Privatisation of Security: The concept, its history and its contemporary application

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PRIVATISATION OF SECURITY: THE CONCEPT, ITS HISTORY AND ITS CONTEMPORARY APPLICATION

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Privatisation of Security: The Concept, its History and its Contemporary Application

By Dr Thomas Mandrup

Introduction
According to much of the academic literature, the nature of war changed dramatically in the last part of the twentieth century, especially after the end of the Cold War (Creveld, 1991) (Kaldor, 2007) (Münkler, 2005) (Jung, 2003) (Chesterman & Lehnardt, 2007) (Fleming, 2009). According to this logic there is a dichotomy between war as a social phenomenon and warfare as the domain of the state, as envisaged by the late Prussian military theorist, Carl von Clausewitz, in the shape of the “Trinitarian War” (Creveld, 1991). The lack of capacity on the part of predominately Third World states to control conflicts has led to low-intensity conflicts (LIC), which can be witnessed, for instance, in Uganda, the Democratic Republic of Congo, Colombia and Sri Lanka (O’Brien, 1998, p. 80). Since the end of the Cold War it has been common for weak state rulers with formal state legitimacy but not empirical legitimacy to have continued to enjoy international recognition because of international fears that they are the only barrier against a total collapse. Amongst other things this paved the way for an expansion of the market for private military and security companies (PMSC) such as the South African-based Executive Outcomes (EO) in the 1990s. However, the lack of state capacity led to a sub-contracting, willingly or unwillingly, of the state’s monopoly on the use of force to non-state actors, PMSCs and semi-state actors, like local militias, warlords, criminal gangs and vigilant groups, in an attempt to secure weak state leaders’ positions. In the competition for state control internationally recognised leaders have an advantage over their

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(2) Chris Dietrich has taken this argument even further by introducing the term “semi-parastatal” privatisation of war to describe, for instance, the previous Zimbabwean military involvement in the war in the DRC from 1998-2002, which to some extent also could be said about the troop contributions of some other states to the UN (Dietrich, 1999). In the Zimbabwean case, a national army was “lent” out to another state in return for resources in, it could be argued, direct competition with “private” entrepreneurs.
non-state rivals because they can seek military help outside their countries with the agreement of the international community and in accordance with international law.

The aim of this study is to fill a significant gap in the existing literature on the role of non-state actors, ranging from rebels and criminal gangs at one extreme to the corporate security industry at the other. As part of the general privatisation of the security sector in the western world, combined with the US-led war on terror, non-state actors have increasingly been tied to the foreign policy priorities of the dominant western military powers. Iraq and Afghanistan are the examples often used, and are well-described in other chapters in this book. In sub-Saharan Africa, as in many fragile states around the world, this picture is blurred, and it is often difficult to make clear distinctions between public and private, or between illegal and legal etc., (non)-state actors.

The End of the Cold War and the Role of Non-state actors

The activities of mercenary and private security contractors have led, both historically and at the present day, to fierce academic and public debate. As Sarah Percy argues, the anti-mercenary discourse has two basic elements. One focuses on the fact that mercenaries use force outside what is considered to be legitimate, authoritative control, that is, popes, princes, the rulers of sovereign states, states in the contemporary international system and international organisations like the UN. The second element focuses on the argument that mercenaries are morally objectionable because they do not fight for a cause, such as religious beliefs, ideology, ethnicity and what is generally considered the common good; they fight for themselves and for money (Percy, 2007, p. 1). This ethical objection has largely remained unchanged from the Middle Ages to the present day, and still forms a large part of the debate. The norm regards the legitimate use of violence as being the domain of the modern state, which as a natural consequence, delegitimises non-state providers of security. Legitimacy is, therefore, tied to the formal state.

The international debate concerning the role of PMSCs has been split primarily into two segments. One argues that multinational PMSCs are part of a neo-colonial wave that is taking control over weak and collapsed states. Others argue that PMCs provide a relatively cheap tool for weak states to regain control over their territories and populations, which in the long run will lead to increased independence. The advantage is that when the PMC’s services are no longer needed, the state can terminate the
contract. The experience of the 1990s showed that the PMCs left when a contract was terminated, which is something that speaks in favour of the companies. Experience, from Iraq especially, is that the US government’s contracts with private security contractors have been plagued by accusations of corruption and mismanagement, and especially by a lack of civilian oversight and regulation. The Iraqi experience, however, also shows that it has become increasingly difficult to distinguish the multinational actors and the PMC operatives, because they often constitute different branches of the same multinational company working on large-scale contracts with the US or Iraqi government. For the US government, the PMCs function as a relatively cheap force multiplier, while at the same time they give the government the ability to sub-contract the responsibility and blame when operations are criticised. That is, they provide the US government with a level of deniability.

There is a whole palette of different sources of security outside the state. In fact, it can be argued that it is often the exception for the state to exercise a full monopoly of the legitimate use of force. This has to be seen as the ideal, depending on the nature of the state,3 and as being located at the one end of an extreme, the other extreme representing a complete lack of state monopoly. No states exercise a full monopoly, but some states come close. However, if one just thinks of the situation in, for instance, Afghanistan, Iraq or the Sudan, it is clear that these states themselves lack the capacity to exercise effective control and therefore often sub-contract this responsibility to other actors, for example, PMCs, the UN, local militias or even elements within its armed forces. The other side of this, of course, is rebel or liberation movements, criminal gangs, vigilantism and other local militias which have been established without government approval, or even as a defence against the state or to topple the state. Non-state actors therefore play a central and important role in state-making.

**A brief history of state-making**

Charles Tilly once argued that there is an analogy between war and state-making, and when this process is less successful, it may also involve organised crime. His further claim was that wars are the makers of states, and that the mercantile capitalism we witnessed in Renaissance Europe and state-making reinforced each other (Tilly, 1985, p. 185). A relevant question

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(3) The state often constitutes the primary source of instability and insecurity amongst the civilian population.
here is whether this is still the case in a number of fragile, failed and even collapsed states, in particular in the African context. What kind of what Tilly terms organised criminal groupings or individuals play a role in these wars and, therefore, their state-making? And what does the term “criminal” include and mean in reality because to a large extent it cuts across the divide between the “public” and the “private” spheres? Phillip Lancaster argues that the first signs of a weak state are always “the rich” in a society installing walls, guards and barbed wire to protect themselves from the poor, that is, when walls are erected between the public and privates sphere of social life (Lancaster, 2009). The distinction between legitimate and illegitimate forces has developed throughout history. In history, a force such as the modern paramilitaries or mercenaries was not considered illegitimate to begin with because it often served as the prince's most important armed force in time of war. In peacetime, these forces may be pirates, bandits etc., while during hostilities they were transformed into a “legitimate” force. Their way of performing the act did not differ much between times of peace and war, since they still robbed, raped, burned, looted etc. Paramilitary militias thus often exercise this dual role of being the ally and, therefore, the representative of the state while at the same time challenging and actually undermining the state. The question of legitimacy is consequently seen from the outside as being tied to the forces that represent the internationally recognised government, while illegitimacy is tied to those that challenge the formal state. The users of “violence” can, therefore, be placed on a continuum between what are considered legitimate sources at one extreme and illegitimate sources at the other, that is, government versus banditry and piracy. However, this distinction is, of course, too narrow because monarchs in time of war often made use of what are here described as illegitimate sources of violence, often through a system of indirect rule. A distinct feature of weak or weakening states is that they willingly and unwillingly sub-contract the state monopoly of the use of violence to non-state entities.4

The (degree of) use of violence

The use of violence has always entailed the ability to use force to achieve specific goals. The ideal of the state's monopoly on the use of violence has evolved exactly because of this ability because violence means to destroy.

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(4) This is not to say that, for instance, the increased use of private security contractors, i.e. corporate mercenaries, in the US and UK is necessarily a sign of weakness. There is a substantial difference between strong states sub-contracting certain security tasks to non-state actors and weak states doing so based on a need and as an attempt to survive.
By having this monopoly, the state has rules and norms for how and when this destructive power may be used. This was decided because the state was seen as the source of legitimate power, and it was assumed that it would not use indiscriminate violence as opposed to random non-state sources of (in-)security. The latter is seen to be using violence to terrorise the population in an attempt to extract as many resources as possible in as little time as possible. This is, of course, a gross oversimplification for the sake of argument because more often than not the state and/or its agents are the main perpetrators of random acts of violence. In fact history shows that the widespread perception of private armies, that is, periodically illegitimate sources of violence, whose *modus operandi* was considered more violent by nature towards the civilian population than state violence. This assumption is questioned by Sarah Percy in her work on the development of the anti-mercenary norm. The point is that private armies tended to be more professional than “national” armies, which often consisted of drafted farmers etc. (Percy, 2007). Whether this finding could be attributed to contemporary militias is, of course, questionable, but it indicates that the idea that the non-state sources of security are violent and undisciplined by nature is often the result of a social construct. The judicial state, or at least its representatives, often seems to be a source of insecurity and a perpetrator of crimes against its citizens, and not their protector. The distinction between the rules of force, as opposed to the rule of law, comes to mind, where the latter has often been tied to the guiding principles of the “civilised” state, being rule-based.

The term “protection” consequently has different meanings, the positive meaning being the source of protection by a stronger, good-hearted friend from something or someone evil, and at the other extreme being forced to buy protection from a powerful strong man who is himself a source of insecurity. This means that the sources of protection often have a dual role as both the source of violence and protection from it, the difference being what it costs to be protected. Tilly argues that the state tends to be less expensive, though historically monarchs found it increasingly expensive to finance their wars (Tilly, 1985). This meant that monarchs increasingly had to tax the population to finance their war efforts. To be able to wage wars, to provide protection etc., the sources of violence thus needed access to taxation, land for food production, access to resources, namely bankers, etc. In that respect the difference between legitimate and illegitimate sources of security consequently become more blurred, especially when, as Tilly argues, the attempt is less successful in state-making, for example, monopolising the
use of large-scale violence. The question is who can legitimately use force in the name of what was, in the European context, shaped to a large extent by the creation of strong states and, therefore, the creation of professional national armies. Placed on a continuum of users of violence, the actors in war should be seen as consisting of one extreme, while bandits, mercenaries and other illegitimate users of violence should be placed at the other end of the continuum, with of legitimate state leaders and armies (Tilly, 1985, p. 173). However, as Percy has correctly pointed out, this idea of judicial states as the legitimate users of violence was constructed over time, which also led to the anti-mercenary norm mentioned above being created (Percy, 2007). The state as we know it today is in itself a construct of time, and it should be understood as a changeable reality.

The role and scope of the book
In placing its focus on the privatisation of security, this book addresses a highly relevant and topical theme which often creates strong feelings and emotions. The reason for this is that it questions some dominant discourses in international politics, such as the ideal of the state monopoly on the use of physical force and the sole right of military personal to apply lethal force. What happens when the state subcontracts the use of lethal force to private actors? Should this be regulated, and if so how and by whom? In what ways do we distinguish between private and state-controlled sources of security? Is it possible to draw clear boundaries between these two concepts of security and show how this is related to the concept of the modern state?

In taking up these questions, the chapters of the book discuss theoretical, normative and political developments regarding the privatisation and non-state provision of security. The book focuses on the consequences of the rise of private military and security services since the early 1990s. Since then, international developments suggest a transformation of the basis for the provision of security. In its attempt to analyse these issues and developments, the book deals with four overarching themes: 1. Norms on the use of mercenaries: history and reactions; 2. Regulation? The current legal framework and future means of regulation; 3. Privatisation and the consequences for modern soldiering; and 4. Different dimensions of privatisation: state–corporate partnerships, civil–military relations, multinational privatisation vs. small scale privatisation etc.

In thematic terms the topics in the book cover a range of different aspects of privatisation to illustrate that the concept of privatised security is not new.
and that it has multiple facets and expressions that go far beyond the well-known examples of Blackwater/XI and Executive Outcomes. However, the central theme which ties the different notions together is organised around the concept of the state, its monopoly of violence and the consequences when it (un-)willingly sub-contracts this monopoly to non-state security providers. Can and should states control, prohibit and/or regulate private contractors? Can modern defence forces function without the use of these private contractors? Is the provision of private security an essentially new phenomenon? Does it make sense to distinguish between different types of non-state sources of security and the ways in which they are related to the formal institution of the state? And finally, what are the consequences of the privatisation for the individual soldier’s attachment to the state? These questions represent the main issues with which the different chapters in the book deal and which the introductory and concluding chapter will tie together. In this way, the book will offer a detailed account of the potential consequences of the privatisation of security for the very nature of the concept of the modern state.

This book is not built upon a rigid theoretical model and does not try to endorse any single explanation. Instead, it is an attempt to map out different aspects and expressions of non-state security in the 21st century. The chapters demonstrate how non-state sources of security developed and expressed themselves both in opposition to the state and also often as an integrated part of state delivery. Some of the cases deal with attempts to regulate the market-driven security industry, while others describe the existence of alternative types of governance in the margins of fragile or even collapsed states. It is the hope of the editor that this book can contribute to a better understanding of the broad spectrum of non-state sources of security, while at the same time be an inspiration for further research in the field.
Chapter 1

Private Security Providers, Past and Future

By Professor Gunnar Lind⁵

During the last two decades private military corporations have reappeared in the western world. Their employees have been deployed in increasing numbers in warlike security operations, as well as in combat. This development has raised questions concerning the *jus in bello*, notably the behaviour of such fighters towards enemies, civilians and neutrals as seen through the lens of international humanitarian law. Other concerns have been raised regarding *control* in the broad sense, the relationship between the corporations and those who pay for their services. Ultimately private military corporations have come to be seen as a challenge to the fundamental idea of the state’s monopoly of legitimate violence (Ortiz, 2010).

Such concerns are not likely to stop the use of private military corporations. Customer satisfaction has varied, but it seems that these companies quite often offer solutions which are attractive with regard to military competence, organizational flexibility, overall cost, or a combination of these. If this is the case, demand will not die away. This makes it more important to understand what is going on.

A well founded understanding is not possible from the still very limited contemporary experience alone, but more can be gained from European history. Private military corporations are not new. Until the early nineteenth century the European world played host to a whole menagerie of private corporations performing military services. A closer inspection of this variety may serve as a platform for a better understanding of private military corporations and their likely future.

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A military typology

It is a defining aspect of private military corporations that they operate for profit and that their employees are there to earn money. The role of money in soldiering has traditionally attracted much interest, witness such terms as ‘mercenary’, ‘professional’ and even ‘soldier’, all meaning ‘working for pay’. Terms such as ‘mercenary’ or ‘professional’ are, however, impossible to employ in a scholarly context without further definition. They are neither useless nor meaningless, but they have too many uses, too many meanings. I will not attempt such a definition, as it seems to me that my analysis is better served by focussing on other variables than pay or profit. These other variables are ‘stateness’ and ‘militariness’.

Stateness is the strength of the link to a state, that is, the employing state if the corporations are hired by a state. The home state of the military company, or of companies or organizations buying their services, may also be relevant. Such links exist on both the individual and the corporate levels. Money plays a considerable role in stateness, but is not its sole determinant. The money link has many forms: paying, profiting from the state, profiting from war, even paying the state. Other obvious links are formed by law, on both the corporate and individual levels: rights and duties to serve, to defend, to own arms, to be preferentially employed. On the individual level important links may be formed by dyadic relationships, such as command, oath, contract, lordship or patronage, and by collective relationships like religious identities, national identities or honour.

Militariness observed at the individual level can be described using Pierre Bourdieu’s terminology as the importance of the military or warrior aspect in the social habitus of the persons involved (Bourdieu, 1977). In some societies this comes close to professionalization. In other societies ‘warrior status’ might be a better synonym. Some main elements contributing to militariness are training level, time spent on war purposes – per day, per year, per life – and personal identification, often expressed in symbolic uses of dress. Militariness tends to have a positive correlation with fighting qualities, but no strong coupling, as self-taught part-time fighters may be very efficient under their chosen circumstances. When observed at the level of the corporation or other organization, militariness concerns the military share of the activities and the military competence of structure, staff and equipment, compared with best contemporary practice. On both the individual and corporate levels, militariness has both a cultural and a fighting power side.
Chapter 1

Figure 1. Some contemporary military types arranged according to their estimated position on the militariness and stateness scales.

Figure 1 arranges some contemporary military types along the stateness and militariness scales. At the top of both scales is the bureaucratic soldier. This is my term, not for the military bureaucrat, but for the military analogue to the civilian bureaucrat as defined by Max Weber: a state servant governed by explicit rules, placed in a hierarchy, educated for the task, paid and pensioned according to a specific scale, not mixing private capital with public funds or private business with public function, and so on. The bureaucratic soldier is a professional soldier in so far as core personnel, and often all personnel, are paid volunteers with long military careers. The term ‘bureaucratic’ is better than ‘professional’, however, because it applies to the organization as well as the personnel, and because drafted soldiers can be fitted into the bottom of the bureaucratic military without changing its character.

The bureaucratic military dominates the western world, qualitatively, quantitatively and conceptually. This has been the case for a long time. Major exceptions have occurred either along the diagonal of the graph, with reduced militariness as well as stateness, or they have been placed to the right of the diagonal, closely connected to states but lower on the militariness scale, such as the militia armies of some neutral European countries. Private military corporations break this pattern in belonging to the left of the diagonal. This is very unusual in a world deeply shaped by the power of states and explains much of the uneasiness that these companies have provoked.
During the late medieval and early modern period, many military types could be found to the left of the diagonal (figure 2). Such types in fact dominated the military scene. Of the many types scoring higher in militariness than stateness, some can be called feudal, namely people who went to war to serve their lord or their lord’s lord. Others were commercial: a contract of limited service for pay was the foundation, even if less limited links might develop and were often simulated. These commercial variants can all be considered private military corporations.

Organizations resembling the bureaucratic military could be found already in the Middle Ages, mainly as guard units. They were far from important until well into the sixteenth century. Both feudal and commercial military types declined quite markedly during the seventeenth century. This process generally implied the nationalization of private military units, leading to the predominance of the bureaucratic military from the eighteenth century. Until this happened, private military corporations of many different kinds offer a rich field for posing questions. How did these companies function, especially regarding *jus in bello* (as this was understood at the time) and control? And why did they disappear? I will explore these themes with a number of examples. They have been chosen using two criteria: they represent very high levels of militariness according to the standards of the era, and they also represent those forms which were closest to being commercial operations on a market in each age, but excluding types that were closer to being either feudal in character or state institutions.
I will focus solely on land forces. There were important private armed corporations operating at sea, notably the privateers and the armed trading companies, such as the East and West India companies chartered by many states. Both types were important sources of armed force, and both had complex connections with states. But as businesses they did not resemble anything found today. Privateers were expected to fund their activities from the profits made on booty captured from the enemy, armed trading companies from trading profits. In practice, state resources and regulations were often used to support such operations. Giving an East India company monopoly trading rights also transferred money from the population to the company. Still, the business models of privateers and armed trading companies make them less relevant for comparison with anything in existence now.

**Condottieri (c. 1300-1550)**

The Italian *condottieri* – literally contractors – of the fourteenth, fifteenth and early sixteenth centuries were the leaders of armed companies. The bands varied enormously in size but were never very large. Two or three thousand was considered huge. Leadership involved both command and business. Contractors were often landed aristocracy, even minor princes. They had the capital required, especially for the formation of a new company. Established companies might acquire new leaders through inheritance or co-optation, but the death of a leader was a threat to their survival. If a company should survive periods of slack demand, the key was access to territories controlled by the commander, either inherited lands or lands acquired as a more or less voluntary award for successful campaigns. This did also work in favour of leaders with land.

The condottieri are notorious, partly due to the influence of critical intellectuals among their contemporaries, such as Machiavelli and Guicciardini. The critics could in fact point to a large number of deplorable situations: leaders or troops refusing to fight, commanders being corrupted by the enemy, and even changing sides, and the frequent plundering of friendly or neutral districts. Quite a few condottieri founded ruling dynasties, either as feudal lords more or less independent of their employer or by seizing power in the state employing them. In short, control problems were considerable.

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(6) This section in general: Bayley, 1961; Mallett, 1974; Mallett and Hale, 1984; Mallett, 1991.
The condotta forces were well equipped and individually well trained according to the standards of the time. When they did fight, discipline in battle and military skill was generally impeccable. In short, militariness was high. This was one reason why Italian states continued to employ mercenary bands for centuries. But they were also short on alternatives. The ruling elites were mainly urban and not very warlike in lifestyle and outlook. Without the elites, others were not likely to fight either. Individuals attracted to a military career became members of the bands instead.

Many factors contributed to making the stateness of condottieri and their companies low, despite the fact that they fought in the name of states and were paid by states. One was short-term contracts. During the fifteenth century, typical contract periods ranged from a few months (a campaign) to a year or more, with mutual expectations of a much longer relationship. This was, however, still based on the recurrent renewal of quite short-term contracts, which made the connection fluid. Short-term contracts were the norm despite their obvious drawbacks because the costs were very high. Even the rich Italian states could not afford many men for long. Another factor contributing to a low level of control was the scarcity of alternative forms of military power. This not only made the military market a seller’s market, pushing up costs, it also made employers dependent on the contractors in wartime and left them with little with which to oppose them if they caused trouble. A third factor was the weakness of the control mechanisms available. High-ranking representatives of the customer were attached to the hired military establishments with wide-ranging authority over strategy, pay and relations with the civilian population, but it was often difficult to find individuals capable of filling this role or to provide them with sufficient means of enforcement. A fourth was the ease with which contractors moved around within Italy from Naples to the Alps. Cultural coherence and high political fragmentation made it easier for a contractor to find alternative employment.

Stateness was not equally low everywhere. Some states had almost continuous trouble, such as Florence. Others had mostly good results, like Venice. The Venetian example seems to indicate that control problems were most of all connected with the lack of alternatives. The navy of the Venetian republic employed a large number of fighting men, protected the seat of government and linked it to a quasi-colonial empire of overseas possessions. The Venetians were also more determined than most to have a large militia of real military value. Embedded in such a larger military structure, even
the condottiere could be handled; but to ensure that, the Venetians were also particularly careful in designing a system of controls centring on the *provveditore*, politically appointed civilian commissaries keeping watch on the hired commanders (Mallett and Hale, 1984: 153-180, 486-87).

During the last century of the system, political power in Italy was consolidated. Fewer, larger political units served by several military companies made for much better control over the contractors and their men. The development of long-term service arrangements based on the regular renewal of contracts pulled in the same direction. The prospect of long-term employment made it much more rewarding for the military companies to serve their employers well (Mallett, 1991: 35-36). So the main trend during these two centuries was towards reduced control problems, partly due to the increasing stateness of the military companies.

The ultimate disappearance of the Italian condotta as a specific social institution was not due to systemic failure but to the overturning of the Italian political landscape during the sixteenth century wars between France and the Habsburgs. Italian professionals did not disappear but became an element in larger military establishments, mostly dominated by foreign soldiers, and often governed from foreign political centres.

**The Landsknecht (c. 1500-1550)**

Military contractors resembling the *condottieri* were also found north of the Alps. The first large commercial military bands in Italy in fact consisted of foreigners. After the middle of the fifteenth century, German and Swiss companies played an increasingly prominent role all over Europe, including Italy. Together with the more tightly run army of the Spanish state, Swiss and Germans set the standard for military organization in the decades after 1500.

Of these, the German Landsknechts were numerically most important and most commercial in character. Attempts by the German Emperor to impose a common law on these soldiers in order to tie them to the Empire and reduce friction with others had some success. But this did not transform the units – the Fehnlin or Regiment – into state organizations, neither of

(7) This section in general: Frauenholz, 1936; Frauenholz, 1937; Baumann, 1994; Baumann, 1998; Glete, 2002.
the empire nor of the many lords inside and outside the German Reich who hired them. They were still private military corporations.

Compared with the Italian companies, far more of these soldiers were infantry. They were more numerous and more proletarian. While the Italians (and the Reiter, the professional cavalry in Germany) were associated with the traditional military aristocracy in style and social pretensions, the Landsknechts famously adopted behaviour and dress codes indicating their rejection of normal standards. They established themselves as a clearly recognizable and partly organized new social group (Baumann, 1994: Ch. 5-6).

Control problems abounded. Complaints about desertion, mutinies and abuse of civilians were numerous. This may not exclusively originate in the cultural codes of the soldiery. We often hear about a lack of pay leading to disobedience or transgressions. The princes of northern Europe may have been even less able to acquit their financial burdens than the states of Renaissance Italy. But it seems that, while there were many control problems at the individual level, problems at the company level were rare. The leaders of German military companies did not take power in states and were not likely to be corrupted by the enemy. Seen from the point of view of the states, this made control problems less significant than they tended to be in Italy.

These differences are easiest to explain as the results of dissimilarities not in the companies but in their environments. First of all, lordship was a more efficient source of fighting forces north of the Alps. Warring rulers could count on noble followers – and their followers – as well as on urban and rural militias. These forces were generally less efficient tools for victory than the professionals of the private military corporations. But they were not negligible either, whether in numbers or in quality. Private military corporations were definitely not the only kind of troops relevant in war. In addition, the scale of things was greater north of the Alps than in Italy. Warring rulers had access to a wider market of commercial military suppliers and generally employed several in wartime. Compared to the Italian case, the market was more favourable for the buyer.

The attempts to regulate the Landsknecht phenomenon in accordance with Imperial law had wide repercussions. It established the soldiery as a separate estate in society, integrating men originating from all the traditional estates. It regulated and thereby condoned practices, mainly concerning violence and sexuality, which were not legal in the outside world. And it
contributed to the growing regularity and complexity of the military units as proto-bureaucratic organizations by specifying a number of specific roles. The development of a military hierarchy was recorded as well as pushed along by another kind of normative texts, the Ämterbucher (Book of Offices). These texts, published on their own or as a part of broader treatises on war, described a military hierarchy of growing complexity and standardization and laid down the duties of everybody from the top of the hierarchy to the bottom.

Transforming the soldiery into an estate with special laws and law courts made it imperative to know who was a soldier and who was not. This increased the importance of the formalities surrounding entering and leaving a military company. At the core of the ceremonies lay the oath and release from the oath. Oaths of service or obedience were, of course, ubiquitous in early modern society, but the soldiery elevated the oath as high as it could. The military laws specified the exact oath that every single man must make to the ruler that the military corporation served – not to the leader of the corporation. This did not produce automatic obedience and unswerving loyalty, no matter what the words said. But it did establish the legitimacy of harsh military justice, putting pressure on the soldiers and creating a direct link between soldiery and the warring lord, thus also putting pressure on the military contractors. In both ways the direct oath contributed to better control.

The German military system had wide influence because so many employed German soldiers. Many lords found it advantageous to reissue the German articles in their own name, changing little. This spread and developed German ideas about the social role of the professional soldiery, the internal structure of the companies, and the links between soldiers, company leaders and states.

The German enterpriser (c. 1550-1650)

The Landsknecht type became the point of departure for a gradual transformation of the professional military during the era of the Thirty Years’ War. The opportunities and pressures of that great conflict established what the scholar Fritz Redlich called The German Military Enterpriser and his Work Force (Redlich, 1964). Through direct participation or through the return

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(8) This section: Frauenholz, 1938; Frauenholz, 1939; Redlich, 1959; Redlich, 1964; Lind, 1994; Murdoch, 2001; Glete, 2002.
of fighters from this first European war, developments in Germany had wide influence, especially in the British kingdoms, France and the Nordic kingdoms. These developments were not radically new, but the war transformed established forms. Important changes were produced by the long duration of the war. It endowed armies as well as many military units with a quasi-permanence unknown before. The large size of the armies deployed and the intense pressure for results during so many years of warfare also stimulated the development of military organizations.

The armies of this war were notorious for their treatment of the population. Extortion enriched commanders as well as common soldiers, and the struggle for bare necessities pitched soldiers against peasants in a parallel war, no matter what their political allegiance. Religious difference degraded the conquered populations in the eyes of their occupiers (Asche and Schindling, 2002). But the German-style military contractors – German, Czech, Scots, Swedish, Danish and so on – were only rarely anything but obedient and efficient tools in the hands of their employers. Military contractors might change their lord, and they might even change sides, especially as the war dragged on and the religious aspect declined in importance; but such changes followed a choreography which mostly prevented a breach of trust. Common soldiers might desert, and often changed their loyalty voluntarily or after capture. Mutinies were not uncommon either, mainly as targeted responses to threats of dismissal or a lack of pay. But the contractor-based armies were reliable and disciplined instruments of war, even if the behaviour of individuals was neither reliable nor disciplined in other respects, especially among the enlisted men.

In short, seen from the point of view of the states employing contractors, control was better than a century before and quite good as a whole on the points which mattered most to the states. The major exception was in money matters. Contemporaries were convinced that officers cheated on the contracts, mainly by falsifying troop numbers, and graft and embezzlement indeed seems to have been common.

The background for the relatively high level of control was a military market where supply was high. This was not due to the different types of feudal alternatives. They were in decline, and multiple attempts to replace them with some form of conscript soldier had only moderate impact. The two Nordic kingdoms were the only powers of any significance to draft soldiers in large numbers from their populations. But within the enterprise system, customers
were less dependent on the enterprisers than before. First, great enterprisers such as Wallenstein were an exception. The enterpriser was generally a colonel or Rittmeister (captain of horse), so a warring state had contracts with a number of suppliers running into two or even three figures. As the war wore on it became ever easier to find new enterprisers, as so many officers gained experience. Secondly, enlisted men could now be systematically produced through drill. This was an innovation originating in the leading permanent state armies of the age, the Dutch, Spanish and Swedish, but could easily be adopted by contractors. The business of war became more proletarian than before, opening up easier supplies from many sources.

The importance of alternatives on the supply side is demonstrated by the counterexample of Wallenstein. His gigantic enterprise provided the bulk of the army of the Emperor. This lasted only for two short periods, 1626-30 and 1632-34. Still Wallenstein established himself as a prince of the Empire and acted with increasing disregard for the wishes of his employer, both as a commander and in diplomacy. The Emperor only gained control of his army from the military monopolist through a secret operation involving Wallenstein’s murder. This was completely different from the normal case where the contractors were many.

Employers also gained increasing control through the increasing stateness of their military enterprises. Contracts became more standardized, sophisticated and enforceable. Accounting became more sophisticated, and the unit of account tended to move down to the level of smaller units or even individuals. This was stimulated by the complexities produced when billeting and other deliveries in kind replaced part of a contractual payment in cash. Military law saw further developments through the influence of the Dutch, Swedish and other revisions of the German tradition.

Stateness increased most of all because of the long duration of the war. Companies and regiments often lived long as a consequence. Rulers in Germany and elsewhere increasingly regarded it as wise to keep considerable numbers in service, even in times of peace. Long life began to produce permanence. Even if permanence was mainly unplanned, long life transformed regiments and companies into less independent units. The longer the life of the unit, the more the original personnel had to be replaced. A common clause in contracts stipulated that colonels could choose the first set of officers, but replacements were appointed by the lord. The same applied when the contractor himself had to be replaced. The passage of time
also enmeshed soldiers, officers and contractors in credit relations with the state. They were never paid in full, and the outstanding amount due to them attached them to their employer. Long life did not alter the business nature of the regiment from an economic point of view, but still changed it as an organization into a partly state-run entity. Hybrid forms also developed when rulers provided capital for the military enterprise, whether in money, conscripts or rights of billeting during the recruiting process. If a lord could do this, he had the freedom to transform any loyal and experienced officer into a military enterpriser of a more dependent kind.

In sum, the great war of the early seventeenth century produced a clear increase in state control with military contractors, due partly to a changing balance on the market and partly to increasing stateness. Stateness was stimulated by initiatives directed at the reduction of control problems in fields like conscription, military law and accounting. The most important stimulus, however, seems to have been the de facto permanence of many military units. The long-term, stable employment of military corporations in state service produced a partial nationalization of their organization, despite continuation of the enterprise in its economic aspects.

