

# NOTES

## “TRADE IN FORCE”: THE NEED FOR EFFECTIVE REGULATION OF PRIVATE MILITARY AND SECURITY COMPANIES

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## I. INTRODUCTION

On September 16, 2007, allegedly without any provocation or justification, personnel from the security firm formerly known as Blackwater Worldwide<sup>1</sup> fired into Baghdad's crowded Nisoor Square and killed seventeen Iraqi civilians.<sup>2</sup> To date, neither the firm nor its employees have been held accountable for this incident.<sup>3</sup> Moreover, a report issued by a U.S. House of Representatives oversight panel in October 2007 indicated that "Blackwater employees had been involved in at least 196 firefights in Iraq since 2005, an average of 1.4 shootings per week."<sup>4</sup> The report also stated that in 84 percent of these incidents, Blackwater personnel were the first to fire even though, by contract, they were allowed to fire only in self-defense.<sup>5</sup>

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1. See *Blackwater Changes Its Name to Xe*, N.Y. TIMES, Feb. 14, 2009, at A10 (noting that Blackwater changed its name due to its tarnished reputation).

2. *Biden Vows the US Will Appeal in Iraq Blackwater Case*, BBC NEWS (Jan. 23, 2010, 17:07 GMT), [http://news.bbc.co.uk/2/hi/middle\\_east/8476794.stm](http://news.bbc.co.uk/2/hi/middle_east/8476794.stm).

3. See *id.*

4. U.N. Working Group on the Use of Mercenaries, *Impact in Human Rights of Private Military and Security Companies' Activities*, at 4 (2008) (by José L. Gómez del Prado) [hereinafter *Impact in Human Rights*], available at <http://www.privatesecurityregulation.net/files/Impact%20in%20Human%20Rights%20of%20Private%20Military%20and%20Security%20Companies%27%20Activities.pdf>.

See also JENNIFER K. ELSEA, MOSHE SCHWARTZ & KENNON H. NAKAMURA, CONG. RESEARCH SERV., RL 32419, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 12 (2008). The prevalence of Xe, formerly known as Blackwater, in the news is disturbing. The company has been the subject of recent litigation efforts to hold the company and its employees accountable for human rights abuses. As of yet, however, these efforts have proved to be ineffective. Despite reports of human rights and international humanitarian law ("IHL") violations, since 2000, Xe has received contracts worth more than \$1 billion for services provided to the U.S. government. Michael Hurst, Essay, *After Blackwater: A Mission-Focused Jurisdictional Regime for Private Military Contractors During Contingency Operations*, 76 GEO. WASH. L. REV. 1308, 1310 (2008).

5. *Impact in Human Rights*, *supra* note 4, at 4.

Unfortunately, Blackwater is neither the first nor the only security firm to commit human rights abuses. In the late 1990s, personnel from another security firm, DynCorp International, allegedly bought women and girls as sex slaves while deployed in Bosnia.<sup>6</sup> The only punishment rendered on the personnel responsible for these human rights abuses was the termination of their employment contracts.<sup>7</sup> Moreover, despite these allegations, the firm later received a contract in Iraq worth \$250 million.<sup>8</sup>

As these examples demonstrate, human rights abuses committed by private military and security companies (“PMSCs”)<sup>9</sup> often go unpunished because the regulatory system has not kept up with the industry’s development. Over the past twenty years, the use of PMSCs has grown exponentially. It is estimated that PMSCs have worked in over 110 countries<sup>10</sup> and have annual global revenues of approximately \$100

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6. Cam Simpson, *U.S. Stalls on Human Trafficking*, CHI. TRIB., Dec. 27, 2005, at 1.

7. *See id.*

8. P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT’L L. 521, 525 (2004).

9. The Swiss Initiative’s Montreux Document defines “PMSCs” as “private business entities that provide military and/or security services, irrespective of how they describe themselves.” Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, Letter dated Oct. 2, 2008 from the Permanent Rep. of Switzerland to the United Nations addressed to the Secretary-General, at 6, U.N. Doc. A/63/467-S/2008/636 (Oct. 6, 2008) [hereinafter Montreux Document], available at [http://www.mfa.gov.hu/NR/rdonlyres/FA7A4BB1-5E7A-4950-BD65-8E2A651C425B/0/Montreux\\_document.pdf](http://www.mfa.gov.hu/NR/rdonlyres/FA7A4BB1-5E7A-4950-BD65-8E2A651C425B/0/Montreux_document.pdf). The Montreux Document goes on to define “military and security services” to “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.” *Id.* “PMSCs” also have been defined as “any company offering, on a commercial basis, services related to the provision, training, coordination, or direction of security personnel, or reform of their institutions.” JAMES COCKAYNE ET AL., BEYOND MARKET FORCES: REGULATING THE GLOBAL SECURITY INDUSTRY 32 (Adam Lupel ed., 2009), available at [http://www.ipacademy.org/media/pdf/publications/beyond\\_market\\_forces\\_final.pdf](http://www.ipacademy.org/media/pdf/publications/beyond_market_forces_final.pdf). The terms “private security companies” (“PSCs”) and “private military companies” (“PMCs”) are used interchangeably to refer to similar entities. Geneva Ctr. for the Democratic Control of Armed Forces, *European Practices of Regulation of PMSCs and Recommendations for Regulation of PMSCs Through International Legal Instruments*, at 9–10 (Sept. 30, 2008) (by Anne-Marie Buzatu) [hereinafter Buzatu], available at [http://www.unwg.rapn.ru/en/analytics/Expert\\_Paper\\_-\\_Buzatu\\_Regulatory\\_Approaches\\_to\\_PMSC2.pdf](http://www.unwg.rapn.ru/en/analytics/Expert_Paper_-_Buzatu_Regulatory_Approaches_to_PMSC2.pdf). These terms, however, were created to define a company by what services—military or security—it provided. *See id.* Because PMSCs have begun to engage in many different activities, it has become hard to define accurately whether a company is a PSC or a PMC. *Id.* The Swiss Initiative chose to coin the term “PMSC” to avoid debate over whether a company was one type or another. *Id.* at 10. Like the Swiss Initiative, this Note will use the term PMSC to cover both types of entities without attempting to decipher whether a company is a PSC or a PMC. For a general discussion of the differences between PSCs and PMCs, see *id.* at 9–11.

10. Uwe Steinhoff, *What Are Mercenaries?*, in PRIVATE MILITARY AND SECURITY COMPANIES: ETHICS, POLICIES AND CIVIL-MILITARY RELATIONS 19, 19 (Andrew Alexandra, Deane-Peter Baker & Marina Caparini eds., 2008).

billion.<sup>11</sup> From 1994 to 2002, PMSCs obtained more than 3000 contracts from the U.S. Department of Defense, totaling approximately \$300 billion.<sup>12</sup> PMSCs now work in conflict zones around the world, such as Afghanistan, the Balkans, Colombia, the Democratic Republic of the Congo, Iraq, Somalia, and Sudan.<sup>13</sup> Some of the largest arenas for the use of PMSCs today are Iraq and Afghanistan, with over 180 PMSCs employing about 48,000 personnel in Iraq and 60 PMSCs employing between 18,000 and 28,000 personnel in Afghanistan.<sup>14</sup> Of the total U.S. forces deployed in Iraq and Afghanistan, approximately 50 percent belong to PMSCs.<sup>15</sup> Thus, while the use of PMSCs is not a new phenomenon, the level of use and the activities performed by PMSCs today are new and have generated increasing interest in industry regulation.<sup>16</sup>

This growth in the industry and its unique “trade in force” have generated a new discussion about the effectiveness of the current PMSC regulatory framework.<sup>17</sup> As recent news reports show, PMSCs seem to be above the law. One scholar notes, “[W]hat is most surprising is that this industry, so central to national and global security, is completely unregulated. No international laws apply. National laws are little better, with the majority of states . . . having none that fully controls the firms.”<sup>18</sup> This idea that PMSCs are above the law is further supported by repeated reports of human rights abuses, such as allegedly unprovoked shootings<sup>19</sup>

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11. See COCKAYNE ET AL., *supra* note 9, at 17 (citing P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 78 (2003)); *Impact in Human Rights*, *supra* note 4, at 1.

12. Steinhoff, *supra* note 10, at 21.

13. *Impact in Human Rights*, *supra* note 4, at 1.

14. *Id.*

15. Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Rep. 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*, at 2, U.N. Doc. A/HRC/15/25/Add.3 (June 15, 2010) (by Shaista Shameem), available at [http://www2.ohchr.org/english/issues/mercenaries/docs/A-HRC-15-25-Add3\\_AEV.pdf](http://www2.ohchr.org/english/issues/mercenaries/docs/A-HRC-15-25-Add3_AEV.pdf) (discussing the findings of the Mission to the United States of America, which took place between July 20 and August 3, 2009).

16. See COCKAYNE ET AL., *supra* note 9, at 16–17 (discussing the growing role PMSCs play throughout the world); Andrea Schneider, *National Regulatory Regimes for PMSCs and Their Activities: Benefits and Shortcomings*, in PRIVATE MILITARY AND SECURITY COMPANIES: CHANCES, PROBLEMS, PITFALLS AND PROSPECTS 407, 407 (Thomas Jäger & Gerhard Kümmel eds., 2007) (discussing how the immense growth of the PMSC industry has led to problems in all levels of the regulatory framework because the regulation has not developed in pace with the PMSC growth).

17. See COCKAYNE ET AL., *supra* note 9, at 18.

18. Kathrin Herbst, *Private Security Companies and Civil-Military Cooperation*, in PRIVATE MILITARY AND SECURITY COMPANIES: CHANCES, PROBLEMS, PITFALLS AND PROSPECTS, *supra* note 16, at 273, 284–85 (alteration in original) (citation omitted).

19. One of the most significant incidents occurred at Nisoor Square in Iraq on September 16,

and overly “aggressive detention practices.”<sup>20</sup>

Furthermore, PMSCs today work for a much larger pool of entities than ever before, including nongovernmental entities (“NGOs”), the United Nations, states, rebel groups, criminal organizations, and transnational corporations.<sup>21</sup> While expanding their clientele, PMSCs also have expanded the services they provide and the operations they are willing to undertake. PMSCs have come to “form a complex web of commercial providers of guarding and protection services; operational support in combat, intelligence, interrogation, and prisoner detention services; and advice to or training of local forces and security personnel.”<sup>22</sup> As PMSCs have expanded their operations and become transnational in nature, with their operations and their personnel often spanning several states, they have become increasingly difficult to regulate because no single regulatory system wholly encompasses their operations. This situation may lead to the potential for abuses of human rights and international humanitarian law (“IHL”) because there is no effective and complete oversight.<sup>23</sup>

As PMSCs continue to grow and gain more financial and political power, the traditional assumption that human rights and IHL apply only to states should be reconsidered.<sup>24</sup> PMSCs benefit from continued advances in international laws that protect their interests, so it is only right that these entities also accept the burdens and obligations that accompany these laws.<sup>25</sup>

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2007, when employees of Blackwater fired upon Iraqi civilians allegedly without provocation, resulting in death for several Iraqis. See ELSEA, SCHWARTZ & NAKAMURA, *supra* note 4, at 12; *supra* text accompanying notes 1–2.

20. See Nikolas Stürchler, *The Swiss Initiative Comes Alive: Seventeen States Agree on How to Legally Deal with Private Security Companies*, J. INT’L PEACE OPERATIONS, Nov.–Dec. 2008, at 9, 9, available at [http://ipoajournal.org/mag/web/images/pdf/journal\\_2008\\_1112.pdf](http://ipoajournal.org/mag/web/images/pdf/journal_2008_1112.pdf). See also Eugenio Cusumano, *Regulating Private Military and Security Companies: A Multifaceted and Multilayered Approach* 5 (Acad. of European Law, PRIV-WAR Project, EUI Working Paper No. AEL 2009/11, 2009), available at [http://cadmus.eui.eu/dspace/bitstream/1814/12953/1/AEL\\_2009\\_11.pdf](http://cadmus.eui.eu/dspace/bitstream/1814/12953/1/AEL_2009_11.pdf) (discussing the involvement of PMSCs, such as CACI and Titan, in the Abu Ghraib prisoners’ abuses incident).

21. Steinhoff, *supra* note 10, at 21. See also MIRKO SOSSAI, PRIV-WAR, REPORT ON THE ROME WORKSHOP: THE CHALLENGES TO THE REGULATION OF PRIVATE MILITARY AND SECURITY COMPANIES 8 (2008), available at <http://priv-war.eu/wordpress/wp-content/uploads/2009/04/rome-workshop-report.pdf> (“PMSCs are used not only by democratic governments but also by rebel groups, drug cartels and dictatorial countries.” (emphasis omitted)).

