Constructing Governance, but Constructive Governance? The emergence and limitations of a dominant discourse on the regulation of Private Military and Security Companies

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Abstract

The private security industry’s rise to prominence has led to much debate, primarily relating to concern for human rights and the role of the state. The industry’s potential to level the playing-field between developed and developing countries in obtainment and deployment of security is often remarked upon, but the divide created by their differing capacities and motivations to control security service providers goes unnoticed. The result is a dominant discourse which embraces assumptions that limit effective policy formulation.

This discourse has two central tenets. The first is the normalization of private military companies as partners and agents of state governments. This is qualified only by human rights concerns, and to a more limited extent concerns about state interests. These concerns are sought to be mitigated through a focus on national regulation – the second tenet of the discourse. But, is national regulation, by the home, host or hiring states, in fact an adequate response to the concerns of vulnerable populations in conflict-experiencing foreign countries? I examine the normative basis for and veracity of the claim that state regulation is the key to governing private military companies.

My analysis is situated around the activities of Blackwater Inc. in Iraq, especially in the wake of the September 2007 shootings. I seek to bring into focus the difficult legal, political and practical hurdles that stand in the way of effective national regulation by home, host and hiring states. In the conclusion I will sketch out a few plausible alternatives – with emphasis on the role of industry-level associations - that can contribute towards more equitable governance of security service providers.

1 PhD Candidate, Cambridge University; LLM NYU ’06; BA LLB (Hons.) NLSIU ’05. This paper was written while I was working as a Program Officer/Institute Fellow at the New York University Institute for International Law and Justice. A very early draft was presented at the NYU-Centre for Policy Research Workshop on Global Governance in New Delhi, January 2008; and a second draft at the Asian Society of International Law Young Scholars Conference in Singapore, September 2008. I would like to thank participants of both workshops. Many thanks to Angelina Fisher and Benedict Kingsbury for discussions which provided many of the ideas for this paper, and to Simon Chesterman, James Crawford and James Irving for their review of and comments upon the draft presented at the AsianSIL workshop. All errors remain my own.
INTRODUCTION

“But the world may not be ready to privatize peace” said former United Nations Secretary General, Kofi Annan, explaining his decision to not employ a private company in 1994 in Goma. He acknowledged however that with the assistance of 5000 personnel, General Dallaire could have saved 500,000 lives. The company he had contemplated hiring, Executive Outcomes, had recently been effective in containing rebels in Angola, and in 1995 it played a key role in Sierra Leone, forcing the Revolutionary United Force (RUF) to negotiate with the Kabbah government.

Around the same time, in a different place, Military Professional Resources Inc. was instrumental in reversing Croatia’s fortunes against Serbia, converting its “ragtag militia” into a professional force.

It is often thought, inaccurately, that international law frowns upon operations of (especially foreign) private military and security companies (PMSCs) in conflict zones; and moreover seeks their eradication through measures like the 1989 Mercenary Convention. In fact, states unhesitatingly accept, and employ, PMSCs. Other actors in the international community also recognize their utility in conflict situations where states are unable or unwilling to deploy necessary manpower, and indeed PMSCs hold service contracts with the United Nations, and several humanitarian agencies, amongst others. Moreover, there has been an increase in the degree of involvement of private companies and value of contracts awarded to them for tasks to be performed in conflict zones.

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4 See David Francis, Mercenary Intervention in Sierra Leone: Providing National Security or International Exploitation?, 22(2) THIRD WORLD QUARTERLY 319 (1999). Francis points out the whole EO played a very important role; its contribution should not be overstated. Also important were the contributions of the Kamajors, the ECOMOG and the Nigerian contingents.

5 Id at 329; DEBORAH AVANT, THE MARKET FOR FORCE 98 (2005).

6 The US chose not to intervene directly in Croatia’s campaign for diplomatic reasons; MPRI provided surrogate assistance. In Rwanda, various states were unwilling to risk their troops in a campaign that had no political rewards.
To a large extent, this is not unwelcome, for as suggested by the above examples, PMSCs do offer states and other actors the physical capability that makes realization of some intended policy objectives more credible. Further, this acceptance of PMSCs is tempered by a fairly nuanced appreciation of the concerns that accompany their employment; in relation to their operations in conflict zones in particular it is recognized that PMSCs may pose challenges to human rights, state interests and international stability.

To address these concerns, various interest groups, among them non-governmental bodies and human rights agencies, and also policy-framing bodies like the UN Working Group on Mercenaries, look to enhanced regulation by the home, host and hiring states of these companies. In doing so, these groups certainly steer clear of a second and quite different misperception from the one that PMSCs operate outside the law; under this second misperception PMSCs operate in a zone of ‘no-law’.7 As recent initiatives such as those undertaken by the International Committee of the Red Cross,8 and the New York University’s Institute for International Law and Justice9 seek to demonstrate, there is no vacuum in the law that relates to the operation of PMSCs in conflict zones. In fact, PMSCs may be governed by a fairly intensive and overlapping network of domestic and international rules; and states may be responsible for and obliged to regulate PMSCs that are linked to them by nationality, contract or territorial operation.

However, prescriptions based solely on this awareness of laws being applicable to companies and states may yet fail a third test. This is of recognizing that conflict situations often widen the gap between mere applicability and actual enforcement of the law. Naturally, conflict situations also make us more anxious about potential harms resulting from acts of violence by PMSCs and may colour our perception of the extent to which regulation is desirable. These facts give rise to a number of issues that those seeking to formulate practicable proposals for regulation of PMSCs must take into consideration. The remainder of the introduction indicates some of these issues.

It is important to recognize that the state of affairs described in the previous paragraphs - of acceptance, concerns and quest for state regulation of PMSCs - represents a fairly well crystallized, and dominant, discourse. And in this discourse, some insights are often lost. The first is that to a great extent it rests upon a presumption of a ‘normal’ principal-agent relationship between states and PMSCs. This may be unfounded in practice. While a well-defined principal-agent relationship may appropriately characterize the experience of the United States and some European countries, it not accurate in describing the ambiguity of PMSCs’ roles in other parts of the world, where though they may be routinely hired, they are not routine “agents” of states. To the extent that this presumption lends itself to policy prescriptions in the form of ‘universal responses’ to regulating PMSCs it is deeply problematic. Indeed, in certain contexts, blind ‘acceptance’ of outsourcing to PMSCs, may itself be inappropriate.

Generally however, our understanding of concerns is less influenced by faith in the principal-agent relationship between states and PMSCs, than it is by the imagery of company personnel as gun toting desperadoes. The remarkable fact about several of the concerns highlighted in this paper is that they are not peculiar to private providers, or indeed to the military/security sector. Singling out PMSCs for especial concern makes at once too much and too little of their role. Too much, for

there is little reliable data on the extent to which these concerns are realized, available information is often both anecdotal and hyperbolic. Too little, because very often, these concerns are mapped on the activities of a small fraction – those providing “armed services”. A focus upon a small set of ‘grave harms’ associated with the actions of one category of service providers in conflict regions, naturally distorts appreciation of the regulatory challenges posed by PMSCs, and policy responses that are desirable. In particular there is often a perception that PMSCs are somehow completely distinct (and more dangerous) than other actors operating in conflict zones. In fact, as the paper aims to reflect, many of the principal concerns relating to PMSCs result from their being in a position of relative power over vulnerable populations and weak governmental entities in conflict zones, which is not different from the power that humanitarian agencies, multinational corporations and even peacekeeping forces have under similar circumstances. There is a real need to examine the regulatory challenges posed by PMSCs as a subset of the challenges posed more generally by various groups operating in conflict zones, and to assess rigorously whether some of the regulatory alternatives applied to these other actors may work well in the case of PMSCs also. For instance it may be useful to pay more attention to industry-level initiatives in this sector; self-regulation remains one of principal controls applied to humanitarian agencies.

The third issue is related. There is often a clamour for more stringent regulation by states than would be considered either plausible or desirable if any other group was involved. This is of course because PMSCs are seen as analytically distinct from other groups, the concerns associated are magnified, and outsourcing to PMSCs a retreat of the state into the Nozickean *ultra minimal*.

However, whatever the poetic fitness of invasive state regulation of a private industry carved into core state functions, and considerations of state responsibility, states do not in fact regulate PMSCs to any remarkable extent. Sometimes this is because they cannot, and sometimes because they will not. A practical approach to state regulation requires an appreciation of the barriers of “will” and “capacity” that impede regulation by states.

It is important also to recognize that such barriers may arise as a consequence of, and may be expressed through, the politico-legal environment within which states are expected to regulate. Quite simply, some limitations on the ability of states to regulate PMSCs result from legal rights attendant upon the ‘private’ and ‘civilian’ status of the companies and their personnel. And it would be unfortunate, if in the desire to achieve more stringent regulation of PMSCs, the various interest groups concerned were willing to sanction infringement of these rights. Again, this has policy consequences. For instance, instead of focusing our attention on the deployment of strict command and control methods, we should perhaps give more attention to mechanisms which will induce PMSCs to adopt high standards of conduct, together with their already high standards of service. An option suggested in the previous paragraph – working more closely with industry level initiatives - may be one such mechanism.

It is unlikely that one short paper can provide adequate justification of the claims made in the above paragraphs, which include pointing to a ‘dominant discourse’ and its limitations, particularly criticizing the perhaps normatively pleasing but factually unsubstantiated reliance upon state regulation; and also present comprehensive framework for regulation of PMSCs. Indeed, one goal of this paper is to provide substantive support for a fast emerging insight that absolute solutions are unlikely to work, and despite concerns of fragmentation, recourse must be had to a plurality of initiatives oriented towards regulation that is effective, but not suffocating or implausible. The paper

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therefore takes on the preliminary burden of demonstrating the emergence and limitations of a unitary discourse about PMSCs; an initial step in the search for more effective solutions.

