

MILITARY PRIVATIZATION: EFFICIENCY OR ANARCHY?

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INTRODUCTION

The United States' military invasion of Iraq generated a great deal of controversy in the international community even before its commencement in the spring of 2003, and the increasing use of private military contractors has been one point of contention. On March 31, 2004, four contractors employed by Blackwater U.S.A. were hired as guards to escort four empty trucks to pick up kitchen equipment at a military installation. While en route, the hired guards were ambushed and brutally killed near the town of Fallujah.¹ The guards were savagely beaten, killed, and strung up on a bridge spanning the Euphrates River.² Both the gruesomeness of the deaths and the identities of the victims captivated the millions of people worldwide who saw news broadcasts of this tragic event. Although the international community already was accustomed to regular reports of military casualties, the Fallujah incident boldly illustrated the fact that “[i]n no conflict has the civilian footprint supporting military operations been larger than in Iraq.”³

This paper will provide a general overview of the private military contracting industry, articulate the problems arising from the outsourcing of military functions to civilian contractors, and hopefully offer some solutions to those problems. Part I traces the factors leading to the proliferation of private military contractors. Section A discusses the current dependence of the U.S. military on private military contractors in fulfilling its obligations around the world.

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¹ FRONTLINE, *The High-Risk Contracting Business* (June 21, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/contractors/highrisk.html> (last visited Dec. 7, 2005).

² *Id.*

³ Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511 (2005).

Section B then explores the benefits of contracting and also examines the serious consequences posed by the way military-civilian partnerships have been executed in recent years, particularly in Iraq. Part II highlights some of the significant holes in the current regulatory scheme and provides some remedies to ensure effective coordination and accountability.

I. THE RISE OF PRIVATE MILITARY COMPANIES

A. The History and Current U.S. Dependence on Private Military Contractors

Private military contractors can be roughly divided into three categories based on the companies' primary functions: (1) logistical support firms; (2) private security firms; and (3) private military companies.⁴ Logistical support firms, such as the Halliburton subsidiary Kellogg Brown & Root (KBR), handle basic, non-military operations like providing laundry services, catering, sanitation, and transportation personnel.⁵ Private security firms, such as Blackwater U.S.A, the company that employed the guards who were killed in Fallujah, supply protection to various groups and individuals carrying out reconstruction efforts as well as to various government officials and installations.⁶

Perhaps the most controversial of all private military contractors are the private military firms,⁷ which provide military training and even combat services to their clients.⁸ Executive Outcomes, a private military firm based in South Africa, garnered notoriety during the 1990s for training Angola's armed forces and for playing a pivotal role in the suppression of rebel

⁴ FRONTLINE, *Frequently Asked Questions* (June 21, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/faqs/> (last visited Dec. 7, 2005).

⁵ FRONTLINE, *Who are the Contractors?* (June 21, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/contractors/companies.html> (last visited Dec. 7, 2005).

⁶ *Id.*; Schmitt, *supra* note 3, at 513.

⁷ Although scholars and commentators refer to private military firms under different terms (such as "private international security companies" and "privatized military firms"), for purposes of this paper, "private military firms" will be used to identify companies engaged in the sort of activities just described. The overlap between the functions of private security companies and private military firms probably accounts for such confusion.

⁸ Tina Garmon, Comment, *Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under the Alien Tort Claims Act*, 11 TUL. J. INT'L & COMP. L. 325, 330-31 (2003).

movements in the Ivory Coast.⁹ An American company based out of Virginia, Military Professional Resources Incorporated (MPRI), provided training to the Croatian army in April 1995; that army launched a (perhaps not-so-) surprisingly effective offensive against Serbian forces shortly thereafter.¹⁰ These activities, along with stories of human rights abuses perpetrated by certain contractors, have done much to shape the public image of private military contracting and have led to charges that private military firms are nothing more than bands of thugs operating as modern-day mercenaries.¹¹ The potential for abuse through the use of private military firms is a major cause for concern. The sheer breadth of services currently provided by private military contractors illustrates the ever-increasing power these companies have over the ability of countries to make war and keep peace.¹²

The rise of private military contractors began with the fall of Communism, as the end of the Cold War changed the structure of military forces around the world.¹³ One factor leading to the use of private military contractors was the decline in demand for regular military personnel following the Cold War, thus reversing a decades-long trend of military buildup.¹⁴ One commentator, P.W. Singer, likens the Cold War militarization to an extended period of hyperinflation: once governments, particularly those located in the former Communist bloc, realized they no longer required such bloated fighting forces, a worldwide glut of underemployed

⁹ *Id.* at 331-34.

¹⁰ *Id.* at 334-36.

¹¹ Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT'L L. 75, 145-46 (1998); Daniel Bergner, *The Other Army*, N.Y. TIMES MAG., Aug. 14, 2005, at 29.

¹² 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, 219-221 (2005).

¹³ P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 49 (2003).

