace from developing the machinery necessary to become effective protectors of individual rights.”² Some propose extending the International Court of Justice’s (ICJ) jurisdiction to include individuals:

One of the main arguments relates to the modest number of cases States have been willing to take to the Court, compared to the wide range of important legal issues that would merit its attention. [A]mending the ICJ Statute to the effect that the Court could be petitioned by any person, non-governmental organization or group of individuals claiming to be a victim of a violation of international law by a [s]tate or an international organization, provided that the [s]tate has accepted, or that the international organization has been made subject to, such a jurisdiction...

[It has also been] argued for the creation of a World Human Rights Court that would have binding jurisdiction over [s]tates, international organizations, transnational corporations and other actors that have recognized the binding jurisdiction of that court to deal with claims by individuals and others about human rights violations.³

However, this would require more money from the member states of the United Nations (UN). Many are currently delinquent on their dues.

² Ibid.

³ Martin Scheinin, “The ICJ and the Individual,” *International Community Law Review*, Vol. 9, 136-137 (June 29, 2007).

The Montreux Document elevated the definition of mercenary to include PMCs. Additionally, the document attempted to specify all of the circumstances that may involve a PMC. As mentioned in the previous chapter, it also distinguished between the various parties such as the home, contracting and client state. In Amnesty International's critique of the Montreux Document, the group commends the authors' efforts and attempts to be specific. Nevertheless, Amnesty International comments that the work fails to discuss applicable international laws. They posit also that some responsibilities between the states are duplicative or similar and it is not clear what state should respond or be held accountable if a problem arises. Additionally:

[t]he document might also have better reflected a key signal development, directly relevant to companies, namely the consensus adoption by the UN Human Rights Council of resolution 8/7 in June 2008, endorsing the normative framework set forth by the UN Special Representative of the Secretary-General (SRSG) on the issue of Human Rights and Transnational Corporations and other Business Enterprise. ... This framework is based on three overarching principles: the [s]tate duty to protect all human rights from abuses by, or involving, transnational corporations and other business enterprises; the corporate responsibility to respect all human rights; and the need for access to effective remedies. The generic language of "duty to protect" and "responsibility to respect" does not appear in the Montreux Document, even though this construction constitutes the consensus formulation in relation to the standard governing business and human rights.⁴

One of the most prolific writers on the subject of PMCs, P.W. Singer, proposes a parallel solution involving both domestic and intercontinental organs and regulations. He

⁴ Amnesty International, "Amnesty International Public Statement on the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to the Operations of Private Military and Security Companies during Armed Conflict," October, 14, 2008, <http://www.amnesty.org/en/library/asset/IOR30/010/2008/en>.

argues that at the very least, states must be held responsible for their native private military firms or those that they employ, in conjunction with the accountability of the transnational community:

Essential requirements include more transparent licensing processes, government oversight over local PM[Cs] contracts, and the establishment of financial and operational reporting requirements of the firms. The business services provided by PM[Cs] are military in orientation, but also impact the realm of foreign policy. Oversight should thus be multi-agency, involving the Commerce, State, and Defense Departments, or their local equivalents, in order to ensure full coverage of the nuances of the issues...

A body of international experts, with input from all stakeholders (governments, the academy, nongovernmental organizations, and the firms themselves), could establish the parameters of the issues, build an internationally recognized database of the firms in the industry, and lay out potential forms of regulation, evaluation tools, and codes of conduct. ...This task force could ultimately become the core of a permanent international office designated to handle such issues on a normal basis...

This would include subjecting PM[Cs] personnel databases to appraisal for past violations of human rights. As a sanctioned business...this would allow PM[Cs] to gain contracts from [a range] of clients...thus, [they] will be motivated to support this system, in that it "clears" them for business. ...⁵

In the past few years, the Working Group has made many recommendations to the global community about the private military security industry. For example, in *Mission to Chile* (2008), the Working Group recommended that nations extend the career of a soldier to dissuade the enlistment of military personnel as one potential solution to the

⁵ P.W. Singer, *Corporate Warriors, The Rise of the Privatized Military Industry*, (Cornell University Press: New York 2002), 240-241.