A final word about structure and tone. The paper is fairly dispassionate and fact-focused in its presentation and analysis of the issues. This seemed appropriate given the often hyperbolic nature of the discussion surrounding PMSCs, particularly in popular media. The first section will thus outline the dominant approach and reiterate the problem of “normalization” that might be its result. The second section will address the various reasons for which state regulation may falter. For illustration, the discussion will be premised on the aftermath of the Blackwater shootings in Nissour Square, Baghdad. Finally, it will identify some of the legal limits on state regulation.

I. PMSC: THE DOMINANT VIEW

I. ACCEPTANCE

Increasingly, it is superfluous to question private involvement in armed conflict; some may even find it “an immoral waste of time” holding the displaced and dying hostage to issues of little concern to immediate distress.\(^1\)\(^1\) Even major incidents that trigger cries for better accountability rarely result in substantive review of the practice of outsourcing.\(^1\)\(^2\) The argument in its favour becomes stronger given that most PMSCs have distanced themselves from direct combat. Executive Outcomes and Sandline – its counterpart in Angola and Sierra Leone - are now defunct. Their successors, and other companies, focus on services ranging across the strategic: advising and training military forces, planning combat strategy, intelligence-gathering; proximate to use of force: guarding persons and property in conflict zones, escorting convoys, interrogation, weapons management, logistics support; and rescues; and near-pedestrian: catering, scanning and frisking at airports and other strategic venues.

The categories often bleed into each other; importantly, each function enjoys a minimum acceptability not thought possible even some years ago. Well into the 1990s, PMSCs were lumped with mercenaries in the category of the condemned. The reversal in perception is evident even in reports by Enrique Ballestros, then UN Special Rapporteur on Mercenaries:

Up to 1996, in reports submitted to the General Assembly, Ballestros made a few references to legal loopholes that allow “associations registered as security services companies which offer contracts freely to people who want to work as mercenaries, without the act of promoting, advertising or signing such a contract being regarded per se as illegal and subject to prosecution.”\(^1\)\(^3\) Between 1996 and 1998, he continued to lament the “change in perception” that encouraged states to handover to PMSCs responsibilities relating to maintenance of internal security - a transfer of authority to “interfere” in the state’s internal affairs,\(^1\)\(^4\) and an infringement of state sovereignty, albeit carried out

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\(^{12}\) In the US, the Bill requiring the Secretary of Defense to ensure that PMSCs do not perform “inherently governmental functions” (Transparency and Accountability in Military and Security Contracting Act of 2007) is languishing at the introductory stage, as is the more stringent “Stop Outsourcing Security Act”. Meanwhile fresh contracts are being signed. Human Rights First agrees that “the propriety of contracting out core military functions” is an important issue, but does not address it in its report: *Private Security Contractors at War: Ending the Culture of Impunity*, 2008.

\(^{13}\) See for instance the following Reports of the UN Special Rapporteur to the General Assembly: A/49/362 September 6, 1994, para 27; A/50/390 August 29, 1995 para. 22; A/51/392, September 23, 1996, para. 27.

by way of a sovereign decision. He described PMSCs as the “biggest and most sophisticated threat to the peace, sovereignty and self-determination…” that, despite hire by legitimate governments, essentially constituted a “formally tolerated mercenary intervention.” He urged states not to distinguish “legal” and “illegal” mercenary activities, for it was “a dangerous distinction which could affect international relations of peace and respect among States.” His recommendation was that “this dangerous line of thinking should be abandoned and that mercenary activities should be considered as a whole and be condemned, banned and characterized as illegal.”

In 1999, following a visit to the United Kingdom, a frequent hirer of PMSCs, a new outlook began to emerge. In meetings with the Foreign Office, NGOs and academics, Ballestros accepted the need to distinguish between “private companies of a military nature which participated in combat and recruited mercenaries to fight, which were unusual, and the more common private security companies,” while reiterating that in practice the line between the two was quite thin. He now characterized the problem as arising when PMSCs otherwise providing useful services “enter into contracts to recruit, hire and use mercenaries and become involved in armed conflicts to such an extent that they supplant the State and its armed security forces.” Thus his recommendation became “the activities of military and security companies should be regulated, limiting … to areas that are not inherent to the very existence of States, while not actually prohibiting the existence of such companies.” Noticeably, his vocabulary also changed, all activities were no longer described as “mercenary”, although the conjunction between PMSCs and mercenaries remained, for him, an unavoidable fact.

What brought about the change? Ballestros’s successor Shaista Shameen suggests the possible explanation: pragmatism. Pragmatism, Shameen’s proposed approach, was certainly an important factor in the increasing use of private contractors by western governments. In two of the largest hiring states, UK and the United States, neo-liberal ideologies and practices demanded cutting back of government spending, in favour of market-provided services. Both countries have embraced military privatization together with other forms of disinvestment from public spending, and

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16 Reports A/52/495 October 16, 1997 para. 19(h); A/53/338 4 September 1998 para. 21(i).
19 Id. at para. 52.
22 Id. at 49.
23 The UN repeatedly conflates PMSCs with mercenaries. The working group which succeeded the Special Rapporteur, and includes the duty to monitor the effects of the activities of private companies within its formal mandate, retains the anachronistic title “Working Group on Mercenaries”. This has been a sticking point in PMSCs’ willingness to engage with the working group. Interview with Doug Brooks, May 27, 2008. See also Sarah Percy, International Regulation, 384 Adelphi Papers 41, 50 (2006).
24 Shameen outlines her approach in A/60/263, August 17, 2005. This includes “encouraging company self-regulation rather than regulation imposed by external bodies, to promote a sense of ownership and sustainability in the implementation of agreed measures.” Para. 62. Her brief tenure focused on efforts to include strong human rights protections in PMSCs’ codes of conduct.
encourage other states to do so too, often conditioning financial aid upon the same.\textsuperscript{26} The utility of private contractors and rhetoric on military privatization have only grown stronger. One day before 9/11, US Secretary of State Donald Rumsfeld referred to the Pentagon bureaucracy as “a serious threat to the security of the United States of America”.\textsuperscript{27} On the other hand, PMSCs provided an effective means of circumventing bureaucracy, and the benefits of ‘economy, efficiency and effectiveness’\textsuperscript{28} such as reduced costs of expertise acquisition and maintenance, reduced administration costs, and increased efficiency through specialization.\textsuperscript{29} Following 9/11, the US and its allies have made extensive use of PMSCs, to the extent that the forces in Iraq are sometimes described as ‘the Coalition of the Billing’.\textsuperscript{30}

Pragmatism is also apparent in the approach of human rights bodies towards PMSCs. The initial outrage\textsuperscript{31} has given way to an acceptance that the PMSCs are, in more or less numbers, here to stay. In responding to whether it is opposed to military privatization, Amnesty International clarifies that it “does not take a position on the use of contractors per se.”\textsuperscript{32} Of course, this does not translate into anything like whole-hearted confidence in contractors; it remains focused on the concerns arising from privatization of military and security services. Like Human Rights First, Human Rights Watch and the International Committee for Red Cross, its attention is focused upon contractor accountability, for which these organizations believe states have primary responsibility.

II. CONCERNS

Human rights concerns: mostly relate to potential violations of rights of civilian populations in conflict zones, particularly by contractors allowed to bear arms. Rules of engagement may strictly define conditions for permitted use of force, but there have been lapses. Recorded incidents include civilians killed in cross-fire, or because mistaken for armed attackers. Even otherwise, proximity between contractors and civilian populations raises threats of abuse.\textsuperscript{33} Also relevant, though less discussed, are threats to employees of PMSCs.\textsuperscript{34}

Military welfare: It is evident that logistical support can affect the outcome of an operation and well-being of troops. Moreover, where contractors provide training or plan operations, their advice directly determines troop-competence and policies followed. Many PMSCs have excellent service records, but on occasion military have been affected by inadequate support,\textsuperscript{35} or influenced by

\textsuperscript{28}Walker, \textit{supra} note 10.
\textsuperscript{29}James Cockayne, \textit{Make or buy? Principalagent theory and the regulation of private military companies}, in Chesterman and Lenhardt \textit{supra} note 20.
\textsuperscript{31}Vestiges may be found in Comments from the Campaign Against Arms Trade on the Green Paper on Private Military Companies, \url{http://www.caat.org.uk/publications/government/mercenary-0802.php}.
\textsuperscript{32}Private Military and Security: Questions and Answers, \url{http://www.amnestyusa.org/business/pdf/pmscsqa3-08.pdf}.
\textsuperscript{34}Employees may be put at risk due to lack of training or recklessness of employers, as in the case of the teams captured in Fallujah. There have also occurred assaults on employees by co-workers. See \url{http://www.amnestyusa.org/our-priorities/military-contractors/page.do?id=1101665&n1=3&n2=157}.
unethical behaviour. Privatization may also have systemic effects on militaries, including: drain on the military as higher salaries attract its personnel towards contract work; and, decline in essential skills owing to desuetude following outsourcing of functions like weapons-maintenance.

State interests: PMS Cs may affect state interests by accepting ‘undesirable’ contracts. For home states, these could be contracts offered by states or groups that are hostile, or whom they do not wish to support. For host governments, one category of such contracts is naturally those offered by groups challenging their authority. For hiring states, these are contracts that result in PMS Cs’ conflicts of interest. Moreover, for hiring states, lack of planning, failure to coordinate, and awarding contracts based on lobbying or political influence rather than competence etc. could affect returns from outsourcing. Finally, given the often strong network between armed forces and PMS Cs, contractors may be privy to strategic information such as blueprints or know-how.

