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# Outsourcing the Big Stick: The Consequences of Using Private Military Companies

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# **Outsourcing the Big Stick: The Consequences of Using Private Military Companies**

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## **Summary**

The outsourcing of military functions is always accompanied by a loss of control over the use of force. Whereas the variances in handling consequences by weak versus strong states have already been addressed in other studies, we know little about the causes of differences among strong states. I will argue that strong states are very well aware of the risk of losing control by outsourcing. In order to mitigate the risk, they develop outsourcing strategies. The strategies of the two states considered here—the United States and Germany—are similar. Despite the resemblance, the U.S. Army faces much greater losses of control than does the German Bundeswehr. This is the result of differences in the compliance with their respective strategies. Whereas the Bundeswehr almost always sticks to its strategy, the U.S. Army instead violates it in numerous cases. This difference can be explained by the different scopes of the two forces' demand-capability gap, a factor that directly affects compliance-behavior with the strategy. The larger the gap, the less compliance is shown and the greater the loss of control. Since the U.S. Army experiences a larger gap than the Bundeswehr, the former suffers a greater loss of control.

## **Introduction**

When the cold war ended, changes in the international scene encompassed more than mere security challenges. Whereas before security had been the domain of the states' armed forces, governments "have started to turn for support to a new security actor" (Kinsey 2006, 1): private military companies (PMCs). "What makes this issue worthy of research is not the fact that contractors are supporting [military] operations but the scope, location, and criticality of that support" (Zamparelli 1999, 11). During Operation Desert Storm in 1991, 541,000 U.S. soldiers were supported by 5,200 contractors, a ratio of about one hundred to one. Twelve years later during Operation Iraqi Freedom, the proportion shrank to ten to one.

This development reflects the fact that, alongside a state's forces, a transnational market for force has developed (Avant 2005, 3). Governments outsource military tasks to players in this market mostly because of the assumed cost efficiency. Against the backdrop of discussions about overbilling (Singer 2003, 155), the monopol- or oligopol-structure of the defense market (Markusen 2001, 6), and "cost-plus" contracts, in which firms are hired for unknown costs (Zamparelli 1999, 14), the general validity of such a claim is rather dubious. Nevertheless, outsourcing triggers concerns that transcend that of losing a big chunk of money. A part of the discussion hovers over whether and how the rise of the market for force and the use of PMCs affect states' monopoly of force.

Anna Leander argues that outsourcing erodes the political, cultural, and symbolic foundation of states' authority regarding the use of force. Private firms are increasingly accepted as actors in military matters. In the process, they gain more and more of a say in the use of force and are able to shape the understanding of security, threats, and national interests (Leander 2006, 137–43). Paul Verkuil (2006, 2) goes as far as to consider the trend toward privatizing and contracting of government functions as a threat to the democratic principle of accountability and a shift from public to private governance. Deborah Avant's findings are similar. She shows that outsourcing enhances PMCs' influence on the foreign policy process

and that purchasing services on the market undermines the collective monopoly of the state in controlling the use of violence (Avant 2005, 145).

Still, states differ in their ability to cope with these consequences of outsourcing. Important intervening variables include the “quality” and capability of the state. Strong states might manage risks better than weak states.<sup>1</sup> Nevertheless, even more capable states face the risk of undermining the capability of public forces by using PMCs (Ibid., 7). In this piece, I consider three dimensions governing the use of force (Ibid., 5–6): functional, political, and social controls. Functional control focuses on an armed force’s capability to produce security. When functional control is lost, security cannot be produced by the military autonomously, necessitating help from PMCs. The political-control dimension addresses who decides if, when, where, and how force is used. In focusing on the military, I consider decision making by military commanders while omitting discussions on the political level. A loss of control occurs when the commander’s power to determine if, when, where, and how force is used is curbed. Social control measures the degree to which the use of force is in accordance with international norms. Therefore, loss of social control does not depend on defective behavior displayed by the contractor but instead on the tasks the contractor has been enlisted to perform, since international law restricts the role of civilians in hostilities. A loss of social control occurs when civilians are contracted to provide a service that violates international norms. The deeper the violation of the core of the norm, the greater the loss.

For the following reasons, I consider here the case of the U.S. Armed Forces (mainly the army) and the German Bundeswehr. First, both countries use PMCs to support their armed forces, have deployed troops abroad, and are among the most important troop providers for multinational operations. Second, the two cases display a variance. The U.S. General Accountability Office (2003a, 17) concluded that, without contractor support, some missions

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<sup>1</sup> Strong states have capable professional forces to conduct military operations and an effective administration to oversee contracts. (This is not to say that the oversight is always effective.) Weak states suffer from ineffective and corrupt administration and their armed forces lack capabilities and are often not reliable.

of the U.S. Army would be at risk. The German Bundeswehr, on the other hand, does not face such risks. This comparison seems to demonstrate a variance in the loss of control over the use of force among strong states. The state's capability appears, therefore, to be not the only important variable. My third reason for choosing these particular cases is that both countries are very well aware of the risks associated with outsourcing and have developed strategies to mitigate the negative effects. These strategies resemble each other strikingly as regards the functional dimension and show only slight differences in the political and social dimensions. The central question is why two strong states with similar outsourcing strategies face such different consequences.

In solving this puzzle, I want to argue that the difference in the loss of control results from varying levels of compliance with the nations' respective strategies. Whereas the German Bundeswehr almost always sticks to its strategy, the U.S. Army instead violates it in numerous cases. As a result, the U.S. Army suffers a greater loss of functional, social, and political control than does the Bundeswehr. The difference in compliance can be explained by the demand-capability gap. As a rule, the more a state's political leadership pushes the armed forces to its limits, the larger the gap becomes. In order to meet demands, and fill the gap, the armed forces turn to PMCs. The larger the gap, the more contractors are needed and the less likely compliance with the strategy will be achieved. As I will show, the gap is bigger for the U.S. Army than for the Bundeswehr.

I unfold my argument by, first, offering a brief explanation of the nature of the market for force, in order to clarify the segment considered in this paper. This is followed by three chapters wherein I discuss the three dimensions of loss of control over the use of force. Each chapter is more or less a freestanding discussion, though redundancies may occur in the use of empirical examples. Chapter 2 deals with the loss of functional control. Since this is the greatest risk confronting armed forces, it is considered first when outsourcing strategies are developed. I discuss, in depth, the outsourcing strategies of the United States and Germany

and the compliance of both armed forces with their respective strategies. The political dimension of the control over the use of force is explored in Chapter 3. In Chapter 4, I turn to the dimension of social control. I flesh out the norms concerned, how they are reflected in the strategies, and whether the U.S. and German armed forces stick to their strategies. Finally, I address the puzzle of why compliance is different in the two cases. In the final chapter, I summarize the discussion and draw further conclusions.

### **1. The Market for Force**

In the early 1990s a global military service industry (Singer 2003, 18) was developed and started offering services on the free market, some of them formerly governed solely by a state's military. This marked the birth of the "market for force," a catchall category for interactions taking place in this market. Nevertheless, the market for force can be broken down into segments (Leander 2006, 60). Since I focus here on just one segment, I want to outline the industry structure briefly. The segmentation is best described along three dimensions: to whom, how, and what private military companies (PMCs) sell.

PMCs offer their services on an open market. Some contract with international organizations (IOs), nongovernmental organizations (NGOs), or transnational companies—others do so with states only. However, even in the latter case, there is vast variety. The firm Military Professional Resources Incorporated (MPRI), for example, acts sometimes as a proxy in propagating U.S. defense policy, whereas other firms simply work in support of or alongside a state's armed forces. The emphasis in this paper lies on the latter.

Firms also differ in how they offer their services. As Christopher Kinsey (2006, 1) puts it, "Writing a book on Private Military Companies ... is not easy. The supply of military/security services is frequently shrouded in secrecy...." This is more than true in a field in which contracts often touch national and strategic interests, the line between legitimate and illegitimate actions is often ill defined, and the contract may even violate legal norms. This is

why some firms conduct covert operations based on contracts hidden from public view.

However, in the case of the German Bundeswehr and the U.S. Armed Forces, various open sources provide information about, at least, the scope and the type of outsourcing, though not about the detailed content of contracts. This paper deals only with information and sources available in public view, and I have not attempted to dig up clandestine agreements.

The scope of services offered by PMCs is broad. To give structure to the variety, most authors categorize PMCs according to the services they sell (Leander 2006, 55–59; Singer 2003, 88–100; Shearer 1998, 21–26; Avant 2005, 7–22; Kümmel 2004, 13–15). Yet even if there is general agreement on the terms of categorization, authors approach the task in numerous ways. Most stick either implicitly or explicitly to a “tip of the spear” typology. This means distinguishing services offered by their proximity to the front lines of military action (Singer 2003, 91). However, authors have fine-tuned and adjusted this typology to their particular area of research interest. Deborah Avant (2005, 17), for example, added services such as crime prevention, unarmed site security, and police training. Since my focus is on firms providing services to the military, this angle is of minor interest here. I instead differentiate among four categories of services (Kümmel 2004, 14; Singer 2003, 91–92):

- Private combat companies: These firms are involved in direct engagement of the enemy or else they command regular troops. One of the best-known examples is the former South African Firm Executive Outcomes, which operated in Sierra Leone in 1995. The firm deployed an entire battalion to support the armed forces of Sierra Leone in their fight against rebel forces (Shearer 1998, 49). These firms will not be taken into closer consideration because western countries do not rely on them. (For a different perspective, see Binder 2004.)



- Private security companies (PSC)<sup>2</sup>: These firms provide special personnel to guard facilities, convoys, and individuals. An example is U.S.-based DynCorp, which guards the Afghan president Hamid Karzai.
- Private consultant companies: Firms active in this market segment offer all types of military expertise and training for armed forces. MPRI, for example, received a contract from the Croatian defense ministry in April 1995 to train Croatian officers. In August 1995 the Croatian army launched an offensive and drove the Serbs out of Krajina. (Singer 2003, 126; Avant 2002).
- Private logistical support companies: The services provided by these firms encompass transportation, warehousing, laundry service, mess hall, maintenance, and intelligence for a state's armed forces. KBR (Kellogg Brown & Root), for example, is responsible for a major part of the logistics of the British and the U.S. armed forces (Singer 2003, 142).

Private security and private logistical firms are of major importance for this paper because western armed forces purchase services mostly in this segment.

The categorization I summarize here is a kind of “ideal typology” in the sense that most firms conduct business in more than one area (Kinsey 2006, 8; Ortiz 2007, 55). As a consequence, the categories cannot account for every thinkable or possible situation.

Nonetheless, the scheme is helpful in reducing complexity and promoting a better understanding of the market. The designation of PMC does not depend on where a firm makes most of its profits or how it refers to itself. The decisive factor is whether the firm provides services to a state's armed forces.

In summary, I deal in this paper with only one particular part of the global market for force. First, I focus on one client, the armed forces, paying no attention to NGOs and IOs. Second, I am not interested in clandestine contracts, but instead in content from open and

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<sup>2</sup> I use PSC and security providers interchangeably.

available sources. Third, I take logistical and security firms into consideration only, since western states purchase mostly these services.

## **2. The Loss of Functional Control**

The basic problem with using contractors for military tasks is that the practice introduces “market logic” to the production of security. If a state contracts out such work, it enters into a business relationship with a firm. This relationship can best be described by the principal-agent model, in which there are two self-interested parties—an ordering party (principal) and another party (agent) who acts on the former’s behalf (Stöber 2007, 122). However, the interests of the principal and the agent never match completely. While the goal of the state, or principal, is to provide for the public good, the firm (agent) is a profit-driven entity. Its decision-making process is always based on a cost-benefit analysis. Taking this for granted, firms will always seek to maximize their profit at the client’s expense (Singer 2003, 154–55).

The most obvious way to increase profit is by overbilling. This concern seems to be more than well founded, at least in the U.S. case in which “Defense Contract Audit Agency audit reports issued between February 2003 and February 2006 identified \$2.1 billion in questioned costs and \$1.4 billion in unsupported costs on Iraq contracts” (GAO 2006b). Still, since overbilling does not directly affect the capability of the military, I will not consider it further here.

Another way for the agent, or contractor, to maximize profits is by providing less service than contracted or by performing poorly. Since it is often impossible to define which services will be needed, and to what extent, in a conflict situation, the contracts give ample leeway for interpretation on quality and scope. Various factors can influence the cost-benefit analysis for contractors in a hostile environment. When, for example, the contractor compares the costs of staying in the theater versus withdrawing and violating the contract, the latter might sometimes seem more attractive (Leander 2006, 79). The more hostile an environment,

the greater the likelihood of “defective” behavior from the contractor. This dynamic contributes to the loss of the capability to produce security autonomously (functional control). The connection between political and functional control is noteworthy. In contrast to the role of a soldier, a contractor is not part of the military and is not integrated in the chain of command. Therefore, he or she cannot be ordered to stay in the theater and perform a duty beyond what is described in the contract. This might constrain a commander in his or her decision as to when, where, and how to use force and therefore cause a loss of political control. I will address these questions in Chapter 3.

The loss of functional and political control is influenced by the military’s dependency on the contractor. Three factors are critical in determining the degree of dependency. First, there is the scope of outsourced capabilities. It is impossible to define a particular threshold for either what is or what is not a “reasonable” amount of outsourcing. However, the more capabilities are outsourced, the more dependent the armed forces become on support from the market. Second is the necessity of the respective capability to produce security, and the third important factor is the state’s ability to replace a defective contractor.

The military capabilities necessary to produce security depend on the mission, the characteristics of the theater, and other factors (Lindley-French, Algieri 2004, 68). Providing security at home is apparently a different task from providing it when deployed abroad. Both missions require, for example, totally different logistical structures. For the latter, fast sea- and airlift capabilities are needed, whereas they are not for the former. Conducting peacekeeping operations, for example, has a different mission profile from high-intensity warfighting against organized forces. Whereas the former requires adequate protection for the force, the latter demands assets and capabilities to suppress and defend against enemy air forces.

Determining the necessary capabilities for each scenario is too broad and complex a task for this paper. I will, therefore, stick to a rough military categorization of capabilities

encompassing combat functions, combat support (CS), and combat service support (CSS). It is a truism that all these capabilities are necessary for conducting military operations in one or the other way. Yet outsourcing of each category has a different effect on the functional military control, described as follows:

- Combat functions: These direct-engagement functions provide fire and tactical-movement capability (Peltz et al. 2003, 17–18).
- CS provides intelligence, security, and communications functions to combat units. It increases the effects of combat platforms by providing fire support and operational assistance (Ibid., 17–18).
- CSS functions sustain all elements of the force, including people and equipment. They provide supply, maintenance, transportation, training, and health and other services required by aviation and ground-combat troops to accomplish their missions (Ibid., 17–18).

With regard to functional and political control, the first category in the list above is apparently the most important. A delegation of combat functions that already has been provided by the military results, in the case of noncooperation or poor performance, in an instantaneous loss of functional control (Avant 2005, 81).

