

Student Paper

Supervision without Vision: Risk Governance and PMSCs

Lucas Roorda*

1. Introduction: contemporary security governing and PMSCs

On May 15th, 2011, the New York Times reported that Eric Prince, the former CEO and founder of Blackwater Worldwide – now Xe Services – had been hired by the United Arab Emirates (UAE) to set up an 800-man strong, independent battalion of foreign troops.¹ The report stated that ‘The force is intended to conduct special operations missions inside and outside the country, defend oil pipelines and skyscrapers from terrorist attacks and put down internal revolts, the documents show. Such troops could be deployed if the Emirates faced unrest in their crowded labor camps or were challenged by pro-democracy protests like those sweeping the Arab world this year.’ While the UAE did not comment on the actual existence of the battalion, it did confirm hiring Prince to provide ‘operational, planning and training support’ to its military.² Coincidentally, these reports came only ten days after Prince’s former company, Xe Services, reported that it had attracted former US Attorney General John Ashcroft as its independent ethics advisor.³ According to the company, Ashcroft was hired to head its subcommittee on governance, ‘which will maximize governance, compliance and accountability’ and ‘promote the highest degrees of ethics and professionalism within the private security industry’.

These three reports bring forth two points about the contemporary private security industry: one, that even a rich and relatively powerful oil-state like the UAE has to rely on private forces to ensure its internal and external security problems, and that it is apparently more efficient to hire private services than to invest in strong state security forces. Two, that the branch of private security providers offering such services has become so respectable, that it is accepted that a former US Attorney General is employed by one of these companies – even one that has come under scrutiny after multiple instances of misconduct and even possible human rights violations. Moreover, the reports provide some evidence of how intricately the private security industry and governmental security interests have become interwoven. Of course, many other examples of this interrelatedness can be named, such as private involvement

* This paper is an adapted version of the research project by Lucas Roorda (e-mail: l.roorda@students.uu.nl) entitled ‘Supervision Without Vision’, which was completed at the Utrecht University School of Law, Utrecht (the Netherlands) on 29 September 2011 under the supervision of Dr. C.M.J. Ryngaert.

1 M. Mazetti & E.B. Hager, ‘Secret Desert Force Set Up By Blackwater’s Founder’, *The New York Times*, 14 May 2011, available at <<http://www.nytimes.com/2011/05/15/world/middleeast/15prince.html?scp=1&sq=erik%20prince&st=cse>> (last visited 29 September 2011).

2 M. Mazetti & E.B. Hager, ‘United Arab Emirates Confirms Hiring Blackwater Founder’s Firm’, *The New York Times*, 15 May 2011, available at <http://www.nytimes.com/2011/05/16/world/middleeast/16prince.html?_r=1> (last visited 29 September 2011).

3 J. Epstein, ‘John Ashcroft to advise Blackwater on Ethics’, *Politico*, 4 May 2011, available at <<http://www.politico.com/news/stories/0511/54283.html>> (last visited 29 September 2011).

in combating Colombian drug cartels⁴ and police training in Kosovo.⁵ Each of these examples shows the involvement of private military or security companies (PMSCs)⁶ in a situation short of actual combat, working closely together with one or more governments on the territory of the state where the security problem is situated.

PMSCs have become an important factor in modern conflict, and much has been written about the consequences of these private soldiers for the enforcement of the law of war, whether they violate prohibitions on mercenaries and their status under humanitarian law. Other questions that have been dealt with by legal scholars are criminal liability for individual contractors for violations of humanitarian law or human rights law, monetary compensation for victims and state responsibility for the actions of PMSCs. One of the major lacunae amongst the various literature, however, is the involvement of private security providers in situations such as the above – situations where the law of war is not applicable, but may involve the use of force and have far-reaching consequences for security provision in that specific situation. This article argues that the role played by PMSCs within those situations has become far more important than the role they play in times of war. Moreover, very little attention has been paid to the restructuring of the security industry as a whole, and the formation of security networks. In these networks, the state is no longer the sole security provider, but merely one actor in a chain of actors collectively responsible for security provision. While such network models have become commonplace in national and international security as well as in other policy areas, international law has very little to say about the mutual responsibilities of the actors within such a network. As corporations – like most non-state actors – remain outside the scope of international law,⁷ most international regulation concerning security focuses on the state. This article will argue that a thorough analysis of the networking model will show the inadequacies of international regulatory schemes for the security industry.

The main question is, of course, why is it important to recognize the networking model as a mode of governance, in order to regulate PMSCs at an international level? To answer this question, this article will discuss five sub-questions, divided into two parts. The first part will consist of an analysis of the PMSC industry, and discuss how the industry is built up, and how the different companies that form the industry can be classified. Secondly, this part will discuss how the risk society and subsequently the risk commodification and risk aversion culture have changed the security sector, especially from the state's point of view. This chapter will explain why, as in the example above, states increasingly rely on private actors to deal with security problems, rather than establishing their own security forces. Lastly, the first part will discuss how the network model can be used to describe the security industry, and how the different actors within that model – such as states, international organizations and private companies – interrelate. The second part will discuss both the national and international legal arrangements that govern the private security industry, specifically focusing on the state control of security provision. The article will then conclude by answering the question at the beginning of this paragraph, and make some recommendations towards future legislation.

2. A multifaceted industry

2.1. Outline

This first section aims to outline the transformation PMSCs have undergone, and the way their role has developed from the role of a military auxiliary to an independent security provider within a network of

4 F. Brancoli, 'A New Security Dilemma: Plan Colombia and the Use of Private Military Companies in South America', *International Affairs at London School of Economics*, 16 November 2010, available at <<http://blogs.lse.ac.uk/ideas/2010/11/a-new-security-dilemma-plan-colombia-and-the-use-of-private-military-companies-in-south-america/>> (last visited 29 September 2011).

5 D. Isenberg, 'PMSC Challenges in Kosovo', *Huffington Post*, 25 January 2011, available at <http://www.huffingtonpost.com/david-isenberg/pm-sc-challenges-in-kosovo_b_813826.html> (last visited 29 September 2011).

6 For the purpose of clarity, this paper will use the term PMSC. Other sources cited in the paper may use different terms, such as Private Military Firm (PMF), Private Security Provider (PSP) or Private Military Company (PMC). Except when noted, these different terms should be read as describing the same companies.

7 *Legal consequences of the construction of a wall in the occupied Palestinian territory*, [2004] ICJ Reports, p. 136; see for an extensive discussion F. Green, 'Fragmentation in Two Dimensions: The ICJ's Flawed Approach to Non-State Actors and International Legal Personality', 2008 *Melbourne Journal of International Law* 9, pp. 47-77.

other market players. This transformation is not so much visible in the services PMSCs provide, as those do not differ much from those offered by the first 'regular' PMSCs; rather, it is demonstrated through the structural changes in the security market. As this section will argue, the security sector is changing rapidly under the influence of neo-liberal modes of governing. While this model has already become a panacea for other markets, its influence in the market for security and risk reduction is only comparatively recent. Neo-liberal forms of governing are different from 'classic' liberal modes of governing in that they move from simple state-to-company privatization to forming networks of actors concerned with the provision of a good or service. Under the old model, the state still had a role in demarcating the playing field in which the private actors can operate, and through directly outsourcing certain activities formerly performed by the state itself. As will be shown later on, it is this model upon which much current legislation concerning PMSCs is based.

The neo-liberal governing model is structured in a very different way. Instead of having private actors operating under either the auspices of the state or the invisible hand of the market, the market takes on the shape of a network consisting of several links or 'nodes'. Several authors, such as the criminologist Clifford Shearing and the political scientist Rita Abrahamsen, argue that this networking model is much more useful for explaining social structures that have to adapt quickly and flexibly to new developments within the field. Their arguments will be discussed later. In this model, the state is still an important player, but it is no longer the central hub where the rest of the structure is centred around. This model thus means a larger, more independent role for private actors such as PMSCs, next to the state, NGOs and international organizations.

Altogether, this section will argue that the PMSC business has changed according to three factors: (1) the gap in the market for force and specifically for risk reduction, caused by the modern political attitude towards risks, (2) the shift towards so-called 'new wars', blurring the distinction between the actual armed conflict and post-conflict phase, and (3) the aforementioned change in governing models towards a network structure, as applied to the security sector. Neither of these factors is new or unique in its effect on the security sector. Rather, they are new trends in processes that can be retraced to before the end of the Cold War, commonly seen as the starting point for modern PMSCs. What is new about these factors is the pace in which they have developed under the influence of the neo-liberal mode of thinking. Thus, this section will be more concerned with a structural view of PMSCs than with specific examples of activities and incidents.

2.2. PMSCs: origins and taxonomy

As Kateri Carmola argues, there are different stories as to the origins of PMSCs, although they probably all contain part of the explanation.⁸ This immediately points to the main issue in retracing the origins of PMSCs and classifying the various activities undertaken by them: there is little data available on how many firms are actually operating in the security sector, and how their activities are divided up amongst them. The PMSC business operates globally, with different types of firms operating from different host states and employing personnel drawn from all parts of the world.⁹ This distribution is uneven, dependent on local factors such as national history and the political climate. Most PMSCs currently operate from the US and the UK, followed by Germany, France, Israel and formerly South Africa. The rate at which the industry has developed within these states varies, even though the business itself is inter-related through subsidiary companies and sub-contracting. This adds to the lack of reliable data. As a consequence, different authors employ different systems of classification, corresponding with different explanations of the origins of the PMSC industry. These different classifications, their merits and corresponding activities will be discussed below.

What is certain is that corporate civilian contractors have worked with state armies at least since the Vietnam War. PMSCs provided logistic support to the US military, eventually employing some 9,000 civilian contractors.¹⁰ Their corporate form and limitation to logistics and supplies distinguished them

8 K. Carmola, *Private Security Contractors and New Wars*, 2010, p. 40.

9 N. Deitelhoff & K.D. Wolf, *Corporate Security Responsibility?*, 2009, p. 182.

10 B. Sheehy et al., *Legal Control of the Private Military Corporation*, 2009, pp. 12-13.

from the mercenaries of the late 1960s and 1970s in post-colonial Africa. While both the US and the UK viewed the presence of civilians in military support roles as an illegal subset of mercenary action, these operations helped establish and legitimize the military contractor business.

2.2.1. Historical developments and PMSCs

As most commentators on PMSCs commonly assume, the main catalyst for the growth of PMSCs was the end of the Cold War. Sheehy et al. cite three interrelated developments that took place after the Cold War that had a direct effect on PMSCs.¹¹ These three broadly correspond with the three factors of PMSC transformation outlined above. Those three are the surplus of military personnel and equipment after the downsizing of several national armies, the export of the liberal privatization model and the overall increase in the privatization of government functions, as well as the increase in regional conflicts. To those one may add the decreased political interest in those regional conflicts, and a category of local political developments, such as the end of South Africa's apartheid regime. Of course, these dynamics fed off and enhanced each other.

