GOING TO WAR WITH THE ARMY YOU CAN AFFORD: THE UNITED STATES, INTERNATIONAL LAW, AND THE PRIVATE MILITARY INDUSTRY

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I. INTRODUCTION

While addressing soldiers stationed at a remote military camp in Iraq in the fall of 2004, then Secretary of Defense Donald Rumsfeld remarked infamously, "you go to war with the army you have, not the army you might want or wish to have at a later time."[1] In reality, the United States and other economically developed nations go to war not just with the armies they have, but with the private armies they can afford. Private military companies ("PMCs," also referred to as "private military firms," "private security contractors," and other like titles) play an unquestionably prominent role in the twenty-first century military apparatus, offering logistical support, strategic consulting, and frontline combat operations.[2] The modern world dictates that states, individuals, corporations, and international organizations need military security around the globe, and private companies appear ready to meet this task.[3]

As long as political communities have waged war they have relied on paid foreign assistance. Whether via individual soldiers-for-hire – the archetypal "mercenary" – or more formal organized groups, specialization in war emerged early in the supply and demand economy.[4] Until the seventeenth century, the practice of individuals fighting for the highest bidder prevailed across Europe.[5] The Peace of Westphalia transformed armies and soldier recruitment into a more state-centric process, leading states to contract their troops to other friendly states and to sell licenses permitting foreign recruitment.[6] This state-to-state process allowed

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[1] Eric Schmitt, *Troops' Queries Leave Rumsfeld on the Defensive*, N.Y. TIMES, Dec. 9, 2004, at A1.

[2] *See* P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 88 (Robert J. Art, et al. eds., Cornell University Press 2008) (2003) [hereinafter SINGER, CORPORATE WARRIORS].

[3] *Id.* at 9-18 (noting that PMC customers include "'legitimate sovereign states, respected multinational corporations, and humanitarian NGOs").

[4] *Id.* at 19-20 ("Hiring outsiders to fight your battles is as old as war itself.").

[5] Sarah Percy, *Morality and Regulation*, *in* FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 1, 12 (Simon Chesterman & Chia Lehnardt eds., Oxford University Press 2007) ("Until the sixteenth century, the practice of individual mercenaries organizing bands and selling their services to the highest bidder was widespread; by the seventeenth century, it had largely disappeared.").

[6] *Id.*("The mercenary trade continued in the sale of entire regiments by one state to another, and by states selling licenses to other states that would allow the recruitment of private citizens."); DEBORAH D. AVANT, THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY 28-29 (Cambridge University Press

thousands of German soldiers to supplement British regulars during the colonial era, a practice the Declaration of Independence decried as "totally unworthy . . . of a civilized nation."[7] States continued to gain relevance into the 1800s, as they supplanted declining overseas chartered trading companies, such as the English East India Company, as sources of international political, economical, and military stability.[8] Classical mercenarism did enjoy a brief return to prominence when colonial interests employed their services during the decolonization of the 1950s and 1960s, but international condemnation and the practice's racial subtext only strengthened the norm against the use of for-profit private actors.[9] Yet since the end of the Cold War, increased privatization and globalization, as well as rising numbers of private (non-state) conflict actors spawned a truly global industry that generates roughly $100 billion per year.[10]

As the private military industry thrives, domestic and international law struggles to keep pace. States, including the United States, have passed laws to regulate the industry, but domestic legislation faces jurisdictional and administrative problems in affecting the behavior of an industry that operates transnationally.[11] International law in the twentieth-century reflected both public condemnation and government indifference by the western powers, resulting in an ill-defined legal regime that undercut

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2005) ("Stretching from the twelfth century through the Peace of Westphalia, . . . [c]hartered companies . . . were an instance of state-delegated commercial control over violence.").

[7] AVANT, *supra* note 6, at 22 ("In the American Revolution, the Germans sent organized units and the British paid the German rulers."); THE DECLARATION OF INDEPENDENCE para. 27 (U.S. 1776) ("[King George III] is, at this time, transporting large [a]rmies of foreign [m]ercenaries to complete the works of [d]eath, [d]esolation, and [t]yranny, already begun with circumstances of [c]ruelty and [p]erfidy, scarcely paralleled in the most barbarous [a]ges, and totally unworthy [of] the Head of a civilized [n]ation").

[8] SINGER, CORPORATE WARRIORS, *supra* note 2, at 36-37 ("[T]he trading companies began to weaken as the political environment stabilized. Times changed, and the firms became victims of their own earlier successes.").

[9] *Id.* at 37 ("Colonial interests who wanted to remain influential in their old stomping grounds funded [mercenaries] . . . . The use of mercenaries thus became a symbol of the racism that hindered the self-determination of the new states, further strengthening international opinion against private actors in warfare.").

[10] *Id.* at 50-51, 78 ("Best estimates are of annual market revenue in the rand of $100 billion, indicating its health and power.").

[11] SARAH PERCY, REGULATING THE PRIVATE SECURITY INDUSTRY 63 (Tim Huxley ed. Routledge 2006) ("At the domestic level, the problems posed by extraterritorial jurisdiction and the difficulties of creating a licensing regime that strikes a balance between effective measures for oversight, and administration and commercial concerns, make creating regulation challenging.").

mercenary activity in certain limited situations.[12] Yet the international legal regime, namely that propagated by the United Nations, neither responds to the frequency, scope, and conduct of present-day PMCs, nor addresses the distinctions between mercenaries and the modern industry.[13] Despite this paucity of legal regulations and an ambiguous status in international law, the ability of PMCs to respond efficiently to twenty-first century strategic and military challenges suggests they will continue to exist going forward[14] Though a formal international legal regime may be the ideal means to regulate PMCs, reality shows a rapidly growing industry serving state interests and subject to state law.

This paper explores recent developments in PMC use, United States policy, and domestic and international law. Part I argues that contemporary PMC use by the United States is distinct from traditional mercenarism but still exists within the existing international legal regime. Part I also suggests that the private military presence will increase and will likely be governed by domestic law. Part II assesses in detail the current state of PMC activity by outlining the growth of the modern private military industry since the end of Cold War, explaining the essential role played by PMCs in Iraq, and addressing the rapidly evolving body of applicable U.S. law. Part III demonstrates the untenable nature of current international norms regarding mercenary usage, while explaining the differences between classical mercenaries and modern PMCs and discussing the fragile legal vacuum which currently tolerates PMCs use. Part IV considers the potential evolution of the industry, consistent with the trends in usage by the United States and domestic and international law, and sketches an example of how a private humanitarian intervention regime might function. Finally, Part V summarizes the paper and concludes that PMCs will take on an expanded role in future military operations, governed by domestic law.

II. The Private Military Industry Today

A. *Facts, Definitions, and Contemporary History*

Roughly 200 private military companies operate worldwide.[15] The expanding industry generates around $100 billion annually, although a lack of transparency makes exact numbers difficult to estimate.[16] Individ-

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[12] David Shearer, Private Armies and Military Intervention 16-28 (Gerald Segal ed., Oxford University Press 1998).

[13] Percy, *supra* note 11, at 63-64. ("The most significant impediment to future international regulation is that the United Nations . . . persists in treating [PMCs] and mercenaries in the same way and through the same office.").

[14] P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 Colum. J. Transnat'l L. 521, 522-23, 547-49 (2004) [hereinafter Singer, *War, Profits*].

[15] Percy, *supra* note 11, at 11.

[16] Singer, Corporate Warriors, *supra* note 2, at 78.

ual contracts with governments, companies, and organizations begin in the hundreds of thousands of dollars, but some major PMCs have been able to enter into one or two billion-dollar contracts.[17] PMCs "with publicly traded stocks grew at twice the rate of the Dow Jones Industrial Average in the 1990s."[18] According to one report, the U.S. Department of Defense entered into more than 3,000 contracts with U.S.-US-based PMCs between 1994 and 2002, estimated at a total worth of $300 billion.[19] While governments remain the industry's primary clients, increasing numbers of multinational corporations, nongovernmental organizations, and regional organizations employ PMCs.[20] The United Nations, for example, relies heavily on private forces for logistical support of its demining programs and disaster response efforts, while corporations employ PMCs to protect their investments in high political-risk areas.[21]

A diverse range of companies offering a host of services fall under the broad private military canopy. In a general sense, these companies perform security functions formerly thought to be within the state's exclusive domain.[22] More specifically, most scholars classify PMC activity into three categories: logistical "military support firms," advice and training "military consulting firms," and operational "military provider firms."[23]

1. Military Support Firms

Military support firms perform logistical and adjunctive tasks such as providing food, laundry services, and maintenance at military bases, as well as some intelligence and transportation services.[24] As has been the case in many other industries, specialized supply-chain and logistics companies perform their duties more efficiently than the military ever could.[25] Logistical support firms are distinctly militaristic in nature and perform tasks traditionally reserved for the state, even though they

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[17] *Id.* at 80.

[18] AVANT, *supra* note 6, at 8 (citing *Jack Kelly, Safety at a Price: Security Is a Booming, Sophisticated, Global Business*, PITTSBURGH POST-GAZETTE, Feb. 13, 2000, at A1.).

[19] *Id.*

[20] *See* SINGER, CORPORATE WARRIORS, *supra* note 2, at 80 (discussing the expanded use of PMCs by corporations, international organizations, and nongovernmental organizations).

[21] *Id.* at 81-82.

[22] *Id.* at 17; Andrew Bearpark & Sabrina Schulz, *The Future of the Market*, *in* FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES, *supra* note 5, at 239, 242.

[23] AVANT, *supra* note 6, at 16; PERCY, *supra* note 11, at 11; SINGER, CORPORATE WARRIORS, *supra* note 2, at 91 (most writers employ his taxonomy, as does this paper).

[24] PERCY, *supra* note 11, at 11; SINGER, CORPORATE WARRIORS, *supra* note 2, at 97.

[25] SINGER, CORPORATE WARRIORS, *supra* note 2, at 97.

appear the furthest removed from the classical mercenary and encompass nonmilitary functions,.[26] Still, given the clear distinction between combat and support, military support firms do not raise significant legal or regulatory challenges and support virtually all U.S. military deployments.[27]

2. Military Consulting Firms

Military consulting firms and military provider firms perform services traditionally identified with the armed forces, and thus raise more complex legal, moral, and political issues than do military support firms.[28] Consulting firms "offer strategic, operational, and/or organizational analysis."[29] They do not operate on the battlefield, though they often organize what occurs there.[30] By applying private-sector consulting methods and hiring brilliant ex-military minds, military consultant firms offer their clients a level of expertise that few public armies can equal.[31] In addition to management-level problem solving, military consultant firms also engage in direct, on the ground training of both military personnel and domestic police forces.[32] As a technical matter, military consulting firms stop one step before the battlefield. At times, however, combat situations have blurred the distinction between training and implementation.[33]

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[26] SINGER, CORPORATE WARRIORS, *supra* note 2, at 97; *see, e.g.,* KBR, Inc., A Leading Global Engineering, Construction and Services Company, http://www.kbr.com/ (last visited Apr. 6, 2009) (website of Halliburton subsidiary Kellogg, Brown and Root (KBR), arguably the most prominent military support firm, as well as an illustrative example of the sector).

[27] PERCY, *supra* note 11, at 11; SINGER, CORPORATE WARRIORS, *supra* note 2, at 137.

[28] PERCY, *supra* note 11, at 11-12 (noting that private logistical support service companies "do not pose important regulatory challenges".

