PART FOUR: REGULATING PMSC

Governance Dynamics and Regulation in the Global Private Security Market

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Abstract: In the contemporary market for force, regulatory efforts have been undertaken by a wide variety of actors including individual states, bodies looking to coordinate state action, international organizations, NGOs, and members of the industry. Many attempts to assess regulation of the industry have focused on the individual effect of one or another type of regulation or specific regulatory effort. A governance approach, however, suggests attention to how these regulatory efforts relate to one another. In a global market with many participants, regulatory efforts are most likely to affect behavior when the labors of these various actors complement and reinforce rather than compete and work against one another. Comparing current regulatory efforts with those in the 1990s, demonstrates that there have been convergences among the efforts of would be regulators and suggests optimism for more effective regulation.

Keywords: private security, regulation, security governance, global governance, mercenaries, market for force, Montreux Document, codes of conduct, PMSCs

In the contemporary market for force, regulatory efforts have been undertaken by a wide variety of actors including individual states, bodies looking to coordinate state action, international organizations, NGOs, and members of the industry. Many attempts to assess regulatory efforts have focused on the individual effect of one or another type of regulation or specific regulatory effort.¹ A governance approach, however, acknowledges that coordination can occur in the absence of one overarching authority. Instead of focusing attention on individual efforts, then, it suggests an examination of how the efforts of different actors relate to one another.

In a global market with many participants, regulatory efforts are most likely to affect behavior when the labors of these various actors reinforce rather than work against one another (Avant, et. al. 2010). Changes in the relationship among regulatory efforts toward convergence should thus produce more effectiveness. I argue that there have been important convergences among the focus of regulators in the last several years. These convergences suggest more effective control of behavior overall. Looking more closely at the particularities of these efforts, we should also expect greater effect in areas where there is most convergence and greater uncertainty and divergences in behavior where there is less.

**Governance Approaches and Global Regulation of the Market for Force**

The bulk of analyses of regulation in the private security sector have focused on one or another type of regulation or specific regulatory effort. Some have focused on regulation by states. Others have examined the wealth of new, market based regulations. Most agree that these regulations are inadequate in some way. What constitutes adequate regulation is often left rather vague, but the implicit assumption is that regulation agreed to and enforced by states is more effective than other kinds of regulation. The inadequacies are thus often blamed on states refusing (or being unable) to play their appropriate role.

A governance approach suggests examining the pattern of regulation among various actors rather than the specific efforts of one or another. The term governance refers to the general structure of behavior in a social organization. It was introduced to

the global political arena to explain the increasing likelihood that this pattern included a variety of actors; not only states and sometimes not even states. To paraphrase Rosenau and Czempiel, it was increasingly common in world politics to have “governance without government”.6 Much of the literature on global governance has documented the emergence of governance arrangements in many arenas of global politics – including security.7 These analyses dovetail with the increasing recognition that the regulation of global markets involves many different actors.8 Governance scholars identify these situations as ones of fragmented (rather than hierarchical) authority. Those examining the global regulation of markets contrast them as situations of “soft” rather than “hard” law. “National regulation is primarily about hard rules, that is, laws made, implemented and enforced by governments. By contrast, much of global regulation has traditionally been soft law; that is voluntary standards, best practices and their like.”9

Knowing that authority is fragmented may be an important feature of global politics, but it does not tell us whether governance will be effective – lead to stable outcomes – or not. Recently scholars have noted that situations of fragmented authority or soft law sometimes lead to effective regulation.10 For instance, Mattli and Woods claim that in many instances standards adopted via soft law processes can be endorsed by governments, “thereby hardening it and giving it real bite.”11 Other times fragmented

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8 (Drezner 2007, Vogel 2008, Mattli and Snidal 2009)
9 (Mattli and Woods 2009:3)
11 (Mattli and Woods 2009: 3)
authority can lead to ineffective regulation, portending instability and change. The key question is what explains the difference.

Abbott and Snidal argue that effective regulation is most likely when the array of actors participating in a governance scheme hold the requisite competencies for each part of the governance process. They chart four competencies crucial for the range of governance tasks: independence, representativeness, expertise and capacity. Assuming that states, NGOs and firms each have different competencies, they examine various schemes according to their ability to deliver the requisite competencies. Those schemes that reflect competencies among these various actors – governance triangles – are more likely to be effective. Abbott and Snidal claim that having the requisite competencies is a necessary, but not sufficient condition for effectiveness. This is a useful framework for distinguishing between various governance schemes or soft law efforts. It was not designed, however, to tell us much about effectiveness among regulatory schemes when several different designs are present.

Avant, Finnemore and Sell also focus on the relations among authorities in global governance. They similarly break the governance process into parts: agenda setting and issue creation, rule making, implementation and enforcement, and monitoring, oversight and adjudication. The key to stable outcomes, they claim, is whether the activities of different governors work together or at cross purposes. Regulatory efforts, whether formally coordinated or not, are most likely to direct behavior in a stable way if they reflect common expectations and encourage similar behavior. When governing actors and/or efforts work together they can complement and reinforce one another, creating synergies that lead to greater stability. If they work at odds with one another, however,

\footnote{Avant, et. al. 2010.}
regulatory efforts allow opportunities for strategic action such as forum shopping, on the part of regulated parties that portends a wider range of behavior. This is more likely to generate instability and change.

Elements of these two arguments can be complementary. Regulatory effectiveness (meaning stable behavior) may be most likely when 1) the efforts of various regulatory actors reinforce one another and 2) the requisite competencies are found within the array of regulators. Using this framework to examine the private military and security sector reveals a shift in the relations among regulatory efforts which should cause us to be optimistic about more effective regulation overall. At the same time this perspective also suggests areas where competencies are lacking and/or efforts still work in tension. In these areas we should expect more instability and change.

