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**Old problems in new packaging:
The need for proactive Private Security Contractor management**

By /par

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Abstract

The presence of private security contractors on the modern contemporary battlefield is now commonplace. For over two decades Western governments have increasingly looked to private industry to provide support and services to their armed forces on deployed operations. Canada, like most Allies, has increasingly become reliant on the private security industry to achieve mission objectives despite widely documented concerns over their employment, problems and challenges with their use, and a recent spate of well publicized incidents. This paper returns to first principles to identify the problems with unfettered private security contractor (PSC) reliance and argues that Canada should adopt a proactive and considered approach to PSC governance, doctrine and risk mitigation to ensure that challenges are sufficiently addressed and that Canadian interests are protected. By adopting this mechanism Canada will ensure that its armed forces are well positioned to exploit PSC capabilities while retaining the necessary capacity and capability to effectively wage war and protect national interests in the future.

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*... mercenary troops are not influenced by affection, or by any other consideration except their small stipend, which is not enough to make them willing to die for you.*¹

Niccolò Machiavelli

1. Introduction

For almost two decades Western militaries have increasingly relied on industry to provide support and services to deployed operations. In many cases industry now provides services once considered to be the sole purview of a state's military. While many consider this to be a new phenomenon, the employment of private citizens to support and augment a force is not an entirely new concept. According to Singer: "[e]very empire, from Ancient Egypt to Victoria England, utilized contract forces."² Examples of the use of private citizens to support conflict include Teutonic tribesmen to extend border lines and rule terrain for the Roman Empire, the use of Hessians by the British during the American War of Independence, the use of civilian haulers and supply vendors by both sides during the U.S. Civil War, and probably more widely known the mercantile companies which fought wars, negotiated trade deals, and expanded colonial influence on behalf of their nations.³ In fact, "[m]ercantile companies held the power to raise armies and navies, declare wars, garner trading rights, and establish ports and

¹ Niccolò Machiavelli, *The Prince and the art of war* (New York: Barnes and Noble, 2004), 64.

² P.W. Singer, "Corporate Warriors: The rise of the privatized military industry and its ramifications for International Security," *International Journal* 26, no. 3, (Winter 2001/ 2002): 191; <http://www.proquest.umi.com>; Internet; accessed 15 January 2008.

³ Michelle Small, "Privatisation of Security and Military Functions and the Demise of the Modern Nation-State in Africa," *ACCORD Occasional paper series* 1, no. 2, (2006): 7; available from; http://www.accord.org.za/op/occasional_paper_2_2006.pdf; Internet; accessed 20 December 2007. Mercantile companies included the Hudson Bay Company, the Dutch East India Company, and the British South Africa Company with each of these organizations embedding private security directly within the enterprise to protect investment, garner greater economic power, and facilitate negotiations through force, if necessary, to advance their business interests.

towns, all on behalf of their home states.”⁴ These rights and privileges are now almost exclusively reserved for what is considered the modern nation state.

The modern nation state emerged following the Treaty of Westphalia in 1648, and had two major impacts: it formally bounded territory; and solidified the belief in absolute sovereignty. The result was that the state became the core structure of the international system and its standing was reflective of how well it administered affairs. As Small noted: “[t]he core organising principle, and indeed the ultimate symbol of the state, became its capacity to administer, regulate, and control all instruments of violence, force, and coercion.”⁵ The use of private citizens to protect interests and provide public security was no longer considered appropriate and therefore their use fell out of favor.⁶ Thus, reliance on private citizens began to fade and by the nineteenth century the provision of security, a cornerstone requirement of the ‘social contract’, has almost exclusively been provided by the state’s armed forces.⁷ Global governance and international regulation has been developed to reflect this state centric approach.

⁴ *Ibid.*, 6.

⁵ *Ibid.*, 11.

⁶ Although the use of private citizens to provide armed services fell out of favor, they continued to be utilized in supporting roles. Examples include Washington’s and Wellington’s extensive use of civilian equipment haulers and Confederate and Union army reliance of private logistic support during the U.S. Civil War.

⁷ Deborah Avant “Mercenary to Citizen Armies: Explaining Change in the Practice of War,” *International Organization* 54, no. 1 (Winter 2000): 41-72; <http://www.jstor.org>; Internet; accessed 6 April 2008. Avant argues that in addition to the ideational turmoil that followed the Treaty of Westphalia material shifts in how war was conducted raised challenges and provided important antecedent conditions for this change.

No longer regularly employed to protect the interests of the state, the general perception became that it was unexpected, inappropriate, and dangerous for civilians to become involved in military affairs.⁸ In more recent times, however, this has begun to change as the state has increasingly looked to industry to provide or share responsibility for the provision of state security. Beginning in earnest immediately prior to the 1991 Gulf War, Western democracies began to rely on industry to augment and support deployed operations and maintain advanced equipment in the field. Reliance intensified following the terrorist attacks of 11 September 2001, and resulted in exponential industry expansion to support the global war on terror (GWOT). Numerous firms are now capable and willing to operate in all security environments with available services ranging from “armed operational support; unarmed operational support on the battlefield; unarmed military advice and training; and logistics support.”⁹

This widespread use and expansion has, in essence, provided a degree of de facto legitimacy to the industry.¹⁰ However, relying on contractors for mission critical support or empowering them to act on behalf of the state can be problematic and has inherent risks. While modern, affluent, nation states that are well administered arguably have the ability to prioritize and manage the associated risks, they also have the “most to lose if privatization tips the ledger and undermines the capacities of public forces or legitimacy

⁸ Christopher Spearin, “Not a ‘real state’?: Defence privatization in Canada,” *International Journal* 60, no. 4 (Autumn 2005): 1095.

⁹ David Perry, “Contractors in Kandahar, Eh?: Canada’s ‘real’ commitment to Afghanistan,” *Journal of Military and Strategic Studies* 9, no. 4 (Summer 2007): 3.

¹⁰ Michelle Small, “Privatisation of Security . . . , 4.

of foreign policy.”¹¹ Although private contractors can be great enablers they can also undermine and jeopardize the efforts of a nation if employed in the wrong environment and without mitigating the inherent risks.

Given the stakes and potential difficulties it is not surprising that Western militaries are largely divided over the utility of private contractors on deployed operations. Industry supporters believe that contractor capabilities can be leveraged to support, enable, or potentially even replace national forces in a broad range of traditional military missions. This potential could be particularly useful in peace-keeping and humanitarian operations. Critics, however, view the industry with disdain and believe they are structured solely for profit, and act not in the interest of the state but for private profit.¹² Furthermore, some are concerned that the presence of industry during operations could undermine the legitimacy of the mission or even jeopardize the safety of military personnel because they are currently “not bound by the codes, rules, and regulations that make a nation’s armed forces unique and accountable.”¹³

¹¹ Deborah Avant, *The Market for Force: The Consequences of Privatizing Security* (Cambridge: Cambridge University Press, 2005), 7.

¹² Fred Schreier and Marina Caparini, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*. (Geneva: DCAF Press, 2005): 11; available from <http://www.globalpolicy.org/nations/sovereign/military/0305privatisingsecurity.pdf>; Internet; accessed 5 January 2008. As an example Schreier and Caparini are highly critical of the industry and suggest that the industry is structured solely for profit and not bound by the code’s, rules, regulations that make a nation’s armed forces unique and accountable. Proponents of the industry include Eugene Smith who believes that the industry has untapped potential to support peace and humanitarian operations. See E.B. Smith, “The New Condottieri and US Policy: the Privatization of Conflict and Its Implication,” *Parameters* 32, no. 4, (Winter 2002/2003): 104-119.

¹³ *Ibid.*, 11.

Despite these concerns governments appear to be pressing ahead without fully understanding and mitigating the medium and long term effect private contractors have on the profession of arms.¹⁴ Although it may be convenient and even necessary to outsource certain services to support current operations, it may not be desirable and could even be counter-productive over a longer period. Today, the largest proportion of services currently outsourced is logistics and equipment support. Deployed units are highly reliant on industry to supply and service equipment and sustain soldiers in the field. Without the food, fuel, ammunition, and spares necessary to support modern soldiers and equipment in the battlespace, deployed units can rapidly become ineffective. Hence, deployed logistics is viewed as a mission critical function and “[h]istorically logistics has been a key factor in the success of military operations.”¹⁵ Clearly, if industry is relied upon to deliver this type of service and fails, the result could alter the course of the conflict and potentially have far reaching strategic consequences.¹⁶ Therefore, the simple fact is that just because “one can outsource does not always mean one should.”¹⁷

Canada, like most other Western democracies, has adopted the practice of utilizing private contractors to provide support, logistics, and facility security for the

¹⁴ *Ibid.*, 99. Schreier and Caparini suggest that senior officials are not making fully informed, risk based assessments when outsourcing military functions. Specific areas of concern include the growing dependence on industry to deliver core capabilities and lack of critical review. Peter Singer supports this position and believes that continued outsourcing will affect the long term health of the military institution. See P.W. Singer, “Outsourcing the War.” *Salon.com*, 16 April 2004, 1; available from http://dir.salon.com/story/news/feature/2004/04/16/outsourcing_war/index.html; Internet; accessed 18 October 2007.

¹⁵ Conference of Defence Associations. *A nation at risk: the decline of the Canadian Force*. (Ottawa: CDAI Press, 2002), 31.

¹⁶ Fred Schreier and Marina Caparini, *Privatising Security ...*, 34.

¹⁷ *Ibid.*, 99.

Canadian Forces (CF) on deployed operations. Initially intended to support non mission critical functions in low risk environments, Canada now employs contractors to fill mission critical roles in the war zone of Afghanistan.¹⁸ The use of contractors in these roles is not without risk, places additional burden on Command, and could leave the CF badly exposed in the worst case scenario.¹⁹ While the Department of National Defence (DND) has mitigated some of these risks many legal, ethical and long term viability issues remain largely unexplored. This paper will identify many of the relevant legal, ethical, and Command considerations when using contractors to support and augment deployed operations and argue that Canada should adopt a proactive and considered approach to governance, doctrine, and risk mitigation to ensure that challenges are sufficiently addressed and that Canadian interests are protected when the CF chooses to rely on this rapidly evolving industry in the future.

To discuss these issues in a coherent manner this paper will first delve into the detail of why Western democracies have adopted the use of private contractors and look specifically at Canada's Alternate Service Delivery (ASD) policy and practices. Within this initial section the industry will be defined and an overview of how Canada and the United States (U.S.) utilize their services will be provided. The next chapter will analyze the legal status of personnel working in the industry when deployed on operations. Key

¹⁸ For the purposes of this paper, mission critical or core capability is defined as those skills that are essential combat, combat support, or related activities. For a complete discussion and definition of what defines a core capability see Brigadier-General Dwayne Lucas, "Outsourcing: A Future Reality for Combat Support," http://wps.cfc.forces.gc.ca/papers/otherpublications/31_lucas.pdf; Internet; accessed 10 March 2008.

¹⁹ A worst case scenario is considered to be a situation where the contractor is unable or unwilling to deliver contracted services and the CF cannot easily resolve the shortfall. Therefore, a loss of services will occur. This loss will significantly impact the mission and potentially jeopardizes its success.

aspects that will be addressed include the legal status of the industry in a conflict environment, applicability of host nation laws, and legal considerations when contemplating tasks and duties. Then, ethical issues will be examined. Topics that will be discussed include the ethics of employing civilians on the battlefield, the ethical standards by which they are governed, industry accountability and transparency, and the ethical effects of having private contractors on deployed operations. Finally, the last chapter will discuss the effect of private contractors on operations and look specifically at how contractors affect Command and Control, operational risk, and governance and doctrine. Throughout, potential issues and problem areas will be raised as appropriate.

2. Why Outsource?

Machiavelli believed that: “[t]he main foundations which all states must have, whether new, or old, or mixed, are good laws and good armies.”²⁰ He believed that laws and armies were required because to prosper and flourish a society needed to feel safe and secure. In Machiavelli’s day it was acceptable for security to be publicly or privately provided, but following the Treaty of Westphalia, this responsibility primarily fell to publicly funded national forces.²¹ Since the 1990s, however, a marked shift back towards a partial reliance on private actors has been observed. This shift surprised many as it may have suggested that standing armies were no longer capable of meeting the security needs of the nation. However, the reality was that the fiscal restraint of the 1990s had forced governments to rationalize defence spending and make tough decisions on how to provide security in a cost effective and viable way.

The end of the Cold War and collapse of the Soviet Union suggested that large standing armies were no longer necessary to meet the nation’s security requirements and that a reduction in force size was justified. Multi-purpose, combat capable forces were still required but they had to be delivered in a more cost effective manner. Outsourcing of some services was viewed as one of the potential solutions to this problem. The thought was that industry could deliver non critical functions more efficiently while armed forces could focus all energy and efforts on the delivery of security. This chapter

²⁰ Niccolo Machiavelli, *The Prince and ...*, 63.

²¹ Deborah Avant “Mercenary to Citizen Armies ...”, 41-42. The shift occurred during the 18th century for two reasons; the ideational turmoil that resulted from the treaty, and the material shifts in the way war was conducted. It was believed that small professional armies would be better suited to Command and Control, technology, and training issues of the day.

will define the private security industry, provide several reasons why outsourcing to this industry was viewed as an attractive solution, and describe how the industry is currently being used by Canada and the U.S. in today's conflict environments.

2.1 An Industry in Need of Definition

A review of the literature indicates that there is no agreement on what constitutes the private security industry or how it should be defined. Some view the industry as modern mercenary warfare while others consider it to be a legitimate service provider.²² While it is hard to argue against those who highlight industry characteristics that resemble those flaunted by mercenaries of days gone by it is also fairly easy to point out legitimate services that the industry can and does provide. The dilemma therefore, is to develop a definition that not only spans the entire breadth of the industry but remains generic enough to be understood.

Thus far, this paper has broadly referred to private contractors as civilians or an industry that supports or provides services previously the purview of the nation's armed forces. While this definition covers all aspects of what the industry does, it is far too broad to facilitate a general understanding of the type and scope of services available. Singer suggests that the industry is made up of a collection of Private Military Firms

²² War on Want, "Corporate Mercenaries: The threat of private military and security companies," 18; <http://www.waronwant.org/download.php?id=488>; Internet; accessed 20 December 2007. Enrique Ballesteros, UN Special Rapporteur on Mercenaries from 1987 to 2004, is an example of those who believe that the private security industry is a modern version of a mercenary. His comments were generally aimed at those companies that provide armed services instead of unarmed support. In 1989 he proposed broadening the UN Convention definition of mercenary to incorporate the industry but found no consensus as many believe that the unarmed services provided by the industry are completely legitimate.

(PMFs) which provide the complete array of services currently available.²³ He subdivides this collection into three distinct entities: service providers (Military Provider Firms – MPF); consultant firms (Military Consultant Firms – MCF); and what he refers to as non-core service outsourcing (Military Support Firms – MSF).²⁴ To define the type of services each entity provides Singer established the “Tip-of-the-Spear” analogy which places MPF at the “pointy end” and MSF at the other.²⁵ Thus, MPFs provide the punch (e.g., services commensurate with actual war-fighting), MCFs provide guidance (including analysis and training), and MSFs provide everything needed to support the other two (e.g. Logistics, intelligence, technical support, etc.). This differentiation is important, and will be discussed in the next chapter, as the legal status of employees ultimately depends on whether they are armed and whether they take an active role in the conflict.

Most other authors refer to Singer’s definitions but adjust them slightly to meet their needs. In many cases this has led to significant confusion. As an example, Avant in her book *The Market for Force* refers to the entire industry as Private Military Contractors but acknowledges the three distinct types of services put forth by Singer.²⁶ Holmqvist separates companies into those which are employed to produce offensive

²³ P.W. Singer, *Corporate Warriors* (NY: Cornell University Press, 2003), 8.

