Corporate Militaries and States: Actors, Interactions and Reactions

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I. INTRODUCTION

Corporate military firms, or private military firms (PMFs) as they are commonly referred, form part of a security industry that has annual revenues estimated at $100 billion. The meteoric rise of PMFs in the period from the mid-1970s to the present day creates a whole host of legal, moral, and political problems for individual states and the international community. The problems these corporations raise range from such relatively mild matters as the appropriateness of hiring armed security firms to protect humanitarian organizations in countries where dire poverty is the norm, to such highly controversial activities as the overthrow of governments, the suppression of internal rebellions supporting independence and self-determination movements, and the legal and moral responsibility for human rights abuses resulting from PMF activities. Rather than addressing all of these issues, this article seeks to contribute to the discussion of state interactions with PMFs, with a focus on actual experiences.

One could question the utility of analyzing how states engage with PMFs as opposed to a broader analysis of how PMFs engage with a range of legal entities, such as corporations, nongovernmental organizations (NGOs), international organizations and states. But until the concept of state sovereignty is abandoned as the guiding principle of international law—or perhaps until transnational companies including PMFs irrevocably undermine it—the state will remain the primary unit in the international arena. Though eroding, one of the basic premises of international law has been that states have a monopoly over the use of violence. The privatized violence of the PMFs cannot easily be reconciled with the state’s purported monopoly and, to the extent that PMFs are not accountable to states, they threaten the state-based system of international law. For this reason the nature of the interactions between states and PMFs warrants specific consideration.

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1. The term private military firms (PMFs) will be used in preference to private military companies (PMCs) and private security companies (PSCs). The term PMF is meant to include personal/personnel security firms to the extent that these are armed or operating internationally.
3. It should be noted that many PMFs act in support of UN humanitarian endeavors.
5. See subpart C of Part III of this article, which discusses the role of PMFs in the Balkans and current litigation regarding activities by interrogators in Abu Ghraib Prison in Iraq. See also Jackson Nyamuya Maogoto, Watching the Watchdogs: Holding the UN Accountable for International Humanitarian Law Violations of the “Blue Helmets”, 5 DEAKIN L. REV. 47, 51 (2000).
At least since the Peace of Westphalia and the dismantling of Wallenstein’s 120,000 strong militia,6 the state has been viewed as the center of military power and, as a result, as the central and nearly exclusive protagonist in matters military.7 There has been a significant change in this landscape since the relatively recent rise of PMFs. States are no longer the only participants in the exercise of military power; they no longer have exclusive control over the power-violence agenda; and, certainly, they have very limited,8 if any, control over the agendas of PMFs.9

As non-state actors, PMFs enjoy the rights and privileges of private actors, including: the privileges of free movement, relatively minor scrutiny of action, the privacy accorded to citizens, and lack of accountability to the general public. In this new landscape, states are choosing to interact with PMFs—to retain their services and marshal their capacity—and in the process are themselves changing in character. PMFs are not waiting passively for states to interact with them; rather, PMFs are locating themselves strategically in key militarily strong states and actively lobbying to be retained by states. These interactions between PMFs and states are generally carried out in private without the glare of international public scrutiny that typically surrounds decisions by states to expand, modernize, or mobilize their military capacity.

With the PMF industry growing dramatically in size and influence, the need for analysis, discussion, and an innovative policy response is now acute. Any proposed response to the PMF phenomenon must take into account the changing international conflict paradigm where economic resources translate into military might as never before10 and where non-state actors can finance war as readily as states.11

Part II of the article provides an overview of PMFs and the subtleties of the national and international context in which they operate. Part III identifies and analyzes three distinct types of interaction between PMFs and states. First, Part III.A discusses problems posed by the retention of PMF services by states for domestic use. Second, Part III.B addresses the current practice in which states privatize parts of their national defense capacity. Third, Part III.C addresses state use of PMFs in support of foreign policy objectives (as opposed to national defense). This section is followed by a reaction section, Part IV, which reviews various attempts by states to regulate PMFs within their borders. Part IV also analyzes the potential for effective state regulation in the current climate, examines responses from the industry itself, and critiques proposals for regulation at the international level. Part V concludes with some policy recommendations as well as sobering reflections on the role of PMFs in today’s international environment.

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8. A state will be able to exercise some control over a PMF if it is in a direct contractual relationship with that PMF or if that PMF is operating from within the state’s boundaries (regulatory control).
9. Singer, War, Profits, supra note 2, at 524.
10. Or at least since Wallenstein’s private army. See Singer, Ultimate Military Entrepreneur, supra note 6.
II. ACTORS

A. The Basic Premise: State Monopoly of Violence

Implicit in most commentaries concerned with the proliferation of PMFs, and explicit on some occasions, is the belief that the state should have a monopoly over the use of violence. The modern formulation of the idea is attributable to Max Weber. However, in states with a common law tradition, one finds earlier manifestations of the principle, such as the 1688 English Bill of Rights which states “[t]hat the raising or keeping a standing Army within the Kingdome in time of peace unless it be with consent of Parlyament is against law.” A major intention of the English Bill of Rights was to reinforce the state’s monopoly over violence by ensuring that there were no standing armies in Britain that were not controlled by the state.

It is the state’s monopoly of violence that underpins the international legal system and justifies the emphasis on state sovereignty. It is on this basis that states are recognized as having the right and capacity to declare war, act in self defense, sign peace treaties, etc. A second dimension of the doctrine of sovereignty is that states have the responsibility for protecting individual rights, a function they could not purport to fulfill if they did not enjoy a monopoly over violence. Accordingly, any non-state actor engaging in violence, including mercenaries, PMFs, and terrorists, can readily be classified as a threat to state sovereignty.

1. Defining the PMF: PMFs and Mercenaries

A common and appropriate starting point for discussion of the state-PMF relationship is the familiar and less controversial figure, the mercenary soldier—the person who fights neither for patriotism nor legal duty, but for economic gain. Generally speaking, mercenaries are internationally condemned and outlawed, at least nominally. The simple principle is that civilians should not engage in violence independent of state sanction. Indeed, this principle underlies much criminal law. The principle encounters a sharp challenge, however, in the instance of PMFs, especially PMFs that carry on some of the same activities as mercenaries.

The international community has not arrived at a unanimous or effective definition of the term mercenary, however, it is clear that it at least includes a person who is foreign to a conflict participating in combat with the aim of securing personal gain. What makes this definition difficult to apply to PMFs in a blanket way is the wide range of services PMFs

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13. WEBER, THEORY, supra note 7.

14. The Bill of Rights, 1 W & M, c. 2 (1688).

15. The doctrine of horizontal/external sovereignty has also entrenched the principle that states have a monopoly over violence. See, e.g., MAOGOTO, STATE SOVEREIGNTY, supra note 7.

16. Of course, international law also recognizes principles capable of running contrary to the state monopoly on violence, such as the right to self-determination of peoples within state boundaries or across state boundaries.


18. See MAOGOTO, STATE SOVEREIGNTY, supra note 7.
offer, including: training, consulting, logistical support, technical support, and potentially combat services. At one end of the continuum, the PMF sector overlaps with the military hardware and software providers which now regularly provide staff to maintain, train in the use of, or operate the equipment they have sold. At the other end of the continuum, PMFs can provide commando troops supported by fighter jets and attack helicopters.

There are at least four reasons why states do not equate mercenaries with PMFs, in spite of the fact that some PMFs provide mercenary (combat) services. First, the definition of mercenary is aimed at identifying and deterring individual human actors. This aim is evident in the drafting of the 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, which concentrates on the recruitment and use of individual mercenaries or on the status of individual mercenaries if they are captured during battle. The modern day reality is that corporations, and not individuals, are now providing private military services, including mercenary services. This corporate repackaging is the first reason why states are unable to make direct comparisons between the individual mercenary of old and the new corporate PMFs.

A second reason is that the hallmark of a mercenary—combat for sale—is not a hallmark shared by the majority of PMFs. Only a small number of PMFs provide combat services. To date, states have not attempted to deconstruct the PMF industry by differentiating between the limited numbers of combat ready PMFs and the more numerous PMFs that provide support services but do not engage in combat. Accordingly, for states to regulate PMFs they first must differentiate between a broad range of PMFs and distinguish not only between PMFs but between the activities carried on within a single large PMF that may provide a broad range of services.

A third reason is that the refined marketing, sophisticated lobbying, and professional business practices of modern PMFs lends them credibility and encourages states to treat them differently from mercenaries. While states view mercenaries stereotypically as maverick, malevolent, and individual misfits motivated solely by the prospect of gain they tend to view PMFs more positively. In short, while PMFs are viewed as professional and credible corporate partners, mercenaries are viewed by states as unprofessional organizations having no credibility.

The final reason why states are reticent to equate PMFs with mercenaries involves economic rationalism and the trend toward policies that seek to increase efficiency in the public sector through the introduction of private sector competition. In this context, states see financial and political advantage in using PMFs as cost effective military service providers.

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19. Note, however, that Singer argues that changes in the nature of warfare have increased the significance of support services provided by noncombat PMFs. See Singer, Corporate Warriors, supra note 11, at 11.

20. Such PMFs would be classified as “military provider firms” by Singer, and would be placed at the “tip of the spear” of his classification system. See Singer, Corporate Warriors, supra note 11, at 16-20. The now defunct Sandline, which was based in Britain, and Executive Outcomes, which was based in South Africa, are examples of PMFs that were prepared to enter combat. Id.


22. The difficulty in so distinguishing lies in the fact that combat and non-combat roles are invariably linked making any distinction between the two somewhat arbitrary.

A stark disparity exists between the international emphasis on prohibiting mercenary activity and the reality of a vigorous and expanding professional PMF industry that provides a full range of defense services. This disparity is significant for states considering how best to integrate PMFs into their national legal framework and whether or not to regulate the PMF industry. The tension is between those who believe PMFs should be treated as just another growing industry able to provide services that were once government provided services, and those who believe PMFs should be treated as pariahs and threats to national and international security—a contemptuous approach that parallels the historic treatment of mercenaries.

These reasons explain why the mercenary discourse and the PMF discourse have not merged. Moreover, these discourses will not merge until an adequate taxonomy of PMFs is developed and agreed upon which enables mercenary activity to be seen as but one type of PMF activity. Peter Singer, a leading scholar in the field, has developed a useful if somewhat rudimentary taxonomy. Singer has classified PMFs into three subgroups: military support firms, military consulting firms, and military provider firms with only the third, military provider firms, providing direct combat services (such as those services provided by mercenaries). Singer presents this classification scheme metaphorically as a spear, with the military provider firms comprising the tip of the spear, a recognition that the combat services they offer place them closest to the battle. The metaphor suggests that all PMFs are inherently militaristic, but the small number of military provider firms willing to engage in direct combat pose the most immediate threat. Singer identifies the spear shaft as military consulting firms, which provide advisory and training services, and the handle end as military support services which include such mundane services as a food supply and basic logistics. Extending Singer’s metaphor and applying it to the nature of the interaction between states and PMFs, one may note that a spear requires a thrower (e.g., a state, corporation, or other individuals with the financing necessary to retain a PMF). Singer’s categories will be used in this article to differentiate among PMFs.

