THE PRIVATE MILITARY COMPANY—UNRAVELLING THE THEORETICAL, LEGAL & REGULATORY MOSAIC

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“Our economic analysis has disclosed the fact that it is only the interests of competing cliques of business men—investors, contractors, export manufacturers, and certain professional classes—that are antagonistic; that these cliques, usurping the authority and voice of the people, use the public resources to push their private interests, and spend the blood and money of the people in this vast and disastrous military game, feigning national antagonisms which have no basis in reality.”

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I. INTRODUCTION

In 1961, United States’ thirty-fourth President, Dwight Eisenhower, cautioned: “[I]n the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.”

Several decades later, Eisenhower’s statement has changed from a prophecy to the unsettling situation in which we currently find ourselves. Jennings, in her work on the private military industry writes: “War . . . always has been a matter of profit and spoils. What is changing is how the profits are distributed.”

Participants in the private military industry include a number of well-known corporations such as Blackwater Consulting USA, Executive Outcomes, DynCorp, Military Professional Resources Incorporated (MPRI), Titan, and California Analysis Center Incorporated (CACI). They have variously been called mercenaries, security consultants, hired guns, civilian contractors, private military companies (PMCs), private security companies (PSCs), private military security companies (PMSCs), and private military firms (PMFs). These corporations provide services ranging from consulting to logistical support to full-fledged armed divisions and are a significant part of global politics and operate in some fifty countries around the world. Although there are significant definitional and classification questions, for purposes of this paper the term “PMC” will be used to refer to any private company providing some form of military support from consulting to fielding active combat groups.

Although the contemporary PMC has gained prominence in the last two decades, its genesis and utility dates back to the Vietnam War era. However, the end of the Cold War in the 1990s produced dramatic changes in the role of PMCs in the international arena. A geopolitical power vacuum replaced the militaristic bipolar international scene, creating an atmosphere for major militaries in the West to downsize their large-standing armies. The downsizing of military forces that followed was driven in part by privatization—the shifting of public ownership, assets, functions, services, management, or tasks to private hands—on the purported economic impetus of improved efficiency and related cost savings for Nation-States.


As with any privatization, the result was the transfer of certain public functions, tasks, or services from the State to private actors who then carry out those functions, tasks, and services on a for-profit basis. PMCs, though in some forms resembling mercenarism, are a type of privatization. Contemporary PMCs, unlike their private mercenary predecessors, have developed a sophisticated business model and a modus operandi compatible with the needs and strictures of the post-Cold War, state-based international system, and the corporate form. This sophistication has permitted them to gain both implicit and explicit legitimacy. Yet, their legitimacy is largely unchallenged even though the utilization of these private agents compromises the strategic and physical security of nations and the confidence of the citizenry in the democratic practices and institutions of the nation. Why? Because PMCs, though beneficiaries of substantial public dollars, operate at best without public notification, oversight, approval, or other accountability. A particularly disturbing issue is that while economic aims are acknowledged to be one driver of warfare at least implicitly, economic aims are not accepted by the global populace at large as a main or even appropriate reason for going to war. That is, a purely economic war would be socially and politically repugnant to the vast majority of the world’s population today.

The problems surrounding violence and war are a tangled and thorny set of human, legal, political, and economic issues, and these issues are exacerbated by the introduction of the PMC. This is brought into sharp focus when one considers that the philosophical/operational spectrum of the PMC welds together the powerful drivers of violence, money, and suffering in greater quantities and into closer proximity than ever in history. This toxic mix and its consequence is evident in the context of comments of Jack London, CEO of CACI International, Inc.—a leading PMC. In the first conference after the exposure of his company’s involvement in the now infamous and well-publicized Abu Ghraib torture scandal, rather than express remorse, London states that he was “delighted” about CACI (albeit in reference to its services and finances).\(^5\) Nowhere in his speech was there any remote reference to the suffering caused by his company’s services.\(^6\) One cannot but wonder that not even an internal investigation was flagged even in the face of broken individuals, shattered families of the torture victims, the trampled dignity of the Iraqi people, and to top it all, the disgust of the international community.

The trashing of international norms by states is scary and unsettling enough, but the nightmare is multiplied when non-statal entities become powerful enough to do so. While the authors do not pass a carte blanche indictment of all PMCs, the reality is that a number of them possess the capacity to encroach on powers traditionally reserved to the State yet operate largely without domestic and international regulation or publicity. It is an actor

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6. Id.
in international affairs, policy and poised for growth. They are, in a sense, an 
undeclared arm of the state, in private hands driven by the profit motive well 
served and also equally protected by the corporate form. On one hand, the 
corporate form, the hallmark of the PMC, has specific benefits and costs that 
are very well suited to some aspects of private military operations, such as 
ability to amass significant resources for action, secrecy, freedom from public 
scrutiny, and rapid response. On the other hand, the corporate form is 
exceedingly injurious such as social costs including the damage to democratic 
oversight, enforcement of unjust resource allocations, and of course, the 
dominance of raw economic power.

As an undeclared arm of the state, the PMC is politically expedient having 
proved to be highly advantageous in certain circumstances when states wish to 
engage in surreptitious or unpopular violence, yet easy to condemn when states 
need to gather political capital. In other words, the PMC has become an 
integral actor in the system of governance at both national and international 
levels. Such corporations, at least at one level, represent the evolution, 
globalization, and corporatization of the age-old mercenary trade. The worry, 
of course, is that they operate without the public scrutiny appropriate for 
military actors. Indeed, the matter of accountability remains unresolved, in part 
because of governments’ intention to avoid accountability by using PMCs 
amplified in part by the complex nature inherent in the ambiguities of the legal 
form of the corporation. As a result, they now have an active role formally and 
informally advising governments on various military policy initiatives. The 
situation is much the same elsewhere.

This Article focuses on the murky and difficult issues posed by the PMC 
and in particular, it examines the significance of utilizing the corporate form in 
the privatization of violent services. A policy and legal analysis is developed 
by focusing on Nation-States and PMCs in the domestic context, reviewing the 
State’s control of force in de jure and de facto terms before turning to evaluate 
the privatization of military goods and services. From that analysis, it goes on 
to embrace an ambitious mandate—regulatory paradigms.

II. PROFIT, ECONOMICS, AND VIOLENCE

A safe peaceful environment and fair and effective political process are the 
driving and ultimate objectives in developing/maintaining paradigms of 
ordering human affairs; meaning achieving this is and ought to be the priority

7. The authors wish to acknowledge that PMCs have made positive contributions in certain 
instances. One notes, for example, the well known cases of a frontline fighting force PMC, Executive 
Outcomes, in Angola and in Sierra Leone. In both instances the PMC was very effective in bringing an end 
to civilian deaths, establishing sufficient order and peace in an environment of chaos and killing to allow real 
and ultimately fruitful political negotiations to occur—as violence is inherently a political matter. Further, 
the PMC did so at a very reasonable cost, although questions concerning mining concessions remain. See, 
e.g., Herb Howe, To Stabilize Tottering African Governments, ARMED FORCES J. INT’L (1997), available at 
of all policy decisions. The issue of whether the ordering involves public or private means, and the related issues of economic efficiency and market liberties are secondary, as the dominant values supporting human well-being are at stake. Accordingly, the matter of raw economic motivation for violence is problematic, and its related sub-issue of violence for profit is highly problematic.

Humanity’s history has demonstrated time and time again that mankind is not driven by a single over-riding concern, whether capitalism’s economic dominance, communism’s brutal equality, or Nietzsche’s will to power. Humans are complex creatures working from a variety of different motivations, at times congruent and at times conflicting, all needed to make human life sustainable, worthwhile, and decent. This drive for a sustainable, worthwhile, decent life embodied in the political processes of the Nation-State should not be adumbrated by the will of a few with economic power who are prepared to pay others committed to the delivery of efficient violence to assist the wealthy who achieve their own narrow goals without due regard for the rest of the population and its interests. While Clausewitz feared that “political, social, economic, and religious motives” had become “hopelessly entangled” in modern warfare, it may well be that it is and has always been that way. Nevertheless, his comment alerts us to an important reality—the resort to violence is too important an action to be left to the boardroom.