**The nationalized regiment (c. 1650-1750)**

The regiments of the first half of the seventeenth century became the almost universal basis for European armies during the next century. In many ways they are the basis for the armies existing today. The century 1650-1750 saw a continuation of the nationalization process. The end point was a type close to the bureaucratic military of the nineteenth century. Some commercial rudiments remained, but a high point of stateness had been reached. The transformation of the original businesses into fully state-controlled organizations enabled armies to expand as national institutions resting on conscription during the nineteenth and twentieth centuries.

Nationalization had several aspects. One of these was de-internationalization. Military migrants did not disappear, but all states developed a strong national core, especially in the officer corps. The enterprise economy was reduced. A typical step was the abolition of the regimental economy in favour of company economies of lesser scope. The possibility of making a profit on the pay of the enlisted men was regulated as a system of permitted

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vacancies and deductions. Beginnings were made in transforming the officers into state servants of the bureaucratic mould. Increasing the separation between the private economy of the officers and their job was one aspect of this. Other typical steps were the establishment of cadet corps and other formal schools and the creation of formal minimum criteria for receiving a commission or a promotion. However, examination requirements were still a thing of the future in most branches of military service.

This was a part of an expanding system of rules, enshrined in a growing corpus of military regulations. In this age such things as uniforms, command words, manoeuvres and armament were standardized for whole armies. Nothing symbolizes this development as well as the uniform, which had made a rare appearance before 1650, but becomes absolutely standard during the century after that (Roche, 1994: 221-258; Lind, 2010). These aspects of the increase in stateness produced an increase in certain aspects of militariness. Soldier and civilian were now separated more clearly than the old warrior classes had been separated from an often well-armed general population in earlier centuries.

This process resulted in the abandonment of private military corporations as a source of military force on land and in Europe, not on purpose, but as an unintended consequence of multiple steps. Traces of the earlier commercial structure were abundant, but the military units did not make contracts on a market any more. What still existed were administrative routines enabling some officials to profit from marginal savings. The military units had no real commercial character.

Control from above was strong within this budding bureaucratic military. The obedience of army commanders and officers was above discussion, whether in the field or in barracks. Continuous attempts at installing and improving discipline did not prevent frequent desertions or the not infrequent abuse of civilians in wartime. At the level of the individual soldier, control was still an issue, but it was less of an issue than before. Protecting civilians, even enemy civilians, and their property became a prominent feature of the practice of war of regular and regularly paid professional armies during the eighteenth century (Best, 1980). Even if it was far from universally successful, the fact that this policy from above did have appreciable results at all testifies to a much higher degree of control with the enlisted men than at any time before.
Privatisation of Security: The Concept, its History and its Contemporary Application

The contemporary private military corporation

The basic configuration of contemporary private military corporations resembles that of the earliest of the historical examples, the condottieri or the Landsknecht Fenlin: private corporations in charge of their own inner organization, paid in cash for specific services and numbers of men, employing men hired on the labour market for cash (but often bound to the corporation through personal networks), using a mixture of their own and customer-supplied equipment, and engaged on short-term contracts which are often renewed.

Militariness is very high seen from the cultural point of view. However, the fighting capabilities of good state-armed forces are much higher than those of the private companies, even on a man-for-man basis, because of advantages in equipment and sometimes training. Even if private military corporations seem to compare well with third-world fighting forces, they do not occupy the top rank in this measure of militariness as the old corporations did.

It is obvious that the private military corporations of today are heavily influenced by the existence of large state armies organized along bureaucratic principles. Militariness is imported by the corporations from state armies. Core personnel are found there. Training protocols, operation manuals and other practices are copied from them. The equipment used is developed for state army use and may be on loan from state armies.

Less obvious – or too obvious to be visible – are the influences of the general political and social setting. Current military corporations reflect the current state of free-market enterprise and secular, egalitarian societies. They operate according to current contract law, corporate law and labour law. These laws, created for corporations that are active on quite different markets, govern the relations of the military corporations with the states that employ them and with their own employees. At the core of all these laws lies the contract: the definition of mutual obligations between contracting parties of different kinds. Sometimes the law imposes standard obligations which are added to all contracts of a certain kind, for example, by defining rights for employees. But the main object of the laws is to delineate how to define, and thereby

(10) A selection of the most recent and very extensive literature: Kinsey, 2006; Jäger and Kümmel, 2007; Alexandra; Baker and Caparini, 2008; Chesterman and Fisher, 2009; Heinze and Steele, 2009; Mikhael; Kellen and Ben-Ari, 2009; Simons, 2009; Carmola, 2010; Krahmann, 2010; Ortiz, 2010; Patterson, 2010.
limit, obligations. A modern contract is by default an agreement under the fluid conditions of the free market. It is limited in time and scope to what is exactly defined by the text: it does not implicitly establish, or attempt to establish, a permanent personal relationship as agreements of service did in the early modern world.

A large number of scholarly works reflect this situation by dealing with the arguments for the legal regulation of private militaries, the practicalities of such regulation and its possible scope and contents (Beyani and Lilly, 2001; Chesterman and Lehnardt, 2007; Sheehy et al., 2008; Chesterman and Fisher, 2009; Quigly, 2009; Carmola, 2010). Legal regulation is a tool that has been successfully employed in many other cases to fine-tune the limits of economic freedom, contract law and labour conditions in segments of the economy ranging from gas installations to medicine. Legal regulation will create a kind of default stateness, especially if it involves such procedures as licensing and inspection. But beyond what is expressly regulated, the fundamental freedom of the private corporation and the private citizen still exists. Such default stateness is quite different from the default stateness created by early modern lordship.

Outside of the realm of law, dominant notions about corporations and individuals determine what people expect and do. For example, authority needs authorization: explicit agreement and specification is needed if ranking representatives of the customer are to issue orders to the employees of private corporations. The representatives do not possess the automatic right to command by virtue of their high rank in society. Alternatively the employees of the corporations are civilians by default, even when fighting, because belonging to the state military has become the defining characteristic of the soldier.

Stateness is then low, lower than in early modern parallel cases. This follows from being private in the contemporary world, which both legally and culturally is founded on a clear separation between private and public. Some informal links of understanding and loyalty are likely to be created by personal contacts and by the movement of people from state armies to the corporations. However, such links are low or medium level and do not link the rank and file of the military corporations to the agents of the state, even less to the head of state.
When stateness is low, it is not surprising that control issues arise. The issues most in public view have concerned the behaviour of individual employees with regard to the customer and to third parties. The most controversial issues have concerned behaviour towards civilians, an area where both law and sensitivities have changed a lot since the early modern era. Performance-related control issues, such as disobedience and dereliction of duty, are also reported at the level of the individual. The corporations are not disobedient, but there is clearly a tension surrounding expectations and performance, which may produce open conflicts over the interpretation of contracts. There are similar issues regarding price and accountability. It seems that all these issues closely resemble conflicts between customers and contractors in other fields of the market economy, conflicts stemming from miscalculations, overselling, unforeseen changes in conditions or unexpressed expectations.

It is not easy to determine how severe the problems are. Most evidence is anecdotal, and some of the contributions come from people who are critical of private military corporations for reasons of political principle. It is unlikely that these control issues are massive in the areas that are most important for customer satisfaction, otherwise the direct customers, mainly state armies and other organizations with considerable political clout, would be visibly struggling to get rid of contractors. This is an argument of limited range, however. Control problems which are less important to the direct customer – such as auditing of payment and deliveries or relations with civilians and other third parties – will not necessarily lessen demand.

This fits well with the fact that corporations deliver only a fraction of the military power available to Western nations, and that these nations have an obvious alternative solution to using private military corporations – in the long term, that is, and depending on political decisions which may not be readily forthcoming. In the short term things can be different. It has been shown that the number of issues concerning the behaviour of corporations and their employees is closely related to the ‘demand-capability gap’ – the amount of pressure on the state-armed forces that are buying services (Petersohn, 2008). The greater the need for the services of corporations, the more difficult it is to implement control measures over operations, services delivered and money paid. High need is also most likely under conditions where the fog of war obscures what contractors are actually doing. An overly extended military – like the US Army during certain stages of the second
war in Iraq – will have trouble deciding what rules ought and might be implemented, or even in implementing any rules.

The fundamental logic is the same as in the early modern age: the status of the market is fundamental to the performance of private military corporations. The supply side of the current market is not unfavourable to the customers in organizational terms. There are a number of private suppliers and well-tested alternative ways of acquiring soldiers. Supply is much more restricted when it comes to numbers of men, however, both on the private side and on the part of the state armies. This can easily produce scenarios where customers cannot get the conditions they would like to have, especially if demand is growing. This does not resemble the market for truck transport, where a huge industry supplies a large number of private customers and where an increase in demand from one customer, even the largest, will be of marginal importance. Increases in demand for the services of military corporations can easily produce a need for a huge increase in supply in an inelastic market.

The old private military and the future of the new
The old and the new private military corporations share a number of characteristics. Some of these produce an eerie resemblance between debates today and half a millennium ago. On the one hand, private military corporations are able to deliver military power in relevant ways, now as formerly. Militariness is high at both the corporate and individual levels. On the other hand, there are always control issues: financial control is a problem due to the special type of services delivered and the even more special character of the setting. Tactical control may be difficult at the interface between the organization of the supplier and that of the customer. Discipline when dealing with civilians and other third parties tends to be low. It may be concluded that issues regarding *jus in bello* and control are practically unavoidable when they recur so regularly in so many settings. This applies especially to issues at the level of the individual private warrior, and most of all to behaviour toward civilians and other third parties. Historically, only bureaucratic armies have shown anything resembling the discipline demanded by contemporary international humanitarian law.

At the level of the corporation, customer satisfaction varies considerably, now as formerly. The main variable determining these variations seems to be the conditions of the market. The more alternatives customers have the better service they receive from private military corporations. In the
past, a lack of alternative supplies of military force sometimes placed states completely at the mercy of their military contractors. Contractors even became sovereign rulers. Market conditions make for easy control in the contemporary Western world, where even the largest companies are dwarfed by state military establishments, and states certainly know the recipe for making armies themselves without subcontracting; but even if contractors are unlikely to grasp political power, states can easily find themselves abused in a seller’s market even today, at least in the short term. In the middle and longer terms, contractors do have an obvious interest in staying on good terms with their customers and preserving a good reputation in the market.

There are also important differences between the early modern age and today. On a militariness scale, modern military corporations and their personnel are highly placed if we look at the cultural aspects, but they are not the most powerful fighting force in the field, like the old companies were. Even if they fielded much larger forces than they do, modern private military corporations would not be able to threaten Western states on their own.

The most important differences, however, are not caused by changes in the character of the companies or the market for military force: what has really changed is the setting. States and societies are very different from their early modern counterparts. An obvious point is expectations. Changed expectations are obvious in areas such as behaviour towards civilians, accounting discipline, or corruption. Events which would not have attracted attention five centuries ago are now seen as important. What we observe is the effect of the experience of the civilian and military branches of the modern state. Rules are created, modified and implemented by the bureaucratic and political instruments of the modern state with an efficiency far beyond anything found before 1800. These changes have lowered the threshold for what is tolerable.

The same changes have made modern states much better financial performers than their predecessors. Lack of payment for military services – a ubiquitous source of friction and failing control in the past – is not very likely to appear today, at least as long as Western states are the customers. The most important changes are in relations between people. We have another gamut of social rules, both personal and impersonal. Even those that share a name and a core set of assumptions, such as contract or law, have changed in important ways.
One core area of change is the meaning of service. There is a world of difference between modern contract law and labour law on one hand, oath, allegiance, favours and grace on the other. No modern boss really resembles an early modern lord; no modern employee is a servant in the early modern sense. The relevant interpersonal links today are more clearly described and circumscribed, easier to terminate, less emotional.

A more circumscribed meaning of service combines with a much more radical concept of being private. This makes it possible for the stateness of modern private military corporations to be low in a way unknown to the early modern era. Early modern rulers made formal and informal direct links with the employees of military corporations and created military law directing the acts of individuals within the corporations they employed. They also expected loyalty outside the scope of employment and service from persons who were owed years of back pay. In short, they were lords as well as contracting parties. Private military corporations today are part of civil society – a concept foreign to early modern Europe. They must be linked to the state within the impersonal regime of the legal organization of society. Contracts cannot be overruled by personal links and personal arbitrariness from above, as was the case in the old society.

The rule of law also limits how modern companies and their personnel can be controlled from above. The idea of the rule of law was far from unknown in the early modern age, but the practical interpretation was different, and both lords of states and military commanders possessed what we would regard as considerable scope for arbitrary punishments for disobedience.

It can thus be argued that private military corporations do not fit as well into western society today as they did five centuries ago because it is difficult to adapt the general rules and practices governing private corporations in a free market economy and to adapt private individuals in democratic states to the extreme conditions of war. Special laws and forms of organization have been developed in modern society for war, but they are seen as closely associated with the stateness of state armed forces and do not extend readily to private corporations. Modern societies are less flexible in this respect than their early modern counterparts, which were able to encapsulate market transactions in a shell of honour, faithful service, lordship, etc.

Seen from a general perspective, early modern private military corporations were a resounding success. They supplanted most other forms of military
organization all over Europe and became the root from which all modern armies grew. Their modern counterparts are not likely to be so successful. As just suggested, the differences between early modern and current conditions are not all in favour of their success. These differences raise the possibility that private military corporations will go under in a stormy sea of scandal and ideological conflict. A quite likely path, however, will be moderate success: successful adaptation to certain niches permanently left by the state forces.

This adaptation will imply stronger regulation in the name of responsibility and efficiency. In the long run, states will find it necessary to interfere in companies because they are sufficiently pleased with them to desire to keep them as partners. They will demand specific accounting procedures to ease contract writing, payment and auditing. They will write new law clarifying the legal conditions of employees and the intricacies of the chain of command. They will act to save companies from bankruptcy if they are deemed too useful to go under and will easily become owners as a result. They will demand influence over leader selection, on both the procedural and personal levels, to ensure performance and cooperation. Legal and bureaucratic tools will be developed transforming private military corporations and their employees into something new: registered, licensed, inspected companies of a particular kind, like corporations operating in other exceptional sectors of the economy. The more successful private military corporations will be, the longer will they live in a symbiotic relationship with states, and the more will such interference accumulate. As this happened every time early modern military corporations had a long and successful life in the service of states, so this is also the most likely course of development today.

In short, private military corporations may be impossible to fit in. Western society is a less suitable environment today than five centuries ago. Otherwise, long-term success will increase the stateness of the companies. Their private character will be reduced and reinterpreted to prevent glitches, improve cooperation and ensure the continued existence of valued partners, just as happened the last time such companies were common. Ultimately really successful private military corporations are likely to be transformed into state organizations, as has always happened before.
Bibliography


Chapter 2

Principles for the Legal Regulation of PMSCs and Prospects for the new UN Convention

By Maria Nebolsina

An international industry of private military and security companies with an estimated annual turnover of US$120 billion is especially active currently in conflict areas like Afghanistan and Iraq. In 2008-2009 the Afghan government introduced a series of regulations which limited the private security industry to 39 selected companies and denounced other companies as “unauthorised armed groupings”. The legal regulations of the Afghan authorities evoked serious domestic and international debates regarding the criteria and scope of the permitted and prohibited activities of such companies. The gradual withdrawal of the international coalition from Iraq also led to changes to the rules under which PMSCs (private military and security contractors) operate in Iraq. Some of the functions performed earlier by the military now went into the private field.

Currently two schemes for regulating PMSCs are being debated. One scheme proposes self-regulation of the industry and is supported by the so-called “Swiss initiative”. The other scheme has been drawn up by the United Nations with the aim of introducing legally binding obligations within the new UN Convention on PMSCs. The new convention has a set of underlying principles which will be discussed individually in the paper. Currently the draft convention is being elaborated by a group of international experts for presentation to the international community.

The aim of this chapter is to consider the advantages and disadvantages of all existing approaches to regulating PMSCs at the national and international levels.

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Legal Regulation of the Military Presence in Afghanistan and Iraq

After the change of power in the US and the advent of the Barack Obama administration, the situation concerning international operations in Iraq and Afghanistan has changed. President Obama proposed a new strategy known as AfPak for the wider Central Asian region, a program encompassing the territories both of Afghanistan and Pakistan. It is worth noting that the governments of these two states welcomed the strategy of the new US Administration since it incorporated measures for the social and economic as well as social and political development of the region, along with counterterrorism strategies on the Afghan-Pakistan borders (Sotnikov, 2009). Experienced diplomat Richard Holbrooke was appointed a special envoy of the US President in Pakistan and Afghanistan, in which capacity he visited regional countries such as Pakistan, Afghanistan and India together with Admiral Michael Mullen, Head of the Joint Chiefs of Staff, in the spring of 2009. At the annual Conference on Security held in Munich in February 2009 R. Holbrooke underlined that “it would be more difficult to establish peace and security in Afghanistan rather than in Iraq, and a new strategy supported by all neighbouring countries, first of all by Pakistan, is required”.

It should be emphasized that in recent years the situation in the AfPak region has grown seriously aggravated: conflicts between anti-government groups and the International Security Assistance Force have escalated, and the number of victims of violence has grown among both the civilian population and the international military forces. Debates concerning the actions of the International Coalition in Afghanistan are increasingly having to address issues of the legitimacy and legal status of the international presence in the country.

Regulatory principles of the International Security Assistance Force in Afghanistan

Operation “Enduring Freedom” was launched in Afghanistan in 2001 pursuant to UN Security Council Resolution 1368 of 12 September 2001. UN SC Resolution 1373 of 28 September 2001 approved the Counterterrorism Committee composed of fifteen members of the UN Security Council. The first stage of Operation Enduring Freedom started on 7 October 2001 with the US Air Force’s attack on Taliban positions (Hushebn, 2009).

A whole range of key documents was adopted in December 2001. On 5 December 2005 the Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions
was adopted in Bonn under UN auspices (UNCHR, 2001). This document defined mechanisms to restore the legitimate political regime, as well as a procedure for creating an interim administration in the territory of Afghanistan. Subsequently, UNSC Resolution 1386 was adopted on 20 December 2001 relating to the deployment of a NATO military mission to maintain security in Afghanistan within the framework of Enduring Freedom called ISAF or International Security Assistance Force, which was aimed at assisting the Interim Authority in consolidating security in Kabul and in the surrounding areas under UN auspices. In addition, the Resolution encouraged the countries neighbouring the Islamic Republic of Afghanistan and other UN Member States to provide ISAF with “such necessary assistance as may be requested, including extension of over-flight and transit clearances” as well as “to render aid to the Afghan Interim Authority in the establishment and training of the new Afghan security and armed forces” (UNSC, 2001 December 20th).

Enduring Freedom covers intelligence activity, the identification of targets for attacks and negotiations with certain Taliban groupings so that they refrain from supporting Al-Qaeda. Besides, NATO holds regular meetings of the ISAF and Enduring Freedom operational commanders-in-chief “to gain maximum synergy between these two operations” (NATO, 2006).

The UN Security Council extends the ISAF mandate in Afghanistan annually for periods of twelve months. Initially, ISAF was formed of the national army units of seventeen Member States totalling four thousand servicemen (Shilo, 2008: pp. 7). However, the US military units preserved their own chain of command within Enduring Freedom without joining ISAF. As of December 2009, the number of international security forces had grown to approximately 71,000 personnel representing 42 countries (NATO, 2009). Currently, at least 17,000 servicemen have been transferred to Afghanistan from Iraq where the operation is in the completion phase, thus constituting about a half the total additional forces of 34,000 personnel people, the total increase of the international contingent in Afghanistan. In December 2009 when B. Obama announced withdrawal of the mission from Afghanistan by the year 2014 additional 30,000 troops were transferred from Iraq to Afghanistan in order “to seize the initiative” and “break the Taliban’s momentum” (Remarks made by B. Obama at West Point on the Way Forward in Afghanistan and Pakistan, December 01, 2009, http://www.whitehouse.gov/the-press-office/remarks-president-address-nation-way-forward-afghanistan-and-pakistan). It should be noted
that the European allies of the US have also provided additional military personnel for the mission purposes.

However, the status of the international forces differs in Iraq and Afghanistan. The status and legal aspects of the presence of the international contingents in Afghanistan are regulated by the Military Technical Agreement of 4 January 2002 between the International Security Assistance Force headed by the United Kingdom of Great Britain and Northern Ireland and the Interim Administration of Afghanistan (International Security Assistance Force, 2002: Article IV). The Agreement specifies the general provisions regarding the ISAF presence in Afghanistan and contains Annexes concerning ISAF’s status, area of responsibility and location of military bases.

Despite the fact that for seven years already the Agreement has been the principal document regulating ISAF legal operational issues in Afghanistan, it still has a great number of loopholes, some of which were intentionally left to create “a grey legal zone” to facilitate the activities of the international forces.

Consistent with the Agreement, ISAF is mandated to assist the Interim Administration of Afghanistan in maintaining security in the area of responsibility. Accordingly, ISAF has been granted unlimited freedom of movement throughout the entire territory of Afghanistan and within its air space, and the ISAF Commander-in-Chief is authorized to take whatever unimpeded actions he deems necessary and appropriate without requesting any additional permission, including taking decisions to use military force to protect ISAF and its mission (ibid.).

ISAF is subject to exclusive jurisdiction of the respective national elements in respect of any criminal or disciplinary offences which may be committed by them in the territory of Afghanistan. Besides, ISAF personnel are immune from personal arrest or detention by the Afghan authorities and it cannot be surrendered to an international tribunal without the express consent of the contributing nation (ibid.: Annex A, chapter 1).

The procedure for regulating ISAF’s presence beyond the Kabul area of responsibility remains unclear. It is worth mentioning that currently only about 6,000 of the 71,000-strong ISAF force are stationed in the Kabul area. Others are dispersed elsewhere in the country, with a majority of 36,000 located in the southern provinces, and another 18,000 in the eastern prov-
inces bordering Pakistan. In fact, the Agreement provides ISAF with the right of unimpeded movement throughout the territory of Afghanistan but still fails to define the format of ISAF responsibility except for a general commitment to respect the laws of Afghanistan. Initially, the mission of the international security forces was permitted to operate only within a clearly defined territory within Afghanistan, namely the Kabul region. Subsequently, UNSC Resolution 1510 of 13 March 2003 extended the ISAF mandate and gave it the task of maintaining security in the regions outside Kabul and its environs.

Although the mission was extended to cover a broader region, no new agreement with the Afghan authorities followed with regard to the status of the coalition troops in case of actions beyond the Kabul area. The lack of regulations concerning ISAF personnel deployed outside the initially approved area of responsibility increases the risk of local groups committing offences against ISAF personnel. It also raises the possibility that ISAF personnel who are formally not liable to Afghan laws commit illegal acts that go unpunished.

Under the Agreement, ISAF is not obliged to license or register the military or civil equipment it employs, has the right to use airports and roads without paying duties, charges and other disbursements and is also exempt from taxes on the tangible movable property imported or acquired in Afghanistan for use by the international forces (ibid.). In addition, the Agreement allows ISAF to import and export free of duty equipment, food and supplies that are indispensable for the mission, provided they are assigned for service use by the international forces (ibid.: chapter 4). Besides, for the purposes of the mission the Interim Administration provides ISAF gratis with the facilities required for their task implementation and assists in obtaining utilities (power, water supply etc.) at the lowest rate (Ibid.: chapter 3).

An item of the Agreement stipulating that “ISAF and its personnel are not liable for any damages to civilian or government property caused by any activity pursuant to the ISAF task implementation” appears to be rather contradictory. “Claims for compensation for any damage or injury inflicted upon the personnel or property of the Interim Administration or upon private persons or their property will be submitted by ISAF through the Interim Administration” (ibid.). What the specific responsibility of ISAF would be if it were faced with a claim for compensation for the damage inflicted, even indirectly through the Interim Administration, is not regulated either. It
is noteworthy that the Agreement allows ISAF to hire local personnel for the mission's use who themselves are liable to local legislation. However, “the employed local personnel will enjoy immunity from legal process in respect of all words said or written by them as well as in respect of all actions performed by them in their official capacity” (ibid.: Chapter 4).

It remains uncertain what the meaning of “all actions performed by them in their official capacity” is and whether the article of the Agreement establishing the lack of responsibility of ISAF personnel for “damage inflicted to civilian or government property caused by any activity pursuant to the ISAF task implementation” covers the local personnel (ibid.: chapter 6). In essence, chapter 6, which defines the jurisdiction and applicability of this Agreement, responds to the question affirmatively, as “protection measures laid down in this document are applied to ISAF and its personnel as well as to forces supporting ISAF and its entire personnel” (ibid.).

It can thus be concluded that the Military Technical Agreement between ISAF and the Interim Administration of Afghanistan contains a great number of loopholes, which, in specific cases, expose the actual personnel of the international forces operating in Afghanistan to various risks and, in most cases, make the local population vulnerable as well.

**New Procedure for regulating the activities of private military and security companies in Afghanistan**

The international military presence in Afghanistan is not limited to the official military representatives of various countries sent to the region to fulfil their mission and render assistance to the Interim Administration of Afghanistan in maintaining security. Numerous private military and security companies operating in the territory of the Islamic Republic of Afghanistan are assigned to assist the local administration, along with official military formations, in maintaining security within the international mission's mandate. According to estimates, until recently the number of such major security companies in the region (with over five hundred personnel) reached sixty, employing up to 28,000 personnel in total (United Nations General Assembly, 2008). However the need to regulate and control the activities of private military companies has become urgent.

In April 2009 the UN International Working Group on military mercenaries visited Kabul, where meetings of UN experts were held with the representatives of the Afghan government, the Ministries of Foreign Affairs, Defence
and the Interior and members of parliament. In the course of the mission, unique facts and documents were collected on the activities of private military and security companies in the territory of Afghanistan. During the visit, the experts of the Working Group also gathered information on the measures and mechanisms that regulate the activities of such companies (United Nations, 2009).

Of most interest in this context is a document prepared by an Inter-Agency Commission created by several Afghan ministries and adopted by the Ministry of Interior in February 2008: “Procedure for regulating activities of private military and security companies (PMSCs) in the territory of Afghanistan.” As a result of the application of new regulations enacted by this document, the number of officially registered non-governmental military and security companies in Afghanistan was limited to 39 in 2008 and to 52 in 2009 (Human Rights Council, 2009). The number of employees in such companies is also now limited to no more than five hundred personnel in each. It should be noted that the authorities made several “registered” exclusions for certain companies for which this restriction was waived. The total number of employees of registered companies was estimated at between 24,000 and 25,000 by the beginning of 2009.

The regulation is designed:

- To create procedures for the initial licensing of the activities of private military and security companies, licensed prolongation of their activities in the territory of Afghanistan and the formation of mechanisms of supervision and control;
- To specify the responsibility of private military and security companies in accordance with the laws of Afghanistan;
- To prevent the transformation of illegal armed units into private military and security companies;
- To ensure greater transparency and establish mechanisms for the regular accountability of private military and security companies;
- To consolidate and observe the working principles of companies’ personnel so that they do not break the law or the International Declaration of Human Rights.

Pursuant to the document on PMSC regulation, the Ministry of Interior of Afghanistan is the sole authorized body to regulate and control the activities of private military and security companies (ibid., Article 3). It is laid down
that private military and security companies should pass through a licensing procedure to implement their activities (ibid.: Article 4). Activities allowed to private military and security companies in accordance with the document's provisions should aim at guaranteeing the security of the population, providing shipping and transportation services, guaranteeing the safety of goods and equipment and training security personnel (ibid.).

At the same time a range of activities which private military and security companies have no right to exercise is defined in the document (they can be effected only by government departments, such as the Ministry of Defence and Ministry of Interior), i.e.:

- To safeguard state borders;
- To ensure the security of government buildings, property and agencies;
- To provide for the security of roads and highways;
- To protect religious relics (“holy places”);
- To guard sites of historical, as well as forests and mineral deposits.

In addition, the Supreme Coordination Council (for PMSCs) was created to regulate PMSC activities with the aim of governing state relations with private military and security companies and to issue licenses to affect their activities. This body is composed of various representatives of the executive power. The Council Director is the Interior Minister, and also included are the deputy ministers for defence, foreign affairs, finance, trade and industry, as well as the heads of the National Directorate of Security, the Criminal Investigation Department, the Counterterrorism Department, the Intelligence Department of the Ministry of Interior, an authorized representative of the National Security Council of the Islamic Republic of Afghanistan and the head of the Afghanistan Investment Support Agency (ibid.: Article 8).

The fact that the Supreme Coordination Council is made up of representatives of various branches of the executive is not accidental. The aim of the Afghan authorities here is to reduce the risk of corruption and prevent a situation in which control over the activities of private military and security companies is concentrated on one agency.

The Supreme Coordination Council is committed to checking the documentation of private military and security companies, and to issuing licenses for carrying weapons, ammunition, armoured cars etc. It was noted that the personnel of a private company engaged in providing security services
might not exceed five hundred personnel unless the Council of Ministers
dems it necessary to increase their numbers (ibid.: Article 31). Violation
of this provision without the agreement of the authorities attracts penalties
against the company in accordance with Afghan laws.

In addition, the Supreme Coordination Council has the right to decline
applications from those companies which fail to meet the requirements
with respect to rendering security services (ibid.: Article 9). Moreover, the
licences of such companies can be annulled when they cease their activities
(ibid.). However, the document fails to specify whether the activities of pri-
vate military and security companie cease definitely when their licences are
withdrawn and whether such companies can repeatedly apply for a licence,
and, if they can, after what period of time it is possible to do so. In practice
there are frequent cases of sanctioned companies changing their names
and locations, splitting into different parts and registering again. This, for
example, is what a major company called Howar did when the Ministry of
Interior attempted to dissolve it.

The activities of private military and security companies is therefore subject
to mandatory licensing (ibid.: Article 11). A great quantity of documents
have be submitted to this end (ibid.: Article 13). In reality, the volume of
documentation, including personnel questionnaires, demanded by the
Afghan authorities and received from a number of companies amount to
many thousands of pages. The absence of any criminal past and facts con-
cerning any offences having been committed by a director, the employees
and leaders of operations is one compulsory condition both for foreign and
local military companies, among others required before a licence can be
issued (ibid.: Article 14). In addition, a restriction has been introduced to
hire only employees of at least 25 years of age and over for private military
and security companies who have a graduate certificate from a military
training school or have undertaken short-term training courses. For Af-
ganistan, where over half of the population is under fifteen years of age
and where many school-age boys participate at armed hostilities, this is a
significant restriction.

A licence is granted to private military and security companies for a period
of one year and should be renewed one month prior to the expiry date to
enable services to be continued legally.
According to the new rules, weapons and military transport should also
be licenced. Moreover, the personnel of a private military and security
company cannot carry weapons beyond the boundaries of the territories
specified in the licence (ibid.: Articles 16, 17). However, provision of the
document appears contradictory where it determines that private military
and security companies are forbidden to purchase weapons from unauthor-
ized sources. Otherwise the procedure provides no definition of who should
be recognized as legally authorized and who not. In light of this, it can be
assumed that this regulation is not likely to impede the chances of weapons
being bought on “the black market”, thus increasing illegal arms trafficking.
It may be recalled that, according to the estimates of various UN agencies,
in Afghanistan there are up to twenty million submachine guns and up to
ten million mines of different types, mostly held randomly both legally and
illegally. In addition, the probability that people already possessing weapons
of unidentified origin being employed is great, in particular former soldiers
or police officers, despite the fact that the regulations of the Ministry of In-
terior of Afghanistan prohibit PMSCs to recruit officers, sergeants, soldiers
and other officials currently serving the Ministry of Defence, Ministry of
Interior or other state departments.

