

# **From market for force to market for peace**

Private military and security companies  
in peacekeeping operations

Edited by Sabelo Gumedze



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# Acronyms

ACOTA	African Contingency Operations Training and Assistance
ACRF	African Crisis Response Force
ACRI	African Crisis Response Initiative
AEC	Assessment and Evaluation Commission
AFL	Armed Forces of Liberia
ASCs	armed security contractors
ASF	African Standby Force
AMIS	African Union Mission in Sudan
AMISOM	African Union Mission in Somalia
AU	African Union
BAPSC	British Association of Private Security Companies
BRS	Brown and Root Services
CAR	Central African Republic
CEO	chief executive officer
CPA	comprehensive peace agreement
CSO	civil society organisation
DCAF	Democratic Control of the Armed Forces
DDR	disarmament, demobilisation
DDRR	rehabilitation and reintegration
DRC	Democratic Republic of the Congo
DPKO	Department of Peacekeeping Operations
ECOWAS	Economic Community of West African States
ECOMOG	ECOWAS Monitoring Observer Group
EO	Executive Outcomes
EU	European Union
FMF	foreign military financing
GOC	general officers course

GPOI	Global Peace Operations Initiative
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICU	International Charter Incorporated
IDRC	International Development Research Centre
IFOR	implementation force
IHL	international humanitarian law
IHRL	international human rights law
IILJ	Institute of International Law and Justice
INCLE	International Narcotics Control and Law Enforcement
IPOA	International Peace Operations Association
IPTF	International Police Task Force
ISS	Institute for Security Studies
MNCs	multinational companies
MONUC	<i>Mission de l'Organisation des Nations Unies en République démocratique du Congo</i> / United Nations Mission in the Democratic Republic of Congo
MRU	Mano River Union
NATO	North Atlantic Treaty Organization
NGO	non-governmental organisation
OAU	Organisation of African Unity
ONUC	<i>Organisation des Nations Unies au Congo</i>
OSCE	Organisation for Security and Cooperation in Europe
PDD	Presidential Decision Directive
PMC	private military company
PMSCs	private military and security companies
PPPs	public-private partnerships
PSCs	private security companies
PSO	peace support operation
RECs	regional economic communities
ROE	rules of engagement
RUF	Revolutionary United Front
SALWs	small arms and light weapons
SI	Sandline International
SOFAS	status of forces agreement
SPLA	Sudan People's Liberation Army

SRAP	Steering and Rowing Approach to Peacekeeping
SSR	security sector reform
SST	security sector transformation
UK	United Kingdom
UN	United Nations
UNAMID	United Nations-African Union Hybrid Mission in Darfur
UNICEF	United Nations Children's Fund
UNDP	United Nations Development Programme
UNEF	United Nations Emergency Force
UNHCR	United Nations High Commissioner for Refugees
UNITA	<i>União Nacional para a Independência Total de Angola</i>
UNITAF	United Nations Task Force
UNMEE	United Nations Mission in Eritrea and Ethiopia
UNMIL	United Nations Mission in Liberia
UNMIS	United Nations Mission in the Sudan
UNAMSIL	United Nations Mission in the Sierra Leone
UNAMIR	United Nations Mission in Rwanda
UNOCI	United Nations Operation in Côte d'Ivoire
UNPOL	United Nations Police
UNPROFOR	United Nations Protection Force
UNSAS	United Nations Standby Arrangement System
US	United States
WFP	World Food Programme

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# Introduction

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This monograph contributes to the debate on the use of private military and security companies (PMSCs). Its specific focus is on the proliferation of these private actors in peacekeeping operations on the African continent. PMSCs, as distinct from their mercenary predecessors, are a relatively new phenomenon, and the monograph seeks to open up discussion by offering the perspectives of five authors from varying disciplines.

While the trend towards the increased use of private operators is gaining momentum, it cannot be accepted without circumspection. As the title of this monograph suggests, one of the key questions is how these companies have within a short space of time made the transition from operators in the 'market for force' to operators in the 'market for peace'. In light of their unprecedented expansion and of the negative publicity they have received in the past two decades, the question of the regulation of these companies looms large.

While the beginnings of the PMSC industry were to a great extent linked to mercenary outfits engaged in direct combat, such as the now defunct Executive Outcomes and Sandline International, the constant and sometimes misguided association of PMSCs with their predecessors has tended to blur understanding of the role they could play in restoring peace and stability. The legally registered

PMSCs that are the focus of this monograph are totally different from the 'dogs of war' mercenaries of the past, hence the need to re-examine their role and the regulatory mechanisms pertaining to them.

