

American University in Cairo

## AUC Knowledge Fountain

---

Theses and Dissertations

---

2-1-2016

### Military contractors and international law

Ali Deif

Follow this and additional works at: <https://fount.aucegypt.edu/etds>

---

#### Recommended Citation

##### APA Citation

Deif, A. (2016). *Military contractors and international law* [Master's thesis, the American University in Cairo]. AUC Knowledge Fountain.

<https://fount.aucegypt.edu/etds/306>

##### MLA Citation

Deif, Ali. *Military contractors and international law*. 2016. American University in Cairo, Master's thesis. *AUC Knowledge Fountain*.

<https://fount.aucegypt.edu/etds/306>

This Thesis is brought to you for free and open access by AUC Knowledge Fountain. It has been accepted for inclusion in Theses and Dissertations by an authorized administrator of AUC Knowledge Fountain. For more information, please contact [mark.muehlhaeusler@aucegypt.edu](mailto:mark.muehlhaeusler@aucegypt.edu).

**The American University in Cairo**

**School of Global Affairs and Public Policy**

**MILITARY CONTRACTORS AND INTERNATIONAL LAW**

**A Thesis Submitted to the**

**Department of Law**

**in partial fulfillment of the requirements for the degree of  
Master of Arts in International Human Rights Law**

**By**

**Ali Deif**

**December 2015**

The American University in Cairo  
School of Global Affairs and Public Policy

MILITARY CONTRACTORS AND INTERNATIONAL LAW

A Thesis Submitted by

*Ali Deif*

to the Department of Law

December 2015

in partial fulfillment of the requirements for the  
degree of Master of Arts in International Human Rights Law  
has been approved by the committee composed of

Professor First Last Name

Thesis Supervisor \_\_\_\_\_  
American University in Cairo  
Date \_\_\_\_\_

Professor First Last Name

Thesis First Reader \_\_\_\_\_  
American University in Cairo  
Date \_\_\_\_\_

Professor Hani Sayed

Thesis Second Reader \_\_\_\_\_  
American University in Cairo \_\_\_\_\_  
Date \_\_\_\_\_

Professor Hani Sayed

Law Department Chair \_\_\_\_\_  
Date \_\_\_\_\_

Ambassador Nabil Fahmy

Dean of GAPP \_\_\_\_\_  
Date \_\_\_\_\_

MILITARY CONTRACTORS AND THE LAW

Ali Deif

Supervised by Professor Jason Beckett

ABSTRACT

In the modern world, regulation is a necessity, especially on an international scale. PMSCs or Private Military Security Contractors are groups that are involved with militaries, and in conflict zones around the world.<sup>1</sup> Due to their unique functions and place in international law, they essentially fall into a regulatory gap. PMSCs are non-state actors<sup>2</sup>, but perform a series of roles and functions historically associated with the state. They can be used in multitudes of situations and have even been recruited in the war against drugs.<sup>3</sup> Some see military contractors as, or similar to mercenaries,<sup>4</sup> while others disagree. Many, if not most, PMSC personnel do not fit the criteria that comprise the definition of a mercenary<sup>5</sup>, as set forth by article 47 of Additional Protocol 1 of the Geneva Convention.<sup>6</sup>

The issue becomes how best to regulate PMSCs and their personnel. Two options for regulation appear to be the most efficient, first, Kristine Huskey's three phase plan which segments the phases of PMSC operations and regulates each in a different way<sup>7</sup>. Secondly, the option of categorization; labeling military contractors and regulating them based on the category they are placed in. Categorization is a possibility however PMSC personnel have a multitude of roles, and therefore have different responsibilities and regulations. One category that includes all roles and

---

<sup>1</sup>Sid Ellington, *The Rise of Battlefield Private Contractors*, 13 PUBLIC INTEGRITY 131–148, 132, (2011), (referencing Weidenbaum, Murray. 2003. “The Changing Structure of the U.S. Defense Industry.”

Orbis 47, no. 4:693–703.).

<sup>2</sup>Antoine Perret, *Privatization of the War on Drugs in Mexico and Colombia*, 7 INTERDISCIPLINARY JOURNAL OF HUMAN RIGHTS LAW 45–67, 46, (2012).

<sup>3</sup>*Id.* at 45

<sup>4</sup>David Perry, *Blackwater vs. bin Laden: The Private Sector's Role in American Counterterrorism*, 31 COMPARATIVE STRATEGY 41–55, 41, (2012).

<sup>5</sup>Sarah V. Percy, *This Gun's for Hire: A New Look at an Old Issue*, 58 INTERNATIONAL JOURNAL 721, 724,725,(2003), (referencing Quoted in Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (London: Weidenfeld and Nicolson, 1980), 375 (footnote 83)).

<sup>6</sup>Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 47, 8 June 1977.

<sup>7</sup>Kristine A. Huskey, *Accountability for Private Military and Security Contractors in the International Legal Regime*, 31 CRIMINAL JUSTICE ETHICS 193, 193, (2012).

responsibilities is that of a MNC, or multinational corporation. Labeling PMSCs as corporations, categorizes them as what they truly are, businesses. Profit and future business are what PMSCs strive for, and therefore a way to regulate them.<sup>8</sup> Some PMSCs are not combat oriented<sup>9</sup>, and therefore it would be incorrect to lump all PMSCs in together.

When analyzing the international regulation of multinational corporations, parallels to PMSCs begin to appear. Both operate internationally, and both have a goal of profit. By understanding the operations and regulations of MNCs the international community could potentially find a way to categorize and regulate PMSCs. Huskey's three phase theory, in combination with the multinational corporation label, is a novel system by which regulation, as well as responsibility can be placed.

---

<sup>8</sup>Andrew Clapham, *Introductory Remarks by Andrew Clapham*, 200, 107 AM. SOC'Y INT'L L. PROC. 199, 200, (2013).

<sup>9</sup>P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, 85, (2003).

## TABLE OF CONTENTS

I.	Introduction .....	1
II.	Military contractors introduced .....	2
	A. PMSCs definition and roles .....	3
	B. Regulation and purpose.....	4
III.	How to regulate PMSCs .....	9
	A. Huskey’s views .....	9
	1. Three Phases .....	10
	2. Options for Redress.....	14
	3. Criminal law.....	16
	B. Categorization .....	18
	1. Mercenaries.....	18
	2. Civilians/ “Unlawful Combatants” .....	21
	3. Corporations.....	30
IV.	Regulation of Multinationals.....	32
	A. Sovereignty and territory .....	32
	B. Legal forms of Multinationals .....	34
	1. Regulating the different forms .....	37
	2. Reforms.....	38
	C. Corporate Social Responsibility .....	39
	1. Definition .....	40
	2. Compliance and Law .....	41
	D. U.S. Multinational Regulations.....	45
	1. Monitoring and the Corrupt Practices Act.....	46
	2. Standards and laws.....	46
V.	MNC regulation and PMSCs.....	49
	A. Three phases of operation .....	53
	B. Corporate entity .....	58
VI.	Conclusion.....	60

## I. Introduction

Contemporary warfare has created need and use for new technologies and groups of professionals in the “theatre of war”. Modern military forces use outside advisers and personnel to aid in their operations and provide support functions.<sup>10</sup> One of the most controversial and impactful groups involved with militaries throughout the world are Private Military Security Contractors, or PMSC’s. PMSC’s have really come into the public eye following their involvement in the wars in Iraq and Afghanistan, on behalf of the United States. However, amongst most people, little is known about PMSC’s and the ways in which they function during a time of war. PMSC’s are a new phenomenon, and function as non-state actors, and therefore can be problematic for the international community as a whole.<sup>11</sup> In this paper I attempt to analyze the current ideas and opinions regarding PMSC’s and their functions during international conflicts. I plan to analyze the works of many scholars, including both the positive and negative aspects of the business of military contracting. I will also speak about the reasons many feel there needs to be a regulation of these contractors, as well as the standing of PMSC’s under international law. From there I hope to provide theoretical categories in which Military Contractors, both as individuals and groups, can fit; under international law. As the categories are listed, this paper will also analyze the effectiveness of regulating these PMSCs within the scope of each category. In addition there will be an analysis of international rules and regulations regarding multinational corporations. From there, I will contemplate the similarities of PMSCs and multinational corporations, and why this categorization may fit under international law. From there I will analyze how said regulating PMSCs as multinationals could work using Husky’s three phase theory. This paper is framed around the regulation of PMSCs, and an analysis of their regulation if categorized as multinational corporations.

---

<sup>10</sup>RICHARD QUIGLY, *MILITARY CONTRACTORS : LEGAL STATUS, OVERSIGHT AND SECURITY*, 8, (2009), <http://site.ebrary.com/lib/alltitles/docDetail.action?docID=10671302> (last visited Dec 17, 2014).

<sup>11</sup>Antoine Perret, *Privatization of the War on Drugs in Mexico and Colombia*, 7 *INTERDISCIPLINARY JOURNAL OF HUMAN RIGHTS LAW* 45–67, 46, (2012).

## II. Military contractors introduced

Throughout history, non-military personnel were used to perform functions during times of war. It is well known that kings and rulers used foreign soldiers for combat during military campaigns,<sup>12</sup> and that civilians sometimes performed functions for a military force.<sup>13</sup> According to Sid Ellington “America has used civilians in non-combat roles in almost every American conflict”.<sup>14</sup> However, in the wars in Iraq and Afghanistan, America has been using military contractors to perform a variety of roles in support of the military forces. Since the war began, private military and security contractors or PMSCs have been used in functions ranging from “health care to combat support.”<sup>15</sup> So when did these PMSCs become so widely used? When speaking about America particularly, the department of defense “formalized the relationship between civilian contractors and the military forces”,<sup>16</sup> since the invasion of Grenada. But it was during the 1990’s that the idea that the government could “outsource services to private contractors” really began to make waves.<sup>17</sup> Also, following Dick Cheney’s rise to power and his inclusion of Donald Rumsfeld into the fray, there has been a drive, spearheaded by Rumsfeld, to privatize military functions.<sup>18</sup> It was a drive to privatize all functions that were not “core war fighting functions.”<sup>19</sup> Sid Ellington also states that the argument could be made that military contractors actually form the largest segment of what President Bush called his “coalition of the willing.”<sup>20</sup> While America’s use of PMSC organizations is the central focus, in the

---

<sup>12</sup>Sid Ellington, *The Rise of Battlefield Private Contractors*, 13 PUBLIC INTEGRITY 131–148, 136, (2011), (referencing Housen, Roger T. 2002. *The Privatization of Warfare: Back to the Future*. Washington, D.C.: National Defense University. Available at [www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA442603&Location=U2&doc=GetTRDoc.pdf](http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA442603&Location=U2&doc=GetTRDoc.pdf), accessed January 30, 2011.).

<sup>13</sup>*Id.* (referencing Pelton, Robert Y. 2006. *Licensed to Kill: Hired Guns in the War on Terror*. New York: Crown Publishers.).

<sup>14</sup>*Id.*

<sup>15</sup>*Id.* (referencing Weidenbaum, Murray. 2003. “The Changing Structure of the U.S. Defense Industry.” *Orbis* 47, no. 4:693–703.).

<sup>16</sup>Perry, *supra* note 4.

<sup>17</sup>Sid Ellington, *The Rise of Battlefield Private Contractors*, 13 PUBLIC INTEGRITY 131–148, 135, (2011).

<sup>18</sup>*Id.* (referencing Shelton, Henry H. 2001. *Quadrennial Defense Review Report*. Washington, D.C.: Department of Defense. Available at [www.defense.gov/pubs/pdfs/qdr2001.pdf](http://www.defense.gov/pubs/pdfs/qdr2001.pdf), accessed January 30, 2011).

<sup>19</sup>*Id.* (referencing Shelton, Henry H. 2001. *Quadrennial Defense Review Report*. Washington, D.C.: Department of Defense. Available at [www.defense.gov/pubs/pdfs/qdr2001.pdf](http://www.defense.gov/pubs/pdfs/qdr2001.pdf), accessed January 30, 2011).

<sup>20</sup>*Id.* (referencing Avant, Deborah D. 2005. *The Market for Force: The Consequences of Privatizing*



public eye, when speaking about private military contractors, it should be said that military contractors have been used in a variety of different countries for a variety of different reasons. In recent years PMSC's have been used in the war against drugs in Mexico and Colombia.<sup>21</sup> PMSC's have also been used by the American government in counter terrorism efforts following the 9/11 terrorist attacks.<sup>22</sup> In David Perry's *Blackwater vs. bin Laden: The Private Sector's Role in American Counterterrorism*, Perry states that military contractors are "the corporate evolution of the profession of mercenaries"<sup>23</sup>. While it is not necessarily true that military contractors are mercenaries, based on the international legal definition of a mercenary, it is interesting that the word "corporate" was used. PMSC's no matter if they are mercenaries, or legal combatants are now functioning mainly as corporations,<sup>24</sup> and this is how they conduct their business in a modern world.

#### A. PMSCs definition and roles

The first and most important fact about PMSC's is that they are non- state actors, and thereby they are not held to the same "doctrines of international law"<sup>25</sup> that states are. Without an official category to place them in, whether it be mercenaries, unlawful combatants, combatants or even corporations, the international community is not able to regulate them as easily, if at all. "The mechanisms of control and accountability have not adapted due to the novelty of the phenomenon and its constant evolution."<sup>26</sup> Due to this evolution, international law is behind, and left trying to patch this gap. According to Nigel White "structural inadequacies in the evolution of international law, in regards to states and state based actors, is why PMSCs are not

---

Security. Cambridge, UK: Cambridge University Press., Horton, Scott, Kevin Lanigan, and Michael McClintock. 2008. *Private Security Contractors at War: Ending the Culture of Impunity*. New York: Human Rights First.  
Available at [www.humanrightsfirst.info/pdf/08115-usls-psc-final.pdf](http://www.humanrightsfirst.info/pdf/08115-usls-psc-final.pdf), accessed January 30, 2011.).

<sup>21</sup>Perret, *supra* note 2, at 45.

<sup>22</sup>Perry, *supra* note 4.

<sup>23</sup>*Id.*

<sup>24</sup>Clapham, *supra* note 8, at 199.

<sup>25</sup>Nigel D. White, *Due Diligence Obligations of Conduct: Developing a Responsibility Regime for PMSCs*, 31 CRIMINAL JUSTICE ETHICS 233, 233, (2012).

<sup>26</sup>Perret, *supra* note, 2, at 46.

regulated.”<sup>27</sup> What has this gap in international law lead to? To quote Perret, “this privatization is the presence of a non-state actor allowed to use force in contexts where once only states were allowed to do so.”<sup>28</sup>

PMSC personnel have a wide variety of contractual obligations and responsibilities. The easiest way to explain the multitude of functions served by PMSC personnel is to break them down into three categories that P.W. Singer has identified recently. These three categories are based on the services the PMSCs have performed for the U.S. military. The first category includes “military support firms that deliver ‘supplementary military services... including logistics, intelligence, technical support, supply, and transportation’”. The second category covers “military consulting firms that supply ‘advisory and training services integral to the operation and restructuring of a client's armed forces’”. The third and final category “military provider firms that focus on the tactical environment by running active combat operations”<sup>29</sup> are the most controversial contractors that are the stereotypical example in most people’s minds. These categories do provide us with a good idea of the variety of functions that PMSC personnel can provide. Many PMSC personnel may never carry weapons or see combat. This then leads us to the question, should we regulate PMSCs and their personnel?

