

PRIVATE MILITARY COMPANIES AND STATE SOVEREIGNTY: AN
ENGLISH SCHOOL APPROACH TO REGULATION AND ITS
CONSEQUENCES

by

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DALHOUSIE UNIVERSITY
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Dedication Page

I would like to dedicate this to my parents, teachers and professors, who gave me the requisite tools and a lasting impression to accomplish this study.

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ABSTRACT

The growth and prevalence of the private military industry has led many to conclude that the state has outsourced one of its core functions: public security. As a global non-state actor, PMSCs pose a risk to state sovereignty by undermining the democratic legitimacy of armed forces and challenging the states international monopoly over force. This study, using the tripartite model in English school theory, refutes this commonly held belief by examining the regulatory methods that have brought PMSCs squarely under state control. This study organizes regulatory efforts in a three level concept of national, international and self-regulatory methods, and based on the increased national regulatory methods, mixed with international norms and weak self-regulation, concludes that states maintain their primacy over violence in world politics.

LIST OF ABBREVIATIONS USED

| | |
|-------|---|
| AECA | Arms Export and Control Act |
| BAPSC | British Association of Private Security Companies |
| CAR | Correcrive Action Request |
| CEJA | Civilian Extraterritorial Jurisdiction Act |
| DCAF | Democratic Control of Armed Forces |
| DCMA | Defence Contract Management Agency |
| DCMA | Defence Contract Management Agency |
| DFARS | Defence Federal Acquisition Regulation Supplement |
| DOD | Department of Defense |
| DOS | Department of State |
| DTCA | Defence Trade Controls Act |
| FMAA | Foreign Military Assistance Act |
| FOB | Forward Operating Base |
| HNC | Host Country Nationals |
| ICRC | International Committee of the Red Cross |
| IHL | International Humanitarian Law |
| ILC | International Law Commission |
| IPOA | International Peace Operations Association |
| ISOA | International Stability Operations Association |
| ITAR | International Traffic in Arms Regulations |
| KBR | Kellogg Brown & Root |
| LIC | Low Intensity Conflict |
| MEJA | Military Extraterritorial Jurisdiction Act |
| MNC | Multinational Corporation |
| MOD | Ministry of Defence |
| MPRI | Military Professional Resources Inc. |
| NATO | North Atlantic Treaty Organization |
| NCACC | National Conventional Arms Control Committee |
| PMI | Private Military Industry |
| PMSC | Private Military/Security Company |
| PSCAI | Private Security Company Association of Iraq |
| POW | Prisoner of War |
| R2 | Reflex Responses |
| RUF | Revolutionary United Front |
| TNC | Transnational Organizations |
| UCMJ | Uniform Code of Military Justice |
| UN | United Nations |

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CHAPTER 1 Introduction

The institution of violence, long heralded as the foundation of state sovereignty, is being systematically outsourced. Beginning with the Clinton administration, and often traced as far back as the Vietnam War,¹ government positions have been purposefully replaced by private industry. This is a remarkable transformation;² the application of military force, while arguably losing some of its effectiveness with the advent of increasingly destructive weaponry, has nevertheless been consistently used as a means of statecraft. The 1990's were a pivotal changing point for many Western powers, it was an era marked by extensive budget cuts and the demobilization of a sizable number of military professionals, creating a surplus of unemployed or underemployed military personnel. Meanwhile, the post-Cold War era left many states without the support from either of the two major powers. Communist Russia had lost the material means to support their periphery, while the Americans had lost their core interest to do so (oppose communism). Consequently, many smaller states fell into turmoil, while the collapse of Soviet Russia flooded the black market with cheap small arms. As states across the world sought outside assistance from internal conflict, Western powers and international regimes were called upon to intervene. In places such as Somalia, Haiti and in the Balkans, Western military forces were stretched thin as they coped with the coinciding budgetary cuts. Not coincidentally, one of history's oldest professions, mercenarism,

¹ Dickinson, L. (2011). *Outsourcing war and peace: Preserving public values in a world of privatized foreign affairs*. Conn.: Yale University Press.

² See Creveld, M. (1991). *The transformation of war*. New York: The Free Press, for the early analysis on this transformation. In a rather prescient prediction, he states that "in the future, war will not be waged by armies but by groups who we today call terrorists, guerrillas, bandits and robbers, but who will undoubtedly hit on more formal titles to describe themselves" (p. 197).

resurfaced to fill in this capability gap, taking advantage of the surplus of well qualified military personnel and the spread of Low Intensity Conflict (LIC) throughout the world.³ But these mercenaries were not the mercenaries of lore – these were highly organized, structured, and registered companies operating in some of the most volatile LICs in the world. While medieval mercenaries were loosely affiliated individuals who fought for those with the deepest wallet, these new mercenaries had a “distinctive corporate character.”⁴ Under the label of Private Military/Security Companies (PMSCs)⁵, they hoped to shake the long established distrust and distaste for mercenarism.⁶ Early companies, such as Executive Outcomes and its sister company Sandline International, offered “highly professional and confidential military advisory service to legitimate governments”.⁷ Few could predict they would be the prelude to one of the biggest transformations in international and military affairs in the 21st century.

When the United States mobilized for Operation Enduring and Iraqi Freedom, it brought with them a sizable coalition of forces. This is not in reference to the ‘coalition of the willing,’ however – this is in reference to the roughly 150,000 contractors from a

³ “In the twenty-first century, most “wars” occur within, rather than between states, and many combatants do not wear uniforms. Of 226 significant armed conflicts between 1945 and 2002, less than half in the 1950’s were fought between states and armed groups. By the 1990’s, such conflicts were the dominant form.” Nye, Joseph (2010). *Is Military Power Becoming Obsolete?* Retrieved from www.project-syndicate.org.

⁴ Shearer, D. (1998). Private armies and military intervention. *Adelphi Papers*, 38 (316), p.2.

⁵ For the purposes of this paper, PMCs, PSCs, and PMFs will be synonymous unless directly stated otherwise. The bulking together of these companies is indeed a problem in itself, which will be addressed in chapter two, but for the ease of reading, PMSCs will be the primary label used.

⁶ This distaste can be traced as far back as Nicolo Machiavelli, who is quoted as saying “Mercenaries and auxiliaries are useless and dangerous; and if one holds his state based on these arms, he will stand neither firm nor safe; for they are disunited, ambitious and without discipline, unfaithful, valiant before friends, cowardly before enemies; they have neither the fear of God nor fidelity to men, and destruction is deferred only so long as the attack is; for in peace one is robbed by them, and in war by the enemy.” Machiavelli, N. (1515). *The Prince*. (W.K Marriot, Trans.). Available at www.constitution.org/mac/prince00.htm.

⁷ This was Executive Outcomes mission statement on their now offline corporate website. They also offered “Clandestine warfare, combat, air patrol, armoured warfare, basic and advanced battle handling, and sniper training”. See Dokubo, C. (2000). 'An Army for rent', private military corporations and civil conflicts in Africa: The case of Sierra Leone. *Civil Wars*, 3, 2, 51-64, p.58.

wide variety of businesses who were employed by the US government to support their contingency operations.⁸ Companies such as Amec, Aegis, Blackwater, Erynis, Armourgroup, Halliburton, KBR, Dyncorp, Triple Canopy, MPRI (to name but a few) have become synonymous with American military power. In order to fight these new counter-insurgency operations, the Department of Defense (DOD) had to work in close collaboration with a number of other government agencies, particularly the Department of State (DOS) and the United States Agency for International Development (USAID). Contractors became a necessary element in this total force application, providing valuable skills and specialization to the battlefield.⁹ The oft cited ratios between state representatives and contractors are perhaps more telling than the total number alone: in Iraq, the estimated force distribution reached parity between public and private forces; in Afghanistan, an unprecedented 1.43 contractors for each government military personnel. By comparison, in Vietnam the ratio stood at a modest 1:55.¹⁰ While most associate PMSCs with armed security personnel, not all contracting companies are the same; the majority of these individuals consist of unarmed logistics and support services, operating convoy or canteen operations.¹¹ For example, as of March 2011, the DOD estimates

⁸ The number of contractors has greatly fluctuated over the course of the contingency operations. “According to DOD, as of March 31, 2011, there were approximately 174,000 DOD contractor personnel in the CENTCOM AOR compared to approximately 214,000 uniformed personnel in the region who are supporting operations in Afghanistan and Iraq.” Schwartz, M. & Swain, J.. (2011). Department of Defense contractors in Afghanistan and Iraq: Background and analysis. *Congressional Research Service* (7-5700, R40764).

⁹ Cotton et. al. (2010) *Hired guns: Views about armed contractors in Operation Iraqi Freedom*. RAND National Security Research Division. Santa Monica: RAND Corporation.

¹⁰ Hammes, T.X. (2010). *Private Contractors in Conflict Zones: The Good, the Bad and the Strategic Impact*. Strategic Forum: National Defense University, 260. An important consideration with these numbers is that, for the most part, accurate tallies are difficult to achieve. Many of the contractors subcontract their work to local forces, or other third country nationals. The Department of Defense and State have been working to get these numbers more accurately assessed.

¹¹ This is not to say that this is not important. Convoy operations in most any combat environment are highly risky; the point here is that contractors, while often put under one umbrella, have significantly varying roles to fill.

12,743 security (i.e. armed) personnel operating in their Iraqi Area of Responsibility (AOR).¹² In monetary terms, the industry is a multi-billion dollar business; in fiscal year 2010, the US DOD had awarded \$414 billion in contract obligations for contingency operations.¹³ While the majority of this spending is earmarked for Afghanistan and Iraq, a substantial amount (\$18 billion), was awarded in other overseas contracts.¹⁴ Needless to say, the role occupied by contractors in contingency operations is a significant development, particularly when we consider that they outnumber both US government personnel (in Afghanistan at least) and allies supporting the operations. Correspondingly, the United States, the leading home and consumer of military contractors, has established new contracting guidelines for agencies such as the DOD and the DOS to improve oversight and accountability. Meanwhile, bi-partisan committees, such as the Commission on Wartime Contracting, have been mandated to conceptualize the impact these contractors have on how war is conducted, particularly in terms of costs. Likewise, international bodies such as the United Nations (UN) and the International Committee of the Red Cross (ICRC) have sought to place a working framework for how to contain yet include PMSCs into the international arena, as industry leaders establish working codes of conduct and standards through their own independent organizations.

While US agencies, international bodies, and industry associations have been working to establish a proper role for PMSCs, scholars have likewise been busy conceptualizing how these companies affect traditional understanding of state

¹² US Government (2011) “Contractor Support of U.S. Operations in USCENTCOM Area of Responsibility, Iraq and Afghanistan” Department of Defence.

¹³This is up from \$165 billion in 1999. Schwartz, M. & Swain, J. (2011). Department of Defense trends in overseas contract obligations. *Congressional Research Service* (7-5700, R41820).

¹⁴ Ibid. An interesting note is that Canada is the fourth largest recipient, receiving \$2.9 billion.

sovereignty, civil-military relations and international law. While closely interrelated to one another, the apparent loss of the ‘monopoly of force’ by the state has been a key focus for many. Many contend that one of the founding principles of a state’s purpose is security; this has been echoed by theorists such as Charles Tilly, who asserted that states are forged and formed by security provisions.¹⁵ The possibility of a post-Weberian model of international relations is embodied by these PMSCs, as states delegate wartime responsibilities to global non-state actors. Despite growing literature on globalization and the effects of non-state actors, state centrality continues to be a founding principle in international relations. Even within the dichotomous relationship between liberalism and realism, they both assume strong tendencies toward state centrality, particularly in terms of the use of force. Some have argued that mercenaries represent the pinnacle of the neoliberal trend of privatizing any service that is not considered a core component of government powers; some have argued that indeed, PMSCs represent the step too far.¹⁶ Granted that certain contras, rebellions and other revolutionary actors have posed an existential threat to individual states during times of turmoil, PMSCs represent a new phase of the privatization of violence. This is the first time in the Westphalian period where states have consciously delegated the use of force to non-state actors who are responsible primarily to market forces, thereby externalizing one of the state’s core responsibilities. Certainly, the extent of their deployment in Iraq and Afghanistan warrants the claim that states are simply “outsourcing war.”¹⁷

¹⁵ Mandel, R. (2002). *Armies Without States*. London: Lynne Rienner Publishers

¹⁶ See Singer, P.W. (2003). *Corporate Warriors: The Rise of the Privatized Military Industry*. Ithaca: Cornell University Press; The Commission on Wartime Contracting also held multiple hearings on this exact question of what constitutes “inherently governmental functions”, with a variety of responses.

¹⁷ Shearer, D. (1998). Outsourcing War. *Foreign Policy*, 112, 68-81.

This state of affairs surely lends itself to such an attack – echoing calls made by Susan Strange almost a decade earlier on what appears to be a ‘retreat of the state’.¹⁸ However, this study will argue is that the concept of PMSCs as inherently antithetical to state centricity is overstated. Both historic and recent developments have reasserted the dominance of the state in terms of ‘outsourcing war’. In light of this attack, the main purpose of this study is to argue that PMSCs are a tool of the state, and have not served to undermine both the legitimate use of force in the international system, along with the dominant perspective of state centricity in international relations. This paper will demonstrate that PMSCs do in fact reside in a difficult gray area of conceptualization in international relations, but they are nevertheless, pending the direction of insourcing and regulation, compatible with the state centric model.

To this end, this paper will employ a unique, pluralistic model of international relations theory: the English school triad. The pluralistic approach will allow for the necessary level of flexibility in methodology to accommodate what are essentially state sponsored non-state actors that can (and have) fluctuated in terms of their loyalty to the state and the regulatory methods which put them under state control. The triad model in the English school is divided into three distinct but sometimes overlapping traditions: international system, international society and world society. In evidential terms, this paper will argue that PMSCs have characteristics that reside in the world society theoretical concept, but through both national and international regulatory controls, PMSCs do not undermine state centricity in international relations. Like the rules governing the anarchy of international society, there are hard and soft ‘rules’ that PMSCs

¹⁸ Strange, S. 1996. *The Retreat of the State*. Cambridge: Cambridge University Press.

must operate under, which makes them controlled agents working in a state centric framework. Interestingly, it can be observed that each division within the triad is conceptually at odds, yet paradoxically congruent with the one another, as each pulls the other for control in terms of regulation. What has been missing within academic literature is an attempt to provide an overarching model that can place these entities within current international theoretically frameworks – particularly in terms of international relations theory; this paper will attempt to fill this gap. The English school triad, which allows for each school of thought to fluctuate in dominance,¹⁹ reflects the dynamic characteristics of the market of force, and allows for a better explanation of where to place PMSCs in this new political landscape. In using English school theory, the attempt is to escape the either/or approach and provide a more dynamic perspective on the effects of PMSCs and their relationship with the state. This study will thus have two objectives: the first is to establish a working framework for an English school interpretation of the role of PMSCs in international relations; the second is to use this theory to analyze current regulation trends, and based on this multi-layered approach, demonstrate that PMSCs are not a threat to state sovereignty.

Certain limitations must be placed in order to qualify this research. First of all, in order to narrow the geographical focus, this study will focus primarily on the United States, United Kingdom and South Africa; these three countries represent the largest client and home nation for PMSCs.²⁰ Secondly, it will be limited to what Herbert Wulf

¹⁹ Bull, H. (1995). *The Anarchical Society: A Study of Order in World Politic*, 2nd Ed. New York: Columbia University Press.

²⁰ Avant, D. (2005). *Market for Force: The Consequences of Privatizing Security*. New York: Cambridge University Press, p.145.

calls top-down privatization, as opposed to bottom-up privatization.²¹ The former is “purposely planned and implemented by governments”;²² whereas the latter is better termed as Violent Non-State Actors (VNSA’s)²³ who go against the state for political or economic gain (this tends to be revolutionary rebels or non-incorporated, loosely affiliated individuals). This includes certain security oligarchs such as warlords. The distinction is contentious as the difference between one to the other may sometimes overlap – a similar argument presented by Peter Singer in his analysis of the certain divisions and cross-cutting within the industry.²⁴ Nevertheless, this helps to conceptualize the lofty term Private Military Industry (PMI) within a more manageable context.

This study is organized as follows: Chapter Two will review current literature on what constitutes the conventional wisdom on the public versus private debate on military affairs. Although far from a consensus, there tends to be a focus on the illegitimate, unaccountable, and detrimental impact these contractors have had on international relations. This chapter will seek to ascertain where these scholars draw their criticism to address them in later chapters, and what factors are attributed to the loss of state control and the hurdles of regulation. There is an emphasis on the debate that these companies operate in a legal vacuum and have no moral attachment to the state, which would associate closer to the world society concept. This study also discusses the problem of

²¹ Wulf, H. (2008). Privatization of security, international interventions and the democratic control of armed forces. In Alexandra et. al. (Eds.), *Private military and security companies: Ethics, policies and civil-military relations* (pp. 191-202). New York: Routledge Military Studies.

²² Ibid. p.192.

²³ Mulaj, K. (ed.) (2010) *Violent Non-State Actors in World Politics*. New York: Columbia University Press

²⁴ Singer, P.W. (2003).

creating a typology for this field; along with effect these companies have on civil-military relations which contribute to the loss of state control.

Chapter Three will briefly introduce the English school approach to international relations. While the English School has been commonly held as a “marginal and traditional body of IR theory,”²⁵ it will be argued that this approach can give us valuable insight and models to conceptualize the impact of PMSCs and where they can be best placed in international politics. This will include an introduction of the three concepts, along with the advantages and limitation of such a model. This section will also discuss the mainstay of the approach, international society, and how these norms are important when considering the control of force by PMSCs, along with an analysis of the position of non-state actors in the world society tradition. Chapter Three will focus on Hedley Bull’s position on the decline of the state as laid out in The Anarchical Society and the reinterpretation of world society by Barry Buzan; this will introduce how to place the multi-tiered regulation for PMSCs into the broader framework in Chapter Four.

Chapter Four will demonstrate how PMSCs occupy, simultaneously, all three concepts of thought to varying degrees. What will be demonstrated here is what would be anticipated if they did indeed fully subscribe to a post-state like agenda, along with the growing regulatory methods that have kept forced them into the state centric model. If it is indeed true that PMSCs are post-Weberian, we should expect to see them come more closely in line with characteristics associated with the world society concept. In relation to this, this chapter will demonstrate how they fit within the international system and

²⁵Buzan, B. (2004). *From international to world society? English school theory and the social structure of globalisation*. Cambridge: Cambridge University Press, p.3.

international society constructs, along with a defence of the state centric approach. Certain national and international regulations have been introduced in recent years to bring these companies under the responsibility of the state, along with establishing concurrent norms to maintain them within the state-centric control. Interestingly, each level of regulation may be in contention with one another, which may lead to further unaccountability if they are established in conflict with one another. This chapter will introduce, in depth, some of the legislation which has come into effect which can hold contractors to account to the public body. This chapter will also introduce the effects of internal codes of conduct and industry standards such as the International Stability Operations Associations (ISOA), along with the growing trend toward insourcing by the US DOD following the drawdown in Iraq and Afghanistan. Both of these trends will have severe consequences on the industry in terms of state control and centrality.

The final chapter will conclude with the importance of keeping these companies within the control of state power, and the possibility of losing them within the nebulous of power decentralization. Following the withdrawal of coalition forces in Iraq and Afghanistan, there is a possibility that these companies will lose the congressional and international attention that has recently been attached to them – this could have detrimental impact for an industry that has no sign of dissipating. This chapter will also include an avenue for further research using this method of analysis, and the importance of conceptualizing the PMI as such for future research models.