²⁴ *Ibid.*, 91.

²⁵ *Ibid.*, 91.

²⁶ Deborah Avant, *The Market for Force ...*, 16-18.

effects and those which are used to provide defensive and support services.²⁷ However, she acknowledges that companies could actually be employed in both areas or that the task could easily change from defensive to offensive (or vice-versa) depending on the situation. Holmqvist's conclusion is that tasks cannot be used as differentiation and therefore she recommends a single term of Private Security Contractors (PSCs) to define the entire industry. Other terms occasionally cited by academics, governments, and the media include Private Security Providers and Private Security Firms.²⁸

Doctrine sections of many Western militaries have also recognized the need to clarify terminology, establish clear definitions, and quantify available services into broad classifications that battlefield commanders can understand and work with in a combat environment. United Kingdom doctrine has coined the term CONDO (Contractors on Deployed Operations) while ABCA have selected and utilize the term Private Military and Security Companies (PMSC).²⁹ Irrespective of the term used the military fundamentally differentiates the industry into those which offer armed versus unarmed services. The reason being the significant legal and ethical challenges armed civilians can present if employed during conflict. These challenges will be discussed in subsequent chapters.

²⁷ Caroline Holmqvist, *Private Security Companies: The Case for Regulation* (Stockholm: SIPRI, 2005), 5.

²⁸ These terms are frequently used by governments and the media when referring to the private security industry. As an example see Andrew Mayeda and Mike Blanchfield. "Private security firms rush to fill lucrative niche; But Afghan government is cracking down," *The Gazette*, 22 November 2007; <http://proquest.umi.com>; Internet; accessed 3 January 2008.

²⁹ Ministry of Defence, *Contractors on Deployed Operations (JDP 4/01)* (London: MOD DG Joint Concepts and Doctrine, 2001), i. ABCA is a coalition of the United States, Canada, Britain, Australia, and New Zealand that focuses on aspects on inter-operability.

This paper will refer to the entire industry using Holmqvist's all encompassing PSC term. This term has been selected to facilitate a generic and straight forward discussion of some of the inherent industry challenges to demonstrate a requirement for proactive management of its use and risks. To demonstrate the requirement for this approach this paper looks holistically at the legal, ethical, and operational issues that should be considered as part of the decision to use PSCs.³⁰ Although many industry experts and PSCs themselves are loath to combine armed and unarmed services under one term, most acknowledge that the lines are becoming increasingly blurred and that: "the difference between service support and combat arms can vanish on the asymmetric battlefield."³¹ Thus, a single term that defines the entire industry is considered appropriate for the purposes of this discussion. Before delving directly into the legal, ethical, and operational challenges of the industry, however, it is appropriate to examine how Canada became reliant on its services.

2.2 The Arrival of Alternate Service Delivery

The increased use of contractors to support deployed operations should come as no surprise. By the mid 1990s, standing forces had been reduced and neo-liberal business practices of the day suggested that many support and administrative functions could be done by industry more economically. According to Singer "the privatised military

³⁰ Throughout this paper examples will be cited to highlight potential problems and justify why they warrant proactive consideration. Although it is understood and acknowledged that many of these challenges may be more applicable to armed or unarmed contractors the main purpose of this discussion is to identify the range of issues that must be considered when deciding to rely on the industry.

³¹ Marc Lindemann, "Civilian Contractors under Military Law," *Parameters: US Army War College* 37, no. 3 (Autumn 2007): 84. Experts include Peter Singer and Deborah Avant.

industry [drew] on precedents, models, and justifications from the wider ‘privatisation revolution’ allowing firms to become potential, and perhaps even the preferred, providers of military services.”³² In Canada, the Liberal government of the early 1990s, was eager to balance the budget, transform the Public Service, and make government significantly more efficient.³³ To achieve a balanced budget sweeping reductions in government spending occurred across all departments. Yet, despite widespread reductions the government expected defence services would be maintained and in 1994 published a Defence White Paper which reaffirmed the CF’s role and reiterated the requirement for multi-purpose combat capable forces.³⁴ To deliver capability, while simultaneously absorbing the financial reductions of the day, the CF consolidated equipment, disposed of surplus infrastructure, and looked to industry to provide general support services in a cost effective manner. This approach was referred to as ASD and its use was widespread throughout all federal government departments and wholly supported by the government of the day. The belief at the time was why do something yourself when industry can do it cheaper.

³² P.W. Singer, “Corporate Warriors: The rise of ...”, 200.

³³ Deficit reduction was a key priority for the Liberal government in the 1990s. All government departments were expected to dramatically cut expenditures while maintaining priority services. As an example the requirement to reduce expenditures was specifically highlighted in the 1994 Defence White Paper. See Government of Canada, *1994 Defence White Paper* (Ottawa: ADM Policy, 1994), Chapter 7; available from <http://www.forces.gc.ca/admpol/content.asp?id={489C0E24-62F7-483B-96D9-D0FC44502C86}>; Internet; accessed 15 February 2008.

³⁴ *Ibid.*, Chapter 3 and 7. The Defence White Paper specifically refers to the requirement to maintain multi-purpose, combat capable forces as part of a total force concept. Examples of multi-purpose, combat capable forces include deployable mechanized brigades, fighter and helicopter assets, and a Naval Task Group.

The rapid advance of technology, so critical to modern military equipment, was also a factor as military weapon systems were becoming increasingly complex and integrated. Industry was viewed as the ideal maintainer and supporter of this equipment throughout its service life.³⁵ Evidence at the time suggested that carefully managed privatization could facilitate the provision of expertise and provide support cheaper - while still maintaining the availability and reliability targets mandated by the armed services.³⁶ Some pitfalls were envisioned but the belief was that these could be managed through effective contracting techniques. When viewed in this context ASD appeared to be an attractive prospect and the CF quickly adopted ASD practices to facilitate training, logistics, and many aspects of service delivery.

2.2.1 ASD in the CF

Although the CF quickly adopted ASD as a concept the long term effects of outsourcing services remains largely unknown. The CF's mission "is to be a body of warfighting specialists who are *directly essential to the achievement of the defence mission* [emphasis added]."³⁷ It follows that those services not deemed "directly essential," or mission critical, can and should be outsourced to private contractors when it makes economic sense to do so. While identification of those functions deemed mission critical remains key, medium and long-term effects of outsourcing on the institution must

³⁵ Original Equipment Manufacturers were highly supportive of maintaining and supporting their equipment after delivery. In many cases, extended service support was negotiated in sale agreements and used to gain competitive advantage.

³⁶ Fred Schreier and Marina Caparini, *Privatising Security ...*, 98.

³⁷ Christopher Spearin, "Not a 'real state' ...", 1097. Emphasized text originated from a Ray Crabbe paper entitled Alternative Service Delivery. This paper is in the possession of the author.

also be considered.³⁸ This will ensure that the CF can continue to fulfill its mission into the foreseeable future.

Canada's growing reliance on private contractors to support operations can be directly attributed to three factors: a general decline in military capability; insufficient personnel to meet commitments; and a desire to maximize efficiency and effectiveness through targeted outsourcing. As a direct result of these factors Canada looks to industry for different reasons: out of necessity, to provide or maintain operational flexibility, and/or to maximize combat effectiveness while staying within mandated troop ceilings. Each generates different risks and challenges that must be understood and managed.³⁹

As an example, Canada currently employs PSCs in Afghanistan to provide four main services: logistics support, personnel protection for high value personnel in theatre, to guard and protect facilities/ equipment, and for convoy protection. Logistics support is provided by unarmed employees of SNC-Lavalin/PAE under the CF Contractor Augmentation Program (CANCAP) which is “. . . a contingency based, flexible program that [can] be used in any theatre of operations.”⁴⁰ Afghanistan is not the first operation where Canada has used this service.⁴¹ The first variant was used domestically to support Y2K and following its initial success the program evolved and was expanded for use in

³⁸ Michelle Small, “Privatisation of Security . . .”, 12.

³⁹ Christopher Spearin, “Not a ‘real state’ . . .”, 1094.

⁴⁰ David Perry, “Contractors in Kandahar . . .”, 9.

⁴¹ *Ibid.*, 12. In 2005 there were 400 CANCAP employees supporting the 2,500 strong Kabul contingent saving approximately 80 to 100 military logistics positions in combat service support.

Bosnia.⁴² Although a relatively mature program Afghanistan is the first time the contractor has been expected to operate in a hostile environment. The current CANCAP mandate is to provide core logistic support functions for Canada's 2,500 troops stationed in the region. To provide this broad range of support, SNC-Lavalin/PAE routinely sub-contract functions to other firms. A recent example is the hiring of six 'Commissionaires' to verify security details and issue passes for all NATO and civilian personnel entering Kandahar Airfield (KAF).⁴³ Armed PSCs currently employed by Canada include the personnel protection provided to the Strategic Advisory Team (SAT) by Hart Security, and site security for the Joint Co-ordination Centre (JCC) in the heart of Kandahar City provided by Blue Hackle Security.⁴⁴ Legal and ethical implications of the use of armed versus unarmed civilians will be discussed in subsequent chapters.

Arguably CANCAP can be used to demonstrate each of the three reasons why Canada resorts to PSCs for support to deployed operations.⁴⁵ CANCAP is required because the CF logistics system does not have the personnel and equipment to sustain the

⁴² Department of National Defence, "Backgrounder - Canadian Forces Contractor Augmentation Program." http://www.forces.gc.ca/site/newsroom/view_news_e.asp?id=1409; Internet; accessed 10 March 2008. The first variant (known as the Contractor Support Program (CSP)) was specific to the Canadian Contingent Stabilization Force (SFOR) in Bosnia. The contractor, engaging a mix of local and Canadian staff, took over a wide range of support services needed by Canada's troops. Services included cooking, laundry, vehicle and building maintenance, and telecommunication services.

⁴³ David Pugliese, "Commissionaires report for Afghanistan tour of Duty," *The Ottawa Citizen*, 15 January 2008, 1.

⁴⁴ Andrew Mayeda and Mike Blanchfield. "Security worker had apartheid past; Firm protects Canadian Forces in Afghanistan," *National Post*, 2 December 2007, 1; <http://proquest.umi.com>; Internet; accessed 3 January 2008.

⁴⁵ Although CANCAP represents an unarmed PSC provided service a similar argument could be made to demonstrate why Canada resorts to the use of armed PSCs for personnel, infrastructure, or convoy protection.

current mandate.⁴⁶ Therefore, CANCAP is being used first and foremost out of necessity. The second reason to outsource is to provide operational flexibility. When originally approving the CANCAP concept then Deputy Chief of Defence Staff, General Raymond Henault, highlighted that: “[contracting] may not produce financial savings but I anticipate benefits in operational flexibility and on relieving pressures.”⁴⁷ David Perry estimates that once duplication of effort and all costs are taken into consideration CANCAP is approximately ten times more expensive than an in-house solution.⁴⁸ However, inherent in CANCAP is operational flexibility as the level of support can be amended to reflect changing requirements or conditions. The last reason to outsource was that the use of PSCs can be a means of avoiding mandated troop ceilings or maximizing deployed combat strength. Canada’s Combat Service Support (CSS) Commander for the move south to Kandahar was shocked when he was told that his contingent was limited to three hundred personnel so that a ceiling of 2500 could be achieved.⁴⁹ Numbering only three hundred, CSS could only meet service delivery requirements with the augmentation and assistance of CANCAP.

Canadian Forces ASD was originally intended to rationalize and outsource domestic base support. However, these decisions and actions had unintended

⁴⁶ Conference of Defence Associations. *A nation at risk ...*, 31.

⁴⁷ General R. Henault, “Framework for the development of the Canadian contractor augmentation program – letter signed and released 7 July 2000,” quoted in Christopher Spearin, “Not a ‘real state’ ...”, 1102.

⁴⁸

consequences. While medium and long term effects continue to be identified a major consequence of domestic base support outsourcing has been the reduced availability of uniformed support trade personnel which historically have formed the CSS cadre. This shortfall severely affects the CF's ability to deploy and sustain operations and has resulted in the decision to outsource on operational rather than purely economic grounds.⁵⁰ Plagued by a chronic shortage of CSS troops and limited number of combat troops, Canada looked to industry to provide mission critical logistic and support services for the Afghanistan operation. Although this allows Canada's 2500 personnel to broadly focus on security and reconstruction it goes against the basic ASD tenant that only non critical functions should be outsourced. Therefore, it should not be surprising that these decisions have operational implications. Some of these implications will be discussed in the last chapter.

2.2.2 U.S. reliance on Private Security Companies

Like Canada, the U.S. armed forces have undergone significant downsizing in the last twenty years. In 2000, the U.S. Army was at sixty percent strength compared to 1989 levels with only 63 of the original 111 combat brigades remaining.⁵¹ Yet despite this reduction, deployments had dramatically increased with 36 major deployments in 15 years compared to 10 during the 40-year Cold War period.⁵² This tempo forced the U.S. to increasingly turn to industry to support and augment deployed operations. By far the

⁵⁰ David Perry, "Contractors in Kandahar . . .", 2.

⁵¹ Gordon L Campbell, "Contractors on the Battlefield: The Ethics of Paying Civilians to Enter Harm's Way and Requiring Soldiers to Depend upon Them." Joint Services Conference on Professional Ethics 2000, 2000; available from <http://www.usafa.edu/isme/JSCOPE00/Campbell00.html>; Internet; accessed 20 December 2007.

⁵² *Ibid.*, 2.

most prolific user of private contractors, the U.S. had 15,000 armed contractors engaged in mission critical activities in Iraq in 2004.⁵³ In direct contravention of U.S. doctrine, many armed contractors are routinely employed to protect personnel, maintain and operate equipment, train U.S. and foreign forces, gather intelligence, and even participate in side-by-side combat with U.S. and Allied forces.⁵⁴

The use of unarmed PSCs is also widespread with estimates exceeding 160,000 personnel being employed in Iraq alone in 2007. An example of U.S. outsourcing is their LOGCAP logistic support mechanism. Similar to CANCAP, LOGCAP provides all basic logistic services in deployed U.S. theatres with 2006 figures estimating that 50,000 personnel are employed to support operations in Iraq and Afghanistan.⁵⁵ This very brief review of U.S. PSC use has highlighted two issues considered particularly relevant to this paper. The first is that by far the U.S. is the largest PSC user with many more civilians, filling much broader roles, than currently any other nation. As such they are considered the leader in the use of the industry. The second is that although U.S. doctrine tries to establish clear guidelines for when and where PSCs should and should not be used, U.S. efforts are hampered by a continually evolving industry and changing operational

⁵³ P.W. Singer, "Outsourcing the War." ..., 1. The total number of contractors in Iraq (armed and unarmed), supporting U.S. forces, is estimated to be in excess of 160,000 in 2007. For additional details see P.W. Singer, "The dark truth about Blackwater," *Salon.com*, 2 October 2007, 1; available from <http://www.salon.com/news/feature/2007/10/02/blackwater/print.html>; Internet; accessed 18 October 2007.

⁵⁴ Emanuela-Chiara Gillard, "Business goes to war: private military/ security companies and international humanitarian law," *International Review of the Red Cross* 88, no. 863 (September 2006): 526. U.S. doctrine does not preclude the use of PSCs. In fact, the Quadrennial Defence Review sees civilians as one of the four major elements of the 'Total Force' concept but acknowledges that the use of PSCs may not be appropriate in all situations. For further details see United States, Department of Defense, *Quadrennial Defense Review Report* (Washington, DC: U.S. Government Printing Office, February 6, 2006), 75-77. <http://www.defenselink.mil/qdr/report/Report20060203.pdf>; Internet; accessed 2 April 2008.

