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## **PRIVATE MILITARY AND SECURITY COMPANIES AND THE STATE: WRESTLING FOR THE CONTROL OF VIOLENCE**

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**PRIVATE MILITARY AND SECURITY COMPANIES AND THE STATE:  
WRESTLING FOR THE CONTROL OF VIOLENCE**

By Lieutenant-Colonel D.A. Warner

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## **Abstract**

The 20<sup>th</sup> Century has witnessed the rise of an industry that has a less than stellar reputation in its genesis of mercenarism. However, the Private Military and Security Company has garnered a role and increased responsibility of which Western Anglo-Saxon states have readily taken advantage. The PMSC has been used as a tool to extend foreign policy and augment military forces that are over-tasked. The question is at what price is such dependence? As the state passes more responsibility to the PMSC, does it relegate itself to the sidelines in its responsibility to control violence? Does law and regulation wrestle the state power of control of force back from the profit-driven PMSC?

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## **Chapter 1 – Introduction**

The 20<sup>th</sup> Century has seen changes to the international community in the transition from a multi-polar to bipolar and currently uni-polar community of states. Concurrent with this change has been the rise in a form of privatized military that has developed from the previous mercenary to corporate form. The theme of this paper will be to review and comment on the modern incarnation of this phenomenon with special attention to the post-Cold War developments in the private military and security industry. The development of the private military and security industry in reference to the role of the state in controlling force and violence will be examined. The premise of the paper is that the rise of private military and security companies (PMSC) challenges the monopoly of the state in its control of violence. The monopoly of the state's control of coercion and violence in the international environment is a cornerstone of the Westphalian model and, subsequently, in the upholding of International Humanitarian Law and human rights. Will there be a mechanism to ensure that the control of force is not totally wrestled from the state by market forces? Is there a regulatory regime to control the use of force?

When considering the sources of data and examples this paper has narrowed the focus to Anglo-Saxon and mainly developed Western states. The spectrum of control of violence runs the gambit from a total lack of control of force by the state (e.g., warlords in Africa) to the Western model in which states claim a virtual monopoly over the use of force. To control the scope, and thus the length of this commentary, the narrative will focus on the Western model to better highlight the impact of the privatized military and security industry on the more mature state model. This constrained selection is meant to narrow the analysis to those states using somewhat

common regulatory models and avoids those states which are greatly divergent due to their current status and stability (e.g., failed, failing, or developing states).

The first section of this paper will provide a survey of the PMSC industry including its rise and development. Tracing the genesis of the growth of the modern use of privatized force, as opposed to the pre-enlightenment use of mercenaries and the pre-industrial use of colonial trading companies, this chapter will address the industry's rise towards the last half of the 20<sup>th</sup> Century. A key observation is that the growth of the industry has been in response to reduction, in Western states, of the capability and capacity in state-level military force but not a reduction in demand for its use.

Considering the transfer of responsibility for key aspects of state-sanctioned force, the second section examines the impact of privatization on the role of the state, in particular Western Anglo-Saxon states. The argument is that the use of PMSC erodes the authority and legitimacy of the state's monopoly over the use of force.

The final section examines three available forms of regulatory control over the use of non-state violence. In particular the topics of self-regulation, national regulation, and international regulation are examined as potential mechanisms to monitor, control, and sanction the PMSC industry. The resolution of regulatory control is essential to the state's control of its military force—even by extension through the use of the PMSC.

### ***Defining the PMSC***

Definitions of the privatized military industry have been in play since it was first a subject of analysis in the 1990s. P.W. Singer provides a comprehensive, and often referenced,

topology of the privatized military industry.<sup>1</sup> His “tip of the spear” analogy distinguishes the various firms based on their level of force and range of services in a battle space template. Basically the industry, in Singer’s topology, consists of Military Provider Firms (MPF), Military Consultant Firms (MCF) and Military Support Firms (MSF). The MPF focus in the tactical space and may engage in the fighting and/or direct command and control activities—literally, the pointy end of the spear. The MCF provide strategic, organizational, and advisory support to state military and government decision makers. Finally, the MSF provide non-lethal support such as logistics, food services, maintenance, and supply.

Additional definitions have been raised that modify the terms to phrases such as Private Military Companies (PMC) and Private Security Companies (PSC). Schreier and Caparini, for instance, provide an analysis of these terms in their occasional paper.<sup>2</sup> The PMC, although not formally defined in existing laws and regulations, is generally given the attributes of a licensed business entity that provide services normally undertaken by state military forces in a conflict zone. PMC have offered services such as logistic support, operational support capabilities such as special forces advisors, intelligence, and even offensive combat. The PSC is defined as smaller firms that are associated with professional services linked to security and protection; they are predominantly concerned with crime prevention and public order and generally work within the scope of domestic law.

For the purpose of this paper, which ultimately will address the regimes to control these entities, the definition provided in the Montreux Document will be used in that it creates a

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<sup>1</sup> P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca: Cornell University Press, 2008), 88-100.

<sup>2</sup> Fred Schreier and Marina Caparini, “Privatising Security: Law, Practice and Governance of Private Military and Security Companies,” Occasional Paper No. 6, (Geneva: Centre for the Democratic Control of Armed Forces, March 2005), 14-43.

highbred term for the corporate entity in the privatized security and military industry—Private Military and Security Companies (PMSC<sup>3</sup>)—and defines them as:

“PMSCs” are private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.<sup>4</sup>

As commented by James Cockayne, the Montreux Document, “...adopts the largely functional definitional approach traditional in IHL—defining armed groups’ status according to their activities, objectives and internal structures ....”<sup>5</sup> The definition avoids the narrowing language attributable to phrases such as ‘direct participation in hostilities’ or ‘offensive services’ or ‘defensive’ services’—thereby avoiding the exclusion of the private security companies noted above.

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<sup>3</sup> **Note:** The use of the abbreviation throughout this document will infer both singular and plural status. There will be no addition of “s” to pluralize the abbreviation.

<sup>4</sup> International Committee of the Red Cross, *The Montreux Document: On Pertinent Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*, (Geneva: ICRC, 2009) 9.

<sup>5</sup> James Cockayne, “Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document,” *Journal of Conflict and Security Law*, vol 13, no, 3 (2009): 405.



## **Chapter 2 – Rise and Growth of the Private Military and Security Industry**

Private military support of rulers' use of force has existed since principalities warred against each other. Such private support in modern time has seen resurgence in the form of the private military and security industry in a post-Cold War market. With a rise in regional instability and the growing requests for military interventions, the demand began to outstrip the supply. Basically, many developed nations had streamlined, adjusted, or reduced their standing militaries (including reserve forces) in response to the peace dividend, the revolution in military affairs, the adoption of advanced technology, and the overall reduction in public spending in the field of projection of violence. While the advances in technology provided, in particular, for more to be done with less – vis-à-vis the number of soldiers on the ground – the conflicts that arose in the post-Cold War world (e.g., insurrections, counter-insurgencies, and internal regional conflicts) would ultimately require boots on the ground to establish and maintain stability. But where would these boots come from if the standing militaries had been impacted by workforce reductions? The military reductions in Western states did not lessen their obligations—either implied or otherwise—to ensure international stability.

In the 20<sup>th</sup> Century, as the bi-polar superpower model of international relations and security dissolved, many Western nations perceived a 'peace dividend' whereby they could realize public savings through the reduction of military forces. In short, many Western nations undertook large-scale reductions in their military forces – both in personnel and assets. Additionally, advances in technology and the concomitant revolution in military affairs resulted in industrialized nations increasing their dependency on technology with the hope of achieving

tactical and operational superiority without a dependence on numerical superiority. But, with the technology came the complexity of the systems themselves—both in their operation and their maintenance. Maintaining technical leadership on par with the private industry resulted in a realization that the maintenance of knowledge and pace of technological advancement became untenable in the public domain. As a result, nations became more dependent on private corporations and specialists to maintain and operate increasingly technologically complex equipment.

### ***Supply and Demand***

Although the bi-polar paradigm of international relations saw its end with the dissolution of the Soviet Union, conflict did not disappear. Indeed minor battles over intra-state and intra-regional issues increased that were once controlled, if not suppressed, by one of the two *World Powers*. Warlords rose to positions of influence either in the general populace, or within the recognized legitimate government of nations whose grip on internal security – and the commensurate control of violence – was nebulous at best, and in some cases non-existent. It was not long before the instability of regions throughout Eastern Europe, the Middle East, and Africa interfered with the economic machinations of developed Western nations. Additionally, internal inter-tribal and long-standing battles and grudges exacerbated the situation and resulted in a rise in historically-based retaliation that had been previously suppressed by one of the *Super Powers*. These developments called, through the international community, for intervention by Western states—most notably the United States of America—under the auspices of the United Nations or other global collectives (e.g., EU, NATO, etc.). Simultaneous with the dissolution of the bi-polar model there was a movement toward neo-liberalism in the West.

The rise of neo-liberalism combined with the end of the Cold War saw a reduction in supporting views for strong central control by states and the growth of the view that privatization came with inherent effectiveness and cost efficiencies. The imperfect, bureaucratic, and arguably inefficient public institutions were seen as a poor substitute for free markets.

As is often the case with market forces, where there is a demand a supply will appear. It is no different with the international requirements for stability. With the demand, in due course came a supply, and many nations—particularly Anglo-Saxon Western states—readily used this source of trained, equipped, and deployable resources to augment, if not replace, their national military in the zone of instability. In some instances, as exemplified by the 32<sup>nd</sup> Reconnaissance Battalion of South Africa, whole disbanded units were simply reconstituted as private companies. In other cases, major corporations such as Dyncorp or Amour Group, seeing the need for additional contracted resources in conflict zones, created extensions to their corporations and recruited from the plethora of military personnel unemployed as a result of the peace dividend. Specialized units were often the target of cost reductions as they had a very high cost for their equipment, training, and employment. The institutional reductions were met with external pressures where a nascent industry of ex-military contractors were attracting and recruiting members of the special forces. Chakrabarti points out the large-scale exodus of Special Operation Force (SOF) personnel.<sup>6</sup> Responding to high salary options, US Green Berets and Navy SEALs have been attracted by annual salaries between US \$100,000 and US \$200,000 in comparison to their base pay of US \$50,000 with a pension of US \$23,000 annually. Likewise, in

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<sup>6</sup> Shantanu Chakrabarti, “Privatisation of Security in the Post-Cold War Period: An Overview of its Nature and Implications,” *IDSIA Monograph Series No. 2*, December, 2009, (New Delhi: Institute for Defence Studies and Analyses, 2009): 28.

2006 the British army increased specialists' pay by 50%, in an attempt to stay the tide of releases of Special Air Service (SAS) and other SOF personnel.

