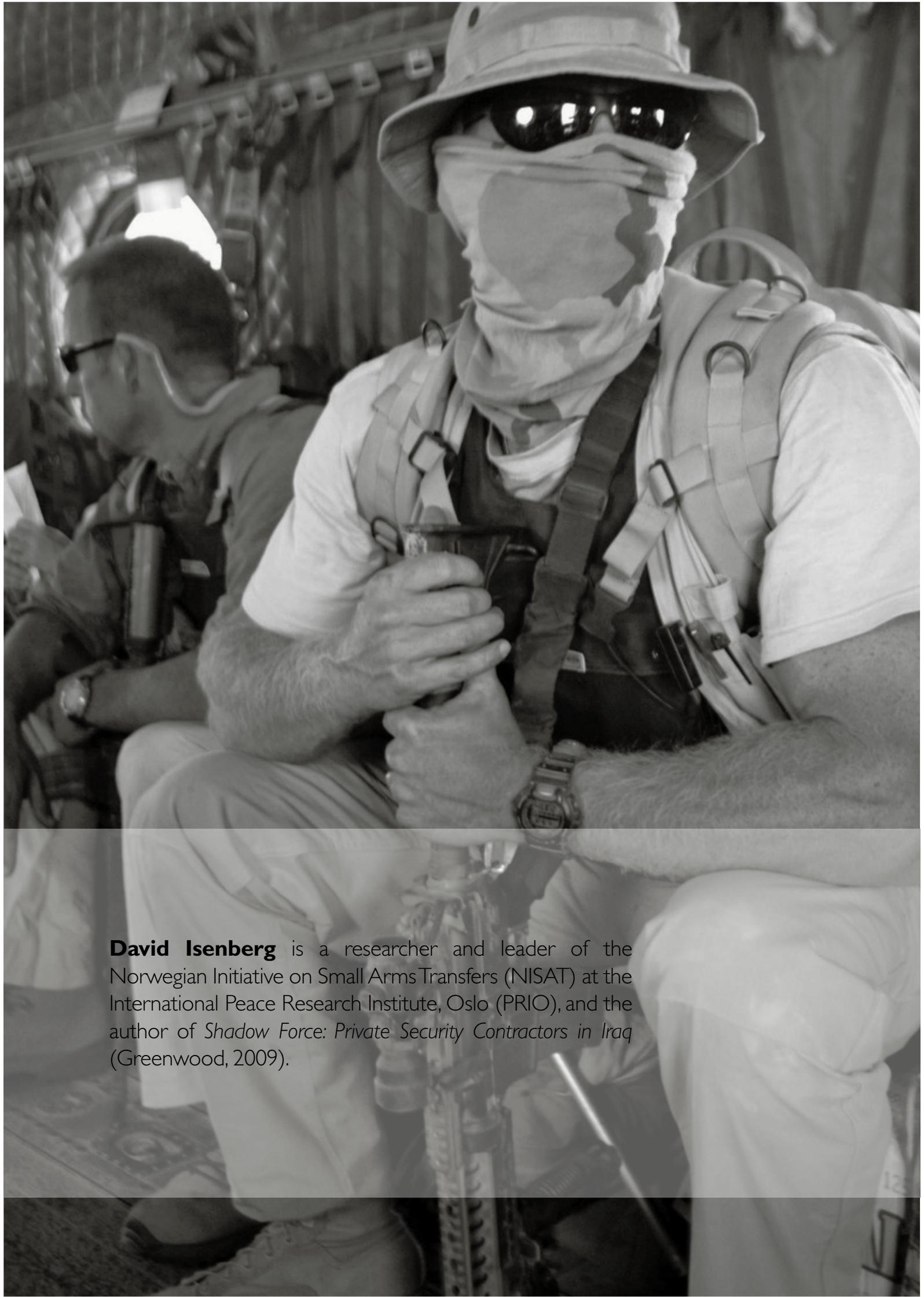


Private Military Contractors and U.S. Grand Strategy

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EXECUTIVE SUMMARY

THE DEBATE OVER WHETHER and how to utilize private military and security contractors generates much heat but not much light. In many cases the level of discourse resembles children's name calling, i.e., "You're a mercenary." "No I'm not." Such rhetoric is silly and distracting and prevents people from facing underlying realities which are rarely dealt with publicly.

The truth is that the United States is by far the world's largest consumer of such services. While contractors have worked with the government since the country's founding their role has grown as Washington has reduced the size of the U.S. military in the post-Cold War era, and as those forces have become strained by the demands of U.S. grand strategy.

This did not happen by accident. Decades ago the government made a deliberate decision to both privatize and outsource military functions and activities that had traditionally been done in the public sector.

One can argue for and against such contractors but what nobody wants to discuss is that the U.S. government's huge and growing reliance on private contractors constitutes an attempt to circumvent or evade public skepticism about the United States' self-appointed role as global policeman. The U.S. government has assumed the role of guarantor of global stability at a time when the American public is unwilling to provide the resources necessary to support this strategy. Private contractors fill the gap between geopolitical goals and public means.

The low visibility and presumed low cost of private contractors appeals to those who favor a global U.S. military presence, but fear that such a strategy cannot command public support. And by using contractors the United States also shifts responsibility and blame for its actions.

As the United States relies more heavily upon military contractors to support its role as world hegemon, it reinforces the tendency to approach global crises in a unilateral, as opposed to multilateral manner, further ensuring that the burdens will be carried disproportionately by U.S. taxpayers. U.S. use of PMCs is inevitable until people grasp the key point, which is that contracting is both part of war and part of maintaining a global military hegemonic presence.

INTRODUCTION

IN RECENT YEARS, the government has outsourced key functions to private sector contractors. This paper focuses especially on its reliance on private military contractors (PMCs), an “industry” that has become the focus of intense media and public scrutiny, occasioning much heat and histrionics, but not much light. The time is long overdue for a factual, dispassionate accounting of the subject.

Beginning in the late 1980s the first of the modern private security contractors, such as South African based Executive Outcomes, started attracting notice for their activities in Angola and Sierra Leone.¹ Since then PMCs have become embedded in popular culture via film, books, and television. More recently, the war in Iraq has drawn attention to PMCs, but there is still great confusion surrounding their roles. Given the U.S. government’s reliance on PMCs, and the continuing large-scale U.S. military presence in Afghanistan, problems are likely to persist.

PMCs are employed chiefly by the Defense and State departments, but the entire government – including the 16 agencies in the intelligence community, along with the departments of Homeland Security and Energy -- relies on contractors.²

The problems are not confined to the United States, however. Policymakers worldwide have yet to figure out just where and how private military and security contractors fit into international law. Without greater transparency of their actions and a greater ability of the government to monitor them, problems are inevitable. We need new rules, adapted to the modern era.

The Obama administration introduced a set of reforms designed to reduce spending on private-sector providers of military security, intelligence and other critical services and return certain outsourced work back to government employees. But the most important question remains unaddressed. The use of PMCs reflects important underlying realities regard-

¹ For a look back at the groups of that time see David Isenberg, *Soldiers of Fortune Ltd.: A Profile of Today's Private Sector Corporate Mercenary Firms*, Center for Defense Information Monograph, November 1997.

² Most of the State Department’s use of PMC is through its Worldwide Personal Protective Services Contract. See David Isenberg, “Dogs of War: WPPS World,” *United Press International*, September 19, 2008; and Derek Dela-Cruz, *Should the U.S. Department of State Continue to Use Private Security Contractors to Protect Diplomats*, Master’s thesis, U.S. Army Command and General Staff College, Fort Leavenworth, KS, June 2008. On contractors in the intelligence community see Tim Shorrock, *Spies for Hire: The Secret World of Intelligence Outsourcing*, (NY: Simon & Schuster, 2008).

ing the U.S. role in the world, which the public has chosen not to face, namely the mismatch between U.S. geopolitical ambitions and the resources provided for them. Putting aside all the arguments about the presumed cost-effectiveness or organizational flexibility of the private sector, a nation that cannot summon public support for its policies, strategies and goals, needs to rethink those policies. Any discussion surrounding the use of contractors should start with that inescapable reality.

DEFINITIONAL ISSUES (OR “WHO ARE YOU CALLING A MERCENARY”)

THE DEBATE OVER THE WIDESPREAD USE of private military and security contractors today is still mired in anachronistic descriptions. Take, for example, the imprecise use of the term “mercenaries.” Contractors doing functions that used to be done only by militaries are routinely described as mercenaries even though they clearly are not.³

The most widely – though not universally -- accepted definition of a mercenary is that in the 1977 Protocol I to the Geneva Conventions. Article 47 puts forward six criteria, all of which must be met, for a combatant to be considered a mercenary. This is important because that Convention is the only globally accepted law regarding mercenaries and therefore governs whether a contractor can be prosecuted as a mercenary. The convention defines a mercenary as any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.⁴

Why would someone working for a private security contractor in Iraq or Afghanistan, for example, not meet that definition?

³ For an example of the use of the grossly unfair and misleading term “mercenary,” see Jeremy Scahill, *Blackwater: The Rise of the World's Most Powerful Mercenary Army*, (NY: Nation Books, 2007).

⁴ Article 47, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1).

