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## Military Inc.: Regulating and Protecting the "A-Team[s]" of the Post-Modern Era

Matt Heibel

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# MILITARY INC.: REGULATING AND PROTECTING THE “A-TEAM[S]” OF THE POST-MODERN ERA

Matt Heibel<sup>†</sup>

I.	Introduction .....	532
II.	Background .....	534
A.	The different species of PMFs .....	535
1.	Military Provider Firms .....	535
2.	Military Consulting Firms .....	537
B.	PMF Activities Today .....	539
C.	PMPs as Human Rights Abusers .....	541
D.	The Best and Worst Private Soldiers from the Past .....	542
1.	The Condottieri of Renaissance Italy .....	542
2.	“Les Affreux” of Post-Colonial Africa .....	543
III.	Attempts at “A-Team” Regulation: Successes and Failures .....	543
A.	Self-regulation .....	544
B.	Domestic Regulation in the United States .....	545
C.	Domestic Regulation in Other Countries .....	547
D.	International Regulatory Options .....	548
IV.	Legal Protection for “A-Team[s]” In the Form of POW Status .....	552
A.	Why Private Military Personnel Should Be Given POW Status .....	552
1.	Legitimacy .....	552
2.	Certainty .....	553
3.	Fairness .....	554
B.	Methods of Granting POW status to “A-Team[s]” .....	555

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1. International Convention .....	555
2. National Efforts .....	556
3. Custom .....	556
V. Conclusion.....	557

## I. INTRODUCTION

The "A-Team," a popular U.S. action television show of the 1980's, featured four former U.S. military personnel who were wrongly convicted of a crime, escaped from prison, and then became mercenaries for hire.<sup>1</sup> When a person had a problem and there was no one else to turn to, the "A-Team" was there to help.<sup>2</sup> Today, there exist dozens of private military firms (PMFs),<sup>3</sup> also known as private military companies (PMCs),<sup>4</sup> which fill the same niche as the "A-Team." At the end of the Cold War, most of the world's militaries downsized, leaving many professionally trained soldiers jobless.<sup>5</sup> Former generals became CEOs of new private companies that sold their services of giving military advice, training, support, logistics, and special operations to whomever was willing to pay.<sup>6</sup> These firms exist as private corporations and, like the "A-Team,"<sup>7</sup> most of their personnel are former members of national militaries.<sup>8</sup> Former soldiers from the United States, Great Britain, continental Europe, Israel, South Africa, the former Soviet Union, and Nepal hung up their national uniforms and joined these PMFs.<sup>9</sup>

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<sup>1</sup> A-Team Shrine, [www.ateamshrine.co.uk](http://www.ateamshrine.co.uk) (last visited Feb. 27, 2006) [hereinafter A-Team Shrine].

<sup>2</sup> See *id.*

<sup>3</sup> See P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 243 (Cornell University Press 2003) [hereinafter SINGER, *CORPORATE WARRIORS*].

<sup>4</sup> See Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1, 5 (2003).

<sup>5</sup> See Nathaniel Stinnett, Note, *Regulating the Privatization of War: How to Stop Private Military Firms from Committing Human Rights Abuses*, 28 B.C. INT'L & COMP. L. REV. 211, 214 (2005).

<sup>6</sup> See Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L. Q. 1001, 1022 (2004).

<sup>7</sup> See A-Team Shrine, *supra* note 1.

<sup>8</sup> See SINGER, *CORPORATE WARRIORS*, *supra* note 3, at 9.

<sup>9</sup> See *id.*; see also Tina Garmon, Comment, *Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable under the Alien*

Since the early 1990's, PMFs have been involved in some capacity with virtually every conflict in the world.<sup>10</sup> However, because of the speed with which PMFs as military actors have burst onto the international scene, public policy and law, both international and domestic, have not yet caught up to practice.<sup>11</sup> The result is that PMFs are largely outside the scope of international law.<sup>12</sup> This legal anomaly presents two problems: (1) it is extremely difficult to hold PMFs as corporations, or their individual employees, responsible for human rights abuses they commit,<sup>13</sup> and (2) these private military personnel (PMPs) are not protected under international law for human rights abuses committed against them.<sup>14</sup> These problems have left the abstract and have already manifested themselves in real world examples. In 2000, an American-based PMF, DynCorp, was hit with a scandal in which seven of its employees allegedly owned prostitutes, one as young as twelve-years-old, while working in Bosnia.<sup>15</sup> Since these employees were not members of the U.S. military, or any other national military, none were ever criminally prosecuted.<sup>16</sup> Instead, DynCorp fired the employee who blew the whistle on the prostitution ring.<sup>17</sup> In March of 2004, four Americans were ambushed and killed in Fallujah, Iraq, and two of their bodies were mutilated, dragged through the streets, hung over a bridge, burned, and eventually driven away.<sup>18</sup> These Americans were not GI's but rather were civilians serving as private contractors.<sup>19</sup> Both of these exam-

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*Tort Claims Act*, 11 TUL. J. INT'L & COMP. L. 325, 330 (2003); Milliard, *supra* note 4, at 11.

<sup>10</sup> See SINGER, *CORPORATE WARRIORS*, *supra* note 3, at 9.

<sup>11</sup> See P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521 (2004) [hereinafter Singer, *War, Profits, and the Vacuum of Law*].

<sup>12</sup> See Stinnett, *supra* note 5, at 216-17.

<sup>13</sup> See *id.*

<sup>14</sup> This Comment starts from the premise that since no authority has ever said that PMPs are protected, and many hint that their status in international law is ambiguous, that they are in fact not protected.

<sup>15</sup> See Nelson D. Schwartz, *The Pentagon's Private Army*, FORTUNE, Mar. 17, 2003, available at 2003 WLNR 13891324, \*5.

<sup>16</sup> See Singer, *War, Profits, and the Vacuum of Law*, *supra* note 11, at 525.

<sup>17</sup> See Stinnett, *supra* note 5, at 215.

<sup>18</sup> See Ellen L. Frye, Note, *Private Military Firms in the New World Order: How Redefining "Mercenary" Can Tame the "Dogs of War,"* 73 FORDHAM L. REV. 2607, 2609 (2005).

<sup>19</sup> See *id.*

ples represent failures in the international law system to either regulate or protect private military personnel.

This Comment argues that PMFs need to be regulated to hold them accountable for their human rights abuses and curb further illegal actions. It also argues that along with regulation should also come protection under international law. Part II of this Comment discusses the history of private military actors from mercenaries in antiquity to the PMFs in the present, highlighting one example of a well-respected group of private actors and another that was despised. This Comment then looks at a sampling of activities of PMFs and looks at cases of human rights abuses by PMPs. Part III discusses the efforts that have been made to regulate PMFs and the successes and shortcomings of these efforts. Part IV then argues that along with regulation, protection of these real-life "A-Team[s]" should also be advanced, specifically by giving PMPs unambiguous prisoner-of-war (POW) status. It then explores a few methods of implementing this legal protection. Finally, Part V concludes by emphasizing the necessity of both regulation of PMFs and protection of their employees.

## II. BACKGROUND

*"Hiring outsiders to fight your battles is as old as war itself."*<sup>20</sup>

The history of private actors in warfare can be traced at least as far back as when Ramses II employed them in 1294 B.C.<sup>21</sup> They fought with the Greeks and the Romans,<sup>22</sup> hired themselves out as "freelances" (which is where this modern business term comes from)<sup>23</sup> to princes in the Middle Ages and the early Renaissance, and were employed by the British to fight the American colonists in the Revolutionary War.<sup>24</sup> Included among the ranks of mercenaries are the legendary Gurkhas of Nepal who served in the British Army,<sup>25</sup> the Swiss Guard that

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<sup>20</sup> SINGER, CORPORATE WARRIORS, *supra* note 3, at 19.