The Market for Military and Security Services

As the market for military and security blossomed in the 1990s, private military and security companies (hereafter PMSCs) registered in many different countries began providing a wide range of military and security services to an array of international actors, including states, international organizations, nongovernmental organizations, and global corporations. 13 After 2000 there has also been a trend toward consolidation in the global suppliers of what had been domestically oriented private security. Global firms such as Group 4/Securicor provide security services in many domestic markets but also

13 (Singer 2001/02; Singer 2003; Avant 2005). The term PMSC is used in the Montreux Document to refer to companies that provide military and security services, which include: armed guarding and the protection of persons and objects, maintenance and operation of weapons systems, prisoner detention, and advice to or training of local forces or security personnel. Others use the term to designate the entire range of contacts in battlespace – military and security services once provided by the military or police forces – see Avant 2005, p. 17. This definition would include logistics and reconstruction services excluded by the Montreux Document. The figures here are provided by the US government and include services for this more expansive definition.
compete with PMSCs to provide security to corporations, NGOs and governments in conflict zones.\textsuperscript{14} The blurring of lines between military and police (and the services the private sector provides to replace both) combined with the increasing role of non-state actors in providing their own security demonstrates the kind of fragmentation highlighted by scholars of security governance.\textsuperscript{15}

The US government has been the dominant consumer in this market from the start. The size of the US defense budget and the US government’s enthusiasm for private alternatives led it to be the dominant consumer presence in the 1990s and US dominance in the private military and security market only increased as the market experienced rapid growth after 9/11 largely the result of the enormous use of private forces during the hostilities in Iraq and Afghanistan.\textsuperscript{16} When the US defeated the Iraqi Army in 2003, more than one out of every ten personnel deployed to the theater were civilians employed by PMSCs performing functions formerly handled by soldiers. As US forces were stretched thin by the chaos that followed the fall of Saddam Hussein, private personnel surged into the country to train the Iraqi police force, the Iraqi army, and a private Iraqi force to guard government facilities and oil fields, and to protect expatriates working in the country.\textsuperscript{17} Retired military or police from countries as varied as Fiji, Israel, Nepal, South Africa, El Salvador, the United Kingdom, the US, and (increasingly) Iraq itself, employed by a multitude of PMSCs, worked for the US or British governments, the

\textsuperscript{14} Abrahamsen and Williams 2006)
\textsuperscript{16} (Avant 2005)
\textsuperscript{17} (Avant 2005) see also Isenberg, …
Coalition Provisional Authority (CPA) and then the fledgling Iraqi government, private firms, and international non-governmental organizations in Iraq.

A 2008 Congressional Budget Office Report found the number of contractors in Iraq in 2007 to be at least 190,000.\textsuperscript{18} This is not only greater than the number of US troops but the ratio of contractors to troops was at least 2.5 times higher in Iraq than it had been during any other major US conflict.\textsuperscript{19} The number of contractors in Iraq declined to approximately 120,000 as of June 30 2009. As the Obama administration shifted its focus to Afghanistan, however, the number of contractors there grew to approximately 74,000, more than the number of US troops in that country. The total number of contractors in Iraq and Afghanistan in 2009 hovered around 240-245,000.\textsuperscript{20}

Though the US efforts in Iraq and Afghanistan have overshadowed most everything else, there are a number of additional US initiatives in which private military and security companies have played a significant role. PMSCs have continued to expand their role in training foreign military forces – often in coordination with US regional security efforts. A prominent example is the role of PMSCs in the security assistance efforts of the State Department. The Department of State (DOS), Bureau of African Affairs’ Africa Peacekeeping Program (AFRICAP) is designed to enhance African countries ability to conduct peacekeeping operations and build African capacities for

\begin{footnotes}
\item[18] As discussed below, “contractors” fall into three categories: private security personnel (who provide armed or unarmed guarding and escort services), logistics personnel (who provide support services), and reconstruction personnel (who provide a wide range of training, construction and development work). Some in the latter category provide police and military training, which are routinely included as services provided by the private military and security industry. Others that do purely construction or some development work would not be included in that category. Roughly 7,000 jobs are construction that would clearly not be included as private military and security jobs. The other categories are traced by service codes that are harder to sort. About 26,000 provide professional, administrative and management support, for instance, which would include trainers as well as secretaries. 20,000 provide services that are uncategorized.
\item[19] (CBO 2008)
\item[20] (CWC 2009, OSD/ACQ 2009)
\end{footnotes}
crisis management and counter terrorism. Four companies, PAE (owned by Lockheed), AECOM, DynCorp and Protection Strategies Incorporated were awarded the 5 year $1.5 billion contract to support these efforts. A wide variety of companies play similar roles under contract with the State Department, the Department of Defense, or both, training foreign forces all over the world.

