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# Legal and Ethical Perspectives on Industry Support to Air Operations

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# Legal and Ethical Perspectives on Industry Support to Air Operations

*Simon Chesterman\**

*This presentation offers a legal and ethical framework for evaluating industry support to air operations. Such support needs to be viewed in the context of larger debates about the relationship between the military and private contractors more generally. Reasons for turning to the private sector include considerations of cost and flexibility; reasons for being wary of outsourcing include problems of accountability and diverging incentives. Where industry support is sought, lessons from past experience can assist in maximizing the benefits and minimizing the risks through ensuring transparency, participation, and review.*

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## Introduction

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On the morning of Sunday, 16 September 2007, USAID and State Department officials were meeting in a guarded compound in central Baghdad. At ten minutes to noon, a bomb exploded on the road a few hundred yards from the compound, prompting a decision to evacuate. The company contracted to ensure the security of State Department employees, Blackwater, bundled the diplomats into one convoy while a second went ahead to ensure a clear path back to the International Zone of Iraq, known more commonly as the Green Zone.

This second convoy, comprising four vehicles, was attempting to stop traffic at Nisour Square when gunfire broke out. Though Blackwater initially claimed that its personnel had been fired upon, this was not supported by subsequent investigations by the Iraqi government, the Pentagon, or the Federal Bureau of Investigation (FBI), all of whom concluded that Blackwater had used excessive force. Seventeen Iraqi civilians were killed in the incident; according to a report in the *New York Times* one Blackwater guard continued shooting after “cease fire” was called out several times, stopping only when another guard turned a weapon on him.

For a year it looked as though no consequences would follow. The Iraqi government threatened to expel Blackwater then quietly backed down. The State Department extended Blackwater’s contract. In December 2008, however, one of the Blackwater guards pleaded guilty to manslaughter; five others have been charged with the same and other offences. In January 2009, The State Department notified Blackwater that its contract would not be renewed again. The following month, Blackwater changed its name to Xe and announced that it was getting out of the security business to focus on training.

Such consequences are the exception rather than the rule. For the most part, private military and security companies (PMSCs) operate with minimal oversight and little prospect of meaningful accountability for their actions. This is not because they operate in a legal vacuum, however. Rather, accountability deficits are caused by a lack of political will, an absence of effective institutions, and a reluctance to take seriously market incentives that might encourage good and punish bad behaviour.

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Now the issues facing air forces would seem, on the face of it, to be quite different from those raised by the Blackwater example. This is true in part because air forces tend not to operate in theatre alongside contractors. But I would like to suggest that it has led to air forces not being required to address some of the opportunities and the costs of dealing with the private civilian sector, outside of traditional procurement. And that the opportunities and costs are going to become more relevant over time.

The aim of my presentation is to give you a legal and ethical framework for considering industry support to air operations. First, I will offer up a brief history of the changing relationship between contractors and the military. Then I’ll give you three

reasons why you *should* rely on industry. After that, I'll give you three reasons why you should *not* rely on the industry. And finally, I'll suggest three safeguards to put in place in the event that you *do* rely on industry.

## The fall and rise of mercenaries

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Private military and security companies such as Blackwater, Triple Canopy, ArmorGroup and many others are frequently compared to mercenaries. This is partly accurate: they are private actors offering military services ranging from training and advice to combat. It is misleading, however, in two very different ways. The first is that no major firm today offers to fight wars for a fee. Though Executive Outcomes and Sandline International did provide such services to Sierra Leone, Angola, and Papua New Guinea in the 1990s, that aspect of the industry has come to be discredited — epitomized in the move from private “military” to “security” companies. (EO and Sandline have since been wound up, though many key individuals quickly resurfaced in new corporate guises. And, as we shall see, though wars may be off limits the privatization of peacekeeping is a real possibility.)

It is also misleading in that it implies that the comparison is negative. This glosses over much of the history of mercenaries. Though the adjective “mercenary” today means motivated chiefly by the desire for gain, until around two centuries ago mercenaries were very much the norm in European armies. Indeed, the Pope is today guarded by a contingent of Swiss mercenaries first retained in 1506. Less pejorative meanings live on in terms such as “freelance,” which now describes a writer operating on short-term contracts but previously denoted contractors who preferred the sword over the pen.

