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## Rethinking Private Warfare

Daphné Richemond-Barak\*

\*Radzyner School of Law, IDC Herzliya, [daphne.barak@gmail.com](mailto:daphne.barak@gmail.com)

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# Rethinking Private Warfare\*

Daphné Richemond-Barak

## Abstract

Waging war for money has been frowned upon since the Peace of Westphalia and the rise of the modern nation-state. The stigma associated with private warfare translates, in legal terms, into a prohibition on mercenary activity and denying mercenaries the protection afforded to regular combatants (in particular, prisoner of war status). Noting the apparent similarities between mercenaries and private military contractors, some have sought to extend to the latter the restrictive regime applicable to the former. But the resemblance between these two types of actors should not imply that private warfare, in its modern form, is condemnable outright. This Article argues that an inclusive approach to military outsourcing—drawing upon historical, legal and moral perspectives—is necessary to contend with the challenges raised by the growth of the private military industry. I examine the connection between history (highlighting the shared roots of private military contractors and mercenaries), morality (through which the stigma against private warfare developed), and law (the formal vehicle of such stigma), to show that private warfare deserves a more nuanced and pragmatic treatment under international law.

**KEYWORDS:** private warfare, military outsourcing, history, morality, law

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\*Daphné Richemond-Barak, Radzyner School of Law, IDC Herzliya.

## INTRODUCTION

This Article argues for a broad analytical approach to military outsourcing, informed by historical, legal and moral perspectives on this growing phenomenon. Most of the existing literature on private warfare focuses on one of these aspects—historical, legal *or* moral<sup>1</sup>—an approach that I argue is incomplete because it does not take into account other, equally important, considerations.

Analyzing military outsourcing exclusively from a legal perspective ignores the essential role played by *moral considerations* in outlawing private violence and the historical evolution of state control over violence. It also ignores the importance moral considerations have played in the development of international humanitarian law, which regulates the conduct of states (and, albeit to a much more limited extent, nonstates) in time of war.<sup>2</sup> As a body of law, international humanitarian law seeks a balance between two competing interests: military necessity and humanity. Not discussing morality would make do of the latter part of the equation.

The role played by considerations of humanity in time of war has been rationalized by the morality of war tradition<sup>3</sup>—which embodies the attempt

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<sup>1</sup> While Peter Singer published, without a doubt, the most thorough survey of the private military industry to date, presenting the issues arising out military outsourcing (including, to some extent, the moral issues), and contributing to the raising awareness about this issue, his book does not (and does not intend to) provide a thorough analysis of the legal issues (PETER SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2003)). As most legal scholars, Emanuela-Chiara Gillard envisages (albeit in great and impressive detail) the legal aspects alone (Emanuela-Chiara Gillard, *Business Goes to War: Private Military/Security Companies and International Humanitarian Law*, 88 INT'L REV. RED CROSS 863 (2006)); and morality of war scholars have yet to publish on this topic specifically. Even Asa Kasher's piece on *Interface Ethics*, while fundamental, could not, in the limited space allotted in an edited book, thoroughly address all moral, legal and historical aspects (Asa Kasher, *Interface Ethics: Military Forces and Private Military Companies*, in PRIVATE MILITARY AND SECURITY COMPANIES, ETHICS, POLICIES AND CIVIL-MILITARY RELATIONS 235 (Andrew Alexandra, Deane-Peter Baker, & Marina Caparini eds., 2008)). The only exception perhaps is Sarah Percy's book (SARAH PERCY, *MERCENARIES: THE HISTORY OF A NORM IN INTERNATIONAL RELATIONS* (2007)), which does address all three aspects—but with an intended focus on mercenaries.

<sup>2</sup> George Wright, *Noncombatant Immunity: A Case Study in the Relation Between International Law and Morality*, 67 NOTRE DAME L. REV. 335, 339 (1991).

<sup>3</sup> The morality of war tradition has a lot in common with just war theory—although the two are distinct. Both explain and rationalize the fundamental rules applicable in war time. However, the morality of war tradition does not rely exclusively on just war theory in conducting such rationalization. To put it bluntly, there is more to the moral tradition than just war theory. In some cases, the two may overlap: for example, Michael Walzer, a just war scholar, is also a prevailing scholar of the morality of war tradition. But others, like Clausewitz and Kant, debate the morality of war without basing their arguments on just war theory (See IMMANUEL KANT, *PERPETUAL*

by philosophers, jurists and political scientists to define “a variety of rules and principles that inform and control thinking about the morally justifiable nature and limits of warfare.”<sup>4</sup> These scholars contend that morality, understood broadly as encompassing values reaching beyond the law, ought to inform the content of the law.<sup>5</sup> But the relationship between morality and law is a complex one: just as the law does not always succeed in articulating the moral considerations at the heart of the norms,<sup>6</sup> morality cannot always be translated into legal terms.<sup>7</sup> Because morality has played such an important role in the development of international humanitarian law and because, at times, such law fails to reflect considerations of morality, morality must be taken into account when contending with new developments in warfare. The moral analysis undertaken in this Article addresses the question of whether private warfare is immoral and examines the moral implications of regulation.

The *historical analysis* is important to understand the context in which new forms of private warfare developed. Yet, examining military outsourcing exclusively from a historical perspective tends to overemphasize the similarities between mercenaries and private military contractors—ignoring modern features that set these actors apart. The historical analysis undertaken in this Article surveys the evolution of state control over violence and highlights the private military industry’s distinctive features.

Finally, viewing military outsourcing exclusively through a moral prism fails to acknowledge that legal norms have been adopted to give expression—albeit

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PEACE (1795); and CARL VON CLAUSEWITZ, *ON THE ART OF WAR* (1832)). They can be counted as morality of war scholars even though their theories are not grounded, strictly speaking, in just war theory. This should not be interpreted, however, as denying or minimizing the role of just war theory in the morality of war tradition. In particular, the just war theory played a significant role in crystallizing some of the obligations weighing on warring parties. But with the move from divine law to natural law in the sixteenth and seventeenth centuries, the laws of war moved away from just war theory. From that point on, the morality of war tradition could no longer be assimilated to just war theory. (See also JUDITH GAIL GARDAM, *NON-COMBATANT IMMUNITY AS A NORM OF INTERNATIONAL HUMANITARIAN LAW* 10 (1993)).

<sup>4</sup> See David Kinsella & Craig Carr, *Introduction*, in *THE MORALITY OF WAR: A READER* 3 (David Kinsella & Craig Carr eds., 2007); see also MICHAEL WALZER, *JUST AND UNJUST WARS* 15 (2006).

<sup>5</sup> WALZER, *supra* note 4, at 75 (noting that the “legalist paradigm” does not suffice to account for complex judgments made in time of war).

<sup>6</sup> Thomas Nagel, *War and Massacre*, 1 *PHIL. & PUB. AFF.* 123, 140 (1972) (“There is ... a moral basis for the rules of war, even though the conventions now officially in force are far from giving it perfect expression.”)

<sup>7</sup> See, e.g., Nagel, *supra* note 6, at 20 (“in war we may often be justified in killing people who do not deserve to die, and unjustified in killing people who do deserve to die, if anyone does.”); and Wright, *supra* note 2, at 361.

sometimes imperfectly—to moral considerations. The *legal analysis* undertaken in this Article serves to draw two sets of conclusions. First, I show that law has long served as the vehicle of the stigma against private warfare. Second, I argue that law constitutes a promising tool, albeit not the only one, to improve the moral and legal framework applicable to military outsourcing. Especially when infused with elements of morality, law has the potential to ensure that the delegation of the power to wage war to private entities is done in a morally and legally satisfactory manner.

Only an inclusive approach—drawing on insights gained from history, morality and law—can account for the complexity of the (modern) privatization of warfare. The inclusive approach advocated in this Article does not accept commonly held views such that private military companies are not legitimate, that regulation would have the effect of legitimating these actors, or that regulation should be avoided. Rather, it calls for a nuanced and pragmatic treatment of private warfare—one that acknowledges the growing role of military contractors while clarifying the moral and legal framework applicable.

Before I elaborate any further, I must define what is meant by military outsourcing. For the purpose of this Article, “military outsourcing” is defined as the hiring by a state of a company to provide military and/or security services, irrespective of how this company describes itself. This definition is borrowed from the *Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict* (Montreux Document)—the first international document seeking to regulate the conduct of private security and military companies operating in armed conflicts.<sup>8</sup> As noted in the Montreux Document, “military and security services” include, in particular, “armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.”<sup>9</sup> Private military contractors, i.e., individuals hired by a private military company, may perform these functions either on or away from the battlefield. As a result, both a contractor in Ohio who identifies targets

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<sup>8</sup> Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict, adopted on September 17, 2008 and *reprinted in* 13 J. CONFLICT SECURITY L. 451 (2008) (defining private military and security companies (PMSC) as “private business entities that provide military and/or security services, irrespective of how they describe themselves.”). For a discussion of the Montreux Document, see *infra* Part III (B).

<sup>9</sup> *Id.* Preface, ¶ 9.

in Afghanistan for attack by unmanned aerial drones and a contractor maintaining equipment on a U.S. military base in Iraq would qualify as military contractors.

## I. A HISTORICAL PERSPECTIVE

Taking a historical look at the evolution of state control over violence is instructive in many respects. First, the historical analysis sheds light on the relationship between mercenaries and private military contractors. It also demonstrates that state control over violence has evolved with time—from periods where the state exercised no control to periods where it allowed the exercise of private violence under a certain measure of control. Finally, the discussion below shows that this evolution has taken place progressively. The point is that the monopoly of the state over violence, which we have come to regard as sacrosanct, is the result of an evolution that has been neither linear nor immediate.

Private warfare is not, in and of itself, a new phenomenon. We know from the Bible and the earliest historical records that armed men have long been hired for pay or loot.<sup>10</sup> But the state has, over time, come to exercise more control over nonstate violence. The state began to exercise control over private violence at sea beginning in the 13<sup>th</sup> century. Key to this trend was the granting of “letters of marque” to private groups and individuals, authorizing them to attack foreign vessels.<sup>11</sup> Given the limited resources of nation-states in projecting force at sea, official endorsement of piracy was a creative means of supporting government objectives while mitigating attacks on one’s own naval assets. The first privateer commissions and letters of marque were issued by British monarchs in 1243 and 1295, respectively, and governed attacks on French shipping.<sup>12</sup> The terms of the letter of marque specified the type of ships that could be attacked, set forth modalities of the use of force, and established rules on the treatment of captives.<sup>13</sup>

The beneficiaries of letters of marque became known as privateers, defined as “vessels belonging to private owners, and sailing under a commission of war empowering the person to whom it is granted to carry on all forms of hostility

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<sup>10</sup> MICHAEL LEE LANNING, *MERCENARIES* 8 (2005).

