

BOTTOM-UP LAWMAKING AND THE REGULATION OF PRIVATE MILITARY AND SECURITY COMPANIES

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Resumen: El aumento de la contratación de empresas privadas militares y de seguridad privada a nivel global crea un problema de regulación debido a las debilidades en la aplicación clara del Derecho Humanitario y Derechos Humanos existentes, y de las deficiencias intrínsecas inherentes a la delegación. Este artículo evalúa el tema de la creación de una regulación legal en relación al sector a través de la aplicación de la teoría de “Bottom-Up Lawmaking” a las asociaciones profesionales vinculadas a dicha industria. Señala un cambio en el modelo clásico centrado en el Estado, donde en vez de la formación de políticas para ser interiorizadas en la práctica, el análisis demuestra un proceso orgánico centrado en la creación de normativas por parte de los profesionales que terminen exteriorizadas a nivel del Estado a través de la agregación de su contenido.

Palabras clave: empresas privadas militares y de seguridad privada, bottom-up lawmaking, normativas internas, regulación.

Abstract: The increased contracting of private military and security companies on a global scale creates a regulatory issue due to the weaknesses in clearly applying existing international humanitarian and human rights law, as well as the intrinsic control deficiencies inherent in delegation. This article assesses the issue of the formation of regulatory policy as it relates to the sector through the application of the theory of Bottom-Up Lawmaking to the professional associations related to the industry. It points to a change in the classic state-centric model, where instead of the formation of policy to be internalized in practice, the analysis demonstrates an organic process centered on the norms created by practitioners being externalized to the state level through content aggregation.

Key Words: private military and security companies, bottom-up lawmaking, internal norms, regulation.

Summary: I. General Considerations. II. Definition Private Military and Security Company. III. Deficiencies in the Existing Legal Framework. 1. International Humanitarian Law. A) Mercenaries. B) Civilian & Combatant. 2. Human Rights Instruments. 3. Additional Issue of Control. A) Principal-Agent Problem. B) Complex and Transnational Nature of the Industry. 4. Conclusion. III. Policy Formation. 1. Issues with Classic State-Centric Model. A) Political Will. B) State Misconception of Established Risk and Sector Realities. IV. Sources of Regulation: Bottom-Up Lawmaking. 1. Initial Considerations. 2. Bottom-Up Lawmaking Theory. 3. Case Study: Bern Union. V. The Application of Bottom-Up Lawmaking to the PMSC Sector. 1. Initial Considerations. 2. Institutionalization. A) IPOA. B) BAPSC. C) Conclusion. 2. Members and Homogeneity. A) IPOA. a) Homogeneous Group. b) Membership Selection Process. B) BAPSC. a) Homogenous Group. b) Membership Selection Process. C) Conclusion. 3. Norm creation and internal-regulation. A) Initial Considerations. B) IPOA. C) BAPSC. D) Conclusion. 4. Judicial Procedure and the Role as Adjudicator. A) Initial Considerations. B) IPOA. C) BAPSC. D) Conclusion. 5. Group Interaction and Norm Compliance. 6. Conclusion. VI. Aggregation to the State Level. 1. Initial Considerations. 2. Montreux Document. A) Aggregation of Topic. B) The Association as Muse. 3. Afghan Law Dalw 1386. 4. Evolution to possible vertical and horizontal aggregation. 5. Conclusion. VII. Conclusion.

I. General Considerations

1. The issue of the regulation of private military and security companies (PMSC) has received increased attention of late. The academic treatment usually revolves around state responsibility and the application of humanitarian and human rights instruments to an actor that does not fit neatly into the existing definitions of the subjects of international law. Less frequent, but present, is the treatment of the sector from a control perspective, dealing with the negative implications of delegation inherent in a principal-agent relationship created through contracting.

2. The overarching theme regardless of the academic approach to the subject matter is the fact that the regulation of the industry is apparently deficient on both the domestic and international levels. This article takes the position that remedy to the regulation concerns on the contemporary actions of the PMSC industry require the application of equally as contemporary research parameters to the subject. It specifically analyzes the professional associations related to the industry as a source of policy content at a state level following the theory of Bottom-Up Lawmaking (BUL).

3. The article begins by briefly outlining the central weaknesses in the current regulatory framework. It first touches on those found in the application of humanitarian and human rights law to the PMSC sector. The reader must understand that much of the debate of the legal architecture applicable to the sector necessitates the argumentation of distinct scenarios in order to prove where a PMSC could be subject to the existing legal norms, contrasting possible theoretical application with real cases. Although the practical examples manifest the variations between the legal theory and the current reality, the limits of this article do not allow for their in depth treatment. The objective of this section is to highlight the general challenges in the application of existing international law and demonstrate that the current situation is a coexistence of possible applications of existing norms with lacunas that remain legally uncovered. The article compliments this overview with a look at the core control issues present in delegation, in an attempt to give the reader a general, although brief, understanding of the necessity for improved overall regulation.

4. Having established these facts, the article then moves into the application of the parameters of BUL to the PMSC sector, focusing on the International Peace Operations Association (IPOA) and the British Association of Private Security Companies (BAPSC), as the leaders in the field of professional associations related to the sector.¹ What the research looks to prove is that these private associations meet the same criteria stipulated by the theory that have been verified sources of content of international law and transnational regulation.

5. It is important to note from the onset that the application of BUL does not eliminate or replace the role of the state in the classic terms of policy formation. The theory does not negate that binding legal norms emanate from the proclamations and actions of states.² It describes a system where the BUL approach and the classic theory function side by side. What it proposes is a change in the role of the state in the development of those instruments.³ It describes a directional flow where the norms ascend from the private professional association to “hard” law through the appropriation of normative concepts,

¹ See International Peace Operations Association (IPOA): <http://ipoaonline.org>. British Association of Private Security Companies (BAPSC): <http://www.bapsc.org.uk>. The Private Security Company Association of Iraq (PSCAI) has not been considered in the scope of the article due to the fact that the majority of its functions are related to domestic permitting processes. See <http://www.pscail.org>.

² G.H. GUTTAL, “Sources of International Law: Contemporary Trends” in N. SINGH ET AL, *International Law in Transition: essays in memory of Judge Nagendra Singh*. Martinus Nijhoff, 1992. pp. 183. (in relation to the United Nations)

³ J. LEVIT, “Bottom-up International Lawmaking: Reflections on the New Haven School of International Law”, Fifth Annual Young Scholars Conference: The “New” New Haven School: International Law - Past, Present and Future, *Yale Journal of International Law*, vol. 32, 2007, pp. 412.

in part or fully, by official state institutions.⁴ Within this process the association acts as a muse, being inspirational and iterative at the same time. It results in the norms of the group acting as a base catalyst and a standard of reference against which official legislators redact and evaluate the subsequent law.⁵

II. Definition Private Military and Security Company

6. The modern resurgence of private military and security companies in the post-Cold War era currently presents several issues in terms of the regulation of the industry under existing legal frameworks, as well as several impediments to the creation of new forms of applicable policy.⁶ This is in large part due to an emerging global pattern of increased dependence on military and security services provided by this non-sovereign market.⁷ These companies have a recognized utility for their clients, be it implicit or explicit, who range from states, corporations, individuals and nongovernmental and international organizations.⁸

7. The PMSC industry is comprised of a group of heterogeneous entities that neither look alike nor serve the same markets.⁹ The general universal commonalities in the sector can be found in the fact that all PMSC share a common organizational business structure as for-profit companies, who provide a professional service to their clients based on a contractual relationship, and by definition are private, meaning that they are the property of non-state actors. But as it is a diverse sector, an in depth analysis of the wide array of specific services provided falls outside of the scope of this paper.¹⁰ At the lack of a common and globally accepted definition of the private military and security industry, one can define the PMSC as-- private, for-profit business entities dedicated to providing professional services including: support, consulting and the direct supply of profession capabilities related to security and defense. This operational definition captures the fact that the industry is comprised of revenue generating entities constituted under legal business structures, within which governments do not play a role in the management structure. It underlines the fact that the businesses are prepared to provide clients with a range of specific professional services via a contractual agreement.

III. Deficiencies in the existing legal framework

8. The deficiencies in the existing regulation of the PMSC sector relate to responsibility and consequences for illicit acts, as well as levels of control in delegation, and how those affect civilians, the states and the PMSC themselves. This article rejects the notion of a total legal vacuum propagated by some authors in relation to PMSC.¹¹ What it does recognize is that existing legal architecture is complex,

⁴ J. LEVIT, "Bottom-up Lawmaking Through Pluralist Lends: The ICC Banking Commission and the Transnational Regulation of Letters of Credit", *Emory Law Journal*, vol. 57, 2008, pp. 1182.

⁵ Ibid.

⁶ For a discussion on the historical background see: D. SHEARER, *Private Armies and Military Intervention*, Routledge, 1998, pp. 69; S. ARMSTRONG, *War Plc: The Rise of the New Corporate Mercenary*, Faber Press, 2008; C. ORTIZ, "Overseas Trade in Early Modernity and the Emergence of Embryonic Private Military Companies", in T. JÄGER & G. KÜMMEL, *Private Military and Security Companies. Chances, Problems, Pitfalls and Prospects*, Vs Verlag, 2007, pp. 11-22; K. BALLARD, "The Privatization of Military Affairs: A Historical Look into the Evolution of the Private Military Industry" in Ibid, pp. 42.

⁷ P.W. SINGER, *Corporate Warriors: The Rise of the Privatized Military Industry*, Cornell University Press, 2003, pp. 18.

⁸ J. MAOGOTO & B. SHEEHY, "Contemporary private military firms under international law: an unregulated 'gold rush'", *Adelaide Law Review*, vol. 26(2), 2006, pp. 245-269. (speaking to the utility of the companies to clients)

⁹ infra note 7, pp. 88.

¹⁰ See infra note 7, pp. 92-100; M. VON BOEMCKEN, *BICC- Private Military and Security Companies: Origins and Definitions*, COST Action A25 Network Meeting on Private Military Companies, 9-10 Feb 2006.

¹¹ For a discussion the possible legal vacuum see: P.W. SINGER, "War, profits and the vacuum of law: Privatized military firms and international law", *Columbia Journal of Transnational Law*, no. 42, 2004, pp. 521; C. WALKER & D. WHYTE, "Contracting out war? Private military companies, law and regulation in the United King-

and at points can appear disjointed, and in some respects contradictory.¹² The analysis of the application of international humanitarian law, human rights law, and issues of control in a principal-agent relationship demonstrate the inadequacy of current regulation.

1. International Humanitarian Law

9. The upsurge in the reliance on military contractors raises the issue of their definition and related protection under the Geneva Conventions and the associated Protocols, which act as a basis for the application of international humanitarian law (IHL) in armed conflict. The application of IHL has also proven problematic especially due to the fact that states, confronted with present day realities of warfare, often have different interpretations of the content of the law and of the measures and mechanisms for its implementation.¹³ Thus civilian populations have the potential of being affected in the extent that they can be offered protections in armed conflicts, partially due to the debate and difficulty in identifying a clear definition for PMSC in light of existing IHL. Further, as many of the obligations and standards that guide states in regulating their armed forces are lacking in relation to PMSC, it raises concerns that states might simply outsource their military policy to PMSC without taking adequate measures to promote compliance with IHL even in light of their theoretical obligation to do so.¹⁴ It is worth noting at this juncture the difference between possibilities, not probabilities, where no study currently proves that a PMSC is more likely to perpetrate illicit acts than a member of a sovereign force. The perception of this being the case is due in part to the tendency of the media outlets to focus only on specific instances where this has occurred.