[29] SINGER, CORPORATE WARRIORS, *supra* note 2, at 95.

[30] *Id.* at 95; *see also id.* at 119-35; AVANT, *supra* note 6, at 18-22 (discussion of Military Professional Resources Incorporated (MPRI), perhaps the most well-known military consultant, which has worked on projects ranging from running the domestic ROTC program to training the Bosnian army).

[31] SINGER, CORPORATE WARRIORS, *supra* note 2, at 96 ("The primary advantage of using outside consultants is access to and delegation of a greater amount of experience and expertise than almost any standing public military force in the world can match.").

[32] AVANT, *supra* note 6, at 18, 20; *see, e.g.* BBC News, *US Firm to Rebuild Iraqi Army*, http://news.bbc.co.uk/2/hi/business/3021794.stm (last visited Nov. 8, 2009) (Vinnell, a subsidiary of Northrop Grumann, received a contract from the US government to train Iraqi soldiers in the aftermath of the 2003 Iraq War).

[33] SINGER, CORPORATE WARRIORS, *supra* note 2, at 97 ("The line between advising and implementing, however, sometimes can be quite fuzzy . . . ."); *see e.g.* PERCY, *supra* note 11, at 13-14 (reviewing why "defining the industry and differentiating it from other private actors is not so simple").

3. Military Provider Firms

Military provider firms focus on the front line, tactical environment and engage in actual combat activities.[34] These firms bear the closest resemblance to traditional mercenaries and perform "core" military functions, so they attract the most negative attention from the public, the media, and government officials around the world.[35] Military provider firms offer clients both full units and more specialized "force multipliers."[36] In the former case, a small number of firms have deployed armed personnel in battalion-sized units on the ground (500 to 1500 troops), reinforced by artillery, helicopters, aircrafts, ships, and various tactical specialists.[37]

After their infamous work with embattled governments in Africa in the 1990s, PMCs today generally do not openly offer combat services.[38] Instead, military provider firms provide "force multipliers" and supplement existing armies with tactical, highly specialized services.[39] Often, PMCs provide security for military, political, and corporate individuals and installations in states like Iraq and Afghanistan.[40] Security and polic-

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[34] SINGER, CORPORATE WARRIORS, *supra* note 2, at 92 (stating that military provider firms have a "focus on the tactical environment").

[35] AVANT, *supra* note 6, at 17 ("A small number of contracts have stipulated services at the very tip of the spear that most closely resemble 'core' military competencies – armed operational support on the battlefield."); SINGER, CORPORATE WARRIORS, *supra* note 2, at 95 (stating that military provider firms are "the most controversial sector of the private military industry").

[36] SINGER, CORPORATE WARRIORS, *supra* note 2, at 93 ("Firms within this sector tend to offer clients two types of contracts, providing either a) overall unit packages, or b) specialized 'force multiplier.'").

[37] *Id.* at 93-94 ("In the first case, the firm provides the client a stand-alone tactical military unit . . . [providing] large-scale, combined-arms units that could operate independently on the battlefield. In Sierra Leone, [they] deployed a battalion-sized unit on the ground, supplemented by artillery, transport and combat helicopters, fixed wing combat and transport aircraft, a transport ship, and all types of ancillary specialists (such as first aid and civil affairs).").

[38] *See* PERCY, *supra* note 11, at 12 ("No PSC openly today offers combat services, although in 2006 the American company Blackwater suggested that it would be able to provide a battalion-sized group of peacekeepers for crises like the one in Darfur if authorised by the United Nations."); *see also* AVANT, *supra* note 6, at 17 n.4 (describing the involvement of various PMCs in Africa and noting that firms are now "less public about their dealings").

[39] SINGER, CORPORATE WARRIORS, *supra* note 2, at 94 ("[I]t is more common for military providers to offer the second type of contract, as 'force multipliers.'").

[40] PERCY, *supra* note 11, at 12. U.S.-based Blackwater Worldwide provided security for numerous US interests, including the Iraq War. Dana Hedgpeth, *Blackwater Sheds Name, Shifts Focus*, WASH. POST, Feb. 14, 2009, at D. On February 13, 2009, Blackwater Worldwide announced that the company changed its name to "Xe," as it shifts its business focus away from private security and seeks to distance itself from the negative reputation garnered in Iraq. This process continued when

ing often entails counter-terrorism, counter-insurgency, and other special operations, in which firms possess large scale military capabilities. Although they are formally positioned as security forces targeting criminal elements, they occasionally engage in activities that resemble traditional combat, due to the nature and scope of international security threats.[41]

4. A Brief and Recent History

Although this paper focuses primarily on the current and future status of the private military industry, the uniqueness of the present situation cannot be understood without a degree of historical context. Like any burgeoning industry, the increase in PMC activity in the 1990s can be traced to supply and demand.[42] On the supply side, the end of the Cold War and the fall of South Africa's Apartheid government resulted in massive military downsizing around the world, thereby creating a glut of experienced personnel ready for private contracting.[43] The Cold War spawned half a century of unprecedented military expansion, while South Africa relied on a sophisticated military to enforce its regional and domestic policies; many of these forces seemingly vanished overnight.[44] Moreover, dismantled military units in less stable states (primarily in the Eastern Bloc) put massive arms stocks for sale on the open market.[45]

On the demand side, PMC supply created its own demand, as recently demilitarized states immediately needed newly-formed private firms to

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founder and CEO Erick Prince resigned his position on March 2, 2009. For the sake of consistency, this paper will continue to refer to the company as Blackwater. Suzanne Simons, *Blackwater Founder, CEO Resigns*, CNN, Mar. 2, 2009, http://www.cnn.com/2009/US/03/02/blackwater.prince/index.html.

[41] AVANT, *supra* note 6, at 21-22 (describing the duties that make PMCs appear similar to regular military groups).

[42] *Id.* at 30 ("As would be the case in the development of any market, the increase in private security can be tied to supply and demand.").

[43] *Id.* at 30-31 ("In the 1990s, the supply factors came from both local (the end of apartheid in South Africa) and international (the end of the Cold War) phenomena that caused militaries to be downsized in the late '80s and early '90s. Military downsizing led to a flood of experienced personnel available for contracting.").

[44] SINGER, CORPORATE WARRIORS, *supra* note 2, at 53 ("Another major shift on the international market of security was the deluge of ex-soldiers onto the open market because of downsizing and state disappearance after the end of the Cold War. Thus, the private military labor pool for both conflict groups and private firms broadened and cheapened.").

[45] *Id.* at 54 ("The most common and cheapest weapons on the market are usually ex-Soviet equipment, sold off directly by Russia or dumped by satellite states that had disappeared, downsized, or reconfigured their militaries to meet Western standards.").

fulfill the tasks formerly performed by their expansive militaries.[46] Additionally, emerging states seeking to join western institutions, weak or failed states, international nongovernmental organizations, and disaffected groups around the world all took advantage of PMCs.[47] The cessation of Cold War spheres of support and intervention allowed for states to fail, released suppressed internal conflicts, and created social and economic problems.[48] Criminals, insurgents, and other private actors took advantage of these new forms of instability.[49] In all of these cases, PMCs emerged ready and able to address the challenges presented.

B. *Private Military Companies and Iraq*

As the United States' single largest military commitment in over a decade – and the first significant engagement in the post-Cold War world – the Iraq War has thrust the private military industry into the strategic, political, and public forefront.[50] The wordplay is dramatic, but the reality stark: private military forces play an unprecedented role in the conflict.[51] Private companies provide their full gamut of services in Iraq, from feeding troops, to maintaining billion-dollar weapons systems, to providing paramilitary security activities.[52] Their total numbers prove difficult to tally, given the diversity of services provided and the volume of private contracts, but even the most conservative estimates place the number of PMC personnel in Iraq around 50,000.[53] By nearly all counts, private mil-

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[46] *Id.* at 231 ("In effect, the phenomenon that economists call 'Say's Law' might be at work in the security market: the mere existence of a supply of firms will call forth added demand for their services."); AVANT, *supra* note 6, at 31 ("Concomitant with the increase in supply was an increase in the demand for military skills on the private market – from western states that had downsized militaries, from countries seeking to upgrade and westernize their militaries as a way of demonstrating credentials for entry into western institutions, from rules of weak or failed states no longer propped up by superpower patrons, and from non-state actors such as private firms, INGOs and groups of citizens in the territories of weak or failed states.").

[47] AVANT, *supra* note 6, at 31.

[48] *See* SINGER, CORPORATE WARRIORS, *supra* note 2, at 49-52.

[49] *Id.* at 53.

[50] P.W. Singer, *Outsourcing War*, FOREIGN AFF., Mar/Apr. 2005, at 119, 122 ("Not only is Iraq now the site of the single largest U.S. military commitment in more than a decade; it is also the marketplace for the largest deployment of PMFs and personnel ever.").

[51] The wordplay has included phrases such as "the first privatized war," "the coalition of the billing," and private military "on steroids." *Military-industrial Complexities*, THE Economist, Mar. 29, 2003 at 56; *see also* Singer, *supra* note 50 at 122 ("President George W. Bush's 'coalition of the willing' might thus be more aptly described as the 'coalition of the billing.'").

[52] Singer, *War, Profits*, *supra* note 14, at 522-23.

[53] *See* SINGER, CORPORATE WARRIORS, *supra* note 2, at 245-46 (The 50,000 figure is provided by the industry group Private Security Companies of Iraq and limits its

itary forces outnumber the troops sent by all other coalition members combined, and the industry has suffered more total causalities than the entire non-U.S. allied force.[54]

To further complicate matters, Iraq required a massive reconstruction program following the ouster of Saddam Hussein's government. The Coalition Provisional Authority ("CPA" or the "Coalition") gained formal legal control of Iraq through United Nations Security Council Resolution 1483, which affirmed the role of the U.S. and U.K., and "the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command."[55] Under Administrator Paul Bremer, the CPA had the power to issue laws and regulations until Iraq reestablished a stable government.[56] During the 14-month period that the CPA formally governed Iraq (April 21, 2003 to June 28, 2004), the Coalition needed and welcomed PMCs into its rebuilding efforts. Most significantly, a June 2003 CPA Public Notice established the legal framework in which PMCs and other foreign companies would operate.[57] The notice stated:

> In accordance with international law, the CPA, Coalition Forces and the military and civilian personnel accompanying them, are not subject to local law or the jurisdiction of local courts. With regard to criminal, civil, administrative or other legal process, they will remain subject to the exclusive jurisdiction of the State contributing them to the Coalition.[58]

Thus, as "civilian personnel," PMCs were not subject to Iraqi laws or jurisdiction so long as the CPA governed Iraq.

As part of the transition from Coalition control to the Iraqi Interim Government (and the subsequent transitional and permanent governments), all CPA "laws, regulations, orders, memoranda, instructions and directives remain[ed] in force until rescinded or amended by the Iraqi

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count to armed personnel. Other figures take a broader approach by including all contractors in Iraq, and place the number around 180,000 – compared to 160,000 US military personnel).

[54] *Id.* at 246.

[55] S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

[56] *See, e.g.,* Coalition Provisional Authority ("CPA") Order Number 1: De-Ba'athification of Iraqi Society, CPA/ORD/01 (May 16, 2003), *available at* http://www.iraqcoalition.org/regulations/20030516_CPAORD_1_De-Ba_athification_of_Iraqi_Society_.pdf (removing Ba'athist Party members from power).

