



Geneva Centre for the Democratic Control of
Armed Forces (DCAF)

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**Privatising Security: Law, Practice and Governance of
Private Military and Security Companies**

Fred Schreier and Marina Caparini

Geneva, March 2005

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Table of Contents

Executive Summary	i
List of Acronyms	v
1. Introduction	1
1.1. The Rapid Growth of the Private Military Sector	3
1.2. The Changing Nature of the Private Military and Security Sector	6
1.3. The State of the Debate and the Unanswered Questions	9
2. What are Private Military and Security Companies?	14
2.1. Mercenaries	15
2.2. Private Military Companies	17
2.3. Private Security Companies	26
2.4. In Search of a Typology	33
3. Issues and Problems of Military and Security Privatization	44
3.1. Contractors in the Battlespace	44
3.2. Contractual Problems and Dilemmas	51
3.3. Legal Murkiness	56
3.4. Impact on Civil-Military Relations	61
3.5. Challenges of Accountability and Transparency	66
3.6. Contractors as Proxies for Governments.....	71
3.7. Double Standards	73
3.8. Other Issues and Problems	76
4. The Use of Private Military and Security Companies	80
4.1. Pros and Cons of Using Private Military and Security Companies	80
4.2. Lessons from Privatizing Security	86
4.3. Lessons from Outsourcing	97
5. Deficiencies in the Governance of Private Military and Security Companies	103
5.1. Regulation at the International Level	103
5.2. Types of National Legislation	104
6. Options for Effective Regulation of Private Military and Security Companies	116
6.1. Options for International Regulation	116

6.2. Options for National Regulation	117
6.3. How to Regulate Private Military and Security Companies?	134
7. Conclusion	141
Annex I.....	143
Private Military Companies and Private Security Companies on the Web.....	143
Annex II	147
International Conventions against Mercenarism.....	147
Bibliography.....	153

Executive Summary

1. The emergence and rapid growth of private military companies (PMCs) and private security companies (PSCs) in the 1990s followed from the downsizing of the armed forces in the aftermath of the Cold War and the development of many new conflicts which increased demand for military manpower and expertise. The redefinition of security strategies and the restructuring of armed forces by Western governments resulted in the elimination of non-core activities from the functions of many armed forces. These have increasingly been filled through various forms of alternative service delivery, in particular being outsourced to PMCs and PSCs.
2. Today, PMCs and PSCs constitute an important component of the security sector. This paper is a broad overview of the issues and challenges evoked by PMCs and PSCs, presenting the various typologies that are suggested by the range of services, activities and characteristics of the emerging private military and security industry. The advantages and disadvantages of using such firms are discussed in various contexts, as are the challenges connected with the regulation and governance of this sector.
3. Some of the most contentious issues that arise from privatizing the military and security sector concern the implications of their use for the battlespace, contractual problems and dilemmas, their ambiguous legal status, their impact on civil-military relations, accountability, transparency, and human rights problems, issues of economic exploitation, vested interests in conflicts, and their use as proxies for governments.
4. Some important lessons from privatizing security are that:
 - The role of the state is transformed in that it loses its monopoly over the means of force;
 - Security risks becoming a good unequally distributed, as only those who can pay for it may enjoy it;
 - Civil-military relations shift in the context of privatisation and outsourcing to the extent that it has made it easier for political leaders to take states to war;
 - PMCs may bolster the claim to *de jure* sovereignty of weak states by stabilizing their power, possibly reducing their willingness to (re)build an effective state administration;
 - In internal conflicts, PMCs are often used to boost the military capacity of the government. In cases where its legitimacy is questionable, the self-determination of the people and their access to resources may be constrained;
 - PMCs are not accountable to the people and parliament, nor are employees of private contractors subject to the military code of justice;
 - Privatisation of military services can harm the reliable delivery of essential services in conflict and war;
 - As is especially visible in the United States, there is serious potential for conflicts of interest arising from close ties between former government officials and the private

sector, including the revolving door syndrome where personnel move between government, industry and the military.

This paper infers further important lessons on the issues of peacekeeping, complex humanitarian emergencies, and domestic security purposes.

5. A close look at issues of outsourcing (or contracting out) reveals that the military and security sector raises formidable challenges to this process. The many contingencies of military operations and security activities make the development of the terms of contract a highly sensitive issue. Evidence suggest that carefully managed privatization can, under the right circumstances, provide specialized expertise, save money, and result in improved service delivery. It also shows, however, that poorly managed outsourcing, or privatization under the wrong circumstances, can lose money and result in poor delivery. Poor delivery in the military context, however, can dangerously compromise a commander's flexibility and capacity for rapid reaction.

In addition, many transaction costs of contracting out are not fully taken into account. The costs of managing contracts, including arranging bids, monitoring outcomes, and taking legal action for contract failures, may offset any efficiency savings.

While many serious technical problems challenge appropriate contracting processes, their susceptibility to abuse reduces the state's capacities to oversee outsourced activities effectively and hold companies accountable. The scandal involving Halliburton's overbilling in Iraq is one such example.

6. Apart from the International Convention against the Recruitment , Use, Financing and Training of Mercenaries, the major obligations under international law for states in the filed of mercenary and PMC or PSC activities arise from the law of neutrality and the prohibition on the use of force against the political independence and territorial integrity of states.

The failure to establish the exact legal status of PMCs and PSCs under international law effectively defers the problems to the national level. However, few states offer clear-cut legislation or effective enforcement mechanisms.

7. At the international and regional level, existing international conventions or regulations should be updated and amended to include PMC and PSC activities, issues of transparency and accountability of the firms, and accountability of the industry's employees. The mandates of the UN Special Rapporteur on mercenaries and the UN Register of Conventional Arms should be adapted for comprehensive control and monitoring of PMCs and PSCs.

National level options for controlling private military companies include a total ban on military activity abroad; a ban on recruitment for military activity abroad; a licensing regime for military services; a registration and notification regime; a general license for PMCs/PSCs; and self-regulation such as through a voluntary code of conduct.

This paper has emphasized the need for pragmatic thinking about the outsourcing of security-related activities, recognizing both the advantages and disadvantages posed by PMCs and PSCs. It is imperative that realistic options for improving the regulatory control of the industry now be pursued, with responsibility particularly resting with those states which systematically engage private military and security companies and those where many of them are based.

List of Acronyms

CIA	Central Intelligence Agency
CJTF	Combined Joint Task Force
DoD	US Department of Defense
EU	European Union
GAO	Government Accounting Office (Watchdog of the US Congress)
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IT	Information Technology
ITAR	International Traffic in Arms Regulations (US)
MEJA	Military Extraterritorial Jurisdiction Act (US DoD)
MoD	Ministry of Defence
NATO	North Atlantic Treaty Organization
NCACC	National Conventional Arms Control Committee (South Africa)
NGO	Non Governmental Organization
OAU	Organization of African Unity
OSCE	Organization for Security and Cooperation in Europe
PFI	Private Finance Initiative (UK)
PMC	Private Military Company
PMF	Private Military Firm
PPP	Public Private Partnerships
PSC	Private Security Company
PSF	Private Security Firm
ROE	Rules of Engagement
SAS	Special Air Service (of the British Armed Forces)
SBS	Special Boat Service (of the British Armed Forces)
SOF	Special Operations Forces (of the US Armed Forces)
UAV	Unmanned Aerial Vehicle
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Program
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
WFP	United Nations World Food Program

Privatising Security: Law, Practice and Governance of Private Military and Security Companies

Fred Schreier and Marina Caparini

1. Introduction

Mercenaries, soldiers of fortune, and private armies have existed since the dawn of war.¹ Individuals, communities, societies or states that were unable to secure territory, property, or engage in war, resorted to the practice of hiring soldiers and armed contingents. This only began to change with the advent of the Westphalian order in 1648, when the idea of states as providers of security became constitutive and defining for modern statehood. Ever since the 18th century, states have monopolized violence with the ability to raise armies and wage war. Governments have conscripted or enlisted their own citizens to secure their citizenry and sovereignty from internal and external threats. Citizens fought wars in the name of the state, out of loyalty, nationality, and ideology. This capacity for providing security at home and abroad has led to the ability of states to contribute to collective security on the regional and global scale.

Today, however, this Westphalian world of the nation-state as the unchallenged pillar of international order – with defence against threats from outside as the primary mission of its armed forces – has been superseded by a much more complex reality that has brought back the privatization of war and conflict. Privatization is not only manifest in the increase of civil strife and internal conflicts around the globe, pitting states and non-state forces against each other. Recent events in Afghanistan, Colombia, Somalia, Sudan, Uganda, Liberia, and the Western Balkans have heralded the return of paramilitaries led by warlords and mercenaries. Transnational terrorist groups, drug cartel forces, ethnically and religiously motivated armed groups, or internationally organized criminal enterprises are other examples of the privatization of conflict, while the increased use of private military contractors is a manifestation of the privatization and commercialization of war. The recent wars in Bosnia, Sierra Leone, Kosovo, Afghanistan, and Iraq were all fought with help of civilian contractors. They are similarly key players in the aftermath of the war in Iraq – in the securing of peace and the reconstitution or reform of state security institutions.

Not since the 17th century has there been such reliance on private military actors to accomplish tasks directly affecting the success of military engagements. Private contractors are now so firmly embedded in intervention, peacekeeping, and occupation that this trend has arguably reached the point of no return. The US, UK, Canadian, and also Australian militaries would struggle to wage war without such private companies. The proportion of contracted personnel in Iraq is claimed to be 10 times greater than

¹ Often referred to as the third oldest profession, after prostitution and spying.

during the first Gulf War.² Though no one in the present US Administration seems to know exactly how many private contractors or the total number of contractor personnel working in Iraq, current estimates vary from 20,000 to 45,000 private security staff coming from all corners of the world.³ According to the Center for Public Integrity's Windfalls of War project, more than 150 American companies have received contracts worth up to \$48.7 billion for work in postwar Afghanistan and Iraq.⁴ Of these, a significant proportion has been awarded to the private military industry – PMCs are the second largest contingent of the “coalition of the willing” in Iraq, after the US and before the UK. Consolidation is evident in the aspiration of the US Department of Defense that civilian contractors should account for 50 percent of deployed manpower in all future operations. The US is currently spending a gargantuan \$420 billion a year on the military. Yet the market revenue of the private military industry is said to have already risen to more than a quarter of that total and is expected to rise from \$55.6 billion in 1990 to \$202 billion in 2010.⁵

Hence, mercenaries, as they were once known, are thriving – only now they are called Private Military Companies (PMCs) and Private Security Companies (PSCs). PSCs are companies that specialize in providing security and protection of personnel and property, including humanitarian and industrial assets. PMCs are private companies that specialize in military skills, including combat operations, strategic planning, intelligence collection, operational support, logistics, training, procurement and maintenance of arms and equipment. While most PMCs serve governments and the armed forces, some have helped democratize foreign security forces, and have worked for the UN, NGOs, and even environmental groups. Others have prospered at the other end of the marketplace, working for dictators, regimes of failing states, organized crime, drug cartels, and terrorist-linked groups.

The rise of the PMC industry reflects the new business face of war. Representing the newest addition to the modern battlespace, the role of PMCs in contemporary warfare is becoming increasingly significant, changing armed forces around the world and the ways wars are fought. As new forms of armed conflict multiply and spread, they cause the lines

² M. Dobbs, “Iraq: Halliburton Reaping Huge Profits”, *Washington Post*, 28 August 2003. The General Accounting Office estimated that in addition to 5,200 US government civilians there were 9,200 contractor employees deployed in support of US Forces providing maintenance for high-tech equipment in addition to other services during the Gulf War. Contingency operations have seen an exponential growth in required contractor support: at one point in Bosnia, the US Army uniform presence was 6,000, supported by 5,900 civilian contractors. See: G. L. Campbell, “Contractors on the Battlefield: The Ethics of Paying Civilians to Enter Harm’s Way and Requiring Soldiers to Depend upon Them”, Paper presented at the Joint Services Conference on Professional Ethics 2000, Springfield, 27 to 28 January 2000, available at www.usafa.af.mil/jscope/JSCOPE00/Campbell100.html

³ The Pentagon has acknowledged that it is not even precisely sure how many companies are involved in providing goods and services in Iraq. See: W. D. Hartung, “An Incomplete Transition: An Assessment of the June 30th Transition and Its Aftermath”, *American News Women’s Club*, Washington D.C., 22 June 2004. In a letter in May 2004 to Representative Ike Skelton, a Missouri Democrat, Defense Secretary Rumsfeld disclosed that 20,000 private employees are working in Iraq in the security field alone. Also: S. Rayment, “Soldiers to be allowed a year off to go to Iraq to earn £500 a day as guards”, *Daily Telegraph*, 23 May 2004.

⁴ D. Politi, “Winning Contractors - An Update. As the number of contracts rises, problems continue to plague the contracting process”, *Center for Public Integrity* (website), 7 July 2004. Available at www.publicintegrity.org/wow/printer-friendly.aspx?aid=338. See also list of 153 firms: “Post-War Contractors Ranked by Total Contract Value in Iraq and Afghanistan. From 2002 through July 1, 2004”, *Windfalls of War*, Center for Public Integrity, available at www.publicintegrity.org/wow/resources.aspx?act=total

⁵ D. D. Avant, “Privatizing Military Training”, *Foreign Policy in Focus*, Interhemispheric Resource Center and Institute for Policy Studies, Vol. 5, No.17, June 2000, available at www.fpif.org/briefs/vol5/v5n17mil_body.html “If taken in aggregate, the second largest military in the world” according to John Robb, “A Corporate Superpower?”, *Global Guerrillas*, 11 April 2004, at http://globalguerrillas.typepad.com/globalguerrillas/2004/04/a_corporate_sup.html

between public and private, government and society, military and civilian to become as blurred as they were before 1648.⁶ Thus, with the continued growth and increasing activity of the private military industry, the start of the 21st century is witnessing the accelerating breakdown of the nation-state's monopoly on violence, and the emergence of a marketplace for the purveyors of armed force.

Most surprising is that in today's world of regulations – where even what food we may eat or which cosmetics we may use is subject to strict regulation and monitoring by public authorities – the private military industry, so central to national and international security remains largely unregulated. Regulation of private security companies in domestic contexts is somewhat more developed but generally can hardly be said to be rigorous. To date, action to control PMCs and PSCs has been *ad hoc* and sporadic. While most countries recognize the need to prohibit the activities of mercenaries, few have developed laws to support the international agreements that exist. The more complicated matter of PMCs and PSCs operating abroad has been left largely to self-regulation and corporate responsibility. The absence of regulation in the private provision of military and security services, the difficulty of democratic control, as well as the inadequacy of measures to hold the companies and their employees to account for their actions, are of particular concern. Hence, there is a need for states to control the private provision of military and security services as well as the role of these actors in the arms trade, the proliferation of weaponry and dual-use goods, and in the circumvention of arms embargoes.

The aim of this paper is to present the varying character and different perspectives of the private military and security industry and its activities, and the problems connected with the governance of this sector. It examines the multifaceted implications and problems of the use of the different services provided by these private actors. It explores the advantages and disadvantages of privatization and commercialization induced by the outsourcing of the state's monopoly over the use of violence for the provision of public goods of security and order, and the problems states incur by the use of contracted military and security services for both direct control over force and the basis of their authority. And it illustrates the legal, policy, governance, and oversight issues that private contracting raise. Since the private military and security industry is still largely unregulated, the rapid increase and diversification of PMC and PSC activities and their expanding customer base have prompted a number of governments to consider adopting legislation. To this end, the paper will present the options and a possible solution for regulation and improved oversight.

1.1. The Rapid Growth of the Private Military Sector

It was the confluence of several changes or shifts at the start of the 1990s that led to the rapid reemergence of this industry. The first was political: the peace dividend that led to a massive downsizing of the armed forces. Since the end of the Cold War, more than 7 million servicemen have been thrown into the employment market with little to peddle

⁶ M. Van Creveld, *The Transformation of War*, New York, The Free Press, 1991, p. 226.

but their fighting and military skills.⁷ Downsizing fed both supply and demand as new threats emerged. The booming private military and security sector has soaked up part of this manpower and expertise, which entails replacing soldiers wherever possible with much better paid civilians, who had often been trained at high expense by the state.

In many countries, downsizing was followed by the professionalisation of the armed forces. But at the same time as conscripted forces were being replaced by all-volunteer forces, which are generally more expensive to maintain than conscript armies, there were increasing demands by civilian leaders around the world for leaner and less expensive armed forces. Thus, additional reductions of personnel, resources, and infrastructure had to be introduced to help governments fight their burgeoning deficits. The growing financial constraints forced the transition of national security away from risk avoidance to a risk management focus and made Western militaries concentrate on developing leaner, meaner, more efficient and flexible forces. Concomitantly, however, military operational tempo has increased significantly following the proliferation of regional conflicts that ensued with the end of the stability engendered by the Cold War balance of power.⁸ In response to these trends, many Western armed forces have focused on redefining and maintaining only core competencies. Non-core activities were eliminated and those activities that need not necessarily be performed by uniformed personnel became the object of various forms of alternative service delivery, thus outsourced to PMCs.

Another change was the power vacuum created at the end of the Cold War that removed controls over levels of conflict while also releasing unresolved tensions and new pressures. In some regions the number of conflict zones and the incidence of civil wars have doubled.⁹ The period since has seen a massive increase in instability which often resulted in failed or failing states, unable to field sufficient armed forces to maintain internal order. At the same time, the end of the bipolar confrontation led to diminished great power interest in these areas. Public support for intervention in potential quagmires against diffuse enemies has become more difficult to garner, and the potential costs less bearable. Thus, for some fragile states, lacking support from the great powers and unable to provide security for their citizens, PMCs have provided a means of reaffirming political control and some semblance of order.

Concomitantly, the international arms trade opened up to an increasing number of buyers and sellers, which not only allowed a larger number and broader variety of actors

⁷ The US military has shrunk from 2,1 million in 1989 to 1,4 million today, and the US Army from 111 combat brigades to 63. The US National Guard and Reserve have experienced the same draw downs: from 1,8 million in 1989 to 876,000 today, all while performing 13 times the man-days a year they contributed prior to the demise of the USSR. The Soviet Union/Russia has gone from an army of 5,227,000 in 1987 to a force of some 977,000 in 2001. NATO countries conducted similar reductions, with the result that the UK now has an army that is at its lowest since it fought at Waterloo. Likewise, France went from a 1987 high of 547,000 to a force of now 295,000; Germany from 469,000 in 1990 to 284,000; Italy from 389,600 to 200,000; Spain from 274,500 to 160,000; Turkey from 647,400 to 515,000; Norway from 34,100 to 26,000; Denmark from 31,700 to 23,000; The Netherlands from 102,600 to 53,000; Belgium from 92,000 to 41,000; and Portugal from 68,000 to now 44,000. Poland went down from 312,800 in 1990 to now 200,000; Hungary from 94,000 to 33,000; Romania from 163,000 to 100,000; and Bulgaria from 129,000 to 51,000. Neutral Austria reduced from 42,500 to 35,000; and neutral Sweden from 64,500 to 34,000. See also: Bonn International Center for Conversion (BICC), *Conversion Survey 2003: Global Disarmament, Demilitarization and Demobilization*, Baden-Baden, Nomos Verlagsgesellschaft, 2003, on a global statistic about downsizing of armed forces personnel from the late 1980s to 2003.

⁸ From 1990 to 2000 the US Army alone has deployed troops on 36 occasions compared to 10 deployments during the 40 year Cold War.

⁹ T. B. Seybolt, "Major Armed Conflicts", in *SIPRI Yearbook 2000*, Oxford, Oxford University Press, 2000, pp. 15-75.

to access weaponry, but also opened more and easier ways for PMCs to profit from conflicts by engaging in the arms trade, thus facilitating arms proliferation.¹⁰ In a classic example of a security dilemma, the procurement of weapons for one side tended to increase the insecurity of the other side which often then turned to PMCs for arms and training. Thus, following the provision of weapons, PMCs could prove their utility for weak client states in a variety of other ways, from providing local security, to serving as military trainers, or actually planning and conducting small-scale military operations. Hence, PMC activity in the arms trade has helped to fuel the privatization of political violence which undermines – or makes more difficult – the reestablishment of the state monopoly on legitimate violence.

A further result of the decreasing direct engagement of external powers in conflicts and the decline in superpower support for clientele states in the developing world has been increasing impoverishment and the declining capacity of failing states to ensure the security of their citizens. Since civilians are no longer random victims, but often principal targets of armed conflicts, the number of refugees has increased from 2.4 million to more than 14 million, and that of internally displaced persons from 22 to 38 million over the last twenty years.¹¹ This has made humanitarian assistance and the system of aid distribution a very important source of revenue and hence part of local political struggles. The result has been increased pressure on aid organizations and rapidly growing insecurity for aid workers. This then led public and private aid organizations, and even UN organizations like the UNHCR, UNICEF, UNDP, and WFP, to hire PMCs or PSCs to ensure the protection of their operations and personnel in unstable areas.

An additional change, initiated by the Gulf War and the wars in the Balkans, is strategic and technological in nature. Essentially, warfare itself is changing in the ways it is carried out, particularly because of the heightened role of technology. Only this time it is either the most modern technology which is in high demand, not yet fielded, still under development or on trial, or pulled from the commercial sector rather than the reverse. As the level of technical sophistication of command and control and military hardware increases, there is a greater push to utilize civilian specialists because of the difficulty of developing and retaining the relevant skills in the military. This shift has led to a much increased demand for private sector specialists.

Perhaps the most important factor in the recent rise of the PMC and PSC industry is the normative shift toward the marketisation of the public sphere: the privatization revolution – the ultimate representation of neo-liberalism¹² – which provides the logic, legitimacy, and models for the entrance of markets into formerly public sector domains. Privatization has gone hand in hand with globalization. Both dynamics are supported by the belief that comparative advantage and competition maximize efficiency and effectiveness. Privatization has been touted as a testament to the superiority of the

¹⁰ The connection between mercenaries and the illicit trafficking of small arms has been identified by the UN Special Rapporteur on the question of mercenaries. See: Enrique Bernales Ballesteros (Special Rapporteur pursuant to Commission resolution 2001/3), *Report on the question of the use of mercenaries as means of violating human rights and impeding the exercise of the rights of people to self determination*. E/CN.4/2001/19, 10 January 2001, § 60 and 61. Hereafter referred to as: *Report on the question of the use of mercenaries*, 2001.

¹¹ International Alert & Feinstein International Famine Center, “The Politicization of Humanitarian Action and Staff Security: The Use of Private Security Companies by Humanitarian Agencies”, Summary Report, International Workshop Summary Report, Tufts University, 23/24 April 1991, p. 1.

¹² K. O’Brien, “Military-Advisory Groups and African Security: Privatized Peacekeeping”, *International Peacekeeping* 5, No.3, Autumn 1998, p. 89.

marketplace over government in provision of certain services. Outsourcing expenditures topped \$1 trillion worldwide by 2001, doubling in just 3 years.¹³ And the pressure for outsourcing will not subside. For example, for a number of years it has been official British government policy to outsource certain defence functions. Britain's public-private partnership, dubbed "Private Finance Initiative", is all about "paying privately for the defence we cannot afford publicly".¹⁴ Thus, transport planes, ships, trucks, training, and accommodations may all be provided on long term leases from private firms. The equipment will be leased to other customers during down time. Pilot training of the Royal Air Force is largely outsourced,¹⁵ and up to 80 percent of all army training now involves civilian contractors in some way.¹⁶

Finally there has been the escalation in the demand for PMCs and PSCs in the wake of 9/11, particularly in Afghanistan and Iraq, and in connection with homeland defence. The confluence of all these dynamics led to both the emergence and rapid growth of the privatized military and security industry. There are no signs that these trends will slow or reverse in the foreseeable future.

1.2. The Changing Nature of the Private Military and Security Sector

In the 1960s and 1970s, mercenaries of a rather unsavoury kind gained a reputation for brutality and exploitation through their involvement in the decolonization process.¹⁷ Mercenary units directly challenged a number of nascent state regimes in Africa, and even fought against the UN in the course of its operation in Congo (ONUC) from 1960 to 1964. They were also involved both in a number of attempted coups and in human rights abuses.¹⁸ Though the involvement of private military forces in today's world is usually a far cry from the mercenary activities of those times, this unsavoury reputation continues to influence public perceptions of the private sector involved in military operations, and the enduring image of those who work for them is that of the "dogs of war". Indeed, some of the stereotypical mercenary outfits do still exist, and are present at the lower end of the spectrum of PMCs. However, while some PMCs may be of the rogue kind, most private military and security companies are not.

¹³ "Outsourcing 2000", *Fortune*, 29 May 2000.

¹⁴ UK Ministry of Defence, "UK. Public Private Partnerships: Changing the way we do business. Public Private Partnerships in the MoD", available at www.mod.uk.business/ppp/intro.htm

¹⁵ The British MoD signed contracts for the training of pilots for attack helicopter, light aircraft, Lynx helicopter, and Tornado fighter jets. See: E. Krahnemann, "Controlling Private Military Companies: The United Kingdom and Germany", Paper presented at the Annual Convention of the International Studies Association, Portland, Oregon, 25 February to 1 March 2003, p. 9.

¹⁶ UK Foreign and Commonwealth Office, "Private Military Companies: Options for Regulation 2001-02", (Green Paper), London; The Stationary Office, HC 577, February 2002, p. 13. Hereafter referred to as "Green Paper". A "Green Paper" is essentially a policy paper that discusses the issues but makes no formal recommendations.

¹⁷ These decades had seen decolonization and the recognition of the right to national self-determination. At the same time, concerns appeared at the extent to which mercenaries were involved in this process. The UN began to condemn the use of mercenaries and to declare support for national liberation movements and declared in 1968 that the practice of using mercenaries against national liberation movements was a criminal act and characterized mercenaries as outlaws.

¹⁸ UK Foreign and Commonwealth Office, "Green Paper", p. 14.

PMCs are business providers of professional services intricately linked to warfare – corporate bodies that specialize in the sale of military skills.¹⁹ Representing the evolution of private actors in warfare and of the mercenary trade, this new industry is different from the classical type of mercenaries. The critical factor is their modern corporate business form. Globalization and deregulation of international markets have been instrumental in facilitating the restructuring of mercenary activities and has made it possible for PMCs to constitute large corporate groups operating across many states. The decreasing weight of bureaucracy and the increasingly fluid movement of goods, people and services across borders today compared to the Cold War period allow for quicker and more flexible operations. PMCs also benefit from contemporary conditions that offer the type of organization best suited for the purpose, and allow them to take advantage of tax-havens, incentives for foreign investment, as well as lax regulation of joint ventures, licensing and franchising.

PMCs are hierarchically organized into incorporated and registered businesses that trade and compete openly on the international market, link to outside financial holdings, recruit more proficiently than their predecessors, and provide a wider range of military services to a greater variety and number of clients. Corporatisation not only distinguishes PMCs from mercenaries and other past private military ventures, but offers clear advantages in both efficiency and effectiveness.²⁰ A fundamental aspect of the rapidly growing demand for and supply of PMC services is that it has taken place in an overall ideological environment marked by the conviction that markets and efficiency are prime criteria for judging the desirability of any project. This has been crucial in making the private military industry thrive and in spreading the idea that they are basically businesses like any other, to be judged on the basis of a price-quality relationship just like any other firm.

Like other corporations, modern PMCs operate as companies that focus on their relative advantages in the provision of military services. They target market niches by offering packaged services covering a wide variety of military skill sets. As business units, they are often tied through complex financial arrangements to other firms within as well as

¹⁹ Historically, corporate mercenaries can be traced to at least the 14th century Italy, as Caferro notes: “...Structurally, it resembled a corporation...with a well articulated hierarchy of commanders, and subcommanders over which the condottiere presided...The company drew to its services lawyers and notaries to deal with legal issues and make contracts (*condotte*), treasurers and bankers to handle money, priests and prostitutes to cater respectively to spiritual and carnal needs”. W. Caferro, *Mercenary Companies and the Decline of Siena*, Baltimore and London, Johns Hopkins University Press, 1998. C. Botta, “Soldiers of Fortune or Whores of War? The Legal Position of Mercenaries with Specific reference to South Africa”, *Strategic Review for Southern Africa* 15, No.2, November 1993, p. 77, adds that these mercenaries “often organized themselves like other commercial guilds at the time ...As men of business, they studied their trade, the available markets and their competitors”. A. Perlmutter, *The Military and Politics in Modern Times*, New Haven, Yale University Press, 1977, p. 32, asserts that modern “professionalism is corporate; that is, it includes group consciousness and a tendency to form corporate professional associations”. And K. Pech, “Executive Outcomes - A corporate quest”, in Cilliers & Mason, (eds.), *Peace, Profit or Plunder? The Privatization of Security in War-Torn African Societies*, South Africa, Halfway House, Institute for Security Studies, 1999, pp. 81-110, defines a “corporate army” as: “A privately owned military group whose finances, personnel, offensive operations, air wing division and logistics are all handled within a single group or through interlinked companies and enterprises. In its most basic form, it would be managed by a common pool of directors and have a small permanent corps of staff, serving its own commercial interests and those of affiliated entities. Such a group of companies would typically be owned, organized, paid and deployed by the controlling shareholders of one or more private companies, which, in turn, may be transnational conglomerates. As such, the traditionally state-owned powers and instruments for effecting political and social change through the use of force are transferred through privatization to a corporate entity or group. These powerful entities function at both a corporate, suprastate and the transnational level thus transferring the powers of a global city-state to a corporate group that is essentially accountable only to laws of profit and those of supply and demand”.

²⁰ P.W. Singer, “Corporate Warriors: The Rise and Ramification of the Privatized Military Industry”, *International Security* 26, No.3, Winter 2001/2002, p. 7. Referred to hereafter as “Corporate Warriors”, 2001-2002.

beyond their own industry. Many PMCs are subsidiaries of larger corporations listed on public stock exchanges. Particularly for some of the military-oriented multinational corporations in the US, the UK, and in Canada, the addition of military services to their list of offerings can help them to maintain profitability in times of shortages of public contracts. And for those multinationals engaged in the mining and energy extracting sectors, links with private military and security companies provide a welcome means for the management of their political risks in dangerous areas and volatile situations abroad.

PMCs and PSCs generally work from established databases that cover the available employee pool. They screen potential employees for valued skill-sets and tailor their staff to specific mission needs. In addition to efficiency gains, the resultant output is usually more effective²¹ than that delivered by mercenaries. While mercenary units operate as a collection of individuals, the personnel within PMCs are organized within the defined structures of a corporate entity. They are specifically grouped so as to operate with a set doctrine and greater cohesion of activity and discipline.²²

Instead of relying on the *ad hoc* black-market structuring and payment systems in use with mercenaries, PMCs function as profit-driven businesses seeking the highest bidder, and maintain permanent corporate hierarchies. This means that they make use of complex corporate financing – ranging from the sale of stock shares to intra-firm trade – and can engage in a wide variety of deals and contracts. In comparison, mercenaries tend to demand payment in hard cash and cannot be relied on beyond the short term. Thus, for PMCs, it is less the people who matter than the corporate structure they are within. Some PMC employees have been mercenaries at one time or another, but the processes surrounding their hire, their relationships with clients, and their impacts on conflicts are considered to be very different.²³

Unlike mercenaries, PMCs compete on the open global market and are in general considered legal entities that are contractually bound to their clients. In some cases, they are at least nominally tied to their home states through laws requiring registration, periodic reporting, and licensing of foreign contracts.²⁴ Rather than denying their existence, as many mercenary organizations do, most PMCs publicly advertise their services, including maintaining their own websites. Many also exhibit a desire for good public relations and a positive corporate image.

Finally, PMCs offer a much wider array of services to a greater variety of clients than do mercenaries. Some companies cover the full spectrum from consulting, training, maintenance and logistics, operational and direct combat support, to post-conflict reconstruction.²⁵ Moreover, they can work simultaneously for multiple clients in multiple markets and theatres – something mercenaries cannot do.

These features and the proliferation of PMCs have also brought about a change in government attitudes – a fact admitted even by those who continue to characterize PMC

²¹ P. W. Singer, *Corporate Warriors. The Rise of the Privatized Military Industry*. Ithaca and London, Cornell University Press, 2003, p. 47. Hereafter referred to as *Corporate Warriors, 2003*.

²² D. Shearer, "Private Armies and Military Intervention", *Adelphi Paper No.316*, London, IISS, February 1998.

²³ D. Shearer, "Private Armies and Military Intervention".

²⁴ J. C. Zarate, "The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Order", *Stanford Journal of International Law* 34, Winter 1998, pp. 75-156.

²⁵ A. Gilligan, "Inside Lt. Col. Spicer's New Model Army", *Sunday Telegraph*, 24 November 1998.

employees misleadingly as corporate mercenaries: “Today’s mercenaries still fight for money, but in the context of global capitalism, some groups are becoming less morally objectionable. The organization of mercenaries into corporations that function like consulting firms has put distance between them and their activities. Moreover, mercenary corporations’ increasing efficiency and self-regulation is influencing the way governments view mercenaries as instruments of state policy”.²⁶

However, the deregulated structure of activities is creating problems of transparency. One of the most obvious characteristics of this industry is that it presents a confusing and misleading maze to the outside observer. Companies sometimes form part of giant multinational and transcontinental concerns, making it difficult to establish where they begin or end. Some of these concerns are often registered as businesses in other territories which complicates issues such as governmental control over their activities. Moreover, contracts are often obtained on a subcontracting basis, thereby diverting the locus of control and responsibility. This becomes more important where the business concerned engages in activities that border on the illegal, which is sometimes the case. The UN Special Rapporteur on mercenaries has linked such companies with a variety of illegal trades, including arms, drugs, and trafficking in humans and organs as well as with extortion, kidnapping and terrorist activities.²⁷

1.3. The State of the Debate and the Unanswered Questions

This study is to a large part based on secondary sources. There exist few primary sources.²⁸ Information on PMCs is difficult to obtain and there is a paucity of information about the nature of services that PMCs offer. Little can be drawn from diplomatic expertise, private knowledge of, or involvement with, the modern private military and security industry. Research remains difficult because of the relative newness of the private military and security industry, its failure to fit neatly into existing theoretical frameworks, and the character of the business itself: since PMC operations are sometimes controversial, secrecy is often the norm and some try their best to cover up their activities. Many PMCs have been employed by intelligence agencies for covert operations and unaccountable foreign policy activities; the explicit political purpose of employing PMCs to further foreign policy objectives is the capacity it offers for official deniability. With the lambasting that some PMCs have received in the media, it is not surprising that many PMCs remain suspicious of the media and outside researchers. PMC employees are under strict orders to avoid contact with the media, and when PMC executives speak at all, it is normally only on condition of anonymity. Moreover, in the US, for example, contractual details are considered proprietary commercial information, and are exempted from release under the Freedom of Information Act.

Despite the fact that the private military industry got its start in the early 1990s with the rise of firms like *Executive Outcomes (EO)*, *Sandline International (SI)*, and *Military Professional Resources Incorporated (MPRI)*, and in the decade since has been expanding tremendously, it

²⁶ S. Creehan, “Soldiers of Fortune 500. International Mercenaries”, *Harvard International Review* 23, No.4, Winter 2002.

²⁷ E. B. Ballesteros, Report on the question of the use of mercenaries, 2001.

²⁸ See the work done by the International Consortium of Investigative Journalists, Center for Public Integrity. Available at www.publicintegrity.org/icij/

remains an enigma. Although numerous articles on PMCs and their activities have been published – the great majority in Anglo-American newspapers and magazines – most have been long on jingoistic headlines and rather short on solid examination. What quickly transpires from the media contributions is how exceptionally controversial the topic is. The media coverage, much of it distorted and sensationalized, is not only repetitive but highly polarized. Apart from gung-ho accounts, most contributions are aimed at either extolling PMCs for their efficacy and efficiency, as demonstrated in some instances in Africa, or condemning their mere existence. Some authors are clearly positive towards the use of PMCs in, for example, future peacekeeping operations, while others have fiercely criticized such proposals and argue that such companies should be outlawed and shut down.

The rather few that are engaged in the public debate over private military and security provision can largely be divided into three camps: activists, analysts, and proponents. The activists, often members of NGOs, aid, development, environmental organizations or humanitarian agencies, seek to drive governments, international organizations and political bodies into enacting legislation that will secure and enforce the conduct of PMCs in line with a commonly understood human rights-based agenda. The analysts view PMCs as a new phenomenon of growing importance in international relations and on the stage of international affairs, and explore, and comment upon, their conduct and practice against a background of issues such as globalization, privatization, and interventionism. The proponents take either a pragmatic or a promotional view of the privatized military and security industry and ponder how non-state commercial actors can play a legitimate and positive role in international security and development.²⁹

Until recently, there was very little earnest discussion about the issues raised by services provided by PMCs. Most Americans were ignorant of the extent of the Bush administration's use of PMCs and PSCs in Iraq until four contract security guards employed by *Blackwater Security Consulting* of North Carolina were killed in March 2004 in Falluja, set afire, and dismembered. Gruesome images of their charred bodies dangling from a bridge over the Euphrates River, and of the remains of another dragged behind a car for 50 kilometres, were broadcast to the American public. The public heard more as a result of the outrage over the abuses of Iraqi prisoners in the Abu Ghraib prison when the investigation was widened to include the role of civilian interrogators.³⁰ Since then,

²⁹ H.M.A. Cummings, "Perception and Profit: Understanding Commercial Military and Security Service Provision". A Discussion Paper read at a Seminar on 24 June 2002, Center for Studies in Security and Diplomacy, University of Birmingham, 14 June 2002, p. 2.

³⁰ See the superb investigative piece by S. M. Hersh, "Torture at Abu Ghraib", *The New Yorker*, 10 May 2004, pp. 42-47, that revealed that there were numerous occurrences of "sadistic, blatant, and wanton criminal abuses" of Iraqi prisoners not only committed by Military Police, but under orders from intelligence officers and civilian private military contractors to "loosen up" the Iraqis for subsequent interrogations. Two companies are being investigated for their role in torture allegations: CACI from Arlington, Virginia, who supplied at least one interrogator, and Titan of San Diego, California, who supplied at least two translators named in the classified internal Army report written by Major General Taguba.

old stories of abuses committed by PMC employees³¹ and newer cases of corporate fraud and scandals are making the headlines again.³²

Equally divided over the use of the private military and security industry are the commissioned military personnel of the national armed forces. On one side are those who argue that PMCs provide the armed forces with the ability to respond across the spectrum of conflict by contracting out for required non-core or emerging capabilities. They see in PMCs an untapped potential for peace and humanitarian operations, for conducting offensive information operations, and for use in countering asymmetric threats at the lower end of conflict.³³ On the other side are those reluctant to use PMCs, because they are structured solely for commercial profit and not bound by the codes, rules, and regulations that make a nation's armed forces unique and accountable. For more than a decade, studies and articles have been published by military colleges and military journals warning of the potential pitfalls of giving PMCs too large a role on the battlefield. A majority of these authors argue that the claimed cost savings are exaggerated or illusory, and that questions of coordination, command and control, oversight, and rules of engagement have not been adequately resolved. Thus, troops could be put at risk by PMCs, and the use of PMCs could result in the usurping of state legitimacy. More recently, several senior commanders of the US and UK armed forces have expressed mixed feelings about the increased use of PMCs and PSCs.³⁴

Many studies and reports have been journalistic, descriptive in nature rather than integrative or comparative with similar companies and general business models. Many are studies of individual companies or of specific conflicts with little elucidation of the variations in activities of PMCs and PSCs, their impact and the implications. Very little exploration of the impact of PMCs on civil-military relations has occurred. Earlier, frameworks of analysis and attempts at examining the private military and security industry as a whole were lacking and the literature was often polarized between the pro-PMC camp that identified and discussed a wider application of military-style force in resolution of modern conflict, and the opposing viewpoint that discussed a perceived need for a more limited and defined application of private military force within modern conflict. Despite the weak beginnings, stronger academic efforts have finally begun to

³¹ DynCorp was implicated in a sex slavery scandal in Bosnia, with its employees accused of rape and the buying and selling of girls as young as 12. A number of employees were fired, but never prosecuted. The only court cases to result involved the two whistleblowers who exposed the episode and were sacked. Of the two court cases, one US police officer working for DynCorp in Bosnia, Kathryn Bolkovac, won her suit for wrongful dismissal. The other, involving a mechanic, Ben Johnston, was settled out of court.

³² Fraud has long been a byproduct of government contracts with PMCs. In 2004 news broke that scandal-plagued Halliburton, US Vice President Cheney's old company, was cheating the US government on its contracts to provide fuel to troops in Iraq, and is implicated in a series of other accounting and overbilling gaffes.

³³ E. B. Smith, "The New Condottieri and US Policy: The Privatization of Conflict and Its Implication", *Parameters* (Winter 2002-03), pp. 104-119.

³⁴ E. Schmitt and T. Shanker, "Big Pay Luring Military", *New York Times*, 30 March 2004. And: J. Brookes, "The Pentagon's Private Corps", *MotherJones.com* (website), 22 October 2003: "...Lt General Charles S. Mahan Jr., the Army's top logistic officer, complained that many contractors refused to deploy to particular dangerous parts of Iraq...We thought we could depend on industry to perform these kind of functions...but it got harder and harder to get (them) in harm's way". And: S. Raymont, "Soldiers to be allowed a year off to go to Iraq to earn £500 a day as guards".

emerge on the private security and military industries and their implications for governance.³⁵

One exceptional study, named among the year's top five books in international affairs by the Gelber Prize, is Peter Warren Singer's groundbreaking book *Corporate Warriors*, which explores the rise of the privatized military industry and the global trade in hired military services.³⁶ It is a hard-hitting analysis that provides a fascinating first look inside this exciting, but potentially dangerous new industry. The study provides the first comprehensive, and by far the best analysis, as well as a critical but balanced look at the businesses behind the headlines. The one work currently most often cited, it traces the PMCs' historic roots in the mercenary outfits of the past and the more recent underlying causes that led to their emergence at the end of the Cold War. In a series of detailed company portraits, Singer, a National Security Fellow at the Brookings Institution and Director of the institution's "Project on US Policy Towards the Islamic World", describes how the industry operates, and the three sectors within the industry: *military provider firms*, like Executive Outcomes, a South African company of ex-apartheid fighters, which offer front-line combat services; *military consulting firms*, like MPRI, a US firm based in Virginia, staffed by veterans of the US armed forces, which provide strategic and military training expertise for clients around the world; and finally *military support firms*, like US Vice President Cheney's former Halliburton and its subsidiary, Kellogg Brown & Root, which carry out multibillion dollar military logistics and maintenance services, including running the US military's supply train in Iraq. Though his contribution may be largely focused on the US experience, he brings perspectives of corporate organization and financing that one does not normally find in discussions of the subject. Furthermore, the study provides the best overview so far on the many implications of the use of PMCs.

Though Singer had some unique insights into the industry, he too had to work with a number of secondary sources and cites some second-hand reports which render some points in the book debatable. But these are minor points and do not detract from his distinct message: *states no longer enjoy a monopoly on the means of violence, and we had better recognize and deal with that fact.* This approach is almost totally absent in current professional literature and academic studies.

With the growth of PMCs and PSCs, the state's role in defence and security has become deprived, just as it has in other international arenas such as trade and finance. While PMCs and PSCs are clearly here to stay, their existence and growth has created new opportunities and challenges. States, international institutions, NGOs, corporations, and even individuals can now lease military capabilities of almost any level from the global market. This development will affect international relations in a number of critical ways, ranging from the introduction of market dynamics and disruptions into security relations to the policy impact of alternative military agents. It may also necessitate far-reaching reassessments in both policymaking and theory-building.³⁷

³⁵ See: E. Krahnmann, 'Private Firms and the New Security Governance', Paper prepared for the International Studies Association, 23-27 March 2002, New Orleans; D. Isenberg, *Soldiers of Fortune Ltd.: A Profile of Today's Private Sector Corporate Mercenary Firms*, Center For Defense Information Monograph, November 1997; D. Shearer, "Private Armies and Military Intervention"; T. K. Adams, "The New Mercenaries and the Privatization of Conflict", *Parameters* 29, No.2, Summer 1999, pp. 103-116.

³⁶ P. W. Singer, *Corporate Warriors*, 2003. In addition, Singer has published a number of insightful articles.

³⁷ P. W. Singer, "Corporate Warriors", 2001-2002.

In terms of policy, just as state armed forces have had to develop a system for working with NGOs during recent peacekeeping and humanitarian operations, so too they will have to consider how to deal with the PMCs and PSCs that they will increasingly encounter within the battlespace. At the decision-making level, governments and international organizations must develop standard contracting policies, establish vetting and monitoring systems attuned to PMCs and PSCs, and ensure accountability and legislative oversight. A policy that defers to the market will not curb the threats to peace.³⁸

Outdated assumptions about the exclusive role of the state in the domain of defense and security will have to be reexamined. A broadening of civil-military relations theory to allow for the influence of third parties is an example of how this can be done without threatening the core of the theory. And consideration of the impact of a broadening military outsourcing market could make theories of deterrence, preemption and preventive operations, arms races, and conflict formation more reflective of the contemporary world. Similarly, corporate branding and marketing might well become more relevant in future conflicts, meriting research from security and defence perspectives.³⁹

Thus, since the rise of PMCs and PSCs raises possibilities and dilemmas not only compelling in an academic sense but which are driven by real-world relevance, it seems paramount that our understanding of mercenaries, PMCs, and PSCs as new players in international security is further enlarged and developed.

³⁸ P.W. Singer, "Corporate Warriors", 2001-2002.

³⁹ P. W. Singer, "Corporate Warriors", 2001-2002.

2. What are Private Military and Security Companies?

In practice, a wide spectrum of people, organizations, and activities – some of them respectable and legitimate, some of them not – may be involved in the supply of military and security services at home and abroad. These include *mercenaries; volunteers; foreign servicemen enlisted in national armies; armed groups, militias and warlords; defence industrial companies; PSCs, and PMCs.*⁴⁰

Here, only *mercenaries, PSCs, and PMCs* will be defined and characterized. Volunteers, foreign servicemen enlisted in national armies, armed groups, militias and warlords, and defence industrial companies will not be addressed. Volunteers are excluded by the Geneva Convention definition if their motives are idealistic rather than financial. In practice, it may be difficult to distinguish volunteers from traditional mercenaries: when they are paid, and when money is as much part of their motivation as ideology, volunteers are mercenaries.

Foreign servicemen enlisted in national armies will not be addressed since personnel and units, even if recruited abroad – as with the Gurkhas in the UK, in Brunei, and in India, the Foreign Legion in France and in Spain,⁴¹ and the Swiss Guards in the Vatican – are widely regarded as legitimate forces. They all swear an oath of allegiance. All are subject to the same military legal code as the members of the national armed forces that normally are citizens of the country they serve. And all are subject to the Geneva Convention and International Humanitarian Law, and are accountable for their conduct domestically through the political process.

Armed groups, militias and warlords represent the next rung from mercenaries. They fight with more organization than smaller mercenary groups and their efforts are more directed over longer periods of time. Though such forces can include mercenaries in organized numbers, these groupings do not always have a national outlook to their conflict, can often be transnational, supported by whatever country they can obtain funds and materiel from at any given time, and fight simply for control of a region or resources, or because the perpetuation of conflict is economically profitable. Diverse entities such as religiously-motivated combatant groups as those supported by the Islamic Brotherhood, the Afghan warlords Mohammed Fahim, Massoud's successor in the leadership of Jamiat-I-Islami, Karim Khalili, the Shiite Hazari commander, and Abdul Rashid Dostum, the commander of the Uzbek Jumbesh-I-Milli, as well as leaders such as John Garang in Sudan, all fall into this category.

Defence industrial companies normally supply weapons and equipment and in some cases export them under license. When they operate weapons and equipment and also supply training and maintenance packages, their services are no longer different from those provided PMCs, and thus are counted among PMCs.

⁴⁰ In his book, the authority on the private military industry, Singer is using the term Private Military Firms - PMF - for "the new business organizations that trade in professional services intricately linked to warfare. PMFs are private business entities that deliver to consumers a wide spectrum of military and security services, once generally assumed to be exclusively inside the public context", see: *Corporate Warriors*, 2003 , p. 8.

⁴¹ Though the Spanish Parliament passed a law in 1997 forbidding the recruitment of foreigners, the Spanish Foreign Legion still exists, in parts deployed in Ceuta, Melilla, and Almeria. Moreover, all branches of the Spanish Armed Forces are allowed to recruit personnel of Spanish origin up to the 3rd generation from Latin American countries, Guinea Equatorial, and some other places, but their number may not surpass more than 2 percent of the effectives of regular units.

2.1. Mercenaries

The Oxford Essential Dictionary of the US Military defines mercenary simply as “a professional soldier hired to serve in a foreign army”.⁴² Nathan defines mercenaries as: “soldiers hired by a foreign government or rebel movement to contribute to the prosecution of armed conflict – whether directly by engaging in hostilities or indirectly through training, logistics, intelligence or advisory services – and who do so outside the authority of the government and defence force of their own country”.⁴³ According to the Geneva Convention, 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 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.⁴⁴ The most recent definition is: “mercenaries are individuals who fight for financial gain in foreign wars; they are primarily used by armed groups and occasionally by governments”.⁴⁵ Others, taking a somewhat larger view, see the mercenary as “an individual or organization financed to act for a foreign entity within a military style framework, including conduct of military-style operations, without regard for ideals, legal, or moral commitments, and domestic and international law”.⁴⁶

The mercenary trade is banned by international law. However, the problem in discussing mercenaries is the definition of the word. Nations have struggled for decades to define the term and still have not come to an undisputed definition that is fully accepted under international law. Attempting to institute an effective legal definition of a mercenary has not proven to be viable, as demonstrated in by the three international conventions in Annex II. Equally important, existing international conventions did not foresee the post-Cold War evolution of mercenaries into PMCs. A means to avoid the definitional morass associated with mercenaries is to transfer the weight and emphasis of legislation from definition to legislation that effectively prohibits certain acts. As with most national forms of criminal and common law, persons are not defined by who they are, but rather by the actions that they conduct. And from the human security perspective, as is the case with weapons, it is not so much the *user* as the *misuse* of these instruments which must be controlled.

⁴² *The Oxford Essential Dictionary of the U.S. Military*, New York, Oxford University Press, Berkley Book, 2001, p. 266. Origin of mercenary: late Middle English (as a noun): from Latin *mercenarius* “hireling”, from *merces*, *merced* – “reward”.

⁴³ L. Nathan, “Lethal Weapons: Why Africa needs alternatives to hired guns”, *Track Two*, Vol. 6, No.2, August 1997, pp. 10-12.

⁴⁴ Protocol Additional to the Geneva Convention of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts, Geneva, ICRC, 1977: Article 47: Mercenaries. Herein after referred to as Protocol I.

⁴⁵ Center for Humanitarian Dialogue, *Small Arms and Human Security Bulletin*, Issue 3, June 2004, p. 2, available at www.hdcentre.org/datastore/Bul3-English.pdf. Armed groups are defined as “those that use military force to achieve their objectives and are not under state control. They usually seek political power and/or autonomy from the state; though their political objectives may often be mixed with criminal activity. This category does not include paramilitary bodies controlled by the state, unless these forces have some real autonomy”. See www.armedgroups.org

⁴⁶ S. Goddard, *The Private Military Company: A Legitimate International Entity Within Modern Conflict* (thesis), Faculty of the U.S. Army Command and General Staff College, Fort Leavenworth, Kansas, 2001, p. 8.

Traditionally, mercenaries have been defined as non-nationals hired to take direct part in armed conflicts. The primary motivation is said to be monetary gain rather than loyalty to a nation-state. This is why they are also called soldiers of fortune. Mercenaries can also be misguided adventurers, but often they are merely disreputable thugs, ready to enlist for any cause or power ready to pay them. Sometimes, they are veterans of a past war or an insurgency looking for whatever new conflict to continue in what they did before: fighting. Thus, what pulls people into the mercenary trade is not necessarily a motivation based entirely on monetary gain, but often the self-awareness that this is the only life-style which such an individual can have. The failure of reeducation or training programs to provide hope to former combatants often plays a major role in making them continue life as warriors. For some who have spent the last decade in combat, the realization that they do not fit into civilian society can be a prime motivator for mercenary activity. Occasionally, the motivator can also be the cause of the conflict combined with ideology – as was the case of mercenaries’ operations in Africa in the 1960s, such as with the Frenchman Gilbert Bourgeaud, known as Colonel Bob Denard,⁴⁷ the Irish-born commando ‘Mad’ Mike Hoare,⁴⁸ or the German Colonel ‘Black’ Jacques Schramme. Associated with the fight against communism, instability, white supremacy, secessionist movements, and attempts to preserve quasi-colonial structures, these professional mercenaries were known across Africa for their involvement in almost all the major battlefronts on the continent, in some coups d’état, and in human rights abuses. Such activity has continued more recently with the “White Legion” which was engaged in the conflict in Zaïre from 1996-1997, and which is typical of the way mercenaries are employed. This unit of some 300, fighting for Mobutu Sese Seko,⁴⁹ was trained by former French presidential guard officer Colonel Alain Le Carro, former Gendarme Robert Montoya, and the Serbian commando Lieutenant Milorad Palemis, and was composed of mercenaries from Serbia, Morocco, Angola, Mozambique, South Africa, Belgium, France and Britain. Following Mobutu’s defeat, they moved to Congo-Brazzaville, where they fought for the besieged Lissouba government.