CHAPTER 2 LITERATURE REVIEW

2.1 Flashpoints in PMSC history

Over the course of the past two decades, and in response to the exponential growth of the private military industry (PMI), PMSCs have attracted a great deal of attention from a wide variety of perspectives. The early literature published on this topic consisted of a modest handful of articles attempting to classify and publicize the role of mercenaries in world politics, with a particular focus on their role in Africa.²⁶ Following the terrorist attacks in 2001 and a number of high profile incidents involving PMSCs in Iraq and Afghanistan, academic, media, and governmental attention on the rise and use of PMSCs flourished; a myriad of interdisciplinary writings appeared, going in depth on a wide range of topics from international law, government acquisition procedures, democratic legitimacy, and moral philosophy. Particular focus centred around PMSC control and regulation. In December of 2006, the Coalition Provisional Authority issued an (infamous) memorandum on PMSCs operating in Iraq. Order 17, as it is commonly known, granted apparent immunity to any foreign contractors operating in the US Iraqi Area of Responsibility (AOR).²⁷ As stated in the Section 4 (3) of the Order, “Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant

²⁶ More specifically, most scholars focused on the role of Executive Outcomes and stabilization operations. See Francis, D. (1999). Mercenary intervention in Sierra Leone: providing national security or international exploitation? *Third World Quarterly - Journal of Emerging Areas*, 20 (2), pp. 319-338 and Howe, H. M. (1998). Private Security Forces and African Stability: the Case of Executive Outcomes. *The Journal of modern African studies* 36 (2), pp. 307-331.

²⁷ Isenberg, D. (2009) disagrees with this assertion; referring to the other provisions and limitations within the document that contractors are subject.

to the terms and conditions of a Contract or any sub-contract thereto.”²⁸ Despite the fact that Order 17 designates responsibility to the sending state in terms of detainment, and outlines the contractors’ responsibility to respect all relevant Iraqi laws, Order 17 became the focal point on the problem with PMSCs deployed abroad: PMSCs apparently operated with impunity, conducting their affairs with little to no accountability or oversight mechanism. In September of 2007, one of the most notorious (yet effective) companies, Blackwater Worldwide,²⁹ was embroiled in a shooting incident in Nisour Square, killing some 14 Iraqi civilians in what appeared to be an unprovoked attack.³⁰ While the role of contractors in Iraq had already been seared in stone after the killing and mutilation of four Blackwater contractors in Fallujah,³¹ the Nisour Square incident further complicated the tenuous relationship with the local government and led to calls for increased regulation and oversight. Meanwhile, the lack of accountability stretched thin civil-military relations in the United States, providing ample research for the effects of contractors on strategic military affairs. Questions about state sovereignty and democratic accountability took form as academics and policy makers came to grips with the impact and scope of the industry. As Small concludes, “the de-monopolization of violence contains inherent dangers with regards to excess, lack of transparency, lack of accountability, and ultimately lack of control.”³² The problems Small discerns are part of

²⁸ Coalition Provisional Authority (2006, revised), *Order Number 17*. Retrieved from www.iraqcoalition.org.

²⁹ Renamed Xe Services following the Nisour Square fallout.

³⁰ There are differing reports on the amount of civilians killed; Scahill, J. (2007). *Blackwater: The Rise of the World’s Most Powerful Mercenary Army*. New York: Nation Books, argues 17 killed and 20 wounded; Reuter’s reports 14 killed.

³¹ Scahill, J. (2008) asserts that the following violent occupation of Fallujah can be directly associated with the brutal killings of the contractors, demonstrating the intangible consequences contractors can have on the battlefield.

³² Small, M. (2006). Privatisation of security and military functions and the demise of the modern nation-state in Africa. *Accord*, 1 (2), pp. 3-44, p.28

the larger debate on how states are losing control of the use of force. The growing base of literature will be explored in this chapter, broken down into separate yet overlapping fields of study: the problems of creating a typology; why states choose to outsource; the civil-military problem they represent; and an overview of current regulations. Each section is based on the concept of state sovereignty from different angles, and will demonstrate the need for a unified theory.

2.2 Definitional Problems: Creating a Typology for PMSCs

While the impact PMSCs have on state sovereignty comes down to the debate on regulatory and control methods, another important aspect must be discussed. While this may appear on the surface to be a practice in semantics, the manner in which the industry is categorized, and where companies fit into this classification, is very important in understanding their impact. What exactly constitutes a PMSC? Do they have to carry arms? Are certain companies more likely to undermine state sovereignty? Some have claimed that the PMI is a definitional morass, as many have sought to assign the industry codification between those who are directly applying violence and those closer to the front line; while also delineating between local, national and international actors. The global nature of the industry is often associated with problems of transparency and state control. It is thus important to understand both the entity and the services that they supply. Not only will this provide an overview of the structure of the PMI, this section will also determine the problems of establishing a typology and the importance this has in terms of regulation and state sovereignty.

In P.W. Singer's *Corporate Warriors*,³³ he uses a rudimentary yet effective system to classify the industry as a whole, describing the industry in a spear-like formation. The manner in which he defines the industry became an important demarcation from earlier mercenary outfits. At the tip of the spear are (1) military provider firms. These companies directly implement and supervise military combat operations; arguably, the only examples of such companies are now defunct: both Executive Outcomes and Sandline International provided direct combat and stabilization operations to their clients, most notably in Angola, Sierra Leone and Papua New Guinea.³⁴ They boasted critical, timely assistance to governments in need or the ability to respond to a humanitarian crisis. For example, former Executive Outcomes Chief of Staff outlined a detailed operational procedure to provide military assistance to intervene during the Rwandan genocide.³⁵ However, the possibility of humanitarian intervention being conducted by PMSCs has run into a great deal of international resistance, and according to Leander can have destabilizing consequences on the host country because of the inherent dynamics of the market for force.³⁶ On the other hand, some hold that the possibility of a PMSC working under United Nations auspices for humanitarian interventions does have promising appeal.³⁷ Military provider firms have perhaps the most media fanfare and international focus, given the increased possibility of certain unlawful transgressions and human rights abuses. Singer contends that even those who

³³ (2003).

³⁴ This sentiment echoed by both Singer, P.W. (2003) and Isenberg, D. (2004), p.15.

³⁵ Groves, C. *Could Executive Outcomes have ended the 1994 Rwandan Genocide?* Memo to Doug Brooks, President of International Peace Operations Association. Retrieved from www.hoosier84.com/00-06eorwanda.pdf.

³⁶ Leander, A. (2005). The power to construct international security: On the significance of private military companies. *Millennium – Journal of International Studies*, 33, pp. 803-826.

³⁷ Wittels, S. (2010). From dogs of war to soldiers of peace: Evaluating private military and security companies as a civilian protection force. *Journal of Military and Strategic Studies*, 12 (3), pp. 130-182.

“claim to only be providing ‘security’ or guarding facilities... this security entails military style protection, from military threats in the midst of war.”³⁸ While Singer’s point is fruitful, it is perhaps unwarranted as there is a large discrepancy between static or mobile security providers, and offensive military operations. The PMSC’s presence alone is intended to ward off any would be aggressor, not to eradicate the aggressor to begin with. The nature of contingency operations means that PMSCs will have incidental contact with insurgents, but their role as an offensive fighting force has been thoroughly downplayed by the DOD.³⁹ In this sense, the PMI tends to get a bad name for itself, shaded by the previous generation of military provider firms such as Executive Outcomes. This category is perhaps the most likely to undermine the legitimate use of violence, given that they are typically armed, the most exposed, and working in direct contact with locals.

The second category is (2) military consultant firms; Singer places these companies as the connection between the front line and non-combat support. Companies such as Military Professional Resources Incorporated (MPRI), Dyncorp, Titan, and Vinell can be listed in this category as providing military advising and training. While this category does not get as much attention as the former, these companies have been the focus of some emerging literature and are an important actor in providing assistance overseas, along with power projection.⁴⁰ Their role in Colombia, for example, is a

³⁸ (2003), P.95

³⁹Lehnardt, C. (2007). Private military companies and state responsibility. In Chesterman, S. & Lehnardt, C (Eds.), *From mercenaries to market: The rise and regulation of private military companies* (pp. 139-157). Oxford: Oxford University Press, is referring to DOD Order 1100.22, section 4(a), which states “Consistent with Reference (a) and section 118(b) of Reference (h), the workforce of the Department of Defense shall be established to successfully execute Defense missions at a low to moderate level of risk.”

⁴⁰ Avant, D. (2005)

significant (if not underexplored) field of work.⁴¹ They can also have a profound impact on strategic situations, such as MPRI's involvement in the Balkans.⁴²

The final category, the (3) military support firm, runs logistics and base support operations. They are at the base of the spear and are hypothetically farthest from the 'front line'. The obvious problem with this is that modern warfare does not have any neat demarcation lines; the front line is more or less an imagined construct. Nevertheless, it is generally true that these companies run services such as convoys and base support in relatively safe areas. This is the least developed field in academic literature – but the most pertinent in terms of government attention as they receive the largest contracts. The US Commission on Wartime Contracting has held multiple hearings on the costs associated with this support industry. Many assert that the possibility of fraud is very high, given that the Government Accountability Office (GAO) is overstretched in terms of its contractor oversight division (or contracting officers).⁴³ The possibility of billions of dollars being lost to fraud and waste is not out of the realm of possibility,⁴⁴ and has been uncovered in cases such as Custer Battles' massive overbilling for some goods – up to as much as 400% for some contracts.⁴⁵ For the most part, the US False Claims Act has allowed for some meaningful avenue in correcting some of the problems with overbilling and fraudulent charges. For example, as of June 2011, DynCorp had refunded \$40.8

⁴¹ Boyson, M. (2007). Private military firms as instruments of U.S. foreign policy: The case of Colombia (Unpublished Master's Dissertation). Naval Postgraduate School, California. See also Spearin, D. (2003). Accountable to whom? An assessment of international private security companies in South America. *Civil Wars*, 6 (1), pp. 1-26.

⁴² Dinckinson, L. (2011).

⁴³ Commission on Wartime Contracting. (2009). *At what cost? Contingency contracting in Iraq and Afghanistan* (First Interim Report to Congress). Available from <http://www.wartimecontracting.gov/index.php/reports>

⁴⁴ Ibid.

⁴⁵ Isenberg, D. (2009).

million following US government auditing.⁴⁶ This is an important consideration for oversight mechanisms because, as identified by Feaver,⁴⁷ the possibility of a military being a threat to its society by draining valuable national resources is a very real possibility – and the same applies to PMSCs.

While this is the commonly held view of how the industry is divided, these three categories have stifling limitations. Many companies operate in all realms of the supply side of service and overlap categories, boasting total force provisions such as Blackwater's early business model.⁴⁸ There is also the problem of new firms which supply intelligence services;⁴⁹ their operations do not fit neatly into Singer's categories. Likewise, the aforementioned divide between defensive and offensive services is contentious, given that practically all contemporary companies supply only light-medium static or convoy security services. Even the role of Blackwater holding back a 'sizable offensive' of insurgents is most likely overstated.⁵⁰ Academics have spilled a great deal of ink by dissecting this typology even further, such as Allison Stanger's bid to limit the use of mobile security services,⁵¹ which allows scholars to define and divide these companies as it fits their argument. The frequent downplaying of the 'base of the spear' is also troublesome, since it "gives a misleading picture of their potential strategic and

⁴⁶ Capaccio, T. (2011). DynCorp had refunded money to U.S. for war work billings. *Bloomberg*. Retrieved from www.bloomberg.com. See also United States Government (2011) Department of Defense Report to Congress on Contracting Fraud, *Department of Defense*, which reports that so far 30 contractors were criminally convicted of fraud. Of these 30, 14 were debarred and 3 received suspensions.

⁴⁷ Feaver, P. D. (1996) "The Civil-Military Problematique: Huntington, Janowitz, and the question of Civilian Control". *Armed Forces and Society*, 23:2 (Winter), 149-178.

⁴⁸ Scahill, J. (2008)

⁴⁹ For an overview of this emerging trend, see Voelz, G. J (2009). "Contractors and Intelligence: The Private Sector in the Intelligence Community" *International Journal of Intelligence and Counterintelligence*, No. 22, 586-613.

⁵⁰ Isenberg, D. (2004). *A fistful of contractors: The case for a pragmatic assessment of private military companies in Iraq*. London: British-American Security Information Council

⁵¹ *Are private security contractors performing inherently governmental functions? Hearing before the Commission on Wartime Contracting*, Bi-partisan committee, 111th Cong. (2010)

tactical influence, since the provision of training or technical advice can have an extremely significant impact on hostilities.”⁵² Moreover, these divisions do not speak to who is operating within the companies. Employing local nationals has proven difficult, as the Afghani case well illustrates.⁵³ The multifaceted nature of the PMSCs makes regulation and state control that much more complex; this is why O’Brien has argued that regulation must focus on the activity, and not the entity.⁵⁴ Those who provide direct combat assistance are often the main focus, but as illustrated here the entire industry needs to be taken into account when discussing matters of sovereignty. While it is very important to understand the different categories within the industry, this study will instead take a simplified aggregate view of the industry, and consider the overall effect of privatizing military services. The multilayered structure of the PMI has so far avoided a solid typology, and the resulting complexity has led many to conclude that there is little hope in regulating this industry properly and keeping them within state control.

2.3 Why do States Outsource Military Services?

One of the most fundamental questions one can ask is: why do states turn to the private sector to supply goods? While most would infer (or hope) that the rationale behind privatization military services would be grounded in quantitative cost-benefit analysis, this has not really been the case. Rather, the motivation to privatize has been attributed to a number of less grounded factors. Some have associated the drive to

⁵² Gillard, E. (2006). Business goes to war: Private military/security companies and international humanitarian law. *International review of the Red Cross*, 88 (863), pp. 525-572, p. 529.

⁵³ Gopal, A. (2010, Oct 28) Private security companies undermine Afghan security. *The Christian Science Monitor*. Retrieved from www.csmonitor.com.

⁵⁴ O, Brien, K.A (2007). What should and should not be regulated. In Chesterman, S. & Lehnardt, C (Eds.), *From mercenaries to market: The rise and regulation of private military companies* (pp. 29-49). Oxford: Oxford University Press.

privatize as predominantly ideological,⁵⁵ drawing from neoliberal principles. The common perception wherein government is ineffective and inefficient drove a top-down restructuring of agencies to outsource what was considered non-core government work. While the Clinton administration did its part in setting the stage for this process, it was Donald Rumsfeld's dramatic speech to the Pentagon on September 10, 2001, which truly pushed this ideology forward.⁵⁶ With this approach being pressured from above, it is no surprise that it was during Bush's tenure in office that the private contracting business exploded. According to Allison Stanger, however, the tendency to associate this trend solely with Bush's "blind faith in the free market and contempt for government... is to miss a much larger story."⁵⁷ She does not associate this ideology as a partisan one; both Democrats and Republicans have their hand in this trend. It is important to consider that it was the Democrats who "expanded outsourcing to include armed security contractors".⁵⁸ In her assessment, the availability of certain market goods to outperform public positions was far too enticing for government agencies not to shed 'excess' jobs. Meanwhile, governments became less focused on the means rather than the ends. To reiterate, the cost savings have not been justified through studies; the cost savings, for the military, tend to be associated with efficiency and the ability to terminate the contract when the job is finished – unlike government employees, who will continue to be staffed and need to be reallocated elsewhere. Government employees have long term expenses such as insurance and pensions that contractors do not have attached. Operationally,

⁵⁵ Isenberg, D. (2004); Mandel, R. (2002)

⁵⁶ "To transform the Department, we must look outside this building as well. Consequently, the Senior Executive Council will scour the Department for functions that could be performed better and more cheaply through commercial outsourcing." Speech delivered to The Pentagon, September 10, 2001; www.defense.gov.

⁵⁷ Stanger, A. (2009). *One nation under contract: The outsourcing of American power and the future of foreign policy*. London: Yale University Press, p.13.

⁵⁸ *Ibid.*, p.15

contractors claim that they can perform similar jobs with a great deal less overhead, as exemplified in Executive Outcomes bid to intervene in Rwanda.⁵⁹ This claim is a bit more difficult to substantiate given the massive amount of fraud charges that have been laid against companies operating in Iraq and Afghanistan,⁶⁰ but the practice of cost-plus contracts, one of the major sources of overbilling, has recently been curtailed.⁶¹

Others associate the drive to privatize as a means for the state to circumvent casualty reports, or to conduct warfare without attracting attention from the watchful eye of public opinion.⁶² Contractors represent the unnamed members of the military force. It is perhaps surprising to many that according to Schooner and Swan, the total fatalities for contractors in Iraq and Afghanistan tally roughly 2,008.⁶³ This number is misleading however, as the true number of contractors killed is difficult to assess and may be quite a bit larger since most of the numbers come from private insurance claims rather than on the ground studies.⁶⁴ Importantly, more contractors than US troops were killed in June of 2010. The issue at hand is that these numbers supposedly do not register in the national consciousness of the warring nation. Wolfendale argues that public opinion directly relates to

⁵⁹ EO claimed their six month operation would cost roughly \$150 million; compare this with the UN operational costs of almost \$100 million a month. Groves, Chris. *Could Executive Outcomes have ended the 1994 Rwandan Genocide?* Memo to Doug Brooks, President of International Peace Operations Association. Retrieved from www.hoosier84.com/00-06eorwanda.pdf.

⁶⁰ Commission on Wartime Contracting. (2009). *At what cost? Contingency contracting in Iraq and Afghanistan* (First Interim Report to Congress). Available from <http://www.wartimecontracting.gov/index.php/reports>

⁶¹ Ibid.

⁶² Singer, P.W. (2003); Avant, Deborah (2005); See also Walker, C. & Whyte, D. (2005). *Contracting Out War?: Private Military Companies, Law and Regulation in the United Kingdom*. *ICLQ*, vol 54, 651-690 and Dickinson, L. (2005). Government for hire: Privatizing foreign affairs and the problem of accountability under international law. *William and Mary Law Review*, 47, pp. 135-237

⁶³ Schooner, S. L. and Swan, C. D. (2010). Contractors and the Ultimate Sacrifice Service Contractor. *GWU Legal Studies Research Paper*, No. 512, pp. 16. Not to mention the 44,152 reported injuries (16,000 of which seriously) – compared to 16,210 US troops.

⁶⁴ Isenberg, D. (2009)

who is doing the fighting.⁶⁵ Although in an ideal world, the fact that a war is occurring should be sufficient to warrant debate, the point remains that “when it is the fellow citizens who are doing the fighting, that emotional and symbolic connection makes a difference to people’s attitudes about a war.”⁶⁶ As Isenberg remarks, “aside from a company press release and a few paragraphs in the hometown newspaper,”⁶⁷ contractors’ casualties are rarely noticed. He continues: “high contractor casualties produce a substitution effect that artificially reduces the public’s perceived human cost of our efforts in Iraq and Afghanistan – quantified by some exclusively as soldier casualties.”⁶⁸

While academics and media tend to attribute this as a malicious or misguided attempt by politicians to undermine public awareness, it is more probable that contractors are used for their practicality. The fact that privatization has been an interagency, bipartisan process spanning multiple administrations leads one to wonder if this effect is not merely an offshoot of the of privatization, rather than a consciously guided objective by politicians to undermine public oversight. The point remains that contractors are easy to hire, and purportedly cheaper, and this seems to hold more sway over the decision to privatize. When the Commission on Wartime Contracting concluded that “contractors have become the default option,”⁶⁹ it was based more on the ease of *process* in filling the ranks with contractors over hiring civilian staff. Regardless of the origin, the worrying detachment of contractor casualties has held sway over a great deal of the discussion on

⁶⁵ Wolfendale, J. (2008). The military and the community: comparing national military forces and private military companies. In Alexandra et. al. (Eds.), *Private military and security companies: Ethics, policies and civil-military relations* (pp. 217-235). New York: Routledge Military Studies.

⁶⁶ Ibid., p.228.

⁶⁷ Isenberg, D. (2011, May 10). The uncounted contractor casualties. *Huffington Post*. Retrieved from www.huffingtonpost.com.

⁶⁸ Ibid.

⁶⁹ Commission on Wartime Contracting. “At What Risk?” (Second interim report).

their relation to the state, which relates closely to the problems with accountability discussed further below.