¹⁴ *Id.* at 53.

soldiers resulted.¹⁵ Governmental downsizing thus freed up these personnel to utilize their skills and training in the private market.¹⁶

In addition to an influx of new soldiers, the global marketplace also experienced an enormous release of weaponry into channels of commerce.¹⁷ In the process of military downsizing, governments quickly sold off arms to raise desperately needed funds.¹⁸ Former members of the U.S.S.R. and assorted Soviet satellite nations were the main suppliers of these weapons. Indeed, German reunification resulted in “essentially a huge yard sale of weaponry, where nearly every weapon in the East German arsenal was sold, most of it to private bidders at cut-rate prices.”¹⁹ This arms sale was not limited to high-ticket items like missile systems and tanks, but also included light weapons such as grenades, machine guns, and land mines.²⁰ Increased access to incredibly destructive weapons meant that governments began to lose their monopoly on the means of warfare, thus enabling a wider variety of private actors to pose greater threats to peace and stability.²¹

Once Cold War politics faded into the background, local conflicts began to skyrocket as once-dormant tensions reignited, exploding into bloody clashes waged by combatants who now possessed an unprecedented access to weapons and knowledge.²² The origins of these conflicts ranged from the reopening of old wounds between various ethnic groups in the Balkans to the implosion of weakened states such as Somalia and Sierra Leone.²³ This disintegration of law and order in turn provided an opportunity for non-state actors such as terrorist networks, drug cartels,

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 53-54.

¹⁸ *Id.* at 54.

¹⁹ SINGER, *supra* note 13, at 54.

²⁰ *Id.*

²¹ *Id.* at 55.

²² *Id.* at 50.

²³ *Id.*

and guerilla movements to expand their influence and consolidate power.²⁴ Indeed, a number of conflicts that have sprung up in recent years appear to be motivated less by purely ideological reasons than by economic motives.²⁵ Such conflicts, wherein the *casus belli* effectively is divorced from strong notions of national loyalty, attract enormous attention from private parties who look to profit personally rather than to effectuate a specific political goal.²⁶

While more and more career soldiers began hanging out their shingles mainly as a result of the market conditions brought on by the fall of the Iron Curtain, this trend was also exacerbated by the privatization revolution that began sweeping national governments in the closing decades of the twentieth century.²⁷ In Britain, the Thatcher administration's rise to power in 1979 led to the denationalization of state-owned industries in the U.K., which helped revitalize the stagnant British economy.²⁸ The trend toward privatization eventually spread to countries across the globe, abetted by institutions like the International Monetary Fund and the World Bank.²⁹

The United States felt the effects of privatization in a variety of ways; both Republican and Democratic leaders began delegating a wide range of government activities to private bidders.³⁰ Accordingly, the U.S. earmarked its national defense activities as early targets for privatization.³¹ On a broader cultural scale, privatization impacted numerous areas of civil society, including domestic security. Concurrent with the rise of private military security companies, during the 1990s domestic security contractors began providing protection to a wide

²⁴ *Id.* at 51-52.

²⁵ SINGER, *supra* note 13, at 64-65 (discussing the "criminalization of conflict," wherein Congolese diamond mines are coveted as war prizes and drug profits finance the operations of opposition groups in Tajikistan and Colombia).

²⁶ *Id.* at 66.

²⁷ *Id.*

²⁸ *Id.* at 66-67.

²⁹ *Id.* at 67.

³⁰ *Id.* at 67.

³¹ SINGER, *supra* note 13, at 67.

range of clients, from gated residential communities to nuclear power plants.³² Similarly, the business practice of outsourcing became an increasingly popular tool for corporations looking to trim the fat by contracting out non-essential activities to less expensive service providers abroad.³³ All of these factors have contributed to the elevation of the private sector in the contemporary imagination:

“Public” – in such terms as “public schools,” “public housing,” or “public transportation” – is synonymous for many with second-rate or cheap. At the same time, there has been a reevaluation of public servants. In what’s been called the “Fall of the Public Man,” the commercial world has been judged superior and is more respected.³⁴

While changing tides in international relations and government spending have fostered the growth of private industry, the U.S. military has found itself increasingly dependent on private contractors as a result of technological innovations by civilians.³⁵ In particular, advances in information technology have required the military to seek outside help.³⁶ More generally, civilian ingenuity, coupled with the rapid pace of development, has endowed non-state entities with greater access to technology than the government.³⁷ Complex weapons systems maintained by private companies on behalf of the military include: the B-2 Spirit stealth bomber, the F-117 Nighthawk stealth fighter jet, the KC-10 refueling plane, the U-2 reconnaissance aircraft, the M1 Abrams tank, and the TOW missile system.³⁸ In addition to collecting and analyzing intelligence

³² *Id.* at 69.

³³ *Id.* at 68.

³⁴ *Id.* at 70.

³⁵ Interview by FRONTLINE with Steven Schooner, Law Professor, George Washington School of Law and Former Administrator, Office of Federal Procurement Policy (May 19, 2005), *available at* <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/interviews/schooner.html> (last visited Dec. 8, 2005).

³⁶ SINGER, *supra* note 13, at 62.

³⁷ *Id.* at 63.

³⁸ Schmitt, *supra* note 3, at 512; P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT’L L. 521, 522 (2004).

using remote sensors, civilians also operate the Global Hawk and Predator unmanned aerial vehicles.³⁹

One of the reasons why employees of private companies wield such control over these types of equipment is that “most military personnel lack the aptitude or length of service to develop the requisite skills” to maintain and operate these machines.⁴⁰ Furthermore, the government is unable to take advantage of economies of scale in training individuals to operate certain weapon systems because so few of these systems exist.⁴¹ Instead of spending an inordinate amount of money to provide its own personnel with the requisite training, the military will often opt for “package deals,” contracts that bundle private training and support services with the initial purchase of weapons systems.⁴² Thus, the march of technology effectively has enabled the growing reality that military privatization may in fact be a necessity to overshadow the argument that it might be cheaper for the military to use private contractors.