First, a majority of those working for a PMC are locals, and as such are “a national of a Party to the conflict.” Second, not all of them take a direct part in the hostilities. There are at least 200 foreign and domestic private-security companies in Iraq. Furthermore the type of work that contractors do is enormously diverse. It is by no means limited to the choice between people doing security work, i.e., carrying guns or performing logistics functions for the active duty military. Some consultancy services, for example, are for decidedly non-kinetic functions, such as sitting in front of computer consoles at Regional Operations Centers and monitoring convoy movements. Contractors also include academics with PhDs, working on the Army’s Human Terrain System.⁵

⁵ See Maj. Ben Connable (USMC), “All Our Eggs in a Broken Basket; How the Human Terrain System is Undermining Sustainable Military Cultural Competence,” *Military Review*, March-April 2009, pp 57-64; George R. Lucas, “The Morality of ‘Military Anthropology’,” *Journal of Military Ethics*, Vol. 7, No. 3, 2008, pp. 165-185, and Robert Young Pelton, “Afghanistan: The New War for Hearts and Minds,” *Men’s Journal*, Jan. 21, 2009, <http://www.mensjournal.com/new-war-for-hearts-and-minds>.

CLASSIFYING PMCs

THE GOVERNMENT'S RELIANCE on private military industry is not as new as is frequently claimed. Civilians have always been instrumental to military operations and have often been in harm's way in support of the military. Throughout, researchers have tried for years to come up with a framework describing the various functions of PMC's beyond the definitional frame (i.e., mercenary vs. not a mercenary) set forth by Protocol I. This is not just a semantic matter. The confusion surrounding PMCs and mercenaries reflects a shift in how security is understood and judged, a shift to what international law has not yet adapted.

Because PMCs are businesses their core mission is to make a profit and they adapt to meet the needs of their clients.⁶

Three main categories of activities stand out:

- *Military combatant companies* provide forces capable of combat. These types of firms constitute a tiny minority of PMCs, even though they tend to receive the most publicity.⁷
- *Military consulting firms* traditionally provide training and advisory services, though some have expanded into personal security and bodyguard services.⁸
- *Military support firms* provide nonlethal aid and assistance, such as weapons maintenance, technical support, explosive ordnance disposal, and intelligence collection and analysis.⁹

⁶ While it is outside the scope of this paper it should be noted that the rise in private commercial security activities has expanded at an even greater rate than that of PMCs. See Rita Abrahamson and Michael C. Williams, "Security Beyond the State: Global Security Assemblages in International Politics," *International Political Sociology*, Vol. 3, No. 1, March 2009, pp.1-17.

⁷ Examples include the now disbanded Executive Outcomes of South Africa and Sandline of the United Kingdom. Other firms, such as Blackwater (now renamed Xe) have offered forces for use in places like Darfur but have so far had no takers.

⁸ Examples include: Xe, MPRI (formerly Military Professionals Resources Inc., now an L-3 Communications division, DynCorp and SAIC (Science Applications International Corporation) of the United States.

⁹ The best known example would be KBR Inc. (Kellog Brown & Root, formerly a Halliburton subsidiary) doing work under the U.S. Army's Logistics Civil Augmentation Program (LOGCAP) contract.

The difference between these three categories and regular military contractors is that they are service providers, not manufacturers. As opposed to building tanks, planes, ships or missiles they are providing armed guards, military advisers, cooks, truck drivers, translators, mechanics, and weapons technicians.¹⁰

But while it might be possible to draw distinctions between PMCs and traditional defense contractors, differentiating one PMC from another based on their primary function is nearly impossible because a contractor can do more than one task and offer more than one capability at any given time. Military consulting firms, in particular, offer a wide variety of services. And, as with most other conventional contractors in the military industrial and national security realms, if they don't have the capability in hand when they win a contract, they hire it.

Even if all contractors were mercenaries, however, that would hardly justify much of the criticism directed at them. Today, people tend to label anyone who carries a gun and isn't a member of a regular military establishment a mercenary. By implication, these guns for hire are supposedly uncontrollable rogues who commit unspeakable atrocities and wreak havoc.

But even the worst mercenaries from the Middle Ages to the era of decolonization in the mid-twentieth century could not rival the human suffering and physical destruction perpetrated by regular military forces. Mercenaries did not invent concentration camps, fire-bomb cities from the air, or use nuclear, chemical or biological weapons. In fact, the bloodiest episodes in the 20th century — the bloodiest century in recorded human history — came courtesy of regular military forces. It is unimaginable that mercenaries could commit the kind of carnage that contemporary regular military forces routinely plan and train to unleash.

In fact, in light of the widespread use of mercenaries in armed conflict throughout human history, their now bad reputation is of very recent vintage. It was only well after the rise of the nation state that mercenaries began to be seen as a bad thing. Indeed, from the fifteenth to seventeenth centuries — the critical period for European state formation — armies deployed through much of Europe consisted largely of mercenaries by lords and military entrepreneurs.

The legitimate concerns about the legal and ethical role and status of private military contractors flow from the fact that international law has not kept pace with the changing nature of war and PMCs.¹¹

The use of PMCs has increased significantly over the past two decades. They were used in Desert Storm in 1991, then in the Balkans in the mid-1990s, and now in Iraq and Afghanistan. PMCs have been involved in numerous civil wars, in such places as Angola,

¹⁰ It should be noted that many traditional military contractors have adapted as service providers, but their primary functions remain the design and manufacture (and, in most cases, service) of hardware and equipment.

¹¹ For detail see James Pattison, "Just War Theory and the Privatization of Military Force," *Ethics & International Affairs*, Vol. 22, No. 2, (Summer 2008), pp. 143–162.

Sierra Leone, the Balkans, and Papua New Guinea.¹² All told, from 1990 to 2000 they were involved in around 80 conflicts (compared to 15 during the period 1950-89).¹³

¹² See Sarah Percy, "Private Security Companies and Civil Wars," *Civil Wars*, Vol. 11, No. 1, March 2009, pp. 57-74.

¹³ Frederik Rosén, "Commercial Security: Conditions of Growth," *Security Dialogue*, Vol. 39, No. 1, March 2008, pp. 77-97.

THE OBAMA ADMINISTRATION AND PMCS

DESPITE THE OFTEN SUPERFICIAL coverage of the issue, scholars and policy-makers recognize that the use of contractors is a permanent part of government, and they are seeking new approaches to deal with this reality.¹⁴ Earlier this year the International Peace Institute released a study that identified five different frameworks — global watchdog, accreditation regime, arbitration tribunal, harmonization scheme and a global-security-industry club — that go beyond market mechanisms and national regulations that can be applied to what it calls the global security industry.¹⁵

After just a few weeks in office, the Obama administration launched a campaign to change government contracting, an issue that President Obama had addressed as a senator. In February 2007, Senator Obama introduced the Transparency and Accountability in Military and Security Contracting Act (S. 674), an amendment to the 2008 Defense Authorization Act, requiring federal agencies to report to Congress on the numbers of security contractors employed, killed, and wounded, and disciplinary actions taken against contractors. The bill was referred to the Senate Armed Services Committee but never passed into law. Continuing on this work, the Obama administration introduced in February 2009 a set of reforms designed to reduce state spending on private-sector providers of military security, intelligence and other critical services and return certain outsourced work back to full-time government employees.

The Obama administration also pledged to improve the quality of the acquisition workforce — the government employees who are supposed to be supervising and auditing the billions of dollars spent monthly on the contracts.¹⁶ Reform of this process is essential. A report from the Center for Public Integrity found that the number of defense-contracting fraud and corruption cases sent by government investigators to prosecutors dropped pre-

¹⁴ This section taken from David Isenberg, “Dogs of War: Lions and Contractors and Robots. Oh My!” *United Press International*, April 10, 2009.

¹⁵ James Cockayne and Emily Speers Mears, *Private Military and Security Companies: A Framework for Regulation*, International Peace Institute, March 2009, http://www.ipacademy.org/asset/file/428/PMSC_EPub.pdf.

¹⁶ For confirmation of the need for this one has only to read how the top security official at the U.S. Embassy in Iraq refused to punish Blackwater security guards for making false statements about an unjustified 2005 shooting in Baghdad because he didn't want to lower the morale of those contracted to work security. See Matt Kelley, “Falsehoods in Iraq Shooting Unpunished,” *USA Today*, April 2, 2009.

cipitously under the Bush administration, even as contracting by the Defense Department almost doubled.¹⁷

This recent shift shows that the Obama White House is less committed to outsourcing in principle than was its predecessor. For example the introduction to Obama's 2010 budget noted, "The administration also will clarify what is inherently a governmental function and what is a commercial one; critical government functions will not be performed by the private sector for purely ideological reasons."¹⁸

Collectively, the Obama reforms reflect the administration's recognition that contractors are fully integrated into national security and other government functions; the United States cannot go to war without them.¹⁹

¹⁷ Nick Schwellenbach, "Fraud Cases Fell While Pentagon Contracts Surged: Procurement Experts Say More Investigators Are Required," *Center for Public Integrity*, April 1, 2009, <http://www.publicintegrity.org/articles/entry/1243>.

¹⁸ For detail, see David Isenberg, "Dogs of War: Two Little Words," *United Press International*, June 13, 2008.

¹⁹ For details on past private contractor work in Afghanistan see Antonio Giustozzi, "The Privatizing of War and Security in Afghanistan: Future or Dead End," *The Economics of Peace and Security Journal*, Vol. 2, No. 1, 2007.

PRIVATIZATION PAST IS PMC PROLOGUE

ALTHOUGH THERE HAVE ALWAYS been partisans and guerrilla forces, most military conflicts over the past several centuries has been conducted using professional militaries. In fact, it was the cost of war that caused the formation of states. As academics such as Charles Tilly explained, because of military innovation in pre-modern Europe (especially gunpowder and mass armies) only states with a sufficient amount of capital and a large population could afford to pay for their security and ultimately survive in the hostile environment. Institutions of the modern state (such as taxes) were created to allow war-making, which became the core feature of the state.²⁰

Contemporary views toward private security firms are shaped by this history. The German political economist and sociologist Max Weber framed the issue. The ultimate symbol of the sovereignty of a nation is its ability to monopolize the means of violence—in other words, raising, maintaining, and using military force.²¹ Anything that erodes this relationship between the citizen and the state could weaken the central rationale for modern government.