There are smaller *ad hoc* outfits from Russia, Ukraine, Belarus, the Balkan countries, South Africa, Israel, the UK, France, the US and other nationalities that have been fighting in the Balkans and Caucasus conflicts and scour the earth for emerging conflicts. Such units may be infiltrated by criminals on the run, terrorists or guerrillas in disguise, sadistic psychopaths, intelligence officers, etc. These ‘dogs of war’ are known for their disloyalty and lack of discipline. Many have committed acts of banditry, rape, and an array of atrocities in the mutilated host countries. Though their trade is banned by international law, mercenaries remain engaged in nearly every ongoing conflict in the

⁴⁷ Denard gained notoriety for fighting with Katanga secessionists in the Belgian Congo against the UN. From the 1970s on, Denard led a series of violent coups in the Comoros Island and the Seychelles. He arranged for his appointments as Minister of Defense, Commander-in-Chief of the Army, and Chief of Police after his mercenary coup in the Comoros. His last coup attempt was as recent as 1995.

⁴⁸ Hoare explained during his trial after the aborted Comoros coup: “I see South Africa as the bastion of civilization in an Africa subjected to a total communist onslaught. In the last 22 years I have watched - in many cases physically battled against - its inexorable encroachment into free Africa and its conquests by default ...I see myself in the forefront of this fight (against communism) for our very existence. I see my men as a noble band of patriots motivated by the same desires”. Cited in: A. Mockler, *The New mercenaries*, London, Sedgwick and Jackson, 1985, p. 328.

⁴⁹ See: “French Covert Actions in Zaïre on behalf of Mobutu”, *AFP*, 2 May 1997. And: S. Boyne, “The White Legion: Mercenaries in Zaïre”, *Jane’s Intelligence Review* 9, №6, June 1997.

world.⁵⁰ The misgivings about this type of mercenaries are that they are freelance soldiers of no fixed abode, who, for large amounts of money, fight for dubious causes. They are said to be inherently ruthless, sometimes help to fuel and prolong conflicts, are disloyal, cannot really be relied up on, and can easily switch sides to the highest bidder in any war zone. This is why the term “mercenary” is a loaded, subjective one, carrying lots of emotional baggage and connotations.

Machiavelli’s warning resonates:⁵¹

...mercenaries and auxiliaries are useless and dangerous; and if one holds his state based on these arms, he will stand neither firm nor safe; for they are disunited, ambitious and without discipline, unfaithful, valiant before friends, cowardly before enemies; they have neither the fear of God nor fidelity to men, and destruction is deferred only so long as the attack is; for in peace one is robbed by them, and in war by the enemy. The fact is, they have no other attraction or reason for keeping the field than a trifle of stipend, which is not sufficient to make them willing to die for you. They are ready enough to be your soldiers whilst you do not make war, but if war comes they take themselves off or run from the foe...

In contrast to PMCs, mercenaries generally are temporary and *ad hoc* groupings of individual soldiers that are recruited in oblique and circuitous ways, in order to avoid legal prosecution. Lacking the professionalism and discipline that come from prior organization, integration, and doctrine, mercenaries are often limited in their capabilities. On the whole, they are unable to provide anything other than direct combat at the small-unit level and some limited military training. They regularly remain dependent on their host communities for logistics and support. Large-scale or long-term training and consulting missions are, like engineering and logistics, mostly outside their scope. Nor are they diversified organizations. In general, mercenary units are far from having the skills, capital, established methods, and capabilities to provide complex multiservice operations as do PMCs. Most often they are restricted to a single customer at a time. But contrary to misleading references in popular culture, mercenary groups do not impose themselves. They are sought after and hired as a means of conducting combat operations, both externally and internally.

2.2. Private Military Companies

The term **private military company** (PMC) does not exist within any current international legislation or convention. One definition of a PMC is: “a registered civilian company that specializes in the provision of contract military training (instruction and

⁵⁰ Today, it is the presence of African mercenaries, either individually, through tribal affiliations, or through the forcing of intervention by external national government actors with private interests and concerns in foreign conflicts throughout the continent, that far outnumbers the presence of any Western actors involved in Africa’s conflicts. UK Foreign and Commonwealth Office “Green Paper” presents a table in Annex A of mercenary interventions in Africa since the 1950s. Most recently, security forces clashed with a group of mercenary fighters in a northern suburb of Bangui, the capital of the Central African Republic. Fighting first erupted when the mercenaries demanded higher payment for their assistance in bringing President François Bozize to power last year. About 500 mercenaries, mainly from Chad, are each demanding about \$1,800 from the President. They say they have no political demands but are angry that they have not been paid a full year after the president seized power.

⁵¹ N. Machiavelli, *The Prince*. Written ca. 1505, published in 1515. Translated by Marriott, W.K. Chapter XII. At www.constitution.org/mac/prince.txt. Also: “The mercenary captains are either capable men or they are not; if they are, you cannot trust them, because they always aspire their own greatness, either by oppressing you, who are their master, or others contrary to your intentions; but if the captain is not skilful, you are ruined in the usual way”.

simulation programs), military support operations (logistic support), operational capabilities (special forces advisors, command and control, communications, and intelligence functions), and/or military equipment, to legitimate domestic and foreign entities”.⁵² A more general definition of a PMC is: “a company that provides, for a profit, services that were previously carried out by a national military force, including military training, intelligence, logistics, and offensive combat, as well as security in conflict zones”.⁵³ Singer employs the term **private military firms** (PMFs) as “business providers of professional services intricately linked to warfare”. He sees PMFs as the corporate evolution of the age-old practice of mercenaries. As opposed to individual ‘dogs of war’, they are corporate bodies that can offer a wider range of services. They specialize in the provision of military skills, conducting tactical combat operations, strategic planning, intelligence, operational and logistics support, troop training, technical assistance, etc.⁵⁴

In fact, there is no consensus on what constitute a PMC. It is a sign of the confusion over, and controversy surrounding, the idea of private sector firms carrying out military and security missions of many different kinds that the term is used in many different ways. Journalists frequently characterize PMC employees as corporate mercenaries. Western media invariably use the term PMC to include firms with employees that carry no arms, for companies providing armed bodyguards, non-military site and convoy protection that others would call PSCs, for companies that supplement the client’s core activity as “force multiplier” at the implementation level, as well as for companies that provide core military capabilities and participate directly in what one might conceive as corporate combat or conflict. Not all PMCs are alike, nor do they offer the same services. Understanding of the industry is seriously hampered by the fact that no clear distinction exists among the different services offered, attuned to the unique blending of business and military features that defines the private military industry. Because PMC operations are often controversial, some firms try their utmost to cover up the scope of their activities. Others prefer to call themselves Security Company in order to attract less attention from the media, to have a better claim to legitimacy or less reason to fear regulation.

The use of civilian contractors in support of the armed forces is not new. Up to World War II, support from the private sector was common. The primary role of contractors was simple logistic support, such as transportation, medical services, and provisioning. As the Vietnam conflict unfolded, the role of contractors began to change. The increasing technical complexity of military equipment and hardware drove the US armed forces to rely on private contractors as technical specialists working side by side with deployed military personnel. Today, contractor logistics support is routinely imbedded in most major systems maintenance and support plans. But private contractors now provide more services, including some that have been considered “mission critical” services and “core military capabilities”.

Thus, private military contractors are profit-driven organizations that trade in professional services intricately linked to conflict and warfare. Their essential purpose is to enhance the capability of a client’s military forces to function better in war, or to deter

⁵² S. Goddard, *The Private Military Company*.

⁵³ Definition by Center for Public Integrity. See also: D. Brooks, “The Business End of Military Intelligence: Private Military Companies”, *The Military Intelligence Professional Bulletin*, July-September 1999, p. 5.

⁵⁴ P. W. Singer, “The Private Military Industry and Iraq: What Have We Learned and Where To Next?”, DCAF Policy Paper, November 2004, p. 2. Hereafter referred to as “The Private Military Industry and Iraq”, November 2004.

conflict more effectively. With the recent rise of the private military industry, clients can now access capabilities that extend across the entire spectrum of military activities that were once monopolized by the state, simply by writing a check.⁵⁵

The first PMC dates back to 1967, when Sir David Stirling founded *WatchGuard International*, a company employing former British SAS personnel to train militaries overseas. Ever since, PMCs are a growing industry that has influenced the outcome of numerous conflicts. *Executive Outcomes*,⁵⁶ *Sandline International*, and *MPRI* are better known because their involvement has been determinant in the wars in Angola, Sierra Leone, and Croatia. Other examples of determinant PMC engagement mainly in Africa include: *Silver Shadow* and *Levdan* from Israel; *International Defense and Security Ltd. (IDAS)* from Belgium; *Teleservices* and *Alpha 5* from Angola; and the *Compagnie Française d'Assistance Spécialisée (COFRAS)*. PMCs have operated on all continents except Antarctica, and in places as diverse as Kosovo, East Timor, the Philippines, Haiti, and Afghanistan. Today, the PMC industry includes hundreds of companies presently operating in more than 50 countries worldwide.⁵⁷ The demand for their services is likely to increase. PMCs regularly work for governments. States that have contracted for PMC services include: militarily highly capable nations like the US and the UK who have become prime clients of the industry; some European powers greatly dependent on PMCs for the deployments of peacekeeping contingents as publics have not been willing to support needed investments in military air transport and support; Latin American countries for the fight against drug cartels; Southeast Asian nations for the fight against terrorism; and a number of failing and failed states that lack capable forces to reestablish internal security and public order. In a number of cases PMCs are hired by multinational corporations or NGOs in the aid and disaster relief business in insecure environments. PMCs might even have a role in enabling the UN to respond more rapidly and more effectively in crises. And the cost of employing PMCs for certain functions in UN operations could be lower than that of the equivalent deployment of national armed forces.⁵⁸

PMCs range from small consulting firms to large transnational corporations that provide logistics support or lease out combat helicopters, fighter jets, companies of commandos, or battalions. Some are well-known corporations like *MPRI* and *DynCorp*, and some are

⁵⁵ P. W. Singer, "The Private Military Industry and Iraq", November 2004, p. 2.

⁵⁶ Executive Outcomes (EO) was founded in 1989 by Eben Barlow, who during the height of Apartheid held second command of 32 Battalion before heading the West European wing of the Civil Cooperation Bureau (CCB), identified by the Truth and Reconciliation Commission as a key unit employed in the assassinations of anti-apartheid activists and in furthering apartheid propaganda internationally. In 32 Bat, Barlow honed his bush fighting skills, notably in Southern Angola on the side of UNITA. EO's corporate culture was derived largely from the common background of its leadership in the bush war in Angola. Entrenched in the ideology of white supremacy for which apartheid South Africa was isolated internationally, 75 to 85 percent of 32 Battalion's fighting force was composed of black Angolans, mostly former members of the FNLA. (Allied with UNITA, the FNLA opposed the MPLA government, and was founded by the brother-in-law of Mobutu, through whom agencies like the CIA channeled millions of dollars in funding for, among other things, the hire of white mercenaries). In Barlow's own words, "The (end of the) Cold War left a huge vacuum and I identified a niche in the market". Thus, he formed the best-known modern corporate mercenary outfit in the world. The first combat EO engaged in was in Angola from at least 1992 until 1995. That it was on the side of the socialist MPLA government surprised both Angolans and the general public.

⁵⁷ P. W. Singer, "The Dogs of War Go Corporate", *The London News Review*, 19 March 2004: "PMCs now operate in more than 50 countries and do up to \$100 billion business a year". A nearly two-year investigation by the International Consortium of Investigative Journalists (ICIJ) reported the existence of at least 90 PMCs that have operated in 110 countries worldwide. According to J. Glüsing, and S. von Ilseemann, "Gladiators For Hire", *Der Spiegel*, 3 May 2004: "80 such companies were involved in the Angolan civil war alone between 1975 and 2003, companies staffed with decommissioned gladiators from all over the world: French Foreign Legionnaires, South African paratroopers, Ukrainian pilots, Nepalese Gurkhas".

⁵⁸ According to the UN Special Representative to Sierra Leone, the UN peacekeeping mission there costs more than \$500 million per year - compared to Executive Outcomes' \$33 million spread over 21 months.

even subsidiaries of Fortune 500 companies such as Halliburton Company, DynCorp, Lockheed Martin Corporation and Raytheon.⁵⁹ A number of modern PMCs are veritable military enterprises, replete with uniformed military ranks, staff, doctrine, training syllabi, unit spirit, cohesion, and discipline. But for the greater part, the private military industry is dominated by smaller businesses with names that seem designed to tell as little as possible about what the company does. Most operate as “virtual companies” which do not maintain standing forces but rather draw from databases of qualified personnel and specialized subcontractors on a contract-to-contract basis. There are others, which are little more than very small businesses consisting of a few opportunists, existing often only for short periods of time, such as France’s *Secrets*, South Africa’s *Stabilico*, and the UK’s *Security Advisory Services Ltd.* Still, these are marginal groups and a tiny minority among PMCs – the last resort, often hired by undesirables and failed states.

PMCs differ from mercenary outfits in that they are mainly hired by governments and corporations, ostensibly to provide military and security services, whereas non-state armed groups, aiming to undermine the constitutional order of states, generally hire mercenaries. PMCs usually recruit former soldiers from the national armed forces of the country where they are based. Some firms only recruit from their home military, whereas other are truly multinational in employee base, recruiting soldiers from all corners of the world: Gurkhas from Nepal; soldiers from South Africa’s old apartheid defence forces;⁶⁰ former members of the French Foreign Legion, the Soviet, Warsaw Pact and Chilean armed forces, or paramilitaries from Fiji. Others are recruited from different intelligence services, SWAT-teams or drug enforcement organizations. A few firms also recruit from guerrilla and rebel groups, but the bulk of the personnel have served for at least some time in the military. The most prized are plucked from the world’s elite Special Forces units: Americans from the Navy Seals, Delta Force, Special Forces commandos, and Rangers; British from the Special Air Service,⁶¹ the Special Boat Service, and Airborne Commandos; Russians from the Alpha Team and Special Forces units of the former KGB, or from the Spetsnaz of the former Red Army.⁶² Representing the peak of the military profession, these typically are far more accustomed to interacting with foreign nationals in conflict areas than the average service member. Proficiency in reconnaissance, intelligence, foreign languages, and cultural appreciation are skills learned during their military training and carried over into their professional approach taken as civilian specialists. Frequently they are former and retired senior NCOs, men in their 30s and early 40s likely to have combat experience. For those willing to pay the price, this level of experience contributes to a more relaxed environment that simplifies operations. Since some PMCs unblushingly charge \$500 to \$1,500 a day for their most skilled

⁵⁹ M. Khan, “Business on the Battlefield: The Role of Private Military Companies”, *Corporate Research Project. Corporate Research E-Letter*, №30, December 2002. Available at www.corp-research.org/dec02.htm

⁶⁰ “Executive Outcomes” and other South African PMCs recruited personnel mainly from units like the 32 Battalion (or Buffalo Battalion), Reconnaissance Commandos (Recces), the Koevoet (crowbar), and the Parachute Brigade, all of which served to clandestinely destabilize South Africa’s neighboring states. 32 Battalion was disbanded in 1992 after its deployment to counter anti-apartheid protests in Phola Park, when its members opened fire, killing a number of unarmed fleeing women and children. For the background of 32 Battalion see: J. Breytenbach, *They Live By The Sword*, Alberton, Lemur Books (Pty) Ltd., 1990.

⁶¹ “More SAS trained personnel currently serve in UK PMCs than in the SAS itself” according to J. Robb, “A Corporate Super-power?”

⁶² For a good up-date on Spetsnaz, see www.specialoperations.com/Foreign/Russia/Spetsnaz.htm. More than 30,000 Russian mercenaries have fought in the various wars in the former USSR and more than 2,000 Russians fought in the former Yugoslavia. See: Singer, *Corporate Warriors*, 2003, p. 37, citing Russian Valery Yakov.

operators,⁶³ military leaders are openly grumbling that the lure of such payment a day is siphoning away some of their most experienced Special Operations people at the very time their services are most in demand.⁶⁴ Competition over elite troops from PMCs working in Iraq is now so intense that the US Special Operations Command has formulated new pay, benefits, and educational incentives to try to retain them⁶⁵ and in the UK, it has led the Army to offer soldiers yearlong “sabbaticals” to staunch the long-term damage being caused by elite troops leaving to work for PMCs in Iraq.⁶⁶

Civilian specialists are also highly sought after. Particularly in the US and the UK, the requirements of high-technology warfare have dramatically increased the need for specialized expertise, which often must be drawn from the private sector. Their armed forces require contract personnel even in close combat areas to keep their most modern systems functioning. This also applies to all other areas where the military’s ability to retain individuals with highly sought-after and well-paying skills is quickly waning, especially in the field of information-related systems, electronic warfare, as well as information and psychological warfare.⁶⁷ As US forces have increased the use of commercial off-the-shelf equipment but do not train troops to maintain such systems, they need more specialists and must hire civilian contractors for these tasks. Specialist contractors are needed for the commercial communication systems that the US Air Force and the US Navy use throughout Southwest Asia. These are equally needed for generator and pre-positioned equipment maintenance and for biological and chemical detection systems. The US Army depends entirely on civilian specialists to maintain its Guardrail surveillance aircraft. With relatively few planes packed with specialized intelligence collection systems on board, the Army decided that it was not cost effective to develop its own maintenance capability. With ever greater outsourcing of such support services, the propensity for hiring former members of the armed forces may diminish while the need for civilian specialists probably will grow in the future.

Partly for economic reasons, but often also for their language ability or knowledge of local conditions, culture, and customs, many western PMCs also hire host country nationals. Given that wages are generally lower in host countries, PMCs have to pay less, especially for translation and interpretation work, but also for missions that are reasonably simple and straightforward such as transports, site security, and guarding of government institutions and infrastructure.

Contracts range from under \$1 million to \$100 million or more. Business agreements in this industry often include hidden perks, side deals, spin-off earnings, and secondary contracts that can multiply formal contract figures by four or five times in actuality.⁶⁸ While no authoritative figures are available, there are estimates that PMCs generate \$100 billion in annual global revenue.⁶⁹ From 1994 to 2002, the US Department of Defense alone entered into more than 3,200 contracts valued at more than \$300 billion with 12 of

⁶³ K. Miller, “Outsource This”, *Center for American Progress*, 6 May 2004. Also: D. Barstow, “Security Companies: Shadow Soldiers in Iraq”, *New York Times*, 19 April 2004.

⁶⁴ E. Schmitt and T. Shanker, “Big Pay Luring Military”, And: J. Brookes, “The Pentagon’s Private Corps”.

⁶⁵ L. Burgess, “DOD Trying To Retain Its Special Operators”, *European Stars and Stripes*, 16 March 2004.

⁶⁶ S. Rayment, “Soldiers to be allowed a year off to go to Iraq to earn £500 a day as guards”.

⁶⁷ T. K. Adams, “The New Mercenaries”, p. 115.

⁶⁸ D. Isenberg, *Soldiers of Fortune Ltd.*

⁶⁹ P. W. Singer, “The Dogs of War Go Corporate”, *The London News Review*, 19 March 2004.

some 35 US-based PMCs.⁷⁰ Concomitant with the war in Iraq the growth of contracts and the results for the contractors have been stunning. In 2003, *Halliburton's* Pentagon contracts increased from \$900 million to \$3.9 billion, a jump of almost 700 percent. The company now has over \$8 billion in contracts for Iraqi rebuilding and Pentagon logistics work in hand, and that figure could hit \$18 billion if it exercises all of its options. *Computer Sciences Corporation*, which does missile defence work and also owns *DynCorp*, a private military contractor whose work stretches from Colombia to Afghanistan and Iraq, saw its military contracts more than triple from 2002 to 2003, from \$800 million to \$2.5 billion.⁷¹ And Iraq contracts have boosted the annual revenue of British-based PMCs alone from \$320 to more than \$1.7 billion.⁷²

The scope of services offered within this industry is expansive and the services provided vary from company to company according to the level and degree of their specialization. At one extreme, PMCs may provide forces for combat and all sorts of combat support. During the recent operations in Afghanistan and in Iraq, US contractor personnel operated drones like the Predator unmanned aerial vehicles (UAV), the data links to transmit information, and targeted the newest precision weapons. US forces relied on civilian contractors to run the computer systems that generated the tactical air picture for the Combined Air Operations Center in "Operation Iraqi Freedom", and the US Navy relied on contractors to help operate the guided missile defence systems on some of its ships. The other end of the spectrum is dominated by PMCs providing logistics and supply services. Camp Doha in Kuwait, which served as the launch-pad for the US invasion in Iraq, was built, operated, and guarded by private contractors. PMCs have thus been essential to the overall effort in Iraq. They have filled gaps in troop strength and a variety of roles that US forces would prefer not to carry out. Without PMCs, the operations currently conducted would likely be even more compromised.

In other parts of the world, the roles PMCs play and the services they offer are not much different. Contract soldiers from the former Soviet Army have been found alongside regular forces in Chechnya, and have defended facilities in Azerbaijan, Armenia, and Kazakhstan. Hired Russian combat aircraft and pilots proved to be decisive to the outcome of the war between Ethiopia and Eritrea.⁷³ In Sri Lanka, the government has hired PMC pilots to fly helicopter gunships. And in Brunei, battalions of Nepalese Gurkhas, who formerly served in the British Army, are in charge of territorial defence. Others are heavily engaged in arms procurement and supply.⁷⁴ The most recent development is that PMCs have been hired to oversee and coordinate the operations of

⁷⁰ M. Khan, "Business on the Battlefield".

⁷¹ W. D. Hartung, "An Incomplete Transition".

⁷² G. Sudborough, "Fascist Mercenaries Come to Iraq", *Makka Time*, 23 June 2004.

⁷³ P. W. Singer, *Corporate Warriors*, 2003. p. 173: "The government hired Russian military experts, serving in a private capacity, to help run its air defense, multibarrel gun artillery, radar and electronic warfare. In addition, the firm Sukhoi sold Ethiopia a wing of Russian Su-27 fighter jets...More important, the firm also included in the contract the services of over 250 pilots, mechanics, and ground personnel, who would fly and maintain the planes. In effect, the firm leased out a small, but complete air force".

⁷⁴ See: D. Isenberg, *Soldiers of Fortune Ltd.*

other PMCs and PSCs.⁷⁵ However, the number of major combat operations that PMCs have undertaken appears to be limited and may eventually turn out to have been a one-off phenomenon.⁷⁶ In fact, the number of companies willing to engage directly in combat and combat support is small. Much more common and widespread are other services such as:

- **Consulting:** may cover anything from advice on reforming and restructuring of the armed forces to establishing democratic control over the armed forces; assisting ministries of defence to establish policies, procedures, and decision making for defence planning as well as for the procurement of weapons and equipment; establishing command and control, doctrine and force development; to strategic, operational or tactical planning – the specialties of firms like the US firm *MPRI* which has on call all the skills of more than 12,000 former military officers, including a number of four-star generals. Apart from the activities in the former Yugoslavia that first brought world attention to *MPRI*, the company taught Swedish senior military leaders some of the lessons of the Gulf War, conducted civil-military transition assistance in Nigeria, developed a “National Security Enhancement Plan” for Equatorial Guinea, executed the “Stability and Deterrence Program” for the Republic of Macedonia, and is still assisting the Colombian MoD with its counter-narcotics program. *Vinnell* has provided advice to the Saudi security forces when they retook the Grand Mosque at Mecca after it was occupied by opposition forces in 1979.⁷⁷ Hungary hired the US firm *Cubic* to help it restructure its military to meet the standards required to become part of NATO.⁷⁸ And the Indonesian government has hired *Strategic Communication Laboratories*, a firm that specializes in psychological warfare operations, to help it respond to outbreaks of secessionist and religious violence.⁷⁹
- **Training:** is a major activity by PMCs, often directly linked to combat – as was the case with *Executive Outcomes*’ training forces in Sierra Leone and Angola, or with *MPRI* training the Croats, which then led to “Operation Storm” whereby Serb-held Krajina

⁷⁵ On May 25, the US Army awarded Lt. Col. Tim Spicer, formerly of the British army, and his company Aegis - a tiny 2-year-old London-based holding corporation - a large and important security contract. The contract is a case study in what not to do. Over 3 years, Aegis will be in charge of all security for the \$18.4 billion in ongoing reconstruction projects being overseen by the US. As part of the contract, Aegis will hire a “force-protection detail” of about 600 armed men and coordinate the operations of 60 other PMCs already working in Iraq and their 20,000 men, including handling security at prisons and oil fields. It is a no-risk, cost-plus arrangement that could earn the company up to \$293 million. But apparently nobody bothered to ask who Spicer really was - a controversial British subject, as CEO of Sandline International involved in the try to put down a rebellion in Papua New Guinea in 1997, and central figure in a British “arms to Africa” scandal in which a 1998 UN arms embargo was broken in Sierra Leone (the Sandline affair). His client in the case was described by Robin Cook, the former British foreign minister, as “an Indian businessmen, traveling on a passport of a dead Serb, awaiting extradition from Canada for alleged embezzlement from a bank in Thailand”. When Spicer told the press that the British government had encouraged his operation, it nearly brought down Prime Minister Tony Blair. Spicer is the author of “An Unorthodox Soldier”, his memoir, and has owned or worked for 4 PMCs that have either failed financially, done poorly or have suspended business. See: R.Y. Pelton, “Mercenary Hits It Big, Thanks to the US”. A controversial figure wins huge contract in Iraq”, *Los Angeles Times* (website *latimes.com*), 24 June 2004. And: P. W. Singer, “Soldiers of fortune make a killing in Iraq”, *New York Times*, 16 June 2004, available at www.iht.com/articles/525038.html

⁷⁶ The well known examples of PMC activities in Papua New Guinea, Angola and Sierra Leone were arguably the result of a particular set of historical factors, and subsequent pressure from the international community has simply not allowed them to continue.

⁷⁷ W. D. Hartung, “Mercenaries Inc: How a U.S. company props up the House of Saud”, *The Progressive* 60, №4, April 1996, p. 26.

⁷⁸ D. D. Avant, “Privatizing Military Training”.

⁷⁹ M. Sheridan, “Briton Quits Indonesia over ‘Psych War’ Claims”, *Sunday Times*, 6 August 2000.

was recovered in 1995, a turning point in the war, and then training the Bosnian armed forces. Or it may be ongoing as the US *Vinnell* and *Booz Allen & Hamilton Inc* are doing, the former training the Saudi National Guard and the new Iraqi army, the latter running the Saudi military staff college. Or training may be limited to simulation and wargaming as is widely offered by Israeli PMCs. And this not only abroad: *MPRI* also has taken over the US Reserve Officer Training Corps programs at over 200 US universities, thus training the US military leaders of tomorrow.⁸⁰ The US Navy and the US Air Force have hired *ATAC* to provide and fly adversary aircraft during their military training exercises.⁸¹ The US *Blackwater*, that has also recruited Chilean ex-soldiers, is training US Navy personnel in force protection, shipboard security, search-and-seizure techniques, and armed sentry duties. The Royal Navy conducts most of its shore-based training in partnership with a commercial consortium, *Flagship Training Limited*, which provides specialist instructors and facility management services.⁸² In the Philippines, *Greyworks Security* provides military training and counterterrorism assistance to the government. The Pentagon and US State Department have outsourced portions of America's expanded military training in Africa to three companies: *MPRI*, *DFI International*, and *Logicon*.⁸³

- **Logistic support:** is provided by the largest number of PMCs. In East Timor, Australian forces, leading the peacekeeping force in 1999, were dependent on logistics outsourced to private companies. *MPRI* assisted the US government in delivering humanitarian aid in the former USSR. PMCs now provide the logistics for every major US deployment. The American *Kellogg Brown & Root*, a subsidiary of *Halliburton*, is providing US forces in the Balkans and in Iraq with everything from barracks, camps, rations, mail delivery, water purification, to the means of repatriating bodies; it constructed and operated refugee camps outside the borders of Kosovo and provided logistical support for the 1,200 intelligence officers hunting Iraqi weapons of mass destruction. *DynCorp* and *Pacific A&E* were engaged in logistic support for the UN force in Sierra Leone (UNAMSIL). *Eagle Global Logistics (EGL)* is transporting military vehicles from Germany to Kuwait and Iraq. *US Force 3* is supplying IT equipment and does network connectivity in Iraq. *Washington Group International*, *Perini Corp* and *Fluor Corp* are providing field support for the US Central Command. The US firm *Dataline Inc* provides secure, multi-user communication and information capabilities to the US military, and *Earth Tech Inc* is renovating military bases in Iraq. In Kuwait, *DynCorp* supports the air force, while in Saudi Arabia *Science Applications International Corp (SAIC)* supports the navy and air defences. And the US Navy and Marine Corps are outsourcing air-to-air refuelling operations to *Omega Air Inc*.
- **Maintenance:** is provided by arms manufacturers like *Lockheed Martin*, *Raytheon*, *Boeing*, *Northrop Grumman*, *General Dynamics*, *United Technologies Corp*, *Science Applications International Corp*, *L-3 Communications Holdings*, *Hughes*, *Rockwell*, *Textron* and many specialized companies. During “Operation Enduring Freedom” in Afghanistan and “Operation Iraqi Freedom”, PMC employees maintained sophisticated weapons

⁸⁰ P. W. Singer, “War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law”, *Columbia Journal of Transnational Law* 42, Spring 2004, p. 522.

⁸¹ C. Lowe, “Services Look to Contractors to Fly ‘Adversary’ Aircraft”, *Defense Week*, 25 September 2000.

⁸² UK Foreign and Commonwealth Office, “Green Paper”, § 28.

⁸³ D. D Avant, “Privatizing Military Training”.

system like the B-2 stealth bomber, the F-117 stealth fighter, U-2 reconnaissance and K-10 refuelling aircraft, Apache helicopters, various unmanned aerial vehicles (UAVs), as well as advanced high-tech systems in many surface combat ships. Today, US armed forces already rely on PMCs to maintain 28 percent of all weapons systems.⁸⁴

- **Intelligence, reconnaissance, surveillance, and monitoring:** is performed by a number of corporations specialized in intelligence, satellite and aerial reconnaissance, photo interpretation, and analysis as well as in SIGINT and MASINT,⁸⁵ psychological and information warfare. The US *Diligence LLC*, founded by former members of the CIA and Britain's MI5, is providing commercial information and competitive intelligence analysis. Others specialize in the tracing and surveillance of drug smugglers. In the South China Sea, PMCs like *Trident*, *Marine Risk Management* and *Satellite Protection Service* have taken on anti-piracy duties, some of these even deploying airborne personnel to deal with pirates. *DynCorp* and *Pacific A&E* have both recruited and managed US contributions to monitor borders in Croatia and were involved in the Kosovo monitoring force. The American *CACI*, *MZM Inc* and *Titan* engage intelligence personnel, interrogators, interpreters and translators in Iraq while the US *AirScan Inc* is handling ground and maritime airborne surveillance in Latin America, Asia and Africa. And the US *BMD* has provided interpreters and translators for US military operations in Somalia, Haiti, Bosnia, Central Asia, and the Persian Gulf.
- **Demining:** is handled both by specialist companies such as the South African *Minetech* or as part of a wider security package, as the *Executive Outcomes* offshoot *Saracen* does in Angola. In Cambodia, the French *COFRAS* provide demining services. The US *Ronco Consulting Corp* cleared cluster bombs and other unexploded ordnance in Kosovo as well as mines in Namibia and Mozambique. The Danish *Demex Services* is involved in mine action projects on behalf of the UNHCR, the World Bank and the EU. Israeli *MAAVERIM* is engaged in mine and UXO clearance in Croatia and Israel, and in mine risk education and consultancy in Albania, Angola, and South Korea. The Australian *Milsearch* is the predominant UXO/demining operator in Indochina while the Swedish *Scandinavian Demining Group AB (Scanjack)* is engaged in humanitarian demining in Croatia. And US *EOD Technology Inc*, *Tetra Tech Inc*, and the Korean *KMAG* are involved in battle area clearance, stockpile destruction, ordnance and mine clearing in Iraq.

Most PMCs of the Western type operate as corporate bodies within registered business and management structures, are self-regulating and selective. They have a reputation that they want to preserve in order to gain a long-term market share by providing a legitimate function. Many claim that they would not render their services to organized crime, drug cartels, rogue regimes, terrorists, illegal arms traders, and regimes known for flagrant violations of human rights. In the US, they have even formed a trade group, the "International Peace Operations Association". Most claim to provide military services under a recognized chain of command structure with disciplinary military procedures that conform to the laws and customs of war. Some proclaim on their website that they have

⁸⁴ US Secretary of Defense Rumsfeld in different addresses and speeches between October 2003 and June 2004. The upshot, he argues, is that the US Army should focus on what it does best and contract out the rest. And the Bush administration wants to increase that figure (of 28 percent) to 50 percent. See: B. Yeoman, "Soldiers of good fortune", *Independent online*, 23 July 2003, available at www.indyweek.com/durham/2003-07-23/cover.html

⁸⁵ SIGINT is signals intelligence; MASINT is measurement intelligence.

subscribed to the Red Cross Code of Conduct and the voluntary Principles on Security and Human Rights.⁸⁶ PMCs may also show a more controlled involvement in conflicts than traditional mercenaries, with greater consideration placed on the background of the conflict and the local politics that contribute to it.

According to David Isenberg, PMCs have done reasonably well in Iraq in fulfilling their contracts, performing difficult missions under trying circumstances. For the most part they were operating there for the first time, and managed to field personnel in far less time that it would take to deploy comparable regular military units. “Generally, their personnel have conducted themselves professionally and are more in tune with the local culture than are regular US military forces. In several, little noted cases, they performed above and beyond the call of duty, coming to the aid of regular Coalition forces, when they did not have to do so”.⁸⁷

2.3. Private Security Companies

Though the term **private security company** is in use in many countries, it does not exist within any extant international convention. In a general way, PSCs may be defined as follows: “A Private Security Company is a registered civilian company that specializes in providing contract commercial services to domestic and foreign entities with the intent to protect personnel and humanitarian and industrial assets within the rule of applicable domestic law”.⁸⁸

The PSC market has been in existence for a lot longer, is far larger and generally much more competitive than that for military services. PSCs are profit-driven organizations that trade in professional services linked to internal security and protection. The majority of PSCs are smaller companies predominantly concerned with crime prevention and ensuring public order, providing security and private guard services domestically. In a number of states as diverse as the US, the UK, Israel, Germany, Russia, South Africa, and the Philippines the number of domestic PSCs and the size of their budgets exceed those of public law enforcement agencies.⁸⁹ A minority of PSCs are organized in larger companies sharing the same corporate attributes and command structures as PMCs – particularly those looking for foreign contracts.

⁸⁶ See www.armorgroup.com

⁸⁷ D. Isenberg, *A Fistful of Contractors: The Case for a Pragmatic Assessment of Private Military Companies in Iraq*, BASIC Research Report 2004 of the British American Security Information Council, September 2004, p. 68.

⁸⁸ S. Goddard, *The Private Military Company* p. 8.

⁸⁹ The ratio of private security guards to police in Germany is 1.5:1, in the US on the average 3:1, in California 4:1. In the US, PSCs out-spend public policing by 73% (1997) and employ more than 2.5 times as many personnel in an industry that, already in 1991, was employing 1.5 million personnel and generating \$52 billion in spending; in contrast, public law enforcement was employing 600,000 personnel and spending \$30 billion. In Israel, PMCs and PSCs are the single largest employer in the country with over 100,000 employees and the revenues generated are said to clearly surpass the large Israeli defense expenditures. In Great Britain, the private security industry is larger than the government’s police force, with 7,850 PSCs employing more than 162,000 people, compared to 142,000 public police. In South Africa, there are 10 times more people engaged in private policing than public police. The largest security force in the Philippines is neither the 102,000 strong national police nor the 120,000 strong national army, but the 182,000 private security guards who are virtually armies for hire. In some other less developed countries the ratio may be even more. See: E. Eppler, *Vom Gewaltmonopol zum Gewaltmarkt*, Frankfurt am Main, Suhrkamp Verlag, 2002, p. 28. And: E.J. Blakely, & M. G. Snyder, *Fortress America: Gated Communities in the United States*, Washington D. C., Brookings, 1997, p. 126.

PSCs operating *domestically* can be divided into the following broad categories:⁹⁰

- The **guarding sector** – by far the largest and most visible component. Regions with the highest levels of crime and private enterprise have the largest number of PSCs. But the activities range from urban to rural security. Guarding sector employees patrol airports, office buildings, apartment complexes, shopping malls, sport arenas, warehouses, railway and bus stations, cargo terminals, parking lots, etc.
- The **electronic security, sensor and surveillance sector** includes installers of alarms, access controls, protection, and quick reaction devices, often with reaction services attached, as well as sweeping and intrusion detection services. Contractors do the guarding mostly remotely via the monitoring of the sensors and surveillance equipment. There may be some overlap with the guarding sector.
- The **investigation & risk management sector** which is the smallest, and comprises private investigators whose activities range from the dangerous to the mundane, from the tragic to the hilarious: from matrimonial disputes, labour matters, vetting, expert witness services, private and industrial espionage, counterintelligence and anti- and counter-surveillance, to VIP protection. From undercover and surveillance missions, insurance fraud to supermarket slip-ups, private investigators play an increasingly varied and ever-evolving role in the prevention and detection of criminals, other wrongdoers, and frauds. Risk management consulting is the least visible of all sectors and possibly the most problematic and potentially threatening to the state.

In addition, the activities of **private intelligence companies** must be taken into account. While in the Western world these are generally involved in legitimate activities, in many parts of Eastern Europe “private intelligence” refers to former State Security elements who now work closely with organized crime syndicates. A good example is Romania, where more than 160 private intelligence services operate, most run by former Securitate or military intelligence personnel. In Russia today, more than 12,000 private security enterprises or security services companies are registered, employing more than 120,000 personnel, mainly recruited from the former KGB, some from the GRU and the former Soviet Army.⁹¹ The majority of these are said to be associated with the Russian mafia.

Demand for PSC services is rising as a result of economic, demographic, and political changes, which are leading to a greater polarization in society. At the same time, the state and public authorities are shouldering a declining share of direct responsibility in ensuring public safety. In order to ensure maximum flexibility and cost effectiveness, these functions are increasingly being delegated to the private security industry. In some countries businesses, homeowners, and communities are coming to rely more on private guards than on tax-supported police because of the fear of crime, the downsizing of the police, and doubts about the effectiveness of the criminal justice system. PSCs have therefore become responsible for ensuring public safety and protecting public and

⁹⁰ C. J. Van Bergen Thirion, “The Privatization of Security: A Blessing or a Menace?” Pretoria, South African Defence College, 1998.

⁹¹ According to D. Shearer, “Private Armies and Military Intervention”, pp. 24-26, Russia during 1997 had 4,500 companies employing 155,000 to a million personnel. But see also: V. Volkov, “Security and Enforcement as Private Business: The Conversion of Russia’s Power Ministries and Its Institutional Consequences”, in: V. Bonnel and T. Gold, (eds), *The New Entrepreneurs of Europe and Asia: Patterns of Business Development in Russia, Eastern Europe and China*, London, M.E. Sharpe, 2001.

private property in a widening variety of locations, including high-risk areas such as nuclear power plants, banks, embassies and airports. They are also increasingly operating prisons, enforcing parking regulations, providing witness protection and security in courts, security services at public events and escorts for high-risk transports, including transports of prisoners, liquid gas, chemicals, and nuclear waste. In Australia, private guards rather than nurses now watch over mental patients, patrol military bases and city centres, and run violence-plagued immigrant centres. Moreover, the demand for private guards has risen since the 9/11 attacks, propelling an increase in use of private security services of about 10 percent in the US and about half as much in Europe.

In 1999, the Confederation of Security Services estimated that there were more than 500,000 guards working for 10,000 companies that specialize in the surveillance of industrial sites, offices, public buildings, stores and airports, the transportation of money, and the protection of individuals and homes in member states of the EU.⁹² Today, with the eastern expansion of the EU, that number may well have doubled – without counting the “shadow self-employed” agents.⁹³ In the EU single market for goods, capital and people, companies operating in poorly regulated countries are free to solicit business anywhere they wish, and there is a growing problem of poor standards driving out the good, since the market share of public tendering in the private security sector is rising constantly and amounts to over 35 percent in most countries. Despite the sensitive nature of these services, public authorities still apply the principle of awarding contracts to the lowest bidder, which is leading to a lowering of quality standards.

For many years, the same has been happening in the US, where the Labour Research Association estimates that 1 to 2 million people regularly or intermittently work in the private security industry. Self-regulation has proven to be a completely inadequate means of either protecting or raising industry standards. It has had the effect of penalizing the better companies who, while doing their best to maintain standards, have found themselves constantly underpriced in tendering for contracts by unscrupulous employers complying with little or no standards. Told to pay for airport security, even airlines opted for cheap labour. As a result, those responsible for screening passengers received little or no training, were paid poorly and left as soon as a better job came along. One of the leading companies was found to have falsified records, hired convicted felons and illegal immigrants, and provided employees with the answers to federally required tests.⁹⁴

The domestic private security industry is largely unregulated and thus often hires poorly trained and inadequately screened guards.⁹⁵ In the US, private security employees have in numerous instances engaged in unwarranted violence or shady dealings.⁹⁶ In the UK, some PSCs induce a more than occasional sense of fear among those supposedly being

⁹² Confederation of European Security Services - CoESS. *Report, Berlin Conference, Joint Declaration on the Mutual Recognition of CoESS and UNI-Europe and the Social Dialogue*. Berlin, 10 June 1999, p. 8.

⁹³ For a country list of just those of the Member Countries and the Associated Members of CoESS see: Confederation of European Security Services - CoESS. *Annual Report 2003*.

⁹⁴ See: B. James, “Doubts Rise About Guards-for-Hire”, *International Herald Tribune*, 10 January 2002.

⁹⁵ In the US, most of the 1 million-plus guards are unlicensed, untrained and not subject to background checks. There are no federal laws governing the more than 11,000 PSCs. State laws remain spotty. Their burgeoning \$12 billion-a-year industry is marked by high turnover, low pay, few benefits and scant oversight. See: M. Hall, “Private security guards are Homeland’s weak link”, *USA TODAY*, 23 January 2003, available at www.usatoday.com/news/nation/2003-01-22-security-cover_x.htm

⁹⁶ M. Zielinski, “Armed and Dangerous: Private Police on the March”, *Covert Action Quarterly*, available at www.caq.com/CAQ54p.police.html

protected, cause confusion about the boundaries of responsibility between the private and public police, and cause friction between the police and the companies.⁹⁷ And in South Africa, PSCs are accused of irregular behaviour, and are unaffordable to many of those who need protection most.⁹⁸

Industry statistics are hard to come by because the work is difficult to define, the turnover of manpower is very high, and because many people work intermittently as guards in the twilight economy. But the biggest obstacle to regulation is lack of political will. In Pakistan, police are proposing to license private guards after training, but this is as rare an initiative as in most other countries. Belgium, which passed laws in the 1930s to prevent the rise of private militias, and Germany regulate the industry more strictly than other countries in Europe. In Belgium, applicants must be screened by the police and have adequate training. The law prohibits guards from giving orders to the public, and they are not allowed to intervene in disputes.

PSCs Providing Services Abroad

The PSC business, which has long been booming in domestic environments, is now spreading rapidly abroad, and the scope of services offered is ever growing. Abroad, PSCs provide security for multinational corporations, governments, government property and personnel, embassies, and other bodies, at least seven UN institutions, other international organizations, NGOs, and even the delegates of the International Committee of the Red Cross (ICRC).⁹⁹ PSCs with a bias towards more sophisticated security services train police, security, and paramilitary forces; protect critical national infrastructure; guard hazardous convoys, protect delegations of all kinds, and multinational corporations engaged in mining, energy production and transport; provide security for companies operating ports, railheads, and airstrips; and carry out airborne surveillance and reconnaissance missions and other security operations like liberating hostages. In Angola, for example, where more than 80 PSCs operate, the government makes it a requirement for foreign investors that they provide their own security¹⁰⁰ – usually by hiring PSCs. Other examples are the British *DLS* and *Wackenbut* from the US, used by multinational companies in the extractive sector, and by individuals, NGOs, humanitarian and disaster relief organizations in conflict and unstable regions. *ArmorGroup*, one of the largest of today's PSCs, has hundreds of contracts in more than 50 countries.¹⁰¹ In terms of speed of expansion, it was rated as one of *Fortune's* 100 fastest growing NYSE-listed companies in the US in 1999 and 2000. *Group4Securicor*, now probably by far the largest PSC, has contracts in more than 85 countries.¹⁰²

⁹⁷ J. Gallagher, "Anti-Social Security", *New Statesman & Society*, №8, 31 March 1995, pp. 21-22.

⁹⁸ "Behind the Razor Wire", *Economist*, №350, 16 January 1999, p. 42.

⁹⁹ Even the ICRC uses security guards although exclusively for the protection of premises. In Kinshasa, it is amongst a number of aid agencies and embassies that use DLS. See: ICRC, "ICRC to expand contacts with private military and security companies", 21 May 2004; at

www.icrc.org/Web/eng/siteeng0.nsf/iwpList132/D30DA71686EC2656C1256E9B004

¹⁰⁰ D. Isenberg, *Soldiers of Fortune Ltd.*

¹⁰¹ See www.armorgroup.com. One of its most important acquisition is Alpha firm, based in Moscow, a privatized unit of Alpha, the former elite Soviet special forces organization, roughly equivalent to the US Delta Force.

¹⁰² See list countries of operations, at www.group4securicor.com/home/countries.htm

The rapid expansion of PSC engagement abroad is best exemplified in today's Iraq. There, the private military and private security industry combined has contributed more forces than any other member of the US-led coalition and is nearly equal to the number of the militaries of all the states except the US combined. Like PMCs, almost all PSCs are on the US payroll, either directly or indirectly through subcontracts with companies hired to rebuild Iraq. Many civilian security guards are hired as "independent contractors" by companies that, in turn, are subcontractors of larger security companies, themselves subcontractors of a prime contractor, which may have been hired by a US department or agency. In practical terms, these convoluted relationships often mean that governmental authorities have no real oversight of security companies on the public payroll.¹⁰³ The combination of an insurgency and billions of dollars in reconstruction and aid money has unleashed powerful market forces in the conflict zone of Iraq. New security companies aggressively compete for lucrative contracts in a frenzy of deal making.

However, PSCs in Iraq should not be confounded with the thousands of civilian contractors providing reconstruction, oil and other services such as the US *Bechtel Group Inc*, engaged in rehabilitation of electricity, water and sewage, airport facilities, the Umm Qasr seaport and reconstructing hospital, schools and government buildings, most of this subcontracted, or firms like *Contract International* which in a joint venture with *AICI* of Maryland, *OCI* of Egypt and *Archirodon* of the Netherlands are rebuilding Iraq's transportation infrastructure. One main difference between these firms and PSCs is that they need a secure environment for reconstruction and rehabilitation work – hence security and protection which in many cases are provided by PSCs. *DLS* and its parent company *ArmorGroup* protect *Bechtel*, the prime infrastructure contractor in Iraq. The British *Olive Security* and the US *Custer Battles* are tasked with security for *General Electric* which is engaged in power infrastructure reconstruction. Most of the armed personnel are the 14,000 Iraqi guards who work the oil field contract for *Erinyes*. These security companies provide three primary tactical services: non-military site security for key installations, facilities, and infrastructures like pipelines; personal security details for senior civilian officials, individuals and teams; and non-military convoy security and escort for all sorts of transports and supplies. They have provided security for Coalition Provisional Authority workers. And they still provide security for Western embassies, trade delegations, NGOs, and Western media.

Since PMCs are equally engaged in providing security and protection, distinctions between PMCs and PSCs are ever more blurred and artificial, particularly when the same companies perform multiple functions and offer security as well as military services. There are indeed PSCs that do no contracting with armed forces. There are others that conclude contracts exclusively with defence ministries or armed forces while insisting on being security companies. Some companies take offence to the term military, preferring the less contentious title of private security firm. And there are others that do all to exclude anything 'military' since this would provoke public interest and too many questions from the media. In the end, there is no fully satisfactory answer to where to draw the line between PMCs and PSCs working abroad.

PSCs working abroad recruit people from law enforcement organizations, customs, the border guards, the coast guard, and highly trained former security personnel from other organizations. They also recruit former soldiers as well as paramilitaries of many

¹⁰³ D. Barstow, "Security Companies: Shadow Soldiers in Iraq".

countries. And they too have a growing need for many types of civilian specialists: prison wardens; dog-handlers for drug- and explosive-detection; translators; interrogators; experts in intelligence and counterintelligence; experts in the oil- and gas-exploitation and the transport industry; specialists in NBC-monitoring and protection; ordnance, bomb, and explosive disposal; VIP protection; criminal investigation, and communications and information-related systems.

Though security in a hostile fire area is a classic military mission, there are ever more PSCs that operate in conflict situations. Today, the Pentagon relies to an unprecedented degree on security companies to guard convoys, senior officials, and US headquarters and facilities.¹⁰⁴ But in Iraq, insurgents ignore distinctions between security guards and combat troops. What is more, they have made convoys, headquarters, and buildings housing state authorities prime targets. As a result, security contractors have increasingly found themselves in pitched battles, supplying services which are difficult to distinguish from what soldiers of regular armed forces do. Given that PSC employees are carrying out services taking place within a war zone and facing military threats, they are clearly a far cry from security guards of companies in the domestic security business, no matter what they call themselves.

Security companies mostly concentrate on assisting foreign governments, corporations, internal security services and agencies, law enforcement organizations, and the armed forces. If hired by multinationals, their operations tend to be confined to specific areas, notably those in which foreign investment is located, and their role is protection against banditry, crime, warlordism, and low-level internal conflict. Their capacity to deal with wider insurgency is limited. US and UK companies dominate the PSC market abroad and, though their activities appear to be those of an independent commercial enterprise, few act outside the national interests of their home state.

Examples of PSC services provided abroad are:

- **Consulting:** in the Philippines, the British *Control Risks Group* and in Africa *Rapport Research and Analysis* provide risk assessments and security planning for mine sites and energy exploration. The French *Secopex*, composed of experts coming from elite units, the ministry of interior, and government security agencies, providing consulting and assistance activities linked to safety, security, training, logistics, organization, and operations, has recently opened an office for North Africa in Algiers. *DSL* and *Lifeguard* from the UK, *Group4Securicor*, the US *DynCorp* and *Kroll Associates*, *Gray Security*, and *Coin Security* from South Africa, all provide various consulting services in most conflict areas, among others to a number of humanitarian aid agencies.
- **Training:** in Saudi Arabia, *O'Gara* trains local security forces. In Malaysia, *TASK International* trained the Royal Malaysian Police in hostage rescue, close protection of infrastructure and people, defensive driving, and crisis management for the Commonwealth Games held in September 1998 in Kuala Lumpur. *DynCorp* won a contract to send 1,000 ex-cops and security guards to Iraq to train the new police

¹⁰⁴ The US Army has even resorted to hiring PSCs to help protect 50 Army installations in the US, some of these housing chemical weapons and intelligence materials. 5-year contracts worth as much as \$1.24 billion were awarded to 4 firms, 2 without having to bid competitively. See www.commondreams.org/headlines/04/0812-05.htm

force. And *Erinys International*, a South Africa-UK joint venture, using former Special Forces personnel, trains Iraqis to guard the oil and electric power infra-structure.