2. Different Types of States

While the article is premised on the validity of talking generally about states because they are all sovereign entities at international law, it does not preclude consideration of the fundamental differences among states. In fact, recognizing and acknowledging the economic, social and political differences among states is the key to explaining the different ways in which states interact with PMFs. By way of illustration and using Singer’s spear metaphor classification, there are strong states (institutionally and economically) with advanced military capacity, such as the United States and the United Kingdom, that have integrated PMF military consulting firms and PMF support firms into their core defense strategies. By comparison, certain institutionally and economically weak states, such as Angola, Sierra Leone and Papua New Guinea, have recently retained the services of PMF military provider firms—the tip of the spear—to engage in combat on behalf of their governments with the aim of quelling rebellions, reasserting control, creating stability, upholding the status quo, and achieving internal security.
From a macro perspective, it could be argued that all states have the same motivation for retaining PMFs, which is the desire to secure efficient and cost-effective solutions to defense problems. However, such general observations obfuscate the fundamental differences between the motivations of strong and weak states when retaining PMFs. When strong states retain PMFs, they are typically engaging military consulting PMFs and military support PMFs primarily to complement their national defense forces. They believe that to do so is a more efficient and cost effective option than relying exclusively on the public service military. In contrast, weak states typically engage all forms of PMFs, including military provider PMFs willing to engage in combat, in order to retain or reassert control within their territory. Weak states are often motivated to hire PMFs because they lack viable alternatives in the face of a national crisis. The important issue is not so much cost effectiveness as affordability. Some weak states have recently been able to afford PMFs only by guaranteeing the PMFs payment in the form of future rights to the state’s natural resources.\(^{27}\)

A second important distinction is that strong states are hiring PMFs for military engagements that generally take place on foreign soil. Strong states that retain the combat services of PMFs are spared the violence and potential immediate harm resulting from military activity. Weak states engage PMFs knowing the human costs will be borne at home. Finally, it is the strong states that tend to be the exporters of PMFs, and enjoy the direct economic benefits.\(^{28}\) It is the weak states that are the importers of PMFs. The imbalance of economic power and conflicting interests between exporting and importing nations exacerbates the aforementioned coordination and classification problems.

Given that different types of states interact with different types of PMFs, this article will frequently refer to a subgroup of PMFs (using Singer’s classifications) or a subgroup of states (economically and institutionally weak or strong states) when discussing the nature of interactions among states. In so doing, the article seeks to minimize generalizations, improve clarity, and engage in a more nuanced discussion of the nature of the interactions between states and PMFs.

### III. INTERACTIONS

#### A. States and PMFs: Their Domestic Context

Each state operates within a unique domestic legal environment that defines the limits of legitimate government activity and decision-making.\(^{29}\) Domestic legal environments are unique and complex but are typically shaped by constitutions, legal traditions, political traditions, laws, precedents, procedures, and the like.

In democratic states, the legitimacy of laws governing the exercise of state power, including violence, will derive from the citizens and their elected representatives. It is because the liberal state is limited by the rule of law and accountable to the people that states are entrusted with a monopoly over violence. The rule of law is sometimes loosely

\(^{27}\) Sierra Leone is one example. See GUY ARNOLD, MERCENARIES: THE SCOURGE OF THE THIRD WORLD 117 (1999).

\(^{28}\) Strong states also enjoy the political benefits of exporting surplus manpower, which, theoretically, they could conscript for their own purposes.

\(^{29}\) A state’s ability to retain PMFs that provide combat services (military provider firms) is also limited by international law. See MAOGOTO, STATE SOVEREIGNTY, supra note 7.
used as a synonym for law and order and encompasses the idea that all power within a state must be exercised according to law. The rule of law is premised on respect for the citizens by the state. If the government of a state chooses to retain PMFs and to sanction their actions, then it is up to the people of that state, if they are unhappy with their government’s actions, to change the law such that it curtails the state from retaining PMFs, or prosecute the government for breach of the law where the law of the state forbids such action.

1. Rule of Law and Constitutional Limitations on the Use of PMFs

States such as Papua New Guinea, have express provisions within their constitutions preventing the government from retaining the services of mercenaries, and it is probable that such provisions will be interpreted to also prohibit the retention of military provider PMFs. Furthermore, in countries that have constitutions that are silent on the retention of PMFs, it is possible that implied limitations could be read into a constitution that would serve to limit a state’s ability to contract with PMFs.

During the contentious and well-publicized Sandline Affair, the constitutional limitations in the PNG constitution had the potential, but failed, to limit the actions of the PNG government. The Sandline Affair constituted a national crisis in PNG in 1997 and arose from a government decision to retain PMFs for use on Bougainville Island to bring an end to a rebellion by indigenous people who, among other grievances, were opposed to Rio Tinto Inc.’s environmentally devastating mining practices.

Section 200 of the PNG Constitution prohibits paramilitary and mercenary activities within PNG in the following terms:

200. Raising unauthorized forces.
   (1) It is strictly forbidden to establish, organize, equip, train or take part in or associate with a military or para-military force, or to organize or take part in military or para-military training, except such as is provided for by this Constitution, or to plan, prepare for or assist in the raising or training of such a force or in such training.
   (2) Subsection (1) does not prevent—
   (a) the establishment of a reserve, auxiliary or special force (by whatever name known) as part of the Defence Force; or

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32. Prosecuting an action in this context is very difficult for a variety of reasons. The law may, in straightforward terms, prohibit a government from declaring war or using its military without democratic approval—but a court may not consider a PMF contract as falling within its scope. Consider, for example, the various efforts made to litigate questions related both to the Vietnam and Iraq wars in U.S. courts, as well as the concerted attempts by governments to pervert and avoid applicable laws. See J. Maogoto & B. Sheehy, Torturing the Rule of Law: USA and the Post 9-11 Legal World, W.U. L.R. (forthcoming) (manuscript on file with author).
(b) the establishment of civilian components of the Defence Force, or the establishment or recognition of non-combatant units or organizations within, attached to or associated with the Defence Force . . . .  

During the Sandline Affair, and despite the clear postulates of section 200, the former Prime Minister of PNG, Sir Julius Chan, retained Tim Spicer and Sandline International (Sandline), a military provider PMF, to help the government end the rebellion.  

Interestingly, there was bipartisan support for the decision to retain the PMF. According to press accounts, the opposition leader, Roy Yaki, is cited as saying that Sandline’s presence would be a “morale booster” for the under-resourced and ill-disciplined PNG security forces. The consideration of the contract was $36 million. 

In order to circumvent section 200, the PNG government deputized all of the Sandline personnel as “special constables” of the PNG defense force. This course of action avoided any possible conflict with subsection 200(1) of the Constitution by bringing the Sandline officers within the bounds of subsection 200(2). It also served to protect the Sandline personnel from liability under any international laws dealing with mercenaries. 

In February 1997, the Australian media reported that the PNG government planned to retain Sandline to act against the rebels on Bougainville. In March 1997, PNG army commander, Jerry Singirok, who was opposed to the contract between the PNG government and Sandline, led a military revolt that was popularly supported by the citizens of PNG. The controversy resulted in the termination of PNG’s contract with Sandline and the expulsion of Sandline personnel. A commission of inquiry was convened to examine the circumstances surrounding the Sandline contract but it had limited time and resources and ultimately found no evidence of government corruption. Elections were held in July 1997 and Chan and many other politicians implicated in the affair lost their seats. 

During the course of the controversy, two constitutional challenges were launched against the government over the retention of mercenaries: one by a human rights advocacy

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35. CONST. INDEP. STATE PAPUA NEW GUINEA, art. 200 (1975).
36. Sandline intended to subcontract some of this work to Executive Outcomes. Shearer, Outsourcing War, supra note 23, at 80. Eric Kwa, a lecturer in law at the University of Papua New Guinea, also argued that retention of Sandline by the PNG government was in breach of section 209 of the PNG Constitution, which requires public spending to be controlled by Parliament and allocated through the budget. Mercenary Contract Faces New Challenges, UNI TAVUR (University of Papua New Guinea student newspaper), Issue 2 (1997).
39. Id. at para. 4.1 (assigning Papua New Guinea’s contractual responsibilities). The agreement delegated far-reaching military command authority to Sandline’s personnel:

Immediately on signing this agreement the State automatically grants to Sandline and its personnel all approvals, permissions, authorizations, licenses and permits to carry arms, conduct its operations and meet its contractual obligations without hindrance, including issuing instructions to PNG defence forces personnel to co-operate fully with Sandline commanders and their nominated representatives. All officers and personnel of Sandline assigned to this contract shall be enrolled as Special Constables, but hold military ranks commensurate with those they hold within the Sandline command structure and shall be entitled to give orders to junior rank as may be necessary for the execution of their duties and responsibilities.

group, the Individual and Community Rights Action Forum, and another by Rimbink Pato, an independent PNG lawyer. Neither action was ultimately decided as they were overtaken by events.

The conclusion to draw from the Sandline Affair is that express constitutional provisions, designed to ensure that only state sponsored military operations are legal in PNG, were easily avoided. The effective limitation on the PNG government’s plan to use PMFs to quell insurrection was the combined dissatisfaction of the PNG public and major international aid donors.

One further point of interest is the nature of the negotiations between Sandline and the PNG government over payment of the contract. Sandline drafted the contract and was not willing to reconsider any of the contractual terms except the payment terms. Sandline indicated in relation to payment that it was willing to consider accepting “part repayment with mineral concessions” in Panguna Copper mine. Corporate and government control over the mine was a critical issue in the indigenous revolt. The PNG government did not agree to make payments of this kind. However, Sandline’s interest in payments in the form of future rights in the national resources of PNG is indicative of a broader problem—if PMFs accept economic interests in a state’s natural resources, then they may be unwilling to leave that state at the end of the contract if to do so means forfeiting their payment, or security of payment. It also compromises the notion of the disinterested PMF. A PMF that counts on payment only in the event of one outcome in a civil war becomes a political warrior and not merely an economic actor.

The postscript to this tale is that in 1998 a peace agreement was negotiated between PNG and the rebels in Bougainville largely through the interventions of the Australian and New Zealand governments. Sandline was compensated for its contractual losses in PNG and continued to operate until April 2004 when it ceased operations.

2. Internal Sovereignty and the Monopoly of Violence

If it is accepted that one essential feature of a state’s sovereignty is that it possesses a monopoly over sanctioned violence within the state, then how does one reconcile the historical reliance of states on the services of mercenaries and the modern day reliance on PMFs? Does the interaction undermine the sovereignty of a state?

41. The director of the Forum was arrested as a result of its opposition to the Sandline initiative. See id. at 287.
42. The PNG government did not pursue this payment option. Id. at 294–95 (citing a government inquiry).
43. Bougainville Peace Process, supra note 34, paras. 2.22-37.
45. Sandline’s reason for ceasing operations was published on its website. It stated:

The general lack of governmental support for Private Military Companies willing to help end armed conflicts in places like Africa, in the absence of effective international intervention, is the principal reason behind Sandline’s decision. Without such support the ability of Sandline (and other PMCs) to make a positive difference in countries where there is widespread brutality and even genocidal behavior is irretrievably diminished.