Violence is the expression of a number of important complex human motivators and should not simply be a cheaper or easier means for the greedy or intransigent to gain power and/or monopolize resources. As these corporations become larger—both economically and politically—corporate managers increasingly engage in decision-making traditionally exercised by politicians. While the political process has its own worries and politicians have their own agendas, it provides at least some level of transparency and accountability above that offered by the private corporate actor. It is thus unsettling that PMCs dedicated to profiting by violence or potential violence have amassed power such that they can affect conflict resolution, world economic stability, and geo-strategic negotiations, more so that their power stands unchecked. A further alarm needs to be raised as the PMC, classified as a non-State actor, enjoys the rights and privileges of a private actor, including the privileges of free movement, relatively minor scrutiny of action, the privacy accorded to citizens, and lack of accountability to the general public, yet carries out the functions of violence traditionally accorded to the State and subject to the correlated scrutiny and accountability.

9. See id. at 557.
III. THE MERCENARY PROBLEM

Mercenarism, that is the sale of military services, is a problem that needs to be addressed in the PMC discussion at various levels. It is a problem from three key perspectives—moral, socio-political, and economic, as we next outline. First, from a moral perspective, the value of human life is uncomfortably calculated in financial terms, whether it be with a life insurance company or a personal injury litigator’s discussion with an injured party. The mercenary receives financial gain for taking human life or at least causing injury. This connection is troublesome for a number of reasons as discussed in the previous section. Second, from a socio-political perspective, the interaction between the State and the commodification of violence in the PMC needs analysis and explication since the State has been a complicit party in the creation and maintenance of the PMC. Lastly, the similarities between PMCs and mercenaries require a nuanced approach to the differences when one considers that differences create a variegated legal conundrum. These coupled with the expenditure of the public purse without the normal accountability of state corporations or parastatals turns back to the second point the commodification of violence.

A. The State and Mercenarism

A common and appropriate starting point for discussion of the State-PMC relationship is the familiar and controversial figure, the mercenary soldier—the person who fights neither for patriotism nor legal duty, but for economic gain. Generally speaking, mercenaries are internationally condemned and outlawed, at least nominally. The simple principle is that civilians should not engage in violence independent of state authorization or sanction. Indeed, this principle underlies much of criminal law. This principle encounters a sharp challenge in the instance of PMCs that carry on activities that seem to fall on the same paradigm as that of “traditional” mercenaries. Three factors account for this state of affairs: Firstly, to the extent that such law can be identified, it provides little guidance regarding the services PMCs provide, whether training or actual combat.” Secondly, despite a multitude of declarations and resolutions by the UN and several anti-mercenary conventions, State practice does not give rise to an absolute international norm banning the use of mercenaries.” Lastly, States have been lax in promulgating and enforcing

12. Id. at 250.
13. Id.
14. Id.
15. Id.
municipal laws that restrict their citizens' ability to serve" PMCs. The key reason is that the contemporary PMC, while bearing some philosophical similarities to the "traditional" mercenary, nonetheless differ in significant ways operationally. The primary four reasons why states do not equate mercenaries with PMCs, despite the fact that some PMCs provide combat services, are elucidated in the next three paragraphs.

First, the definition of mercenary is aimed at identifying and deterring individual human actors. This aim is evident in the drafting of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, which concentrates on the recruitment and use of individual mercenaries or the status of individual mercenaries if they are captured during battle. The modern-day reality is that corporations, and not individuals, are now providing private military services, including traditional mercenary services—i.e. the provision of offense oriented, combat troops. This corporate repackaging is the primary reason why States are unable or unwilling to make direct comparisons between the old individual mercenary and the new corporate PMCs.

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

A third reason is that the refined marketing, sophisticated lobbying, and professional business practices of modern PMCs lends them credibility and encourages States to treat them differently from mercenaries. While States view "traditional" mercenaries stereotypically as maverick, malevolent, and

18. The difficulty in so distinguishing lies in the fact that combat and non-combat roles are invariably linked making any distinction between the two somewhat arbitrary.
individual misfits motivated solely by the prospect of gain they tend to view PMCs more positively. Indeed PMC executives and lobbyists have often been used to provide advice to government, and as a result, are viewed as professional and credible corporate partners. In contradistinction, "traditional" mercenaries are viewed by States as unreliable and without credibility. The fourth and final reason why States are reticent to equate PMCs with mercenaries involves economic rationalism and the trend toward policies that seek to increase efficiency in the public sector through the introduction of private-sector competition. In this context, States see financial and political advantage in using PMCs as cost-effective military service providers.

A stark disparity exists between the international emphasis on prohibiting mercenary activity and the reality of a vigorous and expanding professional PMC industry that provides a full range of defense services. This disparity is significant for States considering how best to integrate PMCs into their national legal framework and whether or not to regulate the PMC industry. A significant tension exits between those who believe PMCs should be treated as just another growing industry able to provide services that were once government-provided services, and those who believe PMCs should be treated as pariahs and threats to national and international security—a conservative approach that parallels the historic perspective on mercenaries and opposes the commodification of violence holding to the potential of democratic accountability by maintaining the State monopoly of violence.

Although in form resembling their antecedents, PMCs have developed a modus operandi compatible with the needs and strictures of the post-Cold War, state-based international system, leading to both implicit and explicit legitimacy. Explicit legitimacy is based on the increasing use of PMCs by countries which lends them a veneer of legitimacy. Implicit legitimacy is derived from both a lack of vociferous condemnation and their participation in normal business activities including developing industry associations, market formations, training, lobbying, and participation in traditional financial markets. To consolidate their legitimacy, PMCs have taken considerable steps to upgrade the image of what has historically been an unsavory profession.

Contemporary PMCs are now incorporated businesses listed on the world’s major stock exchanges20 with employees often recruited from among the most decorated echelons of various military establishments. PMCs form part of a security industry that in 2006 had an annual turnover estimated at $100 billion.21 It is not surprising that Fortune 500 and S&P 500 companies have

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20. Many PMCs are actually divisions or subsidiaries of such prominent businesses as Northrop-Grumman, Booz Allen Hamilton, the Carlyle Group, and Bechtel. Jon D. Michaels, Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War, 82 WASH U. L.Q. 1001, 1023 (2004).

taken notice of the potential profits. Regardless of what opinion one has of the PMC industry, one thing is certain—it is growing and profitable. For instance, in the United States (one of the key PMC clients) from the 1990s, PMCs publicly traded on the stock market saw their stock grow at "twice the rate of the Dow Jones Industrial Average," while in the UK, within a year of the invasion of Iraq, revenues of UK-based PMCs catapulted from $320 million to over $1.6 billion. Globally overall, the private defense market trebled in value in a period of less than five years.

B. The PMCs and Mercenaries: Delineating Uncomfortable Parallels, Acknowledging Clear Lines

The PMC is an institution established to facilitate and conduct war on solely and exclusively economic grounds. This issue has been dealt with historically in discussions on mercenarism and legal instruments designed to deal with that phenomenon, and need not be dealt with here. However, as the PMC industry has taken root and boomed, and significant, dramatic military involvements have occurred, the discussion has morphed from mercenarism into a discussion of State and international legal and policy response to the PMC. Predictably, the issues, parties, and position have changed over time. It is within this emerging dynamic that the authors’ contextualize the Article’s central themes and hypotheses. In this regard, delineating the distinction between mercenary and PMC coupled with the elucidation in the above section, offers further traction for the subsequent discussions.