<sup>11</sup> See Robert P. De Witte, *Let Privateers Marque Terrorism: A Proposal for a Reawakening*, 82 *IND. L.J.* 131, 135 (2007); JANICE E. THOMSON, *MERCENARIES, PIRATES, AND SOVEREIGNS* 26 (1996); J. Gregory Sidak, *The Quasi War Cases*, 28 *HARV. J.L. & PUB. POL’Y* 465, 468 (2005); and Patrick O. Gudridge, *Ely, Black, Grotius & Vattel*, 50 *U. MIAMI L. REV.* 81, 86 (1995).

<sup>12</sup> THOMSON, *supra* note 11, at 22-23.

<sup>13</sup> Matthew Gaul, *Regulating the New Privateers: Private Military Service Contracting and the Modern Marque and Reprisal*, 31 *LOY. L.A. L. REV.* 1489, 1501 (1998).

which are permissible at sea by the usages of war.”<sup>14</sup> The grant of a letter of marque protected privateers (also known as corsairs) from charges of piracy.<sup>15</sup> It afforded them quasi-official status and, therefore, legitimacy; without the letter of marque, pirates were regarded as bandits and offered no protection: “[T]he distinction between a privateer and a pirate is that the former acts under the authority of a state that accepts or is charged with responsibility for his acts, while the latter acts in his own interests and on his own authority.”<sup>16</sup> In other words, although corsairs and privateers were private individuals, the fact that they exercised violence with the state’s consent made them lawful participants in warfare. The practice of granting letters of marque symbolizes one of the first attempts by states to exercise official control over violence.

Mercenary activity, which had been common before the late Middle Ages among the relatively weak city-states of Europe, also declined as states began to realize the risks of delegating the right to use force to private actors.<sup>17</sup> The last major (and particularly violent) war fought by mercenaries on both sides of the battlefield was the Thirty Years’ War in the seventeenth century, which ended with the signing of the Peace of Westphalia in 1648. After that time, “[t]he mercenaries remaining were no longer independent and were generally hired out from one state to another in situations of tight control and even as part of an alliance.”<sup>18</sup>

The Peace of Westphalia marked the beginning of the process through which coercion turned into the state prerogative *par excellence*. Between 1648 and 1900, private violence, “which for three or four centuries was an international market commodity,” was “taken off the market.”<sup>19</sup> Whether it was through the abolition of privateering<sup>20</sup> or the tighter control exercised over mercenaries, “the process can

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<sup>14</sup> THOMSON, *supra* note 11, at 22.

<sup>15</sup> If initially letter of marque and privateering were distinct practices, with the former used in time of peace to allow individuals “to seek redress for depredations they suffered at the hands of foreigners on the high seas,” and the latter used in time of war, when states authorized individuals to attack enemy commerce and to keep some portion of what they captured as their pay, the distinction faded rapidly. The two practices were used equally in time of war and in time of peace by sovereigns eager to exercise some control over the violence affecting the high seas, and the two expressions are used here interchangeably. See THOMSON, *supra* note 11, at 22.

<sup>16</sup> THOMSON, *supra* note 11, at 22.

<sup>17</sup> PERCY, *supra* note 1, at 90.

<sup>18</sup> *Id.* at 91.

<sup>19</sup> THOMSON, *supra* note 11, at 19.

<sup>20</sup> *Id.* at 75-76. Privateering was definitively abolished in 1856 with the adoption of the Declaration of Paris. Although the U.S. was not a party to the Treaty of Paris, it issued a presidential declaration during the Spanish-American War of 1898 stating that it would abide by all the provisions of the Declaration of Paris and renounce privateering.

be seen as a series of stages in the evolution of state authority and control.”<sup>21</sup> By virtue of this process, which was accompanied by strong philosophical and political currents, the state became regarded as the sole legitimate holder of the authority to use force and, as noted above, private violence (state-sanctioned or not) began to disappear.

Since the 1990s, a shift back to private violence has occurred. While it may be premature to speak of a return to private violence on the scale of the 16th, 17th or 18th centuries, it is clear that a broader array of non-state actors—from contractors to transnational terrorist organizations to regional bodies—are actively involved on today’s battlefields, often with the state’s consent. This Article focuses on one aspect of this trend, namely, the use of private military contractors by states to provide security and military services in high-risk environments and armed conflicts.<sup>22</sup>

Though the new trend of outsourcing military functions to private companies began as early as the 1970s, the new breed of actors that emerged in the 1990s as “security” or “military” companies has grown exponentially since September 11, 2001 and with the outbreak of protracted Western military engagements in Afghanistan and Iraq.<sup>23</sup> More than just providing security, these companies are now assuming substantial roles alongside the military or even in its place. Not only do states increasingly rely on the companies’ services (in particular in Iraq and Afghanistan) but the range of the services offered by the companies has also expanded dramatically.<sup>24</sup> It seems that no task is too critical or sensitive for these companies to undertake.<sup>25</sup>

Stated most generally, private military companies provide services normally carried out by a national military force—ranging from truck driving<sup>26</sup> to training

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<sup>21</sup> *Id.* at 145.

<sup>22</sup> Though states constitute the industry’s largest, most common clients, states are by no means the companies’ sole source of business. Private contractors also work—and increasingly so—for multinational corporations, and international and non-governmental organizations. See Andrew Bearpark & Sabrina Schulz, *The Future of the Market*, in FROM MERCENARIES TO MARKET 240-47 (Simon Chesterman & Chia Lehnardt eds., 2007); PRIVATE MILITARY COMPANIES, RESPONSE TO THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS, NINTH REPORT OF UK FOREIGN AFFAIRS COMMITTEE para. 56 (2002) (generally referred to as “Green Paper,” available at [www.fco.gov.uk/Files/kfile/mercenaries,O.pdf](http://www.fco.gov.uk/Files/kfile/mercenaries,O.pdf)); and Peter W. Singer, *Should Humanitarians Use Private Military Services?*, HUMAN. AFF. REV. 14-17 (2004).

<sup>23</sup> PERCY, *supra* note 1, at 206.

<sup>24</sup> Peter Singer, *Can’t Win With ‘Em, Can’t Go to War Without ‘Em: Private Military Contractors and Counterinsurgency*, Foreign Policy at Brookings, Policy Paper (2007).

<sup>25</sup> Simon Chesterman, *‘We Can’t Spy If We Can’t Buy!’: The Privatization of Intelligence and the Limits of Outsourcing ‘Inherently Governmental Functions’*, 19 EUR. J. INT’L L. 1055 (2008).

<sup>26</sup> See, e.g., DEBORAH AVANT, THE MARKET FOR FORCE 147 (2005) (reporting that KBR (Halliburton’s subsidiary) provides a wide range of services, including truck transportation, to U.S. troops stationed in the Middle East).

for specialist military, police and security operations,<sup>27</sup> communications support,<sup>28</sup> aerial surveillance,<sup>29</sup> intelligence,<sup>30</sup> training,<sup>31</sup> strategic planning,<sup>32</sup> armed personal security,<sup>33</sup> and conducting drone attacks.<sup>34</sup>

In spite of the involvement of contractors in almost all aspects of warfare, the ebb and flow of state control over violence suggests that the state could once again revert to a state-only view of coercion (i.e., eliminating private warfare, even when carried out with the state's consent).<sup>35</sup> This state-only view of coercion often rests on the notion that military services constitute "inherently governmental functions"—a concept of US administrative law dating back from the 1960s<sup>36</sup>—i.e.,

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<sup>27</sup> See, e.g., FRED ROSEN, *CONTRACT WARRIORS, HOW MERCENARIES CHANGED HISTORY AND THE WAR ON TERRORISM* 155 (2005) (reporting on Eriny's contract to recruit, train, equip, and manage Iraqi security guards to protect the national oil infrastructure of Iraq).

<sup>28</sup> See, e.g., Esther Schrader, *U.S. Companies Hired to Train Foreign Armies*, L.A. TIMES, Apr. 14, 2002, at 4; and Human Rights Council Res. 7/7, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, 7th Sess., ¶ 3, U.N. Doc. A/HRC/RES/7/7 (Jan. 9, 2008) [hereinafter Working Group on Mercenaries].

<sup>29</sup> See Adam Isacson, *The US Military in the War on Drugs*, in *DRUGS AND DEMOCRACY IN LATIN AMERICA: THE IMPACT OF US POLICY* 43 (Coletta A. Youngers & Eileen Rosin eds., 2005); and *U.S.-Hired Pilot Dies in Crash of Anti-Drug Flight*, L.A. TIMES, Mar. 19, 2002.

<sup>30</sup> See Chesterman, *supra* note 25.

<sup>31</sup> See, e.g., Vinnell Corporation's contract to train the Iraqi Army (Statement of Work, June 9, 2003, at 4 (Section 9.0), available at <http://projects.publicintegrity.org/docs/wow/Vinnell.pdf>) (while the contract may be different, this Statement of Work does provide valuable insight on the contractual terms). See also Borzou Daragahi, *Specialists in Suits Train New Iraqi Army*, SCOTSMAN, Sept. 30, 2003.

<sup>32</sup> See, e.g., LANNING, *supra* note 10, at 199; and SINGER, *supra* note 1, at 125-27 (noting the involvement of the American firm MPRI in the Balkans in the 1990s).

<sup>33</sup> See, e.g., ROBERT YOUNG PELTON, *LICENSED TO KILL: HIRED GUNS IN THE WAR ON TERROR* 110 (2006) (on Blackwater's contract to protect Paul Bremer, the former head of the Coalition Provisional Authority in Iraq). See also Jack Fairweather and Graham Tibbetts, *British Guard Killed in Iraq Ambush*, THE TELEGRAPH, Mar. 24, 2004.

<sup>34</sup> See Mary Ellen O'Connell, *Unlawful Killing with Combat Drones, A Case Study of Pakistan, 2004 -2009*, 6-71 (Notre Dame Law School, Legal Studies Research Paper No. 09-43 (2009)); and Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum, *Study on Targeted Killings*, ¶ 20, U.N.Doc.A/HRC/14/24/Add.6 (May 28, 2010).

<sup>35</sup> See Thráinn Eggertsson, *When the State Changes Its Mind: The Puzzle of Discontinuity in Government Control of Economic Activity*, in *PRIVATIZATION AT THE END OF THE CENTURY* 10 (Herber Giersch ed., 1997) (arguing that periods of privatization and periods of nationalization succeed one another).