Still, even during that evolution to state-sponsored violence private actors played significant roles. Private security is virtually as old as civilization, dating back to the times when man began to domesticate animals and graze his herds.²² People performing this function have been called many things: soldiers of fortune, condotierri, free companies (which is the root of the modern term freelancers), and, thanks to William Shakespeare's "Julius Caesar", "dogs of war." Some of the same criticisms leveled against private contractors today were made against the East India Company in the 17th and 18th centuries.²³

²⁰ See Charles Tilly, *Coercion, Capital and European States, A. D. 990-1992* (Malden, MA: Blackwell Publishing, 1990).

²¹ Ironically, Weber intended his statement as an observation, not an ironclad rule, stating that it has not always been the case that the connection between the state and the use of violence has been so close. He uses the example of feudalism (where private warfare was permitted under certain conditions). Source: http://en.wikipedia.org/wiki/Monopoly_on_the_legitimate_use_of_physical_force.

²² For detail see Herbert Wulf, "Privatizing and Internationalizing Violence," *The Economics of Peace and Security Journal*, Vol. 2, No. 1, 2007, pp. 35-40.

²³ Janet McLean, "The Transnational Corporation in History: Lessons for Today?" *Indiana Law Journal*, 79 Ind. L.J. 363, Spring 2004, pp. 363-377.

In fact, prior to the Napoleonic wars, war was largely a commercial business.

Clausewitz essentially ignored the widespread use of mercenaries in Europe. On the eve of the French Revolutionary wars, half the soldiers in the Prussian army -- 200,000 in all -- were hired from abroad. Even Napoleon's armies relied on them. The best troops that Napoleon took with him to Russia were Italians who fought for money. Some of the smaller German states hired out their own soldiers for profit.²⁴

The British Royal Navy was a semi-privatized force. It operated a prize money system under terms of the 'Cruisers and Convoys' Act of 1708, which was renewed at the beginning of each year (and indeed not repealed until 1917).²⁵ The Admiralty issued letters of marque sanctioning private merchant men to seize enemy shipping. Over 10,000 were issued to private entrepreneurs in the course of the Napoleonic war(s). The private sector which engaged in this trade built heavily armed 'runners' which, though primarily engaged in trade, could defend themselves without having to call upon the Royal Navy.²⁶

Interestingly, foreshadowing contemporary debate, the government had no alternative than to rely on the private sector for security services. To have dispensed with its support altogether would have meant increasing taxation, and Britain by the end of the Napoleonic Wars was already the most highly taxed of all the belligerent powers. British taxes were nearly twice as high as France (even though it had only half its population).

It was the introduction of the income tax in 1799²⁷ that turned the tide and made it possible to envision publicly subsidized armed forces for the first time.

Subsequently, privateers or private ships licensed to carry out warfare, helped win the American Revolution and the War of 1812. In World War II, the Flying Tigers, American Fighter pilots hired by the government of Chiang Kai-Shek, fought the Japanese.

²⁴ Christopher Coker, "Outsourcing War," *Cambridge Review of International Affairs*, Vol. 13, No. 1, Autumn-Winter 1999, pp. 105-106.

²⁵ The Act stipulated that any enemy ship taken in action was given a value by the High Court of the Admiralty. The money was shared between the officers and crew of all ships involved in the action. Source: The Method and Procedures of Nelson's Navy, <http://www.bbc.co.uk/dna/h2g2/A23965590>.

²⁶ Coker, *Outsourcing War*, p. 99.

²⁷ History of individual income taxation, Great Britain," <http://www.britannica.com/EBchecked/topic/284849/income-tax/71954/Great-Britain>

THE U.S. GOVERNMENT AND PMCs

THROUGHOUT MUCH OF U.S. HISTORY, private firms have periodically been used in lieu of U.S. forces to enforce covert military policies outside the view of Congress and the public. Private contractors were prominent in the “nation-building” effort in South Vietnam and grew significantly over the decades that followed. More recent examples range from Civil Air Transport and Air America, the CIA’s secret paramilitary air arm from 1946 through 1976 to the use of Southern Air Transport to run guns to Nicaragua in the Iran–Contra scandal.

The Logistics Civil Augmentation Program (LOGCAP), established by the Army in 1985, paved the way for the extensive use of civilian contractors in wartime and during other contingencies. LOGCAP covers all preplanned logistics and engineering/construction-oriented contracts and includes everything from fixing trucks to warehousing ammunition to doing laundry, running mess halls, and building whole bases abroad.

The PMC industry was fueled by the same zeal for market-based approaches that drove the deregulation of the electricity, airline, and telephone-service industries. During the Clinton administration, Vice President Al Gore’s “Reinventing Government” initiative promised that reducing government payrolls and shifting work to contractors would improve productivity while cutting costs. In 1995, the final report of the United States Commission on Roles and Missions, whose mandate was to avoid duplication among the armed services, devoted a chapter to calling for greater reliance on the private sector.²⁸ A 1995 Defense Science Board report suggested that the Pentagon could save up to \$12 billion annually if it contracted out all support functions except actual warfighting. Not to be outdone, in 2000, presidential candidate George W. Bush promised to let private companies compete with government workers for 450,000 jobs. In 2001, the Pentagon’s contracted workforce exceeded civilian defense department employees for the first time.

The military seemed to be particularly well-suited to the use of contractors, because the need for its services fluctuates so radically and abruptly. In light of such sharp spikes in demand it was thought it would be more efficient for the military to call on a group of temporary, highly trained experts in times of war — even if that meant paying them a premium — rather than to rely on a permanent standing army that drained resources (with pension plans, health insurance, and so forth) in times of peace.

²⁸ See chapter three, *Directions for Defense: Report of the Commission on Roles and Missions of the Armed Forces*, 1995, http://www.dod.gov/pubs/foi/reading_room/734.pdf.

In 2002 the U.S. military was planning to dramatically increase its long-term reliance on the private sector. The plan, overseen by then-Army Secretary Thomas E. White, was known as the “Third Wave” within the Pentagon, because there had been two earlier competitive sourcing initiatives. The Third Wave had three purposes: to free up military manpower and resources for the global war on terrorism; to obtain noncore products and services from the private sector to enable Army leaders to focus on the Army’s core competencies; and to support the President’s Management Agenda.²⁹

The initiative came to a temporary standstill in April 2003 when Secretary White resigned after a two-year tenure marked by strains with Defense Secretary Donald H. Rumsfeld. White warned the Department of Defense undersecretaries for army contracting, personnel, and finances that the Army lacked the basic information required to effectively manage its burgeoning force of private contractors. This was clearly evident the following year when the Army told Congress that it had between 124,000 and 605,000 service contract workers. Given that the Army’s best guess of the size of its own contractor force was so imprecise, it is not surprising that the Pentagon as a whole was hard pressed to estimate the numbers of its contract employees in Iraq.³⁰

Thus the government’s reliance on private military industry is not as new as is frequently claimed. Civilians have always been instrumental to military operations and have often been in harm’s way in support of the military.

²⁹ The President’s Management Agenda, announced in the summer of 2001, was a strategy for improving the management of the Federal government. See http://www.whitehouse.gov/omb/rewrite/budintegration/pma_index.html for detail.

³⁰ Dan Guttman, “The Shadow Pentagon: Private Contractors Play a Huge Role in Basic Government Work- Mostly Out of Public View,” *The Center for Public Integrity*, September 29 2004, <http://projects.publicintegrity.org/pns/report.aspx?aid=386>. In 2002, the Secretary of the Army Thomas White wrote that “army planners and programmers lack visibility at the Departmental level into the labor and costs associated with the contract work forces and of the organizations and missions supported by them.”

HOW DID WE GET HERE?

IN THE TWO DECADES SINCE the end of the Cold War, the United States has reserved the right to militarily intervene anywhere in the world. Such interventions, despite the so-called Revolution in Military Affairs that Defense Secretary Donald Rumsfeld championed, are highly people-powered endeavor. Most Americans have never served in the military, however, and many parents discourage their children from joining.

The military has plugged the gap, but is not entirely happy with its dependence on contractors. While military officers recognize that contractors are here to stay, they also recognize the costs and risks, especially in terms of military professionalism.³¹ As Peter Singer of the Brookings Institution noted:

When the U.S. military shifted to an all-volunteer professional force in the wake of the Vietnam War, military leaders set up a series of organization “trip wires” to preserve the tie between the nation’s foreign policy decisions and American communities. Led by then Army Chief of Staff Gen. Creighton Abrams (1972–74), they wanted to ensure that the military would not go to war without the sufficient backing and involvement of the nation. But much like a corporate call center moved to India, this “Abrams Doctrine” has since been outsourced.³²

The end of the draft was also significant in another way. The Report by President Nixon’s Commission on an All-Volunteer Force, which included economists Milton Friedman and Alan Greenspan, conceptualized military service not as a civic obligation or form of national sacrifice but as a manpower and labor issue best addressed through market mechanisms. Conscriptioin, in this context, was seen as an unfair form of in-kind taxation; Friedman even described it as slavery. This delinking of military service from an obligation of citizenship was an important precursor to the rise of military contractors.³³

³¹ Lt. Col. William C. Latham Jr. (USA Ret.), “Not My Job: Contracting and Professionalism in the U.S. Army,” *Military Review*, March-April 2009, pp. 40-49; and Lt. Col Cynthia J. Grey (USAF), *Blues To Civvies: Morphing the Military Profession*, Air University, Maxwell Air Force Base, Alabama, April 2005.