An example of noncooperation occurred last decade in the conflict between Ethiopia and Eritrea. Both countries had hired contractors with air strike capabilities in 1997–1999 from Russia and the Ukraine. However, the firms' pilots refused to engage their opponents' air force since they faced the risk of meeting equally trained and equipped pilots (Singer 2003, 158). In this case, the foreign pilots could not be ordered to perform their tasks, and neither of the hostile countries' air forces could fill the gap created by the noncooperative behavior of the provider. The result was a substantial loss of political and functional control.

In 1995 the government of Sierra Leone hired the British firm Gurkha Security Guards (GSG) to provide military training and secure an important military base, along with

pacifying the surrounding area. After GSG lost its commander and some personnel in an ambush, the firm pulled out of the country (Vines 2002, 130–31). Replacing GSG with the South African firm Executive Outcomes allowed the government to avoid suffering a loss of functional and political control, but without turning to another firm, the capability gap could not have been closed.

Outsourcing of CS and CSS functions can also have effects on functional control. The impact depends very much on the function at question. A failure in recruitment certainly does not have the same effect as poor performance in transportation or maintenance. Nevertheless, the latter can affect functional control severely, as occurred last decade when Apache and Black Hawk helicopters of the U.S. National Guard broke down. During the Balkan mission these aircraft were maintained by a contractor (GAO 2003a, 8). Had the contractor left the theater, the helicopters would not have broken down on the same day, but the failure would have been just a matter of time in coming. The loss of CS or CSS functions, however, is not as severe as that of combat functions, since the negative consequences of noncooperation or poor performance do not usually occur instantaneously. The state (or “principal”) is less dependent on the contractor in CS or CSS matters because the client has some window to find a substitute service provider. As a general rule, the more time a principal has to replace a defecting agent, the lower the dependency and accompanied loss of functional control. In the Balkan example described before, this extra time would not have helped much because there were neither organic resources (from within the force) nor another contractor with the required skills to replace the original one.

In summary, the more a client depends on a contractor, and the higher the risk of poor- or nonperformance on the part of the contractor, the greater the loss of functional control. Dependency is influenced by the scope of outsourcing, the necessity to produce security in the area for which the contractor was hired, and the principal’s ability to replace the contractor.

## **2.1. Outsourcing Strategies**

Deborah Avant (2005, 57) argues that the quality of a state is the key variable in determining how it will cope with the consequences of outsourcing. Strong states, which have superior monitoring and sanctioning capacities, are better able than weak states to control PMCs and to avoid dependency. However, just as a variance between strong and weak states can be observed, so too can a variance among strong states.

One way of explaining the variance among strong states is to assume that each is different in how it accepts the loss of functional control. In the cases of the United States and Germany, however, this explanation cannot account for the differences. As I will show, the two states have similar outsourcing strategies that reflect the problem, addressed earlier, of dependency and the risk for defection. Germany and the United States try to minimize the risk of losing functional control by reducing dependency. In the process, they bar certain important tasks completely from outsourcing, limit the amount of contractor support for critical tasks, and maintain resources to substitute for the provider in case of nonperformance.

Before I elaborate on the details of the strategies, I want to remark briefly on the term “outsourcing strategy” itself as it applies to the two states selected.

Neither the U.S. Army nor the Bundeswehr has explicitly laid out a comprehensive outsourcing strategy in a single document. For the most part, the states’ policies are contained in a patchwork of statements, documents, and restrictions by law. In the case of the United States, at least some manuals and directives can be found. For the Bundeswehr, not even these exist.

### *2.1.1. The German Strategy*

There is no law generally prohibiting the use of private contractors by the German defense ministry. However, this should not be understood as a *carte blanche* for the government to outsource everything.

An important constraint to outsourcing ambitions is provided by Article 87a of the Grundgesetz (GG), which obliges the federal state to maintain armed forces. This is seen as an exclusive and necessary duty of the state (Gramm 2004, 84), with “exclusive” meaning that it is in the state’s original responsibility and cannot be delegated. “Necessary” means that the state has to provide and maintain armed forces and cannot avoid fulfilling the obligation. Still, while article 87a GG appears to be a material barrier to outsourcing, its restrictive character should not be viewed as limitless. Lawyers agree that it cannot be interpreted as protecting every single military task or service from outsourcing. The German constitution, for its part, remains silent on what can be outsourced, listing neither particular tasks nor establishing a hierarchy of services guaranteed by the constitution (Ibid., 84). Though there is no explicit definition in the GG, implicit guidelines, at least, can be found. According to article 65a GG, the defense minister is in command of the armed forces, and under article 65, 2, GG, the defense minister holds the responsibility of ensuring the readiness of the Bundeswehr (Ibid., 84). From the trilogy of articles 87a GG, 65a GG, and 65, 2, GG, it is usually inferred that all services and capabilities required to keep the Bundeswehr combat-ready are guaranteed by the GG. The capabilities, means, or functions necessary to assure this readiness depend mainly on the mission of the armed forces. As the ministry of defense defines the mission, it is granted ample leeway to determine whether a capability can be outsourced or not (Griephan Briefe 2006, 1). Even the complete abolition of a function is possible, when it is considered to be no longer necessary. In short, the GG does not outline specific capabilities of the state, but rather the ability of the Bundeswehr to carry out its mission. This flexible framework gives the defense ministry ample latitude to adapt the armed forces and its mission to changing circumstances. However, as soon as the mission and the necessary capabilities are defined, they are guaranteed by the GG.

As the security threats and challenges changed after the end of the cold war, so did the mission of the Bundeswehr. This mission change is reflected in the defense directives of 2003

(BMVg 2003) and the German White Book (2006). The principal cold war objective had been to defend Germany and its allies. Afterward, while this task remained intact, the to-do list got extended to include worldwide conflict prevention and crisis response as well as nation building (BMVg 2006, 65–67). These fundamental changes required an adjustment and adaptation of the structure of the Bundeswehr and its capabilities. Acknowledging the tension between the defense budget and the new requirements, the White Book 2006 argued that the Bundeswehr should focus now on its core capabilities (described in the next paragraph). By extending its cooperation with industry, the ministry intended to create more financial leeway and further relief for the armed forces (BMVg 2006, 79; BMVg 2003, No. 66).

In a nutshell, the ministry of defense differentiates roughly between two categories of capabilities: core and noncore.<sup>3</sup> Core capabilities are absolutely necessary requirements that can never be delegated to a civil provider (BMVg 2004, 111; Griephan 2005, 3). Military core capabilities refer to mission tasks and, partly, immediate support functions (Griephan 2006, 1). Yet while the *concept* of core capabilities appears to be important, a precise definition does not exist in government literature. According to the conception of the Bundeswehr (KdB) (BMVg 2003; Punkt, 91–95), in any given case the following categories of capabilities are considered core:

- Operative armed forces (effectiveness, durability, survivability)
- Command and control
- Global reconnaissance
- Strategic ability to deploy
- Maintenance (Griephan 2005, 3)

Apart from these descriptors, the Bundeswehr also uses the term in another way. In relationship to depot maintenance, “core capabilities” describe a particular share of

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<sup>3</sup> Since the Berliner Erlass (decree) of January 2004, it is the responsibility of the German chief of staff to define core capabilities.



capabilities to be maintained by the Bundeswehr. The so-called heavy maintenance can be outsourced as long as core capabilities are sustained “in house” (Ibid., 3). In the same manner the term is used in some special conceptions (TK) of the Bundeswehr. The TKs provide specifications and more detailed information about a particular service or competency. For example, accommodation and supply with provisions in the theater are both special tasks of the Joint Support Service (SKB) and as such a core capability in the strict sense of the KdB. However, according to a “special conception on provision supply in the theater,” not all tasks of procurement need to be provided by the Bundeswehr. Private contractors can be used under specific circumstances. Likewise the “TK accommodation in the theater” offers the possibility to use local forces to provide a given service. Finally “TK fuel supply” claims fuel supply to be a noncore capability that exists outside the theater. So, while logic may indicate it to be a core capability within the theater, the service actually can be provided by civil contractors, depending on the security situation. (All information about TK comes from nonattribution interviews.)

The second type of core capability may seem to resemble a noncore capability. Noncore capabilities can be outsourced even within the theater as long as certain general requirements are fulfilled. First, contractors are not meant to replace parts of the force structure but rather to enhance existing organic capabilities (Frauenhoff 2005; Gottschalk 2004). Second, an operational minimum, or range of capabilities, needs to be maintained. This criterion must always be met when capabilities are outsourced, no matter if it is inside or outside the theater (Rahmenkonzept 1998; Punkt, 3). Third, whether or not a service is outsourced depends on the situation on the ground (TK logistics, nonattributed interview).

The term “core capability” is therefore used in two ways. On the one hand it describes a category of capabilities that cannot be outsourced. On the other, some such capabilities can be outsourced. All the while, certain organic capabilities need to be maintained. While some share of the tasks can be outsourced, the Bundeswehr is obliged to hold up a “core” of

capabilities that can provide the service itself. I will now set categories for the latter, despite its label as “noncore.”

Ordinary noncore capabilities and this “second type” of core capabilities may resemble each other, but a qualitative difference exists between the two. “TK provision supply in the theater” and “TK gas supply” require the commander to develop procedures and to maintain organic capabilities to provide the service in the event of contractor failure.<sup>4</sup> These capabilities seem to be exceptional in two respects. On the one hand they are described as “core,” even though they can be outsourced. On the other, higher hurdles for outsourcing have been established compared with those for regular noncore capabilities. This type of intermediate classification makes sense, when it is assumed to contain essential noncore functions sustaining core functions.

According to this analysis, the Bundeswehr divides capabilities into two broad areas:

- Core capabilities contain five categories of functions that cannot be outsourced—  
operative armed forces, command and control (C<sup>2</sup>), global reconnaissance, strategic ability to deploy troops, and maintenance tasks
- Noncore capabilities
  - Essential noncore capabilities (labeled as core capabilities): These can be outsourced when the circumstances in the theater permit it and a minimum of organic capabilities is maintained. However, backup plans are required to assure the provision of service in case the contractor arrangement falters.
  - Other noncore capabilities: These can be outsourced when the circumstances in the theater permit it and a minimum of organic capabilities is maintained.

### *2.1.2. The U.S. Strategy*

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<sup>4</sup> This conclusion is made to the best of my knowledge. However, it is based on interviews, since the Bundeswehr keeps all TK confidential.

At a RAND Corporation conference on privatization, a member stipulated that there is nothing like a definition of core capabilities within the U.S. Armed Forces. All capabilities (including combat tasks) are free to be outsourced (Pint, Bondanella et al. 2001, 42). Indeed the U.S. government has ample latitude to delegate functions and tasks to private actors. According to Paul Verkuil (2007, 104), “[C]ases that directly forbid delegation by the president of significant government authority to private hands are not easy to find.”

However, there are some restrictions concerning outsourcing. The Quadrennial Defense Review (QDR) Report 2001 claimed that the “DoD [U.S. Department of Defense] will assess all its functions to separate core and non-core functions. The test will be whether a function is directly necessary for warfighting.” Core functions should be DoD “owned” resources and performed by DoD personnel. The report also states, “Any function that can be provided by the private sector is not a core government function (U.S. Department of Defense 2001, 53).” However, it is far from self-evident what core functions actually are. Making the situation even more difficult is that the concept of core capabilities is invoked in multiple and ambiguous ways. We can turn to three sources in attempting to pin down the meaning of core and noncore functions: the law, DoD instructions, and regulation of the services (focusing here mainly on the army).

### *Core and noncore functions*

In April 2002, DoD’s Senior Executive Council launched an effort to classify all department functions as either core or noncore. To give guidance to the services, the DoD defined “core” as “a complex harmonization of individual technologies and ‘production’ (employment, delivery) skills that create unique military capabilities valued by the force-employing CINC [commander in chief]” (GAO 2003b, 38). This definition, however, is too broad and unclear to be of much help (Ibid., 11).

Another definition of “core,” provided by U.S. Code § 2464, requires the armed forces to maintain core logistic capabilities. Core capabilities “shall include those capabilities that are necessary to maintain and repair the weapon systems and other military equipment.” This provision does not prohibit outsourcing at all. U.S. Code § 2466 defines, rather, a threshold for outsourcing—the so-called 50-50 rule. The core capabilities are maintained if “not more than 50 percent of the funds made available in a fiscal year to a military department or a Defense Agency for depot-level maintenance and repair workload [are] used to contract for the performance by non-Federal Government personnel ....” However, the secretary of defense can waive this limitation when national security requires it. Further, this definition of core capabilities clearly contradicts the defense review. DoD uses the concept in an ultimate and strict way, barring the functions considered “core” from being outsourced. I therefore categorize depot maintenance as a noncore function, since outsourcing is possible.

DoD regulations offer another avenue for approaching the classification of core functions. According to the Subdelegation Act, the president has the authority to delegate power to other officials. While on the surface this act appears to empower the chief executive, it can also be seen as a limitation of executive power. In addition, the transfer of inherent governmental functions is allowed to official hands only, but not to private entities—at least not without consent of the Congress (Verkuil 2007, 123).

Moreover, the Federal Activities Inventory Reform (FAIR) Act (1998, section 5, 105–270) dictates that all functions “intimately related to the public interest as to require performance by Federal Government employees” are considered to be inherently governmental in character. Another similar meaning is described in the Circular No. A-76, in which the Office of Management and Budget (OMB) gives guidance with regard to when and how governmental positions can be outsourced. According to the guidelines, all activities “binding the United States to take or not to take actions by contract, policy, regulation,

authorization, order or otherwise; (d)etermining, protecting and advancing ... interests by military or diplomatic action..." (OMB 2002, A-3) are inherent government functions.

Applied to the armed forces, the following are inherent government functions:

- Conducting combat operations
- Exercising command and control functions
- Contracting functions (Fortner 2000, 12–15)
- Filling military positions that involve essential military skills (Verkuil 2007, 130)

This bottom line is implicitly reflected in DoD Instruction 3020.37, according to which essential functions can be outsourced to private hands. Essential functions are services provided by a contractor to support vital systems for which the military may not have the capabilities to perform and that impair or interrupt the effectiveness of defense systems or operations when not available immediately (DoD 3020.37, 2.1.3). Indirectly it can be inferred that vital systems cannot be outsourced. The instruction defines the following functions as vital: "Command, control, communications, and intelligence (C3I) systems, including tactical and strategic information, intelligence collection, and computer subsystems. Selected operational weapons systems ... and [o]perational logistics support ... medical services, noncombatant evacuation activities..." (DoD 3020.37, 2.1.6).

The definition of inherent governmental function in Circular A-76 and the definition of vital systems in the DoD instruction almost overlap. The latter is, however, more detailed in some regards. I assume that the DoD's understanding of core functions combines these two concepts.

In summary, the DoD makes the following distinctions:

- Core functions: These functions contain inherent government functions and vital systems. The delegation (outsourcing) of these functions is prohibited by law.
- Noncore functions: These functions comprise those that are not inherent to the government and not vital systems. They can be outsourced under particular circumstances.

- Essential functions: As long as another contractor or organic capabilities exist and a “backup” plan assures the service is provided in all cases.
- Nonessential functions: In some cases specific requirements need to be met, such as maintaining a minimum of organic capabilities.