22. COCKAYNE ET AL., *supra* note 9, at 16.

23. See Cusumano, *supra* note 20, at 6.

24. See Ahmet Mentis, *The Global Compact: Social Responsibility at Global Scale*, 15 J. AM. ACAD. BUS. 130, 132 (2010).

25. See INT’L COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES 12–13 (2002), available at [http://www.reliefweb.int/rw/lib.nsf/db900sid/ASIN-7DBQ7F/\\$file/ICHRP\\_Beyond%20](http://www.reliefweb.int/rw/lib.nsf/db900sid/ASIN-7DBQ7F/$file/ICHRP_Beyond%20)

This Note discusses the applicability of human rights and IHL to PMSCs.<sup>26</sup> In Part II, the current human rights and IHL framework is discussed. This part looks at some examples of potential sources of international and domestic regulation, PMSC industry initiatives, and individual company efforts. The examples are by no means exhaustive, but they do provide a general overview of the current framework to which PMSCs must look for guidance in determining what constitutes appropriate behavior.

After providing a basic foundation of the current PMSC regulatory framework, this Note continues in Part III with a look at the issues surrounding the application of this framework to PMSCs and their employees. In particular, Part III discusses the problems associated with regulation that is not directly applicable to PMSCs, significant differences in power among various states, and the ease with which PMSCs can structure their corporate entities to avoid stringent regulation. Part IV then discusses some of the solutions to the challenges facing the current regulatory system, such as developing a multilayer approach combining international, domestic, and industry regulatory measures. Presently, improvements to domestic regulation seem to be the most likely new form of PMSC regulation. By working toward an international framework, however, global uniform standards may be achieved, thereby creating a greater level of consistency and accountability in the industry.

Finally, Part V gives a brief overview of some benefits of improved regulation. Ultimately, as investors and clients become more socially conscious, PMSCs that implement human rights and IHL standards into their practices may be able to achieve a market advantage and reduce the potential for future liability.

## II. EXISTING HUMAN RIGHTS AND IHL FRAMEWORK

In recent years, the debate regarding the applicability of a human rights framework to PMSCs has intensified. Some argue that just as individuals have obligations and duties regarding human rights and IHL,

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Voluntarism.pdf.

26. This Note will approach the applicability of human rights and IHL to PMSCs from a business standpoint. But one of the main issues surrounding the application of these laws to PMSCs is how PMSCs and their personnel should be classified. Should PMSC personnel be classified as combatants or mercenaries or something entirely different? This Note does not seek to resolve this issue. For an in-depth discussion of the issue, see generally Lindsey Cameron, *Private Military Companies: Their Status Under International Humanitarian Law and Its Impact on Their Regulation*, 88 INT'L REV. RED CROSS 573 (2006), available at [http://www.icrc.org/eng/assets/files/other/irrc\\_863\\_cameron.pdf](http://www.icrc.org/eng/assets/files/other/irrc_863_cameron.pdf).

PMSCs—separate legal entities, often viewed as individuals in law—have these same obligations and duties.<sup>27</sup> Others, however, have begun to develop a theory that human rights and IHL apply directly to PMSCs without looking to the “individual” corporate fiction.<sup>28</sup> The United Nations has begun to develop guidelines and frameworks for the application of human rights and IHL to corporations, beginning with the appointment of U.N. Special Representative John Ruggie<sup>29</sup> by former U.N. Secretary-General Kofi Annan to “identify[] and clarify[] standards of corporate responsibility and accountability with regard to human rights.”<sup>30</sup>

Today, states increasingly provide for regulation “through ‘human rights conditionality,’ barring corporate presence in certain countries where human rights are not respected, or requiring certain labor practices, or linking government contracts and other benefits to a corporation’s compliance with international human rights norms.”<sup>31</sup> Further, PMSCs now face the possibility of civil and criminal liability for abuses of human rights and IHL.<sup>32</sup> Presently, the regulatory framework for PMSCs includes “a complex web of international and domestic legal norms, contractual obligations, market pressures and self-regulatory measures.”<sup>33</sup> While there are many international and domestic voluntary and binding agreements,<sup>34</sup> this Note looks only at the Universal Declaration of Human Rights (“UDHR”),<sup>35</sup> the U.N. Global Compact,<sup>36</sup> the Voluntary Principles on

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27. See Celia Wells & Juanita Elias, *Catching the Conscience of the King: Corporate Players on the International Stage*, in NON-STATE ACTORS AND HUMAN RIGHTS 141, 151 (Philip Alston ed., 2005).

28. See RALPH G. STEINHARDT, PAUL L. HOFFMAN & CHRISTOPHER N. CAMPONOVO, INTERNATIONAL HUMAN RIGHTS LAWYERING 663 (2009).

29. This Note will not analyze the impact of Ruggie’s efforts in attempting to define obligations of companies with respect to human rights and IHL. To read his report, see Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy: A Framework for Business and Human Rights: Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie) [hereinafter Ruggie], available at <http://www2.ohchr.org/english/issues/globalization/business/docs/A.HRC.8.5.pdf> (creating the Protect, Respect, and Remedy framework).

30. Press Release, U.N. Secretary-General, Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises, U.N. Press Release SG/A/934 (July 28, 2005).

31. STEINHARDT, HOFFMAN & CAMPONOVO, *supra* note 28, at 663.

32. *Id.*; James Glanz & Sabrina Tavernise, *Security Firm Faces Criminal Charges in Iraq*, N.Y. TIMES, Sept. 23, 2007, § 1, at 1.

33. Cusumano, *supra* note 20, at 1.

34. For a brief discussion of some of the leading human rights documents relating to companies, see generally CORPORATE SOCIAL RESPONSIBILITY: THE CORPORATE GOVERNANCE OF THE 21ST CENTURY 215–62, 489–554 (Ramon Mullerat & Daniel Brennan eds., 2005).

35. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 67th

Security and Human Rights,<sup>37</sup> and the Montreux Document.<sup>38</sup> This Note also briefly discusses current initiatives of the International Stability Operations Association, a United States-based trade association for PMSCs.

#### A. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

In the late 1940s, the U.N. General Assembly adopted the UDHR.<sup>39</sup> It encompasses a wide range of human rights, from civil and political rights to economic and social rights.<sup>40</sup> While the UDHR is not itself legally binding, it has been accepted by all U.N. member states, making it truly a universal declaration of basic human rights.<sup>41</sup> Moreover, “Many of the [UDHR’s] provisions . . . have become incorporated into customary international law, which is binding on all states.”<sup>42</sup> As the foundation of modern human rights law, dozens of documents have sprung from the UDHR, providing a basis for how entities should respect and protect human rights.<sup>43</sup>

The preamble of the UDHR explains who should respect and follow the resolution’s tenets. It proclaims

that *every individual and every organ of society*, keeping this Declaration constantly in mind, shall strive by teaching and education to *promote respect for these rights and freedoms* and by progressive measures, national and international, to *secure their universal and effective recognition and observance*, both among the peoples of Member States

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plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

36. *The Ten Principles*, U.N. GLOBAL COMPACT, <http://www.unglobalcompact.org/aboutTheGC/TheTenPrinciples/index.html> (last visited Dec. 12, 2010).

37. *The Voluntary Principles on Security and Human Rights*, VOLUNTARY PRINCIPLES ON SEC. & HUM. RTS., [http://voluntaryprinciples.org/files/voluntary\\_principles\\_english.pdf](http://voluntaryprinciples.org/files/voluntary_principles_english.pdf) (last visited Dec. 12, 2010) [hereinafter *Voluntary Principles*].

38. Montreux Document, *supra* note 9.

39. UDHR, *supra* note 35.

40. INT’L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 25, at 21.

41. See Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 BROOK. J. INT’L L. 17, 20–21 (1999).

42. Hurst Hannum, *The UDHR in National and International Law*, 3 HEALTH & HUM. RTS. 144, 145 (1998).

43. See INT’L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 25, at 21–22 (listing the primary human rights treaties that followed adoption of the UDHR, including the International Covenant on the Elimination of All Forms of Racial Discrimination; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families).

themselves and among the peoples of territories under their jurisdiction.<sup>44</sup>

While the preamble does not directly state that the UDHR is applicable to PMSCs, some scholars have argued that an “organ of society” includes companies and other legal entities, such as PMSCs, because of their growing impact on society, both economically and socially.<sup>45</sup> Another scholar has argued that “[e]very individual and every organ of society excludes no one, no company, no market, no cyberspace. The [UDHR] applies to them all.”<sup>46</sup> Both arguments, as well as the plain language of the preamble, seem to suggest that PMSCs fall squarely within the reach of the UDHR. Moreover, article 30 of the UDHR seems to refer to nearly every entity by stating, “Nothing in this Declaration may be interpreted as implying for *any State, group or person* any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”<sup>47</sup> Thus, the UDHR should be seen as a framework that applies to PMSCs.<sup>48</sup> It can also provide guidance to PMSCs when they draft their internal codes of conduct that incorporate key international human rights standards.

#### B. THE U.N. GLOBAL COMPACT

In 1999, then–U.N. Secretary-General Kofi Annan proposed the creation of the Global Compact to provide a forum for the promotion of corporate social responsibility, including human rights and IHL.<sup>49</sup> The Compact sought to advance two goals: (1) “to make the Compact and its principles *part of the internal strategy and operations of business*”; and (2) “to engage different stakeholders and facilitate cooperation among them, in particular, when there are common problems that must be solved.”<sup>50</sup> The Compact was officially formed in 2000<sup>51</sup> and is currently growing at a rate of about one hundred new participants per month.<sup>52</sup>

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44. UDHR, *supra* note 35, pmb1. (emphasis added).

45. See INT’L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 25, at 58–59.

46. Henkin, *supra* note 41, at 25 (emphasis omitted).

47. UDHR, *supra* note 35, art. 30 (emphasis added).

48. See INT’L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 25, at 2 (arguing for the extension of “international legal obligations to companies in relation to human rights”).

49. Mentès, *supra* note 24, at 131–32.

50. Hans Corell, *The Global Compact*, in CORPORATE SOCIAL RESPONSIBILITY: THE CORPORATE GOVERNANCE OF THE 21ST CENTURY, *supra* note 34, at 235, 235.

51. Mentès, *supra* note 24, at 135.

52. *1,000 Companies Delisted by UN Global Compact Since 2008*, U.N. GLOBAL COMPACT (Oct. 7, 2009), [http://www.unglobalcompact.org/NewsAndEvents/news\\_archives/2009\\_10\\_07.html](http://www.unglobalcompact.org/NewsAndEvents/news_archives/2009_10_07.html) [hereinafter *1,000 Companies Delisted*].

As of January 2009, approximately 6400 businesses from over 130 nations, and more than 2300 nonbusiness stakeholders, such as Amnesty International and Global Witness,<sup>53</sup> were participating in the Global Compact.<sup>54</sup> Although the PMSC industry is generally lacking in representation, some PMSCs do participate in the Compact, including Aegis Defence Services Limited, which joined on April 24, 2009,<sup>55</sup> and DynCorp International LLC, which joined on February 22, 2008 but as of January 2011 is listed as “non-communicating” due to its failure to timely file a report.<sup>56</sup>

The Global Compact sets forth ten principles for participants to recognize and promote; these “principles cover[] human rights, labor standards, environment and anti-corruption.”<sup>57</sup> The first two principles are

53. *Civil Society Organizations*, U.N. GLOBAL COMPACT, [http://www.unglobalcompact.org/ParticipantsAndStakeholders/civil\\_society.html](http://www.unglobalcompact.org/ParticipantsAndStakeholders/civil_society.html) (last visited Dec. 17, 2010).

54. *Note on the United Nations Global Compact and Business and Human Rights*, U.N. GLOBAL COMPACT, 1 (Jan. 13, 2009), [http://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/Resources/Note\\_on\\_Human\\_Rights\\_Jan\\_09.doc](http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/Note_on_Human_Rights_Jan_09.doc) [hereinafter *Note on U.N. Global Compact*].

55. *Participant Information: Aegis Defence Services Limited*, U.N. GLOBAL COMPACT, <http://www.unglobalcompact.org/participant/244-Aegis-Defence-Services-Limited> (last visited Dec. 17, 2010).

56. *Participant Information: Dyncorp International LLC*, U.N. GLOBAL COMPACT, <http://www.unglobalcompact.org/participant/3040-Dyncorp-International-LLC> (last visited Jan. 13, 2011). When a company becomes a member of the U.N. Global Compact, it pledges to complete an annual review known as the Communication on Progress (“COP”). *Communicating Progress*, U.N. GLOBAL COMPACT, [http://www.unglobalcompact.org/COP/communicating\\_progress.html](http://www.unglobalcompact.org/COP/communicating_progress.html) (last updated Oct. 7, 2010). If a company fails to submit its annual COP, it will be listed as “non-communicating”; however, if the company fails to submit its COP for two straight years, it will be delisted. *Frequently Asked Questions*, U.N. GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/faq.html> (last updated Dec. 15, 2009).

57. Mentes, *supra* note 24, at 131. The Ten Principles of the U.N. Global Compact are as follows:

Human Rights

- Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and
- Principle 2: make sure that they are not complicit in human rights abuses.