A state’s reliance on PMFs will undermine national sovereignty, if the absolute monopoly over violence is viewed as a key hallmark of sovereignty. It is likely that the risk of PMFs underming national sovereignty will decrease if (a) the state retaining the PMF is institutionally and economically strong and (b) the PMFs being retained are not providing tip of the spear services.

Large PMFs generally limit their engagements to contracts with internationally recognized states. It is therefore possible for such PMFs to argue that because their actions are instigated, determined, and sanctioned by the state, they do not undermine the sovereignty of the state. This argument raises theoretical and practical problems. At a theoretical level, is the delegation of an essential element of sovereignty at least a partial surrender of sovereignty? Is a state’s sovereignty compromised if PMFs are responsible for, or essential to, a state’s security? Some would argue that such outsourcing of defense services is evidence of an abdication of a state’s responsibility to its citizens. Others would argue that it is evidence of the government taking seriously its responsibility for providing defense services. They would argue, does not the real control rest with the state that is paying the PMF? At a practical level, the degree to which PMFs can be viewed as agents of a state depends on whether it is conceivable, under the circumstances, to view the government of that state as having the capacity to control the PMF. Consider the following point of view espoused by the British government in its Green Paper canvassing the options for regulating PMFs:

The idea of a state relying for its security on a foreign force is contrary both to this reasoning and to our concept of citizenship. Nevertheless the fact that a force is private or foreign does not prevent it from being under the control of the state and although such arrangements may not be ideal they may be far less damaging to sovereignty than an unchecked rebel movement.

The argument that PMFs need not be viewed as an intrinsic threat to the sovereignty of states is supported by academics such as David Shearer, who worked with the UN Department of Humanitarian Affairs and advised in relation to the crises in Liberia in 1995 and Rwanda in 1996.

A contrary view has been expressed by Enrique Bernales Ballesteros, the Special Rapporteur of the Office of the United Nations High Commissioner for Human Rights:

47. For example, the company website stated the company would only undertake projects on behalf of internationally recognized governments (preferably those that are democratically elected); international institutions like the UN; and internationally recognized liberation movements. http://www.sandline.com/company/index.html (cached webpage).
48. UNESCO Report, supra note 23, at para. 50. Mr. Bernales Ballesteros writes:

The fact that a Government hires mercenaries or turns to “qualified” companies that provide mercenary services for its own defence and to strengthen positions during armed conflicts should not be invoked in claiming that its action is legal. A Government is endowed with legitimacy in order to work within its constitutional framework and that of the international treaties to which it is a party. Under no circumstances, however, may they use the power entrusted to them to engage in acts that are contrary to self-determination, to jeopardize the independence and sovereignty of the State itself or to consent to acts that may do irreparable harm to the life and security of the inhabitants.

50. Shearer, Outsourcing War, supra note 23, at 80.
The fact that a Government hires mercenaries or turns to “qualified” companies that provide mercenary services for its own defence and to strengthen positions during armed conflicts should not be invoked in claiming that its action is legal. A Government is endowed with legitimacy in order to work within its constitutional framework and that of the international treaties to which it is a party. Under no circumstances, however, may they use that power entrusted to them to engage in acts that are contrary to self-determination, to jeopardize the independence and sovereignty of the State itself or to consent to acts that may do irreparable harm to the life and security of the inhabitants.\(^{51}\)

The British government has dismissed Bernales Ballesteros’ argument as “an extreme point of view.”\(^{52}\)

Indeed, the two points of view above are not readily reconcilable. On the one hand, from the perspective of the British government (which does not need to retain the services of PMFs to buttress its internal security but which chooses to retain the services of PMFs for training and support services), the concern over PMFs is to ensure the effective regulation of a troublesome but useful industry. Accordingly, Britain’s primary concern is to facilitate the work of “reputable” PMFs and to control “disreputable” and “unsavoury” PMFs through the introduction of an appropriate regulatory regime.\(^{53}\)

On the other hand, and in contrast to the situation in Britain, the Rapporteur visits many states where both security and sovereignty are threatened by the intervention of, or reliance on, PMFs. Given his mandate to report on international mercenary activity, the Rapporteur is concerned with the military provider, “tip of the spear” firms, and it is in this context that the adamant nature of his comments resonates.

In institutionally and economically weak states, particularly where sovereignty is contested, the intervention of a PMF will undoubtedly provide a significant boost to the side that has retained the PMF. The question is whether this type of PMF intervention can be viewed as compromising the independence and sovereignty of a state. For example, if an incumbent government retained a PMF but the government did not enjoy the support of the majority of the citizens, then the PMF’s intervention could be seen as undermining popular sovereignty within the state. The problems with this type of analysis are twofold. First, the ultimate test of the legitimacy of a government’s decision to retain a PMF is only discernable in hindsight, depending upon the view of sovereignty one chooses to adopt and only if there is agreement as to the collective will of the citizens. It is with such thorny and subjective conundrums in mind that Bernales Ballesteros and the United Nations have urged the international community to maintain the view that all mercenary activity (i.e., combat related interventions in foreign countries for gain) are illegal and to accept that this will necessarily mean that some PMF activities are also illegal.

3. Contracting with PMFs

If the government of a state wishes to retain the services of a PMF, it will need the capacity to enter into an appropriate contract. It is accepted that states, as polities recognized at international law, are legal entities that have the legal capacity to enter into contracts. In Australia, for example, the Australian Defence Act of 1903 confers the

\(^{51}\) UNESCO Report, supra note 23, at para. 50. A similar quotation from a later report by the Rapporteur is cited in the Green Paper, supra note 12, at 15. Mr. Ballesteros’s comment posits the illegality of mercenary activity in particular, not all PMF undertakings.

\(^{52}\) Green Paper, supra note 12, at 15.

\(^{53}\) Green Paper, supra note 12, at 5.
relevant contract making power on the Governor-General, titular head of the government. 54
Consistent with parliamentary supremacy, the Australian parliament maintains control over
the Executive’s defense contract-making through the appropriations process and a number
of parliamentary committees. 55

Perhaps the only general legal limitation on the ability of a state to enter into a
contract with a PMF is that a contract can be found to be void if, following traditional law
of contract doctrine, it is contrary to public policy or illegal. 56 The authors are not aware of
any examples of a challenge being made to a contract between a state and a PMF based
either on illegality or on the grounds that it is contrary to public policy.

A related but somewhat tangential issue is whether it is possible to draft contracts
between states and PMFs with the necessary specificity to avoid being void for uncertainty,
and hence, unenforceable. Such specificity is necessary as it permits, at least potentially,
the state to control the PMF by making the PMF subject to damages for breach. In addition,
a state must be able to describe or define the services it wants from a PMF, and be able to
stipulate appropriate performance standards and indicators, to ensure that the all of the
objects of the contract have been met.

An example from outside of the world of PMFs but still involving defense issues
illustrates the point. Mike McNamara, Principal Adviser, Logistics Projects, Department of
Defence in Australia has said that, “we know how to buy guns, boats, trains and planes, but
are less good at buying services.” 57 One request for tender (RFT) from the Australian
Department of Defence in relation to the provision of information technology (IT) services
stated that:

Defence seeks a partnership-oriented cooperative longer term relationship where
the contract is able to flexibly provide the services needed by Defence in the
rapidly changing IT environment. 58

McNamara argued that the RFT was not a “motherhood statement,” rather it clearly
indicated to potential contractors that the Defence Department “was not going to want to
look at the fine detail of the contract every day of the week.” What the Department of
Defence sought was to develop a “close working relationship.” Without providing any
specifics, McNamara states that the prospective contractors put forward very robust and
viable arrangements to achieve Defence’s stated objectives. 59

One can appreciate what the Australian Department of Defence was trying to
achieve—it wanted to ensure that the contract arising from the RFT provided maximum
flexibility with respect to IT in a fast changing environment and did not necessitate
negotiating a ceaseless stream of minor variations to the contract. From a contractor’s
perspective, however, it may not be desirable to build such flexibility into a contract as it
raises the risk of unquantifiable deliverables or unknowable performance measures. Were a
contractor to accept such flexible terms, the contract price would need to be very high to
allow the contractor to meet numerous contingencies and still make a profit. If it is difficult
and time-consuming for the Australian government to draft a suitable contract for the

54. Defence Act, 1903, c. 4, § 63 (Austl.).
57. Mike McNamara, Contestability and Incentives, 81 CANBERRA BULL. PUB. ADMIN. 7, 8 (comment not
made specifically in relation to PMFs).]
58. Id.
59. Id.
delivery of IT services in the defense context, then it will be even more difficult for states to draft effective contracts for the retention of PMFs generally.

4. The PNG-Sandline Contract Example

The contract between the PNG government and Sandline provides one of the rare examples of a publicly available contract between a state and a PMF providing tip of the spear combat services. There are a number of introductory paragraphs that summarize the problem that PNG was facing:

The state [PNG], engulfed in a state of conflict with the illegal and unrecognised Bougainville Revolutionary Army (BRA), requires such external military expertise to support its Armed Forces in the protection of its Sovereign territory and regain control over important national assets, specifically the Panguna mine. 60

Seeking to build international legitimacy for its defense outsourcing contract, the preamble also states that Sandline conforms to “international doctrines . . . and the Geneva Convention.” 61

The contract stipulated that PNG agreed to “utilise and employ the services of Sandline to provide all required and necessary services as are more particularly described below.” The contract documented the military hardware and personnel that Sandline would provide followed by a list of Sandline’s responsibilities and PNG’s responsibilities. 62 The responsibilities read like a list of aspirations, goals, and contingency plans. The primary objective of the contract was “the rendering of the BRA militarily ineffective.” The critical paragraph setting out the services that Sandline would provide in order to achieve the primary objective was listed as one of Sandline’s responsibilities.

Sandline will train the [Special Forces Unit] in tactical skills specific to the objective, such as live fire contact, ambush techniques and raiding drills, gather intelligence to support effective deployment and plan, direct, participate in and conduct such ground, air and sea operations which are required to achieve the primary objective. 63

As the problematic nature of contracting to achieve such an objective was not hidden to the parties, the next paragraph made clear the attainment of the primary objective was not

60. Sandline Agreement, supra note 38, at Preamble.
61. Id. Some would argue that there are international doctrines prohibiting the activities of mercenaries, but Sandline presumably did not accept classification as a mercenary organization, preferring to view itself as a PMF.
62. For instance, the contract specified that Sandline would provide, “[w]eapons, ammunition and equipment, including helicopters and aircraft (servicable for up to 50 hours flying time per machine per month), and electronic warfare equipment and communications systems.” Id. at para. 2.1. Sandline’s personnel commitment under the contract was also significant. Under the agreement, Sandline was obligated to provide:

Special Forces personnel which will deploy to PNG within 10 days of the arrival of the CATT [Command, Admin and Training Team], together with helicopter and fixed wing aircrew and engineers, intelligence and equipment operatives, mission operators, ground tech and medical support personnel. This force will absorb the CATT as part of its number, therefore bringing the total Strike Force headcount to 70.