One of the many significant distinctions between the PMC and the traditional Soldier of Fortune is that unlike the odd or casual mercenary whose participation may be seen as a form of slippage in the regulation of the battlefield, but unlikely to significantly alter the outcome of the battle, the PMC is a different type of actor. It has the potential to drastically alter outcomes on the battlefield. This is mainly because the corporate form and organization of the PMC allows the massing of resources for conducting warfare well beyond...
that of individual mercenaries, thus placing it in a position to significantly impact outcomes on the battlefield.

A further significant distinction involves the PMC shielding. Unlike the private mercenary, the corporate form allows the PMC to completely escape legal censure unlike the mercenary who was subject to censure by both local and international law. PMC involvement in war is shielded as it is deemed the action of private actors, unaccountable to the public at large, and in many instances, at arm's length from governmental supervision via private contract.25 Traditionally the right to amass for use of such extensive resources for war required the scrutiny, approval of and accountability of government and indirectly the populace, the corporate form of the PMC allows the amassing and deployment of extensive violent or potentially violent resources to be expended outside of such an accountability framework. As a secondary consequence, the PMC is inherently anti-democratic on a scale that individual mercenaries were never able to attain.

The anti-democratic nature and scale of the PMC, as opposed to mercenaries armed with light weapons, can further be seen where the PMC is called in by a government unable to muster sufficient support among the populace for causes, or where it and/or a government wishes to evade public scrutiny.26 The undermining of democracy can be seen whether the PMC is aiding an unpopular dictatorship to maintain control over a restive populace in a banana republic, or the PMC is the agent of a first-world government assisting the achievement of its geo-political aims, or aiding multinational corporations in the suppression of opposition to their operations.

A related concern and distinction between PMCs and mercenaries is that whereas wars are lost on many issues beyond economic power, the PMC allows raw economic power to occasionally tip the balance in armed conflicts, exclusive of all other concerns including rights, justice, equity, and self-determination. While the principle of "economic might is right" has a long history in warfare, it has not been determinative, and indeed has on occasion failed. Despite this poignant factual landscape, the PMC stands to, among other things, potentially raise the cost in human lives of combatants by causing a poorly armed but popularly supported uprising or army to continue a struggle that it may well otherwise have already won based on its wide, "democratic" support. Coupled with this operationally asymmetry is another pivotal policy issue—the question of the loss of statal control and oversight since even when


contractors do military jobs, they remain private businesses and thus fall outside the military chain of command and justice systems.27

C. PMCs and the State Based International System

As PMCs become larger, they entrench themselves as key players in the crucial sovereign function of deployment of military force and now stand in a position to influence and engage traditional governmental exercise of decision-making power.28 PMCs support numerous military operations throughout the world and act as crucial components in enhancing the capabilities of countries both in the Third World and in the West. Within the military establishment of countries of all sizes, thousands of PMC technical experts operate communications systems, maintain military aircraft, fix weapons systems, link troops to command centers, and in several cases, train national armies.29 The heavy reliance on PMCs has contributed to increased private contractor presence on the battlefield. Many States (small and large) now rely on them for long-term support for major defense systems.30 With technologically advanced systems requiring PMCs being responsible for long-term support, military establishments are losing the capacity to manage and generate the ability to maintain key components of war, including not only command systems, but also military communication systems and surveillance apparatus.31 PMCs are thus becoming the key supporting actors of military operations, and now stand in a position to “threaten global order with military force that is less accountable and controllable than [S]tate militaries.”32 PMCs are not waiting passively for States to interact with them; rather, PMCs are locating themselves strategically in key militarily strong States and actively lobbying to be retained by States.

Despite the State’s right to hold a monopoly on the use of force, there is nothing natural about this arrangement. The monopolization of force by the State has never been absolute. The reality, past and present, is that “[a]s long

as humanity has waged war, there have been mercenaries.\textsuperscript{33} States have not been averse to incorporating or capturing the "violence of privateers—a form of violence external to the State—and selectively sanction[ing] it when profitable" or expedient.\textsuperscript{34} In centuries past, States often relied on private organizations chartering companies that had their own military power to undertake State-sanctioned foreign ventures.\textsuperscript{35} These ventures included State-centric activities including founding colonies where States themselves lacked the finance, and assisting States' in pursuing hegemonic ambitions by offering extra military muscle.\textsuperscript{36} In essence, the State's monopolization of force is a rather recent phenomenon. Indeed, "[u]ntil the mid-nineteenth century, military knowledge and labor were an alienable commodity in an international market."\textsuperscript{37} "Sovereignty bore little or no relation to the control of organized violence."\textsuperscript{38}

Denationalization of violence to PMCs affects international security by transforming power from State-organized militaries to private militaries. It creates a new threat to the traditional Westphalian paradigm of the State as the natural entity in control of the legal use of lethal military force. This decline of the Nation-State and the growing role of PMCs are symptoms of a larger challenge to the aspirations of order in the world as represented by the system of Nation-States and the rule of law, which is eroded by the alternative system of corporate bargaining and the rule of might.\textsuperscript{39}

In this new landscape, regardless of whether States choose to interact with PMCs—that is to retain their services and marshal their capacity or not—and as a result of the existence of PMCs, States themselves are changing in character. "[I]nteractions between PMFs and States are generally carried out in private without the glare of international public scrutiny that typically surrounds decisions by States to expand, modernize, or mobilize their military capacity" or take violent action, whether internally or against other States.\textsuperscript{40} Further, the profit-making objective of PMCs undermines legitimacy in their deployment, and such legitimacy, which is hard enough to determine in


\textsuperscript{35} \textit{Id.}

\textsuperscript{36} \textit{Id.}

\textsuperscript{37} \textit{Id.} at 10.

\textsuperscript{38} \textit{Id.}


\textsuperscript{40} Newell & Sheehy, \textit{supra} note 26, at 69.
international politics, becomes even more difficult when billions in potential profits come into play when PMC contracting becomes part of the equation.

The PMC does not fit into the paradigm of the State as an entity-bearing monopoly over military force. Commenting on the decentralization of State control over the use of force, Montgomery Sapone notes: "This change in military relationship between States and private entities suggests that some States no longer exert explicit control over military technology or manpower. Military skill is becoming increasingly privatized and commodified."\(^4\) The decentralization of international security from State-organized militaries not only threatens the traditional Westphalian model of State-monopolized force,\(^2\) but also accentuates the inability of international law to hold private actors accountable.\(^4\) One of the dangers of the privatization of force—the dangers of excessive and arbitrary uses of force—materialized on a large and well-publicized scale in the recent invasion of Iraq. "The central claim is that private punishment, policing, and military corporations violate human rights" and international law obligations more often than public punishment, policing, and military institutions\(^4\) in the various scandals that continue to engulf the military operation in Iraq as it did in earlier controversies.\(^4\)

IV. PRIVATIZATION AND THE PMC AS PRIVATIZATION OF VIOLENCE

Privatization of defense follows from two historical trajectories. The first is the events associated with the previously mentioned end of the Cold War.\(^4\) Among the major fall-outs of this was the discharge of vast numbers of employees from militaries of the Communist Block and was the corollary release of all types of weaponry formerly belonging to national militaries.\(^4\) Coincident with this release was a second phase of decolonization marked by the independence of various former Soviet republics and satellites\(^4\) (the first phase of decolonization is of the last century resulting from the combination of expulsion and withdrawal of European powers from former colonies around the

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47. See generally Maogoto & Sheehy, *supra* note 11.
Many of these newly formed States, both republics and former colonies, have generally struggled, and some still do, in successfully establishing their sovereignty, often owing to ineffective national armed services. These factual realities have proved to be significant market drivers creating a great supply of armaments and personnel welded together by a huge demand for violent services.