- **Intelligence:** In East Timor, the UN employed private intelligence firms to assist the UN Transitional Administration. *Special Operations Consulting-Security Management Group* has recruited Iraqi informants who provide intelligence that helps the company assess threats.¹⁰⁵ The British *Northbridge Services Group Ltd.*, staffed by former CIA and SIS employees and special forces personnel, is providing counterintelligence and intelligence services while *Kellogg Brown & Root* is doing bug control on US bases in Iraq. *AirScan* uses Cessna 337 aircraft equipped with various sensors to provide aerial surveillance on the periphery of oil installations in Cabinda, Angola, most owned by Chevron. And the UK *Rubicon International* issues Daily Risk Reports for many countries, including Iraq and Saudi Arabia.
- **Securing key locations and headquarters:** *ITT* supplies armed guards, mostly US citizens, for US installations at home and overseas. In Liberia, *Intercom Security* personnel, guarding the US Embassy, have fought like soldiers during the rebel sieges. *Blackwater* helped to guard the headquarters of the chief administrator in Iraq, Paul Bremer, and *Custer Battles* is handling security at Baghdad International Airport and is supplying dog-handlers for bomb detection. The US *Diligence LLC* provides security for both government and private operations in Iraq. The South African *Gray Security* is an international security solution business that is operational in some 50 countries.
- **Protection of critical infrastructures:** in Colombia, British Petroleum hired a PSC to work with a battalion of the Colombian army for the guarding of pipelines. *Erinys International* has been awarded a contract to guard oil sites and pipelines in Iraq together with *Rubicon International*, its UK partner in many projects. The UK *Hart Group Ltd.* is guarding power lines of the Iraqi ministry of electricity. *Erinys* is a prime contractor to the Gulf Regional Division of the US Army Corps of Engineers, tasked with protective services, employing 14,000 Iraqis directed by former senior members of the UK armed forces. And the US *Pistris* specializes in maritime and infrastructure security as well as in force protection.
- **Escorting supply convoys and humanitarian aid deliveries:** the British *Control Risks Group*, using Gurkhas, ex-Special Boat Service and ex-SAS soldiers, and Fijian paramilitaries distributed the newly printed Iraqi currency to banks countrywide. The British *Genric Ltd.* has set up a unit outside Basra providing armed escort security through hostile territory and armoured car hire. Working for numerous aid agencies, *ArmorGroup* has a client list that is remarkably similar to the list of donors to international NGOs: UN agencies, the governments of the UK, US, Switzerland, Sweden, Japan and Canada, the EU, ECHO, USAID, the ICRC, as well as a number of NGOs, including the International Rescue Committee, CARE, and Caritas.¹⁰⁶ The British *Northbridge Services Group* provides security for many governments, NGOs, and multinationals. *Southern Cross Security* of Sierra Leone specializes in providing protection services for in-country NGOs.

¹⁰⁵ D. Barstow, "Security Companies: Shadow Soldiers in Iraq".

¹⁰⁶ *ArmorGroup* also offers services in relation to kidnappings and ransom demands, investigations into theft and other crimes, and on the evacuation of staff from unsafe situations - in fact, it acts as a sort of the police force in providing security for members of the international community.

- **Personal security for VIPs and senior officials:** in Afghanistan, *DynCorp* is guarding President Karzai and other leaders in the Afghan government. *Blackwater Security Consulting* provided security guards and helicopters for the now defunct Coalition Provisional Authority and Paul Bremer in Iraq. In Saudi Arabia, *O’Gara* is guarding the royal family. The American *Kroll Inc* and British *Global Risk Strategies International* are providing security for USAID and the UN in Iraq while *Control Risks Group*, also from the UK, is protecting officials from Whitehall, aid workers, and businesses in Iraq. The US *DynCorp* is providing escort in the Gaza Strip and the UK *Janusian Security Risk Management* escorts trade delegations into Baghdad. The US *Steele Foundation*, the world’s fifth-largest PSC, operates in 20 countries and also provided the security detail for former Haitian president Aristide.

2.4. In Search of a Typology

A difficult and not yet satisfactorily resolved problem is the categorization of PMCs and PSCs because these companies cover such a wide range of people, activities, and services. Varying in: market capitalization; corporate interrelationships and history; number, qualification, experience, and characteristics of personnel; and even geographic location of their home base, headquarters, and operational zones, these companies neither look alike nor do they serve the same markets. The only unifying factor is that they offer services that fall within the military and security privatization domain.

For some, the panoply of services offered defies classification. Deploring the lack of generally accepted definitions, they believe that there is no clear method to break the industry down into its constituent parts.¹⁰⁷ But in order to really understand the privatized military and security industry, to generate a theory about it, and to assess the legitimacy of the various groups, categorization is needed. This requires recognition of the essential duality of this industry. At the base level, the industry is driven by both security and economic privatization. Any categorization or typology of its constituent parts must take into account both elements.

The Simpler Types of Categorization

Some have tried to distinguish companies by the general level of their activity: placing those that engage in combat operations in the “active”, and those that defend territory or provide training and advice in the “passive” category. Others distinguish between engagement in “hard” and in “soft” activities. Some then have attempted to determine the activity or passivity of a company by whether its employees are armed or unarmed. This criterion led to the distinction used to separate PMCs from PSCs. However, many PSCs are now armed, and often perform military roles with military consequences.

In a similar vein, attempts at dividing the industry into “offensive” and “defensive” categories exist, depending on whether the company’s services are designed to bolster or

¹⁰⁷ J. C. Zarate, “The Emergence of a New Dog of War”.

deter aggression.¹⁰⁸ The problems are that, on the one hand, “active” and “passive” companies are conceptually interchangeable, as are their results, and, on the other hand, that in practice it is ever more difficult to make a clear divide between “offensive” and “defensive” since most weapons and doctrines have both offensive and defensive implications – which makes it very difficult to objectively discern between the offensive and the defensive. The undisputable fact is that ultimately, the hire of either type of company can have strategic effects, and that both can help to alter the course of war or conflict.

Others have tried to delineate the companies according to the international or domestic orientation of PMCs and PSCs – a division which is both artificial and antiquated. It ignores not only the multinational characteristics of the industry and the frequently transborder nature of their activities, but also the ability of these companies to rapidly transfer and recreate themselves as firms across state borders in the effort to find more benign and accommodating corporate environments. Moreover, a majority of wars or conflicts today are internal, thus making it unclear what can be gained by such a distinction.

¹⁰⁸ K. Lieber, “Grasping the Technological Peace: The Offense Defense Balance and International Security”, *International Security* 25, №1, Summer 2000, pp. 179-206. S. Makki *et al.*, “Private Military Companies and the Proliferation of Small Arms: Regulating the Actors”, Policy Briefing 10, BASIC, International Alert and Saferworld, 2002.

Particular Categorizations

There are other attempts to categorize companies offering military and security services, one of which is listed in the British “Green Paper” with the following examples of activities, service providers, and users:¹⁰⁹

Activities & services provided	Examples of companies	Main users of services
Combat and operational support	Executive Outcomes Sandline International Gurkha Security Guards	governments
Military advice and training	DSL, MPRI, Silver Shadow Levdan, Vinnell, BDM	governments
Arms procurement	Executive Outcomes Sandline International Levdan	governments
Intelligence gathering	Control Risk Group Kroll, Saladin, DynCorp	governments multinational companies
Security and crime prevention	DSL, Lifeguard, Group 4 Control Risk Group Gurkha Security Guards Grey Security Coin Security	multinational companies humanitarian agencies
Logistical support	Brown & Root, DynCorp Pacific Architects & Engineers	peacekeeping organizations humanitarian agencies

In response to the British “Green Paper” and to the question of what needs to be regulated, an alternative attempt at categorization is offered by the International Peace Operations Association, a US advocacy and lobbying organization for PMCs and PSCs:¹¹⁰

Military Service Providers (MSPs)

NSPs Nonlethal Service Providers	PSCs Private Security Companies	PMCs Private Military Companies
Mine Clearance Logistics & Supply Risk Consulting	Industrial Site Protection Humanitarian Aid Protection Embassy Protection	Military Training Military Intelligence Offensive Combat
PA&E Brown & Root ICI of Oregon	ArmorGroup Wackenhut Gurkha Security Guards	Executive Outcomes Sandline International MPRI

¹⁰⁹ UK Foreign and Commonwealth Office, “Green Paper”, p. 10. A similar list with only 5 types of activities and services provided, but with more companies listed, is presented by G. Weingartner, “Krieg als Geschäftszweig. Private Sicherheitsdienstleister und Söldner im Lichte des Kriegsvölkerrechts“, *Österreichische Militärische Zeitschrift*, №2, March/April 2004, p. 150.

¹¹⁰ D. Brooks, “Protecting People: The PMC Potential”, *Comments and Suggestions for the UK Green Paper on Regulating Private Military Services*, Alexandria, International Peace Operations Association, 25 July 2002, at www.hoosier84.com/mspconceptualization.html

Companies that provide military services internationally are termed *Military Service Providers*. Most MSPs need little if any additional regulation beyond existing commercial laws since their services are said to be nonviolent and beneficial to humanitarian and international operations.

Nonlethal Service Providers probably need no additional regulation at all. They provide useful logistics services, remove mines or unexploded ordnance, or do other services in high risk environments that the international community finds more useful than threatening.

Private Security Companies usually provide armed protection, most often for other companies rather than states. This protection can be similar to private security guards common in Western nations, or more likely, a higher level of armed security capable of defending against attacks by guerrilla forces. Some of these companies have contracts guarding embassies and humanitarian operations. Usually the technique is for the company to provide a few managers with Western military backgrounds who then train scores or even hundreds of locals to make up the vast bulk of the manpower. These companies do not undertake offensive military actions. While it is conceivable that some regulation might be useful, in fact informal voluntary agreements between the NGO community and PSCs mean that such regulation is not critical and may in fact reduce the level of flexibility that makes these agreements possible.

Private Military Companies represent the type of most concern for regulation. These are companies that generally work for states and provide military services designed to significantly impact strategic situations. This category is then broken down into two sub-categories: *active* PMCs willing to carry weapons into combat, and *passive* PMCs that focus on training and organizational issues.

Yet another taxonomy is in use in the US Army. Army doctrine distinguishes between three categories of contractors: *Systems Contractors* that support *military battlefield operations*; *External Support Contractors*, and *Theatre Support Contractors*.¹¹¹

Systems Contractors provide life-cycle support for weapon and other systems fielded by Program Executive Office (PEO), Program Manager (PM), or Army Material Command managed systems. This support includes specified maintenance and support of equipment deployed with Army forces.

External Support Contractors work under contracts awarded by contracting officers serving under the command and procurement authority of supporting headquarters outside the theatre. Their support augments the commander's organic combat service support capability.

Theatre Support Contractors are contractors, usually from the local vendor base, providing goods, services, and minor construction to meet the immediate needs of operational commanders.

¹¹¹ G. L. Campbell, *Contractors on the Battlefield*.

Singer's Categorization

An interesting attempt at categorization is made by Singer who does not distinguish between PMCs and PSCs but lumps them together as Private Military Firms (PMF). For him, the best way to structure the industry is by the range of services and level of force that a firm is able to offer the industry. The useful analogy from military thought is the "Tip of the Spear" metaphor.¹¹² Using the concept of distinguishing units within the armed forces by their closeness to the actual fighting – the "front line" – that result in implications in their training levels, unit prestige, roles in battle, directness of impact, and so on, he breaks down military organizations into three broad types of entities linked to their location in the battlespace: those that operate within "*the general theatre*", those in "*the theatre of war*", and those in "*the actual area of operations*" – that is, the tactical battlefield.¹¹³

Since normal business outsourcing is also broken down into the three broad types of *service providers*, *consultancy*, and *non-core service outsourcing*, he is subdividing PMCs into *Military Provider Firms*, *Military Consultant Firms*, and *Military Support Firms*. The benefit he sees of classifying PMCs according to this typology is that "one can then explore not only the variations within the industry but also the variation in firms' organization, their operations, and impact. Broader statements can be made about overall firm types, rather than being forced to rely on simple judgments that only apply to one specific firm".¹¹⁴ This, he claims, results in a system that not only reflects the unique complexion of the military service industry, but also yields theoretically informed findings that cross the political and business arenas.

The proviso of any such typology is that it is a conceptual framework rather than a fixed definition of each and every firm. Some firms are clearly placed within one sector while other firms lie at the sector borders or offer a range of services within various sectors.

Military Provider Firms are defined by their focus on the tactical environment, providing services at the forefront of the battlespace, by engaging in actual fighting, either as line units or specialists – e.g. combat pilots – and/or direct command and control of field units. This term defines those firms that supplement the client's core activity at the implementation level of the business chain, often having direct contact with the customer base.

Military Consulting Firms provide advisory and training services integral to the operation and restructuring of a client's armed forces. They offer strategic, operational, and/or organizational analysis and have engagement with the client at all levels but no "customer contact". They do not operate in the battlespace. Though their presence can reshape the strategic, operational, and tactical environment through reengineering of a local force, it is the client who bears the final risk in the battlespace. This is the critical distinction from firms in the provider sector.

Military Support Firms provide supplementary military services, including nonlethal aid and assistance; logistic support, supply and transportation; as well as technical support. The benefit of this type of military outsourcing is that these firms specialize in secondary

¹¹² P. W. Singer, *Corporate Warriors*, 2003, p. 91.

¹¹³ P. W. Singer, *Corporate Warriors*, 2003, p. 91.

¹¹⁴ P. W. Singer, *Corporate Warriors*, 2003, p. 92.

tasks not part of the core missions of the client. Thus, they are able to build capabilities and efficiencies that a client military cannot sustain. The client's own military, in turn, can concentrate on its primary business of fighting. While being the least explored according to Singer, it is also the largest sector of military privatization in scope and revenue, and the most varied in subsectors.

It is intriguing that Singer lists firms that engage in information warfare, psychological warfare, and provide intelligence capabilities under *Military Support Firms* rather than *Military Provider Firms* – notwithstanding the fact that such capabilities could typically be seen as supplementing the client's core activity at the implementation level of the business chain, and that these specialists must of necessity be in direct and close contact with the customer base.¹¹⁵ Even if he labels these potentials as 'non lethal' and 'assistance', it does not really solve the problem since such things like the provision of offensive information warfare operations in particular could cause much more harm than mercenaries can in conventional combat operations.

Though Singer's typology is unlikely to be the final word, it is a better categorization than that provided by the others. Moreover, his typology offers the advantage that it can be applied equally to categorize those PSCs seeking business and engagements abroad. Thus, while retaining the traditional divide between armed forces on the one hand, law enforcement, security forces and agencies on the other, this would lead to the following definitions:

Security Provider Firms are defined by their focus on the local security environment, providing security services in destabilized or insecure areas, by engagement in law enforcement and security operations or by fighting organized crime and terrorism, either as units or specialists. This term defines those firms that supplement the client's core activity at the implementation level of the business chain, having direct contact with the customer base.

Security Consulting Firms provide advisory and training services integral to the operation and restructuring of a client's law enforcement organizations and/or security forces and agencies. They offer operational and/or organizational analysis and have engagement with the client at all levels but no "customer contact". They do not engage in law enforcement or security operations, nor do they directly participate in the fight against organized crime or terrorism. Though their presence can reshape the security environment through reengineering of local law enforcement organizations, security forces and agencies, it is the client who bears the final risk for the reestablishment and maintenance of internal security. This is the critical distinction from firms in the security provider sector.

Security Support Firms provide supplementary security services, including aid and assistance, and technical support. The benefit of this type of security outsourcing is that these firms specialize in secondary tasks not part of the core missions of the client. Thus, they are able to build capabilities and efficiencies that a client's law enforcement or security forces and the security agencies cannot sustain. The client's own security and law enforcement forces, in turn, can concentrate on their primary business.

¹¹⁵ P. W. Singer, *Corporate Warriors*, 2003, pp. 98-100.

Wulf's Categorization

A more complete taxonomy is offered by Herbert Wulf who distinguishes between five categories of private military actors.¹¹⁶

Type of activity	Legal and social status	Main users	Main areas of activity
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I. Private Security Companies

Property Protection			
Protection and surveillance	Legal, often not regulated	Private citizens and companies	Urban Centres in many parts of the world
Guarding factories, mines etc.	Legal, often not regulated	Multinational companies	Many countries
Neighbourhood patrol	Legal, unregulated	Private citizens	Urban Centres in many parts of the world
Law and order in public places (subways, malls etc.)	Legal, semi-regulated	Local governments, shop owners, etc.	Many countries
Crime Prevention and Correcting Services			
Kidnap response	Legal, unregulated, often undesired by police	Private citizens and companies	Countries with high kidnapping rates
Management of prisons	Legal, mainly regulated	Governments, armed forces	Industrial countries, post-war societies
Investigation and intelligence gathering	Legal, not regulated	Companies, governments, armed forces	Many countries

II. Defense Producers

Weapons Production			
Research and development	Mainly licensed by governments	Military procurement agencies	Industrialized countries
Production	Mainly licensed by governments	Military procurement agencies	Industrialized countries
Military Assistance			
Military training	Licensed by governments, occasionally illegal	Governments in developing countries, rebel groups	Developing countries, transformation countries, crisis areas
Export of weapons and components	Licensed by governments, occasionally illegal	Governments in developing countries, rebel groups	Developing countries, transformation countries, crisis areas

¹¹⁶ H. Wulf, "Change of Uniform - but no Uniform Change in Function. Soldiers in Search of a New Role", in: *BICC Conversion Survey 2002*, Baden-Baden, Nomos Verlag, 2002, pp. 97-98. Updated in H. Wulf, *Die Internationalisierung von Krieg und Frieden*, Baden-Baden, Nomos Verlag 2005.

III. Private Military Companies

Consulting			
Threat analysis, strategy development, advice for armed forces	Regulated, occasionally illegal	Official planning authorities, armed forces	Global
Logistics and Support			
Logistics in emergencies and war	Regulated	Defense ministries, humanitarian organizations	Many countries
Mine clearing, refugee camps, infrastructure demobilization, reintegration of soldiers and refugees	Regulated	Humanitarian organizations, UN-agencies, governments	Post-conflict areas
Management of military bases	Regulated	Armed forces	Few governments at home and abroad
Technical Services, Maintenance and Repairs			
Technical services, air control, intelligence gathering, IT-services	Licensed by governments	Armed forces	Many countries
Weapon repair	Licensed by governments	Armed forces	Many countries
Training			
Military training, weapons and special forces training, language training and psychological warfare	Licensed by governments, occasionally illegal	Armed forces, rebel groups	Industrialized and developing countries, conflict areas
Peacekeeping and Humanitarian Assistance			
Logistic for peacekeeping	Regulated	UN	In crises, conflict and post-conflict areas
Disarmament, mine clearing, weapon collection and destruction	UN mandate	UN	In crises, conflict and post-conflict areas
Logistic in complex emergencies	Legal, unregulated	UN agencies, humanitarian organizations	In complex emergencies, refugee camps, conflict and post-conflict areas
Protection of convoys, refugees and humanitarians	Legal, unregulated	UN agencies, humanitarian organizations	In complex emergencies, refugee camps, conflict and post-conflict areas
Combat Forces			
Combat	Mainly illegal, occasionally government-requested	Besieged governments, rebel groups and insurgents, governments wishing a low profile, multinational companies	War-torn societies, developing countries

IV. Non-statutory forces

Rebels			
Combat, terror	Illegal	Self-employed, linked to states	Civil wars, failed states, crisis areas
Warlords			
Combat, terror, violence markets	Illegal	Self-employed, linked to states	Civil wars, failed states, crisis areas
Organized Crime			
Criminal acts for economic gain	Illegal	Self-employed, linked to states	Countries with high crime rates

V. Mercenaries

Combat Troops			
Combat	Illegal, occasionally government-requested	Besieged governments, rebel groups and insurgents, multinational companies	War-torn societies, developing countries

An Alternative Approach to Categorization

An alternative possibility of establishing a broader conceptual framework and taxonomy distinguishing the different types of military and security privatization is a categorization that is reflecting the scope, form, and purpose of services provided, as well as the dangers they present for international relations.¹¹⁷

Scope of Military and Security Privatization

Privatized military and security services can be supplied by non-governmental sources in one state to governmental or non-governmental parties and to corporations in another state, or to international organizations, NGOs, societal groups, and individuals involved in a conflict, conflict prevention, or in post-conflict stabilization and recovery. This may be initiated either by the provider or the recipient. But provider and recipient can also be within the same country. In many states, both developed and developing, national police forces responsible for maintaining internal order are being partially replaced by private security forces composed of people indigenous to the same society. Moreover, there are cases where foreign security assistance goes to both the national armed forces and the national police force, or where a single private military or security company provides both domestic and foreign security services.

A second distinction relating to scope revolves around whether the privatized security is provided top-down or bottom-up. When a government decides to outsource its internal

¹¹⁷ Derived in adapted form from: R. Mandel, "The Privatization of Security", Paper presented at the 41st Annual Convention of the International Studies Association; Los Angeles, March 14-18, 2000, available at www.ciaonet.org/isa/mar01/. Mandel has designed a different, more policy oriented taxonomy in R. Mandel, "The Privatization of Security", *Armed Forces & Society* 28, №1, 2002, p. 137.

or external security functions to private military and security providers, either domestic or foreign, it is a top-down initiation of privatized security. When individuals or societal groups such as self-defence forces, militias and paramilitaries, gangs of organized crime or drug dealers, vigilantes, survivalists, neighbourhood watches, etc. decide for themselves to provide their own security or to offer security services to others, this is a bottom-up form of privatized security. When a multinational corporation decides to provide security services for itself, or decides to hire a private military or security firm from its home state or from abroad, it is less immediately apparent whether this is top-down or bottom-up. This middle ground category where one firm hires another for security purposes may grow in the future, as multinational corporations, e.g. in exchange for future concessions, finance private military and security companies in client nations where governments cannot afford the cost.

Form of Security Privatization

As to the form of military and security privatization, the crucial distinction is between engaging in combat operations and providing military advice. At one end of the spectrum, the provider may participate directly in combat operations by supplying the fighting forces with the tools of violence and by directly bringing to bear sophisticated weapon systems. At the other end, the provider of advice may give classroom education on strategy, operational art, and tactics, supply combat training, or teach civil-military relations within democratic systems. Areas in-between include logistics, maintenance support, and restoration of order after a conflict has ended.

Purpose of Security Privatization

As to the purpose of privatized security, the important distinction is between offensive and defensive intentions, aims, and goals. Though, in practice, it is ever more difficult to make a clear distinction, differentiating between the two is important because of the different baggage associated with each in the military and security privatization context. With defensive tasks constituting the vast majority of what PMCs handle these days, they appear more palatable to those who make a moral distinction between protecting people and attacking people for money. Here the motive and intention of the recipient, not of the provider, is key to categorization. If a recipient obtains private military services with the intention and aim of keeping order, guarding against a threat, and maintaining the status quo, this falls into the defensive category. If, on the other hand, the recipient obtains these services in order to overthrow a legitimate government, it is clearly an offensive application. However, the grey area in-between is large, due in part to the obfuscation in today's anarchic global environment about what exactly constitutes the status quo. Some examples include using private military services to: change the military balance in an ongoing conflict; unseat a despot who took control of a country by force; or empower a separatist group that rejects the government in power.

Dangers of Security Privatization

An additional distinction can be made as to the dangers privatized military and security efforts cause in international relations. Thus, efforts appear to be *more dangerous* when they involve:

- Bottom-up initiation rather than top-down initiation.
- Foreign military assistance rather than domestic military or security substitution.
- Offensive rather than defensive motivations, intentions, aims and goals.
- Recipients or providers from developing rather than developed countries.
- A recipient government's military or security being replaced rather than augmented.
- Greater private provider power than that of its own or neighbouring governments.
- An unstable environment surrounding the provider or the recipient.

The analysis of mercenaries, PMCs, and PSCs, and the attempt to establish a taxonomy suggest that the problem of definition is not merely one of wording. The definitions contained in international conventions have been shaped to suit the agendas of those drafting them and are not necessarily very useful. It is possible to devise different labels according to the activities concerned, the intention behind them, and the effect they may have. But in practice the categories will all too often merge into one another. Used in conflict environments, it is difficult to distinguish PMCs from PSCs, although PMCs are associated more with activities designed to have a military impact, whereas PSCs are primarily concerned with protecting individuals and property. A number of companies provide both sorts of services. If a government were to conclude that it was desirable to regulate this activity, choosing the right definition will be an important challenge. In any case, categorizing companies better will render regulation, particularly of the more sensitive services, substantially easier.

3. Issues and Problems of Military and Security Privatization

If the control of violence is a fundamental issue in politics, the export of private military and security services is an even more contentious one and therefore ought to be taken very seriously by all democratic states and their governments. This is all the more so as the activities of PMCs and PSCs abroad are said to “impede the exercise of the right of peoples to self-determination and jeopardize the sovereignty of states, the principle of non-interference in internal affairs, the stability of constitutional governments and the enjoyment of the human rights of the peoples concerned”.¹¹⁸

Seen in a wider perspective, the use and activities of PMCs and PSCs cause numerous problems for effective security sector governance which stir the debate on military and security privatization. Among the most disputed issues are: implications of their use for the battlespace; contractual problems and dilemmas; legal murkiness; their impact on civil-military relations; accountability, transparency, and human rights; economic exploitation; vested interests in conflicts; underlying problems and stability; their use as proxies for governments; and double standards.

3.1. Contractors in the Battlespace

As states, their armed forces, and international organizations prove less capable or unwilling to meet the security threats, more and more functions formerly performed by national armed forces will be assumed by the private military and security industry. This is opening the road to the privatization of warfare, the level of which will vary in an inversely proportional way to the interests at stake.¹¹⁹

Some of the Benefits of Using Contractors

There are benefits that may be derived from utilization of contractor capabilities. According to Lieutenant General Pagonis,¹²⁰ contractors were key to the success of the US war effort in the Gulf. Others have gone so far as to claim that contractors proved indispensable in supporting US operations during the Gulf War.¹²¹ However, had the Gulf War been longer and the Iraqi forces a more formidable foe, perhaps the use of contractors would not have been quite the success it was claimed to have been.¹²²

¹¹⁸ Enrique Bernales Ballesteros (Special Rapporteur pursuant to Commission resolution 1998/6). Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. E/CN.4/1999/11. 13 January 1999, § 81. Hereafter referred to as Report on the question of the use of mercenaries, 1999.

¹¹⁹ R.T Housen, “The Privatization of Warfare. Back to the Future”, Undated paper, Washington D.C., Fort McNair, National Defense University, National War College, p. 1.

¹²⁰ W. G. Pagonis, *Moving Mountains. Lessons in Leadership and Logistics from the Gulf War*, Cambridge, Harvard Business School Press, 1992, p. 2. He states that the US Army drew up, executed, and monitored over 70,000 contracts in the 1991 Gulf War.

¹²¹ V. H. Ezell, “Logisticians and Contractors Team for LOGCAP Exercise”, *Army Logistician* 31, №6, November-December 1999, p. 17.

¹²² As a matter of fact and despite the rave reviews of Pagonis, contractor support was far from perfect. The lack of Iraqi opposition notwithstanding, the contract drivers were not particularly reliable. They did not keep to schedules and had to be back-filled with a pool of military drivers at the beginning of the ground campaign in case there was a mass defection of civilian drivers. See also: V. Demma, *Contractors on the Battlefield, a Historical Survey from the Civil War to Bosnia*, Washington D.C., Fort McNair, US Army Center of Military History, pp. 7-10.

Nonetheless, there are some benefits of using PMCs and PSCs. Among the possible benefits are: an enhanced deployment capability of the forces by making contract support available within a theatre which does not have to be deployed to the theatre; offsets and gains in operational tempo; the ability to maintain high-tech, low density skills in domains where armed forces can no longer afford to train and maintain career progression for these skills and where the possibility of contracting them out is eliminating the requirement to do so; increasing combat power in force constrained circumstances – for example when a host nation is limiting the presence of uniformed strength; the use of contractors permits the forces to focus on combat operations; and PMCs and PSCs can provide capabilities the armed forces do not have.¹²³

Risks for the Military Commander

However, there are also inherent risks associated with the expanded use and presence of private military and security service providers in the battlespace. Depending on a number of factors and circumstances, the risks are variable in magnitude or significance. Some factors that could influence the level of risks include: the presence or absence of hostilities; the proximity of the contractor's location to areas where tension or fighting is evident; the likelihood of use of weapons of mass destruction; the presence of mines or environmental concerns; the presence or lack of infrastructure; the degree or lack of host nation support; and the availability of resources for the contractor personnel's protection.¹²⁴ Risks can also be looked at in terms of any or all of the following: degradation to mission accomplishment; an increase in the time needed to complete the mission; or an increased threat of loss of life.¹²⁵ The risks can apply either to the contractor personnel or to the commander and the successful achievement of his mission. Both categories ultimately have the potential to impact on the conduct of operations and could influence the ability of the commander to achieve his mission goals and objectives. In the more severe of instances, the result may be complete failure of the mission. The greatest risk to the commander is that the contractor will not be available or willing to perform his duties when the situation deteriorates or hostilities break out.¹²⁶ Hence, every contemplated use of PMCs and PSCs as well as every contract requires a proper risk assessment based on: the commander's mission and critical support requirements; the commander's ability to protect contractors; the costs associated with protecting them; and the nature and extent of the threat. These items affect any decision over whether or not contracting is suitable and cost-effective for achieving the mission's objectives.¹²⁷ The higher the risk assessed to the theatre, the less suitable the theatre would be for contracting.¹²⁸

¹²³ G. L. Campbell, "Contractors on the Battlefield".

¹²⁴ T. H. Addison, "Contractors on the Battlefield - Have We Done Our Homework?", Paper, Canadian Forces College, AMSC 4, 2001, pp. 22-23.

¹²⁵ E. A. Orsini and G. T. Bublitz, "Contractors on the Battlefield: Risks on the Road Ahead?", *Army Logistician* 31, Issue 1, January/February 1999, p. 130.

¹²⁶ S. J. Zamparelli, "Contractors on the Battlefield: What Have We Signed Up For?", *Air Force Journal of Logistics* 23, No3, Fall 1999, p. 12.

¹²⁷ I. K. Garcia-Perez, "Contractors on the Battlefield in the 21st Century", *Army Logistician* 31, Issue 6, November-December 1999, p. 42.

¹²⁸ T. H. Addison, "Contractors on the Battlefield". The author presents an interesting risk assessment methodology for both a new and a stable or mature theater in terms of suitability for contractor support, see pp. 23-25.

Some Downsides of Using Profit-motivated Service Providers

The military focuses on life and death, whereas business seeks profit.¹²⁹ It is clear that contractors providing combat service support to deployed missions are in business primarily to make money. Often, they will not do any more than that which is agreed in their contract, and they will do everything they can to save money and thereby increase their profits. This makes their employment problematic from the outset. Typically, military operations employ a certain degree of redundancy to ensure that if there are any failures in equipment or support, these can be rectified with minimal impact and delay. Additional stores, equipment, and spares are usually kept close at hand. When required, military supervisors can pitch in to ensure that tasks are completed correctly and on time. This also provides a boost to the morale of the more junior personnel and promotes unit cohesion. However, a civilian contractor supervisor may not follow the same work ethic. In keeping with the new “just in time” business practices, he may not have more than the minimum stock on hand, and he may not wish to get his hands dirty when the objective in his mind is only to meet the minimum requirement or standard.¹³⁰ Conversely, once the fighting starts, the objective of the commander and the force can no longer be to cut costs or save money but to accomplish the mission.

The profit motive and the inflexibility of contractor personnel also contribute to their lack of commitment to the overall objectives of the military mission. While acceptable levels of service are provided when the tempo of operations is relatively moderate, there is little doubt that the quality of service and overall readiness of the unit will go down as the situation deteriorates and the contractor starts to experience difficulty. Additionally, the increase in operational tempo will likely bring with it an exponential increase in cost when additional requirements are placed on the contractor.¹³¹

When Contractors are not Part of the Military Chain of Command

Key problems with military contractors exist because they are not part of the regular military hierarchy. At their core, military command centres deal with the planning, synchronization, and the management of violence. The destructive capacity of modern armed force is staggering. It takes an enormous effort to focus that destructive power on the right objectives without killing civilians – the so-called “collateral damage”, or each other – the so-called “friendly fire” or fratricide. Armed contractors operate outside of this military command structure for the most part, and thus their operations are not coordinated with military operations in most circumstances.¹³²

Contractors often live separately, drive nonmilitary vehicles, use nonmilitary radios, and report to their corporate bosses. When their contracts require it, these contractors will establish relationships with local military units and other governmental agencies, but

¹²⁹ W. G. Pagonis, *Moving Mountains*, p. 210.

¹³⁰ T. H. Addison, “Contractors on the Battlefield”, p. 20.

¹³¹ T. H. Addison, “Contractors on the Battlefield”, pp. 21-22.

¹³² This is about to change as far as US contractors are concerned. See note 151:...In times of emergency, the ranking military commander in the immediate area of operations may direct the contractor or employee to undertake any action as long as those actions do not require the employee to engage in armed conflict with the enemy force. The draft regulation allows the combatant commander to issue weapons and ammunition to contractor employees. See: D. Isenberg, “Corporate Mercenaries. Part 2: Myths and mystery”, *Asia Times Online*, 20 May 2004.

these relationships rarely include important details like precise routes and times for contractor convoys, or frequencies and call-signs for contractor personnel. This creates problems when soldiers and contractors work, or fight, in close proximity to each other. In Iraq, when contractor convoys drive from Baghdad to Fallujah, they are under no legal obligation to inform military commanders that they are on the way. Nor are contractors required to call in reports to the military command, leading to absurd situations like in Najaf, in which private contractors fought off attacks on the CPA headquarters that military officials learned of only hours later.

The “ideal battlespace” would not contain any civilians. The presence of noncombatants as well as “civilians authorized to accompany the force” in the area of operations greatly complicates the life of a commander. Complexity is compounded when the commander is dependent upon PMCs to accomplish his mission. From an operational perspective, outsourcing is supposed to improve flexibility and relieve pressures on support personnel. However, one of the most obvious downsides of going into the battle with civilians is the loss of flexibility – one of the key tenets of successfully waging war. A commander’s freedom and ability to improvise quickly in using tactics, employing weapons, and deploying personnel have long been considered essential to victory in combat. Flexibility is equally essential for effective logistics performance – adapting logistics structures and procedures to changing situations, missions, and concepts. To resolve the challenges inherent in using contractors, the commanders must have information and awareness of contractors working in and around their areas of responsibility. Maintaining visibility of contractors and coordinating their movements are vital if the commander is to manage his available assets and capabilities efficiently and effectively. However, this visibility is difficult to establish since contractors are not really part of the chain of command and, in general, are not subject to the same orders that apply to soldiers regarding good order and discipline.¹³³ And commanders have no easy way to get answers to questions about contractor support.¹³⁴ Lack of information and awareness of PMCs or PSCs and their presence in supporting combat operations tend to result in: gaps in doctrine regarding who is responsible for securing lines of communication used by commercial suppliers; loss of visibility of assets moving in and around the theatre of operations; loss of control of contractor personnel and equipment; increased force responsibility for supporting contractor personnel in the areas of life support, force protection, housing, medical care, transportation, and operational and administrative control; use of additional manpower, material, and funding resources to support contractor personnel; concern about the availability of commercial supplies and services in a hostile environment; and gaps in providing logistics support if commercial supply lines become disrupted.¹³⁵ In addition, Status of Forces Agreements and other arrangements with host nations may complicate the commander’s situation by restricting entry, movement, and action of PMCs and PSCs.

¹³³ See: Joint Doctrine for Logistic Support of Multinational Operations, Joint Publication 4-0, V-8, 25 September 2002.

¹³⁴ United States General Accounting Office, “Military Operations: Contractors Provide Vital Services to Deployed Forces, But Are Not Adequately Addressed in DOD Plans”, Washington D.C., 24 June 2003. “Commanders at deployed locations have limited visibility and understanding of all contractor activity supporting their operations ...”

¹³⁵ M. McPeak, “Managing contractors in joint operations: filling the gaps in doctrine: contractors on the battlefield have become a fact of life for the armed services. But comprehensive doctrine on how the services should manage those contractors is lacking”, *Army Logistician*, March-April 2004.

The Impact of Contracting on Operational Flexibility

Outsourced support is guided by a contract – a legal, binding document outlining a statement of work and expectations. Even when written with the best of intentions, a contract cannot cover every possible contingency in advance. If mission requirements change, the statement of work and expectations may need changes. If changes are made, the contract itself may require modification – and many times this will carry associated changes in cost. To stop during combat, no matter how briefly, to rewrite or renegotiate a contractor’s obligations severely limits a commander’s ability to accomplish the mission. Commanders need the flexibility to do what is needed, when it is needed, and to the degree it is needed. To have any less flexibility increases risks significantly. Hence, the art and science of writing contracts is becoming critical to ensuring flexibility, sustainability, and survivability in the battlespace, and every commander and logistician must be familiar and knowledgeable about the contract process.¹³⁶ Thus, rather than being able to concentrate on operations, the commander may have to devote a significant amount of his time and energy to dealing with contractors’ shortcomings and problems. And rather than having a professional, dependable logistics team on which he can rely, he must concern himself with contractual issues and problems.

Moreover, the commander must be prepared for the eventuality that the contractor’s personnel may decide to leave the theatre if they feel their security is threatened. The issue is less whether large defence contractors will continue to service the contract, but whether or not they will be able to keep their employees in the battlespace when and where needed. Furthermore, if subcontractors are performing for a parent contractor, will the subcontractor be as reliable as the primary contractor?¹³⁷ The military must have personnel available to backfill these personnel. Additionally, the commander will have to provide force protection for contractor personnel. Contractors cannot provide their own security; this is a military function and can have a significant impact on resources during heightened activity or combat operations. This means that an additional force structure will be required to protect contractors, even if they are former military personnel. This additional force structure will become especially critical in a situation with asymmetrical threats or when contract personnel are directly supporting the warfighters and moving with lead combat elements. For example, everyone in an area of operations is equally vulnerable to nuclear, biological and chemical (NBC) threats, and everyone requires the same minimum-essential protection. There are costs, both in equipment and in training, associated with preparing contractor personnel to survive NBC attacks.¹³⁸ Given an asymmetric threat in the nonlinear battlespace, there is no “safe” zone within the area of operation. Thus, the bottom line remains that force structure will be required to provide force protection for all civilians working in the theatre of operations, whether in rear areas, on forward lines, or in forward-deployed task forces.

Most military personnel are classified as combatants and can be relied upon to assist and augment the fighting force, as well as to provide self-protection and defend equipment and terrain. As history shows, logisticians have always been the “infantry in reserve”. But PMC personnel are not necessarily cross-trained to execute tasks that are not part of their

¹³⁶ E. A. Orsini and G. T. Bublitz, “Contractors on the Battlefield”.

¹³⁷ E. A. Orsini and G. T. Bublitz, “Contractors on the Battlefield”.

¹³⁸ J. A. Fortner, *Managing, Deploying, Sustaining, and Protecting Contractors on the Battlefield*, at www.almc.army.mil/ALOG/issues/SepOct00/MS571.htm

job description. As a result, use of PMCs can compromise the ability to deal with the unexpected. Not only may they be unlikely to take over tasks which are not part of their contractual obligations; they cannot be ordered to do them by the military chain of command.¹³⁹ In days past, the commander could routinely turn to his troops to perform tasks other than their primary specialty when the work required relatively little skill or training. Given today's sophisticated weapon and support systems, however, turning to military members in times of PMC failure will become less of an option. This contingency, more than any other, might dominate battle planning for military commanders of the next generation.¹⁴⁰

Using contractors also deprives some military personnel of valuable field experience and training. The problem-solving opportunities that are so critical to the preparation of senior logistics officers and NCOs are no longer available.¹⁴¹ Additionally, while the contractors can relieve some of the burden on cooks and supply technicians, these personnel do not get the operational experience they need to be effective members of the team when they really are required. A further problem resides in the "no looking back" nature of outsourced support. When contractors become responsible for providing supplies, this leaves no trained force structure capable of handling this function in the battlespace. If, after a long trial period, the concept of substituting parts of the logistics by contractor services does not prove successful, the military will find itself unable to instantly grow, train, and benefit from the experience of the mid- and upper-level managers developed within the enlisted and officer corps. It may take close to an entire service career of 20 years before the military can regain the capability now resident in its personnel.¹⁴²

Imponderabilities of Readiness and Effectiveness

Another challenge also looms large: how can the military determine in advance that PMCs can meet their wartime responsibilities? An inability to perform during wartime may become quickly and painfully apparent, but problems with contractor readiness and "fitness for mission" may prove harder to detect prior to actually deploying into combat.¹⁴³ In armed forces, unit readiness and ability to accomplish the mission is monitored constantly by commanders, inspections and inspector generals, command-level oversight organizations, and parliament. This monitoring includes assessments of personnel, training, and equipment. Additionally, relevant and vigorous training and manoeuvres ensure combat effectiveness. In contrast, there is no such system in view or in place to monitor contractor readiness and fitness for mission. Would these be driven by industry's financial bottom line? In order to reduce risks, PMC support must be tested and evaluated in ongoing operations and training events on a continuous basis.¹⁴⁴

¹³⁹ T. H. Addison, "Contractors on the Battlefield", p. 19.

¹⁴⁰ L. A. Castillo, "Waging War with Civilians: Asking the Unanswered Questions - the implications of contractors on the battlefield", *Aerospace Power Journal* XIV, №3, Fall 2000, pp. 26-31. Available at www.airpower.maxwell.af.mil/airchronicles/apj/apj00/fal00/castillo.htm

¹⁴¹ E. A. Orsini and G.T. Bublitz, "Contractors on the Battlefield".

¹⁴² E. A. Orsini and G.T. Bublitz, "Contractors on the Battlefield".

¹⁴³ L. A. Castillo, "Waging War with Civilians".

¹⁴⁴ E. A. Orsini and G.T. Bublitz, "Contractors on the Battlefield".

Security Concerns

Security is also an issue in that contractor personnel are not necessarily subject to the same security screening and vetting as regular forces personnel, particularly foreigners and those who may be hired in theatre.¹⁴⁵ They may have sympathies toward the enemy or, in the peace support context, with one or other of the opposing forces. They also cannot be expected to pass on any information that may contribute to the intelligence picture, and they may, in fact, be a threat to security. In hostilities, they may even pass information to the enemy on troop movements or dispositions key to the success of a future operation. In the peacekeeping context, the leaking of information on negotiations or bargaining tactics may undo a great deal of what has already been achieved. Opposing forces may also find it relatively easy to infiltrate contractor staff.¹⁴⁶ The use of insecure commercial communications systems by contractors may also be a security concern.¹⁴⁷

Issues of Support, Discipline, and Morale

Contractors in theatre require a support mechanism. They must be provided what has come to be known as “life support”,¹⁴⁸ which includes a variety of items such as canteen, laundry, mail, off duty recreation and social activities, religious and spiritual support and general administrative support. In most cases this can be provided as part of that which is provided to the military personnel. Most of these issues can be dealt with through local sources. However, in austere environments, this may not be possible and alternate arrangements will have to be made. Some of these issues, such as off duty behaviour towards women, and alcohol or drug consumption require specific policies and direction, and will have an impact on overall morale. Hence, they must be given consideration in the early stages of operational planning. If it appears that adequate life support cannot be provided to contractors once in theatre, then the decision must be to leave PMC support out of the equation.

Thus, there are a number of reasons why PMCs should not be engaged in all deployed operations. Apart from the problems of legal murkiness encountered when working with civilians in the battlespace, there are also a number of operational reasons that, if taken in isolation, are not that daunting. However, when put in combination they can prevent a commander from achieving his mission. As such, contracting out may not be the most suitable solution in every instance.

¹⁴⁵ This may soon change with new regulations for US contractors. See footnote 151. Some requirements of the new regulations insist that contractors and their personnel: (1) make sure all required security and background checks are completed; (2) meet all medical screening and requirements; (3) submit information on contractor employees for entry into military databases; (4) have a plan for replacing employees no longer available for work in the war zone for any reason, including injury or death; (5) be familiar with host nation laws, international treaties and licensing requirements; (6) comply with combatant commanders orders relating to military operations, force protection and health and safety, and replace any personnel who fail to comply with these provisions.

¹⁴⁶ I. K. Garcia-Perez, “Contractors on the Battlefield in the 21st Century”, p. 43.

¹⁴⁷ S. H. Brown, “Using Third Party Logistics Companies”, *Army Logistician* 31, Issue 6, November-December 1999, p. 22.

¹⁴⁸ J. A. Fortner, “Managing, Deploying, Sustaining”.

3.2. Contractual Problems and Dilemmas

Certain concerns and risks arise whenever services are contracted out: Will the mission or job be executed within the time-frame requested, properly, and to our specifications? How can we monitor and assess the execution to ascertain that the contract has been fulfilled to our satisfaction? And how can we be sure that we are not being overbilled?

With PMCs, several factors complicate the process of contractual outsourcing of services, multiply the problems and concerns, and bring real contractual dilemmas into the realm of national and international security. Ultimately, the overall issues of these dilemmas in the complex relationship between the PMC and the client culminate in divided loyalties and goals.¹⁴⁹

At the roots of divided loyalties and goals lies the fact that political and military exigencies do not naturally combine with the economic motivations of PMCs and that, in the end, clients need to rely on PMCs which have their own agenda. While clients commission PMCs to act on their behalf, their interests seldom coincide perfectly. PMCs may claim that they only act in their client's best interest and that their personnel are highly trustworthy. The truth is that PMCs are driven neither by goodwill nor honour, but by profits. Hence, there will always be tensions between the security goals of clients and the companies' desire for profit maximization.

At least three additional aspects compound the problems of divided loyalties and goals. The first is that the execution of the contract will take place in the most complex environment possible: in the context of war, incipient war, or conflict. The second is the fact that neither side will ever have complete information about the other's intrinsic interests, exact goals, and behaviour. And the third is that PMCs will enact decisions that are not only important, but often crucial to the security of the clients. At the same time the clients need to preserve a competitive market whose efficiency led them to outsource in the first place.

While in an ideal world there would be good competition, management, and oversight, producing cost and qualitative efficiencies, government contracting is not always set up to ensure this. The reality is that the provision of military and security services is still too limited to constitute a free market in which the control mechanisms of instant supply and demand would freely work. Rather, PMCs constitute a specialized and entrenched industry where competition is fragmented and where the applicability of sanctions is limited. Two other facts may exacerbate the limited competition. Often, states are not totally free in the selection of contractors. In the US, for example, security considerations normally require that military contracts be awarded to American firms. Moreover, there are cases where the contract winner is predetermined. This, then, gives rise to concerns over whether a PMC that fails in its contracting obligations can readily be replaced.

These problems show the key importance of the contract which has to be written for the most complex environment possible and which, because of this environment, will regularly suffer from "incomplete information". In order to protect the client's interests, to reduce the number of sources giving rise to divided loyalties and goals, and to diminish the PMC's potential to follow its own agenda, the contract must provide for

¹⁴⁹ P. W. Singer, *Corporate Warriors*, 2003, p. 151.

sophisticated mechanisms of monitoring and oversight. Moreover, the contract should contain clear and verifiable standards of performance; appropriate payment provisions with safe-guards; an escape clause with unambiguous terms and conditions; and performance incentives that both reinforce the benefits of doing a job well, completing whatever tasks they have been employed for, and penalize poor execution.¹⁵⁰ In the real world, however, contracts with the private military industry rarely meet these standards. Often, they lack clear mechanisms for monitoring and oversight. Few armed forces have developed a doctrine on how to manage contractor resources and effectively integrate them into their operations. But even in those armed forces that have a doctrine and corresponding manuals,¹⁵¹ monitoring and oversight do not really work. The magazine *MotherJones*, which has won numerous awards for its investigations over the years, took a look at just how much monitoring and oversight is being exercised over companies that contract with the US Department of Defense. The results were revealing. According to its findings, private defence contracts went from \$117.1 billion in 1997 to more than \$167.7 billion in 2002. At the same time, the number of defence contract managers – those who monitor the contracts and determine that the provisions are being met – fell from 14,353 in 1997 to 11,709 in 2002. In other words, nearly 3,000 fewer people are monitoring \$50 billion more in contracts. Comptroller General David Walker complained that he is “not confident that federal agencies have the ability these days to effectively manage cost, quality, and performance in contracts”, and that there is a high risk for abuse in more than a dozen programs that comprise the majority of federal spending.¹⁵²

There are problems with the reliance on contracts as a government tool. These can range from loss of efficiency and lack of control, to insufficient transparency and public accountability. The British National Auditing Office (NAO), for instance, observed in its analysis of the UK’s peacekeeping mission in Kosovo that inflexible contracts meant that the MoD had to pay damages for changing specifications and demands during the course of the operation.¹⁵³ The American experience with more flexible agreements, such as the “indefinite-delivery/indefinite-quantity” contract with *Brown & Root* in the Balkans showed that the company used its freedom to oversupply the US Army and set higher specifications than would have been required, at full cost to the Department of Defense (DoD).¹⁵⁴ Moreover, many of the contracts are of the “cost-plus” type. That means that the contractor’s profit is a percentage of their costs, thus giving them an incentive to keep those costs high – which is hardly a recipe for efficiency or rigor.¹⁵⁵

¹⁵⁰ P. W. Singer, *Corporate Warriors*, 2003, p. 152.

¹⁵¹ See US Army. The primary documents are: Department of the Army. *Contractors Accompanying the Force*, Army Regulation AR 715-9, 29 October 1999; Department of the Army. *Contracting Support on the Battlefield*. Field Manual FM 100-10-2, 4 August 1999; Department of the Army. *Contractors on the Battlefield*. Field Manual FM 100-21, 26 March 2000; Department of the Army. *Logistics Support Element*, Field Manual FM 63-11, 8 October 1996; DA Pam 716-16 Civilian Deployment Guide. See also: UK Ministry of Defense, “The Current MoD Policy for Using Contractors on Deployed Operations”, London, 1 October 2003, available at www.ams.mod.uk/ams/content/docs/condo.htm

¹⁵² D. Zweifel, “Saving money not a Pentagon priority”, *Madison.com*, operated by Capital Newspapers, 2 June 2004.

¹⁵³ National Audit Office (NAO), 2000. “Kosovo: The Financial Management of Military Operations”, *Report by the Comptroller and Auditor General*, HC530, Ministry of Defense. Session 1999-2000. London, The Stationary Office, p. 34.

¹⁵⁴ United States General Accounting Office, “Contingency Operations: Army Should Do More to Control Contract Cost in the Balkans”, Washington D.C., GAO/NSDIAD-00-225. 6 October 2000, at www.gao.gov

¹⁵⁵ J. Surowiecki, “Army, Inc.”, *The New Yorker*, 12 January 2004.

Contract terms are often unspecific, lacking external standards of achievement and established measures of effectiveness. This tends to leave the client at the mercy of the PMC, not only for evaluation, telling him how well the contract is being fulfilled, but also what should be done next. There are numerous examples where PMCs used their position of trusted expertise continuously to identify additional needs in order to gain follow-on contracts. One example is the US military's logistics contracts in the Balkans, which ran over the original costs by hundreds of millions of dollars.¹⁵⁶

Less than perfect competition in the market for military and security services renders the problem of follow-on contracts even more severe. PMCs may find the additional needs in contract areas where they think they could claim to have unique expertise. This then lays the groundwork for follow-up, "sole source" contracts that other firms are unable to bid for. Once they have the contract, an array of incentives exists for firms to overbill the client. If the payment amount is determined by the length of time, then it is likely that the PMC will bill up to the maximum allowable period. If the billing amount is set by the number of personnel required, a PMC will likely hire as many billable employees as possible or pad their numbers with 'shadow' employees. Moreover, PMCs are often also alleged to provide employees who are not properly vetted, or do not meet the contract specifications, focusing on what can be billed for rather than the actual skills required.¹⁵⁷

Many contracts are relatively long-term, particularly those involving high-tech weapons systems which are often outsourced for lifetime support. Such contracts create an essential monopoly once signed, even if competitively bid for. This can distort the original bidding as PMCs have an incentive to low-ball initial bids, knowing they can negotiate add-ons later. More privileged and prone to abuse are those companies which are awarded contracts without bidding. The US Department of Defense (DoD) has nearly doubled the money that it awarded private firms without competitive bidding on contracts – from \$47.2 billion in 1997 to \$71.6 billion in 2002.¹⁵⁸ A *Halliburton* contract for the supply of fuel in Iraq, for instance, was awarded without competition and it bypassed the Pentagon's own Defense Energy Support centre, which had experience keeping the fuel flowing to US armed forces around the world. Jeffrey Jones, the director of the centre, was more than surprised when DoD gave a contract to *Halliburton*, insisting that it could do a better job. Knowledgeable insiders pointed out that *Halliburton* did not do a better job than Jones and his agency. The military soon was paying \$2.64 for a gallon of gas, double the price that Jones said his service would have cost in buying and delivering fuel.