The United Nations Working Group on the use of mercenaries has repeatedly expressed concern about the impact of the activities of PMSCs on the enjoyment of human rights,<sup>1</sup> particularly in contexts where the industry is unregulated.<sup>2</sup> The Working Group has highlighted the fact that when operating in volatile areas these companies have been drawn into military-type activities and become involved in combat, which in many instances have included the use of firearms. It remains a moot question as to whether the tendency for PMSCs to be drawn into combat will apply equally within the peacekeeping situation.

A number of policy options relating to the involvement of PMSCs in Africa can be seen in the contributions of the five authors. Chief among these is the need for the regulation, oversight and monitoring of PMSCs at all levels – international, regional, sub-regional and national. The specialised and highly dangerous military and security services that these companies provide cannot be equated with ordinary commercial services. And in the meantime, as Dan Kuwali (Chapter 5) puts it, 'the rapid growth of PMSCs has outpaced regulation of the industry'.

Opening the debate in Chapter 1, Azeez O. Olaniyan provocatively discusses PMSCs as unorthodox peacekeepers. He argues that in the security arena any opposition to the invasion of the public realm by private hands is redundant, since PMSCs have already become a reality of the 21<sup>st</sup> century. Even in the 1990s, he writes, such companies were key actors in a number of peacekeeping efforts.

Olaniyan goes on to examine Africa's response to the privatisation phenomenon, focusing on the shortcomings of the OAU Convention on the Elimination of Mercenarism in Africa (1977). He points out that while the African Union has been wary of PMSCs, this is not the case with all African governments. He concludes that Africa can benefit from the use of PMSCs for conflict resolution and recommends a review of the OAU Convention to accommodate the use of these companies in peacekeeping.

Eric George in Chapter 2 examines the nature of the market for peace, which has expanded steadily over the last two decades. He provides an overview of peacekeeping in Africa and discusses how the heavy reliance of nation states on private suppliers of security services has created interesting opportunities for the PMSC industry. These peacekeeping operations have allowed PMSCs to

distance themselves from ‘the controversial, and now unprofitable, association with mercenaries’.

Looking at the role played by military and security companies in specific countries – Somalia, the Democratic Republic of Congo, Sierra Leone, Liberia and Sudan – George raises the complications of transparency and accountability in the effective regulation of transnational or international PMSCs. He points out the need to revise international instruments, which hitherto have focused solely on mercenaries, and calls for effective state control and self-regulation of the PMSC industry.

In Chapter 3 Thembanani Mbadlanyana discusses how PMSCs can effectively be used in peacekeeping missions. He traces the evolution of these operators since the end of the Cold War, particularly their engagement by the United Nations in peacekeeping functions and post-conflict reconstruction duties as a result of its own shortcomings. Arguing for a dynamic relationship between ‘realpolitik’ and ‘moralpolitik’, Mbadlanyana suggests that peacekeeping missions can best make use of PMSCs by adopting a ‘steering and rowing’ conceptual framework. He suggests that the creation of a platform for ‘mature, complementary and mutually beneficiary debates’ is a necessary part of the solution to the complex issue of PMSC involvement in peacekeeping operations.

Chris Kwaja, in Chapter 4, turns our attention to peacebuilding initiatives in West Africa. Within a contextual and conceptual understanding of PMSCs and peacebuilding, Kwaja looks at the ‘pathology of conflicts’ in Liberia, Sierra Leone, Guinea Conakry, Côte d’Ivoire, and Nigeria. Among his recommendations, he urges the Economic Community of West African States to key into the existing UN draft international convention on the regulation, monitoring and oversight of PMSCs. Kwaja argues that effective regulation of PMSCs is likely to make their contribution to the building of capacity in the security sector more valuable.

Concluding the monograph, Kuwali’s Chapter 5 examines the question of accountability (and lack thereof) and the limited regulatory framework for deploying PMSCs in the context of peace support operations. He also poses the question of how PMSCs can perform core peacekeeping functions given the neutrality and impartiality required of peacekeepers. Kuwali argues forcefully that the phenomenon of PMSCs has blurred the principle of ‘distinction’ in warfare, since the employees of these companies can be used as ‘force multipliers’ despite the fact that they are civilians. He proposes that PMSCs legitimately employed in peace support operations should instead be called ‘armed security contractors’ since

the term ‘private military and security company’ cannot be rid of mercenary associations.

