

**INHERENTLY GOVERNMENTAL FUNCTIONS  
AND THE ROLE OF PRIVATE MILITARY CONTRACTORS**

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## PART ONE

### I. Introduction and Scope of the Project

In January 2016, the Allard K. Lowenstein International Human Rights Clinic undertook a project in collaboration with the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination (“Mercenaries Working Group”). In 2010, the Mercenaries Working Group recommended the creation of a legally binding instrument regulating and monitoring the activities of private military and security companies (“PMSC”). It subsequently proposed a draft convention to the Inter-Governmental Working Group mandated by the U.N. Human Rights Council to consider the matter. In October 2015, the Human Rights Council affirmed support of the Working Group’s mandate to “continue the work already done by previous mandate holders on the strengthening of the international legal framework for the prevention and sanction of the recruitment, use, financing, and training of mercenaries....”<sup>1</sup> Despite this affirmation of support, however, progress on refining and implementing the draft convention stalled.

The Lowenstein Clinic (“Clinic”) was tasked with supporting the Mercenaries Working Group’s ongoing efforts to clarify state human rights obligations concerning PMSCs. To this end, the Clinic examined a draft convention proposed by the Mercenaries Working Group to the Inter-Governmental Working Group. The draft convention reflects a remarkable achievement—the first effort of its kind to carefully consider and codify norms and expectations for the use of PMSCs. However, the convention failed to secure approval by the Inter-Governmental Working

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<sup>1</sup> Human Rights Council Resolution, 30/6, October 2015.

Group. Therefore, it needed to be reexamined and reimagined in order to meet many competing goals: to create appropriate boundaries on PMSCs without overly constraining state actors from appropriately using them, all while balancing past practice, policy concerns, and the limits of international law.

This paper attempts to answer these questions. It proceeds in two parts. Part I explores a number of risks associated with allowing private military contractors to assume duties that are ideally or traditionally apportioned to military and government officials. Some of the risk assessments are made by means of recent historical examples, while others are speculative. In general, however, the risks the Clinic has considered fall into two broad categories, each of which this Summary briefly considers.

The first category concerns the potential for private military contractors to undermine democratic participation in public decision-making. The nature and scope of most contracts concluded between governments and contracting companies are not only not up for public discussion, but are rarely disclosed at all. The U.S. government often considers these contracts sensitive and, therefore, withholds them from public knowledge.<sup>2</sup> Weaker states seeking to stave off or conclude civil war have also turned to companies that provide training and combat services.<sup>3</sup> Whatever the purposes or motivations of a given state's government in engaging private military contractors, the citizens of the country are not involved in a broader discussion about whether and how to use the services these companies provide. As countries like the United States become more and more reliant on the services of private contractors to conduct and maintain military operations abroad, the citizens of the countries paying the contractors are

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<sup>2</sup> Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, Democracy*, 46 B.C. L. REV. 989 (2005).

<sup>3</sup> In one example, the government of Sierra Leone hired Executive Outcomes to fight back rebels who were terrorizing the country. The firm is widely credited with winning the civil war and restoring peace. *See* LAURA DICKINSON, *OUTSOURCING WAR AND PEACE: HOW PRIVATIZING FOREIGN AFFAIRS THREATENS CORE PUBLIC VALUES AND WHAT WE CAN DO ABOUT IT*, 4 (2011).

quietly edged out of decisions about the scope of military operations and the shape of foreign policy.<sup>4</sup> The use of these contractors also reduces the political “costs” of employing more troops or, even further, of instituting mandatory military service. This, in turn, may increase the proclivity of states to engage in warlike activities, without the consent or involvement of their citizenry.<sup>5</sup>

The second category concerns the manner in which the employment of contractors undermines or sidesteps the body of law that regulates conflicts. The law of armed conflict is largely based on principles of reciprocity. Militaries have incentives to abide by principles of the law of armed conflict because they expect their enemies to do the same—or, more cynically, they reasonably fear that a failure to follow the law will *encourage* their enemy to disregard it as well. In this model, brutality begets brutality. However, private military contractors do not enjoy the status of combatants under the law. Therefore, they have few incentives to respect the law of armed conflict, especially if compliance with the law is expensive or cumbersome.<sup>6</sup> Furthermore, many of these companies operate in relative obscurity, often sidestepping or frustrating the accountability mechanisms that military law, domestic criminal law, and the prospect of public scrutiny provide.

This lengthy analysis provides the foundation for the analysis in Part II, in which the Clinic analyzes the proposed list of areas where PMSCs would be regulated, according to the

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<sup>4</sup> General David Petraeus made it clear in his 2007 testimony before Congress that the U.S. military would not be able to function in Iraq at all without contract security personnel. See *To Consider the Nomination of Lieutenant General David H. Petraeus, USA, to be General and Commander, Multi-National Forces – Iraq, Hearing Before the S. Armed Services Comm.*, 110<sup>th</sup> Congress (2007) (statement of Lt. Gen. David H. Petraeus).

<sup>5</sup> Paul W. Kahn argues in this vein in his article *The Paradox of Riskless Warfare* (2002). *Faculty Scholarship Series*. Paper 326, available at [http://digitalcommons.law.yale.edu/fss\\_papers/326](http://digitalcommons.law.yale.edu/fss_papers/326). Although his essay considers technologically mismatched armies and asymmetrical warfare, some of the arguments apply to our context as well. Even though contractors employed by Western states may still be exposed to situations where they are personally at risk, the political costs of that risk are low for democratic leaders in those states. The citizenry is far less likely to tolerate deaths of citizen soldiers than deaths of anonymous contractors, who may or may not be nationals of the country employing them.

<sup>6</sup> See *infra* Section II.C.

draft convention submitted by the Mercenaries Working Group. This list of areas, called “inherently governmental functions” (a term borrowed from U.S. jurisprudence), includes direct participation in hostilities, detention, interrogation, security, policing, support for weak institutions of a third state, lawmaking, and knowledge transfers with the military. This paper parses the meaning of “inherently governmental functions,” then analyzes each proposed area in turn, concluding whether or not PMSC involvement is appropriate and making a normative argument as to whether that function is or is not inherently governmental. It seeks to contribute a rich background, combining theory, practice, and international law, to more deeply situate the arguments made by the Mercenaries Working Group.

#### *A Note*

The reader will observe that the following arguments rely heavily on examples taken from U.S. involvement with private military contractors. There are two reasons for this. First, the United States is currently the world’s foremost consumer of private military contracting services. Experts offer estimates of the industry’s annual revenue that range from \$20 to \$100 billion.<sup>7</sup> Reports from Iraq indicated that a few years after the U.S. invasion, the number of government contractors employed there exceeded the number of troops.<sup>8</sup> These staggering numbers are part of a broader trend. During the Gulf War, by contrast, the U.S. military hired only 9,200 contractors, with troops outnumbering the private employees by a ratio of 55 to 1.<sup>9</sup> Given U.S. dependence on these companies, the standards, services, and ethical norms of these companies are likely to be influenced by their relationships with the U.S. government. Finally, because the

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<sup>7</sup> Doug Brooks & Jim Shevlin, *Reconsidering Battlefield Contractors*, 6 *Geo. J. Int’l Aff.* 103, 104 (2005).

<sup>8</sup> Cong. Budget Office, U.S. Cong., *Contractors’ Support of U.S. Operations in Iraq*, Publ’n No. 3053, at 8, 13 (2008), available at <http://www.cbo.gov/ftpdocs/96xx/doc9688/08-12-IraqContractors.pdf>.

<sup>9</sup> *Id.*

United States is such an important consumer of private military contracting services, the strategic importance of U.S. buy-in to the primary goals and scope of a potential treaty is critical.

Second, the United States' far-flung foreign policy makes it likely that the United States will use the services of private military contractors not only for more traditional duties such as providing personal security and staffing restaurants, mess halls, and shops on military bases, but for more substantive duties as well. The United States has also been making use of these contractors in fragile, post-conflict states such as Iraq and Afghanistan, where domestic governments are weak and may be unable to regulate the activity of these contractors within their own borders. It is concern about these more substantive duties, ones that have traditionally been performed by military personnel, that forms the impetus for the activities of the Working Group.

## **II. The Accountability Dilemma: Private Military Contractors, Oversight, and Culpability**

Because of their structure and separation from the state, private military contracting companies are unlikely to comply with certain ethical norms that constrain military units. This Section analyzes various means of accountability, concluding that private military contractors are insufficiently accountable to be responsible for certain governmental functions.

*A. The prospect of judicial accountability is unlikely to influence the actions of private military contractors.*

The prospect of judicial accountability is unlikely to meaningfully deter PMSCs from engaging in behavior that is likely to violate human rights. In active war zones or areas under occupation, PMSC personnel are neither consistently monitored nor reported for abuses.

Prosecution is extraordinarily unlikely, as illustrated by the mere handful of successful cases brought by the U.S. government over the past decade. These cases, moreover, were brought only after overwhelming public pressure. PMSCs can assert any number of effective legal defenses against government prosecution or private litigation: for example, claiming that their operations are so closely intertwined with the decisions and activities of a nation's armed forces as to trigger sovereign immunity.

From a practical standpoint, prosecuting or litigating against PMSCs for abuses committed overseas is protracted, cumbersome, and expensive. Evidence gathering can be particularly difficult in war zones, where witnesses rightfully fear retaliation and independent media and civil society are weak and often nonexistent. Cases would likely have to be brought in Western jurisdictions far from the site of abuses, raising financial costs and logistical challenges. These obstacles, in conjunction with the low likelihood that any criminal or civil case will succeed, make it very difficult for governmental or private litigants to pursue any individual case against a PMSC.

*B. The ethical culture of military units is likely to be superior to that of private military contracting companies.*

Military officers receive extensive training on leadership and are taught to cultivate values that serve as examples to the troops they lead. Officer Candidate School for the U.S. Army, for example, lasts twelve weeks. The syllabus for this training program reveals that at least half of the training of future officers is focused on "character development," which includes a cultivation of ethics and values.<sup>10</sup> An inspection of the kinds of training offered to officers in

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<sup>10</sup> Officer Candidate School, Overview, <http://www.benning.army.mil/infantry/199th/ocs/content/pdf/12%20week%20training%20plan.pdf>.

other branches reveals that this practice exists throughout the U.S. military. U.S. Marine officers are taught eleven leadership principles during their Officer Candidate School training. Five of these eleven principles encourage officers to be introspective and to cultivate a mutual sense of accountability for their actions and the actions of their troops.<sup>11</sup> The Officer Training School that prepares officers for entrance into the U.S. Air Force is a nine-week program. Leadership skills are taught and measured throughout the program.<sup>12</sup> The U.S. Navy's Officer Candidate School is a twelve-week course that also focuses heavily on leadership.

Persons hired to be part of military-contractor outfits, by contrast, are often hired because they possess a specific skill set. It is expected that new employees bring skills into the positions they come to occupy, rather than acquiring them when they arrive. Perhaps more importantly, a single military contractor is likely to employ nationals from around the globe, which suggests that the opportunity to train together and create a culture characterized by a thick ethical framework and mutual accountability mechanisms is diminished. Structural differences between highly sophisticated militaries and the operations of private military contractors make it difficult to imagine that private military contractors could ever foster the sense of ethical accountability that comes from training as part of a national military.

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<sup>11</sup> The eleven leadership principles include: being technically and tactically proficient; knowing one's marines and looking out for their welfare; keeping one's marines informed; ensuring that tasks are understood, supervised, and accomplished; training the marines as a team; making sound and timely decisions; and employing one's unit in accordance with its capabilities. The five principles that encourage personal and collective accountability include: knowing oneself and seeking self-improvement; setting the example for one's troops through one's own actions; developing a sense of responsibility in one's subordinates; and seeking responsibility for one's own actions. *See Leadership Principles*, MARINES, <http://www.marines.com/being-a-marine/leadership-principles>.

<sup>12</sup> Officer Training School, Overview, <https://www.airforce.com/education/military-training/ots>.