³² Peter W. Singer, “The Dark Truth About Blackwater,” *Salon*, October 2, 2007, <http://www.salon.com/news/feature/2007/10/02/blackwater/print.html>.

³³ For detail on how contractors are denied recognition for their work and sacrifice see Mateo Taussig-Rubbo, “Outsourcing Sacrifice: The Labor of Private Military Contractors,” *Yale Journal of Law & Humanities*, Vol. 2, No 1, (2009) p. 108.

The process accelerated after the fall of the Berlin Wall. After the first Bush and Clinton administrations downsized the U.S. military after the end of the Cold War without scaling back Cold War missions in Europe and Asia, the military turned to the private sector for help to plug the gap.

The end of the Cold War and the U.S. decision to maintain a dominant global military presence gave other states a reason to downsize their military forces, freeing up millions of former military personnel from a wide variety of countries, many of them Western. At the same time, the end of the Cold War lifted the lid on various long-simmering conflicts held in check by the superpowers. PMCs populated by many recently-retired military personnel emerged to fill the void when conflicts erupted. In some cases, critics of UN peacekeeping forces have called for private security firms to take over.³⁴

³⁴ Some examples are Malcom Patterson, "A Corporate Alternative to United Nations *ad hoc* Military Deployments," *Journal of Conflict & Security Law*, Vol. 13, 2008; Lt. Col. Daniel Lachance, *Military Forces For Hire: Is The World Ready To Privatize Peace*, Canadian Forces College, April 29, 2005; Brent M. Jorgensen, and Cdr. Darren M. Garnier, *The United Nations Revolution in Evolution: A Case for Leveraging Private Military Companies in the Management of Future Peacekeeping Operations*, Canadian Forces College, April 26, 2009.

IS CONTRACTING FOR MILITARY SERVICES COST EFFECTIVE?

DEFENDERS OF CONTRACTING for government services contend that the private sector is more cost-effective than the public sector. With respect to the market in private military services, however, there is some reason to believe that outsourcing increases the cost of military functions. There are two major reasons for this. First, a transparent and competitive market is needed, so that clients can pick and choose among different suppliers. Second, contracts must be subject to transparent bidding procedures, competing offers must be systematically compared and the performance of suppliers on the contract terms has to be closely monitored, and, if necessary, sanctioned. Neither of these characteristics seems to apply to current contracting procedures, however. An analysis by The New York Times showed that fewer than half of all “contract actions”— new contracts and payments against existing contracts — are now subject to full and open competition. Just 48 percent were competitive in 2005, down from 79 percent in 2001. Among other findings the Times reported:

Agencies are crippled in their ability to seek low prices, supervise contractors and intervene when work goes off course because the number of government workers overseeing contracts has remained level as spending has shot up. Contracting almost always leads to less public scrutiny as government programs are hidden behind closed corporate doors. Companies, unlike agencies, are not subject to the Freedom of Information Act.³⁵

A separate study found that only 40 per cent of all contracts of U.S.-government agencies (between 1998 and 2003) were subject to bidding. Since then the numbers have only slightly increased. In terms of transparency and oversight, more than 50 per cent of all contracts are not subject to any monitoring to ensure the performance of suppliers with contract terms.³⁶ Thus, the market for private security services is only partially competitive, and in some cases (for example in certain areas of logistics) quasi-monopolistic. The

³⁵ Scott Shane and Ron Nixon, “In Washington, Contractors Take on Biggest Role Ever,” *New York Times*, February 4, 2007.

³⁶ This point and those in the following three paragraphs are taken from Anna Geis and Nicole Deitelhoff. *Securing the State, Undermining Democracy: Internationalization and Privatization of Western Militaries*, Paper presented at the annual meeting of the International Studies Association, New York, February 15, 2009.

champions of the virtues of privatization and outsourcing with respect to the military generally forget one thing: the Pentagon is as far away from a free market as one can possibly get.³⁷

In general, the environment surrounding military interventions is not conducive to cost-savings and efficiency. Warfare is usually characterized by secrecy, heavy time constraints and the imperative of victory. There is hardly time for either complex bidding procedures; transparency is lacking, which makes it difficult to assess contract performance. Furthermore, military commanders prepare for worst case scenarios, thus always having a backup (or two or three) at hand. For the military commander the priority is accomplishing the mission, not saving money.

To the extent that the push toward increased privatization and outsourcing has been driven by considerations of lower cost and greater efficiency problems arise when cost reductions are assumed, or when statistics measuring savings from outsourcing are based on hypothetical projections. It is, in fact, quite difficult to compare the relative cost of private versus public security services.³⁸ Economists disagree on how to solve this problem at least in part because they use different variables. For example, when measuring the savings of using retired special operations forces personnel, how do you factor in the hundreds of thousands of tax dollars used to train these ex-soldiers? Even more difficult can be attaching a dollar value to in-house military services. Since military establishments often have a monopoly on service delivery and information regarding cost, obtaining accurate comparative information is not easy.

Furthermore, cost is not the only way to measure value. Logistics officers often talk about value in terms of cost/speed of delivery/quality of service. If you need it tomorrow in a war zone, you can't expect Federal Express to get it there for you. That affects quality and price. The private and public sectors might and do behave differently.

The drive to shift activities from the public to the private sector for military activities is presumed efficiency. A *New Yorker* article noted:

The notion that government is fundamentally inefficient and unproductive has become conventional wisdom. It has always had a certain hold on the American imagination, but it gained strength with the ascendancy of conservatism in the eighties and nineties. Second, Washington fell for the era's biggest business fad: outsourcing...don only what you do best and pay someone else to do the rest. The

³⁷ On this point see Ivan Eland, *Reforming a Defense Industry Rife with Socialism, Industrial Policy, and Excessive Regulation*, Cato Institute Policy Analysis No. 421, December 20, 2001, <http://www.cato.org/pubs/pas/pa421.pdf>. The Department of Defense used to call its future budget projections the Five Years Defense Plan; only after people noted the parallels to Soviet-era Five Year Plans did the Pentagon change the name to Future Years Defense Program.

³⁸ Robert Burge, a graduate student at the Naval Postgraduate School, observed that "private military operations often cost substantially more than their original estimates," and concluded "It is difficult to argue that private military organizations offer an efficient alternative to traditional state-sponsored military operations." See "Effectiveness and Efficiencies and Private Military Corporations," Naval Postgraduate School Thesis, June 2008, pp. 63, 64.

Pentagon decided that it should concentrate on its core competency “warfighting.”³⁹

But whether ideology is supported by the facts is still an open question.

[Outsourcing support functions is] a tidy picture: the Army becomes a lean, mean killing machine, while civilians peel the potatoes and clean the latrines. But there’s a reason that companies like General Motors existed in the first place. Effective as outsourcing can be, doing things in-house is often easier and quicker. You avoid the expense and hassle of haggling, and retain operational reliability and control, which is especially important to the military. No contract can guarantee that private employees will stick around in a combat zone. After the Iraq war, some contractors refused assignments to dangerous parts of the country. That left American troops sitting in the mud, and without hot food . . .

Outsourcing works well when there’s genuine competition among suppliers; that’s when the virtues of the private sector come into play. But in the market for big military contracts the bidders tend to be the usual few suspects, so that the game resembles the American auto or steel industries before Japan and Germany became major players: more comfortable than competitive. Sometimes the lack of competition is explicit: many of the contracts for rebuilding Iraq were handed out on a no-bid basis. And many of them are “cost-plus” contracts. This means that the contractors’ profit is a percentage of their costs, which gives them an incentive to keep those costs high. That’s hardly a recipe for efficiency or rigor.⁴⁰

While the free market is undoubtedly a good thing it is no insult to Adam Smith’s invisible hand to note that the market for military services is the closest thing to collectivism since the demise of the Soviet Union.

In fact, as P.J. O’Rourke notes in his book on Adam Smith’s *Wealth of Nations*:

Smith understood the potential of privatization: Public services are never better performed than when their reward comes only in consequence of their being performed, and is proportioned to the diligence employed in performing them. But his experience of the corporations that were contracted to perform British government services—such as the East India Company, the Halliburton of its day—left him too skeptical to suggest privatization: “These companies...have in the long-run proved, universally, either burdensome or useless.”⁴¹

³⁹ James Surowiecki, “Army, Inc.,” *New Yorker*, January 12, 2004.

⁴⁰ Ibid.

⁴¹ P.J. O’Rourke, *On The Wealth of Nations*, (New York: Atlantic Monthly Press, 2007), pp. 137-138.

Indeed, even industry insiders acknowledge that the relative value of contracted services is indeterminate. In testimony before the U.S. House Oversight and Government Reform Committee Erik Prince, the founder and head of Blackwater (now Xe) was asked about the cost–benefit of using private contractors:

MR. PRINCE: I don't know what those numbers are, sir, but that would be a great fully burdened cost study that Congress could sponsor. They don't have to do the whole thing, just take some key nodes and really study it.⁴²

⁴² BLACKWATER USA. Hearing before the Committee on Oversight and Government Reform, House of Representatives, One Hundred Tenth Congress, First Session, October 2, 2007, No. 110–89, p. 87, <http://oversight.house.gov/story.asp?ID=1509>.