The general narrative, common to the analyses of Sheehy et al.,¹² Avant,¹³ Singer¹⁴ and Kinsey¹⁵ is that the end of the Cold War marked the end of hyper-militarization, and reduced the need for large land-based armies. Both the US and the UK, as well as the Soviet Union, started to radically downsize their military personnel, reducing to an average of two thirds of their former size. The US army, for example, currently numbers around 580,000 active duty personnel,¹⁶ compared to 780,000 at the beginning of the first Gulf War.¹⁷ The downsizing operations also led to a large amount of equipment being sold off, especially by former Soviet states. Carmola notes that employment studies of former military personnel show that many have difficulty being re-employed, and many aim to work in either training or military support to use their skills to the fullest.¹⁸ These men formed the main recruitment base for PMSCs, both in the 1990s and today. A specific example is that of South Africa, where former apartheid security forces and special police units were dismantled and formed the base of a highly specialized branch of PMSCs.

The availability of labour force on the security and military market was paired with large-scale privatization of former government functions, now imposed on the security sector and exported to other states. This was influenced by the assertion that these functions can be more efficiently handled on the market. The benefit from the perspective of the state was twofold: outsourcing security, intelligence and training meant vast cost reductions for the military, complementing the downsizing process the state had already engaged in. Secondly, privatization was supposed to lead to much more efficient solutions to security problems, as different parties on the market had to compete for government contracts.

Lastly, the end of the respective spheres of influence of both superpowers during the Cold War meant a declining interest in regional affairs, especially in sub-Saharan Africa. The resulting power vacuum spawned a series of regional, often inter-ethnic conflicts, such as in Sierra Leone, Angola, Nigeria and the DRC. Both the Russian Federation and the US actively disengaged from these conflicts, and 'Lacking determined international action in the form of direct intervention from the West, less powerful and developed nation-States could not guarantee their own security, nor provide for and raise effective national armies against intra-state wars and internal civil wars.'¹⁹ This development was enhanced by negative public reactions on the American interventions in Somalia and Yugoslavia, further eroding political support for military action in localized conflicts. Moreover, these regional conflicts are often blurred in terms of inter-state/intra-state distinctions, citizen/combatant distinction, and most of all whether they

11 Ibid.

12 Ibid.

13 D. Avant, *The Market For Force*, 2005.

14 P.W. Singer, *Corporate Warriors: The rise of the privatized military industry*, 2003.

15 C. Kinsey, *Corporate soldiers and international security: the rise of private military companies*, 2007.

16 US Department of Defense, Active Duty Military Personnel Strengths by Regional Area and by Country, updated December 31, 2010, available at <<http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/hst1012.pdf>> (last visited June 3, 2011).

17 J. Cilliers, 'A role for private military companies in peacekeeping?', 2002 *Conflict, Security and Development* 2, no. 3, pp. 145-151.

18 See Carmola, *supra* note 8, p. 42.

19 S. Goddard, 'The private military company: A legitimate entry within modern conflict', a thesis presented to the Faculty of the U.S. Army Command and General Staff College, Fort Leavenworth, Kansas 2001, p. 5, available at <<http://www.globalsecurity.org/military/library/report/2001/pmc-legitimate-entity.pdf>> (last visited 29 September 2011).

actually pass the threshold of armed conflict. They create a demand for security, both by states engaged in such conflicts as well as by companies and individuals, such as oil companies, diplomats and NGOs. As such services are no longer offered by stronger states, a new market for PMSCs has emerged. The presence of PMSCs in these situations has also been stimulated by host states such as the US and the UK. While these states disengaged their armies from the conflicts, they still have some interest in regional stability. Licensing PMSCs to operate in these areas thus serves their own purposes as well.

2.2.2. Services and taxonomy

Because the privatization trend has been so comprehensive, contemporary PMSCs offer a wide range of services, encompassing virtually every aspect of modern conflict. These services include logistics support, training, facility protection, private protection, intelligence gathering and in some cases even combat support. Nevertheless, this range accounts for the whole industry, not individual companies. Not every PMSC covers all these services, as some companies are highly specialized in one or another, while others take a more comprehensive approach to include all-in packages for potential clients. This also means that not every PMSC is directly involved in the use of force, and for those which are, the examples range from non-lethal use of force from a defensive perspective, to lethal use of force in offensive operations. Moreover, the difference in tasks may also depend on the respective clients, as weak states often seek PMSC services for combat support, while stronger states hire PMSCs for more auxiliary services – which may, incidentally, also involve the use of force.²⁰

Consequently, there is a need for a ‘taxonomy’ of the PMSC industry, to properly differentiate between different companies and the services they provide. One widely accepted classification scheme is offered by Peter W. Singer, using the ‘tip of the spear’ metaphor.²¹ Singer divides PMSCs into three categories: (1) Military Provider Firms, firms that supply goods necessary to the conduct of war and provide logistic support. One example of such a firm is Halliburton subsidiary Kellogg, Brown & Root, which provides services like laundry, catering and construction materials. These firms are usually the furthest away from combat participation, and their personnel are unarmed, putting them at the base of the spear in Singer’s metaphor. The second category is the Military Consulting Firm (2). These firms, including the aforementioned MPRI and Aegis Security, offer services such as training, operational planning and advice, and intelligence gathering. While still unarmed and not directly involved in combat, these companies are closer to the actual execution of plans and can have a significant impact on a conflict. Even the US relies extensively on private firms for training and consultancy. The last category (3), the Military Support Firm, offer services most directly related to combat, such as armed security, escorting convoys and in some cases independent combat operations. Examples include the now defunct Executive Outcomes, Sandline Ltd., Blackwater and DynCorp.

As Sheehy notes, Singer’s classification scheme has quite some merit to it.²² It shows at a glance the different levels at which PMSCs function, the way in which those levels are related and share characteristics, the gradual progress towards battlefield proximity and the functional criteria upon which PMSCs can be classified, explained and regulated. Understandably, several other authors have put forward similar functional classifications,²³ some more or less identical to Singer’s, others more detailed. Still other functional schemes include a differentiation between firms employing personnel that are nationals of parties to the conflict, and firms that employ third states’ nationals.²⁴

The downside of these classification schemes, however, is that lucidity also implies reducing the complex nature of the industry and a certain rigidity in applying the classification logic. Thus, Singer’s scheme as well as other classifications omit several parameters of PMSC activity. First of all, both the ‘tip of the spear’ metaphor and subsequent schemes do not account for firms that provide services along the whole spectrum of violence. PMSCs may easily switch from consultancy to the actual operation of

20 See Sheehy et al., *supra* note 10, p. 16.

21 See Singer, *supra* note 14.

22 See Sheehy et al., *supra* note 10, p. 18.

23 See J.R. Davis, *Fortune’s Warriors*, 2002 and Kinsey, *supra* note 15.

24 D. Isenberg, *A government in search of cover. Private military companies in Iraq*, in S. Chesterman & C. Lehnardt (eds.), *From mercenaries to market: the rise and regulation of private military companies*, 2007, p. 83.

weapons systems. Moreover, the distinction between logistics provision and combat support is often artificial, as logistics and intelligence become increasingly interwoven with the actual use of force. More importantly, the specific tasks fulfilled by PMSCs are only part of the overall taxonomy of the industry. Other relevant factors are the extent to which the tasks PMSCs take on are actually outsourced by the state, and what shape that privatization is taking, as well as the degree of control states can exert over PMSC actions. One classification scheme that does take these factors into account is the model put forward by Schreier and Caparini, distinguishing PMSCs through the different parameters involved in privatization: scope, form and function.²⁵ While lacking the elegant brevity of Singer's classification, it shows that it is not necessary only to include the activities PMSCs engage in, but the background of the privatization initiatives by states that characterize the private security industry can also be considered. This article follows Schreier and Caparini's approach insofar as, rather than solely relying on a functional taxonomy of PMSCs, it aims to demonstrate how PMSCs relate to core state functions and the influence of different models of government. Considering the flexibility PMSCs have demonstrated in adapting themselves to changing circumstances, it is more important to look at the outsourcing agent, namely the state. After all, PMSCs follow the market logic of providing services where a demand exists. The next section will discuss the social and political modes of thought that have shaped the security industry beyond the point of strict classification.

2.3. Risk prevention and reduction as a commodity

One way to understand the complexity of security privatization and the relationship between the state and private security providers is through the lens of the risk society. Like the outsourcing and deregulation trend described above, the risk society is not a new concept, nor is it exclusive to the security sector. However, like the general outsourcing trend, its implications for the security industry have only come to prominence comparatively recently. The prevention and distribution of risk as a good or commodity have come to play a central role in the politics of security, fundamentally changing its character. Moreover, as will be argued later, the influence of privately-owned business on the risk discourse alters the way society sees risks, and how both the state and the individual come to bear responsibility for mitigating their consequences and strengthening the security sector itself. In generic terms, the risk society refers to a worldview wherein society is defined by risks, which can be defined, quantified and managed. It is important to note that 'risk' is not synonymous with 'danger'; it is not just the factual threat to personal safety, it is a method of thinking about and dealing with that threat. In that sense, risk is a concept of prevention or precaution²⁶ rather than of restoration,²⁷ providing a backdrop for governance strategies.

2.3.1. Welfare and the creation of the risk society

The risk society does not necessarily deal with external threats, such as scarcity or natural disasters: risks are a product of the creation of wealth. Beck argues that the industrial societies, by and large situated in the west, have managed to solve the scarcity problem – at least, for themselves – through heavy industrialization, associated technological development and global production mechanisms.²⁸ While there is still a major inequality between the 'first' and 'third' world, the problem of scarcity is losing its urgency: as Beck notes, in most Western societies, more people are obese than hungry. As a consequence, a paradigm shift is taking place from a society preoccupied with scarcity, to a society preoccupied with the side-effects of the solutions to that scarcity. The side-effects of wealth production are well known: industrial manufacturing leads to pollution, energy consumption depletes the stocks of fossil fuels and over-medication contributes to the development of diseases highly resistant to antibiotics. Within the risk society, they are no longer unintended or secondary byproducts of the solution to a larger problem, but the primary problem itself.

25 F. Schreier & M. Caparini, 'Privatising Security: Law, Practice and Governance of Private Military and Security Companies', 2005 Geneva Centre of the Democratic Control of the Armed Forces (DCAF), Occasional Paper No. 6, p. 41, available at <http://www.dcaf.ch/content/download/34919/525055/file/op06_privatising-security.pdf> (last visited 29 September 2011).

26 The fundamental difference between prevention and precaution will be discussed below.

27 R. Abrahamsen & M.C. Williams, *Security Beyond the State: private security in international politics*, 2011, p. 78.

28 U. Beck, *Risk Society*, 1992, p. 20.

In other words, every process that manages or mitigates scarcity or external dangers itself creates a new risk that needs to be identified and managed. This leads, in a term coined by Anthony Giddens, to a reflexive modern society;²⁹ it is now primarily occupied with itself and its own products.³⁰ That does not mean that pre-modern societies were not exposed to dangers and risks, or did nothing to identify and protect against them, but these risks were of a different nature. The first major difference lies in the causes and consequences of modern risks. In pre-modern societies, the effects of man-made risks were mostly personal:³¹ their consequences affected mostly those who entered them. The new category of risks carries global consequences, often affecting states or individuals that have little influence on the causes of that risk. The best example is air pollution: even countries without major polluting industries suffer from declining air quality and its effects on plant and animal life.