The discrediting of skilled warriors offering their services at a price in favor of national armies was partly a function of technology. Around the Napoleonic Wars, the introduction of the musket greatly reduced the time required to train an effective soldier. Quantity soon became more important than quality, and national conscription became a more efficient way of generating an army than outside hiring. These military and economic shifts were reinforced by politics and culture. As Deborah Avant has written, in the nineteenth century mercenaries “went out of style.” Notably, the social contract and the Enlightenment transformed the individual’s relationship to the state, which came to be based not on a feudal allegiance but the idea of citizenship. Reliance upon mercenaries was no longer necessary, but also came to be seen as suspect: a country whose men would not fight for it lacked patriots; those individuals who would fight for reasons other than love of country lacked morals.

Mercenaries never really went out of business, however, and continued to be important in low-technology wars where the quality of troops and their weapons still mattered. This explains both their ongoing significance in Africa through the twentieth century — frequently in attempting to overthrow weak governments — and efforts by those governments through the Organization of African Unity and the United Nations to prohibit mercenarism completely.

But it was the end of the Cold War that saw an explosion in mercenary activity. As Peter W. Singer documented in *Corporate Warriors*, the 1990s saw a proliferation of small-scale conflicts and a demand for skilled military services matched by a sudden

supply of trained soldiers. State militaries by the end of that decade employed roughly seven million fewer soldiers than they did in 1989; some units that were retired, such as the South African 32nd Recon Battalion and the Soviet *Alpha* unit, kept the outline of their structure and simply reconstituted themselves as corporations.

These trends explain the rise of Blackwater and its peers but not their attractiveness to Washington. The United States retains such companies for reasons very different than Sierra Leone, Angola, and Papua New Guinea. In the 1991 Gulf War, it employed one contractor for every 50 active-duty personnel; by the 1999 Kosovo conflict, contractors made up ten percent of U.S. personnel and served as the U.S. force's supply and engineering corps. After the United States went into Iraq in 2003, contractors made up the second largest grouping of personnel after the U.S. military — far more than the number of British troops at their highpoint. A recent National Defense University report estimated that there are 100,000 contractors in Iraq today, including around 35,000 private security professionals. Other accounts put contractor numbers in excess even of U.S. personnel.

The growing reliance on contractors by the U.S. military was driven in part by the need to increase capacity swiftly (and flexibly) after the slow downsizing of the post-Cold War decade. It must also be seen in the context of the larger trend towards outsourcing in the U.S. government. A 2003 Government Accountability Office report examined these trends and concluded that outsourcing by the military provided access to specialized technical skills, enabled it to bypass limits on military personnel able to be deployed to certain regions, and ensured scarce resources would be available for other assignments. What it did not support is the normal justification for outsourcing: that it saves money.

In fact, as the periodic scandals emerging from the contracts awarded to security and reconstruction firms in Iraq have demonstrated, relying on private companies can be very expensive. For a country lacking an effective military, such as Sierra Leone in the 1990s facing Foday Sankoh's Revolutionary United Front, investing in a private army might make at least short-term sense. For the United States, however, it is apparent that the turn to contractors is driven by the ideological conviction that the private sector is inherently more competent than the public sector, and the political necessity of keeping troop numbers — and casualty numbers — artificially low. The use of contractors enabled the United States to keep its troop numbers around 20,000 below what would have been required to field equivalent strength in Iraq. And though precise figures are difficult to obtain, excluding contractor deaths from official U.S. casualties have kept those figures many hundreds lower than they might have been.

So what does any of this have to do with the air force? Well it suggests three reasons why you might want to rely on industry as well as three reasons you should be wary of doing so.

## **Three reasons to rely on industry**

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Australia's 2007 *Defence and Industry Policy Statement* describes Australia's defence industry as a "cornerstone of our national security". Around AUD\$12bn of taxpayers

money is spent with suppliers on defence every year — more than half of the AUD\$23bn defence budget.

The ADF is said to rely on industry to adapt or manufacture equipment, for repair and maintenance, and for general support functions (catering & base support to medical, IT, construction). A further justification is that in time of war, the ADF may need to be able to draw on the logistical capacities of private sector.

A subsidiary goal is creating opportunities for Australian firms, including through the [Skilling Australia's Defence Industry \(SADI\)](#) program and the [Australian Industry Capability](#) program. One example of this is Australia's involvement in the Joint Strike Fighter program, which has created opportunities for Australian companies to compete successfully on one of the largest defence programs in history

Putting this into the context of larger debates over outsourcing, let me suggest three reasons to rely on industry:

### ***1. Cost***

Within the armed services, air power is perhaps most dependent on technology. It is likely that air power will continue to be heavily technology dependent. This will include, among other things, increasing use of armed and unarmed UAVs, which I'll come back to later.