Even with the provided definitions, much work is left to the services. The DoD instruction explicitly asks the component commander to determine functions vital to the mission (DoD 3020.37, 2.1.6). As a result, each service has sought to outline additional rules (GAO, 2003b, 2). Since the army has made most progress in identifying core functions and developing a contractor strategy, I will focus in my remarks on this service, with some exceptions.

### *The U.S. Army*

The army has defined six core competencies in its Army Field Manual 1 (Department of the Army 2001, chapter 3):

- Shape the security environment. Respond promptly—provide a broad range of options to shape the security environment and respond to crises worldwide.
- Mobilize the army—provide the means to confront unforeseen challenges and ensure America’s security.
- Conduct forcible entry operations—provide forcible access to contested areas worldwide.
- Achieve sustained land dominance—provide capabilities to control land and people across various types of conflicts.
- Support civil authorities—provide support to civil authorities in domestic and international contingencies, including homeland security.

The army’s concept of core competencies is not completely equal to DoD’s. Not all inherent government functions necessarily are core competencies of the army and vice versa. Further, many civil functions provided by the Army Corps of Engineers are inherently

governmental but not a core competency of the army. And not every core competency of the army (e.g., medical service) is an inherent governmental function (GAO 2003b, 11). I will not, however, address this difference in any more detail because the army essentially follows the DoD concept and takes the inherent and noninherent governmental approach into consideration in establishing its regulations.

Army Regulation 715-9 (1999, 21) considers, in accordance with the core concept, the use of deadly force and command and control as inherent government functions that cannot be outsourced. This principle is also reflected in its Field Manual (FM 3-100.21) concerning contractors on the battlefield. The manual allows for the contracting of CS and CSS functions (Department of the Army 2003, 1–2), though outsourcing of these noncore functions is not unconditional. Three general rules govern the outsourcing process.

First, PMCs are force multipliers, and therefore cannot serve as permanent replacements for force structure (Ibid., 1–29). PMCs can, however, be used as “bridges” prior to the arrival of army resources or they can augment organic support capabilities (Ibid., 1–2; Joint Chiefs of Staff 2000, chapter V.1). This guideline is noteworthy in showing that the army is more restrictive than required by the Department of Defense. The army makes organic capabilities mandatory for all functions, even for all nonessential functions.

Second, commanders are asked to prepare a contingency plan to assure backup support for essential services, when the contractor decides to abstain from doing so (Department of the Army 2003, 2–51; DoD 3020.37, 1990, E2.1.3).

Third, PMCs can be used everywhere in the theater depending on a given risk assessment. The decision, though, should be based on the following considerations: mission, enemy activity, terrain, use of U.S. troops, time limitations, and agreements with the host nation.

### *2.1.3. Comparison of the Strategies*

Both the U.S. and German armed forces are very well aware of the risk of losing functional control by outsourcing. The strategies, therefore, aim to reduce dependency on the contractor by following these basic principles:

- Principle 1: The more necessary the service is for combat, the tighter are the restrictions for outsourcing.
- Principle 2: In limiting the scope of outsourcing, contractors can be used to enhance but not to replace organic capabilities.
- Principle 3: Backup plans are required for essential services.

In applying the first principle, both strategies define different kinds of functions or capabilities and cut them broadly into two categories: core and noncore. Due to the danger of dependency and the enormous effect on functional control, capabilities in the first category have to be provided by the armed forces and cannot be outsourced. Capabilities in the second category are open to outsourcing in general. However, freedom to outsource is not unconditional since poor performance or nonperformance can, in some cases, severely affect functional control. Both strategies, therefore, differentiate further between essential and nonessential functions. Though essential functions can be outsourced, many requirements have to be met first. In the theater, contractors can provide essential functions after an assessment of the situation and when “backup” support options have been developed. The assessment is intended to single out very dangerous situations in order to reduce the likelihood of defection by the contractor. Backup plans are formed to enable the client to replace the contractor quickly to minimize the effects on functional control (principle 3). To reduce dependency further, the second principle requires the maintenance of organic capabilities. In the case of the Bundeswehr, those organic capabilities also function as backup (nonattributed interview). The U.S. Army considers it sufficient for one contractor to be replaced by another.



Despite resemblances between the two states' approaches, some differences exist. The Bundeswehr demonstrates a slightly broader understanding of core capabilities than does the U.S. Armed Forces. In the German case, strategic transportation and maintenance are included. The U.S. strategy is more explicit with regard to contracting, defining it as a core function. Although contracting does not affect functional control, it cannot be outsourced in the German case either. Contracting decisions are the sole responsibility of the armed forces support command (Streitkräfteunterstützungskommando) in cooperation with the Bundeswehr's Center for Logistics (except in the case of smaller decisions in the theater).

Another difference can be found with regard to outsourcing procedure. The U.S. Army has established detailed guidelines (METT-TC) to assess circumstances on the ground, whereas the Bundeswehr has nothing comparable. A concept similar to METT-TC or alternative guidelines simply do not exist for the Germans (nonattributed interviews).<sup>5</sup>

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<sup>5</sup> There are, nevertheless, similarities in the assessment process here as well. For both states, great latitude is granted to the commander since neither strategy formulates a threshold to determine when outsourcing is permitted or prohibited.

*Table 1: Overview of the German and U.S. Strategies*

	Core functions/Capabilities	Noncore functions/capabilities	
		Nonessential	Essential
U.S. Armed Forces	<ul style="list-style-type: none"> <li>➤ Combat</li> <li>➤ C<sup>3</sup>I functions</li> <li>➤ Contracting</li> <li>➤ Positions involving essential military skills</li> </ul>	<ul style="list-style-type: none"> <li>➤ Organic capabilities</li> <li>➤ Depot maintenance: not more than 50 percent of funds for contractor support</li> </ul>	<ul style="list-style-type: none"> <li>➤ Depends on the situation; METT-TC (Army)</li> <li>➤ Backup plans for essential functions (Army)</li> <li>➤ Operational minimum</li> </ul>
Bundeswehr	<ul style="list-style-type: none"> <li>➤ Combat</li> <li>➤ C<sup>3</sup> functions</li> <li>➤ Strategic transport</li> <li>➤ Maintenance</li> </ul>	<ul style="list-style-type: none"> <li>➤ Operational minimum</li> </ul>	<ul style="list-style-type: none"> <li>➤ Depends on the situation</li> <li>➤ Backup plans for essential functions</li> <li>➤ Operational minimum</li> </ul>

## **2.2. Strategies Are Implemented Differently**

Despite the striking resemblance between German and U.S. strategies, the U.S. Armed Forces faces loss of functional control to a greater extent than does the Bundeswehr. This results from differing levels of compliance with the respective outsourcing strategies. While the Bundeswehr mainly complies with its strategy, the U.S. Armed Forces often evades or violates its strategy.

### *2.2.1. Implementation of Strategy in the Case of the Bundeswehr*

#### *Purchase of core capabilities: strategic airlift and intelligence*

The Bundeswehr relies on PMCs in two core competencies: strategic transportation and reconnaissance.

To deploy and distribute supplies to International Security Assistance Force (ISAF) troops in Afghanistan, the Bundeswehr hired a private contractor, Antonov Airlines. In addition, in March 2006 the SALIS (Strategic Airlift Interim Solution) program of the European Union (EU) and NATO came into service, which also makes use of the Antonov aircrafts of the Ruslan SALIS Ltd. (Handelsblatt 21.4.2004).

The Bundeswehr also relies on the market for maritime transportation. The transport of Leopard main battle tanks to Kosovo was contracted out to a private shipping company (nonattributed interview).

These examples show the dependency of the Bundeswehr on the private providers in the area of strategic transportation, as a result of its lack of organic capability. It can be argued that this is not a real case of outsourcing, since the Bundeswehr was simply outsourcing the jobs to bridge the gap until it had built its own resources. With the A400M project, the German air force is seeking to close the gap in strategic airlift capabilities until 2013. I would argue, however, that at least in the area of transport of heavy and oversize freight, the Bundeswehr will still have to rely on Ruslan SALIS even after delivery of the A400M. The aircraft is designed to carry—depending on the version—a load of between 32 and 40 tons (compared to 120 tons by an Antonov and 72 tons by a C-17 Globemaster). With such a limitation, the new armored personnel carrier Puma can be transported by A400M aircraft only with reduced armor (Lange 2005, 19). A partial lack of capability will therefore remain in this field.

By using a PMC to provide this service, the Bundeswehr violates its strategy, which describes strategic transportation as a core capability (BMVg, 2003). Still, the dependency does not result in severe loss of functional control because of the low risk of noncooperation or poor performance. First, the service is usually provided far away from the theater, a factor that lowers risk. Second, Ruslan SALIS seems to be a reliable partner, having provided its services to several nations since 1991 without any (publicly known) problems. Even in the

worst case of nonperformance, the costs would be moderate for the Bundeswehr to absorb. And, though the Bundeswehr cannot provide the service with organic resources, in most cases it would have enough time to organize a replacement before negative effects on functional control emerge. The U.S. and British forces have C-17 Globemasters at their disposal, which may help out in cases of emergency. When planes with great capacity, such as C-17 Globemasters, are not available, states could alternatively deploy forces by maritime transportation, though more slowly than by air. The loss of functional control is therefore moderate.

The second core capability outsourced by the Bundeswehr is satellite reconnaissance. In the past, the Bundeswehr relied heavily on the U.S. providers Space Imaging and QuickBird because they offered high-quality-resolution images (nonattributed interview). Although this service was always provided outside the theater, the risk of noncooperation or poor performance was high. This was because the U.S. government had so-called shutter control for U.S. firms (Minkwitz 2004, 11), meaning that it could either prohibit the scanning of an area, if national security required it, or have the option of purchasing images. Despite German dependency, and the high risk of defection, the losses of functional control remain moderate. Though the Bundeswehr is not yet able to perform the service itself, there are several other market providers—Russian or French—that can deliver high-quality satellite pictures (Lange 2005, 10). Furthermore, the dependency on the market is seen as an interim solution, until the Bundeswehr and the French armed forces complete joint construction of the satellite system SAR (Synthetic Aperture Radar)—Lupe.

#### *Noncore capabilities outside the theater*

The Bundeswehr contracts numerous noncore capabilities outside the theatre. Here, I focus mainly on the maintenance capabilities that either are contracted entirely or provided in a public private partnership (PPP).

One form of PPP is the “cooperation model,” wherein the state and contractor provide a service together. The model is used by the German air force and the European Aeronautic Defence and Space Company (EADS) and the Motoren und Turbinen Union (MTU) to maintain the flight cell and the engine of the weapons platform Eurofighter. The “Eurofighter cooperation cell” and the “cooperative model engine” integrate approximately 45 air force personnel in the maintenance processes provided by the companies (Boldt 2005, 38).

Another example is that of Heeresinstandsetzungslogistik Ltd. (HIL), a holding founded in 2005 that integrates the federal state and the firms Krauss-Maffei Wegman, Rheinmetall Landsysteme, and Industrierwerke Saar. It provides depot maintenance for armored vehicles and other mobile systems belonging to the army (Griephan 2005, 2–3). This is done by cooperation among civil personnel, former army maintenance personnel, and the army’s mobile maintenance units (Handelsblatt 2005, 5).

By outsourcing these functions, the Bundeswehr is within the boundaries of its strategy. In both cases, the level of dependency is moderate since the Bundeswehr maintains its own resources. In addition, the likelihood of noncooperation and poor performance is very low since all services are provided outside the theater. Even if defection by the provider occurs, the contractor could be replaced (though not entirely) by the Bundeswehr and current operations could be maintained, though with some difficulties. The loss of functional control is therefore small.

#### *Complete outsourcing outside the theater*

The German navy uses private contractors to overhaul its navy vessels, a task that would otherwise fall under the jurisdiction of the federally owned Marine arsenal (MARs). The service is, however, provided partly by private dockyard operators, since the Bundeswehr does not possess the facilities necessary to maintain the engines, steering gear, and hull (Antwort der Bundesregierung 2005, 19).

Though this situation entails moderate military dependence on the contractor, the navy still holds organic expertise in the field of maintenance. Critical systems for sensors, weapons, and communications are supported by the navy itself. The likelihood of uncooperative behavior is also low, since these services are provided outside the theater. In the worst case, a replacement of the contractor would be difficult because of the lack of navy dockyards and the limited number of available private facilities. The loss of functional control is small.

#### *Noncore and core capabilities in the theater*

According to the strategy of the Bundeswehr, outsourcing in the theater depends on the situation and is meant to enhance organic capabilities. But some exceptions can be found by examining the situations in Kosovo and Afghanistan.

1. In its missions in the Balkans and the Congo, the Bundeswehr used contractors for logistic support. Field camps were built, and life support and mess services were provided by private contractors (Neumann 2006, 58; Y. Magazin 2007). According to the Bundeswehr strategy, the construction of field camps is a special task of the SKB and therefore a core capability. In violation of the strategy, the service was entirely outsourced to a Spanish provider in the Congo and partly to local firms in the Balkans.

The dependency on the contractor in these cases was not structural owing to the organic resources of the Bundeswehr. But since the contractor had to perform in the theater, the likelihood of defection was high and, indeed, in the Congo the contractor performed poorly. Complaints were made about the hygienic situation and the quality of the installations (Fritsch 2007, 38). The tents, for example, were totally inadequate for the tropical conditions and provided no shelter against bugs (Unterrichtung 2006, 16). According to the special rapporteur to the Bundestag on the armed forces, the troops lost confidence in the competencies of the leadership when faced with these conditions in the Congo (Ibid., 13). Furthermore, replacement of the contractor was not possible. According to Major General

Glaz (2007), the construction of the field camp was outsourced because no participating nation was ready to take the lead with regard to logistics.

Similar reports of poor performance came from the Balkans mission. After the field's mess hall services had been privatized, the quality deteriorated (Unterrichtung 2006, 14). The outsourcing of mess hall service, however, is not a violation of strategy. And though the contractor defected, the level of dependency was not very high because the services provided were not highly specialized and alternatives could be found. The loss of functional control was small.

In Afghanistan, another special task of the SKB has been outsourced to private contractors: transportation of fuel and food supplies (nonattributed interview). Because no pipeline or organic resources exist in the theater, the Bundeswehr depends on the contractors for support. In Afghanistan's insecure environment, the likelihood of noncooperation and poor performance is very high. In addition, to the best of my knowledge the civil convoys are not protected by soldiers, endangering civilians further. Until today, however, no severe problems have come to public knowledge. This might be the result of either good precautions taken for the convoys, a stable environment, or simply luck.

Anyhow, to replace a defecting contractor would be very difficult. First, without adequate fuel supply, the armed forces' vehicles simply cannot move. Second, the Bundeswehr has not implemented backup plans (nonattributed interview) and lacks enough of its own resources either in the theater or in Germany to fill gaps. The loss of functional control is high.

2. According to the firm Rheinmetall Landsysteme Ltd. (RLS), two of its employees provided maintenance for the armored vehicle Wiesel and training for the Bundeswehr from May 18 to June 3, 2003, in Kabul.<sup>6</sup> In doing so, the RLS employees accompanied the soldiers even on

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<sup>6</sup> Rheinmetall-DeTec AG, *RLS-Kundendienstler im Camp Warehouse*, <http://www.rheinmetall-detec.de/index.php?lang=2&fid=916> (accessed March 2005).

patrol missions. This example shows that a private contractor conducted maintenance tasks in the theater, despite this being a core capability.