The PMSC Regulating Procedure envisages the types of activity prohibited
to private military and security companies. Specifically, private military
and security companies and their staff are not permitted “to participate
in political activity, to sponsor political parties or their candidates, to hire
officers, sergeants, soldiers and other official persons employed by the
Ministry of Defence, Ministry of Interior or other state departments, etc.”
(Islamic Republic of Afghanistan, Ministry of Interior, 2008: Article 21). If
the company violates these provisions, its licence can be withdrawn and its
activity stopped (ibid.: Article 32).

It should be noted that the Regulations forbid “the representatives of legisla-
tive, executive and judicial power as well as their relatives to be the owner
or partner of a private military and security company” (ibid.: Article 20).
However, this provision was violated several times in 2008-2009 when a
few companies owned by the relatives of President Hamid Karzai and of
the Minister of Defence of Afghanistan applied for licences. Submission of
quarterly reporting on the activities to the Supreme Coordination Council
is another mandatory condition for the functioning of private military and
security companies (ibid.: Article 26).
Generally, the procedure for regulating the activities of private military and security companies contains many such provisions, which, though intended to exercise control functions, in reality bureaucratize the process of obtaining a licence and creating an environment for corruption to flourish among officials. The existence of a great majority of control-auditing bodies is invariably fraught with the growth of corruption, followed by attempts by many private companies to circumvent the law. In this context the problem of emerging non-legitimate private military and security companies in the territory of Afghanistan is becoming acute, along with the growth of corruption in the country whose legal regime is still at the formative stage. In practical terms, it is feasible that the process of company licencing be regulated and that those who implement it be controlled, although this would become highly improbable if corruption were to affect power at all levels of activity.

In particular, this problem was raised by President Karzai at the 45th Munich Conference on Security in February 2009. He emphasized that the fight against corruption is being waged at all levels of state governance, though the challenge remains extremely serious (Karzai, 2009). In addition, Karzai welcomed the new US strategy on the unification of regions in Afghanistan and Pakistan into a single strategic objective and the development of a new approach common to both countries regarding the problem of counterterrorism. Karzai also stated that because of the military threat posed by the terrorists, the response to their actions should be military as well. Therefore he applauded the US decision to boost its military presence in Afghanistan. The leader of Afghanistan expressed a hope that military participation by the international coalition will allow counter-penetration of terrorists in border regions (ibid.).

At the Munich Conference on Security, Special Envoy of the US President in Pakistan and Afghanistan Richard Holbrooke affirmed that NATO remains the mechanism capable of coordinating operations in the region (Munich Conference on Security, 2009). However, in the view of many analysts, it is impossible to restore order in Afghanistan using only military means.

According to the data of the International Council on Security and Development, in 2008 the Taliban controlled 18% more territory in various provinces of Afghanistan compared to 2007. The death toll among the civilian population also grew between those years. Based on data from the UN Annual Report on Protection of Civilians in Armed Conflict for 2008, the death toll
among the Afghan civilian population increased in 2008 almost by 30% in comparison with 2007, rising from 1523 deaths to 2118. Most of the deaths occurred in the southern and south-eastern regions of Afghanistan but there were also victims in the northern and north-western areas (United Nations Assistance Mission to Afghanistan, 2008). Destabilization is therefore extending from the southern provinces to the northern and north-western regions (International Council on Security and Development, 2008).

Therefore, after an eleven-year period of the presence of foreign troops in the territory of Afghanistan, the problem of terrorism remains as pressing and acute as it was eleven years ago. Drug trafficking continues to flourish, making the fight against corruption a highly complicated task. The Afghan population cannot enjoy a full-fledged peaceful life, and the international security forces are themselves subject to periodic terrorist attacks.

Regulating the presence of the international military forces in Iraq

The situation in Iraq is similarly far from being peaceful. But here, too, the US Administration has revised its policy and changed the terms of the military presence in Iraq. In this context it should be recalled that UN Resolution 1511, which was adopted by the Security Council on 16 October 2003, sanctioned the creation of multinational forces in Iraq. In accordance with this decision, the multinational forces had to ensure the security of the UN mission on rendering assistance to Iraq and to the Interim Administration bodies. The UN Security Council has revised and prolonged the mandate of the international forces in Iraq by adopting resolutions on an annual basis. At the end of 2005 the first parliamentary elections took place in Iraq, which the Shiite forces won.

Of prime importance in recent years has been the “Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During their Temporary Presence in Iraq”, signed in November 2008 by US Ambassador to Iraq Ryan Crocker and Iraqi Foreign Minister Hoshyar Zebari (Crocker and Zebari, 2008). This document came into force on 1 January 2009 and was to be valid for the following three years till the end of 2011.

This Agreement specifies the terms of US troop deployment in Iraq after the mandate for the presence of the coalition troops in the country expired on 31 December 2008 in accordance with UN Security Council Resolution 1483.
Henceforth, the new Agreement designates the deadline for the presence of the military contingent, after which the troops should be withdrawn.

The key provisions of this document focus on the following. The USA recognizes the sovereign right of the Government of Iraq to demand the full withdrawal of US troops at any time, while the US has the right to withdraw troops from Iraq ahead of schedule.

However, pursuant to the provisions of the Agreement, US troops should be withdrawn from the territory of Iraq no later than 31 December (Ibid.). The Agreement also stipulates that before 30 June 2009 the combat troops of the US Armed Forces should leave Iraqi cities, villages and their surrounding areas and be redeployed to specially negotiated locations, leaving the Iraqi forces to take over full responsibility for security (Ibid.: Article 45).

In contrast to the Agreement on interim mechanisms regulating the activities of international forces in Afghanistan, pending the restoration of permanently functioning government institutions in Iraq this Agreement envisages the establishment of a special body, the Joint Military Operations Coordination Committee (JMOCC) (Ibid.: Article 4). The Agreement also lays down that the US armed forces will be called to Iraq to assist the Government of Iraq in maintaining security, including cooperation in the fight against Al Qaeda and other terrorist groups, illegal formations and radical elements of the former regime’s supporters (Ibid.). The document states that all such military operations should be conducted with the consent of the Government of Iraq, be controlled by the Iraqi authorities and thus coordinated by the Joint Committee (Ibid.).

During such operations members of the US armed forces and civilians should refrain from any actions contradicting the Agreement’s provisions and should be obliged to respect the laws, customs, traditions and regulations of Iraq. According to the Agreement, responsibility for observing this provision is placed on the USA (Ibid.:Article 3).

According to the provisions of the Agreement, all buildings, constructions and equipment in the area of deployment of the armed forces belong to Iraq. In the event of US troops withdrawing, all buildings, weapons etc. should be returned to the Government of Iraq. Iraqi property has been included in two rosters. The return of property from the first list begins at the moment when the Agreement comes into effect. The return of property in the second list
was to start not later than 30 June 2009, i.e. the date when the withdrawal of troops begins from cities, villages and population centres. However, the Government of Iraq can allow US forces to use specific required premises with the aim of implementing the Agreement (Ibid.: Article 5).

Any erection, reconstruction or maintenance of buildings and territories in the zone of the companies' responsibility should be coordinated by the US with the Government of Iraq. The Agreement provides that the US bear all expenses related to the maintenance or modernization of such structures. The Agreement also stipulates that buildings, constructions and other property used by the US forces should be returned to the Government of Iraq without any accruals or financial liabilities (Ibid.: Article 5). Furthermore, the return of property is accepted prior to expiry of the duration of the Agreement or in cases when there is no longer a need for such property. Iraqi property should be returned to the Government of Iraq without debts or financial liabilities (Ibid.).

With regard to technical support of activities of the US forces by private security companies, the Agreement authorizes the creation of companies within the zone of responsibility to render services to members of the US contingent. Such services can include military postal office, financing facilities, medical services, broadcasting services etc., activities that do not require permission. However, if the services listed above are beyond the zone of responsibility of the international forces, they are regulated by Iraqi legislation. Such services should be accessible to members of the military and civilian contingent, while the US authorities should not tolerate abusive practices. These service companies are exempt from taxation, duties and charges, and their activities are regulated by US legislation. With respect to official messages sent through the military mail, the Agreement relieves them from inspection, disclosure or confiscation by the Iraqi authorities, with the exclusion of unofficial messages, which can be inspected (Ibid.: Article 9).

In accordance with the Agreement, the US forces are allowed to deploy and store defence equipment in the territory of their responsibility, though such equipment cannot include any weapons of mass destruction (chemical, nuclear, radiological, biological weapons, as well as wastes of such weapons) (Ibid.: Article 7).
As regards transportation vehicles, technology and aircraft, the Agreement envisages free movement regarding the technology and transport of US forces in Iraq, their free importation into the territory of Iraq and their exportation as well as redeployment throughout Iraqi territory. The Joint Committee is thus entitled to develop procedures to simplify and control transport movements. The Agreement also allows the aircraft of the US Government and civil aviation carrying out activities for the US Department of Defense to cross the territory of Iraq, refuel, take off and land in Iraqi territory without hindrance. The Iraqi authorities are obliged to grant clearance for the landing and take-off of such aircraft in the territory of Iraq. The functions of supervision and control over air space are exercised by the Iraqi authorities, though Iraq can also approach the US to obtain temporary assistance in maintaining supervision and control.

An important provision is related to taxes. The Agreement envisages relief of taxes, duties and charges for US government aircraft, civil aircraft on a mission in Iraq under contract with the US Department of Defense and the transportation vehicles and equipment of the US Forces (Ibid.: Article 9).

To exclude force majeure incidents, both sides are obliged to exchange maps and other information on the location of deposits and other closed zones impeding movement in Iraqi territory (Ibid.).

The Agreement’s key provision is an article devoted to legislation. It should be noted that prior to the conclusion of the Agreement on the withdrawal of US Forces from Iraq, the US military enjoyed immunity from detention or arrest by the Iraqi authorities. The issue of the immunity of the US military in Iraqi territory was a specific stumbling block in signing the Agreement between the two countries. The US side made every effort to prolong the effective period of the immunity regime for its military, thus slowing down the establishment of a legal framework for the presence of the military contingent in the territory of Iraq.

Nowadays the situation has changed and, pursuant to the signed Agreement, Iraq has the right to prosecute the US military and civil employees of the Department of Defense for grave premeditated criminal offenses committed by them outside the locations of the US forces and when off-duty. However, in cases of detention, US military and civil personnel should be passed to the US Command within 24 hours of the detention with an explanation of the reasons for their detention or criminal prosecution while they are
in the custody of the US forces. If are perpetrated by members of the US Armed Forces within the territory of locations of the military or in the line of duty beyond the limits of the negotiated territories, jurisdiction over such servicemen is granted to the US (Ibid.: Article 12).

However, the provisions of this article contain certain nuances suggesting a variety of interpretations. For instance, the wording “not being on duty” seems disputable. Can military servicemen, in principle, not be on duty at any time if the country sends them on a military mission to the territory of another state? Such contentious provisions are to be solved by the Joint Committee.

The definition is also unclear whether persons serving in Iraqi territory by contract or subcontract with the US State Department of Defense are in fact contractors. Such persons come under the statute of Iraqi jurisdiction. However, the contract fails to mention contractors of other US services who are not necessarily serving within the US Forces. Therefore, it can be concluded that any US presence, irrespective of its purpose, is acceptable in Iraq only if there is a contract or a subcontract with the US Forces.

In accordance with the 2004 amendments to the Military Extraterritorial Jurisdiction Act of 2000, all contractors of US services fall under US jurisdiction. Thus the US Government can apply US jurisdiction in relation to contractors present in Iraq for any purposes apart from the purposes of being on duty. It is possible that the current Agreement was aimed at limiting contractors to only those persons who serve within the framework of the US Armed Forces. In this context the ways in which the US can apply the Strategic Framework Agreement demand a more detailed consideration.

In the absence of provisions for the contractors of US Forces in either the Agreement proper or the Strategic Framework Agreement, any non-military presence automatically falls within the ambit of the Military Extraterritorial Jurisdiction Act as amended 2004, if the contract was settled through the US Government service or in accordance with Procedure 17/2004 on the Interim Administration of the coalition forces in Iraq (the Procedure investing Americans with immunity from Iraqi jurisdiction). If the Procedure is cancelled, the persons mentioned above come under the general jurisdiction of Iraq.
Issues concerning jurisdiction with regard to personnel not related to the US Forces and contractors not serving in the US Army remain unsolved. However, all Iraqi citizens detained by the US military should be passed to the Iraqi authorities with 24 hours of their detention (Ibid.:Article 12).

If an offence results in victims not being members of the US military or civilian contingent, the two sides should develop notification mechanisms through the intermediary of the Joint Committee for victims of illegal actions in the course of investigation, indictment of suspects, court hearings and results of acquittal sentences, as well as afford an opportunity to speak during an open court sitting to announce a verdict etc. (Ibid.). In addition, the USA should undertake to conduct hearings of cases involving citizens of third countries as victims in the territory of Iraq. If it is impossible to do this, the US should simplify procedures for victims to be present at the trial (Ibid.).

The Agreement stipulates a revision of the article devoted to jurisdiction and all the amendments to it every six months. The situation in Iraq is thus taken into account at the moment of revision of the article clauses, including the degree of involvement of the US armed forces in military operations, the growth and development of the Iraqi legal system, and modifications to US and Iraqi legislation (Ibid.).

However, a reservation can be made here. The essential point is that the evaluation criteria of the situation in Iraq have not been developed by either the Joint Committee or any other body. In fact, there is no “stability scale” in Iraq. It can be assumed that the US will exert every effort to defend the right to protect its contingent and to apply US jurisdiction in relation to its military without any restrictions.

With regard to weapons, the Agreement allows members of the US Armed Forces and civilian personnel to possess and carry weapons in the territory of Iraq in accordance with their requirements and office duties. Besides, US soldiers are necessarily required to wear a uniform while on duty (Ibid.:Article 13).

Members of the US military and civilian personnel can enter the territory of location in Iraq and leave it by showing an identification card and a mis-
sion certificate issued by the US authorities. This being the case, the Iraqi authorities have the right to check and verify the names of the members of the US military and civilian component entering and departing from the territory of location for the military in Iraq (Ibid. article 14).

In addition, the Agreement contains conditions under which the US military should submit lists of all cargos brought in to the country to fulfil the US military mission to the Iraqi authorities. Equipment can be imported, exported or transported, provided it is not forbidden by the laws of Iraq. In this case imported, exported, re-exported or transported types of equipment are not subject to inspection, licensing or any other restrictions, including taxation, duties or charges applied in Iraq. Nevertheless the Iraqi authorities reserve the right to require the US authorities to open containers for inspection and verification of the assignment of imported objects in the presence of their authorized persons. Besides, the US should confirm that the imported equipment is designated exclusively for use under the provisions of the US-Iraq Agreement.

Export of Iraqi goods by US forces is not subject to either inspection or any other restrictions apart from the need for licensing. The Joint Committee and the Ministry of Trade of Iraq should cooperate to simplify the licensing terms under Iraqi legislation to export goods acquired by US forces in Iraq in view of the relevance of the Agreement’s provisions (Ibid.: Article 15).

The Agreement also permits the US contingent to import or export equipment and goods for personal consumption to be equally exempt from restrictions, licensing, taxation, duties and charges. For their part, the US authorities should guarantee that no subjects of cultural or historical value will be taken out from the territory of Iraq (Ibid.:Article 2). Of importance is a provision prohibiting the import of goods into the territory of Iraq for commercial purposes (Ibid.:Article 15).

In respect of taxes, duties and charges, the Agreement envisages tax exemptions for goods and services acquired by the US contingent in Iraq and designated for official use (Ibid.:Article 16).

Military technology employed by the contingent is relieved from the necessity to be registered and issued with a registration plate (Ibid.:Article 18).

(12) Ibid, article 14, item 1.
One provision of the Agreement is important with regard to compensation claims for damage and destruction, as well as for causing harm to health or entailing the death of members of the military or civilian component by one of the parties during the execution of one’s military duty. The US authorities should justly and reasonably meet the requirements of the third party regarding compensation for damage arising as a result of the actions, mistakes or negligent attitude of the US military or civilian contingent, notwithstanding the fact that the damage caused was a consequence of military obligations fulfilled by the troops or an aftereffect of actions of a non-military nature. All claims should be satisfied in accordance with US legislation.\(^{(13)}\)

One significant provision stressed that from 1 January 2009 the so-called Green Zone in the centre of Baghdad should be passed to the control of the Iraqi security forces. The Green Zone is a specially fortified sector housing government institutions, the Parliament, the Headquarters of the US Command and a number of embassies.

Therefore agreements on the status of military missions in Afghanistan and Iraq are fundamentally different. The Agreement with Iraq contains more distinct and rigid terms of the presence of the military contingent: the US military do not possess immunity from personal arrest or detention and are subordinated to jurisdiction of Iraq. The Iraq-US Agreement contained tougher time limits compared to the Afghanistan-US Agreement.

By contrast, the US agreements with Afghanistan empower the US contingent with immunity from personal arrest or detention, Afghan laws not being extended to the US military, which is under US jurisdiction.

The situation in both Afghanistan and Iraq remains tense. Despite the overthrow of the Taliban regime in Afghanistan and of Saddam Hussein’s regime in Iraq, anti-American sentiments still persist in both states. Specific elements of terrorist groupings active in both Iraq and Afghanistan have not yet been eliminated. The militants leave through the Afghan border with Pakistan, where they continue their activities and undergo training. Additional forces and the AfPak strategy were required precisely for these reasons. Besides, the struggle between internal political forces in these Islamic states periodically intensifies, contributing to destabilization of the

\(^{(13)}\) Ibid, article 18.
situation in relevant regions. Hostages are captured and terrorist acts continue aiming primarily at the US contingent, but affecting the contingents of other countries, as well as peaceful citizens.

A recent fact given wide publicity in Iraq concerns the illegal activity of the US “Blackwater” private military and security company, whose licence was not prolonged by the Iraqi Government in view of investigations into alleged cases of homicide among the peaceful population by the contractors of this company (e.g. incident in Nisur Square in Baghdad in 2007). However, having renamed “Xe” company in February 2009, Blackwater continued to provide private security and military services in the territory of Iraq. In view of the revelations regarding the illegal activities of the company now sheltering behind a new name, the Iraqi authorities took the case to court.

Although the presence of the international coalitions in Iraq and Afghanistan creates a range of problems and controversies in the domestic development of these states, nevertheless the Iraqi scenario of the rapid transfer of control over the regional situation to the local authorities is evidently not suitable for Afghanistan. The level of destabilization in Afghanistan is so persistently high that any potential downscaling or essential reduction of the presence of the international coalition in the country will invariably lead to an “export of instability” from Afghanistan to the neighbouring regions, including Central Asia and the southern Caucasus.

By virtue of this fact, developing further interaction with the countries of the international coalition that are present in Afghanistan is in the interests of Russia and the countries of the Collective Security Treaty Organization (CSTO), especially regarding stabilization of the Tajik-Afghan and Uzbek-Afghan borders and the creation of an “anti-narcotics belt” around Afghanistan on the part of the Central Asian countries. Such interaction requires focusing on careful investigation and management of the actual terms of the international coalition’s presence in the unified Afghanistan-Pakistan region and, in particular, on the understanding of the complexities and challenges of the legal regulation of such presence.
Bibliography


Chapter 2

Chapter 3

The Problem of Regulation and the Role of the International Criminal Court

Katja Creutz

The aim of this chapter is to explore the relevance of the International Criminal Court (ICC) for private security and military companies and their employees. Because the unclear regulatory framework regarding private military companies (PMCs) has left questions of responsibility unsettled, the International Criminal Court could prima facie provide a forum for ensuring that criminal acts committed by the companies and their personnel do not go unpunished. The author explores the possibilities and limits of the ICC in dealing with crimes committed by private military companies and their personnel. She reaches the conclusion that the main role of the ICC lies in its ability to encourage national legislation on serious crimes and to encourage states to try perpetrators of such crimes on their own.

Introduction

After the American invasion of Iraq in 2003, and especially after the revelation of abuses at the infamous prison at Abu Ghraib, hardly anyone could claim to be unaware of the trend towards privatizing military services. Even countries such as the Nordic ones, with less extensive practice in privatization, became familiar with the fact that 20,000 or more private contractors were providing a range of security and military services in Iraq.Already in the early 1990s, international news headlines had reported on private military companies acting in Africa, such as Sandline fighting rebels in Sierra Leone and Executive Outcomes helping the Angolan government. However, few in the Nordic countries would have been fully aware of this trend to privatization or would have heard of Blackwater, for example, before Iraq.

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When Blackwater and many other private military companies started their businesses at the turn to the new millennium, another development, which at first glance went entirely in hand with privatization, had gained prominence, namely the development of international criminal law. International criminal law builds upon the principle of individual criminal responsibility for international crimes, a legacy of the Nuremberg and Tokyo tribunals following the Second World War. The Balkan atrocities as well as the Rwandan genocide in the early 1990s had brought to life the fifty-year-old dream of having an international criminal court which actually would hold real flesh and blood responsible, instead of abstractions like the state, when the worst imaginable crimes had taken place.

The Security Council had created first the Yugoslavia tribunal in 1993 as an extraordinary measure, followed with the Rwanda tribunal in 1994 to deal with the worst atrocities of modern times. The establishment of these ad hoc tribunals intensified the work for the creation of a permanent international criminal court, which for many represented a step towards an international rule of law, a world where ‘commitment to human rights and equality’ would be central (Tuomioja, 2004). The UN’s International Law Commission (ILC) had been working on drafting a list of international crimes together with a statute for a permanent international criminal court for decades, finally adopting the Draft Code of Crimes against the Peace and Security of Mankind in 1996 (ILC, 1996).

These two developments – the flourishing of international criminal law, and the proliferation of private military companies – were not without relevance to each other. Their point at which they came together was mercenarism, a crime that the UN had continuously worked against and one that would in fact have been included as an international crime in the Draft Statute for a permanent international criminal court had the 1989 Convention against Mercenaries been in force at the time (ILC, 1994). Within the UN the antipathies towards mercenarism had amounted to a policy of abolition (Percy, 2007: pp. 11-28, esp. 24-26), first with the adoption of the International Convention against Mercenaries in 1989, and later within the Commission of Human Rights and its Special Rapporteur mandate on mercenaries. Since within the UN framework private military companies had been treated like

with mercenaries, the draft Code of the International Criminal Court would have in effect ruled out the use of this industry altogether.

The fact that mercenarism was excluded from the final ICC Statute, however, came to affect the legal environment for private military companies. Establishing a private military company or working for it is not an international crime \textit{per se}: it is only certain qualified violations of international law that can amount to international crimes under the ICC statute, namely genocide, crimes against humanity and war crimes. The relevant question consequently becomes whether private military companies and their employees can be held responsible for these crimes under the statute? Moreover, if companies and their personnel can be tried before the ICC, what effect, if any, will this have on the industry as a whole and efforts to regulate it? Hence, the purpose of this chapter is first to explore the overlap between the international crimes over which the International Criminal Court has jurisdiction and the activities of private military companies and their employees. Secondly, I will consider how a possible jurisdiction will affect efforts to regulate the PMC industry. The argument will be that the Court plays a limited judicial role with regard to crimes committed by these private actors. Accordingly, its importance is rather indirect and lies in its impact on national jurisdictions and their willingness to regulate and enforce criminal legislation.

### The Problem of Regulation and Impunity

When exploring the private military industry and the problem of regulation, one first needs to spell out what exactly the alleged ‘problem of regulation’ refers to.\(^{(17)}\) Two different positions have appeared simultaneously: some commentators have defined the problem as a lack of regulation (Singer, 2004), whereas most claim there to be plenty of relevant regulation. This ‘schizophrenia’, i.e. the prevalence of two completely opposing views on the same phenomenon, is indicative of a lack of effective regulation capable of addressing the multifaceted problems that characterize the private military industry. Thus, for present purposes, the problem of regulation will be interpreted as meaning not a complete lack of regulation altogether, but rather that the regulatory framework is insufficient in face of the activities of private military companies. This corresponds to the general perception of the status of PMC regulation (Chesterman and Lehnardt, 2007: 2).

There are several challenges in establishing a coherent and effective regulatory framework for private military companies and their activities. First, the purposes of regulation can be many depending on what one is aiming to achieve with the regulation: either regulation can try to ban the activities of private military companies in whole or in part, or it can try to establish an acceptable framework of action for the private military industry. Whereas there have been proponents of a complete prohibition on private military companies, a policy of allowing the companies to stay in business has lately received increasing support, and instead the suggestion is that only certain specific activities might be prohibited, such as engaging in direct combat. One prime example of this is the fact that the UN Working Group on Mercenaries, which has a mandate to deal with PMCs, has shifted its focus from prohibition to permitting certain activities.

Secondly, when it comes to regulating the activities of PMCs, it needs to be decided at what level regulation should take place, what the regulations should look like and what the consequences should be for violating them. Currently there are regulatory efforts at all levels: companies engage in self-regulation, national legislation has been introduced by, for example, South Africa, regionally the European Union has initiated projects exploring the industry and relevant legislation in European states, and at the international level the UN Working Group on Mercenaries is involved in developing an acceptable legal framework for PMCs by calling for an international convention on the issue and by introducing concrete proposals on PMC regulation and accountability. Notwithstanding these various initiatives, the preferred model of regulation appears to favour the creation of a licensing regime for such companies. One important and common aspect of all regulation, whatever it looks like, is nevertheless to ensure legal responsibility for crimes that have been committed by private military companies and their employees. Indeed, for the general public the widespread impunity of private military personnel has so far been perhaps the most visible and deplorable aspect of not having timely regulation in place and of states’ unwillingness or inability to enforce it.

Therefore, one of the main issues to be settled regarding PMCs and their operations concerns their accountability for any crimes they commit, or rather their unaccountability. In several instances crimes have gone unpunished; only with Blackwater’s shooting of seventeen civilians in Iraq in 2007 did changes start to be made. The problems with holding private military companies and their employees responsible for human rights abuses and
violations of international humanitarian law are nevertheless multifaceted: the countries where they operate are often weak and lack sufficient judicial capacity to put alleged wrongdoers on trial; the home state of the company might lack regulation on PMCs or general criminal law statutes extending to crimes committed abroad; and the hiring state might show a lack of interest in investigating alleged abuses. Another factor standing in the way of eradicating impunity is that there might actually be legal arrangements establishing impunity, such as the widespread immunity given to private military contractors by the Coalition Provisional Authority’s Order No. 17 in Iraq.\textsuperscript{18}

The private military companies themselves do not always perceive legal responsibility as a key question. They emphasize that it is only their good reputation that keeps them in business and that as a company they will have to maintain a clean record in order to attract future clients. It is true that market accountability is one essential accountability mechanism from the point of view of the companies. Investors may ‘punish’ private military companies by reducing stock prices and access to capital, while consumers may opt to hire fewer services (Keohane, 2003: 1133). However, placing faith in non-legal accountability mechanisms is not sufficient to ensure responsibility. In practice, market accountability has not managed to keep companies that are allegedly or demonstrably involved in abuses out of the market; for example, CACI and Titan received large new contracts from the US government, even though their employees were involved in the Abu Ghraib abuses (Creutz, 2006: 65-66). Furthermore, irrespective of how prudent the companies are in carrying out their activities, intentionally or unintentionally there will always be situations in which the responsibility of the parties involved must be decided in legal terms. Therefore, legislation ensuring criminal responsibility for crimes committed by private military contractors needs to be in place.

\textsuperscript{18} Coalition Provisional Authority Order No. 17, CPA/ORD/27 June 2004/ 17, esp. Section 4.
Adopting criminal legislation, especially at the national level, is also at the heart of the Montreux Document\(^{(19)}\) adopted in 2008, a product of the Swiss Initiative on PMCs and supported by seventeen states.\(^{(20)}\) It states that the contracting state, the home state and the territorial state alike should have ‘national legislation over crimes under international law and their national law committed by PMCs and their personnel’. Furthermore the Montreux Declaration calls for criminal responsibility to be extended to corporations and extraterritorial crimes. A framework such as this involving all the states involved -- the home state of the company, the state making use of the company’s services and the state where the abuses take place – would indeed close the accountability gap. The fact is, however, that such legislation rarely exists. Lacking such legislation or the political will to make use of such legislation, many scholars and organizations place their trust in an increased role for the International Criminal Court, or at least an exploration of how it might be used in this connection (Singer, 2004: 546). It is felt that ‘[a]n international body such as the International Criminal Court would probably be in a better position to try abusive PMCs’ (Renou, 2005: 113).

The Promise of the International Criminal Court: Punishing the Real Actor

Why is so much reliance and hope being placed in the International Criminal Court, particularly with regard to private military companies? The enthusiasm placed on the International Criminal Court is easy to understand since the state-based international legal system has so far failed to hold not only states but also private actors criminally accountable for atrocities. This has changed with the creation of the International Criminal Court and hence the Court is seen as giving international law the teeth it has lacked by having a court that produces top-down enforcement. Finally a fifty-year-old dream has come true – individuals, i.e. real human beings of flesh and blood, are to be held accountable for the worst crimes in line with the famous statement made at the Nuremberg Tribunal: ‘crimes are


\(^{(20)}\) Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom, Ukraine, and the United States of America.
committed by men, not abstract entities’. This means that the individual is seen as the central actor: it is always an individual who acts unlawfully, for example, commits grave war crimes, and hence the appropriate punishment applies to the individual. Thus, the veil of abstraction is removed, and in line with liberal values it is argued that no one should be outside the law: ‘everyone, regardless of place of activity or formal position, should be accountable for their deeds’ (Koskenniemi, 2002: 2). Thus, individualized international criminal law—and consequently the International Criminal Court—is seen as a tool for dealing with any individual, that is, actors in both the public and private spheres, private military companies and their employees mostly belonging to the latter.

The establishment and functioning of the International Criminal Court surely has many expectations to fill, but the question of whether the Court is able to fulfil what is expected of it is a different matter. Does the individualization of responsibility in the case of atrocities, for example, mean that every individual is now faced with the danger of prosecution before the International Criminal Court if he or she commits atrocities? The analysis below will demonstrate that the answer can only be negative, although the ICC is often portrayed as subjecting individuals overall to the international rule of law. Because of this, the promise of the International Criminal Court is not as tremendous as one is at first inclined to believe. Therefore, before taking for granted references to the International Criminal Court as an integral part of closing the accountability gap, one needs to do what Peter Warren Singer has urged, namely conduct an exploration of the ICC and ask whether it really is capable of promoting the accountability of the private military sector.

However, the relevance of the Court to PMCs is not limited to its punitive function. In addition to the punitive role of the ICC and intertwined with it, another promise with relevance to the private military sector is the ability of the Court to prevent crimes under its jurisdiction. The preamble of the Court’s statute states that the Court should not only ‘put an end to impunity’ but also ‘contribute to the prevention of such crimes’. One such mechanism of prevention is to have states put in place effective criminal

(21) Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946.
legislation. Therefore, in the following the International Criminal Court’s ability to bring accountability into the PMC sector will be analysed from two different perspectives: the Court’s ability to hold PMCs and their employees accountable with respect to international crimes under its jurisdiction; and the effect of the Court in triggering national legislation.

What the International Criminal Court Can Do and What It Cannot Do

The Principle of Individual Criminal Responsibility

Generally analyses of the criminal responsibility of businesses for mass atrocities is studied from the perspective that corporations are allegedly contributors to rather than perpetrators of the crime. This means that the corporation is put on trial for doing business with the organization that is behind the crime, but not for having committed the crime itself. The special nature of private military companies, however, turns this setting upside-down: because of the nature of services provided, private military companies can in fact be directly involved in atrocities. It is from this angle that I will examine the International Criminal Court.