Complicating monitoring are cases where the actual consumer of PMC services may be different from the client that concluded the contract: when the party paying for the service is not the recipient and does not see the actual delivery. Such is the case when states subcontract PMCs to supply services and personnel, for example, to international organizations on their behalf. However, when the usual relationship between buyer and seller, with mutually dependent interactions, no longer holds, PMCs may deliver less to the actual consumer than was paid for. Examples are *Brown & Root*, accused of billing

¹⁵⁶ J. Surowiecki, "Army, Inc.". The report found that effective oversight of the KBR's contract in the Balkans was impaired by the government's confusion about its authority over the contract and insufficient training of Army auditors. Between 1996 and 2000, the company collected more than \$2.1 billion in additional costs for its contracts, nearly twice the amount agreed to originally.

¹⁵⁷ P. W. Singer, *Corporate Warriors*, 2003, p. 156.

¹⁵⁸ D. Zweifel, "Saving money".

salaries for staff in numbers that never matched those actually deployed in the Balkans,¹⁵⁹ and *DynCorp's* supply of overage and overweight, thus unsuitable, police to UN peacekeeping operations in Kosovo.¹⁶⁰

Whenever monitoring is lacking or inadequate, there is always the risk of overbilling. The General Accounting Office singled out a no-bid contract issued to *Kellogg Brown & Root (KBR)*, a subsidiary of logistics giant *Halliburton*, as a particularly blatant example of poor oversight, company overcharging, and war-profiteering. Under this contract issued to supply meals for US troops in Iraq, the military was overcharged by up to 40 percent. The auditors said the company might have charged for millions of meals that were never served. Once the Pentagon had cut out *KBR* as the middleman and began dealing directly with *KBR's* Kuwaiti subcontractor *Timimmi*, the cost per meal dropped from about \$5 to \$3.¹⁶¹ At least \$1.8 billion of *Halliburton's* charges for work in Iraq are presently in dispute by the US Army for insufficient documentation. The company is under investigation for alleged accounting and invoicing irregularities, and the US Army wants to break up the company's \$13 billion logistics contract for supporting the occupation forces in Iraq and reopen the tender process to other, more competitive bidders.¹⁶²

Another contractual danger is the risk that PMCs may not perform their missions to the fullest, particularly when the provision of private military services is taking place in the highly complex and uncertain environment of the fog and frictions of war. Given the nature of the work under such circumstances, the measures of PMC output are often imprecise, as military success depends on the enemy as well. Failure may be due to either enemy action, or the PMC's inability or unwillingness to perform. The latter can either be caused by the PMC's desire not to run undue risks in order to protect corporate assets or interests, or to take advantage of the client in a combat situation for renegotiating, expanding, or prolonging the contract.¹⁶³ But it can, on the other hand, also result in the abandoning of the contract when PMC services are most needed, because a PMC may have no hesitation in suspending a contract if the situation turns too risky in either financial or real terms. Or the contract may be breached because PMC employees quit or are deserting, feeling unsafe or discouraged by set-backs and casualties. For example, during the deployment delays in the summer of 2003, the upsurge of violence in April 2004, and the mass of contractor kidnappings of July 2004, US forces in Iraq faced a wave of firms delaying, suspending, or ending operations because they found it too dangerous, with resultant stresses on the level of supplies and troops' welfare.¹⁶⁴ While PMCs might damage their reputations with regard to winning future contracts, they risk

¹⁵⁹ D. Zweifel, "Saving money". In May 2000, the commander of the US Army brigade in Bosnia surveyed PMC operations in his area of responsibility. His findings were that 85 percent of the work crews of Brown & Root had excessive crew size and 40 percent were not engaged in work at all.

¹⁶⁰ O'Meara, "DynCorp Disgrace", *Insight*, 4 February 2002.

¹⁶¹ "US Army to break up Halliburton's Iraq contract", *ISN SECURITY WATCH*, 7 September 2004, citing the *Wall Street Journal*. Available at www.isn.ch/news/sw/details.cfm?ID=9614

¹⁶² "US Army to break up Halliburton's Iraq contract", *ISN SECURITY WATCH*, 7 September 2004.

¹⁶³ There are a number of other reasons why hired forces can fail to fulfill contracts in combat situations fully. One is that mercenaries may be reluctant to kill fellow nationals. This seems to have been the case during the Ethiopian-Eritrean war, where Russian pilots were willing to bomb civilian targets but less so to engage Eritrea's air force, largely piloted by Russian and Ukrainian comrades. The same reasons seem to have surfaced in the conflicts in Chechnya, in Yemen, and in Zaire. Another reason is that a PMC's links to other commercial entities may influence actions that may not be in their client's best interest. A more damning reason is that PMCs may work with both sides of a conflict to secure or to profit from their own commercial position - for example supplying weaponry to both sides.

¹⁶⁴ P. W. Singer, "The Private Military Industry and Iraq", November 2004, p. 8.

no real punishment if they defect from contractual arrangements. For employees, quitting the job is not desertion, punishable by prosecution and even death, but merely the breaking of a contract with limited enforceability.¹⁶⁵ Thus, the military are put at the mercy of business decisions. The particular dilemma for the military is that if PMCs or their employees decide to pull out or resign, they cannot legally be forced to stick to their contracts.¹⁶⁶

A recurring risk to avoid is that contractors write the rules. *Brown & Root's* first military outsourcing contract came in 1992, when the US Department of Defense paid the firm \$3.9 million to produce a classified report detailing how private companies could help provide logistics for US forces deployed into potential war zones around the world without either host support or preexisting US bases.¹⁶⁷ Later, the Pentagon paid an additional \$5 million to update its report for more specific contingencies. The same year, the company won a five-year contract to implement the plans it had devised. And since 1997, MPRI has produced Field Manual 100-21, known as “Contractors on the Battlefield”, which “established a doctrinal basis directed towards acquiring and managing contractors as an additional resource in support of the full range of operations”.¹⁶⁸ While the new manual contains detailed instructions on how deployed commanders should use contractors – from force protection measures to what kind of shoes contract employees should bring – it makes no mention of intelligence gathering or restriction on contractor roles. In a December 2000 memo, Patrick Henry, Assistant Secretary of the US Army, sharply recommended restricting the use of PMCs in intelligence work, stating that the tactical intelligence gathering could not be contracted because it was “integral to the application of combat power”. At the strategic level, he wrote, contracting out intelligence work posed unacceptable risks to national security.¹⁶⁹ His memo concludes: “FM 100-21 should be modified and clarified to reflect these determinations”. Despite this directive, the prohibition on contractors performing intelligence work never made it into the US Army’s official contracting doctrine, with the result that, in recent months, reports on the use of contractors in Iraq have disclosed that private sector employees have been performing sensitive intelligence work in and around combat zones.¹⁷⁰ An official report on the abuse of prisoners at the Abu Ghraib prison

¹⁶⁵ Government contracting officials and PSC executives concede that employees of PMCs and PSCs have every right to abandon their posts if they deem the situation too unsafe. For example, American civilians, even those fulfilling militarily essential roles, expressly do not fall under the Uniform Code of Military Justice unless Congress declares war - formal declarations which have become increasingly rare. Neither can they be declared Absent Without Leave (AWOL) nor be prosecuted under civil laws.

¹⁶⁶ S. J. Zamparelli, “Contractors on the Battlefield: What Have We Signed Up For?”, p. 13.

¹⁶⁷ P. W. Singer, *Corporate Warriors*, 2003, pp. 142-143. “The initial requirement was that a firm be prepared to enable the deployment of 20,000 troops deployed in 5 base camps over 180 days, with the troop numbers expanding up to 50,000 beyond that”.

¹⁶⁸ Official documents are routinely prepared by contractors and presented as official work products. The field manual written by MPRI acknowledges that Pentagon oversight of contractors is uniformly ambiguous. It notes, “Currently, there is no specifically identified force structure or detailed policy on how to establish contractor management oversight within an AOR (area of responsibility)”. It continues: “Consolidated contractor management is the goal, but reality is that it has been, and continues to be, accomplished through a rather convoluted system”.

¹⁶⁹ J. Werve, “Contractors Write the Rules. Army policy governing use of contractors omits intelligence restrictions”, *Center for Public Integrity*, Washington D.C., 30 June 2004, available at www.publicintegrity.org/wow/printer-friendly.aspx?aid=334

¹⁷⁰ L. Wordon, “Army May Be Misusing Contractors”, available at www.scvhistory.com/scvhistory/signal/iraq/sg061504a.htm – policy prohibits civilian from gathering, analyzing intelligence.

noted the involvement of civilian contractors at the Baghdad facility.¹⁷¹ Thus, there are dangers when PMCs write the rules in official documents and these are presented as official work products. Equally, hiring PMCs to perform exploratory analyses and then paying the very same companies to enact their own recommendations can be a risky business, and may compromise both competition – and therefore the costing benefits of outsourcing – and accountability.

To sum up, the contract-making process is very important. A definite way to enforce responsible contracts must be set up in advance, so that if fraud or defection by the firm is discovered, the process and regulations that were broken are not revisited, but rather the perpetrator is immediately punished. The sanctions should be heavy enough to deter others in the future. More important, outsourcing does not mean handing off oversight. Links with the PMC must be established and constantly maintained at the strategic, operational, and tactical level, to ensure that client interests are served.

There are many other yet unsolved questions connected with the outsourcing of military services: How do mergers or bankruptcies affect the continuation of services provided to a client? What happens in case of a foreign takeover of the parent company, particularly if the new owners oppose the PMC's engagement? And so forth. The key realization of contracting must be that a PMC becomes an extension of government policy and, when operating abroad, functions in a way as its diplomat on the ground. As such, its reputation can precede it and implicate the government as well. Thus when selecting the bids, the government must take into account the PMC's reputation.

3.3. Legal Murkiness

It is unclear exactly what laws apply to the privatized military and security industry. One great problem is the ambiguous legal status of PMCs and PSCs in regard to existing international treaties relevant to conflict and war. This is partly because the whole structure of diplomacy and international recognition rests on the state as a cornerstone and building block of international law and international relations. There is no clarity about the exact relationship between governments and private military and security companies. In their own interests, governments and their military institutions often publicly distance themselves from such companies. Contractors do not fall under the narrowly defined international laws on mercenaries. Nor do most national laws – where they exist at all – clearly apply to contractors. In Iraq for example, US law does not fully apply to PMCs and PSCs because many of the contractors are not American.

¹⁷¹ Contractors were tasked with missions such as “debriefing of personnel...intelligence report writing/quality control, and screening/interrogation of detainees at established holding areas”. These contractors worked closely with military personnel. For example, those hired by Virginia-based CACI as interrogators were assigned to “coordinate and work in conjunction with Military Police units and Military Intelligence interrogation units assigned to support operations of the Theater/Division Interrogation Facility”. According to an Army Inspector General's report, CACI has had 31 interrogators in Iraq since August 2003, 35 percent of which did not have any “formal training in military interrogation policies and techniques”. CACI's work orders for interrogation and logistics should not have been awarded as part of the larger information technology contract, according to a report released by the Department of the Interior's Inspector General on 16 July 2004. Using the contract for such services “was therefore improper”, wrote the Inspector General. Only one out of 11 orders awarded to CACI was determined to follow the original contract scope. See: A. Verlöy and D. Politi, “Contracting Intelligence. Department of Interior releases Abu Ghraib contract”, *Center for Public Integrity*, Washington D.C., 28 July 2004, at www.publicintegrity.org/wow/report.aspx?aid=361

Contractors are no longer restricted to acquisition and logistics but are found nearly everywhere. And their presence in the battlespace is a reality. But PMC employees are not “noncombatants”,¹⁷² as unarmed contractors are under the 4th Geneva Convention¹⁷³ because they carry weapons and act on behalf of the government. However, they are also not “lawful combatants” under the 3rd Geneva Convention¹⁷⁴ because they do not wear regular uniforms or answer to a military command hierarchy. These armed contractors do not fit the legal definition of mercenaries because that definition requires that they work for a foreign government in a war zone in which their own country is not part of the fight. Thus legally, they seem to fall into the same grey area as the unlawful combatants detained as suspected terrorists at Guantanamo Bay, Cuba.¹⁷⁵ This legal murkiness creates real problems in Iraq. International humanitarian law (IHL) requires soldiers on both sides to distinguish between combatants and noncombatants. Armed contractors wearing quasi-military outfits and body armour blur these distinctions, making it harder for the enemy to play by the rules of war – assuming that insurgents and terrorists wanted to in the first place. And it leaves armed contractors open to treatment by foreign governments as unlawful combatants. Should they stray into neighbouring countries, for example, it is possible that they would be locked up on these grounds.

But the key legal question relevant for engagement of PMCs and PSCs is that of “direct” or “active” participation in hostilities. Derived from Common article 3 to the Geneva Conventions, the notion of “direct” or “active” participation in hostilities is found in multiple provisions of international humanitarian law. Direct participation in hostilities by civilians entails loss of immunity from attack during the time of such participation and may also subject them, upon capture, to penal prosecution under the domestic law of the detaining state. Despite the serious legal consequences involved, neither the Geneva Conventions nor their Additional Protocols include a definition of what constitutes “direct participation in hostilities”.¹⁷⁶

The term “direct” participation in hostilities necessarily implies a distinction from “indirect” participation. Notwithstanding the divergences regarding the precise definition of direct participation, any interpretation of this notion should be narrow enough to protect civilians and maintain the meaning of the principle of distinction, while broad enough to meet the legitimate need of the armed forces to effectively respond to violence by non-combatants.

In an attempt to balance these opposing interests, the Commentary on Additional Protocol 1 asserts that the behaviour of civilians must constitute a direct and immediate military threat to the adversary for said action to be deemed “direct participation in hostilities”. This criterion has, however, been challenged by some scholars and, to a certain extent, by state practice, which has tried to enlarge the notion. It has been

¹⁷² US Air Force Judge Advocate General found that if the operators of UAVs are civilians, as most of them are, they risk losing the noncombatant status that civilians normally enjoy. While they may be civilian employees, they are operating weapons systems that are a critical node in overall combat operations. This means that if they are captured they could be considered unlawful combatants and thus liable to prosecution as war criminals.

¹⁷³ *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, Geneva, ICRC, August 12, 1949. Available at www.icrc.org and www.yale.edu/lawweb/avalon/lawofwar/geneva07.htm

¹⁷⁴ *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, Geneva, ICRC, 12 August 1949, available at www.icrc.org and www.yale.edu/lawweb/avalon/lawofwar/geneva03.htm

¹⁷⁵ According to Carter, Phillip, a former US Army officer now at UCLA Law School.

¹⁷⁶ Taken from: International Committee of the Red Cross (ICRC), “Direct participation in hostilities”, Geneva, 1 September 2003, at www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5TALL8?OpenDocument&style=custo_

suggested, for example, that direct participation not only includes activities involving the delivery of violence, but also acts aimed at protecting personnel, infrastructure or materiel. It has even been suggested that the determination of direct participation rests on the appreciation of the value-added brought to the war effort by a civilian post as compared to a purely military activity.

Within these parameters, little doubt exists that a civilian carrying out an attack would be directly participating in hostilities. In the same vein, legal experts seem to agree that civilians preparing for or returning from combat operations are still considered to be directly participating in hostilities, although precise indication as to when preparation begins and return ends remains controversial. Legal literature also attests to intense debates on the qualification of a number of ambiguous situations which do not necessarily imply the use of a weapon, such as logistical support activities, intelligence or guarding activities.¹⁷⁷

Contemporary conflicts have given rise to further challenges in terms of defining and implementing the notion of “direct participation in hostilities”. The use of high-tech warfare, including offensive information operations, psychological and electronic warfare, PMCs and PSCs, and the “fight against terrorism”, among others, illustrate the increased intermingling of civilian and military activities which make it difficult to determine who is taking a “direct part in hostilities” and what measures should be taken to protect those who are not directly participating.

The legal consequences of direct participation in hostilities also raise difficult questions. The fact that “direct participation” by civilians automatically entails a loss of immunity from attack for such time as they take a direct part in hostilities remains uncontroversial. The issue, however, is determining the exact duration of “direct participation” and whether, for example, loss of immunity should be treated in the same manner in international and non-international armed conflict. The legal regime applicable to civilians taking direct part in hostilities in case of capture or detention has also raised numerous queries.¹⁷⁸

Even though it is not a violation of international humanitarian law for a civilian to fight for his or her country, the lack of combatant or prisoner of war status implies that civilians directly participating in hostilities may be prosecuted under domestic law for their acts regardless of whether or not they violated international humanitarian law. It is not clear, however, whether domestic criminal prosecution could ensue for the mere fact of directly participating in hostilities or whether such participation must involve an act prohibited under domestic law or international law.¹⁷⁹

Other unresolved issues include the specific obligations of private contractors working abroad. Private contractors are not obligated to take orders or to follow military codes of conduct, since a contractor is bound by contract, not by oath. One suggested solution is to have contractors sign pledges to stay and not abandon the outsourced tasks and missions. But according to legal opinion such agreements cannot be enforced, since it would constitute involuntary servitude. Equally ambiguous is the question of who

¹⁷⁷ ICRC, “Direct participation in hostilities”.

¹⁷⁸ ICRC, “Direct participation in hostilities”.

¹⁷⁹ One can assume, however, that a civilian attacking a soldier constitutes a prohibited act under most domestic legal systems.

protects contractors and who exactly is in charge of them. Furthermore, it is unclear who, how, when, where, and which authorities are to investigate, prosecute, and potentially punish crimes committed by PMCs or their employees.

Individual contractors are civilians and thus not part of the military chain of command. Even more difficult to answer is how a business organization and its chain of command as an organizational entity can be held accountable. International law has yet to define the status of private military and security contractors and, other than the untested International Criminal Court, lacks the actual means to enforce itself without the state. This defers the problem to the state level. Normally, an individual's crimes fall under the laws of the nation where the crime has been committed. But PMCs typically operate in failed state or conflict zones. In Iraq, for example, there are no established Iraqi legal institutions. This then puts the question to the home state of the contractor. But because the acts were committed abroad, the application of home state law is problematic. While some states have effective laws, but no means to enforce them, such as South Africa, others have certain aspects of laws, but often large gaps in them. Though the British government is now about to respond to requests from Baghdad to regulate contractors that work for UK firms in Iraq,¹⁸⁰ for almost all other governments, there are simply no applicable laws that regulate and define the jurisdictions under which PMCs operate.

Licensed contractors with the US government reportedly sign agreements that provide them with immunity from prosecution under Iraqi law. This is probably consistent with US powers as an occupying power under The Hague Regulations of 1907 and the Geneva Conventions. However, crimes of "universal jurisdiction" – that is, crimes so serious, such as war crimes and torture, that any state has the right to prosecute them – are not protected by immunity agreements. Such crimes could be prosecuted by Iraqi courts.

Another problem with the use of private military and security contractors is the lack of formal rules for them to follow. Soldiers fight according to rules of engagement, which in theory are vetted to align with national-level goals and strategies. In Iraq, a lot of attention is paid to the calibration of force, because too much or too little could result in disastrous consequences. If a soldier breaks the rules, for example by using an unwarranted amount of force, he may be disciplined for doing so. But PMC and PSC employees are not subject to the same rules of engagement as the military, if they operate under any rules at all. Some of the military contractors who perform security functions, such as *Blackwater Security Consulting*, have use-of-force rules built into their contracts, and train their personnel on how to follow them. But these rules are often not vetted by lawyers of the US Department of Defense nor are they designed to match the levels of force desired by US commanders on the ground.¹⁸¹

Private military contractors generally do not have to respect these rules and orders in any event, and they have historically not been prosecuted for disobeying military rules. The

¹⁸⁰ J. Jun, "U.K.: British Government Wants To Regulate Private Security Contractors In Iraq", *The Times*, 3 September 2004.

¹⁸¹ This may change soon. According to proposed DoD regulations, military commanders in such places as Iraq and Afghanistan will be given broad new powers over contractors, including the ability to arm them. Published on March 23, 2004, in the Federal Register, the draft regulations have been in the making for nearly a year. One provision requires deployed contractors to follow combatant commanders' orders. Those orders would supersede any existing contract terms or directions from a contracting officer.

American Uniform Code of Military Justice¹⁸² provides that “in time of war, persons serving with or accompanying an armed force in the field” may be tried by a military court. However, there is little precedent for military trials of civilian contractors who behave badly in a war zone – even assuming Iraq can legally be called a ‘war’. The US Justice Department now has jurisdiction to prosecute military contractors working for Department of Defense (DoD) for actions overseas under the Military Extraterritorial Jurisdiction Act,¹⁸³ enacted in 2000 primarily to protect US soldiers and their dependents on US bases abroad. But this Act has not fully been tested in part because DoD had not issued implementing regulations required by the law.¹⁸⁴ Moreover, DoD may decline to do so as a result of limited resources and the fact that there is no US attorney's office yet established in Iraq to govern US civilian activities there. One result is that of the more than 20,000 PMC and PSC employees deployed in Iraq for a year or longer by now, not one has been prosecuted or punished for any crime. Although the US Army found that PSC employees were involved in 36 percent of the proven abuse incidents and identified six civilian contractors in particular that were culpable in the abuses, not one of them has yet been indicted, prosecuted, or punished – despite the fact that the US Army has already done so for the enlisted soldiers involved.¹⁸⁵ States have an obligation to prosecute perpetrators of war crimes in their courts. States are also obligated to punish perpetrators of war crimes no matter what their nationality or where the crime was committed. Whatever the level of individual responsibility, the state with authority over the military contractor remains responsible under international law for the contractor's actions. That is, the US cannot avoid its international legal obligations to ensure that prisoners are properly treated by hiring contractors.

Thus, the legal murkiness helps shield the contractors from being held to account. The now defunct Coalition Provisional Authority (CPA) has decreed that contractors and other foreign personnel will not be subject to Iraqi criminal processes. Yet, there is also no clear mandate for American jurisdiction. And in the absence of any specific mandate telling military officials to clamp down on contractors, US prosecutors can simply decline to do so as a matter of discretion – precisely what has happened on US military deployments in the Balkans.

By far the hardest problem to solve is that of armed contractors and their international legal status. Short of convening a new Geneva Convention to rewrite the laws of war, there is no way to fix the ambiguous status of these hired guns. And even if one could, it is doubtful that the international legal community would support legal protection for

¹⁸² U.S. Code Title 10 Armed Forces, General Military Law, *Part II Personnel*, Chapter 47 Uniform Code of Military Justice, General Provisions, Section 802 Article 2.

¹⁸³ The US Senate has closed the criminal jurisdiction gap by passage of Bill 768: The Military and Extraterritorial Jurisdiction Act. It (1) extends the jurisdiction of the UCMJ during a declared contingency to DoD civilians and contractor employees (while supporting said contingency). And (2) it extends US Federal Criminal Legal jurisdiction over said individuals plus former members of the armed forces while they are overseas accompanying the armed forces. The full text of the Act is available at www.feds.com/basic_svc/public_law/106-523.htm. However, the Act only applies to civilian contractors working directly for DoD on US military facilities, not for contractors working for other US agencies such as the CIA, nor to US nationals working overseas for a foreign government or organization.

¹⁸⁴ However, at least two cases were brought under the MEJA prior to such regulations went into effect on 29 September 2004. The first ended in a mistrial in July 2004. On 17 June 2004, a federal grand jury indicted David Passaro, a contractor working for the CIA, for committing acts of torture in Afghanistan. As MEJA does not provide jurisdiction over non-DoD contractors, the US government asserted jurisdiction on the basis of Title 18, section 7(9)(A) of the US code, which extends federal jurisdiction to US diplomatic, consular, military or other US government missions or entities in foreign states.

¹⁸⁵ P. W. Singer, “The Private Military Industry and Iraq”, November 2004, p. 13.

armed contractors conducting military operations. That is why, in the meantime, governments must do what they can to oversee the actions of these contractors and ensure they comport with national policies and objectives.

3.4. Impact on Civil-Military Relations

Maintaining proper control of the military is essential to good governance. But keeping civil-military relations in balance have traditionally been a delicate task. A state and its government require effective, functioning armed forces for the survival of both. The government must give the leadership of the armed forces the resources to accomplish its missions, a certain amount of professional autonomy, and the leeway to make the proper technical decisions for preparing defence and applying violence. To deny this may put domestic stability at risk or provoke external aggression. Thus, the armed forces can either be the bulwark of security or can become a risk to the state and society.

A real dilemma in civil-military relations traditionally has been finding a way to cultivate and sustain a body of people with the ability to do things considered abnormal by civilians – to transcend physical discomfort, master fear, and kill and coerce enemies – without undercutting the day-to-day comity that undergirds society. Stable civil-military relations have kept warfighters separate from the rest of society without allowing them to become so isolated that they might turn against society. Though this risk is rather limited in Western democracies, the privatization of warfare is likely to widen the gap between soldiers and civilians and to weaken the link between the armed forces and society – a process that started with the abolition of mandatory conscription in most Western countries. Since PMCs generate military power that does not reside in the nation-state, the balance in Clausewitz’ trinity between the people and passion, the commander, his army, and creativity, and the government and rationality will be disrupted.¹⁸⁶

Adding the private military industry as a third and outside party will not only reshape civil-military relations, but will complicate control and good governance, and may even destabilize the delicate balance. In stable democracies, where the risk of mutiny or coups is remote, the addition of that industry will raise concerns about relations between public authorities and the PMCs. But in weak or developing states, where power often comes from the barrel of a gun, the hiring of PMC services may undermine the regime’s control over the military.

Civil-military theory and practice require a clear separation of the military institution from the domains of politics and economics:

... the military profession is monopolized by the state. ...The skill of the officer is the management of violence; his responsibility is the military security of his client, society. The discharge of the responsibility requires mastery of the skill; mastery of the skill entails acceptance of the responsibility. Both responsibility and skill distinguish the officer from other social types. All members of society have an interest in its security; the state has a direct concern for the achievement of this along with other social values; but the officer corps alone is responsible for military security to the exclusion of all other ends”. ... Does the officer have a professional motivation? Clearly he does not act primarily from economic incentives. In western society the vocation of officership is not well rewarded monetarily.

¹⁸⁶ C. Von Clausewitz, *On War*; ed. and translated by M. Howard, and P. Paret, Princeton, Princeton University Press, 1976.

Nor is his behaviour within his profession governed by economic rewards and punishments. The officer is not a mercenary who transfers his services wherever they are best rewarded, nor is he the temporary citizen-soldier inspired by intense momentary patriotism and duty but with no steady and permanent desire to perfect himself in the management of violence. The motivations of the officer are a technical love for his craft and the sense of social obligation to utilize this craft for the benefit of society. The combination of these drives constitutes professional motivation. Society, on the other hand, can only assure this motivation if it offers its officers continuing and sufficient pay both while on active duty and when retired.¹⁸⁷ And the military professional's "relation to society is guided by an awareness that the skill can only be utilized for purposes approved by society through its political agent, the state."¹⁸⁸

Today, the fact is that the values of the professional soldier within society and the spirit of selfless service embodied in their duty on behalf of the country have begun to erode, even in such states as the US and the UK where the military remains one of the most respected government institutions. More than other things, it is military contracting with the PMC industry and the overwhelming presence of ex-soldiers in its employment rolls that threaten these military virtues. PMCs alter the former exclusivity of the military by marketing the unique expertise their employees acquired from serving in the publicly funded military. PMCs are hired by the civilian leadership in government because they possess skills and capabilities that provide them greater effectiveness than would reliance on the traditional military. But by seeing officers, NCOs, and specialists leaving public service while still remaining in the military sphere, and cashing in on the expertise and training that taxpayers paid for, the public's respect for the institution and its faith in the good motives of the military leadership may fade. Since these privately recruited individuals see themselves as no longer bound by the codes, rules, and regulations that once made military service unique, and sell their skills on the international market for profit, the privatization of military services under contract is perceived as corrupting the armed forces both in the eyes of society and of those who remain in the ranks. Moreover, those in the service also fear that the military pension system might be called into question since profit is being incurred from the very same service for which the public is paying retired personnel back. All these elements reinforce the danger even in stable democracies that the introduction of an external, corporate party into civil-military relations ultimately can have a serious impact on the domestic distribution of status, roles, and also the resources of the state's professional armed forces.

In more dire circumstances, where PMCs and PSCs are called in because of real risks of, or of already existing, internal violence and tensions between the local government and the military, the potential impact of outside actors on civil-military relations can be much greater: either PMCs and PSCs may become a counterweight to the local military and reinforce the regime, or they may become a real threat to civil-military relations and to regime survival where these relations are already troubled.

Private military and security providers' influence on civil-military relations is primarily dependent on the type of PMC and PSC, the context of their contracting, and the circumstances and the environment of their engagement. Generally, companies that provide *military support* are less of a danger since they specialize in secondary tasks not

¹⁸⁷ S. P. Huntington, *The Soldier and the State. The Theory and Politics of Civil-Military Relations*. Cambridge, Massachusetts, London, England, The Belknap Press of Harvard University Press, 1957, Fifteenth printing 2000, p. 15.

¹⁸⁸ S. P. Huntington, *Soldier and the State*, p. 15.

part of the core missions of the client. But the introduction of companies in the *provider* and *consultant sectors* may threaten the institutional balance even when the relationship between regime and the military is stable. There are different reasons for this.

When PMCs are contracted for military roles, usually at the decision of the government, this is often taken as proof of the failure of the local military to carry out its responsibilities properly, perceived as a vote of “no confidence” by the regime, and seen as a threat to the local military’s position in society.¹⁸⁹ Not only is the contracting a manifestation of the erosion of state sovereignty, but also seen as an erosion of the military’s place as an institution designed to maintain it. For the local military, or disaffected groups within it, the loss of prestige, political leverage, autonomy, or access to resources can be an impetus for action against their own regime. Bitterness at exclusion and lost prestige, resulting from the introduction of new parallel forces, has been the driving force behind many coups throughout history.¹⁹⁰ In weak or developing states, the hiring of PMC services may destroy the regime’s control over the military. This happened in Papua New Guinea in 1997, when the government hired *Sandline International* to bring order to Bougainville.¹⁹¹ The local army, upset that *Sandline* had received a \$36 million contract – roughly 150 percent of the army’s yearly budget – to eradicate a rebellion there, instead toppled the government.

In practice, PMCs can destabilize or disrupt civil-military relations in a number of ways: when they impinge on the local military’s prestige; when their employees are much better paid than the local soldiers for comparable tasks; when the companies are kept separate and distinct from the local armed forces rather than being integrated; when their officers become the preferential advisors of the government, are placed in higher command positions or stand in the way of normal promotion tracks of the local officer corps; when they engage in activities that clearly demonstrate the inadequacies of the local military and its leadership; and when they enact programs that threaten the local armed forces with obsolescence or demobilization. Thus, essentially, the potential of negative influence depends on whether PMCs or PSCs supplant core military positions or roles.

However, PMCs and PSCs also have the potential to stabilize the balance of civil-military relations. A basic dilemma for governments in weak states is how to balance the need for capable military forces and maintain their loyalty. In view of the almost 100 successful coups that have been undertaken in Africa alone since the 1960s, regime leaders’ fear of their own militaries is understandable.¹⁹² Some try to prevent coups by entrusting the security of the regime to ethnic or tribal kin groups of the military. Others diminish the risk by intentionally weakening the capabilities of their own armed forces. More leaders of weak regimes try to create a counterweight by engaging a private army or rival paramilitary organization to keep the local military in check – which seems to be a more successful means of maintaining their rule.¹⁹³ Three of the *military provider* firms at the

¹⁸⁹ P. W. Singer, *Corporate Warriors*, 2003, p. 197.

¹⁹⁰ H. Howe, “African Private Security”, *Conflict Trends*, №6, July 2000. Available at www.accord.org.za/publications/ct6/issue6.htm

¹⁹¹ See: P. W. Singer, *Corporate Warriors*, 2003, pp. 191-196; and: S. Dinnen, “Challenging the State: The Sandline Affair in Papua New Guinea”, *Pacific Policy Paper №30*, Australian National University, 1997.

¹⁹² H. Howe, “African Private Security”.

¹⁹³ D. Goldsworthy, “Civilian Control of the Military in Black Africa”, *African Affairs* 80, №318, January 1981, pp. 49-74. And: J. Frazer, *Sustaining Civilian Control: Armed Counterweights in Regime Stability in Africa*, Stanford University, March 1994 (Dissertation).

origin of the outsourcing of private military services, *Levdan*, *Executive Outcomes (EO)*, and *Sandline International*, have clearly proved their usefulness as a counterweight for beleaguered regimes and to counter local threats. The hire of the Israeli firm *Levdan* allowed the new president of Congo-Brazzaville in 1994 to create a new force to replace military units loyal to the former president.¹⁹⁴ *EO*, by securing the entire oil region of Angola and much of the diamond producing areas, solidified the government's ability to make arms purchases and payments abroad, key to rebuilding the rest of its army, and it prevented at least two coup attempts against the regime it supported in Sierra Leone.¹⁹⁵ And *Sandline* helped the same regime in Sierra Leone to return to power after it had been toppled by disgruntled army officers.¹⁹⁶

Companies in the *consulting* sector also have the potential to create a counterweight to the local military and reinforce the regime, specifically in situations where they can train the military, teach the officers how to exist within a civilian-run democratic system, restructure civil-military relations, and balance these with a civilian oversight structure. The latter point is important since efforts at professionalisation will not guarantee the achievement of aimed for results unless these are balanced with efforts to strengthen democratic oversight mechanisms. This is in line with mainstream civil-military theory which maintains that two things establish long-term stability in civil-military relations: enhancing the capacity and professionalism of militaries – that is, focusing military attention on functional specialization and the strategic and technical demands of warfare, rather than on local political concerns – and strengthening the institutions that exercise oversight of the military.¹⁹⁷ “Without oversight, evidence demonstrates that professionalisation programs in transitional or developing states tend to backfire and might even promote a tendency to launch more coups”.¹⁹⁸ PMCs in the consulting business can help accomplish professionalisation and enhancement of democratic oversight through contracts that provide military training and restructuring assistance to military bureaucracies. The success of military consulting companies may be dependent on the acceptance of outside training by the local militaries. Thus, local militaries appear more amenable to PMC assistance if they have faced defeat in war or experienced some other shock that caused them to realize their need to change – as *MPRI* experienced in the case of Croatia and Bosnia. *MPRI*'s assistance was less well accepted when hired by Nigeria to ‘reprofessionalise’ the army after decades of failed military rule and corruption.¹⁹⁹ A similar attitude was exhibited by Equatorial Guinea and Colombia²⁰⁰ who felt they still had the situation well in hand. Another mitigating factor may be the

¹⁹⁴ A. Samia, “Towards a Spiral of Violence? - The Dangers of Privatizing Risk Management in Africa”. *Memorandum. Working Group on Human Rights in Congo, Development and Peace*, Mining Watch Canada, February 2000.

¹⁹⁵ P. W. Singer, *Corporate Warriors*, 2003, pp. 106-115.

¹⁹⁶ P. W. Singer, *Corporate Warriors*, 2003, pp. 106-115.

¹⁹⁷ S. P. Huntington, *Soldier and the State*, p. 15.

¹⁹⁸ P. W. Singer, *Corporate Warriors*, 2003, p. 202.

¹⁹⁹ Until the civilian elections in 1999, Nigeria had mostly been ruled by a revolving set of generals. The resulting theft and corruption hit a high point with the late general Abacha, who stole more than \$2 billion from the Nigerian state in the 1990s. See: P. W. Singer, *Corporate Warriors*, 2003, pp. 131-132.

²⁰⁰ In the same period, *MPRI* began work in Colombia to aid the military in its development and reform, officially as part of “Plan Colombia”, a \$7.5 billion strategy to eradicate the cocaine trade. It worked with the armed forces and the national police in areas of planning, operations, military training, logistics, intelligence, and personnel management. But the initial \$6 million contract was terminated prematurely in May 2001, after Colombian military leaders expressed dismay that the company had staffed its Bogota office with no Spanish speakers and provided advisors with little expertise in the type of low-intensity conflict that the state was engaged in. Finally, Colombian officers felt patronized by retired American generals who had not seen combat in years. See: P. W. Singer, *Corporate Warriors*, 2003, pp. 131-133.

companies' introduction of, and instruction in, new military technologies, used as a kind of carrot to win over professional military opposition.

Sometimes, even private companies in the *military support* sector can act to reinforce the civil-military balance in weak countries. Their support role can pull the local military out of secondary functions which have commercial equivalents and often result in corruption. As was the case during Mobutu's rule in Zaire, rampant corruption can result in the formation of independent power bases and broad military disaffection with the system. Lower-level leaders often refuse to perform roles without pay-offs and the regime's power remains in constant crisis. By gradually taking over these functions, military support companies thus can dampen the internal military competition for self-enrichment.²⁰¹

In sum, a number of weak or developing nations are quietly happy about the emergence of the new privatized military industry, all the more if it is a means to keep demobilized or recently retired soldiers busy. Unlike normal unemployment, unemployed former soldiers possess skills that, if they become disaffected, can make them uniquely dangerous and disruptive. Such was the case in South Africa where Mandela, in view of the first multiracial elections in 1994, had a particular incentive to see the soldiers who had served in the elite units of the apartheid-era military being kept busy making money abroad. Though in public, the Mandela government was decidedly against *EOs'* activities in Angola, as PMCs were acting in contravention of the 'new' attempt of South Africa to become a responsible regional power, it is said that in private, the government quietly tolerated and even facilitated early *EO* recruitment of these forces. The rationale was the government's belief that it would remove from South Africa personnel who might have a destabilizing effect domestically on the forthcoming elections.²⁰²

The potential exists that PMCs and PSCs can violate the sovereignty of states and the right of peoples to self-determination. In the 1960s and 1970s, mercenaries were a threat to legitimacy and self-determination, and they took part in a number of attempted coups. While today it is difficult to see what a modern PMC would have to gain from taking over a state, the risk that PMCs could become a threat to governments that employ them cannot be completely discounted. Thus, a less reputable PMC might act in support of a coup against an established state – as mercenaries did in the Maldives in 1988,²⁰³ and attempted in Côte d'Ivoire in August 2003.²⁰⁴ Most recently, in March 2004, a coup attempt was undertaken by mercenaries against the regime in Equatorial Guinea.²⁰⁵ Although an act like this would certainly damage the PMCs reputation, greatly reduce its prospects of obtaining business elsewhere, and would probably not be tolerated by the international community, sovereignty and self-determination – as well as civil-military relations – are complex issues which PMCs can have significant impact upon and therefore should be key considerations of any regulatory system. The fact that a force is private or foreign does not prevent it from being under the control of the state. While

²⁰¹ P. W. Singer, *Corporate Warriors*, 2003, p. 203.

²⁰² E. Rubin, "An Army of One's Own", *Harper's Magazine*, February 1997, p. 54.

²⁰³ See www.onwar.com/aced/chrono/c1900s/yr85/fmald1988.htm

²⁰⁴ Attempted by the opposition leader Ibrahim Coulibaly and a group of French mercenaries who allegedly planned to assassinate President Gbagbo. See: J. Godoy, "Dogs of War Take to Suits", *Inter Press Service*, 18 November 2003.

²⁰⁵ The coup aborted, with the confiscation of the plane and imprisonment of 67 mercenaries in Harare. See: "Le président de Guinée-Equatoriale visé par un coup d'Etat", *Le Monde*, 10 mars 2004.

such arrangements may not be ideal, they may be far less damaging to state sovereignty than an unchecked rebel movement.²⁰⁶

3.5. Challenges of Accountability and Transparency

Contractors are not only complicating traditional norms of military command and control, they are challenging the basic norms of accountability that are supposed to govern the government's control of violence. Accountability is being answerable or liable for one's conduct or actions.²⁰⁷ The lack of accountability is one of the major problems associated with the private military and security industry. Few states have statutes that even recognize that PMCs exist. For those states in which PMCs typically operate, the legal structures and political environments are often too weak to challenge PMC usage and practices. In particular, there is not enough oversight and control of private military and security firms that sell services directly to foreign countries. With the exception of the US and a few other countries, PMCs are not truly subject to governmental control or scrutiny, partly because they are not beholden to government, and because, as with transnational companies in general, they do not confine their activities within the borders of any single state. If a nation puts too much pressure on a firm, it can simply "shop around" for alternative, more permissive environment in which to base itself. In fact, all the mechanisms typically used by multinationals to avoid taxation or labour and environmental regulations are available to PMCs to avoid oversight. Despite national legislation, state capacity and willingness to monitor and enforce anti-mercenary laws often remain lacking, sometimes due to national interests, resource constraints, or conflicting priorities.

It is the duty of government to maintain disciplined armed forces. National armed forces are accountable domestically through the political process. Soldiers who commit war crimes, together with their military commanders and political superiors who bear responsibility, can be prosecuted in national courts and the International Criminal Court. However, the same levels of accountability do not apply to the private sector. The principal difference with regard to legal status is that PMC employees are subject to the terms of their contract, but they are not subject to the military legal code of service discipline, are not commanded by a military commander, and are not trained to conduct operations in accordance with the Laws of Armed Conflict.²⁰⁸ A combatant is defined as an individual who "is commanded by a person with responsibility, wears a fixed distinctive sign such as a uniform, carries arms openly, and conducts operations in accordance with the Laws of War".²⁰⁹ This definition is critical because contractors have the right to carry arms for self-protection, operate in areas of conflict, and can wear company uniforms, which brings their status into question. With PMCs, command and control structures are all too often unclear.

²⁰⁶ UK Foreign and Commonwealth Office, "Green Paper", § 39.

²⁰⁷ *The Concise Oxford Dictionary*. New York: Oxford University Press, 1991, p. 9.

²⁰⁸ There is one exception: the "Sponsored Reserve" concept incorporated in the Reserve Forces Act 1996 of the UK. Employees of British PMCs, when serving with the armed forces, are subject to the Service Discipline Acts and Service Regulations.

²⁰⁹ S. J. Zamparelli, "Contractors on the Battlefield: What Have We Signed Up For?", p. 14.

A parallel key issue for accountability of PMCs is transparency. In national armed forces, command and control structures are known, hence there is transparency. This is not the case with PMCs. The military and security industry's standard policy of confidentiality precludes transparency. Moreover, when PMCs operate in a conflict zone it will always be difficult to know what they are doing. This is why some propose the establishment of a monitoring system. The defunct *Sandline International* has proposed monitoring,²¹⁰ which they argue should be paid for by the international community. Many others have also argued for this.²¹¹ However, it is not clear whether this would be a practical proposition in a war zone.²¹² Thus, the inadequacy of measures to hold PMCs and their employees to account for their actions is making the objective of ensuring transparency and accountability central to any prospective legislation.

It is a fact that PMCs have been involved in human rights violations and that they present a challenge for the protection of human rights. PMC personnel are individually liable under international humanitarian law, the UN or the EU Declaration of Human Rights, as well as aspects of international criminal law. But in many cases, this is a highly theoretical proposition. Not only does the prosecution and extradition of those who have committed crimes presuppose an adequate or correspondingly prescriptive domestic legislation in the country in which the offence has occurred: this country must also be able to enforce its legislation. However, a weak government which is dependent for its security on a PMC may be in a poor position to do that in order to hold PMCs and their personnel accountable. Moreover, the companies, as opposed to the individuals working for them, do not fall within many aspects of international law and would not, for instance, come within the Statute of the International Criminal Law. Moreover, human rights laws are binding only on states, which reduce the formal legal responsibilities of PMCs, as they are often hired by other private firms, not by states. In practice, therefore, the real extent of accountability of PMCs may depend upon who is employing them.²¹³

PMCs are different from freelance mercenaries since they have continuing corporate existences and wish to maintain reputations as respectable organizations. While this may be true in particular for PMCs who work for Western governments, others, far from having a continuing existence, show a tendency to mutate: unlike states, they can be quickly dissolved or disbanded and may be reconstituted in more accommodating environments, and, as a consequence, their personnel become difficult to trace. The former Yugoslavia clearly demonstrates the difficulties inherent in bringing war criminals to account. Thus, the fact remains that the incentive to uphold internationally agreed human rights standards in conflict situations is weaker for personnel if they are employed by a PMC rather than a state.

One conclusion from this is that at least two options must exist for regulation: either the law of the state in which the operation is taking place must be enforceable; or the law of the state in which the firm is based must be applicable. Since the collapse of the rule of law is what tends to create the conditions for hiring PMCs in the first place, the first alternative is hardly an option. Consequently, legislation of the state in which the PMC is

²¹⁰ Sandline International, "Private Military Companies - Independent or Regulated?", Paper, 28 March 1998, p. 5.

²¹¹ D. Shearer, "Private Armies and Military Intervention". S. Makki *et al.* "Private Military Companies and the Proliferation of Small Arms: Regulating the Actors".

²¹² UK Foreign and Commonwealth Office, "Green Paper", § 36.

²¹³ UK Foreign and Commonwealth Office, "Green Paper", § 34.

based should have an extra-territorial provision in view of the potential inadequacies of laws in countries where crimes may be committed.²¹⁴ However, the transnational nature of the industry makes the second option of home-state regulation difficult as well. Any time a firm finds the regulation too onerous, it can simply move to more friendly environments. Moreover, even among the firms that stay based in the few countries with the ability and will to enforce the law, jurisdiction is still problematic. For example, US criminal law does not apply outside of US territorial and special maritime jurisdictions, so that if an employee of a US-based PMC commits an offence abroad, the likelihood of prosecution is very low. Consequently, other than nonrenewal of contract, there are no real checks and balances on PMCs that will ensure full accountability.

The private military and security industry provides new possibilities for seeking public policy ends through private military means. Employing PMCs reduces the need to involve both parliament and the public in foreign policy and allows governments to carry out actions that would not gain legislative or public approval. While this can be an advantage in meeting unrecognized or unsupported strategic needs, it can also be dangerous for the health of a democracy. The increased American use of contractors in the anti-narcotics war in Columbia illustrates the trend on the covert operations side. The public division over the Iraq engagement shows that it can also be worrisome for overt, discretionary operations, particularly because the use of PMCs in Iraq appears to be less driven by any supposed financial savings than by political cost savings. In lieu of the mass use of contractors in Iraq, the executive would have had to either expand the regular forces deployed, call up more National Guard and Reserve troops, or make political compromises with allies or the UN – all tough decisions which would have incurred political costs, particularly in a presidential campaign season. But already in the past PMCs have provided the US executive a means to evade congressional limits on troop strength. In Bosnia, where a cap of 20,000 troops was imposed by Congress, the addition of 2,000 contractors helped skirt that restriction.²¹⁵ Similarly, during the Vietnam War, President Johnson avoided congressionally mandated troop ceilings by employing over 80,000 contractors during the most intense phase of the war.²¹⁶ Public participation – including public consideration of the risks and benefits of military operations – is fundamental to democracy. Thus, avoiding public disclosure and debate by contracting private military and security companies is likely to have long-term political costs.

Exporting private military services opens the door to foreign policy by proxy, whereby private companies are used to hide the government's fingerprints. They also raise thorny issues regarding the relationship between PMCs and official foreign policy. PMCs have been employed by a range of democratic governments, the UN, several NGOs in the humanitarian aid business, some environmental organizations, and by private corporations. At the same time, PMCs have worked for dictatorships, rebel groups, drug cartels²¹⁷ and before 9/11, two al Qaeda-linked jihadist groups.²¹⁸ The same American companies that export military services and support to foreign governments and corporations also work for the US government. Comparisons with PMCs in other

²¹⁴ C. Beyani and D. Lilly, *Regulating Private Military Companies: Options for the UK Government*, International Alert, August 2001, p. 26.

²¹⁵ K. M. Peters, "Civilians at War", *Government Executive*, July 1996, p. 24.

²¹⁶ S. J. Zamparelli, "Contractors on the Battlefield: What Have We Signed Up For?", p. 11.

²¹⁷ So, for example, the Israeli PSC *Spearhead*.

²¹⁸ P. W. Singer, "The Private Military Industry and Iraq", November 2004, p. 9.

countries demonstrate that the contracts American PMCs receive from the US government give them greater incentives to stay in tune with US policy. The close relationship between the US government and these military contractors, however, also holds the potential for companies to act – with Washington’s tacit support – in ways that violate official US policies, norms, and practices.

Iraq highlights additional shortcomings and problems of accountability which give rise to more criticism. Reliance on poorly monitored contractors is said to bleed the public treasury. PMCs allow placing many of the costs of the Iraq occupation “off budget”. In the US, as in all democracies, funding for government activities are ultimately in the hands of the people, through their elected representatives in legislative bodies. However, PMC employees in Iraq are not listed as military defence personnel. Instead, they are paid out of the money budgeted for Iraqi reconstruction. Recent US government estimates indicate that as much as one quarter of the \$18 billion budgeted for reconstruction will be paid to those who perform military and security operations of one sort or another.²¹⁹ Moreover, using PMCs has the additional advantage that significant numbers of contractor casualties largely stay out of the news. By mid-October 2004, PMCs had suffered an estimated 157 killed in Iraq. Another 750 are thought to have been wounded²²⁰ – more than the casualties of any single US division.

Thus, in the US, contractors are seen to create opportunities for the government to evade public accountability, and, simultaneously, to be on the verge of evolving into an independent force at least somewhat beyond the control of the US military.²²¹ As contractors grow in numbers and political influence, their power to entrench themselves and block reform is growing.²²² The larger that military contractors become, the more influence they have in Congress and the Pentagon and the more they are able to shape policy, immunize themselves from proper oversight, and expand their reach. Many PMCs are led by ex-generals, highly effective lobbyists vis-à-vis their former colleagues – and frequently former subordinates – at the Pentagon.²²³ As PMCs grow in size and become integrated into the military-industrial complex,²²⁴ their political leverage in Congress and among civilians in the executive branch grows.²²⁵ Particularly in the US, PMCs tend to be very well politically connected, which helps them to get contracts regardless of their

²¹⁹ H. Gutman, “US Military. Privatization of Warfare”, *AxisofLogic.com*, Finding Clarity in the 21st Century Mediaplex, 1 May 2004, at www.axisoflogic.com/artman/publish/article_7101.shtml

²²⁰ Interview with P. W. Singer, “Der Krieg wird an Private ausgelagert”, *NZZ am Sonntag*, 7 November 2004, p. 32.

²²¹ M. Kelley, “Pentagon Memo Warned on Army Contractors”, *Guardian*, 7 May 2004. Available at www.guardian.co.uk/worldlatest/story/0,1280,-4063642,00.html

²²² R. Mokhiber and R. Weissman, “Contractors and Mercenaries. The Rising Corporate Military Monster”, *CounterPunch*, Petrolia, 23 April 2004.

²²³ *MPRI* boasts that it has more generals per square meter than the Pentagon. Its president is General Carl E. Vuono, Chief of Staff of the Army during the Gulf War, its executive vice president is General Ronald H. Griffith, former Army Vice Chief of Staff. Until recently, General Crosbie E. Saint, former commander USEUCOM and Lt General Harry Soyster, former head of DIA were part of the board, next to dozens of other retired top-ranked generals and admirals who work as advisors. Secretary of State Colin Powell describes General Vuono, his one time boss, as one of his dearest friends.

²²⁴ *MPRI*, one of the biggest and most prestigious PMCs, was purchased in 2000 by *L-3 Communications*, an entity spun out of defense manufacturers Loral and Lockheed Martin in 1997. Vinnell Corp is a subsidiary of Northrop Grumman, the second largest defense contractor in the US which has swallowed a number of other military contractors.

