Unbecoming Conduct: Legal and Ethical Issues of Private Contractors in Military Situations

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SUMMARY – More and more is being written about the proliferation of private military contractors as a result of the conflict in Iraq. The emphasis has been on the problem of legal accountability of those private individuals for illegal acts, the potential for private contractors to undermine legitimate State and military objectives, a lack of accountability for the day-to-day activity and location of these contractors (i.e., 'who are these guys and what are they doing here?'), the potential for improper influence peddling and corruption in the securing of lucrative contracts, the possibility of State use – and misuse – of private contractors in ways hidden from public/governmental scrutiny and comment, and questions of economic cost/benefit. Other considerations have been the fear that private military firms are stealing away top talent from the military by offering salaries the military can't match, and the suspicion that these firms might tend to attract less than honorable characters, addicted to violence and the adrenaline of danger. There is virtually nothing written, however, about the ethical aspects of the practice itself. Neither cost/benefit considerations nor the discussion of adequate regulatory schemes adequately addresses the ethical challenges presented by the privatization of some uses of force in military operations.

Without an adequate understanding of the ethical issues presented, the true costs of privatization cannot be understood, and cost/benefit analyses are meaningless. Moreover, some ethical challenges are not subject to financial terms at all, neither are they avoidable by drafting more laws or additional regulatory oversight. Simply put, the illegal does not exhaust the unethical. Neither can the ethical be reduced to a legal framework, without a significant remainder.

Introduction:

The task at hand is to determine whether complementarity between private contractors and the military is possible – and/or desirable – in otherwise military

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spheres of action. This is a more theoretical ethical study; more so-called 'practical' and/or political studies of the phenomenon are already increasingly available.

There is a serious lack of study, however, on the larger ethical plane. No actual ethicist has addressed the subject at any length. By and large, the work done in this area falls into the following categories: Political, legal, and economic analyses, or experiential journalistic accounts. Further, the rationale supplied for any ultimate conclusion – either for or against the use of private contractors in military settings – is largely either phenomenological or empirical, although it also often includes an economic cost/benefit analysis along pragmatic lines.

The almost sole exception has been by Sarah Percy.[2] She has a background in politics and International relations, but at least begins her analysis of private military contractors in terms of ethical norms. By contrast, Peter W. Singer (also with a political and international relations background) approaches the problem primarily from a political perspective, and a so-called pragmatic political perspective at that. "Privatization can benefit everyone, but only if done in the right way."[3] The same could be said of Deborah Avant (who has the same background in political and international relations). Avant does provide a more nuanced theoretical study of the impact of military contractors upon the state's control of force[4] and she also adds an element of inquiry into the impact of privatization upon the professionalism of the military.[5] National security and strategy expert James Jay Carafano[6] also follows a pragmatic course, advocating the re-thinking of our attitude toward military contractors, the proper realization of 21st century globalized war (in which contractors are essential, he says), and calls for the more efficient management of contracts and oversight of contractors. Other commentators are more expositional or journalistic, recounting actual experiences either pro (contractor Ashcroft[7]) or con (reporter Fainaru[8]), or purporting to be provide an exposé, like reporter Jeremy Scahill's scathing indictment of Eric Prince and Blackwater.[9]

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[2] Sarah Percy, *Mercenaries: The History of a Norm in International Relations*, (Oxford: Oxford University Press, 2007).
[3] P.W. Singer, "Outsourcing War", Foreign Affairs, March/April 2005 – Summary.
[4] Deborah Avant, *The Market for Force: The Consequences of Privatizing Security* (Cambridge: Cambridge University Press, 2005).
[5] Deborah Avant, "Privatizing Military Training: A Challenge to U.S. Army Professionalism?" in *The Future of the Army Profession*, ed. Lloyd J. Matthews, Don M. Snider and Gayle L. Watkins, project directors (McGraw-Hill Primus, 2002) pp. 179-96.
[6] James Jay Carafano, *Private Sector, Public Wars*, (Praeger 2008)
[7] James Ashcroft and Clifford Thurlow, *Making a Killing*, (London: Virgin Books, 2006).
[8] Steve Fainaru, *Big Boy Rules*, (Da Capo Press 2008) ("This is a book about original sin." at p. xi.)
[9] Jeremy Scahill, *Blackwater: The Rise of the World's Most Powerful Mercenary Army*, (New York: Nation Books, 2007)

Ethical or moral considerations are primarily presented in terms of wrongdoing: whether criminal activities like murder, rape, and human trafficking or more economic criminal misdeeds such as improper billing, conversion of government property, etc. This leaves the larger arena of the ethical – and considerations of values and the 'good' – almost completely untouched.

At the same time, a lot of finger-pointing goes on as to whether or not the other writers are adequately covering the issue. "Given the lack of serious academic scholarship and the distortions of the most popular documentaries on Iraq, controversial best sellers are not what is most needed to inform public policy making" says Carafano, who also notes that of the "small library on the subject"[10], only two come from university presses, "often considered as a mark of at least some promise of responsible scholarship."[11] Those authors? Singer (*Corporate Warriors*[12]) and Avant (*The Market for Force*[13]). Although he cites Sarah Percy in connection with organizations who entered into the debate about PSCs, he does not refer to her Oxford University Press work within the text, but only the work she produced for the Institute for Strategic studies on regulated PSCs. In a footnote[14] he acknowledges that her work on regulation is expanded in *Mercenaries: The History of a Norm in International Relations* (Oxford: Oxford University Press, 2007), yet concludes that she "did not advance the conceptual ball much further than Singer and Avant did. . . ."[15] He appears to fault her [and others] primarily for failing to "assist major research projects."[16] Carafano's work is itself not published by a university press[17]. . . .

