RETHINKING THE ROLE AND REGULATION OF PRIVATE MILITARY COMPANIES: WHAT THE UNITED STATES AND UNITED KINGDOM CAN LEARN FROM SHARED EXPERIENCES IN THE WAR ON TERROR

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I. INTRODUCTION

Private military company personnel almost equaled United States troops in Afghanistan as of March 2011.1 In Iraq, where combat operation ended in August 2010,2 the number of private contractors exceeded the number of American troops by nearly 20,000.3 The increased use of private military corporations (PMCs) in Iraq and Afghanistan prompted the United Kingdom’s Foreign Office to evaluate options for regulating these companies.4 Although the United Kingdom ended its Iraqi combat operations in April 2009,5 its continued use of private military companies in Afghanistan has placed increased pressure on the British government to pass legislation regulating these firms.6 British firms remain involved in the war in Iraq through contracts with the U.S. Department of Defense (DOD), even after the termination of its combat operations.7

The role of U.S. military contractors in Iraq has become increasingly controversial, especially after the September 2007 Nisour Square shootings where seventeen Iraqi civilians died after Blackwater8 guards, who were escorting a State Department convoy in Baghdad, opened fire on a car as it rolled toward them.9 The U.S. Department of Justice (DOJ) indicted five...
Blackwater guards for their involvement in the shooting. The events of that day are disputed:

The Blackwater guards said they believed that they had come under small-arms fire from insurgents when they began firing machine guns, grenade launchers and a sniper rifle in Nisour Square, a busy Baghdad traffic intersection. But investigators concluded that the guards, who were escorting American diplomats, had indiscriminately fired in an unprovoked and unjustified assault.

Contractors have also been sued for alleged abuses at Abu Ghraib prison. British security contractors have made headlines as well, although no British contractor has attracted as much attention and controversy as the American firm, Blackwater.

With President Obama's new focus on Afghanistan and the continued support from the British government—at least in the short term—both countries have continued to rely heavily on private contractors to support the war effort. 2010 saw the addition of roughly 27,000 U.S. troops and 54,000 U.S. contractors in Afghanistan.

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12 Josh White, Judge Allows Abu Ghraib Lawsuit Against Contractor, WASH. POST (Nov. 7, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/11/06/AR2007110602025.html. Many Abu Ghraib detainees sued CACI international for their alleged participation in prisoner abuse. Id.

13 See Margaret Davis, British Contractor Held over Iraq Deaths, INDEP. (Aug. 9, 2009), http://www.independent.co.uk/news/world/middle-east/british-contractor-held-over-iraq-death-1769937.html (declaring that a British contractor was suspected of murdering two of his fellow contractors).


16 MOSHE SCHWARTZ, CONG. RESEARCH SERV., R40764, DEPARTMENT OF DEFENSE
With this continued reliance on contractors comes growing confusion about the legal status of these firms regarding both how they are licensed by their home states, and their accountability when they break laws abroad. The determination of whether the laws of the United States and the United Kingdom adequately address these concerns is crucial, because the use of PMCs could fundamentally alter the way modern wars are fought. War may become increasingly privatized, shifting the burden of conflict from the servicemen and women of national militaries to private actors. Private contractors offer increased efficiency in war-fighting as states are able to purchase military services for less than the cost of providing the same services themselves, but they also pose serious accountability challenges, especially when the duties of their employees include the use of force.

Rather than regulating PMCs directly, the British government promotes self regulation through an industry-wide voluntary code of conduct. The U.S. government regulates military contractors under the Arms Export Control Act and the International Traffic in Arms Regulations, a system that has served as a model for regulation in the United Kingdom to some British commentators.

This Note argues that strong licensing regulations, increased accountability, and, most importantly, a clear limitation of military contractors to services that do not require force, will provide a legal and practical framework for controlling PMCs. In the short run, the United Kingdom should abandon its voluntary code of conduct for the more robust American PMC regulatory model, with the common aim that all PMCs should be licensed when they operate outside of their home states. But in the long run, regulations alone are insufficient to control PMCs. To better prevent another Nisour Square, both countries should limit the use of PMCs to operations that do not involve engagement with nations hostile to their home states and should leave fighting to the national militaries. These policies would ensure that states preserve their monopoly over the use of force and avoid the grave accountability issues attendant to its use.


17 For the purpose of this argument, "home state" refers to the state in which the PMC is based.


Part II of this Note traces the general historical shift from mercenary forces to PMCs and the expansion of private military services in Iraq and Afghanistan. Part III examines the laws and regulatory schemes in the United States and the United Kingdom, illustrating how events in Iraq and Afghanistan have exposed both the inadequacies of current laws and the need for greater regulation. Part IV argues that the American approach to regulation should serve as a model for the United Kingdom, while discussing how the regulatory scheme may be improved through limitations on the use of PMCs based on the types of services provided and the relationship between the home state and the state utilizing the PMC services.

II. BACKGROUND

A. Distinguishing PMCs from Mercenaries

The term “private military company” remains ambiguous and is often used interchangeably with terms like “private security firm” and “private military contractor.” For the purposes of this Note, PMCs are broadly defined as “legally established multinational commercial enterprises offering services that involve the potential to exercise force in a systematic way and by military means and/or the transfer or enhancement of that potential to clients.”\(^2\) This definition encompasses a wide range of activities from direct participation in conflict to support and logistical services, such as providing meals and equipment.\(^3\) The shared element across all of these military services is that they “have a direct impact on and contribute to the management of the state’s monopoly of legitimate violence.”\(^4\) This Note will refer to PMC employees as “contractors.”

A contractor is distinguishable from a mercenary. A mercenary may be defined loosely as “one who accepts money or some benefit for military service.”\(^5\) Although some commentators who are critical of PMCs have referred to them as mercenary organizations, PMCs should not be considered mercenaries within the meaning of international law. Not only does an unfavorable stigma surround mercenaries, but PMCs also do not fit within

\(^{22}\) Carlos Ortiz, The Private Military Company: An Entity at the Center of Overlapping Spheres of Commercial Activity and Responsibility, in PRIVATE MILITARY AND SECURITY COMPANIES 55, 60 (Thomas Jäger & Gerhard Kümmel eds., 2007).