²²⁵ B. Yeoman, “Soldiers of good fortune”.

innate merit. Contracting work to PMCs directed by prominent former politicians, statesmen, and security officials has become big business.²²⁶

Another problem for accountability is the fact that many firms do not properly screen those they hire for work in foreign nations. It is left to very raw market forces to figure out who can work for these, and who they can work for. Early in the Iraq war, quite a large number of PMC and PSC personnel was mostly recruited from elite Special Operations forces – a small enough world that checking credentials was easy. But as demand grew, so did the difficulty of finding and vetting qualified personnel, particularly if recruited abroad. In the US DoD alone, there was, at the end of September 2003, a security clearance backlog of roughly 270,000 investigative and 90,000 adjudicative cases.²²⁷ This may not only increase risks to national security and to the reputation of the nation's PMCs and PSCs, but may lead to more violations of international humanitarian law and human rights. Since the deaths of four American security contractors in an ambush²²⁸ and the role of contractors in the Abu Ghraib prison scandal,²²⁹ which unearthed legal obstacles to prosecuting them for reported abuses, the engagement of contractors in Iraq has raised sharp concerns over an unequalled reliance on the private military and security industry in a war zone. These events have drawn intense scrutiny, both for the perils PMC personnel may face and particularly what critics in the US call a

²²⁶ The *Halliburton* and *Kellog Brown & Root* links to the White House are well known. Former President Bush's *Carlyle Group* is about as well connected to the political establishment as it is possible to be. Its subsidiary, *Diligence*, was founded by William Webster, the only man to head both the CIA and the FBI. Mike Baker, its CEO, spent 14 years at the CIA as a operations officer specializing in counterterrorism and counterinsurgency. Whitley Bruner, its chief operating officer in Baghdad, was once CIA station chief in Iraq. Shortly before the US invasion, he directed a covert operation for the Bush administration to convince high-ranking generals loyal to Saddam Hussein to cooperate with US forces. Richard Burt, the chairman, is the former US ambassador to Germany and key advisor to the *Carlyle Group*, the Washington private equity fund where Bush's father worked for the past 7 years. Ed Rogers, *Diligence's* vice chairman, was one of Bush senior's top assistants when he was president. Among *Diligence's* senior advisors are John Major, the former British prime minister and chairman of *Carlyle Europe*, Ed Mathias, *Carlyle's* managing director, and Lord Charles Powell, a former foreign policy advisor to Margaret Thatcher. In December 2003, *Diligence* established a new subsidiary called *Diligence Middle East*, in which Mohammed al-Sagar, a wealthy Kuwaiti who also runs the Foreign Relations Committee of Kuwait's parliament, has a 40 percent stake. One of its co-chairmen is Joe Allbaugh, President Bush's campaign manager in 2000. In April 2004, it quietly announced it had formed a joint venture with *New Bridge Strategies*, a consulting company headed by Joe Allbaugh and Republican lobbyist Ed Rogers, which was established in 2003 to advise companies on business deals in postwar Iraq. Similarly, *ArmorGroup* announced that former British Conservative foreign secretary and defense secretary Sir Malcolm Rifkind had been appointed its chairman. Rifkind served in John Major's government and is now prospective parliamentary candidate for Michael Portillo's safe Tory seat. In April 2004, *Steele Foundation* announced that retired US ambassador Frowick, who had served under 4 different US presidents, had joined its executive advisory board as an executive director. In 2001, 10 PMCs spent more than \$32 million on lobbying. *DynCorp* retained 2 firms that year to successfully block a bill that would have forced federal agencies to justify private contracts on cost-saving grounds. *L-3 Communications* had more than a dozen lobbyists working on its behalf, including Linda Daschle, wife of then Senate Minority Leader Tom Daschle. 17 of the nation's leading PMCs have invested more than \$16 million in congressional and presidential campaigns since 1999.

²²⁷ US General Accounting Office, "DOD Personnel Clearances. DOD Needs to Overcome Impediments to Eliminating Backlog and Determining Its Size", Washington D.C., GAO-04-344, February 2004. At www.gao.gov/cgi/getrpt?GAO-04-344. Several impediments hinder DoD's ability to eliminate, and accurately estimate the size of its clearance backlog: (1) the large number of new clearance requests; (2) the insufficient investigator and adjudicator workforces; (3) the size of the existing backlog; and (4) the lack of a strategic plan for overcoming problems in gaining access to state, local, and overseas information needed to complete investigations. "Roughly 8,000 full-time-equivalent investigative personnel are needed to eliminate the backlog ... And the average time required to grant a security clearance for a contract employee now exceeds one year".

²²⁸ Four Americans of Blackwater Security Consulting were ambushed, killed, and mutilated in Fallujah on 31 March 2004.

²²⁹ P.Chatterjee, "Titan's Translators in Trouble", *WarProfiteers CorpWatch*, 7 May 2004.

troubling lack of clear, enforceable rules, and of observance of recruiting, hiring, vetting, and security clearances' standards.²³⁰

Many other states find PMCs useful for implementing their own foreign and military policies and oppose efforts to restrict, let alone prohibit them. Thus, the most feasible legal changes that can be expected are those that would enhance transparency in the private military and security sector and allow for greater regulation, for example performing audits of the industry, which would make PMCs and PSCs sanctioned businesses. Both governments and PMCs need to work toward regulations requiring increased transparency and accountability and promoting the rule of law, respect for international humanitarian law and human rights. If one believes in the democratic ideals of accountability, as well as in transparency for governmental and public scrutiny, one should expect that PMCs and PSCs and their employers, both states and transnational corporations, should be held answerable for their actions, and accountable to international and domestic legislation. Otherwise, in the final analysis, the private military and security industry will be a poor substitute for the state in the provision of security for individuals.

3.6. Contractors as Proxies for Governments

Much of the negative attention that has surrounded PMC operations has been the question as to whether PMCs are the “covert wing” of Western governments’ foreign policies. A few claim that these companies are not private entities at all, but rather are simple “front companies” for the major powers, that is, covert public entities with political rather than economic motivations.²³¹ In some cases this is true. Such companies have certainly existed in the past, including those set up by the CIA in the 1960s such as *Air America*, *Civil Air Transport*, *Air Asia*, *Intermountain*, and *Southern Air Transport*. But the fact that some front companies still exist does not mean that each and every PMC is a front for covert operations. Larger PMCs are public entities owned by financial institutions and individual stockholders, allowing a measure of transparency not enjoyed by front companies of the past. Many of the services that the industry offers, such as logistics and support, are simply too mundane to necessitate covert control. Many PMCs have worked for all types of customers, in all kinds of places, sometimes including those contrary to their home governments’ wishes. In addition, there are also pricing structures and competitive practices in the private military market that never characterized front companies. Moreover, their financial independence and business motivations have even led some PMCs to defraud their own governments – this in ways quite different from what any front for a government would consider.

The “Campaign Against Arms Trade”²³² are cited by the Foreign Affairs Committee of the British House of Commons as being concerned that “to license, and thereby

²³⁰ Secretary of Defense, Rumsfeld, in Congressional testimony on 7 May 2004, acknowledged that 37 interrogators were at work at the Abu Ghraib prison, and 27 of them worked for CACI, a private company. One of the other interrogators, John Israel working for Titan, held no clearance of any kind. In Congressional testimony in October 2003, Charles S. Abell, principal Deputy Under Secretary of Defense for Personnel, acknowledged that some contract employees were being sent to Iraq before they had received their security clearances ... since clearances were granted “as time permitted”.

²³¹ P. W. Singer, *Corporate Warriors*, 2003, p. 48, citing Xavier Renou.

²³² CAAT, Comments from the Campaign Against Arms Trade on the Green Paper on Private Military Companies.

condone, the use of armed force by bodies other than publicly accountable military, security and police forces” would give rise to the “danger that, to distance itself, a future Government could use a private company to undertake an activity that many members of the public might find objectionable”.²³³ It is known that companies such as *WatchGuard International* and *KMS* have long assisted the British government with operational interests overseas, supporting or even supplanting UK forces in regions of the world where these forces could not officially be brought to bear. *Sandline International* was thrown into both the public and government spotlight several times between 1997 and 1999, bringing about a change of this long-standing practice. While the US government may be more inclined toward using such firms for covert, clandestine or non-disclosed operations overseas, the UK government has stated clearly that it will continue to use, and even increase its use of, UK government agencies and forces for such operations where required.²³⁴

The undisputable fact is that private contractors go where the Pentagon would prefer not to be seen, carrying out operations for the US government that are far from view of legislators, press and public. During the Cold War, private US firms were associated with tasks “too dirty” for the US government. In Vietnam and Central America, reports of shady and illegal private military activities were rampant. In the wake of the Iran/Contra scandal, for example, it was said that companies like *Southern Air Transport* and *Setco Aviation* facilitated the supply of weapons to the Nicaraguan Contras after Congress cut off aid.²³⁵ In the last few years, PMCs have sent their employees to Bosnia, Nigeria, Macedonia, Colombia, Equatorial Guinea, and other hot spots. In Colombia they are flushing out drug traffickers, and in African countries they are turning rag-tag militias into fighting machines. When a UN arms embargo restricted the US military in the Balkans, PMCs were sent instead to train the local forces. But at times, these endeavours have been disastrous.

As a result, the accusations of conspiracy continue. However, too many assume a link between governments and PMCs or mercenaries, most of the time on the basis of little evidence. Though the fact that PMCs usually include former members of the own armed forces lends some plausibility for those who favour conspiracy theories, such assumptions must not be taken too far. The equally undisputable fact is that there is nothing wrong with governments employing private sector agents abroad in support of their interests – where these interests are legitimate. However, where such links are transparent, they are less likely to give rise to misinterpretation.

Singer, citing the recent “rent a coup” episode in Africa involving the South African *Logo Logistics* firm, points out a different aspect of PMC engagement that “illustrates the problem of teasing out exactly what is the right or moral thing to do in the absence of external guidance or rules. On the one hand, the firm has been accused of fronting for outside interests in the profit motivated toppling of a government. However, at the same time, the end results of a successful coup might have been an improvement in the local situation. The government in question (Equatorial Guinea, led by a president who took

²³³ House of Commons Foreign Affairs Committee. Ninth Report of Session 2001-02, *Private Military Companies*. London, The Stationary Office Limited, HC 922, 1 August 2002, § 69. Citing evidence 51. Hereafter referred to as: *Private Military Companies Report*.

²³⁴ K. A. O’Brien, “PMCs, Myths and Mercenaries: the debate on private militaries companies”.

²³⁵ D. D. Avant, “Privatizing Military Training”.

power by killing his uncle) may have been “legitimate” under archaic international standards, but was a wholly ruthless human rights abuser of the worst sort”.²³⁶

In 2000, this same government has been assisted in the design of a “National Security Enhancement Plan” and the formation of a coastal defence force by the American *MPRI*. The contract had initially been rejected by two separate US State Department offices, holding up its signing for two years on concerns that the client is a military dictatorship, a human rights violator of the most extreme kind, accused of political killings, election fraud, and questionable monetary practices, and one of the most tightly closed and repressive societies still remaining after the end of the Cold War. Moreover, its two closest allies are North Korea and Cuba, so aiding the regime in any way may not be in the US’s best strategic interests. Despite these objections, the contract was pushed after high-level lobbying by *MPRI* convinced US policymakers that if it was not allowed to do the job, some other foreign PMC would – in this case, a French PMC.²³⁷

Thus, there are also economic and other advantages to using PMCs. Contractors allow the US administration to carry out foreign policy goals in low-level skirmishes around the globe without having to fear the media attention triggered if US soldiers are deployed – or are sent home in body bags. In many respects, this is the ‘privatization’ of Western special forces and intelligence capabilities. And denial is easier for the government when those working overseas do not wear official uniforms.

This latter point was taken up by the Foreign Affairs Committee of the British House of Commons, albeit in a different context: they see a danger that British based companies might be confused with British government forces or British foreign policy by the tendency of some PMCs to imitate British military names and uniforms. “Such imitation poses a danger to the integrity of British armed forces, and threatens to tarnish their excellent reputation”. In order to reduce this risk, they “recommend that the Government prohibit private military or security companies from using names similar to those of British regiments or fighting units, or from the use of any emblem, symbol or distinctive item of uniform similar to those of the British armed forces”.²³⁸

3.7. Double Standards

Some see the existence and activity of PMCs in negative terms, although these same observers accept national armies as both necessary and good. Such appears to be the position of the UN Special Rapporteur on mercenaries, who reported:

Within the historical structure of the nation-state, which is still the basis of international society, it is inadmissible for any State legally to authorize mercenary activities, regardless of the form they take or the objectives they serve. Even where legislation is lacking or deficient,

²³⁶ P.W. Singer, “The Private Military Industry and Iraq”, November 2004, pp. 9-10.

²³⁷ J. Brown, “The Rise of the Private-Sector Military”, *Christian Science Monitor*; 5 July 2000. *MPRI* was paid by the regime, which reportedly received the monies for the contract from Amerada Hess, *Mobil Oil*, and other big multinational corporations that have recently begun offshore drilling. See also: P. W. Singer, *Corporate Warriors*, 2003, p. 132.

²³⁸ House of Commons Foreign Affairs Committee *Private Military Companies Report*, § 71. At the same time the Committee took note of the statement from the *Gurkha International Group of Companies* that the term Gurkha “is currently used of soldiers in the Royal Nepalese, Indian and British Armies, as well as of retired British Gurkhas in the Sultan of Brunei’s Gurkha Reserve Unit and of policemen in the Gurkha Contingent of the Singapore Police Force. It is a name much used in Nepal in tourism and commerce”.

mercenarism is an international crime. Mercenary activity arises in the context of situations that violate the right of peoples to self-determination and the sovereignty of States. In practice, mercenaries commit atrocities and impede the exercise of human rights. The mere fact that it is a Government that recruits mercenaries, or contracts companies that recruit mercenaries, in its own defense or to provide reinforcements in armed conflicts, does not make such actions any less illegal or illegitimate. Governments are authorized to operate solely under the Constitution and the international treaties to which they are parties. Under no circumstance may they use the power conferred on them to carry out acts that impede the self-determination of peoples, to jeopardize the independence and sovereignty of the State itself or to condone actions that may do severe harm to their citizens' lives and security.²³⁹

This is a black and white view that does not even take into the fundamental right of self-defense, contained in Article 51 of the UN Charter. Moreover, national armed forces have in many cases been guilty of precisely those types of egregious human rights abuses which PMCs and PSCs are accused of committing.

This has also become evident in international peace support operations, particularly concerning military personnel of many developing countries, where professional standards fall far below those of Western armed forces. Some poorer countries who contribute to UN peacekeeping for financial reasons supply poorly-equipped forces of low quality. However, the UN relies on sovereign states to contribute badly needed forces for peacekeeping operations, and is rarely able to hold the providing states to account for the misdeeds of their peacekeeping forces.

Some peacekeeping forces have proven to be unaccountable, a danger to stability, frequent violators of human rights, and a threat to the civilian population. This was the case with Nigerian forces operating in ECOMOG under UN leadership. In the Democratic Republic of Congo, state authority and discipline of the armed forces have in the late 1990s declined so far that it was no longer possible to distinguish between state and non-state violence. Widely acknowledged also is the fact that the national army in Sierra Leone was undisciplined, violent, corrupt, guilty of widespread abuses, and a looting force that terrorized the civilian populace which had no place to hide. What had begun as a civil war became civil chaos.²⁴⁰ Nobody has suggested anything like this in the record of either *EO* or *Sandline International*. For the most part, these PMCs had no great weapons advantage against their foes. Apart from superior intelligence, the key to their success was the strict discipline and cohesive identity their forces were able to maintain, even when operating in chaotic zones. The conclusion is that national armed forces personnel are by no means necessarily better qualified or behaved than employees of PMCs.

Moreover, there is the perception that many PMCs are operating on behalf of Western mining and oil firms in parts of the developing world with little interest in the national well-being and standard-of-living of the countries in which they operate, further tarnishing the image of these firms and painting them as neo-colonial exploiters. However, here too, some national armed forces have behaved much worse than any PMC ever did. According to one observer, "wherever *EO* went, civilians stopped

²³⁹ E. B. Ballesteros, Report on the question of the use of mercenaries, 1999, § 36.

²⁴⁰ P. W. Singer, *Corporate Warriors*, 2003, pp. 110-115.

dying”.²⁴¹ *EO*, in order to quell its mercenary image and to expand its economic reach, also made an effort to expand its civilian role, developing plans for a hotel resort in Angola and even a cellular phone network. Other firms in the holding company offered medical services, civil engineering, water purification, and hospital construction in addition to logistics provided for an international aid agency to manage the return of roughly 8,000 displaced civilians, air transport provided for the aid agency’s field workers, financial aid to the Children of War Crimes foundation and aid to NGOs such as CARE by *EO* in Sierra Leone.²⁴² The premiere military provider company even set up water filtration networks and free medical dispensaries in Angola and Sierra Leone.²⁴³

Military provider firms do use violence, but their general goal is not violence for its own sake, but rather to achieve the task for which they are hired and paid. Considering the increasingly messy wars of the 21st century, PMC personnel also operate with far greater military professionalism than most actors in local conflicts. “Their standards of discipline are usually higher than the underpaid local militaries or rebels, which often degenerate into looting forces. Unlike local troops, as outsiders they are also less likely to hold specific grudges against any one ethnic group or faction and have less reason to commit atrocities as payback for historic grievances.”²⁴⁴ And military consulting firms can play a positive role in professionalizing foreign military and security forces, teaching them standards of military behaviour and pass on advice that brutality and abuse of human rights are not essential elements of strategy. They frequently even offer instruction in international law. Among other things, these are some of the reasons why PMCs bristle at negative characterizations of their business, claiming that the laws of the market clearly limit the tendency to commit violations of human rights or war crimes, as their ultimate long-term profit is dependent on a good public image.

What is clear, however, is that the ability to track personnel, and to hold them to account for their actions is the most powerful deterrent against illegal behaviour. This is why the Foreign Affairs Committee of the British House of Commons is in favour of the use of licensed PMCs to assist other countries with security sector reform and to facilitate the transfer of British military training, even where the British government is not available to pay for it. “Many of the employees of British based PMCs are former British military personnel who are well qualified to help impart the excellent standards of the British armed forces to those of other countries, thus helping to raise the standards of their armed forces and other security personnel. Improving the security sector of weak states is an important aspect of the international campaign against terrorism”.²⁴⁵ Regulation which grants licenses to PMCs with such well qualified staff would reward such reputable companies, and would help to eliminate those staffed with less suitable personnel.

²⁴¹ J. Harding, “The Mercenary Business: Executive Outcomes”, *Review of African Political Economy*, vol. 24, №71, March 1997, pp. 87-97.

²⁴² Executive Outcomes, “Presentation to the Portfolio Committee on Defense: Parliament, Cape Town”, Supplement D, 1997/98.

²⁴³ P. W. Singer, *Corporate Warriors*, 2003, p. 117.

²⁴⁴ D. Shearer, “Private Armies and Military Intervention”, p. 71.

²⁴⁵ House of Commons Foreign Affairs Committee, *Private Military Companies Report*, § 74.

3.8. Other Issues and Problems

Economic Exploitation

It has been claimed that some countries which have used mercenaries and PMCs, but did not have the funds to pay for those services, have granted concessions of mineral and oil resources. The UN Special Rapporteur on mercenaries has reported concern that some governments facing internal armed conflicts hire security companies to restore order but “do not have the funds to pay for the services of these companies and have to grant those major concessions of mineral and oil resources that account for a valuable share of their national heritage”.²⁴⁶

There are cases where some commercial military and security activity has been paid for through the granting of mineral or oil concessions or other non-monetary methods. Among others, the economic attraction of such resources is said to have been the force behind certain engagements of PMCs in the resource-rich African countries of Angola, Sierra Leone, and Zaire over the last 30 years.²⁴⁷ *Executive Outcomes (EO)* was not only fighting mercenary battles in Angola, but was defending corporate interest in oil and diamonds.²⁴⁸ *DiamondWorks* was one of the four large multinationals in Sierra Leone that had very significant holdings in the diamond industry. *EO* was granted mining concessions through *DiamondWorks* and *Branch Energy* as partial payment for its services for the Sierra Leone government.²⁴⁹ Indeed, “PMCs are paid in partial ownership of natural resources. In this way, the military companies move from consultants to stakeholders, complicating the objectivity of their stated role”.²⁵⁰

The arguments against the payment of PMCs through these means are that the country is “mortgaging future returns from mineral exploitation”²⁵¹ and that economic exploitation is another way through which PMCs could be considered a threat to sovereignty. But there are also some who see a positive side in the association of PMCs with mineral extraction: it may be one of the few ways PMCs can be sure of getting paid. And an interest in mineral extraction will give a PMC a vested interest in peace and stability.²⁵²

The fact is that the granting of mineral or oil concessions to PMCs is unlikely to result in the equitable distribution of the proceeds of such concessions to local communities, and

²⁴⁶ E. B. Ballesteros, Report on the question of the use of mercenaries, 2001.

²⁴⁷ House of Commons Foreign Affairs Committee, *Private Military Companies Report*, § 53.

²⁴⁸ J. Selber and K. Jobarteh, “From Enemy to Peacemaker: The Role of Private Military Companies in Sub-Saharan Africa”, *Medicine & Global Survival* 7, №2, February 2002, p. 93. *EO* was one of several companies under the umbrella of *Strategic Resources Corporation (SRC)*, including security companies *Saracen*, *Alpha-5*, *Lifeguard*, *Safenet*, *Stabilico* and *Grays*, as well as *Ibis Air*, *Falconer Systems* (logistical supplies), *Bridge International* (construction and civil engineering) and *GJW Government Relations*. *SRC* shared offices and telephones with *Sandline International* in London. The *EO/SRC/Sandline/Branch Energy* complex of military and mining companies had offices around the globe - in the UK, the US, Canada, Singapore, Hong Kong, South Korea, Indonesia, China, Australia, and in over 26 African states. Companies in the complex use several offshore banks and have separate corporate accounts - a strategy that allows them to keep their total worth hidden. See: K. Pech, “Executive Outcomes - A corporate quest”, p. 103.

²⁴⁹ K. Pech, “Executive Outcomes - A corporate quest”, p. 103.

²⁵⁰ J. Selber and K. Jobarteh, “From Enemy to Peacemaker”, p. 91.

²⁵¹ A-F. Musah, and J’K. Fayemi (eds), *Mercenaries: An African Security Dilemma*, Pluto Press, London, 2000. Also: D. J. Francis, “Mercenary Intervention in Sierra Leone: Providing National Security or International Exploitation?”, *Third World Quarterly* 20, №2, April 1999, pp. 319-338.

²⁵² J. C. Zarate, “The Emergence of a New Dog of War”.

thus should not be condoned. However, allowing the proceeds of such concessions to remain in the hands of rebel movements or corrupt governments is unlikely to produce a beneficial outcome for the local communities either. Hence, there is a need to consider carefully whether the possibility that PMCs might abuse access to mineral or oil concessions or to other nationally important commercial assets is a sufficiently serious problem to justify the outright banning of such transactions in all circumstances.²⁵³

Vested Interests in Conflicts

Some argue that PMCs, since they are paid to deal with conflict situations, have little interest in bringing conflict to a rapid end. Others argue that the existence of PMCs does not depend on the perpetuation of conflict or war since there is plenty of other business to be had in the security field which is non-contentious, protective, and defensive in terms of the application of security for the promotion of stability.²⁵⁴

In reality, it is often the parties to the conflict who have reasons for prolonging it, in some cases in order to exploit mineral resources illegally. This has clearly been the case with some national armed forces in Africa as well as with many warlords.²⁵⁵ Much less obvious are accusations that *Executive Outcomes* prolonged the conflicts in places of its intervention. *EO's* defining organizational characteristics lay in its origins in the elite forces of the apartheid-era South African Defense Force and its close business links to mining and oil corporations. Its success was partly due to this integration into a larger economic holding. This allowed both the PMC and its associated companies to intervene into areas where governments and other companies feared to go.²⁵⁶ Up to 80 companies are reported to have been associated with *EO* in some way and each worked to its benefit.²⁵⁷ *EO* was indirectly paid through mining concessions that were sold off to related corporations. And the 'security-led' approach to mining allowed *Branch-Heritage*, the group in the overall umbrella owned by Tony Buckingham who shared the London headquarters with *EO*,²⁵⁸ to beat out rivals, such as the global giant *DeBeers*, in gaining diamond rights.²⁵⁹

An extension of the accusation that PMC engagements prolong conflicts is the argument that these companies are prone to switching sides, selling their services to a higher bidder if one emerges.²⁶⁰ The fact is that while such behaviour cannot be excluded, it certainly

²⁵³ House of Commons Foreign Affairs Committee. *Private Military Companies Report*, § 54.

²⁵⁴ House of Commons Foreign Affairs Committee. *Private Military Companies Report*, § 55, citing the hearing of Lt. Col. Spicer, former CEO of *Sandline International*, and now of in charge of *Aegis*, a two year-old London-based holding corporation, that on 25 May 2004 got the most recent and important security contract in Iraq. Over 3 years, *Aegis* will be in charge of all security for the \$18.4 billion in ongoing reconstruction projects being overseen by the US. *Aegis* brings in a "force-protection detail" of about 600 armed men and coordinates the operations of 60 other PMCs already working in Iraq and their 20,000 men, including handling security at prisons and oil fields. It could earn the company up to \$293 million.

²⁵⁵ For example, senior officers involved in Zimbabwe's military adventure in the Democratic Republic of Congo had close links with mineral exploitation companies.

²⁵⁶ P. W. Singer, *Corporate Warriors*, 2003, p. 101.

²⁵⁷ K. O'Brien, "Military Advisory Groups and African Security: Privatized Peacekeeping", *International Peacekeeping*, vol. 5, №3, Autumn 1998, pp. 78-105.

²⁵⁸ Plaza 107 Ltd. The *Branch-Heritage Group* also owned the now dissolved PMC *Sandline International* (the successor of *EO* which later was registered in the Bahamas) and *Ibis Air*.

²⁵⁹ C. Gordon, "Mercenaries Grab Gems", *Weekly Mail & Guardian*, 9 May 1997.

²⁶⁰ UK Foreign and Commonwealth Office, "Green Paper", § 43.

would not go unnoticed, thus it would ruin a PMC's reputation and with it its future business prospects. More likely is that PMC employees might switch sides, offering their services to rivals. This was the case of former *EO* employees who joined the RUF in Sierra Leone and worked for the government in Kinshasa.²⁶¹

Clear regulation of PMCs and their activities might help any foreign government hiring PMCs to ensure that they choose a responsible company²⁶² and that irresponsible companies which perpetuate armed conflicts are denied continuation of operations.

Underlying Problems and Stability

A number of opponents to the use of PMCs argue that these companies are not a real solution to the problems of conflict, that the imposition of military force cannot, on its own, solve the political, economic, and social problems that contribute to conflict, and that military force cannot constitute an alternative to diplomatic initiatives, humanitarian and development aid. According to the UN Special Rapporteur on the use of mercenaries: "The presence of the private company which was partly responsible for the security of Sierra Leone created an illusion of governability, but left untouched some substantive problems which could never be solved by a service company".²⁶³ Another author, also referring to Sierra Leone, argues that "the putative strategic impact of *EO* is often exaggerated. Its so-called stability and coercive security is often fragile and does not address the fundamental political and socio-economic issues that prompted the conflict".²⁶⁴ The "Campaign Against Arms Trade" argued in the hearings on PMCs conducted by the Foreign Affairs Committee of the British House of Commons that "Democracy, peace and justice would be better served if the resources which would otherwise be used by the UK government to control or license mercenary activity are used to give positive support to or impose sanctions on troubled states or regions", and that tighter controls on small arms, arms brokers and 'conflict goods' would "do much to lessen the demand for mercenaries".²⁶⁵

However, there are also the proponents who see the real potential for employing PMCs in all cases of destabilized states where an alternative international security presence is lacking. Some point out that the most effective and constructive use of PMCs is in assisting entities, polities and states, in stabilizing environments so that stable revenue streams and effective government structures can be established.²⁶⁶ Others, in praise of *EOs'* operations, pointed out that it "did much sterling work in Angola and stabilized a destabilized situation ... where the oil fields were concerned".²⁶⁷ *EO* never had more than 500 men in Angola and "usually fewer, compared with Angolan armed forces of more than 100,000 men – it is generally regarded as having played a critical part in

²⁶¹ S. McGhie, "Private Military Companies: Soldiers of Fortune", *Jane's Defense Weekly*, 22 May 2002.

²⁶² House of Commons Foreign Affairs Committee, *Private Military Companies Report*, § 56.

²⁶³ E. B. Ballesteros, Report on the question of the use of mercenaries, 2001.

²⁶⁴ D. J. Francis, "Mercenary Intervention in Sierra Leone".

²⁶⁵ House of Commons Foreign Affairs Committee, *Private Military Companies Report*, § 63. See also: CAAT, Comments from the Campaign Against Arms Trade on the Green Paper on Private Military Companies.

²⁶⁶ House of Commons Foreign Affairs Committee, *Private Military Companies Report*, § 66, citing the hearing of David Steward Howitt.

²⁶⁷ House of Commons Foreign Affairs Committee, *Private Military Companies Report*, § 64, citing the hearing of Michael Bilton.

securing victory for the government forces, the ceasefire and the Lusaka Peace Agreement – shaky as these last two remain”.²⁶⁸ In Sierra Leone, *EO* stabilized the situation even more quickly. As Singer notes: “...during their operations in Sierra Leone, local civilians treated them like heroes. When they entered some towns, crowds would gather and begin chanting and cheering”.²⁶⁹ *EO*, having become emblematic of the overall phenomenon of corporate armies, truly captures the dilemmas and complexities that mark of military provider companies. “At the very same time that *EO* was accused of being a ‘mercenary army of racist killers’, humanitarian groups, such as the ‘Children Associated with the War’ organization in Sierra Leone, were formally thanking it for its work”.²⁷⁰

But the point here is that PMCs are neither equipped nor trained to address underlying political or economic problems, and neither are national armed forces. *EO* was hired for a military task. It can hardly be criticized for having failed to address the problems underlying the conflict. The function of military and other security organizations is to create an environment in which it becomes possible to tackle those problems. PMCs can secure an area temporarily, which facilitates peace brokering between conflicting parties, such as in Angola, Sierra Leone, and Papua New Guinea. They allow international organizations, NGOs, and humanitarian agencies to enter areas of conflict, even rescuing child soldiers as in Sierra Leone and delivering them to a rehabilitation centre. Under certain circumstances, the establishment or maintenance of order through an increased international security presence, or through enhancing the effectiveness of national armies and security forces by the hire of PMCs and PSCs, can help to create conditions under which effective systems of governance can be reestablished. Thus, professional and responsible PMCs and PSCs have a legitimate role to play in helping weak governments to reestablish and maintain stability, and to contribute to secure revenue streams for the provision of governance.

²⁶⁸ UK Foreign and Commonwealth Office, “Green Paper”, Box 1, bottom p. 11.

²⁶⁹ P. W. Singer, *Corporate Warriors*, 2003, p. 103.

²⁷⁰ P. W. Singer, *Corporate Warriors*, p. 101, citing the UN Commission on Human Rights. Report of the 53rd Session, Item 7, Special Rapporteur, 20 February 1997.

4. The Use of Private Military and Security Companies

4.1. Pros and Cons of Using Private Military and Security Companies

Summarizing what has been covered so far, the arguments of those favouring and of those opposing greater use of the private military and security industry are listed. And for a better understanding of the advantages of, and problems caused, by this industry, some of the lessons from privatizing security and from outsourcing are presented.

The Arguments of Those in Favour of Using PMCs and PSCs

In the US, where the debate is the liveliest, the *proponents* maintain that:

- Contracting out to private companies, agencies, or other intermediate types of administration has a place in efficient government. Privatization and outsourcing can reduce public spending and increase efficiency. Outsourcing made industry more competitive in the 1990s; it can do the same for the military.²⁷¹ “In all its purchases, Department of Defense, like the commercial sector, should focus on getting the best value for each dollar spent instead of focusing excessively on performance”.²⁷² Already in 1996, the US Defense Science Board estimated that by changing the way it does business, outsourcing and working more closely with the private sector, the US Department of Defense could save \$30 billion annually.²⁷³
- Using contractors saves money and frees up the military to concentrate on its core missions.²⁷⁴ While contractors’ pay may seem high, it is cost-effective because they are paid only when needed. When comparing costs, the significant benefits received by armed forces personnel have to be taken into account. The average cash compensation to active-duty service members in 2002 was \$43,000; but the average total compensation including cash and non-cash benefits was \$99,000 (counting health care, housing, community services, retirement pay, and veterans’ benefits). The Congressional Budget Office estimated that the reduction in the number of armed forces since the late 1980s has reduced retirement fund payments alone by nearly \$12 billion.²⁷⁵
- Not only are PMCs generally more efficient and more flexible than regular armed forces, in some circumstances they are also better placed for rapid deployment and thus have the potential to make a legitimate and valuable contribution to international security. PMCs offer governments a “surge capacity” and can be mobilized on short

²⁷¹ P. Taibl, “Outsourcing and Privatization of Defense Infrastructure”, *Business Executives for National Security*, March 1997.

²⁷² I. Eland, “Reforming a Defense Industry Rife with Socialism, Industrial Policy, and Excessive Regulation”, *Cato Political Analysis* №421, 20 December 2001.

²⁷³ US Defense Science Board, *Report of the Defense Science Board Task Force on Outsourcing and Privatization*; August 1996. Office of the Under Secretary of Defense for Acquisition and Technology. Washington D.C. 20301-3140. But see also: US General Accounting Office; *Outsourcing DOD Logistics: Savings Achievable But Defense Sciences Board’s Projections are Overstated*; Washington D.C. GAO/NSIAD-98-48, 8 December 1997.

²⁷⁴ So US Secretary of Defense Donald Rumsfeld on many occasions and repeatedly in his speeches.

²⁷⁵ Congressional Budget Office, “Military Compensation: Balancing Cash and Noncash Benefits”, Washington D.C., 16 January 2004.

notice to add to existing military capabilities. Without these companies and that surge capacity, the US would have to maintain a much larger standing military.²⁷⁶

- PMCs and PSCs could improve the quality of UN missions. The UN is slow to deploy peacekeeping troops and the troops are often poorly trained and under-equipped soldiers from developing countries. Not only are these types of operations less controversial when carried out by private companies, they are less costly. PMC operations in Sierra Leone cost about 4 percent of the costs of a subsequent UN peacekeeping operation.²⁷⁷ It is estimated that the intervention in Liberia would have cost 15 times more if US troops were used.²⁷⁸ One PMC claimed that it could have intervened to stop the killing in Rwanda within 14 days of hire at a cost of \$600,000 per day. The UN Operation took much longer, cost \$3 million per day and did not stop the genocide.²⁷⁹ A subsequent UN report emphasized the importance of rapid deployment and on-call expertise for peacekeeping operations.²⁸⁰
- PMCs and PSCs already provide security and support to international and intergovernmental organizations like UNHCR, UNICEF, UNDP, and WFP, and to a multitude of NGOs engaged in humanitarian aid and disaster relief, enabling them to do important work in dangerous places. Violence against relief workers greatly increased during the 1990s. In 1998, for the first time, more UN staff died providing humanitarian relief than on peacekeeping missions. PMCs and PSCs can fill the “security gap” when countries are unable to provide security for aid agencies.²⁸¹
- PMCs can bring stability to conflicts in the developing world. Stabilizing “failed states” is important for reducing the threat of international terrorism and organized crime, and the provision of security is a prerequisite for such stabilization. Despite the prevailing distaste for mercenaries, the record of some PMCs speaks to their potential for resolving conflicts and establishing peace and order in countries that would otherwise be ignored by the world’s leading powers.²⁸²
- Contracting out ensures that Western governments do not have to risk incurring the political costs associated with sending their armed forces into situations that are little understood or supported domestically. Moreover, casualties among PMC employees would not cause the same political problems that the deaths of a country’s armed forces do.

²⁷⁶ D. Brooks, “Contractors Face Iraq Combat”, *PBS NewsHour*, 6 April 2004.

²⁷⁷ S. Fidler and T. Catan, “Private companies on the frontline”, *Financial Times*, 11 August 2003. The president of Sierra Leone contracted with *Executive Outcomes (EO)*, a now defunct South African PMC, to fight rebels from 1995 to 1997. After a peace was negotiated, the government ended its contract with the company under pressure from the World Bank and International Monetary Fund. As predicted by *EO*, there was a coup three months after *EO* left, and the new government held power through terror. After almost two years, a Nigerian-led force was able to gain control of most of the country, and 6,000 peacekeepers were deployed.

²⁷⁸ Nigerian peacekeepers restored order in Liberia in the mid-1990s with the help of US-financed logistical support from a US PMC. See S. Fidler and T. Catan, “Private companies on the frontline”.

²⁷⁹ P. W. Singer, “Peacekeepers, Inc”, *Policy Review*, June 2003.

²⁸⁰ International Alert, *The Politicization of Humanitarian Action and Staff Security: The Use of Private Security Companies by Humanitarian Agencies*; International Workshop Summary Report; Tufts University, Medford/Boston, April 2001.

²⁸¹ L. Brahimi, Report of the Panel on United Nations Peacekeeping Operations, A/55/305 - S/2000/809, August 2000.

²⁸² S. Malaby, “Paid to Make Peace”, *Washington Post*, 4 June 2001. Americans have been reluctant to send US troops into Africa since the 1993 intervention in Somalia.

- Employing the military for non-combat operations weakens the military by distracting it from its core mission of fighting wars. During the 1990s, the US military was often deployed in response to ethnic conflicts and collapsed national governments. One former Chairman of the Joint Chiefs of Staff noted that over time, “our response to the strategic environment has placed a wide range of demands on the US military” resulting in “imbalance between strategy, force structure and resources”.²⁸³ The US National Security Advisor justified withdrawing US troops from the Balkans because peacekeeping missions were “harming morale and reenlistment rates, weakening our military’s core mission”.²⁸⁴
- The armed forces should not be used in actions that are not fundamental to national security, such as drug interdiction and nation-building. Since the 1990s, there has been a trend toward civilian authorities directing the military to undertake such tasks. This demonstrates the lack of understanding of the purpose of armed forces, which is to apply overwhelming and lethal force to defend national security. According to the US Commission on National Security, “if these trends continue, a small professional military will stand increasingly apart from the country and its leaders”.²⁸⁵
- It is more efficient to contract the operation and maintenance of sophisticated weapons systems to the companies that invented them. Rather than managing multiple contracts for weapons systems, its parts and maintenance, the military can manage one vendor who is responsible for meeting performance goals.²⁸⁶

The Arguments of Those against the Use of PMCs and PSCs

In the US, the **opponents** maintain that:

- If a national government has any role at all in guaranteeing the country’s security, it must recruit and maintain the country’s armed forces. The activities contractors are performing are too important to entrust to private companies, which are motivated by profit above all else. To delegate these functions is to abdicate an essential responsibility of government that raises immense questions of sovereignty. Buying in mercenaries would be tantamount to privatizing national security, conflict and war. Doubts would exist about the legitimacy both of the force and of the government that purchased it.
- Government’s use of private military contractors upsets the delicate balance of the remarkable Clausewitzian trinity among the government, the military, and the people. The unity within the Clausewitzian model depends on the concept that the application of a nation’s inherent military power should remain a controlled monopoly of the state.

²⁸³ H. H. Shelton, as cited in E. B. Smith, “The New Condottieri and U.S. Policy: The Privatization of Conflict and its Implications”.

²⁸⁴ S. Holmes, “The 2000 Campaign: Foreign Policy”, *New York Times*, 22 October 2000.

²⁸⁵ United States Commission on National Security, *New World Coming: American Security in the 21st Century*, September 1999.

²⁸⁶ A. Butler, “Loggies v. Contractors”, *Air Force Magazine: Journal of the Air Force Association*, January 2001.

- Despite PMCs having an apparent *de facto* legitimacy from their use by government as an expeditious tool of foreign policy, there has been a transfer of the closely held policy instrument from government to the private sector and permitting it to be accomplished for profit. Privatization undermines political and legal accountability. It is this action of conducting commercial contracts on a proprietary basis outside of direct government oversight that is the modern adaptation of classic mercenary activity.
- A nation's armed forces conduct their duties for reasons of allegiance and selfless service to their nation, as opposed to a PMC structured solely for commercial profit and not bound by the codes, rules, and regulations that make a nation's armed forces unique and accountable. Mercenary forces have long been stigmatized as profiteering opportunists devoid of any allegiance to the cause for which they fight. Thus, their use, whether for national or international security, is a step too far since their main obligation is to their employer, not to their country. Moreover, since PMCs are profit driven organizations, there is the risk that anyone with enough money could bring a PMC onto his side.
- The evolution of PMCs has blurred the distinction between professional armed forces personnel who conduct their duties in formal allegiance to a nation and contractors who exercise a moral responsibility but work for profit. The military profession is unique in that it maintains on behalf of the nation the skill sets pertaining to the application of organized and controlled violence. These skill sets fundamentally differentiate the military from all other professions, as there is no comparative commercial service to that of a nation's military power. A nation's military power is only exerted on the formal direction of government.
- There will always be concern over PMCs' and PSCs' relationship with oil and mining companies operating in some of the more lawless parts of the developing world, and over their role as covert proxies for western governments. The stigma attached to PMCs and PSCs means that their use carries the risk of negative publicity. Moreover, there are the risks that their involvement can prolong the war and of states losing control of military policy to militaries outside the state system, responsible only to their client, managers, and shareholders.
- The evidence does not prove that the use of PMCs saves money. No systematic study of the cost-effectiveness of military privatization and outsourcing exists because there has not been adequate oversight or auditing of military contracts.²⁸⁷ There is reason to believe that outsourcing may not be cost-effective.²⁸⁸ Contracts are often awarded with limited competition. There is often collusion among competing firms, and long-term contracts lead to opportunistic behaviour, such as firms bidding low, knowing that they can add on later. And some contracts are awarded on a cost-plus basis, under which contractors have an incentive to inflate costs.²⁸⁹ Further, the calculated

²⁸⁷ See: M. Kelley, "Pentagon Memo".

²⁸⁸ See: S. Gates and A. Robert, "Comparing the Cost of DoD Military and Civil Service Personnel"; *RAND Report*, MR-980-OSD, 1998. This report on the private provision of professional military education programs in the US found no cost savings.

²⁸⁹ P. W. Singer, "The Enron Pentagon", *The Boston Globe*, 19 October 2003.

costs of outsourcing rarely take into account the fact that the Pentagon must hire people to police the contractors.²⁹⁰

- PMC and PSC employees can currently make \$500 to \$1,500 per day, compared with infantry soldiers' wages that are around \$70 per day.²⁹¹ The cost of employing contractors of any kind increases during war. For example, insurance rates for civilian contractors increased by 300 to 400 percent in the period leading up to the invasion of Iraq.²⁹²
- A 1999 Report of the UN Commission on Human Rights concludes that mercenaries base their comparative advantage and greater efficiency on the fact that they do not regard themselves as being bound to respect human rights or the rules of International Humanitarian Law. Disdain for human dignity and greater cruelty are considered efficient instruments for winning the fight. The participation of mercenaries in armed conflicts and in situation in which their services are unlawful may jeopardize the self-determination of peoples and the human rights of those on whom their presence is inflicted.²⁹³
- There are real concerns about the transparency, probity, and respect for human rights of PMCs. Commercial incentives to refrain from human rights abuses and to uphold international humanitarian law is unlikely to apply abroad where monitoring of their activities is lacking and where PMCs are confident that they will not be found out.
- Military contractors are all too often legally unaccountable. They are not subject to the Uniform Code of Military Justice, as soldiers are. In general, they are subject to the laws of the country they operate in, but in Iraq, for example, the (now defunct) Coalition Provisional Authority issued an order providing immunity from Iraqi law for actions by contractors or their employees in the course of their activities.²⁹⁴ The laws under which an American civilian contractor might be prosecuted for actions abroad are restrictive and have not really been tested.²⁹⁵ Legal accountability becomes even more difficult if the contractors are not US citizens, or if the country they work in does not have a functioning legal system. Under these circumstances, contractors are accountable only to the organization that pays them and its shareholders.²⁹⁶
- There is no central oversight of the companies, no uniform rules of engagement, and no consistent standards for vetting or training new hires. Moreover, contractors are not subject to orders from battlefield commanders because they are not part of the military chain of command. Contractors cannot be ordered into battle, and nothing

²⁹⁰ D. D. Avant, "Privatizing Military Training".

²⁹¹ K. Miller, "Outsource This".

²⁹² B. F. Bruton, "Iraq security eating chunks of contractor costs", *Forbes*, 13 April 2004. "A top Army logistics officer reported last summer that in large parts of Iraq troops were not receiving fresh food and water because contractors were refusing to go into danger zones".

²⁹³ E. B. Ballesteros, Report on the question of the use of mercenaries, 1999.

²⁹⁴ Permission from the Administrator of the CPA was required to prosecute contractors for acts performed outside of their official duties. Coalition Provisional Authority Order №17, *Status of the Coalition, Foreign Liaison Missions, Their Personnel and Contractors*, 27 June 2004. Human Rights Watch argues that war crimes and torture are not protected by immunity agreements and could be prosecuted by Iraqi courts. Human Rights Watch, "Private Military Contractors and the Law", 29 April 2004.

²⁹⁵ P. W. Singer, "War, Profits, and the Vacuum of Law", p. 537.

²⁹⁶ P. W. Singer, "War, Profits, and the Vacuum of Law", p. 537.

but their employment contracts prevent them from leaving. The Gurkha Security Guards, who currently hold a contract for guarding US civilians in Iraq, broke their contract with the Sierra Leonean government in 1994 when their commander was killed in a rebel ambush.²⁹⁷ The government was unable to continue fighting the rebels until it hired a new company.

- Checks and balances that apply to national armed forces can seldom be applied with equivalent strength to PMCs employees.²⁹⁸ Operating outside military command and justice, PMC employees are under no obligation to put themselves at risk. Thus, PMCs may have no compunction about suspending a contract if the situation becomes too risky, in either financial or physical terms. Because they are typically based elsewhere, and in the absence of applicable international laws to enforce compliance, PMCs face no real risk of punishment if they or their employees defect from their contractual obligations. Moreover, even technical issues may lead to a PMC operation ending without regard to a military rationale.
- Private companies may be unwilling or unable to provide needed services in danger zones. An example is the famous tree-cutting incident in Panmunjom, Korea, in August 1976 which caused an increase in the alert status to Defense Readiness Condition 3. As a result, hundreds of contractor employees engaged in military depot maintenance and logistics requested immediate transportation out of Korea.²⁹⁹ In Iraq, US troops suffered through months of unnecessarily poor living conditions because contractors refused to go into danger zones.³⁰⁰ And a contractor hired to train the Iraqi military did such a poor job that the Jordanian Army had to be called in for assistance.³⁰¹
- PMCs and PSCs fill a demand for security that would otherwise be met by increasing the number of troops deployed, or by convincing allies to send troops. The availability of contractors allows policymakers to undertake or continue military activities without the support of parliament, the people, or allies. Political leaders can avoid normal constraints on foreign policy by sending private companies, but the consequences of this may be serious. The US circumvented an arms embargo on the Balkans by encouraging the Croatian government to contract for military training with a private company, MPRI. With a stronger military, Croatia was able to push the Serbs into peace negotiations. But this newly trained military also uprooted 150,000 to 170,000 Serbs from their homes in a bloody campaign of ethnic cleansing.³⁰²
- PMCs are not part of the military hierarchy. Armed contractors operate outside of this military command structure for the most part, and thus their operations are not coordinated with military operations in most circumstances. The presence of noncombatants as well as “civilians authorized to accompany the force” in the area of

²⁹⁷ P. W. Singer, *Corporate Warriors*, 2003, p. 112. “The commander was Bob Mckenzie, and American veteran of Vietnam, Rhodesia, and Croatia. Mckenzie was apparently then eaten by the rebels and his body emasculated, as a warning to other would-be interveners.

²⁹⁸ See: D. Isenberg, *A Fistful of Contractors*, Chapter 5, “Lessons from Abu Ghraib Prison”, pp. 51-67.

²⁹⁹ E. A. Orsini and G.T. Bublitz, “Contractors on the Battlefield”.

³⁰⁰ W. D. Hartung, “Outsourcing Blame”, *TomPain.com*, 21 May 2004. At www.tompaine.com/print/outsourcing_blame.php

³⁰¹ W. D. Hartung, “Outsourcing Blame”.

³⁰² D. D. Avant, “The Outsourced War is Here to Stay”, *Business Week*, 24 May 2004.

operations greatly complicates the life of a commander. Complexity is compounded when the commander is dependent upon PMCs to accomplish his mission. What looms large for a commander is the loss of flexibility, one of the key tenets of successfully waging war, and to have any less flexibility increases risks significantly.

- Most military personnel are classified as combatants and can be relied upon to assist and augment the fighting force, as well as to provide self-protection and defend equipment and terrain. But PMC personnel are not necessarily cross-trained to execute tasks that are not part of their job description. Unarmed support contractors cannot defend themselves, nor can they provide backup. Thus, the commander will have to provide force protection for contractor personnel. Although replacing cooks with civilians might save money, it risks lives because the use of PMCs can negate the ability to deal with the unexpected. Not only may PMCs be unlikely to take over tasks which are not part of their contractual obligations: they cannot be ordered to do so by the military chain of command. This can have an impact on the conduct of operations and could influence the ability of the commander to achieve his mission goals and objectives.
- The use of contractors also hides the true costs of war. Their dead are not added to the official body counts. Since the start of 2003, US contractors have filed claims for 94 deaths and 1,164 injuries. No precise number or nation-by-nation breakdown is yet available, but US Labour Department officials say an overwhelming majority of the cases since 2003 were from Iraq.³⁰³
- Information about PMC activities abroad is hard to obtain and very often unreliable. There is a paucity of information about the nature of services that PMCs offer. The US government classifies contractual details as proprietary commercial information, exempting release under the Freedom of Information Act. Duties and profits are hidden by closed-mouthed executives who do not give details to Congress and apply strict rules of confidentiality to their work and client relationships. As their coffers and roles swell, companies are funnelling earnings into political campaigns to gain influence over military policy; they even get paid to recommend themselves for lucrative contracts.³⁰⁴

4.2. Lessons from Privatizing Security

The transference of state functions to the private sector is occurring in all fields of state activity, including those where the nation-state formerly held a monopoly – the means of coercive force. Facing more challenges to their legitimacy and capacity to act, there is a general tendency for states to turn increasingly towards the private sector with its specialized expertise to fulfill certain military and security functions. The military effects of globalization include the proliferation of private firms that possess specialized knowledge in war and advanced military capabilities, firms that cross borders to apply

³⁰³ D. Barstow, “Security Companies: Shadow Soldiers in Iraq“. Assuming the rough ratio of killed versus wounded that has held among US troop casualties (1 to 6), this means that upward of 200 to 300 private casualties have gone unreported on the public ledger. That is more than the entire 82nd Airborne Division lost in Iraq over the past year. See also: D. Isenberg, *A Fistful of Contractor*, Appendix 1: PMC Casualties in Iraq, pp. 73-78.

³⁰⁴ See: M. Beelman *et al*, “Winning Contractors. US Contractors Reap the Windfalls of Post-war Reconstruction”, Center for Public Integrity, 2004, at www.publicintegrity.org/wow/printer-friendly.aspx?aid=65

that expertise, affecting the sovereignty of the traditional nation-state.³⁰⁵ The declining fear in advanced democracies of external attack, and the decline of the state capacity to provide protection, is suggestive of gradual erosion in citizens' identification of the state as a focus for loyalty and political identity.³⁰⁶

There is a parallel development of the declining capacity of the state to protect its citizens in the internal sphere, as shown by the domestic proliferation of private security firms. The trend towards ever greater privatized security has been criticized for its potential to foster greater injustice and inequality, since only those able to pay for security may enjoy it. Growing inequities in the provision of security within a state, in tandem with the effects of globalization, may result in a deepening of social divisions within a society.³⁰⁷ Moreover, the danger is growing that privatization of domestic security may also involve the allocation of public economic resources to private security that benefits only the privileged.

The prevailing ideology over the past 20 years has supported smaller government and the privatization of certain state functions. The situation today in the US, for example, is that while fewer people now work directly for the federal government, more than ever work as government contractors, at a ratio of about 2 contractors for every civil servant or member of the military. The US currently has a "shadow government" consisting of some 6 million contractors, half of them working for the defense sector.³⁰⁸ If security continues to be privatized, the danger is that the collective effect of this dynamic will fundamentally affect the role of the state, which will no longer command the core function of providing security as a public good but will become one of several potential suppliers. A direct result of the erosion of the state monopoly of the means of force and the privatization of public functions will be a consequent shift away from the state as a focal point for political identities.³⁰⁹

With the rapid growth of the private military industry, warfare has become less the domain of states, and ever more an area for corporate investment, growth, and control. And it is increasingly privatized and commercialized as we enter the 21st century.³¹⁰ The use of private contractors has arguably shifted the nature of civil-military relations to the extent that it has made it easier for political leaders to take states to war. Moreover, PMCs present government with a more discrete, effective and indirect means of executing foreign policy. For countries with professional armed forces, there are fewer political costs involved in using contractors than in calling up reservists to perform the support services.³¹¹

Various governments of weak states in Africa have turned to PMCs, in some instances to conduct counterinsurgency operations against rebel forces. In such situations of internal

³⁰⁵ L. W. Serewicz, "Globalization, Sovereignty and the Military Revolution: From Mercenaries to Private International Security Companies", *International Politics* 39, №2, March 2002, p. 64.

³⁰⁶ J. Stein, "The Privatization of Security in Global Political Space", 2000, unpublished paper, p. 22.

³⁰⁷ J. Stein, "The Privatization of Security in Global Political Space", p. 23.

³⁰⁸ According to Paul Light at the Brookings Institution, cited by: L. Bilomes, "Civil Service has Morphed into U.S. Inc.", *Los Angeles Times*, 18 July 2004, p. M1.

³⁰⁹ J. Stein, "The Privatization of Security", p. 24.

³¹⁰ H. Gutman, "U.S. Military. Privatization of Warfare".