A) Mercenaries

10. Although there is a debate of the definition of PMSC as civilians or combatants under IHL, what is practically undeniable is that the legal parameters as they relate to mercenaries do not apply to the sector. It tends to occur, especially in journalistic pieces, that the term PMSC and mercenary are used synonymously.¹⁵ Although this commonly occurs, it does not truly represent reality. The term mercenary could be employed to demonstrate the disapproval of the author instead of as a reference to specific international legal criteria that have been met.¹⁶ Due to the fact that the use of the term mercenary can imply negative connotations, and its association with PMSC can influence the debate on the regulation of the sector, it is important to clarify the difference between the colloquial use and parameters given to the definition according to international law.¹⁷

11. Different from the colloquial use, the legal definition of a mercenary has its base in Art. 47

dom”, *International and Comparative Law Quarterly*, no. 54, 2005, pp. 687; G. ABRAHAM, “The Contemporary Legal Environment”, *The Privatisation of Security in Africa*, South African Institute of International Affairs, 1999, pp. 97.

¹² K. FALLAH, “Corporate Actors: The Legal Status of Mercenaries in Armed Conflict”. *International Review of the Red Cross*. ICRC, no. 863, 2006, pp. 601.

¹³ “Ensuring Respect for International Humanitarian Law in a Changing Environment and the Role of the United Nations”, *Concept Note: 60th Anniversary of the Geneva Conventions*, Federal Department of Foreign Affairs, Switzerland, 2009, pg. 1

¹⁴ H. TONKIN, “Common Article 1: A Minimum Yardstick for Regulating Private Military and Security Companies”, *Leiden Journal of International Law*, vol.22, Cambridge University Press, 2009

¹⁵ See for example: J. SCAHILL, *Blackwater: The Rise of the World’s Most Powerful Mercenary Army*, Nation Books: 2007; L. WAYNE, “America’s For-Profit Secret Army”, *New York Times*, 13 Oct 2003; S. CREEHAN, “Soldiers of Fortune 500 International Mercenaries”, *Harvard International Review*, Winter 2002; M. Lee Lanning, *Mercenaries: Soldiers of Fortune, from Ancient Greece to Today’s Private Military Companies*, Presidio Press, 2005.

¹⁶ A. CLAPHAM, *Human Rights Obligations of Non-State Actors*, Oxford University Press, 2006, pp. 299–300.

¹⁷ L. CAMERON, *International Humanitarian Law and Regulation of Private Military Companies*, Basel Institute of Governance, 2007, pp. 6.

of the First Protocol Additional to the Geneva Conventions (PGC-I), which regulates their use by states.¹⁸ To be considered a mercenary in accordance with Art. 47.2 of the PGC-I an individual must meet all of the cumulative criteria enumerated in the multifaceted article. As has been well established, the parameters outlined in the treaty produce a very narrow definition, to the point that it has been argued that it becomes unworkable.¹⁹ The greatest complication in the application of this article comes from its cumulative nature, whereby not meeting the terms of one section can free an individual from being legally defined as a mercenary.²⁰ Hence the probability of finding someone who meets all of the criteria, much less within in the PMSC industry, seems complicated if not impossible.²¹

B) Civilian & Combatant

12. Having established that it is improbable that any PMSC meets the legal definition of a mercenary, one must examine the legal definition of a PMSC as either a civilian or a combatant under IHL. It is important to note that the law establishes a distinctive line that is mutually exclusive, where an individual can only be one or the other.²² Therefore any concept that alludes to a partial status of quasi-combatant or semi-civilian can be dispensed with.²³ That said, finding an otherwise clear and general fit of the PMSC into the civilian or combatant legal categories is a nuanced task.

13. In this instance a general conclusion is first hindered by the fact that the legal status under IHL is dependent on the contractual relationship between the company and the client and the type of services provided.²⁴ It becomes an additionally complex process due to the fact that a base guideline in IHL is the relationship between the PMSC and the military chain of command and the command responsible.²⁵ In this instance each state has the capacity to determine the relationship between a contracted PMSC and the military chain of command under its specific domestic jurisdiction. Additionally PMSC who have contractual relationships with states do not necessarily have that relationship with the Ministry of Defense or the armed forces. In these situations the relationship between the contractor and the military chain of command is something more removed and more difficult to pinpoint.²⁶ Thus, many opine that

¹⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. In relation to the impact of the article see: T. MILLIARD, "Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies", *Military Law Review*, vol. 176, 2003, pp. 67; S. GUL, "The Secretary Will Deny All Knowledge of Your Actions: The Use of Private Military Contractors and the Implications for State and Political Accountability", *Lewis & Clark Law Review*, 2006, pp. 294.

¹⁹ F.J. HAMPSON, "Mercenaries: Diagnosis before Prescription", *Netherlands Yearbook of International Law*, 1991, pp. 14-16; G. ALDRICH, "Guerrilla combatants and prisoner-of-war status", *American University International Law Review*, vol. 31, 1982, pp. 881.

²⁰ For a discussion on the weaknesses of the norms as they relate to mercenaries see: D. KASSEBAUM, "A Question of Facts- The legal use of Private Security Firms in Bosnia", *Columbia Journal of Transnational Law*, no. 38.3, 2002; WALKER & WHYTE, "Contacting Out War? Private Military Companies, Law and Regulation in the United Kingdom", *International & Comparative Law Quarterly*, No. 54.3, 2005

²¹ *Infra* note 7, pp.524.

²² Art. 48—Basic Rule. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

²³ See C. PILLOUD, Y. SANDOZ, C. SWINARSKI, B. ZIMMERMANN, *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, Martinus Nijhoff Publishers, 1987, pp. 515

²⁴ E.C. GILLARD, "Business goes to war: Private military/security companies and international humanitarian law", *International Review of the Red Cross*, ICRC, vol. 88, No. 863, 2006, pg. 530

²⁵ Article. 43. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

²⁶ The scope of these relationships is something that is debated even at internal levels of states. See *USA vs.*

the classifications of combatants created so long ago can be incompatible in treating the modern phenomena of companies in the PMSC sector.²⁷

14. That said, IHL establishes under Art. 50 of the PGC-I, that in a situation of doubt, whomever does not fit into the established combatant categories is to be defined as a civilian.²⁸ Thus by default an exhaustive analysis, where only brief key points are mentioned above, leads to the conclusion that the majority of employees of PMSC can be considered civilians, especially when under contract with an entity that is not a state party to a conflict.²⁹ Taking this into account, one can further examine if a PMSC could be defined as a civilian that accompanies the armed forces without being members thereof under Art.4(A)4 of the Third Geneva Convention relative to the Treatment of Prisoners of War (GC-III).³⁰ But in a brief examination of this article, it must be noted that while several of the support functions that companies in the sector provide could fit within the reach of Art. 4(A)4 of the GC-III, there exists many more, particularly functions closer to the nucleus of military operations, that most likely do not fit within the article's reach.³¹ This, combined with other facets of the application of the article, then adds a further level of complication in establishing a clear, concise and generally applicable definition within the parameters of the treaties.

2. Human Rights Instruments

15. Aside from the difficulty in the concise application of IHL seen briefly above, the nuanced nature of various state relationships with the PMSC industry also effects the application of human rights law. As of late the parameters of the discussion of human rights has been extended to include the role of corporations, thus alluding to the possible application to the PMSC sector.³² But the international community is still in the preliminary phases of adapting human rights to more effectively protect individuals and communities from the damages of these rights by corporations.³³ Although it is in preliminary stages, the analysis related to the PMSC sector helps in providing a more ample image of the complex international legal framework that surrounds the industry.

16. Although nothing has been decided in its respect to date, in the context of this ongoing discussion on the application of human rights many opine that non-state agents, especially those that execute functions of a governmental nature, also have to respect human rights norms.³⁴ But,

Slough, Slatten, Liberty, Heard & Ball, CR-08-360, District of Columbia, 8 Dec 2008.

²⁷ R. MORGAN, "Professional Military Firms under International Law", *Chicago Journal of International Law*, Summer 2008.

²⁸ Art. 50, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

²⁹ See similar conclusion reached by E.C. GILLARD, *Private Military/Security Companies: The Status of their Staff and their Obligations under International Humanitarian Law and the Responsibility of States in Relation to their Operations*, Third Expert Meeting on the Notion of Direct Participation in Hostilities, ICRC, 2005, pp. 6.

³⁰ Art.4(A)4: "Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model." Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

³¹ E.C. GILLARD, *Private Military/Security Companies: the Status of their Staff and their Obligations under International Humanitarian Law and the Responsibilities of States in Relation to their Operations*, Presentation held at the governmental experts' workshop, Switzerland, 2006. Pg. 6

³² For a general summary of this line of discussion see: S. JERBI, "Business and Human Rights at the UN: What Might Happen Next?", *Human Rights Quarterly*, vol. 31, no. 2, 2009

³³ J. RUGGIE, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, A/HRC/8/5, 7 April 2008, pg. 3

³⁴ *International Humanitarian Law and International Human Rights Law: Similarities and differences*, Advisory Service on International Humanitarian Law, ICRC, 2003

the application of this area of international law also faces complications, due partially to the fact that human right focuses on, and requires, the action of a state.³⁵ As the application of human rights instruments revolves around the state, the largest impediment in the application to the PMSC sector is the varied state-company relationships that exist. Of these one must consider a relationship with the contracting state, another with the territorial state where the service is provided, and yet another with the state of legal constitution of the corporate structure of the PMSC. One can also speak of a relationship that exists between the state of nationality of the employees of the PMSC.

17. Within the context of these varied relationships, the biggest impediment to the application of human rights is that the legal opinions are still not clear as to which of these states hold the human rights due diligence obligation.³⁶ For the incorporating state, there is a lack of jurisprudence to allow the state to impose its obligation and responsibility of control over the company constituted in its territory.³⁷ Additionally, in the few instance where domestic regulation exists, there is a very high threshold to prove that that regulation is defective to the point that it results in failure of the state to comply with its due diligence responsibilities.³⁸ Combined with this, the instability that is frequently found in the states where PMSC operate almost annuls the capacity of those states to protect human rights within their borders. Furthermore, the application of universal jurisdiction fails to be an effective tool due to the costs and lack of information privy to the state whose nationals are employed by PMSC.³⁹

3. Additional Issue of Control

A) Principal-Agent Problem

18. The increased use of PMSC demonstrates that sovereign state are in the process of exchanging classic forms of authority for a new form of control and an operational structure that is based in delegation and supervision.⁴⁰ The delegation in the context of this article relates to tasks of a security and military nature provided by the PMSC. In essence the PMSC do what the State possibly ought to, or in some instance had done, but in currently not willing or capable of doing. This article takes the position that the central theme in this delegation is not related to privatization, which can be taken as fact, but rather to the control and the responsibility of a new executing entity. These issues of responsibility and control are compounded by the intrinsic deficiencies found within a principal-agent relationship established by delegation, especially in instances where vigilance and control are hindered by information asymmetries.⁴¹

³⁵ L. DICKINSON, "Accountability of Private Security Contractors under International & Domestic Law", *ASIL Insights*, vol.11, issue 31, 2007; C. DROEGE, Private Military and Security Companies and Human Rights: A rough sketch of the legal framework, Swiss Initiative on PMSC/PSCs, Workshop, 16-17 January 2006.

³⁶ *Expert Meeting on Private Military Contractors: Status & State Responsibilities for the Actions*, The University Centre for International Humanitarian Law, Geneva, 2005, pp. 35.

³⁷ C. LEHNARDT, "Private Military Companies and State Responsibility", *International Law & Justice Working Paper*, no. 2007/2, 2007, pp. 19; C. ORTIZ, "Regulating private military companies: States and the expanding business of commercial security provision", in K. VAN DER PIJL ET AL, *Global Regulation: Managing Crises after the Imperial Turn*, Palgrave Macmillan, 2004, pp. 217-218

³⁸ *M.C. v. Bulgaria* ECHR ap# 39272/98, 4 Dec 2003, Para. 169-170; R.L. POWELL, "The Right to Security of Person in European Court of Human Rights Jurisprudence", *European Human Rights Law Review*, Sweet & Maxwell, vol.6, 2007, pp. 662-665

³⁹ B. PERRIN, "Promoting compliance of private security and military companies with international humanitarian law", *International Review of the Red Cross*, ICRC, vol. 88, num 863, Sept 2006, pp. 619

⁴⁰ C. ORTIZ, "Regulating private military companies: States and the expanding business of commercial security provision", in K. VAN DER PIJL ET AL, *Global Regulation: Managing Crises after the Imperial Turn*, Palgrave Macmillan, 2004, pp. 205

⁴¹ G.K. YARROW & P. JASIŃSKI. *Privatization: Critical Perspectives on the World Economy*, Taylor & Francis, 1996, pp. 48 (on profit maximization vs. public good); P. FEAVER, *Armed Servants: Agency, Oversight, and Civil-Military Relations*, Harvard University Press, 2003, pp. 55; MJR. J. MCKAY, "Review: Armed Servants", *Canadian Army Journal*, vol. 8.3, Fall 2005, pp. 117.