\(^{23}\) Because this Note uses such a broad definition of PMCs, it differentiates between PMC services when needed, and makes different recommendations based upon the type of service.

\(^{24}\) Ortiz, supra note 22, at 61.

the international law definition of "mercenary," as defined within Protocol I Additional to the Geneva Conventions,\textsuperscript{26} the U.N. Convention on the Law of Mercenaries,\textsuperscript{27} or customary international law.\textsuperscript{28} The definition of "mercenary" in these conventions reflect Cold War political attempts to outlaw mercenary activity under international law by post-colonial African states, which were often harmed by mercenary activity.\textsuperscript{29} Although some PMC activity could arguably fall within the above broad definition of "mercenary" in the sense that PMCs accept payment for military services, mercenaries generally do not enjoy legal recognition in the Western world and are often associated with criminal activity, whereas PMCs legally provide military services with the consent or authorization of a State.

\section*{B. Rise of the Private Military}

The use of mercenary forces is older than the modern state system and a standing national army.\textsuperscript{30} Even after the rise of national armies and the acceptance of the state's monopoly on the use of force, states continued "to supplement national standing armies with hired support."\textsuperscript{31} Some commentators have pointed out that the rise of national armies in the nineteenth century reduced the need for private military services because strong states did not need private militaries and, in fact, were threatened by these groups.\textsuperscript{32}


\textsuperscript{29} Todd S. Milliard, Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies, 176 Mil. L. Rev. 1, 4 (2003).

\textsuperscript{30} Id. at 2–3.

\textsuperscript{31} Scheimer, supra note 25, at 615.


The growth of bureaucratically mature states capable of organizing violence created increasingly strong competition for private military corporations. At the same time, states began to recognize that their inability to control the actions of these private organizations challenged state sovereignty and
The modern rise of PMCs coincided with the end of the Cold War and the resulting "surplus of highly trained, professional soldiers in search of employment opportunities." As unemployed professional soldiers flooded the market, the collapse of Cold War alliances created an instability that led to increased regional conflict and more failed states, which also created a desirable opportunity for unemployed soldiers. A notable example of PMC involvement in a major conflict before September 11, 2001, was the role of the American PMC, Military Professional Resources, Inc. (MPRI), in the Balkans. Some commentators accredit the successful Croat assault on Serb forces in 1995 to the MPRI. The actions of the MPRI in the Balkans serve as an example of how a PMC's home state may tacitly support PMC action abroad in order to advance its foreign policy objectives.

There are three reasons a state might use a PMC to further its foreign policy: first, "the state's armed forces could be overstretched"; second, "the [PMC] could be in a position to provide the defense services more cost effectively than the state's armed forces"; and finally, "the [PMC] may have good contacts within the retaining/deploying government." Although the reasons for the proliferation of PMCs are more complex than the three factors mentioned above, some combination of these factors likely explains the increase in the use of PMCs by both the United States and the United Kingdom in Iraq and Afghanistan.

This Note analyzes the regulation of PMCs by home states from two perspectives: first, the actual regulation of PMCs in the form of licensing schemes, codes of conduct, and other methods; and second, the extent to which these regulations actually influence the behavior of PMCs and provide for accountability of the PMC to the home state. PMC regulation and licensing are distinct from PMC accountability. A home state may choose to regulate market entry by requiring a PMC to register with the state in order to obtain a license or some other form of state recognition, but this does not necessarily mean that the home state holds the PMC accountable for its actions abroad. Accountability depends on the reach of the home state's legitimacy. The result was that the utility of the private military corporation as a tool of state warfare disappeared . . . until recently.

Id.

33 Milliard, supra note 29, at 11.
34 Smith, supra note 32, at 108.
35 Milliard, supra note 29, at 14.
36 Id.
37 See Virginia Newell & Benedict Sheehy, Corporate Militaries and States: Actors, Interactions, and Reactions, 41 Tex. Int'l L.J. 67, 92-93 (2006) (arguing that the U.S. State Department issued licenses to MPRI to train the Croatian army as a means to further U.S. foreign policy objectives in the region without violating the United Nations ban on providing military assistance to either Serbia or Croatia).
38 Id. at 88.
domestic laws. Alternatively, the laws of the host state where PMCs operate could hold PMCs accountable. However, as a practical matter, immunity arrangements often interfere with enforcement. In short, this Note addresses both the regulations themselves and their effectiveness.

C. U.S. Licensing

The level of scrutiny that a PMC will face in the United States depends primarily on whether it is working for a foreign government or for the United States. The State Department issues licenses for PMCs providing military services to foreign states. However, because many PMCs in Iraq and Afghanistan contract directly with a U.S. agency, the contract between the U.S. agency and the PMC becomes the primary means of regulation because the licensing scheme does not apply. A clear way to discipline a PMC is to terminate its contract with the agency, as the State Department did with Blackwater's contract to protect U.S. diplomats in January 2009. The host state may also keep a PMC from operating by refusing to contract with certain firms.

D. U.S. Accountability

Even when PMCs are required to obtain a license from the State Department in order to work for a foreign government, contractors might not be held accountable for their actions abroad. Contractors who commit

39 See Walker & Whyte, supra note 21, at 667 (discussing the State Department’s approval and registration process).

The Arms Export Control Act 1968 and the International Traffic in Arms Regulations (ITAR) require State Department approval for the sale of military equipment and related services (including training) between US companies and foreign States. Manufacturers and providers of defence goods or services for export must register with the Office of Defense Trade Controls in the Department of State, from whom must be sought a license. Any letter of offer to sell defence articles or services for $50m or more, any design and construction services for $200m or more, or any major defence equipment for $14m or more must be notified by the State Department to Congress . . . .