Labour

- Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
- Principle 4: the elimination of all forms of forced and compulsory labour;
- Principle 5: the effective abolition of child labour; and
- Principle 6: the elimination of discrimination in respect of employment and occupation.

Environment

- Principle 7: Businesses should support a precautionary approach to environmental challenges;
- Principle 8: undertake initiatives to promote greater environmental responsibility; and
- Principle 9: encourage the development and diffusion of environmentally friendly technologies.

relevant to this Note because they relate to human rights and IHL and are founded on the UDHR.<sup>58</sup> The first principle states, “Businesses should support and respect the protection of internationally proclaimed human rights.”<sup>59</sup> This principle reinforces the belief that businesses should ensure human rights are respected in each business’s relevant “sphere of influence.”<sup>60</sup> When businesses implement this principle, they may be able to avoid costly consequences, such as consumer boycotts resulting from human rights abuses, by proving to stakeholders that their companies respect human rights.<sup>61</sup> The second principle states, “Businesses should make sure they are not complicit in human rights abuses.”<sup>62</sup> This principle recognizes that a business may not always be the entity that commits a human rights abuse, but the business may be complicit in the abuse by investing in states that do commit such abuses or by failing to object when it becomes aware of an abuse.<sup>63</sup>

Like the UDHR, the Global Compact is not legally binding; rather, it provides a forum whereby businesses commit voluntarily to uphold its principles.<sup>64</sup> It “is intended as a mutually reinforcing complement to, and not a substitute for, other approaches, including regulatory ones.”<sup>65</sup> Even though it is not legally binding, the Compact provides a limited policing mechanism.<sup>66</sup> Every year, each participating business is required to report its progress relating to implementation of the Ten Principles into its business practices.<sup>67</sup> A repeated failure to report will cause the business participant to be delisted. As of October 2009, approximately one thousand

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Anti-Corruption

- Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

*The Ten Principles*, *supra* note 36.

58. See Mentes, *supra* note 24, at 132.

59. *Human Rights*, U.N. GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/humanRights.html> (last updated Mar. 16, 2006).

60. *Global Compact Principle One*, U.N. GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/TheTENPrinciples/principle1.html> (last updated May 6, 2010).

61. See Mentes, *supra* note 24, at 132.

62. *Global Compact Principle Two*, U.N. GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle2.html> (last updated May 4, 2010) (internal quotation marks omitted).

63. See *id.* (discussing three types of complicity: direct, beneficial, and silent).

64. See STEINHARDT, HOFFMAN & CAMPOVO, *supra* note 28, at 716.

65. *Note on U.N. Global Compact*, *supra* note 54, at 1.

66. See STEINHARDT, HOFFMAN & CAMPOVO, *supra* note 28, at 716 (“[The Compact] articulates no binding code of conduct. Nor does it offer any forum for policing a company’s compliance, other than a minimal annual self-reporting requirement.”).

67. See *Note on Integrity Measures*, U.N. GLOBAL COMPACT, 2, [http://www.unglobalcompact.org/docs/about\\_the\\_gc/Integrity\\_measures/Integrity\\_Measures\\_Note\\_EN.pdf](http://www.unglobalcompact.org/docs/about_the_gc/Integrity_measures/Integrity_Measures_Note_EN.pdf) (last updated Apr. 12, 2010).

business participants had been delisted.<sup>68</sup>

Companies that comply with the reporting requirements and incorporate the principles stand to benefit from an enhanced reputation and a better corporate image.<sup>69</sup> Nonetheless, to maintain its credibility and increase its ability to regulate corporate abuses, the Global Compact needs stronger enforcement mechanisms.<sup>70</sup> If the enforcement problem continues to grow, the credibility of the Compact may be undermined and companies that abide by its requirements may be hurt.<sup>71</sup> To increase its effectiveness, the Compact should implement a more powerful monitoring system that would make independent audits compulsory.<sup>72</sup> This improvement could ultimately increase the reliability of information submitted and, in the long run, help foster trust.

### C. THE VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS

In December 2000, the United States and the United Kingdom announced the Voluntary Principles on Security and Human Rights (“Voluntary Principles”), which were created to provide guidance to companies in the extractive industry regarding human rights and the use of different security entities, such as PMSCs.<sup>73</sup> Today, seven states—the United States, the United Kingdom, the Netherlands, Canada, Colombia, Norway, and Switzerland—as well as several NGOs and companies involved in the extractive and energy industries participate in the Voluntary Principles.<sup>74</sup> New states may apply to join the Voluntary Principles; however, they must submit a request and be accepted according to specific admissions criteria, one of which is respect for human rights.<sup>75</sup> Although the Voluntary Principles are not legally binding, they serve as a “guide for companies to assure the safety and security of their operations while

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68. *1,000 Companies Delisted*, *supra* note 52.

69. *See* STEINHARDT, HOFFMAN & CAMPONOVO, *supra* note 28, at 716; Mentès, *supra* note 24, at 135.

70. *See* Mentès, *supra* note 24, at 135.

71. *See id.*

72. *See id.*

73. *Timeline of Events*, VOLUNTARY PRINCIPLES ON SEC. & HUM. RTS., <http://www.voluntaryprinciples.org/timeline/> (last visited Jan. 13, 2011).

74. *Who's Involved: Participants*, VOLUNTARY PRINCIPLES ON SEC. & HUM. RTS., <http://www.voluntaryprinciples.org/participants> (last visited Jan. 13, 2011). *See also* STEINHARDT, HOFFMAN & CAMPONOVO, *supra* note 28, at 669.

75. *See Voluntary Principles Framework for Admission and Participation of New Governments*, VOLUNTARY PRINCIPLES ON SEC. & HUM. RTS., 1–2, [http://voluntaryprinciples.org/files/vp\\_application\\_framework.pdf](http://voluntaryprinciples.org/files/vp_application_framework.pdf) (last visited Dec. 18, 2010).

respecting human rights and fundamental freedoms.”<sup>76</sup> One of the most important principles for the purpose of this Note is the principle upholding the UDHR and other IHL.<sup>77</sup>

The Voluntary Principles have been an important step in regulating the use of private security by the extractive and energy industries. These principles help establish a basic framework for companies to develop their own internal mechanisms to monitor and prevent human rights abuses.<sup>78</sup> For example, the Voluntary Principles suggest that, when hiring PMSCs, companies perform in-depth background checks and establish contractual procedures to permit investigation into alleged abuse.<sup>79</sup> And because the principles were derived from discussions by a diverse group of entities, including NGOs, states, and companies, they are viewed as credible.<sup>80</sup>

#### D. THE SWISS INITIATIVE AND THE MONTREUX DOCUMENT

In an effort to provide a forum to discuss regulation of the PMSC industry, the government of Switzerland and the International Committee of the Red Cross collaboratively formed the Swiss Initiative, which ultimately developed the Montreux Document.<sup>81</sup> The Montreux Document was developed over the course of three years with the collaboration of eighteen governments and the assistance of representatives from NGOs and PMSCs.<sup>82</sup> Formally adopted on September 17, 2008, by seventeen states, including some of the major PMSC state players—Afghanistan, Iraq, the United States, the United Kingdom, and South Africa—the nonbinding Montreux Document aims to lay the foundation for regulation of PMSCs worldwide.<sup>83</sup>

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76. STEINHARDT, HOFFMAN & CAMPOVO, *supra* note 28, at 669.

77. *Voluntary Principles*, *supra* note 37, at 1 (“[W]e recognize that we share the common goal of promoting respect for human rights, particularly those set forth in the [UDHR], and [IHL] . . .”).

78. See *Overview of Company Efforts to Implement the Voluntary Principles*, VOLUNTARY PRINCIPLES ON SEC. & HUM. RTS., 3, [http://voluntaryprinciples.org/files/vp\\_company\\_efforts.pdf](http://voluntaryprinciples.org/files/vp_company_efforts.pdf) (last visited Dec. 18, 2010).

79. *The Principles: Interactions Between Companies and Private Security*, VOLUNTARY PRINCIPLES ON SEC. & HUM. RTS., [http://www.voluntaryprinciples.org/principles/private\\_security](http://www.voluntaryprinciples.org/principles/private_security) (last visited Dec. 18, 2010).

80. See *Overview of Company Efforts to Implement the Voluntary Principles*, *supra* note 78, at 2–3.

81. See Stürchler, *supra* note 20, at 9.

82. See Montreux Document, *supra* note 9, at 5.

83. *The Montreux Document on Private Military and Security Companies*, SWISS CONFEDERATION, FED. DEP’T FOREIGN AFF., <http://www.eda.admin.ch/psc> (last updated Oct. 8, 2009). The listed states are considered major players in the PMSC industry for several reasons. First, the United States, South Africa, Afghanistan, Iraq, and to some extent the United Kingdom, have developed regulations specific to PMSCs, which suggests that these states are at the forefront of the current PMSC

The Montreux Document is significant because it does not attempt to rewrite international law; rather, it seeks to reaffirm “existing international legal obligations and [to identify] more than seventy good practices for contracting, territorial (host), and home (national) states in armed conflict.”<sup>84</sup> Moreover, it provides regulatory suggestions and discusses the consequences of a state’s decision to use PMSCs. It was created by states, for states, to directly address states’ needs.<sup>85</sup> And because the Montreux Document was created by states, it was drafted in an intentionally practical way.<sup>86</sup> The actual document is divided into two parts: the first part defines “27 core international obligations of states, [PMSCs] and their personnel operating in situations of armed conflict”; the second part provides “73 good practices for states, designed to assist governments in complying with these obligations through a series of legislative and administrative measures.”<sup>87</sup>

The acceptance of the Montreux Document has continued to grow since 2008, with an additional seventeen states adopting its principles.<sup>88</sup> For it to become an effective source of regulation, however, certain aspects of it should be improved. Presently, the Montreux Document is limited in scope to apply only to states and only to situations of armed conflict.<sup>89</sup> To be more effective, it should expand its membership to include PMSCs and other industry representatives.<sup>90</sup> The Montreux Document already suggests that PMSCs should respect human rights and IHL, but it should go further to make itself directly applicable to PMSCs.<sup>91</sup>

Furthermore, the Montreux Document needs to put force behind its

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debate. See JAMES COCKAYNE & EMILY SPEERS MEARS, PRIVATE MILITARY AND SECURITY COMPANIES: A FRAMEWORK FOR REGULATION 3 (Adam Lupel ed., 2009), available at [http://www.ipinst.org/media/pdf/publications/pmsc\\_epub.pdf](http://www.ipinst.org/media/pdf/publications/pmsc_epub.pdf). Furthermore, the United States and the United Kingdom are states with some of the largest markets for PMSC services. SAM PERLO-FREEMAN & ELISABETH SKÖNS, THE PRIVATE MILITARY SERVICES INDUSTRY 2 (Stockholm Int’l Peace Research Inst., SIPRI Insights on Peace & Security Paper No. 2008/1, 2008), available at <http://books.sipri.org/files/insight/SIPRIInsight0801.pdf>. Moreover, both Iraq and Afghanistan play host to a significant number of PMSCs. See *supra* text accompanying note 14.

84. COCKAYNE ET AL., *supra* note 9, at 53.

85. See *The Montreux Document on Private Military and Security Companies*, *supra* note 83.

86. See *id.*

87. Stürchler, *supra* note 20, at 9. See also Montreux Document, *supra* note 9, at 3.

88. Christopher T. Mayer, *Accountability: The Way Ahead*, J. INT’L PEACE OPERATIONS, Jan.–Feb. 2010, at 25, 25, available at [http://ipoajournal.org/mag/web/images/pdf/journal\\_2010\\_0102.pdf](http://ipoajournal.org/mag/web/images/pdf/journal_2010_0102.pdf).

89. See Montreux Document, *supra* note 9, at 3, 5.

90. See CONFLICT GRP., BRITISH FOREIGN & COMMONWEALTH OFFICE, CONSULTATION DOCUMENT: CONSULTATION ON PROMOTING HIGH STANDARDS OF CONDUCT BY PRIVATE MILITARY AND SECURITY COMPANIES (PMSCS) INTERNATIONALLY ¶ 18 (2009), available at <http://www.fco.gov.uk/resources/en/pdf/4103709/5476465/5550005/pmsc-public-consultation>.

