

PRIVATE MILITARY CONTRACTORS AND THE TAINT OF A MERCENARY REPUTATION

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I.	INTRODUCTION	854
II.	AN INTRODUCTION TO THE PRIVATE MILITARY INDUSTRY	857
III.	CONCERNS RAISED BY THE PRIVATIZATION OF FORCE BY DEMOCRATIC STATES.....	858
	A. <i>Governments Increasingly Rely on Private Contractors</i>	858
	B. <i>The Pervasive Use of Private Contractors Threatens the Democratic Nation-State</i>	860
	1. <i>The Private Military Industry Undermines the State’s Monopoly on the Use of Force</i>	860
	2. <i>The Use of Private Contractors Undermines Democratic Checks on War-Making</i>	866
	3. <i>The Private Military Industry Prioritizes the Private Good over the Public Good</i>	872
IV.	THE SPIRIT OF THE LAW: HOLDING PRIVATE CONTRACTORS ACCOUNTABLE UNDER ANTI- MERCENARY LAWS	874
	A. <i>The Taint of a Mercenary Reputation</i>	874
	B. <i>The Concerns with Private Contractors Resemble the Concerns with Mercenaries</i>	876
V.	THE LETTER OF THE LAW: APPLYING PROTOCOL I’S DEFINITION OF MERCENARY TO PRIVATE CONTRACTORS.....	879
	A. <i>Private Contractors Can Meet the “Specially Recruited” Requirement</i>	880
	B. <i>Private Contractors Can Meet the Direct Participation Requirement</i>	882
	C. <i>Private Contractors Can Meet the Foreign Nationality Requirement</i>	884

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D.	<i>Private Contractors Can Meet the Motivation of Financial Gain Requirement</i>	885
E.	<i>The Corporate Nature of Private Contractors Does Not Distinguish Them from Mercenaries</i>	887
F.	<i>State Employ of Private Contractors Does Not Exempt Them from Anti-Mercenary Prohibitions</i> ..	888
VI.	CONCLUSION	890

I. INTRODUCTION

*There is something terribly seductive about the notion of a mercenary army.*¹

Far from being merely a seductive notion, the reality today is that many states, even powerful democratic states, are increasingly relying on private military contractors to manage their military efforts in conflicts and in peacetime.² Most prominently, perhaps, the American military effort in Iraq relies heavily on the private military industry, with a force of some 20,000 to 50,000 private military contractors forming the second largest armed contingent in Iraq (after the American national armed forces).³ Some of these private contractors briefly attracted public attention for their involvement in the Abu Ghraib prison abuse scandal.⁴

More recently, on September 16, 2007, private contractors employed by the private military company (PMC)⁵ Blackwater killed seventeen Iraqi civilians, apparently without any justification.⁶ This incident prompted public outcry in the United

1. Ted Koppel, Op-Ed., *These Guns for Hire*, N.Y. TIMES, May 22, 2006, at A21.

2. See generally PETER SINGER, CORPORATE WARRIORS 4-15 (2003) [hereinafter SINGER, CORPORATE WARRIORS].

3. See, e.g., PBS, Frontline: Private Warriors, Frequently Asked Questions, <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/faqs/> (last visited Mar. 17, 2008) (estimating the number of private contractors in Iraq to be 20,000); Koppel, *supra* note 1 (putting the number at 50,000).

4. Deborah Avant, *Mercenaries*, FOREIGN POL'Y, July-Aug. 2004, at 21 [hereinafter Avant, *Mercenaries*]; Mark Benjamin & Michael Scherer, "Big Steve" and Abu Ghraib, SALON, Mar. 31, 2006, http://www.salon.com/news/feature/2006/03/31/big_steve/print.html.

5. Different terms are used to describe these companies: While Singer refers to them as PMFs (private military *firms*), other authors use the term PMC (private military *companies*), which I will use in this Note.

6. See David Johnston, John M. Broder & Paul von Zielbauer, *F.B.I. Says Guards Killed 14 Iraqis Without Cause*, N.Y. TIMES, Nov. 14, 2007, at A1 (citing

States and in Iraq, drawing media and political attention to the private military industry's lack of accountability.⁷ Much of this outcry has assumed that private military contractors are no more than mercenaries, with all of the ugly connotations that that term carries with it.⁸

From a legal perspective, however, this assumption remains contentious. There is an ongoing debate over whether private military companies, and the private contractors that they employ, should be treated just like any other transnational industry, or whether they should be treated like mercenaries—pariahs under international law.⁹ PMCs and their advocates are quick to assert that they are not mercenaries and that existing international law condemning mercenaries cannot be applied to them.¹⁰ The trend in the legal scholarship is similar, with some academics arguing that treating private contractors as mercenaries is not productive,¹¹ dismissing the fear that if we allow PMCs to “legitimate the profession of mercenarism . . . the dangerous threat of mercenaries in gen-

federal agents' preliminary conclusions that at least 14 out of the 17 shootings were unjustified and noting that an earlier military investigation had found all of the killings unjustified).

7. See, e.g., Andrew Gray, *Private Contractors are a Growing Force in War Zones*, REUTERS, Sept. 18, 2007; Editorial, *Subcontracting the War*, N.Y. TIMES, Oct. 1, 2007, at A24 [hereinafter Editorial, *Subcontracting the War*].

8. See, e.g., Stephanie Nebehay, *Private Security Firms Lack Supervision in Wars*: UN, REUTERS, Nov. 6, 2007 (referring to a UN report condemning private contractors in Iraq as mercenaries); *The Charlie Rose Show: A Conversation with the Chairman and CEO of Blackwater*, Erik Prince, (PBS television broadcast Oct. 15, 2007); Editorial, *Accountability on the Battlefield*, N.Y. TIMES, Oct. 8, 2007, at A18; *Blackwater and the Outsourcing of War: US Reliance on Private Armies is Breeding Lawlessness*, FIN. TIMES (Asia ed.), Oct. 4, 2007, at 8 (noting a “growing awareness of how dependent the US military has become on mercenaries”).

9. See Virginia Newell & Benedict Sheehy, *Corporate Militaries and States: Actors, Interactions, and Reactions*, 41 TEX. INT'L L.J. 67, 72 (2006).

10. See, e.g., Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT'L L. 75, 80 (1998); Jonathan Guthrie, *Tim Spicer Finds Security in the World's War Zones*, FIN. TIMES (London), Apr. 7, 2006, at 21 (“We provide protective security. It is very sophisticated and has little to do with the mercenaries of the 1960s.” (quoting Tim Spicer, CEO of Aegis Defence Services)).

11. See Chia Lehnardt, *Regulating the Private Commercial Military Sector* 8 (Dec. 1-3, 2006) (unpublished workshop report, on file with author); see also Avant, *Mercenaries*, *supra* note 4, at 20.

eral [is unleashed].”¹² The PMC industry seems to have largely succeeded in portraying itself as a new phenomenon to which the old rules on mercenaries do not apply. Rather, proponents of the industry and academics alike argue that new rules, developed in partnership with the industry, are needed in order to adequately reflect and address the privatization of force in the twenty-first century.¹³

My goal in this Note is to show that both the letter and the spirit of the international law on mercenaries support the public’s and the media’s understanding of private military contractors as mercenaries. Contrary to the industry’s assertions, therefore, existing international law on mercenaries (in particular article 47 of the First Additional Protocol of the Geneva Conventions)¹⁴ can be applied to at least some private contractors. As we begin to reflect on how domestic and international law could better regulate the private military industry,¹⁵ it is important to recognize and take into account the similarities between private contractors and mercenaries.

To begin, I briefly introduce the private military industry in Part II. I then identify, in Part III, some of the concerns with the use of private force by democratic states.¹⁶ In Part IV,

12. Zarate, *supra* note 10, at 148 (rejecting this concern).

13. See Lehnardt, *supra* note 11, at 10; see also Ellen L. Frye, Note, *Private Military Firms in the New World Order: How Redefining “Mercenary” Can Tame the “Dogs of War,”* 73 *FORDHAM L. REV.* 2607, 2656-63 (2005).

14. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 47, Dec. 7, 1978, 1125 U.N.T.S. 3 [hereinafter Protocol I].

15. In the wake of the September 16, 2007 Blackwater shooting, there have been several proposals in the U.S. House and Senate to increase private contractor accountability. See, e.g., National Defense Authorization Act for Fiscal Year 2008, H.R. 1585, 110th Cong. § 862 (2007) (vetoed by President Bush on Dec. 28, 2007); Intelligence Authorization Act for Fiscal Year 2008, H. R. 2082, 110th Cong. § 411 (vetoed by President Bush on March 8, 2008, veto override failed in House on March 11, 2008). Finally, a new agreement between the Department of Defense and the Department of State has brought private security contractors operating in Iraq under increased military control and states that they can be prosecuted for criminal acts under American law—although the details of how this could be accomplished were left to Congress. See Robert Burns, *New Agreement Would Tighten Military Control Over Blackwater, Other Security Firms in Iraq*, ASSOCIATED PRESS, Dec. 5, 2007.

16. While I believe that there are problems associated with the privatization of force by any state, I will focus my attention in this Note on the use of

I go on to argue that very similar concerns led to the international regulation of mercenaries, suggesting that, in spirit, the international law designed to discourage the use of mercenaries may be equally applicable to private military contractors. Finally, in Part V, I demonstrate that the letter of the law also applies to private contractors; in particular, the definition of mercenary in article 47 of the First Additional Protocol of the Geneva Conventions¹⁷ applies to some private contractors. As a result, I conclude that it is important to consider the similarities between private contractors and mercenaries in future attempts to regulate the private military industry.

II. AN INTRODUCTION TO THE PRIVATE MILITARY INDUSTRY

The private military industry offers a wide range of services.¹⁸ Peter Singer breaks the industry down into three primary groupings: military provider firms, military consulting firms, and military support firms.¹⁹ Military provider firms “provide services at the forefront of the battlespace, by engaging in actual fighting.”²⁰ Military consulting firms provide “advisory and training services integral to the operation and restructuring of the client’s armed forces.”²¹ By far the largest grouping, however, are the military support firms, which provide logistical, technical, supply, and support services.²²

In addition, some people distinguish PSCs (private security companies) from the PMC category because their services are not thought of as military in nature, but rather as focused on the protection and defense of civilians and their property.²³ A well-known example of a company that is sometimes characterized as a PSC is Blackwater, which was hired by the

private contractors by democratic states, where I believe these problems to be especially prevalent and where, I suggest, there is the greatest likelihood of building the political will necessary to check the private military industry.