Interestingly, Percy in turn faults her fellow authors on the subject noting that "[a] striking feature of the present literature on mercenaries is its lack of theoretical analysis, particularly with respect to international relations."[18] With respect to Singer, she concludes that his work "provides an excellent example of some of the problems with failing to probe normative concerns about mercenaries."[19] In short, Singer "focus[es] on that the industry *does* rather than what it *is*" [Mercenaries at 9] largely deals with questions of morality only tangentially, and

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[10] Carafano, *Private Sector, Public War*, pp. 151, 147.
[11] Carafano, *Private Sector*, p.148.
[12] P.W. Singer, *Corporate Warriors: The Rise of Privatized Military Industry*, (Cornell University Press, 2003).
[13] Deborah Avant, *The Market for Force: The Consequences of Privatizing Security* (Cambridge: Cambridge University Press, 2005).
[14] Carafano, *Private Sector*, p. 151 n. 34.
[15] Carafano, *Private Sector*, p. 152.
[16] *Id.*
[17] Carafano is a senior fellow at The Heritage Foundation, and his book on the subject was published by Praeger Security International.
[18] Percy, *Mercenaries*, p. 4.
[19] Percy, *Mercenaries*, p. 9.

questions of ethics hardly at all. Typical is his article "Privatized Military Firms and International Law", which deals with the question of PSCs as one of *legal* ambiguity and uncertainty, rather than moral or ethical.

To try and get away from finger pointing myself, I turn to what I have not yet seen addressed in the literature, namely a thoughtful analysis of the ethical issues. I began by saying that the task at hand is to determine whether complementarity between private contractors and the military is possible – and/or desirable – in otherwise military spheres of action. Now, by 'complementarity', I refer to the work done by philosopher Paul Ricoeur in terms of practical wisdom – or a critical phronesis, as he calls it (with a nod to the original Aristotelian concept) – whereby the deontological and teleological aims of ethics – the ends *and* the means – are both given effect. Is it possible that the means – the use of private military contractors – can be squared with a desired end of state control over the use of violence, especially in its own behalf? Moving back from the larger question of a desired 'end' of the State to control violence, we might look also at the desired end of the individual and the ultimate "good" he or she is oriented towards. How is the means of the employment of individuals as private military contractors reconciled with the ultimate good of and to the person? In this regard, of course, we will have to go well beyond the question of economic benefit to the individual to take up the threat of physical injury or death as well as the threat of an ethical undoing – or effectively an 'un-becoming' – of the person in terms of ethical identity.

I start by observing an initial lack of effective legal regulations which covered the actions of private military contractors and the proliferation of such personnel in Iraq from 2004 to the present. We may begin with a generally accepted norm *against* the use of mercenaries, but a terminology review is necessary to clarify just what type of conduct we *are* dealing with, today, if private military contractors are not in fact mercenaries against which the norm ought to apply.

Next, we turn briefly to the law as it is developing in this area, overt questions of economic cost/benefit and how a doctrine of necessity[20] might be shaping our approach to the legal and ethical difficulties raised by the use of private military and/or security contractors. I shall argue that ethical questions must be taken up and resolved before a coherent rule of law can be developed, let alone applied.

This leads to the main point of the paper, namely the ethical implications arising out of the work undertaken by private military contractors in military arenas. This analysis necessarily involves questions of identity – both individual and collective – implicating moral identity and capability on both levels as well.

[20] Carafano, *Private Sector*, chapter 5 ("Why We Can't Go back"), pp. 113-35. But Singer acknowledges that we might not be able to go back, either.

I will state my conclusion up front: the use of private contractors in military-like functions in otherwise military spheres of action poses significant ethical challenges that are not resolved by increasing legal oversight or accountability. Neither is the ethical challenge to be avoided by enhanced personal accountability, for example by a more stringent application of a "professional" code of an ethics for warriors, generally. The use of individuals as private contractors in military applications – but without the mutual commitment of state to soldier and soldier to state – blurs the distinction between individual and instrumentality. This is a major foundational flaw.

Once we have charted the footings for the practice of private military contracting it may well be that we can find an alternate support for the practice which does not violate the roots of our very source of being. Note that the danger here is not just to the private contractor, but also to the company employing him or her, the state contracting with that company, the host state, and the citizens who witness and endure the consequences of that practice. In some ways, the practice is fraught with ethical overtones similar to those arising from the practice of slavery, prostitution, and human trafficking for whatever purpose. There is a reason that a common epithet for mercenaries is 'whores of war.' Consider that the legalization of prostitution does not remove ethical censure of the practice. It merely removes legal enforcement of that censure. Neither is this to say that military contractors are effectively prostitutes. There are aspects of military contracting, though – the ones that approach the hired-gun scenario – that present a very similar ethical profile, no matter how honorable the individuals involved.

1. Definitions

It has proven notoriously difficult to define just what a "mercenary" is. For purposes of this paper, we may note other studies of the historical aspects of mercenaries – certainly that of Sarah Percy – and agree that the use of the term is morally freighted. This makes a dialogue about the phenomenon of private military contractors difficult, if not impossible, without first coming to grips about what to *call* the practice. As an initial matter, we may see that the use of the term "mercenary" tends to signal the position of the writer as already *against* the use of private military contractors and therefore to end the dialogue before it starts.[21]

[21] A notable exception here would be Sarah Percy whose book title is straightforward entitled Mercenaries. When she begins to discuss the current private companies providing such services, however, she shifts from the term 'mercenary' to PMCs and PSCs. Ultimately – and a bit surprisingly – her conclusion is that "The norm against mercenary use is in many ways a puritanical norm, which no longer applies to the actual behaviour that it initially regulated. Our moral dislike of mercenaries may no longer be grounded in the realities of mercenary behaviour, and the potential benefits of private force may be obscured by the great strength of the anti-mercenary norm." at p. 247.

Secondly, the activities of those termed "mercenaries" has already generally been proscribed[22] and, as Percy points out, the attempted definition of what constitutes a mercenary has effectively led to the shifting character of the mercenary-type contract activities on offer. In short, the private companies have learned to adapt their activities so as not to fall within the definition of a mercenary.[23]

> "Any mercenary who cannot exclude himself from [the] definition deserves to be shot – and his lawyer with him!"[24]

The emerging consensus seems to be that "mercenary" continues to be the proscribed, derogatory term for the condemned soldiers of fortune for hire.[25] Other terms, such as Private Military Company and Private Security Company, are used for the more accepted practice today of private firms supplying military and protective services. None of the recognized private contracting firms style themselves as mercenaries, and readily explain why they are *not* mercenaries.[26]

A private military company – PMC – is exemplified by the company Executive Outcomes' involvement in Angola and in Sierra Leone in the early 1990's, by which actual military operations and activities were contracted for. This is far less often the case today.