The US is not the only consumer of military and security services, however, and worldwide demand was both instrumental in the emergence of the industry and also continued to grow during the last decade. A number of countries in the 1990s used PMSCs to supplement and upgrade the capacities of their forces. Angola, Sierra Leone, Croatia, Bosnia and Papua New Guinea are among the most well known. In the 1990s and into the 21st century demand also came from governments also involved in contingency operations such as the UK, France and Germany, governments involved in upgrading their forces via private training and systems support, such as Poland, as well non state actors ranging from international organizations like the UN to humanitarian NGOs to multi-national corporations.21

Regulatory Efforts 1990-2005

As the industry grew in the 1990s the initial regulatory efforts were a mix of national processes in place, new national policies in response to the industry’s growth and international/global responses. There was a significant divergence between the impulse of some to treat the industry as an extension of mercenary activity and thus something that should be abolished and others, which used established processes to shape the industry to serve their interests. The United Nations led the international effort to abolish

mercenaries and chose in the 1990s to fold its approach to the military and security industry into that effort. The US and South Africa represent two states that approached the industry’s growth in diametrically opposed way. Though each of these approaches make sense given the different histories and circumstances that led to each actors’ effort in the 1990s, together they worked at cross purposes and thus increased the likelihood that regulation would not be effective at the global level.

The United Nations’ initial response to the rise of the industry was to treat it as a resurgence of mercenarism. In 1987, the United Nations Commission on Human Rights appointed a Special Rapporteur on the use of mercenaries to address increasing concerns about the use of mercenaries, allegedly funded by the apartheid government in South Africa, to fight national liberation movements or undermine governments in southern Africa.22 A specific aim of the Special Rapporteur’s mandate was to look into allegations and to encourage states to ratify the “International Convention against the Recruitment, Use, Financing, and Training of Mercenaries”.23 As the industry in private military and security services grew, the UN office continued its focus on ratification of the “International Convention” and largely side-stepped the issue of PMSCs or argued they were conducting mercenary activity. The International Convention was passed in 2002.24 Its ambiguous definition of mercenary, though, led to many arguments about just what it

23 (International Alert 1999).

Discussion of document A/56/224 summarizing the activities of the Special Rapporteur.
sought to abolish and whether the activities of particular PMSCs were in fact mercenary in character.25

The US had a system in place that provided some regulation even before the industry’s rise. The US government has a long history of contracting with the private sector for goods and services and thus had in place a variety of rules – the Federal Acquisition Regulations (FARS) and the Defense Department Supplement to these (DFARS) that regulated the way a company must behave to continue working in good standing with the US government. The US also had tools for regulating the export of military services through the International Transfer of Arms Regulations (ITAR) of the Arms Export Control Act.26 The legislation, designed to insure that arms sales would further US interests, had a clause on services originally intended to license the kind of training that frequently went along with the sale of complex weapons systems. This provided a convenient, if cursory, regulatory structure as the PMSC industry took off in the 1990s. The process of licensing military service exports uses standard tools to enforce general principles – that the US should export these services to reliable countries that abide by the norms the US supports. The Department of State’s Office of Defense

25 The International Convention defines a mercenary as someone who is specifically recruited for the purpose of participating in a concerted act of violence aimed at overthrowing a government or undermining the territorial integrity of a state, and is motivated by the desire for private gain and material compensation, is neither a national nor a resident of the state against which such act is directed, has not been sent by a state on official duty, and is not a member of the armed forces of the state on whose territory the act is undertaken.

26 A defense service is defined as assistance, technical data or training related to military units. This regulation does not apply to law enforcement or sales of security advice to private entities. “International Traffic in Arms Regulations,” (22 CFR 120-130) as of April 1, 2001 (United States Department of State, Bureau of Political-Military Affairs, Office of Defense Trade Controls).
Trade Controls oversees the process. Before a license is granted, the appropriate regional offices, political-military bureau, desk office for the country, and others (such as the Bureau of Democracy, Human Rights, and Labor) are invited to comment. There are different standards for different kinds of services. Lethal training is more closely scrutinized than non-lethal training. Though there were many gaps, such as the absence of oversight for subcontracts to cite just one prominent example, the US government was initially relatively sanguine about its ability to control contractors. And its regulation was motivated by the desire to harness the industry for US goals – not necessarily the same as global norms or the global good.

South Africa had a very different history. Though it was a target of the initial UN Special Rapporteur on Mercenaries, the South African government took an about face after apartheid laws were repealed in 1992 and the African National Congress won a majority in 1994. As the government transitioned away from apartheid, nascent private military and security firms lured away personnel from the military and other security services in South Africa. In this context, it is not surprising that the relationship between post-apartheid South African governments and PMSCs was tenuous at best. The shaky association dissolved after the government enacted the Regulation of Foreign Military Assistance Act in May 1998. This Act was undertaken in response to the high profile

contracts of one its companies, Executive Outcomes (EO) in Angola and Sierra Leone. According to government officials, the Act had both a moral and a pragmatic motivation. Morally, South Africa was pledged to have an ethical foreign policy and a human security doctrine, both of which it was felt required regulation of PMSCs. Practically, it saw EO and PMSCs like it as a threat to the stability of the government and its control of its own foreign policy – it needed to keep track of “shady activities” on the part of enemies of the regime.\(^28\) The legislation claimed to “regulate the rendering of foreign military assistance by South African juristic persons, citizens, persons permanently resident in the Republic, and foreign citizens who render such assistance from within the borders of the Republic.”\(^29\) Justifications for the refusal of authorizations included any action that may be in violation of international law, South African obligations or interests or may cause human rights abuses, support terrorism, endanger the peace, escalate regional conflicts or “be unacceptable for any other reason.”\(^30\) Though ostensibly designed to regulate, many in the private sector (and, off the record, in government) saw the South African law as attempting to essentially outlaw the industry.

During the 1990s there were also efforts by companies themselves. Some of these were purely individual. Sandline, for instance, claimed to be an “ethical” company, EO said it would work only for legitimate governments, and MPRI refused to have its personnel carry weapons. Toward the end of the decade the first collective effort was

\(^{28}\) Interview with former South African government official Feb 00; interview with South African academic March 00.


