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Becoming Legitimate:
How PMSCs Are Seeking Legitimacy in the International System

by

Sommer Mitchell

A dissertation submitted in partial fulfillment
of the requirements for the degree of
Doctor of Philosophy in Government
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ABSTRACT

The use of private military and security companies (PMSC) by state governments has raised many questions regarding the role of the private security industry (PSI) in conflict. This use of PMSCs by states has resulted in much debate in the public and academic spheres (Avant 2005, Dunigan 2011, Kinsey 2006, Leander 2005, Singer 2008). The PSI and PMSCs are altering the international system of norms and redefining what it means to be secure and make war. States are no longer the only entity in the international system with security needs. Intergovernmental organizations (IGOs), non-governmental organizations (NGOs) and multinational corporations (MNCs) also purchase security services provided by PMSCs. With the ever-growing presence of PMSCs in conflicts, peacekeeping, and humanitarianism, the legitimization of PMSCs is vital for their missions to succeed. Furthermore, companies that operate at the international level as well as their clients have vested interests in changing their image from ‘mercenaries’ and ‘dogs of war’ to ‘private warriors’ and ‘legitimate soldiers’.

This dissertation addresses why and how PMSCs seek legitimacy in the international system. I argue that PMSCs desire and need legitimacy to justify their existence and support the claim that their actions are desirable, proper, lawful, and just because they follow a socially constructed system of norms. My dissertation builds on private security literature by drawing on constructivist approaches to norms and legitimacy and employing discourse analysis. Through my analysis, I identify rebranding and self-regulation as measures taken by PMSCs and the PSI to build and solidify the perception of legitimate security providers. PMSCs and the PSI developed their own discourse through the creation and implementation of the Montreux

Document, International Code of Conduct for Private Security Service Providers (ICoC), and the ICoC Association to counter the negative perceptions created by media coverage and controversial incidents involving PMSC personnel. The rebranding and self-regulation efforts of PMSCs and the PSI supports the argument that they need and desire legitimacy. Without legitimacy and a shift in perception, the actions of PMSCs and their contractors will always be questioned and full integration into the state and international security apparatus will remain out of reach.

CHAPTER 1

INTRODUCTION

In the years since the US invasion of Afghanistan and Iraq, the scholarship on private military and security companies (PMSCs), the private security industry (PSI), and their contractors has expanded at a rapid rate. There are hundreds of books, some written by academics and others by investigative journalists, that attempt to define, categorize, and explain the addition of private entities in the security environment. As many before me have explained, the PSI and PMSCs are not an entirely new concept (Avant, 2005; Dunigan, 2011; Kinsey, 2006; Percy, 2007b; Singer, 2002). There is a lengthy history of monarchs and wealthy individuals hiring private soldiers to fight their battles. Historically, we have called private soldiers mercenaries. Today, we call them private contractors working for private corporations.

Statement of the Problem

PMSCs, companies that provide services that are typically considered military/security functions, have expanded from relatively few companies in the 1990s to thousands of companies today. This rapid growth is due to opportunity and need. Opportunity because the US and USSR downsized their militaries after the fall of the Soviet Union in 1991 leaving a large pool of workers entering the workforce with a very specialized skillset. The need for PMSCs was somewhat limited until 2003 when the US invaded Iraq. President Bush was able to fight a two-front war in Iraq and Afghanistan without serious political fallout domestically because he

supplemented the US forces with civilian contractors. These contractors came from all over the world and often had prior military or police force experience making it easy for them to step into the roles of guarding bases, people, and convoys as well as handling the day to day logistics of fighting a war. Coupled with the opportunity and need of PMSCs is the neoliberal economic push to privatize state industries. This push helped establish the trend of states outsourcing security needs.

As important as outsourcing security has become to states, they are not the only consumers of private security services. Intergovernmental organizations (IGOs), non-governmental organizations (NGOs) and multinational corporations (MNCs) utilize the private security industry as frequently as states. The growing role of PMSCs as a security force for peacekeeping and humanitarian missions under the authority of an IGO or an NGO illustrates that states are not the only procurers of PMSCs. The addition of IGOs, NGOs, and MNCs as purchasers of private security services ensures the continued growth of the industry and the market for force. PMSCs maintain a source of capital, recruit military personnel, possess an arsenal, and provide military and security services with little to no state regulation. States are in the process of creating better and more enforceable regulations for the private security industry. However, the corporate nature of these companies provides them with the ability and opportunity to relocate their headquarters to those places that still lack adequate regulations.

The phenomenon of the privatization of security has seeped into all areas of the international system. Yet, controversy surrounds the industry with accusations from human rights abuses and criminal activity to labeling it the new mercenarism and calling for strict regulations. The controversy of PMSC use is frequently tied to allegations of human rights violations. These allegations are based on incidents such as contractors working for PMSCs

involvement in the abuses at Abu Ghraib prison in 2004 and the shooting of 17 civilians in Nisoor Square in 2007. Despite such incidents, PMSCs are still contracted for all types of missions from state military operations to UN peacekeeping.

The need for regulations and accusations of human rights abuses are two issues among many that speak to the lack of legitimacy – meaning their actions are not perceived as desirable, proper, lawful, admissible, or justified – of the PSI and PMSCs. The PSI refers to all the companies, firms, corporations, and organizations that provide services that at one time would have belonged to the military or that support the military effort of the state purchasing services. PMSCs are one example of the growing number of non-state actors in the international system. As this number has increased over the years following the end of the Cold War, scholars have raised many questions regarding legitimacy in international relations such as who are the legitimate actors in the international system and which rules and norms should they follow to be perceived as legitimate (Collingwood 2006)? Furthermore, do non-state actors desire and need to be perceived as legitimate international actors? What are the benefits and/or drawbacks for achieving legitimacy? Using the PSI and PMSCs as the example, my dissertation focuses on the relationship between non-state actors and their desire to be perceived as legitimate security actors in the international system. The following research question guides this dissertation project: Why and how do PMSCs seek legitimacy in the international system?

The argument presented in this dissertation is three fold. First, I argue that PMSCs struggle with legitimacy because of the anti-mercenary norm. More specifically, PMSCs desire and need to narrow the scope of the anti-mercenary norm in order to be perceived as legitimate security providers. Sarah Percy (2007) argues that PMSCs lack acceptance because of the anti-mercenary norm, which has existed since the twelfth century. The anti-mercenary norm is a

result, according to Percy, of the perception that mercenaries are immoral because their use of force falls outside state control. Furthermore, they raise questions of morality due to their war profiteering. Percy's argument is that PMSCs cannot escape the anti-mercenary norm no matter how they brand themselves or how useful they or their services are. To her, this is evident in the behavior of states as they do not fully accept PMSCs and all the ways they could be utilized by the state. Instead, the moral question presented by mercenarism influences how, when, and where states use PMSCs.

Unlike Percy, I posit that the legitimization of the PSI and PMSCs can narrow the scope of the anti-mercenary norm. In many ways, the continued and growing use of PMSCs has already narrowed the application of this norm. As the practice of hiring PMSCs becomes more prominent and accepted across security environments, the less their clients are willing to perceive them as morally problematic. To do so, would bring the clients own morals and legitimacy into question as well. However, I do agree with Percy that states are still cautious in their use of PMSCs and make attempts at controlling them as much as possible.

Second, I argue that the anti-mercenary norm continued to be applied to PMSCs because of a negative perception of the industry due to discourse created by media coverage and controversial incidents. Media discourse maintained PMSCs' association with mercenarism by continually referring to them as mercenaries, dogs of war, cowboys, and trigger-happy. Finally, I argue that non-state actors desire and need legitimacy to justify their existence and make the claim that their actions are lawful and just according to accepted international norms. More specifically, PMSCs desire and need legitimacy for the continuation of the use of their services, the longevity of their corporations, and the expansion of opportunities to serve varying functions in the international system. Within this point, I also argue that PMSCs exercise

discursive power because they participate in public debates about their use, role, and regulation as well as they offensively and defensively shape their image as security actors (Fuchs, 2005, p. 772; Joachim & Schneiker, 2014, p. 247). PMSCs, to narrow the scope of the anti-mercenary norm and establish legitimacy, developed their own discourse through the establishment of the International Code of Conduct for Private Security Service Providers (ICoC) and rebranding of company services and identity.

The Label Debate

Academics have struggled with labeling and/or categorizing PMSCs because the services provided by companies change, companies merge into larger corporations regularly, and the list of those who hire PMSCs grows daily. Furthermore, so much of what PMSCs do for their clients is reminiscent of the services provided by mercenaries historically, yet how they operate today is so vastly different from entities of the past. Most of the debate within the literature has centered on services provided by these companies.

According to Christopher Kinsey (2006), PMCs provide military services and expertise to their clients. The services they offer lean toward the offensive end of the security spectrum. Kinsey argues that weak or failing governments that are losing or have lost authority in the eyes of their people use PMCs most often. PMCs actively work alongside their clients to provide a force multiplier and have been known to take direct part in conflict. The organization of PMCs is based on a business model that includes a vetting process for employees, a marketing strategy, and company culture. The full-time staff of PMCs are usually small and responsible for the office and contract management. The employees sent into the field by these companies come from an extensive database that includes names, skills, prior experience, and so on for potential

operatives. Furthermore, PMCs are relatively easy to start and have the ability to move location easily and efficiently.

PSCs, on the other hand, provide services that focus on crime prevention, public order, and protection of individuals and property (Kinsey, 2006). The services they offer lean toward the defensive end of the security spectrum. PSCs are often hired to provide security in the form of protection, but in conflict zones, that role has evolved and they have sometimes had to actively engage in the military arena. In most cases, PSC employees are not armed and use force only in self-defense (Percy, 2009). Sarah Percy (2009) has identified three categories of services offered by PSCs. The first category is operational/tactical services that range from interrogation of military prisoners to the operation and support of weapons systems. The second category is security/policing services that range from protecting military and political leaders to securing investment sites for private businesses. The largest portion of PSC business comes from the third category, military advice and training services. These services include training armed forces, police forces, and auxiliary forces, but can also include land mine removals and risk assessment (Percy, 2009).

The academic label is important in the overall conversation of private security in general and to the current understanding of the PSI as a whole. This is because those to whom the public listens like policy makers and investigative reporters incorporate academic scholarship in their analysis and discourse of PMSCs. Additionally, it is through the discussions and research conducted by academics that advancements in our understanding of the private security phenomenon has occurred. The problem with finding an adequate consensus on what to call these entities that make up the PSI is that the services provided by each company, the manner in which those hiring them use those services, and the way the companies merge into larger

corporations have changed, grown, and expanded over time. This differentiation between the two types of companies is important for the field, but will not be applied in this work. The scope of the private security industry as a whole is being studied here. Therefore, there will not be a differentiation of the two types of companies, so private military and security companies (PMSC) will be used.

Theoretical Foundation

The nature of the PSI and PMSCs has made it difficult to develop a new theory on private security or apply existing theories in research projects. The difficulty is due, at least in part, to their clients who tend to be state governments or intergovernmental organizations and the types of services PMSCs provide. It is difficult to argue that a PMSC hired by a state in a traditionally military, albeit not offensive, role maintains its status as a private entity. States, especially Western states, use PMSCs as an extension of their power in a location that is typically immersed in conflict. It's not that the argument cannot be made that PMSCs are private entities. Rather it is that the differentiating line between public (state) and private becomes blurred. If PMSCs are an extension of the state, then state-centric theories may have explanatory power. However, if PMSCs are truly independent, private non-state actors, then state-centric theories explain nothing about their place in security matters.

In the realm of international security, many non-state actors are taking on new roles. For example, NGOs provide human security in regards to healthcare, HIV/AIDS education and prevention, crime, and fighting transnational proliferation of arms (Krahmann 2005). Although non-state actors are contributing to a changing understanding of security, due to the work of Max Weber (Lassman & Speirs 1994), security is understood in terms of violence and as a function of

the state. According to Weber, only the state holds the monopoly on the legitimate use of violence and can determine which groups and individuals have the right to use it. Yet, the privatization of security has significant implications for breaking the states monopoly on the legitimate use of force (Eckert, 2015). Krahmman (2005, 4-10) argues that NGOs, IGOs, and PMSCs are challenging this assumption because they take part in providing security independent of the state. Our very understanding of a 'security threat' is evolving from state targets to targeting societies and individuals. This makes NGOs, IGOs, and PMSCs more suited to address security threats since they can operate globally and cross state borders. Krahmman further argues that non-state actors like PMSCs can either contribute to the problem of the changing nature of security threats or be part of its solution. On the contributing end of the spectrum, there are PMSCs that have participated in human rights violations and have been part of sex trafficking rings (Pingeot 2012). On the solutions end of the spectrum, there are PMSCs that serve as force multipliers for states and participate in humanitarian missions.

Several scholars have addressed the challenge non-state actors, as security providers, has on international relations theory. Deborah Avant (2006) examines the implications of the private security market for Democratic Peace, late state building, and the nature and frequency of conflict. Zelijko Branovic (2011) utilizes economic neoliberalism to explain why states have privatized security. Dunigan (2011) focuses on military effectiveness and utilizes the democratic advantage to discuss the impact of private security. These scholars utilize these theories in reference to the market for force that has developed with the privatization of security. Explaining the market for force is not the only manner in which scholars have utilized theory to discuss private security. Krahmman (2010) seeks to understand the proliferation of private security through the Social Contract and the Republican and Liberal models of democratic civil-military

relations. Finally, Leander and van Munster (2007) argue that neoliberal governmentality bolstered PMSCs to expert status in the discussions surrounding action in Darfur. Whichever theory scholars have utilized to gain insight into the private security industry, none of them are considered mainstream international relations theory.

International security is often associated with the realist tradition. PMSCs fall into the realm of international security because they provide security services to states, IGOs, NGOs, and MNCs. Due to their non-state status, the realist tradition cannot provide an explanation for the usage of PMSCs regardless of their association with security matters. Realists argue that the sole focus of the state is its pursuit of national interests and therefore tend to ignore the rise of non-state actors in the international system. This perspective lacks the ability to explain the rise of power non-state actors possess and utilize regularly. Because variations of realism are state-centric, they struggle with extending their explanatory power to PMSCs. More often than not, the PSI is engaged in providing services usually reserved for the state. Realism explains the state using the PSI as an extension of power, yet it does not explain the slippery slope states are navigating by placing military power and the means and authority to use it in the hands of a private entity they may not control. Although PMSCs are rarely awarded contracts that place them in offensive positions on the front lines, they are hired to provide security that often requires them to be armed and possibly use force. Furthermore, realism is not useful in explaining the dynamics of non-state actors employing and utilizing state means to exert force and gain power.

Theoretical Framework

I support the notion that PMSCs are indeed non-state actors and therefore fall outside the state-centric theory of realism. Since the go to security theory lacks explanatory power for PMSCs, another theory must be adopted. This dissertation examines why legitimacy is desired and how that desire translates into actions. The argument at the core of this work is that PMSCs, like states, are not immune to legitimacy. The actions of PMSCs affect accepted international norms, attempt to overcome the anti-mercenary norm, and contribute to the solidification of the practice of hiring the private security industry to meet security needs. The attempts at legitimization of PMSCs is in direct conflict with several norms such as the anti-mercenary norm, the norm that only states have the legitimate use of force, and the norm of the expected behavior of state and non-state actors in regards to use of force. Constructivism provides the ideal framework for discussing how PMSCs are seeking legitimacy because it examines norms and the argument presented here focuses on norms in two ways. It analyzes the process PMSCs are using to narrow the anti-mercenary norm's scope of application and it examines the norms PMSCs are establishing in their efforts to be legitimate security providers. Since PMSCs want legitimacy, they have to contend with the anti-mercenary norm and constructivism provides the necessary language and frame to explore the varying ways PMSCs may do this. Constructivism has explanatory power for my argument because it recognizes that normative and ideational structures have value because shared knowledge and norms - defined as systems of shared ideas, beliefs, and values - shape the social identities and interests of international state and non-state actors (Farrell 2002). Shared norms are important because they establish the expected behavior of states and non-state actors.

Norms and Identity

The constructivist understanding of the mutual constitution of norms and actors helps explain and understand expectations of behavior. Norms are “collective understandings that make behavioral claims on actors (Checkel 1998, p. 3).” International norms shape the social identities and interests of state and non-state actors through three mechanisms (Checkel 1998; Farrell 2002). First, institutionalized norms condition what actors consider necessary and possible in the international system. Second, state and non-state actors justify their behavior through established norms of legitimate conduct. International norms are related beliefs about the world that “define actors, their situations, and the possibilities of action” and are reproduced through continued interaction (Farrell 2002). The evidence of norms can be found in international law, international legal bodies, and international organizations. Finally, international norms can constrain the conduct and behavior of actors. Conformity to norms allows other states and non-state actors to have a level of expectation of behavior.

In addition to its focus on norm formation and development, constructivism also focuses on identity. The identity of non-state actors is an important component in how they operate and exercise agency in the international system. For constructivists, identity is a social construct and therefore subject to change. Identity is especially important to PMSCs because they are trying to move from their given identity as mercenaries to one that is focused on being a legitimate actor. PMSCs seek the type of legitimacy that other corporations want: legitimacy that is based on the perception that their actions are desirable and proper (Suchman 1995). Legitimacy implies that an actor regularly exhibits appropriate and expected behavior. To be perceived as legitimate actors, PMSCs are combating the negative discourse surrounding their services, use, and actions by creating their own discourse in an attempt to construct a more pleasing and useful identity.

Joachim and Schneiker (2012) argue that identity is important enough to PMSCs that they actively seek ways to influence their image. This is one of the many ways PMSCs seek legitimacy.

Identity is also important to the clients of PMSCs. States, IGOs, NGOs, and MNCs all have different, yet distinct identities. Their constructed identities require, to some degree, legitimacy because without it, they would not be effective international actors. IGOs, NGOs, and MNCs are in the same position as PMSCs in their desire to have the appearance of corporate legitimacy. Legitimacy plays a role in the actions they take, in the contracts they award, and the companies they hire. Furthermore, states, IGOs, NGOs, and MNCs serve as the source of authority for PMSC missions. Therefore, these other state and non-state actors have a stake in the perception of the PMSCs they utilize.

Legitimacy

As an international relations concept, legitimacy is often contested. International relations scholars have, for some time, debated its meaning and the best way to approach its study (Roach, 2013; Bjola, 2008; Clark, 2003; Steffek, 2003). Since the end of the Cold War, IR scholars have steadily moved the discussion of legitimacy beyond the state due to an ever-increasing number of non-state actors operating in the international system (Collingwood, 2014; Reus-Smit, 2007). Private security scholars, regarding PMSCs and legitimacy, have examined types of legitimacy such as moral and legal and how they apply to the PSI (Herbst, 2013; Østensen, 2011). Regardless of its contestation as an international relations concept, legitimacy has a lengthy history and robust scholarship.

Corneliu Bjola (2008) identifies two ways international relations scholars have researched legitimacy. The first is analytical and focuses on describing and explaining the

concept of legitimacy by analyzing why and how norms of legitimacy influence state interests, foreign policies, or the nature of international order (p. 628). The second is normative and focuses on examining the rules, norms, or principles involved in defining legitimacy by comparing and evaluating definitions of legitimacy that serve the interests of peace and justice in the international community (p. 628). Bjola argues that neither an analytical or normative approach to researching legitimacy allows for a differentiation between legitimate and illegitimate actions. Bjola's argument that researching legitimacy in this way is limiting in understanding the legitimacy of actions is not enough for the purposes of this study. Bjola's work raises appropriate questions of legitimacy, however, the focus is on legitimacy as it relates to states and not the legitimacy of non-state actors.

Due to the increase in non-state actors in the international system, IR scholars have had to consider legitimacy outside the state. Vivien Collingwood (2006) argues a fixed definition of legitimacy, especially one based on the liberal democratic state with its focus on democratic representation and accountability to the public, is limiting in understanding legitimacy in terms of non-state actors. According to Collingwood, Clark identifies two issues of concern with legitimacy; which actors should exercise power and which rules should guide their actions (p. 446). Regarding which actors should exercise power, Collingwood points out that globalization has given economic and political power to actors that are not accountable to citizens since they are not chosen by citizens, do not answer to citizens, nor do they operate within the limits of electoral promises. For example, intergovernmental organizations such as the IMF and World Bank continue to influence states' financial and development policies while private-sector actors like multinational corporations influence states' investment decisions and taxation policies. Collingwood's acknowledgement of the economic and political power of non-state actors

further my argument because it provides the space to argue that non-state actors need and desire legitimacy.

Christian Reus-Smit's (2007) work on legitimacy furthers our understanding of legitimacy beyond the state. He argues there is a language of legitimacy that describes the capacity to act as well as the right or entitlement to act (p. 158). Reus-Smit's language of legitimacy is applicable to entities other than the state such as institutions, organizations, and social orders because they can also be described as legitimate or illegitimate. In this sense, legitimacy is the perception that the normative precepts of an institution, domestic and international, are rightful (p. 159). Legitimacy is a trait society places on an actor's identity, interests, or practices as well as on an institution's norms, rules, and principles. It is a social concept attached to the "right to act, right to rule, or right to govern" that goes beyond the capacity to do so since rights are socially granted (p. 159). This means that an actor has the right to act, to rule, or to govern only if the actor is socially sanctioned. Since actors are always seeking legitimacy, they engage in the practice of legitimation which is a normative process "characterized by actors seeking to justify their identities, interests, practices, or institutional designs" (p. 159).

Reus-Smit's understanding of legitimacy is important to my argument for two reasons. First, Reus-Smit recognizes that actors other than the state need and seek legitimacy to justify their identities, interests, and practices. Second, they seek legitimacy to gain the socially sanctioned right to act. Both have applicability to why and how PMSCs seek legitimacy in the international system. They need legitimacy to justify themselves and their place as a security provider in the international system and to earn the right to act. Presently, PMSCs' right to act is attached to their contracts and the client that procured their services. For PMSCs, legitimacy may

(eventually) bring with it the right to act independent of clients. In other words, PMSCs could act in any way they choose as long as they adhere to norms, rules, and practices that are socially sanctioned.

Ian Clark (2003) identifies three types of legitimacy. Although his writing is focused on legitimacy and the state, his approach is useful for my argument in determining the type of legitimacy PMSCs seek. The first approach he identifies is based on Max Weber and argues that “rule is legitimate when its subjects believe it to be so” (Weber, 1968 cited in Clark, 2003, p. 79). This approach is the basis for the general understanding that states have the right to the legitimate use of force. Understanding legitimacy in this way is problematic for PMSCs because it places the right to use force in the hands of the state. However, for PMSCs to be legitimate security providers, at some point, they will need the ability and right to use force even if only in the defense of self and others. The second approach Clark identifies is the consensus approach where legitimacy is based on the degree of consensus of the major powers concerned (p. 84). This type of legitimacy is only useful for PMSCs in that as more and more states, especially the major powers, use PMSCs, the more likely the practice of hiring PMSCs is legitimate. However, legitimacy in this way does not transfer to the legitimacy of PMSCs themselves only to the practice of hiring their services. The final approach identified by Clark is based on Martin Wight who understood legitimacy as rightful membership in international society based on the collective judgment of states (p. 84). This type of legitimacy, as Clark states, is “concerned with principles governing admission to, and recognition by, international society” (p. 84). Although this approach appears very state-centric, it does have relevance to PMSCs because they are looking for rightful membership among the legitimate security providers in the international system. It is at the heart of why PMSCs seek legitimacy.

The final piece that is necessary for understanding legitimacy as it applies to PMSCs and this dissertation is the theory of organizational legitimacy. Mark Suchman (1995) defines legitimacy in a way that acknowledges the social audience in legitimation dynamics. He argues legitimacy is “a general perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions” (p. 574). Suchman further identifies for what purpose an organization needs legitimacy. Legitimacy is necessary for the enhanced stability and comprehensibility of organizational activities (p. 574). Legitimacy leads to longevity because organizations that appear desirable, proper, or appropriate are more likely to receive resources. This is due to the audience perceiving a legitimate organization as more worthy, meaningful, predictable, and trustworthy (p.575).

