

# **Private Actors and Security Governance**

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(editors.)

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## Preface

The Geneva Centre for the Democratic Control of Armed Forces (DCAF) is an international foundation whose mission is to assist the international community in promoting good governance and reform of the security sector. Beyond a range of publications linked to its research and operational programmes, each year DCAF dedicates an entire volume to a selected topic of particular relevance to our ongoing research and analytical work. The first volume was published in 2003 under the title *Challenges of Security Sector Governance*; the second one was published in 2004 under the title *Reform and Reconstruction of the Security Sector*; and the third volume in the series, published in 2005 was devoted to *Security Governance in Post-Conflict Peacebuilding*.

The fourth edition of the series is dedicated to *Private Actors and Security Governance*. Security privatisation, from the perspective of both the top-down decision to outsource military- and security-related tasks to private firms, and the bottom-up activities of armed non-state actors such as rebel opposition groups, insurgents, militias and warlord factions, challenge the state's authority and monopoly of legitimate force. Common to this phenomenon in all its dimensions is that it has significant implications for effective and democratically accountable security governance and is directly linked to opportunities for security sector reform (SSR) across the range of different reform contexts. This volume begins by attempting to situate security privatisation within a broader framework that takes into account different understandings of the role of the state in international relations, concepts such as globalisation, transnationalisation as well as the consequences of 11 September 2001 (9/11). From a security governance perspective, different national cases are then assessed. Finally, different forms of regulation and control are considered with respect to the various faces of security privatisation.

It would not have been possible to successfully complete this volume, particularly in light of the tight timescales involved, without the invaluable support of a number of people. In particular, we would like to thank Jonas Hagmann and Moncef Kartas for research and editing contributions, in particular in authoring the very rich Annex to this volume. Oliver Wates and Jason Powers respectively provided excellent copy- and technical editing assistance, and Tim Donais provided incisive comments and inputs on earlier drafts of the manuscript. Veit D. Hopf of LIT Verlag again guided us

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The topics touched upon in this volume were discussed at a workshop as a part of the bi-annual DCAF International Advisory Board meeting where DCAF IAB members provided a number of important comments. The editors would also like to thank the DCAF IAB members for their very useful inputs.

The Editors  
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# Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
ANSA	Armed non-state actors
ASEAN	the Association of Southeast Asian Nations
AU	African Union
BAPSC	British Association of Private Security Companies
CFSP	Common Foreign and Security Policy
CICAD	Inter-American Drug Abuse Control Commission
CIS	Commonwealth of Independent States
CIFTA	Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other Related Materials
CIMIC	Civil-Military Cooperation
CJTF	Iraq and Combined Joint Task Force
COARM	Conventional Arms Exports Working Group
CoESS	Confederation of European Security Services
CPA	Coalition Provisional Authority
CSecR	Corporate Security Responsibility
CSR	Corporate Social Responsibility
CTC	Counter Terrorism Committee
DCAF	Geneva Centre for the Democratic Control of Armed Forces
DDRR	Disarmament, Demobilisation, Reintegration and Rehabilitation
DFID	United Kingdom's Department for International Development
DSL	Defence Systems Limited
DSO	State Protection Service (derzhavna sluzhba okhorony )
ECHO	European Commission's Directorate-General for Humanitarian Aid
ECOSOC	United Nations Economic and Social Council
ECOWAS	Economic Community of West African States
EU	European Union
FARC	Fuerzas Armadas Revolucionarias de Colombia
GAO	U.S. Government Accountability Office
GCC	Gulf Cooperation Council
HRL	International human rights law

IAEA	International Atomic Energy Agency
IAMB	International Advisory and Monitoring Board
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty's
ICRC	International Committee of the Red Cross
IF-SSR	Implementation framework for SSR
IHL	International Humanitarian Law
IMO	International Maritime Organization,
IPOA	International Peace Operations Association
KLA	Kosovo Liberation Army
MEJA	Military Extraterritorial Jurisdiction Act
MIA	Ministry of Internal Affairs
MONUC	United Nations Mission in the Democratic Republic of Congo
MPRI	Military Professional Resources Incorporated
MTCR	the Missile Technology Control Regime
NAPAPPA	National Association of the Persons and Association Performing Protective Activity
NATO	North Atlantic Treaty Organisation
NCACC	National Conventional Arms Control Committee
NGO	Non-Governmental Organisation
NPA	National Prosecuting Authority
OAG	Office of the Auditor General in Canada
OAS	Organisation of American States
OCHA	Office for the Coordination of Humanitarian Affairs
OECD	Organisation for Economic Co-operation and Development
OIC	Organisation of the Islamic Conference
OSCE	Organisation for Security and Co-operation in Europe
PMC	Private Military Company
PoA	Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons, in All Its Aspects
PPD	Police Protection Department
PPP	Public-private partnership
PSC	Private Security Company
RDA	Relief and Development Agency

RFMA	South African Regulation of Foreign Military Assistance Act
SAPS	South African Police Service
SADC	Southern African Development Community
SBU	Ukrainian Security Service (sluzhba bezpeky Ukrayiny)
SICIRI	Supreme Council of Islamic Revolution In Iraq
SSR	Security Sector Reform
UFNSSF	Ukrainian Federation of Non-State Security Services
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNICRI	United Nations Interregional Crime and Justice Research Institute
UNITA	União Nacional para a Independência Total de Angola
UNITAF	Unified Task Force
WFP	World Food Programme
WMD	Weapons of Mass Destruction



# **PART I**

## **INTRODUCTION**





## Chapter 1

# Approaching the Privatisation of Security from a Security Governance Perspective

*Alan Bryden*

### **Introduction**

This volume considers the phenomenon of security privatisation from the perspective of both the top-down decision to outsource military- and security-related tasks to private firms, and the bottom-up activities of armed non-state actors such as rebel opposition groups, insurgents, militias and warlord factions that challenge the state's authority. Both 'bottom-up' locally-generated armed actors and 'top-down' private security and military companies (PSCs/PMCs), have significant implications for effective and democratically accountable security sector governance as both concern the diminished state monopoly of the use of legitimate military force. The themes and actors addressed in the various chapters provide a broad canvas reaching from village watch groups to companies listed on the world's financial markets. This is deliberate. The intention has not been to focus on issues of interest only to narrow expert communities but to widen the discussion by situating it within a broader security governance framework useful for policy-makers and practitioners involved in security privatisation but also related issues such as security sector reform (SSR).

The SSR concept bridges security policy, peace and democracy promotion and development assistance. This cross-sectoral character is significant because of its integrating effect. By virtue of its emphasis on governance rather than government, it reaches out beyond the state to actors such as non-state civil society organisations and armed non-state actors. Given its holistic perspective, SSR integrates partial reforms of security sector actors such as the military, police or intelligence services with the requirements of democratic governance. It therefore spans a wide array of activities from political dialogue, policy and legal advice and training programmes to technical and financial assistance. SSR, particularly in post-conflict contexts, is therefore directly linked to the topic of security privatisation because it re-

flects the fragmented monopoly of legitimate force. Fundamentally, it also provides a framework to link and sequence reform of the security sector in conjunction with related challenges such as disarmament, demobilisation and reintegration (DDR) or re-establishing the rule of law.<sup>1</sup>

Arguably, all of the challenges described in this volume represent deficits in governance that need to be addressed at international, national and local levels. They certainly reflect the increasing trend for states to share the monopoly of the use of force – willingly or otherwise – with a range of non-state actors. Security governance<sup>2</sup> provides a useful optic to understand this fragmentation of political authority among public and private actors on multiple levels of interaction. The Stockholm International Peace Research Institute's (SIPRI) latest Yearbook has noted that in 2005, 17 major armed conflicts took place in 16 locations and, for the second year running, all of them were intra-state conflicts, thus involving one or more armed non-state actors.<sup>3</sup> Demonstrating the limitations of the Weberian notion of the state, non-statutory actors have to be considered part of the *de facto* security sector.<sup>4</sup> This does not mean that these actors should be considered in unitary terms. Rather, it supposes that they are all significant in shaping security sector governance at the national level.

The *privatisation* of security is closely linked to its *internationalisation*.<sup>5</sup> The failure of the state in many parts of the world to provide security for its citizens underpins the intensification of international interventions since the end of the Cold War. As demonstrated by the first Human Security Report,<sup>6</sup> such interventions, notably led by the United Nations, have resulted in a steady decline in genocides and international crises. Recurring themes in this volume include the importance of external actors appreciating context in harnessing and responding to the challenges of privatisation, the need for more 'joined up' and coherent approaches in the use of such actors, as well as sensitivity to considerations of local ownership. External actors operating in post-conflict environments require a secure environment in order to function and must also operate in a manner that optimises their effectiveness. The vital ingredient of legitimacy – for both international and national actors – can only be gained through operationalising principles of transparency, accountability and participation which may run counter to the commercial principles that underpin the outsourcing of security provision.

In this regard, there is an interesting contrast among contributors to this volume between those who highlight the distinct nature of the PMC/PSC phenomenon and those who link them to a much longer tradition of non-state actors providing security-related services for profit. This contrast is aptly illustrated by Ghebali (Chapter 11) in comparing the views of the first and

second UN Special Rapporteurs on Mercenaries who held markedly different views on this question. In his typology, although making a distinction between ‘traditional mercenaries’ and ‘modern private security or military companies’, Schneckener (Chapter 2) clusters mercenaries and PSC/PMCs on the basis that they all work for profit. Current and draft South African legislation regulating the provision of private security services goes further, drawing direct parallels between the role of PMCs and the deleterious effect of Western mercenaries on peace and security. Clearly, any such linkage – particularly with mercenarism – is anathema to the modern international private security industry. As Bailes (Chapter 3) points out, there is an important difference between suppliers over-charging for the provision of services as with Custer Battles in Iraq (see Chapter 8) and the normative stakes at play in outsourcing intelligence-gathering or defence reform to a private company.

These observations point to the fact that, depending on your viewpoint, security privatisation is either very old or very young. Indeed, if the modern PMC/PSC industry can be traced back only some 20 years, both non-state actors providing security in the absence of adequate state provision and mercenarism have deep historical roots. On the other hand, the commercialisation of security, which has arguably reached its zenith in Iraq, is closely linked to the phenomenon of globalisation. For Bailes, a shift in the centre of gravity in public-private relationships in the security field is just one of many aspects of globalisation. In terms of its security dimension there are evident links between globalisation, privatisation and the consequences of 11 September 2001 (9/11). As Schneckener points out, although the concern of international actors for decades, ‘fragile statehood’ became securitised and globalised post-9/11 with the stark realisation that if local problems are ignored they may have global consequences.

Many of the themes picked up in contributions to this volume can be found in the broader discourse on ways to promote democratic governance of the security sector through SSR. Challenges thrown up by security privatisation echo the contested nature of the SSR concept by highlighting the lack of policy consensus or effective coordination among donor states and the concern by ‘recipients’ over imposing ‘Western’ approaches in the sensitive area of national security. The lack of a gold standard among actors involved in this field makes all the more important the need for practical and practicable lessons learned. Critically, security governance is a functional concept which through focusing on the modes and structures by which security is provided, managed and overseen, points to ways to address both de-

mocratic and security deficits. This volume hopes to make a contribution to the literature on privatisation by applying such a pragmatic approach.

This introductory chapter begins by highlighting some of the key issues drawn from an analysis of security privatisation within a broader policy context. It then considers different regional and national perspectives in order to compare experience and identify potential lessons learned. Both the need for and efforts to date at regulation are then considered. Finally, this chapter considers a number of cross-cutting issues in relation to security privatisation and its links to the broader security governance agenda.

### **The International Policy Context**

Conflict, its underlying causes and the ways in which both local and international actors can address them are closely linked to the concept of fragile statehood, defined by Schneckener in terms of state structures and institutions which have severe deficits in performing key tasks and functions for its citizens. Importantly, such states are not limited to failed or conflict-torn nations but include a much wider range of contexts characterised by deficits in governance, control and legitimacy. Distinguishing between ‘threat’ and ‘risk’ he echoes the United Nations Secretary-General’s High-Level Panel on Threats, Challenges and Change which emphasised that fragile statehood is at the core of many international security challenges.<sup>7</sup> The distinction is an important one because it conditions the nature of the response, in particular, whether such states are perceived as hostile or whether they are seen as having certain deficits which need to be addressed in order to avoid the proliferation of insecurity.

In considering the role of the state in security governance many contributors recognise that a central challenge is not just the state’s *ability* but its *willingness* to provide security on behalf of its citizens. Armed non-state actors (ANSAs) relate to both aspects of security provision. They may undermine a state’s ability to provide security to its citizens but at the same time may exist in response to the state security sector’s inability to provide such security (or even to provoke insecurity through repression and violence). The typology of ANSAs provided by Schneckener highlights both these dimensions but also the interrelationship between state and non-state actors whether for political or self-interested reasons. This is a relationship characterised by uncertainty and change as demonstrated by his example of the ‘sobel’ (soldier and rebel) combining a role in the state security sector with engagement in criminal activities for profit. It is also necessarily fluid

since yesterday's rebel is today's warlord who may be tomorrow's criminal or terrorist. In contrast to classical guerrilla or rebel movements, nearly all the actors covered in his typology<sup>8</sup> place little emphasis on the international law distinction between combatants and non-combatants and thereby reflect the reality that civilian populations have become primary targets in contemporary conflicts. As discussed below, international actors may have an important impact on how individuals and groups transition between these categories.

Wulf (Chapter 5) argues that international interventions are marked by two shortcomings: a lack of success in implementation and an absence of democratic legitimacy. While inherent democratic deficits provide a shaky basis to intervene to improve democratic governance, an increase in such interventions has led to overstretch in the military and security forces of intervening states – given the extent of post-Cold War demobilisation – but also the challenge of re-orienting capabilities away from the traditional role of protecting the nation state towards new and complex challenges such as peacekeeping, peace enforcement or post-conflict peacebuilding that typically combine both security and development dimensions. And as Bailes points out, if the most serious problems of security privatisation relate to the governance field, it is important to recognise that their roots are economic. Privatisation is a means for both Western and developing states to ease resource burdens and plug capability gaps. For both these reasons the market has opened up to private providers offering a range of services from general supply, logistic support, training, repair and maintenance of equipment, to intelligence-gathering and interrogation. Fundamentally, if the governance of national armed forces is difficult, and the 'double democratic deficit'<sup>9</sup> of the internationalised use of force further confuses this picture, then tasking private companies can only further complicate this endeavour.

In shining a light on challenges of privatisation and internationalisation, good *government* through developing state institutions and mechanisms for the democratic control of the security sector is essential. But given the deficits discussed above, such efforts will be insufficient without parallel emphasis on good *governance* at local, regional and international levels. Whatever the difficulties, acknowledged by the author, in implementing such a framework, Wulf's vision of a multi-level public monopoly of force which reinforces the roles of the nation state and (primarily) the United Nations at the global level with increased emphasis on both the regional and local levels aptly captures the complexities of contemporary security governance and stresses that meeting the challenges posed by top-down and bottom-up priva-

tisation can only be achieved through addressing security and democratic deficits at international, state and sub-state levels.

Another significant contemporary trend is that of transnationalisation. National-level security governance has to be understood as inextricably linked to regional and global levels. Attention to regulation at the national level is insufficient where the largest PSCs work through national subsidiaries, so the impact may well be felt beyond national boundaries. Regulation at the state level is increasingly difficult in an environment shaped by non-traditional, non-state multi- or transnational actors. In the case of insurgent movements, Schnabel (Chapter 4) emphasises that globalisation has provided a new impetus. The internet extends their reach to support bases for fundraising as well as the pursuit of weapons, making dual-use technologies and training more readily accessible. Groups operating through transnational networks and ties link war or post-war economies with global shadow economies as well as political agendas disseminated through diasporas, non-governmental organisations (NGOs), third states and the media. As a consequence, the multi-dimensional nature of insurgencies in a globalised world calls for multi-pronged responses by the international community. As one example, United Nations Security Council Resolutions 1373 and 1377<sup>10</sup> were designed to address the financial support base of terrorist groups post-9/11 by creating universally applicable norms and obligations for government action to block terrorist funding. Although this initiative has had meagre results in financial terms, Bailes notes that it has raised awareness of terrorism in the banking and business communities and forced familiarisation with traditional means of banking such as the 'hawala' system prevalent in Islamic societies. Indeed this example raises the question whether some of the heat generated in discussions on the roles played by PMCs/PSCs is down to 'lost in translation' misunderstandings among stakeholders with very different frames of reference to shape their understandings of security privatisation.

### **Regional and National Perspectives**

Perspectives on security privatisation are provided in the very different contexts of Europe and the former Soviet space, the Middle East and South Africa. A number of contributors point to the specificity of these cases and the consequent lack of lessons to be drawn that would be of use in other contexts. However, looking across the cases, a number of parallels do emerge linking security privatisation to the broader field of security governance. It is

therefore important to more clearly map privatisation in these different contexts in order to develop a wider picture that captures the role of the state as well as a range of sub-national and international actors in promoting security, justice and development. Only from such a basis can entry points for reform be identified and programmes calibrated in a realistic manner.

Failure to adequately reintegrate former combatants has been directly linked to increased criminality and a return to violence in post-conflict states.<sup>11</sup> Extensive post-Cold War demobilisation of armed and security forces has played a central role in the growth of the private security industry at both national and international levels. In each of these cases, demobilisation provided qualified personnel with limited options beyond using skills already learned in the police, armed forces or intelligence services, so remaining in the security sector – whether legitimately or as ‘violence entrepreneurs’ – was almost the only available option. The ongoing insurgency in Iraq continues to undermine efforts to achieve stability and reconstruction while in Africa the problem poses an acute security dilemma given the destabilising impact of mercenaries moving from conflict to conflict. The consequences of the downsizing and reform – more aptly described as ‘transformation’ – of the South African security sector that formed a key part of its democratic transition still play out today.<sup>12</sup> As Taljaard (Chapter 9) notes, the same resource pool of ex-South African Defence Force (SADF) personnel fuels both PMCs and mercenary activities, as evidenced in 2004 by the high-profile coup attempt in Equatorial Guinea.

Gounev (Chapter 6) notes that in Bulgaria the decision taken in 1991 to relinquish the state’s monopoly of force was a deliberate one aimed at meeting the employment needs of laid-off security personnel as well as the peculiar category of former state-sponsored athletes and their social networks that were to prove highly influential in the privatised Bulgarian security sector. But weak state capacities in the area of the judiciary and law enforcement, a large grey economy and the downsizing of the police generated a vicious cycle of increased criminality and a deficit in the provision of security and its oversight by the state.

In the post-Soviet cases discussed by Hiscock (Chapter 7), security privatisation was a consequence of the ‘big bang’ resulting from the Soviet Union’s collapse. Property was privatised and redistributed and in the absence of state provision the ‘krysha’ system of organisations and individuals protected clients as well as their business interests. Although downsizing is important to understanding this dynamic, it is significant that in many cases the Soviet-era security networks were not broken up but part-privatised, with

profit replacing repression as the underlying rationale. In Ukraine, the Ministry for Internal Affairs (MIA) plays a major role in privatisation through promoting the State Protection Service with the advantage that only it has the right to possess firearms or protect institutions such as banks, therefore establishing a quasi-monopoly on certain areas of the market. In Georgia a commercialised state body also has a strong presence but links to the MIA are less explicit, under pressure from the US, EU and OSCE who are supporting police reform efforts in the country.

In contrast, in the Middle East security remains by and large guarded jealously by the state. This is enshrined in legal frameworks as in Saudi Arabia where local security guards must replace expatriate staff within a 90-day period. Iraq is therefore very much the exception. For Isenberg (Chapter 8), the extent of the PMC/PSC presence reflects a grave miscalculation of the extent of the post-‘active combat’ stability and reconstruction task and the impact of the insurgency on pursuing these goals. Contractor support on a massive scale has therefore been necessary in areas from logistics to protection and, to a lesser extent, training of Iraqi security forces.

The issue of PSC effectiveness is particularly important in security-related public sector contracts. According to Gounev, contracts relating to border guard duties or the protection of Bulgaria’s only nuclear power station were awarded to PSCs on a cost-based calculation in comparison to using state security forces but also as a result of the political influence of stakeholders with an interest in the companies concerned. The combination of profit and interests pose broader questions over whether such actors have appropriate training and skills to deal with complex issues such as trafficking, the particular security challenge of guarding highly sensitive fissile materials, or, as discussed below, in training armed and security forces in areas such as policing or counter-insurgency techniques.

### **Challenges of Regulation**

Effective regulation of PMCs and PSCs requires an interlocking framework of national, regional and international control mechanisms.<sup>13</sup> Where a level of consensus does exist is that existing laws at the international level are insufficient and national laws are lacking in many countries, creating a legal grey zone. Potential measures have been discussed at length in the relevant literature as well as in policy circles, to include amending the Geneva Conventions, registration and licensing of companies as in the case of arms exports and regulation (including improved self-regulation) of the industry.



Efforts toward national regulation in Bulgaria are instructive in demonstrating the difficulties of implementing such measures in practice. Banning illegal PSCs through prohibiting owners or employees with criminal records provoked a ‘rebranding’ of these organisations as insurance companies and also expanded the market since many saw the new legislation as an opportunity to register companies. An amended law was accompanied by enforcement measures and complemented by reform of the criminal justice system (four times as many individuals were prosecuted in Bulgaria during 1999 as in 1993) under the pressure of meeting EU and NATO accession criteria. Tellingly, the most recent amendments to the legislation covering the private security industry were spurred from within the industry itself with the goal of cutting bureaucracy and clarifying market rules and regulations.

Only the United States and South Africa have national legislation covering the provision of PMC/PSC services in 3<sup>rd</sup> countries. Taljaard distinguishes between these two regulatory frameworks on the basis that the South African Regulation of Foreign Military Assistance Act (RFMA) is underscored by the drive to promote an ‘ethical’ foreign policy. This position reflects the distrust of the post-Apartheid political authorities for an industry largely staffed by Apartheid-era security personnel and a consequent reluctance to see security in private hands. The difficulty posed by this approach is set in stark relief by the paucity of licensing requests to the relevant authorities when set against the numerous South African companies and individuals involved in such work in Iraq. The broad scope of the legislation and loopholes which include extremely high evidentiary requirements – resulting in unsatisfactory plea-bargains – and vulnerability to organisations shifting their territorial base of operations has impaired its effectiveness. New legislation currently under review seeks to close these loopholes but according to Taljaard policy, legal and practical problems remain.

In the case of peacekeeping and humanitarian interventions there is no consensus on the use of PSCs/PMCs in terms of their sustainability, effectiveness or value for money. However, the increasing targeting of non-combatants in recent conflicts has extended to increased intimidation or violence against relief and development agency (RDA) personnel which has heightened the interaction of such organisations with PSCs. In contrast to the commonly-held argument that much of the heat in the privatisation debate is taken up by the PSC/PMC phenomenon, Spearin (Chapter 12) points out that RDAs tend to have well-developed guidelines and protocols for interacting with militias, rebel forces, indigenous and foreign militaries but less familiarity with PSCs.

The lack of national legislation is striking given the profile of the industry, particularly so in Europe where a growing segment is based. Krahmann (Chapter 10) notes the complementary though neglected regulatory role of the European Union (EU) in harmonising export controls of military services and argues that such regional-level regulation should be encouraged and would be supported by both governments and the industry. The EU Code of Conduct on Arms Exports is notable in promoting transparency among member states and could be expanded to military and security services while under the Common Foreign and Security Policy (CFSP) a common EU position – as exists on brokering – could require member states to implement national legislation on the export of military and security services. These suggestions point to the overlapping nature of national and regional regulation, suggesting a potential dynamic for harmonisation as has been witnessed in many other areas of EU competence. A forceful EU role in this field could also provide important emulation effects for other regional organisations.

The Bulgarian and Georgian cases have demonstrated that accession pressures for aspirant members of the Euro-Atlantic clubs can have a positive impact on SSR, including on regulation of the private sector. Krahmann points out that many of the Central and Eastern European states have more extensive licensing requirements than older EU member states. These examples point to the ‘teeth’ inherent in accession processes which could certainly be made more explicit in the appropriate conditionalities with regard to regulation of the private security sector.

On regional and global levels, Ghebali describes the problems and loopholes inherent in three international legal frameworks addressing mercenarism: the 1977 Amended Protocol I to the Geneva Conventions; the 1977 Organisation of African Unity Libreville Convention for the Elimination of Mercenarism in Africa; and the 1989 United Nations Convention against the Recruitment, Use, Financing and Training of Mercenaries. Challenges include the cumulative character of these agreements which make categorisation difficult; emphasis on ‘participation in hostilities’ which excludes a wide range of relevant actors; and a nationality requirement circumvented by individuals assuming local nationality to avoid being caught within the definition. The UN Working Group on Mercenaries, which replaced the function of the Special Rapporteur in April 2005 on the decision of the UN Commission on Human Rights, seeks to map the use of PMC/PSCs by UN bodies in order to ensure the appropriate application of international humanitarian law (IHL) and human rights standards. It has also

encouraged the adoption of appropriate legislation and registration in exporting and user states.

### **Private Actors and Security Governance**

Current debate in the policy discourse on SSR places particular emphasis on two interrelated issues: the need to promote local ownership as the centrepiece of effective SSR and the importance of holistic interventions by external actors in order to implement SSR in a joined-up manner across a range of different reform contexts. The European Commission's *Concept for European Community Support for Security Sector Reform* underlines as a guiding principle the need for 'nationally/regionally-owned reform processes designed to strengthen good governance, democratic norms, the rule of law and the respect for human rights, in line with internationally agreed norms'.<sup>14</sup> The OECD's Development Assistance Committee is currently developing an implementation framework for SSR (IF-SSR) which is intended to provide operational guidance for practitioners. The draft 'Key Messages' document for the IF SSR underlines that 'reforms that are not shaped and driven by local actors are unlikely to be implemented properly and sustained' and recognises a current weakness that 'SSR is still discussed at the conceptual level in Headquarters and delivered and funded at the tactical level in the field'.<sup>15</sup> Finally, although the UN has been engaged for many years in a wide range of SSR activities (if not necessarily labelled as such), there is increasing interest within the UN system for a common, comprehensive and coordinated UN approach to SSR, leading to greater clarity on roles and responsibilities across the UN system.<sup>16</sup>

Issues of local ownership and the importance of tailored external interventions are relevant to both top-down and bottom-up privatisation. The following section therefore links security privatisation to these two broader SSR themes. In order to emphasise and link some of the key empirical findings from this volume it focuses primarily on the different dimensions of top-down security privatisation.

#### *Local Ownership and Security Privatisation*

Regardless of the reform context, establishing sustainable national authorities and supporting domestic constituencies is a pre-condition for stability and longer-term development. It is not for external actors to address the root

causes of grievance or conflict but they can assist national actors in developing solutions based on international norms and standards. For example, Schnabel observes that domestic authorities may be unsuitable agents in stopping insurgent violence, tending to overreact – which can strengthen the insurgency and its support – or to be too defensive in appeasing such actors – which can be similarly counter-productive. However, if international actors are to contribute meaningfully in addressing these issues then the importance of understanding context is essential.

The problem of local ownership in SSR is a specific example of how a conceptually uncontested principle has proved highly difficult to implement in practice. A central problem remains in how to ensure that local actors behave any better than external providers in the light of dramatic governance and capacity deficits. These issues are highly sensitive and shaped by very specific local contexts: in Iraq, PMCs have, according to Isenberg, been preferred by Iraqis to locals as more trustworthy; the impetus behind South African regulation of the private security sector has been to prevent its nationals from engaging in military- and security-related activities, particularly in other African countries even when this may relate to legitimate security and development activities; and Taljaard's example of members of the South African Police Force's Special Task Force resigning to pursue more lucrative work in Iraq demonstrates how public/private distinctions become increasingly blurred if you scratch under the surface.

Deficits and contradictions that are magnified in weak states only reinforce the need to enhance the role of local governance actors – including parliaments in their legislative and budgetary functions – to shape executive decisions. Even in areas where significant national regulation has been developed over a lengthy period the regulatory function is typically linked to the police or Ministry of the Interior rather than among actors such as parliament, civil society, local government institutions or the executive more broadly. This results in a lack of adequate checks and balances and a failure to shift from institutional readjustment to having a positive effect on human security. Participation by a broad range of stakeholders is therefore key to legitimate and sustainable reform processes.

Legitimacy and accountability lie at the heart of addressing the democratic and security deficits discussed in this volume. Certainly the consequences of police officers working for private gain as in Ukraine cannot be ascertained without budgetary transparency or adequate levels of democratic oversight. Accountability of external actors to local authorities is therefore critical. Isenberg may be right that the Executive Outcomes/Sandline profile is out of date in terms of the roles played by the modern PMC/PSC industry.

But if this is the image held by local actors, the perception is significant. As Wilson (Chapter 13) emphasises, if external actors are to play a meaningful role then process is as important as substance. Even where sound internationally-recognised practices exist for regulation, legislation or oversight, the process of local analysis, consultation and debate is key to embedding reforms.

Local ownership is also about taking into account local capacities for reform. The absence of effective Iraqi governance institutions is a compelling, if conditional argument for private actors to operate without reference to local authorities. But a blanket assertion that companies would not work without immunity from local justice systems is both dubious and undermines the legitimacy of the work being carried out, regardless of its quality. In Georgia, where police reform is a central focus of SSR, limited capacity to pass legislation means that standards or new laws for the private sector do not feature highly on the priority list. Yet while for Bulgaria in the early 1990s the private security industry was a key player and the need for regulation evident, in Georgia and Ukraine police and military reform have a higher priority. Ultimately, given the limited capacities of weak states, sequencing of SSR activities must reflect the absorptive capacity of local actors and institutions. Regulation of private sector actors must be realistically prioritised alongside other reform needs.

#### *Privatisation, SSR and the Challenges of Intervention*

Although with long historical antecedents, private security actors' involvement in fields such as SSR is relatively new, as are many of the actors involved. More generally, SSR remains contested in both theory and practice and much remains to be learned to inform future activities. The conflation of different private security providers described earlier in this chapter is significant in that it sends a powerful message that for the recipient a sleek corporate profile and legitimate mandates from bi- and multilateral donors make little difference if such actors remain opaque and unaccountable and therefore undermine local political authorities. Indeed, Ghebali's inference that the mandate of the second Special Rapporteur on Mercenaries was abruptly curtailed as a result of developing states' displeasure at her proactive approach to the private security industry is testimony to this. Yet while acknowledging the strong historical resonance of modern security providers, particularly in Africa, analytically it is not adequate to adopt such a position if these concerns are to be addressed.

Bailes makes a compelling normative argument that the globalising trends which underpin security privatisation make it increasingly illogical for defence and security to be treated apart for reasons of transparency and corporate governance. Licensing of companies, services, corporate transparency, justiciability of offences, stricter contract terms, black lists, monitoring and enforcement of global rules and norms such as through the International Criminal Court (ICC) are all part of getting closer to a gold standard. The defence and security sectors have not historically faced significant shareholder scrutiny. However, beyond self-regulation, there would be merit in looking further at this aspect of good governance, mirroring the corporate social responsibility movement.

Measuring the performance – including the cost-effectiveness – of PMCs is not clear-cut nor should be generalisable since it will be dependent on the framing and implementation of individual contracts. But what certainly can be attributed to privatisation is that the benefits of direct interface, mutual learning and experience transfer are difficult to realise. This is significant since a lack of transparency works against the industry because only the negative issues – such as accusations of overcharging – tend to be visible. Performance and ways in which to better understand success and failure provide the correct and pragmatic lens through which to judge all contributors to SSR. Drawing on experience in the economics field, Wilson identifies *definability* and *observability* as key criteria to achieving more measurable results.

As an example of the former, Wilson cites the incongruity of Sierra Leone, often flagged as a success story for SSR when it remains second from bottom of the UN Human Development Index. It also displays many of the tensions between local ownership and external intervention as well as gains achieved through flexible approaches to overcoming such challenges.<sup>17</sup> Greater attention to definability does not mean tying performance indicators to long-term socio-economic trends influenced by a range of factors beyond the scope of SSR. It does however require a transition from outputs to outcomes in order to avoid problems such as ‘workshop proliferation’.

Contracting is a two-way street. Experience in Iraq clearly shows a gap both in Washington and in the Coalition Provisional Authority (CPA) with insufficient people adequately trained to design, implement and oversee contracts. Regulation of PMCs/PSCs in Iraq has evolved over time, with a US Department of Defense Directive as late as October 2005 clarifying the status and rights to bear arms of contractor personnel. Alongside this, Isenberg identifies a raft of US legislation to which contractors are accountable. Problems of accountability have also been highlighted in the vetting and

tracking of personnel, with this task left to the firms themselves. This demonstrates the observability dilemma of donors at headquarters monitoring consultants in the field. More flexible contracting procedures that take into account the politicised, non-linear nature of SSR and build on good private sector practices are therefore essential.

SSR requires new capabilities and more targeted learning from previous experience that cuts across public and private sectors. Wilson makes the important point that beyond PMCs/PSCs, the private sector in the shape of consultants as well as various research and policy organisations are already heavily involved in SSR policy research, training and consultancy services. PSCs can greatly improve their own profiles by embracing principles of transparency and accountability and demonstrating sensitivity to local contexts. Vinnell's unsuccessful application of experience gained in training the well-paid, well-educated Saudi National Guard operating in a benign environment to unpaid, unskilled armed forces recruits from Baghdad faced with high levels of violence (Chapter 8) would seem to provide a compelling counterfactual. National subsidiaries of international companies using predominantly local staff as in Sierra Leone and Iraq may be a way of encouraging knowledge transfer and capacity-building while time-limiting the tenure of external experts although a blunt instrument at least prioritises knowledge transfer. Maximising the use of local staff, including in management positions, has met with some success in fields such as mine action but requires an explicit normative and resource commitment to move from tokenism to building sustainable local capacity.

In SSR there is a need for approaches that reflect and build on the strengths of a broad range of skills sets and private actors are already central to both policy-making and programming. Analysis of both top-down and bottom-up privatisation show that there is not a need for Western models but certainly an understanding of what different actors have to offer and the development of 'house styles'. Overall, what Wilson terms the 'under-developed SSR eco-system' offers a range of opportunities if actors are prepared to share knowledge, show flexibility and integrate efforts.

## **Conclusion**

The contributions to this volume cover a range of disparate private actors who have in common that they play a significant if differentiated role in security governance. Collectively, an analysis of top-down and bottom-up

privatisation poses questions that merit a broader debate on the role of the state in the provision of security. It is also important to recognise the democratic and security deficits that underpin both the need for non-state security and in many cases its provision. Operationalising principles of democratic governance are central to addressing these deficits.

History continues to weigh heavily on parts of the private security industry. It is important to look openly at the capacities on offer and gauge in a balanced fashion the trade-offs involved in different options. There is a great deal to be learned through drawing on a range of public and private sector competences in terms of good practice and cross-fertilisation of expertise. It is therefore essential to harness its dynamics in a positive way. However, such developments must be consistent with the normative imperative of the security governance approach. Performance gains through the use of private security actors will be more than outweighed by the costs to long term security and development of not implementing the principles of transparency and accountability to democratically elected authorities.

Security privatisation in all its guises is not going away. Effective responses to complex security and development challenges can only be achieved if there is adequate coordination within and between an array of actors on all levels of governance. It is therefore essential to better understand these actors and their influence in order to inform policy and operational decisions in highly specific local contexts. There is a clear need for increased dialogue among stakeholders – governments, international organisations, industry and civil society – to achieve common understandings that will improve effectiveness and address genuine concerns of democratic governance. It is hoped that this volume provides a contribution to that endeavour.

## Notes

- <sup>1</sup> Applying a security governance approach to the various activities that fall under the heading of post-conflict peacebuilding is the subject of DCAF's 2005 Yearly Book: Bryden, A. and Hänggi, H., *Security Governance in Post-Conflict Peacebuilding* (Munster: Lit Verlag, 2005)
- <sup>2</sup> For a discussion of the security governance concept see: Hänggi, H., 'Approaching Peacebuilding from a Security Governance Perspective,' in, Bryden and Hänggi, Op. Cit., 5–9.
- <sup>3</sup> SIPRI Yearbook 2006, *Armaments, Disarmament and International Security* Appendix 2A. (Oxford: Oxford University Press).



- <sup>4</sup> This broad definition of the security sector is recognised by the extant OECD-DAC guidelines on SSR. See: *DAC Guidelines and Reference Series: Security System Reform and Governance* (Paris: OECD DAC, 2005), 20–21, available at URL <[www.oecd.org/dataoecd/8/39/31785288.pdf](http://www.oecd.org/dataoecd/8/39/31785288.pdf)>
- <sup>5</sup> One of the main objectives of DCAF's 2005 Yearly Book was to better understand – from a security governance perspective – the implications of the internationalisation of security on states emerging from conflict. See: Bryden and Hänggi, op. cit.
- <sup>6</sup> The Human Security Centre, University of British Columbia. *The Human Security Report 2005* (Oxford: Oxford University Press, 2005).
- <sup>7</sup> United Nations. 'A More Secure World: Our Shared Responsibility,' Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, New York, 2004.
- <sup>8</sup> Rebels or guerrilla fighters, militias or paramilitaries, clan chiefs or 'big men', warlords, terrorists, criminals, mercenaries and private security companies, marauders.
- <sup>9</sup> See: Born, H. and Hänggi, H., *The 'Double Democratic Deficit': Parliamentary Accountability and the Use of Force Under International Auspices*, (London: Ashgate, 2004).
- <sup>10</sup> A full list of United Nations Security Council Resolutions can be found at URL <[www.un.org/documents/scres.htm](http://www.un.org/documents/scres.htm)>
- <sup>11</sup> Brzoska, M., 'Embedding DDR Programmes in Security Sector Reconstruction,' in Bryden and Hänggi, op. cit., 99.
- <sup>12</sup> For an insider's analysis of this process see: Williams, R., 'Human Security and the Transformation of the South African National Security Environment from 1990–2004: Challenges and Limitations,' *Journal of Security Sector Management*, Global Facilitation Network for Security Sector Reform, March 2005.
- <sup>13</sup> Caparini, M. and Schreier, F., 'Privatising Security: Law, Practice and Governance of Private Military and Security Companies,' *DCAF Occasional Paper No. 6*, March 2005, Geneva. Available at <http://www.dcaf.ch>.
- <sup>14</sup> Communication from the Commission to the Council and the European Parliament, 'A Concept for European Community Support for Security Sector Reform,' COM(2006) final, 24 May 2006, Brussels, 7.
- <sup>15</sup> OECD DAC Network on Conflict, Peace and Development Cooperation (CPDC). 'Key Messages and Preliminary Findings from the Implementation Framework on Security System Reform (IF-SSR),' (Draft) July 2006.
- <sup>16</sup> DCAF 'UN Approaches to SSR,' Background Paper for the Workshop on Developing a Security Sector Reform Concept for the United Nations, 7 July 2006, Bratislava.
- <sup>17</sup> Bryden, A., N'Diaye, B. and Olonisakin, F., 'Democratising Security Sector Governance in West Africa: Trends and Challenges,' *Conflict, Security and Development*, vol. 5, no. 2 (August 2005), 203–226.



## **PART II**

### **THE INTERNATIONAL POLICY CONTEXT**



## Chapter 2

# Fragile Statehood, Armed Non-State Actors and Security Governance

*Ulrich Schneekener*

### Introduction

In the modern world, the state – at least in theory – has to fulfil a dual function with regard to political order: first, the state shall organise and guarantee public order domestically within a defined territory; second, all states together constitute the international system and, thereby, the global order. Ineffective, weak, failing or failed states – which can be subsumed under the rubric of *fragile statehood* – tend to undermine both functions and cause problems at the national, regional and global level. In particular, for experts on development issues, it is common knowledge that many post-colonial (or post-Soviet) states are unable to provide basic public functions and services vis-à-vis their citizens and are incapable of performing their duties and responsibilities as members of the international community. In other words, fragile statehood poses challenges not only for governance internally, but also for any form of regional or global governance.

However, until the turn of the century the issue was largely perceived by Western governments as a local affair, left to development experts and agencies. Only in extreme cases of humanitarian intervention has the issue of fragile statehood become connected to the field of international security policy. Otherwise, the topic did not receive any systematic or strategic treatment in Western foreign affairs and security thinking. This, however, changed profoundly after the terrorist acts of September 11, 2001 (9/11). The debate has shifted – rightly or wrongly – to a more security-oriented approach. The message of 9/11 seems to be clear: if local problems are ignored, they have the potential to produce global risks.

Therefore, both the *US National Security Strategy* (September 2002) and the *EU Security Strategy* (December 2003) call ‘failing and failed states’ a security threat, i.e. a direct or indirect threat to peace and security for the US and the EU.<sup>1</sup> Both strategies, however, fail to acknowledge the analytical

difference between a concrete *threat* and a more general *risk*. Fragile states should not be understood as a threat per se, but as an enabling factor or a catalyst for potential threats and – almost more importantly – as an obstacle to solving key global security issues. In a more comprehensive and more accurate way, the report ‘A More Secure World’ of the High-Level Panel on UN Reform (December 2004), initiated by UN Secretary-General Kofi Annan, underscores that the issue of fragile statehood is at the core of most of today's relevant security problems. The Panel identified six ‘clusters of threat’: (1) economic, social and ecological threats; (2) interstate conflicts; (3) intrastate conflicts; (4) proliferation of nuclear, radiological, biological and chemical weapons; (5) terrorism; and (6) transnational organised crime.<sup>2</sup> In contrast to the US and EU security strategies, failing and failed states are not mentioned as a threat. However, the authors made clear that none of these problems could be solved unless the international community addressed the phenomenon of fragile statehood. In this respect, the issue cuts across various ‘old’ and ‘new’ security concerns. This point can easily be illustrated with a few examples: a meaningful fight against AIDS and epidemics or the implementation of effective disaster-prevention policies is hardly possible without the involvement of state institutions. Similarly, the fight against poverty and the fair distribution of resources require the framework of a state; moreover, the containment of organised crime, the prevention of the proliferation of nuclear material by non-state actors and the fight against transnational terrorist networks require, *inter alia*, state mechanisms of control and means of enforcement; and the reconciliation of regional conflicts and civil wars is directly tied to the creation of legitimate state structures.

Against this background, this chapter argues that the lack of legitimate and effective security governance in many parts of the world makes it difficult to contain and prevent the spread of transnational security problems. In this sense, one key question seems to be whether and how far states are able and willing to provide security for their own citizens, to establish appropriate structures and institutions and to allocate the necessary resources. A major challenge for local security governance, however, is posed by activities of a variety of armed non-state actors which undermine the state's monopoly of the use of force. In extreme cases they may even replace the state and its security apparatus, at least at a sub-national level. This poses a number of relevant questions: Who are armed non-state actors and how can they be categorised? How far do these actors profit from characteristics of fragile statehood? To what extent do they affect security governance? How can one differentiate among potential ‘security providers’? And, more generally,

what strategies can reduce their capacities as ‘spoilers’ in state-building and peacebuilding efforts? The chapter will address these questions by providing a framework of analysis and by highlighting some hypotheses which could inform further empirical research and case study work.

### A Typology of Armed Non-State Actors

In order to analyse the relationship between fragile statehood and armed non-state actors and its consequences for security governance, we need a better understanding of these actors. Generally speaking, armed non-state actors are 1) willing and able to use violence for pursuing their objectives; and 2) not integrated into formalised state institutions such as regular armies, presidential guards, police or special forces. They may, however, be supported by state actors whether in an official or informal manner. There may also be state officials who are directly or indirectly involved in the activities of armed non-state actors – sometimes for political purposes, but often for personal interests (i.e. corruption, clientelism). The following typology aims at identifying the most important and most frequently encountered armed non-state actors as well as highlighting their specific characteristics.<sup>3</sup>

*Rebels* or *guerrilla fighters*, sometimes also referred to as *partisans* or *franc tireurs*, seek the ‘liberation’ of a social class or a ‘nation’. They fight for the overthrow of a government, for the secession of a region or for the end of an occupational or colonial regime. In that sense, they pursue a political – mostly social-revolutionary or ethno-nationalistic – agenda, and view themselves as ‘future armies’ of a liberated population.<sup>4</sup> Hence they sometimes also wear uniforms and emblems in order to benefit from the protection of international law provisions for combatants. In their military operations they avoid direct confrontation with their opponents; therefore, guerrilla warfare typically begins in rural areas, mountainous regions or in remote areas that are beyond the central government’s control.<sup>5</sup> Some writers have propagated the concept of an urban guerrilla that is supposed to function as a vanguard for the rural guerrilla.<sup>6</sup> According to the doctrine of guerrilla warfare, guerrilla fighters depend on the local population for logistic and moral support. In reality, however, the most significant support comes from foreign governments or various non-state actors that provide safe havens, weapons, equipment and know-how.

*Militias* or *paramilitaries* are irregular combat units that usually act on behalf of, or are at least tolerated by, a given regime. Their task is to fight rebels, to threaten specific groups or to kill opposition leaders. These militias

are often created, funded, equipped and trained in anti-guerrilla tactics (counter-insurgency) by state authorities. On behalf of the state they may handle the dirty business of targeted kidnappings and killings, massacres or ethnic cleansing. Nevertheless they often evade government control and, in the course of a conflict, develop their own agenda. Self-proclaimed defenders of an existing system such as 'protection forces' (*Schutzbünde* or *Heimwehren*) or vigilantes also fall into this category since they mostly protect the interests of groups that benefit from the status quo (for example land owners, former combatants, officers, dominant ethno-national groups).<sup>7</sup>

*Clan chiefs or big men* are traditional, local authorities who head a particular tribe, clan, ethnic or religious community.<sup>8</sup> They have usually attained their positions according to traditional rules, whether by virtue of their age and experience, ancestry or personal ability to lead the group. In this regard, they can be seen as legitimate representatives of their people. Most often, they control a certain territory which may range from a few peripheral villages or settlements to larger regions. While this control can be formalised as kingdoms or chiefdoms with a certain degree of autonomy, it may also be more informal since in many cases it either exists parallel to or cuts across administrative units of the state. Most chiefs or big men also command an armed force recruited from members of their tribe or clan. These forces are mainly set up for the purpose of self-defence, but also for deterring and fighting internal rivals.<sup>9</sup>

*Warlords* are local potentates who control a particular territory during or after the end of a violent conflict. They secure their power through private armies and benefit from war or post-war economies by exploiting resources (such as precious metals, tropical timber, commodities or drug cultivation) and/or the local population (for instance, through looting or levying 'taxes'). In doing so they frequently capitalise on transnational ties and links to global markets.<sup>10</sup> Warlords are a typical product of long-standing civil wars. Some of them, however, manage to perpetuate their rule even after the end of combat activities. Quite often they attempt to legalise the benefits they acquired during the war by running for public office.<sup>11</sup>

*Terrorists* aim to spread panic and fear in societies in order to achieve political goals, be they based on left- or right-wing, on social-revolutionary, nationalistic or religious ideologies.<sup>12</sup> They are organised in a clandestine way, most often in small groups and cells, sometimes also in larger transnational networks (in particular Al-Qaida or Jemaah Islamiyya). Most long-standing terrorist groups have a hierarchical structure with a command level at the top. Militarily speaking they are rather weak actors who use terrorist attacks primarily as a mean for addressing the wider public or, in some in-



stances, the international media in order to communicate their grievances and ideology. Typical tactical means include kidnapping, hostage-taking, sabotage, murder, suicide attacks, vehicle bombs and improvised explosive devices. Possible targets range from military sites and official government buildings to companies, airports, restaurants, shopping malls and means of public transport.<sup>13</sup>

*Criminals* are members of Mafia-type structures, syndicates or gangs, as well as counterfeiterers, smugglers or pirates. Their core activities may include robbery, fraud, blackmail, contract killing or illegal (mostly transborder) trade (e.g. in weapons, drugs, commodities, children and women). Organised crime in particular seeks political influence in order to secure its profit interests, and uses means such as bribery, targeted intimidation or murder.<sup>14</sup>

*Mercenaries and private security companies* are volunteers usually recruited from third states who are remunerated for fighting in combat units or for conducting special tasks on their own. They can serve different masters, ranging from the army of a state to warlords who promise them rewards. Therefore, in civil wars mercenaries are frequently to be found fighting on all sides. Mercenarism has a long-standing tradition. Among its famous precursors are the *Condottieri* – contractors who led bands of mercenaries hired for protective purposes by Italian city-states or princes from the 15<sup>th</sup> century onwards. Other historic examples are mercenaries in the 30 Years War (1618 to 1648) or during the period of decolonisation post-1945 (e.g. the activities of former German Wehrmacht officers in Congo ('Kongo-Müller')). This category also includes professional 'bounty hunters' who hunt down wanted (war) criminals or terrorists either on behalf of a government or on their own account in return for financial rewards. While traditional mercenaries are banned under international law, modern private security or military companies usually act on a legalised and licensed basis. They have professionalised and commercialised the business of providing combatants, trainers or advisers, or other forms of operational or logistical support, and are contracted by governments, companies or other non-state actors.<sup>15</sup>

*Marauders* by contrast are demobilised or scattered former combatants who engage in looting, pillaging, and terrorising defenceless civilians during or after the end of a violent conflict. They display a relatively low level of organisational cohesion and move from one place to another. A peculiar version is the so-called *sobel*, a neologism combining the words soldier and rebel. On the one hand, sobels are members of an under-funded army. However, after work they make private profit out of criminal and commercial activities (e.g. looting, robbery, the collection of protection

money, abductions, lynching). Marauders are therefore beneficiaries of a chaotic situation triggered by the central government's loss of control over (parts of) its territory. In some cases, however, marauders may be deployed strategically by regular armed forces, paramilitaries or political movements as auxiliaries to handle the dirty business of ethnic cleansing, massacres of the civilian population or the persecution of political opponents.

Most of these armed non-state actors share a common feature in that by using violent means they do not attach great importance to the distinction made by international law between combatants and non-combatants. If anything, such a distinction may have played a role for classical rebel or guerrilla movements, who avoided using excessive violence against the civilian population, since the latter represented a source of – at least temporary – support for the insurgents. They primarily attacked members of the regular armed and security forces; however, they tended to view as 'combatants' all representatives of the state apparatus (e.g. politicians, policemen or judges) and thereby extended the notion of combatant far beyond the rather strict definition of international law. In contemporary conflicts, especially intra-state ones, the distinction between combatants and non-combatants is increasingly blurred. Far from receiving special protection the civilian population has for a number of reasons become the primary target of various armed non-state actors pursuing political and economic gains.

Another trend emerging since the 1990s has been the process of transnationalisation; most groups and organisations increasingly operate via transnational networks and transnational ties, thereby gaining new room for manoeuvre. Transnationalisation not only facilitates the linking-up of war or post-war economies with cross-border smuggling routes and global 'shadow' markets; it moreover fosters the transmission of political agendas and ideological propaganda that are disseminated through international supporters (such as diasporas or exile communities, third states, NGOs) and international media. The degree of such transnationalisation processes varies from one type to another: whereas rebels, warlords, mercenaries, criminals and numerous terrorist organisations make use of transnational relations, this is much less true for clan chiefs, *big men*, marauders and most militias.

Despite their similarities, from an analytical point of view, four criteria in particular bring the differences between these types into relief (see Table 1):

1. *Change versus status quo orientation*: Some armed non-state actors seek a (radical) change of the status quo; they demand a different government, a different political system, the secession of a region, a new

world order, etc. By contrast, other groups – whether driven by their own interests or instigated by those in power whom they serve – aim at securing and consolidating the status quo. The former position applies to terrorists as well as rebels and guerrilla fighters, whereas the latter applies to warlords and criminals who generally seek to secure their achieved political and economic privileges. The same is often true for clan chiefs and *big men*, in particular when they are integrated into the political system by means of co-optive rule or neo-patrimonial structures. The prototypes of a status quo movement, however, are militias or paramilitary organisations, respectively, who are deployed to protect the rule of a regime or the dominance of particular groups. Mercenaries or marauders, by contrast, behave rather opportunistically; sometimes they may serve the interest of status quo forces, while at other times they may challenge them.

2. *Territorial versus non-territorial aspirations:* Both guerrilla movements and warlords, in principle, aim at the conquest and – if possible – the permanent control of territory. Mercenaries are usually employed for similar purposes. Clan chiefs are usually also connected to a particular territory or region. Terrorists, on the other hand, might have territorial ambitions (e.g. the creation of their own state); however, they are neither willing nor able to conquer territory and defend it by military means. The same applies to criminals and marauders if one neglects the control of town districts or villages. Militias include both variants. Some (especially large) militia organisations are capable of securing or reconquering territory from rebels, whereas other units are assigned special tasks apart from territorial control, such as the persecution of dissidents.
3. *Physical versus psychological violence:* Rebels and guerrilla movements pursue their goals by using physical violence. Their aim is to weaken their opponent's military strength, defeat him or force him to surrender, and subsequently take his place. Terrorists, by contrast, often employ psychological techniques. In between these two extremes other armed non-state actors are to be found: clan chiefs or mercenaries use primarily physical violence in order to defeat opponents, while for marauders and criminals the threat and use of violence is often merely a means of intimidation. Finally, militias and warlords are rather ambivalent with regard to the type of violence they use; depending on the group itself and the general circumstances they make use of both forms of violence.

4. *Greed versus grievance*: Whereas guerrilla movements, militias, clan chiefs, *big men* and terrorist groups pursue – at least rhetorically – a socio-political agenda for which they need economic resources, the reverse usually holds true for warlords and criminals. They are primarily interested in securing economic and commercial privileges. Political power and public offices as well as the use of violence serve the realisation of economic interests. In that sense warlords and criminals are not ‘apolitical’ actors; yet their motivation for joining the political struggle for power is different from that of other political actors. Similarly, mercenaries and marauders pursue primarily economic gains.

**Table 2.1: Types of armed non-state actors**

	Change vs. status quo	Territorial vs. non- territorial	Physical vs. psychological use of vio- lence	Political vs. economic motivation
<b>Rebels, Guer- rillas</b>	Change	Territorial	Physical	Political
<b>Militias, Para- militaries</b>	Status quo	Territorial Non-territorial	Physical Psy- chological	Political
<b>Clan chiefs, Big men</b>	Status quo	Territorial	Physical	Political
<b>Warlords</b>	Status quo	Territorial	Physical Psy- chological	Economic
<b>Terrorists</b>	Change	Non-territorial	Psychological	Political
<b>Criminals, Mafia, Gangs</b>	Status quo	Non-territorial	Psychological	Economic
<b>Mercenaries, PMCs/PSCs</b>	Indifferent	<b>Ter- ritorial</b>	Physical	Economic
<b>Marauders, ‘sobels’</b>	Indifferent	Non-territorial	Psychological	Economic

Clearly, this characterisation is based on ideal-types. In reality numerous grey zones exist, since groups sometimes undergo transformation in the course of a conflict. Rebels, *big men* or marauders, for instance, turn into warlords; militias or warlords may degenerate into ordinary criminals; criminals become involved in terrorist networks and vice versa; militias,

rebels or warlords increasingly employ terrorist methods, and so on. In many cases hybrid forms integrate features of different ideal types, such as the Tamil Tigers in Sri Lanka, the FARC in Colombia or Maoist rebels in Nepal. These organisations not only control significant territory but continue to launch terrorist attacks nationwide. They employ physical as well as psychological violence and pursue far-reaching economic interests. Nonetheless it does make sense to hold onto these distinctions, because they allow us to make statements regarding the extent to which particular groups or individuals correspond to these ideal-type categories. More importantly, in order to analyse the transformation of a particular group, criteria which distinguish one situation from another are necessary. This exercise not only has international legal and sociological implications, but is also relevant for practical policy purposes since it may be helpful for developing hypotheses as to actors that are more or less likely to be integrated into state-building and peacebuilding efforts.

### **Relating Fragile Statehood to Armed Non-State Actors**

Fragile statehood can be defined in terms of state structures and institutions which have severe deficits in performing key tasks and functions vis-à-vis their citizens. Fragile states are characterised by deficits in governance, control and legitimacy. This concept, however, covers a broad spectrum of states and is not limited to failed or collapsed states or to conflict-torn societies. The term statehood is used to avoid restricting the analysis to the government and its bureaucratic apparatus; it comprises instead a range of actors such as political parties and public institutions as well as different levels of governance (sub-national, local). Statehood, therefore, is a functional term which focuses on core state functions, on the political decision-making process and on the implementation of decisions as well as on the political order in general.

In order to operationalise the concept, it is helpful to distinguish at least three basic state functions: *security*, *welfare* and *legitimacy/rule of law*.<sup>16</sup> First, ideally, the state has to provide physical security for its citizens – internally as well as externally. The state should be able to control its territory and borders, safeguard the security of its citizens vis-à-vis each other and defend against external security threats, ensure public access to natural resources and enforce tax administration. In short, the state has to ensure the monopoly of the use of force as well as the monopoly on raising taxes and revenues. Plausible indicators of state failure in this respect are: a lack of

effective control of the state's territory as a whole; weak control of international borders; non-existent or limited control over tax and tariff revenues as well as of natural resources; an increasing number of relevant armed non-state actors; disintegration, fragmentation or commercialisation of the state's security forces; a massive incidence of crime; and, the use of state security forces against the population of the state.

Second, the state should provide basic goods and services as well as distributive mechanisms – both financed by a regular state budget. This welfare function includes, *inter alia*, macro-economic governance, social policies, management of resources, education and healthcare, environmental protection policy as well as the establishment of physical infrastructure. Typical indicators of deficits are: the systematic exclusion of particular groups from access to economic resources; severe financial and economic crises; the unequal distribution of wealth; decreasing state revenues; low state expenditures; high rates of unemployment; a significant decline in human development; poor public infrastructure; degradation of the educational and/or the health system; and environmental degradation (e.g. shortage of water).

Third, the state should enjoy legitimation by being organised in a way that ensures modes of political participation, legitimacy of decision-making processes, stability of political institutions, rule of law and effective and accountable public administration. Indicators of state failure in this area include: limited political freedom; increasing repression against opposition groups; election fraud; systematic exclusion of certain groups from decision-making and political participation; increasing human rights violations; no independent court and legal system; ineffective public administration; and an increasing level of corruption and clientelism.

The effective performance of all three functions can be seriously challenged by armed non-state actors when they systematically exploit the control and legitimacy deficits of the government and other state institutions. In particular, capable actors like rebels, militias, warlords or clan chiefs may even replace the state to some extent by providing a limited degree of security and offering some kind of welfare to the local population, albeit often in an arbitrary and unreliable manner, which could further undermine the state's legitimacy.

Based on the capabilities of states to fulfil their core functions, various types or configurations of statehood can be differentiated. Each type has specific implications for the relationship between state and armed non-state actors as well as for the opportunity structures for armed non-state actors.

- a. *Weak statehood*: The state's institutions are still able to fulfil by and large the security function, but display grave deficiencies in fulfilling at least one of the two other functions. In other words, the government and its apparatus are not willing and/or able to deliver sufficient public services and/or they suffer from severe legitimacy problems. This configuration can be studied in examples covering virtually all regions – see for example Macedonia and Albania in South Eastern Europe, most countries of Northern Africa, the Middle East and Central Asia as well as some states in Sub-Saharan Africa (e.g. Zimbabwe, Kenya, Zambia) and in Latin America (e.g. Venezuela, Bolivia, Peru). As these examples show, authoritarian or semi-authoritarian regimes often fall into that category. Despite appearing strong with regard to the monopoly of the use of force, they are in fact rather weak when it comes to provision of public services and their political and administrative systems, including the rule of law. Under these circumstances, armed non-state actors are usually not able to control a particular territory, or at least not for long periods. These states are thus not primarily threatened by clan chiefs, rebels or warlords, but rather by smaller groups such as home-grown criminal and terrorist organisations. Moreover, in some cases militias or para-military groups set up by state authorities may play a role in oppressing regime critics or minority groups. On the whole, security governance is still very much shaped, dominated and financed by state institutions (*security governance through government*), however, frequently conducted in an ineffective way (e.g. because of widespread corruption) and characterised by human rights violations.
- b. *Failing statehood*: The state is no longer or has never been able to safeguard the security of its population. The monopoly of the use of force and the exclusive control over resources is either severely restricted or entirely absent, while the state is nevertheless able to function in at least one of the other two areas. Examples include Algeria, Colombia, Sri Lanka, the Philippines, Indonesia, Nepal, Yemen, Pakistan or Georgia. These states do not completely control their territory, and they are mainly characterised by armed regional conflicts where violent non-state actors occupy and control certain regions. However, these states still deliver public services to the majority of the population and/or still have some degree of political legitimacy. Sri Lanka serves as an example; despite the long-standing conflict in the northern region, the state as such performs comparatively well, providing public services and running the political system. The examples show

that many states in the process of democratisation which are challenged by separatist forces fit in this category. Depending on the individual case, security governance clearly involves a range of armed non-state actors; the government and its security apparatus is just one player among others (*security governance beyond government*). In particular, actors with territorial claims will figure rather prominently at the sub-national level, rebels, clan chiefs or *big men* may even be able to establish para-state structures. In addition, this type of statehood offers favourable opportunities for transnational criminal and terrorist networks which profit from the security gap and the state's control deficits, especially regarding borders.

- c. *Failed statehood* (or collapsed statehood): None of the three state functions is effectively performed. Statehood as such has collapsed. There may still be a central government, but in lacking resources, capabilities and power, it has hardly any impact. Recent examples include war-torn countries such as Somalia, Afghanistan, the Democratic Republic of Congo, Sierra Leone and Liberia. In the past, Angola, Tajikistan and Lebanon also belonged in this category. In comparison to the other two types, this situation can be described as *security governance without government*. Instead, the country in question is by and large dominated by relatively powerful armed non-state actors who rule not only regions and townships, but may also control the access to natural resources, trade and businesses as well as international humanitarian aid. They act as de facto key 'security providers' based mainly on violence, suppression and intimidation, but sometimes also on popular support (e.g. in the cases of clan chiefs or rebels). Under these circumstances, the establishment of warlord regimes is particularly significant. The same is true for the presence of mercenaries, criminals or marauders. In any case, the category failed states does not imply chaos or anarchy, but fragile and contested forms of political order established by a number of different non-state actors.

The analysis of failures and their possible causes, however, does not give the full picture. Despite negative indicators, a number of fragile states prove to be surprisingly stable, even on a relative low level. In some cases, deficits in statehood and governance exist over decades without leading to a complete breakdown of state structures. In other words, in order to understand fragile statehood, it is not just the question why things do not work, but also why some aspects of statehood are still in place that should be ad-



dressed. Fragility always implies a certain degree of stability. These ‘stabilising factors’ involve a range of social practices and political mechanisms, often developed by the ruling elites, including patronage and clientelism, neo-patrimonial structures, cooptation of certain groups, forms of power-sharing and semi-authoritarianism, the mobilisation of traditional structures and informal practices of self-organisation (i.e. ethnic networks). Most of these mechanisms, however, do not lead to a sustainable statehood, but are part of the problem. The question is how can they be transformed or removed in a way that does not increase tensions and instability. Moreover, in most cases, the elites and particular groups would have to give up some of their power and privileges in order to reform and transform statehood. This problem becomes even more difficult in dealing with armed actors.

### **Dealing with Armed Non-State Actors**

Generally speaking, armed non-state actors can be seen as classical spoilers or trouble-makers for state-building and peacebuilding efforts, meaning the strengthening, reform or reconstruction of state structures and institutions. They have hardly any interest in consolidated statehood since this would inevitably challenge their position – a notable exception are private security companies who depend largely on governments’ contracts. Capable state structures would limit their room of manoeuvre and opportunities to pursue their political and/or economic agendas. Some of them, such as militias or rebels, would face disarmament and, eventually, dissolution. Others like warlords, guerrilla fighters or terrorists would be forced to transform themselves, i.e. to become political forces or to integrate into official state structures, while criminals, mercenaries or marauders would simply lose economic profits. Therefore, they are more likely to challenge than to support any steps which would strengthen *security governance through government*, i.e. the (re-)establishment of the state’s monopoly of the use of force. This behaviour can be observed in almost every international intervention, ranging from Bosnia and Kosovo to Haiti, Afghanistan and DR Congo, which aims at state-building. In these cases, the international community is confronted with the following dilemma: on the one hand, state-building activities have to be implemented against the vested interests of these armed actors in order to achieve positive results in the long run. On the other hand, progress in the area of security is often only possible if at least the most powerful of these actors can be involved in a political process which would grant them political influence (e.g. posts in an interim government) and cer-

tain economic and financial privileges which, in turn, could undermine the whole process of state-building. In other words, armed non-state actors are not only part of problem, but must sometimes also be part of the solution. In particular with regard to already established para-state structures by warlords, rebels, *big men* or militias, the question is whether it is possible to use these structures as temporary solutions and building blocs for reconstructing statehood, or whether this would simply increase the risk that they would be strengthened and legitimised so that the establishment of the state's monopoly of the use of force becomes even less likely. In other words, those actors who have in theory the greatest potential for state-building and security governance are also the ones who can mobilise the greatest spoiling power. Moreover, the international community runs the risk of sending the wrong message ('violence pays') by granting too much power or privilege to armed non-state actors who have already benefited from war and shadow economies. This may not only trigger increasing demands by these actors, but also seriously harm the credibility and legitimacy of external actors vis-à-vis the general public.

Clearly, there are no satisfying answers to these questions. Considering past experience, context-specific, flexible arrangements in dealing with armed non-state actors will always be necessary. However, more broadly speaking, the international community has in principle a number of options for 'spoiler management'. Depending on the type of actor and on the local situation, one or a mix of the following strategies might be appropriate:<sup>17</sup>

- a. *Negotiating a political settlement*: At the negotiation table, facilitators or mediators aim at persuading the armed actor in question to refrain from the use of force and to abandon maximalist positions. Usually, pros and cons of possible solutions have to be exchanged, incentives and disincentives have to be taken into account and a compromise acceptable for all sides has to be found. Often arguing and bargaining strategies (including cost-benefit analysis) are combined in order to achieve such a positive-sum-game outcome. This scenario applies mainly to groups with a clear political agenda and which are strongly tied to a defined constituency (e.g. tribe, clan, ethnic group, political party). The most likely cases, therefore, are clan chiefs, *big men* or classical rebel leaders; in some instances local terrorists or warlords may also be part of such a process, in particular when they seek to transform into more political figures.
- b. *Socialisation*: In the context of established institutional arrangements (e.g. electoral system, modes of power-sharing) and through political

practice spoilers are successively socialised into accepting certain norms and rules of the game. Armed non-state actors undergo processes of collective learning which may change their strategies and, eventually, their preferences and their character. This medium- to long-term strategy may work again primarily for those armed actors with political ambitions who have to address certain long-term expectations of their followers.

- c. *Bribery*: Spoilers are induced to cooperate or silenced through the offering of material incentives, i.e. economic resources or well-paid posts. This strategy is politically and normatively questionable; however, in some cases it is indispensable for getting a peace- and state-building process started in the first place (see e.g. Afghanistan). In particular, profit-driven actors such as warlords, criminals, mercenaries or marauders have often been receptive to such a strategy.
- d. *Amnesty*: No less problematic from a normative point of view is granting amnesty for certain crimes and actions committed by non-state actors. This step, however, could work under certain circumstances as a precondition and an incentive to end violence. Generally, amnesty would be part of a larger political package and may not be applied to every crime or every group member. It might be especially attractive for groups who are aware of their weaknesses and for leaders who are willing to opt for a different political career.
- e. *Containment and marginalisation*: This strategy aims at systematically containing the political and ideological influence of armed non-state actors. The idea is to isolate them from actual or potential followers and their constituencies as well as to marginalise them. For that scenario, a broad consensus is needed among political elites and societal groups not to deal with these actors and not to react to their violent provocations, but to continue an agreed peacebuilding process. This approach is an option in the case of rather weak or already weakened actors such as smaller rebel groups, terrorists or marauders.
- f. *Enforcing splits and internal rivalry*: Another option aims at fragmenting and splitting armed groups between more moderate forces and hardliners. This can be achieved by offering secret deals to some leading figures or by involving them in a political process which would encourage them to leave their group or to transform it into a political movement. The strategy, however, can result in the establishment of radical fringe and splinter groups which may be even more extreme than the former unified group. This kind of fragmentation process can often be observed with rebel or terrorist groups.

- g. *Coercion*: Finally, international actors may use coercive measures, including the use of force. Typical instruments are military or police operations aimed at fighting or arresting members of armed groups, the deployment of international troops in order to stabilise a post-war situation or the implementation of international sanctions (e.g. arms embargoes, no-fly zones, economic sanctions, freezing of foreign assets, travel sanctions, war criminal tribunals) which could harm the interests of at least some non-state actors, in particular para-militaries, rebel leaders, warlords and clan chiefs.

As indicated, all these methods have their downsides. In particular, they imply that the international community has to be prepared to make ambivalent decisions, to risk backlashes and failures and to put up with normative dilemmas. Moreover, the international community must be willing to invest political capital, resources and time into efforts to co-opt, transform or weaken armed non-state actors. However, all three are difficult to sustain. First, the international community – and in particular the UN Security Council – tends to focus primarily on cases of emergency and crisis which may have effects on regional and international security. If the situation has calmed, if a war has formally ended, high-level political attention will usually be absorbed by new crises despite the fact that state-building processes need long-term political support. Second, military, economic and personal resources are limited and demand exceeds supply. Moreover, the mobilisation of resources is directly linked to the question of political commitment. Third, external actors have the inherent problem that their mandates, budgets, programmes or projects are limited in time and scope. Local actors know that and take advantage of this. In particular those powerful actors who do not have an interest in giving up their privileges will pursue all kinds of delaying and obstructive tactics because they know that time is on their side.

In spite of the dilemmas, difficulties and obstacles outlined above, the alternative of staying out of war-torn societies and ignoring problems of fragile statehood is neither realistic nor desirable. Ultimately, disengagement means risking a dramatic worsening of the situation in fragile states, thereby making crises and the spread of armed non-state actors more likely. This would not only lead to additional humanitarian disasters, but create tangible security problems and governance failures – at the local, at the regional as well as at the global level.