17. Protocol I, *supra* note 14, art. 47.

18. See SINGER, *CORPORATE WARRIORS*, *supra* note 2, at 91.

19. *Id.*

20. *Id.* at 92.

21. *Id.* at 95.

22. *Id.* at 97.

23. See, e.g., INTERNATIONAL ALERT, *THE PRIVATIZATION OF SECURITY: FRAMING A CONFLICT PREVENTION AND PEACEBUILDING POLICY AGENDA 7* (1999), available at <http://www.international-alert.org/publications/getdata.php?doctype=Pdf&id=105> [hereinafter *PRIVATIZATION OF SECURITY*].

Department of State to perform various tasks, including providing Paul Bremer's bodyguards during his term in Iraq.²⁴

It is beyond the scope of this Note to examine in detail the different functions performed by the private military industry. As I suggest later in this Note, however, the line between "military" and "security" services is often blurry. Moreover, the concerns posed by the private military industry are not confined to those companies that provide purely "military" services, but apply more broadly to the privatization of force as a whole.

III. CONCERNS RAISED BY THE PRIVATIZATION OF FORCE BY DEMOCRATIC STATES

Having briefly outlined the nature of the private military industry, I move on in this next Part to discuss the pervasive use of private contractors by democratic governments (Section A) and the concerns raised by this reliance (Section B).

A. *Governments Increasingly Rely on Private Contractors*

While PMC activity in Iraq has recently attracted some public attention,²⁵ the size of the privatized military industry is often overlooked. The industry is active on every continent (except Antarctica), playing a decisive role in many conflicts and an essential role in the peacetime military structure of many states.²⁶

Prior to the recent scandals in Iraq, private contractor activity was often associated with African conflicts, such as the decisive role played by the PMC Executive Outcomes in turning the tide of the war in Sierra Leone in 1995.²⁷ Similarly, over eighty private military firms have been involved in some capacity in the Angolan civil war, including Executive Outcomes, which led commando raids against the guerrilla movement National Union for the Total Independence of Angola (UNITA) and operated the Angolan Air Force's planes.²⁸

24. See DEBORAH D. AVANT, *THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY* 21 (2005) [hereinafter AVANT, *MARKET FOR FORCE*].

25. See, e.g., Gray, *supra* note 7; Editorial, *Subcontracting the War*, *supra* note 7; Koppel, *supra* note 1; Benjamin & Scherer, *supra* note 4.

26. See SINGER, *CORPORATE WARRIORS*, *supra* note 2, at 9.

27. See *id.* at 4.

28. See *id.* at 9.

Less often discussed is the similarly pervasive and often decisive involvement of PMCs in the militaries of developed, democratic states. In addition to the United States' heavy reliance on the private military industry in Iraq, many other powerful democratic states are completely dependent on PMCs in order to deploy and operate their armed forces. The United Kingdom, for example, has contracted out training in operation and maintenance of its nuclear submarines, as well as the operation of its aircraft support unit, tank transporter unit, and air-to-tanker refueling fleet.²⁹ Likewise, Australia and Canada have entirely privatized many of their military services, including military recruiting in Australia and electronic warfare in Canada.³⁰ Canada has also contracted out the transport of its troops—leading to an embarrassing incident in 2000, when roughly one-third of the Canadian army was stranded in international waters until a contract dispute between subcontractors was resolved.³¹

Most pervasive of all, however, is the American military's reliance on the private military industry—resulting in more than 3,000 contracts between 1994 and 2002 alone.³² Indeed, the American military has contracted out everything from food preparation to maintenance and administration of the B-2 stealth bomber.³³ In Iraq, “contractors have played a central role in combating the Iraqi insurgency.”³⁴ For example, private contractors working for Blackwater used weapons and helicopters to fight insurgents and were killed and mutilated while protecting a convoy in Fallujah.³⁵ In another area of heavy privatization, truck driving, drivers employed by Kellogg, Brown and Root (the company that built the Guantanamo Bay detention center) were killed driving fuel convoys through combat zones.³⁶ Even more infamously, private contractors who had been hired as interpreters were implicated in the Abu Ghraib prison abuse.³⁷

29. *See id.* at 12.

30. *See id.* at 14.

31. *See id.* at 160.

32. *See id.* at 15.

33. *See id.*

34. *See id.*

35. *See* AVANT, MARKET FOR FORCE, *supra* note 24, at 21-22.

36. *See id.* at 22.

37. *See id.*

As these examples make clear, the private military industry's involvement both in conflicts and in the maintenance of peacetime militaries cannot be underestimated; the industry's contracts are worth hundreds of billions of dollars in the United States alone.³⁸ Clearly, democratic states increasingly rely on the private military industry to fulfill their security needs and goals.³⁹ This growth of the private military industry has effectively broken the state's monopoly over the use of force, leading to potentially huge consequences both for our understanding of warfare generally and for our understanding of the role of the state in making (and in ending) wars.⁴⁰

B. *The Pervasive Use of Private Contractors Threatens the Democratic Nation-State*

The pervasive use of private military force by democratic governments threatens the democratic nation-state because it (1) undermines the state's monopoly on the use of force; (2) increases the executive's power to wage war without democratic accountability; and (3) prioritizes the private good over the public good.

1. *The Private Military Industry Undermines the State's Monopoly on the Use of Force*

*The international community's fear of mercenaries lies in that they are wholly independent from any constraints built into the nation-state system.*⁴¹

Our understanding of government and statehood has historically been premised on the notion that "providing for national, and hence their citizens', security was one of the most essential tasks of a government. Indeed, it defined what a government was supposed to be."⁴² While there is a long history of government reliance on private force,⁴³ by the beginning of the twentieth century states seemed to have generally achieved

38. See SINGER, *CORPORATE WARRIORS*, *supra* note 2, at 15.

39. See *id.* at 18.

40. *Id.*

41. Zarate, *supra* note 10, at 122.

42. SINGER, *CORPORATE WARRIORS*, *supra* note 2, at 7 (citing MAX WEBER, *THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* (1964)).

43. See *id.* at 19.

a monopoly on the use of force,⁴⁴ in theory if not in practice. The United Nations (UN) Charter, for example, is premised on the notion that states have a monopoly on the use of force, proposing that the best way to protect future generations from the scourge of war is to limit the ability of Member *States* to resort to force.⁴⁵ The UN Charter relies on the theory that “[i]f force was to be used, it was to be used in the last resort, by its constituent membership of sovereign states, and these members were to be answerable to the UN for their actions.”⁴⁶

The public’s distrust of mercenaries is partly rooted in the perception that they violate the state’s monopoly on the use of force.⁴⁷ This emphasis on the monopolization of force by states led to the international condemnation of mercenaries beginning in the 1960s, when white mercenaries known as “Les Affreux” fought against African decolonization and independence movements.⁴⁸ The Organization for African Unity (OAU) drafted the regional Convention for the Elimination of Mercenaries in Africa in 1972 (the “OAU Convention”),⁴⁹ and in 1977 the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (“Protocol I”) stripped mercenaries of combatant and prisoner of war status.⁵⁰ Regulation of mercenary activity developed further with the adoption of a much broader definition of “mercenary” in the 1989 International Convention Against the Recruitment, Use, Financing,

44. Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 894-96 (2004).

45. See U.N. Charter pmbll., art. 2, para. 4.

46. Christopher Spearin, *Private Security Companies and Humanitarians: A Corporate Solution to Securing Humanitarian Spaces?*, 8 INT’L PEACEKEEPING 20, 37-38 (2001).

47. See Newell & Sheehy, *supra* note 9, at 70.

48. See SINGER, CORPORATE WARRIORS, *supra* note 2, at 37.

49. Organization of African Unity Convention for the Elimination of Mercenaries in Africa, O.A.U. Doc. CM/433/Rev.L, annex 1 (1972), *available at* <http://www.umn.edu/humanrts/instree/mercenaryconvention.html> [hereinafter OAU Convention].

50. Protocol I, *supra* note 14, art. 47(1).

and Training of Mercenaries⁵¹ (which came into force in 2001⁵²).

Like mercenaries, private contractors also “undermine states’ collective monopoly on violence,”⁵³ but unlike mercenaries, private contractors have so far escaped international condemnation. One reason that the private military industry has successfully avoided condemnation so far is that its major employers are states themselves. As a result, private contractors have been described as “the nation-state system’s bulwark against destabilization,”⁵⁴ rather than as a threat to the state’s monopoly on force. Some scholars argue that so long as private contractors are employed by a state, they can be understood as “a type of state agent.”⁵⁵ In Sierra Leone, for example, the weak government’s contract with the PMC Executive Outcomes saved it from imminent rebel takeover in 1995.⁵⁶ In effect, the private nature of the PMC is subsumed by the public function that it has been hired to fulfill.⁵⁷ Under this theory, private contractors pose a danger only “if they are taken out of the state-controlled system.”⁵⁸

Private contractors do not, however, work solely for states; they are also hired by multinational corporations and nongovernmental organizations to provide security for their personnel and facilities.⁵⁹ As such, they operate outside of the state system, effectively breaking the state’s monopoly on force in the same way as other non-state actors that use violence. Private contractors also work for criminal organizations that di-

51. See International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries art. 1, Dec. 4, 1989, 2163 U.N.T.S. 96 [hereinafter Convention Against Mercenaries].

52. For information about the date of entry into force, see Office of the United Nations High Commissioner for Human Rights, International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries, <http://www2.ohchr.org/english/law/mercenaries.htm> (last visited Mar. 17, 2008).

53. Avant, *Mercenaries*, *supra* note 4, at 28; see also Newell & Sheehy, *supra* note 9, at 69-70.

54. Zarate, *supra* note 10, at 159.

55. *Id.* at 92.