Some also point to the lack of oversight and awareness of PMSC activity as a motivating factor for state privatization. The activities of MPRI in Croatia, now well documented, were merely a footnote in the US involvement (or non-involvement) in the Balkans in the 1990's.⁷⁰ MPRI was given “a nod and a wink”⁷¹ by the United States government to reinforce the Croatian Army. Despite the fact that the Government Accountability Office (GAO) issued a number of reports warning Congress of the accelerated growth of these contractors in the Balkans, there was little public (i.e. Congressional) debate over the matter.⁷² Deborah Avant perceives this type of privatizing as “foreign policy by proxy”⁷³ and something the executive branch “regards as a net functional gain – a new tool in US foreign policy quiver.”⁷⁴ The British also work within a similar framework of ‘plausible deniability’ – as such the U.K. has taken a more indirect approach of enforcing PMSC activities. Avant associates this type of privatization with a loss of democratic oversight; no matter which way you cut it, the public is one step removed from the process of debating military involvement. Despite the fact that the average citizen, more than likely, has little bearing on all of the functionings and operations of the DOD, DOS or MOD, Avant does have a strong point to make. Oversight and regulation would need to address the problem of this perceived loss of democratic control; introducing new mechanisms of accountability should be

⁷⁰ Singer, P.W. (2003)

⁷¹ Dickinson, L. (2011), p.33

⁷² Ibid.

⁷³ Avant, D. (2005), p.152.

⁷⁴ Ibid.

paramount for government officials in order to ensure democratic legitimacy. Corrective measures have come into play to introduce such oversight: the GAO has worked diligently to provide accurate data to Congress,⁷⁵ along with numerous congressional research reports on the numbers and expenses related to contracting. On one hand, the state rationale for outsourcing has been cost saving and ease of process; while on the other, the conventional wisdom dictates that states have purposely (and most tend to lean toward maliciously) outsourced military activities to avoid democratic oversight and delegitimize the use of force by the state, effectively weakening the legitimate use of violence. While this is still a formidable issue, the trend lines certainly seem to be shifting in the other direction, as will be discussed in Chapter Four. The growing attention given to PMSCs, both by public culture and congress, does not lend as much credence to this point as when it was first publicized.

2.4 Detaching Military from Society?

One of the commonly held differentiations between national military forces and PMSCs is that PMSC employees are solely fighting for money. Quoting Donahue, Avant exposes the core of the problem: “there are basic differences between profit-seeking contractors and civil servants: profit seekers, in exchange for a price, deliver a product; while civil servants, in exchange for a wage, agree to accept instructions.”⁷⁶ For many, this can be construed as a morally repugnant motivation,⁷⁷ one that strikes at the core of democratic values of an all-volunteer army. The process of deifying mercenarism has its

⁷⁵*Implementing Improvements to Defense Wartime Contracting: Hearing before the Commission on Wartime Contracting Hearing*, Bi-partisan Committee, 111th Cong. (2011) (testimony of Paul Francis).

⁷⁶ Avant, D.(2005), p.48.

⁷⁷ See Percy, S. (2007). *Mercenaries: The History of a Norm in International Relations*. Oxford: Oxford University Press on a fascinating exploration on the growth of this norm, from early mediaeval period until contemporary times.

roots in the early transformation of state militaries; as Pagare writes: “armies no longer just fought battles; they increasingly came to represent the state they fought for – which tended to render mercenaries an anachronism – and symbolize power, thereby helping create its right to govern.”⁷⁸ The moral dilemma comes primarily from the conception of *jus ad bellum*, a norm that was centered on the state and embodied by international institutions.⁷⁹ Foreign fighters were not expected to take up the fight for citizens, both in terms of social contract between the citizen and the state, and because of the supposed inability of the foreign fighters to stand up for a cause they are not directly attached to.⁸⁰ As Singer argues: “the hire of a [PMSC] is not only read as an erosion of state sovereignty, but also taken as an erosion of the military’s place as the institution designed to maintain it.”⁸¹

Emerging literature has attempted to dissect this commonly held belief – to break the negatively held connotations of mercenarism. At the most fundamental level, there is no *prima facie* reason for why mercenaries are morally evil. As Baker argues, if the consequences were overwhelmingly good from using mercenaries, then the mercenaries are simply not evil in and of themselves.⁸² Baker takes considerable contention with the position that all mercenaries are lucrepaths; she argues “there is no particular reason to think that mercenaries *must* be lucrepaths, or even that they *usually* are...indeed it is far more likely that, like the soldier of a national militia, their motives are mixed.”⁸³ This is

⁷⁸ Pagare, G.K. (2010). *The military foundations of modern politics*. New Delhi: Cyber Tech Publications, p.94.

⁷⁹ Percy, S. (2007)

⁸⁰ Ibid.

⁸¹ Singer, P. (2003), p.198.

⁸² Baker, D. (2008). Of mercenaries and prostitutes: Can private warriors be ethical? In Alexandra et. al. (Ed.), *Private military and security companies: Ethics, policies and civil-military relations* (pp. 30-42). New York: Routledge Military Studies.

⁸³ Ibid., p.34.

exemplified by most firsthand accounts by operational PMSCs. For example, James Ashcroft, a former Special Air Services (SAS) member, returned to Iraq not for the money, but for the camaraderie and sense of belonging back in the field.⁸⁴ This is a sorely lacking area of research in terms of quantifiable data; an interesting study, if not difficult to accurately assess, would be the motivational patterns of operational PMSCs. It would not be surprising to see that most PMSC personnel redeploy based on non-monetary motives such as adrenaline, skillset, and a sense of duty.

While there may not be a *prima facie* reason to hold mercenaries as inherently evil, the above point does not irrefutably morally justify the use of contractors. As Wolfendale keenly observes, “while the motives of some individual military personnel may be straightforwardly dominated by the desire for financial gain, the national military *as an institution* is not governed by mercenary motives.”⁸⁵ This point is an important consideration, particularly in the broader picture of state sovereignty and democratic legitimacy – it speaks to the issue of society’s attachment to the military as an institution that defends their sovereignty. Richard Wrona, on discussing the importance of the civil-military gap, writes that “although history has shown that societies can raise and sustain armies through a variety of means, the most effective militaries have consisted of domestic citizens or subjects organized and influenced by means other than simple monetary incentives” and furthermore that “if the military is completely divorced from its parent society – if its values, ideals, and goals are radically different from those of the

⁸⁴ Ashcroft, J., & Thurlow, C. (2006). *Making a killing*. London: Virgin Books.

⁸⁵ Wolfendale, J. (2008), p.218. Emphasis in original.

society it serves – then recruitment from that society becomes problematic.”⁸⁶ Private military companies represent this problem in its starkest form, or so it would appear. The main point of concern is that the bedrock of civil-military relations (democratic control) is being undermined by outsourcing military forces to PMSCs. Some argue that not only is democratic legitimacy being undermined, military control is being funneled to the executive, who will resort to the use of force more often as it is easier by employing contractors.⁸⁷ Since PMSCs have less attachment to society, they are considered more flexible in their use. This relates to the purported lack of state regulation and oversight in the industry (discussed further in section 2.5) wherein “the freedom of [PMSCs] to operate without legislative or legal oversight disconnects the public from government policy and reduces the citizenry’s ability to influence government policy, undermining the role of popular sovereignty.”⁸⁸ Oversight mechanisms are thus not only about justice, but also about reconnecting the society with its military institution.

The perceived hollowing of the legitimate use of violence is hotly debated. In one of the earlier writings on the topic, Mandel seems to suggest – even with the title of his work – that PMSCs represent something beyond, or at least beside, the state.⁸⁹ Mandel identifies the externalization of state control as a net negative, since “the strength of the

⁸⁶ Wrona Jr, R.(2006). A Dangerous Separation: The schism between the American Society and its Military. *World Affairs*, 169:1, 25-38, p.25-26

⁸⁷ Deitelhoff, N. & Geis, A. (2009, February 15-18). *Securing the state, undermining democracy: Internationalization and privatization of western militaries*. Paper presented to International Studies Association, New York. They also conclude that this will cause states to have little incentive to regulate, since PMSCs “advantages are tied to the fact that their activities are less visible and weakly regulated”.

⁸⁸ Maogoto, J. N. (2006) Subcontracting sovereignty: The commodification of military force and the fragmentation of state authority. *Brown Journal of World Affairs*, 13 (1), pp. 147-160, p.9.

⁸⁹ Mandel, R. (2002). The title of his work, *Armies Without States*, is obviously a reference to the externalization of military force from the state.

private and public sectors [are] in somewhat of a zero-sum relationship.”⁹⁰ He also fears that the PMSC’s connection to money could be a major vulnerability, since “[PMSCs] respond at least as much to the winds of change in the global marketplace, especially changes in supply and demand, as they do to the whims of the governments of countries in which they operate.”⁹¹ While he does admit that one could argue that this merely a changing tide for government function, his point remains troublesome in relation to state sovereignty and control. Some have gone so far as to ask: what would happen if the PMSCs turned on their home state?⁹² It is argued that the basic unit of analysis in international relations, the state, is threatened by the commodification of violence through this possible loss of control. The use of legitimate violence is not only a “core *property* of the state, but also its core *function*,”⁹³ and privatization signals a move away from this functional ontology.

Others have gone further to argue for this loss of control. Scholars such as McCoy are concerned that PMSCs will set the security agenda, or what she terms principal-agent inversion.⁹⁴ There is also the problem of multiple principals, such as the case of subcontracting, which can further problematize control for the original principal.⁹⁵ The means of influencing the government decision makers is an interesting yet highly difficult area to prove academically; the overlap between individuals in the PMI and those in the upper echelons of government is apparent – but this does not mean definitively that the

⁹⁰ Ibid., p.79.

⁹¹ Mandel, R. (2002, p.80.

⁹² Hedges, C. (2007, June 3) What if our mercenaries turn on us? *Common Dreams*. Retrieved from www.commondreams.org.

⁹³ Small, M. (2006), p.12

⁹⁴ McCoy, K. E. (2010). Beyond Civil-Military relations: Reflections on civilian control of a private, multinational workforce. *Armed Forces and Society*, 36 (671), 671-694.

⁹⁵ Ibid.

agent (PMSCs) is in control of the principal (the state). Public officials have a great deal of interests they must consider, some well beyond the purview of military affairs. That being said, Leander has a formidable argument on the problems with securitization and the possible loss of control by the principal.⁹⁶ Influence and control are two very different things, however, and Leander's work seems to attest that they are one in the same. At the end of the day, national governments can, and have begun, to assert their own interests in this field. In summary, the perceived argument that PMSCs are inherently evil is highly debatable, and the perceived fragmentation of the state's authority, or principality, makes a robust national and international regulation framework that much more imperative to establish.

2.5 Regulation and State Sovereignty: A Legal Vacuum?

Due to high profile incidents involving contractor abuses, the possible disconnect from society, the apparent immunity granted by Order 17, the global nature of the industry, and the strategic impact on the battlefield, calls for regulation have been increasingly prominent from civil society, academics, policy makers and even within the industry. Solidified by sensationalist mainstream and popular media,⁹⁷ the role of PMSCs has been generally held as a negative one. PMSCs are described as undermining the

⁹⁶ She argues that PMSCs set the security agenda by being active in major levels of the decision making process and creating path dependencies. See. Leander, A. (2005). As regulation increases, these overlaps will likely decrease as 'cool down' periods (the amount of time before a government official can join the private industry) is increased; there is also the problems associated with differing to 'expert' opinion in critical theory; see: Cutler, A. C. (2010). The legitimacy of private transnational governance: experts and the transnational market for force. *Social-Economic Review*, 8, pp. 157-185.

⁹⁷ The depiction of PMSCs in popular media, through all mediums, is strikingly negative. Some examples: the movie District 9, which displays a PMSC as a rogue, powerful group hell bent on acquiring alien weaponry; similarly, the best-selling video game Crysis 2 depicts PMSC soldiers as highly immoral individuals who ignore government commands; and the newspaper The Independent article titled "With a Licence To Kill" by Johann Hari (June 4, 2007) further solidifies negative public opinion.

legitimate use of force while roaming the battlefield with no accountability. Some have pointed to the multinational aspect of the industry as a major hurdle for regulation⁹⁸ contending that “any regulatory framework must...ensure both national and international regulation is introduced, as well as ensuring that it is clear on what it aims to regulate.”⁹⁹ Through a combination of neglect, international complexity, lack of enforcement and precedents through which to prosecute, many have concluded that PMSCs operate in a legal vacuum.¹⁰⁰ There are even practical issues such as gathering evidence from foreign soil which prosecutors have to deal with. As such, any possibility of establishing an effective international regime is greeted with pessimism. While the typical procedure would be that the host country would have to manage security companies working within their own territory, PMSCs, due to the nature of their work, often operate in war-torn regions with weak judicial systems.¹⁰¹ All of these points have played into the conventional wisdom that PMSCs are running rampant, acting with impunity. Even market control mechanisms have not helped to control them, as contractors with abuse records – such as Dyncorp – are continually employed by the US government. It is only a recent vintage of literature which has come to address this conventional wisdom. This lack of accountability is seen as an affront to state control over PMSCs, and that the industry plays by its own set of rules construed through market forces.

⁹⁸ McCoy, K. (2010)

⁹⁹ O'Brien, K. (2007), p.42.

¹⁰⁰ On their lawlessness, see Maogoto, J. (2006); Singer, P.W. (2004). War, profits and the vacuum of law: privatized military firms and international law. *Columbia Journal of Transnational Law*, 42, p.521-550; Spear, J. (2006). Market Forces: The political economy of private military companies. *New security programme Fafo-report 531*. Retrieved from <http://www.fafo.no/pub/rapp/531/531.pdf>; Rothe, D. L., & Ross, J. I. (2009) Private military contractors, crime, and the terrain of unaccountability. *Justice Quarterly*, 27 (4), pp. 593-617; Catan, T. (2005, February 10). Private armies march into a legal vacuum. *Financial Times*. Retrieved from www.ft.com.

¹⁰¹ This is the rationale for Order 17, which granted ‘immunity’ to PMSCs.

At the national level, there are a remarkable number of regulatory and legal mechanisms in which states can call upon to hold PMSCs to account. Caparini outlines a number of American laws that could apply to PMSCs; she states that “the Military Extraterritorial Jurisdiction Act (MEJA), clearly appl[ies] to contractors and have been on the books for numerous years” for example, “but have very rarely been used”.¹⁰² She also lists the Alien Tort Claims Act (ATCA); War Crimes Act; the USA Patriot Act; the Arms Export and Control Act (AECA); and the Uniform Code of Military Justice (UCMJ).¹⁰³ The AECA and the UCMJ have particular bearing for this study. The AECA essentially grants licenses to companies to operate overseas, and is important when considering training operations or supporting ‘enemy states’. As Isenberg remarks, there are certainly problems with the licensing regime (such as oversight after the license is granted),¹⁰⁴ but it is an option for states to maintain control over their PMSCs. Coupled with the Walker Act which does not allow citizens to go to war with countries with whom the US is at peace, control is possible if any grave breaches of foreign policy are conducted. In 2006, the UCMJ was expanded in an effort to bring the worst excesses of abuse under account; prior to the amendment, those accompanying US military forces were only subject to the law pending a declaration of war from Congress. This is obviously problematic, since a formal declaration of war has not been issued since 1942. US Senator Lindsay Graham (R), a former JAG officer, introduced an amended UCMJ to

¹⁰²Caparini, M. (2008). Regulating private military and security companies: The US approach. In Alexandra et. al. (Eds.), *Private military and security companies: Ethics, policies and civil-military relations* (pp. 171-189). New York: Routledge Military Studies, p.173.

¹⁰³ Isenberg, D (2009); Caparini, M. (2008). There are limitations to these legislations; this will be discussed further in the methodology section.

¹⁰⁴ (2009)

also cover contingency operations.¹⁰⁵ The effectiveness of this amendment has yet to be established, but the fact remains that applicable laws are within the grasp of prosecutors should the need arise. As it will be demonstrated in Chapter Four, even beyond laws mentioned above, there are plenty of national regulatory methods which can reel in PMSCs from the strictly international realm – which has an interesting interplay with international, self-regulation and market forces.

The international level is far more complex. In 1989, the UN passed resolution 44/34, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries which provides a six-part definition of what constitutes a mercenary. In order to qualify as a mercenary, however, the individual needs to fit into all six categories; and in the words of Doug Brooks, “if anyone is ever convicted of being a mercenary under the UN Law, they should be shot and their lawyer should be shot with them for being incompetent.”¹⁰⁶ While Brooks comment was in jest, the fact remains that this working definition is very easy to circumvent, as demonstrated by Sandline contractors being delegated as ‘special constables’ within the Papua New Guinea military. As such, their non-status in international law is often pointed to as a problem for international regulation as well; labelling them as non-combatant or combatant has been particularly troubling in terms of establishing cross-border treatment.¹⁰⁷ The lack of international regulation is a major threat to the state, given that if a PMSC does not agree with the national regulation, they can “melt” and reconstitute in another country more

¹⁰⁵ McNaylor, M. (2010). Mind the “gap”: Private military companies and the rule of law. *Spotlight on Security*, 5 (2).

¹⁰⁶ Bicanic, N. and Bourque, J. (Producers). (2006). *Shadow Company* [DVD]. Vancouver, BC: Purpose Films.

¹⁰⁷ Isenberg, D. (2009)

friendly to their profit motive.¹⁰⁸ Hypothetically, the unregulated nature means that these companies can operate in tax havens or through virtual companies – headquarterless entities that recruit individuals based on demand. This type of company has been atypical however; the majority are established in the United States, while a handful of other notable companies, such as AEGIS or Erinys, are based in the United Kingdom or South Africa.¹⁰⁹ While international regulation is attempting to catch up with this burgeoning industry, Singer contends that “even if the legal definitions were not vague, there would remain few credible mechanisms to implement them.”¹¹⁰ This has led scholars such as Cochrayne and Mears to admit that states need to be the primary focus in enforcing regulation.¹¹¹ Hypothetically, most envision a collaborative framework between international regulation and national level enforcement. Such a construction may be problematic, however, as national interests may conflict with international norms.

Since conventional wisdom has held that PMSCs are operating in a legal void, some scholars have begun to write about why existing frameworks are still applicable, and the externalization of force is *not* grounds for delegating responsibility. Discussed further in Chapter Four, the Montreux Document, written by the International Committee of the Red Cross (ICRC), outlines multiple levels of responsibilities over PMSCs. While Montreux is a non-binding, non-legal document, it has garnered some 17 state signatories – notably including the US and UK. While not introducing any new laws, it reaffirms that “all individuals have to respect international humanitarian law in any activity related to

¹⁰⁸ Avant, D. (2005), p.144.

¹⁰⁹ While it is true that there are a number of PMSCs based in countries all over the world (notably Russia), most of these are homegrown. As mentioned earlier these three states represent the largest exporters of PMSCs.

¹¹⁰ Singer, P. (2004)

¹¹¹ Cockayne, J. & Speers, E.M. (2009). Private Military and Security Companies: A Framework for Regulation. *International Peace Institute*. IPI publications.

armed conflict...PMSC personnel are not an exception...if they commit serious violations of humanitarian law...these are war crimes that must be prosecuted by States.”¹¹² By recapping applicable international law, mostly through the Geneva conventions, Montreux “debunks the prevailing misconception that private contractors operate in a legal vacuum.”¹¹³ In terms of state responsibility, States are still actively responsible and accountable for the actions of PMSCs they hire.¹¹⁴ It is important to recognize that not only do states are responsible for action, but also inaction. As Lehnardt writes

if a state fails to show due diligence in attempting to prevent or respond to the violation of international law, it is not the private conduct itself but its omission or insufficient effort to prevent or respond to it that might generate its international responsibility.¹¹⁵

This is an interesting consideration in terms of states responsibility to ensure that a proper oversight and regulation system is in place to ensure the industry is following acceptable use of force limits.