Id. (citations omitted).


42 See Walker & Whyte, supra note 21, at 669 (noting the “meagre extent to which the US regulatory system guards against the commission of unlawful killings of combatants, or indeed is able to protect US civilians employed by PMCs”).
crimes abroad face possible prosecution under two different U.S. laws. First, under the Military Extraterritorial Jurisdiction Act (MEJA), a contractor could be prosecuted if working for the DOD or for "any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas." Second, a PMC employee could theoretically face prosecution under Article 2 of the Uniform Code of Military Justice (UCMJ), which Congress amended in 2007 to allow for greater flexibility in prosecuting contractors, even without an official declaration of war. Both of these options for prosecution pose unique challenges, which will be addressed below. In addition to United States domestic law, a new agreement between Iraq and the United States terminated PMC immunity from Iraqi law, opening the possibility of prosecution by Iraqi authorities.

E. British Regulations

The United Kingdom does not have a PMC licensing system comparable to the U.S. State Department system. Although the British government considered various regulatory options in a 2002 Green Paper and received continuous domestic pressure to regulate PMCs, British PMCs seeking to provide services face little governmental oversight. The British government’s preferred method for dealing with PMCs—as expressed in an April 24, 2009 statement from the Foreign and Commonwealth Office—involves three components: first, developing a code of conduct for PMCs; second, committing to contract only with firms that meet this standard of

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43 Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261-3267 (2006); see also id. § 3261(a) (declaring that employees of the armed forces, certain members of the armed forces, and those accompanying the armed forces may be prosecuted in federal court for actions abroad that would constitute an offense punishable in the United States by more than one year's confinement).

44 Id. § 3267(1)(A).

45 Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (2009); see id. § 802(a)(10) (extending UCMJ jurisdiction to "persons serving with or accompanying an armed force in the field" during a "declared war or a contingency operation").


47 See discussion infra Part. III.A (stating the problem with the U.S. scheme).


49 PRIVATE MILITARY COMPANIES GREEN PAPER, supra note 4, at 22-26.

50 Norton-Taylor, supra note 18.
conduct; and finally, working internationally to develop global standards regulating PMCs.\(^5\)

In the absence of a comprehensive regulatory scheme, existing British law does little to restrain the actions of PMCs. The 2002 Green Paper frankly admitted the problems with accountability that would be created if the government adopted a self-regulatory approach.\(^5\) The Export Control Act 2002\(^5\) contains technical assistance restrictions that are "potentially usable against PMCs to prevent trafficking and brokering in military equipment . . . ."\(^5\) The Landmines Act\(^5\) might also apply to PMCs if they provide land-mine related services.\(^5\) Although these acts may apply tangentially to British PMCs, they are not designed primarily to deal with PMCs, and will probably not be used to regulate PMC activity in the future.\(^5\)

Because of the British preference for PMC self-regulation,\(^5\) the legislation that governs British military operations includes anachronistic acts such as the Foreign Enlistment Act 1870.\(^5\)

F. British Accountability

British authorities have not yet faced a situation in which they have needed to prosecute British PMC employees for actions committed abroad, as has the United States with Blackwater. Nevertheless, the risk still exists that one of Britain's PMCs, acting under a U.S. contract, may commit a crime in Iraq and expose both the United Kingdom and the United States to scrutiny. This is exactly what happened to contractor Danny Fitzsimons, who was sentenced to life in prison by an Iraqi court in February 2011, for

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52 See PRIVATE MILITARY COMPANIES GREEN PAPER, supra note 4, at 26 ("[Self-regulation] would not meet one of the main objectives of regulation, namely to avoid a situation where companies might damage British interests. The lack of legal backing would mean that the Government might be compelled to watch while a company pursued a course that was plainly contrary to the public interest.").
53 Export Control Act, 2002, c. 28 (Eng.).
54 Walker & Whyte, supra note 21, at 657.
55 Landmines Act, 1998, (Eng.).
56 But see Walker & Whyte supra note 21, at 657 (noting that, despite the language of the Landmines Act 1998, which would likely cover PMC activities, Dyncorp Aerospace Ltd., a British PMC, was not prosecuted for its work with the United States government involving storing mine scattering devices).
57 See id. (noting that "[b]eyond the Export Control Act, PMCs are not the targets . . . of legislation").
58 Norton-Taylor, supra note 18.
59 Foreign Enlistment Act 1870, 33 & 34 Vict., c. 90 (Eng.).
shooting two of his fellow contractors and an Iraqi guard.\footnote{Jane Arraf, \textit{British Security Contractor Danny Fitzsimons Gets Life in Prison for Murder in Iraq}, \textit{Christian Sci. Monitor} (Feb. 28, 2001), http://www.csmonitor.com/World/Middle-East/2011/0228/British-security-contractor-Danny-Fitzsimons-gets-life-in-prison-for-murder-in-Iraq.} By allowing Iraqi authorities to prosecute a British PMC contractor, the British government has effectively announced a policy that British PMCs are responsible for their own people. This responsibility includes the now real possibility that their employees may be subject to prosecution by foreign governments.

III. ANALYSIS

A. Statement of Problem

Based on the foregoing discussion, each country’s legal framework for controlling PMCs has serious deficiencies. The U.S. system offers increased oversight of government accountability through licensing, but this system does not apply to the large number of PMC personnel in Iraq and Afghanistan who contract directly with the United States. Further, federal prosecutors have used the MEJA to prosecute contractors for their actions abroad, but its effectiveness and efficiency remain untested and are likely to pose problems.\footnote{Del Quentin Wilber & Karen DeYoung, \textit{Justice Dept. Moves Toward Charges Against Contractors in Iraq Shooting}, \textit{Wash. Post} (Aug. 17, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/08/16/AR2008081601967.html.} Finally, the expiration of contractor immunity to Iraqi law may expose civilians in the United States to judicial process in countries where a fair trial may not be possible.