## **B. Regulation and purpose**

Military contractors, as a whole, seem to be viewed in a negative light in the eyes of many scholars and the public. But why is this? Many believe, PMSC personnel are joining conflicts in order to make money, in similar fashion to mercenaries. To believe a person would willingly put themselves in positions where they might have to kill, for money, is disturbing to many people. According to Sara Percy, at one point in PMSCs “combat services were simply too controversial and international distaste for the open provision of combat helped push Executive Outcomes and Sandline out of

---

<sup>27</sup>White, *supra* note, 25.

<sup>28</sup>Perret, *supra* note, 2.

<sup>29</sup>Katherin J. Chapman, *The Untouchables: Private Military Contractors’ Criminal Accountability under the UCMJ*, 63 VANDERBILT L. REV. 1047–1080, 1049, (2010), (referencing P.W. SINGER, CORPORATE WARRIORS; THE RISE OF THE PRIVATIZED MILITARY INDUSTRY92-97 (Cornell Univ. Press 2003)).

business.”<sup>30</sup> PMSC’s however, have many functions besides fighting in armed conflicts, and many of the conflicts they do participate in are important and can have a positive impact on the world. For example, military contractors are being used in the “war on drugs”<sup>31</sup> as stated above. This, to many, is a positive use of military contractors, and a good use of their skill and resources. In some cases PMSC companies avoided combat. For example Percy states, “Tim Spicer started a new company, Aegis, which was specifically designed to avoid combat, but would provide other security services.”<sup>32</sup>

In the modern world, PMSC personnel are being used for a multitude of purposes in both conflict and post-conflict situations.<sup>33</sup> As Francesco Francioni said, the use of PMSC personnel has become a “trend” and they “replace soldiers and members of the armed forces in a variety of situations that include armed conflict, prolonged military occupation, peacekeeping, and territorial administration in post-conflict institutional building and intelligence gathering.”<sup>34</sup> So if we must accept the use of Private Military Contractors in contemporary global activities, should we not regulate them? The lack of regulation on PMSC personnel is alarming. It is not that PMSC personnel are necessarily better or worse than any official armed forces, it is that any international body, or any international business (depending on how you view PMSCs) should be regulated, especially if they are used in conflict and post-conflict situations. Regulation should not just be used to serve the international community, it should be there for the PMSC personnel themselves, to avoid liability, and it should be there for the hiring state as well. If a hiring state has even the slightest chance of being held accountable for the actions of PMSC personnel, they need a system of regulation to provide evidence that they performed every action necessary to prevent PMSC personnel from violating the law, in order to protect themselves from liability. According to Francioni, the reliance on PMSC personnel, or private contractors, “diminishes the effectiveness of domestic mechanisms of democratic control over

---

<sup>30</sup> Sarah Percy, *Regulating the private security industry: a story of regulating the last war*, 94 INTERNATIONAL REVIEW OF THE RED CROSS 941–960,943, (2012), (referencing Sarah Percy, *Mercenaries: The History of a Norm in International Relations*, Oxford University Press, Oxford, 2007, Chapter 7.).

<sup>31</sup>Perret, *supra* note, 2, at 45.

<sup>32</sup>*Id.* at 228.

<sup>33</sup>Francesco Francioni, *Private Military Contractors and International Law: An Introduction*, 19 EUR J INT LAW 961–964 (2008).

<sup>34</sup>*Id.*

armed forces, as required in all constitutional democracies.”<sup>35</sup>This is a scary fact to face; PMSCs create a situation that has not been completely covered by international law. For example, Katherine Chapman states that “private citizens employed by the U.S. military in undeclared wars had fallen into a legal loophole, practically beyond the reach of criminal law.”<sup>36</sup>She also states that, “PMCs must be held accountable for their criminal actions, not merely to provide personal justice for those injured by their crimes, but also for the strategic objectives of organizing the U.S. military’s available manpower effectively and retaining the support of citizens both domestic and abroad.”<sup>37</sup>

The United Nations Human Rights Council’s working group on Mercenaries has been given the task of analyzing PMSC activity and its effects. The working group mentioned four items that it saw needed to be addressed. First, due to the increasing number of functions that PMSC personnel were performing which included interrogation of prisoners, the “contractors were more and more in contact with civilian populations and in situations where very serious human rights abuses could and did occur.”<sup>38</sup> Second, regulation of military contractors was “virtually nonexistent” in regards to national law<sup>39</sup>. Contractors are often used in countries where the government or law is weak and the country they are operating in cannot control the “use of force.”<sup>40</sup> The lack of regulation also included the Contractor’s home countries, where there were no rules on vetting or training armed contractors. Third, international law does nothing to mitigate the lack of regulation. There are no clear rules on what “governmental functions can be outsourced” and things like “direct participation in hostilities” and “engaging in combat functions” are not covered either<sup>41</sup>. It is also important to mention that there is “no agreement on what due diligence obligations, if any, a state has.”<sup>42</sup> Fourth, because PMSCs work internationally, there is a greater need for an “international regulatory structure.”<sup>43</sup> In

---

<sup>35</sup>*Id.*

<sup>36</sup> Chapman, *supra* note 29, at 1048.

<sup>37</sup>*Id.* at 1052.

<sup>38</sup> Faiza Patel, *Regulating Private Military and Security Companies: A Comprehensive Solution*, 107 AM. SOC’Y INT’L L. PROC. 201, 201, (2013).

<sup>39</sup>*Id.*

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

<sup>41</sup>*Id.*

<sup>42</sup>*Id.*

<sup>43</sup>*Id.*

many cases there is no clear way of determining what state has jurisdiction and responsibility.<sup>44</sup>

If this is not enough to convince the international community of the need to regulate PMSC personnel, the two scandals involving major PMSCs should assist in exemplifying the need for regulation. The first incident is the Nisoor Square shooting, which involved the PMSC Company called Blackwater and ended with the deaths of 17 Iraqi civilians<sup>45</sup>. According to the New York Times article *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*: This incident occurred when PMSC personnel in a convoy seemed to open fire on civilians.<sup>46</sup> To quote the article “the events in the square began with a short burst of bullets that witnesses described as unprovoked.”<sup>47</sup>It seems the contractors were controlling traffic for a convoy carrying important diplomatic personnel. While the Blackwater officials claim that their personnel were shot at, and the shooting was in self-defense, witnesses say it was not self-defense.<sup>48</sup>

The second scandal is the Abu Ghraib prison issue, in which six civilian contractors were involved in the abuse of detainees<sup>49</sup>. According to the Washington Post article *6 Employees From CACI International, Titan Referred for Prosecution*: “CACI interrogators used dogs to scare prisoners, placed detainees in unauthorized "stress positions" and encouraged soldiers to abuse prisoners at Abu Ghraib<sup>50</sup>. Titan employees hit detainees and stood by while soldiers physically abused prisoners.”<sup>51</sup> One of the larger issues is highlighted by this quote in the article that claims the U.S. military was "unprepared for the arrival of contract interrogators and had no training to fall back on in the management, control, and discipline of these personnel.”<sup>52</sup> This exemplifies the very issue of regulation and control of contractors. There is also the issue of regulation in regards to vetting and screening, for example the article states

---

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

<sup>45</sup>James Glanz & Alissa J. Rubin, *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*, THE NEW YORK TIMES, October 3, 2007, <http://www.nytimes.com/2007/10/03/world/middleeast/03firefight.html> (last visited Dec 17, 2014).

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

<sup>49</sup>Renae Merle and Ellen McCarthy, *6 Employees From CACI International, Titan Referred for Prosecution*, The Washington Post, August 26, 2007, <http://www.washingtonpost.com/wp-dyn/articles/A33834-2004Aug25.html> (last visited Dec 17, 2014).

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

“about half of CACI’s interrogators were not properly trained and that the military officer in charge of interrogations did not screen them before allowing them to conduct interrogations.”<sup>53</sup>

These two incidents exemplify the need for regulation of PMSC personnel. The fact that the U.S. military did not know how to “control and discipline”<sup>54</sup> these PMSC operators lead to an incident of abuse.<sup>55</sup> Without a system of regulation PMSCs are in “legal loophole” and can function with some immunity.<sup>56</sup> PMSC personnel are not necessarily any better or any worse than any other group, yet there should be an international system of regulation governing these PMSCs and their personnel.

---

<sup>53</sup>*Id.*

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

<sup>55</sup>*Id.*

<sup>56</sup>Chapman, *supra* note, 29.

### III. How to regulate PMSCs

There are two popular thought processes when it comes to the regulation of military contractors. The first school of thought comes from a scholar named Kristine Huskey. Huskey believes that the current regulation of military contractors by the international community is based on different “phases” to their operations and each phase is being regulated differently. In this analysis of the “existing legal regime”,<sup>57</sup> Huskey picks apart the international system of regulation and exposes its shortcomings. While this theoretical system of regulation is complex it has the conceptual capability to work in regards to both PMSCs and multinational corporations. This theory will later be hypothetically intertwined with the regulation of PMSCs as multinationals.

The second school of thought, which is mentioned by many academics, and is the school of thought I support, is the idea of labeling military contractors, thereby putting them in a category that is part of the modern system of regulation. The idea behind this school of thought is, in order to understand the possible avenues that international law can take, in an attempt to regulate PMSC’s, military contractors should be put in a category. Without a label, military contractors in essence may “slip through the cracks” of international law, preventing regulation from taking place.

#### A. Huskey’s views

To begin with Kristine Huskey’s opinion on the phases of military contracting, and how each phase is being regulated, I noticed that her opinion was created by a novel and revolutionary analysis that, while she picks the current system apart, does have the potential to be a solution to the problem of regulation in the future, assuming there is no other way of regulating military contractors. Huskey’s thoughts stem from her analysis of two of the largest events of misconduct that were perpetrated by military contractors, namely the company formerly known as Blackwater which was involved in the Nisoor Square shooting, and the companies Titian and CACI, and their torturing of detainees at Abu Ghraib.<sup>58</sup> One of the most disturbing realizations Huskey made after her analysis of these incidents, is that all the talk of regulation and punishment,

---

<sup>57</sup>Kristine A. Huskey, *Accountability for Private Military and Security Contractors in the International Legal Regime*, 31 CRIMINAL JUSTICE ETHICS 193, 193, (2012).

<sup>58</sup>*Id.* at 194.

came post-incident.<sup>59</sup> Following these incidents, there was an awareness of the “available mechanisms for criminal and civil accountability of the individuals whose misconduct caused the harm”. Huskey also makes a point of the weaknesses of post-conduct liability analysis, stating that following an incident there is no way of knowing who to hold accountable, should it be the state that hired the military contractors, or whom?<sup>60</sup> Two questions Huskey points out, about “post conduct accountability” are, first, “who is accountable for the conduct of PMSC’s?”, and secondly “to whom...such conduct can be attributed?”<sup>61</sup> This is very similar to Perret’s view on PMSC accountability when she states “The responsibility of private actors for violations of human rights is in question under the law of many jurisdictions.”<sup>62</sup> To answer the questions of responsibility and accountability, Huskey breaks down the use of PMSC’s into three phases.<sup>63</sup> At every phase Huskey points to who could be held accountable and possible systems of regulation. Basically, by breaking the use of PMSC’s down, Huskey has noticed that there are multiple bodies that could be responsible for regulation.

### **1. Three Phases**

Huskey’s phase argument stems from her belief that not enough attention is being paid to “pre-conduct accountability.”<sup>64</sup> She believes there should be a responsibility of “hiring, hosting, and monitoring” of contractors, by those who use PMSC’s, as well as a “responsibility to the victims” of misconduct by military contractors.<sup>65</sup> In order to understand the regulatory system, Huskey presents us with three “phases” which cover “the "life cycle" of a PMSC.”<sup>66</sup> The first phase is the Contracting Phase, the point in time where the state is hiring PMSC’s or their personnel. In the Contracting Phase the hiring state is extremely important because it has the ability to determine important factors that play into contracting these personnel. Some examples of factors that can be determined, by Huskey’s account, are things like “scope of activities to be outsourced; who can be hired including license requirements, and what screening, or

---

<sup>59</sup>*Id.*

<sup>60</sup>*Id.* at 193.

<sup>61</sup>*Id.* at 194.

<sup>62</sup>Perret, *supra* note, 2.

<sup>63</sup>Huskey, *supra* note, 57, at 195.

<sup>64</sup>*Id.* at 194.

<sup>65</sup>*Id.* at 193.

<sup>66</sup>*Id.* at 195.



vetting, mechanisms can be used; whether previous allegations /conduct/ violations play a factor in the hiring process; and the scope of the contract (for example, location of contract performance).”<sup>67</sup>In essence the hiring state acts like a “gatekeeper” in that they set the requirements and responsibilities of the PMSC personnel they are hiring. Huskey gives an interesting example when she says “the hiring state can determine that translation for interrogation (but not interrogation itself) can be outsourced.”<sup>68</sup> However, the hiring state is not the only one that has influence during the Contracting Phase.<sup>69</sup>

The home state (the state in which the PMSC was formed and operates) has power over PMSC’s during the Contracting Phase as well. The power and authority the home states have is the power to suspend or remove the licenses of these corporations and to prevent them from being hired.<sup>70</sup> So we see that there are two states that have influence over the PMSC and their personnel during the Contracting Phase. One of the most interesting facts about the Contracting Phase is that unlike the other two phases, this phase is not involved with International Human Rights Law or International Humanitarian law. In this phase domestic law is the system that covers contracts, and the agreements made within them.<sup>71</sup>

The second phase is what is called the “In-the-Field Phase”. This is the phase in which the largest amount of damage can be done and the most people can be affected. At this point, also called the “theatre of war”, PMSC personnel will be “potentially interacting with various individuals, such as military forces, other PMSC personnel, civilian nationals and local police of the Host state.”<sup>72</sup> This phase takes place in the Host state, the state in which the PMSC personnel are operating, which is where regulation problems can arise. Both the Host state and the Hiring state may have differing opinions of how to regulate these personnel, and their interests for this regulation may be “overlapping, or competing.”<sup>73</sup> There may also be issues in enforcement of regulation, such as a “failed infrastructure” (Host state), which can prevent efficient regulation from coalescing. In this phase the Home state, theoretically, should be involved in regulation of their military contractors as well.

---

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

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

<sup>69</sup>*Id.*

<sup>70</sup>*Id.* at 196.

<sup>71</sup>*Id.* at 197.

<sup>72</sup>*Id.* at 196.

<sup>73</sup>*Id.*

The Home state should monitor the PMSCs and punish those actors who break either the domestic law of the Host state or don't follow "international guidelines."<sup>74</sup> The factors that Huskey lists for this phase include "domestic and international laws, regulations, and codes of conduct applicable to PMSC personnel conduct in the field; monitoring mechanisms, and which state has responsibility to monitor and ensure compliance with such laws, regulations, and codes of conduct; and responsibility of other bodies (for example, international organizations) for monitoring and ensuring compliance with the same laws."<sup>75</sup>

In this phase, Huskey believes that not only International Humanitarian law, but International Human Rights law, can be applicable. There are many instances where military contractors may have violated international law, yet the violence is used in an unstable area, where the violence "doesn't amount to a conflict."<sup>76</sup> In this case, where there is no conflict, the laws of Humanitarian Law do not apply. Huskey goes on to say that Human Rights Law may in fact have "a wider range of accountability mechanisms" which she believes may include "monitoring by United Nations special rapporteurs and field officers."<sup>77</sup> Human Rights Law also allows those who have been wronged to petition their case, and there is a system in place for them to receive compensation if they prove a harm done to them.<sup>78</sup> International Human Rights Law is applicable in situations of "reconstruction or civil strife"<sup>79</sup> where there is no official conflict. These situations are also where PMSC personnel are frequently deployed and used. Also, there are non-derogable human rights that must be respected even during an armed conflict. Therefore, International Human Rights Law is applicable to PMSC personnel. One point Huskey makes concerning human rights, is the right to life, which may be violated in cases where PMSC personnel are acting in self-defense or are in combat. However, during a conflict PMSC personnel may violate the right to

---

<sup>74</sup>*Id.*

<sup>75</sup>*Id.*

<sup>76</sup>*Id.* at 197, (referencing Hin-Yan Liu, "Leashing the Corporate Dogs of War: The Legal Implications of the Modern Private Military Company," *Journal of Conflict and Security Law* 15 (2010): 141 n. 122).