For this dissertation, a combination of definitions provided by Collingwood (2006) and Suchman (1995) will be used. Collingwood (2006) bases her definition of legitimacy on the work of M.D. Edwards (2000, p. 20) which states “legitimacy is generally understood as the right to be and do something in society – a sense that an organization is lawful, admissible, and justified in its chosen course of action” (p. 444). Collingwood applies this definition to the legitimacy of transnational NGOs. Suchman (1995) takes a different approach by defining legitimacy in terms of organizations in general. As noted earlier, Suchman states legitimacy is based on a generalized perception that the actions of an entity are desirable, proper, or appropriate (p. 574). Building on these definitions provides an understanding of legitimacy that is based in international relations and organizational theory. Therefore, legitimacy is understood here as the generalized perception that the actions of an entity are desirable, proper, lawful,

admissible, and justified because such actions taken by an entity follow a socially constructed system of norms, values, beliefs, and definitions.

Methodology

A constructivist framework incorporating norms and identity will guide my research and methodology. To understand the construction of social reality, some mainstream constructivists use discourse analysis (Adler, 2008). According to Emanuel Adler (2012, p. 113), constructivists of all divisions share common ground in the understanding that there is a social construction of knowledge and there is a construction of social reality. Adler also argues the phenomena we study are social artifacts because they are subject to interpretations and languages (p. 113). Because of this, constructivists utilize discourses to analyze the impact our words and symbols have on our understanding of social phenomena.

Charlotte Epstein (2008) defines discourse as “a cohesive ensemble of ideas, concepts, and categorizations about a specific object that frame that object in a certain way” (p. 2). She also states that “discourse confers meanings to social and physical realities” and through it, “individuals, societies, and states make sense of themselves, of their way of living, and of the world around them” (p. 2). Constructivists also look to discourse to operationalize ideas, identities, and norms that are a result of discursive practices and are constituted by socially shared meanings (Holzscheiter, 2014, p. 145). More importantly for this research project, as Holzscheiter (2014) states “the social construction of reality via discourse comes to bear particularly in social situations where little common knowledge, uncertainty about others’ perspectives and interests and conflict of norms prevail” (p. 146). In other words, discourse is

especially relevant to the study of PMSCs seeking legitimacy because there is limited knowledge about them and extensive uncertainty of others' perspectives of their interests and actions.

Discourse analysis is useful for a constructivist framework because it allows the researcher to “capture the creation of meanings and accompanying processes of communication” (Klotz & Lynch 2007, p. 19). This includes the analysis of language, documents, primary sources, and practices. Cheek (2004) argues that language is neither transparent or value free and that discourse can be any “representation of an aspect of reality” (p. 1144). Holzscheiter (2014) defines discourse analysis as “an engagement with meaning and the linguistic and communicative processes through which social reality is constructed” (p. 144). In this way, discourse is viewed as the setting where the logic behind actions can be observed and analyzed and where justifications for behavior are manifested (p. 146). PMSCs in their search for legitimacy utilize many of the varying types of discourse in one way or another. Discourse analysis allows me to holistically analyze how PMSCs are seeking legitimacy. Understanding the common ground of constructivists is vital to this research project because it articulates the role constructivism can play in understanding the discourse utilized by PMSCs for legitimization and the drivers behind the PSIs' movement toward self-regulation with an industry code of conduct. Keeping the focus on self-regulation allows PMSCs to address and frame the controversies that are most concerning to the public and policy makers in a way that benefits their self-interest.

The discourse utilized here is derived from a sample of newspaper articles and international agreements. The newspaper articles were collected through a *Lexis-Nexis Academic* database search. Using the search period from the date the US invaded Iraq, March 20, 2003, to the signing of the International Code of Conduct for Private Security Service Providers, November 9, 2010, and search terms ‘private security’, ‘private military’, ‘Iraq’, and

‘Afghanistan’, I collected articles from those newspapers that returned 25 or more results: *The Guardian*, *The Washington Post*, *The Times*, *The Independent*, and *The New York Times*. This resulted in a sample of 188 articles¹. The international agreements include The Montreux Document, International Code of Conduct for Private Security Service Providers (ICoC), and the ICoC Association (ICoCA). The Montreux Document and ICoC developed between 2006 and 2010 while the ICoCA was a result of the ICoC and created in 2013.

Although the literature on private security grows daily, it is still new enough that the research possibilities are extensive. An in-depth look at private security in the context of international relations and international relations theory will be useful in understanding the dynamics of international security. Furthermore, private security represents a shift in the manner international security is pursued. PMSCs are non-state actors and that is what is at the center of my dissertation. To fully answer my research question, I utilize discourse analysis of newspaper articles and international agreements to look at PMSCs and determine why and how they seek legitimacy.

Limitations

There are a few assumptions and limitations to my dissertation project. Based on my review of the extensive literature on private security, I am starting from the assumption that non-state actors in general and PMSCs specifically have an invested interest in gaining legitimacy in the international system. As my dissertation unfolds, I will demonstrate that PMSCs have a desire and need for international legitimacy. The fact that they have been actively seeking legitimacy at the international level through an examination of their attempts at reframing their

¹ A more comprehensive explanation of the sample is provided in the chapter “Owning the Label: Overcoming the Mercenary Label through Self-Regulation”.

identity through self-regulation with the Montreux Document, ICoC, and ICoCA supports this claim. Another assumption is that it is possible for PMSCs to become legitimate actors. In conducting my research, I confirm that the possibility of PMSCs as legitimate actors is actually not an assumption. This project focuses on several PMSCs even though this presents a very small minority of the overall number of operating PMSCs; there are thousands of PMSCs in the world. Furthermore, PMSCs range in size, capital, level of operation, and services. The number and range of PMSCs makes it difficult to conduct research that can be generalized to all of them. The scope of this research is limited to large companies that are signatories of the ICoC and frequently operate at the international level.

Organizational Structure

The structure of this dissertation is organized as follows. Chapter 2 charts the emergence of PMSCs and the PSI to frame why legitimacy is a problem that cannot be ignored. Chapter 3 establishes the theoretical framework that supports and helps explain how PMSCs are seeking legitimacy by narrowing the scope of the anti-mercenary norm. This is accomplished through a discussion on legitimacy as it relates to international relations, private security, and organizations. It is also accomplished through an analysis of constructivism with attention to the concept of norms, their formation, development, and change. Chapter 4 analyzes PMSCs response to negative perceptions through self-regulation and illustrates how PMSCs are using discourse to reframe the perception of the industry. Chapter 5 analyzes the standardizing of use of force by PMSCs. This is done through an analysis of incidents where PMSCs used force and the principles and standards established in the ICoC in response to these incidents. Finally,

chapter 6 concludes the study with a discussion on the overall findings as well as industry developments since the start of this dissertation project.

CHAPTER 2

PMSCS: CHALLENGES TO LEGITIMACY IN A NEW ERA

To many, the difference between a mercenary and a private contractor working for Private Military and Security Companies (PMSCs) is semantics. In reality, the difference matters a great deal in our understanding of their use, association with states and non-state actors, and their placement within international law and international norms. PMSCs are currently subject to the prevailing international norm against mercenary use, the anti-mercenary norm. Sarah Percy (2007, p. 1) identifies two key components of the anti-mercenary norm. The first speaks to the morality of mercenaries claiming they are immoral because their actions fall outside the state's legitimate use of force. In other words, they do not have a recognized authority to use force. The second finds them morally problematic because their motivation for fighting wars is driven by selfish, financial gains which means they fight for themselves rather than for a cause.

In addition to the anti-mercenary norm, there is little consensus on a definition or a categorization method of PMSCs let alone a consensus on their status as a non-state actor with the means and authority to use force. Furthermore, scholars and policymakers struggle with many aspects of PMSCs. These aspects include the use of PMSCs, the oversight of their contracts, their conduct in the field, and their domestic and international regulation. Many scholars contend that providing security is an inherent function of the state and should not be subject to the private market. There are two main arguments that support the inherent function claim. First, the contemporary understanding of the state mandates that states have the monopoly

on the use of violence and force (Weber, 1994). Second, it is understood that security is a right of all people and intimately related to public interest (Branovic, 2011). Something that concerns the whole of society to the degree of security should not be placed in the hands of private industry that is concerned only with the whim of the market and profit maximization.

The public also contests PMSCs due to the constant reaffirmation that contractors are suspect through media images of gun-toting, dangerous looking men ready for war. These images help shape public perception that PMSCs and their contractors at the least lack morals and in the extreme, are indiscriminant killers. The anti-mercenary norm, the struggles of scholars and policy makers, and the negative perceptions of the public all speak to the larger problem for PMSCs, their lack of legitimacy.

For these reasons and others, PMSCs have become corporations that focus on the professionalism of their employees. The push to focus on the corporatization of companies and professionalization of employees indicates a desire by PMSCs to distinguish the commercial security services they provide from the combat activities of mercenaries (MacLeod, 2015, p. 124). The anti-mercenary norm has a high level of efficacy that states have internalized. PMSCs continue to be seen as mercenaries, which contributes to the continuation of this norm. Additionally, PMSCs were slow to respond to the issues the anti-mercenary norm presented and their lack of response lessened their credibility and maintained the perception that they are illegitimate actors. This poses a threat to PMSCs' growing popularity and usefulness in the security sector. To answer the overall dissertation questions of why and how PMSCs seek legitimacy, this chapter charts the emergence of PMSCs and the Private Security Industry (PSI) to frame why legitimacy is a problem that requires action.

This chapter focuses on the path that has led to our contemporary understanding of PMSCs and the PSI. Because of this, mercenary and PMSC are used to differentiate the past from the present. The term mercenary has a negative connotation to the degree that it is often used as an insult. For this chapter, mercenary is not meant to inspire a negative image of a private contractor. Rather, it is used simply to distinguish the evolution of the profession from small bands of soldiers to large highly organized companies.

A New Era of Private Force

The use of private force has a long and varied history. Prior to the 1700s, the international norm was for monarchs to hire private armies to fight their battles. As monarchs gained more control within their borders, standing armies and navies slowly became common. During this time, however, they were still seen as tools of the monarchy (Kinsey, 2006). Conscripting citizens to serve in the name of the monarchy earned favor since it insured a degree of allegiance from soldiers. As more and more monarchs raised armies from their populace, hiring mercenaries slowly became the exception rather than the rule. The French Revolution (1789-1799) and Napoleonic Wars (1799-1815) concluded the full shift toward citizen armies and the development of the anti-mercenary norm. Kinsey (2006, p. 43) argues that with the French Revolution, war became the right of the people meaning that wars were fought between states by citizens of the state. The very idea of war was now identified as a pursuit of national interest. Nationalism removed the need for mercenaries because it was easier for states to utilize the citizenry. The allegiance and patriotism citizens felt toward the state provided a far more loyal military than a profit seeking mercenary group ever could. This practice was internalized and institutionalized in the international system making it the new norm. However, hiring mercenaries

resurfaced following the end of WWII when former colonies struggled for independence. With the citizenry divided, many leaders turned to mercenaries to fight their wars.

Two dominant forces drove the emergence of today's PMSCs. The first force, which comes directly from the same neoliberal policies that pushed states to be less involved in economics and trade, is the privatization of many government functions. Godfrey et al. (2014) argues neoliberal policies designed to privatize national industry and outsource services laid the foundation for the return of private armies. Though these policies were originally targeted at domestic affairs, they soon expanded beyond state borders. For example, intergovernmental organizations like the International Monetary Fund, the World Bank, and the World Trade Organization utilized neoliberal policies to promote development in less developed countries. Neoliberalism is deeply rooted in the notion that states should be involved in the market as little as possible and that private companies can provide services more efficiently and effectively than the government. Privatization also provided an opportunity for private organizations to be removed from public accountability; it liberated "private organizations from the limitations of accountability mechanisms" (Godfrey et al., 2014, p. 106). It is not surprising that this ideology quickly evolved to include security (Musah, 2002). By privatizing security, the state can be removed from the burden of providing the service, the market can be used to determine supply, demand, competition, and prices, and the organizations that provide security services are at least one step removed from accountability.

The second driving force is a result of changes in the security environment. The first of these changes comes from the shift of the threat of invasion from fellow states to the threat of guerrilla tactics carried out by non-state actors. Non-state actors in the minds of many people refer to terrorist organizations. Although they have been responsible for their fair share of attacks

and conflicts, non-state actors can include rebel groups, transnational corporations, ethnic or religious organizations, and so on. This shift away from threats between states to threats between states and non-state actors left traditional military forces struggling to find new ways to operate in the new environment.

The second change is related to the loss of a bipolar international system. During the Cold War, the United States and the Soviet Union were patron states for less developed countries. The end of the Cold War brought an end to this patronage leaving a military resource gap in many states around the world (Branovic, 2011). Without the funds and military support from patrons, the military of many less developed countries suffered huge losses in access to technical weapons, tactical training, and strategic advisors. Without the threat of American or Soviet involvement, many local and regional conflicts reemerged. The end of the Cold War also led to the downsizing of permanent military forces in the West leaving a huge labor pool of skilled former military personnel available for work. This labor pool combined with a rise in global conflict allowed for a rapid transition (Singer, 2008).

Finally, changes in security are not solely about who is committing the act, but also who is in need of security. States are no longer the only organizations to procure security providers (Avant, 2006). Weak and less developed states are joined by the private business sector in needing a means to acquire security. The number of weak and failed states that cannot provide protection to natural resources and infrastructure are increasing making for-profit businesses a major consumer for the private security industry (Kinsey, 2006).

Struggling to Legitimize

The PMSCs of today may share characteristics with their mercenary predecessors, but there are many ways the profession of the private soldier has evolved. The first and possibly most influential is the development of the private security industry (PSI). In the past, individuals and groups that hired out their military services were loosely organized and independent of each other. There were no industry codes of conduct or organizations formed for the specific task of lobbying governments. Another development is the size and magnitude of the companies themselves. Many of the PMSCs that operate at the international level have significant capital, large pools of potential contractors to choose from, and a variety of entities in need of their services.

Second, the PSI and larger PMSCs are altering the international system of norms and redefining what it means to be secure and make war. The ability to alter international norms and redefine security and war exemplifies the level of power larger PMSCs exercise at the international level. Because of this and the fact that they are in a position to use force in a manner that we traditionally associate with the state, their lack of legitimacy is significant to our understanding of today's security environment. To maintain their status as a security provider, PMSCs are as concerned with their lack of legitimacy as their client base (e.g. states, NGOs, and MNCs) and even those in the international system that question their use. The PSI and PMSCs have a vested interest in changing their image from 'mercenaries' and 'dogs of war' to 'private warriors' and 'legitimate soldiers'. Without a shift in perception, full integration into the state and international security apparatus will remain out of reach for the majority of PMSCs.

Third, there was rapid growth and state dependence in the industry beginning in the 1990s. The wars in Afghanistan (2001) and Iraq (2003) spotlighted the growing PSI; however,

the modern trend to privatize provisions of security emerged following the end of the Cold War. As international tensions between the US and USSR receded, large standing militaries became unnecessary leading states to downsize. The sudden flooding of the market with a number of highly specialized individuals and the neoliberal economic push to privatize made the PSI a natural progression in military and security policies.

Finally, PMSCs have the appearance of being more cost effective. They are more cost effective because the government only pays a PMSC for what it was contracted to do. There are no long-term costs like pensions, housing, education, or health care. Another way they are more cost effective is because they lower the political costs policy makers have when they deploy troops overseas. PMSCs can increase the number of boots on the ground while the state limits its number of deployed soldiers. These companies provide the appearance of fewer troops without sacrificing the operational integrity associated with a smaller number of deployed enlisted men and women. Furthermore, PMSC contractor deaths are not reported as military casualties keeping the number of reported military deaths low. Because PMSCs are viewed as monetarily motivated, their deaths in the field do not carry the same weight as the death of a soldier. The final way PMSCs appear more cost effective is because their employees become experts in a position or skill while military personnel are constantly in flux. For example, a PMSC development engineer may have 15 years of experience with many more years to come while a military engineer may be in their current position for a few years before they are promoted and move on. The meritocratic design of the military raises costs because military personnel move up in rank and promotion regularly leaving positions to be filled with individuals who lack experience.

PMSCs have desired and struggled to establish legitimacy for several reasons, which fall into three broadly defined themes. First, through a military theme, we struggle to understand the difference between a state military and PMSCs followed by the interactions between the two. Second, a legal theme has emerged and is centered on the difficulties involved in defining PMSCs and their contractors and placing them within existing international law. Both issues are closely tied to calls for regulation of the PSI. Finally, the political theme questions the lack of transparency and accountability often associated with the privatization of state military and security needs that make it possible for politicians to lower some of the costs associated with foreign policy (Avant, 2001; Hammes, 2011; Kinsey, 2006; Leander, 2005; Percy, 2007; Singer, 2005). Together, the military, legal, and political themes provide a foundation for understanding the many challenges PMSCs face and must overcome to move toward their goal of being legitimate security providers.

Military vs. PMSCs

The military theme deals with how privatized military and security providers differ from their military counterparts. This theme speaks to the legitimacy of PMSCs and the PSI in that militaries are extensions of the state and therefore considered legitimate. Since PMSCs are differentiated from the armed forces of a state, the legitimacy afforded to a state's military is not extended to include PMSCs. PMSCs differ from the military yet provide services that once fell under the military umbrella. PMSCs differ because they are not replacements for enlisted soldiers; rather they serve as force multipliers that support combat capability. As force multipliers, they allow military personnel to focus on combat operations while they focus on providing non-combat services like security for people and places. More often than not, however, PMSCs provide logistical and technical support as well as maintenance of bases, transportation,

and weapons systems. Many of the services provided by PMSCs do not require them to be armed or take direct part in offensive action (Brooks & Steng, 2012). The role of force multiplier is further evident in that employing PMSCs enables the US to implement foreign policy without undermining US military readiness. PMSC contractors add to the pool of talent at the disposal of policy makers reducing strains placed on military forces (Stanger & Williams, 2006, p. 10).

PMSCs also increase the number of individuals in a combat zone without raising the number of deployed troops. According to the *Contractors in the Battlefield Army Field Manual*, “This force-multiplier effect permits the combatant commander to have sufficient support in the theater, while strengthening the joint force’s fighting capability” (US Army, 2003). In the case of Iraq, the United States military capability required more than the conventional war making of security forces. Military capability expanded to include a minimum use of force, providing stability, earning legitimacy, and state building. All of which make up the counterinsurgency strategy of ‘winning the hearts and minds’ of the people (Patraeus, 2007). Therefore, state military capability includes the ability of security and force as well as the counterinsurgency strategy and is enhanced by using PMSCs as force multipliers.

PMSCs are also different from the military because they are and operate as corporations. The corporate form provides PMSCs access to large amounts of capital and has allowed them to develop a significant level of power in the international system (Sheehy et al., 2009). Furthermore, PMSCs are corporate entities that are registered businesses with a permanent structure and headquarters. Like other corporations, PMSCs trade openly on the international market, use a marketing strategy, and have vetting systems for personnel (Kinsey, 2006; Singer, 2001). They also possess professional portfolios detailing their performance and success with other contracts (Dunigan, 2011). Unlike militaries, PMSCs maintain a permanent corporate

hierarchy, have access to corporate financing, and provide a wider array of services to many different types of clients (Singer, 2001).

Another serious difference between enlisted military and PMSC contractors concerns their status as Prisoners of War (POWs). The first Protocol to the Third Geneva Conventions provides the definitions of combatants (Article 43-44) and mercenaries (Article 47) in order to determine to whom POW status should be extended. Article 44 states that any combatant, as the term is defined in Article 43, that falls in to enemy hands must be considered and treated as a POW. The Article further states that combatants must distinguish themselves from the civilian population. Contractors are usually distinguishable by their polo shirts, Kevlar vests, and weapons. However, those items alone do not make them part of the armed forces or an official Party to the conflict. Article 43 allows for a Party to the conflict to incorporate a paramilitary or armed law enforcement agency into its armed forces. However, states do not tend to incorporate contractors. The practice would defeat the purpose, to serve as force multipliers, for why states hire them in the first place.

Article 47 states, “a mercenary should not have the right to be a combatant or a prisoner of war.” This particular article also defines mercenary. There is an ongoing argument (see legal status below) on whether PMSC contractors fall into the definition of mercenary. The right to be a POW is given to combatants, but contractors, even if they are not seen as mercenaries, are rarely considered combatants because they are not incorporated into a state’s armed forces. This means that in the event they are captured, they are not given the same rights as a POW. The reality of this lack of status in a combat zone means that contractors understand if they are captured, the enemy does not have to treat their wounds or return them to their state at the end of hostilities. During the Iraq War, some captured contractors were ransomed for a significant

amount of money or beheaded as an example. There is also a question of whether PMSCs would treat captured fighters as POWs since there is little guarantee that they would comply with international law.

The fact that PMSCs are not part of the military benefits the state in a number of ways (Hammes, 2011). The first benefit is related to the manner and speed that PMSCs can deploy their employees to wherever they are needed. This capability comes from using existing databases and foreign companies to gather necessary personnel more effectively and efficiently than the military. For the military, in comparison, the movement of troops can take a considerable amount of time, effort, and oversight and new recruits require months of training (Hammes, 2011, 27). Another benefit is continuity. When dealing with enlisted personnel, many states have policies that insure soldiers are rotated out of the conflict zone every six to twelve months. On the other hand, private contractors can be offered bonuses from their contracting PMSC for staying in a conflict zone for longer periods of time. Overall, continuity is beneficial because it saves money on the movement of personnel and maintains a pool of personnel familiar with the conflict environment. Finally, PMSCs boost the local economy by hiring the local population for non-combat jobs. Many of the local contractors hired by PMSCs are employed as housekeepers, cooks, drivers, and so on so that military personnel can be used in a combat capacity (Hammes, 2011, 27-29).

There is friction created between the growing use of the PSI and the future of the military that can be witnessed in several ways. With the growing use of PMSCs, the pride and uniqueness of serving ones country is at stake. Military personnel are losing their sense of being set apart from the civilian population (Gaston, 2008). This is especially evident when civilian contractors are found in all aspects of conflict zones. Singer notes that, "...the military's professional identity

and monopoly on certain activities is being encroached on by the regular civilian marketplace” (Singer, 2005, 128).

Another issue with the future of the military is that contractors in the field fall outside the chain of command and are not obligated to provide military personnel with their security agenda. This has led to many instances of the military having to deal with the fallout of actions taken by PMSCs. The most well-known instance of this occurred when four contractors, working for Blackwater, were killed in Fallujah² in 2004 while participating in a security convoy. Furthermore, contractors, unlike their military counterparts, can choose which contracts to accept and can suspend or abandon operations at will.

To make the future of the military even more dismal, PMSCs recruit their employees from active military servicemen. Their recruitment policies have led to fears about the ability of the military to keep highly skilled soldiers enlisted. This is especially the case because PMSCs can offer their employees higher pay at up to ten times what they would make as enlisted serviceman (Singer, 2005). In the field, all of this has combined and led to tension between the military and PMSC contractors. This tension highlights how different enlisted soldiers see PMSCs’ contractors from themselves which furthers, in the eyes of soldiers, their family, and the public, the perception that PMSCs and the PSI lack legitimacy.

Legal Status

The legal status of PMSCs is an important contributor to their lack of legitimacy. Without a clearly defined legal status, it is difficult to argue that PMSCs and mercenaries are not one and the same. As mentioned in the last section, the additional Protocol I Article 47.2 of the Third

² The incident that occurred in Fallujah is discussed in detail in chapter 5.