In his attempt to answer the question of whether armed security contractors are really needed in peace support operations, Kuwali argues that while such companies are capable of rapidly mobilizing and disbanding without political implications, it is nonetheless risky to employ them in this capacity as they are motivated by business interests and pleasing shareholders, which means they do not necessarily feel the need to serve a higher political purpose or answer to legal obligations. Kuwali points out that within the context of peace support operations states cannot outsource functions to PMSCs that are inherent to government. The operations of these companies, he says, must therefore be confined to strictly regulated and monitored non-military functions.

The ultimate aim of the monograph is to ensure that policy formulation, legal processes and initiatives relating to the involvement of PMSCs in Africa’s peacekeeping efforts lead towards a more peaceful African continent. It is hoped that this African contribution to the debate on private military and security companies will help to shape current thinking among practitioners, researchers, academics and policy-makers.

## NOTES

- 1 See generally, the Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination by the Chairperson/Rapporteur: José Luis Gómez del Prado. General Assembly, 2 July 2010. A/HRC/15/25.
- 2 Ibid, para 32.

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# 1 Unorthodox peacekeepers and responses in Africa

*Azeez O Olaniyan*

## INTRODUCTION

The end of the Cold War had contradictory effects on African security resulting in a series of conflicts and conflagrations in several parts of Africa.<sup>1</sup> The withdrawal of foreign patronage, crushing economic pressures and unsavoury governments produced a mass of rebel movements across the continent. Owing to the ubiquity, frequency and preponderance of conflicts, the ability of states to rise to the challenge has been weakened and private security forces have filled the vacuum. The reality is that private military and security companies (PMSCs) are here to stay. This gives rise to a number of questions that this paper seeks to answer: How have governments and citizens responded to the presence of the PMSCs? What case is there for the involvement of PMSCs in peacekeeping? How should Africa handle the emerging phenomenon of PMSCs?

## THE STATE AND THE PRIVATISATION OF SECURITY

In the classical conception, the legitimate use of force is one of the fundamentals of the state. In the Weberian definition, the state is regarded as the

community of human beings that claim the monopoly of the legitimate use of force within a given territory. In the Hobbesian tradition, the state represents the collective will of the people, who give up their natural inclinations to self-defence in exchange for protection from the state. In the Hegelian analysis, the state represents the culmination of God's will for humanity to purposely secure the life of man. Contemporary theorists of the state seldom depart from these classical perspectives, in which the state derives its essence from securing its people. To achieve this all-important feat, the state creates institutions and structures.

However, particularly since the 1990s there has been a challenge to this important security function of the state, which Avant describes as a mushrooming of private incursion into the provision of security.<sup>2</sup> This has led to two observable scenarios: a challenge to the state's monopoly of force, and a blunting of the divide between the public and private.<sup>3</sup> Does this mean a relapse to a pre-state historical period where security is left in the hands of individuals? Does it mean the deterioration of the state in its discharge of its basic responsibility? Or could the situation actually enhance the powers of the state?

Long before the emergence of nation-states, security was in the hands of individuals. This changed with man's organisation into communities whose purpose was defence. The communalisation of security represented a major step towards the state. One would expect a continuation and consolidation of this trajectory. However, the modern world has seen the invasion of the public realm by the private, which challenges the very existence of the Westphalian notion of the state. Has the state unwittingly abdicated its duty, and does this mean the deterioration of the state is inevitable?

Opinions are divided. Shearer argues that PMSCs can upset the delicate balance between a country's political leaders and its military, which may view employment of outside force as an indication of its own failure.<sup>4</sup> Mbutu contends:

Privatising security implies the ceding of state sovereignty on matters of law and order and in resolving armed conflicts. It means privatising part of the state responsibilities, and the social contract to provide protection to individuals, communities and their properties. The most rational argument for PMSCs is the inability of the state to fulfil its constitutional obligation to provide protection.<sup>5</sup>



### Supporting this view is William Reno:

By privatising security and the use of violence, removing it from the domain of the state and giving it to private interests, the state in these instances is being both strengthened and disassembled. While groups such as these are attempting to reconstruct the state in order to ensure stability and security sufficient for economic activity, they are also removing the state's control over violence and war.<sup>6</sup>

### From the opposing angle, Joakim Berndtsson argues:

The fact that state's control of security is changing does not always imply deterioration. Rather, what is observable is that the privatization of security has under certain circumstances led to increased flexibility and functionality for states such as the USA and the UK.<sup>7</sup>