International Stability: PMS Cs could increase the probability of conflict for, through operational support, training and planning conduct of operations, they may significantly alter the war-making capacity of any group or state. Moreover, any government could mount an operation under less democratic scrutiny than possible for an entirely military-staffed operation. Actions in the field can also catalyze conflicts. The Battle of Fallujah, triggered by the capture and killing of a Blackwater team by Iraqi insurgents, is an example. The US army had to respond, leading to deaths of 36 service personnel, 200 insurgents and 600 civilians. According to a Congressional report, Blackwater had sent an unprepared team to Fallujah, an insurgent stronghold. The report suggested that if the team been better-trained, this could have been avoided.

These concerns are common to several stakeholders, including human rights and humanitarian groups; state actors; populations in communities of operation; employees; and indeed, PMS Cs themselves. PMS Cs have to grapple with the possibility of losing contract opportunities in case of misdemeanors within their organization, or within the industry as a whole. This risk is additional to those also borne by national militaries. However, militaries, unlike companies, are subject to defined control and accountability structures. This is an important distinction which feeds directly into the call for similar regulation of PMS Cs through formal, state-based mechanisms.

III. The Preference for State Regulation

Human rights and humanitarian bodies, the UN Special Rapporteur and Working Group, and various research scholars, focus upon state regulation to address the above concerns. In general they

36 Reports from Abu Ghraib suggest that contractors were supervising military personnel. Fay Report, supra note 28; Steven Schooner, Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government, 16 STAN. L. & POL’Y REV. 549, 555 (2005).
38 In Iraq, economic costs arising from reliance on PMS Cs, including for replacement, workers’ compensation, insurance premiums, evacuation and rescue, and reconstruction, have been much higher than estimated. Officials acknowledged that these costs led to canceling or reducing the scope of some reconstruction projects. In March 2005, two task orders worth $15 million were cancelled to pay for security at a power plant. David Isenberg, A Fistful of Contractors: The Case for a Pragmatic Assessment of Private Military Companies in Iraq, BASIC Report, Sept. 2004, at 8, 25. The US General Accounting Office found that PMS Cs and equipment accounted for more than 15 percent of contract costs on 8 of 15 reconstruction contracts it reviewed. GAO, Rebuilding Iraq: Actions Needed to Improve Use of Private Security Providers, GAO-05-737, 28 July 2005.
view three relevant constituencies: home, host, and hiring states, as the primary conduits for such regulation. Projects such as the Swiss-ICRC Initiative and Amnesty International’s Business and Human Rights project do refer to roles and responsibilities of contractors, but their thrust is clearly on the duties of states. Amnesty International states that it “believes the ultimate responsibility and ability to ensure that companies uphold human rights, and are brought to justice if they don’t, lies with state actors.”

The core objective of the Swiss initiative is “to study and develop good practices, regulatory models and other appropriate measures at the national, possibly regional or international level, to assist states in respecting and ensuring respect for international humanitarian law and human rights law.” The UN Special Rapporteur asserts that “at the current stage, the most direct and effective way would seem to be to develop national legislation to regulate the activities of private security firms.” This is reiterated in policy papers.

Why this premium upon state regulation? The general thesis draws upon arguments of capacity, responsibility and will, i.e. that states can regulate, are obliged to do so and moreover have incentive to do so. Undoubtedly when these three elements come together, we are more likely to see PMSCs effectively regulated. However, the thesis is not limited to such situations, which is partly explained by non-rational, behavioral preference for formal regulation, along with a not always well-founded skepticism about PMSCs.

[a] Arguments of capacity, responsibility and will

Arguments of capacity are typically based on the theoretical ability of a state to extend control over PMSCs, particularly through prescriptive jurisdiction, though some states may also enjoy enforcement jurisdiction. Three types of states have the capacity to regulate on this basis: home state, host state and hiring state. Home and host states may regulate through licensing and oversight, and application of public laws, civil and criminal. They may prohibit PMSCs altogether, or more likely, bar specific activities. The mechanism employed by hiring states is different, but the ends are similar. Hiring states may use contract as a vehicle to impose public law norms and values upon PMSCs, including obligations under the laws of the host state; humanitarian and human rights

45 For a discussion see Michael Cottier, Elements for contracting and regulating private security and military companies, International Review of the Red Cross (2006), 88:637.
46 This includes individual responsibility of employees and directors, for crimes committed by employees or resulting from directors’ negligence.
47 In Iraq, contractors are not allowed to conduct law enforcement. § 9, Registration Requirements of Private Security Companies, CPA Memorandum 17 (2004), http://www.iraqcoalition.org/regulations/20040626_CPAMEMO_17_Registration_Requirements_for_Private_Security_Companies_with_Annexes.pdf.
Responsibility may arise from the duty to prevent and punish violations of international law, which under human rights and humanitarian law translates into an obligation to regulate conduct, even of non-state actors. This duty is provided in Article 2(2) of the Covenant of Civil and Political Rights, and Common Article 1 of the Geneva Conventions. The courts have also found due diligence obligations in laws of occupation, protection of aliens, neutrality, and protection of diplomatic personnel. Another basis for the responsibility, particularly for hiring states, is through attribution of wrongful conduct of a non-state actor to the state. Under the International Law Commission’s Articles on State Responsibility, conduct is attributable where a company is “empowered by the law of that State to exercise elements of the governmental authority” or where it is acting under the instruction of, or direction and control of a state.

State interest may be linked to each of the concerns described earlier, though it is difficult to predict the extent to which these concerns will motivate states to regulate. One might claim that host states have an interest in protecting their citizens’ rights; home and hiring states have an interest in securing the wellbeing of their military; and all states have an interest in preventing PMSCs from undertaking undesirable contracts, maximizing their own benefits from outsourcing and preserving international stability. It is hard to say when any of these factors will assume a controlling interest, for they may conflict with other matters requiring a government’s attention, or even conflict inter-se. For instance, preserving long term military capacities may conflict with cutting costs in the present. Nevertheless where interest, capacity and responsibility come together, a state is more likely than not to put in place an effective regulatory regime. It is for this reason that we worry much less about

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51 Similar obligations may be found in the Convention against Torture, Genocide Convention, European Convention on Human Rights, American Charter of Human Rights, and the Banjul Charter.
52 Related obligations include: the duty to disseminate the Conventions (Art. 47 GC I, Art 48 GC II, Art 127(2) GC 3, Art 144(2) GC IV); the duty to take preventative action (Article 86 Additional Protocol I); the duty to exercise jurisdiction in case of grave breaches (Common Article 49(2) /50(2) / 129(2) / 146(2) GCs), and other violations (Common Article 49(3) / 50(3) / 129(3) / 146(3)).
53 Chia Lenhardt, Private Military Companies and State Responsibility, Chesterman and Lenhardt supra note 20.
54 Article 5, International Law Commission’s Draft Articles on State Responsibility, 2001. There is little clarity about when a PMSC is “empowered to exercise elements of governmental authority”. See Lenhardt, supra note 48. Some experts at the Geneva meeting put all functions associated with the conduct of hostilities in this category, even tasks like running a film at a theatre on a military base. Others suggest that all military functions that state parties are required to perform under the Conventions would be attributable. Expert Meeting supra note 45, at 17.
55 Article 8 of the ILC Draft Articles. There must exist a real link between the persons or group performing the act and the state machinery. For discussion see Lenhardt, supra note 48.
56 Under Section 126.1 of the International Traffic in Arms Regulations, the United States does not allow export licenses for services to Albania, Bulgaria, Cambodia, Cuba, Estonia, Latvia, Lithuania, North Korea.
57 See for instance the US Arms Export Control Act, Title 22 USC Sec. 2773: “… United States policy should assist in limiting the development of costly military conflict in [Sub Saharan Africa]. Therefore, the President shall exercise restraint in selling defense articles and defense services…”
domestic privatization of security services in Europe and America than we do about the operation of private companies in fragile states and conflict zones.

Often capacity, responsibility and interest do not coalesce. In such case it is less likely that states will regulate PMSCs in an effective way. Predictably, groups that cannot call PMSCs to account by independent means will lose out. This would suggest the need for greater attention to alternatives to state regulation, but this is not commonly-pursued.58

[b] Behavioural factors

The above sub-section has defined the preference for state regulation in terms of a rational actor thesis – we focus on state regulation due to widely-held assumptions that states have the capacity, responsibility and will to regulate. It has cast doubt upon the veracity of these assumptions in actual cases, a theme that Section [II] will build upon. Yet, state regulation remains at the centre of attention of most initiatives. Two inter-linked factors may be at least partly responsible for this. The first is a preference for formal regulation, which arises in most cases where public services are privatized; the second is a basic distrust of PMSCs, given the ready conceivability of their grave impact on vulnerable populations.

According to behavioral theories of law and economics, the preference for formal regulation may be a function of several biases. Among these is ‘preference for status quo’,59 which in the present instance, is imagined in terms of state monopoly over the use of force. Though, as some commentators point out, “there is nothing timeless or natural about the way violence is organized in today’s world”,60 (i.e. as a prerogative of territorial states), outsourcing to PMSCs is somehow seen as a shift in paradigm, a retreat towards an “ultra minimal” state.61 Furthermore, privatization of public services is not readily palatable, for we tend to remain convinced of a basic difference between ‘self-interestedness’ of private actors vis-à-vis the ‘public-spiritedness’ of the government. Even the ‘public-choice’ theory focusing on the influence of private-interest groups on public decision making, does not reverse this understanding. As Jody Freeman notes, we respond to public-choice accounts by cutting them in half: simultaneously resisting the description of legislators and bureaucrats as motivated solely by self-interest, while accepting that of selfish private-interest-group behaviour.62 Focusing on national regulation helps preserve some sense of the continuing centrality of states (whether as licensing or hiring states or states allowing PMSCs to operate in their territory) and assuages the common ‘aversion to extremes’,63 here seen as unregulated outsourcing.

