

The private security sector in Africa

The 21st century's major cause for concern?

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Introduction

The privatisation of security has now become a global phenomenon. From the beginning of the 21st century the world has witnessed an accelerated breakdown of the nation-state's monopoly on violence, and the emergence of marketplace purveyors of armed forces (Shreier and Caparini 2005). This is owing to a number of factors, including general human insecurity, the end of the Cold War, the globalisation phenomenon, the marketisation of the public sphere, the downsizing of armed forces, the professionalisation of armed and police forces, the drive for profit maximisation, the liberalisation of the arms trade, the general unending African conflicts and the events of 9/11.¹ In the contemporary world, the privatisation of security has swept throughout the globe to unprecedented magnitude that is no longer possible to ignore, let alone comprehend. The growth of private military and police is staggering, especially in Eastern Europe, wealthy Middle Eastern states and threatened African states (Howe 1998).

But private security is not new on the international security landscape. Small states, for instance, that private security has undergone many changes, permutations, and alterations over the centuries, but still exists in one form or another (Small 2006:14). Like their public counterparts, the private security forces have the right to use physical force, whether such force is of an offensive or defensive nature. Africa has by no means been spared the development of this phenomenon, which presents new challenges, especially since the world, and Africa in particular, has been taken unawares by its dynamism. This has presented interesting opportunities for scholars and practitioners to engage in debates around the issue, which aims at influencing policy-making processes. This paper is a build-up to the idea that private security as it exists in Africa today must be addressed with contemporary solutions, the obvious being effective regulatory mechanisms. The

setting up of such mechanisms should be informed by a thorough understanding of the private security sector. With particular focus on Africa, this paper seeks to do just that.

Private security as a concept is generally difficult to pin down and the paper will adopt a simpler approach to its understanding. Wairagu, Kamenju & Singo (2004:15) argue that the concept of security is 'contested, complex and vague'. This applies equally to the concept of private security for, as will become clearer below, it carries with it a broad array of forms. It is not the intention of the paper to delve into the philosophical debates around what private security is. Suffice it to say that, as Wairagu et al (2004) note, in the most general sense it is an industry 'made up of individuals and businesses providing a service to clients or employers which consists of the protection and safeguarding of property and persons, and it includes the performance of functions or actions related thereto or supporting these core functions'. It is characterised by the following sequence: first, one makes a choice about what one wants to pay to enhance one's security; second, one

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determines who, among the many security companies, should provide that service, when to provide it, where to provide it, how to provide it and at what cost; and third, one pays for it.

It is beyond question that the private security sector in Africa is expanding at a considerable rate, and that its personnel are likely to outnumber their counterparts in the public sector. In fact, elsewhere some already have. Writing from the perspectives of the USA and UK, Bayley and Shearings (1996) maintained that there were three times as many private police as public police in the US, and twice as many 'private security agents' as public police officers in the UK. It is unfortunate that, save for a few countries such as South Africa, there are generally no figures that can show the magnitude of the private security sector in



Africa. Be that as it may, the increase of the industry is without doubt. In the succeeding subtopics the *raison d'être* behind the growth of the private security sector will be explored.

While much has been written about the involvement of private security companies globally, this paper focuses on the dynamics around such involvement in Africa, both at national and continental level. In the main, therefore, the paper aims to lay a foundational argument towards an effective regulatory framework of the private security sector at regional and domestic levels. From time to time, reference will be made to studies that were undertaken outside the African continent for comparison.

Briefly, the paper attempts to unpack the meaning of the private security sector; consider Africa's multifaceted challenges; highlight the debates around the forces behind the growth of the private security sector; look into the relationship between the private security sector and human rights; consider the relationship between the private security sector and mercenaries; give an understanding of the need for the private security sector; engage on the way forward towards effective regulatory mechanisms; and draw conclusions about the private security sector as cause for great concern.

The meaning of private security

Before delving into the forces behind the growth of the private security industry in Africa, it is important to understand the meaning of 'private security'. According to Howe (1998:2), 'private security' is a broad grouping. It is an industry that operates 'openly on a global market, organised along corporate lines, and showing signs of growth rather than contraction' (Small 2006:4, Wairagu et al 2004:3). In other words, private security is an industry that operates along corporate lines and provides security services that are largely independent of the state. Small (2006:4) maintains that this increasing trend 'typifies the steady erosion of the state monopoly over all forms of organised violence'.

Broadly speaking, the private security sector can be divided into two categories: private military companies (PMCs), sometimes referred to as privatised military firms (PMFs); and private security companies (PSCs). According to Small (2006:14), PMCs and PSCs represent the contemporary forms of private security. Wairagu et al (2004:17) argue that what today is known as 'private security' is in effect the logical transformation of traditional mercenary activities in a variety of forms. (The relationship between mercenaries and private security sector will be explored later in the paper.)

Schreier and Caparini (2005:2) define PSCs as 'companies that specialize in providing security and protection of personnel and property, including humanitarian and industrial assets'. To Small (2004:7), PSCs may be defined as 'having the ability to provide a "proximate capacity" for violence, that is, they provide defensive security services, equipment, and training to (mostly) multinational corporations, businesses, humanitarian agencies, and individuals'. Small (2006:7) adds that PSCs operate in high-risk environments for the protection of private property, assets and individuals. This is because these are always targeted and their security forever remains at stake. While the environments vary in terms of their volatility, PSCs generally operate in a less risky environment than PMCs do. For example, private security personnel who transport money are more exposed to transit heists than PMCs that guard the premises of a humanitarian organisation in a post-conflict zone.

Singer (2003:8), who prefers to call them 'corporate warriors', defines PMFs as 'business organisations that trade in professional services intricately linked to warfare'. PMFs, therefore, constitute private business-oriented and profit-driven warriors who offer diversified professional services bordering on security issues. This broad grouping provides specialised services that include military advice and training, arms procurement, intelligence gathering, logistical and medical support, combat and military support and humanitarian action (and the list is not exhaustive). To Schreier and Caparini (2005:2), PMCs are 'private companies that specialize in military skills, including combat operations, strategic planning, intelligence collection, operational support, logistics, training, procurement and maintenance of arms and equipment'.

Small (2006:8) argues that PMCs 'possess an "immediate capacity" for violence, that is, they offer more active offensive or tactical military and security services, equipment, advice, and training'. Furthermore, they are more combat-oriented and are contracted mainly by states or recognised governments to augment their national military capabilities and specialisation (Small 2006:8). Wairagu et al (2004:17) state that PMCs are better described as private mercenary contractors, which are corporate entities comprising military and intelligence entrepreneurs, whose activities incorporate the provision of multi-purpose security-related products and services. (The question whether PMCs can be classified as mercenaries will be explored later in the paper.)

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It may be therefore be argued that PMCs pose more threat to the state than PSCs, and this informs the need for stricter regulations for PMCs than PSCs. PMCs are more likely to engage in mercenary activities because of their intricate link with warfare. Small contends that the concern about PMCs revolves around their likeness to forms of mercenarism because they 'retain the basic character of a "soldier for hire" and of a non-state form of organised violence' (Small 2006:8). Schreier and Caparini (2005:2) claim that the rise of the PMC industry reflects the new business face of war. Rejecting the need for the state to delegate its military functions to private agents in the form of PMCs, Small (2006:8) states that

empowering private sources of authority ... to perform critical national security and military tasks forever compromises state power and sovereignty [and] commodifies security as a public good, structuring, altering and removing it from the public domain of accountability, legitimacy, and control.

It is accepted that, if left uncontrolled, PSCs and PMCs are both capable of compromising state power and sovereignty. The threat becomes more real in the African fragile state. This paper, however, does not reject the need for the private security sector, as Small passionately does. (I return to this point later in the paper.)

PSCs are sometimes subsidiaries of PMCs, and the relationship between firms such as Lifeguards and Executive Outcomes/Sandline furnishes a good example (Wairagu et al 2004:18). To echo this point, Small (2006:8) contends that the division between the services offered by PSCs and PMCs is somewhat flexible, because they are often affiliates of one another. For this reason, PSCs and PMCs are frequently treated as one grouping, the private security industry, which is capable of operating at domestic and international level independent of the state. In fact, PSCs cannot be treated in isolation from PMCs. What determines their specific nametag is their level of engagement, and the common denominator remains the promotion of security. By the same token, as soon as the common denominator 'flips', they become something else, as the promotion of security is no longer present.