To the extent that the British use of PMCs is limited by the small size of its forces in Afghanistan,\footnote{Currently, there are roughly 9,500 British forces deployed in Afghanistan. \textit{Operations in Afghanistan: British Forces}, MINISTRY OF DEFENCE, http://www.mod.uk/DefenceInternet/FactSheets/OperationsFactsheets/OperationsInAfghanistanBritishForces.htm (last visited Mar. 20, 2011).} accountability problems are not as likely to occur as they are in the United States. However, industry self-regulation poses unique challenges. Although self-regulation provides British businesses with a great degree of flexibility, it gives the government almost no accountability over PMC actions abroad. Self-regulation also exposes PMCs to prosecution abroad and leaves open the possibility that PMC personnel will not be punished at all if the host state does not press charges. Thus, the accountability gap is even more acute than in the United States and could cause serious problems should another Nisour Square arise involving a British PMC.
B. United States Options

The United States' options for regulation can be divided into two broad categories: first, expanding or modifying existing regulations such as the licensing system and the contracts that govern PMCs or the laws that allow prosecution of PMC personnel, and, second, creating new regulations limiting PMC roles in combat operations or integrating PMCs within the command structure. These two categories are not exclusive or exhaustive, but they are broadly representative of a variety of approaches to PMC regulation.

1. Licensing

Pursuant to the Arms Export Control Act and the International Traffic in Arms Regulations, the U.S. State Department issues licenses for PMCs contracting with foreign states. While these laws allow the United States to have some degree of control over PMC activity abroad, Congress is unaware of many contracts since these laws do not require the executive branch to notify Congress if the contract is less than $50 million. Even with strong licensing law and regulations, U.S.-based PMCs seeking to do business abroad may simply move to another country with less restrictive licensing schemes, in order to avoid U.S. regulations. An international regulatory scheme may be one way to avoid PMCs moving to avoid regulation, but the international regulation of PMCs poses a host of problems, such as the creation of a new international body that requires state recognition and its own jurisdiction.

2. Contract

Some writers have seized upon contracts as the most effective and natural way of regulating PMCs. The thrust of these arguments is that the market

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65 Walker & Whyte, supra note 21, at 667.
66 Arms Export Control Act § 2776(c)(1).
67 See Deven R. Desai, Have Your Cake and Eat It Too: A Proposal for a Layered Approach to Regulating Private Military Companies, 39 U.S.F. L. Rev. 825, 855 (2005) (noting that absent international regulation, PMCs can move their base of operations to a less restrictive country when their home country enacts unacceptable regulations).
68 Id.
69 Id.; see also discussion infra Part III.D (discussing PMC relocation tactics to avoid accountability).
70 See Desai, supra note 67, at 858–59 (arguing that the United States could draft contracts that would ensure PMC accountability in U.S. courts and require PMC personnel to undergo
power of the governments that utilize PMC services is great enough to contractually bind PMCs to minimum standards of home-state accountability and human rights.\(^7\)

The basic problem with contractual, market-based regulation of PMCs is that such regulation is effective only to the extent that the contracting state has the ability to monitor and enforce the contracts.\(^7\) In an operation as large as the Iraq War, monitoring all of the contracts can be extremely difficult and costly. Increasing reliance on contractual controls could have an effect contrary to the proponents' intent, by increasing government reliance on PMCs and thereby reducing governmental expertise in the areas required to effectively monitor PMC activities.\(^7\)

3. Current Laws

PMC personnel are most likely to be prosecuted under either the MEJA\(^7\) or possibly Article 2 of the UCMJ.\(^7\) The main problem with the MEJA is that it probably does not cover all of the types of PMCs operating in Iraq. As currently written, the MEJA allows for the prosecution of civilian contractors when their employment relates to supporting the mission of the DOD.\(^7\) Because many of the contractors in Iraq and Afghanistan work for non-DOD agencies, such as the State Department,\(^7\) the MEJA arguably does not apply to them, depending on how broadly the language of the MEJA is interpreted. In response to this loophole, the House of Representatives passed a bill in October 2007 that would expand the MEJA to all PMC personnel operating in Iraq, regardless of agency.\(^7\) Despite the ambiguity of the language about supporting the mission of the DOD, the DOJ indicted the Blackwater employees involved in the Nisour Square shooting, the first prosecution of

\(^7\) Elke Krahmann, *Security Governance and the Private Military Industry in Europe and North America*, 5 CONFLICT, SEC. & DEV. 247, 263 (2005) (“[C]ontracts between government and private military firms can overcome the problem of private firms evading national controls because companies are under direct contractual obligation to the government for which they are operating — whether nationally or abroad.”).

\(^7\) See id. at 263–64 (stating that contracts can only address normative concerns such as transparency).

\(^7\) Id. at 264.

\(^7\) Military Extraterritorial Jurisdiction Act § 3261.

\(^7\) See Uniform Code of Military Justice § 802(a)(10) (stating that persons, such as PMC personnel, serving with the armed forces during a war or contingency operation are subject to the Uniform Code of Military Justice).

\(^7\) Military Extraterritorial Jurisdiction Act § 3267(1)(A).

\(^7\) *State Department Awarding Private Contractors, supra* note 40.

non-DOD private contractors under the expanded MEJA. The trial was set for January 2010, but the charges were dropped in early 2010 because the prosecution improperly used statements given by the Blackwater guards, so the applicability and scope of the MEJA will remain unclear for the immediate future. General Raymond T. Odierno, the commander of U.S. forces in Iraq at the time, described the result as a "lesson in the rule of law," but Iraqis reacted strongly to the news that the charges had been dropped:

"What are we — not human?" asked Abdul Wahab Adul Khader, a 34-year-old bank employee and one of at least 20 people wounded in the melee. "Why do they have the right to kill people? Is our blood so cheap? For America, the land of justice and law, what does it mean to let criminals go?"