This example notwithstanding, the causes of and responsibility for these global risks are also spread out amongst different actors – they are inherent in the globalized economy that characterizes late-modern societies. Indeed, even a state with no polluting industry of its own contributes to air pollution by importing goods produced by pollutant industries abroad, thus forming an integral part of the structure that as a whole creates risks. Every actor that contributes to a global economy that produces these risks carries a certain amount of responsibility for its manifestation. Lastly, the factual consequences of modern risks are beyond human capacity to control. By their nature, they affect all forms of life, the foundations of the economy, and the cohesive society itself.³² The effects of nuclear disasters or climate change are far beyond human capacity to control, and are capable of doing long-lasting and irreversible damage to our environment.

The other fundamental difference that characterizes the risk society paradigm is the preoccupation with risk awareness. In pre-modern societies, large risks such as natural disasters or epidemics were attributed to higher powers, beyond man's capacity to handle or mitigate; one could call this a 'danger', its causes and effects being largely unknown. Transforming a certain danger into a 'risk' means applying mathematical or statistical tools to quantify the probability of it happening, and qualify the consequences of its manifestation. The uncertain pre-modern dangers were characterized by unpredictability and indeterminacy; the application of statistical and mathematical tools changes uncertainty into something quantifiable.³³ Calculating the risk through a mathematical probability test opens up ways to insure and protect against that risk, instead of attributing it to something outside individual or governmental control. Carmola dubs this view of risk management the early-modern to modern strategy of dealing with risks.³⁴ Businesses can insure against factory accidents and possible loss of profit, societies at large insure themselves against security threats such as crime or war by buying into the state's coercive powers. Each of these management tactics is preceded by a calculation of the probability of a certain event, the costs of its effects manifesting, and thus the financial sacrifice one is prepared to make to avert these consequences.

The problem of the late-modern risk society, as opposed to the modern society securely situated in between the scarcity and risk paradigms, is that this practice of risk identification and mitigation itself creates a new sensation of uncertainty. The modern obsession with risk and its calculable nature brought to light a new category of risks that sprung from the same processes used to deal with previous risks. These 'new' risks have three main features: they have a low probability to the point of being immeasurable, they pose grave dangers affecting all of society if they ever manifest, and they are caused by a chain of events involving multiple actors. Examples of such risks are nuclear disasters, climate change, deforestation, the fossil fuel crisis and, most relevant for the security sector, globalized terrorism. The more one focuses on these risks, the more one is confronted with their incalculable and elusive nature, and the more one's risk assessment tools seem inadequate. Against these events, there is hardly any insurance or mitigation possible.

29 A. Giddens, *Modernity and Self-Identity: Self and Society in the Modern Age*, 1991.

30 See Beck, *supra* note 28, p. 20.

31 *Ibid.*, p. 21.

32 *Ibid.*, p. 22.

33 See Carmola, *supra* note 8, p. 72.

34 *Ibid.*

To take the example of nuclear disasters, nuclear plants are often not privately insured; partially because the probability of an accident is largely unforeseeable and thus not fit for economic calculation, partially because the costs of such an accident are far beyond those which any private insurance company can bear. Similarly, the costs of global terrorism are both invisible and unwieldy for the modern nation state. Moreover, any attempt to mitigate such a threat leads to yet another side-effect or risk: tools for combating terrorism erode privacy and trust in public security, abandoning nuclear power increases reliance on polluting fossil fuel, and so forth. Late-modern risk reflection sends its societies into an endless loop of risk prevention and creation. Our obsession with calculating risks of the modern industrial society has left us no coping mechanisms for incalculable risks of the late-modern reflexive society. The more we focus on risks, the more insecure we become, leading to Giddens³⁵ 'ontological insecurity'. Consequentially, the late-modern risk society is permanently looking for new mechanisms to cope with risk.

2.3.2. Risks or opportunities?

Beck himself notes that modern risks have five fundamental capacities that determine the social discourse of the risk society: (1) because of their incalculable and partially unknowable nature, risks are open to social construction and selection.³⁶ Most of these risks are beyond everyday experience, and elude the direct perception of most people – for them, they exist in theory only. This leaves space for experts on certain issues or other elites to frame these risks, or as Lupton says, 'It is rarely lay people who play a major role in the construction of risk objects at the level of public debates.'³⁷ When the reality of incalculable risk eludes even expert analyses, it is especially hard for the general public to challenge assessments of risk. As will be argued later, certain organizations will focus on specific risks, often to their own benefit.³⁸ Such a focus will thus be inherently biased, with the construction of a certain risk based upon the interests and convictions of any given actor. This works even more so for society at large, or as Douglas and Wildavsky note, 'We choose risks in the same package as we choose our social institutions. Since an individual cannot look in all directions at once, social life demands an organization of bias.'³⁹

This means that (2) there is an inequality in how risks are socially distributed. As some are more adversely affected by risks, new social classes emerge based on risk vulnerability rather than wealth. Because the consequences of risks can strike globally and unpredictably, this development acts globally and without regard for existing social structures; it creates inequalities between first and third world states, as well as among first world states. Nevertheless, the redistribution of risk consequences is often enacted in favour of stronger actors, be it social elites or first world states. This is because (3) risks also provide business opportunities. Pre-existing power structures reinforce themselves by adapting to the risk distribution problem, and previously acquired wealth can work to buy off certain risks. Of course, the social definition of risk means that the risk society contains winners – those with the least vulnerability to that constructed risk – and losers – those with the most – and an exchange of resources between the two. It is important to again emphasize the role of the social construction of risk, and the inherent bias in that construction: risk definition will often serve to protect institutions of value within a society. Because the actual risk will never really be eliminated – there is no such thing as zero risk – the market for risk reduction is one of insatiable demand. Moreover, as the actors involved in the reduction of risk are also those involved in its construction, it is a market that sustains itself. The more security providers emphasize the possibility of personal security, the more they create the image that there is actually a need for it.

More than anything, (4) knowledge of risk determines power hierarchy within the risk society. Because risks are not quantified and possessed like wealth and resources, knowledge becomes the main 'currency' – rather than actual control over risks and consequences, knowledge and awareness structure the political debate on risks. This being the case, the political aspect of risk management (5) increasingly penetrates the private sphere, especially the business side of the global economy. As businesses are an integral part of the industrialization that contributed to the formation of risks, risk management is also

35 A. Giddens, *The Consequences of Modernity*, 1991.

36 See Beck, *supra* note 28, p. 23.

37 D. Lupton, *Risk*, 1999, p. 32.

38 See Carmola, *supra* note 8, p. 80.

39 *Ibid.*

concerned with eliminating causes of risk in the production process. Private responsibilities become part of the public debate, and their potential catastrophic outcome cause public concern. Environmental problems are retraced to polluting factories, and crime is retraced to inadequately secured premises. This dynamic works both ways: individual risk management becomes part of the public concern, while at the same time public representatives can be held accountable for problems that originated in the private sphere. As Beck notes, the essence of the risk society is the 'reorganization of power and authority'.⁴⁰

2.3.3. Commodification and risk

Despite Beck's own assessment of the risk society providing ample opportunity for social construction, risk framing and the protection of private interests, he insists that this only concerns a transitory phase. At the time of *Risk Society*, originally published in 1987 and in English in 1991, he argues that even post-industrial Western societies have not yet fully shifted from the scarcity paradigm into the risk paradigm. The five characterizations of the risk society outlined above are mostly valid when it comes to the early stages of that shift, when the implications of global risks are only imperfectly understood. In time, modern reflexive societies have to look for cross-boundary solutions to understand and deal with global risk. Beck later returns to this argument for cosmopolitanism in *The Cosmopolitan Vision* of 2006.⁴¹ Krahmman notes that it appears that Beck is influenced by the German response towards the so-called 'Waldsterben': a massive bipartisan political response to pollution problems in the forests of southern Germany.⁴² This largely governmental response is not mirrored by other states currently under the influence of the risk paradigm, such as the US and UK, where the public-private divide is different from Germany. Therefore, while Beck's analysis is useful in describing the lens through which security provision is seen, one has to look beyond that analysis to see how the sector has shaped itself with regard to risk management.

Most notably, both in *Risk Society* and *World Risk Society*, Beck fails to see the implications of private actors for maintaining and shaping the risk discourse. As mentioned, the definition of risks creates an almost insatiable demand for risk management solutions. This definition is allowed because the true nature of the risks is unknown and incalculable, leaving space for the construction of risks. The private security business has grasped this opportunity by contributing intensively to the risk discourse. Many of them carry names referring to risk, such as 'Control Risks Group', 'Risks Incorporated' and 'Global Risk Solutions'. As Krahmman notes, the potential range of unknown risks is infinite, as they mostly exist in our imagination – thus creating the perfect opportunity for private actors to point to the manifold risks out there and the need for private risk management. Risks are politicized, not just by governments for policy reasons, but by corporations for profit. Security companies constantly emphasize new vulnerabilities in a business, a 'changing risk profile'⁴³ and the importance of regular check-ups. Moreover, as risk assessment is hard for the layman to grasp, even potential clients have a hard time evaluating whether a risk has been accurately taken care of without professional advice. This leads to the paradoxical situation that when a government that does not take adequate measures to control crime gets voted out of office, but a private security provider that convinces his client that he is still at risk gets hired for even more security.⁴⁴ Moreover, successful risk management means that nothing actually happens. Whether or not a security provider actually contributed to that nothing happening is difficult, if not impossible to measure.⁴⁵

It has to be noted that these discursive strategies of both governments and private security providers mask the fact that the providers do not actually deal with the causes of modern risks in the way Beck envisioned. Instead, collective risks are dissolved into individualized risk packages that can be micro-managed by the security industry. The reason why such a strategy is interesting for private actors is twofold: for one, private actors are usually ill-equipped to deal with the actual economic and political backdrop of a problem. The risks they manage are a byproduct of globalized production, beyond the

40 See Beck, *supra* note 28, p. 23.

41 U. Beck, *The Cosmopolitan Vision*, 2006.

42 E. Krahmman, 'The Commodification of Security in the Risk Society', 2008 University of Bristol CGIA Working Paper no. 06-08, p. 7, available at <<http://www.bristol.ac.uk/spais/research/workingpapers/wpspaisfiles/krahmann0608.pdf>> (last visited 29 September 2011).

43 *Ibid.*, p. 22.

44 *Ibid.*, p. 30.

45 Y. Heng, 'The "Transformation of War" Debate: Through the Looking Glass of Ulrich Beck's *World Risk Society*', 2006 *International Relations* 20, No. 1, p. 78.

capacity of a separate company. Secondly, it is economically unprofitable to concern one's business with the actual causes at large of a certain risk. Not only are these causes generally spread out globally and thus not manageable for one company or even a string of companies, such a solution would be undermined by the free-rider problem. Dealing with the actual causes of a risk benefits everyone, even those who did not buy into the solution in the first place. If risk is individualized and bought off, every client has a stake in buying a separate security package, making it much more profitable for the security industry. This is again a difference from the state's centralized approach to risks, in which everyone 'bought into' solutions to risks through taxes and their participation in society, preventing a free-rider problem.