[57] Office of the Administrator of the Coalition Provision Authority, Baghdad, Iraq, Public Notice Regarding the Status of Coalition, Foreign Liaison and Contractor Personnel (June 26, 2003), *available at* http://www.iraqcoalition.org/regulations/20030626_20030626_CPANOTICE_Foreign_Mission_Cir.html.pdf).

[58] *Id.*

legislature."[59] The CPA, therefore, could ensure that the existing favorable legal climate for PMC activity continued indefinitely. CPA Order No. 17, signed the day before the formal transition, granted contractors immunity from "Iraqi laws or regulations in matters relating to the terms and conditions of their [c]ontracts."[60] Further, contractors received immunity "from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a [c]ontract or any sub-contract thereto."[61] While this language might barely affect a "military support" contract to supply soldiers with food services, it would prove significant for "military provider" security contracts. That is, a food service contractor was unlikely to commit any serious violations of Iraqi law, while this was a real possibility for a de facto soldier operating under a security contract. Order No. 17 additionally required that PMCs "respect" all orders, memoranda, instructions and regulations propagated by the CPA to govern their activity.[62] By sustaining all prior orders and memoranda, Order No. 17 required that PMCs to register with the Iraqi Ministry of Interior and the Ministry of Trade and that individual civilians demonstrate a need before being granted a weapons authorization permit.[63] In practice, these programs provided little functional oversight.[64]

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[59] CPA Order Number 100: Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority, CPA/ORD/100 (Jun. 28, 2004), *available at* http://www.iraqcoalition.org/regulations/20040628_CPAORD_100_Transition_of_Laws__Regulations__Orders__and_Directives.pdf).

[60] CPA Order Number 17 (Revised): Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq, CPA/ORD/17 (Jun. 27, 2004), *available at* http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition__Rev__with_Annex_A.pdf) [hereinafter CPA Order Number 17].

[61] *Id.*

[62] CPA Order Number 17, *supra* note 60, at sec. 4.

[63] CPA, Memorandum Number 17: Registration Requirements for Private Security Companies (PSC), at sec. 2, CPA/MEM/17 (Jun., 26, 2004), *available at* http://www.iraqcoalition.org/regulations/20040626_CPAMEMO_17_Registration_Requirements_for_Private_Security_Companies_with_Annexes.pdf; CPA Memorandum Number 5: Implementation of Weapons Control Order No. 3 (CPA/ORD/23 Ma 2003/03), at sec.4 CPA Doc. CPA/MEM/05 (Aug. 22, 2003) *available at* http://www.iraqcoalition.org/regulations/20030822_CPAMEMO_5_Implementation_of_Weapons_Control_with_Annex_A.pdf.

[64] James Cockayne, *Make or Buy? Principle-Agent Theory and the Regulation of Private Military Companies*, *in* MERCENARIES TO MARKET, *supra* note 5, at 196, 212.

C. *Recent Developments in U.S. Law*

1. Criminal Law

Iraq's young government has taken steps towards the repeal of Order No. 17, but the process has been slow and remains a work in progress.[65] At the same time, U.S. law provides for three bases of criminal accountability for the conduct of American PMCs: the Special Maritime and Territorial Jurisdiction Statute, the Military Extraterritorial Jurisdiction Act, and the court-martial system provided for in Uniform Code of Military Justice.[66]

a. *The SMTJ Statute*

First, the Special Maritime and Territorial Jurisdiction ("SMTJ") Statute has since 1790 (albeit under a slightly different title) sought to protect American citizens and property beyond U.S. borders but not yet subject to foreign jurisdiction.[67] Initially comprised of eight areas of special jurisdiction until 2001, SMTJ works as an evolving catchall and applies to: vessels on the high seas, vessels on international waterways, lands acquired by the U.S., certain islands valued for their "guano" (bird excrement used for fertilizer), aircrafts, spacecrafts, lands outside the jurisdiction of any nation, and certain vessels bound for the United States.[68] The 2001 USA PATRIOT Act added a ninth provision to the SMTJ Statute, which extended jurisdiction to offenses committed by or against a U.S. national in any place or residence within a foreign state used by missions or entities of the U.S. government.[69] Specifically, the SMTJ Statue applies to "the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States" and "residences in foreign states . . . used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities."[70]

While the 2001 modification could, in theory, extend jurisdiction to a range of overseas PMC operations, the SMTJ Statute has thus far yielded only one such prosecution.[71] In 2004, a federal grand jury in the Eastern District of North Carolina indicted former CIA contractor David A. Pas-

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[65] *See* Human Rights Watch, *Iraq: Pass New Law Ending Immunity for Contractors*, Jan. 8, 2008, http://www.hrw.org/en/news/2008/01/08/iraq-pass-new-law-ending-immunity-contractors.

[66] *See* Kevin H. Govern & Eric C. Bales, *Taking Shots at Private Military Firms: International Law Misses its Mark (Again)*, 32 FORDHAM INT'L L.J. 55, 89-92 (2008).

[67] Anthony E. Giardino, *Using Extraterritorial Jurisdiction to Prosecute Violations of the Law Of War: Looking Beyond the War Crimes Act*, 48 B.C. L. REV. 699, 715-16 (2007).

[68] 18 U.S.C. § 7(1)-(8) (2006).

[69] 18 U.S.C. § 7(9) (2006).

[70] *Id.*

[71] *See* United States v. David A. Passaro, 2004 WL 1431014 (E.D.N.C. 2004).

saro under the SMTJ Statute.[72] While working in 2003 for the CIA as an interrogator at a remote military base in Afghanistan, Passaro reportedly struck a detainee with a flashlight and kicked him in the groin.[73] The detainee died within 48 hours of the incident.[74] A jury in 2006 convicted Passaro of aggravated assault, and he currently is serving a 100-month prison term.[75] The U.S. had jurisdiction over the incident under Section 9(A) of the SMTJ statute, as a U.S. national committed an offense on U.S. military premises within a foreign state, outside the jurisdiction of any particular state or district.[76] The U.S., guided by a general presumption against the extraterritorial application of domestic legislation, has invoked SMTJ only sparingly in the past.[77] Whether the Section 9(A) modification and the Passaro conviction affect this longstanding practice remains to be seen.

b. *The MEJA*

Second, the Military Extraterritorial Jurisdiction Act ("MEJA") creates a status-based source of jurisdiction for PMC activity, although, unlike the SMTJ Statue, it does not extend jurisdiction beyond traditional territorial limits.[78] Rather, the MEJA creates criminal jurisdiction over certain offenses committed by members of the Armed Forces and by civilians (i.e. PMCs) employed by or accompanying the armed forces.[79] To fall under the statute, an offense must ordinarily be punishable by imprisonment of more than one year.[80] Increased PMC use in Iraq has challenged both the relevance and applicability of the MEJA in two ways. The Abu Ghraib incident first revealed a gap in the statute, as it only applied to civilian contractors accompanying or employed by the Department of Defense and not other departments that contract PMCs such as the State Department.[81] Next, the 2007 Nisour Square incident – in

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[72] Govern & Bales, *supra* note 66, at 90; Giardino, *supra* note 67, at 716; Indictment at 2, United States v. Passaro, No. 5:04-CR-211-1 (E.D.N.C. 2004), *available at* http://news.findlaw.com/hdocs/docs/torture/uspassaro61704ind.html.

[73] Elizabeth Dunbar, *Ex-CIA Contractor Sentenced to Prison* WASH. POST, Feb. 13, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/02/13/AR2007021300883_pf.html.

[74] *Id.*

[75] *Id.;* Press Release, Department of Justice, David Passaro Sentenced to 100 Months Imprisonment: First American Civilian Convicted of Detainee Abuse During the Wars in Iraq and Afghanistan (Feb. 13, 2007), *available at* http://charlotte.fbi.gov/dojpressrel/2007/ce021307.htm.

[76] Passaro, 2004 WL 1431014 at *2.

[77] *See, e.g.,* United States v. Neil, 312 F.3d 419, 421 (9th Cir. 2002).

[78] Giardino, *supra* note 67, at 716.

[79] 18 U.S.C. § 3261 (2006).

[80] *Id.* at § 3261(a).

[81] Giardino, *supra* note 67, at 716-17.

which Blackwater[82] personnel unloaded munitions on an unarmed Iraqi vehicle, leaving 17 dead and 24 wounded – revealed an additional drafting inadequacy, as the MEJA applied only to civilian activity "supporting the mission of the [Department of Defense]."[83] Such language meant that the act did not apply to private contractors acting alone or apart from the formal auspices of the military.[84] An additional criticism lobbied at the MEJA relates to selective and insufficient prosecution, which the Department of Justice has blamed often on a lack of legal precedent.[85]

Despite these shortcomings, recent history suggests that the MEJA might prove a viable option to prosecute PMC offenses in the future. After Abu Ghraib, Congress modified the statutory definition of an "employee" to include individuals contracted by the Department of Defense or "any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas."[86] Congress took further steps to clarify the statute in the weeks following Nisour Square, as the House of Representatives overwhelmingly passed a resolution that would apply the act to contractors "where the work . . . is carried out in an area, or in close proximity to an area (as designated by the Department of Defense), where the Armed Forces is conducting a contingency operation."[87] The House believed the modified legislation would close the gap in the existing law that enabled contractors to escape liability because they were not deemed to be supporting a Department of Defense mission at the

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[82] *See supra* note 40 regarding Blackwater's February 2009 name change.

[83] Ian Kierpaul, Comment, *The Mad Scramble of Congress, Lawyers, and Law Students After Abu. Ghraib: The Rush to Bring Private Military Contractors to Justice*, 39 U. TOL. L. REV. 407, 422 (2008) (quoting H.R. 2740, 110th Cong. (2007)). For more information on the Nisour Square shootings see James Glanz & Alissa J. Rubin, *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*, N.Y. TIMES, Oct. 3, 2007, at A1, *available at* http://www.nytimes.com/2007/10/03/world/middleeast/03firefight.html; *see also* Joe Burgess et al., Image, The Iraqi Account of the Killings, N.Y. TIMES, Sept. 21, 2007, http://www.nytimes.com/imagepages/2007/09/21/washington/20070921_BLACKWATER_GRAPHIC.html.

[84] H.R. REP. No. 110-352, at 3 (2007). *But see* Kierpaul, *supra* note 83, at 422 (arguing that both the original and revised MEJA should be held void for vagueness).

[85] David Isenberg, *A Government in Search of Cover: Private Military Companies in Iraq*, *in* MERCENARIES TO MARKET, *supra* note 5, at 82, 92; *see also* Kierpaul, *supra* note 83, at 422 (arguing that the MEJA gives too much discretion to prosecutors).

[86] 18 U.S.C. § 3267(1)(A)(i)(II) (2004).