According to Wairagu et al (2004:7), security is a matter that is located in the public domain, but is always perceived to be the monopoly of the state. In support of this point, Small (2006) states that 'the growing trend internationally towards the privatisation of security and the outsourcing of state functions typifies the steady erosion of the state monopoly over

all forms of organised violence'. With the advent of the private security sector, however, this no longer holds true. Thus, 'private security industry' implies the 'ceding of the state's sovereignty on matters of maintaining law and order and averting conflicts' (Wairagu et al 2004:7).

This is possibly too general a statement in so far as the engagement of the private security sector operating within a state is concerned. This point may thus be seen to be misleading. For example, while the state/public police are responsible for the maintenance of law and order, they are not necessarily expected to guard private property, install security devices in private property, control gate booms on private property, and so on. Lest we forget, these responsibilities are mostly undertaken on the instigation of private individuals or corporations, who in turn pay for these services. The payment process is not through government-imposed taxes, but payments are made directly to the relevant service provider.

Jones and Newburn (2002:129) dispute the notion of 'state monopoly', which the private security sector threatens to end in relation to the US and the UK. Accordingly, they argue that economists define the term 'monopoly' as the condition that exists when a firm or individual produces and sells the entire output of a commodity or service. This means that the monopolist has total power in the marketplace to set prices and prevent the entry of new competitors. In so far as policing is concerned, Jones and Newburn (2002:133) observe that 'monopoly' tends to be used in a broader sense to describe 'a perceived functional, spatial and, above all, symbolic dominance over policing by the public police' and 'the symbolic monopoly that equated "policing" with activities of the public police has fractured in the past 20 years or so'. They argue:

In pure numerical terms ... it is clear that a 'monopoly' in the field of security provisions has never existed. Data from both the US and the UK suggest that, whilst significant changes have certainly taken place in the policing division of labour, the idea of the end of a 'monopoly' is difficult to support ... the Rand Report (Kakalik and Wildhorn 1972), which provides the best historical picture of private security in the United States, found that in 1950 there were approximately half as many private security guards as public police staff ... in Britain, the 1951 census of population estimates about 66,000 private security employees compared with approximately 85,000 police officers ... [and based on this]

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... [a]t the very least, therefore, the argument that a public monopoly has been broken in the past 30 years is impossible to sustain (Jones and Newburn 2002:134).

As far as Africa is concerned, without statistics to substantiate any argument on the question of 'monopoly' (or lack of it), it remains a matter of speculation. Nevertheless, the monopoly argument cannot hold water even in Africa, because it cannot be said that the state apparatus previously undertook all operations of the private security sector. In many cases, the private security sector complements the operations of state security forces.

The private security sector is also characterised by what many writers refer to as private policing. In an attempt to shed some light on what private policing entails, Joh (2005:378–379) divides it into four categories: protective policing; intelligence policing; publicly contracted policing; and corporate policing. While these categories do not convincingly describe precisely what private policing entails, they illustrate the point that private policing entails a multiplicity of responsibilities.

Joh contends that protective policing focuses on safeguarding private property, which is normally undertaken by armoured car drivers, security guards in retail stores, and private patrols hired by homeowners' associations. Intelligence policing is private detective work, which includes corporate spying, insurance investigation, and marital fidelity surveillance. (The TV programme *Cheaters* comes to mind.) Publicly contracted policing involves the outsourcing of law enforcement work by public agencies. Lastly, corporate policing consists of security departments that 'replicate features of a public department within a private environment'.

Joh's categorisation has not escaped criticism. For example, Skansky (2006:92–94) commented that these categories 'sweep together strikingly different activities in strikingly different settings [and] the lines between the categories are not always well defined'. (A discussion of these is beyond the scope of this work.)

Africa's multifaceted challenges

The debate about the private security sector in Africa must be understood within the context of Africa's multifaceted challenges. The unprecedented growth of the private security industry is one of the many challenges facing the African continent. Africa, being a continent of perpetual suffering and forever engulfed in complex challenges, is faced with the mammoth

task of dealing with the new threat that the private security sector presents at national and regional level. The private security sector, per se, is not a threat, but the absence of an effective regulatory mechanism for its operation presents many risks, which then make it a threat.

From the lack of development to food insecurity, to a weak culture of democracy, to the general absence of peace and security, the involvement of the private security sector has introduced even more complicated challenges, which if not holistically addressed, will no doubt aggravate insecurity on the continent. As Furley and May (2006:1) put it, Africa is a continent 'wracked by wars, full of "hopeless cases", where peace, if it does break out, can be tenuous, full of unresolved rivalries and tensions, liable to be temporary and viewed as unsatisfactory by many participants'. Maintaining a pessimistic approach, Udombana (2004:107) notes that '[p]eace is still as elusive as ever in Africa ... [and the continent] remains one of the most heated spots on the globe'. The main challenge that Africa faces is ensuring peace and security.

It would seem that the African security situation is not getting any better, despite the private security sector's involvement

Does the private security sector present a part solution to this state of affairs in terms of ameliorating and supplementing state endeavours? Does their presence worsen things, especially in the absence of effective regulatory mechanisms? It would seem that the African situation is not getting any better, despite the private security sector's involvement. It is within this context, therefore, that the private security sector has to be effectively regulated.

While human security² generally remains a scarce commodity in Africa, that the privatisation of security should threaten peace and security (yet it should be seen as advancing and anchoring these) is a major cause for concern. Indeed, this could be a signal of the fall of the modern African state. Singer (2003:9) stated succinctly that 'on a continent where weak state structures and legacy of conflict combine to create a truly insecure environment PMFs [and PSCs] are pervasive'. In some respects, the presence of the private security sector makes the African state even weaker. No doubt, the private security sector has the potential to become a force unto itself. PMCs, on the other hand, have been the only guarantee of security. For example, in the Democratic Republic of Congo (DRC), where the state is unable to provide security in all its provinces, PMCs are the only available and effective recourse. In other words, the private security sector fills the security vacuum.

This being said, private security is the reverse of the ensconced principles of the modern nation-state

and inter-state system. Max Weber (1964:154; cf Small 2006:10–12) maintains that the modern state arose because it ‘successfully upheld a claim to the monopoly of the legitimate use of the legitimate physical force in the enforcement of its order’. Zedner (2006:78) observes that the institution of police is akin to the modern state, and public policing is one of the defining characteristics of state power. Today, the legitimate use of physical force is shared between the public and private security sectors at national and international level. No doubt, the seeming change in the African security architecture does pose a challenge to peace and stability on the continent, a human security threat, to be precise.

The forces behind the growth of the private security sector

A thorough understanding of the dynamics of the private security sector calls for an appreciation of the reasons behind its dramatic growth. The forces behind the growth of the private security industry in Africa are manifold. While this paper does not intend to discuss all of them, it is important to highlight the more important ones. Complex as it is, the supply-demand factor is very important to put into perspective the need for radical reassessments of the private security sector in Africa. Among others, Schreier and Caparini have identified most of the factors (below) that have resulted in the rapid growth of the private security sector.

General human insecurity

General human insecurity has been a serious threat to African society. This was obviously made worse by the institution of colonialism, among others. But suffice it to say that threats have always imperilled the continent and rendered it insecure, be they tribal conflicts, border conflicts, disputes over mineral resources, terrorism, genocide, wars, foreign domination, colonialism, post-colonialism or apartheid – the list is endless. The general insecurity that results from failed or weak states (where the state is unable or fails dismally to provide security to the people and enterprises) has also led to the growth of the private security sector.

General insecurity can be seen at domestic and international levels. Hence PSCs usually address insecurity at domestic level and PMCs at international level. The never-ending conflicts in Africa are testimony that PSCs and PMCs are here to stay. In addressing security threats, private security clients require quality services, ‘proactivity’ and the effective pursuit of ‘law enforcement’ ideals. These demands go to the very core of addressing general insecurity. Unless they are met by the private security sector, profitable business becomes a pipe dream. At domestic level, Sklansky (2006:89) contends that increasingly private security firms patrol not only

industrial facilities and commercial establishments, but also office buildings, transportation facilities, recreational complexes, and entire shopping districts and residential neighbourhoods. At international level, the need for private security firms is even more important in ensuring that peace and security prevail.