Id.
63. Id. at para. 3.
a contractual performance measure provided that one party, presumably Sandline, could justify its non-attainment. The contract stated:

The achievement of the primary objective cannot be deemed to be a performance measure for the sake of this agreement if it can be demonstrated that for valid reasons it cannot be achieved within the given timescale and with the level of contracted resources provided.  

A contract, the object of which is to supply X but which contains an absolute exculpation for non-supply that may be invoked and justified by the supplier, is a curious contract indeed.

A further contractual term acknowledged, at least implicitly, the type of acts normally engaged in exclusively by sovereign states and accordingly governed by international law. The indemnification clause clarified that Sandline commanders would have wide-reaching powers of engagement and would be indemnified for any “legitimate acts.” While the term “legitimate acts” was not defined in the context of the contract, it would not encompass acts that were contrary to international doctrines, contrary to the Geneva Convention, or carried out other than in pursuance of the primary objective.

5. States, PMFs, and the Erosion of Sovereignty

The concerns expressed at the beginning of this section related to sovereignty and the rule of law appear justified. If a service provider such as a PMF is expected to exercise discretion in relation to the provision of military services, then the state is not simply outsourcing a military service, it is seeking to divest itself of a responsibility that has been vested in the state by its citizens. In the case of the PNG-Sandline contract, a very broad discretion was given to Sandline to choose how to achieve the primary objective.

From a policy perspective, it would be preferable for states not to outsource highly contentious and value-laden services if the service provider will need to exercise significant discretion in the provision of such services. If a contract between a state and a PMF is drafted with sufficient specificity, then the service provider should not need to exercise significant discretion in completing the contract, and the state can rightly claim to have maintained effective control of the provision of that defense service. However, loosely drafted contracts that pass responsibility for making key defense decisions from a state to a PMF justify the concern that PMFs erode sovereignty.

The very presence of PMFs exercising broad military discretion are anathema to state sovereignty and could, as in the case of PNG’s engagement of Sandline, evidence the temporary abandonment of the rule of law. It is interesting to compare the popular uproar caused by the PNG government’s retention of Sandline and the relative lack of domestic upheaval in the United States, United Kingdom, and Australia over the extensive use of

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64. Id.
65. For an alternative argument regarding the privatization of “highly contentious and value-laden” public services, see Jody Freeman, Extending Public Law Norms Through Privatization, 116 Harv. L. Rev. 1285, 1342 (2003) (arguing that such government contracts are in need of “publicization”).
66. The constitutional limitations that the PNG side-stepped have been discussed above. Also, the PNG government went to great lengths to avoid scrutiny from Parliament, the media, and others. See Dinnen, Militaristic Solutions, supra note 40, at 293-95.
PMFs in the Iraq reconstruction effort. The differing responses may reflect the fact that the PMFs were deployed on home soil in PNG but deployed on foreign soil in the case of Iraq. To some degree, the use of PMFs in foreign theatres has the potential to protect the citizens of the state that has retained the PMFs from the immediacy of war or the difficult work related to post-war reconstruction. This splendid isolation is exacerbated when the mass media fails to inform citizens of the extent and nature of PMF involvement.

The above discussion on the nature of the contractual relationship between states and PMFs leads to a broader issue, the current trend of states to privatize their defense capacity.

B. PMFs and the Privatization of Defense

Privatization does not describe a single government initiative; rather, it consists of a host of government initiatives based upon the economic rationalism of neo-liberal free market ideology. In the supply of public benefits, this commitment translates into, inter alia, the contracting out of government services, the commercialization of government departments, and the sale or partial sale of public enterprises.

The privatization of the public sector is a trend in institutionally and economically strong states that has been dominant since the Reagan-Thatcher era. It is driven by its basic belief that governments are inefficient suppliers of goods and services, and by a political commitment to the philosophy that such government activity impinges on the liberty of citizens. These beliefs translate into a policy that seeks to maximize efficiency and effectiveness while minimizing the cost to the state and requires the introduction of competition into previously closed public sectors. The result of such privatization initiatives is that functions and roles that were once exclusively provided by the state and which were viewed as fundamental to its identity are now being provided by the private sector. As this article explains, one such function is force.

In Australia, for example, the contracting out of government services has gone as far, if not further, than in most western countries because it is seen to be cost effective and consistent with the dominant free market ideology. Broad statements such as the following from the Australian National Audit Office are common:

Where feasible the right to deliver government services should be open to a range of private sector providers. In cases where direct competition in the delivery of government services is not feasible because it is more economic to have only one provider, the right to provide the government service could be put to tender. Such potential competition would provide strong incentives for improved performance by public sector managers.

67. The initial uproar over the decision to invade Iraq was not directed at the use of PMFs. See Singer’s treatment of the current invasion of Iraq as the first privatized war. Singer, War, Profits, supra note 2, at 524.
68. Other factors also contribute to the atmosphere of relative public complacency. For example, in Iraq it is possible to obfuscate the nature of PMF involvement because of the large number of companies providing a wide range of services, most of which are not combat-related.
69. Not as many of their soldiers are on the front line. Citizens working for PMFs may still be on the front line but their hardships, deaths, or injuries are generally not considered to be matters of state concern.
70. Freeman, supra note 65, at 1287.
71. Singer, Corporate Warriors, supra note 11.
In democratic-capitalist political theory, there are currently no ideological underpinnings, except Weber’s theory of state monopoly over violence, that categorically preclude the privatization of violence. The incentives that motivate these states to contract out existing defense roles to PMFs, or more radically, to commercialize their own defense forces, are largely political and economic. As privatization is currently both ideologically and politically in vogue, it follows that states have legislated to facilitate privatization.

As to the efficiency claim—unfortunately, there is inadequate primary data available to independently determine whether or not the services provided by PMFs to states are cost effective. One of the hidden costs of outsourcing of military services is the cost involved in adequately monitoring such contracts. While standing armies are expensive, the less accountable and corporately shielded PMFs may ultimately prove to be more so.

Weak states have often been forced to follow the neo-liberal agenda through the structural adjustment programs of the World Bank and the IMF. In these cases, the governments have no choice but to surrender to the demands of financiers, cutting all government services, including defense. Where this has happened and the complying states find themselves in need of defense services, they often have no choice but to contract for services in the newly created PMF market.

1. The Privatization of Defense Services

There are a number of reasons that could explain why states such as the United States and the United Kingdom, over the last 20 years, have been so receptive to privatization and in particular, outsourcing aspects of their defense sectors. First, there is a long history of private military providers and therefore a sense of familiarity. Second, as a result of the Reagan-Thatcher changes from the 1980s onwards, there was a nascent military service market ready to compete with the public defense sector. These military provider firms, which were primarily providing military hardware up until that time, from that period onwards provided logistical support services as well as military equipment.

Finally, the Gulf War accelerated the privatization of defense services. The vivid television coverage of the Desert Storm campaign brought home the harsh realities of modern warfare and the value of outsourced military services. The US government commissioned studies to explore ways in which private companies could increase their participation in military operations by selling more services to US armed forces operating in

74. Deborah D. Avant, Privatizing Military Training, FOREIGN POL’Y FOCUS, June 2000, available at http://www.fpi.org/pdf/vol5/17ifmil.pdf. Avant argues that the outsourcing of military services to PMFs can only be cost-effective if there is adequate competition—which is often not the case in the defense market. She also argues that outsourcing cannot be viewed as cost effective if it weakens a state’s capacity for engagement or undermines public accountability of defense spending by placing responsibility for choices in the hands of the Executive rather than elected representatives.

75. One is tempted to recall the Thirty Years War and the manner in which the Holy Roman Emperor Ferdinand turned to the financier and mercenary Albrecht Eusebius Wenzel von Wallenstein. See Singer, Ultimate Military Entrepreneur, supra note 6, at 9.


77. See, for example, Howard Zinn’s discussion of the Indian wars in HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES 11-12 (1980).

78. For example, the private aspect of the supply chain of military hardware (the “military industrial complex”) has forged a longstanding relationship between states and private companies and is one facet of the nascent defense market. In this context, consider the competition between Boeing and Lockheed Martin to be the preferred supplier of fighter jets during the Cold War.
combat zones. In the wake of the Gulf War, the 1990s saw a proliferation in the size and number of PMFs worldwide with the value of publicly listed PMFs growing at twice the rate of the Dow Jones Industrial Average. It is estimated that the total value of the PMF market will rise from $33.6 billion in 1990 to $202 billion in 2010.

This exponential growth in the PMF sector suggests that states are increasingly willing to entrust PMFs with the delivery of defense services.

2. Control and Accountability of PMFs as Privatized Defense Forces

Perhaps the greatest challenge to the privatization agenda of the neo-liberals is maintaining control over private contractors. In the case of privatized defense capabilities this entails controlling the PMFs. Unfortunately, the record of such control is not stellar. In other contexts, corporate-controlled services have not lived up to public expectations, having breached commitments to maintenance, operation, and development of areas previously operated by governments. Lacking public accountability, corporations frequently fail to operate facilities and offer services with an eye to the public good. While they can hardly be faulted for this—after all, public good is not their province—they are responsible for failing to fulfill properly their contractual obligations.

The failure to fulfill these contracts has had significant consequences for the governments and populations that have relied upon them, both immediate and practical consequences and economic consequences. Where fresh water, electricity, roadways, or other services have not been provided, the population has suffered, the government has lost credibility, and the great expenditure of economic resources and government resources used to privatize has been wasted. Worse yet, in instances where corporate failure to fulfill contractual obligations has caused governments to “de-privatize” or reassume responsibility for a good or service, the corporation which has been expelled often sues for

80. Avant, supra note 74.
81. Id.
82. The privatization of global water services has resulted in “huge profits [for the private corporations], higher prices for water, cut-offs to customers who cannot pay, little transparency in their dealings, reduced water quality, bribery, and corruption.” Maude Barlow & Tony Clarke, Water Privatization: The World Bank’s Latest Market Fantasy (Jan. 2004), http://www.globalpolicy.org/socecon/bwi-wto/wbank/2004/01waterpriv.htm.
86. For example, governments have been required to bring plants and services up to particular standards to render them marketable; further, it is not uncommon for state-owned enterprises to be sold at prices set well below value. Moazzem Hossain and Justin Malbon Who benefits from privatisation? 1998 See for example, the chapter by Allan Brown “The economics of privatisation: case study of Australian telecommunications” in Hossain and Malbon id.
loss of profits because of the extremely favorable terms the corporations are able to extract from governments.\footnote{Two examples include the PNG-Sandline contract and the privatization of water services in Bolivia.}

The basic challenge of control and accountability is no different when a state privatizes the delivery of defense services. Given the nature of defense services and the consequent need for vast sums of money, secrecy, and power—the importance of control and accountability as well as the risks associated with privatization are exponentially greater.