## Notes

- <sup>1</sup> The US NSS states: 'America is now threatened less by conquering states than we are by failing ones'. See The National Security Strategy of the United States of America, Washington, D.C., 17 September 2002. The European Security Strategy emphasises that failed states pose a key threat that can undermine global policy-making and increase regional instability. See European Security Strategy, 'A Secure Europe in a better World', Brussels, 12 December 2003 <http://ue.eu.int/uedocs/cmsUpload/78367.pdf>.
- <sup>2</sup> See *United Nations*, 'A More Secure World: Our Shared Responsibility', report of the Secretary-General's High-level Panel on Threats, Challenges and Change, New York 2004, 23–54.
- <sup>3</sup> For similar typologies, see Mair, S., *Die Globalisierung privater Gewalt* (Berlin: Stiftung Wissenschaft und Politik, 2002) 10; Wulf, H., *Internationalisierung und Privatisierung von Krieg und Frieden* (Baden-Baden: Nomos, 2005), 54–62; McCartney, C., *Engaging Armed Groups in Peace Processes* (London: Conciliation Resources, 2006), 3–4.
- <sup>4</sup> For a classical account, see Schmitt, C., *Theorie des Partisanen* (Berlin: Duncker&Humblot, 1963).
- <sup>5</sup> On the tactics of guerrilla warfare, see Münkler, H., *Gewalt und Ordnung* (Frankfurt am Main: Fischer, 1992) 152–162; Daase, C., *Kleine Kriege, große Wirkung*, (Baden-Baden: Nomos, 1999); O'Neill, B. E., *Insurgency & Terrorism* (Washington: Potomac Books, 2nd Edition, 2005).
- <sup>6</sup> One of the most prominent proponents of this strand was the Brazilian author *Carlos Marighela*, whose *Handbook of Urban Guerrilla Warfare* (1969) inspired numerous (mostly leftist) guerrillas and terrorist groups. Marighela himself founded the ALN (*Ação Libertadora Nacional*) that became known to a larger public through the terrorist attacks it launched.
- <sup>7</sup> This type includes groups as varied as the White Hand in Guatemala, the Argentine Triple A (Alianza Anticomunista Argentina), the anti-Kurdish Turkish Revenge Brigade (TIT), the protestant Ulster Defence Association (UDA) in Northern Ireland, the Autodefensas Unidas de Colombia (AUC), the pro-Serbian Arkan Tigers in Bosnia and Kosovo, the pro-Indonesian groups Aitarak (thorn) and Besi Merah Putih (red-and-white iron) in East Timor or the Janjaweed militia in Western Sudan (Darfur).
- <sup>8</sup> This definition does not include corrupt and autocratic African presidents or politicians (e.g. the former president Mobutu of Zaire) which in the literature are also often called 'big men'.
- <sup>9</sup> Examples of this type can be found mainly in clan-based societies in Sub-Saharan Africa (see the various clan families in Somalia, the Tuaregs in Mali, the Baganda in Uganda or the Zulu in South Africa) and in the Pacific region, but also in countries like Yemen or Pakistan (Pashtun tribal areas along the Afghan-Pakistani border). See the classic analysis by Sahlins, M., 'Poor Man, Rich Man, Big Man, Chief: Political Types in Melanesia and Polynesia,' *Comparative Studies in Society and History*, (1963) 285–303. For more recent examples, see Ssereo, F., 'Clan politics, Clan-democracy and Conflict Regulation in Africa: The Experience of Somalia,' in *The Global Review of Ethnopolitics*, vol. 2, no. 3–4, (2003) 25–40; Englebert, P., 'Born-Again Buganda or the Limits of Traditional Resurgence in Africa,' *Journal of Modern African Studies*, vol. 40, no. 3 (2002) 345–368.

- <sup>10</sup> On warlordism see Reno, W., *Warlord Politics and African States* (Boulder: Lynne Rienner, 1998); on the problem of war economies, see Jean, F. and Rufin, J.-C. (ed.), *Ökonomie der Bürgerkriege*, (Hamburg: Hamburger Edition, 1999); Pugh, M., and Cooper, N. (ed.), *War Economies in a Regional Context: Challenges of Transformation*, (Boulder: Lynne Rienner, 2004); Heupel, M., *Friedenskonsolidierung im Zeitalter der 'neuen Kriege'. Der Wandel der Gewaltökonomien als Herausforderung* (Wiesbaden: Verlag für Sozialwissenschaften, 2005).
- <sup>11</sup> Prominent examples of such warlords who later assumed high-ranking political positions in the government were Charles Taylor (Liberia), Walid Jumblatt (Lebanon), Laurent-Désiré Kabila (Zaire/DR Congo) or Abdul Rashid Dostum (Afghanistan).
- <sup>12</sup> For various types of terrorism, see Guelke, A., *The Age of Terrorism and the International Political System* (London: Tauris, 1995); Waldmann, P., *Terrorismus. Provokation der Macht*, (München: Gerling Akademie Verlag, 1998); Schneckener, U., *Transnationaler Terrorismus* (Frankfurt am. Main: Suhrkamp, 2006).
- <sup>13</sup> Terrorism is not restricted to a particular region in the world, but is a global phenomenon. Classical historic or current examples of terrorist groups and organisations are the Red Army Faction in Germany, the Action Directe in France, the Basque ETA, the Northern Irish IRA, the Kurdish PKK or the Tamil LTTE, the Islamic Jihad in Egypt or the various Islamic groups in Kashmir and Pakistan.
- <sup>14</sup> For an overview on organised crime, see Krasmann, S., 'Mafioses Verhalten, unternehmerische Mafia und organisierte Kriminalität,' *Kölner Zeitschrift für Soziologie und Sozialpsychologie*. Sonderheft Soziologie der Gewalt, (1997) 200–219; Williams, P., 'Crime, Illicit Markets and Money Laundering,' in *Managing Global Issues. Lessons Learned*, ed. Simmons, P. J. and De Jonge Oudraat, C., (Washington: Carnegie Endowment for International Peace, 2001) 106–150.
- <sup>15</sup> For private military and security companies, see Mandel, R., *Armies Without States: The Privatization of Security*, (Boulder: Lynne Rienner, 2002); Singer, P. W., *Corporate Warriors: The Rise of the Privatized Military Industry*, (Ithaca: Cornell University Press, 2003); Wulf, op. cit., 49–75.
- <sup>16</sup> For this definition of fragile statehood, see Schneckener, U. (ed), *States at Risk. Fragile Staatlichkeit als Sicherheits- und Entwicklungsproblem*, (Berlin: Stiftung Wissenschaft und Politik, 2004) 12–17, 42.
- <sup>17</sup> See also Stedman, S., 'Spoiler Problems in Peace Processes,' in *International Security*, vol. 22, no. 2 (1997), 5–53. He refers to three spoiler management strategies: inducement, socialisation and coercion.

## Chapter 3

# Private Sector, Public Security

*Alyson JK Bailes*

### Introduction

What do these four headlines taken from one week's issues of the *Financial Times* have in common? 'The scramble for energy fuels a new era of power politics' (6/1/2006),<sup>1</sup> 'Banks and insurers take stock as financial health flutters [about corporate planning for bird 'flu] (10/1/2006),<sup>2</sup> 'Businesses fail to assess AIDS effect' (12/1/2006),<sup>3</sup> and 'America's dilemma: as business retreats from its welfare role, who will take up the burden?' (13/1/2006).<sup>4</sup> They all help to illustrate the wide, and sometimes unexpected, variety of ways in which the private business sector has become linked with international, national and individual security and well-being in a globalised world exposed to multi-dimensional threats.

Most fundamentally, since the collapse of communism across most of the globe and its far-reaching transformation in China, private economic activity has become the almost exclusive source of the wealth that pays for national and international measures in all the different spheres of modern security. The once clear boundaries of the 'defence sector' of industry are becoming wider and fuzzier as more and more scientific discoveries, technologies and products lend themselves to dual (military and civilian) or even to multiple uses. Commercial firms are getting into the supply of defence services and functions, not just goods, on a fast-growing scale in contexts ranging from the innocuous to the extremely controversial – as seen in Iraq. Beyond this, however, the modern tendency to define 'security' in new and increasingly many-faceted ways creates a whole range of new and sometimes very active interfaces between the relevant public- and private-sector players. At the same time, as the last news item cited above reflects, there are some counter-trends whereby enterprises (not just in countries emerging from communism) are trying to pass certain social-related burdens back to the state or demanding more state help in bearing them. The flurry of interest in late 2005 over an originally French idea of an EU fund to support workers

whose jobs were hit by developing-world competition is redolent of several paradoxes in the state of Western-style capitalism today.

As a cumulative effect of these trends – and as often noted in more general analyses of globalisation – the balance of *control* in the public-private relationship is shifting in the realm of security as well as in many other fields. There are rather few, if any, instances in which government nowadays can simply force business to do what it wants; and even the more obvious methods of indirect control – ranging from national and international legal regulation through to ‘fixing’ the play of economic incentives – are becoming trickier to apply in an environment increasingly shaped by non-traditional, non-state, multinational or trans-national forces and actors.

To encapsulate this trend as one of the ‘privatisation of security’ is tempting and acceptable as a kind of short-hand, but it does risk missing a number of nuances. Some of the security functions currently exercised by business have been delegated or contracted out on a case-by-case basis, without the full transfer of property and/or competence that occurs in industrial ‘privatisation’. Other functions have always belonged to business, at least in modern industrialised societies, but are now (perhaps belatedly) recognised as having security overtones. To insist on these complexities is not to belittle the seriousness of the issues involved; defence and security are life-and-death matters with a heightened normative dimension, and even a minor and subtle shift in the pattern of governance may have grave consequences for good or ill. But before embarking on any review of the topic it is important to realise what a very wide range of fields and individual cases it covers, and how complex the process of building adequate solutions is likely to prove.

In the rest of this text, the more obvious areas of overlap between public- and private-sector security roles – the business of defence itself, and business and conflict – will first be briefly reviewed. Next, some other areas of growing business influence and/or responsibility will be noted that belong within the wider or ‘newer’ parts of the 21<sup>st</sup> century security spectrum. The last two sections will turn back to the governance challenges posed by new forms of interdependence between the state, business and civil society, and to the question of how to deduce normative principles (‘values’) to govern the entire process.



### **The Permanent Interface Between Public and Private Sectors**

The most obvious security-related functions of the economy could probably be traced back to prehistoric times: the specialised production of weapons, and (slightly less directly) the production of surplus wealth that allows communities to maintain full-time soldiers not engaged in any other form of production. This latter pattern applies even in conscription-based systems because the civil purse both pays for the upkeep of the conscripts – and their repeated training – and has to be capable of meeting all other social needs without the conscripts' own contribution. (The trade-off involved may look particularly positive to governments that are grappling with major youth unemployment.) Whatever the ultimate moral *vires* of these transactions, they are relatively familiar in human societies of all kinds and the secondary mechanisms for making them work within a modern nation-state are also obvious: conscription laws, contract terms for professional soldiers, the defence section of the annual state budget, defence ministry procurement mechanisms, and the defence sector of industrial production which may be state- or privately owned or a mixture of both. In the 21<sup>st</sup> century world, three sets of trends are complicating and blurring this picture, and in the process spurring the search for new governance solutions. They will be sketched here relatively briefly because they are taken up in other parts of this volume. Beyond security concerns *sensu stricto*, the impact of the private sector on environment, demography and health is first considered. This is followed by the shifting and increasingly unclear boundary around what constitutes 'the defence industry' today; third is the shifting of the line between what that industry does and the traditional defence and security prerogatives of the state; and finally, the impact of industrial and trade activity not (directly) linked to the defence sector upon the global phenomenon of armed conflict.

### **Environment, Demography, Health**

The impact of private-sector activity on the natural and human environment – alongside its effect on the economic, political and cultural fortunes of states and societies – has been at the very heart of the debate over globalisation and anti-globalisation in recent years. The negative impact, direct and indirect, that companies can have in all these ways has been more than fully documented and a variety of governance measures has been mooted at all levels to restrain or at least regulate their activities. What seems worth bringing out here is that while the defence of other human and environmental values will always demand some restraint on the play of the free market,

responsible governments and institutions must also rely on *inputs* from the private sector for solutions to the present challenges of climate change and environmental damage, exhaustion of resources, over- and under-population and uncontrolled migration, and both chronic and epidemic threats to the health of people, animals and crops. Obvious examples in the environmental area include the private-sector origins of technologies both for less environmentally damaging activities and for clean-up work, and the role envisaged for the private market in ‘emissions trading’ under the Kyoto Protocol (or future analogous regimes).<sup>5</sup> For purposes both of population control and public health, the main issue recently debated regarding the role of the private sector has been the cost and availability of proprietary drugs (in which the means of contraception may be included). While voluntary initiatives have multiplied – like those involving former President Bill Clinton and IT billionaire Bill Gates in the USA – to transfer large quantities of key drugs to the poorest users at no, or lower, cost, it may sometimes be thought necessary for governments nationally and internationally to intervene and to override or mitigate companies’ intellectual property in certain crucial medical/pharmaceutical products.<sup>6</sup> Taking executive action to stockpile, share or transfer quantities of drugs of especial importance for epidemic control (like Tamiflu for influenza) does not *prima facie* interfere with normal principles of business governance, but it does raise the question of what incentives industry will be given to produce the necessary huge quantities of those particular products in the first place.<sup>7</sup> This whole debate is a rapidly evolving one, but it seems to be leading towards initiatives for government–business practical dialogue and the use of market-based incentives rather than legislative or regulatory solutions. Where stronger international laws and enforcement *do* seem to be required is to tackle the widespread and very damaging phenomenon of drug counterfeiting and denaturing, including the questionable practice even by some larger companies of off-loading time-expired or otherwise sub-standard pharmaceuticals in the developing world.<sup>8</sup>

### **What is the Defence Sector?**

Throughout most of the Cold War period, in both East and West, defence production (and production for space programmes) took place in enterprises separately dedicated to the purpose and often with complete, or a high degree of, state ownership. Technological discoveries could be ‘spun off’ from this sector into civilian production, like the famous case of non-stick coatings for metal goods originating from the US space programmes, but technology crossovers were not normally expected nor observed in the reverse direction. The defence industry was distinct in other respects too, such as a

high degree of security and limited transparency; an often near-governmental bureaucratic culture; and a limited degree of exposure to normal market competition which in turn was often associated with inflated pricing, cost over-runs and suspicions of corruption. Although this model of a ring-fenced, state-owned industry remains widespread in non-European (and even to some extent in post-Soviet) regions, several forces have been combining to alter it in the developed West.

Firstly, the nature of technological innovation today means that new breakthroughs are typically 'multivalent', i.e. they can be applied both in defence and in civilian industries and often in other spheres too, such as medicine and the arts. This means that governments who wish to keep a leading 'edge' and/or a semi-autonomous defence production base are more and more driven to invest in basic scientific and technical innovation, not just in the later stage of specifically 'defence' R+D.<sup>9</sup> It also poses obvious questions about how to stop such powerful discoveries from getting into the wrong hands (i.e. of supposedly unreliable states or terrorists), and perhaps how to stop some particularly frightening and inhuman applications from being developed at all. One remedy now much discussed is to develop codes of conscience, of conduct and/or of practice for scientists and technicians, of a general kind and/or adapted to specific branches.<sup>10</sup> State-level strategic export controls also remain as vital or more vital than they ever were, but need adaptation to a world in which (a) far more of the potentially dangerous items start off as private rather than state-produced property, (b) the range of potential producers is far wider as a result of technological advance in the developing world,<sup>11</sup> and (c) the restraints have to bite on non-state as well as state 'end-users'.<sup>12</sup>

A second factor which amplifies these concerns is the renewed 21<sup>st</sup> century focus (after a perhaps over-complacent decade in the 1990s) on the dangers of 'mass destruction techniques' – currently seen as limited to the nuclear, chemical and bio-science areas but always liable to be expanded by new inventions – and on the perils of their expanded ownership ('proliferation'). This creates a special and particularly acute case of the challenge of control already mentioned, inasmuch as the risk comes from possible aggressive mis-applications of processes and materials that are overwhelmingly used for peaceful civilian purposes, and which it is not practical politics to 'minimise' either in terms of the degree of their use or the spread of ownership. Recent cases of concern regarding nuclear proliferation (Iran and North Korea) have stimulated discussion of possible – technical as well as political – 'fire-walls' that could be constructed between civilian nuclear power generation and the potential for weaponisation,<sup>13</sup> but it is hard to see how any-

thing of the kind could be imagined in the chemical and biological fields where even a vaccine – for instance – could be used as a weapon (by an aggressor who was able to deploy the disease in question against opponents because his own operatives could be vaccinated for protection).

Last but not least under this heading comes the impact on the private sector of the modern extended concept of national security and in particular, the greater salience of internal or ‘homeland’ security concerns since the events of 11 September 2001. This has highlighted that the survival of a nation and its citizens rests not only on their ability to produce or acquire military equipment, but also on the availability of everything needed for other modes of civil protection ranging from police batons and X-ray machines for customs to items with preventive (eavesdropping devices, cameras), prophylactic (disease vaccines) or passive-defensive (gas-masks and bunkers) applications. Some of these types of equipment come from specialised producers analogous to the traditional defence industry, but many others from the pool of general-purpose private sector production. At the least this means that the ‘strategic’ elements and functions of national industry have to be defined in wider terms than before, but there are also interesting issues for security governance that are only in the early stages of being explored. Should the government take back central control of certain such commodities in some situations (e.g. the supply of vaccines against a pandemic), just as it expects to have the right to regulate – more or less strictly – the private possession of firearms? Should more of these types of products be made subject to export controls, not just for humanitarian purposes as the EU and others are striving now to tighten the control of objects that may be used for torture,<sup>14</sup> but with considerations of national security in mind? Does the increasing range and power of instruments being researched and used for non-conflict security purposes – notably, ‘non-lethal’ techniques for crowd control – call for the extension of arms control approaches that have so far been confined to items with some ‘traditional’ military use?<sup>15</sup> (It is noteworthy that under the Chemical Weapons Convention of 1993, certain substances that could be considered as chemical weapons if used in warfare are not specifically debarred from use in ‘crowd control’).

### **Public–Private Sector Overlap in Defence Activity**

Before turning to the phenomenon of private sector activity in realms of defence and security formerly reserved for the state, it is worth noting that while the most problematic effects of this trend may arise in the *governance* field, its roots should be sought rather in the *economic* one. Advanced Western governments, but also some of those facing the challenges of develop-

ment, have been looking for ways of easing their resource burdens (and the very tough trade-off decisions that are linked with them) by drawing in private capital for goals of public service through various forms of public-private partnership (PPP). If this phenomenon has advanced – as it has particularly in the English-speaking world – as far as allowing private management of prisons and of essential medical services, it should hardly be surprising that it has been experimented with also in the sphere of defence where resources are almost everywhere shrinking as the range of challenges everywhere is widening. First and foremost, it has penetrated the core of industry's traditional role which is the production of defence *equipment*. On the one hand, governments are seeking new ways to reduce cost over-runs (and incidentally to limit the scope for corruption) through a combination of 'smart procurement' techniques and of efforts to escape from monopoly/monopsony<sup>16</sup> situations, notably by exploring new non-native sources for procurement and by making use of or even promoting multinational consortia. On the other hand, countries and groups of countries are exploring new ownership solutions such as the leasing of major equipment from industry both for ad hoc operations (sea and air transport) and for aspects of permanent force management (e.g. the supply of trainer aircraft). Offset arrangements for equipment transfers between states are also taking new forms often including counter-purchases of non-military, purely commercial products. Taking this set of trends together with the previously-discussed blurring of the boundary between military and other, strategically significant production, one general normative conclusion might be that there is less justification than there ever may have been for the defence industry to be treated as a case apart for purposes of *transparency* and the other basics of *corporate governance*.<sup>17</sup> A different issue on which the verdict may not be so simple (and is not, properly, a question of security ethics) is to what extent it should still be granted exceptions protecting it from *competition*.<sup>18</sup>

### **The Private Sector's Evolving Role in Defence and Security**

None of the above points, however, has generated anything like as much concern and debate as the development of the private sector's role in the active business of defence and security. The single largest issue here is one that can be seen as a direct outgrowth of the tradition of defence production, namely the provision by the industrial sector (both traditional military suppliers, and others) of *services* as well as goods. Parts of this phenomenon are relatively uncontroversial, including the outsourcing of services that have a

clearly non-military nature; that are applied to the armed forces themselves (not directly to the 'consumer' of defence/security action); and that are supplied in peacetime conditions and/or in the rear echelon of conflict. Typical examples are the supply of food, uniforms, fuel and other generic consumables; laundry, medical cover, and vehicle maintenance, as well as the leasing of transport assets already referred to. Problems may of course arise about the *probity* of such transactions, as US firms winning large contracts in Iraq have been accused of over-pricing and under-delivering, but the norms at stake are, again, not specifically security ones. The controversy starts when private companies and their employees provide services actively and directly in an environment of conflict or other acute security difficulty: providing armed guards for persons and premises under threat, working in military prisons, carrying out intelligence or interrogation tasks, or actually fighting on behalf of a native or foreign government or as part of non-governmental insurgencies. In the last few years there has also been a rapid expansion of private-sector engagement in post-conflict tasks including the restructuring and re-training of indigenous forces. The reasons for concern about these developments have been well documented elsewhere<sup>19</sup> and are further explored in this volume, so it may just be noted here that the problems do not only arise when company operatives 'go bad' – fighting in a non-legitimate cause, failing to deliver on their contracts, failing to obey relevant national and internal security norms (including arms control and export control restrictions as well as humanitarian rules), and committing active abuses against life and property. Any use of a private intermediary blocks the way to the normal exercise of democratic controls (both in the 'providing' and the 'receiving' state) that have been designed for state military activity. It makes the application of domestic and international laws more difficult and sometimes impracticable. It loses all the benefits of direct interface, mutual learning and transfer of experience between one nation and another, which is especially a pity in the context of post-conflict reconstruction.

For all this, observation of current trends – in particular, the growing demand for lengthy and complex international interventions combined with increasing strictures on the size of defence budgets and professional military forces – suggests that state delegation to private actors will become more, not less common in future among both developed and developing countries. This makes it an urgent matter to look at the scope for regulatory and executive solutions to curb the negative effects, which could include: measures by the nation where private military companies or private security companies (PMCs/PSCs) are located, e.g. licensing of companies, licensing of individ-

ual 'exports' of services, corporate transparency requirements, establishing the justiciability of offences committed abroad; measures by the 'consumers' of such services, to include stricter contract terms and justiciability provisions, standard-setting, monitoring, etc and the imposition of 'black-lists' for unsatisfactory performers; and efforts in international fora to clarify and then to enforce the application of relevant global rules and norms (including the jurisdiction of the International Criminal Court) to corporate actors and their employees. Beyond such damage-limitation measures, it may be argued that there is a certain group of functions which no responsible government should outsource or delegate, either to commercial or to other (e.g. foreign or collective institutional) actors, because they are so intimately tied to the rights and responsibilities that go with the state's supposed monopoly of force. Many would think of front-line combat as such an exception, but given the recently demonstrated scope for abuse, the point might well be extended to the interrogation and (*a fortiori*) the execution of prisoners.

PSCs and PMCs are not, however, by any means the only corporate actors that have an influence on active processes of conflict causation and management. Other companies may do so from long range, by supplying or by buying that group of products that have come to be known as 'conflict commodities'<sup>20</sup> because they are particularly often used to fund the activities of non-government insurgents (but not only those). The private sector's own initiative to control the flow of 'conflict diamonds' – the Kimberley process<sup>21</sup> – was born out of such concerns, combining with the consumer pressures that were mobilised in response. Another even more prominent area for concern, NGO campaigns, and governmental and institutional efforts for control has been trade in small arms<sup>22</sup>, which wreak particular havoc in lower-intensity conflict situations. More generally, however, foreign companies that have establishments abroad may themselves become parts of conflict dynamics in the countries and the regions concerned. By following ethical and impartial business practices and appropriate corporate social responsibility (CSR) programmes, they might be able to influence local social and economic developments in a way that reduces the risks of conflict in the first place. They are regularly invited and urged to come in and invest after conflicts, to help kick-start economic and social transformation, to limit the risk of long-term aid dependence and to tie the affected country back into the web of global economic intercourse. It is worth stressing these points before going on to note the more negative roles of companies that tend to attract more public (and certainly, NGO) attention – for example, their impact on the environment, their over-friendliness with abusive governments or with violent rebel leaders, the way they may help to finance such actors' cam-

paigns by dubious deals (particularly, raw material extraction concessions), or the excessive use of force by companies themselves or their hired guards against the local population.

All such excesses ultimately reflect the darker side of the profit motive; but the more positive roles that governments, international organisations and even NGOs might wish companies to play will not be played either unless the profit motive can somehow be harnessed to promote them. This is by no means an argument for *subsidising* companies' conflict-related activities, which would merely create 'aid dependence' in a new place. It does suggest, however, that much more dialogue is needed between governments, business and civil society on the conditions that would allow companies to operate across the widest possible range of territories while making fair profits and behaving correctly in all aspects of their local interactions. The UN's Global Compact network has recently complemented its efforts for responsible corporate behaviour in other fields by issuing an advice document on 'conflict-sensitive' situations,<sup>23</sup> and the ICRC is also stepping up its activism in this context.<sup>24</sup> These efforts might be most effective if they could be joined up with two other areas of investigation that business is pursuing for itself: the refinement of risk analysis and prediction techniques (especially in a geographical frame of reference), and the effort to bolster business continuity and survivability in emergencies, e.g. by better contingency planning, dispersal of key nodes and built-in redundancies. The first should help business better to calculate, and the latter potentially to expand, its risk exposure at any given time without overstraining either its own resilience or the capacity of the global insurance system.

### **The Wider Security Spectrum**

Incursions of business into what are traditionally thought of as 'defence' processes – conflict and the tools of conflict – are bound to attract more attention and concern than the part that the private sector plays in various non-military, or 'new', dimensions of security. This bias in analysis becomes harder to defend, however, in today's conditions when the non-military risks and threats are more likely to cause mass loss of life in the world's most developed countries (and also in those developing regions that are free of conflict) than any traditional military happening, and when business plays a larger, or even dominant, role in these other fields than it could ever do in traditional warfare. The field for examination here is almost infinite, but in this section a set of illustrations will be offered to show the scope of the issue:



- business and the ‘asymmetric’ threats of terrorism and WMD proliferation (and also crime);
- business, infrastructure and vital supplies;
- business, the environment, demography and health.

Such large and diverse topics can of course, only be sketched here in a superficial way; not least because business’s role in them either has not been analysed in a ‘securitised’ way at all, or has been the subject of a number of unconnected lines of study.

### **Security Governance and the ‘New Threats’**

Business has always been exposed to violence from kidnappers, eco-terrorists, violent anti-globalisation protesters and the like. It has lost lives and assets from many of the most sensational attacks by politically-motivated terrorists in recent years, including the destruction of the Twin Towers on 9/11. It has also lost revenue from secondary impacts like the drop in travel, entertainment and consumer spending after such traumatic events, and from the rise in insurance premiums notably in the transport sector. Last but not least, business has been and remains affected by the economic impact of new anti-terrorism measures adopted nationally (especially by the US) and internationally since 9/11: stricter visa rules (affecting ease of access for non-Western partners and customers and also the employment of foreign experts), travel and immigration delays for everyone, and new procedures for the protection and security inspection of ports, harbours, containers and other goods in transit by sea.<sup>25</sup> The extra costs and delays that it was feared the latter would lead to have turned out to be not too damaging,<sup>26</sup> and many in the private sector have come round to see advantages for themselves in the consequently reduced risks of smuggling sabotage, and crime; but visa delays remain a target for recurring business complaints that have led the US Administration to offer at least cosmetic improvements in the new régimes.

It would be as wrong, however, in this case as any other to see only the one side of business’s role and to deny that it can in some cases be part of the ‘new threats’ problem. There has been a particular focus since 9/11 on the risk of funding for terrorists being generated by and processed through business channels, as part of the wider phenomenon of money-laundering which was already a target for stronger international regulation.<sup>27</sup> In many parts of the world terrorism is financed *inter alia* through criminal activity,

and/or corruption, that also has a clear business component (e.g. drug and cigarette smuggling). These concerns led to the early adoption of UN Security Council Resolution 1373,<sup>28</sup> creating universally applicable norms and obligations for government action to freeze suspected terrorist funds in private quarters and to block any further such transfers. While the financial harvest of the concerted effort to implement UNSCR 1373 has been meagre,<sup>29</sup> it has had an undoubted impact in raising bankers' and other businessmen's awareness of the terrorist dimension, and facing them with new challenges in terms of checking their clients' identity and gauging their intentions, at least in the more developed regions of the world. Meanwhile, however, the difficulty of getting a grip by traditional legal means (including UNSCR 1373) on the informal 'hawala' banking system prevalent in many Islamic societies has highlighted the point that the business communities of *all* regions and societies would need to be mobilised for really comprehensive and effective anti-terrorist coverage.

It will be clear from what has already been said above that the same points can be made about business's relevance to WMD control. Over time, the majority of technology leakages that have occurred from the first nuclear-capable states have involved private companies, albeit sometimes with a degree of government connivance. The still-ongoing exposure of the methods used by A.Q. Khan, the father of Pakistan's nuclear weapons programme, to share dangerous technology with other states – as well as information provided by Libya after its renunciation of WMD programmes in December 2003 – has revealed a wide and tangled net of shady business connections summed up by the IAEA's Director-General Mohamed El-Baradei as a nuclear 'Wal-Mart'.<sup>30</sup> The multilateral export control groupings that exist to coordinate constraints on the transfer of various categories of WMD and dual-use goods and technologies<sup>31</sup> have consequently been hard at work since 9/11 to update and expand their 'control lists' of dangerous items, to extend their membership (including to some former strategic adversaries who are willing to work against terrorism),<sup>32</sup> and to improve enforcement. Apart from the technical difficulties of making these rules bite on the various kinds of non-state actors, however, these groups are increasingly confronted with the challenges of both effectiveness and legitimacy arising from the fact that their membership is largely restricted to richer, Northern hemisphere countries. Some experts are beginning to wonder whether the only way to design effective technology transfer controls for a globalised economy – given also the increasing multilateralisation of research, and the rise of outsourcing – would be to make the controls equally universal, egalitarian and omnipresent, and to enlist the active cooperation of the whole

world's business into the bargain.<sup>33</sup> Arguably, an important precedent and experiment was offered by UN Security Council Resolution 1540,<sup>34</sup> which called for equally global enforcement of a set of legal norms against unauthorised WMD possession and trafficking.

The field of export control, at all events, provides a classic case of the proposition that where business is part of the problem it also needs to be part of the solution. Any nation will find it hard to apply statutory export controls unless, at the least, the great majority of businesses are aware of and comply with the licensing rules, since the ability of customs and border personnel to act as 'back-stop' for dangerous transfers is finite. Business's help is also needed to keep the lists of existing and potentially dangerous goods and technologies up to date. A regular government-business dialogue (especially in the sectors of most concern) would seem to be common sense, but is surprisingly far from a universal practice even in advanced Western states. It could and should also be pursued collectively at the level of export control groupings and of international organisations that intervene in the field (as the EU is increasingly doing on both conventional and WMD-related controls, while the OECD is active against money-laundering and corruption). International outreach, sharing of best practice and technical assistance in the export control field – now practised in particular by the US and EU – need to be aimed not just at governments but also at the private sector (and indeed, at parliaments and non-governmental monitors) in the recipient states. While these examples are taken from the WMD dimension of 'new threats', several parallel arguments could be made about cooperation against terrorism.<sup>35</sup> Overall, it must be said that this field has been too much characterised since 9/11 by the unilateral imposition of often hasty and imperfect governmental or institutional edicts, and that it remains a largely unsolved challenge for security governance to devise productive and systematic channels of consultation, information exchange and collaboration in enforcement between the public and private sectors both nationally and internationally.

### **Critical Infrastructure and Supplies**

Human life as well as welfare, in developed as well as developing countries, increasingly depends on the smooth operation of large-scale supply and support systems – electricity, food, water, transport, communications and others – that are well beyond individuals' own control. In modern conditions the vast bulk of the related objects and capabilities are owned and run by the private sector, either because they always have been or because of the recently accelerating wave of industrial privatisation. Moreover, the *national* character of provision in most of these fields has been heavily eroded by the

rise of large multi-national enterprises, the various pressures (e.g. in the EU's Single Market) to dismantle national preferences in public procurement, and more recently the growing practice of providing certain human inputs remotely ('outsourcing') from less developed countries. Increased human dependence plus concentration of supply creates a situation in which a single malfunction – caused by error, natural disaster, terrorism or conflict – can cause distress and even danger to life on a massive scale, not to speak of the economic losses. Concern about this set of problems has led to rapid development in the disciplines of 'infrastructure security' and 'cyber-security', as well as the more traditional topic of 'energy security' (and the concerns about pipeline security and strategic sea-lanes, etc. associated with that). It has also stimulated a debate mainly within the private sector about the capacity of the present global insurance industry, which is definitely under strain after the natural and man-made disasters of the early 21st century and has in some noteworthy cases (like air traffic insurance after 9/11) forced commercial re-insurers to go back to governments for support.

In contrast to the previous set of issues discussed and for obvious reasons, these areas of 'functional security' have been actively discussed between government and business, and most nations have managed to update and expand traditional consultation frameworks to deal with the increased scale and complexity of the challenge. The outstanding governance issues may be grouped under the headings of national authority and coordination, multilateral cooperation, and the case for global regulation. At national level, even where ownership of key utilities (including energy supply) is wholly in private hands, governments customarily have 'emergency powers' allowing them to take some degree of control and direction over privately-owned assets or, where they have broken down, to replace them by state action. The challenge is that such arrangements made in peacetime and under a civil-law system tend to have different origins, durations and terms for different private-sector providers, whereas a present-day emergency is almost certain to become 'complex' and cover many privately-managed sectors at once (a disease outbreak contaminating water, crippling food supply and requiring bans on transport as well as overloading the medical sector, for example). The practical solution usually adopted by governments is to set up a central executive organ of coordination with both planning and emergency response capacity, which can – *inter alia* – provide an efficient focal point for 'plugging in' all necessary business contacts and inputs. For best results, governments that have not yet devised such structures should do so; they should carry out exercises to test *among other things* the robustness of public-private coordination; and the private sector should continue its own efforts

for ‘critical infrastructure emergency planning’, aimed at identifying key nodes, maximising the various elements of organisational and physical protection, and endowing the system with as much redundancy and resilience as possible (notably through fall-back options). In an interconnected global system, the more developed states should do more to address the problems that countries of other regions – including those involved in outsourcing! – face in working with their own and foreign businesses to reach even a basic level of security and preparedness in these fields.

The European Union is currently the scene of lively debates on the need for and shape of a *collective* policy on energy security, following the problems with temporary blockage of gas supplies from Russia in January 2006.<sup>36</sup> The EU’s single market also makes it well placed to address the case for a Europe-wide approach to various aspects of infrastructure security, although up to now these have mainly been discussed at sub-regional level (if at all) and concrete EU mechanisms for intervention are limited to emergency response.<sup>37</sup> As in any other field where security has *de facto* become a matter of transnational interdependence, such regional efforts in Europe or elsewhere are well worth encouraging so long as they do not overly distort competition or obstruct positive *trans*-regional cooperation. It is obviously important that they find the right way to engage private actors. Other points to look out for are the risk of focusing on political threats to supply lines while neglecting physical ones (or vice versa); the need to avoid ‘stove-piping’ of arrangements for the different functional networks; and the delicate balances involved in finding the right level for decision and control – neither pushing everything up to a multinational authority that may become rigid and overloaded, nor insisting on ‘self-help’ first in every case. When considering the option of fully global cooperation in functional security, the same issues apply *mutatis mutandis* but the idea of collective *executive* coordination and response becomes almost impractical. The UN has no direct *vires* to intervene in private-sector activities, and recent international discussions have shown that many states are inclined to resist the introduction of international-legal measures in fields such as Internet management.<sup>38</sup> Nonetheless, recent disasters with strong ‘functional’ impact in a number of countries (such as the December 2004 tsunami in the Indian Ocean region) have rightly spurred interest in this dimension of human security. The angles which could most realistically be explored at world level, either in the UN or the International Financial Institutions, would seem to be the definition of universal safety standards; the encouragement of networks<sup>39</sup> for practical cooperation (and of inter-regional exchanges of aid and expertise); better

capacity for international response in emergencies; plus, of course, the availability of finance for infrastructure projects with a human security rationale.

### **The Other Player: Civil Society**

In the analysis up to now, human society and the individuals that compose it have been cast in a somewhat passive role, as the ‘consumers’ of security – in all its dimensions – whose needs both government and business ought to serve. The reality is not, of course, so simple. In today’s globalised conditions, the trends that create complex *vulnerability* for human populations have also brought certain new elements of (at least potential) *empowerment* for the individual. This point is most often made in connection with the alarming destructive power that single or small-group actors may wield when acting as terrorists or saboteurs; but there is a positive side to it as well. As many recent natural and terrorist-made emergencies have shown, individual reactions can greatly alter both the immediate impact of the event and its ‘manageability’ by swinging towards panic, exploitation and the blame game, or conversely towards responsibility, self-help, mutual help and charity. The question inevitably arises whether governments and international institutions have reflected sufficiently on the possibilities of preparing, motivating and mobilising individuals to play the most positive of the roles available to them in any given contingency. In a Euro-Atlantic context this challenge might be defined as re-inventing Cold War concepts of ‘civil defence’ in the new context of ‘civil emergency preparedness’. It is a tough task because the range of risks is so much wider now, but it should be made easier by rising popular standards of education and access to information, as well as by the fact that the range of coping skills now required is much more widely diffused at grass-roots level. (Contrast the first-aid skills needed after a hurricane with those needed after a military nuclear strike).

Civil society also has a third role beside those of victim and of emergency response: namely, the democratic control of both public and private sector security policies. How the people–government interface is and should be managed has been well documented in many fields of old and new security.<sup>40</sup> Less attention has been paid to the possibilities of popular influence over business in the security field as such. Consumer and share-holder power, mobilised usually by single-issue NGOs, has had an effect that governments would have found it very hard to achieve in transforming business practices in contexts like ecological impact, child labour, and other aspects of human rights and social responsibility. Some NGOs have specialised in observing the big multinationals’ behaviour in conflict regions and their pressure has led (rightly or wrongly) to certain companies withdrawing from

certain locations.<sup>41</sup> Up to now, however, popular pressure on other aspects of corporate *security* behaviour cannot be said to have been much explored as a motor of change, unless in the very general (and typically antagonistic) context of anti-globalisation campaigns. One of the problems here is that the industry whose activities people are most likely to feel strongly about, i.e. the armaments and defence services sector, has little surface of exposure to either private consumer or share-holder pressure (and is likely to have its physical installations strongly protected as well). More thought needs to be devoted, by those who care about principles of answerability, to the general issue of the people–business interface; including the possible new openings for pressure where companies – as discussed above – are straddling the boundary between civil and military production in new ways.

### **The Triangle of Security Governance**

It can be seen from the above that the challenge of achieving efficiency and propriety in the private sector's response to security demands is actually a triangular one. Governments, businesses and civil society all interact and neither efficiency nor propriety can be assured unless all three are working on shared understandings and towards shared goals. The question may again be raised here – drawing together a number of strands from above – of what methods and structures of *governance* could be envisaged (at national and international level) to handle this challenge better than it has been handled up to now. Two extremes may at once be set aside: re-nationalisation and the free play of market forces. Governments might be tempted to try to retrieve direct control of private-sector resources in cases critical for security, and public opinion might press them to do so, but this cannot be a practical proposition except in a very small part of the new security spectrum<sup>42</sup> – and experience gives no confidence that state control will always produce right answers either. At the other extreme, it is clear that allowing profit (and/or other shareholder demands) to guide all security-related business behaviour would often give bad results especially for the weakest governments and the poorest citizens. It could ultimately worsen the environment for business itself, in particular because of the built-in pressures to favour short-term over longer-term returns.

What remains is a range of tools from 'hard' through 'soft' *regulation*, and from institutionalised to ad hoc *consultation* at least between governments and industries and preferably along all three sides of the triangle. It may at once be concluded that only some mixture of these approaches will work. There is an important and still partly unfulfilled role<sup>43</sup> for formal, legally-binding regulations to play, notably in fields where the state preroga-

tive is best established and the life-and-death issues the sharpest: such as private defence services, the trade in deadly weapons and technologies, or bio-safety and bio-security. The method of regulation has its own pitfalls, however: its quality depends on adequate reflection, expertise and consultation (of business *inter alia*), and its equity and effectiveness both depend on its being adopted at the right level and under the right authority. For many of the areas discussed above, purely national regulatory solutions are clearly now sub-optimal and can do damage even beyond national boundaries (because of extra-territoriality or market interdependence) if they get the answers wrong. It should be a general concern to ensure that security-motivated measures cause the minimum possible disruption of free trade and freedom of movement and the minimum distortion of fair competition. Last but not least, as the UN's special adviser on business and human rights has pointed out,<sup>44</sup> it does not by any means follow that a given norm legally defined for states can and should be translated into an identical obligation for business; indeed, to do so would blur the distinction most activists want to protect between the roles of government and the private sector.

These arguments imply that some space must always be left for 'softer' solutions including 'self-regulation' by industry and voluntary codes of conduct to be followed both at corporate and individual level. Many such codes have in fact been drawn up in sectoral contexts (conflict diamonds, extractive industries), by professional groups (scientists) or in regional settings, but they have gaps and overlaps and in particular are inadequately known and applied in the developing world. Two possible approaches to remedy this would be for the UN to extend the normative framework of its Global Compact further into explicitly security-related areas (as in the case of conflict behaviour noted above); and/or for industry itself to develop a movement for 'Corporate Security Responsibility' (CSecR), modelled on that for 'Corporate Social Responsibility' (CSR) and aiming in a comparable way to combine and reconcile all the different dimensions of the issue.<sup>45</sup> (One great merit of a widely endorsed set of 'security responsibility' criteria would be that they would allow insurance providers, credit providers, auditors and experts assessing the health of companies before takeovers – among others – to cite such factors in their judgements, as often happens already, e.g. with existing CSR norms or conformity with the US Sarbanes-Oxley legislation; the market itself would then work for compliance through the penalties that would come to be associated with low ratings.) Last but not least, dialogue and consultation between all points of the 'triangle', on both general and specific security solutions, will always be a necessary and can never be a harmful part of the equation. What needs more creative thought



and energy is the question of where it is most urgent to build such mechanisms for intersectoral policy-shaping (not forgetting international organisations), and – of course – what forms they ought to take.

## Conclusion

In a thoughtful article in the *Financial Times* on 13 January 2006,<sup>46</sup> Ian Davis, a top executive of McKinsey & Company, wrote: ‘The tenets of current global business ideology – for example, shareholder value, free trade, intellectual property rights, profit repatriation – are not understood, let alone accepted, in many parts of the world’. He argued that this problem must be addressed as business, government and society grow more interdependent in a globalised environment: but not necessarily, that all the burden of adjustment must be on the business side. As a matter of observation, governments throughout the world have been trying for years now to import business practices that they find conducive to performing their own duties towards the population better; a growing number of them are promoting ‘public–private partnership’ as the key to funding and delivering critical aspects of social provision; and an opinion poll taken in late 2005 by the World Economic Forum showed that respondents in 60 countries currently had a higher level of trust in business people (60 percent positive) than in politicians (40 percent positive).<sup>47</sup>

Most of the analysis in the present paper has been about ways that corporate norms and behaviour need to be adjusted to public-sector (and public) requirements, normally moving further away from the simpler laws of ‘value’ in the process. While it is reasonable to argue that in the life-and-death business of security there can ultimately only be one set of *values* that guides all sectors, it would be counter-productive to assume that business can never internalise and defer to those values,<sup>48</sup> and unfair to claim even that business has nothing to contribute to those values itself. It may suffice to mention the relevance of notions of comparative advantage and cost-effectiveness to successful security provision; and to recall that business creates the wealth without which we neither have something to defend nor something to defend it with. Against the background of both traditional and modern, multi-dimensional, security challenges we may return to the old human adage that one should not kill the goose that lays the golden eggs: even in the name of saving it from avian ‘flu’.

## Notes

- <sup>1</sup> Stephens, P. 'The scramble for energy fuels a new era of power politics,' *Financial Times*, 6 January 2006.
- <sup>2</sup> Larsen, P.T. 'Banks and insurers take stock as financial health flutters,' *Financial Times*, 10 January 2006.
- <sup>3</sup> *Financial Times*, 'Businesses fail to assess AIDS effect,' 12 January 2006.
- <sup>4</sup> Roberts, D. 'America's dilemma: as business retreats from its welfare role, who will take up the burden?' *Financial Times*, 13 January 2006.
- <sup>5</sup> The idea of emissions trading is that countries whose own ceilings for damaging emissions are too tight can buy the right to additional emissions from the countries (usually poorer ones) that are unlikely to reach their own maxima.
- <sup>6</sup> See Jack, A. 'Clinton agrees deals to cut cost of Aids drugs,'; and Cohen, J. 'When noble ideals are not enough,' both in *Financial Times*, 13 January 2006.
- <sup>7</sup> Minder, R. and Jack, A. 'Austria seeks EU crisis stock of bird flu drugs,' *Financial Times*, 25 January 2006.
- <sup>8</sup> For example, a recent feature in the *New Scientist* estimated that two-thirds of all drugs currently on sale in Nigeria are counterfeit and dishonest suppliers are driving established companies out of the market. See: Abraham, C. 'The most dangerous job in Nigeria,' *New Scientist*, 12 November 2005.
- <sup>9</sup> Hagelin, B. 'Science- and Technology-Based Military Innovation: the United States and Europe,' *SIPRI Yearbook 2004: Armaments, Disarmament and International Security* (Oxford: Oxford University Press, 2004).
- <sup>10</sup> For a recent study of this option by SIPRI experts, see Hart, J. and Kuhlau, F. 'Codes of Conduct for Scientists in the Biological Field'. Paper presented by Frida Kuhlau (kuhlau@sipri.org) at the conference 'Meeting the Challenges of Bioterrorism: Assessing the Threat and Designing Biodefence Strategies', FÜRIGEN (Nidwalden), Switzerland, 22–23 April 2005, sponsored by the Center for Security Studies (CSS) at the Swiss Federal Institute of Technology (ETH) Zurich.
- <sup>11</sup> Mallik, A. *Technology and Security in the 21st Century: A Demand-Side Perspective*. (Oxford: Oxford University Press, 2004).
- <sup>12</sup> The still outstanding challenges this poses for multilateral export control régimes are discussed in Anthony, I. 'Reflections on Change and Continuity in Arms Control,' *SIPRI Yearbook 2006: Armaments, Disarmament and International Security*. (Oxford: Oxford University Press, 2006).
- <sup>13</sup> For example, nuclear fusion cycles or exotic fission cycles based e.g. on thorium cannot lead to weapons, and nuclear plants may be so engineered as to rule out plutonium production or high levels of uranium enrichment.
- <sup>14</sup> See European Council 'EU Council Regulation (EC) no. 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment'. *Official Journal of the European Union*, L 200 (30 July 2005), 1–19.
- <sup>15</sup> See Lewer, N., and Davison, N. 'Non-Lethal Technologies – an Overview'. *Disarmament Forum*, no. 1. URL: <http://www.unidir.org/bdd/fiche-periodique.php?ref-periodique=1020-7287-2005-1-en>; and Marks, P. 'A Lethal Imperative'. *New Scientist*, 17 December 2005.

- <sup>16</sup> Monopsony = a situation where a product has only one buyer (or in oligopsony, a few buyers).
- <sup>17</sup> Surry, E. 'Transparency in the Arms Industry,' SIPRI Policy Paper, no. 12, 2006.
- <sup>18</sup> Considerations of cost-effectiveness, and also a certain 'homogenisation' of military tasks across different countries engaging in international cooperation, tend to undermine the case for protecting a purely national industrial base. On the other side are usually employment and regional-policy considerations, and the larger strategic imperative to keep some autonomous access to defence-critical technologies (nationally, and/or at the level of an entity like the EU). Under these conflicting pressures the EU has recently adopted new rules on increasing the openness to competition of national defence procurement (see 'The Code of Conduct on Defence Procurement of the EU Member States Participating in the European Defence Agency,' EDA Steering Board, Brussels, 21 November 2005, <http://www.eda.europa.eu/reference/eda/EDA%20-%20Code%20of%20Conduct%20-%20European%20Defence%20Equipment%20Market.htm>) but it has not abolished the Treaty provision that effectively exempts the defence industry from the normal rules of the Single Market.
- <sup>19</sup> Holmqvist, C. 'Private Security Companies: the Case for Regulation,' SIPRI Policy Paper, no. 9, 2005.
- <sup>20</sup> Pauwels, N. 'Conflict Commodities: Addressing the Role of Natural Resources in Conflict,' ISIS Briefing Paper, no. 27. Brussels: International Security Information Service. <http://www.ciaonet.org/wps/pan01/>
- <sup>21</sup> See Bone, A. 'Conflict Diamonds: The De Beers Group and the Kimberley Process,' In Bailes, A. and Frommelt, I. (eds) *Business and Security: Public-Private Sector Relationships in a New Security Environment* (Stockholm: Oxford University Press, 2004).
- <sup>22</sup> On this problem see the website of the Small Arms Survey, <http://www.smallarmssurvey.org/>
- <sup>23</sup> UN Global Compact. 'Enabling Economies of Peace: Public Policy for Conflict-Sensitive Business'. [http://www.unglobalcompact.org/docs/news\\_events/8.1/enabling\\_econ.pdf](http://www.unglobalcompact.org/docs/news_events/8.1/enabling_econ.pdf).
- <sup>24</sup> See Carbonnier, G, 'The Role of Humanitarian Organisations: The Case of the International Committee of the Red Cross,' in Bailes and Frommelt, op.cit, 2004.
- <sup>25</sup> It was realised after 9/11 that the marine transport sector had been relatively neglected in terms of security protection, except from piracy and hijacking. The US introduced a container security initiative including the stationing of US customs personnel to inspect containers before shipment from abroad, and has been pursuing internationally (at present in the International Maritime Organisation, IMO) higher standards of security for ports and harbours, including the 'mega-port initiative'. The well-known US-led Proliferation Security Initiative (PSI) is related insofar as it aims to create a capacity to seize cargoes of WMD or terrorist concern at sea, but it has little or no impact on legitimate civilian traffic.
- <sup>26</sup> Lenain, P. 'The Economic Consequences of Terrorism,' in Bailes and Frommelt, op. cit. However, there has been a disproportionate impact on companies trading with and from countries whose ports have not been able to join the new US standards regime and which are thus exposed to more time-consuming *ad hoc* checks. In an extraordinary outburst in March 2006, US Homeland Security Secretary Michael Chertoff blamed business for not standing up for itself more strongly against such security-motivated restrictions (Sevastopulo, D. 'US focus on risk 'poses threat to economy,' *Financial Times*, 13 March

2006). In fact, the Bush Administration has done much to create a climate where businessmen fear political and commercial penalties for speaking out too clearly.

<sup>27</sup> Money-laundering is a major target of the United Nations Convention against Transnational Organised Crime, opened for signature in December 2000. [http://www.unodc.org/unodc/en/crime\\_cicp\\_convention.html](http://www.unodc.org/unodc/en/crime_cicp_convention.html)>

<sup>28</sup> Adopted on 28 September 2001. <http://www.un.org/Depts/dhl/resguide/r54.htm>

<sup>29</sup> Two years after the adoption of UNSCR 1373 only \$134 million of terrorist assets had been blocked as a consequence worldwide. Biersteker, T. 'Counter-Terrorism Measures Taken under UN Security Council Auspices,' in Bailes and Frommelt, op. cit.

<sup>30</sup> On A.Q. Khan see Kile, S.N. 'Nuclear Arms Control and Non-Proliferation,' in *SIPRI Yearbook 2005: Armaments, Disarmament and International Security*, 552-5 (Oxford University Press, 2005); and on Libya see Hart, J. and Kile, S.N. 2005 'Libya's Renunciation of Nuclear, Chemical and Biological Weapons and Ballistic Missiles,' in *SIPRI Yearbook 2005*, op. cit.

<sup>31</sup> The Nuclear Suppliers Group and Zangger Committee for nuclear items and Australia Group for chemical and biological items; the Missile Technology Control Regime is also relevant.

<sup>32</sup> As of end-2005 China and Russia had both joined the Nuclear Suppliers Group and Zangger Committee, and Russia was also in the Missile Technology Control Regime (MTCR) and the Wassenaar Group for conventional arms exports.

<sup>33</sup> Anthony, I. 2006. Op. cit.

<sup>34</sup> Adopted on 28 April 2004. [http://www.un.org/Docs/sc/unsc\\_resolutions04.html](http://www.un.org/Docs/sc/unsc_resolutions04.html)

<sup>35</sup> For example, it has been claimed that business has more innate understanding of some of the forms of organisation and 'franchising' used by terrorists, that its direct involvement in many regions of concern would allow it to make useful inputs to intelligence analysis, and that it has well-developed and relevant skills in risk assessment. See Black, C. 2004. 'The Security of Business: A View from the Security Industry,' in Bailes and Frommelt, op. cit. The World Economic Forum (organisers of the annual Davos meeting) have a new Risks Analysis initiative focusing *inter alia* on this aspect.

<sup>36</sup> See e.g. the document calling for a 'New Energy Policy' (NEP) for the Union, submitted by the Transport, Telecommunications and Energy Council on 14 March 2006 to the European Council and based on a Commission 'Green Paper'.

<sup>37</sup> See Ekengren, M. 'The Interface of External and Internal Security in the EU and in Nordic Polices,' in Bailes, A., Herolf, G. and Sundelius, B. *The Nordic Countries and the European Security and Defence Policy* (Oxford:Oxford University Press, 2006).

<sup>38</sup> See <http://www.itu.int/wsis> for the handling of these issues at the World Summit on the Information Society that was held in two phases at Geneva on 10-12 December 2003 and Tunis on 16-18 November 2005. The Summit did agree to set up a new 'Internet Governance Forum'.

<sup>39</sup> For example, there is an international organisation to promote and coordinate civil emergency planning, though few developed countries belong to it: the International Civil Defence Organisation, see <http://www.icdo.org>. The UN's regional economic commissions have a long history of addressing local transport and infrastructure issues, including security aspects.

<sup>40</sup> For example: Winkler, T.H., Ebnöther, A.H. and Hansson, M.B. (eds). *Combating Terrorism and its Implications for Security Sector Reform*. (Vällingby: Swedish National Defence College, 2005); and Born, H., Fluri, P.H. and Lunn S. (eds). 2003. *Oversight and*

*Guidance: The Relevance of Parliamentary Oversight for the Security Sector and its Reform.* Geneva and Brussels: DCAF and NATO Parliamentary Assembly (details and other publications at <http://www.dcaf.ch>).

- <sup>41</sup> For example, Chevron Oil from Sudan. See Patey, L. 'A Complex Reality: The Strategic Behaviour of Multinational Oil Corporations and the New Wars in Sudan'. Danish Institute of International Studies (DIIS) Report 2006:2. <http://www.diis.dk/sw21249.asp>; and for an account from an oil company that stayed, Batruch, C. 'Oil and Conflict: Lundin Petroleum's Experience in Sudan,' in Bailes and Frommelt, op.cit.
- <sup>42</sup> As noted above, the most practical options include the modern equivalent of wartime 'requisition' (i.e. temporary state control of private resources for the purpose of an emergency), and more specifically, the advance and *ad hoc* state coordination of the responsibilities/reactions of energy and utility providers in the event of a breakdown.
- <sup>43</sup> Hitherto, corporate governance legislation (like the US Sarbanes-Oxley Act) and the best-known Corporate Responsibility Index (CRI) have declined to address directly that corporate behaviour that affects traditional security processes. Put crudely, companies are caught by these mechanisms if they lie about their accounts or befoul the environment but not if they export chemical weapons to North Korea; while the complex set of international-legal instruments that do exist to constrain weaponry-related and conflict-related actions have not always (or successfully) been tailored to 'capture' private sector activities. See also Anthony. 2006, op. cit.
- <sup>44</sup> Professor John Ruggie, quoted in 'Call for clearer human rights standards in business,' *Financial Times*, 1 March 2006.
- <sup>45</sup> Such a concept could start with business's responsibilities for the security of its own employees, premises and operations, and then offer principles and best practice to govern both the direct (e.g. private security companies, defence industry and strategic exports) and indirect (e.g. conflict-related, infrastructure-related) types of business impact on security transactions. It would of course be most effective if the initiative could be taken by business itself.
- <sup>46</sup> Davis, I. 'Plot your course for the new world,' *Financial Times*, 13 January 2006.
- <sup>47</sup> 'Politicians worse than businessmen,' *Financial Times*, 17 January 2006.
- <sup>48</sup> A poll published in the McKinsey Quarterly on 25 January 2006 showed that 70 percent of managers wanted their firms to do a better job of responding to social pressures and expectations in areas such as climate change, health, privacy and 'ethically' produced goods. As many as 90 percent of Indian executives said that business should play a responsible role in society. Maitland, A. 'The frustrated will to act for the public good,' *Financial Times*, 25 January 2006.



## Chapter 4

# Insurgencies, Security Governance and the International Community

*Albrecht Schnabel*

### **Introduction**

Armed non-state actors represent a critical challenge for security governance.<sup>1</sup> They highlight the instability, insecurity and the unpredictable environment characterised by violence and destruction typical of latent conflict situations.<sup>2</sup> Insurgencies have long moved beyond the confines of state borders and make their power and influence felt internationally. The internationalisation of the insurgent – and in the recent past increasingly terrorist – threat makes security governance concerns crucial.<sup>3</sup> National security governance is inextricably linked with regional and global security governance. From this arises the responsibility of international actors to consider security governance at the national level as part and parcel of regional and international security considerations. Effective security governance leaves the state in control of security – i.e. a legitimate, responsible and accountable state having the legal and legitimate responsibility for the monopoly of force. If the state is neither legal nor responsible nor legitimate, insurgencies may be the last resort of the population, as well as potential allies of the international community, in fighting illegitimate and oppressive governments. Such arguments have been made, rightly or wrongly, in cases such as Kosovo, Afghanistan and Iraq.

Insurgent movements consist of both armed opposition groups and their support bases.<sup>4</sup> The insurgents engage in guerrilla warfare (attacks against security forces) and terrorism (attacks against civilians). While some movements engage in local insurgencies, others engage in transnational operations. Insurgency has been exacerbated by the resurgence of ethnicity and religiosity; enhanced movement of people across international borders; free flow of ideas and technologies; and the black and grey arms market. Moreover, globalisation has given a new impetus to insurgency. The forces of globalisation catalyse and empower existing and emerging insurgent move-

ments. Instead of resisting globalisation, even the most puritanical insurgent groups exploit the forces and opportunities of globalisation to advance their political aims and objectives.<sup>5</sup> For example, at the height of his campaign against the West, the Al Qaida leader Osama bin Laden wore a camouflage NATO jacket, carried a Soviet-manufactured AK-47, and used a satellite phone purchased in the USA.<sup>6</sup>

Benefiting from this rapidly-changing environment, the phenomenon of insurgency transformed regionally and functionally. To avoid being traced, contemporary insurgents use pre-paid mobile phone cards to communicate; to reach difficult targets, they have used fuel-laden passenger aircraft in suicide attacks; and to attack from a distance, they prefer to use remote control detonation. The forces of globalisation have facilitated the rise, growth, mobility and acquisition of special weapons and dual technologies by insurgent groups. For instance, the Internet is widely used not only to reach out to existing and potential support bases, but also to shorten the planning and preparation phases of operations. Moreover, using inexpensive means of travel and widespread means of communication, insurgent groups have successfully and in unprecedented ways expanded and influenced their existing and potential support bases located within and far away from the theatres of conflict.

Insurgencies in the post-Cold War period therefore differ markedly from the Cold War period in shape, size, structure and strategy. Contemporary insurgent groups are multi-dimensional organisations. As they challenge state authority ideologically, financially, administratively, and electorally, government and societal responses must be multi-pronged. Therefore, for insurgencies to be managed, both governments and the international community should be prepared to use a variety of instruments. These range from informational, economic, political, military and diplomatic efforts undertaken to influence the spawning, sustenance, escalation and de-escalation of insurgencies.

It has recently become more difficult for governments to defeat insurgencies, as in a more globalised world, cooperation, arms supplies, training and fund-raising are not limited to an insurgency's particular territory of operation. It is in this context that international efforts to manage insurgencies are as important as ever and, possibly, may prove more effective than ever in stifling the threat and violence produced by insurgent activities. This chapter will first discuss the limitations of current approaches to insurgencies. It will highlight the difficult task of understanding and judging the credibility and legitimacy of insurgencies – an important first step before deliberation over the need for external involvement to manage them. It then



considers phased and flexible response strategies (before, during and after violent insurgent conflicts), before summarising the challenges and opportunities posed to governments and the international community in their attempts to respond to insurgent movements and groups. The chapter concludes with a number of recommendations for more effective and constructive international involvement in the prevention and resolution of insurgent conflict.

### **The Limits of Traditional Approaches to Defend Against Insurgencies**

Military force alone is severely limited in addressing insurgencies. As well as targeting the physical capabilities of non-state actors, it is critical to reduce their motivation. However, governments worldwide lack the tools to target non-state groups' motivation to fight. As long as guerrillas and terrorists preserve their will to fight, insurgencies will persist. For instance, despite having a highly skilled security service and military intelligence service, Israel has failed to prevent periodic suicide attacks that kill and injure its citizens. Although target-hardening – such as the West Bank barrier – can reduce the threat temporarily, it cannot end the violence. Soft power combined with hard power is essential to reduce the threat, while hard power alone will only strengthen the insurgents' will to kill and die for their cause and increase the insurgents' support base.

Today, we face unprecedented challenges as well as fresh opportunities for cooperation. To effectively combat insurgencies, governmental, intergovernmental and societal responses must be far-reaching and comprehensive. For counter-insurgency policies to be effective, they must reflect action against such groups at all stages. It is more cost-effective to invest in changing the conditions that spawn insurgency rather than spend billions of dollars on anti-insurgency (protective operations) and counter-insurgency (offensive operations) measures. With the sophistication of insurgent groups, target-hardening and other forms of protection will not reduce the threat. Instead of relying on the intelligence community and the police alone to combat insurgency, governments must develop a broad-based response. The range of actors essential to manage contemporary insurgency includes the military, customs, immigration, border protection, aviation security, port security, surface transportation security, coast guard, emergency services, educational institutions, religious schools, community organisations and private security professionals.

This is a matter primarily of national security governance. The role played by multilateral organisations is limited. Despite its potential, international engagement should not be overstated – it can be short-lived and often dependent on strategic considerations, particularly if violence resumes. The main responsibility and opportunity to manage insurgencies, with or without external assistance, remains with states. Yet particularly in the face of global terrorist insurgent activity, international organisations are called upon to support, foster and legitimise joint state action to combat insurgent violence, but also to use their power of moral persuasion to promote respect for human rights and condemn their abuse – by both state and non-state actors.

With the globalisation of insurgency, the nation-state alone cannot and should not manage an insurgency. Even powerful states are significantly dependent on their allies for assistance. With the dramatic decline in inter-state conflicts and the increase in internal conflicts, the importance of the international community in managing insurgencies is increasing. As most insurgencies develop external dimensions, when and how should the international community become involved in the management of insurgencies? Whose interests should the international community defend: the insurgency's, the population's, the state's or the larger regional or global community of states?

## **Understanding and Judging Insurgencies**

### *Can an Insurgency be Justified?*

The formulation of effective response strategies requires a thorough understanding of the motivations and the perceived and recognised legitimacy of an insurgency's violent struggle. Is there an entitlement to use force to express, for instance, a perceived right to national self-determination, a common motivating force for insurgent movements? Does such a right exist? It could certainly be argued that a right exists to overthrow an oppressive colonial power, but not to break away from an existing state. This is the case especially when possibilities for enhanced autonomy and political self-determination have not yet been fully explored. Amitai Etzioni argues that 'only when secessionist movements seek to break out of empires – and only when those empires refuse to democratise – does self-determination deserve our support. Otherwise, democratic government and community-building, not fragmentation, should be accorded the highest standing.'<sup>7</sup> In this regard, for example, Kosovo Albanian leader Ibrahim Rugova's non-violent struggle

against Serb oppression, and his numerous unsuccessful calls for external support, could be considered to have legitimised the KLA's increasingly violent struggle for political autonomy.

However, a struggle for secession without the exploitation of political channels to work out compromises, or the use of internal violence to further one's own power position vis-à-vis other groups (outside the context of continuous oppression) does not justify violence. This includes wars for personal ambition, and resource wars (such as in Liberia, Sierra Leone, Cambodia, or Biafra); warlords fighting for private interests to establish monopolies over the production and trade of specific commodities, such as diamonds or drugs (as in Sierra Leone or Angola); narco-terrorist warlords (in Colombia and South-east Asia); warlords disguising private interests as tribal or ethno-territorial/ethno-political struggles (Bosnia, Chechnya, Abkhazia, Somalia). It includes secessions for nationalist goals to impose order along religious/ethnic lines (the Taliban); cases where an external actor instigates insurgency and violence (irredentism – such as in the case of the Bosnian Serbs in Republika Srpska and many African intergroup conflicts); and in the case of obvious terrorist activity, i.e. when insurgents conduct politically-motivated violence that deliberately targets non-combatants.

How should the moral justification for an insurgency be classified? A number of factors should be considered, such as its ambitions to serve collective and locally-based interests of the population; its human rights record vis-à-vis the population; the support it enjoys among the population; the nature of its aims, goals and purpose; the government's and state security system's record of behaviour towards the population; the insurgency's record of attempting to reason and negotiate with governing authorities, including efforts made to engage legitimate international actors in political campaigns against state oppression and misgovernance.

#### *Is it Acceptable to Intervene?*

As hinted above, in order to decide how to approach the challenges and threats of emerging and active insurgencies, the international community needs to make difficult judgments. In order to help take both moral and prudent decisions,<sup>8</sup> it is essential to understand the justification for an insurgency as well as the justification for external involvement. The following questions are pertinent:

- What are the reasons, motivations, and objectives of an insurgency?
- Should we differentiate among insurgencies? Are all violent insurgencies unjustified and illegal, or not?
- Are there moral justifications for insurgencies and the resort to violence in furthering their cause?
- Are there moral justifications for the use of violence, even at the expense of civilian casualties?
- Is the international community in some cases justified in using force to support the cause and military campaigns of insurgencies?

At this point it is useful to draw some parallels with the dilemma that international actors face when challenged by the need (and possible responsibility) to engage in humanitarian intervention. This presents a very similar challenge to intervention for the purpose of preventing and managing insurgencies, representing an assault on the sovereignty over internal affairs of a state, notwithstanding how morally justified the use of force and intervention by external parties may be in redressing gross violations of human rights. However, there are mitigating factors: first, one must consider the human rights (and human security) record of the government in power. Second, has the government attempted to address reasonable demands of minority groups, of political opposition, or of border communities? Third, has the government sought political and non-violent solutions to existing problems? Fourth, has the government tried to engage groups with legitimate grievances in its attempts to avoid an escalation of violence? Finally, has the government provoked violence and/or counter-violence?

International order, as much as domestic order, can only function if states and individuals follow the rules that govern their respective communities. Membership of the international community requires adherence to international standards and rules. However, membership also comes with entitlements and rights such as the right of the state to recognition and fair treatment by the international community and the right of the individual to be treated fairly and justly by his/her legitimate government. Poor and irresponsible governance may trigger opposition and – sometimes violent – resistance. In these cases, international sympathy is with those taking up resistance, as demonstrated by widespread international support for ethnic independence and suppressed secessionist movements in the early 1990s. The International Commission on Intervention and State Sovereignty's (ICISS) report *The Responsibility to Protect* calls for the international community's responsibility to oppose and to impose sanctions on irresponsible states.<sup>9</sup> In cases where the international community will not respond – it is

reasonable to assume that the majority of crises, now and in the future, will continue to remain unanswered – local resistance is often the only and last resort to oppose poor and irresponsible governments.

However, while a moral case can be made for many insurgencies – particularly those that are fighting oppression and illegitimate (security) governance – the legality of insurgencies and international responses to them must nevertheless be questioned.<sup>10</sup> Within a domestic context, and from the perspective of governments, insurgencies are usually illegal and have to expect forceful resistance from governing authorities. There may be moral justification for an insurgency. But the use of force can under all circumstances be justified only as a last resort to redress great injustice. Nevertheless, how do international organisations respond if they are a) reluctant to condemn the insurgency and assist the state to regain control and terminate the insurgency; b) in general opposed to international involvement in states' internal crises; while c) at the same time subscribing to an international moral/ethical code of a 'responsibility to protect' in cases of gross state irresponsibility and human rights abuses?

#### *Limits and Opportunities for Effective Involvement*

What should be the role of international actors in the management of insurgencies? As already noted above, there are clear limits. Beyond a possible emerging threshold of gross human rights violations (ethnic cleansing or genocide),<sup>11</sup> the international community possesses very limited authority in internal conflicts. The constraints of state sovereignty make it difficult for external actors to intervene without the government's consent, irrespective of the legitimacy of the government in question. Few members of the international community would support military intervention in a dangerous internal conflict, unless their own security were threatened, for instance, as a result of conflict spillover, massive outflows of refugees, or threatened access to key strategic resources. Political, geo-strategic or economic priorities condition the degree of outrage expressed about human insecurity suffered at the hands of dysfunctional security governance. Thus, willingness for outside involvement in internal wars is marked by overt selectivity, driven mostly by self-interest.<sup>12</sup> Sub-regional and regional organisations are plagued by a lack of resources that make it difficult to intervene even if the necessary political resolve exists. Moreover, while there is usually little support during the crisis stage, there is a persistent lack of will and ability to address internal problems at an early stage of evolving crises and when gov-

ernments are not yet locked into defensive counter-insurgency postures and are still more open to effective resolution.

Despite these obstacles, there are nevertheless opportunities for effective involvement. These include humanitarian intervention in cases where internal wars, with or without insurgent fighting, produce high levels of civilian casualties and result in large-scale humanitarian crimes, cross-border security threats and transnational terrorist activity.<sup>13</sup> International criminal tribunals to judge perpetrators of humanitarian crimes that have been committed at the hands of either a government and/or an insurgent group, have the potential of serving a deterrent role for would-be perpetrators and of assisting the post-conflict reconciliation processes. Diplomatic pressure (both formal and informal) could be applied to convince states to communicate and negotiate with insurgents or to offer compromise solutions or 'rehabilitation packages', also in the interest of larger regional and international security. Diplomatic pressure could also be applied to convince states to meet legitimate and reasonable demands of opposition movements and civil society, and thus counter growing popular support for increasingly militant insurgent strategies. International organisations – such as the UN, through its Counter-Terrorism Committee (CTC)<sup>14</sup> – can offer assistance to states that justifiably fight exploitative insurgencies. The international community can also voice public condemnation and 'shaming' – including the imposition of international sanctions – of states that assist illegitimate insurgencies in third countries with money, training or territory.