*C. The for-profit nature of private military companies creates perverse incentives that may lead these companies to unjustifiably expand the scope of their actions, to unnecessarily prolong engagements, and to seek to influence policy decisions in a way that increases the scope of their action.*

### 1. The Scope of the Business

Private military contracting has expanded from a multimillion-dollar to a multibillion-dollar industry over the past decade. Expert estimates of the private military contractor industry's global value vary widely, from about \$20 billion to \$100 billion annually.<sup>13</sup> Although the actual annual global value of private military contracting is unclear, U.S. Department of Defense (DOD) records clearly show that U.S. DOD total contract obligations for private military contractors increased from \$165 billion to \$414 billion over the last decade.

Not only have the contracts concluded between government and private entities become more widespread and more valuable over time, but contractors may outnumber troops in many individual U.S. military deployments. In 2010, the United States deployed 175,000 troops and 207,000 contractors in war zones. During the Second World War, by contrast, military contractors accounted for 10% of the military workforce. Today, they account for 50% of the overall U.S. military workforce.<sup>14</sup> It is difficult to imagine that the activities of the modern U.S. military would be possible without the existence of private military contractors.<sup>15</sup> The existence

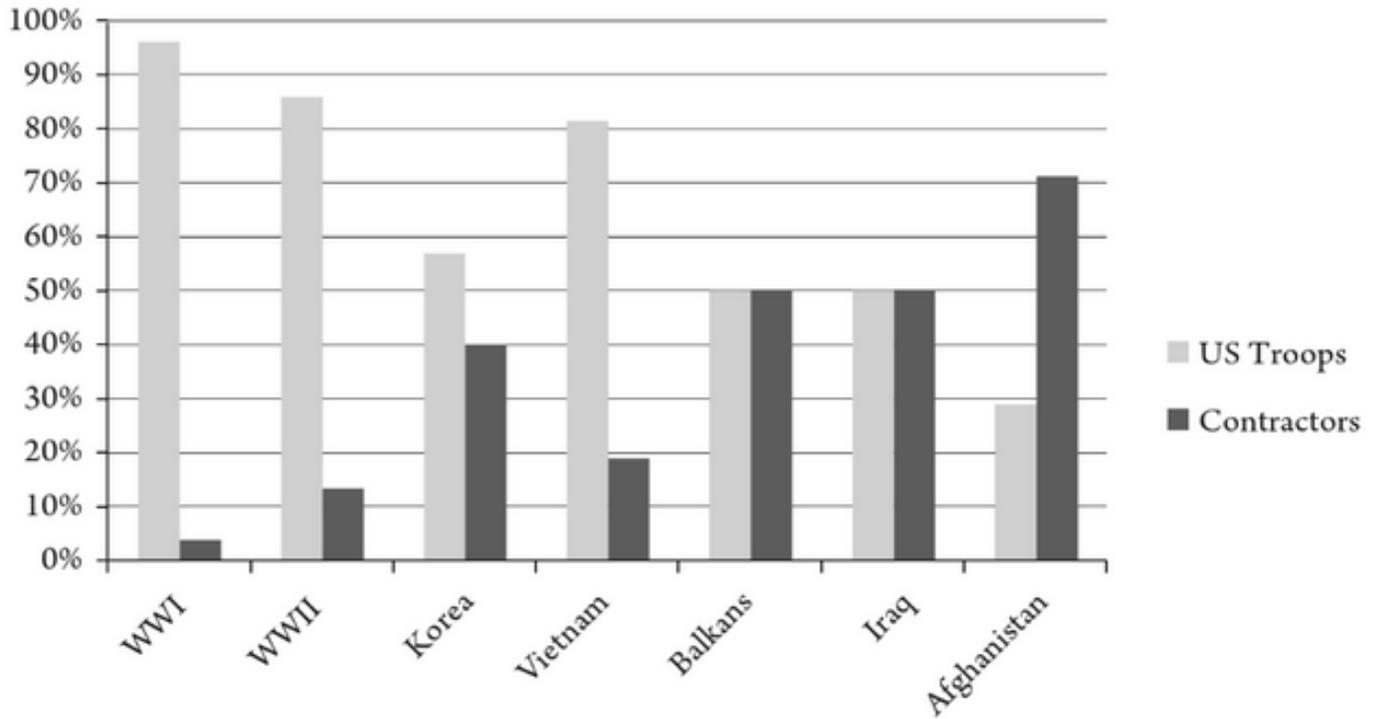
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<sup>13</sup> SEAN MCFATE, *THE MODERN MERCENARY: PRIVATE ARMIES AND WHAT THEY MEAN FOR WORLD ORDER*, 19 (2015).

<sup>14</sup> *Id.*

<sup>15</sup> By 2008, the number of private contractors employed in Iraq was greater than the number of troops: The U.S. Department of Defense employed 155,826 private contractors in Iraq, compared with the 152,275 troops that were there. Molly Dunigan, *A Lesson from Iraq War: How to Outsource War to Private Contractors*, CHRISTIAN SCIENCE MONITOR, (Mar. 19, 2013), <http://www.csmonitor.com/Commentary/Opinion/2013/0319/A-lesson-from-Iraq-war-How-to-outsource-war-to-private-contractors>

of these contractors allows the United States to expand and sustain its presence abroad. These trends lead to a symbiotic relationship that one author has termed the *codependency problem*.<sup>16</sup>



### Contractors as a percentage of U.S. Military Workforce in Theaters of War<sup>17</sup>

#### 2. The Business of War-Making

Private military contractors develop expertise, networks, and infrastructure that is mobile and may seek new markets once the conflicts in which these contractors are involved fade.

Worse yet, the existence of vast investments in these businesses might fuel conflicts that would otherwise find more peaceful resolutions. These fears have already been borne out. One example is Erik Prince, Blackwater's founder and former CEO, who moved to Abu Dhabi after his time

<sup>16</sup> *Supra* note 13, Chapter 3. In McFate's thinking, the *codependency problem* emerges when the U.S. government comes to rely on private military corporations, and these corporations come to rely on continuing or expanding foreign activities of the U.S. government.

<sup>17</sup> This graph is taken from MCFATE, at 20.

with the company ended and was subsequently linked to efforts to build a mercenary force for the United Arab Emirates and a paramilitary outfit designed to battle Somali pirates.<sup>18</sup> Prince's story is evidence of the mobility of PMSCs. If one government acts alone to impose regulations on such companies' trade, the company—by virtue of its private nature—can move elsewhere. Dubai is a favorite hub for these companies because it enjoys both proximity to prime markets and business-friendly laws.<sup>19</sup>

Even when people heavily involved in private military contracting operations do not actively seek new markets, proximity to power and influence in policy decisions may sway the decisions of civilian military leaders. In one important example, William Webster, the only man to head both the CIA and the FBI, founded Diligence Middle East and expanded its services. Among other things, the company provides security services in Iraq. These security services are available for both people and sites. One of the co-chairmen of Diligence Middle East is Joe Allbaugh, President Bush's campaign manager in 2000. In late 2003, the company sold a 40% stake in its new subsidiary to Mohammed Al-Sagar, a Kuwaiti who runs the foreign-relations committee of Kuwait's parliament. In April 2004, only a few months later, the company announced that it had formed a joint venture with New Bridge Strategies, a company headed by Joe Allbaugh and Republican lobbyist Ed Rogers, which was established in 2003 to advise companies on business deals in postwar Iraq.<sup>20</sup> This example illustrates that policy-makers and those with political advisory positions may have a direct financial stake in foreign policy decisions made by democratically elected governments.

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<sup>18</sup> Kate Brannen, *Blackwater's Descendants are Doing Just Fine*, FOREIGN POLICY, July 1, 2014, available at <http://foreignpolicy.com/2014/07/01/blackwaters-descendants-are-doing-just-fine>.

<sup>19</sup> MCFATE, *supra* note 13, at 24.

<sup>20</sup> The British American Security Council, *A Fistful of Contractors: The Case for a Pragmatic Assessment of Private Military Companies in Iraq (2004)*, available at [https://search.wikileaks.org/gifiles/attach/23/23108\\_Fistfull%20of%20contractors.pdf](https://search.wikileaks.org/gifiles/attach/23/23108_Fistfull%20of%20contractors.pdf).

### 3. Cost-Cutting Measures and Accountability

Private military contractors, motivated by financial incentives, may be under pressure to cut costs in ways that national militaries are not, leading to security risks to their personnel and to military personnel as well. In 2004, four Blackwater contractors were killed in Iraq. Allegations emerged that if the four had been accompanied by a rear guard, they would not have been exposed to the same risk.<sup>21</sup> In another example, the family of a soldier killed in a traffic accident in Iraq brought suit against contractor Kellogg, Brown & Root (KBR). The family claimed that the company had negligently hired, trained, and supervised its employees, and as such, the actions of one of its employees had resulted in the death of their son.<sup>22</sup> Such failures by PMSCs impair the ability of regular soldiers to perform their duties.

It has also been alleged that private military contractors tend, for business purposes, to underreport their dead. Underreporting paints an inaccurate picture for the governments with which they are trying to secure contracts, serves as false advertising to troops they are trying to recruit, and skews the image of the wars being carried out in citizens' names. Deaths of private military contractor personnel employed by the U.S. government in Iraq and Afghanistan have tended to far outnumber deaths of military personnel. Underreporting the dead and misrepresenting the risk of death and bodily harm to potential recruits downplays physical risks of employing contractors and thereby undermines what would otherwise be strong incentives to limit or curtail their use in conflict situations. On the other hand, deaths of military personnel

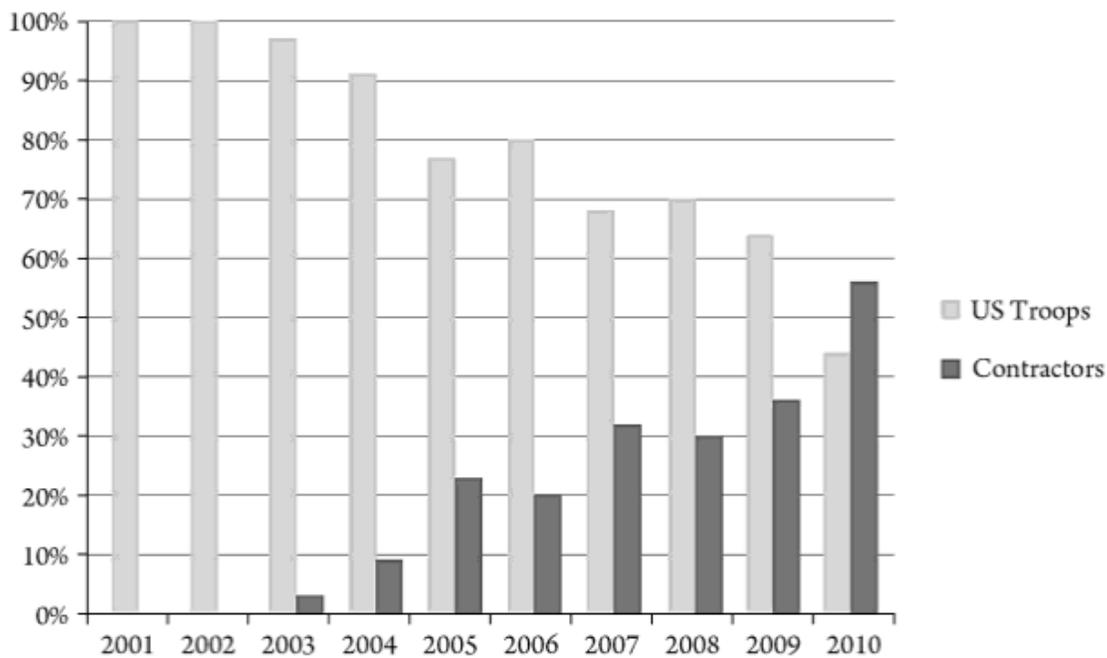
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<sup>21</sup> GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF ARMED FORCES, BACKGROUND REPORT ON PRIVATE MILITARY COMPANIES, available at [http://psm.du.edu/media/documents/reports\\_and\\_stats/think\\_tanks/dcaf\\_background\\_private\\_military\\_companies\\_eng.pdf](http://psm.du.edu/media/documents/reports_and_stats/think_tanks/dcaf_background_private_military_companies_eng.pdf).