The US government's 2005 Government Accountability Office report, drawing from the Defense Manpower Data Center (DMDC), does not contend that the attrition in the occupational specialties has had a marked increase from the period prior the 2001 stop loss policy in spite of growth in the privatized military and security industry.<sup>7</sup> Personnel with previous military police and special operations experience have comprised staff in the PMSC used in Iraq according to the report. However, later in their report GAO highlights the comments of leaders in the special operations and military police that suggest that suggest there is indeed an increase in the attrition in these specialties in particular through early retirement (i.e., at 20 years, the earliest point of eligibility).<sup>8</sup> Similar comments from Naval Special Operations Command and Air Force Special Operations Command at the 2004 House Armed Services Committee hearing, indicated that they too were losing specialists with 8 to 12 years service and attributed these releases to job opportunity in the private sector.

Although there are differing opinions of the impact of the PMSC industry on attrition, the overall assessment is that both external financial attraction and internal organization change have contributed to movement of personnel (either through early retirement or professional exodus). Further, Sarah Cotton et al concluded that, "... military and State Department personnel believe that the pay disparity between contractors and the military has a negative impact on military

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<sup>7</sup> United States, Government Accountability Office, *Rebuilding Iraq: Actions Needed to Improve Use of Private Security Providers*, GA-05-737, July 2005 (Washington DC: US Government Printing Office, 2005), 35.

<sup>8</sup> GAO, *Rebuilding Iraq...*, 2005, 36.

recruitment, retention, and morale, although actual military continuation rates do not reflect such a negative impact.”<sup>9</sup>

As pointed out by Spearin, “... many [PMSC] employees were previous members of state security sectors, thus revealing the movement of uniformed personnel to the private sector.”<sup>10</sup> Lacking conclusive statistics of the numbers of SOF personnel transferring to PMSC, Spearin posits two key variables—remuneration and operational tempo. With the past government monopoly over military service, there has been an historic undervaluing of the labour, resulting in a very attractive salary of between \$12,000 and \$33,000 per month. As for operational tempo, Spearin points to the threefold increase in deployed SOF personnel between 1991 and 1997. This was accompanied by an increase in tour frequency concurrent with a growth in the PMSC industry along with the associated wide selection of assignments, a more flexible work schedule, and ample leave time.<sup>11</sup>

Although attrition rates were able to be controlled with stop-loss policies between 2001 and 2003, these rates of loss returned to their pre-2001 levels when the controls were relaxed. PMSC in both the US and UK have relied heavily on intake from ex-SOF personnel—this has been a value-add that PMSC leverage when advertising the skills and services offered. The GAO reported that interviews with PMSC representatives suggested that the companies do not actively recruit serving members of standing forces, however they are present at transition job-fairs,

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<sup>9</sup> Sarah K. Cotton, *at al, Hired Guns: Views About Armed Contractors in Operation Iraqi Freedom*, RAND Report for National Security Research Division. (Santa Monica: RAND Corporation, 2010), 63.

<sup>10</sup> Christopher Spearin, “Special Operations Forces a Strategic Resource: Public and Private Divides,” *Parameters*, Vol 36, Winter 2006-2007, p. 59.

<sup>11</sup> *Ibid.*, p. 60.

sponsored by the military, they advertise in military magazines and newspaper, and they use the Internet.<sup>12</sup>

In 1996, over 1.6 million people were employed in the private security industry, prompting van Creveld to posit: "...from the White House to 10 Downing Street ... [p]rivate security has turned into a growth industry par excellence ... unquestionably all of this is symptomatic of the state's faltering ability to hold on to its monopoly over violence – or, in plain words, to protect its citizens' lives and property."<sup>13</sup> Consider, however, that industry does not grow without demand and without opportunity for profit.

### ***New Wars and the rise of the PMSC***

Christopher Kinsey attributes three characteristics to recent wars as contributing to the rise of the PMSC.<sup>14</sup> First, recent wars are more concerned with protecting or furthering the interests of sub-state actors than the political power of the state itself. Identity or greed politics and the strengthening of ethnic positions have trumped the stability of the international community. Secondly, the recent wars differ from the pre-Cold War conflict in their affinity for non-conventional conflict based on guerrilla warfare and counter-insurgency. The source of many PMSC recruits is often the special forces personnel who, by nature of their training, possess extensive skill and notable experience in unconventional conflict. Third, Kinsey's "new wars" are characterized by an emphasis on economic versus political struggles with a more global nature linked to international trading networks. The PMSC, lacking alignment to any specific state and its transnational reach, provides an ideal source of skills to address these objectives. Alignment with developed world states may ultimately develop because of the close

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<sup>12</sup> GAO, *Rebuilding Iraq...*, 2005, 36.

<sup>13</sup> Martin van Creveld, "The Fate of the State..." 9.

<sup>14</sup> Christopher Kinsey, "Challenging International Law: a dilemma of private security companies," *Conflict, Security and Development*, Vol 5 Issue 3 (2005), p 275.

alignment of the PMSC objectives and the consistent market opportunities provided by these states.

Peter Singer, well-published in the area of privatized military industry, comments on the ambiguous status of the PMSC in his essay, “War, Profits, and the Vacuum of Law”.<sup>15</sup> Attending to the issue of commerce in war, the potential for abuse and the resultant damages give strong chorus to the cry for a more stringent and inclusive regulatory regime.

### ***Peace or Profit—Differing Motives***

The employment of private sector firms to address matters of stability vis-à-vis international relations between states leads to a question of which motive is primary: peace or profit? The point arising is that the objective of the international community—to establish and maintain stability with minimal force—is not the same objective as that of the PMSC industry—to grow profit from its endeavors (e.g., the provisioning of force). Whereas the state’s military is employed in a theatre of instability with the expectation that their skill will be employed to reduce the conflict to a level manageable by the host nation, the same cannot necessarily be expected of an organization motivated by profit. Although the pecuniary self-serving behaviour of the lucrepath is attributed to the mercenary and not the corporation—as it is more responsive to its shareholders as an entity to itself, the overarching requirement to make a profit may influence its efforts to end the conflict, the very purpose for which it was hired. Singer highlights the propensity of PMSC to “pad their numbers”<sup>16</sup> and gives example of BRS (Halliburton) and DynCorp. Examination of BRS billing for privatization of military base services in Bosnia in 1999 resulted in the US Army determining that the BRS original estimate of 116 personnel

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<sup>15</sup> P.W. Singer, “War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law,” *Columbia Journal of Transnational Law*, Vol. 42, No. 2 (2004), pp. 521-549.

<sup>16</sup> Singer, *Corporate Warriors*, 2008, 156.

exceeded what was actually needed (66 personnel). Similarly, in 2000 a US Brigade Commander in Bosnia cited BRS for excessive crew sizes where forty-percent of the personnel were not actually engaged in work. Further, PMSC have provided resources that don't meet the contracted skill requirements as exemplified by DynCorp, that assigned employees to the maintenance of US combat aircraft "...whose only previous work experience was a waitresses, security guards, cooks, and cashiers."<sup>17</sup>

Harkening back to the 1961 farewell address of President Eisenhower, J. Paul Dunne and Elisabeth Sköns provide comment on unwarranted influence of the military industrial complex in the post-Cold War world.<sup>18</sup> As the security challenges of the international community presented a more asymmetrical threat to developed states and their economic prosperity, there has been a simultaneous acceleration in the growth of technology that has outpaced the state's capability for R&D. Dunne and Sköns argue, "... there is more spin-in of civilian technology to the military. The Western states have benefitted economically and militarily from technological developments—including the *Revolution in Military Affairs*. Many areas of technology ... are now dominated by commercial applications."<sup>19</sup> The 21<sup>st</sup> Century presents a military industrial complex that continues to be populated by contractors who leverage their dominance in the high-technology private sector to influence government policy.<sup>20</sup> This is of concern as governments depend on commercial-off-the-shelf products that are characterized by a technical complexity that cost-sensitive states are reluctant to maintain. If the technology is complex enough to require external advice (e.g., PMSC or other consultants) then these experts can influence the

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<sup>17</sup> Singer, *Corporate Warriors*, 2008, 156.

<sup>18</sup> J. Paul Dunne and Elisabeth Sköns, "The Changing Military Industrial Complex," Carecon Website, March 2011 [discussion papers on-line]; available from <http://carecon.org.uk/DPs/1104.pdf>; Internet; accessed 23 January 2012.

<sup>19</sup> Dunne and Sköns, "The Changing..." 4.

<sup>20</sup> Dunne and Sköns, "The Changing..." 5.



employment of the technology to their ultimate advantage—and thereby increase the state’s dependency on the industry. Dunne and Skön conclude, “The components of the [military industrial complex] have changed but the dynamic and impact of vested interests remain.”<sup>21</sup>

Highlighting the realization that the military-industrial complex continues to support a structure of vested interest, albeit less visible, that is challenging to control and more transnational in nature, it is important that any attempt to manage or control this sector should transcend the nation and rest with international initiatives.

### ***Erosion of the Military’s Role***

The growth of the private military and security industry has raised comment and concern about the dependency of the state on its product. Lieutenant-Colonel David Barnes, in his presentation to the International Studies Association conference in 2010, highlighted key concerns associated with the impact of the use of PMSC on the military profession.<sup>22</sup> The role and function of the state’s military is grounded in the defence of the state. The increased dependency of governments on private contractors erodes this function by detracting from key characteristics of the military.

Authority to decide to go to war is increasingly influenced by growing lobbyist roles being undertaken by private industry, in the form of the PMSC. The trust of the public for the military has rested, from past to present, in the expectation that the institution itself is an independent profession—defined, in Barnes’ opinion, to include expertise, corporateness, and hierarchical responsibility for the control and sanction of its members. The employment of

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<sup>21</sup> Dunne and Sköns, “The Changing...” 7.

<sup>22</sup> LTC David Barnes, “The Challenge of Military Privatization to the Military as a Profession” (conference paper presented at the International Studies Association conference held in New Orleans, LA on 17 Feb 10), Internet: [http://citation.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/4/1/6/5/2/p416522\\_index.html](http://citation.allacademic.com/meta/p_mla_apa_research_citation/4/1/6/5/2/p416522_index.html) accessed 15 Feb 12.

PMSC has the potential effect of eroding the professionalism of the standing military. Increasingly, functions such as transportation, logistics, food services, and training are being contracted outside to PMSC. As this outsourcing continues, the normal succession process in these specialties, including the requisite passage of knowledge, will atrophy. With less opportunity to progress in combat service support roles, there will be a decrease in the production of leaders in those same functions—because leadership depends on experience.

In the logistics world of the military, cooks, truck drivers, and mechanics have been outsourced to one degree or another (e.g., the Logistics Civil Augmentation Program (LOGCAP)). ... Consequently, much of the military's logistics capacity has shifted to private hands. This privatization has also has a different, perhaps unintended effect. By shifting certain capacities to outside of the military, there is a corresponding loss of internal experience and expertise in the planning and employing of logistics assets. ... In the future, there may be an expertise gap, which could then be filled only through contracting of yet another military service—the management of logistics.<sup>23</sup>

The risk is compounded by the reality that the majority of the private firms are currently recruiting their *specialists* from experienced ex-military personnel. A future impact may include a situation where the pool of experienced professionals will dwindle on both sides of the military industrial divide.