At the Nuremberg trials, both corporations and individuals were held criminally responsible for war crimes and crimes against humanity. Is this also the case with the International Criminal Court? Can it, for example, hold private military companies and individual employees guilty of crimes under its statute? According to Article 25 (1) of the Rome Statute, ‘the Court shall have jurisdiction over natural persons pursuant to this Statute’. The wording ‘natural persons’ obviously refers to individual human beings and hence excludes altogether the criminal responsibility of legal persons, that is, corporations. The issue of the criminal responsibility of companies was one of the most controversial during the Rome conference which drafted the Rome Statute. The delegations were deeply divided over the very premise of holding corporations criminally responsible (Saland, 1999: 199). Those in favour of including the criminal responsibility of legal persons argued in terms of efficiency, also pointing out that ‘it would have seemed retrograde, after Nuremberg and Tokyo trials, not to do so’ (Saland, 1999: 199). In addition, holding corporations criminally liable would improve the issues of restitution and compensation to victims (Ambos, 2008: 747). Consensus

(23) Several officials from the Krupp, Farben and Flick concerns were charged with and found guilty of war crimes and crimes against humanity. The International Military Tribunal examined each defendant’s position in the corporation and their personal knowledge of the company’s dealings with the Nazi regime. See, e.g., Cassel, 2008.
on the issue, however, proved impossible, as many states whose national legislative systems do not recognize the criminal liability of corporations firmly resisted the inclusion of such a principle of criminal law in the Rome Statute. The Nordic countries, along with Switzerland, Russia and Japan, provided the ultimate opposition. Hence, corporations cannot generally be held responsible before the International Criminal Court, which corresponds to the lack of international legal rules establishing the criminal responsibility of corporations (Cassel, 2008: 315).

The fact that legal persons such as corporations are excluded from the jurisdiction of the Court does not, however, mean that the International Criminal Court is without means in tackling international crimes committed by private military companies and their employees. In 2003 the Chief Prosecutor, Luis Moreno Ocampo, said regarding the trade in blood diamonds originating in the Democratic Republic of Congo that ‘if corporate executives knowingly trade with perpetrators of war crimes they will be prosecuted as “participants in crimes”’(Deutsch, 2003). This indicates a willingness by the Chief Prosecutor to go after the business world. In situations where the business enterprises actually have committed the crimes themselves, there would probably be even less hesitation on the part of the Chief Prosecutor to initiate investigations. So far, however, the Court has not investigated any cases of alleged crimes committed by corporations, although many of the 1,700 communications submitted to the ICC by individuals or organizations (ICC, 2006) have concerned corporations as well. There have even been communications filed with the Chief Prosecutor by individuals, charging pharmaceutical companies with genocide.24 As the Rome Statute stands today, however, it is clear that the only way to tackle crimes committed by companies is to investigate and punish individuals.

I now return to the question of which individuals—from a private military company, for example—can be held responsible before the International Criminal Court for charges of genocide, crimes against humanity or war crimes. Can only those directly committing one of the Court’s three crimes be put on trial, or can responsibility be extended to persons in charge of them, such as the directors or chief executive officers of private military

companies? In general, an individual is criminally responsible if ‘he or she perpetrates, takes part in or attempts to commit a crime within the jurisdiction of the Court’ (Ambos, 2008: 746).

The ICC Statute differentiates between different modes of participation. It distinguishes between perpetration and other forms of participation. Article 25 (3) lists the following modes of participation that generate individual criminal responsibility: 1) committing a crime under the statute; 2) ordering, soliciting or inducing the commission of such a crime; 3) facilitating, aiding or abetting the commission of a crime; or 4) intentionally contributing to the commission of a crime in any other way.25

The first mode of participation is quite clear: any individual who commits genocide, crimes against humanity or war crimes is clearly responsible. This requires that the crimes were physically committed by the offender him- or herself (Ambos, 2008: 748). This would entail responsibility under the ICC Statute when, for example, a private military contractor attacks civilians against the stipulations of international humanitarian law, thus committing a war crime. In addition, the statute extends to co-perpetration, meaning situations in which the crime is committed jointly with another person. Cases of mass atrocities often involve co-perpetration, since ‘the crimes are often carried out by groups or individuals acting in pursuance of a common criminal design’.26 A crime can also be committed through another person, in which case it is called ‘perpetration by means’. This means that behind the perpetrator is a master-mind, an organizer, who exercises effective control over the perpetrator. Ultimately the master-mind is also responsible for the act.27 Based on the above, perpetration can be divided into three levels: 1) those perpetrators who belong to the leadership level, and who plan and organize the criminal events as a whole; 2) mid-level hierarchy perpetrators who exercise some form of control over a part of the organization; and 3) those who actually carry out the crimes (Ambos, 2008: 755).

Besides direct perpetration, the ICC Statute recognizes other modes of participation in the crimes. First, there is responsibility for ordering, soliciting

(25) See Art. 25 (3) (a)-(d) (ii) of the Rome Statute.
(27) This doctrine was used by the German Supreme Court in holding members of the National Defence Council and Army generals indirectly responsible for the shootings on the inner-German border (Ambos, 2008: 753).
or inducing the commission of crimes. This covers a range of situations in which a person prompts another person (or persons) to commit a crime. Specifically ‘ordering’ also entails the existence of a superior–subordinate relationship (Lehto, 2008: 257). Secondly, an even weaker form of complicity (Ambos, 2008: 756) that generates criminal responsibility before the ICC is ‘aiding and abetting’, which aims to complement what does not fall under ordering, soliciting or inducing the commission of a crime. This encompasses ‘any assistance, physical or psychological, that has a substantial effect on the commission of a crime’ (Ambos, 2008: 759). The third and lowest threshold of participation is contributing in ‘any other way’ to the crime. The requirement is that the contribution takes place intentionally, with knowledge of a common purpose.

Finally, we need to consider one additional ground for criminal responsibility in the ICC Statute, namely superior responsibility. In Article 28 it is clearly laid down that a superior is responsible for crimes committed by his ‘subordinates under his or her effective authority and control as a result of his or her failure to exercise proper control’. Superior responsibility is not only limited to military personnel: civilians can also exercise a command that may generate such responsibility. This means that someone in control of a private military company and its employees can not only be held responsible for having ordered crimes to be committed, but also for having failed to ‘take all necessary and reasonable measures within his or her power to prevent or repress’ the commission of crimes. Who, then, is in the position of a superior in a private military company? The Montreux Document, which restates the existing principles of international law, names specifically as superiors in private military companies ‘directors or managers’ of the companies, as well as governmental officials, whether military commanders or civilian superiors, with the personnel under their effective authority and control.

Having explored the different bases for holding individuals criminally responsible before the ICC, it can be argued that, if a private military company commits genocide, crimes against humanity or war crimes, its individual

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(28) One example from case-law of aiding and abetting is if a person continues to interrogate a victim while the victim is being raped by another person (Ambos, 2008: 757, FN 108).
(29) Art. 28 (b) of the ICC Statute.
(30) Section F. Superior Responsibility, Art. 27 (a) and (b) of the Montreux Document.
employees can be held directly responsible, separately or jointly, for hav-
ing committed the crime. Their superiors within the company could also
be held liable for having created a criminal policy, having ordered a crime
or failing to take measures to prevent a crime. One example could be if
the company provided combat services and had a policy of using illegal
weapons for reasons of efficiency. Another scenario could be a company
providing interrogation services based on a policy that allows torture to be
used as an interrogation method. Despite the small body of ICC case law,
at least its Statute opens the door to it trying the employees and leaders of
a private military company.

**Limits to Having PMCs and their Employees before the ICC**

As noted above, the International Criminal Court does not have jurisdiction
over companies. Hence, its role lies in its ability to charge individuals for
international crimes. This does not remove the relevance of the International
Criminal Court for the question of privatized security: if the ICC cannot
deal with companies, it can still try individuals. Moreover, since crimes are
always committed by individuals, the ICC would appear the appropriate
body for removing impunity regarding private military contractors.

There are, however, a number of obstacles which make it either impossible
or difficult to consider the ICC a solution to the problem of the impunity
of private contractors. The first limitation is the fact that the ICC is not a
court before which any individual on the planet can be tried. It is not an
institution of some higher sort capable of judging equally the acts of all
individuals. It does not have jurisdiction over all natural persons in the
world. Instead, despite its individual focus the ICC is as dependant as the
international legal order is in general on the will of states. It is, like all other
international institutions, a design and product of states and their will,
created to reflect what states have commonly agreed upon. As a result, the
International Criminal Court is dependent on the consent of states. This
means that states are required to ratify the ICC Statute in order for the Court
to have jurisdiction over that particular state's citizens.31

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(31) Article 12 of the Statute sets forth the following: ‘the Court may exercise its
jurisdiction if one or more of the following States are Parties to this Statute or have
accepted the jurisdiction of the Court in accordance with paragraph 3:
(a) The State on the territory of which the conduct in question occurred or, if the crime
was committed on board a vessel or aircraft, the State of registration of that vessel or
aircraft;
(b) The State of which the person accused of the crime is a national’.
From the perspective of holding the employees of private military companies accountable for international crimes, everything becomes dependent on nationality. Consequently, a private contractor can be tried before the Court if the state whose national he is has ratified the ICC Statute. Alternatively, a person can be tried before the Court if the crime was committed on the territory of a state that has ratified the ICC Statute. Two alternatives, then, can be discerned: if I commit a crime in Sweden as a Finnish private contractor, I can be brought before the ICC due to my being a Finnish citizen, but also because Sweden has ratified the statute as well and the crime occurred in Sweden.

With 110 ratifications altogether, it is tempting to argue that a majority of states have ratified the ICC statute, making it likely that when a private contractor commits a crime the ICC will be able to exercise its jurisdiction. Unfortunately this is not quite the case. One limitation is that the most important state in terms of privatized security, the United States, has not acceded to the ICC. Thus, US nationals are excluded from the Court’s jurisdiction, including, therefore, numerous employees of, for example, Xe Services (formerly Blackwater), MPRI, DynCorp etc. In addition, the US has concluded immunity agreements with numerous countries under which US nationals cannot be brought before the ICC even when the host state has ratified the ICC statute. The aim of holding private military contractors responsible before the ICC has consequently suffered a severe blow.

The second limitation in bringing private contractors before the ICC is the principle of complementarity. Article 1 of the ICC Statute lays down that the jurisdiction of the Court is of a complementary nature. Hence, persons who are alleged of having committed war crimes, genocide or crimes against humanity shall first of all be tried in the national courts. Only if the national judicial system fails to address these cases can the ICC take over. In this sense, complementarity can be perceived as a limitation on the Court’s actions. In reality, the complementary clause works in the opposite direction by empowering states to try alleged criminals. Thus, if a state that is a party to the ICC wants to ensure that it has the primary obligation to prosecute, it has to make sure that it has the appropriate legislation. The legislation does not have to be specifically directed towards the employees.

of private military companies, but it must ensure that it covers all nationals of the state in question.

The third limitation is the definition of crimes as laid down in the Rome Statute. The Court has jurisdiction to deal with only four crimes: genocide, crimes against humanity, war crimes and aggression. The crime of aggression has nevertheless been excluded from the Court’s jurisdiction until 2017, after which the state parties need to make a decision to activate jurisdiction with respect to this crime. The crime of genocide is based on the ‘intent to destroy, either in whole or in part, a national, ethnical, racial, or religious group’. To my knowledge, there have not been any serious allegations of private military companies having committed genocide or attempting to do so.

Crimes against humanity consist of acts such as the murder, extermination, deportation or rape of a civilian population which are ‘committed as part of a widespread or systematic attack’. Whereas private military companies and their employees are certainly capable of committing these acts exactly like any military force, crimes committed by private contractors appear to be less part of a systematic attack than isolated incidents. According to the Rome delegations, ‘systematic’ means a ‘highly organized and orchestrated execution of those acts in accordance with a developed plan’ (von Hebel and Robinson, 1999: 97, fn 52). This understanding gains prominence if one looks at the definition of ‘an attack directed against the civilian population’ as laid down in Article 7 (2)(a): an “attack directed against any civilian population” means a course of conduct involving the multiple commission of acts...pursuant to or in furtherance of a State or organizational policy to commit such acts. Whereas the link between military personnel and their home state is quite clear and is based on commands and orders which further state policy, it is less clear whether, in a certain situation, a private military company and its employees are acting in accordance with a policy created by the state, even though they would be hired by a state. It seems unlikely that a state would set out the task of a private military company as

(33) Art. 5(2) states that the Court will have jurisdiction over crimes of aggression only when the international community has been able to agree upon a definition of this crime.
(34) Art. 7(1) of the ICC Statute.
(35) ‘Widespread’ was again understood as something more than just multiple commissions (von Hebel and Robinson, 1999: 96, FN 48).
(36) Art. 7(2) (a) of the ICC Statute.
being to exterminate all the individuals belonging to a specific group in a contract. On the other hand, it is plausible that a company could pursue an organizational, criminal policy of some kind on its own initiative.

Regarding the third crime mentioned in the statute—war crimes—a connection with an armed conflict, international and non-international equally, is necessary. Here, one needs to keep in mind that private military companies do not exclusively operate in war zones. But could those that do become liable for war crimes charges before the ICC, or is it only members of the regular armed forces who can commit war crimes? For the purposes of the Court, war crimes encompass grave breaches of the four Geneva Conventions from 1949 or other international law relating to armed conflicts which has specifically been criminalized. Acts such as wilful killing, wilfully causing great suffering, extensive destruction of property without justifying it by military necessity, killing or wounding a soldier who has laid down his arms, destroying enemy property etc. are war crimes. Although such acts prima facie seem to be acts undertaken mainly by members of the regular armed forces, war crimes can also be committed by civilians. Consequently, the personnel of private military companies can also be guilty of war crimes if they commit serious violations of criminalized international humanitarian law (Doswald-Beck, 2007: 134; Cassese, 2008: 84-85).

Based on actions that constitute war crimes, the risk of committing such crimes is clearly greater than of committing genocide or crimes against humanity: war crimes are ‘an omnipresent danger in times of armed conflict’ (Cryer, 2005: 268). However, the definition of war crimes also refers to their being both widespread and systematic. Article 8 (1) affords jurisdiction to the Court for war crimes ‘in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.’ In sum, therefore, one can say that the crimes that fall under the competence of the ICC contain the features of being widespread and systematic and are committed as part of a policy or a larger plan. According to the drafters, the policy element requires ‘planning, direction or instigation from some source’ (von Hebel and Robinson, 1999: 96). Hence, many sporadic incidents fall outside the Court’s competence, something that would exclude many crimes committed by private contractors. However, at the end of the day it would not be impossible to hold private contractors accountable for war crimes.

(37) Art. 8 (1) of the ICC Statute.
Still, as we have seen, the definition of crimes limits the cases that can be brought before the Court. Besides the core crimes mentioned above, other international crimes were left outside the ICC; on the table were especially drug trafficking and terrorism. Mercenarism could also have been included in the ICC statute had earlier drafts been accepted. However, in the preparatory work on the ICC Statute there was a clear tendency to leave out treaty crimes (ibid., p. 86). At the Rome Conference, Comoros and Madagascar submitted a proposal to include mercenarism as a crime within the ICC statute, but it was not adopted due to a lack of support (ibid.). Had they succeeded, this analysis of the role of the ICC in regulating private military companies would have taken a different turn. One reason for the exclusion of treaty-based crimes and the focus on core crimes was the desire to create a Court enjoying as broad a support as possible from its creation (Wagner, 2003, p. 415). Secondly, agreeing upon a common definition of mercenarism would no doubt have proved difficult. Further, whether mercenarism would have been classified as ‘the most serious crimes of concern to the international community as a whole’, that is, among those that are stated to fall within the ambit of the Court, is also debatable (ibid., p. 474). It is also worth noting with regard to private military contractors that not all of the regulatory problems would be solved within the ICC. For example, recent reports of rape committed by contractors against their female colleagues (Houppert, 2008) would fall outside the Court’s jurisdiction.

A fourth constraint in bringing private military contractors before the ICC is the move towards group responsibility in international criminal law. Although the ICC is a court that hears cases of individual criminal responsibility, several tendencies have accentuated the collective character of the crimes. The ICC Statute contains elements that try to capture the group characteristics of international crimes, mainly through the different modes of commission, but also through command responsibility and the policy requirements of the Rome Statute. The ICC focuses on crimes that are committed as part of a collective. If PMCs were to act in accordance with a policy of evil, it would be more likely to draw the ICC’s attention. Whether or not PMCs have adopted criminal policies is questionable.

A fifth limitation, one connected to the previous point, is the ICC’s limited ability to deal with all kinds of cases. In drafting the ICC Statute, the drafting parties were already aware of the limited capacity the Court would have and thus attempted to define the crimes in such a way that they would not be over-inclusive. The Court simply lacks the ability to prosecute all natural
persons alleged to have committed the international crimes over which it has jurisdiction. One consequence of the limited resources of international tribunals, in particular the ICC, is that it has to choose what cases it will invest its resources in. Hence limited budgets make international tribunals—including the ICC—focus on ‘some big fish cases among many targets’ (Takamura, 2007: 679). There is indeed a focus in the Court on the so-called big fish, both in the ICC Statute and according to the Chief Prosecutor, Luis Moreno-Ocampo. In the Statute this is suggested by Article 17 (1) (d), which affords the Court the right to dismiss insignificant cases, but also by the preamble and the various jurisdictional limitations the Statute imposes (Schabas, 2008). In the words of its Chief Prosecutor, the ICC thus focuses on ‘those with the highest criminal responsibility’. According to Ocampo, focusing on the big fish is ‘the only thing we can do. We cannot do all the cases, we do this selective justice.’

The Indirect Effect of the International Criminal Court on PMC Regulation

Theoretically, under circumstances discussed above, the Court could punish the employees of private military companies if they commit genocide, crimes against humanity or war crimes since its jurisdiction is based on individual criminal responsibility. Yet no such cases have emerged, and unless a private military company becomes involved in widespread and systematic international crimes, the likelihood of such prosecution remains slight. One is therefore bound to conclude that the direct effect of the International Criminal Court is at most peripheral to removing impunity from the private military industry.

The importance of the Court, however, lies not in its ability to punish private military contractors but rather in what it achieves indirectly by virtue of the complementarity principle. The main connection between the ICC and PMC regulation is consequently the fact that one of the Court’s functions is to act as a complement to national courts. Hence, if a state fails to prosecute alleged committers of international crimes—either due to lack of legislation or of the political will to do so—the Court is free to exercise its authority. The purpose of complementarity is to induce national legislation

to be passed against these and to try criminals. Thus, the ideal is to have a functioning national criminal justice system which makes individual criminal responsibility a reality without the threat of an international court taking over. Effective criminal legislation would also have to extend to crimes committed abroad, as well as to private military contractors.

One reason for the insufficient regulation of PMCs is the fact that states have hitherto lacked incentives to develop regulation that enables efficient control and accountability mechanisms for such companies (Gaston, 2008: 222). In some situations, rather than constraining such companies, states have made use of them to circumvent limits on the use of force or governmental oversight (Singer, 2003: 214; Gaston, 2008: 222). For example, in 2004 the Central Intelligence Agency (CIA) of the United States allegedly involved Blackwater in a secret programme to track down and eliminate members of the Al Qaeda network (Mazzetti, 2009). The main role for the ICC, then, is to provide the incentive that has been lacking. At best it can ‘act as a repository of those ideas, and persuading states, through the incentive to them to adopt domestic legislation, and oversight of prosecutions, to prosecute international crimes’ (Cryer, 2006: 995). When the ICC has concluded this task, states will have internalized the ideals of international criminal law so broadly that they ‘simply prosecute international crimes on the basis that they ought to be prosecuted per se, without regard to the concern that the ICC might otherwise do it’ (ibid., p. 996). Much remains, however, to be achieved before the International Criminal Court will make itself useless in this way.

**Final Remarks**

At first glance there seems to be no direct connection between the international and national quest for the regulation of PMCs and the judicial function of the International Criminal Court. The Court is not a body with regulatory powers; its task is to try alleged committers of genocide, crimes against humanity or war crimes, not to order states to adopt regulation of PMCs. However, one of the consequences of the lack of regulation of PMCs and effective extraterritorial criminal legislation is impunity, and it is precisely impunity with regard to the most horrific international crimes that the ICC is trying to abolish.

Although much hope and faith has been placed in overcoming the dark shades of politics by creating an International Criminal Court which can
deal with atrocities that ‘shock the conscience of mankind’, the ICC will not solve the problems we have with private military companies and their employees or the possible violations they commit by punishing employees of private military companies in each and every situation. The ICC is not a magical place where we can rest our case and trust that justice will be served. With respect to the problem of regulation, the role of the ICC is more subtle, and by way of inducing legislation it can make a difference – albeit a limited one. The problem with regulation will nevertheless continue despite the International Criminal Court: without states and national politics, efficient regulation will not be set in place and made use of. Besides, what is needed is not only indirect action to change the problem of the regulation of PMCs. Only active co-operation at the international level together with consideration over what role private military companies should play in the security and military domain will take regulation one step further.

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Chapter 4

Beyond Iraq: a Retrospective of the Contingency Contractor Industry examining reality, regulation and the Future in Stability Operations

Doug Brooks and Angela Aranas

The stability operations industry is indispensible to international policies in conflict and post-conflict environments, and private security companies (PSCs) also fill a small but significant role. The industry function is dependent on two factors, market demand and national and international government policies and laws. This chapter focuses on describing the stability industry profile and mapping the evolution of the perception (and misperception) of the industry in academic and policy circles. It contextualises the role of private security companies within the larger stability operations industry and describes their critical value to international policies.

The PSC segment of the larger stability operations industry has long been a low-profile segment of international operations. While their roles continue to evolve, contractors in these companies remain civilians, with the rights and limitations of civilians under international law, despite attempts by academics and pundits to militarise their role in the literature. PSCs are clear that they do not engage in offensive operations, and in fact there is growing recognition that they can have a significant value in terms of humanitarian security. This distinction encapsulates the broader issue of redefining the private security debate. This chapter analyses the current role of the stability industry and PSCs in Iraq and Afghanistan and also examines the market outlook, especially in terms of global international peace operations.

The chapter also addresses the current myths surrounding contingency contracting, including identifying industry roles and participation in stability

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operations, the costs and risks to governments and other clients in using contractors, and the actual pay rates and profit margins afforded to the industry. The authors also consider current and future recommendations for national and international oversight initiatives, as well as discussing the practical realities and capabilities for industry self-regulation.

Introduction
Private contractors provide a wide variety of services, supporting international contingency operations that range from disaster relief to peacekeeping missions, and frequently work in conflict and post-conflict areas. The size of the contingency contractor industry fluctuates significantly over time and is highly reflective of geopolitical events. In fact, the industry’s size is directly based on the demands of clients, primarily national governments, but also non-governmental organizations, relief organizations, international organizations and other private companies. Industry ethics also largely stem from client requirements, and the drive by some clients to save costs can undermine international efforts to improve ethics and professionalism. The character of the industry is influenced by several factors including market demand, contractual terms for the companies and the laws and regulations of relevant state bodies that govern the type and manner of work that private contractors may perform. Ultimately the industry is a direct reflection of the urgent needs of the international community for specialized services in risky and difficult locations.

Industry profile: The contingency contractor industry
Although the terminology and the conceptualization of a single contingency contracting ‘industry’ may be new, private contractors themselves are not a recent phenomenon. For example, the use of contractors has been documented throughout the history of the United States. In the Second World War there were more than 700,000 contractors, while in the Vietnam War, “contractors accounted for 13 percent of the U.S. presence on the ground.”

The concept of contractors in stability operations is not new; nevertheless, it is evolving.

The modern-day contingency contractor industry grew out of the end of the Cold War. At that time, governments throughout the world were re-structuring, reducing and streamlining their military forces. These changes required that more non-combat support functions to be outsourced to private companies, especially for expeditionary operations. These functions included laundry, catering, construction and logistical support. As international operations in the post-Cold War era became more complex, militaries and international organizations called upon the private sector to provide greater manpower and more elaborate support functions, sometimes in remarkably dangerous environments in Africa, the Balkans and Middle East. Today, private contractors are able to provide a multitude of support services to government clients, including constructing, supplying and maintaining bases in high-risk areas, as well as protecting personnel and assets. As both the complex operational environment and the activities of contractors increase in both risk and complexity, the legal and ethical framework surrounding the industry necessarily must become more comprehensive. A robust contingency contractor industry is increasingly necessary to enhance the capabilities of smaller, all-volunteer militaries by allowing them to focus on combat functions rather than support services. International policies require effective military capabilities despite the reduction in the size of militaries, which is what makes the market for support services necessary.

**Services provided by the contingency contractor industry**

The contingency contractor industry can be divided into three general categories: Logistics and Support Companies (LSCs), Security Sector Reform and Development Companies (SSRDs), and Private Security Companies (PSCs). Within these categories, a non-exhaustive list of work provided by contingency contractors includes: 42

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Logistics & Support Companies (LSCs):
- Logistics and operational support services (i.e. tactical equipment and operation and maintenance, engineering, medical services, base construction and support)
- Unexploded ordnance disposal services (humanitarian mine clearance, battlefield clearance and other devices and mine awareness training/education)
- Transportation by land, sea and air, fleet maintenance

Security Sector Reform and Development (SSR&D):
- Disarmament, Demobilization and Reintegration (DDR)
- Legal system reconstruction
- Education system reform
- Peace-building support
- Security Sector Reform (SSR)
- Weapons/equipment training
- Prison guard training, courts systems training
- Law enforcement and border guard training
- Information and analysis and consultancy services (risk analysis/security audit, development of a security strategy, context-based security planning, crisis response/contingency planning)

Private Security Companies (PSCs):
- Some of the work done by SSR&D companies (i.e. security awareness, weapons/equipment training, information and analysis)
- Private security services (i.e. armed or unarmed protection of people, places, and things)
- Contextual consulting and advice on an area of operation

More specifically, LSCs are companies that provide logistics, aviation services, construction, unexploded ordnance and landmine clearance, water purification, medical services and other capabilities that would generally not be out of place in more peaceful societies. The fact that LSCs provide these services in chaotic, high-risk environments makes them unique and particularly valuable. Employees of LSCs are rarely armed; when they are, it is only are for contractors’ self-defence. LSCs make up roughly eighty to ninety per cent of the contingency operations industry. For example, the giant LOGCAP III contract that provided LSC services for the U.S. Army in Iraq and Afghanistan between 2001 and 2009 involved over $30 billion dollars in work, whereas the largest private security contracts in Iraq worked
out to about $235 million in the busiest years.\(^\text{43}\) Because of their non-lethal focus LSC contracts are generally considered the least controversial.

SSR&Ds are firms that provide long-term strategic solutions to weak and failed states, ensuring the creation of governmental and societal stability and structure that will eventually allow interventions to be scaled back and ultimately concluded successfully. These companies provide development services, long-term training and security reforms aimed at permanent improvements in a state’s capability, capacity and strategic situation. SSR&Ds usually work for governments or international organizations to train militaries, police forces, prison and border guards, to create ministries of defence or to provide military forces with peacekeeping skills. These companies also provide structural services to governments reforming ordinary but vital governmental functions (e.g., educational systems, financial systems).

PSCs are security companies that provide protection for nouns: people, places or things. In conflict and post-conflict environments their employees are usually, but not always armed. They work under legitimate mandates or contracts provided by governments or international organizations. Although their clients are frequently other companies, they also include governments and international organizations. PSC security allows other operations to continue in extremely dangerous environments, including operations such as humanitarian relief, reconstruction and infrastructure development. PSCs are the smallest category and make up 5-10% of the industry’s total value, and their actual size can vary significantly for short periods depending on level of risk, phase of operation, etc. As with the other sectors, PSC personnel are predominately local hires.

It should be noted that some companies may provide services within more than one category of work, while other companies may only specialize in one particular activity. The point of these descriptions is to illustrate the diversity of services and expertise provided by the industry and show how both corporations and non-profit outfits can be part of this industry. Further, it is clear that the range of services includes effectively innocuous activities,

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while others are likely to be more controversial and even challenge the assumption that certain activities are inherently governmental, a subject that will be discussed in greater detail shortly. For some contingency contractors this means anticipating public scrutiny and litigation as states and civil society determine an appropriate balance of public and private services. In fact, finding that balance may have more to do with the pragmatic necessity of carrying out international policies than theoretical idealism.

One additional note on terminology: the terms “private military companies” (PMCs), or even the more voguish “private military security companies” (PMSCs), do not reflect a significant segment of the industry profile as accurately as does the term “contingency contractor”. While industry firms can and do operate in combat environments, even at their most robust they are not militaries and should not been seen as a replacement for state militaries. Inaccurate terminology blurs the understanding of these companies’ roles while also implying that their employees enjoy unwarranted privilege and combat status under international law. There is a need to recognize explicitly that contingency contractors are civilians, and while some contractors may have to be armed in order to carry out their authorized services, they remain defensive in nature. More troubling, when military terminology is used in the context of companies that are pointedly not armed, pundits can, and frequently do, imply more sinister activities.44 Worst still is the sloppy and derogatory term ‘mercenary’, which is often used by industry or policy detractors and which by no stretch of definition accurately portrays the bulk of the industry providing support functions. The term also carries with it historically negative connotations that undermine and emotionalize dispassionate discourse. Using the misleading ‘military’ terminology dangerously risks implying a strategic role beyond what is accepted, and both contractors and policy-makers should be crystal clear that contingency contractors are not military. The ‘contingency contractor’ terminology used in this chapter comes from the U.S. Department of Defense45 and is used accurately to

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reflect the broad, varied and temporary nature of the industry’s activities and services in conflict, post-conflict and disaster relief operations

The contingency contractor industry’s size and value

The contingency contractor industry primarily relies, whether directly or indirectly, on government projects. Because contingency contractors are often used as a government surge capacity to help national militaries or emergency humanitarian efforts, the industry size can expand and contract quite rapidly. Counting contractors in the field and accounting for the dollar value of the industry as whole face two particular obstacles. First, the contingency contracting industry includes services and should not be combined with the infinitely larger defence products industry (i.e. companies that build and sell equipment and systems such as ships, tanks and aircraft but that do not deploy to the field). Secondly, it is worth noting that the number of contractors is particularly elastic, as companies attempt to maintain only the minimum number of personnel required to complete the contractual tasks while remaining financially competitive and, hopefully, profitable. The competitive nature of the industry requires companies to be significantly leaner than government or military entities that engage in similar tasks.

As a result of the nature of its activities, the size of the industry fluctuates more than do other industries, meaning that gauging the industry’s size can only produce a snapshot in time. Contingency contractor companies must be able to respond and adapt to changes in government demands and policies. For this reason, the companies are by necessity small and agile at their core, but able to expand rapidly to address new requirements and contracted services. The total number of active contractors or industry value becomes a moving target, and most published figures are educated guesses at best or deliberate spins at worst.

Another point often overlooked when evaluating the industry is the large-scale employment of local nationals (LNs) and third-country nationals (TCNs). Both these groups represent the majority of contractors working on the ground. In addition to the local expertise LNs can bring, both LNs and TCNs are a more competitive and efficient use of contingency companies’ resources than Western personnel. As an example, as of June 30, 2009, LNs made up 69 percent of U.S. Department of Defense (DoD) contractor
personnel operating in Afghanistan and 95 percent of security contractors in the operation.