proliferation of PMCs.⁶ In 2010 they compiled a *Report on the Use of Mercenaries as Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self- Determination*. The Working Group explains that they have been apprised of numerous situations in which citizens' human rights have been violated by these private firms, and thus, it is imperative to close the existing gaps in the current regulations. Composed of people who have become experts on the private military industry, the Working Group recommends a two tier solution similar to Singer's strategies. Their proposal also involves both the domestic and global governmental bodies. The Working Group strongly asserts that the state has an obligation to implement human rights laws, and therefore, states are further required to enact laws and policies concerning private military industry. Furthermore, the Working Group advised that there should be a transnational body that closely monitors and maintains databases on the PMCs and their global dealings. Concomitantly, the states will report to this organization regularly. The Working Group also advises that a victim fund be established to compensate a party injured by private military personnel.

Like the Montreux Document, the Working Group's definition of a PMC and their contractors does not include the term mercenary because it is already defined in other conventions. A PMC is defined as follows:

Convention:

- (a) Private Military and/or Security Company (PMSC): refers to a corporate entity which provides on a compensatory basis military and/or security services by physical persons and/or legal entities;

⁶ Working Group, *Mission to Chile*, United Nations, A/HRC/7/7/Add.4, February 4, 2008, 18, ¶80.

- (b) Military services: refers to specialized services related to military actions including strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight operations of any type, manned or unmanned, satellite surveillance, any kind of knowledge transfer with military applications, material and technical support to armed forces and other related activities;
- (c) Security services: refers to armed guarding or protection of buildings, installations, property and people, any kind of knowledge transfer with security and policing applications, development and implementation of informational security measures and other related activities.⁷

The Working Group reiterates security theory in that it specifically maintains that only a state may wage or participate in war. A state can not subcontract a private military force:

Inherently State functions: are functions which are consistent with the principle of the [s]tate monopoly on the legitimate use of force and that a [s]tate cannot outsource or delegate to [PMCs] under any circumstances. Among such functions are direct participation in hostilities, waging war and/or combat operations, taking prisoners, lawmaking, espionage, intelligence, knowledge transfer with military, security and policing application, use of and other activities related to weapons of mass destruction and police powers, especially the powers of arrest or detention including the interrogation of detainees and other functions that a [s]tate party considers to be inherently [s]tate functions.⁸

This report is partially a compilation of past works, all of which involved many years of experience and hind sight that assisted in creating resolutions to tackle the role of private military businesses. This document expands on *all* of the past works that attempted to define and regulate a private soldier. Borrowing from its immediate

⁷ United Nations, The Working Group, “The Report of the Working Group on the Use of Mercenaries as Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self- Determination,” A/HRC/15/25, July 2, 2010, Article 2, 24 (emphasis omitted).

⁸ Ibid., 25.

successor, the Montreux Document, the Working Group document expanded on the distinguishing between the home, contracting and territory states to further include the countries that permit their nationals to work for a foreign PMC. PMCs' mass recruiting from developing countries has become a common theme in the current theatres of war in Iraq and Afghanistan.⁹ This encompasses racist and classist policies including, but not limited to, paying those from developing countries considerably less than their counterparts from dominant nations. Many of these contractors from developing nations signed contracts that overrode their government's laws that protected them, as well as their rights to file claims against the PMC.¹⁰ As Jeremy Scahill notes:

While the Bush administration struggled and failed to build a "Coalition of the Willing" among nations for its invasion and occupation of Iraq, the private military firms Washington hired to support its Iraq operation recruited aggressively around the globe – often in nations whose military and security forces had horrible human rights records and reputations. ...The workers from across the developing world [(]many of whose home countries strongly opposed the war [)] [were] hired by Halliburton, Bechtel, Fluor and other "reconstruction" megafirms. ...The United States may not have been able to convince many governments to deploy forces in Iraq, but it certainly could entice their citizens with promises of significantly higher wages than they could earn at home.¹¹

The Working Group endeavored, and may have succeeded, in dealing with most classifications or scenarios involving private military firms and states. It is a vast work.

⁹ Approximately 40 percent of the contractors in Iraq are from developing countries. Kristen A. Huskey and Scott M. Sullivan, "The American Way: Private Military Contractors and U.S. War after 9/11," *The Priv-War Report*, University of Texas Law School, April 30, 2009, 6.