<sup>22</sup> Ben Davidson, *Liability on the Battlefield: Adjudicating Torts Suits Brought by Soldiers Against Military Contractors*, 37 Public Contract Law Journal 803 (2008).

enjoy the status of “sacrifice” in public opinion and may be attended by medals and honors.<sup>23</sup>

More importantly, these deaths are balanced against the perceived necessity of a particular mission or foreign engagement. Public opinion then balances the worthiness or necessity of the mission against the burden of the perceived sacrifice. When the deaths attendant to the engagement of contractors in foreign missions are unreported or underreported, this calculus does not occur. The government thereby sidesteps a crucial accountability mechanism for the conflicts in which it engages: the public’s perception of the human toll of its foreign engagement.



**Percentage Breakdown of Fatalities in Afghanistan<sup>24</sup>**

<sup>23</sup> For a thorough and nuanced examination of how the deaths of military personnel compare to the deaths of contractors in the political imagination, see Mateo Taussig-Rubbo, *Outsourcing Sacrifice: The Labor of Private Military Contractors*, 21 YALE J. OF L. AND THE HUMANITIES 101 (2009).

<sup>24</sup> Graph taken from McFate, 21.

#### 4. Lobbying

In the United States, lobbying efforts by major private military contracting companies have tended to track the extent to which they are employed and the size of their contracts. The ten largest defense contractors in the nation spent more than \$27 million lobbying the federal government in the last quarter of 2009, according to a review of recently filed lobbying records.<sup>25</sup> This trend is not new. As early as 2001, the ten leading private military firms invested more than \$12 million in political campaign donations. Among the leading donors were Halliburton, which gave more than \$700,000 (during 1999-2002), 95% to Republicans, and DynCorp, which gave more than \$500,000, 72 percent to Republicans.<sup>26</sup> Although it is impossible to determine the precise level of influence these corporations have with lawmakers, and precisely how this influence manifests itself, these numbers indicate that it is significant. It is not difficult to imagine a scenario in which these lobbyists engage in providing policy rationales for initiating or prolonging overseas engagements, especially if they anticipate securing or renewing a contract as a part of that decision.

#### 5. Corporate Structure

The board of directors of a given company owes the members and shareholders (if the company is publicly traded) two duties—a duty of care and a duty of loyalty. The first duty requires that directors act in order to promote the company's best interest, with the expectation that before making decisions, they will have fully considered the options available. The second

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<sup>25</sup> Sam Stein, *Top Defense Contractors Spent \$27 Million Lobbying At Time of Afghan Surge Announcement*, HUFFINGTON POST (May 25, 2011), available at [http://www.huffingtonpost.com/2010/01/21/top-defense-contractors-s\\_n\\_431542.html](http://www.huffingtonpost.com/2010/01/21/top-defense-contractors-s_n_431542.html).

<sup>26</sup> The British American Security Council, *A Fistful of Contractors: The Case for a Pragmatic Assessment of Private Military Companies in Iraq* (2004), available at [https://search.wikileaks.org/gifiles/attach/23/23108\\_Fistful%20of%20contractors.pdf](https://search.wikileaks.org/gifiles/attach/23/23108_Fistful%20of%20contractors.pdf).

duty requires that directors be motivated only by the best interests of the company when making business decisions and that they keep personal interests out of the decision-making process. In publicly traded companies, the exposure to liability for failures to uphold these duties is greater, if only because the number of people involved in the corporate venture increases the level of scrutiny that directors may face.

Most private military contractors are private companies, but some are publicly traded. Halliburton, which has a subsidiary devoted to private military contracting operations, is publicly traded. DynCorp, another major PMSC, was publicly traded until 2010. Although private companies may scramble to attract investment, public companies may be under special pressure to distribute earnings to their shareholders as dividends. In both cases, the pressure that PMSCs feel to increase revenues to attract investors likely plays a significant role in determining their behavior and makes them keen to develop relationships with lawmakers in a manner that allows them to influence the policy positions of those lawmakers.<sup>27</sup>

*D. Private Military Contractors face unique chain-of-command challenges that further jeopardize accountability.*

1. International humanitarian law (IHL) depends upon a chain of command to ensure that all relevant actors are educated on IHL norms and to provide accountability structures when those norms are broken.

International humanitarian law (IHL) depends upon a chain of command. This chain serves, at least, two functions: first, to educate all relevant actors on IHL norms and, second, to provide a clear path of accountability when these norms are broken. Private military contractors are not clearly captured by the military chain of command and, thus, risk lacking both knowledge of and accountability for IHL violations.

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<sup>27</sup> See *infra* Section II.C.3, on lobbying.

The chain of command of the majority of states does not clearly capture private military contractors. Although many states' militaries supervise contractor activities to some extent, the influence of the chain of command is limited.<sup>28</sup> Other states seek to explicitly distinguish supervision of private contractors from the military's chain of command. In the U.S. context, for example, the U.S. Army Field Manual explicitly says that private military contractors do not fall within the chain of command, especially in regard to any behavior that falls within the four corners of a civilian's contract. The Field Manual says, for example, "Only the contractor can directly supervise its employees. The military chain of command exercises management control through the contract."<sup>29</sup> The Manual further specifies, "Maintaining discipline of contractor employees is the responsibility of the contractor's management structure, *not the military chain of command*.... It is the contractor who must take direct responsibility and action for his employee's conduct."<sup>30</sup>

Because private military contractors do not fall within the chain of command, they do not receive the training that is required for those in regular military units. One aspect of that training is education on the requirements of IHL. In an era of increased overlap between military and contractor missions,<sup>31</sup> there is a risk that private military contractors may be involved in hostilities without any education on the requirements of IHL. This can lead to such serious consequences as violations of the laws of war and human rights abuses.

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<sup>28</sup> Marc Lindemann, *Civilian Contractors Under Military Law*, PARAMETERS, U.S. ARMY WAR COLLEGE QUARTERLY, Autumn 2007, Vol. XXXVII, No. 3.

<sup>29</sup> U.S. Dep't of the Army, Field Manual 3-100.21, Contractors on the Battlefield § 1-25 (2003) ("It is important to understand that the terms and conditions of the contract establish the relationship between the military (U.S. Government) and the contractor; this relationship does not extend through the contractor supervisor to his employees. Only the contractor can directly supervise its employees. The military chain of command exercises management control through the contract.").

<sup>30</sup> U.S. Dep't of the Army, Field Manual 3-100.21, Contractors on the Battlefield § 4-45 (2003).

<sup>31</sup> *Supra* note 28.

The chain of command serves a second function—a path of accountability for violations of IHL—that is equally important. If such abuses occur, the chain of command allows the state and civilians alike to attribute violations to specific actors. Attribution, in turn, allows for reparations and punishment. But it is difficult to attribute action to a private military contractor, who falls outside the chain of command. First, it is difficult to distinguish PMSC conduct from the conduct of the state’s military personnel, making it difficult to identify the correct actor to hold accountable. Second, even if violative acts are correctly attributed, not all private military contractor companies have mechanisms to investigate alleged violations and ensure accountability by communicating the results to relevant state authorities for prosecution or other remedial action. Even where it is possible to identify and prosecute a culpable individual, judicial accountability for one private military contractor may not adequately address a widespread issue. For example, another contractor might incorporate or continue the same behavior; in such a case it would likely require a complex lawsuit, significant investigation and evidence, financial resources, and mastery of complicated legal doctrine, including conflict of laws, to stop the abusive conduct and hold those responsible accountable.

2. Private Military Contractors are unlikely to have command structures that support adherence to IHL in the way that militaries or government agencies do.

Private military contractors are, for a number of reasons, unlikely to have command structures that support adherence to IHL to the same extent that militaries or government agencies do. Ensuring that soldiers are aware of and act according to the requirements of IHL requires significant resources. For example, a military is able to do significant vetting to ensure that new recruits have never committed violations of IHL or international human rights law and

are not associated with groups that have done so. Militaries are able to supply significant training on international humanitarian law, both broadly and in a task- or situation-specific fashion. Military units receive rules of engagement that are in accordance with obligations under both IHL and applicable state law.<sup>32</sup>

Most private military contractors do not have the resources or motivation to engage in these kinds of protective processes. Consideration of profit maximization may deter the use even of all available resources. Staffing concerns, lack of time and resources, lack of relative expertise, lack of access to information, and a focus on profits all may contribute to making private military contractors less competent and less inclined than the military to ensure that their hires adhere to IHL.

*E. Private military contracting companies are unlikely to be held accountable for their actions in either courts of law or the court of public opinion*

1. The private nature of private military contractors allows them to evade public scrutiny.

Compared with national militaries, PMSCs are, by their nature, less likely to be held accountable for their actions in instances where they commit human rights abuses. National militaries are controlled and overseen by civilian governments that are ultimately accountable to the public through elections or other political accountability mechanisms. Individual military personnel can be subject to discharge, courts-martial, and other disciplinary or judicial proceedings. The authority of a military to use force, as well as its equipment, funding, and personnel, is directly regulated by the legislature and executive; in the United States, for

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<sup>32</sup> See, e.g., Emanguela-Chiara Gillard, *Business Goes to War: Private Military/Security Companies and International Humanitarian Law*, 88 INT'L REV. OF THE RED CROSS 525, 548 (2006).

example, the military is overseen by the President, as Commander in Chief, as well as by multiple House and Senate committees that control appropriations and acquisitions. Militaries may also be subject to freedom of information and transparency laws that expose their operations to public scrutiny, debate, and decision-making. As an institution whose members are drawn from the citizenry, the military is constitutively linked to the body politic—a fact that influences both the military’s sense of obligation to the public and the public’s willingness to send soldiers into harm’s way.

2. Private military companies allow governments to make decisions about foreign policy without the constraints of democracy.

In most democracies, civilian leaders make the high-level strategic decisions about the use of military force, the size and structure of a standing military, and other important but non-tactical decisions. These leaders are elected by the people or nominated by their representatives. Increased reliance on private contractors reduces the level of democratic control over deployment of violent force and allows governments to circumvent democratic oversight of the use of force.

Heavy use of private military contractors carries the risk of drawing states into conflict situations or creating or frustrating existing political alliances without the indirect consent or oversight of their people. An increased willingness to participate in armed hostilities may, in turn, affect the perception of a country by other countries or political entities. Insofar as this increased willingness may be perceived, judged, or anticipated by other states, a state that uses private military services may be more likely to be perceived as dangerous or illegitimate, a perception that may have potential to open the citizens of a particular state to the danger of outside threats. By circumventing the democratic checks on state power and operating in the

name of the people of a country in the international sphere, the leadership of a given country pushes the risk of its entanglements onto its people, threatening their safety and complicating their legitimate claims to peace.

*F. Efforts to Hold PMSCs Accountable in U.S. Courts Have Met with Limited Success*

The experience of the United States in attempting to prosecute PMSC personnel for abuses committed in the so-called War on Terror exemplifies the challenges that nations face in holding contractors responsible for abuses overseas. Despite enacting and amending laws to provide for criminal and civil liability against PMSCs that violate human rights overseas, the United States has struggled to hold PMSCs accountable through domestic courts.