CONTRACTORS AND TRANSPARANCY

THE DIFFICULTY IN OBTAINING adequate information to judge the cost and efficiency of PMCs stems from several sources. Because many PMC sell their services through the Foreign Military Sales program they should be regulated through the U.S. export control regime, under the jurisdiction of the Arms Export Control Act. While the AECA stipulates that the names of the client countries and the types of defense articles or services involved “shall not be withheld from public disclosure unless the President determines that the release of such information would be contrary to the national interest,” the State Department interpreted this narrowly, and in May 2002 the Justice Department issued new guidelines that allow companies to challenge the release of information to the public under the Freedom of Information Act.⁴³

This lack of transparency and oversight makes it virtually impossible for the public to assess the practice of private military contracting. A regulatory framework that guaranteed adequate executive supervision and congressional oversight would be an improvement. But the level of review and inquiry that either branch gives to licensing decisions under the AECA is unclear.

⁴³ Rebecca Ulam Weiner, *The Hidden Costs of Contracting: Private Law, Commercial Imperatives and the Privatized Military Industry* Paper, International Security Program, Belfer Center for Science and International Affairs, Harvard Kennedy School, December 2008, pp. 10-11.

CONTRACTORS AND THE IRAQ WAR

DESPITE THE LIMITED INFORMATION and conflicting estimates of cost and benefits, contractors and their supporters often claim that they are more nimble and cost-effective than the government. The truth is that nobody knows. But with over six years of contracting experience in Iraq, there is ample evidence to question their claims.

In Iraq, contractors had to contend with the same poor planning that afflicted regular military forces. And while it may be true that the private sector can scale up and adapt faster than the regular military it is also true that the Pentagon's oversight mechanisms has not scaled up as quickly. The shortened time-frame and inadequate oversight resulted in hasty tendering of contracts, which forced both the contracting private military or security firm and the awarding organization to make rash decisions. In addition, those awarding contracts had insufficient information about the companies competing for contracts, and often had little experience of the industry or of their own organizations' security needs.

For the first three years of the Iraq War, the U.S. government had no accurate count of its contractors.⁴⁴ Independent commissions such as the Iraq Study Group and media organizations explored the number of private security firms working in Iraq and Afghanistan. They attempted to identify the number of people employed by these firms and the number who have been wounded or killed. Through this process, we are also gaining a greater appreciation for the costs incurred.

Still, the estimates vary widely. In December 2006 the Iraq Study Group issued a laughably low estimate that only 5,000 civilian contractors worked in Iraq. The same month, however, Central Command issued the results of its own internal review. It concluded that about 100,000 government contractors, not counting subcontractors, were op-

⁴⁴ At that time, the only existing databases for collecting data on individual contractors were the Army Material Command Contractor Coordination Cell (CCC) and Civilian Tracking System (CIVTRACKS). The CCC was a manual system dependent on information supplied to it by contractors. CIVTRACKS accounted for civilians (Department of the Army civilians, contractor personnel, and other civilians deployed outside the continental United States in an operational theater). It was not until May 2006 that the Army Central Command and Multi-National Force–Iraq undertook a new effort to develop a full accounting of government contractors living or working in Iraq, seeking to fill an information gap that remains despite previous efforts.

erating in Iraq.⁴⁵ Reporting a major milestone, the *Los Angeles Times* wrote in July 2007 that the number of U.S.-paid private contractors in Iraq exceeded that of American combat troops. In May 2009 the Pentagon reported that approximately 242,657 contractor personnel were working in the U.S. Central Command area of responsibility.⁴⁶

Of course, even with all these data collection efforts, keeping track of contractors is a challenge because contractors rotate in and out of theater more often than soldiers do. Counting the numbers of contractors wounded and killed is equally difficult. Life in conflict zones is dangerous and foreign contractors, especially security contractors, are especially at risk. If they get killed, their dependents can get insurance, but there will be no letters from a military commander or the president commending them for their service to the country. No chaplain shows up at their door to offer consolation.

As of June 2008 (the most recent reliable numbers available publicly), more than 1,350 civilian contractor personnel had died in Iraq and Afghanistan. About 29,000 contractors had been injured, more than 8,300 seriously.⁴⁷ Those statistics suggest that for every four American soldiers who die in Iraq, a contractor is killed. But these numbers were likely understated, for the data only showed the number of cases reported to the Labor Department, not the total number of injuries or deaths that occurred.

Financial costs are equally imprecise. According to an August 2008 Congressional Budget Office report, U.S. agencies awarded \$85 billion in contracts for work to be principally performed in the Iraqi theater, accounting for almost 20 percent of funding for operations in Iraq. Notably, however, the report did not capture the total share of U.S. spending on Iraq that goes to contractors. It did not include any contracts performed in countries outside the Iraqi theater, so it excluded contracts for weapons manufactured and maintained outside Iraq and its immediate neighbors. It also neglects contracts in the classified intelligence budget of which contractors claim a significant portion.

The U.S. government is reluctant to make information available to the public. From the viewpoint of some in the industry, this is by design. According to Doug Brooks, the President of the International Peace Operations Association, a trade group for contractors, “Of- tentimes, the clients, which is [to say] the state governments, like to control the message going out, and they will tell the company, essentially, you know, ‘If there is a media contact or something, it should come through us’ — which would be the State Department, or [the] Department of Defense.”⁴⁸

⁴⁵ “ISG Blunder: Multiply by 20,” IraqSlogger, December 9, 2006, http://www.iraqslogger.com/index.php/post/102/ISG_Blunder_Multiply_by_20.

⁴⁶ Marc Lindemann, “Civilian Contractors Under Military Law, *Parameters*, Autumn 2007, p. 85; David Isenberg, *Shadow Force: Private Security Contractors in Iraq*, (Westport, CT: Praeger, 2009), p. 9; and *Contractor Support of U.S. Operations in USCENTCOM AOR, Iraq and Afghanistan, May 2009*, http://www.acq.osd.mil/log/PS/p_vault/5A_May_2009_3.doc.

⁴⁷ Steven Schooner, “Remember Them, Too: Don't Contractors Count When We Calculate the Costs of War?” *Washington Post*, May 25, 2009.

⁴⁸ *Shadow Force*, op. cit., p. 12;.

BETTER REGULATIONS NEEDED TO MANAGE CONTRACTORS

THE U.S. ARMS EXPORT CONTROL ACT is a problem in other ways. The AECA was drafted primarily to regulate one-time arms sales contracts. As a result, the Act does not provide adequate mechanisms for ongoing review of a service contract that may last for months or years. The AECA has no provision for enforcing compliance with the contract. Further, the AECA's reporting requirements provide inadequate information for Congress to assess private military service contracts.

Often, the activities of a PMC are closely integrated with the U.S. military, and informal contacts between company employees and their active duty counterparts abound. Close informal contacts between executive branch officials and private contractors, however, cannot substitute for strict accountability to Congress. Critics charge that congressional oversight is cursory at best. But there is a whole network of Congressional committees and agencies overseeing the Department of Defense. When DoD functions are turned over to a contractor, however, oversight falls to a group of civil servants in the federal bureaucracy. Leaders within the private military industry know that there are far too few contracting officers, in general, and the few that there are lack significant experience.

Concerns over accountability and regulation of PMCs must be addressed by better regulations. First, although several new laws and regulations have been passed in recent years, such rules that do exist are often ambiguous. More to the point, the rules are different from those governing the U.S. military forces that PMC personnel work to support. The chaos and confusion of a battlefield is unsympathetic to any confusion over rules. Where U.S. military forces are deployed the military commander needs to have undivided command authority over those military and support forces that are part of his area of responsibility.

Second, some of the recent laws that have been passed to plug loopholes in accountability were vaguely written. For example, as part of the FY 2005 Defense Authorization Act, Congress amended the Military Extraterritorial Jurisdiction Act to apply to civilian employees and contractors of any federal agency or any provisional authority to the extent such employment relates to supporting the mission of the Department of Defense overseas. This was supposed to solve the problem that the original MEJA applied only to offenses committed outside the United States by persons employed by or accompanying the armed forces, thus excluding PMC personnel who worked for the State Department. But the phrasing of the amendment is problematic, leaving undefined how broadly 'supporting'

and 'mission' should be interpreted. Similarly, how does one determine at what point another agency's activities constitute support of the DOD mission?⁴⁹

Third, and perhaps most important, the day to day monitoring and oversight of PMC performance, has been abysmal. Any lingering doubts about the state of contractor management were answered by an Army commission report in November 2007. The independent Commission on Army Acquisition and Program Management in Expeditionary Operations, known as the Gansler report after its chairman Jacques Gansler, identified significant failures in the Army's contracting and contract management. It found that:

- The expeditionary environment requires more trained and experienced military officers and non-commissioned officers (NCOs). Yet, only 3 percent of Army contracting personnel are active duty military and there are no longer any Army contracting career General Officer (GO) positions.
- The Army's acquisition workforce is not adequately staffed, trained, structured, or empowered to meet the Army needs of the 21st Century deployed warfighters. Only 56 percent of the military officers and 53 percent of the civilians in the contracting career field are certified for their current positions.
- Notwithstanding a seven-fold workload increase and greater complexity of contracting, the Institutional Army is not supporting this key capability.
- Notwithstanding there being almost as many contractor personnel in the Kuwait/Iraq/Afghanistan Theater as there are U.S. military, the Operational Army does not yet recognize the impact of contracting and contractors in expeditionary operations and on mission success.⁵⁰

The commission suggested improvements to the Army's contracting procedures, the reorganization of contracting in expeditionary operations and at home, training for contracting activities, and obtaining external assistance to ensure contracting efficiency. The commission further recommended that the Pentagon add up to 2,000 military and civilian contract officers, strengthen the Defense Contract Management Agency, overhaul its personnel system and reform its procurement procedures.