Indeed, the service is necessary to keep the vehicles combat ready. In this case, no dependency occurred because of the small number of contractors and, although the Bundeswehr violated its strategy, no loss of functional control took place.

3. The Bundeswehr camps in Badakhshan (Rimli, Schmeidl 2007, 15) and Faisabad, Afghanistan (Hutsch 2005), were protected by a private contractor. In the latter example, it seems that the camp's inner perimeter was still guarded by the Bundeswehr (nonattributed interview). The personnel of the contractor had been selected by the former general of the Northern Alliance, Nasir Mohhamed (Ibid.).

Whether this practice violates the outsourcing strategy of the Bundeswehr is not clear since guarding tasks are not mentioned explicitly in the KdB, White Book, or defense guidelines. I assume, however, that outsourcing of guarding tasks in the theater does violate the strategy. Colonel Frank Leidenberger, head of division conception and transformation of the Bundeswehr, has expressed concern about using PSCs for guard work, since the task might not be free to be outsourced (Y. Magazin 2007). This claim seems to be in accordance with the opinion of the government, which claimed in an inquiry of the parliament not to use private security providers in operations of the Bundeswehr (Antwort der Bundesregierung 2005, 15) and considers the use of force a prerogative of the state (Antwort der Bundesregierung, 2006, 5).

The dependency on the contractor was low, nevertheless, since the PSC manned only the second perimeter of the camp. The first was guarded by the Bundeswehr. The danger of nonperformance or poor performance would depend on the training of the security personnel; this is an issue Bundeswehr personnel do not want to discuss. In the case of nonperformance, Bundeswehr personnel are available to replace the contractor. The loss of control is small.



### 2.2.2. *Implementation of Strategy in the Case of the U.S. Army*

#### *Core functions*

The outsourcing strategy prohibits the contracting of combat functions. Some examples can be found that exist in a gray area.

1. According to Rep. Patrick McHenry, a member of the U.S. House Oversight and Government Reform Committee, approximately 60 security companies are serving under U.S. government contracts in Iraq (Elsea, Serafino 2007, 3). It is not entirely clear, though, how many security companies work for DoD, since little information is made available to the public. At least five of the 60 or so firms have contractual links with DoD.

- Aegis Defence Service Limited, a British firm, was contracted to “provide comprehensive security management...that provides anti-terrorism support and analysis, close personal protection, movement and escort security, and security program management” (Office of SIGIR 2005; see also Elsea, Serafino) throughout Iraq.
- Triple Canopy, a U.S.-based firm, provides security services to KBR, a contractor to DoD.
- ArmorGroup, a British company, was contracted to protect nonmilitary convoys (Fainaru 2007, A01).
- Erinys, a British firm, protects the Army Corps of Engineers.
- Crescent Security, a Kuwait-based firm, provides personal protection services for the Army (Schumacher 2006, 175)

The army does not consider protection of civil assets as combat functions, an area I will outline in more detail in Chapter 4. Of the firms listed here, at least Erinys and Aegis provide services to military personnel. By July 2007, both had about two thousand employees on the ground—a force the size of three battalions (Fainaru 2007, A01). Providing security service in a war zone comes very close to combat and is totally different from holding a bodyguard job in a pacified country. The high death toll (Aegis 19; Erinys 10) indicates the

intensity of the fighting in which the firms get involved and shows the difficulty of differentiating between security tasks and combat.

Furthermore, PSCs provide protection in the same way that soldiers do, thereby freeing service members for other tasks. This is underlined by the fact that the firms hire mostly former military-service personnel.

The use of PSCs to provide combat functions violates the outsourcing strategy of the U.S. Armed Forces. However, the United States depends to a certain degree on the PSC support. The firms have become an enabler, “allowing operations to happen that might be otherwise politically impossible” (Singer 2007, 3).

The risk of nonperformance or poor performance is assumed to be high in accordance with the danger of the task provided by the contractor. But the cases discussed here haven’t necessarily borne out such a hypotheses. To put the situation in context, the U.S. Army is severely overstretched (I will come back to this topic later), and it is impossible to replace 48,000 PSFs (Singer 2007, 3). However, as yet most of the PSCs have performed well based on the terms of their contract. Neither Blackwater (House of Representatives 2007, 24, 497) nor Aegis nor Erinys (Fainaru 2007, A01) has lost a client in Iraq. Furthermore, to the best of my knowledge there has been no serious wave of nonperformance by security contractors. The loss of functional control is therefore moderate.

2. The U.S. Air Force is using private contractors to operate unmanned area vehicles (UAVs). During the Afghanistan and Iraq operations, 56 contractors were deployed as part of an 82-member team to operate the RQ-4A Global Hawk. The contractors not only maintained and supplied the vehicles but also piloted them. According to Major General Joseph P. Stein, director of aerospace operations for Air Combat Command, the Global Hawk generated 55 percent of the targeting data (Guidry, Wills 2004, 5–7). Air force officers themselves concur that contractors conduct combat missions (Ibid., 7). Furthermore, UAV Predator was operated

during Operation Iraqi Freedom by private contractors (GAO 2003a, 8). These UAVs can be armed with missiles and are used to carry out combat operations.

The dependency of the air force on contractors is high given that the service branch simply lacks the personnel to operate the vehicles. The risk of nonperformance in the case of the UAV operators, however, seems to be very low. Although they perform a task at the tip of the spear, they do not put their lives on the line. Modern communications techniques allow them to operate vehicles far away from the theater. During Iraqi Freedom, the Global Hawk was controlled from the United States as it conducted a mission over Iraq (Guidry, Wills 2004, 8). The loss of functional control is moderate.

#### *Noncore functions in the theater*

The U.S. Army has contracted out a big part of its support systems work. Under system support contracts, a PMC maintains a particular weapon system. In 2001, within the U.S. Army, 45 systems below the division level depended on long-term support. Furthermore 27 flying systems were maintained, and for 60 systems PMCs provided lifetime procurement. Forty-two systems depended more than 75 percent on the PMC support (Greenfield, Camm 2005, 3). Some of these systems were critical to the mission, among them the Apache attack helicopter, the Patriot missile defense system, the Fuchs BC detection vehicle, the Wolverine heavy assault bridge, the M1A2 main battle tank and the Bradley armored vehicle (Hamontree 2002, 21–22).

Furthermore the army held external support contracts, which are finalized outside the theater between a higher command component and a PMC to support the troops in the theater. These arrangements usually have a global scope and encompass logistic tasks, transport and life support, or the maintenance of infrastructure. The army set up the Logistical Civil Augmentation Program (LOCAP) in 1985. Meanwhile 200,000 soldiers in more than 70

facilities in Afghanistan, Djibouti, Iraq, Kuwait, Georgia, and Uzbekistan are provided with life support under LOCAP III (Skinner 2005, 24–29).

The sheer number of systems supported by contractors and the number of contractors—180,000 in Iraq, compared to 160,000 troops—might seem to indicate a dependency. Even as a 2005 Congressional Budget Office (CBO) study<sup>7</sup> concluded that “contractors have augmented the Army’s support capability rather than served as a substitute” (CBO 2005, 16), I myself harbor doubts about this conclusion for several reasons.

First of all, the study itself claimed that the available troops could not perform all required functions (Ibid., 66). A report by the U.S. General Accountability Office (GAO) found that because the army could not perform these tasks alone, certain missions were placed at risk without contractor support (GAO 2003a, 17–18). For example, in the Balkans, the Apache or Black Hawk helicopters of the Army National Guard depended fully on contractor maintenance. This was because the National Guard simply lacked the necessary skills (Ibid., 8). The biological detection system deployed by the army in Afghanistan in 2001 was fully dependent on contractor support as well (Ibid., 18). The same is true for most of the 60 systems of the 4th Infantry Division. PMCs provided maintenance for almost every system including the entire C<sup>2</sup> system. Without contractor support, the division would not have been ready for combat (Greenfield, Camm 2005, 3).

Against this backdrop, U.S. Army officer George Hamontree (2002, 13) claims, “Mission essential system contractors are not augmenting or providing assistance for a system; they are *the* support for the system.” The CBO study findings show this judgment to be an overstatement, claiming “that the Army would not be able to provide all of the functions ... without creating additional units....” A lack of support troops is therefore seen as the problem. The army would, according to the study, require 177 units to perform the needed tasks on its own. CBO determined that the army could make available 104 units and the

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<sup>7</sup> CBO analyzed Task Order 59, the largest single order under LOCAP III, providing a wide range of logistical services for about 130,000 troops between June 2003 and June 2004.

remaining 73 would have to be formed (CBO 2005, 32).<sup>8</sup> Even if the U.S. Army maintains organic resources, it has substantial dependency, and I agree with Peter Singer's (2007, 3) conclusion that, without contractors, the Iraq operation would not be possible.

Since much outsourcing has been done in the theater, contractors' lives are always threatened and the likelihood of uncooperative behavior is high. This seems to be backed by findings of the DoD's inspector general (Office of the Inspector General 1991, i). A 1991 report reflected the concern that the armed forces could not ensure continued performance of emergency, or essential, functions in the case of contractor default during hostile situations. This warning was issued even before the big outsourcing wave occurred.

During U.S. efforts to liberate Kuwait in the first Gulf war, contractor support was far from perfect. Despite little Iraqi resistance, contracted drivers were not reliable. They would fall behind schedule and had to be replaced by soldiers to avoid the danger of mass defection (Schreier, Caparini 1999, 44). Other contractors providing food service at several air force installations simply walked off their jobs after chemical-attack warnings were received (Dowling, Feck 1999, 7).<sup>9</sup>

According to Lieutenant General Charles S. Mahan Jr., formerly one of the army's top logistics officers in Iraq, many civilian contractors refused to be deployed to the country's dangerous areas. As a result, the soldiers lacked fresh food, showers, and toilets for months (Bianco, Forest 2003). Similar complaints about the reliability of contractors were raised by a reserve air force colonel who explained to a *New York Times* reporter (Baum 2003, 32) that the communications gear on which his job depended was maintained entirely by civilian employees. "We had a problem in the middle of the night and called down for the contractor; they told us he doesn't come in until 9 a.m." Besides these reports about noncooperative behavior were complaints about poor performance. A corps support group in Iraq experienced numerous problems with regard to quality of food provided by a civil contractor. The

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<sup>8</sup> This number increases to 794 units if the rotation requirements are met (CBO 2005, 32).

<sup>9</sup> They returned, however, after receiving proper protective equipment.

performance of interpreters was also discovered to be poor, with some interpreters providing incorrect translations (GAO 2006a, 32).

Despite the insecure environment, no reports have surfaced of mass defections among contractors in Iraq. According to a 1981 report of the Defense Science Board, PMCs have even proven themselves to be very reliable (Greenfield, Camm 2005, 136). The former chairman of the Joint Chiefs of Staff, General John Shalikashvili, was even very satisfied with the contractors. He said that “no one knows better than I the tremendous work that Brown and Root has done in Somalia” (Hamontree 2002, 7).

Based on differing experiences of contractor performance, I estimate the risk of defection by logistics providers in the theater as moderate but not high. Still, high dependency and a moderate risk of defection have a great effect on functional control. These effects could be reduced if the army had the ability to replace the contractor by developing backup plans to prepare for emergency. At least in 2003, backup plans had not been developed (GAO 2003a, 16). Even if the situation has changed since then, according to the CBO study, the army lacks sufficient resources to replace the contractors. To replace the LOCAP alone, twelve field-service companies (1,476 troops) would be needed, but only three are available (CBO 2005, 73). What makes the replacements even more difficult is the reliance on contractors for the maintenance of weapon or C<sup>2</sup> systems. These tasks require special qualifications and expertise that cannot be provided easily by another company. With regard to logistics and base operations, the sheer scope of the task makes it unlikely that a replacement provider could be found that would be capable of running such a comprehensive operation without extensive forethought.

I have shown that the army depends to a large extent on contractors, and the risk of defection is moderate at least. The loss of functional control is high.

### **2.3. The Loss of Functional Control**

I have attempted to show that the United States and Germany have similar outsourcing strategies. Both aim to minimize the risk of losing functional control by reducing dependency. Therefore both armed forces have developed different categories of capabilities and various limitations on contractor support for critical tasks. In both cases contractors are meant to enhance but not to substitute for force structure.

A greater acceptance of losing functional control is therefore not the cause of the variance between the two states. As outlined in the preceding chapter, the difference in loss of control is accounted for by differing levels of compliance with the countries' respective strategies. The Bundeswehr infringes on its policy inside and outside the theater to a comparably minor extent. Even in the hypothetical scenario in which all contractors walked off the job, and did not provide any service to the Bundeswehr in the theater, the impact would not lead to an immediate and total collapse of a mission. In most cases, the Bundeswehr maintains its own capabilities and uses contractors to enhance its organic capabilities. In the cases in which PMCs serve as a substitute for organic forces, the risk of defection is very low and alternative sources of support are available. Transportation could be provided by German allies or performed by sea vessels rather than planes. Satellite reconnaissance in the theater is of comparatively minor importance against area surveillance by UAVs or Tornados. The Bundeswehr's most severe violation probably involves the outsourcing of fuel supply in Afghanistan without any backup option. Despite this exception, the overall loss of functional control is small.

This appears to be different in the case of the U.S. Armed Forces. First, it uses contractors to run some combat systems and sometimes even operate them. Second, the army depends heavily on contractors for various CS and CSS functions. Contractors substitute for force structure rather than enhance organic capabilities. Third, in most cases no backup plans have been developed to guarantee continued performance if the contractor fails. According to

this dependency on contractor support, the loss of functional control in the U.S. case is substantial.

### **3. The Loss of Political Control**

In military situations, political control refers to who “gets to decide about the deployment of arms and services” (Avant 2005, 6). Employing private military companies (PMCs) has two effects on the decision-making process. One is that it might change the balance of control between executive and legislative powers. The decision to hire PMCs is taken by the state’s leadership and is difficult to oversee by its parliament. Thus, the executive gains an advantage in relation to the legislative branch (Ibid., 128). In the following I do not focus on issues of political decision making, but rather on the role of the military commander in the theater. The increasing use of PMCs might, secondly, constrain a commander’s leeway in making decisions regarding the use of force (Leander 2006, 75). More specifically, it might restrict his ability to decide if, when, where, and how force is used—which is not to say that the commander had absolutely freedom beforehand. A commander’s course of action is always influenced, to some extent, by enemy actions, weather, terrain, and equipment. But since the commander’s principal role is to manage the uncertainties on the battlefield, he strives to unite the efforts of all parts of the armed forces toward a commonly recognized objective. This requires a unity of command, which means a single commander has the authority to direct the efforts of his subordinate troops and continually adapt the actions when necessary (Department of the Army 1993, 2–5; BMVg 2004, 5.2.1 and 8.2). Contractors pose difficulties in this matter. Although they are part of the broader force that is necessary to support the forces in achieving their objective, they are not a part of the armed forces, and their efforts cannot be synchronized by direct command and control. Depending on the contractor’s relationship to the armed forces, its utility as a tool at the commander’s disposal is distinct.