⁵⁵ David Perry, "Contractors in Kandahar ...", 5-7.

situation. Therefore, despite significant effort these guidelines often lag reality or are ignored to meet operational requirements. Thus, the U.S. routinely identifies lessons or the requirement for additional policy and procedures to address problem areas.⁵⁶ Many of these lessons will be used to highlight and clearly delineate risk and potential problems of widespread PSC use throughout this paper.

2.2.3 The Requirement to Re-evaluate

The use of PSCs by both the U.S. and Canada continues to grow. For outsourcing to be effective over the long term, the process of selecting services that can and should be outsourced must be continuously re-visited. Remembering that the basic premise of outsourcing is to provide a cost-effective service while meeting the delivery needs of the customer, it is essential that as needs or the security situation change the provision of services must be adjusted appropriately. As previously explained the CF has not necessarily turned to industry for deployed support to achieve monetary savings. Instead, outsourcing occurs out of necessity, to provide operational flexibility, and to maximize combat effectiveness within a mandated troop ceiling. As experience is gained, lessons identified, and second and third order effects of previous decisions become understood the decision methodology used to employ and rely on the industry should be re-evaluated. This will ensure that future decisions to use the industry meet Canada's short and long term needs.

⁵⁶ Gordon L Campbell, "Contractors on the Battlefield . . .", 4-8. Campbell highlights a number of areas where the U.S. has run into difficulty when employing PSCs. Areas include reliance and trust, command and control, and legal issues. All lessons are considered relevant to Canada.

2.3 Not a Panacea

Fifteen years ago, PSCs were widely regarded as an attractive and cost effective alternative to large standing armies for the delivery of non critical functions.⁵⁷ Critical functions were originally excluded as outsourcing mission essential tasks was perceived to be problematic, risky, and the first step towards compromising power and the nation's sovereignty.⁵⁸ As confirmation of this original assessment President Bush explained in his 2004, campaign speech that: "America must never outsource America's national security."⁵⁹ However, the relentless drive for efficiency, shortage of key personnel, and significant demands of the GWOT have resulted in decision makers blurring the line between critical and non critical functions or more crucially ignoring published policy to meet operational requirements. In some cases this has resulted in mission critical functions being outsourced.

While outsourcing on the modern asymmetric battlefield does result in operational flexibility it also has some significant limitations. Previously, a soldier tasked in a supporting role could easily be reassigned to fulfill a broad range of tasks. However, now that many of these functions have been outsourced, the tactical flexibility to adapt or task PSCs with additional missions is largely constrained by the contract under which they operate. As Singer highlights in *The dark truth about Blackwater* soldiers support

⁵⁷ Brigadier-General Dwayne Lucas, "Outsourcing: A Future Reality for Combat Support," 1-3. In his review of CF outsourcing, General Lucas purports that in the early 1990s the use of industry provided unarmed services to meet force reduction targets was an acceptable option. Outsourcing armed tasks was not considered to be an acceptable option at that time.

⁵⁸ Michelle Small, "Privatisation of Security ...", 5.

⁵⁹ P.W. Singer, "Outsourcing the War." ..., 4.

the broad counter-insurgency effort by not only fulfilling their mission but by reaching out to the population and doing such things as playing cards and drinking tea with the locals.⁶⁰ There is no requirement for a PSC to perform that additional function and in fact, most view it as increasing the risk to their primary mission. As one such contractor said: “[o]ur mission is to protect the principle at all costs. If that means pissing off the Iraqi’s, too bad.”⁶¹

Surowiecki is convinced that the level of American outsourcing has had a negative impact on U.S. forces.⁶² According to him, while outsourcing certain functions may be attractive “doing this in-house is often easier and quicker. You avoid the expense of hassle and haggling, and retain operational reliability and control, ... [n]o contract can guarantee that private employees will stick around in a combat zone.”⁶³ According to Surowiecki, what people often forget is the particularly de-moralizing effect a contractor not meeting his contractual obligations can have on deployed troops, citing a logistics support contractor who refused to operate in certain areas of Iraq leaving thousands of U.S. forces without hot food and water for over a month.⁶⁴

⁶⁰ P.W. Singer, “The dark truth about Blackwater,” ..., 1.

⁶¹ *Ibid.*, 1.

⁶² David Isenberg, *A Fistful of Contractors: The Case for a Pragmatic Assessment of Private Military Companies in Iraq* (London: British-American Security Information Council, 2004), 16.

⁶³ *Ibid.*, 16.

⁶⁴ *Ibid.*, 17.

Fortunately, Canada has not yet encountered these negative experiences. Arguably though it may only be a matter of time unless Canada takes appropriate steps to prevent U.S. identified lessons and well documented industry pitfalls from occurring here in Canada. To mitigate against this possibility Canada should look holistically at its reliance on the industry, identify tasks that should and should not be outsourced, and develop a long term vision of how to exploit industry advantages while limiting the impact of its inherent problems. Ideally, this process will evolve into PSC specific governance and doctrine that keeps pace with industry changes and is applicable in both Canadian and Coalition operations.⁶⁵

This chapter has discussed how the PSC industry is defined and outlined the factors which led the Canadian government to adopt ASD practices in the 1990s. Eager to reduce costs and streamline domestic support the CF embraced ASD practices but in the post September 2001 high tempo security environment, ASD decisions have dramatically affected the CF's ability to deploy and sustain operations. As a result, Canada has increasingly looked to industry for mission critical support and enablers. However, this increased reliance and use of PSCs brings additional challenges and generates risk beyond that incurred from the use of national forces. These risks and challenges are not new ground as a much larger user, the U.S., already employs PSCs in far greater numbers, and in much broader roles, than Canada. Thus, U.S. lessons, doctrine, and

⁶⁵ This requirement is fully supported by CF Joint and Combined logistics doctrine. This publication recognizes the need for contractors to support and service specialized equipment but cautions that there are significant issues that require consideration and continual reassessment. For further information see Chapter 1 of Canada. Department of National Defence. *Logistics Doctrine for CF Joint and Combined Operations*. Ottawa: NDHQ – J4, Unknown. <http://barker.cfc.dnd.ca/Admin/jointdocs/cdnpubs/log/logtc.html>; Internet; accessed 10 March 2008

governance are all considered relevant and should be used by Canada to inform and regulate its use and reliance on the industry. By leveraging this experience and knowledge Canada's ability to proactively manage Canadian governance, doctrine, and risk will be greatly enhanced. The next chapter will discuss the legal status of the industry and its employees when deployed on operations. PSC legal issues that should be considered and might require management will also be identified.

3. Legal Status of Private Security Contractors

For several hundred years now global conflicts have been fought by standing armies of the world's nation states with minimal civilian interference or participation. The legal frameworks developed to manage and control violence were largely predicated on this model. A significant civilian presence was never envisioned and thus when the legal frameworks are applied to the PSC industry it generally results in ambiguity and uncertainty. As summarized by a recent U.S. conference to discuss industry issues: “[t]he law lags reality.”⁶⁶ A further complexity is the constant evolution and exponential expansion of the industry. This has led to confusion over how to define the industry and capture services that it provides. This chapter will discuss the specific legal issues applicable to PSCs, how those issues could affect employment, mechanisms nations (including Canada) have adopted to provide structure and governance, and finally discuss the liability and accountability concerns that fall out of the legal ambiguity.

3.1 An industry in search of legal structure

Modern military operations are different from the majority of conflicts fought since the Treaty of Westphalia. Instead of inter-state conflicts where standing armies of one state fought another, present day conflicts which support the Global War On Terror (GWOT) are asymmetric, intra-state, and the foe is an individual or terrorist and not a nation's army. International law does not readily conform to this new reality as laws governing armed conflict were largely developed in the 19th and 20th centuries to deal

⁶⁶ McCormick Tribune Conference Series, *Understanding the Privatization of National Security* (Chicago, IL, May 2006), 30.

with state on state rather than state on individual conflict.⁶⁷ This has caused confusion and has led to the belief “both in popular and in expert publications, that there is a vacuum in the law when it comes to [PSC] operations.”⁶⁸ However, despite this confusion, three legal frameworks could be considered to apply.

The three frameworks that could apply include host nation human rights law (HNL) (i.e., law of the nation where the crimes are committed); domestic human rights law (i.e. law of the nation which hold the contract); or international humanitarian law (IHL).⁶⁹ The first two are largely non-conflict law enforcement models, while the third is specific to conduct during a conflict. Which applies is a matter of much debate. HNL is problematic in that in a failed or failing state situation it is highly likely that there is little to no indigenous law enforcement capability. Domestic laws are also difficult to apply for reasons of jurisdiction. However, despite these problems, HNL and domestic law are applicable in a number of scenarios which will be identified throughout this chapter.

The third legal framework that could apply is IHL. IHL governs the conduct of states and individuals in armed conflict and provides specific legal frameworks for civilians engaged in theatres of operation (E.g. Geneva and Additional Protocols). However, two significant challenges exist when using this framework.⁷⁰ The first is that

⁶⁷ David Isenberg, *A Fistful of Contractors* ..., 45.

⁶⁸ Emanuela-Chiara Gillard, “Business goes to war ...”, 527.

⁶⁹ Martin Dixon, *Textbook on International Law*, 6th ed. (Oxford: Oxford University Press, 2007), 318-322.

⁷⁰ Michelle Small, “Privatisation of Security ...”, 16.

it is largely based on an international system which remains state centric and therefore focuses on inter-state conflicts, and second its applicability in a non declared conflict environment is arguable.⁷¹ Gillard in her legal review of the industry for the International Committee of the Red Cross asserts that IHL is applicable in all situations and provides appropriate legal regulation of the industry. According to Gillard, this body of law clearly delineates the responsibilities of the states that hire PSCs and regulates the activities of their staff in all conflict or security environments.⁷²

The basic premise of IHL, as defined by The Hague and Geneva Conventions, is that both sides regulate conduct during the conflict to conform to an agreed set of criteria. While historically compliance was expected from all participants, the realities of modern asymmetric conflicts have somewhat changed expectations. In the case of conflicts currently being fought in Iraq and Afghanistan one side is a loosely defined group who is not expected to adhere to IHL as they use indiscriminate terrorist tactics to instill fear and inflict widespread civilian and military casualties. The other side is made up of Western democracies that broadly conform to IHL to demonstrate legitimacy and regulate their conduct but do not recognize the opposing group as lawful combatants. Thus, while IHL may broadly apply some problems with its application can be expected.

⁷¹ Additional Protocol II defines civilian protections during a non international state (i.e., intra state) conflict. However, it has not been ratified by all countries (e.g., the U.S.).

⁷² Emanuela-Chiara Gillard, "Business goes to war ...", 527-528.

3.1.1 PSC Status during Conflict

The legal status of PSCs remains an area of concern because their presence on the battlefield tends to blur the traditional differentiation between combatants and non-combatants. Historically, civilians were always non-combatants as it was assumed that they would not be participants and that conflicts would be fought between the militaries of two or more countries. Based on this assumption The Hague and Geneva Conventions (E.g. IHL but more commonly referred to as the LOAC) defined military personnel as combatants and civilians as non-combatants.⁷³ Status, rights and protections are all broadly based on these definitions. Combatants are fully entitled to participate and afforded certain rights and protections while non-combatants cannot participate and are to be protected from attack. Non-combatants w

Table 1 – Combatant versus Non-Combatant Status

Category	Military Target	POW Status	War Criminal
Combatants	YES	YES	NO
Non-Combatants	NO	YES	NO
[Unlawful] Combatants	YES	NO	YES

Source: BGen Dwayne Lucas, “Outsourcing: A Future Reality for Combat Support,” 9.

Combatants or Non-Combatants

Therefore, the first issue to be resolved is whether PSCs should be defined as combatants or non-combatants. Table 1 outlines the reasons why this distinction is important. The first is whether they will be afforded Prisoner of War (POW) status and legal protection if captured, and the second is whether they may be legally targeted. In general, combatants can be legally targeted at all times, have a right to bear arms, may directly participate in hostilities, and are entitled to POW status if captured.⁷⁶

Alternatively, a non-combatant has no right to bear arms, cannot be directly targeted, and if they are found to have taken a direct part in hostilities they are labeled unprivileged belligerents or unlawful combatants and can be prosecuted for their participation.⁷⁷

Combatants are normally members of the armed forces but can also be a recognized party

⁷⁶ Office of the Judge Advocate General, “Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts, (Protocol I) – 1977, Part III – Methods and Means of Warfare Combatant and Prisoners of War, Section II – Combatants and Prisoner of War Status, Article 43(2),” in *Collection of Documents on the Law of Armed Conflict*, 2001 ed., ed. by Directorate of Law Training (Ottawa: DND, 2001), 148.

⁷⁷ Office of the Judge Advocate General, “Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War – 1949, Part I – General Provisions, Article 5,” in *Collection of Documents on the Law of Armed Conflict*, 2001 ed., ed. by Directorate of Law Training (Ottawa: DND, 2001), 118-119. See also Emanuela-Chiara Gillard, “Business goes to war ...”, 531.

to the conflict. The most common recognized parties are members of militia, volunteer groups, and organized resistance movements provided they meet certain criteria.⁷⁸

The first criterion that must be met is Article 43 of Geneva Convention Additional Protocol I. This Article requires that combatants be hired by the state rather than a private organization.⁷⁹ The second criterion to be met is that PSCs must be subject to Command. This requirement can be interpreted in two ways. The first is that PSCs can never be truly commanded as they are not subject to “unlimited liability.”⁸⁰ Although PSCs may be contractually obligated to be responsive to a military commander, demands must be limited to those services defined by the contract. Any order deemed unacceptable or dangerous could simply be ignored with only contractual repercussions expected in the worst case scenario. Gillard proposed an alternative view and asserts that the provision of “Command” is solely to ensure that authority is asserted over the group and that discipline is maintained.⁸¹ If this assertion is valid, PSCs would have to meet three additional criteria to be considered as combatants. These criteria include displaying

⁷⁸ *Ibid.*, 531.

⁷⁹ Office of the Judge Advocate General, “Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts, (Protocol I) – 1977, Part III – Methods and Means of Warfare Combatant and Prisoners of War, Section II – Combatants and Prisoner of War Status, Article 43(1),” in *Collection of Documents on the Law of Armed Conflict*, 2001 ed., ed. by Directorate of Law Training (Ottawa: DND, 2001), 148.

⁸⁰ Office of the Judge Advocate General, “Hague Convention (IV) Respecting the Laws and Customs of War on Land – 1907, Annex, Section 1 – On Belligerents, Chapter 1 – The Qualifications of Belligerents, Article 1,” in *Collection of Documents on the Law of Armed Conflict*, 2001 ed., ed. by Directorate of Law Training (Ottawa: DND, 2001), 15. Additional Protocol I Article 43(1) also refers. An essential defining or differentiating characteristic separating members of the armed forces from civilians is the acceptance that a member’s right to life may be forgone in the national interest. The expectation that one may give up one’s life for one’s country is spoken of in military literature as “the clause of unlimited liability”.

⁸¹ Emanuela-Chiara Gillard, “Business goes to war ...”, 535.

a fixed and distinctive sign recognizable at a distance, carrying arms openly, and conducting operations in accordance with the laws and customs of war.⁸² In general, PSCs do not meet these criteria. Not all PSCs are armed nor is there a widely recognized symbol to distinguish PSCs from military forces or the civilian population. In fact, PSCs generally wear a “variety of attire, ranging from military uniform-like camouflage gear . . . to civilian attire that makes them difficult to distinguish from other non-military [or military] actors.”⁸³ For these reasons PSCs do not currently meet the requirements for combatant status and therefore must be considered as non-combatants under the LOAC.