The combination of personnel and resources seeking economic opportunities in a destabilized world coincided with the other second major historical trajectory, the neo-liberal commitment to privatization. Neo-liberal policy makers, as indicated above, argue that the government is an inefficient means of providing goods and services, and that, government involvement in their position limits individual opportunity or liberty to participate in the market. So, from a liberal to the greatest extent possible, government should withdraw from the provision of such. Instead, those services should be sourced and purchased from the market, including military services.

Indeed from a democratic-capitalist political perspective, other than the previously discussed theory of State monopoly over violence, there are no ideological reasons to categorically preclude the privatization of violence. The incentives that motivate States to contract out existing defense roles to PMCs, or more radically, to commercialize their own defense forces, are largely political and economic. As privatization is currently both ideologically and politically in vogue, it follows that States have legislated to facilitate privatization including defense.

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

49. Id. at 55.
52. For example, the private aspect of the supply chain of military hardware (the "military industrial complex") has forged a longstanding relationship between states and private companies and is one facet of the nascent defense market. In this context, consider the competition between Boeing and Lockheed Martin to be the preferred supplier of fighter jets during the Cold War.
military equipment. Indeed, services make up majority of privatized defense spending.

Finally, the Gulf War accelerated the privatization of defense services. The vivid television coverage of the Desert Storm campaign brought home the harsh realities of modern warfare and the value of outsourced military services. After that war, the U.S. government commissioned studies to explore ways in which private companies could increase their participation in military operations by selling more services to U.S. armed forces operating in combat zones. In the wake of the Gulf War, the 1990s saw a proliferation in the size and number of PMCs worldwide with the value of publicly listed PMCs growing at twice the rate of the Dow Jones Industrial Average. Earlier estimates suggested that the total value of the PMC market would rise from $55.6 billion in 1990 to $202 billion in 2010; as of 2006, the market had reached an estimated $100 billion. This exponential growth in the PMC sector suggests that States are increasingly willing to entrust PMCs with the delivery of defense services. Indeed, it is to be expected that the market would boom when then U.S. Secretary of Defense, Donald Rumsfeld, published a piece in Foreign Affairs advocating a privatized defense policy.

V. THE NATION-STATE’S SOVEREIGNTY AND CONTROL OF VIOLENCE

Although the origins of the Nation-State can be traced from the Greek City-State, through the Roman Empire and Machiavelli of the Middle Ages, the modern Nation-State, as it is known to us, in the 21st century is a creature of the seventeenth century, resulting ultimately and in a crystallized form from the Peace of Westphalia. The Nation-State, as generally defined by

54. From as back as five decades, the Vietnam War experience marked the genesis of and a significant increase in contracting and saw the start of the trend of senior military personnel moving to the private sector and providing services back to their former employment.
56. See Avant, *supra* note 4.
57. Id.
international law, is "a person of international law [and] should possess the following qualifications:

a) a permanent population;
b) defined territory;
c) government; and
d) capacity to enter into relations with other States."

This traditional definition, however, has found itself challenged in the tumultuous times following the collapse of colonial powers and the disintegration of the Soviet Union, and even more so in the efforts to settle matters following the dismantling of Yugoslavia. The weakness of the population/territory/foreign relations formula results in the necessity of States, or would be States, or other international actors to rely on other, more traditional indicia of Statehood.

One of the fundamental and traditional indicia is the ability to inflict sufficient levels of violence to establish independence from other parties who would control the population, the territory, and govern. These indicia were first seen in the establishment of the Nation-States as legal entities independent of the auspices of the Church conjoined with the Holy Roman Empire. This establishment of Statehood on the basis of violent rebellion, combined with an unrelenting insistence on independence, has been a hallmark of States ever since, as seen in such disparate circumstances as the secession of the Thirteen Colonies to create the United States of America, the rebellions of the Spanish colonies in South America creating the States of modern-day Latin America, and more recently the decolonization of Africa. From this perspective, the need and ability to inflict violence and to limit the effect of other violent behavior is at the foundation of the State.

States by definition are sovereign. That is they are self-contained entities, not defined by reference to other existing orders, or other parties—although as noted, recognition by other States is an important part of the claim to Statehood. The idea of sovereignty, as initially conceived of by the sixteenth

64. MAOGOTO, supra note 61, at 19.
century French thinker, Jean Bodin, was unlimited. That is, there was no lawmaker or law above the State as embodied in the monarch except the laws of God and Nature. Over time, the notion of sovereignty was transferred from individual monarchs to parliaments, and modified to make it subject to law, and in particular a Constitution. As Maogoto puts it:

One thing was clear and unanimous: sovereignty embodied the supreme authority of a State within its territorial sphere excluding dependence on any other authority, and particularly the authority of another State. In essence, sovereignty is independence. ... It is internal independence with regard to the liberty of action of a State inside its border. As comprising the power of a State to exercise supreme authority over all persons and things within its territory, sovereignty is territorial supremacy.

The basis of this independence is the State's ability to impose its will by force. And, it is this ability that gives rise to the discussion of the monopoly of violence.

A. The Nation-State and the Monopoly of Violence

Implicit in most commentaries concerned with the proliferation of PMCs, and explicit on some occasions, is the belief that the State should have a monopoly over the use of violence. Although the modern formulation of the idea is attributable to Max Weber in States with a common law tradition, one finds earlier manifestations of the principle, such as the 1689 English Bill of Rights which states "that the raising or keeping a standing army within the kingdom in time of peace, unless it is with consent of Parliament, is against law."
It is the State's monopoly of violence that underpins the international legal system and justifies the emphasis on State sovereignty. It is on this basis that States are recognized as having the right and capacity to declare war, act in self-defense, sign peace treaties, etc. A second dimension of the doctrine of sovereignty is that States have the responsibility for protecting individual rights, a function they could not purport to fulfill if they did not enjoy a monopoly over violence. Third, and often implicit in the discussion, is the notion that in some way the violence of the State is somehow limited by or answerable to the populace. Accordingly, any non-State actor engaging in violence, including mercenaries, PMCs, and terrorists, can readily be classified as a threat to State sovereignty, and hence, illegitimate.

Given that violence has been the State's ultimate guarantee of sovereignty, violence has traditionally been carefully regulated within the borders of States. On a practical level, States have insisted on the de facto control of violence. That is, the State's monopoly of violence has been guaranteed by the development and institutionalization of State-sponsored, nationalist-based standing armies and police, and the development of State controlled armaments manufacturers. By controlling both the personnel engaged or prepared to engage in violence, and the weapons they would use, the State secured to itself control of the means of challenging its sovereignty, and so ensured its continued existence at least as against those under its control. On the legal level, constraint on the use of State resort to violence has been through a combination of constitutional law, administrative law, and the important related legal principle, the Rule of Law, as it pertains to the State. The discussion now turns to an examination of the two forms for controlling violence within a sovereign State, namely practical or de facto control and legal or de jure control of the State and then the PMC.

B. Nation-State and De Facto Control of Armed Groups and Armaments

In asserting its de facto control over these groups, States have ensured that the groups are clearly identifiable, trained, and accountable. Both the personnel and their weaponry are carefully regulated. Care is taken when the personnel are recruited, trained, and disciplined (within the means of the State in question

74. MAOGOTO, supra note 61, at 15–31.
75. Of course, international law also recognizes principles capable of running contrary to the state monopoly on violence, such as the right to self-determination of peoples within state boundaries or across state boundaries.
76. MALCOLM N. SHAW, INTERNATIONAL LAW 1013 (5th ed. 2003).
77. See id. at 8.
78. Id. at 1013.
79. See id. at 639, 1013.
of course), and the selection of high-ranking officers is done with consideration given to political as well as strategic abilities. The weapons they are given to use are also carefully registered and controlled. They are assigned to limited, restricted areas where they are permitted to amass, train, and discharge weapons. Even with this care in recruitment, training, discipline, and the control of weapons, history is replete with examples of State armies rebelling, overthrowing governments by way of coup d’etat and inflicting violent agendas on civilians. Police history manifests a similar tendency particularly with respect to violent dealings with local populations. This violence has been used at times to support and to oppose the government and its policies as well as to support and oppose the populace.