Although the United States has made advances in enforcing criminal liability for PMSC personnel for human rights abuses committed overseas, prosecutions are rare and subject to difficult jurisdictional and evidentiary challenges. The U.S. Patriot Act, for example, grants U.S. courts special maritime and territorial jurisdiction (SMTJ) over offenses committed by or against a U.S. national on military bases abroad. In 2007, a CIA contractor was convicted of assaulting an Afghan detainee—who later died from his wounds—and sentenced to 8 years in prison.<sup>33</sup> However, as of May 2017, this remained the only case in which a PMSC employee has been convicted for abuses committed against detainees in the War on Terror, despite the central role PMSCs played in the torture of detainees at Abu Ghraib and other detention facilities.<sup>34</sup>

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<sup>33</sup> Kristine Huskey and Scott Sullivan, *Law and Policy Governing Private Military Contractors After 9/11*, in MULTILEVEL REGULATION OF MILITARY AND SECURITY CONTRACTORS 355 (Christine Bakker and Mirko Sossai eds., 2012).

<sup>34</sup> For example, dozens of employees of L-3 Services, a PMSC that helped operate the Abu Ghraib detention center, had allegedly participated in the torture and abuse of detainees but were not prosecuted by the U.S. government. See Robert Beckhusen, *A Decade Later, Contractor Pays Out Millions for Iraq Prisoner Abuse*, WIRED, Jan. 9, 2013, <https://www.wired.com/2013/01/torture-settlement/>

The U.S. Military Extraterritorial Jurisdiction Act (MEJA) grants the federal government jurisdiction to prosecute felonies committed by contractors who are employed overseas by the Department of Defense (DOD) or whose employment relates to supporting the mission of the DOD overseas.<sup>35</sup> In its most significant prosecution under MEJA to date, the U.S. government secured the convictions of four Blackwater guards for murder and manslaughter for their role in the massacre of 14 unarmed Iraqis in Nisour Square in Baghdad in 2007.<sup>36</sup> Until then, only a handful of contractors, all of them employed by the DOD, had been successfully prosecuted under MEJA—and only on charges unrelated to their role in supporting U.S. military operations.<sup>37</sup> Yet prosecutions under MEJA are fraught with jurisdictional and evidentiary issues. The Nisour Square case was the first instance in which non-DOD contractors were charged under MEJA since its amendment in 2005, and the convictions of the Blackwater guards could still be overturned on appeal.<sup>38</sup> The ambiguous language of the amended statute and the paucity of case law will pose obstacles for future prosecutions of PMSC employees not directly employed by the DOD.<sup>39</sup> Moreover, federal prosecutors lack sufficient resources to meaningfully investigate offenses committed overseas in war zones.<sup>40</sup>

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<sup>35</sup> Huskey and Sullivan, *supra* note 19, at 355.

<sup>36</sup> One defendant was sentenced to life in prison; the other three were sentenced to 30 years in prison. See Spencer S. Hsu and Victoria St. Martin, *Four Blackwater Guards Sentenced in Iraq Shootings of 31 Unarmed Civilians*, WASH. POST, Apr. 13, 2015; Erica Telchert, *Blackwater Verdict May Dampen Allure Of Overseas Contracts*, LAW 360, Oct. 22, 2014, <http://www.law360.com/articles/589455/blackwater-verdict-may-dampen-allure-of-overseas-contracts>

<sup>37</sup> In 2007, an employee of Kellogg, Brown, and Root (KBR) who was working under a DOD contract was prosecuted for stabbing a fellow contractor. Also in 2007, a DOD contractor in Bagdad was prosecuted for possession of child pornography. See LAURA DICKINSON, *OUTSOURCING WAR AND PEACE: PRESERVING PUBLIC VALUES IN A WORLD OF PRIVATIZED FOREIGN AFFAIRS* 55 (2011).

<sup>38</sup> Lawyers for the convicted guards have appealed the conviction to the D.C. Circuit. They argue that the legislative history and the text of the amended statute require a more direct connection to the military's mission than was present in the Nisour Square case, where the Blackwater guards had been hired to provide personal security for State Department personnel. See Brian Koenig, *Blackwater Guards Tell DC Circ. Extrajudicial Law Improper*, LAW 360, Jun. 6, 2016, <http://www.law360.com/articles/803728/blackwater-guards-tell-dc-circ-extrajudicial-law-improper>

<sup>39</sup> Huskey and Sullivan, *supra* note 19, at 356.

<sup>40</sup> *Id.*

Prosecutions through the military justice system face legal obstacles and have been even more rare. Since 2006, PMSCs “serving with or accompanying” the U.S. military “in the field” “in time of [a] declared war or contingency operation” have been subject to the Uniform Code of Military Justice (UCMJ).<sup>41</sup> However, only one individual has been prosecuted under this revised statute: an interpreter who stabbed a coworker.<sup>42</sup> Prosecutions have been hampered by ambiguities about how directly connected to the military PMSCs must be in order to qualify as “serving or accompanying an armed force” and whether “in the field” extends to non-traditional battlefields.<sup>43</sup> Furthermore, trying civilian contractors in military courts remains highly controversial, as it threatens to erode protections normally afforded to criminal defendants under the U.S. constitution.<sup>44</sup>

Private civil suits against U.S. PMSCs face similarly daunting challenges. Plaintiffs have attempted to use the Alien Tort Statute (ATS) and common law torts to hold U.S.-based PMSCs accountable for torture, extrajudicial killings, war crimes, crimes against humanity, and other violations of international law allegedly committed during the U.S. occupation of Iraq.<sup>45</sup> However, PMSC defendants have successfully raised jurisdictional challenges and asserted broadly defined immunities to shield themselves from liability.

In ATS suits, plaintiffs face a significant obstacle in that ambiguity surrounds the extent to which international law regulates human rights abuses committed by private entities, as opposed to state actors. The D.C. Circuit—the country’s most influential appeals court—has

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<sup>41</sup> Pearlman, Adam R. "Applying the UCMJ to Contractors in Contingency Operations," American University National Security Law Brief, Vol. 6, No. 1 (2016), *available at* <http://digitalcommons.wcl.american.edu/nslb/vol6/iss1/1>

<sup>42</sup> Ingrid L. Price, *Criminal Liability of Civilian Contractors in Iraq and Afghanistan* 49 STAN. J INT’L L. 491 (2013), <http://iisonline.net/note-criminal-liability-of-civilian-contractors-in-iraq-and-afghanistan/>

<sup>43</sup> Huskey and Sullivan, *supra* note 19, at 361.

<sup>44</sup> Steve Vladeck, “Analysis of U.S. v. Ali: A Flawed Majority, Conflicting Concurrences, and the Future of Military Jurisdiction,” LAWFARE (July 19, 2012, 8:09 PM), <https://www.lawfareblog.com/analysis-us-v-ali-flawed-majority-conflicting-concurrences-and-future-military-jurisdiction>

<sup>45</sup> Huskey and Sullivan, *supra* note 19, at 364.

dismissed ATS suits brought by families of victims who were tortured and murdered at Abu Ghraib, holding that the conduct of PMSCs did not qualify as “state action” and thus did not violate settled norms of international law that primarily regulate governments.<sup>46</sup> Plaintiffs before the court were “caught between Scylla and Charybdis”; establishing jurisdiction required them to allege that the PMSCs had acted under color of law, but that same showing would potentially allow the PMSCs to claim the sovereign immunity afforded to state actors.<sup>47</sup> These jurisdictional barriers have allowed PMSC defendants to secure dismissal of many claims or to prolong litigation, leading a number of plaintiffs to settle their claims.<sup>48</sup>

PMSC defendants have also defeated civil suits by invoking immunities rooted in their contractual relationship with the U.S. government. PMSCs have argued that they were operating under the direct supervision or control of the government and that subjecting them to civil liability would necessarily force the courts to examine non-justiciable political questions. For example, the district court in *al-Shimari* dismissed claims brought by Abu Ghraib victims against interrogators employed by CACI, reasoning that the U.S. military chain of command exercised

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<sup>46</sup> *Saleh v. Titan Corp.*, 580 F.3d 1, 15 (D.C. Cir. 2009) (“Although torture committed by a state is recognized as a violation of a settled international norm, that cannot be said of private actors.”). To establish liability against a PMSC under the ATS, foreign plaintiffs must prove that international law banned *private* actors from engaging in the conduct in question or that the PMSC’s actions were taken in concert with a state and thus qualify as state action. See Jenny S. Lam, *Accountability for Private Military Contractors under the Alien Statute*, 97 CAL. L. REV., 1459, 1466, <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1125&context=californialawreview>

<sup>47</sup> “Thus, as the district court recognized, appellants are caught between Scylla and Charybdis: they cannot artfully allege that the contractors acted under color of law for jurisdictional purposes while maintaining that their action was private when the issue is sovereign immunity.” *Saleh v. Titan Corp.*, 580 F.3d 1, 15-16 (D.C. Cir. 2009).

<sup>48</sup> In *In re Xe*, several dozen plaintiffs who were injured by Blackwater guards in the Nisour Square shooting settled an ATS lawsuit for sums ranging from \$10,000 to \$100,000. Some injured plaintiffs later claimed that they had been told that Blackwater was on the verge of bankruptcy and, on that basis, pressured to accept a meager settlement. Liz Sly, *Iraqis Say They Were Forced To Take Blackwater Settlement*, L.A. TIMES, Jan. 11, 2010, <http://articles.latimes.com/2010/jan/11/world/la-fg-iraq-blackwater11-2010jan11/2>; see also David Kinley and Odette Murray, *Blackwater: Corporations that Kill*, in SHOOTING TO KILL: SOCIO-LEGAL PERSPECTIVES ON THE USE OF LETHAL FORCE 308 (Simon Bronitt, Miriam Gani and Saskia Hufnagel, eds., 2012) Similarly, the 71 plaintiffs in *al-Quraishi* who were tortured and abused in Abu Ghraib settled an ATS lawsuit against L-3, a PMSC that provided interpretation services for the U.S. military, for \$5 million. See Baher Azmy, *Equity, Damages, and the Rule of Law*, in FOREIGN AFFAIRS LITIGATION IN UNITED STATES COURTS 99, 109 (John Norton Moore ed., 2013).

“plenary” and “direct” control over interrogators at the prison and that a decision on the merits of the claim “would require the judiciary to question actual, sensitive judgments made by the military.” Accordingly, the court dismissed twenty claims alleging that CACI and its personnel had engaged in torture, war crimes, and cruel, inhuman, and degrading treatment (CDIT).<sup>49</sup>

Similarly, some PMSC defendants have escaped liability by arguing that any abuses committed in Iraq and Afghanistan were part and parcel of the U.S. military’s “combatant activities” during a time of war and thus protected by sovereign immunity. Under U.S. law, the government is entitled to sovereign immunity against “any claim arising out of the combatant activities of the military or armed forces, or the Coast Guard, during time of war.”<sup>50</sup> The rationale for this law is to enable military commanders on the battlefield to make subjective judgments “free from the hindrance of a possible damages suit.”<sup>51</sup> In *Saleh v. Titan Corp.*, the D.C. Circuit extended this reasoning to dismiss a lawsuit brought by victims of torture at Abu Ghraib against two PMSCs, holding that the companies had acted as extensions of the military in conducting interrogations and were consequently entitled to immunity.<sup>52</sup> The court reached this finding even after acknowledging that employees for CACI, one of the PMSCs involved operated under a *dual* command structure in which company site managers had independent authority to halt abusive interrogations.<sup>53</sup> Moreover, many PMSC personnel had not been subjected to background checks or undergone interrogation training, further distinguishing them from professional soldiers in the U.S. military’s chain of command.<sup>54</sup> But because the PMSCs

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<sup>49</sup> *Shimari v. CACI Premier Tech., Inc.*, 119 F. Supp. 3d 434, 445 (E.D. Va. 2015).

<sup>50</sup> 28 U.S.C.A. § 2680(j).

<sup>51</sup> *Johnson v. U.S.*, 170 F.2d 767, 769 (9th Cir. 1948).

<sup>52</sup> *Saleh v. Titan Corp.*, 580 F.3d (D.C. Cir. 2009).

<sup>53</sup> *Id.* at 4.