Private Security Companies – or PSC's – is generally what we mean today when we talk about private military contractors, and the kind of operations that were being undertaken when Blackwater was involved in the Nisoor Square shooting incident in Bagdad, September of 2007. Typically, PSCs provide 4 different types of services: logistical support, operational/tactical support, military advice and training, and security (police).

For purposes of this paper, we will not use the term "mercenary". It is too encumbered with adverse connotations to be useful in any critical study or

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[22] See, e.g., Article 47 of Protocol I additional to the Geneva Conventions (1977) and, using effectively the same definition, the U.N. Convention against the Recruitment, Use, Financing, and Training of Mercenaries (drafted in 1989 and which came into force in 2001).

[23] See Percy, *Mercenaries*, p. 208.

[24] Percy, describing the debate over the inefficacy of Article 47, the attempted definition of mercenaries for the Geneva Convention. See Percy at p. 53 and n. 17.

[25] See Janice E. Thomson, *Mercenaries, Pirates, & Sovereigns* (Princeton: Princeton University Press, 1994) for another account of the move from authorized non-state violence to a norm against non-state violence.

[26] See "An hour with Erik Prince, Chairman, CEO and Founder, Blackwater USA", Interview by Charlie Rose, October 15, 2007, available online at http://www.charlierose.com/view/interview/8734 (accessed December 2008). Prince has argued that they are not mercenaries, because they are "Americans fighting for America."

dialogue. Further, we will primarily focus on PSC's – private contractors who are armed, but presumably engaging in the use of violence only in the prior instance of having been attacked, and therefore in self-defense or in the defense of others (the contracted-for security and defense of those others or property). True PMC's are currently less common and, being one step closer to the mercenary scenario, present the more obvious ethical challenge. It is the PSC's, however, that are more often encountered and, as I believe I can make the same ethical case as to them, we will focus on that level and the more commonly-presented scenario.

2. The Regulatory Scheme – a Brief Overview

I have elsewhere argued that the law has limits, bound up in the values of the State's society which the State presupposes, but which the State can neither impose nor renew.[27] Much of the critique against the use of PSCs has taken the form of hand-wringing over a lack of legal accountability of the private contractors, with little or no attention paid to the underlying values sought to be preserved or implemented. That's certainly one problem: it's difficult to regulate that which you have not adequately thought through.

The hand-wringing over the supposed unaccountability of contractors and PSCs only emphasizes this point. There is no serious suggestion that we need new laws to outlaw actions commonly accepted as crimes whether on or off the battlefield: murder, rape, pillaging. Neither is it seriously contended that only law will save us from PSCs who overcharge and under-deliver, as if this was something we'd never seen before. No. War profiteering has undoubtedly been around as long as camp followers have been, and condemned and rather despised for just as long. There's no new ethical dilemma – or even challenge – there.

The ethical challenge arises out of the permissible use of violence. We expect it of a soldier at war – within limits – but require strict justification from all others at all times. This has been obscured by the situation in Iraq. There, CPA Order 17, provided immunity from *Iraq* law not only for U.S. and coalition soldiers, but also for the actions of private contractors. This was not a problem when it came to U.S. soldiers, as they are accountable under the UCMJ. Again, from soldiers we expect the use of violence within limits, and the UCMJ takes those limits into account. There was a problem, however, in dealing with the criminal misdeeds, including violence, of military contractors.[28] The immunity from Iraq law left legal

[27] Susan Marble, "The Limits of Law: Paul Ricoeur and a Critical Phronesis to Engage Law, Ethics and Religion" (PhD. diss. Trinity College, Dublin, October 2007).

[28] Apparently unaddressed is the question of whether the U.S. has the ability to waive contractor immunity from prosecution under Iraq law in a case, for example, where it

accountability for their criminal actions in the hands either of international law for war crimes (which is uncertain at best and not likely at all for U.S. citizens since the U.S. is not a participant in the International Criminal Court [ICC]), or in the hands of the US Federal Government under MEJA, or more recently still, to the military under the UCMJ. Completely unaddressed was the ethical question of whether or not it was a good thing to permit private individuals to act like soldiers.

With respect to straight-forward criminal accountability, under MEJA [Military Extraterritorial Jurisdiction Act], the problem lies in the difficulty of initiating a case in the United States for events that occurred overseas.[29] This involves evidence, witnesses and a crime scene far from the place of prosecution, if the case were ever to get that far. In fact, it rarely *does* get that far. At last count I think there is only one – at most two – cases successfully brought. The high profile indictments recently brought against the Blackwater guards involved in the Nisoor Square, Bagdad incident in September of 2007 will be a telling test case. Beyond the logistical difficulties of distance and lack of prosecutorial interest, lie significant costs of investigation and prosecution. Noting the time that elapsed between the incident and the eventual prosecution, it seems reasonable to think that only the high profile of the case and the outrage expressed concerning those events finally led to the indictments.[30] Moreover, conviction is not at all certain. Conflicting accounts, delays in investigation and a "contaminated" crime scene may fail to convince a jury of U.S. citizens used to television's *CSI* investigations and *Law and Order* prosecutions. One is left to wonder how a case of lesser profile would fare, and whether the U.S. attorney's office would even be bothered to indict for the run-of-the-mill stabbing, battery, rape or even murder.[31] Finally, a

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would appear that otherwise the contractor would literally otherwise get away with murder.

[29] Additional jurisdictional elements not vital to our presentation here are added by the SMTJ – [Special Maritime and Territorial Jurisdiction' – 18 USC Sec. 7 – extends jurisdiction to offenses committed by or against a US national on "any lands reserved or acquired for the use of the US and under the exclusive or concurrent jurisdiction thereof. . . ." and by the USA Patriot Act Section 804 (recognizing that Federal courts were divided over the proper level of extraterritorial application) which provided that jurisdiction would be extended to cover offenses committed on "the premises of US diplomatic, consular, military or other US government missions or entities in foreign states."