56. See SINGER, CORPORATE WARRIORS, *supra* note 2, at 3-4; AVANT, MARKET FOR FORCE, *supra* note 24, at 86-87.

57. See Rosky, *supra* note 44, at 942.

58. Zarate, *supra* note 10, at 145.

59. See Avant, *Mercenaries*, *supra* note 4, at 26.

rectly oppose states, such as the Colombian and Mexican drug cartels.⁶⁰ For example, PMCs are involved on both sides of the conflict in Colombia.⁶¹ While American companies such as DynCorp have been hired by the U.S. government to assist in the Colombian government's anti-drug activities, an Israeli PMC (Spearhead, Ltd.) is rumored to have been hired by drug cartels to provide combat training and support services.⁶² Similarly, in Mexico, drug cartels have hired private companies to train their forces in military tactics as well as in counter-surveillance techniques.⁶³

In short, since the private military market is unregulated, the companies and the contractors can, and do, work for whomever they choose.⁶⁴ Although in some situations a PMC's concern with its reputation might prevent it working for a less than savory client such as a drug cartel, in other situations the large financial rewards might trump reputational concerns.⁶⁵ Some PMCs might even choose to base their reputation on being willing to work for anyone—producing a race to the bottom.⁶⁶ It is a mistake, therefore, to dismiss private contractors as unproblematic because they are employed solely by states. Rather, like any other business, private contractors can sell their services to whomever they choose. Unlike other businesses, however, private contractors are engaged in selling the use of force. As a result, by creating a market for violence, they effectively break states' monopoly on the use of force.

Private contractors also threaten the state's monopoly on the use of force because they frequently operate outside the control of any national laws.⁶⁷ It remains unclear, for example, whether private contractors hired by the United States are subject to the Uniform Code of Military Justice (UCMJ), as are members of the national armed forces.⁶⁸ Indeed, at the time

60. See SINGER, *CORPORATE WARRIORS*, *supra* note 2, at 14-15.

61. *See id.* at 14.

62. *See id.*

63. *See id.* at 15.

64. *See id.*

65. *See id.* at 180.

66. *Id.* at 219.

67. *See* Avant, *Mercenaries*, *supra* note 4, at 24.

68. An amendment to the UCMJ in 2006 may have eliminated contractors' immunity from that statute. *See* Pub. L. No. 109-364 § 552 (2006)

this Note goes to press, the debate continues over whether the private contractors involved in the September 16, 2007 shooting in Iraq can be prosecuted in U.S. courts: Because the contractors were employed by the Department of State rather than the Department of Defense, they appear to be outside the jurisdiction of American courts.⁶⁹ Private contractors em-

(amending 10 U.S.C. § 802(a)(10) by striking “war” and inserting “declared war or a contingency operation,” thereby applying the UCMJ to contractors operating in conflicts where Congress has not formally declared war). According to Peter Singer, “with this change, contractors’ ‘get out of jail free’ card may have been torn to shreds. Previously, contractors would only fall under the Uniform Code of Military Justice, better known as the court martial system, if Congress declared war.” Peter Singer, *The Law Catches Up To Private Militaries, Embeds*, DEFENSE TECH, Jan. 3, 2007, <http://www.defensetech.org/archives/003123.html>. The breadth of the amendment and the application of military law to civilians, however, could make the amendment subject to constitutional challenge, as the Supreme Court has held that civilians cannot be court-martialed under the UCMJ. See *Reid v. Covert*, 354 U.S. 1, 37-40 (1957); see also Griff Witte, *New Law Could Subject Civilians to Military Trial: Provision Aimed at Contractors, but Some Fear It Will Sweep Up Other Workers*, WASH. POST, Jan. 15, 2007, at A1; Farah Stockman, *Contractors in War Zones Lose Immunity: Bill Provision Allows Military Prosecutions*, BOSTON GLOBE, Jan. 7, 2007, at A13. Private contractors employed by the Department of Defense are now subject to the criminal jurisdiction of the American federal courts, under the Military Extraterritorial Jurisdiction Act and the PATRIOT Act, which extended federal jurisdiction to crimes committed by or against U.S. citizens on lands designated for use by the U.S. government. Military Extraterritorial Jurisdiction Act (MEJA), Pub. L. No. 106-523 (2000); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, § 804 (2001); see also AVANT, MARKET FOR FORCE, *supra* note 24, at 234-35; Avant, *Mercenaries*, *supra* note 4, at 22; Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1085-86 (2004).

69. MEJA technically appears to apply only to contractors employed by the Department of Defense. See 18 U.S.C. § 3261 (2000); see also Matt Apuzzo & Lara Jakes Jordan, *Blackwater Probe Narrows Focus to Guards*, ASSOCIATED PRESS, Dec. 7, 2007 (noting that prosecutors may not be able to bring charges under MEJA). This loophole may soon be closed, as numerous proposals have been made by both the House and the Senate in the wake of the September 16, 2007 Blackwater shooting. See, e.g., Holding Security Contractors in War Zones Overseas Accountable, H.R. 2740, 110th Cong. (2007) (passed by the House, placed on the Calendar of the Senate on Oct. 5, 2007, where it is known as MEJA Expansion and Enforcement Act of 2007); Stop Outsourcing Security Act, S. 2398, 110th Cong. (2007) (referred to the Senate Homeland Security and Governmental Affairs Committee on Nov. 16, 2007).

ployed in Iraq were also granted immunity from Iraqi laws by the Coalition Provisional Authority's Order 17.⁷⁰ Even where they are not exempt from local law, however, the situation on the ground in many of the states where private contractors operate is too unstable to guarantee any real accountability.⁷¹

Where it has been tried, national regulation⁷² has been notably unsuccessful at curtailing the private military industry because many PMCs operate "virtually," allowing them to dissolve, reform, and relocate easily when operating in a particular location becomes too difficult.⁷³ For example, Executive Outcomes, which formally disbanded after South Africa passed the Foreign Military Assistance Act in 1998, actually transformed itself into multiple firms operating outside of South African jurisdiction.⁷⁴ It will be interesting to see whether the same effect is repeated in the United States if some of the recent proposals to increase the industry's accountability become law.⁷⁵

The monopolization of force by states allows states, at least in theory, to regulate the use of force under international law through Security Council sanctions, International Court of Justice decisions, and political and economic pressures on other states. If force is a commodity that can be bought and sold like any other, however, these limits are likely to become even less effective than they are now. The underlying concept

70. See Coalition Provisional Authority [CPA], Order No. 17, § 4, Doc. No. CPA/ORD/27 June 2004/17 (June 27, 2004), available at http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev__with_Annex_A.pdf ("Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto."); see also Avant, *Mercenaries*, *supra* note 4, at 24. The Iraqi cabinet initiated the revocation of CPA Order 17 following the Blackwater incident on September 16, 2007, but the revocation has, at the time this Note goes to press, not yet been passed into law by the Iraqi parliament. See *Iraq: Pass New Law Ending Immunity for Contractors*, HUMAN RTS. NEWS (Human Rts. Watch, New York, NY), Jan. 9 2008, <http://hrw.org/english/docs/2008/01/09/iraq17703.htm>; Robert Brodsky, *The Game Changer*, GOV'T EXECUTIVE, Jan. 2008, at 9.

71. See Avant, *Mercenaries*, *supra* note 4, at 24.

72. See, e.g., Regulation of Foreign Military Assistance Act, R15/1998 in GG18912 of 20 May 1998 (S. Afr.), available at <http://www.info.gov.za/gazette/acts/1998/a15-98.pdf>.

73. See SINGER, *CORPORATE WARRIORS*, *supra* note 2, at 75, 118.

74. *Id.*

75. See *supra* note 15 for a discussion of recent legislative proposals.

of the United Nations system fails where there are powerful actors outside of the control of states in possession of the means of violence.

Moreover, even if states could effectively control the private military industry, there is also a deeper-rooted objection to private companies taking on what are fundamentally governmental responsibilities.⁷⁶ Successful national regulation of the private military industry may appear to re-impose state control over the industry, but by recognizing and accepting the state's reliance on private contractors it also "communicates disregard for the norm that states have primary responsibility for and monopoly over legitimate security services."⁷⁷ If the state's monopoly on the use of force is a "fundamental feature of the modern state system,"⁷⁸ then the privatization of the state's military functions will always be fundamentally problematic.⁷⁹

Private contractors threaten the state's monopoly on the use of force because they represent a clear alternative to state force—a purchasable alternative that has already proven alluring to criminal factions and other forces opposing legitimate governments—and because they generally operate outside of the control of national law. Even when private contractors are hired by a state, however, the role of the state as the primary provider of security is necessarily diminished.⁸⁰

2. *The Use of Private Contractors Undermines Democratic Checks on War-Making*

*[I]t is ironic that the problems related to non-state force are actually based on its state-centric nature.*⁸¹

In addition to challenging the state's monopoly on the use of force, the privatization of military force also threatens the democratic state because it allows governments to make

76. See PRIVATIZATION OF SECURITY, *supra* note 23, at 49; Montgomery Sapone, *Have Rifle With Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 CAL. W. INT'L L.J. 1, 5-6 (1999).

77. AVANT, MARKET FOR FORCE, *supra* note 24, at 69.

78. *Id.*

79. See PRIVATIZATION OF SECURITY, *supra* note 23, at 50.

80. See SINGER, CORPORATE WARRIORS, *supra* note 2, at 18 ("With the growth of the global military services industry . . . the state's role in the security sphere has now become deprivileged.")