Geneva Conventions³ provides a definition of mercenary. Per the Protocol, a mercenary is a person who

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

This rather vague definition provides a framework for understanding mercenaries, yet in many ways PMSCs fall outside this definition. For example, Article 47.2b states that a mercenary takes direct part in hostilities. PMSCs are usually hired to provide non-combat services. More often than not, in places like Iraq and Afghanistan, PMSCs were hired to guard persons and property and not for combat missions. On the other hand, this definition in some ways applies to PMSCs. Article 47.2c states that a mercenary is motivated by private gain in excess of that paid to combatants. As stated earlier, PMSCs can pay their contractors up to ten times more than an

³ Further attempts at defining and outlawing mercenaries were made in the OAU Convention for the Elimination of Mercenaries in 1977 and the International Convention against the Recruitment, Use, Financing, and Training of Mercenaries in 1989 (Panke & Petersohn, 2011).

enlisted member of the military making it possible to see overlap between mercenaries and PMSCs further complicating their legal status.

In his work, *The Privatization of Security in Failing States: A Quantitative Assessment*, Zeljko Branovic (2011) attempts to further our understanding of the PSI by identifying the following criteria as necessary for a company to be considered a PMSC rather than a mercenary group. The criteria are the company must have market-oriented logic, have a high degree of professionalism with a well-trained military staff, have contracts based on implementing security goals, have contracted tasks that would usually be provided by the military, have the use of private human resources, be organized under private law, and be a legally registered body. This criterion is helpful in further differentiating PMSCs from mercenaries. Yet, it does not clarify exactly where PMSCs fall within international definitions and/or norms as they relate to security, conflict, and combat.

For instance, PMSCs are not combatants. Combatants are defined as “the armed forces of a Party to a conflict...under a command responsible to that Party for the conduct of its subordinates...” (Protocol I, Article 43.1). PMSCs are not classified as armed forces and typically fall outside the military chain of command. Furthermore, Article 43.3 of the Protocol states, “whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.” Though it is possible to place PMSCs within this frame, it clarifies little because states rarely incorporate the PMSCs they hire into their armed forces. Because of this, actions taken by PMSCs that violate established international norms, rarely lead to holding the hiring state responsible. E.L Gaston (2008) explains that this is because, “Article 43 of Protocol I suggests that an individual must be formally incorporated into the armed forces of a state before that state can be held legally

responsible for that individual as a combatant” (p. 236). PMSC contractors do not fall within the definition and guidelines of combatants. The struggle to define and categorize PMSCs in terms of international law highlights the grey area of their legal status.

Another issue with their legal status is that a rapid rise of the PSI has led to a gap in policy and practice. Western powers like the United States and Great Britain were not prepared for the unintended growth of the industry (Percy, 2009). This has led to inadequate and reactive policymaking. An example of a state that has attempted to provide regulations that hold PMSCs responsible for conduct overseas is the United States. The first attempt was made in 2000 with the Military Extraterritorial Jurisdiction Act (MEJA). MEJA extended the United States’ jurisdiction over civilians working for or accompanying the armed forces outside the United States. It applied to offenses that would be punishable for more than one year if committed in the United States. Originally, the statute was applicable to the Department of Defense (DoD) contractors only. In 2004, MEJA was further extended to include contractors of any agency if their role related to the support of the DoD mission. It was not, however, extended to contractors of other agencies involved in their own operations (GAO, 2008; Schwartz et al., 2008)). Another attempt was made in 2007 with extension of the Uniform Code of Military Conduct (UCMJ) to civilians. UCMJ was extended to include “persons serving with or accompanying an armed force in the field” during times of declared war or contingency operations (GAO, 2008). Both MEJA and UCMJ are problematic because their language is vague, their constitutionality is questioned, and their application seems to be limited to DoD operations.

Furthermore, limited regulations on the private security industry have led to insufficient controls over who is working for these firms and for whom these firms are working. Singer (2005) argues that although most of the employees of private military firms are highly qualified

individuals, the rush for contractors at the beginning of the war in Iraq led to a lax in vetting processes allowing less qualified personnel to slip through the cracks. Taking unqualified and undertrained employees into a combat zone like Iraq is risky and could jeopardize missions. The lack of regulation also applies to who can hire PMSCs. Their clients can range from democratic governments, the United Nations, and non-governmental organizations to dictators, drug cartels, and rebel groups. In many cases, the location of the headquarters of a PMSC matters in what kind of clientele they choose to contract. Many of the values they pass on to their clients are similar to the values of their host government (Avant, 2007). The problem is not necessarily with the *reality* of the client lists of PMSCs as much as it is with the *potential* client list.

By allowing security to be a commodity that can be sold by businesses and bought by any consumer, the ability to control the industry has proved arduous. Like other businesses, the security industry looks for ways to maximize profits. In many areas of business, this does not threaten the national security of states. However, with security, governments are finding it difficult to regulate what resources can be sold and to whom.

Political Status

The third theme focuses on the political implications of PMSCs and the PSI regarding democratic transparency, political restrictions on military action, and an increase in executive power. One of the largest concerns about PMSC use is that it cultivates an environment that lacks democratic transparency (Avant & Spigelman, 2010). States benefit from the use of PMSCs because they reduce the military and political costs of conflict. For example, a high number of military deaths can have major political consequences for those in office such as a decline in ratings or loss of an election. PMSCs reduce the number of military deaths since fewer troops are in combat zones. Contractor deaths are not reported in the same way or to the same

sources as military deaths. Instead, contractor deaths are reported to the Department of Labor where they are divided based on employer, insurance carrier, and nation where the death occurred. They do not include information on cause of death, so it is not immediately transparent if contractor deaths occur in combat (iCasualties.org). This makes the total death of Americans in the field appear to be smaller (Hammes, 2011).

Democratic transparency is also lost because PMSC contracts are considered either classified by the US government or they fall under the protections of corporate privacy. Those contracts that are open to the public are usually vague enough to not fully disclose purpose or intent. This is best exemplified through tracking defense contracts on the Department of Defense's website. The DoD publishes a daily announcement of contracts valued over \$6.5 million. Though this may seem like the government is making the contracts available to the public, they rarely provide the actual legal documents. For example, on December 13, 2010, the US DoD announced that MPRI (one of the most used PMSCs by the United States government) was awarded the following:

MPRI, Inc., Alexandria, Va., was awarded on Dec. 9 a \$156,051,487 cost-plus-fixed-fee contract. This award will embed former law-enforcement professionals into corps, division, brigade, regimental and battalion headquarters to assist commanders with enhanced expertise to penetrate and suppress criminal networks and their employment of improvised explosive devices throughout Operation New Dawn, Operation Enduring Freedom, and other overseas contingency operations. Work is to be performed in Afghanistan, Iraq, and Alexandria, Va., with an estimated completion date of Dec. 10, 2011. One bid was solicited with one bid received. The U.S. Army Research,

Development and Engineering Command Contracting Center, Aberdeen Proving Ground, Md., is the contracting activity (W91CRB-08-D-0049).

This announcement provides more information than others and even though it seems to explain the contracted services, it does not clarify what is meant by phrases like “assist commanders with enhanced expertise”. It raises questions like will MPRI contractors instruct classes, participate in “suppression of criminal networks”, or provide expert advice. The lack of democratic transparency contributes significantly to PMSCs’ lack of legitimacy because transparency is closely tied to perceptions of legitimacy (Leander & van Munster, 2007; Zedeck, 2007).

Another concern is that PMSCs make it possible for a state to circumvent domestic political restrictions on military action (Gaston, 2008; Hammes, 2011). The Bush administration could deploy fewer troops to Iraq because they were supplemented with PMSC contractors. In the fourth quarter of fiscal year 2008, USCENTCOM census reported that there were 163,446 contractor personnel in their area of responsibility in Iraq. Of those, 20,309 were from PMSCs (USCENTCOM, 2008). Table 1 provides the number of DoD private security contractors in Iraq for fiscal years 2008-2013. These numbers only reflect what was reported by the Department of Defense. Other U.S. agencies operating in Iraq also utilize the PSI, however, they do not publish census reports like those of the DoD.⁴

The report dated July 2012 states, “There was a 33% decrease in the number of DoD contractors as compared to the 2nd quarter 2012 due to the continued transition of DoD contracts to the Department of State” (USCENTCOM, 2012). Table 1 illustrates the continued reduction in the number of DoD contractors. For example, the number of contractor personnel reported in the 4th quarter of FY 2012, 2,126, was significantly less than the number reported in the 1st quarter,

⁴ It is important to note that the USCENTCOM census reports are a result of Congressional inquiry into contractor action in Iraq. Contractor numbers were first reported in the third quarter of FY 2008.

8,995, of that same year. Although the report indicates that the number of DoD contractors is decreasing because the contracts are being moved to another agency. It raises questions as to the number of contractors that have been moved, where their numbers are reported, and what services they provide to another agency. The movement of contractor numbers from agency to agency restricts policy makers and the public from seeing the whole picture of PMSC use by the U.S. government. This picture became even more opaque when Mission Iraq transitioned to the Government of Iraq at the end of 2013 causing the DoD to stop submitting reports on contractor numbers in Iraq (USCENTCOM, 2013).

Table 1: DoD Private Security Contractor Personnel in Iraq 2008 - 2013

	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter
FY 2008	N/A	N/A	14,825	20,309
FY 2009	17,919	23,685	28,511	23,846
FY 2010	20,526	22,639	22,639	11,628
FY 2011	8,327	9,207	10,414	9,554
FY 2012	8,995	3,577	2,407	2,126
FY 2013	2,281	2,359	2,148	2,409

This table was compiled using the USCENTCOM quarterly census reports fiscal years 2008-2013.

The final concern is that private security increases the power of the Executive Branch because it can circumvent the Legislative Branch, thereby giving the executive an unchecked power. If the leader of a state wishes to deploy troops, the action is open to public scrutiny. With the onslaught of private security use, it has become apparent that states can utilize the skills and expertise of the PSI to their own ends without having to worry about public support. By concentrating power in the executive, foreign policy decisions that may not be possible through traditional channels can be facilitated (Percy, 2009). Since the contracts awarded to the private security sector are not subject to legislative critique, transparency is lost (Avant, 2006).

Overcoming the Legitimacy Problem

The lack of legitimacy is historically an industry trademark for mercenaries of the past and has continued with PMSCs of the present. The themes mentioned above have a role in the perception that the PSI, PMSCs, and their personnel are illegitimate. There is a call for states and IGOs to discontinue using their services (Pingeot, 2012). Purchasing entities have made overtures to regulate the industry and its contractors, but these overtures lack any real teeth. The political theme informs the understanding that to a degree, states are better off with an industry that lacks transparency and accountability and therefore, legitimacy.

There are many stakeholders in the development of a legitimized PSI and by extension PMSCs and contractors. Although it may seem that these parties are better off without it, this is not the case. The movement away from using mercenaries and private armies in the 1800s and the movement to outlaw them in the 1960s and 70s indicate that privatized security can fall out of favor. The PSI today has more resources and connections than its predecessors and is well on its way to being a permanent fixture in the international security apparatus. However, it is not there yet and because it lacks legitimacy, it may never get there.

States from all over the world hire PMSCs, however, they are not the only actors in the international system to do so. The United Nations is a growing consumer of PMSC services for their peacekeeping and humanitarian missions. The UN is seen as one of the major entities in the international system that provides the foundation for the development and growth of international norms and state behavior. Many NGOs, human rights groups, media outlets, state governments, and individuals have called for more regulation of PMSCs, yet the United Nations continues to use them. This is significant because the fact that the United Nations is using an industry that is so controversial and lacks adequate state and international regulations could set

precedent and make the use of the private security industry acceptable despite allegations of human rights abuses and criminal activity.

The extensive list of stakeholders and clients has allowed PMSCs to developed agency at the domestic and international levels. Through this agency, these companies have the means to achieve legitimacy as well as the potential to set agendas and policy (Leander, 2005; Mathieu et al., 2009). PMSCs have gained agency at the domestic level through lobbying practices. PMSCs attempt to shape the security perceptions of politicians by shaping security discourse in such a way as to support the interpretation of facts that is in the interests of the company. As with many interest groups in the USA, the military industrial complex has developed the capacity to donate to political campaigns. It is argued that the lack of transparency and accountability of PMSCs is directly related to their ties with policymakers. PMSC lobbying groups remind government officials that the industry is useful to the defense of the state and it is profitable (Mathieu et al., 2009). There have been several accusations of misconduct and corruption in the U.S. due to linkages between private companies like Halliburton and politicians like Dick Cheney. PMSCs provide the kinds of incentives to politicians that can lead to being awarded monetarily large contracts for all types of security services (Leander, 2005).

PMSCs lobby at the international level as well. The International Stability Operations Association (ISOA) is the largest lobbying group for PMSCs. The very nature of the work and services PMSCs provide encourages them to seek new ways to define terms like threat and security to insure the survival of their company. The ISOA, as well as individual companies, have made attempts to reframe themselves as the “new humanitarians” (Joachim et al., 2012). The ISOA’s mission statement declares that the organization “engages in a constructive dialogue and advocacy with policy-makers about the growing and positive contribution of these firms to

the enhancement of international peace, development, and human security” (ISOA, n.d.). The need and desire to reframe suggests that the industry is well aware of its negative reputation and understands that the survival of the industry to some degree is reliant on a more positive image. The private security industry, through entities like the ISOA, also seeks to convince the UN that PMSCs are the best choice because they are more efficient and cheaper.

PMSC agency at the domestic and international levels is due in part to the market for force that is created by the PSI. This market requires companies to insure the continuation of conflict and threat so that there is still a need for their services. Because of this, attempts at reframing PMSCs as the new humanitarians seem distasteful. The market for force also provides PMSCs with the capital necessary to continue their lobbying efforts and to further the strength of the security market through reinvestment. Furthermore, the security market re-conceptualizes the notion of security in a free market discourse. Re-conceptualizing security means that it is no longer viewed as an inherent function of the state. Instead, the market for force makes security a commodity that must be purchased individually. Understanding the agency of PMSCs is necessary in understanding why and how they are seeking legitimacy in the international system because the PSI can use its agency to win contracts, affect government regulations, produce capital, and reframe themselves as legitimate security providers.

Conclusion

Scholars and policymakers take issue with many aspects of PMSCs including the way they are contracted and conduct themselves in the field. The public is often bombarded with images of ‘dogs of war’ and ‘soldiers of fortune’ that solidify the negative, moral lacking perception of contractors. The many voices that disagree with using the PSI and PMSCs are loud

and always ready to capitalize on the questionable actions of a few contractors. On the other hand, the PSI and PMSCs quietly go about offering their services and fulfilling contracts. This is due in part to the classified and somewhat covert nature of their missions as well as their understanding that having contractors that can do what they do for their hiring entities is necessary. The lack of legitimacy inspired by the many perceptions of PMSCs and the difficulty with placing them in a concrete legal role is dangerous for the longevity of the PSI. Without legitimacy, their actions will always be questioned and viewed under a microscope.

CHAPTER 3

**FROM EMERGENCE TO DISAPPEARANCE:
THEORIZING NORMS AND PMSC LEGITIMACY**

To become legitimate security providers in the international system, PMSCs must find a way to deal with the anti-mercenary norm. The anti-mercenary norm recognizes mercenaries as morally problematic primarily because they exercise the use of force traditionally reserved for the state. For this reason, the anti-mercenary norm is strongly rooted in our understanding of the state, its role as the actor with a monopoly on the legitimate use of force, and the current state centered international system. In her book, *Mercenaries: The History of a Norm in International Relations*, Sarah Percy (2007) uses a narrative methodology to trace the evolution of the norm against mercenaries through historical contexts and examine the influence of norms on states as well as the influence of states on norms. According to her (p. 1), the anti-mercenary norm's existence stems from the notion that mercenaries are immoral due to their use of force outside of state control and morally problematic because they fight wars for profit. Percy's interpretation of the anti-mercenary norm suggests that regardless of how PMSCs frame their brand and identities, how useful they are, the degree they provide necessary services, and other possible benefits of the industry, they can never escape this norm. Furthermore, the anti-mercenary norm shapes state behavior and identity by influencing their decisions on when, where, and how PMSCs are utilized. States stop just short of full acceptance due to the inherent belief that mercenarism is immoral and threatens the foundations of the state.

Percy attempts to differentiate mercenaries of the past from the PMSCs of the present by focusing on the extent to which contractors are associated with a larger group cause independent of monetary motivation and the degree to which contractors fall under the control of the proper authority (Petersohn, 2014, p. 6). She does not equate mercenaries and PMSCs, but states that the anti-mercenary norm still applies because PMSCs fall into a grey area that questions their motivations and the extent that a state controls their use of force. Percy (p. 45) does acknowledge that, “If the normative objections to mercenary use could be overcome, then the use of private force on a wider scale would be possible.” I argue, however, that PMSCs are using discourse not to overcome normative objectives per se, but to distance themselves from the term mercenary altogether.

The anti-mercenary norm places PMSCs in a difficult situation, as they must find a way to separate themselves from the ‘mercenary’ aspect of the norm without drastically changing the services they provide clients in order to develop their standing as a legitimate private security provider. At this point, all PMSC clients including states have a stake in helping PMSCs rise from the mercenary shadow. There are many possible ways to manage this, but here, I shall focus on how PMSCs are working toward narrowing the anti-mercenary norm’s scope of application by distancing themselves from the ‘mercenary’ label so that states no longer hesitate on when, where, and how they are used. Narrowing the anti-mercenary norm’s scope also provides PMSCs an opportunity to shift perception from that of mercenary to that of legitimate security provider. This is being accomplished through changing discourses associated with the controversy surrounding past actions.

Understanding how PMSCs are working to narrow the scope of the anti-mercenary norm requires a theoretical framework grounded in constructivism, norms, and the norm life cycle.

Constructivism is the best theoretical perspective to develop my thesis since it studies how ideas, identities, and interests are socially constructed. This allows me to address the problem or challenge of PMSCs as legitimate actors and differentiate the type of legitimacy a state desires with the type PMSCs as corporations desire. Moreover, it places significance on norms and recognizes that the study of discourses can provide valuable data and information about the international system.

This chapter, therefore, analyzes the importance of legitimacy in terms of international relations, PMSCs, and organizations. It then explains why alternative theories like realism and neoliberal institutionalism are not appropriate for my argument. Finally, it establishes the theoretical foundation that explains PMSCs seeking legitimacy through narrowing the scope of the anti-mercenary norm.

The Concept of Legitimacy

Legitimacy is a well-established, important concept in international relations, however, it is also a highly complex and contested idea. For quite some time, international relations scholars have debated its meaning and the best approach to study it (Bjola, 2008; Clark, 2005; Steffek, 2003). More recently, IR scholars have discussed legitimacy beyond the state by incorporating IOs, IGOs, NGOs, and non-state actors into the discussion. Private security scholars further contest the notion that binds legitimacy and the state's monopoly on the use of force together by exploring the potential loss of the legitimate use of force by states through the PSI or by equating legitimacy with rightful membership. In this section, I outline the concept of legitimacy as it is discussed in terms of international relations, private security, and international organizations.

Legitimacy in International Relations

In *Legitimacy and the Use of Force*, Corneliu Bjola (2008) analyzes the epistemological limitations of the study of legitimacy. According to Bjola (p. 629), scholars thus far subscribe to Weberian reasoning and approach the issue of legitimacy analytically to address it in an explanatory way or they subscribe to Kantian reasoning and approach legitimacy normatively to examine the value of rules, norms, and principles as a prescription of social reality. Understanding legitimacy in terms of Weber and Kant results in the lack of a convincing way to discriminate between legitimate and illegitimate actions (p. 630). Bjola argues that both “the manner in which actors’ commitment to social norms is crafted and the types of conditions that facilitate or constrain the definition, contestation, and adjudication of what counts as legitimacy” are equally important as legitimacy represents social action (p. 630).

Christian Reus-Smit (2007) takes a somewhat different approach by arguing that legitimacy is the right to act (p. 159). He states legitimacy is a social construct that assigns an actor the right to act, to rule, or to govern. According to Reus-Smit, “rights are socially ordained” and legitimacy requires social sanction and endorsement for an actor to have the right to act, rule, or govern. Furthermore, legitimacy is “a quality that society ascribes to an actor’s identity, interests, or practices, or to an institution’s norms, rules, and principles (p. 159).” The type of actor matters in that institutions and social orders can also be described as legitimate or illegitimate. Institutions, like the United Nations and World Bank, can have legitimacy because their organizational capacities afford them the right to act. Additionally, legitimacy can be assigned to the norms, rules, and principles that make up organizational capacities to act because their normative standing warrants respect.

Reus-Smit's (2007) understanding of legitimacy as the right to act is an extremely critical piece of my argument for why PMSCs seek legitimacy. PMSCs seek legitimacy, as it will grant them the right to act. It is conceivable that once PMSCs have legitimacy and all it brings with it, they will perceive themselves as having the right to act independent of clients. Currently, PMSCs find their right to act attached to the contract they have signed and to the entity that procured their services. In terms of military operations and security matters, this places their actions firmly under the state (in some cases, under the MNC or IO). Although they currently operate in a grey area, they tread carefully so they do not inspire distrust from their largest client base, the state. Becoming a legitimate actor in the international system affords them the opportunity to act in any way they choose. Since legitimacy is a social concept, PMSCs would still need to adhere to a set of norms, rules, and procedures to maintain their place as a legitimate security actor.

English School theorists, according to Ian Clark (2003, pp. 79-85), argue legitimacy makes the most sense within the framework of a community because the belief system of its members is crucial to its analysis as only a community can confer legitimacy (p. 81). This argument is relevant here because the international system is indeed a community and legitimacy is granted by major powers, not necessarily states, to actors fitting within their belief system. Clark determines three ways that legitimacy is discussed in international relations literature. First, the Weberian approach argues a "rule is legitimate when its subjects believe it to be so (Weber, 1968 cited in Clark, 2003, p. 79)." This context bases legitimacy on the belief system of relevant actors, not on the rightness of actions taken by a ruler.

Second, the consensus approach argues that legitimacy is about the degree of agreement and consensus, of the principle states, in the international system. Legitimacy is not tied to fairness or justice; rather it is determined by stability and the degree of consensus of the beliefs

of the major powers (p.84). This approach places importance not on social justice issues, but on the consensus major powers reach on a specific order. The consensus approach leads studies to focus on the principle of how members of the international system behave. Finally, the Wightian approach equates legitimacy with rightful membership and recognition. Legitimacy is offered based on the collective judgement of the international community in relation to the criteria for admission and recognition governing it. Understanding legitimacy in this way tends to lead studies toward the principles of how international society was formed (p.85). Despite the differing approaches, the one notion they all have in common is that “legitimacy is essentially about agreement and consensus in the international system (p. 84).” Clark’s work parallels the discussion of PMSCs and legitimacy.

Private Security and Legitimacy

In the private security literature, legitimacy is discussed in two ways. The first relates to Clark’s Weberian approach to legitimacy and explores the potential loss of the legitimate use of force by states through the PSI. The growing use of the PSI challenges this long held assumption due to the state placing the means of violence and the legitimacy to use that violence in the hands of the private sector (Weber, 1994). Krahnmann (2013) argues this is dangerous to the state and the international system being as PMSCs may fuel violence and conflict based on profit motivations. The now debunked Executive Outcomes participation in hostilities during the Sierra Leone civil war serve as a perfect example (Pingeot, 2012).

Closely related to the Weberian tradition of the legitimate use of force is democratic legitimacy. Democratic legitimacy requires “a connection to prevailing social norms and procedural rules” such as accountability and transparency (Herbst, 2013, p. 284). Accountability refers to liability and ties demands for reports of activities to the imposition of costs. States that

hire PMSCs are rarely held accountable for actions taken by these companies and their contractors (Herbst, 2013; Østensen, 2011). The United States was not implicated in the incident in Iraq of the Nisour Square shooting, where Blackwater employees opened fire killing 17 people even though Blackwater was operating under a US contract at the time of the shooting. If states are not held accountable for the actions taken by PMSCs under their contracts, then it is difficult to impose any sort of costs on hiring states. Transparency refers to the exchange of information. There is a significant lack of transparency in the contracts awarded to PMSCs. The United Nations awards contracts to PMSCs to provide “security services”, but there is limited information on exactly what security services entails. Furthermore, in the United States, contracts signed between the government and a PMSC are not subject to the Freedom of Information Act making it next to impossible to know exactly what the company was hired to do and where they were hired to do it.