Contractors with a contractual relationship to the armed forces need to be managed. This might curb the decision-making capability of the commander, since management is a weaker form of influence than commanding. First, management can be a time-consuming process. To begin with, contracting poses difficult legal questions that are beyond the daily business of a military commander. The situation becomes even more complicated if the contractor has subcontracted parts of its services. Second, PMCs cannot be used beyond their contractual obligations; when circumstances change on the battlefield, the commander has to renegotiate. Yet because contractors follow an economic rationale, I will start from the assumption that they will usually perform and that adjustments of a contract is possible in most of the cases. Nevertheless, the management process is more time consuming than commanding and therefore constricts the commander's leeway with regard to *when* to launch an operation. I will assume, though, that the impact of such situations on political control is limited, since we are only discussing timing, or the "when" aspect of political control. Of course, loss of control depends also—like the loss of functional control—on the importance of the task and the scope of outsourcing.

Contractors with no contractual relationship to the armed forces are more difficult to synchronize. For instance, in Afghanistan and Iraq nongovernmental organizations (NGOs) and allies are using contractors in the theater. Of particular interest in this matter are the security providers operating in the area of responsibility. Their operations may have a major impact on the political control exercised by the commander. Besides the operations of the enemy forces, the commander must now take into account a third armed—though not hostile—group. The lack of influence on or coordination with such an armed group operating within the area of responsibility can cause much more substantial loss of political control for the commander than in the situation involving government contractors. It can have effects on if, when, and how to use force, as the following examples show:

- The operation of the contractor can force the commander to change his plan during an operation. According to one officer, contractors escorted a local Coalition Provisional Authority (CPA) administrator into Najaf without the knowledge of the local commander while a military operation was in progress. When the administrator and his guards got involved in a firefight, the military had to send troops. This had a significant impact on the operation (GAO 2005, 22).
- The operations of contractors can sometimes change a commander's entire strategy, as happened in Fallujah in March 2004. After four contractors had been ambushed and killed (Scahill 2007, 105–15) the U.S. government and high-ranking U.S. military officials became convinced that they should respond with an assault on the city: "Their death will not go unpunished. It will be at a time and a place of our choosing. We will hunt the criminals down."<sup>10</sup> For the military commander on the ground, Major General James Mattis, the orders triggered by the incident meant a change in strategy. He had come to Fallujah with the goal of breaking the cycle of violence and winning over the people with a culturally sensitive approach, high-profile infrastructure-improvement projects, and low-profile raids against individuals who posed threats (Ricks 2006, 311–20). When the ambush occurred, Mattis wanted to treat the killings as a law enforcement issue. But his leadership had other plans (Scahill 2007, 114). Thus, as a result of the failed operation of a contractor, the military commander was forced to change his strategy.

### **3.1. The U.S. Army Strategy**

As mentioned already, a central task for the commander is to synchronize the efforts of the troops in order to attain the mission. Therefore, he has the authority to command his subordinates and command is unified in his hands. Since contractors are not integrated in the

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<sup>10</sup> Transcript: Coalition Provisional Authority briefing, April 1, 2004—Brigadier General Mark Kimmitt, deputy director for Coalition Operations, and Dan Senior, senior adviser.

chain of command, the main tool used by the commander to direct contractors' efforts is management through the contracting officer (Department of the Army 2003, 1–22; Department of the Army 1999b, 1–17).

To simplify the management process, the U.S. Armed Forces maintains flexible contracts—so-called cost-reimbursement, indefinite-delivery/indefinite-quantity contracts—in order to match the commander's requirements (Wynn 2000). Furthermore, army policy requires that all contractors adhere to general orders covering conduct of personnel when entering army facilities (Department of the Army 2003, B-6). However, the provisions refer to only general matters such as lodging and the use of alcohol (Ibid., 5–23). Additional orders must be given in written form, addressing all personnel subordinate to the commander. This obligation must be included in the contract. The intent here, apparently, is not to fine-tune contractor services to changing circumstances.

U.S. Armed Forces officials are aware of the increased risk to political control posed by contractors with no relationship to the military. However, a strategy to coordinate between the military and private security company (PSC) operations did not exist until October 2004, and contacts were maintained chiefly on an informal basis (GAO, 2005, 21). In October 2004 an attempt was made to institutionalize coordination by setting up a Reconstruction Operation Center (ROC) in Iraq. The U.S. Department of Defense (DoD) contracted with the British firm Aegis Defence Security Ltd. to establish the ROC in order “to develop a common operating picture for contractors and the military, and facilitate coordination between the military contractors” (GAO July 2005, 23). Since then, the ROC and six regional centers have provided intelligence information to the contractors. In cases of emergency, the ROC serves as a 911 operator. Contractors can ask for military or medical assistance, and the ROC conveys the request to the military, which responds. The ROC also addresses the lack of radio interoperability between the military and contractors. Contact numbers are provided and, if the contractor agrees, a real-time tracking system is installed on its convoys (Ibid., 26).

Finally, the commander can influence contractors indirectly—including, sometimes, those not connected to the armed forces—through sanctions. The commander has the authority to revoke or suspend clearances and to restrict access to army installations (Department of the Army 2003, 4–47). These measures can be very effective. A complete cancellation of a security clearance means that the contractor cannot work for a firm under a government contract anymore. Even lowering the status of a security clearance has consequences for access to facilities.<sup>11</sup> The level of a security clearance determines which people a contractor is allowed to protect (Pelton 2006, 207) and which buildings the contractor has access to. If a contractor loses its clearance and is not allowed to access facilities where relevant institutions are located, the contractor simply cannot perform its service anymore (Ibid., 210). Even a temporary suspension of the clearance amounts to a severe punishment. If we assume that the average rotation time for a contractor in Iraq is between three and six months (Ibid., 224), a hiring firm could be prompted to withdraw the contractor earlier, resulting in loss of income.

In addition to these measures, a blacklist seems to exist. In May 2005, 19 security contractors working for Zapata Engineering were detained for unintentionally shooting at and almost striking U.S. forces. The contractors were released without being charged, but complained that the U.S. military had blacklisted and banished them from working in the security business in Iraq.<sup>12</sup>

### **3.2. The German Strategy**

The German Bundeswehr follows the same principles of unity of command and unity of effort as does the U.S. Army, and tries to integrate contractors. However, the German armed forces has not yet developed a document dealing with contracting on the battlefield, as the U.S. has done. The coordination between civil and military efforts is conducted by the Armed Forces

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<sup>11</sup> Three kinds of clearances are issued: confidential, secret, and top secret.

<sup>12</sup> See <http://www.corpwatch.org/article.php?id=12829> (accessed February 11, 2008).

Support Command and the Center of Logistics of the Bundeswehr (nonattributed interview). Contracting in the theater is done by a “contracting officer.” According to Article 87b, the Federal Defense Administration is charged with budgeting and accounting and pay, as well as procurement issues. This means that the contracting officer is not a real military officer but rather an employee of the defense administration.<sup>13</sup> In short, the commander has to direct the contractors through management protocols.

With regard to security providers hired by organizations outside the German military, the Bundeswehr is aware of the risk of losing political control (Y-Magazin 2007). However, no effort to assure coordination has yet been forged. Generally, Bundeswehr personnel are asked to deal with PSCs in the theater as if they were members of foreign intelligence services—or criminals. Different procedures are sometimes set up on a mission-by-mission basis (Antwort der Bundesregierung 2005, 10).

### **3.3. Comparison of the Strategies**

Both armies follow the same basic principle. In order to assure unity of effort, commanders are given the tool to manage contractors. The contracting officer is therefore assigned to the commander through whom military and contractor operations are coordinated. In addition to the management arrangement, contractors must comply with general rules when entering military compounds and the commander can administer sanctions. Although this policy is only outlined explicitly in U.S. documents, it is likely to be the same on a German military base.

Differences exist with regard to contractors that lack a contractual relationship to either country’s government. The U.S. Army addressed the problem by setting up the ROC, while the Bundeswehr has yet to develop a similar structure or procedures.

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<sup>13</sup> During his deployment, however, he wears the uniform of a Bundeswehr officer in order to affirm his combatant status.

### **3.4. Implementation of the U.S. Strategy**

The first and most basic requirement for enabling the commander to manage contractors is to provide him with the necessary information on the support services the contractor provides. According to a U.S. Government Accountability Office (GAO) (2006a, 15) report, no office or database exists to store and make available such information. As a consequence, many commanders do not have enough knowledge of contractors supporting their troops. The “base commander of Logistical Support Area Anaconda, a major logistics hub in Iraq with about 10,000 contractor personnel ... had limited visibility of the number of contractors at his installation and the support they were providing; a battalion commander from a Stryker brigade ... was unable to determine the number of contractor-provided interpreters available to support his unit” (GAO 2006a, 15). Similar problems were encountered by Colonel Thomas Hammes (PBS interview, 2005), who was responsible for operating a base in Iraq. He did not know what services he could request from his contractors because he did not even have a copy of the contracts.

Furthermore, the DoD has an inadequate number of personnel to oversee the contracts. In 2005 the Project and Contracting Office (PCO) was short-staffed, with 41 officers administering 6,500 contracts (Office of SIGIR 2005, 11). This level had not changed by the end of 2006, when the army’s contracting agency was downsizing its force and struggling to find the necessary expertise to provide support (GAO 2006a, 21). Without adequate personnel, management of military contractors is almost impossible and increases risk that the commander will lose influence when deciding whether to exercise force. When contracting officers have to oversee too many contracts, problems cannot be addressed on time, with certain resolutions taking more than a week (PBS interview, Hammes, 2005). This becomes worse when the contract is not managed by the regional contracting officer but instead by personnel who do not even reside within the theater. “According to a senior Defense Contract Management Agency official in Iraq, relying on support from contract oversight personnel

outside the theatre of operations may not meet the needs of military commanders in Iraq who are operating under the demands and higher operational tempo of a contingency operation in a deployed location” (GAO 2006a, 23).

Finally the commanders being deployed lack training in how to use contractors. Without this knowledge, they are unable to incorporate the contractors in ensuring the unity of effort. In one case officers showed confusion as to the command and control of contractors (Ibid., 29).<sup>14</sup> In other cases contractors were instructed by a military commander to perform a task outside the scope of their contract (Ibid., 30). This lack of training can also cause delays in the conduct of the mission, when the commander has to gather information while already deployed.

Because of officers’ inadequate training as to the role of contractors, the instrument of sanctions is a double-edged sword. When a commander has limited knowledge about the role of contractors, such an action can have unintended repercussions. Many commanders, for example, do not want to work with contractors and want them out of their area of responsibility (GAO 2006a, 29). If they restrict contractor access, however, such a move can have serious consequences with respect to the ongoing mission.

The scope of U.S. outsourcing itself—coupled with a lack of oversight—allows for even more serious problems. A high level of outsourcing in conjunction with commanders who lack management capabilities causes a greater loss of political control as compared with a situation in which fewer tasks are outsourced.

Managing own contractors is only one side of the coin. As outlined above, the commander also must cope with contractors that have no contractual relationship to the armed forces. The ROC was established to address this problem—to coordinate efforts—but the

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<sup>14</sup> An interesting example relating to the command and control authority of contractors happened in April 2004 when the Coalition Provisional Authority headquarters in Najaf was attacked by insurgents. One marine asked, according to his military training, for permission of the officer in charge to commence fire. The order came, however, from a Blackwater contractor. At that moment, a contractor had taken over command of a U.S. Marine, replacing the commander in his decision regarding if, when, and how to use force (Pelton 2006, 150).

ROC has not been effective as a tool to integrate the contractors into the unity of effort. One reason for the failure of coordination is that registration at the ROC is not mandatory. As a result, many contractors have operated without even knowing about the cooperation system; others simply did not take the time to register (PBS interview, Toolan, 2005). Two of the largest PSCs in Iraq, Blackwater USA and DynCorp International, have refused to even participate (Horton 2007). The movements of such contractors are therefore invisible to the military, causing further interference between the two entities, the U.S. military and the contractor. The incidence of friendly fire (contractors shooting at U.S. military and vice versa) offers one troubling case study. Such incidents remained high after the ROC went into operation.<sup>15</sup> Between January and May of 2005, 20 incidents were reported (GAO, 2005, 28). This helps confirm that the PSCs are not integrated in the unity of effort and the commander suffers a further loss of political control.

Even if such incidents could be reduced, it is unlikely that the security providers could be included in the unity of effort. Although security providers and the military both work to stabilize areas, their particular objectives are different. PSCs are hired to protect the client, while the army provides public security. To achieve the latter goal, the commander has to fight the insurgency. This is done by engaging in actual combat against the enemy and by winning the hearts and minds of the people. The problem is that PSCs can harm the counterinsurgency strategy when they perform their tasks. In order to protect a client in a war zone, PSCs must be aggressive, and their tactics can offend residents. Sometimes—for example—local bystanders are forced to the side of the road; they can be intimidated, and even killed. By providing exactly the service they are asked to perform, the PSCs' actions can run counter to the military's counterinsurgency effort (Singer 2007, 6; PBS interview, Hammes, 2005).

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<sup>15</sup> Data before January 2005 were not available. The estimate is based on ROC officials' data (GAO, July 2005, 28).



As has been shown, the U.S. Army violates fundamental requirements of its strategy. The commanders are not trained to manage contractors, and they lack adequate personnel to manage them. In conjunction with the scale of outsourcing, the loss of political control is substantial. An even greater cause of lost political control is the ineffective implementation of the strategy to coordinate with security providers without a contractual relationship to the armed forces.

### **3.5. Implementation of the Bundeswehr Strategy**

As yet, no report has surfaced about command and control problems with regard to contractors in the Bundeswehr. Nevertheless, the Bundeswehr might suffer a loss of control were a contract to be renegotiated because of changing circumstances. Since the Bundeswehr has outsourced only a small proportion of noncore tasks in the theater, however, the problem is unlikely to occur on a large scale. Thus, the Bundeswehr does not risk a loss of political control.

The lack of a coordination strategy between the Bundeswehr and contractors with which it does not have a direct relationship has not yet caused a loss of control, either. This is probably because of the small number of PSCs in the area of responsibility of the German Bundeswehr in both Afghanistan and Kosovo.

### **3.6. The Loss of Political Control**

Both the U.S. and German armed forces follow the principles of unity of effort and unity of command. To include the contractors when establishing unity of effort, both forces use the tool of management, though the two implement their strategies in different ways. The U.S. forces, to begin with, have failed to meet the necessary prerequisites for managing contractors. As has been shown, U.S. commanders have inadequate oversight and knowledge

about the role of contractors, resulting in a substantial loss of political control. Germany, in contrast, has not yet experienced command and control problems. This is partly because the Bundeswehr has outsourced tasks less frequently than the U.S. Armed Forces has—and for very few tasks within the theater. Therefore, the problem for the Germans is unlikely to occur on the same scale as it has for the U.S. forces.

The incorporation of PSCs with no contractual relationship to the military into the unity of effort has posed a much bigger problem for U.S. forces. The PSCs' operations are able to influence military operations and even the course of an entire mission. On the other hand, the chances for commanders to influence contractors' behavior are limited. All of these factors, mainly ineffective coordination efforts between the commander and contractors, cause the U.S. loss of control to be very high.