81. Spearin, *supra* note 46, at 39.

war while avoiding democratic accountability.⁸² Democratic governments are entrusted with a monopoly on the use of force because their power to exercise that force is limited by the rule of law and by accountability to their citizens.⁸³ Private contractors, however, greatly undermine democratic accountability, and in so doing circumvent the democratic reluctance for war. By undermining the public's control over the war-making powers of the state, private contractors threaten the popular sovereignty of the state.⁸⁴ Thus, the problem with private military force may not be simply a lack of state control, as discussed above, but also too much *government* control, particularly executive control, at the expense of *popular*, democratic control.⁸⁵

At an extreme, a government, even a democratic government, might use private violence as a brutal police force to ensure its control over the people.⁸⁶ In reality, however, a democratic government's outsourcing of military functions undermines the democratic process much more subtly than this far-fetched scenario. Because the executive branch is generally in charge of hiring contractors, private contractors allow the executive to evade parliamentary or congressional checks on foreign policy.⁸⁷ Indeed,

[t]o the extent privatization permits the Executive to carry out military policy unilaterally . . . it circumvents primary avenues through which the People are

82. See AVANT, MARKET FOR FORCE, *supra* note 24, at 4.

83. Newell & Sheehy, *supra* note 9, at 74.

84. See Armin von Bogdandy, *Globalization and Europe: How to Square Democracy, Globalization, and International Law*, 15 EUR. J. INT'L L. 885, 887 (2004) ("Under a democratic constitution, *popular* sovereignty is nothing but the realization of democracy upon which the legitimacy of all public power rests."); see also Michaels, *supra* note 68, at 1079-80; PRIVATIZATION OF SECURITY, *supra* note 23, at 21.

85. Similar concerns were raised during the writing of the American Constitution, when some of the Founders were concerned that a professional army, instead of a citizen militia, would undermine the system of democratic government. See Kirsten S. Dodge, *Countenancing Corruption: A Civic Republican Case Against Judicial Deference to the Military*, 5 YALE J.L. & FEMINISM 1, 22-23 (1992) (quoting Samuel Adams as having reasoned: "The Militia is composed of free Citizens. There is therefore no Danger of their making use of their Power to the destruction of their own Rights.").

86. See PRIVATIZATION OF SECURITY, *supra* note 23, at 21.

87. Michaels, *supra* note 68, at 1078.

informed and blocks off primary channels (namely Congress) through which the People can register their approval or voice their misgivings.⁸⁸

Privatizing military force results in a lack of transparency and puts the military effort outside of the scope of the democratic dialogue, “obscuring choices about military needs and human implications.”⁸⁹ Notably, in the United States, private contractors are not subject to the scrutiny of the Freedom of Information Act,⁹⁰ which greatly restricts the public’s ability to be well-informed about the government’s reliance on the private military industry. Thus, the privatization of military force allows the executive “to operate in the shadows of public attention”⁹¹ and to subvert democratic political restraints.⁹²

The privatization of combat duties is potentially much more problematic than the privatization of other government functions because the privatization of the use of force inherently removes many of the burdens of war from the citizenry, thereby reducing public debate about national involvement in the conflict.⁹³ Indeed, governments may turn to private military forces not because they are cheaper, but because they are less accountable and less likely to attract political backlash.⁹⁴ For example, by outsourcing military functions, the executive branch is able to evade certain forms of democratic accountability by circumventing congressional caps on the number of

88. *Id.*

89. Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 1024 (2005).

90. See Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 192 (2005).

91. Michaels, *supra* note 68, at 1008.

92. See Avant, *Mercenaries*, *supra* note 4, at 28.

93. See Newell & Sheehy, *supra* note 9, at 81 (arguing that the privatization of force allows the state not simply to outsource, but to divest itself of a responsibility vested in it by its citizens); Rosky, *supra* note 44, at 881 (arguing that to speak of the privatization of force in the same terms as the privatization of schools, hospitals, and welfare systems is to miss the special problems posed by the privatization of force).

94. See Michaels, *supra* note 68, at 1008.

troops approved for deployment.⁹⁵ Employing private contractors also allows the executive to avoid instituting a draft, keep official casualty counts and public criticism down, and even to avoid arms embargoes.⁹⁶ The government is also able to distance itself from mistakes by blaming them on the contractors.⁹⁷ By subverting public debate and by undermining the separation of powers, the privatization of military force poses a direct threat to the democratic system.⁹⁸

This impediment to public debate is important because, as Immanuel Kant famously reasoned, the chances for peace are greatly increased when the people control the decision on whether or not to go to war, since it is the people themselves who will suffer “the miseries of war.”⁹⁹ If, on the other hand, the decision rests with the head of state, he has little incentive to refrain from war because he bears none of its costs.¹⁰⁰ At a fundamental level, therefore, the use of private contractors subverts Kant’s reliance on the democratic reluctance to go to war by circumventing the public’s reluctance to sustain casualties.¹⁰¹ In Iraq, for example, contractor deaths are not counted towards the official death toll,¹⁰² allowing the government to present a far lower number of American casualties. Recent estimates suggest that the total number of contractors killed in Iraq is 1,000, with over 10,000 wounded or injured on the job.¹⁰³ But, as the daughter of one contractor killed in Iraq put it: “If anything happens to the military people, you

95. See Rebecca Ulam Weiner, *Sheep in Wolves’ Clothing: Private Military Men Patrol Iraq in Constant Jeopardy of Stepping on Legal Landmines*, LEGAL AFF., Jan.-Feb. 2006, at 23, 25.

96. Michaels, *supra* note 68, at 1039.

97. Newell & Sheehy, *supra* note 9, at 88.

98. Michaels, *supra* note 68, at 1008.

99. IMMANUEL KANT, *Perpetual Peace*, in POLITICAL WRITINGS 93, 100 (H.S. Reiss ed., 2000).

100. *Id.*

101. See Michaels, *supra* note 68, at 1043.

102. See, e.g., John M. Broder & James Risen, *Death Toll for Contractors Reaches New High in Iraq*, N.Y. TIMES, May 19, 2007, at A1.

103. Bernd Debusmann, *In Outsourced US Wars, Contractor Deaths Top 1,000*, REUTERS, July 3, 2007 (basing figures on statistics released by the Department of Labor in response to a Freedom of Information Act request; of the 1,000 deaths, over 200 are thought to be U.S. citizens).

hear about it right away Flags get lowered, they get their respect. You don't hear anything about the contractors."¹⁰⁴

Just as the private military industry poses a threat to established democratic regimes, it also potentially impedes the emergence of new democratic states. When private contractors become involved in a conflict, there is necessarily a danger that security will become a commodity that only the rich can afford.¹⁰⁵ This tendency can undermine democratic movements that aim at a redistribution of resources and power.¹⁰⁶ Fundamentally, private contractors "serve a commercial rather than a humanitarian purpose. . . . [T]hey are not drawn towards the interests of the poor, but towards those who can pay."¹⁰⁷

Compounding this shortfall in public accountability, it is also unclear how privately accountable private contractors actually are. It is sometimes assumed that private contractors are accountable to the controls of the market and that a disreputable reputation will reduce a PMC's competitive edge, making it less likely that it will be hired. In practice, however, PMCs often escape oversight through sole-source, non-competitive bids and other practices that circumvent the market (a prominent example is Halliburton's non-competitive bid for the contract to manage logistics for the Iraq war), putting into question just how effective a control the market really provides.¹⁰⁸

In addition, while contractors are technically regulated to some extent by their contracts,¹⁰⁹ there is in fact a notable lack

104. Broder & Risen, *supra* note 102.

105. PRIVATIZATION OF SECURITY, *supra* note 23, at 21.

106. *Id.*

107. TONY VAUX ET AL., INT'L, ALERT, HUMANITARIAN ACTION AND PRIVATE SECURITY COMPANIES: OPENING THE DEBATE § 3.7.2, at 19 (2002), available at <http://www.globalpolicy.org/nations/sovereign/military/0302humanitaction.pdf>.

108. See Minow, *supra* note 89, at 992, 995. The National Defense Authorization Act for Fiscal Year 2008 proposed to limit and increase accountability for awarding defense contracts based on non-competitive bids, but President Bush refused to sign it into law. See H.R. 1585 § 862, 110th Cong. (2007) (vetoed by President Bush on Dec. 28, 2007).

109. See Minow, *supra* note 89, at 1000-01; Laura Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383, 401 (2006) (arguing that contracts can be used to promote public law values).

of means to ensure contractual compliance.¹¹⁰ Importantly, most militaries have no developed system with which to monitor contractual compliance.¹¹¹ In Iraq, for example, a contractor allegedly involved in the Abu Ghraib abuse “posed a ‘different dilemma’” than the uniformed soldiers involved.¹¹² Since the contractor could not be prosecuted under the UCMJ, the Army was confined to reporting him to the off-site Army officer responsible for the contract under which he had been hired.¹¹³ In fact, no contractor has ever been prosecuted for his or her involvement in the Abu Ghraib abuse scandal, although a private contractor was convicted for his role in the death of a detainee in Afghanistan.¹¹⁴

As this Section has demonstrated, when the state privatizes its military functions, a great deal of the accountability inherent in democratic government is lost, as “[t]here is, in the final analysis, no direct chain of command from the government to units of [private contractors].”¹¹⁵ Fundamentally, corporations are not subject to the same kind of electoral accountability as governments, because while “public accountability is shared . . . market accountability is sold.”¹¹⁶ While a PMC may be accountable in the sense that it must generate a profit in order to remain a viable corporation, a democratic government is held accountable in more complex and effective ways.

110. See Dickinson, *supra* note 109, at 406-10 (discussing the current lack of monitoring); Minow, *supra* note 89, at 1001; SINGER, CORPORATE WARRIORS, *supra* note 2, at 153.

111. See SINGER, CORPORATE WARRIORS, *supra* note 2, at 153.

112. Benjamin & Scherer, *supra* note 4 (quoting Col. Thomas M. Pappas’s testimony in Sgt. Michael J. Smith’s (an Army dog handler at Abu Ghraib) court-martial).

113. See *id.* Note that a recent change in the law in the United States may mean that the UCMJ does apply to private contractors, as discussed above. See *supra* notes 68 and 69 and accompanying text.

114. See Benjamin & Scherer, *supra* note 4; *National Briefing South: North Carolina: C.I.A. Contractor Is Sentenced*, N.Y. TIMES, Feb. 14, 2007, at A20 (“A former contractor [David A. Passaro] for the Central Intelligence Agency was sentenced to eight years and four months in prison for beating an Afghan detainee who later died.”).