Leander comments on the PMSC efforts to influence politics because their business depends on what happens in the political realm. The future PMSC, in Leander's estimation, will focus on the influence of political opinion.<sup>24</sup> The International Peace Operations Association (IPOA) published a review and supported a petition suggesting Western involvement in Darfur in 2006—the obvious intent was to influence the international community to become involved.

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<sup>23</sup> *Ibid.*, 6.

<sup>24</sup> Anna Leander, "Regulating the Role of PMCs in Shaping Security and Politics," Working Paper No. 84 presented by the author at the Copenhagen Business School 5 Dec 2006; available from <http://openarchive.cbs.dk/handle/10398/7019>; Internet; accessed 20 May 12, 9.

Of course, the PMSC industry foresaw potential business—not to unfairly tar them with the label of lucrepath, as the publications were more analysis on the Darfur situation than an advertisement for the industry’s capability. However, the intent is pretty clear.

Additionally, the close affiliation between key politicians—especially in the person of Vice President Dick Cheney—cannot be missed as a prime source of influence in the executive branch of the US when deciding on foreign and military policy.

With funding pressures and limitations, states rely more on private contractors’ rosters of ex-military experts to develop and deliver core training. The longer this arrangement continues, the more depleted the institutional sources of experienced trainers will become. Xe (formerly Blackwater) offers training to merchant mariners on anti-piracy procedures and have parleyed this service offering to military personnel deployed to Somalia—this dependence on the private sector for doctrinal and practical training further relegates the specialty skill to the PMSC and away from the state’s military.<sup>25</sup>

Where military training contains more knowledge than simply trade skills, important additional knowledge on ethos, ethics, and customs and traditions are exchanged when training is delivered. As example, where military training has a underpinning of self-sacrifice the undercurrent of the private sector training delivery focuses on contract deliverables and profit generation.

Military corporateness focuses on the ideal service to society as the cornerstone of the profession. PMSC are founded on the principle of pursuit of profit. Where the standing military force is formed as an extension of the state, the private firm is incorporated with the paramount

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<sup>25</sup> Barnes, “The Challenge of Military Privatization...,” 2010, 16.

purpose of generating profit for the stakeholders and owners. In short, the private military and security industry exists with a financial motivation and this depends on a market for their services. By extension, the existence of conflict forms this market for their services. The military, as a profession, exists to respond to conflict with an objective to either avoid conflict by either threat of force, or to bring conflict to an end with the application of force.

The employment of contractors has a further detracting impact on the military as a profession in that members of the profession often work in tandem with the contractor. It is not unusual that a soldier will compare their paycheck to that of the contractor and perceive a sense of inequality. Additionally, military personnel's self-identification with their profession suffers a corrosive impact when they witness improper acts or omissions that receive little or no sanction.<sup>26</sup>

The military fills an advisory role in the state management of violence in advance of its role as implementer of state-sanctioned use of force. The primacy of civil rule over the use of state-sanctioned violence is an overarching premise of character of the state. The weight garnered by private firms' recruitment of retired military leadership at the strategic and institutional level has challenged the perception that the states' decision to employ force is self-contained.

The control of the number of military personnel deployed by a state is the purview of the elected representatives. The limitation set on force composition and size has been circumvented by executive branches of government relying on privatized military and security forces—the personnel of which are not counted as part of the state's forces in a theatre. The intention of civil

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<sup>26</sup> Barnes, "The Challenge of Military Privatization...", 2010, 10.

control of military deployment is to provide transparency to the electorate. The ready use of privatized military and security forces clouds this transparency and potentially erodes at the accountability of governing bodies of the state. As an example, President Obama sent 30,000 additional troops to Afghanistan. “What he did not discuss was the thousands of new contractors (at least 56,000 by one source) that would be required to help support the increase in troops as well as provide security for the increase in other government agencies’ personnel.”<sup>27</sup>

Hiring of ex-military senior leadership by PMSC has garnered increased influence for the private military industry vis-à-vis the state’s decision to use force. Through its recruitment of executive level ex-military, the lobby power of the private industry has increased through the leverage of past associations and connections—thus providing increased influence and access to the state decision-making process. For example, “Blackwater hired Rob Richer in 2005, former head of the CIA’s near East division and associate deputy director of operations; Enrique “Ric” Prado, who served as chief of operations for the CIA’s Counterterrorism Center (CTC), joined Blackwater; And, J. Cofer Black, former head of CTC, also joined Blackwater.”<sup>28</sup>

The state’s use of and the fast-paced developments of technology have seen increases in range, speed, and survivability of its force. The complexity of the technology and its rapid turnover has seen an increase in dependency of the state on private companies to maintain, configure, and in some cases operate these various critical systems. The developed states have ultimately become addicted to the expertise of private industry to maintain their complex systems.

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<sup>27</sup> Barnes, “The Challenge of Military Privatization...,” 2010, 14.

<sup>28</sup> Barnes, “The Challenge of Military Privatization...,” 2010, 16.

Cantir and Schrodt observed a progressive change in the Clauswitzian-Westphalian model characterized by a growing affinity towards industrialization and trade as opposed to military conquest.<sup>29</sup> Drawing on numerous authors, they focus on the growth of private military forces coupled with the decentralization of states and the growing inability of developed states to control violence.<sup>30</sup> Since the end of the Cold War there has been a rise in states' dependence on private military and security firms for everything from food production to protection of diplomats.

The PMSC that developed after the fall of the Soviet Union were often characterized as mercenary but in reality they represented a major departure from the historical model of the mercenary.<sup>31</sup> Mercenarism had and continued to imbue an image of “dogs of war”. In its beginnings the new PMSC industry found that redefining of the terminology and acceptance of Private Military Companies (PMC) as a descriptor improved the public's perception as the industry distanced itself from the likes of “Mad” Mike Hoare, Bob Denard, and “The Terrible Ones” of the 1950s and 1960s in Africa. They more resembled conventional businesses as they successfully combined corporate structure with the privatized control of military force.

As the PMC term still highlighted the military character of the industry, there was a successful move to develop a less militaristic tone with the phrase Private Security Company (PSC). IPOA continues to regard the use of the term mercenary as derogatory—shunning its emotive and inflammatory impact.

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<sup>29</sup> Cristian Cantir and Philip A. Schrodt, “Neomedievalism in the Twenty-first Century: Warlords, Gangs, and Transnational Militarized Actors as a Challenge to Sovereign Preeminence.” (conference paper presented at the annual meeting of the International Studies Association, held in New Orleans, US on 17-20 Feb 10), Internet: [http://convention2.allacademic.com/one/isa/isa10/index.php?cmd=Download+Document&key=unpublished\\_manuscript&file\\_index=1&pop\\_up=true&no\\_click\\_key=true&attachment\\_style=attachment&PHPSESSID=c15764036ba01266d46a3e05952d764a](http://convention2.allacademic.com/one/isa/isa10/index.php?cmd=Download+Document&key=unpublished_manuscript&file_index=1&pop_up=true&no_click_key=true&attachment_style=attachment&PHPSESSID=c15764036ba01266d46a3e05952d764a) accessed 15 Feb 12.

<sup>30</sup> Cantir and Schrodt, “Neomedievalism...”, p12.

<sup>31</sup> Cantir and Schrodt, “Neomedievalism...”, 24.

The concerns posited by Cantir and Schrodt vis-à-vis the effect of PMSC on state interests include a rise in dependency and institutional harmonization where the PMSC gains a place as expert advisor whereby it becomes a de facto part of the government of the state. This issue becomes a concern when private industry goals are incongruent with the state's goals, but the position of expert advisor overrides the layperson's perceived limited expertise. Cantir and Schrodt suggest that the marketability of force allows for the lowest bidder to gain access and influence the state's decision process whereby the state proportionately loses control over the commodity of violence itself. "In the United States ... companies like MPRI do work closely with the Government and are, in theory, private branches of the government. This is less the case with the U.K.... The possibility of a conflict of interests can, therefore appear."<sup>32</sup>

A further influence by PMSC on the state control of force is the practice of lobbying for contracts or *cultivating contracts*. In the US context the political connections of Halliburton (including its subsidiary of Kellogg, Brown and Root) are well known. Although direct collusion is not documented, it is notable that many contracts were initiated during and preceding Mr. Cheney's various roles in the federal government.

### ***PMSC as Legitimate Actors***

Andrea Schneiker opines that PMSC actively try to frame themselves as legitimate actors in the security and peace operations environment.<sup>33</sup> There are three forms of power being exerted by PMSC, namely: instrumental power, structural power, and discursive power. Lobbying and

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<sup>32</sup> *Ibid.*, 28.

<sup>33</sup> Andrea Schneiker, "How to avoid state regulation: The power of private military and security companies." (conference paper presented to the International Studies Association conference held in New Orleans, US, between 17-20 Feb 10), Internet: [http://convention2.allacademic.com/one/isa/isa10/index.php?cmd=Download+Document&key=unpublished\\_manus\\_cript&file\\_index=3&pop\\_up=true&no\\_click\\_key=true&attachment\\_style=attachment&PHPSESSID=11f26697145fb93588e234476cf54e4e](http://convention2.allacademic.com/one/isa/isa10/index.php?cmd=Download+Document&key=unpublished_manus_cript&file_index=3&pop_up=true&no_click_key=true&attachment_style=attachment&PHPSESSID=11f26697145fb93588e234476cf54e4e), accessed: 15 Feb 12.

campaigning constitute instrumental power, which is further extended through the lobby actions of professional associations such as IPOA, BAPPSC, PSCAI, and PASA. The participation in standard-setting processes demonstrates structural power by giving members of the industry opportunity to influence the developmental process and also allows them to publish their individual discourse. Additional discursive power is derived from participation in conferences and publications (e.g., *The Journal of International Peace Operations*—JIPO). Research institutes, such as the Peace Operations Institute (PIO)—founded by IPOA—gives further discursive powers to the industry whereby they present themselves as experts in the analysis and evaluation of their own industry.<sup>34</sup> Discursive power is used by the private military and security industry to gain legitimacy in two forms: social legitimacy and normative legitimacy.

Social legitimacy is demonstrated by acceptance of the private military and security companies as valid actors by others in the international environment. The use of public discourse by the private military and security industry, according to Schneiker, focuses on their effectiveness and expertise.<sup>35</sup> Acceptance in a professional association (e.g., IPOA) carries an inference that the actor adheres to a published set of ethical and moral standards. Being regarded as legitimate by other actors (e.g., agencies, states, governments) is essential to securing contracts and therefore income.

Normative legitimacy is garnered from ethical, moral, or legal criteria. The role of the professional association, and by corollary the membership of the private military and security company, enables this normative legitimacy by developing, publishing, and enforcing a set of

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<sup>34</sup> Schneiker, “How to avoid state regulation...”, p. 4.

<sup>35</sup> Schneiker, “How to avoid state regulation...”, p. 5.



stringent ethical standards. Of course, the value of the ethical standard only holds currency when it is seen to be enforced.