The word “accountability” encompasses a wide variety of notions, including ensuring that: (1) the defense services provided by the PMF meet contract specifications; (2) the services are performed within the bounds of the law; (3) the activities undertaken are fully and truthfully reported; and (4) all breaches of obligations create appropriate avenues of liability and compensation. Broadly speaking, holding PMFs accountable requires ensuring that PMFs are not behaving in a manner that undermines governance norms. For example, one may ask if a PMF were retained to provide military consulting services, would it be acceptable for that PMF to have a corporate policy of never employing women or of only employing white staff? A state can control the behavior of PMFs that are incorporated in its territory within the bounds of corporate law, contract law, and procurement law. Further, there exists the possibility of control through effective regulation. Finally, a state can also control the behavior of the PMFs it retains—which may or may not be incorporated within its borders—either through individual contractual terms or by legislatively stipulating the circumstances in which a PMF can be selected to provide private defense services.

One approach has been suggested by Professor Jody Freeman in *Extending Public Law Norms Through Privatization*.\footnote{Freeman argues that where important government services that impact essential rights of health, safety, and liberty have been outsourced, a}
government should use its relationship with the contractor to ensure that key public sector norms such as accountability, due process, equality, and rationality underpin the manner in which the contract is fulfilled.\(^89\) The outsourcing of defense services has an impact on citizens' safety and potentially their liberty; thus, adopting Freeman’s argument, states that enter into contracts with PMFs should ensure that the PMFs incorporate key public law norms into their organizational structure and their delivery of services. Some of these norms are the same norms advanced by corporate social responsibility (CSR) advocates (although these are generally opposed by neo-liberals\(^90\) whose agenda is driving the privatization movement). Freeman’s arguments were made with reference to the United States and other liberal democracies and, as such, at least have a prospect of implementation. In states where public law norms are not entrenched in the public sector—as in many of the weak states—it may be futile to advance arguments advocating an extension of public law norms into the private sector.

In the context of the privatization of defense, the matter of accountability is a matter of urgent concern. When public militaries and governments interact, the interactions have not always been peaceful. Drawing from the history of such interactions, one may argue that a public military cannot be expected to always act in the public interest. History is replete with instances in which a military has seized control and been unwilling to give up power.\(^91\) Nevertheless, public militaries often can and do surrender to public will, particularly when the basis for their legitimacy rests on a notion of public accountability and maintenance of the rule of law. The privatized defense industry has no such constraints, and it is not hard to imagine PMFs running amok. Consider the example of the US-sponsored PMFs supporting the Contras’ attacks on the democratically elected government of El Salvador. That debacle, which was finally brought to an end by public scrutiny and disclosure of what came to be known as the Iran-Contra Affair, left El Salvador in shambles with gangs and paramilitaries running rampant.

3. The Privatization of Defense in the International Context

An important facet of the debate concerning privatization of defense involves the role of PMFs in humanitarian operations. A key issue is whether the current United Nations procedures for providing cost effective peacekeeping operations—which currently involve the UN asking states to donate money, military resources, and military personnel—would be more effective practically, politically, and economically if PMF peacekeepers were allowed to participate. The Secretary-General of the UN, Kofi Annan, has said that the UN considered retaining PMFs to separate refugees in the camps in Rwanda and Goma (in the Democratic Republic of the Congo), but they decided the “world is not ready for privatized peace.” Annan did not say that he does not think PMFs would be cost effective or that he was fundamentally opposed to the idea.\(^92\)

\(^89\) See id. at 1302. Freeman refers to the process of extending public law norms into the private sector in the context of privatization as “publicization.” Id. at 1285. She also notes that the term “publicization” was coined by Jerry Frug. Id. at 1285, n.1.


\(^91\) One current well known example is the situation in Myanmar (formerly Burma), where an invidious military dictatorship, calling itself SLORC (the State Law and Order Restoration Council), maintains its iron grip on power, despite the tireless agitation of Nobel Peace Prize laureate Daw Aung San Suu Kyi, and the selfless sacrifices of countless martyrs. See Ms. Suu Kyi’s website, http://www.dassk.com/.

\(^92\) Green Paper, supra note 12, at 19.
Equally, the British government Green Paper on PMFs indicates that the UN and NGOs already use PMFs to provide logistical support for their missions.\(^93\) Presumably, the PMFs are providing personnel security services (e.g., guarding compounds and similar non-aggressive or non-offensive activities) rather than tip-of-the-spear PMF combat services.\(^94\) The assertion in the Green Paper—that both the UN and NGOs retain PMFs—has been quoted widely but without further elaboration, presumably with the aim of buttressing PMF legitimacy by association.

Promoters of privatized peacekeeping operations point to Executive Outcomes’s 19-month operation in Sierra Leone beginning in May 1995. That operation, which was not a peacekeeping operation but rather a military intervention by a PMF at the behest of the government of the affected state, cost $35 million\(^95\) and involved a few hundred personnel.\(^96\) By way of comparison, the UN observer force (UNOMSIL) that was sent into Sierra Leone for the eight months following the 1997 coup cost $47 million.\(^97\) At least from this limited economic perspective, arguments for PMF intervention on the basis of cost appear to be justified. Whether it is appropriate to directly compare the two interventions is another matter. UNOMSIL had an expansive role and—in addition to monitoring disarmament, demobilization, and human rights abuses—was also involved in training the new Sierra Leone army.\(^98\) The yearly cost of the subsequent United Nations Assistance Mission in Sierra Leone was approximately $600 million per year but this included a large humanitarian program.\(^99\) Also significant is that the cost of retaining Executive Outcomes fell on Sierra Leone while the international community paid the cost of the United Nations’ missions.

More recently, in July 2004, the International Peace Operations Association, a representative body for PMFs, lobbied the U.S. government to allow Northbridge Services, a PMF based in the United States, to deploy 500-2,000 armed personnel to Liberia to halt fighting in Monrovia. The argument mounted in support of the proposal was that the mission would cost a fraction of what it would cost to deploy U.S. troops and would have the added advantage of not placing service personnel in harm’s way.\(^100\) The U.S. government was unreceptive to the plan.\(^101\)

A further dimension to the discussion of PMFs that merits consideration stems from the differences among weak states themselves. As discussed above, states that suffer the incursions, or retain the services, of combat-ready PMFs for use within their own territories are typically weak states (i.e., states that are weak institutionally or economically, states

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93. Id. at 4.
95. Shearer, Outsourcing War, supra note 23, at 73.
96. The initial number of persons deployed was 170.
99. Green Paper, supra note 12, at 12; Shearer, Outsourcing War, supra note 23, at 79.
101. Catan & Fidler, supra note 100.
where sovereignty is contested, and states experiencing civil unrest). Where weak states have a good supply of natural resources (usually in the form of mineral wealth), they can afford to retain PMFs by offering resource concessions in lieu of payment—as was the case with Sandline. Yet consider the position of a weak state that is facing internal instability and has neither the domestic military capacity to restore stability nor the wealth to retain PMF assistance to help restore stability. The internal security within such states typically continues to deteriorate until such time as the UN or other interested states choose to intervene.

If PMFs were allowed to participate in peacekeeping missions, as Singer has noted, launching peace-keeping missions would not require the UN to plead with states to commit troops and resources but would rather entail collecting enough money from entities (states, corporations, nongovernmental organizations, etc.) or individuals willing to contribute. Singer refers to this ability to easily turn financial might into military might as the “new fungibility of power.”

Despite the obvious utility and initial appeal of the fundraising PMF model, it requires further consideration. This new model of private peacekeeping, utilizing PMFs rather than the armed servicemen of states, would allow corporations with a financial interest in quelling civil threats to become actively involved—through donating money to a specific military intervention or peacekeeping mission—in the ongoing suppression of civil movements. Even Shearer, who is in favor of utilizing PMFs for peacekeeping missions, sees additional potential risks involved in allowing non-state actors to have a greater role in military operations. For example, peacekeeping interventions could become aimed primarily at protecting corporate economic interests rather than protecting civilians, public institutions, democracy movements, or democratically elected governments in war-torn states. Shearer argues, however, that these risks are manageable if all peacekeeping missions continue to be authorized by the affected states and also, preferably, by the UN Security Council.

C. The Use of PMFs Extraterritorially by States

1. PMFs as Foreign Policy Tools

When a state retains a PMF to act on its behalf extraterritorially, it is using the PMF to further its foreign policy objectives. It is important to consider all the dimensions of such a decision. Why would a state choose to retain a PMF to further its foreign policy objectives rather than use its own armed forces? A state could choose to retain a PMF to act on its behalf extraterritorially for any number of reasons such as: (1) the state’s armed forces could be overstretched, (2) the PMF could be in a position to provide the defense services more cost effectively than the state’s armed forces, or (3) the PMF may have good contacts

102. However, I note that in the United States a PMF now undertakes the training of the Reserve Officer Training Corps (ROTC) operating through universities and training future military leaders. Singer, War, Profits, supra note 2, at 522. Also, the UK outsources a significant proportion of its Armed Forces training to civilian contractors. Green Paper, supra note 12, at 13.
103. The United Nations is finding it increasingly difficult to convince member states to donate money and personnel for humanitarian missions in “such weak” nations. Shearer, Outsourcing War, supra note 23, at 70–71.
104. Singer, Corporate Warriors, supra note 11, at 211-14.
105. Id. at 209.
107. Id.
within the retaining/deploying government. From a state’s perspective, one of the key advantages of using PMF contractors extraterritorially to further foreign policy objectives is that when something goes wrong the state can disavow responsibility for the problem by turning the blame onto the PMF.  

For example, the United States uses a PMF called Aviation Development Corporation to provide reconnaissance for the CIA in South America. In 2001, the PMF identified a plane as possibly belonging to cocaine traffickers, and consequently the Peruvian Air Force shot the plane down. Unfortunately, the intelligence from the PMF was faulty, and a U.S. missionary and her daughter traveling on the plane were killed. When questions were asked in Congress about the incident, the CIA directed the enquiries to the company.

Institutionally and economically strong states such as the United States are increasingly choosing to retain PMFs to advance their foreign policy objectives when intervening extraterritorially in the domestic affairs of weak states. Such interventions are often cloaked as offering foreign aid but may work as a means of achieving foreign policy objectives without attracting the level of attention that is generated when a state mobilizes its armed forces extraterritorially. As the examples below will illustrate, all of which involve the retention of PMFs by the United States and Australia, there are a variety of domestic and foreign policy imperatives that lead institutionally and economically strong states to retain PMFs for use extraterritorially. The examples considered below include Iraq, Sudan, East Timor, Equatorial Guinea, and the Balkans.

Finally, when one state pays for a PMF to intervene in another state, there is a risk that the intervention will be resisted by the recipient state and viewed as an aggressive act. A situation could arise where one state retains a PMF in order to launch a war by proxy against another state or, less dramatically, to exert some control over the foreign state or its resources in order to further its own foreign policy objectives. Perhaps requiring states to answer the following three questions would help to determine whether one state is justified in retaining a PMF to intervene in another state: (1) was there a request for assistance from the state in which the PMF is operating; (2) has the UN decided that military intervention in the state is necessary for humanitarian reasons, and (3) what is the motive of the state that has retained the PMF services?