\(^{30}\) Ibid., Section 7.
begun – led by Doug Brooks, a graduate student who had operated a list serve on private military companies for several years and at the time was doing research on Sierra Leone. Doug Brooks left academia and founded the International Peace Operations Association (IPOA) in 2001, and at the same time introduced a code of conduct for military and security companies. Its first Code of Conduct, adopted in April 2001, pledged that IPOA members would adhere of international law on human rights, be transparent, support accountability and investigation of alleged human rights abuses, work only for legitimate governments, IOs, and NGOs, abide by their client’s control, support ethics, negotiate rules of engagement with their clients, work to end the conflict, support IOs and NGOs working to end the conflict, acquire weapons legally and insure their personnel were properly trained and vetted. Some saw these as a promising start but others worried that they were vague and unenforceable – and lent legitimacy to an illegitimate enterprise.

The regulatory environment surrounding the private security industry in this period reflected the fragmented global governance that was increasingly common in the 1990s – with a variety of state and non-state actors at work. It also reflected a dissonance among the goals of would be regulators. The efforts of the UN and South Africa were largely at odds with the efforts of the US. The UN’s approach was aloof from an effort at regulation – aiming instead at abolishing the mercenary elements of it. South Africa sought to effectively outlaw the industry. The US (along with the UK and, eventually, an increasing number of European governments) sought to regulate the industry to harness it for the pursuit of its national interests. Industry efforts aimed at both a more global standard and to abide by the laws of individual states – leading to seemingly contradictory impulses in some situations. They were also vague and had unclear
capacity for implementation and enforcement. With different governors offering competitive (but none more inherently legitimate than the other) views of the industry, there was a competition over agenda setting, competing rules, and little capacity for working together to implement or enforce standards for behavior given that there was not agreement on standards of behavior to begin.

Though the US had the largest impact on the industry’s behavior by virtue if its purchasing power it lacked the capacities for effective regulation outlined by Abbott and Snidal. The industry grew quickly and the US government did not have adequate personnel to oversee either contracts with various US agencies or export licenses for contracts between PMSCs and foreign governments. As the industry harnessed an increasingly transnational labor force oversight was even more problematic. Finally, the legal structures within which the industry worked were skeletal at best. The use of the private security market also eroded the US government’s independence from private interests within the military and security industry. The export process was somewhat idiosyncratic and resulted in many opportunities for particular rather than general interests to win out.31 Also, the process accorded much more influence to the executive than congress, making for more flexibility and quick adjustment in US capabilities for goals the president thought were important. At the same time this change in process made it easier for presidents to take action that Congress and the public might not support.32 Finally, the US government was not seen as a good representative of global concerns. The US could harness the industry for its own purposes but those around whom PMSCs contracting with the US government operated were not US citizens and

31 (Avant 2005)
32 (Avant 2006)
had little capacity to have their voices heard. Many outside the US saw its process as illegitimate and were able to use their expertise and representativeness to challenge the regulatory agenda with a debate about the degree to which the industry should even be allowed to operate.

The behavior of firms in the industry reflected the uncertain regulatory environment. Though all firms sought to distinguish themselves from mercenaries and claimed to be legitimate and law abiding, what that meant for their actual behavior varied significantly. Some were secretive, others more open. Some tied their futures to US interests and others to a more global market. Many tried to legitimize their efforts by working for interested governments – even if not their own. South African companies, for instance, sold their services to the US and the UK. Some companies claimed to hold to particular standards to enhance their legitimacy and distinguish themselves from old style mercenaries but it was unclear if this effort paid off. Many were skeptical of company standards, seeing them as ephemeral. Also it was unclear to those within the industry that abiding by standards gave companies a competitive edge. Some claimed that the US in particular hired based on connections or national interests rather than adherence to global standards. In this uncertain environment many – even some within the industry – warned of a race to the bottom.33

Regulatory Efforts 2005-2010

The explosive growth in the role of PMSCs in Iraq generated some controversy and increased attention. This is partly a function of the growing numbers of PMSC personnel and partly due to the enlargement of particular roles – such as personal security

33 (Fenning 2004)
details and interrogation. PMSC personnel were prominent in several well publicized incidents in Iraq – the 2004 killing and mutilation of Blackwater personnel in Fallujah, the participation of CACI and Titan personnel in the Abu Ghraib prison scandal just a few months later, and Blackwater personnel’s shootout in a Baghdad square in 2007.

In response to this increased attention, the US took note of failures in its regulatory process and proposed a variety of steps to correct them. The industry has redoubled its efforts at self-regulation to counteract potential backlashes against the very idea of private military and security services. Consideration of industry problems in Iraq also led to stepped up efforts by those such as that by the ICRC and the Swiss government to create global standards for the regulation of the industry. Finally, and somewhat ironically, these controversies have led some of those critical of the industry, particularly the UN, to come to the pragmatic conclusion that PMSCs are not going to go away. Rather than working to outlaw the industry, more are focus on augmenting the regulation of their behavior. Though South Africa stands out as passing legislation banning the use of mercenaries, it also participated in the Swiss government initiative.

The common focus on the need for improvements in regulation is the most important convergence among these recent efforts. Rather than outlawing what they are, more governors are trying to shape what PMSCs do. Beyond that recent efforts also reflect attention to the global scope of the industry and thus the need for transnational coordination. Finally, the content of the various initiatives contains similarities including similar categorizations of companies, governments, services and relevant risks.