<sup>21</sup> See Stinnett, *supra* note 5, at 212.

<sup>22</sup> *Id.*

<sup>23</sup> See SINGER, CORPORATE WARRIORS, *supra* note 3, at 24.

<sup>24</sup> See Stinnett, *supra* note 5, at 213.

<sup>25</sup> See ANTHONY MOCKLER, THE MERCENARIES 16 (1969).

has protected the Pope since Julius II hired them in 1502,<sup>26</sup> and the Legionnaires of the French Foreign Legion.<sup>27</sup> Mercenaries faded from military engagements in the late 1800's, specifically after the Franco-Prussian War, and nations from that time on held a monopoly on war-making ability.<sup>28</sup> Mercenaries reemerged in post-colonial Africa, were branded as criminals, and became known as *Les Affreux* ("the horrors") because of their horrible practices.<sup>29</sup>

#### A. *The different species of PMFs*

Like mercenaries, today's PMFs are primarily motivated by profit,<sup>30</sup> but the similarities between the two stop there. Today's PMFs differ from the soldiers of fortune of the past in that they are corporate entities, traded on the open market and often part of broader multi-national corporations.<sup>31</sup> Also, PMFs fill many different niches in the war machine and are more than hired foot soldiers used to bulk up the ranks of an army. These new "A-Team[s]" not only fight alongside national armies, they also train them and support them logistically.<sup>32</sup> According to author P.W. Singer, these PMFs can be broken down into three different categories based on what services the firm provides: military provider firms, military consulting firms, and military support firms.<sup>33</sup>

##### 1. *Military Provider Firms*

Military Provider Firms employ their personnel at the forefront of the battle, either as actual troops engaged in fighting,

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<sup>26</sup> See SINGER, CORPORATE WARRIORS, *supra* note 3, at 27.

<sup>27</sup> See generally MOCKLER, *supra* note 25, at 130.

<sup>28</sup> See *id.* at 15.

<sup>29</sup> See *id.* at 145.

<sup>30</sup> See Singer, *War, Profits, and the Vacuum of Law*, *supra* note 11, at 525.

<sup>31</sup> See SINGER, CORPORATE WARRIORS *supra* note 3, at 40.

<sup>32</sup> See *id.* at 92-97.

<sup>33</sup> See *id.* at 91. Often not included in analyses of private military firms, Military Support Firms do just that—they support the national military to which they are contracted out. This support comes in the form of logistics, technical support, supply, and transportation. See *id.* at 126-27. Most PMPs employed in support firms are usually towards the rear of the combat and are more often referred to as civilian contractors than part of a privatized military firm. *Id.* at 97. Since these contractors are given identity cards by the U.S. military that identify them as having POW status, this Comment need not discuss them in further detail.

as specialists such as combat pilots, or as direct commanders and controllers of forward deployed units.<sup>34</sup> The best example of a Military Provider Firm in action is the now dissolved South African PMF Executive Outcomes' (EO) operation in Sierra Leone.<sup>35</sup> Made up of mostly apartheid-era South African Defense Force (SADF) elite units, EO has been around since 1989.<sup>36</sup> In 1993, the Angolan government hired EO forces to recapture oilfields and the town of Soyo that were held by the rebel group, National Union for the Total Independence of Angola (UNITA).<sup>37</sup> EO's hiring in Sierra Leone was based largely on its success in Angola.<sup>38</sup> Ironically, many of the EO personnel had fought alongside UNITA as members of the SADF against the Angolan government less than a decade before.<sup>39</sup> In 1995, the Sierra Leone government hired EO to drive out the Revolutionary United Front (RUF) rebel force, which was imminently close to seizing the capital.<sup>40</sup> In addition, EO was charged with the task of reestablishing control of the economically productive parts of the country, specifically Sierra Leone's diamond fields.<sup>41</sup>

Sierra Leone, a poor country torn apart by a bloody civil war, could not afford the original one-year contract of \$15 million U.S. dollars.<sup>42</sup> Instead, Anthony Buckingham, who owned a mining company that had operations in Sierra Leone, bankrolled the contract.<sup>43</sup> In exchange, Buckingham received future diamond mining concessions from the Sierra Leone government.<sup>44</sup> Within nine days, 160 EO personnel had already landed in Sierra Leone (most came directly from their last mission in Angola)<sup>45</sup> and had pushed the rebels back from the capi-

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<sup>34</sup> See *id.* at 92.

<sup>35</sup> See *id.* at 101.

<sup>36</sup> See *id.* at 101-02.

<sup>37</sup> See *id.* at 108-09.

<sup>38</sup> See *id.*

<sup>39</sup> See *id.* at 107-08. South Africa wanted to punish the Soviet-supported Angolan government for its support of rebels fighting apartheid in Namibia and South Africa and intervened to support UNITA against the Angolan government. See *id.*

<sup>40</sup> See *id.* at 112.

<sup>41</sup> See *id.* at 112-13.

<sup>42</sup> See *id.* at 112.

<sup>43</sup> See *id.*

<sup>44</sup> See *id.*

<sup>45</sup> See *id.*

tal and into the jungles.<sup>46</sup> EO then moved to secure the Kono diamond fields (mostly because that was where their payment was coming from) and with the help of an additional 200 employees, subsequently invaded the RUF stronghold in the Kangari Hills.<sup>47</sup> Within months after the operation, Sierra Leone held multi-party civilian elections and the RUF signed a peace agreement.<sup>48</sup> EO warned the new president that Sierra Leone's newly earned stability would not last long and offered a 500-man force to provide intelligence and protect the members of the civilian cabinet.<sup>49</sup> Within ninety-five days of rejecting this offer, a bloody coup staged by RUF fighters and its allies displaced the civilian government and killed hundreds of civilians.<sup>50</sup> Though Sierra Leone held elections in 2002, the country has never recovered since EO pulled out.<sup>51</sup>

## 2. *Military Consulting Firms*

Military Consulting Firms provide expert military advice and strategy to their clients.<sup>52</sup> The client gives them a particular situation, such as capturing territory or structuring a military, and the firm analyzes the problem and develops a solution.<sup>53</sup> The key difference between Military Provider Firms and Military Consulting Firms is that the client is the one "who

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<sup>46</sup> See *id.* at 112-13.

<sup>47</sup> See *id.* at 113.

<sup>48</sup> See *id.* at 113-14. The RUF only signed the agreement after it tried to remobilize and EO destroyed its headquarters in the southeast part of the country. See *id.* at 114. As with Angola, the peace agreement was conditioned upon EO's withdrawal. See *id.*

<sup>49</sup> See *id.* at 114.

<sup>50</sup> See *id.* President Kabbah then hired Sandline International, another PMF, to win back the country. See *id.* at 115. Sandline used the same tactics as EO did and successfully fulfilled their contract. See *id.* This later proved embarrassing to Western officials when it came to light that the British government, after raiding Sandline's offices because Sandline's shipment of arms violated a U.N. embargo, actually knew about Sandline's operation. See *id.*

<sup>51</sup> See *id.* at 115. As for Executive Outcomes, it disbanded in 1999. See *id.* at 117. This action was most likely a reaction to a South African law, discussed later in this Comment, that required a company like EO to seek government authorization for each contract. See *id.* at 118. However, EO has produced many spin-off PMFs started by former EO employees such as Southern Cross and NFD Ltd., which are still active today. See *id.*

<sup>52</sup> See *id.* at 96.