115. Koppel, *supra* note 1.

116. Rosky, *supra* note 44, at 940.

3. *The Private Military Industry Prioritizes the Private Good over the Public Good*

[C]ontractors' livelihoods depend on the continuation—
if not exacerbation—of conflict.¹¹⁷

Similarly, there is often a vast difference between the public good that the state's use of force is meant to achieve and the private good that is the desired result for a PMC.¹¹⁸ A PMC is a corporation and, like any other corporation, it "work[s] for the shareholder . . . [and its] job is to go out and make the most money for those people."¹¹⁹ Unlike a state, which is under pressure to resolve conflicts, there is little incentive for private contractors to encourage the resolution of the conflicts¹²⁰ that motivated their hire in the first place. Thus, when military force is sold as a commodity on the market, there is a risk that private contractors, who "directly benefit from the existence of war and suffering,"¹²¹ will aggravate a conflict situation in order to keep their profits high.¹²² For example, "[t]here have. . . been allegations that Halliburton has run additional but unnecessary supply convoys through Iraq because it gets paid by the trip"—a clear case of a company's incentive to turn a higher profit leading it to risk aggravating the conflict.¹²³ In sum, "[s]oldiers serve their country; contractors serve their managers and shareholders."¹²⁴ Nevertheless, a PMC does have reputational concerns that generally encourage it to perform its contract successfully, which in many cases may help resolve the conflict.¹²⁵

Even if their participation can sometimes assist in the immediate, short-term resolution of a given conflict, however, on

117. Michaels, *supra* note 68, at 1099.

118. SINGER, *CORPORATE WARRIORS*, *supra* note 2, at 217.

119. Koppel, *supra* note 1 (quoting Exxon CEO Rex Tillerson who, during an interview on NBC's Today show, rejected a suggestion that Exxon lower summer gas prices out of concern for its consumers).

120. See Sapone, *supra* note 76, at 3-4.

121. SINGER, *CORPORATE WARRIORS*, *supra* note 2, at 216.

122. See Avant, *Mercenaries*, *supra* note 4, at 24.

123. See Michaels, *supra* note 68, at 1099-1100 (citing Mary H. Cooper, *Private Affair: New Reliance on America's Other Army*, 62 CONG. Q. WKLY. REP. 2186, 2194 (2004)); see also SINGER, *CORPORATE WARRIORS*, *supra* note 2, at 155.

124. Weiner, *supra* note 95, at 23.

125. See Avant, *Mercenaries*, *supra* note 4, at 24.

a broader level contractors can “worsen the conditions for long-term stability.”¹²⁶ Private contractors can be used to “help prop up rogue regimes, resist struggles for self-determination, and contribute to the proliferation and diffusion of weaponry and soldiers around the world—axiomatically a destabilizing and thus undesirable phenomenon.”¹²⁷ In addition, private contractors sometimes remain in a country after the conflict (and their contract) has ended. This happened in Sierra Leone, where the government paid for the contractors’ services in mining subsidiaries, leading the PMC Executive Outcomes to retain a militarized presence in Sierra Leone long after its contract had ended in order to protect these mining assets.¹²⁸ This militarized presence destabilized the already vulnerable country by creating a parallel force that ultimately became a challenge to the national army.¹²⁹

The above example highlights the especially high danger of public interests becoming “subservient to private interests when governments pay for the services of private security services through mining or other facilities.”¹³⁰ Paying a PMC with natural resource concessions undermines popular control over the nation’s natural resources and introduces corporate priorities into the conflict zone. Moreover, PMCs are often closely linked to other multinational corporations,¹³¹ and their involvement in conflicts may be seen “solely as a means of obtaining concessions and related contracts for their corporate brethren.”¹³²

Zarate suggests that PMCs’ links to other companies are not of concern, because these links “give [the PMCs] an economic stake in the peace and stability of a country and region.”¹³³ According to Zarate, no business can profit in chaos.¹³⁴ This reasoning assumes, however, that the public

126. *Id.*

127. Michaels, *supra* note 68, at 1119.

128. See AVANT, MARKET FOR FORCE, *supra* note 24, at 86-92.

129. See *id.*

130. PRIVATIZATION OF SECURITY, *supra* note 23, at 21.

131. See, e.g., SINGER, CORPORATE WARRIORS, *supra* note 2, at 133 (noting the purchase of the PMC MPRI by L-3 Communications, a spin-off from Loral and Lockheed, in 2000).

132. Zarate, *supra* note 10, at 147.

133. *Id.* at 150.

134. *Id.*

good and the private good are one and the same. Clearly, businesses often thrive in the midst of conflict and chaos: From conflict diamonds to oil, history has shown us that conflict and profit frequently go hand in hand, and that the private good of profit can all too easily eclipse the public good of peace and security. Nowhere is a company's profit more explicitly linked to chaos and conflict than in the private military industry, which would quickly cease to exist in the event of world peace.

As this Part has illustrated, the private military industry threatens the democratic state, both as a *state*, because private contractors undermine the state's monopoly on the use of force, and as a *democracy*, because private contractors undermine democratic accountability and prioritize the private good at the expense of the public good. These concerns suggest that the public condemnation of PMCs in the wake of the Blackwater incident is well-founded.

IV. THE SPIRIT OF THE LAW: HOLDING PRIVATE CONTRACTORS ACCOUNTABLE UNDER ANTI-MERCENARY LAWS

In the next two Parts of the paper, I argue that labeling private military contractors as mercenaries is supported by both the spirit and the letter of the international law developed to discourage states from hiring mercenaries. As this Part will demonstrate, the term "mercenary" carries an unflattering connotation that the private military industry has been keen to avoid—and with good reason: Closer examination reveals that the concerns with private contractors identified above closely resemble the concerns that led to the development of international law on mercenaries.

A. *The Taint of a Mercenary Reputation*

The history of mercenary activity is a long one¹³⁵ and, until fairly recently, international humanitarian law did not treat mercenaries differently from other combatants.¹³⁶ Beginning

135. See SINGER, *CORPORATE WARRIORS*, *supra* note 2, at 19.

136. See Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague Convention V) arts. 4, 6, Oct. 18, 1907, 36 Stat. 2310; see also Todd Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1,

in the 1970s, however, mercenaries came to be seen as a threat and a series of international conventions were drafted to discourage their use.¹³⁷

The term “mercenary” has been used to describe a wide range of people—from “individuals killing for hire, to troops raised by one country working for another,” and even to PMCs.¹³⁸ The public perception of mercenaries is one of “dogs of war” and “freelance soldiers of no fixed abode, who, for large amounts of money, fight for dubious causes.”¹³⁹ Some mercenaries, such as “Mad” Mike Hoare and Bob Denard, gained international notoriety for their violent roles in African decolonization struggles.¹⁴⁰ Mercenaries are often ex-soldiers who hire themselves out on a free-lance basis, frequently working for rebel groups, businesses operating in weak states, or racist regimes and movements.¹⁴¹ In addition, mercenaries are generally believed to be motivated by a desire for financial gain, thus distinguishing themselves from volunteers or members of the national armed forces who are thought to fight out of a more noble sense of loyalty or patriotism.¹⁴² Thus, while there is no clear consensus on the definition of mercenary, the term has certainly “acquired an unflattering connotation.”¹⁴³

The strength of this unflattering connotation can be seen in the Geneva Convention Additional Protocol I’s radical declaration that “[a] mercenary shall not have the right to be a combatant or a prisoner of war.”¹⁴⁴ This exclusion runs contrary to “the general thrust of international humanitarian law to extend protection to as many civilians and combatants as possible,”¹⁴⁵ thus illustrating just how negatively international law views mercenaries.

20 (2003); Antonio Cassese, *Mercenaries: Lawful Combatants or War Criminals?*, 40 ZAÖRV 1, 28 (1980).

137. See *supra* Part III.B.1.

138. AVANT, MARKET FOR FORCE, *supra* note 24, at 22.

139. SINGER, CORPORATE WARRIORS, *supra* note 2, at 40.

140. See *id.* at 37.

141. See *id.*

142. See Convention Against Mercenaries, *supra* note 51, art. 1(1)(b), (2)(b); Protocol I, *supra* note 14, art. 47(2)(c).

143. SINGER, CORPORATE WARRIORS, *supra* note 2, at 40.

144. Protocol I, *supra* note 14, art. 47(1).

145. Sapone, *supra* note 76, at 37.

Most PMCs have attempted to distance themselves from the unflattering connotations associated with mercenaries, out of fear that a mercenary reputation might undermine their chances at future contracts.¹⁴⁶ Indeed, the term “mercenary” is used disparagingly even within the private military industry. For example, one PMC executive criticized some of the other PMCs employed by the United States in Iraq by noting that they were retained because the United States “needs an organ that is from outside the US, far less accountable, and already tainted . . . with a whiff of dirty tricks. . . . The powers that be want mercenaries, for mercenary activity. Dirty stuff doable, non-accountable and at no extra cost to boot!”¹⁴⁷

While private contractors seem, in many respects, to have succeeded in “repackaging” themselves as distinct from mercenaries,¹⁴⁸ it is less clear that they are *actually* any different.¹⁴⁹ In fact, the concerns that motivated the development of anti-mercenary international law are extremely similar to the contemporary concerns about private contractors described in Part III.

B. *The Concerns with Private Contractors Resemble the Concerns with Mercenaries*

This Section examines the existing international law on mercenaries to illustrate that there are “disturbing similarities” between some of today’s private contractors and “the 1960s-style soldiers of fortune.”¹⁵⁰ I use the existing international law on mercenaries to illustrate that the concerns that led to the development of this body of law closely resemble the concerns that I raised in Part III with respect to private contractors. Mercenaries, much like private contractors, threaten states’ monopoly on the use of force, prioritize the private good over the public good, and generally undermine democratic checks on war-making and the emergence of new democratic regimes.

146. See AVANT, MARKET FOR FORCE, *supra* note 24, at 85-86.

147. *Id.* at 227 (quoting an email from Cobus Claassens, Southern Cross Security, July 2004).

148. *Id.* at 29-30.