#### *Politically Delicate Issues*

External actors must not worsen the situation on the ground as a result of their intervention. Ultimately they will – intentionally or unintentionally – become the partners and allies of one or the other side in a conflict. As a result, international actors will be perceived as enemies by the side that does not profit from their involvement, raising the stakes not only for troops and civilian actors on the ground, but – given the internationalisation of insurgencies – also in their home countries and for their representatives and interests abroad.

There are significant operational difficulties in dealing with insurgencies, including the challenge to negotiate with insurgent groups. Often there is no clear line of command, exacerbated by internal political struggles between different factions within insurgencies (often over more or less violent modalities of opposition, resistance and the use of force).

Fighting insurgent movements (if that is indeed required) is dangerous and causes casualties among the intervening actors. In most cases, local states and local actors will have to do the fighting. International actors might assist either one or all sides of the struggle with material and financial resources, as well as by internationally isolating insurgents, warlords or irresponsible governments and their leaders. Finally, exit and transition strategies are important and highly delicate considerations for all parties concerned – for insurgency leaders, governments and external actors.

### **Response Strategies and the International Community**

With insurgencies increasingly assuming a multi-generational and transnational character, the application of military force can have limited long-term and strategic success. Yet, as the face of insurgency changes, international organisations and government coalitions increasingly possess comparative advantages in dealing with insurgencies and insurgency networks compared to local and state actors.

#### *Local, National and International Actors*

At all stages of the management of insurgencies, local actors play the most crucial role, either with or without the assistance of external actors. Particularly in cases where governments have been among the perpetrators of violence, (constructive) civil society actors must shoulder internal resistance to violence, advocacy of non-violent conflict and violence management, and post-violence reconstruction of the society (and the state). External actors must assure local ownership of external interventions and assistance.

States play a key role in the management of insurgent movements. Their actions nurture, trigger, escalate, but also defuse insurgent movements. Their collaboration is required if external efforts at defusing insurgencies are to be successful. Governments are in a better position to prevent the radicalisation of insurgencies when the international community becomes involved at the initiation phase of an insurgency.

External actors either support states in fighting ‘illegitimate’ insurgent movements, or they pressure states into negotiating and making peace with ‘legitimate’ insurgencies. It is in the international community’s interest to bring insurgent wars to a conclusion, thus permitting societies to be rebuilt without territorial divisions and the creation of new splinter states. This may require the replacement of an existing government, and the inclusion of the

political leadership of the insurgency not only in peace negotiations and settlements, but also in the post-war political order and institutions. External actors include prominent individuals, groups (political and ethnic movements, diaspora communities), states, groups of states, sub-regional and regional organisations, and the UN. Given the global phenomenon of insurgencies, the UN's response might be particularly important in forging international response systems to emerging and active insurgent movements.<sup>15</sup> External actors can be helpful in managing insurgent movements at pre-conflict, conflict and post-conflict stages. Target states are those that are too weak to deal with insurgencies, except to engage in a protracted conflict. Often, domestic authorities are unsuitable agents in stopping the violence that accompanies insurgencies. Hard as well as soft state responses to insurgencies can be highly counterproductive. In the developing world, states tend to over-react, as a disproportionate response to insurgent activities targets the wide support base for a movement. Such action can strengthen the insurgency, while consolidating its popular support base. The Tamil militancy in Sri Lanka or the various insurgencies in India's North-east are examples.<sup>16</sup> On the other hand, a soft-line, defensive approach resembles a policy of appeasement, where the government protects potential targets, but avoids engaging insurgents in actual military warfare. Critics lament that such a policy – as being pursued by the Colombian government towards the Fuerzas Armadas Revolucionarias de Colombia (FARC) in particular – prevents governments from forcing insurgents to the negotiating table.<sup>17</sup>

There are more constructive and, ultimately, more successful approaches; A hard-line, yet proportional response drives a wedge between the insurgents and their support base. It isolates and fights active and core leaders of the insurgency, while offering social and economic measures to pacify the support base (and to compete with social services previously provided by the insurgent movement). Sri Lanka is an example of such an approach.<sup>18</sup> A 'soft-hard' approach means harassing insurgents until they accept certain incentives such as power-sharing arrangements and until they prefer to continue their struggle on a political level, rather than on the battlefield. A common mistake in state responses is to target only the activists in the actual insurgent movement, rather than their support base, which is crucial if insurgencies are to be weakened to the degree that they can be defeated, or to the degree that they consider political negotiations. However, since 9/11, measures have been taken, nationally and internationally (UN Security Council Resolutions 1373 and 1377), to address the financial support base of, in particular, terrorist groups.



### *Timing*

What is the ideal timing of involvement? Ideally, of course, one can only speak of successful engagement of an insurgency if its escalatory response in anticipation and response to state action can be precipitated and influenced, preferably before the outbreak of violence and, should that fail (as it tends to be the case), during and after the violence.

### *Pre-Conflict Phase*

At the pre-conflict stage, international actors should compel states to address legitimate demands from parts or all of society; particularly in cases where states fail to meet their responsibility of providing effective, accountable and just governance (including security governance).<sup>19</sup> In many cases, social, economic or political oppression, marginalisation or deprivation feed insurgent movements. In these cases states carry at least partial blame for insurgencies that respond to such threats to the security and freedom of part or all of society. At the pre-conflict phase, the international community thus has to ensure that there is no feeding ground for insurgencies, and that societies are not compelled to look towards violence as the only recourse to address legitimate demands for political, economic and social capital. The experience of the OSCE in making the internal affairs of its member states a key concern of its approach to cooperative security, and in particular the work of the High Commissioner on National Minorities, could serve as a model for effective preventive work by international organisations.<sup>20</sup>

States should provide peaceful channels for all groups in society to express both support and opposition to government policies and actions. Injustices and disputes can then be addressed peacefully – and morally ‘legitimate’ insurgencies can be prevented. If such peaceful channels exist, international actors need to support non-violent movements and their leaders, while denouncing and imposing sanctions on movements that use or intend to use violence to express their demands.

### *Conflict Phase*

During the conflict phase, international actors need to serve as mediators between insurgencies, society and state authorities in stopping violence and war<sup>21</sup> through convincing states to address injustice and inequalities that may have led to the formation of an insurgency and the outbreak of violence. They must integrate insurgencies and their political leaders in negotiations to

end violence. They should support ceasefires, the imposition of peacekeeping forces and the support of political processes towards the cessation of war. They should facilitate and support political settlements that allow for an end to violence and the disbanding of insurgency movements. If the 'legitimate' demands of insurgencies are met by the state, the political movement underpinning an insurgency should receive an opportunity to stand for future elections – particularly if they have made reasonable efforts towards seeking non-violent solutions to their demands.

In the case of 'illegitimate' insurgencies, international actors should, as far as this is possible, aid governments to suppress such insurgencies, engage moderate insurgent leaders in negotiations and assist in cutting off financial, third-party and other support from such movements. States that are destabilised in such ways must count on the assistance of the international community in their defence against destructive forces from within.

#### *Post-Conflict Phase*

During the post-conflict phase, international actors must assist states to overcome the human and material scars of conflict and violence. They must assist in demobilisation of both insurgent and government forces, disarmament and the reintegration of former combatants into post-conflict society. Otherwise, in the absence of alternative livelihood options, disillusioned armed ex-combatants are likely to regroup and spoil fragile peace and rebuilding processes. Moreover, the creation of viable and legitimate institutions that are able to reintegrate both government and non-government forces into a functioning and legitimate post-conflict security architecture will not only lower the potential for the resurgence of violence, but will also instill confidence in the government's ability to provide long-term security.

In the post-conflict phase it is vitally important to remember the reasons, values and goals that engendered insurgent movements, and the support – or lack thereof – they enjoyed from local populations. If insurgencies fought ruthless wars without regard for civilian casualties, for their own interests and ambitions, they should not be permitted to retain or gain control of the political and economic life of post-conflict societies. Those insurgencies should be considered criminal organisations, and their leaders and supporters should be treated as such. In the wake of the Bosnian war such an approach was taken vis-à-vis the Bosnian Serb forces. While they defended the Serb community against the Bosnian Croatian and Bosnian communities (heavily supported from Belgrade), their involvement in heinous cases of ethnic cleansing (such as the Srebrenica massacre of July 1995) discredited

them to the point that their political and military leaders as well as the wider Bosnian Serb population were subjected to much harsher treatment by the international community than the Muslim-Croat Federation following the Dayton Peace Treaty of December 1995.<sup>22</sup> In addition, their military and political leaders, General Ratko Mladić, former Chief of Staff of the Bosnian Serb Army, and former Bosnian Serb leader Radovan Karadžić have been indicted for war crimes and genocide by the International Criminal Tribunal for the Former Yugoslavia in The Hague. They still remain at large.

If an insurgency has been fought mainly to redress social, economic and political injustices within an oppressed society, after all political means for redress have been exhausted, there may be moral and political justification for integrating, or even handing over political power to the (moderate) leaders of such insurgencies. In other words, the international community should be prepared to take sides and judge if an insurgency has the right and capacity to shape significantly the political landscape of the post-conflict society.

In summary, the main approaches for external actors in addressing the challenges posed by insurgencies are early warning, preventive diplomacy, conflict management and resolution, and post-conflict reconstruction. Early warning requires thorough and honest attempts to understand the background, goals and operating procedures of an insurgency. Through preventive diplomacy – both official and unofficial diplomacy with pre-insurgency movements and states – international actors may be able to mediate early resolutions to escalating crises.

If preventive action fails and war breaks out, conflict management requires further involvement to limit the escalation of violence, if at all possible at a low-intensity stage of the insurgency. If an insurgent war can be settled, with or without the involvement of external actors, the conflict's resolution may require external assistance through mediation, facilitation, and arbitration. Exit strategies need to be offered to insurgencies' leaders and fighters – but preferably not exit strategies that offer fame, wealth, political profile and power. And, finally, assistance has to be offered in post-conflict reconstruction – assistance in the reintegration of combatants, support in building a new state, overcoming the culture of violence and introducing a culture of peace.<sup>23</sup>

### **Challenges of Insurgencies**

Insurgencies pose a number of serious challenges, yet also some opportunities to external actors committed to constructive involvement in internal conflicts.

#### *Difficulties*

Once an insurgency breaks out, violence is difficult to stop. Insurgencies are part of, or are the manifestation of, protracted social conflict that can subside, flare up again, and move between times of low- and high-intensity violence. This makes it hard to design a long-term strategy to manage insurgencies, just as it is difficult to manage protracted social conflict. Moreover, while an intervention in an internal conflict may be justified, legitimised and undertaken by external actors, this is only possible and feasible in the context and at times of excessive violence.<sup>24</sup> As violence subsides, so will the justification for external involvement. If violence resumes, chances are low that the international community will be willing to resume its previous level of involvement.

Insurgents rally local populations around the need to use violence and counter-violence, convincing populations that non-violence is ineffective. Actions by international actors often support such assumptions. For instance, a number of secessionist groups that have pursued a non-violent path towards reaching their political goals and towards securing the support of the international community, have failed miserably while once they have engaged in violence to pursue their goals and make themselves heard, the international community responded. The Kosovo Liberation Army's (KLA) experience in Kosovo is a case in point. In the early 1990s, the KLA was considered a terrorist group. Since 1998, it has been considered as a movement for freedom, autonomy and self-determination, and a partner in fighting Serbia. During the Rambouillet talks in early 1999, the KLA was treated as a partner in peace negotiations. During the NATO bombing of the former Yugoslavia during the Kosovo war in 1999, significant cooperation was evident between the KLA and NATO. In the post-war period, the KLA emerged as a spoiler of post-conflict rebuilding activities; it created disorder in Kosovo and launched military operations in southern Serbia and in northern Macedonia. The metamorphosis of the KLA (and the later demise of its political arm, the PDK, in the November 2001 provisional assembly elections) is an interesting example of the impact that external actors, in particular international organisations, can have on the 'life cycle' of an insur-

gency.<sup>25</sup> Moreover, this illustrates the dilemma of preventive action by international actors. As long as there is little or no violence, there is no sense of urgency. The same applies to cases where there is no far-reaching threat to the international community. It is thus in the interest of insurgents – should they seek the assistance of the international community in advancing their goals – to raise the level of violence and appeal to the conscience (and hope for the support) of the international community.

Insurgencies must secure the support of a significant part of the local population to ensure the long-term viability of their actions, as well as money, food and housing for their fighters. Without local support, few insurgencies can sustain their efforts and recruit new personnel. High levels of civilian casualties at the hands of government forces strengthen the local support for an insurgency's cause. Government forces can generally be easily triggered into stepping up their violence (again, the KLA's approach supports this observation). Thus, violence breeds counter-violence, which, as has been noted above, is necessary to draw international attention to the plight of 'legitimate insurgencies'.

Insurgencies that function as substitute states create dependencies that are not easily undone after the violence ends. Long-lasting insurgencies, particularly if geographically confined to a specific part of a country, can indeed develop quasi-state structures that, after the end of a conflict, can either be codified through the inclusion of the movement's leaders in joint governing structures, or that need to be undone at the risk of even greater local destabilisation. This requires a thorough understanding of the insurgency's internal dynamics, its ties to the local population, its ideology and post-war expectations. Otherwise post-war governments and external actors will not be able to find the most appropriate and – for the stability of the country – most beneficial approach towards integrating insurgencies' remnant political and social structures into the country's post-war order.

During especially long-standing insurgencies there is a creeping culture of violence that defines entire generations' outlook on life and social behaviour. Violence becomes a normal means of political and social communication with 'the other'. To break this cycle of past and future violence, international organisations must become involved in social engineering exercises – targeted at ex-combatants as well as the civilian population – to help generations to overcome the traumas of war. This requires long-term commitment and investment.

Insurgencies are often divided into various subgroups, with no direct line of command. It is difficult to pinpoint reliable negotiation partners who can guarantee that decisions are implemented on the ground. Compromise by

whoever claims leadership may not be supported by other influential members of the insurgency, thus endangering the authority of particular representatives of a group to speak on behalf of the movement (such as was the case with former Palestinian President Yasser Arafat's position in Palestine). If peace deals and agreed assistance operations by the international community are repeatedly threatened by this lack of clear lines of authority within insurgent movements, patience will run low and external actors are likely to withdraw their support.

In resource wars, such as during three decades of war between the União Nacional para a Independência Total de Angola (UNITA) and government troops in Angola, there are few incentives for insurgents to end violence, relinquish their local authority or join post-war political structures.<sup>26</sup> If they benefit from the continuation of war, they will threaten and endanger external actors on the ground. Peace will not be in their interest, and they are likely to sabotage efforts towards securing an end to violence. Thus, private interest insurgencies are frequent spoilers in peace-building processes.

### *Opportunities*

On the other hand, insurgencies seem to offer society (and the international community) the opportunity to unseat criminal, unconstitutional, oppressive or unpopular regimes. Northern Alliance forces in Afghanistan have helped the American-led coalition to fight Taliban forces on the ground. In such instances, insurgencies can serve as allies of the international community. However, subsequently insurgencies do expect to partake in post-war governance and need to be integrated carefully in post-war reconstruction and transition efforts. In the case of Northern Alliance forces this has been a counterproductive and futile effort: Sharing the monopoly of force with non-state entities weakens central government structures and greatly weakens security governance, while Northern Alliance leaders' unfulfilled expectations for a significant stake in the post-war dispensation of power and influence only led to frustration and, ultimately, refusal to recognise internationally-supported post-war governance structures.

If an insurgency fights for collective interests, the likelihood is great that it enjoys popular support and that it desires to end violence and re-establish peace and order once its goals are met. Collective interest insurgencies are thus likely to support externally-initiated peace-building processes, particularly if they are invited to join and contribute to the process.

*The United Nations, Insurgencies, and Terrorism Post-9/11*

As the only international organisation with global representation, the UN has a special responsibility and significant comparative advantages in managing incipient and active insurgencies. The response of the United Nations to insurgencies has seen partial successes as well as failures. To change the strategic environment and to make it harder for such groups to operate, the United Nations has played a significant role in developing 12 international conventions to counter terrorist activity.<sup>27</sup> In regional conflicts, notably in Palestine and Kashmir, which are internationally disputed areas, the United Nations has so far failed to facilitate or enforce peace. In Bosnia, Kosovo, Afghanistan, Iraq or the Democratic Republic of Congo (DRC), the United Nations has failed to take the lead in generating an international response robust and sustainable enough to capitalise on the UN's expertise and legitimacy to stop violence and help build locally-trusted and internationally-supported institutions of political and security governance. With or without the mandate and/or support and cooperation of the UN, others – such as NATO in Bosnia and Kosovo, the US and its 'coalition of the willing' in Afghanistan and Iraq, the EU in DRC, or the AU in Darfur/Sudan – have therefore stepped in to pursue those goals.

Nevertheless, the UN's normative and moral authority in guiding state action in conflict intervention as well as post-conflict peace- and nation-building efforts should not be understated. As an example, the mandate of the United Nations Monitoring Group, which was originally established pursuant to Security Council Resolution 1363 (2001) and subsequently monitored the implementation of sanctions against Al Qaida, the Taliban and their associates, should be expanded to include other groups that practice terrorism.<sup>28</sup> The Group has been effective and greater use should be made by the United Nations' system of the Group's accumulated know-how and institutional knowledge to persuade governments to act more rigorously against terrorist infrastructure and personnel. The key to the Group's success has been its visits to many states, enabling them to see implementation on the ground at operational and technical levels. Consequently, the Group has been able to bring to the attention of the Security Council the shortcomings of states' implementation of resolutions, highlight some of the successes and provide recommendations for improving the overall process of the Monitoring Group.

The United Nations should develop another list, similar to the current Consolidated List, concerning Al Qaida, the Taliban and their associates, to designate groups and their supporters that target civilians as terrorist groups,

and produce an annual report similar to the US government's *Patterns of Global Terrorism*.<sup>29</sup> Even if their cause is 'legitimate', groups that target civilians must be banned, proscribed and criminalised. Alternatively, the current Consolidated List could be expanded to include individuals and entities covering all terrorist groups against which sanctions should be implemented. These could then be subject to monitoring by the Group. Here, shared intelligence might be an answer to the lack of consolidated information that could inform such a joint endeavour.<sup>30</sup>

Ultimately, however, it is the member states that must combat terrorism (coordinating, if possible, their activities through regional organisations<sup>31</sup>). This should happen under the aegis of the United Nations, which in turn has to provide the necessary encouragement – and legitimacy, if appropriate – to fulfill their obligations in regard to measures stipulated under Chapter VII resolutions.

## Conclusion

A number of lessons drawn from experience to date should guide the international community's involvement in insurgencies. First, the international community can contribute to the *prevention of insurgencies* by building conflict observatories, through which domestic, regional and international institutions can be warned before a societal conflict breaks out into insurgent violence, and to trigger diplomatic efforts to pressure governments into addressing the legitimate grievances and aspirations of marginalised people. From a security governance perspective, it is not the task of external actors (be they interested states or intergovernmental organisations) to address the root causes of grievances that lead to insurgencies. Yet it is their task and, as some would argue, their responsibility<sup>32</sup> to assist national actors in developing and consolidating institutional solutions in areas of democratic control and oversight based on international norms and standards. Through this they can assist in addressing some of the grievances that have inspired and maintained support for insurgencies.

Second, the international community can contribute to *ending insurgencies* through mediation, negotiation, and arbitration in cases of 'legitimate' insurgencies; by assisting states in ousting 'illegitimate' insurgents, including through the provision of material and financial assistance; by isolating such movements internationally; and by punishing those state and non-state parties who provide assistance to them.



Both international organisations (regional organisations and the UN) and government coalitions can engage insurgent groups. However, there is a specific role for the international community in the management of insurgencies; international organisations can play a role in engaging insurgent leaderships in peace negotiations. Striking compromise solutions among actors with often competing or conflicting interests is the bread and butter of inter-governmental organisations. Nevertheless, in the absence of the total defeat of either side and the accompanying human suffering of civilians, a compromise is the best each party can hope for. International organisations can help negotiate such a compromise and monitor its implementation. The UN in particular could learn much from the OSCE's experience, in particular the High Commissioner on National Minorities' low-key mediation activities with both governmental and non-governmental actors.

However, there has to be immediate and visible improvement (beyond the cessation of violence) that accompanies settlements and peace-building efforts, and that effectively prevents the relapse into violence. In the absence of such improvements, insurgencies and counter-insurgencies will remobilise and rekindle violent resistance. At this point the international community will in all likelihood withdraw its active engagement. Therefore the role of the international community in combating or engaging contemporary insurgencies is limited. Yet a thorough understanding of the roots, aspirations and extent of public support of insurgencies is likely to put the international community in a better position to judge insurgencies more accurately, engage them more effectively and cooperate with governments to address insurgent and counter-insurgent violence, impressing upon them the need to address the root causes of insurgency. Building institutional structures of security governance that are legitimate, accountable and trusted by both the population and the international community is a key part of this endeavour.

## Notes

<sup>1</sup> According to David Petrasak in 'End and Means: Human Rights Approaches to Armed Groups,' (Geneva: International Council on Human Rights Policy, 2000), armed non-state actors are 'groups that are armed and use force to achieve their objectives and are not under state control'. Caroline Holmqvist includes the following groups in this category: rebel opposition groups (groups with a stated incompatibility with the government, generally concerning the control of government or the control of territory); local militias (ethnically-, clan- or otherwise -based); vigilantes; warlords; civil defence forces and paramilitary groups (when clearly beyond state control); and private security companies

that provide military and security services. See: Holmqvist, C., 'Engaging Armed Non-State Actors in Post-Conflict Settings,' in *Security Governance in Post-Conflict Peacebuilding*, ed. Bryden, A. and Hänggi, H. (Münster: LIT Verlag, 2005) 45–46.

<sup>2</sup> See Holmqvist, op. cit. 45–68.

<sup>3</sup> See Tan, A. and Ramakrishna, K., *New Terrorism: Anatomy, Trends, and Counter-strategies* (Singapore: Eastern University Press, 2003). See also Gunaratna, R. and Schnabel, A., 'The Challenge of Contemporary Insurgencies,' in *Understanding and Managing Insurgent Movements*, ed. Schnabel, A. and Gunaratna, R., (Singapore: Marshall Cavendish Academic, forthcoming in 2006).

<sup>4</sup> An often-referred to definition of insurgency describes it as 'an armed rebellion against a constituted authority, by any irregular armed force that rises up against an enforced or established authority, government or administration. Those carrying out an insurgency are "insurgents." Insurgents conduct sabotage and harassment. Insurgents usually are in opposition to a civil authority or government primarily in the hope of improving their condition.' See < <http://en.wikipedia.org/wiki/Insurgency> >.

<sup>5</sup> This chapter is based on research conducted by the author and Rohan Gunaratna for their forthcoming book *Understanding and Managing Insurgent Movements*, op. cit. The author is grateful to Rohan Gunaratna for his feedback and contributions to various versions of this chapter, and he thanks Marshall Cavendish Academic for permission to base this chapter on parts of the introductory and concluding chapters in the aforementioned book.

<sup>6</sup> See Gunaratna, R., *Inside Al Qaeda: Global Network of Terror*, (New York: Berkeley Books, 2002), 137.

<sup>7</sup> Etzioni, A., 'The Evils of Self-Determination,' *Foreign Policy*, no. 89 (Winter 1992–93), 35.

<sup>8</sup> Including decisions that may not be legal (such as NATO's intervention in Kosovo in 1999) and which are based on at least partially moral reasoning.

<sup>9</sup> Ibid.

<sup>10</sup> For an extensive discussion on the moral, normative, and legal justifications and ramifications of NATO's intervention in Kosovo, see Schnabel A., and Thakur, R., ed.) *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship*, (Tokyo: United Nations University Press, 2000). See also Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned*, (Oxford: Oxford University Press, 2000); and Tunstead Burchael, J., 'Framing a Moral Response to Terrorism,' in *International Terrorism: Characteristics, Causes, Controls* ed. Kegley, Jr, C. W., (New York: St. Martin's Press, 1990), 213–218.

<sup>11</sup> Ibid.

<sup>12</sup> See Schnabel, A., 'Humanitarian Affairs and State Foreign Policy: On State Interests and Self-Serving Humanitarian Commitment', presented at the 46th Annual Convention of the International Studies Association, 'Dynamics of World Politics: Capacity, Preferences & Leadership,' Honolulu, USA, 1–5 March 2005.

<sup>13</sup> For an emerging discussion within the UN on Security Council-authorised preventive action, see the Report of the High-Level Panel on Threats, Challenges and Change, a More Secure World: Our Shared Responsibility, New York: United Nations, 2004, Article 125; and the Secretary-General's response: United Nations Secretary-General. 'In Larger

Freedom: Towards Development, Security and Human Rights for All,' UN Document A/59/2005, New York, United Nations, 2005.

<sup>14</sup> Established as a result of Resolution 1373 (2001)

<sup>15</sup> See also Holmqvist, op. cit. 56–57.

<sup>16</sup> See, for instance, Behera, A. D., 'Conflict to Co-option? Experiences of Dealing with the Insurgencies in India's Northeast,' and Karthikeyan, D.R., 'The Tamil Tigers of Sri Lanka,' in Schnabel and Gunaratna, op. cit.

<sup>17</sup> See Bruneau, T. C., 'The Military in Post-Conflict Societies: Lessons from Central America and Prospects for Colombia,' in *Security Sector Reform and Post-Conflict Peacebuilding*, ed. Schnabel, A. and Ehrhart, H.-G., 233–242 (Tokyo: United Nations University Press, 2005).

<sup>18</sup> On the interdependence of civilian populations and insurgencies, see Chesterman, S., *Civilians in War*, (Boulder: Lynne Rienner Publishers, 2001).

<sup>19</sup> For a strong case of the international community's responsibility to come to the rescue of battered populations, see ICISS, op. cit.

<sup>20</sup> See Wohlfeld, M., 'The OSCE as a Primary Instrument of Conflict Prevention in Europe: Frameworks, Achievements, and Limitations of the OSCE's Preventive Action,' in *Conflict Prevention: From Rhetoric to Reality: Organizations and Institutions*, ed. Schnabel, A. and Carment, D., 167–205 (Lanham: Lexington Books, 2004).

<sup>21</sup> For a series of studies on this subject, see Ricigliano, R. (ed), 'Choosing to Engage: Armed Groups and Peace Processes,' *ACCORD*, no. 16 (2005).

<sup>22</sup> Strazisar, N., 'Rethinking the Concept of Peacebuilding: Bosnia and the Lessons for Kosovo,' in *Southeast European Security: Threats, Responses, Challenges*, ed. Schnabel, A., 213 (New York: Nova Science Publishers, 2001).

<sup>23</sup> ICISS, op. cit.

<sup>24</sup> Ibid.

<sup>25</sup> See also Demjaha, A. and Peci, L., 'Albanian Insurgency Groups in the Balkans,' in Schnabel and Gunaratna, op. cit.

<sup>26</sup> On the dynamics of resource wars, see Collier, P. and Hoeffler, A., 'Greed and Grievance in Civil War,' *Oxford Economic Papers*, vol. 56, no. 4 (2004), 563–595.

<sup>27</sup> See <<http://untreaty.un-org/English/Terrorism.asp>>.

<sup>28</sup> The author thanks Rohan Gunaratna for the following comments on the UN Monitoring Group.

<sup>29</sup> *Patterns of Global Terrorism*, Washington, DC: United States Department of State (annual publication).

<sup>30</sup> See Chesterman, S., 'Shared Secrets: Intelligence and Collective Security', Lowy Institute Paper 10, (Double Bay: Lowy Institute for International Policy, 2006).

<sup>31</sup> For a list of regional conventions on terrorism, see <<http://untreaty.un-org/English/Terrorism.asp>>.

<sup>32</sup> ICISS, op. cit.



## Chapter 5

# Reconstructing the Public Monopoly of Legitimate Force

*Herbert Wulf*

### **Introduction**

Weak countries lack the means to deal effectively with violent conflict. They are not capable of guaranteeing internal security and their instruments to execute the state monopoly of violence are inefficient or – in the case of failed states – incompetent or non-existent. The central argument of this chapter is that the failure or inadequacy of the state to ensure the state monopoly of legitimate force is a central problem of conflict-prone and post-conflict societies. As a consequence, in order to open a path to peace in such societies it is essential to create or restore a monopoly of force that is not limited to the nation–state.<sup>1</sup>

It is claimed, and supported by empirical data, that over the past dozen years, genocides and international crises have declined sharply; internal wars have been in steady decline as has the average number of people killed in conflict.<sup>2</sup> This positive trend correlates to the internationally felt need to intervene in the sovereign domain of a state if its government cannot provide the most basic state functions or if it commits gross violations of human rights. Violent conflicts demand the attention of the international community since failure to address them is risky, both for the people of that country and for international peace and security. International interventions authorised by the United Nations have intensified since the end of the Cold War, increasingly with the moral responsibility and humanitarian concern in mind to save lives and to prevent gross human rights abuses.<sup>3</sup> Yet, the international community intervenes not only for altruistic humanitarian reasons; self-interested political and economic agendas are often hidden behind morally legitimised interventions.

These international interventions suffer from two shortcomings: lack of success in implementation and an absence of democratic legitimacy. Despite many efforts of post-conflict programmes in all corners of the world,

including such diverse countries as Bosnia and Herzegovina, Kosovo, the Former Yugoslav Republic of Macedonia, Haiti, East Timor, Afghanistan, Mozambique, the Democratic Republic of Congo, Liberia and Sierra Leone, the results are often unsatisfactory. Even when UN-mandated peacekeepers intervene on humanitarian grounds, this mandate suffers from a democratic deficit. To be accepted by the population of the country undergoing intervention, such interventions must be legitimate. However, the decisions to intervene, although according to international law and accepted norms, are taken by a highly politicised UN Security Council in which democratic rule, namely the will of the sovereign, is not represented. Stricter criteria are required to avoid the selectivity and arbitrariness of these decisions and to hold the decision-makers accountable. The fact that the executor of the global authority to apply force is not controlled by a legitimised body and operates instead according to the veto of the powerful permanent members of the Security Council de-legitimises its actions. This flaw in global governance is the specific bottleneck and barrier in creating a globally required and democratically legitimised monopoly of force.

The experience of most internationally sponsored reconstruction programmes shows that long-term external engagement is required to establish or re-establish the monopoly of force. However, international programmes are often designed (but also fail) to bring quick results. This chapter questions whether the focus on building primarily state-centric structures is an adequate concept for all post-conflict societies and the only means to overcome their problems.<sup>4</sup> Instead, a monopoly of force which goes beyond the nation-state and also includes the local, regional and global levels is proposed here.

This proposition is grounded on an empirical–analytical observation and a normative–theoretical concept. The empirical–analytical observation recognises that more and more social forces operate across, below, and above the nation-state. Globalisation and localisation, integration and fragmentation have transformed the conditions for the monopoly of force of the nation-state. While ineffective state structures in authoritarian, transforming, war-torn or post-conflict states vary in form, three common characteristics and structural pitfalls are apparent which increase the risks of tensions and the outbreak of violent conflicts:

- the *security* gap, which is the state's inability to execute its most basic function and ensure security by exercising the monopoly of force;
- the *capacity* gap, which is the state's lack of capability to provide the most basic services such as health and education, as well as infrastruc-

ture in key areas such as railways, ports, airports, waterways, mass transit, water and sanitation;

- and, the *legitimacy* gap, which is the state's missing authority to advance basic rights and freedoms, enforce laws and allow for citizens' participation in the political process.<sup>5</sup>

In practical terms it is evident from experience in the major peace-building and reconstruction programmes that security, and with it the legitimate monopoly of force, is a crucial prerequisite to progress.<sup>6</sup>

The normative-theoretical concept is grounded in cosmopolitanism.<sup>7</sup> The cosmopolitan democratic agenda aims at establishing global governance that is based on democratic, elective, participatory principles and a programme to overcome national sovereignty. At the core of this concept is a belief that the present patterns of global processes of regionalisation and localisation are undermining existing national forms of governance and that alternatives need to be found. Governance needs to be expanded across, between, beyond and below the nation-state level. The cosmopolitan concept is attractive since it envisions a step-by-step development and wants to make use of proven democratic mechanisms. Cosmopolitanism strives to transfer the democratic processes of the local and national level to the international level, so that international decisions are no longer grounded in the traditional pattern of political and economic power. The cosmopolitan concept envisages a post-Westphalian global order, a system beyond the nation-state with overlapping authorities entitled to exercise the monopoly of force.

Without in principle questioning the concept of the monopoly of force of the nation-state, new international norms have emerged which require the international community to intervene. It is therefore argued here that while the nation-state is still an important actor in exercising the monopoly of force, neither the UN at the global level, nor authorities at the regional, national or the local level are by themselves adequately equipped to perform an increased role in executing this monopoly. What is called for is conceptual rethinking and a capability reform, creating or buttressing a division of labour at global, regional, national and local levels.

A recent intervening factor, questioning the execution of the monopoly of force, is the privatisation of violence. This chapter will explore the ways in which the privatisation of violence is carried out and how the international community reacts to these challenges, and assess the impact on the monopoly of force. This is followed by an analysis of the dilemmas and challenges posed by privatisation from the perspective of security governance. It will then introduce the model of a multi-level public monopoly of

legitimate force and discuss the challenges, barriers and implications of creating such a public monopoly of force beyond traditional national borders. The chapter concludes by summarising these findings and by articulating several policy recommendations.

### **Privatising and Internationalising Violence**

An analysis of contemporary wars and violent conflict reveals at least two new trends: *First*, the number of armed non-state actors engaged in these conflicts has decidedly increased. Armed non-state actors such as warlords, militias, rebels, para-military groups and gangs engage for political reasons or economic gain in these conflicts. At the same time, governments contract more and more private military companies to assist the regular armed forces in wars with the provision of technical or other services or even, in exceptional cases, for combat operations. *Second*, the international community has progressively tried to counter the outbreak and fighting of wars through concerted efforts, if necessary by military means. For more than three centuries, since the Peace of Westphalia, the monopoly of force was held in Europe by the nation-state, a state with a clearly defined territorial space. This concept of the monopoly of force, which served as a model beyond Europe is now fundamentally questioned for a variety of reasons, including the privatisation and internationalisation of violence.

I distinguish between two types of privatisation of violence. Firstly, the *bottom-up privatisation* in which armed non-state actors spread violence, create insecurity and contribute to the failure of states. Many governments are no longer capable of guaranteeing law and order. Their police and military forces are too weak, too corrupt or unwilling to exercise the rule of law and the state monopoly of force. This type of privatisation offers attractive economic gains for non-state actors. Warlords, for example, fight not primarily for political or territorial control but to make an economic living through continued fighting. They are usually well connected into the world economy (or the shadow economy) by exporting resources like diamonds, tropical wood or drugs. From this income they pay their soldiers, serve their clientele and usually find it easy to buy weapons for their forces.

A second type of *top-down privatisation* is based on the outsourcing of police and military functions, purposely undertaken by a number of governments.<sup>8</sup> Armed forces in many countries have demobilised millions of soldiers since the end of the Cold War. Yet today these forces are increasingly burdened with various deployments in conflict and post-conflict situa-



tions, such as in the Balkans, Africa, Afghanistan and Iraq. The burden on the armed forces leads to outsourcing military functions. The armed forces have consequently come to depend more and more on private military companies for logistic support, training, the repair and maintenance of weapons systems and other military equipment, for the collection of intelligence information, for interrogation of prisoners of war, and for supplying mail, food and clean uniforms. Major corporations are active worldwide in pre-war preparation, in conflict, and in post-conflict reconstruction. At issue is that this development occurs largely outside the control of parliaments and only partially under the control of governments.

Within the concept of internationalisation of armed conflicts I distinguish between two areas which are causally related. There is the general trend in recent years of political decisions to engage in *international interventions*, e.g. military missions of peacekeeping, peace enforcement, peace building or other types of international military or civil-military interventions. As a result, armed forces are operating more and more jointly, as 'Blue Helmets' or within coalitions of the willing or military alliances, which has an effect on the organisation of the military. Such interventions necessitate structural changes within the armed forces. Militaries that were traditionally geared to the nation-state must now orient their structures internationally.

These international interventions suffer from democratic deficits. Lacking legitimacy provides a shaky basis for introducing democratic structures through peacebuilding programmes and are not always desired or accepted by the people of countries subject to such interventions. Legitimacy is the key to stabilising a society and to building peace and creating the conditions for development. However, all external interventions have to cope with the dilemma of a fundamental democratic deficit.<sup>9</sup> Even when interventions and reconstruction programmes are authorised by the United Nations, the decision to intervene is not based on a democratic decision.

Furthermore, decisions in foreign and security policy, despite noticeable constitutional differences in many democracies, seem to be one of the least democratic policy areas, and the control and oversight rights of parliaments are not very advanced. Rules and regulations do exist nationally in many countries, even though they are often insufficient to comply with democratic norms. However, decisions in most international organisations are not taken democratically and rules and regulations are rudimentary or non-existent.<sup>10</sup> Nationally organised armed forces are usually inadequate to prevent or end conflicts in crisis regions. But considerations of prestige and pride, and national political and economic interest, are a barrier to establishing a truly integrated international armed force. The democratic control of

internationalised armed forces is more complex than of national forces. Tasking private military firms complicates the democratic control even more or can make it impossible in certain situations. However, armed forces tasked with international interventions in the name of the defence of human rights, the promotion of democracy and the prevention or ending of war are only credible if they operate on the basis of effective democratic control.

Privatising violence and international peace support missions are part of, and a reaction to, what have become known as the 'new wars'.<sup>11</sup> The two trends of privatisation and internationalisation are closely related. The two forms of privatisation, however, are different in principle, and partly contradictory, since privatisation in violence markets is exercised bottom-up through non-state actors, while outsourcing is a government planned top-down process. In many countries the state's inability to establish internal security or maintain domestic law and order creates the space in which organised crime and warlords can emerge to fill the security vacuum. As a consequence, people who can afford it seek to organise their own security without having to resort to under-funded, incompetent or corrupt state authorities. Private security and protection of property has become a booming market in many urban centres. Some 2,000 private security companies currently operate in Kenya and large sections of the population rely on them. Similarly, it is estimated that security companies in Nigeria employ in excess of 100,000 people; these services have become a major part of the economy to protect residential and commercial areas and especially the oil industry.<sup>12</sup> Those who cannot afford such services either have to live with insecurity or might themselves resort to violence in their fight for survival. Zones of asymmetric security have emerged, or rather zones of insecurity for the poor and zones of relative security provided for people and their wealth by private companies.

Privatisation of violence – a trend which reverses a centuries-old development of disarming of citizens in the process of nation-building – undermines and fundamentally challenges the legitimate monopoly of force. Furthermore, international interventions and the internationalisation of the armed forces have an effect on the monopoly of force as well, since decision-making on intervention and the use of force takes place at the international level. Despite the fact that delegating the monopoly of legitimate force (at least partially) to the private and/or the international sector is pursued consciously, the notion of the monopoly of legitimate force itself, which rests first and foremost on the nation-state, is currently not being systematically re-conceptualised.

A variety of factors has led to outsourcing military tasks to private companies, including the reduction of armed forces, their limited capabilities to cope with ever more high-tech weapons, the intensified demand for interventions and emergency aid, the demands of the 'war on terror' and, last but not least, the dominant concept of the 'lean state'.<sup>13</sup> Given that both the trends to intensified international intervention and to privatisation of violence are here to stay, the question will need to be asked what the future of the state monopoly of force is going to be.

### **Security Governance and Democratic Control of the Monopoly of Force**

The practice of outsourcing military functions is part of the effort to create more efficient armed forces. But this notion also has an inherent danger since a central function of the state, the monopoly of force, could be damaged or endangered.

At the global level the monopoly of force is completely lacking. A generally accepted, globally practiced monopoly of force does not exist and the weakness and impotence of the UN Security Council in the case of the 2003 Iraq invasion is demoralising evidence of this fact. The UN Security Council already has a monopoly to *authorise* the use of force at the global level, although the UN was never given the necessary means – like the capacity to implement sanctions, a police force and armed forces – to exercise this authority. At the global level, a system of a legitimate monopoly of force is possible only, given the continued existence of states, within a system of collective security. This is already reality in embryonic form in as far as the Charter of the UN stipulates that all its members refrain in their international relations from the threat or use of force, except in cases of individual or collective self-defence against external aggression. The prohibition to use force and the authority of the UN to use force, of course, do not constitute a monopoly of force at the global level.

The deployment of private military companies complicates the situation further and is not without tension. Pursuing two at least partially competing principal objectives creates friction. The public good 'security' and the private good 'economic gain' can be in competition with each other or even be contradictory. Therefore, privatising public goods has certain limitations. Private military firms are specialised and offer professional services that are used in wars and violent conflicts. Yet, companies (like states) might be reluctant to engage in providing security or preventing war by military means if there exists too high a risk of losing the companies' assets in such

conflicts. However, the opposite may also be the case and companies' business interests might function as conflict accelerators. The deployment of private companies has a profound impact on how the state monopoly of force is exercised and controlled. An important consideration must be that these companies are currently not accountable to parliament or the public – neither in the country that contracts them nor in the country where they operate. While the government is held accountable by parliament, private companies are responsible only to the shareholder and client. This is precisely the reason why some governments want to make use of private companies. For example in the United States, congressional restrictions on the use of the armed forces in operations like the anti-drug campaign in Colombia, have stimulated government decisions to circumvent such restrictions by contracting private military companies.

Hiring privately organised troops and companies which provide operational support can result in mutual dependencies between client and contractor, and even the danger that conflicts might be deliberately extended in the bilateral interest of such contracts. In such a situation it is not clear which state tasks can be implemented, who decides upon them, and how decisions are taken as to the way in which the monopoly of force (which, strictly speaking, is no longer a monopoly) is carried out. Contractors seem to create their own demand or at least have an influence on the demand for security services, when security is purchased commercially.

The following figure summarises the arguments both for and against the privatisation of military tasks presented in research and the media and by the companies themselves. In all seven categories summarised in this table controversial opinions are raised and contradictory empirical evidence regarding the usefulness or the danger of contracting private military companies is available. The economic results of the private military sector are not entirely convincing. Within the military the deployment of private military firms is controversial while in peacekeeping and humanitarian interventions private military firms have had no real opportunity yet to demonstrate their claimed effectiveness. In international crises, their services are questioned regarding sustainability in ending conflict. Within the military, the question is raised if the superior technology employed by the private sector is really available when needed and governments have reason to worry that disreputable private sector operators might compromise the contracting governments. There seems to be agreement that the existing laws at the international level are insufficient to control these companies and since national laws are lacking in most countries, companies operate in a legal grey zone. Ways in which such regulation may be possible are, however, controversial.

**Table 5.1: Arguments for and against deployment of private military companies**

Area	Pro	Contra
Economics	Companies work more cost- effectively	Evidence for their cost-effectiveness is rather weak Business practices of the companies are not very transparent Real cost of military missions is blurred through outsourcing
Military	Troops can concentrate on core missions Companies are more flexible and are quicker to deploy Synergies between companies and the armed forces are created	Dependency of the military on firms Companies are unreliable on the battle-field The <i>just-in-time</i> method is not suitable for war-fighting Additional tasks for the military to protect contractors
Peacekeeping and humanitarian intervention	Quick reaction of companies in response to crises Quality of UN missions increases Protection of humanitarian actors Caution of deploying national troops	Responsibility of the international community for protection is delegated Dubious firms are legitimised by the UN
International crises	Stabilisation of collapsing states Engaging the private sector in post-conflict reconstruction	Continuation of conflict in the interest of companies Companies might damage the foreign policy of their home country Distinction between civilians and military disappears Companies act as proxies of their government
Technology	Better know-how of companies	Technology is not available in critical situations
Policy	Governments can reduce the presence of their forces by hiring companies	No democratic control of companies States should have to guarantee security Complicated civil-military balance is disturbed
Law	Companies operate under government licence Codes of conduct regulate business practices	Lacking legal regulation of company deployment Hard to prosecute companies and employees for criminal acts or violations of human rights Geneva Convention (combatants/non-combatants) is undermined

Source: Wulf, H. *Internationalizing and Privatizing War and Peace*. (Basingstoke: Palgrave Macmillan, 2005) 63–64.

Given the fact that security governance at the global level exists only in rudimentary form, that a global monopoly of force is lacking and that new, largely unregulated actors engage in international crisis situations, it is no surprise that international interventions, nation-building programmes and re-creation of state institutions are faced with a number of serious problems.

*First:* A fundamental issue is that the existence of central states is taken as given. Obviously, this is not necessarily the case and some conflicts have been exacerbated in the process of state-building.

*Second:* The legitimacy to carry out interventions is weak. Reconstruction programmes are not always desired or accepted by the people of the country experiencing international intervention. Neither are the decisions for an intervention democratically legitimised.

*Third:* Intervention and reconstruction are usually implemented because of humanitarian concerns of the international community. At the same time, however, veiled behind these aims to prevent or end conflict, provide peace and enable development, there is also the ambition of some powerful members of the international community to exert political influence and advance their own economic interests.

*Fourth:* Interventions and reconstruction programmes are often given unclear mandates and suffer from notorious coordination problems involving the external donors. Competition between them leads to failure and waste of scarce resources.

*Fifth:* It is usually the case, almost by definition in situations where reconstruction is undertaken under international auspices, that the local structures are weak. The emphasis on the need for local ownership in the process of transformation of conflict is – conceptually – uncontested.<sup>14</sup> But what happens when theory meets reality? Often, international donors, both governments and NGOs, violate this supposedly guiding principle of local ownership.

*Sixth:* International donors often treat peace-threatening crises as short-term problems which have to be solved as soon as possible. While this is understandable considering the humanitarian consequences of inaction, experience in many post-conflict societies has proved that the conflicts have deep-rooted causes which do not disappear quickly.

The fundamental nature of these difficulties leads to the conclusion that there are no easy solutions. Looking at the various experiences in peace-keeping, conflict resolution, post-conflict reconstruction and state-building, a common feature in all of these cases is the lack of a legitimate monopoly of

force. It is assumed therefore, that the nation–state focus is too narrow to establish or re-establish such a monopoly.

### **The Need for a Multi-level Public Monopoly of Force**

#### *Globalisation and the Erosion of the Nation–State*

The concept of the state monopoly of force entails the elimination of private armies and the disarmament of other armed non-state actors who want to take the law into their own hands. However, this notion is challenged in many parts of the world, primarily by bottom–up privatisation, but it is questioned also by top–down privatisation. While the internationally accepted norm of a state guarantee for the public good of ‘security’ still exists, its implementation in reality is at present not possible.

The state monopoly of force is also challenged by another development. The idea of the undisputed national entity no longer exists as national boundaries have been increasingly broken down or lowered due to the general trend of globalisation. Many actors today operate outside the boundaries dictated by the logic of territoriality. Economics, politics and culture are increasingly de-nationalised.<sup>15</sup> Conceptually and in reality the state is being emptied of some of its functions. A logical consequence of the weakening of the nation–state is the need for multiple layers of authority over the monopoly of force. Such a new agenda breaks with conventional accounts of the monopoly of force concept in which the nation–state is conceived as the sole appropriate agent.

The Westphalian ideal presupposes a world with sharply drawn borders demarcating distinct, territorial jurisdictions administered in relative isolation from other sovereign actors. This perfect model has never fully materialised. In today’s world cross-cutting and intersecting grids at the local, state, regional, and global levels have emerged.<sup>16</sup> As a result of increasing interdependence and globalisation, the nation–state has lost or transferred part of its sovereignty to other entities: from the top (supra-national or multilateral organisations as well as private actors like companies and NGOs) and down to lower levels (such as local and district associations). However, at the same time, there was also a re-nationalisation process visible in many post-communist countries which had to restructure state institutions and build domestic capacity, and in certain cases build state institutions from scratch.

At the global level, the dominant role of the nation–state is challenged both conceptually through global governance and institutionally through the ever-increasing number of multilateral regimes. Regionally, probably with the exception of the EU, there are only weak signs of state sovereignty functions being delegated to regional bodies. The picture is different below the state level: in many regions of the world, local constituencies and traditional authorities within federalist structures are authorised to exercise public regulatory functions. There is a trend towards a multiplicity of authority among public institutions and more and more functional areas that were previously part of state functions are taken over by private citizens and private organisations.

#### *The Model of a Multi-level Monopoly of Force*

The reconstruction of the monopoly of force is not just about re-establishing a central *state* monopoly of force. A more holistic approach is necessary to establish rules and regulations for the use of force. It is proposed here that the concept of global governance and the establishment and enforcement of international norms require a *public monopoly of force* at all levels of governance – at the local, national, regional and global levels. A segmented, but carefully crafted public monopoly of force with a clear division of labour should be based on at least the following four levels of authority:

- the *local* level, with federalist structures or other traditional forms of shared authority, which offers proven forms of regulating violence with the inclusion of ‘zones of peace’ and ‘islands of civility’;
- the *national* level, with credible and accountable institutions of organised force and good governance;
- the *regional* or sub-regional level, with regional organisations engaged in providing security and facilitating peace beyond the various national boundaries; and
- the *global* level, through the United Nations, with accepted international principles and agreed norms and with a legitimate authority to intervene for the protection of people.

The intention of proposing such a model is to overcome the narrow Westphalian-type territorial fence, the national space. Given the globalised world, with porous or non-existent national borders, with failing or collapsed states and with asymmetric zones of insecurity, the future lies not necessarily in the re-establishment of a nation–state monopoly, but rather in a multi-



level public monopoly of force. Such a multi-level legitimate public monopoly comes closer to the present reality of the international system since it addresses the different levels of political decision-making.

Besides the daunting practical difficulties, such a system is faced with two conceptual problems: First, how shall the four different levels be legitimised, given the acute deficit in democratic processes at all four levels? Second, how must authority be apportioned at the different levels to avoid disputed sovereignties, and how can cooperation and a division of labour between these segmented authorities function?

A multi-level monopoly is, precisely speaking, an oligopoly since the powers of a monopoly need to be shared between authorities. Oligopolies are faced with the prospect of competition and conflict. When one authority encroaches on another, this necessarily means a loss of authority for one actor and gain for another. To create the suggested multi-level public monopoly of force as an efficient and functional instrument, and avoid a ruinous zero-sum game, a set of agreed rules is a precondition. Only if the system functions is there a chance to move from the present situation of the breakdown of the monopoly of force in many parts of the world to establishing a legitimate public monopoly of force.

Cosmopolitanism could provide a normative framework. Cosmopolitanism emphasises diversity and multiculturalism; it is centred on the idea of collective human security and a wide spectrum of cross-cultural understanding to resolve conflict and sustain peace non-violently.<sup>17</sup> The introduction of a multi-level public monopoly of force would imply creating a normative and institutional framework of world order in which authority is not simply imposed from the top.<sup>18</sup>

Two crucial functional principles (graphically illustrated by the Table below) should provide the basis. First, the monopoly of force should be exercised according to the *subsidiarity principle*. In a bottom-up approach the lowest level should be the starting point and only when the local level is not capable or cannot be tasked with exercising the monopoly of force should the next level up be entrusted with this mission. This concept is, for example, exercised in many federal states where a federal authority (or even local community) executes policing functions. The central state (the nation-state) will only become involved if the task goes beyond the local level or if the instruments of legitimised organised violence at that level prove to be incompetent or inadequate. If the nation-state level is ill-equipped or incapable of exercising the monopoly of force, the regional organisation would be tasked, for example, with preventing trafficking in humans, drugs or weap-

ons. This would leave the UN as the highest authority to ensure peace and security only as a last resort.

The second principle is based on *supremacy*, on a hierarchy of authority. Norm-setting takes place as a top-down process. International norms prevail over regional, regional over national and national over local levels. The UN has higher authority than regional organisations, the region is placed higher than the national level and the national level has prevalence over the local level. Given the realities of conflict-prone and war-torn societies, not all four levels will actually be functional, but the multi-level approach is designed precisely for such situations where one of the four levels is lacking or incompetent, namely, to compensate for the partial or prevent the complete breakdown of the monopoly of force.

**Table 5.2: Establishing the multi-level monopoly of force**

Subsidiarity principle: bottom-up ↑	Monopoly of force  Global Regional National Local	Supremacy principle: top-down ↓
Implementing the monopoly of force		Norm setting

Conceptually, the division of labour along the lines of subsidiarity and the supremacy principles is clear. In practice, however, tensions over exercising the authority are foreseeable. This model, however, suggests a method to include bottom-up concerns rather than pursue an ‘OECD-country-club’ approach which has experienced insurmountable difficulties in practice. The suggested model is of course not easy to implement. All of the four levels experience shortcomings. The local level in many societies is haunted by corruption, dominated by criminal networks and suffers from weak public institutions; a functioning civil society is often non-existent. The central state level, although usually still considered as the most important agent in exercising the monopoly of force, is at present incapable in many countries. Regional organisations are often too inept to perform their missions, not just because of a lack of capabilities but more so because of deep-rooted political differences amongst their members and the unwillingness of most states to devolve sovereignty functions to the regional body. Although they are recognised as potentially important actors in maintaining peace, conceptually

they are somewhat overlooked in the emphasis on the UN as the highest authority and the nation–state with its still important feature of state sovereignty.

At the global level, the UN's activities are often heavily biased and contested. International norms are often selectively applied because the double standards of members prevail. Conflict regions are not only assisted with crisis prevention programmes but all too often they are at the same time at the mercy of the dominant intervening powers.

The suggested multi-level public monopoly of force would be difficult to implement, and pitfalls and shortcomings at each of the four levels could be enumerated. However, in many circumstances where security is lacking, a holistic approach would offer solutions to problems commonly encountered in currently prevailing approaches. The weakness at one level (for example at the national level) could be compensated for by the level below (at the local level) or above (the regional level). Compared to the present difficulties in implementing international post-conflict programmes, this multi-level public monopoly of force promises to tackle the root causes of some of the difficulties of weak states.

#### *Implementing the Multi-Level Public Monopoly of Force*

Establishing the suggested multi-level public monopoly of force requires an institutionalised division of power between the different levels.

*The local level – federalism and traditional conflict resolution mechanism:* The relationship between the local level and a central government can best be described as a federal system. Federalism is considered to be a seed-bed of democracy, as it allows for more participation and accountability, stimulates civil society, adds channels of access for political participation, broadens sources of legitimacy, widens citizenship by institutionalising multi-ethnicity and provides for sub-national competition, thus stimulating local self-governance, innovation and efficiency. However, federalism can also preserve sub-national authoritarianism, promote rule along ethnic instead of democratic lines, foster regional disparities, undermine the rule of law, and facilitate the rise of demagogues rather than encouraging democracy.<sup>19</sup> The closeness of local leaders to the local space and their knowledge of traditional conflict regulation are likely to promote realistic, bottom–up decisions. Their familiarity with the history and root causes of a conflict in their region facilitates their role in mediating between belligerent groups and allows the various stakeholders to participate in solving problems.<sup>20</sup> Even

war-torn societies are also populated by citizens who form ‘zones of peace’ and ‘islands of civility’.

*The national level – institution-building:* Notwithstanding the intensification of globalisation, the quest for global governance, international norm building and the growth of global civil society, the international political sphere remains decidedly state-centric – even though its importance is gradually diminishing. But, at the same time, many states are unable to fulfil their security and governance function effectively. To properly establish and control the agents of the state monopoly of force, a legitimised government with functioning state institutions is required. It is an extremely difficult task to democratise a society and build effective state institutions where democracy has no tradition and where state institutions scarcely exist.

*The regional level – increasing responsibility and capacity:* Regional organisations should have an immediate interest in promoting peace since civil wars normally affect neighbouring countries through spill-over and destabilisation. The experiences in Europe and Asia have facilitated the prospects for a more active and expanded responsibility of regional organisations. The United Nations has continued to emphasise since the 1990s the special importance of regional organisations in promoting and facilitating peace and stability within their respective regions.<sup>21</sup>

In reality, however, most regional organisations have no convincing record of peace missions to justify such expectations. Given their present structure, institutions such as the African Union (AU), the Organisation of American States (OAS), the European Union (EU), the Association of SouthEast Asian Nations (ASEAN), the Organisation for Security and Cooperation in Europe (OSCE), Organisation of the Islamic Conference (OIC) and others are not in a position to apply the monopoly of force effectively. Regional organisations suffer from four weaknesses which need to be overcome in order to establish a functional multi-level monopoly of force: contested sovereignty and a lack of delegating traditional nation–state authority to a regional body; overlapping responsibilities and competition among regional organisations; fundamental political differences and lack of common values which lead to inaction; a lack of capacity to execute sanctions or to project force.

*The global level – norm setting and global governance:* The functioning of the international system, and with it the multi-level monopoly of force, depends on the enhancement of international norms. The UN is a hybrid system of an intergovernmental organisation not operating according to democratic rules and at the same time acting as the conscience of the international community and the highest authority on questions of war and peace.

This inherent tension makes it an organisation in need of reform. However, despite these organisational and conceptual insufficiencies and despite the gap between theory and practice of international norms, there is no realistic alternative to the UN.

The prohibition against the use of force, enshrined in the Charter of the UN, of course, is a different matter from a monopoly of force at the global level. In theory, UN members enjoy an inherent right to individual or collective self-defence under international law. As is well known, the practice of collective self-defence is different. It is not the provisions and obligations of international law but rather political opportunity and power politics that are the decisive criteria for intervention. Thus, the concept of a responsible 'international community' is still far from being a reality. The lack of global governance is the specific bottleneck and barrier in creating the globally required and democratically legitimised monopoly of force.

## **Conclusions**

Practical experience from recent peacekeeping missions and post-conflict reconstruction programmes have underlined that the failure or inadequacy of the state to ensure the monopoly of legitimate force is a central problem in societies haunted by violent conflict and wars. Both security and democratic deficits need to be addressed in order to find alternatives to the destabilising situation in many societies at present. Experience in recent years illustrates the pivotal role that the international community places on building strong state-centric structures at a time of globalisation when typical state functions are de-nationalised and the role of the nation-state diminishes. Interestingly, concepts of state-building and nation-building have re-emerged now, though the increase of global threats as well as intra-state violent conflicts and wars make concepts of national security appear outdated.

A recently emerged and strengthened intervening factor of importance is the privatisation of violence. Armed non-state actors have contributed to insecurity and intensification of conflicts. At the same time the use of private military and security companies in wars and conflicts has increased dramatically. The privatisation of violence is a trend of great concern since it questions the idea of security being a public good and transforms it into a commercial and marketable product. Military resources are now offered on a contract basis in the global market. Experts for almost any military job wait to be called. Economic power can now be more quickly transformed into military power than in the past.

As a consequence of the weakening of the nation–state, a broader based monopoly of force is required to facilitate the stabilisation of societies. The governance tasks are too complex for single nation–states to handle, especially those states that are in crisis or have emerged from conflict.

Three politico–legal areas of great importance for the future development of peace and security and the regulation of force need to be considered:

*First:* the regulation and the strict legal control of private military companies to overcome the legal grey zone in which they currently operate. The regulation of companies can be addressed at different levels, ranging from a reformed Geneva Convention, to registration and licensing of companies, as is done for example in arms export regulation, to international transparency and verification methods.<sup>22</sup> To ensure a public monopoly of force, steps need to be taken to improve regulation of the private security and military companies at the international and global level. The established and endangered monopoly of force must be reformed in order not to leave the internationalisation and privatisation of war and peace to market forces or uncontrolled non-state actors.

*Second:* overcoming the democratic deficit. At the national level parliaments can use their legislative function and budgetary powers as an important and effective instrument to strengthen their role in influencing or preventing executive decisions. While this is not uncommon with regard to the deployment of troops, contracts with military firms and the deployment of contract personnel is hardly on their agenda. However, the established, albeit often inadequate, control mechanisms at the national level are more complicated when international missions are involved. Although the UN organisation can operate out of humanitarian concerns and moral obligations and intervenes on the basis of international law and emerging norms, it suffers from a democratic deficit and power politics which are due to its structure as an intergovernmental organisation.

*Third:* overcoming the security deficit and reforming the state monopoly of force. Reconstructing the monopoly of force should not be geared primarily to creating or re-establishing efficient institutions at the level of the nation–state. This chapter proposes a carefully crafted division of labour in exercising the monopoly of force at the global (UN), regional (regional organisations), nation–state and local level. This proposal is made both because of practical experiences with a reduced nation–state function and an increased role of the UN as well as on the basis of conceptual considerations to establish democratically legitimised interventions. Probably the weakest factor in this multi-level approach is the regional level because of continued political disagreement over state sovereignty, overlapping responsibilities of

regional organisations, political differences within the regional organisations and a severe lack of capacities.

One might dismiss the proposal of a multi-level monopoly of force as unrealistic and utopian. Yet the present fundamental assault on the Westphalian nation–state system is so far-reaching that alternatives need to be considered. This has been recognised de facto by the creation of transitional administrations or UN protectorates, but conceptually, peacebuilding is still considered as a hopefully short-term transition to establishing a functioning nation–state. The proposed multi-level monopoly of force does not require more military force; on the contrary: if the suggested authorities at the various levels are to provide security to the people who need it, less militarised conflict solutions seem desirable.

## Notes

- <sup>1</sup> This chapter is based on recently published research by the author. Wulf, H. *Internationalizing and Privatizing War and Peace*. (Basingstoke: Palgrave Macmillan, 2005). The concept of a public monopoly of force has been further developed by the author in an occasional paper for DCAF. Wulf, H. 'Good Governance Beyond Borders: Creating a Multi-level Public Monopoly of Legitimate Force'. *DCAF Occasional Paper*, no.10 (2006).
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- <sup>3</sup> 'A More Secure World: Our Shared Responsibility'. New York: Report of the High-level Panel on Threats, Challenges and Change (2004).
- <sup>4</sup> For the different terms of institution-, state- or nation-building, peacekeeping, peace enforcement or peace building, reconstruction or post-conflict programmes, see Hänggi, H. 'Approaching Peacebuilding from a Security Governance Perspective' in A. Bryden and H. Hänggi (eds), *Security Governance in Post-Conflict Peacebuilding* (Münster: Lit Verlag, 2005) 3–19.
- <sup>5</sup> Commission on Weak States and US National Security. 2004. 'On the Brink: Weak States and US National Security'. Washington, DC: Center for Global Development. URL: <[http://www.cgdev.org/doc/books/weakstates/Full\\_Report.pdf](http://www.cgdev.org/doc/books/weakstates/Full_Report.pdf)>
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- <sup>7</sup> McGrew, A. 'Democracy Beyond Borders?'. In Held, D. and McGrew, A. (eds) *The Global Transformations Reader* (Cambridge: Polity Press, 2000) 405–419. Held, D. *Democracy and the Global Order* (Cambridge: Polity Press, 1995).
- <sup>8</sup> The terms bottom–up and top–down are used by Mandel, R. 'The Privatization of Security', *Armed Forces & Society*, vol. 28, no. 1 (Fall, 2001), 129–151. Privatization of

police functions, although an important development in many countries, is not the focus of this chapter.

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- <sup>10</sup> Born, H. and Hänggi, H. (Eds.) *The 'Double Democratic Deficit'*. (Aldershot: Ashgate, 2004). Ku, C. and Jacobson, H.K. (eds) *Democratic Accountability and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003).
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<<http://users.aber.ac.uk/rbh/privatesecurity/country%20report-nigeria.pdf>> Abrahamsen, R., and Williams, M.C. 'The Globalization of Private Security. Country Report: Kenya'.  
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- <sup>13</sup> For details of the different motives see Wulf, H. *Internationalizing and Privatizing War and Peace*, op. cit.
- <sup>14</sup> Caparini, M. 'Enabling Civil Society in Security Sector Reconstruction' in Bryden, A. and Hänggi, H. (eds) *Security Governance in Post-Conflict Peacebuilding* (Münster: Lit Verlag, 2005) 69–91.
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- <sup>18</sup> Mason, A. C. op. cit., p.48.
- <sup>19</sup> Mehler, A. 'Dezentralisierung, Machtteilung und Krisenprävention'. In Debiel, T. (ed). *Der zerbrechliche Frieden* (Bonn: Dietz Verlag, 2002) 121–140.
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- <sup>21</sup> United Nations General Assembly. 'Prevention of Armed Conflict. Report of the Secretary-General'. A/55/985 and S/2001/574, 7 June, 2001. New York, p.31
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## **PART III**

# **REGIONAL AND NATIONAL PERSPECTIVES**



## Chapter 6

# Bulgaria's Private Security Industry

*Philip Gounev*

### **Introduction**

This chapter examines the transformation of the private security industry in Bulgaria.<sup>1</sup> The case of Bulgaria is of special interest for several reasons. First, it highlights a wide range of problems posed by the transformation of the private security industry between 1990–2006. These include corruption, organised crime, and a lack of capacity at the state level which has hampered oversight of the industry. Secondly, security privatisation has reached such profound proportions that about nine percent of all employed males in Bulgaria are now engaged in a private security-related activity. Thirdly, for most of the 1990s the private security companies (PSCs), particularly those involved in racketeering, were part of the public and political life to such an extent that numerous media reports and surveys provide valuable opportunities to examine the Bulgarian case. Therefore, the Bulgarian experience provides an important opportunity to identify ‘lessons learned’ that may be of benefit for other transition countries with active private security sectors.

The central argument put forward in this chapter is that effective regulation of the private security industry depends on a range of factors linked to security governance including issues of resources, organised crime, and corruption. Understanding the underlying factors that contributed to the establishment and transformation of the private security industry is important for several reasons. First, it demonstrates the limitations of ‘best practices’ modelled on developed countries. Second, it suggests that looking at PSCs strictly from a security perspective might not be sufficient; also needed is an understanding of broader issues including the role of the judiciary, the informal economy, criminality and the broader framework of government capacities. Finally, considering the factors that undermine PSC regulation suggests that privatisation should be approached differently in countries in transition in comparison to developed countries.

This chapter lays out chronologically the development of the private security industry from 1990 to 2006, while highlighting its effect on state and human security. It analyses the challenges faced by Bulgaria and the factors that contributed to the transformation of the private security sector from the perspective of security governance. The chapter concludes with a number of policy recommendations drawn from this analysis.

### **The Emergence of Privatised Security**

The recent history of PSCs in Bulgaria provides an experience quite different from many other countries not only in the EU but also in Eastern Europe. For much of the 1990s Bulgarian organised criminal groups, and the PSCs they controlled, were powerful enough to influence not only politics but the life of the average citizen. The names of the main PSCs were well known and became synonymous with crime, extortion, violence and fear. Fresh memories of these experiences have made Bulgarian society's perceptions of PSCs quite different to that of many Europeans.

During the early 1990s extensive lay-offs within the police and the military left tens of thousands of former security officers unemployed. The army was downsized from 150,000 in 1989 to 39,000 in 2001. The police force was also reduced as State Security (the former secret police) was disbanded and along with it close to 30,000 police and security officers were laid off. There were several possible career paths for laid-off law-enforcement and military officers. Some used their connections to start businesses; many of those established private security companies. Others used their relations with the underworld to become involved in criminal activities.

Three periods are discussed below in terms of the history of Bulgaria's PSCs. In the early 1990s, many professional athletes were left without jobs. Secondary boarding schools, specialised in training of professional athletes, could not offer employment prospects to their graduates. These schools became the breeding ground for a new criminal class in Bulgaria, which includes many of the present-day underworld bosses as well as many of the country's nouveaux riches. They facilitated the establishment of a social network of young, aggressive men with connections to security services (as the two main sports clubs in the country were established under the auspices of the police and the army). Some started their careers in Central Europe, engaging in auto theft, currency fraud or pimping, while others remained in Bulgaria, specialising in robbery, prostitution rings and protection

rackets targeting fledgling businesses. They also provided protection for street gangs against the police or rival criminal groups.<sup>2</sup>

### *The Violent Period*

The first private security companies were founded in late 1991 after an internal decision to relinquish the state monopoly on force in order to meet the needs of unemployed professional athletes and laid-off security officers.<sup>3</sup> At that time no legal provision regulated private security activities in any way.<sup>4</sup> On the one hand this change created the opportunity for laid-off military and law-enforcement officers to apply their skills in the private sector. Many of them took up this opportunity. Some of the largest present-day PSCs were started by such individuals in that period (1991–1994).<sup>5</sup> On the other hand, criminal groups drawn from former wrestlers, boxers and martial arts experts grasped this opportunity to put a legal face on their activities.<sup>6</sup> This second group of PSCs continued to be involved in racketeering, particularly of the retail and hospitality industries. Agricultural markets and tourist resorts around the country began to be controlled by different groups, with significant effects on the national economy – bankrupting companies unwilling to give in to racketeering, distorting competition, fixing prices at high levels, and concentrating resources within preferred companies.

These conditions differ from those in other countries in the region. Former Yugoslav countries, such as Macedonia or Serbia, maintained high numbers of military and police personnel for most of the 1990s due to the ongoing conflicts in the region. Organised criminal groups there engaged primarily in trafficking and smuggling activities. In Romania and Hungary, even though the military and police personnel were gradually reduced, the state maintained a strong hold on security for most of the 1990s, keeping crime under control and the criminal justice systems were much more efficient than in Bulgaria.<sup>7</sup> In addition, all of these countries lacked the social network of criminalised athletes that created the backbone of PSCs engaged in protection rackets. Closer to the Bulgarian example is the case of Russia, where rampant crime and the state's inability to provide security to businesses created strong demand for private security provision.<sup>8</sup> As in Bulgaria, the founders of many of the most prominent Russian criminal groups were former athletes with state boarding school backgrounds.<sup>9</sup>

During this initial period there were at least four sources of demand for private security services in Bulgaria. First and foremost, the weak judicial and law-enforcement systems led to a pervasive sense of impunity. The absence of effective enforcement presented new opportunities for organized

criminal groups to extort money and prey on small businesses. During that period the criminal justice system had practically come to a halt. In 1993, for instance, the courts convicted three times fewer individuals than in 1989<sup>10</sup> while the crime rate more than doubled.<sup>11</sup>

On the other hand, with transformation of the economy only slowly starting to take place, there were no adequate mechanisms for debt collection and almost all PSCs carried out this function through intimidation and violence. The scale of the grey economy during most of the 1990s approached 40 percent of the gross domestic product (GDP).<sup>12</sup> As Frye has argued in his research on Poland and Russia, businesses within the grey economy do not have access to official law enforcement mechanisms and therefore rely on private protection.<sup>13</sup> In addition, the downsizing of the police force left unguarded many sites which still needed protection. These included large state-owned enterprises, government and municipal buildings, hundreds of military warehouses, sea and river ports. Finally, the increase in crime, particularly racketeering, created further demand for private protection.