Non-Combatants

The LOAC defines two types of non-combatants; civilians, and civilians authorized to accompany the armed force. Both are afforded the same protections under the LOAC with the sole exceptions being that civilians authorized to accompany the armed force are entitled to POW status and legal protection if captured. By the nature of their employment PSCs are broadly considered to be civilians authorized to accompany

⁸² Office of the Judge Advocate General, “Hague Convention (IV) Respecting the Laws and Customs of War on Land – 1907, Annex, Section 1 – On Belligerents, Chapter 1 – The Qualifications of Belligerents, Article 1,” in *Collection of Documents on the Law of Armed Conflict*, 2001 ed., ed. by Directorate of Law Training (Ottawa: DND, 2001), 15.

⁸³ Emanuela-Chiara Gillard, “Business goes to war . . . , 535. PSCs are discouraged from wearing clothing that is distinctly similar to that of the civilian population or the military. Instead, they wear a wide variety of clothing that is typically suited to the task which they perform. This clothing does not conform to a widely recognized standard and could be confused with clothing worn by other actors in a theatre of operations. As such, it is not considered to meet the requirements of “distinctive” under the IHL.

the armed force.⁸⁴ However, this status presents some inherent challenges and limitations.

Civilians authorized to accompany the armed force

Civilians authorized to accompany the armed force are civilians who:

... accompany the armed forces without actually being 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 force, provided 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.⁸⁵

Although PSCs are widely considered to fall within this category two aspects require a brief discussion before this status can be universally applied. The first is what type of services are specifically covered, and the second is the relative importance of written authorization (i.e. the identity card) to accompany the force. In her legal review, Gillard addresses both of these issues. According to Gillard, the *Commentary* outlines the intention to include all civilians accompanying the armed force under this provision.⁸⁶

Aircraft crews, war correspondents, etc. were provided as examples only. Identity cards

⁸⁴ Any civilian employed by government is considered as a civilian authorized to accompany the armed force under the provisions of IHL provided they are authorized by that nation to be present. Therefore, any employee or contractor of agencies such as the Department of Foreign Affairs and International Trade (Canada), Department for International Development (U.K.), and the Department of State (U.S.) would be protected under this provision. Contractors of non government organizations or independent actors (i.e., non-affiliated) are not entitled to this status and are considered as civilians under IHL.

⁸⁵ Office of the Judge Advocate General, "Geneva Convention (III) Relative to the Treatment of Prisoners of War – 1949, Part I – Provisions, Article 4A(4)," in *Collection of Documents on the Law of Armed Conflict*, 2001 ed., ed. by Directorate of Law Training (Ottawa: DND, 2001), 95.

⁸⁶ Emanuela-Chiara Gillard, "Business goes to war ... , 537. *Commentary* is the document used to capture all discussions which led to the actual convention wording.

were intended solely as a supplementary safeguard and therefore do not affect status.⁸⁷

As a result of Gillard's substantiation PSCs that are unarmed, authorized to accompany the armed force, and take no direct part in hostilities can universally be assumed to be covered by this provision. What then constitutes direct participation?

Direct Participation

Unfortunately, direct participation is not defined in any of the international treaties. The majority of activities conducted by PSCs are in the area of support and logistics. Many of these functions have historically been the responsibility of Combat Service Support (CSS) troops and include tasks such as: general logistics support, ammunition re-supply, catering, etc. Whether these roles amount to direct participation is highly subjective and dependent on the situation and circumstances.⁸⁸ One argument routinely used to demonstrate that PSCs do not participate in hostilities is that they are contracted solely to provide defensive services and are restricted to self-defence actions only.⁸⁹ While this may be true, IHL makes no distinction between offensive and defensive operations.⁹⁰ Therefore, according to IHL, those PSCs employed in defensive roles (i.e. guarding facilities, personnel, or simply defending themselves) violate their non-combatant status if they respond to any attack.

⁸⁷ *Ibid.*, 537.

⁸⁸ *Ibid.*, 540.

⁸⁹ *Ibid.*, 540.

⁹⁰ Office of the Judge Advocate General, "Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts, (Protocol I) – 1977, Part IV – Civilian Population, Section I – General Protection Against Effects of Hostilities, Chapter I – Basic Rule and Field of Application, Article 49(1)," in *Collection of Documents on the Law of Armed Conflict*, 2001 ed., ed. by Directorate of Law Training (Ottawa: DND, 2001), 149.

A more general definition of direct participation is provided by Gillard. She suggests that direct participation be defined as “acts which, by their nature and purpose are intended to cause actual harm to enemy personnel and equipment.”⁹¹ To supplement this definition the *Commentary* (created in support of the Third Geneva Convention) suggests that direct participation amounts to: “a sufficient causal relationship between the act of participation and its immediate consequences.”⁹² Based on both of these definitions any act, whether defensive or offensive in nature, which is deemed to cause damage or has an immediate effect on the conflict would be considered direct participation.

Once deemed to have directly participated in the conflict a civilian authorized to accompany the armed force would no longer meet the prerequisites for this status and be subject to the provisions of Additional Protocol (AP) I - Article 50. This Article states that any person who does not meet any of the definitions defined by the Third Geneva Convention (i.e., combatant, civilian accompanying the force, etc.) is to be considered a

⁹¹ Emanuela-Chiara Gillard, “Business goes to war . . . , 540.

⁹² Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 1987, para 1942, 4787, quoted in Emanuela-Chiara Gillard, “Business goes to war . . . , 540.

civilian.⁹³ A civilian who has taken a direct part in hostilities is considered an unprivileged belligerent or unlawful combatant and may be tried for their participation.⁹⁴

Draft CANCAP governance, U.S., and U.K. interpretations of direct participation all broadly agree with Gillard.⁹⁵ However, the legal ramifications of direct participation broadly differ. Canadian draft governance does not address this issue but the U.S. purports that civilians authorized to accompany the armed force never lose their right to protection from prosecution or POW status regardless of whether they participate in hostilities.⁹⁶ The U.S. base this argument on an interpretation of AP I, Article 53(3) and insist that: “[AP I] deprives civilians who take direct part in hostilities only of their protections under Section I of Part IV of the Protocol – i.e., against the effects of hostilities.”⁹⁷ Conversely, the U.K. believes that contractor legal protections are directly tied to whether or not contractors are armed. According to U.K. doctrine, regardless of whether or not they are considered to be participating in the conflict, contractors should

⁹³ Office of the Judge Advocate General, “Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts, (Protocol I) – 1977, Part IV – Civilian Population, Section I – General Protection Against Effects of Hostilities, Chapter II – Civilians and Civilian Population, Article 50(1),” in *Collection of Documents on the Law of Armed Conflict*, 2001 ed., ed. by Directorate of Law Training (Ottawa: DND, 2001), 149.

⁹⁴ Emanuela-Chiara Gillard, “Business goes to war ...”, 538.

⁹⁵ Department of National Defence. *Canadian Forces Contractor Augmentation Program (CANCAP) Governance (Draft)* (Ottawa: PWGSC, 2006), 7-9. With the Canadian interpretation of direct participation left undefined a Canadian employed PSC could inadvertently jeopardize their status and protection under international law. This omission increases the risk of PSC use. U.S. and U.K. interpretations are extensively defined in national doctrine.

⁹⁶ Gordon L Campbell, “Contractors on the Battlefield ...”, 9.

⁹⁷ Emanuela-Chiara Gillard, “Business goes to war ...”, 538.

always be entitled to POW status and prosecution protections provided they remain unarmed.⁹⁸

Accountability

Regardless of their LOAC status and entitlement to protections, PSCs are fully accountable for their actions under IHL. PSCs may be prosecuted for grave breaches of the Geneva Conventions for actions they committed or ordered committed in the course of their employment.⁹⁹ These proceedings can be initiated by “the state where the alleged wrongdoing occurred, the state of nationality of the victims, the state of nationality of the alleged perpetrator and that of the [PSC] employing him/ her.”¹⁰⁰ The last body that may initiate proceedings is the International Criminal Court which may try any national who commits a LOAC offense.

Although the legal framework clearly exists to hold individuals accountable for their actions, it is rarely done. Gillard believes that this is due to a number of factors not the least of which includes political and practical considerations.¹⁰¹ In many cases PSCs have been given immunity under agreements, operate in nations with no functioning legal

⁹⁸ Ministry of Defence, *Contractors on Deployed Operations ...*, 2-7. Although U.K. Joint doctrine prohibits the use of armed contractors to support or augment military operations they are still being used. ArmorGroup employs armed protection officers to provide security for embassy staff and workers from the U.K. Department for International Development. For further information see Saeed Shah, “ArmorGroup boosted by Afghanistan tension,” *The Independent*, 20 September 2006, 1; <http://www.independent.co.uk/news/business/news/armorgroup-boosted-by-afghanistan-tension-416742.html>; Internet; accessed 6 April 2008.

⁹⁹ Emanuela-Chiara Gillard, “Business goes to war ...”, 540-541.

¹⁰⁰ *Ibid.*, 541.

¹⁰¹ *Ibid.*, 543.

system, extradition is complicated, and finally the necessary evidence and witnesses to secure a conviction and not readily available.¹⁰² Therefore, due to many of these complications, only the major transgressions are routinely pursued and these are generally pursued under human rights law rather than IHL.

The key tenant that falls out of this IHL analysis is that PSCs can fundamentally be defined as non-combatants under the LOAC. As a non-combatant they may be authorized to accompany the armed force and retain this status so long as they are not armed nor participate directly in hostilities. As Gillard states: “[w]hile many of the support functions . . . undoubtedly do fall within [this category] there are also many others, especially those closer to the heart of military operations, which probably do not.”¹⁰³ Those military operations which do jeopardize PSC non-combatant status are likely those which are closer to the “pointy end” of Singer’s “tip-of-the-spear” analogy. PSCs that are contracted to engage in these activities could be subject to prosecution and therefore legal exemptions for these contractors are routinely negotiated with the host nation governments.¹⁰⁴ The requirement for and detail of why mission specific agreements are important is articulated in U.S. and U.K. PSC doctrine.¹⁰⁵ Although

¹⁰² *Ibid.*, 543.

¹⁰³ *Ibid.*, 539.

¹⁰⁴ Strict adherence to IHL and respect for host nation law and sovereignty regulates conduct to ensure that it conforms to internationally accepted standards and preserves legitimacy for Western involvement. There is no expectation that insurgent adversaries will observe the LOAC or protect contractors in accordance with IHL provisions.

¹⁰⁵ Although Canada does not have formal governance and doctrine on the use of PSCs, many of the issues are captured within draft governance (2006) or the PSC contract itself. The important take-away is the mission specific interpretation of status which necessitates a proactive approach and evaluation each time PSC use is considered.

Gillard has argued that IHL applies in all scenarios, PSCs may be employed in situations outside of those normally covered by the LOAC.¹⁰⁶ In these situations human rights law is considered to apply.

3.1.2 Contractors and Human Rights Law

Outside of the LOAC legal status argument, serious questions surround the applicability of human rights laws to PSCs and the criminal accountability of the industry and its employees.¹⁰⁷ Recent examples of inappropriate behaviour include the Blackwater killing of innocent civilians in September 2007, and the 2005, ‘trophy’ video which showed employees of Aegis Defence Services indiscriminately firing at passing civilian automobiles.¹⁰⁸ When such actions occur it is not entirely clear who has the authority to prosecute the offenders nor is there appropriate mechanisms to sanction companies if the offense was the result of inappropriate company policy or practice.¹⁰⁹ While it could be argued that these actions are war crimes under IHL, there is a general reluctance to lay charges using LOAC provisions because of the West’s unwillingness to

¹⁰⁶ Office of the Judge Advocate General, “Hague Convention (IV) Respecting the Laws and Customs of War on Land – 1907, Pre-Amble,” in *Collection of Documents on the Law of Armed Conflict*, 2001 ed., ed. by Directorate of Law Training (Ottawa: DND, 2001), 14. The link between treaty law and customary international law was established as part of the pre-ambles to the 1907 Hague Convention Respecting the Laws and Customs of War on Land and is commonly known as the Martens Clause.

¹⁰⁷ McCormick ... *Understanding the Privatization of National Security* ..., 30.

¹⁰⁸ P.W. Singer, “The dark truth about Blackwater,” ..., 1. In September 2007, a convoy of Blackwater employees guarding U.S. State Department representatives entered a crowded square in Baghdad Iraq, and opened fire killing 20 Iraqi civilians. What precipitated this incident is a subject of debate but the actions generated outrage within the Iraqi population and government. The ‘trophy’ video surfaced in 2005 and shows security guards in Baghdad randomly shooting at Iraqi civilian vehicles. The video’s soundtrack includes Elvis Presley’s “Train I Ride.” For more detail see Sean Rayment, “Trophy video exposes private security contractors shooting up Iraqi drivers,” *The Telegraph*, 27 November 2005, 1; available from www.telegraph.co.uk; Internet; accessed 6 April 2008.

¹⁰⁹ The responsibility of superiors for grave breaches of IHL is expressly recognized in Article 86(2) of Additional Protocol I.

recognize insurgents as combatants and the sensitivity surrounding whether civilians are actually participating in the conflict.¹¹⁰ As such, a conundrum exists over how to hold the industry accountable for its actions and which laws should apply. According to one delegate at a recent industry conference the dilemma is best described as follows:

Let's say a private contractor is guarding an Iraqi government official and, in defending that official, shoots an Iraqi family by mistake, it doesn't happen on a U.S. base, but on a road in Iraq. The likelihood is that the person who was shooting is a third-country national or a local national, and therefore it's not clear to me there's arrest authority to get them [to trial], even if you wanted to charge them.¹¹¹

Most countries recognize the ambiguity of these issues and have attempted to provide clarification within PSC contracts and national doctrine. Doctrine is intended to provide both a baseline understanding of the issues but also delineates baseline expectations of the industry.¹¹² This clarification is important for two reasons. First, it defines clear "rules" industry personnel are expected to follow, and second it defines a level of accountability for the industry.

However, not all countries believe these steps are necessary. To date, only the U.S. and U.K. have published PSC doctrine. Both use this medium to define the industry, provide guidance on how it should be employed, and outline their interpretation of what legal mechanisms apply. An example is the U.S. series of PSC field manuals and army requirement publications that define the industry and provide guidance on how it is

¹¹⁰ McCormick ... *Understanding the Privatization of National Security* ..., 30. See also Martens Clause in Hague Convention (IV) Respecting the Laws and Customs of War on Land – 1907.

¹¹¹ *Ibid.*, 30.

¹¹² Fred Schreier and Marina Caparini, *Privatising Security* ..., 66.

legally defined when in support of deployed operations.¹¹³ According to U.S. doctrine, any U.S. citizen deployed to support U.S. operations is subject to the Uniform Code of Military Justice (UCMJ) and shall be tried for any crimes under U.S. military law.¹¹⁴ If employed in a theatre of operations where no conflict has been formally declared they are subject to the law of the nation in which they are employed unless specifically exempted by U.S./ host nation agreement. Should that nation not have a functioning legal system or trial by a third party not be in the interest of the U.S. the *Military and Extraterritorial Jurisdiction Act of 1999* may be invoked.¹¹⁵ This mechanism allows the U.S. to try any alleged transgression provided the punishment is imprisonment of more than 1 year.¹¹⁶ Third country nationals and U.S. citizens who commit crimes with punishments of less than a year are subject to HNL, except where specifically exempted under bilateral agreements.¹¹⁷

¹¹³ Examples include AR 715-9 (Army Contractors on the Battlefield/ Contractors Accompanying the Force), FM 100-21 (Contractors on the Battlefield), FM 100-10-2 (Contracting Support on the Battlefield), and DA Pam 716-16 (Civilian Deployment Guide).