**US Efforts**

In response to particular incidents in Iraq and Afghanistan, Congress has used its appropriations powers to demand more information about, and affect the legal status of,
contractors on the battlefield. Most significantly, it required the Department of Defense to develop tools for tracking the number of contractors employed in areas where the US military is involved in war or contingency operations.\textsuperscript{34} Congress also amended language in both the Military Extraterritorial Jurisdiction Act (MEJA) and the Uniform Code of Military Justice in an attempt to extend the jurisdiction of US law over persons serving with or accompanying armed forces in the field.\textsuperscript{35} A variety of other legislation has been proposed in including some that would limit the kinds of jobs that PMSCs can perform.\textsuperscript{36} The 2009 Senate Defense Authorization Bill initially had provisions that would have barred particular jobs such as armed security and interrogation from being contracted out on the grounds that these are inherently governmental. Ultimately these

\textsuperscript{34} See Department of Defense Instruction (DoDI) Number 3020.41 (3 October 2005), Section 4.5. and 6.2.6. The Synchronized Pre-deployment Operation Tracker (SPOT) database now implements this requirement. Although problems remain (see GAO 2008, GAO 2009), this is a vast improvement on the early years of the wars.


provisions were removed under threat of a veto by then President George W. Bush. The final act did add a requirement that a contractor misconduct database be kept to inform decisions about hiring.\textsuperscript{37} The provision banning the use of contractors for interrogation was passed in the 2010 Defense Authorization Bill and signed into law by President Barack Obama.

In addition, Congress established the Commission on Wartime Contracting (CWC), in 2008 to look further into these issues. The Commission on Wartime Contracting has issued a preliminary report and two special reports. These reports have framed the problem for the US government; offering categories and preliminary definition of key problem areas.

For categories, the CWC’s interim report differentiated among logistics, security, and reconstruction services.\textsuperscript{38} Logistics services include supply of food, laundry, and fuel and construction of temporary base facilities. The US Army’s logistics civil augmentation contract (LOGCAP) was held by Kellogg, Brown and Root (KBR) in the early years of the Iraq and Afghanistan conflicts. Those providing security services are those that guard people, buildings, and convoys. Many are armed (the CBO estimated that 30-35,000 of the contractors working in Iraq in 2008 were armed) and in carrying out their duties routinely shoot and are shot at.\textsuperscript{39} Reconstruction, stabilization, and development contractors provide a wide range of services, from building infrastructure (roads, communication, water, and power) to building institutions (training government employees including military, police, and justice personnel at the national, provincial and


\textsuperscript{38} (CWC 2009)

\textsuperscript{39} (CBO 2008)
local levels, supporting civil society groups, promoting rule of law and democratization, and so on).

In its analysis of problems areas, the CWC focused on general issues of management and accountability as well as specific issues inherent in each service category. The general issues include a mismatch between government (military and civilian) workforce and number and value of contracts, concerns about training for government contract managers, concerns with the effectiveness of auditing in contingency contracting and the implementation of audit findings, and concerns with the clarity of standards for inherently governmental functions.

The CWC voices particular concerns with security services. These include qualms that rules of engagement for contractors do not adequately protect military personnel as well as concerns about inadequate regulation of selection, training, equipping, arming, performance and accountability of personnel who perform security services. Specific concerns with logistics services focus first on inadequate accounting of the contracted support the military relies on. There are also worries about inadequate number of staff for contract oversight, and lack of clarity over plans for the role of contractors during the drawdown in Iraq. Specific concerns with reconstruction focus on weaknesses in coordination and oversight that impair unity of effort, absence of locus for planning and coordination of these activities, and lack of coordination between DoD and USAID.

Though initial efforts by Congress were met with occasional resistance from the Bush administration – such as the 2009 attempt to ban interrogation - the attitude of the Obama administration has been more sympathetic to regulatory efforts. The DoD
Instruction Number 3020.50 “Private Security Contractors (PSCs) Operating in Contingency Operations”, for instance, goes a long way toward outlining various responsibilities and procedures for the use of contractors to do security work and the 2010 Defense Appropriations Act bans the use of contractors for interrogation, requires better record keeping on contractors, and authorizes the DOD to deny contracts to companies found to jeopardize the health and safety of US government employees.\(^{40}\)

Also the Labor Department began a review of the federal system designed to provide medical care and disability benefits to civilian contractors injured in war zones.\(^{41}\)

Most of these efforts focus particularly on the regulatory capacity of the United States, but there is evidence that US policy makers are aware of the global scope of the industry. This means not only that the US should be attentive to global coordination but also that it should be aware of the consequences of its actions in setting global precedents. “…the role of private contractors may imply changes in the rules-based international society that the United States has endeavored mightily to construct since 1945. Through legal precedents established in the course of current wars, US employment of contractors will shape the way that current and rising powers conduct future wars…As a result, the United States should consider carefully the broad and enduring implications of its own precedent.”\(^{42}\)

**Industry Self Regulatory Efforts**

Industry efforts continue to be undertaken by individual firms (in the form of codes of conduct) as well as by industry associations.\(^{43}\) IPOA remains among the most

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\(^{41}\) (Miller 2009)


