# The Private Law of War

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"Security will become a function of where you live and whom you work for, much as health care is allocated already."

- John Robb[1]

Ten years ago, a common perception was that military logistics firms did little more than provide cafeteria services or laundry outsourcing to US bases overseas. Mercenaries, on the other hand, were seen as pariah outfits operating in African backwaters, but not employed openly by major powers or respected corporations. Such perceptions were never entirely accurate, but today these two worlds have very publicly merged and exploded onto the international scene in the form of the modern Private Military Corporation (PMC). While the first Gulf War had a ratio of government soldier to private contractor of over 100:1, the current conflict in Iraq has a ratio of less than 10:1.[2] In fact, The Economist called this conflict "the first privatized war."[3] The awarding of multi-billion dollar logistics contracts to firms like Bechtel and Halliburton was highly publicized,[4] but there was much less publicity about the direct combat role

[1] John Robb, *Security: Power to the People*, FAST COMPANY, Mar. 2006, at 120, *available at* http://www.fastcompany.com/magazine/103/essay-security.html.
[2] Kenneth Bredemeier, *Thousands of Private Contractors Support U.S. Forces in Persian Gulf*, WASH. POST, Mar. 3, 2003, at E01.
[3] *Military Industrial Complexities*, ECONOMIST, Mar. 29, 2003, at 56.
[4] Mike Gongloff, *Bechtel Wins Iraq Contract*, CNN, Apr. 17, 2003, *available at* http://money.cnn.com/2003/04/17/news/com.

played by private contractors in today's conflicts, or about the extensive use of PMCs beyond Iraq and Afghanistan. Despite the lack of publicity, this expanded role led to increased concerns by several observers that PMCs were increasingly committing human rights abuses, and that the lack of transparency, regulation, and clear rules on liability for their operations was facilitating such behavior.[5] At present, the legal status of Private Military Corporations is largely ambiguous.[6] The rapid pace of innovation and the huge profit potential within the industry has outpaced the development of legal norms and regulations, resulting in a dangerous legal vacuum where PMC operations proceed largely unchecked.

In this paper I will address the rapidly changing legal environment of Private Military Corporations. I will first provide an overview of developments within the industry. I will then address the problem of differentiating legal private military functions from prohibited mercenarism with an overview of the development of prohibitions on the use of mercenaries. I will discuss various attempts and plans for regulation of PMCs at both the international and national level, along with the difficulties of developing any such regulatory regime. Next I will cover problems of international liability within the private military industry and attempts by both PMCs and regulation advocates to shape the legal environment. I will conclude with future concerns and recommendations.

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[5] *See, e.g.*, James R. Coleman, *Constraining Modern Mercenarism*, 55 HASTINGS L.J.1493, *and* Mark W. Bina, *Private Military Contractor Liability and Accountability After Abu Ghraib*, 38 J. MARSHALL L. REV. 1237.

[6] Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and The New World Order*, 34 STAN. J. INT'L L. 75 (1998).

## I. Introduction to the Modern PMC

A recent Harvard Law Review symposium declared today the "Era of Privatization."[7] While the privatization of government functions has demonstrated its ability to save money,[8] many draw the line at privatizing functions that are closely intertwined with fundamental human rights, arguing that fundamental principles must not be sacrificed to save money.[9] Among traditional monopolies of the state, the functions of security and warfare have perhaps the greatest potential impact on basic human rights. Concern over this potential impact on human rights is driving increasing scrutiny of the role of privatization within the traditional state functions of military and security operations.[10] While the United States has been a leader in the privatization of military logistics and support, it is just now catching up with many other nations in the more problematic outsourcing of combat support and direct combat operations.[11] Are these private corporations merely extensions of traditional military contractors, or are they a new manifestation of the mercenary, shielded behind a veil of corporate legitimacy?

Mercenaries played a prominent role in modern history, proving to be influential and often decisive participants in the numerous post-colonial conflicts that rocked Sub-Saharan Africa after World War II.[12] Today's Private Military Corporation, however, is quite different from the loose groups of ex-patriot soldiers that once plied the Third-World. Today's PMCs are often billion-dollar operations[13] with respectable offices in

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[7] *See* Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1211 (2003).
[8] *See, e.g.*, Simon Domberger & Paul Jensen, *Contracting Out by the Public Sector: Theory, Evidence, Prospects*, 13 OXFORD REV. ECON. POL'Y 67, 72-75 (1997).
[9] *See* Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 23-24 (2005).
[10] *See* ELLIOT D. SCLAR, YOU DON'T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION 47-70 (2000).
[11] *See* Rosa Ehrenreich Brooks, *Failed States, or the State as Failure?*, 72 U. CHI. L. REV. 3 (2005)
[12] *See* Singer, *infra* note 34, at 522.
[13] *Id*., at 524.