Currently, the impact of private military contractors is most evident in the U.S. reconstruction of Iraq. As of June 2005, fifty thousand contractors, all employed by KBR and most hailing from developing countries, provide support and logistics services, such as weather forecasting, food preparation, carpentry, and mechanical work.⁴³ Twenty thousand more are non-Iraqi security contractors, five to ten thousand of which are American, European, Russian, and South African.⁴⁴ An additional fifteen thousand security contractors are local Iraqis, mostly hired by Erinys, a British security company charged with guarding oil facilities.⁴⁵ In addition, forty to seventy thousand contractors, mostly Americans employed by corporations such as

³⁹ Schmitt, *supra* note 3, at 512.

⁴⁰ *Id.* at 518.

⁴¹ *Id.*

⁴² *Id.*

⁴³ See FRONTLINE, *Frequently Asked Questions*, *supra* note 4.

⁴⁴ *Id.*

⁴⁵ *Id.*

General Electric, Bechtel and Parsons, are engaged in the actual rebuilding of Iraq.⁴⁶ These figures are especially striking considering that in June of 2005 total U.S. troop strength in Iraq was about 135,000 (by October 2005, the number rose to 152,000).⁴⁷

In the midst of all this activity, several private military contractors have stood out for their prominent roles in the Iraq reconstruction process. Aegis Defence Services, a British security company, was awarded a \$292 million contract in May 2004 to coordinate security throughout Iraq, including within Iraq's high-profile Green Zone.⁴⁸ The CEO of Aegis, a former Scots Guard colonel named Tim Spicer, remains a contentious figure because of his previous work with the Sandline security firm.⁴⁹ Aegis is facing renewed controversy after one of its former employees posted, on a personal website, a video of Baghdad motorists apparently being shot for entertainment.⁵⁰ Another British company, Erinys, is carrying out a \$50 million contract to protect the U.S. Army Corps of Engineers and a \$100 million contract to guard Iraqi oil fields.⁵¹

Blackwater U.S.A currently guards U.S. State Department personnel and was previously hired to protect Ambassador Paul Bremer, who headed the Coalition Provisional Authority (CPA) until June 2004.⁵² In addition to employing the contractors who were killed in Fallujah, Blackwater also succeeded in defending the CPA headquarters in Najaf when eight of

⁴⁶ *Id.*

⁴⁷ Michael E. O'Hanlon & Nina Kamp, *Iraq Index: Tracking Variables of Reconstruction & Security in Post-Saddam Iraq*, BROOKINGS INST. (Nov. 21, 2005), available at <http://www.brookings.edu/fp/saban/iraq/index20051121.pdf>.

⁴⁸ FRONTLINE, *Who are the Contactors?*, *supra* note 5.

⁴⁹ *Id.*

⁵⁰ Press Release, Aegis Defence Systems, Aegis Investigates Iraq Video Clips (Nov. 28, 2005), available at http://www.aegisworld.com/downloads/aegis_iraq_video.pdf.

⁵¹ FRONTLINE, *Who are the Contractors?*, *supra* note 5.

⁵² *Id.*

Blackwater's guards headed off an attack by Iraqi militia members.⁵³ The families of the contractors who were killed in Fallujah have filed a wrongful death action against Blackwater, alleging that the company breached its contract by not providing an adequate number of guards to accompany the convoy.⁵⁴ However, determining ultimate accountability will probably be difficult because Blackwater's contract to escort the convoy was made with a Kuwaiti caterer through another contract with a Cypriot company.⁵⁵

Perhaps the most well-known contractor, Halliburton, operates under its subsidiary KBR and is noted for the extremely lucrative contracts it has been able to secure with the U.S. government.⁵⁶ KBR currently is the military's main supplier in Iraq, performing \$12 billion worth of services to U.S. armed forces.⁵⁷ These services can be divided roughly into two contracts: the Logistics Civil Augmentation Program and the Restore Iraqi Oil contract.⁵⁸ The 2001 Logistics Civil Augmentation Program (LOGCAP) contract obligates KBR to provide logistics and infrastructure support to U.S. forces worldwide for ten years.⁵⁹ The services include food preparation, laundry, sanitation and utilities.⁶⁰ The controversial Restore Iraqi Oil (RIO) contract, which was negotiated before the U.S. invasion of Iraq on a no-bid basis, provides for the distribution of oil throughout Iraq as well as for the reconstruction of oil facilities that would presumably be damaged during combat operations.⁶¹

B. Weighing the Benefits and Risks of U.S. Use of Private Military Contractors

Although it is undeniable that the privatization of military services is here to stay for the

⁵³ Dana Priest, *Private Guards Repel Attack on U.S. Headquarters*, WASH. POST, Apr. 6, 2004, at A01, available at http://www.sandline.com/hotlinks/Wash_Post-Private_guards.html.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ FRONTLINE, *Who are the Contractors?*, *supra* note 5.