<sup>53</sup> See *id.* at 95.



bears the final risks on the battlefield.”<sup>54</sup> Military Consulting Firms can tell a client how to win the battle, but it is the client who must actually execute the plan.<sup>55</sup>

Military Professional Resources Incorporated (MPRI) is the quintessential example of a Military Consulting Firm. Founded in 1987 by eight former senior U.S. military officials,<sup>56</sup> MPRI's leadership consists almost entirely of former top U.S. military personnel and boasts that it has “more generals per square foot than the Pentagon.”<sup>57</sup> The background of their employees, as well as their location in Alexandria, Virginia (less than an hour away from Washington D.C.), has helped MPRI to gain the trust of the United States' government.<sup>58</sup>

Perhaps MPRI's most famous accomplishment is one for which it does not even publicly take credit.<sup>59</sup> During 1994-95, the U.S. State Department hired MPRI to serve as border monitors and to enforce U.N. sanctions against Serbia.<sup>60</sup> The U.S. wanted to strengthen Croatia into a regional enforcer and ally them with the Bosnians in order to balance the scales that weighed heavily on the side of the Serbs.<sup>61</sup> However, a U.N. arms embargo prohibited the sale of weapons to any of the warring Balkan nations, as well as any military training and advice, severely limiting any U.S. military involvement.<sup>62</sup> The Pentagon referred the Croatian Defense Minister to MPRI and two contracts were negotiated in early 1995.<sup>63</sup> In August of that same year, the Croatians launched a massive offensive campaign called “Operation Storm,” which was a huge success.<sup>64</sup> It was the first major victory against the Serbs and be-

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<sup>54</sup> *Id.* at 95.

<sup>55</sup> *See id.* Though, according to Singer, lines between advising and implementing can be somewhat blurred. *See id.* at 97. Employees of Vinnell went into combat at the battle of Khafji with the Saudi National Guard Units that they trained. *See id.*

<sup>56</sup> *See id.* at 119.

<sup>57</sup> Michaels, *supra* note 6, at 1022 (citing Nicholas von Hoffman, *Contract Killers: How Privatizing the U.S. Military Subverts Public Oversight*, HARPER'S, June 2, 2004, at 79).

<sup>58</sup> *See* SINGER, CORPORATE WARRIORS, *supra* note 3, at 120.

<sup>59</sup> *See id.* at 126.

<sup>60</sup> *See id.* at 125.

<sup>61</sup> *See id.*

<sup>62</sup> *See id.*; *see also* Michaels, *supra* note 6, at 1027.

<sup>63</sup> *See* SINGER, CORPORATE WARRIORS, *supra* note 3, at 125.

<sup>64</sup> *See id.* at 126.

came the turning point in the war, eventually bringing the Serbs to a ceasefire and signing the Dayton Agreement in November 1995.<sup>65</sup> What caught the eye of Western officials was the sophistication of military tactics used by the Croats in Operation Storm.<sup>66</sup> As the British colonel in charge of a U.N. observer mission in the area said, "Whoever wrote that plan of attack could have gone to any NATO staff college in North America or Western Europe and scored an A-plus."<sup>67</sup> Though MPRI denies any involvement in Operation Storm, it is hard to ignore the fact that in less than a year, the Croatian army went from a band of "rag-tag" soldiers to a professional military force that executed a brilliantly planned military operation.<sup>68</sup>

### B. *PMF Activities Today*

The private military industry is in the middle of a growth boom right now, with several hundred companies earning over \$100 billion U.S. dollars in annual revenue.<sup>69</sup> In Iraq alone, it is estimated that there are more than 15,000 private military contractors.<sup>70</sup> PMFs provided security for L. Paul Bremer III, the Chief of the Coalition Provisional Authority, and defended locations inside the Green Zone<sup>71</sup> in Baghdad.<sup>72</sup> Vinnell Corporation, a U.S.-based PMF,<sup>73</sup> has the contract to train the New Iraqi Army.<sup>74</sup> Custer Battles, a self-described "international business risk consultancy,"<sup>75</sup> has been contracted out to guard

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<sup>65</sup> *See id.*

<sup>66</sup> *See id.* at 126-27.

<sup>67</sup> *Id.* at 127.

<sup>68</sup> *See id.* at 126-27.

<sup>69</sup> *See Singer, War, Profits, and the Vacuum of Law, supra* note 11, at 523-24.

<sup>70</sup> *See* Peter W. Singer, *Outsourcing the War*, SALON.COM, Apr. 16, 2004, <http://www.brook.edu/views/articles/fellows/singer20040416.htm>.

<sup>71</sup> The Green Zone is the heavily protected area in Baghdad where the Iraqi government and the U.S. and British embassies are located. *See* The All I Need, *Iraq Votes in Landmark Election*, <http://www.theallineed.com/news/0512/15074920.htm> (last visited Sept. 25, 2006).

<sup>72</sup> *See* Frye, *supra* note 18, at 2610.

<sup>73</sup> *See* Vinnell Corporation, <http://www.vinnell.com> (last visited Sept. 25, 2006).

<sup>74</sup> *See* James R. Coleman, Note, *Constraining Modern Mercenarism*, 55 *HASTINGS L.J.* 1493, 1503 (2004).

<sup>75</sup> Custer Battles, [www.custerbattles.com/aboutus/index.html](http://www.custerbattles.com/aboutus/index.html) (last visited Sept. 25, 2006).

the Baghdad airport.<sup>76</sup> PMF giant DynCorp has a multi-million dollar contract to train the Iraqi police force.<sup>77</sup> Erinys International, another PMF, has 14,000 contractors working security for Iraq's oil production facilities.<sup>78</sup>

Outside of Iraq, the U.S. government employs PMFs in many different capacities. In October 2003, U.S. diplomats were escorted through the Gaza Strip by DynCorp security forces and three of the American contractors on the security detail died.<sup>79</sup> In Afghanistan, DynCorp was awarded a State Department contract to protect Afghan leader Hamid Kharzai, replacing the U.S. Special Forces troops who previously protected the foreign leader.<sup>80</sup> In South America, the U.S. employs PMFs to fight the "war on drugs" by flying fumigation spray planes to destroy coca fields in Columbia.<sup>81</sup> Perhaps the most shocking employment of PMFs by the U.S. government is not in a distant foreign land but on its own soil. In 1996, the Army hired MPRI to work in the ROTC program (which trains new officers in college) as professors of military science, effectively outsourcing at least part of the task of training the Army's future leaders to a private firm.<sup>82</sup> One year later, the Army again hired MPRI, this time to "write the Army field manuals on how to deal with acquiring and managing contractors in a wartime environment,"<sup>83</sup> meaning that a private military firm wrote the book telling the Army how to interact with such firms.<sup>84</sup>

The use of PMF services extends beyond the U.S. and even beyond state actors. In 2001, Great Britain began transferring complete control of key military services, including air-to-air refueling and aircraft support for the Royal Air Force to private

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<sup>76</sup> See Coleman, *supra* note 74, at 1503.

<sup>77</sup> See *id.*

<sup>78</sup> See *id.*

<sup>79</sup> See Michaels, *supra* note 6, at 1036-37.

<sup>80</sup> See Schwartz, *supra* note 15, at \*2-3; see also Michaels, *supra* note 6, at 1003.

<sup>81</sup> See Kristen McCallion, Comment, *War for Sale! Battlefield Contractors in Latin America & the 'Corporatization' of America's War on Drugs*, 36 U. MIAMI INTER-AM. L. REV. 317, 320 (2005).