Bjola’s critique of how legitimacy is studied as well as the Weberian and Democratic approaches to legitimacy are problematic for this study since they focus mostly on legitimacy as it relates to states. Though PMSCs often act on behalf of states, they are corporations that act FOR states not AS states. International relations theory is often state-centric. Unfortunately, since PMSCs are corporation with profit and the bottom line in mind, understanding legitimacy through the lens of accountability, transparency, or the state is not helpful. It can also skew the discussion as it maintains focus on how the state seeks legitimacy which can keep legitimacy seeking non-state actors from scrutiny.

The second way legitimacy is discussed in the private security literature relates to Clark’s Wightian approach where legitimacy is equal to rightful membership. In this regard, the literature often discusses legal and moral legitimacy of the PSI and PMSCs. Legal legitimacy

refers to the system of norms, values, beliefs, and definitions that create a common understanding of whether PMSCs should exist and moral legitimacy refers to whether PMSCs have the social license to operate (Herbst, 2013; Østensen, 2011). It is argued that PMSCs lack Wightian legitimacy, at least in part, due to the creation of legal dilemmas, which are created through the ambiguity of the roles of contractors working for PMSCs in conflict zones. These employees are more than citizens in that they can be armed, but they are not quite soldiers. Their legal status is not clearly defined, meaning that any crime committed by contractors falls outside military authority.

An undefined legal status calls their moral legitimacy into question (Avant, 2007). States have attempted to remedy this through legislation that incorporates PMSCs in varying ways into the military. However, in practice, especially in Iraq and Afghanistan, contractor crimes rarely were investigated and never resulted in a conviction.⁵ Additionally, PMSC employees are often immune to local prosecution (Percy, 2009). This policy was originally designed to protect such employees from facing prosecution in states with weak institutions. However, this policy has kept them from justice all together. For example, some of the interrogators involved in the Abu Ghraib prisoner abuse case were CACI contractors operating under a US contract. Unlike their military counterparts, the contractors have yet to face indictment, prosecution, or punishment (Singer, 2005).

Legal and moral legitimacy, then, are types of legitimacy PMSCs seek. However, the controversy surrounding PMSCs questions their legal and moral legitimacy, which contributes to a negative perception of the PSI. Although states, NGOs, IOs, and corporations regularly use the

⁵ For the first time, on October 22, 2014, contractors were found guilty for crimes committed in Iraq. One Blackwater employee was found guilty of murder while three others were found guilty of manslaughter.

industry regardless of their negative image, PMSCs are still not viewed as legitimate security providers. Issues with regulations and legal dilemmas are two factors that contribute to the desire and need for PMSC legitimation, but they are not the only factors. Other factors include use of force and unflattering media attention.

The continued focus on regulations and legal dilemmas in the private security literature is limiting since it only provides part of the story. This study contributes to the literature on legitimacy seeking of non-state actors in general and PMSCs specifically by expanding the discussion. Here, the analysis incorporates the use of discourse and international agreements to address issues raised by the lack of regulation, legal status, use of force, and media coverage. This work accomplishes this through an analysis of how PMSCs have responded to the questions surrounding their legal and moral legitimacy.

International Organizations and Legitimacy

Another area of research on legitimacy involves its meaning and function beyond the state. Steffek (2003, p. 251), writing on international organizations, argues that “legitimation built on accepted norms and principles, often (but not necessarily) enshrined as law” is the appropriate starting point for examining legitimacy beyond the state. Researching legitimacy in this way requires an examination of compliance and the motivations behind it. PMSCs are more closely related to corporations than international organizations, however, Seffek’s work moves the conversation away from the state and places import on norms and norm compliance as a means of being perceived as legitimate. Furthermore, international organizations’ legitimacy is closely tied to their competence to make decisions on a very specific range of topics based on specific principles. Understanding legitimacy in this way is more in line with how corporations view and seek legitimacy than with how states do. For example, PMSCs claim competence and expertise

in security matters by utilizing an identity that is closely tied to military values and capabilities.

Legitimacy, according to organizational theory, leads to longevity because, as Mark Suchman states “organizations that appear desirable, proper, and appropriate” are more likely to procure resources (Suchman 1995). Suchman (1995, p. 577) identified three types of legitimacy that are relevant to the generalized perception of organizations: pragmatic legitimacy, cognitive legitimacy, and moral legitimacy. With all three types, legitimacy is still perceived as actions that are desirable, proper and appropriate within a socially constructed system. The difference between pragmatic, moral, and cognitive legitimacy is based on different behavioral dynamics. Basu and Palazzo (2008, p.126; Elms and Phillips, 2009) interpret Suchman’s three types of legitimacy as follows.

First, pragmatic legitimacy is based on utility with an organization convincing its stakeholders that its decisions are useful. To do this, an organization might use advertising campaigns to demonstrate its conformity with norms and expectations or its willingness to address stakeholder interests and concerns. Basu and Palazzo point out that Suchman’s underlying assumption is that the organization can substantially control its environment and manage legitimacy as a resource. Taking pragmatic legitimacy as associated with utility has applicability for PMSCs. It explains why PMSCs purposely created the ICoC with stakeholders to demonstrate their conformity with international law and norms. However, the underlying assumption with pragmatic legitimacy is problematic since PMSCs operate in environments heavy with violence and conflict making it next to impossible for anyone to believe they could substantially control their environment in order to use their legitimacy as a resource. Therefore, pragmatic legitimacy is related to PMSCs and their pursuit of international legitimacy, but it falls short in supporting how they are seeking legitimacy.

Second, cognitive legitimacy is based on familiarity where an organization's actions are predictable, meaningful, and inviting as well as given (Basu & Palazzo, 2008, p. 126; Suchman, 1995, p. 582-3). To accomplish cognitive legitimacy, organizations align their actions with societal expectations by continually modifying to increase compatibility with their environment. Not only are they adaptable, but they are also able to transform disorder into givens that make alternatives unthinkable. Basu and Palazzo argue that the underlying assumption of cognitive legitimacy is that the environment controls the organization where legitimacy comes from successfully adapting to the environment. Cognitive legitimacy is more appropriate for PMSCs because they operate in a variety of environments all of which require them to successfully adapt to the environment to survive and protect their clients and their client's interests.

Finally, moral legitimacy is based on an organization achieving legitimacy by creating acceptable norms with relevant stakeholders and usually occurs under extreme uncertainty brought about by social change (Basu & Palazzo, 2008, p. 126; Suchman, 1995, pp.579-582). Parker (2002) argues that moral legitimacy can be accomplished with self-regulation through a code of conduct as a way to renew or reestablish legitimacy following societal change (as cited in Basu & Palazzo, 2008, p. 126). Successfully establishing moral legitimacy supports the perception of an organization's actions as desirable, proper, and appropriate. This type of legitimacy is most relevant to PMSCs because moral legitimacy is the best way to address the morality question often associated with the use of PMSCs. If they are perceived as having moral legitimacy, then their connection to mercenaries is further eroded. However, for the process of winning contracts, any form of legitimacy serves as an asset, resource, and advantage (Krahmann, 2013, p. 372). Suchman's understanding of legitimacy in terms of organizations supports the argument that states are not the only entities in the international system concerned

with legitimacy and provides a connection between organizational theory and international relations. More importantly, it is necessary for understanding why and how PMSCs seek legitimacy.

Realist and Institutionalist Limits

Most scholars agree on what a norm is, but they disagree on what norms do. For example, not all international relations scholars believe that norms influence state behavior; nor do they agree on the role non-state actors play in the international system (Percy, 2007). The PSI and PMSCs relate to international security concepts as they provide security services on an international scale to states, IGOs, NGOs, and MNCs. Their association with security matters implies theoretical discussions of PMSCs should be based on the realist tradition⁶. However, realism's limited understanding of non-state actors and its view that international institutions and norms reflect state interest limits its explanatory power for PMSCs and their search for legitimacy. Realists argue that the sole focus of the state is its pursuit of national interests. In so doing, they ignore the rise of non-state actors in the international system. However, realism does not completely ignore international institutions. John Mearsheimer (1994/95, p. 13), for example, argues that realists believe the rules and norms associated with institutions reflect state calculations of self-interest. This view indicates that international institutions are not independent of the state.

Percy (2007, p. 15) supports this when she explains that structural realists argue that norms are created to serve the interests of states, but have no influence on state behavior when they fall outside state interests. Because of this and the non-state status of the PSI, realism cannot

⁶ The realist tradition in this work refers to those variants based on structural rather than classical realism.

provide an explanation for why and how PMSCs seek legitimacy. Additionally, the realist tradition lacks the ability to explain the rise of power non-state actors possess and utilize regularly. More often than not, PMSCs provide services usually reserved for the state. Realism explains state use of PMSCs as an extension of power, yet it does not explain the slippery slope states are navigating by placing military power and the means and legitimacy to use it in the hands of a private entity they may not control. Although PMSCs are rarely awarded contracts that place them in offensive positions on the front lines, they are hired to provide security that often requires them to be armed and possibly use force. Furthermore, realism is not useful in explaining the dynamics of non-state actors employing and utilizing state means to exert force and gain power.

Unlike realism, neoliberal institutionalism places import on non-state actors and international institutions. According to Keohane and Martin (1995), institutions “provide information, reduce transaction costs, make commitments more credible, establish focal points for coordination, and in general facilitate the operation of reciprocity” (p. 42). In other words, their import is in their ability to facilitate opportunities that further cooperation and interdependence between states. The focus that Keohane and Nye place on international cooperation allow states to broaden their understanding of self-interest (Burchill 2009, 66). In addition to institutions, neoliberalism also considers regimes as playing another important role in coordinating state behavior. In an anarchic international system, states, with the help of NGOs and IGOs, create international regimes - defined as sets of principles, norms, rules, and procedures - that raise the cost of not meeting obligations, following rules, or cheating. These regimes create structural constraints and opportunities that facilitate cooperation since states

adhere to them in order to lower transaction costs (Reus-Smit, 2009, p. 215; O'Neill et al., 2004, p. 163).

Although institutions and regimes are shaped by norms, neoliberal institutionalists view them as limited for they reflect the facts of world politics (Percy, 2007, p. 16). The reliance on institutions and regimes to help shape state behavior does demonstrate that neoliberal institutionalism places importance on actors other than the state. Unfortunately, neoliberal institutionalism does not help explain why and how non-state actors like PMSCs seek legitimacy. The lack of explanation and understanding, much like that of realism, is due to the assumption that international institutions and regimes are tied to the state and state interests. Neoliberal institutionalism also falls short with PMSCs because, as Mearsheimer (1994/95) argues, the theory focuses on political economy while struggling to deal with security issues. Keohane (1995, p. 43) criticizes this position arguing that neoliberal institutionalism should be applicable because institutions provide information and information accompanied with communication can overcome security competition. However, even if neoliberal institutionalism can be applied to security matters, it still does not provide an explanation for PMSCs' desire to gain legitimacy because it is state-centric.

The Constructivist Framework

As already mentioned, Constructivism provides a useful framework because it places import and focuses on the social construction of identity and norms. Identity is significant to this study because how PMSCs define and perceive themselves directly impacts how they operate and exercise agency in the international system. For constructivists, identity is a social construct and therefore subject to change. Identity is especially important to PMSCs because they are

trying to move from their given identity as mercenaries to one focused on being a legitimate security provider with the right to act (Reus-Smit, 2007). PMSCs seek the type of legitimacy that other corporations want: legitimacy based on the perception that their actions are desirable and proper (Suchman, 1995). Legitimacy implies that an actor regularly exhibits appropriate and expected behavior. In order to narrow the scope of the anti-mercenary norm and be perceived as legitimate security actors, PMSCs are changing the language and discourse that surrounds them in an attempt to construct a more pleasing public image and useful identity. Joachim and Schneiker (2014) state that identity is important enough to PMSCs that they actively seek ways to influence their image. PMSCs influence their image by utilizing a variety of identities to garner support. For example, they use discourse supporting and exemplifying military values and capabilities as well as claiming to provide security solutions based on individual needs (p. 247).

Constructivism places import on norms and recognizes that the study of discourses can tell us a lot about the international system making it the ideal framework for discussing how PMSCs are seeking legitimacy. Since PMSCs want legitimacy, they have to contend with the anti-mercenary norm placing norms at the center of this study. Within constructivist literature, there are numerous ways to define and understand a norm. Axelrod (1986, p. 1097) argues, “A norm exists in a given social setting to the extent that individuals usually act in a certain way and are often punished when seen not to be acting in this way.” By defining norms this way, Axelrod makes the existence of a norm a matter of degree and not an all or nothing proposition.

Katzenstein (1996, p. 5) states that norms act as rules and standards for a given identity. Furthermore, Katzenstein argues that norms can define identities, prescribe behavior, or do both. Finnemore and Sikkink (1998, p. 891), in their work on the norm life cycle (as explained below) follow Katzenstein’s definition. Checkel (1998, p. 326) adds, “norms constitute states/agents,

providing them with understandings of their interests.” With so many variations, it is difficult to determine the best way to define or understand norms.

By synthesizing the constructivist literature on norms, Krahnmann (2013, p. 55) identifies four characteristics of conceptualizations of norms. The first characteristic is that norms are dependent upon collective social expectations; only a group or society can establish norms. These collective expectations help actors determine possible actions. Second, norms concern generalized standards of behavior since there is an expectation that norms are followed. Furthermore, the standards of behavior that come from norms provide actors with justification for their actions. Third, norms are normative since they prescribe actions based on ethical and moral concerns. Finally, norms vary in the strength of their impact being that frequent violation, failure of punishment for non-compliance, and the size of the community that subscribes to the norm can limit a norms power. Therefore, for the purposes of discussing PMSCs seeking legitimacy, norms are systems of shared ideas, beliefs, and values with prescriptive character for a defined scope of application (Farrell, 2002; Panke & Petersohn, 2011, p. 721).

Constructivists also argue that normative and ideational structures are as important as material structures. This is due to shared knowledge and norms shaping the social identities of international state and non-state actors (Farrell, 2002; Panke & Petersohn, 2011, p. 721). Normative and ideational structures shape actors through three mechanisms. First, institutionalized norms condition what actors consider necessary and possible in the international system. In an anarchic international system, international regimes - defined as sets of principles, norms, rules, and procedures - raise the cost of not meeting obligations, following rules, or cheating (Burchill, 2009, p. 215). In this way, regimes provide actors opportunities to overcome obstacles to cooperation. Second, state and non-state actors justify their behavior through

established norms of legitimate conduct. International norms are related beliefs about the world that “define actors, their situations, and the possibilities of action” and are reproduced through continued interaction (Farrell, 2002, p. 49). Finally, current international norms determine the standards of appropriate and effective behavior by regulating and constraining conduct (Finnemore & Sikkink, 1998, p. 891). Such constraint helps explain states’ conformity to the norms and embedded social expectations. It is in this way constructivists argue that international norms can lead to the social cooperation needed to address insecurity in the international system.

The Norm Life Cycle

Understanding what norms are is important for the overall argument of this dissertation, but it only provides a portion of the whole picture. Equally important is the social formation or functional evolution of norms as well as the need to understand norm emergence, cascade, internalization, and degeneration. This formation, I claim, will allow us to better explain how PMSCs are working toward narrowing the scope of the anti-mercenary norm. The reason for this is that their efforts to reframe the anti-mercenary norm reflect these kinds of norm cascades and degenerations.

According to Finnemore and Sikkink (1998), norms have a three-stage life cycle. During the first stage of norm emergence, norm entrepreneurs seek to gain a critical mass of states to embrace the new norm through organizational platforms (p. 896). Entrepreneurs usually use standing international organizations that have their own agendas because those agendas can provide the support emergent norms require. Furthermore, organizational platforms provide norm entrepreneurs with resources and leverage to further a norms life cycle. These platforms also allow norm entrepreneurs to persuade targeted states by spreading their carefully constructed cognitive frame. Frames rely on shared understandings and help name, interpret, and

dramatize issues so that norm entrepreneurs can create or explain broader social meanings (Payne, 2001). As a result, norm entrepreneurs can use their frames to persuade others to accept their understanding of appropriate behavior. Persuasion is the key mechanism utilized by norm entrepreneurs to advance a norm through its life cycle.

Movement from the first to second stages requires a tipping point. This serves as one of the weaknesses of Finnemore's and Sikkink's (1998) argument because it is difficult to define, measure, and operationalize a tipping point. However, Finnemore and Sikkink do provide evidence that at least one-third of the total states in the system have to accept the new norm before tipping can occur. They also suggest that 'critical states' – states that without their support the substantive norm goal is compromised – must accept the new norm or tipping is unlikely (p. 901). The second stage of norm cascade is associated with imitation by states in order to socialize others to become followers. States comply with norms at this stage due to their identities as members of the international community (pp. 895 & 902). The third stage, norm internalization, follows the extreme norm cascade where a norm is no longer a matter of debate; it is expected. Once the third stage of the life cycle is reached, conformance to a norm is almost automatic (pp. 895 & 904). The norm life cycle is important to the current research considering it provides an explanation for the formation, construction, development, and adoption of norms in the international system.

However, as important as the norm life cycle has been for understanding norms in the international system, it only tells us how norms develop and not what happens to them after internalization. According to Krook and True (2012), ending the norm life cycle with internalization implies that norms are static while their diffusion is dynamic. This view defines norms as 'things' with fixed boundaries. The norm life cycle recognizes that norms may be

contested, but their contestation comes from external competition with other norms and not from internal contradictions or dissonance (Krook & True, 2012). Furthermore, the norm life cycle fails to explain how norms evolve and change over time (e.g. human rights and sovereignty) or why and how they disappear (e.g. wartime plundering and slavery). The norm life cycle helps in understanding PMSCs and their search for legitimacy since it helps frame the diffusion of the anti-mercenary norm. Yet, because it stops at internalization, it does not provide all of the pieces necessary for a theoretical framework. Those pieces it lacks can be found in recent studies focused on norm change and disappearance.

Several scholars question the internalization of norms by developing their own models to explain norm change and disappearance. This research observes that norms are dynamic because of their broad scope. Being dynamic allows the content of norms to expand or contract and their application to be appropriated for different purposes. In this way, norms are viewed as processes or works-in-progress and not finished products (Krook & True, 2012, p. 104). Ryder McKeown (2009), for example, argues that the norm against torture is in a norm death cycle, movement toward the expiration of the norm, due to US revisionism. Panke & Petersohn (2011) address this idea by arguing that the norms against unrestricted submarine warfare, mercenarism, and forcible intervention have undergone norm degeneration due to consistent violations without sanctions for non-compliance. For Wayne Sandholtz (2008) the norm against wartime plunder demonstrates a cycle of norm change since at one time plunder was not only acceptable, but also expected. These authors illuminate a gap in the norm life cycle literature seeing that it fails to deal with the change and disappearance of norms. The following sections discuss McKeown's norm death series, Sandholtz's cycle of norm change, and Panke's & Petersohn's norm degeneration process in further detail.

Norm Death Series

McKeown (2009) fills the gap through his discussion on norm regression in the ‘norm death series’. The norm death series begins where the norm life cycle ends and explains how an internalized norm becomes de-internalized which means it is viewed no longer as an expectation. De-internalization is a process involving “policy choices and public debate that challenge the taken-for-granted, habitual status of a norm within a state” (McKeown, 2009, p. 9). McKeown breaks the norm death series into three stages. First, instead of a norm entrepreneur, the norm death series begins with a norm revisionist who challenges the existing norm through direct public statements and subtle policy changes away from the practice of compliance of the norm. He utilizes the example of US revision of the torture norm to demonstrate how a norm revisionist utilizes discourse and policy to challenge internalized norms. Before the second stage, a challenge resonance, like the tipping point in the norm life cycle, is necessary. In a challenge resonance, the relevant audience is receptive to the revisionist’s challenge to the extent that the norm loses prominence resulting in the second stage, a reverse cascade. The reverse cascade takes place as states, other than the norm revisionist, realize that the stigma attached to not complying with the norm is reduced. As more and more states participate in noncompliance, the norm suffers a crisis of legitimacy. If the crisis is not resolved, the norm reaches the third and final stage of the death series, expiration of the norm (McKeown, 2009, pp. 11-13).

McKeown’s norm death series adds a critical piece of the theoretical framework for understanding PMSCs and their search for legitimacy; namely, norm revisionism. States, IGOs, NGOs, and MNCs hiring PMSCs serve the industry as norm revisionists, by contracting PMSCs to provide security services even though many continue to question the status of contractors as mercenaries. Furthermore, those hiring PMSCs refrain from using the term mercenary in order to

help legitimize their decision to hire contractors. McKeown (2009, p. 11) develops norm revisionists further by stating that secretive policy changes are not sufficient to regress a norm. Rather, the changes in practice must be accompanied by public legitimate discourse. The development of an industry code of conduct, with all the publicity and discourse surrounding it, demonstrates how PMSCs and their clients are using norm revisionism to narrow the scope of the anti-mercenary norm.

Cycle of Norm Change

Sandholtz (2008) builds on the norm life cycle literature through his argument that norms are not static. He claims that the norm life cycle does not end with internalization. Instead, norms are continuously modified through the “cycle of normative change: rule structures, actions, disputes, arguments, and norm change (Sandholtz, 2008, p. 110).” The cycle of normative change requires a) an existing norm (rule structures) and b) a rational maximizer (p. 103). The existing norms provide the structure for actors to choose what to do, justify their actions, and evaluate the behavior of others. While norms do shape and change the behavior of actors, some of those actors do in turn change and reshape those same norms. In light of this, existing norms serve as the framework for the rational maximizer to pursue such change. Specifically, a rational maximizer is an individual focused on normative reasoning and arguments. They make a cost benefit analysis of potential actions based on how other actors are likely to react. Rational maximizers understand societal norms as well as how society interprets and applies those norms. PMSCs are rational maximizers who understand past and current application of the anti-mercenary norm. This helps them envision the kind of discourse and actions necessary for narrowing the scope of the anti-mercenary norm.

Sandholtz (2008, pp. 105-109) continues the cycle with the understanding that rational maximizers will eventually choose actions that create disputes since norms cannot cover every eventuality. The dispute PMSCs use is their claim that they are corporations providing security services according to legal contracts and therefore, not mercenaries. To win the dispute, the rational maximizer must use the most compelling arguments possible to justify the disputed action. Arguments are most compelling when they are based on precedents of past acceptable behavior. In other words, a rational maximizer is trying to persuade others that their understanding of norms and the disputed act are appropriate given how the international community has responded to similar situations in the past (Sandholtz, 2008, p. 107). Norms are modified through these disputes and their subsequent persuasive arguments. For Sandholtz, the outcome of this process of norm change is inevitable. When norms are modified so too is the rule structure of a society (Sandholtz, 2008, p. 110). The altered rule structure remains until the next cycle of norm change begins. Sandholtz's argument that norms are continuously modified is important for this study as it supports the understanding that PMSCs are rational maximizers using compelling arguments to win disputes and modify the anti-mercenary norm.

Panke and Petersohn (2011) attempt to fill the gap in the norm life cycle literature through understanding the process of norm degeneration or more simply, the disappearance of norms. Their work focuses on the violation of norms and whether or not non-compliance is sanctioned. States violate norms all the time and it does not always lead to the disappearance of a norm for two reasons. First, it is possible that other states will sanction the violation to correct non-compliance behavior. Second, when other states cannot or will not sanction a violator, the violation continues without other states mimicking the behavior. In other words, the original violator is the only state not in compliance, while other states continue to comply with the norm.

A norm starts to degenerate when it begins to lose its prescriptive status. This is followed by a non-compliance cascade where other actors start violating a norm as well instead of sanctioning non-compliance behavior (Panke & Petersohn, 2011, p. 721). The process of norm degeneration can take place in small steps or large leaps.