Moreover, though the concerns described earlier are undoubtedly valid, we may overestimate the danger posed by contractors, owing to the documented “availability” bias. Behavioral scholars note that people tend to think that risks are more serious when an incident is readily called to mind (i.e. “available”). Or, even if they know that risks may be lower than suggested, they may act as if risks

58 See Elke Krahmann, Regulating Military and Security Services in the European Union, in ALAN BRYDEN AND MARINA CAPARINI (EDS.), PRIVATE ACTORS AND SECURITY GOVERNANCE 190 (2006) [stating that this is one reason for the lack of attention paid to the European Union as a source of regulation of PMCs].
61 According to Clive Walker and David Whyte privatization of military and security services is one step removed even from the classical liberal classical liberal ‘night-watchman State’ which protected citizens against violence and enforced contracts on their behalf. Clive Walker and Dave Whyte, Contracting Out War: Private Military Companies, Law And Regulation In The United Kingdom, 54 ICLQ 651 (2005).
63 Sunstein, supra note 54, at 3.
were serious, out of concern for their public reputation. Availability entrepreneurs, who recognize these behavioural characteristics, can exploit the availability bias to further their specific agendas. For instance, according to the International Peace Operators Association (IPOA), sensational media reporting has, through a focus on contractors’ nexus to force and incidents of violations, contributed towards a disproportionately negative image of private military contractors. Sunstein et al. note that in other instances, relating to environmental and health issues, such sensationalization led to clamor for government intervention and often resulted in over-regulation. To an extent we may be seeing a repetition of this in the call for state regulation of military contractors.

The result is a stronger focus upon the regulatory responsibility of states, even to the exclusion of questions of state capacity and will, though it is recognized that these elements present greater barriers to effective regulation. This will be discussed later. Prior to that, the next sub-section will examine another problematic aspect of this dominant view of PMSCs.

IV. “NORMALIZATION” AND SOME QUALIFICATIONS

Preliminary to the call for state regulation is the “normalcy” achieved by PMSCs. To this extent, it is important to note that the dominant approach to PMSCs is quite nuanced. The acceptance of PMSCs is based on pragmatism and is tempered with concerns. Indeed, the above description of concerns is abbreviated; each has been explored in much greater detail by most regulatory initiatives. Yet, there are generalizations inherent in this dominant approach which are inaccurate and interfere with the formulation of practicable regulatory policies.

As mentioned in the introduction, the first such generalization is in the statement of the concerns, in a way that makes too much and too little of PMSCs. Moreover, the dominant understanding of how these concerns manifest themselves is skewed by its focus on the relationship between these companies and western states. As recent writing by African scholars emphasizes, the relationship of PMSCs to African states is far more complicated.

An obvious starting point is the fact that nearly all concerns are intensified in application. More importantly, the “choice” (to outsource) is severely curtailed. Outsourcing is not just a convenient alternative – it is driven by external and internal compulsions. External compulsions may arise from other states’ acts of omission: such as the retreat of direct security assistance with the end of the Cold War, leaving behind a security vacuum; or commission: such as propagation of privatization, including through tying outsourcing to financial aid. More directly, they take the form of pressures for personal security by Africa-bound enterprises and agencies, such as multinationals attracted by its immense natural resources, diplomats and humanitarian bodies. Mpako Foaleng notes that PMSCs “are engaged to protect diplomats and other foreign workers in some countries as if there were no

64 Timur Kuran and Cass Sunstein, Controlling Availability Cascades, CASS SUNSTEIN (ED.), BEHAVIORAL LAW AND ECONOMICS 374, 375 (2000).
65 Id.
67 Id. See also Christine Jolls, Cass Sunstein and Richard Thaler, A Behavioural Approach to Law and Economics, CASS SUNSTEIN (ED.), BEHAVIORAL LAW AND ECONOMICS 13, 37 (2000).
68 Sabelo Gumedze succinctly states “Africa does not seem to have a choice” in answering the question that headlines his article. See Sabelo Gumedze, To embrace or not to embrace: Addressing the private security industry phenomenon in Africa, Sabelo Gumedze (ed) Institute for Security Studies Monograph Series No 139, November 2007 at 1.
forces and no need to train and form a national army, national security service or police forces capable of defending the state and provide protection and safety for its residents.”

It is important to fully understand the implications of this statement: as Foaleng notes, Africa is not so much a bunch of “failed states” as it is a collection of entities that have not fully crystallized into statehood. There is a need for development of public institutions and infrastructure, but even as the process gets underway it is short-circuited by pressures to outsource key sectors. The fact that conflict-related concerns are often both domestic and immediate, and physical insecurity is rife, makes it all the more unfortunate that security services are only available to those that can pay for them. Because these are often the most visible groups, and are well-protected, there is little incentive to develop an effective public security service bound by public laws and public obligations.

One may of course ask why African states cannot simply address this problem by hiring PMSCs for safeguarding their whole population, i.e. turning over their security administration to companies on long term contracts. While in some situations – especially during conflict/post conflict situations we do find companies administering the entire security infrastructure of a state, this in unsustainable, in terms of costs and workability, in the long term. It puts the government at the mercy of companies, who could withdraw leaving a security vacuum. Moreover a company is not bound to the rules and procedures borne by an administrative body, nor is it likely to invest much in a long-term vision of development of the state. Executive Outcomes (EO) provides an illustration.

During the civil war in Sierra Leone, EO dominated its security administration. In the eastern parts it reportedly even operated judicial tribunals. Certainly, it was the key player in disposing off RUF’s challenge, and securing important mining sites. Prior to its involvement, the government had been quite powerless, despite assistance from Nigeria and Guinea. According to David Francis, “the brutality of this conflict, particularly the atrocities against the local population…demonstrated the inability of the government to provide security for its citizens.” EO turned the conflict around, made democratic elections possible, and forced RUF to negotiate.

Yet, EO’s interjection did not provide a lasting solution. The Sierra Leone government could not afford to retain its services, and once EO left, Sierra Leone’s security “collapsed like a pack of cards” culminating in the overthrow of the government. Some commentators feel that EO’s efforts were tilted towards protecting the mining concessions granted to them as payment, and it was this interest that determined their conflict strategy. This of course brings us back to the question of where a company’s loyalty may lie. In Africa, according to Francis and Foaleng, it is likely to be oriented towards exploitation of natural resources for personal gain.

The EO example brings out another aspect of African governments’ relationships with PMSCs. Sierra Leone, though in principle the ‘principal’ and EO its ‘agent’, was actually more dependent on EO than vice versa. This made it difficult to exercise restraint over EO’s actions. Instead, EO “virtually held to ransom the entire politico-military and economic system.” Again, this is significant beyond the fact that it refutes the argument for state regulation:

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70 Mpako H Foaleng, Private military and security companies and the nexus between natural resources and civil wars in Africa, ISS Monograph, p. 39, 50.
71 Id.
72 Cockayne, supra note 24.
73 Francis, supra note 3, at 325.
74 Id at 330.
75 Id.
Weak governments’ need for PMSCs for survival, coupled with the seductively easy availability of these companies, has tempted several to enter into contracts that may prove too costly to their citizens. For, in order to attract the PMSCs, these governments have had to sign over valuable stakes in natural resources, or offer other such benefits to PMSCs and their (invariably existing) corporate affiliates. What results is “corporate recolonization”. Sabelo Ndlou-Gatsheni describes the consequence: “…leaders of weak states, such as Sierra Leone, Democratic Republic of Congo, and Angola, have wilfully transformed their states into [comprador regimes], that do not care about the welfare of their citizens but serve as agents of foreign interests and foreign businesses.” Having hired PMSCs, the government insulates itself from pressures that drive development of public institutions, thus locking in a vicious cycle of state weakness.

Of course, for many African governments, invidious contracting with private agents is not a phenomenon of the 1990s. Africa has a troubled history with mercenaries hired to bolster colonial and racist regimes. Later, these mercenaries reconstituted themselves into corporate firms – and this fact to some extent continues to influence perceptions and reactions towards PMSCs. In South Africa, for instance, it has motivated very broad legislation, probably out of sync with the government’s enforcement capabilities.

All these factors suggest that the “normaley” thesis is not fully descriptive of PMSCs in all contexts. Several authors recognize this, but respond by shifting their focus to western states for making policy prescriptions. But, in fact, the problems in state regulation do not arise only out of the complicated relationships of African governments to PMSCs.

II. UNPACKING STATE REGULATION

In order to fully appreciate the potential and limits to regulation by states, it is important to be aware of the current, gap-filled, regulatory landscape. It is also essential to question the assumptions of state responsibility, will and capacity. Positive and normative hurdles to application of state responsibility for actions of PMSCs are well-described in literature, though the issue may sometimes propagated as clear-cut, especially by human rights groups. “Will” and “capacity” do not receive as much attention, though they may often be the more relevant hurdles. This section will focus on these problems, through an account of the recent events relating to Blackwater’s operations in Iraq. As the Blackwater example reveals, lack of will or capacity may result from, or justified by legal rules.

76 In January 1996, the International Crisis Group sent a mission to Sierra Leone, which found complex links among security firms, mining houses and mining concessions. The mission even concluded that the crisis in Sierra Leone was not the ‘rebel war’ but weak governance and economic mismanagement punctuated by complex involvement of PMCs.