Washington or London, and publicly traded stocks.[14] Does this façade really differentiate PMCs from mercenaries? Perhaps more importantly, how should they be treated amongst the broad spectrum of non-governmental organizations?

One traditional way to differentiate "acceptable" PMCs from mercenary firms is to classify the former as support and logistics providers, while reserving the label "mercenary" for those who actually participate in combat operations. Of the 20,000+ private contractors currently employed in Iraq,[15] the majority are cooks, truck drivers, construction workers, maintenance technicians, and laundry operators. While these may be mundane jobs, they are of no mundane significance—Halliburton's contracts alone in Iraq are estimated at more than $15 billion.[16]

Beyond the more publicized role of PMC contracts providing logistical support to military operations, PMCs are increasingly involved in more controversial combat support roles. The PMC DynCorp was awarded a contract to provide specialists to interrogate prisoners at Abu Ghraib prison.[17] A Delaware-based PMC affected the extraordinary rendition of two Egyptian nationals from Sweden to the US under government contract.[18] The Virginia-based company MPRI (Military Professional Resources International) was hired by the US government to help the Croatian military defeat Serbian forces, helping Croatia to acquire controlled and highly-sensitive radar technology from Russia in the process.[19] Vinnel Corporation provides training to Saudi

[14] MPRI was recently purchased by the publicly traded Fortune 500 company L-3, a stock held by many public employee retirement funds. *See* P.W. Singer, *Corporate Warriors*, 26 INT'L SECURITY 186, 199 (2001).
[15] Jonathan Turley, *Soldier of Fortune – At What Price?*, L.A. TIMES, Sept. 16, 2004, at B11.
[16] *See* Felix Rohatyn & Alison Stanger, *The Profit Motive Goes to War*, FIN. TIMES, Nov. 17, 2004, at 19.
[17] Chaffin, *infra* note 62, at 7.
[18] SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB 61 (2004).
[19] *See* R. Craig Nation, *War in the Balkans*, STRATEGIC STUDIES INSTITUTE, August, 2003, *available at* http://www.strategicstudiesinstitute.army.mil/pdffiles/00117.pdf.

military forces.[20] As the aggressive nature of these "support" contracts demonstrates, PMCs are increasingly blurring the boundary between combat support roles and direct combat operations. While direct combat roles have been a regular part of the business plan of outright mercenary firms such as South Africa's Executive Outcomes,[21] the United States also now regularly contracts with PMCs for direct combat operations. Firms such as Blackwater USA and Triple Canopy provide hundreds of combat personnel to serve as armed escorts to ground convoys in Iraq.[22] Evidence suggests that PMCs are taking on more dangerous direct combat roles in Iraq than uniformed US personnel: there have been 330 combat fatalities among the roughly 20,000 PMC personnel but only 2428 fatalities among the roughly 150,000 uniformed personnel, representing a slightly higher fatality ratio for contractors than for uniformed personnel.[23]

While convoy-escort contracts in Iraq are the most blatant US use of PMC personnel in direct combat roles, they are by no means the only example. In Colombia, the deceptively-named American corporation Virginia Electronics conducts riverine combat operations as part of Plan Colombia, directly engaging both paramilitaries and FARC rebels.[24] In Peru, the US PMC CACI is under contract with the DEA to identify and shoot down drug smuggling planes.[25] Raytheon Corporation's "Big Crow" program is another example of direct combat activity by PMCs. Big Crow, an airborne electronic

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[20] *See* http://www.vinnell.com/militytraining.html (last visited May 10, 2006).
[21] *See Guards and Gumshoes*, ECONOMIST, 17 April 1997, *available at* http://economist.com/displaystory.cfm?story_id=86154.
[22] *See* Daniel Bergner, *The Other Army*, N.Y. TIMES, August 14, 2005, *available at* http://www.nytimes.com/2005/08/14/magazine/14PRIVATI.html.
[23] *See Iraq Coalition Casualty Count*, available online at http://icasualties.org/oif/ (last visited May 10, 2006).
[24] *See* Peter Gorman, *Plan Colombia's Mercenaries*, NARCONEWS, http://www.narconews.com/iquitos1.html.
[25] *See* S. Leon Felkins, *Outsourced Tyranny: The Use of Private Companies to do Government's Dirty Work*, Antiwar, May 10, 2001, http://www.antiwar.com/orig/felkins2.html.