Schneiker observes that it is in the best interest of the private military and security industry to frame itself in a positive light. This is achieved in four phases: first, to define (or redefine) their name; second, to depict the state security actors as being less effective at solving the security issues and challenges; third, the promotion of its own legitimacy; and fourth, to build alliances with powerful actors.<sup>36</sup>

PMSC use their discourse to highlight state actors as being ineffective or unable at solving issues as crime, terrorism, insecurity, and war while highlighting the industry's own capabilities, effectiveness, and normative legitimacy as proof of its ability to provide a solution to these issues. The industry's discourse focuses on developed nations as being unwilling or unable to resolve the issues because of constant and critical economic and political pressures. State financial constraint has reduced or restrained its military capability, and the aversion to public body counts has reduced the state's political appetite for loss. Framing the image of the developed world being irresponsible by not resolving the ongoing security challenges, the private military and security industry portrays its capability and willingness while promising efficiencies and cost reductions. Scholars and state agencies remain skeptical that efficiencies and savings would materialize, however the political face-saving by avoiding a body count is noted. This framing is further enhanced in light of recent state affinity with neo-liberalism and the privatization of many state functions, not the least of which is that of military capability—whereby the private military and security industry portrays themselves as efficient and a cheaper, faster, better alternative.

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<sup>36</sup> Schneiker, "How to avoid state regulation..." p. 9.

PMSC develop alliances with powerful actors, especially policy-makers in developed countries. As noted earlier, this is accomplished through the recruitments of senior executives from state institutions such as agencies, departments, and the military. Additionally, successful contracts with powerful actors and their agencies in the security environment contributes to the legitimacy of the sector and further builds these alliances. The special role and contact between PMSC and Western governments have given them routine and trusted interaction with senior decision makers. Their position of trust is able to be used to position themselves within the defence complex and portray analysis of security threats to best showcase their own corporate offerings. Additionally, increased dependence on proprietary and technically narrow solutions have permitted PMSC to situate themselves as experts.

The political aim is to regulate, not eliminate the PMSC. The goal of the industry is to frame itself as the legitimate actor and standard-setter. The US have enacted laws to control and regulate their private military and security industry, but even these have been drafted with industry assistance and authorship.<sup>37</sup> As will be noted later, there are a number of initiatives with an objective to control the industry of the PMSC. When considering the control mechanism, it is important to examine the impact of the PMSC on the state's monopoly over the use of force and coercion.

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<sup>37</sup> Schneiker, "How to avoid state regulation...", pp. 16-17.

### Chapter 3 – PMSC Impact on State Control of Violence

This section will provide an overview of the role of the state; in particular its key function of the control of violence in the protection of its independence, the growth and prosperity of its citizens and its economy. As noted previously, the 20<sup>th</sup> Century shift from a bi-polar power struggle to the uni-polar dominance of the United States resulted in a reduction of standing military forces in the developed world. The reduced defence budgets resulted in lower force levels. Western armed forces shed personnel.<sup>38</sup> The British military reached its lowest manning since the Napoleonic wars. The US-military has seen a 30% personnel reduction between 1990 and 2005—a decrease by 600,000 troops. Savings in state budgets with the reduction of sizes of military establishments have been met with a rise in the private military and security industry—resulting in a concern over the shift from state control of violence to the private sector’s pursuit of profit.

From the Treaty of Westphalia in 1648 to the current day, international relations have centered on the recognition of the nation state as a self-directing entity. Each nation state has certain key powers and responsibilities, including the ability to develop its citizenry, to increase the scale and range of its national economy, and to protect its wealth through the ability to project violence on other countries and to repel threats and incursions. With respect to this latter power, the 19<sup>th</sup> Century saw a projection of violence or the capability thereof as instrumental in the growth of states through colonization and economic expansion. Michael Howard, in his

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<sup>38</sup> Stephan Maninger, “Soldiers of Misfortune: Is the Demise of National Armed Forces a Core Contributing Factor in the Rise of Private Security Companies?” in *Private Military and Security Companies: Chances, Problems, Pitfalls and Prospects*, ed. Thomas Jäger and Gerhard Kümmel, 69-85 (Wiesbaden: VS Verlag für Sozialwissenschaften, 2007), 70.

analysis of war and the state, comments that, “In most cases ... [states] came into existence and defined their boundaries by the use, or the threatened use, or force.”<sup>39</sup>

Regarding the first component, the development of its citizenry, the state is responsible for encouraging those people, within its defined boundaries, to identify with the state and to self-identify as citizens of that state. Stemming from this identity is the development of a national affinity, the investment in the goals and objectives of the state, and contribution of the individual citizen to the state’s welfare through institutions such as the government, its military, and other public offices and department. In connection with the use of force specifically, “... loyalty and commitment to the State are ultimately tested by the degree of readiness on the part of its citizens to engage in military service, or accept comparable hardships, on its behalf.”<sup>40</sup> As the nation state developed from Westphalia to the current day, the 19<sup>th</sup> Century militarism inevitably characterized the rise of nationalism and ultimately the state.

Economic prosperity of the state has the prerequisite of a stable environment—both internal and external—that will foster trade and commerce. If a nation state is to continue to exist, it will require at minimum an economy that returns wealth to the nation and fosters prosperity to support public institutions. Although the necessity of economic prosperity of a state has not disappeared, it has transfigured from a mercantile model of the 19<sup>th</sup> Century to a model of liberal trading and internationalism in the 20<sup>th</sup> and 21<sup>st</sup> Centuries. The protection of economic prosperity has not lessened in importance regardless of the evolution from bipolar to uni-polar dominance in international relations, nor will it likely lessen with the possible development of future multi-polar international power models.

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<sup>39</sup> Michael Howard, “War and the Nation-state,” *Daedalus*, Vol. 108, No. 4, (Fall 1979): p. 101 [journal on-line]; available from <http://www.jstor.org/stable/20024637>; Internet; accessed 9 May 11.

<sup>40</sup> *Ibid.*

Finally, as the borders of states are often fixed based on territorial gains through past conflict and within which they depend on safety and security, it is a prerequisite that the state maintain the capability to offer violence to deter both internal and external threats. Internally, police and security forces act on behalf of the government to maintain order through controlled violence. Externally, in the preservation of borders formed through territorial gains, national military forces offer protection and response to threats to the peaceful economic prosperity of the state. Martin van Creveld (1996), for example, argues that the principle function of the state is to fight other states, while either defending its interests or extending them.<sup>41</sup> The extension of the state's capacity for violence provides pre-emptive protection, as exemplified by the administration of George W. Bush, when instability in the international community (Afghanistan and Iraq) threatened the United States' economic or territorial integrity.

### ***The Legitimacy of the State***

In international relations, the state has historically been defined in terms of power—either through the amassing of resources that confer economic power, or the projection of physical power through acts of coercion such as war. Whereas the predominant projection of power in the first half of the 20<sup>th</sup> Century was defined by the action of superpowers, the 'wars' of the second half of the century predominantly have been the result of conflict in minor and developing powers. The involvement of the superpowers has been primarily in the form of external influence.

K.J. Holsti suggests that the key characteristics of the state have evolved from the point of simple power construed along military lines, and more along the lines of its command of

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<sup>41</sup> Martin van Creveld, "The Fate of the State," *Parameters*, (Spring 1996): 1; <http://www.carlisle.army.mil/usawc/Parameters/Articles/96spring/creveld.htm>; Internet; accessed 2 March 2011.

loyalty predominantly through a monopoly of the use of force dependent on the support of a political community.<sup>42</sup> The definition of the state relies on three components, namely the idea of the state, its physical existence, and roles and influences of its institutions. Defined territorial boundaries substantiate the physicality of the state, whereas the extant community therein confirms the existence of the idea through their identity with the history, ideals, and common ethos of one or more of the internal political communities. The institutional infrastructure of the state provides for the maintenance of the state through laws and constitution, regional and national governing forums, and the occupants of key offices and functions within the structure. However, alone these three components cannot make a nation state. The key ingredient that cements these components is legitimacy.

Legitimacy forms the final crucial ingredient of a strong state and is represented in two planes of vertical and horizontal legitimacy.<sup>43</sup> Vertical legitimacy is embodied in the loyalty of the citizens to the idea of the state, and their consent to the authority of the state's institutions. Horizontal legitimacy, in contrast, is dependent on all communities' political roles. The vertical legitimacy of the state is validated through the reciprocity of the extraction of resources from the community with the commensurate return of services. Horizontal legitimacy is strengthened by the representation of all internal communities in the political process of the state. Internal use of coercion—laws, juridical sanctions, prisons, etc.—maintains the strength of the state with its citizen communities. Likewise, in support of the physical borders of the state and the effective control of military force by the civilian leadership, international legitimacy is maintained and strengthened. So while the state is founded and defined in physical, ideological, and institutional

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<sup>42</sup> K.J. Holsti, *The state, war, and the state of war* (Cambridge: Cambridge University Press, 1996), 83.

<sup>43</sup> K.J. Holsti, *The state, war...*, 92.

terms, it is essential that internal and external legitimacy exist on the vertical and horizontal plane to ensure its strength and survival.

Michael Howard highlights the dependency on nuclear weaponry and clandestine operations during the Cold War and the ongoing rivalry between the two superpowers and opines that such dependency effectively reversed the previously progressive nationalization of the state. “The result of this development is that the State *apparatus* is likely to become isolated from the rest of the body politic...”<sup>44</sup> and the impatience of the functionaries of the state with the inefficiencies of popular control and popular participation in the decision process becomes a burden to be eschewed. The legitimate use of state force can only be held in the hands of responsible political leaders and further delivered by trained persons acting with discipline and within the confines of military and constitutional law; without this monopoly, chaos will ensue.<sup>45</sup>

The role of the state in the control of violence has been impacted by recent decisions of Western governments to reduce military spending and thereby reduce the sizes and capability of standing military forces. Although the previous bipolar struggle for superpower status has receded, a more fractured and generally destabilized international environment that threatens to impact the economic prosperity of developed nations has replaced it. PMSC have grown to address the imbalance between supply and demand for military force. This leads to the question of whether the provision of violence—a role of the state—is now a service of private industry and whether the objective of international violence—reestablishing stability and peace—is at risk of being replaced with the pursuit of private profit. Let us next consider if international governance provides sufficient mitigation of the risk that profit could overrule peace.

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<sup>44</sup> Michael Howard, “War and the Nation-state...” 106.

<sup>45</sup> Michael Howard, “War and the Nation-state...” 108.

Posen argues that the use of nationalism by the state provides a capability to raise and field mass armies, and maintain a level of intensity in war to protect the state.<sup>46</sup> Moreover, the level of nationalism is maintained by its military capacity and this capacity is accomplished through a strong sense of nationalism. Structural realism supports the premise that nations maintain autonomy through security competition. This competition, in Posen's view, is accomplished through the state's establishment and maintenance of a strong military juxtaposed to that of its neighbours. In short, mass armies have historically ensured the protection of the state. The state has used nationalism to establish, maintain, and grow these armies.