The other de facto strategy for controlling violence within the Nation-State has been by control of armaments and weapons industries. This strategy has a long history, and indeed, archaeological excavations in ancient Crete have unearthed jars of weapons stored in the floors of royal palaces indicating the recognition of the strategic importance of control of amassed weapons by rulers thousands of years ago. Arsenals of various sorts have been major enterprises of nations and indeed have been described as “the largest industrial undertaking of medieval Europe.” In the twentieth century, the formerly denominated the military-industrial complex—now New Military Industrial Complex—remains a major force in business and government around the world. The 2008 budget of the Department of Defense of the George W. Bush Jr. administration is seeking $100 billion for weapons acquisition, just under 10% of the 2006 annual worldwide military expenditure of $1204 billion. Much if not all of the major weaponry of the twentieth century was developed under the auspices

80. For a general review, see ERIC A. NORDLINGER, SOLDIERS IN POLITICS: MILITARY COUPS AND GOVERNMENTS 85 (1977); for a more critical examination focused on a specific case, arguing among other things that a military coup is part of the normal political process, see JOHN SAMUEL FITCH, THE MILITARY COUP DE’TAT AS A POLITICAL PROCESS: EQUADOR, 1948-1966, 149–59 (1977).


82. See Id.

83. See Id.

84. Ian Mount et al., The New Military Industrial Complex to Arm For Digital-Age War, the Pentagon Has Turned to a New Generation of Defense Contractors. The Hardware Is Impressive. It’s also Deadly., 4 (No. 2) BUS. 2.0 102, 102 (2003).


From fighter jets and stealth bombers, to the Internet, to precision-guided bombs and missiles, and nuclear armaments, governments have sought to control the development and distribution of weaponry in all its forms.87 The State, however, can no longer rely on de facto control over personnel and weaponry for the regulation of armed groups, including the PMC. One cause of the loss of de facto control is the end of the Cold-War, when much of both the personnel and the weaponry, previously so carefully controlled and regulated, escaped sovereign reigns, and both created and entered a market for just such goods and services.88 Second, a burgeoning black market has evolved with many surplus weapons entering the black market mainly from former Eastern Bloc countries as well as a surplus from Western powers downsizing their militaries post-Cold War. Equally for leading arms manufacturers, the loss of traditional markets, combined with the explosion of transnational organized crime, have contributed to the development and growth of non-statal clients.89 Despite various efforts at regulation of the arms trade, weapons manufacturers, as profit-driven businesses, have found ways to sell and distribute arms wherever they find markets.

Efforts to control the black market in weapons have arguably been unsuccessful.90 As Peter March observes, "[A]lmost all firearms in the black market were originally manufactured under government control, came from military stockpiles, or were bought from licensed gun dealers."91 In other words, a large black market for weapons has made governments’ de facto control not practically possible. In addition to the obstacle represented by the black market, de facto control is not feasible because modern States never eliminated the private manufacture and distribution of weapons in the first

88. An excellent resource on the arms trade is publications section of the British American Security Information Council website. For a summary review of weaponry and perceived threats, see id.
89. See Jason Freier, Arms and the Terrorist, (No. 9) J. INT’L SEC. AFF. (2005); see also SINGER, supra note 25, 55-56.
92. Marsh, supra note 91, at 223.
place. Furthermore, the changing nature of weaponry and technology is such that contemporary advanced weaponry may be made from components that may be dual use and/or sourced through a long obscure supply chain, making it quite possible for private parties to source and assemble weapons on their own.93

C. Nation-State and De Jure Control of Armed Groups, Weapons Industries and Violence

Nation-State control of armed groups and weapons industries is not only de facto but also de jure. That is to say, the laws of the nation create not only the existence of the armed forces and police, but create a regulatory framework allowing the government to ensure the safe, appropriate, and legal use of violence—at least in theory. Having a framework in place, monitored by government, accountable to the populace (again theoretically),94 and subject to judicial scrutiny and determinations, the independent ability of such armed groups to control or inflict violence on society is curtailed.

As previously noted, the English Parliament made private-standing armies illegal in 1689.95 In other words, the State military was the only legitimate military organization—all other militaries were illegal, and to organize or maintain one would be illegal. After the Peace of Westphalia, as Nation-States developed institutionally, they developed standing armies and the law governing the existence, activities, and uses of those armies contemporaneously.96

Interestingly, the situation in the United States led to a different view of the matter, and it may be a bit of an exception to the general rule. Indeed, even today, the issue of legalities of private militias is not settled at law. As a result of the Second Amendment, which reads: “A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed,” Americans have the right to bear arms.97 Despite on-going litigation, judicial interpretation of the amendment is not settled. Accordingly, two different circuit courts have held conflicting views on whether the right is an individual right or a collective right/militia to bear arms.98

93. The reader is referred to the vast literature on this area, perhaps starting with web accessible resources at Weapons, supra note 87; Failures, supra note 91.
95. ENGLISH BILL OF RIGHTS, supra note 73.
96. See MAOGOTO, supra note 61, at 19–20.
97. U.S. CONST. amend. II.
98. U.S. v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001) (holding that the right is individual); Nordyke v. King, 319 F.3d 1185, 1191 (9th Cir. 2003) (holding that the right is collective). For discussion, see Robert Hardaway et al., The Inconvenient Militia Clause of the Second Amendment: Why the Supreme Court Declines to Resolve the Debate Over the Right to Bear Arms, 16 ST. JOHN'S J. LEGAL COMMENT. 41, 129 (2002).
Nevertheless, even in that Nation-State, it is well-established that the right of private militias to parade and exercise in public is quite restricted.\textsuperscript{99} Regardless, it is universally accepted that the national military should be subject to government-legislated control.

The issue of police regulation is quite similar. Police are not free to act and inflict violence as they see fit. Instead, with the development of modern policing, arguably with the London constabulary reorganized under Robert Peel in 1829,\textsuperscript{100} police have been held accountable by law for their actions.\textsuperscript{101} Police can be liable to both criminal and civil prosecution for violent acts carried out in the course of their duties.\textsuperscript{102} Police use of force is carefully circumscribed by law, as is the wearing of uniforms, and the display and discharge of their weapons.\textsuperscript{103} Where police violate these laws, they will be subjected to legal sanction like any other member of the public.\textsuperscript{104} Just as the other organized armed groups in modern society, the military and the police are subject to de jure control.\textsuperscript{105}

Private policing has a longer history than public policing in the modern State.\textsuperscript{106} Indeed, policing was a private matter until the early nineteenth century.\textsuperscript{107} In the United States and subsequently elsewhere, names such as Wells-Fargo, Burns, and Pinkerton have become well-known. These and other private-police providers have lesser legal powers than public police. Like public police, however, they are subject to the laws governing the behavior of non-police actors, and generally, in many instances, their status as private police officers does not offer them additional protection from the liabilities of their policing actions. In addition, private police may be subject to special regulation where they interact with the public in an official capacity, wear a uniform, or otherwise carry restricted weapons.\textsuperscript{108} Thus police, whether public or private, are in theory subject to high levels of legal accountability.

\textsuperscript{99} Hardaway, \textit{supra} note 98, at 118.
\textsuperscript{104} \textit{See id.}
\textsuperscript{105} \textit{See id.}
\textsuperscript{106} \textit{See id. at 12.}
\textsuperscript{107} \textit{See id.}
\textsuperscript{108} \textit{See Dixon, supra} note 102, at 72.
Still it is important to note in the context of de jure control of public and private police that all is not as well as it might seem in theory. One of the world's leading experts on policing, Philip Stenning, describes these common notions of police accountability and control as myths. Stenning writes:

A . . . prevailing myth about private police is that they are not [as] accountable as public police are. This is . . . particularly troubling . . . because it misleads us about the public police as well as the private police. The public police are not as effectively accountable as this myth would have us believe, and private police are certainly not as unaccountable as the myth suggests.