<sup>82</sup> See SINGER, CORPORATE WARRIORS, *supra* note 3, at 123. Army officers also come from the U.S. Military Academy at West Point or can be commissioned after first serving as an enlisted soldier and going through Officer Training School.

<sup>83</sup> *Id.*

<sup>84</sup> See *id.* at 123-24.

companies.<sup>85</sup> The United Nations has even considered privatizing part or all of its peacekeeping force and has already used PMFs when it needed to assemble a U.N. police force or provide airlift and logistics to peacekeepers.<sup>86</sup> Major industrial companies, notably oil and diamond companies, hire contractors to guard their facilities or to train locals to do the same.<sup>87</sup>

### C. PMPs as Human Rights Abusers

As the use of PMFs by governments, NGOs, and transnational corporations rises, so does the possibility of human rights abuses being committed by private military personnel (PMPs). Though PMFs are a relatively recent phenomenon, there are already a few examples of their employees stepping outside the bounds of international law. In 1995 when Executive Outcomes (EO) conducted its operation in Sierra Leone, subordinates asked their commanders how to distinguish between civilians and rebels.<sup>88</sup> "EO commanders supposedly [instructed] their pilots to just 'kill everybody.'"<sup>89</sup> In 2000, news broke of a sex scandal perpetrated by employees of DynCorp while in Bosnia.<sup>90</sup> Allegedly seven DynCorp employees owned and sold prostitutes, including one as young as twelve years old.<sup>91</sup> Neither the U.S. government, the individuals, nor DynCorp were prosecuted for these abuses, and the employee who blew the whistle on the prostitution ring was fired by DynCorp for his troubles.<sup>92</sup> Lastly, two contractors, Steven Stephanowicz, who was an interrogator, and John Israel, who worked as an interpreter, were implicated in the Taguba report on the Abu Gharib prison

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<sup>85</sup> See *id.* at 12. The refueling contract on its own is expected to be worth more than \$15 billion U.S. dollars. See *id.*

<sup>86</sup> See Traci Hukill, *Should Peacekeepers be Privatized?*, THE NAT'L J., May 15, 2004. Though there are strong advocates of integrating private forces with peacekeepers, this is unlikely to happen in the near future. Many weaker countries fear that PMFs could be used against them, and other countries who contribute military forces to peacekeeping operations see PMFs as unwanted competition. See Deborah Avant, *Mercenaries*, FOREIGN POL'Y, July 1, 2004, available at 2004 WLNR 11531068, \*6.

<sup>87</sup> See Avant, *supra* note 86, at \*5.

<sup>88</sup> See Stinnett, *supra* note 5, at 215.

<sup>89</sup> *Id.* (citing Garmon, *supra* note 9, at 326).

<sup>90</sup> See Schwartz, *supra* note 15, at \*5.

<sup>91</sup> See *id.*; see also Stinnett, *supra* note 5, at 215.

<sup>92</sup> See Stinnett, *supra* note 5, at 215.

abuses.<sup>93</sup> The harshest punishment that was recommended for the two civilians was an official reprimand to be placed in their employment file and a revocation of their security clearances.<sup>94</sup>

#### D. *The Best and Worst Private Soldiers from the Past*

##### 1. *The Condottieri of Renaissance Italy*

The private military actors of the past that bear the closest resemblance to the PMFs of today are the Condottieri of the Italian Renaissance.<sup>95</sup> The relationship between the condottiere (a mercenary captain) and his employer was kept strictly professional, meaning there was never any suggestion of loyalty or allegiance outside the terms of the *condotta* (the contract between the condottiere and his employer).<sup>96</sup> Though loyalty to a state or sovereign was never part of the agreement, the condottiere would normally agree that once the term of the *condotta* had run, he would not be a part of any hostilities against his former employer for an additional period of time.<sup>97</sup> A *condotta* featured precise language, including the specified length and terms of service, the number of men, and what pay the soldiers were to receive.<sup>98</sup> Like any contract drawn up today, lawyers on both sides did the legwork.<sup>99</sup> Though first treated with disdain by Italian princes and scholars, including Machiavelli, the Condottieri quickly became the weapon of choice for virtually all of Italy's wealthy city-states.<sup>100</sup> The Condottieri, their method of contracting, and their professional nature bear a strong resemblance to their PMF counterparts.

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<sup>93</sup> See US Army 15-6 Report of Abuse of Prisoners in Iraq, art. 2.8 (Recommendations)(11)-(12) (2004), available at [http://www.npr.org/iraq/2004/prison\\_abuse\\_report.pdf](http://www.npr.org/iraq/2004/prison_abuse_report.pdf). This report was prepared by Maj. Gen. Antonio M. Taguba, the Deputy Commanding General Support of Coalition Forces Land Component Command (CFLCC). Although it was not intended to be released publicly, it has been made widely available through the internet.

<sup>94</sup> See *id.*

<sup>95</sup> See MOCKLER, *supra* note 25, at 42.

<sup>96</sup> See *id.* at 44-45.

<sup>97</sup> See *id.*

<sup>98</sup> See *id.* at 44.

<sup>99</sup> See *id.*

<sup>100</sup> See MOCKLER, *supra* note 25, at 47-49, 65.

## 2. "*Les Affreux*" of Post-Colonial Africa

Due to the unstable nature of the newly independent African nations in the 1960's and 1970's and to the support provided to competing factions by the two superpowers, mercenary activity flourished.<sup>101</sup> In contrast to the professional and honored Condottieri, *Les Affreux* ("the horrors") left the world with disdain for private soldiers. One of the most famous of these soldiers of fortune was Coastas Giorgiou, who called himself "Callan."<sup>102</sup> Callan fought for the Front for National Liberation of Angola (FNLA), which was supported by the U.S. both financially and through the hiring of mercenaries.<sup>103</sup> The FNLA was in a three-way power struggle with the National Union for the Total Independence of Angola (UNITA), a South-African-supported group, and the Marxist Popular Movement for the Liberation of Angola (MPLA), which was backed by the Soviet Union and Cuba.<sup>104</sup> Callan famously ordered the execution of thirteen of his own mercenaries for attempting to defect from the FNLA and carried out a fourteenth execution himself by shooting a man three times in the head with a pistol.<sup>105</sup> The brutality of Callan and other mercenaries during the first two decades of African independence had a chilling effect on the world community and, in large part, shaped world opinion of private soldiers.<sup>106</sup>

## III. ATTEMPTS AT "A-TEAM" REGULATION: SUCCESSES AND FAILURES

Regardless of what is thought about PMFs and their activities, there is no serious effort to outlaw them, either in individual states or on an international level. Their specialized and relatively inexpensive services make PMFs a valuable tool for national governments who are politically unwilling or economically unable to send their own troops to fight.<sup>107</sup> Also, PMFs

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<sup>101</sup> See Milliard, *supra* note 4, at 38-39.

<sup>102</sup> *Id.* at 47-48.

<sup>103</sup> See *id.* at 39, 48.

<sup>104</sup> See *id.* at 39-40. Cuba sent over thousands over its own soldiers in support of the MPLA.

<sup>105</sup> See *id.* at 49. Callan and three others were sentenced to death without trial by the MPLA-led Angolan government in 1976. See *id.* at 50.

<sup>106</sup> See *infra* Part III.D.i, IV.A.i.