The Bush White House essentially ignored these recommendations; in a few cases, President Bush reversed what minimal safeguards already existed to ensure taxpayer dollars were not wasted. Among the 2887 sections of the FY 2009 National Defense Authorization Act that President Bush signed were provisions, he said, which "purport to impose requirements that could inhibit the president's ability to carry out his constitutional obliga-

⁴⁹ For detail see Marina Caparini, Chap. 12 "Regulating Private Military and Security Companies: The US Approach," in *Private Military and Security Companies: Ethics, policies and civil-military relations*, Eds., Andrew Alexandra, Deane-Peter Baker and Marina Caparini (NY: Routledge, 2008), pp. 171-188.

⁵⁰ *Urgent Reform Required: Army Expeditionary Contracting. Report of the Commission on Army Acquisition and Program Management in Expeditionary Operations*, October 31, 2007, p. 2, http://www.army.mil/docs/Gansler_Commission_Report_Final_071031.pdf.

tions to take care that the laws be faithfully executed, to protect national security."⁵¹ Accordingly, the Bush White House issued a presidential signing statement which waived these provisions.⁵²

Two of those concerned PMCs. Section 851 would have established an independent, bipartisan Commission on Wartime Contracting. This endorsed by the Pentagon's inspector general, who told Congress in a November 2007 meeting, "We're leaning forward in the saddle, we're committed to this."⁵³

Bush also waived Section 842 that would have extended whistle-blower protections to employees of defense contractors, effectively closing off a source of information that uncovered numerous cases of fraud, including that against Custer Battles, the first civil fraud case brought against a U.S. contractor accused of war profiteering in Iraq.

To date, President Obama has not rescinded this waiver.

In short, despite ongoing or planned corrective actions, the contracting system for PMC remains deeply troubled. On June 10, 2009, the congressionally established Commission on Wartime Contracting in Iraq and Afghanistan issued its interim report. It found that "a critical shortage of qualified contract-management personnel in theater and those that are there are stretched too thin. In particular, the process for designating and training contracting officer's representatives to check contractor performance in theater is broken."⁵⁴

With respect to management and accountability issues the commission found that:

- Neither the military nor the federal civilian acquisition workforces have expanded to keep pace with recent years' enormous growth in the number and value of contingency contracts.
- Contract auditors are not employed effectively in contingency contracting [and that]

⁵¹ David Isenberg, "Dogs of War: The importance of oversight," *United Press International*, Feb. 1, 2008.

⁵² "Statement on Signing the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009," 44 WCPD 1346, October 20, 2008. See list of all Bush administration signing statements at <http://www.coherentbabble.com/listGWBall.htm>.

⁵³ Despite the Bush veto the Commission was established per a provision in the National Defense Authorization Act for Fiscal Year 2008. It is mandated by Congress to study federal agency contracting for the reconstruction, logistical support of coalition forces, and the performance of security functions, in Iraq and Afghanistan, <http://www.wartimecontracting.gov>.

⁵⁴ *At What Cost? Contingency Contracting in Iraq and Afghanistan: Interim Report to Congress*, Commission on Wartime Contracting, June 2009, p. 5, <http://www.wartimecontracting.gov>.

- The government still lacks clear standards and policy on inherently governmental functions.⁵⁵

Such findings should prompt the military to learn lessons from past mistakes but there is little evidence that is happening. The commission noted, “As military units withdraw from bases, the number of contractor employees needed to handle closing or transfer tasks and to dispose of government property will increase. Strong government oversight will be required, but preparations for this major shift out of Iraq and into Afghanistan or other areas are sketchy.”⁵⁶

In fact, if every dark cloud has a silver lining, the Iraq war has had the beneficial effect of motivating the United States and other governments to concentrate on proper utilization and oversight of contractors. For example, since the release of the Gansler report the Department of Defense has taken a number of steps to better prepare its forces to work with contractors.⁵⁷ The State Department has also sought to improve its use of private security contractors.⁵⁸

Yet, even though the U.S. government has taken significant steps — such as implementing the Gansler Commission recommendations, expanding the jurisdiction of the Special Inspector General for Iraq Reconstruction (SIGIR), establishing the office of the Special Inspector General for Afghanistan Reconstruction, requiring coordination between the Pentagon, State Department, and the U. S. Agency for International Development on matters relating to contracting in Iraq and Afghanistan, and requiring the Comptroller General to review annually all contracts in Iraq and Afghanistan and report to Congress — there is still room for improvement.

A report by the Government Accountability Office released in April 2009 found that while contractor personnel are a key segment of its total acquisition workforce, DOD lacks critical department-wide information on the use and skill sets of these personnel. DOD also does not track why contractor personnel are used, which limits its ability to determine whether the use of contractors to supplement the in-house acquisition workforce is appropriate. DOD also lacks key pieces of information that limit its ability to determine gaps in

⁵⁵ *Ibid.*, p. 2.

⁵⁶ *Ibid.*, p. 3.

⁵⁷ Moshe Schwartz, *Training the Military to Manage Contractors During Expeditionary Operations: Overview and Options for Congress*, Congressional Research Service, R40057, Dec. 17, 2008. Governmental ability to track contractors has improved with the creation and use of the Synchronized Pre-Deployment and Operational Tracker (SPOT) database. See *Contingency Contracting: DOD, State, and USAID Are Taking Actions to Track Contracts and Contractor Personnel in Iraq and Afghanistan*, GAO-09-538T, April 1, 2009.

⁵⁸ *Status of the Secretary of State’s Panel on Personal Protective Services in Iraq Report Recommendations*, United States Department of State and the Broadcasting Board of Governors Office of Inspector General, Middle East Regional Office, Report No. MERO-IQO-09-01, December 2008.

the acquisition workforce it needs to meet its missions and lacks complete information on the skill sets of its in-house personnel.⁵⁹

A separate report by the SIGIR released that same month, reviewed incident reporting procedures put into place after the shootings of Iraqis by Blackwater in September 2007 and found that the two main databases CONOC (Contractor Operations Cells) and RSO (Regional Security Office) did not capture all reported serious incidents and did not present a complete picture of the serious incidents they are tasked to track.⁶⁰ The SIGIR also identified vulnerabilities in the government's oversight. The most significant was that the experience and training of the contracting officer representatives (COR) were limited, and the time they will have available to devote to their oversight responsibilities for these contracts was insufficient. The report found that the U.S. military lacks the capacity to manage its contractors in a contingency environment. Selecting CORs with limited or no direct contract management experience, providing them on the job training and then assigning them other principal duties, increases the government's vulnerability.⁶¹

In response, the U.S. government has undertaken corrective actions.

⁵⁹ *Acquisition Workforce: DOD Can Improve Its Management and Oversight by Tracking Data on Contractor Personnel and Taking Additional Actions*, GAO-09-616T, April 28, 2009.

⁶⁰ Among the report's findings are: The Armed Contractor Oversight Division judgmentally decides which incidents to track even though it is responsible for ensuring that all serious incidents received by the CONOC are reported, tracked, and investigated. ACOD is applying a more limited definition of a serious incident than the definition contained in MNF-I guidance. MNF-I guidance has a more expansive definition of a serious incident than in Embassy guidance.

ACOD and CONOC have established their own databases even though they are supposed to be tracking the same incidents, although for different purposes. As a result, information for the same incidents is inconsistent, which raises questions about information accuracy.

ACOD has performed analyses but has not developed formal lessons learned even though it is responsible for lessons learned. The limited incidents that ACOD tracks do not represent a complete picture of what PSCs are reporting, and its limited analyses may be impacting its ability to develop lessons learned.

No organization appears to have visibility of subcontractor PSCs, which is a potential gap in PSC incident reporting processes.

Opportunities to Improve Processes For Reporting Investigating, and Remediating Serious Incidents Involving Private Security Contractors In Iraq, Office of the Special Inspector General For Iraq Reconstruction, Report No. 09-19, April 30, 2009, <http://www.sigir.mil/reports/pdf/audits/09-019.pdf>.

⁶¹ David Isenberg, "The Good, and Bad, News on Contractors," *Asia Times*, Apr 29, 2009, http://www.atimes.com/atimes/Middle_East/KD29Ak03.html; and *Need To Enhance Oversight Of Theater-Wide Internal Security Services Contracts*, Office of the Special Inspector General For Iraq Reconstruction, SIGIR-09-017, April 24, 2009.

THE CONTRACTING SEAL OF APPROVAL

PMCs OPERATE WITHIN a somewhat ambiguous legal status under existing international treaties governing armed conflict. The state is the cornerstone of international law, but there is a lack of clarity over the exact relationship between states and PMCs. Such ambiguity leaves companies vulnerable. PMCs are combatants under the Geneva Convention if they bear arms and are clearly working on behalf of one side in a conflict; yet they could also be treated as non-combatants if they do not wear recognizable uniforms or are not under military command.

Beginning nearly three years ago, the Swiss Initiative on Private Military and Security Companies joined with the International Committee of the Red Cross to resolve some of these ambiguities. On September 17, 2008, they released their report which, while not legally binding, recalls existing obligations regarding private security companies during armed conflict and identifies good practices to assist states in ensuring respect for applicable human rights law. The signatories, including the United Kingdom, France, Germany, China and the United States, pledged to promote responsible conduct in their relationships with private security companies during armed conflict.⁶²

The report, often referred to as the Montreux Document, is divided into two sections. The first highlights existing international laws with which such companies should comply. States cannot circumvent their obligations under existing international law by using private military contractors. They have to take appropriate measures to prevent any violations of international humanitarian law and human rights law and to provide the necessary remedies for the suppression of such violations. States are directly responsible for the conduct of contractors if these enterprises act in a governmental capacity.