<sup>36</sup> Bureau of the Budget, 87th Cong., Report to the President on Gov't Contracting for Research and Dev. (1962); and United States Office of Management and Budget, Circular A-76, May 29, 2003 [hereinafter Circular A-76].

functions “so intimately related to the public interest as to mandate performance by government personnel.”<sup>37</sup> Applied to military services, this notion could be used to restrict the ability of the government to delegate war-related activities to private actors. If so, the state-only view of coercion may once again prevail. The industry is thriving and no compelling evidence suggests that things will change radically in the near future. While being mindful of the importance of the notion of “inherently governmental functions” for the development of the private military industry going forward, this Article assumes that the industry is here to stay.<sup>38</sup>

To conclude, this historical overview suggests that private violence—exercised with or without state control—is not an entirely new phenomenon. While states authorized non-state violence between the thirteenth and nineteenth centuries—in the form of mercenaries, privateers or mercantile companies<sup>39</sup>—state control over violence grew between the eighteenth and twentieth centuries. Today, we are witnessing the scaling back of the state’s monopoly over force and a return to a form of state-sanctioned private violence. I suggest to focus our efforts on clarifying and enhancing the legal and moral framework in which these

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<sup>37</sup> Circular A-76, *supra* note 36, Attachment A, Section B(1)(a). Among those arguing for a return to more control of the government over sensitive military-like functions are Peter Singer, an expert of the private military, who views “armed assignments in the battlespace, including security of U.S. government officials, convoys and other valuable assets; as well as critical but unarmed roles that affect the mission’s success or failure, such as military interrogations, intelligence tasks and the movement of critical supplies like fuel or ammunition” as inherently governmental functions (see Peter Singer, *The Dark Truth About Blackwater*, Salon.com, Oct 2, 2007, at 10). Similarly, Simon Chesterman argues that intelligence should be regarded as inherently governmental and not delegated. In Chesterman’s view, the simplest way to contain privatization would be “to forbid certain activities from being delegated or outsourced to private actors at all.” (see Chesterman, *supra* note 25, at 1069).

<sup>38</sup> On this point, see Green Paper, *supra* note 22, at 5 (“The industry is essential, inevitable, and international. It is essential, because people need protecting in dangerous countries; it is inevitable, because governments cannot deploy protection in all theaters; and international, because the market and suppliers are global. Any proposal by the British Government needs to recognize both this industry’s positive and legitimate role globally, as well as the geographic extent of arenas in which PMSCs operate,” emphasizes in text); and Oral Statement by Mr. Alexander Ivanovich Nikitin, President of the Working Group on the use of mercenaries as a means of violating human rights and impeding the right of peoples to self-determination, Human Rights Council, 10<sup>th</sup> Session, 6 March 2009, at 5 (“[W]e should take note that even with the likely eventual withdrawal of international forces from countries such as Iraq or Afghanistan, the issue of the role and status of private military and security companies will remain. The issue may even increase in urgency as some functions formerly performed by such forces may be transferred to private military and security companies remaining in the region”) (emphasis included).

<sup>39</sup> THOMSON, *supra* note 11, at 21-32.

actors operate, and to abandon the abolitionist and unrealistic approach sometimes advocated.<sup>40</sup> The approach to private warfare, in other words, must be a pragmatic and nuanced one, reflecting the reality of today's battlefield.

## II. A MORAL PERSPECTIVE

In this section, I address some of the moral questions raised by military outsourcing. I begin by addressing the question of whether military outsourcing is immoral, which I answer in the negative. I then analyze the argument that regulating the private military industry would have the effect of legitimating it, which I similarly reject. Finally, I show why modern forms of military outsourcing are morally distinct from other forms of soldiering for money.

### A. IS MILITARY OUTSOURCING IMMORAL?

That a stigma attaches to mercenaries cannot be disputed. As far back as the 16<sup>th</sup> century, Machiavelli described mercenaries in the harshest of terms,<sup>41</sup> and similar criticism continues to be voiced against mercenaries and private military contractors alike.<sup>42</sup> Public opinion typically does not distinguish among these actors, which it

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<sup>40</sup> See, e.g., ABDEL-FATAU MUSAH & KAYODE FAYEMI, *MERCENARIES: AN AFRICAN SECURITY DILEMMA* (2000); and Anna Leander, *Global Ungovernance: Mercenaries, States and the Control Over Violence* (Copenhagen Peace Research Institute, Working Paper (2002)).

<sup>41</sup> MACHIAVELLI, *THE PRINCE* 55-6 (Bedford/St. Martin's, 2005) (1513) ("I say, therefore, that the arms with which a prince defends his state are either his own, or they are mercenaries, auxiliaries, or mixed. Mercenaries and auxiliaries are useless and dangerous; and if one holds his state based on these arms, he will stand neither firm nor safe; for they are disunited, ambitious, and without discipline, unfaithful, valiant before friends, cowardly before enemies; they have neither the fear of God nor fidelity to men, and destruction is deferred only so long as the attack is; for in peace one is robbed by them, and in war by the enemy. The fact is, they have no other attraction or reason for keeping the field than a trifle of stipend, which is not sufficient to make them willing to die for you. They are ready enough to be your soldiers whilst you do not make war, but if war comes they take themselves off or run from the foe; which I should have little trouble to prove, for the ruin of Italy has been caused by nothing else than by resting all her hopes for many years on mercenaries.") For an analysis of Machiavelli, see PERCY, *supra* note 1, at 76-77 (arguing that although Machiavelli's facts are inflated, "his argument still stands as an example of Renaissance humanist thinking about mercenaries.")

<sup>42</sup> For a moral criticism of mercenaries, see F. J. Hampson, *Mercenaries: Diagnosis Before Proscription*, 22 *NETHERLANDS Y.B. INT'L L.* 3, 11 (1991); C.M. Peter, *Mercenaries and International Humanitarian Law*, 24 *INDIAN J. INT'L L.* 373, 373 (1984) (writing that "[m]ercenaries are hated by millions" and referring to them as "brutal people," doing "frightful things"); Mike Hoover, *The Laws of War and The Angolan Trial of Mercenaries: Death to the Dogs of War*, 9 *CASE W. RES. J. INT'L L.* 323, 379 (1977) (the verdict provides insight into the moral stigma affecting mercenaries from time immemorial); and Lindsey Cameron, *Private Military Companies and Their Status Under*

regards as unfaithful, unprincipled, and unworthy of respect and legal protection.<sup>43</sup> When analyzing this antagonism in greater detail, one finds that the stigma stems from two main aspects of soldiering for money. The first aspect is that waging war *as a business* is considered immoral. The second aspect is that soldiering for money constitutes a form of intervention in other states' affairs. I analyze these two aspects in turn.

### 1. WAR AS A BUSINESS

The first moral objection focuses on the financial incentives of private soldiers. Not being part of a state's armed forces, private soldiers do not fight (at least not formally) in defense of a flag and as such lack the patriotism, idealism, and values of ordinary soldiers. Their main, if not sole, motivation is financial reward—so the argument goes.<sup>44</sup> This argument may have held true for classic soldiers-of-fortune such as the Italian mercenaries described by Machiavelli, who fought between the thirteenth and the sixteenth centuries, or the Greek mercenaries of the same era who were known to switch sides according to the best offer.<sup>45</sup> But when contending with modern forms of military outsourcing, a more subtle approach is in order.

Like mercenaries, private military contractors do not belong to a state's armed forces. Nevertheless, the argument that private soldiers do not fight for an appropriate cause<sup>46</sup> cannot be extended to private military contractors. The latter actually do identify with the party they have been hired to support and, in many cases, are actually hired by states to take part in warfare on their behalf. In fact, most of them have previously served in their own national armies.<sup>47</sup> They either leave the army to join the private sector during their military service or join the private sector following retirement from the army.<sup>48</sup> The reasons why soldiers and former soldiers “go private” are complex. Soldiers are attracted to the private sector because it “offers more money, a more comfortable life and more freedom.”<sup>49</sup>

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*International Humanitarian Law*, 88 INT'L REV. RED CROSS 573, 577 (2006) (“The word evokes a strong emotional reaction among many—be it romantic notions of loners exercising an age-old profession, or vigorous condemnation of immoral killers and profiteers of misery and war.”)

<sup>43</sup> For moral criticism of private military contractors, see PERCY, *supra* note 1, at 212, 218; *The Disappearing Dichotomy*, THE HUFFINGTON POST, Feb. 15, 2010; and David Isenberg, *Blackwater Uses the F(raud) Word*, THE HUFFINGTON POST, Feb. 13, 2010.

<sup>44</sup> *Id.*

<sup>45</sup> LANNING, *supra* note 10, at 7.

<sup>46</sup> PERCY, *supra* note 1, at 77-78.

<sup>47</sup> See, e.g., Deborah Haynes, *Private Guards Set for Bigger Role Despite Fury at Blackwater Deaths*, TIMESONLINE, Oct. 15, 2007.

<sup>48</sup> See SINGER, *supra* note 1, at 76.

<sup>49</sup> *Id.*

Take, for example, the case of Paul Palmer who shifted to the private sector after five years in the British military police and made his way to contracting work for Control Risk in Iraq where he made \$7000 a month.<sup>50</sup> Those who have more experience—10 to 15 years in high level army positions—are typically looking for a place where they can continue to use their skills following their retirement.<sup>51</sup> In this case, the move to the private sector may be driven by a sense of duty, patriotism, a thirst for adventure, the remuneration, or a combination of the above.<sup>52</sup> American contractors, in particular, are known to have joined private military companies working in Iraq for a variety of reasons, not limited to financial considerations—notably the opportunity to work alongside US forces and the pride of taking part in the reconstruction effort.<sup>53</sup>

Financial motivation was already viewed as a subjective (and thus unhelpful) criterion during the Diplomatic Conference leading up to the adoption of Additional Protocol I, which defines the meaning of “mercenary.”<sup>54</sup> The complex reality of today’s private military industry makes the assessment of a contractor’s motivation all the more difficult.<sup>55</sup> This reality calls into question, perhaps more than ever before, the argument that pecuniary reward is what makes private warfare inherently immoral.

Moreover, if pecuniary reward makes private warfare inherently immoral, the question arises whether what is immoral is to fight *in part* for money or *only* for money. This question has been examined by the Israeli Supreme Court in a

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<sup>50</sup> See Yves Eudes, *La Guerre en Privé*, LE MONDE, Apr.4, 2007.

<sup>51</sup> See, e.g., *Military for Hire*, ABC News, Sept. 18, 2007, available at <http://abcnews.go.com/WN/IraqCoverage/story?id=3619090&page=1>.

<sup>52</sup> See, e.g., *Private Contractor from Springs Killed*, COLORADO SPRINGS GAZETTE, Jan. 30, 2007.

<sup>53</sup> See, e.g., Jackie Spinner, *Amid Dangers, Contractors Find It Hard to Remain in Iraq*, WASHINGTON POST, Apr. 16, 2004; Andrew Jacobs & Simon Romero, *U.S. Workers, Lured by Money and Idealism, Face Iraqi Reality*, N.Y. TIMES, Apr. 14, 2004; and *Wounded in War, Civilians Face Care Battle at Home*, NPR, Jan. 11, 2010.