91. See *id.* ¶¶ 17–18; Stürchler, *supra* note 20, at 10, 12.

principles to ensure compliance. To achieve this end, two separate mechanisms may be used. First, participants of the Montreux Document initiative should contract only with PMSCs that uphold the initiative's standards, thereby giving strength to the Montreux Document and pushing noncompliant PMSCs out of the market.<sup>92</sup> If states and PMSCs are able to continue to contract with one another and not act in compliance with the Montreux Document's standards, current participants will be deterred from incurring the extra costs associated with compliance, given that they will not derive any market benefit. Second, a compliance body capable of hearing complaints and issuing sanctions should be established to ensure compliance with and ultimately hold PMSCs accountable for their commitments to the Montreux Document.<sup>93</sup> These sanctions could vary in severity and may include (1) modifications to contracts requiring additional constraints, (2) issuance of official warnings, (3) financial penalties, and (4) temporary or permanent removal of the PMSC from the Montreux system.<sup>94</sup> With these suggestions, the Montreux Document may become a more effective tool. Currently, however, it still can provide a starting point for continued discussions leading to the creation of a universally approved standard of conduct for PMSCs.<sup>95</sup>

#### E. THE INTERNATIONAL STABILITY OPERATIONS ASSOCIATION

The International Stability Operations Association ("ISOA") (or, as it was known until recently, the International Peace Operations Association ("IPOA")), a Washington, D.C.-based trade association, was founded in 2001 to assist in developing the use of PMSCs globally.<sup>96</sup> Specifically, the ISOA developed to ensure the provision of high-quality, ethical PMSC operations and to engage with governments and the public to demonstrate the ability of PMSCs to make positive contributions to the security industry.<sup>97</sup> The ISOA consisted of sixty-one member companies as of September 30, 2009, and it continues to grow.<sup>98</sup> One of the more controversial PMSCs, Blackwater, withdrew from the then-IPOA after an

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92. See CONFLICT GRP., *supra* note 90, ¶ 19.

93. *Id.* ¶¶ 21–22.

94. *Id.*

95. See COCKAYNE ET AL., *supra* note 9, at 42–43.

96. ISOA FAQs, INT'L STABILITY OPERATIONS ASS'N, <http://ipoaworld.org/eng/isoafaqs.html> (last visited Dec. 22, 2010).

97. See *id.*

98. INT'L PEACE OPERATIONS ASS'N, NO. A.111.09, ANNUAL REPORT 2009, at 5, available at [http://www.ipoaworld.org/eng/docs/ipoa\\_annual\\_report\\_2009.pdf](http://www.ipoaworld.org/eng/docs/ipoa_annual_report_2009.pdf).

investigation into the company's activities was authorized.<sup>99</sup>

An important part of the ISOA is its Code of Conduct, which is revised every two years to ensure it remains current as the industry continues to change.<sup>100</sup> According to the ISOA, the Code “seeks to ensure the ethical standards of [ISOA] member companies operating in conflict and post-conflict environments so that they may contribute their valuable services for the benefit of international peace and human security.”<sup>101</sup> The Code urges ISOA members to adhere to human rights and IHL standards established by the UDHR, the Geneva Conventions, the Convention Against Torture, the Chemical Weapons Convention, the Voluntary Principles, and the Montreux Document.<sup>102</sup> Further, specific provisions of the Code require ISOA members to “respect the dignity of all human beings and strictly adhere to all applicable international humanitarian and human rights laws” and to “take every practicable measure to minimize loss of life and destruction of property.”<sup>103</sup>

The ISOA developed a method to enforce the provisions of its Code through a system known as the Standards Compliance and Oversight Procedure (“SCOPE”).<sup>104</sup> While SCOPE is not legally binding, it is a method by which the ISOA can ensure its members comply with its Code.<sup>105</sup> If the ISOA Standards Committee, following the SCOPE process, determines that a member PMSC has violated the Code, it may recommend expulsion and a bar on reapplication for membership for at least one year.<sup>106</sup>

While the ISOA continues to improve its Code and welcomes criticism from organizations such as Amnesty International USA (“AIUSA”), it has not yet adequately implemented AIUSA's suggestions.<sup>107</sup> AIUSA noted two key faults of the Code and its

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99. Ian Bruce, *Blackwater Leaves Monitoring Group*, HERALD (Glasgow), Oct. 16, 2007, at 14 (“Blackwater informed [the IPOA] that it was withdrawing with immediate effect and was unwilling to submit to an investigation.”).

100. Natalie Ng, *Standards: The Next Generation*, J. INT'L PEACE OPERATIONS, Mar.–Apr. 2009, at 8, 8, available at [http://web.peaceops.com/pdf/journal\\_2009\\_0304\\_lores.pdf](http://web.peaceops.com/pdf/journal_2009_0304_lores.pdf).

101. *Code of Conduct 12—English*, INT'L STABILITY OPERATIONS ASS'N (Feb. 11, 2009), <http://ipoaworld.org/eng/codeofconduct/87-codecodeofconductv12%20enghtml.html>.

102. *Id.*

103. *Id.*

104. *Standards Compliance and Oversight Procedure 2—English*, INT'L STABILITY OPERATIONS ASS'N (Sept. 25, 2009), <http://ipoaworld.org/eng/compliancev02eng.html>.

105. *Id.*

106. *Id.*

107. See *Analysis of IPOA Code of Conduct, Version 12*, AMNESTY INT'L USA (July 2009), <http://www.amnestyusa.org/military-contractors/aiusa-analysis-of-ipoa-code-of-conduct-v-12/page.do?>

enforcement: (1) ISOA member companies have no duty to assist or provide information during a pending investigation into allegations of abuse and (2) there is a lack of outside, independent monitoring that could provide additional credibility.<sup>108</sup> Currently, enforcement of the ISOA's Code "lacks transparency and appears highly partial, given that it leaves [its] enforcement . . . to the unfettered discretion of its membership."<sup>109</sup> Moreover, the Code does not define how human rights and IHL compliance can be implemented by PMSCs; therefore, it provides little guidance for its members to comply with these laws as well as to those seeking to ensure that members are in compliance.<sup>110</sup>

Also problematic, the ISOA's Code is "neither universal nor compulsory."<sup>111</sup> Because PMSCs are not bound to follow the Code or even to join ISOA, they can strategically choose not to join to avoid publication and investigation of their alleged abuses and the potential corresponding reputational damages.<sup>112</sup> In one instance, the then-IPOA refused membership to a British PMSC that was subsequently awarded a significant Coalition Provisional Authority contract in Iraq.<sup>113</sup> The awarding of this contract to a PMSC that the ISOA viewed as unfit to be a member demonstrates that the ISOA lacks the authority and influence necessary to regulate the PMSC industry effectively.

Despite these problems, the importance of the ISOA in the PMSC industry continues to grow. Representatives of PMSCs have indicated that, as members of the ISOA, they have gained a competitive advantage because potential clients see them as stable companies that respect human rights and IHL; therefore, potential clients are willing to grant contracts to them.<sup>114</sup> Further, in 2008 the U.S. government promulgated new regulations seeking to achieve the same objectives as those of the ISOA.<sup>115</sup>

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id=1520016 (discussing AIUSA's recommendations for revising the ISOA Code of Conduct, including well-defined implementation guidelines, independent compliance monitoring and oversight, enhancement of the enforcement mechanism, and increased transparency).

108. Cusumano, *supra* note 20, at 13–14.

109. COCKAYNE & MEARS, *supra* note 83, at 4.

110. See *Analysis of IPOA Code of Conduct, Version 12*, *supra* note 107.

111. See Cusumano, *supra* note 20, at 14.

112. See *id.* (discussing Blackwater's withdrawal from the then-IPOA when investigation began into its conduct in Iraq).

113. *Id.* (citing KERRY ALEXANDER & NIGEL WHITE, PRIV-WAR, THE REGULATORY CONTEXT OF PRIVATE MILITARY AND SECURITY SERVICES IN THE UK 21 (2009)).

114. See *Member Testimonials*, INT'L STABILITY OPERATIONS ASS'N, <http://ipoaworld.org/eng/testimonials.html> (last visited Dec. 22, 2010).

115. Robert S. Wells, *Ensuring Ethical Conduct on the World Stage: Remembering the IPOA Code of Conduct*, J. INT'L PEACE OPERATIONS, Nov.–Dec. 2009, at 27, 27, available at [http://ipoajournal.org/mag/web/images/pdf/journal\\_2009\\_1112.pdf](http://ipoajournal.org/mag/web/images/pdf/journal_2009_1112.pdf).

The government of Afghanistan also now requires all PMSCs operating within the country to comply with the Code of Conduct established by the ISOA.<sup>116</sup>

### III. PROBLEMS WITH EXISTING REGULATORY FRAMEWORK

As noted above, PMSC regulation at all levels remains largely ineffective. Current regulatory efforts have proved unsuccessful due to the unique nature of PMSCs. Regulation of PMSCs is complicated by the following conflict of interest problems:

- PM[S]Cs might have different interests to the agent employing them.
- PM[S]Cs might act in ways that are difficult for employers and the public to monitor.
- PM[S]Cs may be tempted to cut corners, overcharge or to ‘cut and run’.
- PM[S]Cs might become more powerful than those employing them and thus become a threat.
- In order to pay the PM[S]C the employer (often a state) might pawn its most valuable assets (access to natural resources).
- Those actors (states) with more cash to hire PM[S]Cs will become more powerful than others.
- Weak states with cash can become interventionists with the aid of PM[S]Cs.
- The executive branch of governments, by using PM[S]Cs, can bypass the controls of legislatures.
- The ability of weak states to provide internal security becomes dependent on their relationship to rich states who are prepared to pay for the services of PM[S]Cs.<sup>117</sup>

The regulation of the PMSC industry is further complicated by the unique nature of a state’s contracting for—and thus consenting to—the use of force by a private entity. Another complication for effective regulation of PMSCs can be attributed to other characteristics of the industry.<sup>118</sup> First,

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116. Ng, *supra* note 100, at 8.

117. Mervyn Frost, *Regulating Anarchy: The Ethics of PMCs in Global Civil Society*, in PRIVATE MILITARY AND SECURITY COMPANIES: ETHICS, POLICIES AND CIVIL-MILITARY RELATIONS, *supra* note 10, at 43, 43.

118. See Deborah Avant, *Selling Security: Trade-Offs in State Regulation of the Private Security Industry*, in PRIVATE MILITARY AND SECURITY COMPANIES: CHANCES, PROBLEMS, PITFALLS AND PROSPECTS, *supra* note 16, at 419, 422 (noting that “the industry’s low capitalization, fluid structure, and the lack of commitment to territory” make domestic regulation difficult (citations omitted)).

unlike states, which may be held directly accountable to the public, PMSCs are accountable only to their corporate management and shareholders, who may not know or care about duties regarding human rights and IHL.<sup>119</sup> Second, because positions with PMSCs often receive higher salaries than state positions with the police or military, PMSCs recruit away from these vital state forces, leaving a potential void in essential local and national security forces.<sup>120</sup> Third, PMSCs often employ people from around the world and send their employees to countries in which the PMSCs have no connection, thus leading to conflict of law issues.<sup>121</sup> Finally, current regulations suffer from (1) differences in power among parties, (2) conflicts of interest between regulating and contracting for PMSC services, (3) failure to develop regulation in step with development in the industry, and (4) inadequate use of market mechanisms.

#### A. DIFFERENCES IN POWER AMONG PARTIES

One of the most significant issues plaguing regulation of the industry is the differences in power, both financially and politically, among the parties. The key conflict arises among host states,<sup>122</sup> contracting states,<sup>123</sup> and home states.<sup>124</sup> Each of these states has a unique role to play and may have a vastly different approach to regulation. Host states, for example, may seek strict regulation because the PMSCs are operating on their soil. Contracting or home states, however, may not have as great a stake in obtaining strict regulation if they are able to obtain better contractual arrangements with PMSCs when regulation is weak.

This difference in viewpoints makes it difficult to reach an international consensus and create a fair regulatory system because each state will attempt to act in its own best interest. And such conduct may create an atmosphere of distrust and foul play, which would stymie any

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119. See Buzatu, *supra* note 9, at 12.

120. See *id.* at 13.

121. See *id.* at 14.

122. The Montreux Document refers to “host States” as “territorial States” and defines them as “States on whose territory PMSCs operate.” Montreux Document, *supra* note 9, at 6.

123. The Montreux Document defines “contracting States” as “States that directly contract for the services of PMSCs, including, as appropriate, where such a PMSC subcontracts with another PMSC.” *Id.*

124. The Montreux Document defines “home States” as States of nationality of a PMSC, i.e. where a PMSC is registered or incorporated; if the State where the PMSC is incorporated is not the one where it has its principal place of management, then the State where the PMSC has its principal place of management is the ‘Home State.’

*Id.*

international attempt to regulate the industry. For example, host states may not provide a fair judicial system to try foreign PMSCs due to a bias against a company seen as an invading force.<sup>125</sup> This scenario may work the other way as well if charges against a PMSC are dropped in home states or contracting states, leading to a perception of favoritism and disregard for citizens of host states.<sup>126</sup>

Moreover, host states often do not have the ability to enforce regulation against foreign PMSCs.<sup>127</sup> In some instances, contracting states specifically prohibit host states from holding foreign PMSCs accountable for violations of domestic and international laws.<sup>128</sup> For example, the United States, one of the largest contracting states, through the Coalition Provisional Authority (“CPA”), issued Order Number 17 in June 2004, which granted immunity to foreign PMSCs operating in Iraq and prevented the application of local Iraqi law to foreign PMSCs.<sup>129</sup> After a new Status of Forces Agreement took effect in January 2009, CPA Order 17 was canceled.<sup>130</sup> The Iraqi government, however, continued to encounter problems with regulating PMSCs operating within its territory.<sup>131</sup>

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125. See Hurst, *supra* note 4, at 1321.