[87] [An act] to Require Accountability for Contractors and Contract Personnel under Federal Contracts, and for Other Purposes, H.R. 2740 §2(a)(3), 110th Cong. (1st Sess. 2007).

time of their criminal conduct.[88] Questions remain regarding potential ambiguities in the language, and the Senate has yet to act on the bill.[89]

In December 2008, the Department of Justice brought charges in the Washington, D.C. District Court against five Blackwater employees and subcontractors for their role in the Nisour Square shootings.[90] The thirty-five count indictment – for voluntary manslaughter, attempt to commit manslaughter, aiding and abetting, and using a firearm in during the commission of a violent crime – was brought against the State Department contractors under 18 U.S.C. § 3267(1), the 2004 amendment to the MEJA.[91] A sixth Blackwater employee pled guilty to similar charges and offered a detailed proffer in support of the alleged criminal conduct, depicting a hectic scene in which the contractors, without warning, fired machine guns at civilian vehicles who posed no discernable threat.[92] The charges represent a significant development in PMC regulation, given both the international fury surrounding the incident and the expanded use of the MEJA to prosecute non-Department of Defense contractors.[93]

c. *The UCMJ*

As important as the recent Nisour Square charges may be, political will, legal ambiguity, judicial resources, and evidentiary problems make criminal prosecution of PMCs difficult.[94] The third source of U.S. jurisdiction, the courts martial under the Uniform Code of Military Justice ("UCMJ"), seeks to address these shortcomings. Even before the Revolutionary War, military law and jurisdiction was routinely applied to civilians accompanying armed forces into the field.[95] This practice became

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[88] *See* H.R. REP. No. 110-352, *supra* note 84, at 3.

[89] Govern, *supra* note 66, at 91; *see also* The Library of Congress, All Congressional Actions for H.R. 2740, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR02740:@@@X (last visited Nov. 7, 2009) (showing that's H.R. 2470 was "placed on Senate Legislative Calendar under General Orders" on Oct. 5, 2007).

[90] *See* United States v. Paul Alvin Slough et al., No. CR-08-360 (D.D.C. 2007), *available at* http://www.usdoj.gov/opa/documents/grandjury.pdf.

[91] *Id.*

[92] Factual Proffer in Support of Guilty Plea, ¶¶ 4, 11, United States v. Jeremy P. Ridgeway, No. CR-08-341-01 (D.D.C. 2008), *available at* http://www.usdoj.gov/opa/documents/us-v-ridgeway.pdf.

[93] *See* Ginger Thompson & James Risen, *Plea by Blackwater Guard Helps Indict 5 Others*, N.Y. TIMES, Dec. 9, 2008, at A12; *see also* Del Quentin Wilber & Karen DeYoung, *Justice Dept. Moves Toward Charges Against Contractors in Iraq Shooting*, WASH. POST, Aug. 17, 2008, at A1.

[94] Peter W. Singer, *The Law Catches Up to Private Militaries, Embeds*, BROOKINGS INSTITUTION, Jan. 4, 2007, http://www.brookings.edu/articles/2007/0104defenseindustry_singer.aspx [hereinafter Singer, *Law Catches Up*].

[95] Kara M. Sacilotto, *Jumping the (Un)Constitutional Gun?: Constitutional Questions in the Application of the UCMJ to Contractors*, 37 PUB. CONT. L. J. 179, 189 (2008).

almost invisible in recent years, however, following *United States v. Averette*, a 1970 United States Court of Military Appeals decision which narrowly construed Article 2(a)(10) of 10 U.S.C. § 802.[96] In a short opinion, the *Averette* court determined that military jurisdiction over accompanying civilians "in time of war" meant a "war formally declared by Congress."[97] Without relying directly on any binding precedent, the majority found "guidance in this area" from a string of cases in which the Supreme Court limited the applicability of military jurisdiction over civilians in various circumstances.[98] As Congress has not formally declared war since World War II, the *Averette* decision appeared to be the end of the civilian court-martial.[99]

In October 2006, the Graham Amendment to the National Defense Authorization Act for Fiscal Year 2007 made a minor change to the statutory language of 10 U.S.C. § 802 with potentially major implications for the private military industry.[100] Amidst the hundreds of pages comprising the Act (which essentially sets the Pentagon's budget), Congress eliminated the "in time of war" restriction on jurisdiction over civilians and replaced it with a broader grant of military jurisdiction "in time of declared war or a contingency operation [over] persons serving with or accompanying an armed force in the field."[101] The new law reflects a more realistic understanding of the private military industry and the nature and scope of their activities in Iraq and other modern battlefields, as it provides military officers with a direct recourse for any crimes they witness and avoids some of the logistical problems associated with international prosecution under civilian law.[102]

At the same time, the modification appears ripe for a constitutional challenge on due process, vagueness, and over-inclusiveness grounds.[103]

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[96] Jonathon Finer, *Holstering the Hired Guns*, 33 YALE J. INT'L. L. 259, 261 (2008); United States v. Averette, 19 U.S.C.M.A. 363, 365 (C.M.A 1970).

[97] Averette, 19 U.S.C.M.A. at 365.

[98] *Id.*

[99] Finer, *supra* note 96, at 261. In dicta, the *Averette* court suggested a policy-based undertone in its decision: "We emphasize our awareness that the fighting in Vietnam qualifies as a war as that word is generally used and understood. By almost any standard of comparison - the number of persons involved, the level of casualties, the ferocity of the combat, the extent of the suffering, and the impact on our nation - the Vietnamese armed conflict is a major military action. But such a recognition should not serve as a shortcut for a formal declaration of war . . . ." Averette, 19 U.S.C.M.A. at 365-66.

[100] Giardino, *supra* note 67, at 718; Singer, *Law Catches Up*, *supra* note 94.

[101] 10 U.S.C. § 802(a)(10) (2006).

[102] Singer, *Law Catches Up*, *supra* note 94.

[103] *See* Finer, *supra* note 96, at 262; Peter W. Singer, *Frequently Asked Questions on the UCMJ Change and its Applicability to Private Military Contractors*, Jan. 12, 2007, http://www.brookings.edu/opinions/2007/0112defenseindustry_singer.aspx; Giardino, *supra* note 67, at 719-20. *See generally* Sacilotto, *supra* note 95, at 188-208.

Reid v. Covert, the 1957 decision which restricted the civilian court-martial for capital offenses during times of peace, specifically endorsed the "in time of war" language in section 802(10) as "the maximum historically recognized extent of military jurisdiction over civilians . . . ."[104] A future Court may be charged with determining whether "declared war or a contingency operation" fits within or exceeds this historical maximum. Conversely, a case involving a private military employee might warrant a functional classification of the individual as member of the armed forces and not as a civilian, depending on the particular nature of their activities. This would in turn apply the entire UCMJ to the contractor. Considering the ramifications of such a classification, that decision should emanate from Congress and not a court.

In April 2008, the U.S. military charged translator Alaa Mohammed Ali with assault, the first time a civilian faced military charges since 1968.[105] Ali, who allegedly stabbed a fellow contractor while working in Anbar Province, Iraq, pled guilty to lesser chargers at a court-martial at a U.S. military base in Baghdad.[106] Procedurally, the process played out as prescribed in a March 2008 memorandum from Defense Secretary Robert M. Gates.[107] The Defense Department first notified the Justice Department and allowed them to pursue prosecution, while military investigators continued their work.[108] Only after federal prosecutors deemed U.S. federal criminal jurisdiction "to be unavailable" did military prosecution begin.[109] From a substantive perspective, however, the particular facts of the Ali case make it a less-than-ideal first application of the modified civilian court-martial. Although Ali was employed by the U.S. based Titan Group of L-C Communications, he held Canadian and Iraqi citizenship, raising questions about the appropriate venue since he had stabbed an Iraqi.[110] Ali's defense team additionally questioned the use of a military forum, portraying the dispute as a local altercation and not the sort of abuse by a military contractor that Congress had in mind when it passed the Graham Amendment.[111] In any event, Ali's guilty plea meant that the court did not need to address these issues or the

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[104] Reid v. Covert, 354 U.S. 1, 34 n.61 (1957).

[105] Michael R. Gordon, *U.S. Charges Contractor at Iraq Post in Stabbing*, N.Y. TIMES, Apr. 5, 2008, at A6.

[106] Dean Yates, *First Contractor Convicted Under U.S. Military Law in Iraq*, REUTERS, Jun. 24, 2008, http://www.reuters.com/article/topNews/idUSL243864420080624.

[107] Memorandum from Dep't of Def. to Secretaries of the Military Dep'ts (Mar. 10, 2008), *available at* http://www.fas.org/sgp/othergov/dod/gates-ucmj.pdf [hereinafter Memorandum from Dep't of Def.];

[108] Gordon, *supra* note 105.

[109] Memorandum from Dep't of Def., *supra* note 107; Gordon, *supra* note 105.

[110] Michael R. Gordon, *Military Role Overseeing Contractors Tested in Iraq*, N.Y. TIMES, Apr. 6, 2008, at A16.

[111] *Id.*

larger issue of constitutionality, and the legal application of civilian courts-martial remains an open question.

2. Civil Law

a. *Contract Law*

As with any business, a private military company makes decisions with an eye toward the bottom line, and thus must consider the financial implications brought by contract and tort claims.[112] The False Claims Act ("FCA") has emerged as a tool to regulate PMC contracts with the U.S. government, as the FCA allows private parties to bring suit on behalf of the government and to share in a portion of any damages won from the suit.[113] By allowing individuals to bring suits, the FCA alleviates some of the evidentiary and investigative problems associated with governmental evaluation of contract performance from thousands of miles away. For example, in 2006 a jury issued a $10 million verdict for fraud and theft under the FCA against Custer Battles, a PMC contracted to provide security at the Baghdad International Airport.[114] Although a federal judge in the Eastern District of Virginia ultimately overturned the verdict and granted summary judgment for the defendant contractors, the case reflects the potential ability of domestic contract law to serve as a check on PMC conduct.[115]

b. *Tort Law*

Domestic tort law applied to PMCs abroad may serve as means to deter, punish, and regulate unlawful conduct.[116] The Alien Tort Claims Act ("ATCA") grants district courts jurisdiction over "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."[117] ATCA offers at least a theoretical basis of jurisdiction over suits filed by foreigners against PMCs.[118] After the Second Circuit's expansive reading of "the law of nations" in *Filartiga v. Pena-Irala*, a rush of human rights claims were brought under the statute.[119] In 2004, the Supreme Court considerably narrowed the reach of the ATCA in *Sosa v. Alvarez-Machain*, holding that it was "a jurisdic-

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[112] Isenberg, *supra* note 85, at 92.

[113] 31 U.S.C § 3730(b), (d) (2007).

[114] Laura A. Dickinson, *Contract as a Tool for Regulating Private Military Companies*, *in* MERCENARIES TO MARKET, *supra* note 5, at 217, 219.

[115] Isenberg, *supra* note 85, at 92; United States ex rel. DRC, Inc. v. Custer Battles, 472 F. Supp. 2d 787, 788, 800 (E.D. Va. 2007).

[116] Kierpaul, *supra* note 83, at 433.

[117] 28 U.S.C. § 1350 (2000);

[118] *Id.*; Finer, *supra* note 96, at 264.