2.6 Summary

It is evident from this literature review that the field is in essence pockets of intertwined and overlapping concepts, yet has escaped any formal attempt to draw in a

¹¹² International Committee of the Red Cross. (2009). 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. *Federal Department of Foreign Affairs*. Geneva: ICRC, p.39.

¹¹³ *Ibid.*, p.5.

¹¹⁴ Lehnardt, C. (2007). Private military companies and state responsibility. In Chesterman, S. & Lehnardt, C (Eds.), *From mercenaries to market: The rise and regulation of private military companies* (pp. 139-157). Oxford: Oxford University Press; Carsten, H. (2008). Passing the buck: State responsibility for private military companies. *The European Journal of International Law*, 19 (5), pp. 989-1014; Liu, H. (2009) Leashing the corporate dogs of war: The legal implications of the modern private military company. *Journal of Conflict & Security Law*, 15 (1), pp. 141-168.

¹¹⁵ Lehnardt, C. (2007), p.153. Lehnardt admits that this may be difficult in terms of foreign relations, as it does not have any precedents – nevertheless the conventions that oblige states to ensure, protect, or secure rights takes priority.

theory to understand the different interplays between regulation, state sovereignty and democratic oversight. This is particularly true in discussing PMSCs within international relations theory. The reason for this may be due to: the depth of the topic; the typology problem; or differing conceptions of where these companies stand on accountability and control. Indicative of the above literature, the conventional wisdom dictates that PMSCs are morally aloof and erode the principality of states as the sole wielder of violence. The hypothesis that PMSCs operate in a legal vacuum has come under attack by a small handful of legal scholars, but from the standpoint of public perception and prosecution records, the dominant theme still perceives them as unaccountable. The following chapters will seek to connect these pockets of literature, by first establishing a possible theoretical model to apply to PMSCs, and using this framework to analyse how PMSCs are forced into the state centric international society through multiple levels of regulation. By introducing English school theory to the discussion on PMSC, it will be demonstrated that states are still the primary actors in world affairs – particularly in light of the growing state centric mechanisms for regulation

CHAPTER 3 ENGLISH SCHOOL THEORY

3.1 A Need for Pluralism

In such a crowded patchwork of literature, it is often difficult to see the larger picture on the effects of PMSCs. As emphasized above, they are a significant transformation with equally significant consequences. The difficulty has been in finding a theory that can cope with all of these perspectives, while maintaining the dynamic qualities necessary to properly grasp all of the different interactions at the international level. PMSCs have a hand in every level of analysis in international relations; spanning qualities from the national, international, and individual level of analysis. Mixed with the inherently violent nature of the business, these interactions provide a unique challenge to statesman and policy makers, as they have to take into account each level when conceptualizing the impact of employing PMSCs. The English school approach may help to break out of the either/or debate and reconceptualise the fact that PMSCs associate simultaneously in each level of analysis. The English school provides both an analytical approach for interpreting international as well as a basis for a normative analysis. The two dominant characteristics the English school can claim are its “three key concepts and its theoretically pluralist approach.”¹¹⁶ The theoretical pluralism allows for multiple interpretations of the same phenomenon, in order to take in to account multiple theoretical explanations. Where much of the literature focuses on the hollowing impact PMSCs have on the state, their relationship with the state appears far more complex and uncertain when viewed through the three conceptual lenses of the English school. This

¹¹⁶ Buzan, B. (2004), p.6.

chapter will briefly explore the three key concepts in English school literature by first explaining each of the traditions individually. This will be followed by the commonly held role of non-state actors, and Buzan's reinterpretation of the world society concept.

3.2 The Three Traditions

While most would associate the English school with their most prominent work on the international society, the English school is in actuality more comprehensive than this. Indeed, the international society concept is by far the most developed and clear, but to view it as the *only* concept which is important in the English school would be an error. As Little writes, "it is an oversimplification to suggest that the English school is synonymous with the study of international society... a comprehensive understanding of international relations must embrace all three traditions."¹¹⁷ While it is important to understand the norms that govern international society, it is not the sole tradition of understanding world politics. The school thus breaks down into three overlapping yet independent traditions: Realism/International System, Rationalism/International Society and Revolutionism/World Society. These three traditions have taken on different meanings and significance as the English school has developed; a major debate within the school is the conceptualization of each tradition, particularly in relation to international society.¹¹⁸ The demarcation of where one ends and the other begins has been a focal point for research thus far. The distinction between one to another may have some overlap, particularly in terms of the international society and world society concepts, yet each maintains a strong independent interpretation of what governs world affairs. As cited in

¹¹⁷ Little, R. (2000). The English school's contribution to the study of international relations. *European journal of international relations*, 6 (3), 395-422, p. 398.

¹¹⁸ Buzan, B. (2004).

Buzan, Jackson “puts an interesting twist on the three traditions by viewing them as defining the diverse values that statespeople have to juggle in the conduct of foreign policy.”¹¹⁹ This view will be the dominant analytical type for this study, as each tradition corresponds well to the considerations for employing PMSCs and the regulatory methods which have been embraced so far. The following sections will explain each school as traditionally understood within the English school model.

3.2.1 Realism/International System

This tradition is perhaps the most prominent in international relations theory; it has roots spanning as far back as Thucydides and Machiavelli in the classical variation, all the way to the more recent vintage of neorealist or structural theory posited by Waltz.¹²⁰ Realist theory is founded on the concept of anarchy, where there is no overarching governing authority higher than sovereign states and the guiding motivation is survival. States follow their interests in an environment with a zero-sum relationship between their security and their neighbours’ security.¹²¹ This creates a problem of a ‘security dilemma’ where states are perpetually competing with one another in a self-help environment. What ultimately regulates their relationship is war,¹²² governed by structural ‘rules’ such as balance of power. It is squarely rooted in power politics, and is “based on an ontology of states, and is generally approached with a positivist epistemology, materialist and rationalist methodologies and structural theories.”¹²³ In the

¹¹⁹ Ibid., p. 8

¹²⁰ See Waltz, K. (1979) *Theory of International Politics*. Mass.: Addison-Wesley

¹²¹ This is based on Mearsheimer’s view of offensive realism paradigm, where states seek hegemony to ensure security. See Mearsheimer, John J. (2001) *The Tragedy of Great Power Politics*. New York: W.W. Norton & Company.

¹²² Wight, M. (1991). *International Theory: The three traditions*. London: Leicester University Press, p.7.

¹²³ Buzan, B. (2004), p.7.

international system, states interact with each other akin to how billiard balls may collide into one another. While the billiard balls may in fact differ in size (or capability), the fact remains that their core motivation erases any internal differences that may separate one to the other. In terms of transnational or Non-Governmental Organizations (NGOs), they are typically dismissed, as states are the primary actors in world politics. Likewise, moral imperatives are often dismissed for a focus on prudential or rational motivations.¹²⁴ The main focus within this tradition is national interest, and what is ‘good’ for the state based on prudence; this tends to be coupled with security concerns or matters of high politics.

3.2.2 Rationalism/International Society

The international society concept is based on a *via media* principle between liberalism and realism. It is the centrepiece of English school theory and as such is the most heavily theorized. In *The Anarchical Society*, Bull sought to establish that at the international level – despite the appearance of anarchy – there is a set of rules which govern the interactions between states. This is not merely an analytical observation – Bull traces the creation of international society through history, demonstrating that there has been set of rules governing international relations that have evolved from the early Christian international society, followed by European international society, and finally into world international society. Rather than viewing states as billiard balls clashing into one another, this view heralds a more complex vision of states as sentient creatures, calculating their interactions based on dialogue and common rules. Stated directly, Bull envisions a society forming when “a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to

¹²⁴ Little, R. (2000)

be bound by a common set of rules in their relations with one another, and share in the working of common institutions.”¹²⁵ This is what separates the international system from international society; in an international system, states may interact, but they are not aware of their position in a society as such. The interactions between states are physically realized through means such as diplomacy,¹²⁶ international law, international institutions, and commerce. These institutions solidify concepts such as sovereignty and balance of power – remnants of European international society.¹²⁷ The English school does well to find meaning within these social constructions, such as “international law’s role in producing and reproducing a certain reading of sovereignty.”¹²⁸ For Bull, society has always been present in international relations, yet it has been a dynamic relationship between the other two traditions of international relations. While the world can fluctuate between a Hobbesian state of war toward more universalist, Kantian values, “at no stage can it be said that the conception of the common interests of states, of common rules accepted and common institutions worked by them, has ceased to exert an influence.”¹²⁹ The common values and rules are further demonstrated by the need for states to justify or give pretence to their claim to war. They must justify their actions to the society of states with a persuasive cause; otherwise nations may unite to suppress their uncapped aggression.¹³⁰

¹²⁵ Bull, H. (1995), p.13

¹²⁶ See Langhore, R. (2005). The diplomacy of non-state actors. *Diplomacy and Statecraft*, 16, pp.331-339, on the changing concepts of diplomacy. He argues that conceptions of diplomacy need to be reworked to understand the complex influence of non-state actors and TNAs.

¹²⁷ Little, R. (2000).

¹²⁸ Neumann, I. B. (2001). The English school and the practises of world society. *Review of International studies*, 27, 503-507, p. 503.

¹²⁹ Hedley, B. (1977), p.42

¹³⁰ *Ibid.*, p.44.

One of the main purposes of these rules and institutions is to mitigate the effect and occurrence of war. International society dictates that there are principles governing the application of violence. For Bull, war is still an institution of state interaction – albeit one that signifies the breakdown of such order. In terms of interstate war, this has been drastically limited due to the destructive power of nuclear weapons. Security has become the primary motive for why wars are fought, rather than territorial gains. This is not to say that war is a completely defunct institution – it has merely changed in scale and type. Bull rightfully theorized that the scope of political units other than states going to war has and will increase,¹³¹ and that the international society will not be allowed to let those forms of war be conducted outside their purview of rules and values. Presciently, Bull concluded that international institutions would need to curb and include rules governing non-state violence.

3.2.3 World Society/Revolutionism

The third tradition in the English school triad is perhaps the least developed and the most contentious of the three.¹³² Buzan admits that the English school has treated the world society concept as an “analytical dustbin, uncomfortably containing revolutionism, cosmopolitanism and transnationalism.”¹³³ As such, differing accounts and definitions of world society exist within English school literature, but can nevertheless be useful in situating the effects of non-state and transnational movements.¹³⁴ World society is loosely

¹³¹ Ibid., p. 197

¹³² Buzan, B. (2004)

¹³³ Ibid., p.44

¹³⁴ For the sake of simplicity, this study will not break down the world society model to the extent Buzan has committed; the differentiation between individual and transnational actor for example, and the nuisances thereof, would complicate rather than clarify the application to PMSCs. For the purposes of this

based on the Kantian principles of universal (or cosmopolitan) moral values that tie together every human being. Unlike international system and international society, it is *not* based on an ontology of states. As such, it can best be viewed as post-state or a theory which transcends the state. The state system is something to be overthrown by raising universal moralism not based on the immediacy or expediency of state interests.¹³⁵ While world society is firmly grounded in normative theory, Neumann¹³⁶ argues that one way in which this field needs to be reconceptualised is how world society can and has influenced international society, along with Buzan's focus on the role of actors within each tradition (discussed in section 3.3). Thus there is both a normative and analytical aspect to this tradition. The English school does, however, differentiate between the patterns of transnational behaviour and the possibility of common universal values.¹³⁷ The physical counterpart of world society is thus difficult to fully realize, but it tends to be formulated in terms of human rights discourse within transboundary institutions or organizations. The fact remains that "any serious attempt to develop a world society... will tend to undermine the states that are the foundation of international society."¹³⁸ This is important in terms of considering how the three traditions are in contention with each other, yet still maintain a certain level of overlap in terms of constituting world politics.

3.3 Non-State Actors in the English School

The precarious relationship of non-state actors within this matrix of theories is often times difficult to pin down but important in conceptualizing the entire model. There

study, the world society model will simply help conceptualize the interplay of non-state actors with the other traditions.

¹³⁵ Bull, H. (1977)

¹³⁶ Neumann, I. (2001)

¹³⁷ Little, R. (2000)

¹³⁸ Buzan, B. (2004), p. 29

is certainly a privileging of the state in all three traditions¹³⁹ which – given the influence and growth of transnational actors (such as emphasized above with the growth of PMSCs) – is not adequately representative of contemporary world politics. In light of this, Buzan sought to use world society as a “vehicle for bringing the non-state elements into the picture.”¹⁴⁰ By creating a firm separation between state and non-state, this has interesting and profound implications for the English school model – consequences that may help to reconceptualise the impact of PMSCs in world affairs. Buzan notes that “for now, and for some decades to come, the interesting question is about how the state and the non-state worlds do and will interact with each other.”¹⁴¹ While this can be conceptualized through the dominant ideas within the triad model, for Buzan it is the actors that provide a more useful approach to qualifying the demarcation line between international society and world society. He adds that it is not merely the shift in power structures that must be seen, but the deeply interdependent yet antagonistic relationship they hold with one another. This study will seek to place PMSCs as unique actors within this model.

The importance of this dynamic was not lost on Bull either. He recounts the many ‘alternate paths to world order’ and questions the possibility of a system that resides beyond states. World society, for Bull, similarly took on the dimensions of non-state actors influencing or supplanting the state dominant international society. The breakdown of the state system could take form in a number of ways, such as world government or technological unification, but the possibility of a New Medievalism (Neomedievalism) is

¹³⁹ Even within the world society tradition which is not focused on the state, its neglect can be attributed to the disbelief that non-state actors may transplant states.

¹⁴⁰ Buzan, Barry, p.92.

¹⁴¹ Ibid., p.88

pertinent to this study. Neomedievalism is characterized as a “system of overlapping authority and multiple loyalt[ies].”¹⁴² This is most commonly realized as internal divisions within the state as breaking their authority down into smaller systems, such as stronger municipal or local governance; it also may take form in terms of transboundary organizations such as INGOs or Multi-National Corporations (MNCs). The possibility of a breakdown in state supremacy is regarded as highly suspicious by Bull. One of the core features of Neomedievalism is pertinent here, which Bull identifies as the “restoration of private international violence.”¹⁴³ Bull lists a number of entities which have infringed upon the state’s monopoly on the use of force, including the United Nations, guerrillas, international terrorists, pirates, and the East India Trading Company. What Bull wanted to convey was that the use of private military force, or by political actors outside of states, is nothing new. It actually has deep roots – and states were able to outlast them. What is new, however, is the global dimension that it is occurring, and for PMSCs the corporate legitimacy that they hold at an international level. The possibility of transnational organizations posing a threat to state sovereignty is also addressed by Bull; as far as he was concerned, however, they had to play by the rules established by the international society of states.

3.4 Summary: On using English School Theory

The question, then, is to assess whether PMSCs do in fact ‘play by the rules’ of international society, or operate in their own domain associated with that of world society, signalling a transformation of conventional understandings of state sovereignty.

¹⁴² Bull, H. (1995), p.245

¹⁴³ Ibid., p.258

Since the world society concept is a ‘vehicle for non-state actors’ as mentioned above, it may provide an interesting analytical tool to conceptualize PMSCs in relation to the state. The tripartite model allows for a more fluid approach to this dynamic interaction, as we may conceivably place each means of regulation into corresponding traditions.¹⁴⁴ The global nature of these companies predicated the possibility of bypassing state regulation and therefore state sovereignty. The English school model is ideally suited for understanding the global and interstate impact of such an entity; as Buzan writes: “the English school’s triad of concepts exactly captures the simultaneous existence of state and non-state systems operating alongside and through each other, without finding this conceptually problematic.”¹⁴⁵ PMSCs occupy a space within world society as they are non-state actors, but they also work within the interstate system and impact it in unique ways, particularly where they deal with matters considered core to state sovereignty. Consequently, the English school model can delineate a workable typology that takes into account the interplay of overlapping levels of analysis. The following chapter will discuss the application of this theory further by looking at how PMSCs have their stake in each section of the tripartite model, along with an analysis on how PMSCs have adapted into international relations. The focus of Chapter Four is to bring to light the different forms of regulation that have been created to bring PMSCs under state control and thereby maintaining the dominant state centric tradition.

¹⁴⁴ For ease of conceptualization, Appendix A, Figure 1.1 illustrates a basic diagram of how each tradition situations to one another.

¹⁴⁵ Buzan, B. (2004), p.3

Chapter 4: Reassessing PMSC Regulation and State Sovereignty

4.1 Applying and Adapting English School Theory

As Chapter Two demonstrates, the lack of an applicable theory to interpret PMSCs at the international level has been a gap in literature covering this growing and important field. A great deal of this literature focuses on how these new entities break the monopoly of violence held by the state, and that a new ontology based on something beyond or outside of the state can be constructed for international relations. This chapter will sketch an outline of how regulatory efforts can be interpreted through each triad of the English school model, and may help to overcome this commonly held idea by analyzing the rules and use guiding PMSCs at each level. The objective of this chapter is to reinterpret the role of PMSCs at the national, international and world society level, focusing on their relationship with the state. The three levels of the English school theory will help create a clearer typology on which guiding principles are the most dominant. In the international system tradition, we can associate any national level regulation as states attempt to maintain full control over PMSCs whom they employ; however, states do not work in a vacuum, and it is important to consider the international laws and established norms that govern the employment and use of PMSCs at the international level (or international society tradition) which has informed the push to regulate PMSCs. Finally, the world society concept will allow for an analysis on the non-state methods of regulation such as industry standards such as codes of conduct. In so far as those who claim that PMSCs undermine the legitimate use of violence and democratic legitimacy,

PMSCs should align closer to the world society concept of transnational non-state actors, seeking to undermine state legitimacy or create a common identity, and operate against the purview of state policy. The stronger case seems to fit with the international system, as the norms governing the use of PMSCs which funnel toward the state centric model. The following sections will break down each level of regulation, demonstrating the increasing control the state has over PMSCs.

4.2 International System (National Level Analysis)

At the national level, PMSCs provide an interesting set of incentives for states to employ their services. If we interpret the hiring of PMSCs through prudential security concerns, mixed with power political calculations, it provides a reasonable understanding for their hiring. We can identify two such reasons for their employment: for weaker states, PMSCs help to dissuade rebellions and re-establish control; for powerful states, it helps to assert their dominance through alternate means (such as training¹⁴⁶) and provides a necessary surge capacity, while boosting their military capabilities in the international realm. Either way, PMSCs are best seen as a means for self-defence, both in terms of external or internal threats. In both cases, they are employed to support the national security interests of the state and assert the legitimate use of violence as agents of the state.¹⁴⁷

¹⁴⁶ Avant, D. (2005)

¹⁴⁷ Cockayne, J. (2008). Make or Buy? Principal-agent theory and the regulation of private military companies. In Chesterman, S. & Lehnardt, C (Eds.), *From mercenaries to market: The rise and regulation of private military companies* (pp. 196-216). Oxford: Oxford University Press. Cockayne uses the economic theory of principal agent theory to come to a similar conclusion, through much different means, that PMSCs are merely agents of the state – the question is how much autonomy will be granted these companies in their operations.

The use of PMSCs by weak or failing states to re-establish control over their country in contemporary times is few and far between. Perhaps one of the most notable is the use of PMSCs in Sierra Leone.¹⁴⁸ The history of Sierra Leone is not a cheery one; burdened with the so called ‘resource curse’, the country had been embroiled in a civil conflict for most of its post-colonial existence.¹⁴⁹ The head of the government, a young army Captain Valentine Strasser, was faced with an intractable civil war. Without external support from other states, he turned to Executive Outcomes to provide tactical military support and training. Through the use of Executive Outcomes, Strasser was able to drive out the Revolutionary United Front (RUF)¹⁵⁰ and secure the local diamond mines, a valuable source of income for the government of Sierra Leone. It is notable that during this operation, Executive Outcomes also held a relatively stellar human rights record while operating in Sierra Leone, and managed to gain a surprising level of trust and support from the local population.¹⁵¹ While they were mandated to drive back the RUF and secure the diamond mines, they were also tasked to re-train and professionalize the national military. In order to reassert legitimate government power, it was also during Executive Outcomes’ occupation that Sierra Leone was able to hold democratic elections.¹⁵² The stability provided by this PMSC was short-lived however; after Executive Outcomes’ contract expired and its subsequent withdrawal, there was a military coup that overthrew the democratically elected government. Ironically, some of

¹⁴⁸ This is certainly the most thoroughly documented and debated, given that the standards for ‘success’ are highly contentious.