Perhaps the argument is irrelevant, as private military and security companies have become a reality in the 21st century. They offer their services to both private and public clients, including non-governmental organisations, the United Nations, aid agencies and governments. But why is this so? According to Singer, the roots of the growth of the PMSC industry can be found in three factors: the end of the Cold War, a transformation in the nature of warfare that has blurred the traditional lines between soldiers and civilians, and the general trend of globalisation towards privatisation and outsourcing of government functions.<sup>8</sup> One of the important features of the post-Cold War era was the transition from centralised warfare state to privatised and fragmented security governance, with differing national attitudes to the privatisation of force.<sup>9</sup>

Privatisation of security has become a global reality. The ratio of contractors to active-duty personnel contracted by the US government during the first Gulf War in 1991 was 1 to 50; in Operation Iraqi Freedom, which began in 2003, it was 1 to 10. PMSCs now provide a bigger range of services, including some considered to be core military capabilities.<sup>10</sup> In the 1990s companies such as Executive Outcomes, Sandline International, Military Professional Resources Incorporated (MPRI) and Defence Systems Ltd were frequently contracted.

The reality, therefore, is that the privatisation of security provision has become a global practice and one of the ways by which the state is being

assisted in meeting its basic responsibility of security provision. It can be argued, as Berndtsson does, that rather than weakening the state, the practice of employing private security providers has enhanced its capability. Nowhere is this felt more than in the management of violent conflict. According to Murphy, in recent years, notably in Sierra Leone and Angola, PMSCs have been seen to be effective in ending violent conflict and in bringing about situations where warring factions are compelled to negotiate settlements.<sup>11</sup>

Nevertheless the activities of these companies have led to a contentious debate among experts and commentators about whether they can really be partners in securing peace. In a clarification by Bearpark, director-general of the British Association of Private Security Companies (BAPSC), private security companies are said to engage in four things. First, they offer security and risk management services to other private businesses. Second, they take on tasks that national militaries no longer want to do. Third, they protect post-conflict reconstruction efforts in places like Iraq and Afghanistan. Fourth, they undertake security sector reform themselves.<sup>12</sup>

## PMSCs AND PEACEKEEPING

Can an unorthodox structure, in the form of a private military company, be instrumental to peacemaking? Is there any evidence of this? According to Oldrich Bures, PMSCs have been hired by several governments, agencies, and various non-governmental and intergovernmental organisations to perform peacekeeping tasks that international peacekeepers were not mandated to perform, or were reluctant or incapable of performing.<sup>13</sup> Their involvement in peacekeeping falls into four main areas: logistics support, security and policing, military support and direct combat.

Let us look at some examples. During the crisis in Yugoslavia, the US government hired 45 MPRI personnel as border monitors. The essence of their contract was to enforce an earlier UN arms embargo on Bosnian Serbs in Bosnia-Herzegovina. Meanwhile the same company was hired to train the Kosovar forces for combat operation.<sup>14</sup> While the former assignment was a success, the latter was not. During the crisis in Liberia, MPRI trained the Nigerian peacekeeping forces in the ECOMOG<sup>15</sup> contingent in the effective handling of military vehicles supplied by the US government.

In another development in Bosnia-Herzegovina in 1998, a private military company, DynCorp, was subcontracted by the US government to provide 150 weapon inspectors and verification experts to the Organization for Security Cooperation (OSCE) Kosovo Verification Mission. At about this time, the US administration used PMSCs to run peacekeeping training programmes in Africa, including in the Africa Crisis Response Initiative (ACRI) and the Africa Contingency Operations Training Assistance (ACOTA). In Darfur the US government contracted PMSCs to provide logistical support to African peacekeeping forces.

PMSCs have been used to support UN peacekeeping in activities such as de-mining and water purification, with several registered on the UN Common Supply Database. They have also been used by the UN for transportation, logistics, personnel security and training. International Charter Incorporated (ICI), for example, has been engaged at various times by the UN, and has been contracted by the US and the Economic Community of West African States (ECOWAS) to ferry personnel, troops and supplies into and within Liberia, Sierra Leone and Nigeria to support regional peacekeeping operations.