The end of the Cold War

On the African continent, human insecurity intensified because of the end of the Cold War. And indeed, commentators seem to share the sentiment that the dramatic growth of the private security sector in Africa is an aftermath of the Cold War. At the end of that era, Africa saw a dramatic decline in the direct engagement of external powers in conflict. In other words, a vacuum was created with the disengagement of the external powers that were involved in African conflicts. Singer (2003:49) argues that the end of the Cold War, during which the standoff between the two superpowers had ordered international politics for half a century, is at the heart of the emergence of the privatised military industry. Singer (2003:49) declares that ‘[t]he resultant effect on the supply and demand of military services created a “security gap” that the private market rushed in to fill’. Howe (1998:1) asserts that as

[t]he demise of the super power competition lowered foreign support to many governments, ‘Collapsed states’ [became] a post-Cold War phenomenon and governments in Ethiopia, Liberia, Somalia and Zaire lost significant support when their cold war patrons withdrew their previous aid and the possibility of military intervention.

Howe (1998:1) observes that, as a result, national militaries in Africa often found themselves incapable of national defence and sometimes increased state instability. This has been seen in a number of African states, such as Zaire/DRC.

On this issue, Singer (2003:10–11) notes that PMFs played a multiplicity of roles in the DRC (former Zaire) for all the parties that have been involved in the conflict since the Mobutu Sese Seko regime. When Sese Seko’s regime began to crumble in the mid 1990s, Mobutu began negotiations, which proved unsuccessful, with PMCs, Military Professional Resources Incorporated (MPRI) and Executive Outcomes (EO) to assist against the rebellion led by Laurent Kabila. Ultimately Giolink aided the regime without success. Kabila, who eventually took over power in the DRC, was reportedly assisted by the Bechtel Corporation. Singer (2003) further argues that Kabila himself was faced with adversaries, including the former president Sese Seko’s supporters, who contracted with the firm of Stabilco (Stability Control Agencies),

which is notable in being run by a former EO employee, Mauritz le Roux, the national armies of Rwanda and Uganda, who were assisted by another Johannesburg-based military intelligence firm; and Angolan UNITA rebels, who were also supported by mercenaries and PMFs of their own.

In turn, Singer (2003) continues, Kabila hired EO, which supplied his regime with air combat support, electronic assistance and protection. Air supply firms such as Avient Aviation supported the Zimbabwean government, which intervened in the Great Lakes conflict. This is but one classic example of the operations of the private security sector in Africa. In fact, it would be naïve to dismiss allegations that the DRC is still largely controlled by the private security sector, which operates at the instance of the present government, rebel movements and even foreign elements.

Globalisation

The end of the Cold War coincided with the introduction of the Bretton Woods system (World Bank and International Monetary Fund) that engendered globalisation and consequently gave Africa an 'economic shock'. While defining globalization remains a difficult challenge warranting a topic on its own, this paper shall however not attempt to define it. Suffice to say that from the standpoint of the Third World,

Globalization is widely seen as the expansionist take-over of the present-day developing countries by the Western market-model and model of prosperity, in the course of which traditional cultures disappear, the systems associated with a capitalist market-economy and formal democracy are disseminated, and the less developed economies are forcibly integrated into a world market dominated by the industrial countries. (Tetzlaff: 1998)

Globalisation has had a more significant impact on Africa than any other continent. This has also led to the unprecedented growth of the private security sector. While acknowledging that globalisation has introduced positive spin-offs, it has had its share of disadvantages, especially in Africa. For example, Udombana (2002:306) notes that,

[g]lobalisation allows the rich nations and corporations to get richer because they have the capital and power to enforce trade agreements that favour their interests [and which] furthers the emergence of a new order from which many

countries in sub-Saharan Africa are excluded because they cannot compete effectively.

Capital, power and the need for profit maximisation that characterise the notion of globalisation apply equally to the unprecedented growth within the private security sector. Hence in Africa we have many corporations from within and outside that are operating in tandem with the dictates of capitalism. For example, PMCs such as MPRI (Military and Professional Resources International), DynCorp, PAE (Pacific Architects and Engineers), Saracen, and Gray Security remain active in a number of African countries. Singer (2004:522) asserts that PMFs operate globally in more than fifty countries and have been the determinate actors in a number of conflicts, playing a role in winning wars for example in Angola, Ethiopia-Eritrea and Sierra Leone.

The New Partnership for Africa's Development (NEPAD) acknowledges that the governments in the developing world, in partnership with certain private sectors, have played important roles in shaping the form, content and course of globalisation.

Perhaps the greatest devastation of African economies resulted, inter alia, from the notorious structural adjustment programmes (SAPs) that were introduced by the Bretton Woods institutions and supported by bilateral donors such as the Paris and London clubs. Summarising the operations of the SAPs in Africa, which were to result in Africa's 'bitter herbs of poverty', Udombana (2002:313) states:

SAPs were imposed on the continent purportedly to deal with Africa's economic fragility and non-response to previous development strategies.

The reforms were aimed at stabilising Africa's external and internal balances, thereby promoting their growth. Under the SAPs, African countries were required to, inter alia, to liberalize their trade sector and eliminate distortions in prize, to devalue their currencies and remove government subsidies, to reduce budget deficit and the size of the public sector, and to privatize governmental parastatals. The interventions were justified on the ideological grounds of economic neo-liberalism or what has become known as 'the Washington Consensus'. SAPs made the implementation of such policies a precondition for debt rescheduling, new loan facilities and other concessions.

Because of the reduction of the size of the public sector and the consequent abject poverty that the SAPs resulted in, the growth of the privatisation of the security sector (together with other sectors) became inevitable.

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The marketisation of the public sphere

In the contemporary climate, there is a growing trend for marketisation of the public sphere. Many governments opt to outsource some of their responsibilities for a number of reasons. For instance, 'leaner governments', engendered by policies associated with Bretton Woods, find themselves obliged to adopt a marketisation of the public sphere approach. Further, governmental departments may be incapable of undertaking some of their responsibilities (or 'commodifying'), or they may opt to outsource because of economic viability.

By marketing their responsibilities in this way, governments are seen to be effective in terms of the delivery of services to their citizens. The private security addresses the inability or neglect of the state to provide protection for its citizens. In some instances the state's apparatus may be so weak that it cannot provide security for its citizens. The private security sector in the form of PSCs therefore intervenes to fill the void. Wairagu et al (2004:21) posit that 'private security is focused on client protection and loss prevention [and] responsive needs [are] therefore of paramount importance'.

The downsizing of armed forces

The downsizing of armed forces after the Cold War contributed significantly to the growth of the private security sector. Globalisation also played a part. As Udombana (2002:326) observes, 'globalisation is enticing countries to democratize, privatize and decentralize, yet these opportunities are not materialising because the rules of the game are unfair'. The issue that became important concerned the future of those affected by the 'imposed' privatisation strategy, especially in the military and security forces.

Schreier and Caparini (2005:4) state that 'since the end of the Cold War, more than 7 million servicemen have been thrown into the employment market with little to peddle but their fighting and military skills'. They add that the process of downsizing fed both supply and demand from the new threats that emerged (Schreier and Caparini 2005:4). Downsizing in the military intensifies competition for jobs in the private security industry. After any conflict/war situation, there is normally a sudden influx of cash associated with peacekeeping forces and other externally funded operations. The private security sector seizes the opportunity to compete for a considerable share. In the African context, rebel movements that sprang up after decolonisation remained a threat to the ruling government. Some of the rebels had been in the

national armed forces before the downsizing process took place. They engaged the services of private security firms to pursue their own agendas or formed private firms to pursue their needs.

Another point raised by Schreier and Caparini (2005:4) is that, owing to financial constraints, many Western forces have focused on redefining and maintaining only core competencies, and resort to outsourcing non-core activities to the private security sector in the form of PMCs. This trend has been followed in Africa, especially where the state lacks the technical knowhow so far as security matters are concerned. The practice of outsourcing services inevitably leads to the armed forces being downsized. Schreier and Caparini (2005:4) add that within the private military and security sector, there is a growing need to replace soldiers with better-paid civilians to augment manpower and expertise, and this can only be done through the recruitment of civilians who have been trained at high expense by the state. Downsized forces feed into this industry.