³¹¹ S. Gardiner, as quoted by J. Mayer, "Fresh Air", hosted by Terry Gross, National Public Radio, 19 February 2004, 12 noon ET.

conflict, the state has lost its capacity to provide security and enforce public order. The use of PMCs may bolster the weak state's claim to *de jure* sovereignty, and may even function in a state-building role to the extent that it reinforces the state's claim to *de jure* sovereignty.³¹² However, the drawback of hiring foreign PMCs to fulfill basic security functions is that the ruler of a weak state may as a result fail to undertake the difficult task of (re)building an effective state administration that will deliver services and public goods to citizens and enjoys legitimacy among the population.³¹³

Leaders may also seek to avoid involving their armed forces in internal conflict because of the risk of the military posing a challenge to the incumbent civilian government. Hiring a PMC to deal with civil conflict may help the state's central political authority to maintain civilian control of its armed forces.³¹⁴ It may boost the military capacity of the state, but it may also complicate the building of civilian oversight and democratic control. There is also the risk and major concern that PMCs can become significant forces powerful enough to become stronger than the state they are hired to protect.³¹⁵ PMCs may work for governments whose legitimacy is questionable, thereby causing a struggle for self-determination and access to resources whose ownership may be shared by the government elite and PMCs in return for their repression. But in unstable states or in those where the legitimacy of the government is in question, this may also lead to further attempts to unseat the government. Ultimately, a government's decision to contract out security functions to PMCs or PSCs underscores the gaps and inadequacies in its own security infrastructure and capacities and affects perceptions of the state itself.

Privatizing security raises basic questions of legitimacy. PMCs sell military expertise independent of nations and their military. Certain PMCs conduct some of the distinct roles and missions of the nation-state's armed forces, but do so entirely within an alternate framework of commercial enterprise and legitimacy. Significantly, they are commercially conducting the roles and actions of a nation-state's military, but are not bound by the codes, rules, and regulations that make the military unique. And their proprietary basis of employment contradicts the fundamental and inherent measure of legitimacy afforded to the actions of a nation-state's military. Accordingly, the measure of legitimacy afforded to PMCs cannot be equivalent to that of a nation's military, but rather a *de facto* and *amoral* legitimacy. In this sense, PMCs contradict the military ethic of selfless service.

Not all military functions can be privatized. Military core functions as well as those that are "mission-critical" should be banned from privatization. Outsourcing of military support functions to the private sector can be undertaken, except for activities that are "inherently governmental, are directly involved in warfighting, or for which no adequate private sector capability exists or can be expected to be established".³¹⁶ Where to draw the line, is not easy to define. But Abu Ghraib has clearly shown the dangers that may result from privatization. Prisoner interrogation is so sensitive a function that it needs to be carried out under clear rules by properly trained and supervised people who will be

³¹² W. Reno, "Internal Wars, Private Enterprise, and the Shift in Strong State - Weak State Relations", *International Politics* 37, №1, March 2000, p. 72.

³¹³ W. Reno, "Internal Wars, Private Enterprise", p. 71.

³¹⁴ L. Serewicz, "Globalization, Sovereignty", p. 85.

³¹⁵ T. Adams, "The New Mercenaries", p. 6.

³¹⁶ Office of the Secretary of Defense, *Report of the Defense Science Board Task Force on Outsourcing and Privatization*. Washington D.C., 28 August 1996, covering memo.

held accountable for misconduct or abuse. For that reason, private contractors are not appropriate for the job.³¹⁷ To a large degree the same is true for intelligence. In other words, there are activities and roles that are so important that the risks of losing control outweigh the possible benefits to be gained by privatizing. Thus, there is a clear need for national debates among policy-makers and their publics on what can be privatized and what should not.³¹⁸

The accountability challenge of PMCs is that while governments are accountable to the people and parliament, and soldiers are accountable to international and military law, private corporations are only accountable to their shareholders. Employees of private contractors are not subject to the military code of justice and do not answer to the military chain of command as would a soldier. During times of war, the employees of PMCs fall under Common Article 3 of the Geneva Convention, which applies to all combatants. They are also bound by the contracting state's international obligations to human rights conventions. There is a further problem with transparency, as their day-to-day activities are not subject to scrutiny by government or the public. Contractor personnel are subject to federal, host nation, and status of forces agreement, yet supervision will reside with the contractor.³¹⁹ How can states ensure that PMCs will act to ensure and guard the public interest? This must be the responsibility of the contracting authority – the governments and international or regional organizations making use of PMCs. Ultimately, PMCs do not operate in a political vacuum, but are hired by governments, or alternatively by NGOs or corporations, but this ought to be done with the approval of the host and domicile governments.³²⁰

Moreover, military privatization complicates military command and control because PMCs and PSCs are not fully integrated into the military command structure. Furthermore, concerns exist about the impact of outsourcing military and security tasks to generally much better paid civilians on military morale and organizational culture. Privatization of some military functions may risk erosion of the military ethos and self-perception of military honour and values. The lesson here is that it is unclear what the implications are of the use of civilian contractors in conflict situations, of the blurring of military and civilian roles, and how to address the issues of trust, confidence and partnership.³²¹

The lessons of the privatization of military and security services include that this can harm the reliable delivery of essential services in conflict and war. In the case of PMCs, the argument has been raised that private contractors do not have the same interest in remaining in the battlespace if conditions worsen, compared to regular armed forces. For example, according to the US Army's top logistics officer, Lieutenant General Charles S. Mahan Jr., contractors refused to deliver fresh food and water to troops stationed in numerous danger zones throughout Iraq during the summer of 2003.³²² Under more

³¹⁷ K. Hartley, "Military Outsourcing: UK Experience", Centre for Defence Economics, University of York, undated.

³¹⁸ T. H. Winkler, "Learning from Mistakes: What Should be the Lessons from the Abu Ghraib Prison Scandal?" *WorldSecurityNetwork*, 26 August 2004. Available at www.worldsecuritynetwork.com/showArticle3.cfm?Article_ID=10127

³¹⁹ I. K. Garcia-Perrez, "Contractors on the Battlefield in the 21st century", p. 4.

³²⁰ D. Whyte, "Lethal Regulation: State-Corporate Crime and the United Kingdom Government's New Mercenaries", *Journal of Law and Society* 30, №4, December 2003, p. 584.

³²¹ K. Hartley, "Military Outsourcing".

³²² W. Hartung, "Outsourcing Blame". See also: A. Bianco and S. Anderson Forest, "Outsourcing War", *Business Week*, 15 September 2003, p. 68.

difficult conditions, then, private sector actors may find it easier to disengage and leave. Many of the issues surrounding contractors in conflict situations are issues of trust, confidence, mutual understanding and partnership: all features which are difficult to include in a standard contract.

Growing privatization in the US, intense competition and the weakening of rules governing the relationship between contractors and the government have contributed to the “revolving door” phenomenon, which consists of the movement of former federal officials to the private sector, and through their connections and inside knowledge, exerting political influence over the government decision-making process as lobbyists, consultants and board members on behalf of the contractors for whom they work. The revolving door also involves the naming of executives from government contractors to senior positions within the state administration. Spurred by the move to streamline government and involve industry in procurement decisions, contractors and government have developed a symbiotic relationship in the US that is reflected in the fluid movement of key individuals between government and industry.³²³

Both Secretary of Defense Donald Rumsfeld and Vice President Cheney – when he held this job before becoming CEO of Halliburton and its subsidiary Kellogg Brown & Root – have tried their utmost to privatize the American military. For Rumsfeld, following corporate strategy, downsizing means moving to “just in time” hiring, using private firms to provide what the military formerly did for itself. He has insisted that it makes no sense to keep and pay for a well-trained standing army, when the US can purchase every sort of service on an “open market” whenever there is a need for military action. Cheney and other proponents of outsourcing ask why should soldiers cook for themselves, move their trash, provide supplies, run and maintain their technology – why not privatize these activities and free the military to concentrate on core tasks only? Even in the case of actual military duty – guarding public officials from hostile attack, fighting terrorist and guerrilla assaults – much of what soldiers traditionally do can be performed by PMCs. All of these services can be hired only when needed, and the army can be kept small, and hence inexpensive in terms of manpower.³²⁴

Thus, on taking office, Cheney named executives from leading military contractors as heads of the three services. James Roche, the secretary of the Air Force, is a former vice president of Northrop Grumman; Gordon England, the secretary of the Navy, is a former executive at General Dynamics; and Thomas P. White, a former secretary of the Army, came from Enron.³²⁵ A recent study of defense contracting in the US identified 224 high-ranking government officials over the past seven years who moved into the private sector to work as lobbyists, board members or executives of contractors. Moreover, at least one-third of these former high-ranking former government employees had held positions that allowed them to influence government contracting decisions.³²⁶ A survey of the revolving door phenomenon concluded that “the revolving door has become such an accepted part of federal contracting in recent years that it is frequently difficult to determine where the government stops and the private sector begins”.³²⁷ The

³²³ R. Merle, “Recruiting Uncle Sam”, *Washington Post*, 19 February 2004, p. E01.

³²⁴ H. Gutman, “U.S. Military. Privatization of Warfare”.

³²⁵ L. Wayne, “Pentagon Brass and Military Contractors’ Gold”, *New York Times*, 29 June 2004, p. C1.

³²⁶ Project on Government Oversight (POGO), *The Politics of Contracting*, 29 June 2004, p. 3.

³²⁷ POGO, *Politics of Contracting*, p. 7.

rapid growth of outsourcing and the private military industry in the US has strengthened and accelerated the revolving door between the Pentagon and industry. Typically, the large PMCs count many former military personnel as employees. The reputation that retired officers built while in public service may cause government officials, as well as members of the legislature, to give undue credence to their lobbying efforts.³²⁸ The report recommended simplification of the complex laws and regulations on post-government employment (which also contain significant loopholes for high-ranking government officials in policy positions) and more oversight.

Privatizing Security for Peacekeeping

Western states have become less willing to send troops abroad to intervene, or on peacekeeping missions in conflict zones outside the areas of key strategic concern. Not only do they retain, for the most part, Cold War-era military structures that leave them ill-prepared to fight low-intensity conflict such as civil wars, but Western governments are hesitant to become embroiled in regional conflicts and to send their armed forces into “peripheral” conflicts where they might sustain casualties and expenses that would have to be justified back home. Private military companies have moved into the vacuum.

PMCs are being used in peacekeeping contexts in transport, support, communications and logistical roles. There is increasing talk about employing PMCs in a variety of roles, including as actual peacekeepers and peace enforcers, due to financial and political constraints faced by countries and concerning the use of their own state armed forces for such roles. Proposals have been put forward that the UN could hire Gurkhas from Nepal or other private military groups for permanent rapid reaction forces.³²⁹

In one scenario, PMCs would be used as a rapid reaction force within the context of a regular peacekeeping operation, or alternatively there would be a complete outsourcing of peacekeeping to PMCs.³³⁰ They have been seen as a way to shore up regional capabilities for peacekeeping, by filling “gaps in logistics, transportation and other support tasks that trouble poorer states and regional organizations”.³³¹ One of the arguments in favour of hiring PMCs for peacekeeping is that they could be hired and deployed more quickly than traditional peacekeepers drawn from the armed forces of states, and that calling on PMCs in an *ad hoc* manner would be more cost-effective than maintaining a permanent stand-by force of national contingents from UN members.³³²

PMCs also offer more flexibility than the large bureaucratic institutional decision-making procedures typical of traditional peacekeeping operations. The classic example is the involvement of *Executive Outcomes* in Sierra Leone, hired by the besieged government – with the support of mining interests – in 1995 to fend off its likely defeat by the

³²⁸ D. Avant, “Privatizing Military Training”.

³²⁹ Herbert Wulf’s oral comments to the author, 2004: His interviews at the UN and UN agencies have revealed that there are great reservations about hiring armed PMC or PSC companies for peacekeeping or humanitarian assistance.

³³⁰ M. O’Hanlon and P. W. Singer, “The Humanitarian Transformation: Expanding Global Intervention Capacity”, *Survival* 46, №1, Spring 2004, p. 92.

³³¹ M. O’Hanlon and P. W. Singer, “The Humanitarian Transformation”, p. 86.

³³² D. Lilly, “The Privatization of Peacekeeping: Prospects and Realities”, *Disarmament Forum*, United Nations Institute for Disarmament Research, №3, 2000.

Revolutionary United Front (RUF). With a battalion-sized unit of assault infantry, *EO* defeated the RUF and enabled Sierra Leone to hold democratic elections. Once *EO*'s contract was terminated, however, the war restarted and a UN peacekeeping mission was sent into Sierra Leone in 1999. "Despite having nearly twenty times the budget and personnel of *Executive Outcomes*, the UN force took years and multiple crises to come close to the same results – and required substantial help from the UK".³³³ However, in practical terms, it is not yet feasible to expect a PMC to be able to mount and sustain a full-fledged peacekeeping operation, and especially not given the demand for PMCs in Iraq.³³⁴ PMCs are "simply too small to be involved in peacekeeping operations in a significant way".³³⁵ Furthermore, "many national contingents would simply be unwilling to work alongside private companies or cede operational control to them".³³⁶

More fundamental concerns have arisen over the accountability of PMCs and their adherence to international human rights conventions. PMCs that do not maintain close relations with national governments are generally not subject to regular observation and monitoring. Even where there are close links, the national government may not seek to maintain close scrutiny of the activities of a private firm, or may have supported the hiring of a PMC in the first place because of the constraints posed on state military operations by legislation or human rights conventions.³³⁷ In a multinational peacekeeping operation, it is not clear who would be accountable, aside from the UN itself generally, for the actions of PMCs. Normally, national contingents are accountable to their national governments for any wrongdoing. Further, individuals are recruited for PMCs on the basis of military effectiveness, and this trait is not necessarily the most complementary with the culture and requirements of peacekeeping.

While PMCs tend to be quicker to organize, more flexible and more cost-effective than multinational peacekeeping operations, it is also questionable whether the military solution they provide would lead to lasting peace. The lessons are that a sustainable resolution to the conflict depends on the peace settlement and the effectiveness of subsequent measures such as demobilization, demilitarization and reintegration of former soldiers into civilian life. Because these measures tend to require a lengthy investment of resources, it is questionable that PMCs would be as interested or committed to them than other activities. "If companies accepted the constraints of impartiality, minimal force and achieving a ceasefire, as under UN mandates for instance, their effectiveness and economic viability would decline".³³⁸ In the face of reduced profits or financial losses, a PMC would be induced to cut corners or withdraw from the situation. Hence, PMCs could not fill peacekeeping functions in a way that is consistent with the principles underlying peacekeeping.

³³³ M. O'Hanlon and P.W. Singer, "The Humanitarian Transformation", p. 92.

³³⁴ M. O'Hanlon and P.W. Singer, "The Humanitarian Transformation", p. 93.

³³⁵ D. Lilly, "The Privatization of Peacekeeping".

³³⁶ D. Lilly, "The Privatization of Peacekeeping".

³³⁷ S. Brayton, "Outsourcing War: Mercenaries and the Privatization of Peacekeeping", *Journal of International Affairs* 55, №2, Spring 2002, pp. 325-326.

³³⁸ S. Brayton, "Outsourcing War", pp. 325-325.

Privatizing Security for Complex Humanitarian Emergencies

Traditionally, the host government in a state in which UN humanitarian operations are underway is responsible for providing security for the agencies' personnel, premises, property and activities.³³⁹ However, in zones of conflict the state may often be incapable of providing even a basic level of public security or maintenance of order, and may have lost control of parts of its territory to rebel or insurgent groups. Humanitarian actors on the ground – the UN, ICRC, NGOs and other aid and relief actors – may need to employ private security guards to protect the homes, offices or warehouses of its workers. Indeed, there has been an alarming growth in the occurrence of violent attacks against humanitarian aid workers and NGOs in conflict zones.

The UN has developed two policies governing the use of private security companies in protecting humanitarian assistance. In situations where local police and security services are unable to guarantee security, PSCs used by UN field representatives must be registered by the government of the country in which they are operating. The government must also have authorized their use for a specific contract. In territories outside the control of the government and under the control of armed groups, the UN holds the armed groups responsible for the security of UN operations in the same way that it holds governments responsible under normal conditions. While this approach tends to work with armed groups seeking to gain legitimacy, it does not function where there is no concern for political legitimacy and thus no concern for providing security guarantees or for the welfare of the civilian population in the areas under the group's control. Typically, this occurs with lucrative natural resource extraction activities. The lesson is that in such situations, humanitarian agencies must either turn to PSCs for protection of aid deliveries or withdraw altogether.³⁴⁰

The hiring of foreign private security personnel may pose the benefit of avoiding having to hire locals from the belligerent communities. Reliance on state military actors for protection of humanitarian actors especially holds the potential for compromising the perceived independence, neutrality and impartiality of humanitarian action, and may result in the politicization of aid and denial of access to deliver essential assistance to vulnerable populations in sensitive areas. The prevailing lesson is that use of military protection in support of humanitarian operations should only occur when there is no comparable civilian alternative.³⁴¹ An advisory publication for humanitarian actors maintains that “the decision to seek military-based security for humanitarian workers should be viewed as a last resort option when other staff security mechanisms are unavailable, inadequate or inappropriate”.³⁴² As a result, humanitarian aid organizations have tended to turn to private security firms to provide for the protection of staff and humanitarian relief convoys. The delivery of aid supplies through insecure territory or territory controlled by a number of different armed groups may require the negotiation

³³⁹ This principle stems from the Vienna Convention on the Privileges and Immunities of the Personnel of the UN.

³⁴⁰ M. Barber, “Private Security Companies and Humanitarian Assistance”, *The Privatization of Security*, International Alert, 1999, p. 35.

³⁴¹ United Nations Department of Humanitarian Affairs, Inter-Agency Standing Committee Working Group, “Use of Military or Armed Escorts for Humanitarian Convoys”, Discussion Paper and Non-Binding Guidelines, 14 September 2001, p. 8, at www.humanitarianinfo.org/iasc/MCmilesescort.doc

³⁴² United Nations Department of Humanitarian Affairs, Inter-Agency Standing Committee Working Group; “Civil-Military Relationship in Complex Emergencies”, IASC Reference Paper, 28 June 2004, paragraph G.24, p. 9. at www.reliefweb.int/library/documents/2004/ocha-civmil-28jun.pdf

of security arrangements by experienced security staff.³⁴³ Yet even an armed civilian escort has its potential problems, and the ICRC and Red Crescent Movement have declared they will never use an armed escort to deliver assistance into an area contrary to the will of forces controlling the area, as it would in practice constitute a military operation.³⁴⁴ But the growing numbers of private security contractors involved in and around humanitarian operations is raising distinct problems of accountability. Whereas local actors in conflict situations can usually identify local belligerents and military actors, it is not clear who private security personnel are and to whom they are responsible. Humanitarian organizations are concerned about the effect of the growing role of PSCs or PMCs on perceptions of aid workers in the local communities where they operate.

In recognition of the exponential growth of private security and private military companies on the ground in conflict zones, fulfilling a number of roles including training of armed forces, the ICRC³⁴⁵ recently announced plans for a program of training and advice in international humanitarian law to private military and security firms. It announced plans to embark on a more systematic dialogue both with the firms and the authorities that contract them, as well as the state of origin, aimed at having those companies know and respect fundamental humanitarian principles and include international humanitarian law in their training and counselling.³⁴⁶ While the ICRC declared that it would not comment on the legitimacy of private military companies, it has been recognized that its instituting high level interaction with headquarters of PMCs and PSCs may foster the perception that it has conferred a certain legitimization upon those companies.³⁴⁷ Given the increasing trend of using such companies, the ICRC hopes that its initiative will help to avoid any weakening of respect for international humanitarian law.³⁴⁸ The lesson here is that humanitarian aid organizations are increasingly aware of monitoring threats to safety and security of their workers, and are working towards sharing analysis and developing collaborative approaches to security policy and procedures.³⁴⁹

Privatizing Security for Domestic Security Purposes

The private security market is much more extensively developed than the private military market. One of the strongest arguments in favour of privatization is provided by looking at the often wide and diverse array of services that a state security body may have collected over time. Privatizing peripheral tasks will better enable the state body to perform its core functions. For example, privatizing of the South African Police Service's peripheral tasks, such as mortuary work, transportation of prisoners, lab-based forensic analysis, would better enable it to focus on its core tasks in preventing, combating and

³⁴³ M. Barber, "Private Security Companies and Humanitarian Assistance", p. 36.

³⁴⁴ Y. Sandoz, *The Privatization of Security: Framing a Conflict Prevention and Peacebuilding Policy Agenda*, International Alert, Wilton Park Conference proceedings, 19-21 November 1999, p. 20.

³⁴⁵ The ICRC has a dual mandate to bring protection and assistance in the field to victims of armed conflicts, and to work for the promotion, development, dissemination and implementation of international humanitarian law.

³⁴⁶ International Committee of the Red Cross, "The ICRC to expand contacts with private military and security companies", 4 August 2004, at www.icrc.org/Web/Eng/siteeng0.nsf/html/63HE58

³⁴⁷ Comments of Y. Sandoz, . The Privatization of Security.

³⁴⁸ P. Keilthy, "Private security firms in war zones worry NGOs", Reuters Foundation, *Alertnet*, 11 August 2004.

³⁴⁹ United Nations, General Assembly Economic and Social Council, "Strengthening the coordination of emergency humanitarian assistance of the United Nations", *Report of the Secretary General, A/59/93-E/2004/74*, 11 June 2004, para. 47, p. 13.

investigating crime, maintaining public order and upholding and enforcing the law. By outsourcing certain non-core functions, the institution can focus its specialized capacities more effectively on its core responsibilities.

From the late 19th century, the criminal justice system became one of the most protected monopolies of the modern nation-state. Over the past 40 years, however, this monopoly has begun to erode. Many developed states today have transferred certain functions in the criminal justice sphere – policing, building and running prisons, sometimes even prosecution – to the private sector. On the grounds that providing all services relating to policing and criminal justice is simply too expensive, states have privatized a number of non-core services. Studies of police activities, for example, have shown that the majority of police officers' time is not spent in activities linked to the primary roles of the police – crime prevention, reacting to calls for assistance and investigating crime – but on peripheral functions that could easily be performed by private actors.³⁵⁰

Increasingly, however, not only peripheral functions are being outsourced, but also core functions. A group led by the firm *Accenture* recently won a US government security contract awarded by the Department of Homeland Security worth up to \$10 billion, to track foreign visitors using digital photographs, fingerprints and other biometric data.³⁵¹ However, objections have been voiced because *Accenture* is based in Bermuda and it is perceived to have located outside the US in order to diminish their tax liabilities while picking up major contracts. Others criticize the outsourcing of key elements of national security, in particular border security, to a non-American firm as not in the public interest.

There are however some signs of resistance to increased privatization of governmental functions in the security sphere. US lawmakers in June sought to prevent the Citizenship and Immigration Services bureau from privatizing important immigration official positions, and moved to classify those positions as “inherently governmental” and therefore shielded from outsourcing. Because of the years of training and the level of judgment required of immigration officials, who screen immigration applications and adjudicate benefits disputes, opponents of outsourcing maintained that the immigration officials performed a vital public function that required continued oversight, and therefore argued against commercialization.³⁵²

Similarly, alarm has been raised by moves by the Bush administration to replace government safety requirements at nuclear facilities with standards written by the private contractors who maintain or guard those facilities. The move to contractor-defined safety requirements followed a move by US Congress to fine contractors who violated guidelines for protecting workers from industrial hazards.³⁵³ The situation is made more opaque by the decision of the Nuclear Regulatory Commission (NRC) to no longer reveal safety and security lapses at nuclear power plants, or the enforcement actions taken against contractors. The withholding of such information from the public sphere

³⁵⁰ M. Schönteich, “Introduction”, in M. Schönteich *et al.*, *Private Muscle: Outsourcing the Provision of Criminal Justice Services*, Institute for Security Studies, Monograph №93, January 2004, p. 10.

³⁵¹ Reuters, “Big Bucks for Biometric Screening”, *Wired News* (online), 1 June 2004. At www.wired.com/news/privacy/0,1848,63683,00.html

³⁵² A. Gruber, “House votes to halt immigration services competition”, *GovExec.com*, 18 June 2004. Available at www.govexec.com/dailyfed/0604/061804al.htm

³⁵³ N. Zuckerbrod, “Shift sought on nuclear facility rules”, *Boston Globe* (online), 29 January 2004.

has been justified on the grounds that the information could be used by terrorists.³⁵⁴ The lesson is that greater opacity can erode public confidence in the NRC, particularly in view of the history of security lapses concerning nuclear power plants and nuclear weapons facilities – about half of which are guarded by personnel from *Wackenhut*, a leading provider of security guard services in North America, purchased by *Group4Falck*, a giant Danish security services corporation.³⁵⁵ In another criticized decision, *Wackenhut* will be allowed to test the security responses of guards at nuclear facilities. This is seen not only as a conflict of interest, but raises serious concern about the integrity of the tests since *Wackenhut* has been accused of security lapses in the past at nuclear facilities.³⁵⁶ Critics assert that the firm may not robustly challenge the security at those plants where its guards are employed, while it may be tempted to mount aggressive challenges at those plants not guarded by its own personnel, in a bid to gain new contracts.³⁵⁷

In terms of PSCs, much controversy exists because of the increasing role that these firms play in traditional areas of public policing. Moreover, there is in general no external oversight body for the private security industry that can maintain certain standards in personnel, enforce compliance with industry regulations and apply sanctions against those who break them. The question boils down to which services are appropriately outsourced to PSCs without compromising the public police's core functions in fighting crime and upholding and enforcing the law.³⁵⁸ Similarly, outsourcing criminal justice services such as prosecution and incarceration remains controversial as these are still seen as part of the state's core function.³⁵⁹ Outsourcing may also result in the provision of services in a non-equitable manner to members of the public. In the field of policing and criminal justice especially, outsourcing protection could result in injustice and inequality as only those who can afford it could enjoy security. This would run counter to the notion of the role of the nation-state in ensuring a minimum of public security to the citizen body as a public good.

However, a truly competitive marketplace can help to discourage ineffective, inefficient or abusive behaviour by private actors that have been sub-contracted to provide public services. Public complaints or lawsuits against a private security firm will, in a competitive market, hurt the firm's chances of maintaining the contract and its reputation, and hence harm its chances of getting future contracts. Moreover, while

³⁵⁴ M. Rulon, "Nuclear Safety Lapses Won't be Revealed", *Guardian* (online), 5 August 2004.

³⁵⁵ See: *Wackenhut* at <http://encyclopedia.thefreedictionary.com/Wackenhut> During the 1980s, *Wackenhut* was a leader in airport security but refused to compromise the company's high standards by cutting wages under pressure from airports and airlines. As a result, it only protected 4 airports in the US on 9/11. Airports in the US are now protected by the Transportation Security Administration of the Department of Homeland Security.

³⁵⁶ R. Londner, "Union accuses *Wackenhut* of lax security", *The Business Journal* (South Florida), 29 April 2004.

³⁵⁷ B. Mannion, "Public interest agencies fear secrecy will prevent nuclear power plant accountability", *The Post-Standard* (Syracuse, New York), 10 August 2004.

³⁵⁸ A. Minnaar and D. Mistry, "Outsourcing and the South African Police Service", in M. Schönteich, *Private Muscle*, pp. 40-41.

³⁵⁹ *Wackenhut Corrections Corporation* is a leader in this growing but controversial industry, It employs about 40,000 people and operates a number of private prisons in various parts of the US, Australia, Canada, and Britain. *Wackenhut* owns 50 percent of the stock for *Premier*, another prison corporation. Critics argue that *Wackenhut* decreased prison security in order to increase profits. It has also been criticized for permitting guards to abuse inmates. *Wackenhut* has been further criticized by state officials who argue that *Wackenhut* fails to provide the services it offers, thus forcing the state to pick up the tab. For example, New Mexico maintained extra police in order to combat the relatively high level of prison riots which occur in *Wackenhut* prisons. In 1999, Texas terminated a prison contract with *Wackenhut* after allegations of staff sexually abusing prisoners. Also in 1999, Florida terminated a prison contract with the corporation.

experience shows that private security firms frequently go out of business, public police departments or forces almost never do.

Many states including the UK, the US, Canada, Australia, and South Africa have outsourced peripheral criminal justice functions and services, for example, the provision of support services. States having high rates of incarceration, such as the US and South Africa, have turned to the private sector for assistance in accommodating the growing prison population and performing corrections work, and the private prison industry is undergoing rapid growth.³⁶⁰ However, there have also been moves to outsource certain aspects of core functions. States now commonly employ PSCs to augment police patrols, hire private security firms to respond to possible attacks or break-ins, have privately run building and operating of police custody facilities and prisons, as well as privately run immigration detention centres. Policing is presently undergoing a fundamental transformation. No longer carried out exclusively by governments, policing has become 'multilateralised': a host of nongovernmental groups have assumed responsibility for their own protection, and a host of nongovernmental agencies have undertaken to provide security services.³⁶¹

4.3. Lessons from Outsourcing

Outsourcing – or contracting out – occurs when the state retains responsibility for funding a service, such as through taxation, but hires a private sector actor to provide the service. The state maintains control over the standard of service provided. Outsourcing is mostly seen as applicable to non-core functions. Its purported benefits include the provision of services at lower cost, higher quality and increased efficiency than could be provided by the state, greater organizational and management flexibility, and more rapid responsiveness to changing conditions and requirements. To its supporters, competitive tendering – or the threat of rivalry – means improved efficiency and cost savings. Competition promotes innovation, the application of new management techniques, the introduction of new equipment and new methods of working, and allows the ministry of defense to re-contract with different suppliers and for different levels of service – for example, manning levels can be reassessed and part-time workers can replace full-time staff. Successful firms in a competition are also subject to the disciplines of the capital market and the incentives and penalties of a fixed price contract.

There are, however, also risks involved in outsourcing with a number of the pitfalls being: the rationale for outsourcing; preparation; assessment; tender and selection of service provider; implementation and transition; contracting and contract management; loss of control; dependence on and exposure to contractor; untimely service disruptions; high exit barriers and cost of conversion; inflexibility and high costs to meet changing requirements; security breaches; loss of information; and high costs of providing additional services. And there is also the problem of accountability: how can government ensure that it does not 'lose control', but instead retain an appropriate degree of oversight and responsibility for provision of a service being privatized?

³⁶⁰ K. C. Goyer, "Incarcerating and Rehabilitating Offenders", in M. Schönteich, *Private Muscle*, pp. 82-84.

³⁶¹ D. H. Bayley and C. D. Shearing, *The New Structure of Policing: Description, Conceptualization, and Research Agenda*, Washington, D.C., National Institute of Justice, 2001, p. 1.

Contracting out must not only be integrated with the overall strategy of the government: it requires the active leadership of top management if it is to achieve its full potential. The ownership and oversight of the contracting out exercise must rest with the very top of the public organization. Contracting out should also be used as an opportunity to re-evaluate both the rationale for existing tasks and the processes used to carry them out. These re-engineering benefits can only be reaped with top management involvement. Evidence suggests that carefully managed privatization can, under the right circumstances, provide specialized expertise, save money, and/or result in improved service delivery. It also shows, however, that poorly managed privatization, or privatization under the wrong circumstances, can lose money and result in poor service delivery.³⁶²

A central feature of outsourcing and the economics of contracting is the notion of transaction costs. These are ‘the costs of running the economic system’ and include costs of negotiating, monitoring, and enforcing contracts. Outsourcing does not merely imply the withdrawal of the state from the provision of certain services. It often requires extensive administrative and regulatory structures to oversee the delivery of services by private providers, and thus involves a process of re-regulation.³⁶³ All too often not fully taken into account are the implications and costs of dismantling existing public institutions and losing the labour skills of the existing governmental workforce when the provision of services is shifted to private parties. Hence, there is the question of real savings from outsourcing. There is reason to believe that outsourcing may not necessarily be cost-effective, particularly the outsourcing of military services.³⁶⁴ However, no systematic study of the cost-effectiveness of military privatization and outsourcing exists because there has not been adequate oversight or auditing of military contracts.³⁶⁵ Overall, the transaction costs analysis shows that the costs of managing contracts, including arranging bids, monitoring outcomes, and taking legal action for contract failures, may offset any efficiency savings.

Some question the assumption that private contractors are more efficient in providing services than the public sector, arguing that it is less an issue of the inherent inefficiency of the public sector than the lack of political will to establish efficiency as a top priority of government operations.³⁶⁶ The public service may embrace other goals, such as social justice and being representative of social diversity. The lesson is that the decision to outsource is often taken purely for financial reasons, while social, economic or environmental factors are left out of the decision. Thus, certain values that are promoted by the public service, such as ensuring equitable public access to services, may be jeopardized.³⁶⁷

³⁶² California Legislative Analyst's Office, *Contracting Out for State Services*, at www.lao.ca.gov/analysis_2004/general_govt/gen_04_cc_contracting_anl04.htm

³⁶³ D. Whyte, “Lethal Regulation: State-Corporate Crime and the United Kingdom Government’s New Mercenaries”.

³⁶⁴ See: S. Gates & A. Robert, “Comparing the Cost of DoD Military and Civil Service Personnel”. This report on the private provision of professional military education programs in the US found no cost savings.

³⁶⁵ See: M. Kelley, “Pentagon Memo”.

³⁶⁶ J. Prager, “Contracting out government services: lessons from the private sector”, *Public Administration Review* 54, No2, 1994.

³⁶⁷ Justice Forum and Centre for Public Services, *Privatising Justice: The impact of the Private Finance Initiative in the Criminal Justice System*, London, Justice Forum, March 2002, p. 49, available at www.centre.public.org.uk/publications/briefings/privatising-justice/this-document-is-only-available-as-a-pdf-file.pdf

A pressing policy concern is the lax and haphazard way in which governments have privatized their own military services over the last decade. The simple fact that one can outsource does not always mean one should. Rather, each decision should be given due consideration and not be taken before a fully informed, risk-based assessment. At the higher decision-making levels, the general practice of military outsourcing should be re-examined. Specifically, senior officials should critically evaluate the purported costs savings and overall implications of turning over essential military services to the private market.³⁶⁸ Specific areas to explore include how to diminish the risks of dependence and defection, and how to establish regulations and standards that take into account the new reality of civilians deployed in the battlespace. These include the exact rules of engagement, identification requirements, and where PMCs fall under military command.

The contracting process must be competitive. The lessons of past experience show, however, that this is often not the case. It is difficult to write fully-specified contracts which meet all unknown and unknowable future events, especially where contracts cover long periods of time, where technologies, costs and the strategic environment are highly uncertain, and where the contractor has to commit to funding costly and highly specific investments. Imperfect information enables parties to a contract to behave opportunistically exploiting information asymmetries, for example about the true costs or quality of supply.

Many military contracts are long-term, including lifetime support contracts for highly technical weapons systems. These create an essential monopoly once signed, even if competitively bid. Similarly, PMCs use previous contracts to stake a claim of unique expertise. This then lays the groundwork for follow-up, “sole-source” contracts that other firms are unable to bid for.³⁶⁹ This present US practice should be ended wherever possible, since it combines the dangers of a monopoly with the inefficiencies of a government bureaucracy. Contracts, instead, should be broken down in order to mitigate the risks and increase savings.³⁷⁰ This is equally true for two particular types of contracts that have arisen in military outsourcing: the “cost-plus” contract and the “unlimited services/open ended services” contract which are notoriously prone to abuse. One of the most infamous cases concerns *Halliburton*, which was awarded the LOGCAP (Logistics Civilian Augmentation Program) contract in 2001, worth about \$3.7 billion and mostly concerning providing logistics support in Iraq. As a cost-plus type contract, the LOGCAP contract establishes that the US government will reimburse the company for its costs, plus pays it an additional fee, which constitutes a percentage of the costs. This type of contract has a built-in mechanism for inflating costs, which results in larger profits for the company. *Halliburton* has recently been accused by two whistle-blowers of deliberately accepting inflated costs for goods and services for purchase orders below \$2,500 in value in order to avoid having to solicit more than one quote, and to pass on the increased costs while maximizing the additional fees accruing to *Halliburton*.³⁷¹ *Halliburton* is now the subject of a number of investigations for corruption, overbilling, and other abuses.

³⁶⁸ P. W. Singer, *Corporate Warriors*, 2003, p. 235.

³⁶⁹ P. W. Singer, *Corporate Warriors*, 2003, p. 155.

³⁷⁰ United States General Accounting Office, “Contingency Operations: Army Should Do More to Control Contract Cost in the Balkans”.

³⁷¹ H. Waxman, and J. Dingell, “Don’t Worry About Price: Whistleblowers Sound the Alarm on Halliburton in Iraq”, *Multinational Monitor* 25, №3, March 2004, available at <http://multinationalmonitor.org/mm204/04march/march04corp3.html>

When outsourcing takes place in developing states and states that are in transition to democracy, outsourcing may encounter more challenging conditions due to more limited selection among private contractors and less transparency in governmental decision-making and contract-awarding. Even in developed states, outsourcing experiences such as in the criminal justice sector in the UK – which now has the most privatized criminal justice system in Europe – have shown that a handful of multinational corporations hold a majority of outsourced contracts.³⁷² In contrast to the myth of efficiency and cost-savings resulting from open competition, outsourced projects – in the UK the criminal justice sector, for example, or in defense – have often taken place with minimal or no competition.³⁷³ The lessons are that “collusion among bidders is a real danger, because the incentive structure of competitive bids is designed to benefit the contractee at the expense of the bidders. Even the potential winning bidder may gain from a collusive arrangement, because both the contract award is higher and the cost of bidding is lower. Moreover, collusion avoids the ‘winner’s curse’, which asserts that the winner will most likely have overpaid... Competition cannot be taken for granted; in its absence, the gains from contracting will be diminished, if not dissipated entirely”.³⁷⁴ With the ‘winner’s curse’, the contractor bids a low price to win the contract, but then finds that the resulting revenues are so low as to not be able to fund the service and earn a normal profit. However, a contractor may accept the ‘winner’s curse’ and make a strategic decision to bid low in order to win the contract and renegotiate it later when the contracting party – the UK MoD for example – has lost its in-house capability and other contractors cannot easily enter and take over providing the service. “As a result, MoD becomes dependent on a private monopoly which, in the long run, means higher prices, a lack of dynamism and a poor quality service”.³⁷⁵

Another of the key lessons from privatization is the importance of sophisticated mechanisms of monitoring and oversight. The contracting process must be closely monitored and adequate oversight mechanisms must be in place to make the PMCs and PSCs accountable. Outsourcing may result in less accountability of service providers. Accountability poses potential problems because states may find it difficult to monitor the implementation of its outsourced contracts. They may also have difficulty developing criteria for monitoring and implementing the outsourced contracts. Most of the reconstruction work in Iraq, for example, is being performed by sub-contractors who have been hired by large corporations such as *Halliburton* and *Bechtel* that have been awarded huge umbrella contracts. These companies, in contrast to the public sector, are not subject to the Freedom of Information Act (which requires federal public agencies to provide information to the public for a modest processing fee), and therefore are under no obligation to provide information about their activities. Thus, monitoring of outsourced contracts has proven to be a big problem in Iraq. Originally there were only five men in the contract management office overseeing the \$18 billion reconstruction aid in Iraq. After the various scandals about overbilling, that number was increased to 14.³⁷⁶ A US Army official responsible for administering the huge *Halliburton* contract for providing food, housing and other services in Iraq recently admitted that they had not

³⁷² Justice Forum and Centre for Public Services, *Privatising Justice*, p. 9.

³⁷³ Justice Forum and Centre for Public Services, *Privatising Justice*, pp. 21, 35.

³⁷⁴ J. Prager, “Contracting out government services”.

³⁷⁵ K. Hartley, “Military Outsourcing: UK Experience”.

³⁷⁶ P.W. Singer (Interview), “The Privatized Military: The Unmonitored, Unregulated and Unchecked Global Growth of Private Military Firms”, *Multinational Monitor* 25, №3, March 2004. Available at <http://multinationalmonitor.org/mm2004/04march/march04interviewingsinger.html>

been properly resourced, nor had enough trained staff to properly monitor and oversee the contract.³⁷⁷

The problems with American government outsourcing pre-date Iraq. A Washington-based watchdog group maintains that the federal contracting system is deeply flawed. “Favoritism, waste, abuse and even fraud are far more likely today because of the systemic reduction of oversight and transparency in government contracting over the past decade”.³⁷⁸ But other states have also failed to protect their capacities to oversee outsourced activities effectively and hold companies accountable. The UK has failed to develop an overall strategy for outsourcing or pooling of resources or expertise, leaving each individual authority to develop its own expertise.³⁷⁹ Also, when states outsource certain functions, they often lose the expertise and thus the capacity to ensure effective and rigorous monitoring of the service provided by the contractor. While outsourcing peripheral functions may entail limited risk, outsourcing of core functions can be dangerous because of the inherent loss of knowledge and internal control that accompanies outsourcing.³⁸⁰ The combination of business agency issues, along with the normal fog and friction of war, present real dangers of potential losses of control that could be decisive in battle.³⁸¹ The loss of in-house expertise has even resulted in the outsourcing of audits of government contractors to other contractors, who often have business relationships with the companies they have been hired to oversee

Contracting out security services can also prove politically sensitive both domestically and in relations with foreign allies and partners. The Pentagon recently awarded a contract worth \$293 million to *Aegis Defense Services*, headed by Tim Spicer, to coordinate security support for reconstruction contractors in Iraq, including supervising the exchange of civilian and military information between the UK and US militaries and private military and security companies.³⁸² The decision, which does make *Aegis* one of the most important and powerful PMCs in the world, was highly controversial. Spicer’s previous firm, *Sandline International*, was accused of violating the UN arms embargo against Sierra Leone. The decision sparked protests by Irish-American groups, who cite Spicer’s unwavering support for two soldiers convicted of murder while under his command in Belfast, Northern Ireland.³⁸³ Some observers maintain that the officials involved in awarding the contract to *Aegis* apparently had no prior experience with private military companies and were unaware of Spicer’s previous involvement in highly suspicious activities. Others suspect the politicization of the outsourcing decision, citing the irritation of many in the UK that British firms have not been rewarded contracts in the huge reconstruction effort in Iraq despite the strong support of the Blair government and British forces in the war.³⁸⁴ The fact that *Aegis* was less than two years old, had no experience in Iraq, and had only conducted anti-piracy activities, not security

³⁷⁷ R. O’Harrow and V. Williams, “Halliburton Oversight Criticized”, *Washington Post*, 19 August 2004, p. E01.

³⁷⁸ J. Berlau, “Democrat Attacks On Contractors; Supposed ‘reforms’ of the Clinton-Gore era instead created a flawed federal-contracting system that shuts out innovative businesses”, *Insight on the News*, 1 March 2004, p. 18.

³⁷⁹ Justice Forum and Centre for Public Services, *Privatising Justice*, p. 16.

³⁸⁰ E. Garaventa and T. Tellefsen, “Outsourcing: The Hidden Costs”, *Review of Business* 22, №1, 2001.

³⁸¹ S. Davidson, *Where is the Battle-line for Supply Contractors?*, US Air Command and Staff College Research Report, April 1999.

³⁸² R. Ourdan, “L’irrésistible ascension du lieutenant-colonel Tim Spicer dans l’eldorado de la sécurité privée à Bagdad”, *Le Monde*, 1 juillet 2004.

³⁸³ M. Fitzgerald, “U.S. Contract to British Firm Sparks Irish American Protest”, *Washington Post*, 9 August 2004, p. A13.

³⁸⁴ P. Chatterjee, “Controversial Commando Wins Iraq Contract”, *CorpWatch*, 9 June 2004.

coordination, contributed to dismay at the decision. Nor was *Aegis* on the US Department of State's list of recommended security companies in Iraq. Accordingly, *DynCorp*, one of the six companies bidding for the contract, subsequently filed a complaint with the US General Accounting Office, challenging the grounds on which the contract was awarded. Similarly, the *CACI* civilian interrogators at Abu Ghraib were part of a broader Interior Department contract for provision of computer services.

Problems with lack of transparency and information disclosure are typical with outsourcing, as private firms claim "commercial confidentiality" to withhold basic financial information, even when such information is in the public interest. On the other hand, another problem of outsourcing, especially with regard to information technology and data handling functions, is the potential risk to privacy if companies do not establish safeguards for the handling of personal data. With outsourcing, it is common practice for companies holding contracts for outsourcing to further outsource or subcontract the services. Such subcontracting is not tracked. As a result, sensitive personal data, such as medical and financial information may be misused by clerks abroad.³⁸⁵

A further lesson suggested by experience is that citizens and the media are more likely to be roused to anger by the abuse of public power and public sector corruption than by private sector abuses, and the political penalties of violating public trust are likely to be much heavier than abuses involving the private sector.³⁸⁶ Thus, in addition to the potential for official deniability, PMCs and PSCs offer lower risks of public outrage and its accompanying political ramifications.

Thus, in sum, the lessons indicate that in order to be effective, outsourcing must have properly conceptualized contracts and effective monitoring of the implementation of contracts. Effective monitoring of contracts requires the existence of a reporting system in which performance and costs can be tracked. The reporting system also requires competent individuals with adequate skills to implement the system and manage the contract. "The efficiency and effectiveness of outsourcing lies in the manner in which the contractors are managed".³⁸⁷ The state should remain responsible for ensuring that outsourcing agreements are carefully negotiated in order that there is no ambiguity regarding the respective rights, duties and responsibilities of the state and private contracting parties. Outsourcing contracts must, moreover, contain safeguards to ensure that the rights of individuals and the public are respected, and that the rule of law is upheld. They should also contain penalty clauses that establish the consequences of a failure to meet service levels. And the contractor's performance must always be evaluated at the conclusion of the contract.

³⁸⁵ Kim Zetter, "Outsourcing: Danger to Privacy", *Wired News* (online), 20 February 2004. At www.wired.com/news/business/0,1367,62356,00.html

³⁸⁶ J. Prager, "Contracting out government services".

³⁸⁷ E. Garaventa and T. Tellefsen, "Outsourcing: The Hidden Costs".

5. Deficiencies in the Governance of Private Military and Security Companies

5.1. Regulation at the International Level

Obligations under International Law

Apart from the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, the major obligations for states in the field of mercenary and PMC or PSC activities arise from the *law of neutrality* and the *prohibition on the use of force* against the political independence and territorial integrity of states.

The Law of Neutrality

The law of neutrality grew out of the 1907 Fifth Hague Convention Respecting the Rights and Duties of Neutral States which sets out the rights and duties of neutral powers in international armed conflicts under customary international law. Article 4 prohibits the formation of corps of combatants and the opening of recruiting agencies on the territory of a neutral power to assist belligerents.

The principle of neutrality applies to both *international* and *internal conflicts*. The basis for this stemmed from the obligations arising from the recognition of belligerency in the 1928 Convention Concerning the Duties and Rights of States in the Event of Civil Strife,³⁸⁸ which obliged the states parties to:

- Use all means at their disposal to prevent the inhabitants of their territory, nationals or aliens, from participating in, gathering elements, crossing the boundary or sailing from their territory for the purpose of starting or promoting civil strife; thus mercenaries would be included in this prohibition; and
- Disarm and intern every rebel force crossing their boundaries, with the expenses of internment to be borne by the state where public order may have been disturbed.³⁸⁹

The rules of this Convention were subsequently included and amplified in the 1970 UN Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States.³⁹⁰ Reflecting customary law, this Convention addresses, amongst other principles of law, the prohibition on the threat or use of force against the political independence and territorial integrity of states under the UN Charter. This declaration should be read in tandem with the 1975 UN Resolution on the Definition of

³⁸⁸ Convention on Duties and Rights of States in the Event of Civil Strife, 134 L.N.T.S. 45, entered into force 21 May 1929. At www1.umn.edu/humanrts/instree/1928a.htm

³⁸⁹ Convention on Duties and Rights of States in the Event of Civil Strife, 134 L.N.T.S. 45.

³⁹⁰ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. United Nations General Assembly Resolution 2625. UN GAOR, 25th Session, Supp. No28, A/8028, 24 October 1970.

Aggression, which describes what is understood to be belligerency in international affairs.³⁹¹

In the event of the recognition of belligerency in civil wars or internal armed conflicts, the obligation of neutral states comes into effect to regulate the conduct of other states, so they would not permit the recruitment of mercenaries on their territories. In the past, recognition of belligerency in civil wars had the effect of placing the neutral state under an obligation not to allow the organization or enlistment of troops in its territory on behalf of one or both belligerents, provided that the grant of recognition was not premature. If recognition was premature, the recognizing state would not be regarded as neutral by the belligerent government – as occurred when Zambia and Tanzania recognized Biafra prematurely in 1967.³⁹²

However, since very few states now recognize belligerency, the recognition cannot be relied upon as a sound basis for adopting a posture of neutrality for the purpose of the prohibition on the recruitment and enlistment of mercenaries by neutral states.

The Prohibition on the Use of Force

The traditional application of neutrality laws only prohibited neutral states from permitting the enlistment and recruitment of mercenaries. Non-neutral states fell outside the ambit of that prohibition. Representing an advance in international law on the question of mercenaries, Principle I of the 1970 Declaration of the Principles of International Law Applicable to Friendly Relations Between States, however, closed this loophole and led to the general application of the prohibition on mercenaries.³⁹³ State responsibility for a breach of the prohibition of force was, moreover, further developed in the case of *Nicaragua vs. the United States*³⁹⁴ by the International Court of Justice.³⁹⁵

5.2. Types of National Legislation

The failure of international law to establish the exact legal status of PMCs and PSCs effectively defers the problems to the national level. However, few states have attempted to find solutions to this problem.

³⁹¹ *Definition of Aggression*, United Nations General Assembly Resolution 3314, UN GAOR, 29th Session, Supp. №19, A/9619 and Corr.1, 14 December 1974.

³⁹² C. Beyani and D. Lilly, “Regulating Private Military Companies”, p. 22.

³⁹³ The Declaration represents an important transition in international law, as mercenaries became “outlaws” in a sense. However, it still places the burden of enforcement exclusively on state regimes, failing to take into account that they are often unwilling, unable, or just uninterested in the task. See: *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, General Assembly Resolution 2625.

³⁹⁴ ICJ, *Military and Paramilitary Activities In and Against Nicaragua. Nicaragua* (Nicaragua versus the United States of America) Re(1986), pp. 61-65. This is one of the few examples of how these obligations can be applied.

³⁹⁵ The International Court held that any act of sending armed bands across the frontier of another state constituted a breach of the prohibition on the threat or use of force against the political independence and territorial integrity of a state. However, the way in which state responsibility for breach of this principle is engaged is still unclear in the application of international law. The Court found that the support, alleged to have been rendered to the Contra rebels by the US against the Sandinista government during the 1980s, whilst in breach of the principle, was insufficient to establish liability or agency of the US government.

United States

The US Arms Export Control Act of 1968 regulates both arms brokering and the export of military services. These were included in the Act by amendment in the 1980s following the discovery by the State Department that a number of private companies were giving military training to individuals from countries with which the US did not have good relations. This Act now constitutes the primary law in the US establishing procedures for the sale of military equipment and related services.

The Act stipulates the purposes for which weapons and services may be transferred; these range from self-defense to internal security. Defense services are defined as including the provision of and assistance in the design, manufacture and use of defense equipment, any provision of technical data on that equipment, any provision of military advice, and any training of foreign units and forces, both regular and irregular. Training includes that delivered by correspondence courses and media of all kinds, and through exercises. Brokering defense services to close US allies such as NATO members is exempt from the constraint, while brokering activities to countries “under US embargo and those subject to special regulations for reasons of national security” is prohibited.³⁹⁶

US companies offering military advice to foreign nationals in the US or overseas are required to register with, and obtain a license from, the US State Department under the International Transfer of Arms Regulations (ITAR), which implement the Arms Export Control Act. Defense services, including training, are considered military products under US law, and their overseas sales are regulated just like American-made guns or tanks. The ITAR requires PMCs to obtain approval from the US State Department before selling their services to a foreign government. US State Department’s Office of Defense Trade Controls in the Bureau of Political-Military Affairs reviews contract proposals to ensure they do not violate sanctions or other US policy. Under the ITAR, every person (other than an officer or government employee acting in official capacity) who engages in the business of brokering activities with respect to the manufacture, export, import or transfer of any defense article or defense services is required to register with the government agency. This applies to any US citizen, wherever located, and any foreign person located in the US or subject to US jurisdiction. Each application for a license to enter into a contract, to broker arms or military services undergoes an internal process involving a variety of national and regional bureaus including those established to protect democracy and human rights. This minimal regulation provides official approval, which might supersede international regulation. Whilst the processes do place some restrictions on companies selling military services abroad, they are more concerned with US foreign policy than with provisions within international law.