The DoD has made the most comprehensive attempt to count the number of contractors in the field with its SPOT database, and the vast majority of contingency contractors are working for that department. A recent report by the U.S. Government Accountability Office (GAO) used the SPOT database and sources from the Department of State and U.S. Agency for International Development (USAID) to determine that there were “226,500 contractor personnel, including about 28,000 performing security functions, in Iraq and Afghanistan, as of the second quarter of FY 2009.” While the U.S. Department of Defence’s (DoD) contractor database has been criticized, it is at least a somewhat accurate account of the size of the industry that offers useful insights into the breakdown of its contract typology. Even more importantly, it was able to categorize contractor personnel into security and the other key occupations, definitively proving that security contractors are a fraction of total contractors. This fact, coupled with the predominance of LN contractors, is important, as many commentators implied (and some still imply) that most contractors are Americans and other Westerners doing primarily security functions. It is difficult to have a rational discussion if no one even agrees on the size and form of the issue.


(49) Ibid.

(50) The U.S. Government Accountability Office (GAO) recently reported DoD database numbers to be 226,500 contractor personnel, with 28,000 conducting security functions in Iraq and Afghanistan (for the second quarter of FY 2009). However, they go on to note that these numbers should not be used to identify trends or draw conclusions about contractor personnel numbers.
Another highly inaccurate or at least misunderstood figure related to the contingency contracting industry is the private security industry’s “$100 billion” dollar value. This figure may have originated with the 'Privatisation of Security in Africa Conference' in Johannesburg in 1998 – possibly with Alex Vines of Human Rights Watch, who has written a number of studies on Angolan security and has estimated the size of the global domestic market.\(^{51}\) At the time the values he discussed related to private security globally, but with a focus on the global domestic industry, not just the PSCs working in conflict and post-conflict environments. Unfortunately, most estimates of the industry size fail to distinguish between domestic private security and the significantly smaller, unique international PSCs, and they often include the enormous military product market which includes aircraft and ship manufacture. Already exorbitant, these numbers are then recycled and amplified to compensate for inflation, new conflicts, perceived growth patterns and so on.\(^{52}\) Dollar value assessments or the counting of contingency contractors ought to be made with a clear knowledge of who is being counted and for what reason.\(^{53}\)

Attempts to obtain the best value out of contingency contracts have been hampered by the focus on cost to the exclusion of other important factors. In the United States this is the policy concept of “lowest cost, technically acceptable,” and necessitates competing companies shaving all extraneous costs in order to win contracts. If all the elements cut from contracts were superfluous, this would not be problematic; however the concept allows procurement officers no leeway and can lead to significant deficiencies in quality. The U.S. Department of State was required by law to use the ‘lowest

\(^{(51)}\) At the Johannesburg conference in 1998, it was estimated that the ‘private security market’ would be worth $202 billion by 2010. “Private Military Companies Face Crisis in Africa,” ANC Daily News Brief, 14 December 1998.

\(^{(52)}\) See, for example, Deborah Avant's book, “Recent estimates suggest that the 2003 global revenue for this industry was over 100 billion.” Peter Singer, “Peacekeeping, Inc.,” Policy Review, July 2003: 60. As quoted in Deborah Avant, “The Market for Force” (Cambridge: Cambridge University Press, 2003). Peter Singer's $100 billion statement was repeated in a number of news articles in 2003: “Behind the transformation is an industry that is generating $100 billion to $200 billion a year for fewer than 1,000 companies.” Mark Fineman, “Kuwait ambush is reminder of risks to private army,” The Associated Press, January 26, 2003 and Joseph Giordono, “Contractors do more than sling troops’ chow,” European Stars and Stripes, March 10, 2003.

\(^{(53)}\) IPOA’s own rough estimate in 2008 was $20 billion for the larger contingency contracting industry – services provided by the private sector in conflict and post-conflict environments, of which $2 billion was actual PSC services. This estimate was based on U.S. government contracting statistics from Afghanistan and Iraq, as well as estimates of industry support for UN operations globally.
cost, technically acceptable’ formula, and this is believed to have directly led to some of the problems they had with their diplomatic security. This policy is not required in the DoD, which can therefore enter into ‘best value’ contracts. This issue was highlighted by the U.S. Commission on Wartime Contracting in Iraq and Afghanistan in a report strongly recommending an end to ‘lowest cost, technically acceptable’ for security contracts.54 Smart contracting requires flexibility in choice of contractor and a trust in the procurement professionals who make the awards.

In addition to governments, contingency contractors frequently contract for inter-governmental and non-governmental organizations. More often than not, the U.N. and NGOs will not publically acknowledge their use of contingency contractors – especially security contractors – due to sensitivities related to perceptions about the use of private-sector services. Contractors themselves tend to be reticent with information on the topic, as publicity can negatively influence their relationships and thus threaten future contracts. U.N. agencies and NGOs do use private security, and unfortunately sometimes simply glorified militias, to protect their personnel and assets, secure convoys, protect aid agencies’ warehouses, secure U.N. camps for internally displaced persons (IDPs) and provide security for unexploded ordnance clearance missions.55 A recent statement by U.N. Secretary-General Ban Ki-Moon in which he commented that he would consider the possibility of hiring private security contractors to protect U.N. staff – a statement entirely in line with the usually unstated practices of many NGOs working in the field – may reflect a more realistic and open acceptance of the contingency contractor by the U.N.56 Thus, while it is not a widely publicized aspect of

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the industry, the role it plays in supporting other international actors should be kept in mind as regulation and accountability modifications are explored so as not to undermine these necessary and useful relationships.

**Historically governmental and inherently governmental**

The term “historically governmental” describes the activities or markets where the private sector has not generally provided goods or services in the past, whether due to limited resources, laws or a lack of market incentive. Many historically governmental activities are being outsourced to take advantage of the efficiencies and savings inherent in competition with relatively little controversy. In a military setting, these might include logistics, transportation and catering for soldiers. “Inherently governmental”, meanwhile, is the concept that there are activities that must be reserved only for governments. The concept is not as clear-cut as it may seem, and even within the U.S. government there are multiple definitions of inherently governmental.57 These activities might include law-making, strategic intelligence, interrogation, military training and prison operations, although some academics would point out that there is plenty of historical precedent for outsourcing many of these activities.

For contingency contractors, their future depends on building public confidence that they can provide value and ethical services, no matter whether the activity is considered historically governmental or inherently governmental. This requires companies that are involved in military missions and national security operations to maintain a balance between their business interests and their civic responsibilities. Former U.S. Congressman Christopher Shays, co-chair for the Commission on Wartime Contracting, recently highlighted this point when he discussed the intangible requirements of government contractors. He said that companies and company employees have a responsibility to identify and address problems of waste, fraud and abuse, even if it means hurting the company’s bottom line – there is a long-term corporate value in doing so. Further, companies ought to welcome such self-regulating oversight (i.e., employees who raise such issues with their supervisors), as it could save them additional costs and problems down the road like government investigations and law suits.58

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This sentiment reflects the unique role of government contractors as private entities who are the face of government policies and missions. Ethical and professional services by the industry will create confidence in the private sector and lead to greater value in the future.

**The contingency contractor industry in context**

While the issue has been well covered elsewhere, the 1977 Amendment to the Geneva Conventions providing a legal definition of “mercenaries” and contractors, and even armed PSCs, does not meet the stated conditions. Among other disqualifications, the PSCs in question are in fact entities sent by states that are participants in a conflict. Moreover the companies are not sent to engage in combat, but in security activities that would be normal in any other country – the protection of people, places and things. Regardless, there has been a clear shift in norms regarding the use of PSCs by states and international organizations and a broader recognition of their legitimate role.

Studies of private contractors have been prone to ideological misrepresentation and oft-repeated inaccuracies. Discourse among academics and decision-makers is too often one-sided in the negative portrayal of private contractors, and conventional wisdom is more often wrong than right. For example, one misrepresentation that is often repeated is that of the industry’s stratospheric growth. Pundits will use the first Gulf War, exceptional in American conflicts for its small numbers of contractors, as a base when describing an apparently uninterrupted growth to current ratios. As a foundation for comparison, this reference point ignores the true nature of

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(60) Alexandre Faite, among others, provides a detailed breakdown of how PSC personnel cannot fall under Article 47. See: Alexandre Faite, “Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law” Defence Studies 4 (Summer 2004:166-183). Available online (accessed December 14, 2009): http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall PMC-article-310804/$File/ PMC-article-A-faite.pdf In this work, Faite also cites other authors that have deemed Article 47 as unworkable.
an industry that grows and shrinks based on government demand. Part of the reason for this misrepresentation, and others, comes from the sensationalistic nature of the media, as well as the pressure to publish compelling theory, but one would hope that academics at least would be above this.

Although the analysis of the industry certainly has evolved, much of the primary discourse is led by advocates, pundits and academics who have ideological reservations about any private-sector role in international conflicts. Accurate analysis depends upon a more comprehensive understanding of the work of contractors, the supporting role contractors play in international operations and the reasons why governments and international organizations continue to rely on contractors. When making the argument that private capabilities should not be used, too often reasonable alternatives are absent.

Indeed, contractors are essential to successful international peacekeeping and stability operations and ensuring a true assessment of the contingency contractor industry is imperative in creating effective laws and regulations. Legal frameworks should be designed to ensure proper behaviour while not being so onerous as to undermine the ability of contractors to effectively support the larger mission. Further, such frameworks need to recognize that contractors work for a wide variety of private, NGO and governmental


clients in conflict, post-conflict and disaster relief environments providing myriad essential services.

Ultimately, the industry’s legitimacy comes from states. Contingency firms rely on home governments and host countries as their means of retaining their legal status as legitimate actors. Their growing centrality to the success of international operations means that their role in contingency operations is constantly being re-evaluated. Despite the acceptance that other non-governmental groups, such as the NGO community, have vital roles in conflict and post-conflict environments, many in the international community stubbornly question the legitimacy of the private sector in conflict zones—a stance that unfortunately will weaken international stability policies and humanitarian efforts which heavily rely on contractors.

A key point for consideration is the debate over government outsourcing writ large. For the most part, outsourcing is used because those jobs can be done faster, more efficiently and/or more cost-effectively by the private sector. As a result, some of the industry’s roles place companies at the forefront of the debate over what is ‘inherently governmental.’ These activities include the protection of government assets and personnel in conflict zones, intelligence and interrogation services. Yet, the vast majority of contingency contracting includes work that is both vital and fairly uncontroversial such as communications support, logistical transport and reconstruction projects. Thus, the debate over what ought to be done by the private sector remains open. The realities are that governments will continue to outsource services in conflict and post-conflict environments in support of international policies and that contractors are indispensable to policy success.

There is also a presumption among some that private contractors have an incentive to encourage conflict. The profitability of conflict is both exaggerated and extrapolated to ridiculous levels. The profit margin for contingency contractors is remarkably slim due to the highly competitive nature of the market. This is especially true of the large cost-plus contracts that are specifically bid based on large capacity and thin built-in profit margins. The LOGCAP III contract that supported the army in Afghanistan and Iraq was won by KBR based on a 1% profit margin and a potential 2% bonus.63

Secondly, while the industry remains a reflection of international demand, the reality is that it has been rare for governments to be able to afford to fulfil missions and foreign policy using exclusively in-house or military resources. A number of sensationalists have suggested that contractors ‘lobby for war,’ but there appears to be scant evidence of that actually occurring. Indeed, there appears to be little motivation to prolong conflicts, since there is significantly more investment and funding available to the private sector in reconstruction. Mozambique, Uganda, Sierra Leone and Angola have all had significant economic growth in the private sector and in foreign investment since their conflicts have ended.

Another myth is that companies work for the highest bidder, regardless of legality or morality. Were this true, it could lead to scenarios in which companies contract with heinous dictators or illegitimate insurgent groups. While there are always individuals willing to take on illegal and unethical contracts, it more difficult for companies to do so, since they have a different and more sophisticated cost-benefit analysis and long-term outlook. Even more difficult is to find reliable and effective employees willing to shed their morals and risk imprisonment to staff illegal and/or unethical contracts. Because the majority of the on-going contingency contractor work rests with governments and international organizations, as in any business relationship companies have an incentive to ensure that they retain a good, ethical reputation and a legal basis for operation. It is far more difficult for a company to operate anonymously and illegally than an individual, and far easier to get caught.

**The legal framework: defining the role of the contingency contractor**

As both primary clients and rule-makers, governments thus have the ultimate ability to control the industry. As the industry’s single largest client, the U.S. government has by far the most experience and ability to influence the industry. Companies working for the U.S. government have to follow multiple levels of regulations, both national and international, as well as the

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Federal Acquisition Regulations and others. For those companies working abroad on behalf of the U.S. government, they become liable both to the laws of their home, contracting, and host countries. In fact, companies are required to be licensed in the countries of operation, no small requirement in weak and failed states. All contingency contractor companies must have government-issued licenses to work in Afghanistan and Iraq, for example. Individual companies remain responsible for being compliant and for respecting the laws of both states.

A key requirement in improving industry-government relations is the need for better contract management. While U.S. government defence and security contracts become more and more complex, government oversight in this area has not kept up. There have been a number of initiatives to address this problem, including the excellent recommendations of the Gansler Commission\(^6^5\) and the creation of the independent federal Commission on Wartime Contracting in Iraq and Afghanistan – other countries utilizing contractors could learn much from these entities.\(^6^6\) It should be noted that while the Afghanistan and Iraq conflicts have certainly increased the attention paid to the industry, government regulation should not be defined solely by these two experiences. Governments, including the U.S. government, have been utilizing contingency contractors since long before these two conflicts, and regulations should be designed to avoid hamstringing international policies by undermining the private sector’s ability to respond and support future international operations as well.

Criminal legal proceedings related to the industry have increased in proportion to its operational tempo, and egregious behaviour by individual employees working for contingency contractors can and should result in government criminal investigations and prosecutions. The main U.S. legal tool for addressing crimes by contingency contractors is the much modi-

\(^{65}\) Commission on Army Acquisition and Program Management in Expeditionary Operations, Urgent Reform, Required: Army Expeditionary Contracting, October 31, 2007, p. 43.

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ried Military Extraterritorial Jurisdictional Act (MEJA). MEJA addresses serious crimes only, and while it was initially focused only on Department of Defense contractors, it was eventually expanded to include all U.S. contractors ‘working in support of a Department of Defense mission.’ Unfortunately, even that expansion may not be broad enough to cover Department of State contractors working in Afghanistan and Iraq. Although there has been some impatience regarding the number and transparency of MEJA cases, government insiders privately report more than fifty cases at some stage of completion.

From an industry perspective, it makes sense that individual accountability issues be addressed despite the complexities of accountability issues on weak and failed states. First, the reputation of the industry, and thus future contracts, suffer whenever a contractor escapes prosecution, which creates the impression of impunity and reduces client comfort levels. Government and non-government clients all have more confidence in hiring contractors when there is clear and effective legal accountability. Secondly, companies benefit when their employees receive fair legal trials. The unique reality of the industry is that it primarily operates in places where there are weak legal systems, thus creating unusual risks for employees. Having some form of internationally recognized legal remedies creates valuable commercial predictability. Companies have to ensure the welfare of their employees if they are going to be able to recruit quality personnel in the future.

Civil suits have grown in number as well, and they raise their own problems. Such suits indicate that, in addition to all the unique legal issues raised by private operations in conflict and post-conflict environments, ordinary legal issues continue to be relevant as well. As with all industries, ‘ordinary’ lawsuits (i.e. “slip and fall”) are a normal part of business. Some suits will be frivolous, although casual observers may not differentiate due the politically charged atmosphere of contingency operations. While governments have introduced some legal protections for companies carrying out their


policies in the field, civil suits have the potential to significantly raise the costs of stability operations and reduce their effectiveness. While this would have obvious implications for the high-profile operations in Afghanistan and Iraq, it could have a far more detrimental impact on the smaller, less well-funded, mainly UN-led humanitarian operations.

From an industry perspective there are important benefits to be derived from broad improvements to ethical operations since any misbehaviour by an industry firm can colour public perceptions. As was aptly put by analysts writing on the defence-contracting industry, “As these businesses [contingency contractors] face unprecedented scrutiny, self-interest equals public services. Otherwise, the malfeasance of a few headline-generating scandals will tarnish the vital accomplishments of the great majority of contractors committed to the service of our soldiers and allies.”69 Thus there is good reason for all the major contractors to use their political influence and association leadership to pressure smaller companies and subcontractors to ensure ethics and professionalism in all their operations.

Closely linked to government oversight mechanisms is the work of international groups such as those in the U.N. Working Group on Mercenaries and the Swiss Initiative which resulted in the historic Montreux Document in 2008. The U.N. Working Group was saddled with a counterproductive title that limits industry participation and support, and the Group unfortunately includes some members with significant political bias70 and thus has been limited in its influence. A more progressive route can be found through the Swiss Initiative led by the Swiss government and the ICRC, which has achieved far more concrete results. Their most significant achievement thus far has been the Montreux Document of 2008, which has already earned enormous international legitimacy and is supported by key governments.71

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(70) José L. Gómez del Prado of Spain has been particularly dogmatic in his opposition to even the most beneficial private-sector support for international operations, although others on the Working Group are far more pragmatic.
The Montreux Document is “the first international document to describe international law as it applies to the activities of private military and security companies (PMSCs)”\(^{(72)}\). Currently there are 34 participating states,\(^{(73)}\) significantly including the U.S. and the U.K., as well as Afghanistan and Iraq. While the Swiss Initiative included significant participation by the industry and the NGO communities, the agreement gains its greatest legitimacy from its involvement of state participants. The document clarifies international law and the responsibility of states, as well as setting out guidelines for the utilization of private-sector services in contingency operations. The next step in the process is a global Code of Conduct and enforcement mechanism, and the industry has been thoroughly supportive and involved.

At the industry level, organizations like IPOA and others have emerged to provide companies with important tools for self-regulation and peer-reviewed oversight that can induce behaviour modifications.\(^{(74)}\) IPOA achieves this through the Association’s Code of Conduct,\(^{(75)}\) a public reporting/complaint process that allows for anonymous complaints,\(^{(76)}\) and the creation of a Standards Committee, essentially a jury of peers, to judge other firms operating in the same contingency operations. It is important to keep in mind associations’ capabilities and limitations in ensuring ethical compliance. Associations are not a replacement for governments or contract law: they cannot throw anyone into prison, for example. They can demand that their members operate ethically and professionally, and they do have the means to penalize poor ethics through peer review, publicity and measures that impact on reputation and ultimately financial value. Further, they can support ideas like the Swiss Initiative and influence how governments and


\(^{(74)}\) Emergence of such associations is another area of possible further research.


the wider community address contractor ethics in contingency operations in a positive way. Associations have strong incentives to ensure compliance since their existence depends on a healthy industry and their board leadership comes from companies that benefit from a prosperous market. Finally, associations can educate clients regarding their central role in ensuring ethics and quality in the industry. Ultimately companies are most likely to respond quickest to customer demands.

The future of the contingency contractor industry: conclusion
The contingency contractor industry requires more nuanced analysis from both academics and decision-makers. To this end, there are three groups of actors with different, but related responsibilities. First, academic discussions regarding the role of the contingency contractor industry must acknowledge the diversity of contingency contractor activities while responsibly acknowledging the actual work and value done by contingency contractors in conflict, post-conflict and disaster relief operations. Much of the information that lawmakers use to formulate their policies comes from academic analysis, and thus it behoves academics to practice self-policing and avoid polemics, while ensuring rigorous and accurate analysis. Secondly, there is always a need for enhanced government contract oversight and management: the fact that such activities are difficult and dangerous in the places the industry operates in makes oversight more difficult, but it does not reduce the necessity. There have been recent improvements in government oversight by the United States, although there is still much more that can be done. Since good oversight and accountability benefits the better companies, these improvements will always be supported by the industry. Too often driven by populist tendencies, much of the oversight these days focuses on ‘vengeance contract management’ – i.e. simply creating incentives for oversight personnel to probe a contract until a significant enough transgression can be found to ensure some sort of punishment takes place to please the electorate.77 Clients must remember that effective policies require partnerships with contractors, not adversarial relationships. Lastly, the industry itself can enhance its own ethical compliance mechanisms through the better enforcement of codes of conduct, increased association membership and the broader inclusion for outside stakeholders such as academics and NGOs to ensure greater acceptance and legitimacy for their ethical compliance programs.

Like all stability operations Afghanistan and Iraq are unique, and we must be careful that any legal or international measures we put into place do not undermine other stability operations elsewhere in the world, something that could have catastrophic humanitarian consequences. Increased reliance on contractors in Afghanistan and Iraq has made smaller international military forces more capable, but also highlighted the need for improved regulations, legal structures and oversight. In the 21st century, any military that expects to be relevant beyond its national borders will be utilizing the support of the private sector, so governments and militaries should be paying attention and taking note of lessons learned.

To be sure, the Afghanistan and Iraq experiences have raised awareness of one sector of the industry in particular: private security contractors. Unsurprisingly much of the debate and oversight has focused on the work and actions of these companies and their employees, but while some analysts appear to believe that they are not necessary to policy success, no one has submitted realistic alternatives. All contractors, including PSCs, are vital to successful international policies, and all should be held to high ethical and professional standards by their clients. Indeed, it is clients that have the greatest power to drive quality and professionalism in the industry, and all too often it has been clients – governments and others – that fail to pay attention to quality in the drive for lowest costs.

This chapter has attempted to place the contingency contractor industry within a more accurate context. There has always been a need for contractor support, and without the private sector no international stabilization policy could succeed: any examination of law and regulation needs to accept that reality. This chapter has also emphasized the benefits to both clients and the industry of improved oversight and accountability and shown that that ethical and professional companies benefit from a clearly defined and well-enforced legal framework. In the stability operations industry, good regulation and good oversight benefits good companies while also benefiting vital international policies. The best thing that could help the industry today is clients who pay attention not just to how the industry operates and what the rules should be, but also to the ethics of the companies they hire to carry out their policies in the first place.

Bibliography


Chapter 5

Upsetting the Civil-Military Balance? Exploring the Relationship between the State, the Military and Private Security Companies

Joakim Berndtsson

The privatisation of security has meant that state militaries and private security companies (PSCs) increasingly find themselves operating side by side in and around zones of armed conflict. As several commentators have pointed out, this development can be fruitfully construed as the introduction of an additional, commercial component into civil-military relations. In addition to changing existing relationships between the state and the armed forces, privatisation also creates new ‘PSC-military’ and ‘civil-PSC’ constellations. Analysing these changes contributes to the knowledge of the roles of PSCs in armed conflicts, military operations and post-conflict reconstruction efforts, and adds insight into the changing nature of civil-military relations. Drawing on data collected on the case of Iraq between 2004 and 2007, this chapter aims to problematize the relationships between the state, the military and PSCs, focusing primarily on the impact of security privatisation on state control of the instruments and use of force. The chapter shows how differences between the military and PSCs, as well as problematic working relationships and attitudes, create a number of problems linked to cooperation, coordination and communication between state and non-state actors in the field. In turn, these problems suggest that the privatisation of security adds further complexity to civil-military relations and changes the basis for state control of force in several ways.

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Introduction
The privatisation of security, that is, the increasing use of private companies to provide security- and military-related services to state and non-state clients, has accelerated in the post-Cold War period. Significantly, many of the tasks currently being carried out by PSCs have been associated more or less exclusively with states and institutions such as the police, the military or the intelligence services. While security privatisation is global and occurs in most societies, the debate on this phenomenon has frequently focused on what is arguably its most controversial representation: the hiring of private companies to provide security services in zones of armed conflict. This focus is understandable given the fact that the use of PSCs in high-risk environments has flourished in recent years, particularly since the start of the wars in Afghanistan and Iraq.

In cases such as Iraq and Afghanistan, privatisation has meant that state militaries and PSCs have found themselves operating in close proximity. This mixing of private security and military personnel in conflict areas raises questions about the organisation and control of armed force, as well as the ways in which state and non-state actors relate to and cooperate with each other. The use of PSCs suggests a change in the relationship between the state and the instruments and use of violence and a challenge to dominant conceptions of the sovereign state as a monopolist of violence and its role in the security sphere (e.g. Mandel, 2002; Singer, 2003; Avant, 2005; Wulf, 2005; Kinsey, 2006; Chesterman and Lehnardt, 2007; Berndtsson, 2009).

More concretely, security privatisation can be understood as the introduction of an additional, commercial component into civil-military relations, possibly tilting the “balance of the soldier and the state” (Singer, 2003: 191). The central argument in this chapter is that the privatisation of security creates new relationships between the state, the military and PSCs, adding complexity to civil-military relations and at the same time changing the basis for state control of force. Drawing on empirical data collected on the case of Iraq in the period 2004-2007, the aim is to problematize these relationships, focusing primarily on the impact of privatisation on aspects of state control. To pave the way for an analysis of security privatisation in Iraq, the chapter will start by discussing in more detail how the privatisation of security connects with central ideas in the literature on civil-military relations and state control of force.
The Civil-Military Problematic and the Privatisation of Security

Essentially, the military is an institution established by civilians and contracted with the mission of using force on behalf of and in defence of the state. Serving the state is the *raison d’être* of the military institution and firmly connects it to issues of national security and state sovereignty (Wolfendale, 2008: 219). In civil-military relations, the question of securing civilian control is a key problematic, borne out of the paradoxical relationship between the state and the military, where “the very institution created to protect the polity is given sufficient power to become a threat to the polity” (Feaver, 1999: 214). The challenge is to “reconcile a military strong enough to do anything the civilians ask them to do with a military subordinate enough to do only what civilians authorize them to do” (Feaver, 1996: 149). In reality, as Krahmann concludes, democratic control over the legitimate use of force has always been problematic (Krahmann, 2010: 283). As we shall see, introducing PSCs into the civil-military equation makes the issue of control even more challenging.

While opinions on what constitutes good or bad civil-military relations or modes of state control differ, the subordination of the military to civilian leadership is an idea going back at least to Clausewitz (Desch, 1999: 3). In theory the relationship between civilians and the military is hierarchical, with the civilians enjoying a privileged position; they have “legitimate authority, whatever their de facto ability to control the military might be” (Feaver, 2003: 54). In democracies, civilian control is fundamental because it “allows a nation to base its values, institutions and practices on the popular will rather than on the choices of military leaders” (Kohn, 1997: 141). Expressed differently, the military should identify threats to the state and suggest responses, but only civilian leaders should ultimately decide what constitutes an acceptable risk to society (Feaver, 1996: 153; Huntington, 1957: 15). In Kohn’s words, the purpose of the military “is to defend society, not to define it” (Kohn, 1997: 142).

Seen in this light, it is understandable that studies of security privatisation and the question of state control have turned to civil-military relations theory (e.g. Singer, 2003; Avant, 2005; Alexandra, Baker and Caparini, 2008; Berndtsson, 2009; Krahmann, 2010; Dunigan, 2011; Bruneau, 2011; Baker, 2011). Apart from providing a basis for discussing and assessing control, the literature on civil-military relations is also useful because it devotes considerable time and energy to analysing the nature of the military. Drawing on these ideas allows students of security privatisation to analyse...
how private companies relate to and differ from contemporary models of military organisation. As argued below, PSCs display features that connect them to conventional images of the military, but they are also different in some crucial respects. To make such comparisons, an image of the modern military is needed.

In *The Man on Horseback*, S.E. Finer describes the modern army as being:

> a purposive instrument. It is not a crescive institution like the church; it comes into being by fiat. It is rationally conceived to fulfil certain objects. One may be to assist the civil power, but the principal object is to fight and win wars. The highly peculiar features of its organization flow from this central purpose, not from the secondary one, and find in it their supreme justification. These features are (1) centralized command, (2) hierarchy, (3) discipline, (4) intercommunication, (5) esprit de corps and a corresponding isolation and self-sufficiency. (Finer, 2006 [1962]: 7)

According to Finer, the peculiar features of the army’s organisation are justified by the main purpose for which it has been conceived, namely to fight wars on behalf of the state. Yet the image of the military as an instrument of the state is not unproblematic. To Finer, there are no “natural” reasons as to why the military should conform to the wishes of the civil power; the military is an organisation specialised in the large-scale application of force and with access to weapons, so the question is “not why this [the military] rebels against its civilian masters, but why it ever obeys them” (Finer, 2006: 6).

Addressing the issue of control, Huntington argues that the structure and disposition of the officer corps – the military professionals – is at the centre of the relationship between the state and the military (Huntington, 1957: 2f). In his view, professionalism comprises three main features: military expertise, social responsibility and corporate loyalty to fellow specialists (ibid.: 11-18, Ch. 2). Military officers are “technicians in the management and organisation of violence; they feel a responsibility to their client … and they have a powerful corporate tradition and organization” (Finer, 2006: 24). Yet, ideas about the consequences of military professionalism for civilian control diverge (Desch, 1999: 8ff; Egnell, 2008). Huntington sees in the maximising of professionalism a way of making the military an expert organisation and an apolitical tool of the state (Huntington, 1957: ...
80-85). Others argue that professionalism can also be a source of conflict between the military and the civil authorities: “the military’s consciousness of themselves as a profession may lead them to see themselves as the servants of the state rather than of the government in power” (Finer, 2006: 25). The purported care for the “state” or the “nation” or “national interest” may be a source of loyalty and compliance, but it has also been an important cause of military interventions in politics. If civilian authority is to be secured, Finer asserts, the military “must believe in an explicit principle – the principle of civil supremacy” (ibid.). Correspondingly, Janowitz argues that “the military can only be controlled by being effectively integrated into the larger society, not merely by being professional” (Janowitz, 1960: 343).

Certainly, the nature of a particular state (stable, unstable, democratic, totalitarian) will also influence the relationship between the holders of political power and the military, as will different types of military organisation (e.g. professional, revolutionary, praetorian etc.) in different states (Perlmutter, 1977). However, there is no need to dig deeper into these issues to see that civilian (and democratic) control is at the heart of civil-military relations. Ideally, the military is a highly professional, integral and subservient part of the state bureaucracy. As such, “the military establishment, like any other instrument of the state, has no autonomous reason to exist. It can exist only if its client defines its functions, expectations and behaviour” (ibid.: 26).

Departing from this simplified image of modern (Western) civil-military relations, the question now, of course, is how PSCs may be understood in this context. On the one hand, many PSCs and their staff – particularly those offering armed services in unstable environments – share some of the features of the modern military. Like the military, many PSCs boast (and indeed live off) a high level of military and technical expertise, as well as professional training, hierarchical organisation and discipline. However, while PSCs sometimes perform tasks that make them resemble the armed forces, they are not military units by conventional standards. Apart from the obvious fact that militaries are public institutions, there are several differences that make it difficult to speak of PSCs as “military”, and this complicates the question of state control.

First, the principal object of PSCs is not to fight and win wars on behalf of states (even if PSCs have occasionally been hired to do so), but to sell their services to state and/or non-state clients in a global market. Secondly, PSCs are not tied to a particular state in the way national militaries are: they do
not necessarily have a social responsibility only to one client. Thirdly, though PSCs and their staff may have close professional and emotional ties to a specific country, they are business enterprises (or employees), and this does not necessarily entail identification with a state (nationalism/patriotism) or conformity to the security goals of a particular client. Fourthly, private companies are bound by business contracts that are quite different from the social contract between the state and the military, which is “ritualized in the officer’s oath of allegiance and reinscribed through a myriad of cultural symbols” (Feaver, 2003: 57). Finally, because economic goals are key to all companies, PSCs have reasons to exist that, ostensibly, are not shared by national militaries. Of course, economic motives may certainly be relevant for individual soldiers, but not, as Wolfendale points out, for the military as an institution (Wolfendale, 2008: 218; also Krahmann, 2008).