Not only are private police less accountable than public police, but they have considerably more power than is commonly believed. Again, Stenning is worth quoting:

A more accurate description of the powers of most private security personnel would be that they have no fewer powers than . . . other powerful persons and institutions in society whose agents they are. Even a moment's reflection will make it clear that these people and institutions are able to wield power over the lives of ordinary citizens which far exceed those we accord to the public police, let alone ordinary citizens themselves.

This comment is important because it highlights the problem associated with control and accountability of potential violence, particularly in its private form despite nearly two centuries of lawmaking and regulation. Consider that in most developed countries, neither the military nor the police are granted independent discretion as to when they choose to inflict violence on the populace, and they certainly cannot do so without some accountability to both the government and the populace. Of course, in countries where the police and military are more corrupt, accountability to and control by government and the populace, in general, is not nearly as pervasive. However, such corruption does not invalidate the principle; rather, it illustrates the point that armed groups need to be closely watched and accountable to protect civilian interests, create an environment of safety and peace, and enhance governability of the State. Despite the huge challenge posed by the presence of potentially violent groups in society which are accountable to government, in the last decades of the

110. Id. at 149.
111. Id. at 148.
twentieth century, governments took steps back from immediate control of such groups by engaging in an exercise of the privatization of defense services.

VI. PRIVATIZATION AND THE CONTROL AND ACCOUNTABILITY OF PRIVATISED DEFENCE FORCES

One of the most significant challenges to the privatization agenda is maintaining control and accountability. The basic challenge of control and accountability of violent public services is exacerbated when a State privatizes the delivery of those services. Given the nature of defense services and the consequent need for vast sums of money, secrecy, and power, the importance of control and accountability as well as the risks associated with privatization are exponentially greater.

In the context of the privatization of defense, as will be shown, the situation is different, making the accountability of PMCs a matter of urgent concern particularly in relation to regulation. When public militaries and governments interact, the interactions have not always been peaceful. Drawing from the history of such interactions, one should certainly conclude that a public military does not always act in the public interest. History is replete with instances in which a military has seized control and been unwilling to give up power. Nevertheless, public militaries often can and do surrender to public will, particularly when the basis for their legitimacy rests on some notion of public accountability and maintenance of the Rule of Law. The privatized defense industry, however, has no such constraints, and indeed, history is replete with examples of PMCs running amok, uninhibited by any allegiance or claim to public legitimacy and constitutionalism. No surprise then that in the case of controlling privatized defense capabilities and ensuring accountability, the record is appalling.

There have been a shocking number of serious abuses by PMCs of their de facto powers. These include fraud, corruption, and deceit, including failing to warn a government it has been hired to protect, but in fact, participating in the overthrow of that government in favor of a preferred government. Other incidents are related to exploitative compensation demands including mineral rights put to cash-strapped governments. As the Iraq experience demonstrates, there have been few, if any, lessons learned when dealing with

113. SINGER, supra note 25, at 164–66.
114. Id. at 166.
PMCs. Companies that have murdered civilians have escaped legal sanction, and far from being penalized, have either been awarded additional contracts or continued to enjoy benefits of existing contacts.115

Perhaps the greatest challenge of accountability has to do with violent actions undertaken by a PMC extraterritorially in the name of a nation without corollary accountability to the people of that nation. Unlike other privatized services, which may be provided extraterritorially, PMC services may well include intentional death, injury, and challenge to the sovereignty of citizenry. Services of this nature and potential consequences require a distinctly higher level of accountability to a nation's people than to the provision of privatized transport services. Indeed, Rachel Weber, in her detailed study of the defense industry, argues for a thorough revision of governments' approach to defense industry contractors; in essence, removing industry participants from the strictly private sphere based on the nature of their work, subsidies received, and the level of importance to the nation.116

In South America, consider the early 1980s example of United States sponsored PMCs supporting the Contras' attacks on the democratically elected government of El Salvador.117 That debacle, which was finally brought to an end by public scrutiny and disclosure of what came to be known as the Iran-Contra Affair, left El Salvador in shambles with gangs and paramilitaries running rampant.118 No corporate actors were held accountable.119 In a sign that this was not a one-off incident, in the early 1990s, the crumbling of Yugoslavia not only turned the Balkans into a war zone dripping with blood, but another opportunity for PMCs to "assist" in restoring order through provision of logistical and training support.120 However, in the process, employees of one of the leading PMCs in this theatre, DynCorp, were implicated in serious human rights violations; the trafficking of women and running a prostitution ring.121 Lesser known are events such as those of Spearhead Ltd.'s training of Colombian drug enforcers whose "non-holds" barred approach had its list of victims including mayors, provincial governors, judges, presidential candidates, and civilians massacred.122 The activities of

115. See id. at 220–22.
118. See id. at 352–63.
119. See SINGER, supra note 25, at 221–22.
120. See id. at 4–5.
121. Including sexual slavery, prostitution and illegal arms trade. Id. at 222.
122. For a narrative of the events, see the account of the barrister involved in proceedings in the USA in GEOFFREY ROBERTSON, THE JUSTICE GAME 241–61 (1998).
some PMCs, which have left whole regions in ruins, have touched all corners of the earth—the latest and most publicized being in the Middle East. The PMC's record in Iraq includes torture, random killings, and massacres, again without accountability.

One thing that has been a constant in all noted human rights and humanitarian norm breaches (the raison de etre this Article) has been the impunity enjoyed by implicated PMCs—neither their employees, directors or other allied actors have been called to account. These events form the impetus and drive the necessity to evaluate the issue of accountability of PMCs. Accountability requires identification, analysis, and evaluation as to whether:

1) the defense services offered by the PMC are legal and the objectives appropriate whether cast as contract specifications or broader policy objectives;
2) the services are performed within the bounds of the law;
3) the activities undertaken are fully and truthfully reported; and
4) all breaches of obligations create appropriate avenues of liability and compensation.123

Singer sets out the nub of the problem thus: "With PMCs, clear tensions always exist between the security goals of clients and the firms' desire for profit maximization. For governments, the public good and the good of the private companies are not identical."124 Singer identifies the three main obstacles to effective control of PMCs, which are set out in the next three paragraphs.

First, among the obstacles to accountability, Singer identifies the problem of monitoring.125 From the contract drafting and tendering process, to the implementation, evaluation, and renewal process, contracting is complex and hence, difficult to monitor.126 Complexity may be part of any contract monitoring, and transparency poses a particular quagmire for governmental contracting with the PMC.127 PMC contracts may be pre-determined or in a highly specialized niche market that precludes actual competition; therefore, avoiding market scrutiny and monitoring of its terms or in award.128 Contracts with PMCs often take place in highly secret contexts, such as in the course of war.129 In any case, PMCs as private actors dealing with private contracts and having access to military secrets, are well shielded from public scrutiny.130 The public

123. See SINGER, supra note 25, at 152, 220.
124. Id. at 151.
125. Id. at 152.
126. Id.
127. Id.
128. SINGER, supra note 25, at 152.
129. Id. at 153.
130. Id.
is, thus, not privy to either private commercial transactions or to military secrets. Such being the case, it is obvious that PMC contracts may well go unobserved by public authorities. Monitoring is further challenged in the field when the chain of command is not clear—a complaint made by military officials—leaving it unclear to where the PMC is accountable and for what. The question of accountability becomes even more difficult when parties' accountabilities are in conflict. The conflict of profit and security is not a minor matter as was illustrated in a recent incident when the airport in Baghdad was shut down by the firm engaged to guard it over a pay dispute.