<sup>77</sup>*Id.* (referencing Andrew Clapham, "Human Rights Obligations of Non-State Actors in Conflict Situations," *International Review of the Red Cross*, no. 863 (2006): 491, 503, available at [http://www.icrc.org/eng/assets/files/other/irrc\\_863\\_clapham.pdf](http://www.icrc.org/eng/assets/files/other/irrc_863_clapham.pdf)).

<sup>78</sup>Kristine A. Huskey, *Accountability for Private Military and Security Contractors in the International Legal Regime*, 31 *CRIMINAL JUSTICE ETHICS* 193, 197, (2012).

<sup>79</sup>*Id.*

life if they are not considered “legal combatants.”<sup>80</sup> This is why labeling and categorizing PMSC personnel is so important, without knowing where to put them we don’t understand how to regulate them, or to consider some actions violations. Another human rights violation that PMSCs have potential to violate is “the right to be free from torture and cruel, inhuman, and degrading treatment”, as set out by the “United Nations Convention Against Torture, Cruel, Inhuman and Degrading Treatment.”<sup>81</sup> The reason that PMSC personnel have a potential to violate this right is because many times they are used as guards. Their job may include guarding people or detention centers.

As mentioned earlier, the Abu Ghraib issue was one of PMSC personnel abuses that reached the level of torture as well as the use of cruel, inhuman and degrading treatment.<sup>82</sup> These acts could not have been given legitimate reason to have occurred. Even during a time of emergency or an armed conflict these rights cannot be violated with the exception of “only if and to the extent that the situation constitutes a threat to the life of the nation.”<sup>83</sup> While International Human Rights can be used to regulate PMSC personnel, there is also a draw back in using this form of law. For example, during a time of conflict International Humanitarian Law is given the *lex specialis* privilege and can override human rights.<sup>84</sup> Enforcement can also be an issue, especially because International Human Rights Law only applies to people who are “in the territory or jurisdiction of a state party to the instrument.”<sup>85</sup> There is also an issue of responsibility for violations. To use an example from Huskey’s literature, “a PMSC from Home State X, contracted by Hiring State Y, sends personnel to operate in Host State Z—a failed state that lacks capacity to protect—it is unclear which state has the legal responsibility to ensure human rights violations are not occurring in Host State Z.”<sup>86</sup>, which again leads to the issue of categorization of PMSC personnel. The

---

<sup>80</sup> Huskey. *supra* note 57, at 198. (referencing See Francesco Erancioni, "The Role of Human Rights in the Regulation of Private Military and Security Companies," in Erancioni and Ronzitti (eds). *War By Contract*, 61).

<sup>81</sup> *Id.* (referencing U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46, U.N. Doc. A/RES/39/46 (December 10, 1984)).

<sup>82</sup> Huskey. *supra* note 57, at 198.

<sup>83</sup> *Id.* at 199, (referencing See HRC, CCPR General Comment No. 29, "States of Emergency," (July 24, 2001): sec. 3, available at [http://www.unhchr.ch/tbs/doc.nsf/898586bldc7b4043c1256a450044f331/71eba4be3974b4f7c1256ae200517361/\\$FILE/G0144470.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586bldc7b4043c1256a450044f331/71eba4be3974b4f7c1256ae200517361/$FILE/G0144470.pdf)).

<sup>84</sup> Huskey. *supra* note 57, at 199.

<sup>85</sup> *Id.* (referencing See, e.g., ICCPR, art. 2; ECHR, art. 1.).

<sup>86</sup> Huskey. *supra* note 57, at 199.

home state would be responsible for its armed forces if they violated an individual's human rights, yet because we have not categorized PMSCs it is unclear where the responsibility lies.

The third phase Huskey recognizes is the "Post-Conduct Phase"; the phase where we assume that a military contractor has harmed someone. Huskey, points out that this harm can be the result of an act, or a result of an omission.<sup>87</sup> At this point, following the violation, the focus is on the consequential results of the situation. Will the victim be given recompense and justice? Will the PMSC personnel responsible face criminal charges? These are the questions that should be answered during this phase. The important factors, according to Huskey, are the following:

applicable law or legal doctrines to determine who is accountable/liable (for example, PMSC, individual, state) for the relevant conduct, and to whom; applicable criminal laws and mechanisms, and which state or international body has responsibility to enforce such laws, or, if not currently existing, to enact them; applicable civil liability laws and mechanisms, and which state or international body has responsibility to enforce such laws, or, if not currently existing, to enact them; and responsibility to provide reparations to victims, independent of civil liability lawsuits.<sup>88</sup>

While it is extremely important to determine who should be accountable for the actions taken by PMSC personnel, Huskey also notes that it is just as important to determine who is responsible to remedy the situation for the victims of these violations.

## **2. Options for Redress**

During the "Post-Conduct Phase", International Human Rights law finds itself in a situation that provides plenty of problems. To begin, even though it seems individuals should be held responsible for International Human Rights breaches, it actually states that are held responsible. As stated in the ICCPR states must take measures to assure they "exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities... [and] provide effective remedies in the event of breach."<sup>89</sup> This leaves all of the power to the states, and their domestic law to remedy the situation. Theoretically, this allows for a good system of criminal

---

<sup>87</sup>*Id.* at 196.

<sup>88</sup>*Id.*

<sup>89</sup>*Id.* at 200. (referencing HRC, General Comment No. 31, sec. 8).

liability and punishment. By allowing the states to handle the situation themselves, limiting the issues of international criminal charges and determining who tries the accused contractors. However, these states may not feel they need to punish the PMSC personnel for their actions. In this case, there is no international legal system of enforcement. So if states choose not to punish the charged personnel, there is no way to make them.

The individuals who have been harmed do have a system of recompense, under international law. These people, who have suffered a violation of their rights, can petition the Human Rights Committee. This, according to the ICCPR can be done in order to remedy the situation; but can only be done only if the violation was committed within the territory of a country who is “party to the Optional Protocol to the ICCPR.”<sup>90</sup> This can be avoided if the victims were “within the power, or under the effective control, of a state party to the Optional Protocol in a territory which is within the state’s extraterritorial jurisdictional reach.”<sup>91</sup> These facts, unfortunately lend themselves to defend the United States, and its obligations in regards to the Military Contractors in Iraq. Due to the fact that the United States is not a party to the ICCPR Optional Protocol, it can be said that the US is not responsible for the punishment of the PMSC personnel it brought to Iraq, or for bringing justice or providing reparations to the victims. It should also be mentioned that the US would not be responsible for ensuring that the PMSC personnel obey human rights laws, within Iraq. What is worse is that because the US is not a party to the Optional Protocol, victims of the actions executed by the PMSC personnel cannot petition for remedy.<sup>92</sup>

International Humanitarian Law provides little help, as well, when it comes to the “Post-Conduct Phase”, it provides so little help that Huskey goes as far as to say “IHL is mostly silent.”<sup>93</sup> When speaking about remedy and redress for victims, International Humanitarian Law literally says nothing.<sup>94</sup> There are only three conventions of International Humanitarian Law that allows for any analysis of PMSC personnel during the “Post-Conduct Phase”. According to Huskey, the Fourth Hague convention alongside the Protocol 1 of the Geneva Convention are two tools that “may address

---

<sup>90</sup>*Id.* (referencing Optional Protocol to the International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 UNTS. 302, entered into force March 23, 19).

<sup>91</sup>Huskey. *supra* note 57, at 200.

<sup>92</sup>*Id.*

<sup>93</sup>*Id.* at 201.

<sup>94</sup>*Id.* at 202.

state responsibility for organs”, these organs being the PMSCs they hire.<sup>95</sup> However, Huskey states that the “International Law Commission's(ILC) Articles on Responsibility for States for Internationally Wrongful Acts” are what is really needed to determine who is responsible for IHL violations in a situation involving a non-state actor such as a PMSC.<sup>96</sup> The issue with the ILC articles is that they are vague when it comes to narrowing down responsibility. For example, it states in the articles that the state is responsible for a private actor when “‘empowered by the law of that State to exercise elements of governmental authority’ or are *de facto* acting on its instructions or under its direction and control.”<sup>97</sup> In the case of the Nisoor square shooting, the Black Water PMSC personnel involved, even though they were contracted by America, did not necessarily perform actions attributable to the United States. The American government claims they were “not acting as employees of the U.S.”<sup>98</sup> This means that, according to the United States, Black Water was “neither exercising governmental authority nor acting under its control or supervision.”<sup>99</sup>

### 3. Criminal law

Huskey also raises the question of International Criminal Law’s place in the system of PMSC accountability in the “Post-Conduct Phase”. The most important aspect of International Criminal Law is that it gives validity and power to International Humanitarian Law as well as International Human Rights Law. It does this because it criminalizes certain transgressions and violations of these bodies of law.<sup>100</sup> Huskey, points out that International Criminal law has its basis in treaties, and international customs.<sup>101</sup> International Customs cannot be violated, and if they are the international community can become involved. International Criminal law would be the strongest

---

<sup>95</sup>*Id.* at 201. (referencing Convention (IV) Respecting the Laws and Customs of War on Land, October 18, 1907, art. 3, 36 Stat. 2277; Additional Protocol I art. 91.).

<sup>96</sup>*Id.* (referencing International Law Commission (hereafter ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 1, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) and See Nigel D. White's contribution on the ILC Articles on State Responsibility, in this issue).

<sup>97</sup>*Id.* at 201,202.(referencing ILC, Articles on Responsibility of State for Internationally Wrongful Acts, arts. 5, 8,U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001)).

<sup>98</sup>*Id.* at 202 (referencing *In re Xe Services Alien Tort Litigation*, 665 F. Supp. 2d 569 (ED Va. 2009)).

<sup>99</sup>*Id.* at 202.

<sup>100</sup>*Id.* (referencing Chia Lehnardt, "Individual Liability of Private Military Personnel Under International Criminal Law," *European Journal of International Law* 19 (2008): 1015, 1016).

<sup>101</sup>Huskey. *supra* note 57, at 202.

choice to use against violators, especially ones that are non-state actors, since customary law holds jurisdiction over everyone. Huskey also mentions that International criminal tribunals, such as the ICC or International Criminal Court create jurisprudence which provides laws for International Criminal Law.

The reason Huskey mentions International Criminal Law in the “Post-Conduct Phase” is that she says that International Criminal Law is “narrowly focused on achieving criminal accountability of individuals during the Post-Conduct Phase.”<sup>102</sup> By looking at the ICC and the crimes under its jurisdiction, Huskey has narrowed down the type of crimes PMSC personnel are most likely to commit. According to Huskey the ICC covers “the most serious crimes of concern to the international community”: genocide, crimes against humanity, war crimes, and the crime of aggression”. Huskey believes that the crimes against humanity and the war crimes are the two crimes that PMSC personnel are most likely to violate.<sup>103</sup> So if the ICC has the ability to prosecute these crimes, why have there been not been more charges brought against PMSC personnel who commit these crimes? The ICC itself has certain limitations as well it seems. The ICC cannot prosecute people for these crimes unless the crimes were “committed as part of a plan or policy or as part of a large-scale commission of such crimes.”<sup>104</sup> There is also an argument that states that PMSC personnel may not even be able to commit “war crimes”; because “war crimes” theoretically must be committed by “members of the armed forces of either party to the conflict, that their acts are attributable to either party, that they are exercising public authority, or that they are de facto representing the government to support the war effort.”<sup>105</sup> A war crime also has to be “part of a ‘widespread or systematic practice’” and must be used “in furtherance of a State or organizational policy.”<sup>106</sup> Labeling something as a “war crime” seems to be a tricky issue, and can prevent criminals from being brought to justice. Another issue is that the ICC does not have its own police or military force. This makes enforcement very limited, and in effect creates a problem when it comes

---

<sup>102</sup>*Id.*

<sup>103</sup>*Id.* (reference Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF 183/9, arts. 1, 5(1); reprinted in 37International Legal Materials [ILM] 99 (1998) (hereinafter Rome Statute)).

<sup>104</sup>*Id.* (referencing Rome Statute, arts. 7-8).

<sup>105</sup>*Id.* (referencing Lehnardt, "Individual Liability of Private Military Personnel Under International Criminal Law," 1017-18 (citing jurisprudence in the International Criminal Tribunal for Rwanda)).

<sup>106</sup>*Id.* (referencing Rome Statute, art. 7.).

to investigation and prosecution. In these situations the ICC must rely upon the honest help and cooperation of states.<sup>107</sup>

Huskey's analysis of the current system of regulation, regarding PMSCs and their personnel, is presented from an interesting angle. While I believe that PMSCs should be put in a category, in order for them to be regulated more efficiently, Huskey's phased approach posits an interesting idea. If the international community were to take these three phases that Huskey has analyzed, and create a system of regulation based on the phases, they could regulate PMSC personnel more efficiently. For example, there should be a certain standard of behavior and conduct that is spelled out in the contracts of PMSC personnel. Since the hiring State is responsible for setting the standards and responsibilities for these personnel, there should be a regulation of the contracts and the agreements made. Phase by phase the system of regulation would change, but it would help to organize the ways in which PMSC personnel are regulated.

## **B. Categorization**

The second school of thought, regarding the regulation of PMSCs, is the school of thought that calls for a categorization of PMSCs and their personnel. The status of PMSC personnel is a widely debated topic that could have a huge effect on the way that PMSCs are seen by the public. The first theory, in regards to the status of PMSC personnel, is that they are mercenaries, hired to fight. The second idea is that PMSC personnel are actually civilian non-combatants who are hired for a variety of reasons and if they join in battle they become "unlawful combatants". The third, and not as widely discussed category that PMSCs could fit, is that of Multinational corporations. While this category seems odd, and not many authors have covered this category, it is a personal favorite of mine. After researching PMSCs and analyzing the ways in which they have, or could be regulated, in my opinion that considering them corporations and regulating them in that manner may be more effective than treating them as mercenaries, or as unlawful combatants.

### **1. Mercenaries**

The First School of thought, regarding military contractors, is that they act as mercenaries, and should be legally labeled as mercenaries under international law.

---

<sup>107</sup>Huskey. *supra* note 57, at 203.