Furthermore, the private security industry concerns itself mostly with risk mitigation or precaution, instead of prevention. Prevention implies taking away the causes of a certain risk, so that the risk will not manifest itself. As Beck notes, the private industry is more concerned with the consequences, or what he calls 'the symbols and symptoms of risk'.⁴⁶ Merchant ships carry armed guards against pirates, vehicles are armoured against IEDs and government personnel are trained in self-defence against personal attacks. Each of these activities does not reduce the threat itself: they only mitigate the impact of the consequences, thus acting only in a precautionary fashion. These mitigation activities lend themselves better for commodification and transfer than actual risk reduction because, unlike the risk itself, they are calculable. Thus, they form the basis of a 'risk economy' where risk is defined by individualized consequence packages that can be made into a commodity, given a price tag, transferred and bought.

The willingness of private security providers to engage in this risk economy is further supported by the political individualization trend when it comes to private security interests. As mentioned, modern security strategies have relied heavily on buying into the state's ability to provide safety and security for all, through policing and border protection. The neo-liberal thinking model has shifted the responsibility for personal security onto the individual. As Press notes, while the risks outlined here are of collective origin and only make sense at societal level, the symptoms of those risks are highly individualized. Looking at PMSC advertising, one can see constant emphasis on the individual risks companies or persons may experience, and that those risks are unique even for similar businesses. At a governmental level, this discourse is sponsored by the philosophy that individual risks are no longer a collective responsibility, and that each individual becomes responsible for his own security.⁴⁷

2.4. From auxiliaries to networks

2.4.1. Risk reduction and risk aversion in new wars

As individual responsibility for risk reduction is promoted, the question is why those actors that formerly provided security are now retreating from managing collective risk problems. With regard to security provision in conflict areas, that role was and still is that of the military. If that is the case, and if states have it in their capacity to deal with the causes of risk without encountering the free-rider problem, why have state armies retreated from their role of primary risk managers? While the problem partially lies in the attitude towards the individualization of risk as described above, it also relates to the increasing aversion to risk within the military. This aversion, in turn, goes back to the changing nature of interventions and the increasing tendency to describe these interventions along the lines of risk and risk management.

To properly assess the military's changing attitude towards risk, it is first important to emphasize the different dimensions to military risks. It stands to reason that the main category of risks is physical risks – extensive combat casualties. The political risk, however – changes to the political order as a result of shifting public opinion – play an almost equally important role. Within this broader definition of risk, Shaw posits that the contemporary Western approach to conflict is to minimize the amount of Western casualties, and thus the amount of risk, as much as possible.⁴⁸ The implication of the political element is that within the definition of casualties, some count heavier towards the manifestation of a political risk than others. Specifically, wounded soldiers count more than wounded civilians. As mentioned in the

46 See Beck, *supra* note 28, p. 22.

47 See Krahmann, *supra* note 42, p. 23, citing Thatcher that one might '[blame] a large proportion of crime on the victims' carelessness.'

48 M. Shaw, *The New Western Way of War: risk-transfer and its crisis in Iraq*, 2005, p. 71.

first section, the assumption is that this casualty aversion comes from the public response to war deaths. Recent polls, however, show that the actual situation is more complex.⁴⁹

As Heng notes, war in a risk society perspective has a more proactive element to it than wars of the industrial age.⁵⁰ Military intervention can be translated as a risk-averting strategy by taking care of a certain risk (terrorism, weapons of mass destruction, natural resource conflicts) before it manifests itself. However, at the core of these 'precautionary' conflicts is exactly the sort of minimalist attitude towards risk management that proscribes extensive risk acceptance by the military. If the core of these interventions is a 'safety first' logic, then this logic will penetrate into every aspect of the operation. Possible security hazards are identified and assessed, and have to be mitigated even before they actually realize themselves. One strategy has been to structurally increase the dependence upon technology to avert the risk to personnel. Nevertheless, the operation and maintenance of this technology requires more specialized personnel to avoid technology breaking down and exposing weak points in the system.⁵¹ These personnel, in turn, have to be fed, housed, trained, and most importantly, guarded. Performing these tasks themselves would once more expose the military to risks they feel are not necessary to take – making them ideal activities for private partners to engage in.

Paradoxically, while the military try to shape their interventions in a risk-neutral fashion, the complexity of their operations increases. At the core of contemporary conflicts, or 'new wars', is a blurred distinction between combatants and civilians on both sides. As the Iraq war demonstrates, the period immediately after the initial conflict turns out to be the most deadly, as it escalates into guerilla warfare where civilians become insurgents at any given time. On the other hand, taking up the task of transforming a society still in the middle of an insurgency means that civilian jobs become intertwined with security provision, military support and police training. Moreover, increased dependence on technology also means increased dependence on civilian engineers; engineers that have to be housed, fed and guarded. These two aspects taken together result in the type of conflict where the military becomes aware of a vast expansion of risks to itself and its personnel. Moreover, as argued before, private causes of global risks have come to the public domain, and the state is becoming responsible for the manifestation of risks originating in the private sector. As a result, the military becomes part of an intensive public-private effort to control every possible risk,⁵² a task which it is neither prepared nor willing to take. In such an environment, repackaging certain risks and outsourcing them to private actors becomes an attractive option.

2.4.2. Networking models, nodal structure and security assemblages

The model of the risk society helps explain and understand the worldview that stands at the base of contemporary models of governance. The risk society changes modern governance from a state-centred world preoccupied with solving scarcity problems through globalization, to a society dominated by mitigating the risks of the by-products of globalization. Spreading the consequences of risks amongst different responsible parties has become the dominant governance strategy, giving opportunities to the private sector, and the private security sector specifically. As explained above, the attitude of private security contractors towards risk is a somewhat ambiguous one, as is that of the military. To maintain Schreier and Caparini's parameter model, risk aversion and dispersion are a general manifestation of the *purpose* of privatizing security.⁵³ Whatever the particular motives of the security provider, the state seeks to outsource its security activities in order to spread responsibility.

The implication of this conclusion is that in the security sector, the state operates in conjunction with private actors to provide security instead of alone. The question of how that cooperation takes shape sees to the *scope* of security privatization. The security sector does not operate solely as an auxiliary or junior partner of the state, nor is it entirely separate from it in some sort of independent private enclave.⁵⁴

49 See Carmola, *supra* note 8, p. 91.

50 See Heng, *supra* note 45, p. 71.

51 *Ibid.*, p. 76.

52 See Shaw, *supra* note 48, p. 80.

53 See Schreier & Caparini, *supra* note 25, p. 49.

54 See Abrahamsen & Williams, *supra* note 27, p. 80.

In fact, as Abrahamsen and Williams correctly state, the modern security sector is a highly pluralized environment, best viewed as a network of different actors. While Schreier and Caparini refer to ‘top down’ and ‘bottom up’ models of security provision,⁵⁵ contemporary security networks are in fact neither. The problem with networks is that they cannot be viewed in terms of hierarchy: they exist by virtue of a fragmentation of authority amongst state and non-state actors.⁵⁶ Again referring to Krahmman, security according to the network model has shifted from government to governance. The question of how that network functions is then more accurately phrased as how any one actor can manage the network, or rather his place within it, rather than how one can govern it.

One supposed model for analyzing security networks is the model of nodal governance, as put forward by Les Johnston and Clifford Shearing.⁵⁷ Nodal governance models are essentially born out of necessity, for competing models of government do not adequately reflect factual security arrangements on the ground. The Westphalian, state-centric model has been discussed here before, and its inadequacies will probably be familiar. Notions of citizenship as the dominant affiliation have started to lose their strength, and both political and economic globalization have expanded security issues to beyond the state’s grasp. The latter problem of course relates to the emergence of global risks from the previous section. Realizing the paradoxical weaknesses of a strong state, several states responded by resorting to a model of ruling at a distance.⁵⁸ The government hands over the implementation of its policies to private actors under bilateral public-private arrangements. Under this model, several states have outsourced parts of their security tasks to private actors, as was referred to in the introduction. One may note its influence on PMSC taxonomy discussed in Section 1.2, where PMSCs are classified according to their respective activities. It is also this model that dominates the debates on the regulation of PMSCs, focusing on private actors performing singular governmental objectives. As Shearing correctly notes, the model of ruling at a distance fails on three different levels: it does not account for autonomous objectives of the contractor – in other words, it is a one-way outsourcing model. Secondly, it assumes clarity in the outsourcing party’s objectives, which might not be the case. Lastly, it disregards the presence of other parties concerned with the provision of security, and the mutual relationships between them.⁵⁹

The nodal model of governance takes a somewhat in-between view, building upon a networked structure of security. The ‘nodes’ in this model are, according to Les Johnston, ‘sites of knowledge, capacity and resources that function as governance auspices or providers.’⁶⁰ They form essential junctions in a network where individual security providers function as links. The important difference with either the state-centred model or the distant governance model is that in a nodal structure, no set of nodes is given conceptual priority.⁶¹ This means that at a given time, any one part of the network might play the dominant role, which in some cases means that the state is not the most important security provider. Thus, other nodes do not function under the direct auspices of the state, as was the case in the distant government model. That does not mean that the state is no longer an important player, or even the most important player; states are still vast bases of knowledge and capacity when it comes to providing security. Consequently, the state will almost always play an important role within a security network.⁶² The difference is that they now work in conjunction with a network of private actors like PMSCs, local governance agents not primarily linked to the centralized state, NGOs, and even international organizations.

2.4.3. Security assemblages

In a way, the networking model mirrors the way the security risks of the previous section are composed. Transnational terrorist networks do not follow the logic of a single, hierarchical command, but are built out of several autonomous entities. Especially in areas of armed conflict, such as Iraq, the threat consists

55 See Schreier & Caparini, *supra* note 25, p. 41.

56 See Krahmman, *supra* note 42, p. 31.

57 C. Shearing & L. Johnston, ‘Nodal Wars and Network Fallacies: a genealogical analysis of global insecurities’, 2010 *Theoretical Criminology* 14, no. 4, pp. 495-514.

58 *Ibid.*, pp. 497-498.

59 C. Shearing & J. Wood, ‘Nodal Governance, Democracy and the New “Denizens”’, 2003 *Journal of Law and Society* 30, no. 3, pp. 406-408.

60 See Abrahamsen & Williams, *supra* note 27, 84.

61 See Shearing & Wood, *supra* note 59, p. 404.

62 See Abrahamsen & Williams, *supra* note 27, 85.

of loosely affiliated organizations such as former Ba'ath forces, foreign terrorist cells, organized crime and even local corporations. Another example would be the ongoing conflict in the DRC, where local warlords, defected government institutions and natural resource companies form a *de facto* war economy. These networks are constantly changing, with continuously shifting alliances. The network itself is not dependent on the presence of one or more actors; it exists autonomously and can expand or decline over any given period of time. Moreover, as the Iraq example shows, these networks are not contained to a certain geographical area: any link in the network can be geographically distant from the actions on the ground, yet be an important connection within the network. It makes sense for security providers to form a similar network to combat this threat. In fact, in international police cooperation, such networks already exist, consisting of local law enforcement, federal agencies, supranational organizations such as Interpol, internal regulative bodies in specific business sectors such as finance, and private security firms.⁶³ Each of these actors possesses a certain amount of knowledge and capital that makes it important within the network.