⁶⁰ *Id.*

⁶¹ *Id.*

time being, the interests and consequences implicated in such a sensitive area of public policy demand constant reevaluation of privatization efforts. Proponents of private military contracting usually cite cost reduction and efficiency as reasons to outsource a growing number of activities to independent companies. These advocates argue that by hiring professionals to do discrete jobs, U.S. forces may operate at "surge capacity," meaning that the U.S. can rapidly gear up personnel and carry out a specific mission for which private contractors have been trained. In describing the concept of surge capacity, Professor Steven Schooner explains:

You don't have to have a tremendous number of troops stationed at installations all over North America waiting for the next big military action. So if we decide to invade Iraq, we can go out and hire contractors, very, very quickly at a rate we'd never be able to recruit otherwise. . . . if you only have to move the troops, and you have contractors moving the equipment or contractors taking care of the food and the water and the other essential services, you can move your troops more quickly and, more importantly, be ready to fight⁶²

This line of thinking applies not just to logistical support, but also to other functions traditionally thought to be inherently military. For example, Doug Brooks of the International Peace Operations Association suggests that utilizing U.S. military forces to provide protection to figures like President Karzai of Afghanistan would be a waste of resources because "you need somebody who's very professional and knows what they're doing and [is] experienced and so on. You don't need a Navy SEAL to do that. There's better jobs for Navy SEALs to do."⁶³

Related to the idea of surge capacity is the argument that using contractors reduces costs because of reduced overhead expenses. When missions are contracted out, the military need not provide those workers with the facilities and benefits to which regular soldiers are entitled. As Paul Cerjan explains, "it's cheaper . . . because of what it takes to maintain a soldier on active

⁶² Interview by FRONTLINE with Steven Schooner, *supra* note 35.

⁶³ Interview by FRONTLINE with Doug Brooks, president, International Peace Operations Association (Mar. 22, 2005), *available at* <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/interviews/brooks.html> (last visited Dec. 14, 2005).

duty.”⁶⁴ Schooner also points out that “the government isn't going to pay pensions for anyone working for a contractor in Iraq.”⁶⁵ Also, in exchange for providing specialized services to the government, the contractors themselves find a way to still utilize their extensive military experience and skills, which may not otherwise be marketable to mainstream employers.⁶⁶

An often-overlooked reason for employing private contractors is that this strategy allows the U.S. government to provide unofficial aid to certain groups in circumstances where the U.S. may fear attracting controversy or violating standards of neutrality. As previously mentioned, in 1995 the American company MPRI trained Croatian forces to great success during their struggle against the Serbians.⁶⁷ However, such assistance was in violation of United Nations sanctions against the provision of military aid to the Croatians.⁶⁸ Incidentally, the United States had voted to institute those sanctions.⁶⁹ MPRI also trained members of the Kosovo Liberation Army (KLA) at secret bases in Albania under a Pentagon license, despite the official stance by the U.S. government against recognition of the Kosovar independence movement.⁷⁰ Thus the use of private security companies and private military firms has been upheld as a way to transfer skills and know-how “in an age when governments do not have the resources or political will to enter internal skirmishes or civil wars on behalf of recognized regimes.”⁷¹ However, the legitimacy of the practice has been attacked as a “clean hands” approach to foreign policy that “appears dangerous to those who see transparent nation-state accountability as essential to controlling

⁶⁴ Interview by FRONTLINE with Paul Cerjan, Vice-President, KBR Worldwide Military Affairs, Camp Victory, Iraq (Apr. 13, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/interviews/cerjan.html> (last visited Dec. 14, 2005).

⁶⁵ Interview by FRONTLINE with Steven Schooner, *supra* note 35.

⁶⁶ See Bergner, *supra* note 11, at 35 (discussing how the talents of some former members of Special Operations teams were “going unrecognized and unused when they left the military and entered civilian society.”).

⁶⁷ See Garmon, *supra* note 8, at 336-37.

⁶⁸ *Id.* at 336.

⁶⁹ *Id.*

⁷⁰ *Id.* at 337.

⁷¹ Zarate, *supra* note 11, at 116.

human rights violations and the type and quality of military activity throughout the world.”⁷²

The conflicts that private military contracting generates in the foreign policy context are but one example of the misgivings voiced by critics of the current contracting system. No definitive study has shown that the practice actually saves the military any money.⁷³ On the other hand, cost-effectiveness may not actually be the primary goal of contracting. As Schooner has maintained, “[s]ometimes the government pays more money for greater flexibility or greater capacity or better services that could be provided more quickly.”⁷⁴ Some evidence supports this conclusion; in particular, the U.S. General Accounting Office's (GAO) 2004 audit of the KBR LOGCAP contract, which revealed that \$88 million dollars of food never was served to military personnel.⁷⁵ Halliburton contended that it was obligated to provide a minimum number of meals.⁷⁶ Even assuming that no fraud was involved, the sheer waste involved indicates a lack of proper foresight during the negotiation of that contract.⁷⁷ Incidentally, a 2003 report prepared by the GAO did not even cite cost-effectiveness as a reason for outsourcing to private military contractors.⁷⁸ Nevertheless, the lines between economy, efficiency, and effectiveness oftentimes are blurry. As explained by retired Marine Colonel Thomas X. Hammes, “[w]artime is not about efficiency; it's about effectiveness. The American way of war is ‘We don't care what it costs. Let's get it done right and save lives.’ Contracting’s about the most efficient way rather than the

⁷² *Id.* at 78.

⁷³ See Interview by FRONTLINE with Steven Schooner, *supra* note 35; Deborah Avant, *Think Again: Mercenaries*, FOREIGN POL’Y, July/Aug. 2004, available at http://www.foreignpolicy.com/story/cms.php?story_id=2577&print=1.

⁷⁴ Interview by FRONTLINE with Steven Schooner, *supra* note 35.

⁷⁵ See FRONTLINE, *Who are the Contractors?*, *supra* note 5.