19. Additionally, the principal-agent problem has a second level in the delegation of power from the state to the private company. It is very common that the private company outsource certain service to another entity in the specific geographic area of operation, especially one with local knowledge and know-how.⁴² Although it is in the best interest of the PMSC to implement best practices and procedures within the context of this subcontracting, the company may find itself facing the same control and monitoring issues with the second company as the state with the PMSC, where the agent eludes contractual responsibilities and the principal is faced with a lack of information permitting full knowledge and transparency of exactly what is occurring on the ground.

B) Complex and Transnational Nature of the Industry

20. Compounded by the legal and control issues outlined above, the complex and transnational nature of the PMSC industry is a dynamic variable that itself hinders the creation of effective regulation. Much of PMSC activity occurs outside of the borders of the country of corporate incorporation, as well as outside of the territory of the contracting state. This transnational scope, as related to the principal-agent issues, can be found in the great levels of difficulty in testing and proving that a PMSC operations' are in line with domestic and international norms, as well as the contract in itself. The state of incorporation can face extraterritorial impediments, while the state where the operations occur faces issues with how to monitor and control a foreign entity. The transnational element of the PMSC sector also implies that the contracting state may also lack the full monitoring capacity of the contract. This can be further exacerbated when one speaks of inequality between governments. Asymmetries exist between the approaches of distinct governments towards the industry, as well as between the power of the industries in different countries. Additional variations also exist between the structures of political culture and its influence on the policy formation and legislative process.

21. In the cases where the transnational nature of the industry may not present large constraints, the makeup of the PMSC sector in itself can present impediments. The reality of the heterogeneous industry, providing a variety of services, can complicate the process in identifying the PMSC subject, due not only to the variation in corporate structures but also the nuanced complexities of the sector on a whole. The complex corporate structures that exist in the industry can inhibit the creation of universally applicable regulatory parameters. Efficient regulation is thus hindered, as it must treat various types of services as well as various organizations as the legal subject imparting those services.

22. To complicate this one step further, the PMSC sector has undergone numerous mergers and acquisitions as of late. Due to this, many PMSC are now part of massive corporate structures, where the overall entity may be diversified into numerous markets unrelated to security or military services.⁴³ Thus the market reality is that many PMSC can be found within multi-leveled corporate structures with vast diversification. Thus, any applicable regulation must have a component to identify the actual entity realizing the services of a military or security nature within what could be a massive global organization diversified into distinct and non-related markets. As Ortiz notes, not all of the operations of these corporations can be treated and regulated as if they were PMSC functions.⁴⁴

⁴² S.NARFELDT & N. CHEADLE, "Act Globally, Hire Locally", *Journal of International Peace Operations*, vol. 5, 2009 (Proposes that the local contracting ratio for operations in Chad are between 60% and 80%); J.J. MESSNER, Testimony, EU Parliamentary Cmte Meeting: Human Rights (DROI), A3G3, Brussels, 9 Feb 2009. (Estimating that 99.7% of the employees in Afghanistan are Afghans).

⁴³ See for example MPRI as a division of L-3 Communications as of 2003, http://www.mpri.com/esite/index.php/content/about/mpri_history; DynCorp's acquisition by Computer Sciences Corporation, "CSC Completes Acquisition of DynCorp", Press Release, http://www.csc.com/investor_relations/press_releases/1209-computer_sciences_corporation_completes_acquisition_of_dyncorp

⁴⁴ *Infra* note 40, pp. 208

C) Conclusion

23. This section has established the problems in relation to the application of international law and the effective supervision and control of the PMSC. It has briefly demonstrated that although the probability of finding a PMSC that can be legally defined as a mercenary is low, the capacity in applying the definitions, and related obligations and restrictions, established by IHL of a civilian or combatant is taxing. This is in part due to the fact that the established legal parameters related to older combat contexts. Additional impediments are rooted in the ability of each sovereign state to define their contractual relationship with the PMSC and how that relates to the established command structure of their armed forces. The section has further highlighted the issues under discussion as they relate to the application of human rights obligations to corporate entities, where the PMSC case is complicated due to the varied relationships that exist between numerous state actors.

24. The intrinsic problems of control in a principal-agent relationship created by delegation have also been shown. It has been further demonstrated that the transnational nature of the industry combines with these principal-agent problems in creating greater probabilities of information asymmetries amongst parties. The transnational operational scope of the PMSC sector further complicates a clear regulatory framework due to the complex corporate structures from which PMSC operate, which are diversified into various services sectors that often combine military and security related services with unrelated sectors within a single global entity.

25. Having established the current issues faced in the regulation of the PMSC sector, the article now turns to the specific issues related to the development of policy content. Looking first at the weakness in the classic state-centric model and then turning to an alternative approach through the application of Bottom-Up Lawmaking to the regulatory issues.

III. Policy Formation

26. With the general understanding of the weaknesses in the current international regulatory framework of the PMSC sector, one may turn to the possible modes of rectifying this situation through the formation of new policy proposals. In doing so it would appear as though the classic model of policy creation where the state has a monopoly on the process does not seem to meet the needs. This section will first examine the obstacles confronted by the classic model as it applies to the regulation of PMSC and then look to the application of Bottom-Up Lawmaking as an alternative in the process.

1. Issues with Classic State-Centric Model

27. The classic approach of policy formation places the state in the position of the central actor with a monopoly on the process.⁴⁵ The creation of policy content under this model in relation to the PMSC sector seems to be hindered by two central factors. The first being a possible lack of political will on behalf of the states, and the second being a lack of a full understanding of the industry in order to approach the policy formation process.

A) Political Will

28. Let us first turn to the issue of political will in the state centric policy formation process. Firstly, in terms of delegation on behalf of the state, although it is evident that effective contracting requires superior monitoring and evaluation of the contracted entity, the political will to activate the regulatory process has been frequently absent.⁴⁶ There are some that doubt, in a similar vein to the formation

⁴⁵ See GOLDSMITH & POSNER, *The Limits of International Law*, Oxford University Press, 2005, pp.13.

⁴⁶ S. PERLO-FREEMAN & E. SKÖNS, "The Private Military Services Industry", *SIPRI Insights on Peace and Security*, no. 2008/1, 2008

of mercenary policy on the international level, that the states lack the desire to regulate the sector, at least at a multilateral level in the forum of international law.⁴⁷ The principle argument is that the state wants to ensure a margin of maneuverability in the contracting and use of PMSC. Combined with this, other States who at present may not be using PMSC, may seek to ensure that the option is available to them in the future. Due to this, until very recently, the levels of political will have been lacking.

29. It is true although that a limited number of states have taken steps within their domestic legislative spheres to establish modes of regulation.⁴⁸ These initiatives could be rooted in the fact that the process and ability to change domestic regulation is frequently less of a labyrinth than on the international level, thus leaving the state viable room to maneuver within the domestic forum. But, in the instances where domestic regulation exists, it has many times been in the form of reactive policy, only in response to an embarrassing situation for the state.⁴⁹

B) State Misconception of Established Risk and Sector Realities

30. That said, the possible lack of political will is a variable that could change, especially bearing in mind the increase in the use and growing recognition of the utility that PMSC offer. In the case that the political will to begin the regulatory formation process exists, other issues can feasibly present themselves in relation to the creation of legislative proposals to be debated and negotiated in the international forum. Specifically, it has been noted that too many of the proposals on ways to better regulate the sector have been based on myths or exaggerations that lack the support of correct information.⁵⁰ Additionally the process could see parallels with some forms of domestic regulation where policy proposals could be written in a more reactive tone as a result of a specific incident. This in turn would result in proposals that only focus on part of the bigger and more intricate problem.⁵¹ Therefore, aside from the political will to being the process, problems exist in the capacity of the existing system in formulating proposals that are based in established risks and integral realities to the entire vast PMSC sector. The capacity of the state to identify these core, and overarching issues, may also be rooted in the aforementioned transnational scope and complexity of the heterogeneous industry. The increase in the number of think-tanks and research centers publishing reports focusing on strategic aspects inherent in the privatization of security and military outsourcing featuring PMSC as central players, could attest to the need to educate the political actors on the areas of the sector where they lack a full understanding.⁵²

31. Thus the fact that the State is not always in the position to begin the process of the development of policy proposals, combined with the complexity of the sector and the quantity and diversification of the actors resulting in policy proposals that do not effectively treat the realities or the full scope of the issues, makes the investigation of possible alternative sources of such proposals for a more clear and solid regulation interesting. If the impetus of the State is low, the magnitude of the issues with the regulation of PMSC obligates the exploration of these alternative sources. Thus, the following section of this article applies an alternative theory as it relates to the sources of policy content in the formation of law, specifically investigating if the professional associations of the PMSC sector that could be viable sources of inspiration for future regulation.

⁴⁷ For a discussion of the lack of political will associated with mercenary regulations see: S. GODDARD, *The Private Military Company: A Legitimate International Entity within Modern Conflict*, U.S. Army Command and General Staff College, Fort Leavenworth, Kansas, 2001, pp. 37

⁴⁸ See a comprehensive list of domestic regulation: PMSC Regulation Database, Resource for the Regulations on Private Military and Security Companies, DCAF. <http://www.privatesecurityregulation.net/pmsc-regulation-database>

⁴⁹ J. SPEAR, *Market Forces: The Political Economy of Private Military Companies*, New Security Programme, FAFO Report 531, 2006, pp. 44

⁵⁰ *Security Privatization: Challenges and Opportunities*, Human Security Bulletin. The Canadian Consortium on Human Security, vol. 6, issue 3, March, 2008, pp. 18

⁵¹ *Regulating the Private Commercial Military Sector*, Workshop Report, Institute for International Law and Justice, New York University School of Law, Dec 2005, pp. 2

⁵² See for example the compilation of actors listed at www.privatemilitary.org/thinktanks.html

IV. Sources of Regulation: Bottom-Up Lawmaking

1. Initial Considerations

32. The State has been the central actor in the classic formation of international law, where the policy formation process is led from above by the political elite, especially the Executive.⁵³ But the study of international law is currently diversifying in the techniques, methods and theories on policy formation and the role of the key actors involved in the process.⁵⁴ Taking into account the possible lack of political will on behalf of the State in being the source for the preliminary steps of the policy formation process as it relates to PMSC or the possible lack of a full understanding on behalf of the state of the full depth and breadth of the PMSC industry to a degree that makes the formation policy proposals possible, the variations in the approaches of the study of the formation of regulatory parameters present an interesting path by which to examine alternative sources of norm creation as it relates to the PMSC control and responsibility issues.

2. Bottom-Up Lawmaking Theory

33. One such theory is Bottom-Up Lawmaking (BUL), developed through the research of J. Levit in relation to the international financial sector.⁵⁵ BUL looks at the formation of legal instruments as a process that flows in the opposite direction from the classical approaches, being the top-down formation of law that, in the words of Levit, is internalized into practice.⁵⁶ BUL on the other hand describes an organic process centered in private actors that complete a process of codification of group norms based in experience and practices in their respective sector. What occurs is that these practice-based norms are “externalized” and hardened in the form of law at a state level.

34. BUL begins with a relatively small homogenous group of active members of a specific sector that institutionalizes into an identifiable entity. This group creates a set of substantive internal rules, in essence organic norms based in and emanating from the day-to-day experiences of the members. The norms reflect and simultaneously condition the behavior of that sector through the creation of an internal governing system that regulates members’ conduct. To achieve this the group establishes procedural measures and remedies that strengthen these rules, but at the same time permit the possibility to modify the internal norms, which assures their proximity to the pertinent issue to the sector.