Nevertheless, the way the model is presented makes it appear as if the nodal security model has transferred authority and responsibility for security issues into the hands of private actors. This is supposed to be the result of deliberate movements of states, based upon neo-liberal modes of thought. While that might be the case in some situations, one might argue that what actually happened is the recognition of already existing *de facto* security governance structures, giving them the legitimacy they formerly lacked.⁶⁴ This argument goes back to the response of insurance industries to the emergence of global risks: spreading the risk to themselves by outsourcing security and protection where the state fails. As Wood and Shearing note, this is more in conformity with the broader development of the public/private discussion that has dominated governance models in the late 20th century.⁶⁵ As will be discussed below, privatization initiatives in the UK and the US demonstrate that networking structures and public-private partnerships in security provision amount to a transfer of governmental powers to actors that already have those capacities, rather than the creation of a new actor. Through redefining security and risk aversion as an individual responsibility, states have empowered private actors within the network through legitimizing their existence and actions. Again, rather than being a desperate resort due to a lack of power, the privatization initiative has been a deliberate move by states inspired by a political model.

The way the network takes shape in the security sector is described by Abrahamsen and Williams as a 'global security assemblage'.⁶⁶ Within this assemblage, power, knowledge and capital are distributed over a series of actors, both public and private, to create a governing network semi-independent from the nation state. Global corporations and private security providers play a central role in these assemblages. One such example is the resource extraction industry in Nigeria's Niger Delta. Although this region is rich in oil, few of its rewards have benefited the local population, sparking continuous unrest and local eruptions of violence. The Nigerian government has comparatively little control over the region, as it is constantly on the brink of civil war without actually passing the threshold of armed conflict. As a result, the oil extracting companies increasingly rely on private security firms for safety and protection, both in the role of guards and as consultants on fortifying the installations and the housing for their personnel. As Abrahamsen and Williams note, almost 100,000 people currently work in Nigeria's private security industry.⁶⁷ By law, these contractors have to be unarmed. However, they work in close cooperation with heavily armed Nigerian special police units, who work under the guidance of the PSCs and receive the bulk of their wages from the oil companies – all with the consent of the Nigerian government, which sees a steady income flow in from the oil companies. At the same time, using PSC consultants to guide armed police is cheaper for the companies' insurance, compared to the possible loss of oil and installations due to local uprisings. It is a perfect example of how Western-based oil companies, the insurance industry, Western-licensed PMSCs employing local guards, and various levels of public authorities work together

63 N. Gerspacher & B. Dupont, 'The Nodal Structure of International Police Cooperation: an Exploration of Transnational Security Networks', 2007 *Global Governance* 13, pp. 347-364.

64 Shearing & Wood, *supra* note 59, p. 403.

65 Shearing & Johnston, *supra* note 57, p. 510.

66 R. Abrahamsen & M.C. Williams, 'Security Beyond the State: Global Security Assemblages in International Politics', 2009 *International Political Sociology* 3, p. 9.

67 *Ibid.*

in a security assemblage. Of course, the profit made within this assemblage largely surpasses the population.

2.5. Conclusion: the new industry

The Nigerian example is a perfect example of both the structure of the PMSC industry, its relation to governments and also its problems. First of all, it demonstrates that the conception that states have receded from the security business, leaving gaps for the private sector, is erroneous; or at least, incomplete. States have not so much given up on their role; they have redefined it by shifting from being a prime provider and regulator to a manager and partner for private corporations. This development is a product of a conscious choice by states, as a way of dealing with the complexity of the globalizing risk society with which they have been faced. It also implies that the image of PMSCs operating in legal vacuums, immune from state interference, is also false. Both in Nigeria and Iraq, PMSCs have been able to establish the positions they have because it benefits the states that hire them, taking on individualized risk symptoms. They do not perform their activities despite state regulations; they perform them because of such regulations. Moreover, they work as but one extension of the extensive public-private cooperation between states, their citizens, the insurance industry and company interests. One particular role the state has played in this cooperation is legitimizing its operations. As far as the state is concerned, transferring the responsibility for mitigating risk through insurance and security provision is not a public concern, and the state should sponsor solutions that promote individual caretaking of their own risks. While the effects of this mode of thinking is most clearly visible in states that lack a strong state apparatus to begin with, its origins lie in stronger, often Western states and the outsourcing of governmental functions, without re-establishing control through regulation.

3. State-centric regulation and political incentives

3.1. Regulation: a matter of focus and culture

As mentioned above, the risk aversion culture has strongly impacted the debate on regulating private security services. To examine the differences between states offering and contracting such services and to show the impact of the networking model, this section will first examine how national regulatory schemes have changed since the emergence of the private security industry in the 1970s. Although, as stated in the first section, PMSCs are now present in states ranging from the USA to former Soviet States, Western Europe, Israel and South Africa, this section will look at the two states that have the largest private security industry: the United States and the United Kingdom. The second reason for choosing these two states is that the privatization debate has been conducted most explicitly in these two states. One might argue that the neo-liberal mode of thought and the risk aversion culture described in Section 2 originated in the 1980s in these two states, prompting the development of the network model. Describing the legal developments in the US and the UK will reflect most accurately the privatization debate discussed above. This section will show that legislation within these states has been largely a matter of shifting focus, mostly driven by policy needs, rather than by a comprehensive debate on which security responsibilities can be privatized. This is, of course, backed by a culture of risk aversion and efficiency resonating in the lack of political will to re-establish some form of state control over PMSCs. This part will not discuss private or criminal liability for private security actions, but only focus on state control.

The second part of this chapter will be an outline of how these national developments resonate in the international sphere. As with the first part, this part will focus on state control of the use of force and international sanctioning of the PMSC industry, and not on criminal liability or compensation for violations of international law. As will be argued below, until the signing of the Montreux Document, no international regulation existed that covered PMSCs. The main reason for this legal vacuum was the exclusive political focus on mercenaries in sub-Saharan Africa and neo-colonialism, rather than private control of force in general. As PMSCs are hardly equitable with 1970s individual mercenaries, existing legal provisions do not cover them. While the Montreux Document does address PMSCs and gives some clarity in this field, it still does not deal with the question of which services may and which may not be

privatized. Concluding, this section will state the reasons why international law fails to grasp the national tendency to move towards a security network, and thus remains inadequate in dealing with PMSCs.

3.2. National regulation and licensing: governing at a distance

3.2.1. The USA: managing murky waters and hidden objectives

As mentioned above, the US hosts the largest private security sector, and has done so since the Vietnam era. Even before the end of the Cold War, private contractors accompanied US forces in a variety of roles into the combat theatre. At the moment, between 190,000 and 196,000 contractors – of which 38,700 are US nationals – are estimated to be working in Iraq, divided over more than 100 US companies.⁶⁸ These companies altogether execute contracts worth some \$85 billion, 20 per cent of the total military spending on the Iraq war.⁶⁹ Various successions of neo-liberal modes of thinking under four different Presidents, from Reagan to Bush, have narrowed down the definition of ‘inherently governmental services’ to include almost nothing, outsourcing almost everything.⁷⁰ Even though the OMB circular A-76 listed several activities that would not lend themselves for the private sector, the example of counterintelligence gathering is telling. While enumerated in the A-76 list, by 2006, almost 70% of counterintelligence gathering was run by private companies and managed by the Department of Defense (DoD). The extent to which contractors are involved in the daily operation of the US military invokes the image of the military not as a supplier of services, but in some areas more as a manager. Like the UK below, the US has changed its privatization focus to create long-lasting partnerships with private actors, splitting responsibilities over infrastructure and the procurement of both capital and knowledge.

It stands to reason that the US regulatory scheme is more sophisticated and developed from other PMSC-hosting states, as the US has over time come across the pitfalls of security privatization before other host states have. Indeed, the US has both a specific regulatory system for the export of military and security goods and services, which includes PMSCs, and a network of laws making civilian contractors potentially liable under US law. One would assume that these schemes together create a comprehensive system of governmental control and accountability for US PMSCs. Nevertheless, it has often been US PMSCs that are the subject of controversy and legal debate, be it the activities of DynCorp in Bosnia and Herzegovina,⁷¹ the involvement in Croatia by MPRI,⁷² or the shooting of 17 unarmed civilians in Nisoor Square by Blackwater employees.⁷³

Like all arms and security services exporters, PMSCs are subject to the licensing system of the US Arms Export Control Act⁷⁴ (AECA) and its implementation through the International Traffic in Arms Regulations (ITAR).⁷⁵ This scheme requires every company exporting military goods or services abroad to obtain a licence from the State Department for its operations.⁷⁶ Nevertheless, while this process aims to set uniform standards for and ensure the reputability of the companies the US is engaged with, the departments controlling the PMSC contracts change from contract to contract, as the contracts are awarded by the DoD, the State Department and intelligence agencies alike. The input upon which the licence is awarded consequently varies, and it is unclear to both the companies themselves and observers how

68 K.A. Huskey & S.M. Sullivan, ‘The American Way: Private Military Contractors & US Law After 9/11’, 2009 *Priv-War Report*, National Report Series 02/08, p. 6 available at <<http://priv-war.eu/wordpress/wp-content/uploads/2009/05/nr-02-08-usa.pdf>> (last visited 29 September 2011).

69 Ibid.

70 E. Krahnemann, *States, Citizens and the Privatization of Security*, 2010, p. 126.

71 D. Isenberg, ‘It’s Déjà Vu for DynCorp All Over Again’, *Huffington Post*, 6 December 2010, available at <http://www.huffingtonpost.com/david-isenberg/its-dj-vu-for-dyncorp-all_b_792394.html> (last visited 28 September 2011).

72 M. Thompson et al, ‘Bosnia, Generals for Hire’, *Time Magazine*, 15 January 1996, available at <<http://www.time.com/time/magazine/article/0,9171,983949,00.html>> (last visited 28 September 2011).

73 ‘Iraqi Official: Blackwater Implicated in second shooting September 16’, *CNN World*, 1 October 2007, available at <http://articles.cnn.com/2007-10-01/world/iraq.blackwater.secondshooting_1_nisoor-square-blackwater-convoy-blackwater-contractors?_s=PM:WORLD> (last visited 28 September 2011).

74 Arms Export Control Act (AECA), 22 U.S.C. § 2778 .

75 International Traffic in Arms Regulations (ITAR), 22 CFR § 120.1 .

76 O.R. Jones, ‘Implausible Deniability: State Responsibility for the Actions of Private Military Firms’, 2008-2009 *Connecticut Journal of International Law* 24, p. 253.

the process exactly works.⁷⁷ Moreover, not only is there little oversight between governmental departments over the contracts, congressional control over the contracts is also sorely lacking. Under ITAR, the government is not required to notify or acquire permission from Congress for a defence contract worth under \$50 million. As Avant notes, most contracts stay under that amount, and larger contracts can be split up and redistributed to make each sub-contract remain below that limit.⁷⁸ In the end, there is no centralized database that monitors the contractors or the requirements they have to fulfil in order to obtain licences, and whether such licences run contrary to either US foreign policy or international agreements. While the President does have the power to terminate these licences under AECA, the lack of oversight, uniform standards and close ties to parent companies of PMSCs, such as Halliburton, will often prevent him from doing so.