149. See Sapone, *supra* note 76, at 2, 13.

150. Avant, *Mercenaries*, *supra* note 4, at 21.

Just as private contractors today can be hired to prevent the emergence of a new democratic regime, the initial laws on mercenaries were developed to check the hiring of mercenaries by racist regimes resisting the decolonization movement in Africa.¹⁵¹ The OAU Convention, in particular, reflects the concern that mercenaries can undermine the emergence of new, democratic governments. Citing “the grave threat which the activities of mercenaries represent to the independence, sovereignty, territorial integrity and harmonious development of Member States of OAU,”¹⁵² the OAU Convention determined to put an end to “the subversive activities of mercenaries in Africa.”¹⁵³ The OAU specifically defines the mercenary as an individual aiming to overthrow the government or to undermine the independence or territorial integrity of a Member State, or to block the activities of an OAU recognized liberation movement.¹⁵⁴

Furthermore, Protocol I of the Geneva Conventions appears designed to address the concern that mercenaries, just like private contractors, prioritize the private good over the public good. This concern is reflected in Protocol I’s definition of a “mercenary” as someone whose motivation to take part in the hostilities is “essentially . . . the desire for private gain and [who], in fact, is promised . . . material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces.”¹⁵⁵ This provision reflects the intent to distinguish mercenaries from volunteers, who are not feared in the same way and to whom this condemnation does not extend.¹⁵⁶ Protocol I’s definition of the term “mercenary” reflects a concern with the commodification of force and a fear of combatants who have allegiance only to profit (a private good), rather than the allegiance to the public good that national armed forces are traditionally assumed to espouse.

151. See *supra* note 48 and accompanying text.

152. OAU Convention, *supra* note 49, pmb.

153. *Id.*

154. *Id.* art. 1(a)-(c).

155. Protocol I, *supra* note 14, art. 47(2)(c).

156. See Jean de Preux, *Article 47—Mercenaries (Protocol I)*, in INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 571, 578 (Yves Sandoz et al. eds., 1987) [hereinafter ICRC COMMENTARY].

Protocol I's definition of "mercenary" also reflects the concern that mercenaries undermine states' monopoly on the use of force by defining a mercenary as a combatant, a person who "is specially recruited locally or abroad in order to *fight* in an *armed conflict*."¹⁵⁷ Protocol I is clear that it is targeting mercenaries who take a "direct part in the hostilities."¹⁵⁸ Most importantly, Protocol I also emphasizes that a mercenary must not be officially attached to a state—namely, that the mercenary cannot be a member of a Party's armed forces or sent on official duty by a state not Party to the conflict.¹⁵⁹

The most recent definition of "mercenary," included within the International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries (the "Convention Against Mercenaries"), reflects a desire to promulgate a broad, all-encompassing definition embracing elements of both the OAU Convention and Protocol I. Like Protocol I, the Convention Against Mercenaries requires that mercenaries directly participate in a conflict.¹⁶⁰ Like the OAU definition, a mercenary is defined by the Convention Against Mercenaries as a person participating in "a concerted act of violence" (note the lower threshold than armed conflict) aimed at overthrowing a government or otherwise undermining the constitutional order or territorial integrity of a State.¹⁶¹ Thus, an examination of the Convention Against Mercenaries suggests that the same concerns with mercenaries are still prevalent today.

Nevertheless, while the international law against mercenaries may be strongly worded on the books, these laws are neither widely ratified nor respected in practice.¹⁶² The Convention Against Mercenaries only came into force in 2001, when Costa Rica became the necessary twenty-second state to ratify it.¹⁶³ None of the states of the European Union or the

157. Protocol I, *supra* note 14, art. 47(2)(a) (emphasis added).

158. *Id.* art. 47(2)(b).

159. *Id.* art. 47(2)(e)-(f).

160. Convention Against Mercenaries, *supra* note 51, art. 3(1).

161. *Id.* art. 1(2)(a).

162. See LEONARD GALTIER ET AL., INT'L ALERT, THE MERCENARY ISSUE AT THE UN COMMISSION ON HUMAN RIGHTS 26 (2001), available at <http://www.international-alert.org/publications/103.php> (noting the lack of any widely accepted customary international law banning mercenaries directly).

163. For a list of the current States Party, see International Committee of the Red Cross, International Convention against the Recruitment, Use, Fi-

G8 have signed the Convention Against Mercenaries, and the generally low level of ratification has led some to claim that the Convention is “anti-customary law.”¹⁶⁴ Given the low level of ratification and the frequent use of mercenaries by states, there seems to be little state practice or *opinio juris* for a customary international law ban on mercenaries, let alone on the PMCs and private contractors that are used even more widely and more openly by states.¹⁶⁵

Despite the low incidence of ratification of and the lack of respect for the mercenary prohibitions, the fact remains that these prohibitions do exist, at least in theory, and there is a general public perception that international law outlaws mercenaries.¹⁶⁶ As examined earlier, the private military industry has certainly attempted to distance itself from mercenaries,¹⁶⁷ suggesting that the existing international law on mercenaries has at least some rhetorical clout, even if full legal clout is still lacking. This leads me to conclude that as American legislators begin to seriously consider how to regulate the private military industry, it is important that they remember the similarities between the concerns surrounding private contractors and those raised by mercenaries rather than readily accepting the industry’s attempt to distance itself from the taint of a mercenary reputation.

V. THE LETTER OF THE LAW: APPLYING PROTOCOL I’S DEFINITION OF MERCENARY TO PRIVATE CONTRACTORS

It is often assumed that the international legal definition of “mercenary” is so vague that no private military contractor

nancing and Training of Mercenaries, <http://www.icrc.org/ihl.nsf/Web-Sign?ReadForm&id=530&ps=P> (last visited Mar. 2, 2008).

164. See, e.g., Peter Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT’L L. 521, 531 (2004) [hereinafter Singer, *War, Profits, and the Vacuum of Law*]; Zarate, *supra* note 10, at 134.

165. Zarate, *supra* note 10, at 134.

166. AVANT, MARKET FOR FORCE, *supra* note 24, at 230-31.

167. See, e.g., Guthrie, *supra* note 10, at 21 (“We provide protective security. It is very sophisticated and has little to do with the mercenaries of the 1960s.”(quoting Tim Spicer, CEO of Aegis)).

could ever be found to qualify as such.¹⁶⁸ In this Section, however, a close examination of Protocol I shows that at least some private military contractors may qualify as mercenaries under the four main criteria of Protocol I's definition. First, private contractors can be deemed to have been "specially recruited"; second, private contractors frequently meet the direct participation requirement; third, private contractors will sometimes meet the foreign nationality requirement; and fourth, private contractors are even more likely to meet the financial motivation requirement than the traditional mercenary. I conclude this Section by rejecting two frequently asserted distinctions between mercenaries and private contractors: first, that contractors cannot be considered mercenaries because of their corporate structure, and second, that they cannot be considered mercenaries because they are employed by legitimate states. Ultimately, I demonstrate that at least some private contractors can be defined as mercenaries. I go on to conclude that defining private contractors as mercenaries will increase public debate surrounding their role and their overall democratic accountability, the lack of which, I have argued, currently characterizes the private military industry and threatens the democratic nation-state.

A. *Private Contractors Can Meet the "Specially Recruited" Requirement*

The definition of "mercenary" contained in article 47 of Protocol I requires first that the mercenary be *specially* recruited to fight in an armed conflict.¹⁶⁹ This provision was intended to exclude "volunteers who enter service on a permanent or long-lasting basis in a foreign army, whether as a result of a purely individual enlistment (French Foreign Legion, Spanish Tercio) or an arrangement concluded by their national authorities (for example, the Nepalese Ghurkhas in India, the Swiss Guards of the Vatican)."¹⁷⁰

Many private contractors qualify as "specially recruited." PMCs generally keep databases of personnel from which to re-

168. See Dickinson, *supra* note 109, at 398 (noting that "broad gaps in the definition of 'mercenary' leave most types of work by private military companies outside the treaties' prohibitions").

169. Protocol I, *supra* note 14, art. 47(2)(a) (emphasis added).

170. ICRC COMMENTARY, *supra* note 156, at 578.

cruit to fill contracts as they come up.¹⁷¹ Many private contractors appear in several databases and move easily from one contract to another or operate on a freelance basis.¹⁷² Given this arrangement, a private contractor called up from this kind of database when a PMC is awarded a particular contract is likely to be considered “specially recruited.”

Some scholars argue, however, that a private contractor would not satisfy the “specially recruited” requirement because many private contractors work on long-term contracts and are not therefore “specially” recruited to fight in a specific armed conflict.¹⁷³

This argument misconstrues the meaning of the term “specially recruited.” As an initial matter, it is possible to distinguish private contractors from forces like the French Foreign Legion, which are formally incorporated into the national armed forces in a way that private contractors never are, no matter how long-term their contract.¹⁷⁴ While the International Committee of the Red Cross (ICRC) Commentary on Protocol I (the “ICRC Commentary”) indicates that the term “specially recruited” was meant to exempt forces such as the Foreign Legion, it is not clear whether the key characteristic was the long-term nature of the French Foreign Legion, or the fact that Legionnaires essentially become members of the national army, thus eliminating the concern that mercenaries (and private contractors) are not accountable in the same way as the national armed forces. Were a state to formally incorporate its private contractors into its armed forces, the majority of the concerns discussed in Part III could be dismissed and there would be very little argument that such forces were anything like rogue mercenaries. As it stands, however, while

171. See Avant, *Mercenaries*, *supra* note 4, at 21.

172. See *id.*

173. See Christopher Kinsey, *Le Droit International et le Contrôle des Mercenaires et des Compagnies Militaires Privées* [*International Law and the Regulation of Mercenaries and Private Military Companies*], CULTURES & CONFLITS, Winter 2003, at 91.

174. For information about the French Foreign Legion, see Embassy of France in the United States, What is the Foreign Legion, <http://www.ambafrance-us.org/atoz/legion/what.asp> (last visited Mar. 17, 2008) (“As an integral part of the French army, the French Foreign Legion is a professional fighting unit using the same equipment and with the same missions as any other infantry, tank, or engineer unit of the French army.”).

PMC contracts may be long lasting, they certainly do not involve formal incorporation into the armed forces. As a result, private contractors are likely to qualify as “specially recruited.”