The first issue in labeling PMSC personnel as mercenaries is that there does not seem to be a clear definition of what makes a fighter a mercenary. According to Sarah Percy, contemporary critics define mercenaries based on two components: foreign status, and motivation. Foreign status means that a mercenary should have “no national association with any of the parties to the conflict in which they fight.”<sup>108</sup> The second component that defines a mercenary is that his primary motive, his drive for fighting is monetary gain.<sup>109</sup> These two defining factors are immediately criticized by Percy, and are dismissed as insufficient and incorrect. It should be mentioned that it is not necessarily possible to determine the motivation of a fighter, and even if it could be proven that a fighter is motivated by financial gain, according to Percy, his motivations may change over time and he could “later adopt the cause.”<sup>110</sup> If a fighter started to believe in the cause he is fighting for, then, according to the current view of mercenaries, he would cease to be a mercenary because his motivations would have changed. It is also known that many soldiers join the armed forces for financial reasons. As Percy stated “the military promotes itself as a “career option”<sup>111</sup> with attractive pay and benefits.”<sup>112</sup>

Under international law, the main definition of a mercenary can be found in the Geneva Convention. In article 47 of Additional Protocol 1 of the Geneva Convention (sub section 2) a mercenary is defined using a number of criteria. Article 47 states:

---

<sup>108</sup>Sarah V. Percy, *This Gun's for Hire: A New Look at an Old Issue*, 58 INTERNATIONAL JOURNAL 721, 722, (2003).

<sup>109</sup>*Id.* (referencing Abdulqawi A. Yusuf, "Mercenaries in the law of armed conflict," in *The New Humanitarian Law of Armed Conflict*, ed., Antonio Cassese (Napoli: Editoriale scientifica, 1979), 114; Thomas K. Adams, "The new mercenaries and the privatization of conflict, *Parameters*, us Army War College Quarterly (summer 1999), available at <http://carlisle-www.army.mil/usawc/parameters/99summer/adams.htm>, 1. (Accessed 26 March 2003.); Juan Carlos Zarate, "The emergence of a new dog of war: private international security companies, international law, and the new world disorder," *Stanford Journal of International Law* 34 (winter 1998), available at [www.westlaw.com](http://www.westlaw.com). (Accessed 21 March 2002.); Kim Richard Nossal, "Roland goes corporate: Mercenaries and transnational security corporations in the post-Cold War era," *Civil Wars* 1, no. 1 (1998): 18; Shearer, "Outsourcing war," 69; Singer, *Corporate Warriors: The Rise and Fall of the Privatized Military Industry*, 41; Mohed Omer Beshir, *Mercenaries in Africa* (Khartoum: Khartoum University Press, 1972), 4; Janice E. Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Princeton: Princeton University Press, 1994), 26; S. Burmester, "The recruitment and use of mercenaries in armed conflict," *American Journal of International Law* 72 (1978): 37; Yves Sandoz, "Private security and international law," in *Peace, Profit or Plunder? The Privatization of Security in War-Torn African Societies*, ed., Jakkie Cilliers and Peggy Mason (Johannesburg: Institute for Security Studies, 1999), 208).

<sup>110</sup>Percy. *supra* note 108, at 724.

<sup>111</sup>*Id.* (referencing Tony Lynch and A.J. Walsh, "The good mercenary?" *The Journal of Political Philosophy* %, no. 2 (2000): 135).

<sup>112</sup>Percy. *supra* note 108, at 724

A mercenary is any person who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;

(b) does, in fact, take a direct part in the hostilities;

(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;

(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

(e) is not a member of the armed forces of a Party to the conflict; and

(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.<sup>113</sup>

This definition is not only complex in nature, but it requires all of the criteria to be met in order for a fighter to be considered a mercenary. For example, if it could be proven that a fighter meets all the criteria, but the amount the fighter is paid is not “substantially in excess of that...paid to combatants of similar ranks and functions...in the armed forces”<sup>114</sup> then the fighter is not considered a mercenary. The term “substantially in excess”<sup>115</sup> is itself extremely debatable, and that is only a fraction of the criteria that must be met.

There can be an argument made for labeling PMSC personnel as mercenaries. Of the PMSC personnel functioning in Iraq twenty percent were citizens of the United States of America, this is compared to the forty percent of “third country nationals” who

---

<sup>113</sup>Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 47, 8 June 1977.

<sup>114</sup>*Id.*

<sup>115</sup>*Id.*

were not U.S. citizens or citizens of the country they were functioning in.<sup>116</sup> These statistics show a large number of personnel who could potentially fit the Geneva Convention definition of a Mercenary. U.S. citizens, would not fit the definition because they are “a national of a party to the conflict”<sup>117</sup> and therefore they do not fulfill subsection (d). The “third country nationals,”<sup>118</sup> however, are not nationals to a party to the conflict. This makes labeling them as mercenaries much easier. The difficult part is determining if they “take a direct part in hostilities”<sup>119</sup> which is debatable currently in international law. The other difficult part, in categorizing these fighters as mercenaries, is determining their motivation. It seems almost impossible to determine a fighter’s motivation. Even if it were possible, as I mentioned earlier, motivations can change.<sup>120</sup>

Categorizing PMSC personnel as mercenaries would require an overhauling of the definition of a mercenary, under international law. Many PMSC personnel would not fit the definition, and this would create a system where regulation of PMSC personnel is applicable only if the individual fighter fits the definition of a mercenary. The definition is so ambiguous it is almost impossible to fit the definition of a mercenary. “Any mercenary who cannot exclude himself from this definition deserves to be shot-and his lawyer with him!”<sup>121</sup>

## 2. Civilians/ “Unlawful Combatants”

The Second school of thought is that of civilian non-combatants. This school of thought posits that PMSC personnel are hired for a variety of reasons and those that actually see combat are considered “unlawful combatants”. According to Richard Quigley, PMSC personnel who work with the armed forces are “civilian non-

---

<sup>116</sup>RICHARD QUIGLY, *MILITARY CONTRACTORS : LEGAL STATUS, OVERSIGHT AND SECURITY*, 11, (2009), <http://site.ebrary.com/lib/alltitles/docDetail.action?docID=10671302> (last visited Dec 17, 2014).

<sup>117</sup>*supra* note 113.

<sup>118</sup>QUIGLY, *supra* note 116.

<sup>119</sup>*supra* note 113

<sup>120</sup>Percy. *supra* note 108, at 724.

<sup>121</sup>Percy. *supra* note 108, at 724, 725. (referencing Quoted in Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (London: Weidenfeld and Nicolson, 1980), 375 (footnote 83)).

combatants whose conduct may be attributable to the United States.”<sup>122</sup> The armed contractors, however, create a situation that is not covered under international law. According to Quigley, a civilian captured during an international armed conflict, should not be treated as a Prisoner Of War<sup>123</sup>, because they are considered civilians, which means they are non-combatants and have not been granted permission to fight in the conflict.<sup>124</sup> This leaves armed contractors, as well as contractors that participate in the hostilities in a “grey area.”<sup>125</sup> Once military contractors begin to participate in hostilities, which is hard to determine since participation is a hotly debated topic, they become legal targets and can be tried as criminals for their participation.<sup>126</sup> Combatants are fighters who have the “right to participate directly in hostilities,”<sup>127</sup> and therefore these combatants cannot be considered criminals for the acts of war they commit. They can only be held accountable for the actions that violate international Humanitarian Law, especially things like war crimes. This is due to the fact that combatants are lawful military targets.<sup>128</sup> This means they have traded their civilian status, and the protection of not being a lawful target, for the ability to fight, wound and kill their opponents. Being recognized as a combatant allows for Prisoner of War status, if captured and these POWs then “benefit from the protection of the Third Geneva Convention.”<sup>129</sup> So, one of the major differences between a combatant and an “unlawful combatant” is the POW status given during capture. The reason the PMSC personnel are not considered combatants is that they fail to meet the criteria. For example, Quigley states that “groups that come under military command and meet

---

<sup>122</sup> QUIGLY, *supra* note 116, at 44.(referencing E-Mail from Blackwater to Diplomatic Security Service (Dec. 26, 2006)).

<sup>123</sup>*Id.* (referencing Blackwater Internal E-Mail re Al-Arabiyah News Report (Dec. 27, 2006)).

<sup>124</sup>*Id.* (referencing State Department E-Mail re: From RSO Al-Hillah (July 1, 2005). Additional information about this incident is described in part II, *supra*).

<sup>125</sup>*Id.*

<sup>126</sup>*Id.* (referencing Blackwater Contract S-AQMPD-04-D-0061, Iraq, June 11, 2005 to September 10, 2006, *supra* note 4; Blackwater invoices to the U.S. Department of State under WPPS II).

<sup>127</sup> Knut Dörmann, *The legal situation of “unlawful/unprivileged combatants,”* 85 INTERNATIONAL REVIEW OF THE RED CROSS 45–74, 45, (2003), (referencing See Article 43(2) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (PI)).

<sup>128</sup> Knut Dörmann, *The legal situation of “unlawful/unprivileged combatants,”* 85 INTERNATIONAL REVIEW OF THE RED CROSS 45–74, 45, (2003).

<sup>129</sup>*Id.*

certain criteria... qualify as combatants”<sup>130</sup> and because “contract employees fall outside the military chain of command” they will not get POW status.<sup>131</sup>

The third Geneva Convention gives us an idea of what a prisoner of war is. In article 4 it states:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being

---

<sup>130</sup> QUIGLY. *supra* note 116, at 44. (referencing State Department E-Mail re: From RSO Al-Hillah (July 1, 2005). Additional information about this incident is described in part II, *supra*).

<sup>131</sup> *Id.*

members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception

of Articles 8, 10, 15, 30, fifth paragraph , 58 -67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.<sup>132</sup>

A civilian who accompanied the armed forces without being a member of them which could consist of “such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces.”<sup>133</sup> This segment seems to cover Military contractors who perform duties that do not constitute direct participation. The Geneva Convention also touches upon “Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory”, however there are criteria that need to be met for these militia fighters to be recognized, such as: “being commanded by a person responsible for his subordinates;... having a fixed distinctive sign recognizable at a distance; carrying arms openly;...conducting their operations in accordance with the laws and customs of war.”<sup>134</sup> If combatants are granted POW status, and PMSC personnel are not, then it can be inferred that the PMSC personnel are in fact not considered combatants.

This also tells us that civilians are people who are not included in Article 4’s sections (1), (2), (3) and (6). Civilians, under international law, are “entitled to general

---

<sup>132</sup>Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, art. 4, 1960.

<sup>133</sup>*Id.*

<sup>134</sup>*Id.*

protection against the dangers arising from military operations.”<sup>135</sup> This also means that armed forces are not legally allowed to target civilians. However, this also means that civilians are not legally allowed to take part in hostilities and if they do so they become a legal target for armed forces.<sup>136</sup> What does this mean for PMSC personnel? PMSC personnel, unless considered part of the armed forces of a State, and meeting the criteria to be considered such, are civilians. Those PMSC personnel who choose to directly participate in the hostilities are then considered “unlawful combatants”. According to Dormann, this means they would be “... persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy.”<sup>137</sup> These fighters are entitled to some protection under international law. For example, “unlawful combatants” are given the treatment as described by Article 75 of Additional Protocol 1. It is even stated in Article 45 of Protocol 1 that “any person who has taken part in hostilities, who is not entitled to prisoner of-war status and who does not benefit from more favorable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol.”<sup>138</sup> Article 75 of Additional Protocol 1 specifies the “fundamental guarantees”<sup>139</sup> of captured people.<sup>140</sup>

#### Article 75 -- Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, color [sic], sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

---

<sup>135</sup> Knut Dörmann, *The legal situation of “unlawful/unprivileged combatants,”* 85 INTERNATIONAL REVIEW OF THE RED CROSS 45–74, 46, (2003).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 50, 51.

<sup>139</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 75, 8 June 1977.

<sup>140</sup> *Id.*



2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) violence to the life, health, or physical or mental well-being of persons, in particular:

(i) murder;

(ii) torture of all kinds, whether physical or mental;

(iii) corporal punishment; and

(iv) mutilation;

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

(c) the taking of hostages;

(d) collective punishments; and

(e) threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court

respecting the generally recognized principles of regular judicial procedure, which include the following:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defense [sic];

(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;

(c) no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

(d) anyone charged with an offence is presumed innocent until proved guilty according to law;

(e) anyone charged with an offence shall have the right to be tried in his presence;

(f) no one shall be compelled to testify against himself or to confess guilt;

(g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgment [sic] acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;

(i) anyone prosecuted for an offence shall have the right to have the judgment [sic] pronounced publicly; and

(j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.<sup>141</sup>

The article specifies that anyone who doesn't "benefit from more favorable treatment...shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article."<sup>142</sup>In the article a list of acts are to be considered "prohibited at any time any place" and they include things like murder, torture, mutilation and standards that must be met if charges are brought against the prisoner and standards for the trial.<sup>143</sup>

Considering PMSC personnel "unlawful combatants" is not the best route to follow. By considering them "unlawful combatants" that also means there is limited control over these personnel, since they are not part of the official armed forces. For example, Jeffery Morton argues that by denying people POW status and combatant status we actually "reduce the regulatory capacity" over certain fighters.<sup>144</sup> A possible solution would be to simply consider PMSC personnel combatants, solving many of the problems of regulation. This, however, is likely not to happen. One of the benefits of using PMSC personnel is that they are not considered part of the armed forces of the state that uses them, a benefit many states are not willing to lose. Sid Ellington stated that "the use of contractors allowed for 'a much more politically palatable troop count.'"<sup>145</sup> According to Francesco Francioni, using PMSC personnel can lead to "the possibility of circumventing the requirement of parliamentary authorization for specific missions and services" as well as "going beyond limits on the number of

---

<sup>141</sup>Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 75, 8 June 1977.

<sup>142</sup>*Id.*

<sup>143</sup>*Id.*

<sup>144</sup>Jeffrey S. Morton & Presley Jones, *The Legal Status of Mercenaries*, 30 *POLITICS & POLICY* 624–645,625, (2002).

<sup>145</sup>Sid Ellington, *The Rise of Battlefield Private Contractors*, 13 *PUBLIC INTEGRITY* 131–148, 138, (2011), (quoting Briody, Dan. 2004. *The Halliburton Agenda: The Politics of Oil and Money*. Hoboken, N.J.: John Wiley and Sons).

troops to be deployed abroad or allowed to serve in a theatre of military operations.”<sup>146</sup>

### 3. Corporations

The last and most recent way that Military contractors can be categorized, is by treating PMSCs as multinational corporations. There is currently not much discourse covering the idea of treating PMSCs as corporations, however it may yet prove to be one of the better possibilities for regulation. By following the international system of regulation for multinational corporations, PMSCs may behave in a better manner. According to Andrew Clapham, the best way to ensure a company is brought “into line” and to “ensure redress for the victims and ensure non-repetition” is to “highlight the misbehavior of the company” which can have a negative effect on the company’s future opportunities.<sup>147</sup> Clapham believes that the international community may be able to bring PMSCs to heel by “focusing on the liability and reputation”<sup>148</sup> of these corporations. While it is possible that many PMSC corporations, especially the well-connected ones, do not fear a bad reputation, it is also possible that there will eventually be a shift in way PMSCs are chosen. For example, if a certain PMSC repeatedly gets caught violating international law and caught in scandalous situations, states may choose a competitor that will bring less negative publicity.

Clapham believes that in the international system there has been a movement away from “actual international law to norms and principles that are negotiated and adopted by the relevant parties”. These “norms and principles” can include things like “codes of conduct.”<sup>149</sup> This supports the idea that PMSCs could be treated as multinational corporations, especially because corporations may be willing to “go beyond the traditional norms accepted by states.”<sup>150</sup> In regards to things like “codes of conduct”, due to the very fact that they are not treaties, more detail can be added to the text,<sup>151</sup> and will more likely be accepted.

---

<sup>146</sup> Francesco Francioni, *Private Military Contractors and International Law: An Introduction*, 19 EUR J INT LAW 961–964 (2008).