¹⁰ Working Group, *Mission to Chile*, 8-11.

¹¹ Jeremy Scahill, Blackwater, *The Rise of the World's Most Powerful Mercenary Army* (New York: Nation Books, 2007), 181-182.

Like any doctrine, it is only a work in progress. It is not without criticism. Its dissenters suggest that the document's proposals need to be more specific. Furthermore, they argue that the cost of all of its plans will be enormous to the state.

Conclusion

The Working Group's report is thus far only a draft proposal. Nevertheless, it is the most significant document to emerge from this sixty year debate of what is a mercenary and what are the legal constraints. As noted above, it extracts and enhances the ideas of past works and creates new proposals about the private military industry. If the policies of this draft were implemented, it would further unify and strengthen the domestic and intercontinental legal systems. The Working Group's proposal to hold domestic legal systems accountable for their national PMCs would in turn cultivate a strong transnational legal system. One structure would reinforce the other.

PMCs' existence offers the global community many chances to address imperative issues such as state sovereignty, the state's monopoly on security, the devaluing of institutions, the expansion of governmental branches, such as the executive power, the use of non-state actors to implement foreign policy and the further weakening of delicate nations in the throes of conflict.

PMCs are currently used as a foreign policy apparatus. In the post 9/11 United States, the "fight against terrorism" has tacitly allowed the chipping away of citizens' civil liberties as well as permitted the executive power to balloon. As mentioned at the beginning of this thesis, the Obama administration has been involved in many clandestine, illegal activities in Yemen, North Africa and Pakistan using private

contractors.¹² On January 27, 2011 Raymond Davis, a private military freelancer working for the CIA, who used to be in United States special forces, killed two men in Pakistan. It is unclear if Davis is a diplomat or a PMC. The United States claims he worked as a diplomat and therefore declared diplomatic immunity for his crimes. Some news articles maintain that Davis used to work for Blackwater, while another source says that he was contracted by the PMC Hyperion LLC.¹³ Nonetheless, the deceased families were paid-off to the tune of \$2.3 million dollars. In one phone call, Davis was “removed” from the situation by the United States’ Consulate in Pakistan.¹⁴ Using PMCs in this covert manner, expands the executive branch, is a breach of another nation’s sovereignty and as such, could ignite a potentially volatile conflict between states.

Additionally, as we have seen in Angola, Sierra Leone, and perhaps Iraq, a PMC can expand a conflict, further weakening collapsed states. PMCs have been accused of not only causing more violence but financially ruining some countries. Some opponents even insist that it is in the PMC’s interest to create and maintain chaos so that their businesses remain profitable. For instance is the recent (2011) civil conflict that has arisen in Libya where citizens have attempted to remove Moammar Qadhafi. In the first days of the revolt, the Qadhafi government hired private military soldiers to buttress the

¹² See Ftnts 12 and 13 in Chapter 3.

¹³ Lauren Frayer, “Accused Killer Raymond Davis was CIA Spy in Pakistan,” <http://www.aolnews.com/2011/02/21/accused-killer-raymond-davis-us-diplomat-in-pakistan-or-cia-spy/>, February 21, 2011.

¹⁴ Chris Arsenault, “Spy Game: The CIA, Pakistan and ‘Blood Money,’” *AlJazeera* <http://english.aljazeera.net/indepth/features/2011/03/2011317131348571552.html#>.

remaining army. These soldiers, most from Africa,¹⁵ have reportedly killed thousands of Libyan civilians, including doctors to prevent them from treating the wounded victims.¹⁶

The United Nations and the domestic governments must address discontented non-state actors, such as terrorists and “legitimate” non-state actors, such as PMCs.¹⁷ The international body has to begin revising applicable conventions to include individuals, not just nations accused, of committing egregious acts or breaching conventions. At the domestic level, states need to supplement and reinforce the international efforts to curb non-state actor violence too. Non-state actors are the cause of many international violations of human rights laws and United Nations’ conventions. “[N]on-state actors are often most responsible for human rights violations and ...the governmentcentric view [is] inadequate in dealing with these violations.”¹⁸ The modern day non-state actors can also be very sophisticated, and they can procure the most advanced equipment, such as weapons or various electronic devices.