Although Krebs agrees that the role of the military as a nation-building tool is misguided, he recognizes the military's value to mediate between the domestic and international political standing of the state.<sup>47</sup> The military contributes to the state's international standing while balancing its role domestically vis-à-vis the establishment and protection of the rule of the governing person and institutions. Since the end of the Cold War, European nations have all but abandoned conscripted service—following the US decision to do so in the 1970s.<sup>48</sup> These domestic decisions had an impact of reducing the size of standing forces in many nations, a void that was filled with PMSC product offerings. Although the direct impact of elimination of conscription on the Western Anglo-Saxon states is limited, the collateral impact is that there are less alliance personnel on which to depend.

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<sup>46</sup> Barry Posen, "Nationalism, the Mass Army, and Military Power," *International Security*, Vol 18, No. 2 (Fall 1993), pp. 80-124.

<sup>47</sup> Ronald Krebs, "A School for the Nation: How Military Service Does Not Build Nations, and How it Might," *International Security*, Vol 28, No 4 (Spring 2004), p. 123.

<sup>48</sup> Krebs, "A School for the Nation...", p.124.



Anna Leander attends to the role of the state's monopoly over force by focusing on the two key aspects of control and authority.<sup>49</sup> Control addresses the capacity to regulate the use of force and thereby restrict anyone who is not approved by the state to use it. Authority, as summarized by Leander, is the recognition of the state's right to engage, in this case, in the use of force. Authority is the capability to command adherence by general acceptance vice coercion or persuasion.<sup>50</sup>

Leander highlights the PMSC garnering of authority in three veins—direct, indirect, and diffuse authority.<sup>51</sup> PMSC gain direct authority simply through their presence—for example, logistic provisioning, consultancy, training, and armed personnel in the area of operations. Through consultancy and lobbying efforts the PMSC gain indirect authority. Less easily measured, albeit noted, the growing central role of PMSC in state international relations has produced diffused authority including influencing how and when force should be used.

Two groups of commentators, liberal economists and international relations scholars, argue that the growth in PMSC industry marks a delegation of state authority vice the privatization of war.<sup>52</sup> Liberal economists argue that the PMSC represent an efficient response to public sector inefficiency and mismanagement. Arguing that soldiers of standing armies are expensive when cheaper and readily available alternatives exist, liberal economists put additional weight in favour of off-the-shelf versus customized technologies. Leander further summarizes IR scholars' point of view that PMSC represent a tool of foreign affairs by proxy, where the private firms act as a covert operations tool.

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<sup>49</sup> Anna Leander, "Eroding State Authority? ...," 2006, p. 17.

<sup>50</sup> Anna Leander, "Eroding State Authority? ...," 2006, p. 14.

<sup>51</sup> Anna Leander, "Eroding State Authority? ...," 2006, p. 19.

<sup>52</sup> Anna Leander, "Eroding State Authority? ...," 2006, p. 31.

Contractors predominantly are sources from rolls of ex-military or ex-police and leverage their professional lineage to give inference of their professionalism and threshold knowledge. The question of screening candidates of PMSC does not necessarily guarantee that problems from the public sector are not transferred to the private force. There is an internal impact on military organizations when past career credentials and connections confer defacto authority on the contractor inside the state military team.

Leander's caution regarding the impact of contractors on military organizations points to the impact on the commander's planning when contracts represent a pivotal role in the force.<sup>53</sup> Commanders may need to dedicate resources to protect contractors. More worrisome, commanders may be held to account for illegal warfare either simply by the contractors' presence, or by specific actions that violate international proscriptions. Leander's solution to mitigate the risks inherent in the use of the private market for force is the creation, monitoring and enforcement of regulation.

Additional to military planning impacts, the PMSC industry has demonstrated an impact on democratic decision making in state use of force by Western nations. Leander provides analysis of the impact of privatization on democratic control of force by pointing out a number of areas of risk.<sup>54</sup> Privatization and outsourcing reduces the control of force to a small circle of corporate executives and military decision makers. This includes control over defence spending. Outright privatization reduces insider knowledge in the military, as an institution. Further, the length of contracts often extend to the duration of the operation and the private firm comes to hold a virtual monopoly. An example of such a virtual monopoly is the UK Private Finance

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<sup>53</sup> Anna Leander, "Eroding State Authority? ...," 2006, p. 95.

<sup>54</sup> Anna Leander, "Eroding State Authority? ...," pp. 98-108.

Initiative (PFI) in which contracts lasting between ten and forty years are offered to PMSC willing to purchase equipment and infrastructure and in turn lease this back to the UK MOD. Another example of subverting the democratic control of force is where US PMSC reshuffle contracts to change bottom-line values and avoid congressional oversight. Another work around used to avoid oversight and reporting requirements under the International Traffic in Arms Regulation (ITAR) involves DOD raising contracts under the auspices of the Defence Department's Foreign Military Sales programme where DOD pays foreign governments to contract a specific firm and that government redirects the funds to the PMSC.

The use of private firms as a means to avoid public stigma of body counts, since private contractors do not factor into the official casualty count, demonstrates another example of circumventing public scrutiny of foreign policy decisions. Media reports in July 2008 noted that 4,673 service members have died in Operations Iraqi Freedom and Enduring Freedom. Not so clearly published was that, at that same juncture, 1,350 contractors had died and 29,000 were injured supporting US operations in Iraq and Afghanistan.<sup>55</sup>

When considering the influence and authority of the PMSC in the international realm many assume that the corporate interests are in lockstep with the interests of Western states. Such assumption can have a corollary effect of encouraging the belief that PMSC growing authority is not a threat to the state's objectives—since both are aiming for the same goal. It is suggested by Leander that such belief is a risk and may impact the state's public authority in the international and transnational spheres.<sup>56</sup>

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<sup>55</sup> Steven Schooner, "Why Contractor Fatalities Matter," *Parameters*, Autumn 2008, 78.

<sup>56</sup> Anna Leander, "Eroding State Authority? ...," p. 118.

PMSC continue to influence both state and non-state groups through lobbying efforts. The growing dependence of both groups on the privatized defence industry, give PMSC an increased input into the regulation of force in an international environment. Direct authority is acquired by the PMSC when they act as proxy and a resource for the states in the execution of foreign policy. Outsourcing of the maintenance of the F117, unmanned drones, and even the M1A1 Abrams tank provide clear examples of direct influence. Further, Vinnell in Saudi Arabia and DynCorp in Afghanistan deliver and evaluate training programmes as part of Western state assistance programmes. Decisions of what training and even what equipment is provided to train with are often left in the hands of the PMSC. Where national regulation may provide some control over contracts with state actors, the same is not to be said to equally occur for non-state groups. In such cases, PMSC determine which non-state groups to approach and what services to offer. There is no presumption warranted that such engagements adhere to home-nation foreign policy objectives. As an example, Defence Systems Ltd (DSL) of the UK was hired by British Petroleum to protect production sites in Colombia. In time, DSL became involved with paramilitary groups accused of killing and/or *disappearing* civilians.

The growing prevalence of PMSC in the delivery of training and advisory roles for developing nations (who are requesting assistance from the West) is affecting the requesting states' impression of the sponsoring state. What else is a developing nation to think when the Western, developed nation delegates the training and advice being requested to a surrogate? Leander suggests that the outsourcing of advisory and training support has the potential impact

of building resentment by the receiving nation and doubt that the West is truly *invested* in their issues.<sup>57</sup>

### ***Impact on the Democratic State***

Avant and Sigelman comment on the impact of the PMSC on democracy. They base their analysis on three core attributes of democracy: transparency, constitutionalism, and public consent.<sup>58</sup> The ability of citizens, government officials, and other stakeholders to access information about policy defines transparency. Constitutionalism represents controls on the government's power—through checks and balances. Finally, the citizens' ability to express their preference on government policies through mechanisms such as the vote encapsulates public consent.

The protection of corporate data and information on the grounds of proprietary protection has resulted in less information on private forces disposition, costs, and losses than with public military forces. The ability to redact information from FOIA responses has been extended to anything that a PMSC may determine to be material to the company's competitive advantage. An example of this was the response of Kellogg, Brown, and Root's response to FOIA requests regarding their role in the Iraqi oil fields—where significant sections of the material was redacted. Less information impacts media coverage. Less media coverage demonstrated by Avant and Sigelman, results in less public scrutiny and therefore less debate.<sup>59</sup>

The ability of PMSC to avoid congressional checks and balances in the US has an impact on the constitutionalism of the democratic state. The contracting of PMSC by the executive

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<sup>57</sup> Anna Leander, "Eroding State Authority? . . .," p. 123.

<sup>58</sup> Deborah Avant and Lee Sigelman, "Private Security and Democracy: Lessons from the US in Iraq," *Security Studies*, Issue 19, (2010), p. 256.

<sup>59</sup> Avant and Sigelman, "Private Security and Democracy . . .," p. 248.

branch does not require Congressional oversight or approval. Additionally, the use of proprietary protection as grounds, the PMSC has been able to restrict Congress' access to details in their contracts and terms, thus reducing the transparency. Even when reports are sent to Congress, the content is more about what is being done than how it is being accomplished.<sup>60</sup> Where Congress has the power to cap force strength in foreign theatres, the same is not true for contractors. The executive has used the tactic of having foreign governments contract directly and thus avoid any exposure on the part of the US through proxy foreign policy. Even when Congress may attempt to restrict contractor counts, the PMSC can simply circumvent this by hiring staff from another state, Avant and Sigelman point to the rise in contractors in Iraq from 20,000 in 2004 to 190,000 in 2008 as example of the lack of control by Congress over the state-sponsored forces in an operation. Another example of circumvention of Congressional oversight was the executive branch's facilitation of a contract between MPRI and the Croatia government in 1994 for military training and advice, when actually an embargo was set in place for the US with the Croatian state.<sup>61</sup>

Attempts by Congress to control PMSC include amendments to the Military Extraterritorial Jurisdiction Act (MEJA) and the Uniform Code of Military Justice in which they modified the scope of the law to include contracted personnel accompanying US armed forces in the field. The effectiveness of these changes were seen to be less than effective when the DOJ attempt at charging Blackwater employees for the 2007 Nisoor Square shootings were ultimately dismissed after challenges on jurisdictional grounds.

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<sup>60</sup> Avant and Sigelman, "Private Security and Democracy ...," p. 251.

<sup>61</sup> Avant and Sigelman, "Private Security and Democracy ...," p. 253.

Finally, public consent—the third attribute of democracy examined by Avant and Sigelman—suffers because of the lack of transparency on the part of the PMSC. The public is generally unaware of the scope of contractor involvement. Unlike the running tally of military casualties and deaths, the public is unaware of the loss of contractors in Iraq and Afghanistan.<sup>62</sup> Avant and Sigelman conducted a small survey that indicated that the opinion/support by the public for the US presence in Iraq and Afghanistan does not change regardless of the loss of a military or contractor life. However, it was determined that the reality that the public is generally unaware of the deaths/injuries of contractors thus resulting in a lack of knowledge of the full facts and therefore informed consent.

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<sup>62</sup> Avant and Sigelman, “Private Security and Democracy ...”, p.256.