The downsizing of the armed forces also resulted from the process of political transformation, and inevitably affected the military structures. In the South African Defence Force (SADF), for instance, a considerable number of white defence personnel were left unemployed and were later absorbed into the private security sector, which provides for a source of revenue and employment. For example, ex-combatants established two major domestic security companies, Sibuyile and Thuthuka (BICC:26). Many ex-combatants from Namibia joined Executive Outcomes and became involved in conflicts in Sierra Leone and Angola (BICC:26).

Downsizing in the military intensifies competition for jobs in the private security industry

The professionalisation of armed and police forces

Schreier and Caparini note that downsizing of armed forces was followed by the professionalisation of armed forces (Jones and Newburn (2002:133). This included the police forces. Professionalism is inevitable, especially where the business is competitive. Armed forces that were downsized from national armies possess not merely ordinary fighting and military skills, but professional fighting and military skills. Corporate business principles dictate that their professional skills must meet the demands of the client, who is willing to pay for professional and quality services. As Waigaru et al (2004:3) state, the services offered by the private security firms are available only to people who are willing to pay. This makes them even more competitive than ordinary national armies or police. Because professionalisation comes at a good price, this makes

the industry a lucrative one and ensures high returns for individuals with the required expertise.

According to Jones and Newburn (2002:134), there has been a long-term trend within business organisations to contract out non-core tasks such as security. Thus, provision for security and related products is best left to the professionals. As Jones and Newburn (2002:134) state, 'whereas many of the people working in security and related occupations in the 1950s and 1960s would have been employed in-house, increasingly companies contract in security services from specialist providers'. Thus, Schreier and Caparini (2005:4) maintain that in as far as the state is concerned, 'non-core activities [are] eliminated and those activities that need not necessarily be performed by ununiformed personnel [become] the object of various forms of alternative service delivery, thus outsourced to PMCs'. PMCs are professionals and quality assurance is always guaranteed.

Profit maximisation

That the private sector is organised along the capitalist mode of production is beyond question. Anyone who engages the services of the private security sector must be willing to pay for them to ensure profit maximisation, not only for him- or herself (if he or she is involved in business), but also for the private security company, which is itself a business concern. This is in sharp contrast to relying on public security, which is normally paid through the collection of income tax, among other things. The professionalisation of the armed forces is therefore coupled with the quest for profit maximisation. As Zedner (2006:84: cf South 1988 and Johnston 1992) notes, 'vast security companies seek to exploit market opportunities, expand their turnover and maximize returns to their shareholders'. For this reason, some Marxian approaches have focused on the private security sector as an industry that provides 'a legitimating or "buffer" function for the bourgeois state' and '[t]he fiscal crisis of the state is thus considered to result in recrudescence of policing for profit' (Rigakos and Greener 2000:147-148).

Jones and Newburn (2002:129) refer to the private sector as 'commercial policing' since their activities are strictly commercially based, as opposed to mainstream policing. By policing, Jones and Newburn (1998:18) mean 'those organised forms of order-maintenance, peacekeeping, rule or law enforcement, crime investigation and prevention and other forms of investigation and information-brokering'. The commercialisation that stems from the privatisation of security is not a new phenomenon. Zedner (2006:79),

for instance, holds that 'contemporary trends in policing signify less a departure from historical practice than those who proclaim the arrival of a new epoch acknowledge'. Zedner finds support from Spitzer and Scull (1977:19), who note that 'what is perhaps most intriguing about this movement towards privatisation is the way it parallels the rise of policing for profit in earlier historical periods'.

Rigakos and Greener (2000:150) argue that the rise of large holdings by corporations has resulted in a shift in responsibility for maintaining peace. They contend that 'expansive public access mall-ways and thru-ways have resulted in the squeezing out of public-area sites for assembling and shopping'. Rigakos and Greener (2000:150; Shearing 1988) note that '[l]arge corporate entities thus become legally responsible for the safety and security of "denizens" passing through their particular "bubbles of governance". If these large corporations did not provide security to their customers, business would crumble. The more secure their premises, the more business they get. The use of the private security sector, therefore, considerably increases their profit margins.

Small arms and light weapons are now debatably Africa's 'weapons of mass destruction' and the private security sector provides for their easy access

The liberalisation of the arms trade

Another important point raised by Schreier and Caparini (2005:5) is that of arms trade liberalisation. They state that the international arms trade has opened up to an increasing number of buyers and sellers, which has not only permitted a larger number and broader variety of actors to access weaponry, but has also provided more and easier ways for PMCs to profit from conflicts through their involvement in the arms trade, thus facilitating arms proliferation. In Africa this has presented the complex issue of

small arms and light weapon proliferation. Small arms comprise revolvers and self-loading pistols, rifles and carbines, assault rifles, sub-machine guns, and light machine guns. Light weapons are heavy machine guns, hand-held under-barrel and mounted grenade launchers, portable anti-tank and anti-aircraft guns, recoilless rifles, portable launchers of anti-tank and anti-aircraft missile systems, and mortars of less than 100 mm calibre.³ Small arms and light weapons are now debatably Africa's 'weapons of mass destruction' and the private security sector provides for their easy access.

Ironically, while involved in the facilitation of arms proliferation in Africa through procurement, the private security sector is playing a significant role in the destruction of it. The private security sector is contracted for de-mining in a number of African countries. Thus, the private security industry supplies weapons to African countries; participates and takes



sides in African conflicts; uses these arms in the conflicts as supporters of state governments, rebel factions and even foreign elements; participates in rendering humanitarian assistance to the victims; participates in the peacekeeping process; and then becomes involved in the disarmament, demobilisation and reintegration (DDR) processes. The involvement of the private security industry thus becomes a vicious circle. While benefiting the African people in terms of ensuring security, the private security sector becomes a force of destruction.

Never-ending African conflicts

Singer (2003:50) maintains that the massive global levels of conflict since the Cold War ended have been the driving force behind the privatisation of military services. Africa has not been insulated from this, especially since its conflicts remain varied and complicated. Even before the end of the Cold War, the involvement of the private security sector was a reality. Owing to arbitrary colonial borders, the private security sector has been active in interstate border disputes. The conflicts between Somalia and Ethiopia (1977/78), Ethiopia and Eritrea (1998–2002) and Uganda and Tanzania (1978–79) are good examples.

While interstate wars in postcolonial Africa have been rare, the continent has not been spared intrastate conflicts. Peace and security undoubtedly is still scarce. Intrastate conflicts continue to dominate Africa and as a result the private security sector remains active. Schreier and Caparini (2005:4) observe that since the end of the Cold War, there has been a massive increase in instability, often resulting in failed or failing states that were rendered unable to field sufficient armed forces to maintain internal order. In addition, the world superpowers no longer had an interest in these states. As a result, Schreier and Caparini (2005:4) comment that 'for some fragile states, lacking support from the great powers and unable to provide security for their citizens, PMCs have provided a means of reaffirming political control and some semblance of order'.

As Africa's conflicts continue unabated, there is always a need for humanitarian intervention. Humanitarian intervention entails a response to human rights violations that are a threat to peace and security. Such a response may consist of the use of force to bring the violations to a stop. Again, the role of the private security sector is important. Under the auspices of the African Union (AU) and in line with article 6 of the Peace and Security Council of the African Union Protocol,⁴ article 15 of the protocol provides for humanitarian action. The African Standby Force

(ASF) is responsible for such action, while the Peace and Security Council of the African Union (PSCAU) is responsible for its coordination. Article 7(1)(b) of the protocol provides that the PSCAU shall 'support and facilitate humanitarian action in situations of armed conflict or major natural disasters'.

While the private security industry has the capacity to wage a conflict or war, it also possesses the competence to end them. Hence, it will no doubt engage within the umbrella of the ASF, which is mandated under article 13(f) of the protocol to render humanitarian assistance in order to alleviate the suffering of civilian population in conflict areas, among other things. While humanitarian assistance may take many forms, its main purpose is to ease the suffering of civilian populations in conflict zones.