[30] Note that recent news reports indicate that there is now also an indictment in the works in the other high-profile case against a Blackwater contractor, namely the contractor who on Christmas Eve, 2006, while drunk, apparently shot an Iraqi who turned out to be a guard for the Iraqi Vice President. Gene Johnson, "Feds plan to charge Seattle man for Iraq death", A.P. news report dated Jan. 6, 2009, available online at http://www.salon.com/wires/ap/us/2009/01/06/D95HQKU01_blackwater_seatt (accessed Jan. 2009).

[31] It is beyond the scope of this paper to gather statistical data on the numbers of crimes committed by troops versus contractors in Iraq. Consider for just a moment, however, the significant dearth of *prosecutions* against contractors, as opposed to routine

specific criminal case is not the proper forum for debating – let alone deciding – larger ethical issues such as *whether or not it is a good thing to permit private individuals to act like soldiers.*

Turning to the UCMJ [Uniform Code of Military Justice], a revision in January of 2007 grants Military jurisdiction "in time of declared war or a contingency operation" over those "serving with or accompanying an armed force in the field."[32] This effectively extended application of the UCMJ to private contractors, and would provide a mechanism for enforcing at least criminal laws as against them.

Problems with extending the UCMJ to private contractors are:

1. Military command is often unaware of the activities of those contractors until well after the fact, and after the contractor has already left the area.

2. There is little incentive to investigate and expend limited resources necessary to proceed against a private contractor.

3. The UCMJ does not apply to State Department contracts. [33]

4. Little or no guidance has been given to commanders in the field as to how and when to apply the UCMJ to contractor malfeasance. A recent memo provides that the commander first notify the Justice Department and give them the option of prosecuting under MEJA, which only further complicates the matter.[34]

5. The application of the UCMJ to civilians is potentially unconstitutional especially insofar as questions of right to a fair trial and trial by jury is concerned.[35]

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prosecutions of troops for misconduct and criminal actions. Certainly this is not because contractors are inherently better, more law-abiding, than are our troops.

[32] 10 U.S.C. Section 802 Art. 2 (10).

[33] Thus, the UCMJ as amended would still not have applied to the actions of the Blackwater guards involved in the Nisoor Square incident, as they were operating under a State Department contract and not the DOD.

[34] Secretary of Defense Robert Gates Memorandum (March 10, 2008).

[35] *Reid v. Covert*, 354 U.S. 1 (1957) (the court-martial of a civilian dependent in a capital case in time of peace is unconstitutional). Consider this point in light of the argument made below regarding imperfect duties. I submit that the different standard acceptable for the soldier signals the different *status* of that soldier. A *higher* and more trusted – and trustworthy – status.

There are additional prosecution options. The War Crimes Act of 1996 (18 U.S.C. § 2441), as amended in 2006 provides that it is a criminal offense for a U.S. national to commit a "war crime", defined as a "grave breach" of the 1949 Geneva Conventions, or, with respect to prisoners of war covered under Common Article 3, certain other specified actions including torture, cruel and inhumane treatment, murder, rape, and even lesser included offenses such as causing serious injury and sexual assault or abuse. To date, it appears that no one has been prosecuted under the War Crimes Act. [36]

Another option is the Anti-torture Statute (18 U.S.C. § 2340A) (1994) which provides for the prosecution of U.S. nationals who torture anyone while outside the U.S. It appears that there has been only one prosecution under this statute, namely the charges and recent conviction of American-born Charles Taylor, Jr., arising out of his actions in heading up Liberia's "Anti-terrorism Unit" for his father, which was responsible for crimes of rape, murder, abduction, torture, etc. from 1997 through 2003.[37]

As an aside, there is also civil liability which can be enforced in the US against U.S. citizens under the Alien Tort Claims Act (and, in fact, a scant month after the event, a lawsuit was brought pursuant to that Act on behalf of the families of those killed in Nisoor Square Sept 16, 2007).

So as we have seen, there exist a number of statutory provisions which would provide some legal accountability for *criminal* acts committed by private contractors in a foreign military setting. In addition, there are provisions geared toward the effective oversight of the *corporate* PSC, including the U.S. Arms Export Control Act of 1968[38] and the International Traffic of Arms Regulations (ITAR).[39] Great Britain's "Green Paper" – *Private Military Companies: Options for Regulation* (Feb. 2002) – provides an exhaustive examination of the regulations in Britain and elsewhere, together with an assessment of the perceived benefits as well as potential problems thereof. The options considered are an absolute ban, licensing programs, and self-regulation.[40] No conclusion

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[36] A White House press release stated that "the United States has never prosecuted anyone for violation of the War Crimes Act. If violations of the War Crimes Act are to be prosecuted, fairness requires that there be clarity and certainty as to what constitutes a criminal offense under the Act." White House Press Release, *Myth/Fact: The Administration's Legislation to Create Military Commissions*, September 6, 2006; available online at http://www.whitehouse.gov/news/releases/2006/09/20060906-5.html (accessed January 2009).

[37] *USA v. Belfast,* 1:06-cr-20758-CMA (S.D. Fla. 2008). Note that there is no relation between Charles Taylor – father or son – and Canadian philosopher Charles Taylor, who I refer to below in section 3.

[38] 22 U.S.C. Chapter 39.

[39] 22 CFR Parts 120 – 130.

[40] *Green Paper*, pp. 22-26.

was announced, insofar as the desired goal was to achieve a "wide debate" of all the options.[41]

I close our consideration of the legislative options already in place for PSCs and their employees with a similar goal as we proceed to analyze the ethical challenges presented by the private use of force by contractors in military situations, namely: to look more closely at *all* the options. These options should include questions of what 'good' is to be served in allowing the operation of PSCs. Much more common has been the debate over a 'bad' to be prevented or accounted for. Whether or not the legislative provisions are effectively used is another question. It appears that many of the criminal provisions are in fact *not* widely used at all. There is considerable criticism as well of the administrative regulations governing and licensing the actual activities of PSCs, together with questionable oversight of U.S. contracts after they are granted.[42] This supports my contention that legal oversight and enforcement are not the long-hoped-for panacea. More is required. I believe that that 'more' is to be found after an ethical analysis of this situation, and a commitment to attempt to reach consensus on an agreed common good to be pursued individually as well as on our individual behalves by the State, especially where the use of violence on our account is contemplated.