<sup>54</sup> Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Geneva (1974-1977) (CDDH/SR.41), Volume VI, Summary of the 41<sup>st</sup> Plenary Meeting, Thursday, May 26, 1977, at 156 ff. See also COMMENTARY ON ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 580-1 (Claude Pilloud, Jean S. Pictet, Yves Sandoz, Christophe Swinarski, & Bruno Zimmerman eds., 1987) [hereinafter Commentary to AP I]. See *infra* Part III (A) for a discussion of Article 47 of Additional Protocol I.

<sup>55</sup> As a practical matter, it is unclear who is competent to assess the nature of a contractor’s motivation. But I leave this question aside, and focus instead on a moral analysis of the financial motivation requirement.

landmark case prohibiting the management of prisons by private entities.<sup>56</sup> The decision, which analyzes the implications of the private entity's financial motives on the constitutionality of private prisons, is highly relevant to our discussion even though it does not deal directly with military outsourcing.

The relevance of the decision to this Article lies in the connection established by the Court between the monopoly of the State, on one hand, and the private actor's financial motives, on the other. The Court rejected the idea that a profit-making enterprise, motivated mainly even if not exclusively by commercial incentives, be entrusted with the authority to deprive individuals of their right to personal liberty and human dignity. The Court reasoned that the only entity competent to deny such liberty must do so in the realization of "some essential public interest."<sup>57</sup> Though the underlying rationale bears strong resemblance with the concept of "inherently governmental functions," the concept is not discussed in the decision. Rather, the Court explained that, in Israel,

the power to punish someone who has been convicted under the law and to imprison him in order that he may serve his sentence is, therefore, one of the most significant powers of the state, and under the law the body that is responsible for carrying out this function of the state is the Israel Prison Service. This power, as well as the powers of the other security services, is an expression of a broader principle of the system of government in Israel, according to which the state (...) has exclusive authority to resort to the use of organized force in general, and to enforce the criminal law in particular.<sup>58</sup>

This reasoning—namely that the state holds a monopoly on coercion in furtherance of the public interest—cannot be transposed to modern forms of military outsourcing for a number of reasons. First, it is unclear how the motivation of a soldier, in particular one who belongs to a professional military force, should be assessed. While state-operated prisons have no commercial purpose at all, ordinary soldiers may have financial incentives for taking part in warfare. In addition, the structure of private security and military companies and the nature of the industry provides for a number of safeguards which do not exist in the realm of prison management. Private military contractors are subject to "a clear executive hierarchy that includes board of directors and share-holdings"<sup>59</sup> and accountable

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<sup>56</sup> H CJ 2605/05 The Human Rights Division, The Academic Center for Law and Business v. The Minister of Finance [Nov. 19, 2009] (unpublished), an English translation is available at [http://elyon1.court.gov.il/files\\_eng/05/050/026/n39/05026050.n39.pdf](http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.pdf).

<sup>57</sup> *Id.* at para. 21.

<sup>58</sup> *Id.* at para. 25.

<sup>59</sup> SINGER, *supra* note 1, at 45.

to a system of corporate governance, with its built-in checks and balances.<sup>60</sup> As I note below with respect to self-regulation, private military contractors are also the subject of increasingly sophisticated self-regulatory mechanisms, which illustrate the industry's willingness to be regulated and bound by law - a feature absent from the prison industry.

A related objection to private warfare highlights the financial incentives private soldiers (and the companies that hired them) may have to perpetuate conflicts. Simply put, the assumption holds that the commercial incentives of private actors may result in unnecessarily prolonged conflicts. The assumption can hardly be verified empirically as it would require the isolation of contractor involvement as a variable influencing the duration of war. Nevertheless, it is important to note that in the common psyche, the assumption that private military contractors fuel conflicts forms an integral part of the stigma against private warfare.

## 2. A FORM OF INTERVENTION IN OTHER STATES' AFFAIRS

The second moral objection traditionally voiced against soldiering for money contends that it constitutes a form of intervention in other states' affairs: by taking an active part in conflicts in which their state of nationality has no reason to become involved, or in which it has chosen to remain neutral; the mercenary has traditionally been "perceived as intervening, whether he is motivated by ideological considerations or monetary gain."<sup>61</sup> According to this objection to private warfare, "[t]he essence of the problem is not his conduct or his motive but his very presence at the scene of conflict."<sup>62</sup>

As applied to modern forms of military outsourcing, the intervention rationale ignores that in a number of cases, private military contractors fight with the consent of their state of nationality. For example, American and British contractors working in Iraq—whose state of nationality is both a party to the conflict and the contractors' indirect employer—certainly cannot be treated as foreign fighters who intervene in a conflict to which they are not party.<sup>63</sup> Though the stigma against private warfare is deeply rooted in the non-intervention rationale, this rationale cannot justify treating modern forms of military outsourcing as immoral.

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<sup>60</sup> See also Deborah Avant, *Think Again: Mercenaries*, FOREIGN POLICY, July 1, 2004; Jeffrey Herbst, *The Regulation of Private Security Forces*, Paper prepared for South Africa Institute of International Affairs Conference (1998), at 14; and LANNING, *supra* note 10, at 231-34.

<sup>61</sup> See Hampson, *supra* note 42, at 15.

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

<sup>63</sup> The point I am making is that while in the past most hired soldiers were non-nationals, today most hired soldiers are nationals of a party to the conflict. In certain cases, contractors may still be of a nationality of a state not party to the conflict—as, for example, a Fijian contractor working in Iraq—but those cases are no longer the norm.

Why, then, would private warfare be immoral? Mindful of the extent to which modern practice challenges commonplace assumptions regarding private warfare, the philosopher Deane-Peter Baker seeks to draw insight from a comparison between mercenaries to prostitutes.<sup>64</sup> Baker asks whether there might be any similarities between “offering sex commercially on the one hand, and offering military services commercially on the other.”<sup>65</sup> He replies that

[j]ust as it might be argued that the only morally appropriate relationship for the exercise of sexual relations is that between a husband and wife, so the implied argument here is that the only morally appropriate relationship for the exercise of martial skills is that between the citizen and the nation of his citizenship.<sup>66</sup>

This brings us back to the question of the state’s monopoly over violence, examined above. As Baker puts it, “we must ponder whether the relationship between citizen and state is indeed the only appropriate one in service of which the warfighter can legitimately apply his deadly skills?”<sup>67</sup> The question applies equally to prison management—a question resolved by the Israeli Supreme Court by declaring that the state is indeed the only appropriate authority to make decisions affecting human dignity and freedom. The Court would likely agree that the relationship between the state and its citizen is “violated or disrupted”—to paraphrase Baker<sup>68</sup>—by the involvement of profit-seeking private actors. But Baker remains unconvinced that this makes private warfare inherently immoral, for two main reasons. First, he draws a comparison with private body guards whose actions, he remarks, are not regarded as unethical.<sup>69</sup> Moreover, even if that were true, Baker notes that it still would not explain why a state cannot employ its own citizens as private contractors.<sup>70</sup> For these reasons, Baker rejects the idea that the monopoly of the state on war is what makes private warfare inherently immoral and, ultimately, concludes that “there is nothing particular about their being mercenaries that makes them intrinsically bad.”<sup>71</sup>

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<sup>64</sup> Deane-Peter Baker, *Of ‘Mercenaries’ and Prostitutes: Can Private Warriors Be Ethical?*, in PRIVATE MILITARY AND SECURITY COMPANIES, ETHICS, POLICIES AND CIVIL-MILITARY RELATIONS, *supra* note 1, at 30.

<sup>65</sup> *Id.* at 38.

<sup>66</sup> *Id.*

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

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 39-40.

<sup>70</sup> *Id.* at 40.

<sup>71</sup> *Id.* at 38-40.

Overall, and no matter how prevalent in public consciousness, none of the moral objections to private warfare stand up to scrutiny—and, to conclude, I would agree with Baker that

[e]ven if soldiers-for-hire are not necessarily bad in themselves, the exercise of this trade might not result in bad consequences for the world. But if it turns out that there are ways of regulating the private military profession such that these private warriors may be employed in ways that are generally beneficial, then it seems to me there is then no further reason for African policy-makers to deny them a role in the management of armed conflict.

#### B. THE MORAL LEGITIMACY ARGUMENT

The argument has been made that regulating private military contractors would have the undesired effect of “elevating” them to higher moral grounds.<sup>72</sup> As noted above, private military contractors face moral criticism for not wearing the colors of any state, “doing it for the money,” and intervening in the affairs of other states.<sup>73</sup> Regulating private warfare, the argument holds, would have the effect of legitimating it.<sup>74</sup> As such, the regulation of this activity would be morally objectionable.

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<sup>72</sup> See, e.g., U.N. Econ. & Soc. Council [ECOSOC], *The Right of Peoples to Self-Determination and Its Application to Peoples Under Colonial Or Alien Domination Or Foreign Occupation*, ¶ 97, U.N. Doc. E/CN.4/2005/23 (Jan. 18, 2005) (“Certain experts raised concerns that the regulation of private military companies could lead to further legitimization of the trend towards private security.”); and Herbert Howe, *Global Order and the Privatization of Security*, 22 FLETCHER F. WORLD AFF. 1, 8 (1998) (“Governments may find it difficult to agree to international regulation because such action would confer legitimacy upon non-state military actors.”).

<sup>73</sup> See, e.g., ELKE KRAHMANN, *STATES, CITIZENS AND THE PRIVATISATION OF SECURITY* 47 (2010).