The ASF is also involved in supporting efforts aimed at addressing major natural disasters. Again, the private security sector's involvement is crucial. The ASF is adequately equipped to undertake humanitarian activities under the control of the chairperson of the

AU Commission and responsible for facilitating the activities of humanitarian agencies in the mission areas.⁵ Also adequately equipped for humanitarian action, the private security sector plays a crucial role in diffusing humanitarian crises. As Marshall and Gurr (2005:39–40) observe, 'when armed conflict breaks out in poor countries [most African countries] the potential for the emergence of a humanitarian crisis is immediate and severe ... [it] disrupts patterns of everyday life and its principal victims are non-combatant populations'. It is also common cause that not every African state has the capacity to make a significant contribution from its own

military forces towards contingencies within the auspices of the ASF for rapid deployment in conflict zones. Hence, the only remedy is to contract (or outsource, as it were) the private security sector, in particular PMCs, as part of this important institution.

When African conflicts finally end, programmes such as DDR become essential. Again the private security sector becomes involved. It is significant that the quest for profit maximisation remains the driving force. Implementation of DDR programmes is not an easy task, and not every African state has the capacity to undertake this task without engaging the private security sector, which includes both PMCs and PSCs. A possibility always exists that, despite the implementation of DDR programmes, the conflict situation will remain volatile. The private security sector may be required to address the situation, especially so far as disarmament is concerned. Spear (2006:64) states that the aims of disarmament are to

While the private security industry has the capacity to wage a conflict or war, it also possesses the competence to end them

remove the means by which violence is perpetrated and provide an environment in which a degree of stability has been achieved, thus adding to the process of confidence and security building. To Baker (2006:39), demobilisation is part of a larger governance objective of removing all armed forces except a national army.

Insecurity for aid workers

The wide customer base for the private security industry involves services to numerous organisations, including aid workers. Citing Brooks and Solomon, Singer (2003) explains that PMF customers are ranged across the moral spectrum from 'ruthless dictators, morally deprived rebels and drug cartels to legitimate sovereign states, respected multinational corporations, and humanitarian NGOs'. The private security sector, therefore, plays a major role in giving support to humanitarian aid workers in conflict zones. The greater the number of conflicts in Africa, the greater the need for aid workers. The greater the involvement of aid workers in humanitarian crisis situations (which are seldom safe), the greater the need for private security companies to ensure the security of humanitarian personnel and their property. The security threat that aid workers normally face in conflict zones has led public and private aid organisations and even UN organisations such as UNHCR, UNICEF, UNDP and WFP to hire PMCs and PSCs to ensure the protection of their operations and personnel in unstable areas (Shreier and Caparini 2005:5).

Events of 9/11

According to Ward (2003:289), the events of 11 September 2001 set in motion a new paradigm for the international community to combat international terrorism. Africa has not been insulated from terrorist attacks. In August 1998, terrorist bombings attributed to al-Qaeda occurred at the US embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya. These events made significant inroads into Africa's peace and security. While acknowledging the difficulty in defining terrorism (a topic beyond this paper), it is accepted that Africa is increasingly being seen as a springboard for terrorists to launch their activities and acts of terror. It is now common cause that Africa provides a breeding ground for terrorists to collaborate, plan and grow in strength in order to target developed countries such as the US and its interests worldwide. Security concerns, therefore, call upon governments to, inter alia, contract the private security sector to address this problem.

The events of 9/11 not only 'changed the world', but also fuelled the growth of the private security sector in general. Within the discourse initiated by the US on foreign policy and the consequent campaign against terrorism, there was a great need for the

reinforcement of the US military forces in fighting wars in the name of combating terrorism. As a result of the US campaign against terrorism, private security was needed to reinforce this effort as well as other governmental-initiated operations. Singer (2003:522) maintains that:

Even the US military has become one of the prime clients of the industry. Indeed, from 1994–2002, the U.S. Defense Department entered into over 3,000 contracts with U.S.-based firms, estimated at a contract value of more than US\$300 billion. PMFs now provide the logistics for every major U.S. military deployment, and have even taken over two hundred universities; that is, private company employees now train the U.S. military leaders of tomorrow.

The events of 9/11 also precipitated the unlawful use of force by powerful nations such as the US and the UK under the guise of pre-emptive self-defence, which is prohibited under international law.⁶ This was seen in the invasion of Iraq by the US, the UK and their allies in March 2003. This invasion could not have been undertaken by these nations, despite their military strength, without the private security sector and in particular the PMFs. In this regard, many South African ex-soldiers or police officials are currently employed in private security firms operating in Iraq. The US government hired DynCorp, (a PMF based in Virginia that carried out operations in Columbia, Kosovo and Afghanistan) to re-establish the post-Saddam Iraq police force (Singer 2003:522). DynCorp's contract for training this force is worth a staggering US\$250 million (Isenberg 2003). (Whether this effort is working or not is beyond this paper.)

With the 9/11 events, there was also a need for the establishment of undercover agents, who had to work on intelligence issues that sometimes culminated in unlawful and secretive arrests, questioning, and even torture and inhumane and degrading treatment of people thought to be linked to terrorist groups. There have been secret US secret airlifts from European countries whose governments do not want to be associated with US actions that violate fundamental human rights. Again the private security sector is contracted to carry out these operations as they are 'independent' and their actions cannot be imputed to particular governments.

Human rights and the private security sector

The concept of human rights has become the idea of our time. It transcends almost every facet of life. No doubt the private security sector is a human rights issue; thus, its existence has an impact on human rights. While the private security sector is involved in ensuring security, security is a human right

guaranteed by, among other instruments, the Africa Charter on Human and Peoples' Rights.⁷ Ensuring peace and security, as a human right, creates an environment that is conducive to the realisation of other human rights in line with the notion of the indivisibility, interdependency and interrelatedness of human rights.⁸ That national and international peace and security as a human right is what Africa needs is beyond question. The right to peace and security under article 23(1) of the African Charter has two dimensions, national and international. While the former is enjoyed within national borders, enjoyment of the latter extends beyond these borders.

Within the African context, the right to peace and security is exclusively conferred upon 'all peoples' and not individuals. This underscores the importance of the right, which is enjoyed by an individual only in concert with others. Peoples are made up of individuals. The whole idea of conferring the right to peace and security on all peoples is not hard to find. A better life for the African peoples in terms of development and otherwise requires them to enjoy their right to peace and security as peoples and not merely individuals. The notion of solidarity among the African peoples is still very important in achieving peace and security. The OAU (now the AU) noted that 'at the close of the 20th century ... of all regions of the world, Africa is indeed the most backward in terms of development from whatever angle it is viewed and the most vulnerable as far as peace, security and stability are concerned'.⁹

In the event that the private security sector becomes a force unto itself, this will result in the violation of human rights and in particular the right to peace and security. While accepting the role that the private security sector plays as far as the realisation of the right to peace and security is concerned, it may impact negatively on this right, particularly in the absence of effective regulatory mechanisms. Because women and children are mostly affected in conflict situations, where the private security sector also operates, there is a great need to keep checks on the conduct of its personnel, who in most cases conduct their business independent of any state government. Respect for women's and children's rights becomes very important. Recent reports of sexual violence against women in the ongoing armed conflicts in Burundi (HRW 2003), DRC (HRW 2005), Sudan (HRW 2005) and Uganda (Lough and Denholm 2005) put the private security sector under the spotlight, especially because of their active involvements in these conflicts. Crewdson (2002) refers to two previous DynCorp operations in which several of its employees were accused of 'engaging in perverse, illegal and inhumane behavior

[and] purchasing illegal weapons, women, forged passports and [committing] other immoral acts'.

In Africa, millions of conflict-affected children become displaced within their own countries or cross borders as refugees. More often than not, the private security sector is involved in such conflicts and plays a role in causing more harm to these children. During armed conflicts, children face a heightened risk of rape, sexual humiliation, prostitution and other forms of gender-based violence, which are downplayed as unfortunate but inevitable side-effects of conflicts. African children are increasingly participating in conflicts as combatants, and they are sometimes deliberately recruited by the private security sector, among others. During and after conflicts, children remain exposed to the dangers of landmines and unexploded ordnance: bombs, shells and grenades that failed to detonate on impact. Again, the private security sector is involved. In most cases, the operations of the private security sector in armed conflicts totally ignore the 'best interest principle' that should be accorded to children.