¹⁴⁹ Francis, D. (1999).

¹⁵⁰ The RUF were a group of vicious individuals, known for the use of violence and intimidation as a means for recruitment and were composed largely of individuals from neighbouring countries. See Dokubo, C. (2000). ‘An Army for rent’: Private Military Corporations and Civil Conflicts in Africa: The Case of Sierra Leone. *Civil Wars*, 3, 2, 51-64.

¹⁵¹ Howe, H. (1998)

¹⁵² Ibid.

these military members were trained by Executive Outcomes (such as the Kamajors). Shearer recognizes that this was not entirely the result of employing Executive Outcomes however – Sierra Leone was left on its own far too soon, despite intelligence warnings of a coup if their contracted security services were disbanded.¹⁵³ A follow up stabilization effort by other NGOs and state governments could have been used to ensure the security of the state. Executive Outcomes provided a unique means to reassert Sierra Leone’s sovereignty, but could not provide the requisite of long-term stability. While this type of tactical, offensive military service has not been offered since the 90’s, the possibility of weaker states using PMSCs in order to bolster their internal security is not out of the question. Amidst quite a bit of fanfare, the United Arab Emirates has recently taken it upon themselves to do just this; in 2011 they reportedly hired Reflex Responses (or R2) to raise an army of some 800 foreign trained and recruited troops.¹⁵⁴ It is important to keep in mind the responsibility of the state in terms of hiring and deploying these companies; if UAE were to delegate an offensive operation to R2 (i.e. operate in another sovereign country), it is still an act of war. As a close United States ally, the UAE has been given tacit support to hire R2 (through licensing mechanisms), yet this is being done under close scrutiny of the US DOS to ensure that it does not violate “American laws regulating the export of defense technology and expertise.”¹⁵⁵ Thus, in realist terms, the hiring of R2 is perhaps best seen as a means to securing the state, rather than undermining it.

¹⁵³ Shearer, D. (1998)

¹⁵⁴ Mazzetti, M. & Hager, E. (2011, May 14). Secret desert force set up by Blackwater’s founder. *The New York Times*. Retrieved from www.nytimes.com. Originally this exposé drilled the role of Erik Prince in this process. Prince’s role in this situation was conflated significantly. He advised, but he neither owns, nor is affiliated to the hired company Reflex Responses.

¹⁵⁵ Ibid.

The problem, of course, is when illegitimate governments use private individuals to quell popular revolts. The reports on the employment of mercenaries to defend the illegitimate government of Muammar Qaddafi during the so-called ‘Arab Spring’ have been paradigmatic for understanding the norm against mercenaries.¹⁵⁶ It is important to consider that these individuals are not part of a company – they are loosely affiliated individuals who apparently take employment from anyone. For any self-respecting PMSC, employment by Qaddafi would be a sure end to their company in any capacity outside of that one contract. It is important to consider that most PMSCs “have a professional management; they are legally registered and sometimes even traded on the stock markets. Some of the bigger companies are meanwhile part of global Consortia such as Halliburton, L-3 Communication or Lockheed Martin.”¹⁵⁷ As such, they have a reputation to uphold both in terms of their employer (the state) and the international community (more on this in section 4.2). The United States also put limitations on the use of private military contracts in Libya, ensuring that funds could not reach Qaddafi through other means.¹⁵⁸ The possibility of a state using an established PMSC to quell a popular revolt is highly remote and morally unlikely. If we hold Baker’s argument as true, then most PMSCs are not lucrepaths and would see this as morally bankrupt – and even if they *were* lucrepaths, it can be unwise for business to go against international norms.

¹⁵⁶ Most coverage, unsurprisingly, is held in a negative light. There has been some dissenting voices however, questioning if these individuals are mercenaries at all; see for example Smith, D. (2011) “Has Gaddafi unleashed a Mercenary Force on Libya?”. *The Guardian*. www.guardian.co.uk.

¹⁵⁷ Deitelhoff, N. and Geis, A. (2009), p. 12

¹⁵⁸ See S.J. Res. 20 Kerry-McCain resolution; under Section 2 (D)(B), which states that none of the funds going toward the Libyan campaign may be awarded to a private security contractor to conduct “any activity on the ground in Libya.”

In these cases there is a common thread: weaker states tend to employ PMSCs as a means to secure the state. Neither had any other option than to seek external support to reassert their control. Viewed through the lens of national interest, weaker states employ PMSCs for a far different rationale than stronger states, yet they are both motivated to increase their relative military capabilities. Understood through the international system tradition, the use of PMSCs by powerful states is more strategic. As Spearin writes,

[PMSCs] are increasingly not seen as ‘rogue’ actors in the sense of possessing independent initiative at the strategic level...this falls in line with realism’s contentions as espoused by the likes of Hans Morgenthau, Kenneth Waltz and John Mearsheimer that powerful states in the international system are not only affected by global phenomena differently, but they can also to a certain extent shape these phenomena to their benefit.¹⁵⁹

The strategic deployment of PMSCs during counterinsurgency operations can have significant benefits for powerful states such as the United States. A large percentage of PMSCs employed in Iraq and Afghanistan are in fact Host Country Nationals (HCNs). While the complications arising between warlord feuds, such as the case between “Mr. Pink” and “Mr. White” in Afghanistan,¹⁶⁰ can have significant backlash in employing locals, for the most part it is an important way of including the local populace in the reconstruction effort. This has been acknowledged by commanding US General David Patreus, who outlined new guidelines for hiring and managing PMSCs on the battlefield. In a short two-page memorandum, Patreus clarifies that local contractors are an integral

¹⁵⁹ Spearin, C. (2008). Privatized peace? Assessing the interplay between states, humanitarians and private security companies. In Alexandra et. al. (Eds.), *Private military and security companies: Ethics, policies and civil-military relations* (pp.203-216). New York: Routledge Military Studies.

¹⁶⁰ See: Inquiry into the Role and Oversight of Private Security Contractors in Afghanistan, US Senate Committee on Armed Services, 111th Cong., (2010). A caveat must be noted here: some have argued that using local contractors can incur unnecessary vulnerabilities as contractors may not be adequately trained or are ‘playing for both sides’, as it were; in rebuttal, the same could be said of the ANA or ANP. It is not solely a contractor phenomenon. By employing locals, the economic benefits, while decreasing the number of individuals who go to the Taliban, tend to trump these strategic security concerns.

part of rebuilding Afghanistan and creating a self-sustained country – not to mention boosting the local economy.¹⁶¹ He has made it clear that it must be to the commanders' discretion on who is contracted and to ensure that these individuals are reliable and benefiting the Afghan community. As it stands, HCNs represent roughly 51% of contracted individuals operating in Afghanistan and roughly 15% in Iraq, down from 53% in 2007.¹⁶² They provide local expertise while gaining valuable experience that can stay in country. Generally speaking, NATO forces have utilized a small percentage of contractors as a means to fill in their ranks for simple security tasks, thus freeing up their own troops for offensive military operations, while the majority of contractors perform base support services, such as dining services and laundry.

We can safely assume that the purpose of employing PMSCs for states at the national level is typically prudential, seeking to augment their capabilities. Conceptually, they fall in line quite well with the realist position of power politics; states now have the option to purchase military security off the global market, rather than raising standing armies from their populace, to offset perceived imbalances within their security environment. Not only do they provide valuable local and foreign expertise, they also provide the hegemon with valuable flexibility in terms of alliances. Where post-Cold war alliances such as NATO struggle to find a defining identity, the United States has augmented their numbers through contingency contracting to negate the lack of troops supplied by allies. It is no secret that the second largest force in Iraq and Afghanistan is

¹⁶¹ Rubin, A. (2010, October 27). Karzai delays order to ban private security companies. *The New York Times*. Retrieved from www.nytimes.com. New York Times has available the full unclassified document online.

¹⁶² Schwartz, M. and Swain, J. (2011). In Iraq, most locally contracted workers were construction or base support; as American and British presence has drawn down, so has this number. It will be interesting to watch this trend line as foreign presence completely exfiltrates to see if HCNs regain majority, seeing as Iraq has increased oversight and accountability over foreign workers, creating additional operating costs.

private corporations. As Spearin notes, “these firms [PMSCs] not only support American missions, they increasingly can be perceived *as* the coalition”¹⁶³ Where old alliance structures may actually tie down US strategy, not only in terms of finding consensus but also in technological capabilities, PMSCs offer the level of flexibility and long standing support which contingency operations require. While this does provide flexibility in terms of functional control over operations, it does *not* confer moral legitimacy or international legitimacy for the application of violence. This influence can be traced to the forces that inform the international society; again, simply because they have delegated a partial role of military expertise does not mean that state delegate the responsibility of their actions.¹⁶⁴

From this tradition it is difficult to take into account the moral arguments surrounding the use of contractors. While the English school provides a normative as well as an analytical method of analysis, this tradition (international system) does not entirely consider morality as a matter concerning state strategy. In terms of trend lines, this is perhaps best characterized as the early days of the Operation Iraqi/Afghani Freedom, when the means justified the ends. The enactment of Order 17 to grant immunity was done out of prudential security considerations (and perhaps short-sightedness on Paul Bremer’s part); oversight mechanisms were not a priority in terms of the US effort of securing the Iraqi or Afghani state. In other words, the security considerations were dire enough to warrant the provision of security from an external source, despite the lack of proper accountability. Attempts to ban PMSCs outright because of this lack of accountability have not been an effective method of control. In Afghanistan, President

¹⁶³ Ibid., p.35-36.

¹⁶⁴ Lehnardt, C. (2007)

Karzai's attempt to ban private security companies led to the cancellation of millions of dollars worth of reconstruction work, and the subsequent delaying of said ban.¹⁶⁵ The calls for regulation and guidelines governing the use of contractors are a direct reaction to these apparent amoral or prudential security considerations. Lawful regulation is by far the best method to maintain control over PMSCs. While national level regulation has been commonly perceived as weak, recent developments, particularly in the United States, have certainly created greater methods of control.

There are three forms of regulation which can be identified at the national level that have helped to maintain control over PMSCs: what I will term hard laws, soft laws and export laws.¹⁶⁶ Hard laws are those which can bring PMSC transgressions to account through judicial retribution, either through military courts or civilian courts; it can also be through means such as contract laws. Soft laws are based more on norms and values, and tacit approvals of certain business practices through financial compensation. Export laws are exactly what they sound like: the governing of PMSC business through licensing regimes. The combination of all three is what has maintained PMSCs within the strategic purview of the states which they are hired. While the conventional view would dictate that international private military actors have no bearing through which to prosecute, this is far from the truth. The following sub-section will explore these laws more in depth.

¹⁶⁵ Rubin, A. (2010); Filkins, D. & Shane, S. (2010, August 16). Afghan leader sees plan to ban private guards. *New York Times*. Retrieved from www.nytimes.com.

¹⁶⁶ There have been multiple variations of what these laws have been named or how they have been categorized; for the purposes of this study, these three will suffice.

4.2.1 National Level: 'Strategic Accountability'

From this perspective then, the end goal for regulating these companies for states is twofold: first, they require a modicum of regulation in order to abide by their home state's foreign policy, and ensure strategic harmony; secondly, to appease the growing calls for regulation from international institutions and human rights activists. Given that contingency operations follow a "hearts and minds" doctrine, the two are technically synonymous. As mentioned in Chapter Two, the United States has multiple avenues through which to prosecute contractor malfeasance. The first that will be discussed here is the Military Extraterritorial Jurisdiction Act (MEJA) and the Uniform Code of Military Justice (UCMJ).

It is interesting that many claim that PMSCs operate in a legal vacuum given that the MEJA undoubtedly applies to military contracted personnel. The MEJA, passed by the 106th Congress in 2000, was intended to

establish Federal jurisdiction over offenses committed outside the United States by persons employed by or accompanying the Armed Forces, or by members of the Armed Forces who are released or separated from active duty prior to being identified and prosecuted for the commission of such offenses, and for other purposes.¹⁶⁷

The wording is fairly straightforward in terms of establishing jurisdiction over those employed for or by the DOD, including contractors and sub-contractors. It was enacted to "address a long standing problem of how to deal with civilians who had committed

¹⁶⁷ Military Extraterritorial Jurisdiction Act of 2000, S. 768, 106th Congress, 18 U.S.C. §§ 3261-3267. (2000) Retrieved from www.pubklaw.com/hi/pl106-523.pdf.

crimes while accompanying military forces overseas.”¹⁶⁸ Until MEJA was enacted, the federal criminal courts “lacked jurisdiction to prosecute crimes of civilians overseas.”¹⁶⁹

Of course, the MEJA is not without its problems. Some have cited the lack of prosecutions that have been accomplished using the MEJA as a sign for its ineffectiveness. Chesterman and Lehnardt agree that the MEJA “provides the US military justice system extraterritorial jurisdiction over contractors in some instances” but they admit that “prosecutors appear to be reluctant to pursue such cases”.¹⁷⁰ Similarly, Isenberg argues that “government lawyers must be bold enough to prosecute cases using MEJA”¹⁷¹ in order to establish precedents to pursue further cases. Indeed, prosecutions under this act would be difficult to pursue – but not impossible. Two cases against contractors have been presented thus far: one for the possession of child pornography, and the second for attempted rape.¹⁷² Government lawyers do indeed have an inroad to bring justice to those contracted by the DOD. Any prosecution would work twofold: it would ensure accountability for those who have committed abuses, as well as tarnishing the record of said company. Since the MEJA applies to individuals and not companies, it may not lead to the company losing the contract, but it would at minimum expose company vetting policy and training standards, and bring in to question future business contracts with the company. It would also provide an avenue for prosecution against the most egregious acts. Again, the 2000 version MEJA is not foolproof – the loophole for MEJA is apparent: those who are contracted through other agencies such as the DOS

¹⁶⁸ Caparini, M. (2008), p.179

¹⁶⁹ Hartney, J. (2010). A call for change: The Military Extraterritorial Jurisdiction Act. *Gonzaga Journal of International Law*. Retrieved from <http://www.gonzagajil.org/content/view/198/26/>

¹⁷⁰ Chesterman, S. and Lehnardt, C. (2007), p.252.

¹⁷¹ Isenberg, D. (2008), p.92

¹⁷² Herszenhorn, D. (2007, October 4). House’s Iraq bill applies U.S. laws to contractors. *New York Times*. Retrieved from www.nytimes.com.

would not technically be under the jurisdiction of MEJA. Where the largest diplomatic security contract program (the Worldwide Personnel Protective Services or WPPS) is administered by the DOS, this is obviously problematic. Companies such as Blackwater, Erynis and Dyncorp – those who provide armed diplomatic convoy security – could not be held accountable under MEJA while contracted through agencies outside of the DOD. In an effort to curtail this fact, the MEJA Expansion and Enforcement Act (H.R. 2740) was overwhelmingly approved in the House of Representatives by 389-30, but was not ratified into law prior to the end of that session of congress.

This being the case, the US Congress has attempted to introduce bills to close the legal gap, and successfully passed legislation in 2007 to greatly expand the UCMJ to include contractors. Simply by changing the wording from “declared war” to “declared war *or* contingency operation”, PMSCs operating in Iraq and Afghanistan found themselves applicable to the same laws that the US military are subject to. Ironically being hidden within a very large bill not pertaining to PMSCs, the ramifications of the amendment quickly became apparent. Although highly sceptical of its potential, Singer admits that the expansion of the UCMJ was “the single biggest legal development for the private military industry since its start.”¹⁷³ As such, it is not surprising that the expansion of the UCMJ is highly controversial, with many legal scholars questioning its constitutionality. For example, McNaylor argues that the broadening of the UCMJ criminalizes what is typically legal in civilian life.¹⁷⁴ Theoretically, there is a problem with applying the UCMJ to *civilian* contractors as they must be held to a different set of

¹⁷³ Singer, P. W. (2007). Frequently Asked Questions on the UCMJ Change and its Applicability to Private Military Contractors. *Brookings Institute*. Retrieved from http://www.brookings.edu/opinions/2007/0112defenseindustry_singer.aspx.

¹⁷⁴ McNaylor, M, (2010)

standards than the military. Not all crimes within the UCMJ have an equivalent civilian law; some laws, such as desertion, are even punishable by death. Although PMSCs status as quasi-military entities does pose a problem in terms of prosecution and legal standards, as argued by Chapman, the UCMJ “presents the best option for holding quasi-military PMSCs criminally accountable”¹⁷⁵ based on the fact that “it represents the most viable and effective source of criminal sanctions.”¹⁷⁶ Although Chapman stipulates certain limitations in order to ensure that the UCMJ functions properly (such as limiting it to what Singer would term military provider firms), the ability of the UCMJ to be a complementary avenue for control in conjunction with MEJA should not be overlooked. In 2008, the first case against a civilian using the UCMJ led to a guilty plea by an Iraqi interpreter who was charged with stabbing a co-worker.¹⁷⁷ Federal prosecutors can rein in those working for the US government to safeguard against any abuses that contractors may commit. While the cases that have been prosecuted to date are relatively straightforward cases, the Department of Justice has the means to prosecute more complex cases such as unlawful killings during operations. The motivation to prosecute has certainly changed drastically since the early days of the contingency operations. Significantly, two contractors working for Paravant LLC were convicted of involuntary manslaughter in Afghanistan. During a convoy escort operation, the two former Blackwater employees allegedly opened fire, killing two Afghan civilians and wounding a third. Although acquitted of one of the killings and the wounding, one contractor was

¹⁷⁵ Chapman, K. J. (2010). The untouchables: Private military contractors’ criminal accountability under the UCMJ. *Vanderbilt Law Review*, 63 (4), pp. 1048-1079, p. 1053.

¹⁷⁶ *Ibid.*, p. 1059

¹⁷⁷ Hammond, D. C. (2008, Fall). The first prosecution of a contractor under the UCMJ: Lessons for service contractors. *Service Contractor*. Retrieved from <http://www.crowell.com/documents/The-First-Prosecution-of-a-Contractor-Under-the-UCMJ.pdf>.

sentenced to 30 months in prison and the other to 37 months in prison.¹⁷⁸ In 2009, the case against five Blackwater Worldwide employees for the killing of 17 Iraqis in Nisour square was dismissed because of what the judge deemed to be tainted evidence. In 2011, the New York Times reported that the federal court of appeals reopened the case, dismissing the claim of tainted evidence.¹⁷⁹ Congress and the Department of Justice apparently have a renewed impetus to hold contractors to account and ensure that the legal unaccountability myth is dismissed. The common perception that contractors work in a legal vacuum far out of the reach of state control and accountability mechanisms is simply no longer applicable.

Of these developments, perhaps one of the most interesting is the introduction of the Civilian Extraterritorial Jurisdiction Act (CEJA). Although not ratified into law yet, this is the second reintroduction of the bill following the end of the 111th congress. Treated as a bi-partisan matter, the bill has support from both sides of the political spectrum. At the time of this writing, it had been reported to a committee for amendments and revisions.¹⁸⁰ Introduced by Senator Patrick Leahy (D), this bill would extend criminal liability to non-defense contractors operating overseas. Like the UCMJ, the CEJA is a complementary bill to the MEJA, in that it works to ensure that those operating under contracts not assigned by the DOD are applicable to the same laws. This is important in

¹⁷⁸ Gordon, N. (2011, July 29). Two former Blackwater employees heading to prison. *Project on Government Oversight*. Retrieved from www.pogoblog.typepad.com. It is important to note that the contractors pleaded leniency, which was outright rejected by the judge. Gordon acknowledges this as an obvious message to contractors operating on the battlefield; one can agree with this assertion, in that recent developments tend to point toward almost overzealous prosecution attempts.