⁷⁶ *Id.*

⁷⁷ A settlement eventually was reached in April 2005 wherein the terms of the contract were adjusted for more flexibility. *Id.*

⁷⁸ See Avant, *supra* note 73.

most effective way.”⁷⁹

Another serious concern regarding the use of private military contractors is that contractors siphon off talent to the detriment of an already-strained uniformed service. For example, the British American Security Information Council reported in 2004 that just when the War on Terror increased government demand for their services, members of Special Forces units were flocking to private firms.⁸⁰ During the same year, senior enlisted advisers from the elite contingent testified to Congress that more and more troops were declining to stay past the twenty-year mark even though those individuals were still eligible to serve for an additional number of years.⁸¹ The advisers also noted that the Navy SEALs were experiencing similar difficulties; troops that otherwise were satisfied with their work had been leaving the service after the ten-year mark in pursuit of more money.⁸²

The benefits offered by private military companies are quite competitive: the salary for U.S. and Western European security workers averages \$400-700 per day.⁸³ Senior company personnel earn approximately \$20,000 per month, and individuals working in blue-collar positions can earn from \$80,000-100,000 per year.⁸⁴ In light of increasing attrition rates, the Special Forces have responded by offering \$150,000 cash re-enlistment bonuses.⁸⁵ Unlike full-time soldiers who remain deployed for extended periods of time, most military contractors only

⁷⁹ Interview by FRONTLINE with Marine Col. Thomas X. Hammes (Ret.) (Mar. 21, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/interviews/hammes.html> (last visited Dec. 14, 2005).

⁸⁰ David Isenberg, *A Fistful of Contractors: The Case for a Pragmatic Assessment of Private Military Companies in Iraq*, BRIT. AM. SECURITY INFO. COUNCIL (Sept. 2004), available at <http://www.basicint.org/pubs/Research/2004PMC.pdf>.

⁸¹ See Reid Mitenbuler, *Private Sector Draw Seen as Biggest SOCOM Personnel Issue*, 20 INSIDE THE PENTAGON 30, July 22, 2004.

⁸² *Id.*

⁸³ See Bergner, *supra* note 11, at 34. Employees from other countries, such as Chile and Fiji, make about \$40-150 a month. *Id.*

⁸⁴ See Schmitt, *supra* note 3, at 515.

⁸⁵ See FRONTLINE, *Frequently Asked Questions*, *supra* note 4. This unintended consequence perhaps further chips away at the notion that privatizing is somehow saving the government money.

work for three-month rotations followed by a one-month leave.⁸⁶ Because their obligations are purely contractual, those same contractors may halt operations or break their contracts if they decide that conditions have become too dangerous.⁸⁷ For example, after an ambush on April 9, 2004, KBR truckers refused to perform their jobs until security conditions improved.⁸⁸

Not only do private military companies compete with the government for talent, but the activities of contractors on the ground sometimes undermines the efforts of U.S. military forces. Against a backdrop of limited coordination between private and military forces, impropriety and misconduct by contractors create negative consequences for uniformed personnel. As Col. Hammes observes, security companies like Blackwater have an interest in protecting their clients at all costs, which results in its employees being as “aggressive and as muscular as possible as they need to be to fulfill what [the U.S. military] contracted them to do.”⁸⁹ When Blackwater was transporting Ambassador Bremer, it occasionally ran motorists off the road in effort to intimidate any would-be assailants, arguably “making enemies each time they went out.”⁹⁰ Even though the contractors may technically be private actors, “whether you like it or not, they represent [the U.S. military] – period, end of sentence. You may think the contractors are a separate entity, but to the local population, they're your hired guns.”⁹¹

In a more serious example, an interrogator from the CACI Corporation and two linguists from Titan Corporation, none of whom were supervised by contracting officers, were implicated in the Abu Ghraib prison scandal.⁹² The allegations of detainee abuse at the military installation incited a firestorm of controversy after a government report issued in early 2004 revealed that

⁸⁶ See Bergner, *supra* note 11, at 34.

⁸⁷ See FRONTLINE, *Frequently Asked Questions*, *supra* note 4.

⁸⁸ *Id.*

⁸⁹ Interview by FRONTLINE with Col. Thomas X. Hammes, *supra* note 79.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See Interview by FRONTLINE with Steven Schooner, *supra* note 35.

military police and intelligence personnel had subjected captured Iraqis to various forms of degrading treatment.⁹³ Although no charges were filed against the contractors, the vulnerability of U.S. military personnel to the imputation of the acts of the contractors that serve them is easy to fathom.⁹⁴

The concern for contractors' conduct raises a second inquiry: just who are these contract workers, anyway? Although some companies diligently evaluate their applicants, others have been known to hire candidates who may be unqualified or unfit.⁹⁵ As one contractor with Triple Canopy has indicated, "[a]t best you've got professionals doing their best in a chaotic and aggressive environment. At worst you've got cowboys running around almost unchecked, shooting at will and just plain O.T.F. (Out There Flappin')." ⁹⁶ That individual had previously worked with a colleague who, in addition to fleeing embezzlement charges in Massachusetts, once had been convicted of assault for almost shooting a friend's jaw off while playing Russian roulette.⁹⁷

One incident that allegedly took place on May 5, 2004 illustrates both the problem of conduct and the problem of contractor identity.⁹⁸ Fourteen security agents employed by Zapata Engineering reported being stopped by U.S. Marines in Fallujah and detained for three days.⁹⁹ The Marines accused the guards of firing on civilians and military forces, driving erratically, and possessing illegal arms.¹⁰⁰ The contractors, who contend that they had only fired warning shots,

⁹³ See Seymour H. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, available at http://www.newyorker.com/fact/content/?040510fa_fact.