Because women and children are mostly affected in conflict situations, there is a great need to keep checks on the conduct of private security personnel

The privatisation of security, therefore, has the potential to violate a plethora of human rights as a result of the increase in conflicts. Schreier and Caparini (2005:1) observe that privatisation is not only manifest in the increase of civil strife and internal conflicts around the globe, pitting states and non-state forces against each other, but recent events, particularly in Africa (Somalia, Sudan, Uganda, Liberia, to name but a few) have heralded the return of paramilitaries led by warlords and mercenaries. Africa continues to have its share of warlords and mercenaries and their conduct of committing atrocities and violating human rights is now well documented.

What complicates the matter is that Africa is plagued by what Small (2006:12) refers to as 'a host of intra-state instabilities, lawlessness, criminality, civil wars, ethnic clashes, recurrent coups d'état, armed insurgencies, factional fighting, military disloyalty, and ideological conflicts'. Africa is best characterised by all these.

Africa, being a well-endowed continent in terms of mineral resources, finds itself on the receiving end in as far as the influx of foreign elements is concerned. These elements generally include PMCs whose parent companies are based outside Africa. As was noted at the UN Conference on Trade and Development Report (UNCTAD 2004), natural resources do not always bring the expected benefits of growth and development. In some of the poorest countries, resources have been a curse, as they tend to invite corruption and induce conflicts that are difficult to tackle. It is now well known that a number of PMFs

played a major role in looting natural resources from the African continent. This has led to the violation of the African peoples' right to development. The human security threat that the private security industry poses in Africa calls for radical assessment of its causes and their effective regulation. The private security industry introduces a new trend in which state functions are apportioned to non-state actors in the form of private police and military. This trend, which is a complex one, has great potential to challenge the traditional state system, which has been controlled by the state since its inception. The impact of the private security sector on the continent's security architecture and on human rights in particular calls for thorough understanding of its involvement on national and international fronts.

Another dimension of the impact of the private security sector on human rights is the inequality it creates and consequently perpetuates between rich and poor. Only the rich can afford the services of private security companies, and the poor rely on the state to provide for security, which is generally non-existent. Only rich states can meet the expense of hiring private security companies and this creates the problem of foreign domination and invasions, as seen in a number of cases, including Iraq. From a Marxist point of view, the existence of the private security sector creates a situation in which those in power remain in power, because they can afford to pay for their security, despite their failure to embrace the democratic principles to which the population aspires. Many African leaders rely on the private security sector to stay in power and this is to the detriment of the majority of the population. The poor continue to be exploited by private security companies (especially security guards). Because of meagre salaries, some resort to crime, a social evil, and this create more insecurity among the people in society.

Private security vis-à-vis mercenaries

According to Wairagu et al (2004:17), what is known today as 'private security' is in effect the logical transformation of traditional mercenary activities into a variety of new forms, with PMCs, which are described as private mercenary contractors, comprising the first group. Dugard (2006:540) notes that whereas in the past mercenaries fought wars, today international law has turned against them, largely as a result of their involvement in conflicts in Africa. Indeed Additional Protocol I to the 1949 Geneva Conventions of 1977 proscribes for mercenaries 'the right to be a combatant or a prisoner of war'.¹⁰ In 1989, the International Convention against the Recruitment, Use,

Financing and Training of Mercenaries was adopted to criminalise the recruitment and use of mercenaries as well as participation in hostilities as a mercenary.¹¹

One problem associated with this discourse is the meaning of the word 'mercenary'. While mercenaries are generally private armies, not all private armies are mercenaries. It is therefore incorrect to assume that the private security sector comprises only mercenaries. Like many other commentators, Lamb (2000:3) asserts erroneously that the privatisation of security is the equivalent of the employment of 'mercenary' forces in armed conflict. Lamb (2000) refers to a definition by Nathan (1997:10), who classifies mercenaries (otherwise referred to by Lamb as 'private armies') as:

soldiers hired by a foreign government or rebel movement to contribute to the prosecution of armed conflict – whether directly by engaging in hostilities, or indirectly through training, logistics, intelligence or advisory services – and who do so outside the authority of the government and defence force of their own country.

**While mercenaries
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are mercenaries**

In the 1960s and 1970s, the African continent witnessed a spate of mercenary activities in the wake of the decolonisation process. Schreier and Caparini (2005:6) declare that mercenary units directly challenged a number of nascent regimes in Africa and even fought against the UN during its operation in Congo (ONUC) from 1960 to 1964. To make things worse, mercenaries were involved in a number of attempted coups and in human rights abuses.¹² These 'unsavoury' developments informed the negotiations at the level of the OAU

and the subsequent adoption and coming into force of the 1977 OAU Convention for the Prohibition of the Mercenary Activities in Africa, which may be viewed as the first attempt to regulate military actors in Africa.

To date, the convention has been ratified by 27 out of 53 African states.¹³ The number of state parties to the convention speaks volumes in terms of political will in the fight against mercenarism in Africa.¹⁴ (It must be noted that mercenarism is the darker side of the private security sector.) Given the number of state parties to the convention, it is questionable whether African states are indeed committed to addressing the problem of mercenarism, let alone to regulating the private security sector.

In January 2005 the AU adopted the African Union Non-Aggression and Common Defence Pact (not in force at the time of writing),¹⁵ which inter alia establishes

the African Union Commission on International Law. The commission's objective, among others, is to study all legal matters relating to the promotion of peace and security in Africa. It is hoped that this commission, once the pact comes into force, will consider the challenges presented by the existence of the private security sector.

That the convention is outdated is without question and its successful application to PMFs would be an exercise in futility. In fact, it can be argued that technically not one PMF or PSC falls within the ambit of the definition provided in the convention. While article 1(1) of the convention defines a mercenary as a 'person who' undertakes an activity, PMFs and PSCs are firms or companies. In this way, they cannot be liable under the convention because they are not persons in the literal sense. In law, they may be regarded as having a legal personality. However, it would seem that this is not what was envisaged in the wording of the provision.¹⁶ While this provision gives a definition for a mercenary, it fails to give the definition of 'person' within that definition.

Even if an employee of a PMF/PMC were to commit the crime of mercenarism, in law the principle of vicarious liability would apply. That is, the act of the employee would be imputed to the PMF/PMC, the employer, and according to article 1(1) of the convention that entity is not 'a person'. That is, if such a commission is within the course and scope of that employee's defined work. The question of criminal liability also arises. The employee is employed by the PMF/PMC, which is contracted by a client. Assuming the employee does undertake the act of mercenarism, the question of who then becomes criminally liable is not addressed. Should it be the individual employee, the PMF/PMC itself, or the client with whom the contract is entered? Or should every legal person be criminally liable, whether individual or corporate?

Article 1(2) of the convention further provides for the actors in the 'game' of mercenarism being 'the individual, group or association, representative of a State or the State itself'. Again companies/corporations/firms do not feature. Hence they are technically absolved from liability under the convention. This 'brainteaser', however, does not end there. Article 1(3) of the convention provides that '[a]ny person, natural or juridical who commits the crime of mercenarism as defined in paragraph 1 of this article commits an offence considered a crime against peace and security in Africa and shall be punished as such'. The more one reads this article, the more confusing it becomes.

Paragraph 1, which is referred to in article 1(3), defines 'mercenary' but not 'the crime of mercenarism'. It is only in paragraph 2 that the crime is defined. Reference to paragraph 1 is therefore misleading and no attempt has been undertaken to address this anomaly. After all, approximately half of the African states associate themselves with this convention. As if this were not enough, article 1(3) attempts to include a juridical person, which may debatably include a PMF and/or PSC. Thus, the definition of the mercenary is 'a person' in terms of article 1(1) of the convention, while the crime is capable of being committed by 'any person, natural or juridical' in terms of article 1(3) of the same convention, which may include a PMF and a PSC.