The cost barriers to entry can be prohibitive and may require a country like Australia to rely not merely on industry but also on allies. The development cost of the Joint Strike Fighter, for example, would have consumed a few years of Australia's total defence budget.

### ***2. Flexibility***

In the case of personnel, hiring from the private sector can enable you to increase and decrease numbers swiftly — though in practice hires that are meant to be “temporary” can quickly become “essential”.

There are also obvious advantages to relying on the capacity of the private sector for innovation. One of the insights of organization theory is that organizations frequently do not adapt to changing circumstances, instead *groups* of organizations do. This form of Darwinian selection is possible only when there is significant turnover — far more applicable to the private sector than the public. Failure to adapt will only rarely lead to the abolition of a government entity, and there may be few other incentives to change: the U.S. Army, for example, maintained a horse cavalry until the Second World War; until the mid-1990s customs forms required ships entering U.S. ports to list the number of cannons on board.

### ***3. Strategic interest?***

A third possible reason is that there is value in itself in having an effective Australian defence industry.

The argument that this is important from the perspective of creating jobs may hold some weight politically, but it is dubious economics and, given the restrictions on defence expenditure (even with a 3% real increase), dubious defence policy.

But there is an argument that — due to Australia’s remoteness and special circumstances — having some local capacity is a strategic asset. Given the expense that would be necessary to do this effectively, however, it’s probably a losing argument in general, though one might note some special cases worthy of further consideration.<sup>1</sup>

## **Three reasons not to rely on industry**

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### ***1. Morality?***

The traditional concerns about mercenaries are sometimes grounded on the belief that there is something immoral about killing for money, as opposed to killing for love of country. As my brief survey of the history of mercenarism has shown, that’s a pretty recent conceit and not the most helpful in formulating procurement policies or service contracts for what is, anyway, a professional army.

### ***2. Accountability***

More persuasive is the problem of accountability.

In the context of companies like Blackwater, the concern is the use of potentially lethal force in an environment where accountability may be legally uncertain and practically unlikely. Contractors have uncertain status under international humanitarian law (depending on whether they “directly participate” in hostilities) and typically operate outside the chain of command.

Again, this might seem a little removed from air force operations, but we now have examples in some countries of contractors piloting UAVs. In the not too distant future we could have contractors piloting UAVs with kill capacity, or at least directly assisting in the targeting process.

Accountability can also be a concern even when we move away from the theatre of operations. The further away you get from political accountability through the minister, or hierarchical and legal accountability through the chain of command, you need to supplement with additional structures of oversight and review.

Billions of taxpayers dollars being spent, and frequently full disclosure of projects will not be possible. If one is simply outsourcing the production of widgets, that may be well and good, but usually the role of industry is much more involved than that. This is all the more true if, as the 2007 *Policy Statement* suggests, there are moves to involve industry at earlier stages of procurement.

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<sup>1</sup> I’m grateful to Paul Dibb for pointing this out to me.

### ***3. Incentives***

Third reason for concern is the different incentives that operate for a contractor serving shareholders and uniformed personnel serving their country.

Discussions of this issue frequently paint a somewhat idealized picture of the patriotism and competence of full-time government employees, and underestimate the patriotism of many contractors. But there are reasonable grounds to be wary of inserting a profit motive into military activities.

This is not new to air forces, which have long dealt with problematic incentives of how to retain pilots who may be attracted by higher salaries in civilian airlines. (There is a rich academic literature on the sticks and carrots that air forces can use.)

But the closer you get to the theatre of operations, the more problematic this can become. A contractor may ultimately make an assessment of the risk that he or she is being paid to take, and determine that the compensation is inadequate. Such a contractor may suffer financial penalties for refusing service, but if operating outside the chain of command there's not much more that one can do.

It is also arguable that the freedom to outsource alters the incentives of the armed services themselves, particularly when it comes to hiring consultants. Such freedom offers flexibility but also avoids the need to justify a fulltime employee and allocate responsibility, thereby breeding duplication and inhibiting collaboration.

It is possible, of course, that a profit motive may encourage *better* behaviour through the operation of a kind of market. Markets can indeed be an effective form of regulation, but operate best where there is (a) competition, (b) an expectation of repeat encounters, and (c) a free flow of information. It is far from clear that these qualities obtain in the commercial military sector. Competition is limited by the small number of players and the security clearances that may be necessary. This creates monopoly-type problems and reduces leverage over contractors. The need to fill contracts quickly may undermine market forces, though in industry support to air operations the longer time horizon and the emergence of established companies may help encourage good behaviour by contractors seeking future work. The flow of may information undermined by necessary secrecy of some projects, and active efforts to avoid oversight in others.