¹⁷⁹ Risen, J. (2011, April 22). Ex-Blackwater guards face renewed charges. *New York Times*. Retrieved from www.nytimes.com.

¹⁸⁰ S. 1145--112th Congress: Civilian Extraterritorial Jurisdiction Act (CEJA) of 2011. (2011). In *GovTrack.us (database of federal legislation)*. Retrieved July 2, 2011, from <http://www.govtrack.us/congress/bill.xpd?bill=s112-1145>

considering contracts issued by the DOS and the USAID to both armed and unarmed contractors. According to the press release by Congressman David Price (D) (a co-sponsor of the bill), the CEJA would work double duty: it would ensure that any accountability gap would be closed “once and for all” for contractors who commit any abuses, and it would also ensure the protection of American and foreign nationals operating in countries with weak judicial systems and ensure due process for those charged with criminal offenses overseas.¹⁸¹ Admittedly, contractor abuse can run counter to the foreign policy objectives of the hiring country (or home country); the CEJA certifies that contractors must operate within the legal standards of the home country as well as the host country. In all likelihood, given the increased congressional and media attention on the issue, this bill will likely pass in the house and provide (yet another) method of bringing contractors to account.

One of the sticking points for some has been the fact that contractors operating in weak or failing states are not responsible to the host country’s laws. This has been a particularly contention for Harmid Karzai, and has had equal attention in Iraq – particularly following the Nisour Square fallout. Some would say that this violates the sovereignty of the host country and further weakens the security apparatus that the government is supposed to supply. In so far as this may have been true in the earlier days of Operation Iraqi Freedom, the 2008 adoption of a Status of Force Agreement (SOFA) between Iraq and the United States places domestic jurisdiction over contractors operating in Iraq. The SOFA states that “Iraq shall have the primary right to exercise

¹⁸¹ Press Statement (2011). Retrieved from www.price.house.gov.

jurisdiction over United States contractors and United States contractor employees.”¹⁸²

Again, the jurisdiction is never as simple as it sounds on text: contractors working for agencies other than the DOD will still be responsible to their home countries’ laws (i.e. MEJA and UCMJ). Nevertheless, this is a promising first step in bringing PMSCs under the control of the Iraqi government. The same will hopefully be said of Afghanistan as its reconstruction efforts take form; in the meantime, contractors working in Afghanistan for the United States can still be held accountable through the above legal framework.

The practise of prosecuting PMSCs after they have committed criminal acts may help to ensure they fall within the strategic plan of the home country, but there is also a concern that PMSCs may undermine state sovereignty by operating against the geopolitical foreign policy of their home country. This is where export control acts and licensing regimes have helped to limit which countries PMSCs can offer their services. The United States has multiple pathways through which to control contracted defence services. The International Traffic in Arms Regulation (ITAR), the Arms Export and Control Act (AECA), and the Defence Trade Controls Act (DTCA) are the three most prominent mechanisms of control.¹⁸³ Among others, there is also the Defense Federal Acquisition Regulation Supplement (DFARS) which oversees the “purchases and contracts by DOD contracting activities made in support of foreign military sales or North Atlantic Treaty Organization cooperative projects.”¹⁸⁴ Caparini identifies two types of military export systems for the United States: direct commercial sales (DCS) and

¹⁸² Nichols, R. (2008). New U.S.-Iraq SOFA lifts contractor immunity. *International Government Contractor*, 5 (12), pp. 102-104.

¹⁸³ Caparini, M. (2008)

¹⁸⁴ United States Government (2011). Defense Federal Acquisition Regulation Supplement (DFARS) and Procedures, Guidance and Information (PGI). Retrieved from www.acq.osd.mil.

government-to-government assistance or Foreign Military Sales (FMS) program.¹⁸⁵ The Directorate of Defense Trade Controls (DDTC) oversees and reviews defense contracts and even keeps an updated “watch list of suspicious organizations and individuals it consults when considering export licence application.”¹⁸⁶ The United States licensing regime (which keep in mind is by far the largest contracting country) is thoroughly comprehensive. Although not without its problems,¹⁸⁷ this provides a strong mechanism of control over security sales and acquisition by foreign governments. The privatization of foreign policy is thus a process of delegation rather than hollowing. There are oversight mechanisms in place to ensure that these companies are providing services that do not run counter to realist foreign policy objectives. For contractors, it makes sense from a business perspective as well: PMSCs that prove they are loyal to the state and following end-user agreements like those in the licensing regimes would acquire more contracts; profit incentive will help to maintain state control. Likewise, pending the clarification and standardization of a Past Performance Record Database,¹⁸⁸ those who do not follow government regulations would be punished with no future contracts. It is no wonder, as Avant points out, that PMSCs tend to reflect their home government’s foreign policy.¹⁸⁹ While some may ask the perennial question of “what if contractors turn on

¹⁸⁵ Caparini, M (2007). Domestic Regulation: Licensing regimes for the export of military goods and services. In Chesterman, S. & Lehnardt, C (Eds.), *From mercenaries to market: The rise and regulation of private military companies* (pp. 158-180). Oxford: Oxford University Press.

¹⁸⁶ Ibid., p. 161

¹⁸⁷ Like any government program, there are problems with following up on oversight after licensing is granted. See Isenberg, D. (2008).

¹⁸⁸ A Past Performance Database has been a sticking point due to problems of contracting officers working for the DCAA and DCMA getting out into the field – particularly in Afghanistan. See: Are Contractors Performing Inherently Governmental Services?: Hearing before the Commission on Wartime Contracting Hearing, Bi-partisan Committee, 111th Cong. (2011). Past Performance Records are also difficult to keep and access for local companies, such as hiring Afghan security companies for convoy duty.

¹⁸⁹ Avant, D. (2005).

us?”¹⁹⁰ there are actually provisions within the United States Patriot Act which ensures that contractors cannot give material support, which encompasses expert advice and professional training, to those designated as terrorist groups. As of 2010, the Supreme Court still upheld this law – despite protests from NGO groups who “fear that the court’s decision is chilling the efforts of peacemakers.”¹⁹¹ Unforeseen consequences aside, it still outlaws the possibility of contractors offering their services to terrorist organizations. During the contract, the Defence Contract Management Agency (DCMA) can issue Corrective Action Requests (CARs) to improve any tactical deficiencies that contractors are omitting. This includes training, vetting and other standards that they deem are not being met as laid out in the contract agreement. While the DCMA has been sparing in issuing these requests,¹⁹² it nevertheless can act as a mechanism for control following the approval of a security or defence contract. The possibility of using contract laws may also prove to be a valuable avenue for keeping PMSCs under state control as well as ensuring any human rights abuses do not go unpunished.¹⁹³ Overall, it is apparent that there exists a strong network of laws that maintain state control over PMSCs.

So far the discussion around state control of PMSCs has focused on the American precedent. This is reasonable given the extent of their contracting and by the fact that the majority of defence companies reside in the United States. However, the South Africans

¹⁹⁰ Hedges, C. (2007).

¹⁹¹ Conflict Mediation: Privatising Peace (2011, June 30). The Economist, retrieved from www.economist.com

¹⁹² A 2010 inquiry made by the United States Senate Committee on Armed Services makes note of the lack of utilizing CARs; this was mostly due to a lack of DCMA personnel on the ground in the area they were in, rather than a lack of mechanism. See: Inquiry into the Role and Oversight of Private Security Contractors in Afghanistan, US Senate Committee on Armed Services, 111th Cong., (2010)

¹⁹³ Dickinson, L. (2007). Contract as a tool for regulating private military companies. In Chesterman, S. & Lehnardt, C (Eds.), *From mercenaries to market: The rise and regulation of private military companies* (pp. 217-238). Oxford: Oxford University Press.

and British also employ different mechanisms of control that keep PMSCs within their foreign policy agenda. While not nearly as thorough as the United States, the South Africans, given their history with Executive Outcomes and other early PMSCs, have also put into legislation laws governing the use of PMSCs. In an effort to curtail unauthorized cross border military assistance by South African citizens, the South African parliament passed the Foreign Military Assistance Act (FMAA) in 1998. This act “precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in the Constitution or national legislation.”¹⁹⁴ Specifically referring to mercenaries,¹⁹⁵ it also applies to companies that are based in South Africa that conduct foreign military trade. Any company who wishes to participate in a conflict outside the jurisdiction of the South African government must register and seek approval through the National Conventional Arms Control Committee (NCACC). While this bill has been a valuable first step in establishing firmer control mechanisms, thus far the government has not chosen to exert it to its full power. While South Africa is not officially part of the coalition of the willing which invaded Iraq in 2003, South African citizens represent the third largest contingency of contractors. As Caparini argues, the FMAA has been plagued with a weak enforcement mechanism – dealing out pittance fines that do little to dissuade the lucrative overseas contracts.¹⁹⁶ Amidst a few other practical problems, the FMAA has been argued as a weak licensing tool.¹⁹⁷ But the real focus in regards to state sovereignty is its potential; pending the possibility of issuing

¹⁹⁴ Republic of South Africa Government Gazette (1998). Foreign Military Assistance Act, no. 18912, vol. 395. Retrieved from www.info.gov.za.

¹⁹⁵ Specifically, the law states that “no person may within the Republic or elsewhere recruit, use or train persons for or finance or engage in mercenary activity.” Ibid.

¹⁹⁶ Caparini, M. (2007)

¹⁹⁷ Ibid.; Singer, P. (2004)

large enough fines – or even jail time – to truly dissuade contracts might help to reassert full government control. The power is there if the South African government chose to exert it. However, this must be viewed through two lenses: one is that fact that as a government official, PMSCs may very well employ many of your own constituents, and coming down hard on the industry may well cost voters support. Secondly, it may be better to incentivize the licensing process rather than punish; for example, licensing with NCACC provided financial benefits such as tax breaks. Regardless, the point is that, like the Americans, the South Africans have the tools necessary to come down hard on its security sector if they chose to. And this may already be taking place: in 2005, the South African cabinet approved The Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Bill. In terms of viewing this situation through a national level of analysis, this bill strikes at the core of the state centric international framework: citizenship. Those found guilty of being employed by a foreign army which goes against South African foreign policy will be fined as well as lose their South African citizenship.¹⁹⁸ This form of regulation is conceivably one of the most effective in terms of maintaining nationals under their control. While it may not deter all, rationally speaking the possibility of losing citizenship should work as a deterrent far more effective than financial penalties. As Frost argues, “for citizens who are setting up a PMC, it is crucial that they do not flout the rules of the practice within which they are constituted as citizens.”¹⁹⁹ Citizenship may play a pivotal role in constraining PMSCs; “if their private military companies are to prosper then they must ensure that they, together

¹⁹⁸ Caparini, M. (2007)

¹⁹⁹ Frost, M. (2008). Regulating Anarchy: The ethics of PMCs in global civil society. In Alexandra et. al. (Eds.), *Private military and security companies: Ethics, policies and civil-military relations* (pp. 43-55). New York: Routledge Military Studies, p. 47.

with all the employees of their companies behave in ways that do not undermine their civilian and citizenship rights.”²⁰⁰ The prospect of citizenship constraints aside, The Prohibition of Mercenary Activities bill might even be overambitious in its application. Amid a few definitional problems on the exact definition of mercenarism, the bill included an extraterritorial clause as well as a broad definition that may encompass humanitarian workers.²⁰¹ Doug Brooks, president of the ISOA, also stated that the “bill as written... is far too expansive, and will result in negative repercussions far beyond the intended targets.”²⁰² Ironically, South Africa may be a case where over application of regulation is the problem, rather than legal impunity. By banning the sale of contractors overseas they have potentially undermined their position as a regulatory body. Nevertheless, the South Africans have in place a framework for regulation that, pending increased enforcement practises and a narrowing of their legal definitions, can reel in PMSCs through proper licensing techniques.

The final country to be discussed here is the United Kingdom. The British are a large consumer of PMSC services, and as such have a bit more control through market forces than say, the South Africans might have. That is not to claim that the United Kingdom could be categorized as overreliant on contractors; indeed, evidence suggests that the United Kingdom armed services “are employing industry to bridge genuine gaps in military capability.”²⁰³ Despite this, Avant has argued the United Kingdom works

²⁰⁰ Ibid.

²⁰¹ Democratic Control of Armed Forces (DCAF). (2008). *Report on Swiss-Based military and security service providers operating in crisis and conflict regions: Comparative study of regulatory approaches*. Retrieved from: www.bfm.admin.ch/content/dam/data/sicherheit/.../ber-dcaf-teil1-e.pdf

²⁰² Brooks, D. (2005). IPOA commentary on South African Bill on mercenary activity. Retrieved from www.ipoaworld.org.

²⁰³ Uttley, M. R. H. (2004). Private contractors on deployed operations: the United Kingdom experience. *Defence Studies*, 4 (2), pp. 145-165.

under the motif of “plausible deniability”²⁰⁴ by giving PMSCs more agency than most countries. To an extent, this is not entirely warranted. While they have taken a light approach in terms of prosecutions, there are a number of legislative pieces that could be applied to PMSCs if they were to ever go against British foreign policy. While each having its own shortcomings, the Foreign Enlistment Act 1870, the Terrorism Act 2000, the Export Control Act 2002 and the Landmine Act of 1998 could conceivably be applied to PMSCs if the government saw fit to do so.²⁰⁵ The problem lies more with the international application of these laws. The extraterritorial application of these regulatory bodies is considered separate from the domestic regulation; this separation was deliberately applied. Following the “arms to Africa” scandal, the British House of Commons called for a Green Paper concerning options for regulating PMSCs. This was far from surprising, seeing as how the “arms to Africa” scandal was indeed an embarrassment for the UK government. The situation stemmed from Sandline International supplying arms to Sierra Leone, which was at the time under a UN arms embargo²⁰⁶. Sandline International claimed that the British government knew full well what Sandline was doing, and even sanctioned the actions.²⁰⁷ The fallout from the scandal was remarkable; the opposition party in the House of Commons lambasted the reigning Blair government for contravening its ‘ethical foreign policy’ by circumventing international law.²⁰⁸ The Green Paper on PMSC regulation for the United Kingdom outlined a number of regulatory methods which could ensure strong accountability

²⁰⁴ Avant, D. (2005)

²⁰⁵ Geneva Centre for the Democratic Control of Armed Forces (DCAF) (2008).

²⁰⁶ UN resolution 1132

²⁰⁷ The CEO of Sandline, Tim Spicer, has a long history in the PMI. He is now the head of Aegis, a company in charge of overseeing and coordination PMSCs operations in Iraq. Somewhat in jest, he has been described as an individual fluent in “failing upwards.”

²⁰⁸ BBC World News (1998). “British High Commissioner is a ‘hero’ in Sierra Leone”.
www.news.bbc.co.uk/2/hi/africa/89291.stm

controls over PMSCs.²⁰⁹ Instead, the UK government seems to work under the concept of strong norms rather than hard laws for international operations. Any wayward acts by a UK PMSC can be responded to via market incentives (such as contracts), publically disowning the companies, and also through the above legislations if the government sought priority to do so. It is also important to consider that “the bulk of [PMSC] personnel come from a public service background and would likely be uncomfortable acting against the wishes of the government.”²¹⁰ While the United Kingdom and South Africa do not have as strong control mechanisms, they nevertheless have the tools necessary at their disposal to come down hard on the PMI if it ever were to go against their foreign policy. While the regulatory methods may not be unassailable, it is a far cry to say that PMSCs operate within their own sphere of accountability or legal impunity.

4.3 International System: Analysis and Summary

The three countries taken together demonstrate that regulation at the state level is not only possible – it has very much taken form. While each has its own unique way of establishing regulation, the fact is that they all have the *means* to ensure accountability. For PMSCs, accountability and control are closely synonymous. The United States have established a very strong mechanism of accountability and licensing to ensure that the companies based in their country as well as those who they employ fall in line with their strategic foreign policy. From the national perspective then, the dominant and prevailing motive for regulation has been to keep PMSCs within their control – which has been successful thus far. In a growing morass of internal and external security threats, coming

²⁰⁹ Foreign and Commonwealth Office. (2002). *Private military companies: options for regulation* (HC 577). London: The Stationery Office.

²¹⁰ Geneva Centre for the Democratic Control of Armed Forces (DCAF) (2008), p. 38

from not only state but non-state actors, the state has indeed transformed in terms of keeping itself relevant through spending. In a special entitled “Taming Leviathan”, the Economist reports that as a percentage of GDP, the state “has kept on grabbing an ever larger share of the economy in the rich world for a century”.²¹¹ By employing PMSCs, states are in fact increasing their functional capacity. Employed properly, these companies provide welcome tactical and strategic benefits for the contracting state. Through regulation, the decision to employ force is still maintained within the state centric framework; the decision process is still funnelled to a public body in some capacity. In this sense, the term strategic accountability may best be suited for describing national level regulation of PMSCs. Authors such as Nicole Deitelhoff and Anna Geis²¹² believe that the privatization (or externalization) removes the democratic legitimacy of the deployment and use of force, thereby eroding the very basis of the leviathan’s legitimate use of force. Two assumptions are made through this argument: that the executive is purposefully using PMSCs to directly undermine their respective public representatives and that public representatives are not keeping due diligence regarding military contracts – particularly overseas contracts. Taken together, these arguments miss the fact that regulatory efforts, and a great deal of research, has been called by either parliamentarians or congressman. Demonstrated above, it is evident that public officials have taken a much harder stance and analysis on the use and applicability of PMSCs, ensuring democratic responsibility through increasingly vigilant public representatives. For the United States, the work done by the Commission on Wartime Contracting is ample evidence of this trend. The adoption of regulation is due in part from international

²¹¹ Taming Leviathan (2011, March 19th). *The Economist*, vol.398, no. 8725.

²¹² (2009)

norms that have pressured the application of accountability mechanisms, but it also stems from the states' own strategic purposes. It is thus a mixture of prudential security concerns – a new capability in realist terms – and international human rights norms that have situated PMSCs squarely within (as opposed to outside of) the state centric framework. The next section will look at the international norms that have helped to shape the state level regulation. Once again, the English school will help analytically separate the levels as this can best be understood through the international society tradition.

4.4 International Society

Not only have states put in place national regulatory methods, but at the international level, the dominant rules and norms governing the application of force has been largely left unchanged. While PMSCs present a significant transformation in terms of externalizing military force, they have not violated the norms that govern the acceptable use of force. As well, they are still applicable to international human rights laws and in equal measure to norms embodied within institutions such as the United Nations. As Buzan writes, international society is about “the institutionalisation of shared interest and identity amongst states, and puts the creation and maintenance of shared norms, rules and institutions at the centre of IR theory.”²¹³ As such, it grants a valuable analytical tool for conceptualizing how these norms have been created in relation to how PMSCs operate at the international level. While norms are difficult to access in terms of effectiveness, there have been concrete efforts at the international level to ensure accountability. The catch thus far has been that these efforts have placed accountability and ownership squarely on

²¹³ Buzan, B. (2004), p. 7

states. Given that they are held as the legitimate wielders of violence within international society – this makes sense. Accordingly, international level regulation, rather than externalizing responsibility for human rights abuses and accountability to a world regulatory body, has reasserted the dominant norm of state sovereignty and responsibility. The global nature of the industry necessitates this level of coordination among states. Although Cockayne and Mears argue there are limitations to state level regulatory efforts and that “PMSCs operating transnationally can easily escape domestic regulation,”²¹⁴ their transnational characteristic does not make them invulnerable. Being transnational does not predicate that they will consciously avoid state regulation, nor does it annul responsibility to international institutions. This section will argue that through International Humanitarian Law (IHL), the ICRC’s Montreux Document, and the United Nations, the dominant paradigm of states as the legitimate wielders of violence has not been radically supplanted by PMSC; instead, PMSCs have been amalgamated into this norm structure. Within international society, the purpose of international law and international institutions is to maintain the ‘order’ inter-state relations; as such, they have confirmed and reinforced that private violence comes under the jurisdiction of states. In other words, the state still holds the sole responsibility of the application of violence, even when it is delegated to a non-state actor such as PMSCs. Despite its global nature, PMSCs have not broken the primacy of sovereign states over international violence; they must have the legitimate imprimatur of acceptable international norms to operate on their own. What will be demonstrated here is that international institutions, particularly the United Nations, have attempted to play down the role of private force unless under the direct control and responsibility of a legitimate state.