[119] JEFFREY L. DUNOFF, ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 328 (2d ed. Aspen Publishers 2006); Filartiga v. Pena-Irala, 630 F.2d 876, 881-84 (2d Cir. 1980).

tional statute creating no new causes of action," enacted in 1789 to grant jurisdiction over a "modest number of international law violations."[120] Though the court stated that the statute should be "gauged against the current state of international law," it required ATCA claims "based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms . . . ."[121]

As applied to PMCs operating abroad, the *Sosa* decision limited the scope of potential claims that might have otherwise been brought under the ATCA. For example, the Abu Ghraib incident fostered numerous suits under the ATCA and state law against the private contractors at work in the prison.[122] In 2005, a Washington, D.C. District Court applied the *Sosa* precedent to the Abu Ghraib victims' torture allegations under the ATCA in *Ibrahim v. Titan Corp.*[123] The court determined that while treaties and other sources of international law might permit an ATCA claim when a state actor engages in torture, such conduct by private actors "is not actionable under the Alien Tort Statute's grant of jurisdiction, as a violation of the law of nations."[124]

In a related case also stemming from Abu Ghraib, *Saleh v. Titan Corp.*, the same court further ruled that the ATCA did not grant jurisdiction over alleged conduct by private contractors, even if they acted under the color of law or with the aid or complicity of state actors.[125] Relying heavily on an earlier D.C. Circuit ruling, *Sanchez-Espinoza v. Reagan*, the court stated that "there is no middle ground between private action and government action, at least for purposes of the Alien Tort Statute."[126] State law tort claims continued in both the *Ibrahim* and *Saleh* cases.[127] Ultimately, the district court joined the cases and determined that the state law claims against the contract translators employed by Titan were preempted by the Federal Tort Claims Act, because they performed their duties under the exclusive operational control of the military.[128] Conversely, the state law claims against the second group of contract interrogators employed by CACI were not preempted by FTCA, because there were genuine issues of material fact relating to the amount of control exercised by the military or by CACI over the contractors.[129] Both the

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120 Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).

121 *Id.* at 733, 725.

122 *See e.g.* Factsheet, Center for Constitutional Rights (CCR), Corporations & Torture in Prisons in Iraq (2009), [hereinafter CCR Factsheet: Iraq], *available at* http://ccrjustice.org/files/FINAL%20factsheet%20Caci%20L-3.pdf.

123 Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 13-15 (D.D.C. 2005).

124 *Id.* at 14-15.

125 Saleh v. Titan Corp., 436 F. Supp. 2d 55, 57-58 (D.D.C. 2006).

126 *Id.* at 58.

127 *See* Ibrahim v. Titan Corp., 391 F.Supp.2d at 15-19; *Saleh*, 436 F.Supp.2d at 60.

128 *Ibrahim*, 391 F.Supp.2d at 19.

129 *Id.* at 19.

plaintiffs and defendant CACI appealed, and the D.C. Circuit Court of Appeals heard oral arguments in February, 2009.[130]

Although both *Titan* cases appear as setbacks to domestic regulation of PMC conduct, other courts faced with a similar set of facts might be compelled to sustain ATCA claims against PMCs. In *Sosa*, the Court stated that ATCA claims should be "gauged against the current state of international law," suggesting that an evolved understanding of the state/non-state divide could cut against the bright-line rule drawn in *Sanchez-Espinoza*.[131] For instance, the Second Circuit in its 1995 *Kadic v. Karadzic* decision "[did] not agree that the law of nations, as understood in the modern era, confine[d] its reach to state action . . . . [C]ertain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[132] The court based its decision on the broad understanding of ATCA claims as defined by *Filartiga*.[133] In *Saleh*, the D.C. Circuit considered and rejected the *Kadic* state action finding for individuals acting "under color of law," citing instead the *Sanchez-Espinoza* test as controlling circuit precedent.[134] Nonetheless, a different court in the future might sustain an ATCA claim against a non-state actor based on *Kadic*'s more permissive state action requirement and the *Sosa* mandate to judge ATCA claims against a modern understanding of international law.

Two lawsuits, filed in 2008 and sponsored by the Center for Constitutional Rights, rely on the ATCA to seek redress for the abuses of Iraqi prisoners at Abu Ghraib.[135] *Al-Shimari v. CACI*, pending in the Eastern District of Virginia, and *Al-Quraishi et al. v. Nakhla*, filed in the District Court of Maryland, allege despicable human rights abuses by private military contractors and cited the ATCA as their source of jurisdiction for their international law claims.[136] Both cases are factually similar to *Ibrahim* and *Saleh*, so the fate of the claims brought under ATCA should be similar. In March 2009, the District Court dismissed the ATCA claims against CACI, while sustaining the remaining state and federal tort claims.[137] In dismissing the ATCA claims, the court gave heavy consideration to *Sosa* before declining to find jurisdiction for two reasons.[138]

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[130] CCR Factsheet: Iraq, *supra* note 122.

[131] Sosa v. Alvarez-Machain, 542 U.S. 692, 733 (2004).

[132] Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995).

[133] *Id.* at 238.

[134] *Saleh*, 436 F. Supp. 2d at 57-58.

[135] CCR Factsheet: Iraq, *supra* note 122.

[136] *Id.*; *see also, e.g.,* Amended Complaint at 3-13, Al-Shimari v. CACI International, Inc., No. 08-cv-0827 (E.D. Va. 2008), *available at* http://ccrjustice.org/files/Amended%20Complaint%20on%20the%20Defendants.pdf.

[137] Memorandum Order at 69, Al-Shimari v. CACI International, Inc., No. 08-cv-0827 (E.D. Va. 2008), *available at* http://ccrjustice.org/files/3.18.09%20Al%20Shimari%20decision.pdf (see generally for background and rationale).

[138] *Id.* at 59.

First, the specific use of government-contracted interrogators exists as a recent development and cannot be pigeonholed into the universal understanding of war crimes.[139] Second, the court expressed reluctance in applying ATCA to private actors since there is no clear consensus in international law.[140]

The Center for Constitutional Rights initiated an additional set of ATCA lawsuits against Blackwater, stemming from the Nisour Square shootings. Filed in late 2007 in the D.C. District, *Abtan v. Blackwater* and *Albazzaz and Aziz v. Blackwater* accuse Blackwater (in its corporate capacity) of various offenses, including war crimes under the ATCA.[141] These cases can be distinguished from *Ibrahim* and *Saleh* in that the earlier suits alleged torture while these cite war crimes as the offense in violation of the law of nations subject to the ATCA.[142] Since all four cases were brought in D.C. District Courts, the *Sanchez-Espinoza* private actor distinction likely will apply to Blackwater's motions to dismiss. Both suits against Blackwater allege additional state law tort violations, including assault and battery, wrongful death, and negligent training and supervision.[143] In light of the political and public outrage that followed the Nisour Square incident, the related criminal charges filed by the Department of Justice, and the fact that the incident motivated the State Department to end its relationship with Blackwater, the additional tort claims should be able to survive the political question and claim preemption defenses launched at other suits against PMCs.[144]

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Understanding the three main points sketched in the preceding sections is essential in crafting a workable framework of the industry in the future. First, the two decades since the end of the Cold War have created a seemingly perfect storm for both the supply and demand of PMCs. Second, PMCs perform a diverse array of essential military functions and are seated deeply within the U.S. military apparatus. Third, a growing body

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[139] *Id.*

[140] *Id.* at 60 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004)).

[141] Factsheet, CCR, Guns for Hire in Iraq (2008) [hereinafter CCR Factsheet: Guns for Hire], *available at* http://ccrjustice.org/files/6_4_08_Blackwater_0.pdf.; *Ibrahim*, F. Supp. 2d at 13-15; CCR Factsheet: Iraq, *supra* note 122; Second Amended Complaint, Abtan v. Blackwater Lodge and Training Center, Inc., No. 1:07-cv-01831 at 7, 16 (D.D.C. 2007), *available at* http://ccrjustice.org/files/3.28.08%20Abtan%20Second%20Amended%20Complaint.pdf

[142] Abtan Second Amended Complaint *supra* note 141.

[143] *See Id.* at 16-18.

[144] *See Ibrahim,* F. Supp. 2d at 13. *See generally* The CACI Defendants' Motion to Dismiss Plaintiff's Amended Complaint at 1, Al-Shimari v. CACI International, Inc., No. 1:08-CV-00827 (E.D. Va 2008), *available at* http://ccrjustice.org/files/Motion%20to%20Dismiss%20Plaintiffs%20Amended%20Complaint.pdf.

of U.S. law applies extraterritorially to PMCs and has the potential to regulate conduct through tort and criminal sanctions. Taken together, these three ideas suggest a trend towards increased use and acceptance of American PMCs in future U.S. military operations.

III. PMCs, Mercenaries, and International Law

A. *The "Old" Mercenary Consensus*

The private military industry rapidly evolved into its present state in the post-Cold War era, and has experienced an unprecedented expansion through U.S. use of PMCs in Iraq. While U.S. law has labored to keep pace with the changing economic, political, and military realities presented by the industry, international law has seen no such progress. Instead, international treaties and legislation reflect an outdated reality and a response to the mercenary paradigm as it existed in the 1960s.[145]

1. Hague Law and Geneva Law

International humanitarian law in the twentieth century developed broadly through two schools: Hague Law and Geneva Law, both of which predated the rise of the private military industry.[146] The 1907 Hague Conventions mark the first modern formulation of the international laws of war.[147] The thirteen agreements "emerged from efforts to codify the rights and obligations of combatants [and to] limit combatants [sic] choice of the means and methods used to injure the enemy in international armed conflicts."[148] As the agreements reflected the contemporary understanding that state conduct and individual conduct existed in two distinct spheres, the agreements did not prohibit individuals from one state from fighting for another.[149] Hague V ("Rights and Duties of Neutral Powers and Persons in Case of War on Land") tacitly acknowledged the use of mercenaries by prohibiting state-sponsored recruitment of soldiers in neutral territories, but allowing free travel across neutral states by individuals wishing to offer their services to a belligerent nation.[150] Geneva Law, emerging from the 1949 Geneva Conventions, dealt with the protection of non-combatants, including military personnel rendered

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145 Shearer, *supra* note 12, at 16.

146 Dunoff, *supra* note 119, at 527.

147 Singer, *War, Profits*, *supra* note 14, at 526.

148 Dunoff, *supra* note 119, at 527.

149 Singer, *War, Profits*, *supra* note 14, at 526.

150 Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land ch. 1, art. 4, Oct. 18, 1907, 36 Stat. 2310, T.S. No. 540 [hereinafter Hague V].

unable to fight.[151] The agreements did not mention mercenaries, and scholars generally believe they did not seek to change the status quo.[152]

2. UN Resolutions

The 1950s and 1960s marked the zenith of twentieth-century mercenarism as the archetypal "soldier-for-hire" came to prominence in areas with weak state control, namely Latin America, China, and Africa.[153] Mercenaries in this period worked for states, rebel groups, and corporations, and their conduct – particularly their prominent role in violent coups in Benin, the Seychelles, and the Congo – drew the ire of the international community.[154] In response to these episodes and as a part of the larger postcolonial movement, the international legal climate shifted decidedly against the practice.[155] Interestingly, however, the first UN General Assembly resolution of the era reflected the existing Hague V status quo. The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty ("Resolution 2131"), adopted unanimously in 1965, reaffirmed the United Nations' strict nonintervention policy and declared that "no state shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow" of another state.[156] By not directly mentioning individual mercenary activity and placing the onus on states, Resolution 2131 parallels the prohibition on state-sponsored recruitment of soldiers codified in Hague V.[157] Read broadly, the term "tolerate" could impute a responsibility that states prevent their nationals from joining mercenary organizations, but few in political or academic circles have advanced such an argument.[158]

In 1968, the General Assembly adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples ("Resolution

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151 DUNOFF, *supra* note 119, at 527-28.

152 Govern & Bales, *supra* note 66, at 70; *see also* Singer, *War, Profits*, *supra* note 14, at 526-27. ("As long as the mercenaries were part of a legally defined armed force (which originally meant state militaries, but was later expanded to include any warring parties), they were entitled to POW protection.").