77 Howe, supra note 2, at 318.

78 Sabelo Ndlou-Gatsheni, supra note 71.

79 For an account of South Africa’s lack of success in enforcing PMSC-related legislation see Marina Caparini, Domestic Regulation: Licensing Regimes for the Export of Military Goods and Services, in Chesterman and Lenhardt supra note 20.


81 See Lenhardt supra note 48.
I. CURRENT REGULATORY LANDSCAPE

Only two states have regimes specifically addressing export and activities of PMSCs in conflict zones. These are the US and South Africa. The US addresses licensing of PMSCs through its International Traffic in Arms Regulations, promulgated under the Arms Export Control Act. Actions in the field fall under the purview of: the Military Extraterritorial Jurisdiction Act (MEJA) which applies to PMSCs contracted by the Department of Defense; and lately, the Uniform Code of Military Justice (UCMJ). Possibly, the Alien Tort Claims Act, Patriot Act, War Crimes Act and Torture Act could also be invoked before domestic courts. As the US is the home state of several PMSCs and a frequent hirer, much attention is paid to its efforts to regulate the industry. As later discussed, these have been disappointing in practice.

In South Africa, PMSCs fall under the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006. This requires nationals to obtain authorization from the National Conventional Arms Control Committee in order to work in countries proclaimed as zones of existing or imminent conflict. In case of offenses under the act, national courts have broad powers to try South African companies, nationals and permanent residents found anywhere in the world, and foreign nationals found in South Africa (for offences against South Africa). There is little ground for optimism that the Act will lead to effective regulation of PMSCs. South Africa’s implementation of the previous law was woeful, though this was partly due to the flawed nature of that Act, apart from limited budgetary resources and difficulties in collecting evidence. The present Act too is criticized for over-broad jurisdictional claims and unclear definitions, which bring even humanitarian bodies within its fold.

In 2002, the UK initiated discussion on regulating export of PMSCs to conflict zones, via a paper setting out ‘Options for Regulation.’ It concluded: a total ban was not practicable, but the government could prohibit direct participation in armed combat; PMSCs could be required to obtain specific licenses for each contract; though notification of contract would be sufficient for contracts with trusted organizations or responsible governments. Voluntary self-regulation would be insufficient. Ironically, there has been no further action and voluntary self-regulation is the only way in which PMSCs are governed.

Few host states experiencing armed conflict have regulatory schemes in place –Iraq and Sierra Leone being the exceptions. In Iraq, the Coalition Provisional Authority’s Memorandum 17 remains the principal document, though the licensing scheme is now administered by the Iraqi Ministry of Interior. The Kurdistan Regional Government has separately issued ‘Private Security Company Requirements’, which are to be read with CPA-issued documents including Memorandum 17 and Orders 3, 17 and 100. Sierra Leone lays out licensing requirements under Section 19 of the National Security and Central Intelligence Act. Outside the context of armed conflict, some other

82 § 3261 MEJA read with §3267(1).
83 The Center for Constitutional Rights has filed a suit against Blackwater on behalf of the families of three Iraqis killed in the September 16 shootings. The documents of the case, Estate of Himoud Saed Ajitan, et al v. Blackwater USA, et al., are available at http://ccrjustice.org/ourcases/current-cases/ajitan-et-al-v-blackwater-usa-et-al.
84 There has been one prosecution. In 2004 David Passaro, a CIA contractor was charged with causing death of an Afghan, Abdul Wali, by assaulting him during interrogation at a US military base in Afghanistan. The Act has not been invoked since. Human Rights First, Private Security Contractors at War, supra note 7.
85 Section 11 of the South African Act.
86 Caparini, supra note 74.
88 Cottier, supra note 40, at 647
89 Id.
states, notably European Union members, and India have regulations addressing domestic private security providers.

With respect to using the contract of service to impose public law obligations, it is difficult to assess the extent to which this actually takes place, for contracts are not easily available. Laura Dickinson notes that none of the 60 available contracts between the US government and PMSCs contain specific provisions relating to human rights, anticorruption, and transparency, though Department of Defense instructions on contracting practices do state that contractors “shall abide by applicable laws, regulations, DoD policy, and international agreements.”

At the regional level, the former Organization for African Unity, had adopted a Convention which only took note of mercenaries in context of overthrow of governments or subversion of national liberation movements. Little effort has been made since to develop regulation for PMSCs, though they are employed by individual states and for support of multinational peacekeeping forces. The European Union has been more proactive. Rulings of the European Court of Justice, internal market pressures and exertions of the European Confederation of Security Services and the trade federation UNI-Europa, have pushed for harmonization of national standards. However harmonization has not proceeded at the same level for all services: the Common Foreign and Security Policy has made an impact on regulation of military services to embargoed destinations, small arms and light weapons, technical assistance for weapons of mass destruction, and brokering and trafficking of arms, but there is little similarity in regulation of private security services.

II. ILLUSTRATING PROBLEMS OF WILL AND CAPACITY: BLACKWATER IN IRAQ

[a] Nissour Square and its Aftermath

A leading PMSC, Blackwater USA has contracts with the US Departments of State (DoS) and Defense (DoD) to provide security services to government personnel and property. On September 16, 2007, a team escorting a DoS convoy was accused of firing upon civilians without provocation; killing seventeen. The incident provoked an unprecedented response from the Iraqi government, which soundly condemned the ‘trigger-happy practices’ of PMSCs and threatened to expel Blackwater from Iraq. The US government stepped in to negotiate its continued stay; the Secretary

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92 Dickinson, Public Law Values in a Privatized World, supra note 44 at 403.
99 Blackwater has received more than $1 billion in federal contracts between 2001 and 2006. See, Additional Information about Blackwater USA, Memorandum to Members of the Committee, October 1, 2007, available at http://oversight.house.gov/documents/20071001121609.pdf. [“Blackwater Memorandum”].
State apologized and promised a full review of the incident. Iraqi authorities launched their own investigation and soon after concluded that the killings were without provocation.

For a short period, there was a buzz of activity in both states. The US was forced to recognize and attempt correction of a gaping hole in its regulatory regime: MEJA was sought to be amended to bring all federal contractors under its purview. In early October, the House of Representatives voted in favour of this amendment. Meanwhile, an American-Iraqi joint commission was constituted to examine issues of security and safety in using PMSCs. The FBI was roped in to investigate, and the House Committee on Oversight and Government Reform hearings held hearings at which three DoS officials and the CEO of Blackwater were asked to testify. There was also speculation on whether the UCMJ, recently made applicable to contractors during contingency operations, would be invoked. Upon Iraqi insistence, a DoS officer was asked to accompany convoys manned by contractors, and vehicles were outfitted with security cameras. In Iraq, the Ministry of Interior contemplated removing the immunity allowed to contractors by the CPA. A bill to this effect was introduced in the parliament. The Ministry also announced a six-month maximum for Blackwater contractors’ presence in Iraq.

After the first few weeks, the activity has petered out. Though the FBI concluded that at least 14 of the killings were without cause, there have been no prosecutions by the US government, and none seem intended. Instead, the State Department offered immunity to the contractors in return for information about the incident. Besides a joint DoD/DoS Memorandum that purports to clarify the rules of engagement for PMSCs (though it omits mention of legal consequences upon violation of these rules), there have been no further developments in the law. The MEJA Expansion and Enforcement Act is languishing in the Senate. The UCMJ was invoked for the first time on April 4, but not against Blackwater. The State Department has renewed its contract with Blackwater. In Iraq too, the proposed law passed by the Cabinet, remains unratified by the parliament; while efforts are underway to secure agreement of the United States for lifting of immunity, at the moment CPA Order 17 remains in force.

103 Peter Walker, supra note 95.
108 Previously it was only applicable to contractors during war. See Peter Singer, The Law Catches up to Private Militaries, Embeds, January 3, 2007, http://www.defensetech.org/archives/003123.html.
110 Iraqi official: Blackwater staying on ‘is bad news’,” CNN, Apr. 5, 2008.
111 § 4, Status Of The Coalition Provisional Authority, MNF - Iraq, Certain Missions And Personnel In Iraq, Order 17 www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf. The immunity was reaffirmed post the dissolution of the CPA.
116 Memorandum of Agreement between the Department of State and Department of Defense at http://www.defenselink.mil/pubs/pdfs/00003/MOA%20Dec%202007.pdf. [“Joint Memorandum”].
117 For the status of the bill, see http://www.govtrack.us/congress/bill.xpd?bill=h110-2740.
Problems of will and capacity illustrated

Host state regulation: Iraq’s response

As the host state, Iraq’s duty to regulate arises out of its obligations to its nationals. Its right to regulate arises (or would arise, were immunity not granted) mainly due to territorial jurisdiction, for most PMSCs are ‘foreign’. Several do sub-contract locally or employ Iraqi nationals; where matters relate to these sub-contracts or Iraqi nationals, Iraq would retain jurisdiction.\textsuperscript{120} In Nissour Square however, the contractors involved were US nationals.

The Iraq example illustrates one form of limitation upon the capacity of any state to impose regulation upon a PMSC: its multiplicity of relationships with states, non-state actors and intergovernmental agencies.\textsuperscript{121} These multiple relationships may directly exclude application of the laws of one state, at the insistence of another state or multilateral body. It is common for Status of Forces Agreements, to fetter the jurisdiction of the host state, though subjugation and restriction of jurisdiction are more common than outright exclusion.\textsuperscript{122} However, as an “occupied state”, Iraq had little bargaining power to prevent such exclusion of its jurisdiction by the CPA.