Article 1 identifies mercenaries directly by referring to the purpose of their employment, specifically if they are hired to overthrow governments or OAU/AU-recognised liberation movements (Singer 2003:528). This is implicit, but not of course expressed. Article 1(2) provides that the crime of mercenarism must be aimed at 'opposing by armed violence a process of self determination, stability or the territorial integrity of another state' by practising certain acts that are listed in it. A problem with this provision is that not all PMFs and PSCs are employed with this aim. Instead, their aims are wide ranging and depend largely on the needs of the client.

Given their wide range of products and services, not all PMFs and PSCs are recruited to 'fight in an armed conflict' or 'hostilities'. Again the convention overlooks this fact. Assuming a PMF/PSC has been contracted by the International Committee of the Red Cross to guard its premises in a conflict zone, there are no regulations in place for its operation in that conflict zone. Assuming that the PMF/PSC is recruited and undertakes to 'fight in an armed conflict' or 'hostility' within the meaning of the convention, the question is whether they should be regarded as 'a mercenary' within the meaning therein? If they are, then in terms of Additional Protocol 1 to the 1949 Geneva Conventions of 1977, they do not have 'the right to be a combatant or a prisoner of war'.¹⁷

Assuming that PMFs and PMCs fall within the ambit of the definition (resulting from the inclusion of the word 'juridical' person), only those that are working towards realising these objectives may be liable under this convention. With this in mind, there is no regulation whatsoever for the operation of PMFs or PSCs working outside the opposition 'by armed violence [to] a process of self-determination, stability or the territorial integrity of another state'. The process of 'self-determination' is not defined,

Given their wide range of products and services, not all PMFs and PSCs are recruited to 'fight in an armed conflict' or 'hostilities'

and one is left to guess whether it refers to external self-determination, relating to the right to secede and form a new state, or to internal self-determination, relating to the right to choose an own political status, to freely pursue a particular economic, social and cultural policy and to choose and participate in the government of state.

Because article 1(1) of the convention requires the 'mercenary' to be 'neither a national of a party to the conflict nor a resident of a territory controlled by a party to the conflicts', this introduces another problem. Given their power and influence, PMFs and PSCs can easily facilitate the nationality/citizenship or residency status of employees, register their company within a state of operation to suit their needs and escape any possibility of being branded mercenaries. If their operation is well connected to the state, this becomes even easier, especially given the prevalence of corrupt practices in many African states. The convention does not safeguard against this problem.

It has been argued that the intention of the drafters of the convention to 'allow African governments to continue to hire non-nationals, as long as they were used to defend themselves from "dissident groups within their own borders", while disallowing their use against any other rebel groups that the OAU supported [such as the African National Congress (ANC)]' is evident (Singer 2003:529). It has also been observed that the OAU/AU governments were still legally allowed to hire mercenaries for use against their own rebel groups, and many, such as Angola and Zaire, did so (Singer 2003:529). Again, it is clear that no regulation of the private security sector was envisaged in this regard.

Dispelling the misapprehension that a PMC was involved in the alleged coup plot aimed at overthrowing the regime in Equatorial Guinea, Small (2006:8) sheds some light, which is important for our purposes. In this matter, an ad hoc conglomeration (as opposed to a registered company) of South African, Armenian and Angolan former soldiers were allegedly sponsored by Mark Thatcher and headed by Nick du Toit, a former soldier and arms manufacturer from South Africa. They allegedly conspired to stage a coup d'état in Equatorial Guinea for purely financial reasons. Small (2006:8) notes that this conglomeration is distinct from a PMC in the sense that 'it is an ad hoc transient structure as opposed to the permanency of the PMC business entity, and their orientation is of a covert and destabilising nature working against the state rather than as PMCs position themselves, as actors working for the state system'.

The need for the private security sector in Africa

There is no doubt that Africa needs the private security sector in order to foster peace and security. Given the complex security concerns, the continent needs to foster its security architecture and legitimise the private security sector, which is now part of that security. On this point, Small (2006:4) argues that 'PSCs and PMCs have come to acquire a de facto legitimacy and feature prominently in today's security setting'. In fact, even if one were to reject the need for the private security sector in Africa, the industry is here to stay. After all, it is one of the fastest growing industries in the world, let alone in Africa.

While some commentators, such as Howe (1998:1), maintain that the need for better security is the driving force behind the private security's recent growth, this is not entirely true, especially in the African context. Taking the argument further, it sometimes does not tally with the fact that most warring factions in Africa engage the services of the private security sector to fight their battles. In this case, the 'need for security' argument falls away because many lives are lost during these conflicts. Schreier and Caparini (2005:2) observe that

Even if one were to reject the need for the private security sector in Africa, the industry is here to stay

While most PMCs [and PSCs] serve governments and the armed forces, some have given assistance in democratising foreign security forces, and have worked for the UN, NGOs, and even environmental groups. Others have prospered at the other hand of the marketplace, working for dictators, regimes of failing states, organised crime, drug cartels, and terrorist groups.

The negativity that was brought about by the involvement of the PMCs and PSCs in the continent calls for serious introspection among African states about putting in place effective regulation of private operations. Elucidating the negative impact brought about by the private security sector, Small (2006:5) posits that by providing state-like military and security, PSCs and PMCs attain state-like agency in the sense that they perform a core state sovereign function. This sometimes makes their relationship with state agents adversarial, as they become competitors as far as they provide security services. Moreover, they have great potential to be a threat rather than a benefit to the continent.

According to Williams (1998), the private security sector employs more people and expands at a faster rate than public law enforcement, thus representing an increasing threat to individual security. At domestic

level, this threat comes as the result of searches and seizures by private security personnel, which according to the Minnesota Supreme Court decision in the case of *State v Buswell*,¹⁸ could not be considered unconstitutional because their action failed to constitute government action so as to trigger the Fourth Amendment's exclusionary rule which demands exclusion of evidence from criminal proceedings in federal and state courts. The Fourth Amendment protects individuals only from government conduct. Thus, as Williams argues 'The Fourth Amendment provides no protection against unreasonable searches and seizures conducted by private parties ... [and] ... [t]he suppression of evidence discovered by a private party fails to advance the Fourth Amendment's currently recognised purpose: regulation of police activity' (Williams 1992:177–178).

A critique levelled by Williams (1992: 184) against the decision in *Buswell* is threefold: the ruling fosters the idea that private security guards possess broader authority to conduct searches than government officials; the decision encourages reliance on private security personnel because security guards (excluded from the application of the Fourth Amendment) become an attractive alternative to public law enforcement; and the decision diminishes Fourth Amendment protection because private security guards operate in a 'gray area' that straddles the public-private distinction.

In Africa the absence of regulatory mechanisms in matters relating to search and seizure, debt collection and private investigation makes the private security industry even more dangerous, especially as far as the rights of citizens are concerned. This is made worse because most PSCs operating in Africa are not professional and sometimes hardly respect the law in conducting their activities. Wairagu et al (2004:28–29) for instance argue that the dominance of guard services in Kenya can be explained by the fact that it is the cheapest private security business to start up because all you need are guards and willing customers. They add that '[t]his explains the mushrooming of "briefcase" security companies, a term commonly used to describe companies that are haphazardly established and that pay little attention to professional standards'. Non-adherence to professional standards incapacitates the PSC's ability to uphold the rule of law because the notion of professionalism comes with respecting the law, and in particular human rights.

Towards effective regulatory mechanisms

Schreier and Caparini (2005:6) argue that while some PMCs may be of the rogue variety, most

private security companies are not. The question is how to prevent the existence of the 'rogue kind' and the possibility of the genuine ones becoming the rogue kind. This therefore calls for an effective monitoring and regulatory mechanism to be put in place. Having laid the foundation upon which the call for the regulation of the private security in Africa is premised, the mammoth task is to determine certain aspects. What shape and form should the regulatory mechanism take? How should the regulations be implemented and made effective? Who should be responsible for such implementation and at what levels? What benchmarks can be put in place to determine the success or failure of such regulations? These are but some of the questions that need to be addressed in charting a way forward for the general regulatory strategy.