Altering the Anti-Mercenary Norm

Sarah Percy (2007) argues that PMSCs lack acceptance as security providers in the international system because of the anti-mercenary norm. In contrast to Percy (2007), Panke and Petersohn (2011, p. 721) argue that the anti-mercenary norm has incrementally degenerated. A norm can degenerate when actors challenge it and trigger a 'non-compliance cascade'. A non-compliance cascade takes place when international institutions and/or states are unwilling or incapable of punishing a norm violator resulting in other actors also violating the norm instead of enforcing it. As the norm loses its prescriptive status, it degenerates. A necessary condition for norm degeneration is the violation of a norm with the violator going unpunished triggering a non-compliance cascade. The authors are not suggesting that every case of a violation will result in a non-compliance cascade or that every non-compliance cascade will result in norm degeneration.

Panke and Petersohn state that the process of degeneration for norms is important to PMSCs since the anti-mercenary norm is degenerating. Degeneration occurred due to states that originally violated the anti-mercenary norm did so to curb the scope of the norm to achieve their interests. As states began to violate the norm of hiring private military or security providers, other international actors like the UN and MNCs followed suit. Demand grew for PMSCs and their services, which in turn led to more scrutiny of the PSI from lawmakers and media outlets.

This scrutiny links non-compliance with the anti-mercenary norm to the need for PMSCs to seek legitimacy.

The ambiguity of the anti-mercenary norm allowed for violators to argue their actions did not fall under the scope of the norm. For example, they did not directly violate the norm by hiring mercenaries. Instead, they incrementally weakened the norm by hiring PMSCs. Panke and Petersohn conclude that in the case of the anti-mercenary norm, the growing and continued use of PMSCs indicates the presence of the necessary conditions for norm degeneration.

It is important to note that states have taken action to curb the scope of the anti-mercenary norm so that the act of hiring PMSCs does not qualify as non-compliance. As one of the many stakeholders in the legitimacy of PMSCs, states are dealing with the anti-mercenary norm in a manner that allows for the continued use of the PSI in all its many forms. However, the actions of states focus on their interests and needs and can only go so far in the process of narrowing the scope of application. In order to narrow the scope of the anti-mercenary norm as much as possible at this time, PMSCs and the PSI also have to act in a manner that reflects their own interests and needs. Their actions come in the form of setting industry norms through the International Code of Conduct for Providers of Security Services (ICoC). The ICoC provides a public space for PMSCs and the PSI to demonstrate their commitment to international law and human rights and raise the professionalism, quality, accountability, and reliability of the industry while furthering their agenda of legitimacy in the international system (Ralby, 2015, p. 6).

Major Powers and the United Nations have used PMSCs for quite some time and their usage may increase the chances of success, but alone is not enough to alter the existing norm (Sandholtz, 2008). Altering the anti-mercenary norm enough to allow PMSCs to be considered legitimate security actors requires a carefully constructed frame and persuasive narrative that

conforms to the norm while at the same time redefines its scope (Petersohn, 2014; Sandholtz, 2008). Navigating this delicate line is necessary so that actions can be justified within the discourse of the norm rather than being seen as violations or noncompliance.

Although PMSCs are hired on a regular basis, the anti-mercenary norm still heavily impacts the services they can offer as well as the services for which they are contracted. This is due to a large number of international actors strongly supporting a core component of the anti-mercenary norm: private contractors should not participate in combat. Past companies that directly participated in hostilities as a hired army suffered harsh consequences. For example, Executive Outcomes and Sandline International openly participated in combat in Sierra Leone, Angola, and Papua New Guinea with the result that both companies were disbanded (Mathieu & Dearden, 2006). With such strong support of a core component of the anti-mercenary norm, PMSCs, at least at this time, are more likely to have success at legitimization by focusing on discourse that narrows the scope of application rather than directly challenging the entirety of the norm. This being the case, PMSCs and all other actors that wish for their legitimization must justify their usage within the discourse of the anti-mercenary norm to succeed.

In their efforts to seek legitimacy, PMSCs understand the need to narrow the scope of the anti-mercenary norm, but they also recognize the need to establish normative behaviors for the industry and its employees. Codes of conduct serve as self-imposed corporate obligations that establish normative standards outside a company's original core business. For companies that impose them, they serve the purpose of public relations, risk management, and socio-political contributions. Ideally, codes of conduct lead to predictability and equal competitive conditions (Rosemann, 2008, pp. 6-7). According to Rosemann (2008) they require "a company's readiness to cooperate, the recognition of the initiative by circles that are critical of such companies, and

the political will of a lead nation” (p. 6). The ICoC meets all these requirements since companies indicated their readiness to cooperate by participating in its development. NGOs, IGOs, and news media outlets that heavily criticized the industry have recognized the initiative. The political will of the US and the UK was evident in their desire to require PMSCs awarded contracts to be signatories of the code. For PMSCs, a code of conduct establishes the industry’s desire to be legitimate security actors that respect international law and human rights. With this respect comes the desire to insure the companies and their employees have a set of standards in which they operate and obligations to abide international norms and law.

Conclusion

As much as PMSCs operate in a theater traditionally held for states, they are corporations and organizations that do not rely heavily on transparency or accountability for their legitimacy. Instead, they are concerned with demonstrating to stakeholders that their actions are useful, familiar, and normatively appropriate. By keeping their focus on the legitimacy tied to the identity and actions they take as corporations, they further distance themselves from ‘mercenary’ and the anti-mercenary norm. This distance affords states the opportunity to utilize PMSCs when, where, and how they choose without hesitation. However, as Reus-Smit argues, legitimacy is about more than the perception of appropriate behavior. It is also about action. As PMSCs gain legitimacy, they earn the right to act. This is the ultimate goal for it breaks the ties that bind PMSCs to states freeing them to conduct business in the international system as they see fit.

CHAPTER 4

OWNING THE LABEL: DISCOURSE AND OVERCOMING THE MERCENARY LABEL THROUGH SELF-REGULATION

PMSCs are disadvantaged in their search for legitimacy due to the prohibition of the use of mercenaries and the anti-mercenary norm. The UN General Assembly adopted more than 100 resolutions criticizing mercenary activities while the Security Council also denounced their use in the 1960s and 1970s (Panke & Petersohn, 2011, p. 729). Through the UN, the anti-mercenary norm, and international treaties, international law developed making the use of mercenaries illegal. For example, the UN Convention against the Recruitment, Use, Financing, and Training of Mercenaries, adopted in 1989, endeavored to outlaw mercenarism worldwide (Assembly, 1989).

PMSCs operating during the 1980s and 1990s were illegitimate actors violating the anti-mercenary norm because it extended to “all private commercial actors participating in conflict” (Petersohn, 2014, p. 3). However, despite the anti-mercenary norm and international law, PMSCs were hired regularly by state actors as well as international organizations to provide support services for military and security operations. The increase in private actors operating in conflict zones skyrocketed in 2003 when the US invaded Iraq. The steady increase of private actors and their controversial actions in Iraq and Afghanistan caused PMSCs to look for ways to alter the negative perceptions that surrounded them individually and the PSI as a whole.

As we saw in the previous chapter, altering negative perceptions is imperative for legitimacy because organizational legitimacy, the type of legitimacy PMSCs are seeking, is the generalized perception that the actions of an entity are desirable, proper, and appropriate (Suchman, 1995). Perception is shaped by what we see, hear, and read. Specifically, media reporting shapes perception because much of what the average citizen knows about the wars in Iraq and Afghanistan as well as the incidents involving PMSC contractors came from media outlets accessible to anyone any day and time. This reporting developed a discourse PMSCs realized they had to address in order to seek legitimacy through narrowing the scope of the application of the anti-mercenary norm in such a way that it still applied to mercenaries, but was no longer associated with PMSCs. More directly, they are not claiming mercenaries are okay, but that they are not mercenaries. I claim that PMSCs address the negative perception perpetuated by the media through the discourse of the Montreux Document, ICoC, and the ICoCA. The constructivist discussion from that last chapter helps provides a frame through which we can understand that PMSCs' chosen avenue of discourse helps their legitimacy by tying their identity and the actions they take to their corporate status.

As I shall show in this chapter, PMSCs have chosen to seek legitimacy through a discourse established through the process of initiating, developing, and publicizing the 2008 Montreux Document, the 2010 International Code of Conduct (ICoC), and the 2013 ICoC Association (ICoCA). Brooks and Streng (2012) argue PMSCs and the PSI advocated for and supported each initiative in order to increase accountability. Participating in their development moves them closer to legitimization in two ways. As Anna Leander (2012) states, "setting standards for PMSCs and making reference to the CoC [Code of Conduct] pertaining to their activities legitimizes their presence both on the ground and in regulatory debates" (p. 111).

Leander goes further arguing that a result of the Montreux Document and ICoC is a diffusion of military expertise to a wide range of actors who speak authoritatively on military matters.

Including PMSCs in these debates furthers their legal legitimacy since they would have been excluded if key stakeholders did not recognize their right to exist. Their inclusion also furthers their moral legitimacy because placing them as experts on military matters provides them with the social license to operate. Furthermore, PMSCs involvement in the regulatory debate is beyond doubt because the mainstreaming of ICoC places them at its center (p. 111).

Together, the Montreux Document, ICoC, and ICoCA establish a discourse framing the three initiatives as a commitment to understand applicable international law, develop normative standards, and implement oversight and accountability measures regarding PMSC use. However, the three documents provide only an appearance of regulation. In reality, the Montreux Document, ICoC, and ICoCA demonstrate the continuation of a system that benefits the industry and its clients through vague language and self-regulation.

This chapter first establishes the PMSCs' response to negative perceptions and controversy by analyzing the process of development and discourse of each initiative. My analysis of media perception follows and will demonstrate how the discourse chosen by media outlets has shaped public understanding of PMSCs. It then presents media discourse in newspapers compared to the discourse in the Montreux Document, ICoC, and ICoCA to evidence how PMSCs are seeking legitimacy. Furthermore, it illustrates how PMSCs utilize this discourse to reframe the perception of the industry. Finally, the chapter highlights the incestuous nature of the initiatives, the industry, and its clients that continue to influence the likelihood of PMSCs legitimization.

Establishing the PMSC Discourse

For the continuation and longevity of the industry, PMSCs had to find a way to alter the public's perception of them as mercenaries and frame themselves as legitimate security providers. To do this, they established their own discursive narrative that addressed many concerns over their regulation and accountability. First, regarding regulation, PMSCs and the PSI altered the discourse they used when characterizing their services. Baum and McGahan (2013) discuss how leaders from Executive Outcomes and Sandline spoke freely about their willingness to engage in combat services. However, this stance was too closely associated with mercenaries and limited their legitimacy both publicly and with clients. By the early 2000s, they stopped referring to services like war and military and started referring to their services as research and intelligence, protective security, and risk management (p. 22).

Second, PMSCs and the PSI became more vocal about their need and willingness for regulation. The rise in public criticism occurred because companies, their employees, and actions taken in the field were frequently in the media⁷. They recognized without regulation, limits to their normative standing, as security providers, would continue (Baum & McGahan, 2013).

Both concerns led PMSCs and the PSI to develop regulatory principles and standards. The establishment of their discourse can be divided into three stages. The first is the Montreux Document developed between 2006 and 2008. The second is the development of the ICoC between 2008 and 2010. Finally, the ICoCA was established from 2011 to the present. The ICoC was not designed to replace the Montreux Document. Instead, the Montreux Document, ICoC, and the ICoCA build on each other in an attempt to provide a comprehensive set of standards for the industry. To understand fully how the Montreux Document, ICoC, and ICoCA form a

⁷ Public criticism is discussed fully in later sections of this chapter.

narrative that supports the legitimization of PMSCs, it is necessary to understand how each initiative came about as well as how each initiative is connected. The process of establishing the discursive narrative unfolds in a relatively linear fashion, starting with the Montreux Document and ending with the ICoCA. However linear the narrative may be, it is still a complex story full of subtleties and ulterior motives, as we shall see.

The Montreux Document

The roots of the ICoC lead back to an initiative started by the Swiss government and the International Committee of the Red Cross (ICRC, 2009). A series of meetings, five intergovernmental and four expert, between 2006 and 2008, led to the adoption of the Montreux Document.⁸ As of September 2016, the number of participating states had grown to 54 (FDFA, 2014). The Montreux Document draws from a diverse group of sources including the Geneva Conventions, UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, ICRC Study on Customary International Humanitarian Law, existing practices in the industry, and the CoESS/UniEuropa Code of Conduct and Ethics for the Private Security Sector⁹ (Cockayne, 2009, pp. 402-403). The Montreux Document is directed at states and international organizations, rather than the industry itself, and applies only to armed conflict. This document may provide the discourse PMSCs need for seeking legitimacy, however, a closer look at each section leads to the understanding that the document does little actually to regulate the industry.

⁸ Full title: The Montreux Document on pertinent international legal obligations and good practices for States related to the operations of private military and security companies during armed conflict. The Document can be found in English, French, Spanish, or Chinese at <https://www.icrc.org/en/publication/0996-montreux-document-private-military-and-security-companies>.

⁹ CoESS is the industry association for PMSCs in the European Union and the Code of Conduct can be found at http://www.coess.org/Uploads/dbsAttachedFiles/Code_of_Conduct_and_Ethics_EN.pdf.

Nonetheless, the Montreux Document is an important step the PSI and PMSCs needed to take in seeking legitimacy.

Prior to the development of the Montreux Document, PMSCs lived in a legal limbo. No one was taking responsibility for their actions. States did not have laws that applied to contractors working outside the borders of their territory and since PMSCs were rarely incorporated into the state's armed forces, military law was also not applicable. The Montreux Document served as the first step in regulating the industry, by defining the international legal obligations of potential clients. It did not go far enough to be considered a regulatory agreement, however, it was a start in the right direction.

The Document is divided into three parts, the Preface, Pertinent International Legal Obligations Relating to Private Military and Security Companies, and Good Practices Relating to Private Military and Security Companies. The Preface (point 1) lays out the purpose of the document that "certain well-established rules of international law apply to States in their relations with PMSCs." With the very first point, the Montreux Document placed the responsibility of PMSCs and their actions in the field with states. Another purpose for the Document is to "recall existing legal obligations of States and PMSCs" as well as to "provide States with good practices to promote compliance with international humanitarian law and human rights law during armed conflict" (The Montreux Document: preface point 2). The Preface also identifies the parties, or potential clients, the Document addresses. Important definitions include 'contracting states'-those states that directly contract services, 'territorial states'-states where PMSCs actually operate, and 'home states'-the states where a PMSC is registered or incorporated. As the remainder of the document suggests, these definitions offer a vital distinction. Until this Document, the responsibility of PMSCs was constantly in flux

passing from state to company or vice versa. By distinguishing between contracting, territorial, and home states, the Montreux Document can and does clearly state the responsibility each type of state holds regarding PMSCs.

The document, for example, stipulates pertinent international legal obligations of each type of state regarding use of PMSCs (The Montreux Document: pertinent international legal obligations relating to private military and security companies, pp. 11-15). Each type of state is addressed in their own subsection of the Pertinent International Legal Obligations Relating to Private Military and Security Companies section, yet each point, regardless of subsection, is standard across all types of states. All types of states are obligated not to contract PMSCs for services that are in opposition to international humanitarian law (The Montreux Document: pertinent international legal obligations relating to private military and security companies points A2 and A3, B9 and B10, and C 14 and C15). All states are also obligated to take action such as military regulation or adopting legislation to suppress human rights violations (The Montreux Document: pertinent international legal obligations relating to private military and security companies points A3 and A4, B9 and B10, and C14 and C15). Finally, all states are obligated to investigate, prosecute, extradite, or surrender those suspected of violating international law (The Montreux Document: pertinent international legal obligations relating to private military and security companies points A6, B12, and C17). In appearance, the Montreux Document sets out obligations for all the states that might have interactions with PMSCs. However, all states being obligated to take the same actions regardless of status as contracting, territorial, or home state means it is still possible, maybe even probable, that the actions of PMCSs are not addressed since all parties can say some other party is responsible for regulating violations to international law.

It then goes on to address good practices relating to PMSCs and their activities (The Montreux Document: good practices relating to private military and security companies, pp. 16-27). Clarifying good practices is important in terms of regulation and accountability for an industry that often occupies and operates in an unclear area of international law. These obligations and duties are placed with contracting states, territorial states, and home states. All states, regardless of type, are reminded that their responsibilities are non-transferable and are obligated to ensure respect for international humanitarian law and human rights and ensure criminal accountability even if that means adopting new legislation. In addition, good practices are described for each type of state to provide guidance and assistance in their relationships with PMSCs both in and outside areas of conflict.

It is important to note that the Montreux Document does not endorse the use of PMSCs (Leander, 2012, p. 111) nor does it establish new legal obligations (Geneva Academy, 2013). It is, however, as Anna Leander (2012) puts it, “the most important interstate initiative pertaining to the governance of the use of force by commercial actors taken” since the UN Convention against the Finance and Use of Mercenaries (p. 108). The Document was adopted on September 17, 2008 by seventeen states including the United States and the United Kingdom. The establishment of the Montreux Document was a positive first step in moving the PSI toward regulation and accountability.

Unfortunately, by focusing on armed conflict, the Document leaves a lot of grey space in which PMSCs continue to operate. This grey space includes services that require personnel to be armed like guarding locations, providing armed security for individuals, and training police forces. PMSCs have deliberately removed themselves from offering combat services in order to move away from the mercenary label. The Montreux Document only addressing armed conflict

means that the majority of the services provided by PMSCs falls outside the realm of this agreement.

International Code of Conduct

For corporations, codes of conduct are voluntary self-imposed obligations that establish normative standards outside the original core business objectives of a company (Rosemann, 2008). They are not legally binding, but they often monitor implementation and compliance, which are both subject to a binding procedure. According to Nils Rosemann (2008), voluntarily adopting international standards and subjecting to external monitoring procedures complements existing rules and responsibilities. On the other hand, Leander (2012) argues that although there has been a welcomed push for socially responsible companies in recent years, focusing on internal standards may undermine the development of binding regulation. Codes of conduct serve as part of a company's public relations, risk management, and socio-political contributions. For Rosemann (2008), a code of conduct for PMSCs would obligate companies to comply with human rights and international humanitarian law and provide an implementation and enforcement mechanism. For example, a code of conduct for PMSCs might require a procedure for certification and a company could lose this certification for not implementing or complying with the code of conduct.

Unlike the Montreux Document, which was directed at states, the ICoC was established for the PSI itself. Leading up to the development of the International Code of Conduct for Private Security Service Providers, much of the discourse centered on regulation. Typically, the calls for regulation focused on the need for improved laws to govern and oversee the industry. The purpose of the Code, as outlined in the Preface (pp. 3-4), is to establish "a commonly-agreed set of principles" and affirmed that Signatory Companies "have a responsibility to respect the

human rights of, and fulfill humanitarian responsibilities towards, all those affected by their business activities.” The Code thus establishes a set of principles and commitments ranging from “responsible provision of security services” to “specific principles regarding the conduct of personnel”. It also acknowledges support for the groundwork set in the Montreux Document, committing Signatory Companies “to the responsible provision of Security Services so as to support the rule of law, respect the human rights of all persons, and protect the interests of their clients (p. 3).” The Code states that it is a complimentary measure not intended to replace, limit, or alter international or national law (p. 6). Instead, it requires Signatory Companies, Clients, and other stakeholders to create an external independent mechanism charged with governance and oversight of the Code through a certification process. This mechanism has grown into the International Code of Conduct Association (ICoCA, 2013), which obligated PMSCs to comply with human rights standards and international humanitarian law.

The ICoC was developed over a series of workshops and conferences attended by representatives from PMSCs, industry associations, governments of various countries (including the US and UK), humanitarian organizations, and NGOs. The original ICoC draft was mutually developed by members of the PSI and Swiss Department of Foreign Affairs and facilitated by the Geneva Centre for the Democratic Control of Armed Forces (DCAF) and the Geneva Academy of International Humanitarian Law and Human Rights (ADH). The multi-stakeholder approach to the development of the Code suggests a willingness on the part of the PSI to standardize and regulate their services based on the interests of varying parties. This is an important point to make because, not being totally driven by market-interests frames their image as pursuing humanitarianism/security rather than profits. This lends a degree of credibility and legitimacy to the ICoC.

Initially, the ICoC document answered negative perceptions by providing PMSCs with a way to alter their image by becoming Signatory Companies. The signature indicated a desire to take responsibility and an endorsement of the document's principles and guidelines that respect human rights and international law. According to the ICoC website, the document, signed on November 9, 2010 by 58 PMSCs, had over 700¹⁰ Signatory Companies by September 2013. Despite the number of signatures and the appearance of accepting regulations, PMSCs and their industry associations played a large role in the initiation and development of the ICoC. The monopoly role that these PMSCs and their affiliates played in drawing up their rules naturally raises question regarding its integrity.

In their efforts to be perceived as more legitimate, PMSCs utilized the development of the ICoC to address public¹¹ concerns (Ralby, 2015), many of which were raised in response to specific incidents with high media coverage. The ICoC sets standards for specific issues like use of force, torture, sexual exploitation, and human trafficking. These issues relate to incidents and accusations involving PMSCs still operating today. For example, Blackwater (now Academi) employees were involved in an incident with excessive use of force when they opened fire in Nisoor Square¹² resulting in 17 Iraqi civilian deaths in 2007 and CACI and Titan Group employees were part of the 2004 Abu Ghraib prison scandal where prisoners were tortured. (A full analysis of how PMSCs utilized the ICoC as a legitimization measure is discussed in the following chapter.)

¹⁰ The Association has moved beyond signatures and now has a membership process. This means those Signatory Companies that have not applied for membership are no longer fulfilling their commitments.

¹¹ For the purposes of this argument, public includes civilians as well as policy makers.

¹² The Nisoor Square incident is discussed in detail in Chapter 5.

International Code of Conduct Association

The ICoC Association (ICoCA), an organization that grew out of the implementation measures discussed in the ICoC, governs membership and the certification process. The ICoCA is a multi-stakeholder initiative that includes a General Assembly, Board of Directors, and the Secretariat who operates under the Executive Director. The General Assembly is made up of all members, which include private security companies, governments, and civil society organizations (<http://www.icoca.ch/en/icoc-association>). It serves as a forum for voting on decisions made by the Board of Directors such as amendments to the ICoC, requirements for membership, and certification procedures. The Assembly also provides a forum for dialogue and discussion related to the ICoC and is tasked with meeting at least once a year. The Board of Directors includes twelve elected members that represent the interests of all Association Members. It is the decision-making body of the ICoCA and the Executive Director is appointed by and executes its decisions. The Secretariat maintains the records on rules, bylaws, and votes that are necessary for the governance of the ICoCA (http://www.icoca.ch/en/articles_of_association#article-9-executive-director-and-secretariat).

The purpose of the ICoCA, as stated in the Articles of Association, is to “promote, govern, and oversee” the implementation of the ICoC as well as promote the responsible provision of security services (https://www.icoca.ch/en/articles_of_association#article-2-purpose). The Articles include three mandates. The first mandate, certification, gives the ICoCA the responsibility of certifying that a company’s policies meet the principles and standards of the ICoC. Certification is an important development for how PMSCs are seeking legitimacy. Certificates, in general, imply something is official or authenticated. Whether the certification

process has any real teeth matters not since simply being certified by the ICoCA grants a portion of legitimacy.

At the 2016 Annual General Assembly, held on September 29, members agreed that all members undergo ICoCA certification by September 2018. With the addition of a certification timeframe and membership policies, the ICoCA no longer recognizes Signatory Companies. Now, to be considered in good standing, PMSCs must be members of the Association, pay dues, and undergo ICoCA certification. A search on October 18, 2016 discovered 102 companies identified as “in good standing” with the Association¹³. The certification process went into effect on November 1, 2016 (<http://icoca.ch/en/news/2016-AGA>).