Another PMSC, Defence Systems Limited has provided both logistical and intelligence support for national contingencies participating in the UN-sanctioned International Force in East Timor, known as INTERFET, while DynCorp has supplied helicopter transport and satellite network communications. In Angola, the UN hired a private firm to provide intelligence on Unita's<sup>16</sup> guns-for-gems trade. Outside of Africa, Sandline was contracted by Papua New Guinea to assist in the re-opening of the Panguna copper mine in Bougainville, once the source of a third of the country's export earnings. Prime Minister Julius Chan claimed that his government had no alternative, as the Australian government had been unwilling to provide support and the Papua New Guinea military was incapable of restoring stability.<sup>17</sup> The US relies on private military firms for logistics, war information, aerial surveillance, and computer and communications systems.<sup>18</sup> PMSCs have often been contracted for de-mining operations, in fact for nearly every UN de-mining mission – with the overall world market reaching US\$ 400 million annually.<sup>19</sup>

It is clear that PMSCs are fast becoming an alternative force for peacekeeping in the world. This means that, among other things, these companies represent huge business opportunities as well as job opportunities for both skilled and unskilled personnel.

## RESPONSES IN AFRICA

Africa, according to David Isenberg, is the continent most closely identified with the modern private security contractor.<sup>20</sup> Nevertheless the African Union (and its predecessor the Organisation of African Unity), as distinct from individual governments, has been opposed to the use of private armies in the management of conflicts and disputes. In July 1977, in the Gabon city of Libreville, members of the OAU adopted the Convention for the Elimination of Mercenarism in Africa, which came into force in 1985. Through this convention, the continental body effectively disallowed the use of unorthodox forces in conflict management. Its intention in the first instance was to protect newly independent states from threats to their sovereignty posed by mercenaries. According to Blain:

[T]he presence of European and American mercenaries, often supporting a particular ideological faction, was a common trend throughout Cold War conflicts in Africa and over the course of innumerable conflicts during and after the Cold War, mercenaries have proven to be a valuable tool for governments that are seeking to preserve their power base, as well as insurgent groups that have sought to overthrow existing regimes.<sup>21</sup>

From the OAU perspective the resolution represented a pragmatic approach to a festering problem. Another reason was that mercenaries were seen as roaming killers offering their skills to the highest bidder. In the words of James Wither, 'mercenary' remains 'a pejorative term associated with the hired killers implicated in coup attempts in Africa in the 1960s and 1970s'.<sup>22</sup>

While this negative image of mercenaries has become the lens through which private security companies are viewed by many in Africa, there are substantial differences between traditional mercenaries and modern-day PMSCs. The traditional mercenary was generally an individual soldier of fortune seeking monetary remuneration for his services, whereas PMSCs are far more differentiated. Baker and Gumede see PMSCs as partners in the restoration of peace, and mercenaries as the antithesis of this.<sup>23</sup> This distinction seems to have been lost on the drafters of the OAU Convention.

While the African Union has been wary of endorsing PMSCs for peacekeeping activities, the same cannot be said of individual African governments. Some governments are known to have approached PMSCs directly for operational help.

For a greater part of its post-colonial existence, Angola was enmeshed in conflict; then, in 1992, Executive Outcomes secured a contract to guard oil facilities near Soyo for the oil companies Gulf-Chevron and Petrangoil. This proved so successful that in 1993, the government of Angola entered into a contract through which Executive Outcomes would help restructure, train and support the Angolan army in its fight against Jonas Savimbi's rebel group, UNITA.<sup>24</sup> After the peace accord of 2002 the number of private military and security companies in Angola multiplied, so that by 2004 it was reported in a study conducted by Ulrike Joras and Adrian Schuster for the Swiss Peace Report that there were over 300 such companies in the country, collectively employing about 35 715 staff, and with a stock of light arms estimated to number 12 087.<sup>25</sup>

In Sierra Leone, from 1995 until January 1997, the government of Captain Valentine Strasser employed Executive Outcomes to help combat the Revolutionary United Front. The company provided military hardware, training and other logistical support, as well as helping government forces to fight the Revolutionary Front.<sup>26</sup> Sandline International was also contracted in a similar fashion. In Nigeria, the government of Olusegun Obasanjo awarded an \$8 million contract to MPRI to audit the Nigerian army.

In São Tomé and Príncipe, a private military group worked against peace by masterminding a coup d'état on 16 July 2003. Many of those involved in the São Tomé coup were former members of the Buffalo Battalion, a mercenary unit created in the 1970s by the apartheid government in South Africa to fight in Namibia and Angola.<sup>27</sup> In Equatorial Guinea there was an attempted coup d'état in 2004, which bore all the hallmarks of a mercenary operation supported by external sponsors. While the Angola and Sierra Leone cases show the advantages of using unorthodox forces for restoring peace, the São Tomé & Príncipe and Equatorial Guinea cases demonstrate the dangers of relying on these forces.