<sup>54</sup> HANNA TONKIN, STATE CONTROL OVER PRIVATE MILITARY AND SECURITIES COMPANIES IN ARMED CONFLICT, 24 (2011).

were deemed sufficiently integrated into the military's operations, they were able to enjoy the benefits of sovereign immunity against attempts to hold them legally accountable for torture.

More broadly, both criminal and civil cases against PMSCs have suffered from evidentiary obstacles. Securing physical evidence and reliable witness testimony in active war zones is inherently difficult, often requiring the cooperation of a host state that may struggle to provide law-enforcement assistance.<sup>55</sup> Procuring witnesses for a trial may be particularly burdensome, as prosecutors or plaintiffs must persuade them to testify, provide for their security and (potentially) the safety of their family, and arrange travel. For example, U.S. prosecutors were able to convict a CIA contractor for assaulting an Afghan detainee in 2007, only because a key witness was willing and able to travel to the United States and other witnesses were U.S. citizens who could be subpoenaed.<sup>56</sup> The costs of holding a trial can be staggering; apart from conducting an investigation on the ground and arranging for witness testimony, prosecutors and plaintiffs may need to translate large volumes of documents and spend months, if not years, litigating motions surrounding jurisdictional issues.<sup>57</sup> In civil suits, these litigation costs are likely to be borne by the parties themselves, creating an enormous barrier to plaintiffs hoping to obtain a verdict against a PMSC.

Efforts to hold PMSCs accountable through U.S. courts have thus been stymied by jurisdictional barriers, broad-based immunities available to PMSCs, and evidentiary challenges. These challenges reflect the inherent difficulty of attributing legal liability to, and imposing sanctions upon, PMSCs that nominally operate under the military's control but nevertheless function as private actors that enjoy a degree of autonomy. In criminal prosecutions, PMSCs

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<sup>55</sup> Cedric Ryngaert, *Litigating Abuses Committed by Private Military Companies*, 19 EUR. J. INT'L L. 1035, 1045-1046.

<sup>56</sup> *Id.* at 1045.

<sup>57</sup> *Id.*

such as Blackwater have undercut the jurisdictional basis of the government's case by emphasizing degrees of separation from the military's operations and chain of command. On the other hand, PMSCs facing civil suits, such as Titan and CACI, have successfully claimed a form of sovereign immunity by virtue of their contractual relationship with the U.S. government or their participation in activities traditionally carried out by the military, such as detention and interrogation. These legal obstacles have been compounded by the evidentiary challenges of investigating and trying PMSCs for abuses committed in war zones overseas. As the U.S. experience illustrates, domestic courts may not be able to effectively sanction PMSCs that can leverage their ambiguous legal status to selectively distance themselves from, or associate with, a nation's military for the purposes of minimizing liability.

*G. The Draft Articles on State Responsibility provide two channels for attributing PMSC conduct to states, but both are easily circumvented.*

The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles on State Responsibility) provide two channels for attributing PMSC conduct to states, but both are easily circumvented. No state has been found responsible for the conduct of a PMSC.

## 1. Entities Exercising Elements of Governmental Authority

Article 5 of the Draft Articles addresses the “conduct of persons or entities exercising elements of governmental authority” and provides a standard by which otherwise-private institutions or individuals can be treated as public entities (i.e., state organs).<sup>58</sup> Article 5 reads:

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.<sup>59</sup>

In particular, Article 5 targets “parastatal entities” that “exercise elements of governmental authority in place of State organs,” as well as “former State corporations [that] have been privatized but retain certain public or regulatory functions.”<sup>60</sup> Such entities may include private companies, so long as the company “is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned.”<sup>61</sup> Article 5 takes a functionalist approach to identifying such parastatal entities: Neither an entity’s legal classification nor the degree of its ownership by a state are decisive criteria for establishing attribution; much more important is the exercise of governmental authority.

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<sup>58</sup> Rep. of the Int’l Law Comm’n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 53d Sess., Apr. 23–Jun. 1, July 2–Aug. 10, 2001, 42, U.N. Doc. A/56/10; GAOR 55d Sess., Supp. No. 10 (2001)

[hereinafter *Draft Articles on State Responsibility*].

<sup>59</sup> *Id.* at 42.

<sup>60</sup> *Id.* at 42, ¶1.

<sup>61</sup> *Id.* at 43, ¶2.

PMSCs exercising public powers such as detention or direct participation in hostilities would likely qualify as parastatal entities under Article 5. In particular, the International Law Commission’s Commentaries on Article 5 note that “*private security firms* may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline (emphasis added).”<sup>62</sup> PMSCs that provided security, interrogation, and interpretation services at detention facilities in Iraq with U.S. government approval would qualify as “parastatal entities” that exercise government authority. Under Article 5, abuses committed by PMSCs in the course of providing services to U.S. detention centers would likely be “considered ... act[s] of the [United States] under international law.” Similarly, direct participation in hostilities would likely qualify as a “function[] of a public character normally exercised by State organs”; much like the “power[] of detention and discipline,” the ability to exercise deadly force on the battlefield would be a fundamental expression of a state’s authority.<sup>63</sup>

However, even under the Draft Articles, there are a number of unresolved questions about when a private entity is exercising an element of governmental authority.

First, the Commentaries on Article 5 do not define in granular terms the powers that would qualify as elements of governmental authorities, noting that “[b]eyond a certain limit, what is regarded as ‘governmental’ depends on the particular society, its history and traditions.” A PMSC’s actions can be attributed to a state only if they are undertaken in the course of exercising elements of delegated governmental authorities—that is, the public powers of a state.

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<sup>62</sup> *Id.*

<sup>63</sup> The governmental functions identified in the ILC Commentaries involve the power to restrict or deprive an individual of liberty or property. The Commentaries note that companies exercising “public powers of immigration control and quarantine” would qualify as parastatals, as would charities that are empowered to identify property for seizure. *Draft Articles on State Responsibility*, supra note 50, at 43, ¶2. See also Avril McDonald, Ghosts in the Machine: Some Legal Issues Concerning U.S. Military Contractors in Iraq, in *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES* 357, 358-359, 394 (Michael Schmitt & Jelena Pejic eds., 2007).

Broadly described, these powers would likely include the use of force, detention and punishment, immigration control, quarantine, and, potentially, the expropriation of property.<sup>64</sup> However, the Draft Articles and their Commentaries leave ambiguous the scope of those powers that can be presumed to be governmental. Rather than defining them, the Commentaries list four factors to consider:

- (1) the “content of the powers,”
- (2) “the way [the powers] are conferred on an entity,”
- (3) “the purposes for which they are to be exercised,” and
- (4) “the extent to which the entity is accountable to government for their exercise.”<sup>65</sup>

The Commentaries do not specify whether one, some, or all of these factors would need to be fulfilled in order to determine that a private entity’s actions represent an exercise of governmental authority.<sup>66</sup>

Second, it is difficult to establish that a PMSC was exercising the governmental authority it was delegated at the time it committed human rights abuses. To attribute the abuses of a PMSC to its hiring state, a plaintiff or prosecutor would need to show: (1) the PMSC was empowered by the “internal law” of the contracting state to exercise governmental authority relating to the conduct in question, and (2) the PMSC was exercising this delegated authority—that is, acting in an official capacity—when it committed the abuses.<sup>67</sup> In the absence of “internal law” that clearly defines the scope of certain public powers delegated to a PMSC, it may be difficult to show that the PMSC was empowered to exercise a particular sort of governmental authority.

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<sup>64</sup> *Id.*

<sup>65</sup> Draft Articles on State Responsibility, *supra* note 50, at 43, ¶6.

<sup>66</sup> JERNEJ LETNAR ČERNIČ, HUMAN RIGHTS, LAW AND BUSINESS 115 (2010).

<sup>67</sup> Carsten Hoppe, *Passing the Buck: State Responsibility for Private Military Companies*, 19 EUR. J. INT’L. L., 989, 991 (2008).

This is particularly problematic in instances in which PMSCs are hired to provide personal security and protection services but end up participating in active hostilities. For example, Blackwater contracted with the State Department to provide security for the agency's convoys in Iraq during the U.S. occupation. But it would strain credulity to suggest that the contract alone gave Blackwater a sufficiently broad grant of authority such that individual guards were acting in an *official capacity* when they shot indiscriminately at civilians and engaged Iraqi soldiers in a firefight in Nisour Square. To be sure, some academics have argued that Article 5 would be sufficient to hold states responsible for PMSC actions taken beyond or in contravention of their contractual terms—for example, the abuses at Abu Ghraib committed by CACI interrogators.<sup>68</sup> But, at a minimum, establishing that a PMSC was exercising an element of governmental authority when it committed certain abuses would entail a complex factual inquiry, made all the more difficult by the nebulous legal standard set out in Article 5.

## 2. Conduct Directed or Controlled by a State

On the other hand, Article 8 of the Draft Articles provides for attribution of responsibility to a state *de facto* when a private individual acts under the instructions or the control of the state. Article 8 does not necessarily require that the powers in question be legally delegated by the state, only that the state exercises control over the relevant private actors.<sup>69</sup> Article 8 provides:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the

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<sup>68</sup> HANNA TONKIN, STATE CONTROL OVER PRIVATE MILITARY AND SECURITY COMPANIES IN ARMED CONFLICT 113. (2011); Carsten Hoppe, *Passing the Buck: State Responsibility for Private Military Companies*, 19 EUR. J. INT'L L., 989, 992 (2008).

<sup>69</sup> In contrast, Article 5 provides for attribution *de jure*, as it involves examining whether the laws of a contracting state delegate authority to a private actor.

instructions of, or under the direction or control of, that State in carrying out the conduct.<sup>70</sup>

Thus, Article 8 provides for two potential ways to attribute the conduct of PMSCs to a contracting state.

First, attribution can be established if a PMSC commits violations under the “instructions” of a state. As the International Court of Justice (ICJ) noted in the *Genocide Convention* case, such instructions must be “given, in respect of *each operation* in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations (emphasis added).”<sup>71</sup> One academic has argued that a state’s general instruction that effectively authorizes human rights violations should be sufficient to trigger a state’s responsibility—for example, an order to shoot anyone who comes near a base or instructions to “get a prisoner to talk by any means necessary.”<sup>72</sup> More difficult would be establishing attribution when a PMSC acts beyond the scope of its authorization, in which case attribution of responsibility would hinge on “whether the unlawful or unauthorized conduct was really incidental to the mission or clearly went beyond it.”<sup>73</sup> Theoretically, a state that issued vague or ambiguous instructions to PMSCs could be held responsible for violations of human rights that were undertaken to further the objectives of the mission. But in practice, establishing state responsibility would be challenging. For example, a state might order PMSC guards to shoot anyone *suspicious* who tries to approach a convoy: The instruction would lend itself to at least two plausible interpretations—to shoot only individuals

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<sup>70</sup> Draft Articles on State Responsibility, *supra* note 50, at 47.

<sup>71</sup> Case Concerning Application Of The Convention On The Prevention And Punishment Of The Crime Of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 1996 I.C.J. 43, ¶ 400 (July 11).

<sup>72</sup> HANNA TONKIN, STATE CONTROL OVER PRIVATE MILITARY AND SECURITY COMPANIES IN ARMED CONFLICT 115 (2011).

<sup>73</sup> Draft Articles on State Responsibility, *supra* note 2, at 48, ¶8.

who look like combatants or to shoot indiscriminately without warning. In that case, it would be difficult to establish that shooting civilians was incidental to the mission of protecting the convoy, as opposed to a deviation from the operation the PMSC was authorized to carry out.<sup>74</sup>

Second, attribution can be established if a PMSC operates under the “direction or control” of a state. Here, the prevailing standard is the “effective control” test laid out in the ICJ’s *Nicaragua* decision. For a state to be held responsible for violations conducted by private actors, it must exercise “effective control of the military or paramilitary operations during the course of which the alleged violations were committed.”<sup>75</sup> In the *Nicaragua* case, the “partial dependency” of the *contras* on U.S. assistance—the United States had selected and paid their leaders, furnished organization, training, equipment, and operational planning and support, and even chosen targets—was insufficient to impute the actions of the *contras* to the United States.<sup>76</sup> In other words, a state’s exercise of overall control over a PMSC would not be sufficient to attribute to the state the private actor’s specific violations of human rights or humanitarian law.<sup>77</sup> Rather, a state would have had to “direct[] or enforce[] the perpetration of ... acts contrary to human rights and humanitarian law,” which would entail ordering specific operations such as the killing of civilians.<sup>78</sup> Without evidence that state officials gave such explicit orders, it is difficult to attribute abuses committed by PMSCs to a contracting state.