PMCs are most likely here to stay, therefore, as “legitimate” non-state actors, their role, particularly during conflicts, must be addressed and defined.

As long as war exists, so will a demand for military expertise. PM[Cs] will resultantly benefit from any slack

¹⁵ Petra Cahill, “How Gadhafi Could Find Mercenaries,” http://worldblog.msnbc.msn.com/_news/2011/02/25/6132143-how-gadhafi-could-find-mercenaries, February 25, 2011.

¹⁶ Democracy Now, <http://www.democracynow.org/>, February 22, 2011.

¹⁷ As stated in chapter 1, for the purposes of this paper, “non-state actors” does not refer to non-violent groups such as NGOs.

¹⁸ Jill Greenfield, “The Future of Alien Tort Statute Litigation: A Talk by Paul Hoffman,” *Harvard Law School*, March 11, 2011, 1.

given by traditional sources of security. The overall history of public military actors indicates that the privatized military industry will continue to play a significant and increasing role in international security in the next decades. Moreover, it will likely do so for all measures of clients. The simple reason is that the very same structural conditions that led to the industry's growth still appear to be in place. Few dampening forces loom, while pressures for further expansion remain on the rise. As one recent conference report noted, "The supply of private security forces and the demand for them are growing by leaps and bounds..."¹⁹

Continued changes in the nature of war and the realm of privatization will also play a role in sustaining the industry's health. The growing effects of technology in the revolution in military affairs only reinforce private firms' critical importance to high-level military functions and expose states' inability to supply such activities on their own. Likewise, continued reductions and restrictions in force structure "make using a logistic-support contractor like [Kellogg] Brown & Root almost mandatory."²⁰

Therefore, since the PMCs will continue to be hired by many entities (particularly the United Nations and various states), laws and regulations concerning them must be passed. However, this must be accomplished internationally as well as locally. In order for it to succeed, the regulation of the PMCs should be initiated concurrently at each governmental tier. The only doctrine that addresses the joint legislative effort of the global and domestic communities (in addition to other specific proposals mentioned above) is the Working Group's draft *The Report of the Working Group on the Use of Mercenaries as Means of Violating Human Rights and Impeding the Exercise of the Right*

¹⁹ Singer, 230 (quoting "Are Private Security Forces Sometimes Preferable to National Military Forces?" Conference Notes, Fiftieth Anniversary Symposium of the Moore Society on International Law, University of Virginia, February 24, 2001).

²⁰ Ibid., 231 (quoting Donald T. Wynn, "Managing the Logistics-Support Contract in the Balkan Theater," *Engineer* (July 2000), http://findarticles.com/p/articles/mi_m0FDF/is_3_30/ai_65350720/).

of Peoples to Self- Determination. As mentioned, this document's detractors argue that it will be very expensive to fulfill its requirements. Some of the financial burden can be decreased by PMCs paying mandatory annual dues to the United Nations or through coalition groups such as the International Stability Operations Associations (ISOA) or British Association of Private Security Companies (BAPSC). These military firms are extremely affluent and many are also subsidiaries of wealthy Multinational Corporations (MNCs). In addition, as businesses, they are administered many tax breaks. Tim Spicer, the owner of Aegis, who has had a lengthy career peppered with accusations of human rights violations said:

Given that a PMC is a business, it is acknowledged that a fundamental law of successful business is that the supplier is only as good as his last contract. Ethical businesses first build a reputation and then work hard to protect it. If a particular PMC performed badly or unethically, exploited the trust placed in it by a client, changed sides, violated human rights or sought to mount a coup, then this company and its principals would find that their forward order book was decidedly thin. Discarding ethical and moral principles can therefore only be a one time opportunity. The chance will not recur and the company's prospects would disappear.²¹

The concept of a company not living up to its legal responsibilities and thus losing business, would be ideal, however this is not reality. The reality is that PMCs may be hired for many reasons (legitimate or otherwise) but if necessary, they can do some dirty work, such may have been the case involving Raymond Davis, in which there were few political ramifications for the governments because they could than plead ignorance. The armed forces are given the trust and responsibility to protect their citizens, while

²¹ Andrew Clapham, "Human Rights Obligations of Non-State Actors in Conflict Situations," *International Review of the Red Cross*, Vol. 88, No. 863, September 2006, 517.

concurrently being given weapons. But they also have rules that they must follow. The same concept must be applied to military firms because they also are entrusted to sometimes protect citizens or be near them in conflict zones. Additionally, many of the contractors do carry weapons.