2. Iraq: Supplementing Unilateral Action

The current war against Iraq is still unfolding but has already been termed “the first privatised war.” In 2003, the ratio of private contractors to US military personnel was
roughly one to ten. Another interesting and significant figure released in March 2003 indicates that while Britain had the second largest contingent of national personnel in Iraq with around 9,000 troops, British soldiers were narrowly outnumbered by PMF personnel, which were estimated at 10,000. Other data suggest that, in 2004, there were as many as 20,000 PMF personnel on the ground in Iraq. PMFs are carrying out multifarious tasks, including supplying food; maintaining machinery and weapons systems; guarding officials, convoys and national assets; and training Iraq’s new army, paramilitary, and police. The nascent Iraqi authorities are currently playing catch-up and attempting to control the quality and behavior of the PMFs. Repeated attacks on PMF personnel in Iraq demonstrate that Iraqi insurgents consider them to be hostile to Iraqi sovereignty and self-determination.

Illustrative of the military nature of the work undertaken by some PMFs in Iraq is a story published in an Australian newspaper about local ex-police officers working in Iraq on lucrative contracts with a “private security company.” One of these new recruits was regularly emailing diary entries to the newspaper (and his local pub) and reported that a week after crossing onto Iraqi soil from Kuwait, he was dressed like a U.S. Marine, was armed with M16s and 9mm Berretta pistols, and was being shot at and returning fire while supporting a U.S. Marine convoy. He wrote, “[t]he insurgents, radicals, criminals etc. try to disrupt the supply convoys moving around the country [and w]e tag along [with the convoys] to provide further fire power and to ensure the goods get there.” He later elaborated on what he meant by “providing further firepower,” explaining that it involves shooting when under attack with the aim of “neutralising the source.”

Stories such as the one above explain why the Iraqi resistance forces are not differentiating between PMF personnel and military personnel when selecting targets. The story also suggests that many PMFs currently operating within Iraq would, arguably but for the support of the recently elected Iraqi government, meet the international definition of mercenaries discussed above.

The U.S. determination to invade Iraq without the approval of the UN demonstrates clearly that this military engagement was undertaken in furtherance of U.S. foreign policy interests. It may well be that the unilateral nature of U.S. action has forced the country to rely on PMF services, some of which would undoubtedly, in other instances, have been supplied by other UN member states.

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117. For example—in April 2004, to coordinate PMF security services by controlling personnel quality—the Coalition Provisional Authority took steps to ensure that all PMFs operating in Iraq were registered with the Ministry of the Interior, and that PMF personnel registered the serial numbers of their weapons and disclosed their rules of combat engagement. Flaherty & Priest, supra note 115.
119. *Id.*
120. *Id.*
121. That the Iraq invasion furthers U.S. foreign policy can be inferred from the manner in which the U.S. government has justified the invasion. Stated objectives have changed over time: from ridding the world of Saddam Hussein; to removing weapons of mass destruction; to fighting the good fight against terrorism; to promoting democracy. The unstated foreign policy objectives remain objects of supposition but certainly include securing access to a stable oil supply and exerting geopolitical influence in the Middle East.
3. Sudan: Avoiding Public Scrutiny

In late 2004, Sudan agreed to accept a peacekeeping force from the African Union comprising 4,500 Rwandan and Nigerian soldiers. The peacekeepers received logistical support from the United States via two PMFs: DynCorp Corporation and Pacific Architects & Engineers (PAE). The joint contract between DynCorp and PAE and the U.S. State Department is valued at $20.6 million and is described as an “indefinite delivery, indefinite quantity” contract. The contract was entered into pursuant to a five-year task order issued in 2003 by the State Department, which allows for the use of these two PMFs anywhere in Africa.

The reluctance of the United States to contribute defense force personnel to the peacekeeping mission in the Sudan could reflect that its military resources are overstretched by the current invasions and occupations of Iraq and Afghanistan. Charles Snyder, however, the State Department’s senior representative on Sudan, said that the United States uses PMFs out of preference because “[p]rivate companies can do the job more quickly and efficiently in the short term than a government bureaucracy.” The fact that this particular contract was entered into by the executive arm of the U.S. government has led at least one commentator to conclude that the real reason behind the U.S. decision to utilize PMFs in the Sudan is to indirectly exert influence without attracting congressional oversight.

4. East Timor: Honoring International Commitments

The Australian government contracted with Chubb Security Australia (Chubb) as part of Australia’s commitment to rebuilding East Timor. The rebuilding was necessitated by Indonesia’s brutalities and subsequent withdrawal from East Timor in 2000. At the time Australia sent Chubb to East Timor, the country was not internally stable and hostility still existed between Indonesia and pro-Indonesian rebels on the one hand and the East Timorese on the other. Indonesia’s withdrawal had left a governance void in East Timor—there were no elected leaders or public servants, and there was no working legal system. In this environment, Chubb was retained to provide security personnel, some of whom were armed, to guard key infrastructure, equipment, warehouses, and supply routes. The internal instability in East Timor and the scope of the security work carried out by Chubb demonstrate that it was operating as a PMF in East Timor, although Chubb does not view itself as a PMF but rather as a personal security provider.

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123. Id.
124. Id.
125. Id.
126. Mr. Chatterjee attributed this conclusion to an anonymous official. Id.
127. Chubb Security Holdings Australia Ltd. (part of Chubb PLC, which is now a business unit of United Technologies Corporation).
128. Countries like Australia and New Zealand had sent contingencies of their Armed Forces to secure East Timor from internal and external threats.
129. As a postscript to Australia’s use of Chubb in East Timor, the Trade Union Confederation of Timor Lorosae complained in 2003 that Chubb was one of the worst employers in East Timor, due to its record of nepotism.
5. Equatorial Guinea: Advancing Domestic Values on the International Stage

In 1998, the Government of Equatorial Guinea approached Military Professional Resources Incorporated (MPRI) to evaluate its defense systems and to determine whether it was in need of a coast guard to protect its oil reserves. MPRI duly applied for a license from the U.S. government to carry out the work. The application was rejected by the Clinton Administration on the grounds that the regime in Equatorial Guinea had an appalling human rights record. MPRI lobbied the Pentagon and the State Department with a view to having the license granted; in 2000, the State Department reversed an earlier determination. One U.S. State Department official who was initially opposed to the granting of the license to MPRI changed his mind after hearing that the proposed training would include human rights training. The same official was also reported as saying that “[t]hese private military companies, if properly directed by U.S. government officials, can in fact play positive roles.” The policy reversal provides another example of the use of PMFs as a tool for implementing foreign policy objectives and, in this case, advancing domestic values.

The United States’ self image as a model for all other states to follow, and the subsequent implications for U.S. foreign policy, are well-documented. As the New York Times writer David Sanger has observed:

For more than half a century, the United Nations has been the main forum for the United States to try to create a world in its image, maneuvering its allies to forge global accords about human rights, nuclear tests, or the environment that Washington insisted would mirror its own values.

Having used up much of its political capital at the UN, the United States has arguably abandoned it, at least to some extent, and turned its energy toward accomplishing the same ends first through the World Trade Organization (WTO) and, more recently, through a plethora of bilateral and multilateral free trade agreements. Reviewing U.S. history and recent events, some commentators argue that the driving force behind U.S. intervention is nothing other than the economic demands of its financiers, thinly cloaked in the language of Wilsonian idealism. It would appear from the above examples that the United States has utilized PMFs for the same ends.

6. The Balkans: Achieving Conflicting Objectives by Sleight of Hand

After the breakup of the former Yugoslavia, the UN banned the provision of military assistance to either Serbia or Croatia. During the Bosnian conflict, the U.S. State Department issued two licenses to MPRI to carry out contracts in the Balkans.

The first contract, entered into in 1994, involved MPRI’s provision of training to the Croatian army. According to journalist Barry Yeoman, the United States’ foreign policy objective in granting a license to MPRI involved ensuring that the Croatian army became an effective counterforce to the dominance of the Serbian forces and President Slobodan

130. Yeoman, supra note 79.
131. Id. The person cited was U.S. State Department official Bennet Freeman.
133. See NOAM CHOMSKY, PROFITS OVER PEOPLE 68-72 (1999) (asserting that U.S. exportation of American “values” is simply a facade that allows American oversight); see also HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES 11-12 (1980) (charting recourse to Wilsonian idealism as a cloak for predatory foreign policy initiatives).
Milosevic.\textsuperscript{134} MPRI insists that the contract did not require it to provide combat training, but in August 1995, after benefiting from MPRI’s services, the Croatian army launched Operation Storm. The operation was a very efficient and bloody four day assault that saw the Croats regain the Krajina region from the Serbs. In many respects, this outcome could be seen as consistent with the U.S. foreign policy objective of establishing a strong Croatian army able to counter Serbian forces.

Having signed the Dayton Peace Accords in late 1995, the State Department issued another license to MPRI the following year, this time to train and equip the Army of the Federation of Bosnia and Herzegovina (the Croat-Muslim army).\textsuperscript{135} The contract was paid for by moderate Arab states\textsuperscript{136} and the US State Department donated $100 million worth of equipment without restricting its distribution or use.\textsuperscript{137} This approach fulfilled the dual U.S. foreign policy objectives of remaining ostensibly neutral while at the same time ensuring that the military balance between the Muslims and Croats on the one side and the Serbs on the other was relatively even.\textsuperscript{138} The intervention was considered cost effective\textsuperscript{139} and had the added advantage of reducing the need for direct U.S. military engagement.

IV. REACTIONS

There have been a variety of reactions to the emerging PMF industry. This section examines a range of reactions including various national approaches to regulation, self-regulation, state ownership, and international regulation.

A. State Regulation of PMFs

International law has never effectively furnished a legal definition of a mercenary or regulated mercenary activities, let alone turned its attention to the effective regulation of the industry’s contemporary manifestation—the tip-of-the-spear PMF. The result of this inaction at the international level is that the problem been left to individual states to tackle on an ad hoc basis.\textsuperscript{140} Mindful of the current lacuna in international law in relation to PMFs and concerned about the inherent violence and lack of accountability of some PMFs,\textsuperscript{141} some states have sought to regulate PMFs operating domestically or extraterritorially.