Clearly then, there have been different responses to the emerging phenomenon of PMSCs in Africa. It is worth noting that most such companies operating in Africa are externally based, which means local entrepreneurs have not taken advantage of the business opportunity that they represent.

## POLICY SUGGESTIONS

In conflict-ridden Africa, PMSCs promise to be an alternative source of armed forces for managing conflict. These companies can complement the efforts of an

African Standby Force (ASF) in logistics and transportation. They can also play a role in post-conflict management, such as de-mining, demilitarisation and providing security to refugees.

A first step is for the African Union to recognise the potential of PMSCs in peacemaking, and review the 1977 Convention to accommodate this. At the same time such companies should be restricted to non-combat activities. If PMSCs are to be engaged in peacekeeping in Africa, they should be both based and managed on the African continent. There is therefore a need for African investors to become involved in the business of PMSCs. One of the immediate benefits would be a reduction in unemployment among the youth.

To prevent private operators from working against peace, formal regulation is needed, including a regular review of laws governing PMSCs. Thus there is the need for a regional registration and monitoring system, which should be coordinated by the AU Peace and Security Commission so that, for instance, ECOWAS could handle military and security companies operating in West Africa. Regional monitoring bodies should maintain a database of PMSCs in their region and know which ones to engage if specific supporting functions are required in peacekeeping activities.

## CONCLUSION

One of the major challenges to the prevailing concept of the state is the privatisation of security and peacemaking. While the contemporary world has witnessed several instances of the involvement of PMSCs in peacemaking activities, the response of the African Union has been ambivalent. At the continental level there has been denial that private operators have a role to play in peacekeeping, even though there have been instances where these operators have been accepted at the country level.

Africa can benefit from the use of PMSCs in conflict resolution if these companies play a non-combat role and if there is regional surveillance and registration of such companies. The first step in achieving these aims would be a change of opinion, and this needs to start from the revision of the 1977 Convention on the Elimination of Mercenaries from Africa.

## NOTES

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# 2 The market for peace

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## INTRODUCTION

The role of private military and security companies (PMSCs) in peace operations in Africa has expanded steadily over the last two decades. The services of these companies have been used for peacekeeping missions led by regional organisations such as the African Union (AU) and the Economic Cooperation Organisation of West African States (ECOWAS). In Liberia and Sudan these companies have worked alongside United Nations peacekeepers and also in operations led by non-UN actors working under UN authorisation.

While PMSCs increase capacity and capability in areas such as air transport, protection (armed and unarmed), and troop support, the issue of accountability requires careful consideration. In establishing the foundational building blocks of a state, the question is whether government responsibilities and tasks can legitimately be outsourced. Inseparable from this question is the role of interested third parties in financing these operations.

The UN needs to consider how its agencies will manage their relationship with the private military and security industry in situations where such companies are hired by a third party, such as a government, in support of a regional

organisation within UN-mandated operations. Similarly, regional organisations such as the AU and ECOWAS need to establish a framework for employing and working alongside private military and security companies.

The first section of this chapter provides an overview of peace operations and the PMSC industry and examines the July 2010 position of the UN Working Group on the use of mercenaries in violating human rights and impeding the right of people to self-determination. The second section looks at how the rise of 'lead states', coalitions and regional organisations coincided with the first steps taken by private military and security companies into the realm of privatised peace-keeping. The growth of the peacekeeping market in relation to training and security-sector reform is explored in the next section, titled 'The market for peace'. This is followed by case studies of Liberia and Sudan, and a concluding section that reviews international regulation and offers policy recommendations on the PMSC industry's involvement in peace operations in Africa.

## PEACE OPERATIONS

Peacekeeping emerged in the 1950s as a means of intervention by the UN within the parameters of the Cold War. Although the notion of peacekeeping as such is not included in the UN Charter, as a multilateral concept it suited the interests of both the United States and the Soviet Union.<sup>1</sup> In 1956 the UN Emergency Force in Egypt established the practices of 'observation and interposition' and the fundamentals of 'consent, neutral interposition and moral presence rather than enforcement'.<sup>2</sup> In 1960 the UN sent troops to the Congo where its ONUC mission (United Nations Mission in the Congo) found a country 'politically contested and territorially fragmented',<sup>3</sup> struggling with 'internal divisions, ethnic tensions and secessionist pressures'.<sup>4</sup> The UN intervention raised questions concerning 'host-state consent' and 'interposition' versus 'enforcement'.<sup>5</sup> The ONUC mission foreshadowed the complexity of the large-scale operations of the 1990s as similar challenges manifested themselves in later missions in Rwanda, Sierra Leone, Angola, Mozambique, Somalia, Côte d'Ivoire and Sudan, bringing together elements of peacekeeping, peace-building and peace-enforcing.<sup>6</sup>