## **Chapter 4 – Regulating the PMSC Industry**

Whereas the fundamental characteristic of the state is theoretically the control of violence, this control does not contend that violence is eliminated. Indeed, the control of violence has proven that states have made great strides in developing more efficient and more aggressive forms of violence throughout history. And, realizing that this propensity to develop forms and methods of violence, in the interim between conflicts the community of states made effort to define the legitimacy and control the proportionality of the violence. The Geneva and Hague conventions represent the modern history's attempt at controlling violence through international standards and definitions. As time has progressed, it has become clear that the international conventions are not easily or uniformly applied to the privatized military and security industry. This chapter summarizes and comments on the realization that existing conventions are not easily applied to modern employment of privatized military and security companies.

This chapter reviews international and national laws and codes of conduct proposed by the industry and other stakeholders as they apply to PMSC employment and accountability. The argument is that existing laws fail to formally address the PMSC as an entity and thereby fail to provide sufficient sanctioning power to redress improper actions. On the other hand, two codes of conduct—the Montreux Document and the International Code of Conduct—provide suggestions more than proscriptions. The point is that more work will be required to maintain the state's control of force.

Specific cases of uncontrolled violence and associated media attention of disproportional or abusive uses of force have seen pressure put on the private industry to reign in abhorrent behaviour. This pressure has resulted in the industry's attempt at self-regulation in a number of



forms. While the tenets of the regulations are laudable, the enforcement and adherence to the regulation have been less successful.<sup>63</sup>

Transparency, government control, and decreases in efficiency have been highlighted as key contributing factors to the failure of governance of private military and security industry.<sup>64</sup> The dissolution of clear hierarchies, prominent during the Cold War, and their replacement with horizontal private-public partnerships have seen the transference of accountability from an elected body to one or more private firms. Whereas governments are obliged, within clear legislature, to be forthright with their electorate, the private firm—citing the need for competitive advantage—takes precaution to protect the details of their transactions and plans. Privatization has also eroded government control of the governance model. Adopting more complex technology with a reduction in the size of the military complex, Anglo-Saxon states rely increasingly on the input, advice, and even authoring of governance by the private military and security community. Additionally, as the industry becomes more transnational, the state has seen its governance model influenced by the internationalization of the service offering. Government control over security policy and governance has weakened due to two developments: PMSC have avoided government controls, and the balance of power between the public government and PMSC has changed.

The national-level security governance controls often contributed to an inefficient use of resources. Whereas the intention of contracting the services of private military and security companies were meant to maximize cost savings through the reduction of the fixed costs of maintaining a large standing military force, such contracting was often accompanied with

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<sup>63</sup> Refer to the aftermath and resulting initiatives of the IPOA/ISOA code of conduct

<sup>64</sup> Elke Krahnemann, “Security governance and the private military industry in Europe and North America,” International Policy Institute, 2005

inefficient monitoring and management of contract deliverables. As commented by Krahmann, a case in point was the exploitation of contract conditions of indefinite-delivery and indefinite-quantity. When in Yugoslavia, Kellogg, Brown and Root (KBR) installed a 100% electric backup of all US military facilities when the intention of the contract was to backup only essential systems such as military hospitals. Further, KBR set excessive standards for cleaning facilities. The over-provisioning resulted in excessive charges to the US. In summary, the expected reduction in fixed costs resulted in the escalation of variable costs. The inefficiency was a result of minimal or absence of oversight and control measures.

As Anglo-Saxon states transfer the responsibility and delivery of force from the state to the private sector the risk of lack of clear governance becomes a challenge. Mitigation of this risk has three modes of governance to be considered: self-governance, contracting, and legislation at the national and international level.

Leander criticizes existing regulation of PMSC industry as being fragmented, contradictory, and incomplete.<sup>65</sup> Her conclusion on the matter of regulation is to suggest that any successful regulatory model must be multi-layered and address the three levels of local, national, and international authority. In short, the rules of PMSC employment are, "... less anchored in formal legislation than they are in the discipline of the market."<sup>66</sup>The presence of PMSC in operational theatres directly complicates military authority in the battle-space. Contractors will often interpret their contracts in a narrow context when it suits their needs (e.g., avoidance of risk) and this can severely restrict the latitude of operational commanders' decision making. Further, misconduct and abherent behaviour by contractors can expose the strategic mission to

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<sup>65</sup> Anna Leander, "Eroding State Authority? ...," 2006, p.66.

<sup>66</sup> Anna Leander, "Eroding State Authority? ...," 2006, p. 70.

risk and set back operational progress. In some cases, where existing martial regulations fail to include private contractors, commanders may be left powerless to redress improper behaviour. So, the increase in contractors reduces the commander's capability to predict the size of the force at his disposal when these individuals are not subject to military command or discipline/sanction.<sup>67</sup>

Industry-led initiatives to set professional standards, training requirements, ethical credos, guidelines for operations and conduct, and forms of sanctions each contribute to the development of a framework of self-regulation. Self-regulation can be implemented by an association (e.g., International Peace Operations Association) or by discrete standards and guidelines at the company level. The effectiveness of these standards is dependent on monitoring, enforcement, and censure. Additionally important for the voracity of self-regulation is the characteristic of transparency—the clear and public display of the standard, adherence to its criteria, and demonstration of its enforcement or sanction of those employees or firms who transgress.

Contracts provide states the ability to include specific constraints and conditions that may include standards of conduct and performance. Additionally, conditions of service codified in regulations of state military organizations can be transcribed and adapted to the contracts and provide for investigative and corrective controls for violations of terms and conditions. Contracts can further offer options for transparency and efficiency through clauses that specify reporting and monitoring requirements.

Where contracts fail is when they are between the PMSC and other private business and firms—where there is no guarantee nor requirement for transparency, indeed the propensity for

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<sup>67</sup> Anna Leander, "Eroding State Authority? ...," 2006, p.83.

secrecy is ever present, citing proprietary protection. Further, the provision for reporting and monitoring requires the government to actually monitor and enforce these conditions. The reduction of standing military forces and the associated rise in dependency on privatized military and security providers has resulted in governments being less capable of monitoring the very contracts they are writing; this is especially true for open-ended, complex contracts.

Regulation is the third form of governance of the private military and security industry. This form of control may be at the national or international level. Regulation has the ability to set and maintain standards similar to those self-regulation and contracts above except in this instance the government body, whether national or international, centralizes the monitoring and enforcement with governments. These governments have an obligation for transparency, accountability, and efficiency as responsibilities to their electorate or constituent bodies. International regulations address the limitations of national regulations when they have jurisdiction over multiple states—thus avoiding the loophole of private firms, incorporated in one country, using the fact that they are operating in another country while employing resources from a third.

### ***Controlling PMSC by Defining the Mercenary***

Commentary on the legal status of PMSC often launches from the perspective of anti-mercenary regulation and sanctions. The PMSC industry has taken great pangs to distance itself from the mercenaristic definition—not without good reason. Key to the examination of laws and regulations of PMSC is the realization that the industry is market-driven and the actions of the firms are rooted in the corporate goal of profit. However, the sole dependence on market forces will allow the industry to progress in spite of a void in legal controls—for the market is driven by profit not morals. Allowing the PMSC to solely search for profit without regard to the limits

imposed by generally accepted international law (e.g., The Geneva Conventions, or International Humanitarian Laws) will undoubtedly see their inclusion in the definition of mercenary.

International laws and sanctions of state violence have a relatively short lineage from the Hague Conventions (1907) which addressed the standards of neutrality. The 1949 Geneva Conventions addressed the definitions and standards of treatment for prisoners of war (POW)—giving the holder of the status special protection and standards of treatment. Mercenarism saw its first international regimen of sanction in a UN resolution in 1968 which was eventually codified in the 1970 Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States. Even in the 1970 Declaration, the states' legal regimes were the only mechanism of enforcement and punitive responses.<sup>68</sup>

Opinions differentiate the mercenary from the professional soldier by highlighting the mercenary as the lucrepath, who fights solely for the financial gain and the glory of the fight itself. On the other hand, the professional soldier's actions are tied to the ethos of their military profession and the grander goal of the state, of which they are a member. Article 47 of Additional Protocol I of the Geneva Conventions (1949), developed in 1977, formally categorizes and defines the mercenary cumulatively as being specifically recruited, participating in a hostility, motivated by personal gain, neither a national or resident of a party to the conflict, not a member of an identified armed force, and not sent as a member of an armed force of a state.

The definition of mercenarism has been used as a basis of criticism of the private military and security industry.<sup>69</sup> The members of the industry counter this criticism by pointing out their

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<sup>68</sup> P.W. Singer, "War, Profits, and the Vacuum of Law ...," pp. 526-528.

<sup>69</sup> Schneiker, "How to avoid state regulation? ...," 2010, 11.

status as a legally registered corporation with the attributes of a legal personality driven by business profit versus personal profit.

The requirement to regulate PMSC primarily arises from a need for the protection of human rights.<sup>70</sup> Although much of the private sector is bound by contract and corporate law, the protection of human rights is not codified therein. Basically, the requirement exists to control the actions of the PMSC no less than the actions of the state for the purpose of ensuring public security and maintaining law and order.

Besides the general good, it is in the interest of the Anglo-Saxon states to protect the role of the state itself—weakens states’ increased dependency on PMSC result in the erosion of the legitimacy of the state, specifically key function-groups that control force: the police and the military. The overarching requirement of regulation is the maintenance of a mechanism for accountability through transparent observation of the actions of PMSC. The issue arises that international regulation does not necessarily meet this challenge.

Kinsey points to the primary shortfall in formulating international regulation of private military and security industry as being attributable to issues with the definition of mercenary.<sup>71</sup> In its draft of an International Convention against the Recruitment, Use, Financing, and Training of Mercenaries in 1989, the 35<sup>th</sup> session of the UN General Assembly was presented with a more inclusive definition. Kinsey highlights that although the definition was more inclusive the policing of the individual companies remained at issue. The definition continues to rely on the motivation of the individual vis-à-vis the provision of force—the critical problem is that it is near impossible to attribute lucrepathic motive to the corporation as an entity. While those who are

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<sup>70</sup> Kinsey, “Challenging International Law...,” p. 279.

<sup>71</sup> Kinsey, “Challenging International Law ...,” p.281.

employees of a PMSC are compensated, it is a salary based on a combination of skill valuation and negotiation and not individually profit-driven. Singer likewise criticizes the UN definition due to the inability to confirm the motivation of an individual with any surety.<sup>72</sup>

The convention, in its attempt to control mercenarism faces three criticisms: addressing the crime of mercenarism is limited to the state within whose borders the act occurred; there is no mechanism for the aggrieved state to respond to the offending state; and the convention provides no monitoring mechanism. These limitations make the use of this regime difficult at best, and since the PMSC fails to meet the definition of mercenary, it fails to provide a control mechanism.