35. The practice based norms, although “soft” in the sense of international law between states when they exist at the level of these private groups, over time terminate formally aggregated into formal legal systems via the aggregation of their content by the inter-state system. BUL breaks this aggregation into general types-- vertical, making reference to regional or domestic systems, and horizontal, referring to the connection with the international institutions and instruments.⁵⁷ BUL presents two possible causes for this aggregation, being either efficiency due to the inherent advantages of a system of norms based in the technical and practical experience of members of a sector, or the advocacy on behalf of the group for the acceptance and official adoption of their norms.⁵⁸

⁵³ GOLDSMITH & POSNER, *Infra* note 46.

⁵⁴ RATNER & SLAUGHTER identify 7 methodologies, RATNER & SLAUGHTER, “Symposium On Method In International Law: Appraising the Methods of International Law”, *American Journal of International Law*, vol. 93, no. 2, 1999; Variations New Haven School see: M. McDUGAL & W.M. REISMAN, *The International Law Essays: A Supplement to International Law in Contemporary Perspective*, Foundation Press:1988; International Law & Economics-J.L. DUNOFF & J.P. TRACHTMAN, “*Economic Analysis of International Law*”, *Yale Journal of International Law*. vol. 24, no.1, 1999; International Law, A.M. SLAUGHTER ET AL, “International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship”, *American Journal of International Law*, no. 92,1998

⁵⁵ Complete works of JANET KOVEN LEVIT: <http://www.law.utulsa.edu/facbib/134/>

⁵⁶ J. LEVIT, *Infra* Note 3, pp. 395.

⁵⁷ J. LEVIT, “The Dynamics of International Trade Finance Regulation: The Arrangement on Officially Supported Export Credits”, *Harvard International Law Journal*, vol. 45, 2004, pp. 119.

⁵⁸ J. LEVIT, “A Cosmopolitan View of Transnational Bottom-Up Lawmaking: The Case of Export Credit In-

36. In essence BUL refutes as false assumptions certain aspects of the classic study of the formation of international law, such as the state as the sole and primary actor in the policy formation process, and that it is a process orchestrated from the above by the political elite.⁵⁹ What BUL represents is the diffusion on a global level of the process of formation of law into multiple sources and overlapping processes that end in the creation of state level instruments.⁶⁰ The examples of BUL are not limited to official acts or diplomatic and political agreements as is the case in most of the classical study; it focuses on the daily practices of a myriad of transnational actors such as private individuals and specialized technocrats.⁶¹ It is imperative to note that the theory does not attempt to replace or substitute the classic process; in BUL's perspective they are processes that operate in tandem.⁶² What BUL describes is a reality where the state does not have the monopoly of the formation of law, but still plays an integral role in the policy formation process.⁶³

3. Case Study: Bern Union

37. BUL has been applied to the formation of legal instruments related to export subsidies, climate change, social corporate responsibility initiatives and letters of credit.⁶⁴ Taking export subsidies as an example, the investigation into the formation of what ended as part of the WTO Agreement on Subsidies and Countervailing Measures, started with a group of friends in a bar in Bern in 1934. This group, made up of export credit insurers, decided to share information on their claims experiences in the aim of establishing best practices.⁶⁵ With the passage of time this group formally constituted itself as the Bern Union.⁶⁶

38. With the global increase in the use of these financial instruments after World War II, the members used their half-yearly group meetings to continue sharing experiences and practices. They codified the obligations and guiding principles related to the conduct of members in the Union's General Understanding (General Understanding).⁶⁷ This General Understanding produced what BUL describes as a self-sufficient and self-executing legal community.⁶⁸ Thus the Union transformed from a simple commercial association into a regulatory entity, with the goal of mitigating abusive practices in the sector by members.

39. The principles of the General Understanding reflect the collective beliefs on how members should carry out their business, producing a regulatory matrix that translated the daily work experiences of the members into a set of technical rules.⁶⁹ But, it must be noted that as a private association the members are not legally bound to the principles, which at the same time do not produce rights.⁷⁰ Nevertheless,

surance", *Wayne Law Review*, vol. 51, 2006 pg. 1197; J. LEVIT, "Bottom-up Lawmaking Through Pluralist Lends: The ICC Banking Commission and the Transnational Regulation of Letters of Credit" *Emory Law Journal*. Vol. 57: 2008. Pg. 1153

⁵⁹ See discussion on Instrumentalism of political leaders, *Ibid*, pp. 13

⁶⁰ M. REISMAN, "The Democratization of Contemporary International Law-Making Processes and the Differences in Their Application", in WOLFRUM & ROBEN, *Developments of International Law in Treaty Making*, Springer, 2005. Pp. 16; J. Levit. *Infra* note 3, pp. 395

⁶¹ J. LEVIT, "A Bottom-up Approach to International Law: the Tale of Three Trade Finance Instruments", *Yale Journal of International Law*, vol. 30, 2005, pp. 178

⁶² *Ibidem*. pp. 173

⁶³ J. LEVIT, "A Cosmopolitan View of Transnational Bottom-Up Lawmaking: The Case of Export Credit Insurance", *Wayne Law Review*, vol. 51, 2006, pp. 1199

⁶⁴ J. LEVIT, "International Law Happens (Whether the Executive Likes It Or Not)", in R. Saba. *El Poder Ejecutivo*. Editores del Puerto, 2007.

⁶⁵ See current member list: http://www.berneunion.org.uk/bu_profiles.htm

⁶⁶ About Bern Union: History, <http://www.berneunion.org.uk/history.html>

⁶⁷ Bern Union Guiding Principles, <http://www.berneunion.org.uk/guiding-principles.html>

⁶⁸ J. LEVIT, *Infra* note 63, pp 2000

⁶⁹ J. LEVIT, *Infra* note 3, pp 401

⁷⁰ *Infra* note 67

although the General Understanding lacks the technical title of state level law, Levit's research has demonstrated that it functions in the same way.⁷¹ The members follow the established rules, incorporating them into their policies. When it happens that a member does not adhere to those rules, her research has shown that they are subject to informal sanctions within the context of the group, which in turn act as a control mechanism over possible infractions.⁷²

40. The effective control of the General Understanding of the Bern Union has resulted in the adoption of their content by formal state level institutions and agreements, such as the Organisation for Economic Co-operation and Development (OECD) and the World Trade Organization (WTO), thus following the process laid out by BUL. This example of content aggregation into formal legal instruments occurred via two general stages. First, the OECD incorporated the substantive rules, procedures and structure of the General Understanding into the Arrangement on Officially Supported Export Credits (Arrangement) in 1978.⁷³ At this juncture the content of the Understanding could continue to be defined as "soft" due to the fact that the OECD Arrangement was a gentlemen's agreement, although it received administrative support from the Secretariat of the OECD.⁷⁴ But for Levit and others it could be described as a norm that acted as if it was international law formed between states.⁷⁵

41. Following this, in 1994 the WTO Uruguay Round completed the path of the substantive rules to formal international law in the Agreement on Subsidies and Countervailing Measures (Agreement).⁷⁶ In this instance the content of the OECD Arrangement was incorporated into the WTO treaty, where it creates a legal provision that serves to ease or eliminate the violation of the Agreement if a Party can demonstrate that they operated in accordance with the parameters of:

"...an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement."⁷⁷

42. Hence, Levit's research has demonstrated that in various instances, such as the example of the WTO and the Bern Union, this style of private association can create norms that begin lacking the definition of formal state level law but that end up being adopted and strengthened by formal entities and agreements at the inter-state level. For this reason, this article applies the parameters of the theory of BUL to the associations in the PMSC industry to see if the private associations meet the requirements to be possible sources of regulatory norms in relation the sector.

V. The Application of Bottom-Up Lawmaking to the PMSC Sector

1. Initial Considerations

43. The previous section delineated three general phases of the formation process of law according to BUL: (1) the institutionalization of the group in order to share their experiences and best practi-

⁷¹ Following the definition of Art. 2, Vienna Convention on the Law of Treaties 1969.

⁷² J. LEVIT, *Infra* note 61, pp. 153-156

⁷³ *Ibid*, pp. 166-167. Examples. "notice and Match" and "transaction starting time"; Arrangement on Officially Supported Export Credits, Official Unclassified OECD Document TAD/PG(2009)6

⁷⁴ See J. LAJUGIE, "Soft Law Hard Results", *The Export Credit Arrangement 1978/1998: Achievements and Challenges*, OCDE, 1998, pp. 107; Art. 2. del TAD/PG(2009)6.

⁷⁵ J. LEVIT, *Infra* note 61, pp. 164-165; J. Ray, "The arrangement from the inside", *The Export Credit Arrangement 1978/1998: Achievements and Challenges*, OCDE, 1998.

⁷⁶ See WTO Gateway on Subsidies and Countervailing Measures. http://www.wto.org/english/tratop_e/scm_e/scm_e.htm

⁷⁷ *Ibidem*. Anexo I(k). Marrakech Agreement; Anexo 1^A y Art. 3, Agreement on Subsidies and Countervailing Measures; J. Levit. *Infra* note 61, pp. 165

ces; (2) the creation of substantive practice based rules that create a procedural system of interpretation and remedy over the behavior of the members; (3) the adoption of those internal norms into the sphere of classic state centric law. In order to prove if the associations of the PMSC sector meet the parameters of the theory, the underlying aspects of these phases must be identified and examined.

44. In the first instance the associations must represent an organization that is rightfully institutionalized as an entity with a mission that is clearly defined. Subsequently the institution must be comprised of a group of members that demonstrate a certain level of professional homogeneity, with a process by which the selection of new members is critically judged in relation to having the same characteristics. This process of control and inspection prior to approval of new members creates a style of private “club” amongst this homogenous group as it is closed to the masses.⁷⁸

45. Secondly, the homogenous group must share perspectives and practical professional experiences that guide the formation of an internal norm structure that regulates the behavior of the members within the professional field. BUL establishes that in order for this system to function, it must also contain judicial procedures and capacities to act as an adjudicator between members. Within this system repeated interaction of the members’ acts as a motivating force that produces incentives for members to follow the norms.

46. The following analysis examines to what degree the IPOA and the BAPSC meet these aspects of BUL. It begins looking to prove that the organizations meet the criteria of institutionalization. From there the level of homogeneity amongst the members and the existence of a selection process for potential members that maintains this level must be present. The article then examines the existence of established norms, which in accordance with BUL must be tools for internal regulation of the activities of the members, based in the day-to-day experiences and expertise emanating from the daily participation in the sector. The analysis must also prove if these institutions contain a judicial and adjudicative system amongst the members. Given the fact that a precept of BUL is the aggregation of the content of the normative system of the association efficiency, and BUL espouses this to repeated interaction, the analysis also looks to prove if this exists amongst the members.

2. Institutionalization

47. The process that BUL describes begins with a homogenous private group brought together by common practices in their professional sector. In a determinate moment the group constitutes into a formal institution, expressed in statutes where specific aims and purpose are contemplated.⁷⁹ In order to prove the institutionalization of the two associations in question, when they were created, their structure, and mission within their statutes must be identified.

A) IPOA

48. The IPOA is a trade association headquartered in Washington. It is a nongovernmental not-for-profit organization that is non-partisan.⁸⁰ The starting point for its formation came from the ideas of a

⁷⁸ See KEOHANE & NYE, “The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy”, in Porter et al. *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium*, Brookings Institution Press, 2001

⁷⁹ For an opinion on the moment and cause of institutionalization, see: D. SNIDAL, “Political Economy and International Institutions”, *International Review of Law and Economy*, vol. 16. no. 1, 1996; KEOHANE & MARTIN, “The Promise of Institutional Theory”, *International Security*, vol. 20, no.1, 1995; KRATOCHWIL & RUGGIE, “International Organization: A State of the Art on the Art of the State”, *International Organizations*, vol. 40 no. 4, 1986.