<sup>147</sup> Andrew Clapham, *Introductory Remarks by Andrew Clapham*, 200, 107 AM. SOC’Y INT’L L. PROC. 199, 200, (2013).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

Clapham also notes that there is a new shift in the system of accountability for corporations. For example, to guide corporate behavior, states are focusing on the certification these corporations need in order to operate. Clapham states that “gaining or losing a certificate could be as effective, if not more effective, in affecting behavior than winning or losing cases in the courts.”<sup>152</sup> Another advantage Clapham sees is the ability for hiring states to demand that PMSCs abide by the codes of conduct. Clapham mentions that the United Nations requires that “an armed private security company must be a member company of the International Code of Conduct for Private Security Service Providers.”<sup>153</sup> So it seems that the new system of control over these corporations is reputation. PMSCs as well as other corporations are trying to “minimize risks to their reputation.”<sup>154</sup>

Oddly enough, this system of categorization may please those critics who believe that PMSC personnel are mercenaries. By focusing on the reputation of the PMSC corporations, and regulating their ability to operate, states are focusing on the money these PMSCs can stand to make. Those that believe that PMSC personnel are mercenaries must also believe that their motivation is “the desire for private gain.”<sup>155</sup> Threatening the ability of corporations to make profit would, theoretically, also threaten the mercenary’s primary motivation for operating. Overall this category provides for a new and novel way to regulate PMSCs. It appears that by categorizing, and regulating PMSCs as multinational corporations, the international community can more effectively control military contractors.

---

<sup>152</sup>*Id.*

<sup>153</sup>*Id.*

<sup>154</sup>*Id.*

<sup>155</sup>*Supra* note 141.

#### IV. Regulation of Multinationals

Regulation of multinational corporations, or MNCs, is a tricky subject, in the fact that it intertwines with international law. The fact that multinational corporations operate through and within multiple countries, and therefore multiple jurisdictions, can create scenarios that are incredibly complex.

Specifically regarding human rights, Muchlinski states that multinationals, being private entities, “do not have any positive duty to observe human rights... Thus it is for the state to regulate...”<sup>156</sup> It is also interesting that Muchlinski points out that multinationals only have the ability to influence human rights by treating their workers well, but otherwise the rest is left up to the state.<sup>157</sup> PMSCs are a bit different insofar as they can also observe human rights law by their actions, yet the general idea is similar, besides harming others, or mistreating their own people, PMSCs as well as MNCs may not have any influence over human rights, meaning that states are the primary actors of regulation and influence in that area.<sup>158</sup>

##### A. Sovereignty and territory

To begin, the sovereignty of each state over its territory builds barriers to regulation.<sup>159</sup> For example, if Germany wants to regulate a multinational based within its territory, but operating in China, it has to be careful not to violate the sovereignty of the Chinese state. As Muchlinski puts it “should the territorial principle of state jurisdiction be observed to the letter, any assertion of extraterritorial jurisdiction by a state would amount to a violation of international law.”<sup>160</sup> The sovereignty principle creates a duty of “non-intervention”<sup>161</sup>, and prevents home states from regulating their multinationals.<sup>162</sup> There is, however, a change beginning to take form. Brownlie believes that the international legal system is evolving “in light of the need to modify

---

<sup>156</sup>Peter Muchlinski, *Multinational Enterprises & The Law*, 515, (Second ed. 2007).

<sup>157</sup>*Id.*

<sup>158</sup>*Id.*

<sup>159</sup>*Id.* at 125,126.

<sup>160</sup>*Id.*

<sup>161</sup>*Id.* referencing (I Brownlie *Principles of Public International Law* (Oxford: 6<sup>th</sup> edn, 2003) chs 14 and 15; Dp O’Connell *International Law* (London: Stevens 2<sup>nd</sup> edn, 1970) vol II ch 19, Akehurst ‘Jurisdiction in International Law’ 46 BYIL 145-257 (1972-73); FA Mann *Studies in International Law* (Oxford: Oxford University Press, 1973) ch I or 111 Hague Recueil (1964 I)).

<sup>162</sup>Muchlinski, *supra* note 156, at 126.

the territorial principle.”<sup>163</sup> There are also alternative types of jurisdiction being suggested, with the exception that they maintain a real “connection between the subject-matter of jurisdiction and the territorial base”, and also that they preserve “reasonable interests, of the state seeking to exercise jurisdiction.”<sup>164</sup>

The first principle that can be used to have jurisdictional domain over nationals in foreign territory is the nationality principle.<sup>165</sup> In certain cases, it is accepted that a state can have “jurisdiction over its nationals abroad.”<sup>166</sup> Using this principle, a home state could, theoretically, justify jurisdiction over the activities of a corporation in a foreign territory. The managers of said corporation “could be subject to home country legal requirements.”<sup>167</sup> If there are no home country nationals on the board of the subsidiary, the home country could make the parent company order its overseas units to act in accordance with home country laws. This is done through the “nationality of the parent company as the principle shareholder in the foreign subsidiary”, which effectively negates the “foreign nationality of incorporation of the subsidiary.”<sup>168</sup> There is also the case of the parent company operating in foreign territory, “through unincorporated branches” which will “retain the nationality of the parent” and in turn can be brought under the “direct jurisdiction” of the home country because of their “corporate nationality.”<sup>169</sup> In the case of United States banks operating overseas, this specific jurisdictional application has been significant for regulation.<sup>170</sup>

The second regulatory principle that may be applicable is the “objective territorial jurisdiction” principle. This modification of the territorial principle comes into play when the “elements of a criminal offence are commenced in one state and are completed in another.”<sup>171</sup> Originally accepted due to the infamous *Lotus*<sup>172</sup> case, states have asserted they should have “objective territorial jurisdiction over offences initiated abroad and completed within the jurisdiction”.<sup>173</sup> To reach “non- resident”

---

<sup>163</sup>*Id.* (referencing (I Brownlie Principles of Public International Law (oxford: 6th edn, 2003) chs 14 and 15 at 297.)).

<sup>164</sup>*Id.*

<sup>165</sup>Peter Muchlinski, *Multinational Enterprises & The Law*, 126, (Second ed. 2007).

<sup>166</sup>*Id.*

<sup>167</sup>*Id.*

<sup>168</sup>*Id.*

<sup>169</sup>*Id.*

<sup>170</sup>*Id.* See references

<sup>171</sup>*Id.* At 128.

<sup>172</sup>*Id.* ((1927) PCIJ, Ser A No 10, 23.)

<sup>173</sup>Muchlinski *supra* note 156, at 128. (referencing (I Brownlie Principles of Public International Law (oxford: 6th edn, 2003) chs 14 and 15 at 299-301.)).

units of multinationals<sup>174</sup>, the United States has put its antitrust laws into play internationally, and states that “Anticompetitive conduct that affects U.S. domestic or foreign commerce may violate the U.S. antitrust law regardless of where such conduct occurs”<sup>175</sup>. It goes on to say that a violation can be committed by anyone no matter “the nationality of the parties involved.”<sup>176</sup> The international courts did not make clear the limits and barriers of the principle; therefore it has been left up to the interpretation of states.<sup>177</sup> Decisions of the ICJ have shown, however, that there is a need for a solid connection between the “subject-matter of the jurisdiction and the territory of the state seeking to exercise its jurisdiction.”<sup>178</sup>

Exemplified in Muchlinski’s book, are situations in which states have attempted to regulate their multinationals. One of the examples given is that of the “jurisdiction to prescribe”. The United States has attempted to “extend its laws to non-resident units of MNEs.” The way this has been justified is through the need for “regulatory effectiveness in major fields of economic and public policy”. The U.S. has asserted this principle for many reasons including: “to restrict exports of goods by overseas subsidiaries... to prevent the avoidance of US trade embargoes;” or “to freeze the assets of unfriendly powers held in banks accounts located in overseas branches of US banks.”<sup>179</sup> This principle shows that the “state has jurisdiction to prescribe on the basis of territorial control, effects within the jurisdiction, the nationality of the person or entity subject to control, and under the protective principle.”<sup>180</sup>

## **B. Legal forms of Multinationals**

In order to understand the ways in which multinational corporations are regulated, an analysis of the legal forms of multinationals must be undertaken. This analysis should include such information as: nature of the business activity, transaction costs, the extent to which the law will require the use of a particular structure and most

---

<sup>174</sup>Muchlinski supra note 156, at 129. (referencing Rosenthal and Knighton). (ask)

<sup>175</sup>*Id.* (referencing US Department of Justice Antitrust Division *Anti-trust Enforcement Guidelines for International Operations* (April 1995) s #. 1 available at [www.usdoj.gov/atr](http://www.usdoj.gov/atr)).

<sup>176</sup>*Id.*

<sup>177</sup>*Id.* at 128.

<sup>178</sup>*Id.* (referencing *Nottebohm* case ICJ Reports (1955); *Anglo-Norwegian Fisheries* case ICJ Reports (1951)).

<sup>179</sup>*Id.* at 129. (referencing US Restatement *ibid* s414 Reporter’s Note 6 279-80; Heininger ‘Liability of US Banks for Deposits Placed in Their Foreign Branches’ 11 *Law & Pol.Int’l Bus.* 903 (1979).

<sup>180</sup>*Id.* at 130.



importantly, the principal national characteristics of the firm as well as the legal form within which they operate.<sup>181</sup> However, it must be kept in mind that the goal of the firm is to gain as much profit as possible<sup>182</sup>; therefore, it is safe to assume that firms will usually try to reduce regulatory burdens.<sup>183</sup>

The first legal form of a multinational corporation to be analyzed is the “contractual form”. In the contractual form of a multinational corporation, the corporation can supply foreign markets without the creation of “an owned and controlled subsidiary in the host state”.<sup>184</sup> The legally binding contracts that are used by this type of firm can go from one-time export deals to multiple or permanent “international consortia”.<sup>185</sup> This type of firm has the potential to create a novel business category due to the fact that it is an association that uses corporate and contractual systems of operation, and therefore it is beyond the separation between corporations and contracts.<sup>186</sup> This multinational form is important to analyze due to its similarity to PMSC operations. PMSCs operate as multinationals through contracts, and they do not necessarily need a subsidiary in the state in which they choose to work.

The second form of a multinational corporation is the Public Private Partnership. These contracts typically give concessions to foreign private contractors for a given length of time “whereupon ownership vests in the public or private sector of the host country.”<sup>187</sup> The organizational system that public private partnerships follow is centered on technology and man power.<sup>188</sup> Usually the private parties will obtain the financial backing, usually by way of “project finance”, and supply the technology and the knowledge of its use. The local partner will most often provide the workforce and man power and many times the supporting infrastructure for the project.<sup>189</sup> The advantage of a public private partnership is that the state retains its strategic control over the operations and after the contractual period is done, it gains the assets and attracts further capital for the future. This also helps accelerate the process of construction in regards to the project.<sup>190</sup>

---

<sup>181</sup> *Id.* at 52.

<sup>182</sup> *Id.* at 515.

<sup>183</sup> *Id.* at, 52.

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

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 55. (referencing Schmitthoff’s *Export Trade* above n 3 at 512).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

The third and most common idea of what a multinational corporation is the “equity based corporate group”.<sup>191</sup> This consists of a group of companies that are controlled by a parent company. The parent company controls the other companies by holding shares in said companies<sup>192</sup>. There are multiple forms of these groups, and they vary in organization and their relationships. There is one main form of equity based groups that Muchlinski touches upon, which seems most relative to the regulatory aspect of MNCs. This structure is aptly named “the Anglo-American ‘pyramid’ group”.<sup>193</sup>

In this structure, a parent company “owns and controls a network of wholly or majority-owned subsidiaries.” These subsidiaries can themselves be “intermediate holding companies for sub-groups of closely held subsidiaries.” This creates a pyramid like organizational structure, with the parent as the tip of the pyramid. Muchlinski points out that when this “pyramid” is involved in multiple countries, this forms the traditional and stereotypical view of what a multinational enterprise is, and this model is what has guided most of the MNC regulatory thinking.<sup>194</sup> One of the gaps, however, that this structure leaves, is the ability of a parent company to use their subsidiaries to avoid regulatory laws. For example, Tom Hadden who studied the “legal and business organization of three British corporate groups”<sup>195</sup>, discovered that some corporations were using “agent only” businesses to reduce “the administrative burdens of full disclosure.”<sup>196</sup> The way these companies avoided their disclosure duties, was to transfer the assets from a subsidiary to a holding company. This allowed the subsidiary to trade as an agent of the holding company, obliged only to produce a formal balance sheet.” In this balance sheet, Hadden points out that the “capital would be typically offset by a loan to the holding company.”<sup>197</sup>

Another important factor is the public. In today’s world information is more easily accessible via the internet, which makes awareness of the operations and violations of multinationals more widespread. Many might argue that although people know about the violations and scandals of corporations, they still buy the products. I understand

---

<sup>191</sup> *Id.* at 56.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

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

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 57

<sup>197</sup> *Id.* at 55. (referencing dunning, and see further O Osunbor “The Agent-Only Subsidiary Company and the Control of Multinational Groups’ 38 ICLQ 377 (1989); Tricker above n 10 at 66-67.).

and agree that it does not always affect the corporation's profits. However, the younger generations seem to be showing more concern about the world and the environment, and they may yet boycott these companies. Either way, the ability of information to be received at one's finger tips will keep the corporations worrying about the possibilities of potential scandals and the consequences they stand to face. In regards to PMSCs, violations, being easily discovered, may hurt their business. As multinationals, PMSCs must look at their reputation as a selling point, a factor for future business. A bad reputation could hurt them significantly and give the competition an edge.

### **1. Regulating the different forms**

In terms of regulation, the question then becomes is the "resulting legal structure" in correspondence with the decision making structure of the corporation and does this legal structure in essence cover put the corporation in a category, which then determines its legal responsibilities.. It is important to point out that the current legal structures of businesses, specifically contract and corporation, are not designed in a way that can fully cover multinational corporations, due to their complex and extensive nature. Contract is a system in which there is an "arm's length relationship between otherwise independent entities of equal bargaining power" and therefore decision making power, responsibility and blame can be more easily placed. The corporation structure is comprised of a "single unit enterprise owned and controlled by its members", and therefore it is responsible for its actions.<sup>198</sup>

In regards to contracts there is the possibility of control by one firm, which brings to light an issue. Should the "contractual veil" be lifted or pierced in order to see who is in control of the undertakings, to create liability for the actions, of the subordinate, done under the directions of the dominant party. A similar question arises with equity based structures, in the fact that the "veil" could be lifted in order to understand between the parent and subsidiary companies, who made decisions they should be held liable for.<sup>199</sup>

Some possible answers to these issues are outlined in Muchlinski's work. When analyzing the weaknesses of the contractual system, Muchlinski mentions the

---

<sup>198</sup>*Id.* at 78.