jamming platform, was piloted and operated by Raytheon personnel during the recent Iraq War. The aircraft was fully integrated into the US Air Force ATO (Air Tasking Order), and directly engaged in offensive military operations against the Iraqi military while under non-government civilian control.[26]

The growth of privately-contracted military activity under the auspices of corporate respectability would not be so troubling if not for the continuation of the tradition of mercenary abuses. The adventurer-mercenaries of Post-Colonial Africa were noted for increasing "the violent and cruel nature of specific aspects of the conflict in which they are involved."[27] Unfortunately, the current record of Private Military Corporations is little better. Employees of the American firm CACI, under contract with the US government, acted as interrogators at Abu Ghraib and reportedly directed or participated in some of the horrendous abuses associated with that detention facility.[28] Employees of the American PMC DynCorp stand accused of rape and running underage prostitution networks in association with their security duties under contract with the US military in Bosnia.[29] Other PMCs have been recently accused of everything from killing Ecuadorian peasants by spraying their villages with toxic defoliants,[30] to accidentally shooting down a missionary plane incorrectly suspected of drug trafficking,[31] to numerous other significant violations of human rights. Perhaps most alarmingly, among

[26] Information about Big Crow employment provided here is unclassified and based on personal experience. General information on the Big Crow aircraft is *available at* http://www.edwards.af.mil/brochure/docs_htm/aircraft/ac_html/nkc135eb.htm.
[27] Elizabeth Rubin, *An Army of One's Own*, HARPERS, Feb. 1997, at 48.
[28] LT. GEN. ANTHONY R. JONES & MAJ. GEN. GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 131-135 (2004).
[29] *See* O'Meara, *supra* note 73.
[30] *See* Peter Gorman, *Scorched Earth Policy*, FORT WORTH WKLY, Mar. 13, 2003, *available at* http://www.fwweekly.com/content.asp?article=2387.
[31] *See* Lisa Croke, *Iraq Torture Investigations Reveal Scores of New Cases*, NEW STANDARD, Dec. 31, 2004, *available online at* http://newstandardnews.net/content/index.cfm/items/1359.

the most publicized violations of human rights by PMCs, no firm or individual has recently been held accountable for their actions under either civil or criminal law.

## II. Difficulties in Prohibiting Mercenarism through International Law

Following the Peace of Westphalia and the dissolution of Wallenstein's 120,000-man militia,[32] the state has been the traditional locus of military action in the international community.[33] Since that time, and especially after World War II, there developed among the international community a broad perception of a prohibition against mercenarism. Unfortunately, the ground truth of state practice has not paralleled this theoretical development. While some types of mercenary activity are clearly and explicitly prohibited by international law, a careful analysis of international norms related to mercenarism reveals a de-facto endorsement, not prohibition, of such conduct. This apparent contradiction stems not from the lack of treaty law outlining mercenarism-in-theory, but rather from the difficulty in applying that law to the modern activity by Private Military Corporations. As P.W. Singer observes, "[w]hat little law exists has been rendered outdated by the new ways in which [PMCs] operate. In short, international law, as it stands now, is too primitive in this area to handle such a complex issue that has emerged just in the last decade."[34] Specifically, the existing prohibitions on mercenarism fail in their very definition of "mercenary," rendering them largely inapplicable in practice (if not in theory) to modern PMC operations. This definition fails, not because it attempts to differentiate between support and combat roles, but because it grounds the

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[32] *See* Peter W. Singer, *The Ultimate Military Entrepreneur*, Q.J. MIL. HIST., Spring 2003, at 6.
[33] *See* JACKSON N. MAOGOTO, STATE SOVEREIGNTY AND INTERNATIONAL CRIMINAL LAW: VERSAILLES TO ROME 15-31 (2003).
[34] P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, at 525-26.

definition of "mercenary" on several attributes of individual participants such as nationality and profit motive that are either inapplicable in today's context or nearly impossible to prove.