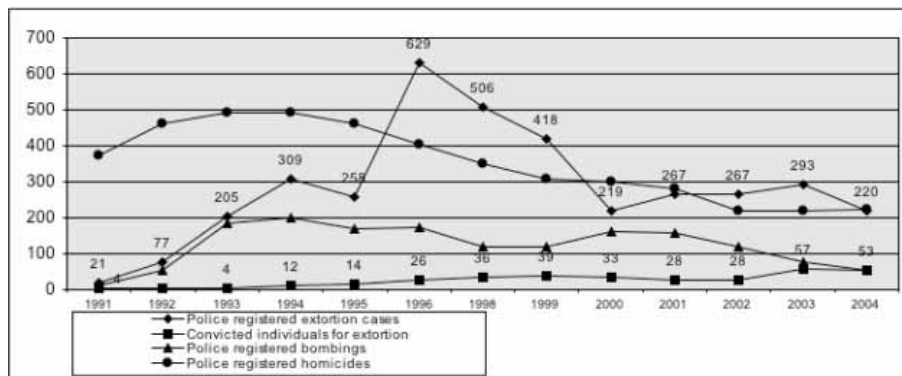
The lack of government control and regulation of PSCs instilled an increasing sense of insecurity among businesses and citizens. Intimidation tactics involved beatings, mutilations, bombings and murders (see Graph 6.1), which reached record-high levels in 1994. PSCs owned by athletes racketeered entertainment establishments, retail establishments and restaurants, smaller offices, and hotels in sea-side resorts. PSCs founded by former security officers tended to insert themselves into a legitimate niche market created as a result of the reduced state-provided protection of large state-owned enterprises, banks or infrastructure (ports, sports facilities, schools, etc.).

Due to the staggering scale of racketeering and the impunity of those involved, very few people saw a reason to report such incidents to the police. Graph 6.1 shows that protection rackets peaked in 1993–1994, illustrated by the record high levels of bombings and murders in these years. At the same time registered racketeering cases numbered only a few hundred per year and less than a dozen individuals were sentenced, highlighting the large number of unreported racketeering incidents.

It was at the height of this crisis that the government took the first steps towards regulating the PSCs, by adopting in March 1994 *Ordinance №14 for the Issuance of Permits for Guarding of Sites and Private Individuals by Physical and Legal Persons*.<sup>14</sup> This ordinance mandated that a PSC could not be registered if one of the owners or its employees had criminal records, were under investigation, or had not paid taxes. The law left significant discretion to local Area Police Departments (APDs) to decide on which

PSCs to register. Since practically all the owners of PSCs involved in racketeering had criminal records or were under investigation, the law was used to force the closure of such PSCs.

Graph 6.1. Racketeering and Violence in Bulgaria



Sources: Ministry of Interior; National Statistics Institute

#### *From Protection to Insurance Rackets*

The new law marked the beginning of the second period (1994–1998) in the history of Bulgarian PSCs. The closure of notorious companies such as *VIS-1* or *Club 777* had an unexpected, negative effect that led to the widening of the influence of organised criminal groups. In response to losing their legal status the owners of the banned PSCs transformed their businesses into insurance companies. Thus, for example, the owners of *VIS-1* registered an insurance company *VIS-2* and *Club 777* was transformed into *Sila*. Some former security officers, particularly from the Ministry of the Interior's Anti-terrorist Unit, already involved in criminal activities, saw this as a new opportunity to register companies. The re-branded PSCs continued their protection racketeering practices with the main difference being that they changed their legal face from the provision of security to provision of 'insurance'. However, the insurance rackets significantly widened the range of criminal opportunities with insurance forced not only on businesses but also on private individuals' motor vehicles and homes, or government and public institutions.<sup>15</sup>

The two archrivals *VIS-2* and *SIC* each had nationwide coverage. The presence of a sticker of one of the major insurers guaranteed that property would not be damaged or stolen. The sticker acted in effect as static protec-

tion because any attempt to steal or break into insured property that had a *VIS-2* or *SIC* sticker would cause a team of security guards from the insurance company to be sent to recover the object or seek compensation for the inflicted damage. For instance, instead of receiving a payment from their insurance company, insured owners of vehicles that had been stolen were simply given a replacement – usually another stolen vehicle. During this period organised criminal groups became increasingly interested in circumventing the international embargo against the former Yugoslavia and in developing illegal markets (consumer goods and drugs smuggling, prostitution rings, etc.). In addition, the economic crisis of 1996–1997 made racketeering even less profitable, and interest gradually started to shift away from this activity.

In 1997 the new government of Ivan Kostov made a political decision to challenge the violent insurance companies. In April 1997 Interior Minister Bogomil Bonev met with the heads of all the top organised crime-affiliated insurance companies and informed them that they would have to discontinue their racketeering and extortion practices.<sup>16</sup> In July 1998 amendments in the Law on Insurance<sup>17</sup> marked the beginning of a new period. The new provisions specifically banned: (1) insurance companies from performing private security activities (Art.4); (2) PSCs managing or owning insurance companies, whether fully or in part (Art 9.9); (3) actuaries or insurance agencies from being owned, managed, or linked to PSCs (Art.13.3, Art.43.3, Art.43.5, 43v); (4) insurance companies from conducting any activities through legal or private persons that provide private security (Art.31.6); and (5) most importantly, the law banned with immediate effect any insurance companies that had carried out private security activities. Added to this was a requirement for insurance companies to re-register as part of the new requirements with a minimum capital that most criminal insurance companies did not have. In practice these amendments brought about, if not the closure, at least a significant transformation of PSCs turned insurance companies.<sup>18</sup>

### *Attempts at Regulation*

The closure of the insurance companies involved in racketeering marked the beginning of a new period of increasing regulation of PSCs in Bulgaria. In February 1999 a short-lived *Ordinance №39* and the June 2000 *Ordinance 79 on the Conditions and Order for Carrying out Private Security Activities* developed further the PSC legislation. The new legislation was accompanied by stringent enforcement measures. In August 2001 police throughout the country carried out inspection visits on 847 PSCs, 2338 sites with armed



guards and 1079 sites with unarmed guards, reporting that 'dozens of violations' had been identified and given administrative sanctions and 69 had been issued warnings.<sup>19</sup> The regulation of private security activities should be seen in broader perspective, however, as a number of other regulations and laws were being developed simultaneously relating to the use of firearms or transportation of precious cargo.<sup>20</sup>

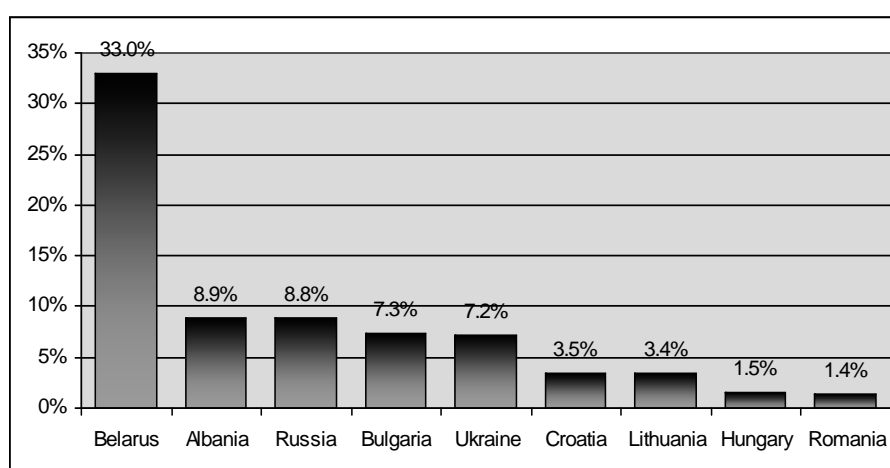
Despite this flurry of legislative and law-enforcement activity, racketeering continued to be relatively widespread. A crime victimisation survey of businesses in Sofia, conducted in 2000 for the United Nations Interregional Institute on Crime and Justice, provides a snapshot of the use of protection rackets.<sup>21</sup> The survey findings indicate that 11.4 percent of businesses stated that protection rackets were either common or very common in their line of business. When asked if they had been racketeered, 7.7 percent of businesses responded positively. For 78.9 percent of them, this had happened less than five times during 1999 but for the rest it was almost a monthly experience. The respondents pointed to 'organised crime groups' (79 percent) and rival businesses (21 percent) as the main perpetrators. The United Nations Interregional Crime and Justice Research Institute (UNICRI) study (see Graph 6.2) shows that at that time the phenomenon of protection rackets was still much more widespread in Bulgaria than most East European countries that had not been part of the former Soviet Union.

The great majority of racketeering, however, remained unreported. Only 7.9 percent of businesses in Sofia responded that they had reported all instances of racketeering to the police during 1999. The main reason for the lack of reporting was fear of reprisals (63 percent). Two other reasons mentioned were that the police were not interested (40 percent) and were unlikely to be able to help (23 percent). It is probable that at the height of the racketeering boom (1993–1995) an even greater share of the crimes remained unreported. Under pressure to meet requirements for Bulgarian membership of the EU and NATO, by 1999 the criminal justice system was more functional and the courts convicted **four times** more individuals than they did in 1993 (from 6,935 to 29,391).

The most significant step towards regulation of the PSCs was the acceptance in 2004 of the *Law on Private Guarding Activities*.<sup>22</sup> The official rationale of the law was that it meant to bring Bulgarian legislation regulating PSCs up to the standard of the best European practice, particularly that of the Scandinavian countries.<sup>23</sup> The law strengthened the definitions of private security activities and introduced an obligation for all PSC employees to attend a six-day training programme. The new law mandated that the private security activity licence did not have a time limit (unlike the previous three-

year limitation) and that all PSCs had to register under the law. From a business standpoint this latter development was positive as it reduced significantly the bureaucratic process. The removal of limits on licences also had a positive effect by allowing the police to focus on monitoring or controlling PSCs rather than administrative issues related to the renewal of licences. Added to this were explicit limitations on the use of automatic weapons by PSC personnel.

Graph 6.2. Have you been asked money for protection? (only capital cities)



Source: UNICRI<sup>24</sup>

### Security Governance and the Private Security Business in Bulgaria

The factors driving the transformation of PSC regulation in Bulgaria have changed over the years, ranging from the state's own desire to exert some level of control over the means of force, to external (NATO or EU) pressures to deal with organised crime. The initiative behind the most recent regulatory effort (the *Law on Private Guarding Activity*) could to a large extent be attributed to the PSC industry itself, which recognised the need for a well-regulated relationship with the police, clear rules in the security services market, and as little bureaucratic muddle as possible. NATO and the EU have played no particular role in shaping the present regulatory framework or practices but were instrumental in intensifying the political will to crack down on organised crime-related PSCs in the late 1990s. Civil society or-

ganisations and communities have not taken a particular interest in this issue, which is reflected in the present *Law on Private Guarding Activity*, where there are no provisions or institutional platforms that allow for civilian control or complaints mechanisms.

The present *Law on Private Guarding Activities* leaves oversight of the private security industry entirely to the police and the Ministry of the Interior, from granting and revocation of licenses, to control over the use of firearms and administrative sanctioning of irregularities. No provisions are made for oversight by local government, the National Parliament or other government authorities. The judiciary only becomes involved in resolving disputes between the PSCs and the police or other plaintiffs. A trade union of private security guards was only established in September 2005<sup>25</sup> and has yet to have any effect. In addition, five different associations of PSCs sprung up involving the majority of PSCs.<sup>26</sup> These first steps towards self-regulation included the establishment of a common code of ethics, and working towards improving the public image and trust in PSCs. However, despite the establishment of common standards, there is no oversight or monitoring mechanism that allows such associations to adequately enforce their ethics codes.

### *Oversight Capacity*

Being the only institution responsible for overseeing the private security industry, the interior ministry faces a number of challenges. The government has allocated few additional resources to overseeing the private security industry. The licensing work was simply added to the tasks of local police departments without adding staff specifically involved with licensing and oversight. Control is carried out mostly on an ad hoc basis and an indication of the lack of proper resource management is the incomplete knowledge of the Ministry of the Interior of the size of the private security industry; the ministry has officially stated on various occasions that there are around 130,000 guards working in private security companies in Bulgaria.<sup>27</sup> A 2005 survey of businesses revealed, however, that in fact there were only around 54,000 security guards working for PSCs, while the rest (around 70,000) were employed in in-house security teams. Data presented by the National Statistical Institute (NSI) also indicate that security companies at the end of 2004 employed some 42,733 personnel. One possible explanation for the discrepancy between the NSI and the survey figures is that a significant number of PSC guards work without contract and are paid 'under the table'.<sup>28</sup> In addition, since most PSCs employ guards who are equipped with

their own personal firearms, the MoI does not have a clear picture of the number of firearms possessed by PSCs and in-house security teams.

Two recent incidents further highlight existing difficulties in controlling the large private security sector in Bulgaria. On 23 November 2005, the citizens of the village of Gabra (near Sofia) staged a protest against the decision of the Sofia municipality to use an abandoned local mine for depositing the city's garbage. The protesters clashed with about 50 private security guards that the mine owner had hired from a number of different PSCs. Ten protesters were injured. The police detained 34 guards and found that none of them had the right to guard the mine and that 13 of them had criminal records. During the police investigation all guards declared that they happened to be walking around the mine and had not been hired.<sup>29</sup> And in the end no PSC was sanctioned. This case illustrates the readiness of some PSC guards to break the law as well as the problems with the current *Law on Private Guarding Activity* that allows individuals with criminal records to become guards.<sup>30</sup>

In another case, the private guards of a wealthy land-owner who had illegally taken over public forest lands attacked two forest rangers, beating and robbing them of their arms and ammunition. Three hundred local inhabitants signed a letter to the MoI and the Ministry of Forestry and Agriculture protesting against lawlessness and the inability of police to control the security guards, who regularly abused the local population and patrolled the region on horses with automatic weapons, wearing bullet-proof vests and masks.<sup>31</sup>

### *Crime and PSCs*

A more detailed illustration of the lingering challenges in overseeing the private security industry is presented in an analysis of PSC involvement in racketeering or illegal dispute settlement. During the past six years such influence has subsided. In the 2005 business crime victims survey, only 1.3 percent of the respondents indicated that they had been asked for protection money during 2005 – a significant reduction from the 2000 level of 7.3 percent.<sup>32</sup> Overall, however, 8.8 percent of the companies had been victims of a range of threats and extortion (protection money being only one aspect of it). Generally, small companies with fewer than 10 employees were up to five times more likely to fall victim to such crimes than companies with over 100 employees. In only 7 percent of cases though were PSCs directly blamed as the perpetrators of such threats and extortion. In the other cases, local organised crime groups (33 percent) and competition (26 percent) were named as

the main culprits. Nevertheless, the data suggests that some PSCs remain involved in criminal activities. The levels of reporting threats and racketeering to the police were still low – 70 percent were not reported – but 22 percent had reported such crime, which is a clear increase from the earlier figure of 7.9 percent. However, this is significantly lower than other types of crimes that generally have reporting rates of over 50 percent.

In 2005 the key reasons for not reporting incidents to the police were the perception that the police cannot do anything about it (31 percent), and that this is a problem that has nothing to do with the police (31 percent). One key difference with the 2000 survey's reasons for not reporting is the issue of reprisals; while in 2005 only 21 percent mentioned this as a reason for not reporting, in 2000 63.3 percent mentioned it as a reason. This indicates changing patterns of action by the perpetrators and decreased levels of violence by PSCs. This supports the more general observation that organised crime in Bulgaria has gone through a period of a high level of violence in the early 1990s towards reduced levels of violence and, as discussed in the following section, its substitution by corruption as a tool to achieve its goals.<sup>33</sup>

### *Corruption and Conflicts of Interest*

A major gap in the present legislation is the lack of sufficient checks and balances to ensure adequate measures against corruption. This encompasses a broad range of issues concerning both public administration and the private sector.<sup>34</sup> There are various ways in which corruption has affected the oversight of PSC services. Some of the problems stem from the close relations between the police and the former military or police-turned-PSC-owners. Other issues are more systemic and are related to the more general problem of corruption in Bulgaria.

The most widespread aspect of corruption relates to the issue of public procurement contracts. In 2003, 54 percent of all companies (not only PSCs) in Bulgaria admitted to having paid bribes to obtain a public procurement contract. In 2005 the share fell to 35 percent.<sup>35</sup> There is no reason to believe that private security companies were in any way an exception to such practices. Such levels of corruption, though, take on an entirely different meaning when concerning public procurement contracts for provision of security services to military sites, the Kozlodui nuclear power plant, international sea or river ports (i.e. international border crossings). It is probably the issue that most directly questions the limits of security privatisation particularly in countries with high levels of corruption. During the past decade, security for hundreds of military sites, most major international ports (such as Varna,

Russe and Burgas), power plants and other key infrastructure sites has been contracted out to PSCs.<sup>36</sup> These had formerly been guarded by police or military forces.

At the highest level, corruption could be described in terms of conflict of interest or influence-peddling by politicians who own PSCs. The present legislation fails to impose adequate measures against such practices. There are three models of corrupt practices. One involves using political influence to ensure that the regulation over certain PSCs is more or less strict, depending on the politician's business interests. The second, which is more widely applied, is to gain public procurement contracts through influence over other government agencies, possibly through kickbacks. The third is trading in influence where a given company could be forced to (or even would willingly) give a contract to the politician's PSC, and as a result expect certain favours in return.

Given that the majority of the private security companies in Bulgaria are either staffed or run by former police officers, assigning the oversight of PSCs solely to the police leaves significant room for informal relations between PSCs and their regulators. It is well known that some influential politicians or their families still own PSCs. For example, allegations of undue influence have been made against both the well-known *Scorpio* PSC regarding contracts to guard the National Customs Agency<sup>37</sup> and against *Ipon* concerning the contract to guard municipal property in Sofia.<sup>38</sup> Both companies have ties to prominent politicians. In another case the PSC *Khan Krum*, owned by an off-shore company and linked to a former Member of Parliament and member of the ruling coalition party *Movement for Rights and Freedoms*, was awarded a contract to guard the Kozlodui Nuclear Power Plant (the only one in the country).<sup>39</sup>

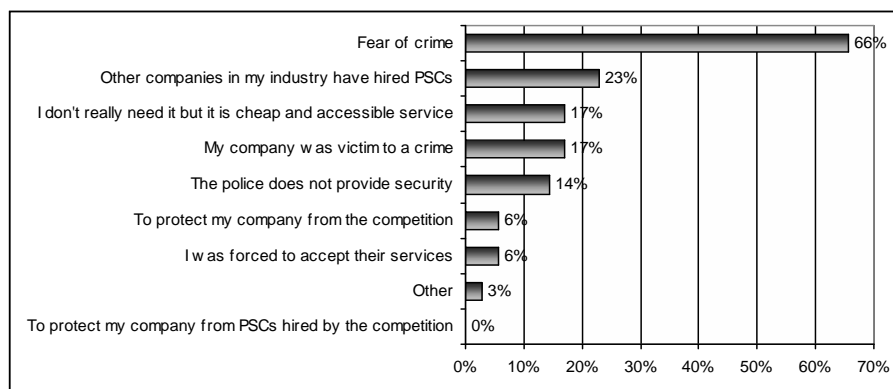
Certainly, the above cases do not suggest any easy answers and it could be argued that private security companies are one means of circumventing widespread corruption within the police and the military. This may be true but salaries in most PSCs are lower than those offered by the police or the military, with evident consequences in terms of incentives to corruption. Also, unlike the police or military (where there are internal affairs departments), PSCs do not have instruments and resources to fight internal corruption. Further to that, the difficulties described in terms of oversight and control of PSCs suggest that much remains to be done to further develop the current regulatory framework and strengthen the oversight capacity of the government. Such initiatives should take into account the underlying factors that drive the demand for private security. This is important, because

while certain demand-driven factors are perfectly legitimate (for instance increased security around a private defence production facility), others (like collection of debts) are the result of existing legislative gaps or inefficient work of law enforcement agencies.

### The Demand for Security Services

Despite the challenges described above there remains a significant demand for private security services. There are various factors that fuel such demand. The 2005 CSD/Vitosha Research survey indicated that perceptions about crime were by far the leading factor, but the grey economy, experiences of crime, and racketeering were also factors.

*Graph 6.3. What were the reasons you hired a PSC? (% of respondents)*



Source: CSD/Vitosha Research

### *Fear of Crime*

The fear of crime is by far the leading factor that has driven the demand for private security services. During the 1990s, such fears were fuelled by the PSCs themselves, as many of them were involved in the criminal activities described above. In recent years, though, these fears have been maintained by growing media attention on criminality.<sup>40</sup> During the 2001–2005 period, overall crime significantly declined in Bulgaria. The reasons for this decrease are complex, including demographic factors (rapidly declining population, particularly young males), decreasing unemployment, rising incomes, and an increase in the prisoner population. The crime prevention effect of

private security companies is not clear. Analysis indicates that companies using the services of PSCs have a lesser chance of being victims of burglary. However, the likelihood that they would become victims of theft from outsiders or employees or become victims of threats and extortion is not affected and they remain vulnerable to such crimes.<sup>41</sup>

### *Economic Factors*

A number of economic factors drive the demand for PSC services. First, it has been argued that the informal economy in itself attracts PSCs because contracts in the grey sector cannot be enforced through the legal system and official law enforcement channels, therefore opening a market niche for private enforcers.<sup>42</sup> The shrinking of Bulgaria's informal economy over the past few years<sup>43</sup> has probably contributed to the reduced negative influence of PSCs.

Another source of demand for PSCs' services has been created by the inefficiency of Bulgaria's court system, which provides a slow and unreliable system of debt collection. In 2005 the courts had blocked 375,000 debt claims worth 917 million euros. At the same time debt among companies and individuals has mounted to 3.5 billion Euro.<sup>44</sup> A judge passes an average of six collection verdicts per month, which means that most debt claims will remain stuck in court for years. Even slower is the actual enforcement of verdicts, which usually takes years.<sup>45</sup> Therefore a demand has been created for debt collection services, some of which are provided by legitimate debt collection agencies, but often there are 'special units' within PSCs which also provide such services using threats and intimidation to collect debts.<sup>46</sup> The introduction of private collection judges, due to start work during 2006, is expected to gradually help make official debt collection more enforceable.

Finally, hiring a private guard makes sound business sense to many companies because this is still a relatively inexpensive service and certainly cheaper than hiring military and law enforcement personnel. Furthermore, it seems that hiring private security guards has become to many something of an 'industry standard', particularly for retail or wholesale enterprises since instead of quality of service or price serving as the main criteria to hire a PSC, business owners remain cautious, pointing to reputation and trust as the two key criteria in selecting a PSC.

Although financially attractive, private security guards are often not properly trained and managed to provide quality services. A recent incident, in which the Bulgarian Football Union tried to save money and paid a PSC *SOT 161*, instead of the police, to guard a football match proved disastrous.



The company failed to control a fight between hundreds of hooligans, and the police were called in to intervene.<sup>47</sup> Specific skills are moreover needed when guarding key infrastructure or military sites. For instance, the question whether PSCs are fit to guard complex border sites such as international sea ports is a valid one. There are no specific conditions or skills required from PSCs bidding for such contracts, even though guards are likely to be exposed to challenges related to smuggling of drugs, arms, or human beings.

There are at least two reasons why PSCs are less efficient at providing certain specialised services. One is insufficient training and skills; police have more extensive and continuous training in comparison to the three-day general course required for security guards. Secondly, PSC guards have neither the authority nor the deterrent effect of the police; they do not have sufficient powers to detain trespassers or to use force. And attacks on PSC guards are not sanctioned any differently than attacks on regular citizens, unlike attacks against the police.

### **Conclusion and Recommendations**

Per capita, Bulgaria is near the top of the European list measuring the ratio of private security guards to police officers. Thus, for each Bulgarian police officer there are two guards employed by private security companies and about three more private guards in in-house security teams.<sup>48</sup> This fact highlights the need for even greater resources and measures to ensure adequate control over PSCs.

Implementing the regulations to divert PSCs from racketeering in security provision has been a long process that has depended on political will, the capacity to enforce new legislation, economic development, the appearance of more profitable criminal opportunities and the influx of a critical mass of former police and military officers with a better work ethic and professional standards. However, despite the positive developments that led to the decriminalisation of significant parts of the private security industry, a new set of challenges has emerged in recent years connected by a lack of oversight capacity, corruption and lingering crime-related problems.

The transformation of the private security industry is a process that involves a broad range of legislative and administrative reforms and measures related to firearms regulations, corruption, crime, judicial and law enforcement capacity, and more broadly to the business environment.

Countries in transition in Eastern Europe or the former Soviet Union, where former police and military personnel (due to downsizing of the secu-

rity apparatus) constitute the backbone of the private security industry, pose their own challenges. Adopting best practices in PSC regulation from Western Europe is a first step. While adopting a sound law is relatively easy, failure to adapt it to the local context can render it inadequate when facing the realities of countries where corruption and organised crime have undue influence. The following recommendations, drawing on the Bulgarian experience, could certainly be taken into account when drawing up legislation and establishing PSC control mechanisms in other countries in transition.

- **Provision of adequate resources** for oversight is key. One possible approach would be to allocate funding for licensing, levy fines, or even introduce additional fees that could support the oversight body. Another solution could be to broaden the range of institutions that oversee the PSC industry, thus splitting the cost across several agencies, possibly even mandating the establishment of an industry-funded independent monitoring body.
- **Providing additional bodies with functions in oversight of PSCs.** Although the police are certainly best fit to control and monitor PSCs, local government could be allotted a role. There are two important dimensions of the oversight – licensing and monitoring. One possible way would be to establish an **inter-agency licensing mechanism**, so as to avoid undue influence over the licensing process by former police officers. Another would be to concentrate the licensing process within regional centres, instead of keeping responsibility with the local police stations or municipalities. This would reduce the likelihood of inappropriate relations. **Monitoring** could also be improved by establishing multi-agency monitoring teams. Thus not only the police, but also labour conditions inspectorates, civil defence agencies, fire departments, or an industry body could be involved in such teams, in order to provide more objective and balanced assessment.
- **Stricter regulation of in-house security.** Given that in-house security guards outnumber PSC guards, there is no reason to have lesser regulation of this sector. In fact it has been argued that they are *de facto* PSCs registered simply as companies with only one department – in-house security.<sup>49</sup> Therefore, in-house security teams should be put on an equal standing with regard to training, responsibilities, and registration requirements.
- **Stricter rules for individuals with criminal records.** Criminal incidents involving PSC staff have highlighted the danger to the public from guards with criminal records. At least two steps could be taken

to provide safeguards. First, security guards with criminal records should be barred from working in a PSC if they re-offend. In the case of Bulgaria this should include any violent crime as well as 'hooliganism', which usually captures all small-scale violent and threatening behaviour. A second approach would be to set up **higher criminal liability** of PSC guards, i.e. that criminal offences committed by security guards should result in harsher penalties (higher fines or longer sentences) than would be given to ordinary citizens.

- **Widening opportunities for citizens to seek legal remedy.** In light of the public threat that some PSCs have posed and given the fact that PSC management remains well-connected to law enforcement structures, alternative sanctions and remedies outside the police should be made available. One potential ally is the ombudsman institution, while local government bodies could also be allotted a more significant role.
- **Increasing PSC liability for actions of their personnel.** At present there is a whole raft of practices aimed at reducing company liability at the expense of individual guards. These range from having no official contractual relationship between guard and company to obliging guards to obtain personal firearms permits and use their own weapons in the course of their daily work, to not bearing responsibility for semi-legal guarding or debt-collection activities that guards unofficially carry out on behalf of their employer. Increased liability would force the company to more strictly control the actions of its personnel and to limit their involvement in illegal practices.
- **Higher standards for companies guarding critical infrastructure.** Existing regulations do not require a higher level of training, special skills, or higher liability for companies providing security services for key security infrastructure, such as ports, military facilities or nuclear power plants. If such requirements are fulfilled, the cost of private security is likely to surpass the cost of hiring law enforcement personnel. Thus, from a financial or security point of view it makes little sense to employ PSCs under present conditions.
- **Measures against conflicts of interest.** Although some of the above recommendations aim to diminish corruption, there should be some direct legislative provision as well. The absence of rules and regulations against conflict of interests of government officials or their families that own PSCs has created conditions for corrupt practices and trading in influence. Legislation could include provisions barring owners or individuals related to PSCs from holding public office.

Despite the impressive transformation through which Bulgaria's private security industry has gone since 1990, the need for further reforms, in terms of creating the conditions for more effective, well-managed and democratically-governed security provision, remains clear. The case of Bulgaria highlights some of the difficulties that future European Union initiatives to establish common standards for PSC regulation might encounter. Countries in East-Central Europe, like Poland, Bulgaria or Hungary, where corruption is higher and the PSC sector larger than in most West European countries, need more regulatory and legislative safeguards to ensure adequate control.

## Notes

- <sup>1</sup> The historical overview is based mainly on investigative journalism from this period. In addition, the paper draws on interviews with employees and managers of private security companies conducted between February and March of 2005. The paper also analyses two crime victimisation surveys of businesses. The first survey was conducted during 2000 in Sofia by the United Nations Interregional Crime and Justice Research Institute (UNICRI). This survey was part of the International Crime Business Survey (ICBS), as identical surveys were carried out in eight other capitals in East European countries. The second survey used was conducted in Bulgaria in September 2005 by the Center for the Study of Democracy and Vitosha Research. This survey contained not only the ICBS-based questions on crime victimisation but also questions on private security companies (PSCs) and the grey economy. As the two surveys differ in many ways, comparisons between them have been largely avoided. Where appropriate, the results of the two surveys are juxtaposed to police and judiciary statistical data. The analysis on Macedonia and Serbia was based only on secondary sources.
- <sup>2</sup> Hajdinjak, M., 'Partners in Crime: The Risks of Symbiosis between the Security Sector and Organised Crime in Southeast Europe,' Center for the Study of Democracy, (2004), 20–22.
- <sup>3</sup> Interview of Tihomir Bezlov (Senior Analyst at the Center for the Study of Democracy) with Dimitar Ludjev, Deputy Prime Minister (Dec. 1990 – Nov. 1991), Sofia, November 1991.
- <sup>4</sup> In 1993 the Law on the National Police for a first time included a new article (Art.43) which simply states that PSCs need to register with the police, i.e. simply inform the police that they conduct private security activities (State Gazette №109, 1993).
- <sup>5</sup> For example: Daga Security, IPON-1, SOT, Scorpio and Pireli.
- <sup>6</sup> The most infamous PSCs founded by such individuals included *VIS-1*, *Club 777*, *TIM*, and *Apolo Balkan*.
- <sup>7</sup> Between 1990 and 1996 the violent crime rate in Romania and Hungary was about half that in Bulgaria. In addition, despite the higher crime rates, convictions per 100,000 population in Bulgaria remained consistently lower (criminal justice data from <http://www.europeansourcebook.org>).

- <sup>8</sup> Volkov, V., *Violent Entrepreneurs: The Use of Force in the Making of Russian Capitalism* (Ithaca and London: Cornell University Press, 2002).
- <sup>9</sup> Ibid.
- <sup>10</sup> Calculations based on: National Statistical Institute, *Crimes and Persons Convicted 2005*, provided to CSD in electronic format.
- <sup>11</sup> Ministry of the Interior crime statistics provided to CSD.
- <sup>12</sup> Center for the Study of Democracy, 'The Hidden Economy in Bulgaria', (Sofia: CSD, 2004).
- <sup>13</sup> Frye, F., 'Private Protection in Russia and Poland,' *American Journal of Political Science* (July 2002).
- <sup>14</sup> Published in State Gazette, no. 28 from 1994.
- <sup>15</sup> Public transport stops in Sofia were insured by SIC and all carried an SIC sticker.
- <sup>16</sup> 'The Wrestlers Remain in the Insurance Business,' *Capital Weekly*, 24 October 1998.
- <sup>17</sup> Some amendments were first introduced in July 1997 (State Gazette №58) but they were deemed insufficient and were therefore strengthened in August 1998 (State Gazette №93).
- <sup>18</sup> Even though some of these companies reinvented themselves – *SIK* became *Yunion* and later *Bulins*; *VIS-2* became *Planeta* and later on *Jupiter*; *TIM* purchased *Armeetz* – these companies were much less likely to be used as instruments for racketeering or extortion, although they kept to some extent violent methods as part of their ways of conducting business. In legal terms, though, they were unrelated to the PSCs that founded them.
- <sup>19</sup> 'Dozens of PSCs have not Instructed their Guards,' *Demokratia Daily*, 9 August 2001.
- <sup>20</sup> For instance: Ordinance no. 69 of 19 May 2000 on the conditions and order in establishing the psychological fitness for the use of firearms and ammunition; the 1999 Regulations for the Implementation of the Law for Control over Explosives, Firearms and Munitions (SG. 78/3, last amended 2004, SG. 12/13); the 1998 Law for Control over Explosives, Firearms and Munitions (SG 133/11, last amended 2003, SG 71/12); Ordinance no. I-121 from 24 June 2004 on the Order of Organisation of Security during Transportation of Precious Cargo (SG 63/2004) (Ivanov, H., *The Business: Private Security*, (Sofia: Albatros, 2005))
- <sup>21</sup> The numbers quoted below are based on the author's own computations from the SPSS data files. As close to one third of Bulgaria's economic activity is concentrated in the capital, Sofia, this study is considered quite indicative of the overall situation.
- <sup>22</sup> State Gazette, no. 15, 2004.
- <sup>23</sup> Justification of the Law on Private Guarding Activity.
- <sup>24</sup> Calculations of author based on SPSS file provided by UNICRI. The surveys have been conducted during 2000.
- <sup>25</sup> Framework Convention for Social Dialogue in the Security Services Industry, [http://www.fes.bg/bg/ProjectsAndPartners/LabourRelationsAndSocialSecurity/2005/09/20\\_ramkovo\\_sporazumenie.html](http://www.fes.bg/bg/ProjectsAndPartners/LabourRelationsAndSocialSecurity/2005/09/20_ramkovo_sporazumenie.html).
- <sup>26</sup> These included the National Association of Industrial Security Companies, the National Association of the Persons and Associations Performing Guarding Activities, the National Association of Companies Guarding with Technical Means, the Union of the Guarding and Security Companies, and the National Industry Chamber of Guards and Detectives.
- <sup>27</sup> Official letter of the Ministry of the Interior to the Center for the Study of Democracy, March 2005. Further talks have made it clear that the data is based on information provided by the National Social Security Institute, rather than on any register kept by the MoI.

- <sup>28</sup> Bezlov, T., Gounev, P. and Hristov, H., *Crime Trends in Bulgaria 2000 – 2005*, (Sofia: Center for the Study of Democracy, 2006).
- <sup>29</sup> Major Stoil Tomev, head of Elin Pelin Area Police Department, quoted in ‘The Guards that Beat the Protesters from Gabra were from Different Companies,’ *Dnevnik Daily*, 24 November 2005.
- <sup>30</sup> The law only does not allow PSC owners to have criminal records.
- <sup>31</sup> The War on the Hunting Fields of the Beautiful Elena, *Trud Daily*, 15 February 2006.
- <sup>32</sup> Among respondents from Sofia, less than one percent have been victims of racketeering.
- <sup>33</sup> Bezlov, T., ‘Organised Crime in Bulgaria,’ Presentation made at the international conference “EU Prospects and Security in South Eastern Europe: Hidden Economy, Transborder Crime and Development”, (Sofia, 29-29 October, 2006).
- <sup>34</sup> For more on this subject, see: Center for the Study of Democracy, ‘On the Eve of EU Accession: Anti-corruption Reforms in Bulgaria’, (Sofia: CSD, 2006).
- <sup>35</sup> Center for the Study of Democracy, ‘On the Eve of EU Accession: Anti-corruption Reforms in Bulgaria’, (Sofia: CSD, 2006), p 26.
- <sup>36</sup> Register of Public Procurement, <http://www1.government.bg/rop/index.html> (6 June 2006)
- <sup>37</sup> ‘The Bulgarian Socialist Party Takes over the Customs’, 8 June 2006.
- <sup>38</sup> ‘Dontcheva and Gavriiski Have the Same Ideas How to Run Sofia,’ <http://news.ibox.bg/>, 10 April 2006.
- <sup>39</sup> ‘An Off-shore Company Guards Kozlodui Power Plant,’ *Monitor Daily*, 6 April 2006.
- <sup>40</sup> Bezlov et al. op.cit.
- <sup>41</sup> Victimization risk coefficients are calculated by the method used in Van Kesteren, J.N., Mayhew, P. and Nieuwbeerta, P., *Criminal Victimization in 17 Industrialised Countries: Key findings from the 2000 International Crime Victims Survey*, (The Hague: Ministry of Justice, WODC, 2000). It involves an assessment of the chances that a person from a definite social group (e.g. a big city resident) may or may not become a victim of a crime (see Appendix 2). This coefficient is then divided by the victimisation risk ratio of a person belonging to a different social group (e.g. small town/village resident).
- <sup>42</sup> Frye, T. and Zhuravskaya, E., ‘Rackets, Regulation and the Rule of Law,’ *Journal of Law, Economics, and Organization*, vol.16, no.2 (October 2000), 478–502.
- <sup>43</sup> Center for the Study of Democracy, ‘Informal Economy in Bulgaria,’ (Sofia: CSD, 2004)
- <sup>44</sup> Dimitrov M., and Stanchev, K., ‘A Law on Private Collection Judges should be Approved Before the Elections,’ Institute for Market Economy (February 2005), [http://ime-bg.org/pr\\_bg/213-3.htm](http://ime-bg.org/pr_bg/213-3.htm)
- <sup>45</sup> Ibid.
- <sup>46</sup> Interviews with PSC officers, February 2005.
- <sup>47</sup> ‘How the Police Came Back to the Stadium,’ *Dnevnik Daily*, 31 May 2006.
- <sup>48</sup> Previous surveys (such as Page, M., Rynn, S., Taylor, Z. and Wood, D., *SALW and Private Security Companies in South Eastern Europe: A Cause or Effect of Insecurity?* (Belgrade: SEESAC, August 2005)) based their measurements on the Mol/NSSI data and used 130,000 as the reference figure, leading the researchers to conclude that the ratio between PSC guards and police officers was 4.6:1.
- <sup>49</sup> Boyan Boyanov’s comments at a Press Conference of the National Association of the Persons and Association Performing Protective Activity (NAPAPPA), 23 February 2005

## Chapter 7

# The Commercialisation of Post-Soviet Private Security

*Duncan Hiscock*

### **Introduction**

This paper considers the private security industry in post-Soviet countries from a security sector governance perspective. It focuses particularly on Georgia and Ukraine, two countries in which significant reforms of the security sector are under way, yet where democratic control of the private security industry has rarely been discussed. It also looks more widely at the Commonwealth of Independent States (CIS) region, where similar dynamics could be witnessed, at least in the early post-Soviet years.

This study does not claim to be a comprehensive review of private security provision in Georgia, Ukraine or the CIS overall. Rather, it aims to give the reader a broad impression of the salient issues in the region, with the hope that this may encourage further discussion on the topic within the region itself, since this has not been systematically focused on either by academics, policy-makers or broader civil society. It also hopes to make a contribution to the academic and policy dialogue about the privatisation of security internationally, since there are some significant differences between private security industries in the CIS and their Western counterparts.

The main thesis of this paper is that whilst in many ways the post-Soviet region has witnessed the same processes whereby the maintenance of security is no longer the sole preserve of the state and there are now a multitude of private security actors, both the factors underlying this transition and the overall situation with regard to ‘police-style security services’ display notable variations from the Western model.<sup>1</sup> Most discourse about the privatisation of security rests on a ‘Western’ perception of the division between the public and the private, and assumes that economic liberalisation is following the same course everywhere. Both these assumptions are questionable with regard to the former Soviet Union, and analysing the ‘privatisation’ of security thus risks overlooking some key factors. For this reason, it

is proposed that a wider assessment of the ‘commercialisation’ of security may provide a better analytical framework for understanding the transition period, and allow a wider perspective of security sector governance issues affecting private security provision.

The paper begins by sketching the main factors driving the rapid expansion of the domestic private security industry in the immediate post-Soviet period, marking out several stages in their development, particularly in Russia, the largest and most influential CIS state. It then considers the private security industries in Georgia and Ukraine in more detail, demonstrating that despite common roots, significant differences already exist between CIS countries. The paper then discusses the main issues concerning security sector governance in these countries, and concludes by suggesting some of the practical and policy implications of this analysis and outlining areas for much-needed further research.<sup>2</sup>

### **The Development of the Private Security Industry in the CIS**

Given their common Soviet roots, the early history of the private security industries in CIS countries probably does not differ much from state to state. Over time, however, they have developed in different ways – both in terms of their overall political, economic and security directions, and more specifically with regard to their private security industries. This section touches particularly on Russia, as the largest state in the CIS and often the leader in various trends. The following sections, on Ukraine and Georgia, provide counterpoints demonstrating some of these variations.

#### *Stage 1: Uncontrolled Privatisation*

The privatisation of security in the post-Soviet world did not creep up on analysts and policymakers as it did in the West – rather, it occurred as a sudden explosion. The proliferation of private security companies (PSCs) in the early 1990s came as an unintended consequence of the collapse of the Soviet Union and the badly planned ‘liberal’ reforms that followed. A swift privatisation and redistribution of property took place without first having equipped state institutions (which were essentially new, even when formed on the basis of their Soviet predecessors) with the mechanisms to ensure the correct functioning of the market or to maintain security in a democratic state.<sup>3</sup> The result was a kind of ‘wild’ capitalism where large swathes of the economy were effectively criminalised, with primordial methods often being em-



ployed to gain and maintain control of resources. Crime did not only affect businessmen: there was an upsurge in various forms of petty crime, such as burglary, robbery and street violence. In some areas, particularly the South Caucasus, conflicts ignited, causing even greater insecurity.

In the absence of a legitimate and effective national system for protecting property, resolving conflicts and enforcing decisions, there was a sudden increase in demand for some sort of externally-provided security. Writing about Russia, Vadim Volkov notes that since 'the speed of liberalization was greater than that of institution-building, the emerging markets spontaneously developed alternative mechanisms of protection and enforcement.' The most significant was the role that quickly came to be known as the '*krysha*' (roof).<sup>4</sup>

At its simplest, the *krysha* may have resembled little more than a protection racket, but it was usually considerably more advanced. Volkov defines it as 'an enforcement partner, criminal or legal, and signifying a complex of services provided...to its clients in order to protect them physically and minimize their business risks.' He notes that this relationship goes well beyond physical protection, including, most importantly, 'the ability to engage in informal negotiations with other enterprises and their enforcement partners in case of a breach of contract or failure to return the debt.'<sup>5</sup> Though the more successful *kryshy* usually resolved such matters peacefully, regular reports in the 1990s of vicious gun battles and businessmen being assassinated indicate that such negotiations often turned violent.

The gap which the private security industry sought to fill was thus larger than just police-type services such as static surveillance or close protection, and this, as Volkov rightly notes, distinguishes the industry from its counterparts in most of the rest of the world.<sup>6</sup> Yet it should be noted that the private security industry was not alone, or even the main actor in filling this vacuum; this role could equally be played by overtly criminal groups or corrupt state officials.

This is an important point both theoretically and practically. From a theoretical point of view, the distinction between the private and the public in Western dialogue on private security actors implicitly rests on the following assumptions:

- The state implements the law in an impartial manner;
- The state has the capacity to fulfil its responsibilities, however it defines them;

- State officials act in the interests of the state rather than for their own gain; and these interests, in a democratic state, are to a great extent identical to the public interest;
- Private and corporate actors are driven by personal/company gain in a way that state actors are not.

Unfortunately, these assumptions were not true in post-Soviet states blighted by weak institutions and corruption (nor are they true in most developing and post-authoritarian states). The former meant that the state monopoly over violence disappeared almost overnight; the latter ensured that it was not only individuals in the private sector who saw the opportunity to charge money for providing security. The result was that security soon became a commodity like any other, almost regardless of who was offering it.

### *Stage 2: Capturing Market Share*

Though they were never the only actor, PSCs were nonetheless able to capture an important share of the private security market in several post-Soviet states. They achieved this partly because there was a ready supply of staff, partly because there was plenty of room for expansion in the market, and partly because of their format and status.

The private security industry could expand rapidly because there were plenty of experienced personnel available for employment. In most post-Soviet states, independence was followed almost immediately by downsizing and/or reform of the security sector, including the police, the armed forces and the intelligence services. For many newly-unemployed security professionals, working for or running a PSC was an obvious way to continue to be paid for one's skills. Given low levels of pay and high dissatisfaction across much of the state security sector, many employees were attracted by the alternative employment opportunities that PSCs offered.

It is worth briefly highlighting the background of these employees. The KGB and the Ministry of Internal Affairs (MIA) existed not so much to protect the Soviet people as to protect the Soviet state from everything – including its own citizens. These agencies did not escape the wave of commercialisation of security; on the contrary, their skills, experience and contacts left them extremely well-placed to benefit. Yet it would be naïve to expect that only those that moved into the private security industry were motivated by profit; rather, a web existed stretching across both state and private structures that was mutually beneficial. It may be argued that despite many fractures, the Soviet-era security networks were never convincingly broken up – they were merely part-privatised and re-directed from repression towards making a profit.<sup>7</sup>

The early development of a legislative framework for regulating PSCs should be seen in this light. Volkov argues that though the 1992 'Law On Private Protection and Detective Activity in the Russian Federation' did reduce crime, it was intended more as a way of offering alternative employment to those leaving the state sector.<sup>8</sup> Nonetheless, it allowed the state to gain at least some control over the already advanced privatisation of security. Indirectly, it acknowledged that the state had lost the monopoly of violence and that enforcement was increasingly carried out by *kryshy* – but even if some of their work was of dubious legality, PSCs were still preferable to purely criminal groups, since they were easier to monitor and sanction. Of course, their legal status also made them preferable for both employees and clients. This fact was not lost on criminal groups either, who saw the advantages of using PSCs to give a legitimate framework to their activities, including (in Russia) the ownership of weapons.<sup>9</sup>

Over time, therefore, PSCs captured a fair proportion of the market for police- and *krysha*-style security provision, since they provided a legal shell for a range of activities that the state was in no position either to provide itself or prevent, turning a blind eye to much that was not strictly 'above board'. As privatisation and the redistribution of wealth continued apace, there was an increased demand for protection and plenty of people willing to pay for it.

### *Stage 3: Stabilisation and Consolidation*

Gradually, most former Soviet countries reached a point of natural stabilisation (though this happened earlier in some countries than in others). In economic terms, this meant that a new elite had largely been formed which now wished to consolidate its position. The state began to take more control, though with different aims, since its interests had to a considerable degree become the interests of this elite (part of which had always remained within state structures).

For the private security industry, this meant two things. Firstly, the state gained greater capacity to regulate its work, since the (re)consolidated elite saw the potential for using the machinery of state to strengthen its own position and root out its rivals. Slowly, the grey area of semi-legal activities for which a PSC was valued became smaller, and overtly criminal elements were further squeezed out of the protection market. Yet it should not automatically be assumed that re-establishment of state control over security provision (whether directly, or through better regulation of the industry) is the same as the establishment of the rule of law. The latter assumes that the entire justice sector functions effectively and impartially. If this were so, it could be expected that there would no longer be a need for the wider 'enforcement partnership' role of the *krysha*, and PSCs would revert to more traditional forms of 'police-style security' functions. However, judicial sys-

tems in much of the CIS are still considered to be corrupt, open both to bribery and to pressure from the executive. In this case, strengthening state control may offer opportunities for those within the state to profit from the commercialisation of security without necessarily reducing this commercialisation *per se*: on one level, some officials benefit from close contact with PSCs, possibly reducing incentives to implement policies aimed at improving security for everyone; at a higher level, the fact that security can be offered or removed means it can be used for political or economic leverage. Hence improved *control* over the private security sector does not necessarily lead to better *democratic governance*.

As noted above, these three stages are most clearly defined in Russia, yet are visible in some form in many other CIS states. Nonetheless, after 15 years of independence it is no surprise that significant variations exist in terms of how security has become commercialised, the scope and strength of the industry, and the state's capacity and interest in managing security provision. Two case studies, in Ukraine and Georgia, explore these differences in more detail.

### **Ukraine: Not Private, Not Profit-Making, Not Free to All**

#### *Background to the Privatisation of Security*

Ukraine has many social and political similarities with Russia, and as the second most populated Soviet successor state, it is not surprising that it faced many of the same challenges. Ukraine was struck just as hard by the criminalisation of the economy, had even greater problems establishing functioning state institutions, and suffered huge corruption. As a result, Ukraine also saw a rapid increase in demand for externally-provided security, also saw the concept of the *krysha* spread through business circles, and also seemed initially unable either to provide security itself or to manage its provision by others. The criminal groups that blossomed in the early post-Soviet period were not just analogous to their Russian counterparts – they often cooperated or even combined.

Essentially, therefore, the rapid commercialisation of security in Ukraine did not differ much from the first stage mapped out above. The two main differences in Ukraine relate to how the government responded to these security challenges, and to the wider issue of security sector reform. Firstly, the Ministry of Internal Affairs (MIA) quickly moved to ensure it played a major role in the provision of 'private' security through the establishment and promotion of the State Protection Service (see below). Secondly, Ukraine pursued a more westward-looking course, with ambitions of NATO

membership and a declared interest in the principles of democratic security sector governance (even if this did not always appear to translate into practical changes). This process accelerated following the 'Orange Revolution' and the election of Viktor Yushchenko in December 2004, with a more defined emphasis on assimilating European norms of governance in all areas. This case study considers whether this alternative political direction has had any impact on management of the private security industry.

#### *Size and Scope of the Private Security Sector*

According to MIA figures for May 2006, there are 3,018 enterprises licensed to undertake protection work, employing 33,000 people. Approximately two-thirds of these licenses involve the protection of state or private property, while the other third concern personal protection. In 2005 alone, nearly 1,600 such licenses were granted.<sup>10</sup> Though most PSCs' work is limited largely to property protection (installation of alarm systems, physical guarding, rapid response, accompanying of freight transport) and/or close protection, some also offer background checks on potential business partners,<sup>11</sup> and there have been cases of PSCs carrying out raids on disputed properties.<sup>12</sup> This in effect forms part of the 'enforcement partnership' role described above.

The private security industry, although significant in itself, is dwarfed by its governmental counterpart, the State Protection Service (*derzhavna sluzhba okhorony* – DSO), a department accountable to the Ministry of Internal Affairs. The DSO includes 218 sub-divisions, 170 cash transportation services and 35 special 'Titan' sub-divisions, and employs more than 51,000 people.<sup>13</sup> It offers the same range of services as the private security industry, as well as others that non-state actors cannot perform, such as armed protection of banks and cash transportation. Indeed, it regularly reminds potential clients that it is the only protection service with the right to possess firearms.<sup>14</sup> Furthermore, it also runs training centres, and is responsible for various tasks relating to the regulation of the industry, raising important governance issues (see below). All these services cost money; approximate charges can be found on the DSO's website. Should such an agency be left out of an analysis of the commercialisation of security? To answer this question, it must be classified in some way.

The DSO appears to be a strange hybrid, part government agency and part entrepreneurial activity. According to the cabinet decision that established it,<sup>15</sup> the department's activities are financed by the payment of its services on a contractual basis. However, its operations are not intended for

profit and any money made in the course of its activities should be re-channelled into improving its resources and its workers' welfare (though it is unclear how this is done in practice). In theory, therefore, it is neither private in the sense that it is a non-governmental actor nor that it is motivated by profit. Yet since it is providing and charging for the same services as the private security industry, it is clearly in direct competition with it. In fact, it does not seem that different from state-run enterprises in other sectors and in other countries: a behemoth which dominates the market with state support.

The complaint that the DSO has an unfair monopoly as the only provider of armed protection has been loudly made by the Ukrainian Federation of Non-State Security Services (UFNSSS – an industry association bringing together about 140 private security companies) and the Association of Ukrainian Banks (AUB). In particular, the AUB complains that since its banks are forced to turn to the DSO for armed protection, the DSO charges the banks excessively for its services.<sup>16</sup> Though the AUB and UFNSSS bring legal and moral arguments into their conflict with the DSO, it is probably fair to say that their main concerns are economic. However, the current state of affairs also raises significant concerns from a security governance perspective.

### *Governance of the Private Security Sector*

There are questions about both the quality of governance currently exercised over the 'commercialised security sector' (i.e. PSCs and the DSO taken together), and about the whole structure by which it is governed.

Starting with the quality of governance, PSCs do not always appear to live up to best practice. Most obviously, there appears to be fruitful ground for illegitimate cooperation between PSCs and state security institutions, since most PSC staff have previously worked for the state. This is cemented further by a requirement in the licensing conditions that PSC chiefs must either have a higher legal education, have three years middle or senior level experience within the MIA or SBU (*sluzhba bezpeky Ukrayiny* – the Ukrainian Security Service), or have served at least five years in parts of the Armed Forces.<sup>17</sup> Other concerns include occasional accusations of political misuse of PSCs (such as those made by representatives of *Nasha Ukraina* during the 2004 presidential elections)<sup>18</sup> and illegal raids perpetrated by PSCs on private property.<sup>19</sup>

The government acknowledges that problems exist within the private security sector, and in March 2006 the Ministry of Internal Affairs was ordered to review the licenses of all non-governmental protection companies

by the end of the year.<sup>20</sup> However, it claims to have had much success already in reducing unlicensed activity and abuses by the private security industry.<sup>21</sup>

Obvious doubts arise, however, about the legitimacy of the MIA having responsibility for regulating the private security industry when its own DSO is in direct competition with the industry, especially if the DSO itself is involved in the licensing and review process. The fear is that the MIA/DSO could use its regulatory powers to further squeeze its private competitors out of the market.

The regulatory structure also raises concerns. Non-governmental protection companies are regulated primarily by the law 'On Licensing of Certain Types of Economic Activity',<sup>22</sup> and the aforementioned 2004 licensing conditions, while the DSO is largely governed by the same legislation as the rest of the MIA. It is widely agreed that there is a need for a proper law to regulate the industry. A draft law 'On Protection Activities' was proposed both in 2002 and in 2005, but has not yet passed. The UFNSS agrees with the need for such a law, but complains that in its current form, the draft law is aimed at further strengthening the DSO's position rather than creating a fair or well-governed system.<sup>23</sup> Some credence to these claims was given by the comments on the draft law presented by the parliament's main analytical department, which recommended that the law should not be passed until significant changes had been made.<sup>24</sup>

The DSO argues that its staff have had more training and are more professional than those of PSCs (though this is hard to measure), and also implies that by merging protection and policing functions (it claims to have prevented more than 65,000 crimes and detained more than 72,000 criminals in nine months of 2005)<sup>25</sup> it can serve private and public interests simultaneously. Yet the DSO's status raises many questions. Firstly, should police officers, who should be serving the public interest, be involved in money-generating activities for private employers? Secondly, is there not potential for conflicts of interest between the needs of those using the DSO's services and those of the state and the public? What happens in such cases? Thirdly, although the rules governing the DSO's work say that it is a non-profit-making body, unless there is total budgetary transparency and accountability, can the public be sure that the DSO is not involved in profit-making activities? Lastly, is it possible to argue that since an overall improvement in public security might limit the demand for some of the DSO's activities, this may weaken the resolve of some MIA officials to focus their activities on improving security for all?

The protection sector faces a double governance challenge: not only does the regulation of the private industry by the MIA create an apparent conflict of interests; it is also unclear whom the DSO itself is accountable to. It is presumably governed by the same oversight mechanisms as the rest of the MIA. It is beyond the scope of this chapter to analyse these mechanisms in full, but it should be noted that despite increased talk of 'security sector reform' in Ukraine over recent years, the lion's share of attention has gone to the military. As Leonid Polyakov noted in January 2005, this has meant that 'the military attempts to adhere to democratic norms as officially declared, but the intelligence and law-enforcement agencies have not yet retreated from excessive secretiveness nor the inherited Soviet traditions of low transparency of their activities neither to society nor to even the Verkhovna Rada (the parliament)'.<sup>26</sup> Indeed, despite many statements of good intent, it is still hard to pinpoint concrete reforms that would lead to a more democratic or accountable police service – and little has changed under the 'Orange' government, which has appeared divided on many issues and lacks the political strength to break through the web of bureaucracy and personal interests that characterises the MIA. This is a major disappointment for much of Ukrainian society, which repeatedly rates the police as one of the least trusted organisations. It is also a failure on the part of both the Ukrainian government and its Western interlocutors: with an eye to eventual NATO membership, 'security sector reform' has still been largely associated with the military, even though NATO regularly claims that military reform is only part of the equation.

This discussion of police reform may seem a little far from the topic of private security actors. Yet since private security issues form part of a wider debate about the *whole* security sector which is still not taking place, it may be optimistic to imagine that much attention will be given to governance of private security actors except by those who are directly involved. This carries the risk that the industry will be regulated in the interests of the industry itself, rather than those of the public or state. Whether this will change depends in part on whether the new government formed after parliamentary elections in March 2006 will be more able or willing to address the issue. It also depends, however, on whether the Western institutions which Ukraine aspires to join indicate that improved governance of the protection industry should be part of Euro-Atlantic integration.



**Georgia: Who Gains from Regulating the Industry?<sup>27</sup>***Background to the Privatisation of Security*

The general collapse in economic, social and political fortunes that accompanied the collapse of the USSR hit Georgia harder than most. Previously a reasonably prosperous and peaceful republic (by Soviet standards), by 1993 it had suffered a small civil war and two separatist conflicts in Abkhazia and South Ossetia. By the time the ceasefire agreements were signed, Georgia had lost control over significant sections of its internationally recognised territory, its economy had been ruined, and the state's ability to govern drastically weakened. The process of creating effective institutions (including a security sector) out of the rubble of the Soviet Union, which was challenging enough already, was thus made even harder.

Although Eduard Shevardnadze's government initially brought some kind of order and economic stability in the mid-1990s, by the end of the decade a sense of decay had set in. Corruption was extremely widespread, and the police were no exception, ranging from simple bribe-taking by rank-and-file officers through to semi-legal business activities and overtly criminal acts such as extortion and smuggling, which were often thought to be coordinated at a senior level.<sup>28</sup> Poor equipment and training meant that even non-corrupt officers lacked the capacity to police effectively. Levels of public trust in the state's ability to maintain security were thus rather low.

This created strong incentives to turn to private companies for protection, and a fair number of PSCs appeared to fill this gap; if PSCs were never quite as prevalent in Georgia as they were in Russia or Ukraine, this was probably because the economy was so weak that there were fewer businesses or rich individuals who could afford such services. As elsewhere, PSCs were generally set up by former security sector employees; it is likely that in the early years they were also joined by members of various disbanded paramilitary groups.

In November 2003, Shevardnadze was ousted following several weeks of protests known as the 'Rose Revolution' and replaced by a reformist government led by new president Mikheil Saakashvili. This government was younger and more Westernised than its Ukrainian counterpart, and the break with the old system much cleaner. Hence police reform was made one of the government's top priorities, and major changes soon followed. Employing fewer people but paying them well was seen as a key precondition to reducing corruption. The first stage was thus the disbandment of the unpopular traffic police, the dismissal of over 15,000 employees, and significant pay

increases for those that remained. By the summer of 2005, therefore, the size of the Ministry of Internal Affairs had been reduced from well over 30,000–40,000 employees (depending on how this was calculated; the previous government had no clear figures for the number of MIA employees) to under 17,000 employees, of which about 14,500 were serving police officers.<sup>29</sup>

Beyond reducing numbers, the government set several key priorities for the reform of the police. There were three key goals. The first was to civilianise the MIA. Previously, virtually all employees of the MIA had been policemen, regardless of their function within the ministry, and there was no clear separation between the ministry as a management body and the police as an operational body. Furthermore, the ministry contained nearly 10,000 Internal Troops, which were essentially a militarised body; and the rest of the police force was also organised along military lines, with military ranks and management methods. The reforms therefore intended to separate the management and operational functions within the ministry, and to create a truly civilian police force. A major step in this direction was the transfer of the Internal Troops to the Ministry of Defence (MOD) in November 2004.

The second goal was to professionalise the police, through comprehensive restructuring and (re-) training. Many changes have been made to the organisational structure to bring the MIA closer to European norms, and major efforts have been made at the Police Academy to overhaul the system for training new recruits and regularly re-training older staff. The most high-profile change so far has been the launch of a new 'Patrol Police' in summer 2004, parading modern cars and equipment and a considerably more polite manner in dealing with citizens. Public approval ratings for the new Patrol Police have stayed extremely high, and the government is now undertaking further ambitious reforms, supported by the US, the OSCE, and the EU, to introduce a community-based policing model and reform the remaining police departments into a fully operational Criminal Police.<sup>30</sup>

The third goal was simply to ensure that the MIA and the police had a suitable level of equipment and financing to ensure that they continued to function in a sustainable fashion. In the short term, this has required major international support for infrastructure and equipment. In the longer term, however, the Georgian government intends to become self-sufficient through improving the size of the MIA's budget and the efficiency with which it is spent, which also requires major reforms to the whole management culture; here again, international assistance is currently being provided.

Despite this definite sense of positive momentum, however, it remains too early to say that there has been a major improvement in public security; embedding these changes will take several years, and the Georgian public

has come to be cynical about promised reforms until they can really see the effects of them. This means that for the near future, the demand for private security is likely to remain high for those that can afford it.

### *Size and Scope of the Private Security Sector*

As in Ukraine, there are questions about how to define the ‘private’ or ‘commercialised’ security sector, since there is also a state body that provides protection services on a commercial basis, the Police Protection Department (PPD). However, the situation is made even more confusing by the lack of a clear structure for either PSCs or the government body.

Starting with the private security industry, it is difficult to give figures for the number of PSCs operating in Georgia, since there are no specific legal provisions for their activity. This means that no particular statistics are kept, and it can be difficult to decide whether a specific company qualifies as a PSC or not. However, it is estimated that there are about 250 to 300 PSCs in existence, though fewer than 10 of these are major players.<sup>31</sup> It is also thought that many companies are dormant, acting as a potential safety net for protecting the interests of their founders, mostly former members of various security sector institutions.<sup>32</sup> PSCs in Georgia predominantly focus on guarding property (physical guards and alarm systems). Close protection does not appear to be common, possibly because PSC staff cannot legally carry weapons, though some companies do offer such services.<sup>33</sup>

According to industry representatives, the market is undergoing a period of rapid change, with many new companies set up in the last few years, though most have quickly gone out of business.<sup>34</sup> This is most likely linked to the downsizing in the police and other institutions, which has left a lot of security professionals looking for work. Given the alleged links between the industry and various key officials and parliamentarians, the change in government may also have contributed to the shake-up, with some companies going out of favour and others gaining it.

Within the Georgian government there is a Special State Protection Service, subordinate to the President, which is responsible for the protection of senior officials and some important buildings (and also takes some commercial contracts). However, the key competitor for PSCs is the PPD within the MIA, which in some ways is run along similar principles to the DSO in Ukraine, since it provides protection services to other government agencies and to private companies and individuals on a contractual basis. It is estimated to have about 10,000 employees, making it a very significant actor on the private security market.

Unlike the DSO, however, it does not seem to be considered a ‘proper’ part of the MIA. They have no police powers, wear separate uniforms, and have separate identification.<sup>35</sup> As a result, figures listed for the number of MIA and police employees usually leave out the PPD. Both the

history and future of this department are unclear; Darchiashvili suggests that in the past, essentially private actors were registered as police officers within the PPD as it gave them more legal rights, which may have provided financial opportunities for those in charge of registration.<sup>36</sup> The future is potentially more promising, from a governance perspective, since there have been strong recommendations from international police advisers that the PPD has no role within a European police force.<sup>37</sup> The MIA has promised to remove this department, possibly by privatisation; however, some advisers are cynical as to the likelihood of the ministry doing away with a body that currently provides a useful revenue stream.<sup>38</sup>

### *Governance of the Private Security Sector*

It is difficult to speak of governance of the private security sector in a situation where very few rules exist to regulate its behaviour. There is no specific legislation on private security companies, so they are licensed under the general 'Law on Entrepreneurs'.<sup>39</sup> There is therefore virtually no way of ensuring that any particular standards are maintained within the industry. Huge grey areas exist in which the industry operates to the best of its ability.

Despite the obvious deficiencies in the current system, insiders remain pessimistic about the prospects of passing suitable legislation in the near future. This is because it is believed that various parliamentarians and senior officials have close links to the private security industry and are opposed to introducing legislation that might damage their interests or restrict their freedom of movement.<sup>40</sup> Furthermore, given the limited capacity of the Georgian state to pass and implement appropriate legislation in any field, it may well be perceived that the private security industry is not currently important enough to expend the government's energy on.

The situation with the PPD is equally murky, since although it is officially part of the MIA, in practice it is unclear how much even the MIA itself considers this department to be part of the Ministry, nor is it clear under what legal framework it is currently operating (unlike the Special State Protection Service, for which there is a separate law). This has been acknowledged by the MIA, at least, largely as a result of the deep international engagement on police reform, yet no concrete changes have yet taken place.

Thus although Georgia's approach to security sector reform has been broader in scope than in Ukraine, governance of the private security sector has still remained largely off the map. The huge international support for police reform has led certain advisers to touch on PSCs during their analyses of the current situation, yet this has not been backed up by a genuine focus

on the issue of private security. Again, unless there are European or 'Euro-Atlantic' standards that Georgia is encouraged to uphold in order to move closer to NATO and the EU, developments in the PSC market are likely to depend more on economic or political factors than concerns about the best form of democratic governance.

### **Post-Soviet Security Privatisation in Context**

This chapter has questioned some of the implicit assumptions behind the Western dialogue on the privatisation of security: that there is a clear distinction between the public and the private; that state officials act in the interests of the state and the public good, and only private companies are motivated by profit; and that processes of economic liberalisation are essentially similar everywhere. On the contrary, it is argued that through corruption and lack of capacity, there are frequent occurrences of state officials putting private gain before duty, thus blurring the separation of public and private, and that although the states of the former Soviet Union certainly underwent economic liberalisation in the early 1990s, this was a much more extreme and chaotic experience than in the West, resulting in unintentional 'shock therapy' for the private security market without allowing the time or resources to build a new regulatory framework. It is thus suggested that an analysis of the 'privatisation' of security fails to capture the complexity of these changes, and that considering events in terms of the 'commercialisation' of security allows a better understanding of what has happened.

This paper has raised numerous concerns about the quality of private security governance in the CIS region, with particular regard to Georgia and Ukraine (though these are meant only as case studies rather than to 'single out' these states). These include insufficient or controversial legislation, areas where the industry does not appear to be operating according to best practice, or beyond its mandate (the *krysha* role), potential clashes of interest between various 'commercial' security actors, and unclear lines of transparency and accountability.

The paper has also noted considerable differences between CIS states in the way in which the private security industry has developed, along two main variables: the level of state involvement in 'commercialised' protection and the scope and depth of legislation. There may be numerous reasons for this, many of which do not relate to the private security industry in particular, such as the level of consolidation of elites and overall state capacity to pass and implement legislation. Nonetheless, the level of control over

the industry in different CIS countries may not be as great as first appears, since legislation is no guarantee of democratic control in states where the rule of law is still shaky, and the potential remains for elites to (mis)use PSCs for their own ends. It may well be that it is more a question of whether such control is formal or informal; further comparative study of this question would be extremely interesting but methodologically challenging.

However, perhaps the greatest concern is that private security governance does not appear to be regarded as an important issue. If there are few mechanisms for either parliament or the public to exercise democratic control over the sector, this is due in large part to a lingering Soviet attitude that the security sector as a whole is a matter for the state alone. Despite the obvious risks of allowing unregulated private security actors to operate and the enormous social impact of the commercialisation of security, there is still little understanding that the public *has the right* to control such matters, let alone of *how* to do this; furthermore, given the massive decline in living standards associated with the end of the Soviet Union, most people are still more concerned with making ends meet than with demanding democratic governance. Unfortunately, this means that even where private security industries are regulated, this tends to be in the interests of the industry or powerful figures, rather than democracy and public security.

It is likely that state control over the private security industry will grow over the next few years; in some countries, such as Ukraine, the state never really lost control. This is certainly necessary to some degree, and should be expected in a region where governments still have a natural tendency towards intervention and control in many spheres. Yet government control is not necessarily the same as democratic governance, especially where the rule of law is perceived as incomplete. In that sense, it is optimistic to expect that governance over the private security industry will be much better than in the security sector as a whole.

Currently, however, governance of the private security industry has not been part of the dialogue on SSR in the region. There is comparatively little research on security sector governance in the region, and even in countries which have declared their intention to reform towards European structures, understanding that the scope and purpose of SSR stretches far beyond military reform or democratic control of the armed forces is largely lacking. This must be addressed at both policy-making level, for example by including discussions in NATO or EU Action Plans (where appropriate), and at the analytical level, by incorporating private security into future studies of security sector governance.

A related point is that most CIS governments lack both the capacity and the political will to prioritise private security governance, but international pressure could help to push this issue up the agenda: even states that have no interest in EU or NATO membership are sensitive to accusations that they are failing international or European standards. Thus although the 'Western model' of the privatisation process may not be relevant to the CIS context, 'Western' standards of regulation and democratic control of the industry could play a major role in improving governance – if such standards and best practice were clearly codified and it was therefore possible to encourage CIS states to adhere to them. Without this external impetus, governance of private security industries in CIS states is likely to improve even more slowly than overall security sector governance, unless major internal changes dictate otherwise.

## **Conclusion**

This paper does not claim to be comprehensive, but merely to present a broad overview of some of the relevant issues and open them up for discussion. This cursory analysis suggests that the situation in Ukraine requires further study. From a practical and policy point of view, major questions remain unanswered about whether the current situation is appropriate to ensure democratic governance of the sector; from a theoretical perspective, studying the development and set-up of the 'commercialised' security sector in more detail may offer insights into wider questions about the privatisation and commercialisation of security since the late 1980s. Comparative analysis looking at why different countries in the CIS have developed in different directions may also contribute something to the academic debate.

In order to do this, and to provide reliable baseline information to policy-makers and academics, there is a need for comprehensive national surveys using appropriate methodology.<sup>41</sup> Currently, very little academic or policy research is available with which to make truly informed judgements about the state of the private and commercialised security industries in the CIS. Without this, any analysis, such as this paper, can only be provisional in nature.