²¹⁴ Cockayne, J. and Mears, E. S. (2009), p.3.

The role of international law in international order is a complex one. As Hedley Bull argues, international law can best be seen as a “body of rules” that, despite missing a world sovereign to enforce the rules, still maintains a special status of law.²¹⁵ Of interest here is what he terms the efficacy of international law: “that there is some degree of resemblance as between the behaviour prescribed by the rules, and the actual behaviour of states and other actors in international politics.”²¹⁶ In Bull’s analysis, states have sufficiently abided by international law as to consider them reasonably efficient. Within this same line of thought, we can assess how PMSCs have been brought under international law in a way that maintains international order. Among others, one of the principal functions of international law in relation to international order “has been to state the basic rules of coexistence among states and other actors in international society.”²¹⁷ One of these sub-functions is the “restriction of violence between states and *other* actors.”²¹⁸ Order is maintained through principles of state sovereignty, and bringing PMSCs within the bounds of international law should help to mitigate their threat to state sovereignty. The following section will look at some of these initiatives and rules which have sought to maintain this dominant order.

4.4.1 International Human Rights Law and the Montreux Document

Far from being immune to international law, PMSCs, and their corresponding home states, have due responsibility to existing international humanitarian law (IHL), use of force laws, and standard international law. Granted that there are no international laws

²¹⁵ (1995), p.122-130.

²¹⁶ Ibid., p.131.

²¹⁷ Ibid., p.135.

²¹⁸ Ibid., emphasis added.

dealing strictly with PMSCs (it continues to use the language of mercenarism), there is customary international law which is applicable nonetheless. To clarify this fact, the International Committee of the Red Cross/Red Crescent (ICRC), in collaboration with the Swiss government, created the Montreux Document. As a non-legal binding document, it does not force the hand of any signing states through legal means. Instead, it recognizes the existing obligations that states and PMSCs have with respect to international law. As James Cockayne points out, this is a rather significant initiative because it is the first international document to clearly lay out the laws governing PMSCs.²¹⁹ As a rather thorough document, it outlines the responsibility of each party when contracting PMSCs: the territorial states; the home states; all other states; and PMSC and their individual employees. Cordula Droege, a legal adviser for the ICRC, states that “for the ICRC...it is clear that in situations of armed conflict there *is* a body of law that applies, namely IHL, which regulates both the activities of PMC/PSC staff and the responsibilities of the States that hire them.”²²⁰ Home states have a responsibility to ensure that PMSC employees are fully aware of the Geneva Convention (just like their public counterpart) and which laws apply to their conduct. While these are the ‘hard laws’ which apply to PMSCs and state, the Montreux also lays out a number of ‘soft’ laws in the form of ‘good practices’ for PMSCs and the countries who use their services. This includes important considerations such as training and background checks, as well as operational procedures.

²¹⁹ Cockayne, J. (2009). Regulating private military and security companies: the content, negotiation, weaknesses and promise of the Montreux Document. *Journal of Conflict & Security Law*, 13 (3), pp. 401-428.

²²⁰ Cordula, D. (2008). Interview: Getting Private Military and Security Companies to Respect the Law. *ICRC Resource Centre*, Retrieved from www.icirc.org/eng/resources

One of the early shortfalls of this document was that it garnered only 17 signing members, which was argued as hardly representative of the wider international community.²²¹ Importantly, however, those who first signed the document included some of the foremost players such as the United States, Iraq, Afghanistan, South Africa and the United Kingdom. Moreover, as of February 2011, there have been 36 signatories to the Montreux document.²²² The document seems to be gaining traction within the wider international community, as government officials have come to recognize the significance of PMSC activity. The initiative also sought to ensure an agreement that PMSCs should not take an active part in combat operations. Obviously there is a fine line between ‘active combat duty’ and Forward Operating Base (FOB) security, given the nature of contingency operations, but it is apparent the initiative seeks to keep PMSC off the front line as much as possible. The point is that while the document is not legally binding as mentioned before, a growing consensus around the proper role of PMSCs as subordinate and applicable to both national and international law is apparent.

A great deal of the confusion around the applicability of IHL to PMSCs stems from the problem of legally assigning them combatant or non-combatant status. As non-combatants, they are protected by the Fourth Geneva Convention, the Additional Protocols of 1977 and customary law.²²³ On the other hand, if they are classified as combatants the rules governing their status is not as clear; at what point are they legally viable targets in an armed conflict? What laws govern their treatment as POWs?

²²¹ White, N. D. (2011). The privatisation of military and security functions and human rights: comments on the UN working group’s draft convention. *Human Rights Law Review*, 11 (1), 133-151.

²²² See <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html> for a complete list of signatories. (last accessed July 13, 2011).

²²³ ICRC, (2010).

Although this has been a major focus in legal circles, on the ground the problem is not as pertinent. Contemporary insurgency operations have not been characteristically civil; those taken as POWs, be they civilian or military, are typically beheaded for their involvement in the conflict – or go missing altogether – regardless of status. Be that as it may, giving PMSCs a legal definition in international law is beneficial not only to PMSCs (who will mitigate risk if captured by enemy combatants) but also to state and international bodies. The clearer the definition, the easier it will be to give these companies protected legal status.²²⁴ Yet international bodies have been very cautious in giving them legitimacy outside the scope of state control. This is perhaps why international law applies to individuals rather than companies; assigning companies legal status within international law would legitimize their status as a body of violence outside the state system. As it stands, it comes down to individual states for enforcement of regulation and accountability. Section 4.2 outlines many of these regulations which are quickly coming into effect.

The Montreux Document reasserts the fact that there are “non-transferable responsibilities of the state.” Generally speaking, the document outlines the “fact that PMSCs are private enterprises and not State authorities does not relieve States from their international obligations... for example, they retain their obligation not to start a war in contravention of the charter of the United Nations.”²²⁵ States using PMSCs must still observe both the law of neutrality and the “prohibition on the use force against the

²²⁴ Authors such as Renee De Nevers (2009) seem to believe they have an easier solution: to limit the use of PMSCs that act on the state’s behalf. Rather than reassigning them different legal definitions is to simply cut reliance on them altogether. This solution is far from viable: for all intents and purposes, PMSCs are here to stay, and legal definitions should try to adapt to this rather than try to change this fact.

²²⁵ (2008), p.33.

political independence and territorial integrity of states.”²²⁶ Those who fret that PMSCs will undermine democratic legitimacy (and consequently the legitimate use of force) by commandeering wars through private entities seem to miss this point. The Montreux Document reaffirms state responsibilities (no doubt in direct recognition of the wars in Afghanistan and Iraq) during situations of occupation are especially crucial. The occupying state still has “obligations towards the occupied population...it has to ensure public order in the occupied territory and the population’s safety.”²²⁷ The International Law Commission (ILC) Articles on State Responsibility make it clear that private entities providing public functions are still the responsibility of the state. As such, the “rationale behind this attribution is that a state cannot evade its responsibility simply by transferring its functions to a private entity...this principle is dictated by logic and well acknowledged in international law.”²²⁸ Furthermore, in 2005, the International Court of Justice in the case of Congo against Uganda found that Uganda (as an occupying power), was responsible for the actions of private actors.²²⁹ Likewise, being delegated public responsibility does not invalidate the possibility of individuals working for PMSCs being charged for war crimes – if the offense was egregious enough to warrant such a case. Additionally, under the precept of due diligence, even PMSCs which operate outside of the state, such as those who work for NGOs, are still under the responsibility of the state. The “duty to exercise due diligence under Human Rights Law (HRL) imposes an

²²⁶ Schreier, F. & Caparini, M (2005). Privatising security: Law, practice and governance of private military and security companies. *Geneva Centre for the Democratic Control of Armed Forces (DCAF)*, occasional paper no. 6. Retrieved from: <http://www.dcaf.ch/Publications/Publication-Detail?lng=en&id=18346>

²²⁷ Ibid.

²²⁸ Lehnardt, C. (2008), p.144.

²²⁹ Doswald-Beck, L. (2007) Private military companies under international humanitarian law. In Chesterman, S. & Lehnardt, C (Eds.), *From mercenaries to market: The rise and regulation of private military companies* (pp. 115-139). Oxford: Oxford University Press.

obligation on states to prevent, to investigate and to punish abuses”²³⁰ regardless of clientele. The drive of regulatory efforts at the state level is perhaps best seen (in part) as a response to the international pressure to solidify state control over PMSCs and ensure adherence to IHL. Logically, not only can regulation be seen as keeping PMSCs within state control at a strategic level, but it is also fulfilling states international obligations to the wider community. In terms of reinforcing international order, international efforts have reasserted the dominant norm of international society of sovereign states.

These same pressures are being acted upon the industry as well. Not only do states have a duty to prosecute and maintain control over PMCSs, the Montreux document reaffirms the responsibilities of the industry to create standards to govern their own affairs. While the major burden is placed on states, the industry must still seek to incorporate IHL within their training and hiring regimen. It is in the companies’ interest to do so for two reasons: first of all, the fact that those who demonstrably abide by IHL standards will be seen as more legitimate by dispelling the myth of operating with impunity. Secondly, it will align their policies more closely with the states that employ them; the more congruence in terms of policies, the less friction during operations. Taken together this should grant the company greater employability. The ensuing Codes of Conduct that industry leaders have professed can be associated as a direct reaction to the increased call by the international community to act within international law standards. Codes of Conduct will be discussed in greater depth in section 4.4.

²³⁰ Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions (2005), p. 6.

4.4.2 The United Nations and the Anti-Mercenary Norm

Contributing to this push for states to bring PMSCs under their control is the United Nations. As an international body, the United Nations has a long history of dealing with mercenarism – particularly in relation to self-determination. The United Nations has done well to reflect the typical sentiment that was best described by James Pattison; in his work he makes it clear that there is something inherently morally wrong with the use of private force.²³¹ Informed by years of reports done by the Special Rapporteur on Mercenarism (Enrique Bernales Ballesteros – the longest continuously serving Special Rapporteur) and a number of working groups on the use of mercenaries “as a means of violating human rights and impeding the exercise of the right of peoples to self-determination,”²³² the general international disposition toward PMSCs is a negative one. As Percy points out, Ballesteros used two very strong norms (the norm of national self-determination and the appropriate cause for the use of force) to create a lingering norm against the use of PMSCs.²³³ The rapporteur had no interest in separating between traditional mercenary outfits and corporate PMSCs. Consequently, PMSCs, try as they might, are still often associated with mercenaries. Although PMSCs hold a very different corporate composition, fundamentally, they both derive a common (and publicly dominant) characteristic of fighting for money. They hold an especially repugnant distinction because this norm has become stronger over time; to the point that it can be labeled a puritanical norm. A puritanical norm “makes an unreflective condemnation

²³¹ Pattison, J. (2010). Deep objections to the privatisation of military force. *Journal of Political Philosophy*, 18 (4), pp. 425-447. Interestingly, he argues that even *with* a robust regulatory system, the objections that he sees with the privatization of force are so profound that regulation cannot address them.

²³² See: Office of the United Nations High Commissioner for Human Rights. Available at: http://www2.ohchr.org/english/issues/mercenaries/annual_reports.htm (last accessed July 14)

²³³ Percy, S. (2007), p. 222. Percy is one of the few authors to thoroughly disseminate the long standing norm against mercenaries right up until the new age PMSCs.

without attention to the facts.”²³⁴ The UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries is certainly reflective of this trend. It is also reflected in the impossibility of the UN using PMSCs to conduct humanitarian intervention or peacekeeping missions worldwide; along with the PMI moving away from controversial combat operations performed in the 1990’s.²³⁵

In January 2010, the United Nations Working Group on the use of Mercenaries proposed a draft convention on the use of PMSCs to acknowledge the need for greater control over PMSCs at the international level. This convention, if it were to be adopted, would be a legally binding treaty. Core to their work was the definition of what they termed (and what the Commission on Wartime Contracting sought to define²³⁶) as inherent government functions. These functions are those considered core to public interest and should not be privatized or delegated to external actors. Their focus, somewhat in line with the Montreux Document, was to “reaffirm and strengthen State responsibility for the use of force.”²³⁷ By doing so it rightfully neglected the role of PMSCs as autonomous actors in the international system. As White points out, the “lack of direct responsibility and accountability for PMSCs in the treaty is reflected in the fact that PMSCs cannot become parties to the treaty, although they ‘can communicate their support.’”²³⁸ To anyone reading the document, it is apparent that the authors see PMSCs as something that ought to be limited, minimized and highly controlled. Rather than prohibiting them altogether, the Working Group seems to begrudgingly accept their

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ *Are Contractors Performing Inherently Governmental Services?: Hearing before the Commission on Wartime Contracting Hearing*, Bi-partisan Committee, 111th Cong. (2011).

²³⁷ Office of the United Nations High Commissioner for Human Rights (2010), p. 2.

²³⁸ White, N. (2011).

existence, so long as it is within the confines of state control. At the international level, it seems apparent that the norm against the use of mercenaries, indistinct from PMSCs (for the UN in particular), is certainly alive and well.

4.5 International Society: Analysis and Summary

If we accept that international society is the embodiment of norms directing the proper interaction between states at the international level, and that international institutions reflect these norms, it is apparent that PMSCs have a long way to go before they are accepted as legitimate, autonomous violent actors. Far from being immune to international law, they in fact are subject to both common international law standards and fall squarely within the jurisprudence of states through the concept of due diligence and state responsibilities. The push to force states to create greater national regulatory methods along with documents that foster this cooperation is reflective of the continued norm of the legitimate use of violence. Rather than try to establish an international body that could effectively regulate PMSCs at the international level (which would be difficult to achieve in practical terms, but also infringes on state sovereignty), the United Nations and the Montreux document maintain that controlling the use of force is still the responsibility of the state – no matter what actor is performing the violence. Perceived through English school literature, international society has attempted to bring PMSCs within the dominant order of state sovereignty and have, thus far, been relatively successful. If it were true that, at the international level, PMSCs did not respect international law and conventional norms, this author suspects that companies would be reflect closer semblance to earlier PMSCs, which offered offensive combat operations and operated with their own agenda. The dominant norms within international society

have pressured states to look beyond simple security considerations to bring PMSCs under IHL standards. Likewise, we can see how these same effects have pressured the industry itself (here represented by the world society tradition) to ensure proper conduct. Insofar as the international society has come to be commensurate with national legal frameworks, this may not always be the case. If national level regulation fails to adequately address the PMSCs' abuses it is conceivable that international organizations such as the UN may take it upon themselves to enforce regulation. If this were to happen, the possibility of legitimizing these actors as legitimate wielders of force on the international level could very well take form. For now, the imprimatur of state acceptance has been the only acceptable form of PMSC use, and those operating outside of this purview are deemed illegitimate. The following section will examine this phenomenon from the perspective of the world society tradition. This will be done by analyzing industry attempts to create a self-regulatory body that would internally regulate their affairs, while exploring the concept that they represent a post-state, or 'new model' soldier.

4.6 World Society and the Autonomous PMSC

Thus far the discussion has been clearly focused on a state approach to analyzing PMSCs. The world society concept however, as mentioned in Chapter Three, takes as its starting point non-state actors. This presents a problem for conventional international relations theory. Insofar as PMSCs hold an intimate relationship with the state, they are difficult to completely separate within their own sphere of operation. As demonstrated above, they lack autonomy in terms of legitimate use of force (through international norm creation) as well as being controlled through national regulation. However, there are

certain characteristics which arguably detach them from the state – even if they are not the dominant characteristics thus far. One is the apparent disconnect from the contracting state’s society, or what has been termed the ‘post-modern’ soldier; while the second is the possibility of creating a self-sustained regulatory body through industry Codes of Conduct. Is it possible that PMSCs represent a move toward the universalism that Wight claimed would overthrow the state system? Do they represent a post-state agenda that binds together societies at the level of the individual? As a normative question, the idea that PMSCs may adopt a greater universal guiding ethics is not out of the question; as an analytical question, their relationship with the state is dynamic and conditional.

4.6.1 The ‘Post-Modern’ Soldier?

As mentioned in Chapter Two, some of the authors who claim that PMSCs are undermining state sovereignty claim they are doing so by disconnecting the natural attachment government militaries have with their society. In civil-military relations, the dominion over the military through civilian bodies is central to effective control over their armed forces. This is most starkly illustrated in democracies where the “governed should govern.”²³⁹ Both Janowitz and Huntington, the founding fathers of civil-military theory, ground a great deal of their literature on the concept of professionalism. As a ‘club’, professionalism works as a filtering system that separates legitimate from illegitimate actors within the field. Over time, the military has taken on various forms in relation to their society (and still hold different qualities from one national to another). Elke Krahnmann²⁴⁰ traces this evolutionary typology and places PMSCs at the tail end of

²³⁹ Feaver, P. (1996)

²⁴⁰ (2008)

this transformation. In the earlier part of contemporary history, the citizen soldier was the standard for raising legitimate armies. The citizen soldier is raised directly from the country's population through either conscription or a voluntary call-to-arms. The citizen soldier lacks a professional identity, but is directly connected to the society that they have sworn to protect. Politically, conscription is by far the most costly choice, particularly in an age where threats are rarely direct existential security concerns (such as during the Cold War). Today the threat is less tangible, embodying transnational features such as international terrorism. Attributed to the Vietnam War, the citizen-soldier model lost legitimacy as the war itself lost public support; the evolution from citizen soldier to the professional all-volunteer army has its roots in the problems of drafting eligible citizens for wars that had waning support. The professional military, particularly in the United States, is defined by its high degree of expertise in the field of military application, while "separating the armed forces from broader society, by education and indoctrination, and an emphasis on combat as the distinctive feature of the military to promote a common identity and sense of purpose."²⁴¹ To a large extent, the core debate within civil-military relations is addressing this phenomenon in terms of ensuring that these same professionals, honed in the skills of applied violence, do not overturn the very citizens they are meant to protect.

Krahmann identifies a new strand within this evolutionary model: the contractor. Contractors do not have the same societal attachment as the professional military, as they do not have the same (direct) duty to the state. He claims that these individuals see military affairs as an occupation, rather than a vocation or calling. They are defined by

²⁴¹ Ibid., p. 253

their profit motivation and multi-national element, often-times fighting in a war to which they have little symbolic attachment. Beyond this, Krahmman also sees contractors as missing a collective identity, while also maintaining the ability to disregard orders if they believe that the dangers are not commensurate to the pay. Taken together, they are the ‘post-modern’ soldiers that can defy or disregard state orders and operate outside of the state, within the autonomous environment of international affairs.

But does this model hold up to closer scrutiny? Beginning with the concept that they can and may disregard orders in dire situations, this is a moot point. While there have been cases of dereliction of duty (such as the infamous TELIC situation where a UK contractor refused to stay in theatre), the overall picture is of a very different situation. Contractors are operating in a heavily volatile environment – one that has claimed the lives of many of these contractors in the field. The security situation is perhaps as dangerous as it could be for many of the convoy duties that the contractors risk their lives to perform. Yet they continue to provide these services. If it was indeed the case that contractors were unreliable in performing the services they were contracted to do, it is inconceivable that the United States or United Kingdom would continue to employ them for crucial services in such high risk environments. We would expect to see PMSC individuals leaving the country in droves. Instead, the number of PMSC personnel as stayed relatively consistent.²⁴² This is particularly true for the armed contractors overseas, many of whom join this line of work *because of the dangers* – not to avoid it. Even if adrenaline is not what they are seeking, many would lose their jobs by refusing to deploy – and the company itself would have a difficult time finding contracts if this became the

²⁴² Schwartz, M. and Swain, J. (2011)

norm. In fact, the remarkable ability of contractors to deliver reliable supply chains is perhaps *too* good, “leaving some officer to voice concerns that troops are in fact too well supplied and too comfortable.”²⁴³ Secondly, we would also see more Quick Reaction Forces (QRFs) being deployed to aid contractors who either could not handle an attack by insurgents or completely vacated their posts due to dereliction of duty. A quantitative RAND study (the only type of its kind) reported that 60% of DOD respondents with experience operating with PMSCs and 80% of those who did not have direct relationship with PMSCs said they “never” had to provide QRFs to aid armed contractors. Roughly 1-2% of those with experience with contractors responded positively with “always”.²⁴⁴ The idea that contractors would refuse operations due to extraordinary dangers seems exaggerated at best. Danger is, as the colloquial saying goes, in their job description.