The licensing process itself is assessed to be idiosyncratic.³⁹⁷ “The Defense and State Department offices that have input into the process vary from contract to contract, and neither the companies nor independent observers are exactly clear about how the process works”.³⁹⁸ But the government maintains the right to take action to confirm that licensing provisions are being met. In addition to this licensing procedure, the executive branch of

³⁹⁶ Y. Sandoz, “Private Security and International Law”, in Cilliers & Mason (eds), *Peace, Profit or Plunder? The Privatization of Security in War-Torn African Societies*. South Africa, Halfway House, Institute for Security Studies, 1999, pp. 216-217.

³⁹⁷ The ITAR regimes are detailed in the Defense Trade Controls website at www.pmdtc.org/reference.htm

³⁹⁸ D. D. Avant. “Privatizing Military Training”.

the US administration must give Congress advance notice of sales valued at \$50 million or more, regardless of whether the sale is negotiated by the government, directly by the arms industry, or by a broker. Many contracts naturally fall under this amount, while larger ones are easily broken up to do so.

The enforcement of controls on US PMCs is primarily the responsibility of the US Customs Service. There is no formal oversight once a license has been granted, nor are there provisions to ensure transparency other than contracts in excess of \$50 million requiring congressional notification before being granted. Only in these instances does Congress have the right to demand additional information about the proposed contract. US embassy officials in the contracting country are charged with general oversight, but no official actually has a dedicated responsibility to monitor the firms or their activities.³⁹⁹

PMCs can also sell their services abroad through the US Department of Defense Foreign Military Sales (FMS) program, which does not require any licensing by the State Department. Under FMS, the Pentagon pays the contractor for services offered to a foreign government, which in turn reimburses the Pentagon. Vinnell's contract to train the Saudi Arabian National Guard, and MPRI's contract to train the Macedonian and Bulgarian militaries, came under the FMS program.⁴⁰⁰

The US Federal Criminal Statute prohibits US citizens from enlisting or from recruiting others from within the US to serve a foreign government or party to a conflict with a foreign government with which the US is at peace.

The domestic private security industry in the US is very competitive, marked by high turnover, low pay, few benefits and scant oversight. There are no federal laws governing the domestic private security industry. Efforts in Congress to mandate training and background checks nationwide failed last year but sponsors expect better results this year. State laws remain spotty. 16 states require no background checks. In 30 states no training is required while in the others 1 to 48 hours are mandatory.⁴⁰¹ In 22 states, private security services do not have to be licensed. In an industry in which contracts are awarded to the low bidder, PSCs oppose government mandates that would increase operating costs.⁴⁰²

³⁹⁹ P. W. Singer, "War, Profits, and the Vacuum of Law", p. 539.

⁴⁰⁰ Steve Schooner, a government contract expert and law professor at George Washington University, said companies will often seek FMS support in order to avoid the lengthy ITAR licensing process and gain backing and stability of the US government. See: L. Peterson, "Privatizing Combat, the New World Order", Center for Public Integrity, Washington D.C., 28 October 2002. At www.publicintegrity.org/bow/printer-friendly.aspx?aid=148

⁴⁰¹ 1 hour in Texas; 4 hours in Nevada, North Carolina, South Carolina, Tennessee, and Washington; 6 hours in Arkansas; 8 hours in Georgia and Utah; 12 hours in Minnesota and Oregon; 16 hours in Louisiana and Virginia; 20 hours in Illinois; 24 hours in New York; 32 hours in North Dakota; 40 hours in Florida, California and in Oklahoma; and 48 hours in Alaska. See: M. Hall, "Private security guards are Homeland's weak link".

⁴⁰² Contracts are won and lost based on pennies per hour. If PSCs invest in training their employees, these will want more pay. The businesses that hire them for protection do not want those costs passed along. Guards, earning in 2000 an average of \$17,570, get no health insurance through work, no paid vacation and no paid sick days. For many, it is a second job; most leave within months. Companies are buying more security, but they still hire the low bidder. For PSCs, it is hard to prove their value. They cannot prove that hiring guards will avert disasters.

South Africa

South Africa is the country that has adopted the clearest position on the regulation of private military companies and their supply of military assistance services abroad. The South African Regulation of Foreign Military Assistance Act (FMA),⁴⁰³ which entered into force in 1998, is the most far-reaching national legislation dealing with mercenaries, PMCs and PSCs. Its wider purpose is, however, to regulate foreign military assistance defined as including: “advice and training; personnel, financial, logistical, intelligence and operational support; personnel recruitment; medical or paramedical services; or procurement of equipment”. The Act includes extraterritorial application and punitive powers for those who do not abide by it. The decision to create an integrated mechanism for addressing the issues of mercenaries, PMCs, and conventional arms control was inspired mainly by the controversy surrounding the activities of South Africa’s PMCs like *Executive Outcomes*.

The Act is applicable to “a natural person who is a citizen of, or permanently resident in, the Republic, a juristic person registered or incorporated in the Republic, and any foreign citizen who contravenes any provision of this Act within the borders of the Republic”. The FMA provides that no person within South Africa or elsewhere may recruit, use or train persons for, or finance or engage in, mercenary activity. Mercenary activity is defined as “direct participation as a combatant in armed conflict for private gain”. Any PMC based in South Africa is compelled to seek government authorization for each contract it signs, whether the operation is local or extraterritorial. The Act introduces a sentence of no more than 10 years’ imprisonment and a fine of no more than 1 million rand for nationals or foreigners resident in South Africa who participate in military missions outside South African territory unauthorized by the State. It defines jurisdiction of private companies and imposes limits on the freedom of security companies to deal with military matters. It regulates, but does not prohibit, the existence of these companies which employ mercenaries and provide foreign military assistance. Requests to supply such assistance and all arms related materials are scrutinized by the National Conventional Arms Control Committee (NCACC), chaired by a minister from a government department having no direct links with the defense industry. The NCACC has the power to refuse an application, or to grant a license. Decisions are based on principles of international law, including human rights law. Licenses may be revoked should there be a change in circumstances in the recipient state.

In most cases, the Act’s application depends upon the existence of armed conflict. The recipient of the service must be party to the conflict. If the recipient was a private company in need of security services for legitimate concerns, the FMA would not apply. However, to date, the Act has been enforced only to a limited degree and controversy has surrounded its practical application. The criteria to render FMA have been described as vague and subjective, raising the possibility that the courts may consider them to be vague and invalid. The application may also be challenged because it infringes the freedom of expression, belief, association, trade and occupation of citizens as enshrined in the constitution. While the legislation is a major step forward in both intent and word, the Iraq conflict has demonstrated the difficulty of enforcing these new regulations. The South African *Meteoric Tactical Solutions* is currently providing protection services in Iraq

⁴⁰³ Republic of South Africa, *Regulation of Foreign Military Assistance Bill*, Bill 54D-97 (GG), 1997, at www.gov.za/gazette/bills/1997/b54-97.pdf

and training new Iraqi police and security forces. *Erinys*, a joint UK-South African company, has received a large contract to protect Iraq's oil industry. Neither company has yet received formal approval from the NCACC; *Erinys* failed to apply at all. Yet, they continue with their operations. Due to a lack of resources and perhaps will, South Africa seems to be unable to further monitor and enforce its legislation.

The law is not unproblematic. By requiring the government to approve each contract, the FMA results in the official sanctioning of the contract. This makes the South African government responsible for the actions of PMCs and PSCs, as it has licensed them and thus allows the potential escape from international legal controls. By seeking to control all forms of PMC and PSC services, including "advise and training" to forces engaged in conflict, the FMAs brings in too extensive a realm of activity and actors, making it almost irrelevant. Moreover, by giving the contract sanctioning power to the foreign ministry, hence granting the executive broad discretionary powers reminiscent of the apartheid-era, the FMA raises issues of subverting parliamentary oversight.⁴⁰⁴

With enactment of the Security Industry Regulation Bill 2001,⁴⁰⁵ South Africa's domestic private security industry, after having grown at breakneck speed in the past 10 to 15 years, has entered a period of consolidation. Stricter regulations, mergers and acquisitions which are reducing the number of PSCs, have tightened service standards and are channelling more revenue to fewer large entities.⁴⁰⁶ The primary objective of the new Act is to regulate the industry by exercising control over security service providers in order to increase the standards of professionalism, transparency, accountability, equity and accessibility within the PSC industry.⁴⁰⁷ The Act established a Security Industry Regulatory Authority (Sira). Headed by a five-member Council appointed by the minister, it replaced the old Security Officers Board, which had been made up mostly of industry representatives and which government felt lacked the power and will to effectively regulate the sector. Among Sira's main functions are: to receive, consider, grant or reject applications for registration and renewal from security providers; to regulate the PSC industry; to control security service providers; to make quality assessments of training standards; and to prevent exploitation of PSC employees. The Act provides for the

⁴⁰⁴ P. W. Singer, "War, Profits, and the Vacuum of Law", p. 539.

⁴⁰⁵ Republic of South Africa, *Security Industry Regulation Bill*. B12-2001. ISBN 0 621 29742 9

⁴⁰⁶ South Africans, who experience the highest rate of criminality in the world and who generally have little faith in the police's ability to guarantee their safety, have turned increasingly to PSCs to protect themselves and their valuables. South Africa spends more on private security as a share of GDP than any other nation. Size and scope for expansion of the South African market have attracted big multinationals in recent years. 3 of the world's biggest PSCs - *Chubb* of Britain, *Group4Falck* of Denmark and the US *Tyco International* through its subsidiary *ADT* - entered the market by way of acquisition. The biggest of the lot, *Securitas* of Sweden, is said also to be eyeing South Africa. In addition to the foreign entrants, domestic mergers and acquisitions occurred at bewildering pace - at least 14 in the past 4 years. There are more than 4,300 registered security businesses, but just 12 of them own 36 percent of the market. In a 2001 market survey, Credit Suisse First Boston (now split in two) predicted that by 2006 the top 6 companies will control more than half of the market.

⁴⁰⁷ There are six types of private security, with many PSCs doing more than one: guarding; assets-in-transit; armed response; investigation and risk management; electronic and hardware; and in-house or self-employed security. It is indicative of the wide spread of Sira's authority that the regulator lists 15 separate categories. Guarding is by far the largest with 3,000 companies employing 150,000 guards covering mostly residential and commercial properties, shopping complexes, schools and government institutions. The asset-in-transit is closely aligned with guarding and grew out of the transport of money and valuables by banks and large corporations. High capital requirements serve as barriers to entry, so fewer than 700 PSCs are registered with Sira. Armed response and area monitoring have 394 registered PSCs serving some 500,000 clients. The electronic and hardware sector represents about one third of the industry's market value. There are 857 registered investigative and risk management companies. In-house security is estimated to employ 60,000 to 80,000 guards, mostly in government departments, parastatals, banks and industries. See: P. Honey, "Private Security Industry Feeling the Pinch", *Financial Mail*, 14 November 2003.

suspension, withdrawal and lapsing of registration; for inclusion of an enforceable code of conduct; for the payment of annual and monthly fees per company as well as monthly fees per registered employee; and fees for registration, renewal and inspection to the authority. The fees are used for the policing of the act by inspectors.

All companies and individuals engaged in any security service must register, or are liable for prosecution, including directors, management, sales staff, technical staff, temporary staff, trainers, guards, response and other personnel. Also all domestic manufacturers, distributors, and importers of security equipment must register. Security equipment used in PSC services include among other things: any electronic and surveillance means; alarm control and detection equipment; safes and vaults; satellite tracking devices; fire, metal and bomb detection devices; X-ray inspection and secure communications equipment; locks and locksmith equipment. In order to register, the applicant must: be a citizen or permanent resident of South Africa and at least 18 years old; be legal and mentally sound; have complied with the relevant training requirements; submit a clearance certificate if he has worked in the military, police or police reserve force, or in intelligence services; not be an unrehabilitated insolvent; and have the prescribed infrastructure and capacity.

This new regulatory regime has taken to new lows the already uneasy relationship between private security and the state. The two sides disagree strongly over key elements of the regulations. But the government, represented by the safety and security minister and the Private Security Industry Regulatory Authority, seem unwilling to respond to the industry's complaints. The adversarial relationship is delaying a formalized partnership between the state and private security to improve community security and crime prevention. Companies complain of lengthy delays and bureaucratic red tape in registration and inspections. One regulation that has drawn vehement objection from the industry is the provision that compels company directors to undergo training and qualify for a "grade B" security officer's rating. Tensions rose when draft regulations appeared that would prevent security guards from using their own guns for work, and compel companies to use only specified colours for guard uniforms.⁴⁰⁸ Industry representatives decry what they see as the regulator's "dictatorial" methods of issuing regulations without consulting the industry. A Sira official acknowledges that relations have reached a low point, but insists that strong regulation is essential to bring the PSC industry in line with standards to enable future public-private partnership in law enforcement.⁴⁰⁹ This, however, is still far from likely since existing law enforcement statutes make no provision for such an eventuality.

European States

Beyond South Africa and the US, there is little regulation of PMCs and PSCs.⁴¹⁰ Outside of Europe, the vast majority of legislation either ignores private military actors, deferring to the international level, or falls short of any ability to define or regulate the industry. In

⁴⁰⁸ These are seen necessary to distinguish private security from police officers and because strict gun regulation is essential in an industry awash with firearms.

⁴⁰⁹ A key purpose of tighter regulation and higher costs is to drive the weak and fly-by-night companies out of business. Someone high up in Sira recently survived an assassination attempt which he insists involved a uniformed security officer.

⁴¹⁰ See: UK Foreign and Commonwealth Office, "Green Paper", Annex B, which contains a list of legislation outside the UK.

Europe, in general, governments use both *public-private partnerships* and *national regulation* as governance mechanisms to control their private military industries.

Public-private partnerships include a variety of arrangements that are defined by different relations between governments and private companies in the public service sector. They range from the outsourcing of single functions or entire service sectors to joint ventures and fully government-owned private companies. Each type of public-private partnership is associated with different forms and levels of governmental control. Whereas outsourcing provides supervision through commercial contracts, joint ventures and shareholdership directly involve governments in the provision of public services.

All European countries that employ public-private partnerships to shape the outsourcing of military services have embraced the belief that private companies are able to provide military support at better value for money than their national armed forces can. However, countries adopt various positions on whether and how to control their emerging private military service industries. Thus, wide differences exist, probably most so between the UK and Germany.

In the UK, the frontrunner of privatization in Europe, “Private Finance Initiatives” (PFI) have substantially transformed the relationship between the public and private sector in military affairs. These continue to be announced as the MoD’s “first choice method of funding new capital projects”⁴¹¹ and facilitate the growth of the private military service industry in the UK. While, initially, outsourcing was confined to non-military support and management, PFI programs are including more and more military functions such as logistics and training. As a consequence, private support operations have increasingly moved towards the front line. This so much so, that the Sponsored Reserve concept, which was incorporated into British law in the Reserve Forces Act (Part V)⁴¹² in 1996, envisaging that PMCs provide services in conflict situations by enrolling parts of their workforces as voluntary Sponsored Reserves, is challenging the notion that there is a clear line between armed forces operating in the battlespace and the employees of PMCs who will not become directly exposed to military conflicts.

Not only is the growing scope of PMC services and the move towards the front line increasing the dependence of the UK MoD on private firms, prime contracting also facilitates the national and transnational consolidation of the industry which contributes to reducing the competition among PMCs. PFIs, with their long-term commitments of between 10 and 40 years, place a heavy burden on the design and management of public-private contracts, the renegotiation of which can be costly. Between 1998 and 2002, some £10 billion of the MoD’s annual business, or approximately 45 percent of the defense budget, was reviewed under the “Better Quality Services” initiative.⁴¹³ The MoD now has 42 projects in operation bringing £2 billion of private sector investment, and

⁴¹¹ The British MoD has signed over 30 Private Finance Initiatives with a value of over £1.4 billion by 2002 and was considering more than 90 new projects with an estimated value of £6 billion. See: “Public Private Partnerships in the MoD: MoD’s approach to the Private Finance Initiative”, at www.mod.uk/business/pfi/intro.htm and “The Private Finance Initiative” at www.mod.uk/aboutus/factfiles/pfi.htm

⁴¹² HMSO, *Reserve Forces Act*, 1996, at www.hmso.gov.uk/acts/acts1996/1996014.htm. PMC employees will become reservist members of the armed forces and will receive training accordingly. When serving with the armed forces, they are subject to the Service Discipline Acts and Service Regulations. Sponsored Reserve employers have no right to appeal against a call out. Like other reserve forces, the maximum call-out period is 9 months, but might be extended with the agreement of the reservist and the employer.

⁴¹³ Cabinet Office, “Better Quality Services: A Handbook on Creating Public/Private Partnerships Through Market Testing and Contracting Out”, HM Government, London, 1998, p. 9.

another 40 projects in procurement that, it is claimed, will ultimately generate £12 billion more investment in UK defense.⁴¹⁴ While minor reviews occur on average after five years, the majority of contracts include only one major review – usually at half term – which allows for the discontinuation of the arrangement. Since the PFIs mean that the ownership of military service facilities as well as technical expertise remains with PMCs, the MoD may find it difficult to opt out of such contracts because it will lack the facilities and staff who could replace the contractor in the short term. More crucially, the terms of PFIs are not public. Moreover, unlike governmental regulations, PFI contracts do not have to be approved by Parliament, and neither does the call-out of Sponsored Reserves.⁴¹⁵ “Thus, while contracts between the government and PMCs or Sponsored Reserves may give the executive some control, they lack transparency and offer only limited accountability”.⁴¹⁶

In contrast to the UK, the German government has been much more cautious in the outsourcing of military functions and has maintained direct control over military services through government ownership. Progress was made with the Framework Agreement “Innovation, Investment and Efficiency in the Bundeswehr” between the minister of defense and representatives of the German economy, signed by some 700 private companies covering fourteen pilot projects.⁴¹⁷ These projects range from information technology to military training and logistics, and take the form of conventional outsourcing to companies.⁴¹⁸ While the Framework Agreement envisages the private provision of individual military services on the basis of case-by-case market testing assessment, the German government has taken a different approach with regard to the management of four core segments of the Bundeswehr: white fleet;⁴¹⁹ estates; clothing supplies; and information technology. In order to evaluate the options for public-private partnerships in these and other areas, the government created the “Association for Development, Procurement and Operations” (Gesellschaft für Entwicklung, Beschaffung und Betrieb – GEBB)⁴²⁰ in 2000. Unlike the British MoD, the fully government-owned GEBB has been keen to maintain a direct involvement in the provision of military services, arguing that the constitution requires that the Bundeswehr preserves a control and coordination function over the private provision of military services.

⁴¹⁴ M.R.H. Uttley, “Private Contractors on United Kingdom Deployed Military Operations: Issues and Prospects”, London, Draft Paper, King’s College, undated, p. 5.

⁴¹⁵ E. Krahnemann, “Controlling Private Military Companies”, pp. 4-9.

⁴¹⁶ E. Krahnemann, “Controlling Private Military Companies”, p. 9.

⁴¹⁷ E. Krahnemann, “Controlling Private Military Companies”, pp. 10-13.

⁴¹⁸ These include the privatization of the Army Combat Training Center and a training facility for the Eurofighter aircraft. The 3-year €75 million contract of the Army Training Center went to *GÜZ-System-Management Ltd.*, a company owned by STN Atlas Elektronik, EADS/Dornier and Diehl. *Eurofighter Typhoon* aircrew training has been contracted out to Eurofighter Simulation Systems Ltd., a consortium of STN Atlas Elektronik and CAE Ltd. of Germany, *Thales Training and Simulation* from the UK, *Indra* of Spain, and *Meteor* of Italy.

⁴¹⁹ For which GEBB created the *Bundeswehr Fuhrpark Service*, a joint venture which is owned to 75.1 percent by GEBB and to 24.9 percent by the Deutsche Bahn AG.

⁴²⁰ “Von Grund auf”, at <http://ministerium.bundeswehr.de/presse/146.php> The main reason for forming GEBB was economic. Due to budget constraints, the defense ministry wanted to get more value for money and, especially with regards to military bases and other assets, like barracks, the ministry wanted to earn money. Previously, closure of military bases and sale to the private sector, or non-defense public sector meant that the earnings from sales would go to the general budget under control of the minister of finance. With GEBB being responsible for part of the marketing of closed bases, the money would go into the coffers and budgets of the ministry of defense.

Thus, Germany is using corporate shareholdership and joint ventures as mechanisms for the control of private military services. Rather than relying exclusively on contractual obligations, public-private partnerships⁴²¹ enable the Bundeswehr to exert immediate control over these companies and determine how services are provided. This ability is crucial where strategic concerns are more important than cost efficiency. Moreover, through governmental shareholdership the Ministry of Defence becomes publicly accountable for the operations of PMC services.

Since public-private partnerships do not always offer a sufficient mechanism for ensuring transparency, accountability, and control of PMCs,⁴²² national regulation seems likely to gain prominence in Europe. Three sets of controls are relevant for the private military industry: the *regulation of private policing*, the *licensing of armaments and dual-use exports*, and the *regulation of mercenaries and PMCs*.

A comparison of national legislation of *private policing* conducted by the European Confederation of Security Services (CoESS) and the Union Network International (UNI) shows significant differences.⁴²³ Some European countries, such as Denmark, Finland, France, Portugal and Spain, have strict and comprehensive controls of PSC services. Others, such as Germany, Austria and Italy, have only narrowly defined regulations. Some countries have had laws controlling private security services since the early 1980s. The UK and Ireland have for a long time favoured self-regulation of the sector and introduced national legislation only in 2001.⁴²⁴ But with the growth of the industry, most governments have taken a more proactive approach towards regulation of PSCs. In particular, the UK and Germany have recently strengthened their controls.

With the Private Security Industry Act 2001, the UK has introduced regulations for domestic private policing services. The Act established a Security Industry Authority (SIA) which specifies licensing criteria and supervises their enactment plans for door supervisors, wheel-clampers, key holders, manned guarding, private investigators, and security consultants.⁴²⁵ Licensing procedures are published and the conditions which can be attached to licenses include training; registration and insurance; the manner in which activities are to be carried out; the production and display of the license; and information that the licensee has to provide to the SIA from time to time.⁴²⁶ Not controlled by the Act are services relating to strategic training, military logistics, and management; neither is the export of military services to customer overseas covered by the Act.

⁴²¹ "Public Private Partnership im Bereich des Bundesministeriums der Verteidigung", at www.bundeswehr.de/pic/pdf/reform/PubPrivPartnership.pdf

⁴²² See: E. Krahnemann, "Controlling Private Military Companies", pp. 4-13.

⁴²³ T. Weber, "Eine vergleichende Übersicht der Rechtsvorschriften für die private Sicherheitsindustrie in der Europäischen Union". Arbeitspapier für die gemeinsame Konferenz von CoESS und UNI-Europa. Dritte Europäische Konferenz für private Sicherheitsdienste, Brüssel, 12/13 Dezember 2001. Birmingham, ECOTEC Research and Consulting Ltd. See also: D. Hemmer and W. T. Bauer, "Privatisierung und Liberalisierung öffentlicher Dienstleistungen in der EU, Teil 4: Sicherheit", Paper OGPP, Österreichische Gesellschaft für Politikberatung und Politikentwicklung, Wien, August 2003.

⁴²⁴ D. Hemmer and W. T. Bauer, "Privatisierung", see Table 1: Key legislation governing the industry in each member state and general characteristics of the sector.

⁴²⁵ SIA, "Who will need a license?", at www.the-sia.org.uk/licenses/who-will-need.asp

⁴²⁶ SIA, "The Private Security Industry Act", at www.the-sia.org.uk/legislation/the-act.asp

In Germany, private security and policing services have been regulated by the Trade Code (*Gewerbeordnung*) since 1927, and by special legislation for security services⁴²⁷ (*Bewachungsgewerberecht*) since 1995. The Trade Code prescribes the assessment and licensing of service companies. Regulations for private security services, which have been strengthened in 1999 and 2001, define further requirements such as training hours; a written and oral test on legal and other requirements; sufficient insurance, and other obligations for private security personnel. Private military services are also regulated by the Trade Code. And private security regulations specifically refer to private military services where they concern the protection of military facilities.

As far as *national armaments* and *dual-use export controls* are concerned, there has been a growing recognition in Europe that arms export and non-proliferation policies need to be adapted to changing practices and technologies. Part of this development has been the licensing of the electronic transfer of sensitive technologies. The spread of small arms has given rise to strengthening controls on the trafficking and brokering of weapons. The establishment of the EU Code of Conduct on Arms Exports in 1998 was considered a significant advance in regional arms export control. The 15 member states declared at that time that they would set minimum common standards in controlling arms transfers, and would prevent exports which could be used for internal repression, international aggression, or would contribute to regional stability. However, according to Amnesty International, the design and application of the EU Code are deeply flawed⁴²⁸ – particularly since the enlarged EU now has over 400 companies in 23 countries producing only slightly fewer small arms and light weapons than the US. Moreover, the EU Code is not a legally binding instrument; it is a political declaration which had some effect, especially with regard to transparency, through the publication of an annual report on exports. However, national legislation is applied and if jobs are at stake, the Code does not really have much effect.⁴²⁹

As to *regulating mercenaries* and *PMCs*, the UK has been the first European government to investigate the possibility of national regulation.⁴³⁰ The UK's efforts arose out of the scandal involving Sandline International, the PMC that shipped weapons to Sierra Leone in breach of a UN embargo in 1997. The arms shipment apparently was endorsed by officials in the Foreign and Commonwealth Office. The House of Commons Foreign Affairs Committee then undertook an inquiry into the affair and requested as part of its report a government "Green Paper", outlining options for control and regulation of UK-based PMCs. However, so far the British government has failed to announce a timetable for the drafting and implementation of such controls.⁴³¹

⁴²⁷ BGBl (2002) Gesetz zur Änderung des Bewachungsgewerberechts vom 23. Juli 2002, Bonn, *Bundesgesetzblatt*, Teil I, Nr. 51, 26. Juli 2002, at <http://217.160.60.235/BGBl/bgbl102s2724.pdf>

⁴²⁸ Amnesty International, "Summary of EU Report", at www.amnesty.org.uk/controlarms/eureport/summary.shtml. For the full report see: Amnesty International, *Undermining Global Security: the European Union's arms exports*, at www.iansa.org/regions/europe/documents/undermining_security/contents.htm. See also: S. Bauer, "The EU Code of Conduct on Arms Exports - much accomplished, much to be done", *SIPRI*, Stockholm, 27 April 2004. And: S. A. Jones, "The Current System of Harmonizing EU Export Controls". At www.uga.edu/cits/documents/html/nat_eval_eu.htm

⁴²⁹ Remarks made to the author by Herbert Wulf, 2004.

⁴³⁰ In London alone, there are headquartered at least 10 firms that have overseas contracts thought to be worth more than £100 million.

⁴³¹ UK Foreign and Commonwealth Office, "Green Paper". The Green Paper took a 2 full years to craft and immediately came under fire from parliament. Labour party leaders attacked the proposal, calling it 'repugnant', 'deeply offensive', and 'an abdication of the responsibilities of government' that the government would consider giving PMCs political cover.

In France, a country that has not ratified the UN International Convention against Recruitment, Use, Financing and Training of Mercenaries, the Senate adopted on 6 February 2003 a law which makes mercenary activity a criminal offence under French Law.⁴³² The constitutive elements of the crime are very close to the wording of Article 47 of the Additional Protocol I, but do not differentiate between the involvements in international or non-international armed conflicts. This new law is meant to deal with a renewal of “old style” mercenary activity that France was confronted to in recent years, for instance when a plane carrying 12 suspected French mercenaries was intercepted in Tanzania on its way to Madagascar.⁴³³ However, the discussions during the adoption of the text show that the French authorities are aware that the text fails to take into account the full picture of the privatization of military services. The debate clearly spells out the need to engage in consultations on the subject with other European countries, and refers to the “pragmatic approach of the UK Parliament regarding the issue of private military companies”.⁴³⁴

Apart from that, mercenarism is not classified as a separate crime in the criminal legislation of most states,⁴³⁵ a situation that prevents legal action from being taken against mercenaries, except when they have committed related offences for which they are charged. In Switzerland, the Penal Code prohibits Swiss nationals from joining a force that is designed to fight abroad. The sole exception is the Swiss Guard of the Vatican.⁴³⁶

Krahmann analyzed the question of how these three sets of controls have been resolved in the UK and in Germany.⁴³⁷ Her comparison is interesting because these countries have approached the governance of private military services in different ways. The British government has placed considerable trust in the privatization of the sector and has only recently strengthened governmental regulation. The German administration has been careful to maintain its steering capabilities through public-private shareholdership of key military functions and through stricter legislative controls.⁴³⁸ However, the development of regulation is too recent and inconsistent to offer direct insights into the effectiveness of different types of national controls. Though the existing German controls surpass those of the UK in areas such as the trafficking and brokering of arms by PMCs in, as well as outside, Germany, and the sale of military services to countries subject to an embargo, secondary legislation to the British Export Control Act of 2002 and the prospective regulation of mercenaries might change this imbalance in the future.

⁴³² Loi no 2003-340 du 14 avril 2003 relative à la répression de l'activité de mercenaire (1). NOR: DEF0200004L. J.O. no 89 du 15 avril 2003, page 6636.

⁴³³ See <http://news.bbc.co.uk/1/low/world/africa/2056207> and www.dawn.com/2002/06/22/int8.htm

⁴³⁴ See: *Répression de l'activité de mercenaire : Adoption d'un projet de loi*. Séance du 6 février 2003 (compte rendu intégral des débats du Sénat). At www.senat.fr/seances/s200302/s20030206/s20030206004.html And: *Rapport de M. Michel Pelchat, au nom de la commission des affaires étrangères, N°142, 2002-2003. Rapport de M. Marc Joulaud, au nom de la commission de la défense, no 671.*

⁴³⁵ As in the US, current domestic law in the UK reflects a stance that is alternate to the intent of the Additional Protocol I and the UN Convention. Both states' domestic law only prohibits the recruitment of mercenaries and the actual conduct of mercenary activities. Being a mercenary in either country is in itself not a criminal activity. See: UN, *General Assembly Report A/54/326*, p. 14.

⁴³⁶ Between 1994 and 2000, 17 persons were sentenced for having served in foreign armed forces, mostly in the French Foreign Legion.

⁴³⁷ See: E. Krahmann, “Controlling Private Military Companies”.

⁴³⁸ See: BGBl, *Gesetz zur Änderung des Bewachungsgewerberechts vom 23. Juli 2002*, Bonn, *Bundesgesetzblatt*, Teil I, Nr. 51, 26. Juli 2002, at <http://217.160.60.235/BGBl/bgbl102s2724.pdf>

A positive outlook for the governance of the private military industry seems nevertheless justified by the observation that, as far as governmental regulation is concerned, the policies of the two countries appear to have been converging over the past years. One explanation for this development is policy transfer due to the growing recognition of the dangers involved in the use of private military force at the national level and the export of PMC services to third countries. After years in which the British government hoped for a successful self-regulation of private policing services, the failure of national service organizations to agree on, and enforce, common standards for the industry, the UK has thus turned to public regulation.⁴³⁹ In addition, the outcry resulting from the *Sandline* Affair led the British government to reconsider its armaments export controls.⁴⁴⁰ Another explanation is increasing pressure within the EU to harmonize the regulation of private policing and military services in order to ease the transfer of services within the Community and to eliminate competitive disadvantages arising from differences in national export controls. In the final instance, all these developments will have crucial implications for the use of PMCs not only in Europe, but also in the Third World.⁴⁴¹

⁴³⁹ See: HMSO, *Private Security Industry Act 2001*, London, The Stationary Office, 2001, at www.hmso.gov.uk/acts/acts2001/20010012.htm

⁴⁴⁰ DTI, *Export Control Act 2002*, London, The Stationary Office, 2002, at www.hmso.govt.uk/acts/acts2002/20020028.htm

⁴⁴¹ See: E. Krahnmann, "Controlling Private Military Companies", pp. 23-25.

6. Options for Effective Regulation of Private Military and Security Companies

6.1. Options for International Regulation

Government should encourage, through all means available, that a corresponding approach be taken at the international and the EU, NATO or OSCE level. Existing international conventions should be updated and amended to include PMC and PSC activities, issues of transparency and accountability of the firms, and accountability of the industry's employees. A new and expanded role may be found for the UN Special Rapporteur on mercenaries that could improve monitoring of PMC and PSC activities and behaviour. Moreover, the UN could set up a database of vetted firms that are available for hire. The model may be the UN Register of Conventional Arms, which compiles declarations by both importers and exporters of conventional arms, thus permitting cross-checking. A similar register could be created for PMCs and PSCs which would contain declarations by the importers, the states or groups employing such firms, and the exporters, the firms themselves. Its function could be expanded to set high standards for, and to receive, consider, grant or reject applications for registration and renewal from private military and security providers. Enforcement mechanisms should be established for cases of non-compliance and violation of all relevant international laws. This would help provide transparency and international standards of conduct for such companies.

If governments or international bodies intend to employ PMCs and PSCs in the future, and current trends suggest that will be the case, they must first establish regulatory control.⁴⁴² Given the new corporate nature of Western PMCs and PSCs, such regulations could be enforced if an interlocking framework of national, regional, and international control mechanisms were developed. To achieve sufficient regulatory control, the priorities for states include:

1. Ratification of relevant international and regional legal instruments;
2. Introduction of controls over arms brokering and shipping agents into the scope of arms export controls that recognize the role played by PMCs and PSCs;
3. Development of national legislation to license and control the activities, and to improve transparency of PMCs and PSCs;
4. More rigorous implementation of UN arms embargoes and sanctions which include in their scope PMCs and PSCs and technical assistance that may accompany arms transfers;
5. Support for the continuation and broadening of the mandate of the UN Special Rapporteur on mercenaries to include PMCs and PSCs;
6. Development of international measures to share information on PMCs and PSCs and to improve the monitoring of their activities abroad;

⁴⁴² T. H. Winkler, "Learning from Mistakes".

7. Promotion of measures to ensure that employers of PMCs and PSCs introduce sufficient safeguards to prevent breaches of human rights standards, international humanitarian law, and other relevant aspects of international law by PMC and PSC personnel;
8. Promotion of security sector reform programs that lead to accountable PMCs and PSCs with proper civilian oversight and democratic control so as to reduce the need for PMCs and PSCs engaging in combat and support efforts to combat illicit trade in arms.

6.2. Options for National Regulation

The governments that hire the services of PMCs and PSCs are essentially responsible for their conduct, particularly with respect to international humanitarian and human rights law. But ultimately responsible for their activities are governments in countries from where PMCs and PSCs operate or where they are registered. This must be so, because states are required under international law to control military actions against the territorial integrity and independence of other states.⁴⁴³ And these requirements are applicable not only to national armed forces, but also to irregular “armed bands” of mercenaries as well as to PMCs and PSCs. Since the consequences for the acts of irregular armed bands may be imputed to the state for which they have assumed responsibility, governments in supplier countries should ensure that military and security services provided by PMCs and PSCs only occur at the request of, or authorization by, the government in question. In turn, PMCs and PSCs willing to supply services abroad should be required to be licensed to carry out such activities as well as to apply for authorization from their host government. Moreover, military and security services should only be rendered to states and governments that are internationally recognized. State recognition would be determined by the official policy of the supplier government.

The British “Green Paper” set out six options:⁴⁴⁴

1. A ban on military activity abroad;
2. A ban on recruitment for military activity abroad;
3. A licensing regime for military services;
4. Registration and notification;
5. A general license for PMCs/PSCs;
6. Self-regulation: a voluntary code of conduct.

The following section is based closely on the Green Paper options for controlling private military companies, and expanded with additional arguments and examples.

⁴⁴³ R. Higgins, *Problems and Process: International Law and How We Use It*, Oxford, Clarendon Press, 1994, Chapter 14.

⁴⁴⁴ UK Foreign and Commonwealth Office, “Green Paper”, pp. 22-26.

A Ban on Military Activity Abroad

Most countries have neutrality laws which apply to internal conflicts and international wars. The UN Declaration of Principles on International Law concerning Friendly Relations and Cooperation built on these neutrality laws and referred for the first time to mercenaries by calling on state parties to prevent “irregular forces or armed bands, including mercenaries, for incursion into the territory of another State”.⁴⁴⁵ This was to the extent that such incursions violated international norms of non-interference, the right to self-determination, territorial integrity, and political independence. The upshot of these legal instruments is that there are strong obligations within international law for the government to introduce a “ban on unlawful participation in armed conflict abroad”. Such a ban could be achieved by independent legislation or by amendment of existing international laws against the recruitment and use of mercenaries.

Advantages:

This would be the most direct method of dealing with an activity that is deemed unacceptable by some people. Participation would be ‘unlawful’ unless an individual had received prior approval from the government – which would be unlikely for those wishing to directly participate in conflict, assist non-state actors, fight in embargoed countries, or any other proscribed activities made unlawful by legislation. The legislation could apply either to all such activities or to a limited range like “direct participation in combat”.

Disadvantages:

- There are likely to be very few states willing to introduce a blanket ban and to enforce it. The great majority of states would argue that an outright ban on PMCs and PSCs would be counterproductive. Enforcement would be difficult; since the military activity would take place abroad, it would not be easy to collect sufficient evidence meeting the standards required for a successful prosecution in a nation’s courts, thus it might not be practicable. Therefore, it seems highly unlikely that PMCs and PSCs will face any ban.
- Problems with definitions arise with a military ban. Banning only active participation in combat would raise questions of inconsistency, since training, other activities may be essential for the conduct of military operations. Alternatively, a ban on the provision of services to combatants could apply to medical services – and hence the activities of some humanitarian organizations. Would it apply to the provision of things like securing critical infrastructure of power, energy, water supply, telecommunications, and transportation? It would be difficult to determine whether military activity should be defined to include activities such as guarding property.
- A blanket ban could have other negative effects. It could constitute an unwarranted interference with individual liberty.⁴⁴⁶

⁴⁴⁵ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly Resolution 2625.

⁴⁴⁶ However, the Human Rights Act would allow the restriction of movement in the interest of public order and security.

- A blanket ban could also leave legitimate but weak and challenged governments without needed support, especially if the international community is unable or unwilling to provide any. This may have a negative effect not only on stability in the country itself, but may more broadly affect regional stability.
- Finally, since services are often an inherent part of defense export sales, a blanket ban would deprive the nation's defense exporters of legitimate business.

A Ban on Recruitment for Military and Security Activity Abroad

- Making legislation only applicable to recruitment at home would no longer be an adequate enough response to the concerns raised. But to enforce a ban on recruitment taking place abroad, the government would need extraterritorial powers.
- Many PMCs and PSCs have the potential to make a positive contribution to international security. Thus, through regulation, the government should be striving not only to restrain the worst excesses, but to facilitate the development of high professional standards in the private military and security industry. A ban for all recruitment by PMCs for armed combat operations and other activities abroad which are illegal under national law, whatever the difficulties of enforcement, would be consistent with these aims since one of the main purposes of regulation is to prevent unregulated PMCs and PSCs from damaging national interests.

Advantages:

- A ban on recruitment, and extraterritorial powers to enforce the ban, would avoid some of the difficulties in legislating for activities that take place abroad.
- Prohibiting companies operating out of countries with no regulatory structure for PMCs and PSCs from recruiting might help, in a limited way, to extend the scope of the home government's regulatory system abroad, and to protect the nation's reputation.
- Those giving publicity to the recruitment opportunity would be equally liable for prosecution as the nationals or residents recruited at home or abroad.

Disadvantages:

- Many PMCs and PSCs do not have a fixed set of employees and often have to draw upon networks of ex-servicemen or 'soldiers for hire' on the international market.⁴⁴⁷ Companies can advertise on the Internet, and much recruitment is likely also to be undertaken informally. While some of the larger PMCs and PSCs have detailed procedures for recruiting and vetting employees, irregular and largely untraceable recruitment procedures are practiced at the disreputable end of the spectrum of PMCs and PSCs – those companies to which regulation should be most carefully directed.

⁴⁴⁷ C. Beyani and D. Lilly, *Regulating Private Military Companies*.

- The practicability of the enforcement of a complete ban on recruitment of nationals, passport holders, or residents for armed combat operations and other activities abroad, which are illegal under national law, is questionable if these are recruited abroad by overseas-based or offshore PMCs and PSCs.
- It may be questionable whether a ban on recruitment for military activity abroad could prevent a PMC or PSC which had recruited employees for one conflict transferring them to another.
- It would be inconsistent and legally prejudicial if a ban on recruitment for unlawful participation in armed conflict abroad applies to some countries and not others.
- It would enable the government to prevent the worst kind of interventions by PMCs and PSCs, but it would do little to contribute to the creation of a respectable and responsible private military and security industry.

A Licensing Regime for the Provision of Military and Security Services

Under this scheme, individuals or companies would be required to obtain a license for contracting to provide military and security services abroad. Legislation would define the activities for which licenses would be required, which could include personnel management, weapons procurement and maintenance, advice and consultancy services, training, logistical support, intelligence and counterintelligence, information, psychological and electronic warfare operations, other operational support as well as combat support and combat operations. It could also include crime prevention services, law enforcement and policing, physical guarding of personnel and installations, security consultancy services, protection of critical infrastructure, as well as providing security for transports, delivery of equipment, and valuables, provision of medical and paramedical services, humanitarian aid and disaster relief in conflict situations. One possible approach would be to establish a threshold for contracts so that only those above a specified value would require a license. Individuals or companies would apply for the required licenses in the same way as they do for licenses to export arms and dual-use goods, and would have to conform to criteria established for the export of services.

*Advantages:*⁴⁴⁸

- Licensing would be a more flexible approach than an outright ban. The government would have the opportunity to consider the nature of the service in question and its political, strategic, and economic context.
- States have a legitimate right to self-defense that they may legitimately seek from foreign individuals and companies. To ensure that such external assistance is lawful, the legal responsibility of the individual or the company should be imputed to the state from which it comes, otherwise it could represent unlawful intervention.
- Just as governments license the export of arms and military goods, and of dual-use goods and services to prevent NBC-proliferation, it seems reasonable that they

⁴⁴⁸ UK Foreign and Commonwealth Office, "Green Paper", § 73 adapted and expanded.

should also license the export of military and security services. This should include a system that both licenses companies to operate in the first place as well as granting the government powers to authorize each contract that a provider wishes to enter into.⁴⁴⁹

- The US experience with a licensing system has been relatively successful for over two decades. The combination of arms brokering and PMCs or PSCs is how the regulatory system operates in the US.⁴⁵⁰
- A licensing and authorization system for PMC and PSC services could draw on several of the provisions in the EU Code of Conduct on Arms Exports, such as those relating to embargoed destinations, external aggression, human rights, and sustainable development.

*Disadvantages:*⁴⁵¹

- A national regulatory regime must be complemented by international regulations. The government would, through all means available, have to take the same approach at the national level as at the international level.⁴⁵²
- There would be problems in enforcement. Since the provision of services which are licensed would take place abroad, it would be difficult to prove that the terms of the license were breached. This could be ameliorated to some extent by the inclusion of transparency conditions in licenses, including access to the places where the services will be take provided.
- An appropriate screening and vetting procedure should be set up to help decide whether an individual or a company should receive a license.
- To make such a regulatory system feasible, clear guidelines would have to be provided by the government containing information about countries and sectors relevant to the activities of PMCs and PSCs, to enable companies to assess whether or not a project was permissible before submission. Moreover, the government would have to establish a list of activities that it deemed severe enough to warrant license. Constant appraisal of this list would then be necessary to ensure that it remained up to date with new developments in the field.⁴⁵³
- The strategic, political or economic circumstances under which a license is issued might change. At what point should the license be reexamined?

⁴⁴⁹ In many countries a similar system exists for arms exports.

⁴⁵⁰ There are two clear models one could follow currently: In South Africa, the National Conventional Arms Control Committee (NCACC) of the South African Parliament is responsible for overseeing the Regulation of Foreign Military Assistance Act of 1998 in all of its parameters. In the US, it is the US Arms Export Control Act of 1968 that regulates both arms brokering and the export of military services through the US Department of State Office of Export Controls which oversees the International Transfer of Arms Regulations (ITAR), granting license to those companies who meet the requirements. The government maintains the right to take action to confirm that licensing provisions are being met. In addition to this licensing procedure, congressional notification is required before the US government approves exports of defense services worth in excess of \$50 million.

⁴⁵¹ UK Foreign and Commonwealth Office, "Green Paper", § 73 adapted and expanded.

⁴⁵² This approach is also being pushed at the EU level, as part of attempts to standardize a common approach to law enforcement, legislative, juridical and security considerations across EU member states.

⁴⁵³ House of Commons Foreign Affairs Committee, *Private Military Companies Report*, § 117 and 118.

- The licensing process could mean delays for companies looking to begin their operations.⁴⁵⁴ This could work to the disadvantage both of PMCs/PSCs and their customers. Hence the government should establish a licensing regime that allows PMCs and PSCs to operate with the necessary speed without compromising the effectiveness of the vetting process.
- Since speed and flexibility are key attributes of PMCs and PSCs, and since these should not be compromised through the establishment of a regulatory system, the government would have to consider grading projects according to their time sensitivity, and to establish a ‘fast track’ procedure for some projects such as the renewal of an existing license.
- The regulatory authority should give PMCs and PSCs a target period for approval or denial of the license, and a similar time limit for an appeal process. Applications by reputable companies with an unblemished track record of scrupulous compliance with the terms of the license would have to be expedited.⁴⁵⁵
- Confidentiality of commercial information and sometimes even military security will be a sensitive issue for the private military and security. Foreign governments hiring PMCs or PSCs would often be unwilling to disclose the specifics of a contract relating to their national security with any third party.
- PMCs and PSCs not wishing to be subject to a licensing regime could move their operations offshore. These companies can be highly mobile; with few fixed assets or permanent employees, they can move relatively easily from one jurisdiction to another should they find a regulatory environment inconvenient – this, however, would mark them as possibly being less than wholly respectable.
- Unless special provisions were made, a licensing regime could put a state’s defense exporters at a competitive disadvantage. This could, however, be dealt with either by ensuring that licenses for arms exports included provision for associated services – like maintenance or training. Or there could be an “open general license” allowing companies to support equipment produced at home that has already been exported under a license.
- The government would have to integrate its approach to regulating the activities of PMCs and PSCs operating abroad with its approach to regulating the activities of PSCs domestically. Today, the transience of numerous companies between domestic operations and external operations abroad means that numerous companies will fall under both regulatory regimes as the activities often are the same.
- Regulation would, however, place an administrative and financial burden on both government and the private sector. There are difficulties both for government and

⁴⁵⁴ CEOs of PMCs raise concerns about the slowness of government bureaucracy in granting licenses. The UK Secretary of State for Trade and Industry told the Quadripartite Committee that though most arms export licenses were approved within 20 days, delays of 18 months or more had sometimes occurred. These were not a consequence of administrative problems, but “because of getting intelligence, making sure we get the latest information from the companies concerned”. See: House of Common Foreign Affairs Committee, Seventh Report of Session 2000-2001, *Draft Export Control and Non-Proliferation Bill*. London, The Stationary Office Limited, HC 445, Evidence Q270.

⁴⁵⁵ House of Commons Foreign Affairs Committee, *Private Military Companies Report*, § 124.

industry in seeking to arrive at precise estimates of the impact of the imposition of any controls. There is little hard data available about the likely impact on export businesses.

Registration and Notification⁴⁵⁶

Companies wishing to accept contracts for the provision of military or security services abroad would be required to register with the government and to notify them of contracts for which they were bidding. In the event that the government perceived a threat to national interests, strategy or policy, it would retain powers to prevent PMCs and PSCs from undertaking a contract.

Advantages:

- This would be a minimal regulatory framework under which companies would be required to register with the government and to notify it of contracts for which they are bidding. The burden on companies would normally be minimal.
- It would increase the government's knowledge of the sector.
- The government could use the framework to proactively deal with emergent problems concerning PMCs and PSCs.
- Granting 'automatic' licenses for projects provided to and carried out under the auspices of trusted international organizations of which the country is a member, or the EU, NATO, or OSCE could be justified because companies who have been vetted for competence under the government's general licensing scheme and which were providing services to intergovernmental organizations or to the agencies of the home government would be unlikely to compromise national interests in any way.
- The government could draw up a list of 'states of concern' to which the export of military services could automatically be banned. Exemptions to the normal licensing procedure would also be applied to contracts for non-contentious services such as the delivery of basic medical equipment to conflict zones. This would save time, free administrative capacity, and thus enable more thorough vetting of controversial project proposals.⁴⁵⁷

Disadvantages:

- This option is essentially a watered-down licensing regime in which a license is automatically granted unless the government takes action to withhold it.
- Though a 'light regulatory system', it is subject to many of the difficulties of the full licensing regime. There would be difficulties with enforcement, changing

⁴⁵⁶ UK Foreign and Commonwealth Office, "Green Paper", § 74.

⁴⁵⁷ In the US, contracts with NATO countries and Sweden do not require assessments before export licenses for arms or armed services are granted. Countries under embargo are automatically rejected. There is also a "presumption of denial" for the provision of military services which would lead to a lethal outcome. See: C. Beyani and D. Lilly, *Regulating Private Military Companies*, p. 32.

circumstances, confidentiality issues and evasion. Only the risks of delay would be less and cost would be lower.

- Little onus is placed on PMCs and PSCs other than to register with the government and notify it of each of its contracts. PMCs and PSCs might perceive this as a *carte blanche* for operating abroad.
- A less explicit licensing system such as this would confer less benefit in terms of helping establish a reputable industry. What most companies require is clear guidance from the regulatory system for what services they can provide abroad.

A General License for PMCs and PSCs

Rather than issuing licenses for specific contracts, a government could license the company itself to perform a range of activities in a specific list of countries. Such an agreement could set out standards the companies are expected to meet – for example, that they should not employ people with criminal records or ex-servicemen without an honourable discharge.⁴⁵⁸

Advantages:

- The establishment of a general register of PMCs and PSCs would have the two benefits that it would help speed the licensing of specific projects, and – if the government had vetted a company on the basis of its track record and personnel – that the government would be required to check only the specific project when the time came to grant a license.
- A general register would facilitate the development of a responsible private military and security sector by rewarding companies which could demonstrate high professional standards, level of transparency, appropriate staff recruitment, and training.⁴⁵⁹ It would provide a significant incentive for companies to be transparent and to maintain high professional standards, because failure to meet the standards demanded to join this general register would constitute a clear indictment of a company's credentials. This then would help warn potential clients like foreign governments, international organizations, NGOs, or private corporations against its employment.
- A general register could be employed as an alternative to licensing individual service contracts or, more credibly perhaps, as an additional measure to a licensing regime or an integral part. The general license as an additional measure is the practice in the US.

⁴⁵⁸ UK Foreign and Commonwealth Office, "Green Paper", § 75.

⁴⁵⁹ The procedure through which companies should go in order to be permitted to operate at home and abroad should include vetting of the company with respect to ownership, financial structure, commercial interests, management structure, recruitment policies, training, and qualifications and experience of company personnel - including verification that none had criminal or human rights violation records.

Disadvantages:

- There is the potential for misjudging a company's character which could put government in the position of lending credibility to companies of whose operations it knew little or whose character might change.
- Such a system would provide little protection for the public interest. It would need to be supplemented with one of the other options.
- Methods for monitoring and regulation, including regular reassessment of the company's record need to be established, and PMCs and PSCs would be required to reapply for operating licenses regularly, perhaps every two to three years.
- In terms of the "standards it expected the companies to meet", the government should ensure that it is as accountable for PMC and PSC personnel as it is for members of its armed forces. However, it is probably unrealistic for a PMC or PSC to be required to register all names of its employees. Instead, the onus should be on the PMC and PSC to introduce appropriate vetting procedures to demonstrate to the government that they are taking sufficient safeguards for who they employ. The introduction of such procedures would be a requirement of obtaining a license.
- A publicly available register of PMCs and PSCs would have to be created to provide public scrutiny of their activities as well as setting standards that companies should meet.

Self-regulation and Voluntary Compliance with a Code of Conduct

Self-regulation should be implicit in a company's activities, both in terms of carrying themselves with respect to and governance by law – including international corporate law, international humanitarian law, and the laws of the country from which they originate and of those in which they are operating. In this scenario, individual companies may develop their own code of conduct. Alternatively, companies in the private military and security sector could become members of an industry association that would then draw up a code of conduct for work overseas. The code would be developed through consultation within the industry and with other actors, including NGOs and clients. It could address subjects such as respect for human rights, respect for international law including international humanitarian law, respect for sovereignty, and transparency, including access for monitors or government representatives. Members of the association would undertake to adhere to the code of conduct or resign from the association.

Advantages:

- Efforts by PMCs and PSCs to self-regulate should be encouraged as a complement to government forms of regulation. Company membership in the Trade Association would be seen by the government as an assurance of respectability. It would be able to recommend to companies or foreign governments that they should employ only companies who are members; and it would be able to promote business abroad for them.