153 SINGER, CORPORATE WARRIORS, *supra* note 2, at 37.

154 *Id.; see also* SHEARER, *supra* note 12, at 16 (noting that the public reaction to these incidents "magnified the impact beyond their real strategic significance").

155 Singer, *War, Profits*, *supra* note 14, at 527.

156 G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (Dec. 21, 1965) [hereinafter Resolution 2131]; *see also* Todd S. Millard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1, 23-24 (2003) (noting that the 109 member states unanimously adopted Resolution 2131).

157 Hague V, *supra* note 150, at ch. 1, art. 4.

158 Millard, *supra* note 156, at 24.

2465"), which directly addressed the mercenary issue.[159] The resolution declared as criminal the "practice of using mercenaries against movements for national liberation and independence" and assigned "outlaw" status to mercenaries themselves.[160] Resolution 2465 was adopted with just fifty-three votes in favor, eight votes against, and forty-three abstentions, manifesting a clear lack of international consensus.[161] Moreover, the resolution's narrow focus on using mercenaries to prevent national liberation and independence movements demonstrates that it was a reaction to the postcolonial era, with little bearing on today's established states.[162]

Two years later, the General Assembly adopted the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations ("Resolution 2625").[163] The Assembly adopted the resolution by consensus largely because it reflected international legal traditions and dropped the rhetorical undertone of Resolution 2465.[164] Resolution 2625 did not seek to outlaw mercenary status nor did it criminalize their use, but rather it returned the focus to state conduct. In relevant part, it stated: "Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State."[165] Thus, while Resolution 2625 reflected a softened position on the punishment and criminal status of mercenary conduct, it expanded the proposed duties of states by removing the "national liberation and independence" movement nexus found in Resolution 2465.[166] By prohibiting state-sponsored use of mercenary intervention while remaining silent on conduct of individual citizens, Resolution 2625 parallels Hague V, which restricted neutral state recruitment of soldiers for use in foreign wars while permitting individuals from neutral states to fight in foreign conflicts.[167]

The apparent schizophrenia between general prohibitions with broad support and rhetorical condemnations with limited approval continued in the General Assembly into the 1970s. The Declaration on Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes ("Resolution 3103"), adopted

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[159] G.A. Res. 2465, U.N. GAOR, 23d Sess., Supp. No. 18, at 4, U.N. Doc. A/7218 (Dec. 20, 1968) [hereinafter Resolution 2465].

[160] *Id.*

[161] Millard, *supra* note 156, at 26–28.

[162] *Id.* at 27.

[163] G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (Oct. 24, 1970) [hereinafter Resolution 2625].

[164] Millard, *supra* note 156, at 27.

[165] Resolution 2625, *supra* note 163.

[166] *See* Resolution 2465, *supra* note 159.

[167] *See* Hague V, *supra* note 150, at ch. 1 arts. 4, 6.

in 1973, returned to aggressive rhetoric and a criminal framework.[168] The Resolution condemned colonialism and Apartheid and sought to clarify the legal status of the "combatants struggling against colonial and alien domination and racist regimes . . . ."[169] Regarding mercenaries, Resolution 3103 stated that their use "by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals."[170] Despite its rhetorical tone, the resolution garnered eighty-three votes in support, compared to thirteen against and nineteen abstentions.[171] Although the increase in support might reflect growing approval and an emerging custom, the resolution as written only applies to mercenaries employed by "colonial and racist regimes" against liberation movements.[172]

The General Assembly again addressed the broader issue in 1974 with the Definition of Aggression ("Resolution 3314").[173] Resolution 3314 listed certain practices that constituted a breach of the Article 2(4) understanding of the use of force under any circumstances.[174] Specifically, Resolution 3314 condemned states that sent "armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State . . . ."[175] Thus, Resolution 3314 fell in line with the Hague V tradition followed by Resolutions 2131 and 2625: it prohibited state use of mercenaries as a means of foreign intervention under all circumstances, but did not criminalize the practice or address the individual status of mercenaries themselves. Taken together, the unanimous adoption of Resolutions 2131, 2625, and 3314, contrasted with the limited support for Resolutions 2465 and 3103, suggests an international consensus and custom to disavow state use of mercenaries in armed attacks on another state. Such condemnation applies to all states, but does not speak directly to the status of mercenaries as individuals.

3. Protocol I

Amidst the growing hostility to mercenaries, the Diplomatic Conference on Humanitarian Law met in Geneva from 1974 to 1977.[176] The

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[168] G.A. Res. 3103, U.N. GAOR, 28th Sess., Supp. No. 30, at 142, U.N. Doc. A/9030 (Dec. 12, 1973) [hereinafter Resolution 3103].

[169] *Id.*

[170] *Id.*

[171] Millard, *supra* note 156, at 28.

[172] *See* Resolution 3103, *supra* note 168.

[173] Millard, *supra* note 156, at 30.

[174] G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 14, 1974) [hereinafter Resolution 3314].

[175] *Id.* at 143.

[176] SHEARER, *supra* note 12, at 16.

conference produced the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts ("Protocol I").[177] African nations at the conference, notably Nigeria, shared the common experience of mercenary activity in their countries and thus worked towards establishing a standard definition of the practice.[178] The conference saw considerable debate on the phrasing and terminology in defining "mercenary", with the developing world leading the push for a strong moral and criminal condemnation.[179] Article 47 of Protocol I states that mercenaries shall not have the right to prisoner of war status.[180]* It then defines a mercenary as someone who:

> (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
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> (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 State which is not a Party to the conflict on official duty as a member of its armed forces.[181]

The Protocol I classification remains the most commonly accepted definition of mercenaries in international law.[182] Although as of 2009 roughly eighty-five percent of U.N. member states have ratified the treaty, prominent nations including the United States, Israel, and Iran have not.[183] The U.S. State Department took issue with the document's political underpinnings as well as its treatment of "liberation movements"

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[177] Millard, *supra* note 156, at 31.

[178] *Id.*; SHEARER, *supra* note 12, at 16.

[179] Millard, *supra* note 156, at 31-33.

[180] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1) art. 47, June 8, 1977, 1125 U.N.T.S. 3. [hereinafter Protocol I].

[181] *Id.*

[182] SHEARER, *supra* note 12, at 16.

[183] Govern & Bates, *supra* note 66, at 79. For a list of signatories and ratifications, see International Committee of the Red Cross, State Parties/Signatories, http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P (last visited Apr. 9, 2009) (list of signatories) and http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=S (last visited Apr.9, 2009) (parties yet to ratify).

and irregular forces (i.e. granting them POW status).[184] As applied to mercenaries, at least one commentator has echoed this sentiment, criticizing the inconsistency in expanding humanitarian protection for guerilla and irregular combatants while restricting similar protections traditionally afforded to mercenaries.[185] Despite these criticisms, Article 47 remains important because it establishes a narrow definition of mercenaries and expresses a strong moral condemnation of the practice, emanating largely from the decolonization process.[186] Although it does not criminalize the practice and conceivably would allow mercenaries to operate at their own risk of capture and prosecution, Protocol I reflects a broad distaste for mercenaries and an effort to discourage their continued use.

4. The OAU Convention

If African states left the 1977 Geneva Conference unsatisfied with Protocol I's treatment of the mercenary question, they remedied the issue through the Organization of African Unity ("OAU"). The OAU in 1977 established the Convention for the Elimination of Mercenarism in Africa (the "OAU Convention") – a particularly relevant document to international law in light of the prevalence of mercenary activity on the continent.[187] The OAU Convention is akin to General Assembly Resolutions 2465 and 3103 in adopting aggressive rhetoric and a criminal paradigm.[188] It uses an almost identical definition of a mercenary as Protocol I and states that mercenaries do not enjoy prisoner of war status.[189] Further, the OAU Convention makes mercenarism a crime committed by individuals, groups, and states and encourages states to respond with the "severest penalties . . . including capital punishment."[190] It narrowed the circumstances of the criminal practice to the use of mercenaries in opposition to the "self-determination stability, or . . . territorial integrity of another State," implicitly suggesting that mercenaries could be employed by states to quell domestic uprisings.[191] The OAU demonstrated an additional bias in requiring states to ban mercenary activity "against any Afri-

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[184] Millard, *supra* note 156, at 37; Ronald Reagan, Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions, 1 PUB. PAPERS 88 (Jan. 29, 1987), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=34530; *See also* Protocol I, *supra* note 180, at art. 44(3).

[185] John Robert Cotton, Comment, *The Rights of Mercenaries as Prisoners of War*, 77 MIL. L. REV. 143, 164 (1977).

[186] Millard, *supra* note 156, at 41–44.

[187] Organization of African Unity Convention for the Elimination of Mercenarism in Africa, July, 3, 1977, 1490 U.N.T.S. 96 [hereinafter OAU Mercenary Convention].

[188] *See generally id.*

[189] *Id.* at arts. 1, 3.

[190] *Id.* at arts. 1, 7.

[191] *Id.* at art. 1(2).

can State member of the Organization of African Unity or the people of Africa in their struggle for liberation."[192] This qualifying language meant that, in theory, the Apartheid government in South Africa (at the time not an OAU member) was prohibited from using mercenaries against liberation movements within the country, while other OAU states could employ mercenaries to fight their own domestic uprisings and civil wars.[193]

5. The UN Mercenary Convention

The United Nations returned to the mercenary question in the 1980s amidst growing international uncertainty on the issue. After nine years of debate and diplomacy in an Ad Hoc Committee, the General Assembly in 1989 adopted the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (the "UN Mercenary Convention").[194] After declaring mercenary activity to be in violation of the "principles of international law" and calling on states to prevent, prosecute, and punish offenders, the UN Mercenary Convention set forth a two-part definition of the practice.[195] Article 1(1) of the Convention employs a definition similar to that set forth in Protocol I and adopts the six criteria of mercenary activity with two minor modifications.[196] First, the UN Mercenary Convention removes Protocol I's "direct participation" nexus from the mercenary definition and instead lists participation "directly in hostilities or in a concerted act of violence" as an explicit violation of the Convention.[197] Second, the UN Mercenary Convention by its language applies "without prejudice to . . . the law of armed conflict and international humanitarian law," thereby going further than Protocol I, which only applied to international armed conflicts.[198]

Article 1(2) reflects the OAU understanding of mercenarism. It supplements the definition of mercenaries by adding that a mercenary is also someone who, in any situation:

(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
    (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or

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[192] *Id.* at art. 6.

[193] Singer, *War, Profits*, *supra* note 14, at 529.

[194] Millard, *supra* note 156, at 57-58.

[195] International Convention Against the Recruitment, Use, Financing and Training of Mercenaries art. 1, Dec. 4, 1989, 2163 U.N.T.S. 75 [hereinafter UN Mercenary Convention].

[196] *Id.* at art. 1.

[197] Protocol I, *supra* note 180, at art. 47(2)(b); UN Mercenary Convention, *supra* note 195, at art. 3(1).

[198] UN Mercenary Convention, *supra* note 195, at art. 16.