Many states are utilizing these firms to implement their countries' foreign policies. If human rights violations are committed by a PMC, then conflicts between countries can arise. For example, at the time of writing this thesis, many in Pakistan are demanding justice over the incident involving the quasi CIA agent/ contractor Raymond Davis.²² In another event, an American contractor, Allan Gross, was found guilty of "crimes against the state" by a United States' enemy, Cuba, where he will serve 15 years in prison.²³ Incidents such as these could have had serious repercussions for states including communication breakdowns, trade embargoes and even war.

To sum up, the best solution would be the passing of the Working Groups' recommendations. This would be difficult because primarily countries would need to establish domestic legislation and departments. Establishing regulations internationally would be less arduous but it would involve the ratification of the Working Groups' Report first. After which, instituting the departments for implementing the international regulations would not be laborious. Besides the task of achieving unanimous votes domestically and internationally, the major impediment is money. Many countries, particularly where PMCs are hired, do not have much money. Therefore it must be

²² Arsenault,
<http://english.aljazeera.net/indepth/features/2011/03/2011317131348571552.html#>.

²³ Paul Haven, "Cuba finds American Guilty of Crimes Against the State,"
http://www.msnbc.msn.com/id/42048959/ns/world_news-americas, March 12, 2011.

accomplished by having the PMCs pay yearly membership dues to help establish these regulations domestically in the poorer countries and internationally.

The other solution might be to retain the definitions of a PMC in the Montreux Document and the Working Groups' Report while concurrently pressuring the "home" states to institute domestic regulations on the PMCs (especially concerning background checks, diagnosing and treating Post Traumatic Stress Disorder, arms control and public disclosure). For the most part, PMCs are based in the wealthier countries where there should not be many obstructions. Additionally, the UN probably could afford to monitor the private military firms on a minimal level. Both the ISOA and the BAPSC could promote the rules mentioned above. As Tim Spicer alluded to, in order for a PMC to continue to profit, it should want to encourage regulations on the industry. Moreover, if MNCs and Non-Governmental Organizations are sometimes the clients of these private security businesses, they also should insist that laws be approved. For example, insurance companies and the military industrial complex make large sums of money on this modern day gold rush. If they want to continue reaping the financial rewards of the PMCs, then they should insist that the contracting security businesses be more regulated.

If no new laws or regulations concerning the private military industry are ratified, then at least in the United States court system, victims of human rights violations can possibly find relief by claiming the Alien Torts Statute.

[T]hese cases stand for the proposition of corporate accountability in ways that almost nothing else out there does now, at least symbolically. It's one of the few places we can bring corporations to account for these kind of violations. Recognizing the limits of the [United States'] lawyers bringing suit against [United States] corporations in district courts, [the] ultimate goal is to inspire

international regulation of corporate conduct in order to enforce good corporate behavior.²⁴

However, just recently in *Kiobel*, the Second Circuit decided against a hearing *en banc* on its earlier decision where it ruled that corporations can not be held liable under ATS claims (over turning many of its own verdicts). The *Kiobel* case may be heard in the Supreme Court. If at the Supreme Court level the judges affirm the 2d Circuit's decision, this will destroy ATS litigation seeking to find MNCs culpable of human rights violations. If *Kiobel's* petition for writ of certiora is denied, then the 2d Circuit ruling will remain. This is not auspicious either because the Supreme Court may use it to judge another ATS case in the future. Additionally, the 2d Circuit is one of more important courts when reviewing ATS cases. Therefore, *this circuit's* "controlling law" unless overturned, is *Kiobel*.

Hate them or love them, the debate over PMCs will force governments and the transnational community to tackle various issues such as the roles of non-state actors, state sovereignty, security, the expansion of certain branches of government, covert activity, the potential for weakening institutions such as the armed forces, and the further weakening of other countries' institutions and collapsed states. Additionally, as we have seen, the old ways of making war have changed, which means the rules and regulations need revisions as well.

²⁴ Greenfield, 2.

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