The second point against contractors is that they lack a common identity. This overlooks a few considerations. First of all, the United States, the United Kingdom and South Africa are highly diverse countries. The volunteer military, while providing a common sense of identity through indoctrination of certain codes, is raised from a very diverse group of individuals. Individuals who volunteer from Texas would have little in common with a New York inner city immigrant who also joined the forces. Common country does not mean common identity. It is by working together in combat situations that they develop their identity. Much the same can be said for PMSCs. While they may indeed come from very diverse backgrounds, this does not mean that they will not eventually come to adopt a common identity. Through the company itself, the contractors

²⁴³ Brooks, D. & Chorev M. (2008). Ruthless humanitarianism: Why marginalizing private peacekeeping kills people. In Alexandra et. al. (Eds.), *Private military and security companies: Ethics, policies and civil-military relations* (pp. 115-131). New York: Routledge Military Studies.

²⁴⁴ Cotton et. al. (2010); figure S.5

may form a commonality or sense of camaraderie. Again, the account of John Ashcroft, an ex-SAS soldier contracted in Iraq, reveals a similar pattern of common identity that evolved through operating in combat situations. Likewise, Combustion Claassens, a South African security contractor, fondly describes the camaraderie that developed through working together in combat.²⁴⁵ The absence of identity is therefore not the problem: the issue is that this identity may not necessarily be founded on a single state but instead on some broader identity (one perhaps above or beyond the state system). There is the possibility that PMSCs may in fact associate closer with a broader sense of humanity than with just a single nation. That being said, this is merely aspirational: so far PMSCs certainly identify and follow their home state's foreign policy far closer than most would care to admit.

The point here is that the differences between national militaries and PMSCs are perhaps not as wide as some may first assume. Insofar as they are subject to national regulation from the home country as demonstrated in section 4.2, many of the companies are headed by previous government employees or at minimum a citizen of their home country. This makes it difficult to agree with the perception that they are completely disconnected from their home society. It is undoubtedly their corporate character which keeps them in touch with international standards. At the extreme end, it is not difficult to imagine an international arena where PMSCs operate with complete disregard of international law and state centrality; to a greater degree, their operations would look more like the attempted coup plot that took place in Equatorial Guinea in 2004. In a rather strange series of events, a group of mercenaries were hired to overthrow President

²⁴⁵ Bicanic, N. and Jason B. (Producers). (2006).

Teodoro Obiang Nguema with the support of Logo Logistics. Despite the fact that this regime was led by a ruthless dictator, the coup fell apart when law officials in Zimbabwe's capital impounded a plane carrying the suspected mercenaries. Long story short, in a rather sensational turn of events those involved were arrested and Sir Mark Thatcher was implicated in the whole affair.²⁴⁶ In this situation, the mercenaries took it upon themselves to correct a moral injustice being carried out in a repressed country. Those that took part were arrested, and the coup itself received widespread condemnation. This was certainly a one-time event – one that has yet to be replicated. The world society concept dictates that the state will be overthrown on a normative plane by actors who do not take into account state interests or geopolitical considerations and can connect across territorial boundaries. If PMSCs subscribed to something beyond the state (at least on a normative level) would we not see their involvement in situations such as Libya where rebels are attempting to overthrow an oppressive regime in the name of democracy? In terms of payment, they could make a similar deal as Executive Outcomes in Sierra Leone and pay for their services using oil revenues.²⁴⁷ We might also see involvement of PMSCs supporting democratic revolutions in Syria. Again, these are all extreme examples, but they demonstrate how the argument that PMSCs are disconnected from the society of their home state does not seem to be borne out at the international level. Along the same line, the industry has developed its own set of standards and principles that it is attempting to implement, but it aligns quite closely to international law and state considerations. This is what we turn to next.

²⁴⁶ British Broadcasting Corporation. (2010, Nov. 3). Equitorial Guinea coup plot. Retrieved from <http://news.bbc.co.uk/2/hi/africa/3597450.stm>.

²⁴⁷ The case in Sierra Leone was a bit different, as the deal was based on diamond concessions with a company which may have had very close corporate ties with Executive Outcomes.

4.6.2 Codes of Conduct and Self-Regulation

Formally, Codes of Conduct are “self-imposed corporate obligations for the adoption of normative, and therefore not necessarily legally enforceable, standards which are not part of the original core business objectives of the company.”²⁴⁸ They are closely related to corporate responsibility in the sense that they instill a social conscience onto the company. For PMSCs, it is held that the adoption of Codes of Conduct is paramount for both the industry to maintain legitimacy as well as the dispelling of certain ‘cowboy’ organizations within the industry. As Avant points out, “standards for behavior reduce uncertainty in ways that enhance the prospect for profitability by weeding out fly-by-night firms and ‘mercenaries’ – who may both drive down prices and endanger the legitimacy of the industry.”²⁴⁹ Some companies have adopted an internal Code of Conduct that is readily accessible through their websites or public relations, but they inevitably rely on the individuals within the industry. Beyond company level self-regulation, there are also formal organizations that represent the industry and have attempted to create a binding self-regulatory mechanism. The American based International Stability Operations Association (ISOA)²⁵⁰ for example, has established a Code of Conduct which “seeks to ensure the ethical standards of International Stability Operations Association member companies operating in conflict and post-conflict environments.”²⁵¹ Co-authored by NGOs and human rights lawyers, the ISOA Code of Conduct helps to whittle out those that do not have their seal of approval; it also provides

²⁴⁸ Rosemann, N. (2008). Code of conduct: Tool for self-regulation for private military and security companies. *Geneva centre for the democratic control of armed forces (DCAF) occasional paper*, 15.

²⁴⁹ Avant, D. (2007)

²⁵⁰ Previous known as the International Peace Operations Association (IPOA)

²⁵¹ For the full document, see: ISOA Code of Conduct. Available at <http://www.stability-operations.org/index.php>.

a complaint mechanism against its members from both inside and outside of the industry.²⁵² With a burgeoning international membership, the hope is that these companies will go above and beyond the minimum legal requirements of human rights and ethical operations. There is also the British counterpart which was established in 2006, the British Association of Private Security Companies (BAPSC). With a similar objective as the ISOA, the BAPSC also seeks to promote greater transparency with UK government based contracts.²⁵³ There is also a lesser known association dedicated strictly to PMSCs conducting operations in Iraq. The Private Security Company Association of Iraq (PSCAI) seeks greater visibility and legitimacy while maintaining a healthy community of security contractors.

While industry standards are a welcome addition to the multiple levels of regulation, thus far they have not been very successful. Recognized by the President of the ISOA, contracting clients, be they states or NGOs, consistently neglect to check if they are in good standing of the ISOA.²⁵⁴ There is also the rather embarrassing point that Blackwater, despite being one of the founding members of the ISOA, withdrew its support for unknown reasons. Besides this, there is also the problem of enforcement. As an industry standard, they have only market forces to guide their enforcement mechanisms, rather than hard law mechanisms available to states and international law. Amnesty International, while acknowledging the worthwhile efforts of industry leaders

²⁵² Brooks, D. & Rathgeber, L. (2008). The industry role in regulating private security companies. *Security privatization: Challenges and opportunities*, 6 (3).

²⁵³ Isenberg, D. (2009)

²⁵⁴ Brooks, D. and Rathbeger, L. (2008)

and trade associations, reports that the “Code remains an aspirational set of values”²⁵⁵ rather than a concrete enforcement mechanism. They hope that one day these values will be observed in practical terms, but have not seen the evidence necessary to suggest that PMSCs take Codes of Conduct seriously. Similarly, Rosemann reveals that a large percentage of PMSCs do not have company statements directly referring to their own internal Code of Conduct. Legally speaking, there is not very much that the industry can do to hold accountable any of its members outside of being ostracized; they do not possess detainment jurisdiction. Not until the ISOA and the BAPSC become stronger entities by increasing its membership count and international influence will it become an effective tool of self-regulation. Ironically, the one may not happen without the other. Until then, it is apparent that “unless they are sanctioned by states or international organizations, they are likely to be a very weak instrument”.²⁵⁶ The trade associations do not supplant or even share the authority that states have in regulating PMSCs. At the end of the day, most of the Codes of Conduct that have been written embody many of the same norms that are found within contemporary IHL and human rights discourse anyway – all of which are bound very closely to the state centric system. The push for companies to adopt Codes of Conduct has thus far proven their willingness to be brought into international standards and state level regulation. Rather than flouting the rules, they are attempting to adopt as many standards as possible to give them a legitimate position on

²⁵⁵ Amnesty International United States (n.d.). Improved human rights policies and practices within private military and security companies (PMSCs). Retrieved July 14 2011, <http://www.amnestyusa.org/our-work/issues/business-and-human-rights/private-military-and-security-companies/improved-human-rights-policies-and-practices-w>

²⁵⁶ Holmqvist, C. (2005). Private security companies: The case for regulation. *Stockholm International Peace Research Institute*. Retrieved from <http://www.sipri.org>, p. 47.

the world stage. For many companies, embracing state level regulation is seen as a means of protecting its personnel and limiting risk.

4.7 World Society: Summary and Analysis

As Hedley Bull commented in The Anarchical Society, the restoration of private international violence is nothing new. What is new is the predominantly global nature of this privatization of violence. PMSCs may have a very ripe opportunity to become a multinational task force that stands for something above or beyond the prudential security or geopolitical considerations that states must be cautious of. While this is the possibility, it is far from reality. Despite the fact that PMSCs may, hypothetically, subscribe to an identity that is beyond the state, this has yet to really take form. So far their identity is still loyal and inextricably bound to the state centric system. Although the advent of internal Codes of Conduct speak to a more universalist moral position (since most Codes of Conduct are normatively individualistic in their ontology), companies still take geopolitical considerations to account; both as a risk factor in business terms, but also because of the strong norms against the use of mercenaries within international society. Try as they might to establish an internal regulatory mechanism, the PMI is still dependent on the state system to enforce and maintain a set of standards. After all, they remain the ultimate arbiters of law. As evidenced by the trade association and the public outcry of many of the top industry

leaders,²⁵⁷ the industry *wants* to be highly regulated. The less their companies are viewed as unmitigated cowboys, the more legitimate their business enterprise becomes.

There are a few points that must bear in mind however: if industry regulation becomes strong enough to be an internal enforcement mechanism, could this be a threat to national sovereignty? Would regulation move from international system and society traditions to be placed more closely within the world society concept? This would appear to be most certainly the case. Hypothetically, if trade associations became the standard by which companies had to measure their operations, they would have little incentive to follow state-based regulation. Although hypothetical, this counterfactual allows one to see just how responsive PMSCs are to international regulation that is inherently state centric. To the extent that PMSCs are being controlled and align to state interests as much as they do, the world society concept helps to predict the possible shift that could take form over the coming years. As it stands, PMSCs are not transnational private actors that stand beyond or above the state system, both analytically and normatively, but rather they are actors within international society that are bounded by the same principles and considerations as states.

²⁵⁷ This is not an entirely selfless keep in mind: the stronger the regulation, the less competition for the larger international companies.

CHAPTER 5: Conclusion

By using the English school theory as an outline for how to interpret the different methods of regulation for PMSCs, we can draw a few conclusions. While this is far from a comprehensive study into the nuances the English school can help us to interpret the growing phenomenon of PMSCs, it also allows us to see the different levels of regulation that have come into effect to ensure that PMSCs do not undermine state sovereignty in international relations. In terms of looking at the challenge to state sovereignty, when it is viewed through the multiple traditions of English school literature it is obvious that PMSCs are not inherently antithetical to the state. They do not maintain their own strategic agenda, and states have maintained their authority over the use of force both by legal means but also through international norms. Although policy makers and legal experts have sought to establish commensurate regulatory methods through each conceptual lense, it is not inconceivable that these methods may actually come into competition with one another. If international norms become enforceable through international jurisdictions such as the United Nations or other international institutions, this may detract from some of the control states have over PMSCs. If, for example, the United Nations began to use these companies for peace and stability operations in direct contravention of state sovereignty, there may be a greater challenge to the state centric system and perhaps a greater move toward a world society concept – wherein individualistic human rights can be maintained by the sword.

Perhaps one of the most likely scenarios that may play out over the next years is the process of insourcing for many of these governments. In an effort to curb the overreliance on PMSCs, countries such as the United States have already begun to adopt a pattern of so called “insourcing”. In May 2011, the Center for Strategic & International Studies conducted a DOD workforce cost assessment to guide an intelligent pattern of insourcing. Following US Secretary of Defense Robert M. Gates announced plan to reduce the reliance on contracted personnel by replacing more than 30,000 contractors with DOD civilians in 2009,²⁵⁸ the United States has taken its first steps to increase the number of organic staff that is employed through the DOD. Although this position has been downplayed since the original grand statement, the fact remains that the contingency operations in Afghanistan and Iraq are coming to a close. As they come to a close, so too must the massive contracts that DOD, DOS, USAID, the UK Ministry of Defence, and other government agencies have granted to PMSCs. These companies will naturally lose out as spending is cut back.²⁵⁹ One of the benefits of contracting corporations during wartime is the ability to quickly cut budgetary constraints. Undoubtedly, given the debt crisis that has come to engulf US political attention, national security spending will be drawn down as agencies are mandated to rein in spending. Relations between federal agencies and PMSCs may very well break down.²⁶⁰ This situation could have a myriad of unforeseen consequences.

²⁵⁸ Berteau, D., Hofbauer, J., Ellman, J., Kiley, G., Ben-Ari, G. (2011). DoD workforce cost realism assessment. *Center for Strategic & International Studies*. Washington: CSIS.

²⁵⁹ The Washington Post has already reported on this trend. See: Big Contractors May Lose Out As Federal Agencies Cut Back (2011, July 18). Washington Post, pg. 11.

²⁶⁰ Chacko, S. (2011, July 18). Contractors vs. Feds: What’s behind crumbling relations. *Federal Times*. Retrieved from www.federaltimes.com.

While it is impossible to predict the future, using the English school model that has been drawn above to predict the direction that insourcing and regulation may take PMSCs is not hard to imagine. If in fact government agencies from around the world begin to draw down their military contracts and spending, where will this leave once powerful PMSCs? If they do not disband altogether, it is reasonable to expect that they would move their services to perhaps other corporations or NGOs. At the same time, the termination of contracts may lead to a loss of political attention on such an important phenomenon. The incentive to rein in contractors is at an all-time high, and this precious legal and societal pressure on the industry may be lost as contingency operations close down. While these companies would still be bound by territorial laws, and remain inherently responsible to either the home state or the state they operate within, the fact remains PMSCs will have more incentive to ignore national regulation if it works in their business favor. The proliferation of private violence mixed with a corporate transnational actor could lead to a very profound restructuring of the international society. This is the situation where states may very well be in competition with PMSCs, as they get pushed further toward the world society concept of self-enforced regulation and strategic agenda setting. This does not mean that they will become violent scourges however; consistent with the world society model, it is perfectly conceivable that PMSCs may embody a more universal normative ideology that is not based on state interests, and instead is founded on individualistic human rights. As policy makers, it is imperative that strong extraterritorial regulation is in place while the motivation to do so is as strong as it is ever going to be. PMSCs are not going away – they are simply going to change form. It is

paramount that insourcing is coupled with equal integration, regulation and employment opportunities for PMSCs and their personnel.

While this study has focused on the use of the English school to look at the ‘outsourcing’ effect of state sovereignty, there are in fact many ways that this model could be adapted for further research. Within the English school is a much deeper debate that was not directly touched on here: the debate between solidarists and pluralists. Within the traditional model, solidarists are those who believe that states should do more to promote universal human rights, and associate closer to the world society concept. The pluralists, on the other hand, believe in the diversity of mankind and preserve the core concepts such as non-intervention and absolute state sovereignty.²⁶¹ PMSCs may offer a *via media* for this debate, as they could be commissioned to promote human rights through international bodies while preserving state sovereignty to the fullest extent possible. Conversely, while unlikely, it is possible to imagine a scenario where international bodies act against state interest to infringe on state sovereignty, using PMSCs as the military component of the operation. Either case may be an interesting addition to the growing literature on the use of PMSCs for humanitarian operations. Furthermore, this study was limited to a less complex model which Buzan creates in his reinterpretation of the world society concept. This was done purposefully as it helps to simplify where each level of regulation has come into effect to maintain state control over the use of force. An ambitious research project might be to go even further down the line of Buzan’s work to place PMSCs within the transnational framework that Buzan rewrote.

²⁶¹ Buzan, B. (2004)

In either case, the English school may provide a flexible analytical tool to place these new and important entities within international relations theory.

Although regulatory methods have certainly become tighter around PMSCs, the situation is still far from perfect. This study does not claim that regulatory methods are foolproof; despite the state's best efforts, there may be those who fall out of line. The purpose of regulation is to mitigate this risk as much as possible. Much the same can be said for national level legislation; while regulation can dissuade the majority of companies from operating outside of the purview of their home or contracting state, there may always be those who break the rules. What will be important for countries is to set precedents that will dissuade as many PMSCs as possible from falling out of line, and to continue to reinforce state centrality through international institutions. Thus far, by embracing PMSCs within their national foreign policy and employing them for contingency operations, states have been relatively successful in establishing this level of control. What may be an interesting consequence from this is *over* regulation. Within the military this is commonly labeled as 'lawfare'. The possibility that national laws and oversight bodies getting to the point where they infringe on operational security or bottom line profits may either stymie the industry or push them further away from state control – driving them underground. Likewise, this situation may in fact cut into the entire purpose of employing PMSCs to begin with. If PMSCs have to contend with a maze of national and international regulation, their effectiveness as a cheaper quick-reaction force may be substantially lessened. If their deployment is over-politicized or held up by significantly varying pressures (along with mixed messages from both national and international regulatory bodies), it may be more efficient to use national

military personnel. Given the current trends of zealous prosecution patterns, the concept of over-regulation is an interesting possibility that future academics and policy makers may have to contend with.

In the meantime, the current regulatory system of hard laws, mixed with long standing international norms, has reinforced the dominant role of states in international relations theory. This study has set forth a workable framework to bring PMSCs into international relations theory while demonstrating that PMSCs do not undermine the dominant paradigm of state sovereignty. This has been a gap within literature, as PMSCs are both a relatively new phenomenon as well as a very complex, multileveled entity that are difficult to pin down to any one model. This method of analysis clarifies the different regulatory methods that exist while demonstrating that PMSCs have a long way to go before supplanting the dominant norm of the legitimate use of force. It also allows for a clearer understanding of where to place PMSCs within the wider international system, particularly in terms of where their identity may rest, and how we can trace this transformation as it unfolds. In the meantime, without the blessing of contracting states, PMSC operations will be limited by all three levels of analysis discussed here. Modern warfare involves a complex interaction between the public and private spheres; the use of contractors has increased the functionality of public militaries while maintaining the relevance of the state in administering security for the public. Based on the increasing regulatory methods and norms governing their use, PMSCs do not undermine the primacy of states, but instead complement it.

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APPENDIX A The English School Diagram



Figure 1.1: English school model and tripartite levels of regulation. Adapted from original copy in Buzan, B. (2004).