Matters of speculation cannot inform an effective regulatory mechanism in Africa. Instead, thorough research around the issue should be undertaken. It is therefore recommended that certain aspects should be determined in order to inform an effective regulatory mechanism: its scope; its depth; and its density. Determining the scope means ascertaining the number of activities covered by the private security sector. Determining the depth underscores the extent of lawful powers that shape the private security sector. And determining the density requires an understanding of the concentration of the existing regulatory authority-shaping structure of the private security sector at international, regional and national level. These recommendations cannot be addressed in a modest contribution such as the present one, which is based solely upon desk research. Over an above desk research, field research becomes a sine qua non for such an undertaking.

Undoubtedly effective regulation of the private security sector is needed, not only for ensuring peace, but also for fostering a democratic culture, which is always scarce on the continent. On this point, Sklansky (2006:91) asserts:

If we want private security forces to behave in particular ways – complying with constitutional restrictions on the police, say, or paying attention to the concerns of people other than their customers – there are legal mechanisms at our disposal. Statutes can be passed; regulations can be promulgated; administrative oversight can be imposed; tort duties can be created. In the not-uncommon situation where government itself is the purchaser, "public norms" can be imposed by contract; moreover, we can be choosy about which police functions we privatize, and

Non-adherence to professional standards incapacitates the PSC's ability to uphold the rule of law because professionalism comes with respecting the law

further under what circumstances. In short, there are ways to make privatisation safer for democracy, and there may even be ways to make privatisation the friend of democracy.

It may therefore be deduced that while the privatisation of security can threaten the African state's democratic aspirations, it can be a complementary tool for the realisation of democracy, provided that proper regulatory mechanisms are put in place.

Conclusion

Making a revolutionary speech before the Association of Chief Police Officers in Birmingham, UK, in 1988, Chief Constable Ian Blair of the Surrey Police noted that '[within] ten years, it is possible that a substantial proportion of the police function may be absorbed by other local authorities and by an unregulated private security sector'. Blair's prediction applies to the African continent. While recognising the need to have the presence of the private security sector, the main concern is the absence of effective regulations to govern its operations. In as much as Africa needs the private security sector in the promotion of peace and security, caution must be taken to guard against the industry becoming a force unto itself as a result of the lack of a regulatory mechanism.

It is a major cause for concern that the AU has not taken a robust stand in addressing the influx of the private security sector into the continent's conflict zones. Although the Mercenary Convention remains, with respect, useless, the AU has not made any attempt to revise it to make it more relevant to contemporary challenges influenced by the existence of the private security sector. That there is still a misunderstanding between mercenaries and the private security sector calls for more discussion and clarification, since these two are totally different in form and purpose.

Any effective regulation of the private security sector must be informed, *inter alia*, by proper African-focused research on the following:

- The extent of the private security industry.
- The effect of the privatisation of security on human rights with special reference to vulnerable groups, including women and children.
- The advantages and disadvantages of the private security industry.
- Existing policy frameworks (if any) of security establishments regarding outsourcing and public/private partnerships and their implications.
- The effect of the privatisation of security on the implementation and execution of the African security policy.
- The extent to which mercenary activities are still taking place.

- The extent to which Africa controls and regulates the private security sector.
- Identifying the gaps, inconsistencies and areas of improvement with regard to the private security sector in Africa.

Again, justice cannot be done to these issues in a single desk research paper such as the present one. This paper has sought to contribute to the ongoing debate around the private security sector in Africa. First, it attempted to discover the meaning of the 'private security sector' as forming part of both PSCs and PMCs. Second, it sketched out the context within which the private security sector operates, namely Africa's multifaceted challenges. Third, the paper attempted to unpack the *raison d'être* for the dramatic growth of the industry and its impact in Africa. Fourth, an understanding on the relationship between the private security sector and human rights was considered. Fifth, the paper looked into the linkage between the private security sector and mercenaries with the aim of separating the two. Finally, a discussion on the way forward was embarked upon in terms of the manner in which effective regulations should be set up for the benefit of the African continent and its people.

That the private security sector is here to stay is beyond question and because it poses a major cause for concern to Africa, it must be effectively controlled and regulated for the betterment of human security within the continent. The paper conveniently skirted the issue of how the private security sector should be controlled and regulated for this requires a separate topic on its own. Suffice it to say that further debates are still needed in this regard. It is now convenient to endorse Creutz's observation that '[t]he mixture of state and private actors within the field of security is here to stay and consequently the international community [and Africa in particular] has to find a way, if not to embrace it, at least to cope with it' (Creutz 2006: 9).

Notes

- 1 These will be addressed extensively later in the paper.
- 2 In its broadest sense, human security means 'the security of the individual in terms of satisfaction of his/her basic needs. It also includes the creation of social, economic, political, (military), environmental, and cultural, the protection of and respect for human rights, good governance and guarantee for each individual of opportunities and choices for his/her development'. See the African Non-Aggression and Common Defence Pact, Abuja, 31 January 2005 p. 6.
- 3 Definition used in the United Nations' Report of the Panel of Governmental Experts on Small Arms (United Nations, 1977).
- 4 In terms of article 6 of the PSCAU Protocol, the areas in which the PSCAU shall function are: the

promotion of peace, security and stability in Africa; early warning and preventive diplomacy; peace-making, including the use of good offices; mediation, conciliation and enquiry; peace support operations and intervention pursuant to article 4(h) and (j) of the AU Treaty; peace-building and post-conflict reconstruction; humanitarian action and disaster management; and any other function as may be decided by the Assembly.

- 5 Articles 15(3) and (4) of the PSCAU Protocol, respectively.
- 6 See article 2(4) of the Charter of the United Nations, which provides that '[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.
- 7 See article 23 of the African Charter on Human and Peoples' Rights of 1986.
- 8 Vienna Declaration and Programme of Action, A/CONF.157/23, para 5.
- 9 Organisation of African Unity (OAU), Assembly of Heads of State and Government, Declarations, Resolutions and Decision. Yaounde Declaration (Africa: Preparing for the 21st Century), AHG Decl. 3, pmb1. para. 2, OAU AHG/Res. 247-257 (XXXII)(8-10 July 1996).
- 10 Article 57 of Additional Protocol I of 1977.
- 11 Accessed at <http://www.un.org/documents/ga/res/44/a44r034.htm>. Adopted and opened for signature and ratification by General Assembly Resolution 44/34 of 4 December 1989. Entered into force on 20 October 2001.
- 12 See UK Foreign Affairs Office Green Paper p 14 as quoted by Schreier and Caparini 2005:6.
- 13 See list of countries which have signed, ratified/acceded to the Mercenary Convention at <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm> (accessed 12 October 2006).
- 14 Regarding the United Nations International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, very few African states are state parties. See status of ratification at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=530&ps=P> (accessed 13 October 2006). Again this convention focuses on individual mercenaries and not on PMFs and PMCs.
- 15 Adopted in Abuja, Nigeria, 31 January 2005. Available at <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm> (accessed 1 October 2006).
- 16 Otherwise the use of the words 'a person which' could have been included.
- 17 Article 47 of Additional Protocol 1 of 1977.
- 18 460 N.W.2D 614 (MINN.1990), Reh'g Denied, (MINN. OCT.8, 1990), Cert. Denied, 111 S.CT. 1107 (1991).

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About this paper

The private security sector in Africa has been experiencing unprecedented growth. In the last decade this growth has presented a number of challenges on the continent as far as peace and security are concerned. While the overriding purpose of the private security sector is to provide security and related services, there is a danger of the sector becoming a force unto itself because of a lack of (effective) regulations. This paper seeks to contribute to the ongoing debate around the private security sector with an African focus.

About the author

Sabelo Gumedze is a senior researcher attached to the Defence Sector Programme (DSP) at the Institute for Security Studies (ISS) in Pretoria. After obtaining a BA in Law and an LLB from the University of Swaziland, he worked as a candidate attorney and was subsequently admitted as an attorney of the High Court of Swaziland. He also holds an LLM degree in Human Rights and Democratisation in Africa from the University of Pretoria. Sabelo has a specific interest in human rights in Africa. His ongoing project at the ISS focuses on the regulation of the private security sector in Africa. He wishes to thank Godfrey Musila, a PhD Fellow at the South African Institute for Constitutional, Public, Human Rights and International Law (SAIFAC), for his comments on an earlier draft of this paper.

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