Modern international law dealing with mercenaries begins with the 1949 Geneva Convention, which afforded the convention's prisoner of war treatment standards to anyone who was part of the legally defined armed force, but did not provide those protections to private groups operating outside the aegis of a state military.[35] The next major step in the development of the international prohibition on mercenarism was the 1970 Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States.[36] The Declaration stated that all states have an obligation to prevent the organization of private armed groups for incursions into other countries, but did little to distinguish what was specifically prohibited, and left enforcement to the state in which such mercenaries were operating. As these subject states were normally nascent Sub-Saharan African nations, their prospects at effective enforcement were virtually nil. While the 1970 declaration had the intent to prevent one state from utilizing a mercenary force in support of rebels in a neighboring state, the real impact was to legitimize the use of mercenaries by governments against internal rebels.[37]

The Additional Protocols to the Geneva Convention of 1977 were significant because they provided for the first time a clear test for what qualified as a "mercenary,"

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[35] GATH ABRAHAM, THE CONTEMPORARY LEGAL ENVIRONMENT, IN THE PRIVATIZATION OF SECURITY IN AFRICA 89, 90 (Greg Mills & John Stremlau eds., 1999).
[36] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, 124, U.N. Doc. A/8028 (1970).
[37] Abraham, *supra* note 35, at 92.

and specifically denied Geneva Convention protections to this class.[38] However, the 1977 Additional Protocols failed to explicitly outlaw mercenarism, and instead only denied certain protections to mercenaries. Additionally, the definition of mercenary provided by the Additional Protocols was highly problematic. The problematic portion of the definition of "mercenary" is the requirement that a mercenary be an individual who is motivated to take part in the conflict by private gain substantially in excess of that paid to the uniformed military participants and who is not a national of a party to the conflict or a resident of the territory of a party to the conflict.[39] This definition was aimed at the individual, ex-patriot adventurer-mercenaries prevalent in post-colonial Sub-Saharan Africa, but is uniquely inapplicable to modern day PMC employees, who are often residents of one of the parties to the conflict and represent a corporate, not individual presence in the conflict. Even in those cases where the definition seems applicable, it may be impossible to prove the financial motivation of each individual, as individual motivation does not easily submit to an objective test and there are numerous plausible, alternative motivations: adventure, sympathy for the cause or plight of one party to the conflict, etc. A British government report on this definition of "mercenary" concluded that it was so flawed as to make mercenarism "not an offense under international law."[40]

The most recent attempt at defining and outlawing mercenarism was the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, more commonly known as the UN Mercenary Convention.[41] The UN

[38] Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 3.
[39] *Id*.
[40] Report of the Committee of Privy Counsellors Appointed to Inquire into the Recruitment of Mercenaries, 1976, Cmnd. 6569, at 10.
[41] International Convention against the Recruitment, Use, Financing, and Training of Mercenaries, Dec. 4, 1989, U.N. GAOR, 72nd plen. mtg., U.N. Doc A/Res/44/34 (1989).

Mercenary Convention, while more clear on expressing an international prohibition on mercenarism, follows in the footsteps of its predecessors in failing to provide a workable definition of mercenary. It contains the same essential weaknesses as the 1977 Additional Protocols to the Geneva Convention; specifically, that a mercenary is an individual, that he is motivated by financial gain, and that he is not a resident of the territory of any party to the conflict.[42] The perpetuation of such an unworkable "prohibition" was possibly the true intention of the African nations that were the driving force behind the UN Mercenary Convention. These nations were increasingly dependent on the services of a new breed of corporate mercenarism—embodied by the South African firm Executive Outcomes—and they were careful to *not* update the definition of mercenary in a way that might jeopardize the availability of these services. In the 1980s and 1990s, Executive Outcomes played an instrumental and often decisive role supporting African governments as a direct combat provider (but not meeting the UN Mercenary Convention definition of "mercenary") in Angola, Sierra Leone, Uganda, Kenya, and Congo.[43]

Beyond definitional problems, the UN Mercenary Convention also fails to convince of a Customary International Law prohibition of mercenarism: it was not ratified by the 22 states necessary for it to come into effect until 2001, nearly 12 years after its signing, and it has not been ratified by any major power.[44] This lack of endorsement by any major power, coupled with broad state practice to the contrary, actually supports the formation of Customary International Law *legitimizing*

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[42] *Id*.
[43] *See We're the Good Guys These Days*, ECONOMIST, July 29, 1995, at 32.
[44] Singer, *supra* note 32, at 531

mercenarism, at least as practiced by modern PMCs: over 50 states currently serve as patron nations to PMC firms, offering them licensing in one form or another.[45]

Given this murky state of international law regarding mercenarism, it is tempting to observe that there is no law and all loophole. While some activities certainly remain prohibited, they are not the kind currently in practice, nor do these prohibitions seem applicable to any of the broad spectrum of current PMC activities. What international norms *do* apply to PMC conduct? An analysis of the various national plans for PMC regulation will demonstrate that few, if any, norms of conduct are sufficiently universal or enforceable as to create an obligation under international law.