In the case of Germany, no such loss of control can be found. This avoidance of failure can hardly be attributed to the implementation of an effective German strategy, though, since the Bundeswehr has no procedures in place to deal with PSCs. The limited loss of control seems to be due more to the small number of such contractors in the area of responsibility—mainly Kosovo and northern Afghanistan (for Afghanistan, see Rimli, Schmeidel 2007, 6).

#### **4. Social Control of the Use of Force**

Social control of force means the degree to which a force's current practice is in accordance with prevailing international norms (Avant 2005, 6). Realists often assume that everything is permitted in warfare or that the law is "silent" during war. Even a brief review of the history of warfare rebuts this claim. As various studies have shown, war is a social activity and its conduct is influenced highly by the respective cultures of the societies engaged in fighting (Keegan 1993; Howard 1979). According to Michael Howard (1979, 1), western societies impose limitations on themselves in the conduct of war. He even speaks of a "cultural regulation of violence." Such constraints, which have developed over centuries, are reflected

in norms of international law as well as social norms. Both types of norms define behaviors that are considered to be appropriate in the case of armed conflict.

In the following chapter, I want to elaborate on whether the U.S. and German strategies, as well as the forces' respective practices, reflect the international norms governing conflicts. Indeed, I cannot address every norm and will therefore focus on two that protect the states' monopoly of force: the combatant-only norm and the anti-mercenary norm.

I will focus first on the combatant-only norm, which differentiates between civilians and combatants and invests each category with different duties and privileges. The most important difference is that only combatants are entitled to "participate directly in hostilities." I further examine whether the strategies and practices of the United States and Germany comply with this norm and then evaluate potential losses of social control.

Second, I will turn to the anti-mercenary norm, which bars foreign fighters (non-nationals of a party to the conflict) from participating in conflicts when they are primarily motivated by financial profit. The scope of this norm, it turns out, is difficult to define, particularly as it relates to the use of armed security providers. I will argue that, although some security contractors can be subsumed under the anti-mercenaries norm, the widespread practice of hiring security companies by various social actors has constituted an exception to the anti-mercenary norm.

I will conclude that both strategies reflect international norms but that the states differ in their compliance with the strategies. The United States violates its strategy in critical areas, whereas Germany complies with its strategy. Thus, the loss of social control is substantial in the U.S. case and does not occur in the German case.

#### **4.1. Combatant-Only Norm**

The combatant-only norm restricts the number of actors entitled to participate in hostilities to those holding the status of a combatant. Since the norm is an expression of a state's monopoly

of force, the crucial criterion to qualify for combatant status is the relationship between the respective group and the state. This idea is reflected in three important international agreements on the conduct of warfare: the Hague Regulations, the Third Geneva Convention (GC III), and the Additional Protocol to the Geneva Conventions. When in 1899 the Hague Regulations were formulated, only state actors or associates were permitted to take part in hostilities. Apart from regular armies, only volunteer corps, militias, and spontaneous armed resistance groups consisting of the inhabitants of an invaded territory were granted combatant status. This restrictive trend was followed when the GC III was drafted. Apart from armed forces, only militias and volunteer groups were eligible for combatant status as long as they belonged to a party to the conflict, under a responsible command, wearing distinctive signs, carrying arms openly, and conducting their operations in accordance with the laws and customs of war. This principle was set forth formally in the Additional Protocols to the Geneva Conventions. Additional Protocol I (AP I) deals again with the issue of combatants' status. Compared with its predecessor' agreements, it is much more open, though a link to the state was still considered necessary. Only groups "responsible" to a party to the conflict and "acting on its behalf" were eligible for combatant status.

The literature on international law is divided on the question of whether contractors can qualify for combatant status. One view argues that each state decides independently under which conditions individuals are integrated into the armed forces. In most cases this requires recruitment procedures and subordination under the military chain of command. Neither of these situations can be applied to contractors, which perform their services usually on the basis of a commercial contract. Moreover, a "mere commercial contract is not a sufficient instrument to confer combatant status upon a person" (Schaller 2007, 347). In this vein contractors are viewed as civilians and not combatants.

Article 4 of GC III offers another avenue for contractors to gain combatant status without becoming incorporated into the armed forces: a de facto relationship between the

contractor and the state. In such a scenario, a formal authorization by the government can be replaced by an informal link (Gillard 2006, 534), which may exist in the case of many U.S. contractors. According to its strategy,<sup>16</sup> the U.S. Department of Defense (DoD) provides “executive civilian employees of the DoD Components a distinctive ID card for use in identifying their status as executives of the Department of Defense....” (DoD Instruction 1000.13). According to Louise Doswald-Beck (2007, 119), these identity cards are proof of an informal relationship between contractors and the government. Michael Schmitt (2005, 528) argues in favor of an even lower threshold to assume an informal relationship. Instead of referring to the ID cards, the group in question might claim a sufficient tie by simply fighting on behalf of a party to the conflict. Following these arguments, contractors might gain combatant status if they comported with the other criteria listed in Article 4 of GC III. Thus, there seems to be a window for contractors to qualify as combatants.

Still, neither Doswald-Beck nor Schmitt believes that combatant status should be accorded to private security contractors (PSCs), a view in keeping with the majority of international lawyers. I argue that granting combatant status to contractors runs counter to the historical idea of Article 4 of GC III. The concept of an informal relationship was thought to qualify partisans in the Second World War as both combatants and legitimate prisoners-of-war. To clarify: “Granting combatant status to security guards hired by an occupying power turns the purpose of Article 4 A (2) on its head, for it was not intended to allow for the creation and use of private military forces by parties to a conflict, but rather to make room for resistance movements and provide them with an incentive to comply with international humanitarian law” (Cameron 2006, 586).

In short, the contractual relationship is not sufficient to invest contractors with combatant status. Under international law, they are civilians.

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<sup>16</sup> DoD Directive 1000.22, Uniformed Services’ Identification (ID) Cards (Oct. 8, 1997); DoD Instruction 1000.23, DoD Civilian Identification Card (Dec. 1, 1998); DoD Instruction 1000.13, Identification (ID) Cards for Members of the Uniformed Services, Their Dependents, and Other Eligible Individuals (Dec. 5, 1997).

#### *4.1.1. U.S. Strategy*

The U.S. Army strategy follows a strict interpretation of the GC III terms and does not claim contractors to be combatants. FM 3-100.21 (1-21) explicitly claims that “contractors and their employees are not combatants, but civilians ‘authorized’ to accompany the force in the field.” The issued identity cards are meant to meet the standards of Article 4 (4) of GC III—in other words, they are given to persons accompanying the armed forces (Department of the Army, 2003, 1-21; Department of the Army 1999a, 3-3 d).

The civilian status of contractors is further embedded in the regulations of the army, which reflect the criteria of Article 4 of GC III like a negative template.

To begin with, a combatant must be subordinate to a commander. Field Manual (FM) 3-100.21 (1-22) meanwhile describes the relationship between the commander and contractors in the following way: “Management of contractor activities is accomplished through the responsible contracting organization, not the chain of command. Commanders do not have direct control over contractors or their employees....”

Second, a combatant has to wear fixed distinctive signs such as a uniform. For contractors, wearing a uniform is prohibited by the U.S. strategy. Army Regulation 715-9 (3-3e) claims, “Contractors accompanying the force are not authorized to wear military uniforms....”

Third, combatants are obliged to carry their weapons openly. According to the FM 3-100.21 (6-29), “[T]he decision to allow contractor employees to carry and use weapons for personal protection rests with the combatant commander. The general policy of the Army is that contractor employees will not be armed.”

Fourth, the strategy prohibits entrusting contractors with any task or role that could jeopardize their civilian status (Department of the Army, 2003, 1-21). Whether this U.S. Army practice is in accordance with the combatant-only norm depends very much on how a “task jeopardizing contractors’ status” is defined. As outlined above, only combatants are

allowed to participate directly in hostilities, whereas civilians are not. Since contractors are civilians, a line can be discerned between direct and nondirect participation in hostilities. Not immediately clear, however, is what tasks constitute “direct participation in hostilities.” Attacks, of course, are considered direct participation, but beyond this common denominator no widely shared definition has yet been developed. Article 49 (1) of the Additional Protocol defines attacks as “acts of violence against the adversary, whether in offence or in defence.”<sup>17</sup> The conventional use of weapons in order to cause harm to enemy forces or equipment is clearly covered by this definition (Schaller 2007, 351). But beyond this clear-cut case, various interpretations exist regarding the scope of this article. I will return to this point shortly.

The DoD and State Department employ a narrow interpretation of the term. Both consider offensive force to be direct participation, but not defensive force by civilians. In light of this distinction, contractors “shall not engage in offensive combat operations, along or in conjunction with U.S., Coalition or host nation forces” (Memorandum, 2007, 4).<sup>18</sup> The use of defensive force, however, is not considered to violate the combatant-only norm. Security providers may be used to protect senior civilian officials and personnel belonging to nonmilitary site security and nonmilitary convoy security (Isenberg 2007, 84). As long as the contractors use force for defensive purposes and with well-aimed shots (Memo 2007, 4), they do not jeopardize their civilian status. Since this is a DoD (and State Department) policy, it applies not only for the army but for all services.

#### *4.1.2. U.S. Practice and the Loss of Social Control*

In this section, I want to elaborate on whether U.S. Armed Forces’ practice causes a loss social control, taking two measures into consideration. First, I take for granted the U.S.

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<sup>17</sup> The United States has not yet ratified AP I. However AP I’s influence on the interpretation of the term “direct participation” also affects the interpretation of GC III.

<sup>18</sup> Even though this memo was published long after the occupation began, it can be assumed that it was DoD policy from the beginning. This is indicated by FM 3-100.21 (6-3), according to which contractors retain the right of self-defense and can be armed with approval of the commander.

interpretation of “direct participation in hostilities” and evaluate the practice of the armed forces in view of this measure. Afterward, I show that the narrow U.S. interpretation is disputed and that by following this policy the status of contractors might be jeopardized.

The distinction between combatants and noncombatants—it is worth noting—applies to international conflicts only (Schaller 2007, 357). Since most of the examples mentioned here took place in Iraq, I want to point out that the character of the conflict changed with the transition from the Coalition Provisional Authority (CPA) to the Iraqi Interim Government on June 28, 2004. After this date the conflict transformed from international to non-international conflict. This means that the same practice would have different effects on the loss of social control, depending on what exactly had happened. Civilians participating in hostilities cause a loss of control in international conflicts, but not in non-international conflicts. I restrict my analysis here to international conflicts.

As already mentioned, DoD has a narrow interpretation of the term “direct participation.” But narrow as the interpretation may be, systematic violations of the strategy have caused a loss of social control. The U.S. Air Force, to invoke an earlier example, used contractors to pilot the Predator drone. This is clearly a case of direct participation in hostilities, since these vehicles are armed and their weapons are used in an offensive manner. Moreover, the reliance on contractors as unmanned aerial vehicle (UAV) pilots is not an emergency measure. The practice is likely to continue (and grow), and can be explained by the so-called reachback concept. “Reachback” allows a geographic separation of the UAV and the command and control elements, which means the pilot need not be deployed on site and can operate the vehicle from anywhere in the world. This concept “lends itself to a greater role of UAV contractor pilots in combat operations” (Guidry, Wills 2004, 9).

Second, the strategy proscribes the use of contractors for guarding military assets. Nevertheless, in May 2004, the protection of the Army Corps of Engineers was outsourced to



a private security company (PBS interview with Andy Melville)<sup>19</sup>. Additionally, contractors were used (most probably under a State Department contract) to protect the civilian CPA facilities. Because military and civilian installations are often placed side by side on the same compound, security companies were—de facto—used to guard military installations. Thus, both practices run counter to the U.S. strategy.

Third, the U.S. strategy considers “well aimed” use of defensive force as nondirect participation in hostilities. But the contractor Blackwater (under a State Department contract) has used overwhelming firepower and was able to unleash “seven thousand bullets against an attacker” within moments (Pelton 2007, 201–2). The Crescent Security Team (hired frequently by DoD) has used suppressing fire in all directions to break free of an ambush (Schumacher 2006, 242). These two examples are strong indicators that suppressing fire and overwhelming firepower are commonly used tactics by security contractors in Iraq and Afghanistan. Three additional facts support this view. Some contractors have a counterassault team, which is meant to “extract” and support security teams under attack with additional firepower (Pelton 2007, 79). Contractors engage in training for extraction techniques in which one man gives covering fire and the other retreats (Ibid., 173). Insiders’ statements about the aggressive tactics used by security providers further strengthen this conception of contractors’ role (Ibid., 289; Schumacher 2006, 254).

These tactics seem to run counter to the U.S. Armed Forces’ understanding of defensive force and the well-aimed-shot requirement. By employing such contractors, the U.S. Armed Forces violates its strategy—and has violated it further by supplying contractors with rocket and grenade launchers in order to ensure they have enough firepower (Pelton 2007, 201).

Fourth, according to DoD strategy, security contractors should not be employed alongside soldiers. But such a provision seems impossible to follow since the two work in the

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<sup>19</sup> See <http://www.erinysinternational.com/Experience-SpecialistProtectionServices.asp> (accessed February 1, 2008).

same place. The Green Zone in Iraq, for example, is protected by security guards and marines, although at different checkpoints (Ibid., 216–19). Nevertheless, when a compound is under attack, contractors and soldiers fight side by side. This has already happened in Al Kut in April 2003 and Najaf in April 2004. In both cases the CPA compound was in danger of being overrun by insurgents. In Al Kut the army provided fire support for contractors with two Apache helicopters (Ibid., 163) and in Najaf security providers and marines fought back against the attackers side by side (Ibid., 147–54).

All these violations of the strategy seem not to be random and unintended but rather systematic and deliberate. Using contractor pilots for UAVs, civilian guards to provide security for military-civil complexes, and deploying contractors and soldiers alongside one another all offer support for this conclusion. Thus, even if DoD's narrow interpretation of "direct participation in hostilities" is taken for granted, the U.S. Armed Forces violates its strategy and loses social control.

This loss of control increases under a *broad* interpretation of "direct participation." Some authors claim that contractors offering guard and other protective services engage in direct participation (Schaller 2007, 351). Others define the term even more broadly to include indispensable function in support of the weapon system or, simply, hostile acts (Schmitt 2005, 533). The scope of these interpretations is much broader than is the official U.S. view. According to these understandings, security providers would be seen as taking part directly in hostilities, with even tactical intelligence-gathering and certain maintenance tasks provided by contractors counting as a violation of the combatant-only norm. This is because these tasks are viewed as indispensable functions in support of hostile acts. The U.S. Armed Forces has, in part, outsourced both functions. During the Balkan conflict (non-international) and in Afghanistan, tactical intelligence-gathering duties—the collection of information necessary to locate and identify targets—were partly outsourced (Leander 2004, 18). The U.S. Army's

Guardrail surveillance aircraft command and control system of the 4th Infantry Division in Iraq were supported entirely by contractors (GAO 2003, 9).