Judging from these observations, security privatisation has the potential to change the organisation of the instruments of force and the ability of states to control them. The differences also point to the limited possibility of incorporating actors such as PSCs into mainstream civil-military relations thinking. Not only do public and private “forces” display different characteristics, privatisation also creates mixes of public and private actors and activities that complicate civil-military relations. In sum, security privatisation changes civil-military relations by introducing an additional component into the relationship between the state and the instruments of violence and protection. The constellation may be seen as a triangle, where attention needs to be placed on the relationship both between the state and private companies, that is civil-PSC relations, and between the military and private companies or what may be termed PSC-military relations (cf. Leander, 2007; Dunigan 2011):

(80) The oaths that soldiers take when entering military service or becoming officers symbolize the close ties between these individuals and the state/nation. For instance, in the Swedish equivalent to the British Oath of Allegiance or the US Oath of Enlistment/Office (Sw. Soldaterinran) the message of obedience and duty to the country is clear: “In peace as well as in war we shall conscientiously and to the best of our abilities fulfill our duties and obey orders. […] If war comes, we shall use our collective power to defend our country to the utmost” (Swedish Code of Statutes (SFS) 1996:927, my translation).
Security privatisation not only creates something new in the form of civil-PSC and PSC-military relations but also impacts on existing civil-military relations. As indicated in the figure, the relationship between the civil power and PSCs is qualitatively different from that between the civil power and the military. Hence, established modes of oversight and control designed to deal with the military are not necessarily convertible into civil/democratic control over PSCs. Additionally, the introduction of PSCs into this civil-military mix signals a need to pay attention to new relationships between the armed forces and PSCs. The nature of PSC-military relations may be structured (institutionalised) or unstructured (informal) and can be problematised in terms of PSC-military cooperation, communication and coordination. Also, the impact of security privatisation on civil-military relations can be related to ways in which these state and non-state actors relate to, and perceive of, each other. Taken together, the introduction of PSCs into the civil-military balance suggests several changes to civil-military relations and state control of force. How can we make sense of these changes?

It has been argued that the inclusion of PSCs into the civil-military balance can have both stabilising and destabilising effects (Singer, 2003: 197-205; Avant, 2005: 253ff). The outcome depends on a number of factors: the type of company, the nature of the contract (what the company is hired to do), the type of client (public or private, strong or weak state), and the context in which services are delivered (war, peace, post-conflict reconstruction). Moreover, the assessment of privatisation depends on the meaning ascribed to the term ‘control’. On the state level, control may be thought of as the ability of the state to monitor and enforce compliance with the rules it sets up (Thomson, 1995: 223). Drawing on civil-military relations thinking,
Avant points to three basic dimensions of control: functional control, which concerns the capabilities and effectiveness of the armed forces; social control, which deals with the integration of the use of force with social norms and values such as democracy, international law and human rights; and political control, meaning subjection of the use of force to political or civilian rule and decisions (Avant, 2005: 5ff, Ch. 2).

In areas of political and social control, control comprises activities such as screening, selection, monitoring and sanctioning of PSCs and their personnel, as well as making PSCs behave in accordance with social norms and values such as human rights. Functional control includes issues such as military capacity, or what Percy has called the “military control over the use of force on the battlefield” (Percy, 2006: 17). On the functional level, it is also important to study PSC-military relations to gain a better understanding of how and why friction occurs and what role the relationship between the military and private companies – as well as these actors’ views of each other – might play in this context.

All three dimensions are related to the institutionalisation of the instruments and use of force, which means that they are linked to the formal and informal rules and constraints that apply to the use of force by (and the relationship between) state actors and PSCs, as well as the characteristics of enforcement mechanisms related to the activities of these actors. Studying the impact of security privatisation on state control in empirical cases, one also needs to consider different categories or aspects of privatisation, such as the production, regulation and financing of services or activities (Lundqvist, 1988). Equipped with these categories in combination with the three dimensions of state control, the following sections will turn to the case of Iraq, first to discuss the pattern of privatisation, and then to identify challenges to the civil-military balance and state control of force.

Security Privatisation in Iraq

The use of PSCs in Iraq has been extensive. Since 2003, they have supplied state and non-state clients with a wide range of services, including logistics, maintenance of weapons systems, military/police training, security-sector reform (SSR), risk assessment, intelligence services, interrogators/ translators, static guards and bodyguards, as well as armed convoy escorts or close protection teams. In 2006, it was estimated that some 50,000 people were working for PSCs in Iraq and that around half of them were carrying out armed tactical services such as guarding key installations, individuals
and convoys (GAO, 2006). In September 2009, the number of armed PSC employees was estimated at around 30,000. About 13,000 of these were working under US Department of Defense contracts (Schwartz, 2009). In a 2008 report, the Congressional Budget Office (CBO) estimated that the total spending by US agencies and US-funded contractors for private security in the period 2003-2007 ranged between $6 and $10 billion (CBO Report, August 2008). This large number of armed civilian security personnel operating under contracts worth billions of dollars, coupled with the many widely publicised violent incidents involving PSCs and their employees – such as the Nisour Square shootings in 2007 – has kept security privatisation in Iraq in the international spotlight.

The heavy reliance on PSCs in Iraq makes it interesting in several respects. Judging from the size of contracts, the number of PSC employees and the range of services that the companies have been called upon to provide, it is safe to assume that security privatisation in Iraq has brought about new public-private relationships and constellations that affect both the organisation and control of the instruments and use of force and protection. Recalling the division of privatisation into the areas of production, financing and regulation, a cursory glance at the Iraq case is enough to show that all three forms of privatisation are there and, importantly, that they are mixed. This means that drawing clear-cut lines between public and private actors, activities and responsibilities becomes very difficult. Even so, one may discuss a general pattern of privatisation, as well as major changes over time.

In Iraq, some of the services produced by PSCs are provided under contracts with state agencies and financed directly by state funds. One example of this arrangement would be the contract between the US State Department and Triple Canopy and DynCorp to provide protective services under the so-called WPPS (Worldwide Personal Protective Services) contracts. In addition, services are delivered under subcontracts with other contractors, financed indirectly by public funds channelled through private subcontractors. One example of this would be the contract that Blackwater (which changed name to Xe in 2009 and Academi in 2011) had in 2004 with Regency Hotel & Hospitality, a Kuwaiti company operating under a subcontract of the LOGCAP (Logistics Civil Augmentation Program, a US Army initiative to employ predetermined corporations to provide logistics support in the field). In Iraq, the bulk of security contracts are between PSCs and reconstruction contractors who are responsible for their own security (GAO Report, 2005; SIGIR, 2007; House Committee, February 2007).
Apart from the production and financing of security services, the regulation of the industry also involves privatisation. The issue of regulation is complex, and while some areas of private security are regulated on the national and international levels, many aspects of existing regulation have been found to be ambiguous, impractical or simply out of touch with the realities of PSC activities (Percy, 2006; Kinsey, 2006; Isenberg, 2007; Leander, 2007). Importantly, even though regulation does exist and has increased over time, oversight and enforcement have been lagging behind, partly because oversight in conflict zones is difficult and costly, but also because of an apparent lack of political will (Isenberg, 2007; Kinsey, 2009: Ch. 6). In addition, both the US and the UK have proved willing to rely on a certain amount of self-regulation by the industry, for instance, through standards constructed by business organisations such as the IPOA (now the ISOA) or the BAPSC. Hence, regulation has also been privatised to some degree. At the same time, there have been changes in regulation (particularly in the US and in the wake of the Nisour Square incident) whereby state actors seem to have wanted to tighten their grip and thus increase their degree of control over PSCs (Isenberg, 2007; GAO, 2008).

In sum, security privatisation in Iraq has involved private companies in the production, financing and regulation of security- and military-related services. The pattern has continued to be an intricate and variable mix of public and private actors and activities. This increasing complexity is important because it points to changes in the civil-military balance. To develop this thinking, the following pages will problematize security privatisation in relation to civil-PSC and PSC-military relations and the functional, political and social dimensions of the state control of force.

The Case of Iraq and the civil-PSC-military Balance

“Will Prescott: Why can’t we use, say, the Army to protect people like Bremer and the ambassadors instead of companies like Blackwater?

Colin Powell: Yeah, because the Army is limited in size, it’s only about 500,000 troops plus a couple of hundred thousand reservists, and they can only go so far. And, you have an army to take the battle to the enemy and not just to be

(81) On the international level, one can also mention the processes leading up to the so-called Montreaux Document of 2008 and the International Code of Conduct for Private Security Providers. Strictly speaking these documents do not constitute new regulation, although they do outline ethical guidelines and make recommendations that PSCs can choose to adopt.
bodyguards. And if you can get qualified contractors – many of them are ex-service, ex-secret service and have those skills – then why not do that, OK?” (The Oklahoma Daily, September 11, 2007)

From this quote, three functional arguments in support of privatisation can be extracted. First, since the army is limited in size, letting PSCs produce certain services gives speedy access to functions that are not readily available, thus enhancing capabilities, at least temporarily. Secondly, because the primary function of the military is to fight wars and not to be bodyguards to ambassadors, using private contractors to perform these functions is a way of letting the army focus on its principal mission. Thirdly, the fact that PSCs are qualified effectively to carry out the tasks of protecting civil servants is indicated by the fact that many of them have been trained by US military or law enforcement agencies.

However, outsourcing can also drain the military of core competences, such as logisticians and military trainers (Singer, 2004: 15). The loss of military competence to the private sector is a functional problem; when private companies attract military personnel important and expensive knowledge is lost, and states looking to increase capabilities by hiring private companies may end up contracting for skills they originally produced and financed (Isenberg, 2004: 26ff; Kinsey, 2006: 107). Also, because PSCs in Iraq have operated to a large extent outside the normal chains of command, it has been argued that the companies have added “another level of complexity to the military decision-making process” (Percy, 2006: 17). Finally, the fact that PSCs are not directly controlled by the military makes control over the use of force more complicated, resulting in problems or friction at the operational level.

Examples of such challenges are found in problems of communication. Asked to describe the exchange of information in 2004/05, one PSC employee said:

The idea was that they [coalition forces] would provide us with information because there were attacks and the point was that their intelligence unit would forward information to private companies about hot spots and about places where you should not be. But the information never came. We lived in a world where we had to sit by ourselves and try to figure out what routes to take and what the situation looked like at the moment. The result was that we tried to build informal networks. (Interview, Anonymous 01)
To illustrate these problems further, the GAO cites one example where a PSC escorted a CPA (Coalition Provisional Authority) administrator into a US military unit’s area of operations without prior notification to the unit. When a fire fight broke out at the location of the CPA administrator, the squadron had to pull troops from an operation in Najaf to rescue the CPA official. According to one officer, this had a significant impact on on-going military operations (GAO, 2005: 22). However, the most serious manifestations of these problems are the so-called blue on white (or white on blue) incidents, when military forces have fired upon PSCs (or vice versa). Between January and May 2005, twenty such instances of blue on white violence were reported (GAO, 2005: 28; also Dunigan, 2011: 59ff). Finally, there have been problems with the flow of information among PSCs, partly because of varying degrees of access to information and partly because of competition, possibly making companies less willing to pool information (Isenberg, 2004: 21).

In Iraq, several measures were taken to improve coordination and the flow and quality of information. One example of this is the 2004 RSSS (Reconstruction Security Support Services) contract. The contract included PSD (Protective Security Detail) teams, static guards, reconstruction liaison teams and support to the so-called ROC (Reconstruction Operations Centre) system. The ROC system was launched in 2004 to improve coordination and cooperation between different actors in the field by processing information and intelligence and making it available to contractors. The British firm Aegis was originally awarded the $293 million contract to get the ROC system up and running, and their contract was renewed in late 2007 (Donald, 2006: 71f; Kinsey, 2006: 105f).

Through the ROC system, (declassified) information from the military and intelligence processed by Aegis personnel was made available to commercial reconstruction contractors (or their non-state security providers), who could then use the information to plan their activities and movements. The ROC was organised into several regional HQs, making it possible to relay requests for medical evacuations or military Quick Reaction Force (QRF) and providing the military with information on the movements of reconstruction contractors and PSCs (Donald, 2006: 72). The decision to outsource the coordination of PSC and contractor activities and to relay information was a way for the US to improve functional control, that is, to get things done which the administration could not (or would not) do on its own (Isenberg, 2007: 86).
In spite of initiatives such as the ROC system (and later the Contractor Operations Cells), problems of communication and cooperation persisted (GAO, 2006 and 2008; SIGIR, 2009). The reasons for this are many: differences in organisation between private companies and the military, competition among private companies, and negative perceptions of “the other” on the part of public and private actors are but a few examples. Within the military, there are different views of PSCs and their employees. One industry analyst writes: “At an individual level it is probably fair to say British Armed forces personnel view British PSC contractors with a degree of envy” (Donald, 2006: 33). This purported envy may be rooted in differences in salaries, standards of equipment or length of contracts. In Iraq, some view American military contractors as being at “the top of the food chain”, while others see them as “cowboys” or “mercenaries” (Pelton, 2006: 219; interview, Anonymous 01). Conversely, PSC employees recruited from the armed forces may have negative attitudes towards the military and may be disinclined to cooperate because they want to “pay back for having been treated badly in the military” (interview, Anonymous 02). Ultimately, bad PSC-military relations created by a lack of institutionalised working relationships may hamper cooperation and communication, causing friction and decreasing functional control. In addition, problematic PSC-military relations can effect civil-military relations: the military might be more inclined to “shirk” if PSCs are viewed as (unfairly) better paid or equipped (Feaver, 2003: 58ff; also Dunigan, 2011: 76ff; Cotton et al., 2010).

The privatisation of security and the creation of new civil-PSC and PSC-military constellations may give rise to several problems linked to functional control. On the ground, one important set of problems arises from the fact that PSCs are business enterprises. This means that they compete with each other for contracts and that they owe their loyalty first and foremost to their clients, something which could make cooperation between companies difficult. As one PSC employee expressed it: “No one would bring their client into harm’s way to save operatives from another company – responsibility to the client comes first” (interview, Anonymous 01). Between companies and armed forces working in Iraq, the (often informal) relationship is influenced by attitudes that may affect operations. Effective cooperation demands functioning working relationships between different actors and a clear chain of command. This has not been the case in Iraq. Particularly in the early period, communication and cooperation were largely ad hoc and dependent on personal contacts.
Turning back to civil-PSC relations, privatisation can affect the social control of force, i.e. the fit between force and social values such as democracy, human rights and the laws of war. Now, adherence to these values and rules need not diminish as a result of privatisation. On the contrary, many PSCs hire ex-military personnel from elite regiments of Western militaries who bring these presumed commitment with them to the private sector. As a result, strong states that contract with companies whose personnel stem from their own militaries need not necessarily worry about social control. Yet, the adherence to international values – even among highly trained professionals from Western militaries – cannot be taken for granted. In Iraq, one clear example allegedly including both active duty military and the contracted interrogators from CACI and Titan Corp. is the abuse of prisoners at the Abu Ghraib prison (Isenberg, 2004, 2007).

Describing the situation in Iraq in 2005, one PSC employee said that “My impression is that it is a Klondike that attracts all different types of people. You’ve got everything from people with an incredibly solid military education to fortune-seekers and mythomaniacs” (interview, Anonymous 01). In addition, far from every employee of a PSC in Iraq is a former member of a Special Forces unit. As Kinsey observes, some PSCs in Iraq have “resorted to employing bouncers and security guards, raising new concerns about the calibre of staff providing vital protection services” (Kinsey, 2006: 107). Even if these observations are not representative of the security industry as a whole, they indicate serious challenges to social control on part of state clients such as the US and the UK, especially as there is a lack of oversight and enforcement mechanisms to ensure conformity to these values.

Changes to social control are not necessarily seen as problematic by states: Avant even suggests that in Iraq, the US have intentionally chosen to contract “cowboy” companies, that is, companies that are willing to take on “dicey” tasks, that are willing to take risks and that “act like soldiers, not businessmen” (Avant, 2005: 226-228). While this might make sense from a functional perspective, it also raises questions about the impact of hiring these companies on the norms that govern companies. A case in point here is the conduct of Blackwater in Iraq. US official investigations and hearings indicated that Blackwater was involved numerous escalations of force and shooting incidents from 2005, including the Nisour Square incident, which resulted in over a dozen civilian deaths (House Committee, October 2007). The question, of course, is whether the allegedly aggressive behaviour of the company during its time in Iraq was a function of a conscious trade-off
between functional and social control on part of the contracting agency. While no satisfactory answer can be provided here, one interviewee expressed it in the following way:

Now, Blackwater has come in for a lot of flak over the way that it conducts itself in Iraq. I think one has to bear in mind the principal contract, or certainly the most visible contract that it’s got, protecting US State Department people, pretty much requires that they behave in that fashion. I’m not sure that any other firm doing that job would be able to do it any different. The reality is that the US State Department is not going to allow one of their people to go out to a meeting in a beaten up, old, Toyota, wearing a rag over his head, escorted by three blokes, maybe two of them or one of them Iraqi, and one or two of the others being Westerners with big beards and heavy suntans. They’re just not going to allow that. (Interview, D. Donald, 2007)

If the behaviour on the part of some private companies in Iraq is seen as aggressive, this may contribute to the increasing targeting of public and private actors alike. Thus, if, in the eyes of insurgents, some PSCs are seen as part of the coalition and thus part of the threat, then not only will this put armed forces at risk, it will also contribute to increasing insecurity for PSCs and their (state or non-state) clients. True, state clients may try to improve social control and thus civil-PSC relations by choosing certain companies over others and by trying to promote certain behaviour. However, in order to promote desired behaviour, states would also need thorough knowledge and oversight of that behaviour. In the case of Iraq, such knowledge and oversight has frequently been in very short supply.

Shifting the focus to another aspect of civil-PSC relations, it has been argued that privatisation can create problems of political control by reducing direct state authority over the organisation and deployment of force (Avant, 2005: 59). In practice, political control involves activities such as vetting and screening employees. The fact that in Iraq these functions have often been performed by private companies is a challenge to political control because the authorisation of individuals to use violence is partly placed in the hands of private companies (GAO, 2006). Although most PSCs do try hard to vet prospective personnel, problems of individuals lying about their training or criminal record and getting away with it have persisted (interview, Anonymous 02). From the point of view of civil-PSC relations, this means that the ability to use screening and selection mechanisms to
ensure that “the right sort of agent” is authorised and contracted to use force diminishes (Feaver, 2003: 78).

However, even if the contracting agency does play a significant role in deciding who can work for the company under a particular contract, problems arise if these requirements are not specific enough or not followed up on. One PSC representative phrased the problem in the following fashion:

The original DOD contracts under the Coalition Provisional Authority, the CPA, was that an individual, going over in a war zone, carrying a gun, had to have prior military or law enforcement experience. The type and length of military experience was not specified. Although the individual applying may have met the basic contractual requirements, this did not mean he was qualified to carry a gun as part of a PSD [Protective Security Detail]. (Interview, Lee van Arsdale, 2007)

This is an example of the contracting agencies not being explicit enough about the qualifications or backgrounds of personnel being contracted to perform armed services in a conflict zone. Effectively, this meant that private companies were left in charge of the selection process and of specifying selection criteria. Under these circumstances, state authorities had little or no direct control over persons hired by the companies.

On the same note, the lack of adequate oversight mechanisms – especially in terms of contract officers – was identified as problematic by several commentators (Singer, 2007; Isenberg, 2007; Dickinson, 2007; Elsea and Serafino, 2007). Without proper oversight, the possibility to enforce rules and policies, or to identify misbehaviour and fraud, is seriously hampered. Why this lack of oversight and enforcement mechanisms? From a functional and economic perspective, the answer is simple: enforcement is costly. It is costly to find out if a contract has been violated, more costly to measure the extent of the violation, and still more costly to apprehend and impose punishment on the violator (North, 1990: 58). Hence, putting in place comprehensive oversight and enforcement mechanisms decreases the relative (economic) gains of security privatisation.

Another instrument in the political control of force is the Rules of Engagement (ROE) that govern the use of force for members of the armed forces. According to Feaver, ROE are important because they restrict military autonomy, proscribe certain behaviour and require that the military report
up the chain of command and inform civilian principals about operations, thus indicating when the rules need to be changed. As such, the ROE are “both a leash on the military and an information source for senior leaders, civilian and military” (Feaver, 2003: 77). Thus, as “long as the military operators do not ‘pull’ on the leash, the senior commanders know that the pace of the military operation is less than the bounds set by the rules” (ibid.).

Certainly, there are Rules of Engagement (or Rules for the Use of Force, RUF) for PSCs working in Iraq (Isenberg, 2004: 42; Isenberg, 2007: 88ff; Bruneau 2011: 136ff). Yet problems of information have been frequent, and many violent incidents have gone unreported. When feedback mechanisms are dysfunctional or non-existent, these rules cannot function as a leash on PSCs or as an instrument of political control.

To sum up, this analysis of the case of Iraq shows that the public-private assemblages created through security privatisation are multifaceted and do not yield straightforward explanations. Yet it is clearly the case that the introduction of PSCs into the civil-military balance affects the functional, political and social control of force in several ways. A closer examination of PSC-military and civil-PSC relations points to serious problems of cooperation and communication, as well as problematic attitudes. While contracting agencies have sought to address some of these problems, quick fixes are unlikely to remedy the more complex and deeply seated problems of social control or the issues of negative perceptions discussed above (cf. Cotton et al., 2010; Berndtsson, 2012).

**Discussion**

The aim of this chapter has been to problematize the relationships between the state, the military and PSCs by drawing on observations from the Iraq case and focusing on issues of state and democratic control. One important point of departure for this investigation was the argument that, although security privatisation means that private companies sometimes take over military-type functions, PSCs are not military forces in their own right. In fact, PSCs differ from the military in several ways, two of the most central being the fact that their relationship with the state is primarily based on a business contract, and that the basis of their existence is economic. Studying security privatisation and issues of state control, it makes good sense to adopt a theoretical framework based on civil-military relations thinking, although fundamental differences between PSCs and the military need to be acknowledged and brought to the fore.
To structure the analysis of empirical data and to be able to probe qualitatively different yet interrelated relationships further, the chapter has used the idea of civil-PSC-military relations, combined with threefold concepts of privatisation and state control. The analysis of the Iraq case has indicated several problems linked to the functional, political and social control of force that are rooted in differences between PSCs and the military and in the structure of the relationships between PSCs and the state or between PSCs and the military.

Significantly, the analysis has also pointed to the fact that, even though privatisation patterns are hard to delineate, one of the most striking aspects of security privatisation in Iraq has been the mixture of public and private actors and activities when it comes to the production, financing and regulation of security- and military-related services. Thus, privatisation is not (and never was) merely a matter of either public or private: it is a combination of both. In the case of Iraq, the combination of public and private created complicated situations in which it has been difficult to distinguish the public and private spheres. Not only does this create difficult situations on the ground, it also impedes transparency and complicates the task of assigning responsibility.

In Iraq, and especially in the early period, insufficiently structured and largely informal working relationships between PSCs and the military caused serious problems, not infrequently leading to increased security problems for, and even violence between, state and non-state actors on the ground. Even as PSC-military relations were being formalised, oversight mechanisms put in place were not sufficiently robust or rigorous to ensure an appropriate level of state control. Importantly, even though problems of state control and oversight have persisted, and in spite of serious incidents such as the Nisour Square shootings in 2007 (which prompted a massive effort in the US to increase oversight and control), the reliance – indeed the dependence – on PSCs in Iraq has not diminished. On the contrary, it has been an important part of the US exit strategy and remains vital to the protection of foreign interests, staff and infrastructure in the country.

Taken together, these observations indicate that civil-PSC and PSC-military relations will continue to form an important part of the picture for some time to come, not only in Iraq, but also in other areas of armed conflict such as Afghanistan. While this chapter has only scratched the surface of many of these issues, the analysis clearly shows the need for a continued empirical
focus on privatisation patterns and basic relationships to understand how the privatisation of security is realised and what problems and prospects of state control arise in the process. In addition, this chapter has argued that theories of civil-military relations are useful for students of security privatisation. However, the changes in the organisation of the instruments and use of force brought about by privatisation also necessitate a critical reassessment of several of the basic ideas and assumptions of civil-military relations theory.
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Chapter 6

**Soldier, Sailor, Poor man, Thief**

Pirates, States and Navies from the Days of Yore to the Present

Bjørn Møller

Preface

The title of this paper is inspired by an old English nursery rhyme, best known from A.A. Milne’s “Tinker, tailor, soldier, sailor, rich man, poor man, beggar-man, thief” (1927: 19-21) and John le Carré’s famous spy novel, *Tinker, Tailor, Soldier, Spy* (1974). The four characters retained in the present title all describe features common to both historical and contemporary pirates. Pirates have historically been poor men who have striven to become rich and who have quite often succeeded in this endeavour, mainly through theft. Indeed one of Shakespeare’s characters uses the expression “Notable pirate. Thou saltwater thief” (*Twelfth Night or What You Will*, V.I). They have, of course, been sailors, making the seven seas their home and “danc[ing] in triumph o’er the waters wide”, like the hero of Lord Byron’s epic poem *The Corsair* from 1814 (Byron 1900: 228). The term “corsair” takes us to the final feature of pirates, namely the fact that they have often served as soldiers, typically when a state has outsourced national defence tasks to private agents who have been motivated by a quest for personal enrichment—in fact by legal definition inspired by an *animus furandi*, the desire to plunder (Noyes 1990; Murphy 2008: 54).

On the following pages we shall focus on this curious and confusing public-private interface, devoting most attention to contemporary piracy, but viewing this in a historical perspective with a special focus on how pirates have served as contracted naval units for states. This is followed by a brief account of how state navies, following the abandonment of the use of

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privateers in the mid-nineteenth century, have emulated pirate tactics and strategies through naval *guerres de course*. Approximately the last half of the paper looks more closely at contemporary piracy, especially in Somalia, and again with a special focus on the public-private interface and on how the various “sovereignty games” played out around Somalia have contributed to the rise of piracy and hampered its suppression.

**States and Pirates: To Suppress, Condone or Promote?**

Today it is often claimed that piracy flourishes when states are “unwilling or unable” to maintain order in their maritime domain—as is, likewise, claimed to be the case with maritime and other terrorism. However accurate it may be, the conflation of unwillingness and inability only serves to obfuscate not only this issue but also others posed by the phenomenon of so-called “failed states”.

With regard to both will and ability we are, of course, dealing with degrees. While it is fairly obvious that no state is able to completely prevent piracy—nor other crimes for that matter—it is also evident that some are better at it than others, at least if they really put their minds to it. It may be less obvious to the modern mind why some states might sometimes not want to do so, but history provides plentiful evidence that even reasonably strong states have turned a blind eye to piracy, deliberately and clearly tolerated and condoned it, or even actively promoted what other states have labelled piracy.

**Corsairing: Pirating for the State**

In antiquity, several polities thrived on the proceeds of piracy, most notoriously the Cilicians under King Mithradates of Pontus, who more or less used them as a regular navy, commissioning the services of pirates both to fill the state’s coffers and in pursuit of political goals such as weakening his rivals in the Mediterranean, especially Rome (Ormerod 1924: 190-247). Hence, when Pompey received Senate authorization under the *Lex Gabinia* of 67 BC to suppress piracy in the Mediterranean, this also entailed a war against Cilicia (Smith 1960; Tröster 2009).

With the decline and eventual fall of the (West) Roman empire, piracy spread again throughout the Mediterranean. The relationship of pirates to states was quite ambiguous, as the embryonic states not only struggled hard to control piracy within what they regarded as their maritime territories and to protect their seaborne trade, but also occasionally found it advantageous to align themselves with pirates for raids against their respective adversar-
ies (Lewis 1937). Faced with an endemic threat from pirates in the Aegean Sea, the Byzantine emperor Michael III (840-867) thus resorted to hiring pirate captains to form a new Byzantine navy under the nominal auspices of which the pirates (now renamed “corsairs”) would continue their raids against Venetian and other Italian merchant shipping whilst sparing Byzantine trade (Konstam 2008: 30-31; Katele 1988). The Muslim successors to the Byzantine Empire, the Ottomans, likewise resorted to extensive use of corsairs, including pirates from the Barbary Coast in North Africa such as the notorious Barbarossa brothers and Murat Rais (Gosse 1946: 10-47). A successor to the latter, Uluç Ali Reis (1519-1587), even managed to move from piracy to privateering as a corsair and to end his career as High Admiral of the Ottoman navy (Konstam 1999: 50-51).

For centuries after their de facto independence from Ottoman rule, the various sultanates and emirates along the Barbary coast continued to support pirates and corsairs, who gradually came to challenge not only Mediterranean shipping, but also shipping in parts of the Atlantic Ocean. Hence not only was the dominant naval power of the time, the United Kingdom, forced into action, but even an emerging power such as the United States chose to go to war against them in 1801-1805 and again in 1815 (Garrity 2007), as eulogized in the hymn of the US Marine Corps, with its reference to “the shores of Tripoli.”

The fact that the Barbary corsairs were mostly Muslims and also engaged in the capture and sale of slaves made it possible to portray their suppression as a humanitarian and civilising imperative (Löwenhein 2003). While the British navy thus saw itself as fighting against “enemies of mankind” (hostes humani generis, a term used for both pirates and slave-traders), if seen from the point of view of the owners of the slave ships, what the British warships were doing when boarding the merchant ships was illegal commerce raiding, that is, state-sanctioned piracy, however much it may have been undertaken (at least partly) for humanitarian reasons. One reason for not automatically accepting the British claims at face value might be that the British had themselves only recently ceased making extensive use of privateers, as they had for several centuries. In Elizabethan times, for instance, several otherwise notorious pirates (labelled “sea dogs”) rendered such valuable services to the public good of the realm that they were knighted by the English crown, as happened to Sir Francis Drake and Sir John Hawkins, just as members of the well-established landed nobility such as the Earl of Warwick became deeply involved in the corsairing business.
Later, the British, French and Dutch all enrolled so-called buccaneers in their various wars against Spanish dominance, tasked with both piratical attacks against the merchant fleets en route from the Spanish Main to Europe and attacks on Spanish settlements in the Americas and the Caribbean (Exquemellin 1678; Konstam 2008: 95-149; Earle 2004: 87-108).

Among their precursors in the business of state-sanctioned maritime predation we might also mention the notorious ancestors of the present author, the Vikings, who launched raids against coastal areas ranging from the North Sea to the Mediterranean and even down to the Byzantine Empire, relying upon their excellent seamanship and mainly voluntary levies of freemen under rather decentralised command. Gradually, however, their kings managed to establish greater control over their predatory activities as well as over the settlements and colonies established by the Vikings, both in the British Isles and elsewhere. The Vikings are sometimes described as pirates, and there is little doubt that they also engaged in piracy as usually defined, that is, robbery from and of vessels at sea or in harbours, though they mainly raided targets ashore, and even established territorial control (Griffith 1995; Van Houts 1995; Gosse 1946: 88-82).

The Economic, Political and Strategic Value of Privateers

All of the above pirates, corsairs, buccaneers etc. were private actors pursuing private ends in an entirely rational and economical fashion, as demonstrated in a recent book by Peter Leeson (Leeson 2009). The attractions of such selfish and criminal actors to the ruling princes and monarchs of the time were pretty obvious.

In the rivalry between the great powers of any era (e.g. between the Venetians and the Ottomans or between the UK and Spain) relative strength has been what mattered (Thompson, ed. 1999); indeed, modern International Relations “Realists” see this as a perennial feature of world politics (Mearsheimer 2001; Baldwin, ed. 1993). There are logically three ways a state may tip the balance of power in its own favour: by strengthening itself, by weakening its adversary or by combining the two. In all three cases it is not merely direct military strength that matters, but just as much the economic foundations thereof, which may be understood as latent war-making capabilities (Knorr 1956; 1992). What pirates or privateers can do for a state is primarily to weaken its opponents, as happened when the English crown issued so-called “letters of marque and reprisal” to pirates (Starkey 2001a), granting them...
state authorisation to raid the Spanish merchant fleets on their journeys between Europe and the Spanish Main (Bialuschewski 2008; Starkey 2001b), thus weakening the economic foundations of Spanish power. It also helped that these “pirate licences” defined English merchantmen as off-limits, the latter thus presumably avoiding at least some of the piratical attacks they would otherwise have endured; and what was even better was that the licences stipulated the crown’s entitlement to a certain share of the booty, thus contributing economically to English war-making potential. There might also be more direct military advantages in thus launching a wave of piratical attacks against the merchant fleet of one’s adversary, namely that this would divert the latter’s men-of-war from attacking one’s own navy to providing a protective escort for convoys of one’s own merchant ships.