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<sup>74</sup> Tonkin, STATE CONTROL OVER PRIVATE MILITARY AND SECURITY COMPANIES, at 116.

<sup>75</sup> Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Merits, 1986 I.C.J. 14, ¶115 (June 27). *Id.* at ¶¶106-116.

<sup>76</sup> *Id.* at ¶¶106-116.

<sup>77</sup> Tonkin, *supra* note 10, at 120; Antonio Cassese, The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia, 18 EUR. J. INT’L. L. 649, 653 (2007).

<sup>78</sup> “By such ‘effective control’ the Court meant that the US should have directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State.’ It seems clear from these words that by ‘effective control’ the Court intended either (1) the issuance of directions to the *contras* by the US concerning specific operations (indiscriminate killing of civilians, etc.), that is to say, the ordering of those operations by the US, or (2) the enforcement by the US of each specific operation of the *contras*, namely forcefully making the rebels carry out those specific operations.” Antonio Cassese, *The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT’L. L. 649, 653 (2007).

H. *The use of private military contractors may erode the perceived legitimacy of a country's foreign policy action in the international community*

1. Reputational Harm to Nations

States might wish to avoid employing private military contractors, because those that overstep their role as private entities—especially through committing violations of IHL or human rights law—cause reputational harm to their employing state.

2. The CACI Case Study

The CACI case study illustrates the criticism that states can receive as the result of illegal conduct by private military contractors that are under their supervision or control (in practice, if not in name).<sup>79</sup>

In terms of reputational harm, it is worse, for two primary reasons, to have private military contractors, such as CACI, involved in allegations of violations of IHL and IHRL than to have the U.S. military alone involved in such allegations.

First, having private military contractors involved in allegations of abuse makes it appear as though the United States is avoiding responsibility for its actions. Given how difficult it is to hold private military contractors accountable for abuses perpetrated abroad and outside the clear chain of command,<sup>80</sup> using private military contractors can be perceived as a means of creating sufficient plausible deniability to allow the employing state to evade responsibility and

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<sup>79</sup> CACI International, Inc., is a private military contractor based in the United States. CACI supplied at least one interrogator who allegedly participated in torture in the Abu Ghraib prison in Iraq. According to a civil suit filed in 2008, CACI employees were accused of conducting interrogation at Abu Ghraib and conspiring with military personnel to abuse and torture four detainees in 2003 and 2004. *See Al Shimari v. CACI Intern., Inc.* 679 F. 3d 205 (2012). The case received wide press coverage. *See Catherine Ho, Abu Ghraib Suit Against Contractor CACI is Reinstated*, Wash. Post (June 30, 2014).

<sup>80</sup> “Will Anyone Pay for Abu Ghraib?” New York Times (Feb. 5, 2015), [http://www.nytimes.com/2015/02/05/opinion/will-anyone-pay-for-abu-ghraib.html?\\_r=0](http://www.nytimes.com/2015/02/05/opinion/will-anyone-pay-for-abu-ghraib.html?_r=0).

accountability. The U.S. Joint Chiefs of Staff, for example, found that abuses committed by contractors in Iraq and Afghanistan led to increased hostile sentiments against the United States in the region.<sup>81</sup>

Second, a perception that a state is not being held sufficiently accountable for violations of international law can erode other states' confidence in that body of law. Such erosion may create a risk that some states will diminish their participation in relevant international institutions, procedures, and cooperation and will comply less strictly with international law and diplomatic norms.

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<sup>81</sup> Chairman of the Joint Chiefs of Staff, Operational Contract Support, Joint Publication 4-10, October 17, 2008, pp. IV-20.

## PART TWO

### **III. PROPOSED “INHERENT GOVERNMENT FUNCTIONS” AND ARGUMENTS FOR INCLUSION OF PARTICULAR FUNCTIONS**

A number of activities were included in the Draft of a Possible Convention on Private Military and Security Companies for Consideration by the Human Rights Council and classified by that document as “inherently state functions.” These include: direct participation in hostilities; waging war and/or combat operations; taking prisoners; law-making, espionage; intelligence; knowledge transfer with military; security and policing application; use of and other activities related to weapons of mass destruction and police powers; and the powers of arrest or detention, including the interrogation of detainees. However, the document expressly states that other activities may also be included if they are deemed to be functions inherent to the state. The list seems exhaustive and forward-looking; the team did not find evidence that private military companies had been employed to perform each action on the list. However, for those activities that have fallen within the purview of such companies in recent history, cautionary arguments against such involvement are offered below.

#### *A. DIRECT PARTICIPATION IN HOSTILITIES*

##### 1. Legal Rationales for Banning PMSCs from Direct Participation in Hostilities

International law does not explicitly ban PMSCs from directly participating in hostilities.<sup>82</sup> Instead, PMSCs that participate directly in hostilities do not benefit from certain

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<sup>82</sup> At an intergovernmental working group in 2012, representatives of the ICRC noted that while IHL barred the outsourcing of certain functions, such as the command of POW and civilian internment camps, to PMSCs, there was

protections normally accorded to combatants under international humanitarian law; for example, they are not entitled to prisoner-of-war status and can be prosecuted by national courts for simply killing soldiers, even on the battlefield.<sup>83</sup> In effect, this reading of international law creates negative incentives for private-contractor participation, without necessarily banning it altogether.

Nevertheless, both international law and domestic legal regimes have enshrined principles that lay a theoretical foundation for barring PMSCs from directly participating in hostilities.

First, international humanitarian law has already established that some state responsibilities are non-transferable, making it unlawful for states to contract out certain functions to PMSCs. Article 39 of the Third Geneva Conventions provides that, in an international armed conflict, “[e]very prisoner of war camp shall be put under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power.” Similarly, Article 99 of the Third Geneva Convention states that “[e]very place of internment shall be put under the authority of a responsible officer, chosen from the regular military forces or the regular civil administration of the Detaining Power.”<sup>84</sup>

Consequently, if a state placed a POW camp under the immediate authority of a PMSC or allowed a PMSC to operate a place of internment without supervision from its military or government, it would be in violation of the Geneva Conventions.<sup>85</sup> In other words, a state’s otherwise-sovereign prerogative to define and delegate its functions to actors of its choosing is

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no explicit prohibition on private persons or entities directly participating in hostilities. Liu, *Law’s Impunity*, at 156, 162.

<sup>83</sup> ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (Nils Melzer ed., 2009), 83, available at <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

<sup>84</sup> Geneva Convention Relative To The Protection Of Civilian Persons In Time Of War, Aug. 12, 1949, 75 U.N.T.S. 287.

<sup>85</sup> Tonkin, *State Control over Private Military and Security Companies*, at 187,

*already limited* under existing IHL. Although this principle is currently limited to specific state responsibilities in administering captives in war, it binds states regardless of whether they are willing to assume responsibility for the actions of private actors or whether the risks of human rights abuses stemming from delegation are actual or hypothetical.<sup>86</sup>

Second, states have an affirmative obligation to “ensure respect” for IHL, as well as a “duty to prevent” violations of non-derogable rights under the ICCPR. Common Article 1 of the Geneva Conventions requires state parties, including hiring states and states in which PMSCs are incorporated, to “ensure respect” for IHL.<sup>87</sup> Both hiring states and states that host PMSCs in their territory must require that PMSCs are properly trained in IHL, that their standard rules of engagement comply with IHL, and that any violations are reported to superiors and, if necessary, prosecuted.<sup>88</sup> Where states are unable to fulfill their responsibilities to ensure respect for IHL—in particular, in situations where enabling PMSCs to participate directly in hostilities will facilitate, if not lead directly to, breaches of IHL—states arguably have an obligation to refrain from contracting altogether.<sup>89</sup>

Similarly, states also have a “duty to prevent” violations of non-derogable rights under the ICCPR, including the right to life and the right to be free from torture or cruel, degrading, or inhuman treatment or punishment.<sup>90</sup> With regard to Article 7 (the ban on torture and cruel,

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<sup>86</sup> *Id.*

<sup>87</sup> Lindsey Cameron and Vincent Chetail, *PRIVATIZING WAR: PRIVATE MILITARY AND SECURITY COMPANIES UNDER PUBLIC INTERNATIONAL LAW* 247 (2013).

<sup>88</sup> Hoppe, *supra* note 65, at 993-994.

<sup>89</sup> A straightforward interpretation of the due diligence obligation under Common Article 1 suggests that states have a responsibility to contract with PMSCs that respect IHL and to refrain from hiring PMSCs that are likely to perpetuate abuses, such as security forces from regimes that have been involved in violations of IHL. States thus have an obligation to refrain from contracting with *particular* PMSCs if doing so is likely to result in violations of IHL. Extrapolating from that principle, in contexts where the involvement of *any* PMSC would likely result in violations of IHL (i.e., undertaking combat missions in a war zone), states should be obligated to refrain from contracting with PMSCs altogether. See Lindsey Cameron and Vincent Chetail, *supra* note 88.

<sup>90</sup> *Id.*, at 235, 236.

degrading, or inhuman treatment), the Human Rights Committee, the body established by the ICCPR to monitor compliance with its provisions, has maintained that states have a duty to prevent abuses that are not strictly legally attributable to them, including abuses by persons acting in their private capacity.<sup>91</sup>

Third, at the national level, states have made progress toward banning PMSCs from direct participation in hostilities. In 2015, Switzerland banned PMSCs based in the country from “actively particip[ating] in hostilities” and mandated that PMSCs operating in the country adhere to the International Code of Conduct for Private Security Service Providers.<sup>92</sup> The United States has gone one step further in issuing regulations mandating that “all combat and ... security operations in certain situations connected with combat or potential combat” are “inherently governmental functions” that must be performed by federal government employees.<sup>93</sup> Although there are debates about how best to define direct participation in hostilities for the purpose of restricting the outsourcing of such functions to PMSCs,<sup>94</sup> there is a growing recognition that involving PMSCs in combat operations are inherently inconsistent with states’ legal order.

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<sup>91</sup> *Id.*, at 230-231.

<sup>92</sup> This measure is outlined in a Progress Report issued by the Swiss Government on the Law on the Control of the Activities of Swiss Security Service Providers Abroad, which was passed in 2015. See Foreign Ministry of the Swiss Federation, Taetigkeitsbericht 2015/2016 zur Umsetzung des Bundesgesetzes ueber die im Ausland erbrachten privaten Sicherheitsdienstleistungen: 1. September 2015 – 31. Dezember 2016, available at [https://www.eda.admin.ch/content/dam/eda/de/documents/aussenpolitik/sicherheitspolitik/taetigkeitsbericht-2015-16\\_DE.pdf](https://www.eda.admin.ch/content/dam/eda/de/documents/aussenpolitik/sicherheitspolitik/taetigkeitsbericht-2015-16_DE.pdf).

<sup>93</sup> Office of Mgmt. & Budget, Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56227 (Sept. 12, 2011).

<sup>94</sup> Charles Kels, Contractors in the “Kill Chain”? At the Nexus of LOAC and Procurement Law, LAWFARE (January 24, 2016, 7:03 AM), <https://www.lawfareblog.com/contractors-kill-chain-nexus-loac-and-procurement-law>.

2. Policy rationales for banning PMSCs from direct participation in hostilities
  - a. Permitting PMSCs to participate directly in hostilities will result in more violations of IHL

Enabling PMSCs to participate directly in hostilities will disrupt the military's tightly integrated command structure that is crucial to preventing violations of IHL.