Bargaining power may also restrain the exercise of jurisdiction to regulate. Iraq is currently pressuring the United States to allow it to lift the immunity granted to PMSCs. It is possible that the US will agree to this demand for it is seeking several concessions from Iraq, including: continued military presence after expiry of the UN mandate; and (apparently) the permission to create a permanent military base - evidently a pre-emptive move against Iran. Even so, there remain various impediments to Iraq’s ability to enforce its laws.

First, Iraq is very unlikely to exercise its options against contractors like Blackwater, because quite simply, this may not be strategically expedient. Iraq remains heavily dependent upon the United States and the United States upon Blackwater. For this reason it is unlikely also to \textit{arm-twist} the United States government to prosecute the Blackwater contractors, though notionally it may do so, under a claim of state responsibility.\textsuperscript{123}

The lack of will is further supported by lack of capacity. Iraq has weak legal infrastructure. A few days before Nissour Square, a US Independent Commission\textsuperscript{124} concluded that the Iraqi Ministry of Interior (MoI) is “a Ministry in name only”, being dysfunctional, sectarian and suffering from ineffective leadership. It added that this has hampered the development of the Iraqi police service, which has weak investigative and forensic capacities; further that Iraq also lacks a coherent judicial framework; rule of law is absent. The facts make effective regulation of PMSCs improbable. Moreover, even efforts made to regulate, whether through licensing or post-hoc investigations, may lack credibility. Members of the PMSC industry claim that the Iraqi licensing process is dysfunctional. One quixotic clause requires a company to apply nine months in advance for a license valid for six months i.e. it needs to apply for a renewal even before it gets the original license.\textsuperscript{125}

\begin{footnotes}
\item[120] This is due to the terms of the immunity granted to “coalition contractors, their sub-contractors as well as employees not normally resident in Iraq” §3 CPA Order 17, \textit{supra} note 107.
\item[121] For a discussion on how PMSCs play off these multiple relationships against each other, see Cockayne, \textit{supra} note 24.
\end{footnotes}
Another example of dysfunctionality came to light, when following Nisour Square, MoI announced it was “revoking Blackwater’s license”. Apparently it was unaware that Blackwater did not at that time possess a license.\textsuperscript{126}

In the past there have been situations where a commitment towards more stringent regulation is expressed immediately after an incendiary – and highly publicized - incident, but is subsequently not followed through. This was true of the United Kingdom (though not a host state), which initiated a process to implement regulation in large part as a result of embarrassment over the Arms to Africa affair;\textsuperscript{127} now eight years later, this initiative has remained without result. A similar “reaction” may be at the root of Iraq’s angry response to the Nissour Square episode, where the events created a media storm, even though in the past it has not responded to other instances of unprovoked firing.

Iraq is not a singular example of any of the above points. Impediments to exercise of jurisdiction are standard in conflict-affected states, i.e. a large proportion of “host states”. Furthermore, these are not necessarily eased where the host-relationship is supplemented by the state also being the hiring state of a company, as Sierra Leone was, and/or its home state.

In situations of conflict or internal disturbance, a government’s decision to hire a PMSC may be dictated by interest in the very survival of its authority. It is then hardly in a position to specify ‘public law obligations’ in its contract, or monitor the company’s adherence to the same. As mentioned, even PMSCs’ contracts with the US include no provisions carrying such obligations. Presumably, this is because such obligations do not directly further the US government’s most important aims relating to the use of contractors. A host government, may similarly be interested in securing particular ends such as its own stability, and thus be willing to discount infractions against its population, etc. Even if it is not willing to discount violations, it may not be able to give them due consideration, for these may be outstripped by dependence upon the company.

Here the simple point is that the very fact that a state is playing/has recently played host to a conflict or internal disturbance (and which has thus created a role for PMSCs) should lead to a presumption that enforcement of laws in practice is going to be far more difficult than suggested by a theoretical understanding of its legal authority. Several constituencies take this into consideration, and turn their focus upon home states.\textsuperscript{128}

**Home (and hiring) state regulation: United States’ response**

In Iraq, the United States is the home and hiring state for most PMSCs, including Blackwater. Clearly this compounds its responsibility. As the home state, it has the obligation to discerningly license PMSCs intending to operate abroad. This obligation may be further strengthened by express extension of the GATS to export of PMSC services; at the moment it follows upon a general due diligence obligation to prevent harm, owed to other states. The US moreover owes due diligence obligations to its own nationals and Iraqis to prevent and punish wrongful acts against them. As the hiring state, wrongful actions of PMSCs may be directly attributable to it; its responsibility was bolstered during its “occupation” of Iraq. The US also possesses greater relative capacity for regulation; this finds expression in the creation of numerous laws and procedures for licensing, oversight and prosecution of PMSCs, national or hired. This could suggest that contractors like


\textsuperscript{127} Clive Walker, *supra* note 22.

Blackwater are subject to more stringent controls overall than non-US, or non-US-hired contractors. But this has not been the case. In fact, the dual relationship has probably undermined regulation:

One obstacle has been the multiplication of departments responsible for regulating PMSCs, especially given the lack of coordination between them. The legal framework is fragmented, separate executive authorities license and oversee PMSCs; oversight is further dispersed depending upon the hiring body. While the Department of Justice (DoJ) retains jurisdiction over any US entity; the DoS gets jurisdiction over Blackwater through contract. Blackwater may be subject to the courts-martial jurisdiction of the military under the amended UCMJ, although it is possible that like MEJ/A, the UCMJ too would be interpreted to apply only to DoD contractors. In practice these multiple nodes of accountability have, due to collective action problems, led to Blackwater’s overall accountability being less than the sum of its parts. As one consequence, efforts of the DoJ to frame charges against the Nissour Square contractors have been impeded by the immunity granted by the DoS.\(^{129}\) Collective action problems are further exacerbated because the legal regime governing PMSCs, and thus the precise roles of each department, are not clearly delineated. The boundaries of DoS jurisdiction are unclear: there is no consensus on whether it need or need not have consulted the DoJ before allowing immunity to the Blackwater employees.

Failure to coordinate may also be strategic; a practical accommodation of the differing interests of various departments, or indeed a supercession of the interests of some (here: DoS — a hiring department) by those of others (here: DoJ). With respect to the DoS, given that its priorities, such as protection of personnel, and successful conduct of its missions, are different from those of, say, human rights groups, it is not surprising it has not displayed the will to call Blackwater to account, though naturally it cannot assert this expressly. It may instead have simply side-stepped taking action by avoiding collaboration with DoJ. Indeed, it is significant that though jurisdictional overlaps between these Departments were evident from the multiple investigations launched post-Nissour square, little effort has been made to clarify their roles for the future. Even the joint memorandum issued by DoD and DoS makes no reference to the status of DoJ.

Several other practical obstacles also impede investigation of Blackwater. Though Nissour Square has received extensive media coverage, establishing what happened has not been easy. News-stories and official reports have been incoherent;\(^ {130}\) an initial incident report endorsed by the State department asserted that the Blackwater convoy fired in response to attack; a later FBI report stated that 14 out of 17 attacks were unprovoked and the Iraqi investigation concluded that Blackwater killed 20 Iraqis, all without provocation.\(^ {131}\) And this is despite the fact that this incident is exceptional in terms of the efforts to investigate. In the ordinary course, DoS rarely follows up on incident reports, it officials cite the “impossibility” of doing so in a war zone.\(^ {132}\) This is confirmed by the Committee on Oversight and Government Reform.\(^ {133}\) Ironically, even this Committee has to rely upon Blackwater’s own submissions to conclude that several shooting incidents in which Blackwater employees were involved have remained unreported.

DoS at least has a presence in Iraq, and lately its officials are required to accompany all contractor-manned convoys. DoJ does not benefit from similar arrangements. Its investigation (via the FBI)

\(^{129}\) Risen and Johnstone, supra note 109.


\(^{131}\) Tavernise and Glanz, supra note 121.

\(^{132}\) Brian Ross, Despite Repeated Incidents, Blackwater, Others 'Rarely' Investigated, The Blotter (ABC News), Sept. 19, 2007.

\(^{133}\) Blackwater Memorandum, supra note 94.
could commence only a fortnight later by which time Blackwater had repaired and repainted its trucks. These repairs “essentially destroyed evidence that Justice Department investigators hoped to examine.”\textsuperscript{134} While the delay in this case is seen as politically motivated, it is true that in any such case of operations in far flung zones, there will be a lag between an incident and the arrival on the scene of DoJ officials. For this reason, commentators like Peter Singer have been in favour of the application of the UCMJ, which carries the promise of on-site Courts Martial of military contractors. However doubts remain as to the constitutionality of the UCMJ’s extension to contractors in contingency operations.

All of these above problems are those that arise after a major incident has already occurred, and there is pressure upon the government ‘to do something’. Ordinarily, contractors’ operations, including the instances of exemplary behaviour, get no attention; at the field level, researchers have found a significant gap between media reporting on contractors and the military,\textsuperscript{135} with only the most sensational incidents related to the former garnering significant coverage.\textsuperscript{136}

It is therefore unsurprising that ordinarily oversight of PMSCs is lax; indeed for governments, hiring contractors is a means of escaping democratic accountability. Thus, even at the very outset, contractors are subject to limited screening; the contracting process is often not based on competitive bidding, and as mentioned, contracts rarely include public law obligations upon contractors. Moreover as described above these deviations may be further exacerbated where, like in the present case the state is both the home and hiring state of a company. Links between the White House and Blackwater are both close and strategic, mutual interests and understanding of priorities, probably supercede dependence upon contracting procedure; and make public law obligations both unnecessary and irrelevant restrictions. More bluntly, on the understanding that it won’t cross certain lines, Blackwater can be confident on getting away with small infractions.