⁹⁴ See Peter Spiegel, *No contractors facing Abu Ghraib abuse charges*, FIN. TIMES, Aug. 9, 2005, at 6, available at <http://www.corpwatch.org/article.php?id=12535>.

⁹⁵ See Bergner, *supra* note 11, at 50, 54.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Morning Edition: Confusion in Iraq over alleged incident between Marines and private contractors*, (Nat'l Public Radio broadcast, June 13, 2005) (transcript on file with the author).

⁹⁹ See Bergner, *supra* note 11, at 54, 57.

¹⁰⁰ *Id.*

eventually were released without charge.¹⁰¹ The story's twist is that the contractors also claim that the Marines beat them up and asked, "[h]ow does it feel to be a rich contractor now?"¹⁰²

In addition tension arising from the deployment of two different kinds of forces on the ground, private military contracting also may lead to the delegation of sensitive activities to unaccountable parties. Specifically, private contractors may be committing human rights violations without being held responsible for their actions, as illustrated by allegations that contractors were involved in prisoner abuse at Abu Ghraib.¹⁰³ To some degree individual contractors are accountable to the organizations with whom they contract, but "[t]he use of contractors to avoid governmental accountability is more worrisome. . . . Although the U.S. Congress approves the military budget, its access to information about contracts is often limited. The [P]resident can use this advantage to evade restrictions on U.S. actions, effectively limiting congressional checks on foreign policy."¹⁰⁴

Weak states that hire private military companies are particularly susceptible to undue influence from those firms, which in the past actually have won valuable concessions from certain African governments in exchange for their services.¹⁰⁵ Those concessions, which include oil facilities and diamond mines, enable military companies to exert economic control over national affairs as "a semi-sovereign force" long after their contracts have expired.¹⁰⁶ The fact that foreign policy decisions are being removed from the political arena and instead are being made by private individuals should concern the entire international community.

Despite the lucrative nature of the contracting business, the contractors themselves are

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See Spiegel, *supra* note 94.

¹⁰⁴ Avant, *supra* note 73.

¹⁰⁵ See Zarate, *supra* note 11, at 100.

¹⁰⁶ *Id.*

subject to an enormous amount of risk when they carry out their missions.¹⁰⁷ Private contractors make up the second-largest number of casualties in Iraq, second only to U.S. forces and outstripping the losses suffered by the next-largest military contingent, the British.¹⁰⁸ As of November 13, 2005, the Brookings Institution placed the contractor death toll at 280, counting back from August 2003 and leaving out an additional forty-four contractors whose deaths could not be traced to a specific month.¹⁰⁹ By contrast, ninety-seven British troops have died since the invasion in March 2003.¹¹⁰ Because contractors are not part of regular military forces, their death tolls often are ignored, thus “artificially deflat[ing] the human cost of . . . involvement in Iraq.”¹¹¹ The risks also are palpable elsewhere. In February 2003, Colombian guerillas captured three U.S. government contract employees when the contractors’ military intelligence plane crashed into rebel territory.¹¹² Because the legal status of the contractors is unclear, neither the U.S. nor the Colombian government has taken action, and the hostages remain in captivity to this day.¹¹³

One response to these concerns is that the market should be trusted to correct anomalies in the contracting process. Arguably, because private military contractors are registered corporations, the contractors in fact are subject to some degree of state oversight.¹¹⁴ Companies also have an incentive to act reasonably abroad because the contractors are dependent on the government for contracts, with most being repeat players.¹¹⁵ In essence, the market should weed out those contractors that habitually engage in misconduct and undermine the goals of the U.S.

¹⁰⁷ See Schmitt, *supra* note 3, at 515.

¹⁰⁸ See O’Hanlon & Kamp, *supra* note 47, at 13.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 7.

¹¹¹ Interview by FRONTLINE with Steven Schooner, *supra* note 35.

¹¹² See Singer, *supra* note 38, at 525.

¹¹³ *Id.*

¹¹⁴ See Zarate, *supra* note 11, at 148.

¹¹⁵ *Id.*

government.¹¹⁶ Additionally, companies working for foreign clients can be valuable sources of intelligence for their home governments, as was the case when the South African military company Executive Outcomes provided information to the Mandela administration regarding activities in Sierra Leone and Angola.¹¹⁷

The question remains whether the activities of private military contractors simply carry out U.S. policy or in fact influence it. In 2001, ten prominent contracting firms expended over \$32 million on U.S. lobbying efforts and shelled out more than \$12 million in political campaign contributions.¹¹⁸ The leading donors were Halliburton and DynCorp, with the former spending 95 percent of its \$700,000 total on Republicans and the latter spending 72 percent of its \$500,000 on G.O.P. as well.¹¹⁹ More recently, Titan Corp. and CACI Corp., the two firms whose employees were implicated in the Abu Ghraib scandal, have been accused of lobbying senators into rejecting a proposed amendment to the 2005 defense authorization bill that would have banned private contractors from performing or translating detainee interrogations at U.S. military installations.¹²⁰

III. REGULATION OF PRIVATE MILITARY CONTRACTORS: PROBLEMS AND SOLUTIONS

While the litany of flaws in the private military contracting system makes a complete ban on military contracting appear to be the simplest solution, the current state of affairs indicates that the U.S. government simply is too dependent on civilian assistance,¹²¹ rendering any blanket

¹¹⁶ See Interview by FRONTLINE with Doug Brooks, *supra* note 63.

¹¹⁷ See Zarate, *supra* note 11, at 102.

¹¹⁸ See Isenberg, *supra* note 80, at 8.