⁸⁰ “Endorsing Association” Iraqi Development Program, “Endorsing Association”, <http://www.iraqdevelopmentprogram.org>.

group of individuals of the non-governmental, academic, business and legal sectors who worked in conflict zones and recognized the benefits that the private sector brings to the victims of conflict and people that live in post-conflict areas. In Sierra Leon in the 90s the group wrote a document outlining the best practices on how private business could be utilized in areas of conflict and reconstruction, with a strong belief in the ethical and economic efficiency of the sector.⁸¹ When the association was founded in April of 2001, this document acted as a base for the ethical foundation of the organization, today embodied in its Code of Conduct (CoC).⁸²

49. The mission of the IPOA is to promote high operational and ethical standards in the companies active in the sector that they define as the “peace and stability industry.”⁸³ The organization looks to create and take part in constructive conversations on the positive and growing contribution of the companies in the sector in the betterment of peace, development and security. The association also seeks to inform the greater public on the role and the activities of the industry.⁸⁴

B) BAPSC

50. The BAPSC was constituted in February of 2006. It is an independent commercial association, incorporated as private and limited organization under British law, headquartered in London. The association’s creation came from the realization on the part of a group of leaders in the private security sector in the UK that an urgent need existed to elevate operational standards and promote self-regulation of the sector.⁸⁵ The mission of the organization is to promote, augment and regulate the interest and activities of the companies based in the UK who are providers of armed security services outside of the country. The BAPSC also represents the interests of the members in topics that relate to legislative proposals and actual legislation.⁸⁶ The association’s mission and goal of self-regulation are embodied in the Charter.⁸⁷

C) Conclusion

51. In applying the terms of BUL in relation to institutionalization to the two associations, it is proven that both organizations began with the interest of actors in the sector. The homogeneity in the founding group of the BAPSC is highlighted by the fact that they were private businesses in the sector that initiated the process of institutionalization. In the case of the IPOA, the base document created before institutionalization also counted with the support of members of the industry, although it came from a more diverse group of professionals. But, as the actual institutionalization of the association counted with the support of companies in the sector, it too fits the requirements of BUL. The analysis also demonstrates that the two institutions are formal private entities, and both share a mission of promoting best practices in the PMSC sector, embodied in their respective CoC or Charter.

2. Members and Homogeneity

52. A key part to the BUL process is the homogeneity of the members of the group of practitioners.⁸⁸ This professional homogeneity, where for example the members auto identify themselves as belonging to the same sector, produces a critical mass of practical information and procedures gained

⁸¹ See IPOA, History of the Code of Conduct, <http://www.ipoaworld.org/eng/codeofconducthistory.html>

⁸² IPOA, About Us: History en <http://ipoaonline.org>

⁸³ IPOA, About IPOA, <http://www.ipoaworld.org/eng/aboutipoa.html>

⁸⁴ Ibid

⁸⁵ BAPSC, About Us, <http://www.bapsc.org.uk>

⁸⁶ BAPSC, Key Documents: Charter en <http://www.bapsc.org.uk>

⁸⁷ Ibid.

⁸⁸ ELLICKSON examines this phenomena in close knit groups and social norms. R. ELLICKSON, *Order Without Law*, Harvard University Press, 1991

from real experiences in the sector. It results in a general normative perception that is shared amongst the preferences of the group.⁸⁹ Within each association the resources and practical experiences of the members act as a common core, not only in creating a systems of rules for the association based in practice, but also built on shared beliefs on a common objective, in this case the regulation of the PMSC sector.⁹⁰ BUL also establishes that amongst the common attributes of the members, aside from emanating from the same sector, they must be private actors, not representatives of States.⁹¹

53. BUL dictates that the group homogeneity plays a role in the process of selection of new members, producing an institution with a configuration and aspects of a private “club.”⁹² By acting in a manner similar to a private club, this group of practitioners restricts access in a selective manner in accordance with internally established standards.⁹³ Within the closed “club” atmosphere the reputation of the members becomes an important mechanism of control in mitigating deviation from the substantive norms in place amongst the group.⁹⁴

54. In relation to the associations in the PMSC sector, the research in the application of BUL must therefore show that the members of the associations in question are private actors who emanate from the same professional industry. It must also determine that the groups have established parameters in place for the admittance of new members, of which a fundamental obligation is that they come from the same sector. The creation of a closed “club”-like group will exist if the members share common interest originating from the necessities and obligations of the sector, and the inaccessibility of people who do not meet the requirements of admission to the established institution.

A) IPOA

a) Homogeneous Group

55. The IPOA has more than 60 members, made up of professional companies from the “contingency contractor” sector connected to stability and peace missions.⁹⁵ The IPOA breaks its members down into three industry categories: Logistics & Support Companies, Private Security Companies and Security Sector Reform and Development Companies.⁹⁶ These categories divide the members into two general categories of organizations whose primary commercial endeavor is either as a service provider or as a manufacturer.⁹⁷ Thus, although the member companies of the IPOA provide various services with the diverse PMSC industry, where some provide services in more than one of the categories, all emanate from the same professional industry and act under contract in post-conflict and conflict zones. The testimonies of some members attest to the homogeneity by auto identifying the association as “a coalition of companies from the sector.”⁹⁸ The homogeneity of the members of the IPOA is accentuated by the

⁸⁹ For example, the groups in the financial sector in LEVIT’S investigations accept the fundamental tenets of free trade in the context of open markets.

⁹⁰ For discussion of the autonomy of the three groups in LEVIT’S research see infra note 61, pp. 167.

⁹¹ Group members can be state employees, but their interactions in the context of the group must be as private individuals, not state representatives.

⁹² For an explication of the Club Model see: KEOHANE & NYE, “The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy”, in PORTER ET AL, *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium*, Brookings Institution Press, 2001

⁹³ The fact that the profession sectors usually have a common technical language also contributes to making them less accessible to the outsiders, thus reinforcing the club like characteristics.

⁹⁴ J. LEVIT, Infra note 61, pp. 185

⁹⁵ List of full members: <http://www.ipoaworld.org/eng/ipoamembers.html>.

⁹⁶ D. BROOKS, *Presentation: The Role of the Peace and Stability Industry in Peace Operations*, The Humanitarian Development Summit, Oct. 2006, pp. 8; D. BROOKS, *IPOA Presentation*, Iraq Defence, Security & Communications Summit, Iraq Development Program, Dubai: Feb 2008, pp. 4

⁹⁷ Levels of Corporate Membership. IPOA. <http://www.ipoaworld.org/eng/levelsofmembership.html>

⁹⁸ IPOA Membership: For Perspective Corporate Members: Member Testimonials: Blackwater USA,

fact that they have members active in all of the ongoing peace and stability operations in the world.⁹⁹ Additionally members represent a large section of the industry from various countries in the world.¹⁰⁰

b) Membership Selection Process

56. The process to become a member of the IPOA is not automatic.¹⁰¹ The association admits new members based on an application and acceptance process, where standards are taken very seriously. Member companies are determined to allow only the most ethical and professional companies into the Association.¹⁰² The process begins with a simple, but formal, application that contains general company information and attests to their willingness to adhere to the organizations CoC.¹⁰³ This information is submitted to the IPOA along with past performance information. From that point the company is subject to a series of interviews and a due diligence process by the Membership and Finance Committee.¹⁰⁴ From the time that the due diligence process is complete, the Committee completes its own investigation of the potential member company. The applicant company is then notified as to whether their application has been successful. Upon acceptance, all new companies serve a mandatory six-month probationary period during which time they are allowed to participate in IPOA Committees but are not permitted to vote.¹⁰⁵

B) BAPSC

a) Homogenous Group

57. Membership to the BAPSC is limited to security companies based in the UK who provide overseas armed security services.¹⁰⁶ According to the BAPSC Charter, “armed services” is defined as any service that involves the recruitment, training, equipping, co-ordination, or employment, directly or indirectly of persons who bear lethal arms.¹⁰⁷ This includes armed protective services, specialist consulting services and security training services. Under this definition, the members of the BAPSC would fall into the IPOA general definition of “PSC”, using the same definition and criteria but explicitly incorporating the necessity of lethal weapons.¹⁰⁸ Aside from the geographic requirements, and that of a service that contemplates lethal weaponry, the BAPSC also limits the acceptance of complete membership to those companies willing and capable of demonstrating best practices and a commitment to maintain the standards of the organization.¹⁰⁹ The capacity and willingness of the company to do so is verified through the membership application documentation examined in more detail below.

58. The homogeneity of the BAPSC members is not only interesting in terms of the organization itself, but also in terms of the industry on a whole. Of the almost 20 current members of the BAPSC,

www.ipoaonline.org. It must be noted that as of 12 Oct 2007, Blackwater is ceased to be a member of the IPOA. http://www.ipoaonline.org/php/index.php?option=com_content&task=view&id=156

⁹⁹ IPOA Annual Report: 2006-2007, pp. 8

¹⁰⁰ Ibid, pp. 21

¹⁰¹ Ibid

¹⁰² IPOA: How the application process works, <http://www.ipoaworld.org/eng/applicationprocess.html>

¹⁰³ See IPOA Online application. <http://www.ipoaworld.org/eng/applicationonline.html>

¹⁰⁴ In 2005 this committee passed to the hands of the members, who from that point have carried out the process of admitting new members. The Committee is comprised of member companies who elect a Committee President in six-month rotations. See IPOA Annual Report: 2006-2007, pp. 18

¹⁰⁵ Step 6. IPOA Membership Process. <http://www.ipoaworld.org/eng/applicationprocess.html>

¹⁰⁶ BAPSC, Membership: <http://www.bapsc.org.uk/membership.asp>

¹⁰⁷ BAPSC, Charter, http://www.bapsc.org.uk/key_documents-charter.asp

¹⁰⁸ For companies with in the professional sector who do not fit the requirements to be official members, they can solicit to become associate members of the BAPSC.

¹⁰⁹ BAPSC Self-Assessment Workbook, V.2.2. pp. ii , Membership: Membership Criteria. <http://www.bapsc.org.uk>

several coincide in membership with the IPOA.¹¹⁰ Thus further proving the homogeneity of the members as a part of a larger professional sector.

b) Membership Selection Process

59. The companies that meet the aforementioned requirements must petition to become members of the BAPSC, and are subject to the obligations that membership entails including the guiding principles of the Charter of the organization.¹¹¹ The BAPSC has two types of members—Provisional and Complete. The membership selection process is based on: the formal membership application form, Basic Checks, more detailed Due Diligence Documentation and the completion and revision by elected members of the BAPSC of a Self Assessment Workbook.¹¹²

60. The membership approval process is comprised of three phases, beginning with the demonstration of interest from the company. The company becomes a “Provisional Member” after it has demonstrated such interest and has been approved to continue in the membership process, submitting the required documentation. The Provisional Members are subject to the association’s Charter and benefit from membership privileges.¹¹³ After the formal application and additional documentation have been submitted, they are examined by the Membership Committee chaired by the Director General of the BAPSC and including executive members who are elected by the General Assembly.¹¹⁴ Full Membership status is granted to the applicant company upon the final approval of the Committee, where the opportunity to appeal does exist if the application is denied.¹¹⁵

C) Conclusion

61. The investigation into the homogeneity of the two associations in question demonstrates that they meet the requirements established by BUL. Although the BAPSC and the IPOA place distinct parameters on the types of PMSC that can apply to become members, both associations are comprised of homogenous members from the same general industry. The fact that there is an overlap between the lists of members further proves the point. Additionally, these groups of private actors limit the access of new members through the membership application and approval process. During which the degree to which the applicant company meets the established membership requirements is tested. And the parameters must be met in order to allow them to share the title of member with the preexisting members. The incorporation of members into the decision making process on new members, combined with the fact that the application process is rigorous, it can be seen how the process reinforces the “club” like parameters of the group as defined by BUL, where new members are accepted in accordance with specific criteria relating to the industry in general.