Since the certification process includes a review of company policy and contractor fieldwork, clients are encouraged to require companies be certified before contracts will be awarded. As more clients include certification requirements in their contracts, the more companies will have no choice whether or not to certify. At the same time, without the cooperation of most clients in the world, the situation with PMSCs that do not certify under the Code remains status quo.

The second mandate, reporting, monitoring, and assessing performance, requires the ICoCA exercise oversight of Member companies’ performance under the ICoC. This oversight includes external monitoring, gathering information¹⁴ on how companies are operating in the field, and communicating with Member companies to address concerns. Under this mandate,

¹³

http://icoca.ch/en/membership?private_security_companies=companies&op=Search&view_type=list&form_id=search_for_members_filter_form

¹⁴ The Articles mandate the Secretariat is responsible for gathering information from available sources including the public.

Member companies are required to provide written assessments of their performance and cooperate in good faith with oversight policies. Mandated oversight of PMSCs supports their efforts in seeking legitimacy because it indicates that companies are constantly monitored and regularly under review. It generates the impression that PMSCs are regulated by as well as accountable to their governing body.

The third mandate, complaints process, obligates the ICoCA to maintain a process for handling complaints of Member companies' alleged violations of the ICoC. The ICoCA's website¹⁵ provides detailed information on who can complain, when a complaint can be made, how to file a complaint, the complaint process, and a timeline for processing complaints. A complaints process also furthers PMSCs efforts in seeking legitimacy because it allows victims to voice their grievances. It provides an appearance of PMSCs' accountability.

As with the certification process, the procedures for registering complaints was adopted by Members in September 2016. Interestingly, any affected individual or representative can file a complaint. Complainants are informed within 30 days if their claim is accepted for processing. Once it moves forward, the ICoCA assesses if the Member companies' grievance mechanism is a viable path and if not, determines if there are other fair and accessible grievance mechanisms available to the complainant. Although there is a fleshed-out complaints process, it includes a confidentiality component that requires parties to not disclose matters relating to the allegations and/or resolutions of the complaint to anyone outside the complaints process. This reality supports the many concerns that the industry's self-regulation with the ICoC and ICoCA is an appearance of regulation and accountability, not an actuality.

¹⁵ <https://www.icoca.ch/en/complaints>

For PMSCs, a possible consequence for not meeting its ICoC obligations is loss of legitimate business. Those PMSCs that do not meet obligations of the ICoC or simply do not certify at all will still have clients seeking their services. Although the process is very new with a handful of companies having undergone certification, ICoCA discourse is constructing the belief that without certification, the type of client, not to mention the amount of money tied to contracts, will be vastly different. Legitimacy of PMSCs is tied not only to their actions and industry standards, but also to the legitimacy of their client base. Accepting contracts with entities that lack legitimacy like a dictator or transnational criminal organization would significantly affect their future pool of clients.

Reframing Media Discourse

Kruck and Spencer (2013) argue that PMSCs care about their image as demonstrated by the hiring of “large public relations firms such as Burson-Marsteller and high-level individual specialists such as Kenneth Starr” (p. 326). Using narrative analysis, Kruck and Spencer (2013) illustrate opportunities and constraints for self-legitimization of security actors. They argue that media narratives indicate how PMSCs are perceived “by a societal opinion elite” which draws on and informs the broader public (p. 327). To evidence this claim, Kruck and Spencer analyze PMSCs’ self-presentation and media adoption of it. The authors acknowledge an important gap in the literature. Due to limited empirical research on PMSCs successfully establishing a positive image, it is difficult to determine whether PMSCs have discursive power. Conducting a discourse analysis of newspaper media and international agreements helps bridge this gap by

highlighting PMSCs use of international law in conjunction with a code of conduct to seek legitimacy and reframe perceptions.¹⁶

Brooks and Steng (2012) argue that how the industry is characterized through public discourse effects attitudes toward contractors, individuals who work for PMSCs, as well as how those contractors perceive themselves. Understanding discourse as a concept with concrete categories useful for empirical analysis strengthens the argument of this dissertation. I am rigorously analyzing media coverage to establish the discourse used by the media in regards to PMSCs to demonstrate how the PSI addresses negative images and societal concerns through the development of an Industry Code of Conduct.

To find relevant media coverage, I used the *Lexis-Nexis Academic* database and conducted a newspaper article search for the period between March 20, 2003 (the date the U.S. invaded Iraq) and November 9, 2010 (the date the ICoC was signed)¹⁷. I chose this time period for three reasons. First, March 20, 2003 is an important date for the United States as it marked the beginning of a long, costly war in Iraq while also fighting a war in Afghanistan, which strained an already taxed military force. Second, this date is also important to PMSCs because it marked an opportunity for massive growth in the PSI. Established companies were awarded numerous contracts that significantly increased their profits. However, these companies struggled to keep up with the demands for so many contracts, which provided the opportunity for many new companies to pop up all over the world. Not only did the private security industry grow in terms of profit, it also increased in terms of size. Finally, November 9, 2010 is important because

¹⁶ Further research beyond the scope of this work is needed to fully determine the success PMSCs' attempts at improving their image and seeking legitimacy have had.

¹⁷ Using the search terms 'private security', 'private military', 'Iraq', and 'Afghanistan', I collected articles from those newspapers that returned 25 or more articles: *The Guardian*, *The Washington Post*, *The Times*, *The Independent*, and *The New York Times*. This resulted in a sample of 188 articles.

it is the date the ICoC was signed. Developing a code of conduct provided the PSI a platform to address public concerns raised in newspaper articles. The ICoC serves as the industries discursive response to Media discourse by addressing the most controversial incidents involving PMSCs.

The 188 articles that make up my sample came largely from US and UK newspaper outlets. This is due to many of the larger PMSCs, those with large annual profits, being based in these areas. It is also because these two states award a large number of contracts worth a significant amount of money. Although the sample came from mainstream, large newspaper outlets, there is some variation in their political stance. For example, *The New York Times* tends to be a more liberal publication where *The Washington Post* is more conservative. Prior to my analysis of the articles, the academic literature revealed five major codes: labeling, use of force, regulation, accountability, and torture. Through my analysis of the newspaper articles, the themes that emerged followed these codes. I have chosen to focus my analysis on the labeling of PMSCs and use of force because the process of developing the Montreux Document, the ICoC, and the ICoCA demonstrated PMSCs willingness to address regulation and accountability of the industry. I determined through my analysis of the sample terms, listed in Table 2, that best-identified relevant articles within each theme.

Table 2 Terms within each theme that identified relevant articles

Labeling	Use of Force	
Cowboys	Blackwater	Torture
Guns for Hire	Combat	Abu Ghraib
Hired Guns	Guns	Fallujah
Mercenaries	Killing	Nisour Square
Mercenary	Shooting	

The Media Label

The media coverage in the years between the U.S. invasion of Iraq (March 20, 2003) and the signing of the International Code of Conduct for Private Security Professionals (November 9, 2010) painted an unsavory picture of PMSCs and their contractors. For example, in 2005, *Frontline* gave “viewers an unprecedented behind-the-scenes look” at KBR, Erinys, and Blackwater in *Private Warriors* (Gaviria & Smith, 2005). David Isenberg, writing for *The Huffington Post*, regularly published articles using terms like “Dogs of War” and “Shadow Force” which led to his 2008 publication of *Shadow force: Private security contractors in Iraq*. Seymour Hersh published one of the first articles on the torture at Abu Ghraib prison exposing the role of contractors in the inhumane treatment of prisoners in the May 10, 2004 issue of *The New Yorker*. These news reports and others like them raised questions about the number of contractors working in Iraq, human rights violations, cost effectiveness, overcharging, accountability, and transparency.

The public climate for PMSCs and the contractors who work for them was not positive and led to the perception that what PMSCs are hired to do reflects the negative connotations associated with mercenarism like war profiteering, questionable allegiances, and indiscriminate use of force. Furthermore, it led to Congressional inquiries resulting in reports such as *Private security contractors in Iraq: Background, Legal Status, and other issues* (Schwartz et al., 2008) and required USCENTCOM produce a quarterly census report on the number of contractors operating in their area of responsibility including Iraq and Afghanistan.

PMSCs preferred private military or private security contractors, yet were frequently referred to as mercenaries, hired guns, cowboys, guns for hire, dogs of war, soldiers of fortune, and war profiteers. Newspapers maintained the perception and connection between PMSC

contractors and mercenaries with headlines such as “Mercenaries in trouble spots to be regulated”, “Steroids, drink and paranoia: the murky world of the private contractor; Terri Judd on the guns for hire fighting for business in Iraq and Afghanistan”, “Cowboys chase riches in the new Wild West”, and “Blackwater and its soldiers of misfortune”. However, some PMSCs’ representatives added to the problem such as when Tim Spicer¹⁸ was quoted saying “his kind were directly descended from the classic mercenary companies of antiquity” (Klein, 2007, p. D01).

Table 3 Media Characterization of PMSCs

Search Term	Number of Instances Used	Number of Articles
Mercenaries	63	30
Mercenary	41	20
Hired Guns	21	13
Cowboys	15	10
Guns for Hire	9	6

This table was compiled using the sample of 188 articles from the *Lexis-Nexis Academic* search.

Table 3, which illustrates the number of times authors used negative terminology, indicates that mercenaries was used in 16% of the articles while mercenary was used in 11% of the articles. As discussed earlier, the label mercenary is perceived as extremely negative and against international law. The reference and characterization of PMSCs as mercenaries was especially problematic for the industry. Though PMSCs were doing their best to lose the mercenary distinction, the media continually referred to them in that way bringing not only their

¹⁸ Tim Spicer is the founder of Aegis Defense Services. More importantly, he is the former owner of Sandline International which is the now defunct firm that was tied to delivering weapons during Sierra Leone’s civil war known as the Arms to Africa scandal.

actions into question, but also their legality. For example, Scott Fainaru (2007) in *Warnings unheeded on guards in Iraq; Despite shootings, security companies expanded presence* reports that critics “warned that the Pentagon had used an obscure defense acquisition rule to push through a fundamental shift in American war-fighting without fully considering the potential legal and strategic ramifications.” Furthermore, the media regularly questioned the use of PMSCs. For example, Norton-Taylor (2006) states:

The government admits that private security companies are here to stay, and that their operations are likely to increase further as pressures on the armed forces increase. Yet it is keeping the companies at arm's length, apparently concerned about dealing with "mercenaries". The companies, meanwhile, are desperate to shake off what they insist is an outdated and misleading moniker. (p. 16)

Here, he addresses the growing use of PMSCs in Iraq while also putting the number of companies and contractors operating in country into perspective. For him this illustrates the fine line governments walked regarding PMSCs. Governments, in other words, needed these companies to act as force multipliers. Force multipliers allow military personnel to focus on combat operations while they provide non-combat services. It would have been extremely difficult, if not impossible, for the U.S. to fight a two-front war in Iraq and Afghanistan without them. Yet, however necessary they were to military operations, governments like the U.S. and the U.K. kept them on the periphery of their armed forces. This left PMSCs bereft if captured or killed as well as unregulated with little oversight.

Overcoming the Mercenary Label

As the media label illustrates, the wishes of PMSCs to not be associated with mercenaries were ignored. Academics may have dropped the mercenary label, but the debated categories were not determined by the industry. Furthermore, the media used mercenary frequently to help sensationalize their stories and gain readership. Sensationalized stories about the conduct of contractors overseas tied the negative perception of PMSCs to the mercenary label and contributed to their need for legitimacy. The Montreux Document, ICoC, and ICoCA provided the perfect opportunity for PMSCs to take ownership of their label.

PMSCs have utilized the ICoC to overcome the mercenary label in three ways. First, they claim ownership of potential consequences their role as security providers may have. According to the Preamble (ICoC: preamble point 5), PMSCs¹⁹ acknowledge that their activities can have “positive or negative consequences for their clients, the local population, the general security environment, and the enjoyment of human rights and rule of law” (ICoC: preamble point 1). This is important to the overall success of the ICoC because PMSCs are often on the defensive about their actions claiming they are justified or in self-defense. None of that language acknowledges the potentially negative consequences of using PMSCs to fill security needs. This statement inspires a reexamination of an industry that is taking responsibility for their controversial past while moving forward with normative standards that can prevent the kinds of incidents that put the PSI in a negative light to begin with. As this statement appears at the beginning of the document, it serves as a first step in using the ICoC²⁰ to change discourse.

¹⁹ In the first part of the Preamble, the industry identifies private security companies and private security service providers collectively as PSCs.

²⁰ The Geneva Academy of International Humanitarian Law and Human Rights published an Academy Briefing titled *The International Code of Conduct for Private Security Providers*. In this briefing, the writers examine each paragraph of the ICoC providing insight into its language and legal applicability.

Second, PMSCs claim their label of choice with the first point in the Preamble by referring to themselves as “Private Security Companies and other Private Security Service Providers (collectively PSCs).” The ICoC defines PSCs as “any company whose business activities include the provision of Security Services either on its own behalf or on behalf of another” (ICoC: definitions, 2010). Security Services refer to the “guarding and protection of persons and objects...(whether armed or unarmed), or any other activity for which the Personnel of Companies are required to carry or operate a weapon in the performance of their duties” (ICoC: definitions, 2010). This highlights an important difference in how the Montreux Document and the ICoC label private security providers. Where the ICoC (industry-centered) defines, and utilizes the PSC label, the Montreux Document (state-centered) defines and utilizes the PMSC label. For the purposes of the Montreux Document (preface point 9a), PMSCs are defined as “private business entities that provide military and/or security services irrespective of how they describe themselves.” Military and security services include “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 (preface point 9a).”

The difference matters for the PSI for two reasons. First, according to Brooks²¹ and Streng (2012) the PMSC label is problematic because it is “inherently faulty and deceptive” since only a small percentage of companies deal with armed security (p. 304). The authors argue that only 5-10% of the industry performs armed security tasks and that the use of ‘military’ is “inaccurate, as the companies are civilian and it is misleading to imply they have the legal rights and responsibilities of soldiers under international law” (p. 304). Brooks and Streng (2012) both

²¹ Brooks is the founder and President Emeritus of the International Stability Operations Association (ISOA) which is the largest international trade association for PMSCs.

worked for the International Stability Operations Association (ISOA) when they authored *The stability operations industry: The shared responsibility of compliance and ethics*. The ISOA, the largest international trade association for PMSCs, took part in the development of the Montreux Document and the ICoC. As indicated through their article, they advocated against the all-encompassing label of PMSC. It is in their interest to push a label with a less controversial history as representatives of the leading PMSC trade association. Finally, utilizing PSC instead of PMSC is a good example of the PSI's attempts at changing discourse because one of the most controversial aspects of these companies is their placement in combat. Dropping military from the label, to a degree, diverts attention away from the military aspects of the industry.

Lastly, PMSCs utilize the ICoC to overcome the mercenary label by identifying sound principles for the selection and vetting of personnel. The quality of the actual personnel employed by PMSCs was a serious public concern. Unlike issues of the use of force and torture (discussed in the next chapter), this concern is not a result of a specific incident. It is a culmination of all the media coverage on the questionable behaviors and hiring practices associated with private contractors. One questionable behavior is individuals applying for positions with PMSCs falsifying their work experience. In *Clampdown on rogue security guards*, McGrory (2004) points out:

Another concern is that there is evidence of rogue companies having no proper vetting for new applicants. Former British soldiers who signed up to work as bodyguards in Iraq have told *The Times* how they have been sent recruits from Britain with no military training and who lied about their backgrounds on application forms. (p. 1)

Another questionable behavior was PMSCs not conducting thorough background checks. Judd and Peck (2009) discuss this in their article, *Security industry to review vetting after report on murder suspect; Case of Daniel Fitzsimons highlights need for change*, when they state:

The private security industry regulator has promised to tighten vetting practices after *The Independent* revealed that the man accused of shooting dead two fellow security contractors in Iraq had a long history of psychiatric illness, was awaiting trial for assault, and had previously been sacked by another private security company. (p. 6)

Finally, participation in the overthrow of governments is questionable behavior that concerned the public as well as policymakers. Hastings (2006) argues that “hired guns”, “like Mark Thatcher's merry band who sought to stage a coup in Equatorial Guinea” make headlines “because they have been caught doing ugly and reckless things” (p. 29). All three of these articles illustrate the need for PMSCs and the PSI to create solid practices for the selection and vetting of personnel.

Concern was also raised about the vetting of personnel who are Third Country Nationals. Third Country National (TCN) refers to a person working for a PMSC who is neither a citizen of the hiring state nor the host state. Table 4 illustrates the number of TCNs working in Iraq and Afghanistan from 2008-2010. It is easy to see that the number of TCNs increased steadily through this period. More importantly, Table 4 highlights that the number of armed and unarmed TCNs were almost equal. This matters because the difficulty with hiring TCNs is that criminal background screenings return inaccurate or unavailable records in some countries (Solis, 2006). Furthermore, determining the quality, based on training and experience, of TCNs is nearly impossible until they start to operate in theater (Hammes, 2011). Industry representatives like Brooks and Streng (2012) argue that only 5-10% of contractors are armed. However, as the

numbers reported in 2009 indicate there were nearly as many TCNs armed, 36,438, as there were unarmed, 39,769, in Iraq. Even if they were the only PMSC contractors armed that year, which is unlikely, that is still a large number of weapons in the hands of individuals who may not have been thoroughly vetted. Interestingly, table 4 also illustrates that the USCENTCOM quarterly census reports stopped differentiating between armed and unarmed contractors after the first two quarters in 2010. This indicates that presenting the number of armed contractors may have been deemed too problematic for reasons such as providing counts on the number of arms in USCENTCOMs area of responsibility or numbers that illustrated there were more armed contractors in Iraq and Afghanistan than policymakers were led to believe and therefore no longer reported.

Table 4 Private Security Contractor Third Country Nationals in Iraq & Afghanistan²²

	Total TCNs Iraq	Armed TCNs Iraq	Total TCNs Afghanistan	Armed TCNs Afghanistan
FY 2008	12,669	12,113	47	20
FY 2009	39,769	36,438	1,333	1302
FY 2010	37,915	16,665*	3,340	1,349*

This table was compiled using Department of Defense USCENTCOM quarterly census reports fiscal years 2008-2010.

*Reflects the first two quarters because the DoD stopped separating armed PSCs from total PSCs numbers in Sept. 2010.

Singer (2005) argues that although most of the employees of PMSCs are highly qualified individuals, the rush for contractors at the beginning of the war in Iraq led to a lax in vetting processes allowing less qualified personnel to slip through the cracks. PMSCs, not the

²² The Department of Defense started reporting the number of private security contractors in Iraq and Afghanistan beginning with the third quarter in 2008.

government that awarded the contract, are responsible for training their contractors. It is risky to take unqualified and undertrained employees into a combat zone like Iraq because they could jeopardize missions (Hammes, 2011). Furthermore, employees with limited qualifications and training are less predictable in their behaviors and actions. The lack of predictability contributed to the perception that PMSCs are mercenaries, cowboys, and hired guns, which directly influenced their legitimacy as security service providers.

PMSCs understood the basis of this concern and determined action was necessary. Hurst (2004) reported in *No more must they cry havoc and let slip the dogs of war: Tired of the trigger-happy tag picked up in battle zones like Iraq* that:

some of the biggest and most powerful British security firms have had enough. They are tired of the allegations and criticisms and have decided to take action. At a conference to be held at Oxford University..., leading figures in the industry will gather to discuss ways of weeding out the rogue firms in an attempt to create a distinction between the legitimate security companies and the mercenaries. (p. 6)

To help alter the public view that many PMSCs hire indiscriminately, the ICoC includes a section designed to establish standards for selecting and vetting personnel. First, the ICoC states that Signatory Companies must exercise due diligence in the selection of Personnel, regularly assess the continued ability of their Personnel to perform their duties, and evaluate the physical and mental fitness of their Personnel on a regular basis to ensure they meet appropriate standards (ICoC: specific commitments regarding management and governance point 45). Second, Signatory Companies must establish and maintain internal policies and procedures designed to determine the suitability of applicants to carry weapons including checks that they have not

- a) been convicted of a crime that would indicate that the individual lacks the character and fitness to perform security services pursuant to the principles of this Code;

- b) been dishonorably discharged;
- c) had other employment or engagement contracts terminated for documented violations of one or more of the principles contained in this Code; or
- d) had a history of other conduct that, according to an objectively reasonable standard, brings into question their fitness to carry a weapon (ICoC: Specific Commitments Regarding Management and Governance point 48).

For clarity, the ICoC also states that “disqualifying crimes may include, but are not limited to, battery, murder, arson, fraud, rape, sexual abuse, organized crime, bribery, corruption, perjury, torture, kidnapping, drug trafficking or trafficking in persons” (ICoC: Specific Commitments Regarding Management and Governance point 49). Third, Signatory Companies will require all applicants and employees to authorize access to prior employment and government records as a condition of employment and engagement. Finally, all the principles outlined in the ICoC for selection and vetting of personnel also apply to the selection and vetting of subcontractors (ICoC: Specific Commitments Regarding Management and Governance point 51).

The *Selection and Vetting of Personnel* section of the ICoC includes more standards than the *Use of Force* and the *Prohibition of Torture* sections combined indicating that the stakeholders responsible for developing the ICoC considered setting standards for the selection and vetting of personnel important. Many of the concerns with private contractors may be eliminated altogether if the selection and vetting process can weed out individuals with questionable past behaviors as well as those who lack the appropriate training and experience.

Conclusion

PMSCs have worked hard at constructing an alternative narrative through discourse that disengaged them from the mercenary label. The Montreux Document, ICoC, and ICoCA helped

PMSCs establish their desired narrative by demonstrating their commitment to address public concerns over the questionable behavior of their contractors and the selection and vetting of personnel. This chapter analyzed the development and discourse of each initiative and it presented an empirical analysis of media coverage that supports the argument that PMSCs are seeking legitimacy through the discourse of the ICoC. More importantly, it illustrated the importance of PMSCs need to own their label so their claim that they are not mercenaries is no longer undermined by media coverage and negative perceptions.

CHAPTER 5

THE DISCURSIVE (NORM) CHALLENGE: STANDARDIZING THE USE OF FORCE

Through the Montreux Document, ICoC, and ICoCA, PMSCs worked hard to own their label. They did this through categorizing themselves as Private Security Companies willing to do what is right and regulate their industry. However, PMSCs still have an image problem because, more often than not, those outside the industry have dictated their image through public discourse. Media coverage in both the 1990s and 2000s presented a specific image of PMSCs. As noted in the last chapter, the media was determined to maintain the connection between PMSCs and mercenaries through their discourse. However, this connection was made in other ways as well. Images were painted of men “sporting goatees, wrap-around sunglasses, and bandannas” (Klein, 2007, p. D01) “carry[ing] automatic rifles, [wearing] body armor...” (Robertson, 2006, p. 68) in “tight-fitting ‘under-armor’ T-shirts...and Merrill boots with the same haircuts, [and] tattoos” (Hennessey, 2009, p. 20). Haynes (2007) provides a similar description, “Muscle-bound, often tattooed and always armed, private security guards can strike an intimidating pose, in particular those who insist on wearing wraparound sunglasses and strapping a pistol to one thigh” (p. 37). This image led the public to see PMSC personnel as “mega-masculine Rambos and trigger-happy brutes” (Joachim and Schneiker, 2012b, p. 496).

Through the continued use and coverage of this image, the media contributed to the perception that PMSCs were morally problematic in the same way as mercenaries (Percy, 2007).

Mercenaries, according to international law, are foreign soldiers specifically recruited to fight and take part in hostilities for substantial money (Howe, 1998). The association with mercenaries continually calls into question PMSCs' use of violence and force because it brings this image of 'Rambos' to mind. The industry's perceived ties to mercenarism was only partly due to the mercenary label. Another tie, discussed further in the chapter, lies with the image of using force indiscriminately and frequently violating human rights. Even with the image problem, PMSCs have gained prominence and have no difficulties finding clients (Joachim & Schneiker, 2012a).