<sup>107</sup> See Stinnett, *supra* note 5, at 220.

can potentially be very valuable in peacekeeping or intervention operations.<sup>108</sup> For example, in 1994 Western governments would not recognize the genocide that was occurring in Rwanda and refused to send in troops to defuse the situation.<sup>109</sup> A small, specialized PMF may not have been able to stop the genocide from happening, but they could have destroyed or jammed the radio broadcasts, which incited and sustained the genocide, and prevented or discouraged poorly armed militiamen from killing and raping Tutsis.<sup>110</sup> Additionally, because of the large volume of outsourcing to PMFs that has already occurred, most governments would be hard-pressed to conduct a military operation without assistance from these private companies. As Paul Lombardi, CEO of DynCorp, said, "You could fight without us, but it would be difficult."<sup>111</sup> Lastly, it may even be against international law to ban PMFs. One academic posited that such an action would violate Article 51 of the U.N. Charter, which permits a country to act in its own self-defense.<sup>112</sup> While most scholars agree that PMFs are here to stay, even the staunchest supporters of PMFs agree that because they operate largely outside the law, they need to be regulated in some fashion.<sup>113</sup>

#### A. *Self-regulation*

PMFs argue that the industry should be self-regulated and that the market will penalize those companies that do not act in congruence with the law.<sup>114</sup> Additionally, if there is any formal regulation, PMFs believe that they would be the best enforcers.<sup>115</sup> One lobby group, the International Peace Operations Association, wrote a voluntary code of conduct for all firms pro-

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<sup>108</sup> See Milliard, *supra* note 4, at 18-19.

<sup>109</sup> See *id.* at 18.

<sup>110</sup> See *id.* at 18-19. *Radio Mille Collines*, known as "Hate Radio," constantly broadcasted messages inciting the Hutu majority to slaughter the Tutsi minority in Rwanda. See *id.* It is also credited as one of the forces that kept the genocide going for one hundred days. See *id.* at 19.

<sup>111</sup> Schwartz, *supra* note 15, at \*2.

<sup>112</sup> See Singer, *War, Profits, and the Vacuum of Law*, *supra* note 11, at 544; U.N. Charter art. 51.

<sup>113</sup> See Singer, *War, Profits, and the Vacuum of Law*, *supra* note 11, at 521; see also Stinnett, *supra* note 5, at 212; see also Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT'L L. 75, 80 (1998).

<sup>114</sup> See Singer, *War, Profits, and the Vacuum of Law*, *supra* note 11, at 543.

<sup>115</sup> See *id.*

viding military services to follow.<sup>116</sup> Companies who are signatories to the code agree, among other things, to adhere to the Geneva Conventions, work only for legitimate clients (recognized governments, international organizations, non-governmental organizations, and lawful private companies), and punish unlawful behavior of their employees.<sup>117</sup> However, because of the lack of enforcement methods, the demand for PMF services, and the already recorded accounts of human rights abuses committed by PMPs, self-regulation is not a viable method to control the activities of PMFs.

### B. *Domestic Regulation in the United States*

In 1968, Congress enacted the Arms Export Control Act (AECA) to authorize “the President to control the export and import of defense articles and defense services.”<sup>118</sup> The International Traffic in Arms Regulation (ITAR), which implements the AECA, requires that any company selling military advice, services, or sales to foreign nationals must first obtain a license from the U.S. State Department.<sup>119</sup> Any contract exceeding \$5 million U.S. dollars is subject to regulation by the Secretary of Commerce and to Congressional notification.<sup>120</sup> While these statutory regulations are important, they only cover PMFs based in the United States; and with U.S.-based companies like MPRI and Halliburton being so closely tied to the U.S. govern-

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<sup>116</sup> See International Peace Operations Association, <http://ipoaonline.org/en/standards/code.htm> (last visited Sept. 25, 2006).

<sup>117</sup> *Id.* Currently, there are twenty-six PMFs that are members of the IPOA and have signed onto the voluntary code of conduct. One of these members includes the previously discussed MPRI. See *id.*; see *supra* Part II.A.ii.

<sup>118</sup> Arms Export Control Act, 22 U.S.C.A. § 2778 (West 2005); see also International Traffic in Arms Regulations, 22 C.F.R. § 120.1 (2005).

<sup>119</sup> See Frye, *supra* note 18, at 2634; see also 22 C.F.R. § 120.1.

<sup>120</sup> See International Transfer of Arms Regulation, 15 C.F.R. §§ 701.1, 701.3(a) (2005). There is evidence that the previous statutory requirement was for contracts more than \$50 million U.S. dollars rather than \$5 million U.S. dollars. See Frye, *supra* note 18, at 2634 (“Congress must be notified before the export of military services in excess of U.S. \$50 million”); Stinnett, *supra* note 5, at 218 (“the State Department must individually approve (after Congressional notification) each specific PMF contract in excess of U.S. \$50 million”); Singer, *War, Profits, and the Vacuum of Law*, *supra* note 11, at 539 (“under current U.S. law, as long as the contract amount is under US \$50 million, any U.S. military firm can work abroad with or without notifying Congress”).



ment, there is the possibility that contracts awarded to these companies will largely be rubber-stamped.

In response to the rise of PMFs, the military has modified the Uniform Code of Military Justice (UCMJ)—the laws which govern the conduct of U.S. military personnel—to include civilians abroad, including those personnel who work closely with American GIs.<sup>121</sup> The 2000 Military Extraterritorial Jurisdiction Act allows civilians working for U.S. military operations overseas to be punished under the UCMJ when they engage in conduct that would constitute a UCMJ violation.<sup>122</sup> Like the AECA, the Military Extraterritorial Jurisdiction Act only provides partial regulation since it only applies to U.S. citizens working directly for the U.S. Department of Defense.<sup>123</sup> It does not apply to U.S. citizens working for other government agencies (such as the CIA), private entities, or foreign governments or organizations.<sup>124</sup>

A third option for holding PMFs accountable is through the Alien Tort Claims Act (ATCA), which gives district courts jurisdiction over civil actions brought by an alien for acts “committed in violation of the law of nations or a treaty of the United States.”<sup>125</sup> Enacted as part of the Judiciary Act of 1789, the ATCA was rarely invoked over the subsequent two centuries until 1980 when the Second Circuit in *Filartiga v. Pena-Irala* interpreted the ATCA to give a forum for aliens suing for enforcement of their rights under international law.<sup>126</sup> While the ATCA would allow individual aliens to sue PMFs for their human rights abuses, the ATCA is limited by jurisdictional requirements and it would be extremely difficult for plaintiffs to

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<sup>121</sup> See Military Extraterritorial Jurisdiction Act, 18 U.S.C.S. § 3267 (Lexis-Nexis 2005); see also Frye, *supra* note 18, at 2634.

<sup>122</sup> See 18 U.S.C.S. §§ 3261, 3267.

<sup>123</sup> See *id.*; Singer, *War, Profits, and the Vacuum of Law*, *supra* note 11, at 537; *The Privatized Military: The Unmonitored, Unregulated, and Unchecked Global Growth of Private Military Firms. An Interview with Peter W. Singer*, MULTINAT'L MONITOR, Mar. 2004, at 25, available at <http://multinationalmonitor.org/mm2004/04march/march04interviewsinger.html> [hereinafter *Interview with Singer*].

<sup>124</sup> See Singer, *War, Profits, and the Vacuum of Law*, *supra* note 11, at 537; *Interview with Singer*, *supra* note 123.