The final advantage of thus relying on privateers was that they came cheap, costing little more than the ink and paper required for a letter of marque, which compared very favourably with the costs of building a regular fleet, which would also have to be maintained in times of peace. The disadvantages of such a contract or mercenary navy in terms of a partial loss of control might well be more than offset by the flexibility it offered and the benefits which (especially in countries where public opinion played a role) an outsourcing to private actors represented for a monarch who would like to have something done, but for which he or she would prefer not to be held accountable, either because it was dubious on moral grounds or inherently risky.

Some of these advantages could even be amplified by what we may call “double outsourcing,” which was used extensively by the European powers in their colonisation of the rest of the world, especially in the early stages. The task of establishing British, French, Portuguese, Spanish or Dutch control was often delegated to so-called “chartered companies” in which the state in question held shares and over which it exercised some control, but which were nevertheless expected to operate independently and on commercial terms. To the extent that these companies required armed protection of their colonising and commercial enterprises, mercenaries and privateers were their armies and navies of choice (Thomson 1994: 32-41; Risso 2001; Amrade 2005).

**States Emulating Pirates: Continental Naval Strategies**

A sea-change occurred in 1856 when the great powers of the day signed the Declaration of Paris, which abolished privateering with a stroke of a pen
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(Stark 1897; Stockton 1920; Thomson 1994: 70-75). Most other powers soon acceded to the new regime, to which were also added, more or less simultaneously, prohibitions against the use of mercenaries in warfare on land.

The United States, however, did not sign up, but was determined to preserve the right of Congress, codified in Article VIII of the Constitution, to issue “letters of marque and reprisal” to privateers (Staub 2009; Thomson 1994: 73, 177-178). In a letter from US Secretary of State W.L. Marcy of 28 July 1856 to the plenipotentiaries of the various European powers at the Paris conference, the underlying philosophy was explicated:

The United States considers powerful navies and large standing armies as permanent establishments, to be detrimental to national prosperity and dangerous to civil liberty. The expense of keeping them up is burdensome to the people; they are, in the opinion of this government, in some degree a menace to peace among nations. A large force, ever ready to be devoted to the purposes of war, is a temptation to rush into it.

The Secretary of State proceeded to quote with approval a “treatise on naval prizes” of unknown provenance claiming that,

Privateers are especially useful to those powers whose navy is inferior to that of their enemies. Belligerents, with powerful and extensive naval armaments, may cruise upon the seas with their national navies; but should those States, whose naval forces are of less power and extent, be left to their own resources, they could not hold out in a maritime war; whilst by the equipment of privateers they may succeed in inflicting upon the enemy an injury equivalent to that which they themselves sustain. (U.S. Department of State 1856: 13)

Even though the new norms were not uniformly observed (far from it, in fact) the change was still significant, as it served to de-legitimise the use of private and commercially motivated actors in the pursuit of public goods. The main explanation for this sea-change was probably not so much that the various comparative advantages of private agents had vanished into thin air, but that new norms of accountability and the rights and duties of citizenship had by now become so firmly entrenched that they could not be ignored (Thomson 1994: 77-89; Percy 2007). However much IR Realists would have us believe that ideas do not matter, as least sometimes they actually do (Goldstein & Keohane, eds. 1993). However, because the belief
persisted that it was important for a state to weaken its enemies economically as well as politically, for example, by attacking their commercial shipping, the new regime outlawing mercenaries and corsairs paradoxically forced (at least some) states to emulate pirate tactics in pursuit of their political and grand strategic goals.

This grand strategy of commerce raiding has not generally appealed to the dominant naval powers, who have usually preferred to seek “sea command” as recommended by the American naval strategist and geo-politician Alfred Thayer Mahan (1899; Sumida 1997; Gray 1992: 136-173; 1994: 13-25), who based his advice to the United States on the study of how the UK had come to “rule the waves”:

The sea power of England therefore was not merely in the great navy, with which we too commonly and exclusively associate it (…). Neither was it in a prosperous commerce alone (…). It was in the union of the two, carefully fostered, that England made the gain of sea power over and beyond all other states; and this gain is distinctly associated with and dates from the War of the Spanish Succession [1701-14, BM], Before that war England was one of the sea powers; after it she was the sea power, without any second. (…) She alone was rich, and in her control of the sea and her extensive shipping had the sources of wealth so much in her hands that there was no present danger of a rival on the ocean. (Mahan 1889: 225)

Viewing cruising and commerce-raiding warfare such as that usually practised by means of privateers as, at most, a supplement to decisive naval battles by means of ships of the line, Mahan had a distinct preference for large men-of-war and decisive naval battles as means to the end of achieving sea command (Mahan 1889: 511; 1899). These views were, however, challenged by the almost equally famous British naval strategist Julian Corbett, who granted Mahan the point that “The object of naval warfare must always be directly or indirectly to secure the command of the sea or to prevent the enemy from securing it,” but then went on to state that, “the most common situation in naval war is that neither side has the command; that the normal position is not a commanded sea, but an uncommanded sea” (Corbett 1911: 91). Moreover, no matter how attractive a maritime pax romana, pax britannica or pax americana might have appeared to the governments in Rome, London or Washington respectively, other governments have generally been much less comfortable with such arrangements.
When they have been unable to contest directly command of the sea by the dominant maritime power, they have usually had no other option than to make the best of their position of inferiority by asymmetrical means.

This was position in which France found itself in the latter half of the nineteenth century, when its rival and antagonist Britannia “ruled the waves.” Hence, France’s answer to British dominance was a naval strategy usually referred to as the *Jeune École* and primarily associated with the name of its principal protagonist, Vice-Admiral Hyacinthe-Laurent-Theophile Aube (Coutau-Begarie 1990; Cellier 1990; Ropp 1987; Bueb 1971). He has been quoted for asserting that “the next naval war, especially against England, will be carried on by cruisers attacking her commerce”, as well as for a more ominous threat: “Every power of attack and destruction will be employed against England’s littoral towns, fortified or unfortified, whether purely peace establishments or warlike—to burn them, to destroy them, or to pitilessly ransom them” (Field 1887: 109). On another occasion he is quoted for the view that “War is the negation of right (…) Everything is thus not only permitted against the enemy, that is the law” (Higgins 1921: 177, translated by the present author).

Aube’s proposed strategy entailed a guerre *de course* (cruising warfare) of commerce raiding by means of a plenitude of smaller warships (mainly torpedo boats and cruisers) which would be widely dispersed prior to the raid as a hedge against their being destroyed by the enemy’s superior battle fleet. For the attack, however, they would rapidly concentrate on their target, thanks to modern means of communication and transport such as the telegraph—a stratagem quite similar to what is today sometimes referred to as “swarming” and presented as if this were something new (Dahl 2005; Arquilla and Ronfeldt 2000).

Even though the *Jeune École* was mainly a French phenomenon, it also had an influence on the naval thinking and planning of the other major land powers, such as the Habsburg Empire and Germany (Sondhaus 1992; Höbelt 1988; Ropp 1970). As a land power, Germany had historically not really prioritised the sea, and the main task of its navy had all along been coastal defence. This remained the case throughout the nineteenth century, but gradually commerce raiding was added to its panoply of missions in the form of *Staatskaperei*. This strategy benefited *inter alia* from new ship designs, such as the ironclad and the steam-propelled corvette (Olivier 2001; 2004). Gradually, however, this orientation changed when Admiral Tirpitz em-
barked on the construction of a navy with a much greater “punch,” devoted to what would soon become obvious as a futile quest for sea power, which would have required a larger fleet of much more offensive-capable warships (Hobson 1996). The sequel to this was the extensive use, alongside surface raiders, of submarines by Germany for the raiding, and indeed sinking, of ships belonging to the opposing side during both the First and the Second World Wars—a strategy to which the other warring sides also gradually, and with some reluctance, turned (Lautenschläger 1986; Halperin 1994: 287-380; Kaplan and Currey 1997). What distinguished this form of raiding from that conducted by pirates in the past was that the objective was now not so much to appropriate the war-making potential of the enemy—for which submarines are ill-suited—as simply to destroy it, in casu by sinking the ships with their cargos, and usually with very little concern for the crews, no matter whether they were military or civilian.

The next modification of raiding strategies was that of the Soviet Union—a land power to an even greater extent than Germany, France or the Habsburg Empire, the naval strategy of which was primarily intended to support the land war. One of the main problems in this connection was that although the USSR, certainly after the Second World War, may have enjoyed superiority in terms of standing armed forces, it was clearly surpassed by the West combined in terms of its medium-to-long-term mobilisation potential, reflecting the economic and technological superiority of the West. Hence, a land war had better be swift, regardless of who would attack whom (Vigor 1983). If this main objective was not achieved and the war became protracted, the second-best would be to prevent the United States—the immense economic and war-making potential of which was largely out of reach of the Soviet military—from bringing its power to bear on the battle in Europe. One of the envisaged means to this end was to attack NATO’s SLOCs, that is, its sea lines of communication (McGwire 1987: 106-107, 149-153, 448-476; Tarleton 1992), mainly by means of submarines operating across what was often referred to as the GIUK (Greenland-Iceland-UK) barrier which NATO would attempt to establish as its SLOC defence perimeter in the North Atlantic (Till 1986). Whereas the SLOCs would, of course, also be used for the sea-lifting of US military reinforcements to its European NATO allies, just as important was the sea-lifting of non-military items, mainly on-board merchant ships commissioned for the task, implying that the Soviet strategy could well be seen as envisaging a modern form of commerce raiding, for which privateers would previously have been employed.
Contemporary Pirates and States

Even though since the mid-nineteenth century most states have thus emulated rather than hired pirates, there have been instances when states (or at least state agents) have seemingly condoned or even supported piracy, albeit usually in secret. In some cases local state agencies or individual state officials have benefitted economically from piracy, typically by “taxing” the pirates (Murphy 2008: 54-58, 161-162), but there have been no trustworthy reports about the involvement of central governments in large-scale maritime predation.

In quite a few cases, however, states have clearly appreciated the political consequences of piratical activities and therefore apparently tolerated them. Perversely they may have appreciated these consequences even more the more morally dubious the activities have happened to be, as this simply raised the value of “plausible deniability.” A case in point was the flow of refugees as “boat people” out of Vietnam after the fall of Saigon in 1975, most of whom sought refuge in other countries in Southeast Asia. Underway the ships were subjected to attacks by pirates, initially fishermen moonlighting as “opportunistic pirates”, but gradually these attacks came to be conducted by more organised pirate groups, who not only robbed their victims, but also raped the women, often as a prelude to selling them off into prostitution. Suspicions were raised in this connection, including by the UN High Commissioner for Refugees, Paul Hartling, about the connivance of government officials in these activities. At the very least the governments of the region appreciated the sharp decline in the number of refugees produced by these attacks (Eklöf 2006: 17-34).

The most important contemporary contribution to piracy by states, however, seems to be what they do not do, either because of a lack of will or of capacity, or of both. Even when a state does absolutely nothing, neither to support nor suppress piracy, it still matters because of the various “sovereignty games” being played by states and international organisations in the modern world. The term “sovereignty game” seems to be the invention of political scientist Robert Jackson (1987; 1990: 32-49), but its basic rules have also been described by Hedley Bull (1995: 62-73, 122-155) and others. It entails a number of rules, among which the most basic one is that states are sovereign, i.e. the supreme authorities within their territorial domains and ipso facto protected by the rule of non-interference in internal affairs. This distinction between what is inside and outside has been criticised by authors such as R.B.J. Walker (1992: 159-183) and described as “organised
hypocrisy” by Stephen Krasner (1999). The main problem is that, according to the “new” rules of the game adopted as the foundation of the Westphalian system, statehood, and thus also sovereignty, is granted to polities with little or no regard to whether or not a state actually exercises control over its sovereign domain, and especially to whether or not it maintains a Weberian “monopoly on the legitimate use of force” (Weber 1919: 78). In the absence of these factors, a state enjoys only formal (also called negative or external), not empirical (internal or positive) sovereignty, making it a “quasi-state” (Jackson 1990: 26-31).

Quasi-states are covered by international law to the same extent as “real” states, enjoy the same privileges and are formally bound by the same commitments, even though they completely lack the ability to implement them; and the rest of the community of states, as well as the international organisations of which they are members, are obliged at least to pretend that they are real states and treat them as such. Hence, their territory is legally inviolable, their laws apply (albeit without enforcement) throughout their internationally recognised territory, and they are entitled to join international organisations. This further complicates the international law dealing with piracy, which would be complicated enough without this additional complication (Bahar 2007). We shall refrain, on this occasion, from going into details here and merely recapitulate the main aspects:

1. Long-standing jus cogens norms, which are peremptory and non-derogable, i.e. obligatio erga omnes, define pirates as the aforementioned hostes humani generis, which entails universal jurisdiction over them (De Vattel 1758; Bassiouni 2001; Addis 2009).

2. General principles in natural law define the high seas as mare liberum, i.e. as falling beyond the sovereign domains of states whilst at the same time making the ships navigating them small and mobile pieces of sovereign territory, protected (with qualifications) by the aforementioned norms of sovereignty (Grotius 1633).

3. Two sets of conventions constitute the general Law of the Sea: (A) The Geneva “Convention on the High Seas” (1958), and a companion “Convention on Territorial Seas and Contiguous Zones” (1958) which remain binding on states such as the United States which have not ratified the successor (Duff 2004), i.e. (B) UNCLOS or the United Nations Convention on the Law of the Sea (1982), which has been in force since 1994 (Azubuike 2009).
Both contain definitions of piracy and prescriptions for how to combat pirates legally, as well as criteria for distinctions between territorial waters, contiguous zones, exclusive economic zones and the high seas.


5. Various regional or sub-regional agreements are binding on their signatories (Guilfoyle 2008).

6. Pieces of ad hoc international law such as the various UN Security Council resolutions adopted in 2008 about piracy off the coasts of Somalia may mandate counter-piracy operations, but are limited in both time and space (Guilfoyle 2008; Treves 2009).

To this should be added, when applicable, national legislation on piracy—which a surprisingly large number of states lack, probably because the problem has been almost non-existent for most countries for a very long time. Hence in legal cases between victims of piracy (mainly shipping companies) and their insurance companies, courts have sometimes had to rely for precedence on very old cases or even to base their rulings on other countries’ legislation (Passman 2009).

A main problem with the international conventions about piracy is their definition of it as something that takes place on the high seas, a legal criterion which has been criticised by Martin Murphy, claiming that “the only people who are pleased are the pirates (one minute) or armed robbers (the next minute), as they skip from one side to the other of an invisible line that divides the high seas from territorial seas in order to evade capture” (Murphy 2008: 9). This “invisible line” is also variable and potentially controversial, as some parties to the Geneva Conventions and UNCLOS have declared either larger or smaller territorial seas than these conventions allow for, while non-signatories may contest even lawful declarations of territorial sea delimitations.

Moreover, both the Geneva conventions and UNCLOS (but not SUA) include motivation as a defining criterion of “pirates” (i.e. the label activating universal jurisdiction), thus stipulating that miscreants only count as pirates...
if they are motivated by “private ends”, which typically but not necessarily constitute an *animus furandi*, that is, an “intention to plunder”. An intention to rape—as was the case in some the aforementioned attacks against boat people in the late seventies (Eklöf 2006: 23)—is, likewise, private and allows the culprit to be categorised as a pirate, whereas insurgents or terrorists cannot count as such, even if they attack a ship in international waters, because they are fighting for a “higher” cause.

Some of the complexities are illustrated in Fig. 4, which depicts a third party (e.g. a warship patrolling the Gulf of Aden) witnessing an attack by pirates against a civilian ship. Not only are there several different zones of jurisdiction in play, but there may also be many nationalities involved as actors or stakeholders. For instance, the ship under attack may be, and quite often is, owned by a company in one state, but flagged as belonging to another; and its crew may belong to yet other states, as may the cargo, which is usually underway from yet another state of origin to one of destination—to which should be added the complication that the ship will often have traversed several territorial waters and contiguous zones *en route* from its original to its final destination.

**Figur 4: Legal complications in anti-piracy operations**

In the case of “real states” which are actually seeking to suppress piracy, such legal problems are usually manageable, as the coastal state will have good reasons to collaborate (in its territorial waters and ashore) with actors operating on the high seas. In the case of either capable but malevolent, or very weak or quasi-states, however, jurisdictional problems may become very tricky indeed.
What kinds of legal problems may emerge also depends on who is seeking to suppress piracy or defend themselves against pirates, and how. While a degree of self-help is expected, states generally feel obliged to protect their citizens, included their property, not only within their own sovereign domains, but also (with qualifications) abroad (Ronzitti 1985; Wingfield 2000). It is thus only natural that some states sometimes seek to protect their merchant shipping against pirates in distant waters, but less than self-evident that this is always their responsibility. Alternatively, it might either be the responsibility of the individual ship-owners to protect their vessels against pirates as they already do against hazards of nature, with the assistance of the insurance sector, or it might be the responsibility of the proverbial international community, or it might be a combination of all of the above, that is, a form of multi-level governance (Roe 2009).

If the high seas are seen as the “global commons”, to make and keep them safe for navigation might reasonably be viewed as a global public (or common) good (Kaul et al. 1999). If so, however, it will most likely suffer from the same “collective action problems” as other public goods where there is no link between production and consumption (Olson 1965). There will thus be strong incentives for states to free-ride on the efforts of others, but if everybody succumbs to these temptations there will soon be no public good to enjoy, and pirates and other maritime predators will rule the high seas to the detriment of global shipping. The spectre of such a “global public bad” would seem to make piracy a textbook example of the need for international regimes to facilitate coordination and collaboration between the world’s states (Keohane 1982; Stein 1993). Such regimes may conceivably be created in a piecemeal fashion, for example, commencing with collaboration between states belonging to the same region, like arrangements which seem to be emerging in Southeast Asia (Ho 2009) and West/Central Africa (Kraska 2009: 204-205). Alternatively it may be promoted via “coalitions of the willing” forged among states which are particularly affected and/or have more to offer than most others, as envisaged in the new “Cooperative Strategy for 21st Century Seapower” (U.S. Navy et al. 2007), with its plans for a “Global Maritime Partnership” and a multinational “thousand ship navy” (Ratcliff 2007; Till 2008).

At the opposite end of the response spectrum we find the privatisation option, leaving the protection of the private shipping of private commodities to private actors, which also has its merits, the outline of which I have relegated to the end of the case study, to which I shall now turn. It is devoted
to Somalia, where just about all response options have been tried in order to suppress piracy, but so far to no avail.83

Case Study: Somalia
Within a few years, beginning in 2007, Somalia—which had always known piracy, but of modest and manageable proportions—has become the unchallenged piracy centre of the world. Not only did the number of pirate attacks increase steeply, but the typical attacks also surpassed those in other parts of the world in terms of the size and value of the prey as well as presumably the profits reaped by the pirate syndicates. The pattern of Somali pirate attacks is quite distinct and differs significantly from that in other pirate hotspots.

What Makes Somali Pirates Special?
Pirates in Southeast Asia are typically “opportunistic pirates” lying in wait in the Singapore and Malacca Straits in order to launch nocturnal attacks against whatever ships seem to be the easiest targets, usually boarding and raiding them for cash and other portable valuables and then swiftly disappearing into the night (Burnett 2003; Eklöf 2006: 35-64). In some cases, however, Southeast Asian pirates have undertaken larger operations, seizing entire ships and managing to dispose of both vessel and cargo, taking advantage not only of the weakness and corruption of the states in the region, but also benefitting from the fact that there are state structures. In Somalia, according an interesting recent study, such operations would not be possible because of the total absence of a state, leading to the conclusion that “state failure is associated with less logistically sophisticated hijackings (kidnappings for ransom), while state weakness encourages more sophisticated attacks (those where the ship and cargo are seized and sold)” (Hastings 2009: 1). Whether one is more “sophisticated” than the other is debatable, and the Somali pirates have certainly exhibited considerable sophistication in their selection of high-value targets; in their tactics and seamanship, allowing them to seize large ships, sometimes at full speed and far from the shore; and in their negotiations with the owners for ransom payments. They have, furthermore, been remarkably disciplined and business-like and have generally treated their hostages reasonably well, the number of fatalities being remarkably low.

(83) A very elaborate account of Somali piracy is Cawthorne 2009, pp. 1-159. Unfortunately without a single source it does not even come close to meeting ordinary academic standards. Much better is Murphy 2011.
Moreover, just as closer analysis shows the almost taken-for-granted assumption of a link between statelessness and terrorism to be completely unfounded (Møller 2007: 103-140), the evidence linking state failure with piracy is also less clear than is often assumed. Looking at Somalia as one political unit certainly provides *prima facie* evidence of a strong correlation, but a closer look weakens it considerably. In actual fact, Somalia does not constitute one, but at least three political units. Somaliland in the north-west, the former British colony of Somaliland, has been *de facto* independent ever since 1991 and has constructed what is in all respects a functioning state exercising empirical sovereignty and lacking only in international recognition and formal sovereignty (Bradbury 2008). Puntland in the north-east declared itself autonomous in 1998 and has maintained this status ever since, without ever going all the way to a declaration of independence, but with a government enjoying a considerably higher degree of actual control than obtains in the rest of the country (Höhne 2006). Central and southern Somalia remains *de facto* stateless, even though this region has a so-called government enjoying international recognition, which means that it is best characterised as a quasi-state. Interestingly, most of the pirates come from Puntland, where we also find their “nests,” such as the harbour town of Eyl, and there has been speculation that the authorities in Puntland are collaborating with the pirates (Kraska and Wilson 2009; Gilpin 2009; Murphy 2008: 108). In any case, some of the revenues from the ransom paid to the pirates undoubtedly end up in local coffers (Lindley 2009).

**Sovereignty Games and Piracy**

Several of the aforementioned sovereignty games have been played around Somalia, and several of them have revolved around the issue of piracy or affected its incidence and limited the potential for suppressing it. First of all, because the international community is uncomfortable with statelessness it has made around a dozen state-building attempts, all failing to create a functioning state in Somalia (Jan 2001). The last two have, however, created quasi-states, in the sense of governments with at least some international recognition, but without any governance capacity whatsoever. First came the Transitional National Government (TNG) in 2000, which was followed by a Transitional Federal Government (TFG) in 2004 (Menkhaus 2007). While the TFG has been completely lacking in both governance capacity and legitimacy, it has been both able and willing to provide a fig-leaf of legality to, first, US counter-terrorist activities on Somali territory and then to the Ethiopian invasion in December 2006. The former produced a so-called Alliance for the Restoration of Peace and Counter-Terrorism,
ARPCT (Prunier 2006; Prendergast and Thomas-Jensen 2007), which in turn provoked the unification of the various local and clan-based *shari’a* courts around the country, forming a Union of Islamic Courts (UIC).

The UIC swiftly defeated the US-backed ARPCT and took control of the rest of south-central Somalia. It ruled for about half a year, exercising far greater control than any formal government had done since 1991, and the incidence of piracy off the coast of Somalia dropped significantly. Unfortunately, it also managed to provoke neighbouring Ethiopia, Somalia’s arch-enemy, to invade and subsequently occupy the country for two years, ostensibly acting on behalf of the TFG (Menkhaus 2007; Møller 2008; 2009b). During this period piracy rose steeply, as did the general level of violence in the country, which now took the form of a struggle for national liberation, led by the Alliance for the Re-Liberation of Somalia (ARS), and especially by the faction of the ARS residing in Eritrea. The growth of piracy has continued since the Ethiopian withdrawal at the beginning of 2009. Its troops were replaced by a peacekeeping force from the African Union; representatives of the Djibouti-based faction of the ARS were co-opted into the TFG, and one of its leading members was “elected” to head the revamped TFG (Møller 2009c). By the end of 2011, however, these sovereignty games had not come one step further towards creating a functioning state.

Having been involved in the creation of the TFG and having recognised it diplomatically, the international community (both individual states and the United Nations and other international organisations) found themselves entrapped in a related sovereignty game. The various great powers persuaded the UN Security Council to adopt several consecutive resolutions, the combined effect of which was to allow them to pursue pirates within Somali territorial waters (UNSCR 1816 and 1838 of 2 June and 7 October 2008) and eventually even on land (UNSCR 1851 of 16 December 2008). Each of these resolutions formally mentioned the need for TFG consent and confirmed the sovereignty of Somalia, including its territorial waters. They thus undermined the otherwise perhaps reasonable argument raised by US “legal eagles” that the collapse of the Somali state in 1991 entailed a forfeiture of its rights under UNCLOS, which the Siyad Barré regime had duly ratified on the eve of its collapse (Bahar 2007: 67-68). In the same breath as they undermine Somali sovereignty and territorial integrity, the UN and the individual states implementing its mandates are thus confirming the very same sovereign rights, yet seemingly without accomplishing anything in terms of creating a state capable of suppressing piracy.
Nor have the international naval deployments to the Gulf of Aden been successful in suppressing piracy off the Somali coasts, which continued to grow through 2010—and the minor drop in 2011 has probably mainly been due to other factors (vide infra). There thus seems to be no (inverse) correlation between the size of the naval forces deployed and the incidence of piracy, but here we may be seeing yet another sovereignty game being played out. What the UN and the individual states are ostensibly trying to do is to offer and provide, however unsuccessfully, public and indeed international protection for private actors against other private actors. They do so partly as a genuine public good—as when ships, regardless of their nationality, are offered to join a convoy being escorted through the Gulf of Aden by a multinational naval force—and partly as a “club good”, as when a nation’s navy is merely protecting its own ships (Sandler and Tschirhart 1997).

Private Guards and Saltwater Robin Hoods?
This provision of public and club goods to private economic actors is even more significant, as most of the states involved otherwise belong to the neoliberal economic camp and are ideologically committed to reducing state involvement in the economy and leaving as much as possible to market forces.

Doing exactly that would probably reveal the true proportions of the Somali piracy problem as being very modest. Were private actors (mainly the ship-owners) obliged to pay the real costs of these naval deployments, they might well choose not to do so, simply because they would be excessive in comparison with the actual economic risks against which companies can and do protect themselves by means of insurance policies. Alternatively, companies might opt to re-route their shipping south of Africa, as they have anyhow had to do on previous occasions when the Suez Canal has been closed for other reasons. That most shipping companies still prefer the short and cheap but risky route to the safe, but longer and more expensive one surely constitutes strong evidence that the problem is of modest proportions—but the provision of naval protection as a free public good tends to skew economic calculations away from what is rational and economically sound.

What the private actors might otherwise choose to do, but are deprived of economic incentives for doing, is active self-protection, for which numerous options are on offer, ranging from passive protection, for example, by means of “pirate nets”, to active defence by means of armed guards provided
by private security or even private military companies (Burnett 2003: 90, 105-111; Liss 2006; 2007; Berube 2007) such as the notorious Blackwater, which has been renamed, first to XE Services and then to Academi (Osler 2008). There are surely both advantages and drawbacks to the latter option, which might provide both some deterrence against and some actual protection from pirate attacks, but might also make attacks more violent and destructive—and it is surely worth taking seriously that the International Maritime Organisation warns against arming civilian ships (IMO 2009). It would also be problematic from a legal point of view, as the Geneva, UNCLOS and the SUA conventions all reserve universal jurisdiction for warships, and because several countries in which a ship with such armed guards on board might have to seek harbour have prohibitions against such armed personnel. As a solution to these problems, some recent articles published in reputable US academic journals have suggested an activation of the dormant US option, mentioned earlier, of issuing letters of marque to merchant ships, thus legally transforming them into warships (Berube 2007; Staub 2009; Cooperstein 2009).

Should this advice be followed, we will have come full circle—from pirates being tolerated by their home states, via the enrolment of pirates into state navies as privateers for commerce raiding against a state’s enemies and, after 1856, the adoption by state navies of the same commerce raiding tasks, to civilian ships being transformed into warships in order to fight pirates on behalf of states protecting private actors against other private actors. To return to the truncated nursery rhyme of the title, sailors will thus have become soldiers to protect rich men (ship-owners) against poor men forced (or tempted) to become thieves while still remaining sailors.

Moreover, at least some of the Somali pirates also claim to be soldiers, referring to themselves as the “National Volunteer Coastguard” or the “Somali Coast Guard” and claiming to protect Somali territorial waters against foreign intruders. Even though these claims are, of course, preposterous, those making them do have a point, and the problems to which they are refer are genuine, as Somali territorial seas and EEZ have indeed long been violated by foreign fishing fleets engaged in “maritime poaching” and

been polluted by the dense traffic through the Gulf of Aden. The pirates do absolutely nothing to stop or punish the actual perpetrators and very little to deter future miscreants, but they might be seen as exacting a sort of collective vengeance against the elusive villains, “the West” or “the rich countries”. While this does surely not suffice to earn them a label as what Eric Hobsbawm (1969) called “social bandits”, they may in fact be regarded as such by at least some of their fellow countrymen. Even though they do not behave as “saltwater Robin Hoods” by taking from the rich in order to give to the poor, they do in fact take their ransom monies from the filthy rich of the world, and at least some of the proceeds are spent locally, thus benefitting, however indirectly, some of the dirt poor of the world (Lindley 2009).

**Conclusion**

If there are any conclusions or lessons to be drawn from the above analysis, it is surely that things are more complex than they first appear. Historically, the dichotomous normative distinctions to which we have grown accustomed—between good public and bad private actors as far as armed force is concerned, and its neoliberal twin, good private/bad public economic actor—reveal themselves as being of a fairly recent vintage and never fully applicable. States have always been economic actors alongside private ones, just as they have usually shared their more or less fictitious monopoly of armed force with private actors.

Hence, the various sovereignty games are also revealed as exactly that, that is, as social constructions without many real-life counterparts, raising and questions about their continued utility.
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Chapter 7

The African State and the role and nature of non-state sources of security in the Democratic Republic of Congo and South Africa

Thomas Mandrup

Introduction

The end of the Cold War and the subsequent withdrawal of military and economic support by the superpowers, combined with the harsh economic consequences of the Structural Adjustment Programmes (SAP) enforced by the Bretton Woods institutions, led to a security gap, which PMSCs and other non-state actors were able to fill. Many African leaders were unable to stave off the pressure placed on them by their domestic political opponents, and the services of the PMSCs came in handy. Many academic authors have dwelt on this process of how different elements of the state can take over each other, which has often been the case in Africa (see, for instance, (Bayart, Ellis, & Hibou, 1999); (Bayart J. F., 1993); (Reno, 1998); (Chabal & Daloz, Africa Works: disorder as political instrument , 1999); (Herbst, 2000)). Non-state security actors have all played a central part in this process, propping up and undermining the ruling elites at one and the same time.