## Notes

- <sup>1</sup> This study looks particularly at ‘private security companies’ (PSCs), defined by SEESAC (see note 41) as ‘companies that provide security services (generally of a police type) for profit to other organisations and/or individuals’, as opposed to ‘companies that provide military services for profit’ (private military companies – PMCs). Whilst this distinction is to some extent artificial, and may lose all meaning in many overseas contexts, it is nonetheless useful when looking at domestic security industries. As far as the author is aware, there are few cases of international PMCs operating in the CIS region, nor of CIS-owned PMCs undertaking major activities elsewhere; there is certainly a need for further research into such issues, but this was deemed outside the scope of the present study.
- <sup>2</sup> The work presented here is based largely on secondary sources, although a few interviews were carried out with representatives of the private security industry, government officials and civil society representatives. A more comprehensive survey would require much more primary research in countries across the CIS region. The author takes full responsibility for any mistakes or misrepresentations and welcomes any feedback.
- <sup>3</sup> Volkov, V. ‘Security and Rule Enforcement in Russian Business: The Role of the “Mafia” and the State,’ (online paper), 1. Available at URL: <<http://www.colbud.hu/honesty-trust/volkov/>>
- <sup>4</sup> Ibid.
- <sup>5</sup> Volkov, V., ‘Security and Enforcement as Private Business: The Conversion of Russia’s Power Ministries and its Institutional Consequences,’ in *New Entrepreneurs in Russia and China*, ed. Bonnell V., 9 (Boulder: Westview Press, 2001).
- <sup>6</sup> Ibid., 10.
- <sup>7</sup> Similar comments are made about Poland in Los, M., ‘Reshaping of Elites and the Privatization of Security: The Case of Poland,’ *The Journal of Power Institutions In Post-Soviet Societies*, no. 2 (2005). <<http://www.pipss.org/document351.html>>
- <sup>8</sup> Volkov, V., ‘Between Economy and the State: Private Security and Rule Enforcement in Russia,’ *Politics & Society*, vol. 28, no. 4 (December 2000): 494.
- <sup>9</sup> Interview with PIR Center, Moscow, May 2006.
- <sup>10</sup> Statement by Press Service of the Ukrainian Ministry of Internal Affairs, ‘Do kintsya roku Derzhdepartament Sluzhby okhorony MVS Ukrainy pereviryt’ vsi nederzhavni okhoronni pidpriyemstva.’ Available at URL: <[http://www.kmu.gov.ua/control/uk/publish/news\\_article?art\\_id=36533737&cat\\_id=35884](http://www.kmu.gov.ua/control/uk/publish/news_article?art_id=36533737&cat_id=35884)>
- <sup>11</sup> See for example interview with Bolshakov, A., ‘Nasha zabota – zashchit’ biznes,” *Sluzhba bezopasnosti*, no. 5 (2002): 9.
- <sup>12</sup> Cf accusations made against PSCs ‘Sprut’ and ‘Alfa-Metal’ in Press Statement by the Ukrainian MIA listed above; also reported by NTN television channel on 1 November 2005, available online as ‘Pid Kiyevom zakhopili dityachyi sanatoryi’, <<http://www.ntn.tv/news/kriminal/05/11/01/1821.html>>
- <sup>13</sup> Website of the Derzhavna Sluzhba Okhorony. <<http://www.dso.kiev.ua/page2/page2.htm>>
- <sup>14</sup> Ibid.
- <sup>15</sup> Resolution No. 615, ‘On Measures to Improve the Protection of State Objects and Other Forms of Property’ [author’s translation], 10 August 1993.



- <sup>16</sup> Shumylo, S., 'Osoblyvosti natsional'noyi okhorony' in *Okhoronnyi visnyk*, October 2003, <[http://www.aub.com.ua/ua/zmiproohoronu.html?\\_m=publications&\\_t=rec&id=1368](http://www.aub.com.ua/ua/zmiproohoronu.html?_m=publications&_t=rec&id=1368)>; Shumylo, S., 'Bankiri napolohayut' na demonopolizatsiyi okhoronnykh posluh'. <[http://www.aub.com.ua/ua/zmiproohoronu.html?\\_m=publications&\\_t=rec&id=1419](http://www.aub.com.ua/ua/zmiproohoronu.html?_m=publications&_t=rec&id=1419)>
- <sup>17</sup> Decree of the State Committee on Regulatory Policy and Entrepreneurship/Ministry of Internal Affairs of Ukraine (No 145/1501), adopted on 14 December 2004, 'On confirmation of licensing conditions for economic activity relating to services concerning the protection of state and other forms of property and the protection of citizens' [author's translation].
- <sup>18</sup> Cf Pavlenko, Y., 'The Authorities are Testing the Methods and Mechanisms of Influencing the Elections,' *National Security and Defence*, (Ukraine, Razumkov Centre) no. 4 (52) (2004): 51ff.
- <sup>19</sup> See Bolshakov, A. op. cit.
- <sup>20</sup> Press Statement by the Ukrainian MIA listed above.
- <sup>21</sup> Ibid.
- <sup>22</sup> Law No. 1775-III, adopted 1 June 2000.
- <sup>23</sup> 'Zauvazhennya (postateine) UFPNSB do proektu Zakonu Ukrayiny 'Pro okhoronnu diyalnist''. <[http://www.aub.com.ua/ua/docohorona.com?\\_m=publications&\\_t=rec&id=4537](http://www.aub.com.ua/ua/docohorona.com?_m=publications&_t=rec&id=4537)>
- <sup>24</sup> 'Vysnovok Holovnoho naukovo-ekspertnoho upravlinnya VRU do Proektu Zakonu Ukrayiny 'Pro okhoronnu diyalnist'', *reyestratsiynyi*, no 7336. <<http://www.rada.gov.ua:8080/pls/zweb/webproc34?id=&pf3511=24242&pf35401=72795>>
- <sup>25</sup> Website of the Derzhavna Sluzhba Okhorony.
- <sup>26</sup> Polyakov, L., 'An Analytical Overview of Democratic Governance of the Defence and Security Sector in Ukraine,' Working Paper No. 152, Geneva Centre for the Democratic Control of the Armed Forces (2005): 1-2.
- <sup>27</sup> This section is similar in content to the relevant section of a forthcoming survey of small arms and light weapons in Georgia by Saferworld in which the author was involved.
- <sup>28</sup> Darchiashvili, D., 'Georgia: A Hostage to Arms' in *The Caucasus: Armed and Divided*, ed. Mateeva, A. and Hiscock, D., 76-78 (London: Saferworld, 2003).
- <sup>29</sup> Boda, J. and Kakachia, K., 'The Current Status of Police Reform in Georgia' in *From Revolution to Reform: Georgia's Struggle with Democratic Institution Building and Security Sector Reform*, ed. Fluri, P.H. and Cole E. (Vienna: LaVAK, 2005).
- <sup>30</sup> See the website of the Georgian Ministry of Internal Affairs for more details: <<http://www.police.ge/>>
- <sup>31</sup> Estimates based on interviews with representatives of the private security industry.
- <sup>32</sup> Anonymous interviewee, Tbilisi, December 2005.
- <sup>33</sup> Interview with the private security company 'Aligator', April 2006.
- <sup>34</sup> Private security companies 'Guarantor of Security of People and Property' and Voltra', interviewed in Tbilisi, April 2006.
- <sup>35</sup> Krunic, Z. and Siradze, G., 'The Ministry of Internal Affairs in Georgia – Report on the Current Situation with the Recommendations for the Reform,' Report for the European Commission Delegation to Georgia, Tbilisi (2005), 34.
- <sup>36</sup> Darchiashvili, D., 'Georgia: A Hostage to Arms,' in *The Caucasus: Armed and Divided*, ed. Mateeva, A. and Hiscock, D., 76 (London, Saferworld, 2003).
- <sup>37</sup> Krunic, Z. and Siradze, G. op. cit., 35.

<sup>38</sup> Ibid.

<sup>39</sup> Law on Entrepreneurs, adopted 1994 and then reviewed in 1999.

<sup>40</sup> Anonymous interviewee, Tbilisi, December 2005.

<sup>41</sup> Such as that offered by SEESAC and Saferworld in their survey of PSCs in South Eastern Europe: See South Eastern European Clearinghouse for the Control of Small Arms and Light Weapons (SEESAC) and Saferworld, *SALW and Private Security Companies in South Eastern Europe: A Cause or Effect of Insecurity?*, (Belgrade, 2005).

## Chapter 8

# Challenges of Security Privatisation in Iraq

*David Isenberg*

### **Introduction**

There has been no systematic attempt to date to collect data on and analyse security privatisation in the Middle East. Furthermore, the types of private actors in the region, ranging from ethnic- or religion-based militias to guerilla groups to corporate security firms are so different as to defy coverage in a single paper. This paper will therefore focus on private military companies and private security companies in the Middle East, focusing in particular on the case of Iraq.

Private military and security firms, that for the sake of convenience only are here referred to broadly as private military companies (PMCs), are extremely difficult to generalise about. As an industry, or at least, business sector, PMCs have been around for less than 20 years. And while they have attracted growing attention from analysts, scholars, governments and the general public in the past decade, there is still no agreement on how to define, let alone categorise them. Furthermore, the privatisation of security, at least in the sense the term has come to mean in the West – the outsourcing of former inherently governmental functions to the private sector, particularly those associated with regular military forces – is not something that has taken root in the region. With the exception of various guerrilla groups in Lebanon or Palestine most states still zealously guard their monopoly on the legitimate instruments of violence. Consequently, they have not privatised combat support or combat service support functions in the same way as the United States or Britain.

Current legal frameworks are hostile to foreign PMCs working in the region. It is a misconception that PMCs have open entry into the Middle East. By and large, countries in the Middle East do not want Western foreigners carrying weapons and even if a PMC could land a contract it is most likely that it would be forced out once the required knowledge had been

imparted. For example, in Saudi Arabia in July 2005 the Council of Ministers passed a new law that bans employment of non-Saudis as security guards at private companies and organisations. Saudis must replace non-Saudis within 90 days after the law comes into effect.<sup>1</sup> The only other countries where PMCs are operating, albeit not directly for national stakeholders, include Kuwait and Jordan. But both are related to Iraq insofar as they are being used as part of the supply lines for forces operating in Iraq. In addition, facilities in Jordan are used to train Iraqi forces by such PMCs as Military Professional Resources Incorporated (MPRI) and DynCorp International.

Generally in the Middle East, if security is defined in the Weberian sense of who has a monopoly on the instruments of violence, and assuming there has been no lapse into civil war – as was the case with Lebanon in the 1970s and 1980s – that role is still generally held by the state. Nevertheless, some societies are tribal in nature, and while various ethnic or ideological groups can amass considerable security and military forces on their own (Hezbollah in Lebanon), these may uneasily co-exist with government forces or may be entirely independent of the government (both the Kurds in northern Iraq and the group SICIRI, representing the Shiites, while Saddam Hussein was still in power). More recently, the rise to political power through elections in the Palestinian Authority of the armed group Hamas will undoubtedly have a significant impact on the provisioning of security, although it is too soon to say what it will ultimately be.

Yet, given the recent announcement at an international conference in Amman, Jordan, by Cofer Black, vice-chairman of Blackwater USA, a major US PMC, that Blackwater stands ready to help keep or restore the peace anywhere it is needed, it is not difficult to envision PMCs bidding for contracts in the region in the future.<sup>2</sup> In fact, PMCs have in recent years competed for contracts in Saudi Arabia and Kuwait but have usually ended up on the losing side, due to fairly restrictive laws against foreign-owned companies.

Much of the public image of PMCs is based on perceptions that are woefully out of date, such as the activities of now defunct groups like Executive Outcomes and Sandline.<sup>3</sup> Specifically, many people still think that companies undertake direct offensive combat operations such as Executive Outcomes did in Angola and Sierra Leone, which is simply not the case. Or that the various PMCs operating in Iraq constitute a cohesive army, second only in size to the American forces there.

In fact, the private security sector in Iraq is very diverse. Yes, there are thousands of Westerners carrying arms but there are also more host na-

tionals – Iraqis – and third-country nationals, who are doing the same. Some are more low-key than others when it comes to the use of force but, in general, these PMC personnel are more disciplined and experienced than their active duty counterparts. And their functions, as detailed below, vary, depending on the terms of their contract. While the common theme for a security contractor is providing security and protection it can take many different forms, ranging from static security for buildings and infrastructure to security details for officials and reconstruction workers.

The role and impact of private actors in both providing security and reform of the security sector varies significantly according to the context. Obviously in the case of Iraq the provision of personal security, primarily for people doing reconstruction work, but also for infrastructure, has been the top priority, especially given the dangers caused by the insurgency. But as time goes by and the new Iraqi government seeks to establish, consolidate, and expand its powers, personal protection will assume less of a role, as Iraqi military and paramilitary forces assume security functions and as the reconstruction effort draws to a close. Then the emphasis will be on training and professionalisation of those forces, something the United States did not become serious about until 2005. While the US military has taken back some of the responsibility for training Iraqi military forces that it originally outsourced out of dissatisfaction with the way it was being done, other PMCs – notably DynCorp, which has the contract for training Iraqi police – will continue to play a prominent role in reforming that aspect of the Iraqi security sector.

This paper will briefly examine the role of PMCs in security provision and security sector reform in the Middle East. It then assesses their importance and influence in Iraq, describes their impact on the country and tries to discern whether their role has any wider regional impact. Areas for further research and policy lessons that should be learned from activities to date are proposed.

### **Private Actors, Security Provision and the Reform of the Security Sector in Iraq**

Iraq has raised the level of international attention on the role of PMCs to new heights.<sup>4</sup> Reliance on PMCs increased greatly after the initial major combat operations phase. This was mainly due to two factors. First, the US political leadership grossly underestimated the number of troops that would be required for stability and security operations. As a result, companies such

as Halliburton were needed just to meet the military logistics requirements of sustaining US and other coalition forces.

Second, as part of the US plan to bring democracy to the Middle East, Iraq was to be remade into a new country. This required a massive reconstruction project to overcome the effects of over two decades of war, against Iran and subsequently the United States, as well as the consequences of the sanctions regime. But the US administration did not anticipate the emergence and growth of the insurgency. Since US forces were not available to protect those doing reconstruction work, such firms had no choice but to turn to private security contractors in order to protect their employees. Put another way, while PMCs provide valuable services in Iraq, monumentally poor planning created the need for them; these are not exactly the sort of market conditions the industry can or should count on in the future.

Initially, PMCs were involved in the retraining of Iraqi security forces but due to problems and the increasing challenges posed by the insurgency this task has been taken back by American military forces. Over time, therefore, PMCs have provided three main categories of services in Iraq:

- personal security details for senior civilian officials;
- non-military site security (buildings and infrastructure); and
- non-military convoy security.

Rather than working directly for the US government or the Coalition Provisional Authority (CPA), most PMCs are subcontracted to provide protection for prime contractor employees, or are hired by other entities such as Iraqi companies or private foreign companies seeking business opportunities in Iraq. This obviously makes PMC accountability difficult. A Congressional Research Service report from 2004 noted:

Details of the CPA contracts and related subcontracts are not public information. This has led to questions concerning the cost-effectiveness of the contracts as well as of any obligations of the contractors under the contracts regarding the use of force. According to the CPA, 'subcontracted PSCs and their parent companies generally do not make available details concerning the prices of their contracts, salaries, or numbers of employees,' because 'such information is proprietary and may have privacy implications...'. Some analysts suspect that at least a few of the contracts may detail 'rules of engagement' under which contracted personnel are permitted to use their weapons as a means of protecting the personnel

and other assets of the companies performing reconstruction work, as there currently is no legal framework governing the use of private weapons in Iraq.<sup>5</sup>

In fact, companies did and do provide significant detail to government contracting officers. However, the Bush administration has been particularly reluctant to share that information with Congress. Moreover, the CPA gave an enormous amount of personal data of PMC employees – such as names, addresses, and contact information – to the Iraqi government, which, arguably, was a violation of the 1974 Privacy Act.<sup>6</sup> CPA Memorandum 17 required companies to provide detailed information as a condition of receiving a licence to operate.

The lack of security in post-war Iraq created an enormous demand for PMC services. At least 10 to 15 cents of every dollar spent on reconstruction is for security, according to the Inspector-General for the CPA.<sup>7</sup> More recent reports indicate the cost of security is much higher, approaching 50 percent.<sup>8</sup>

Certainly, PMCs have not lacked for business. In February 2006 the British government disclosed it had spent more than £100 million on private security companies in Iraq since the 2003 invasion. Some PMCs have done very well financially.<sup>9</sup> A joint investigation by Corporate Watch, an independent watchdog, and *The Independent* newspaper found that British businesses had profited by at least £1.1 billion since coalition forces toppled Saddam Hussein. In early February the British press reported that Aegis Defence Services had seen turnover rise more than 100-fold in three years thanks to its security contracts in Iraq. According to its Chief Executive Officer, Tim Spicer, turnover in 2005 was £62 million, of which three-quarters came from work in Iraq. In 2003, the firm's first full year of operation, turnover was £554,000.<sup>10</sup>

Given that US military forces are reluctant to take on any new missions while trying both to turn responsibilities over to Iraqi military and security forces and reduce their own presence, it is likely that any additional attempts to proceed with reconstruction will provide PMCs additional business opportunities.<sup>11</sup> Some believe that Iraqis prefer foreigners for critical security tasks, as international staff are harder to bribe or threaten (via vulnerable family members).<sup>12</sup> However, using foreigners risks strengthening distrust of Iraqi government institutions such as the police and security services. And ultimately, only a capable, autonomous government can provide the fundamental security that is so desperately needed in Iraq.

From a PMC perspective most activities have been of a tactical, not a strategic nature. That is, their day-to-day activities are not serving to trans-

form the overall political, military and social environments in which they operate. The one possible exception in Iraq where PMCs could help effect a strategic change would be in the training programmes for Iraqi military and security forces. The creation of competent, professional, and trusted forces will be essential for the formation of a central government that is in turn necessary if there is to be a future state of Iraq.

In that regard, DynCorp International was prominent for its hiring of former US police officers to train police recruits in Iraq. Training was also conducted by Vinnell Corp. or one of its subcontractors.<sup>13</sup> Unfortunately, there is at least some reason to doubt how effective PMCs have been.<sup>14</sup> For example, Vinnell, owned by Northrop-Grumman, is technically in charge of training the new Iraqi Army, having long done the same in Saudi Arabia. Vinnell won a one-year contract to train nine battalions of 1,000 men each for the new Iraqi army, with an option to train all 27 battalions if it performed well. But Vinnell was viewed as having performed badly and had subcontracted some of that work to other American PMCs. The CPA consequently decided to use the Jordanian military to train Iraqi officers and other PMCs to train Iraqi non-commissioned officers (NCOs).

For several reasons the number of police officers and soldiers trained was far below expectations. Some problems were beyond the contractors' control. For one thing, the US administration in Baghdad balked at paying the recruits more than about \$70 a month, a minimum wage even in Iraq. It has been argued that Vinnell erred in that it based its techniques on its 25-year experience in training the Saudi Arabian National Guard – a relatively well-paid, well-educated fighting force that bore little resemblance to the unskilled recruits fresh off the streets of Baghdad. US military officials complained that the contractors had put too much emphasis on classroom studies of strategy and tactics and not enough on basic combat skills. Another problem centred around objections from Iraqi officials who asked why Iraq should pay US contractors to train police when France and Germany were reportedly offering such services for free. And they said it was a waste of money to hire contractors to build a training facility in Jordan when there were plenty of facilities in Iraq. A more important problem was that Iraq's security situation became so precarious that personnel in outlying areas were afraid to hazard a trip to Baghdad or Jordan for training. One year after the first training contracts were issued, the Iraqi army had only 6,700 troops and fewer than half of them had received training. The first real sign of trouble came in December 2003, when more than half of Vinnell's first battalion deserted. Some of the remaining soldiers had not mastered such basic skills as marching in formation or responding correctly to radio calls.<sup>15</sup>



In Iraq, PMCs can be divided into two types: those with guns and those without. Simply put, the difference is between a security contractor and a logistics contractor. Inevitably, a security contractor has used weapons for a living – either law enforcement, more usually the military, or a combination of both. Some contractors employ non-Iraqi Westerners from the US, Britain and other Western countries; third country nationals from Chile, Nepal, Fiji, South Africa, etc.); and Iraqi nationals. For example, Erinys, a British company, had hired over 14,000 Iraqis to guard the country's petroleum infrastructure.

There are also domestic PSCs. Some of these have made the news for operating in a heavy-handed manner and routinely disregarding Iraqi government forces, including soldiers. Government leaders who do not trust Iraqi government forces use them.

Logistics contractors include employees of the big companies such as Halliburton and its Kellogg, Brown & Root subsidiary. These are the people driving supply trucks, setting up and staffing US military bases, running the mess halls, and laundry services, and doing all the usual logistics that a regular military force requires. While this is an immense operation, it has virtually nothing to do with security or security sector reform in Iraq. It is simply the most recent iteration of the military sub-contracting phenomenon.

It is often said that such firms are more cost-effective and efficient than the public sector but the simple truth is that nobody knows for sure.<sup>16</sup> There is no empirical data to confirm such assertions and there has been enough evidence of cost overruns, inflated invoices, and fraud and abuse to be somewhat sceptical. Whether or not a PMC is cost-effective will depend heavily on how the contract between the client and PMC is structured and what incentives it contains.<sup>17</sup>

PSCs have not been immune from the corruption more commonly linked with their PMC brethren.<sup>18</sup> An auditing board sponsored by the United Nations recommended that the United States repay as much as \$208 million to the Iraqi government for contracting work in 2003 and 2004 assigned to Kellogg, Brown & Root, the Halliburton subsidiary. The work was paid for with Iraqi oil proceeds, but the board said it was either carried out at inflated prices or done poorly.<sup>19</sup> As of the December 28 meeting of the International Advisory and Monitoring Board (IAMB) for Iraq there had been no recommendation to repay the money.<sup>20</sup> However, the overall cost of the KBR work was subsequently reduced by \$9 million.<sup>21</sup>

The prosecution of Custer Battles is a case in point, pitting two whistle-blowers against two former Army officers whose company, Custer Battles LLC, won multimillion-dollar contracts in the aftermath of the fall of

Saddam Hussein in 2003. The trial in February 2006 was notable for being the first civil fraud case against a US contractor accused of war profiteering in Iraq; specifically bilking the US government out of \$50 million. The case generated extensive media coverage because of the seriousness of the fraud charges and because it became the first test of whether the federal False Claims Act applies to the conduct of contractors working in Iraq. Court filings in the Custer Battles case detailed how CPA officials in Baghdad were ill-equipped to write, much less oversee, the processing of millions of dollars in contracts. The federal jury found Custer Battles guilty and ordered it to pay more than \$10 million in damages and fines. It found that Custer Battles committed fraud in 37 instances in connection with a \$9 million contract to help distribute new currency in Iraq. It was found guilty of defrauding the CPA of millions of dollars. The company denied the charges and said it would appeal.<sup>22</sup>

### **The Consequences of Iraq**

Iraq has become the poster child for the private military and security sector. Certainly, the role of such firms has inspired a torrent of popular and academic writing on the subject.<sup>23</sup> Moreover, most people nowadays will at least recognise firms like Halliburton, Blackwater, DynCorp, ArmorGroup, Triple Canopy, et cetera, something that would not have been the case just three years ago.

The impact of private military and security contractors in Iraq has been mixed.<sup>24</sup> Their impact varies according to who is viewing their activities, i.e. US military, civilians doing reconstruction work, other US government agencies, the Iraqi government, or Iraqi civilians. Since we still do not have a full accounting of the actions of all contractors operating in Iraq, it remains impossible to assess where the balance lies between positive and negative assessments.

Overall, the PMC sector has transformed itself into a more mature industry with fewer firms employing many hundreds, if not thousands of contractors around the world, and receiving multi-hundred million-, if not billion-, -dollar contracts. They are also increasingly well-connected politically, hiring former government officials to their staff or boards of directors to help bid for contracts. These developments are a sign of the emergence of the PMC sector as a significant industry, insofar as all industries seek to influence government for their own advantage. This evolution of the PMC indus-

try is also a worrisome development, in that it puts these firms squarely in the midst of the favour-trading game in order to influence contract awards.

### **Governance Challenges in Perspective**

With the advantage of hindsight it is clear that there has been friction between clients and contractors on numerous occasions in this field, notably over coordination. According to a US Government Accountability Office report:

While the US military and private security providers have developed a cooperative working relationship, actions should be taken to improve its effectiveness. The relationship between the military and private security providers is one of coordination, not control. Prior to October 2004 coordination was informal, based on personal contacts, and was inconsistent. In October 2004 a Reconstruction Operations Center was opened to share intelligence and coordinate military–contractor interactions. While military and security providers agreed that coordination has improved, two problems remain. First, private security providers continue to report incidents between themselves and the military when approaching military convoys and checkpoints. Second, military units deploying to Iraq are not fully aware of the parties operating on the complex battle space in Iraq and what responsibility they have to those parties.<sup>25</sup>

Although there is no publicly available data, anecdotes and common sense suggest that the use of lethal force by regular military personnel, through accidents and errors, is far greater than that by PSC employees. US military rules of engagement favour ‘force protection’ over any obligation to protect innocent life.<sup>26</sup> There are far more shootings of innocent civilians by soldiers manning checkpoints than all the known killings of civilians by PSC personnel. However, examples of controversial incidents involving private security staff include the following:

- The *Los Angeles Times* reported in December 2005 that private security contractors had been involved in scores of shootings in Iraq, but none had been prosecuted despite findings in at least one fatal case that the men had not followed proper procedures. Instead, security contractors suspected of reckless behaviour were sent home, sometimes with the knowledge of US officials, raising questions about accountability and stirring fierce resentment among Iraqis.

- In March 2006, Kays Juma, an Australian resident and a professor at the University of Baghdad, was shot dead in Baghdad when private security guards mistakenly fired on his vehicle.<sup>27</sup>
- An alleged 'trophy' video appeared to show security guards in Baghdad randomly shooting Iraqi civilians. The video, which first appeared on a website that has been linked unofficially to Aegis Defence Services, contained four separate clips in which security guards open fire with automatic rifles at civilian cars. While there has been much hue and cry over the shootings it is far from clear that the guards did anything wrong. The results of an investigation by the US military, released 10 June 2006, determined that no one involved would be charged with a crime.<sup>28</sup>

There have also been problems between contractors and regular military forces. For example, one major PMC in Iraq, Triple Canopy, has had several friendly-fire incidents in Iraq where military personnel shot at them.<sup>29</sup> One of the better-known complaints occurred in May 2005 when a group of armed American private security guards from Zapata Engineering were taken into custody on suspicion of shooting at a Marine guard tower. Although subsequently released, the contractors feel that they were unfairly arrested and, once in the military prisons, some say they were subjected to humiliating treatment and were abused. The marines say the contractors were treated professionally. Recently it was announced that the contractors had been cleared of all charges.<sup>30</sup>

While there have been incidents involving friction between contractors and regular military in Iraq the overall trend has been downward. Contractors clearly recognise that they are subordinate to regular military forces and when so directed must obey the orders of the commanders under whose jurisdiction they fall. To the extent there are still incidents it is likely a result of new troops being rotated into the theatre who are unfamiliar with working with contractors, along with some resentment, fuelled by often misleading reports in the media, of the higher salaries of contractor personnel.

### **PMC Regulation**

Concerns over accountability and regulation of PMCs have long been a staple in academic discussion of the industry.<sup>31</sup> However the widespread use of PMCs in Iraq brought increased publicity to and discussion of the issue.<sup>32</sup> One problem in regulating PMCs is their somewhat ambiguous legal status

in regard to existing international treaties relevant to conflict and war. There is a lack of clarity over the exact relationship between governments and PMCs. Such ambiguity leaves companies open to arbitrary treatment by combatants or other countries if they stray over borders.<sup>33</sup> PMC personnel are combatants under the Geneva Conventions if they bear arms and are clearly working on behalf of one side in a conflict; yet they could also be treated as non-combatants if they do not wear recognisable uniforms or are not under military command.

A significant development, though not well covered in the press, was the issuance by the Pentagon on October 3, 2005 of DoD Instruction 3020.41 'Contractor Personnel Authorized to Accompany the U.S. Armed Forces', issued pursuant to a provision in the FY 2005 Defense Authorization Act. The 33-page document clarifies the legal status of civilians hired to support those forces in a contingency. The new instruction also explains when contractors can carry weapons in areas where US troops operate – for example in Iraq, where armed contractors have been operating for more than two years without clear regulatory guidance. The regulation ties together nearly 60 Pentagon directives and Joint Staff doctrinal statements that relate to the role of contractors on the battlefield.

From the viewpoint of the PMC industry the new regulation is important because it establishes criteria for civilian contractors to carry weapons, which are to be used only in self-defence. It also sets forth detailed procedures for arming contingency contractor personnel for security services. However, the key question now is how it will be implemented. Reportedly, a number of Defence Federal Acquisition Regulations are being modified to reflect the guidance in the new instruction. But it may be too difficult to retroactively implement all of the rules and regulations spelled out in the policy to cover the contracts in effect in Iraq.

Aside from international legal controls, private security firms are also accountable to the War Crimes Act of 1996, Victims of Trafficking and Violence Protection Act of 2000, Anti-Torture Statute, Defense Trade Controls Act, Arms Export Control Act, Gun Control Act, Export Administration Regulations, International Traffic in Arms Regulations, Defense Base Act, Foreign Corrupt Practices Act, and the General Orders of the Central Command, Multi-National Corps – Iraq and Combined Joint Task Force (CJTF).

However, the problem has not been a lack of relevant laws, but of means. Regulations existed but were not implemented because the relevant administration existed mainly on paper. Public discussion on immunity granted to foreign contractors has overlooked the fact that, without being granted immunity from the jurisdiction of Iraqi courts, security contractors

simply were not going to work in Iraq due to the likelihood of arbitrary legal treatment of their employees. In addition, without immunity, insurers were threatening to increase their premiums significantly. Furthermore, because there is no status of forces agreement in place it has never been clear in what venue legal proceedings against a contractor might take place. Such uncertainty was another reason for granting contractors immunity.

The impact of all the above is ambiguous. Theoretically, even with the immunity granted by CPA Memorandum 17, contractors could still be prosecuted under various legal authorities, especially the Military Extraterritorial Jurisdiction Act (MEJA). But, until recently, federal prosecutors were not that interested in using the Act and local prosecutors in the states where PMCs are headquartered, and for whom MEJA holds greater relevance, normally do not have sufficient resources to use it.

Despite these rules and regulations, it is unlikely that the activities of PMCs in Iraq, numerous as they are, offer many permanent lessons for the industry as a whole. From an industry perspective, nobody believes that they are going to see another Iraq. The United States could not intervene in another country on the same scale as Operation Iraqi Freedom, even if it wanted to. The industry recognises that whatever contracts they get in the future are going to be in countries and situations that will be quite different from those in Iraq.

There have been numerous problems with accountability of private contractors of all kinds in Iraq. Consider these excerpts from a study released in February 2006 by the Special Inspector-General for Iraq Reconstruction:

- The US government also experienced shortcomings in accounting for personnel deployed to Iraq – especially civilians and contractors. There was, and still is, a lack of effective control procedures at many entry and exit points for Iraq, and there is no inter-agency personnel tracking system. Official and contract personnel often arrived and departed with no systematic tracking of their whereabouts or activities, or in some cases, with no knowledge of their presence in country. Shortly before its dissolution in June 2004, CPA was still unable to account for 10 percent of its staff in Iraq.
- Mechanisms to track contractors supporting CPA have been left largely to the contractors' individual firms and have not been enforced.<sup>34</sup>

The most important factor in the risk-management trade is choosing and training the right people. While PMCs generally subject employees to

vetting<sup>35</sup> and have codes of conduct for their staff, there is no uniform check of these actors by government agencies. In the United States, contractors to the government are theoretically liable to prosecution but as yet this has never happened. Disciplining contractor personnel is seen as the contractor's responsibility.

The CPA set some initial minimum standards in Iraq for regulating PMCs and subsequently the Iraqi Ministries of the Interior and Trade adopted new mandatory guidelines to vet and register PMCs. However, while the Iraqi government is, in a *de jure* sense, in charge especially since the end of the CPA and handover of sovereignty back to the Iraqi government, it is a sovereignty that is still largely theoretical, given the challenges posed by the insurgency and its lack of resources. Thus, from the viewpoint of the PMC sector, doing business with the relevant Iraqi ministries is extremely difficult.<sup>36</sup> Currently, there is nobody in the Iraqi Interior Ministry who can issue a Weapons Authorisation Card. This means security contractors are using a variety of IDs, making their own, or using none at all. When there exists a variety of identification documents there is no credibility, undermining the point of regulation.

One question worth pondering is the potential for PMCs to create an insecure environment by training Iraqi forces without the guarantee that they will have sustainable employment in the future. Beyond the training of members of the Iraqi security forces, PMCs are training men and equipping them with a set of military skills. These men are often earning two to three times more than the average Iraqi. But what happens after Western forces and reconstruction workers leave and those Iraqis no longer have a job? Are we training the next insurgency force? While firms such as DynCorp include democratic policing and respect for rule of law in their training of Iraqi police, other firms probably train Iraqis for future subsidiaries they hope to establish. While Iraqi authorities may recognise such issues, it is unlikely they can do much about them. The truth for them, and for PMCs, is that knowledge is fungible. Once you teach a set of skills there is nothing you can do to prevent it from being used.

## Conclusion

In conclusion, let us consider some specific questions. First, how effective has been the use of PMCs/PSCS instead of national staff to train Iraqi military and police? With respect to the military the answer seems to be 'not very'. Providing personal security for reconstruction work was a far bigger

task. Also, training was primarily a task that the US military and other coalition forces reserved to themselves, even though, in the case of the United States, it initially did not spend much time and effort on it.<sup>37</sup> Although the United States initially contracted with PMCs to do some training of Iraqi military forces they subsequently took back responsibility as the growth of the insurgency increased the importance of this task.

PMCs have been more significant in regard to police training. In February 2004, Dyncorp, then a unit of Computer Sciences Corporation, won a State Department contract for civilian police services worth about \$1.7 billion over five years. That contract was one of three awarded under the State Department's \$6 billion Civilian Police Program. By most accounts Dyncorp contractors have performed competently, and many have been killed in the course of their work. What problems there have been with the programme are mainly due to the US government not providing funding on time. There is little evidence to date that use of PMCs for training Iraqi police and security forces has had any adverse effects. While this author has not seen any of the training materials used by PMC personnel, press reports indicate that such key principles as the rule of law, the importance of human rights, and the subordination of the military and security forces to civilian leadership are taught.

Second, a key principle of democratic security sector governance is that of local ownership as a pre-condition for sustainable reform and reconstruction of the security sector. What can be said about the roles of PMC/PSCs in Iraq from the point of view of accountability and transparency and the consequent implications for nascent Iraqi governance institutions?

This was probably the least successful aspect of PMC/PSC operations in Iraq. This is because most accountability and transparency issues were between the companies and the US government and not the Iraqi government. After all, when PMC/PSCs first started operating in Iraq the Iraqi government was mostly theoretical. Companies were only being supervised by the CPA, which took fairly little interest in their activities. More importantly, US government agencies and regulators were far too often too few in number, inadequately trained, overburdened in terms of contracts to be monitored, and kept on the job for too short a period to gain the experience they needed to adequately monitor contract performance.

Finally, there are anecdotal reports that many Iraqis prefer the use of foreign PMC/PSC personnel as honest brokers, or at least as being less susceptible to corruption or pressure than fellow Iraqis. Given the viciousness and brutality of the ongoing insurgency, it is understandable that outsiders might seem more reliable. But this situation is unlikely to last. A prerequisite



for a stable security sector is public confidence in fellow citizens staffing positions in the security sector, i.e. those who carry out their professional duties as members of the police, military, border police and other paramilitary forces.

Iraq has served to highlight and publicise the existence and role of private security actors in a way that would have been unimaginable if the war had not occurred. Tactical lessons to be learned include how to coordinate with each other and regular military forces, standardising operational procedures, gathering and analysing intelligence, improving vetting procedures for hiring personnel, and, at least for the United States, improving some of its laws to provide better oversight and accountability of PMCs.

Some suggest that a strategic lesson to be learned from Iraq is the need to improve oversight and accountability of PMCs working in the field. However, while PMC and government performance in those areas can always be improved, their efforts in Iraq – undoubtedly the harshest environment PMCs have faced thus far – showed that we have plenty of means to ensure both oversight and accountability. The problem is not one of means, but of political will. After all, governments set the standards by which PMCs must abide.

Strategically, we have not learned any new strategic insights from the experience of PMCs in Iraq. While it may be new to the general public, all the relevant issues, including coordination with regular military forces, compliance with domestic and international laws, preventing human rights abuses and corruption in the contracting process, had already been extensively discussed previously and, if not solved, at least recognised as an issue meriting special effort and attention in the future.

Calls for increased regulation of the industry are met by industry replies that while it is not against regulation there are already numerous laws and regulations on the books. But the truth is that many of those laws and regulations are either about setting standards or providing legal authority to prosecute someone if they break the law. What is really needed is a mechanism that provides transparency and oversight while a PMC operation is ongoing, not after the fact.

To the extent that PMCs will seek to work as part of future operations conducted by regular military forces it is necessary to know what has gone right and wrong. There are enough examples of friction between the two in Iraq to suggest that there are still problems of control and coordination, as evidenced by the number of friendly-fire incidents that need to be worked out. Thus, an exhaustive lessons-learned report needs to be compiled, based on access to records from all the PMCs operating in Iraq. In addition, access

to records from all government agencies that interacted with PMCs would also be needed.

A final major policy lesson that Iraq offers is that while improved national legislation by the states that PMCs are headquartered in is necessary, it is insufficient since a PMC could always relocate to another state if it feels burdened by a state's laws.<sup>38</sup> Thus, considerably more work needs to be done on harmonising international legal standards relevant to PMC activities, either by revising existing law or by creating new ones, or by creating a common international standard for PMC registration and licensing.

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## Chapter 9

# Implementing South Africa's Regulation of Foreign Military Assistance Act

*Raenette Taljaard*

This Chapter seeks to analyse the South African state's attempts to regulate the activities of private military and security companies through the implementation of the Regulation of Foreign Military Assistance Act (RFMA), enacted by the new democratically-elected South African government in 1997. This country-specific case study is done against the broader backdrop of significant gaps and ambiguity concerning private security firms in public international law, and a clear failure of the field of civil-military relations to adequately grapple with and respond to the profound conceptual, legal, political, practical and moral dilemmas inherent in the emergence and increase of private security actors. The study also offers an interesting reference point in debates on the possible regulation of PSCs and/or PMCs, since the RFMA constitutes one of the most direct legislative attempts in the world, outside of the United States, to regulate the activities of private actors involved in the deployment and use of force.

This case study comprises five core focus areas. First, it examines what has been said in some of the leading academic literature on the South African case. Second, it contextualises the challenges posed by the sheer scale of the South African PSC and PMC market. It examines the emergence of the industries in the broader context of the South African negotiated transition and the Disarmament, Demobilisation, Reintegration and Rehabilitation (DDRR) debates that informed that transition with a specific focus on the former apartheid state security forces. Third, a brief synopsis of the Act and its existing provisions is provided. Fourth, the implementation of the Act in a series of recent high-profile cases involving South African PSCs and PMCs is considered. The various legal challenges that were encountered in the attempted prosecution of these cases are examined, including the use of plea bargaining to secure convictions; the hurdle of evidence in securing clear-cut prosecutions; the different principles at stake in pursuing RFMA-related prosecutions; and the question of effective sanctions imposed by the

courts thus far. Lastly, recent efforts by the South African government to close the gaps in the RFMA, as evidenced in the myriad of plea-bargains that have emerged and the tabling of the draft Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in an Area of Armed Conflict Bill<sup>1</sup> is briefly discussed, highlighting some of the severe difficulties inherent in the new draft legislation.

This study concludes by addressing the broader question posed to the international community as a whole – whether it is possible for the ‘state’ in its residual Westphalian and Weberian shape to continue to exert ‘control’ over an increasingly complex and diffuse security sector in an era of multinational PSCs and PMCs, and whether it is possible to re-establish some form of democratic control in view of the reality of private sector presence in the security sector globally and locally. There can be no doubt that this debate has to take place with clear normative parameters and not only with a positivist analysis of the status quo. It is equally clear that such a debate can only lead to progress if states realise the limits to their self-interest in a world where PSCs and PMCs currently fall largely outside defined norms of international law bar a broad interpretation of the law of state responsibility. Regulation at the level of the law of state responsibility in the absence of new clear-cut norms on the role of PSCs and PMCs in international peace and security will remain an inadequate response to the challenges posed by these actors to conventional notions of civil–military relations and security governance.

### **South Africa’s Regulatory System**

Avant highlights different trade-offs that states make in their choice and design of frameworks to regulate PSC and/or PMC activity and emphasises that in the United Kingdom, the United States and South Africa, the relevant policy-makers were well aware of the trade-offs they were making in selecting and designing their regulatory responses to the emergence of private companies as security sector players.<sup>2</sup>

Whilst there are clear similarities between the US and South African cases in their decision to implement a licensing regime – albeit with very different levels of efficacy – differences in the design of the licensing systems and their practical operation have led to very different consequences in the two countries. South Africa has opted to favour the integrity of its foreign policy principles over the US approach that uses PSCs extensively in a way that could be termed ‘foreign policy by proxy’. This assessment has

largely been borne out by the lack of licensing requests received by the National Conventional Arms Control Committee (NCACC) – the licensing authority for all arms exports including foreign military assistance – since the enactment of the RFMA and the wilful flouting of its requirements by key commercial security sector players. It is most obviously demonstrated by the large numbers of South African citizens working on contract for security firms in Iraq. Thus in contrast to the US approach, South Africa's efforts to sideline the market for force have not only led it to forego new policy tools, but have also reduced its ability to control the violent actions of its citizens abroad.

The sheer magnitude of the numbers of South Africans working for PMCs in Iraq in violation of the Act has marked a particularly important turning point for policy in South Africa. The NCACC issued a clear statement declaring Iraq a 'conflict area', triggering the application of the Act. In addition, and largely in response to the challenges emanating from Iraq, the draft bill on the Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in an Area of Armed Conflict has been tabled in the South African Parliament. These events are of particular importance and will alter the regulatory landscape in South Africa with reference to PSCs and/or PMCs.

The most important analytical questions, however, are whether the new regulatory system that is to be created will continue to de-legitimise PMCs and PSCs as is inherent in the RFMA's legislative foundation, and what the respective benefits and costs of such a new regulatory framework will be. Whilst some analysts felt that the correct trade-offs were made in respect of the RFMA, evidence of its implementation may suggest otherwise. One argument suggests that the South African government lost an opportunity to co-opt the PSCs and allow them to legitimise their operations, as opposed to the strategy that was adopted which has resulted in more covert actions on the part of firms engaged in unregulated activities outside of South African borders.<sup>3</sup> In addition, it remains to be seen whether the current draft bill will make the correct trade-offs in maintaining the integrity of South African foreign policy while dealing adequately with the challenge posed to security sector governance by the emergence of the private sector as a key player.

In analysing the reasons for the regulatory strategy of de-legitimising PSCs opted for by the new South African government in the early 1990s, a few influencing factors should be borne in mind. The South African PSCs of the early 1990s were generally staffed with apartheid-era personnel, result-

ing in a particularly hostile relationship with the new government. Furthermore, the new government was concerned with establishing effective control over a state security sector that it still regarded with mistrust, and in aiming to reconstruct the new 'state', did not wish to see security as the first state function in private hands. The new government wished to 'leash the dogs of war' as part of a new ethical foreign policy and human security doctrine, and in order to establish effective control over the new South African state's foreign policy agenda. In practical terms, the state was not going to be a client for PSC services on a large scale given the political transition dynamics involved. PSCs therefore started looking to the private sector and foreign markets for potential clients. In this regard the PSC sector that subsequently emerged within South Africa itself – servicing primarily the private sector and individuals – has become very sizeable and significant, whilst countless foreign 'opportunities' have arisen for PSCs and PMCs, notably in Iraq and Afghanistan.

In comparing the US and South African licensing regimes, Ortiz identifies a crucial similarity in the two-step process the Act establishes.<sup>4</sup> First, it requires any person wishing to offer foreign military assistance to approach the NCACC for authorisation and, second, it requires subsequent scrutiny and approval of every agreement reached after initial authorisation has been granted. The regulation issued pursuant to the RFMA enactment specified the procedures to be followed to comply with the requirements of the Act. Ortiz emphasises the fact that the South African government's efforts at regulation occurred in part in response to international pressure over the activities of key firms such as Executive Outcomes, but also emanated from the concern of the South African government about the activities of its citizens in African conflicts. This concern sets it apart from the focus of the US regulatory system.

Holmqvist effectively captures the two-fold purpose of the Act: to ban mercenary activity outright and, secondly, to regulate the provision of military services abroad, and argues cogently that the South African government's frustration with the implementation of the Act will see it potentially banning exports of private security services to war zones.<sup>5</sup> This is clearly the direction inherent in the draft Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in an Area of Armed Conflict Bill, and is a direct response to the death of South African citizens on contract to US PSCs in Iraq and an attempt to enforce not only the NCACC statement with reference to Iraq, but to ensure no South African security worker ever conducts security work in contexts where the line between security contract work and combat situations could blur.



Singer identifies three key problematic areas of this regulatory framework.<sup>6</sup> First, the provisions effectively result in official sanctioning by requiring the government to approve each contract. Second, the wide remit of the definition of foreign military and security services is identified as a key weakness of the legislative framework, rendering it nearly irrelevant. Third, the contract sanctioning power vests in the NCACC (an executive organ of government responsible broadly to the Ministers of Defence and Foreign Affairs) thereby granting the executive branch of government considerable discretionary powers and effectively subverting parliamentary oversight. Apart from the specific flaws Singer highlights, he draws attention to the far more serious problem that afflicts all national-level regulation – the ease with which it can be subverted by moving the base of operations of the PMC or PSC to other jurisdictions. An important first step in strengthening the South African national regulatory framework would be to amend the RFMA to focus the definition of its scope (when it is triggered) on the nature of the assistance offered (i.e. whether the service is military in content or not) rather than focusing on the destination of the service (i.e. whether or not it constitutes a conflict zone). It is interesting to note that the draft Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in an Area of Armed Conflict Bill does the exact opposite – it strengthens the emphasis on whether an area is a conflict area to be designated as such by the executive branch of government, whilst it increases the scope of the definition of services to be near all-encompassing along the lines outlined by Holmqvist – the delegitimisation of/ban on the export of security services.

### **Confronting the Past in the Present: DDRR and South Africa's transition**

The South African democratic transition was marked by a clear and distinct phase of military downsizing that coincided with the end of the Cold War. Despite a largely effective DDRR (Disarmament, Demobilisation, Reintegration and Rehabilitation) effort, it soon became clear that, on the one hand, former military personnel who had taken voluntary severance packages wished to supplement their income in the private sector and, on the other hand, that some DDRR efforts, specifically the efforts to deal with the notorious former 32 Battalion (a specialised unit of the former SADF) would remain largely unresolved following the Unit's disbandment in 1992.<sup>7</sup> These former combatants subsequently became key members of PMCs and the

desolate mining town (Pomfret) where former 32 Battalion members were left with their families became a key recruiting ground for PSCs and PMCs.

There can be little doubt that aspects of the transitional DDRR efforts in South Africa continue to play out today in the efforts of the South African government to curtail mercenary and PMC/PSC activity regionally and globally. It seems as if there is a constant uphill struggle for the current ANC government to ensure that all South African citizens do not actively undermine the foreign policy goals of the South African state. Indeed many of the South African citizens currently in Iraq have former South African Defence Force (SADF) links whilst many of the alleged mercenaries recruited for the Equatorial Guinea/Zimbabwe mission, discussed below, were former 32 Battalion members from Pomfret. After the wrangling around the alleged mercenaries in Zimbabwe and Equatorial Guinea, the South African government has taken certain steps to attempt to disperse the residents of Pomfret, invoking the nearby asbestos mine as a key reason for the purported move.

The actions by the South African government were a direct response to the world's first primarily military service provider firm – Executive Outcomes (EO). EO was as close an example as possible of a modern era private army with a client base that included private mining companies as well as the governments of Sierra Leone, Rwanda, Angola and the Central African Republic.<sup>8</sup>

After the RFMA was enacted and EO was formally disbanded (despite receiving a license in 1998) South African PSCs became smaller and more specialised with very few offering actual combat services and most offering non-combat services due to the clear mercenary ban in the new RFMA. However, many new firms can merely be regarded as sophisticated EO offshoots involving ex-employees of the former state security sector apparatus in new private sector incarnations.

### **The Regulation of Foreign Military Assistance Act – Key Features**

South Africa's new Constitution clearly crafted the backdrop to the adoption of the RFMA. Section 198(b) of the Constitution states:

The resolve to live in peace and harmony precludes any South African citizen from participating in an armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.

The enactment of the RFMA gave clear content to the Constitutional commitment. In essence, the Act addresses mercenarism, PMC/PSCs and aspects of conventional arms control. Whilst it bans mercenary activity outright, defined as 'direct participation in armed conflict for private gain', the RFMA regulates rather than bans the provision of foreign military assistance. The Act stipulates that no person within South Africa or elsewhere may recruit, use or train persons for, or finance or engage in mercenary activity.

The Act contains a licensing mechanism which is presided over by the NCACC. Decisions of the NCACC are subject to the Promotion of Administrative Justice Act and based on principles of international law including human rights law. The application of the Act is triggered by the existence of an armed conflict – a factor many analysts believe is its Achilles heel – and requires that the recipient of the assistance must be a party to such conflict.

Whilst it may be the most direct effort to regulate PSC and PMC activity thus far, it has been fraught with many difficulties. Avant identifies at least three potential fault-lines in the RFMA that have resulted in difficult enforcement.<sup>9</sup> First, the definitions contained in the Act are both too vague and cast too broad a definitional net trying to regulate activities that cannot be regarded as 'military', resulting in considerable regulatory uncertainty and arbitrariness. Second, the legislation excludes 'humanitarian or civilian activities aimed at relieving the plight of civilians in an area of armed conflict'. This is the 'loophole' some PSCs utilise to claim that their activities in Iraq are completely legal despite a NCACC statement to the contrary issued in January 2004. Third, there is a level of distrust in the PSC community as to the fair execution of the Act that hampers its effectiveness and, arguably, creates disincentives to applying for a licence.

Whatever the shortcomings of the legislation, it has certainly served to highlight the conceptual and practical difficulties inherent in aiming to regulate the emergence of the private sector as a player in this field. In addition, the new draft legislation before the South African Parliament has aimed to go much further than plugging any 'loopholes' in the RFMA and is grappling with the thin line between PSC activity in conflict zones and 'tip-of-the-spear'-style PMC activity, if not modern-day mercenarism. Whether this will be a workable proposition will only be judged once the legislature concludes its ongoing deliberations on the draft law.

**Contemporary Challenges to Regulation: the Ivory Coast, Equatorial Guinea/Zimbabwe, Iraq and DRC**

In recent months the South African government has come under increasing pressure to demonstrate the efficacy of the RFMA through some key prosecutions. Events in the Ivory Coast, Equatorial Guinea/Zimbabwe and the involvement of between 5,000 and 10,000 South Africans in Iraq has added to the pressure to demonstrate the effective functioning of the Act as a deterrent, against mounting evidence to the contrary.

Public statements by the president, the various government ministers and the Chair of the NCACC have publicly sought to reinforce the clear message that transgressions of the provisions of the Act are regarded in a very serious light and will be prosecuted. The reality that has emerged has been slightly different. Most prosecutions have occurred via plea bargains thereby not subjecting the law in its current form to a specific robust test by the Courts – despite some cases proceeding to the South African Constitutional Court. Core questions about the efficacy of the Act can legitimately be asked when the NCACC receives a paltry amount of licensing or authorisation applications whilst more and more South African PMCs, and PSCs emerge and increasing numbers of South Africans start working on contract for US or other private military and security companies around the world.

One of the biggest areas of controversy engendered by the new draft legislation has been the unprecedented extraterritorial jurisdiction it aims to accord the South African authorities – a matter deeply troubling to many international agencies that have made submissions on the drafts.

The South African government has reiterated the fact that Iraq is regarded as a conflict zone, thereby triggering the application of the RFMA and therefore requiring PSCs and/or PMCs to obtain specific authorisation to commence any contract work in Iraq. Between 2003 and 2004 the NCACC only received two applications for authorisation, which it subsequently turned down. The NCACC referred two cases to the National Prosecuting Authority (NPA) but the NPA highlighted severe evidence problems in obtaining clear-cut prosecutions and convictions.

The three recent cases that have led to prosecutions, or where prosecutions are in process – Ivory Coast, Equatorial Guinea/Zimbabwe and Iraq – deserve more detailed analysis as they all highlight the challenges faced in implementing the RFMA. These challenges range from evidential burdens (including intelligence-gathering in foreign locations), to the prospect of difficult prosecutions tied to evidential burdens and hence the prospect for

repeated plea bargain agreements, to minimal sentences that do not serve as effective deterrents.

#### *Ivory Coast*

The first man to be convicted in South Africa for contravening the RFMA was Francois Richard Rouget, a former French soldier. During the deliberations of the Truth and Reconciliation Commission, Rouget was linked to the murder of Dulcie September, an ANC representative to France, in the mid-1980s.<sup>10</sup> Rouget, a naturalised South African citizen, tried to recruit mercenaries in South Africa to fight in the Ivory Coast civil war and was convicted in late 2003 in the Pretoria regional court after pleading guilty to recruiting persons for military assistance to the Ivory Coast government in October 2002. The assistance entailed logistical support and equipment, with the group contracted as training pilots or infantrymen. Rouget was fined 100,000 Rand (approximately \$14,000) for contravening the RFMA but later appealed his sentence and claimed the fine was too harsh. In 2005, two years after his conviction and sentencing, Pretoria High Court acting Judge Kobus van Rooyen reduced the fine to 75,000 Rand.<sup>11</sup>

Though conceding the serious nature of mercenary activity, the judge stated that Rouget's guilty plea and full disclosure of his involvement should count in his favour. The Court held that mercenary activity is an embarrassment to the country and should be discouraged. Although the offence was a serious one, the court considered the fine imposed on the appellant too harsh. It set out the appropriate sentencing approach to be adopted by courts, and found that the trial court in this case had failed to follow the said guidelines.<sup>12</sup> It does not appear that the reduced fine served as an effective deterrent to future prohibited activities, as Rouget was subsequently alleged to be active in Iraq.

On 3 February 2004, South Africa's elite Scorpions unit (a specialised investigative agency) arrested Carl Alberts, a decorated former defence force pilot, for alleged mercenary activities in the Ivory Coast.<sup>13</sup> Mr Alberts took part in Operation Askari in Namibia and Angola and was decorated for his leading two Alouette gunships in an attack on Cuvelai during South Africa's border wars.<sup>14</sup> Alberts was sentenced to two years in jail or a 20,000 Rand (\$3,000) fine in the Swellendam Magistrate's Court.<sup>15</sup> The sentence was suspended and Alberts was released after paying 10,000 Rand. The guilty plea and fine formed part of a plea bargain agreement between Alberts and

the NPA.<sup>16</sup> In addition Alberts had to surrender 20,000 Rand to the South African Asset Forfeiture Unit as part of the proceeds of criminal activity.

*The Makings of a 'Coup': Equatorial Guinea, Zimbabwe and the Alleged Mercenaries*

The alleged Equatorial Guinea coup attempt started unfolding in March 2004 in the midst of South Africa's third democratic election campaign. In subsequent months this made the rounds through different chambers of South Africa's legal machinery and ended up in the Constitutional Court, setting numerous precedents in South African constitutional law though still not fully testing the strength of the RFMA.

The South African government appears to have taken a keen interest in the unfolding events for at least two clear reasons. First, they posed a challenge to the country's efforts to ban mercenary activity outright in the RFMA in pursuance of its growing peacekeeping obligations on the African continent. Second, the involvement of many former 32 Battalion members was of additional concern in a context where these veterans had never satisfactorily been enmeshed in the overall DDRR efforts of the transition.

On 7 March 2004 about 70 people mainly of South African nationality, although including a British Old Etonian and former SAS officer Simon Mann, were arrested at Harare International Airport where they had allegedly stopped to collect weapons.<sup>17</sup> The Zimbabwe authorities alleged that they were 'mercenaries' en route to overthrow the government of Equatorial Guinea with the assistance of the British, Spanish and US secret services.

Those arrested denied the charge and claimed they were on their way to the DRC where they had been contracted to guard a mine, and that they stopped at Harare airport to collect weapons which had been legally purchased for that purpose. They were tried in Harare in July 2004, charged with breaching the country's firearms and security legislation, as well as immigration and aviation laws. Two men were acquitted while 67 were convicted of immigration offences. In addition, the two pilots were also convicted of aviation offences. They were all sentenced to prison terms ranging from 12 to 18 months. Simon Mann was convicted of trying to purchase weapons and sentenced to seven years in prison. However, on appeal their sentences were reduced by four months in March 2005. Mann's sentence was cut to four years' imprisonment whilst the Boeing used in the operation was confiscated by the Zimbabwean government.

During the course of the proceedings in Zimbabwe, the spectre of a possible rapid extradition to Equatorial Guinea loomed large. Given the pos-

sibility that a court in Equatorial Guinea would avail itself of the death penalty for the alleged offences the accused sought urgent relief from the South African Constitutional Court. In order for an extradition to be valid, in respect of requirements of dual criminality, there were two hurdles: first, the accused would have to admit to contravening South Africa's RFMA; and second, Zimbabwean law lacked similar legislation and therefore similar offences.

Of specific interest from an RFMA perspective is the specific matter of the plaintiffs' request for the court to compel the South African government to seek their extradition. The men had already admitted in their court papers to offences that could potentially trigger prosecution under the RFMA. The NPA did indeed open an investigation into the possibility of charging the applicants under the RFMA. However, as the Constitutional Court pointed out, a request for extradition would require a clear *prima facie* case containing basic evidence – evidence that was not clearly in the hands of the NPA despite the investigative docket being open.<sup>18</sup>

Makhosini Nkosi, the NPA spokesperson in South Africa, is on record as stating that most of the men to be charged under the RFMA probably had little to do with the planning of the alleged botched coup and were mere foot soldiers. Nkosi stated clearly that the Scorpions were really interested in the people who had planned and organised the alleged coup, including Simon Mann, but that there were clear jurisdictional barriers in pursuing such prosecutions. This is clearly problematic if the offences of which they are suspected under the provisions of the Act are not regarded as crimes in the countries in which they reside. In the case of the UK in particular, where there is no RFMA equivalent, the sharing of this information beyond the channels of normal diplomacy may not have much effect. In addition, and in the same interview, Nkosi is quoted as stating that the alleged mercenaries who would be charged next in connection with the alleged botched coup attempt would also be allowed a plea bargain provided they met the requirements. Yet another prosecution based on a plea bargain under the RFMA.

Of these 67 men at least 20 were former 32 Battalion members, and two of the men, Louwrens Horn and Hermanus Carelse were involved in another PSC that had lucrative contracts in Iraq – also in clear contravention of the RFMA. After returning to South Africa, having served their sentences in Zimbabwe, some of the men were charged with violating the South African RFMA. On 16 January 2006, the trial of nine men accused of involve-

ment in a planned coup d'état in Equatorial Guinea was postponed until July 2006 in the Pretoria Regional Court.

It is important to note that thus far these prisoners have never been convicted of taking part in any coup plot. With the exception of Carelse and Horn, who were fined 75,000 Rand each subject to a plea bargain agreement which saw them co-operate with further investigations, there have thus far been no further convictions under the RFMA with respect to the former detainees. Rather, these men were convicted for various transgressions of Zimbabwean aviation, immigration and weapons acquisition laws.

#### *Equatorial Guinea – the 15 Black Beach Prisoners*

On 8 March 2004, 15 foreign nationals were arrested in Malabo and Bata, suspected of plotting a coup attempt. Eight of them were South Africans. Nick du Toit, the alleged ringleader and director of Triple Option Trading, was immediately arrested and taken to Black Beach prison. The subsequent detention and trial were condemned by Amnesty International as core human rights had been breached.<sup>19</sup> Allegations were also made to Amnesty International by detainees who were acquitted that, despite not having jurisdiction in Equatorial Guinea, South African National Prosecuting Authority officials were taking statements to probe possible breaches of the RFMA. According to the acquitted detainees, both the NPA and the Zimbabwean Security forces were particularly interested in the military careers of the detainees and especially their experiences in 32 Battalion.

The trial<sup>20</sup> of 19 people charged with crimes against the Head of State and the form of government began on 23 August 2004 and concluded on 26 November 2004 – a few hours after the appearance of Sir Mark Thatcher in South African courts on charges of breaching the RFMA, allegedly for the same mission. The prosecutor explicitly asked for the death penalty for Nick du Toit and Severo Moto Nsa and for sentences ranging from 26 to 102 years for other defendants. In the end three Equatorial Guineans and three South Africans were acquitted – significantly the acquitted South Africans had not been members of 32 Battalion – and those found guilty received sentences ranging from 16 months to 65 years in prison.

#### *The Conviction of Sir Mark Thatcher*

By far the most prominent prosecution under the provisions of the RFMA in South Africa has been that of Sir Mark Thatcher – son of former British Prime Minister Margaret Thatcher – for his alleged involvement in the al-



leged coup attempt in Equatorial Guinea. According to reports, Thatcher invested in a company run by Simon Mann called Logo Logistics, via a South African company, Triple A Aviation, which was operated as Air Ambulance Africa by Crause Steyl.<sup>21</sup>

Steyl was approached by the NPA to turn state witness in return for immunity from prosecution under the RFMA. Thatcher was arrested on 25 August 2004 and in a hearing on the same day bail was set at £167,000. At this point of the prosecution there was a clear stale-mate: in the one corner was Thatcher, desperate to avoid a prison sentence, while in the other South Africa's NPA with a case that was far from watertight and a clear concern about the damage a high-profile failure to secure a conviction could inflict on the credibility of the RFMA. Thatcher subsequently admitted to a lesser charge, conceding that his actions may have recklessly but unwittingly contributed to the financing of the coup plot, and received a four-year suspended sentence and a three million Rand (\$415,000) fine in accordance with a plea bargain agreement. In addition Thatcher was requested to continue assisting the NPA in its ongoing probe and, after a subsequent unsuccessful appeal, was forced to answer questions from Equatorial Guinean prosecutors.

South Africans were furious at Thatcher's light sentence, believing it was a clear example of an undeserved plea bargain. Some commentators correctly argued that South Africa's jurisprudence is the poorer for the Thatcher case not testing the mettle of the RFMA but merely resulting in the Court upholding a plea bargain agreement. This was yet another such plea bargain agreement under the RFMA following similar agreements between the State and Rouget and Alberts as well as the State and Horn and Carelse.

#### *South African Citizens and the War on Iraq – PSC and PMC Boom*

There can be no doubt that many South Africans – both former state security sector operatives and current members of the armed forces, South African Police Service (SAPS) elite Special Task Force and dog handlers – are currently working in Iraq illegally under the RFMA and various military and public service codes.

Two companies, Meteoric Tactical Solutions and Grand Lake Trading 46 (Pty) Ltd, submitted applications to work in Iraq under the RFMA provisions whilst a third, Erinys, did not apply. Thus far, more than 20 South African contractor employees have been killed in Iraq working for, amongst others Dyncorp, Blackwater and Erinys International. According to one risk analyst, there could be between 1,500 and 2,500 South Africans currently

working in Iraq with the possible ratio of South Africans in the PMC and PSC ranks in Iraq potentially being as high as one in eight, based on a PMC/PSC 'force' of 20,000 estimated to be in Iraq.<sup>22</sup>

It took South Africa's NCACC one year following the American invasion to rule that Iraq was to be regarded as a conflict area and therefore 'off limits' unless operating licenses were granted. The granting of licensing for any activities – whether foreign military assistance or security work – in Iraq seemed relatively remote given the South African government's staunch foreign policy opposition to the US-led intervention. Those who stepped into the profitable Iraqi occupation can credibly claim that there was some ambiguity due to the NCACC's slow response in issuing a clear ban on activities in post-war insurgency-plagued Iraq. However, once the NCACC formally declared Iraq a conflict area for RFMA purposes, the legal position of PSC contract workers was in clear transgression of the RFMA, a position vociferously stated by the South African Minister of Defence Mosiuoa Lekota.

It is clear that most companies in Iraq were acting in breach of the RFMA. Even though some companies were only involved in commercial security work, like protecting buildings and private individuals, these activities could be problematic in terms of the Act. A popular loophole that exists is for companies to register themselves as demining companies, a move which exempts many from the law as their efforts are seen as humanitarian. In the same vein, the broad discretion allowed for 'humanitarian assistance' opens up a very clear loophole in the law and may be the reason for the ban on support for humanitarian assistance in the new draft Bill.

But it is not only former security operatives who are active in Iraq. Members of the police Special Task Force are resigning to pursue more lucrative security work in Iraq in close protection services, generating similar staff retention problems as are faced by the UK and US armed forces.

### *Omega and the DRC*

In May 2006, 32 security service agents employed by a private firm registered in South Africa as the PSC Omega Risk Solutions were detained in the Democratic Republic of Congo (DRC) as alleged mercenaries suspected of 'destabilising government institutions' – a euphemism for a coup attempt.

Of these 32 men, 19 were South African citizens, 16 were working for Omega Security Solutions on contract with the DRC's National Transport office, training security personnel, and three were working for a mining company (Mirabulis) as interpreters. (Omega Security Solutions is an offshoot of Omega Risk Solutions). Omega Risk Solutions did not have

NCACC approval in terms of the procedural requirements of the RFMA to offer services in the DRC – a country that technically could still qualify as a ‘conflict area’ under South African legislation pending the outcome of democratic elections and the ongoing peacekeeping mandate of MONUC. According to a statement issued by Omega, it adhered to all procedural requirements though this has been denied by the South African government. Given that Omega Security Solutions was apparently duly registered in the DRC, this may prove to highlight the ineffectual nature of the RFMA’s extra-territorial application in a context where other countries do not necessarily have similar provisions in their national legislation. The firm was assisting with the upgrading of port security, according to its staff, but also had a potentially more controversial contract with a US security company (AQMI Strategy Corp) for close protection and related services to a Congolese politician, Oscar Kashala.

The detainees were released and deported within days by the interim DRC government, which continued to state that the detained men were ‘mercenaries’ and asked prosecuting authorities in their countries of origin to charge them. Omega contradicted these statements, highlighting the clear registration of the company as a DRC-based company and the training contracts for security personnel it had with the interim DRC government. It remains to be seen whether the DRC detainees that have been deported will be charged under the RFMA.

### **The New Draft Legislation**

The South African case studies under the RFMA serve to highlight key challenges inherent in regulation. First, the lack of clarity in respect of definitions in terms of mercenaries, PMCs and PSCs is vividly highlighted. Second, the cases demonstrate the tremendous hurdle in obtaining adequate evidence to secure convictions through prosecutions, resulting in decisions by prosecuting authorities to opt for plea bargains instead. Given the nature of operations that are often conducted abroad, the evidential burden can be near insurmountable. Third, the definition of a ‘conflict area’ is open to considerable discretion, and possible alignment, arguably, with foreign policy positions as is clear in the case of Iraq. Whilst this makes for interesting foreign policy, it generates considerable legal uncertainty due to the tremendous administrative discretion present in procedures and the lack of clear criteria for determining licensing approval requests. Lastly, all the cases in

question have highlighted the challenge of extraterritorial ‘offences’ or ‘breaches’ being committed and the inability of regulation to be binding beyond national boundaries. In addition, the Zimbabwe-Equatorial Guinea case has highlighted, through the South African Constitutional Court ruling, the importance of dual criminality for extradition requests to be successful with regard to RFMA-related offences. This points to the importance of interlocking regulation at the national, regional and international levels if any regulation is to be workable.

Whilst the new draft legislation before Parliament seeks to address many of these challenges, it may fail entirely due to confused objectives, possible overreach and contradictions that could cause immense legal uncertainty if implemented in its current form.

In his State of the Nation Address in 2005, President Thabo Mbeki clearly signalled the government’s intention to tighten the provisions of the RFMA:

In the coming year, we shall continue with all these and other programmes, to...review the Foreign Military Assistance Act in order to discourage, for their own good and the good of the country, those who seek to profit from conflict and human suffering such as in Iraq.<sup>23</sup>

In confronting the clear areas of difficulty that have emerged in the implementation of the RFMA, the South African government tabled the draft Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in an Area of Armed Conflict Bill in Parliament in October 2005. The Bill is a clear legislative response to the perceived failure of the RFMA to act as an effective deterrent to practices the government regards as undesirable and potentially undermining its foreign policy goals.

The explanatory memorandum of the Bill highlights that it has been designed to address ‘some deficiencies’ in the RFMA under which the government has only been able to secure a few prosecutions and where the convictions were in nearly all instances the result of plea bargain agreements between the accused and the NPA. The explanatory memorandum deals explicitly with concerns about events in Equatorial Guinea and the fact that private military and security companies have been recruiting South Africans to offer these services in areas of armed conflict such as Iraq. The Bill is a clear attempt to tighten the provisions of the RFMA vis-à-vis private security companies and aims to close certain ‘loopholes’ that were used to broaden the scope of the operation of these firms in controversial conflict areas under the banner of ‘humanitarian assistance’. The Bill in its current draft form is

beset by a number of difficulties which the Minister of Defence has requested the Joint Standing Committee on Defence to address in upcoming public hearings.

Despite the good intentions behind the Bill, it has the potential to make the regulatory framework in South Africa more unworkable and arguably even less effective than in its current form. From comments made by the Minister of Defence after the tabling of the draft Bill, it seems clear that the government is well aware of the complexities inherent in the new draft and of the difficulties it faces in ensuring that the RFMA has a successor that is a stronger regulatory instrument.

In recent public hearings on the new draft law in May and June 2006, the Portfolio Committee on Defence heard a number of concerns from independent security sector analysts, academics, the South African Special Forces League, some key PSCs and various international actors.<sup>24</sup> Most commentators have criticised the draft legislation for hindering South Africans from doing legitimate humanitarian and private security work abroad and for contravening certain key clauses of the South African Constitution's Bill of Rights, as well as being inconsistent with international law in respect of the unprecedented extraterritorial jurisdiction the Bill aims to vest in the South African authorities. The near banning of humanitarian assistance without proper authorisation – which would be time-consuming and subject to considerable administrative discretion – came in for stinging criticism despite the concerns of the South African government that it was exactly this 'loophole' many South Africans working in Iraq used to create a veneer of legitimacy for their activities while lacking NCACC approval. The blanket exemption for entities involved in struggles for national liberation caused considerable distress. The BAPSC stated that the Bill's requirements were akin to a forced global licensing of private security services and humanitarian aid organisations in areas of armed conflict. Though this may be an idealised goal for advocates of increased regulation, it is ill-conceived to try to reach this aim by means of a single national statute instead of working at the international level to craft a global regulatory regime.