A second concern Singer identifies is the profit motive. Whereas one of the government's neo-liberal objectives of the use of privatized defense service is the reduced expenditure, the PMCs objective is the opposite. Although the government seeks to control costs of violent action, the PMC seeks to increase profits and correlative costs. What particularly distinguishes the PMC-government relationship from a business-to-business relationship, however, is that the nature of the services provided puts the government in a vulnerable position in two senses. First, where a government has privatized its defense services, it is no longer in position to substitute its own resources in the event of PMC failure. Accordingly, it is in a very weak bargaining position, particularly vis-à-vis an entrenched PMC providing service in a niche market. Second, services as opposed to goods, are harder to measure and monitor, and indeed, are easier to supply at less than agreed levels than goods, and again, particularly so in the supply of military services. Unsurprisingly, PMCs have encouraged outrageous and notorious cost overruns, including over-charging, billing for ghost employees, encouraging unwitting military officers whose focus is on strategy rather than expenditures to take more expensive alternatives, and even outright fraud.

The outrages have occurred to such an extent in Iraq that a Senate Hearing, "Combating War Profiteering: Are We Doing Enough to Investigate and Prosecute Contracting Fraud and Abuse in Iraq?" was organized. Senator Leahy reported "untold billions [were] unaccounted for" and the Office of the Inspector General was only able to report that $9.8 million had been repaid in

131. Id. at 153–54.
132. Id. at 153.
134. SINGER, supra note 25, at 153.
135. Examples of such acts are too numerous to mention. One can look at investigations on-going into contractors in Iraq, defense industry initiate reports, or for a broader discussion, see id. at 155–56.
restitution. Thus, on a cost-benefit calculus, the profit motive far outweighs any penalties, real or potential, encouraging PMCs to avoid controlling and accounting for costs (financial) and activities (domestic and international humanitarian violations).

Singer identifies the third issue for the PMC as “Why fight hard?” He notes the incentives to prolong contracts, protect one’s weapons, and employees. Other concerns include the firm’s potential reluctance to fight on the basis of protecting its own commercial interests in certain areas, preferring to protect its land-based assets over the government’s strategic needs and objectives, or divided loyalties where its employees wish to avoid engaging in combat against former comrades working for PMCs on the other side of a conflict, as appears to have happened in Ethiopia. While Singer notes these negative examples, PMCs have engaged in firefights, apparently, beyond contractual obligations in certain instances in Iraq. The ability to control and call PMCs to account by legal means such as court-martial is non-existent. It means that accountability and control in the military chain of command arising from legal sanction is gone.

The issues above have a bearing on the efficiency claim supporting the neo-liberal privatization policy agenda. A study by U.S. scholar, Markusen indicates that the predicted efficiencies have not been realized. She wrote: “No one has been able to evaluate fully the long-term costs and consequences of extensive privatization of national defense, and the sheer inability to do so should give pause to advocates of outsourcing anything other than the most routine functions.” Indeed, while standing armies are expensive, the less accountable and corporately shielded PMCs will almost certainly prove to be more so, even without counting the costs to democracy and its institutions. This serves only to add impetus to achieving PMC accountability to the Nation-State and may well require some radical re-thinking of traditional approaches.

137. Id. at 10 (statement of Thomas F. Gimble, Acting Inspector General, Dep’t of Defense).
138. SINGER, supra note 25, at 157.
139. Id.
140. Id. at 158.
142. SINGER, supra note 25, at 220.
143. See Markusen, supra note 53.
144. Id. at 493.
to control PMCs, as well as reform to corporate and contract law and regulation. The foregoing discussion of the complexities of accountability and control associated with the privatization of defense sets the stage for a fresh analysis of the Nation-State—the corporate PMC relationship and potential for the de facto and de jure control of the PMC to which we turn next. It should be noted that in terms of the accountability for violence inflicted extraterritorially, one cannot be but pessimistic. Laws and courts have been remarkably otiose in constraining governments in their foreign adventures. Given such, control of PMCs in that context by legal means is not likely to produce much result.

VII. THE CREATION OF A CORPORATE FRANKENSTEIN

From Sandline International’s connections with the British government to MPRI’s relations with the U.S. Army, to the AEGIS, U.S.-CACI, and U.S.- links, PMCs need to court favor with the governments has been at the center of their cultivation of extensive political connections. Consider, for example, the current Iraq war. The connections between the PMC and government have been so close that there has been considerable concern expressed among scholars and media alike. Isenberg, for example, makes “Political Connections” leadership, political donations, and lobbying of PMCs the first items of concern in his ground-breaking work on PMCs in Iraq.146 As one would expect, the extraordinary growth of the PMC sector suggests that it will be undertaking all the normal channels for increasing its business, and particularly, with government being a main client, a heavy reliance on lobbyists.

The tentacles of the PMC in commercial and political circles are dwarfed only by their financial ambitions. In 2005, for example, a Blackwater subsidiary put on a by-invitation-only convention for diplomats, oil companies, and weapons manufacturers.147 Another example of PMC lobby success is that which followed the gruesome killing and desecration of four Blackwater employees in Fallujah. That killing lead to the assault on the city and a swell of patriotism and support for the occupation of Iraq, and the timing of those events is well known; Blackwater’s capitalization on the event is not. The day after the incident, Blackwater retained the well-connected lobby firm, Alexander Strategy Group. While the information shared and services rendered are confidential, and hence, one must be cautious in drawing inferences or conclusions, the record is that two months later, Blackwater had won a coveted international security contract valued at $300 million.148

In the world of profits, nothing is sacred. In another attempt to drum up new business, PMC lobbyists have engaged in calling for PMCs to be engaged in a new line of work—delivery of humanitarian aid and peacekeeping operations. Doug Brooks, the President of the PMC lobby group, International Peace Operations Association, claims that westerners fail to grasp the reality of weak, inept, and corrupt African militaries. Brooks argues that without this important information about Africa, non-Africans incorrectly assume that African militaries can attend to African peacekeeping. In line with his views, Brooks wrote an article for popular consumption advocating surrendering the problem in Darfur to PMCs. Unsurprisingly, among a rather significant lobby, Blackwater has made known its interest in securing a contract for services in Darfur, making its case in the media in March 2006. This intention is supported by Brooks who refers to the well-known cases where PMCs, Executive Outcomes and Gurkha Security Services, made significant positive contributions to end the brutal civil wars in Angola and Sierra Leone, respectively. It is not at all clear, however, that a few cases produce a norm; although, it is inappropriate to rule out some tip of the spear PMC assistance in certain interventions.

A relatively significant amount of opinion and advice on PMCs given to Congress in a 2007 research report is based on the opinions of the above-mentioned Brooks. In a research report on the subject entitled, “Private Security Contractors in Iraq: Background, Legal Status, and Other Issues,” Brooks is mentioned ten times, which is more than the combined input of the

154. See Brooks, supra note 151.
world’s four leading PMC experts. This industry lobby reflects not only a particular ideology concerning governance, but obviously an agenda to increase the PMC market through further commoditized violence.

Professor Anna Leander identifies the issue in its broader, political context:

... the political processes establishing for what purpose what kind of force is used are fundamental and PMCs do take part in them and do shape them. PMCs are increasingly present as a new cast of efficient, competent, and apolitical security experts. In this context, the... way PMCs (as specialists on violence) shape politics is readily swept aside and forgotten.

In the African context, it has been described as: “[PMCs] interpret political instability in Africa as a market issue, and position themselves perfectly in that market.” Indeed Brooks, when advocating PMCs peacekeeping, sees the problem in Africa as a technical issue, and hence, subject to his exclusively technical solution. For the most part, politics escapes the discussion except as lamentable obstacles to the PMC solution. Brooks does make mention of a mediation group as part of a pre-PMC deployment procedure, and notes that in the African context: “There are too many factions involved, too many warlords, and too much money in the offing for the winner.” However, he fails to address who should get the support of the PMC or on what basis.