<sup>74</sup> See James Cockayne, *Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document*, 13 J. CONFLICT SECURITY L. 401, 418, 420 (2008) (reporting the initial reluctance of the ICRC and certain states to take part in the initiative leading up to the adoption of the Montreux Document. Cockayne notes that, in order to alleviate these concerns, it was emphasized that “the Swiss Initiative was not intended to ‘legitimize or endorse the industry in any way, but instead aimed to adopt a ‘humanitarian approach [which] aims to prevent or to reduce potentially adverse consequences’ of the use of PMSC services,” quoting SWISS FEDERAL DEPARTMENT OF FOREIGN AFFAIRS, *SWISS INITIATIVE IN COOPERATION WITH THE INTERNATIONAL COMMITTEE FOR THE RED CROSS TO PROMOTE RESPECT FOR INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW WITH REGARD TO PRIVATE MILITARY AND SECURITY COMPANIES OPERATING IN CONFLICT SITUATIONS: OUTLINE*, November 2007). Further evidence of the significance of the moral legitimacy critique can be found in the *Explanatory Comments to the Montreux Document*, at 41 available at [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/\\$FILE/ICRC\\_002\\_0996.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/$FILE/ICRC_002_0996.pdf) (devoting an entire paragraph to the question of whether the Montreux

Why is public opinion—and, by extension, states and international bodies—so wary of legitimating private warfare? Historically it has not always been so, as the doctrine of belligerent recognition allowed states to recognize certain warring non-state parties as belligerents and afford them combatant-like status. The doctrine was used even though it granted its beneficiaries a certain degree of legitimacy. The United States, for example, relied on belligerent recognition during the American Civil War. Under the doctrine of belligerent recognition, insurgents in a civil war who occupy part of the state territory and administer such territory, observe the laws of war, and act under responsible authority, can be afforded all the benefits and responsibilities of combatants under such laws even though they do not act on behalf of a state party to a conflict.<sup>75</sup> The benefits granted to the belligerents are balanced by the greater latitude granted to the state in the conduct of hostilities. Indeed, belligerency

relieve[d] an incumbent government from some potentially burdensome obligations: Whereas a state fighting rebellion or insurrection still bore responsibility for the actions of its rebellious or insurgent nationals, belligerents were, effectively, nationals of another state, and the government was no longer liable for their actions with respect to other states or their nationals.<sup>76</sup>

While belligerent recognition probably would not apply today for a number of reasons that go beyond the scope of this Article,<sup>77</sup> the mere existence

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Document legitimizes the activities of private military and security companies, answering the question in the negative, and noting that the Montreux Document “does not take a stance on the question of PMSC legitimacy. It does not encourage the use of PMSCs nor does it constitute a bar for states who want to outlaw PMSCs”) and in the views of the former Rapporteur of the UN Working Group on the Use of Mercenaries, who noted that the Montreux Document “legitimizes the services the industry provides.” See José Gómez del Prado, *Private Military and Security Companies and the UN Working Group on the Use of Mercenaries*, 13 J. CONFLICT & SECURITY L. 429, 444 (2009).

<sup>75</sup> See Lieutenant Colonel Yair M. Lootsteen, *The Concept of Belligerency in International Law*, 166 MIL. L. REV. 109 (2000); and Eyal Benvenisti, *The Origins of the Concept of Belligerent Occupation*, 26 L. & HIST. REV. 621 (2008).

<sup>76</sup> Kenneth Heath, *Could We Have Armed the Kosovo Liberation Army? The New Norms Governing Intervention In Civil War*, 4 UCLA J. INT’L L. & FOREIGN AFF. 251, 268 (1999).

<sup>77</sup> Considering that Common Article 3 to the Geneva Conventions (Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 28 and Additional Protocol II of 1977 (Protocol Additional to the Geneva Conventions of August 12 1949 and relating to the Protection of Victims

of this doctrine begs the question—where does the fear of legitimizing non-state belligerents come from, and is it justified?<sup>78</sup>

The fear of legitimating non-state belligerents arises with particular acuteness in non-international armed conflicts. As a local insurgency unfolds, a government often has to determine whether the insurgency has risen to the level of a non-international armed conflict. If the state makes this determination, the application of international humanitarian law will afford it greater latitude to defend itself. Yet, governments are often reluctant to make a determination which can be perceived as conferring legitimacy upon the insurgents:

[t]o compel the Government of a State in the throes of internal conflict to apply to such a conflict the whole of the provisions of a Convention expressly concluded to cover the case of war would mean giving its enemies, who might be no more than a handful of rebels or common brigands, the status of belligerents, and possibly even a certain degree of moral recognition.<sup>79</sup>

Similarly, it is feared that regulating private warfare would confer moral legitimacy upon private military contractors and, in turn, further accelerate the outsourcing trend. But regulation and growth do not necessarily go hand in hand. In fact, the experience of mercenaries shows quite the opposite: “[e]ven where international law clearly afforded no legitimacy (mercenaries or international terrorist organizations, for example) such actors emerged, and in some cases flourished.”<sup>80</sup> Nevertheless, legitimacy remains a matter of extreme sensitivity<sup>81</sup>

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of Non-International Armed Conflicts (Protocol II) June 8, 1977, 1125 U.N.T.S 609) (which, like belligerent recognition, regulates non-international armed conflicts) makes no mention of such doctrine, it has been argued that the doctrine no longer exists. Moreover, the doctrine has not been invoked since the Spanish Civil War of 1936, and may simply have fallen into desuetude. *See* Heath, *supra* note 76, at 268; and Lootsteen, *supra* note 75, at 110.

<sup>78</sup> For a discussion of legitimacy with respect to yet another type of non-state actors, see ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* 294 (2006) (arguing that the Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action, whereby non-state actors undertake not to use landmines, “endow[s] the non-state actor with some sort of enhanced moral status.”)

<sup>79</sup> COMMENTARY: GENEVA CONVENTION III RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 32 (Jean Pictet ed., 1960).

<sup>80</sup> Christopher Mandernach, *Warriors Without Law: Embracing a Spectrum of Status for Military Actors*, 7 *APPALACHIAN J.L.* 137, 177 (2007).

<sup>81</sup> *See* James Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 *INT’L REV. RED CROSS* 313, 348 (2003) (“[A] major reservation in the development of international humanitarian law relating to internal armed conflicts has been the recognition of belligerency. That recognition elevates a rebel movement to the status of a State and demands that other States remain neutral between the

and constitutes today one of the main objections to the regulation of private warfare.<sup>82</sup>

Domestic law, too, negates these basic assumptions regarding the effect of regulation. Consider legislation regulating domestic violence or the electronic download of music and software from the Internet. Regulating such offenses does not legitimate, let alone encourage, the relevant criminal conduct. Just as regulating a certain behavior in the domestic realm does not morally endorse such behavior; regulating private military contractors would neither enhance the legitimacy of these actors nor encourage their use.

Setting aside speculation over how regulation would impact the growth of the private military industry, I argue that we should adopt a pragmatic approach to military outsourcing and seek regulation. Military outsourcing grew as a response to the need of governments to hire manpower “à la carte,” spend less money on training military personnel to perform highly technical tasks, and avoid maintaining large armies. Absent a drastic change in modern warfare, an absolute ban on the industry or a resurgence of the concept of “inherently governmental functions,” states and others will continue to turn to the private sector. In light of this reality, military contractors must be brought clearly under the ambit of the law—even at the price of enhancing their legitimacy (which I argue would not be the case in any event).<sup>83</sup>

More troublesome than the risk of legitimating such actors, I find the use of military contractors as substitutes for ordinary soldiers—without matching rights and obligations—morally unsustainable. Since they are used as substitutes for soldiers, contractors should enjoy similar rights and a measure of state support in the event that they are injured, killed or captured.<sup>84</sup> The moral and ethical regimes

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warring parties ... [T]he fear that application of the Geneva Conventions might lead to belligerent recognition is a matter of extreme political sensitivity.”); and GEOFFREY BEST, *WAR AND LAW SINCE 1945*, at 365 (1994) (“Touchy about their sovereignty and nervous about security, they feel such acknowledgment to be *infra dig* and moreover they know that in practice (despite the Article’s closing sentence’s assurance to the contrary) it raises the status and reputation of their opponents.”)

<sup>82</sup> See *supra* note 72.

<sup>83</sup> *Id.* at 177 (“Now, as then, the law must recognize reality; it is far preferable to legitimize actors, bring them within the law, and hold them accountable than to leave them illegitimate, outside the law, and unaccountable.”)

<sup>84</sup> There are numerous available examples of cases in which contractors were captured by enemy forces but did not receive the attention or support they would have expected as soldiers. For example, in 2003, while performing aerial surveillance of cocaine fields in Colombia, three employees of California Microwave Systems, a Northrop Grumman subsidiary contracted by the U.S. government, were captured by FARC guerillas, while two additional colleagues were executed. The captured contractors were held for over five years in the jungle before being freed along with

to which “private soldiers” are subject should mirror that of ordinary soldiers. Consideration must be given, for example, to the discrepancies existing between the constraining military ethics weighing on the members of the armed forces and the more relaxed organizational ethics of a private military company.<sup>85</sup>

Another issue requiring immediate attention is whether private military companies performing highly sensitive tasks on behalf of the government must bear responsibilities similar to those of governmental agencies. Should the companies (and/or their employees) have a moral or legal duty to act in accordance with governmental policies? To what extent should the duties of these actors mirror those of state agents?

The relevant question, therefore, is not whether regulating the industry would legitimate it. It is about what can be done to ensure that, to the extent they are being used (and they are), military contractors are protected and held accountable when needed.<sup>86</sup> Regulation would create incentives (both collective and individual) for these actors to act in accordance with the law and ensure oversight of their activities.

In sum, the moral legitimacy critique carries little weight. It stems from the unfounded fear of legitimating private warfare—even though it has yet to be proven that regulation would lead to an increase in the use of private military contractors. Instead of speculating on the effect of regulation on the use of private military contractors, the discourse should focus on ways to improve the moral (and legal) environment in which these actors operate.

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high-profile hostage Ingrid Betancourt in 2008. The fact that the three were contractors, as opposed to soldiers, is likely the reason that their case aroused such little attention in the press and public opinion. Had they been U.S. troops—for whom they in effect acted as substitutes—they would have been entitled to prisoner of war status and certainly a greater degree of support from the US government, whose efforts on their behalf were universally criticized as inadequate. See Heather Carney, *Prosecuting the Lawless: Human Rights Abuses and Private Military Firms*, 74 *GEO. WASH. L. REV.* 317, 318 (2006); Major Charlotte M. Liegl-Paul, *Civilian Prisoners of War: A Proposed Citizen Code of Conduct*, 182 *MIL. L. REV.* 106 (2004) (pointing to the lack of rules applicable to civilian contractors when captured and the consequences of this situation on the principle of distinction); and Press Release, United States Department of Justice, Senior Member of FARC Terrorist Organization Indicted for His Role in Hostage-Taking of Three Americans Recently Rescued in Colombia, Aug. 4, 2008, available at <http://www.usdoj.gov/opa/pr/2008/August/08-nsd-684.html>.

<sup>85</sup> On this point, see Kasher, *supra* note 1.

<sup>86</sup> See also Howe, *supra* note 72, at 8 (“Rather than engaging in futile attempts at legally eliminating mercenary behavior or ignoring this growing phenomenon, the world community should channel these companies’ capabilities into assisting global security.”)

C. MORALLY DISTINCT

A fundamental difference between mercenaries and private military contractors—on the moral plane—is that the latter have made very significant efforts to be brought within the law.<sup>87</sup> The important players in the industry have moved to increase the accountability of individual contractors through self-regulation<sup>88</sup> and membership in industry associations.<sup>89</sup> In addition to making their activities public and more transparent, private military companies have also called for more regulation of the industry.<sup>90</sup>

A comprehensive description and analysis of the self-regulatory schemes developed by the industry goes beyond the scope of this Article.<sup>91</sup> But in the context of a moral analysis of modern forms of private warfare, these regulatory schemes must be mentioned as they set apart today's actors from mercenaries and other soldiers of fortune. The broad extent to which private military companies have voluntarily subjected themselves to ethical and normative standards demonstrates a concern for morality and law unknown to mercenaries.