It is possible that where the relationship between a hiring state and a company is not so close, the state will actually focus more on procedural regularity in hiring the company and setting out its terms of hire. However, there are several limitations to will and capacity even in instances where the sole relationship is one of hire.

First, for such hiring state, there would be little independent basis, beyond the contract, to hold PMSCs accountable. Moreover, it may not be within its bargaining power to include within such contract controls stronger than the option to terminate the services of a company in case of a violation; a small return for the concerns relating to human rights and international stability. Moreover, its interest in retaining the PMSC’s services may override any interest in preventing violations of human rights whether of the affected populations in the territory of operation, or within the company’s own organization.

In such situation, it is also easy to see how regulatory obstacles would arise for the home state. For one, there would be conflicts of interest and asserted jurisdiction between states. For instance, a situation could arise where the home state is unable to exercise its enforcement jurisdiction upon the individuals who have committed wrongdoing because they have obtained “asylum” in the hiring state. Scholars also suggest that PMSCs may be able to elude enforcement by simply moving off the

\textsuperscript{135} See Deborah Avant and Lee Sigelman, \textit{What Does Private security in Iraq mean for Democracy at Home?}, January 2008 \url{http://www.international.ucla.edu/cms/files/PrivateSecurityandDemocracy.pdf}
\textsuperscript{136} Project for Excellence in Journalism, \textit{A Media Mystery: Private Security Companies in Iraq}, June 21, 2007, \url{http://journalism.org/node/6153}.
home state’s territory, or disappearing altogether.\textsuperscript{137} Indeed, it is difficult to see why, where a company is hired by another state, there would be a willingness on the part of the home state to regulate – beyond making sure that the contract does not impair its own strategic and foreign policy interests. Even in the US, ITAR licensing focuses only on these issues.

Other important concerns that all states face (often to a greater extent than the US) in regulating PMSCs include costs of enforcement; having in place institutions capable of regulating; the secrecy under which PMSCs operate; foreign policy considerations etc.

III LEGAL BARRIERS TO REGULATION

Significantly, these manifestations of lack of will and capacity also gain sustenance from legal provisions incorporated in international instruments, bilateral and multilateral, as well as state- and rights- centric. As discussed, one example is the immunity from Iraqi laws granted to foreign contractors. A few other such examples are indicated in this section. The list is not exhaustive; its purpose being to highlight that a regulatory framework for PMSCs, must contend with the fact of its existence within a cluttered field of fragmented, overlapping and conflicting regimes.

It is not at all self-evident that in framing their regulatory approaches, states should seek to override these legal provisions. The origin of several of the ‘barriers’ to regulation mentioned below lies in respect for state sovereignty and individual liberty, and balancing the benefits of more stringent control over PMSCs with the undesirability of compromising upon these values is necessarily an extremely delicate task, with enormous consequences for the basic assumptions that underline democratic governance.

[a] Jurisdictional barriers

Jurisdictional barriers are fairly common, and mostly directly provided for through agreements or declarations. Continuing with the example of the US, Iraq is not the only state whose courts lack criminal jurisdiction over contractors. In Afghanistan too, jurisdiction of Afghan courts over US contractors was excluded by an exchange of Diplomatic notes.\textsuperscript{138} In other states like Timor-Leste, jurisdiction is not expressly excluded but reference is made to the authority of “the United States Government to exercise criminal jurisdiction” over its personnel.\textsuperscript{139}

It is rare for a state to directly seek exclusion of host-state jurisdiction for contractors that may be its nationals but are not in its own employ, though this may be accomplished through access barriers, discussed below. The US however does seek to exclude the jurisdiction of foreign courts even for such category of persons. It has, besides unsigning the Rome Statute of International Criminal Court, concluded a series of bilateral agreements, including with ICC parties that guarantee non-surrender of US “persons” to the jurisdiction of the ICC. Though the US government claims that these agreements fall within the purview of Article 98(2) of the Rome statute, the definition of exempted “persons” is much broader than that contemplated in the said article. Article 98(2) refers to persons “sent” by a state, which according to Professors James Crawford and Philippe Sands would not normally include contractors and would certainly not include locally hired employees, or

\textsuperscript{137} The proposition that PMSC personnel may be able to put themselves beyond the reach of their home state may appear untenable to some, but it is not inconceivable that given enough incentive, personnel may just disappear, or obtain asylum in some other state. Executive Outcomes, for instance has been reconstituted as ArmorGroup.


\textsuperscript{139} Art. VI, Status of Forces Agreement between Timor-Leste and the United States. See also Charles Scheiner, \textit{East Timor Puts U.S. Soldiers Above the Law}, Nov. 12, 2002, \url{http://www.etan.org/news/2002a/11sofa.htm#Full%20text}
nationals ordinarily resident in the other state or visiting it in a private capacity. Yet, in the bilateral agreements, “persons” is defined as “current or former Government officials, employees (including contractors), or military personnel or nationals ...”. In case of Iraq, the US was apparently also the force behind the transitional administration’s about-turn on the ICC — initially it had declared its intention to ratify the Rome statute, but then reversed its decision.

[b] Access Barriers

The law often supports access barriers. One of these, as already discussed is the absence of an accused from the territory of the state seeking trial. Normally, the state seeking trial would have to request extradition from the state in which the accused is currently present. However, extradition need not automatically follow. If the state from which extradition has been requested believes that there may be a threat of pre- or post-trial torture or cruel, inhuman and degrading treatment or that the accused will not be granted a fair trial, it may legitimately refuse extradition. Moreover, such right of refusal subsists even where: an extradition treaty signed between the two states does not explicitly refer to the concerns stated above; or the request comes from a state of nationality. Even though, based on the principle of comity, the general policy followed by courts and executive branches of most states is to respond favourably to extradition requests; in many instances extradition has been refused. This includes cases where the request has come from the US.

In Iraq, it is evident that such concerns for fair trial subsist. Indeed, they partly explain persistent US efforts to secure a Status of Forces Agreement confirming the immunity granted to its contractors, which the Iraqis had threatened to revoke. On at least one occasion a contractor acting outside the scope of his duty (he shot an Iraqi guard while drunk at a Christmas party) and thus possibly outside the Order 17 immunity, was flown out of Iraq the next day. He is now working in Kuwait. This could actually keep him from prosecution in both Iraq and the US.

Other forms of access barriers that may be legally reinforced are those attendant upon the “private” nature of the contractors. This, for one limits public access to information. With respect to the United States, Avant and Sigelman note that even in highly sensitive policy arenas procedures such as the Freedom of Information Act guarantee public access to information relevant to the public interest. However, because private firms are assumed to operate in a market environment, the rules governing their information-sharing recognize the necessity for proprietary secrecy; such secrecy can be “abused” by the company or its hiring entity as an excuse to withhold all kinds of information including contract terms and performance reviews.

143 Most recently, the extradition from Russia to Colombia of Yair Klein, an Israeli mercenary has been the halted by European Court of Human Rights. Klein, faces an 11-year jail sentence in Colombia for training rightwing paramilitaries and a private army for the drug barons of the Medellin cartel. David Pallister, Rights court Halts Mercenary’s Extradition, The Guardian, June 3, 2008. Before his capture by Russia in August 2007 following an Interpol warrant for his arrest issued in April 2007, Israel had several times refused Colombia’s request for his extradition.
144 For instance, Netherlands v. Short, HR 30 Mar. 1990, NJ 249, discussed in Dugard, supra note137.
145 While the Iraqi foreign minister suggests that the US has agreed to lifting of contractor immunity, the US itself has not confirmed. Associated Press, US Agrees to scrap immunity for security guards in Iraq, July 1, 2008.
146 Brian Bennet, America’s Other Army, Time, October 18, 2007.
147 Contractor involved in Iraq shooting got job in Kuwait, CNN, October 4, 2007.
148 Avant and Sigelman, supra note 130.
Significantly, the access of the Congress and foreign governments may also be restricted on the same basis. Recently, Eric Prince, the Blackwater CEO resisted disclosure of financial data before the Oversight Committee, claiming “We're a private company and there's a key word there, private”. Immediately thereafter, his counsel requested a minute to confer with him, possibly to remind him of the limits of “commercial confidentiality”. Such limits could include judicial or administrative subpoenas *duces tecum* (for production of documents). While judicial subpoenas follow commencement of trial, an administrative subpoena may be issued without such preliminaries. However the authority to issue an administrative subpoena must be provided in legislation and in the US, must satisfy the Fourth Amendment. It must also satisfy, for a non-national corporation, national treatment and disclosure guarantees in bilateral investment treaties, and other documents defining the rights and obligations of corporate entities, such as their licenses of operation.

International law also recognizes the right to privacy, which may be pleaded against intrusive surveillance of private spaces. This right provides basis for objection to surveillance of corporate premises, communications and conduct, even where a company is operating on a government contract. Of course, this too is not an absolute right, the International Covenant on Civil and Political Rights which provides for it, also classes it within its derogable provisions. In context of municipal law, the US has, in the course of its war on terror, enacted legislation enabling intrusive interventions into private spaces. To give one instance, under the amended Foreign Intelligence Surveillance Act [FISA], the US government could conduct physical searches and electronic surveillance, without judicial warrant, over non-national PMSCs operating in the US, or US national PMSCs hired by foreign entities. Moreover read with the Patriot Act, such surveillance could be extended to purely domestic operators. The Fourth amendment however continues to restrict such authority, and on this basis a recent US District Court decision has held the Patriot Act amendments to FSA unconstitutional.