3. Norm Creation and Internal-Regulation

A) Initial Considerations

62. Upon being institutionalized, BUL establishes that the organizations must act as more than a professional association that members use as a forum to disseminate technical abilities. To meet the requirements of BUL the association must also actively regulate its members operations, dictating rules

¹¹⁰ See lists of full members at http://www.bapsc.org.uk/membership-list_of_members.asp & <http://www.ipoaworld.org/eng/ipoamembers.html>

¹¹¹ See BAPSC General Membership Information <http://www.bapsc.org.uk>

¹¹² See BAOSC General Membership Criteria and related documentation at http://www.bapsc.org.uk/key_documents-membership_criteria.asp

¹¹³ BAPSC Self-Assessment Workbook. BAPSC. July 2007, pp. iv.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

on conduct.¹¹⁶ BUL prescribes that the group create a normative system of rules relating to the sector, the contents of which emanate from the practical experience gained from daily professional endeavors of the members. These substantive norms and standards reflect general aspect of the industry, the professional practices and the expertise of the members. In essence it is the codification of practice-based rules that prescribe specific technical norms on the professional activities of the members.¹¹⁷ The practitioners, whose daily participation in the sector provides an understanding of the technical details of the industry, create, interpret and enforce observance, that in turn govern said practices.¹¹⁸ These rules normally take the form of a CoC that the group uses as a barometer for other members.

63. Aside from the creation of the internal norms, BUL requires the establishment of procedures relating to the periodic revision, and where necessary alteration, of the norms. The goal of which is to maintain the corpus of rules as a living document that is pertinent to the sector and the members. Thus the evolution of the norms and innovation in the standards is assured to always be relative to the opportune problems facing the group as a whole. The capacity to reform the internally produced norms is especially important due to the fact that the institutionalization of the organization can add inertia to the substantive rules, increasing the risk that they lose relevance to the practices of the members.¹¹⁹

64. Thus, the application of BUL must begin by proving that these norms exist and that their origin is the daily practice of the members within the professional sector of the PMSC. It must analyze the enunciation of specific standards to follow and the goal of the CoC, being tools of a system of internal regulation of the members. In order to prove the capacity of the norms to regulate the members, the commitment the members make to follow the rules must be identifiable along with the mechanisms to monitor their compliance. Lastly, the analysis must demonstrate that periodic revision mechanisms on those norms exist.

B) IPOA

65. The substantive normative rules of the IPOA are embodied in its CoC that was first adopted in April of 2001 and in February of 2009 advanced to its twelfth version.¹²⁰ As is well explained in its preamble, the CoC of the IPOA seeks to ensure the ethical standards of IPOA member companies operating in conflict and post-conflict environments so that they may contribute their valuable services for the benefit of international peace and human security.¹²¹ The latest CoC contains eleven articles related to the practices of the members, dealing with topics such as: human rights, transparency, responsibility, clients, employees and contract styles.

66. The IPOA is committed to ensuring that the CoC and its monitoring mechanisms maintain their relevance and effective capacity. The Standards Committee, comprised of volunteers from the member companies, is the axis of the maintenance, revision and vigilance of the proper application of the CoC amongst the members. It is within this committee that the members discuss compliance and promote consensus on best practices.¹²²

67. In order to ensure the relevance and contemporaneous, the Committee engages in a yearly simulation with case studies that represent pertinent and actual situations. After open discussion between members on the CoC's application in those instances and possible solutions, the Committee invites

¹¹⁶ For a discussion of this in relation to the OCDE see: J. Levit. *Infra note 57*, pp. 77-82.; in relation to the Bern Union: J. LEVIT, *Infra note 61*. Pp. 149

¹¹⁷ J. LEVIT, *Infra note 63*, pp. 1197; J. LEVIT, *Infra note 61*, pp. 149-151

¹¹⁸ J. LEVIT, *Infra note 63*, pp. 1199

¹¹⁹ J. LEVIT, *Infra note 61*, pp. 171

¹²⁰ International Peace Operations Association: Code of Conduct: Version 12. <http://ipoaworld.org>

¹²¹ *Ibid*

¹²² IPOA Annual Report: 2006-2007, pp. 17

members of other interested communities (such as human rights groups) to opine on the simulation and offer suggestion on how to improve the CoC.¹²³

68. The organization also ensures the relevance of the CoC through an established review and reform process. The CoC is reviewed every two years where if changes are deemed necessary, the internal norms of the organization dictate the necessity of a vote of two-thirds majority of the members to replace the prior version.¹²⁴ The IPOA not only accepts suggestions from members, but also opens the forum to the public during a limited time period. Although the public may make suggestions on possible modifications to the CoC, they are still subject to the aforementioned discussion and debate by members. That said, the IPOA strives to maintain the brevity of the CoC, to around two to three pages in general terms, in order to ensure its applicability, which would be difficult with a highly specified document due to the variations in the services and operating structures of the members within the PMSC industry.¹²⁵

B) BAPSC

69. The Charter of the BAPSC contains the base elements that could evolve into a more formal CoC acting as the central focal point of the internal norms of the organization. The Charter of the association dictates that the members completely accept and abide by the general obligations set forth in international, humanitarian and human rights law, the ethical codes of practice of the Association, and the aims and objectives of the Charter without reservation.¹²⁶ Combined with these commitments the Charter contains ten individual principles under which the members make a commitment to be governed. The particular commitments include amongst other things: providing services based on defensive principals, properly training and equipping staff, and to avoid contracts that violate the law or infringe on political stability.¹²⁷

70. The BAPSC strives to have its formal CoC ready in the near future. Its Standards Committee has been working with the British Standards Institute on the development of a normative document. The process has presented itself to be a bit slower than originally projected, due to the fact that the association is looking to maximize the efficiency of the document, taking the opinions and commentaries of the members into account.¹²⁸ A base document exists and deals with topics such as: recruitment, training, health and security of employees, insurance and accounting. Possible additional elements are under discussion, such as environmental factors.¹²⁹

C) Conclusion

71. The analysis thus proves that the substantive rule for internal regulation exists in both associations. In the case of the IPOA they are solidified in the CoC, where the BAPSC uses its Charter while the final CoC is being perfected. In both cases the substantive content comes from, and regulates, the operations of the members, and all members pledge to follow the parameters established there within. The monitoring of compliance is more evident in the case of the IPOA, in part due to the fact that the institution has a longer track record. This is similarly reflected in the norm modification process.

4. Judicial Procedure and the Role as Adjudicator

A) Initial Considerations

¹²³ Process explained in an interview with the President of the IPOA and the author.

¹²⁴ IPOA Standards & Laws: Codes of Conduct: Public Consultation, www.ipoaonline.org

¹²⁵ Infra note 123.

¹²⁶ BAPSC. Key Documents: Charter. http://www.bapsc.org.uk/key_documents-charter.asp

¹²⁷ Ibid.

¹²⁸ Opinion expressed by the Policy Director of the BAPSC in an interview with the author.

¹²⁹ Ibid.

72. Aside from the substantive rules established by the group, BUL also requires that a process exists for their interpretation. In this way when a member has a doubt or question in relation to the application or the meaning of an internal norm, the group has the required mechanisms to answer established. In these instance the organization takes an advisory position on the interpretation of the rules, a quasi-judicial position in the words of Levit.¹³⁰ This is carried out by issuing opinions and policy declarations.

73. BUL also establishes that aside from the advisory position, BUL also dictates that system be self-executing, where those who make the substantive law also interpret and enforce them.¹³¹ In this position as adjudicator members who have a dispute in relation to the rules may turn to the association for its mediation or resolution. Thus the system of substantive internal norms is elevated to become a “closed” system due to the fact that members do not need to turn to an external entity to resolve disputes related to the internal norms.

74. Hence, the investigation into the application of BUL to the IPOA and the BAPSC must examine if the associations take the position of interpreter and/or advisor for the members when a doubt or dispute exists on the internal norms. The organization must also have established steps to mediate and deflate these disputes.

B) IPOA

75. The role as an adjudicator of the IPOA is well established by the internal norms, embodied in the Enforcement Mechanisms of the Standards Committee.¹³² This mechanism is activated when the organization receives a complaint related to one of the member companies and their compliance with the CoC of the association.¹³³ The Committee meets quarterly to review the placed complaints. With each complaint the Committee opens an ad hoc task force to review the content and the relevance to the CoC and that is it not specious.¹³⁴ In order to ensure impartiality, no member of the task force can be affiliated with the subject of the complaint.¹³⁵ The group has thirty days to complete its investigation into the complaint.¹³⁶ After that point they may opt to either refer the complaint to the Committee as a whole if it has merit, or dismiss it.¹³⁷

76. If the complaint is directed to the Committee, they may rule to impose corrective measures and sanctions or dismiss the complaint.¹³⁸ The norms of the IPOA establish that the corrective measures prescribed by the Committee can include actions that alleviate the violation of the CoC, but may not be punitive in nature.¹³⁹ The sanctions can include decided disciplinary actions, with the most severe being expulsion from the association.¹⁴⁰

77. To date, the IPOA has received less than twelve complaints against its members.¹⁴¹ Given the frequency of global operations of the members, the experience of the IPOA has been that the work of the Standards Committee is more as an agent that identifies situations where noncompliance with the CoC

¹³⁰ J. LEVIT, *Infra* note 61, pp. 171

¹³¹ *Ibid*, pp. 172.

¹³² IPOA Enforcement Mechanism v.1. <http://www.ipoaworld.org/eng/enforcementv01eng.html>

¹³³ It should be noted that the complaint process is open to members and the public in accordance with Art. 2.1 of the Mechanism. One can easily lodge a complaint via a dedicated section of the IPOA website. The association takes the complaints that come from the public with the same level of seriousness as those from other members.

¹³⁴ Art. 3.1 *infra* note 132.

¹³⁵ Art. 3.2.1 *infra* note 132.

¹³⁶ Art. 3.3 *infra* note 132.

¹³⁷ Art. 3.4, 3.5 & 3.8 *infra* note 132.

¹³⁸ Art. 4.2.4 *infra* note 132.

¹³⁹ Art. 5.4 & 5.5 *infra* note 132.

¹⁴⁰ Art. 5.6-5.10 *infra* note 132.

¹⁴¹ *Infra* note 123.

could exist. The experience of the IPOA has been that the member companies are more than disposed to attend to and rectify an issue in the moment that the Committee informs them of a possible problem.¹⁴² It is important to note that just as the CoC, the Control Mechanism originates in the internal norms of the IPOA and thus is not legally binding outside of the group. Due to the fact that the association lacks the characteristics of a judicial entity in international or domestic legal terms, the processes carried out by the Committee do not presuppose to prove innocence or guilt of the members in criminal or civil terms.¹⁴³

78. Aside from its role as an adjudicator in relation to the internal norms of the association, the IPOA is very active in issuing opinions and policy papers. The association not only publishes policy opinions, but also acts as a spokesperson for the members and as a representative of its interests in relation to interested government bodies. The IPOA further meets the advisory requirements of BUL by publishing research reports on legal issues that may affect its members. The Journal of International Peace Operations and the Peace Operations Institute (POI) carry out part of this research. Founded in 2006, the POI focuses on research, analysis and the promotion of discourse and dialogue on key subjects related to the industry.¹⁴⁴ The aim of the POI is to present the challenges the sector faces within its operations and then make recommendations on effective remedies to those evolving challenges.¹⁴⁵

C) BAPSC

79. The BAPSC sees its role as an adjudicator of self-regulation and advisor to its members in three spheres: the standards established in the Charter, the eventual CoC and the training and advice they offer members in relation to the application of international law to members' operations. For the moment the association may lack the capacity to be considered a "quasi-judicial" entity in terms of BUL. But, while the official CoC is being completed, the role of the BAPSC in relation to the violations of the Charter centers in the notification of members of a complaint, and ongoing communication with that member in order to reach a rectification of the situation if need be. The association has several tools available that include exercising pressure on members, imposing monetary sanctions, and or the suspension or limitation of the member's rights.¹⁴⁶

80. The BAPSC notes that its members take the complaint process seriously, because it relates to the quality of their business, something they want to function well.¹⁴⁷ At the same time the organization recognizes two impediments in realizing this function. First, due to the fact that a membership requirement is off-shore operations, the distance can hinder the investigation efforts in relation to possible violations of the Charter.¹⁴⁸ Secondly, the BAPSC is not privy to the details of the contracts signed between its members and their clients, where they must request the utmost transparency on behalf of the members.