Despite conceding the clear difficulties in the implementation of the RFMA to date,<sup>25</sup> key departments of the South African government such as the South African Police Service and the Department of Defence emphasised that the country had an obligation to oversee and regulate the thousands of military-qualified citizens selling their skills abroad. However, even if the considerable legal and conceptual hurdles in passing a sound new legislative instrument are overcome, it remains to be seen whether the South African

government will be able to provide adequate evidence (effectively intelligence given the nature of the evidence that would need to be obtained), will devote adequate resources to investigations, and will attach clear priority to enforcing the new legislation in a more pro-active manner than has been the case with the RFMA to ensure that any new law becomes a more effective deterrent.

### **Conclusion**

There are at least four salient issues that emerge from the South African case:

First, there are still some transition aspects of the DDRR process that remain unresolved. With reference to 32 Battalion and their enclave in Pomfret in particular, the South African government is now increasingly confronted by this legacy in its ongoing efforts to promote an ethical foreign policy.

Second, the question posed by Avant proves to be crucial: has the South African government's 'trade-off' in its choice of regulatory instrument (the RFMA) paid off or has it simply sent operators 'underground', limiting the effective option for control? In the light of few licensing applications, a paucity of information and evidence to pursue prosecutions, and the frequent resort to the plea-bargain route for convictions, there appears to be a compelling argument for the latter argument. However, it is unlikely that the South African government will opt to legitimise the notion of private actors in the military or security field given its commitment to an integrity-based foreign policy process – a choice it appears unlikely to reverse in favour of the US model of regulation.

Third, it is an inescapable conclusion that the RFMA has been difficult to implement in practice in terms of sourcing information and intelligence and gathering adequate evidence to ensure convictions. Given that most convictions were achieved through plea bargains, a true litmus test of the RFMA through the courts has not occurred and was neatly side-stepped by the Thatcher plea-bargain in particular. In addition, it does not appear as if the Act has acted as an effective deterrent when considering the case studies described above and the paltry fines that have been imposed in cases where convictions have been forthcoming.

Fourth, though the South African government is rightly concerned about the ultimate credibility of the regulatory system in South Africa, recent amendments proposed in the draft Prohibition of Mercenary Activities and

Prohibition and Regulation of Certain Activities in an Area of Armed Conflict Bill are unlikely to result in a more coherent and stronger regulatory framework without considerable debate and amendment of proposals.

It is clear that any national regulatory response will have to recognise the transnational nature of the industry it seeks to regulate. It logically follows that any national legislative efforts, however well-intentioned, will never be adequate without a concerted and considered response by the international community to the increasing role of the private sector in war and peace. A key challenge for analysts, policy- and law-makers is to determine the measures that will be required to adequately address the emergence of the private sector as a key player in the security sector and to craft an international regulatory framework capable of responding credibly to this challenge globally.

## Notes

- <sup>1</sup> [B42-2005]
- <sup>2</sup> Avant, D., *The Market for Force* (Cambridge: Cambridge University Press, 2005), 77.
- <sup>3</sup> O'Brien quoted in Avant, op. cit., 163.
- <sup>4</sup> Ortiz, C., 'Regulating Private Military Companies: States and the Expanding Business of Commercial Security Provision' in *Global Regulation. Managing Crises After the Imperial Turn*, ed van der Pijl, K., Assassi, L. and Wigan, D., (Basingstoke: Palgrave Macmillan, 2004) 215.
- <sup>5</sup> Holmqvist, C. 'Private Security Companies – The Case for Regulation', *SIPRI Policy Paper No. 9* (2005): 52.
- <sup>6</sup> Singer, P. 'War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law', *Columbia Journal of Transnational Law*, vol.42, no.2 (2004):521ff, 540.
- <sup>7</sup> Nortje, P. *32 Battalion –The Inside Story of South Africa's Elite Fighting Unit*. (Cape Town: Zebra Press, 2004), 282.
- <sup>8</sup> There are numerous other examples of South African PMCs including, for example, Saracen, Southern Cross Security, Gray Security, Lifeguard, Omega Support Ltd, Shitabe, Strategic resources Corporation, Meteoric Tactical Solutions, Erinys International, to name but a few.
- <sup>9</sup> Avant, op. cit., 162.
- <sup>10</sup> *The Star*, 'Government gets tough on hired guns,' 29 July 2003.
- <sup>11</sup> *Independent (SA) Online*, 'Rouget convicted under SA mercenary laws,' 20 May 2005; *Sunday Times (SA) Online*, 'Convicted Rouget has fine reduced,' 21 May 2005.
- <sup>12</sup> *Rouget v S* (2006) JOL 15962 (T) Case No. A 2850/03, Judgement Date: 20 May 2005.

- <sup>13</sup> Van der Merwe, J. 'Old comrades say dog of war's a hero'. *Sunday Times*, 8 February 2004 <<http://www.suntimes.co.za/2004/02/08/news/news10.asp>> ; 'Ivory Coast 'hired gun' in court'. *news 24.com*, 04 February 2004. <[http://www.news24.com/News24/South\\_Africa/News/0,,2-7-1442\\_1478682,00.html](http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_1478682,00.html)>
- <sup>14</sup> Gosling, M., 'Helicopter pilot held on mercenary allegations' *Cape Times*, 4 February 2004.
- <sup>15</sup> 'Mercenary activities land pilot in the dock' *Independent Online*, 13 February 2004.
- <sup>16</sup> 'South Africa: Authorities target alleged mercenaries' *IRIN news*, 4 February 2004.
- <sup>17</sup> sourced from Zimbabwe Defence Industries by a PSC – Military Technical Solutions.
- <sup>18</sup> Kaunda and Others v President of the Republic of South Africa and Others 2005 /4) SA 235 (CC) Case Number CCT 23/04, August 2004.
- <sup>19</sup> Amnesty International 'Equatorial Guinea – A Trial With Too Many Flaws, AFR, 24 May 2005.
- <sup>20</sup> Case 14/2004
- <sup>21</sup> Hollingsworth, M., and Halloran, P., *Thatcher's Fortunes - The Life and Times of Mark Thatcher* (Edinburgh: Mainstream Publishing, 2005), 36.
- <sup>22</sup> Schmidt, M., 'Easy money lures SA men to war-torn Iraq' *Independent*, 14 May 2005; 'Mercenaries may face prosecution' *Independent*, 12 May 2005; Tromp, B. 'South African hired guns flock to Iraq' *The Star*, 4 February 2004; Tromp, B. 'Hired guns from SA flood to Iraq' *Cape Times*, 4 February 2004; 'SA fighters in Iraq could face prosecution' *Independent*, 1 March 2004. Independent is available online at <<http://www.iol.co.za>>
- <sup>23</sup> State of the Nation Address by President Thabo Mbeki, February 2005.
- <sup>24</sup> Various submissions made to the Portfolio Committee on Defence Public Hearings on the Bill (22-24 May 2006 and 6 June 2006) Submissions included: SA Special Forces League, SA Catholic Bishop's Conference, Helmoed Romer Heitman, Omega, SaferAfrica, IPOA and PSCAI, ICRC, Safenet, Department of Defence, South African Police Service (SAPS), etc.
- <sup>25</sup> The SAPS concede that there had not been any 'full-out' prosecutions under the RFMA to date: 'Some cases have been finalised through plea bargains so we cannot say there has been convictions, but in terms of real prosecutions, there are problems...the Act is more symbolic than a realistic deterrent' – Philip Jacobs (SAPS).



## **PART IV**

# **CHALLENGES OF REGULATION**



## Chapter 10

# Regulating Military and Security Services in the European Union

*Elke Krahmann*

### **Introduction**

In recent years, there has been a growing disillusionment with the lack of national and international regulation of private military and security services. While the expansion of the industry after the end of the Cold War has led to an increasing number of incidents – such as private soldiers accused of shooting at civilians on the streets of Baghdad,<sup>1</sup> torturing prisoners in Abu Ghraib,<sup>2</sup> trying to overthrow the government of Equatorial Guinea,<sup>3</sup> training the Croatian army which committed human rights atrocities in the Krajina,<sup>4</sup> and circumventing the arms embargo against Sierra Leone<sup>5</sup> – only the United States and South Africa currently have separate laws concerning the export of private military and security services. Moreover, regional and international efforts such as the United Nations and African Union conventions on mercenaries have proven ineffective.

This chapter seeks to show that the extent to which private military and security services are currently controlled by national and international regulation, and the options for strengthening existing legislation have been very much underestimated. In particular, in Europe there has been an expansion of national and international regulation since the mid-1990s which also controls some aspects of the provision and export of private military and security services. The emergence of European controls is particularly important because a growing section of the private military and security industry is not only based in Europe, but also employed by European governments in international interventions. Moreover, through the development of best practices and through the active promotion of European standards such as the European Union (EU) Code of Conduct within international organisations and allied nations, the EU is contributing to improving the global governance of the private military and security industry.

This chapter is divided into four parts. The first part seeks to explain why the role of the EU in the regulation of private military and security services has so far been neglected. The second part investigates the growing range of EU policies which seek to control the provision and export of military and security services. The third part examines how these have complemented and influenced national regulations among the member states. The fourth part identifies existing loopholes in the current legislation and what steps could be taken to address these. The chapter concludes by arguing that the approach of regional harmonisation and strengthening of military service export controls embraced by the EU is likely to be supported by both governments and industry.

### **Security Governance: The EU and the Regulation of PSCs**

One reason for the lack of attention paid to the EU with regard to the regulation of private military and security services has been the state-centric models with which many authors have approached the issue. Proceeding from Weber's imperative that the state should hold the monopoly on the legitimate use of force, the key question has been how the state can retain or regain control over the use of force by private military and security companies. An international regime on the control of private military force is generally believed to be highly unlikely in the light of the failures of both the 1989 United Nations International Convention Against the Recruitment, Use, Financing and Training of Mercenaries and the Organisation of African Unity (OAU) Convention for the Elimination of Mercenaries in Africa.<sup>6</sup> However, in conflict regions or failing states, where private military contractors have increasingly been employed, state control is often weak and sometimes non-existent.

What the prevailing perspective underestimates is the positive role that exporting states in Europe and North America and their regional organisations can play in setting new standards for the regulation of private military and security services. Although it is correct that private security and military companies can evade stricter national and regional controls by moving abroad, experience with armaments companies shows that the standards and export regulations of exporting nations can significantly influence and improve the global level of governance of the defence sector. Moreover, since many defence export countries and regions are developed and democratic, they are much more capable of enforcing controls and standards than

the underdeveloped or failing states which tend to import military and security services.

A security governance approach helps to illustrate the range of actors who might be involved in regulating the sector. It suggests that centralised governmental control over the provision of security has been replaced by more fragmented modes of governance in which state and non-state actors, including private companies but also regional organisations such as the EU, NATO and the OSCE play a growing role.<sup>7</sup> The differentiation of governance can be observed in seven dimensions: geography, function, resources, interests, norms, decision-making and policy implementation. In each of these dimensions, exclusive governmental control is increasingly replaced by a multitude of actors, policies and regulations. In geographical terms, governmental legal authority over citizens and companies competes or overlaps with that of regional regimes and private regulations. In functional terms, many regional security organisations have expanded their remit from defence and deterrence to conflict prevention and non-proliferation. Moreover, there can be a spillover effect from some dimensions to the others which can contribute to the transformation from centralised modes of government to fragmented ones.<sup>8</sup> For instance, the fragmentation of resources and security expertise among state, private and international organisations has facilitated the inclusion of these actors in the security policy decision-making and policy implementation process.

The exponential growth in private security and military services can be understood as part of this shift from centralised 'government' to fragmented 'governance'.<sup>9</sup> It is on the one hand a result of the differentiation of resources and expertise between the armed forces and private military and security companies, and on the other hand it is a factor which contributes to the further involvement of private companies in security policy-making and implementation.

However, the security governance approach also suggests the possibility of controlling private security contractors beyond the state. In particular, it argues that the state is not the sole actor capable or even responsible for the regulation of private military and security companies. In addition, there is scope for the self-regulation of private security firms and for a growing role of regional organisations in regulating the private use of force. Most importantly, the security governance approach argues that contemporary governance can proceed through sets of overlapping standards and regulations at multiple levels including the company, industry, state, region or globe which can be mutually reinforcing and frequently create their own dynamics contributing to tighter regulations.

Diverse standards, codes of practices and legislation can be observed across these levels. They include registering and licensing of companies providing private security and military services as well as the provision and export of these services themselves. The relevant companies include specialised military service firms, domestic private security and guarding companies, risk consultancies and armaments corporations; the services can range from combat, personal security and military training to security consulting, technical support for the operation and maintenance of military equipment, procurement, trafficking and brokering of military equipment, explosive ordnance disposal, logistical support for military operations and bases, intelligence collection and analysis, including the interrogation of military prisoners.<sup>10</sup>

Given the variety of companies and services that can be subsumed under the private military and security service sector, different regulations, laws and standards apply to separate sections of the industry. In Europe, such laws and standards include national registration of companies, public and private training standards set by governments and industry associations, but also a growing number of national and regional EU-wide regulations on the export of specific military and security services.

Just as the differences between the mode of governance in different dimensions can lead to pressures for further transformation, the divergences and interactions between distinct regulatory approaches and standards in Europe have led to demands for greater harmonisation. However, rather than limiting standards to the lowest common denominator, as has been the case in some environmental regulations,<sup>11</sup> controls over the private military and security sector have been tightened and expanded.

The EU has been a key actor in this development because it has been at the centre of various overlapping sets of regulations – both in functional and geographical terms. Functionally, the EU's authority ranges from the regulation of the private security industry as part of the internal market to the potential control of the export of private military and military support services under its Common Foreign and Security Policy. Geographically, the EU influences the regulatory policies of its member states, but is also involved in representing its members at the United Nations and promoting common EU standards, such as the EU Code of Conduct on Arms Exports, worldwide.

However, while a system of multilevel governance in which overlapping national and regional regulations strengthen each other appears to have major advantages, there are also some disadvantages. The disadvantages include the complexity and inconsistency of the emerging controls which

currently leave a number of legislative loopholes and which put a heavy administrative burden on regulators and private security providers. The following sections examine how these controls have evolved over the past decade before proceeding to discuss the potential for further improvements.

### **European Union Regulations and Policies**

The European Union has played a critical role in promoting national and regional regulations on the provision of military and security services in its member states and their export to third countries.<sup>12</sup> Existing regulations include the EU Code of Conduct on Arms Exports and a range of Common Foreign and Security Policies, either in conjunction with the Code or separately, which have created requirements for national laws or imposed limitations on the export of military services such as technical assistance related to weapons of mass destruction (WMDs) and to embargoed destinations, the brokering of arms, and the export of small arms and light weapons. In addition, the EU Court of Justice has formally established EU competence over the regulation of domestic security services under the first pillar.<sup>13</sup> The following sections examine each policy in detail before turning to national legislation in the member states.

#### *Code of Conduct on Arms Exports*

The EU Code of Conduct on Armaments Exports emerged in June 1998 out of the Common Foreign and Security Policy, but through its institutionalisation has taken an independent role in the promotion of stricter export controls for military equipment and services.<sup>14</sup> The Code of Conduct was originally drawn up to set common standards for conventional arms transfers and to facilitate the exchange of information about arms exports among member states. The Code of Conduct further called for the circulation among the member states of confidential annual reports on their arms exports and the implementation of the Code, as well as for the production of a consolidated yearly report by the EU. The first report was published in November 1999.<sup>15</sup> It was four pages long and observed the initial efforts to establish institutional channels of communication on arms transfers among the member states. Since then the details contained in each report and the scope of the Code have increased every year.<sup>16</sup> While the fifth report of 2003 was 42 pages long and included lists of arms export volumes by destinations and exporting member states,<sup>17</sup> the seventh report of 2005 contained no less than

288 pages specifying national exports by country, destination, type of equipment and value.<sup>18</sup>

Since all member states are required to produce annual national reports as the basis for the consolidated EU report, most members have decided to make their national data on armaments exports public. Today all but two of the 25 member states, Cyprus and Greece, publish their national reports online.<sup>19</sup>

The impact of the Code of Conduct has not only been to increase transparency concerning armaments exports from the EU, the Conventional Arms Exports Working Group (COARM) has played an important role in identifying additional areas which require regulation and in strengthening existing export controls. With regard to private military and security services, COARM has specifically contributed to EU regulation on the brokering of arms. COARM first identified the issue of brokering as a problem in the annual report on the implementation of the Code in 2000. By 2001, member states had agreed on a set of guidelines for controlling brokering as the basis for national legislation.<sup>20</sup> The result was the Council Common Position on the control of arms brokering, passed in June 2003, which has made binding the national regulation of brokering among the member states.<sup>21</sup>

#### *Armaments Brokering*

The provision for the national regulation of armaments brokering are set out in Council Common Position 2003/468/CFSP of June 2003.<sup>22</sup> The Common Position formally requires member states to implement these guidelines in the form of national legislation. The stated objective of the Common Position 2003/468/CFSP is 'to control arms brokering in order to avoid circumvention of UN, EU or OSCE embargoes on arms exports, as well as of the Criteria set out in the EU Code of Arms Exports'. The Common Position mandates that 'member states will take all necessary measures to control brokering activities taking place within their territory', but it also encourages member states 'to consider controlling brokering activities outside their territory carried out by brokers of their nationality resident or established in their territory'.<sup>23</sup>

#### *Technical Assistance Related to WMDs and Embargoed Destinations*

Whereas Common Position 2003/468/CFSP emerged from deliberations within the context of the EU Code of Conduct, other defence export control issues are discussed under the general provisions of the EU's Common For-



eign and Security Policy. Specifically, the Council agreed on the need to control technical assistance related to weapons of mass destruction.

The resulting EU Council Joint Action 2000/401 of 22 June 2000 has committed member states to the control of technical assistance related to certain military end-uses or destinations among the member states.<sup>24</sup> The proposed regulations concern technical assistance related to items 'which are or may be intended for use in connection with weapons of mass destruction or missiles for delivery of such weapons'.<sup>25</sup> Technical assistance as defined by the EU Joint Action covers nearly the entire spectrum of private military and security services, albeit only with regard to WMDs, including 'technical support related to repairs, development, manufacture, assembly, testing, maintenance or any other technical service, and may take forms such as instruction, training, transmission of working knowledge or skills or consulting services'.

The Joint Action also 'encourages' member states to 'consider the application of such controls also in cases where the technical assistance relates to military end-uses other than those referred to in Article 2 ... and is provided in countries of destination subject to an arms embargo'. In sum, the Council suggests national legislation regarding the export of private military services related to chemical, biological or nuclear weapons as well as to any country subject to international arms sanctions.

#### *EU Embargoes on Technical Services*

While Joint Action 2000/401/CFSP suggests that EU member states should contemplate a national regulation of the export of technical assistance to embargoed destinations, the EU has also directly mandated the licensing or prohibition of technical service exports to certain countries in compliance with United Nations sanctions.

Following increasing awareness of the dangers of exporting military assistance and services to conflict regions by the United Nations and the inclusion of such services in UN sanctions since the mid-1990s, the EU Council has imposed collective EU regulations on technical assistance to a number of destinations.<sup>26</sup> In May 2006, nine individuals, groups and countries were subject to such export restrictions – the Democratic Republic of Congo, Ivory Coast, Liberia, Myanmar/Burma, Somalia, Sudan, Osama bin Laden/Al-Qaida/Taliban, Uzbekistan and Zimbabwe.<sup>27</sup> Previously, similar embargoes had been imposed on Afghanistan,<sup>28</sup> Ethiopia and Eritrea,<sup>29</sup> Libya,<sup>30</sup> Nigeria<sup>31</sup> and the former Yugoslavia.<sup>32</sup> Importantly for the regulation of PSCs, the EU's definition of 'technical services' in most of these

embargoes subsumes all types of military, security and military support services. The definition is also considerably broader than those embraced in many of the national export legislations that emerged from Joint Action 2000/401/CFSP.

### *Small Arms and Light Weapons*

In addition, the EU has adopted common policies regarding the transfer of small arms and light weapons, which can be facilitated by the operations of PSCs in developing countries.<sup>33</sup> In 1998, the Council adopted Joint Action 1999/34/CFSP on the EU contribution to combating the destabilising accumulation and spread of small arms and light weapons.<sup>34</sup> Amongst others, the Joint Action envisaged that the EU should enhance efforts to build a consensus in international organisations such as the United Nations and the OSCE for restrictive arms export criteria as provided in the EU Code of Conduct. Moreover, the Joint Action proposes that member states 'shall seek to increase the effectiveness of their national actions in the field of small arms'.<sup>35</sup>

In 2002, it was replaced by Joint Action 2002/589/CFSP which also included the export of ammunition for small arms and light weapons and expanded the list of measures sought to counter the spread of small arms.<sup>36</sup> In direct application of the Joint Actions, the Council passed two Decisions which offered the government of Cambodia assistance in the development of appropriate legislation for the possession, use and sale of small arms and ammunition and for general disarmament measures.<sup>37</sup> Other projects directed at the finding, collection and destruction of small arms were agreed on with regard to Georgia/South Ossetia<sup>38</sup> and Mozambique (Operation Rachel).<sup>39</sup>

### *Private Security*

Finally, the EU is beginning to exert its influence over the regulation of private security services among the member states. Specifically, the European Court of Justice has established the competence of the EU Commission in several rulings according to which private security counts as an 'economic sector' and as such falls under the first pillar of regulation of the internal market.<sup>40</sup> However, the movement towards common European regulations on private policing has so far been rather slow. A Spanish initiative concerning the establishment of a network of contact points of national authorities responsible for private security was rejected by the European Parliament for formal reasons.<sup>41</sup> Nevertheless, the committee of the European Parliament in charge of the issue was in favour of harmonising member states' regulations

of the private security sector and the Council adopted on 13 June 2002 a recommendation regarding cooperation between the competent national authorities of member states responsible for the private security sector.<sup>42</sup> Further pressure for common European regulations is exerted by the Confederation of European Security Services (CoESS) and the trade union federation Uni-Europa which signed on 18 July 2003 a Code of Conduct for the private security sector. The sectoral social partners believe 'that the rules governing their sector need to be harmonised across the EU'.<sup>43</sup>

### **National Controls**

The impact of EU policies on national legislation regarding private military and security services in the member states has been significant. Current national regulation applies to six types of military and security services in particular: technical assistance related to WMDs and embargoed countries, brokering, technical services related to controlled goods, military training and domestic security services. The first three sets of regulations are a direct consequence of the EU policies outlined above. The last three are the result of national policy priorities and export control traditions, specifically among the new member states in Central and Eastern Europe which used to have strict export controls and were recently required to develop new laws due to accession.<sup>44</sup> Since a detailed examination of the legislation in all 25 member states is beyond the scope of this chapter, the following sections discuss the scope and variance of regulation in each of the six areas.

#### *Technical Assistance Related to WMDs and Embargoed Destinations*

Since Joint Actions are legally binding for EU member states, Joint Action 2000/401/CFSP on the export of technical assistance related to WMDs has to be implemented in the form of national legislation by the member states. As of 2006, a majority of members have done so. They include Austria, the Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Italy, Latvia, Lithuania, the Netherlands, Poland, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. However, slow legislative processes have delayed new legislation on technical assistance as well as embargoed destinations in a considerable number of countries. In particular, Belgium, Cyprus, France, Ireland, Luxemburg and Malta have not yet or not fully implemented specific legislation controlling the export of technical assistance related to all WMDs and missiles for their delivery.<sup>45</sup>

While Joint Action 2000/401/CFSP requires member states to regulate the export of technical assistance related to WMDs and delivery missiles, the form of regulation is left to the individual member states. Accordingly, national legislation within the EU varies considerably. Five countries, namely Austria, Denmark, Germany, Sweden and the United Kingdom, have prohibited the export of related technological assistance, whereas other member states request that exporters apply for a licence.

The variation is even greater with regard to technical assistance for embargoed destinations because Joint Action 2000/401/CFSP encourages, but does not demand, national legislation on the issue. Whereas Austria and Hungary prohibit the export of certain types of technical assistance to all countries under an arms embargo, others such as the Czech Republic, Estonia, Germany, Italy, Latvia, Lithuania, the Netherlands, Poland, Slovakia and Spain require export licences. Finally, Denmark, Sweden and the United Kingdom, have decided not to nationally regulate the export of technical assistance to countries subject to international sanctions, perhaps because prohibitions to export technical services are today already included in most United Nations and EU arms embargoes with which member states have to comply.

### *Brokering*

Three years after Joint Action 2000/401/CFSP, Common Position 2003/468/CFSP on the brokering of arms has been implemented more widely among the member states, although not more consistently.<sup>46</sup> National licensing requirements exist in 19 EU countries with the exceptions of Cyprus, Greece, Ireland, Italy, Luxemburg and Portugal. However, the scope of the controls differs considerably among the member states. Some countries such as Austria and Denmark regulate brokering activities only when conducted from within their national territories; other countries such as Finland, Hungary and Slovakia control brokering also if citizens, permanent residents or registered businesses engage in brokering activities abroad. Some national laws are very complex and detailed; others are very general leaving much open to interpretation. In addition, several countries, including Hungary, Latvia, Lithuania, Malta, the Netherlands, Slovenia and Spain, have set up national registers for armaments brokers in which individuals or businesses planning to engage in future brokering activities have to be registered prior to applying for a licence, whereas most states require only individual export licences.

*Technical Services Related to Controlled Goods*

As a consequence of historically strict export controls and the necessity to revise national export legislation in compliance with EU accession in 2004, most Central and Eastern European countries have more extensive licensing requirements than the older EU member states. In particular the accession process has encouraged the new members to draft legislation which subjects the export of all types of military equipment and related services to licensing. The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovenia and Slovakia thus have comprehensive regulations which typically include the services provided in connection with controlled military equipment, such as development, design, production, adjustment, repair, maintenance and use, under the same licensing laws.

How strict national criteria are for granting a licence is, as in all the cases above, a separate question. In principle, the EU Code of Conduct lists seven criteria which member states have agreed to take into account when granting arms export licences:

1. Respect of human rights in the country of final destination;
2. The internal situation of the country of final destination;
3. Preservation of regional peace, security and stability;
4. The national security of the Member States and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries;
5. The buyer country's behaviour with regard to the international community, in particular its attitude to terrorism, the nature of its alliances and respect for international law;
6. The existence of a risk that the equipment will be diverted within the buyer country or re-exported under undesirable conditions;
7. The compatibility of the arms exports with the technical and economic capacity of the recipient country.

*Military Training*

Due to the explicit linkage of services to controlled military equipment in EU Joint Action 2000/401/CFSP, few member states regulate the export of military training beyond that in the use of military technology. Thus, the Czech Republic, Hungary and Italy demand licences for the export of all training related to the 'use' or 'handling' of military equipment; and Estonia and Poland regulate the export of training and consulting services related to

military goods, including ‘technical support related to the development, manufacture, assembly, testing, repairs, transport or maintenance of military goods, or any other relevant service’.<sup>47</sup> Only Sweden has a separate stipulation on the licensing of all ‘training with a military purpose’.<sup>48</sup>

### *Private Policing*

Whereas the preceding sections have focused on the export of certain types of military and security services, a large body of national legislation applies to the provision of security services within the territory of the member states. Although these regulations do not apply to the transfer of private security services overseas, it can be argued that companies which have to meet certain standards nationally will to some degree export them when operating abroad. An overview of national legislation on private security services among the 25 EU member states has been produced by CoESS.<sup>49</sup> It shows that from the 1990s nearly all European countries have stepped up their control of domestic private security and policing services.

The prime mechanisms regulating private security and military services in the EU member states are the national registration and licensing of security companies and their personnel.<sup>50</sup> The conditions for a licence, which on average needs to be renewed every five years, vary among the member states. However, all member states require a clear criminal record among management and personnel. Additional conditions include sufficient liability insurance, identification cards with name and photo, and approved uniforms which are not easily confused with those of the police or armed forces.<sup>51</sup>

About 60 percent of the EU member states mandate specific training of private security personnel and the passing of an examination.<sup>52</sup> Training can range from basic instruction of between 32 (France) and 300 hours (Poland) to complementary and follow-up training, including for the protection of persons, the transport of valuables and the use of firearms. With the exception of Denmark, France, the Netherlands and the UK, most member states allow for the carrying of firearms by security personnel with a special permit. Nevertheless, many states limit and request registration of the type and number of weapons concerned, and most mandate that after-hours storage has to be in special facilities.<sup>53</sup>

### *General Level of Controls*

Although the extent to which EU member states are controlling the provision or export of private military and security services is larger than commonly

recognised, few countries go beyond the requirements currently set by the EU Code of Conduct and the Common Policies and Joint Actions outlined in the first part of this chapter. As summarised in Table 10.1, the main European arms-exporting states, such as the UK, France, Germany and Italy, do not have the most extensive controls. In fact, the largest exporter of military and security services, the UK, is one of the member states with the least restrictive export regulations. Although the UK has implemented all new EU regulations, it has only done so to the required minimum. Other large defence exporters, such as France and Italy, are still in the process of implementing the new EU export control policies with regard to technical assistance or brokering in national laws.

Among the medium-sized arms exporters, Sweden stands out as the member state with the strictest controls, followed by the Netherlands; whereas the regulations of Austria and Spain are merely average. The states with the most restrictive armaments and military service export regulations can be found among the new members, including Poland, Hungary, Latvia, Lithuania, Estonia, Slovakia, Slovenia and the Czech Republic. Ironically, these countries have been more likely to be importers than exporters of private military and security services.<sup>54</sup>

### **Loopholes and Options for Future Regulation**

The preceding analysis has illustrated the range of regulative measures which control the domestic provision and international export of private military and security services in Europe. Although some organisations such as Amnesty International find reason to criticise the implementation of existing armaments export legislation in Europe,<sup>55</sup> it demonstrates that the member states of the EU are recognising the importance of regulating not only the export of military equipment, but also of related services. In addition, the central place of the EU within the evolving security governance structures in Europe and pressures for the harmonisation of various standards and legislations have contributed to the strengthening of controls. Since the new regulations on the control of technical assistance and brokering have only recently come into force and only in some member states, it is too early to attempt an assessment of the effectiveness of these controls and their implementation. Instead, this section will discuss the remaining gaps in the current legislation and how the EU might address them.

**Table 10.1: Military Service Export Controls in the EU**

Country	Technical assistance - WMDs & Missiles	Technical assistance - Embargoed destinations	Brokering	Technical services related to controlled goods	Training
Austria <sup>56</sup>	prohibited or licensed	prohibited or licensed	licensed	—	—
Belgium <sup>57</sup>	—	prohibited or licensed	licensed	—	—
Cyprus <sup>58</sup>	—	—	—	—	—
Czech Republic <sup>59</sup>	licensed	licensed	licensed	licensed	—
Denmark <sup>60</sup>	prohibited	—	licensed	—	—
Estonia <sup>61</sup>	licensed	licensed	licensed	licensed	licensed
Finland <sup>62</sup>	prohibited	—	licensed	—	—
France <sup>63</sup>	C-weapons prohibited	—	licensed	—	—
Germany <sup>64</sup>	prohibited	licensed	licensed	—	—
Greece <sup>65</sup>	?	?	—	?	?
Hungary <sup>66</sup>	licensed	prohibited	licensed	licensed	licensed
Ireland <sup>67</sup>	—	—	—	—	—
Italy <sup>68</sup>	licensed	licensed	—	—	licensed
Latvia <sup>69</sup>	licensed	licensed	licensed	licensed	—
Lithuania <sup>70</sup>	licensed	licensed	licensed	licensed	—
Luxembourg <sup>71</sup>	—	—	—	—	—
Malta <sup>72</sup>	—	—	licensed	—	—
Netherlands	licensed	licensed	licensed	licensed	—
Poland <sup>73</sup>	licensed	licensed	licensed	licensed	licensed
Portugal <sup>74</sup>	?	?	—	?	?
Slovakia <sup>75</sup>	licensed	licensed	licensed	licensed	—
Slovenia <sup>76</sup>	licensed	licensed	licensed	licensed	—
Spain <sup>77</sup>	licensed	licensed	licensed	—	—
Sweden <sup>78</sup>	prohibited	—	licensed	—	licensed
United Kingdom <sup>79</sup>	prohibited	—	licensed	—	—

*Gaps in Current Legislation*

As has been argued in the second part of this chapter, the private military and security industry includes a broad variety of providers and services. They range from armaments corporations to security guards; and from combat and armed site protection to risk consulting and military training. The preceding sections have shown that only a limited section of these providers and services are subject to specific legislation. As a result, control over the provision and export of private military and security services in the EU has two major gaps.



The first gap in the current controls concerns the application of national licensing and training standards to companies and individuals who are registered in one of the member states, but who are providing their services in other member states or outside the EU. With regard to the former, the EU Court of Justice has ruled that, in the absence of common EU regulations, member states have to recognise the national standards of other EU countries even if these are lower than their national licensing requirements. Since the majority of security companies rely on local and national expertise and reputation for their success, the danger of companies circumventing tight controls by moving to those member states with the least controls is limited. Although there is an increasing transnationalisation of larger companies, most work through national subsidiaries, which operate under national laws. For instance, the world's second largest private security company, G4S which was formed in 2004 by a merger between Group 4 Falck and Securicor, operates globally through a network of subsidiaries registered in over 100 countries.

Nevertheless, there has been increasing pressure for a harmonisation of national legislation under the authority of the EU, including from security industry associations such as CoESS. The industry contends that the current differences not only give companies registered in member states with low standards a competitive advantage, they also make it difficult for security firms to supply transnational security services such as transport security for the integrated market of the EU.

With regard to the operation of security companies outside the EU, there has so far been no attempt to enforce national licensing and training standards. Although Finland, Hungary and Slovakia have set a precedent for the extraneous application of national regulations in the case of arms brokering, most EU member states are reluctant to take responsibility for the foreign operations of national companies or citizens. The main argument against such legislation is that states do not have the resources to monitor compliance with national standards abroad.

A second gap regards the export of military and security services that are not directly linked to military equipment. Unfortunately, these services make up a major proportion of the private military and security sector. They include armed combat, personnel and site protection, transport security, strategic and tactical military training, risk analysis, intelligence gathering and contingency planning. Even the prohibitions of technical military assistance and services to embargoed destinations under the EU's Common Foreign and Security Policy rarely subsume these services. Nevertheless, experience in the Balkans, Afghanistan and Africa has demonstrated that the provision

of strategic and tactical assistance can be as decisive for the outcome of a conflict as the export of missiles and tanks. Although embargoed destinations are obviously the main areas of concern with regard to the supply of non-technical military assistance, the long-term impact of military training in particular should be taken into account when permitting their export to non-democratic regimes.

### *Policy Options*

Several policies suggest themselves to address these gaps and simplify the regulation of the private security industry within the EU. With regard to the national registration and licensing of companies and individuals, considerable progress towards the harmonisation of national laws within the EU has been made by the ruling of the EU Court of Justice that security services are part of the common internal market. As a consequence, the Commission has technical authority over the sector under the first pillar. While the EU Council decided to exclude private security services from the Commission's proposed draft directive on services in the internal market which is likely to come into force in 2006, it tasked the Commission with presenting a separate proposal for the harmonisation of regulations concerning private security services within a year after the implementation of the directive.<sup>80</sup>

The most effective solution would be a proposal for common basic standards for the registration and licensing of private security providers, including vetting, training, safekeeping of weapons and licence renewal. Common EU standards could help to raise the level of regulation and lessen the administrative burden on both companies and member states. Moreover, common regulations would facilitate the spread of EU best practice among acceding and aspirant members.

Concerning the export of military and security services not related to military equipment, a number of complementary policies could be envisaged. Most effective would be an agreement within the EU Council on a CFSP (Common Foreign and Security Policy) Common Position comparable to that on brokering activities, which requires member states to implement national legislation controlling the export of military and security services. Such legislation should apply to all third countries and require the licensing of all service exports by the national authorities. Member states would decide what types of services should be controlled and what requirements should be made for an export license.

Alternatively, or to complement the above, the EU Council could extend the application of the export control criteria endorsed in the EU Code of

Conduct on Arms Exports to military and security services. Although the Code is less binding than an EU Common Position, it might serve as a first step towards the introduction of export controls on military and security services. Given the success of the Code's COARM working group in bringing about legislation on arms brokering, an extension of the Code would facilitate broader awareness and discussion of the problems posed by unregulated service exports among the EU member states.

In addition, COARM might want to consider a common list of military and security services similar to the EU common list of military equipment established under the EU Code of Conduct to encourage the harmonisation of the military and security service export legislation among the member states.<sup>81</sup> The list would need to be reviewed regularly to take into account new developments in the sector and to establish best practice. In the case of further legislation, the EU Code of Conduct could also be used to facilitate the exchange of information regarding military and security service license denials through the same network that has been set up for notification on arms exports among the member states.

Finally, the EU's common regulations on the export of dual-use equipment, i.e. goods with civilian and military applications, could be extended to cover technical assistance related to these services. A 2005 study on the possible amendment of Council Regulation 1334/2000 on export control of dual-use items and technologies initiated by the EU Commission has already investigated different options for controlling the illicit brokering of dual-use items to comply with UN Resolution 1540.<sup>82</sup>

## **Conclusion**

The aim of this chapter has been to illustrate the current extent and future possibilities for strengthening the national and international regulation of private military and security services in the EU and, thus, worldwide. It has demonstrated that private security companies are not only subject to extensive standards and regulations within the member states, but that the EU is also controlling the export of an increasing range of military and security services ranging from technical assistance to support for military activities in embargoed destinations.

What are the consequences of this analysis for the debate over the regulation of private military and security services? Most contemporary efforts to control the growing private military sector have aimed towards new, preferably global, regimes on mercenaries and private military and security

firms. However, in order to function, these regimes not only need the support of a sufficient number of signatories, they also require a strong normative commitment in the absence of global monitoring mechanisms or effective sanctions. As a consequence, progress on a global regime for private military services has been limited.

This chapter suggests that there might be a faster and more effective way to improve the regulation of private military and security services. It has demonstrated that overlapping national and regional regulations, while not perfect, can create a dynamic by which a centrally-placed actor such as the EU can exert pressure for harmonisation in favour of more comprehensive control mechanisms. This approach appeals to governments because common controls are more cost-efficient and easier to implement than national regulations by simplifying overlapping legislations. However, it is also supported by the industry because regional regulations eliminate competitive disadvantages.

It might be argued that the example of the EU is not directly transferable to other regional organisations because few have the central decision-making capacity and authority of the EU. Nevertheless, several arguments suggest that the evolution of military and security service regulations in Europe might still serve as a model. First, the EU Code of Conduct, Common Position 2003/468/CFSP and Joint Action 2000/401/CFSP were decided intergovernmentally and on the basis of a consensus among the member states. High levels of integration are thus not a precondition for common regulations. Second, the initial level and scope of EU export controls were limited. Rather than trying to achieve a maximum level of control immediately, member states agreed on a general framework in the form of the Code of Conduct which institutionalised cooperation and consultation on the issue of armaments export controls. While the original Code was only politically binding and very general in its stipulations, it was this institutional network which has created a permanent forum for the discussion, and implementation, of more extensive regulations. Finally, the EU, through enlargement and as an international actor in organisations such as the United Nations, seeks to increase the number of states which subscribe to the Code and related regulations. A small number of states who can agree on common regulations for their growing national and international private military service industry might thus serve as a core for future regional or pan-regional controls. In conclusion, the EU not only suggests how other regions might be able to improve the regulation of private military and security services, it also plays an active part in the expansion and export of its controls.

## Notes

- <sup>1</sup> Sean Rayment, S., 'Trophy' Video Exposes Private Security Contractors Shooting Up Iraqi Drivers, *The Telegraph*, 27 November 2005.
- <sup>2</sup> Borger, J., 'US Military in Torture Scandal', *Guardian*, 30 April 2004.
- <sup>3</sup> 'Q&A: Equatorial Guinea 'Coup Plot'', *BBC*, 13 January 2005.
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<sup>27</sup> The list of EU embargoes is constantly updated and can be viewed at: [http://ec.europa.eu/comm/external\\_relations/cfsp/sanctions/measures.htm](http://ec.europa.eu/comm/external_relations/cfsp/sanctions/measures.htm).

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## Chapter 11

# **The United Nations and the Dilemma of Outsourcing Peacekeeping Operations**

*Victor-Yves Ghebali*

In the context of globalisation, a process which has been accelerated by the revolution in information technologies and the shift from bipolarity to multipolarity, the UN reached out to private actors for obvious reasons: the triumph of market ideology coupled with a growing scepticism (essentially from major Western powers) vis-à-vis the UN's overall capacity to deliver, and more generally the UN's failure to achieve a quantum leap from multilateralism to globalisation.<sup>1</sup> Thus, the continuous decline in official development aid and the dramatic progress of economic globalisation convinced it that the state-centred approach to socio-economic development was leading to a dead end: hence the launching, by Secretary-General Kofi Annan, in July 2000, of the *Global Compact Initiative*.<sup>2</sup> The UN also concluded that international peace and security were now endangered mainly by intra-state conflicts, that state collapse represented a regional and global security threat (with the paradox that extreme weakness could be as dangerous as excessive military capabilities), that armed non-state actors were now able (through terrorism or organised crime) to put at risk the security and good governance of nation-states, and that the victims of post-Cold War conflicts were predominantly civilian populations. Consequently, the UN realised that the concept of collective security could no more be limited to the protection of states, but must include human security concerns so as to encompass development and human rights.

In parallel, voices emanating from some major Western governments, academia and the private sector itself made the case for outsourcing private security and/or military companies (PSC/PMC) to UN peacekeeping operations.<sup>3</sup> Actually, PSC/PMC have been used within the UN system at large for the provision of logistical and support services, as well as security and policing functions. However, as noted in the *Green Paper* issued by the British House of Commons in 2002, if the services that private companies are providing to the UN (and also to NATO and the European Union) are relatively

uncontroversial, ‘more problematic is the notion that private military forces might be used for politically sensitive and high-profile areas of UN operations, such as peacekeeping and peace enforcement.’<sup>4</sup> This paper analyses the shifting position of the UN towards mercenarism, the problem in the context of which the central debate on PSC/PMCs is taking place, and then focuses on the two major associated hurdles: the legal definition of the concept of ‘mercenary’ and the advantages versus the inconveniences of a possible partial ‘privatisation’ of UN peacekeeping operations.

### **The Shifting UN Position Towards Mercenarism – From the Special Rapporteur to the Working Group on Mercenaries**

As decolonisation unfolded in the 1960s, the UN General Assembly, the Security Council, ECOSOC and the Commission on Human Rights adopted repeated resolutions condemning the activities of mercenaries combating (at the behest of former colonial powers or domestic opposition groups) national liberation movements or groups aimed at destabilising newly-independent states. Given the persistence of the phenomenon, the General Assembly decided in 1979 to undertake the framing of a binding international text against the recruitment, use, financing and training of mercenaries<sup>5</sup> – which came to fruition only in 1989. Meanwhile, in 1987 the Commission on Human Rights appointed a Special Rapporteur to address the issue of the ‘use of mercenaries as a means of violating human rights and impeding the exercise of the right to self-determination of peoples.’<sup>6</sup>

The Special Rapporteur (Enrique Bernales Ballesteros, from Peru) began his work by addressing mercenary activities against the exercise of the right to self-determination of peoples carried out by individuals or more or less informal groups. Soon afterwards, he realised that mercenary action was not restricted to situations of armed conflict, but could also be closely linked to organised crime – through illicit trafficking of human beings, weapons, diamonds and drugs serving, fuelling and prolonging armed conflicts – and international terrorism.<sup>7</sup> As a consequence, mercenaries were consistently labelled criminals, offering multiple services in multiple roles. At first focused on Africa, the continent the most affected by mercenary activities, the Special Rapporteur progressively extended his investigations to Central America (Guatemala, Salvador, Nicaragua), the Caribbean (anti-Cuban mercenary activities), South Pacific (Papua New Guinea), former Yugoslavia, as well as to a number of former Soviet Republics (Armenia, Azerbaijan, Georgia, Moldova, Tajikistan).<sup>8</sup>

The Special Rapporteur's task was certainly not easy: his annual reports were criticised 'for focusing overly on theoretical and legal questions' and, at the end of the day, little attention was paid to them.<sup>9</sup> Over time, the Special Rapporteur realised that the problem of mercenarism was changing and acquiring aggravating characteristics: initially concerning certain 'dogs of war' driven by ideology and in search of thrill and financial gain, it now involved corporate firms (PSCs and PMCs) offering services to recognised governments with close links to major Western governments. He directly addressed the issue of PSC/PMCs from 1997, in relation to the activities of Executive Outcomes in Africa, as well the operations conducted by other companies (Sandline International, Military Professional Resources Inc., Keeni Mine Services, British DefenceSystems, Air Scan...) throughout the world.<sup>10</sup>

From the outset, Ballesteros regretfully noted that PSC/PMCs were offering 'a kind of alternative security model for countries with internal conflicts that are practically unmanageable for the Governments concerned.'<sup>11</sup> Consequently, those companies were taking upon themselves responsibilities and functions hitherto exclusively reserved to states.<sup>12</sup> The Special Rapporteur considered that this 'new operational model' was leading to situations where the state was being *supplanted* by private actors in what constituted its basic *raison d'être*.<sup>13</sup> From there, he went on to argue that 'no Government is authorised to exercise the attributes of authority against the sovereignty of the State itself, because responsibility for internal order and security in a sovereign country is an obligation which may not be renounced or transferred ...'.<sup>14</sup> He added that the state cannot divest itself of its basic obligations in this area because it 'would no longer have any obligation to defend peace and life and would be replaced in military matters by private companies that by definition are concerned with their own interests...'.<sup>15</sup> Furthermore, he considered that if states were prepared to give up an intrinsic element of their sovereignty, this should be clearly expressed and consented to by the population.<sup>16</sup> Finally, he signalled that such a development would affect the nature, structure and functions of the state, while at the same time changing the nature of international relations themselves.<sup>17</sup> For the Special Rapporteur, such a development was not only unwelcome as matter of principle, but also for two basic practical reasons.

*First*, while PSC/PMCs established corporate structures and signed contracts with internationally recognised governments, the result was invariably a 'formally tolerated mercenary intervention'.<sup>18</sup> Given their very composition, PSC/PMCs are 'mercenary companies which work with mer-

cenaries and carry out mercenary activities.<sup>19</sup> In any case, 'the selling of security operations' results in allowing 'intervention in internal affairs by paramilitary forces with a mercenary component.'<sup>20</sup> *Second*, 'the privatisation of war' has significant consequences for such important issues as the self-determination of peoples, state sovereignty and national and international guarantees of the observance of human rights.<sup>21</sup> Handing over such type of authority to a private entity not only amounted to 'agreeing to a limitation of State sovereignty', but could also result in impairing the basic human rights of the population.<sup>22</sup> Proceeding from those premises, the Special Rapporteur did not suggest prohibiting the existence of PSC/PMCs but the establishment of clear and precise limits for their activities by means of regulation. Considering that PSC/PMCs must act within certain bounds, he argued that 'the appropriate course of action is to devise regulations clearly establishing the areas in which private companies may legally operate', that is to say clearly fixing 'what the State can legitimately transfer to the private sector in terms of military security and what should remain in State hands because it is inherent to the State's very existence.'<sup>23</sup> In this connection, the most important point was to prohibit PSC/PMCs from recruiting, hiring, financing or using mercenaries to fight in armed conflicts. In other words, to avoid the formation of private armies.<sup>24</sup>

In his final Report to the Commission on Human Rights (2003), the Special Rapporteur arrived at four main conclusions. *First*, despite all efforts by the UN and regional organisations to combat mercenary activities, such activities had not disappeared; they continued to occur in many parts of the world in multiple forms and represented a danger to peace and security in weak countries, especially in Africa and small island states.<sup>25</sup> *Second*, whether acting individually or not, the mercenary still performed as a violator of human rights.<sup>26</sup> *Third*, one of the major obstacles to the fulfilment of the Special Rapporteur's mandate was the absence of a clear definition of a what precisely a 'mercenary' was: hence the need for updating the 1989 UN Convention on mercenaries.<sup>27</sup> *Fourth*, the Special Rapporteur recommended that 'private companies offering military assistance, consultancy and security services on the international market should be at least regulated and placed under international supervision' and that 'the crimes and offences committed by employees of such companies must not go unpunished as is usually the case.'<sup>28</sup>

In July 2004, the Commission on Human Rights decided to extend the mandate of the Special Rapporteur for a period of three years and appointed to the position to Shaista Shameem (Fiji). In her two successive reports (addressed to the Commission on Human Rights and the General Assembly in

2004-2005), the new Special Rapporteur adopted a pragmatic approach sharply contrasting with her predecessor's longstanding positions.<sup>29</sup> Stressing the need for 'a paradigm shift' with respect to the mandate, she advocated 'a fundamental rethinking of the issue of mercenarism and its relation to the promotion and protection of human rights' as well as 'a fundamental reconsideration of (...) the responsibility of States and the United Nations with respect to the activities of actors currently legally defined as mercenaries.'<sup>30</sup> Hence the need for a debate on the role of the State with respect to the use of force 'so as to reach a common understanding on the respective duties and responsibilities of the different State and non-State actors in the current context, and their respective obligations for the promotion and protection of human rights', the core issue being to identify 'who is entitled to legitimacy in the use of force in the current political and security climate.'<sup>31</sup> Such a debate, she concluded, could conceivably lead to 'a fundamental revamping or the total revocation of the UN 1989 Convention on mercenaries' and also yield 'a useful outcome for the United Nations itself with respect to effective maintenance of its peacekeeping and peacebuilding mandates.'<sup>32</sup>

In line with this 'paradigm shift', Shaista Shameem cautioned against confusing mercenaries with other actors supplying security services in troubled world spots: 'while there may be occasions when the activities of mercenaries merge with activities of these other actors, it is important to avoid making assumptions', including not overstating the link between mercenarism and terrorist activity.<sup>33</sup> Thus, as regards PMC/PSCs, she considered that in the absence of a satisfactory definition of mercenaries and corresponding legislation, a pragmatic approach should be promoted in the interim: encouraging company *self-regulation* rather than regulation imposed by external bodies, to promote a sense of ownership and sustainability in the implementation of agreed measures.<sup>34</sup> She noted that such companies were under contract with governments, NGOs and, 'increasingly, the United Nations', to provide security, logistical support and training in conflict and post-conflict contexts, for example, in Iraq and Afghanistan,<sup>35</sup> and that there was inadequate justification for their criminalisation under the UN Convention.<sup>36</sup> Accordingly, consideration should be given to identifying PMC/PSCs primarily as private sector actors to which should be extended 'the corresponding principles and consultations, including the United Nations Global Compact, the draft Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights and voluntary principles on security and human rights.'<sup>37</sup> The new Special Rapporteur then went on to suggest 'to explore whether licensing and regulation of genuine private secu-

rity companies, such as through strong national legislation or an international registration mechanism, could serve to identify clear lines of accountability for bona fide companies and thereby distinguish other organisations engaging in mercenary activity to the detriment of human rights and the rights of peoples to self-determination.<sup>38</sup>

During her brief mandate (2004-2005), the second Special Rapporteur took the initiative to contact a number of PMC/PSCs – Beni Tal, Erinys Africa, Northbridge Services Group, ArmorGroup International, Blackwater, Military Professional Resources Incorporated, as well as a US-based industry association, the International Peace Operations Association (IPOA) – to explore the possibility of a code of conduct consonant with international human rights law and standards.<sup>39</sup> IPOA informed her that it had already developed in 2000, in coordination with several NGOs, a code of conduct for its corporate members operating in conflict or post-conflict environments, and that human rights were the key concern in the original draft of the text – which was subsequently improved by contributions from legal experts, academics and human rights specialists.<sup>40</sup> More significantly, Shaista Shameem held a meeting in London (June 2005), convened at her suggestion, with representatives of a number of ‘members of the peace and security industry’ which ended with a joint statement.<sup>41</sup> The text affirmed that ‘Peace and Security Companies within this industry fully support all appropriate international human rights instruments, norms and principles, and seek to engage the UN, NGOs and humanitarian organisations to see how we can best continue to support these norms.’ Consequently, it requested that in light of the fact that those corporations were ‘frequently employed by UN member States and the UN own entities, we strongly recommend that the UN re-examine the relevance of the term *mercenary*’ because ‘this derogatory term is completely unacceptable and is too often used to describe fully legal and legitimate companies engaged in vital support operations for humanitarian peace and stability operations.’ The communiqué also stressed that ‘the industry is keen to engage with UN mechanisms and is willing to examine a wide variety of options to ensure that the private sector continues to be an increasing and positive presence in peace and stability operations’ before announcing the convening of ‘a future industry conference to develop a unified international code of conduct related to private sector operations in conflict/post conflict environments’.<sup>42</sup>

In sum, in the second Special Rapporteur's view, PMC/PSCs could help compensate the deficiencies of the UN when the latter is confronted with widespread violations of human rights and genocide, it being understood that such an option ‘need not be at the expense of the contributions to



peacekeeping or peacebuilding missions by member States, but in addition to them [and] provided there is a properly registered vetting mechanism and guidelines for private companies put in place in advance.<sup>43</sup> Shaista Shameem's positions displeased many Third World governments: while that remains undocumented, it can hardly be doubted. The Commission on Human Rights abruptly decided, in April 2005, to end the mandate of the Special Rapporteur and to replace it overnight by a Working Group made up of five regional independent experts for a period of three years.<sup>44</sup> The Commission tasked the Working Group to continue the work previously done by the two successive Special Rapporteurs, taking into account the proposal for a new legal definition of a mercenary drafted by Enrique Bernales Ballesteros before his departure.<sup>45</sup> Since then, the Working Group has been concentrating on two issues: the role of the state as the primary holder of the monopoly of the use of force, and agreements between governments which led to immunity from accountability for human rights violations by PMC/PSCs and their employees. At the same time, it adopted a text outlining its methods of work, including the establishment of a monitoring and complaints mechanism to address complaints regarding mercenaries' activities. It also decided to elaborate concrete proposals and advisory opinions on possible new standards, general guidelines or basic principles, to examine (as a special category) situations where children are involved in mercenary-related activities, to make use of an 'urgent action' procedure in case of need and, finally, to establish a network of academics to further support the gathering of information on and study of different regional experiences.

As of the time of writing (July 2006) this chapter, the Working Group had submitted two reports.<sup>46</sup> Noting that some UN departments, funds, programmes and organisations, were reportedly utilising the services of PSC/PMCs, the Working Group expressed the intention of seeking further information on the nature and scope of this practice and the criteria used for selecting these companies, with a view to ensuring the appropriate application of international human rights standards and international humanitarian law.<sup>47</sup> In the meantime, it tabled four suggestions. *First*, the Working Group recommended the application of the normative provisions of the draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003) to PSC/PMCs providing military and security services in more than one country or as a cluster of economic entities operating in two or more countries, with particular care to be given to the right to security of persons, the rights of workers and respect for national sovereignty, territorial integrity and human rights.<sup>48</sup> *Second*, it

considered that states from which PSC/PMCs exported military assistance, consultancy and security services should adopt appropriate legislation and regulatory mechanisms to control and monitor their activities, including a system of registering and licensing which would authorise these companies to operate and to be sanctioned when the norms were not respected.<sup>49</sup> *Third*, it called upon governments making use of PSC/PMCs' services to establish registering and licensing regulatory mechanisms for ensuring that human rights were respected at domestic level.<sup>50</sup> *Fourth*, the Working Group endorsed Shaista Shameem's suggestion as to the convening of a high-level round-table on the role of the state as primary holder of the monopoly on the use of force.<sup>51</sup>

### **The Legal Hurdle: The Definition of a Mercenary**

Throughout his lengthy tenure (1987-2003), the first Special Rapporteur realised that the failure to curb mercenary activities effectively was due above all to the loopholes and shortcomings of the legal definition of a mercenary contained in the three international instruments in force, namely Additional Protocol I to the 1949 Geneva Conventions (1977), the OAU Libreville Convention for the Elimination of Mercenarism in Africa (1977) and the UN International Convention against the recruitment, use, financing and training of mercenaries (1989).<sup>52</sup>

Article 47 of Additional Protocol I considers the issue of mercenaries in the strict framework of international humanitarian law: it denies the mercenary the rights of a combatant or of a prisoner of war without referring to state obligations towards mercenarism.<sup>53</sup> From this limited scope, it defines the mercenary through a set of six cumulative elements, qualifying him as any person who a) is specially recruited (locally or abroad) in order *to fight in an armed conflict*; b) does, in fact, take a direct part in the hostilities; c) is motivated to take part in the hostilities essentially by *the desire for private gain* and is actually promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party; d) is *neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict*; is *not a member of the armed forces of a party to the conflict*; and who has not been sent by a state non-party to the conflict on official duty as a member of its armed forces.

The UN Convention repeats the definitions of Article 47, but differs by specifying that a mercenary is any person who *also* participates in a con-

certed act of violence aimed at overthrowing a government or undermining the constitutional order or the territorial integrity of a state – a provision covering internal conflicts. In addition, it creates international obligations in relation to offences committed not only by a mercenary (Article 1), but also by any person who recruits, uses, finances or trains mercenaries (Article 2) and any person who is the accomplice of a person who commits or attempts to commit any of the offences set forth in Convention (Article 4 b). State parties are bound to make the offences punishable by appropriate penalties (Article 5 § 3) and to cooperate, directly or through the UN Secretary-General, in preventing and prosecuting the abovementioned offences (Articles 7, 8, 10 and 14). Notably, the UN Convention also provides for fair trial guarantees for captured mercenaries (Article 10 §§ 3-4 and Article 11).<sup>54</sup>

As for the OAU Convention, it is a regional instrument prohibiting both mercenary activities and mercenarism as a crime against peace and security in Africa, whether committed by an individual, a group, an association, a State or a State representative (Article 1 §§ 2 and 3). It replicates the substance and letter of Article 47 of Protocol I. Although establishing obligations comparable to those of the UN Convention (articles 6 to 11), the text differs from the latter in that states may be accused of breaches of the Convention ‘before any competent OAU or international organisation tribunal or body’ (Article 5 § 2). Furthermore, by explicitly referring to ‘any person, natural or *juridical*, who commits the crime of mercenarism’ (art 10 2 c), it covers the responsibility of private companies.

The definition contained in all texts present obvious shortcomings which have been outlined by the initial Special Rapporteur.<sup>55</sup> *First*, the elements of the three definitions being cumulative (they have to be all met simultaneously), makes it difficult to categorise someone as a mercenary. *Second*, the requirement that the mercenary takes a direct part in the hostilities excludes military advisers or counsellors and, more fundamentally, does not consider that mercenaries can engage in illicit trafficking, organised crime and terrorism. *Third*, besides being difficult to prove, the condition related to excessive material compensation does not take into account conscripts and foreign nationals driven by sincere convictions of humanitarian, ideological, political or religious nature. *Fourth*, the nationality requirement overlooks the situation where a mercenary acquires the citizenship of the country in which he fights in order to avoid being categorised as such.<sup>56</sup> *Fifth*, it is not uncommon that mercenaries integrate into the armed forces of the side on whose behalf they are acting. All loopholes are further aggravated by the fact that the legislation of most states does not criminalise mercenary activities,

basically because weak states affected by internecine conflicts are willing to hire PSC/PMCs and powerful ones may use them as undercover tools of foreign policy. At the end of his mandate, after 16 years of reporting, the first Special Rapporteur suggested a new legal definition, presenting the following improvements:<sup>57</sup>

- a. A mercenary is any person who is specially recruited not only in order to participate in an armed conflict, but also in *other crimes* such as ‘destabilisation of legitimate governments, terrorism, trafficking in persons, drugs and arms and any other illicit trafficking, sabotage, selective assassination, transnational organised crime, forcible control of valuable natural resources and unlawful possession of nuclear or bacteriological materials.’
- b. The *nationality criterion* should be taken into account when the mercenary acquires the citizenship or the nationality of the country in which he fights or when he ‘is hired to commit the crime in his country of nationality and uses his status as national to conceal the fact that he is being used as a mercenary by the State or organisation that hires him.’
- c. A mercenary is any person who does not form part of *police forces* as well as the regular armed forces at whose side the person fights.
- d. A mercenary is any person who is specially recruited for the purpose of participating in a concerted act of violence aimed at overthrowing a government or otherwise undermining the *constitutional, legal, economic or financial order or the valuable natural resources of a State*, undermining the territorial integrity and *basic territorial infrastructure* of a State; committing an attack against the life, integrity or security of persons or committing terrorist acts and denying self-determination or maintaining racist regimes or foreign occupation. The reference to the ‘valuable natural resources of a State’ refers indirectly to those PSC/PMCs whose activities have been rewarded by mineral or oil concessions.
- e. ‘Where a person is convicted of an offence under article 1 of the Convention, any *dominant motive* of the perpetrator should be taken into account when sentencing the offender.’

When taking over as Special Rapporteur, Shaista Shameem noted that, given the futile number of ratifications to the UN Convention, its parameters should be reconsidered.<sup>58</sup> She also pointed out that a new legal definition of a mercenary would be useless, all available or proposed definitions being

unworkable for practical purposes.<sup>59</sup> In her opinion, a fresh definition might be arrived at 'only after a policy decision has been reached on the fundamental question of whether States wish to continue to be solely responsible for the use of force, for declaring war and for sanctioning the use of force within certain internationally acceptable rules of engagement.'<sup>60</sup> In this connection, 'the first question to be determined, therefore, is what is to be considered as outside the law and criminalised, and what is to be considered acceptable within the new geopolitical environment and the deregulation of State military activity.' Only then can the question of the definition of a mercenary, in the Special Rapporteur's view, respond to the realities facing the international community today. 'A new legal definition can then be drafted with ease and is likely to be more acceptable to Member States, which have provided such contradictory replies to the notes verbales on this issue.'<sup>61</sup>

In sum, the absence of an all-encompassing and unambiguous definition is not without consequences. Given its non-enforceability and the absence of a monitoring mechanism, it allows mercenaries to act with impunity. At the same time, it does not permit PMC/PSCs to avoid being accused of performing mercenary-type activities, with no distinction whatsoever made between 'reputable and disreputable private sector operators.'<sup>62</sup>

### **The Political Hurdle: The Externalisation of UN Peacekeeping Operations**

In conjunction with the crisis that affected UN peacekeeping operations in the mid-1990s (due to the disastrous mismanagement of conflicts in Bosnia, Rwanda and Somalia) and following the apparent successes of Executive Outcomes in Angola and Sierra Leone, the idea of outsourcing UN conflict and post-conflict management functions to private actors gained ground. In June 1998, Kofi Annan declared that during the Rwanda tragedy of 1994, when he was Head of the Department of Peacekeeping Operations and when the UN needed skilled soldiers to separate fighters from refugees in the Rwandan refugee camps in Goma, he 'considered the possibility of engaging a private firm', but did not do so because he felt the world was not 'ready to privatise peace.'<sup>63</sup> Nevertheless, PSC/PMCs were gradually called upon to provide logistical and support services as well as fulfil security and policing functions (including mine action) in UN peacekeeping operations. For instance, beside delivering logistical services to ECOMOG, International Charter and Defense Systems provided local guards to UNAVEM in An-

gola.<sup>64</sup> Pacific Architects & Engineers also provided logistics to UNAMSIL in Sierra Leone;<sup>65</sup> in the Democratic Republic of the Congo, it refurbished airfields and managed air traffic control for MONUC. Furthermore, the UN's humanitarian branches relied on PSC/PMCs to ensure the protection of their personnel and premises.<sup>66</sup> By contrast, and apart from the coordination of Sandline International with ECOMOG, so far PSC/PMCs have not been engaged in military support for peacekeeping operations.<sup>67</sup> Whether emanating from governments, the security business industry itself or academics, the case for the use of private contractors revolves around two main twinned arguments: the deficiencies inherent in UN peacekeeping operations and the capacities of PSC/PMCs to provide a viable alternative in this regard.<sup>68</sup>

Notoriously, UN peacekeeping operations are, more often than not, conducted by ill-trained, poorly-armed and badly-coordinated volunteers representing different cultures, operating with heterogeneous equipment and minimal funding and, to make things worse, lacking strong motivation. This means that the UN lacks the capacity for undertaking large-scale military enforcement actions and that a number of conflicts could not be effectively addressed by means of standard peacekeeping operations. No wonder, then, that UN peacekeeping is in constant crisis. Although the UN is unfairly and routinely scapegoated for that, the root of the crisis stems from the reluctance of Western and other major governments to become enmeshed in conflicts that do not directly affect their vital interests. Be that as it may, PSC/PMCs affirm that they can offer a viable alternative to the major powers' lack of commitment and UN constraints; they are able to deploy much more rapidly (in terms of days and not of months), make use of highly-skilled troops with a firm chain of command, use compatible equipment and perform assigned objectives with much better efficiency than the UN and, moreover, at much cheaper cost. Executive Outcomes claimed that it could have been able to prevent the Rwandan genocide.<sup>69</sup> Today, as the Darfur tragedy (which has caused the deaths of 180,000 people and two million refugees in three years) is still raging, the private sector has expressed willingness to intervene should they be officially asked. The main thrust of the PSC/PMCs' argument is that, in certain circumstances, the international community's choice lies between abdication or outsourcing, all the more since some conflicts can only be resolved by enforcement measures.

Admittedly, the contribution of PSC/PMCs could take three main *complementary* forms: intervention prior to the deployment of a UN peacekeeping operation in order to secure the zones in which the latter will operate (this is what the US-led UNITAF coalition of the willing was expected to do in Somalia but did not); back-up of an already deployed UN operation aimed

at pacifying certain highly troubled zones (a role akin to that the European Union's Operation *Artemis* performed in support of MONUC in the Democratic Republic of Congo); or monitoring the continuing implementation of peacebuilding arrangements after the withdrawal of a UN operation for the sake of deterring any possible upsetting of those arrangements.

No consensus yet exists (or is emerging) to use 'guns for hire' for two basic reasons. *First*, a number of governments consider that, as a modern form of mercenarism, PSC/PMCs represent illegitimate non-state actors supplanting the basic functions traditionally reserved for the state. Their perception is compounded by two additional political factors. On the one hand, given the close relations they entertain with their domestic military establishments, PSC/PMCs are used by major Western states as tools for a covert parallel or proxy foreign policy. On the other hand, companies are often closely associated with mining and natural resource industries. In any event, UN peacekeeping operations are a source of income for poor states which can only 'dispute the expenditure of UN funds on private military companies rather than on the current practice, which helps to support their national armed forces.'<sup>70</sup> *Second*, the possible use of contracted peacekeepers raises fundamental problems of accountability, especially in weak states where law enforcement devices are lacking. Reportedly, PSC/PMC personnel have often violated fundamental human rights and international humanitarian law.<sup>71</sup> The trouble is that, contrary to regular armed forces, PSC/PMCs operate outside criminal justice standards, without real national or international oversight, which means that even in case of egregious misconduct (as for the abuses committed in Iraq's Abu Ghraib prison) they are seldom prosecuted and even less punished. It has been suggested that a regulatory framework at both domestic and international level could help to alleviate the accountability problem.<sup>72</sup> Arguably, the best way to make private companies accountable is through domestic legislation. However, besides their heterogeneity, PSC/PMCs conduct their activities in foreign countries (outside the purview of domestic law) and can move from one jurisdiction to another.<sup>73</sup> More significantly, whether strong or weak, the most interested states are reluctant to constrain their liberty to hire private military contractors. Undoubtedly, without adequate regulation at domestic level, international regulation (through the setting up under UN auspices of a regulatory body to register and monitor the activities of PSC/PMCs, complemented by a Code of Conduct) would simply be ineffective.

## **Conclusion**

As PSC/PMCs have become a standard feature in the post-Cold War security landscape, the UN can clearly not avoid closer interaction with them. However, there are two insuperable obstacles to this. The first is that one cannot reasonably expect the UN to outsource part of its peacekeeping operations in the absence of both adequate domestic and international legislation regulating the activities of PSC/PMCs, depriving them of the infamous label of mercenarism and recognising their legitimacy. As to the second, the outsourcing of peacekeeping on a regular or irregular basis would entail abdication of the 'Weberian' privilege which, under Article 42 of the Charter, attributes to the Security Council the monopoly of the legitimate use of force for the maintenance of international peace and security. When states decide to externalise part of their military prerogatives for clear reasons (using proxies to pursue foreign policy objectives in the case of strong countries and exercising the right of self-defence, consistent with Article 51 of the UN Charter, for weak ones), this might be debatable but remains perfectly understandable. By contrast, the reneging by the UN – the repository of international legitimacy – on the cornerstone provisions of its own Charter is a qualitatively different thing. As acknowledged by a prominent figure of the security business industry (Doug Brooks, President of the International Peace Operations Association), the UN remains against all odds the natural solution to international peace and security problems because it has got 'some surprising capabilities and expertise to help with humanitarian services, peace making and state building' and remains the most qualified international organisation in the world capable of organising humanitarian relief on a massive scale.<sup>74</sup>

It would be wrong to assume that the choice for the UN is between outsourcing or indifference to protracted conflicts. Ideally speaking, there are two rational solutions. The first one is the appropriate beefing up of the UN's peacekeeping capabilities. Indeed, all arguments advanced in favour of private contractors, miss a crucial point: the UN could be an effective security organisation should its member states take the step of endowing it with a standing rapid deployment force – a prospect which at present is unpalatable to most if not all of the Security Council's permanent members.<sup>75</sup> The second solution is systematic large-scale bilateral and multilateral assistance efforts to improve the good governance of the weak states' legitimate security sector.