By their very nature, PMSCs cannot be effectively integrated into a military's chain of command: not, at least, in the way necessary to both inculcate and enforce norms of international humanitarian law. Soldiers in the military are subject to a rigid discipline and accountability structure that involves extensive training in the laws of war and obedience to a commander who has broad discretion to impose sanctions under the military's code of justice. In contrast, PMSCs are controlled through the terms of their contracts.<sup>95</sup> In Iraq, for example, PMSCs employed by the United States were attached to disparate commands that had separate and sometimes-uncoordinated missions. As a consequence, U.S. troops were often unsure of which commanders PMSC personnel were attached to, making it difficult to report violations and to discipline individuals who killed combatants or civilians in violation of the rules of engagement.<sup>96</sup> Although militaries could attempt to better integrate PMSCs into their command structures, doing so would also impair the short-term, fluid nature of PMSC employment that makes such an arrangement attractive in the first place. Moreover, such integration would still be impaired by the differing missions, rules of engagement, and incentive structures of a state's military, which

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<sup>95</sup> Amy Eckert, *OUTSOURCING WAR: THE JUST WAR TRADITION IN THE AGE OF MILITARY PRIVATIZATION* (2016).

<sup>96</sup> Molly Dunigan, *VICTORY FOR HIRE: PRIVATE SECURITY COMPANIES IMPACT ON MILITARY EFFECTIVENESS* 75 (2011).

pursues national objectives and is collectively responsible for the actions of its soldiers, and PMSCs that are focused on completing discrete missions to generate revenue.<sup>97</sup>

Because it is always difficult, if not impossible, for military forces to fully integrate PMSCs into their command structures, PMSCs' engagement in direct hostilities will result in more violations of IHL. PMSCs are unlikely to be trained in IHL norms and may be less willing to endure heightened risks to their safety in order to abide by the rules of engagement. PMSCs are less sensitive than the military to the consequences that collateral damage may have on a larger mission (i.e., winning hearts and minds in a post-war occupation) and, as a practical matter, are less likely to be held accountable for violations of IHL.<sup>98</sup> Compared to military forces, PMSCs that participate directly in hostilities will likely inflict more collateral damage upon civilians as they attempt to fulfill specific missions while minimizing risks to their own safety.

b. *States will have incentives to exploit the attribution and accountability gap that using PMSCs produces.*

Because PMSCs are likely to operate in a legal and operational gray zone, states have strong incentives to use them to carry out missions that they would otherwise not want to be attributable to their national militaries. This may take at least two forms. On the one hand, states may be tempted to use PMSCs to evade domestic political constraints in conducting interventions abroad. On the other hand, a state may turn to PMSCs to mask its involvement in secretive operations that are likely to result in violations of international law; for example, states

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<sup>97</sup> *Id.* at 78-79.

<sup>98</sup> Dunigan, *supra* note 97.

might use PMSCs to intervene in the domestic conflicts of other states or to support irregular forces linked to IHL violations or human rights abuses.

In the context of contemporary complex conflicts, the use of PMSCs may enable states to intervene or prolong interventions without the same domestic political costs that would otherwise constrain their use of their national militaries. The United States, for example, has often downplayed the number of PMSCs deployed to Iraq and Afghanistan, while trumpeting drawdowns of U.S. military personnel.<sup>99</sup> The U.S. has also declined to track the nationalities of PMSCs killed in Afghanistan, even though U.S. PMSC deaths in the country now outnumber the deaths of U.S. military personnel.<sup>100</sup> Many commentators have noted that the U.S. move to an all-volunteer army, the use of high-altitude air and drone attacks, without the need for ground forces, and the deployment of PMSCs diminish the need for public support for U.S. armed intervention or for the political process to legitimize such use of force.<sup>101</sup> In this way, the use of PMSCs threatens to increase the likelihood that states, relatively unconstrained by the need to secure political approval, will turn too readily to the use of violent force.

## B. DETENTION

### 1. Perverse Incentives

Control of detention facilities by private military contractors causes perverse incentives that may lead to the detention of more people for longer periods of time. This objection to the involvement of private military contractors in detention facilities ascribes profit-seeking motives

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<sup>99</sup> Micah Zenko, *The New Unknown Soldiers of Afghanistan and Iraq*, FOREIGN POLICY, May 29, 2015, <http://foreignpolicy.com/2015/05/29/the-new-unknown-soldiers-of-afghanistan-and-iraq/>

<sup>100</sup> *Id.*

<sup>101</sup> See, e.g. Paul Kahn, *Riskless Warfare*, 22 PHILOSOPHY AND PUBLIC POLICY QUARTERLY 3 (2002) (arguing that asymmetrical warfare upsets the framework for the “internal morality of warfare”—namely that traditionally, just war has been fought in self-defense with the imposition of mutual risk); see also Anders Henriksen, *Drone Warfare and Morality in Riskless War*, 1(3) GLOBAL AFFAIRS 285 (2015).

to the private companies and assumes that such companies would seek to increase their profits wherever possible. In the domestic context, critics have argued that private prison companies have sought to increase profits by influencing substantive criminal legislation in ways that would drive up the prison population. These companies have been accused of supporting tough-on-crime candidates, scaring the public about crime, and advocating tougher sentencing.<sup>102</sup> In situations in which private contracting companies receive payment based on the number of prisoners they oversee, incentives would likely push them to use political leverage to ensure that their detainee population is as high as possible.

This raises two separate concerns: one relating to notions of justice and the other relating to claims concerning resources of the state. In terms of justice, a private prison system has the potential to incarcerate individuals not for punishment, but for profit. Also, it might be more appropriate for state resources to be used for the purposes of rehabilitation and reintegration—among the core values of detention—rather than to entrust those critical state responsibilities to private corporations. The incentives of a profit-focused private prison system risk becoming divergent from those of a system operated by a constitution-focused government

## 2. Public Scrutiny and the “Strategic Corporal” Principle

Traditionally, militaries have overseen the detention of prisoners of war. In situations characterized by significant and sustained power imbalances, such as those that exist between people being detained and the people detaining them, abuses of power are frequent and

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<sup>102</sup> Michael Brickner, Shakyra Diaz, *Prisons for Profit: Incarceration for Sale*, 38 American Bar Association Human Rights Magazine 38 (2011), [http://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol38\\_2011/human\\_rights\\_summer11/prisons\\_for\\_profit\\_incarceration\\_for\\_sale.html](http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol38_2011/human_rights_summer11/prisons_for_profit_incarceration_for_sale.html).

pervasive.<sup>103</sup> A working environment that fosters a strong sense of ethics may provide a bulwark against these kinds of abuses. The officer training provided by all branches of the U.S. military is characterized by a strong, consistent focus on ethics and on the fact that military officers operate under public scrutiny. Officers are encouraged to consider the consequences of their behavior, not only for the soldiers in their charge, but also for public discourse. As U.S. General Charles C. Krulak put it: “In many cases, the individual Marine will be the most conspicuous symbol of American foreign policy .... His actions, therefore, will directly impact the outcome of the larger operation; and he will become ... the *Strategic Corporal* [emphasis in the original].”<sup>104</sup> Military contracting companies, on the other hand, often hire people for specific jobs to carry out narrowly circumscribed functions. For example, the CACI International, Inc., group based in Arlington, Virginia, called for applicants for positions as interrogators.<sup>105</sup> In its call for applicants, it stipulated that would-be interrogators must be comfortable working under “moderate supervision” providing “intelligence support for interviewing local nationals and determining there [sic] threat to coalition forces. Must be able to work with interpreters to gather intelligence information from multiple sources.”<sup>106</sup> If CACI’s practices are typical of industry practices, private contractors prefer to hire employees who, at the time of hiring, already possess the specific skills necessary for the job and, as a result, provide much less training to them. This “thinner” training regime means that ethical considerations are less likely to play the major role

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<sup>103</sup> See, e.g. Philip Zimbardo’s Stanford Prison Experiment, which demonstrated how quickly power structures can be internalized and used as the basis for psychological abuse.

<sup>104</sup> General Charles C. Krulak, *The Strategic Corporal: Leadership in the Three Block War*, Marines Magazine (1999), available at [http://www.au.af.mil/au/awc/awcgate/usmc/strategic\\_corporal.htm](http://www.au.af.mil/au/awc/awcgate/usmc/strategic_corporal.htm). The “Strategic Corporal” concept in military training parlance emphasizes the importance of each service member’s actions to the entire mission.

<sup>105</sup> Job descriptions posted on the recruitment section of the CACI Website before the emergence of torture allegations have been collected and documented on the website Cryptome, which has been both praised and criticized for its role in making sensitive information public. A series of job descriptions posted by CACI in 2004 are available here: <https://cryptome.org/caci-jobs-iq.htm>.

<sup>106</sup> [http://www.democracynow.org/2004/5/12/private\\_contractors\\_and\\_torture\\_at\\_abu](http://www.democracynow.org/2004/5/12/private_contractors_and_torture_at_abu)

that they do for military officers and their troops. At Abu Ghraib, both troops and private military contractors were involved in perpetrating torture against prisoners. Both the troops involved in the torture that occurred at Abu Ghraib and outside observers have emphasized that a lack of training and oversight contributed to abuses of prisoners in U.S. custody.<sup>107</sup> Given the high risk of abuse in these situations, military training and a strong normative culture are crucial in ensuring a minimum of safety for detainees.

### C. INTERROGATION

#### 1. Hiring Concerns

It is difficult for governments to ascertain the skill level of private interrogators. If a contractor hires former government employees, their prior work under the auspices of a government organization is likely protected by confidentiality policies. If a contractor hires an interrogator whose previous work as an interrogator was conducted with a private contracting company, the hiring company is unlikely to have robust mechanisms to accurately evaluate his or her skill level. States ostensibly rely on interrogations to gain access to critical security information under time pressure. It is important and delicate work that requires a high level of specific skills. When governments rely on interrogators hired by private contractors, they do not have reliable mechanisms for determining whether these interrogators are adequately skilled and ethical. The companies that provide the personnel have incentives to misconstrue information

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<sup>107</sup> See, e.g. Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORK MAGAZINE (2004), available at <http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib> (highlighting the fact that an Army investigation found that troops involved in interrogation work “had not been given any ‘training guidelines’ ...”); Todd Richissin, *Soldiers’ Warnings Ignored*, THE BALTIMORE SUN (May 9, 2004), available at <http://www.baltimoresun.com/news/bal-te.guard09may09-story.html> (noting that soldiers charged with interrogation duties had received little or no training and that the contractors who worked alongside them balked at the chain of command).

about the skill level and ethics of their employees in ways that will ensure that they secure favorable contracts.<sup>108</sup>

Confidentiality concerns keep states from being able to fully ascertain the level of training and experience of private military contractors who are hired for interrogation positions. And profit incentives, in turn, run the risk of motivating private military contractors to not fully disclose information that might jeopardize their ability to earn a contract from a state. The uniquely confidential circumstances in which interrogators are contracted can put states in a vulnerable position in which they indirectly and, thus, blindly hire individuals who have insufficient training or experience, unable to fully assess their qualifications due to the very nature of the job.

## 2. Conflicts of Interest

In a system in which contracts between government and private companies are periodically reviewed and potentially renewed, governments compensate contracting companies for their perceived or actual effectiveness. If private contractors are deemed to be effective, governments are likely to renew or extend their contracts or to consider them for future contracts. Insofar as a robust code of ethics interferes with behavior that companies believe leads to effective extraction of information, private contractors have an incentive to disregard or intentionally breach relevant ethical codes. Members of a government agency or a military may have a similar incentive in situations of national emergency, but private contractors face the additional financial incentive. The corporate structure might increase the strength of financial incentives in perverse ways. In contrast to the military command structure, private military contractors, with the people managing the business side the firm generally sitting far from the

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<sup>108</sup> See generally DAVID ISENBERG, SHADOW FORCE: PRIVATE SECURITY CONTRACTORS IN IRAQ 124 (2009).

places in which interrogations are taking place, these incentives are likely to become magnified in ways that reward unethical behavior.