In the literature the groups and individuals in the area of non-state sources of security are often depicted as cynical mercenary killers or rebels fighting an unjust battle who slay civilians for their own pleasure and, of course, the money they earn. Furthermore, the connection with organised crime has also often historically been very close. Machiavellian logic (never trust a mercenary) is often used to describe the dangers that these elements bring into the state. This is presented as a contrast to the formal post-Westphalian state that represents law and order, as illustrated by the judicial distinction between the rule of law and the rule of force. However, since the end of the Cold War the market for private military entrepreneurs, also known
as “Private Military and Security Companies” (PMSCs),\(^{85}\) has changed dramatically. The world’s bipolarity has been replaced by uni-/multipolarity, depending on one’s theoretical approach, and in the 1990s the former superpowers lost their strategic interest in their former partners in, for instance, sub-Saharan Africa. Nevertheless, many of the intrastate wars that had been raging during the Cold War did not stop just because the Warsaw Pact collapsed. In fact, many states collapsed\(^ {86}\) and new conflicts evolved. Private entrepreneurs found a market in the power vacuum left by the end of the Cold War, and PMCs became important players, primarily in sub-Saharan Africa. The conflict in Angola was an excellent example of this, where both parties in the conflict, the MPLA and the UNITA, lost their patronage and had to find alternative sources of support to be able to continue the war effort. The result was that many African leaders turned to private providers of security, both domestic private militias and external private security companies, in an attempt to fill the vacuum. The method of payment was often concession rights to national resources. The states in question sometimes ended up having privatised their monopoly on the use of force and their source of future income. This study therefore enters the academic debate started by William Reno (Reno, 1998) and Christopher Clapham (Clapham, 1996), who, like Cillers et al. above, argued that the “privatisation” of security is more problematic in weak than in strong states. This is relevant because weak governments in states that were plagued by insecurity and low-intensity conflict (LIC) in the 1990s were the most common customers for the PMSCs’ services. However, the privatisation of security that has taken place in the OECD countries also had an impact in stronger African states like South Africa, being both a large provider of privatised security and a customer of private security, where the market for security has exploded since the end of apartheid. South Africa is therefore a very interesting case, as it includes elements of both tendencies, that is,

\(^{85}\) It is possible to distinguish between the traditional mercenary, the private military companies (Pertti article), private security companies, military consultant companies and military provider firms (Singer, 2003). It is also possible to differentiate between three types of personnel: 1. mercenaries, 2. military instructors and consultants for national armies, and 3. security personnel under contract to a government or private corporation.

\(^{86}\) According to Crawford Young the first time the term “failed states” was used was in 1980 in relation to the debt -crisis which was beginning, when the extent of the economic collapse became apparent. However, as the English historian Michael Twaddle remarked, the proverbial sentence “in a Ugandan state” was used in the English language in 1970s to describe something that had disintegrated and was dysfunctional.

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the lack of state capacity leading to privatisation and then the strong state privatising peripheral tasks.

The consequences of this are profound in the African context, where the formal state is often weak and where the provision of security is often in the hands of non-state actors. The extreme case was the role of EO in Sierra Leone in the 1990s, when the Sierra Leonean authorities became dependent on a foreign private enterprise to a certain extent to provide security. The industry claims that this case is a successful example because the industry went in for a relatively short period of time and stabilised the situation, creating the foundations for the positive developments seen in Sierra Leone since then (Greyling, 2010).

One way to try and understand and analyse the phenomenon of non-state provision of security and its impact on state capacity and delivery is to scrutinise the nature of the African state and the scope and role of the term ‘non-state security’ in the African context. This chapter will therefore investigate the concept of the state in Africa and also determine the role that non-state sources of security in the broadest term play in that context, using two small examples from each end of a continuum, namely South Africa and the Democratic Republic (DR) of Congo.

**The term “sovereignty” and African states**

The traditional understanding of the term “sovereignty” has, as mentioned in the introduction, always been based on a post-Westphalian notion in European philosophy and cannot, therefore, be directly transferred to an understanding of African states. The empirical states which formed the basis for the creation of the term in the European context cannot be directly transferred to the African context because the empirical state has seldom been found in Africa. The basis for the sovereignty of African states was the external recognition of African actors’ sovereignty as independent states on the eve of independence. This, however, was not based on any recognition of their ability to function as effective states. Jackson differentiates between what he defines as positive and negative sovereignty, the positive including both empirical statehood and external recognition.\(^\text{87}\) Based on Hegel and Schmitt, Kaspersen argues in relation to this that, without other states’ acceptance of it as a state, a state will dissolve into civil wars and conflict,

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\(^{87}\) Several examples can be found, for instance in Somalia where empirical statehood exists, but where international recognition is absent.
creating new states from the ruins of the former state (Kaspersen 2003 p. 35). This means that when a state is, for instance, classified as “failed,” the internal forces start to struggle between themselves in an attempt to establish new states. If any lessons are to be taken from the European state-making process, these are that territories constitute themselves as states over time as part of their interaction with other states, but not necessarily as nations, and if so, only slowly over time (Elias 1994 pp. 274-75). The notion of stateness is, therefore, both a process of external acceptance and recognition as such, and then involves domestic acceptance.

One distinctive feature, which is valid for both types of sovereignty, is that it claims the right to non-interference in the domestic affairs of other states. The Western powers have used this notion in their attempts to avoid involvement in conflicts outside their direct strategic interests, while the postcolonial states have used it to avoid any external involvement in their domestic affairs, such as human rights violations, developmental strategies or democratisation problems. The inclusion in the African Union of the new principle of non-indifference, as opposed to non-interference, is therefore potentially a significant move.

It is central in the understanding of the historical “state” in sub-Saharan Africa to recognise that there is a need to distinguish between the individual states and their history in order to be able to understand their present-day history. It is therefore impossible to create one set of theoretical explanations in an attempt to address the problem of the African state. It is, for instance, impossible to understand the state in Sudan and Angola within the same framework. The next problem is that not all states in Africa are pre-modern. Some areas of the continent have a different background. It is therefore necessary to make a distinction between the terms “state”, “regime” and “government”. The most pressing distinction in this regard is the question of the “state”, because how are we to understand this definition? It is defined historically, but it is impossible to come up with a definition that includes all aspects (Schoeman, 1998, p. 52). Two different working definitions of the term state could be, first, the neo-realist version: “The state comprises in conceptual form what is visual on a map … the country as a whole and all that is within it: territory, government, people, society,” while a more sociologically influenced version could be: “The concept of the state refers to an institutionalised legal order which consists of a set of associations and agencies controlling defined territories and their populations, and it constitutes an aggregate of more or less permanent institutions of gover-
nance” (Schoeman, 1998, p. 53). In the African context, it could be argued that, according to the first definition, all African territories qualify as being states, while, according to the other definition, a number of the collapsed and war-torn societies could arguably have ceased to be considered states. The judicial implications would, of course, be tremendous. Sovereignty and a geographical territory are the central elements in the modern conception of the term “state”. The success of the state depends, therefore, on its individual internal coherence being safeguarded. The central authorities must be capable of securing the existence of the necessary structures that make the society function in a satisfactory way. A collapse of the state’s capacity to deliver a minimum of service to its citizens would also result in a breakdown of the internal legitimacy and sovereignty of the state, which, according to this logic, will cease to exist. The social contract between the individual and the state, as described by Hobbes, will break down. According to Schoeman, in the African context the question is whether there have ever existed states in Africa of the above-mentioned type. It could be argued that the sovereignty claimed by many African states is not due to internal legitimacy, but is caused by international recognition, that is, what Robert Jackson calls positive and negative sovereignty. This means that the present-day international community includes a number of actors that cannot be said to be states in Weber’s understanding of the word because of a lack of national perception of belonging to a state and territorial control. However, they possess the rights of a state in the international structure because it was appropriate for the international system to grant these states sovereignty, since the whole system is based on interaction between individual state actors. It is central to the understanding of the state in the African context to conceptualise that there is a dichotomy between the terms “nation” and “state”, and in many instances it does not serve much purpose to refer to nation states in Africa. The individual concept of the term “nation” is predominately tied to the individual’s own clan or tribe, which is often spread out across huge geographical areas, while the concept of the state is bound to a specific territory. Ethnicity is often used instrumentally as a political tool, as a legitimising foundation for both nepotism and corruption and the public exclusion of other ethnic groupings. A number of African states have, according to René Lemarchand, been characterised by the social, economic and political exclusion of specific segments of their population. Crawford Young calls this a de-participating process, where the political elite regarded

(88) As opposed by the Lockean state, which sees the social contract as being between the ruler and a group of people (Lemarchand, 2001).
ethnicity as a both threat to development and a way of ensuring control. The newly independent states inherited structures in which the externally superimposed tribal definitions and classifications were introduced by the colonial powers as a means of control. This rigid classification was then continued by the new indigenous political elites (Chabal, 2009).

The phenomenon that the perception of the nation is primarily tied to the clan or the tribe, for example, that the individual is a Nande before he is a Congolese, means that conflicts could very easily spread across national boundaries. The hope for Western states seems to have been that by granting external sovereignty to weak African states it would be possible for them to develop internal sovereignty throughout, that is, to create the empirical state. It could therefore be argued that the conflicts we are witnessing today are a part of a state-building process, a process Europe went through, starting with the French Revolution. The fragmentation of the international system, caused primarily by globalisation, combined with the fragmented structure which characterises many African states, undermines the chances of survival of these structures. It is important to recognise, however, that the existence of some level of common identity does not alone constitute a state, as proved by the example of the collapse and fragmentation of the Somali State (Clapham, 2001, p. 10) (Kock, 2009).

**The contemporary African context**

“So long as many African states remain fictional legal sovereign entities with unresolved political/security problems, and with many retired military available in an environment where there is a profound ambivalence on the part of the international community towards both the plight of African states and regulation of private armies, there will be a fertile, lucrative market with few barriers to the provision and regulation of such services.” (Mills, 1999, p. 14)

(89) Globalisation is here seen as the process whereby economies throughout the world have become globally interdependent, introducing a new form of relationship between economy, state and society in a system of variable geometry (Castells, 1996, p. 1). It can be argued that sub-Saharan Africa is partly cut off from this process because of marginalisation in the world market. Two basic considerations have to be taken into account: 1. It is important to distinguish between the formal and informal economies, the latter having become increasingly important. 2. Bayart uses the old French term ‘Africa util’ and ‘Africa inutil’ to describe different sectors of the continent. The useful sectors are integrated into the global economy, e.g. some mining areas in the DR. Congo, while other sections are excluded (Bayart J. F., 1993).
Political systems and societies in sub-Saharan Africa are not by nature more corrupt or violent than other societies around the globe. This impression could actually result if the international news media were to be believed. Nevertheless, in Sub-Saharan Africa there is a correlation between power, conflict and the accumulation of resources and illegal activities which has become a historically determined circumstance which can only be understood in this context. It has been the tradition that the socially dominant groupings and actors take advantage of their position by securing control through economic resources, such as gold and diamonds. Temporary access to political power is seen as both control over political power and as an opportunity to accumulate resources for private purposes, such as servicing the clan or tribe. There is an old African proverb which describes this: “The goat grazes on the spot where it is tied”. The circumstances have been such that an analogy between conflicts and state-building on the one hand and organised crime on the other can be said to have existed in Sub-Saharan Africa. The political elites in the African states have always tried to obtain support from the different national strongmen and groups in an attempt to secure their power base. However, as mentioned earlier, there has been a tendency to exclude specific elements of society by using the strongmen as a tool of repression. The dominant actors in African societies have also used their positions to create international alliances and secure international support. France’s policy on Africa was for many years characterised by this client relationship, whereby political leaders in a number of former French colonies were assured economic, military and political support in return for their support for France in international forums. This neo-patrimonial relationship of rule helped secure a number of African dictators their positions, of whom the best known were probably Mobuto Seke Seko in the former Zaire and Felix Houphouët-Boigny in Ivory Coast. The criminalisation of the African states for which, amongst others Beatrix Hibou and Jean-Francois Bayart (Bayart, Ellis, & Hibou, 1999) are spokesmen has to be understood in terms of an increased willingness to use the state’s tools of coercion, such as the army and police, to secure political power and accumulate economic resources. The accepted degree of corruption and violence has reached unprecedented levels in attempts to stay in power, and the army has often been given unlimited access to national resources. A good example of this was when the Mobuto regime in what was then Zaire let the army, the FAZ, pillage, because the government was incapable of paying the soldiers’ salaries. Another example could be the Zimbabwean defence forces deployed in the D.R. Congo, whose salaries were allegedly being paid partly in local diamonds. Mobuto’s Zairian state was a perverted
example of camaraderie within government circles. The plundering of the public coffers should, according to Lemarchand, be seen not so much as a perverted ethos amongst public employees, but more as their fundamental reason for being there (Lemarchand, 2001). A number of academics have pointed out the correlation of interest between the general wave of privatisation and the elitist power structures that are either directly or indirectly in power. A privatised coercive apparatus would be able to serve the interests of the elite, as was seen, for instance, in Rwanda with the private Interahamwe Hutu militias, but also in, for example, Sierra Leone and Kenya. It is not so important in this context whether a national ethnic militia or a foreign force is involved. The central element is that they serve a specific private interest and not broader national interests. The UN’s former special rapporteur on the use of mercenaries, Enrique Ballesteros, has stated in this connection that the greatest risk for the states lies in the privatisation of the security apparatus, whereby the political elites claim direct responsibility for the security of their citizens. However, a relevant question arising from the above is whether, in cases where the state hires PMCs, its ability to provide security for its citizens and its monopoly on the use of force has already disappeared. Béatrice Hibou argues that the fragmentation of the state in Sub-Saharan Africa has led to a confiscation of power by private entrepreneurs. The lack of governmental capacity has led to the creation of a shadow state, that is, parallel structures have been created alongside the official ones which in reality hold power. However, the question in this regard must be whether this is a new phenomenon. It could be argued that this has always to a large extent been the case in Sub-Saharan Africa. The newly independent states took over colonial forces which, though small in numbers, were characterised by being a coherent ethnic elitist unit within a highly ethnically divided society. The political leaders based their political power and their domestic legitimacy on military power because national unity was often non-existent. The change, if it exists, should arguably be found in the increased willingness and necessity to use military coercion against the state’s own citizens. The intermingling of the military and the civilian spheres has become more apparent than has previously been the case. One of the countries where this tendency has been most apparent is in Zimbabwe, where, because of President Mugabe’s and ZANU-PF’s decreasing public support, the military has become increasingly influential in the everyday politics of the state. The Zimbabwean scholar and former military officer Martin Rupiya stated in 2000 that the reform process of the defence force that was initiated at the beginning of the 1990s in an attempt to professionalise the army has been destroyed by the ruling party’s attempt
to politicise the armed forces (Rupiya, 2000). Developments in Zimbabwe since then support this claim.

In the 1990s the number of intrastate conflicts rose in Africa, while the resources available for conflict resolution through the international community were simultaneously falling significantly. However, this has since then changed, and the number of active conflicts in Africa, and in the world in general, has been decreasing, while the number of UN peacekeepers deployed has risen to 120,000, of whom 17,000 are part of the UN mission in the DR Congo (Harbom & Wallensteen, 2010). By redistributing its resources in a patron-client pattern,90 the traditionally weak African state lost a major part of its overseas funding. William Reno argues that post-Cold War Africa featured new state structures that were vulnerable because of the lack of traditional overseas support and the harsh Bretton Woods medicine, which left them open to warlordism and insecurity. The ties these African states have with the world market economy further enhance the above and thereby bring the weak state closer to the definition of warlordism (Reno, 1998). The warlords are filling the power vacuum left by the weak states’ inability and lack of military capacity to address these conflicts (Jackson P., 2003) (Mccormick & Lindsay, 2009) (Reno, 2009). An important addition is, as Emmanuel Kwesi Aning has pointed out, that the dynamics for warlords are valid also for PMSCs (Aning, 1998, p. 9) and other non-state providers as well. These phenomena are visible in most conflict in Africa, including the DR Congo and South Africa, each illustrating this and representing one end of a continuum.

The history of private sources of security in the modern DRC/Zairian state

Private sources of security have played a central role in post-colonial Congo, both in the form of mercenary forces and non-state sources of security. In the first post-independent civil war, mercenary elements and foreign fighters certainly played an important role. The (in)famous story of Che Guevara’s ill-fated attempt to export the Cuban revolution to the DRC is merely one example, and others could be the role of infamous actors, such as “Mad” Mike Hoare and Bob Denard, who, together with a number of other mercenaries, created notoriety for themselves during this war. Lemarchand even goes as far as to argue that, had it not been for the predominantly South African and Belgian mercenaries, Mobutu Sese Seko

(90) For further reading on clientism, see for instance (Bayart J. F., 1993).
would have been unable to win the war (Lemarchand, 2001, p. 23). Then
President Joseph Kasavubu’s promise to the OAU leaders to repatriate the
mercenary backbone in the national Congolese army played a critical role
in Mobutu’s decision to stage a military coup in 1965, with support from
the USA and Belgium.

Internally the civil war was characterised by the central role played by a
number of ethnically and religiously dominant militias, as opposed to more
ideological political movements, which was also, of course, one of Guevara’s
frustrations. The Mobutu presidency was characterised by and infamous for
his personalised leadership style and by the fact that he managed to ruin the
country. When he lost his usefulness to the Western powers after the end of
the Cold War – symbolised by the Bretton Woods institutions’ decision to
stop Zaire’s access to additional lending in 1989 – he found it increasingly
difficult to secure his continued grip on power. This was best illustrated
by the increased political opposition to his regime and the government’s
inability to pay the salaries of the members of its security services, leading
to rampaging and plunder by the dissatisfied soldiers on several occasions
from 1991-93 across the whole of what was then Zaire (Lemarchand, 2001,
p. 24). By 1993 the army was out of Mobutu’s control and was not much
more than an armed gang of thugs, as the military defeats in 1996-97 clearly
indicated. Mobutu’s late attempt to bring in Yugoslav mercenaries to prop
up the army was unsuccessful. The fall of Mobutu in 1996/97 also marked
the start of the newest chapter in the history of the Congolese wars.

In post-Mobuto Zaire/DR Congo the state has to be understood as a centre
with satellites, to paraphrase Reyntjens. He argues that:

… the extreme weakness of the Congolese state has led to the ‘satellisa-
tion’ of large parts of its territory. This has in turn led to the privatisation
and criminalisation of public space, to the advantage of both neigh-
bouring countries and local, regional and international ‘entrepreneurs
of insecurity’. (Reyntjens, 2005, p. 587)

However, as I argue in another article, while it is very true that the weak-
ness of the DRC has opened up a space for actors other than the state, in
its modern independence history the DRC has always been weak, and the
distinctions between public and private, illegal and legal, and citizen and
non-citizen/foreign have at least been blurred, creating both formal and
informal partnerships between different actors (Mandrup, 2010). This
distinction is important as it questions the very notion of when something is, for instance, defined as “private” and “criminal”. The bottom line in this equation is that it is difficult to create clear categories of public and private in the case of the DRC, and that many actors have both roles. In many ways the DRC seems to resemble the second or third phase in Lane’s categories, where strong actors use violence in an attempt to gain a substantial income and to affirm their control over a specific territory. Another important element is that in large sections of the DRC the non-state actors are the only source of a semblance of security for the local population because of the nature and fragility of the state. Core state functions, including the monopoly on the use of violence, have been sub-contracted to “non-state” actors that collect “taxes” from the local population in their own “fiefdoms”, and in some instances provide embryonic services. In these areas, especially in the eastern part of the DRC, these non-state actors, often in collusion with elements of the government security forces, attempt to create a monopoly on tax-collection in these areas. Alliances are created and changed relatively often, adding to the fluidity of the situation. Adding to the confusion is the increasing number of external business actors who are active in the DRC, with different alliance partners. In this situation it is difficult to determine who is (il-)legal, who is “public” and who is private/non-state, because the same actors can have several roles at the same time. A good example is the national army, which for a long time cooperated with one of the militia groups, the FDLR, in a mining area in North Kivu province (Mandrup, 2010). This meant that the army filled a public function, being the representative of the formal state in that location, while it at the same time had a private function, taxing the local population with private economic gain in mind. Another example could be the areas controlled by the mining industry, with its own security provision, these being islands of order and prosperity in the midst of something of a lesser order. Here the private businesses, in collusion with private security providers, secure an area in an attempt to protect some private economic interests, which is the only reason why they are present in the first place. This makes their motivation very different from that characterising the militia, which often has ties to the geographical area in which they operate. In the DRC this has often been seen in the way the militia conduct their operations inside and outside their own “home areas”, that is, two sets of rules of engagement seem to apply, one relatively disciplined at home and one more violent away from home (Mandrup, 2010). Violence and especially the use of violence is here a key determination of the role that different actors play and aim to play in a specific area. To use the framework presented above by Tilly, violence is an integral part of war- and
state-making, while fighting represents the revival of the individual actor attempting to secure a monopoly of power and taxation. In the DRC there is no clear distinction between “public” and “private” because the formal state presence is limited in many areas. At this stage the non-state actors play a dominant role in security provision by maintaining relatively autonomy from the judicial state, often being both in partnership and in competition with the formal state. The continued strong position of the non-state actors undermines the attempt to create a stronger state.

The non-state sources of security in South Africa

In South Africa non-state sources of security have been prevalent for a long time, in the forms both of private security contractors and vigilantism. Because of the nearly epidemic levels of crime the private security industry is booming, with more than 387,000 private security officers of different categories and more than 7400 registered companies providing security related services \(^{(91)}\) (PSIRA, 2010). The number of private security officers has nearly doubled since 2001, and there are more than double the number of South African Police Service officers. However, South Africa is a poverty-stricken country, being economically one of the most unequal societies in the world. A large percentage of South Africans do not have the economic means to buy the services of the PSC and have to organise themselves in community watch and vigilant structures to protect their own communities. This is fine and within the perimeter of the law, as long these structures do not take the law into their own hands and cross the line that divides the legal from the illegal. The problem is that this happens relatively often, and the government finds it difficult to control such occurrences. The dilemma for the South African state is that it has comprehensive legislation in place, a relatively strong security sector and a regulated security industry, \(^{(92)}\) but is unable to put an end to the crime pandemic, leaving a space for non-state actors to respond and operate. This is unproblematic as long as these actors operate within the parameters of the law. The problem is that it is not uncom-

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\(^{(91)}\) All private security officers and companies needs to be registered with and receive a permit from the Private Security Industry Regulatory Authority (PSIRA) before being allowed to operate legally. Another remarkable statistic is that 1.4 million individuals have been registered as security officers, but are inactive. This means that the industry can potentially expand its numbers relatively quickly. However, in summer 2010 the board was fired by the government due to non-deliverance, and a new board has yet to be named (Greyling, 2010).

\(^{(92)}\) However, the regulatory mechanism is weak and does not function well. For instance, individuals applying for licences as private security officers are only checked once for a criminal record, and no mechanism is available to follow up on this.
mon for these groups to take the law into their own hands, providing what could be termed "local justice", but which in itself undermines the state, the formal justice system and the sense of justice. For the current government it is also problematic in the sense that, with the end of apartheid, it tried to put an end to the widespread vigilante phenomenon and the "local justice" which was part of daily life, especially in the townships during the apartheid era as a response to apartheid. The security vacuum created by the crime wave undermined the attempt to build a strong state in judicial terms, but especially in terms of empirical legitimacy and statehood. This has resulted in question marks being placed over the formal state itself, asking whether it is a "colossus on clay feet"?

How should the state react to this phenomenon if it does not have the ability to put something else in its place? It can attempt to privatise elements of the security provision, allowing regulated market access for non-state actors in, for instance, the form of PSC's or as part of "community policing" initiatives. This is part of controlled privatisation. However, another side to the non-state debate is the so-called "criminal" gangs that operate on the periphery of the state, and sometimes in coalition with elements of the state. In some sections of Cape Town these gangs provide security, jobs (in the informal/illegal sector) and some social services, thus taking over functions normally provided by the state and resembling the structures often attributed to warlordism (Hübschle & Erin, 2010). In an interesting study carried out by the South African-based Institute for Security Studies, the blurred distinctions between public and private and between legal and illegal are very visible. In Kwazulu Natal the South African national telecommunications giant, Telcom, has been plagued by large-scale and systematic theft of its copper cables. As a response Telcom hired a PSC to guard sections of its cables. The PSC contract continued to grow and by far exceeded the cost of the theft, and it turned out that some of the thefts were being organised by the PSC itself to obtain new contracts for the stretches it was hired to protect. To add to the confusion the two PSCs hired by the parastatal company donated money to the ANC, the governing party (Hübschle & Erin, 2010). As this shows, some criminal elements in South Africa are organised by individuals attached to the PSC, involving government officials and representatives of the formal state. However, an important distinction here is that in the South African case the state is used as a vehicle to generate resources for

(93) In December 2010 the SAPS announced that some 130 police officers had been fired in 2010 due to corruption, cooperation with and assistance to criminals.
private individuals, which is distinctly different from, for instance, areas characterised by the absence of the state. The law and state in South Africa are clear and unquestionable, but are constantly being challenged by the state’s inability to police and implement the law, thus undermining the state itself. However, the informal partnership between elements in the ANC, a parastatal and the PSC industry illustrated in the example from the IIS research shows that the illegality is affecting the state itself, meaning that crime is not something that is tied to the private sphere. The difference in the South African case, compared to DRC, is again the well-defined criminal law, making it relatively easy to distinguish between legal and illegal actions. The grey zone consists of the vigilante actors, whose presence is to some extent accepted by the state.

In addition to the domestic non-state actors, South Africa has a large PMSC industry organised in the Pan-African Security Organisation (PASA), which currently has twelve companies as members. The industry has been part of the Swiss Initiative over regulation that led to the Montreux document. PASA has tried to register with PSIRA, which referred the industry to the National Weapons Control Committee, because PASA members predominantly operate outside South Africa (Greyling, 2010).

**The PMSC in South Africa**

In general the PMSC has been a contested area in South Africa, where in 1997 the government introduced the Foreign Military Assistance Act that was to regulate the PMC and effectively stop the activities of especially the enterprise called Executive Outcomes and its subsidiaries. The result was that the industry is operating outside the public limelight, and it is more difficult to establish a precise picture of its size, clients and areas of operation. The reasons for this are relatively easy to understand, since many of these companies’ operations are in breach of the Regulations and Act. The Act therefore had a dual purpose, both to make operations more difficult and also to be able to prosecute offenders. In that sense the regulatory attempts have been successful in that they have limited the official number of South Africans working in the industry. However, as the November 2010 tour of South Africa by the UN Working Group on the Use of Mercenaries showed, South Africa is still considered to be one of the main providers of

(94) A number of accusations have been levied against the ANC for receiving illegal contributions.

(95) For an in-depth study of South African attempts to regulate the PMSC industry, see (Taljaard, 2008).
personnel for the industry. The Committee has called on the South African government to increase its attempts to implement the frameworks put in place to regulate its PMSC industry. At the end of the 2010 visit to South Africa, the group stated that:

… there is no doubt that the regulatory regime established in South Africa for private military and security companies and individuals operating in different countries has faced challenges in terms of implementation. In addition, throughout the discussions with the authorities there was broad agreement that the attempted coup in Equatorial Guinea in 2004 provided added momentum to revise the legislation to address the whole spectrum of activities to be regulated. For instance, the Working Group noted that some of the South Africans involved in the attempted coup had been or were employed by private military and security companies. (UN Working Group on the use of Mercenaries, 2010b)

The last section of the statement illustrates an important point in this debate in that the South African government has had difficulties in getting contraveners of the act convicted. The industry itself argues that it would like to have a dialogue on the issue of regulations and has suggested establishing a filing system to keep track of individual contractors to ensure that they have not been involved in mercenary activities (Greyling, 2010). The industry’s main argument is that it would increase reliability for and of the industry. However, this is also a double-edged sword, because by accepting regulation the government also provides legitimacy to the industry, which it has been unwilling to provide thus far. As mentioned previously, the industry has as a consequence chosen to work below the radar of the government, and a large number of South African nationals work in security-related functions in many places in Africa and, for instance, in Iraq and Afghanistan.

This provides a direct challenge for the SANDF because the industry has been able to attract many of the most qualified individuals and because a substantial number of defence force and police employees take leave and join the private contractors for a period. The DOD has announced that this is not an acceptable practice for DOD personnel, but that does not seem to have stopped the traffic. However, these structures also reflect the nature and capacity of the South African state because of its partial inability effectively to implement and give effect to the national laws. The South African case is characterised by the fact that, because of the state’s lack of capacity
to fully deliver its part of its social contract with its citizens, they have to seek other sources for security. However, as opposed to the DRC case, the state does attempt to regulate these non-state actors, and the blurred lines between private and public actors are less visible in South Africa due to the stronger nature of the state and its institutions.

**Conclusion**

This chapter started out by posing the question of the role non-state and private actors are playing in the context of the contemporary Sub-Saharan African state. The chapter has shown that this varies very much depending on the nature and strength of the state itself. The widespread fragility found in many African states has always left room for non-state and/or semi-parastatal actors to fill the vacuum left by the absence of a formal state. This also points to the old academic debate over how to understand the African state analytically. That it is weak, plagued by artificial borders etc. is not a novel discovery. However, the debate revolves around the extent to which this should be included in the understanding and approach to the state itself, that is, is the state the state itself, or should it be seen analytically for what it is, namely consisting of several different centres and sources of power? Lane’s categories are a useful tool in this regard since they help to categorise the empirical reality and explain different developmental stages. The main question, however, remains whether the development will by nature lead to a Weberian state, as envisioned by Lane and Tilly, in other words can the European process of state formation be summarily transferred to the African context? But the phase model can at least still be used to help explain different dynamics between different sets of actors at certain stages of a development. The chapter has shown that especially the distinction between the rule of law and the rule of force reveals a great deal about the nature of the actors and especially their longer term ambitions, in other words, what directs their behaviour.

The South African case shows that the fragility of states and the role of non-state actors can assume many forms. The transition from apartheid released a large number of demobilised personnel, well trained and with many years of combat experience. Combined with an increased demand for private security services caused by the security vacuum left by the end of the Cold War and the apartheid era, this resulted in an exponential growth in the PMSC industry, both in South Africa and in the rest of Africa. Many South African PMSCs have both a domestic and an international branch. The South African state has so far been unable and/or unwilling to implement
and monitor this industry effectively. This mirrors the domestic scene in South Africa, where the state has been unable to provide effective security for its population, nor, therefore, justice, which has created a large domestic market for non-state actors to fill, both in the form of PSCs and as “private”, often unauthorized, anti-crime entities providing “local justice”.

However, the relevant question in this regard must be to what extent this in reality constitutes a problem for the state. There is no doubt that when the state fails to fulfil its functions and is replaced by or fails to replace the non-state and/or semi-private actors, it is an indication of the state’s fragility and should be seen as a warning sign. However, in most places it is well regulated by the state and does not constitute a problem because it happens in coalition with the formal state. In the South African case it can be argued that this is what happens with the PSC industry, which seems to support the state’s ability to function. However, a problem arises when citizens have to pay taxes to a state that does not produce services in return and therefore have to buy additional private security. This undermines support for the formal state, since the question is asked why we should pay and contribute to something that does not give us something in return? The dilemma is exacerbated when the state is used to service private or party interest and by corrupt and criminal behaviour by state officials, which undermines the general support for and trust in state institutions. In addition traditional systems of power, such as chiefs and clan systems, as well as the dominant role played by criminal gangs as security providers in large sections of especially urban township areas, replace or supplement the state.

In the case of the DRC the formal state is merely an empty judicial construct, which is dependent, and has most likely always been dependent, on local autonomous or semi-autonomous “lords”. The DRC is characterised by being controlled by a plethora of private, non-state actors, traditional chieftaincies, foreign elements in the form of armies, PMSCs, the UN etc. The non-state actors continue to undermine the formal state, as long as it serves their interests to do so. State sovereignty in this context is consequently something that is only a fig-leaf, without empirical legitimacy. At this stage violence is widely used, as this determines the rules of the game. The judicial state has unwillingly meant that the monopoly on the use of violence is situated in local hegemonies.
Bibliography


Chapter 7


Privatisation of Security: The concept, its history and its contemporary application

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