The PMC advocates emphasize how PMCs crave legitimacy. They claim PMCs value their good names so highly that there is little or no cause for

156. Id. In her report, Elsea cites or refers to Brooks (ten times), Peter Singer (six times), and Deborah Avant (twice), Simon Chesterman (once), and Fred Schreier (once).
161. Id. at 10.
162. Id. at 8.
164. See Brooks, Africa’s Welcome Pariah’s, supra note 150.
They so emphasize the social benefits of PMCs, economic benefits of PMCs, and their humanitarian assistance, sprinkled with discussions of "capacity building" that it begins to sound like PMCs are interested in charity work. In the midst of all the public service bombast, it becomes difficult to remember that under discussion is a group of self-interested, profit-seeking armed individuals whose job it is to fight. Importantly, this picture does not reflect the views and experiences of some employees on the ground with the same famed PMCs on the missions in question.

The efficacy of the PMC lobby has drawn academic comment. Markusen observes: "Their congressional success makes it difficult for the nation to adapt to new security realities and to shift resources toward new approaches such as peacekeeping missions, negotiated settlements, and economic development in place of regional warfare." This effective lobbying activity calls attention to a dangerous and fundamental problem with PMCs; there is a combination of commercial imperative with its marketing spin, disregard of (if not outright opposition to) political process and worldview that violence is the solution. The limitation of a worldview is encapsulated in the old adage, "to a man with a hammer, everything looks like a nail." This dangerous combination of issues suggests that PMC industry's activities, connections, and advice to home governments and in the international community, should be subject to scrutiny and any advice considered and taken only with utmost caution. After all, policy makers do not turn to tobacco companies for advice on health issues.

VIII. CONCLUSION: CONTROL OF THE CORPORATION—THE HEADACHES OF THE PMC AND AVENUES FOR ACCOUNTABILITY

Most States have a legislative framework and extensive regulatory regime which controls corporations. From the initial enabling provisions of a statute, to the registration, reporting, internal governance, and winding up of the corporation, most corporate acts are controlled or at least addressed by a statutory framework. This framework is in addition to the rules governing human persons, which, by large, also apply to corporations. Thus, the corporation occupies one place in the State's overall legislative schema, which regulates and controls the activities of actors within its internal sovereign

165. Id.
166. See Brooks, Hope, supra note 163.
sphere. It follows logically from this that the corporation ought not to dictate to the State, and morally, that the corporation ought not to threaten the State with violence. As stated, control of the PMC is done by the State through four areas of law—contract, corporate, procurement, and regulation aimed at the industry generally. However, equally as noted, there are a number of specific problems resulting from the presence of the corporatized mercenary, the PMC. The concerns about their activities are of such a fundamental and urgent nature that remedies need to be reconsidered. Fortunately, corporate law is not without some such remedies at hand for its offspring, the PMC. Focusing on corporate remedies where violence and State interests are involved, we suggest the following.

The usual remedy for corporate misdeeds is a fine. Fines are the preferred mode of punishing a corporation—preferred by both the corporation and the regulator. They are easier to administer, calculate, and measure, both in terms of the corporation calculating costs of compliance versus profit for non-compliance, and in terms of a regulator watching to see whether the fine has been paid as opposed to some more intrusive, resource-intensive monitoring. There is the obvious drawback, however, with a financial penalty regime in that the punishment is paid by the shareholders, not the directors or managers instigating the non-compliance in the first place. In terms of the PMC, it has been noted that fines, along with other market-based sanctions, are preferred by the industry and inadequate in relation to certain harms they may inflict.

A second remedy, revocation of a charter, is limited to the power of the State. It is not at all clear why this remedy, so carefully reserved to the State, is so seldom invoked. While it may be undesirable to over use it—it is the equivalent of the death penalty for corporations. Given the interests and high stakes involved in PMC activities, it should be brought to the forefront as a remedy to control PMC behavior. Despite States' aversion to using this remedy against corporate serial offenders, the bleak enforcement and accountability regime seems to strongly suggest that it is high time the remedy is re-visited.

170. This relationship between state and corporation has come under considerable scrutiny and subjected to serious challenge by the development of multinational corporations. See, e.g., Simonovic, supra note 69, at 379.

171. Singer, supra note 27, at 546.

172. Perhaps the most notorious of such corporate offenders is Unocal engaged in some of the exact same crimes PMC's have committed. A shareholder activist website offers:

Unocal has been involved in some of the worst oil spills and leaks in California history, and in a polluting sour-gas plant on Lubicon Cree land in Canada, as well as business negotiations with the Taliban militia of Afghanistan, which practices "gender apartheid." Organizations have submitted a petition to the Attorney General of California calling for the revocation of Unocal's corporate charter, due to the company's "environmental devastation," "complicity in crimes against humanity" in Burma and elsewhere, and other forms of corporate misconduct. Called "a company
A second set of recommendations arising from corporate law is the notion of some form of vetting and control of directors. This could be done by setting standards to be required of PMC directors. These standards would require knowledge of more than business or even military matters. It would require a certain standard of understanding of the laws governing war and human rights. Where the directors are directing the utilization of the corporation’s assets for such risky, potentially fatal ends, surely something more ought to be demanded of them than a mere nose for business and a sharp eye for profit. Like other professionals taking the lives of others into their hands, they ought to be held to a higher standard—the standard of a professional. Just as doctors and attorneys are required to have particular education and to swear certain oaths to pursue something more than mere profit and self-interest, society could certainly require of directors of PMCs the same. Indeed, given the vast powers bestowed on directors in the common business corporation, there are increasing calls among corporate governance experts for just such a regulatory system to be implemented in various jurisdictions. Experts are suggesting that professional bodies with examinations, regulation, and powers need to be established with directors obligated to comply with the regulations. Indeed, current law in some jurisdictions precludes certain people from being directors on the basis of prior misdeeds. There is no reason such a framework could not be developed tailored specifically to the issues surrounding PMCs.

A third set of recommendations from a corporate law perspective would involve some change to law, namely, dealing with board composition. There is no reason that board structures cannot be modified to include a representative on the board of those particular civil interests. This may be done by some form of government or humanitarian representation on the board. Simply, some non-business personnel with expertise in international law could be placed on the Board of Directors so as to ensure compliance with at least the minimal norms of international law. This approach has been taken with success in the case of popular efforts to eliminate multinationals’ use of sweatshops. In the case of the PMC, there is no legal or economic reason that a group such as Amnesty

without a country" by Business Week, Unocal is a rogue company. In 1997, Unocal sold its refineries and Union 76 gas stations to Tosco, making it no longer subject to any boycott regarding Burma. In support of Burma’s democracy movement, we call on Unocal to completely withdraw from Burma. All corporations should cease operations in Burma until genuine democracy is in place.


174. For example, see the Australian legislation, Corporations Act, No. 50 (2001) (Austl.)
International or the Red Cross-Red Crescent Societies or some other appropriate body could not have a representative on the Board of Directors—with adequate corporate funding, of course, to ensure that appropriate information is collected and reported in a timely manner.

Further, and especially where direct and overt political ends are to be engaged violently, as the always the case where "tip of the spear" and other offensive action is contemplated in PMC operations, there is no reason a political representative cannot be appointed to the board for purposes of public accountability. Certainly this idea cannot be objected to as "foreign" to the nature of the enterprise engaged in by the corporation, for as previously noted, many of these corporations explicitly identify their objectives as being not only closely aligned with government objectives, but indeed parroting word-for-word the political speech of the day. This approach—having a politician on the board—is part of Chinese corporate law in State-owned enterprises. Although it may not achieve all the ends hoped in that context, the idea should still provide some comfort and power ensuring government accountability to the populace and an implementation of a commitment to democracy.