In sum, the U.S. Army strategy reflects the combatant-only norm and even incorporates the requirements of the GC III. However, the crux of the strategy is DoD interpretation of the term “direct participation in hostilities.” Even as the two international lawyers Lisa Turner and Lynn Norton agree with the narrow interpretation (Turner, Norton 2001, 28), sufficient legal ambiguity exists for the contractor’s status to be challenged and jeopardized. The U.S. government cannot simply use its authority to circumvent such a reality, since other parties to a conflict might interpret the legal situation differently. A paradox then emerges, wherein even if the U.S. Armed Forces complies with its strategy, it might lose social control, since the strategy does not reflect international law.

Finally, some actions taken by the U.S. Army, Air Force, and Marines—even if the narrow U.S. interpretation is taken for granted—show noncompliance with the strategy. As a result the U.S. Armed Forces has experienced a loss of social control. Keeping in mind that the combatant-only norm is meant to restrict use of force to assure a monopoly of force, the norm’s core is violated by using contractors to operate armed vehicles, guard military-civilian facilities, and through the use of military tactics and heavy weapons. Therefore, I assume a substantial loss of social control over the use of force.

#### *4.1.3. Bundeswehr Strategy and Practice*

The German Ministry of Defense employs a broader interpretation of the term “direct participation in hostilities” than does the DoD. This conclusion can be inferred from answers during a parliamentary inquiry on security providers. As long as security providers are not incorporated into the armed forces, Germany does not consider them to be combatants (Antwort der Bundesregierung 2005, 11; Antwort der Bundesregierung 2006, 7). The German government, therefore, rules out explicitly the use of contractors for security and military

services in international conflicts (Antwort der Bundesregierung 2005, 5, 15). As yet, there has been no case in which the Bundeswehr has used these services in an international conflict. Whether the ministry of defense follows the view that, in addition, indispensable tasks constitute direct participation is unclear. Although the Bundeswehr does not outsource tactical intelligence and field maintenance, this reasoning does not emerge from restrictions of international norms, but rather from the concept of core capabilities (see Chapter 2.1.1).

However, in non-international armed conflicts, the government takes a more relaxed approach to use of contractors. According to the German defense department's remarks in response to the parliamentary inquiry (mentioned earlier), use of security providers is decided on a case-by-case basis, with the ministry of defense issuing specific rules of engagement for each separate mission. Although the defense department statement did not rule out using PSCs explicitly, it implied an intention to refrain from using this option (Antwort der Bundesregierung 2005, 15, Antwort der Bundesregierung 2006, 5). The Bundeswehr uses security providers in two cases (see Chapter 2.2.1).

The German strategy reflects the combatant-only norm and the practice of the armed forces accords with this strategy. The broader interpretation is much less open for legal challenges and therefore avoids the pitfalls allowed by the more narrow U.S. interpretation. Thus, there is no loss of social control in the German case.

## **4.2. Anti-Mercenary Norm**

The civilian status of contractors can cause problems when they provide security services. As mentioned already, providing security can be seen as direct participation in hostilities. Security contractors might therefore be viewed as taking part in mercenary activities and, as a result, violating the anti-mercenary norm. As I will show, there are two anti-mercenary norms: a legal and a social norm. Of these two, the legal norm is very weak and plays almost no role in determining the status of security providers. The social norm, on the other hand, is

very strong. Although some security providers meet the criteria reflected in the norm, it is not immediately clear whether these providers qualify as mercenary since numerous exceptions exist to the rule. The question to be answered is whether the use of security providers constitutes an exception to the anti-mercenary norm. I will argue that the widespread practice of hiring PSCs does, in fact, indicate an exception to the norm.

#### *4.2.1. The Legal Anti-Mercenary Norm*

The anti-mercenary norm is incorporated deeply into the body of international law. Three international conventions developed treaties to deal with the question of mercenaries: the Organization of African Unity (OAU) Convention for the Elimination of Mercenarism (1977), the AP I of the Third Geneva Convention in 1978 (GC III), and the International Convention against the Recruitment, Use, Financing, and Training of Mercenaries (1989). The GC III document is the most important on the subject—because it is the most widely accepted. As of 2007, 167 states had ratified it. As quoted from Article 47 (2) AP I, a mercenary is any person who:

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

Since all these criteria have to be met cumulatively, it is almost impossible to qualify under Article 47 as a mercenary. While the security providers hire personnel from other countries or are often even based in a third country (Isenberg 2004), many PSC employees are indeed citizens of a party to the conflict, disqualifying them from mercenary status.

There is still a chance that third-country nationals can qualify as mercenaries, but they must fulfill all other criteria as well. In sum, Article 47 provides so many loopholes that “any mercenary who cannot exclude himself from this definition deserves to be shot—and his lawyer with him” (Geoffrey Best quoted in Shearer 1998, 17). Due to these shortfalls of Article 47 and all identical approaches, the documents become almost irrelevant for the categorization of PMCs as mercenaries (Schaller 2005; for different opinion, see Drews 2007).

#### *4.2.2. The Social Anti-Mercenary Norm*

Despite the lack of an effective legal norm, it appears astonishing that mercenaries have played almost no role in 20th century warfare—apart from some exceptions in the 1960s and 1970s in Africa. The answer to this puzzle is that weak law does not preclude a strong social anti-mercenary norm (Percy 2007, 368). The terms of the social norm are simpler than those posed by the legal norm, with the aim to protect the state’s monopoly of force and reflect its citizens’ duty to defend the country (Avant 2000, 44).<sup>20</sup> Use of a mercenary is considered a contradiction of these ideas since he is defined as an individual having no national association to a party to the conflict in which he fights, using force outside the control of the state and solely motivated by financial profit (Percy 2007, 371).

Both the U.S. and German strategies reflect this anti-mercenary norm. The U.S. strategy explicitly prohibits the outsourcing of combat functions. The German government explained, in a parliamentary inquiry, that mercenaries are considered to be criminals and will

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<sup>20</sup> Since the norm is “social,” I consider it applicable to international and non-international conflicts.

be prosecuted as such (Antwort der Bundesregierung 2001, Antwort der Bundesregierung 2006, 6). Thus, both strategies are in accordance with the so-called normative structure. However, both states outsourced security services during the Iraq and Afghanistan campaigns, a practice I outlined in Chapter 4.1. When the PSC is seen to qualify as a mercenary group, this might be an infringement of the states' respective strategies and therefore cause a loss of social control.

Indeed, according to the norm only third-country nationals can be considered mercenaries.<sup>21</sup> Since most contractors hire people from all over the world—e.g., South Africa, Chile, and Croatia (Rimli, Schmeidl 2007, 18; Isenberg 2004, 23)—a great share of the security providers might be considered mercenaries. That said, one's nationality is not so much the central concern. Volunteers fighting in the Spanish Civil War or the mujahideen in Afghanistan typically were not considered to be mercenaries. This suggests that being foreign is not so much a problem as fighting to earn money outside the control of the state (Percy 2007, 372; see also: Scahill 2007, xiii–xxviii).

The salary of security personnel varies by the type of the service provided as well as by the nationality of the contractor. Each international staff member from Western countries (e.g., the United States and the United Kingdom) guarding facilities or providing close protection earns between \$7,000 and \$10,000 a month (in U.S. dollars). Each nonwestern staff member (e.g., from Nepal or Africa) gets between \$2,000 and \$3,000 a month. Since both wage ranges surpass what the guards would earn performing the same service for their own respective militaries, the PSCs can be assumed to be fighting for money and, therefore, as mercenaries. According to Robert Pelton, “[P]rivate security has no ideology, no homeland, no flag. There is no God, no country. There is only the paycheck” (Pelton 2006, 218; for another opinion, see Schumacher 2007, 189, 256–62).

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<sup>21</sup> The Bundeswehr used local security contractors based in the host nation.

The United States therefore violates its strategy by hiring mercenaries. The German practice of hiring local contractors can also be considered a violation of the norm in cases in which greater emphasis is placed on “fighting for money outside the control of the state.” As outlined in Chapter 4.1.2., PSCs use military tactics and heavy weapons. Since the anti-mercenary norm is meant to protect a state’s monopoly of force, the very core of the norm seems to be violated by this practice. If such a conclusion turned out to be valid, the loss of social control would be substantial.

*Do PSCs constitute an exception to the anti-mercenary rule?*

As already mentioned, numerous exceptions can be outlined to the anti-mercenary rule. The question is whether PSCs might constitute a “new” exception even though their members are fighting for money. The question is now how an exception to the rule is formed.

Norms are meant to safeguard the conditions of social coexistence (Kratochwil 1989, 70). Usually actors comply with norms because their identity as legitimate members of the international community depends on this acceptance (Boekle, Rittberger, Wagner 2000, 10). Compliance with norms, however, can be expected and judged only when the norm explicitly formulates what behavior is demanded. Uncertainty occurs when different interpretations are possible. A new phenomenon always needs to be interpreted and classified as belonging to a norm—or not. This is done in a public discourse by social actors, such as representatives of companies, governmental organizations or NGOs, journalists, experts, or government (Neidhardt 1994, 8). In such a debate each participant seeks to convince the “opponent” by argument and to generate a common perception on the issue (Risse 2000, 9). An assumption of this argumentative logic is that the better argument will prevail in the discourse and actors will alter their views accordingly.

The objection might be made that bargaining power and status are more important than the persuasiveness of a given argument. Both factors definitely play a role if one thinks,



for example, of the United Nations (UN) Security Council. In public debate, however, such material factors recede in importance (Ibid., 8). In communicative situations neither the rank nor status of an actor qualifies one argument as better than another (Ibid., 18). I will argue, however, that the importance of rank and status increase again when equally persuasive arguments are discussed. In that case, a powerful actor can choose to comply with the interpretation it favors,<sup>22</sup> giving the strong actor a better chance of shaping the normative structure by its actions than a comparatively weak one. Since “structure exists, has effects, and evolves only because of agents and their practices” (Wendt 1999, 185), structural change can also be caused by actions (Ibid., 186), and powerful actors are at an advantage.

As I will flesh out, no public consensus has been generated as to whether security providers are mercenaries, since both proponents and opponents have provided compelling arguments. This “stalemate” has opened the door for social actors to choose between two courses of action. An overwhelming number have chosen to treat PSCs as legitimate actors and have hired them, thereby constituting security providers as an exception to the mercenary rule.

When the debate about security providers centered on the western interventions in Afghanistan and Iraq, the public echo was divided. The experience with the Executive Outcome and Sandline operations in Africa in the mid-1990s lead some commentators to label the new security providers “dogs of war” (Zarate 1998) or mercenaries (Silversteen 2000, 141–87). The International Consortium of Investigative Journalists coined the term “private military companies,” meant as a euphemism for “mercenaries” (ICIJ 2002). In 1999 Thomas Adams published an article in the U.S. Army journal *Parameters* about the “new mercenaries” and warned of the dangers of military corporations (Adams 1999). In a similar vein, United Nations (UN) special rapporteur on mercenaries Enrique Ballasteros warned of private security providers as “new modalities of mercenarism” (GA 2007, 69). Most of these

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<sup>22</sup> Power can derive from different sources; for example, moral authority or material resources.

authors argued that while differences exist between the new mercenaries and the older ones, the core of “new mercenarism” has not changed. PMCs are nothing more than organized mercenary companies selling military services outside the state structure for the sake of profit (Binder 2004, 14; Scahill 2007, XIX–XX).

Other commentators emphasized differences between the traditional mercenaries of the 1960s and 1970s in Africa and the newer ones (O’Brian 2000). In earlier decades, mercenaries lacked any cohesive organizing structure and formed—at best—loose, ad hoc groups. Today’s PMCs are permanent businesses. According to Peter Singer (2004, 45) PMCs are “the next evolution in the provision of military service by private actors....” They provide a much broader spectrum of services as mercenaries, compete on an open global market, with the company structure mattering more than the individual. But whether the services prohibited by the anti-mercenary norm are now provided in a more professional, corporate manner makes no difference as far as the norm itself is concerned. Moreover, trading on an open market does not render a practice appropriate. If a pharmacy hires a dealer to sell marijuana, it may face difficulties in turning to its “corporate” structure or the “open market” to defend its conduct as appropriate. If the pharmacy, alternatively, encounters no problems, it is more likely to assume that the rules have simply changed. Some PMCs, it is worth noting, have a very weak corporate structure—the firm might be no more than someone with military experience and a database (Kinsey 2006, 20). The North Carolina–based security provider Blackwater, for example, hires on a case-by-case basis from a huge database, which contains more than 14,000 “independent contractors.”<sup>23</sup>

Second, whereas today PMCs sell their services on an open market, earlier mercenaries almost always dealt in a clandestine way. Still, most firms today claim that their policy is to avoid getting involved with governments with a poor human rights record. They also purport to instill their recruits with professionalism—and to hire professionals only

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<sup>23</sup> See <http://content.hamptonroads.com/story.cfm?story=107949&ran=97936>.

(Kinsey 2007, 96). Some commentators object that the clandestine character military-contracting work has not disappeared. Anna Leander (2005, 64) claims the market to be segmented, with some contracts open and others hidden. For Blackwater, 15 percent of current business is deemed “black operations” for the U.S. Central Intelligence Agency (Pelton 2006, 284). Kevin O’Brian counters that secretive deals are not inherently negative and argues that PMCs add to the covert operations of special forces and should be considered a resource to the state (O’Brian 2000, 62–63).

Third, in contrast to traditional mercenaries, security providers offer defensive services such as guarding and protection. If the firms were to cross the line and start providing offensive services, they would be rendered mercenaries (Pelton 2006, 109). Firms such as Greystone—a Barbados-based off spring of Blackwater—however, already offer “light infantry solutions.”<sup>24</sup> Furthermore, it is difficult to draw a line between offensive and defensive actions (Singer 2004, 89), which can be exemplified in the discussion about preemptive versus preventive uses of force. Traditional mercenaries, comparatively, performed offensive as well as defensive tasks and the norm did not differentiate between different kinds of force. As Sarah Percy points out, “[T]he origins of the proscriptive norm against mercenary use clearly lie in the interest of ... states, kings, lords, or popes, who attempted to assert the exclusive right to use force within their territories” (Percy 2007, 90).

In a nutshell, the public discussion on the use of security providers was inconclusive, with each view supported by arguments of equal persuasiveness. This meant that the phenomenon had not been decisively subsumed under the anti-mercenary norm, and the United States and Germany were left with two possible courses of action. Both states made the same clear choice. They differentiated between mercenaries and security providers and hired the latter. According to a U.S. State Department official, PMCs are a “cadre of security professionals” (Griffin 2007). A petition in the German Bundestag called for a two-track

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<sup>24</sup> See <http://www.greystone-ltd.com/humanitarianPeace.html>.

policy: enforcing the anti-mercenary norm and enacting national regulations for the security companies (Antrag der Fraktion der CDU 2004).

Does this mean, that an exception had been constituted and the practice did not violate the anti-mercenary norm? Due to the mutual influence of actor and structure, the practice of two powerful actors such as the United States and Germany plays a substantial role in constituting a new norm or exception. In this case this leads to a paradoxical situation in which the United States and Germany could violate the anti-mercenary norm, while at the same time creating an exception to sanction the violation. However, the practice of two states is not enough to change the norms structure internationally and it remains unclear when a new norm or, in this case, a new exception will be adopted. According to Martha Finnemore and Kathryn Sikkink (1998, 901), a “critical mass” has to be reached. But it is not only the mere mass matters—the particular states that subsequently adopt the norm are of great importance.