¹¹⁹ *Id.*

¹²⁰ See Elaine M. Grossman, *Possible Interrogation Contractor Influence Cited in Senate Vote*, 20 INSIDE THE PENTAGON 26, June 26, 2004.

¹²¹ See generally U.S. GEN. ACCT. OFF., *MILITARY OPERATIONS: CONTRACTORS PROVIDE VITAL SERVICES TO DEPLOYED FORCES BUT ARE NOT ADEQUATELY ADDRESSED IN DOD PLANS* (June 2003) available at <http://www.gao.gov/new.items/d03695.pdf> (concluding that the military is dependent on civilian contractors for a broad range of services due to, among other reasons, a lack of adequate skills and training and mandatory limits on troop deployment in areas such as Bosnia and Kosovo).

prohibition on outsourcing impractical and unlikely.¹²² Rather, regulation of the contracting industry appears to be the most feasible alternative and one that has been vigorously supported by the contracting companies themselves, demonstrating the contractors' eagerness to strengthen their legitimacy and shed the stigma of mercenarism.¹²³ As revealed by the problems in Iraq, however, the current regulatory scheme has failed to properly coordinate civilian and military efforts on the ground, and doubts about accountability for contractor misconduct remain.¹²⁴ Accordingly, more robust measures that guarantee transparency and oversight are needed to fill in the remaining regulatory holes.

The ideal solution would involve a multinational effort that takes account of the inherently global character of military contracting. Several international conventions ban mercenary groups, but these documents do not cover most private military contractors like the ones currently working in Iraq. These existing agreements only apply to increasingly antiquated "classic soldier-of-fortune activities"¹²⁵ such as overthrowing a government or aiding a "colonial or racist" regime.¹²⁶

One popular proposal is the establishment of an international registration regime that not only determines the initial qualifications for registration but also allows for auditing of military firms to ensure their compliance with fair business practices and international military standards.¹²⁷ This "clearing for business" would perhaps be done by the U.N. Secretary General's Special Rapporteur on Mercenarism.¹²⁸ In the alternative, the British American

¹²² See Stinnett, *supra* note 12, at 219.

¹²³ See Bergner, *supra* note 11, at 54.

¹²⁴ See Nathan Hodge, 'Coordination,' Not 'Control' of Security Contractors in Iraq: Report, 227 DEF. DAILY 28, Aug. 12, 2005.

¹²⁵ See Isenberg, *supra* note 80, at 12.

¹²⁶ See Maj. Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1, 87-92 (2003).

¹²⁷ See Singer, *supra* note 38, at 545.

¹²⁸ *Id.* at 545-46.

Security Information Council recommends the extension of the International Court of Justice to contractor activities, the negotiation of a “Convention on the Use of Armed Non-Military Contractors by an Occupying Force,” and the creation of common standards through the harmonization of domestic laws.¹²⁹

Army lawyer Major Todd S. Milliard has combined several of these solutions into a proposed international convention dubbed “The International Convention to Prevent the Unlawful Transfer of Military Services to Foreign Armed Forces.”¹³⁰ The draft calls for the Office of the United Nations High Commissioner for Human Rights (OHCHR) to oversee all lawful military transfers and to issue minimal guidelines that each member state must enforce under domestic laws and regulations.¹³¹ Lawful military transfers include the transfer of training or direct assistance under an agreement between two states or between a receiving state and a military provider duly licensed in the sending state.¹³² The OHCHR also would maintain a database of licensed contractors, would receive a copy of all contracts and would immediately notify member states of any credible evidence concerning human rights violations committed by those states’ licensed military providers.¹³³ Under the proposed convention, member states that did not establish domestic measures to prosecute the unlawful transfer of military services would be subject to the jurisdiction of the International Criminal Court.¹³⁴

Unfortunately, perhaps, “the biggest obstacle to doing anything internationally is a lack of political will.”¹³⁵ Indeed, considering the current international political climate, it is unlikely

¹²⁹ See Isenberg, *supra* note 80, at 12.

¹³⁰ See generally Milliard, *supra* note 126, at 87-92 (discussing how the major anti-mercenary conventions are too narrow and politicized to apply to modern private military companies because of their enactment against the very specific backdrop of the African independence movement following World War II).

¹³¹ *Id.* at 91.

¹³² *Id.* at 90-91.

¹³³ *Id.*

¹³⁴ *Id.* at 90.

¹³⁵ Isenberg, *supra* note 80, at 12.

that a workable convention can be negotiated within a reasonable time frame, if ever. Consensus on even fairly routine matters of commercial law can take years to develop. The regulation of military contracting, an area where economically-advanced countries provide services to developing countries, would require many countries with diverging interests to come to a consensus. Such global unity appears far from achievable.

Because the United States and Great Britain are major exporters of military services, internal regulation ought to be the most effective solution. One significant loophole in U.S. law that must be closed involves the International Traffic in Arms Regulations (ITAR) implemented pursuant to the U.S. Arms Export Control Act, which licenses the export of arms and military services.¹³⁶ Although ITAR requires congressional approval of military contracts that exceed \$50 million, most contracts are negotiated for much less.¹³⁷ Furthermore, larger contracts can be broken up into smaller ones in order to evade the notice requirement.¹³⁸ One start-up company, Triple Canopy, managed to avoid jurisdiction under the Act altogether by getting permission from the Department of Defense to go straight to Iraq and salvage captured AK-47s rather than purchasing the weapons and shipping them from the United States.¹³⁹ Aside from that particular circumvention, the loopholes in ITAR should be relatively easy to close just by lowering the minimum amount required for approval and consolidating all related contracts for purposes of calculating the total contract value.