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<sup>87</sup> Doug Brooks, *Messiahs or Mercenaries? The Future of International Private Military Services*, 7 INT'L PEACEKEEPING 129, 131 (2000) ("Freelance mercenaries are individuals that generally exhibit few of the inhibitions that influence companies to maintain a degree of ethics in their operations."); and PERCY, *supra* note 1, at 69.

<sup>88</sup> See, e.g., Montreux Document, *supra* note 8; The Voluntary Principles on Security and Human Rights, available at [http://www.voluntaryprinciples.org/files/voluntary\\_principles.pdf](http://www.voluntaryprinciples.org/files/voluntary_principles.pdf); Triple Canopy's Code of Ethics, available at <http://www.triplecanopy.com/triplecanopy/en/assets/pdf/triple-canopy-code-of-conduct-001.pdf>; IPOA Code of Conduct (Version 12), available at <http://www.ipoaworld.org/eng/codeofconduct/87-codecodeofconductv12enghtml.html>; and Aegis' Code of Conduct, June 2010, and Aegis' Code of Business Conduct, July 2009, available at <http://www.aegisworld.com/index.php/codeofconduct>.

<sup>89</sup> There are three main industry associations, whose aim is to enhance transparency and accountability in the industry: the International Peace Operations Association, the British Association of Private Security Companies, and the Private Security Company Association of Iraq. For more information, see Surabhi Ranganathan, *Between Complicity and Irrelevance? Industry Associations and the Challenge of Regulating Private Security Contractors*, 141 GEO. J. INT'L L. 303 (2010).

<sup>90</sup> See, e.g., *Regulation—An ArmorGroup Perspective* (2004) (on file with the author); <http://www.aegisworld.com/index.php/about-us/regulation-ethics-and-sector-reform> (where Aegis welcomes the adoption of the Montreux Document and notes that it "believes that the sector will only benefit from improved regulation and accountability under a proper regulated system."); and the British Association of Private Security Companies' website, <http://www.bapsc.org.uk> (declaring that one of its goals is to raise the standards of operation of private security companies and promote self-regulation).

<sup>91</sup> This analysis is conducted in Daphné Richemond-Barak, *Regulating War: A Taxonomy in Global Administrative Law*, EUR. J. INT'L L. (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1723036](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1723036).

To conclude the moral analysis, I call for a rethinking of the (im)morality of private warfare. In spite of intuitive and other arguments to the contrary, there is nothing inherently immoral about waging war for money. I have dismissed the argument that regulating the industry would legitimate it or lead to its growth. On the contrary, I believe that appropriate regulation constitutes an essential safeguard against potential abuses and a way to allow the private sector to most appropriately serve the needs of states.

### III. A LEGAL PERSPECTIVE

I have addressed the question of whether military outsourcing is inherently immoral, and answered it in the negative. But is military outsourcing illegal? Are private soldiers recognized by international law as lawful participants in war? Although mercenaries were outlawed by the international community, and private military contractors were initially viewed through the prism of mercenaries, the consensus today is that private military contractors are *not* subject to the restrictive regime applicable to mercenaries. I do not elaborate here on domestic legislation and focus instead on international instruments illustrating this trend. For our purposes, the relevant international instruments are international treaties and conventions, as well as certain informal means of regulation.

I begin with the evolution of the treatment of mercenary activity by the United Nations. I show that while the UN played a significant role in outlawing mercenaries, it has recently rallied itself to the position that private military contractors are distinct legal entities to which the regime applicable to mercenaries does not apply. Today, this reflects the position of most countries—and it deserves to be analyzed as such.

#### A. OUTLAWING MERCENARIES: LAW AS THE VEHICLE OF THE MORAL STIGMA AGAINST PRIVATE WARFARE

The law against mercenary activity echoes the moral objections, rooted in the financial motivation of private soldiers and the non-intervention rationale that is analyzed above.

The United Nations first outlawed mercenary activity in a series of General Assembly resolutions in the 1970s. Such resolutions, though not binding, played a fundamental role in paving the way for the later adoption of binding norms prohibiting mercenary activity.<sup>92</sup> In those days, the UN's position rested on the

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<sup>92</sup> See G.A. Res. 34/140, U.N. Doc. A/RES/34/140 (1979) (Drafting of an international convention against activities of mercenaries); G.A. Res. 42/96, U.N. Doc. A/RES/42-96 (1987) (Use

non-intervention rationale. For example, Resolution 2625 (1970) declared that “every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, *for incursion into the territory of another State*,”<sup>93</sup> and Resolution 36/103 (1981) stressed the need for “any threat of aggression, any recruitment, any use of armed bands, *in particular mercenaries*, against sovereign States to be completely ended.”<sup>94</sup> While mercenary activity was not viewed as the only illegitimate form of intervention, it was explicitly condemned as such.

By the latter part of the 1970s, the General Assembly broadened its criticism by condemning mercenary activity as “contrary to fundamental principles of international law, such as interference in the internal affairs of States, territorial integrity and independence.”<sup>95</sup> In the same vein, in 1977 and again in 1982, the Security Council condemned “all forms of external interference in internal affairs of Member States, including the use of international mercenaries.”<sup>96</sup> As a result of this evolution within the United Nations, mercenary activities became viewed as a violation of principles fundamental to the UN’s worldview—in particular non-interference, state sovereignty, and territorial integrity.<sup>97</sup>

The first attempt at transposing these anti-mercenary views into treaty law took place in Angola following the trial of 13 alleged mercenaries, with the adoption of the Draft Convention on the Prevention and Suppression of Mercenarism (commonly known as the Luanda Convention).<sup>98</sup> Article 1 of the Luanda Convention establishes the crime of mercenarism, which is committed when an

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of mercenaries as a means to violate human rights and to impede the exercise of the right of peoples to self-determination); GA Res. 44/81, U.N. Doc. A/RES/44/81 (1989) (Use of mercenaries as a means to violate human rights and to impede the exercise of the right of peoples to self-determination); and GA Res. 45/132, U.N. Doc. A/RES/45/132 (1990) (Use of mercenaries as a means to violate human rights and to impede the exercise of the right of peoples to self-determination).

<sup>93</sup> G.A. Res. 2625 (XXV), U.N. Doc. A/2625 (Oct. 24, 1970) (emphasis added).

<sup>94</sup> G.A. Res. 36/103, U.N. Doc. A/RES/36/103 (Dec. 9, 1981) (emphasis added).

<sup>95</sup> GA Res. 41/102, U.N. Doc. A/RES/41/102 (1986); and 42/96, U.N. Doc. A/RES/42/96 (1987).

<sup>96</sup> SC. Res. 405, para. 6, U.N. Doc. S/RES/405 (1977); and SC Res. 507, U.N. Doc. S/RES/507 (1982), (emphasis added). *See also* ECOSOC Res. 1987/61, para. 5, U.N. Doc. E/RES/1987/61 (1987) (recognizing that the activities of mercenaries are contrary to the principle of non-interference in the internal affairs of States).

<sup>97</sup> David Mugadu Isabirye, *State Responsibility for Nationals Who Serve As Mercenaries In Armed Conflicts*, 26 *INDIAN J. INT’L L.* 405, 417 (1986) (“One of the reasons for lack of observance [of the duty to prevent recruitment of mercenaries on their territory] is that although it is a duty founded on the law of neutrality, the chief consideration for its observance is avoidance of usurpation of sovereignty.”)

<sup>98</sup> *See* George Lockwood, *Report on the Trial of Mercenaries: Luanda, Angola*, 7 *MAN. L. J.* 183, 183 (1976).

individual, group or association, representatives of State and the State itself which... organizes, finances, supplies, equips, trains, promotes, supports or employs in any way military forces consisting of or including persons *who are not nationals of the country where they are going to act, for personal gain*, through the payment of a salary or any other kind of material recompense.<sup>99</sup>

The stigma against private warfare, which I discuss in Part III, was already apparent at the time—as the emphasis on a mercenary’s financial motivation and foreign nationality illustrates. The Luanda Convention also stated that mercenaries were not entitled to combatant status or prisoner of war status as a result of their crime.<sup>100</sup> Although the Luanda Convention was never adopted into law, it marked the first step towards the adoption of anti-mercenary norms applicable internationally.

In June 1977, the first elaborate, treaty-enshrined definition of mercenary was adopted as Article 47 of the *Additional Protocol I to the Geneva Conventions* (AP I). Article 47 defines mercenary as any person who:

Is specially recruited locally or abroad in order to fight in an armed conflict; does, in fact, take a direct part in the hostilities; 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; *is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict*; is not a member of the armed forces of a Party to the conflict; and *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>101</sup>

By setting forth six cumulative criteria, Article 47 makes it practically impossible for anyone to fall under its definition of mercenary.<sup>102</sup> But when an

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<sup>99</sup> Luanda Draft Convention on the Prevention and Suppression of Mercenarism, *reprinted in* Paul W. Mourning, *Leashing the Dogs of War: Outlawing the Recruitment and Use of Mercenaries*, 22 VA. J. INT’L L. 589, 616 (1981-1982).

<sup>100</sup> Luanda Convention, *supra* note 99, art. 4. In addition, the Luanda Convention provided that mercenaries may be held accountable for the crime of mercenarism, as well as “for any other crime committed by him as such” (Article 5) and called for states to adopt domestic legislation needed to implement its provisions and to bring mercenaries to trial (Articles 6 and 7),

<sup>101</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] (emphases added).

<sup>102</sup> See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 51 (2004); Green Paper, *supra* note 22, para. 6; and Peter Singer, *War, Profits, and*

individual does meet all six cumulative conditions set forth in Article 47 of AP I, he is considered an illegitimate participant in warfare, constitutes a legitimate target, and is entitled to prisoner of war status if captured.<sup>103</sup>

Most importantly for our purposes, three of the six conditions set forth by Article 47 expressly echo the moral objections to private warfare: first, being remunerated substantially more than ordinary soldiers of the same rank for the services provided, and, second, being a foreigner to the conflict. Among the six conditions it sets forth, Article 47 requires that a mercenary is “neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict.” Only those individuals who are *not* of the nationality of one of the belligerents to the conflict are regarded as mercenaries—excluding, for example, American private military contractors working in Iraq as nationals of a state party to the conflict. The underlying rationale, inherited from both neutrality laws and intervention law, was to prevent lone individuals from intervening in conflicts in which their state of nationality remained neutral. That non-intervention is at the core of the legal prohibition against mercenary activity also appears from the sixth and final condition set forth by Article 47, namely that a mercenary “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.” In other words, soldiers sent on official duty by a state—even if such state is *not* a party to the conflict—are excluded from the definition of mercenaries.<sup>104</sup> By giving its approval, the state signals its awareness of the presence of its nationals in a foreign conflict and acknowledges the implications such presence may have on its neutrality. Because concerns of unauthorized intervention are alleviated, these troops are not regarded as mercenaries.