¹¹⁴ Gordon L Campbell, "Contractors on the Battlefield . . . , 5. Until Congress passed the fiscal year 2007 defense authorization act contractors were exempt from UCMJ provisions because Iraq and Afghanistan were not declared conflicts. MEJA was considered to apply but was applicable to Department of Defence (DoD) contractors only. Contractors employed by other government agencies (e.g., Department of State) were exempt from MEJA and, until recently, were largely not legally accountable for their actions. For a more detailed explanation see Marc Lindemann, "Civilian Contractors under Military Law," . . . , 83-94.

¹¹⁵ For MEJA to apply the contractor must be employed by DoD and the crime had to have been committed in the theatre of operations. In practice, MEJA was largely unsuccessful in regulating PSC conduct and resulted in changes to the UCMJ in 2007. As a result of these changes the UCMJ now applies to all U.S. contractors (including those hired by agencies other than defence) in the Iraq and Afghanistan theatres. For complete details see Marc Lindemann, "Civilian Contractors under Military Law," . . . , 86-89.

¹¹⁶ *Ibid.*, 6.

¹¹⁷ McCormick . . . *Understanding the Privatization of National Security* . . . , 31. An example of a bilateral agreement is CPA Memorandum No. 17 between the U.S. and Iraq. This Memorandum of Understanding specifically exempts all registered PSCs from Iraqi prosecution.

The U.K. approach is defined in Joint Doctrine JDP 4/01. Unlike the U.S., the U.K. subjects not only U.K. nationals but also all third country nationals to U.K. military law when employed to support U.K. forces.¹¹⁸ At the discretion of the U.K. force commander, military law may be waived to allow the PSC to deal with the transgression administratively or in certain cases the offender can be turned over to the host nation for prosecution if warranted. Locally engaged personnel are exempt from these regulations and are subject to HNL only. Like the U.S., the U.K. routinely enters into agreements with local government to formalize the legal status of its PSCs.

Canada has yet to formally define and publish doctrine and policy in this area. CANCAP governance was produced in April 2006 but this governance/ doctrine document has never been formally issued or broadened to incorporate other Canadian employed PSCs.¹¹⁹ According to this document, similar to the U.S., Canadians employed by PSCs to support Canadian operations are subject to the Code of Service Discipline. By virtue of section 132 Canadian employees remain subject to the Criminal Code of Canada.¹²⁰ Disciplinary responsibility is vested in the Canadian theatre commander and he has the authority to demand removal of any employee from a theatre, demand

¹¹⁸ Ministry of Defence, *Contractors on Deployed Operations ...*, 3-5.

¹¹⁹ Major M. Kebic (CANCAP Ops O), Conversation with author, 20 December 2007. Major Kebic is the current manager and military administrator of the CANCAP project. He believes that current policies and procedures are sufficient to control and regulate CANCAP use.

¹²⁰ Department of National Defence. *Canadian Forces Contractor Augmentation Program ...*, 8.

employment termination, or lay charges for transgressions (Canadians only).¹²¹ Canada, like the U.S. and U.K., has a legal Memorandum of Understanding (MOU) with Afghanistan which protects Canadian employees from arrest and prosecution unless specifically authorized by the Canadian theatre commander.¹²² Draft governance provides no guidance on the legal status of non-Canadian employees and thus it is assumed that they are subject to HNL only.

3.2 Mitigating the Loopholes

While nation's doctrine helps to create a legal framework for use outside of the LOAC, it can also generate legal loopholes that could allow certain transgressions to go unpunished. Therefore, prior to the decision to employ PSCs for a given task legal issues must be considered, resolved, or mitigated to ensure that PSCs are fully aware of their legal standing and accountable for their actions. Furthermore, it is fundamental that all safeguards are employed to ensure that PSC actions do not affect mission legitimacy, public support, or the operation itself. Acknowledging the convoluted legal environment that exists, one of the most appropriate mitigations that should be considered is training. This will ensure that PSCs understand their legal status and how it can be affected.

Additional Protocol I, Article 83 highlights the state's responsibility to ensure LOAC training is provided to all members of the armed forces and those civilians who

¹²¹ *Ibid.*, 8. As defined by the terms of the CANCAP contract PSC employees are responsive to the military commander not responsible to him/ her. Therefore, they are not subject to "unlimited liability" and cannot be ordered to place themselves at risk for the good of the operation. This has placed a number of limitations on what charges can be brought against them under the Code of Service Discipline.

¹²² The agreement could also take the form of a Status of Forces Agreement (SOFA). Typical SOFA provisions address criminal jurisdiction, customs and tax exemptions, settlement of damages caused by the forces (or their employees) of sending states, immigration, carrying weapons, and driving licenses.

accompany them during periods of peace and war.¹²³ Members of the armed forces routinely receive detailed LOAC training and generally strictly adhere to the guidelines by adopting compliant standard operating procedures (SOPs) and rules of engagement (ROE). Deviations from these guidelines are dealt with using established disciplinary mechanisms which are embedded in the Command & Control structure of military forces. This formal and structured approach is generally not followed for PSCs. Normally PSCs are only provided a cursory LOAC overview and they may or may not operate to PSC defined SOPs and ROE. As an example, under CANCAP, SNC-Lavelin/PAE is contractually required to provide LOAC familiarization for personnel prior to deployment but the expected standard of knowledge is not defined.¹²⁴ Routinely this familiarization is limited to a superficial checklist that provides no real in depth understanding, does not address PSC specific legal issues, and provides no detail of why Canadian military ROE may be limited or restrictive.¹²⁵ Thus, PSCs may be ill prepared and their actions could inadvertently breach international treaties, jeopardize national restraint, or cause national embarrassment on the international stage.

Should transgressions occur it is essential that those who committed the crimes are held accountable and satisfactorily punished for their actions. Failure to do so, or an

¹²³ Office of the Judge Advocate General, “Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts, (Protocol I) – 1977, Part V – Execution of the Conventions and its Protocols, Section I – General Provisions, Article 83,” in *Collection of Documents on the Law of Armed Conflict*, 2001 ed., ed. by Directorate of Law Training (Ottawa: DND, 2001), 157.

¹²⁴ Department of National Defence, *Canadian Forces Contractor Augmentation Program (CANCAP) Statement of Work (Annex A to TO TFA-KAF M001 Amdt 002)* (Ottawa: PWGSC, 2006), 11.

¹²⁵ Broader detail on why PSC specific legal issues should be covered is available from Fred Schreier and Marina Caparini, *Privatising Security ...*, 68.

unexplainable delay, will undoubtedly be scrutinized by the media and potentially affect public support for the mission, jeopardize legitimacy, and reflect poorly on the mission as a whole. Thus, efforts to identify and close legal loopholes, assure accountability, and mitigate associated risk must be progressed as a matter of priority. Should this not occur significant repercussions from a PSC incident can be expected. A relevant example is the Blackwater shooting of civilians in Iraq in September 2007. As a result of these shootings, the Iraqi population was outraged, the government suspended all U.S. PSC licenses, and the U.S. found that it had no legal basis to hold Blackwater accountable.¹²⁶ This left the U.S. scrambling due to its heavy reliance on the industry for support and ultimately required the U.S. Secretary of State to intervene. Only after intense negotiation and assurance that U.S. contractors would be held accountable in the future was the U.S. able to secure the reinstatement of PSC licenses.¹²⁷

This chapter has explored the legal status of PSCs and established that, under the LOAC, they are considered to be non-combatants - civilians authorized to accompany the armed force. As such, they are entitled to protection from prosecution and POW status if captured. PSCs lose this status if armed or if they conduct activities deemed to be direct participation in the conflict and could be prosecuted for war crimes if captured. The U.S., U.K., and Canada have recognized this potential issue and now enter into agreements with host nations to ensure that all PSCs are provided appropriate legal

¹²⁶ P.W. Singer, "The dark truth about Blackwater," ..., 1.

¹²⁷ Following the UCMJ changes in 2007 DoD now has the authority to exercise oversight of all U.S. hired PSCs regardless of who employs them. Although who will enforce UCMJ provisions is yet to be decided DoD clearly will play a leading role. For further detail see Marc Lindemann, "Civilian Contractors under Military Law," ..., 88-93.

protection while in theatre. The U.S. and U.K. have also developed doctrine and governance to specifically define their interpretation of LOAC legal status, define HNL and military law applicability, and broadly outline policy on when, where and how private contractors should be used. Having yet to publish doctrine or governance to cover the use of the industry, Canada has traditionally dealt with these issues in an ad hoc manner or by embedding requirements in the various contracts and statements of work. A more structured and holistic approach, captured in doctrine, is necessary to ensure consistency and thoroughness as the CF's use and reliance on the industry continues to expand. This will ultimately facilitate and support decision making and ensure that legal issues are appropriately considered each time the use of PSCs is contemplated in the future. The next chapter will discuss the ethical issues surrounding the industry and outline some of the ethical problems that are inherent with its use. These challenges will be used to further demonstrate the need for clear governance and policy to regulate Canadian use of the industry in the future.

The Ethical Dimension

The Treaty of Westphalia established the modern nation state and the concept of absolute sovereignty. Inherent in these concepts is the state's responsibility to provide security and control the use of the force. Instead of relying solely on national force capabilities, Western democracies now rely on private firms for mission critical support or look to them to provide security and control violence on their behalf. This has elicited an extensive range of responses and provoked moral revulsion at the prospect of entrusting public security to private contractors.¹²⁸ In their defence, PSCs and their numerous supporters are quick to establish the numerous advantages of the industry and the capabilities they can provide. They argue that the very existence of the industry rests on its ability to “solve peoples’ and states’ problems” and therefore it is to their benefit to act in the interest of their employer or the state.¹²⁹ At the other end of the spectrum are those who argue that it is unethical and immoral to hire PSCs as they are motivated solely by profit, not national interest, and their use promotes continued violence.¹³⁰ Moreover, Singer suggests that: “[PSCs] directly benefit from the existence of war and suffering; it is a precursor to their hire”.¹³¹ Therefore, a moral dichotomy has been created by the industry. On one hand they exist to provide or facilitate security but on the other they need war and instability to prosper.

¹²⁸ Robert Mandel, *Armies without States: the privatization of security* (Boulder, Colo.: L. Rienner, 2002), 130.

¹²⁹ P.W. Singer, *Corporate Warriors*, 216.

¹³⁰ Michelle Small, “Privatisation of Security ...”, 7.

¹³¹ P.W. Singer, *Corporate Warriors*, 216. PSCs do not necessarily require continued hostilities to prosper. Once established in theatre, firms may seek other market opportunities to expand their business.

As outlined in the first chapter, PSCs are rarely the first choice of states to facilitate security. Instead, they are hired out of necessity, to provide flexibility, or to maximize combat effectiveness. However, due to limited national capacity, most Western states have little option but to rely on industry to support or augment national forces for extended deployed operations. This construct can present a number of challenges and could have a long term impact on the military as an institution. This chapter will discuss the ethical issues surrounding the industry and outline some of the ethical problems that are inherent with its use. To facilitate this discussion an overview of the ethical standards which govern the industry will be provided. Then, issues of accountability, transparency, and legitimacy will be discussed. Last the potential effects on the civil – military balance will be presented.

3.3 Ethical standards

At the heart of the argument is whether it is ethically appropriate to use private corporations to support and protect national interests. Many fully support the use of PSCs and argue that the de facto legitimacy garnered by the industry over the last fifteen years clearly demonstrates ethical behaviour and that their use is appropriate.¹³² Others, however, are quick to cite examples of indiscriminate killings, use of illegal weapons,

¹³² Michelle Small, "Privatisation of Security ...", 25.

and abdication of contracts to counter this argument.¹³³ Fundamentally, ethics are the guiding principles by which people make decisions and conduct their lives. Because PSCs, like any other business, are social constructs which act and make decisions that ultimately affect society there is an ethical component in each decision they make or action they pursue.

Most businesses demonstrate ethical conduct by conforming to regulation, establishing acceptable practice and procedures, and forming independent bodies to oversee conduct. For reasons of definition and lack of formal recognition, PSCs have yet to establish these universally accepted mechanisms to demonstrate and regulate ethical compliance. Instead, they rely on self-regulation or voluntary conformance to a Code of Conduct established by the International Peace Operations Association (IPOA). IPOA is a loosely defined trade organization whose mission is:

to promote high operational and ethical standards of firms active in the Peace and Stability Industry; to engage in a constructive dialogue with policy-makers about the growing and positive contribution of these firms to the enhancement of international peace, development, and human security; and to inform the concerned public about the activities and role of the industry.¹³⁴

Founded by individuals, rather than industry itself, IPOA has developed a Code of Conduct for individuals and corporations involved in the pursuit of peace. According to

¹³³ *Ibid.*, 25. The Aegis ‘trophy’ video is a good example of indiscriminate killing by an armed contractor (see Sean Rayment, “Trophy video exposes private security ...”, 1.). For an example of a supply contractor who abdicated their responsibilities on the battlefield see David Isenberg, *A Fistful of Contractors* ..., 17.

¹³⁴ International Peace and Operations Association. “IPOA Mission Statement.” http://ipoaonline.org/php/index.php?option=com_content&task=view&id=14&Itemid=31; Internet; accessed 6 February 2008.

Ortiz: “IPOA’s Code of Conduct has an ethical dimension [and] encourages service delivery consistent with international laws governing conflict and values purporting the respect of human rights.”¹³⁵ While IPOA’s Code of Conduct is applicable to the PSC industry, it was not developed solely for that industry and there is no independent oversight or disciplinary framework associated with the Code. ArmorGroup, a major U.K. based player in the industry and IPOA member, argues that IPOA’s Code of Conduct is not sufficient. According to its position paper, differing U.S. and U.K. perceptions, lack of regulation, and the need to inform the public demand a clearly defined code of practice to which PSCs are accountable.¹³⁶ Ortiz agrees and suggests that: “[c]odes respond to public concerns and expectations for service delivery in a particular sector.”¹³⁷ While unquestionably a good collection of guidelines and goals, without oversight and sanctions, IPOA’s Code of Conduct can simply be viewed as another form of self-regulation. Therefore, PSCs do not currently operate, nor are they held accountable, to a clearly defined set of ethical standards.

3.4 Accountability, Transparency, and Legitimacy

Unlike PSCs, national forces are subject to numerous standards and independent oversight of their activities. These include military and domestic law, parliamentary scrutiny and public opinion, and IHL.¹³⁸ Within each of these controls is an ethical

¹³⁵ C. Ortiz, “Assessing the Accountability of Private Security Provision,” *Journal of International Peace Operations* 2, no. 4 (January – February 2007): 9.

¹³⁶ ArmorGroup, “Regulation – An ArmorGroup Perspective,” 3; [http://www.armorgroup.com/files/financialreport/3205/Regulation an AG Perspective.pdf](http://www.armorgroup.com/files/financialreport/3205/Regulation%20an%20AG%20Perspective.pdf); Internet; accessed 8 February 2008.

¹³⁷ C. Ortiz, “Assessing the Accountability of Private Security . . . ,” 9.

¹³⁸ P.W. Singer, *Corporate Warriors*, 220.

dimension which regulates conduct to reflect that which is acceptable to the state as a whole. While aspects of law, as discussed in the last chapter, do apply PSCs are largely protected from public opinion and government scrutiny by way of corporate confidentiality and secrecy. PSCs operate at the behest of their Parent Corporation, shareholders, or owner whose interests do not necessarily correspond with that of the public good. Furthermore, while all national forces are drawn from the state, PSCs draw on personnel from all over the world. The guiding principles by which decisions are made are not necessarily the same across different cultures. Accordingly, a divergence in morally acceptable conduct could occur.