<sup>199</sup>*Id.*

“enterprise entity’ ” theory which “deduces the parent company liability from the fact of economic integration between itself and the subsidiary.” This in effect considers the corporate group a new business association and paves the way for a “specialized legal regime” in the future.<sup>200</sup> Muchlinski also states that competition laws be used to defend the business independence of weaker of the two entering into the contractual obligations.<sup>201</sup>

## 2. Reforms

When looking at the equity based multinational corporations, there are two reforms that are proposed by Muchlinski. First, is preferred by Hadden, and leans towards a reform of the structural side of the corporation. In this reform the corporation should be restructured so it “more closely corresponds to its business organization.” This includes the “existence of a relative unit for accounting, fiscal and other regulatory purposes.”<sup>202</sup> Hadden believes in the “identifiable legal representation of the underlying business activity,” which should be reformed to meet “modern realities.”<sup>203</sup> This could create “new group enterprise forms for equity based groups,” which begs the question should informal alliances be required to reform and adopt a legal form?<sup>204</sup>

The second reform method is preferred by Tricker, and is focusing on the operational side of the corporation. Tricker proposes leaving the legal form of the company as it is, but focusing on the obligations on specific establishments within the equity based group. Tricker believes that there should be an increase of the “obligations placed directly upon...divisions within the group.” From there he expects an “introduction of greater divisional disclosure through the concept of an ‘accountable business activity’.” Through this, managers become responsible for disclosing information “according to the actual lines of decision-making in the enterprise.” This improves upon the limits of the obligatory disclosure which is legally necessary, but only for “incorporated entities”.<sup>205</sup>

---

<sup>200</sup>*Id.* at 317.

<sup>201</sup>*Id.* at 79.

<sup>202</sup>*Id.* at 78.

<sup>203</sup>*Id.* (referencing Hadden *Control of Corporate Groups* at 44-45).

<sup>204</sup>*Id.*

<sup>205</sup>*Id.* (referencing Robert I Tricker *Corporate Governance* (Aldershot: Gower, 1984) at 156-159.).

### C. Corporate Social Responsibility

The actual regulation of multinational corporations can be looked at from many angles. Different countries believe differently regarding the regulation of multinationals or corporate social responsibility. Virginia Harper Ho points out that the “constrained regulatory capacity” as well as “the limits of traditional command and control regulation” has caused states to look for more efficient ways of “incentivizing good corporate conduct”<sup>206</sup>. Governments are now involved in the corporate social responsibility awareness, and demonstrate the acceptance of “soft law” and other “quasi-voluntary standards” which will cause a push towards a set of “minimum regulatory goals”<sup>207</sup>. While “soft law” may not have the strength to regulate PMSCs, Corporate Social Responsibility may be able to navigate formal regulation. As multinationals, PMSCs are concerned about profit and business, and given the right incentives; any multinational might adhere to standards.

An example of such a movement by a state is found by examining the Chinese corporate social responsibility policy. Throughout different levels of the government, China has created a system by which they “promote CSR as an explicit policy objective”<sup>208</sup>. One of the ways the Chinese government implements this, according to

---

<sup>206</sup>Virginia Harper Ho, *Beyond Regulation: A Comparative Look at State-Centric Corporate Social Responsibility and the Law in China*, 377, (August 18, 2012), <http://poseidon01.ssrn.com/delivery.php?ID=448116089123100088104066122116104081056087054032028010066007110074003099073008123030002122118022114055124102028126095099126071014010033010014097100071094068087090095040021049071065097002071015008087003120023124078003007007009105126103068026103091120095&EXT=pdf>.

<sup>207</sup>*Id.* at 378. (referencing deep literature analyzes these trends. *See, e.g.*, ROBERT AGRANOFF & MICHAEL MCGUIRE, *COLLABORATIVE PUBLIC MANAGEMENT: NEW STRATEGIES FOR LOCAL GOVERNMENTS* (2003); IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 3, 19 (1992); EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982); FIONA HAINES, *CORPORATE REGULATION: BEYOND ‘PUNISH OR PERSUADE’* (1997); JAY A. SIGLER & JOSEPH E. MURPHY, *INTERACTIVE CORPORATE COMPLIANCE: AN ALTERNATIVE TO REGULATORY COMPULSION* (1988); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 *UCLA L. REV.* 1 (1997); Peter J. May, *Compliance Motivations: Affirmative and Negative Bases*, 38 *LAW & SOC’Y REV.* 41, 41–42 (2004).)

<sup>208</sup>*Id.*

Virginia Ho is through “legal compliance or regulatory mandates”<sup>209</sup>. There are also measures that are “beyond regulation” but these are tied to “institutions and incentive structures”<sup>210</sup>. While China can be considered to be at the forefront in regards to the level of governmental support of CSR, the western world is just now beginning to pay attention to this issue.<sup>211</sup>

## 1. Definition

While Corporate Social Responsibility does not have a set definition, there are two aspects that most definitions include: first the way in which a corporation conducts its operations, which is also known as “good corporate citizenship”. The second aspect is in regards to the corporation’s response to stakeholders of all kinds. These include “employees, local communities and the environment.”<sup>212</sup> The first segment of the definition touches upon the corporation’s goal to “adhere to moral and ethical norms and make a positive impact on society”<sup>213</sup>. The second segment speaks about the company’s responsibility not only to its shareholders, but to everyone who is impacted by its operations, which is often in connection with the company’s “contribution to economic and environmental sustainability”<sup>214</sup>. The parameters of

---

<sup>209</sup>*Id.*

<sup>210</sup>*Id.* (referencing *infra* Part III (surveying state-backed CSR in China).

<sup>211</sup>*Id.* at 379. (referencing Lin’s excellent survey of CSR developments in China. Lin, *supra* note 9, at 68. A recent special issue of the *University of British Columbia Law Review* on Corporate Social Responsibility in the Asia-Pacific Rim also includes contributions on CSR developments in China. Pittman B. Potter, *Corporate Social Responsibility in the Pacific Rim*, 45 U.B.C. L. REV. 635, 635–36 (2012). Leading treatments of the topic by Chinese scholars include ZHENGFU TUIJIN QIYE SHEHUI ZEREN FALU WENTI YANJIU [GOVERNMENT PROMOTION OF CSR AND THE LAW] (Wang Dan ed., 2010) [hereinafter GOVERNMENT PROMOTION OF CSR]; ZHENGFU YU QIYE SHEHUI ZEREN: GUOJI JINGYAN YU ZHONGGUO SHIJI [GOVERNMENTS AND CSR: INTERNATIONAL EXPERIENCES AND CHINESE PRACTICES] (Chen Jiagui et al. eds., 2010) [hereinafter GOVERNMENTS & CSR 2010].).

<sup>212</sup>*Id.* at 382.

<sup>213</sup>*Id.*

<sup>214</sup>*Id.* (referencing Cheng, *supra* note 22 (identifying these dimensions within Chinese scholarship); see also *EC 2011 CSR Strategy*, *supra* note 21, ¶ 1.1 (“CSR requires engagement with internal and external stakeholders . . . .”); GOVERNMENT PROMOTION OF CSR, *supra* note 12, at 28–30 (noting that CSR could be analyzed in the framework of Chinese economics law base on social interest); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-744, NUMEROUS FEDERAL

what comprises good CSR are what is needed in regulating multinationals, as well as PMSCs.

## 2. Compliance and Law

Corporate social responsibility has often been seen as “voluntary actions” that are done by corporations and are “beyond what is required by law”<sup>215</sup>. This then lead to a belief that corporate social responsibility was guided by private actors, and that it functions “beyond regulation.”<sup>216</sup> This also stems from the fact that the push for CSR in developed economies, has usually come from the market, mainly from investors, consumers and civil society organizations<sup>217</sup>. This being said, a good CSR record can provide a corporation with a leg up on the competition. This also means that the government’s involvement in CSR is based around its “core legislative and enforcement function”<sup>218</sup>. In reality many segments of CSR like labor rights and environmental protection have become “the subject of independent legal obligations in most jurisdictions”<sup>219</sup>.

It is a common belief, however, that the separation between “soft law”, being voluntary actions, and “hard law”, being “enforceable legal mandates”<sup>220</sup>, is not distinct and cannot be the way that corporate social responsibility is identified<sup>221</sup>. For

---

ACTIVITIES COMPLEMENT U.S. BUSINESS’S GLOBAL CORPORATE SOCIAL RESPONSIBILITY EFFORTS 5 (2005) [hereinafter GAO REPORT], *available at* <http://www.gao.gov/new.items/d05744.pdf> (discussing different definitions and components of CSR).

<sup>215</sup>*Id* at 383.(referencing *EC 2011 CSR Strategy*, *supra* note 21, ¶ 1, *Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility*, ¶ 20, COM (2001) 366 final (July 7, 2001) [hereinafter *EC 2001 CSR Green Paper*]).

<sup>216</sup>*Id.*

<sup>217</sup>*Id.* (referencing DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY* (2005) (discussing the origins and potential of CSR)).

<sup>218</sup>*Id.*

<sup>219</sup>*Id.* (referencing The “core subjects and issues” included in the ISO26000:2010 CSR standard).

<sup>220</sup>*Id.* (referencing DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY* (2005) (discussing the origins and potential of CSR)).

<sup>221</sup>*Id.*

example, Virginia Ho points out that “legal compliance is widely recognized as a foundational element of CSR”<sup>222</sup>. An example of this is found by looking at ISO26000:2010, which is a standard created by ninety-nine countries that comprise the International Organization for Standardization. ISO26000:2010 states that CSR’s definition should include “legal compliance and ‘respect for the rule of law’”<sup>223</sup>. Another example is the CSR pyramid that was developed by Archie Carroll. In this pyramid, the base layer, the very foundation of the pyramid is law. Aspects such as “corporate philanthropy, ethical and moral dimensions, and the internalization of CSR strategy into firm operations” are all near the top of the pyramid, exemplifying the importance of the law in CSR<sup>224</sup>. Furthermore, there are enforcement mechanisms that split the division between voluntary and mandatory rules. As Virginia Ho puts it “both legal obligations and CSR commitments that go beyond regulation can be enforced” by these mechanisms that are found in the divide<sup>225</sup>. One example of this is the enforcement of corporations “voluntary CSR commitments” by “NGO’s” and “consumer activism”, which not only regulate in the present, but can also “influence the content of future regulation as well.”<sup>226</sup>

It seems also that CSR and the law are “intertwined and mutually influencing”<sup>227</sup>. As Virginia Ho states it, governmental “regulation, policymaking, standard setting” have an effect on the voluntary choice to promote and use better business practices, beyond

---

<sup>222</sup>*Id.* at 384. (referencing *EC 2011 CSR Strategy*, *supra* note 21, ¶ 3.1 (“Respect for applicable legislation, and for collective agreements between social partners, is a prerequisite for [CSR].”); *EC 2001 CSR Green Paper*, *supra* note 25, ¶ 21 (“Being socially responsible means not only fulfilling legal expectations but also going beyond compliance . . .”).).

<sup>223</sup>*Id.* (referencing ISO, *supra* note 24, at 3 (“[C]ompliance with law is a fundamental duty of any organization and an essential part of their social responsibility.”); *see also* INT’L ORG. STANDARDIZATION, [www.iso.org](http://www.iso.org) (last visited Feb. 6, 2013) (listing ISO members)).

<sup>224</sup>*Id.* (referencing Archie B. Carroll, *The Pyramid of Corporate Social Responsibility: Towards the Moral Management of Organizational Stakeholders*, *BUS. HORIZONS*, July–Aug. 1991, at 40–43.).

<sup>225</sup>*Id.* (referencing ZERK, *supra* note 8, at 35. On these intersections, *see generally* CHRISTINE PARKER, *THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY* (2002); Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 *YALE J. INT’L L.* 113 (2009)).

<sup>226</sup>*Id.* (referencing ZERK, *supra* note 8, at 32–36 (discussing how voluntary standards can ultimately shape legal rules)).

<sup>227</sup>*Id.* (referencing ZERK, *supra* note 8, at 35.).



that of the “legal rules”<sup>228</sup>. Once governments start to set CSR policies, and those policies become a part of their “legislative and regulatory functions” the line between CSR and the law begins to become blurred<sup>229</sup>. The European council, however, determined that the creation of “positive law and related regulations” in fact do serve a purpose, which is to create a base upon “which voluntary CSR initiatives may build.”<sup>230</sup> Unfortunately, there are limits to the way in which these interact. Simply shifting focus from the “legislative process...to the enforcement of enacted laws and regulations” can create limits and problems<sup>231</sup>. With the increase of globalism, multinational corporations, culture and the increased ability to quickly exchange information, the limits have become more and more blatant<sup>232</sup>.

In regards to domestic regulation, governments have tried a variety of regulatory options to try to work around these limits. One of the strategies has been to switch from a “command-and-control, penalty-based regulation” to a mix of different strategies, which include an emphasis on “voluntary and quasi-voluntary strategies”, which takes the place of the threat of consequences, which is believed can influence CSR operations in a positive manner<sup>233</sup>. For example, these strategies include

---

<sup>228</sup>*Id.* (Noting: For empirical evidence, see, e.g., Christine Parker’s work on “metaregulation,” that is, the regulation of self-regulation. PARKER, *supra* note 33, at 245–91.).

<sup>229</sup>*Id.*

<sup>230</sup>*Id.* at 385. (directing : See, e.g., text accompanying *supra* note 35.).

<sup>231</sup>*Id.* (referencing: Christine Parker, *The “Compliance” Trap: The Moral Message in Responsive Regulatory Enforcement*, 40 LAW & SOC’Y REV. 591, 591–92 (2006). and sources cited *supra* note 1.).

<sup>232</sup>*Id.* (referencing: ZERK, *supra* note 8, at 243–83 (discussing the emergence of transnational voluntary regimes in response to the limits of territorially based regulatory tools). See generally Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT’L L. 501 (2009) (same); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 803–04 (2005) (noting the limits of law as a constraint on corporate conduct, in part because “variations in legal regulation among different nations . . . inevitably leave legal gaps requiring supplementation by social and moral sanctions that operate internationally”); Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705 (2002) (challenging standard economic arguments that conducting business “within the bounds of the law” provides a clear standard for modern multinationals).).

<sup>233</sup>*Id.* (referencing: sources cited *supra* note 1; see also EC 2011 CSR Strategy, *supra* note 21, ¶ 4.3 (“Self and co-regulation are acknowledged by the EU as a part of the better regulation agenda.”). ).

“penalty waivers for self-disclosure of violations...and financial incentives for firms who implement voluntary internal compliance systems.”<sup>234</sup> The most direct role a government can play in the application of CSR is partnering. Partnering can include “direct government collaboration with companies on specific projects”, which is a public-private partnership. Another collaboration is the state’s support and participation in efforts to promote CSR by international organizations, as well as “state-mediated dialogue around CSR involving companies and other stakeholders.”<sup>235</sup> Virginia Ho makes an important observation, by saying that the interaction between governments and corporations is “bidirectional” meaning that “both contribute to evolving practices and policies.”<sup>236</sup> Governments can work with civil society groups to create joint working groups that determine the design, implementation, and monitoring of CSR programs<sup>237</sup>. Governments also can mandate CSR through “legislation and regulatory enforcement.”<sup>238</sup> This can be done through “mandatory sustainability reporting” or through “standards for the corporate codes of conduct that may reach beyond legal compliance.”<sup>239</sup> The European Commission has stated that the “top down” system of regulation plays an important part in “creating an environment more conducive to enterprises voluntarily meeting their social responsibility.”<sup>240</sup>

How does this relate to PMSCs? First and foremost, PMSCs, functioning as multinationals, may find a demand from the market for CSR. On the other hand, the market may not have such a demand. However, due to the violations and scandals that

---

<sup>234</sup>*Id.* (referencing: SIGLER & MURPHY, *supra* note 1, at 143–65 (surveying these tools). ).

<sup>235</sup> *Id.* at 386. (referencing FOX, WARD, & HOWARD.).