<sup>125</sup> Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

<sup>126</sup> See *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980); see also Garmon, *supra* note 9, at 339-40.

establish *in personam* jurisdiction over PMFs not based in the United States.<sup>127</sup>

### C. *Domestic Regulation in Other Countries*

South Africa, largely in reaction to Executive Outcome's activities in Angola and Sierra Leone, passed the Regulation of Foreign Military Assistance Act (RFMAA) in 1998.<sup>128</sup> The RFMAA, like its American counterpart AECA, regulates any offer of foreign military assistance by mandating that any person (including foreign nationals and corporations)<sup>129</sup> wishing to offer military assistance submit an application to the National Conventional Arms Control Committee, which in turn makes a recommendation to the Minister of Defence.<sup>130</sup> Foreign military assistance includes "advice or training," "personnel, financial, logistical, intelligence or operational support," "personnel recruitment," "medical or para-medical services," or "procurement of equipment."<sup>131</sup> Under Article 7, any license will not be approved if it is in conflict with South Africa's obligations under international law, infringes on human rights and fundamental freedoms, endangers the peace or escalates conflict within the region, or promotes or supports terrorism.<sup>132</sup> The punishment for a violation of the RFMAA is a fine or imprisonment and a forfeiture of any equipment involved.<sup>133</sup> The RFMAA also applies extraterritorially, so a violator of the act may still be prosecuted even if the wrongful act occurred outside of South Africa.<sup>134</sup>

The main problem with this regulation is its lack of enforceability<sup>135</sup> since companies could easily slip through the net of the Minister of Defence and the National Conventional Arms Control Committee. However, the enactment of this statute has

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<sup>127</sup> See Stinnett, *supra* note 5, at 221.

<sup>128</sup> See Frye, *supra* note 18, at 2635.

<sup>129</sup> See Regulation of Foreign Military Assistance Act 15 of 1998, 1 JSRSA, art. 1(vi), available at [www.up.ac.za/publications/gov-acts/1998/act15.pdf](http://www.up.ac.za/publications/gov-acts/1998/act15.pdf).

<sup>130</sup> See *id.* at arts. 1(ii), 1(v), 4(1)-(2).

<sup>131</sup> *Id.* at art. 1(iii)(a)(i)-(v).

<sup>132</sup> See *id.* at art. 7(a)-(f).

<sup>133</sup> See *id.* at art. 8; see also Frye, *supra* note 18, at 2636.

<sup>134</sup> See Regulation of Foreign Military Assistance, *supra* note 129, at art. 9. The only time the act would not grant jurisdiction is if a non-South African citizen committed the wrongful act outside of South Africa.

<sup>135</sup> See SINGER, CORPORATE WARRIORS, *supra* note 3, at 118.

at least shown that South Africa is serious in its efforts to ensure that PMFs operate within the law. The passing of this provision was part of the reason that Executive Outcomes (EO) disbanded in South Africa.<sup>136</sup> Finally, it should also be noted that although many African nations are hosts to PMFs, only South Africa has developed a regulatory scheme.<sup>137</sup> South Africa's Regulation of Foreign Military Assistance Act has done the most to help regulate PMFs and curb human rights abuses.<sup>138</sup>

#### D. *International Regulatory Options*

A mercenary was first defined in international law by Article 47 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977 ("Protocol I").<sup>139</sup> Under Protocol I:

A mercenary is any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of the territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.<sup>140</sup>

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<sup>136</sup> See *id.*

<sup>137</sup> See Frye, *supra* note 18, at 2637.

<sup>138</sup> See generally *id.* at 2643.

<sup>139</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 47, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

<sup>140</sup> *Id.* at art. 47(2).

Additionally, Article 47 denies mercenaries the right to be a combatant or a prisoner-of-war (POW).<sup>141</sup> This denial of POW status differed from customary international law, which gave mercenaries the same status as members of the regular armed forces.<sup>142</sup> This backlash against mercenaries likely occurred because of the havoc and instability they caused in Africa in the 1960's and 1970's.<sup>143</sup> Protocol I was widely adopted,<sup>144</sup> with the exception of the United States, which maintained that Article 47 was not an expression of current customary law.<sup>145</sup>

In 1989, the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries ("Convention Against Mercenaries") expanded the definition of mercenaries.<sup>146</sup> In addition to the elements laid down by Protocol I, the Convention Against Mercenaries further defined a mercenary:

A mercenary is also any person who, in any other situation:

- (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
  - (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
  - (ii) Undermining the territorial integrity of a State;
- (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
- (c) Is neither a national nor a resident of the State against which such an act is directed;
- (d) Has not been sent by a State on official duty; and

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<sup>141</sup> See *id.* at art. 47(1). In the original Geneva Conventions, no mention was made of mercenaries or a denial of POW status to them. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention].

<sup>142</sup> See Milliard, *supra* note 4, at 35-36.

<sup>143</sup> See *id.* at 34.

<sup>144</sup> See *id.*

<sup>145</sup> See *id.* at 37-38. There was also a concern that if the purpose of Protocol I was to expand humanitarian protection, then it is very dangerous to create categories of combatants, some of whom are protected and others who are not. The United States argued that if guerillas and unconventional combatants were included under Protocol I, then there was no reason why mercenaries should be excluded. See *id.*

<sup>146</sup> See International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, at art. 1, U.N. GAOR, 44th Sess., 72d plen. mtg., U.N. Doc. A/RES/44/34 (Dec. 4, 1989) [hereinafter Convention Against Mercenaries].

(e) Is not a member of the armed forces of the State on whose territory the act is undertaken.<sup>147</sup>

This Convention was not nearly as well received by the world community and only twelve states originally passed it, while twenty-two were necessary for it to enter into force.<sup>148</sup> It was not until 2001 when Costa Rica became the twenty-second state party that the Convention actually entered into force.<sup>149</sup>

There are multiple shortcomings of the Convention Against Mercenaries, most notably its lack of world support, especially among the major powers—none of which have signed it.<sup>150</sup> Secondly, both Protocol I and the Convention Against Mercenaries only focus on individuals as mercenaries and make no mention of mercenaries as part of a corporation.<sup>151</sup> PMPs, as members of a corporation and not simply individual soldiers of fortune, do not fall within the definition set down by Protocol I or the Convention Against Mercenaries, even though common sense says they are soldiers paid to participate in an armed conflict.<sup>152</sup>

The problem with defining what a mercenary is runs deeper than simply choosing the correct verbiage. Even if the definition were reworked to include PMFs and PMPs, the amount of support for this new definition would likely be minimal. As discussed above, most nations value PMFs and depend on the services they provide so they would be unlikely to sign anything that makes PMF activity illegal.<sup>153</sup> Secondly, even though both mercenaries and PMPs fight in conflicts for monetary compensation, the world does not view a PMP as a type of mercenary.<sup>154</sup> An illustration of this comes from inside the

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<sup>147</sup> *Id.* at art. 1(2).

<sup>148</sup> See Milliard, *supra* note 4, at 64.

<sup>149</sup> See *id.* at 64-65.

<sup>150</sup> See Singer, *War, Profits, and the Vacuum of Law*, *supra* note 11, at 531.

<sup>151</sup> See Coleman, *supra* note 74, at 1510.

<sup>152</sup> See *id.*; see also Singer, *War, Profits, and the Vacuum of Law*, *supra* note 11, at 534.

<sup>153</sup> See discussion *supra* Part II.B.

<sup>154</sup> See U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Report of the Special Rapporteur, *The Right of Peoples to Self-Determination and its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation: Use of Mercenaries as a means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, ¶ 60, U.N. Doc. E/CN.4/2005/14 (Dec. 8, 2004)(prepared by Shaista Shameem) [hereinafter Report of the Special Rapporteur].