A Green Paper by the U.K. government focused on the options for regulating private military companies and noted that there were two primary arguments favoring regulation of the PMF industry.\textsuperscript{142} These are: (1) the need to keep non-state violence under control and (2) the recognition that the nature of the transactions entered into by PMFs are atypical commercial transactions with the potential to impact the stability of a country or region.\textsuperscript{143}

\begin{thebibliography}{9}
\bibitem{Yeoman} Yeoman, \textit{supra} note 79.
\bibitem{Singer2} Singer, \textit{Corporate Warriors}, \textit{supra} note 11, at 31.
\bibitem{Kassebaum} Kassebaum, \textit{supra} note 135, at 582.
\bibitem{Id} \textit{Id.} at 583.
\bibitem{Id2} \textit{Id.} at 583.
\bibitem{Singer3} Singer, \textit{War, Profits}, \textit{supra} note 2, at 524.
\bibitem{Zarate} Zarate, \textit{supra} note 46, at 77.
\bibitem{Green Paper} Green Paper, \textit{supra} note 12, at 20.
\bibitem{Id} \textit{Id.}
\end{thebibliography}
Both of these reasons demonstrate the concern that states reestablish their monopoly over violence. Commentators are divided over the efficacy of national regulatory efforts. Commentators such as Zarate believe that regulation at the national level is important to securing accountability of PMFs, while others, such as Singer, believe that regulation at the national level is doomed to fail. Zarate has noted that PMFs tend to be based in, though not necessarily incorporated in, militarily advanced countries. On a practical level, this allows PMFs ease of access to military expertise and networks of retired military officers. On a strategic level, it allows PMFs to claim some form of state endorsement as the state has either tacitly agreed to the PMF’s operation within its territory or it has expressly regulated the PMF’s operations in relation to its contracts. If a state has introduced a regulatory regime to control PMFs, then it should be able to exert a degree of control over the activities of PMFs incorporated or operating within its territories. From the state’s perspective, the presence of one or several PMFs may be desirable for reasons of power, namely demonstrating significant reserves.

Singer and other commentators are skeptical of a state’s ability to regulate PMFs. They note the ability of corporations to dissolve, reform, and move across borders with minimal effort. The result of the corporate form is that all regulatory efforts can easily be evaded by PMFs not willing to conform to certain domestic laws.

Regulation of the PMF industry is necessary and should go further than the Green Paper advocates. The control that a regulating state exercises should fulfill two objectives: (1) it should ensure that the state is either sanctioning the PMF intervention or that another recognized state enjoying the support of the majority of its citizens is sanctioning the intervention, and (2) it should ensure that the PMF is legally bound and complies with the regulating state’s domestic laws and international law commitments. As a corollary, the regulating state then has an obligation to ensure that the regulatory scheme is properly financed so that PMF activities can be monitored to ensure adherence to and enforcement of domestic laws and international legal commitments.

If national legislation regulating PMFs incorporated in, or operating from, national territory could be introduced in states where the majority of PMFs are based (United States, United Kingdom, France, and South Africa), the regulation would significantly contribute to the effective regulation of the PMF industry as a whole. The following sections analyze the attempts that have been made to regulate PMFs in three of these key states: the United States, South Africa, and the United Kingdom.

1. United States: Licensing

For more than twenty years, the U.S. Department of State has issued export licenses to American PMFs in accordance with the United States’ Arms Export Control Act and International Transfer of Arms Regulations. The system has been described as

144. Id. at 18.
145. Zarate, supra note 46, at 80. See also Green Paper, supra note 12, at 14.
146. Singer, War, Profits, supra note 2, at 524.
147. Zarate, supra note 46, at 76. The US, South Africa, UK and Israel are the preferred bases for PMFs. See Guns for Hire, supra note 114.
148. Zarate, supra note 46, at 76.
149. Id. at 77-78.
150. See infra text accompanying note 28.
151. See Singer, War, Profits, supra note 2, at 533.
idiosyncratic since input from the State and Defense Departments varies from contract to contract.¹⁵²

One of the criticisms directed against the U.S. licensing regime is that, pursuant to the International Transfer of Arms Regulations, Congress does not need to be informed of a contract in advance of the issuance of a related license unless the contract is valued at over $50 million. Another criticism is that once a company receives a license, there are no oversight or reporting requirements.¹⁵³

The pros and cons of a U.S.-type regulatory system were considered by the UK in the previously mentioned Green Paper. Its authors concluded that the primary drawback of a U.S.-style licensing system was that in order for it to be effective, the regulating state had to be prepared to expend money on policing and enforcement.¹⁵⁴ A further drawback of licensing regulatory schemes is that some may interpret the issuance of a license as evidence of state sanction for a particular PMF activity. Singer, for example, refers to a national regulatory scheme involving licensing as providing a “safe harbor” for PMFs insofar as the licenses obtained by PMFs through the schemes can be touted as evidence of state endorsement.¹⁵⁵

The example of Equatorial Guinea¹⁵⁶ illustrates how the United States makes use of its PMF licensing scheme to influence the activities of PMFs operating from within the United States. The United States refused to issue MPRI a license to operate in Equatorial Guinea because of that state’s poor human rights record. The U.S. refusal to issue a license continued until the nature of the engagement included human rights training. Having spent a considerable amount of time and money securing the license from the U.S. government, MPRI could now claim with some justification that the United States had endorsed its intervention. By hosting PMFs within its borders, the United States has successfully influenced PMF activities at little expense to taxpayers. The downside to this arrangement, as Singer has noted, is that the process places the imprimatur of state approval on PMF activity.

2. South Africa: Registration and Approval

Another model of regulation has been adopted in South Africa. In 1998, South Africa enacted the Regulation of Foreign Military Assistance Act, which prohibits individuals and companies within South Africa and all South African individuals and companies outside of the country from “direct participation as a combatant in armed conflict for private gain.”¹⁵⁷ The Act also prohibits the recruitment, training and financing of mercenaries.¹⁵⁸ The legislation establishes a multilayered regulatory process. A person or company wishing to provide military-related services must first register with the National Conventional Arms Control Committee (NCACC), obtain Government approval to offer foreign military assistance and then receive authorization to enter into a specific contract with a third party.

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152. Avant, supra note 74.
153. Avant, supra note 74.
155. Singer, War, Profits, supra note 2, at 533.
156. See infra part III.C.5.
for the provision of these services.\textsuperscript{159} The decision on whether to grant authorization or approvals lies with the Minister of Defense acting on advice from the NCACC.\textsuperscript{160} There are no specific timeframes for ministerial decisions, nor are there provisions requiring the Defense Minister to give reasons for a refusal or an approval.\textsuperscript{161} This convoluted procedure combined with ministerial discretion would seem to be a significant impediment to PMFs operating in South Africa. The unpredictability and potential for delay in South Africa’s regulatory scheme may deter business-minded PMFs. But the combination of the difficult procedure and discretionary authority should be monitored closely—it would appear to provide ample opportunity for corruption to creep into the regulatory system.

Ironically, a major problem with the South African legislation is that it potentially regulates bona fide activities regularly carried out by NGOs and others in the context of peacekeeping and which have nothing to do with mercenary activities. The problem arises because “foreign military assistance” is defined very broadly to include not only such things as engaging in armed conflict by way of providing military advice, training, or cooperation, but also a wide range of support activities. Covered activities include: (1) providing medical and paramedical services, (2) procuring equipment, (3) providing security services for individuals or property, or (4) any other action that has the result of furthering the military assistance of a party to the armed conflict.\textsuperscript{162} “Armed conflict” is also defined broadly to include everything from conflict between armed groups to formal wars.\textsuperscript{163} The broad definitions of armed conflict and foreign military assistance, in conjunction, may have the effect of stymieing the ability of South Africans to work towards building peace in many areas of Africa without first obtaining the approval and authorization of the South African government.\textsuperscript{164} To date, however, there is no record of the South African government using its discretion to thwart such peace initiatives.

In January 1999, six months after the new regulatory legislation became law, Executive Outcomes, the South African based PMF notorious because of its overt willingness to engage in combat, ceased operations entirely. This example is cited as proof of the power of national regulation to control PMFs, but it is more likely that the increased regulation was a minor factor in Executive Outcomes’s demise\textsuperscript{165} and may support the contrary position set out by Singer—the notion that PMFs can simply pull up stakes and move to another country, or morph into another less visible form (as discussed further below).

\begin{footnotes}

\textsuperscript{159} \textit{Id.} (explaining that Sections 3 and 4 of the Memorandum on the Objects of the Regulation of Foreign Military Assistance Bill, 1997 from South Africa makes clear that it was the South African Government’s intention to bring the provision of military services by South African individuals and companies into line with the regulations that were already in place governing the transfer of arms).

\textsuperscript{160} \textit{Id.}

\textsuperscript{161} \textit{Id.}

\textsuperscript{162} South Africa Foreign Military Assistance Act, supra note 157, at § 1.

\textsuperscript{163} \textit{Id.}

\textsuperscript{164} See Malan & Cilliers, supra note 158.

\textsuperscript{165} See Bruce Blain, The Role of Private & Mercenary Armies in International Conflict, Information Clearing House, http://www.informationclearinghouse.info/article3396.htm (last visited Nov. 19, 2005) (chronicling the decline of Executive Outcomes—which had been forced to leave Angola in 1996 and Sierra Leone in 1997, and which in 1998 found itself without any major contracts and without the patronage of British millionaire Anthony Buckingham—and stating that “national regulation in South Africa in the form of the 1998 Regulation of Foreign Military Assistance Act placed EO under greater scrutiny”). Note, however, that subsidiaries of Executive Outcomes were still operating in Angola and Sierra Leone in 2002. Green Paper, supra note 12, at 11-12.
\end{footnotes}
3. United Kingdom: Clean Up and Self-Regulate

As outlined in the Green Paper, the U.K. has considered regulating PMFs in a variety of ways. Proposals have included enacting a complete prohibition on their activities, imposing a licensing regime on the provision of military services, or permitting the PMF industry to self-regulate through a voluntary code of conduct. The major argument put forward in support of self-regulation is that it is “a relatively unburdensome form of regulation” from the perspective of the British government, which would nonetheless help establish standards of behavior within the industry. Furthermore, self-regulation would not require the British Government to police “unenforceable legislation or regulation,” which could arise if the law attempted to define or specify the types of PMF activities being regulated.

After collecting public submissions, the Green Paper was sent to the U.K.’s Foreign Affairs Committee for consideration. The committee formulated a number of recommendations for the British government’s consideration. The recommendations suggest support for a limited form of regulation that would not disrupt the legitimate activities of the PMF industry. The recommendations encouraged the Government to choose appropriate criteria for regulation that would distinguish reputable from disreputable PMFs and facilitate the business of the former while curbing the latter. In a rather generous assessment of the industry, it seems that all activities short of dealing in arms or engaging in combat are to be considered reputable activities of PMFs.

The U.K. has not taken any further action to regulate the PMF industry since 2002. If the Green Paper and responses can be taken as accurate indicators of political will, it seems likely that the U.K. will eventually introduce regulations designed to protect and facilitate the economic viability of what are considered to be reputable PMFs.

Some commentators would suggest that the U.K. benefits directly from a close working relationship with disreputable PMFs and that British firms need these disreputable PMFs to further their business interests in countries that do not offer security. Such hypotheses are difficult either to establish or disprove. However, if benefits truly are forthcoming, the phenomenon would explain Britain’s preference for self-regulation or light regulation. Light regulation of the PMF industry allows Britain to suggest that it is cleaning up the industry while at the same time benefiting from the widespread availability of unfettered PMFs. Light or self-regulation also allows the U.K. to avoid expenditure on regulatory oversight. Regardless of speculations concerning motives, the U.K. approach of clean up and self-regulate provides an alternative and fits well with the neo-liberal, laissez-faire ideology that seeks to leave the market to regulate itself. It may also lead states to differentiate between different types of PMFs and to limit regulation to PMFs they consider the greatest threats to the state.