To suggest that all PSCs act unethically would be dishonest and wrong. However, they are private actors which operate in a very public domain and are not governed by the rules and regulations which govern national forces. However, public opinion and parliamentary scrutiny demand that the states' armed forces act in a fully transparent and accountable way. Furthermore, the state expects that the actions of the armed forces will not embarrass the government. Now that PSCs are employed to support or augment national forces "the responsibility for a public end – security – is diffused across a number of actors, public and private."¹³⁹ This diffusion can cloud the lines of responsibility and can make accountability, transparency, and legitimacy difficult to achieve.

¹³⁹ *Ibid.*, 220.

3.4.1 Accountability

Schreier and Caparini believe that: “[t]he lack of accountability is one of the major problems associated with the private military and security industry.”¹⁴⁰ The state and its citizens demand accountability from all public organizations and especially the nation’s armed forces. When deployed, the state’s armed forces form the face of the nation, represent national beliefs, and are expected to act in the nation’s interest. Thus, they are held to high standards and are fully accountable for their actions. Now that PSCs are being employed to support and augment national forces it is essential that mechanisms are established to define expected behaviour and ensure PSCs are accountable for their conduct.

In a broad sense, accountability is understood to mean “being answerable” for one’s actions. To be viewed as an institution that is answerable, PSCs must be both legally accountable and subject to public oversight and scrutiny. Although some loopholes do exist, PSCs can be legally held accountable for their actions as previously discussed. In the public domain however, PSCs are not subject to the same level of scrutiny. Shrouded in corporate confidentiality and secrecy the industry is rarely directly answerable to public authorities.¹⁴¹ Provided they meet the terms of their contract, PSCs conduct activities at their discretion, and generally favor the interests of the company over those of the nation when forced to choose. According to a study conducted by War on Want (an independent organization which confronts those companies which profit

¹⁴⁰ Fred Schreier and Marina Caparini, *Privatising Security* ..., 66.

¹⁴¹ Michael Cottier, “Elements for contracting and regulating private security and military companies,” *International Review of the Red Cross* 88, no. 863 (September 2006): 638.

from war): “there are no real checks on [PSC] activity. Contracts often allow a wide range of unspecified duties to be carried out, with few standards, safeguards or monitoring mechanisms”¹⁴² This study found that: “of 60 contracts in Iraq, not a single one contained provisions requiring contractors to abide by human rights or corruption norms.”¹⁴³ Based on available information it is believed that, like the U.S., Canada does not stipulate any of these provisions in Canadian contracts.¹⁴⁴

3.4.2 Transparency

A parallel issue which supports accountability is transparency. In a state’s armed forces clear responsibilities are established by the codes of military discipline and the Command and Control of the organization.¹⁴⁵ PSCs have no such framework. The prevalence of industry confidentiality inherently precludes transparency. To further complicate the situation, PSCs routinely sub-contract elements of their work to other players. An example is the previously cited sub-contract to the Canadian Commissionaires to provide security services at KAF by SNC-Lavelin/PAE. Without fully transparent reporting structures and little control over what sub-contracts are let, the state has little hope of maintaining effective oversight of PSCs.

With transparency difficult to achieve, ensuring that PSCs are fully accountable is near impossible. Most PSC users recognize this dilemma but there appears to be a lack

¹⁴² War on Want, “Corporate Mercenaries”, 13.

¹⁴³ *Ibid.*, 13.

¹⁴⁴ No human rights or corruption norms are cited within the CANCAP contract.

¹⁴⁵ Fred Schreier and Marina Caparini, *Privatising Security*, 67.

of political will to address the issues. Western democracies are now so heavily reliant on third party services to support their pursuit of national objectives and interests that they are reluctant to jeopardize this pursuit by regulating the industry.¹⁴⁶ Without regulation, however, states are subject to risk and international and domestic scrutiny for inappropriate PSC actions. Isenberg suggests that regulation is essential and that it is the most expedient way to enhance transparency.¹⁴⁷ He suggests that regulation should include a new international convention on the use of armed and unarmed contractors and that harmonization of national laws are necessary to create a universal approach to the industry.¹⁴⁸ Western democracies have attempted to address many of the issues in national doctrine and contracting provisions but current attempts fall short as they do not promote or mandate complete transparency over the long term.

3.4.3 Legitimacy

According to Singer accountability and transparency are only two of the issues that pose serious ethical dilemmas for states. The third issue is that of legitimacy. To be considered legitimate an industry must be legally registered and conform to an acknowledged set of standards. As previously demonstrated an acknowledged set of standards does not exist for the industry and thus the industry claims legitimacy solely based on having previously worked for legitimate governments. Singer highlights that: “[t]he problems with this circular statement, though, are manifold” as without internationally accepted guidelines and standards PSCs have no basis on which to claim

¹⁴⁶ David Isenberg, *A Fistful of Contractors* ..., 12.

¹⁴⁷ *Ibid.*, 12.

¹⁴⁸ *Ibid.*, 12.

or demonstrate legitimacy.¹⁴⁹ Although continued use and exponential expansion of the industry provides a degree of de facto legitimacy, Singer believes that complete recognition and widespread acceptance will be difficult, if not impossible, to obtain. This presents a number of challenges for those who rely on their services not the least of which is the requirement to regulate and control their conduct by standards defined in national governance and policy.

3.5 The Civil – Military relationship

While accountability, transparency, and legitimacy are important the industry also affects the civil-military balance in both the domestic and deployed environment. Of all the arguments to demonstrate the immediate requirement for formal Canadian PSC doctrine none is as compelling as the potential effect of the industry on the delicate civil-military balance. As stated by Schreier and Caparini “it is the duty of government to maintain disciplined armed forces.”¹⁵⁰ These forces should be made up of military professionals who purport integrity, valour, and service as cornerstones of their institution. Yet, PSCs are now hired to operate alongside and directly support these individuals but are not subject to the same rules and regulations that govern military conduct. Instead of serving for the social benefit of society, PSCs provide services for

¹⁴⁹ P.W. Singer, *Corporate Warriors*, 224.

¹⁵⁰ Fred Schreier and Marina Caparini, *Privatising Security ...*, 66.

monetary gain and financial reward.¹⁵¹ Not only are the motivations of service fundamentally in tension, but differences in compensation, lack of formal authority, and the aggressive recruiting of ex-serviceman all seek to undermine the delicate balance.¹⁵² In essence these differences could potentially pit members of the armed services directly against those employed by PSCs.

From a national perspective, the continued use of PSCs further erodes the state's monopoly on the use of force and undermines the armed forces as an institution. As Avant argued in *The Market for Force* the government's increasing reliance on PSCs, in lieu of national forces, will continue to "undermine the loyalty, initiative, and fighting power of soldiers."¹⁵³ These statements are fully supported by Schreier and Caparini as they believe that: "values of the professional soldier within society and the spirit of selfless service embodied in their duty on behalf of the country have begun to erode."¹⁵⁴ Once perceived as the sole protector of national sovereignty, the privatization of military

¹⁵¹ Charles C. Moskos, "Institutional and Occupational Trends in Armed Forces," in *The Military: More than just a job?* ed. Charles C. Moskos and Frank R. Wood, 15-26 (Washington: Pergamon-Brassey's International Defense Publishers, 1988), 19-26. Moskos highlights that while state service remains a cornerstone belief of the military profession some occupational tendencies, typical of private industry, have been adopted by Western militaries. An example is the Gates commission report which argued that U.S. recruitment and retention should be based on monetary inducements guided by labour force realities. Outsourcing to PSCs did not initiate nor has it influenced this trend. Instead, militaries have long struggled to find an appropriate balance between institutional and occupational models that meet the needs of both the military profession and its personnel while preserving the core institutional principle of selfless service.

¹⁵² For a more detailed discussion see (Deborah Avant, "Privatizing Military Training: A Challenge to U.S. Army Professionalism?" in *The Future of the Army Profession*, ed. Don M. Snider and Gayle L. Watkins, 179-196 (New York: McGraw-Hill Primis Custom Publishing, 2002), 192-193. Avant suggests that military personnel are frustrated by doing the same jobs as contractors for less pay and with fewer benefits. Furthermore, as government policy has traditionally been that only non-core activities are outsourced, military personnel tasked with the same or similar duties generally feel undervalued.

¹⁵³ Deborah Avant, *The Market for Force* ..., 261.

¹⁵⁴ Fred Schreier and Marina Caparini, *Privatising Security* ..., 62.

services has demonstrated that the armed forces can be replaced. This has resulted in a loss “of prestige, political leverage, autonomy, [and] access to resources” all of which are fundamental to the maintenance of the military institution.¹⁵⁵

In the eyes of society, the employment of private citizens not bound by the same “codes, rules, and regulations that once made military service unique . . . is perceived as corrupting [to] the armed forces”¹⁵⁶ In fact, outsourcing society’s security could potentially be seen to be fundamentally breaching the terms of the social contract. According to Singer: “[w]hen government is no longer responsible for aspects of security, the rationale for citizen loyalty is thus weakened.”¹⁵⁷ Yet, despite the clear disadvantages of states relying on PSCs, their use continues to expand. Often these decisions are based solely on short term financial or operational criteria without understanding the long term impact on social, economic, or environmental factors.¹⁵⁸ This short term, reactive, approach should be avoided whenever possible. Instead, a balanced and long term view of PSC use should be adopted to manage and avoid institutional pitfalls whenever possible.

¹⁵⁵ *Ibid.*, 63.

¹⁵⁶ *Ibid.*, 62.

¹⁵⁷

One area currently being investigated for potential outsourcing by Canada that could have long term negative consequences is basic recruit training.¹⁵⁹ Basic recruit training is where the military institution formally indoctrinates recruits. The goal of this training is to fundamentally change behavioral patterns to those required of a soldier. Specifically, “a willingness to obey legitimate orders without question, to engage in life-threatening activity, . . . and to kill efficiently and without hesitation.”¹⁶⁰ While a PSC can no doubt instill the basic concepts of these activities, it is questionable whether a civilian can appropriately convey the reality and finality of the unlimited liability associated with military service. More importantly, what will be the long term impact on the institution if the basic tenants of military service are no longer appropriately provided during initial training?¹⁶¹

While it is easy to focus on the civil-military effects within the contracting state the use of PSCs also has an effect on the local population during a deployed operation. Two observations can be made on the use of PSCs in these situations. First, in missions such as Afghanistan and Iraq the use of PSCs directly support and augment coalition

¹⁵⁹ David Perry, “Contractors in Kandahar . . .”, 22. Despite widespread acknowledgement that training is fundamental to the maintenance of a credible and professional military force it is currently considered to be a non core task. Therefore, training has traditionally been viewed as a task that should be outsourced. For a complete discussion on the potential long term effects of outsourcing training see Deborah Avant, “Privatizing Military Training . . .”, 179-188.

¹⁶⁰ Captain Donald A. Neill, “Ethics and the Military Corporation,” *Canadian Military Journal*, (Spring 2000): 30.

¹⁶¹ Avant critiques recent U.S. decisions to privatize training and suggests that much more research is necessary to understand and determine the impact of outsourcing this training. Specific to ROTC training she suggests that research should focus on the deeper issues associated with communicating standards and instilling professionalism through contractors. For further detail see Deborah Avant, “Privatizing Military Training . . .”, 182-188.

operations intended to re-establish the social contract within these states.¹⁶² The long term impact of such a large PSC presence is not known, however, the extensive use of PSCs could be perceived by the local population as an attempt by the coalition to limit engagement and direct involvement. Second, the presence of a significant number of PSCs has had a largely negative impact on society. PSCs are increasingly relying on the local population for employees. While in one sense this provides employment for the local population it also precludes these individuals from assuming leading roles in the “new national armies and police forces, as local people prefer taking up employment with foreign PSCs.”¹⁶³ According to Holmqvist this has created a two-tier society that could pose certain problems and difficulties after coalition forces and the PSCs depart.

This chapter has outlined a number of ethical dilemmas that must be considered and overcome when employing PSCs. As demonstrated the industry relies on self-regulation as it operates without an internationally recognized set of ethical standards. Without standards, effective oversight is complicated and the dissuasion of unethical behaviour can be problematic. Due to the lack of rules and regulations, and the inherent corporate confidentiality and secrecy within which the industry operates, accountability and transparency are difficult to achieve. Although PSCs have obtained a de facto legitimacy over the last two decades this chapter has demonstrated that this legitimacy is largely based on a circular argument, where legitimacy is obtained not by conforming to a universally accepted set of codes and standards but by working for organizations

¹⁶² Caroline Holmqvist, *Private Security Companies* ..., 33.

¹⁶³ *Ibid.*, 33.

perceived to be legitimate. Until a set of ethical standards are developed and accepted there will be a requirement to regulate and control the industry through national governance and policy. Last, the analysis of the civil-military balance highlighted the delicacy of this relationship and that society's perception of the armed forces may be in decline. Furthermore, it is apparent that PSC use may be detrimental to nation building and that past decisions to outsource have been based on financial or short term operational considerations only. A more holistic, forward looking approach, designed to regulate PSC use and evaluate the ethical effects of their presence will ultimately safeguard the military institution and protect public support for its operations. The next chapter will investigate the impact of PSCs on operations and demonstrate that formal governance is required to address Command and Control issues, manage the additional risk PSCs generate, and acknowledge the impact that PSCs have on the way a military conducts operations.

4. Effect on operations

In the early 19th Century, Carl von Clausewitz produced an essay for his young student, sixteen year-old Prussian Crown Prince Fredrick William (later King Fredrick William IV), which outlined the broad tenants of military leadership.¹⁶⁴ These tenants, later to become known as the Principles of War, are now used by militaries around the world to focus the planning and thinking of their leaders in their pursuit of military and political objectives. Although how these principles are termed vary slightly between states, the fundamental requirements remain the same.¹⁶⁵

Military training, organizations, and doctrine are developed largely to conform to these principles. In doing so, the probability of task success can be maximized through coherent planning and effective execution of Command. The exponential growth of the PSC industry and the West's growing dependence on its services has introduced a new variable into this dynamic. In order to maintain Clausewitz's principles careful thought and consideration of how PSCs are managed, integrated, and incorporated into the mission becomes important. This chapter will discuss how the presence of PSCs can and does affect military planning, preparations, and operations in modern environments. The

¹⁶⁴ Carl von Clausewitz, *Principles of War*. ed. and trans. Hans W. Gatzke (Harrisburg, PA: Telegraph Press, 1942), 3.

¹⁶⁵ Department of National Defence, *CF Operational Planning Process (B-GJ-005-500/FP-000)* (Ottawa: Chief of the Defence Staff, 2002), 1-6, 1-7. Canadian doctrine defines the Principles of War to be: Selection and Maintenance of the Aim, Maintenance of Morale, Offensive Action, Surprise, Security, Concentration of Force, Economy of Effort, Flexibility, Cooperation, and Administration. For a review of the history and epistemology of the Principles of War see John Alger's, *The Quest for Victory: The History of the Principles of War*.

challenges that will be discussed include Command and Control, risk, and governance and doctrine.¹⁶⁶

4.1 Command and Control

Two critical elements of Clausewitz's Principles of War are economy of effort and cooperation. Without clear lines of communication and responsibility the efforts of the multitude of players involved in a modern theatre of conflict can quickly become confused and counter-productive. To promote cooperation and economy of effort General Dwight D. Eisenhower introduced the concept of "Unity of Command" during the Second World War. This concept represented a simple organizing principle that clearly defined lines of responsibility and authority that applied to all services, supporting agencies, and Allies.¹⁶⁷ Eisenhower believed that through earnest cooperation, economy of effort could be achieved and enhanced if patience, tolerance, frankness, and honesty were exercised by all participants.¹⁶⁸

Practiced successfully for over fifty years, the introduction of PSCs, and their legally binding contracts, presents various challenges with regards to how they fit into this concept. As Campbell highlights "[t]he commander has no "Command and Control" authority over contractor personnel. While the contract can require [PSCs] to abide by all

¹⁶⁶ For the purposes of this paper governance and doctrine is deemed to define the entire myriad of documentation necessary to support, control, and regulate use of the PSC industry.