81. In relation to its role as the interpreter and advisor on legal issues, the BAPSC sees its position as essential to its members. This is due to the fact that members may very well be familiar with the corpus of applicable international law, but from the standpoint of a different legal subject, i.e. as a member of the armed forces of a state, not a private contractor. For that reason the association promotes training

¹⁴² Ibid.

¹⁴³ Preamble Control Mechanism, Standards & Laws: Enforcement Mechanism, www.ipoaonline.org; The subordination of the internal system is also demonstrated in the fact that they suspend the process in the case that a civil or criminal case begins on the same subject.

¹⁴⁴ Peace Operations Institute. About Us. <http://peaceops.org>

¹⁴⁵ See By Laws Peace Operations Institute. <http://peaceops.org>

¹⁴⁶ BEARPARK & SCHULZ, "The Regulation of the Private Security Industry and the Future of the Market", in S. CHESTERMAN & C. LEHNARDT. *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*. Oxford University Press, 2007, pp. 248; Sanctions Section 9. Charter BAPSC.

¹⁴⁷ Infra note 128.

¹⁴⁸ Infra note 146.

and consultations for members in relation to their obligations and responsibilities as a private actor.¹⁴⁹ This training can take the form of an obligation under Art. 2 of the Charter that requires that employees be trained to the standards commensurate with each assignment and in accordance with applicable laws of the appropriate country.¹⁵⁰

82. The BAPSC also dictates policy papers and opinions as part of its functions. Their works focus on the topics related to the services and interest of the members as well as the regulation of the sector on a whole. The organization also disseminates works of other institutions that it feels are of particular interest to its members.¹⁵¹

D) Conclusion

83. Thus it is shown that the IPOA has a strong role as both an adjudicator and advisor to its members. It has also been demonstrated that due to the young nature of the BAPSC, it does not strictly meet all of the parameters established by BUL at this time. It does play a strong current role as an advisory, especially on the application of legal issues to the members operations. As the Charter of the organization acts as a guide and establishes the general guidelines for members to follow, one can assume that the specific details of the finalized CoC will follow that general path and that the BAPSC will meet the requirements of the aspects of BUL as an adjudicator.

5. Group Interaction and Norm Compliance

84. Under the theory of BUL the members of the private institutionalized groups meet frequently, not only at events specifically related to the group, but also in other forums related to the industry. This repeated interaction serves to reinforce the fraternity within the group, and simultaneously creates direct implications on the behavior of the group members and their norm compliance. It specifically serves to accentuate reputation as an ordering force amongst the members, as repeated interaction elevates the desire to preserve a high standing amongst the group and in turn a lower likelihood to deviate from internal institutional norm compliance.¹⁵² Within a small closed group environment, mechanisms such as hallway gossip and public shaming are effective in dissuading members from violating established internal norms of the group.¹⁵³ Reputation thus becomes a commodity of the utmost worth for the members, where the risk of damage to that reputation serves to maintain the compliance of the members with the norms of the organization.¹⁵⁴ Thus although the association assume the good faith of the companies in following the internal norms, the role of the reputation plays a factor that means that it is in the actors best interest to follow the norms as they have more to lose than gain from not.

85. Due to length limitations an in-depth analysis of the patterns and frequency of the interaction of the members of the IPOA and BAPSC falls outside of the scope of this article. Suffice to say that in terms of the application of BUL to the two institutions that the formal and informal interaction of the members is high. Both organizations take active roles in organizing professional conferences and working sessions, ranging from breakfast meetings to large scale multi-day conferences.¹⁵⁵ There is also substantial data that proves interaction on a more social level amongst members through events that are planned within the auspices of the events of the organizations as well as on the individual impetus mem-

¹⁴⁹ Ibid.

¹⁵⁰ Art. 2, Charter BAPSC, http://www.bapsc.org.uk/key_documents-charter.asp

¹⁵¹ Key Documents, <http://www.bapsc.org.uk>

¹⁵² J. LEVIT, *Infra* note 61, pp. 185

¹⁵³ J. LEVIT, *Infra* note 61, pp. 156; L. Bernstein. "Private Commercial Law in the Cotton Industry". *Michigan Law Review*, vol. 99, no.7, 2001. pp. 1745-1762

¹⁵⁴ J. LEVIT, *Infra* note 61, pp. 172

¹⁵⁵ For more information see the dedicated events calendar microsites: IPOA- <http://www.ipoworld.org/eng/calendar.html>; BAPSC- <http://www.bapsc.org.uk/events.asp>

bers. In relation to the application of BUL in this investigation, the general findings of more in depth research have proven that both the IPOA and the BAPSC foment not only the interaction of the members within the forum of the association, but that there also exists a high level of interfertilization amongst the members beyond the organized association events. Thus, the factors that BUL has outlined as motivators for norm compliance based on reputation effects of repeated interaction are met.¹⁵⁶

6. Conclusion

86. The analysis of the application of BUL to the IPOA and BAPSC proves that the two institutions meet the requirements established by the theory. They are organization that have legally institutionalized with a concrete mission and vision that seek to better the standards in the PMSC sector. Following the parameters of BUL, both associations have a corpus of members that demonstrate professional homogeneity and carry out specific admission processes to maintain this professional profile.

87. The investigation has further demonstrated that IPOA and the BAPSC function on the basis of substantive internal rules, which are organic norms based in and emanating from the daily practices of the members. These norms reflect and simultaneously condition the behavior of the members. The extent to which this is possible is more evident in the CoC of the IPOA, where the BAPSC uses its Charter while the full CoC is finalized.

88. The research has shown that in accordance with BUL these internal norm based systems also establish the procedural measures and remedies, with the possibility of modification, creating a private quasi-judicial system within the organization in part due to the dispute and sanctioning elements to monitor compliance. The system of the creation, interpretation, application of the norms of the internal regulatory system describes the creation of a private legal community. The systems that BUL describes as applicable to the associations in question are self-sufficient and self-executing, remaining separate from the state system. The application of the internal norms remains an intra-community issue, where order and compliance are reinforced due in part to the consequences in reputation for a member who violates the norms.¹⁵⁷

VI. Aggregation to the State Level

1. Initial Considerations

89. The analysis has thus forth demonstrated that the IPOA and BAPSC meet the basic institutional parameters established by BUL. One can now turn to the subsequent phase of the theory and examine their potential as institutions that act as sources of regulatory content at a state and interstate level. In this context BUL proposes that in the course of being utilized by these organizations, the internal institutional norms frequently take the form of more formal binding regulation within a type of state level law.¹⁵⁸ Thus the subsequent phase that BUL describes is a process where the norms filter from the informal to the formal; a conversion where the norms becoming effectively binding through a state sponsored instrument. This can occur when the norms harden into law at the state level, be it in domestic or international instruments. BUL describes two general ways in which this content aggregation occurs. Horizontal aggregation describes a link to international instruments and institutions, such as the World Bank, the United Nations or the WTO.¹⁵⁹ The vertical aggregation describes linkages to regional and domestic systems.¹⁶⁰

¹⁵⁶ J. LEVIT, *Infra* note 61, pp. 156.

¹⁵⁷ J. LEVIT, *Infra* note 63, pp. 1199-1200.

¹⁵⁸ J. LEVIT, *Infra* note 61, pp. 172-3.

¹⁵⁹ J. LEVIT, *Infra* note 57, pp. 119-121.

¹⁶⁰ *Ibid* pp. 122-124.

90. BUL describes the efficiency of the internal norms as a big attribute for their transition to the state level. It could be described as a comparative advantage founded in the fact that the norms emanate from the sector. Due to this fact it can then be argued that the practitioners better understand their sector than the organs of the state, and can thus more effectively formulate and apply norms and sanctions focused in relevant issues. The comparative advantage can also be found in the fact that the track record of norm compliance within the private community can be evaluated *ex ante* by the state in order to test and identify the most effective mechanisms.

91. The aggregation then results in two main advantages. First, it creates a *de facto* sanction regime that increases the penalty for norm violating behavior.¹⁶¹ Thus the gravest violation can be met with more far reaching repercussions than expulsion from the association. Secondly the aggregation to the state level expands the applicability of the norms to cover more than only the initial association members.¹⁶²

92. Thus the final section of the investigation will examine this last phase of BUL and the aggregation of the internal norms of the IPOA and the BAPSC to the state level. The research looks to prove if the internal norms of the two associations examined complete the cycle of BUL. The affirmation of this will be demonstrated by the appropriation of the content of the internal norms into on the state level instruments.

The investigation has focused on three processes of the formation of law in the attempt to prove if the process of BUL in relation to the internal norms of the association can be applied. In these instances it must be demonstrated that the norms of the associations have acted as either a base catalyst or a standard of reference in the policy formation process, or that the organization have taken the role of iterative or inspirational muse in the flow of the content to either nonbinding international agreements, international or domestic law in relation to the regulation of the PMSC sector.

2. Montreux Document

93. In 2006 the Swiss government in collaboration with the International Committee of the Red Cross began “the Swiss Initiative” in relation to international law applicable to the PMSC sector and the promotion of best practices in situations of armed conflict. After a series of intergovernmental meetings between January of 2006 and September 2008, the process terminated in consensus on the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict (Montreux Document).¹⁶³ The Montreux Document was distributed as a General Assembly document in the United Nations in October of 2008.¹⁶⁴ Although the document is legally non-binding in relation to the existent international obligations and best practices of PMSC operations, to date, thirty-four states have notified the Swiss government of their support for the document.¹⁶⁵

A) Aggregation of Topic

94. In analyzing the Montreux Document for the aggregation of concepts of the internal norms of the IPOA and the BAPSC, one must first take into consideration that although the internal norm sys-

¹⁶¹ Ibid pp. 125.

¹⁶² Ibid pp. 126.

¹⁶³ The Montreux Document on Private Military and Security Companies, Federal Department of Foreign Affairs, Government of Switzerland. <http://www.eda.admin.ch/psc>

¹⁶⁴ “Letter dated 2 Oct 2008 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary-General”, A/63/467-S/2008/636, 6 Oct 2008.

¹⁶⁵ See full list of participating states as 28 Oct 2009, Federal Department of Foreign Affairs. Government of Switzerland. <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/psc/parsta.html>

tems of the associations and the document treat the same PMSC sector, the subjects are distinct. The associations deal with the company, whereas the Montreux Document deals with states.¹⁶⁶ Therefore, the difference in the subject obviously results in few verbatim appropriations from the CoC of the IPOA and the Charter of the BAPSC into the document. But the content aggregation on the part of the state officials is evident in an analysis of the Montreux Document by topic.

95. In the examination by concept of the aggregation of the internal norms of the IPOA and the BAPSC, there appear nine topics that demonstrate concordance. Although length limitations of this article affect the depth in which each of these topics can be examined, one can take as general examples the common treatment in a global sense between the Montreux Document, the CoC of the IPOA and the Charter of the BAPSC of issue such as humanitarian and human rights, combined with the respect of national laws.¹⁶⁷ The documents also simultaneously attend to issues related to labor laws, the establishment of rules in relation to the use of force and its use in defensive modes.¹⁶⁸

96. The analysis also reveals various analogous topics between the CoC of the IPOA and the Document of Montreux, where both positively specify the parameters for the course of action necessary to remedy illicit acts, the need to vet and train employees, and the necessity to acquire licit arms through the correct channels.¹⁶⁹ The Charter of the BAPSC alludes to the same points, but they remain to be positively iterated in the final CoC of the association.