126. See *id.* at 1323. For example, in 2010, the U.S. Court of Appeals for the Second Circuit held that foreigners could not bring suit against corporations under the U.S. Alien Tort Claims Act of 1789 because “no corporation has ever been subject to any form of liability under the customary international law of human rights.” *Kiobel v. Royal Dutch Shell Petroleum Co.*, 621 F.3d 111, 120–21 (2d Cir. 2010). For a brief discussion of the decision, see Bob Van Voris & Patricia Hurtado, *Torture Ruling Bars “Alien Tort” Claims on Companies*, BLOOMBERG (Sept. 17, 2010, 3:32 PM), <http://www.businessweek.com/news/2010-09-17/torture-ruling-bars-alien-tort-claims-on-companies.html>.

127. Francesco Francioni, *The Responsibility of the PMSC’s Home State for Human Rights Violations Arising from the Export of Private Military and Security Services* 10 (Acad. of European Law, PRIV-WAR Project, EUI Working Paper No. AEL 2009/18, 2009), available at [http://cadmus.eui.eu/dspace/bitstream/1814/13137/1/AEL\\_2009\\_18.pdf](http://cadmus.eui.eu/dspace/bitstream/1814/13137/1/AEL_2009_18.pdf).

128. Cusumano, *supra* note 20, at 16 (discussing the effect of the Coalition Provisional Authority’s Order 17).

129. See Coal. Provisional Auth., *Coalition Provisional Authority Order Number 17 (Revised): Status of the Coalition Provisional Authority, MNF–Iraq, Certain Missions and Personnel in Iraq*, § 4(2)–(3), CPA Doc. CPA/ORD/27 June 2004/17 (June 27, 2004) [hereinafter CPA, *Order No. 17*], available at [http://www.iraqcoalition.org/regulations/20040627\\_CPAORD\\_17\\_Status\\_of\\_Coalition\\_Rev\\_with\\_Annex\\_A.pdf](http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf) (“Contractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their Contracts . . . . Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto.”); PERLO-FREEMAN & SKÖNS, *supra* note 83, at 8 (suggesting that the United States is one of the largest markets for PMSC services); Jan Grofe, *Human Rights and Private Military Companies: A Double-Edged Sword Too Dangerous to Use?*, in PRIVATE MILITARY AND SECURITY COMPANIES: CHANCES, PROBLEMS, PITFALLS AND PROSPECTS, *supra* note 16, at 241, 250.

130. Human Rights Council, *supra* note 15, ¶ 85.

131. See *id.* (noting that Blackwater personnel continued to work in Iraq despite the Iraqi government’s denial of Blackwater’s operating license).

This Order shows that host states often have little bargaining power to regulate PMSC activity; yet, these are the states in which most of the human rights and IHL abuses occur. Thus, to be effective, an international framework must level the playing field so that host states have the authority to regulate PMSCs and contracting states may use their power to protect human rights, as they do in many other contexts. Some host states have begun to implement PMSC regulations.<sup>132</sup> In Afghanistan, for example, the local government issued an administrative directive requiring local PMSCs to follow the standards established by the ISOA.<sup>133</sup>

In addition to this difference in political power, there is often a significant difference in financial power.<sup>134</sup> For a regulatory system to be effective, a great deal of monetary and institutional resources must be expended. Often, host states do not possess the resources to hold PMSCs accountable for abuse of any type of law.<sup>135</sup> But even if states possess the necessary resources, it will be difficult, if not impossible, to get them to expend these resources on an international regulatory system. As PMSC industry representatives stated, “no grouping of global powers will be willing to invest large amounts of money and manpower in the creation and maintenance of a major regulatory body.”<sup>136</sup>

#### B. CONFLICTS OF INTEREST

In addition to differences in power, states may encounter conflict of interest situations.<sup>137</sup> States want to acquire and keep foreign investments, but businesses look for ways to save on the bottom line and, therefore, may want to invest in a state with limited regulation.<sup>138</sup> Thus, states have little incentive to enforce human rights and IHL on PMSCs for fear of losing these investments.<sup>139</sup> Further, some states do not themselves abide by human rights and IHL, making it highly improbable that they would enforce these principles on PMSCs that invest in these states’

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132. COCKAYNE ET AL., *supra* note 9, at 41.

133. *Id.*

134. *See* Cusumano, *supra* note 20, at 21.

135. *See id.* at 16.

136. *Id.* at 21 (citation omitted).

137. *See* INT’L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 25, at 12 (explaining that states “will have serious conflicting interests if [they] tr[y] to act on behalf of victims, or to develop laws that hold [PMSCs] accountable, and at the same time tr[y] to attract foreign direct investment from multinationals who can choose to invest in any number of countries”).

138. *See id.*

139. Wells & Elias, *supra* note 27, at 144.

economies.<sup>140</sup> Conflicts of interest also apply to contracting states that have a duty to regulate PMSCs.<sup>141</sup> The contracting states are placed in situations in which they “are not only the watchdogs for but also major clients of the industry.”<sup>142</sup>

Furthermore, states may actually have an incentive merely to create the appearance of a domestic regulatory framework. Unlike direct government involvement, the use of PMSCs gives states a “shield of plausible deniability.”<sup>143</sup> States may contract for the use of PMSCs to carry out missions that would be politically dangerous, allowing the states to wash their hands of dealing with complicated foreign policy issues. This behavior in turn can cause significant damage to the public’s ability democratically to affect a state’s choice to engage in the use of force.<sup>144</sup> In these situations, contracting states may have legitimate national security reasons for limiting disclosure of certain information to the public. But the lack of disclosure may reduce the trust of the public and other societal actors regarding the state’s ability to regulate PMSCs effectively.<sup>145</sup> Since information is not disclosed to the public, market regulatory mechanisms may not function properly because the public does not possess the necessary information.<sup>146</sup>

Conflict of interest issues also arise when PMSCs attempt to regulate themselves. Methods of self-regulation in the PMSC industry have been criticized for several reasons: (1) self-regulation is an improper means to address PMSC abuses of human rights and IHL; (2) regulation of the industry by the industry lacks an appropriate level of transparency and may make industry measures appear self-serving; (3) without support from states and other key stakeholders, self-regulation efforts lack the resources necessary to implement any regulatory measures; and (4) self-regulation may lead to a narrow viewpoint that takes into account only industry insiders and not other stakeholders, such as those in the host state.<sup>147</sup>

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140. *See id.* at 152.

141. COCKAYNE ET AL., *supra* note 9, at 43.

142. *Id.*

143. Cusumano, *supra* note 20, at 18.

144. *See id.*

145. *See* COCKAYNE ET AL., *supra* note 9, at 43.

146. *See id.*

147. *Id.* at 19.

C. FAILURE TO DEVELOP REGULATIONS IN STEP WITH INDUSTRY  
DEVELOPMENT

Even without these problems, current regulatory systems would still be unsuccessful because they have failed to keep up with the development of the PMSC industry. First, present domestic and international human rights and IHL regulations often do not directly address PMSCs.<sup>148</sup> Problems arise in PMSC classification under the Geneva Conventions and in the ability to hold individuals accountable regardless of the jurisdictions in which they operate.<sup>149</sup> PMSCs do not fit squarely into existing definitions, and, therefore, problems have arisen relating to “impunity, democratic accountability, and the awkward extraterritorial application of laws that were designed to apply on the home turf.”<sup>150</sup>

Furthermore, domestic regulation has failed to adjust to the increasingly global nature of PMSCs. PMSCs can now easily evade unfavorable domestic regulations by changing their corporate structures.<sup>151</sup> For example, Sandline International, a United Kingdom-based PMSC, chose to register in the Bahamas to avoid more stringent British laws and to gain advantages from a more favorable tax system.<sup>152</sup> As a result, states face significant difficulties in attempting to regulate PMSCs operating on a global scale, such as conducting effective investigations on foreign soil and applying domestic regulations extraterritorially.<sup>153</sup>

The United States has attempted to remedy this situation by extending some of its laws to include PMSCs operating abroad.<sup>154</sup> But until the United States achieves an adequate domestic monitoring system or strengthens its relationships with other countries and stakeholders, any new

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148. See Sebastian Drutschmann, *Informal Regulation: An Economic Perspective on the Private Security Industry*, in PRIVATE MILITARY AND SECURITY COMPANIES: CHANCES, PROBLEMS, PITFALLS AND PROSPECTS, *supra* note 16, at 443, 448 (noting that PMSCs do not fit squarely into any existing regulation and the means and political will to improve this situation are seriously lacking).

149. See Stürchler, *supra* note 20, at 9.

150. Buzatu, *supra* note 9, at 7. To avoid being held accountable for their actions, PMSCs have employed varying legal arguments, “including the Government contractor defence, the political question doctrine and derivative immunity arguments. . . . [C]ontractors have also challenged the applicability of international law to them, claiming that international law obligations—including the prohibitions on torture and war crimes—do not extend to them as they are ‘non-State actors.’” Human Rights Council, *supra* note 15, ¶¶ 80–83.

151. See COCKAYNE ET AL., *supra* note 9, at 18–19; CAROLINE HOLMQVIST, STOCKHOLM INT’L PEACE RES. INST., PRIVATE SECURITY COMPANIES: THE CASE FOR REGULATION 54 (2005), available at <http://books.sipri.org/files/PP/SIPRIP09.pdf>.

152. HOLMQVIST, *supra* note 151, at 54.

153. See COCKAYNE ET AL., *supra* note 9, at 42.

154. See *id.* at 39.

regulations will merely be “law on the books.”<sup>155</sup>

Moreover, these domestic regulatory systems are often a mess of different regulations that fail to provide a comprehensive system of human rights standards.<sup>156</sup> The United States, for example, has approximately fifty different laws that may be applicable to PMSCs.<sup>157</sup> Yet, none of these statutes address the entirety of PMSC activity, as they seem to assume that PMSCs can be adequately regulated by the United States and its various government entities.<sup>158</sup> Further, states lack an effective compliance mechanism for the regulations that they do have.<sup>159</sup> For example, a U.S. Department of Defense study found that, in Iraq, “more than half of the [PMSC] contracts had not been adequately monitored.”<sup>160</sup>

Two major state players in the PMSC industry, the United States and South Africa,<sup>161</sup> have made significant attempts to regulate PMSC behavior effectively. But other than the efforts of these two countries, there is almost a complete lack of domestic regulation of PMSCs.<sup>162</sup> One of the more significant pieces of U.S. regulation is the International Traffic in Arms Regulations (“ITAR”).<sup>163</sup> The Directorate of Defense Trade Controls, a part of the U.S. Department of State, is responsible for ensuring

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155. *Id.* at 39–40 (internal quotation marks omitted).

156. See STEINHARDT, HOFFMAN & CAMPONOVO, *supra* note 28, at 679–80.

157. COCKAYNE ET AL., *supra* note 9, at 39 (citing U.S. GOV'T ACCOUNTABILITY OFFICE, REBUILDING IRAQ: DOD AND STATE DEPARTMENT HAVE IMPROVED OVERSIGHT AND COORDINATION OF PRIVATE SECURITY CONTRACTORS IN IRAQ, BUT FURTHER ACTIONS ARE NEEDED TO SUSTAIN IMPROVEMENTS (2008)).

158. *Id.*

159. Sebastian Drutschmann suggests that even if states were able to monitor PMSCs, states do not have the resources or the will to hold PMSCs accountable. For example, it would be extremely costly for a state to stop its use of a PMSC for abuses of human rights during a mission, and, therefore, the state most likely would not do so. See Drutschmann, *supra* note 148, at 447.

160. Cusumano, *supra* note 20, at 12 (citing OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEFENSE, REPORT NO. D-2004-057, CONTRACTS AWARDED FOR THE COALITION PROVISIONAL AUTHORITY BY THE DEFENSE CONTRACTING COMMAND-WASHINGTON 24 (2004)).

161. South Africa has one of the most extensive domestic regulatory systems. One of its significant achievements was the promulgation of the Foreign Military Assistance Act (“FMAA”); however, this Note will not discuss this Act. For more information, see Regulation of Foreign Military Assistance Act 15 of 1998 (S. Afr.); Fred Schreier & Marina Caparini, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies* 107 (Geneva Ctr. for the Democratic Control of Armed Forces, Occasional Paper No. 6, 2005), available at [http://se2.dcaf.ch/serviceengine/Files/DCAF/18346/ipublicationdocument\\_singledocument/ba695123-3145-4caa-b29a-a60711724c96/en/op06\\_privatising-security.pdf](http://se2.dcaf.ch/serviceengine/Files/DCAF/18346/ipublicationdocument_singledocument/ba695123-3145-4caa-b29a-a60711724c96/en/op06_privatising-security.pdf) (providing a description of the FMAA).