\(^{43}\) (de Nevers 2009: 503).
active. IPOA members provide a wide range of goods and services related to military and security missions. Members of the IPOA must sign on to its Code of Conduct. The Code has been amended several times, most recently in February 2009. Each amendment has generated more specificity. For instance, rather than simply requiring that signatories adhere to all applicable international human rights and humanitarian laws, version 12 outlines the relevant laws and codes in its preamble: Universal Declaration of Human Rights (1948) Geneva Conventions (1949) Convention Against Torture (1975) Protocols Additional to the Geneva Conventions (1977) Chemical Weapons Convention (1993) Voluntary Principles on Security and Human Rights (2000) Montreux Document on Private Military and Security Companies (2008). Its accountability standards are also more detailed, requiring that companies take action – including the notification of relevant authorities – if their personnel engage in unlawful activities and there is a long section on the responsibilities of companies to and for their personnel. The code stipulates that IPOA members should work only for legitimate governments, international organizations, NGOs or lawful companies and refrain from offensive activities ‘unless mandated by a legitimate authority in accordance with international law”. It also has a number of stipulations as to the fair treatment of employees including the provision of insurance. Finally, it has clauses pertaining to the use of force, support for efforts of IOs and NGOs it operates around, and respect for arms control rules. It also contains a mechanism for outside parties to lodge complaints against an IPOA member and a mechanism to investigate alleged violations of the code. If members violate the Code, they are subject to dismissal from IPOA.
The British Association of Private Security Companies (BAPSC) also advertises that its members adhere to a strict Code of Conduct but does not post the Code on its website. It does have a detailed self assessment workbook for firms that is suggestive of what this Code of Conduct might contain. The BAPSC and IPOA also were participants in the process that led to the Montreux Document.

*Montreux Document:*  
The Montreux Document came about in late 2008 through an initiative by the Swiss government and the International Committee of the Red Cross. It was developed with participation of nineteen governments as well as representatives from civil society and the private military and security industry. The Montreux Document clarifies what current international law means for states with a variety of relationships to PMSCs. It first disaggregates state vis a vis their relationships to PMSCs: contracting states (that contract for PMSC services), territorial states (where PMSCs operate), home states (whose citizens are PMSC personnel) and all other states. Then it articulates the different responsibilities each type of state has in their relations with the security industry. It both defines the international responsibilities of states vis a vis the industry and suggests best practices for national laws.

The Document defines the PMSCs as private business entities that provide military and/or security services (including armed guarding and protection of people 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).

Its 73 best practices issue suggestions regarding the whole industry but the focus is on states. The goal is to affect the behavior of both states that interact

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44 (ICRC 2008: 9)
with PMSCs and PMSCs themselves by encouraging states to live up to their responsibilities.

Twenty three of the best practices focus on contracting states. It advises states to consult international law to determine whether a service is permitted to be contracted out (anything that may cause PMSC personnel to become involved in direct hostilities is suspect). It also encourages the selection of PMSCs carefully and with transparent processes according to criteria that account for the past behavior, resources, and personnel policies of firms. Attention to national law, international humanitarian law and international human rights law is encouraged in both the selection of PMSCs and the writing of contracts with them. Finally it suggests a variety of ways in which contracting states should insure compliance and accountability by establishing requisite laws with which to prosecute firms or individuals that commit crimes abroad, as well as contractual vehicles to punish non-criminal misbehavior, monitoring tools to insure misbehavior is caught, and cooperate with territorial and home states on matters of common concern.

Best practice suggestions for territorial states include similar attention to the kinds of services authorized (those that will not involve PMSCs in direct hostilities). They also consist of developing procedures for licensing and keeping track of PMSCs and their personnel in a transparent way and sensitive to national and international legal guidelines. In addition, they offer guidance as to insuring that weapons carried by PMSCs are limited, legally obtained, registered, and operated by trained personnel. Territorial states are finally advised to provide for criminal jurisdiction in their laws over crimes committed by PMSC personnel, to negotiate agreements on legal coordination with
contracting states, and to cooperate with contracting states and home states over the investigation of matters of common concern.

Home states are advised to focus their attention on export policies. They should be alert to services that may draw personnel into hostilities and prohibit or limit these. Suggestions for home states also include authorization (via export policies) that limit and license services and weapons, require information about them and insure that they abide by national and international law, transparency processes and coordinate with contracting and territorial states on monitoring and compliance issues.

The UN Draft Legislation

After many years of machinations about how best to respond to what increasingly looked like an irreversible trend toward the use of PMSCs, the UN working group on the use of mercenaries was charged in March 2009 with drafting an international convention on the regulation, oversight and monitoring of private military and security companies. The “Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies” focuses its greatest effort on the responsibility of states.

The Draft International Convention adopts the terminology of the Montreux Document in regards to contracting, territorial and home states and much of its advice for states is consistent with the Montreux Document. It advises states that international law requires that certain functions are inherently governmental and cannot be outsourced. Among such functions are, “waging war and/or combat operations, taking prisoners, law making, espionage, intelligence and police powers, especially the powers of arrest or detention, including the interrogation of detainees”.\textsuperscript{45} It requires that state act

\textsuperscript{45} (UN 2009: 7)
consistently with the principles of state sovereignty, respect human rights, prohibit mercenary activity, excessive use of firearms and use of illegal firearms. States that do choose to contract for security services have the responsibility to establish comprehensive regimes of regulation and oversight including a body to act as a national center for collection, analysis and exchange of information concerning potential violations of national and international law.\footnote{UN 2009: 14} It stipulates that states should have or create law to license PMSCs, license the export or import of services by PMSCs, and insure that company employees are trained and respect sovereignty and international law. The draft also articulates a state responsibility to impose penal sanctions on those who conduct misdeeds and provide remedies to victims.