Furthermore, the system only provides for licences for contractors themselves, not the individual activities they engage in. After awarding the licence, there is little or no oversight or enforcement mechanism to ensure that the company's operations live up to the same standards as the company appeared to do during the licensing process.⁷⁹ The UK government realized this when discussing the US licensing system in its Green Paper on PMSCs, stating that a licensing system for individual companies only works fully if it is accompanied by extensive policing and enforcement of these licences.⁸⁰ As of now, the US licensing system works as a kind of endorsement mechanism for PMSCs to operate abroad, as if it were a stamp of approval – even when a particular PMSC activity may not be approved by the State Department. The other side of this problem, as Sheehy notes, is that the State Department may use its licensing power as leverage to get PMSCs to conform with its foreign policy objectives.⁸¹ In such cases, the licence to operate abroad may only be awarded when the PMSC commits to performing certain activities, which may range from protecting strategic interests to human rights training. One might argue that this is the major benefit of a licensing system, namely employing state power and endorsement capacities to influence PMSC behaviour without directly assuming control over the operations.

Next to the licensing regime, the US has a number of laws in place that aim to ensure liability for misconduct by private contractors by extending jurisdiction for military personnel to PMSC personnel. As Carmola notes, domestic prosecution of PMSC personnel can be done pursuant to two legal regimes: the Military Extraterritorial Jurisdiction Act of 2000 (MEJA)⁸² and the amended Uniform Code of Military Justice (UCMJ).⁸³ The MEJA, in short, establishes domestic jurisdiction for any civilian accompanying the US military, including PMSCs. The MEJA was borne out of a jurisdictional gap between the armed forces and civilian contractors, manifest after a case of child abuse on a US army base.⁸⁴ Nevertheless, the MEJA is a partial solution. It only appears to apply to civilians working on US military bases or in front-line situations, not to civilians working on their own. Moreover, it only applies to contractors working for the DoD or the State Department, not to contractors with intelligence agencies or private businesses. Lastly, it only applies to US citizens, not to citizens of receiving states or third states.⁸⁵ Consequently, the MEJA has no bearing on roughly 80% of US-hired contractors in Iraq. One can also easily imagine ways to devise contracts not subject to MEJA jurisdiction, especially considering PMSCs that do not actually accompany the military into combat. These deficiencies show: as of 2009, only one case had been brought under MEJA jurisdiction that concerned a DoD contractor, for possession of child pornography⁸⁶ – a serious offence, but unrelated to PMSC activities.

The application of the UCMJ is characterized by similar problems. While initially only applicable to military personnel, the UCMJ was extended in 2007 to include civilian contractors outside of war,

77 D.D. Avant, 'Privatizing Military Training', 2002 *Foreign Policy In Focus* 7, No. 6, p. 2.

78 *Ibid.*

79 See Sheehy et al., *supra* note 10, p. 130.

80 United Kingdom Foreign and Commonwealth Office, *Private Military Companies: Options for Regulation*, HC 577, 2002.

81 See Sheehy et al., *supra* note 10, p. 130.

82 Military Extraterritorial Jurisdiction Act of 2000 (MEJA), 18 U.S.C. § 3261, 3267.

83 Uniform Code of Military Justice (UCMJ), 64 Stat. 109, 10 U.S.C. § 47.

84 See Carmola, *supra* note 8, p. 114.

85 P. Jenkins, 'How To Clear Up Blackwater: Bringing Effective Regulation to the Private Military Industry', 2009 *Temple International and Comparative Law Journal* 23, no. 1, p. 197.

86 J.K. Elsea, 'Private Security Contractors in Iraq and Afghanistan: Legal Issues', Congressional Research Service, no. 7-5700, 7 January 2010, p. 28, available at <<http://www.fas.org/sgp/crs/natsec/R40991.pdf>> (last visited 29 September 2011).

through an amendment of Senator Lindsay Graham. The amendment changed the reach of the UCMJ to situations from declared war, to include 'contingency operations'.⁸⁷ The background of the Graham amendment appears logical, in the words of Sen. Graham, 'this will bring uniformity to the commander's ability to control the behavior of the people representing our country'.⁸⁸ What the amendment did not do, however, was to clarify which civilians would be included in the UCMJ jurisdiction, whether it would include non-US citizens, and how the jurisdiction could be enforced without direct command and control by the military commander on the ground. Consequently, the amendment met much resistance within the military, and it is questionable whether it would stand up to constitutional scrutiny, as the Supreme Court has constantly re-emphasized that the UCMJ can only apply to professional soldiers. This lack of clarity has led to much resistance within the DoD legal department, alleging that the amendment would change the coherent ideology of the UCMJ into a piecemeal application of legal norms in wartime. Nevertheless, Defense Minister Gates and the DoD enacted new regulations meant to implement the amendment and structure the coordination between the DoD and the Department of Justice (DoJ) in prosecuting civilian contractors for misconduct in war situations. As of yet, few prosecutions have been initiated, although this number is expected to rise.⁸⁹

3.2.2. The UK: all ideas, no initiatives

If the US is the world's largest supplier of private military and security services, the UK makes a good second. While not as extensive as the military-industrial complex in the US, the UK has still had a long-standing tradition of public-private partnerships, semi-public ventures (such as the British East India Company) and a strong relationship with the insurance industry. More than any other country in Europe, the UK implemented neo-liberal market policies and external risk management strategies in the provision of security, almost abandoning the notion that there are core state functions that cannot be outsourced to private actors.⁹⁰ One can see these policies reflected mostly in the Private Finance Initiative (PFI), introduced in 1992. The PFI took financial responsibility for defence and security services to private investors, enabling 10 to 40-year contracts with the Ministry of Defence (MOD) for these investments.⁹¹ Moreover, ownership of the products of these investments remains with the private investors, instead of with the government. These financial changes were coupled with the 'Competing for Quality' programme and its 'Better Quality Service' successor, both assessing the extent to which private contractors could take over defence services – based on the presumption that there are little or no government services that cannot in principle be outsourced. As Krahmman notes, the only difference between the neo-liberal Thatcher and Major governments, and the Labour government of Blair is the shift from competition between public and private providers, to cooperation between the two.⁹² In fact, far from breaking the Thatcherite tradition of privatization, the Blair government announced PFI to be its primary method for defence funding.⁹³

The outcome of these extensive privatization programmes is that private investments in the defence sector under PFI arrangements now total over £2 billion, with another £12 billion in private investments expected to be generated.⁹⁴ The Competing for Quality programme outsourced the management of most military bases, including all naval bases and nuclear facilities, to private companies.⁹⁵ While these contracts mostly concern management and logistics, PMSCs and related companies have also jumped on the risk control wagon in the UK, mostly at the behest of the insurance industry.⁹⁶ Most PMSCs that advertise themselves as risk managers, as described in Section 2.3.4, operate out of the UK. British PMSCs have strongly manifested themselves in Iraq, where the number of private contractors even beats the

87 See Carmola, *supra* note 8, p. 115.

88 <http://www.brookings.edu/opinions/2007/0112defenseindustry_singer.asp> (last visited 29 September 2011).

89 See Huskey & Sullivan, *supra* note 68, p. 8.

90 See Krahmman, *supra* note 70, pp. 84-85.

91 See Schreier & Caparini, *supra* note 25, p. 110.

92 See Krahmman, *supra* note 70, p. 88.

93 *Ibid.*, p. 95.

94 As of 2010, see Schreier & Caparini, *supra* note 25, p. 110.

95 See Krahmman, *supra* note 70, pp. 91-92.

96 See Carmola, *supra* note 8, p. 112.

number of British military personnel by a two to one ratio.⁹⁷ At least seven of the major PMSCs operating in Iraq originate in the UK, including the most important coordinating PMSC, Aegis Security.⁹⁸ Democratic control over these developments has however been lacking. Contracts under the PFI arrangement are not public, and do not have to be approved by Parliament. In this respect, the privatization and liberalization initiatives in the UK have gone beyond the already weak control of the US. On the other hand, the MOD itself loosened its grip on the contracts by handing over the ownership of facilities and services to the private investors themselves. Although the contracts are reviewed periodically, the MOD thus lacks the organization to replace those facilities and services in the short term, should the contract be terminated.⁹⁹

As noted, the privatization trend in security provision and the emergence of PMSCs in the UK has its roots in the 1980s. Nevertheless, regulation initiatives and debates on licences have been comparatively recent. It is commonly assumed that the main reason for this is the so-called ‘Sandline Affair’. In 1998, a UK PMSC, Sandline Inc., exported rocket launchers, assault rifles and ammunition to Sierra Leone in violation of a UN¹⁰⁰ arms embargo. The UK government refused to prosecute, claiming that Sandline was acting in the UK’s interests, and therefore did not violate the spirit of the embargo.¹⁰¹ Nevertheless, the affair put the UK government in the embarrassing position that its privatization strategies had put it at odds with its own national law. This specific affair, along with growing concerns over the reputability of PMSC personnel, led to two initiatives: the 2002 Green Paper on PMSC activities,¹⁰² and the 2001 Private Security Industry Act (PSIA), including the creation of the Security Industry Authority (SIA), operational in 2004.

The Green Paper was commissioned in 1998, just after the Sandline affair, and published in 2002. Under the guidance of Foreign Minister Jack Straw, the paper listed a number of possibilities and recommendations for the regulation of the private security industry. Dismissing the possibilities of outright banning PMSCs and having no regulation at all, the Paper came up with three licensing options. First of all, it proposed a regulatory regime based on licences for each individual contract. Although it did not specify which services should be subject to a licensing system, the Paper also suggested that any licensing system would also entail the prohibition of combat operations for PMSCs. Another option would be to register every PMSC with the government, and notify officials of a contract bid. This ‘lighter’ regime would only activate government control when a company could be suspected of executing that contract contrary to UK interests. Lighter still would be a licensing system for companies instead of contracts, mirroring the American solution. As with some of the US companies, this solution would run the risk of disengaging control of particular operations far more damaging than the company’s general policy.¹⁰³ Lastly, the Paper opted for self-regulation within the industry itself, trusting on internal market regulation and the economic interests of the security industry. This option was supported by the fact that several companies had themselves asked for regulation, presumably to further their own legitimacy as security providers.

The focus of the Green Paper was mostly on the provision of military services outside of the UK by UK companies. In contrast, the PSIA only focused on security provision within the UK, and its regulatory body, the SIA, initially only covered England and Wales, later adding Scotland and Northern Ireland.¹⁰⁴ Although the focus of this Paper is mostly on security provision outside of provider states and in conflict areas, SIA provides a good allegorical example of governmental priorities and limits when it

97 A. Stephen, ‘America – Andrew Stephen on the mercenaries in Iraq’, *New Statesman*, 26 April 2004, available at <<http://www.newstatesman.com/200404260005>> (last visited 29 September 2011).