## Notes

- <sup>1</sup> The development of globalisation is seriously affecting intergovernmental organisations which (with the rare exception of the WTO) incarnate multilateralism – an inter-state driven process meant to regulate the conflictual and cooperative relationships of nation-states and, hence, *preserve* national sovereignties. By contrast, globalisation restrains the capacity of nation-states to perform as fully sovereign entities in a world where there is yet no global governance. In a preparatory report to the 2000 Millennium Summit, Secretary-General Kofi Annan recognised that the time had come for the UN to shift from multilateralism to globalisation because “while the post-war multilateral system made it possible for the new globalisation to emerge and flourish, globalisation, in turn, has progressively rendered its designs antiquated”(A/54/2000 of 27 March 2000, § 30).
- <sup>2</sup> The Initiative aims at encouraging transnational corporations to adhere to and respect, on a voluntary basis, fundamental norms concerning human rights, labour standards, protection of the environment and anti-corruption. For more details, see Thérien, J.-P. and Pouliot, V., ‘The Global Compact: Shifting the Politics of International Development,’ *Global Governance*, vol. 12, no 1, 2006, pp. 55–75.
- <sup>3</sup> Although private security companies are normally concerned with protection of individuals and property while private military companies provide military assistance, it is difficult to make a rigid distinction between the two categories which, in practice, do offer both kinds of services. For more details, see Schreier, F., and Caparini, M., ‘Privatising Security: Law, Practice and Governance of Private Military and Security Companies,’ DCAF Occasional Paper, no. 6, (Geneva: DCAF, 2005), 17–43.
- <sup>4</sup> House of Commons. ‘Private Military Companies: Options for Regulation,’ London, the Stationery Office, 2002 (HC 577, 2002), § 85. See also the Ninth Report of the Foreign Affairs Committee on Private Military Companies presented by the Secretary of State for Foreign and Commonwealth Affairs at Session 2001-2002 (Cmd 5462).
- <sup>5</sup> A/RES/34/40/ of 14 December 1979.
- <sup>6</sup> Ecosoc Resolution 1987/61 of 29 May 1987.
- <sup>7</sup> The Special Rapporteur devoted special attention to terrorism in his report for 2000 (E/CN.4/2001/19 of 11 January 2001, §§ 50–61). See also E/CN.4/2003/19 of 29 November 2002, §§ 40–42.
- <sup>8</sup> Ballesteros Reports to the Commission on Human Rights: E/CN.4/1988/14 of 20 January 1988, E/CN.4/1989/14 of 16 January 1989; E/CN.4/1990/11 of 1 March 1990; E/CN.4/1991/14 of 27 December 1990; E/CN.4/1992/12 of 13 December 1991; E/CN.4/1993/18 of 8 January 1993; E/CN.4/1994/23 of 12 January 1994; E/CN.4/1995/29 of 21 December 1994; E/CN.4/1996/27 of 17 January 1996; E/CN.4/1997/24 of 20 February 1997; E/CN.4/1998/31 of 27 January 1998; E/CN.4/1999/11 of 13 January 1999; E/CN.4/2000/14 of 21 December 1999; E/CN.4/2001/19 of 11 January 2001; E/CN.4/2002/20 of 10 January 2002; E/CN.4/2003/16 of 29 November 2002 and E/CN.4/2004/15 of 24 December 2003.
- <sup>9</sup> Lilly, D., ‘The Privatisation of Security and Peacebuilding. A Framework of Action,’ (London: International Alert, 2000), [http://www.reliefweb.int/rw/lib.nsf/db900SID/LGEL-5F9JUE/\\$FILE/intalert-privatisation-sep02.pdf?OpenElement](http://www.reliefweb.int/rw/lib.nsf/db900SID/LGEL-5F9JUE/$FILE/intalert-privatisation-sep02.pdf?OpenElement)

- <sup>10</sup> E.CN.4/1997/24 of 20 February 1997, §§ 92–111. See also E.CN.4/1998/31 of 27 January 1998, §§ 67–92; E.CN.4/2000/14 of 21 December 1999, §§ 68–74 and E.CN.4/2001/19 of 11 January 2001, §§ 62–70.
- <sup>11</sup> E.CN.4/1997/24 of 20 February 1997, § 92.
- <sup>12</sup> *Ibid.*, § 108 and E.CN.4/1998/31 of 27 January 1998, § 67.
- <sup>13</sup> E.CN.4/2001/19 of 11 January 2001, § 63.
- <sup>14</sup> E.CN.4/1998/31 of 27 January 1998, § 74. See also E.CN.4/1997/24 of 20 February 1997, § 109.
- <sup>15</sup> E.CN.4/2000/14 of 21 December 1999, § 70.
- <sup>16</sup> E.CN.4/1998/31 of 27 January 1998, § 88.
- <sup>17</sup> E.CN.4/1997/24 of 20 February 1997, § 108. See also E.CN.4/1998/31 of 27 January 1998, §§ 75 and 88.
- <sup>18</sup> E.CN.4/1998/31 of 27 January 1998, § 72 (and § 68); and E.CN.4/1998/31 of 27 January 1998, § 74.
- <sup>19</sup> E.CN.4/1998/31 of 27 January 1998, § 85.
- <sup>20</sup> *Ibid.*, § 75.
- <sup>21</sup> *Ibid.*, § 67.
- <sup>22</sup> *Ibid.*, § 74. See also E.CN.4/1997/24 of 20 February 1997, § 109 and E.CN.4/2000/14 of 21 December 1999, § 73.
- <sup>23</sup> E.CN.4/2000/14 of 21 December 1999, § 71. See also E.CN.4/2001/19 of 11 January 2001, § 67.
- <sup>24</sup> *Ibid.*, §§ 69 and 72. See also E.CN.4/2001/19 of 11 January 2001, §§ 64 and 68.
- <sup>25</sup> E.CN.4/2004/15 of 24 December 2003, § 63.
- <sup>26</sup> *Ibid.*, § 30.
- <sup>27</sup> *Ibid.*, § 65.
- <sup>28</sup> *Ibid.*, § 67.
- <sup>29</sup> Text of the two reports: E/CN.4/2005/14 of 8 December 2004; and A/60/263 of 17 August 2005.
- <sup>30</sup> A/60/263 of 17 August 2005, § 45.
- <sup>31</sup> E/CN.4/2005/14 of 8 December 2004, § 48.
- <sup>32</sup> A/60/263 of 17 August 2005, § 61.
- <sup>33</sup> E/CN.4/2005/14 of 8 December 2004, §§ 60 and 53.
- <sup>34</sup> A/60/263 of 17 August 2005, § 62.
- <sup>35</sup> *Ibid.*, § 47.
- <sup>36</sup> *Ibid.*, § 64.
- <sup>37</sup> *Ibid.*, § 63. The Norms (E/CN.4/Sub.2/2003/12/Rev.2 of 26 August 2003) state that within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to respect the right to equal opportunity and non-discriminatory treatment, the right to security of persons, the rights of workers, national sovereignty and human rights (including the rights and interests of indigenous peoples and other vulnerable groups), as well as obligations with regard to consumer protection and environmental protection.
- <sup>38</sup> E/CN.4/2005/14 of 8 December 2004, § 62. See also §§ 35–42 and 46–52.
- <sup>39</sup> A/60/263 of 17 August 2005, §§ 35, 36 and 58.
- <sup>40</sup> *Ibid.*, § 39. For the 2005 version of IPOA's Code of Conduct, see <http://ipoaonline.org/en/standards/code.htm>.

- <sup>41</sup> For the list of companies that attended the meeting, see Annex I of A/60/263 of 17 August 2005.
- <sup>42</sup> Ibid, Annex II.
- <sup>43</sup> A/60/263 of 17 August 2005, § 53.
- <sup>44</sup> Resolution 2005/2, endorsed by Ecosoc decision 2005/255 of 25 July 2005. In procedural terms, the move was not unusual. In addition, Shaista Shameem was designated as one of the members of the Working Group.
- <sup>45</sup> E/CN.4/2004/15, §. 47.
- <sup>46</sup> Working Group Reports: E/CN.4/2006/11 of 23 December 2005 and E/CN.4/2006/11/Add.1 of 3 March 2006.
- <sup>47</sup> E/CN.4/2006/11/Add.1 of 3 March 2006, § 26.
- <sup>48</sup> Ibid, § 32.
- <sup>49</sup> Ibid, § 37.
- <sup>50</sup> Ibid, § 38.
- <sup>51</sup> Ibid, § 35.
- <sup>52</sup> E/CN.4/2004/15 of 24 December 2003, § 37.
- <sup>53</sup> In a written submission to the Commission on Human Rights, *International Alert* criticised the stripping of such rights as being contrary to the very spirit of humanitarian law and inducing mercenaries not to abide by their obligations as combatants (E/CN.4/1999/NGO/117 of 25 March 1999).
- <sup>54</sup> Text of the UN Convention: Annex to General Assembly' Resolution 44/34 of 4 December 1989.
- <sup>55</sup> E/CN.4/2004/15 of 24 December 2003, § 40.
- <sup>56</sup> The Special Rapporteur has verified this phenomenon during his visits to the successor States to the former Yugoslavia: E/CN.4/2003/16 of 29 November 2002, § 25.
- <sup>57</sup> E/CN.4/2004/15 of 24 December 2003, §§ 47; see also 1 §§ 37–46.
- <sup>58</sup> A/60/263 of 17 August 2005, § 54. Adopted in 1989, after nine years of discussion, the UN Convention entered into force on 20 October 2001 and, at present, has only 28 parties none of which is a major power. The parties include only four Western states: Belgium, Cyprus, Italy and New Zealand. The other parties are Azerbaijan, Barbados, Belarus, Cameroon, Costa Rica, Croatia, Georgia, Guinea, Libya, Liberia, Maldives, Mali, Mauritania, Moldova, Qatar, Saudi Arabia, Senegal, Seychelles, Surinam, Togo, Turkmenistan, Ukraine, Uruguay and Uzbekistan..
- <sup>59</sup> The British government for instance has stated that it did not ratify the text "mainly because it does not believe that it could mount a successful prosecution based on the definitions of the Convention. This is because of the extreme difficulty of establishing an individual's motivation beyond reasonable doubt" (House of Commons, op. cit., § 68).
- <sup>60</sup> A/60/263 of 17 August 2005, § 51.
- <sup>61</sup> Ibid, § 55.
- <sup>62</sup> House of Commons, op. cit., 5 (foreword by the Secretary of State for foreign affairs).
- <sup>63</sup> UN Press Release SG/SM/6613/Rev.1 26 June 1998.
- <sup>64</sup> Lilly, D. 'The Privatization of Peacekeeping: Prospects and Realities,' *Disarmament Forum*, no.3 (2003), 55–56.
- <sup>65</sup> House of Commons, op. cit., §56.

- <sup>66</sup> Vaux, T., Seiple, C., Nakaono, G. and Van Brabant, K., *The Politicisation of Private Security Companies – Opening the Debate*. (London: International Alert, 2002), (<http://www.international-alert.org/publications/getdata.php?doctype=Pdf&id=88>). See also Spearin, C., 'Private Security Companies and Humanitarians. A Corporate Solution to Securing Humanitarian Spaces,' *International Peacekeeping*, vol. 8, no 1 (Spring 2001), 20–43.
- <sup>67</sup> Lilly, 'The Privatization of Peacekeeping,' op. cit., 57. It is also worth mentioning that the UK has, in a memorandum of understanding with the UN's DPKO, reserved the right to resort to PSC/PMCs (ibid., 57).
- <sup>68</sup> For academic argumentation, see for instance Howe, H., 'Private Security Forces and African Stability: The Case of Executive Outcomes,' *The Journal of Modern African Studies*, vol. 34, no 2 (1998), 307–331 and Shearer, D., 'Private Armies and Military Intervention,' Adelphi Paper 316, (London: IISS, 1998), 88. (from the same author see also 'Privatising Protection,' *The World Today*, vol. 57, no 8/9 (August/September 2001), 30).
- <sup>69</sup> Lilly, 'The Privatization of Peacekeeping,' op. cit., 57.
- <sup>70</sup> House of Commons, op. cit., § 93.
- <sup>71</sup> In Angola, appalling misconduct by *Executive Outcomes* – including looting and use of cluster bombs – has been reported, see ibid., § 44.
- <sup>72</sup> Lilly, *The Privatisation of Security and Peacebuilding*, op. cit., sub-section 7.1. See also Schreier and Caparini, op. cit., section 6.
- <sup>73</sup> House of Commons, op. cit., § 64.
- <sup>74</sup> 'The Challenges of African Peacekeeping,' testimony of Doug Brooks, President of the International Peace Operations Association (IPOA) at the Subcommittee on Africa of the US House of Representatives' Committee on International Relations.
- <sup>75</sup> It is to be noted that the Outcome Document of the 2005 World Summit did timidly reopen the issue through a provision calling for the "further development of proposals for enhanced rapidly deployable capacities to reinforce peacekeeping operations in crises" (§ 92).

## Chapter 12

# Assessing the Relationship Between Humanitarian Actors and Private Security Companies

*Christopher Spearin*

Since the end of the Cold War, interest regarding the interaction between Relief and Development Agencies (RDAs) and international private security companies (PSCs) has risen in waves as determined by humanitarian crises.<sup>1</sup> In the mid-1990s, the first wave followed the genocide in Central Africa. In response to this disaster, the non-governmental organisation (NGO) CARE Canada issued the *Mean Times* report that openly suggested the need for further interaction between RDAs and PSCs.<sup>2</sup> Later, in the wake of hostilities in Sierra Leone instigated by the Revolutionary United Front (RUF) at the start of the new century, further attention was given to the option of PSCs maintaining the humanitarian space. In the present day, three specific conflict milieux have again raised interest pertaining to PSCs: Afghanistan, Iraq and Sudan.

Though RDA/PSC interaction is increasing, this reliance is contentious and has remained so despite the differences in the waves of interest (location, actors, etc.).<sup>3</sup> Many RDAs eschew PSCs for strategic, operational and ethical reasons.<sup>4</sup> Indeed, choosing to rely upon a PSC, a body that for some is nothing more than a group of mercenaries in the most pejorative sense, is a difficult and trade-off-laden decision for RDAs.

In order to inform a nuanced perspective on a complex issue, this chapter examines RDA/PSC interaction by considering the operational implications, legitimacy concerns, and culture divides that it poses. To do this, the chapter first looks at the threats RDA personnel face and suggests the reasons for these threats. It then outlines the relevant PSC services for RDAs and indicates examples of RDA/PSC interaction. The chapter asserts that many of the concerns about RDAs using PSCs have changed, so that the debates should no longer be perceived exactly as they were in the first wave of interaction.

Recognition and understanding of these contextual factors and their changing dynamics are important so that RDAs can make informed determinations about contractually engaging PSCs. The chapter concludes with a number of policy recommendations drawn from this analysis.

### **Relief and Development Agencies Under Threat**

Since the early 1990s, RDAs, regardless of their mandate, organisational culture and operational ethos, have faced intimidation and violence in a variety of conflict-plagued regions.<sup>5</sup> One study concludes that 'malicious acts' claimed the lives of 218 UN civilian personnel from 1992 to 2004.<sup>6</sup> Similarly, a Johns Hopkins Bloomberg School of Public Health report finds that over a 14 year period ending in 1998, 'intentional death' was the leading cause of death for personnel in 32 RDAs. The study 'The Year of Living Dangerously' establishes that more humanitarian workers died in 2003 than in any other year, while the 2005 *No Relief* study, perhaps the largest victimisation survey of RDA personnel ever conducted, calculates that 20 percent of RDA respondents were subject to 'security incidents' such as assault, robbery, intimidation, and sexual violence.<sup>7</sup> Equally troubling is the observation that security incidents are likely to be under-reported by RDAs.<sup>8</sup>

Why has this violence occurred? At times, RDA personnel were simply caught in the crossfire. On other occasions, armed actors purposely attacked RDA operations, even if they were conducted in an independent, neutral and impartial manner, as dictated by the humanitarian ethic, because of the political effect they were having on the ground. Similarly, RDAs were attacked because of the economic value of the goods they provided. What is more, in many countries, the line is often blurred between military and criminal activity; stolen funds and provisions can both facilitate military operations and line pockets. In this vein, the *No Relief* study finds that 'crime appears to be the biggest contributor to insecurity'.<sup>9</sup>

While the existence of these catalytic factors has been ongoing, other factors, noted since the terrorist events of 11 September 2001, have brought into question the integrity of the humanitarian ethic. First, it is increasingly plain that the diversity of RDAs and the desire many of them have for independent status means that there is a lack of coherence in terms of how the RDA community presents itself to those in conflict zones, combatant and noncombatant alike. As a result, indiscretions and controversial policies by one RDA risk painting the entire in-theatre RDA presence with the same brush. Though this does not justify attacks upon those with protected non-

combatant status, it does threaten to spread violence and intimidation due to a lack of differentiation. Additionally, though many RDAs assert that they observe the humanitarian ethic, they often provide more than emergency relief. Human rights advocacy, development, reconstruction and rehabilitation might also be part of their overall agendas; they are multi-mandate agencies with activities that have political, economic and social repercussions. Though RDA activities may be normatively positive, they may nevertheless invoke hostility because they change how 'humanitarians' are perceived.<sup>10</sup>

Second, in the era of the 'Global War on Terror', one characterised by asymmetric warfare, insurgency and terrorist activity, RDAs may be targeted. From one standpoint, this may be because traditional state-sanctioned humanitarian norms and understandings are rejected by religious extremists or other non-state actors in conflict zones intent on accruing tactical or strategic advantage. The fact that groups in Islamic countries have labelled RDA personnel 'the enemy' or that Mullah Omar stated in October 2003 that Western humanitarian organisations were the 'worst enemies of Islam' reinforce this line of thought.<sup>11</sup>

But from another standpoint, armed actors in conflict zones may have certain cause for upset because, though many RDAs may be uncomfortable with this, RDAs are increasingly viewed by states, particularly the US, as part of an overall 'peace consolidation strategy'.<sup>12</sup> In this light, RDAs, regardless of their desire for independence, are thought to be but one of the instruments that states can employ to promote stability, security, and reconstruction. This is a difficult predicament for many RDAs, especially humanitarian NGOs. Troubling, therefore, are the words of one US military officer, speaking with respect to Afghanistan, that further obscure the distinctions between relief, development and military action: 'The war will be won by humanitarian workers and not soldiers because they, the humanitarian workers, address the root causes of the conflict'. Similarly, in October 2001, then US Secretary of State Colin Powell referred to NGOs as 'force multipliers' that were part of the 'combat team'.<sup>13</sup> For Kjell Bjork and Richard Jones, the implications are clear: '[T]he blurring of boundaries between civilian and military distinctions means that to some attackers their motivation for attack is based on their perception that all foreigners are in some way or another working for the consolidation and expansion' of foreign political and military objectives. RDAs, therefore, become proxy or soft targets.<sup>14</sup>

The cumulative result is the hampering of RDA activism which in turn means that fewer communities in need benefit from relief and development

assistance. The Afghanistan NGO Safety Office (ANSO), for instance, finds that because of security concerns in Afghanistan in 2004–2005, 44 percent of respondents curtailed their programming and an additional 35 percent operated in fewer areas than initially planned.<sup>15</sup> As for specific examples in 2004, Médecins Sans Frontières (MSF) closed its operations in Afghanistan, CARE and World Vision suspended their work in Iraq, and Save the Children removed its personnel from Sudan. Overall, for the authors of the *No Relief* study, ‘an unprecedented number of NGOs are pulling out of countries in the absence of adequate security guarantees’.<sup>16</sup>

### PSC Roles

Just as the reasons why RDA personnel are threatened are complex, so too are the methods employed to bolster security. Generally, RDAs select their approach to security on the basis of three options: acceptance, protection and deterrence. The UN’s Office for the Coordination of Humanitarian Assistance (OCHA) describes the acceptance approach as ‘based on the premise that local communities and power structures will allow and even support humanitarian activities if these activities are well understood. The acceptance approach requires that those in a position to undermine humanitarian work must see it to be consistent and believe it to be independent’.<sup>17</sup> Security for RDA personnel is facilitated through social relationships, solidarity with local populations, and the development of trust. For many, the alternatives of relying upon protective procedures and armed actors sends the wrong signal; it affects the image of humanitarianism, hinders the solidarity relief and development providers are meant to have with affected communities, and contributes to a ‘war culture’.<sup>18</sup> Thus, the protection approach, with its emphasis on ‘hardening’ of targets through training, potentially self-isolating security procedures, and security equipment is to be eschewed. This is doubly so for the deterrence approach manifest in a counter-threat stance that involves armed personnel.

However, in light of the increased violence RDAs face, one can question the continued, or at least the perceived, universal utility of the acceptance approach. Indeed, a 2004 study made by the European Commission’s Directorate-General for Humanitarian Aid (ECHO) finds several problematic features with this approach. For instance, the acceptance model makes it less likely some RDAs will challenge the status quo with respect to human rights conditions in theatre. The acceptance model still leaves RDAs vulnerable to crime. RDAs often assume the inherent goodness of their work and do not



feel the need to constantly negotiate their continued presence. Finally, in environments in which RDAs are linked, rightly or wrongly, to foreign political agendas, the acceptance model becomes moot because of the difficulties in illustrating uniqueness and independence, either between RDAs and intervening states or within the RDA community itself.<sup>19</sup>

As a result, the *No Relief* study finds that due to security risks, RDA strategies often move away from the acceptance pole and towards the protection and deterrence end of the security continuum. The study also finds that 32 percent of respondents have relied upon armed guards, an increase from the 17 percent found in an initial 2002–2003 assessment.<sup>20</sup> This signals a move towards the end of the security spectrum where PSCs become more relevant.

The considerable range of potential PSC services for RDAs includes the following: threat and context assessments, security audits, policy development for risk control and evacuation, security training, and the provision of security management and guards.<sup>21</sup> For the latter service, this can cover both compounds and RDA convoys. In recent years, several RDA clients have taken advantage of these services, including CARE, CARITAS, ECHO, IRC, Save the Children, the UN Development Programme, the UN High Commission on Refugees, the UN Office for Project Services, the UN Children's Fund, the UN World Food Programme, and Worldvision. As for service providers, Peter Singer determines that about 25 percent of firms that he describes as 'high-end' have had RDA clients.<sup>22</sup> A list of PSCs that have worked with RDAs includes ArmorGroup, Control Risks Group, Global Risk Strategies, Erinys, Hart Security, Kroll, Lifeguard, MPRI, Olive, RONCO, Southern Cross, and Triple Canopy.

### **Challenges and Dilemmas for RDAs**

Despite the description above, it is clear that many RDAs have yet to contract PSCs; there has been no bandwagoning towards the PSC alternative amongst RDAs. Put differently, if one extrapolates from the *No Relief* study, more than two-thirds of RDA personnel did not rely upon armed guards (which would include PSC personnel). Obviously, this number is partially dictated by the level of danger present in the particular operating environment; PSC assistance may not be warranted. But it is also determined by RDA worries – strategic, operational and ethical – regarding reliance upon armed actors in their work. (One can also argue that those RDAs that do rely

upon PSCs may not be entirely comfortable in doing so.) While many RDAs have developed protocols and guidelines regarding their interaction with armed actors such as militias, rebel forces, indigenous militaries and foreign forces, in order to manage and mitigate these worries, this has not occurred to the same degree with respect to PSCs. But with RDA/PSC interaction on at least a slow rise, this study now turns to analysing factors RDAs should consider in their interactions with PSCs. Indeed, shifts on the geopolitical landscape since the start of the new century require RDAs to be savvy of the place PSCs now hold in global security governance.

### *Operational Implications*

The seeming advantage of RDA/PSC interaction is the separation of RDAs from those armed actors that have political and/or criminal stakes in the operating environment. Reliance upon local warlords and militias for protection still often continues the theft and graft; the relationship is nothing more than a protection racket.<sup>23</sup> Such reliance also potentially implicates RDAs with extreme violence or human rights violations attributed to their hired protection, leads to the indirect financing of factions in conflict, and further militarises the citizenry.<sup>24</sup> As for reliance upon intervening military forces, this also further links RDAs to the varying political agendas they represent. Additionally, because these forces usually operate under the principle of 'last in, first out', RDA timetables and requirements may not always be heeded.

The PSC alternative, however, does not necessarily negate these concerns. Like all industries, the PSC industry wishes to keep costs low and profits high. As such, it is economical to rely upon local expertise rather than solely upon personnel with experience garnered from security sectors in the developed world. For instance, in Sierra Leone in the late 1990s, the PSC Lifeguard had managerial staff from South Africa, the United Kingdom, and the US, but the bulk of its employees were Sierra Leonean. Depending on the contract, the ratio was anywhere from 3 to 15 local employees to every foreign national. While the PSC may be foreign in origin, it does often have very indigenous attributes.

Another related cost reduction and profit-seeking measure may also cause armed actors on the ground, rightly or wrongly, to make linkages between RDAs and the agendas of others: the desire for multiple clients and the resultant economies of scale. This is borne out by International Alert in its 2001 assessment that 'some apparently bonafide private security companies...may provide services of a more military nature to other clients whilst at the same time working for aid agencies'.<sup>25</sup> For instance, the PSC Southern

Cross, in addition to its RDA clients in Sierra Leone, held a contract with the government in Freetown for fisheries protection. Again, in the case of Lifeguard, it did become involved in firefights with the RUF while guarding diamond mines. Though this situation did not produce any known repercussions, Lifeguard at the time was providing assistance to the UN and other RDAs.<sup>26</sup>

More recently, thousands of Iraqis work as private security employees in Iraq, often for foreign-based firms or those with joint Iraqi–foreign management. Their clients are not isolated from the broader conflict dynamics. One accusation made by the Iraqi National Accord in 2003 was that Erinys, hired to protect oil pipelines and infrastructure, recruited its employees largely from the ranks of the Iraqi Free Forces linked to Ahmad Chalabi's Iraqi National Congress. Erinys' officials, for their part, offered a spirited defence of their hiring policies and procedures.<sup>27</sup> Nevertheless, challenges such as these reveal how PSCs, wittingly or not, may become caught in strong intrastate rivalries that may spill over onto the larger client base, RDAs included. Indeed, Yves Sandoz, the former Director of International Law and Communication of the International Committee of the Red Cross (ICRC), appropriately suggests that RDA caution is required before interacting with PSCs: '[I]t might be delicate to have a contractual relation with a company which is actively engaged on the side of a party to a conflict'.<sup>28</sup>

The Iraqi case, along with other post-11 September 2001 examples, highlights added dimensions to the delicate issues RDAs face. As already mentioned, RDAs are increasingly seen as part of larger intervention efforts with definite political rationales. RDAs will probably not enjoy a greater sense of independence through relying upon PSCs because these firms too are part of these larger endeavours; they are likely to have contracts with numerous clients including states, corporations and international organisations. In Iraq alone, of the billions of dollars allotted for reconstruction projects, approximately one-third of all costs will go towards security, a statistic that underscores the considerable PSC presence.<sup>29</sup>

It is likely that this integrated approach that draws in PSCs and thus poses challenges to RDAs will continue. Certainly, the general supply, demand and ideational reasons that brought about this private presence have already been well documented.<sup>30</sup> But more specifically, the increased US reliance on executing policy through 'à la carte multilateralism' and 'coalitions of the willing' tailored to the task at hand, rather than consistently through established organisations such as NATO, means that PSCs will occupy a key role because of their abilities, flexibility, and lack of political

qualifiers. As identified in important guiding documents such as the *Quadrennial Defense Review*, the US does not wish to rely on state allies to the degree that it once did. From one angle, for reasons related to cost and strategy, many of the US's traditional allies have not maintained ready deployability or interoperability with US forces.<sup>31</sup> From another angle, as made plain in the Balkans and elsewhere, the maintenance of good relations in alliances often comes at the price of lowest common denominator decisions that complicate operations and sometimes lead to suboptimal outcomes.<sup>32</sup> As for Iraq, the US faced outright hostility from many of its closest military partners. In Iraq, the 20,000 PSC personnel collectively serve as a major component of the overall foreign presence given the services they provide to many clients, RDAs included. If PSCs can be considered *as* the coalition, as I have argued elsewhere, in terms of their overall presence or vis-à-vis other state contributions, then RDA/PSC interaction will not offer separation from the conflict dynamics in regions where there is a substantial and integrated operation headed by the world's superpower.<sup>33</sup>

#### *Legitimacy Concerns*

While PSCs can work for a wide roster of clients, both state and non-state actors, it has been argued that RDA clients are particularly appealing.<sup>34</sup> Because of RDA prominence in international affairs, and especially because of the normatively positive nature of humanitarian endeavour (the problems noted above aside), RDA/PSC interaction offers a degree of legitimacy to the PSC industry. Michael Barnett's general argument about the salience of post-Cold War humanitarianism, confirms the specific advantages for PSCs of an RDA clientele: 'Humanitarianism became so popular that everyone wanted to be a humanitarian and to label their activities as humanitarian. The result was that humanitarianism became caught...in broader activities and practices'.<sup>35</sup>

One can argue that many RDAs have been reluctant to provide this legitimacy. First, sanctioning the PSC alternative seemingly reduces pressure upon states to be responsible for maintaining the humanitarian space. RDAs are, in fact, more likely to first highlight state failure than they are to consider alternative security arrangements.<sup>36</sup> Second, because of the unsavoury character of mercenary activity in the post-colonial age and how the PSC industry represents a diffusion of control over violence, RDAs have been reluctant to provide sanction. This stems from both ethical concerns and the desire not to offend donors in what is a very competitive environment for relief and development funding.<sup>37</sup>

This fear of implication extends beyond a particular conflict to encompass past or current operations in other areas of the world. For instance, Defence Systems Limited (DSL), which is now ArmorGroup, has attempted to woo RDA clients through both public adherence to the Code of Conduct of the International Red Cross and Red Crescent and attempts to maintain a positive international image: '[W]hen we sneeze in Africa, we catch a cold in Asia'.<sup>38</sup> Nevertheless, in May 2000, great controversy amongst RDAs surrounded the decision by the United Kingdom's Department for International Development (DFID) to grant DSL a £1 million (\$1.87 million) contract to remove unexploded clusterbombs and landmines in Kosovo. Of particular concern was DSL's earlier contract to guard oil installations for British Petroleum in Colombia. This was because of accusations that DSL provided training in counter-insurgency techniques to Colombian soldiers who violated human rights, and fed intelligence on environmentalists and community leaders to the Colombian police and military. Even stronger allegations concern the importation of weaponry. The DSL contract, therefore, seemed to be antithetical to the goals of humanitarian demining.<sup>39</sup>

This particular RDA distaste for PSC services has come about despite the call for realistic comparisons between PSCs and other actors found in contemporary conflicts. Oldrich Bures, for one, finds that there is considerable overlap between what UN peacekeepers and PSCs perform and that the private option is often qualitatively superior. This assessment echoes that of the United Kingdom's Foreign and Commonwealth Office that finds UN peacekeeping forces from the developing world 'are often of poor quality and badly equipped'.<sup>40</sup> The ICRC's Yves Sandoz asserts that there is no reason to believe that PSCs would be worse than any other actor. In fact, the International Peace Operations Association (IPOA), a PSC advocacy group, contends that even with criticism of the PSC industry, the scale and nature of problems are not comparable to UN and state-led activities. Finally, though one can focus on violence perpetrated by white mercenaries in 1960s Africa, this pales alongside the violence perpetrated by states in the 20<sup>th</sup> century – 'the Age of Genocides'.<sup>41</sup>

Recognition that RDAs operate in a larger contracting environment for PSC services, one in which they are smaller players, must be made. While the PSC industry is a global one in terms of its operations and sourcing of personnel, it is focused particularly around a number of strong states in the developed world. In particular, because of the number of US-based PSCs and the degree to which Washington relies upon PSC services (as

noted above), one should perceive the US as central to ‘the market’s ecology’.<sup>42</sup>

If the world’s only superpower utilises PSCs and publicly recognises their contribution, then this enhances the stature and legitimacy of PSCs on the international stage. What is more, these factors financially sustain the industry. This presents a number of issues for RDAs to ponder. If PSCs are generally legitimised, does this make it easier for RDAs to employ PSCs, especially given that many of their key donors are states – the very actors that utilise PSCs? If not, what criteria for RDAs must be satisfied that are different from the standards and guidelines, set out informally and formally, through state/PSC interaction? Finally, is the issue moot if the PSC industry is increasingly geared towards the marketplace provided by states? Have RDAs lost the opportunity to use their collective market power to shape the PSC industry to conform to their interests?

### *Cultural Divides*

In relation to the above, though RDA/PSC interaction usually entails the movement away from the acceptance approach towards security, a further concern is that PSCs do not understand the security needs of RDA clients. In other words, there is a cultural divide between RDAs and PSCs because other PSC clients instinctively want ‘hardening’ and PSC personnel are drawn from the ranks of state security sectors with a mindset of physical force protection. PSC understanding of RDA operations is important to ensure feasibility and appropriateness of security advice to facilitate a humanitarian agenda; humanitarian clientele demand a different approach due to the need to be close to communities in need. Nevertheless, PSCs are not often keen to ‘learn’ about humanitarian requirements, preferring instead a more uniform approach towards their client base.<sup>43</sup>

Beyond the aforementioned issue of state dominance in the marketplace, a further reason to affirm that PSCs will not readily ‘learn’ in the future is based on military appropriation of ‘humanitarian’ activity. To explain, just as RDAs are increasingly becoming integrated into state strategies, militaries are increasingly entering into the provision of humanitarian and development assistance, albeit not necessarily with the humanitarian ethic in mind. Assistance has become instrumentalised because maintaining the support of the populace in a counterinsurgency campaign is key. A ‘hearts and minds’ approach pursued through aid and development projects is required for security reasons and for the gathering of intelligence in order to prosecute military campaigns.

While earlier arguments suggested that the PSC industry was largely facilitated by a manpower bubble created by the Cold War's end that would eventually subside, PSCs have continued to acquire contracts and thus draw personnel away from state security sectors.<sup>44</sup> Therefore, the individuals who will be filling the ranks of PSCs now and in the future will have this particular military mindset regarding the utility of aid and development activities. This stance is manifest in evolving doctrines for civil–military cooperation (CIMIC) amongst developed world militaries. It can be seen in the concept of Provincial Reconstruction Teams (PRTs) in Afghanistan. It is evident in the 'Three-Block War' (3BW) concept coined in 1997 by the then US Marine Corps Commandant, General Charles Krulak, and now found in US, Australian, and Canadian army doctrines, amongst others. In 3BW, armies must be highly versatile with the ability to slide between three functions: high-intensity combat, stability operations, and humanitarian activity.

Of particular note for RDAs is that PSCs are often managed and staffed by personnel garnered from the Special Operations Forces (SOF) of developed world militaries, a trend that has become more pronounced in the 21<sup>st</sup> century.<sup>45</sup> While firms may rely upon local manpower to cut costs, this is frequently balanced with SOF expertise for qualitative, manpower, and marketing reasons. Certainly, SOF have become the vanguard units in current operations. This is made clear in the resolution of many states to bolster their SOF and in the Bush Administration's January 2003 decision to assign the United States Special Operations Command (USSOCOM) primary responsibility for prosecuting the 'Global War on Terrorism'. This distinction is important for RDAs because of the assumed flexibility of SOF, as described in 1998 by General Peter Schoomaker, then USSOCOM commander:

Decision-makers may choose SOF as an option because they provide the broadest range of capabilities that have direct applicability in an increasing number of missions, from major theatre wars to smaller-scale contingencies to *humanitarian assistance*.<sup>46</sup>

In addition, the traditional SOF tasks of training indigenous forces and providing assistance to locals for the sake of intelligence-gathering, force protection and offensive operations reinforces the strategic value of certain populations over others – a stance strongly condemned by humanitarians. Though the Australian, British, and US militaries have all instituted measures to better retain their SOF expertise, it is likely that PSCs will still maintain a certain SOF character. As a result, RDAs must recognise that PSC

personnel will not only have particular ideas about security, but also about the nature and importance of humanitarian assistance.

### Conclusion and Recommendations

It is obvious that in an age of terrorism, non-state actors and counterinsurgency, one very different from when traditional humanitarianism came to the fore in the 19<sup>th</sup> century, the security of RDA operations can no longer be taken for granted. As stated at the outset, this chapter's goal has been to provide context regarding the evolving nature of RDA/PSC interaction in the hope of allowing for reflection about opportunities, trade-offs and challenges in RDA security management. As Peter Singer argues, RDA/PSC interaction is not *a priori* bad, '[b]ut, it clearly carries both advantages and disadvantages that must constantly be weighed and mitigated through effective policy and smart business sense'.<sup>47</sup> This weighing and mitigation are made all the more difficult by changes related to operational implications, legitimacy concerns, and culture divides. The irony is that although RDA/PSC interaction, at first glance, concerns international organisations, corporations and NGOs and the diffusion of state authority on the international stage, it is the policies and activities of states that in many ways further complicate RDAs contracting PSCs.

In light of this study, there is a need to explore several policy options. In order to create a standard RDA marketplace to which PSCs might better respond, inquiry first into the degree to which RDAs might cohere around uniform policies regarding PSCs is required. This investigation would determine if RDAs possess the 'security savvy' to properly engage the PSC industry. Similarly, it would ascertain the desire of RDAs to sacrifice their operational autonomy and independence to achieve such commonality. Here a consideration of the ICRC's role would be important because it straddles and influences both states and RDAs and has an interest in the PSC issue with respect to international humanitarian law. As well, examination of other endeavours to manage PSC activity, such as the interaction between PSCs, states and corporations involved in the extraction of renewable and nonrenewable resources, would be helpful in developing a common RDA approach towards PSCs.

In the final analysis, RDAs will continue to confront a number of challenges as they struggle to maintain their unique identities and humanitarian profile in the face of state integration of humanitarian endeavour on the one hand and a lack of respect by indigenous combatants for RDA opera-



tions on the other. The introduction of PSCs into this situation, though perhaps providing some benefit through their protection and deterrence capabilities, also presents additional and shifting complications and trade-offs for RDAs to evaluate. Though the subsequent policy requirements will be substantial tasks for analysts, RDAs and PSCs alike, they are urgently required so that RDAs are best able to protect their personnel and assets and thus assist communities in need.

## Notes

- <sup>1</sup> RDAs are international and non-state actors including UN agencies, humanitarian non-governmental organisations and the International Committee of the Red Cross. The author would like to thank Doug Brooks for identifying the wave-like character of interest.
- <sup>2</sup> Bryans, M., Jones, B. and Stein, J., 'Mean Times: Humanitarian Action in Complex Political Emergencies – Stark Choices, Cruel Dilemmas,' *Coming to Terms*, vol. 1, (1999), <http://www.care.ca/downloads/publ/MeanTimes99.pdf>.
- <sup>3</sup> European Commission's Directorate-General for Humanitarian Aid (ECHO). 'Report on Security of Humanitarian Personnel: Standards and Practices for the Security of Humanitarian Personnel and Advocacy for Humanitarian Space,' 2004, 60, [http://www.reliefweb.int/rw/lib.nsf/db900SID/LHON-66VEC8/\\$FILE/security\\_report\\_echo\\_2004.pdf?OpenElement](http://www.reliefweb.int/rw/lib.nsf/db900SID/LHON-66VEC8/$FILE/security_report_echo_2004.pdf?OpenElement).
- <sup>4</sup> Cockayne, J., 'Commercial Security in Humanitarian and Post-Conflict Settings: An Exploratory Study,' International Peace Academy, March 2006, <[http://www.ipacademy.org/PDF\\_Reports/COMMERCIAL\\_SECURITY\\_FINAL.pdf](http://www.ipacademy.org/PDF_Reports/COMMERCIAL_SECURITY_FINAL.pdf)>.
- <sup>5</sup> Afghanistan, Angola, Burundi, Chechnya (Russia), Democratic Republic of Congo, Haiti, Indonesia, Iraq, Ivory Coast, Liberia, Papua New Guinea, Pakistan, Philippines, Sierra Leone, Somalia, Sudan, and Uganda.
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- <sup>10</sup> ECHO, 23.

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- <sup>20</sup> Buchanan and Muggah, 25, 29.
- <sup>21</sup> Van Brabant, 348.
- <sup>22</sup> Singer, P., 'Humanitarian principles', 70.
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- <sup>40</sup> United Kingdom, Foreign and Commonwealth Office, 'Private Military Companies: Options for Regulation', 12 February 2002, 19.
- <sup>41</sup> Clapham, C., 'African Security Systems: Privatisation and the Scope for Mercenary Activity,' in *The Privatisation of Security in Africa*, ed. Mills G. and Stremlau, J. (Johannesburg: South African Institute of International Affairs, 1999), 25; Bures, O., 'Private Military Companies: A Second Best Peacekeeping Option?' *International Peacekeeping*, vol. 12, no. 4 (2005), 536; Sandoz, 'Privatisation of Security'; Brooks, D. and Loroia, G., 'Privatized Peacekeeping,' *National Interest*, Summer 2005, 121–125; Lynch, T. and Walsh, A.J., 'The Good Mercenary?' *Journal of Political Philosophy*, vol. 8, no. 2 (2000), 151.
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- <sup>44</sup> For earlier analysis, see Nossal, K. 'Bulls to Bears: The Privatization of War in the 1990s,' *War, Money and Survival* (Geneva: International Committee of the Red Cross, 2000), 38.
- <sup>45</sup> For additional analysis on PSCs and SOF, see Spearin, C., 'Depleting the Elite: The Impact of Privatized Security on Special Operations Forces,' *World Defence Systems*, vol. 7, no. 2 (2004), 45–48.

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## Chapter 13

# Private Security Actors, Donors and SSR

*Peter Wilson*

### **Introduction**

There are two distinct elements to any discussion of the role of the private sector in Security Sector Reform (SSR). The first is to see the private sector as a target for reform, and in particular to develop a country's ability to regulate and control the security activities of the private sector. The second is to understand the positive contribution that the private sector can make as implementers of reform, in particular in providing training and advisory services to governments and donors. In this regard, it is important to distinguish between 'internal' and 'external' private sector actors, both of which in different ways have significant implications for democratic security sector governance.

In order to examine both the positive and negative roles of the private sector in security governance we need to tackle some underlying issues that have become problematic for all aspects of donor-supported reform in developing countries. Almost all reform practitioners acknowledge the essential role of local ownership and the need for sensitivity to the local political and cultural context. But if we are serious about this, what role is there for outsiders? Can anything useful be said in general about 'reform' and are there any principles that can be applied globally, or must everything be country-specific? Can donors and other external actors be flexible and knowledgeable enough to contribute to locally-driven reform?<sup>1</sup>

This paper aims to apply these general questions to the issue of how to regulate the private sector and also to the question of how the private sector can help implement reform. It focuses mainly on the latter question, that is, the role of 'external' private sector actors, and in particular on the shortcomings that donors and governments have in harnessing the potentially positive contribution of the private sector. It then assesses these issues from the perspective of security governance and concludes with a number of recommendations drawn from this analysis.

### **The Private Sector as a Target for Security Sector Reform**

SSR advocates have long espoused the basic principle that donors should not aim to impose their own security sector blueprints or doctrine on other countries. In general, donors should restrict themselves to facilitating the discussions of local actors and supporting the implementation of locally-made decisions.<sup>2</sup> This approach has been justified by fundamental ideas of self-determination<sup>3</sup> but also for pragmatic reasons – external consultants rarely know enough about the local political situation to make sensible recommendations, and solutions that have been devised externally will struggle to achieve local buy-in and proper implementation.<sup>4</sup>

Good SSR practitioners have stuck to this principle even in those fields, such as policing and military reform, where there is broad consensus on the proper roles of a police force or army and extensive international experience in regulation, legislation and oversight. The *process* of local analysis, consultation and debate is seen as an important factor in embedding reform and encouraging democratic ways of working, even when the eventual solutions look similar to those adopted elsewhere.

If such a self-limiting approach by donors has proved valuable in the relatively mature fields of police and military reform, it will prove even more important in the immature and contested field of regulation of private security actors. Attitudes to the private sector's role in providing security are highly political, morally-charged and emotional, and often rest on culturally-specific attitudes to the right and wrong reasons for individuals to exert force over others.<sup>5</sup> Whilst we may feel distaste towards people who exert force in return for money, exerting force for the sake of ideology or power does not have a very honourable history in many countries either. In this context there is no global consensus on the 'correct' role of the private sector in security provision and certainly no standard technocratic solution to questions of regulation and control.<sup>6</sup>

Any debate on the proper role of the private sector in a country has to be rooted in local security concerns and conducted by legitimate local institutions. In particular, it is impossible to distinguish between the positive and negative uses of private security until you have some consensus on the threats the nation faces, the security capabilities that will be needed to counter those threats, and the links between security sector reform and wider development. Creating a space for private security companies may have some negative outcomes but may be the only way to fill a capability gap or attract the foreign investors who could underpin economic development. Or regulation of private security may be considered useful but of relatively low

priority for a government with more pressing concerns<sup>7</sup> and limited capability to create and enforce legislation and oversight.<sup>8</sup> Deciding how to balance these trade-offs is a fundamentally political decision and cannot be made solely by theoretical discussion of the *possible* negative impacts of the private sector or by over-reliance on evidence from other countries at different stages of development.

SSR practitioners in most developing countries have until now rightly not focused on the specifics of private sector regulation, but have worked instead on the more fundamental issues that could underpin local decisions:

- Does the nation have a clear vision for its future and understand the potential security threats to that vision?
- What security capabilities will be required to manage those threats? What are the gaps between current and required capabilities? Is it realistic to assume that the state can fill these gaps without external or private sector support?
- Do legitimate and competent institutions exist to debate and decide these issues?
- Do agencies exist which can competently prepare and enforce legislation and regulation?

In the countries that are most in need of SSR, the answer to these questions is often ‘no’. There is a danger in jumping ahead to the technical complexities and controversies of private sector regulation and adding yet another topic to the growing list of subjects to be covered by SSR, regardless of a country’s ability to enforce what is ultimately decided.<sup>9</sup> Instead there is a *generic* requirement to develop local institutions that can fill the governance gap and which can then develop private sector regulation as one of the many issues they have to tackle.

### **The Private Sector as an Aid to Security Sector Reform**

The private sector is already heavily involved in providing research, training and consultancy services to donors and governments on security sector reform. ‘Traditional’ Private Military Companies (PMCs) and Private Security Companies (PSCs) are certainly entering the sector. But we should not forget the array of academics, NGOs and individual consultants (often with an operational background in security) who operate under commercial terms and who currently dominate the field.

It is sometimes argued that the 'private sector' (used in this case to mean only PSCs and PMCs) has 'captured' SSR in its own interest and in particular has promoted a military-centric approach<sup>10</sup>. But this ignores the fact that the real private sector is full of different consultancies offering a variety of individuals with different backgrounds and different approaches who could contribute positively to SSR. If it is only private military and security companies that have so far been attracted to the table, this may be because donors and governments have not yet created demand for the other, subtler forms of private sector consultancy that could contribute to SSR. We discuss some of the possible reasons for this below. There is also often an unspoken assumption that private companies are bad, NGOs and academics are good, but as we argue below they are all subject to the same incentives and it is difficult to argue a priori that one part of the sector is 'better' than another.<sup>11</sup>

What defines PMCs, PSCs, academics and NGOs as private sector is that they are employed on a contract basis rather than as permanent employees of a government or donor. We can therefore simplify the debate on the role of the private sector in supporting SSR to the easier question of 'do consultants operating under contract have the right incentives and management arrangements to support SSR effectively?'

In particular the fundamental question for a government or donor seeking to employ an outsider, whether it be a PSC, a university department, an NGO or an individual, is whether it is possible to manage the consultant in a way that delivers the desired results. In particular, is it possible to write an arms-length commercial contract that will secure the right outcomes and be sufficiently robust to weather changes in the operating conditions and political situation?

This problem is not unique to SSR and indeed has become a fundamental question in economics. Contracts are finite documents that cannot possibly envisage all eventualities<sup>12</sup>. In particular, contracts cannot exercise the sort of nuanced management of behaviour that can be implemented *within* an organisation, where employees are motivated not only by payment for performing a specific task but also by a desire to be promoted and respected within the organisation. Disputes or under-performance within an organisation are rarely settled by legal action but rather by day-to-day management and oversight, training and incentives for improvement. Many economists understand an organisation as a means of bringing in-house those people who cannot be managed by contract and who need a subtler set of controls and incentives.<sup>13</sup>

The decision on whether to use a permanent employee or an outsider is therefore an important one. Outsiders bring diversity, flexibility and spe-



cific skills, but using a contract as a method to manage them is very much a blunt instrument. The more intangible and subtle the task, the harder it is to write a contract that adequately captures and rewards what you want the outsider to do.

We would not want to exclude all outsourcing simply because contracts are difficult to write, and there is much we can do to improve the quality of contractual arrangements. Whilst contracts can never be perfect, they will be improved if the desired outcomes can be defined precisely and if it can be clearly observed whether or not they have been fulfilled. Ultimately, in case of dispute over payment, it is helpful if these can be so precise and clear that they can be determined in a court of law. Sadly, it is precisely these twin criteria of *definability* and *observability* that are so problematic in SSR and make contracting for SSR so difficult.

### *Definability*

It is common to sit in seminars and listen to long lists of SSR activities that have been undertaken in a given country. ‘Workshops’<sup>14</sup> have been held, legislation has been passed and committees have been formed. But people rarely talk about the fundamental indicators of whether all this activity has been successful – despite all the SSR activity in Jamaica<sup>15</sup> it continues to have the highest per capita murder rate in the world<sup>16</sup> (OSAC, 2006) and despite the fact that we often hold up Sierra Leone as a model of SSR success,<sup>17</sup> it still languishes at second-from-bottom of the UN Human Development Index (UNDP, 2005). In management consultancy jargon, we are measuring outputs not outcomes.

SSR practitioners will argue that these high-level measures are unfair criteria by which to judge an SSR programme. SSR is a long-term activity that may not produce immediate results and SSR is only one factor that can influence the level of crime or the overall level of human development. But this is precisely the problem in contracting for SSR. No sane person in the private sector would agree to be paid in 10 years’ time for outcomes over which they have at best partial control. But the alternative is to pay for short-term outputs that may or not eventually contribute to our ultimate desired outcomes or, even worse, to pay a daily fee to someone simply for their time (which means we are now paying for inputs, not outcomes or even outputs).

What is needed are some intermediate measures that are not limited to measuring the number of workshops held but are not so high-level and long-term as to be outside of the SSR practitioners’ immediate influence. The lack of such measures has been the subject of a recent general criticism of SSR<sup>18</sup>,

but filling the gap will be especially important if we seek to continue to use the private sector to deliver reform.

As Peake and Scheye point out, the problem of lack of measures is caused by a more fundamental lack of conceptual clarity about what SSR is for. There is a high level of agreement that a good society would be characterised by human security, economic opportunity and a high level of autonomy<sup>19</sup> and a sense that these elements are related. But often this is no more than a list of good things with little understanding of how exactly they are related or how they might be achieved. At the other end of the spectrum we believe, based on our experience in the developed world, that good governance or human security might be helped by legislation or committees or institutions, but again with little clarity about how our specific activities to develop these will ultimately contribute to the desired high-level objectives. In short, perhaps because SSR is such a young discipline, there is as yet no real cause-and-effect narrative of how our practical activities lead over time to a genuine change in welfare.<sup>20</sup>

How, then, do we define and communicate what we want from the private sector? If we have proved incapable so far of writing it down in a policy document or academic paper, what chance do we have of writing it down in a contract in a way that might be understood by a procurement department or a commercial court?

### *Observability*

The second problem is one of observability. Even if we could clearly define the outcomes we required, could we practically observe whether or not they have been achieved?

There are some basic problems about observability in SSR. Does a donor sitting in his headquarters have any way of monitoring the activities of a consultant in a far-flung police outpost? If a task is not achieved, can the failure be attributed to the consultant or to one of the many factors outside their control, such as local capacity or local politics? Can the donor be well-informed enough about the local situation to distinguish between excuses for failure and genuine mitigating factors?

There is a particular problem in measuring the important questions of transfer of knowledge and development of local ownership. What matters in SSR is not that a consultant achieves a task but that he develops the capability of a local person to do so. Style and tone are important,<sup>21</sup> and the consultant needs to be a mentor not a do-er. Sadly, SSR practitioners often find that it is easier and faster to do a task than to mentor someone else to do it, and if

their contract is paying them by the basic tasks they complete then they have every incentive not to waste time on mentoring.

Problems of definability, observability and overall evaluation are rife in the development world and are of course not restricted to SSR or the use of the private sector. In 2000 a World Bank Report stated '...despite the billions of dollars spent on development assistance each year, there is still very little known about the actual impact of projects on the poor'.<sup>22</sup> Whilst efforts are being made to improve evaluation of development activities, there is as yet no clear answer on how to do it properly and even some resistance to doing detailed evaluation because of a potential negative impact on political support for overseas development.<sup>23</sup>

SSR is likely to be one of the most difficult fields in which to conduct proper evaluation. The traditional development challenge of producing and measuring economic growth or poverty alleviation is, if anything, relatively simple compared to the task of producing and measuring human security, and is at least backed up by decades of rigorous economic research and the ability to attach some numbers to income or economic activity. So whilst we should certainly work to improve our understanding of cause and effect in SSR and aim to develop some useful measures, there is unlikely to be a magic bullet which will solve the problems of definability and observability very soon. In the meantime we must find other ways to overcome the limitations of contracts for managing tasks that will always contain some intangible elements.

#### *Filling the Gaps in Contracts*

The private sector is full of examples of companies outsourcing ill-defined or unobservable tasks. A major corporation might employ a management consultancy to 'change corporate culture' or 'introduce innovation' with no particularly reliable way of measuring whether the programme has been successful. However the methods that companies use to overcome incomplete contracts – by creating 'trusting, long-term relationships' and developing 'a reputation and in-house style' – are not yet well-developed in the field of SSR and in some cases are specifically excluded by policy or legislation.

In the commercial world, clients will typically develop a 'trusting, long-term relationship' with their consultants.<sup>24</sup> Project plans and activities will be amended in real-time, as client and consultant learn about weaknesses in the initial project design or respond to changing conditions. Consultants are content to respond to these changes, and indeed will seek regular reviews with the client because they hope that bonuses, reputation and future

contracts with the client will result. There is huge flexibility on exactly how a set of outcomes is delivered, and the client will often be a senior individual with the power to set payments and offer further work.

This flexibility is all but ruled out in the world of SSR donors. Procurement 'good practice' and regulations such as the EU's Official Journal of the European Union (OJEU) rules deliberately distance the people who award and administer contracts from the donor specialists who oversee the project. Contracts are awarded on spuriously objective grounds which allow little room for personal judgement, real-time renegotiation, performance bonuses or rewards for flexibility. It is no surprise that donor desk officers spend much of their time breaking projects up into small chunks so that they will not come under the OJEU rules and be handed over to the procurement department. They rightly do not want to set in stone one single large contract which might then be awarded on the wrong criteria by people who do not know the subject. Such a contract then proves extremely difficult to change or break if the design or the consultant selection proves to be wrong or the circumstances change.

The linear procurement process of analysis followed by project design followed by contract allocation followed by implementation followed by review may be right for general government procurement of hardware or infrastructure but, as we have argued, is not right for the subtleties of SSR consultancy and has no similarity with how the best private companies manage their procurement for these type of services. Worse, it underpins a general linear approach to SSR projects which is already being criticised for failing to deliver effective reform. An OECD-DAC meeting to draft SSR implementation guidelines, which took place in Ghana in December 2005,<sup>25</sup> expressed widespread dissatisfaction with SSR programmes which committed to large-scale, long-term projects on the basis of a short scoping study and which had little flexibility to deviate from the initial project design. It was felt that the sort of subtle political and cultural insights required for effective SSR could not be captured in a short self-contained report at the beginning of a project and instead would only be achieved by a trial-and-error approach of observing the results of project activities, learning from the client and becoming embedded in the culture and politics of the host nation.<sup>26</sup> The meeting therefore recommended an experimental approach which would put more weight on the insights that the project management staff developed over time and would allow them to respond to what they had learnt by changing the project design, and would see the initial scoping study as merely a set of initial ideas and hypotheses that needed to be tested against reality.

Clearly if we are to adopt such an iterative, experimental approach and involve the private sector in implementing it, we will have to become far more flexible in our procurement systems. We will also need to assess the value of learning and relationship-building when assessing the outcomes of specific activities – it is quite possible that some activities will have little or no immediate development impact but will instead contribute to the preparation of more sophisticated and effective future programmes. Host and donor governments will need to understand and agree to what is an unconventional approach for civil servants, and constant communication will be required to ensure that the programme changes being made are acceptable and based on strong evidence. Officials will need to start accepting the language of uncertainty and resist the temptation to seek rapid results, particularly in post-conflict environments where there is understandable pressure for instant stabilisation.<sup>27</sup>

The second way in which the wider private sector manages the contracting of intangible tasks is by consultancies developing a ‘reputation and in-house style’. When a large corporation employs the management consultancy McKinsey, it knows that they will deliver a different approach from Accenture or KPMG. A client does not have to write in a contract exactly the way he wants a project to be delivered because he knows broadly what approach each consultancy will adopt. The consultancy has a strong incentive to develop a unique house style, and instil it in all their consultants, because it offers an alternative to competing against similar competitors solely on the basis of who has the lowest fees.

The economic eco-system of different consultancies offering different approaches to SSR<sup>28</sup> is under-developed. There are some individuals and institutions whose work is known and who have developed their own approaches, but there are many more individual consultants coming to the field who may have operational security experience but who lack a track record in consulting or development. If they are not associated with an institution, or if they are associated with a consultancy which manages the logistics of their deployment but not the substance of what they do, then there is little way of knowing how they will perform and little way of monitoring their activities.

The existing PMCs, PSCs and other consultancies who would be well-placed to build distinctive house-styles, develop their own SSR doctrine, and provide training for newcomers to the field are tentative about what resources they should allocate to SSR.<sup>29</sup> They can achieve higher daily fees and, as argued above, deal with more sophisticated customers by using their security knowledge for the benefit of corporate clients rather than donors. A commitment from donors to more flexible procurement practices and more

engagement with the private sector during policy discussions and programme design phases would do much to convince companies to allocate some resources to the field and reassure them that donors were working to overcome the current market failures in SSR.

### *Security Governance and the Private Sector*

What do these various failures and gaps mean for security governance in developing countries? There is no doubt that private sector actors will rush to fill the gaps in security provision created by a disfunctional state and in particular will respond to demand from individuals, companies, donors and NGOs for security that the state is unwilling or unable to provide. Such private sector actors may exploit holes in regulation and control, and in an unregulated environment unethical companies may rapidly dominate the market at the expense of more responsible competitors. But such private security activity should be seen primarily as a symptom of state failure rather than a cause. The weak state has a generic challenge to secure a monopoly over the exercise of force – seizing the initiative from the private sector but also more pressingly from militias and criminal gangs. We should not jump ahead to the technicalities of private sector regulation until we have legitimate bodies that can debate the underlying political and security issues and until we have state agencies that can enforce regulation and, most importantly, meet the demand for effective security. To try to suppress the private sector before a legitimate and effective state alternative has been created is to risk opening the field entirely to wholly illegitimate criminal actors.

These pressing tasks need to be supported by donors who are flexible, responsive to the local context<sup>30</sup>, and who have a clear understanding of how their practical activities contribute to overall development objectives. There is a general push for donors to become better at these questions, and the private sector could contribute to this by bringing a wider range of country and subject experts, experience from change management in other fields and a diversity of approaches. But none of this will happen if reform practice is determined by procurement rules rather than vice versa. Involving the private sector in reform before we have the systems to reward an experimental, non-linear, locally-responsive approach simply risks reinforcing the rigidities and failures of current donor practice.

## **Conclusions**

The current emphasis on developing generic solutions to problems of private sector regulation may be misplaced if they ignore the prime role for local analysis and discussion. The higher priority is to develop the local institutions that can devise and implement their own reforms. Such institutions need to go back to first principles and ask:

- What are the security needs of individuals, companies and institutions?
- Why are they not being met by the state? Where is the state abusing its power?
- What security roles could legitimately be played by the private sector and what should become or remain a monopoly of the state?
- What capabilities will we need to develop in order to deliver effective regulation and control of all non-state actors?
- What capabilities will we need to develop in order to deliver effective security?

There may also be an important positive role for the private sector in supporting SSR. In order to manage this potential contribution, donors will need to develop a more precise description of the outcomes they expect from SSR and will need to be more flexible about the means by which they are achieved. Such improvements are already being discussed in the general approach to SSR but will be particularly important if we wish outsourcing to be effective. Donors could also contribute to a wider eco-system of suppliers by encouraging the involvement of experts from other fields, clarifying the likely demand for SSR services and analysing the weak points of their current contract and procurement arrangements. Too often, an open conversation with the private sector to discuss these issues is prevented because donors see the sector as part of the problem and not part of the solution. Instead of generic labels of 'private sector', 'PMC' and 'PSC', donors and governments need to identify the specific activities that they wish to encourage and the specific activities they wish to control.

In return, the private sector needs to offer distinctive house-styles and the development of doctrine and training rather than just act as 'body-shops' for consultants with operational security experience but no developmental track record.

## Notes

- <sup>1</sup> Nathan, L. 2006. 'Operationalising the Principle of Local Ownership in Security Sector Reform'. (Forthcoming)
- <sup>2</sup> Nathan, L., 'Let Local Actors Take The Lead' Background paper for the War-torn Societies Project/International Peace Academy Peacebuilding Forum Conference, New York City, 7 October 2004.
- <sup>3</sup> 'Processes of participation have to be understood as constitutive parts of the ends of development in themselves.' (Sen, 2000)
- <sup>4</sup> Evans, P., 'Development as Institutional Change: The Pitfalls of Monocropping and the Potentials of Deliberation' *Studies in Comparative International Development*, vol. 38, no. 4 (2004): 30–52.
- <sup>5</sup> Percy, S., 'Morality and Regulation' in *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, Chesterman, S. and Lehnardt, C. (eds) (Forthcoming 2007).
- <sup>6</sup> E.g. 'It was pointed out that these were not new issues. The problems relating to the regulation of PMCs had been around a long time. But the fact that they were still being discussed indicated the difficulty of choosing the means of national regulation, and of enforcing existing international law.' 'Private Military Companies: A Legal Vacuum?' a summary of discussion at the International Law Programme Discussion Group at Chatham House on 16 March 2005.  
< <http://www.chathamhouse.org.uk/pdf/research/il/ILP160305.pdf>>
- <sup>7</sup> 'While [SSR] may have grown in width it has not grown in depth...Lists of actual or possible activities falling under SSR have become long..., often drawn up for development donor organisations by consultants with academic background. While recommendations are generally commensurate, there is little indication as to what to do first under particular circumstances. In fact, there is a general stress on the importance of comprehensive and consistent programmes, which obviously places a great burden on those actually planning SSR activities. There is little guidance on priorities for activities in much of the thinking on SSR so far.' Brzoska, M., 'Development Donors and the Concept of Security Sector Reform' *DCAF Occasional Paper* no.4 (2003).
- <sup>8</sup> Nathan, L., 'Obstacles to Security Sector Reform in New Democracies', *Journal of Security Sector Management*, vol. 2, no. 3 (September 2004).
- <sup>9</sup> E.g. "It was generally agreed that there was no vacuum in international law. The problems were ones of enforcement of the law, control and accountability, and of establishing an effective chain of command. How can the activities of PMCs and their employees be properly controlled in a situation where the courts of the State in which they are operating are often not functioning...?" Chatham House, op.cit.
- <sup>10</sup> Leander, A., 'Privatizing the Politics of Protection: The Authority of Military Companies' in *The Politics of Protection: Sites of Insecurity and Political Agency*, Dobson, A., Raia, P. and Huysmans J. (eds) (London and New York: Routledge, Forthcoming).
- <sup>11</sup> For an economic analysis of NGO incentives and a literature review see Meyer, C., 'Opportunism and NGOs: Entrepreneurship and Green North-South Transfers' *World Development*, vol. 23, no. 8 (1995): 1277–1289.
- <sup>12</sup> 'People are limited in their ability to observe and to process information. Contracts among individuals and institutions are therefore limited in length and may fail to address all of



the different contingencies that may arise. This incompleteness can lead to inefficiency in the contractual outcome, as evidenced by legal disputes or costly renegotiation.' Krasa, S., and Williams, S., 'Limited Observability as a Constraint in Contract Design', Working Paper 12 (October 2001). <[http://www.business.uiuc.edu/Working\\_Papers/papers/01-0128.pdf](http://www.business.uiuc.edu/Working_Papers/papers/01-0128.pdf)>

<sup>13</sup> E.g. Hart, O., *Firms, Contracts and Financial Structure*. (Oxford: Oxford University Press, 1995).

<sup>14</sup> The comedian Alexei Sayle says that anyone who works in a workshop who isn't employed in light engineering should be shot.

<sup>15</sup> E.g. Stone, C., Miller, J. et al, 'Supporting Security, Justice and Development, Lessons for a New Era', report for the UK Department for International Development. (New York: Vera Institute of Justice, 2005) <<http://www.dfid.gov.uk/pubs/files/security-justice-development.pdf>>

<sup>16</sup> Overseas Security Advisory Council, 'Kingston, Jamaica: 2006 Crime and Safety Report'. 7 April 2006. <<http://www.osac.gov/Reports/report.cfm?contentID=44728>>

<sup>17</sup> E.g. 'The UK is working with a number of Africa partners on SSR projects of varying scales. Our largest commitment is in Sierra Leone where we provide for and lead the International Military Advisory Training Team (IMATT) at a cost of around £15 million a year. IMATT are developing the Republic of Sierra Leone armed forces into an accountable, self-sustaining, and professional force for Sierra Leone. In parallel with IMATT, we are also funding projects to develop the Sierra Leone police force and advocate the rule of law.' Foreign and Commonwealth Office website, accessed on 4 May 2006 at <<http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1094236372310>>

<sup>18</sup> Peake, G. and Scheye, E., 'To Arrest Insecurity: Time for a Revised Security Sector Reform Agenda' *Conflict, Security & Development*, vol.5, no. 3 (2005).

<sup>19</sup> E.g. Sen, A., *Development as Freedom*. (New York: Anchor, 2000).

<sup>20</sup> This problem is not unique to SSR and is also beginning to be considered in economic development. For example Evans (2004) says; 'Our theories of how fundamental institutional change occurs are underdeveloped. The interaction of ideas, presumed behavioural repertoires, cultural assumptions, and organizational forms are complicated enough, but a theory of institutional change must also address political power and conflict. Hence, it is not surprising that an institutional approach may produce perverse results when processed through a policy paradigm committed to perceiving development as a 'technical' problem.'

<sup>21</sup> As Graham Thompson, Security Sector Reform Adviser at DFID, puts it: 'It ain't what you do, it's the way that you do it.'

<sup>22</sup> Baker, J., 'Evaluating the Impact of Development Projects on Poverty: A Handbook for Practitioners, Directions in Development'. (Washington: World Bank, 2000).

<sup>23</sup> When an OECD-DAC Aid Effectiveness meeting was presented with a proposal to conduct country-level assessments of aid effectiveness, the meeting report recorded that; '...some members, however, considered the proposal overly ambitious and urged a degree of caution. The main issues raised concerned: the lack of visible demand from partner countries, and a potential disconnect from their needs; the political risks involved in this initiative, including the possibility that its results might 'backfire' affecting the image of ODA negatively; the challenge of getting partners to accept the role of possibly being put 'under the spotlight'; the evaluability problem inherent in the study and more particularly

the difficulty of counterfactuals; the study's cost implications; the dangers of a comparative analysis of different aid modalities and donor programmes." DAC Network on Development Evaluation. 'Summary Record Of The Second Meeting', 9-10 November 2004. <<http://www.oecd.org/dataoecd/secure/63/0/33991789.pdf>>

<sup>24</sup> The Nobel-Prize winning Economist Kenneth Arrow says that '...virtually every commercial transaction has within itself an element of trust'. Arrow, K., 'Gifts and Exchanges', *Philosophy and Public Affairs*, vol. 1, no. 4: 343–362.

<sup>25</sup> Report forthcoming

<sup>26</sup> Effectively the meeting was arguing that successful SSR required the *tacit* knowledge of practitioners based in the country more than it needed the *explicit* knowledge of visiting analysts.

<sup>27</sup> One senior UK military officer (in private conversation with the author) says of post-conflict activity: 'if you plan for it to be quick, it will be slow'.

<sup>28</sup> In such an immature field we should not yet be talking about best practice, but instead different organisations trying different approaches to crack some enduring problems.

<sup>29</sup> Private conversations with the author.

<sup>30</sup> Nathan emphasises that this is far from simple or uncontroversial – it is particularly challenging to encourage local ownership in bodies which may lack legitimacy and capability and do not have a service delivery mindset. However he argues strongly that the alternative of imposing external solutions is likely to be even worse. See Nathan, 'Operationalising the Principle of Local Ownership in Security Sector Reform', op. cit.

## **PART V**

## **CONCLUSION**



## Chapter 14

# Applying a Security Governance Perspective to the Privatisation of Security

*Marina Caparini*

### **Introduction**

This volume has broadly focused on the trend in which security is increasingly being provided, and in certain cases eroded, by non-state actors, both within states and transnationally. It has attempted to encompass two distinct trends under the rubric of privatisation. ‘Privatisation from above’ has been used to refer to the top–down dynamic in which the responsibility for certain security-related functions formerly performed by formal state institutions is delegated to other private sector actors, usually through outsourcing or contracting out those functions to commercial firms. ‘Privatisation from below’ has been used to address the bottom–up dynamic whereby central state responsibility to provide security for citizens is weakened, whether by the autonomous actions of militias, guerrillas, tribal groups, and other armed non-state actors which pose challenges to central state authority, or by individuals, firms, communities and other social groups that seek to procure protection and security services from non-state actors, perhaps most commonly from private security firms.

This concluding chapter seeks to place the insights and findings from the preceding chapters on the privatisation of security into the broader academic and policy discourse that is emerging on security governance. This chapter will focus chiefly on privatisation in the domain of internal security, where the trend has gone the furthest, but will also identify relevant lessons for the transnational domain. As several contributors to the volume have noted, privatisation is part of a wider evolving process in which the state’s traditional responsibility and presumed capacity to act as primary provider of safety and security to its population is challenged. Various policing experts now subscribe to the view that during at least the past 30 years a global

transformation in the nature of policing has been underway, in which the provision of security to society is no longer performed exclusively by the state. Security is becoming pluralised, characterised by various types of actors beside the state who seek to procure security and who seek to provide it. What we are seeing, in other words, is the pluralisation of security, both within states and transnationally. This phenomenon is visible in the context of mature developed democracies, transitional and weak or failing states and in areas where states and societies are being reconstructed after armed conflict.

That transformation is linked to the gradual shift from government to governance, or the diffusion or fragmentation of political authority among various public and private actors at the local, state and international levels. Governance encompasses shifting networks or constellations of actors who may interact formally or informally and at multiple levels.<sup>1</sup> The pluralisation of security refers to the multiple types of authorisers and providers of security that include state (public) authorities and institutions, non-state (private) actors and hybrid or mixed forms.<sup>2</sup> Security governance today, then, concerns the management and control of the process by which security is being provided by multiple types of agents and actors beyond the state.