The first consecration of the nationality requirement into treaty law in Article 47 was followed, less than a month later, by the *Convention for the Elimination of Mercenarism in Africa* (known as the OAU Convention). Adopted by the Organization of African Unity, the OAU Convention reiterated the necessity for a mercenary to be of a nationality distinct from that of the parties to the conflict.<sup>105</sup>

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*the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 531 (2004). Among excluded categories are long-standing or semi-permanent volunteers, such as the French Foreign Legion, the Gurkhas, or the Swiss Guards of the Vatican. See Commentary to AP I, *supra* note 54, at 578-79.

<sup>103</sup> The language of Article 47 (mercenaries “shall not” have the rights of legal combatants or be treated as prisoners of war) has been interpreted as entitling a state to grant such status if deemed appropriate (see, e.g., Hampson, *supra* note 42, at 27; and Gillard, *supra* note 1, at 561).

<sup>104</sup> Commentary to AP I, *supra* note 54, at 581.

<sup>105</sup> Convention of the O.A.U. for the Elimination of Mercenarism in Africa, art. 1, July 3, 1977, O.A.U. Doc. CM/433/Rev. L. Annex 1 (1972) [hereinafter OAU Convention] (defining a mercenary as a person who (a) is specially recruited locally or abroad in order to fight in an armed

Although the definition set forth in the OAU Convention resembles the definition provided by Article 47 of AP I (including the nationality requirement), the OAU Convention extends further by criminalizing mercenary activities.<sup>106</sup> The OAU Convention takes a strong moral and legal stance against mercenarism—perhaps because it was adopted by precisely those countries that suffered most from mercenary activity.<sup>107</sup>

When the turn finally came for the United Nations to take concrete action against mercenary activity, it adopted its own international convention, the *UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries* (the “UN Convention on Mercenaries”).<sup>108</sup> Once again—and for the third time in international and regional instruments—the UN Convention on Mercenaries established the requirements that mercenaries must be motivated by private gain and hold a nationality distinct from that of the parties to the conflict. Article 1 of the UN Convention reads as follows (emphases added):

For the purposes of the present Convention,

1. A mercenary is any person who: (a) Is specially recruited locally or abroad in order to fight in an armed conflict; (b) 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

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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; (d) is neither a national of a party to the conflict nor a resident of 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) *is not sent by a state other than a party to the conflict on an official mission as a member of the armed forces of the said state* (emphases added).

<sup>106</sup> OAU Convention, *supra* note 105, arts. 1 6-8 (punishing anyone engaging in acts related to mercenarism, including anyone who “shelters, organizes, finances, assists, equips, trains, promotes, supports or in any manner employs bands of mercenaries” and any state allowing mercenary activities to take place on its territory or under its control; and suggesting capital punishment as a possible sentence for mercenarism).

<sup>107</sup> See PERCY, *supra* note 1, at 181 (noting that African states, “most challenged by mercenary action, or most afraid of it, were also the states that pursued international legal regulation.” In this context, Percy refers not only to the OAU Convention, but also mentions the Luanda Convention, and Nigeria’s initiative in drafting Article 47 of Additional Protocol I and the UN Convention.)

<sup>108</sup> International Convention against the Recruitment, Use, Financing, and Training of Mercenaries, art. 19, Dec. 4, 1989, U.N. GAOR, 72d plen. mtg., U.N. Doc. A/Res/44/34 (1989) [hereinafter UN Convention]. While the first part of the definition of a mercenary is derived from Article 47 of AP I, the second part of the definition slightly broadens it by applying it to any person in “any other situation” who meets the requirements of the definition. The definition is therefore no longer limited to international armed conflicts. The UN Convention on Mercenaries is also broader in that it does not require a person to take direct part in hostilities to be considered a mercenary and extends the offense to accomplices of the perpetrator of the act.

substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party; (c) *Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict*; (d) Is not a member of the armed forces of a party to the conflict; and (e) *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*.

2. 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 (e) *Is not a member of the armed forces of the State on whose territory the act is undertaken*.

Despite the best intentions of its sponsors, the UN Convention had little practical effect.<sup>109</sup> What remains, however, is a strong moral stigma against private warfare embedded in two essential objections—the financial motivation and the foreign nationality of the mercenary. Customary international law, too, reflects this stigma. As noted in the ICRC’s study of Customary International Humanitarian Law, mercenaries fulfilling Article 47’s cumulative conditions do not benefit from prisoner of war status.<sup>110</sup> However, the consensus is that this body of law—which echoes the main moral objections to private warfare—does not apply to modern forms of military outsourcing.

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<sup>109</sup> Article 19 of the UN Convention on Mercenaries provides that it enters into force upon ratification by 22 countries; however, it took until 2001 and much pressure from the UN to gather 22 signatures. To date, few Western countries are among the parties to the UN Convention on Mercenaries. Until the entry into force of the UN Convention, Italy was the sole Western State party (ratified the Convention in 1995). Following the entry into force, Belgium and New Zealand became parties, in 2002 and 2004 respectively. It should be noted that later instruments took a more careful approach to mercenary activity. For example, mercenarism is neither expressly included in the International Law Commission’s 1996 “Draft Code of Crimes Against the Peace and Security of Mankind” (adopted by the International Law Commission at its 48<sup>th</sup> session, *available at* [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7\\_4\\_1996.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf) nor in the Rome Statute, in spite of proposals by the Comoros and Madagascar to include it (UN Doc. A/CONF.183/C.1/L.46, July 3, 1998).

<sup>110</sup> JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 383 (2005) (Rule 108).

B. ARE MODERN FORMS OF MILITARY OUTSOURCING ILLEGAL?

Putting aside the practical weaknesses of the prohibition on mercenary activity, it is clear that, conceptually, mercenaries are regarded as outlaws under international law. Private military contractors are another matter. While the United Nations initially adopted a one-size-fits-all approach to private warfare and argued that the prohibition against mercenary activity also prohibited the use of private military contractors, its approach has since shifted.

The UN's initial orientation in the face of increasing private military activity transpires from the mandate of the *Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination* (the "Working Group"). Established in 2005, the Working Group's mandate includes questions related to private military companies.<sup>111</sup> This reflects the UN's approach as a whole, which has traditionally treated private military contractors as a form of mercenaries.<sup>112</sup> Only recently has the UN acknowledged that private military contractors ought to be treated as legally distinct entities (although it should be noted that the question continues to be handled by the Working Group).

A shift in the UN's orientation can be traced to the middle of the past decade—a decade in which the scope of private military activity, particularly in Iraq and Afghanistan, reached entirely new levels. In the face of this growing phenomenon, the UN dropped its one-size-fits-all approach and took measure of the differences between mercenaries and private military contractors. Beginning in 2004, the UN began to pay "particular attention to the impact of the activities of private companies offering military assistance, consultancy and security services

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<sup>111</sup> The Working Group was established in July 2005 pursuant to the Commission on Human Rights' resolution 2005/2. It succeeded the mandate of the Special Rapporteur on the use of mercenaries, which had been in existence since 1987 and was serviced by Mr. Enrique Bernales Ballesteros (Peru) from 1987 to 2004 and Ms. Shaista Shameem (Fiji) from 2004 to 2005. In March 2008, the Human Rights Council extended the mandate of the Working Group for a period of three years (Human Rights Council Res. 7/21, Mandate of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, 7th Sess., ¶ 2, U.N. Doc. A/HRC/RES/7/21 (Mar. 28, 2008)).

<sup>112</sup> U.N. Econ. & Soc. Council [ECOSOC], *The Right of Peoples to Self-Determination and Its Application to Peoples Under Colonial Or Alien Domination Or Foreign Occupation*, ¶ 69 & 78, U.N. Doc. E/CN.4/1997/24 (Feb. 20, 1997). At the time the UN used to hold that view, it aroused much criticism including, for example, by the UK which characterized the UN's position as "an extreme point of view" (see Green Paper, *supra* note 22, para. 37). Also criticizing what was once the UN position, see PERCY, *supra* note 1, at 222 ("The proscriptive norm against mercenary use has resulted in UN condemnation of the private military option even in situations where it could be useful, and has resulted in the bizarre response that an intractable civil war is preferable to the use of [private military companies].")

on the international market on the right of peoples to self-determination.”<sup>113</sup> A series of country visits, interviews and communications with member states enabled the UN to gain a better understanding of the private military industry—in particular the fact that, unlike mercenaries, not all private military contractors are of a nationality distinct from that of the belligerents. This latter aspect challenged the very foundation upon which anti-mercenary norms developed, i.e., that private warfare is inherently immoral (as I argued above). Since many private military contractors are nationals of one of the parties to the conflict and cannot be said to wage war only for financial gain, the justifications for the prohibition of private military contractors had to be reexamined.

Because international legislation dealing with mercenary activity “failed adequately to prohibit and criminalize traditional and new forms of mercenarism,”<sup>114</sup> the UN Special Rapporteur on the use of mercenaries proposed amending international definitions of “mercenary” to include modern forms of military outsourcing.<sup>115</sup> Although the UN continued to regard military outsourcing as a form of mercenarism, it acknowledged that the definitions needed revision in order to reflect the new reality.<sup>116</sup>

Rather than amending existing definitions of mercenary as initially contemplated, in 2008 the Working Group elaborated a new definition of “private military and security companies,” defined as

companies which perform all types of security assistance, training, provision and consulting services, i.e. ranging from unarmed logistical support, armed

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<sup>113</sup> U.N. Econ. & Soc. Council [ECOSOC], The Right of Peoples to Self-Determination and Its Application to Peoples Under Colonial Or Alien Domination Or Foreign Occupation, ¶ 7, U.N. Doc. E/CN.4/2005/14 (Dec. 8, 2004) (prepared by the Special Rapporteur, Shaista Shameem) [hereinafter U.N. Doc. E/CN.4/2005/14].

<sup>114</sup> UN Econ. & Soc. Council [ECOSOC], Note by the United Nations High Commissioner for Human Rights, The Right of People to Self-Determination and its Application to People under Colonial or Alien Domination or Foreign Occupation, ¶ 7, U.N. Doc. E/CN.4/2005/23, (Jan. 18, 2005) [hereinafter U.N. Doc. E/CN.4/2005/23].