### 3. High Value Detainees and Information Gathering

The likely lack of coordination between the intelligence apparatus of a state and private military contractors has the potential to create situations in which interrogations of detainees with access to critical, time-sensitive information may be botched or delayed. Interrogations of detainees occurring in situations of prolonged armed conflict are different from interrogations of criminal suspects in that they are often purportedly conducted to gain information about *future* crimes rather than *past* crimes.<sup>109</sup> In these situations, it is important to act swiftly, to refrain from torture and other forms of punishment that have been proven to lead to incorrect or incomplete information,<sup>110</sup> and to act within the bounds of international and domestic law. If interrogation duties are completely outsourced to a private company, and especially if detention of persons undergoing interrogation is similarly outsourced, there is likely to be less robust coordination between the intelligence apparatus of the state and the private detention facility. This can lead to situations in which detainees are held for long periods of time without proper questioning, causing the information to which the detainees may have access to become less valuable. If private contractors' scant training, inadequate oversight, and weak ethical culture<sup>111</sup> lead to

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<sup>109</sup> In the famous "ticking time bomb" scenario that underlies much discussion of torture, coercive interrogation of enemies occurs in order to prevent or eliminate future harms. Generally, interrogations of criminal suspects are conducted in furtherance of the case against them, which would involve establishing evidence of their involvement in past crimes.

<sup>110</sup> The ineffectiveness of torture was scientifically demonstrated by Jane Goodman-Delahunty's study, which showed that rapport-building is more effective than torture. The research involved 34 interrogators and 30 international detainees being held on suspicion of terrorism. The study found that disclosure was 14 times more likely to occur early in an interrogation when a rapport-building approach was used and that confessions were 4 times more likely when interrogators retained a neutral and effective tone. Goodman-Delahunty, J., Martschuk, N., & Dhami, M.. INTERVIEWING HIGH VALUE DETAINEES: SECURING COOPERATION AND DISCLOSURES in 28 APPLIED COGNITIVE PSYCHOLOGY (2014).

<sup>111</sup> See *supra* note 107.

torture of detainees, a state may lose access to valuable military information. In situations in which perpetrators of international crimes are later put on trial, evidence against them obtained as the result of torture by government-hired non-state actors will face difficult admissibility challenges.

#### *D. SECURITY*

Enlisting PMSCs to provide security services will, in practice, create many of the same kinds of risks regarding violations of IHL as does permitting PMSCs to participate directly in hostilities. In combat zones, PMSCs that are nominally contracted to provide security services may come under fire and quickly find themselves engaging in hostilities. The U.S. government contracted with PMSCs, such as Blackwater, in Iraq, not to participate in combat, but rather to provide security for convoys, diplomatic personnel, and major facilities.<sup>112</sup> In the Nisour Square massacre, for example, Blackwater employees hired to secure a convoy claimed that they were responding to a possible suicide bomber and had been fired upon by insurgents dressed as police officers.<sup>113</sup> In these scenarios, PMSCs must exercise judgments about necessity and proportionality in responding to perceived threats, a difficult proposition for individuals who are unlikely to have received the same extensive training in IHL as professional soldiers.<sup>114</sup> While PMSCs are obligated to obey the orders of local commanders, they are not integrated into the units of these commanders in the same way that members of the uniformed military are. As a result, PMSCs are more likely to deviate from rules of engagement and less likely to be

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<sup>112</sup> Walter Pincus, U.S. Pays Steep Price for Private Security in Iraq, WASH. POST, Oct. 1, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/30/AR2007093001352.html>

<sup>113</sup> Spencer S. Hsu and Victoria St. Martin, *Four Blackwater Guards Sentenced in Iraq Shootings of 31 Unarmed Civilians*, WASH. POST, Apr. 13, 2015, [https://www.washingtonpost.com/local/crime/four-blackwater-guards-sentenced-in-iraq-shootings-of-31-unarmed-civilians/2015/04/13/55b777e0-dee4-11e4-be40-566e2653afe5\\_story.html](https://www.washingtonpost.com/local/crime/four-blackwater-guards-sentenced-in-iraq-shootings-of-31-unarmed-civilians/2015/04/13/55b777e0-dee4-11e4-be40-566e2653afe5_story.html).

<sup>114</sup> Lindsey Cameron and Vincent Chetail, *PRIVATIZING WAR*, at 101.

disciplined or held accountable for violations.<sup>115</sup> In active war zones, the distinction between security services and participation in hostilities may be difficult to maintain, increasing the risk that PMSCs who are ill-equipped to handle combat will commit violations of IHL.

Moreover, states will have a strong incentive to classify PMSCs as providing security services, rather than direct combat support. In doing so, states may be able to escape the normative and legal costs of openly outsourcing combat functions to private actors while enjoying a high degree of operational flexibility.

#### *E. POLICING AND SUPPORT FOR WEAK INSTITUTIONS OF A THIRD STATE*<sup>116</sup>

##### 1. Attribution and Accountability Concerns

PMSCs' involvement in policing raises concerns of attribution. When a PMSC actor undertakes actions typically conducted by government officials, an average citizen might assume that the PMSC actor is, in fact, a government official. This raises two troubling issues. First, government actors and private actors are subject to different legal standards for conduct that harms or affects the rights of others, particularly for conduct that allegedly violates another person's constitutional rights. This difference in legal standards is likely to complicate legal action against PMSCs whose actions, in effect, straddle this divide. Second, civilians may have difficulty identifying the correct means for seeking a remedy in the case of illegal action committed by a private contractor working for the government. In the worst-case scenario, domestic tort mechanisms that are used to prosecute private individuals may be foreclosed because of an unstable legal system, and PMSCs may be exempt from liability under military law or the civil legal code of the country that employs them. Finally, the U.S. Department of

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<sup>115</sup> *Id.*

<sup>116</sup> The language "third" state is drawn from the draft convention. Here, "third" can be interpreted to mean "other" or "foreign" state.

Justice has often highlighted the benefits of community engagement and monitoring of policing to ensure accountability, integrity, and fair protection of civilians.<sup>117</sup> When police are disconnected from communities and are not even informally evaluated by them, the effectiveness of the protection they offer can suffer, and they might even threaten the safety of the communities they are responsible for protecting.

## 2. Lack of Training

Police forces are generally required to undergo training before beginning their jobs, and that training is often rigorous. For example, police forces in the United States are trained in constitutional law and on proper use of firearms (including principles of using weapons only rarely and deadly force only when absolutely necessary).<sup>118</sup> However, private military contractors are not subject to municipal liability structures and therefore may have disincentives to provide adequate training to individuals whom they hire to conduct policing. In an unregulated private sector unlikely to incur lawsuits, training may be a low priority.

### F. LAWMAKING<sup>119</sup>

Private military contractors are not equipped to fill the sovereign role of lawmaking. First, sovereigns should carry out the lawmaking function in order to protect the state's democratic legitimacy and in order to ensure that the people can identify and hold accountable

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<sup>117</sup> See generally THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING: ONE YEAR PROGRESS REPORT (2016).

<sup>118</sup> For details about the training programs used by more than 600 state and local law enforcement offices, see <http://www.bjs.gov/index.cfm?ty=tp&tid=77>.

<sup>119</sup> "Lawmaking" was a category presented in the draft convention. However, our research has not uncovered any examples of private military contractors actually lawmaking. Moreover, it is not clear what precisely the term "lawmaking" is intended to encompass. Nor did reading the *travaux* shed any light on what was meant when lawmaking was included in the draft convention. We have, therefore, addressed this hypothetically, explaining why PMSCs are not ideally suited for this role.

those who make the laws governing them. Voters who elect government officials should be able to judge them on their merits, which include their ability to craft, pass, and implement legislation. Citizens who dislike particular legislation should be able to affect the political process and subsequent legislation with their votes; however, having a PMSC enacting or implementing legislation creates a significant barrier to civilians' ability to control or influence the content or quality of legislation through a democratic process.

Moreover, because legislating is the mainstay of a government, citizens are likely to attribute lawmaking functions to the legislature, rather than a private contractor. Just as attribution of responsibility for conduct during armed hostilities is complicated when private military contractors are involved, because the chain of command is interrupted or obscured, delegating the lawmaking function to private actors makes it difficult for the public to track legislation to its source and hold the actual lawmakers responsible.

#### *G. KNOWLEDGE TRANSFER WITH MILITARY*

Private military contractors have long engaged in knowledge transfer with militaries. Some forms of this knowledge transfer are more frequent and do not impose upon inherently governmental functions. Thus, while some forms of knowledge transfer fall under common-sense definitions of "inherently governmental functions," other forms may remain appropriate for the private sector to carry out.

In order for a prohibition on such knowledge transfer to be meaningful and for it to be considered by countries that make significant use of PMCs, the prohibition of unacceptable knowledge transfer with militaries must be more limited and specific. For example, private military contractors often provide support to foreign militaries, including supplying component parts for weapons and other equipment, training forces on the use of such resources and on

relevant rules (including on such issues as export controls or lawful use of weapons), and providing other forms of technical support. Other types of knowledge transfer, however, may be more closely related to an inherent government function. This includes knowledge transfer that is closer to actual participation in hostilities. For example, private military contractors that themselves provide direct support to military forces in the context of hostilities are likely carrying out an inherently governmental function (that is, direct engagement in hostilities), while PMSCs that only advise the armed forces of other states represent a closer case.

In order to locate the line between appropriate and inappropriate knowledge transfer, it is necessary to look more closely at acceptable definitions of military activity. Both the UN Working Group's definition of *military* activities and what scholars and practitioners consider to be knowledge transfer can help to develop a useful definition of "knowledge transfer with military." Art. 2b of a draft document prepared by the UN Human Rights Council's Working Group on the Use of Mercenaries as Means of Violating Human Rights and Impeding People's Exercise of the Right of Self-Determination defines military service as: "specialized services related to military actions, including strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight operations of any type, manned or unmanned, satellite surveillance, any kind of knowledge transfer with military applications, material and technical support to armed forces and other related activities."<sup>120</sup>

One scholar has written that knowledge transfer in the context of military affairs includes "logistical and administrative support involved in the projection of organized violence"; this, in turn, includes providing "material and technical support to armed forces and other related

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<sup>120</sup> Draft of a Possible Convention on Private Military and Security Companies (PMSCs) for Consideration and Action by the Human Rights Council, UN Doc. A/HRC/15/25.

activities.”<sup>121</sup> Another scholar breaks down the kind of action that PMSCs undertake, suggesting that they fall into three types: *Military Provider Firms* (which engage in direct combat), *Military Support Firms* (which provide supplementary military services such as logistics, intelligence, technical support, supply, and transportation) and *Military Consultant Firms* (which give advice and training for operating and restructuring militaries themselves).<sup>122</sup> All three of these categories encompass work that falls within the UN Working Group’s own definition of the inherently state function of “military service” as “specialized knowledge transfer.” Going forward, sensitivity to these nuances may be helpful to the drafting team when considering what kinds of knowledge transfer should be prohibited.

In light of the above, the language of “knowledge transfer with military” should be revised to narrow its scope. In its present form, it is not specific enough to capture only the forms of knowledge transfer that are harmful and, at the same time, overly restrictive in a way that could keep states from receiving critical, timely information. Examination of the definitions of military activity might provide helpful information to draw firmer boundaries between appropriate and inappropriate knowledge transfer.

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<sup>121</sup> Hin-Yan Liu, *Law’s Impunity: Responsibility and the Modern Private Military Company* 105 (2015).

<sup>122</sup> Alane Kochems, “When Should The Government Use Contractors to Support Military Operations?” (May 19, 2006), available at <http://www.heritage.org/research/reports/2006/05/when-should-the-government-use-contractors-to-support-military-operations>.