One area in need of regulation is contractor hiring, because private military contractors vary in the scope of background checks they conduct on potential employees. While many contractors are former military personnel that come into the private sector with years of

¹³⁶ See Singer, *supra* note 38, at 538-39.

¹³⁷ *Id.* at 539.

¹³⁸ *Id.*

¹³⁹ See Bergner, *supra* note 11, at 30.

experience, some firms concede that a substantial portion of their employees have no military training.¹⁴⁰ The lack of uniform criminal background checks or psychological profiling within the hiring practices of different companies is troubling from a human rights perspective. In order to prevent unqualified or unfit individuals from carrying out missions within war zones or other places experiencing war-like conditions, licensing requirements should include mandatory investigations of employees similar to those utilized in obtaining security clearances for certain government jobs.

When contractor misconduct occurs, an effective adjudication process should be available to punish those who commit human rights abuses in the host country. Interpretation of the Alien Tort Claims Act, which gives aliens the right to sue in U.S. federal court for human rights violations, has been expanded in the last two decades to cover more than just visiting diplomats who suffer violations on U.S. soil; the Act now covers activities in foreign countries as in the United States.¹⁴¹ Although these developments may allow U.S. courts to hold private military contractors liable for misconduct committed abroad, defendants nonetheless may prevail using a variety of tools at their disposal, including: *forum non conveniens*, lack of standing, failure to join indispensable parties, and a ten-year statute of limitations.¹⁴²

A more promising remedy comes in the form of the Military Extraterritorial Jurisdiction Act (MEJA), a 2000 law that gives U.S. federal courts jurisdiction over crimes committed by persons employed with or accompanying the armed forces abroad, including contractors with the

¹⁴⁰ See Schmitt, *supra* note 3, at 515.

¹⁴¹ See Stinnett, *supra* note 12, at 217. See also Garmon, *supra* note 8, at 339-40 (*discussing* Filartiga v. Pena Irala, 630 F.3d 876 (2d Cir. 1980) (upholding federal jurisdiction over claims of torture that allegedly occurred in Paraguay); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999) (holding Ford liable for using slave labor during World War II)).

¹⁴² See Stinnett, *supra* note 12, at 221.

Department of Defense (DOD).¹⁴³ However, as originally passed, the MEJA was narrow in its sole reference to the DOD. Contractors affiliated with other agencies, such as the personnel working at Abu Ghraib under contract with the Central Intelligence Agency (CIA) and the Department of the Interior, were not covered under MEJA.¹⁴⁴ In the wake of the Abu Ghraib scandal, Congress hastily amended the MEJA to extend jurisdiction over workers connected with other federal agencies and those contracting with “any provisional authority.”¹⁴⁵ These legislative efforts represent a positive step towards ensuring contractor accountability, but one significant loophole still remains. The MEJA does not account for persons who contract with foreign governments, a problematic omission considering that coalition forces have handed over sovereignty to the Iraqis while the march of reconstruction will continue for years to come.¹⁴⁶ Unfortunately, no legislative history exists to explain the language of the amendment.¹⁴⁷

Although legal accountability is necessary to address misconduct and impropriety by private military contractors, adjudication only occurs when abuse already has happened. Authorities therefore should take a preventative approach to ensure that contractors who unofficially represent the U.S. abroad comport with internationally accepted standards of behavior. A serious reassessment of the U.S. military’s outsourcing policies is needed to identify the tasks that can and cannot be delegated to civilians. In addition to strengthening the criteria allowing for U.S. security companies to work abroad, sensitive tasks should be performed only by U. S. military personnel. In particular, the use of private contractors in interrogation violates an Army policy that requires government employees to carry out functions that implicate

¹⁴³ Maj. Glenn R. Schmitt, *Amending the Military Extraterritorial Jurisdiction Act (MEJA) of 2000: Rushing to Close an Unforeseen Loophole*, 2005 ARMY LAW. 41, 41-42 (2005).

¹⁴⁴ *Id.* at 42.

¹⁴⁵ *Id.* at 43.

¹⁴⁶ *Id.* at 45-46.

¹⁴⁷ *Id.* at 44.

national security concerns.¹⁴⁸ Because the commission of human rights violations not only contravenes basic moral standards but may also undermine counter-insurgency efforts, the use of contractors should be limited to situations where the government truly is dependent on civilian expertise or to “mundane, repetitive tasks that are clearly defined with a legal structure.”¹⁴⁹

CONCLUSION

Private military contracting has become more common in recent decades due to a confluence of economic, political and social factors. The current state of the American armed forces indicates that civilians will continue to play a large role in carrying out the U.S. military’s missions in the years to come. However, a lack of coordination and effective regulation will continue to pose problems for the military as more and more private contractors fulfill roles previously performed by the United States military. This delegation need not pose a significant problem if stricter requirements in licensing and accountability are instituted. A multinational effort to regulate the activities of private military contractors is ideal, but the political climate probably will deter any timely, meaningful consensus on the matter. The United States therefore must enact and enforce the necessary measures. Furthermore, sensitive tasks that implicate issues of national security should be performed solely by trained U.S. military personnel. These proposals will ensure that civilians assisting the military will be held responsible for deviations from the basic standards that their military counterparts are obliged to uphold.

¹⁴⁸ See Isenberg, *supra* note 80, at 54.

¹⁴⁹ Interview by FRONTLINE with Col. Thomas X. Hammes, *supra* note 79.