The second section lists some 70 practices for assisting countries in fulfilling their legal obligations. States are advised to avoid the use of contractors for activities that clearly re-

⁶² On the date of signing other signatories included Afghanistan, Angola, Australia, Austria, Canada, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, and Ukraine. Parts of this section on the Montreux Document are taken from David Isenberg, "Dogs of War: Busting the Unaccountability Myth," *United Press International*, Oct. 10, 2008. See also James Cockayne, "Regulating Private Military and Security Companies; The Content, Negotiation, Weaknesses and Promise of the Montreux Document," *Journal of Conflict & Security Law* (2009), Vol. 13, No. 3, pp. 401-428. For a somewhat self-serving critique of the Montreux document see José L. Gómez del Prado, "Private Military and Security Companies and the UN Working Group on the Use of Mercenaries," *Journal of Conflict & Security Law* (2009), Vol. 13, No. 3, pp. 429 - 450.

quire the use of force. States must assure the good reputation of companies they send abroad, and they are encouraged to create a system of control, surveillance and sanctions in case of breaches. The report stipulates that companies be regulated and licensed, and that personnel from these companies be trained in the rules of international humanitarian law.

This document is important because it reflects the fact that the number of private military and security contractors is growing worldwide (they operate in more than 100 countries around the world) and it reminds states of their international obligations if they contract with such companies.

As the document points out, it is not true that private military companies are operating in a legal no-man's-land. "There are plenty of rules anchored in general international legislation, in humanitarian laws and human rights," notes Paul Seger of the Directorate for International Law at the Swiss foreign ministry. The object is not to ban military companies, Seger explains, but rather "to create model rules of best practice as part of a set of common legal standards of applicable international law."⁶³

A report by the U.S. National Defense University called for the U.S. government to consider additional mandatory Federal Acquisition Regulation clauses that would increase contractor liability for employees, such as:

- Mandating transparent reporting mechanisms for contractors;
- requiring contract employees to abide by international human rights laws;
- improving temporary command and control over contractors in emergency, contingency and combat situations; and
- pursuing debarment of rogue contractor and "black listing" of errant employees from contract operations.⁶⁴

The last clause would help to prevent situations like that of Andrews J. Moonen, a former Blackwater employee. In December 2006, he had been drinking heavily while off-duty, and tried to make his way into the "Little Venice" section of the Green Zone which houses many senior members of the Iraqi government. When stopped by Iraqi bodyguards for Adil Abdul-Mahdi, the country's vice president, he shot one of the Iraqis. Although Blackwater subsequently fired him and shipped him home, less than two months later he was hired by another private contractor, Combat Support Associates to work in Kuwait where he worked from February to August of 2007. Because the State Department and

⁶³ David Isenberg, "Dogs of War: Busting the Unaccountability Myth," *United Press International*, October 10, 2008. For a survey of U.S.: legal regimes applicable to contractors see Kristine A. Huskey & Scott M. Sullivan, *The American Way: Private Military Contractors & U.S. Law After 9/11*. PRIV-WAR Report 02/08, December 2008.

⁶⁴ *Privatized Military Operations*, Spring 2007 Industry Study, Final Report, Industrial College of the Armed Forces, National Defense University, Fort McNair, Washington, DC, p. 9.

Blackwater kept the incident quiet and out of Moonen's personnel records, CSA was unaware of the December incident when it hired Moonen.⁶⁵

⁶⁵ *Shadow Force: Private Security Contractors in Iraq, op. cit. pp. 140-141.*

WHY NOT SELF-REGULATION?

PERHAPS, IN TIME, American PMCs will be able to rely on self-regulation, as their trade associations often call for, through codes of conduct.⁶⁶ The British government recently suggested such an option for its industry.⁶⁷

But now, when PMCs don't even have their own industry-wide standard, is not the time. Jake Allen, a U.S. military veteran who worked as a security contractor in Iraq, and who publishes an e-zine on private contractors wrote:

We are long past self-regulation. We've had ample opportunity to do that in the past decade and we could have done it if we had had real visionary industry leadership as opposed to self-centered corporate greed out to make only fast money at the expense of long-term sustainable revenues."⁶⁸

Given the obvious potential for conflicts of interest, stricter oversight is essential. To continue on our present course, with too little information and inadequate public scrutiny is an invitation to waste, inefficiency, and in extreme cases, outright fraud.

⁶⁶ For detail on the inadequacy of codes of conduct see David Isenberg, "Dogs of War: Codes of Conduct -- Trust but Verify," *United Press International*, January 16, 2009.

⁶⁷ *Consultation Document: Consultation on Promoting High Standards of Conduct by Private Military and Security Companies (PMSCs) Internationally*, <http://www.fco.gov.uk/resources/en/pdf/4103709/5476465/5550005/pmsc-public-consultation>; *Impact Assessment on Promoting High Standards of Conduct by Private Military and Security Companies (PMSCs) Internationally*, UK Foreign & Commonwealth Office, April 2009; <http://www.fco.gov.uk/resources/en/pdf/4103709/5476465/5550005/pmsc-impact-assessment>; and Kerry Alexander and Prof. Nigel White, *The Regulatory Context of Private Military and Security Services in the UK*, PRIV-WAR Report – The United Kingdom, Report 01/09, January 2009, <http://priv-war.eu/wordpress/wp-content/uploads/2008/10/nr-01-09-uk.pdf>.

⁶⁸ Jake Allen, "Self Regulation? Wouldn't That Be Nice..." *The Combat Operator*, April 27, 2009, <http://combatoperator.com/blog/2009/04/27/self-regulation-i-wish>. For Allen's view on how effective self-regulation might work see "PSC Regulation is not that hard..." May 4, 2009, <http://combatoperator.com/blog/2009/05/04/psc-regulation-is-not-that-hard>.

ENABLING BAD POLICIES AND SHIFTING BLAME

TODAY, THE U.S. GOVERNMENT'S growing reliance on contractors constitutes an attempt to circumvent or evade public skepticism about the United States' self-appointed role as global policeman. Viewing PMCs through a market framework focuses attention on questions of efficiency, at the expense of more fundamental considerations about the policy being pursued. The related question of whether force should be used – either by uniformed military personnel or else by private contractors – is often neglected.⁶⁹

In this respect, the low visibility and presumed low cost of private contractors appealed to those policy analysts who favor a global U.S. military presence, but fear that such a strategy cannot command public support. Max Boot, senior fellow for national security studies at the Council on Foreign Relations, has long championed the use of contractors on these grounds. Writing in *The American Interest* Boot explained:

In a perfect world, Congress would bring the size of our armed forces into closer alignment with our massive defense commitments. But our legislature, like most democratic legislatures, is loath to spend what's needed on defense, and it is even more reluctant to conscript its citizens... Just as Victorian parliaments stinted on the size of the British army, forcing reliance on regiments raised in India, so too our Congress will never provide enough uniformed personnel to address every perceived need... Thus, in all likelihood, we will continue to muddle along with a mixture of private and public providers of security services.⁷⁰

⁶⁹ This point taken from Ana Leander, *Chimeras with Obscure Powers: Hybrid States and the Public-Private Discussion*. Presented at the International Studies Association Workshop: The Chimerical States and the Public-Private Hybridization of the 21st Century State, January 14, 2009, New York, p. 12.

⁷⁰ Max Boot, "The Mercenary Debate; Three Views," *The American Interest Online*, May-June 2009, <http://www.the-american-interest.com/article-bd.cfm?piece=597>. See also Max Boot, "Accept the Blackwater Mercenaries," *Los Angeles Times*, October 3, 2007; and Max Boot, "A Mercenary Force for Darfur," *Wall Street Journal*, October 25, 2006.

Governments also rely on contractors in order to shift responsibility and blame for their actions. A state employing contractor personnel to advance its foreign policies faces less international responsibility in terms of attribution than would be the case if it relied on its own armed forces.⁷¹

But states bear responsibility for the actions of contractors they employ. They should not be allowed to evade responsibility, especially with respect to contractors functioning as the equivalent of the states' armed forces. The United States is the world's leading user of private contractors because the U.S. government has assumed the role of guarantor of global stability at a time when the American public is unwilling to provide the resources necessary to support this strategy.⁷² Washington either has to use private contractors to fill the gap between goals and means or else change its goals, and policymakers have shown little interest in the latter.

As the United States relies more heavily upon military contractors to support its role as world hegemon, it reinforces the tendency to approach global crises in a unilateral, as opposed to multilateral manner, further ensuring that the burdens will be carried disproportionately by U.S. taxpayers, and especially U.S. troops.⁷³ Other states have not kept up with the ongoing qualitative changes in the United States military; their armed forces are not readily deployable nor easily interoperable with American personnel and equipment. In contrast, military contractors have not only geared themselves to serving the American marketplace, they have been instrumental in bringing about those changes within the U.S. military. The marketplace, in other words, can often more readily satisfy the United States' operational requirements than can our allies and prospective regional partners.⁷⁴

The use of contractors has other deleterious effects, including the weakening of our system of government. Deborah Avant, a professor of political science at the University of California at Irvine and the Director of International Studies and the Center for Research on International and Global Studies, identifies three features that are common to democracies – constitutionalism, transparency and public consent, and concludes that the use of private security contractors in Iraq had “impeded constitutionalism and lowered transpar-

⁷¹ See Carsten Hoppe, “Passing the Buck: State Responsibility for Private Military Companies,” *European Journal of International Law*, Vol. 19, No. 5, 2008, pp. 989-1014.

⁷² To cite just one example, contractors are playing a significant role in the area of operations of the U.S. military's newest regional command: Africa Command (AFRICOM), established in October 2007, and is responsible for U.S. military relations with 53 African countries; David Isenberg, “Dogs of War: Back to Africa,” *United Press International*, May 30, 2008.