162. Schreier & Caparini, *supra* note 161, at 109; Schneiker, *supra* note 16, at 407.

163. International Traffic in Arms Regulations, 22 C.F.R. §§ 120–130 (1993). See also Schneiker, *supra* note 16, at 412–15 (discussing the negative and positive aspects of ITAR).

compliance with ITAR.<sup>164</sup>

Certain PMSCs have been held liable under ITAR.<sup>165</sup> Overall, however, ITAR has proved largely ineffective in curtailing human rights abuses. Further, certain provisions of the the ITAR allow PMSCs to avoid congressional oversight.<sup>166</sup> First, the system used to license PMSCs has proven to be “idiosyncratic, inconsistent and not transparent, as the number of offices involved and the criteria used to assess PMSCs’ requests remain unclear.”<sup>167</sup> Second, a provision within ITAR requires that Congress be involved only if a PMSC contract is greater than \$50 million.<sup>168</sup> This provision allows PMSCs to avoid congressional oversight by breaking up large contracts or accepting contracts with a lower dollar amount. Moreover, critics argue that ITAR and its licensing process are too open to the efforts of PMSC industry lobbyists, which may call into question the credibility of ITAR’s enforcement.<sup>169</sup>

International regulatory efforts of the United Nations have also failed to provide effective regulations. The main U.N. body focusing on PMSC issues is the U.N. Working Group on the Use of Mercenaries. This group suffers from major flaws: it does not work with members of the PMSC industry and it continues to refer to PMSC activity as that of mercenaries.<sup>170</sup> The failure to engage with and understand PMSCs has created distrust of the United Nations in the PMSC industry, and the United Nations now does not have the access to the industry needed for effective regulation.<sup>171</sup> Also, the U.N. Working Group does not work in conjunction with the Swiss Initiative; ultimately, these two initiatives may create conflicting regulatory systems and cause additional confusion in the

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164. See *Compliance*, U.S. DEP’T OF STATE, DIRECTORATE OF DEF. TRADE CONTROLS, <http://pmdtc.state.gov/compliance/index.html> (last updated Dec. 5, 2008).

165. See, e.g., Interturbine Aviation Logistics GmbH (Dep’t of State Jan. 4, 2010) (order), [http://pmdtc.state.gov/compliance/consent\\_agreements/pdf/IAL\\_Order.pdf](http://pmdtc.state.gov/compliance/consent_agreements/pdf/IAL_Order.pdf) (ordering Interturbine Aviation Logistics to pay a fine of at least \$100,000); Northrop Grumman Corp. (Dep’t of State Mar. 25, 2008) (order), [http://pmdtc.state.gov/compliance/consent\\_agreements/pdf/NorthropGrummanCorp\\_Order.pdf](http://pmdtc.state.gov/compliance/consent_agreements/pdf/NorthropGrummanCorp_Order.pdf) (ordering Northrop Grumman to pay a fine of at least \$10 million); Lockheed Martin Corp., (Dep’t of State June 13, 2000) (order), [http://pmdtc.state.gov/compliance/consent\\_agreements/pdf/LockheedMartinCorp\\_Order\\_00.pdf](http://pmdtc.state.gov/compliance/consent_agreements/pdf/LockheedMartinCorp_Order_00.pdf) (ordering Lockheed Martin to pay a fine of at least \$8 million).

166. See Avant, *supra* note 118, at 425.

167. Cusumano, *supra* note 20, at 17 (citing Deborah Avant, *Selling Security: Trade-Offs in State Regulation of the Private Security Industry*, in PRIVATE MILITARY AND SECURITY COMPANIES: CHANCES, PROBLEMS, PITFALLS AND PROSPECTS, *supra* note 16, at 419, 425). See also Schreier & Caparini, *supra* note 161, at 105.

168. Cusumano, *supra* note 20, at 17; Schreier & Caparini, *supra* note 161, at 105–06.

169. See Cusumano, *supra* note 20, at 17 (citations omitted).

170. See COCKAYNE ET AL., *supra* note 9, at 51.

171. See *id.* at 51–52.

industry.<sup>172</sup> Moreover, as with most international bodies, the U.N. Working Group lacks many of the resources and much of the expertise necessary to create and implement an effective framework.<sup>173</sup>

Similar issues affect industry self-regulation. As with domestic regulation that may be only “law on the books,” industry codes of conduct may be nothing more than mere statements on paper.<sup>174</sup> If PMSC codes of conduct were effective, the stories of PMSC abuses of human rights and IHL would be reduced; however, this reduction has not happened.<sup>175</sup> PMSCs are not yet prepared to handle the task of enforcing compliance with human rights and IHL across all of their operations.<sup>176</sup> Even if a PMSC possesses an adequate internal compliance mechanism, most PMSCs do not possess a third-party complaint mechanism that would satisfy the requirements detailed in a report by U.N. Special Representative John Ruggie.<sup>177</sup> And like most other regulation, industry initiatives and self-initiatives are voluntary and, therefore, often lack sufficient influence to create universal compliance.<sup>178</sup> These efforts are usually either ignored completely or result in punishment that is nothing more than a slap on the wrist.

#### D. INADEQUATE USE OF MARKET MECHANISMS

In addition to having ineffective regulatory systems, states have failed to make use of contractual provisions as a regulatory mechanism. As major purchasers of PMSC services, states could affect the behavior of PMSCs by including, and subsequently enforcing, provisions in contracts requiring them to abide by human rights and IHL standards. By failing to make use of this regulatory mechanism, states indirectly promote a “race to the bottom” by seeking to contract with the lowest-cost provider.<sup>179</sup> Further, most government contracts “possess so few guidelines, requirements, or benchmarks that they effectively contain no meaningful evaluative criteria.”<sup>180</sup>

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172. *See id.* at 52.

173. *Id.*

174. *See id.* at 45–46.

175. INT’L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 25, at 7–9.

176. *See* Drutschmann, *supra* note 148, at 447 (suggesting that PMSCs may actually have an incentive to ignore effective monitoring to save on costs and increase their profit margins).

177. COCKAYNE ET AL., *supra* note 9, at 47.

178. *See id.* at 30–31.

179. Cusumano, *supra* note 20, at 11.

180. *Id.* at 12 (quoting Laura A. Dickinson, *Contract as a Tool for Regulating Private Military Companies*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY

Contractual regulation, however, is somewhat different in the PMSC industry because there are no mass markets; rather, states are the major consumers, and these states may prevent information regarding PMSC behavior from reaching the public.<sup>181</sup> Thus, the PMSC industry lacks adequate market controls for two reasons: (1) there is a lack of a mass consumer market that can affect PMSC behavior by changing spending habits and (2) there is a lack of transparency in the industry, so the public often remains unaware of PMSC behavior.<sup>182</sup>

#### IV. FUTURE HOPE: ESTABLISHING NEW METHODS OF REGULATION

Due to the perceived, and potentially justified, negative reputation of PMSCs, some argue that the industry should be completely abolished and that any attempt to regulate it merely confers on it legitimacy.<sup>183</sup> As demonstrated above, however, the demand for PMSCs and the ability to meet this demand makes abolition unrealistic.<sup>184</sup> In fact, in 2007 the demand for PMSCs was estimated to continue to grow to a minimum by \$202 billion in 2010.<sup>185</sup> By directly addressing the need for regulation in the industry and working with PMSCs, it is possible to obtain greater accountability and more effective regulation.<sup>186</sup>

Indeed, PMSCs may actually provide a legitimate service. As then-British Foreign Secretary David Miliband noted, “The PMSC industry is *essential, inevitable and international*. It is essential, because people need

COMPANIES 217, 218 (Simon Chesterman & Chia Lenhardt eds., 2007)).

181. *See id.*

182. *See* Human Rights Council, *supra* note 15, ¶ 76 (“The information accessible to the public on the scope and type of contracts between the Government of the United States and PMSCs is scarce and opaque. . . . Often, the contracts with PMSCs are not disclosed. . . . either because they contain confidential commercial information or on the argument that nondisclosure is in the interest of national defense . . .”).

183. HOLMQVIST, *supra* note 151, at 42.

184. *See id.*; ELSEA, SCHWARTZ & NAKAMURA, *supra* note 4, at 1 (suggesting that functions performed by PMSCs are necessary to the success of U.S. operations in Iraq); Devin R. Desai, *Have Your Cake and Eat It Too: A Proposal for a Layered Approach to Regulating Private Military Companies*, 39 U.S.F. L. REV. 825, 826 (2005) (citing a British House of Commons report concluding that PMSCs are here to stay).

185. HANS BORN, MARINA CAPARINI & EDEN COLE, REGULATING PRIVATE SECURITY IN EUROPE: STATUS AND PROSPECTS 1 (Geneva Ctr. for the Democratic Control of Armed Forces, Policy Paper No. 20, 2007) (citing DEBORAH D. AVANT, THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY 9 (2005)), available at [http://kms1.isn.ethz.ch/serviceengine/Files/ISN/46091/publicationdocument\\_singledocument/111da5bc-395b-4bcf-8324-1027192783c4/en/PP20\\_Born\\_Caparini\\_Cole\\_%5B1%5D.pdf](http://kms1.isn.ethz.ch/serviceengine/Files/ISN/46091/publicationdocument_singledocument/111da5bc-395b-4bcf-8324-1027192783c4/en/PP20_Born_Caparini_Cole_%5B1%5D.pdf).

186. *See* HOLMQVIST, *supra* note 151, at 42–43.

protecting in dangerous countries; inevitable, because governments cannot deploy protection in all theatres; and international, because the market and suppliers are global.”<sup>187</sup> Thus, it seems that calls to abolish the industry are unrealistic; PMSCs are here to stay. To obtain the full positive benefits they can provide, it is important that PMSCs be viewed as legitimate, making effective regulation and monitoring imperative.<sup>188</sup> PMSC representatives also welcome improved regulatory measures and well-defined duties because these changes could ultimately help improve the industry’s reputation.<sup>189</sup>

Regardless of what form this global system takes, the interests of all parties must be accounted for and proper incentives must be placed in the system to encourage all parties to act appropriately. This system, involving multiple layers of regulation, is necessary because it accounts for differences in individual states and PMSCs.<sup>190</sup> Further, the regulatory system should encourage active participation from all parties so that it may continue to develop and foster trust among them.<sup>191</sup> To develop trust among state governments, an equal voice should be given to all states without concern for their political statuses on the international stage. As noted above, host states and contracting states may already distrust one another. With equal voices, however, they may be more willing to negotiate. But providing an equal voice for all in the system may discourage the more powerful states from participating. To counteract this potential effect, incentives must be provided to powerful states to bring them to the negotiating table. Such incentives may include assistance with enforcement of regulations, concessions on other points, and increased political goodwill.

Moreover, the participation of PMSC industry representatives is essential. These parties may provide the expertise necessary to draft appropriate regulations for the industry, and, ultimately, these parties may be responsible for a significant portion of the costs associated with any global regulatory system.<sup>192</sup> As noted above, by encouraging participation of all relevant parties, the system may be plagued by deadlocks in negotiations or failures of enforcement; thus, proper incentives to

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187. David Miliband, *Foreword to CONFLICT GRP.*, *supra* note 90, at 5, 5.

188. See HOLMQVIST, *supra* note 151, at 43.

189. COCKAYNE ET AL., *supra* note 9, at 27–28.

190. Andrew Bearpark & Sabrina Schulz, *The Future of the Market*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES, *supra* note 180, at 239, 239–40.

191. See HOLMQVIST, *supra* note 151, at 43.

192. See COCKAYNE ET AL., *supra* note 9, at 61–62.

encourage compliance must be established. These incentives may include market forces, such as blacklists and licensing requirements, as well as nonmarket forces, such as international legal sanctions or arbitration agreements.<sup>193</sup>

To develop this framework by providing increased consistency and accountability, current regulatory efforts must be expanded to create a global regulatory system comprised of both compulsory and voluntary regulation at the international, domestic, and industry levels.<sup>194</sup> Moreover, membership in current initiatives should be expanded and developed, ideally to the point at which the regulation is applicable to all relevant parties.<sup>195</sup> Also, to ensure consistency among different initiatives, the United Nations should declare the obligations of PMSCs with respect to human rights and IHL so that these initiatives can develop in concert with one another and not in opposition.<sup>196</sup> Ultimately, as Ruggie suggested, an international regulatory framework must be founded on three concepts regarding human rights and IHL: (1) the states' duty to protect against abuses; (2) the industry's duty to respect; and (3) effective access to remedies.<sup>197</sup> Each of these concepts builds upon the others and provides a foundation for the creation of a multilayer regulatory system.