U.N. In her annual report to the U.N. Commission on Human Rights, U.N. Special Rapporteur Shaista Shameem discussed some of the human rights abuses committed by PMPs.<sup>155</sup> In her conclusion, the Special Rapporteur said that mercenaries should not be confused with other actors in the field, including private security companies.<sup>156</sup>

The Special Rapporteur went on to recommend exploring the option of licensing and regulating private security companies, either through international registration or domestic legislation, for the purpose of creating accountability and distinguishing these legitimate companies from other organizations engaged in mercenary activity.<sup>157</sup> First, this statement suggests that the U.N. does not see PMFs as mercenaries but rather as members of their own separate category. This view is shared by at least one academic, Deborah Avant, who cites PMF corporate structure, their operation in an open market, and the activities they perform as factors that differentiate them from mercenaries of the past.<sup>158</sup> Secondly, the U.N. wants to regulate the industry, but it does not want to ban it.<sup>159</sup> Making private security companies illegal was never even mentioned in the Report of the Special Rapporteur.<sup>160</sup> This is due not only to the fact that there is no popular support among nations for this measure, but also because the U.N. and its members do not believe it would benefit the world.<sup>161</sup> Therefore, because nations do not want to ban PMFs and do not see them as mercenaries, trying to fit them into a “mercenary” category and attempting to use Protocol I and the Convention Against Mercenaries as a way to criminalize PMF activity is a useless exercise.

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<sup>155</sup> See *id.* ¶¶ 46-52.

<sup>156</sup> See *id.* ¶ 60.

<sup>157</sup> See *id.* ¶ 66.

<sup>158</sup> See Avant, *supra* note 86, at \*2.

<sup>159</sup> See Report of the Special Rapporteur, *supra* note 154, ¶¶ 60, 66.

<sup>160</sup> See *id.* ¶¶ 46-52, 60, 66.

<sup>161</sup> See *id.*

#### IV. LEGAL PROTECTION FOR "A-TEAM[S]" IN THE FORM OF POW STATUS

##### A. *Why Private Military Personnel Should Be Given POW Status*

###### 1. *Legitimacy*

The sooner private military personnel (PMPs) are given prisoner-of-war (POW) status, the sooner their activities will be viewed as legitimate. It is evident that PMPs do not fall under the official definition of mercenaries.<sup>162</sup> They work for publicly-traded companies that operate on the open market and, while they need to be licensed and regulated,<sup>163</sup> they do not resemble the mercenaries of the 1960's and 1970's that plagued Africa.<sup>164</sup> Throughout history, hired soldiers were a necessity for going to war and were not looked down upon as inferior or illegal.<sup>165</sup> It is only recently that mercenaries have been viewed with suspicion or disdain, due largely to the horrors they committed on the African continent after World War II.<sup>166</sup> It is also evident that nations, non-governmental organizations, and international corporations find PMF services extremely valuable.<sup>167</sup> PMFs are being used now and their use will likely expand in the near future. As discussed above, there is great potential to use PMPs for humanitarian missions.<sup>168</sup> However, the use of PMFs has only recently come to light and the public is largely ignorant of the depth of their role in operations in Iraq and around the world. This ignorance will not last forever and the public may react negatively to governments employing soldiers-for-hire, especially if the trend continues and PMPs begin to occupy mission-essential positions. If this is the case, negative public opinion will significantly curb the use of PMFs and national armies will be forced to undergo the painful and expensive process of trying to de-privatize jobs that have already been outsourced. However, if PMPs are given POW status and effective PMF regulations are put in place, they will be treated as legitimate and

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<sup>162</sup> See *supra* notes 150-151 and accompanying text.

<sup>163</sup> See Report of the Special Rapporteur, *supra* note 154, ¶ 66.

<sup>164</sup> See discussion *supra* Part II.D.ii.

<sup>165</sup> See discussion *supra* Part II.A-B, D.

<sup>166</sup> See discussion *supra* Part II.D.ii.

<sup>167</sup> See *supra* Part II.A-B.

<sup>168</sup> See discussion *supra* Part II.B.

professional soldiers, like the Condottieri in Renaissance Italy,<sup>169</sup> rather than as ruthless mercenaries.

## 2. *Certainty*

As it stands right now, no one is really sure what status private military personnel (PMPs) occupy in international law.<sup>170</sup> They are neither soldiers of national government nor mercenaries under the Convention Against Mercenaries.<sup>171</sup> Sometimes PMPs are subject to the domestic law of the territory in which they operate, while other times they must answer to the laws of their home country, but it is often unclear which one applies.<sup>172</sup> For example, the Coalition government in Iraq stated that PMPs would be subject to the laws of their home country, but as discussed above, most domestic law, including U.S. law, is too narrow to cover PMF activities.<sup>173</sup> As PMPs have already begun to take a more active role in combat operations, including the use of lethal force, they also are put at a higher risk of being captured without receiving POW status protections.<sup>174</sup> These protections include the right to be treated humanely (art. 13),<sup>175</sup> the right to be free from physical or mental torture (art. 17),<sup>176</sup> the right to be given daily food rations (art. 26)<sup>177</sup> and clothing (art. 27),<sup>178</sup> the right for officers not to be forced to do manual labor (art. 49),<sup>179</sup> and the right to be tried only by a court that offers “the essential guarantees of independence and impartiality” (art. 84),<sup>180</sup> including the right to call witnesses in one’s defense and to have the assistance of a qualified advocate (art. 105).<sup>181</sup> This uncertainty of prisoner-of-war status would likely lead to confusion on the part of the cap-

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<sup>169</sup> See discussion *supra* Part II.D.

<sup>170</sup> See Avant, *supra* note 86, at \*5.

<sup>171</sup> See *supra* Part III.D.

<sup>172</sup> See Avant, *supra* note 86, at \*5.

<sup>173</sup> See *id.*; see also discussion *supra* Part III.B.

<sup>174</sup> See Avant, *supra* note 86, at \*5; see also Geneva Convention, *supra* note 141, at art. 47.

<sup>175</sup> See Geneva Convention, *supra* note 141, at art. 13.

<sup>176</sup> See *id.* at art. 17.

<sup>177</sup> See *id.* at art. 26.

<sup>178</sup> See *id.* at art. 27.

<sup>179</sup> See *id.* at art. 49.

<sup>180</sup> See *id.* at art. 84.

<sup>181</sup> See *id.* at art. 105.



tors on how they are legally obligated to treat captured PMPs. This could lead to PMPs being viewed as illegal combatants and receiving no legal protection. Since they are not national soldiers, they would likely receive little, if any, diplomatic support from their home country; additionally, they could not depend on the leadership of the company they work for to plead their case on their behalf.

### 3. *Fairness*

While much has been made of PMPs committing human rights abuses, PMPs have also been the victims of these abuses. In March 2004, four American contractors from Blackwater Security Consulting were killed in Fallujah, Iraq.<sup>182</sup> Two of their bodies were mutilated, dragged through the streets, and hung from a bridge over the Euphrates River.<sup>183</sup> Their bodies were later "cut down, burned, dragged behind a cart, tied to a car, and driven away."<sup>184</sup> In Colombia in 2003, the terrorist group Revolutionary Armed Forces of Columbia (FARC) abducted three American contractors from Northrop Grumman after their plane crashed due to engine failure.<sup>185</sup> FARC allowed a Colombian reporter to interview the hostages to prove that they were still alive, but this was only a few months after their capture, and their fate as of the date of this article is unknown.<sup>186</sup>

As author Peter Singer stated, "The laws of war are not just about regulating behaviour, but also about determining status and ensuring that soldiers receive their due rights."<sup>187</sup> As the line grays between a PMP working as a security guard protecting a convoy or a building and a national soldier on patrol, PMPs are in harm's way as much as regular soldiers but without the legal protection of POW status. In Iraq, insurgents have paid no heed to the distinction between PMPs and army regulars.<sup>188</sup> If there is no distinction between the two groups

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<sup>182</sup> See Frye, *supra* note 18, at 2069.