98 C. Walker & D. Whyte, ‘Contracting Out War?: Private Military Companies, Law and Regulation in the United Kingdom’, 2005 *International and Comparative Law Quarterly* 54, p. 654.

99 See Schreier & Caparini, *supra* note 25, p. 110.

100 ‘Sandline boss says officials knew about arms-to-Africa’, *BBC News*, 19 May 1998, available at <http://news.bbc.co.uk/2/hi/uk_news/97093.stm> (last visited 28 September 2011).

101 See Sheehy et al., *supra* note 10, p. 126.

102 United Kingdom Foreign and Commonwealth Office, *Private Military Companies: Options for Regulation*, HC 577, 2002.

103 See Walker & Whyte, *supra* note 98, p. 665.

104 K. Alexander & N. White, ‘The Regulatory Context of Private Military and Security Services in the UK’, 2009 Priv-War Report, National Report Series 01/09, p. 1, available at <<http://priv-war.eu/wordpress/wp-content/uploads/2009/08/nr-01-09-uk.pdf>> (last visited 29 September 2011).

comes to PMSC regulation. SIA has two components: a mandatory registering regime for PMSC employees and a voluntary Approved Contractor Scheme (ACS) for licensing companies.

While the Green Paper itself was already not hasty in its composition, the government has apparently lost its sense of urgency for regulation completely after the publication of the Paper. As of 2011, none of the regulatory options considered in the Paper have been put to use. The only concrete initiatives that have been taken are policies on the use of foreign PMSCs within the Contractors on Deployed Operations (CONDO) framework,¹⁰⁵ and the foundation of the British Association of Private Security Companies (BAPSC) by the industry itself in 2006. It appears, however, that cooperation with BAPSC has provided the British government with another incentive not to regulate from the top down, but to reinforce its cooperation with the private sector by persuading BAPSC to pursue 'aggressive self-regulation'.¹⁰⁶ Such self-regulation might include new industry standards and even a PMSC ombudsman, according to one report.¹⁰⁷ As of now, such regulations have either not been installed, or when they are, they have not been tested.

3.3. International norms: the mercenary shadow

The previous sections have argued that the socio-political developments in the governance cultures of states are the main factor behind the rise of the PMSC industry, and the current character of the market. Moreover, governance culture does not only create demand for PMSCs, it also shapes the domestic regulation schemes to accommodate that demand. Risk aversion and commodification has been the most important contributor to the privatization tendency that characterizes modern – especially Western – governance culture, as demonstrated above. Domestic regulation has been adapted to make that risk commodification possible, as seen in the previous section. The risk aversion culture can be regarded as an organizational stigma, a mode of thinking that dominates the PMSC legislation debate. Nevertheless, domestic regulation is evidently not the only possible way of regulating PMSCs, especially since the private security business is by definition an international market. Public international law, as well as international humanitarian law and international human rights law, all contain some provisions applicable to PMSCs. The next section will discuss how the development of international law regarding private security and military services has suffered from its own organizational stigma, namely the challenge of mercenarism. Moreover, it will discuss how the insistence on maintaining state sovereignty vis-à-vis mercenaries is strongly at odds with the attitude of those same states towards PMSCs, being another implication of the risk aversion culture. Lastly, it will discuss whether the Montreux Document, dealing specifically with PMSCs, provides better possibilities for regulating PMSCs and changing the debate.

3.3.1. Anti-mercenary norms: IHL and GA resolutions

While there is currently no international treaty or customary norm directly relating to PMSCs,¹⁰⁸ there are several rules stemming from IHL and relating to mercenary activity and participation in hostilities by contractors and other non-combatants. Secondly, a number of UN General Assembly resolutions have dealt with the question of mercenarism, particularly in sub-Saharan Africa. Lastly, there are some regional conventions regulating the use of mercenaries, and arguably PMSCs. Consequently, unravelling the legal regime concerning PMSCs resembles what Sheehy calls 'peeling a legal onion':¹⁰⁹ several layers of international law rules covering some core norms regarding mercenaries. This part will discuss several of those specific norms, their origins and applicability to the contemporary PMSC business.

Arguably, the primary focus of most international instruments relating to private force are born from the desire to reinstate state control over the use of force. As is often repeated in IHL textbooks, the primary focus of public international law and IHL specifically is the state. The state is the only actor sanc-

105 See Krahmman, *supra* note 70, p. 116.

106 A. Bearpark & S. Schultz, 'Regulation of the Private Security Industry and the Future of the Market', 2005 BAPSC working paper, available at <<http://www.bapsc.org.uk/downloads/BAPSC%20on%20Regulation.pdf>> (last visited 29 September 2011).

107 See Carmola, *supra* note 8, p. 114.

108 K.A. O'Brien, *What should and should not be regulated?*, in S. Chesterman & C. Lehnardt (eds.), *From mercenaries to market: the rise and regulation of private military companies*, 2007, p. 37.

109 See Sheehy et al., *supra* note 10, p. 145.

tioned under international law to use force, and the only actor that can be held responsible for unlawful use of force.¹¹⁰ This backdrop also provides for the distinction between civilian and combatant: combatants are exempt from prosecution for murder, exactly because their actions in combat are sanctioned by the state. Mercenaries defy these assertions by acting beyond the permanent control of the state, and thus evade the sanctioning mechanisms focused on and provided by the state. Consequently, most international norms concerning mercenaries have the common aim of bringing mercenaries again within the control of the state, and thus within the control of accountability mechanisms.

The responsibility for the state for mercenary activities was already recognized in the fifth 1907 Hague Convention,¹¹¹ wherein Article 4 recognized the possible threat to the neutral status of a state by recruiting activities by other states.¹¹² While Article 6 states that the neutral state cannot be held responsible for any of its nationals crossing the border to serve in foreign armies,¹¹³ the two articles taken in conjunction are an expression of the customary norm that states are generally responsible for any illegal activities originating within its borders. The state thus bears a certain responsibility for any mercenary recruitment activities on its territories, even though mercenary activity is not proscribed or criminalized; the implications of Articles 4 and 6 merely concern the state's neutral status. This of course follows from the practice that the 'mercenaries' of the First World War were mostly nationals of one state fighting in the army of another, remaining within the sanctioning regime of state responsibility. Arguably for the same reason, the Geneva Conventions of 1949 do not specifically mention mercenaries, while the First Additional Protocol (I) devotes a separate article to them.¹¹⁴ Nevertheless, the mercenary definition in Article 47 is so exclusive in nature, containing seven cumulative criteria, that it hardly captures any mercenary – even though it was developed at a time when 'traditional' mercenaries were at their prime.

The changing perception of mercenaries as a threat to governmental control of force stems from the renewed interest in state sovereignty and self-determination pursuant to Article 2(4) of the UN Charter. In the early 1960s, the UN started to read this article as a prohibition for former colonial powers to enlist the help of mercenaries to oppress national resistance movements and protect their own foreign policies.¹¹⁵ This reading followed the surge of individual mercenaries in wars of independence and self-determination in sub-Saharan Africa. Not only did these mercenaries fall outside the ambit of governmental control, they often acted as foreign policy proxies. The response by the General Assembly was first to condemn, then to outlaw mercenary activity in wars of self-determination, through Resolutions 2395 and 2465 respectively. The problem with the GA resolutions as well as the OAU Convention with regard to PMSCs is twofold: firstly, their definition of mercenary solely targets individuals, and does not cover corporate organizations such as PMSCs. More importantly, they show a very narrow political scope, placing mercenaries in the context of neo-colonialism and self-determination. As will be clear from Section 2.4, while PMSCs and the security assemblages they are part of have a complex relationship with state sovereignty – especially in the weak states of sub-Saharan Africa – nowadays they work at the invitation of and in conjunction with the state. GA resolutions are of course not law; they express state opinions and form evidence of state practice. If that is how Resolutions 2395, 2465 and their successors are read, practice and opinions have evolved, making the resolutions obsolete.

Similar criticisms can be made with regard to the 1989 UN Convention against the Recruitment, Use, Financing and Training of Mercenaries.¹¹⁶ Inspired by the 1980 Convention Against Mercenaries of the Organization for African Unity (OAU), this Convention contains some exceptionally strong language. It does not only prohibit the use of mercenaries by states, but imposes an obligation to criminalize,

110 D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 2008, p. 1.

111 1907 Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War On Land, 205 CTS 299 (hereafter: Hague V).

112 Hague V, Art. 4, 'Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents.'

113 Hague V, Art. 6, 'The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents.'

114 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, Art. 47.

115 See Kinsey, *supra* note 15, p. 273.

116 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, A/RES/44/34.

try and extradite individuals suspected of mercenary activity.¹¹⁷ It also extended the scope of previous anti-mercenary legislation to all armed conflicts, in line with state opinion as voiced in the GA resolutions. Nevertheless, it suffers from a number of deficiencies that prevent it from being effective against mercenaries in general, and PMSCs in particular. First of all, while the Convention contains a wider definition of ‘mercenary’ than the GA resolutions and Article 47 of AP I,¹¹⁸ it is still extremely narrow.¹¹⁹ The Convention also lacks any monitoring or enforcement mechanism,¹²⁰ but also does not provide its signatories with extended jurisdictional powers to control extraterritorial activities. Most importantly, the Convention only addresses mercenary activity in the context of armed conflict, and more specifically wars of self-determination subsequent to the GA resolutions mentioned above. Next to the problems associated with this resolution, this narrow scope does not account for the diverse range of activities most PMSCs engage in; most PMSCs operate in environments other than armed conflict, and provide services that do not involve the use of force. Indeed, the 1989 Mercenary Convention was only signed and ratified by 22 states, out of 32 signatories. None of those signatories hosts a significant security industry of its own, but several have made extensive use of PMSC services, including Angola, Nigeria and the DRC. This has led Singer to dub the Convention ‘anti-customary law,’ a prime example of the failure of mercenary prohibitions.

What is striking about the debate on mercenarism and the ineffectiveness of the applicable laws is the paradoxical attitudes of states towards PMSCs and security assemblages. The prime motivator behind the anti-mercenary legislation, as outlined above, was the loss of newly gained state sovereignty through the emergence of private violence, albeit as proxies for former colonial powers. Radiating from the language of the GA resolutions, as well as the OAU Mercenary Convention and the 1989 UN Mercenary Convention is a strong desire to be free from external influences in the territorial affairs of African states, an attitude that could be summarized as ‘leave us alone.’ The same states, however, have had little qualms about going into partnerships with multinationals, and enabling them to perform semi-state functions through large security assemblages; some of these examples have been discussed above. These assemblages, as shown above, are made possible by a strong private security sector – the same sector that still suffers under the reputation of being pseudo-mercenaries. While this development can be ascribed to the inherent weakness of the limited government apparatus present in most African states, it is paired with the very deliberate trend towards public-private cooperation in security emitting from leading Western states. The common factor, of course, is the companies – often the same companies working the assemblages in sub-Saharan Africa. None of these developments has yet been captured by international law.