¹⁶⁷ Daniel Christman, "Ike-First in Leadership," *Leadership Excellence* 23, no. 8 (August 2006): 18.

¹⁶⁸ Eisenhower, *Crusade in Europe*, 75.

guidance and obey all instructions . . . they cannot be “commanded”.”¹⁶⁹ Instead, commanders and their staff must manage PSCs in accordance with the contract terms and conditions. Contracts may require employees to be responsive to Command and subject them to military law but PSCs cannot be treated or managed as military personnel. This presents a number of challenges for Command. Challenges that will be discussed include the additional burden due to the civilian presence, PSC integration, and force structure pressures that result from continuous use.

4.1.1 Burden on Command

One of the factors that is often overlooked when employing PSCs is the additional burden that they place on Command. The presence of PSCs severely complicates the battlefield and introduces a new dynamic that must be understood and considered in every decision process.¹⁷⁰ Some significant considerations include PSC force protection, management of PSC personnel, and the maintenance of tactical flexibility. Spearin argued that: “the military now face the additional burden of protecting these private personnel either because of their importance to the operation or because of the international legal implications posed were they to be armed.”¹⁷¹ Therefore, in most situations force protection becomes critical and “sufficient combat capability to protect [the PSCs]” must be withheld to ensure their support and services are maintained.¹⁷² If a safe or suitably secure environment cannot be maintained PSCs may be unable or

¹⁶⁹ Gordon L Campbell, “Contractors on the Battlefield . . .”, 5.

¹⁷⁰ *Ibid.*, 4-5.

¹⁷¹ Christopher Spearin, “Not a ‘real state’ . . .”, 1105.

¹⁷² Gordon L Campbell, “Contractors on the Battlefield . . .”, 5.

unwilling to continue. As previously described this scenario was aptly demonstrated in 2003, when a U.S. contractor refused to deliver fresh food and water to troops stationed throughout Iraq. This loss of support significantly limited operations and had a devastating effect on morale.¹⁷³

A second consideration is how to effectively manage PSCs and maintain employee discipline. Many contracts currently stipulate that PSCs are responsible to the area commander and must follow published rules and regulations. However, contractors are different from military forces as they can never be truly commanded into harm's way.¹⁷⁴ "For [PSCs], quitting the job is not desertion, punishable by prosecution and even death, but merely the breaking of a contract with limited enforceability."¹⁷⁵ Therefore, commanders are at the mercy of business decisions as very little prevents a contractor from abdicating their responsibilities and departing if the risk is too great or the monetary reward not sufficient. To provide some mitigation for this risk commanders must ensure that sufficient numbers of troops are available to surge into theatre to fill the

¹⁷³ Fred Schreier and Marina Caparini, *Privatising Security* ..., 89.

¹⁷⁴ Gordon L Campbell, "Contractors on the Battlefield ...", 5.

¹⁷⁵ Fred Schreier and Marina Caparini, *Privatising Security* ..., 55.

void when and if required.¹⁷⁶ Few other options are available if “non-availability of Combat Service Support personnel” prevents this ability to surge.¹⁷⁷

The last consideration is how tactical flexibility, one of the Principles of War, is maintained when mission critical functions are outsourced. When a military force is completely self sufficient the tactical commander has maximum flexibility as he can allocate resources and personnel as and when needed.¹⁷⁸ The introduction of PSCs limits this dynamic as PSCs are obliged to deliver only what is defined by their contract. Good relationships and quickly adaptable contracts can restore some of this flexibility but as PSCs are fundamentally businesses, designed to turn a profit; these mechanisms have limits and will never be as responsive or as flexible as an in house solution. Thus, while the use of PSCs provides flexibility to re-allocate forces at the operational level it inherently limits the tactical flexibility of the commander.¹⁷⁹

¹⁷⁶ Jennifer F. Herron, and Gregory Santiago, *Analysis of Security Contractors in Deployed Environments* (Monterey, California: Naval Post Graduate School, 2006), 19. As an example in August 1976, the U.S. increased the South Korean defence readiness condition and immediately received numerous requests for civilian contractor evacuation. These civilians were working in depot maintenance and supply and had to be replaced by military workers. For further detail see Major Lisa L. Turner and Major Lynn G. Norton, “Civilians at the Tip of the Spear,” *Air Force Law Review*, no. 51 (2001): 40.

¹⁷⁷ David Perry, “Contractors in Kandahar ...”, 17. Due to manpower limitations Canada is limited in its ability to surge CSS personnel into theatre if required. For further information see: Department of National Defence, *Lessons Learned – Contractor support on ISAF Rotation 0 (Operation ATHENA)* (Ottawa: DND Canada, 2003), 6. <http://kg-kgtn-6f.kingston.mil.ca/llkw/index.htm>; DIN; accessed 20 December 2007.

¹⁷⁸ Conference of Defence Associations. *A nation at risk* ..., 33.

¹⁷⁹ Fred Schreier and Marina Caparini, *Privatising Security* ..., 47.

4.1.2 Integration and Intelligence Sharing

To further complicate the environment, PSCs are not always integrated into military command structures nor given access to available intelligence information. This could lead to problems as PSCs and military forces that are not properly coordinated could easily strive to conflicting objectives or act in a counter productive way.¹⁸⁰ Should this occur, one of the key Principles of War, economy of effort, is violated and the legitimacy of the operation could be jeopardized.¹⁸¹ As Colonel Killebrew describes in Singer's article *Outsourcing the War* "[y]ou want very, very tight control. The issue is not so much their safety . . . [it is] what [their actions] do to American legitimacy in the country."¹⁸²

Probably the most notable example of a failure of integration and intelligence sharing was the killing of four Blackwater employees in Fallujah, Iraq in March 2004. With no coordination with local forces or up to date intelligence, four Blackwater employees drove through the town and were ambushed and killed by insurgents. The town was known by U.S. forces to be extremely dangerous and filled with Iraqi rebels. The bodies of the four Americans were mutilated and paraded through the streets of Fallujah, all of which was captured by the press. After viewing the graphic images, the

¹⁸⁰ P.W. Singer, "Outsourcing the War." . . ., 1-4. Proper control and coordination of armed PSCs is widely accepted as necessary and essential. However, effective management of unarmed contractors is equally important as they represent a significant force protection burden to Command.

¹⁸¹ U.S. doctrine emphasizes the importance of coordination and unity of Command when dealing with contractors. JP 4-0 emphasizes the risks and dangers of relying solely on contractors and locally engaged employees to provide augmentation during operations. For a complete discussion see United States. Department of Defence, JP 4-0 *Doctrine for Logistic Support of Joint Operation* (Washington, DC: U.S. Government Printing Office, April 6, 2000), Chapter 2.

¹⁸² P.W. Singer, "Outsourcing the War." . . ., 1.

U.S. population was outraged and demanded that their government act. The mounting political pressure resulted in the U.S. government ordering local U.S. forces to seize the city against all military recommendations and published counter insurgency doctrine.¹⁸³

Although lack of coordination and cooperation is widely recognized as a problem, no consensus has been reached on how to rectify this situation. For the military, two basic issues complicate PSCs full integration into the military command structure. First, PSCs tend to employ a large number of local citizens making the release of classified information and intelligence difficult.¹⁸⁴ Sanitizing information and selecting that which can be released takes time and resources. The second issue is that PSCs are now routinely employed by a wide range of public and private actors. In many cases the objectives and missions of these actors are not synonymous with that of the government complicating and confusing any attempts at coordination. Ideally, coordination should occur at the operational level (e.g., Defence, Diplomacy, and Development). However, it appears that operational coordination rarely occurs and that most, if any, is done at the tactical level through informal relationships.¹⁸⁵ This informal solution is far from ideal, prone to failure, and could easily lead to another Blackwater type incident in the future.

¹⁸³ P.W. Singer, "The dark truth about Blackwater," ..., 1.

¹⁸⁴ David Isenberg, *A Fistful of Contractors* ..., 21-22.

¹⁸⁵ Integration and coordination is facilitated when legal mechanisms require independent oversight of PSC actions and ultimately regulate their conduct. An emerging example may be the 2007 UCMJ changes adopted by the U.S. Congress which has resulted in DoD oversight of all U.S. employed PSCs. For further detail see Marc Lindemann, "Civilian Contractors under Military Law," ..., 88-93.

4.1.3 Force Structure

The previous two sections have highlighted the additional burden placed on Command and the integration challenges that result from PSC use. A further impact is the inherent pressure to reduce or eliminate the in house military capability once services have successfully been outsourced.¹⁸⁶ This pressure originates from the desire to minimize duplication or reallocate forces to other roles. While fully understandable for roles which are not critical, for those deemed mission critical duplication is essential as the use of PSCs is not appropriate in all situations. Thus, some capability must be retained by the armed forces to ensure a fully deployable combat capable force is readily available and sustainable.¹⁸⁷ Furthermore, even when PSCs are engaged to fill mission critical roles, military forces must always be available to surge into theatre to replace PSCs if required, to provide in theatre force protection, and to train forces and maintain the equipment to support that reserve.¹⁸⁸ Therefore, duplication is an inherent cost of doing business when using PSCs. While an element of risk can be assumed by reducing this duplication, in the right circumstances, this could ultimately lead to mission failure.

4.2 Risk

Some element of risk is inherent in all military operations. The CF risk management manual defines three broad risk categories to be managed and mitigated.

¹⁸⁶ Conference of Defence Associations. *A nation at risk* ..., 31.

¹⁸⁷ Government of Canada, *1994 Defence White Paper*..., Chapter 7.

¹⁸⁸ Fred Schreier and Marina Caparini, *Privatising Security* ..., 48.

These categories include operational risk, tactical risk, and accident risk.¹⁸⁹ Aspects of each may be mitigated through training, technology, and procedures but even absolute adherence to the Principles of War will never mitigate all of the risk or guarantee mission success. Although risk can never be entirely eliminated the impact, should something go wrong, can be minimized through considered planning and operating procedures. The presence of PSCs presents additional challenges and complicates this risk mitigation process. This section will discuss how the use of PSCs can impact and influence risk and a commander's ability to manage it.

Oliver Letwin believes that risk tolerance in Western society has steadily decreased over the past several decades. According to him “[t]hings that would not trouble sub-Saharan Africans for an instant, frighten us.”¹⁹⁰ As a result of this growing tendency, Western society now tends to be somewhat risk averse. Those in government and the nation's armed forces are a sub-set of society and thus it is not surprising that some risk aversion is also present within these groups. Governments are elected and remain in power so long as they retain public support. Therefore, they are wary of how their decisions and actions are perceived as opposition parties stand ready to exploit any visible weakness or bring additional focus to isolated scandals in order to discredit the governing party and win public favor. “Media pressures induce paranoia in politicians who are often amongst the first to be pointed at, and who therefore protect themselves by

¹⁸⁹ Department of National Defence, B-GJ-005-502/FP-000 *Risk Management for CF Operations* (Ottawa: Chief of the Defence Staff, 2007), 1-1.

¹⁹⁰ Oliver Letwin, “Nothing Ventured, Nothing Gained,” *Conservatives.com*, 3 September 2004, 1; available from <http://www.conservatives.com/id=115360&speeches=1>; Internet; accessed 26 February 2008.

introducing regulations as if risk could be abolished by law.”¹⁹¹ Acknowledging that the military is a government institution, real or perceived failures of the armed forces will be viewed as government failures. Hence, the CF must take steps to ensure risk is managed appropriately and effectively in all situations.

The use of PSCs to support and enable deployed operations presents a number of challenges to the risk management process. Normally, the Command team identifies, considers, and evaluates risk throughout the Operational Planning Process (OPP) and makes decisions based on the consequence and likelihood on an unwanted occurrence actually happening.¹⁹² As articulated by the CF risk manual “[t]he level of risk is often related to potential gain, so leaders must be able to weigh the estimated cost properly against the desired ends for each operation.”¹⁹³ This implies that the commander can estimate the expected cost and has control over how the desired ends are to be achieved. However, as discussed throughout this paper, PSCs are largely unregulated and can act in unexpected ways (e.g., unexpectedly cease delivery of services or withdraw from theatre). This complicates the cost estimation process and limits what the commander can actually control. Therefore, not only is risk expected to be higher when relying on a third party but the commanders ability to manage the additional risk is hampered and complicated by uncertainty and factors generally outside his control.

¹⁹¹ *Ibid.*, 1. While this article specifically describes the prevention of physical risks, it could equally apply to any other type of risk.

¹⁹² Department of National Defence, ... *Risk Management for CF Operations*, Chapter 2, 1-4.

¹⁹³ *Ibid.*, 1-2.

According to Schreier and Caparini any function deemed critical to the mission should be “banned from privatization.”¹⁹⁴ Their argument is that by definition the failure of any mission critical task will inherently cause the mission to fail and that two decades of experience has indicated that PSCs can harm the “reliable delivery of essential services in conflict and war.”¹⁹⁵ This argument is fully supported by Perry who believes that: “[i]n hostile environments, like Afghanistan . . . support services must be provided by military professionals.”¹⁹⁶ However, not all support these arguments. Lieutenant Colonel Conrad believes that although Afghanistan “. . . is lethal to ground-based logistics . . . the Canadian Army possesses a superb tactical logistics capability surprisingly well suited to deal with [the complexities].”¹⁹⁷ An integral component of this logistics capability is the PSC provided CANCAP as previously described. While not all agree that mission critical tasks should be entrusted to PSCs “there is little doubt that the quality of service and overall readiness . . . will go down as the situation deteriorates and the contract starts to experience difficulty.”¹⁹⁸ Although services provided by national forces would also be expected to suffer, military personnel are trained to operate in adverse environments and are fundamentally more reliable as they are subject to military Command and discipline. Therefore, the use of PSCs to conduct mission critical activities requires careful thought and consideration.

¹⁹⁴ Fred Schreier and Marina Caparini, *Privatising Security* . . . , 88.

¹⁹⁵ *Ibid.*, 89.

¹⁹⁶ David Perry, “Contractors in Kandahar . . . , 16.

¹⁹⁷ Lieutenant Colonel John Conrad, “We three hundred . . . , 257.

¹⁹⁸ Fred Schreier and Marina Caparini, *Privatising Security* . . . , 46.

Quality, training, and the background of the personnel that PSCs employ are also areas of concern. The armed forces have little oversight or ability to control who PSCs select for employment. PSCs set the standards and seek out suitably qualified personnel to meet contract obligations while minimizing costs. The result is that in many cases a high percentage of local nationals and third country nationals are hired by the industry. In some cases the level of training and background of these individuals is suspect and cause for concern. To provide a degree of mitigation Cottier suggests that “the company should therefore be required by contract to ensure that each employee . . . has received sufficient training, both generally and in a context and task specific manner adapted to each assignment.”¹⁹⁹

Knowledge of employee backgrounds is critical as without this information integrating PSCs into the command structure of a deployed armed force is near impossible due to security considerations. Traditionally the state has relied on the industry to vet its employees. However, a recent Canadian experience highlights that this approach is risky and may not be working. Protection for Canada’s Strategic Advisory Team in Kabul is provided by Hart Security – a well established PSC. One of their employees, Gray Branfield, was killed while working on a separate contract in 2007. An investigation found that he had inappropriate apartheid links and had orchestrated a

¹⁹⁹ Michael Cottier, “Elements for contracting and regulating private security . . .”, 643. Training must be tailored to the needs of the task that PSCs are engaged to perform. Although a basic level of knowledge is applicable to both unarmed and armed contractors, specific task knowledge requirements will be situation and threat dependent. As an example, detailed training on Rules of Engagement may only be necessary for armed contractors.

terrorist attack on behalf of the South African government in Zimbabwe.²⁰⁰ Hart Security admitted that they were unaware of these activities despite reporting that a background check had been completed. The fact that personnel with questionable backgrounds can still find employment highlights a lack of proper industry regulation, represents a security threat, and ultimately generates risk to the mission.