<sup>115</sup> The new definition of “mercenary company” would require (1) the existence of a contract of service, with the element of compensation (material gain) being a key factor; (2) the knowledge and intention to participate in armed conflict; (3) usually but not always, the mercenary being engaged in armed conflict in a country/countries of which he himself is not a national or where the company is not registered; and (4) a mercenary (person) or mercenary company (legal personality) being engaged in armed conflict for its own sake and/or to topple the constitutional order of a State (U.N. Doc. E/CN.4/2005/23, *supra* note 114, ¶ 65. *See also* G.A. Res. 63/174, ¶ 13, U.N. Doc. A/Res/63/164 (Feb. 13, 2009) (encouraging the Special Rapporteur to continue working on a new definition of mercenary). But this “new” definition still held on to the traditional moral objections to military outsourcing (material gain and the nationality requirement).

<sup>116</sup> U.N. Doc. E/CN.4/2005/14, *supra* note 113.

security guards, and those involved in defensive or offensive military and/or security-related activities, particularly in armed conflict areas and/or post-conflict situations.<sup>117</sup>

This marked a significant shift toward the recognition of private military contractors as a distinct legal entity. Shortly thereafter, the main UN bodies welcomed the adoption of the Montreux Document<sup>118</sup> and invited states to “consider adopting such measures as appear therein.”<sup>119</sup> Announcements were made regarding the elaboration of a new international convention dealing with private military and security companies.<sup>120</sup> This convention would later be supplemented with a Model Law designed to assist governments in the adoption of appropriate national legislation.<sup>121</sup> By suggesting the elaboration of a treaty dealing *specifically* with private military contractors and encouraging states to adopt legislation dealing *specifically* with these actors, the UN showed that it had begun looking at the issue in a new light.

Other initiatives—the main ones I analyze below—confirm that the trend to treat private military contractors as distinct from mercenaries reflects state practice

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<sup>117</sup> Working Group on Mercenaries, *supra* note 28, ¶ 3 (emphasis added). Other suggestions included the adoption of an international “code of conduct” for the industry (UN Econ. & Soc. Council [ECOSOC], Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, U.N. Doc. E/CN/Sub.2/2003/12/Rev.2 (Aug. 26, 2003)) and the application of the (UN Econ. & Soc. Council [ECOSOC], Norms on the Responsibilities of Transnational Corporations and other business enterprises with regard to human rights to companies operating and providing military and security services in more than one country, U.N. Doc. E/CN.4/2006/11/Add.1 (Mar.3, 2006).

<sup>118</sup> Press Release, Amada Benavides and Alexander Nikitin of the UN Working Group on the use of mercenaries, and Dan McNorton, UNAMA Public Information Officer (Apr. 9, 2009) (noting that in Afghanistan the industry fills a definite need, in particular that of ensuring the protection of the civilian population); and Montreux Document, *supra* note 8.

<sup>119</sup> Letter of October 2, 2008 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary-General, U.N. Doc. A/63/467-S/2008/636 (Oct. 6, 2008).

<sup>120</sup> UN Working Group Press Release, UN Working Group Concludes Fourth Session, Expresses Concern about the Involvement of Mercenaries and Private Military/Security Companies in Conflict Situations, Sept. 9, 2008, *available at* [http://www.unwg.rapn.ru/en/news/Latest%20Statements/ls\\_1.htm](http://www.unwg.rapn.ru/en/news/Latest%20Statements/ls_1.htm). *See also* Oral Statement, Alexander Ivanovich Nikitin, President of the Working Group on the use of mercenaries as a means of violating human rights and impeding the right of peoples to self-determination, Human Rights Council, 10th Session (Mar. 6, 2009), at 3, *available at* [www2.ohchr.org/.../mercenaries/docs/Statement\\_Nikitin\\_HRC10\\_6Mar09.doc](http://www2.ohchr.org/.../mercenaries/docs/Statement_Nikitin_HRC10_6Mar09.doc). *See also* A/HRC/15/25, Annex (July 2, 2010), *Draft of a Possible Convention on Private Military and Security Companies (PMSCs) for Consideration and Action by the Human Rights Council* (Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination).

<sup>121</sup> *Id.* at 2.

as a whole. In 2005, New York University's Institute for International Law and Justice, with the support of the Carnegie Foundation of New York, launched a project on the topic of private military and security companies.<sup>122</sup> As part of this project, the Institute for International Law and Justice convened a closed workshop in March 2007 at the Greentree Foundation Estate, Manhasset, New York, bringing together providers, consumers, regulators, and commentators of the industry. At the end of the workshop, the Greentree Notes were drafted—putting down on paper a set of issues arising out of military outsourcing, areas of consensus, and areas for further discussion.<sup>123</sup> Significantly, it was agreed that states are responsible for the conduct of private military companies attributable to them. Consensus was also reached among the participants regarding the need to regulate the private military industry. This could be achieved, in particular, by distinguishing between the various activities carried out by the companies. While self-regulation was deemed necessary, it was regarded as insufficient to address all concerns about modern forms of military outsourcing. Specifically, the Greentree Notes recommended the adoption of a global code of conduct and the drafting of a short handbook outlining the obligations of private military contractors and suggested means of enforcing such obligations. The Greentree Notes did not take any concrete steps but they outlined promising avenues for future regulation.

Soon thereafter, a Swiss-led intergovernmental initiative led to the adoption of the Montreux Document.<sup>124</sup> Signed in 2008 by 17 states,<sup>125</sup> and endorsed by an additional 18 states since its release,<sup>126</sup> the Montreux Document is not binding. However, as noted above, it is the first international document seeking to regulate the conduct of military and security companies involved in armed conflicts. The approach of the Montreux Document is unique in that it seeks to recall the obligations of, and establish good practices for (1) states (or other entities) hiring private military and security companies; (2) states hosting private military companies; (3) home states (e.g. the state of incorporation of the company); (4) all other states; and (5) the companies and their personnel. At no point does the Montreux Document use the

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<sup>122</sup> See <http://www.iilj.org/research/PrivateMilitaryandSecurityCompanies.asp>.

<sup>123</sup> Chairman's Notes, Greentree Conference on Regulation of Private Military and Security Companies, at the Institute for International Law and Justice, New York University Law School (Mar. 22-24, 2007), available at <http://www.iilj.org/research/GreentreeNotes.asp>.

<sup>124</sup> See *supra* note 8.

<sup>125</sup> Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom, Ukraine, and the United States.

<sup>126</sup> See <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html> (Macedonia, Ecuador, Albania, Netherlands, Bosnia and Herzegovina, Greece, Portugal, Chile, Uruguay, Liechtenstein, Qatar, Jordan, Spain, Italy, Uganda, Cyprus, Georgia, and Denmark).

word “mercenary”—further demonstrating that the regulation of the private military industry is considered today independently of the question of mercenaries.

Building on the impetus created by the publication of the Montreux Document, the European Union published a report entitled “On Private Military and Security Firms and Erosion of the State Monopoly on the Use of Force.”<sup>127</sup> It envisages the possibility of adopting a Council of Europe treaty (potentially open for ratification to non-European states) setting certain minimum regulatory standards. In addition to formally endorsing the Montreux Document, the EU report supports the establishment of a licensing/registration system applicable to the activity of private military companies. It encourages European states to review their national laws in order to determine whether they provide a proper degree of regulation of the extraterritorial activities of private military companies, enable jurisdiction over serious offences committed by the companies’ employees, and allow claims for damages for extraterritorial civil wrongdoing to be brought against the companies themselves. The approach is clearly directed at the private security and military industry—here again, the word “mercenary” does not appear in the document. At no point does the report consider the domestic legislations of states on mercenaries; military outsourcing is treated as its own independent issue, calling for the adoption of entirely new instruments.

These various informal initiatives demonstrate the breadth of the consensus among states and other entities on the need to regulate (rather than prohibit) the use of private military contractors. Once again, the absence of any reference to mercenaries shows that a consensus has emerged to treat private military contractors and mercenaries as distinct legal entities.

To summarize, the legal analysis demonstrates that modern forms of military outsourcing deserve a distinct treatment under the law. Unlike mercenaries, private military contractors are often of the nationality of the state they support, they are not devoid of idealistic aspirations, they are subject to checks-and-balances within the company that employ them, and they aspire to more effective regulation. In light of these important features, the law cannot contend with modern forms of military outsourcing using the same tools it used to contend with mercenary activity. Rather, in the same way as the law crystallized the moral stigma against private warfare, it ought to serve as a tool (albeit not the only one) to clarify the moral and legal framework in which private military contractors operate.

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<sup>127</sup> EUR. PARL. ASS. DEB., *Private Military and Security Firms and the Erosion of the State Monopoly on the Use of Force*, Political Affairs Committee, Doc. 11787, (Dec. 22, 2008).

#### IV. CONCLUSION

Although we tend to regard war as a prerogative of the state *par excellence*, state control over violence has not remained constant over time. While at times the state did not exercise any control over violence, at others it authorized the use of force by private actors under limited circumstances. Since the 19<sup>th</sup> century, the state has commonly been viewed as holding a monopoly on war. Today, the growing reliance on private military contractors (in particular by states) suggests that the state may be loosening its formal control over private violence and once again authorizing state-sanctioned violence.

While this is not a surprising development from a historical standpoint, the privatization of warfare nevertheless raises important legal and moral questions. In this Article, I have shown that an adequate treatment of modern forms of military outsourcing must be informed by historical, moral and legal perspectives. The relationship between law and morality in the field of military outsourcing is apparent from the development of anti-mercenary norms and from recent discussions surrounding abuses committed by private military contractors on the battlefield. While I argue that military outsourcing is, in and of itself, neither immoral nor illegal, I emphasize that a moral and legal framework must be developed to apply to private military contractors. This framework must take into account the strong moral stigma against mercenary activity and include an analysis of whether such stigma equally attaches to modern forms of military outsourcing. It must also be developed with a view to providing a pragmatic and nuanced response to the growing needs of national armies for expertise, logistical support, and flexibility. Regulating the industry will not encourage its growth or legitimization, but it will enable private military contractors to operate within a clear moral and legal framework. The consensus that has emerged among states, international bodies and non-international organizations in this sense confirms that the use of private military contractors must be regulated, rather than prohibited.

In contemplating this new approach to private warfare, international law provides promising tools. Just as international law was used as a vehicle for the moral stigmatization of mercenaries, it can be used today to implement a nuanced and pragmatic approach to the delegation of military services to private actors. This can be done through the adoption of treaties or regional agreements, as is increasingly contemplated. It can also be achieved through the use of informal means of regulation, such as those noted above, the Greentree Notes and the Montreux Document. Perhaps informal initiatives will lead to a formal regulatory framework. In the meantime, self-regulation must be encouraged as a step towards a more nuanced, pragmatic, and realistic approach to modern forms of military outsourcing.