3. The Ethical Implications

The ethical difficulties I wish to focus on are three-fold: (1.) The consequences of severing the State monopoly over violence, (2.) consequences to the course of mutual recognition that attend making a shift from status relationships between persons to contract relationships of choice, and (3.) the instrumentalization inherent in PSC provisions of services pursuant to such narrow commercial exchanges, which – if it becomes the norm – undermines ethical identity.

Violence and the State

First in our list of ethical issues, we turn to the difficulty of the relaxation of the State monopoly over violence and the consequences thereof, apart even from the moral/immoral. Consider here its effect in the unleashing of Hobbes' Leviathan and the undoing of Rousseau's social contract. Shall we cut those lines without thought? Legally, there is also an undermining of the legal

[41] *Green Paper*, p. 5. See also Sarah Percy, *Regulating the Private Security Industry*, (Routledge 2006).

[42] See Sarah Percy, "Regulating the Private Security Industry", Adelphi Papers, Volume 46 Issue 384 (2006); Carafano, *Private Sector, Public Wars*, pp. 128-29, 202-03.

pragmatist position along the line of Oliver Wendell Holmes,[43] that the law and lawyers are designed to divine what the holding of the judge – and court – will be.[44] This is important, since under that pragmatist view, the court is the only repository of legally sanctioned force and compulsion, domestically. A legal pragmatist position holds increasing sway in the American court system.[45] One can readily see that the dilution of the proper authority for the exercising of violence can also thereby dilute the current actual authority of the courts and the rule of law. It is ironic that two of pragmatism's tenets (one, cost-benefit analyses and two, that the rule of law is enabled by its exclusive control over the exercise of violence) are thereby set at odds to one another. It is the cost-benefit argument that is traditionally relied upon to justify the very existence of PSCs, and yet the very existence of PSCs undermines the rule of law that would enforce the laws by which those PSCs may operate. Again, this is done by severing the exclusive connection of the State to the exercise of violence which, in the domestic rule of law, is controlled by the courts.

Here, I would like – following Hannah Arendt – to be careful of my terminology. In her work *On Violence*, she distinguishes sharply between power, strength, force, authority, and violence,[46] even as she is careful to point out that these distinctions are not ironclad and rarely are compartmentalized in real-life examples. Making the distinction, however, helps us to see "Who rules Whom", according to Arendt. Thus:

> Power, strength, force, authority, violence – these are but words to indicate the means by which man rules over man; they are held to be synonyms because they have the same function.[47]

Briefly considered, for Arendt *power* relates to the ability of humans to act *in concert*. It is not individual. *Strength* is an individual characteristic, subject to

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[43] Oliver Wendell Holmes' view is still very much alive in the U.S. Courts, as currently interpreted by Court of Appeals Judge Richard A. Posner. See e.g. Richard A. Posner, *Law, Pragmatism, and Democracy* (Cambridge, MA: Harvard University Press, 2003); "Pragmatism Versus Purposivism in First Amendment Analysis," *Stanford Law Review* 54 (2001-02): 737-52; "The Problematics of Moral and Legal Theory," *Harvard Law Review* 111, no. 7 (1998): 1637-1717. For a critique of same, see Martha C. Nussbaum, "The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis," Journal of Legal Studies 29 (2000): 1005-36; and "Flawed Foundations: The Philosophical Critique of (A Particular Type of) Economics," *University of Chicago Law Review* 64, no. 4 (1997): 1197-1214.

[44] Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review* X, no. 8 (1897): 457-78

[45] See above, n. 40.

[46] Hannah Arendt, *On Violence*, New York: Harcourt, Brace & World, Inc., 1969 and 1970, pp. 44-47.

[47] Arendt, *On Violence*, p. 43.

being overcome – over*powered* – by the many. *Force*, Arendt argues, "should be reserved, in terminological language, for the 'forces of nature' or the 'force of circumstances' . . . that is, to indicate the energy released by physical or social movements."[48] *Authority* is a measure of respect which can be vested either in persons or in offices, but is marked by "unquestioning recognition by those who are asked to obey; neither coercion nor persuasion is needed.[49] And:

> *Violence*, finally, as I have said, is distinguished by its instrumental character. Phenomenologically, it is close to strength, since the implements of violence, like all other tools, are designed and used for the purpose of multiplying natural strength until, in the last stage of their development, they can substitute for it.[50]

This relationship is even more complex of course in international contexts. There, there *is* no single authority which controls the exercise of violence and disputes between two separate states (each presumably the authority and sole wielder of violence in its own respective state) can lead to war. International law is notoriously nonbinding (except by consent) precisely *because* it does not possess the exclusive power of enforcement by violence. In that sense, we can see that the 'binding' power of International law is dependent upon a so-far nonexistent "authority" in Arendt's sense of the term.

These distinctions also shed light on the violence which has contributed to the need for PSCs in the first place. There is a significant correlation to the example Arendt gives to the 'one' disrupting the 'many' by means of violence. Her commentary, referring to disruptive demonstrations by a minority of students in German Universities deserves to be quoted at length:

> The extreme form of power is All against One, the extreme form of violence is One against All. And this latter is never possible without instruments. To claim, as is often done, that a tiny unarmed minority has successfully, by means of violence – shouting, kicking up a row, et cetera – disrupted large lecture classes whose overwhelming majority had voted for normal instruction procedures is therefore very misleading. . . . What actually happens in such cases is something much more serious: the majority clearly refuses to use its power and overpower the disrupters; the academic processes break down because no one is willing to raise more than a voting finger for the *status quo*.
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[48] Arendt, *On Violence*, p. 45.
[49] Arendt, *On Violence*, p. 45.
[50] Arendt, *On Violence*, p. 46.