**III. National Regulation of PMCs**

The prospect of developing an effective regulatory environment for PMC activity through individual nation regulation is problematic for two reasons: mobility and enforcement. While many PMCs, especially in the United States, are firmly linked to a single government sponsor, many are increasingly gaining their "sea legs" as multi-national corporations without inseverable ties to any one nation. This mobility creates the possibility that regulation will merely drive a PMC to a more permissive environment, much as tax havens or ship registry currently operates. Indeed, this phenomenon has already defeated the most ambitious regulatory schemes. When the South African firm Executive Outcomes (EO) officially closed due to a new regulatory environment, its subsidiary, Lifeguard, continued operations in Sierra Leone with many of the same executive staff.[46] EO founder Eben Barlow noted, in response to the new

[45] *Id*., at 533.
[46] Zarate, *supra* note 6.

South African regulations, that "three other African countries have offered us a home and a big European group has even proposed buying us out."[47]

In addition to problems of corporate mobility, national regulations face the difficult prospect of effective enforcement. The majority of states that employ PMCs within their territory do so for the very reason that they do not have military capability possessed by the PMC, and therefore are unlikely to have the ability to hold that PMC directly accountable for their actions. This removes the possibility of enforcement to those states that can offer an effective forum. However, political considerations may prevent an otherwise effective judicial system from holding PMCs accountable, as was clearly demonstrated in the US in the Sarei case (discussed in detail below), as well as by Germany's refusal to hear the claims of Abu Ghraib detainees due to the issue's political sensitivity.[48]

Despite the problems with national regulation of PMCs, an overview of current regulatory schemes is necessary to establish the current extent of the legal vacuum. Most regulatory schemes operate under the patron-state concept that a PMC located in a given nation must receive some form of licensing from its host nation, and must have that nation's approval for its international operations. The three principle PMC patron-states are the United States, the United Kingdom, and South Africa, each of which have, or are contemplating some type of a regulatory regime.

The United States has a minimal regulatory regime. While the Neutrality Act prohibits the recruitment of mercenaries within the United States, it does not prohibit US

[47] *Id*.
[48] *See* Reuters, *German Prosecutor Rejects Investigation of Rumsfeld*, L.A. TIMES, Feb. 11, 2005, at A9.

firms from conducting military operations abroad.[49] Similarly, the Uniform Code of Military Justice (UCMJ) regulates the behavior of uniformed personnel abroad, but not that of civilian contractors.[50] The Military Extraterritorial Jurisdiction Act was intended to extend UCMJ jurisdiction to contractors as well, but it only covers those contractors working directly for the Department of Defense[51]—not, for example, the CACI contractors implicated in abuses at Abu Ghraib, who were actually under contract with the Department of the Interior.[52] Additionally, liability for actions under the UCMJ only permits criminal charges to be brought *at the discretion of the US government*, but does not provide a mechanism for foreign victims to seek civil compensation for damages caused by PMCs. This focus on the individual actor represents a systemic failure to impose sufficient costs on the PMC as a corporation to provide an economic disincentive to human rights abuses. Beyond this limited accountability under the UCMJ, there is also a limited licensing process under the International Traffic in Arms Regulations (ITAR).[53] Under ITAR, the State Department and Defense Department both have some inputs into licensing of PMC operations, but "neither the companies nor independent observers are exactly clear about how the process works."[54] Furthermore, once a license is granted there are no follow-up requirements, and there is no requirement to inform Congress of licensing for contracts of less than $50 million.[55]

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[49] *See* Neutrality Act of 1937, ch. 146, 50 Stat. at 122.
[50] Uniform Code of Military Justice, 10 U.S.C. 801-946 (2000).
[51] The Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. 3261-67 (2000).
[52] *See Agreement Between the Department of the Interior and CACI Premier Technology, Inc.*, No. NBCHA010005 (2000), *available at* http://www.publicintegrity.org/docs/wow/CACI_ordersAll.pdf.
[53] 22 C.F.R. § 120.1 (1995).
[54] Deborah D. Avant, *Privatizing Military Training*, FOREIGN POL'Y IN FOCUS, May 2000, *available at* http://www.foreignpolicy-infocus.org/briefs/vol5/v5n17mil.html.
[55] *See* Bruce D. Grant, *U.S. Military Expertise for Sale: Military Consultants as a Tool of Foreign Policy*, NAT'L DEF. U., Essays 1998, at 89 (1998).