B. *Private Contractors Can Meet the Direct Participation Requirement*

Under Protocol I, individuals must participate directly in combat in order to qualify as mercenaries¹⁷⁵ because “[o]nly a combatant, and a combatant taking a direct part in hostilities, can be considered as a mercenary in the sense of Article 47.”¹⁷⁶ The term “direct participation” is “highly ambiguous,”¹⁷⁷ however, and has been defined in various ways. For some scholars, the phrase requires “but for” causation¹⁷⁸ and the ICRC Commentary similarly interprets it to require “a direct causal connection between the activity and the harm.”¹⁷⁹ It is clear that the term is meant to narrow the application of article 47 so that it does not apply to the entire war effort, yet not narrow it to the point of being limited solely to active combat operations.¹⁸⁰ At the very least, according to the authoritative ICRC Commentary, it clearly excludes “foreign advisers and military technicians.”¹⁸¹

Even under a fairly narrow understanding of the term, however, the conflict in Iraq has highlighted the involvement of private contractors in combat-like situations which are likely to meet the direct participation requirement.¹⁸² From maintaining complex weapons such as the B-2 bomber to performing interrogations to selecting targets and flying surveillance missions, private contractors in the Iraq conflict have shown that the industry is increasingly taking on core military responsibilities.¹⁸³ Moreover, in Iraq, private contractors are permitted to join coalition forces in combat operations for the pur-

175. Protocol I, *supra* note 14, art. 47(2)(b).

176. ICRC COMMENTARY, *supra* note 156, at 579.

177. Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 531 (2005) (referring to article 4(A)(4) & (5) of the Third Geneva Convention).

178. *Id.* at 533.

179. *See id.*

180. *See id.* at 532.

181. ICRC COMMENTARY, *supra* note 156, at 579.

182. *See* Avant, *Mercenaries*, *supra* note 4, at 21.

183. *Id.*; Michaels, *supra* note 68, at 1019.

poses of self-defense and for the defense of people specified in their contract.¹⁸⁴ Private contractors are also permitted to stop, detain, search, and disarm civilians if those actions are specified in their contract.¹⁸⁵ Even those private contractors performing less clearly military functions, such as truck driving, may become involved in combat if they have to drive through combat zones.¹⁸⁶

Nevertheless, some scholars claim that the great majority of private contractors do not provide combat services,¹⁸⁷ but rather support services that do not appear mercenary in nature.¹⁸⁸ Private contractors themselves are quick to deny that they provide tactical military services,¹⁸⁹ claiming to provide purely defensive and protective services¹⁹⁰ “concerned with the protection of people and premises.”¹⁹¹ As a result, industry proponents argue that the majority of private contractors do not meet the direct participation requirement and thus cannot be conceived of as mercenaries. Instead, they are analogous to expert trainers and advisers¹⁹² and primarily fulfill logistical and support roles.¹⁹³ One author opines that, so long as private contractors are not contracted specifically to engage in combat and do so only in self-defense, they fall outside of the definition of article 47.¹⁹⁴

In fact, the line between combat and non-combat services is fuzzy, and private contractors perform a wide range of functions ranging from logistical support to training to more combat-like roles, including serving as commando troops, interrogators, and weapons operators.¹⁹⁵ Although private contractors may have initially fulfilled purely support roles, they have today “spread across the full spectrum of government activi-

184. See CPA Order No. 17, *supra* note 70, annex A, ¶ 2.

185. *Id.* ¶ 5.

186. See Avant, *Mercenaries*, *supra* note 4, at 21.

187. See, e.g., Newell & Sheehy, *supra* note 9, at 71.

188. SINGER, CORPORATE WARRIORS, *supra* note 2, at 97.

189. See *id.* at 95.

190. PRIVATIZATION OF SECURITY, *supra* note 23, at 7.

191. *Id.*

192. See Sapone, *supra* note 76, at 39; Zarate, *supra* note 10, at 123.

193. See Schmitt, *supra* note 177, at 536.

194. Zarate, *supra* note 10, at 124.

195. PRIVATIZATION OF SECURITY, *supra* note 23, at 19; Newell & Sheehy, *supra* note 9, at 71.

ties.”¹⁹⁶ PMCs tend not to openly advertise their more combat-like services¹⁹⁷ (no doubt in order to avoid too closely resembling mercenaries), but private contractors are no longer “just running the soup kitchens.”¹⁹⁸ Therefore, while it may be true that certain private contractors do not meet the direct participation requirement, an increasing number do.

C. *Private Contractors Can Meet the Foreign Nationality Requirement*

Article 47 also requires that a mercenary be “neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict.”¹⁹⁹ As with the previous requirements, it is clear that at least some private contractors will satisfy this condition. Private contractors are recruited from all over the world to work wherever their firm has been awarded a contract.²⁰⁰ For example, the majority of Executive Outcomes’ employees working in Sierra Leone were South African.²⁰¹

Nevertheless, some scholars correctly argue that not all private contractors will satisfy this requirement. For example, the American PMC MPRI only hires ex-U.S. forces personnel.²⁰² It would therefore be inaccurate to claim that MPRI employees working alongside American troops in Iraq meet the article 47 definition of mercenary. PMCs also frequently subcontract out to local forces or individuals—a common occurrence in Iraq.²⁰³ Again, it would be impossible to claim that Iraqis hired to assist in the rebuilding in Iraq qualify as mercenaries under the article 47 definition. Even MPRI (and other PMCs with similar policies), however, operate in conflicts that do not involve their host state. MPRI itself has

196. J. Stephen Shi, *The Legal Status of Foreign Military and Civilian Personnel Following the Transfer of Power to the Iraqi Interim Government*, 33 GA. J. INT’L & COMP. L. 245, 257 (2004).

197. Rosky, *supra* note 44, at 908.

198. Leslie Wayne, *America’s For-Profit Secret Army*, N.Y. TIMES, Oct. 13, 2002, at C1 (quoting John H. Hamre, former Deputy Secretary of Defense under President Clinton).

199. Protocol I, *supra* note 14, art. 47(2)(d).

200. SINGER, CORPORATE WARRIORS, *supra* note 2, at 76-77.

201. *Id.* at 101.

202. *Id.* at 120.

203. See Avant, *Mercenaries*, *supra* note 4, at 26.

worked for the Taiwanese and Swedish militaries, as well as for the Croatian army²⁰⁴—situations in which their contractors would meet article 47's foreign nationality requirement.

D. *Private Contractors Can Meet the Motivation of Financial Gain Requirement*

Article 47 defines a mercenary as an individual who is “motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised . . . material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces.”²⁰⁵ According to the ICRC Commentary, this requirement was introduced to distinguish the mercenary from the noble volunteer.²⁰⁶

At first glance, this requirement appears the easiest for private contractors to satisfy. A private contractor, like a mercenary, “however civilized, skilled, and professional he may be . . . [is still] a private agent, principally motivated by profit.”²⁰⁷ Likewise, private contractors are paid substantially more than their counterparts in the national armed forces, with some making up to \$20,000 a month in Iraq.²⁰⁸ In fact, the incitement of the high salaries offered by PMCs has resulted in something of a brain drain from the special forces of countries such as the United States and the United Kingdom.²⁰⁹

Nevertheless, this element of the Additional Protocol's definition has been heavily criticized as the biggest loophole in the international definition of mercenary,²¹⁰ leading some scholars to joke that anyone convicted under the current definition of mercenary should be shot, and their lawyer with them.²¹¹ Scholars argue that this requirement is almost impossible to prove: Many soldiers in the national armed forces are

204. SINGER, *CORPORATE WARRIORS*, *supra* note 2, at 125-26.

205. Protocol I, *supra* note 14, art. 47(2)(c).

206. ICRC COMMENTARY, *supra* note 156, at 579.

207. Michaels, *supra* note 68, at 1019-20.

208. Avant, *Mercenaries*, *supra* note 4, at 22.

209. SINGER, *CORPORATE WARRIORS*, *supra* note 2, at 76-77 (describing the private military industry's ability to “labor poach” highly trained soldiers from the special forces of various countries).

210. AVANT, *MARKET FOR FORCE*, *supra* note 24, at 231-32.

211. SINGER, *CORPORATE WARRIORS*, *supra* note 2, at 238.

motivated to enlist for monetary gain, while many private soldiers (both mercenaries and private contractors) have non-monetary motivations.²¹²

It is important to note, however, that Protocol I does not require that mercenaries be motivated *exclusively* by financial gain, but only *essentially*.²¹³ Thus, this requirement is not as high an evidentiary burden as some critics have suggested. In addition, Protocol I's definition also requires that the mercenary *actually* be paid substantially more than the actual soldier.²¹⁴ According to the ICRC Commentary, this concrete qualification was introduced to facilitate proving financial motivation.²¹⁵ Indeed, as discussed above, this fact is relatively easy to prove with respect to today's private contractors.

Moreover, as applied to private contractors, this requirement is actually less problematic than when it is applied to traditional mercenaries.²¹⁶ Unlike the mercenaries of the 1960s, contemporary private contractors do not pick and choose their conflicts on the basis of more or less noble ideas; today's private contractors are essentially on call for the next available conflict. A private contractor whose name is maintained in at least one PMC database, ready to be called upon when a bid is won, can hardly claim that he operates without a desire for private gain. The very fact that private contractors are organized into a corporate structure to compete on the open, global market suggests that they are driven by business profit.²¹⁷ While "mercenary labor is not fully commodified,"²¹⁸ a multinational PMC clearly has a "purely commercial

212. ICRC COMMENTARY, *supra* note 156, at 579; see Sapone, *supra* note 76, at 15 (listing examples of mercenaries with other motivations).

213. Convention Against Mercenaries, *supra* note 51, art. 1(1)(b), (2)(b); Protocol I, *supra* note 14, art. 47(2)(c).

214. Protocol I, *supra* note 14, art. 47(2)(c).

215. ICRC COMMENTARY, *supra* note 156, at 579. Still, evidentiary problems remain, as it is almost impossible to prove how much mercenaries are actually paid, since mercenaries generally do not maintain bank accounts in the countries where they are serving. *Id.* at 580.