There is evidence that the PMSC market is gradually maturing, particularly through professionalization of the industry and the creation of industry associations such as the [British Association of Private Security Companies](#) (BAPSC) and the [International Peace Operations Association](#) (IPOA). This is largely being driven by self-interest as some actors seek to establish themselves as “legitimate” and thereby raise the costs of entry for competitors while enabling the charging of higher fees for similar services. But it may be a positive development nonetheless.

### **Three safeguards to put in place if you do rely on industry**

So how can you maximise the benefits and minimise the risks?

Obviously one needs to use the legal means available — this includes effective use of criminal law, civil litigation, licensing, contracts, and non-traditional regulation such as industry associations.

But most important are the provisions that are established prior to the decision to contract

One of the key misconceptions about accountability is that following revelation of some scandal the prosecution of an individual or the termination of a company's contract is "accountability". But if it takes a scandal to create an accountability mechanism — an inquiry, for example — then that's not true accountability

You can think of this as the "accountability when" problem. Accountability should be about more than just punishing spectacularly bad behaviour. It should also be about encouraging good day-to-day behaviour.

(The limits of accountability in PMSC context were shown by Abu Ghraib. It was only after humiliating photographs of detainees were widely disseminated that serious investigations began. Only one person above the rank of staff sergeant faced a court-martial and was cleared of any wrongdoing; no charges have been laid for abuses other than those that were photographed. No charges have been laid against contractors, despite repeated allegations that they participated in abuse. The lesson internalized by some from this episode? Don't take photographs.)

Here I'll offer you three things to focus on when going down the industry path.

## ***1. Transparency***

Sunlight, as U.S. judge Louis Brandeis once wrote, is the best disinfectant.

But transparency is important not just because it reduces the opportunities for corruption. Being open to public scrutiny also encourages better decisions.

Transparency should therefore be required in the decision *whether* to privatize certain functions, in explaining the reasons *why* those functions will be carried out by private rather than public actors, and detailing the process *how* contracts will be awarded and overseen.

## ***2. Participation***

If transparency can encourage virtuous behaviour, participation can encourage sensible behaviour.

This may seem obvious, but conscious efforts to involve all stakeholders lead to better policies and, sometimes, greater efficiency.

This raises a different sort of accountability problem — accountability *to whom*? Frequently there is only accountability "up" to those who pay the bills. We also need accountability "down" to those who consume the services and, potentially, those adversely affected by them.

In addition to involving government and industry, this means concerted effort to involve uniformed personnel who are nominal beneficiaries and, depending on circumstances, affected civilian populations.

### ***3. Oversight & review***

Third and finally you may need lawyers.

Oversight and review mechanisms need to be set up in advance, and should normally comprise two forms.

*Oversight* is day to day supervision and management. One needs adequate resources devoted to this. A U.S. GAO report concluded that not only did DOD have inadequate oversight of contractors, it wasn't even in a position to identify how many contractors it employed. One needs, therefore, a rational oversight structure as well as training of personnel to perform this function effectively.

*Review*, by contrast, is a mechanism in place to respond to problems. Here one needs a clear procedure to deal with non-compliance with terms of the contract or violation of the agreement. It's also helpful to have whistleblower protection to encourage revelation of problems not picked up by oversight or in the normal course of review.

## **Conclusion**

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All of this points to the problems of regulating this new phenomenon, and of identifying the appropriate role that private industry should play in supporting the public function of the military

On the regulation front, I've argued in my work on PMSCs for the need for a governance regime that strikes a balance between commercial and public interests, between voluntary and imposed regulation. In the absence of such a regime the marketplace of war will continue to be regulated only by bankruptcy and death.<sup>2</sup>

On the question of whether there should be limits to privatization, I'll take you back to Baghdad.

Three weeks after the Nisour Square incident, half a dozen FBI investigators prepared to fly out to examine the crime scene and interview witnesses. Under its State Department contract, initial plans provided for the investigators' security and transportation outside the Green Zone to be provided by... Blackwater.

Following protests, the FBI announced that in order to avoid "even the appearance" of a conflict of interest their agents would be protected by U.S. government personnel.

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<sup>2</sup> See Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford University Press, 2007) and Simon Chesterman and Angelina Fisher (eds), *Private Security, Public Order: Governance and the Limits of Outsourcing* (Oxford University Press, forthcoming).