In South Africa, the 1997 passage of the Regulation of Foreign Military Assistance Bill signaled a sea-change in their regulatory regime.[56] Prior to this time, South Africa had hosted the most notorious of PMCs, Executive Outcomes. Under the provisions of the 1997 bill, the South African government must approve each contract signed by any PMC operating from its territory.[57] This requirement alone was enough to cause Executive Outcomes to dissolve into numerous subsidiary PMCs that continue global operations from bases outside South Africa.[58]

The United Kingdom, another major international hub for PMCs, has virtually no regulations governing their operations.[59] The UK is actively considering how to regulate PMCs, and has produced a "Green Paper" that outlines potential regulatory options.[60] The proposal immediately came under fire from Parliament,[61] and one minister noted that the attempt to create a regulatory scheme has been "nightmarishly complex."[62]

While no nation has managed to untie this Gordian Knot with an effective regulatory scheme, some commentators have suggested that the problem can be solved through transparent contracts and an type of Lex Mercata for mercenaries.[63] Such a proposal would create a normative scheme of language that should be included in PMC contracts, and that would guarantee liability for misbehavior. However, the powerful political and financial incentives to maintain the status quo may be an insurmountable

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[56] Regulation of Foreign Military Assistance Bill, 1997, Bill 54D-97 (GG), *available at* http://www.gov.za/gazette/bills/197.pdf.
[57] *Id*.
[58] *Id*.
[59] Victoria Burnett et al., *From Building Camps to Gathering Intelligence*, FIN. TIMES, Aug. 11, 2003, at 13.
[60] U.K. FOREIGN & COMMW. OFF., PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION (2002), *available at* http://www.fco.gov.uk/Files/kFile/ mercenaries,0.pdf.
[61] Paul Waugh, *"Mercenaries as Peacekeepers" Plan Under Fire*, INDEPENDENT, Feb. 14, 2002, at 8.
[62] Joshua Chaffin et al., *Foreign Office Faces Opposition to Regulation*, FIN. TIMES, Apr. 18, 2001, at 4.
[63] *See* Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM AND MARY L. REV. 135, 199-206 (2005).

obstacle to the creation of such a normative environment. Additionally, the entire process depends on a level of contractual transparency that does not currently exist. Within the United States, the Freedom of Information Act (FOIA) does not apply to the actions of private contractors because while the terms of the contract are subject to public release under FOIA, contractors are granted an essentially limitless loophole to deny the release of any information which they determine to contain "trade secrets and commercial or financial information."[64] Additionally, there are many valid national-security justifications to limit PMC contract transparency such as the need to maintain confidentiality of intelligence sources and methods, sensitive military capabilities, and the desire to control access to information about military force structure and order of battle. Secrecy seems likely to be a persistent feature of PMC contracts, yet without a dramatic increase in transparency there is little chance for the successful regulation of PMCs through contractual norms.

**IV. PMC Regulation Through Civil Liability**

In the absence of effective regulatory regimes, there may seem to be little chance of holding PMCs accountable for their actions. Many NGOs and PMC victims are attempting, however, to cobble together a de-facto international regulatory regime out of a diverse mix of existing statutes from various judicial systems. Thus far, the majority of these efforts have attempted to leverage existing US statutes such as the Alien Tort Claims Act (ATCA) and the Racketeering Influenced Corrupt Organizations Act. While these plaintiffs have had limited or no success to date, there are cases currently pending that may lay the groundwork for holding PMCs accountable for violations of

[64] 5 U.S.C. § 552(b)(4) (2000).

international norms within the US judicial system—or that may carve out generous immunity from such liability.

To date, the Alien Tort Claims Act has been the most popular vehicle to attempt to hold PMCs liable for human rights violations. These attempts stem from the holding in the Sosa case that the US court system is available for tort claims that are founded upon violations of a narrow class of offenses that are clearly in violation of established international law.[65] While Sosa did open the door for actions against PMCs, the vague and unclear prohibition of mercenarism under international law certainly does not provide a cause of action under the Supreme Court's narrow acceptance of ATCA claims. As a result, victims and advocate groups hoping to take PMCs to court have been faced with the much more difficult challenge of proving one of the "very limited category"[66] of violations recognized in Sosa such as rape, torture, murder, or forced labor. While the holding in Sosa clarifies the scope of the ATCA as a tool to hold PMCs accountable, the Political Question Doctrine also creates serious problems for those who would use the ATCA in actions that may harm US foreign policy considerations.