Yet, as Percy (2007) states, the anti-mercenary norm still influences how clients utilize PMSCs' services. The reason for this is that norms do not have to fully degenerate or disappear to still influence society. Aspects of a norm can disappear or change while the heart of the norm remains. For this reason, PMSCs cannot ignore their public image since it is tightly bound to the application of the anti-mercenary norm to the PSI. Therefore, narrowing the scope of the anti-mercenary norm so that it no longer applies to PMSCs is vital to their legitimacy. Despite PMSCs efforts to disconnect themselves from the mercenary label through public discourse, their legitimacy is still held hostage by the anti-mercenary norm. Owing their label, as discussed in the last chapter, is only the starting point in seeking legitimacy. To be perceived as legitimate security providers, PMSCs must do more to alter the negative image of the industry. Losing the connection to mercenaries through the discourse of the Montreux Document and ICoC was step one in the process of narrowing the scope of the anti-mercenary norm. Step two involves developing standards and principles in relation to use of force through self-regulation with the ICoC. In the near future, the ICoCA certification process will add to this discussion, but is still too new with too few companies²³ having undergone it to be of use here.

²³ As of August 17, 2017, 5 out of 102 PMSC members are certified under the ICoCA certification process.

This chapter addresses standardizing the use of force by PMSCs through an analysis of incidents of PMSCs' use of force and the principles and standards developed in response to these incidents. This is accomplished through a comparison of media discourse and the discourse established by PMSCs on the use of force through the ICoC.

Use of Force and PMSCs

Before moving into the analysis of PMSCs, incidents of force, and the ICoC, a discussion on the reasons why PMSCs' use of force is problematic is necessary. The very nature of the services provided by PMSCs places their personnel in a position to use force. Although it was argued earlier that only 5-10% of the industry performs armed security tasks (Brooks & Streng, 2012), PMSCs were hired regularly in Iraq and Afghanistan to provide personal security for prominent diplomats, guard convoys transporting goods, and train military and police forces. It was through services like these that led to controversy and mass media coverage. This media coverage led many, policy makers and civilians alike, to question whether use of force was an inherent function of the state or if privatizing it was more beneficial. This debate tasked PMSCs with placing themselves parallel to the apparatus of the state while maintaining their corporate nature as well as proving how beneficial they could be. It was a difficult position, yet necessary for legitimacy. There were many arguments for both inherent function and privatization. Yet, two are most relevant for the discussion here: a) that the state controls the right to use force and b) that private force invokes an automatic negative response.

Use of Force and the State

There is a general understanding that the state controls the right to use force. This understanding was constructed over time and is now an accepted international norm (Finnemore,

2004). Since the right to use force lies with the state, it is not surprising that Article 2.4 of the UN Charter serves as the basis for international norms regarding use of force. Article 2.4 prohibits “the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” Based on the Charter, use of force is divided into two types, offensive and defensive. When it comes to use of force, defensive force is generally accepted especially when it pertains to the protection of civilians either in combat or during peace. Offensive use of force on the other hand is against international law.

These two types of force are closely related to two international norms, the just war tradition’s *jus in bello* (conduct of those engaged in armed conflict) and *jus ad bellum* (conditions under which states can resort to armed conflict). For states, these norms are important in determining how and why wars are fought and providing parameters for state behavior in terms of conflict. Furthermore, these use of force norms shape the rights and responsibilities of states toward other states as well as how states interact with each other (Finnemore, 2004, p. 2). States tend to conduct their international relations with other states in mind. Although both *jus in bello* and *jus ad bellum* are traditionally associated with the state, the rise of private security questions this assumption. Amy Eckert (2015) argues that the just war tradition is not inherently tied to the state. However, if the very use of PMSCs in combat zones is challenged, then it is not surprising that their right to use force is questionable. PMSCs are not usually incorporated into a state’s armed forces and therefore, the right a state grants its military to use force is not automatically transferable to PMSCs.

As Martha Finnemore (2004) states, “large-scale force is the prerogative of states.” She goes further by concluding “violence by non-state actors is branded as illegitimate...” (p. 1).

Understanding use of force in terms of the state is problematic and limiting because like most norms or international laws, it does not address the actions of an individual person or group. At one time, this made perfect sense because most threats to states and their civilians came from other states. However, more recently, non-state actors have the resources, means, and agency to follow through on threats toward the international system. Non-state actors other than PMSCs that use force such as insurgents, terrorists, mercenaries, and guerillas fall into categories most consider illegal and immoral. PMSCs as non-state actors who use force struggle with maintaining their need to use force with their need to be excluded from these categories. Narrowing the scope of the anti-mercenary norm so that it no longer applies to PMSCs is necessary for the continuation of the PSI. While the norm that states control the right to use force looms over them, the public will always question when, where, why, and how PMSCs utilize force while carrying out the mandates of their contracts. If PMSCs want legitimacy, then they must find a way to alter the perception that only states can and/or should use force. For the purposes of PMSCs seeking legitimacy in the international system, the right to use force must be addressed.

Private Use of Force

Percy (2007) illuminates the second argument on the use of force and PMSCs when she states that a negative response to the use of private force is almost automatic due to the long history and institutionalization of the anti-mercenary norm. One concern affecting the negative response to private force is PMSCs' participation in direct combat or using the same force as the military. Companies today work hard at reframing the services they provide. They avoid words like combat and military, instead referring to their services in terms of security. They distanced themselves from early companies like Executive Outcomes and Sandline International by

offering non-combat services and not openly participating in combat operations²⁴. This reframing is an attempt by PMSCs not to invoke this automatic negative response.

As mentioned earlier, media reporting shapes public perception of what a contractor looks like, how they act, why they do what they do, and whether or not their actions are questionable. Through media coverage of contractor actions in Iraq and Afghanistan, the perception that PMSCs use force indiscriminately developed. For example, McGrory (2004) reported that "...drunken security guards are accused of killing four Iraqi civilians in late-night shooting sprees" (p.1). While Haynes (2007) reports that "Farah Duraid, 30, a housewife, said: 'They behave like monsters, killing anyone in their way'" (p. 37).

The perception that PMSCs use force regularly and indiscriminately also can be traced to extensive media coverage of several high-profile incidents involving PMSCs using force. The first incident occurred in the 1990s while Executive Outcomes (EO) and Sandline International were still in operation. Their operations during the civil wars in Angola and Sierra Leone were greatly scrutinized by the media as well as the international system. Unlike PMSCs of today, both companies participated in combat with their client's military. The second incident involved the death of four Blackwater contractors in Fallujah. The third incident took place in Nisour Square where 17 Iraqi civilians were killed and another 20 injured. The fourth incident was the participation of contractors in the Abu Ghraib prison scandal. The final incident implicated contractors in the development of a sex trafficking ring²⁵. It is important to note that the claim here is not that any one of the incidents discussed was the only like it or even the worst to occur, rather that these incidents were the ones that caught media attention. By no means are the

²⁴ I use "openly" here because we cannot be sure that PMSCs are never involved in combat as many of their contracts and activities are classified.

²⁵ All incidents are discussed in further detail later in the chapter.

incidents addressed here meant to serve as a comprehensive list of all the incidents involving contractors and use of force. These incidents, however, are representative of the concerns media coverage incited in the public and policy makers.

Standardizing the Use of Force

PMSCs utilized the ICoC to overcome controversial use of force incidents by providing principles and standards regarding force. As stated earlier, Reus-Smit (2007) defines legitimacy as the right to act. When legitimacy is considered in this way, it makes sense that PMSCs would create a set of standards and principles for the industry. Without at least the appearance of regulation, accountability, and willfulness to adhere to international law, PMSCs would never reach the level of legitimacy that grants them the right to act independent of the state and even with them, PMSCs may never hold this power. However, the possibility of not having the right to act independent of the state does not negate their need and desire to narrow the scope of the anti-mercenary norm to be perceived as legitimate security providers. The public climate and willingness to accept private force is dynamic and the future could hold a perception that private force is better than sacrificing for the nation.

The incidents that follow illustrate how the rules for use of force established by the ICoC respond to incidents with vast media coverage in an effort to develop discourse that demonstrates PMSCs' response to controversy. These incidents also provide the background for why the use of force by PMSC personnel needed to be addressed. The ICoC sections that establish conduct for personnel are a result of the many incidents of use of force by contractors, however, it is difficult to do a point by point comparison with the incidents discussed here. To some degree,

this can be attributed to the fact that there are general commitments set forth in the ICoC that apply across all incidents.

The first general commitment that does this is point 22 of the General Commitments section of the ICoC. It states that Signatory Companies are obligated to refrain from contracting with any entity that infringes on UN Security Council sanctions. Point 22 goes further still and gets at the heart of the controversies surrounding contractor actions in the field when it states, “Signatory Companies will not, and will require that their Personnel do not participate in, encourage, or seek to benefit from any national or international crimes...” (ICoC: general commitments point 22). Those crimes listed²⁶ include war crimes, crimes against humanity, genocide, torture, sexual or gender-based violence, among others. Point 22 helps further establish international humanitarian laws like the Rome Statute by reaffirming they are applicable to all individuals, not just state representatives, who violate them. It is interesting to note that point 22 technically covers all the international crimes PMSCs have been accused of committing. However, one point does not provide the amount of discourse PMSCs needed to counter claims of human rights abuses and violations of international humanitarian law. For the purposes of legitimacy, PMSCs needed the recognition that they were consciously making an effort to prevent the types of incidents that led to the negative perception of the PSI and its association with mercenaries. This is why some of the points discussed below from the Specific Principles Regarding the Conduct of Personnel cover the crimes listed in point 22.

Another general commitment that applies across incidents is in points 23-25 of the General Commitments section, which states that Signatory Companies commit to not justifying

²⁶ Those crimes include, but are not limited to war crimes, crimes against humanity, genocide, torture, enforced disappearance, forced or compulsory labor, hostage-taking, sexual or gender-based violence, human trafficking, the trafficking of weapons or drugs, child labor or extrajudicial, summary or arbitrary executions.

illegal action on any basis including on the grounds of contractual obligations. This means that PMSCs at no time can claim that illegal actions or violation of international humanitarian law were a result of an order from a superior or based on a contract. It removes a layer of protection for individual contractors making them take ownership of their actions. They also commit to reporting any acts contrary to international law and taking reasonable steps to ensure their goods and services are not used to violate human rights (ICoC: general commitments points 23-25).

Finally, to address issues that apply across all incidents, point 27 obligates Signatory Companies to establish a corporate culture that promotes personnel to be aware of and adhere to the ICoC. The norms established by the corporate culture of PMSCs strongly influences the degree of violence employed by personnel (Fitzsimmons, 2013, p. 711). Requiring PMSCs to build corporate norms that follow international law is important to PMSCs because they can prevent controversial incidents. It can also help develop a more pleasing image of contractors if they no longer look or act like ‘trigger-happy brutes’. Point 27 also obligates Signatory Companies to provide the training necessary to assure personnel have the knowledge and skills to follow the principles and standards of the ICoC (ICoC: general commitments point 27).

To provide a more cohesive analysis, I have grouped each incident with the closest corresponding ICoC points. Interestingly, the ICoC directly discusses the use of force in four points (ICoC: Specific Principles Regarding the Conduct of Personnel points 29-32). However, I claim several additional points in the Specific Principles Regarding Conduct of Personnel section of the ICoC apply to these incidents.

Combat: Executive Outcomes and Sandline International

There are two companies, that operated in the 1990s, which shaped perception of PMSCs and their use of force, Executive Outcomes (EO) and Sandline International²⁷. Unlike the PMSCs of today, both of these companies offered combat services and both are no longer in business. The rise and fall of these companies helps explain why current PMSCs so adamantly deny combat services and distance themselves from arms as much as possible (Baum & McGahan, 2013; Percy, 2007; Singer, 2003). Although EO and Sandline International were organized similarly to PMSCs now, their willingness to directly participate in combat, connection to natural resource mining companies, and acceptance of contracts from weak states made it impossible for them to shed the mercenary label.

EO was established in 1989 by Eben Barlow, a former officer in the South African Defense Force (Howe, 1998, 310; Singer, 2008, p. 102). Howe (1998) described Executive Outcomes as “the world’s largest and best known ‘mercenary’ group” and also as “a private army with access to some 2000 ex-South African Defense Force (SADF) combat veterans...” (p. 307). Singer (2008) claimed “Executive Outcomes [became] emblematic of the overall phenomenon of corporate armies” (p. 101). According to Percy (2007, p. 209), EO gained notoriety as a major player in the private military industry when it was hired by the Angolan government in late 1992.

EO’s roles in the civil wars in Angola and Sierra Leone provides insight into the earliest manifestation of the use of private force (Percy, 2007). In some ways, EO exemplified the kind of success a state can have using PMSCs. In Angola, EO successfully liberated the Soyo oilfield and trained the Angolan army. In Sierra Leone, EO successfully drove rebel forces away from

²⁷ For more discussion and analysis of Executive Outcomes, see Howe (1998), Percy (2007), and Singer (2008).

the capital, Freetown and the diamond areas of Koidu and Kono (Percy, 2007). In other ways, EO exemplified the many ways PMSCs can be utilized by corporations to continue exploiting the natural resources of weak states. EO's motives for successfully liberating natural resource rich areas in both Angola and Sierra Leone were 1) they knew their Clients needed access to natural resources in order to pay for their services and 2) they were most likely paid with natural resource concessions which they sold to mining companies (Fuchs, 2007). There is no clear evidence that EO received concessions. However, EO was part of the Branch-Heritage Group which had mining and oil interest in the areas where EO operated (Fuchs, 2007; Howe, 1998; Percy, 2007; Singer, 2008). Whether or not concessions were granted, the possibility and perception that they were part of EO's contracts was damaging to the companies reputation. Concessions meant PMSCs offered their military and security services to states that had no other options in exchange for the state's financial future.

The media²⁸ picked up on the close ties between EO and mining companies and reported on it regularly. Michael Ashworth (1996) reporting for *The Independent* described EO as "one element in a unique fusion of muscle and money" (p. 2). He goes on to say EO's "close ties to capitalism have earned it the name 'the diamond dogs of war'" (p. 2). He supports this claim with the following:

In Sierra Leone, the Freetown newspaper *For Di People* claimed that "Executive Outcomes is made up of killers who are very dangerous, because their presence can

²⁸ I conducted a second *Lexis-Nexis Academic* search since Executive Outcomes and Sandline International were in operation outside my sample dates. I used the search terms 'Executive Outcomes' and "Sierra Leone" or "Angola". The search resulted in many articles and to narrow it down, I used the same newspapers as my sample *The Guardian, The Washington Post, The Times, and The Independent* resulting in 91 articles. *The New York Times* did not have any articles with my search criteria.

quickly lead to political unrest. Let's be honest, they're not here for the security of Sierra Leoneans, they're here for diamonds". (p. 2)

Jeremy Harding (1997) states "Executive Outcomes thrives on the absence of civility, consensus, law, and order" (p. 32). He continues his analysis of EO arguing "its biggest operations are carried out in countries that have valuable mineral resources: oil- and diamond-strewn Angola, diamond-encrusted Sierra Leone, and now copper-rich Papua New Guinea" (p. 32). In 1999, James Rupert reported "Sierra Leone paid Executive Outcomes to fight the rebels, the government also awarded diamond-mining rights to Branch Energy, a firm linked to Executive Outcomes through cross-ownership among a group of former South African and British military officers" (p. A01). The media's portrayal of EO and their connection to mining companies solidified the negative perception of PMSCs at that time.

Another company that added to the media's use of the mercenary label was Sandline International. Sandline was established in 1995 by Tim Spicer, a former British Lieutenant-Colonel (Fuchs, 2007; Percy, 2007; Spicer, 1999). Although both EO and Sandline executives denied they were formally linked, both companies operated in Angola and Sierra Leone and shared contractors. Welsh (1998), writing for *The Times*, stated, "Mercenaries from Spicer's Sandline and Executive Outcomes...have fought together in Sierra Leone's internal conflict" (Features). Ashworth notes, "it [Sandline] works closely with-and contracts work to-Executive Outcomes" (p. 2). Both authors demonstrate that EO and Sandline could deny their link all they wanted, but very few believed them. A formal link between the two companies was problematic because there were allegations of connections between PMSCs and natural resource extractions companies. This connection provided further support for allegations that the benefits of private force came hand in hand with the exploitation of natural resources by mining companies. It was

believed, although difficult to prove, that Sandline and EO (both PMSCs), Branch Energy, Branch Minerals, Heritage Oil and Gas (all three mining companies), and the air support company, Ibis Air were all part of Branch-Heritage Group which was a British multinational holding company (Howe, 1998; Percy, 2007). Howe (1998) argues these commercial ties threatened the sovereignty of the African states where these companies operated.

Although the linkage between Sandline and EO raised concerns, Sandline also became news worthy through their work in Sierra Leone. In Sierra Leone, Sandline was contracted to help restore President Kabbah to power (Fuchs, 2007; Percy, 2007). One of the tasks they were hired for was equipping the government of Sierra Leone (exiled in Guinea) with weapons. The delivery of these weapons, approximately 35 tons of arms and ammunition, resulted in the Sandline Affair. At the time of the delivery, the UN had in place an arms embargo for Sierra Leone (Fuchs, 2007, p. 112). When Sandline completed their task to arm the government, they violated this embargo. As with EO, the media covered the Sandline Affair. McGrory and Wood (1998) argued, “But the uproar over whether Sandline had government approval to ship arms to Sierra Leone in contravention of a UN embargo has set back the efforts of private security operators to be seen as legitimate” (Home news).

ICoC and Combat

The ICoC does not directly state that Signatory Companies cannot engage in combat. Instead, there are several points that imply this. In the General Commitments section, Point 20 states that Signatory Companies will not knowingly enter into contracts that would lead to violations of the ICoC. Point 21 requires Signatory Companies to comply with international humanitarian law and human rights law and respects the human rights of persons with which they come into contact. Point 22, in response to the Sandline Affair, mandates that Signatory

Companies abide by UN Security Council sanctions. Furthermore, the standards and principles established for use of force (discussed in more detail below) in the ICoC were developed to ensure the kind of notoriety and attachment to mercenaries experienced by Executive Outcomes and Sandline International is avoided. For instance, requiring Signatory Companies only allow their personnel to use firearms in self-defense or the defense of others attempts to maintain distance between security services and combat operations (ICoC: specific principles regarding the conduct of personnel point 31). Companies today, unlike EO and Sandline which used combat services as a selling point, downplay any role they may play and/or service they may provide to offensive military operations. By doing this, contemporary PMSCs distinguish themselves from the international definition of mercenary. Adding the ICoC provision that PMSC personnel may only use armed force in defense of self and others further distinguishes today's companies from the past.

Use of Force: Blackwater

As EO and Sandline were the most notorious PMSCs of the 1990s, Blackwater was so notorious during the wars in Iraq and Afghanistan that it was and to some degree still is a household name. Blackwater is mentioned in 47% of the articles (88 of 188) in my sample, a total of 527 times. Headlines such as *Blackwater pair charged over deadly shooting*, *Blackwater accused of defrauding US government*, *Blackwater tied to clandestine CIA raids*, and *Blackwater and its soldiers of misfortune* contributed to the public's view that the company was unregulated and without accountability. In addition to headlines, Blackwater was mentioned in same sentence as 'killing' or 'shooting' 37 times each. Sengupta (2010) reported that Blackwater employees were linked to 195 shooting incidents between 2005 and 2008 (p. 34).

Founded by former Navy SEAL Erik Prince in 1997, Blackwater provided protective services in Iraq. Most notably, the company provided the protection detail for the Coalition Provisional Authority chief, Paul Bremer. Due to continued controversy, Blackwater changed its name to Xe Services in 2009 and then again in 2011 to Academi²⁹. Scott Fitzsimmons (2013) found in his study on corporate culture and use of force that between 2005 and 2007 Blackwater personnel fired their weapons in 323 incidents resulting in the death of 62 people and 86 injuries (p. 708). Fitzsimmons also noted that Blackwater's corporate culture was influenced by the Navy SEAL culture of its founder. In addition to Prince, contractors hired to work for Blackwater were often from special forces units with many being former Navy SEALs (p. 717). Furthermore, Blackwater had a proactive use of force with the mindset of "fire first, ask questions later" (Fitzsimmons, 2013, p. 719). This is supported by, as Jeremy Scahill (2007) states, "it has become common...to fire off rounds from a machine gun at approaching Iraqi vehicles" (p. 4). For Blackwater personnel, all approaching unidentified vehicles were considered a threat to the client and their security team (Fitzsimmons, 2013). The corporate culture described by Fitzsimmons was reflected in the many incidents involving Blackwater and use of force. The two incidents that stand out the most, however, were Fallujah in 2004 and Nisour Square in 2007.

Fallujah

On March 31, 2003, four Blackwater contractors were killed when their convoy was ambushed by insurgents in Fallujah. The contractors were providing a security escort for food trucks carrying supplies. The ambush in and of itself was not what made the incident so notorious. Instead, it was what happened in the ambush's aftermath. The bodies of the four men were dragged through the streets of Fallujah and their burnt corpses suspended from a bridge

²⁹ Regardless of the renaming of Blackwater, the company is often referred to by the original name in scholarly works as well as in the newspaper articles that make up my sample. I will do the same here.

over the Euphrates River. It was a graphic public display that drew attention not only to the company, but the entire PSI as well. According to Erik Prince (2013), “the relentless rolling of the awful footage seared my company’s name into the public consciousness” (pp. 121-122). He goes on stating, “people who hadn’t known a thing about PMSCs now had but one horrible scene – and one name – to associate with the industry” (p. 122). The public response to the incident, due to the media attention it drew, was outrage with calls for action. Five days after the killing of the four Blackwater contractors, three former Army Rangers and one former Navy SEAL, “sparked the twin battles of Fallujah, the most deadly single battles of the occupation to date” (Denselow, 2010, para. 5).

Once the ambush started, the four contractors killed in Fallujah did not have time to fire a single shot. This incident did not involve contractors firing their weapons and using force. Instead, it served as the first moment when PMSCs came into the spotlight and the public and policymakers alike started asking questions. The images of the contractors’ bodies being burned and put on display were everywhere. The brutality of what was done to the bodies for hours following the men’s deaths was a major blow for American propaganda (Scahill, 2007). As Paul Bremer noted, “The images immediately became icons of the brutal reality of the insurgency, [they] underscored the fact that the coalition military did not control Fallujah” (as cited in Scahill, 2007, p. 171). The incident also served as a lesson that although states may not consider contractors part of their armed forces, those in Iraq and Afghanistan did not differentiate the two. Yeoman (2004) supported this conclusion when he observed, “Private contractors are viewed by Iraqis as part of the occupation” (p.19). The incident in Fallujah serves as an example of force used against PMSCs and therefore not directly addressed within the ICoC. However, this incident is crucial for understanding the environment in which other incidents occurred.

Nisour Square

At the time of the Nisour Square shooting, Blackwater was working for the US Department of State in Iraq under their Worldwide Personal Protective Services (WPPS) contract. On September 16, 2007, Blackwater contractors were escorting a US diplomatic convoy through Baghdad. News reports, later confirmed by US and Iraqi investigations, claimed Blackwater employees fired on a slow-moving civilian car that failed to stop when they entered the roundabout in Nisour square stopping traffic. Blackwater officials insisted their men responded to an attack by insurgents. However, eyewitness accounts claimed Blackwater guards were unprovoked when they fired on the car (De Nevers, 2009, p. 170; Schwartz et al, 2008, p. 12). In the confusion that followed, the contractors continued firing at civilians and Iraqi security forces in the square (De Nevers, 2009, p. 170). According to the indictment of five of the contractors involved in the shooting, 17 civilians were killed and 20 wounded (De Nevers, 2009; Schwartz et al, 2008; USDOJ, 2008).