B) The Association as Muse

97. Having seen these common topics, what is more important in the analysis of the aggregation in terms of BUL in the Montreux Document is the role the associations took in the formation of the document. As Levit's investigations have proven

‘Bottom-up lawmaking is a normative march between communities, and moments of interface are endemic to its path. Yet, these moments are wrought with multifaceted complexity. As informal, practice-based norms permeate more formal, lawmaking communities, the iterative process produces positive synergies. On the one hand, informal rules and institutions spark jurisprudential creativity among official lawmaking institutions, enhancing the quality of deliberations on substantive issues as well as the effectiveness of ensuing legal rules.’¹⁷⁰

In this sense, BUL is a process that represent more than dialogue, but rather a strong normative interplay between actors.¹⁷¹

98. This interplay between communities is evident in the analysis on the formation of the Montreux Document.¹⁷² During the various meetings in the auspices of the initiative between 2006 and 2008 the PMSC industry was regularly consulted.¹⁷³ The IPOA and the BAPSC took part in these intergovernmental meetings.¹⁷⁴ They were present in the first steps of the initiative in the first day of the preliminary

¹⁶⁶ Infra note 164, Point 8.

¹⁶⁷ Montreux Document: 1.a.1-1.a.2, B9-10, C14-15, E.22, E.26(a), III.12; IPOA CoC Article 1.1; BAPSC Charter Para 3,4,8.

¹⁶⁸ Montreux Document: 6.b,6.c.10, 13, 18; IPOA CoC: 6.5,6.11,6.3,6.4,9.2.1,9.2.2, BAPSC Charter: Para 1.

¹⁶⁹ Montreux Document: 11.a,11.b,11.c; IPOA CoC:9.4.1,9.4.3.

¹⁷⁰ J. LEVIT, Infra note 4, pp. 1182.

¹⁷¹ Ibid, pp. 1183.

¹⁷² It must be noted that the meeting in relation to the formation of the Montreux Document were held behind closed doors. The analysis in this section is based in publicly available documents relating to the process and data and commentaries facilitated in interviews with the author.

¹⁷³ *Governments acknowledge duty to control private military and security companies*, ICRC Feature, 19 Sept 2008.

¹⁷⁴ The participation of the association was corroborated in interview with representatives of the associations, although it must be noted that at points some commentaries pointed to a desire for more involvement in the process. The official reports on the meetings reflect the presence of the association, using the definition of industry representatives or other experts.

workshops in 2006, where the intention was to give government representative the opportunity to dialogue and share experiences with industry representatives, where the representatives outlined the steps they were taking through the associations to promote best practices.¹⁷⁵ Amongst the topics presented were: the vetting procedures for employees, training in humanitarian and human rights, operating procedures, internal discipline systems and the refusal of contracts that could include illegal activity.¹⁷⁶ In this way the perspectives and opinions of the associations acted in a complementary and mutually reinforcing manner. Furthermore the associations were also present in the second meeting on the formation of the Montreux Document that took place in November of 2006, although in this instance with a reduced number of representatives while intergovernmental exchanges continued.¹⁷⁷

99. Posterior to this meeting, between October and December 2007 four expert consultations took place between the Swiss Government, the ICRC, the International Peace Institute (IPI) and the Geneva Center for the Democratic Control of Armed Forces (DCAF). The intention of these consultations was to bring together recommendations on improvements in the draft texts of the initiative. On the basis of these recommendations the final document was presented in the last intergovernmental meeting.¹⁷⁸ The presence of the associations in these consultations is demonstrated via the positions that the President of the IPOA and the Policy Director of the BAPSC hold as members of the Advisory Group on Private Security of the DCAF.¹⁷⁹ In addition, although the structure of the IPI differs from the DCAF, the organization has expressed its belief in the importance of the formation of professional associations by the private sector, where the goals should be the promotion of CoCs, the inculcating of trade standards and the sponsorship of policy guidelines.¹⁸⁰ Thus, taking the direct and indirect roles of the associations in the consultation process attests to the capacity of the IPOA and BAPSC to act as iterative and inspirational muses in the formation process of the Montreux Document.

3. Afghan Law Dalw 1386

100. According to BUL vertical aggregation occurs when the contents of the internal norms of the private associations are aggregated into domestic or regional legal systems. A clear example of this can be seen when one analyzes the application of BUL to the IPOA in the Afghan Dalw 1386 on the regulation of PMSC with Afghan national territory.¹⁸¹ In this instance the Afghani legislators and the Ministry of the Interior opted to utilize the IPOA standards found in the CoC as the basis for the establishment of the procedures that both foreign and domestic PMSC must follow to legally operate in the country. According to the system created by the Afghan government without reservations, all PMSC must commit to observe the IPOA standards in order to receive an operating license.¹⁸²

¹⁷⁵ *Workshop of Governmental Experts and Industry Representatives on Private Military/ Security Companies*: 16-17 Jan 2006. Zurich, Switzerland. Federal Department of Foreign Affairs FDFA, Directorate of International Law DIL. Swiss Confederation. Summary of Chair. Pg. 1.

¹⁷⁶ *Ibid*, pp. 3.

¹⁷⁷ *Expert Meeting of Government and Other Experts on Private Military and Security Companies*: 13-14 Nov 2006, Montreux Switzerland, Federal Department of Foreign Affairs FDFA, Directorate of International Law DIL, Swiss Confederation, pp 2.

¹⁷⁸ *Third meeting of Governmental and other experts on Private Military and security Companies*. 14-16 April 2008, Montreux, Switzerland, Federal Department of Foreign Affairs FDFA, Directorate of International Law DIL, Swiss Confederation. pp1. Chair Summary. It must be noted that several working groups that discussed pertinent topics took place, but a specific list of these groups and their participants was not available.

¹⁷⁹ List of members of the Advisory Group <http://www.privatesecurityregulation.net/advisory-group>

¹⁸⁰ F. MANZINI, *In Good Company: The role of business in security sector reform*, Demos & The International Peace Academy, 2005, pp. 27, 82. Also see J. COCKAYNE ET AL, *Beyond Market Forces: Regulating the Global Security Industry*, International Peace Institute, 2009, pp. 9. (expressing that the standards developed by the associations can be seen as a starting point for the regulation of the industry).

¹⁸¹ *Procedure for Regulating Activities of Private Security Companies in Afghanistan*, Feb 2008 (Dalw 1386), Ministry of Interior, Islamic Republic of Afghanistan. <http://www.privatesecurityregulation.net/countries/results/taxonomy%3A237.1>

¹⁸² Art. 14 (8) & Art. 15 (6), *Procedure for Regulating Activities of Private Security Companies in Afghanistan*, Feb 2008 (Dalw 1386), Ministry of Interior, Islamic Republic of Afghanistan.

101. In this way the Afghan government explicitly incorporated the complete content of the CoC into the domestic law of the country. The verbiage of the articles has undeniable impact, as the legislators did not transpose sections of text but rather made a reference to the external document to be applied in its amended version over time. Thus the Afghan government deposits total faith in the IPOA and its CoC, demonstrating a strong example of vertical aggregation and the institution as muse.

4. Evolution to possible vertical and horizontal aggregation

102. After having seen the two examples of vertical and horizontal aggregation, there is a third example that is worthy of investigating. In April of 2009 the British government announced a public consultation on the preferred option to promote high standards of conduct for PMSC industry.¹⁸³ The policy proposal was comprised of three main parts including: working with the UK industry to promote high standards through a code of conduct, using the government's status as a buyer to contract only those companies that demonstrate that they operate to high standards, and an international approach to promote higher global standards, based on key elements of the UK approach.¹⁸⁴

103. What is interesting in the policy proposal in relation to BUL is the proposed role of the BAPSC within the policy option.¹⁸⁵ According to the published documentation the association would work with the government to formulate a CoC and would be the organization in charge of its implementation.¹⁸⁶ In this way, the proposal makes the allusion to a future vertical aggregation of internal norm content of the BAPSC.

104. The proposal continues in proposing a system of international cooperation to attend to the issue of PMSC regulation.¹⁸⁷ Using the Montreux Document as a stepping off point, the British proposal abdicates for the extension of the initiative, based in the standard established by the government and the BAPSC. It continues in foreseeing the establishment of an international secretariat to monitor the global standards and ensure compliance on the part of the PMSC.¹⁸⁸ Thus, the policy proposal outlines the creation of an international organization and the horizontal aggregation of the norms of the association into the international system.

5. Conclusion

105. The analysis demonstrates the directional flow of BUL, through which the internal norms of the private associations become hardened at the level of state instruments through the appropriation of the normative concepts. It has been demonstrated that the organization that meet the private legal communities requirements of BUL in the PMSC sector have acted as iterative and inspirational muses for the state level officials in the formation of law. Thus the investigation has proven that the internal norms of both the IPOA and the BAPSC complete the cycle of BUL. The process BUL describes in these instan-

¹⁸³ Public consultation on Private Military Companies (24/04/09), <http://www.fco.gov.uk/en/newsroom/latest-news/?view=PressS&id=16784533>

¹⁸⁴ General Ministerial Statement, The Secretary of State for Foreign and Commonwealth Affairs, David Miliband, 24 april 2009. <http://www.fco.gov.uk/en/newsroom/latest-news/?view=PressS&id=16784533>

¹⁸⁵ See specific reference to the BAPSC, Evidence Base, *Impact Assessment on Promoting High Standards of Conduct by PMSC Internationally*, UK Foreign and Commonwealth Office, Version 1, April 2009, pp. 14. §46. www.fco.gov.uk

¹⁸⁶ Policy Proposal, Consultation Document, *Consultation on Promoting High Standards of Conduct by Private Military and Security Companies Internationally*, UK Foreign and Commonwealth Office, pp. 9. <http://www.fco.gov.uk/en/about-the-fco/publications/publications/consultations1/>

¹⁸⁷ Consultation Document, Consultation on Promoting High Standards of Conduct by Private Military and Security Companies Internationally, pp. 5. <http://www.fco.gov.uk/en/about-the-fco/publications/publications/consultations1/>

¹⁸⁸ Internationally Agreed Benchmark Standard for PMSC, Consultation Document, *Consultation on Promoting High Standards of Conduct by Private Military and Security Companies Internationally*, pp. 10. §21

ces demonstrates how the role of the state officials may be changed, but not eliminated. It represents the aggregation by the state of the regulatory schema in relation to the PMSC sector from the associations due to either their efficiency or the inspirational role played by the private associations.

VII. Conclusion

106. In summation, the increased reliance of the services provided by the PMSC sector, in this article assessed mainly in terms of the state-PMSC relationship, raises questions on how to best approach the regulation of the sector. The need for more efficient methods of regulation is made evident in large part due to the deficiencies seen in the application of both IHL and human rights law, as well as the intrinsic control and monitoring issues inherent in delegation. The complexity of the industry and the large variety of services it provides to distinct clients, in diverse situations, under variant contracts, underlines the areas where the legal norms lack indisputable application. But it appears that the classic state centered theories of policy formation are hindered because of a lack of political will or a lack of complete comprehension on how to best regulate the complex industry. Thus, in the attempt to explore alternative methods of the formation of policy content, the article has examined the application of BUL, as a compliment to classic model.

107. The analysis has shown that the IPOA and the BAPSC meet the institutional requirements established by the theory, specifically the creation of an internal self-sufficient and self-executing norm system from the practical experiences of a professionally homogeneous member group. The analysis has further demonstrated that these private quasi-judicial communities have acted as iterative and inspirational muses for state level officials, where the internal norms act as a base catalyst and a standard of reference against which official legislators redact and evaluate the subsequent law, leading to the aggregation of policy content into legislative instruments directed at the regulation of the PMSC sector.

108. The investigation describes a process where BUL and the classic theory function side by side, but where the role of the state in the development of those instruments has been changed though not eliminated. The analysis of the BUL process in relation to the PMSC sector points to change in monopoly of the state, where instead of the formation of policy to be internalized in practice, it shows indications of an organic process centered on the norms created by practitioners being externalized to the state level. Thus it can be said that the public-private sector interaction takes on an additional level than just the provision of services on behalf of the PMSC. In this context BUL present an opportunity for a new style of approach to the formation of regulatory policy.