Because the shootings occurred when contractors were immune from Iraqi laws, the Blackwater guards cannot be prosecuted in Iraq, although the Iraqi government announced that it is considering suing Blackwater for civil damages.

The UCMJ modification arguably has the same problems as the MEJA in that it does not extend to PMCs that support non-DOD agencies. In addition to its incomplete coverage, the UCMJ amendments may not be constitutional based upon Supreme Court precedent in Reid v. Covert and McElroy v. United States ex rel. Guagliardo. Although the argument for UMCJ jurisdiction is likely stronger for PMC personnel because of the

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81 Williams, supra note 11.

82 Id. (Odierno added, "Of course people are not going to like it because they believe these individuals conducted some violence and should be punished for it . . . . But the bottom line is, using the rule of law, the evidence obviously was not there, or was collected illegally.").

83 Id.

84 Id.

85 Military Extraterritorial Jurisdiction Act § 802(a)(10) (detailing that the Act extends UCMJ jurisdiction to “persons serving with or accompanying an armed force in the field”). However, this would arguably not cover PMCs providing security for State Department convoys, unless they are found to “serve with” or “accompany” an armed force.

86 See Reid v. Covert, 354 U.S. 1 (1957) (holding that application of UMCJ court martial jurisdiction to civilian dependents of members of the armed forces overseas during times of peace is not constitutional); see also McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960) (holding that UCMJ court martial jurisdiction does not extend to civilian employees of overseas military forces for non-capital offenses).
Congressional authorization of the use of military force in Iraq and Afghanistan, Congress still has not officially declared war, and any prosecution under the UCMJ will have to get around the strong precedent of Reid and Guagliardo.

One last option for accountability under U.S. law is derived from the Alien Tort Statute (ATS). It allows only civil actions filed by aliens for violations of either customary international law or a United States treaty. The complexities of the ATS are beyond the scope of this discussion, but in at least one case, the Supreme Court has been strict in its interpretation of the language of the ATS and establishing a violation of either a U.S. treaty or customary law can be difficult. Despite these difficulties, the Center for Constitutional Rights brought a claim against Blackwater under the ATS on behalf of some of the families of Iraqis killed in Nisour Square.

4. Integration with Military Command Structure

Another option for regulating PMCs is to place them within the command structure of the military. PMCs working for the DOD are already substantially within the military chain of command, but State Department contractors are not. Some commentators argue that all PMCs, both DOD and non-DOD, should be placed within the military chain of command to ensure both that military orders are followed and that the PMCs can be disciplined. This approach might be ideal from a commander's perspective, but because of the amount of interagency coordination required, it could be extremely difficult to implement. This approach would also not solve the underlying issue of accountability because being under a military chain of command

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88 Alien Tort Statute, 28 U.S.C. § 1350 (2009) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

89 Id.


92 See Thumher, supra note 46, at 81 (discussing a September 2007 memorandum from Deputy Secretary of Defense, Gordon England, directing commanders to fully use their UCMJ authority against PMC employees who violate the code).

93 Id. at 87 (“The most efficient system would be to instead place these armed [PMCs] under the control of one authority, presumably the military.”).
does not necessarily mean that PMCs can be held accountable under the UCMJ. Simply placing PMCs in the chain of command would not automatically make them subject to the UCMJ.

5. Limitation to Non-Combat Operations

Finally, control over PMCs can be achieved by limiting contractors to non-security services. A non-security limitation of PMC activity could achieve many of the same results as other forms of regulation, but with a more direct and immediate impact. However, even though limiting reliance on PMCs may be the most effective way to avoid another Nisour Square, the current level of reliance on PMCs for security in Iraq and Afghanistan might make such limitations unrealistic or impractical. 94

C. British Options

Because of the dearth of British statutes directly applicable to most PMC activity,95 and the de facto adoption of a self-regulatory approach,96 most PMC accountability under present law must come from within the industry itself, or possibly under the auspices of the International Criminal Court (ICC), or even from Iraqi courts. Self-regulation, the possibility of a licensing regime, and the possibility of ICC jurisdiction are addressed in turn.

1. Self-Regulation

Self-regulation has a couple of distinct advantages over other regulatory options. It is the cheapest form of regulation available, costing the government nothing beyond the initial costs of helping to draft a voluntary code of conduct.97 The scheme has the added benefit of helping to create standards within the PMC industry to distinguish between respectable and disreputable companies.98

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94 Id. at 90 ("Even though it seems an unlikely move given the current desire and willingness of the administration to privatize such functions, the United States' abilities to win counterinsurgencies would improve if it scaled back on its use of [PMCs].")
95 See Walker & Whyte, supra note 21, at 657 (citing little legislation to control PMCs apart from the Export Control Act).
96 See CONSULTATION, supra note 51, at 9 (measuring effectiveness of self-regulation).
97 PRIVATE MILITARY COMPANIES GREEN PAPER, supra note 4, at 46 ("The costs of self-regulation would fall entirely upon companies, since they would need to finance the industry association to oversee the scheme.").
98 See id. at 26 (noting that membership would provide assurance of respectability).
The approach has several notable drawbacks as well. First, self-regulation does not provide a mechanism for the British government to monitor or control PMC activity abroad, which could result in a situation where the government would be "compelled to watch while a company pursued a course that was plainly contrary to the public interest." Second, the regulation would necessarily depend on the industry's ability and desire to discipline itself. Even with a strong commitment by the industry to enforce its own policies, determining what exactly PMCs are doing in remote and often inaccessible regions around the world may be extremely difficult or impossible.

2. Licensing

Although more complex than self-regulation, a licensing system has several advantages. First, because the British government also licenses military goods, "it seems logical that it should also license the export of military services." Second, the licensing scheme of the United States has performed well for two decades without major problems. Finally, a licensing regime is more flexible than other options and gives the government "the opportunity to consider the nature of the service in question and the political and strategic background against which it took place."