This incident of excessive use of force brought to light the difficulties involved in prosecuting PMSCs' contractors operating in foreign countries for several reasons. First, it is difficult to maintain a crime scene in a conflict environment making the collection of evidence subject to scrutiny. Second, the Military Extraterritorial Jurisdiction Act (MEJA) was reformed in 2004 to allow the Justice Department to prosecute contractors working for the DoD overseas. However, in this case, Blackwater was operating under a contract with the Department of State. The defense for the five contractors argued they were exempt from MEJA for this reason. There were a lot of questions about which US laws were applicable in such a situation. Finally, the five contractors originally were indicted for the shooting in Nisour Square in December 2008. However, the case did not go to trial, due to dismissals and appeals, until July 2014. It took

several years and many attempts to convict four contractors of murder and manslaughter for the shooting of these civilians.

One of the consequences of this incident was the Iraqi government making PMSCs accountable under Iraqi law. Prior to this point, Coalition Provisional Authority Order 17 protected PMSCs from local prosecution (Percy, 2009). After the Nisour Square shooting, the position of PMSCs in Iraq was in doubt. The Iraqi government wanted contractors involved in the deaths of Iraqi civilians held accountable.

Media coverage of Blackwater and the shooting of Iraqi civilians was extensive. In his article, *Blackwater billed US for use of prostitute*, Tim Reid (2010) states, “the most controversial incident involved the shooting and killing of 17 Iraqi civilians...” (p. 50). In *The danger of hired guns*, Denselow (2010) asks “with the rule of law far weaker in the more chaotic Afghanistan arena, the question is what guarantees are in place for preventing another Nisour Square massacre” (no page number). Kim Sengupta (2007) reported one victim of the shooting saying, “This is not the first time they have killed innocent people, and they will do it again, you’ll see...nothing, absolutely nothing will be done” (p. 40).

ICoC and Use of Force

Discourse in the ICoC is easily attached to the Nisour Square shooting. Point 29 states that Signatory Companies must adopt rules for the use of force consistent with applicable laws and the minimum requirements on the use of force set by the ICoC. Point 30 obligates Signatory Companies to require their personnel take all reasonable steps to avoid the use of force and if it must be used, then it should not exceed what is strictly necessary, be proportional to the threat, and appropriate to the situation.

Points 31 and 32 deal with use of force that involves firearms. Because the use of firearms could lead to serious injury or death, Points 31 and 32 are based on the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials developed in 1990. Although these basic principles were developed without PMSCs in mind, they are considered applicable by those who wrote the ICoC³⁰. Point 31 prohibits the personnel of Signatory Companies from using firearms “against other persons except in self-defense or the defense of others against imminent threat of death or serious injury, or to prevent the perpetration of a particularly serious crime involving grave threat to life” (ICoC: Use of Force point 31). Point 32 establishes rules for Signatory Companies use as law enforcement stating that personnel comply with all national and international obligations applicable to regular law enforcement officials in relations to their weapons and use of force. The Basic Principles on the Use of Force and Firearms established “law enforcement officials as anyone, appointed or elected, who exercises police powers, especially the powers of arrest or detention” (Geneva Academy, 2013, p. 36).

Points 29-32 make up the entire section on the use of force in the ICoC. This can be interpreted in two ways. First, having four points cover use of force where other sections like the selection and vetting of personnel have far more could be interpreted to mean that those behind the ICoC only pay lip service to the development of principles and standards for the use of force. There may be some truth to this interpretation as the four points are vague and do allow for the growth of services that may expand PMSCs’ use of force in the future. However, I believe that there are only four points for another reason. Other points in the Specific Principles Regarding the Conduct of Personnel section relate to and/or may result in the use of force by PMSC

³⁰ Authors include: members of the PSI, Swiss Department of Foreign Affairs, the Geneva Centre for the Democratic Control of Armed Forces (DCAF), and the Geneva Academy of International Humanitarian Law and Human Rights (ADH).

personnel. The authors broke the use of force into additional section like the detention and apprehension of persons, prohibition of torture, sexual-based violence, and human trafficking to establish the discourse that supports their claim that they are willing to be regulated in order to prevent future controversial incidents and human rights violations.

Torture: CACI & Titan

Although CACI International, Inc. and Titan Corporation were not as notorious as Blackwater, the scandal at Abu Ghraib in which several of their employees were involved was. CACI was founded in 1962 and over the years has grown in the services it provides. Like many PMSCs of its time, CACI began to really grow in the 1990s with a major boom occurring once the war in Iraq began in 2003. According to their website, CACI provides “information solutions and services in support of national security missions” (<http://www.caci.com/about/profile.shtml>). CACI was contracted to provide interrogators at Abu Ghraib. Titan Corporation was founded in 1981 with a specialization in national security solutions like providing information and communications products and services for intelligence agencies (http://www.sourcewatch.org/index.php/Titan_Corporation). It was purchased by L3 Technologies in 2005 and is now the L-3 Communications Titan Corporation. Titan was contracted to provide translators at Abu Ghraib.

Contractors from CACI and Titan were implicated in the “sadistic, blatant, and wanton criminal abuses” between October and December 2003 at the Abu Ghraib military prison (Hersh, 2004, para. 5). According to the Taguba report, the abuse of detainees³¹ at Abu Ghraib included videotaping and photographing naked male and female detainees, forcibly arranging detainees in

³¹ For a full list of the abuses carried out at Abu Ghraib see *Article 15-6 Investigations of the 800th Military Police Brigade* written by Major General A.M. Taguba, p. 17.

various sexually explicit positions for photographing, forcing naked male detainees to wear women's underwear, using military working dogs without muzzles to intimidate and frighten detainees, among many others. Singer (2007), citing the Fay Report³², stated that contractors committed 36% of the proven abuse incidents at Abu Ghraib with six specific employees being named. Unlike their military counterparts, no contractors have been charged, prosecuted, or punished (p. 7). A *New York Times* editorial, *Interrogation for Profit* (2008), best represents the media's view of contractors at Abu Ghraib when it states "Operating free of the restraint of military rule and ethics, some of these corporate thugs turned up in the torture scandal at the Abu Ghraib prison and walked away with impunity" (p. 30). This incident illuminated issues with contractor use and oversight that were common in the early years of the Iraq war. Furthermore, it highlighted that contractors commit heinous crimes and face little to no consequences for their actions.

Interestingly, within my sample, there are few incidents of PMSCs and their contractors participating in torture and/or enhanced interrogation techniques. In relation to the Abu Ghraib scandal, the media did make statements like "Congress is finally moving to ban one of the Bush administration's most blatant evasions of accountability in Iraq – the outsourcing of war detainees' interrogation to mercenary private contractors" (*Interrogation for Profit*, 2008, p. 30). Other than the Abu Ghraib abuses, contractors were linked to the CIA's rendition of terrorist suspects and transporting detainees. However, there is no specific incident that made headlines. Yet, the ICoC has a section dedicated to the prohibition of torture and other cruel, inhumane, or degrading treatment or punishment.

³² The Fay Report refers to the 143-page *Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 52* report that details the Army's investigation into the prisoner abuse at Abu Ghraib prison.

ICoC and Torture

The Specific Principles Regarding the Conduct of Personnel section point 35-37 establishes a prohibition on the use of torture. The developers of the ICoC utilized far stronger language in this section than can be found in others like the use of force. Signatory Companies and their employees are prohibited from engaging in torture or other cruel, inhumane, or degrading treatment or punishment. The section further clarifies “for the avoidance of doubt, torture and other cruel, inhumane or degrading treatment or punishment...includes conduct by a private entity which would constitute torture or other cruel, inhumane or degrading treatment or punishment if committed by a public official” (ICoC: specific principles regarding the conduct of personnel point 35). It also establishes that superior orders or exceptional circumstances cannot be used as justification. Finally, it requires Signatory Companies and their personnel to report any acts of torture and cruel, inhumane or degrading treatment or punishment of which they have reasonable suspicion or is known to them. The report must be filed with the Client and competent authorities in either the country where the act took place, the country of nationality of the victim, or the country of nationality for the perpetrator. This strong language and appearance of intolerance is critical for addressing concerns that contractors participate in what amounts to war crimes. It also helps to alter the perception that contractors do not abide by international law, the Geneva Conventions, or human rights.

Sexual Exploitation: DynCorp International

DynCorp International has a lengthy history dating back to two companies formed following World War II, Land-Air, Inc. and California Eastern Airways. It is based in Virginia and the name DynCorp International was established in 1987 (DynCorp International website: <http://www.dyn-intl.com/about-di/history>). DynCorp is one of the most used American-based

PMSCs by the US State Department. At one time, they held contracts for police training in Iraq, Afghanistan, Latin America, Haiti, Bosnia, and Kosovo (Broder & Rohde, 2007). DynCorp was mentioned 58 times in 20 different articles in my sample.

DynCorp differs from other companies discussed here because it was not an incident in Iraq or Afghanistan that led to its notoriety. Rather, DynCorp is known for being implicated in a sex slavery scandal while under contract to train the Bosnian police force. In 2000, 13 employees were accused of participating in a sex slavery ring. Kathryn Bolkovac, a company whistleblower, reported overhearing male colleagues discuss women they owned or had purchased. Another whistleblower, Ben Johnston, reported trafficking-related activities of fellow contractors and overhearing a colleague brag, “My girl’s not a day over 12” (as quoted in MaffalMacro, 2009). Both Bolkovac and Johnston were fired not long after making their reports. DynCorp transferred the accused employees to Germany before the local police could investigate. Of the 13 accused, only seven were fired and none were criminally prosecuted.

Media coverage of the company’s work in Iraq and Afghanistan led to the continued association between the sex slavery scandal and DynCorp with statements like “its employees accused of rape and the buying and selling of girls as young as 12” (Traynor, 2003, p. 1) and “DynCorp is the same company whose employees hired child prostitutes while working in Bosnia” (Smith & Gall, 2004, p. 4). A wrongful termination suit filed by Johnston reported that he “witnessed co-workers and supervisors literally buying and selling women for their own personal enjoyment” (Traynor, 2003, p. 1).

ICoC and Sexual Exploitation

The Specific Principles Regarding the Conduct of Personnel section point 38 establishes the prohibition of sexual exploitation and abuse or gender-based violence. In only one point, the

ICoC goes beyond potential applicable law as it prohibits PMSCs and their personnel from benefiting or engaging in prostitution or other forms of sexual exploitation even when it is legal under national or local law (Geneva Academy, 2013, pp. 40-41). Incorporating prostitution into sexual exploitation is reminiscent of the DynCorp sex scandal where employees were accused of hiring prostitutes. Of course, the entirety of point 38 recalls the many accusations made against DynCorp personnel while under contract in Bosnia. It is worth noting, that Point 38 also prohibits sexual harassment and abuse within the company. Although this subsection seems limited with only one point, it allowed the ICoC to develop discourse that directly addresses one of the major incidents involving contractors and human rights abuses.

Conclusion

The ICoC developed discourse that responded to the many concerns of contractors' involvement in controversial incidents of force. The General Commitments and Specific Principles Regarding the Conduct of Personnel sections establish the perception that PMSCs are committed to addressing past incidents and avoiding incidents in the future. This chapter presented arguments for why PMSCs needed to address the use of force by the PSI. It also analyzed incidents of force such combat with EO and Sandline, use of force through Blackwater, torture with CACI and Titan, and sexual exploitation and DynCorp. Finally, it analyzed the principles and standards developed in the ICoC as a response to the negative perception such incidents helped create.

CHAPTER 6

CONCLUSION

I began this dissertation project quite some time ago and bound my study to the period from 2003 to 2010. This period was selected because 2003 marked a spike in the growth of the PSI. Although the industry has roots in the end of the Cold War, it was not until the US invaded Iraq in March of 2003 that the industry boomed and PMSCs began to pop up overnight to fulfill the sudden and highly lucrative demand for private contractors in Iraq and Afghanistan.

November 2010 was significant because it marked the adoption of the International Code of Conduct for Private Security Service Providers (ICoC). The Montreux Document, adopted two years earlier, focused on states making the ICoC the industry's attempt at developing standards and principles aimed at the conduct of PMSCs' personnel.

The signing of the ICoC is now seven years old and fully operational. The Association that was established in the ICoC has developed and implemented a certification process for members. The certification process was adopted in 2016 and has resulted in certification of 6 of the 100 companies in good standing. Those companies are Aegis, Al Hurea Security Services, GardaWorld, Hart, Olive Group, and Vesper Group. This list indicates that only three of the large PMCSs, Aegis, Hart, and Olive Group, have undergone the certification process. However, to remain in good standing, all members must be certified by September 30, 2018.

Recent Developments

In the years beyond the period in which I chose to focus, there have been many developments in private security scholarship as well as the private security industry. Although there are many possible developments I could discuss, only one truly represents why it matters whether PMSCs have legitimacy. In recent months, there has been a lot of discussion in Washington about what should or should not be done with US policy in Afghanistan. In many ways, the possible paths forward came down to two, pulling American troops out of Afghanistan entirely or staying the course (Prince, 2017, para. 7). Earlier this summer, Erik Prince (2017), founder and former owner of Blackwater, published an opinion piece in the *Wall Street Journal* and presented a third path for US policy in Afghanistan. Basically, Prince's plan would hire a PMSC, most likely his company Frontier Services Group based in Hong Kong and Beijing, to fix Afghanistan (McFate, 2017, para. 1). According to McFate (2017), Prince is not the only private contractor to support this type of plan. Many in the PSI support it including Stephen Feinberg, owner of DynCorp (para. 2).

Prince's plan includes five points. First, he suggests that Afghan policy would benefit from an American viceroy. According to Prince, American policy in Afghanistan is bound to fail due to the frequent shift in military commanders; there have been 17 different commanders over a 15-year period (para. 2). This viceroy would emulate the role General Douglas MacArthur held in Japan following the end of World War II. To Prince, MacArthur is a worthy example because his leadership "moved Japan ahead by centuries" (para. 3). The American viceroy in Afghanistan would report directly to the president and head all US government and coalition efforts like budget, policy, promotion, and contracting (para. 2). Sean McFate (2017) writing in response to

Prince's opinion piece noted that President Truman fired MacArthur for abuse of power, a problem which Prince's viceroy could fall victim as well.

McFate also wonders who Prince had in mind for the viceroy and speculates that Prince was probably considering himself. However, Prince's leadership as a CEO has been questioned in the past. While Prince oversaw Blackwater, several incidents occurred, the most notable being Fallujah, where four Blackwater contractors were killed, and Nisour Square, where 17 Iraqi civilians were killed by Blackwater employees. As stated in the last chapter, Blackwater became notorious through these incidents and others. The notoriety added to the negative perception of PMSCs and the PSI. Even if policymakers were willing to consider Prince's plan, he is probably not the best option to oversee anything the government does in Afghanistan.

The second point of Prince's plan is the American viceroy should be authorized to set rules of engagement in collaboration with the elected Afghan government. This would allow for better and faster decision-making. Prince argues that troops on the ground should not have to ask lawyers, who are hundreds of miles away, whether they can drop a bomb. He supports the need for faster decisions with this, "our plodding, hand wringing, and over caution have prolonged the war – and the suffering it bears on the Afghan population" (para. 4). Prince believes Afghanistan needs leadership on the ground with the authority and responsibility to complete the mission.

For the third point, Prince argues that instead of spending billions on the ideal way to build the capacity of the Afghan security forces, the US should build it in an effective and proven way. The example he provides for support is the presidency armies of the East India Company, who Prince argues, had 250 years of success in the region. Prince states that the presidency armies were effective because they were locally recruited and trained and led by contracted professional soldiers who lived, patrolled, and fought beside their local counterparts. The East

India Company approach would be cheaper than the current method. It would also fill logistical and air support gaps in the current Afghan security forces. In response to this point, McFate states that the East India Company presidency armies did a lot of harm in India and eventually bankrupted the company. In addition to this, McFate argues that “Prince’s solution for Afghanistan amounts to neo-colonialism” (para. 5). The presidency armies also bring to mind Executive Outcomes and Sandline International as both companies recruited and trained locals and also lived and fought beside their local counterparts. The actions taken by these companies were not sanctioned by the international community as evidenced by the fact that neither exists today.

The fourth point of Prince’s plan argues that the military default policy to control terrain, as it would in a conventional war, is the wrong move in Afghanistan. He states that the population-centric theory of warfare is flawed and has led to the Taliban controlling major economic resources. The result is the Afghan government depending on donors for revenue instead of taxes and exports. Prince claims it is “absurd that Afghanistan – which holds an estimated \$1 trillion worth of mineral resources – still doesn’t have a mining law, after 15 years of American presence and advice” (para. 11). Instead, a trade-centric approach would be more beneficial for the Afghan government. Again, bringing resources into the conversation, no matter how relevant to the future of Afghanistan, draws a comparison with Executive Outcomes and Sandline International since both companies helped their clients, Angola and Sierra Leone, liberate natural resource rich areas. Both companies were accused of gaining resource concessions and having connections to mining companies operating in the area. The plan as Prince has outlined it lends itself to the same concerns once raised by the way Executive Outcomes and Sandline International conducted business in weak states.

Finally, Prince reminds the president that the US must not lose sight of the reason behind our involvement in Afghanistan, “to deny sanctuary to those who want to destroy our way of life” (para. 12). Furthermore, the US needs to abandon nation building, Prince argues, and “focus on pounding the Taliban and other terrorists so hard they plead for negotiation” (para. 11). Through this point, it appears that Prince is also in favor of targeting and eliminating more individuals suspected of terrorism. And even if he only meant “pounding” through air support, how does that not result in mass civilian casualties?

Erik Prince’s argument for using contractors in Afghanistan brings to light a concern with PMSCs. They may be presently used as force multipliers most of the time, yet, nothing is stopping clients from expanding their use into other arenas. Maybe expanding their use is not as problematic as some fear. Still, it is difficult to predict how PMSCs might use their legitimacy once they feel comfortable and confident in it. Prince’s plan may not have won out over a conventional plan at this time, but what about the next? This summer is not the first-time Prince has offered PMSCs as the solution to global problems. In October 2014, Prince pitched a plan to fight the Ebola outbreak in West Africa with contractors. He argued a large supply vessel off the coast could quickly deliver medical assistance where needed. He stated, “We could carry 250 vehicles, couple helicopters, couple landing craft, and everything else – so that’s all your mobility equipment” (Drennan, 2014, para. 2). In addition to using contractors in West Africa, Prince also advocates PMSCs as part of the solution for ISIS.

McFate identifies other ways PMSCs have been hired that fall outside their manner of use in Iraq and Afghanistan. For instance, he notes that Nigeria hired a PMSC after struggling with the jihadi terrorist group Boko Haram for nearly six years. The PMSC accomplished what the Nigerian military could not, they pushed Boko Haram out of much of the territory it held in

Nigeria (para. 11). McFate, a former contractor himself, is not against the PSI or its continued use. Rather he likens contractors to a tool that can either be used to build or to destroy.

The argument for generally using contractors to “fix” Afghanistan or push terrorist organization from territory is not necessarily problematic. However, it does require us all to question the potential consequences of using private corporations in place of government forces when conducting foreign policy. It is unclear how such policies may impact the international system and because of that, we must debate, research, and argue the possible outcomes. PMSCs may be force multipliers, more cost effective, and so on, but are those uses worth the potential consequences? At this time, we do not have a solid, evidence-based answer. It is situations and questions like these that led me to focus my research on PMSCs.

Summary of the Argument

Although PMSCs and the PSI are here to stay, how, when, and where they are used is still open for debate. The decisions made on how, when, and where are, at least in part, dependent on the legitimacy of the practice of hiring private security as well as the legitimacy of the PSI and PMSCs. This dissertation aimed to answer the questions why and how PMSCs are seeking legitimacy in the international system through discourse analysis. To do this, the argument utilized a constructivist framework that helped illustrate the importance norms and identity play in the legitimization of PMSCs and the PSI. The argument presented had three main points. First, PMSCs struggle with legitimacy because of the anti-mercenary norm that supports the understanding that mercenaries are morally problematic since their use of force falls outside the control of the state and they profit from war. Second, due to the negative perception of the industry perpetuated by media coverage and controversial incidents, the anti-mercenary norm

continues to be applied to PMSCs. Finally, PMSCs, as well as other non-state actors, desire and need legitimacy for the continuation of the use of their services as well as to support claims that their actions are lawful and just according to international norms.

My argument demonstrates two ways discourse developed by PMSCs furthered their goal of legitimacy. The first way discourse developed by PMSCs furthered their goal of legitimacy is through narrowing the scope of the anti-mercenary norm. The reason PMSCs needed to narrow the scope of the norm was due to their having a legitimacy problem which in many cases, presented itself as negative perceptions of the industry. The negative perceptions were often based on the historical connection between mercenaries of old and PMSCs of today. The evidence presented in earlier chapters demonstrates that PMSCs sought to narrow the scope of the anti-mercenary norm through the process of removing their connection to mercenaries by choosing their own label. This was not an easy feat and in some ways, is a battle still taking place. The media continued to utilize terms like mercenary, cowboys, and hired guns when referring to personnel in the industry. To overcome the mercenary label, PMSCs chose their own label, Private Security Company, in the Montreux Document. In the ICoC, they acknowledged the possibility that their actions in the field could have positive as well as negative consequences and they established principles for the selection and vetting of personnel. The evidence presented in chapter 4 illustrates the need for PMSCs to own their label so that their claim that they are not mercenaries can hold against years of media coverage and negative perceptions.

The second way discourse developed by PMSCs furthered their goal of legitimacy is through establishing normative standards for the industry. The reason PMSCs needed to establish normative standards was due to controversial incidents involving PMSC contractors' use of

force. Through a discussion on representative controversial incidents, it was evidenced that PMSCs utilized the ICoC to establish standards and principles regarding the kinds of crimes and human rights abuses for which they were accused. For example, they utilized the General Commitments section to ensure PMSCs and their personnel followed international humanitarian law. The Specific Principles Regarding the Conduct of Personnel section addressed the general use of force and when, why, and how it can be used as well as the prohibition of torture and prohibition of sexual exploitation and gender-based violence. Chapter 5 demonstrates the need for PMSCs to standardize the use of force so that they could demonstrate a responsiveness to negative perception associated with accusations of abuse.

The ICoC is meant to stand as an example of the industry's commitment to abide by the obligations of international law and human rights. It establishes a discursive narrative that includes the language in the ICoC and the discourse surrounding its development and implementation. The narrative drives home the notion that PMSCs are not mercenaries, but law-abiding citizen warriors. Unfortunately, the narrative provides only an appearance of commitment as this initiative allows for the continuation of a system that benefits the industry and its clients through vague language and self-regulation.

Future Research Projects

Studying and researching PMSCs and the PSI is a fascinating, yet somewhat frustrating endeavor. Although the scholarly literature grows daily, most of it struggles with the same issues found in determining this dissertation project such as finding and collecting data on an industry that is frequently involved in classified missions and shrouded in secrecy. At the same time, it is understood that PMSCs, the PSI, and their use will play a major role in international security for

the foreseeable future. Their presence in the international system is changing the conflict environment because there is movement away from using standing militaries to fight battles, both domestically and internationally, toward hiring highly trained and organized companies on a short-term basis to show up and battle enemies in our stead. This shift in conflict raises ethical and moral questions as well as democratic and legal ones. It is difficult to not wonder what war will look like in the near future when considering how, where, when, and why PMSCs will have a role in it.

For the reasons mentioned above, as well as others not yet considered, it is vital to our continued understanding of conflict, war, the state, human rights, humanitarian aid, peace, and so on to continue to creatively devise research projects on the topic of private security, PMSCs, and the PSI. Future research projects based on the work evidenced in this dissertation could include: 1) determining whether PMSCs were successful in owning their label, meaning others no longer use the term or associate them with mercenary, 2) establishing the success of the ICoC in altering the negative perception of the PSI and PMSCs, 3) focusing on the discursive power of PMSCs especially regarding their image, and 4) studying the success of standardizing the use of force in the ICoC. Moving forward, the argument presented here forms the foundation for continued research in the field.

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