<sup>236</sup>*Id.* at 387. (referencing: LOZANO, ALBAREDA & YSA, *supra* note 3, at 37 (describing relational CSR approaches); FOX, WARD, & HOWARD, *supra* note 4 (discussing the respective roles of business and government).).

<sup>237</sup> *Id.* (referencing: LOZANO, ALBAREDA & YSA, *supra* note 3, at 35–39; FOX, WARD, & HOWARD, *supra* note 4, at 22. ).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* (referencing Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT’L L. 389 (2005) (advocating such measures).).

<sup>240</sup> *Id.* (referencing: *EC 2011 CSR Strategy*, *supra* note 21, ¶ 1 (noting that “certain regulatory measures create an environment” that is more conducive to voluntary CSR practices).).

have appeared in the past, many in the market may want a good record of CSR, in order to prevent bad publicity.

#### **D. U.S. Multinational Regulations**

While not as focused on CSR as other countries<sup>241</sup>, America has developed “various cooperative enforcement tools that facilitate voluntary compliance with regulatory mandates.”<sup>242</sup> One of the ways they do this is by creating examples of CSR when the government functions as a market player. For example, the “green government procurement standards” have been adopted by Massachusetts and California among other U.S. states<sup>243</sup>. Another advantage the United States has is a long history of “public-private collaboration” which helps create a system of compliance and responsibility among the corporate elements of American society<sup>244</sup>. Federal bodies, such as the Department of Commerce, the Department of State and the Department of energy have “award and training programs” which help create a sense of CSR awareness. Federal programs also create awareness and interest in CSR<sup>245</sup>. The “federal income-tax deduction for charitable contributions state constituency statutes, and the creation of new stakeholder-focused business forms in some states” help create awareness and interest in CSR within the private-sector<sup>246</sup>.

---

<sup>241</sup>*Id.* at 388. (referencing: *See* Susan Ariel Aaronson & James Reeves, Nat’l Policy Ass’n, The European Response to Public Demands for Global Corporate Responsibility 50–51 (Feb. 5, 2002) (unpublished manuscript), available at [http://centreonphilanthropy.com/files/kb\\_articles/1251121958European%20Response%20to%20CSR.pdf](http://centreonphilanthropy.com/files/kb_articles/1251121958European%20Response%20to%20CSR.pdf)).

<sup>242</sup>*Id.* at 389. (referencing: *See generally* Cary Coglianese & Jennifer Nash, *Government Clubs: Theory and Evidence from Voluntary Environmental Programs*, in VOLUNTARY PROGRAMS: A CLUB THEORY PERSPECTIVE 231, 231–58 (Matthew Potoski & Aseem Prakesh eds., 2009) [hereinafter VOLUNTARY PROGRAMS] (discussing governmental initiatives in voluntary environmental programs); Matthew Potoski & Aseem Prakesh, *The Regulation Dilemma: Cooperation and Conflict in Environmental Governance*, 64 PUB. ADMIN. REV. 152 (2004) (same).).

<sup>243</sup>*Id.* (referencing: McBarnet, *supra* note 2, at 42–43.).

<sup>244</sup>*Id.* (*See generally* Ellen Rogers & Edward P. Weber, *Thinking Harder About Outcomes for Collaborative Governance Arrangements*, 40 AM. REV. PUB. ADMIN. 546(2010)).

<sup>245</sup>*Id.*

<sup>246</sup>*Id.* at 390. (referencing: Kahn v. Sullivan, 594 A.2d 48, 63 (Del. 1991) (interpreting DEL. CODE ANN. tit. 8, § 122(9) (2011), which authorizes corporate charitable contributions). On for-benefit corporations and related enterprise forms, see Anne Field, *Benefit Corporations, L3Cs and All the Rest:*

## 1. Monitoring and the Corrupt Practices Act

Some federal regulations appear and help to monitor MNCs and their CSR. For example, the disclosure obligations, required by the federal securities regulation create transparency from some firms<sup>247</sup>. The United States also has other acts and regulations that are intertwined with CSR. One of the most important of these is the Foreign Corrupt Practices Act. The FCPS, made in 1977, makes it illegal for “certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business.”<sup>248</sup> It specifically speaks about using the “instrumentality of interstate commerce corruptly” and knowingly using money to “induce the foreign official to do or omit to do an act in violation of his or her lawful duty.”<sup>249</sup> And on top of all of that the act also makes it necessary “for companies whose securities are listed in the United States to meet its accounting provisions.”<sup>250</sup> This act provides a great example of a government regulating its corporations even if they are abroad. If nothing else it is a valid and possibly successful attempt at keeping corporations in line in regards to corruption.

## 2. Standards and laws

To build a regulatory agenda, however, there must be a system by which standards of regulation are determined. Sources of these standards, while not a fully “embracing generalization”, regulation, and standards of regulation, are often based on “formal, mandatory sources of regulation such as national laws, administrative rules, and

---

*Making Sense of Those Confusing Choices*, FORBES (May 25, 2012, 9:58 AM), <http://www.forbes.com/sites/annefield/2012/05/25/benefit-corporations-l3cs-and-all-the-rest-making-sense-of-those-confusing-choices/>).

<sup>247</sup> *Id.* (noting: *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). On the limits of nonfinancial reporting under federal law, see generally Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1289–93, 1299–1311 (1999).).

<sup>248</sup> *Foreign Corrupt Practices Act*, September 23, 2105, <http://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act>.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

binding international agreements.”<sup>251</sup> In the case of Corporate social responsibility, these sources tend to be “non-binding voluntary codes or declarations.”<sup>252</sup> Some sources, however, are legally binding if they are a convention on a specified issue<sup>253</sup>. While most of the CSR sources are considered “soft law”<sup>254</sup>, “soft law” can become “hard law” in the future<sup>255</sup>. For example, the “emergent new standards of customary international law” are an observed transformation from “soft” to “hard” law.<sup>256</sup> Corporate Social Responsibility, while not necessarily a “hard law” system of regulation, has influence and force over multinationals, as well as future regulations<sup>257</sup>. CSR in a way can be seen as the most influential system of regulating multinationals due to the incentives that it provides. It is a system that facilitates a voluntary support and involvement<sup>258</sup>, which is more important than “hard law regulation” in many ways. In creating a system by which multinationals choose to follow CSR voluntarily, it can be taken as convincing them that it is in their best interest and there is an advantage to be gained from the use of CSR. In a sense it presents a “win win”, allowing both corporations and the community to benefit from the use and observance of CSR. Also, if corporations feel CSR functions in their best interests, they may hesitate more to violate it, because they will lose something, caused by their violation.

If a corporation can break an international law, and the only result is a fine, or a public scandal, they may feel it is worth it to violate the norm. However, if the corporation has something at stake in their observance of CSR, and they have to make the decision of whether or not to violate international law, they may determine it is in

---

<sup>251</sup>Peter Muchlinski, *Multinational Enterprises & The Law*, 110, (Second ed. 2007).

<sup>252</sup>*Id.*(referencing: Ans Kolk, Rob van Tulder and Carlijn Welters 'International Codes of Conduct and Corporate Social Responsibility: Can Transnational Corporations Regulate Themselves?' 8 *Transnational Corporations* 117 (No 1 1999) and the articles in 14 *Transnational Corporations* (No 3,2005).).

<sup>253</sup>Peter Muchlinski, *Multinational Enterprises & The Law*, 110, (Second ed. 2007).

<sup>254</sup>Harper Ho, *supra* note 206, at 378.

<sup>255</sup>*Id.* at 111.

<sup>256</sup>*Id.*

<sup>257</sup>*Id.* at 384. (referencing: ZERK, *supra* note 8, at 32–36 (discussing how voluntary standards can ultimately shape legal rules).).

<sup>258</sup>*Id.*

their best interest to simply observe international law and reap the rewards of their CSR incentives. On top of that, with the CSR incentives added, the corporation stands to lose those incentives, as well as face a scandal and international justice if they are caught in violation of international law. This in essence adds another level of loss to the corporation, if they decide to violate international law, or human rights law.

## V. MNC regulation and PMSCs

Understanding the ways in which multinationals are regulated under international law, it is plausible to consider regulating PMSC's under that category. While the regulation of multinationals is not perfect, it is at least existent and has multiple ways of creating both voluntary and mandated observance of international norms and customs. The regulatory system of corporations may not be the "glass slipper" when it comes to PMSC's, but it would seem that it is a possible solution.

PMSC's are corporations. They run as businesses and the goal of business and corporations, no matter what service or product they provide, or where they are located, is profit<sup>259</sup>. As stated earlier, corporate scandal may not always hurt the profit making ability of a business, however, many corporations will still try to avoid a scandal. Realistically speaking, the international system can, and possibly should view PMSC's as businesses that render a service. It has been mentioned, multiple times, that military contractors are not necessarily hired for combat functions<sup>260</sup>. This means that when analyzing what system of regulation would fit, we need to take into consideration the multitude of services they provide.

The military services market seems to be leaning toward the direction of global corporations. Even though until the mid 90's there were no "truly global companies", it seems to be changing<sup>261</sup>. The industry itself is expanding and including a wider array of services that can be provided<sup>262</sup>. The market demand has caused PMSCs to follow the "standard business techniques for market engineering used by other types of firms"<sup>263</sup>. For example, many PMSC firms are either partnering with others, or buying smaller firms. The acquisition of smaller firms gives the larger corporation access to the niche markets and technological specialization that these smaller firms possessed. This strategy allows the larger firms to compete on a global scale, using "brand marketing and sub specialization." Due to "complex security situations", "broader-based firms" offer a larger array of services which allows these

---

<sup>259</sup>Muchlinski, *supra* note 253, at 515.

<sup>260</sup>Perret, *supra* note, 2, at 45.

<sup>261</sup>P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, 83, (2003).  
(referencing: Simon Sheppard, "Soldiers for Hire," *Contemporary Review*, August 1999. "RAF Puts Refuel Job on Market," *London Times*, December 22, 2000.

<sup>262</sup>*Id.* at 83.

<sup>263</sup>*Id.*

companies to increase their market share more rapidly. This is due to the capital they already contain, as well as the brand recognition through their records.<sup>264</sup>

An example used by P.W. Singer is that of Defense Services Limited. DSL hired primarily ex-SAS personnel, being that they were a British company. They offered security training and consultation to multinational corporations stationed in areas of conflict, and even guarded embassies.<sup>265</sup> DSL was bought by Armor Holdings, which was an American company that originally was in the body armor industry. Armor holdings did this in order to “build up its ‘risk management services’”, and used a “growth through acquisitions-strategy.” Armor Holdings has also acquired twenty other companies, and now has a new set of “military-related services” including mine clearing and intelligence.<sup>266</sup>

Armor Holdings is also an example of a progressive firm which does more than “military-related services”. With the expansion of technology, and the internet relatively unregulated and as singer puts it “weakly controlled by governments”, Armor Holdings found a fresh market. To build their “virtual security” support, Armor Holdings has bought both IBNet and NTI, both in the internet security business.<sup>267</sup> With the exponential growth of cyber threats, the investment in cyber security was a great business decision that could hugely benefit Armor Holdings in the future.<sup>268</sup>

There are market niches to be had in this business, and while many corporations are expanding their ownership and expertise to envelop other aspects of the “military-related services”,<sup>269270</sup> some companies prefer to stick to their specialty<sup>271</sup>. This comes from a concern regarding reputation, which, in this line of work, has the ability to cut both ways<sup>272</sup>. For example, many firms involved in demining operations, while they

---

<sup>264</sup>*Id.*

<sup>265</sup>*Id.*, at 84.

<sup>266</sup>*Id.*

<sup>267</sup>*Id.*

<sup>268</sup>*Id.* (referencing: House of Commons, *Private Military Companies: Options for Regulation*, HC 557, February 12, 2002.).

<sup>269</sup>*Id.*

<sup>270</sup>*Id.* at 85.

<sup>271</sup>*Id.*

<sup>272</sup>*Id.*



“recruit many of the same ex-military personnel as larger, more diversified firms”<sup>273</sup>, are considered to be doing humanitarian work. Demining is viewed as a more acceptable operation than combat training or consulting due to the fact that it centers on “weapons’ removal, rather than use.”<sup>274</sup> To prevent their humanitarian oriented clientele from leaving for another firm, demining corporations often try their best to “disassociate” themselves and their operations from the other PMSCs and the “mercenary label”<sup>275</sup>. However, with more diversified corporations getting a foothold in the demining field, it will be interesting to see if these corporations disassociation from the rest of the firms make a difference in their success.<sup>276</sup>

On the other hand, as stated earlier, some clientele prefer the “more aggressive, smaller firms that can cut informal deals that bigger transnational firms cannot.”<sup>277</sup> These firms care less for their reputation, and can utilize the “barter system of payment that larger firms with scrutinized accounting practices would not be able to employ”<sup>278</sup>. These firms fill a specific market niche<sup>279</sup>, which more well-known and highly regarded firms cannot or are not willing to fill.

There is a third market segment, which is comprised of firms that “have their cake and try to eat it too”. These firms try to fill the above two market segments, by having a “central global brand”, but when they enter new local markets, they “rapidly spawn new firms” to “take advantage of the benefits of such smaller organizations.”<sup>280</sup> Executive Outcomes serves as an excellent example. Right after deployment into a country Executive Outcomes would “create a network of smaller local firms.”<sup>281</sup> Former employees would run the businesses which could be anything from “security protection to airlift”. Some firms even moved out of the military services industry and entered into things like telecommunications and vacation resorts.<sup>282</sup>

---

<sup>273</sup> *Id.* (referencing: Yves Goulet, “Mixing Business with Bullets,” *Jane's Intelligence Review*, September 1997.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 86.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

There are many advantages to this form of corporate structure. These “stay-behind” firms create a “marriage of local specialization and transnational branding”. This in turn creates a “flexible network, loosely linking each new market into an overall corporate structure.”<sup>283</sup> Structures such as these provide advantages such as reducing the regulatory capacity of domestic monitors, in the firm’s central country, which is already limited to begin with<sup>284</sup>. This also allows the firm to “pack up and move” whenever it needs “surge capacity for larger operations in one spot”.<sup>285</sup>

There is competition in these markets, however, and in less developed countries, PMSC’s have begun to emerge. For example, demining firms in Africa are now in operation, and take business from the larger richer companies.<sup>286</sup> The market can also be influenced by factors that create independent scenarios. For example, many firms based in an area ravaged by war could actually have an advantage, comparatively, because the war affects labor pricing and experience.<sup>287</sup> These firms can also, generally, “provide relatively inexpensive military services that may be able to undercut established Western Firms.”<sup>288</sup> This provides evidence that in the future of the industry, clients will have a broad spectrum of services to choose from, in the military services field.<sup>289</sup> Lower pricing will battle with higher technological options, and “developing-region” PMSCs will compete with “Western-based firms”<sup>290</sup>. According to Singer, it is likely that the most successful PMSCs will be those that “move toward product integration” instead of focusing on lower prices or technological specialties. In other words, success will come from the “best balance” of pricing and quality.<sup>291</sup>

There is another avenue that may be taken. Smaller firms may be bought and absorbed before they truly take off, in order to reduce competition. As Singer

---

<sup>283</sup>*Id.*

<sup>284</sup>*Id.*

<sup>285</sup>*Id.*(referencing: Michael Sheridan, “Briton Quits Indonesia over 'Psych War' Claims,” *Sunday Times*, August 6, 2000.<http://www.Sunday-times.co.uk/news/pages/sti/2000/08/06/stifgnasio2001.html>).