The Draft goes beyond the responsibilities of states alone to also address the obligations of inter-governmental organizations and non-state actors. IOs must also exercise due diligence to ensure adherence to human rights norms and laws if they hire PMSCs. It also accords obligations to PMSCs to insure the behavior of the firm and its employees. Interestingly, it does not speak of any obligation or responsibility on the part of private corporations or NGOs that hire PMSCs. Finally, the document establishes a form of international oversight in the form of an international committee and reporting requirements to it and provisions for an ad hoc conciliation commission to negotiate agreeable resolution to any complaint.

South African Efforts

Among these, South Africa’s efforts stand out. Its Prohibition of Mercenary Activity and Prohibition and Regulation of Certain Activities in an Area of Armed Conflict Bill passed in 2006 echoes its more critical stance in the initial period. The law
not only prohibits mercenary activity but also attempts to specify conditions under which operating in zones of conflict may lead security or guarding tasks to take on a mercenary tone. This law was undoubtedly inspired by the particular experience of South African personnel in Iraq that exacerbated the already tense and mistrustful relationship between the South African government and the industry. As with the 1998 law, there were concerns that this law would be difficult to enforce.\textsuperscript{47} At the same time, though, South Africa was also a participant in the process leading up to the Montreux Document.

\textit{Convergences}

As suggested above, the most significant convergence is on the idea of regulation itself. Most of the efforts in the recent period have focused on regulating the new industry rather than on abolishing mercenary activity. The prior attention to abolition kept attention aimed at what PMSCs were rather than what they did.\textsuperscript{48} The shift toward regulation focuses more attention on what PMSCs do. The most significant shift in this direction was at the UN. South Africa, while it participated in efforts to shape regulation, also passed legislation prohibiting mercenary activity. While the UN’s shift is a weakening of the efforts against PMSCs by removing the constant threat of being de-legitimized altogether, it does present much more opportunity to define legitimate activity and how it must be pursued, to reward those PMSCs that work to protect international law and punish those that do not, and to educate and encourage states on their proper role with respect to PMSCs.

It is not only the UN which has shifted its stance on regulation, though. The United States government, which was largely complacent about its regulatory tools in the


\textsuperscript{48} (Percy 2007)
The problems and abuses in Iraq were grave enough to raise flags that the US regulatory structure was inadequate. The most serious efforts have been undertaken by Congress. While these were sometimes in tension with the executive branch while the Bush administration was in power, even members of the Bush administration saw the need for some reform. The Obama administration came into power intent on a more serious regulatory effort. So the US and the UN have converged on their overall approach to regulation – the UN by focusing more on regulation than abolition and the US by noticing that its skeletal regulations were not sufficient.

There are also important overlaps in what these regulatory efforts seek to do. The first is over the proper role of states vis a vis the industry. Many of the initial conversations at the UN focused on generating greater state responsibility for the PMSCs with which they contracted. Both the Montreux Document and the UN Draft Convention go to great lengths to specify state responsibilities. An important step here is the distinction among the relationships states can have with PMSCs – contracting, territorial or home. The requirements for contracting states include keeping track of the PMSCs they hire and their employees, overseeing them effectively, and keeping records of their misdeeds. The efforts undertaken by the US thus far reflect attention to just these requirements. The US now tracks PMSCs and their employees deployed in Iraq and Afghanistan, has specified oversight responsibility for them while in theater, and has set in motion tools to keep track of misdeeds. The CWC’s preliminary report suggests that furthering oversight and accountability capacities will also be a key portion of its final recommendations.
Related to this is agreement that there are inherently governmental services that should not be outsourced. The Montreux Document suggests these are services that could draw PMSC personnel into direct hostilities. The UN Draft Convention is more specific about forbidden services and included intelligence and interrogation. The CWC suggests concern over the criterion for determining just what an inherently governmental service is but is not specific about how determination should be gone about. Private codes of conduct thus far say much less about what is (or is not) an inherently governmental service – though “offensive” activities are often claimed to be suspect. It will be important to attend to how the CWC’s final report assesses this issue and how the US responds to track whether or not there is agreement on what inherently governmental security services are.

There is also general agreement on the special concern posed by armed PMSCs. The CWC is actually even clearer on this issue than either of the international documents – as it separated security services into their own special category. The Montreux Document’s focus on services that could draw PMSC personnel into hostilities seems to be approaching a similar concern but from a different perspective.

Each of the international documents along with the industry self regulation initiative give great attention to following international human rights and humanitarian law. This has also been of concern in the US and, even though it is raised less specifically, the CWC’s concern with rules of engagement and accountability for personnel that provide private security services reflect a concern with issues related to international law. So this is another area of general agreement.
In addition, there are similar concerns reflected in the initiatives of each actor for national law. The US approach is somewhat narrower – reflecting the issues it faces as a contracting state (rather than a home or host state), but it is largely consistent with the other efforts in its call for national laws that do a better job addressing the particular issues posed by this global industry.

Finally, there is reflected in each of these initiatives some sensitivity to providing reasonable working environments for those employed by PMSCs. This is specifically dealt with by the US. There are mentions of insurance in the Montreux Document and the Draft UN Convention as well and both the IPOA Code of Conduct and the Draft Global Code of Conduct for Private Security Companies and Private Military Companies, recently authored by the Swiss Federal Department of Foreign Affairs, contain substantial discussion on this issue. There is more room for growth in this area as home and territorial states think about how they might ensure not only the good behavior but also the welfare of their citizens employed in this industry.

**Tensions**

These convergences notwithstanding, there are also some areas of tension. The treatment of intelligence services suggests one probable point of contention. The US continues to use a good amount of private support for intelligence purposes (Mayer 2009). Intelligence does not fall obviously within the categories generated by the CWC. The UN, however, clearly articulates this as an area of concern. There is thus less room for optimism over the regulation of intelligence services at the moment.