This chapter examines the emerging security governance framework as a means of better understanding the challenges and opportunities presented by the privatisation and, more broadly, the pluralisation of security. It draws on insights and examples from the various national and thematic case studies in this volume, as well as the wider literature, particularly in the policing domain, concerning aspects of this phenomenon.

### **The Pluralisation of Security**

Pluralisation trends have become apparent in both internal and external security, across a broad array of states. The state has traditionally been seen as the main provider of security, a view that can be traced to the Hobbesian concept of the legitimate government created by the consent of the people through a social contract, and the Weberian notion of the state's monopoly of the legitimate use of physical force. Together, these views constitute the main philosophical pillars of received wisdom of the proper role of the state in creating and maintaining the monopoly of force. However contemporary empirical evidence across a variety of states indicates that security is in fact being provided by multiple actors. In addition to state security institutions, there are also security providers from the private sector, local communities

and civil society, and mixed entities that combine public and private attributes. While the state remains a crucial actor in the provision of security, it is not the only actor, and sometimes or under certain circumstances, it may not even be the most important one.

Certain close observers of policing and security have characterised this trend as the pluralisation of the 'auspices' and 'providers' of security.<sup>3</sup> That is, the state can no longer be considered the sole element authorising security provision (auspice); other non-state actors have assumed the responsibility for their own protection and exercise the power and capacity to arrange for and procure their own security, transforming the nature of security governance. Security is moreover being provided by actors additional to or other than the state, which may include commercial firms, community-based actors, non-state agencies and non-governmental organisations.

Pluralisation is most obvious with the proliferation of contract private security firms who sell their services to members of the public, including businesses, homeowners and banks. In countries across the world, the number of private security personnel outnumbers public police, sometimes by a factor of 2 or 3. Individuals, communities, firms and other groups are arranging for their own security through the use of commercial security firms, or in the case of commercial enterprises, often the establishment of their own in-house security departments.

Underlying the pluralisation of security are profound economic and social changes, resulting in neo-liberal market reforms, cutting back the state, privatisation and outsourcing of functions formerly considered governmental. A related factor linked to the pluralisation of security is the emergence of the 'risk society' in the contemporary era of advanced modernity, in which individuals have become highly focused on personal safety and security, including the need to protect themselves from the risks that result from human and technological developments.<sup>4</sup> The globalisation of market dynamics and the emergence of risks that cross jurisdictional boundaries and are very difficult to manage require specialised expertise from both public and private sectors. Together, these factors have engendered a mentality of managing risk (hazards or adverse consequences) through preventive governance.

There is simultaneously more emphasis on (and acceptance by) individual citizens and communities taking responsibility for their own security and safety, something that sociologists have termed 'responsibilisation', or the effort 'to spread responsibility for crime control onto agencies, organisations and individuals that operate outside the criminal justice state and per-

suade them to act appropriately.<sup>5</sup> That is, rather than a direct approach to crime control through state agencies (police, courts, prisons, etc), members of society individually and in local communities, as well as non-governmental organisations, are encouraged in the belief that they share in the responsibility to reduce crime.<sup>6</sup> This may result in people and organisations deciding to engage the guarding or protective services of private security companies, install security devices for their homes or businesses, or hire security risk management consultants. Responsibilisation also promotes greater citizen involvement in community-based voluntary security initiatives like Neighbourhood Watch schemes. Thus pluralisation of security is also visible in the proliferation of civil society-based forms of policing, notably community policing in which public police develop relationships and cooperation with various sectors of the community, including religious leaders, business groups, neighbourhood associations and other citizen self-help groups.

While some view responsibilisation as the ‘abdication’ of state responsibility for providing security to the private or non-profit sector, others are more sceptical about the supposed retreat of the state. Some scholars view the move towards pluralisation of security in terms of a move towards ‘governing at a distance’, in which the state develops or retains an overseeing or meta-regulatory role while the actual implementation of security measures and other functions is taken over by other actors. This has given rise to the notions of ‘rowing’ and ‘steering’ with regard to security, or the ability of central governments to steer or determine overall frameworks and standards while entrusting the rowing – the actual security provision activities – to other actors such as corporate entities supplied by the market.<sup>7</sup> The role of the state in this vision is to regulate the activities of non-state actors.

The responsibilisation trend also implies the increased acceptance and legitimisation of security provision by non-state and commercial actors. The state itself has played a fundamental role in the legitimisation of the role of private actors in the provision of security through decisions to privatise formerly governmental functions, and through recognition of the expertise and knowledge the private sector can offer through its pursuit of public–private partnerships, the outsourcing of military support functions, and collaborative relations with civil society and the private sector in managing crime and security, including the post-9/11 drive for systematic cooperation in counter-terrorism and critical infrastructure protection.



### **Blurring of Public and Private**

What is becoming increasingly apparent in terms of security in advanced democracies and equally in developing states is that the line between public and private is blurring. The growth in consultative public–private sector relationships reflects a blurring of the distinction between the categories and their integration through network relations and practices. Private security is used by public authorities (governments) now as well as by private authorities (individuals, firms, organisations). For example, security in public places is increasingly undertaken by private actors, as is seen in the widespread use by governmental authorities of private security firms to guard courthouses, military bases, nuclear power plants and embassies, and in the management and operation of prisons.

The emergence of hybrid policing and security structures that incorporate elements of both public and private also contribute to blurring: joint public–private policing initiatives, governments and other public agents hiring private security firms, and personnel exchanges and flows between public and private bodies, as well as the adoption of corporate management practices and the commercialisation of services by public law enforcement and security agencies, one common result of which is the ability of private interests to hire public police on a fee for service basis.<sup>8</sup> Indeed, there is increasing recognition that the public–private or state–private sector dichotomy is the wrong way to view security more generally today; rather, some observers claim that since there are hybrid forms of policing and security provision, it is more correct to replace the dichotomy between public and private with a continuum.

A visible manifestation of the blurring of private and public is provided by what is termed 'mass private property', such as shopping malls, business and industrial complexes, campuses, gated communities and sports venues, which are privately owned but which large numbers of people have daily access to in order to work, play, trade and live in. Owners of mass private property tend not to rely on public police for security, but typically hire private security firms or develop in-house security departments responsible for providing for the safety and security needs in relation to the property and its users.

Blurring is also suggested by the increasing collaboration and cooperation between, on the one hand, public police, armed forces and other state security providers, and on the other hand private security actors. This has become more apparent in the US and other Western states following the

terrorist attacks of 11 September 2001 and subsequent bombings in Madrid and London. With greater attention focused on anti-terrorism and internal security, private security firms and businesses are increasingly being asked to join with state authorities in developing plans and coordination for possible attacks and disasters, especially those involving critical infrastructure. For example, experts support the development of consultative relationships between the private sector and the public sector, better information-sharing about vulnerabilities and threats between security intelligence agencies and key stakeholders in private sector facilities, and the establishment of standards for protective security and resilience.<sup>9</sup> Further, private sector owners and operators of critical energy infrastructure would be expected to 'embed security into the design of critical infrastructure facilities, to decrease vulnerabilities, and mitigate consequential damage.'<sup>10</sup>

It has become increasingly dubious whether it is possible to clearly delineate public and private roles in security governance. These developments are not limited to advanced Western liberal democratic states, although the blurring may take different forms in other contexts. In transition states such as post-communist states of Central and Eastern Europe, public-private blurring and hybrid forms of policing and security provision are also visible. As discussed by Hiscock (Chapter 7), hybrid institutions have developed in some post-Soviet states that provide private protection services while enjoying the status of formal state institutions. The role of such institutions in the regulatory process for private sector security firms raises questions of impartiality given that they compete directly with private sector firms for contracts. These structures are also more susceptible to corruption due to their close links with the private security sector.

Moreover, the growth of transnational private military and private security companies and their increasing involvement abroad is further blurring the distinction between public and private. Not only are PMCs and PSCs providing a range of services and support for national military forces deployed abroad, but they are increasingly involved in the training, professionalisation and reform of foreign states' armed forces, police and security services (see Isenberg, this volume).

An important consequence of the privatisation of security and the blurring between private and public spheres is the existence of state-non-state networks of security governance in which it may be impossible to demarcate the exact division of responsibilities between them. A corollary of this blurring is resulting problems and ambiguities in terms of accountability.

## **Security Governance**

Given the pluralisation of security and the blurring of public and private roles described above, security governance appears to be an appropriate framework with which we can better understand the challenges of security management today. Governance suggests deliberate efforts to shape and influence the behaviour and field of action of individuals and groups in support of certain objectives. In policy studies, it is commonly maintained that governance extends beyond government, that is, it implies more than a single set of actors (such as state political institutions) in shaping a field of action and behaviour. Security governance suggests that security is provided not only by state institutions like the armed forces or state police, but by a broader range of non-state actors which may include voluntary groups, community-based associations, citizens' forums, commercial or corporate entities, militias, rebel groups, regional and international organisations. Thus the security environment is diverse and disparate; the state is one actor (albeit a very important one) among various actors at multiple levels – local, state, regional, transnational – who supplement, augment, replace or enrich the state's provision of security.

Governance does not necessarily imply a normative agenda. Governance merely refers to the existence of multiple actors who interact and contribute in the provision of security. Their actions may or may not be motivated by the public good; state actors are not necessarily or by definition serving some politically neutral notion of the public good, although this is often assumed to be the case. As discussed by Hiscock in his examination of post-Soviet states, members of state institutions may be motivated by their individual self-interest. In the case of the Ukrainian state institution involved in providing and regulating private security, members may act in the entrepreneurial or corporate self-interest of that institution. Even government cannot be assumed to always pursue policies in the public interest; state governments advance partisan interests, whether democratically elected or not, because they are formed by groups seeking to address the concerns of specific constituencies.<sup>11</sup>

The multiplicity of actors now involved in governance of security clearly poses an even bigger challenge to the notion of the collective good – i.e. How can citizens ensure that 'the actions of the various commercial and civil partners engaged in governance accord, as much as possible, with the collective good'?<sup>12</sup> For some experts, that points to the essential and predominant role that the state should play in providing the public good of secu-

rity – ie. Retaining or re-establishing the monopoly of force (see Schneckenner and Schnabel, this volume). Others believe that in the contemporary environment, the proper role of government should be as a facilitator of the provision of goods and services, providing guidance to the array of actors involved through active rule- and standard-setting; in other words, the role of the state should be less 'rowing' (actual provision of security) than 'steering'.<sup>13</sup> The role of the state in regulating non-state actors to protect and serve the collective good is central to this debate. The complementary idea of the 'regulatory state' is that in tandem with neo-liberal inspired trends such as privatisation and bureaucratic downsizing, governments have sought to exercise control, but control 'at a distance'. Yet as Gill underscores, the processes of privatisation, downsizing and restructuring increases the resources available to non-state actors and thereby their capacity to resist state control when they choose to.<sup>14</sup>

A critical question that arises with regard to security governance is how security can be delivered effectively by a multiplicity of actors and agencies, but also with respect for democratic principles and values. Democratic security governance is an explicitly normative approach that suggests that security should be provided in a way that is equitable, legitimate, effective, accountable and responsive to the needs of its consumers, while allowing for a multiplicity of security providers. Some objections to privatised security stem from democratic principles – namely that privatised security often means only those who can afford it can get it. Thus security, which is often described as being a public good and a key responsibility and function of the state, becomes a commodity monopolised by the rich and powerful and is distributed unequally among the citizenry. There is also the concern that private security is not accountable to government and can operate at the margins of legality. In looking at the growth of public-private partnerships and privatisation of functions such as security, the Canadian Office of the Auditor General (OAG) has suggested that 'new governance arrangements' involving public and private actors in a parliamentary democracy should respect two principles: first, parliamentary accountability remains vital whenever discretionary authority is used to spend public funds or to execute public authority. And second, any programs that deliver state programs and services (i.e. are outsourced) involve 'stewardship of the public trust' and accordingly 'must respect the public trust, observing public sector values of fairness, impartiality and equity'.<sup>15</sup>

Another important but sometimes overlooked factor, however, is that security has a strong political and symbolic importance – that is, the extent to which it is perceived to be a common interest and good and right to which

all are entitled helps create communities of feeling and identity.<sup>16</sup> Due to its role in helping to produce the civic trust and cooperation which is a foundation of democratic political societies, the state's central position in security governance is said to be both necessary and virtuous. If a society derives common identity and understandings of the state and its legitimacy from the provision of security, security governance is intimately linked with legitimacy and the constitution of the social order.<sup>17</sup>

However close observers of private security and state policing maintain that there is a legitimate role for private security in security governance, including in transition states, and that the private security industry approach can be complementary to that of the state's police institutions.<sup>18</sup> The private security approach to security governance is preventive in focus because it is more closely dependent on the instruments of property rights and liability law. In comparison, the public security function of the state police and criminal justice system focuses on punishing past transgressions and relies on criminal law. Further, private security used by local agencies tends to be more directly responsive to the needs of local populations, which is also a democratic principle. Given the benefits that the private security industry can bring to security governance, the state should not only look to legally regulate the industry, but should seek to involve it in the broader project of facilitating access to security for all citizens.

The collective good may be served in part through local ownership and community-driven initiatives, with solutions to security problems stemming from local definitions of the problem, local knowledge and local capacities. In Wulf's terms, this could be considered the challenge of subsidiarity. Promoting local ownership of security in an environment of an array of security providers suggests the need for cooperation and consultation among members of local communities, including businesses, voluntary organisations and local authorities, and state institutions and statutory agencies. While the local ownership challenge is not a concern with regard to the engagement of local private security firms by local actors, other environments clearly need security governance networks that systematically involve local actors in planning and oversight of security provision. For example, transnational PMCs contracted by Western governments to work with developing or post-conflict states' armed forces and state police in security sector reform, training and security institution capacity-building should seek local input and respond to local concerns. Otherwise, the contribution of such commercial firms to democratic governance of security is minimal.

### **Regulation and Accountability**

What the preceding sections make clear is that while security governance has become more complex and has many possible types of actors and providers, government has a strong interest in retaining the responsibility to safeguard the public interest and in promoting certain values in the delivery of policing and security to members of their societies. In a democratic society these values may include equitable distribution, accountability of service providers, protecting human and civil rights, and setting standards of quality of services provided. In order to safeguard the public interest, then, governments must seek to regulate the provision of security, even where this is performed by a multiplicity of actors, and especially to ensure its provision supports democratic values.

The rapid growth of privatised security and its involvement across the broad spectrum of policing and security tasks, domestically and internationally, has raised serious concerns especially concerning its accountability. State police in established democratic societies are typically subject to various overlapping oversight and accountability mechanisms, in particular with regard to their coercive and intrusive powers and capacities to restrict the freedom of citizens. Governments in democratic states generally develop a system of checks and balances that, at least in theory, work to reinforce accountability of state security. However that is generally not the case for private and non-state provision of policing and security, whether domestically or transnationally. Private security providers tend to be primarily accountable to those who have hired them – i.e. their clients. While governments can and do become involved in regulating aspects, this occurs invariably to a lesser degree than government regulation of those state institutions formally charged with security functions.

Regulating transnational private military and security companies which operate in unstable, conflict-ridden or post-conflict environments is considered to be particularly challenging, and only two states – the United States and South Africa – have developed legislation specifically governing the commercial export of military- and security-related services. As discussed by Ghebali in this volume, efforts to create a legal definition of a mercenary in international law have proven highly problematic and are unenforceable, and have failed to delineate the differences between mercenarism and private security activity. Regulation is also said to be challenging since these companies in theory can re-locate their headquarters from a state's jurisdiction if they find the regulatory environment there too onerous.

It can be argued that in tandem with the move from government to governance discussed above, regulation has undergone a parallel shift. The emergence of the phenomenon of governance has entailed 'the dispersal of capacities and resources relevant to the exercise of power among a wide range of state, non-state and supranational actors.'<sup>19</sup> Governing, that is, is no longer seen as the exclusive preserve of the state but is conducted by various actors at various levels – local, national, regional and global. The state's role as a regulator has grown, but regulation in the context of neo-liberal market reforms aimed at cutting back the state and outsourcing functions entail steering and coordinating. As with the emergence of governance, the idea of the regulatory state (which emphasised hierarchy as a means of control) has been replaced by the idea of a new or post-regulatory state (in which there are other bases of control). In other words, regulatory control is no longer exclusively undertaken or controlled by the state, but is more diffused throughout society with a plurality of regulators and regulatory methods. Similarly, not only firms may be the subject of control in post-regulatory governance, but individuals, selected segments or dominant players in an industry, high-risk players, or the government itself may be the subject of control.<sup>20</sup> In the new or post-regulatory state, regulation is a layered web joining the actions of public and private groups, with strands or nodes composed of state agencies, professional and community organisations, individuals, and international organisations in increasingly influential globalised regulatory networks.<sup>21</sup>

It is too simplistic an approach to deal with the new reality of pluralised security through state regulation alone. Much regulation of policing and security can now be said to be conducted by non-state actors. At the sub-state level, actors with a role in regulating the provision of security include professional associations, industry bodies, accreditation agencies and labour unions. Similarly, other businesses also can have the capacity to monitor the behaviour and compliance of commercial security firms. Thus, banks and credit-rating agencies can provide some means of control over firms' behaviour and compliance with certain standards.<sup>22</sup> Insurance companies can also play a significant role in shaping the behaviour of private security firms, whether through the requirements imposed on the clients of private security firms through insurance agreements to provide for the security of the goods or property insured, or through the requirements imposed on the firms themselves as a condition of coverage.

Beyond the state's parameters, new forms of regulation are globally exercised by international organisations such as the IMF and World Bank in

imposing conditionality especially for post-communist and developing states, but also the WTO and other regulatory bodies that affect state behaviour.<sup>23</sup> The European Commission is also an actor that may play a role in the regulation of private security in EU member and candidate states, as described by Gounev's (this volume) description of the impact of EU pressure on Bulgaria to address its weak judicial system and corruption problems as conditions of gaining EU membership; both problems were closely linked to the private security industry. Another type of control is processes of standard-setting, such as private standards institutes or standardization bodies at the EU level. Another locus of control may be the capacity of an NGO to monitor compliance and 'name and shame' a firm that has failed to abide by norms or rules or standards.

As discussed in the chapter by Taljaard, in seeking to regulate PMCs the South African state has adopted the classic command and control approach, which uses the force of law to prohibit certain forms of conduct and to lay down conditions or sets standards for legitimate activity in a sector.<sup>24</sup> The licensing process is intended to function as a gate, screening entry into the sector. The command and control regulatory approach sends a clear political signal that the law is used, both symbolically and practically, for the public good. In the case of South Africa, however, the regulatory system has proven largely ineffective at preventing prohibited activity. In part, this is a result of definitional problems in the legislation, difficulties of monitoring the activities of South African PSCs abroad, challenges in gathering evidence for prosecution, and sanctions which have been too weakly imposed.

While the United States similarly regulates the export of commercial military and defence services using a command and control approach embodied in a licensing system, the outcome is much different. This is rooted in various factors, among which include the clear position of the US Government that sales of military and defence goods and services should support US foreign policy goals, the extent of privatisation and outsourcing of public functions, the 'revolving door' phenomenon in which high level officials move between government and industry posts. It might be argued that this latter factor raises the spectre of 'regulatory capture', in which close relationships between the regulators and regulated result in outcomes where the regulated firms' interests are advanced rather than those of the public. Regulatory capture can also result when the regulating body relies on the regulated industry or firms for information in order to carry out the function of regulation. This can be seen in arguments that the US Government has not made provision for adequate personnel resources in terms of contract monitoring for outsourced services. Outsourcing brings with it the danger of los-



ing in-house expertise and experience, increasing reliance on the firms hired to provide those services. That reliance is a form of leverage that over time can produce regulatory capture.<sup>25</sup>

Another mode of regulation the transnational private military and security industry is self-regulation. This can be done by the industry itself, as through industry associations, or at the level of the firm. Self-regulation has been criticised as being ineffective because it is voluntary. It is typically the largest firms that undertake self-regulation, and this is perceived as a means of driving out smaller firms and reducing competition. In industry self-regulation, an industry sets standards for itself, often through voluntary industry associations. This, for example, has been the case with the British Security Industry Association, whose self-regulating activities have been encouraged by the British government. At the level of the individual firm, self-regulation occurs when the firm sets and applies standards to itself. Sometimes derided as an inadequate means of holding private security actors accountable, there have been very few empirical studies to date on self-regulation of the private security industry. Nevertheless, some of the very few recent studies undertaken indicate that self-regulation can have a positive impact on internal accountability and the level of training, education and professional standards.<sup>26</sup> Corporate compliance with norms of democracy and human rights can stem from the rational process in which firms seek to establish their legitimacy and maintain their reputation, both with clients (and potential clients) and with broader public opinion and the mass media. They may also be constrained by practical considerations relating to possible litigation (liability and duty of care considerations) and meeting requirements for insurance coverage.

The reluctance of the private sector to share information is a function of its for-profit orientation. Companies will not want to release business information that could be exploited by their competitors and hurt profitability. Further, sharing information with public police raises the possibility in some countries that it could become public through freedom of information procedures. Conversely, law enforcement agencies may be unwilling to share intelligence with companies owned by foreign interests, and may indeed be legally barred from doing so.<sup>27</sup> The information problem, in which states rely on firms to provide the information essential for their regulation, is the key one in the challenge of monitoring the behaviour of private firms. This is exacerbated by the readiness of most states to respect commercial confidentiality and proprietary information.<sup>28</sup>

### **Implications for Security Sector Reform**

Proponents of security system reform (SSR), the relatively new approach in the development and democracy-promotion communities that advocates the establishment of both effective and democratically controlled and accountable security sectors, initially tended to focus on state institution-building and capacity-building. In this, they were joined by international financial institutions (IFIs) such as the World Bank and IMF and international organisations (IOs) which were also oriented towards building up the state capacity of developing countries. Original SSR approaches thus tended to uphold the traditional notion of the state as holding the monopoly of legitimate force as proposed by Max Weber.

In fact, this is a very questionable assumption regardless of the context or region considered. In many developing countries, private security companies have emerged and provide protection and security services that the state is unwilling or unable to provide.<sup>29</sup> While there may be unfortunate consequences of private security markets in some states – such as the tendency of private security markets to reinforce racial and economic divisions in South Africa<sup>30</sup> or the tendency of Bosnian private security firms to reflect and reinforce existing ethnic divisions<sup>31</sup> – these private security providers are meeting real needs which state institutions are unable to meet. In Western countries, as has been discussed above, there has been a growing tendency to use commercial security and community-based actors to fulfil policing roles formerly performed by state agencies and to fill various military-related functions such as training, maintenance, logistics and operational support at home and abroad through the use of private military and security firms. Internationally, private security companies are increasingly involved in reconstruction and reform efforts in post-conflict environments.

While it is understandable that in post-conflict contexts there is an urgent need to re-build the central state and its capacities for providing basic public goods, much of the emphasis in SSR has focused exclusively on the state rather than the more dispersed institutions and actors that are now relevant to security provision. That is, rather than looking at what exists and is actually happening in terms of security provision, SSR has tended to proceed from the assumption of the state monopoly of force, with the resulting tendency to focus on law and formal state institutions.

The provision of security by non-state actors, especially commercial actors, can meet basic human needs for safety and security when the formal state institutions are unable to do so effectively or equitably. In that sense, private security can help to enhance societal stability and help to reassure

potential investors and other economic actors in weak states.<sup>32</sup> Moreover, security that is provided directly by locally-based agencies will be more responsive to the conditions and needs of the individual, community or organisation that has hired them, and responsiveness to local needs is a key component of democratic policing. On the other hand, only those who have the means to employ private security usually enjoy its services, and this can reinforce security deficits for poor and marginalised populations, further entrenching divisions within society and possibly undermining state legitimacy. Security in this scenario is no longer a public good, but a commodity available only to those who can afford it. This is arguably what has occurred in South Africa (and other states), where the proliferation of commercial security has resulted in a 'new apartheid' or neo-feudalism characterised by fortified islands of security from which undesirables are excluded.<sup>33</sup>

What is needed is a realistic approach in which policy-makers – including international donors who may be instrumental in shaping a state's SSR programme – recognise the broad range of non-state agencies involved in filling security and policing functions, and seeks to facilitate access to security for all of citizens while ensuring that whatever mode or actor is involved is also accountable.<sup>34</sup> One vision sees private and non-state actors in security and policing linked up in a network to meet needs flexibly and provide more equitable and democratic policing to all members of society.

One of the central ideas to come out of the security governance literature intended to address the pluralisation of security is to shift the focus from institution to activity, that is, from police to policing. This would have major implications in terms of the state's budget and coordinating framework for public security, and would tangible support for a network of security governance. This idea was put forward in the Independent Commission on Policing for Northern Ireland's recommendations for police reform. The key means would entail creating a *policing* budget, rather than a *police* budget, thus enabling money to be spent on a range of actors playing a role in the provision of security including the public police but also paid private security agencies, community-based grass-roots organisations and individuals. Moreover the budget would be administered by a *policing* board, rather than a police board, and would seek to coordinate the network that provide public security and that monitors policing to ensure accountability. The Patten Commission further called for the ability of local policing boards to collect taxes for locally provided and directed policing. It is based on the idea of giving local, especially poor, communities the resources to solve their own security problems, and hence empower them in terms of security govern-

ance.<sup>35</sup> The Law Commission of Canada, in a study recognising the extent of plural policing in Canada, has recently put forward a very similar proposal for the creation of policing budgets.<sup>36</sup>

A similar networked approach, albeit one which keeps the public police firmly at the centre of the process coordinating non-state security providers, has been mooted in Great Britain by Ian Blair, who proposed 'a position in which the police service puts itself forward, first, as the central point for inter-agency co-operation designed to strengthen communities and, secondly, as the centre-point of a coordinated system of patrol services, carried out by a mixture of police, volunteer, local authority and private sources. It is not abandoning a monopoly of patrol – it is admitting that we haven't had one for years and then moving the discussion on.'<sup>37</sup>

More broadly, if the aim in transition states is to achieve democratic policing (policing that mobilises local knowledge and capacity, and policing that is responsive to local needs, is transparent and accountable), then both state institutions and non-state (private) security services must be made accountable and responsive to citizens.<sup>38</sup> One way to regulate private security actors and make them more accountable is to involve more local actors to monitor and check their activities.

Notwithstanding the general neglect of non-state security issues in SSR, there are very recent efforts to shift towards a 'development approach' to SSR in fragile and post-conflict states in which security is viewed 'not only in state or military terms but takes a more people-centred understanding of security and justice based on democratic norms, human rights principles and the rule of law.' A draft OECD guidance document notes that up to 80 percent of security and justice services are delivered by non-state actors, and that SSR programmes should not be focused on either the state or non-state actors but take a balanced approach.<sup>39</sup> The document also advocates taking a less technical approach and one 'more focused on providing support to non-state actors to enhance their scrutiny of security affairs and preparing the political terrain and understanding of SSR.'<sup>40</sup> As indicated by the number of transnational PSCs who now offer SSR as one of their services, it is likely that private security companies will become increasingly involved in SSR as providers of advice, training and other consultancy services pertaining to the reform of security approaches. The OECD-DAC guidance document reminds us that not only are there various types of providers of security, but that there exists the potential for pluralisation of oversight through strengthening of non-state institutions and mechanisms.

## **Conclusion**

The volume has drawn on scholars and practitioners with a rich diversity of experiences and backgrounds and participants in the ongoing debate about how changes in the distribution of power are affecting state's capacities to govern. The result is interdisciplinary but focused on providing insights and, where possible recommendations, for policy – i.e. for actors who structure and inform the responses of states and societies to the contemporary security context.

Given ongoing privatisation and, more broadly, pluralisation of the provision of security, a security governance perspective offers helpful insights into a complex and shifting environment. As evidenced in this volume, the debate among security experts about the proper role of the state in security is ongoing. However it is telling that many practitioners and those concerned with the legal parameters within which policing and security occur recognise that our received frameworks are no longer adequate and that we must move on conceptually and in practice to incorporate these new actors and trends in governance patterns. Not only does private policing occur in virtually all realms in which public policing has operated, but policing experts maintain that effective policing must entail some collaboration or networking between public and private security providers.<sup>41</sup> Private sector firms can, and increasingly do, play a significant role in policing and security provision, whether at the local, national, regional or international level.

This chapter has underscored that the empirical reality on the ground – i.e. the multiple actors now engaged in producing security – must be the basis of any attempt to coordinate or control security governance. There remains a vital role for the state in providing security, but it is also clear that this is no longer an exclusive role; many other actors are now acting as security providers in developing and developed states, and can contribute to oversight and control. The state remains a vital actor in the governance of security and in defending the public interest. Most practically, a strong central state is needed in order to secure the budgetary revenues that can then be allocated to a community or locality for provision of policing services from a variety of actors that it determines.<sup>42</sup> At a more strategic level now, the state should aim to facilitate access to security for all of its citizens, recognising the plurality of actors able to fill security functions. In helping citizens to enjoy security through a multiplicity of possible actors, the state should also seek to identify and enforce suitable standards of democratic accountability for policing and security providers.

Despite the clear evidence of privatisation of policing, social control and other means of security, mainstream criminology remains preoccupied with the administration of security and justice by states, just as mainstream defence studies remains preoccupied with the management of external security by the state's armed forces. Focusing too narrowly on state institutions limits our understanding of what is being done and what can be done to govern security. Security and order have been understood traditionally using a state-centric point of view based on a Hobbesian conceptualisation of governance. What is required is that both law and policy adjust to the transformation that has occurred in security through the growing involvement of private security companies and other non-state actors. Services provided by the police and the armed forces in democratic societies have striven simultaneously to respect the democratic values and fundamental legal principles on which these societies are based. As domestic policing and transnational security provision become pluralized through the growing involvement of corporate entities, governments retain the responsibility to ensure that these activities are performed in a manner consistent with core democratic values.

## Notes

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# **ANNEX**



## Annex

# International Organisations and the Governance of Private Security

*Jonas Hagmann and Moncef Kartas*

### Introduction

The international regulation of non-state security providers centres around two debates.<sup>1</sup> On the one hand, there is the discussion whether such security providers allow for an effective provision of security. Drawing strongly on the idea of global governance, the main thrust of the argument is that decentralised regulation and provision of security provides superior effectiveness to centralised, government-sponsored approaches.<sup>2</sup> This debate highlights that the security sector has been transformed into a non-centralised collective of security providers comprising a multitude of different actors with non-hierarchical relationships in many regions of the world. On the other hand, there is an ongoing debate about the means by which such non-state security providers can or should be held accountable to international humanitarian law (IHL) and international human rights law (HRL) in particular. With their traditional focus on states, these legal frameworks often fail to address non-state actors.

Both of these discussions accept the notion of security governance. Yet in so doing, they fail to address the important issue of democratic control and oversight. Although the first debate draws on the concept of global governance, it omits that concept's widely discussed corollary on representative control. Critics of the global governance concept argue that its emphasis on non-centralised and non-hierarchical relationships curtail the ability of parliamentary oversight in particular.<sup>3</sup> In contrast, proponents of global governance argue that citizens can influence networks by participation, and that the superior output efficiency of networks provides for 'output legitimacy'. Taken together, proponents of global governance thus argue that a new form of cosmopolitan democracy is emerging, which does not rely on formalised state and parliament-centric notions of democratic control.<sup>4</sup> In turn, accountability promotion efforts under IHL and HRL do not consider issues of de-

mocratic accountability. Such control is fundamental to the security sector, where the absence of democratic control often caters to favouritism in security provision, privileging some interest groups and marginalising others. Trends in the privatisation of security services diffuse responsibilities and thus make democratic control an especially difficult endeavour at the national level.<sup>5</sup> Yet at the same time, the shift from government to governance, the trend away from state-centric provision of public services such as security and towards network- and private sector-centric provision, allows international organisations to play a role in the regulation of security governance.

This synopsis maps different approaches by intergovernmental organisations to non-state security actors with the aim of identifying patterns and lacunae in international security governance. Since the 1990s, international organisations have been given wide mandates on ever more numerous issue-areas, so boosting the tendency towards international top-down regulation.<sup>6</sup> In parallel, the trend towards international regulation was reinforced by a perceived failure of nationally operated regulatory systems. In looking at international organisations' approaches to non-state security providers, this synopsis considers the following four questions: (1) How do different international organisations define non-state security actors? (2) Are these actors understood as competitors or as contributors to security? (3) Is the aim of international regulation to provide *efficient* security sector governance, to increase accountability to IHL and HRL, or to boost *democratic* security sector governance? (4) In the absence of explicit regulatory approaches to private security, what are the potential entry-points for such regulation that are capable of addressing aspects of private security 'through the back door'?

### **International Organisations and Private Agents of (In-)Security**

#### *The United Nations, International Law and Private Security Actors*

The United Nations as the universal political body plays a central role in the creation and codification of international law, and would be *prima facie* the appropriate international organisation to formulate a policy towards the commercialisation of security and military services. However certain international norms, although not codified by the United Nations, play an important role for the governance of private security actors by the international community and are therefore also considered.

### *Mercenaries*

In the literature on private military and security companies, disagreement exists as to whether these companies represent a modern form of mercenaries in corporate guise or a new type of business that emerged concomitantly to the wave of professionalisation of national armies.<sup>7</sup> In contrast to the generally pejorative understanding of the term 'mercenary' in ordinary language, customary international law does not criminalise the fact that an individual is by definition a mercenary.<sup>8</sup> The international law of armed conflict first addressed the issue of mercenaries in the *Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land* providing that neutral states cannot allow the recruitment of mercenaries on their territory. This obligation relates primarily to the principles of sovereignty and territorial integrity rather than mercenary activities.<sup>9</sup>

*Additional Protocol I to the Geneva Conventions* does not outlaw mercenaries but clarifies their status in situations of armed conflict. The purpose of international humanitarian law, however, is to protect as far as possible civilians in armed conflict. Therefore, the definition of a 'mercenary' provided in Article 47<sup>10</sup> has been drafted in a minimalist way to ensure that no civilians could come under that status: hence, international humanitarian law underlines that states have no obligations to grant mercenaries combatant and prisoner-of-war status, but remains silent on the use of mercenaries.

In the context of decolonisation, the UN's approach toward mercenaries experienced a gradual shift. Security Council Resolution 239 of July 1967, addressing developments in the Democratic Republic of Congo, condemned states allowing, facilitating, or tolerating the recruitment of mercenaries 'with the objective of overthrowing the Governments of States Members of the United Nations'.<sup>11</sup> Leaders of decolonising countries deplored the role of mercenaries in destabilising nascent governments. The UN approach therefore adopts a perspective based on the peoples' right to self-determination. The General Assembly highlighted the link in its Resolution 2465 (XXIII) (1968), which not only condemned the violations of the territorial integrity and sovereignty of independent African states, but also linked the recruitment or training of mercenaries with the impediment of the struggle for self-determination, freedom and independence.<sup>12</sup>

While previous resolutions underlined the state obligation to refrain from the use of mercenaries, the evolving perception by the UN of mercenaries as a threat to human rights and peaceful relations among states<sup>13</sup> led increasingly to the criminalisation of mercenarism (i.e. the use of mercenaries to destabilise and overthrow independent governments) and mercenaries.

This was made clear for the first time in the General Assembly Resolution 3103 (XXVIII) on 12 December 1973 stating that the use of mercenaries against national liberation movements was considered a criminal act and that mercenaries should accordingly be punished as criminals.<sup>14</sup>

The *International Convention against the Recruitment, Use, Financing and Training of Mercenaries* of 1989 which entered into force on 20 October 2001 constitutes the culmination of the UN's efforts to outlaw mercenaries and mercenarism at the international level.<sup>15</sup> The Convention principally expresses the state obligation to prevent mercenary activities (Article 5). It also establishes individual criminal liability for mercenaries and for any person who uses mercenaries (Article 2-3). However, this rule is not self-executing but requires transformation into national legislation. Such national legislation could be applicable to employees of private military companies (PMCs) if they were engaged in mercenary activities and if they fell under the jurisdiction of a signatory state. However, PMCs operating outside armed conflicts or not threatening the self-determination of a people or territorial integrity of a foreign state would not be covered by the Convention.<sup>16</sup> Finally, it should be highlighted that the Convention aims to prohibit and penalise mercenaries and their use. Therefore, the Convention stands in contradiction to the current debate on regulation and oversight. Yet, the principal problem of the convention remains its definition. First, the treaty drafters based it mainly on the mercenary definition provided in *Additional Protocol I*, which, as stated above, has a different purpose. The focus of the definition on the individual's motivation, nationality and non-membership of the armed forces of a state make it easy for employees of PMCs/PSCs to take appropriate measures to evade the definition. What is more, the definition covers only individuals used or offering their services for acts of violence committed against a government or the integrity of a state. The use of foreign military services by a government or with its consent on its own territory is therefore hardly covered by the convention.

The Special Rapporteur mandated by the UN Economic and Social Council (ECOSOC) and the Commission on Human Rights has adopted a human rights perspective to the issue of mercenaries. Until 1994 the Rapporteur's reports did not mention security companies, but focused only on 'traditional' forms of mercenaries.<sup>17</sup> The activities of Executive Outcomes and Sandline International in Angola and Sierra Leone in 1995–6 drew attention to the practices of private military and security companies in Africa.<sup>18</sup> Yet, it took the General Assembly considerable time to broaden the mandate of the Special Rapporteur. In fact, the General Assembly only expressed in 1998 the conviction that, 'notwithstanding the way in which mercenaries or mer-

cenary-related activities are used or the form they take to acquire some semblance of legitimacy, they are a threat to peace, security and the self-determination of peoples and an obstacle to the enjoyment of human rights by peoples.<sup>19</sup> This confined the Rapporteur to a very state-centric approach focused on the state's duty to protect human rights. Yet, neither the General Assembly nor the Rapporteur tackled the issue of mercenarism and private security and military services in the framework of security governance.<sup>20</sup> In fact, attempts to formulate a new definition still aim at defining a specific group of people, but make no explicit mention of corporate entities and do not offer a clear picture of the line separating legal and illegal services.<sup>21</sup> *Prima facie* security governance being first an issue of domestic political organisation falls within the 'domaine réservé' of states. Yet, in other fields (e.g. human rights, peace-building) the UN has crossed the line of 'internal affairs'.<sup>22</sup> Probably the framing of the issue of privatisation and commercialisation of security as mercenarism, thus referring mainly to a discourse of territorial integrity and sovereignty, closes the door to questions of national security governance.

In 2004, a new Special Rapporteur asked member states for a debate on the governance of the use of force. As she states:

The legal definition of a mercenary can be decided only after a policy decision has been reached on the fundamental question of whether States wish to continue to be solely responsible for the use of force, for declaring war and for sanctioning the use of force within certain internationally acceptable rules of engagement.<sup>23</sup>

However, the report indicates an evolution in the UN's attitude to private security actors which may help to address the issue in terms of security governance. This would include considering international monitoring mechanisms, developing minimum standards, and establishing the responsibility and liabilities of contracting states.

### *PMCs and Peacekeeping*

Although the International Peace Operations Association (IPOA) which is an industry organisation sponsored by PMCs argues in favour of using private security services for peace support operations, the UN Secretary-General has rejected the idea.<sup>24</sup> In fact, recourse to private military personnel, beyond its operational implications, would be in contradiction to the reservations against PMCs expressed by the Special Rapporteur in diverse reports to the General Assembly.<sup>25</sup> Nevertheless, in 1996 the UN Department of Peace-

keeping Operations reviewed the option of hiring a PMC to enforce peace in eastern regions of the Democratic Republic of Congo.<sup>26</sup> Up to this point, the UN had not hired private military or security companies to set up a peace operation although single tasks had been contracted out as PMCs registered with the UN Common Supply Database were contracted to deliver security expertise as well as supply and demining services.<sup>27</sup>

It has also been argued that private security companies could provide crucial security services to humanitarian relief operations.<sup>28</sup> With the increase of complex civil wars, the safety of civilian and humanitarian staff has become a central challenge for the UN as well as the Red Cross and NGOs. In fact, in 1998 for the first time the number of casualties among UN civilian personnel exceeded those of military personnel. The UN's approach to the safety and security of UN personnel is based on the principle of the responsibility of the host government as articulated by the ground-breaking 1949 'Reparations' advisory opinion of the International Court of Justice and the subsequent *Vienna Convention on the Privileges and Immunities of the Personnel of the UN*. Due to a rise in attacks on civilian UN personnel the Secretary-General sponsored the 1994 *Convention on the Safety of UN and Associated Personnel*. However, this is an essentially state-centric stance to a policy and operational challenge raised principally by armed non-state actors.<sup>29</sup> The 2000 report of the Secretary-General on the safety and security of UN personnel does not address the issue of private security services.<sup>30</sup> It seems that the use of commercial services is principally governed by a security directive disseminated on 9 January 1996 on the use of armed guards by organisations of the United Nations system<sup>31</sup> requiring authorisation from the United Nations Security Coordinator, who is principally responsible for the security of UN personnel.

Nevertheless, private security companies have been commissioned by some UN departments and specialised organisations to review and advise on security management strategies.<sup>32</sup> Furthermore, recent studies have highlighted that UN specialised organisations such as the UN High Commissioner for Refugees (UNHCR), Office for the Coordination of Humanitarian Affairs (OCHA), and the World Food Programme (WFP) are increasingly making use of commercial security services.<sup>33</sup> International or local security companies provide services which include primarily the protection of premises, risk analysis, staff security training, and crisis management advice but also in certain cases mobile security for humanitarian transport or personal protection of humanitarian staff.<sup>34</sup> The use of PSCs has so far been irregular and highly contingent on the specific context of the intervention which itself raises certain concerns. The contracting of commercial security services by



UN agencies proved to be very ad hoc in nature. In fact, no centralised (formal) procedures and guidelines exist on the hiring of private security services. Furthermore, the UN agencies and their staff have proven reticent to admit to or speak about their use of PSCs, hampering the possibility of exchanging information and experiences on the quality of services provided.

In sum, a significant divergence is apparent between the attitude of the UN's main political bodies and the practice of its operational departments, and specialised organisations. Obviously, the UN's state-centric and legalistic approach to the phenomenon of private security actors redirected the focus from an 'activity-based' to a legal-definitional approach, which has avoided the need to draw a clear line between legal and illegal private security and military services.

#### *Private Security Actors and Small Arms*

The issue of small arms and transnational organised crime further highlights that the UN may develop a differentiated approach towards private security actors. In certain cases private security actors have been involved in the proliferation of small arms and light weapons through their links to transnational organised criminal groups,<sup>35</sup> a fact that the General Assembly in its various resolutions on the use of mercenaries has highlighted.<sup>36</sup> Several UN instruments are thus relevant, including the *UN Firearms Protocol* accompanying the *Convention on Transnational Organised Crime* which underlines the connection between illicit trafficking and terrorism, transnational organised crime, and mercenary and criminal activities.<sup>37</sup>

The UN raised the issue of the proliferation of small arms and light weapons for the first in time in a 1995 General Assembly resolution.<sup>38</sup> This led to the establishment of two expert groups which issued reports on the subject. At a UN conference in July 2001, participating States adopted the *Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons, in All Its Aspects* (PoA). To this point the PoA does not refer to private security actors and the 2006 UN Conference to Review Implementation of the PoA ended without an agreement.<sup>39</sup>

In sum, private security and military actors are neither particularly targeted by international regulations nor by the UN's current programmes. Nevertheless, the net of varying policy issues covered by the UN and of specific concern to transnational commercial security providers is gradually becoming tighter. The mainly state-centric approach of the UN bodies to security issues limits considerably the governance of commercial security services.

*European Union and Council of Europe*

The EU Common Foreign and Security Policy and the Council of Europe's human rights regime are affected by the activities of private security actors. It is therefore useful to assess the approach and policy of the European Union (EU) and the Council of Europe towards the privatisation of security.

*Private Military Companies*

Neither the European Union nor the Council of Europe has taken concrete action to regulate and/or oversee the activities of private military companies. Two different perspectives play an important role. The first relates to 'domestic' private military services like the maintenance of equipment, the management of facilities or technical support for high-tech weapon systems. Although the build-up of a common European intervention force appears to be primarily a domestic political question on the scope of privatisation and professionalisation of the armed forces, it will require a minimum of harmonisation.

Second, the contracting of PMCs outside the EU remains an issue that has been concretely tackled neither by the European institutions nor by European states. The UK issued a Green Paper outlining policy options for regulation of PMCs in 2002, but no draft legislation has yet been presented.<sup>40</sup> Nevertheless the European Joint Action of 22 June 2002 concerning the control of technical assistance related to certain military end-uses should be applied by national governments. The EU guidelines, however, centre principally on the production of weapons of mass destruction (WMD).<sup>41</sup> Although regulation could be applied to other types of technical assistance including private military services, it neither provides clear guidelines nor provision for a monitoring regime.

Arms exports are controlled by overlapping national and international regulations. To be workable or at least to be more effective, however, there is a need for coordination and harmonisation offering important international actors like the UN or particularly the EU the opportunity to set up more comprehensive control mechanisms.<sup>42</sup> In this context, the *EU Code of Conduct on Arms Exports* could offer a feasible and realistic entry point for regulation.<sup>43</sup> This would correspond more or less to the approach adopted by the US in regulating private military and security services under arms exports laws. Yet, such an approach rests on an analogy between goods and services that is quite problematic. Companies and individuals require a totally different quality of oversight than the use of goods, especially in regions with low

levels of governance where states have very weak institutions and limited bureaucratic capacities to enforce rules and ordinances. Further, arms export legislation in most European countries generally forbids the export of military goods to conflict regions. Yet, as the cases of Iraq and Afghanistan show, Western armed forces rely in conflict situations on private security and military actors.<sup>44</sup> That is, PMCs/PSCs are not contracted by a foreign government, but are policy 'actors' of the sending governments. Thus, the accountability aspects related to services are far more complex than those of goods. In this vein, fraudulent use of imported military goods falls within the responsibility of the perpetrator of the offence. States are responsible for the illegal activities of a company hired to provide services falling under the sovereign duties of the state, such as the provision of security. Hence, the fundamental governance issue with respect to private security actors relates to the possible function of commercial security services within a democratic society and the possibility of adequate democratic oversight.

#### *Private Security Companies*

In contrast to other industries, national legislation on the private security industry within EU member states has not yet been harmonised. However, the Confederation of European Security Services (CoESS) and the European trades union body (UNI-Europa) are pushing for the diffusion of minimum industry standards in Europe regarding licensing and training of PSC staff and management, and have developed and promoted a code of conduct. Although such attempts at self-regulation are highly desirable, they can have only limited effect. As highlighted by the recent interim report drafted by the Geneva Centre for the Democratic Control of Armed Forces on behalf of the Council of Europe, there is a risk that companies not adhering to the principles might outbid (through lower costs) those companies adhering to a code of conduct.<sup>45</sup> Additionally, such codes are by definition not enforceable and rely on the rather abstract oversight mechanisms of the free market.

The European Convention on Human Rights and its diverse protocols constitute the minimum human rights standards in the area of the Council of Europe. At the national level these norms apply fully to the private security industry and particularly to its personnel. However, in terms of governance an important difference between public and private security forces is the application of parliamentary control mechanisms to the former. Public employees or civil servants are immediately bound by the prerogatives of the Convention, while PSCs and their personnel are bound primarily by commercial, civil and criminal law.

Finally, the argument that national legislation regulating private security and policing services would also apply to companies exporting their services does not take account of the realities of the business. For example, the 'British' company Erinys, contracted for the protection of oil facilities in Iraq, operates as an Iraqi company under the name of Erinys Iraq and employs mainly Iraqis.<sup>46</sup> In fact, the company has close links to Ahmed Chalabi and his former militia and has been awarded contracts by the Coalition Provisional Authority under allegedly dubious conditions.<sup>47</sup> Erinys Iraq did not exist before the invasion of Iraq in March 2003 and is not registered in the UK where it would be subject to licensing requirements. Yet, until now, Iraq has not adopted legislation on the control of the private security industry.<sup>48</sup> The enforcement of rules has been extremely limited to date.<sup>49</sup>

#### *African Union and ECOWAS*

The absence or inadequacy of security provision from state authorities is perhaps most clearly visible on the African continent, which has been scarred by rebel insurgencies since the end of the colonial era. More recently, conflicts in countries such as Eritrea, Kenya, Uganda, Sierra Leone and Angola have focused attention on the increasingly widespread use of technologically well-equipped and predominantly Western private security firms in terms of their origins, utility and legitimacy. Some argue that PMCs respond to African state failure, rampant gang violence, and a general militarisation of African politics, balancing off the end of superpower interventionism.<sup>50</sup> In this light, private security is seen as a tool to foster the rule of law in regions of disorder. Others stress that private security services aggravate the divide between 'haves' and 'have-nots', and that they perpetuate situations of insecurity.<sup>51</sup> With its human rights regime and the 1977 *Convention for the Elimination of Mercenarism*, the African Union is an international organisation with two potential entry-points for international regulation of armed non-state actors. Also the Economic Community of West African States (ECOWAS) features agendas against transnational crime and small arms trafficking which might be expected to address the issue.

The African regional human rights system falls squarely under the authority of the African Union. It comprises five treaties, the 1969 *Convention on Specific Aspects of the Refugee Problem*, the 1981 *African Charter on Human and People's Rights*, the 1990 *African Charter on the Rights and Welfare of the Child*, the 1997 *Protocol on the Establishment of an African Court on Human and Peoples' Rights* and the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women*. The treaties

institute two implementation bodies, the African Commission on Human and Peoples' Rights (ACHPR) and the Committee of Experts on the Rights and Welfare of the Child. To fulfil its functions, Article 25 of the *African Charter* stipulates that the ACHPR may resort 'to any appropriate method of investigation' including hearing whatever person it deems necessary. Individual complaints are receivable after the exhaustion of national remedies. Problematically, however, the court has not yet started to function, and the system remains targeted at states' human rights protection responsibilities, so omitting direct references to non-state security actors.

In contrast, the *Mercenaries Convention* straightforwardly addresses the issue in article 1(1) defining a mercenary as

...any person who is specially recruited locally or abroad in order to fight in an armed conflict, does in fact take a direct part in the hostilities, is motivated to take part in the hostilities essentially by the desire for private gain and in fact is promised by or on behalf of a party to the conflict material compensation, is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflicts, is not a member of the armed forces of a party to the conflict, and is not sent by a state other than a party to the conflict on official mission as a member of the armed forces of the said state.

Under the Convention, all mercenary activities are qualified as threats to state stability and sovereignty. The convention therefore seeks to rule out rather than regulate. Accordingly, states are required to prevent the sheltering, organisation, funding, equipping, training or any other form of assistance to mercenaries. An important weakness of the Convention is, however, its narrow focus on mercenaries. By looking only at one set of non-state security actors, the Convention fails to integrate others such as PMCs, PSCs or rebel groupings into potential accountability mechanisms. What is more, the Convention has been ineffectively implemented in practice, arguably under the pressure of strong northern interests in the PMC industry.<sup>52</sup> As such, African regulation of private violence at the regional level is much less potent than the best national approaches.<sup>53</sup>

Regional regulatory approaches also lack teeth. For example, the 1999 ECOWAS *Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security* establishes that certain private security actors pose concerns to the regional community. Article 46 asks for cooperation against transnational organised crime, and Article 51 calls for effective actions against those who traffic in small arms, a practice that is often intimately linked to the issue of private security. Yet, the Protocol does not address the issue beyond these two general articles. Similarly,

the 1998 *Declaration of a Moratorium on Importation, Exportation and Manufacture of Light Weapons in West Africa* was weakly drafted, omitting any provision that would refer to effective implementation of that moratorium.<sup>54</sup> In March 2006, the UN Commission on Human Rights' Working Group on the use of mercenaries called on ECOWAS to promote the effective transposition of its regional framework into national legislation.<sup>55</sup> Pending this transposition, the privatisation of security has not been addressed effectively by ECOWAS so far.

#### 4. Organisation of American States

Latin America also has important experiences with armed non-state actors. Various countries in the region have experienced powerful rebel movements while several states have sponsored private security actors such as the *auto-defensas* in Colombia.<sup>56</sup> Despite the occurrence of such 'top-down' privatisation, it is rampant crime and corruption which are cited by Latin American security analysts today as the primary and legitimate drivers for private protection even if the same analysts concede that their pacifying effects prove to be highly ambivalent.<sup>57</sup> The Organisation of American States (OAS) is an important regional organisation comprising all 35 states of both Americas.<sup>58</sup> With its Permanent Council, General Assembly, Ministerial Meetings and various committees it plays important norm-setting and regulatory roles in the realm of poverty reduction, human rights protection, security cooperation and democracy promotion.<sup>59</sup> Although the OAS does not formally address and thus not officially define armed non-state actors, its human rights, democracy promotion, counter-narcotics and small arms mandates in particular provide for potential entry-points into this debate.

The OAS human rights system was instituted by the 1948 *American Declaration of the Rights and Duties of Man*, yet it was the work of the Inter-American Commission on Human Rights, founded in 1959 which significantly expanded its realm of jurisdiction, and which led to new instruments such as country reports, on-site visits and a petition system for individuals. Such pro-active extensions of the system were repeatedly formalised by the General Assembly at the 1965 *Second Special Inter-American Conference of Rio de Janeiro*, via the 1970 *Protocol of Buenos Aires* and, crucially, via the 1970 *American Convention on Human Rights*. This last treaty instituted the Inter-American Court of Human Rights whose decisions may be binding on states. With these mechanisms and institutions the OAS human rights system is considered as one of the most elaborate of its kind.<sup>60</sup> Yet only 25 of the 35 member states have adopted or ratified the 1970 *Con-*

*vention on Human Rights*, and fewer have accepted the Court's jurisdiction. What is more, the system is still focused on states. Although individuals may file complaints with the Commission, it is states which are held responsible for eventual human rights violations. The difficulty of holding non-state actors responsible under OAS rules strengthens the case – as in Africa – for more effective national legislation. And indeed, such legislation is required by Article 2 of the 1988 *Additional Protocol to the American Convention*.

Another potential entry-point to international regulation of private security actors is the OAS democratisation agenda. Throughout South America there is a strong consensus that non-state security providers undermine democratic institutions. Indeed, the democratic control of such forces is explicitly described as a matter of broader democratisation.<sup>61</sup> Contrary to many regional organisations, the OAS has a traditionally explicit democratisation agenda which was particularly vigorously enhanced after the end of the Cold War. Then, the OAS General Assembly Resolution 1080 (XXI-0/91) of 1991 established that threats to democracy would be responded to collectively. Six years later, the 1997 *Washington Protocol* allowed the suspension of member states whose democratically-elected government had been overthrown. Finally, the 2001 *Inter-American Democratic Charter* provided a catalogue of fundamental democratic rights and obligations.<sup>62</sup> In operational terms, the OAS Department for Democratic and Political Affairs hosts a Unit for the Promotion of Democracy which seeks to enhance democratic governance in the hemisphere. Although regional security experts clearly frame the presence of private security as a problem of democratic governance, the Unit has not taken up this issue as of today.

The OAS counter-narcotics and small arms mandates also serve as potential if unused entry points for international regulation. Article 19 of the revised statute of the 1986 *Inter-American Drug Abuse Control Commission* (CICAD) stipulates a need for regional action programmes which reduce the supply and use of drugs, curtail drug trafficking and strengthen national control institutions and regulations. CICAD makes a clear linkage between the production, trafficking and sale of drugs and the emergence and subsistence of armed non-state actors. In its preamble, the 1997 *Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other Related Materials* (CIFTA) acknowledges the various links between SALW (Small Arms and Light Weapons) trafficking and terrorism, transnational organised crime and mercenarism. Although CIFTA names such private security actors, its thematic focus makes it impossible to regulate such actors from a governance perspective. What is more, Article 3 of CIFTA underlines that its implementation is based on

national legislation to the point of making it hard to qualify the OAS small arms agenda as a purely international regulation effort.

Although there is a strong agreement in the OAS today that the proliferation of private security actors poses both security threats and challenges to democratic governance, the organisation has so far abstained from addressing this development directly. The relative novelty of private security as an OAS agenda item may explain this lack of direct action. As long as these actors have not been addressed directly, the sophisticated cooperation arrangements of the OAS in the domain of human rights, but also its democracy promotion, counter-narcotics and small arms limitation mandates could serve as powerful entry-points to the regulation of private security that, deliberately or not, have not been fully exploited to date.

### 5. Commonwealth of Independent States

The Commonwealth of Independent States (CIS) regroups 11 former Soviet Republics.<sup>63</sup> Initially, the CIS was created to facilitate the non-violent dissolution of the Soviet Union. Today, the CIS serves as a forum for cooperation in the realms of economics, defence and foreign policy. The CIS features several charter and branch cooperation bodies such as the Council of the Heads of States, the Council of Defence Ministers, the Economic Council, the Interstate Bank or the CIS Inter-Parliamentary Assembly.

In November 2005, the Defence and Security Commission of the CIS Inter-Parliamentary Assembly adopted a model law entitled *On Countering Mercenarism*. Drafted by independent experts, this model law serves today as the single regional framework for private security actors and activities. The model law's first two chapters lay out the fundamental provisions. Chapter 1 provides two definitions of mercenarism. The first looks at persons who are not state officials, but hired by states or international organisations with the purpose of participating in armed conflicts. Importantly, these actors must be motivated by material compensations or 'a desire for private non-material gain in any form'. The second definition draws up a list of vague mercenary activities such as the overthrowing of governments or the undermining of territorial integrity. Chapter 2 posits an organisational framework for countering mercenarism. Centrally, its Article 5 prohibits any form of mercenarism. However, its remaining articles do not explain how mercenarism should be countered. Rather, these articles vaguely define the countering of terrorism as including preclusion and prevention, primarily through the work of executive agencies.



It is still too early to judge the effectiveness of the model law today. Its merits are the inclusion of non-material gains in the definition of mercenarism and the obligation of CIS member-states to notify each other in case of mercenarism. The model law's acknowledgment that it is poor socio-economic conditions which are the root causes of mercenarism, remains debatable. Private security firms which are the product of a deliberate privatisation of public services are not covered. As such, the model law only looks at a limited segment of the private security sector. In so doing, it provides not for a regulatory framework but for an outright ban.

### **Conclusion**

At least since the time of the League of Nations, international organisations have played an important role in regulating global security. More recently, the same organisations have also acquired regulatory powers that could touch security governance on the non-state actor level. With the ongoing shift from government to governance in international relations, the major regional organisations such as the European Union, the African Union, ECOWAS and the Organisation of American States have acquired an increasingly important role in the regulation of private security. Similarly, other regional organisations such as Commonwealth of Independent States (CIS), the Association of Southeast Asian Nations (ASEAN), the Arab League, the Gulf Cooperation Council (GCC), Mercosur or the Southern African Development Community (SADC) are in the process of expanding their authorities.

Yet, the international organisations analysed here have not established effective regulatory frameworks for private military and security companies. Approaches to private security are indirect and partial. They cover only selected private security actors, mercenaries being the most often addressed. The approaches of international organisations also tend to be un-coordinated, operating through various entry points such as human rights law, mercenarism, democratisation, counter-narcotics and small arms. Furthermore, non-state security provision is generally addressed as IHL and HRL problems, not as concerns of democratic accountability. As such, international organisations have not adequately taken up this important and controversial corollary of the security governance concept. This conclusion points to a substantial need for coherent and regionally-informed agendas for the democratic control of privately-sponsored armed forces. In most international organisations, the various entry points to such agendas already exist today.

## Notes

- <sup>1</sup> For an example of such an approach see Holmqvist, C., 'Engaging Armed Non-State Actors in Post-Conflict Settings,' in *Security Governance in Post-Conflict Peacebuilding*, ed. Bryden, A. and Hänggi, H., (Münster: LIT Verlag, 2005): 45–68.
- <sup>2</sup> Krahmann, E., 'Conceptualizing Security Sector Governance', in: *Cooperation and Conflict*, vol. 38, no. 1 (2003): 5–26; for a powerful critique see Leander, A., 'The Market Force and Public Security: The Destabilizing Consequences of Private Military Companies', in: *Journal of Peace Research*, vol. 42, no. 5 (2005): 606ff.
- <sup>3</sup> Sorensen, E., 'The Democratic Problems and Potentials of Network Governance,' *European Political Science Review*, no. 4 (2005): 348–357.
- <sup>4</sup> For an overview of different notions of governance and their implications on democratic control, see Van Kersbergen, K., and Van Waarden, F., 'Governance as a Bridge Between Disciplines: Cross-Disciplinary Inspiration Regarding Shifts in Governance and Problems of Governability, Accountability and Legitimacy,' *European Journal of Political Research*, vol. 43, (2004): 143–171.
- <sup>5</sup> Singer, P. W., 'Corporate Warriors: The Rise and Ramifications of the Privatized Military Industry,' *International Security* (Winter 2001/2002): 215.
- <sup>6</sup> This trend is illustrated best by the authorisation of international actions against situations that were previously qualified as 'internal' to states, and thus of no concern to the UN. UN action on Haiti represents such international action on domestic affairs, as Security Council resolution 841 (1993) declared the deposition of democratically-elected President Jean-Bertrand Aristide as a threat to international peace. Equally illustrative is the much-discussed report of the International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' (2001), available at [http://www.idrc.ca/en/ev-9436-201-1-DO\\_TOPIC.html](http://www.idrc.ca/en/ev-9436-201-1-DO_TOPIC.html).
- <sup>7</sup> See for example: Musah, A.F. and Kayode Fayemi, J. (eds.), *Mercenaries: An African Security Dilemma*, (London: Pluto, 2000); Singer, P.W., *Corporate Warriors: The Rise of the Privatized Military Industry*, (Ithaca: Cornell University Press, 2004); Taulbee, J.L., 'Mercenaries, Private Armies and Security Companies in Contemporary Policy,' *International Politics*, vol. 37, (December 2000), 433–456.
- <sup>8</sup> Most of the international humanitarian norms codified in the Hague and Geneva Conventions crystallised into international customary law. Additional Protocol I Article 47 (2) states: 'A mercenary is any person who: (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; (e) is not a member of the armed forces of a Party to the conflict; and (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.' Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. However, it must be clearly differentiated between the state's legal liability for the use of mercenaries and the individual liability for being a mercenary. International law is principally about rights and obligations

of states. In light of several UN resolutions condemning the use of mercenaries it is quite probable that the prohibition enjoys customary status. The individual criminal liability for being a mercenary has not customary law status, yet war crimes, acts against humanity, gross violations of human rights, etc fall under international criminal law (ICL), applicable to any individual independently of his status. For more details on IHL and (ICL) see Bassiouni, M. C., *Introduction to International Criminal Law* (New York: Transnational Publishers, 2003); and specifically on non-state actors Clapham, A., *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006), 299–301.

- <sup>9</sup> See Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V); October 18, 1907. <<http://www.yale.edu/lawweb/avalon/lawofwar/hague05.htm>>
- <sup>10</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. <<http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>>
- <sup>11</sup> United Nations Security Council Resolution 239 (1967) of 10 July 1967. UN Doc S/INF/Rev.2.
- <sup>12</sup> United Nations General Assembly Resolution 2395 (XXIII). 'Question of Territories under Portuguese administration', 29 November 1968, paras. 1, 8, 9 and 11.
- <sup>13</sup> See United Nations General Assembly Resolution 48/92 of 20 December 1993. A/RES/38/92.
- <sup>14</sup> United Nations General Assembly Resolution 3103 (XXVIII). 'Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist régimes', 12 December 1973, para.5.
- <sup>15</sup> See United Nations General Assembly Resolution 34/140. 'Drafting of an International Convention Against Activities of Mercenaries', 14 December 1979; And United Nations General Assembly Resolution 44/34. 'International Convention Against the Recruitment, Use, Financing and Training of Mercenaries,' 4 December 1989.
- <sup>16</sup> See Gaultier, L., Hovsepian, G., Ramachandran, A., Wadley, I. and Zerhdoud, B., 'The Mercenary Issue at the UN Commission on Human Rights: The Need for a New Approach,' (London: International Alert, 2001), 30.
- <sup>17</sup> See for example 'The Right of Peoples to Self-Determination and its Application to Peoples under Colonial or Alien Domination of Foreign Occupation,' Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, submitted by Enrique Bernales Ballesteros (Peru), Special Rapporteur, pursuant to Commission resolution 1992/6. Commission on Human Rights, Forty-ninth session. E/CN.4/1993/18, 8 January 1993. (Hereinafter quoted as Report of the Special Rapporteur including year and document number.)
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- <sup>20</sup> The first resolution addressing specifically the issue of security companies was adopted in 2005. See United Nations General Assembly. Resolution 59/178. 'Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Rights of Peoples to Self-Determination,' A/RES/59/179, 3 March 2005.
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- <sup>23</sup> Report of the Special Rapporteur. A/60/263 (2005), 14.
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<sup>41</sup> See 'Council Joint Action 2000/401/CFSP of 22 June 2000 concerning the control of technical assistance related to certain military end-uses,' *Official Journal* L159, 30 June 2000. Article 2.

<sup>42</sup> Krahmann, E., 'Regulating Private Military Companies: What Role for the EU?,' *Contemporary Security Policy*, vol.26, no.1 (2005): 120.

<sup>43</sup> See op. cit.

<sup>44</sup> See e.g. Isenberg, D., 'A Fistful of Contractors: The Case for a Pragmatic Assessment of Private Military Companies in Iraq,' BASIC Research Report 2004.2. (London: BASIC 2004); Taylor, I., 'The Privatisation of War,' *The Guardian*, 10 December 2003.

<sup>45</sup> See Born, H., Caparini, M. and Cole, E., 'The Desirability and Feasibility of Regulating Private Security Companies on a European Level: An Analysis of Existing Research,' Interim Report (version 09.06.2006).

<sup>46</sup> On the background of Erinys Iraq and its link to Ahmed Chalabi see Royce, K., 'Iraq: Start-up Company with Connections,' *New York Newsday*, 15 February 2004 (reprinted at [www.corpwatch.org](http://www.corpwatch.org)); and Glantz, A., 'MercWar: Mercenary Boom in Iraq Creates Tension at Home and Abroad,' *Guerrilla News Network*, 1 April 2004. <<http://www.gnn.tv>>

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<sup>48</sup> The Coalition Provisional Authority (CPA) issued licenses to PSCs, contractors and sub-contractors if they had no license from the sending state. However, the CPA in its Order 17 of 27 June 2004 granted broad immunities to PMCs and contractors from Iraqi legal Process (see 'Status of the Coalition Provisional Authority, MNF, Iraq, Certain Missions and Personnel on Iraq'. CPA Order 17 (revised), 27 June 2004). Concomitantly the Transitional Administrative Law in its Article 26 C affirms: 'The laws, regulations, orders, and directives issued by the Coalition Provisional Authority pursuant to its authority under international law shall remain in force until rescinded or amended by legislation duly enacted and having the force of law.' *Law of Administration for the State of Iraq for the Transitional Period*, 8 March 2004. (The TAL and CPA Orders are available at <<http://www.cpa-iraq.org/>>. That is, the legislation enacted remains in force until it is explicitly replaced by a new regulation. Hence, the new Iraqi Constitution dissolved the TAL but not all other laws and regulations. Finally, CPA Order 17 also regulates that it is valid until the last element of the Multi-National Forces has left the country.

<sup>49</sup> See 'Rise of Private Security Companies in Iraq Creates Regulatory Quandary'. *USA Today*, 5 July 2006. <[http://www.usatoday.com/news/world/iraq/2006-05-07-securityfirms\\_x.htm](http://www.usatoday.com/news/world/iraq/2006-05-07-securityfirms_x.htm)>

<sup>50</sup> Cilliers, J. and Cornwell, R., 'Africa – From the Privatisation of Security to the Privatisation of War? Peace, Profit or Plunder?' in *The Privatisation of Security in War-Torn African Societies*, ed. Cilliers, J. and Cornwell, R. (Pretoria: ISS, 1999).

<sup>51</sup> Mandel, R., 'The Privatization of Security,' *Armed Forces & Society*, vol. 28, no. 1: (2001): 129-51; O'Brian, K. A., 'PMCs, Myths and Mercenaries: The Debate on Private

Military Companies,' *Royal United Service Institute Journal* (February 2000); Chatham House, 'The Globalization of Security,' *ISP/NSC Briefing Paper 05/02*, (2005)

- <sup>52</sup> Leander, A., 'Global Ungovernance: Mercenaries, States and the Control of Violence,' paper presented at the Seminar on Private Military Companies, (Copenhagen: Centre for Development Research, 2003), 13; Leander, A., 'The Market for Force and Public Security,' *op. cit.*, 607.

- <sup>53</sup> For an example of South Africa, see Cilliers and Crawford, *op. cit.*, 238.

- <sup>54</sup> Stemmet, A., 'Regulating Small Arms and Light Weapons: The African Experience,' *African Security Review*, vol. 10, no. 3 (2001).

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- <sup>56</sup> Amnesty International 'Colombia: The Paramilitaries in Medellin: Demobilization or Legalization? Facts and Figures,' (1996). <<http://web.amnesty.org/library/Index/ENGAMR230282005?open&of=ENG-COL>>; Human Rights Watch 'Colombia's Killer Networks,' (1996). <<http://www.hrw.org/reports/1996/killertoc.htm>>.

- <sup>57</sup> A prominent case is BP's hiring of Defence Systems Limited, a PMC with a poor human rights record. See Mandel, *op. cit.*, 141. Indeed, commentators argued that it reinforces societal divisions and organised crime. See Canadian Foundation for the Americas 'The Privatization of Security in Latin America,' (1999) <http://www.focal.ca/pdf/privati.pdf>>.

- <sup>58</sup> Cuba being a suspended member since 1962.

- <sup>59</sup> Organisation of American States 'OAS and the Inter-American System' (2006). <<http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/documents/eng/aboutoas.asp>>.

- <sup>60</sup> Harris, D. J. (ed.), *The Inter-American System of Human Rights*, (Oxford: Clarendon Press, 1998); Sanchez, M., *The Inter-American Court of Human Rights and the Americas*, (Geneva: IUHEI and University of Geneva, 1994).

- <sup>61</sup> Canadian Foundation for the Americas, *op. cit.*

- <sup>62</sup> What is more, it was OAS states which had pressed the UN Security Council to declare in resolution 841 (1993) that the coup against the democratically-elected government of Haiti presented a 'threat to international peace and security'.

- <sup>63</sup> Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Ukraine and Uzbekistan. Turkmenistan withdrew its CIS membership and is today an associate member.

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## **About DCAF**

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