<sup>286</sup>*Id.*

<sup>287</sup>*Id.*

<sup>288</sup>*Id.* (referencing: Christopher Bowe, “Agency Aims to Swell the Ranks,” *Financial Times*, August 10, 2000.).

<sup>289</sup>*Id.*

<sup>290</sup>*Id.*

<sup>291</sup>*Id.*

mentions, this specific “market seems to have a tendency toward consolidation”. Larger corporations with more money will have the ability to make grand offers that smaller firms may find hard to refuse.<sup>292</sup> This prevents the smaller firms from threatening the larger firms competitively, and can give the larger firms a new foothold in the market.

### **A. Three phases of operation**

Using Kristen Huskey’s three phase model in combination with the current MNC regulatory system, it is possible to imagine an alternative way to regulate PMSC’s, assuming the international system views them as multinational corporations. By attaching different regulatory demands and incentives to each of the three phases, the operations of a PMSC and its personnel can more accurately be regulated, and held accountable. Each phase of operation has specific differences that make it difficult to find a specific regulatory system that fits. By using multiple regulatory options from the multinational spectrum, in essence the international system could, metaphorically, build a glove to fit the hand instead of trying to fit existing gloves to the hand. An example is that of medieval armor, knights often had the armor made specifically for them, made to fit their body only, allowing them better movement and comfort. However, if one purchased armor that was not fitted to their body, it would not move as easily, or be as comfortable. The raw materials of the armor are the same, just as the regulatory raw materials are present. Fitting the regulation to the field is like fitting the armor to the person, things must be shaped to align correctly.

Shaping the regulation to fit the situation will never yield a perfect solution; there will always be fluctuations and different situations that don’t fall within the regulatory framework. However, using the three phase model may provide enough variety, allowing differing situations to be covered and understood. In other words, the distinction between each of the three phases creates a new regulatory umbrella that can be used to cover a specific situation.

In the first phase of regulation, the Contracting Phase, Huskey seems to give the power to the hiring state.<sup>293 294</sup> In effect the hiring state is given some responsibility in regards to who they hire and why. If regulatory bodies were indeed to put the three

---

<sup>292</sup>*Id.*

<sup>293</sup> Huskey, *supra* note 7, at 195.

<sup>294</sup>*Id.* at 196.

phase theory into effect, then the responsibility in contracting would be completely on the hiring state. This is an important example of how the three phases can clarify accountability in the case of violations. In regards to the contract, the responsibility, and accountability can be directly traced to the hiring state. The contract contains the responsibilities and duties of the PMSC personnel.<sup>295</sup> Therefore, the hired personnel cannot argue that they were given orders that they contractually had to follow. If the order falls outside of their contractual responsibilities, then, theoretically, they are accountable for performing the action.

One way of viewing the contractual relationship between PMSCs and a national military, is to see it as an international consortium. Muchlinski defines this as “an organization which is created when two or more companies co-operate so as to act as a single entity for a specific and limited purpose.”<sup>296</sup> In the case of PMSC and their relationship to national militaries, there is a “limited purpose” in that they are “co-operating” during war or peace time operations, for specific reasons. Contractually, there can also be Public Private Partnerships, specifically when a state uses the services of a “foreign private contractor”. As stated earlier, in this situation the State being the larger of the two groups, provides the financing and technology, and the local party that has been hired will provide the “workforce and supporting infrastructure”.<sup>297</sup> If there is indeed a Public Private Partnership, this allows the state to remain in “strategic control” of the project.<sup>298</sup> Using the regulatory framework for multinationals, it is easier to see who is accountable for what in the contractual phase. One of the other benefits of the contractual phase is that regulation can also come from the home state<sup>299</sup>, the state in which the PMSC is based. Potentially the home state and the contracting state can be one in the same, giving them twice the regulatory power. According to Huskey, the home state has the ability to suspend and/or take away the licenses of said corporations.<sup>300</sup> This keeps business inactive and can even close down a corporation. Given that the most impactful and the principal jurisdictional level for multinationals is the home state, extraterritoriality becomes a problem. However, with the three

---

<sup>295</sup>*Id.* at 195.

<sup>296</sup>Muchlinski, *supra* note 253, at 54. (Suggests, for reference: Schmitthoff's Export Trade (Lndon: Sweet and Maxwell, 9<sup>th</sup> edn, 1990) at 343.).

<sup>297</sup>*Id.* at 55,

<sup>298</sup>*Id.*

<sup>299</sup>Huskey, *supra* note 7, at 196.

<sup>300</sup>*Id.*

phase argument, the nation state has the regulatory power, responsibility, and accountability for the contracting phase.<sup>301 302</sup> With the home state's influence over the contracting phase, it can prove that there was no "direction and control"<sup>303</sup> during a violation, and it can be used as evidence to absolve the state of any responsibility.

The second phase, called the in-the-field phase, is where regulation truly matters. In this phase the potential for violations and criminal acts becomes more apparent, and therefore should be regulated more acutely. Unfortunately, this is also the phase in which regulation is hardest to enact and enforce. The main problem with national regulation is that the multinational, in this case the PMSC, operates across the limits of national jurisdiction. This results in a "mismatch between...the managerial and operational reach of the firm and...the jurisdictional reach of the state that seeks to regulate"<sup>304</sup>. What the state may choose to do, is "extend the operation of its laws outside its territorial jurisdiction," resulting in a case where it applies the "laws extraterritorially"<sup>305</sup>. There could also be a prescription of laws that are applicable to the whole of multinational groups. This would be done regardless of the multinationals presence in a foreign country.<sup>306</sup> This is important for multiple reasons that extend beyond the image of the state to the international community.

Muchlinski provides a scenario that works for multinationals and PMSCs equally. Muchlinski states that a home state may want to prevent its multinational "from trading with potential enemy powers."<sup>307</sup> PMSCs should also be regulated in the same manner to prevent them from being hired by enemies or potential enemies of their home states. Due to the nationality of the parent corporation, and the control it has over its subsidiaries, this can be done.<sup>308</sup> This may also happen in the contracting phase as well, however, to control the subsidiaries; it has to be done while they are in action. A subsidiary could easily deceive the home country or even its parent

---

<sup>301</sup> *Id.* at 195.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 201,202. (referencing ILC, Articles on Responsibility of State for International Wrongful Acts, arts. 5, 8,U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001)).

<sup>304</sup> Peter Muchlinski, *Multinational Enterprises & The Law*, 115, (Second ed. 2007).

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

company, and actively operate under the direction of a foreign government. By using the nationality principle, the legal nationalities of the subsidiaries are overcome by the law of the home state of the parent company<sup>309</sup>. What this entails is, the home state imposing legal duties on the parent company<sup>310</sup>. To control the subsidiaries, the parent company must be ordered to “direct the acts of the subsidiary in the required manner.”<sup>311</sup> Basically, a state wants to ensure that the “overseas unit of the MNE acts in accordance with the law that governs the activities of the unit present within the regulating state.”<sup>312</sup>

Muchlinski has determined that the extraterritorial application of regulation is usually done by stronger states. The reason this is, is because there can be conflict caused by the imposition of laws on a multinational operating on foreign soil. The host state may see it as a violation of their sovereignty.<sup>313</sup> The exercising of jurisdiction across borders, according to Muchlinski, is based on the “regulating state’s power and confidence in the validity...of its policies.”<sup>314</sup> In the specific case of PMSC personnel, this could also be seen. For example, if a European PMSC was hired to guard a compound in Africa, and was later ordered to fight rebels, the European home state could intervene to prevent this from happening. The host country may be upset that the home state’s government stopped their operations, yet on an international scale, the operations of the PMSC personnel bordered dangerously on mercenary activity, and would put these personnel in a different level of danger. The European state would be extremely confident in their decision, even if the African country disagreed, and considered it a violation of their sovereignty.

Muchlinski also makes a point to state that the host country, especially if they are a weaker or less developed state tends to be more accepting of the extraterritorial regulation.<sup>315</sup> While they may be upset with the violation of their sovereignty, or the jurisdictional dominance, however, they may accept it as “the price to be paid for foreign aid and investment.”<sup>316</sup> This is when a subsidiary of a PMSC or the PMSC

---

<sup>309</sup>*Id.*

<sup>310</sup>*Id.*

<sup>311</sup>*Id.* at 116.

<sup>312</sup>*Id.*

<sup>313</sup>*Id.*

<sup>314</sup>*Id.*

<sup>315</sup>*Id.*

<sup>316</sup>*Id.*

itself is operating in or for a host state. A PMSC may also be hired by a state other than its home state, and be used in a third state. In this case the state that hires the PMSC is labeled as the hiring state, while the state it is operating in is the host state. In a scenario where a home state, or a hiring state send their PMSC personnel into foreign territory, most likely the state in which they are deployed, the host state, will not object to regulation by the home or hiring state.

According to different cases in international law), it seems that extraterritorial regulation, at least in some scenarios can and does happen<sup>317</sup>. However, “civil regulation”, a system by which informal regulation is enacted through NGOs<sup>318</sup>, may be overlooked in the global order. This system of regulation involves “both cooperative approaches, under which NGOs and MNEs act in partnership to further...social responsibility goals”<sup>319</sup>. While many PMSCs may not want to be involved with NGOs, others may. For example, many demining firms may want to organize with NGOs in order to exemplify their difference from other PMSCs. There are also more critical avenues that can be taken, in a partnership between PMSCs, or multinationals in general, and NGOs. Assuming PMSCs and MNCs have an ultimate goal of profit, they can be hurt by bad publicity. NGOs in partnership with other multinationals can highlight “corporate malpractice” and “monitor compliance with voluntary and/or mandatory standards”<sup>320</sup>. While this may seem to have little impact, it has the potential to whip PMSCs into shape. Bad publicity can always hurt the company, and if there is an international group, such as an NGO, watching them closely, then they may think twice before breaking the rules.

The third phase, in Huskey’s model, is the “post-conduct phase.” At this point, it is assumed that PMSC personnel have harmed someone, or violated an international norm, or law. First and foremost, if one of three core segments of international criminal law, namely genocide, crimes against humanity or war crimes, is violated, any businesses or individuals can be held liable<sup>321</sup>. For example, after world war two,

---

<sup>317</sup>*Id.* at 115.

<sup>318</sup>*Id.* at 114.

<sup>319</sup>*Id.*

<sup>320</sup>*Id.*

<sup>321</sup>Robert Grabosch, *Prospects of Legal Redress for Victims of Corporate Human Rights Violations in a Globalised World*, 160, *Globalisation and Governance*, 2011, [https://www.researchgate.net/publication/215560443\\_Prospects\\_of\\_Legal\\_Redress\\_for\\_Victims\\_of\\_Corporate\\_Human\\_Rights\\_Violations\\_in\\_a\\_Globalised\\_World](https://www.researchgate.net/publication/215560443_Prospects_of_Legal_Redress_for_Victims_of_Corporate_Human_Rights_Violations_in_a_Globalised_World).

officials of German corporations were held liable for international crimes that were “connected to active participation in the Nazi regime”.<sup>322</sup> The second strategy to hold corporations liable is to seek redress for damages through a lawsuit<sup>323</sup>. The lawsuit does not necessarily have to be filed in the home country of a corporation, but can be filed in a country where a corporation’s assets are located<sup>324</sup>. If nothing else, the lawsuit can bring attention to the violation and may change popular opinion of the business.

The redress phase, while important to exemplify the consequences of a violation, is not as important as the other two phases for a simple reason; the violation has already occurred. While redress and punishment are important, they are reactions to the violation, not a solution or a preventative measure. As mentioned earlier, Huskey believes what needs to be determined in this situation is “applicable law or legal doctrines to determine who is accountable/liable (for example, PMSC, individual, state) for the relevant conduct, and to whom; applicable criminal laws and mechanisms, and which state or international body has responsibility to enforce such laws...”<sup>325</sup>. However, as also stated earlier, in regards to post conduct situations, “IHL is mostly silent.”<sup>326</sup> In comparison to domestic law, murderers are punished for their crimes, yet people still choose to murder, even knowing the punishment that could await them. Why would this be any different for international violations, especially if consequences are not as dire? In summation, these violations need to be prevented, not reacted to. The third phase, the “post-conduct” phase is important, but once that phase has been entered, the violation has already happened, and it is too late.

## **B. Corporate entity**

One thing that should be considered an advantage, however, of labeling PMSCs multinational corporations, is the legal liability a corporation may have on the international scale. Corporations are “granted existence by the state” but are considered a “legal person” under the law<sup>327</sup>. This means that multinationals can be sued, and held accountable for violations of international law. Theoretically, this may

---

<sup>322</sup>*Id.* at 161.

<sup>323</sup>*Id.* at 164.

<sup>324</sup>*Id.*

<sup>325</sup>Huskey, *supra* note 7, at 196.

<sup>326</sup>*Id.* at 201.

<sup>327</sup>Muchlinski, *supra* note 253, at 509.



be advantageous, in so far as if a corporation, as a legal entity, is brought before an international court for violations it has committed, and is sued, the entire corporation loses that profit. This may have more impact on future operations; the reason being, it hurts profit. For example, if one person in a PMSC violates international humanitarian or human rights law, that person may be held accountable in the international justice system, and the corporation may suffer some bad publicity. However, if the corporation itself is brought to court and sued for a large sum, it affects everyone in the corporation. As Muchlinski states, a MNCs “only social responsibility is to make profits...”<sup>328</sup>. Assuming the goal of PMSCs is to make money, the loss of profit would matter more than the loss of an employee, and the subsequent scandal following a violation. Potentially, this could create a scenario where employees are more closely monitored and self-regulation is taken seriously in order to prevent a loss of profit.

---

<sup>328</sup>*Id.* at 515.

## VI. Conclusion

PMSCs are not categorized under international law, causing a loophole in regulation.<sup>329 330</sup> Similarly, there are issues in regulating multinational corporations. There are however, systems of authority and control that can be implemented to regulate multinationals. A gap in regulation under international law is always dangerous and should be closed. There are many theories regarding the regulation of PMSCs, one of which is placing them in an official category and thereby applying the regulatory bodies and rules to these PMSCs. One of the categories that PMSCs can fit is that of a MNC or a multinational corporation.<sup>331</sup> This category is advantageous because PMSCs are in essence businesses that operate across national boundaries.

However, the advantages also include other categories. For example, another category some have placed PMSCs in is the ‘mercenary’ category.<sup>332</sup> While the legal definition of a mercenary is extremely hard to meet, and easy to avoid as a label<sup>333</sup>, mercenaries are, in essence, focused on profit.<sup>334</sup> This is the same as a corporation which has a simple goal of profits. Labeling PMSCs MNCs also means that the drive of the PMSC is profit<sup>335 336</sup>, meaning that PMSCs can be affected, and regulated in regards to their profits, the same as mercenaries. Overall, however, international MNC regulation provides a good base to regulate PMSCs. Using Huskey’s three phases of regulation in combination with MNC regulation, PMSCs can be more thoroughly regulated, and accountability more accurately determined. In addition to regulation, being considered corporations may allow a PMSC as an entity to be held accountable for violations. The possibilities are there, and while the system has gaps, it seems it could be an answer in the future.

---

<sup>329</sup> White, *supra* note 25.

<sup>330</sup> Perret, *supra* note 2.

<sup>331</sup> Andrew Clapham, *supra* note 8.

<sup>332</sup> *supra* note 141.

<sup>333</sup> Percy, *supra* note 5.

<sup>334</sup> *supra* note 141.

<sup>335</sup> *Id.*

<sup>336</sup> Muchlinski, *supra* note 253, at 515.