A further limitation of the 1989 Convention is its lack of adoption by Western powers, since its ratification did not occur until 2001 when Costa Rica gave its endorsement, bringing the total signatories to twenty. As observed by Singer, none of the signatories included a major state power and despite its creation, there have been no prosecutions under the law itself.<sup>73</sup>

There has been no total ban on mercenarism in international law and the current prohibitions do not adequately deal with PMSC. The focus by anti-mercenary laws on the individual actor fails to include the incorporated entity of the PMSC in either definition or scope. Further, the requirement of mercenary prohibitions to associate the individual actor with the specific conflict misses the mark when it is applied to an employee of a PMSC—as assignments are not pre-determined at the point of hiring. Further, the PMSC are contracted to provide services that are distinctly military in nature, but may not be attributable to a specific conflict;

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<sup>72</sup> Singer, “War, Profits, and the Vacuum of Law ...,” p. 529.

<sup>73</sup> Singer, “War, Profits, and the Vacuum of Law ...,” p. 531.

therefore confirming direct participation in a specific hostility—another condition of the definition of mercenary—has proven elusive, at best.

Another shortcoming of the attempted mercenary prohibition is the exclusion of identified armed forces, as this is clouded by the routine state policy to deputize or accredit contracted forces as part of their state establishment. In effect the PMSC employee can be defined as an actor of the state and thus avoid inclusion in the definition. Additional steps to avoid the label of mercenary include awarding of citizenship, state licensing, and credentialing as special agents.<sup>74</sup>

Kinsey further opines that the customary international law aims mainly at the mercenarism that threatens legitimate state's sovereignty, but has proven inadequate in dealing with the military activities of the PMSC.<sup>75</sup> He observes the generally accepted reality that the UN General Assembly lack authority under its charter to create, change or repeal rules of international law. So, where does this leave us?

### ***National Law versus International Laws***

Considering the ambiguity of international law vis-à-vis incorporated PMSC and focusing on the fact that most states have national regulation to control and censure corporations, at least in the realm of business law, we turn to the utility of national-level regulatory regimes. Singer reminds us of three issues with national regulations.<sup>76</sup> First, the PMSC has the flexibility to modify its corporate structure, to change its name, or simply dissolve itself. Such flexibility can include a change to the operating base of the firm to an off-shore location while maintaining

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<sup>74</sup> Singer, "War, Profits, and the Vacuum of Law ...," p. 533.

<sup>75</sup> Kinsey, "Challenging International Law..." p. 285.

<sup>76</sup> Singer, "War, Profits, and the Vacuum of Law ...," pp. 534-541.



corporate offices in the home nation. Second, national regulations lack extra-territorial enforceability—the arm of law reaches only to the border. Even when the PMSC is at risk of sanction under state law, it can deflect scrutiny through use of off-shore subsidiaries. Finally, current domestic laws, in many developed states, lack a focused definition of the privatized military and security sector.

Kinsey focuses attention on national regulation and highlights the apparent shortage thereof: “The lack of national legislation to control the sale of military services by [PMSC] could be construed as a failure by states to discharge their international obligation to preserve international peace and security.”<sup>77</sup> The limitation of national legislation is characterized by the flexibility of the PMSC to circumvent regulation by structural change or contractual sidestepping. Additionally, national regulation is limited by the borders of the state and therefore lacks extra-territorial juridical power, not to mention internal resources to monitor and enforce the regulations themselves. Additionally, it has been observed by Kinsey and Singer that many of the national level regulatory tools are out of date and fail to account for or stipulate controls and sanctions for PMSC that violate norms of conduct.<sup>78</sup>

PMSC involvement in conflict zones and culpability for incidents of abuse has brought the issue of regulation to the forefront. As example, the 2007 shooting incident at Nisoor Square in Bagdad, involving Blackwater employees became a lightning rod for public attention on the PMSC industry. DynCorp activities in Bosnia in 1999 and 2001 were highlighted for accusations of illegal activities including prostitution, sex trade, and even statutory rape. Similarly, private contractors were implicated in the 2004 Abu Ghraib prison abuses. Various levels of media

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<sup>77</sup> Kinsey, “Challenging International Law...,” p. 286.

<sup>78</sup> See Kinsey, “Challenging International Law ...,” p. 287 and Singer, “War, Profits, and the Vacuum of Law ...,” p. 537.

attention have focused on these incidents, among others. These incidents have highlighted the apparent powerlessness of national regulations. DynCorp avoided prosecution by repatriating the accused individuals and equally concerning, the whistleblowers were subsequently fired by the company.<sup>79</sup>

Singer examines five elements for the regulation of PMSC.<sup>80</sup> The first element is a set of clear and unbiased objectives with public protections being paramount. Second, the definition of the PMSC and clarification of the status of their agents must encompass all services offered. Third, any prohibited or regulated acts must exist within international laws of war and human rights. Fourth, regulations cannot be achieved solely by market pressures—whereas voluntary industry codes set a good, self-preserving standard, the reality is that the industry is driven by profit not communal altruism. Finally, any regulatory regime requires funding and this should be extracted from the industry through membership tariffs and possibly through enforceable fines and bonds when sanctions are determined necessary. Paramount to these five attributes any regulatory regimen must be international in scope.

Highlighting the fact that a total prohibition of privatized military service industry would require an elimination of both the demand for and supply of the service, Singer adroitly surmises that such a prohibition is unlikely.<sup>81</sup> In today's environment of cost-cutting in developed states the demand for the services of PMSC is growing. Likewise, the lack of stable control of violence in failed, failing, and even developing states will see the demand for such services grow into the future. Where there is a demand, inevitably there will be a supply.

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<sup>79</sup> Singer, "War, Profits, and the Vacuum of Law ...," p. 538.

<sup>80</sup> Singer, "War, Profits, and the Vacuum of Law ...," pp. 542-544.

<sup>81</sup> Singer, "War, Profits, and the Vacuum of Law ...," p. 544.

Kinsey notes that the current mercenary laws do not apply to the PMSC.<sup>82</sup> He calls for an international standard of conduct with political and legal force from state signatories to enforce it, but posits that such an eventuality is unlikely; instead, Kinsey recommends national-level regulatory controls by key developed states as the most viable option—notwithstanding the limitation of transnational enforcement. Both the Montreux Document and ICoC stipulate that they support IHL, human rights laws, and national laws and statutes.

Seeing regulatory adherence as a way to demonstrate legitimacy, many firms support a regimen of standards and proscriptions. Singer opines that the most viable regulation would be international in nature, and require a public, transparent international body to audit the PMSC. The UN has a potential role as this international body, and could be charged with the creation and maintenance of a database of adherent and truant PMSC. As individuals are truly the face of the PMSC, a database of known individual violators of international humanitarian laws and laws of war would be valuable when auditing member firms. Incentive for firms to submit to oversight by an international agency would be the potential contracts by states that depend on the unbiased opinion of such an agency.

The international body would need unfettered access to corporate contract details of member firms, including the authority to require inclusion of assurances to adhere to international humanitarian laws and laws of armed conflict. Although market sanctions would address violations of contract terms, the requirement for stronger censure must be met for violations of the international laws. Such sanctions could, and should, include options for extradition of employees accused of violations and agreement to be subject to jurisdictional powers of legal forums such as the International Criminal Court.

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<sup>82</sup> Kinsey, “Challenging International Law ...,” p. 291.

Ambiguous jurisdiction and accountability in conflict zones, coupled with minimal international regulation, poses a challenge for accountability. Yet, the matter of transnational response to abuses and improper conduct is essential to span the multinational characteristic of the PMSC industry.

Since PMSC are incorporated entities it falls on states to set the standards of their incorporation and employment. The US has developed a licensing regimen that depends on the International Transfer of Arms Regulation (ITAR) to control PMSC service offerings. Even countries within conflict zones—Angola, Afghanistan, and Iraq for example—have had limited success exerting control over PMSC within their borders.<sup>83</sup> Western states may set thresholds (e.g., contract values) to ensure regulatory influence, however PMSC circumvent these caveats by parceling and dividing contracts to avoid state regulation.

Singer observes that the complexity of any regulatory regime to oversee and sanction members of the PMSC industry is a disincentive for any international body to undertake the responsibility.<sup>84</sup> He further suggests proactive measures to include expansion of the mandate of the Special Rapporteur on Mercenarism to address the PMSC industry. Secondly, Singer proposes enhancement to national legal measures, such as more transparency in the US licensing process and tightening of loopholes that allow firms to avoid contract value-caps by splitting contracts into smaller values. Finally, more cooperation between leading developed states to harmonize their various national initiatives would build towards a stronger international regimen.

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<sup>83</sup> Renee de Nevers, "(Self) Regulating War?: Voluntary Regulation and the Private Security Industry," *Security Studies* Vol 18 Iss 3 (2009), p. 489.

<sup>84</sup> Singer, "War, Profits, and the Vacuum of Law ...," p. 547.

### *Self-Regulation as a Control*

Renee de Nevers argues that PMSC lack the incentive and capacity to create and maintain self-regulatory regimes.<sup>85</sup> External pressure is a pre-requisite to industry adoption of self-regulation. Such pressure may include any combination of government regulation, erosion of reputation, third party criticism, or even market preservation. Catalysts for self regulation include the threat of constraining government regulations, adoption of a community of fate, and/or incentives to develop a strong trade association. Lacking these, the private military and security industry has lacked sufficient incentive to effectively self-regulate. The propensity to develop aspirational self-regulation has gained traction with PMSC who want to garner the reputational benefits of adopting such business principles.

“Beyond compliance” constraints and voluntary subjugation by adherent parties form the two key components to any self-regulatory regime. The level of formality will depend on the interaction between the PMSC and the state. The history of self-regulation dates back more than two-thousand years to private maritime rules in the Mediterranean. Today engineers, doctors, and lawyers have formed and adhere to self-regulatory bodies. The adoption of self-regulation has been used as a defensive tactic of business to pre-empt government-imposed regulatory initiatives. Such pre-emptory action avoids top-down design and offers an opportunity to shape the regulation from the industry’s perspective. Additionally, self-regulation can assuage third-party stakeholder (e.g., citizens) attempts to see stricter regulatory controls implemented.

Second to the proactive defensive measures afforded by self-regulation, industries use regulatory codes to protect their reputation. Additionally, industries have used self-regulation to preserve market share through the control and restriction of new entrants.

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<sup>85</sup>de Nevers, “(Self) regulating War? ...,” p.481.

Business or industry associations act on behalf of the collective economic interests of their members. Two forms of association are highlighted by de Nevers namely representative and self-regulatory.<sup>86</sup> Representative associations focus mainly on lobbying activities whereas enforcement of standards and behavioural guidelines is the *raison d'être* of the self-regulatory association.

Four factors are attributed by de Nevers to account for the willingness of PMSC industry to adopt self-regulation as a “beyond compliance” approach.<sup>87</sup> First, flexibility is accommodated as knowledge and technology improves, thus giving the industry ability to determine policy, procedures, and standards. Second, the industry’s expertise allows them to better address specific regulatory needs when outside agents may not understand intricacies of the group. Third, internal-to-industry audits are less threatening to the group and protection is afforded for proprietary and sensitive business data. Finally, the acceptance of the self-regulatory regimen by governments confers legitimacy and authority on the industry as a whole and the regulatory body specifically.