“Commercial confidentiality” and “privacy” provide two forms of protections to PMSCs. The first is through judicial intervention or diplomatic intervention when a state is seeking to sidestep these protections. A PMSC may approach a court, or another state with a relationship of nationality or hire with the company may intervene, for example on the basis of a bilateral investment treaty (nationality), or its own national security (hire). Second, where a state wishes to avoid conducting extensive oversight, rights of privacy and confidentiality provide a legal plank for its position. Thus the US government could defend its minimal oversight over its PMSCs on this basis. The weight attached to these rights by the industry itself provides a prudential reason for states to uphold them. Indeed, given the strategic nature of many of their activities, these rights hold particular value for PMSCs. Thus, in discussing the proper scope of its regulatory framework for PMSCs, the United

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149 *Id.*
150 House of Representatives Committee on Government Oversight and Reform, Hearing on Blackwater USA, October 2, 2007 p. 172, lines 4070-4071.
152 Article 17, International Covenant of Civil and Political Rights. See also Dugard, supra note 137.
153 The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001.
Kingdom government specifically took note of the industry’s need for “reassurance on the question of confidentiality” in establishment of a scheme prescribing general and specific operating licenses.\footnote{Foreign and Commonwealth Office Green Paper: Private Military Companies: Options for Regulation, at www.fco.gov.uk/resources/en/pdf/pdf4/fco_pdf_privatemilitarycompanies, at p. 24. The FCO added that “In some cases it would not merely be commercial confidentiality that would be at stake but also military security. Id.}

[c] Other Legal Barriers

Other legal barriers may again include “status barriers”. For instance, the *private* nature of PMSCs implies that human rights laws are not directly enforceable against them. This naturally precludes some causes of action against PMSCs before domestic and international forums. It might also imply that actions amounting to human rights abuses by PMSCs will escape review by human rights bodies, such as the Human Rights Committee. While these abuses may yet fall within applicable domestic or international law, they are shielded from the undeniably more powerful rhetoric – and reactions – associated with human rights law. The private nature of the companies also makes the application of international humanitarian law more problematic – also to the detriment of the contractors themselves who thus cannot readily avail of the protections inherent in this body of law. One of the most important aims of the Swiss-ICRC Initiative, is thus to clarify the rights and obligations of PMSCs under humanitarian law.

Related to this, their *civilian* status may pose obstacles to the application of military justice. Recently, there has been much controversy over the creation of military commissions to try “unlawful combatants” by the United States government. While many of the challenges to the proposed commissions relate to flaws in the procedural and evidentiary rules, one key criticism is of the overbroad definition of ‘unlawful enemy combatant’ that could “subject thousands of people, including civilians, to military trial.”\footnote{Human Rights First, Analysis of the proposed rules for Military Commission Trials, January 21, 2007, available at http://www.humanrightsfirst.info/pdf/07125-usls-hrf-rcm-analysis.pdf.} The same criticism has also been directed at the extension of the UCMJ to PMSCs. There may be a constitutional challenge to the application of military rules and procedures to civilian contractors, and there is a tacit recognition of this in the memorandum issued by the Deputy Defense Secretary, which refers to UCMJ’s authority only in connection with DoD contractors.\footnote{Deputy Secretary of Defense, Memorandum on the Management of DoD Contractors and Contractor Personnel Accompanying U.S. Armed Forces in Contingency Operations Outside the United States, September 25, 2007, at http://www.acq.osd.mil/dpap/pac闩/cc/docs/DepSecDef%20Memo%20Mgt%20of%20Contractors%2025Sep07.pdf} The Nissour Square team of Blackwater, contracted by the DoS thus remains clear of the UCMJ’s reach. This remains the position even after the joint memorandum issued by the DoD and the DoS which states that “they will jointly develop, implement and follow core standards, policies and procedures for the accountability, oversight and discipline” of PMSCs.\footnote{III (c), Joint Memorandum, supra note 112.}

CONCLUSION

The aim of this paper was two-fold. First to highlight the creation of a dominant discourse relating to PMSCs, the fundamental tenets of which are: i) that privatization of military and security services is well-accepted by various constituencies, and moreover, these constituencies conceive of the relationship between states and PMSCs in narrow principal-agent terms; ii) that this characterization is not completely without nuance. Certain concerns are recognized, but these are defined both too narrowly, heavily based on experiences with US-hired armed security services in Iraq; and too broadly, in terms of the scope of the impact attributed to PMSCs. This description at once makes
too little and too much of PMSCs, in the absence of a more nuanced exploration of the environment within which any or all of these concerns may be realized. iii) The narrow characterization of the principal-agent relationship between states and PMSCs feeds into a focus upon states as holders of the primary responsibility for regulation of PMSCs.

Second, this paper aimed to problematize these three tenets. In the first section, building upon recent African scholarship, and using Executive Outcomes actions in Sierra Leone as illustration, it provided a brief picture of alternate experiences with PMSCs. What emerges is a clear and quite simple understanding that policy prescriptions based on the western experience of PMSCs cannot simply be transplanted to all other states.

In the second section it explored in greater detail the position supporting the primary regulatory responsibility of states. While in sympathy with the basic argument on state responsibility, it objected to the manner in which the claim that “states should regulate” engulfs the presumption that states can, and states will regulate. Through the recent Nisour Square episode it pointed out the many reasons which illustrate why states cannot and may not wish to exercise stronger controls over PMSCs. And it is only fitting, given the high degree of scrutiny levied upon PMSC operations, that we arrive at a realistic appreciation of the degree to which a proposed course of action, here state regulation, is likely to succeed.

Moreover, as the final subsection seeks to highlight, the thrust on state regulation cannot ignore the pre-existing politico-legal framework (political because of the enabling, as opposed to definitive, aspect of some of the laws) within which states must operate. This framework arms states with reasons why they should not exercise greater scrutiny upon PMSCs. More importantly, it suggests that states must think about regulation of PMSCs in terms of balancing between priorities, some of which relate to rights of the companies and their employees, as well as rights of other states; others relate to addressing the various concerns raised by outsourcing.

So, in sum, what does this discussion suggest about regulation of PMSCs? Some scholars aware of the gap between state regulation in theory and in practice have rejected it as a plausible model and have focused instead on direct regulation through an international body. Peter Singer, for instance, suggests the creation of an “international office” to review and monitor PMSC contracts. Very intrusive international regulatory models are however difficult to realize, for states will not acquiesce. Indeed it is significant that even in the EU, there is little progress in terms of collective action in regulating PMSCs. This paper is therefore not sympathetic to claims that state regulation can be ignored in favor of international alternatives.

The paper does support the thesis that concerns relating to, and concerns of PMSCs, must be addressed through a plurality of initiatives. This is no radical conclusion, but the insight is often lost in the details. The preference for state regulation that arises out of an increasingly standard conception of PMSCs and attendant concerns, difficulties of formulating an appropriate global regulatory framework, and the fears of fragmentation arising from pursuit of plural forms of regulation, make it simpler to conclude that regulatory responsibility must devolve upon states in the first instance. This is at odds with the often geographically nebulous, transnational nature of PMSC operations.

Fragmentation is an understandable concern, for plural initiatives may well end up at cross purposes with each other, as has indeed been the case with the internal efforts of the United States. However, at least two avenues offer promise of better and indeed more balanced regulation of PMSCs. The

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159 Singer, *Vacuum of Law*, supra note 7.
first is regulation at the industry level. At least three industry associations are in existence and each seeks a better regulated industry, in the pursuit of greater contract opportunities.\(^{160}\) They each have a Code of Conduct that their member companies are obliged to follow and have mechanisms for reviewing conduct of errant members. However, their efforts are undercut by the scant regard paid to them by states – the major source of contracts for PMSCs. Given that the incentive for PMSCs to acquire and retain membership is mainly the increased visibility and access to contracts promised by these associations, it greatly reduces their impact when states do not take their decisions on membership or good standing of PMSCs into account. Their efforts would receive a boost if states, and indeed international organizations, humanitarian groups and multinational corporations who also hire PMSCs, openly consult their ratings and decisions on PMSCs when awarding contracts.

The second, a strategy for overcoming some obstacles of regulatory will, is the inclusion of PMSC services within the General Agreement on Trade in Services. This at once suggests procedural gains in contracting process and oversight process and provides incentive for the development of common standards of service and regulation. Moreover it brings into focus the fact that additional concerns persist in developing and least developed countries. This is a strategy that bears further exploration; at the moment there is some resistance to the inclusion of PMSC services within the WTO framework, though in principle there is no reason why they may not fall within it. Services excluded are those supplied in the exercise of governmental authority”,\(^{161}\) further clarified as those supplied neither on a commercial basis nor in competition with other suppliers.\(^{162}\) PMSCs are supplied both on a commercial basis and in competition with other suppliers.

Ultimately PMSCs throw up challenges similar to those in other industries and like in those industries, regulation will proceed through a combination of initiatives and through active participation of the industry. Providing the right incentives both to companies and to states for undertaking regulation is important and these two initiatives seek to address the same. Most important however is to recognize that just like any other industries, PMSCs cannot be viewed through a single dominant conception, or regulated by a single universally-applicable strategy. Many authors suggest focusing on the nature of the service provided as opposed to the nature of the service provider and this indeed is useful, for it guards against the creation of a single discourse. As this paper has sought to demonstrate, such discourse has proved none too useful.

\[^{160}\text{The associations are: the International Peace Operations Association, the British Association of Private Security Companies and the Private Security Company Association of Iraq.}\]

\[^{161}\text{Article I (3) (b) GATS.}\]

\[^{162}\text{Article I (3) (c).}\]