The case of Sarei, et al. v. Rio Tinto, et al. is illustrative of the political problems of using the Alien Tort Claims Act as a means of holding PMCs accountable.[67] In Sarei, residents of Papua New Guinea sued the international mining consortium Rio Tinto and other defendants on several grounds, including alleged war crimes committed by a spin-off of the South African PMC Executive Outcomes, Sandline International.[68] In July,

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[65] *Sosa v. Alvarez-MacHain, et al*., 542 U.S. 1 (2004).
[66] *Id.*
[67] *Sarei, et al. v. Rio Tinto, et al*., 221 F. Supp.2d 1116 (C.D. Cal. 2002) (in June 2002 the conditional was removed and the dismissal made final. Plaintiffs have appealed the dismissal to the 9th Circuit Court of Appeals).
[68] *Id*.

2001, the Court denied Rio Tinto's motions to dismiss on grounds of forum non conveniens and failure to state a claim.[69] However, the Court made the possibility of judiciability conditional pending an evaluation by the US State Department of the potential effects of this action on US foreign policy interests. In July, 2002, the Court dismissed all claims under the Political Question Doctrine following the State Department's reply that continuation of the case would "risk a potentially serious adverse impact on the [Papua New Guinea] peace process, and hence on the conduct of United States foreign relations."[70] Opponents may claim that the State Department's response was motivated more by financial and political concerns than by the desire to protect human rights against PMC operations. However, one issue is clear: if every ATCA case permits transient political considerations to trump principles of international law, then surely the ATCA is not a valid mechanism for the broader regulation of PMCs according to those international legal principles. While the ATCA may be a valid tool for enforcing clear violations of human rights in the absence of foreign policy concerns, as was demonstrated by Doe v. Unocal,[71] it is not a panacea to address the closely linked political and human rights considerations presented by most PMC operations.

One of the most troubling episodes of recent PMC misconduct is that of DynCorp in Bosnia. Several DynCorp employees allegedly participated in trafficking women for prostitution, ran an underage prostitution network, and participated in other illegal activities while in working under contract for the Department of Defense in 1999.[72]

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[69] *Id.*
[70] *Id.*
[71] *Doe v. Unocal*, 110 F. Supp. 2d. 1294 (C.D. Cal. 2000) (Unocal settled out of court after a three judge panel of the 9th Circuit Court of Appeals affirmed that Unocal was liable under the Alien Tort Claims Act).
[72] *See* Kelly Patricia O'Meara, *DynCorp Disgrace*, INSIGHT, 14 January, 2002, *available at* http://www.corpwatch.org/article.php?id=11119.

While no DynCorp employee was ever held criminally liable for these actions, despite several employees confessing to the behavior in a US Army CID investigation,[73] Kathryn Bolkovac and Ben Johnston were fired after reporting the offenses to superiors.[74] Both Bolkovac and Johnston brought suit for wrongful termination; Bolkovac won her suit with DynCorp in a UK court and was awarded £110,000. Johnston brought suit in a Texas court under the Racketeer Influenced and Corrupt Organizations Act (RICO). Johnston's suit was settled out of court after Bolkovac won her case.[75] The novel issue presented here is the potential to use the RICO statute to impose a peripheral liability on PMCs that commit violations abroad. However, despite the importance of protecting whistleblowers as part of a larger scheme to use normative pressures to govern PMC activity, the RICO approach does not address the core of the problem—no liability has been imposed for the actual violations allegedly committed by DynCorp employees, and no restitution has been paid to foreign victims. This failure to impose liability is particularly concerning considering DynCorp's subsequent record of abuses: DynCorp employees have been implicated in abuses in Afghanistan, Iraq, and Ecuador, all stemming from contracts awarded *after* the Bosnia affair was exposed.[76] The Deputy Commander of the Third Infantry Division in Iraq summarized the behavior of DynCorp employees, saying that "These guys run loose in this country and do stupid stuff. There's no authority over them, so you can't come down on them hard when they escalate force... They shoot people, and someone else has to deal with the aftermath. It happens all over

[73] *Id*.
[74] *Id*.
[75] *See* http://www.publicintegrity.org/wow/bio.aspx?act=pro&ddlC=17, last visited May 11, 2006.
[76] *Id*.

the place."[77] Clearly, attempts at imposing peripheral liability through RICO have failed to reign in PMC behavior.