On the other hand, licensing has drawbacks beyond cost, including enforcement difficulties, delays for PMCs seeking to operate abroad, the possibility of PMCs moving to other states to avoid regulations, and that British PMCs might face a market disadvantage.

3. Limitation/Ban on PMC Services

A total ban on PMC military activity abroad is a possible solution to the regulatory issues. The appeal of this approach is its simplicity and effectiveness in preventing the types of abuses that regulation of the PMC industry seeks to address. If PMCs are not operating militarily abroad, then there will be little risk of human rights violations or accountability gaps because the services that PMCs provide, such as supplying food and shelter for troops, do not place armed PMC employees in direct contact with civilians.

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99 Id.
100 Id.
101 Id. at 24.
102 Id. at 24–25.
103 Id. at 22 ("This would be the most direct way of dealing with an activity that many find objectionable. The legislations could apply either to all such activities or to a limited range, for example direct participation in combat.").
Yet this approach has a number of practical drawbacks such as preventing weak states from gaining access to necessary military services and the difficulty of drawing a clear line between military and non-military services. Even services, such as construction, which seem non-military, still require armed security to succeed, and thus have a military component.

D. International Options

Some commentators have argued that international regulation is needed because of PMCs' ability to relocate in order to avoid accountability for their actions. The main problem with international regulation of PMC activity is the lack of political support in both the United States and the United Kingdom, two states that rely heavily on PMCs. If the United States and the United Kingdom did not participate, a treaty regulating PMC activity would be politically unpopular, difficult to negotiate, and likely ineffective. However, one nonbinding declaration has had some success in defining the customary international law concerning PMCs, and has received support from the United States, the United Kingdom, and the PMC industry. The likely political opposition to a PMC treaty in both the United States and United Kingdom makes international regulation an unrealistic and impractical option at this point, although it may become more viable in the future if the political attitudes change or if additional high profile PMC abuses occur.

104 Id. at 23.
106 Id. ("[S]ome states, including the United States and the United Kingdom, clearly support the industry, finding its activities to their advantage in many foreign policy activities. They are unlikely to back such a program to ban [PMCs]. As a result of all of these factors, efforts at legal prohibition appear to be a non-starter in the present context. Moreover, they would likely only repeat the past failures of the anti-mercenary laws.").
108 See Desai, supra note 67, at 854 (predicting that "[t]he United States will either categorically oppose the [proposed international regulatory] system or not consider joining such a system until after it is fully laid out," and also noting the political opposition to proposals to regulate British PMCs).
E. Recommendations

The United States and the United Kingdom should modify their regulatory systems to ensure that PMCs, when contracting with their home state, only provide services that are unlikely to require the use of force. When a PMC contracts with a state other than its home state, this limitation would not apply, and the PMC could supply services that are likely to involve the use of force, subject to the limitations discussed below. This recommendation reflects the reality that PMCs provide a broad range of services with varying degrees of danger—from providing meals for troops to armed security for State Department convoys—and seeks to limit PMC involvement in home state war efforts to lower the potential for Nisour Square-type incidents as much as possible. In the United States, this recommendation could be accomplished by having the military provide all of the armed security for the State Department and other executive agency convoys, extending the reach of the MEJA to ensure that PMC personnel can be held accountable when abuses occur, and continuing to use the ITAR to license PMCs who provide military services for other nations. In the United Kingdom, this recommendation could be accomplished in much the same way as in the United States; however, the United Kingdom needs to create a licensing system as well to ensure that the British PMC personnel are held accountable for their actions abroad.

The trend of home states using PMC services in situations where the state’s military would traditionally possess a monopoly on the use of force is unique, at least in recent history. The expansion of PMC personnel performing traditional military roles is unprecedented in modern times and corresponds with U.S. involvement in Iraq and Afghanistan. The reason

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109 In this case the home state is either the United States or the United Kingdom, so the suggested limits would apply only when an American or British PMC is providing services on in another state, on behalf of its home state.

110 Ortiz, supra note 22, at 56.

111 See id. (explaining that one end of the PMC “service spectrum” consists of firms “offering services that are more commonly undertaken by and/or associated with armed forces”).

112 See Thurnher, supra note 46, at 67 (citing Stephen M. Blizzard, Increasing Reliance on Contractors on the Battlefield: How Do We Keep From Crossing the Line?, 28 A.F. J. LOGISTICS 1, 6 (2004)) (noting that the United States used contractors primarily for logistical purposes from the Revolutionary War until Vietnam).

113 Id. at 68.

More significant than the sheer size and cost of the increased use of contractors is the breadth of assignments being given to these workers. The United States is tasking its contractors in Iraq in a manner not done in prior conflicts. The biggest area of change is the reliance on contractors to perform security functions in an “unstable environment.” Contractors are being used to “protect individuals, buildings and other infrastructure, and
for keeping PMCs out of the military aspect relates to the reason for using PMCs in the first place: contracting out logistical tasks allows the military to focus on its primary task, fighting the war.\textsuperscript{114} When the purpose of fighting the war is to help a country develop institutions and a stable government, then providing security for the agencies that provide these services can be seen as part of the overall war effort rather than a logistical task that would not normally be performed by the military.

Beyond the simple observation that the military is best at traditional combat, there are a variety of reasons for forbidding PMCs from getting more involved in traditional military roles. First, this approach substantially reduces the risk of PMCs committing crimes or human rights abuses generally, simply because personnel are less likely to be placed in a situation that calls for the use of deadly force. Second, the increased privatization of war in general, particularly the use of deadly force, has troubling implications for how modern wars are fought. Specifically, privatization minimizes and downplays the sacrifices of PMC personnel who die while working on a government contract.\textsuperscript{115} Privatization also erodes the idea of the sovereign possessing a monopoly on the legitimate use of force, making

\textsuperscript{114} Nelson D. Schwartz & Noshua Watson, The Pentagon’s Private Army, FORTUNE, Mar. 17, 2003, available at http://money.cnn.com/magazines/fortune/fortune_archive/2003/03/17/339252/index.htm (“The upshot is that the Pentagon is outsourcing as many tasks as possible to enable the military . . . to focus on its core competency: fighting.”).