117 See Sheehy et al., *supra* note 10, p. 150.

118 Defining a mercenary as any person who:

- (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) 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 rank and functions in the armed forces of that party;
- (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- (d) Is not a member of the armed forces of a party to the conflict; and
- (e) 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.

2. A mercenary is also any person who, in any other situation:

- (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at :
 - (i) Overthrowing a Government or otherwise undermining the constitutional order of a State;or
- (ii) Undermining the territorial integrity of a State;
- (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
- (c) Is neither a national nor a resident of the State against which such an act is directed;
- (d) Has not been sent by a State on official duty; and
- (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

119 E.L. Gaston, ‘Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement’, 2008 *Harvard International Law Journal* 49, no. 1, p. 233.

120 W. Kidane, ‘The Status of Private Military Contractors Under International Humanitarian Law’, 2008-2009 *Denver Journal of International Law and Policy* 38, no. 1, p. 410.

3.3.2. *The Montreux Document: one step closer?*

The first and thus far only step towards an international regime of PMSC regulation as regards states was made in 2008 with the Montreux Document on Pertinent Legal Obligations and Good Practices of States related to Operations of Private Military and Security Companies during Armed Conflict (the Montreux Document).¹²¹ The Document was the result of a series of meetings at the initiative of the Swiss government and the ICRC, starting in 2005 and involving most states that were either the main suppliers or main hirers of PMSC services.¹²² These states included the UK and the US, the legal regimes discussed above. In the process of drafting the document, the negotiating states drew upon a number of earlier documents regarding obligations of states during armed conflict, including the ICRC's work on Customary International Humanitarian Law, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the UN Code of Conduct for Law Enforcement Officials, the EU Arms Export Code, the CIS Model Law on Countering Mercenarism and several domestic and regional jurisdictions.¹²³ The resulting document was comprised, as its name suggests, of two parts: one part outlining existing legal obligations of states under public international law, international humanitarian law and human rights law, and a second part stating several 'good practices' for Contracting States, Territorial States and the Home States of PMSCs. The Montreux Document is not legally binding; it is only a recommendation for states to follow, perhaps in the future becoming a customary norm through state practice. At the moment, it contains some suggestions for future binding instruments, and makes important distinctions in its analytical framework. Unfortunately, the Montreux Document also suffers from some drawbacks that make it less effective in tackling the private security sector in all its aspects than it could have been.

The first and main benefit of the Montreux Document is that it is the first international document that specifically addresses PMSC activities by the nature of their role in combat, rather than by the specific service they provide.¹²⁴ The Document thereby rejects the tendency to classify PMSCs differently according to the services they offer, recognizing that a particular PMSC can change its role from a personal security provider to a supplier according to the circumstances of its contract, without escaping the Document's framework. Also, it rejects the popular conception of 'offensive' and 'defensive' services,¹²⁵ reiterating the notion that international humanitarian law does not distinguish between offensive and defensive combat.¹²⁶ Secondly, the Document follows the negotiating states' agreement that there is a distinction between hiring states (Contracting States), states on whose territory the activities take place (Territorial States) and states in which the PMSCs are based (Home States). This distinction is important both in the context of its reaffirmation of public international law obligations for the territorial state and occupying state,¹²⁷ as well as forming *opinio juris* on what is the actual base of operation of a PMSC.¹²⁸ If the consensus of the Montreux Document holds out, PMSCs cannot evade accountability in their home state by registering in Monaco, the Cayman Islands or some other tax haven.

As for the specific legal obligations stated in the first part of the Montreux Document, the first section deals with state obligations for PMSC contracts, especially those arising from IHL. This section reaffirms that both contracting and territorial states retain a number of basic IHL obligations, mirrored in the Fourth Geneva Convention,¹²⁹ that will remain with states despite the contract.¹³⁰ It is up to the state to ensure liability and the possibility for reparations for PMSC misconduct, even when the contract

121 Montreux Document on Pertinent Legal Obligations and Good Practices of States related to Operations of Private Military and Security Companies during Armed Conflict, UN doc. A/63/467-S/2008/636, (hereafter: Montreux Document).

122 J. Cockayne, 'Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document', 2009 *Journal of Conflict and Security Law* 13, no. 3, p. 403.

123 See Cockayne, supra note 122 for an exhaustive list.

124 Paragraph 9, 'PMSCs' are private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.

125 See Cockayne, supra note 122, p. 405.

126 L. Doswald-Beck, 'PMCs under international humanitarian law', in S. Chesterman & C. Lehnardt, *From mercenaries to market: the rise and regulation of private military companies*, 2007, p. 122.

127 See Cockayne, supra note 122, p. 407.

128 Ibid.

129 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War.

130 See for example paras. 1-6 and 9(a), Montreux Document.

does not directly impose those obligations. The second part deals with attributing PMSC actions to states, drawing upon the combatant definitions of the Third Geneva Convention.¹³¹ Mirroring Articles 4 and 5 of the Draft Articles on State Responsibility,¹³² the Document adds direct state responsibility for when PMSCs execute ‘inherently governmental’ functions.¹³³ However, the Document does not define more precisely which functions those might be, and as the American debate on outsourcing government functions shows, such a definition is widely interpretable and unhelpful. Lastly, the Montreux Document reaffirms that PMSCs themselves carry the same obligations under IHL and have the same status as other contractors accompanying the armed forces, and that they do not represent a separate category distinct from the Geneva Conventions.¹³⁴ Nevertheless, this part also lacks definitional clarity, and does not answer the question how a concept like command responsibility functions in the context of PMSCs.¹³⁵

The second part, the soft standards and good practices, mostly deal with ensuring the reputability of PMSCs and the hiring process, and a separate section on monitoring mechanisms. The Document first lays out some criteria that Contracting States ought to take into account when selecting PMSCs, based on employee records, financial capabilities and training background. Similar criteria are mentioned when discussing the authorization of PMSC activities by Host States and Territorial States, including which procedures should be followed. The Document also looks into the internal organization of PMSCs, including its adherence to labour rights and the tendency to use subcontractors. With regard to the latter, the Document advises to keep a clear command structure and liability mechanisms to ensure that subcontractors are not misused to evade responsibility by the prime contractor. The crucial part here is the closing chapter regarding each of the state categories: adequate monitoring and accountability mechanisms.¹³⁶ As made clear by the US and UK debates on PMSCs, the key factor is the constant monitoring of PMSC activities and hiring procedures, and setting up bodies to deal with PMSC misconduct and impose sanctions. Nevertheless, for all its emphasis on monitoring, the Montreux Document does not detail how such monitoring should take place, according to which criteria, and under whose responsibility – including responsibility for monitoring failures.

That said, the Montreux Document also has some general deficiencies other than the specific omissions mentioned above. First and foremost, it is only applicable in situations of armed conflict, with its strong focus on IHL compliance. This discounts the reality of PMSCs operating in situations that do not meet that threshold, which is notable since the PMSC business came to prominence mostly because of state militaries lacking the capacity to engage in such operations. One may think of the security assemblages governing the Niger Delta, as mentioned above – especially when PMSCs only provide a guiding role. Secondly, a related problem is that the Document provides no guidance as to the exact conduct PMSCs may or may not be engaged in; it only refers to the vague notion of inherent government functions.¹³⁷ Thirdly, while the Document continuously refers to state liability for PMSC activity, it makes no suggestions as to how accountability mechanisms should work. Thus, it provides little or no solace for individual victims of PMSC misconduct. Lastly, and perhaps most importantly, the Montreux Document says little or nothing about corporate responsibility beyond the state.¹³⁸ As mentioned, the practice of PMSCs being hired by other private actors rather than states is growing – again referring to the chapter on security assemblages and the insurance industry – and solely referring to state responsibility has little bearing on this practice. While the Montreux Document correctly defines PMSCs as actors with responsibilities of their own, not just subsets of the state, it fails in fleshing out the legal implications of those responsibilities.

In conclusion, the inherent weakness of anti-mercenary norms as applied to PMSCs is exactly in their nature: PMSCs are not ‘Mercenaries 2.0’, and thus are hardly captured by international regulation

131 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War, Art. 4.

132 Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission, ILC Yearbook (2001), UN Doc A/56/10.

133 Montreux Document, Para. 7(c).

134 *Ibid.*, Paragraph 26.

135 See Cockayne, *supra* note 122, p. 411.

136 *Ibid.*, p. 413.

137 A. Mehra, ‘Bridging Accountability Gaps - The Proliferation of Private Military and Security Companies and Ensuring Accountability for Human Rights Violations’, 2008-2009 *Pacific McGeorge Business and Development Law Journal* 22, p. 328.

138 *Ibid.*, p. 329.

regarding mercenaries. Neither their organizational structure, nor the services they offer, nor the level of international political acceptance resembles in any way the individual mercenaries that are the subject of AP I, the Mercenary Convention and the General Assembly resolutions. On the other hand, the corporate form of PMSCs and the broad spectrum of force they operate in challenge the strict combatant/civilian distinction of IHL. Even though the Montreux Document is a step forward in casting off the mercenary shadow, it still provides no pathway into the debate on security outsourcing. Consequently, even with the myriad of international provisions seemingly applying to PMSCs, there is very little substance governing their activities, nor is there any prospect of these legal provisions leading to a comprehensive framework of governmental control of security. In other words, beneath the layers of the legal onion, the core is missing.

4. Conclusion: unwinding the risk/security assemblage?

In the broadest terms, one could say that one of the main goals of public international law is to promote peace, security and stability, as is also reflected by the preamble to the UN Charter. To achieve this goal, international law restricts the ability of states to use force to further their own interests. In a similar vein, international human rights law tries to curtail other state activities, such as deprivation of liberty and breaching the right to privacy, because of their intrusiveness into citizens' lives. If that is indeed the case, the question needs to be asked how international law will treat these activities if states are no longer the sole or even principal actors conducting those activities. As the first section shows, states themselves have vested interests in outsourcing and privatizing security, including the use of force, detention and intelligence gathering, so leaving the debate on what can be privatized up to the states themselves is clearly not a satisfactory solution. As far as international law is concerned, to properly regulate security privatization, either one of the following questions needs to be answered: one, are there 'core state functions' that can only be executed by or under the direct responsibility of the state? Two, if one argues that within transnational security networks, there is no such thing as a 'core state function', the question would be how other actors, such as companies or NGOs, can be held accountable under international law – independently from the states in which they originate. In short, international law needs to be able to deal with the security network, including recognition of the autonomous role played by private actors such as PMSCs, instead of only regulating some of the activities conducted by that network.

This merits a debate on the purpose of that network, namely risk reduction. As stated in the second section, rather than collectively dealing with greater risks, modern risk culture has resorted to commodifying and trading individual risk symptoms. Only regulating the precautions against such risk symptoms thus contributes to the fragmentation of society's risk, which cannot be the purpose of a legal system that aims to promote peace and security in general. Legal recognition of the mutual responsibilities of the actors within the network, and regulation of the purpose of the network in general, may be a better option. However, as long as international law remains state driven, this option is as far away as the peace and security it tries to achieve.