> the merely onlooking majority. . . is in fact already the latent ally of the minority.[51]

Insurgents in Iraq are not unarmed, and yet the example is still a compelling analogy. To what extent does the provision of PSC services continue to excuse a host nation's refusal to "use its power and overpower the disrupters"? Here, the time-honoured idea presents itself that freedom cannot be *given* to a passive people, it must be fought for.[52]

Status versus Contract Relationships

Second in our list of ethical issues is the transformation of a status relationship – that of a citizen soldier – into a contract relationship of choice presents additional ethical difficulties. Here, I am indebted to ethicist Onora O'Neill's work in bioethics.[53] From a neo-Kantian perspective, she traces the undermining of status relationships characterized by imperfect duties (which are impossible of being precisely specified in legal terminology as, for example, how one 'properly' fulfils the role of being a loving spouse) to legal relationships of choice. Having chosen the relationship or mutual economic exchange, one can just as easily UNchose the relationship, or choose another. These relationships of choice are generally chosen on the basis of momentary preference, hope for advantage, or precisely spelled-out mediums of exchange. Contracts, in other words.

Consider here the difference between a soldier honorably carrying out his duty and a private security contractor fulfilling [or failing to fulfill] the terms of his contract, and you will see the difference between legal duty and the imperfect duty we are talking about. This element of imperfect duty becomes important with respect to retaining and nourishing the concept of the 'unenforceable' in a society increasingly oriented toward the law and its [enforceable] requirements. The *unenforceable* becomes the stuff of virtue ethics and character-formation

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[51] Arendt, *On Violence*, p. 42.

[52] Quotations are legion, but see e.g. Thomas Paine: The American Crisis, No. 4, 1777 ("Those who expect to reap the blessings of freedom must, like men, undergo the fatigue of supporting it."); John Stuart Mill, *Representative Government* (1861) ("A people may prefer a free government, but if, from indolence, or carelessness, or cowardice, or want of public spirit, they are unequal to the exertions necessary for preserving it; if they will not fight for it when it is directly attacked; if they can be deluded by the artifices used to cheat them out of it; if by momentary discouragement, or temporary panic, or a fit of enthusiasm for an individual, they can be induced to lay their liberties at the feet even of a great man, or trust him with powers which enable him to subvert their institutions; in all these cases they are more or less unfit for liberty: and though it may be for their good to have had it even for a short time, they are unlikely long to enjoy it.").

[53] Onora O'Neill, "The 'Good Enough' Parent in the Age of the New Reproductive Technologies" in *The Ethics of Genetics in Human Procreation*, ed. Hille Haker and Deryck Beyleveld (Aldershot, U.K.: Ashgate Publishing, 2000) 33-48.

ethics in the long line proceeding from Aristotle. It is present also in Kant's Groundwork of the Metaphysics of Morals in the requirement of a "good will", or one acting from a good motive, as Ricoeur has pointed out. Specifically, it is one acting out of respect for law in obedience to Kant's second formulation of the categorical imperative to treat others as an end in themselves, and not as a means. I would argue that Kant does not thereby speak of actions *enforceable* by law in the legal sense, but rather actions undertaken out of respect for a higher, *unenforceable* philosophical law of reason, in conjunction with the universal maxim of his Categorical Imperative.[54] Its guiding idea is that each person is an end in themselves, "ineffable", inexhaustible, and not at another's or their own disposal.

Unfortunately, this sense of duty is one which is no longer either attractive *or* entirely enforceable in a culture that appears to be losing the moral resources needed to sustain it. The military, with its strong sense of honor apart from legal concepts, is a culture where it still holds sway.[55] Thus, we may readily see the importance of the concept of imperfect duties as some measure of possible substitute. Imperfect duties fall at a crucial point showing the limits of law - in that the imperfect duties are neither legally specifiable nor enforceable - and at the limit of rights, in that imperfect duties may not be demanded as a matter of right, although they may be reasonably expected. Thus, imperfect duties are where motivation, spontaneity, internal resources, and moral emotions are called for, instead of a crippling demand for rights, which operates mainly defensively, limits the "rights" by specifying them, and damages the ability of the parties to - together - pursue a flourishing life.

Another case may be seen utilizing a different starting point, where the conflict is between a primary and a secondary institution, such as a family over against the legal system. One may readily see the encroachment of the legal system on the family - or lifeworld, to use Habermas' colonization thesis - where a prohibition of slapping, for example, disempowers the primary relationship by transforming it into a legal one. Similarly, the encroachment of private contractors into inherently military roles, which happens when they are empowered to use violence, disempowers the primary military relationship and threatens to turn *it* into a legal one. We have already seen a slide towards after-action legal micromanagement and review.

The alternative to the unenforceable - whether in the original sense of Kantian duty under the Categorical Imperative, or the lesser imperfect duty - is, of course,

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[54] See, e.g., Paul Ricoeur, *Oneself as Another*, trans. Kathleen Blamey (Chicago: University of Chicago Press, 1992), pp. 262-73.

[55] I would interpret e.g. Eric Prince's requirement that Blackwater contractors take the same oath as that required by military soldiers as an *attempt* to operate at that same level of honor and duty.

to fall back on actions only as required and enforceable at law or else to express ourselves content to rely entirely on gratuitous action.

Onora O'Neill traces a potential difficulty besetting imperfect duties, namely a distinction between status and choice, and the difference it makes to the formation and type of duties and rights. Increasingly, our relationships are becoming relationships of choice rather than the status ones which give rise to imperfect duties not accompanied by corresponding rights. We divorce, move, and even change citizenship with an ease formerly unknown. Military tours of duty are now shifting towards becoming service contracts, which I believe is an example of the phenomenon[56]. With the shift towards the relationship of choice, however, comes a rise in the *conditional* nature of obligations. This is different from the concept of imperfect duties, which may not be specifically demanded, but which are still not conditional. For example, a conditional obligation might be to serve an additional two years, say, in return for receiving advanced training. There is no obligation for the additional two years absent having received the advanced training. Having received the advanced training, however, the imperfect duty in this scenario would be *willingly* to serve those two years *diligently*, and with the extra benefit of that training, and not just to mark time. In that light, allowing the monetary pay-back for the training (a typical contract remedy) in lieu of the two years' service effectively places a zero value on the imperfect duty of diligent service.