#### A. LICENSING AND MONITORING MECHANISMS

To increase the effectiveness of domestic and international regulatory measures, the creation of a licensing and monitoring system is essential. This system should be universal and exclusive, so as to prohibit the continual operation of PMSCs that do not abide by the licensing provisions. This universal aspect of the system should create a level of consistency in the regulatory system and provide stability that is currently nonexistent.<sup>198</sup>

At both domestic and international levels, a licensing and monitoring system could require all PMSCs to submit to independent audits, thereby increasing transparency and accountability in the industry, and to participate in compulsory training of all personnel in human rights and IHL.<sup>199</sup> With independent audits, the licensing regime could determine

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193. *Id.* at 62–63.

194. Grofe, *supra* note 129, at 253–54.

195. See HOLMQVIST, *supra* note 151, at 49; Cusumano, *supra* note 20, at 21.

196. See HOLMQVIST, *supra* note 151, at 45–46.

197. Ruggie, *supra* note 29, ¶ 9.

198. See Cusumano, *supra* note 20, at 19 (explaining the regulatory system's current lack of "[c]ollective action at the international level").

199. Grofe, *supra* note 129, at 254. The U.N. Working Group's report, following a mission to the

whether PMSCs are acting in compliance with the established standards and whether disciplinary action is required. By establishing a functioning licensing system, home states, for example, would be able to monitor and enforce compliance with existing standards.<sup>200</sup> These licensing systems would help protect human rights because they “enabl[e] home states to mandate the inclusion of human rights and [IHL] conditionalities in the licensing instrument, while ensuring transparency as to the actual operations in which the company is engaged.”<sup>201</sup> Thus, the licensing system may be proactive and prevent abuses rather than reactive and provide only remedies after an abuse has occurred.

If a PMSC violates human rights and IHL, as defined by the licensing regime, the PMSC could be temporarily or permanently expelled from the governing body. Also, a database could track PMSC activities and alert potential clients to the behavior of individual PMSCs.<sup>202</sup> These penalties would have a significant effect on a PMSC’s ability to obtain new contracts and renew existing ones, and may lead to the removal of an offending PMSC from the market entirely. Further, if an abuse is so egregious as to warrant criminal liability, the licensing regime could determine which state’s laws apply and refer the PMSC to that state, or refer the PMSC to the international judicial body.<sup>203</sup> These enforcement mechanisms would provide incentives for PMSCs to comply with the regulations to avoid being forced out of the market, and they would provide civil society with confidence that PMSCs are not above the law and will be held accountable for their actions.

Ultimately, though, for a licensing and monitoring system of this magnitude to work, a significant amount of financial, political, and institutional costs must be expended. Thus, appropriate incentives should be provided to ensure that all parties participate and that the system can thrive. With a system in which clients contract only with PMSCs that comply with licensing provisions, PMSCs would have an incentive to join and to work with the system to ensure they continue to receive contracts and are not excluded from the market. If the system works properly, PMSCs would also have an incentive to pay an annual fee, provided it does not exceed potential profits gained from membership, so that the

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United States, outlined similar provisions to increase accountability of PMSCs and to ensure appropriate oversight of PMSC activities. See Human Rights Council, *supra* note 15, ¶¶ 97–101.

200. Francioni, *supra* note 127, at 11.

201. *Id.*

202. See Grofe, *supra* note 129, at 254.

203. See COCKAYNE ET AL., *supra* note 9, at 59–60.

compliance mechanism would have the resources necessary to carry out its monitoring tasks. Further, states and other entities that are clients of PMSCs would have an incentive to contract with only member PMSCs so that clients do not become subjects of negative social advocacy campaigns, which may cause significant damage to the entities' reputations and political images.

This licensing system would be applicable to all levels of regulation. At the regional level, this system could be supported by incentives, such as those noted above, so that only PMSCs and states that comply with established human rights and IHL standards are granted access to the market. Moreover, regional frameworks would be effective in the changing global marketplace by regulating corporate activity that spans across states, a type of regulation that individual states would have difficulty doing.<sup>204</sup>

Efforts at the domestic level to develop a licensing and monitoring system are equally important. As Ruggie stated in his report, the duty of the state to protect human rights and IHL is the "bedrock" of an effective international regulatory system.<sup>205</sup> At least in the near future, domestic efforts may be the most reliable means of regulation because no international consensus needs to be reached; only an internal domestic consensus needs to be reached. Domestic regulatory improvements may be more easily achieved because there are fewer competing interests and fewer actors. Moreover, individual states have the power to directly affect standards via market mechanisms because the states are some of the largest clients of PMSCs.

The creation of a domestic framework may vary from state to state depending on the state's relationship with the PMSC industry. For example, a home state that receives significant economic benefits, through tax revenue, from PMSCs registered in its territory should allocate a portion of this revenue to support the system.<sup>206</sup> Moreover, contracting states can support a regulatory system by providing access to information regarding PMSC activities, both past and present, as well as the contractual provisions agreed to between the states and the PMSCs.<sup>207</sup> By providing this access, contracting states could improve accountability in the industry. Host states, on the other hand, are often weak in comparison to home

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204. *See id.* at 31.

205. Ruggie, *supra* note 29, ¶ 50.

206. Francioni, *supra* note 127, at 12.

207. *See* Cusumano, *supra* note 20, at 18 (discussing the Transparency and Accountability in Military and Security Contracting Act, S. 674, 110th Cong. (2007), a bill that was proposed in the U.S. Senate to include such provisions, but was ultimately not passed into law).

states; thus, they may find it difficult to enforce any regulation on foreign PMSCs.<sup>208</sup> But host states may be able to employ the aid of civil society to ensure PMSCs operating in their territories abide by human rights and IHL.<sup>209</sup> By employing the aid of civil society, host states could use the media to shame not only the PMSCs that abuse human rights, but also the PMSCs' clients and home states. Yet, among these different states, a delicate balance must be achieved so that PMSCs will not flee regulated states to set up business in states with weak regulatory systems, rendering any of these regulatory attempts useless.<sup>210</sup>

Therefore, while a licensing and monitoring system such as the one described above could be effective at all levels, a global system may ultimately provide greater industry consistency and an equal regulatory system in each state. As suggested by Peter Singer, an international system is an imperative to effective PMSC regulation and should be complemented by a monitoring and enforcement mechanism.<sup>211</sup> Also, it is possible to build an international regulatory body; similar regulatory bodies have been created in the diamond industry<sup>212</sup> and the civil aviation industry.<sup>213</sup>

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208. See CPA, *Order No. 17*, *supra* note 129 (granting immunity to PMSCs from Iraqi law).

209. See Cusumano, *supra* note 20, at 16.

210. See Desai, *supra* note 184, at 851.

211. *Id.* at 851–52 (citing P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 539 (2004)); Scheiker, *supra* note 16, at 417–18.

212. The Kimberley Process is the international regulatory body for the diamond industry. It has an extensive certification and monitoring system, which provides for transparency and accountability in the industry. See KIMBERLEY PROCESS, KIMBERLEY PROCESS CERTIFICATION SCHEME, pmbl., § VI(11)–(15) (2002), available at <http://www.kimberleyprocess.com/download/getfile/4>. This regulatory system also provides extensive guidance to industry participants regarding what is acceptable behavior. See *id.* §§ III–V, annex II. Moreover, because the Kimberley Process Certification Scheme was adopted and accepted by major states in the diamond industry, there is state support for industry regulation. See KIMBERLEY PROCESS, INTERLAKEN DECLARATION OF 5 NOVEMBER 2002 ON THE KIMBERLEY PROCESS CERTIFICATION SCHEME FOR ROUGH DIAMONDS 1–2 (2002), available at <http://www.kimberleyprocess.com/download/getfile/5>. In addition, the diamond industry has established a trade association, similar to the ISOA, that represents the industry's attempt to provide a monitoring system to prevent the trade of blood diamonds. See *History*, WORLD DIAMOND COUNCIL, <http://www.worlddiamondcouncil.com> (follow "ABOUT WDC" hyperlink) (last visited Dec. 23, 2010). But regulation of the diamond industry is not perfect. For a comprehensive evaluation of the effectiveness of the Kimberley Process, see PAMELA WEXLER, AN INDEPENDENT COMMISSIONED REVIEW EVALUATING THE EFFECTIVENESS OF THE KIMBERLEY PROCESS (2006), available at <http://www.globalwitness.org/sites/default/files/import/GW%20Commissioned%20Report%20on%20K%20P.pdf>.

213. See Bearpark & Schulz, *supra* note 190, at 243–44. The International Civil Aviation Organization provides for international regulation of the civil aviation industry. See *About ICAO*, INT'L CIV. AVIATION ORG., [http://www.icao.int/icao/en/m\\_about.html](http://www.icao.int/icao/en/m_about.html) (last visited Dec. 25, 2010). See also Int'l Civil Aviation Org., *Convention on International Civil Aviation*, art. 93 bis, ICAO Doc. No. 7300/9 (9th ed. 2006), available at [http://www.icao.int/icaonet/arch/doc/7300/7300\\_9ed.pdf](http://www.icao.int/icaonet/arch/doc/7300/7300_9ed.pdf) (detailing

## B. JUDICIAL MECHANISMS

A key part of any regulatory body is effective judicial enforcement. Due to the current state of international courts, domestic judicial measures will probably be most effective in the short term. Ultimately, though, international judicial measures should be a goal for regulation of the PMSC industry. This international judicial body is an essential element in the regulation of PMSCs because it could help avoid jurisdictional issues.<sup>214</sup>

This judicial branch may take one of two forms: (1) an extension of the International Criminal Court (“ICC”)<sup>215</sup> or (2) an entirely new international judicial system. A potential complication with an international judicial body, however, is the failure of the United States to submit to the jurisdiction of the existing ICC, which suggests that the country will not submit to the authority of any international judicial body.<sup>216</sup> To ensure the success of this international system, the support of the United States will be needed because it is a major international player in the PMSC industry. Therefore, current efforts should focus on creating international standards for domestic judicial enforcement of human rights abuses committed by PMSCs.

## C. MARKET MECHANISMS

States may choose to regulate PMSCs through market or contractual means.<sup>217</sup> This regulation may supplement existing regulation or, in the near future, provide the only means of PMSC regulation.<sup>218</sup> States are significant clients of PMSCs; according to a 2007 survey by the then-IPOA, approximately only 15 percent of participating PMSCs did not provide services to state actors.<sup>219</sup> Thus, states can use this power to regulate PMSCs through contractual provisions that require compliance with human rights and IHL.

For this regulation to be effective, states must ensure that there will be negative consequences for failing to comply with a contractual provision,

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regulatory guidelines and sanctions, such as expulsion from the organization, for violation of the regulatory measures).

214. See Grofe, *supra* note 129, at 254.

215. See *id.* at 249.

216. See Desai, *supra* note 184, at 851.

217. See Ruggie, *supra* note 29, ¶¶ 2, 29–32.

218. See Cusumano, *supra* note 20, at 11 (discussing the prospects of regulating PMSCs through market pressures).

219. *Id.* at 10.

such as contract termination or complete prohibition from competing for contracts in the future.<sup>220</sup> By providing these negative consequences, states may also encourage more effective industry regulation and self-regulation as PMSCs create internal policies to ensure their compliance with these state contracts.<sup>221</sup> If states fail to implement negative consequences, PMSCs will not have any incentive to change their practices to respect these laws and, therefore, the regulatory attempt would fail.

#### D. INDUSTRY CODES OF CONDUCT

In recent years, individual PMSCs and industry trade associations have attempted to regulate the industry via internal codes of conduct (“codes”). In a survey of 235 PMSCs, “30.6% (72 of the companies) profess[ed] their compliance with normative and ethical values. 3.8% (nine companies) expressly advocat[e] the recognition of human rights, and 5.1% (12 companies) acknowledge[d] the necessity of their activities being regulated.”<sup>222</sup> These codes, however, have not been effective and must be strengthened so that commercial interests do not outweigh the need to comply with human rights and IHL.<sup>223</sup>

To improve the effectiveness of these codes, the following should be considered. First, as the statistics above show, there is a lack of consistency and uniformity among the various codes.<sup>224</sup> While codes may vary in content due to the differing sizes and services provided by the individual PMSCs implementing them, a uniform set of human rights and IHL standards should be agreed on and adopted by all PMSCs to ensure industry-wide compliance with these standards. Uniformity would ensure that PMSCs operate on an even playing field by not unknowingly subjecting themselves to liability for implementing standards different from their competitors. To achieve this uniformity, PMSCs could work with international organizations and states to draft global standards.<sup>225</sup> Second,

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220. W. HAYS PARKS, *THE PERSPECTIVE OF CONTRACTING AND “HEADQUARTERS” STATES* 6 (2006), available at <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0072.File.tmp/Presentation%20The%20Perspective%20of%20Contracting%20and%20Headquarters%20States.pdf>.