(ii) Undermining the territorial integrity of a State.[199]

This language mirrors the OAU Convention's definition of mercenarism as a crime committed in opposition of the "self-determination stability, or the territorial integrity of another State."[200] Similarly, the UN Mercenary Convention harkens to the OAU Convention in enumerating specific crimes. The UN Convention lists four situations constituting an "offense": one who acts as a mercenary, one who "recruits, uses, finances or trains mercenaries," one who attempts to use or act as a mercenary, and one who is an accomplice in any such act or attempt.[201] In slightly different but overlapping language, the OAU Convention defined three situations where mercenary activity constitutes a "crime against the peace": acting as a mercenary, supporting mercenaries in any manner, and allowing mercenary activity in any place under a state's jurisdiction.[202]

Although the UN Mercenary Convention imposes a clear obligation on states to refrain from recruiting, using, financing, and training mercenaries, the document exists at best as *de lege ferenda*. Article 19 states that the treaty would enter into force thirty days after the twenty-second nation ratified the agreement, but this did not occur until 2001, when Costa Rica acceded to the treaty.[203] To date, just twenty-eight of the 192 U.N. member states have ratified the treaty, none of which can be considered a major military power.[204] Moreover, of the six original OAU signatories, just Cameroon ratified the agreement, and only seven of the fifty-three OAU states are party to the treaty in total.[205] Even as applied to the twenty-eight ratifying states, the UN Mercenary Convention's specific list of vague requirements makes it nearly impossible to find anyone who fits all of the criteria, and to date nobody has been prosecuted under the treaty.[206] In fact, the ambiguous and unworkable definition set forth in UN Mercenary Convention has resulted in an unofficial mantra within the private military industry: "anyone who manages actually to get prose-

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[199] *Id.* at art. 1(2).

[200] OAU Mercenary Convention, *supra* note 187, at art. 1(2).

[201] UN Mercenary Convention, *supra* note 195, at arts. 2-4.

[202] OAU Mercenary Convention, *supra* note 187, at art. 1(2)-(3).

[203] UN Mercenary Convention, *supra* note 195, at art. 19(1); *see also* Press Release, General Assembly, Mercenaries Often A Presence in Terrorist Attacks, Special Rapporteur Tells Third Committee As It Begins Discussions on Self-Determination, U.N. Doc. GA/SHC/3650 (Oct. 31, 2001), *available at* http://www.un.org/News/Press/docs/2001/gashc3650.doc.htm.

[204] United Nations, *Multilateral Treaties Deposited with the Secretary-General*, vol. 2 part. 1 ch. 18 sec. 6, U.N. Doc. ST/LEG/SER.E/25 (Vol. II) (Dec. 31, 2006); Singer, *War, Profits*, *supra* note 14, at 531.

[205] Millard, *supra* note 156, at 65-66.

[206] Singer, *War, Profits*, *supra* note 14, at 531.

cuted under the existing anti-mercenary laws actually deserves to 'be shot and their lawyer beside them.'"[207]

B. *The "New" Private Military Reality*

As previously discussed, the modern private military industry is a fundamentally new species compared to mid-twentieth century mercenarism, even if the two share the same genus. Thus, as the United States and other nations ramp up their use of PMCs around the world, they challenge the hastily constructed international legal regime that emerged to combat a largely outdated type of mercenary activity. This poses two questions: whether the existing mercenary regime applies to PMCs and whether international custom, apart from treaty law, addresses the issue.

1. Applying Mercenary Law to PMCs

Much of the international law on mercenaries – namely Protocol I, the UN Resolutions, the OAU Convention, and the UN Mercenary Convention – deals with defining mercenary status and banning mercenaries in certain situations.[208] Contrary to popular belief, there exists no ban on mercenaries in international law, even taking the UN Mercenary Convention into consideration.[209] Rather, international law has crafted a narrow definition of mercenaries and has endeavored to condemn and ban their conduct in a limited set of circumstances. PMCs, in their present form, do not fit this definition, nor do they act in prohibited areas. As it forms the basis of later agreements and has widespread international support, the Protocol I definition remains the best classification of a mercenary in international law.[210] By using a six-element definition of mercenaries in Article 47, Protocol I simultaneously offers six defenses to the claim that PMCs should be considered mercenaries.[211] While not every private contractor will be able to employ every defense, what is important is that at least one defense can readily be made by most members of the modern private military industry.[212]

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[207] SINGER, CORPORATE WARRIORS, *supra* note 2, at 238 (quoting from private correspondence); *see also* Singer, *War, Profits*, *supra* note 14, at 531 n.39 (citing GEORGE BEST, HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICTS 328 n.83 (1980)) (commenting on the internalization of this sentiment within the industry).

[208] *See* discussion *supra* Part III (A).

[209] Singer, *War, Profits*, *supra* note 14, at 531.

[210] SHEARER, *supra* note 12, at 16.

[211] *But see* Zoe Salzman, Note, *Private Military Contractors and the Taint of a Mercenary Reputation*, 40 N.Y.U. J. INT'L L. & POL. 853, 880 (2008) (arguing that "at least some private military contractors may qualify as mercenaries" under the Protocol I definition).

[212] SHEARER, *supra* note 12, at 17-19.

The first two definitional elements, that a mercenary be "specially recruited . . . to fight in an armed conflict" and that they in fact "take a direct part in the hostilities," do not apply to military support firms, military consultant firms, and security provider firms who by their contracts are not directly involved in hostilities.[213] Next, and perhaps most vague, Protocol I attaches a motivational requirement (mercenaries must be "("motivated to take part in hostilities essentially by the desire for private gain") that is both difficult to prove and easily rebuttable by personal testimony as to one's motivations.[214] The remaining three elements of the Protocol I definition work as exceptions based on nationality. A mercenary "[i]s neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict," meaning, for example, all American, British, and Iraqi contractors in Iraq would immediately be exempt.[215] The final two definitional criteria exempt members of the armed forces of both parties to the conflict and nonparties sending soldiers on official duty.[216] PMCs operate in the private sphere and thus do not appear to be members of the armed forces. At the same time, the nature of their work and the willingness of the United States to court martial PMC employees create at least some doubt as to whether private military contractors fit either of these two exceptions. In sum, the diverse services provided by the private military industry do not fit neatly into the Protocol I mercenary definition, and the industry therefore operates outside the legally defined mercenary regime.[217]

The non-binding U.N. resolutions and less supported OAU Convention and UN Mercenary Convention express strong condemnation of mercenaries when they are employed to undermine a state's legitimacy. Resolution 2131 targeted the financing of "subversive, terrorist or armed activities directed towards the violent overthrow" of another state, while Resolutions 2625 and 3314 spoke of a duty to refrain from using mercenaries "for incursion into the territory of another State."[218] The OAU Convention meanwhile focused on "self-determination, stability, [and] . . . territorial integrity," while the UN Mercenary Convention mentioned undermining the government, constitutional order, or territorial integrity

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[213] Protocol I, *supra* note 180, at art. 47(2)(a)–(b).

[214] *Id.* at art. 47(2)(c); *see also* Singer, *War, Profits*, *supra* note 14, at 529 ("A foreign soldier who was being paid to fight for a cause could argue that he or she was motivated by other factors, such as the rightness of the cause, a feeling of kinship with fellow fighters, or a simple search for adventure.").

[215] Protocol I, *supra* note 180, at art. 47(2)(d).

[216] *Id.* at art. 47(2)(e)–(f).

[217] Singer, *War, Profits*, *supra* note 14, at 532.

[218] Resolution 2131, *supra* note 156; Resolution 2625, *supra* note 163; *see also* Resolution 3314, *supra* note 174, at art. 3(g) (prohibition on "mercenaries . . . which carry out acts of armed force against another State").

of another state through the use of mercenaries.[219] Even if these documents do not amount to hard law, they express an international sentiment against hiring mercenaries specifically to undermine and intervene in established states – a sort of "worst of the worst" criterion. Nonetheless, even the most militaristic full-service military provider firms do not meet this criterion, as now defunct companies like Executive Outcomes and Sandline International notably contracted with the legitimate governments in Sierra Leon and Papua New Guinea rather than rebel groups.

2. International Custom

Customary international law, comprised of state practice and *opinio juris*, joins treaty law as the second major source of international law.[220] "State practice" refers to what states actually do or do not do, while *opinio juris* refers to what states believe to be required of them by international law.[221] The U.N. Resolutions demonstrate a state practice to refrain from the use of mercenaries to counter self-determination or to destabilize an established government, while Protocol I suggests a state practice to deny mercenaries prisoner of war status if they fit certain criteria.[222] The Protocol I definition, when promulgated, represented a departure from international custom, since mercenaries had been previously considered ordinary members of the armies for which they fought.[223] Further, Protocol I deviated from traditional prisoner of war classifications in that it was not grounded in the distinction between civilians and armed combatants.[224] Ultimately, this leaves a norm of moral condemnation of mercenary activity, grounded in two basic underpinnings: a distaste for mercenary's selfish motivations and a concern over of sovereign control of mercenary activities.[225] These ideological underpinnings have proven difficult to translate into a workable legal regime, thereby contributing to the current ambiguity in the law.[226]

Though not subject to formal mercenary law, the moral norm against mercenaries does impact modern PMCs. Informal and off-the-record payments and concessions continue to draw the ire of the international

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[219] OAU Mercenary Convention, *supra* note 187, at art. 1(2); UN Mercenary Convention, *supra* note 195, at art. 1(2)(a)(i)-(ii).

[220] DUNOFF, *supra* note 119, at 74.

[221] *Id.* at 78-80.

[222] *See* discussion *supra* Parts III(A)(2), III (A)(3).

[223] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 51 (Cambridge University Press 2004).

[224] *Id.*

[225] SARAH PERCY, MERCENARIES: THE HISTORY OF A NORM IN INTERNATIONAL RELATIONS 66 (Oxford University Press 2007).

[226] *Id.* at 204. Percy also argues that strong international legal norms of state responsibility in combat and freedom of association and movement conflicted with the weaker norm against mercenaries. *See id.* at 192-202.

community, demonstrating the selfishness criticism.[227] States have labored to gain control over the industry, demonstrating the sovereignty fear.[228] In general, PMCs no longer openly advertise full-service combat operations after states and the public condemned their work in Africa in the 1990s.[229] Yet beyond these narrow limits, practice and custom around the world show a tolerance and acceptance of private military services. Various PMCs have in recent years provided myriad services to governments, corporations, rebel groups, and drug cartels in all corners of the globe.[230] Seventeen states in 2008 – including African states such as Sierra Leone and Angola and major powers such as the U.S., U.K., France, and China – produced the Montreux Document, a list of good practices for PMCs and the states that hire them.[231] Among other obligations, the Montreux Document guarantees PMC personnel POW status (provided they comply with article 4(A) of the Third Geneva Convention), and thus stands in stark contrast to Protocol I.[232] Further, some of the original signatories to the UN Mercenary Convention have failed in practice to demonstrate an obligation to be bound by the agreement: Angola and the Democratic Republic of Congo have since hired mercenaries while Congo-Brazzaville, Zaire, and Ukraine have directly benefited from the mercenary trade.[233] Ultimately, the debate over how to classify PMCs into existing mercenary law becomes almost moot, as state practice and *opinio juris* portray the mercenary regime to be a form of "anti-customary law" while reflecting an acceptance of PMC use.[234]

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The international legal community has wrestled with the mercenary question over the past fifty years, resulting in a vague definition of the

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[227] *Id.* at 216.

[228] *See, e.g.,* PERCY, *supra* note 11, at 63-68.

[229] PERCY, *supra* note 225, at 227.

[230] See SINGER, CORPORATE WARRIORS, *supra* note 2, at 11-17 for an overview of the global reach of the industry. Like the globalization process that fostered it, the modern industry exists as a series of interconnected webs (e.g., U.S. PMCs fighting Colombian rebels believed to be trained by an Israeli PMC). *Id.* at 14.