Following his Battle Group Command in Afghanistan, Colonel (then Lieutenant Colonel) Lavoie stated that: “there are three fundamental catalysts that can affect the outcome or success of a mission irrespective of the reality on the ground.”²⁰¹ The first is a major scandal such as Abu Ghraib, the second is unacceptable collateral damage to a civilian population, and the last is own force casualties.²⁰² What Colonel Lavoie is fundamentally highlighting is the effect each type of incident can have on the legitimacy and public support for the operation. Sometimes referred to as an aspect of the “CNN effect,” every action of the armed force (or an agent) is captured and reported by the media. Recent examples of inappropriate activity that has clouded public perception, generated mission risk, and affected legitimacy include the killing of innocent civilians by employees of Blackwater, billing for services never delivered, and Canada’s hiring of General Gulalai’s firm to provide armed security at one of Canada’s forward operating

²⁰⁰ Andrew Mayeda and Mike Blanchfield. “Security worker had apartheid past . . . , 1. Questionable linkages are not uncommon for personnel who were employed in Africa during the latter half of the twentieth century.

²⁰¹ Colonel Bernd Horn, “In the Breach: The Combat Command of Lieutenant Colonel Omer Lavoie,” in *The buck stops here: Senior Military Commanders on Operations*, ed. Colonel Bernd Horn, 227-241 (Kingston, ON: Canadian Defence Academy Press, 2007), 228.

²⁰² *Ibid.*, 228. In 2003/2004 six PSC employees were involved in prisoner abuse incidents at Abu Ghraib prison in Iraq. For further detail see Sarah Percy, *Regulating the Private Security Industry*. Abingdon (New York: Routledge, 2006), 23.

bases in Afghanistan.²⁰³ Regardless of whether media reporting is accurate when a story of this nature is published the state is forced to explain PSC conduct, justify their actions (or hold them accountable), and mitigate or control any damage caused. These efforts take time, resources, and ultimately shift the focus of the military away from the primary mission.

To address these issues Spearin suggests that Canada must be “prepared to devise savvy mechanisms by which [PSCs] might be managed in order to maximize benefits and to minimize, or at least to recognize, . . . risks.”²⁰⁴ Schreier and Caparini agree and suggest more generally that: “every contract requires a proper risk assessment based on: the commander’s mission and critical support requirements; the commander’s ability to protect contractors; the costs associated with protecting them; and the nature and extent of the threat.”²⁰⁵ Although all seem to agree that the use of PSCs increase risk and that some type of risk evaluation and mitigation mechanism is required no framework or methodology to address this deficiency has been established. Currently, planning and operational staffs give risk the same consideration regardless of whether the service is provided by a contractor or national forces. This approach is problematic in that PSC specific issues and requirements are not appropriately considered during the planning and

²⁰³ P.W. Singer, “The dark truth about Blackwater,” . . . , 1, Andrew Mayeda and Mike Blanchfield. “Private security firms rush to fill lucrative niche . . . , 1, Fred Schreier and Marina Caparini, *Privatising Security* . . . , 52, Christopher Spearin, “Not a ‘real state’ . . . , 1104. Each of these activities was reported in a negative light by the media and resulted in significant government activity to mitigate damage.

²⁰⁴ Christopher Spearin, “Not a ‘real state’ . . . , 1111.

²⁰⁵ Fred Schreier and Marina Caparini, *Privatising Security* . . . , 45.

pre-deployment phases. One option to potentially address this problem is to develop PSC doctrine and outline specific PSC planning considerations and risk in the OPP.

4.3 Governance and Doctrine

The employment of PSCs is expected to continue into the foreseeable future and will undoubtedly have profound implications on national force governance and doctrine. In the modern era of ad hoc international cooperation commonly referred to as “coalitions of the willing” governance and doctrine define standards and facilitate interoperability with Allies.²⁰⁶ The CF has no formally established standards to regulate and control Canadian use of PSCs on deployed operations. Other nations, most notably the U.S. and U.K., have developed and promulgated extensive documentation to clarify PSC roles, status, and responsibilities when employed in an operational theatre.²⁰⁷ Although these efforts have resolved or mitigated many of their issues, the industry is changing so rapidly that new issues and problems emerge as quickly as they can be solved. This evolution is being fuelled by a number of factors that include regulatory gaps, general unease with the industry, and the exponential reliance on their services. To be effective governance and doctrine must evolve with the changes. Two examples of developments currently being contemplated that could drive further change are industry regulation and the outright ban of PSC use by certain nations.

²⁰⁶ Christopher Spearin, “Not a ‘real state’ ...”, 1109.

²⁰⁷ Examples include FM 100-21- Contractors on the Battlefield , FM 100-10-2 - Contracting Support on the Battlefield , FM 63-11 - Logistics Support Element , DA Pam 716-16 - Civilian Deployment Guide, and JDP 4/01 – Contractors on Deployed Operations.

In general all PSC users suffer from the lack of international regulation and standards. Although the industry purports to be self-regulating “[p]oliticians and commentators . . . share a general agreement that self-regulation, open to numerous claims of ineffectiveness in far less daunting environments than war, would be totally unsuitable in a sector where life and death is so regularly at stake.”²⁰⁸ In the wake of a series of scandals and mounting public pressure the U.S. House of Representatives approved a Contractor Accountability Bill in October 2007, which partially addresses the regulatory gap and eliminates many of the legal loopholes that were previously discussed.²⁰⁹ As this legislation gains traction in the U.S. and potentially worldwide, oversight, regulation, and clear rules to control and govern U.S. use of the industry will naturally follow. Once the U.S. adopts this legislation all users will undoubtedly be affected as PSC practices will naturally conform to those mandated by their largest employer. Canada would do well to follow these developments closely and proactively adopt policy to meet the changing requirements and industry practices.

Western democracies also assume that PSCs can be used to support national forces in any area of the world. However, because of national belief, prejudice, or recent industry scandals some nations are now considering legislation that is intended to limit or prohibit PSC use within their borders. Examples include the government of Iraq and Afghanistan who eventually “may either prohibit [PSCs] from carrying out certain

²⁰⁸ War on Want, “Corporate Mercenaries . . .”, 17.

²⁰⁹ Sue Sturgess, “House passes military contractor bill as Iraq demands Blackwater guards be tried there,” *Facing South*, 4 October 2007, 1; available from <http://southernstudies.org/facingsouth/2007/10/house-passes-military-contractor.asp>; Internet; accessed 25 March 2008. The bill is now before the U.S. Senate.

military or armed security activities, and/ or determine preconditions such companies and operatives must meet in order to be allowed to carry out such activities.”²¹⁰ If this type of legislation becomes common place it could significantly limit operational employment of PSCs and reinforces the requirement to define and maintain core capability.²¹¹ Maintenance of core capability will ensure that national forces will be able to deploy globally when required by government.

In addressing the loss of U.S. core capability Singer notes:

[the U.S.] dependency on military contractors shows all the signs of the last downward spirals of an addiction . . . when it comes to counterinsurgency and the use of [PSCs], the U.S. has locked its national security into a vicious cycle. It can't win with them, but can't go to war without them.²¹²

Canada must take steps to avoid this situation by establishing clear guidelines and policy to determine when, and in what roles, PSCs may be used. Although a relatively minor employer when compared to key Allies, Canada is beginning to show the signs of addiction referred to by Singer in his commentary of U.S. PSC use. CANCAP currently employs hundreds of people to provide mission critical logistics support to CF personnel in Afghanistan. Never intended to meet short notice logistic demands, CANCAP has a contracted planning timeline of 90 days to prepare the Task Order and a further 90 days

²¹⁰ Michael Cottier, “Elements for contracting and regulating private security . . .”, 647. Although the possibility of complete ban is considered remote, restrictions or preconditions which limit or preclude certain PSC activities may be adopted which could impede or make PSC use problematic in the future.

²¹¹ Affects may not be limited to the actual area of operations but could also include staging or regional support areas.

²¹² P.W. Singer, “The dark truth about Blackwater,” . . ., 1.

to hire and deploy personnel before assuming service delivery responsibilities.²¹³ Thus, the CF accepts responsibility for Rotation 0 logistic support and must maintain sufficient depth to meet rapid deployment requirements as part of an overall balanced force structure. Yet, to establish the Canadian presence in Afghanistan, following the terrorist attacks of September 2001, the CF was forced to rely on CANCAP for mission critical support from the beginning as they were unable to muster sufficient CSS troops to fully support Rotation 0.²¹⁴

The after action report outlined several critical issues that required resolution. These included a lack of a detailed strategic analysis, limited ability to surge support if CANCAP failed to deliver, and no risk mitigation strategy. Furthermore, it highlighted the inflexibility of the Task Order process and recommended that a streamlined, responsive, process be adopted. “Given the complexity of this mission, planning decisions were made in record speed and unfortunately our inability to have the Task Order amended in a timely manner still affects both the CF and the Contractor greatly.”²¹⁵ Although the Task Order process has now been amended, no evidence is available to demonstrate other recommendations have been adopted. These shortfalls must be addressed and the CF must ensure that as reliance on PSCs increase appropriate governance and doctrine is available to guide and inform the decision process. Doing so

²¹³ Department of National Defence, *Canadian Forces Contractor Augmentation Program (CANCAP) Statement of Work (Annex A to TO TFA-KAF M001 Amdt 002)* (Ottawa: PWGSC, 2006), 7.

²¹⁴ Department of National Defence, *Lessons Learned – Contractor support ...*, 6.

²¹⁵ *Ibid.*, 6.

will ensure that when the CF decides to rely on PSCs basic Principles of War are adhered to and appropriate strategic oversight is maintained.

This chapter has discussed how the presence of PSCs can and does affect military planning, preparations, and operations in modern environments. Key challenges that were discussed include Command and Control, risk, and the requirement for clear governance and doctrine. What is readily apparent following this review is that the presence of PSCs complicates the battlefield, presents “Unity of Command” challenges, and results in pressures to eliminate national capabilities once services have successfully been outsourced. Although PSCs may provide flexibility at the operational level their presence restricts tactical flexibility and results in increased mission risk. While it is recognized that savvy mechanisms to manage and mitigate risk are required no Canadian framework has been developed nor are PSC specific issues addressed during the OPP. Thus, some form of governance and doctrine is required to regulate Canadian use of the industry and resolve or manage many of the problems presented. To be completely effective, however, these policies must keep pace with industry evolution and therefore a proactive approach is warranted.

Conclusion

For many, PSCs on the battlefield is an emotive issue that easily raises hackles and causes speculation that appropriate services will not be forthcoming when required. Once thought that is was unexpected, inappropriate, and even dangerous for civilians to be directly involved in military affairs, PSC use is now widespread and in many cases a necessity to support deployed operations. The widespread use and expansion of the industry has provided a degree of de facto legitimacy, but numerous problems are inherent in the reliance on contractors to provide services once believed to be the sole purview of the nation's armed forces.

The expectation is that Canadian use of PSCs will continue to increase as the CF will undoubtedly be subjected to continued pressures to reduce costs and streamline activities for the foreseeable future. While PSCs may be useful in relieving some of these pressures Canada must also remember and balance its moral obligation to provide guaranteed support to personnel deployed on operations, to respect the laws and customs of the host nation, and ensure the long term viability of Canada's military institution. Accordingly, Canada must address the challenges presented by PSC use and manage the fact that the industry is not well defined, is largely unregulated, and functions in uncertain legal and ethical territory. This paper has returned to first principles to identify key legal, ethical and operational challenges of unfettered reliance on PSCs and argues that Canada should adopt a proactive and considered approach to problems inherent in the use of the industry.

The legal status of PSCs when deployed on operations has historically been the subject of widespread speculation and cause of great concern. This review has established that under the LOAC all Canadian government employed PSCs are considered to be non-combatants - civilians authorized to accompany the armed force. As such, they are entitled to protection from prosecution and POW status if captured. This status is forfeited if they are armed or engage directly in hostilities. Thus, the practice of negotiating host nation legal protections for PSCs must be continued. However, while appropriate legal protection is necessary the agreements must not inadvertently create loopholes which exempt PSCs from prosecution when appropriate. How this balance is achieved and addressed, in the Canadian context, is a topic which warrants further investigation and study.

Historically, the use of private corporations to pursue national objectives and state interests has been widely criticized. Despite these concerns, however, Canada and most Allies saw distinct advantages to PSCs and their use is now widespread and continually expanding. Although PSCs may provide operational flexibility and be used to augment national forces when necessary, their use can also be problematic. Many of these problems are a result of the fact that the industry operates without an internationally accepted set of ethical standards and is largely unregulated. With limited regulation to govern the industry and corporate secrecy precluding traditional mechanisms of oversight the desired levels of PSC accountability and transparency will continue to be difficult to achieve. Thus, Canada should actively support all future international efforts to regulate the industry and consider national regulation as an interim solution. The context, content,

and urgency of national regulation requires further investigation and should be the subject of detailed discussion and assessment.

Of immediate concern for the CF is the realization that unfettered use of PSCs may affect the delicate civil-military balance at home and abroad. This paper has demonstrated that unrestricted use of PSCs could fundamentally destabilize the armed forces as an institution by undermining the values inherent in the profession of arms and the idea of selfless service. Furthermore, unless an appropriate civilian/ military balance is struck, it has been demonstrated that the military may be at risk of losing prestige, status, autonomy, and could ultimately lose access to the resources needed to maintain and sustain the military institution. Accordingly, an appropriate balance must be determined, defined, and promulgated to help delineate under what circumstances, and in what roles, PSC use is acceptable.

The presence of PSCs and the reliance on their support and services for mission critical activities has severely complicated the battlefield, challenges traditional Command and Control structures, and generates additional risk that must be assessed and mitigated by planning and operational staffs. While PSCs are appealing from an operational perspective, their use presents real challenges at the tactical level. These challenges include the additional burden placed on Command, how effective integration is achieved and implemented, and how duplication of capability is minimized while still retaining a self-sufficient, fully deployable, armed force. Although the concept of PSCs dovetails nicely with Canadian ASD policy and objectives, outsourcing mission critical

functions has inherent risk. Acknowledging that Western governments and populations are increasingly becoming risk averse it is essential that the use of PSCs is appropriately rationalized, controlled, and risk managed. Savvy methodologies and risk control mechanisms should be developed to assist planning and operational staffs in the identification and mitigation of PSC specific risk. Adoption of these coherent methodologies and strategies will inform future leaders about the strengths and weaknesses of the industry, reinforce the need to retain a capacity to surge, and ultimately advise Canadian decision makers on when and where PSC use is appropriate.

Governance and doctrine that defines mission critical activities, regulates and controls PSC use, and guides planners and decision makers is the most obvious choice to address the majority of the issues presented in this paper. The goal of these policies must be to recognize the distinct differences and different challenges posed by armed and unarmed contractors with a view to creating a framework that leverages the benefits available while simultaneously minimizing the risks posed. To be effective and remain relevant however, these policies and practices must continually be reassessed and evolve to keep pace with the industry. Thus, Canada should adopt a proactive and considered approach to PSC governance, doctrine and risk mitigation to ensure that challenges are sufficiently addressed and that Canadian interests are protected when the CF chooses to engage and rely on PSC provided services. The scope and method by which this is best achieved is recommended for further study. However, by ultimately adopting this mechanism Canada will ensure that its armed forces are well positioned to exploit PSC

capabilities while retaining the necessary capability and capacity to effectively wage war and protect national interests in the future.

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