<sup>183</sup> See *id.*

<sup>184</sup> *Id.*

<sup>185</sup> See McCallion, *supra* note 81, at 345-46.

<sup>186</sup> See *id.*

<sup>187</sup> Singer, *War, Profits, and the Vacuum of Law*, *supra* note 11, at 542.

<sup>188</sup> See David Barstow, *Security Companies: Shadow Soldiers in Iraq*, N.Y. TIMES, Apr. 19, 2004, at A1.

while the fighting is taking place, there should be no distinction when they are captured by the enemy.

B. *Methods of Granting POW status to "A-Team[s]"*

1. *International Convention*

The most direct and effective way to ensure that PMPs are given POW status when captured is for the international community to come together and recognize that this is something that is not only fair to PMPs but also in the PMPs' best interest.<sup>189</sup> This recognition should go hand-in-hand with establishing some sort of international licensing and regulation scheme, which should be used to govern the actions of PMFs. By presenting both the carrot of legal recognition and the stick of enforceable regulation, the international community could bring the use of PMFs out of legal uncertainty and into legitimate practice.

While this sounds easy enough, trying to get the world community to agree on this may prove difficult. The issue is still controversial and the record of PMFs has been blemished by events such as the DynCorp sex scandal in Bosnia and PMP involvement in Abu Gharib.<sup>190</sup> Also, nations might be content with PMPs not having any legally protected status as combatants. Governments are required to ensure that their own soldiers are treated fairly, but PMPs do not belong to them. Therefore, if by chance the Geneva Conventions are not complied with, protesting such an action may not be the government's highest priority. PMFs may also be a means for a government to accomplish a military goal if its hands are tied and the use of its own national military is prohibited, such as MPRI's alleged assistance of the Croatian military in Operation Storm.<sup>191</sup> This guarded desire to keep PMFs out of the mainstream may prove a deterrent to PMPs receiving the POW protections they deserve.

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<sup>189</sup> See *supra* Part IV.A.i-ii.

<sup>190</sup> See *supra* Part II.C.

<sup>191</sup> See SINGER, CORPORATE WARRIORS, *supra* note 3, at 125.

## 2. *National Efforts*

While it would be a step in the right direction for national legislation to recognize the legitimacy of PMFs, POW status is something found in international law. National legislation will only ensure PMPs protection when they are fighting alongside that nation's military or on its soil.<sup>192</sup> For PMPs to be protected regardless of where they operate, it will take an international effort.

However, once it is determined what legal status PMPs should occupy, the information can be disseminated on a national level. One way would be national legislation, but the most effective way would be through a rewriting of military manuals, which set out general guidelines on how military officials must conduct themselves. In addition to this, in the U.S. (and presumably in other countries), before any force deploys overseas, they are given a legal briefing that includes the status of different individuals they encounter and how the military personnel should treat them.<sup>193</sup> These groups of individuals usually include the local population, un-uniformed insurgents, etc.<sup>194</sup> PMPs will simply be one more group added to the brief.

## 3. *Custom*

Perhaps the actual way PMPs will retain equal status with regular combat troops is the way mercenaries did in previous parts of history—through state practice.<sup>195</sup> Until the 1970's and the passing of Protocol I, mercenaries were treated as if they were members of the regular army which had hired them.<sup>196</sup> There are even accounts of the mercenaries treating POWs more humanely than the soldiers of the belligerent force. In the American Revolutionary War, George Washington noted that the Hessian mercenaries gave captured Colonial soldiers much kinder treatment than British officers and soldiers.<sup>197</sup>

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<sup>192</sup> See e.g., Military Extraterritorial Jurisdiction Act, 18 U.S.C.S. § 3267 (LexisNexis 2005).

<sup>193</sup> The author of this article graduated from the AFROTC program and is a commissioned officer in the United States Air Force.

<sup>194</sup> *Id.*

<sup>195</sup> See discussion *supra* Part III.D.

<sup>196</sup> See Milliard, *supra* note 4, at 35-36.

<sup>197</sup> See THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 79 (Michael Howard et al. eds., 1994).

Now that private soldiers are beginning to become more commonplace in military theatres, state practice may revert back to treating hired soldiers as equals rather than as criminals. At least one non-state actor, FARC, has already done this.<sup>198</sup> FARC, the group that captured the three American PMPs in Columbia, granted the captured Americans POW status, even when the U.S. government only designated them kidnapes.<sup>199</sup> While it will take a lot more state and non-state actors behaving consistently over a long period of time to establish treatment of PMPs as an international custom, it is still a step in the right direction.

## V. CONCLUSION

"A-Team[s]" are no longer fictional fantasies come to life on the small screen. Private military personnel (PMPs) working for private military firms (PMFs) that sell military support, strategy, training and combat-ready units to whomever is willing to pay, are now a reality and are major actors in any military engagement. Like the mercenaries of antiquity and the Middle Ages, most of these private soldiers used to be members of State militaries before those armies downsized.<sup>200</sup> Unlike most other groups of mercenaries, these new "A-Team[s]" operate under corporate structures for publicly traded companies.<sup>201</sup> Some scholars believe they are dangerous and should be heavily regulated, while others point out their potential to aid in humanitarian efforts.<sup>202</sup> Regardless of what scholars think, PMFs are already so integrated into most national military operations that they are here to stay. However, due to the mushrooming of the industry in the last fifteen years, the international legal structure has been slow to react and PMFs largely operate outside the law. This is a double-edged sword where, on the one hand, PMPs are not held accountable for the human rights abuses they commit and, on the other hand, they have been the victims of illegal acts and have not been afforded legal protection.

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<sup>198</sup> See Avant, *supra* note 86, at \*5.

<sup>199</sup> See *id.*

<sup>200</sup> See Stinnett, *supra* note 5, at 211.

<sup>201</sup> See SINGER, CORPORATE WARRIORS, *supra* note 3, at 40.

<sup>202</sup> See Milliard, *supra* note 4, at 85; Zarate, *supra* note 113, at 150-51.

This Comment first explored the history of private actors in military engagements. It discussed the two major types of PMFs, including what services they provide and the military operations in which they were involved. Secondly, it listed some of the areas of the world in which PMFs are active today, most prominently Iraq. It then focused both on the most horrific mercenaries, *Les Affreux* ("the horrors") in post-colonial Africa, as well as those private soldiers that bear the closest resemblance to PMFs, the Condottieri of Renaissance Italy. In Part III, it described and analyzed the efforts to regulate PMFs, looking at domestic efforts in the United States and South Africa as well as international efforts, citing the South African case as the most successful. Part IV argued that, along with regulation, PMPs should also be given prisoner-of-war (POW) status in order to legitimize their use by governments, to give certainty to their legal status, and to be fair to PMPs who are increasingly moving out of a support role and putting themselves in harms way. It also suggested the possible methods of granting POW status.

The one positive side effect of the extensive use of PMFs is that the more they are used, the more likely they will be written about, and knowledge of who they are and what they do will become generally known among the public. The sooner this happens, the sooner the debate over what status PMPs should occupy, how they should be regulated, and how they should be protected, will leave academia and enter into legislative buildings, a place where it desperately needs to be.