\textsuperscript{115} See Mateo Taussig-Rubbo, Outsourcing Sacrifice: The Labor of Private Military Contractors, 21 YALE J.L. & HUMAN. 101, 119–20 (2009) (discussing the relationship between the private military contractor, sacrifice, and American citizenship). Contractors’ deaths are not sacrifices, we might think—contractors are motivated by private gain, not national service. That is, they did not die so that the nation might live, but because they chose a dangerous, well-paid line of employment. They are mercenaries whose deaths do not resonate with a broader national audience. We need only point out that there is a Tomb of the Unknown Soldier, none for the Unknown Contractor. Arlington National Cemetery, that sacred site of the nation’s military, also does not provide for the burial of the contractor as such . . . . Contractors are not included in overall troop figures announced by U.S. officials, even though at present in Iraq they are more or less at parity. Contractor deaths are not included in the daily body count of soldiers (by one estimate they have been killed at a rate one quarter that of U.S. soldiers), nor are they given official medals, pensions, or public honors. (In fact, individual contractors have been given medals from the United States, including Bronze Stars and Purple Hearts, in recognition of their service; but the military has said it intends to retract the medals).
it difficult to determine how to classify PMC use of force: is the PMC an
extension of the sovereign’s monopoly on force, or an independent actor,
challenging the sovereign’s traditional monopoly?

Third, privatization of military force may further disengage the civilian
population from the costs of war and give the impression that the cost of the
war effort is born not by American servicemen and women serving in the
military, but by employees of private firms. The employees, whose actions
have little impact on the lives of civilians, are increasingly disconnected
from the life of the average American citizen.

The first argument—that limitation of PMC to non-combat and non-
security roles will reduce the incidence of PMC crimes and human rights
violations—is self-explanatory, but necessarily limited in scope. For
example, the Nisour Square shootings, in which seventeen Iraqis died,
involved Blackwater employees tasked with providing security for a State
Department convoy.116 The DOJ subsequently indicted five Blackwater
employees for their involvement in the shooting.117 There is no guarantee,
however, that the situation would have turned out differently had the military
been responsible for providing security. In fact, those Blackwater personnel
who are former members of the U.S. military received training similar to that
of the military forces they accompany. The key difference is that, military
personnel, had they been involved in the shootings, would have been
immediately and directly held accountable for their actions through their
chain of command and UCMJ jurisdiction.

The contractors, in contrast, may or may not be held accountable at all.
The DOJ’s attempt at holding them accountable has thus far required an
extensive investigation by both the military and the FBI, and prosecution
under the MEJA may not be successful due to the statute’s ambiguous
language and scope.118 The clear advantage of having military personnel
providing security instead of Blackwater is that troops may be reached easily
under UCMJ jurisdiction and would be subject to a court-martial without the
legal wrangling that complicates the Blackwater trials under MEJA
jurisdiction.119 Rather than an extensive, politically divisive, and highly
public investigation involving multiple agencies, the accused could be court-
martialed. The qualities that make a court-martial an attractive method for
administering military justice, namely speed and efficiency, also make it an
ideal way to address abuses of the civilian population. Because a court-
martial can be convened relatively quickly,120 it offers the advantage of

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116 Glanz & Rubin, supra note 9.
117 Thompson & Risen, supra note 10.
118 Id.
119 Uniform Code of Military Justice § 802(a).
120 See id. §§ 822–824 (describing how a court martial is convened and who may convene
expeditious and noticeable results that will immediately register with the civilian population. This approach is neither unrealistic nor unworkable.

F. Counterargument and Response

Americans who criticize the approach suggested above might argue that it fails to recognize both the efficiency of using PMCs to provide security services and the high cost of training troops to provide armed security for U.S. convoys. Conversely, British critics might focus on the political and economic costs of establishing a licensing system by legislation. American critics might also claim that the high costs of using the military to provide security are not justified since contractors usually do not abuse civilians or undermine the military’s strategy. Critics from either side might also point out that drawing the line between military and non-military objectives is inherently difficult. For example, if PMCs can be used for security functions, then military personnel theoretically have greater freedom to focus on more important military objectives. Further, most PMC employees are ex-military and are already trained to perform security related missions, thereby necessitating no additional training cost for the military. These increased efficiencies cannot be denied and partly explain why militaries have come to rely increasingly on PMC security.

Cost concerns are well founded as there is no denying that replacing security contractors with American troops will require either training more troops or shifting troops from other missions. These costs, however, will likely be manageable. Security contractors comprise a relatively small percentage of all DOD contracts; as of March 2010, security contractors—the type of contractors most likely to use force—accounted for about twelve percent of all DOD contractor personnel in Iraq (or 11,610 security contractors). See SCHWARTZ & SWAIN, supra note 1, at 8. The negative aspect of any additional cost required to train U.S. troops would be dulled by the continued savings of using the remaining 88% of contractors for non-security roles. Additionally, the government, if it continues to rely on PMCs for security, must investigate alleged PMC abuses abroad, which is inherently both difficult and costly because of the logistical concerns.

As for the argument that PMC abuses are the exception, rather than the rule, this may be true. The abuses that do occur, however, are deadly and public enough to justify the costs of investigation. While transferring the responsibility for security from PMCs to the U.S. military will not directly prevent abuses, it will ensure accountability through the UCMJ.
Continued use of PMCs would have costs that go beyond mere dollar figures. The strategy of counterinsurgency in Afghanistan relies on "retain[ing] legitimacy by winning the hearts and minds of local people." If the goal of military operations in Iraq and Afghanistan is to win the "hearts and minds" of the local populace, then the U.S. government employing thousands of private contractors who are not directly accountable to the military does not further this goal. Revoking contractor immunity in Iraq was a step in the right direction, but it is not enough. Maintaining a system that makes it extremely difficult to hold contractors accountable when they commit abuses makes it more difficult for the United States to claim to be helping local peoples.