Many PMC firms are not, however, waiting for a test case to establish a means of securing liability for violations committed overseas. Instead, they are actively working to eliminate their liability under the Defense Base Act of 1941.[78] General Counsel for the PMC Blackwater USA laid out an affirmative defense to potential liability problems, utilizing the liability provisions within the Defense Base Act to say "look—we can do anything we want and not be held accountable."[79] This strategy is currently being tested, as the families of the four Blackwater employees killed in Faluja on March 31, 2004, have brought a wrongful death lawsuit against the firm. [80] While this lawsuit alleges that Blackwater's misconduct led to the employees death, Blackwater's law firm, Greenberg Traurig, hopes to use this case as a vehicle to dramatically limit Blackwater's overall liability for its actions overseas.[81] Their legal theory is that the Defense Base Act, which requires that all government contractors purchase a fixed liability insurance plan for their activities, also has the effect of limiting their total liability to those claims covered under this mandatory insurance program.[82] If this strategy is successful, the case may create a blanket liability shield for PMC activity.

While the potential to hold PMCs liable under US law looks slim, the prospects appear no brighter overseas. The few nations that retain some form of viable universal

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[77] *See* Rene Merle, *Storm-Racked Parish Considers Hired Guns*, WASHINGTON POST, Mar. 14, 2006, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/03/13/AR2006031301777_pf.html.
[78] Defense Base Act, 42 U.S.C. §§ 1651-1654 (1988).
[79] Jeremy Scahill, *Blood is Thicker than Blackwater*, THE NATION, Apr. 20, 2006, *available at* http://www.commondreams.org/views06/0420-22.htm.
[80] *Id*.
[81] *See Id*.
[82] *See* http://www.cpa-iraq.org/PSD/insurance.pdf (last visited Mar. 11, 2006).

jurisdiction statute to bring international crimes into their judicial system have proven very reluctant to step into the politically-charged minefield of PMC liability. Most recently, German courts have refused to hear the claims of Abu Ghraib victims against the US PMCs Titan and CACI in their courts despite the potential under Germany's universal jurisdiction statute.[83] While the risk-reward calculation may continue to compel some nations to try individual defendants under such universal jurisdiction statutes, the prospects for bringing well connected and financed PMCs into court on such grounds look slim.

**V. Conclusion & Future Concerns**

Today's rapidly growing marketplace for private military and security functions is essentially unregulated. While there are numerous theories of how to resolve this problem ranging from instilling a sense of corporate social responsibility in PMCs to holding them liable for their misconduct under a variety of national statutes, none of them seem at all likely to succeed. Furthermore, the escalating record of abuses and misconduct by PMCs highlights that this is not a problem that can simply be ignored. If anything, it has the potential to become far more serious. While some commentators have suggested that privatization of security and military functions will help to create a more peaceful world,[84] recent history suggests otherwise. Security as a commodity that is provided as a function of the market will create the situation in which derivatives of security—fundamental human rights and freedoms—also become market commodities. Such a situation is clearly and directly in contradiction with the goals and aspirations of

[83] *See* Reuters, *supra* note 48.
[84] *See* Robb, *supra* note 1.

the international legal community, for a right cannot be fundamental and universal and at the same time available only to those who can afford to pay. While privatization of security functions may be an inevitable result of globalization and free trade, this privatization does not have to lead to the commodification of fundamental rights. Controlled privatization within a comprehensive and rigorous international regulatory regime, coupled with an effective enforcement capability, could capture the potential cost-savings of privatization while safeguarding our fundamental rights. Today, however, we have put the cart well before the horse, with privatized security and military functions racing far ahead of the meager efforts to regulate them. The consequences of this failure are already echoing around the world, creating impacts far outside the Western security paradigm. Where security has already become a commodity, owing to the failed promises of national and international programs, alternative security providers such as the Taliban in Afghanistan, the Moro Islamic Liberation Front in the Philippines, and the private paramilitary groups in Colombia are demonstrating that a world with freely privatized security is also a world without fundamental rights and freedoms.

We stand now at a fork in the road: the world is rapidly but almost imperceptibly moving towards security as a market function. If we hope to uphold a set of supra-market standards in areas like human rights, privacy, and freedom, then the world community must act to bring security functions back within the publicly regulated realm. Whatever the solution, there is a critical need for better regulation of private military and security functions of all types—hopefully awareness of this legal vacuum will be the first step in the path to a collective, international solution.