The diminishment of individual moral accountability and self-legislation honorably to carry out one's imperfect duties – unltimately unenforceable – can be seen in the form of a corresponding demand for increased positive law.[57] The limits of law may be seen in that it cannot *make* people moral, it can only enforce a certain minimum standard - and this is a very important and valuable function. Nonetheless, for a flourishing life – and that *is* what the ethical is, after all – we can see the need for what may be called the *unenforceable*, and we have seen that this is something the law cannot provide. In exploring what imperfect duties, operating at a level deeper than Kant's Categorical Imperative, may add, we find that imperfect duties show signs of erosion as well, (1) by the tendency to attempt to transform them into rights by operation of law, (2) by the encroachment of legal institutions on the relationship that gives rise to the

[56] Note, however, that military stop/loss provisions, for example, may override contract provisions as to duration – an essential contract element not generally subject to unilateral suspension. This is indicative of a relationship that is founded at a more profound level than one of mere contract. The theological concept of *Covenant* could be a very helpful way of understanding this different relationship.

[57] See John Fletcher Moulton, "Law and Manners", *The Atlantic Monthly* (July 1924), who lays out three domains, with positive law on one side, absolute choice on the other, and in the middle – which ought to be the biggest area – "manners", which he describes as the "Obedience to the Unenforceable."

imperfect duties, and (3) by the increasing conditional nature of our relationships, which undermines imperfect duties, rendering them conditional, as well.

The Instrumentalization of Guard and Guarded

Third on our list of ethical issues is how the nature of the work and services performed by individuals pursuant to private security contracts that involve violence in military spheres effectively instrumentalizes the person, on both sides of the equation. This effectively works an UNbecoming of the persons involved, who operate more as interchangeable functionaries than as individual, autonomous person in community. In the PSC context, it is 'guard' and 'guarded.'

Why would this be more so than, for example, for the soldier performing the same work? Partly it is as a result of the second ethical difficulty we just discussed – that of contract versus status relationships. The relationship of PSC guard to guarded is one of contract by choice and effectively severable at will for any or no cause. From a legal perspective, the contractor may terminate his work at any time and will face at most a breach of contract action, demanding money damages[58]. The soldier could face desertion, cowardice, or even charges of treason, none of which (as such) would be actionable under an action for breach of contract.

The relevant inquiry under the PSC scenario, however, would be whether or not the contracted-for security services were provided and, if not, what damages (measurable in money) can be seen to have resulted from that failure so to provide. Questions of character: cowardice, desertion or disloyalty, are not immediately relevant. Note also that questions of breach of contract would be as between the contracting agency and the corporate PSC. As to the individual contractor and the individual being guarded, it is unlikely that any such considerations would arise. There is no primary legal cause of action between the guarded and the PSC guard, for example, for the guard's failure to guard. There is no privity of contract. At best, the guarded would be a third-party beneficiary to the security contract, and his primary legal action would be – if at all – with his employer. That action would either be a workers' compensation claim or possibly (imaginatively!) under a theory of "negligent" failure to provide a safe work environment. The primary question at the individual contractor level

[58] In fact, in State Department briefing materials covering military contractors in answer to the question "What happens if they walk off the job?" the answer given was: "Unless excused by *force majeure* or other conditions making continued performance impossible as a matter of law, the contractors and grantees would usually be subject to termination for cause and possible debarment from eligibility for award of future Government contracts." The Government thereby appears to proceed as if *its* termination of the contract with the contractor were the worst that could happen.

would revolve around whether or not the individual contractor is still employed by the PSC and/or whether he should be paid.

The nature of the work and the relationship of choice versus status – employment-at-will, if you will – further undermines the identity of the contractor in that he becomes interchangeable with other individual contractors. In effect, he is a robo-cop. The corporation is the entity liable for failure to provide security services in the form of a man or woman. The individual contractor can choose to work – or no – for which he is then paid – or no. This is not the case in the relationship of the soldier to the military, and ultimately to his country, to which he is (for the moment, anyway) inextricably bound.

Even at law, there are certain contracts which are held to be so personal in nature that the attempted substitution of another person to fulfill them is considered a breach. Thus, the substitution of one singer[59] for another would be a breach of contract. The delivery of a portrait painted by an artist other than the one who entered the contract would likewise be a breach. One nanny cannot procure a substitute to take her place caring for a child and remain in compliance with the terms of the contract. Even an employment agency generally relies on the approval of the proposed employees or agents by the contracting – paying – party, and does not have the right to substitute workers at will.

This does not appear to be the case for PSCs.[60] The very intimate task of ensuring the personal safety of a contracting party is undertaken without regard to whether or not the person being guarded even knows the members of his personal security detail. Undoubtedly, requests or vetoes could be entertained, but the contract would not typically be person-specific. The impersonalization goes the other way as well, with the private security guards not necessarily knowing the person they might be asked to risk their lives for, and who is apparently routinely referred to as the "package".

How is this different, though, from what we would see in a military provision of security? There, we also might not have a personal relationship between guard and the guarded. What we *do* have, however, is the pre-existing and continuing relationship between the guard and the military providing the military guard, a relationship which can not be duplicated by the relationship of, say, Blackwater

[59] No pun intended, although it is amusing to consider the effects of a switch between Peter W. Singer who writes about military matters for the Brookings Institution and Peter Singer, controversial philosopher and passionate animal rights advocate.

[60] Interestingly, anecdotal reports indicate that in Iraqi culture, it is not uncommon to hire one person, only to have someone else show up to do the work. Getting a job thus could be seen as a possession that may be sold, rather than a personal obligation, let alone a relationship, chosen or otherwise.

with its "independent contractor."[61] This brings up a whole other area of inquiry, namely to what extent we wish to blur the line between military and police.[62]

I would note that the military increasingly emphasizes a *contractual* basis for the terms of service of its members. Although this terminology may be helpful in terms of recruitment and retention campaigns, its use is not entirely accurate. The day-to-day activities and duties of a soldier are not comprehensively spelled out and covered by any written contractual agreement and neither is a lawsuit sounding in contract the remedy for any alleged breach. We discussed this briefly in the section above, with respect to conditional obligations versus imperfect duties. More importantly, however, the continued use of legal contract terminology to describe the military employment can only serve to undermine any distinction to be drawn between a soldier and a private contractor and to change an honorable tour of duty into merely fulfilling the terms of a contract.