221. See *id.* at 7.

222. NILS ROSEMANN, *CODE OF CONDUCT: TOOL FOR SELF-REGULATION FOR PRIVATE MILITARY AND SECURITY COMPANIES* 21 (Geneva Ctr. for the Democratic Control of Armed Forces, Occasional Paper No. 15, 2008), available at [http://se2.dcaf.ch/serviceengine/Files/DCAF/94661/ipublication\\_document\\_singledocument/6abc2c81-929c-45d7-9576-5471608920bd/en/OP15\\_Rosemann.pdf](http://se2.dcaf.ch/serviceengine/Files/DCAF/94661/ipublication_document_singledocument/6abc2c81-929c-45d7-9576-5471608920bd/en/OP15_Rosemann.pdf).

223. See INT’L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 25, at 8.

224. See ROSEMANN, *supra* note 222, at 23.

225. See Cusumano, *supra* note 20, at 14.

while a code is an important statement of a PMSC's values, it is nothing more than a statement if the PMSC does not change its corporate culture to take the values into account. For example, a PMSC could ensure all of its personnel are trained in human rights and IHL, and that it hires only employees with a background free of human rights abuses.<sup>226</sup> Third, PMSCs should establish a compliance and enforcement mechanism that will allow them to receive complaints from third parties and provide transparent adjudication.<sup>227</sup>

To ensure that these codes are effective, incentives must be included to induce PMSCs to abide by the established standards. If a code is accepted by PMSCs industry wide, an informal market may be created in which only PMSCs that accept the code receive contracts and remain in business. If the code can affect the market in this way, it will be indirectly enforced because PMSCs will comply with it to avoid being forced out of the market.<sup>228</sup> Also, even though uniformity may be achieved, a code is different from international regulation in that PMSCs may be given the freedom to structure compliance with industry standards to match their corporate cultures.<sup>229</sup> This freedom could encourage PMSCs to adjust their behavior to meet a higher standard to gain a competitive advantage, which would, in the long run, increase overall industry standards.<sup>230</sup> This system, however, has a fatal flaw: companies may need additional incentives, besides reputation, to join the system.<sup>231</sup> Therefore, new incentives may need to be created to ensure that the industry's regulatory system becomes both universal and effective.

By improving the effectiveness of their codes, PMSCs may be able to obtain significant benefits. For example, by implementing standards found in their codes and ensuring compliance, a PMSC may be able to limit its liability because it may be viewed by the judicial body as "a manifestation of special diligence."<sup>232</sup> Moreover, individual PMSCs could experiment

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226. EMANUELA-CHIARA GILLARD, PRIVATE MILITARY/SECURITY COMPANIES: THE STATUS OF THEIR STAFF AND THEIR OBLIGATIONS UNDER INTERNATIONAL HUMANITARIAN LAW AND THE RESPONSIBILITIES OF STATES IN RELATION TO THEIR OPERATIONS 7–8 (2006), available at <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0071.File.tmp/Presen-tation%20PMSC%20and%20Int.%20Hum.%20Law.pdf>.

227. See *id.* at 8.

228. See HOLMQVIST, *supra* note 151, at 49.

229. See Katrina Mason, *UK Pursues Self-Regulation over Licensing: Foreign & Commonwealth Office Releases Public Consultation Document*, J. INT'L PEACE OPERATIONS, July–Aug. 2009, at 26, 26, available at [http://ipoajournal.org/mag/web/images/pdf/journal\\_2009\\_0708.pdf](http://ipoajournal.org/mag/web/images/pdf/journal_2009_0708.pdf).

230. See *id.*

231. See *id.* at 30.

232. ROSEMANN, *supra* note 222, at 24.

with implementing different human rights standards and may choose to enforce standards beyond the bare minimum, which could lead to a market advantage.<sup>233</sup> This experimentation may ultimately affect the design of future domestic and international frameworks. Also, unlike the vague nature of most international regulations, codes can specifically define what is required of a PMSC's personnel to comply with human rights standards.

## V. BENEFITS OF A FUNCTIONING REGULATORY FRAMEWORK

Corporations have often been viewed by the public and by economists as entities established solely for the purpose of generating the most profit with little consideration for anything else. This view was held by the late economist Milton Friedman, who believed that corporations "may contribute to welfare of the societies by utilizing the scarce sources in the most effective manner."<sup>234</sup> Yet, given the vast resources of PMSCs, it seems that they should be responsible for more. A more modern approach to the responsibility of PMSCs suggests that these entities have an obligation to assist in solving societal problems; these efforts may, in the end, lead to a better-functioning market.<sup>235</sup>

As noted above, society often views PMSCs as actors that repeatedly violate human rights and IHL standards and, therefore, should be banned. As a global framework continues to develop, however, industry standards will increase, thereby pushing disreputable PMSCs out of the market and improving societal opinions of the PMSC industry.<sup>236</sup> Any PMSCs that do not adapt their policies to the changing regulatory environment may find that they are pushed out of the market.<sup>237</sup> PMSCs have a significant stake in a positive public image and, therefore, stand to benefit from improved regulation. By increasing the force of compulsory regulations, PMSCs could more easily avoid the costs associated with free riders and uncertainty regarding the PMSCs' duties with respect to human rights and

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233. See INT'L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 25, at 9 ("[C]odes [of conduct] are highly flexible and adapted to the circumstances of particular industries or firms" and "[s]ome codes . . . go beyond minimum human rights standards.")

234. Mentes, *supra* note 24, at 130 (citing Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970 (Magazine), at 32).

235. See *id.* at 131.

236. See BORN, CAPARINI & COLE, *supra* note 185, at 5.

237. See INT'L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 25, at 19 ("The debate on human rights and business has moved rapidly in the past few years. Though discussion still centres on voluntary approaches, increasing attention is being given to the role of national and international regulation. . . . The point to note here is that companies would be short sighted . . . if they ignore this trend.")

IHL.<sup>238</sup> Moreover, PMSCs could contribute to the growth of human rights and IHL in weak states and publicize their efforts to gain goodwill.<sup>239</sup>

By establishing and working in environments that respect and protect human rights and IHL, PMSCs would find a more conducive environment for commercial efficiency and economic growth.<sup>240</sup> Investors would be better able to trust the market because the potential for PMSC liability and costs associated with an uncertain and nonuniform market would reduce.<sup>241</sup> Also, PMSCs that implement these standards could avoid reputational and financial litigation costs and obtain a competitive edge over rivals.<sup>242</sup> Furthermore, as PMSCs increase industry regulation and self-regulation efforts, they may actually be able to help shape the future of domestic and international regulations.<sup>243</sup> A more effective global regulation framework may provide the industry with a more certain future and more secure investments while also reducing or eliminating costs associated with competing on an uneven playing field.<sup>244</sup>

According to the U.N. High Commissioner for Human Rights, PMSCs may benefit commercially by

- (1) ensuring compliance with local and international laws;
- (2) satisfying consumer concerns;
- (3) promoting the rule of law, by contributing to ‘the development of legal systems in which contracts are enforced fairly, bribery and corruption are less prevalent and all business entities have equal access to legal process and equal protection under law’;
- (4) building community goodwill;
- (5) improving supply chain management by selecting business partners that are well-managed and reliable;
- (6) enhancing risk management by assuring more stable and productive business operations;
- (7) keeping markets open;
- (8) increasing worker productivity and retention; and
- (9) applying corporate values in a way that maintains ‘the faith of employees and external stakeholders in company integrity.’<sup>245</sup>

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238. *See id.* at 18–19.

239. *See Mentes, supra* note 24, at 132.

240. *See id.*

241. COCKAYNE ET AL., *supra* note 9, at 20–21.

242. Cusumano, *supra* note 20, at 13.

243. *See id.*

244. *See* COCKAYNE ET AL., *supra* note 9, at 21.

245. STEINHARDT, HOFFMAN & CAMPONOVO, *supra* note 28, at 676 (citing U.N. High Commissioner for Human Rights, *Business and Human Rights: A Progress Report* (Jan. 2000),

As competition in the industry continues to increase, having an internal system in place to ensure compliance with human rights and IHL may allow PMSCs to differentiate their businesses from competitors and gain the benefits noted above.<sup>246</sup>

#### A. INVESTMENT CONSIDERATIONS

PMSCs that integrate human rights and IHL into their business practices stand to gain a significant market advantage. As investors, both individuals and large institutions, become more socially conscious, PMSCs that violate human rights and IHL may lose significant sources of investment. Abuses of human rights and IHL can be costly to investors because the environment in which the PMSCs operate becomes less secure and certain as a result.<sup>247</sup> The ultimate effect of continued abuse would be a decrease in both growth and investment rates,<sup>248</sup> because investment returns become less certain when human rights are not protected.<sup>249</sup> For example, the Norwegian State Pension Fund sold \$5.4 million worth of shares of a PMSC, Elbit Systems, which had been involved in the abuse of human rights and IHL.<sup>250</sup> The Norwegian life insurance company Kommunal Landspensjonkasse also sold all of its Elbit shares, and PKA Ltd., one of the largest pension funds in Denmark, sold \$1 million of its Elbit shares.<sup>251</sup> Elbit was added to a blacklist containing thirty-five other companies compiled by a Danish financial watchdog, Danwatch, and Danske Bank sold \$1 million shares of Elbit.<sup>252</sup> Thus, by engaging in abuses of human rights, Elbit lost several significant sources of investment.

#### B. AVOIDING COSTLY LIABILITY

While domestic and international regulation has proved largely ineffective, PMSCs and their personnel may still be subject to liability for

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<http://www.ohchr.org/Documents/Publications/BusinessHRen.pdf>.

246. See Drutschmann, *supra* note 148, at 451–52 (suggesting that PMSCs have a market incentive to comply with human rights and IHL standards so they continue to obtain good contracts and personnel).

247. See Lorenz Blume & Stefan Voigt, *The Economic Effects of Human Rights* 8 (UniKassel Versität Volkswirtschaftliche Diskussionsbeiträge Nr. 66/04 [Univ. of Kassel Econ. Discussion Paper No. 66/04], 2004), available at <http://www.uni-kassel.de/fb7/ivwl/diskussionsbeitraege/workingpaper/papier6604.pdf>.

248. *See id.*

249. *Id.*

250. Adri Nieuwhof, *Scandinavian Financial Institutions Drop Elbit Due to BDS Pressure*, ELECTRONIC INTIFADA (Feb. 19, 2010), <http://electronicintifada.net/v2/article11084.shtml>.

251. *Id.*

252. *Id.*

their behavior.<sup>253</sup> A lawsuit may result in a PMSC having to pay damages to a victim, perhaps including large punitive damage awards.<sup>254</sup> Even if a lawsuit does not result in monetary damages, a PMSC may suffer reputational damages that could effectively end its business.<sup>255</sup> Further, a PMSC subject to a lawsuit may become the center of advocacy efforts by states, NGOs, and other members of civil society.<sup>256</sup> PMSCs subject to such attacks may lose credibility in the industry and may ultimately lose clients, as clients would not want to be associated with a company that is in the news for negative reasons.

Moreover, regulations that punish PMSCs directly for human rights and IHL abuses may force a PMSC to change both its internal governance and corporate culture.<sup>257</sup> While a PMSC should adjust its corporate policies to prevent abuses by its personnel, being forced to change immediately and under public scrutiny would probably be much more costly than changing on its own initiative. Ultimately, as the global framework becomes more developed and more effective, PMSCs may find themselves subject to more lawsuits. PMSCs that implement practices that honor human rights and IHL standards will be better equipped to avoid and quickly overcome these costly lawsuits.

## VI. CONCLUSION

As PMSCs continue to grow, the opportunity for abuse of human rights and IHL will grow too, unless an effective regulatory framework is created. This framework should ensure increased transparency in the industry and ensure that PMSCs are held accountable for their violations of established standards. Moreover, the framework should take into account the interests of all relevant parties and should comprise regulation at the domestic, international, and industry levels. By working in concert with one another, states, PMSCs, and international bodies can create a system

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253. See David Zucchino, *Iraqis Settle Blackwater Lawsuits*, L.A. TIMES, Jan. 8, 2010, at A16 (noting that Blackwater settled several civil lawsuits for killings by its personnel); Joe Sterling, *Family's Lawsuit over Slain Contractors Stalls*, CNN.COM INT'L (Apr. 21, 2005, 19:30 GMT), <http://edition.cnn.com/2005/LAW/04/11/blackwater.lawsuit/index.html> (discussing a lawsuit by the families of employees killed while working for Blackwater).

254. See INT'L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 25, at 10–11; Cusumano, *supra* note 20, at 13.

255. See Joanna Kyriakakis, *Australia and International Criminal Law: The Responsibilities of Companies to Abide by International Criminal Law*, J. INT'L PEACE OPERATIONS, July–Aug. 2009, at 29, 30, available at [http://ipoajournal.org/mag/web/images/pdf/journal\\_2009\\_0708.pdf](http://ipoajournal.org/mag/web/images/pdf/journal_2009_0708.pdf).

256. See INT'L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 25, at 10–11.

257. See Kyriakakis, *supra* note 255, at 30.

that defines the obligations of PMSCs and seeks to prevent continued human rights and IHL abuses in the industry.