- This would not involve the government in unenforceable legislation or regulation. And the voluntary code would be policed by the industry itself who often have a better idea than anyone else of what is happening in the field. The provision for external monitoring – by international organizations, NGOs, and others – could provide a further check.
- This form of regulation would impose relatively few costs on companies and government. It would operate on the basis of peer pressure and concern on the part of the firm for its reputation.
- It would help establish standards of good practice within the industry and would enable outsiders to easily identify respectable business partners.
- The implications of a breach of a morally justifiable voluntary code would prove to be a major motivator for compliance by any company concerned for its reputation. A publicly broadcast breach would lead to isolation and loss of business for offenders.⁴⁶⁰

Disadvantages:

- A voluntary code is insufficient to regulate the private military and security industry because, lacking the force of law, it would not enable the government to prevent the activities of disreputable companies and would not give the government legal recourse if a PMC or PSC were found to have damaged national interest abroad. Thus, it would not meet one of the main objectives of regulation, namely to avoid a situation where companies might damage national interests. The lack of legal backing would mean that the government might be compelled to watch while a company pursued a course that was plainly contrary to the public interest.
- Individual company codes of conduct are not sufficient to regulate the industry as a whole.
- An industry association could find itself in difficulties either because of an inability to be sure exactly what was going on abroad, or if it was obliged to discipline one of its more prominent members.
- Certification by an industry association prior to membership would be a step in the right direction for regulation, but should be further integrated with new regulatory measures at the state level.

Defining Legitimate and Illegitimate Activities

While there have been numerous attempts to define the different kinds of enterprise which operate as PMCs or PSCs, in practice, the categories of companies often merge into each other. Moreover, all companies evolve according to circumstances, making consistent categorization of them as entities very difficult.

⁴⁶⁰ After seeing the effects of the Enron affair on accountancy firm Arthur Anderson, companies will be well aware of the need to protect their business by protecting their reputations.

A more productive approach than distinguishing between acceptable and unacceptable categories of companies would be to distinguish between acceptable and unacceptable activities. Some activities could be prohibited in all circumstances, if government would be willing to do so. Others, because of their risky and potentially violent nature, need to be clearly regulated. Clarity over which activities are permitted and which are proscribed is essential for any legislative measures.

Some propose the following seven activities from which individual mercenaries, PMCs and PSCs should be proscribed:⁴⁶¹

- Direct participation in hostilities;
- Use, recruitment, financing and training of mercenaries;
- Activities that could lead to a lethal outcome;
- Assistance to governments that are not internationally recognized, non-state armed actors, or irregular forces;
- Acts that might lead to human rights violations or internal repression;
- Looting, plunder, and other illicit economic activities such as mineral extraction; and
- Unauthorized procurement and brokering of arms.

It is clear that the use, recruitment, financing and training of mercenaries; assistance to non-recognized governments, non-state armed actors, and irregular forces; and unauthorized procurement and brokering of arms can and should be proscribed as illegitimate acts. However, defining activities that could lead to a lethal outcome, and defining the point at which a PMC or PSC becomes directly involved in hostilities are hopeless approaches. The UK Green Paper cites Tim Spicer, who described the “complexity of a situation where a security company ... is providing expatriate armed guards for a strategic installation, such as an oil well, jointly owned by the local government and an international oil company, in a country where there is a conflict with a rebel movement. If the guards protect the installation with their weapons against the rebels – are they fighting for the government and thus supporting the war effort?”⁴⁶²

Establishing a prohibition on direct participation in hostilities might be further complicated by the fact that PMCs and PSCs are sometimes hired by states to train nationals for the armed forces. Drawing the line between training for military planning and the planning itself would already be difficult. The US firm *MPRI*, for example, was involved in the sophisticated Croat “Operation Storm” whereby Serb held Krajina was recovered in 1995, a turning point in the war, and then in rearming and training the Bosnian armed forces. Both consulting missions made possible to decisively tip the military balance without taking the national and international political debate which open interventions would have provoked.

⁴⁶¹ See: C. Beyani and D. Lilly, *Regulating private military companies*, p. 35.

⁴⁶² Foreign and Commonwealth Office, “Green Paper”, p. 12.

A reasonable approach can be derived from the lessons of outsourcing and privatization, and taken from the old military doctrine on contracting with respect to arming civilians. A general lesson from outsourcing is that privatization can be beneficial – up to the point where it begins to move into *core functions*. This equally holds true for the armed forces. Thus, *core military* as well as *core security functions* should not be outsourced. The best guidepost for this is the determination that if the function is either “mission critical” or “emergency essential” – that is, greatly influencing or in any possible or foreseeable way effecting the success or failure of the operation – then it must be kept within the force. And the old military doctrine on contracting out held that civilians should be armed only under extraordinary circumstances for their self-protection, and that they definitely should not be deployed in roles which mandate arming as a functional requirement. The rest of the outsourcing can then be guided by four criteria: the assessment of roles and functions that are in the best national security and public interest to privatize; acceptability of outsourcing as long as the service providers are accountable to the same extent as state-operated services would be; regulation through government licensing of all roles and functions before these are being outsourced; and letting the market play through sanction mechanisms that increase adherence to, and respect for, all legal provisions, accountability and efficiency. Potential punishment of contract suspension, license retrieval, or the costs of a terrible repute will make the marketplace self-correcting.

Monitoring and Evaluation

A regulatory regime that lacks monitoring is not credible. In addition, a strong regulatory regime would need substantial enforcement mechanisms to ensure that credibility.

There are not yet appropriate defining mechanisms through which concerned parties can control PMCs and PSCs that threaten state sovereignty, and violate international humanitarian law and human rights. These need to be developed.

From an arms control perspective, PMCs and PSCs are salient insofar as they may enable a state to augment its military capabilities in a short period of time, either by armament procurement through such firms, by hiring combatants, or training a state’s military forces and transforming them into a far more effective combat force. While modern PMCs and PSCs generally are not a threat to regular military forces, they can be a significant factor in many developing countries given that coups have often been effected with just a few score or hundreds of combatants. The fact that many PMCs and PSCs, and the states which employ them, are not forthcoming about what services they provide or to whom the services have been provided, raise legitimate concerns in neighbouring states about what a PMC or PSC may be doing.

In order to bring transparency to PMC and PSC activities, and thus reassure states that the presence of such companies is not a threat to their security, an international register for such firms should be established. A model could be the UN Register of Conventional Arms, which compiles declarations by both importers and exporters of conventional

arms, thus permitting cross-checking.⁴⁶³ A similar register could be created for PMCs and PSCs which would contain declarations by the importers – the states or groups employing such firms – and the exporters, the firms themselves. That way, if a firm withheld data on the grounds that it was proprietary, it could be released by the employer.

In order to allay fears about human rights violations, and as a condition for operating outside the borders of a state in which they are headquartered, PMCs and PSCs should be required to abide by the relevant human rights and Geneva Conventions instruments. Documented violations would be cause for penalties such as fines and contract suspension. If an employee of a PMC or PSC was found guilty of committing crimes against humanity or war crimes, he could be tried before the International Court of Justice.

Parliamentary Oversight and Scrutiny

Lost oversight is another issue of concern. When governments engage in official military and foreign policy endeavours, the policy is held accountable by a wide range of supervision, both from within their own agencies and in the competitive branches of government, such as the legislative and the judiciary. The result is a balance that keeps each branch within the law and holds their relative power in check. This division of responsibility is at the crux of successful democracy. However, PMCs and PSCs allow leaders to short-circuit democracy by turning over important foreign policy tasks to outside, unaccountable companies. Private firms offer an alternative mechanism for the executive to conduct secret operations without other branches involved. Parliament normally only have authority over official policy, not over private entities. It is also often possible to arrange for a PMC or PSC to be paid by other parties or use off-budget funds. Hence, there is frequently no opportunity for legislative oversight.⁴⁶⁴

Thus, parliamentary oversight and scrutiny has to be established. If the government adopts a licensing or other regulatory regime for the export of military and security services, it will be logical for this to be subject to the same reporting requirements *vis à vis* parliament as is the case for arms export licenses and dual-use goods. Parliamentary oversight of the license-issuing process would be essential with two or more parliamentary committees, individually or collectively participating.⁴⁶⁵ As part of a licensing system, PMCs and PSCs could be required to report against the contracts that they have fulfilled in order to ensure compliance. This would provide the government with the necessary information to include details of these contracts in its annual report. Client confidentiality would not be compromised as the information would be provided after the completion of the contract. Proposals have also been made for a system to be established by which a parliamentary committee is given the powers to scrutinize

⁴⁶³ However, the UN Register is not an institutionalized verification mechanism. One big disadvantage is that it gives information *post factum*. A Register creates transparency but cannot prevent dangerous action. E. J. Laurance, H. Wagenmakers and H. Wulf have written a critical, but generally positive assessment of 10 years experience of the UN Register in “Managing the Global Problems Created by the Conventional Arms Trade: An Assessment of the UN Register of Conventional Arms”, *Global Governance* 11, №2 (forthcoming May 2005).

⁴⁶⁴ P. W. Singer, *Corporate Warriors*, 2003, p. 214.

⁴⁶⁵ The Foreign Affairs Committee, the Security Policy Committee, and the Armed Forces Committee could, among others, all have a role to play, either separately or collectively.

sensitive arms exports before authorization is granted. If Parliament assumes such powers in the future, it would be important that PMC and PSC contracts also come within the scope of such a system of parliamentary scrutiny.

The Benefits of Regulation

There are a number of reasons for considering action to regulate activity by PMCs, PSCs or mercenaries:

- Bringing non-state violence under control was one of the major achievements of the last two centuries. To allow it again to become a major feature of the international scene would have profound consequences. Were private force to become widespread, there would be risks of misunderstanding, exploitation, and conflict. It may, moreover, be safer to bring the private military and security industry within a framework of regulation while they are still a comparatively minor phenomenon.
- Legal measures have in the past demonstrated that they can play an important role in dealing with non-state threats to security. For example, the elimination of piracy as a mass epidemic in the 1700s came about less through brute force than through changes in domestic and international law.⁴⁶⁶ The legal gaps, defects and ambiguities that currently facilitate operations by these polyvalent companies should be remedied through explicit rules that regulate and clearly limit what these private companies may or may not do internationally, while clearly defining their responsibility for human rights violations and abuses, and other crimes and offences, as well as that of the states that hire them and that of the individuals who recruit them. The UN Mandate and its work in peace-building and peacekeeping operations must be strengthened at the same time.
- Actions in the military and security field have implications which go far beyond those of normal commercial transactions. They may involve the use of force and the taking of lives. Or they may impact on stability within a country or a region. They could cut across the state's foreign and defense policy objectives, strategies, and national interests. The state's own armed forces could find themselves confronting forces which had been assisted, trained or equipped by PMCs and PSCs based or headquartered at home. The activities of such companies will also reflect on the nation's reputation. If PMCs are operating abroad, the outside world might assume that they have some degree of approval from the government. Moreover, in a major operation abroad, PMCs or PSCs might also put at risk the lives of their own nationals living or travelling abroad, and those of innocents. And there might well be national liabilities for rescuing failed PMC operations.
- Regulation would help reduce all these risks. While a regulatory system might be less than foolproof, it would have a good chance of working if the sector as a whole believed that it was in their interests. Moreover, there are some PMCs or PSCs that

⁴⁶⁶ J. Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe*, Princeton, N.J., Princeton University Press, 1994, p. 148.

might welcome clear guidelines.⁴⁶⁷ If the result of regulation was to help establish a reputation for PMCs or PSCs and those headquartered in-country as reliable and responsible partners, it could have the effect of making it easier for them to win business, for example from international organizations, NGOs, and multinational corporations. And if the regulatory regime was viewed as fair and reasonable, those companies who chose to place themselves outside it by going offshore would be putting themselves on the margins of the sector and their reputation would suffer accordingly.

Since the private military and security industry is definitely here to stay and probably will proliferate further, governments will also have to become clear on how PMCs and PSCs can best be legitimately abroad and how best these can fit in and cooperate with their own armed forces. Five fields of possible engagements come to mind that could be beneficial: providing reform and stabilization services for countries in transition; support to weak but legitimate governments; support to international peace operations; support to humanitarian organizations; and relief to national armed forces.

Providing Reform and Stabilization Services for Countries in Transition

Nations in transition need assistance with their security sector reform programs. Some PMCs and PSCs have proven to be quite successful in providing specific services within the context of assistance programs of international and regional organizations – such as NATO’s Partnership for Peace program (PfP), or reform programs of the EU and OSCE – and of donor countries. The mandates received relate to legitimate goals to create credible, democratically controlled defense and security systems compatible with nations such as those in NATO and the EU. PMCs and PSCs offering reform and stabilization services have become part of the larger grouping of providers that contribute to making the military and the security agencies more efficient. Without effective democratic control of the armed forces and of the broader security sector in general, not only is a nation’s internal security unstable, inhibiting political and economic reform, but such a lack of internal security may spill over regionally or beyond.

Support to Weak but Legitimate Governments

States have a duty to ensure the security of their citizens and to maintain internal order. But in practice, some states are unable to do so. Where these face serious armed opposition and if there is no willingness from other states, from the UN, or regional organizations to lend effective and timely assistance, then those states have the right to appeal for professional help to train their own soldiers, security agencies or law enforcement organizations, to provide logistical or other support to ensure that the state itself can exercise law and order, overcome, and stop violence in its territory.

⁴⁶⁷ In an unusual reversal of roles, the push for standards is coming from PMC and PSC executives themselves. Several PMCs and PSCs have themselves been pressing for the rules, warning that an influx of inexperienced and small companies has contributed to a chaotic atmosphere.

Support to International Peace Operations

PMCs and PSCs already provide support to international and intergovernmental organizations such as the UN, NATO or the EU. The services provided include security guarding, logistics support, and demining. These are legitimate activities, and the use of PMCs and PSCs in this area of UN and other organizations' work is uncontroversial. More problematic and politically sensitive are peacekeeping operations.

The UN remains reliant on member states to provide peacekeeping troops. But when crises occur, the UN is frequently prevented from taking effective action because member states do not provide troops with sufficient alacrity to prevent a crisis from spiralling out of control. Another problem faced by the UN is that member states willing to provide troops have sometimes sent them without the necessary equipment or have provided troops untrained for the tasks they are to perform in peacekeeping operations. Contingents may also be of variable quality and sometimes poorly disciplined.

Particularly since the 1990s, the implications of the UN's failure to mobilize troops for peacekeeping missions have been severe. Given the problems experienced, the idea of hiring PMCs by the UN to do the job has thus gained appeal.⁴⁶⁸ Rapidly deployable PMCs might stabilize the situation so that by the time national contingents are recruited from member states and mobilized, the force required could be a peacekeeping force rather than a peace enforcement force, with a correspondingly lower risk of casualties. Although there are many arguments against the use of PMCs in peacekeeping operations,⁴⁶⁹ if regulation of the private military sector resulted in the development of a transparent, trusted industry, further commercial involvement at the low intensity end of UN peace operations might become increasingly acceptable to member states. If this helped to increase the speed and efficiency of UN reactions to ensure the enforcement of UN Security Council resolutions, and to prevent further atrocities such as those committed in Rwanda and in the Balkans in the 1990s, then such regulation should be welcomed.

Peace operations represent an area of activity in which the use of PMCs would bring benefits. The three areas of activities in which PMCs have worked in peacekeeping operations are logistical support; security and policing functions; and military support.⁴⁷⁰ PMCs can provide capabilities such as planning, security, force protection, logistics, engineering, medical and paramedical support, as well as air and ground transportation. Equally important, PMCs can also provide reconnaissance, surveillance, and intelligence capabilities to monitor cease-fire and truce implementation in disengagement zones.

⁴⁶⁸ In June 1998 UN Secretary-General Kofi Annan indicated that he considered the possibility of engaging a private firm in separating fighters from refugees in the Rwandan refugee camps, but did not feel the world was ready to privatize peace. See: Speech given by the UN Secretary-General at Ditchley Park UK, 26 June 1998, Press Release SG/SM/6613.

⁴⁶⁹ For many Third World countries, participation in peacekeeping is a source of considerable income.

⁴⁷⁰ D. Lilly, *The Privatization of Peacekeeping: Prospects and Realities*, International Alert, London, 2000.

Support to Humanitarian Organizations

There may be a role for PMCs and PSCs in protecting humanitarian organizations operating in unstable environments.⁴⁷¹ Aid agencies are beginning to accept that cooperation with the military is necessary and may be desirable.⁴⁷² This is opening the way for greater use of PMCs and PSCs as additions or alternatives to the military.⁴⁷³ Humanitarian operations offer some of the same challenges and opportunities as peace operations. A key factor in humanitarian efforts is rapid intervention, something that has often proved elusive for states with the constraints arising not only from the normal decisionmaking procedures, but from the force generation process as well. To overcome these roadblocks to rapid intervention, states could maintain contingency contracts with PMCs or PSCs to ensure a rapid response once approval is obtained. A contingency contract with a PMC for such missions could ensure faster decisions, particularly if the contract already had parliamentary approval. In any event, the PMC or PSC would have to provide planning expertise, air and ground transportation, engineering, medical, and security capabilities. In planning for all this, a PMC or PSC with a contingency humanitarian intervention contract could also conduct preliminary coordination with appropriate national donors as well as NGOs to provide the required assistance.

Relief to Armed Forces

Over the past decade, the response to the strategic environment has placed a wide range of demands on the military. Increases in missions and requirements coupled with decreases in structure and procurement have stretched elements of the forces and resulted in imbalances between strategy, force structure, and resources. Many of these new missions have come at the lower end of the operational spectrum, the result of the growth of ethnic conflict, failing states, and transnational threats. Failed and failing states are fertile breeding grounds for terrorists, organized crime, arms trafficking, genocide, and the proliferation of weapons of mass destruction. Military means are often not sufficient to allow full and efficient implementation of national security strategies. If the risk is to be mitigated, states must find alternative approaches. One such approach is the use of PMCs. Countries are again faced with circumstances in which they lack the required means to accomplish desired ends. Despite the historical reasons for the eventual suppression of mercenarism, private military corporations once again represent a convenient means to accomplish desired ends.

Information warfare is another example of how the armed forces may lack the appropriate force structure because the requisite capability is not considered a core activity. This capability, known as hacking, phreaking, and other such terms for arcane computer skills, poses cultural problems for most armed forces. The hacker community is somewhat anarchistic, with individuality being the key motivator. That cultural norm is at odds with a traditional military approach, making the acquisition of new and evolving skills difficult. The armed forces could hire specialized PMCs or PSCs for specific

⁴⁷¹ T. Vaux, et al., *Humanitarian Action and Private Security Companies*, International Alert, London. And: *The Privatization of Security: Framing a Conflict Prevention and Peacebuilding Policy Agenda*. Wilton Park Conference, 19-21 November 1999, International Alert, London.

⁴⁷² See for example CARE International.

⁴⁷³ See the use of PSCs by UN agencies like the WFP, UNICEF, UNHCR, and the bigger NGOs like Oxfam, Save the Children, Catholic Relief Services, Caritas, International Rescue Committee, CARE, Mercy Corps, and World Vision.

information warfare campaigns, providing a surge capability instead of attempting to maintain limited-use, cutting-edge skills in the regular force, far removed from its core activity.

A more problematic area, but one worthy of consideration, is that of dealing with such transnational threats as criminal groups, drug cartels, and terrorists. These grey-area threats increasingly represent a sophisticated networked enemy that mixes criminal enterprise and armed conflict, and they pose a growing strategic threat to all states. Dealing with these threats in failed states may not necessarily involve large-scale operations. More likely, these types of threats call for paramilitary operations that many armed forces may be ill-equipped to mount. Asymmetric terrorist warfare is an area where it is hard to maintain appropriate forces. Defensively, this is an area where vulnerabilities are rarely recognized until an attack has occurred. As a consequence, it is difficult in most cases to respond quickly and with the appropriate capabilities. Offensively, even after a target has been identified, a capability may be required that is not in the current inventory and would take too long to create. The provision of sophisticated surveillance, signals intercepts, and jamming capabilities may illustrate what a PMC or PSC can do to provide a client state with asymmetric capabilities against its enemies. This approach could keep the armed forces from trying to defend against all threats or to maintain capabilities across the entire spectrum regardless of risk and cost.

Either larger forces must be maintained or alternate solutions must be found. PMCs and PSCs provide the armed forces with the ability to respond across the spectrum of conflict by contracting out for required non-core or emerging capabilities. Their use for peace and humanitarian operations, and to provide cutting-edge capabilities for combating transnational threats, conducting offensive information operations, or facing asymmetric threats at the lower end of the conflict spectrum represents untapped potential. This is a pattern in state affairs that is not entirely new. Indeed, it is one that has been used successfully by states for ages. Rather than usurping state legitimacy, clearly regulated PMCs and PSCs can become a tool to further the state's strategic interests.

6.3. How to Regulate Private Military and Security Companies?

The National Level

In order to regulate PMCs and PSCs and their activities, governments should:

- Establish a licensing system with clear standards and contracting processes for PMCs and PSCs, and the individuals working for them;
- Define prohibited activities and clearly regulate all permitted activities;
- Define basic minimum requirements for transparency and accountability of the firms, and in terms of preparation, training, and behaviour of the firms and their employees;
- Establish rules and systems for the screening and vetting of the companies and their personnel;

- Establish a monitoring system for PMC and PSC activities;
- Establish parliamentary oversight;
- Establish rules that make contracting competitive, fair, and transparent to the public;
- Secure the financing of all measures required for regulation.

As PMCs and PSCs constitute a transnational industry, there is a need for international involvement. Because the status of this industry under international law is, at best, ambiguous, clarification of, and amendment to, international law in relation to PMCs and PSCs is required. Proposals exist, ranging from an updating of the 1989 UN Assembly International Convention against the Recruitment, Use, Financing, and Training of Mercenaries; creating a UN body that regulates and sanctions the private military and security companies; establishing an international register which compiles declarations by both importers and exporters of the services provided by these firms; to extension of the International Court of Justice to the activities and employees of these firms. Human rights laws, and the Geneva Conventions, are more relevant, but they are binding only on states, which would limit the formal legal responsibilities of PMCs and PSCs, as they are often hired by other private firms and NGOs, not only by states.

It is clear that any regulating movement on the international front will take years to agree and to implement. However, it is equally clear that most of the legal options for dealing with PMC and PSC violations are national rather than international. Existing national regulations vary in quality and effectiveness, and, in many countries, are either full of loopholes or non-existent. And in most cases there are legal grey areas, including extra-territorial issues and problems related to a mixture of state and private actors working together.⁴⁷⁴ This means that each state that has some involvement with the industry, either as client or home base, has an imperative need to develop laws relevant to PMCs and PSCs, and the regulation of their activities. While certainly a burden for government, dealing with the legal challenges presented by the emergence of new industries is a requirement to ensure a living body of law. States have had to similarly adapt to the emergence of telecommunications, the Internet and gene-technology.⁴⁷⁵

There are laws that govern the worst of human behaviour; it is thus unacceptable to have one lone domain of PMCs and PSCs devoid of regulation, and to just hope for the best in their absence. Laws must be developed that provide control for the variety of legal and jurisdictional dilemmas that the industry has raised. A key requisite is to extend legal clarity to the questions of who can work for these firms, who the firms can work for, which legal codes will govern, and what bodies will investigate, prosecute, and punish any wrongdoing and in what domains. In an ideal arrangement, states will coordinate their efforts and involve regional organizations to maximize coverage in order to ease the path to international standards. In Europe, for example, states would be well advised to coordinate their efforts within the EU, and in cooperation with the US, NATO or the OSCE, in order to harmonize the creation of common standards that could help to set the basis for subsequent international regulation. Among other things, harmonizing is needed to prevent PMCs and PSCs from moving to countries without regulation, or to

⁴⁷⁴ M. Bourne, *The Privatization of Security*, Centre for International Cooperation and Security, Department of Peace Studies, University of Bradford, 2 June 2004.

⁴⁷⁵ P. W. Singer, *The Private Military Industry and Iraq*, November 2004, p. 21.

places where restrictions are less stringent. The developments that have been achieved in relation to arms exports, such as the EU Code of Conduct on Arms Exports, provide an important model with which to approach the issue. Moreover, the EU Commission has adopted a Common Position on technical assistance that accompanies arms sales, which is not dealt with under the EU Code. It is likely that a number of other services undertaken by PMCs and PSCs might also fall within its scope.

As to the general approach to be taken by governments, it should be clear that issues like arms exports and brokering, non-proliferation obligations, export controls for dual-use and other relevant goods, and all other international obligations of relevance for the private military and security industry and their activities, as well as coordination, alignment and conciliation with the objectives and strategies of national security policy, foreign policy and foreign economic policy, should all fall within one package regulating PMCs and PSCs. Hence, all these issues and problems ought to be dealt with by a high-level *interministerial committee* in joint fashion.

If a government decides to propose legislation to the parliament, it will wish to secure the following objectives:

- Satisfy international and national political pressures for regulation of PMCs and PSCs and their activities;
- Ensure national and international legal compliance by the nation's PMCs and PSCs as well as by foreign companies headquartered in-country;
- Ensure government knowledge and understanding of the private military and security industry and of the risks and dangers for the nation-state, its interests, and its citizens abroad, incurred by PMC and PSC activities abroad;
- Enable the private military and security industry to bid more easily for outsourced government business and to enhance and diversify market competition.

A wisely regulated environment for PMCs and PSCs is likely to have the following additional effects:

- Assist in growing global perceptions of the legitimacy, qualification, and high reputation of the national private military and security industry;
- Attract new and diversifying PMCs and PSCs to operate from the state and to deter the less reputable companies of that state from operating offshore or from countries with fewer restrictions;
- Assist sector and PMC/PSC market share growth and competitiveness.

The starting point for developing regulation of the industry should be its legal basis, which should be based on the state's obligation under international law, and aim to close loopholes in existing national laws. This legislation would need to define the actors, activities, and services to which it would apply.

Establishing a Licensing Regime

Ideally, governments should introduce a three-fold licensing system:

1. Licensing the company: individual companies would be licensed to perform a range of possible activities in a specified list of countries.
2. Licensing service capabilities: companies would be required to obtain a license to undertake contracts for military and security services abroad. The activities for which licenses are issued would be defined in the license.
3. Licensing of individual contract or at least notification: companies would be required to notify a national government agency of each contract requested prior to tendering or bidding, in order to obtain a license for each individual contract.

A government should integrate its approach to licensing the activities of PMCs and PSCs working abroad with its approach to regulate domestic activities of PSCs to whatever degree required, based on explicit crossovers and due to the facts that companies can fall under both regulatory regimes and that the activities could be the same.

Defining Prohibited Activities and Clearly Regulating Licensed Activities

A government should make a clear statement of policy in legislation, outlining activities deemed prohibited or where there would be a “presumption of denial” if companies apply for a license to engage in them. A government should prohibit services and activities of the following kind: all mercenary and individual operations; all direct combat services, and all core military and “mission-critical” or “emergency essential” functions and services; all core security functions and services in zones of conflict; all arms brokering; and all arms, dual-use goods, and NBC proliferation.

Legislation should state the criteria by which license applications will be assessed. Criteria would be based on whether the activities would *inter alia* jeopardize public security and law and order; undermine economic development; enhance instability and human suffering; augment the threat perception in neighbouring countries; contribute to or likely provoke internal intervention or external aggression; violate international embargoes, etc.

Acceptable activities would require a license, depending on the circumstances of the proposed contract, which should be judged on a case-by-case basis. Among some of the more sensitive activities that clearly would require licensing are: strategic and military advice and training; arms procurement; intelligence collection and counterintelligence; security and crime prevention services; interrogation; logistics support, etc. Moreover, licensing requires that the regulatory authority have an enforcement regime with extra-territorial powers. Thus, the means and operational procedures for enforcement must be clearly defined and stated in the legislation.

Defining Minimum Requirements

Government should define minimum requirements for the firms and for their employees. For the companies, minimum requirements should be defined for transparency and accountability. For transparency, such minimum requirements should be defined for: ownership, shareholding arrangements and financing; declaration of board members and responsibilities; identification of headquarters; corporate or firm structure with divisional activities; joint ventures; partners; subsidiary and subcontractor ownership and interests; contracts for outsourced services, and the clients. For accountability, minimum requirements should be defined to cover: qualification of boards of directors, corporate or firm leadership and duties of public disclosure; capacities and means for the recruitment of personnel, preparation of operations and provision of adequate training; enforceable performance standards; and a code of conduct, etc. Moreover, the company must agree to be held responsible under national law even while performing operations abroad. In this way, any abuses committed by the firm and its employees will fall under the jurisdiction of national courts.

For the employment of personnel, minimum requirements should be defined for the recruitment, qualification, preparation, training and conduct of personnel (for instance: no criminal record, no human rights violation and no violation of international humanitarian law or other international law, and no dishonourable discharge from the armed forces; personnel must be made well acquainted with international humanitarian law, human rights laws, and instructed in gender issues). Key considerations must be professional qualifications and operating legally. In addition, the company would have to ensure that the personnel recruited locally in the country of its foreign engagement receive the same notification, preparation and training as those recruited from its home country or from third countries.

Screening and Vetting of Firms and Personnel

Government ought to be under obligation of vetting and screening national PMCs and PSCs and foreign ones headquartered in the country. And a government should either provide screening and vetting for PMC/PSC owners, CEOs and leadership, staff and employees, or establish clear rules for the outsourcing of such processes to independent private organizations. To this end, a centralized database could be established, and cooperative declarations signed by all parties involved. Companies should be required to keep a register of their staff that can be reviewed periodically by government inspectors. Moreover, companies would do well to pre-screen people to fully benefit from their ability to speedily deploy to a conflict zone, even if it means added expense.

Monitoring of PMC and PSC Activities

Government should monitor PMC and PSC activities. Monitoring can be done by the diplomatic mission or defense attachés stationed in the country where PMC or PSC provide services; by national inspectors; through governmental contacts with the country of service delivery; or in cooperation with international, intergovernmental or regional organizations, NGOs or other institutions present in the country where the national PMCs and PSCs, or the foreign ones headquartered in-country, are deployed. Moreover,

PMC/PSC activities should also be monitored in ways comparable to the application of arms exports, non-proliferation, dual-use goods and general export controls.

Parliamentary Oversight

There should be parliamentary oversight over the outsourcing of PMC and PSC services delivered abroad and contracted by the home government or by foreign governments. Oversight should be subject to the same reporting requirements *vis à vis* parliament as is the case for arms export licenses, non-proliferation and dual-use goods export controls. Hence, parliamentary oversight would be executed by two or more parliamentary committees participating individually or collectively. PMCs and PSCs should be required to file reports on the contracts that they have fulfilled in order to ensure compliance. This would provide the government with the necessary information to include details of these contracts in its reports to the legislature. Client confidentiality is not to be compromised as the information will be provided after completion of the contract. Moreover, parliament should be given the powers to scrutinize the more sensitive contracts before authorization is granted, and to tackle cases where outsourcing is considered to have gone too far.

Making Contracting Competitive, Fair, and Transparent to the Public

Government must subject contracting to clearly defined rules that apply industry-wide and to all contractors and subcontractors, whether national or foreign. Government must ensure accountability of, and control over, PMCs and PSCs. The burden is not on the PMC or PSC, but on the client – the government – to guard its own interests, to ensure oversight and controlling, financial scrutiny of contract competition, industry-wide high standards preferably with an incorporated and enforceable code of conduct, as well as timely and adequate delivery of the outsourced services.

For the enforcement of the rules, government must establish inspection and monitoring systems, engage enough well-trained people with experience of the industry and of their own organizations security needs for awarding the contracts, and have an adequate number of contracting officers ready for quick deployment to theatres where PMCs and PSCs operate. Sanction mechanisms should be introduced that increase adherence to, and respect for, all legal provisions, accountability and efficiency. While incentives and awards could be used to honour best performances, a system of contract suspension, license withdrawal, winding-up, seizing of assets, and financial and criminal penalties should be in place as a ‘backstop’ for when transgressions come to light. Firms that have been found to have overcharged government in the past or have committed crimes in the contracting process, as well as firms that have been found to lack the proper business and management skills to fulfill the contracts efficiently or to have otherwise been failing crucially, must be banned.

As for the contracting proper: some flexibility in contract pricing and delivery is required. However, underbidding of fixed-price contracts by less reputable companies should be avoided, and contracts of the ‘no-bid’, ‘sole-source’, ‘cost-plus’, and ‘indefinite delivery/indefinite quantity’ types should be prohibited. Nor should contracts be receivable or awarded on the basis of lobbying or political influence. The government

should also establish rules excluding all sorts of “revolving door” practices, and should prohibit government employees from regulating or contracting private sector firms that formerly employed them.

Securing the Financing of all Measures Required for Regulation

Such a regulatory and licensing regime cannot be established without considerable financial consequences. While such costs are difficult to estimate, not all can nor should be carried by the state. Thus, the private military and security industry should participate in the financing of the regime. This may be done by charging fees for the registration, contract licensing and contract renewal, as well as for each inspection. Moreover, payment of annual and monthly fees per company and per registered employee could be demanded and used for the monitoring of PMC and PSC activities abroad.

7. Conclusion

The heavy use of private military and security companies in the American-led campaign in Iraq has highlighted many of the concerns about the use of such firms. While increasingly necessary for international interventions spanning the spectrum from war, to humanitarian relief and peace support operations, to post-conflict reconstruction and security sector reform assistance, outsourcing security functions poses significant challenges to transparency, oversight and accountability. The broad range of services provided by PMCs and PSCs and the growing reliance on their use by governments of developed and developing states, international and regional organizations and private actors suggests that privatization of security is a long-term trend with profound consequences for the nature of the state and its former monopoly in activities in war and peace, and more broadly for international security relations. This paper has emphasized the need for pragmatic thinking about the outsourcing of security-related activities, recognizing both the advantages and disadvantages posed by PMCs and PSCs. It is imperative that realistic options for improving the regulatory control of PSCs and PMCs now be pursued, in particular by those states which systematically engage private military and security companies and those where many of them are based.

To conclude, we are reminded by Peter Singer of the old proverb that held that “war is far too important to be left to generals”. For the 21st century, a new adage may be necessary: “War is far too important to be left to CEOs of an unregulated private military and security industry”.⁴⁷⁶

⁴⁷⁶ More or less according to Singer, *Corporate Warriors*, 2003, p. 242.

Annex I

Private Military Companies and Private Security Companies on the Web

AD Consultancy	www.adconsultancy.com
Aegis Defence Services	www.aegisdef-webservices.com
AirScan	www.airscan.com
AKE Limited	www.akegroup.com
Alpha	www.alfa-m1.ru/about/about-eng.html
American International Security	www.aisc-corp.com
AOgroup-USA	www.aogroup-usa.net/who.htm
Applied Marine Technology Inc	www.amti.net
ArmorGroup	www.armorgroup.com
ATCO Frontec	www.atcofrontec.com
Aviation Development Corp	www.aviationdevelopment.com
Beni Tal	www.beni-tal.co.il
Betac	www.betac.com
BH Defense	www.bhdefense.com
Blackheart International, LLC	www.1stoptacticalgear.com
Blackwater USA	www.blackwaterusa.com
Blue Sky	www.blueskysc.com
BritAm Defence Ltd	www.britamdefence.com
BRS (Halliburton)	www.halliburton.com/brs/brs.asp
CACI Systems	www.caci.com
Carnelian International Risks	www.carnelian-international.com
CastleForce Consultancy Ltd	www.portaliraq.com/showbusiness.php?id=464
Centurion Risk Assessment Serv.	www.centurion-riskservices.co.uk
Chochise Consultancy Inc	www.chochiseconsult.com
Combat Support Associates	www.csakuwait.com

Chilport Ltd	www.chilport.co.uk
Control Risk Group	www.crg.com
Critical Intervention Services	www.cisworkservices.org
Cubic	www.cai.cubic.com
Custer Battles	www.custerbattles.com
Decision Strategies	www.decision-strategies.com
DFI International	www.dfi-intl.com
Diligence Middle East	www.diligencellc.com
Drum Cussac	www.drum-cussac.com
D S Vance Iraq	www.iraqitradecenter.com/companies/?inc=comvw&coid=162
DynCorp	www.dyncorp.com
E.G. & G. Services	www.egginc.com
EOD Technology	www.eodt.com
Erinys International	www.erinysinternational.com
Evergreen Helicopters	www.evergreenaviation.com
Genric	www.genric.co.uk
Global Impact	www.closeprotection.ws
Global Risk Strategies Ltd	www.globalrsl.com
Global Security Source	www.globalsecuritysource.com
Global Univision	www.globalunivision.com
Gormly	www.gormlyintl.com
Gray Security Securicor	www.graysecurity.com
Group4Falck A/S	www.group4falck.com
The Golan Group	www.grupogolan.com
Halo Group	www.halointernational.com
Hart Group	www.hartgrouplimited.com
Henderson Risk Ltd	www.hrlgroup.org/hrl/index.html
Hill and Associates Ltd	www.hill-assoc.com
HSS International	www.hikestalkshoot.com

ICP Group Ltd	www.icpgroup.ltd.uk
i-Defense	www.idefense.com
ISI	www.isiiraq.com/isisecurity.htm
International Charter Inc	www.icioregon.com
International Security Solutions	http://iss-internationalsecuritysolutions.com
International SOS	www.internationalsos.com/company
Janusian Security Risk Managem.	www.janusian.com
Kroll Security International Ltd	www.krollworldwide.com
L-3 Communications	www.l-3com.com
Logicon	www.logicon.com
Marine Risk Management	www.marinerisk.com
Meyer & Associates	www.meyerglobalforce.com
MidEast Security	www.globalic.net/security.htm
MPRI	www.mpri.com
MZM Inc	www.mzminc.com
New Korea Total Service	www.nkts.co.kr/eng/serv1/sub3.php
NFD	www.nfd designs.com
Northbridge	www.northbridgeservices.com
Olive Security Limited	www.olivesecurity.com
Pacific Architects and Engineers	www.paechl.com
Pilgrims Group	www.pilgrimgroup.co.uk/pss_home.html
Pistris	www.pistris.com
RamOPS Risk Management Group	www.ramops.com
Ronco Consulting Corporation	www.roncoconsulting.com/index.html
Rubicon International	www.rubicon-international.com/cases/sierra.htm
SAIC	www.saic.com
Saladin Security	www.saladin-security.com
SCG International Risk	www.scgonline.net
Sandline	www.sandline.com

Seven Pillars	www.7pillars.com
Southern Cross Security	www.southerncross-security.com
SOA	www.specialopsassociates.com
SOC-SMG	www.soc-smg.com
Steele Foundation	www.steelefoundation.com
Strategic Communications	www.bahavioural.com
Strategic Consulting International	www.sci2000.ws
Sumer International Security	www.thesandigroup.com
TASK International	www.task-int.com
THULE Global Security	www.brainstemdowry.com/work/thule/intro.html
Titan Corp	www.titan.com
Trident	www.trident3.com
Triple Canopy Inc	www.triplecanopy.com
Trojan Security International	www.trojansecurities.com
TRW	www.trw.com/systems_it/defense.html
Unity Resources	www.unityresourcesgroup.com/contact.htm
UPES	www.yomari.net/upes/gurkha.html
USA Environmental	http://usa-environmental.com
Vance International	www.vancesecurity.com
Vector Aerospace	www.vectoraerospace.ca
Vigilante	www.vigilante.com
Vinnell	www.vinnell.com
Wade-Boyd & Associates LLC	www.wade-boyd.com
Worldwide Language Resources	www.wwlr.com/home.htm

Annex II

International Conventions against Mercenarism

Three International Conventions against Mercenarism are in force:

1. The OAU Convention for the Elimination of Mercenarism in Africa
2. The 1977 Protocol 1 Additional to the Geneva Conventions
3. The UN International Convention against the Recruitment, Use, Financing, and Training of Mercenaries

The OAU Convention for the Elimination of Mercenarism in Africa

One attempt in international law to offer a definition was the 1972 Organization of African Unity (OAU) Convention for the Elimination of Mercenaries. This Convention never came into force but its main provisions were incorporated into the 1977 OAU Convention for the Elimination of Mercenarism in Africa,⁴⁷⁷ which legislates against mercenary activity, outlining responsibilities and obligations of member nation-states towards the prohibition, prevention, and judicial prosecution of mercenary-related military actions. It defines a mercenary as anyone who is not a national of the state against which his actions are directed, is employed, enrolls or links himself willingly to a person, group or organization whose aim is:

- a) to overthrow by force of arms or by any other means, the government of that member state of the OAU;
- b) to undermine the independence, territorial integrity or normal working institutions of the said state;
- c) to block by any means the activities of any liberation movement recognized by the OAU.

The 1977 Convention is useful in terms of defining the act of mercenarism rather than who a mercenary is. This is in the spirit of the need to regulate activities and, in turn, the consequences of these being used for a specific purpose. The definition has to be understood in the context in which it was developed, namely, the process of decolonization in Africa⁴⁷⁸ to which it is limited - although this regional limitation does carry the advantage that its framework legally affects any mercenary activity perpetrated in Africa, whatever its source. Established in the Convention is the much-criticized category of the general criminal responsibility of states and their representatives. Articles 5 and 6 elaborate on the content of the obligations of states parties to: eradicate mercenary activities in Africa; fortify extradition against refusal; and establish the duty to prosecute as the exception to such refusal.

⁴⁷⁷ *Organization of African Unity Convention for the Elimination of Mercenarism in Africa*. OAU; Doc. CM/817 (XXIX) Annex II Rev. 3, 1977.

⁴⁷⁸ Lilly, Damian. *Private Military Companies: Options for Regulation*. Green Paper Submission. International Alert. July 2002, p. 2; at www.international-alert.org

However, the Convention does not cover the activities of PMCs, nor does it include corporate criminal responsibility, which may emerge as a crucial aspect of controlling PMC activities. Applicability is not universal, but limited to member states within the OAU and to those member states that have signed and ratified the Convention. There is no real enforcement mechanism; instead the regime relies on regional compliance and local state decisions. Although in force since 1985, the Convention has rarely been enforced. Signatories such as Angola and Zaire who overtly hire mercenaries show that the Convention alone will not end the use of private armed forces.

The 1977 Protocol 1 Additional to the Geneva Conventions

Another case is Article 47 of the 1977 Protocol 1 Additional to the Geneva Conventions of 1949, said to constitute “the only universal international provision in force that contains a definition of mercenaries”.⁴⁷⁹ This Protocol does not legislate against mercenary activity, but acknowledges the existence and practice of such persons within warfare, and seeks to define their legal status and codify their standing within the context of International Humanitarian Law. Paragraph 1 excludes the mercenary from the category and rights of recognized combatants and prisoners of war. Paragraph 2 defines the cumulative and concurrent requirements that must be met in order to determine who is a mercenary and who is not. According to the latter, a mercenary:

- a) Is specifically recruited locally or abroad in order to fight in an armed conflict.
- b) Does, in fact, take a direct part in 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 territory controlled by a Party to the conflict.
- e) Is not a member of the armed forces of a Party to the conflict.
- 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.

Additional explanatory remarks highlight exceptions to the requirements:

Excluded from (a) are volunteers who enter service on a permanent or long-lasting basis in a foreign army, irrespective of whether as a purely individual enlistment (French Foreign Legion) or on arrangement made by national authorities (Swiss Guards of the Vatican, and Nepalese Gurkhas in India and Brunei).

Excluded from (b) are foreign advisors and military technicians even when their presence is motivated by financial gain. This distinction was included to recognize the very technical nature of modern weapons and support systems that may necessitate the presence of such persons for their operation and maintenance. “As long as these persons do not take any

⁴⁷⁹ *Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*. United Nations. General Assembly. Report A/54/326, p. 19.

direct part in hostilities, they are neither combatants nor mercenaries, but civilians who do not participate in combat”.⁴⁸⁰

Subparagraph (c) is centred on individual remuneration and parity in payment between mercenaries and nation-state combatants. The focus of this condition is directed against the “freelance” mercenary at the individual level. No detail is made against corporate payments that are in turn finalized in individual bank accounts in foreign countries.

Excluded from (e) are persons who have been formally enlisted into the armed forces of the nation-state that they are contracted to operating within.

All six requirements must be satisfied for the definition to be met. A failure to satisfy one requirement is sufficient to prevent the definition being met. This is also the fundamental weakness of the Protocol. Moreover, the definition is difficult to apply practically. It has rarely, if ever, been invoked in a legal case. It is worth noting, though, that it was carefully devised so as to reserve the right for states to use mercenaries. The criticisms that are made therefore are a point of fact rather than a deficiency in the definition *per se*.⁴⁸¹ Furthermore, as the date of ratification already indicates, the framework does not encompass the evolution of PMCs that occurred in the late 1980s and early 1990s. This is why a number of governments regard this definition as unworkable for practical purposes.⁴⁸²

The UN International Convention against the Recruitment, Use, Financing, and Training of Mercenaries

A further authority that defines “mercenary” is the UN International Convention against the Recruitment, Use, Financing, and Training of Mercenaries, adopted in 1989 by the General Assembly of the UN.⁴⁸³ The intent was to establish universal law beyond the definition contained in the 1977 Additional Protocol 1 by specifically legislating against mercenary activity. The document, containing 21 articles, sought to:

1. Reinforce the existing definition of a mercenary (Additional Protocol 1).
2. Establish and define offences under the Convention for the recruitment, use, financing, or training of mercenaries.
3. Establish and define mercenary actions.
4. Establish and define the role, responsibilities, and obligations of States.
5. Establish and assert the judicial responsibilities of States and referral of matters to the International Court of Justice if required.
6. Establish universal law after the thirtieth day following receipt of the twenty-second instrument of ratification or accession with the UN Secretary General.

⁴⁸⁰ International Committee of the Red Cross. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol 1), 8 June 1977, p. 5.

⁴⁸¹ Lilly, Damian. *Private Military Companies: Options for Regulation*. Green Paper Submission. International Alert. July 2002, p. 2. At www.international-alert.org

⁴⁸² Several countries, among them notably France, the UK, and the US. “The definitions contained within the Additional Protocol and the UN Convention are not applicable under the UK legal system. The UK government asserts that it would be very difficult to apply the UN Convention within its legal system and therefore there would be no advantage in acceding to it. The UK government does not support the current Convention and will not propose its accession until the document has been thoroughly redrafted”.

⁴⁸³ Resolution 44/341 of 4 December 1989.

The Convention does not impose a total ban on mercenarism; it only prohibits those activities aimed at overthrowing or undermining the constitutional order and territorial integrity of states. Thus, it does not prevent internationally recognized governments hiring outside assistance for their defense and protection. The underlying premises of the Convention, stated in its preamble, postulates awareness about the requirements of neutrality and state responsibility. Recruitment, financing and training of mercenaries is a violation of the basic principles of international law, notably: sovereign equality; political independence; the territorial integrity of states; and the right to the self-determination of peoples. The terms of the Convention seek to prohibit and, to that end, establish as punishable offences, the recruitment, use, financing and training of mercenaries. Moreover, it requires that the state, in which the alleged offender is found, must exercise universal criminal jurisdiction or extradite the alleged offender to another state.

Although the Convention has captured evolving developments in international law in relation to mercenary activity, it has been criticized.⁴⁸⁴ Its principal weakness is that it repeats and reinforces the deficiencies identified within the framework of the Additional Protocol. Currently, the scope of the Convention only extends to the country where the mercenary activity has taken place, which means that it is difficult for states to take measures against other states acting in breach of the Convention. There is also no monitoring or enforcement mechanism, so the application relies on individual member states. It does little to improve the legal confusion over private military actors in the international sphere, and has merely added a number of vague, almost impossible to prove, requirements that must all be met before an individual can be termed a mercenary and few consequences thereafter.⁴⁸⁵ Therefore, the measures are inadequate to combat the scourge of mercenaries and do not go far enough to curtail or regulate the activities of PMCs. The definition would not have included employees of the now defunct Executive Outcomes (EO) in Sierra Leone or Angola, nor anyone else working for a recognized government,⁴⁸⁶ probably including the so-called “White Legion” employed by Zaire’s Mobutu during his last days in power.⁴⁸⁷

The Convention entered into force 20 October 2001⁴⁸⁸ – just as the private military trade began being dominated by PMCs. Since it took more than a decade to enter into force and was ratified by only a minimal number of countries, the Convention is hardly up to the task in an era where powerful governments actively encourage the emergence of PMCs that would, in any event, fall outside the Convention’s definitional remit. The UN will have to update the Convention through additional protocols that bring greater definitional clarity and create a permanent monitoring and enforcement structure, probably best modelled on the UN Conventional Arms register.

Assessment

The approach of instituting an effective international legal definition of a mercenary has proven to be not viable. The definition contained within the Additional Protocol is

⁴⁸⁴ Abraham, G. “The Contemporary Legal Environment”, in Mills, G. & Strelau, J., eds., *The Privatization of Security in Africa*. South Africa: The South African Institute of International Affairs, March 1999, p. 98.

⁴⁸⁵ In fact, the consensus is that anyone who manages to get prosecuted under this definition deserves to be shot - and his lawyer with him, as Singer wrote, citing Best, George. *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts*, 1980. See: Singer, Peter W. “War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law”, Essay; *Columbia Journal of Transnational Law*; 2004, p. 531.

⁴⁸⁶ The “Green Paper”, § 8.

⁴⁸⁷ Faced with a growing rebellion, Mobutu hired a motley collection of poorly skilled white mercenaries, mostly Bosnian Serb war veterans, right-wing French radicals, and Ukrainian pilots - a force known as the “White Legion” which dissolved under limited pressure of a bigger rebel force. Boyne, Sean. “The White Legion: Mercenaries in Zaïre”, *Jane’s Intelligence Review* 9, №6, June 1997.

⁴⁸⁸ See: Doc. A/RES/44/34. Official Records of the UN General Assembly, Forty-fourth Session, Supplement №49 (A/44/49), p. 306.

unworkable, and the UN Convention does not improve it, but merely adds non-international conflict to the context of international legislation.

The Additional Protocol details the mandatory and concurrent prerequisites in order for a legal determination of a mercenary status. Its framework is outdated. The application of the Additional Protocol cannot definitively determine the status of the post-Cold War evolution of PMCs. PMCs therefore are flourishing and conducting international contract operations within a vacuum of effective and applicable international legislation that truly defines and establishes their international legitimacy. As the UN Special Rapporteur explained: "...the increasing tendency of mercenaries to hide behind modern private companies providing security, advice and military assistance may be due to the fact that international legislation has not taken account of new forms of mercenary activities". The Rapporteur points out further that "International legal instruments that characterize mercenary activities negatively do exist, but their configuration and classification leave something to be desired. In other words, they contain gaps, inaccuracies, technical defects and obsolete terms that allow overly broad or ambiguous interpretations to be made. Genuine mercenaries take advantage of these legal imperfections and gaps to avoid being classified as such".⁴⁸⁹

An international realm devoid of effective and constraining definitional legislation is beneficial to some parties. Moreover, the further maintenance of this status quo decidedly remains to the advantage of the individual nation and the PMC. This situation includes those Western governments who seek to exploit the opportunity to utilize selective PMCs for the discrete execution of contentious aspects of their national foreign policy as well as those nations who seek to contract PMCs for assistance in effecting their own integral national security.

A means to avoid the definitional morass associated with PMCs and mercenaries is to transfer the weight and emphasis of legislation from definition to legislation that effectively prohibits certain acts without the express permission of a political authority and then within a prescribed framework of accountability. As with most national forms of criminal and common law, persons are not defined by who they are, but rather by the actions that they conduct. The process of defining the act, not the actor, represents a fundamental paradigm shift from the actions of the UN Special Rapporteur on mercenaries. Thus, PMCs could formally be recognized as legitimate entities within the international realm, rather than as some contend "a necessary evil in out-of-area conflict management in the post-Cold War arena".⁴⁹⁰

⁴⁸⁹ *The Right of Peoples to Self-Determination and its Application to Peoples under Colonial or Alien Domination or Foreign Occupation*. Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, submitted by Mr. Enrique Bernales Ballesteros (Peru), Special Rapporteur pursuant to Commission resolution 1998/6. UN Economic and Social Council, Commission on Human Rights, 55th Session, item 5 of the provisional agenda. E/CN.4/1999/11, 13 January 1999, § 45 and § 48.

⁴⁹⁰ Howe, Herbert M. "African Mercenaries".

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Geneva Centre for the Democratic Control of Armed Forces (DCAF)

Established in October 2000 on the initiative of the Swiss government, the Geneva Centre for the Democratic Control of Armed Forces (DCAF) encourages and supports States and non-State governed institutions in their efforts to strengthen democratic and civilian control of armed and security forces, and promotes security sector reform conforming to democratic standards.

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