The instrumentalization that is inherent in the provision of private security services by individuals pursuant to government contracts with private security companies gives rise to a question of the identity – and ethical identity – of those providing such services. We have any number of potentially different ethical aims in the mix: that of the government, that of the individual soldier, that of the corporate PSC, that of the individual contractor, and that of the person being guarded or the owner of the property being guarded. In addition, there are also the aims of the host country and its individual citizens. How can these aims be harmonized – if not reconciled?

Here, we would do well to closely study models of personhood so that we might better understand the process involved, and how the use of private military contractors can undermine that whole process. In this presentation, it is not possible to present a comprehensive study of all the options, or even an in-depth presentation of the ones I would concentrate on[63], but I wish to at least name them to sketch out some options for further consideration:

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[61] Neither does the gratuitous swearing of an oath of allegiance to the United States and its Constitution (which Blackwater apparently requires) transform that relationship. Blackwater is not empowered to administer such an oath on behalf of the U.S. and the U.S. is not entitled to rely upon it as it does with its soldiers.

[62] Here, also, we would need to consider *Jus post Bellum* requirements urged upon us by Brian Orend. See Orend, *The Morality of War*, Broadview Press, 2006, chapters 6 and 7, pp. 160-219.

[63] I am intentionally leaving out the deontological models of ethical identity that are based effectively on more external regulation – external rules and law – insofar as I proceed from an assertion of the *limits* of law at the beginning of my thesis here. I dealt with this topic much more comprehensively in "The Limits of Law: Paul Ricoeur and a Critical Phronesis to Engage Law, Ethics and Religion" (PhD. diss. Trinity College, Dublin, October 2007), chapter 1, Ethics and Moral Identity, pp. 9-30.

- Charles Taylor's *Sources of the Self* – ethical identity through what he calls "strong evaluations".[64]

- Hannah Arendt's thinking person in unity with herself as a matter of integrity with one's conscience. [65]

- Paul Ricoeur's *phronemon*, gaining selfhood, meaning, and recognition through the mediation of the self to the self in narration over time and acting in practical wisdom according to a three-fold maxim of (i) not disregarding one's own self, (ii) not disregarding another, and (iii) not establishing unjust institutions.[66]

Looking more closely at Paul Ricoeur's ethical starting point - the desire to live well, with and for others, in just institutions – it would appear that the aims of the at-least eight different entities we immediately came up with above would not automatically share such a starting point. Could discordant ethical aims of this nature be resolved using what he calls a critical *phronēsis*, which seeks a complementary interaction between two apparently opposing orientations – the deontological and teleological ethical aims - held in a critical tension?

My past work has sought to chart such a course between law and ethics, and we have a similar tension in this case, as evidenced by the call for more and greater legal regulation in the face of serious ethical challenges. As I said, Ricoeur's starting point in his seminal work: *Oneself as Another* is the individual's desire to "live well", "aiming at the 'good life' with and for others, in just institutions. Our current focus – that of the ethical and legal issues attending private contractors in military situations – may well imply the need for a different starting point, at least from a policy perspective. In the case of armed private military contractors for hire, we may need to remember and reassert *their* individual aim to live well, with and for others, in just institutions by *acting* as a just institution, and reclaiming exclusive control over the implementation of violence within the tenets of the Just War Doctrine.[67]

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[64] Charles Taylor, *Sources of the Self: The Making of Modern Identity*, (Cambridge: Cambridge University Press, 1989); also *The Ethics of Authenticity*, (Cambridge and London: Harvard University Press, 1991).

[65] Especially from her chapter "Some Questions of Moral Philosophy" in *Responsibility and Judgment*, ed. Jerome Kohn (New York: Schocken Books, 2003), 49-146.

[66] Paul Ricoeur, *Oneself as Another*, trans. Kathleen Blamey, (Chicago: University of Chicago Press, 1994); *The Course of Recognition*, trans. David Pellauer, (Cambridge, Mass.: Harvard University Press, 2005); *Memory, History, Forgetting* (Chicago: University of Chicago Press, 2004).

[67] *Including*, of course, fielding proper and recognizable combatants.

Conclusion

Where does this leave us? Much has been made of the sheer numbers of military contractors – at least on the logistics' side – and the inability of the U.S. to prosecute the war in Iraq *without* PSCs. This is, in effect, a *Doctrine of Necessity*: "We can't do what we do without them, so therefore we have to have them."[68]

It is not enough to say 'just say no'. We will not be able to *say* no unless we can see how desperate the need is to retreat from that path. We will not be able to *see* that need unless and until we take the time to study the ethical implications, and then make a reasoned decision based on sound ethical considerations, not only for ourselves, but for others, and for the sake of just institutions.

As we have seen, the primary difficulty appears to be with the trigger-pullers – those individuals armed and able to engage in violent prosecution of their desired activities. For a variety of reasons, an opportunity has recently emerged (or re-emerged) by which private individuals may engage in such violence outside of the constraints and framework it has been thought wise to impose upon the soldiers of our military.

Respectfully, the question should not be *Why should they not be allowed to continue to operate?* but *Why have they been allowed so to operate at all?*

The burden of proof ought to rest on those seeking a change. It is no acceptable ethical reasoning to affirm that this is cheaper, faster, or more efficient. Neither is it enough in a society oriented toward common values of the 'good' merely to affirm that the activity – as yet – is not *illegal*. Mere legality does not, absent more, translate into legitimacy, let alone the high standard of honour to which our military profession is called. A long history – and history of ideas – first led to the shift from monarchs with mercenaries and mercenary armies to the citizen soldiers of our republic, committed to a democratic governance. We should proceed here – if at all – with utmost caution. More than anything, we should act deliberately rather than allowing ourselves to be placed into the position of having to *react* unthinkingly. There is a lot at stake.

[68] I am leaving out the other very common argument, namely that it is more cost-efficient to use PSCs. It is likely also more "cost-efficient" immediately to kill our seriously wounded soldiers, default on our education or retirement promises to them, and/or entirely to ignore the plight of suffering people groups under harsh tyrannies or the hand of natural disasters. The "good" of ethics trumps cost. Or else we have no ethics.