With this in mind, I considered two western states alongside the United States and Germany: Canada and the United Kingdom. Both states are big troop contributors to the Afghanistan and Iraq operations, which are said to be the breakthrough markets for the security industry (Donald 2006, 12–15). The two states’ practice can therefore be considered influential. I also included African states. Since the states in Africa suffered most under mercenary activities in the 1970s and 1980s, many developed a strong interest in banning the groups’ activities. The African nations’ practice therefore represents an important contribution (or hurdle) in the constitution of an exception to the anti-mercenary norm. Furthermore, I included the practice of NGOs, which can claim moral authority, since they are less frequently suspected of promoting “private” interests than other groups. The moral power of many NGOs can often have a major impact on the discourse and development of norms (Risse 2000, 22). When all these actors display the same practices and opinions, it can be assumed that a critical mass has been reached.

The Canadian Armed Forces has discussed using armed contractors. An analysis conducted by an officer at the Canadian Forces College argued that security companies were legitimate and that their employees could not be considered mercenaries. The anti-mercenary norm, in such a view, would not constrain Canada from hiring security providers (Liedtke 2006, 37). However, as yet Canada has not used the services of PSCs. Nonetheless the step is still being discussed as the next logical move in the privatization of military force to assist the Canadian forces' mission and to ease the stresses on the military (Gifford 2007, 33).

The British Foreign and Commonwealth Office differentiate in its green paper between mercenaries and security providers. Mercenaries are viewed as “soldiers of fortune” who are ready to enlist for any cause or under any power that is ready to pay them (Foreign Affairs Committee 2002, 7). PMCs, on the other hand, are defined as providing a wide range of tasks to governments, the UN, and NGOs. Although the government is reluctant to engage combat providers because of the fallout from the Sandline affair (Kinsey 2007, 105)—a scandal involving a military company in Sierra Leone and Papua New Guinea in the 1990s—they have hired various security providers to protect their civilian personnel in Iraq (Donald 2006, 15).

Although the UN special rapporteur on mercenaries was very skeptical about using security providers, the UN has used PMCs, including Defense Systems Limited (DSL) and DynCorp, since the 1990s (Deschamps 2005, 32). During the Rwanda crisis, the UN even considered outsourcing the intervention mission to DSL (Ogata 2005, 203–4).

The International Committee of the Red Cross opposes mercenarism decisively. In its journal, for instance, it warned about the return of mercenaries<sup>25</sup>. In Kinshasa, the capital of the Democratic Republic of the Congo, however, the Red Cross is among a number of aid agencies that use DSL for security (von Boemcken 2007, 263). Even NGOs such as Save the Children, CARE, Catholic Relief Services, the International Rescue Committee, Mercy Corps,

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<sup>25</sup> See [http://www.redcross.int/EN/mag/magazine2004\\_3/26-27.html](http://www.redcross.int/EN/mag/magazine2004_3/26-27.html).

and World Vision improve their safety by enlisting security providers (Vaux 2002, 23).

Finally, the World Wildlife Fund employed a security provider in 1997 to protect endangered species in the Congo's Garamana National Park (Avant 2006, 204–15).

Various African states also use security providers. Rita Abrahamsen and Michael Williams (2007, 137) argue that the “corporate” private military sector is increasingly present on the continent, whether as part of peacekeeping operations, military training, or other development and security-related activities. In particular, PSCs have expanded across the continent. In Kenya, for example, about two thousand companies employ 48,811 people. In Nigeria, the sector has expanded to reach up to 100,000 employees. The firms in the market are not all local, but the presence of international security companies has increased. Group4Securicor (D4S) works in more than 40 African countries, and ADT, and ArmorGroup also run large operations across the continent (Ibid., 137).

In sum, all the social actors taken into consideration have either chosen to hire or considered hiring security providers. A critical mass seems to have been reached and an exception to the anti-mercenary norm constituted. This conclusion is supported by the findings of S. Goddard and Sarah Percy. Goddard claims that PMCs are legally registered and legitimate corporate entities that sell military expertise. The United Kingdom and United States, in particular, have reinforced PMCs' legitimacy by offering them contracts for operations (Goddard 2001, 47). Sarah Percy (2007, 375) argues similarly that the “large-scale use of private security companies in Iraq and Afghanistan demonstrates that the anti-mercenary norm strongly held in the 1960s, 1970s, and 1980s has been eroded.”

Thus, the conduct of the United States and Germany is in accordance with international norms with regard to the anti-mercenary norm and neither state violates its own strategy. A loss of social control over the use of force does not occur with the use of PSCs.

### 4.3. Conclusion

In this chapter I have sought to explore whether Germany and the United States lose social control by using contractors. Two norms were taken into consideration: the combatant-only norm and the anti-mercenary norm.

Both states' strategies reflect the combatant-only norm. They differ, however, with regard to the interpretation of the term "direct participation in hostilities," a distinction that leads to different practices. Germany rules out categorically the use of security providers in international conflicts. Its standpoint with regard to indispensable tasks, however, is not clear. Although the German strategy prohibits the outsourcing of maintenance services, the reasoning for the practice is functional and not norm-based. In sum, the outsourcing strategy and the practice do not violate the combatant-only norm and Germany does not suffer a loss of social control.

The U.S. defense department takes a narrower view of the term "direct participation in hostilities." Security contractors guarding nonmilitary assets, providers of tactical intelligence, and maintenance services are not considered to be participating in hostilities. Even under this narrow view, the U.S. Armed Forces violates DoD strategy and the combatant-only norm. Since the violation hits at the core of the norm, the loss of social control over the use of force is substantial.

A general question was, whether the anti-mercenary norm applies to security providers. As has been shown, the public discourse had been divided on this issue and the use of PSCs had therefore not been shown as clearly prohibited or permitted. The United States and Germany have both decided to hire security providers, distinguishing them from mercenaries. Since various other states, international organizations (IOs), and NGOs have displayed a similar practice, I concluded that security providers constitute an exception to the anti-mercenary norm. As a result, neither the United States nor Germany loses social control.

## **5. Causes for Differences in Implementation**

In this analysis, I have shown that the strategies of the U.S. and German armed forces display a striking resemblance in addressing the functional dimension of control along with broad similarities in other areas. The puzzle that remains is why the German Bundeswehr shows more compliance with its strategy than does the U.S. Army. The varying levels of compliance can be observed in the forces' differing gaps between the availability of resources<sup>26</sup> and demands to be met. The greater the gap, I deduce—the lower the level of compliance with the strategy. Indeed, the gap for the United States is much larger than it is for the Bundeswehr, and the U.S. Armed Forces shows less compliance.

### **5.1. The Demands and Capabilities in the Case of the U.S. Army**

The demands set by the U.S. political leadership are high. According to some military experts, the “U.S. military is facing demands that are more wide-ranging and intensive than at any time since the end of the Vietnam War. But evidence is mounting that the armed forces lack the manpower to meet those challenges.” (Barnicle, Haase 2004, 1).

A good indicator of an overstretched military is troop deployments. Currently twenty of the army's 44 combat brigades and cavalry regiments are deployed overseas (Korb et al. 2007, 10). In addition, the current pace of deployments is very high. Most units served multiple tours in Iraq and/ or Afghanistan. Twelve brigades have served one tour in either Iraq or Afghanistan. Twenty have already toured twice, nine have served three times, and two have even served four times (Ibid., 9).

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<sup>26</sup> Another important reason for the reliance on contractors may be the increasing complexity of the weapon systems. This, however, is not a new development. Since the Reagan era, the U.S. military has used contractors to maintain and operate new technologies (Donald 2006, 8). The cause of increased reliance on contractors is a rise in demands on the military overall. Former U.S. secretary of defense Donald Rumsfeld wanted to reduce the acquisition period for new weapon systems. He claimed that the process was “ill-suited to meet the demands posed by expansion of unconventional and asymmetrical threats in an era of rapid technological advances....” (Guidry, Wills 2004, 8). Faster acquisition, though, results in less perfect systems and less time to train military pilots.



Troops are not only experiencing very high deployment rates, but the time the troops remain in the theater has also been extended—in some cases from twelve to fifteen months.<sup>27</sup> Since 2001, 50,000 troops whose enlistment ended while being deployed have been prevented from leaving the army by the stop-loss policy. One commander of an infantry division said that, without this policy, he would not be able to maintain the division as operational (Ibid., 11).

Military officials warn that the surge of 32,000 additional troops in Iraq imposes an increasing strain on U.S. forces. In testimony before the U.S. Senate Armed Services Committee, General Peter Schoomaker said, “We are having to...go to some extraordinary measures to make sure that we have the ability to respond properly” (Schoomaker 2007).

According to the vice chairman of the Joint Chiefs of Staff, General Richard Cody, there is also a shortage in nondeployed forces (Cloud, 20.3.07). For every unit deployed, two must be in reserve to respond to other threats and to maintain a proper “dwell” time. Army doctrine requires one year of recuperation and an additional year of training after a service member’s deployment. Yet under present conditions, the army cannot sustain this policy. Units are often redeployed after less than two years, and sometimes even less than nine months (Kolb et al. 2007, 10). To maintain sufficient troop levels, the army has to rely heavily on reserve components. The U.S. National Guard and Reserves have had to carry out thirteen mission days more per year than usual, even despite a manpower reduction of around 48 percent (Blizzard 2004, 4–15). Since 2001, 400,000 national guard members and reservists have been deployed to Iraq and Afghanistan; 56,000 of the reserve soldiers served multiple tours (Kolb et al. 2007, 10). Colonel Charles Hardy of the Forces Command, which oversees army training and equipping of troops, summed up the army’s current situation: “We are fully committed right now” (Cloud, 20.3.07).

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<sup>27</sup> See <http://www.military.com/NewsContent/0,13319,146498,00.html?ESRC=army.nl>.

## 5.2. Demands and Capabilities in the Case of the Bundeswehr

While German forces are already being deployed overseas, the Bundeswehr is transforming its cold war design toward structures able to conduct “out of area missions.” Until 1991 German politicians had not called on the army to deploy abroad and even considered it a violation of the German constitution. The change began with the missions in Cambodia and the Balkans in the early 1990s. At the same time that the Bundeswehr was supposed be conducting operations for which it had never been designed, it experienced cutbacks in budget and manpower. The share of the defense budget in the gross national product shrank from 3 percent (1985–1989) to 1.4 percent (2000–2004) (NATO-Russia Compendium 2005, 7). By the end of 2005, the German armed forces had participated in more than twenty peace-enforcing, -keeping and -building missions. In running its current nine missions, the Bundeswehr pushes the envelope of its capabilities. According to the concept “Heer 2010,” the army plans to have ten brigades and accompanying commando troops available in 2010. The number of deployed troops in Africa, the Middle East, the Balkans, and Asia varied in 2006–2007 between 7,800 and 9000 (including sailors, airmen, and soldiers).<sup>28</sup> At first glance these figures do not seem to represent an overstretch or a manpower crisis. Furthermore, only a small number of reservists are currently serving overseas, and they have not yet been called up, but serve voluntarily. In Afghanistan the share of reservists is 8.7 percent (300 troops), in Kosovo 7.2 percent (180 troops), and in Bosnia-Herzegovina 4.8 percent (15 troops).<sup>29</sup> The Bundeswehr therefore does not rely on reserve components to maintain its current operational level.

I will still argue that the Bundeswehr is already operating at its limits. In contrast to a U.S. soldier, a Bundeswehr soldier is not deployed for longer than four months (sailors for six months) on average. Since official data are not available, I assume that about 6,300 soldiers

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<sup>28</sup> See <http://www.bundeswehr.de> (accessed December 4, 2007).

<sup>29</sup> Ibid.

are now deployed, or roughly one and a half brigades.<sup>30</sup> For each deployed brigade, the Bundeswehr needs at least two others—one recently rotated out and one preparing to be deployed. Deployment happens twice a year, so in order for a soldier not to be deployed twice within a twelve-month period, the number of available soldiers must actually equal the current number deployed multiplied by *two*. Based on these assumptions, we end up with nine brigades. All in all, the short deployment periods (as compared with U.S. tours), can reasonably suggest that the situation is not that bad, if the Bundeswehr maintains its current praxis. Even so, the Bundeswehr has a different culture of deployment from the U.S. Armed Forces, and this culture cannot be changed overnight. Given current numbers, the limit has indeed been reached. According to the special rapporteur on the armed forces of the Bundestag (Unterrichtung 2005), the German armed forces has shortfalls in particular areas. Desperately needed are highly specialized personnel for the military staff, military police, light-aircraft crews, and medical units (Unterrichtung 2005–2006, 12). In these areas the lines are stretched thin, placing an extraordinary burden on units' personnel (Unterrichtung 2006, 12).

## **6. Conclusion**

In this paper I addressed the variance in the loss of functional, social, and political control among strong states. I have shown that the two examples, the United States and Germany, contract out a great variety of tasks formerly performed by soldiers. Both countries are aware of the risks associated with the use of contractors and therefore have developed outsourcing strategies to mitigate it. These strategies resemble each other strikingly when addressing the functional dimension of control and show broad similarities on the political and social levels. However, the loss of control over the use of force differs between the two forces. This phenomenon can be explained by different levels of compliance with the states' respective

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<sup>30</sup> I have subtracted the personnel of pure navy missions and the squadron for air force Tornados in Afghanistan from the total number of deployed troops.

strategies. By sticking in most cases to its strategy, the German Bundeswehr experiences comparably less loss of control than the U.S. Army, which evades its strategy to a great extent.

The cause of this difference can be found in the different sizes of each state's demand-capability gap. In the case of the U.S. Army, the gap is wide. In order to fill it, the armed forces outsourced responsibilities extensively to PMCs. Former U.S. undersecretary of defense Michael Wynne (2004, 3) concluded that contractors are needed to carry out postwar stability and reconstruction efforts in Iraq, and they are often used in areas in which the armed forces has no organic resources or expertise (Ibid., 4). The case of the 50-50 rule supports the direct connection. The rule requires an armed force to spend no more than 50 percent of its funds for depot-level maintenance on contractors. However, the former Air Force secretary F. Whitten Peters had to suspend the rule temporarily in 2001 and 2002 (Cahlink 2006, 67).

Although Bundeswehr forces are committed to their limit, they are not yet overstretched. With this context in mind, the German practice backs the results drawn in the U.S. case. First, in areas where the Bundeswehr experienced a big gap between demand and capability, it disregarded its strategy. In the areas of substantial shortfalls—strategic reconnaissance, strategic transportation, and fuel supply in Afghanistan—the Bundeswehr relied on contractors in order to close the gap. Second, all in all the Bundeswehr complies with its strategy because its demand-capability gap (smaller than that for the United States) allows such compliance. As a result, it suffers loss of control to a lesser extent.

Thus, the scope of the capability gap directly affects a state's compliance-behavior with its strategy. The larger the gap, the less compliance is shown and the greater the loss of control. Since the U.S. Army experiences a larger gap than the German Bundeswehr, the army suffers a greater loss of functional, social, and political control over the use of force.

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