The government also sees benefit in allowing self-regulation. Primarily, PMSC voluntarily accept self-imposed constraints. Secondly, finding themselves under competing pressures from citizens demanding oversight and the costs associated with such monitoring, governments defer the cost of such oversight to the industry. Finally, as much of PMSC activity is transnational it is beneficial to the state that may be unable or unwilling to extend monitoring and enforcement outside its borders.

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<sup>86</sup> de Nevers, “(Self) Regulating War? ...,” p. 495.

<sup>87</sup> de Nevers, “(Self) Regulating War? ...,” p. 496.

As pointed out by de Nevers, there are drawbacks to self-regulation.<sup>88</sup> Companies can avoid government regulation by free-riding on the voluntary self-regulatory model and not actually participate in the industry association. Also, when profit is in competition with compliance the industry is less likely to adopt voluntary regulation and constraints that threaten profit maximization. Finally, self-regulation developed without input from or visibility by external stakeholders (e.g., citizens or NGO) can be regarded as non-democratic and have reduced transparency, and therefore foster distrust of the regulatory regime itself.

Aspirational and obligatory codes of conduct represent two forms of voluntary self-regulation. Aspirational codes are often regarded as little more than public relations tools—simply meant to bolster or repair an industry’s image. Lacking any effective monitoring and enforcement program, aspirational codes tend to be limited to functions of educating industry outsiders or improving community relations.

Differing from aspirational codes, because of their verification and enforcement mechanism, the obligatory codes have a demonstrable effect on activities of member companies. The goal of obligatory codes is to change members’ behaviour in spite of their voluntary adoption.

Factors differentiating obligatory codes include information, monitoring, and sanctions. Effective obligatory codes disseminate clear information on standards but more importantly require timely and accurate reporting by firms to confirm compliance. Monitoring is usually internal to the industry association but may allow for external stakeholder review. The existence of sanctions is a key aspect of the obligatory code of conduct and may involve punitive actions

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<sup>88</sup> de Nevers, “(Self) Regulating War? ...,” p. 497.

including fines, censure and/or expulsion, and even deferment to state and international regulatory agencies.

Three aspects of industry codes of conduct are noted by de Nevers.<sup>89</sup> Information is key for the assurance of compliance. Although it does not have to be public, it is essential that the industry's association has unfettered access and ability to monitor PMSC activities. Second, industries have limited capability to impose sanctions and punishments—especially when states have strong anti-trust laws, as in the US where punitive powers of industry associations are restricted. In effect, the only sanctions available to industry associations are limited to expulsion, peer pressure, and shaming. Third, although aspirational codes are considered weaker than obligatory ones they still do have impact. Outside stakeholders, such as human rights groups and democratic watchdogs, have successfully leveraged corporate pledges and ideals to improve behaviour and actions—for example, labour and workplace conditions.

A number of factors contribute to industry adoption of obligatory self-regulation. Defensive and reputational pressures often spur industry to adopt codes of conduct. If governments or outside groups grow concerned that an industry is failing to control its actions, or is in crisis, they may propose or enact regulations that ultimately would be stronger, and more restrictive, than the industry would want. Likewise, the outcome of a significant event, such as Abu Ghraib (2004) or Nisoor Square (2007) could have a negative impact on the industry's reputations.

De Nevers is of the opinion that the threat of strong government regulation (at least in the US) is negligible. However, the reputational impacts of critical events have encouraged industry-

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<sup>89</sup> De Nevers, "(Self) regulating War? ...," 2009, p.499.



lead (e.g., IPOA, BAPSC) initiatives to separate the *good* from the *bad*. The reputational impact of incidents such as Abu Ghraib, Fallujah, and Nisoor Square resulted in an increase in media attention between 2004 and 2007. Industry attention and action to create self-governance for its members received impetus. The question arises as to what success.

In the case of Nisoor Square, IPOA attempted to enforce its industry code and open an investigation into the conduct of Blackwater to determine if there were violations of the code of conduct. Within a month of the IPOA action Blackwater withdrew from the association. Further, the US government indicated a lukewarm attitude to the gravity of the situation when it renewed the company's contract for services the following year. It was only when the Iraqi government denied Blackwater a business license that there was any apparent action taken to address the company's behaviour or reputation. The has lead de Nevers to suggest that the waning media attention and tepid adherence to the voluntary industry code were of limited impact on the behaviour of a company suspected of bad behaviour in relation to the code of conduct. Additionally, the Western government showed little interest in stepping in with state-lead sanctions or more robust regulation.<sup>90</sup> The conclusion made by de Nevers is that the industry lacks a sufficiently strong sense of community of fate to induce it to develop and impose a strong code of conduct.

Although there has been limited success in the creation and enforcement of industry self-regulation, de Nevers does not dismiss its value nor its potential as an effective control mechanism. The aspirational nature of the PMSC self-regulatory initiatives have had limited effect mainly because the industry lacks a sense of being a community of fate. However, self-regulatory initiatives can enhance state-level regulations. The reputational protections afforded

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<sup>90</sup> de Nevers, "(Self) regulating War? ...," 2009, p.509.

from industry codes can be of value to its members. Further, governments can use elements of codes of conduct in contracts. Finally, the attention of state lawmakers and the specter of additional, and possibly more restrictive, regulation can act as encouragement for the industry to adopt and adhere to a voluntary code before a state regulation is imposed.

### ***The Montreux Document – A Guiding Light***

The *Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*<sup>91</sup> (Montreux Document) is an initiative of the Swiss Federal Department of Foreign Affairs (FDFA) in cooperation with the International Committee of the Red Cross (ICRC) that was drafted in late 2005 and received endorsement from 17 states on 18 September 2008.<sup>92</sup> Drawing guidance from multiple sources, including the ICRC Study on Customary International Humanitarian Law, the Geneva Conventions, the UN Code of Conduct from Law Enforcement Officials, and the European Union’s Arms Export Code to name a few.<sup>93</sup> Additionally, the initiative draws from industry standards, codes, and practices such as the IPOA Code of Conduct, the Sarajevo Code of Conduct and Client Procurement Guidelines, and others. Cockayne suggests that it is regarded as one of the clearest statements of legal norms and standards of conduct to be published to date.

James Cockayne identifies five significant features of the document in his analysis.<sup>94</sup> First, it represents a very public reaffirmation by numerous states—including the US, UK, and other Western states—of the applicability of extant International Humanitarian Law (IHL).

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<sup>91</sup> The Montreux Document is available at <http://www.eda.admin.ch/psc>.

<sup>92</sup> James Cockayne, “Regulating Private Military and Security Companies: The Content, Negotiation, Weakness and Promise of the Montreux Document,” *Journal of Conflict & Security Law*, v 13 n 3 (2009): 401-402.

<sup>93</sup> *Ibid.*, 402.

<sup>94</sup> *Ibid.*, 403-404.

Second, the Montreux Document repudiates the opinion that PMSC operate in a legal vacuum—indeed, the Part One of the document identifies the hard legal requirement for states to adhere to IHL and protect human rights. Third, it identifies common ground for states relating to the governing of extraterritorial activities of PMSC. Fourth, the Montreux Document details seventy-three ‘good practices’ addressing such issues as use of force, direct engagement in hostilities, immunity in foreign jurisdictions, and vetting employees. Finally, the document highlights a dichotomy between a state-based approach and industry-led approach to international regulation initiatives.

Part one of the Montreux Document stipulates the state’s responsibility to adhere to hard law including IHL, human rights laws, and customary international and treaty laws with respect to the PMSC that are contracted by the state or resident in the borders of the state. The state is held responsible to ensure that employees of PMSC are trained and aware of their obligations. States are further responsible to take punitive measures when violations of the hard laws are violated and likewise the state is responsible for reparations when actions of PMSC employees violate IHL and human rights laws and their actions are attributable to the state. The PMSC employees are also obligated by the Montreux Document to observe and adhere to IHL, national and international laws, and are subject to prosecution if they commit crimes in contravention to these laws. Additionally, employees are afforded protections as civilians under IHL and in certain instances may have status as prisoners of war.

Part two of the Montreux Document promotes responsible conduct between states and PMSC and provides a description of ‘good practices’ that ensure respect for IHL and human rights laws. However, in the introduction the document stipulates that the list of good practices is

neither exhaustive nor legally binding on states nor PMSC.<sup>95</sup> States are encouraged to consider the impact of PMSC participating directly in hostilities and to ensure regulations are in place for export of weapons and ammunition. Additionally, states are advised to ensure transparency including practices regarding reporting to legislators, aggregation of incident reports and data, and publication of fees and contract awards.<sup>96</sup> Examination and review of past conduct of PMSC, and flow-through provisions in contracts for sub-contracting are recommended as good practices. These and numerous other good practices are contained in the Montreux Document,

Cockayne offers criticisms of the Montreux Document. Three weaknesses include: the document is unwieldy for PMSC to use as a guide, the standards of due diligence on the part of states and corporations need to be further developed, and remedial arrangements stipulated in the document require further development including a mechanism and guidance on responding to victims complaints.<sup>97</sup> Cockayne cautions that the Montreux Document could be used as a “... fig-leaf to hide the absence of more rigorous efforts to regulate [the PMSC] industry.”<sup>98</sup> In spite of criticisms, the Montreux document provides a good guide for states to further develop regulatory arrangements.

The Montreux Document provides states and PMSC with a guiding light towards a better regimen of control and responsibility. However, it is not a solution in and of itself. The fact that numerous nations have endorsed the document, and various non-government and private agents have been involved in its development bodes well for a future where the state can depend on

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<sup>95</sup> ICRC, *The Montreux Document*, 16.

<sup>96</sup> Cockayne, “Regulating Private Military and Security Companies...,” 413.

<sup>97</sup> *Ibid.*, 427.

<sup>98</sup> *Ibid.*, 428.

good conduct by non-state agents in the employment of violence but there is more work to be done.

### *A Combined Response to Regulation*

Each of the regulatory regimes addressed above have creative and positive aspects that will ensure the responsible use of force in the guarding of peace. However, no one approach will ultimately be the panacea. Industry-lead standards and controls with influence from the market will pressure non-conformists to address their internal workings. National regulations will control the incorporation and business operations of the PMSC within borders. And international law, with attention to initiatives as those in the Montreux Document, will improve with adaptation to a new reality that force is not solely available from the state but ultimately must remain within its control.

## **Chapter 5 – Conclusion**

Examination of the PMSC industry and its impact on the state's control of force, and ultimately violence, has come to the conclusion that regulatory regimes are available for responsible control. The growth of the PMSC industry is not expect to reverse—governments will not likely see a resurgence of public funding of the massive standing armies of the Cold War era. Western governments will continue to feel pressure to reduce spending and will continue to *rationalize* their dependence on standing military forces. However, the importance of controlling the state's use of force remains a keystone to the state's existence.

There remains a need for standing military forces—all cannot be outsourced. However, the PMSC industry has a valuable role to play in extending the Western state's reach when required. The issue remains that such extension must still adhere to International Humanitarian Law, Customary International Laws, and human rights. The development of a stronger, more inclusive regulatory regime is necessary to ensure such controls are in place. Much of this can be addressed through inclusive definitions at national and international levels. Codes of conduct provide standards but lack enforceability.

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