[231] *See* The Permanent Representative of Switzerland to the General Assembly, *Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*, Annex, *addressed to the Secretary General,* U.N. Doc. S/2008/636, A/63/467 (Sep. 17, 2008). The seventeen states are: Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, Ukraine and the United States of America. *Id.* at 5.

[232] *Id.* at 11.

[233] Millard, *supra* note 156, at 65, 66 n.378; Singer, *War, Profits*, *supra* note 14, at 531.

[234] Singer, *War, Profits*, *supra* note 14, at 531.

practice and a soft law ban on the use of mercenaries to oppose self-determination. This result has three implications for the private military industry. First, international law does not ban PMCs, as it is nearly impossible in practice to categorize them within the established mercenary definition. Second, the stagnation in relevant international law since the 1989 U.N. Mercenary Convention and the international community's inability or unwillingness to respond to the PMC boom suggest that an international regulatory regime is unlikely to develop in the near future. Finally, the international community's tacit response to increased PMC use, when contrasted to earlier moral condemnation of mercenaries, suggests an emerging international norm that tolerates an increased private presence within a state's military structure.

IV. Going Forward: Continued and Evolving PMC Use

A. *Two Emerging Trends*

Thus far this paper has described two complementary trends relating to PMC use. First, the United States has embraced and sponsored the global growth of the private military industry by heavily relying on PMCs and by working to modify and apply existing domestic laws in an effort to monitor the industry. Although the legal evolution is far from complete, a significant measure of legal accountability over PMCs has emerged in less than a decade. Second, the international community, through its conduct and polices, has tacitly approved of modern PMC usage, and have demonstrated an inability or unwillingness to act on the issue. Taken together, these trends suggest that the United States and others will continue to rely on PMCs, while monitoring and regulation of the industry will continue at the domestic level. A litany of scholarly work has proposed dramatic changes for the private military industry, ranging from international regulatory conventions, U.N. supervision, and a declaration of mercenary status, but the recent past does not suggest wholesale changes.[235] An international or U.N. regulatory framework would provide both transparency and legitimacy, but a lack of political will makes this unlikely.[236] Instead, the status quo appears likely to remain.

B. *A Hypothetical Future: Humanitarian Intervention for Profit*

Rather than speculate on how international law might attempt to regulate or govern the private military industry, a more pressing question is how the United States and other military powers will expand their use of industry. Such a scenario appears likely if recent history is any indication. Peter W. Singer, the preeminent authority on the private military industry, hypothesized a scenario in which PMCs would provide peacekeeping

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[235] *See* Millard, *supra* note 156, at 79; Singer, *War, Profits*, *supra* note 14, at 545; Salzman, *supra* note 211, at 874.

[236] Singer, *War, Profits*, *supra* note 14, at 547.

services in areas where the UN or a foreign state lacks the capability, motivation, or will to intervene.[237] Singer's model envisions three possible roles played by PMCs: as private security providers for international aid organizations, as "rapid reaction forces" that could quickly intervene whenever tensions flared, and as an outsourced means of humanitarian intervention.[238] The third model is the most controversial and would undoubtedly draw accusations of mercenarism, because it would involve a state or the U.N. hiring a PMC, which would then deploy troops, defeat local opposition, and stabilize a region faced with genocide or other humanitarian crises.[239]

Yet for the same reasons that a wholly outsourced private intervention force would create controversy and garner human rights criticism, the concept represents a window through which to consider the continued legal uses of PMCs. Humanitarian intervention[240] has existed since at least the early 1800s, but has gained a new vitality since the end of the Cold War.[241] Immediately after the Cold War, the UN Security Council appeared ready to reach a consensus on the ends and means of humanitarian intervention, but tensions in the former Yugoslavia disrupted this brief harmony.[242] The 1999 NATO air strikes in response to Serbian aggression and atrocities in Kosovo, commenced without express Security Council authorization, demonstrated the dilemma of humanitarian intervention.[243] On the one hand, a regional organization used force without a UN mandate; on the other, not doing so would have allowed grave humanitarian violations to continue unchecked.[244]

Much has been written on the legality of the NATO campaign, specifically as to whether an emerging customary norm supports humanitarian intervention.[245] If such a norm does in fact develop, or if the United States, NATO, or another actor seeks to intervene in a future humanita-

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[237] Peter W. Singer, *Peacekeepers, Inc.*, BROOKINGS INSTITUTION, Jun. 2003, http://www.brookings.edu/articles/2003/06usmilitary_singer.aspx [hereinafter Singer, *Peacekeepers*].

[238] *Id.*

[239] *Id.*

[240] Humanitarian intervention is defined as "the use of force by a state (or states) to protect citizens of the target state from large-scale human rights violations."

[241] ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE 113 (Routledge 1993); DUNOFF, *supra* note 119, at 937-38.

[242] DUNOFF, *supra* note 119, at 938.

[243] *Id.* at 940; *see also Hearing on Kosovo After-Action Review Before the S. Armed Servs. Comm.*, 106th Cong. 2 (1999) (joint statement of William S. Cohen, Sec'y of Defense & Gen. Henry H. Shelton, Chairman of the J. Chiefs of Staff), available at http://www.dod.mil/dodgc/olc/docs/test99-10-14CohenShelton.pdf.

[244] Kofi Annan, *Two Concepts of Sovereignty Complexities*, THE Economist, Sep. 18, 1999, at 49, 50.

[245] *See, e.g.,* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 70–73 (Cambridge University Press 2005) (1988).

rian conflict, the private military industry could potentially handle the operation. Putting aside the extensive legal debate, two obstacles stand in the way of humanitarian intervention: political will and financial cost. PMCs appear well-suited to meet each of these challenges. First, when faced with a purely humanitarian situation (in which the intervening state has limited strategic interests), a domestic population would likely favor sending a private army rather than putting "the troops" in harm's way in an unessential war. Second, recent usage suggests that PMCs can provide humanitarian intervention at a lower cost than the public sector. In 1994, the PMC Executive Outcomes considered contracting with the United Nations to intervene in Rwanda to stop the genocide, restore order, and provide safe-haven for refugees.[246] The company estimated that a wholly privatized six-month intervention at the outset of the genocide would cost $600,000 per day, compared to the eventual UN intervention which cost roughly $3 million per day and did not commence until the genocide and fighting had spiraled out of control.[247]

In addition to the accountability and jurisdictional dilemmas previously discussed, private humanitarian intervention raises additional concerns of incentives and control.[248] Moreover, the post-intervention transition from private military to public governance might pose logistical concerns.[249] Despite these uncertainties – and a basic assumption that private intervention would work as second- best option to state military intervention – private humanitarian intervention represents a potentially beneficial use of the private military industry. For instance, if faced with a new humanitarian crisis akin to Kosovo, the Security Council could identify the threat to the peace under Article 39 and authorize military intervention under Article 42.[250] From there, Article 43 requires "special agreements" to govern state- provided assistance and armed forces, but does not speak to the issue of the Security Council directly contracting with private companies.[251] Thus, such a contract appears permissible pro-

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[246] SINGER, CORPORATE WARRIORS, *supra* note 2, at 185; Singer, *Peacekeepers*, *supra* note 237. At the same time, evidence also suggests that Executive Outcomes explored contracting with the Hutu government in Rwanda. Though it was an established government protecting its sovereignty against the rebel the RPF, the Hutu government also perpetrated a horrific genocide campaign against the Tutsi rebels. Regardless of what existing mercenary law might permit in relation to protecting sovereignty, such an incursion by a PMC would undoubtedly undercut any meaningful framework for an expansion of PMC activity in the future. *See* SINGER, CORPORATE WARRIORS, *supra* note 2, at 224; Singer, *Peacekeepers*, *supra* note 237.

[247] SINGER, CORPORATE WARRIORS, *supra* note 2, at 185-86. The Genocide in Rwanda killed over 500,000 people. *Id.* (acknowledging that estimates usually range from 500,000 to 800,000).

[248] Singer, *Peacekeepers*, *supra* note 237.

[249] *Id.*

[250] U.N. Charter arts. 39, 42.

[251] *Id.* at art. 43.

vided that it meets the basic threshold of being consistent with the Security Council's mandate to maintain peace and security.[252]

Returning to the relevant legal questions, a U.N. sponsored private humanitarian intervention would not fall under existing mercenary law based on the nationality exemption.[253] A hired PMC would almost certainly originate from a nation that supported the U.N. action, or alternatively, the U.N. might be a party to the conflict depending on the nature of its contract with the PMC. International custom further supports the legitimacy of a privately contracted U.N. army, as PMCs currently support the national armies that carry out U.N. authorized deployments.[254] Directly contracting with these companies would eliminate the middleman, and suggests that the concept is not as radical as it might initially appear. Although the U.N. and the international community currently lack a regulatory scheme or power over PMCs, such control could come through contract law or domestic prosecution. Recent developments in the U.S.'s usage and prosecution of PMCs, the U.S.'s past support of humanitarian intervention in Kosovo, and the country's influence in the Security Council suggest that if private intervention were to happen, it would likely occur via contracts with U.S. companies governed by U.S. law.

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This brief consideration of privatized humanitarian intervention intends to be more illustrative than predictive. Rather than suggesting that such a regime necessarily will arise from continued PMC use, the discussion attempts to conceptualize one of many possible legal uses for the private military industry that falls in line with recent developments in domestic and international law. As evidenced by the growing body of domestic law in the U.S., the tacit approval of the international community, and its general prevalence, PMC usage has emerged as a twenty-first century norm in international law and politics. For better or worse, the practice appears poised to expand in the near future, and even wholesale private interventions may soon become regular practice.

V. Conclusion

Since the end of the Cold War, and particularly after September 11, the explosion of the modern private military industry has reshaped the way in which the United States and other global powers conduct military operations. This use of private actors in international combat operations raises

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[252] *Id.* at art. 24; *see also* Malcolm Patterson, *A Corporate Alternative to United Nations Ad Hoc Military Deployments*, 13 J. Conflict & Sec L. 215, 222 (Summer 2008).

[253] *See* Protocol I, *supra* note 180, at art. 47(2)(d).

[254] *See* Singer, Corporate Warriors, *supra* note 2, at 82.

new legal and jurisdictional challenges, to which a growing body of U.S. domestic law seeks to respond. Although far from complete, the evolution of U.S. law presents an increasingly coherent framework through which to regulate PMC conduct and hold PMC personnel accountable. In contrast to the developments in domestic law, international treaties and conventions have yet to see a similar progression and continue to apply to an outdated model of mercenary usage. International custom, meanwhile, supports only a limited restriction on mercenaries and demonstrates both explicit and implicit approval of the modern private military industry.

Taken together, recent trends in PMC usage and developments in domestic and international law suggest a continued PMC presence in international military operations, likely regulated by domestic law. A comprehensive international regulatory and licensing regime may be the ideal scenario for the industry in terms of transparency, accountability, and widespread acceptance, but recent history offers little evidence that this outcome is anywhere close to reality. Instead, the United States' continued engagement with private forces and its refinements in domestic law likely will foster increasingly novel uses of the private military industry, such as the private humanitarian intervention hypothesized herein. Eventually, the international community must adapt and develop a formal and comprehensive response to expanded PMC use, as the challenges presented by PMCs have the potential to weaken the existing state-centric understanding of the use of force. In the short run however, private military use governed by U.S. domestic law appears poised to expand to the outer limits of international law.