⁷³ For detail see Christopher Spearin, “American Hegemony Incorporated: The Importance and Implications of Military Contractors in Iraq,” *Contemporary Security Policy*, Vol. 24, No. 3, December 2003, pp. 26-47.

⁷⁴ Spearin, “American Hegemony Incorporated”, p. 35.

ency.” She speculates that it had circumvented or impeded “effective public consent.”⁷⁵ Because Congress has less information about and control over the use of contractors than the use of troops, the White House and the Pentagon can rely on contractors to evade congressional (and, indirectly, public) opposition.⁷⁶

PMC employees usually remain outside the formal chain of command and are not allowed to take part in hostilities because they are regarded as civilians under International Humanitarian Law. However, in most of the military interventions today the distinction between frontline and hinterland blurs, bringing PMCs who are most active in logistics, site and convoy security and weapon maintenance ever closer to theater and to an active participation in hostilities. This not only increases risks that they will become a target of military attacks, it also calls upon the regular forces to extend their protection to these companies. Additionally, coordination is needed to prevent conflicts between the regular forces and the PMCs. The increase of so-called blue-on-white fire in Iraq — accidental attacks between U.S. forces and the contractors — indicates how difficult that is.⁷⁷

On a broader level, because the use of PMC receives less attention than the use of regular troops, this reduces the political cost of using force. Bluntly put, if someone is contributing to the war effort but is not on active duty in the U.S. military, nobody beyond his or her immediate family cares if they get killed. By contrast, the death of even a single infantryman or marine routinely winds up on the front page of the major papers.

⁷⁵ Deborah Avant and Lee Sigelman, *What Does Private Security in Iraq Mean for US Democracy?* Paper prepared for the 2009 annual meeting of the International Studies Association, New York, NY 15-18 February, 2009.

⁷⁶ One U.S. military report on the use of DynCorp contractors in Colombia largely confirmed these concerns. The report stated that DynCorp acknowledged the need for more accountability; however, for the interest of its client, the U.S. government, the company preferred to “seek a low profile.” Matthias Boysen, *Private Military Firms as Instruments of U.S. Foreign Policy: The Case of Colombia*, Master’s Thesis, Naval Postgraduate School, June 2007, p. 54.

⁷⁷ See Martha K. Clark, *Soldier & The Contractor: The Interactions of Military & Private Security Company Personnel in The Field of Combat*, Paper prepared for the Annual Meeting of the International Studies Association, Chicago, Illinois, February 28-March 3, 2007.

CONCLUSION

PMCs EXISTED LONG BEFORE George Bush made the decision to invade Iraq and will be around long after the last U.S. soldier is withdrawn from there. Given the U.S. government's heavy reliance on contractors, and the likelihood of a continuing large-scale U.S. military presence in Afghanistan, problems are likely to persist. The thinking reflects a "Doctrine of Necessity: We can't do what we do without them, so therefore we have to have them."⁷⁸

But such thinking is a tautology, not a doctrine. As previously noted it is not always true the use of PMCs is cheaper or more efficient. And the mere fact that PMC activities are legal does not necessarily translate into the legitimacy people accord regular military forces. The use of PMCs by the U.S. government is an inevitable outgrowth, however, of U.S. foreign policy.

Contracting is both part of war and part of maintaining a global military hegemonic presence. Nevertheless, some things can be done to improve the situation, even short of a major revision to U.S. foreign policy. Since the Obama administration took office it has begun efforts to change the culture of government contracting. It introduced a set of reforms designed to reduce state spending on private-sector providers of military security, intelligence and other critical services and return certain outsourced work back to government. It has also pledged to improve the quality of the acquisition workforce, a badly needed and long overdue action.

But further actions can and should be taken. First, the U.S. government should reverse the staff reductions of the 1990s among auditors and regulators. The number of military members who are well qualified in contracting regulations must be increased. If the U.S. military is going to continue to rely so heavily on PMCs, having personnel who are highly qualified in contract management is vital.

But increasing numbers is not enough. A larger workforce requires updated training, and not the kind used for procuring weaponry. Training should include federal acquisition regulations, customer contract requirements, execution and closure. Training should be done in schools, not on the job. The government also needs to incorporate training into the mid-and senior-level leadership and senior non-commissioned officer schools.

⁷⁸ Susan Marble Barranca, *Unbecoming Conduct: Legal and Ethical Issues of Private Contractors in Military Situations*, International Society for Military Ethics Conference, 2009, P. 21, <http://www.usafa.edu/isme/ISME09/Barranca09.pdf>.

Better planning is also crucial. If the government is going to rely on PMCs it must bring them into the planning process. Military staffs should establish contracting planning cells to determine what is contracted and establish the proper command authority before contracts are written, much less before contractors arrive in the field. Classifying service providers, although difficult, is also necessary, because classification aids the planning process.

The government also needs to take steps to better enforce existing laws. The best way to accomplish this is to target PMC bottom lines. If a for-profit company were to lose money as a result of its employees' behavior, it will have more incentive to ensure its employees perform according to legal standards and contractual obligations. The Pentagon should establish contract teams consisting of legal, acquisition and inspection personnel. Legal members should be judge advocate general (JAG) equivalents. Acquisition members should have an MBA or equivalent level of education.

As PMCs are not directly responsible under international law for wrongful acts of their employees one could work to establish international norms that any wrongful act or omissions of PMCs should be attributed to organizations under whose authority they operate and which are under the overall control of the organization. This would be similar to the level of control that organizations have exercised over peacekeepers where it is accepted that acts of soldiers can be attributed to the institution.⁷⁹

PMCs themselves should take additional actions. For example, they would do well to properly pre-screen far more people than they currently do. The murder of two of his colleagues by a security contractor working for the British PMC ArmorGroup in August 2009 emphasized the need for proper vetting.⁸⁰

Ironically, in September 2004 ArmorGroup, published a white paper arguing that companies offering armed guards abroad should be vetted under the United Kingdom's 2001 Private Security Industry Act. At that time only companies offering services within the country were covered by the law.⁸¹

Christopher Beese, director of ArmorGroup International, said:

"It seems extraordinary that the doorman for a nightclub, catering for a particular clientele in a particular part of town may have to be vetted and licensed, when the same man can be equipped with a rifle and an armoured vehicle and be engaged to protect diamond concessions for a foreign regime in clear breach of

⁷⁹ For detail see Nigel D. White and Sorcha MacLeod, "EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility," *European Journal of International Law*, Vol. 19. No. 5, 2008, pp. 965-988.

⁸⁰ Michael Gillard, "MAD, BAD OR JUST DANGEROUS TO KNOW?" *The Sunday Times*, August 16, 2009.

⁸¹ Thomas Catan, "Call to vet security companies working overseas," *Financial Times*, September 29, 2004.

public interest and perhaps even in contravention of human rights, but needs no such regulation.”⁸²

The industry needs to ensure that every armed guard is fully informed regarding the level of risk associated with their employment, as well as the terms and conditions of their contracts. If industry is truly serious about being able to self-regulate itself this is a minimum requirement.

PMCs can also increase their credibility by having external actors endorse their codes of conduct. Currently that is a weakness of the code of the International Peace Operations Association, one of the industry’s better known trade groups.

Similarly, more internal investigations and audits need to be conducted by or on behalf of outside actors, particularly governments, not the companies themselves. To that end they could use the same standards and practices used by various Inspector Generals, If the Inspector General Act was used as a model, a private entity could provide oversight for PMCs. Given that the government has essentially resigned itself to continued dependence on PMCs this could actually provide more accountability.

Effective accountability demands greater transparency. The current practice where PMCs and their subcontractors under government contract refuse to make internal records public under the excuse that they are “proprietary” should end.

The existence and widespread use of PMCs reflect important underlying questions regarding the U.S. role in the world, which the public has chosen not to face, namely the mismatch between U.S. geopolitical ambitions and the resources provided for them. Putting aside all the arguments about presumed cost-effectiveness or organizational flexibility of the private sector, it seems likely that if a nation can't summon public support for its policies, strategies and goals, it probably should revisit its goals. People who want to argue about the use of contractors should begin their critiques by examining the inescapable disconnect between ends and means.

⁸² “Regulation—an ArmorGroup Perspective,” ArmorGroup International plc, September 27, 2004: A statement of its position on the regulation of Private Security Companies (“PSCs”) and Private Military Companies (“PMCs”) that are based in the United Kingdom and operate in areas of diminished law and order and civil strife around the world, <http://www.privatemilitary.org/industrydocuments.html>.



Private Military Contractors and U.S. Grand Strategy

The debate over whether and how to utilize private military contractors (PMC) often seems like childish name calling, e.g. "You're a mercenary." Such rhetoric is silly and prevents people from facing underlying realities.

What nobody wants to discuss is that the U.S. government's huge and growing reliance on private contractors constitutes an attempt to circumvent or evade public skepticism about the United States' self-appointed role as global policeman. The U.S. government has assumed the role of guarantor of global stability at a time when the American public is unwilling to provide the resources necessary to support this strategy. Private contractors fill the gap between geopolitical goals and public means.

As the United States relies more heavily upon military contractors it reinforces the tendency to approach global crises in a unilateral, as opposed to multilateral manner. U.S. use of PMCs is inevitable until people grasp the key point: contracting is both part of war and part of maintaining a global military hegemonic presence.

Such a policy is not without problems. As Adam Smith wrote in the Wealth of Nations about his experience of the corporations that were contracted to perform British government services — such as the East India Company, the Halliburton of its day, left him too skeptical to suggest privatization: "These companies... have in the long-run proved, universally, either burdensome or useless."

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