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49 The US is also a home state but because most of the companies from the US also contract with the US, the home state perspective of the US is distinct from other home states – like Chile or the Philippines or South Africa.
Also while the UN’s Draft Regulation, the Montreux Document, and IPOA’s Code of Conduct reference the importance of abiding by the laws of governments, there are differences – particularly between the UN and IPOA – on what those laws should be in the best of worlds. The UN generally would like tougher laws that exert the primacy of the state in security and IPOA sees the private sector as a partner in security. In a recent survey, several members of the IPOA also voiced serious concerns about the sincerity or effectiveness of the US government’s regulatory efforts as the major challenge to their company in the future.50

Finally, the South African government’s 2006 law demonstrated a continuation of concern about the industry. Other governments whose citizens have been recruited by transnational PMSCs, such as Chile and the Philippines for instance, have also voiced worries about the potential exploitation of their citizens. Though South Africa is worried about its citizens committing illegal acts abroad rather than being exploited, these countries’ concerns share a similar desire to affect the conditions under which their citizens can be recruited by the transnational security industry.

Competencies
These recent regulatory efforts involve international organizations, NGOs, groups of governments, and the US government. The Montreux Document is the only effort that involves the “governance triangle” argued to be the most potentially effective by Abbott and Snidal and it has not yet developed rules and enforcement mechanisms for governments. All of these efforts are new and several of them are not even fully formed so a serious discussion of competencies is premature. Nevertheless, it is worthwhile to mention how requisite competencies might and might not obtain in particular areas.

50 Survey by Deborah Avant and Nicholas Dew, results available upon request.
The Montreux Document has undoubtedly had effect already on both the draft convention of the UN, the IPOA Code of Conduct, and some initiatives undertaken by the United States. Its reflection of a mix of governments (with different relations to PMSCs), NGOs, and industry groups provides the most representativeness, expertise, and independence from particular interests. All of this has enhanced its role in agenda setting. The UN has stronger potential for actual rule making but weak potential for enforcement (beyond its market tools – which it has thus far been rather reluctant to engage).

The United States remains the player with the most capacity in both rule making and enforcement. Given its roles as a contracting, home and (occasionally – as in post-Katrina and current efforts in homeland security) territorial state, it also has the most pervasive influence over the market. Where the US endorses and develops harder rules and enforcement mechanisms reflecting agreement with other efforts, it is likely to have effects both over those areas it controls and over standard practices in the industry. Even without coordination, then, as the US develops rules and enforcement mechanisms (such as licensing, training requirements and the like) that reflect the general areas of agreement outlined above, we should see significant effects on the behavior of the industry – at least those parts of it aiming for the US market. Some amount of harmonization may occur even without a formal agreement. A more active role by the US with international initiatives has also enhanced the legitimacy of these efforts and may further enhance the regulatory effects.

Most of the agreements outlined above address only the most serious of the issues associated with the use of private forces. Many of the problems having to do with private
forces – particularly lack of transparency in both firms and the government processes by which they are hired – will require additional effort. An independent watchdog (or watchdogs) with serious expertise in the security arena would help solve this problem – as would an accreditation regime – both of which are discussed in the IPI’s recent blueprint for a framework for regulation. The skeleton for a global regulatory framework, however, may already be forming.

**Regulation and the Global Good**

Is effective regulation good? There are competing views among the analyses used in this essay. Mattli and Woods focus less on effectiveness per se than common interest or capture regulation. Common interest regulation – and the broader purpose it evokes – is good and capture regulation by narrower or private interests is not. Abbott and Snidal assume that effectiveness is only reached if regulation is seen to be in the general or common interest rather than captured by a particular (and smaller) subset. Both claim that common interest regulation requires both particular institutional processes – including due process, transparency and broad representation – and societal demand.

While sympathetic with this analysis, Avant, Finnemore and Sell take a narrower view of effectiveness – as simply that outcome which is stable. An outcome may be stability (and thus seen as effective) even if it is held in place by power and/or a nascent, unorganized opposition. Indeed, the capacity to deliver outcomes can even generate governing authority among some constituencies. An outcome becomes unstable – and thus ineffective – only if the constituency among which the regulation is seen as illegitimate mobilizes to call it such.

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51 (IPI 2009)
This latter approach has the advantage of taking account of many features of global governance that are seen as effective (and even good) within dominant constituencies but leaves open the possibility that this outcome may nonetheless be seen as illegitimate in some circles. It can also take into account the (increasingly frequent) situation when due process, transparency, broad representation and societal demand lead not to no action at all because there is not agreement. Effective regulation, in this account, generates stability but, depending on one’s view, that may not line up neatly with what one thinks is best.

Conclusions

Many have approached regulatory initiatives one by one – comparing their effectiveness or bemoaning their lack of effectiveness over all. A governance approach suggests looking at how the various approaches relate to one another. Through this lens, the regulatory efforts as the industry first emerged look quite different from those in recent years. While the number of regulators has grown, so too has the degree to which their efforts complement one another rather than compete. Noting the variability among governance situations suggests the potential that the dedifferentiation Daase writes of could yield quite different results, some more stable than others. And it raises the possibility that the contestedness of security as a commodity may also vary. The effectiveness of public private partnership and codes of conduct depends, in part, on the degree to which various public and private governors agree. Further analysis will be required as the UN Draft Convention and the US CWC take their final forms and we have more information about the competencies of the various regulatory actors become clearer.
Nonetheless, we should not only attend to the strengths and weaknesses of particular processes but the way in which the processes fit together.
References