167. Id.
168. Id.
170. Id. at 4 (“The availability of reputable companies to provide support [for peacekeeping and humanitarian deployments] means that the UK may be in a better position than might otherwise be the case to respond positively to requests to take part in such operations.”).
171. See, for example, Zarate, supra note 46, at 76-78, for general comments on the close links between PMFs and the militarily advanced countries in which these PMFs form.
4. Can National Regulation of PMFs be Effective?

Despite his skepticism about regulation generally, Singer notes that national regulation of PMFs offers the hope of superior legal definitions and enforcement. He warns, however, that the globalized nature of the PMF industry should caution against viewing national regulation as a panacea. Singer identifies three fundamental reasons why national regulation alone cannot adequately control the PMF industry.

First, Singer notes the ability of PMFs to rename, relocate or change their legal form, and in so doing, to circumvent legislation or escape prosecution. Second, while extraterritorial legislation can be promulgated, it is often difficult (if not impossible) to enforce. Finally, states will have difficulty successfully defining PMFs and stipulating what elements of their activities they are regulating.

Echoing Singer’s last point, those advocating the regulation of PMFs need to clearly identify exactly what elements of the work undertaken by PMFs requires regulation. In other words, regulators will have to delimit the appropriate realm of activity for PMFs and then decide on the appropriate criterion for regulation. The criterion for regulation should include one or more of the following aspects of PMF activity: (1) the nature of the PMF services being rendered, (2) the suitability of the PMF providing the services, (3) the physical location in which the PMF services are rendered, and (4) the point in time when the PMF services are provided, (5) the nationality of the individuals involved in the PMF, and (6) the identity and motive of the entity retaining the PMF’s services.

In practical terms, the regulatory scheme will need to be carefully designed and well-financed to ensure that PMFs behave in a manner that is consistent with the norms of state and international law. The objective of the regulatory scheme should be to use regulation to embed public sector norms, such as accountability, within the PMF industry. This concept has been optimistically referred to as “publicization” and involves private actors committing themselves to the pursuit of traditionally public goals in return for the opportunity to provide lucrative services to the public.

5. State-Owned PMFs?

One of the recommendations of the British Foreign Affairs Committee was that the Government weigh the costs of effectively regulating PMFs against “the option of developing a publicly funded armed service cadre to provide on a commercial basis the tasks currently being undertaken by PMCs.” The British Secretary of State for Foreign and Commonwealth Affairs responded by stating that the Government would consider the recommendation but warned, “[t]here would be risks inherent in setting up an operation which might be seen as amounting to a publicly owned PMC.” The recommendation

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172. Singer, War, Profits, supra note 2, at 524.
173. Id. at 534-37.
174. Id.
175. Singer, War, Profits, supra note 2, at 535–37.
176. The Expert Committee convened in Geneva in January 2001 to discuss, amongst other things, problems arising from the current definition of a mercenary under international law. It similarly concluded that there was a need for a broader definition of a mercenary that addressed motive, purpose, payment, type of action, and nationality. See UNESCO Report, supra note 23 (noting that “General Assembly resolution 52/112 requested the Secretary-General to invite Governments to make proposals towards a clearer definition of mercenaries”).
177. Freeman, supra note 65, at 1285.
179. Id.
likely derived from a desire to ensure that there are PMFs available that can be effectively controlled by the U.K. government, or a realization that a state-owned PMF could be a lucrative state asset.

In the case of state-owned PMFs, sovereignty is not compromised because the state retains its monopoly over violence. The notion of a state-owned enterprise offering military services, however, still faces all the objections and problems associated with PMFs in their other relationships. In addition to the larger foreign policy issues posed by state or state-owned militaries acting on foreign soil, a conflict could arise if the government sought to employ a state-owned PMF but its resources were engaged elsewhere by a higher paying bidder.

6. PMF Industry Reaction

Another reaction has come from the industry itself. The industry has gradually progressed toward “professionalisation,” presumably in an effort to deter state or international regulation and to promote some type of self-regulation—a proposition in line with the UK position. Some of these trappings of PMF “professionalism” include: (1) the use of formal contracts when entering into agreements with states; (2) the drafting of voluntary codes of conduct that serve to, amongst other things, prevent illegitimate states from availing themselves of PMF services; (3) the establishment of a PMF representative industry body, the International Peace Operations Association, to lobby on its behalf; and (4) a change in rhetoric which downplays PMFs’ desire for financial gain at the expense of states and instead emphasizes their ability to deliver cost efficient military services while serving patriotic and humanitarian objectives. For example, Blackwater Consulting, a spear shaft, and possibly, tip-of-the-spear PMF, offers its services “[i]n support of freedom and democracy everywhere.”

Experience with self-regulation is decidedly mixed and experience thus far suggests it is unlikely to be successful. From an experiential perspective, markets left to the participants often fall prey to human weakness and collapse. Arguably, market activity is not self-regulating, does not work well without supervision, and some form of external supervision is often necessary.

B. Regulation of PMFs Under International Law: The 1989 Convention Against the Recruitment, Use, Financing and Training of Mercenaries

The congregation of most large PMFs in a small number of militarily advanced countries, and the fact that a relatively small percentage of PMFs offer tip-of-the-spear services, provides the international community with a window of opportunity to bring PMFs under the authority of international law. The 1989 United Nations Convention Against the Use, Training and Recruitment of Mercenaries came into force in 2001. Neither the states of the European Union nor the G8 have signed the U.N. Convention because the

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180. In 2001, according to federal disclosure forms, 10 PMFs spent more than $32 million lobbying the U.S. government. Yeoman, supra note 79.


182. Perhaps one of the best known early evidences of this truth is the “South Sea Bubble” fraud and resulting legislation. See Julian Hoppit, The Myths of the South Sea Bubble, 12 TRANSACTIONS ROYAL HIST. SOC’Y 141 (2002).

183. UN Convention, supra note 21.
definition of a mercenary is considered to be deficient, the monitoring mechanism nonexistent, and the terms of the Convention accordingly unenforceable. The failure of the Convention to be widely adopted has led to quips that it may amount to evidence of “anti-customary law” in relation to regulating mercenary activity.184

Despite the general lack of support for the U.N. Convention, New Zealand acceded to it in September 2004 and has recently enacted the Mercenary Activities (Prohibition) Act 2004 to implement its obligations under the Convention.185 The Act criminalizes taking part in hostilities for financial gain.186 The debate surrounding the passage of the legislation was aimed at preventing individual New Zealanders from pursuing lucrative $1,000-a-day security work in Iraq.187

Many countries independently passed similar laws preventing the recruitment of mercenaries prior to the drafting of the Convention.188 Shearer has noted that state legislation banning mercenaries has resulted in very few prosecutions. He cites the example of the U.K. which, after enacting the Foreign Enlistment Act in 1870, has yet to prosecute a single individual.189 There have been a limited number of prosecutions under the Australian legislation.190

V. CONCLUSION

Before any effective, let alone uniform, regulations can be implemented, many of the issues addressed in this article will need to be resolved. The starting point is to acknowledge the impossibility of returning the genie to the jar. Furthermore, pragmatically speaking, the governance of states is now such a complex affair that the simpler models of monopolies and militaries are no longer of service. Although PMFs will always be distasteful to some, in certain instances, they may have a legitimate role to play.

The principal obstacle to regulating PMFs has been the tendency to classify them as either legitimate service providers or mercenaries of the kind witnessed in Africa thirty years ago, rather than to recognize them as multinational entrepreneurs eager to sell services and gain legitimacy.191 Once the subtleties distinguishing PMFs have been adequately identified, it should be possible to effectively regulate PMF activity, particularly odious tip-of-the-spear combat activity, by drawing on the best aspects of the U.S. and South African regulatory models.

A preferred regulatory scheme might involve licensing both specific PMF activities and PMF executives and consultants (much as members of other professions are licensed). These licensing schemes could be usefully supplemented by an independent industry association that develops codes of conduct and standardized training in areas such as international human rights law.

As the majority of major PMFs are based in a handful of developed countries (the United States, United Kingdom, France, and South Africa), there is a potential to make

184. Singer, War, Profits, supra note 2, at 531.
186. Id. at §§ 5, 12.
188. See, e.g., Neutrality Act of 1937 (U.S.); Crimes (Foreign Incursions and Recruitment) Act of 1978 (Aus.); 1870 Foreign Enlistment Act (U.K.).
189. Shearer, Outsourcing War, supra note 23, at 77.
190. See, e.g., June Marie v. The Queen (1981) 2 N.S.W.L.R. 100; Monte v. Mirror Newspapers Ltd. (1979) 2 N.S.W.L.R. 663, 684.
191. Shearer, Outsourcing War, supra note 23, at 78.
major inroads in the regulation of PMFs without waiting for international consensus or relying on a cumbersome and lengthy international treaty process. All that is necessary is for the four or five key PMF host states to enact uniform regulation. A useful start would be to regulate tip-of-the-spear PMF activities. Arguably PMFs could relocate to avoid restrictive regulatory schemes. In response to regulation—states would simply move. But in general, PMFs have more to gain by staying and complying with state regulation (increased legitimacy, stable business environment, etc.) than they will gain by moving. The rest of the world could either follow directly or draw on the experience and design a better regulatory framework. In this manner, the international community could move incrementally to a consensus on the appropriate level and manner of PMF regulation. Ultimately, an international convention dealing specifically with PMFs may be within reach.

Furthermore, a shift in priorities and premises is required for these key states to coordinate their regulatory initiatives. Regulation is likely to fail if strong states continue to pursue self-interested foreign policy objectives that threaten the sovereignty of weak states. The state monopoly over violence, whether directly or indirectly threatened by PMFs, must be subject to constant public scrutiny. The peace and well-being of citizens should be paramount over all else, including economic growth, corporate profits, and foreign investors. And finally, extraterritorial expansion of the state must be rejected as an illegitimate policy.

In the final analysis, the impetus for addressing the PMF issue derives from the argument that the right to life; the integrity of political and legal institutions of states, including the concept of the rule of law; the maintenance of international security and peace; and a commitment to the principles of democracy, are not matters to be turned over to private companies driven solely by profit. PMFs stand to gain by selling their services and cannot be entrusted with the responsibility of protecting life and maintaining security. Those obligations are ultimately vested in the state.\footnote{192 UNESCO Report, supra note 23, at para. 120. Mr. Bernales Ballesteros writes:}

\begin{itemize}
  \item On the basis of the facts and analysis presented in this report, it is recommended that the Commission on Human Rights should consider keeping this subject under review as a matter of priority with a view to formulating proposals for a better legal definition of private companies that offer security services, precluding the presence of mercenaries, and safeguarding the sovereignty of States and their non-transferable responsibility of matters of law enforcement and internal security.
\end{itemize}