It is also unsatisfactory to claim that change is not necessary because no additional high profile abuses have occurred since Nisour Square. President Obama, then a Senator, described the problem well: "We cannot win a fight for hearts and minds when we outsource critical missions to unaccountable contractors."

While a licensing scheme similar to the U.S. system would certainly be both politically and economically costly if implemented in the United Kingdom, the British PMC industry has been successful so far in lobbying for self-regulation. The glaring cost of self-regulation, however, is that the United Kingdom has almost no control over what contracts its companies accept, and will still suffer from bad press every time a British PMC is accused of wrongdoing. If a Nisour Square-type incident occurs involving a British PMC, the government may be forced to evaluate the costs and potentially institute some sort of licensing scheme.

Some may argue for a total ban on PMCs in use of force operations, but drawing the line between contractors who use force and those who do not may be more difficult than it seems. Is the best solution to ban contractors from carrying weapons, or should limitations be based on the type of services that PMCs provide? Regarding the former, banning contractors from carrying weapons is not a good way to implement the above recommendations, since contractors of all types may need to carry weapons for self-defense in a dangerous environment. Any solution that places contractors at greater risk than necessary is not a viable one. The solution

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122 Moshe Schwartz, Cong. Research Service, Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis 11–12 (2009) ("Local nationals may not draw a distinction between government contractors and the U.S. military, and the abuses committed by contractors may strengthen anti-American insurgents, as evidenced by the public outcry following such incidents.").

must also recognize that there will be certain situations where the use of force by contractors is unavoidable, such as in self-defense.

The better approach is the latter—to limit PMC involvement according to the type of services provided, specifically security services. Providing armed security for agency officials and convoys presents the risk that PMC employees will use force in a setting that would traditionally involve national militaries. Because PMC personnel must be safe to perform non-security contracts, they should be able to use force in order to defend themselves when performing their duties under these contracts. However, this does not mean that they should be used specifically for a mission that poses a great risk that force will be used, such as providing armed security. Replacing PMC security contractors with American troops would increase government control over the guards’ actions and ensure that they are held accountable if any abuses actually occur. Further, a move away from security services would not be fatal to the PMC industry. In 2008, Blackwater announced that it would be shifting its focus to non-security services to avoid placing the company at further risk. Lawsuits from the victims of PMC abuse are just as likely to cripple the PMC industry as the changes recommended above. Rather than waiting for the next high profile PMC incident, the United States can act now to provide its own security—the alternative ignores the lesson of Blackwater.

Recommending that the United States refuse to use PMCs for security work is not to suggest that the legal reforms discussed above are not imperative. Legal reform is by its nature, however, a slow, political process. By being proactive, the U.S. government can reduce the possibility of PMC abuses while working to pass legislation that can reach contractors abroad when abuses inevitably occur.

IV. CONCLUSION

As the United States and United Kingdom begin to exit Iraq and the focus turns to counterinsurgency in Afghanistan, both countries have the opportunity to learn from mistakes made there in order to avoid repeating them in Afghanistan. The key to a successful counterinsurgency campaign is to win the “hearts and minds” of the people. This cannot be accomplished if Afghans do not truly believe that the United States and United Kingdom are there to help them. Every effort to reduce the impact of the war on civilians will increase the legitimacy of the mission and the likelihood of success.

If the United States and United Kingdom refuse to use private contractors to provide armed security for government agencies or diplomats, the legitimacy of the mission will increase in the eyes of the Afghan people. Further, in the event abuses do occur, the Afghans must see that those responsible are brought to justice. Experience in Iraq has shown that the legal uncertainties surrounding contractors frustrate efforts to bring justice to those who commit abuses. Replacing security contractors with military personnel will not ensure that such abuses will not occur or even reduce their likelihood, but it does ensure that if service members are accused of a crime, they can be held accountable under the UCMJ. The economic cost of this approach is higher than using PMCs, but it will also show the Afghan people that the United States values their lives and places a premium on justice and the rule of law.

This approach will not solve all of the problems associated with PMCs. The United States can and should continue to use PMCs for non-security services, and these contractors will need protection. However, due to the staggering number of contractors in Afghanistan and Iraq, it would not be feasible or even desirable for the United States or British militaries to provide all of the security for all contractors in their countries. For this reason, contractors must be permitted to provide their own security.

Because armed contractors will continue to operate within Iraq and Afghanistan, the United States and the United Kingdom must adopt a strategy of regulatory reform. In the United States, this will take the form of continued licensing of all U.S. contractors, along with clear and powerful legislation that will allow the United States to exercise jurisdiction over PMC activities abroad. The United States must also give the Afghan and Iraqi governments a greater stake in the decision-making process and be more reluctant to grant PMCs immunity from local law in the future. When cases reach U.S. courts, the Department of Justice must be more diligent in prosecuting cases in order to ensure that cases proceed and that the defendants receive a fair trial.

In the United Kingdom, the regulatory strategy requires a licensing system. Because the United Kingdom has yet to experience a PMC incident on the scale of Nisour Square, the political will to regulate PMCs has yet to materialize despite pressure from NGOs. Rather than waiting for an incident that will reveal the inadequacies of self-regulation, the British government should establish a regulatory system based on the U.S. licensing scheme.

Nisour Square has shown how a single incident can threaten the legitimacy of both the entire mission in Iraq, as well as the whole PMC industry. Iraqi bitterness over the attack will likely linger for years, and Blackwater has had to substantially alter its business model because of the resulting scrutiny of its activities abroad. Regardless of these events, the
United States and United Kingdom continue to rely on security contractors to protect their government agencies. With the promise of a new strategy and greater American resolve, Afghanistan offers a chance to change course.