216. See Damian Lilly, *The Privatization of Peacekeeping: Prospects and Realities*, 2000(3) DISARMAMENT F. 53, 59-60 <http://www.unidir.org/pdf/articles/pdf-art135.pdf>; see also Frye, *supra* note 13, at 2657.

217. SINGER, CORPORATE WARRIORS, *supra* note 2, at 46; see also PRIVATIZATION OF SECURITY, *supra* note 23, at 7.

218. Sapone, *supra* note 76, at 15.

purpose.”²¹⁹ A private contractor employed by a PMC is thus more likely to meet the financial gain motivation requirement than is a traditional mercenary.

E. *The Corporate Nature of Private Contractors Does Not Distinguish Them from Mercenaries*

*[W]hat little law exists has been rendered outdated by the new ways in which these companies operate.*²²⁰

I have argued above that many private contractors do meet the definition of mercenary laid out in article 47. Nevertheless, scholars often distinguish PMCs from mercenaries because of the corporate nature of the PMC, which cannot be neatly analogized to the individual mercenary.²²¹ These scholars argue that because of their corporate structure, PMCs are not covered by existing international law on mercenaries, which was written to regulate mercenaries as *individuals*²²² who sometimes group together on an ad hoc basis but always lack the corporate hierarchy of a PMC.²²³

This distinction focuses on the PMC as a company rather than on the individual private contractors that the company employs, as I have done in this Note. The question of whether existing laws on mercenaries can be directly applied to legal persons (as opposed to natural persons), that is, directly to the PMCs *as corporations*, is a complex one beyond the scope of this Note.

My examination of the existing law on mercenaries suggests, however, that it is possible to hold at least some private contractors accountable as individuals under the existing laws. The fact that they are employees of a corporation in no way affects the applicability of the mercenary laws, as there is no indication that the concerns underlying the mercenary laws would have been allayed had mercenaries been corporate em-

219. *Id.* at 17.

220. Singer, *War, Profits, and the Vacuum of Law*, *supra* note 164, at 525-26.

221. Newell & Sheehy, *supra* note 9, at 71.

222. *See id.*; PRIVATIZATION OF SECURITY, *supra* note 23, at 7; SINGER, CORPORATE WARRIORS, *supra* note 2, at 45; *see also* OAU Convention, *supra* note 49, art. 1; Convention Against Mercenaries, *supra* note 51, art. 1; Protocol I, *supra* note 14, art. 47(2).

223. SINGER, CORPORATE WARRIORS, *supra* note 2, at 42, 46; PRIVATIZATION OF SECURITY, *supra* note 23, at 7; Singer, *War, Profits, and the Vacuum of Law*, *supra* note 164, at 524.

ployees. Rather, as I argued in Section B of this Part, the concerns underlying the development of international law on mercenaries largely parallel the concerns that I expressed with regard to private contractors in Part III: namely, that mercenaries are generally perceived to threaten states' monopoly on the use of force, to prioritize their desire for private profit over the public's desire for security, and to undermine democratic government. There is no suggestion anywhere in the law that if mercenaries were to incorporate, these concerns would be in any way diminished.²²⁴

It is interesting to note, moreover, that much like PMCs and private contractors today, mercenaries were (and still are) most likely to be involved in conflicts where "vital economic interests are at stake, usually mining and oil interests."²²⁵ While it is clear, therefore, that there are obvious structural differences in terms of how mercenaries and private contractors package their services, it does not follow that the services offered are substantively different. There is no indication that the mere "corporatization of military service provision"²²⁶ renders the privatization of force any less problematic. As suggested in Part III, the concerns about private contractors remain despite the fact that they are corporate employees.

F. *State Employ of Private Contractors Does Not Exempt Them from Anti-Mercenary Prohibitions*

Some scholars also argue that private contractors can be distinguished from mercenaries because they work only for legitimate states.²²⁷ As a result, the argument goes, such contractors

cannot be considered 'mercenaries' because their activities have not challenged the sovereignty of states or the right of populations to self-determination. . . . [and because] they have restricted their contracts

224. See generally OAU Convention, *supra* note 49; Protocol I, *supra* note 14; Convention Against Mercenaries, *supra* note 51.

225. Zarate, *supra* note 10, at 89.

226. SINGER, CORPORATE WARRIORS, *supra* note 2, at 45 (emphasis in original).

227. See PRIVATIZATION OF SECURITY, *supra* note 23, at 7.

solely to work for legitimate regimes or organizations.²²⁸

Mercenaries, on the other hand, supposedly operate without government support for their actions²²⁹ and serve employers considered illegitimate in the eyes of the state-based system, namely terrorists, arms and drug dealers, “alien governments,” and insurgencies.²³⁰ These scholars assert that the international norms against mercenaries were simply not designed “to deal with security corporations employed by recognized regimes.”²³¹

This argument is both factually and legally unpersuasive. First, as I discussed in Part III, this purported distinction is factually inaccurate both because states do employ mercenaries and because private contractors do not work solely for states,²³² but also for non-state actors ranging from NGOs and the UN to drug cartels and rebel factions.²³³

Second, this distinction is not legally supported by the existing international law on mercenaries. While the OAU Convention specifically defined mercenaries in such a way as to allow their continued employ by Member States,²³⁴ both Protocol I and the Convention Against Mercenaries moved in the opposite direction—to discourage the state employ of mercenaries.²³⁵ Protocol I only applies to international armed conflicts—that is, conflicts between two or more State Parties.²³⁶ As a result, it directly targets the use of mercenaries by States. In addition, the Convention Against Mercenaries specifically prohibits State Parties from recruiting, using, financing, or training mercenaries.²³⁷ Thus, even if it were accurate to say that private contractors work only for states, this would not exempt their actions from the sanction of existing international

228. Zarate, *supra* note 10, at 80.

229. *Id.* at 121.

230. *Id.* at 159.

231. *Id.* at 117.

232. See SINGER, CORPORATE WARRIORS, *supra* note 2, at 44.

233. See Avant, *Mercenaries*, *supra* note 4, at 26; Sapone, *supra* note 76, at 3.

234. See OAU Convention, *supra* note 49, art. 1.

235. Compare Convention Against Mercenaries, *supra* note 51, art. 1, and Protocol I, *supra* note 15, art. 47(2).

236. See Protocol I, *supra* note 14, arts. 1-2.

237. Convention Against Mercenaries, *supra* note 51, art. 5(1).

anti-mercenary laws, which specifically target state-employ of mercenaries.

It is possible, therefore, to bring at least some private contractors within the scope of article 47 of the First Additional Protocol. Doing so would strip private contractors of the right to combatant status and prisoner of war status upon capture.²³⁸ Without combatant status, private contractors who engage in fighting would be unauthorized combatants, pariahs under international law just like traditional mercenaries, and subject to prosecution for their participation in the conflict.

VI. CONCLUSION

The pervasive use of private contractors by democratic states such as the United States, Canada, the United Kingdom, and Australia raises numerous concerns. It undermines the state's monopoly on the use of force by de-privileging the role of the state as the primary protector of its citizens. More ominously still, it weakens democratic accountability and increases the executive's power to make war unchecked by democratic constraints. The private military industry also prioritizes the private good at the expense of the public good, leading to the risk of an increasingly militarized world.

The similarity of the concerns about the use of mercenaries and the use of private contractors suggests that laws that were written to apply to mercenaries can appropriately be extended to cover private contractors as well. Many private contractors do in fact come within the definition of mercenary adopted in Protocol I. By denying private contractors the benefit of combatant status, this solution opens the door to future regulation of the private military industry.²³⁹

Nevertheless, the existing prohibitions on mercenaries are undeniably full of legal loopholes and, more importantly, have not been widely ratified. Moreover, as my examination of Protocol I's definition of mercenary demonstrates, it is by no

238. See Protocol I, *supra* note 14, art. 47(1).

239. Cf. Clive Walker & David Whyte, *Contracting Out War?: Private Military Companies, Law and Regulation in the United Kingdom*, 54 INT'L & COMP. L. Q. 651, 674 (2005) (discussing the concern that if PMC personnel can bring themselves within the framework of the Geneva Conventions, then "any policy of criminalization against them would have to be curtailed, and there would arise immunity for combatants").

means the case that existing anti-mercenary prohibitions can be applied to all private contractors, or even to the majority of them.²⁴⁰ The weaknesses of the existing prohibitions on mercenaries lend support to the claim that we ultimately need to redefine existing rules in order to apply them effectively to private contractors.²⁴¹ Possible solutions short of complete prohibition include: requiring governments to formally incorporate private contractors into the national armed forces (much like the French Foreign Legion) by requiring the contractors to wear the uniform of the national armed forces; to count private contractors among the number of troops deployed and the official casualty counts; and to subject private contractors to national legislation regulating the conduct of the armed forces.²⁴²

It may, therefore, be primarily rhetorical to refer to private contractors as mercenaries. Nevertheless, I believe that this rhetoric can play an important role in the ongoing debate over the regulation of the private military industry. The industry's eagerness to avoid the tarnishing effect of a mercenary reputation suggests that there is some strength to the anti-mercenary laws. I propose to leverage that clout to contribute to the public debate surrounding the use of private contractors, particularly in democratic states, in a manner similar to the way in which the human rights movement has shown that legal rhetoric can affect how states act,²⁴³ as the "[n]aming and shaming for human rights abuses now have real consequences."²⁴⁴

Given the unflattering connotation associated with the term "mercenary," labeling private contractors as mercenaries may help keep the private military industry in the public eye after the initial outrage over specific abuses dies down. Bolstering public disapproval of private contractors addresses one of the main concerns with the private military industry: that it operates in the shadow of public awareness and debate and

240. See SINGER, *CORPORATE WARRIORS*, *supra* note 2, at 97 (noting that the majority of private contractors do not directly participate in combat).

241. See Frye, *supra* note 13, at 2642.

242. As was recently done in the U.S, see *supra* note 68 and accompanying text.

243. See Michael Ignatieff, *Human Rights as Politics*, in *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 3, 4-7 (Amy Gutmann ed., 2001).

244. See *id.* at 12.

that it threatens to undermine democratic checks on war-making. A democratic government simply should not be able to circumvent popular disapproval of a war merely by contracting out the true costs of the war.