Beginning in the 1990s, the UN expanded the scope of its peacekeeping operations beyond the mandate of traditional peacekeeping. In 1992, a report of the UN Secretary-General, known as *An Agenda for Peace*, identified peacekeeping as 'the deployment of a United Nations presence in the field, hitherto with the

consent of all parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well. Peacekeeping is an activity which expands the possibilities for both the prevention of conflict and making of peace.<sup>7</sup> Peacekeeping, together with preventive diplomacy, peacemaking and peace-building, was one activity located within a broader UN repertoire. In 2008 the UN Department of Peacekeeping Operations re-emphasised in its principles and guidelines that peacekeeping also involved activities related to conflict prevention, peacemaking, peace enforcement and peace-building within the context of a new generation of ‘multi-dimensional’ peacekeeping operations.<sup>8</sup>

For its peace operations in the 1990s, the UN began to partner with, or delegate responsibility to, regional powers, coalitions, and lead states. According to Bellamy and Williams (2009) the involvement of organisations other than the UN in expanded peacekeeping mandates suggests that today’s peacekeeping missions,

involve the expeditionary use of informed personnel (police and/or military with or without UN authorization, with a mandate to or programme to: (1) assist in the prevention of armed conflict by supporting a peace process; (2) serve as an instrument to observe or assist in the implementation of cease-fires or peace agreements; or (3) enforce ceasefires, peace agreements or the will of the UN Security Council in order to build stable peace.<sup>9</sup>

Bellamy and Williams distinguish seven types of peacekeeping operations according to their intended purpose: preventive deployments; traditional peacekeeping; wider peacekeeping; peace enforcement; assisting transitions; transitional administrations; and peace support operations.<sup>10</sup>

The increase in opportunities for the private sector to participate in peacekeeping activities results from a combination of factors: the broadening of peacekeeping objectives to encompass both development and security; the uneven capacity of regional organisations such as the AU; and the willingness of lead states to rely on the private sector. These new roles have helped the industry distance itself from the controversial, and now unprofitable, association with mercenarism. The ONUC operation is significant in that it brought the UN into direct contact with mercenaries and established the links between mercenaries, self-determination and national liberation, and the foreign exploitation of natural resources.<sup>11</sup> Decades later, the involvement of private military and

security companies in peace operations indicates the greater legitimacy of for-profit providers of military services.

The 2008 Montreux Document ‘Pertinent international and legal obligations and good practices for states related to operations of private military and security companies during armed conflict’ defines private military and security companies as ‘private business entities that provide military and/or security services, irrespective of how they describe themselves’.<sup>12</sup> The UN Working Group, in its 2 July 2010 report and Draft Convention on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, defines a PMSC as ‘a corporate entity which provides on a compensatory basis military and/or security services by physical persons and/or legal entities’.<sup>13</sup> Recognising that private companies are involved in ‘armed conflict, post-conflict and low-intensity armed situations’, the Working Group indicated that the ‘draft convention specifies that it would apply to all situations whether or not the situation is defined as armed conflict.’<sup>14</sup>

The Working Group also expressed concern that ‘intergovernmental organizations such as the United Nations, the North Atlantic Treaty Organization (NATO), the European Union and others are using the services of PMSCs’, and underscored the need to establish a framework specifying the conditions under which companies could be employed. It recommended considering ‘regional integration organizations as parties in matters within their competence’.<sup>15</sup> The Working Group clearly acknowledged that ‘PMSC personnel cannot usually be considered to be mercenaries under the current international legal instruments’ and stated that it did not seek the ‘outright banning of PMSCs but to establish minimum international standards for States parties to regulate the activities of PMSCs and their personnel’.<sup>16</sup> Thus the report and Draft Convention appear to reflect a new willingness to integrate private companies as legitimate actors in global peacekeeping. As the UN has turned to regional organisations, key states, and coalitions, so these entities have in turn looked to the private sector to play a greater role in global peacekeeping.

## LEAD STATES, COALITIONS AND REGIONAL ORGANISATIONS

Although there have been occasions when the UN (and its agencies) has directly hired the services of private military and security companies, for the most part

the UN appears to have worked alongside PMSCs without having directly contracted their services. Private operators first became involved in peace operations in Africa in 1992 in support of the US-led coalition in Somalia. Five years later, in 1997, the British company Sandline International took part in peace enforcement alongside ECOMOG – the Monitoring Observer Group of the Economic Cooperation Organisation of West African States. Significantly, in both cases peacekeepers operated alongside troops employed by non-UN actors.

Private military and security companies have been directly employed by the UN to provide a number of services. All 18 UN peacekeeping missions underway in 2006 made use of the air transport capabilities of DHL and other companies.<sup>17</sup> The same year the UN spent several millions of dollars on aviation support and armed guards, including weapons and ammunition, in the Democratic Republic of Congo (DRC) MONUC<sup>18</sup> operation.<sup>19</sup> Pacific Architects and Engineers (PAE), a US company, was active in the DRC in 2001, and was subsequently investigated by the UN for overcharging.<sup>20</sup> UN agencies have employed private military and security companies in other areas as well, with the UN High Commissioner for Refugees (UNHCR), the UN Children’s Fund (UNICEF), the UN Development Programme (UNDP), and the World Food Programme (WFP) all having reportedly used private security for protection and to secure aid delivery.<sup>21</sup>

In the aftermath of the genocide in Rwanda the UN seriously considered hiring a private firm for peace-enforcement purposes. The South African company Executive Outcomes planned for a possible intervention in Rwanda while its British counterpart Sandline International approached the US with its own proposal.<sup>22</sup> In 1994 the UN Department of Peacekeeping Operations was required to support the UN High Commissioner for Refugees to secure Rwandan refugee camps in neighbouring Zaire. It was difficult and dangerous to deliver humanitarian assistance to these camps because they were being used by fleeing perpetrators of the genocide. The Department therefore considered hiring the services of a private company to train and support Zairian forces in the camps,<sup>23</sup> and entertained the possibility of using a private firm to protect another UN department, but the UN Security Council rejected these options. In 1995 the UN provided funds for Zaire to deploy its own police personnel.<sup>24</sup> Kofi Annan, the UN secretary-general at the time, later observed: ‘When we had need of skilled soldiers to separate fighters from refugees in the Rwandan refugee camps in Goma, I even considered the possibility of engaging a private firm. But the world may not be ready to privatize peace.’<sup>25</sup> In 1996 the UN and the US discussed the idea

of sending private military and security companies to Rwanda, but there were disagreements about who would assume responsibility for the costs.<sup>26</sup>

The 1992 Somalia intervention is notable as the first instance of large-scale reliance on a private company. As part of Operation Restore Hope, the US company Brown and Root Services (BRS) provided services ranging from laundry to camp maintenance for US troops. BRS was present in Mogadishu almost as soon as the US first set foot in the country and remained there until the departure of the last US soldier, becoming during its stay the country's biggest job provider.<sup>27</sup>

The BRS contract in Somalia illustrates the complexity of contractor relations with their employers and other actors in peace operations. For example, BRS supported US troops as part of the Unified Task Force (UNITAF), an international coalition under US command with a UN mandate meant to reinforce the first UN operation in Somalia (UNOSOM I). The nature of the tasks performed by the company shows the potential range of outsourced support roles within a peacekeeping operation. Singer (2001) gives one example of a contracted BRS mortician that ensured that the bodies of fallen UN peacekeepers were cared for before being repatriated.<sup>28</sup> In Haiti and Rwanda the company was also involved in UN missions.<sup>29</sup>

The PMSC intervention in Sierra Leone proved more problematic in a number of ways. The government of Sierra Leone in 1992 contracted the South African company Executive Outcomes. Five years later, in January 1997, the agreement was terminated as required by the Abidjan agreement. When renewed insurgency forced newly elected President Ahmad Tejan Kabbah into exile in May 1997, he turned to Sandline International in an agreement that reportedly involved British officials. Sierra Leone's ambassador to the UN explained that 'the legitimate government of Dr Kabbah did what it had to'.<sup>30</sup> The 'Arms-to-Africa' controversy centred on Sandline International's apparent violation of the UN arms embargo in the region and the complicity of British officials. It also brought into focus the growing role of private operators in African conflicts. The tacit acceptance by West African states of Sandline International's presence alongside ECOWAS appeared to legitimise the industry's role in peacekeeping missions in Africa.<sup>31</sup>

These interventions by private operators were problematic for several reasons. Through associated companies and shared personnel, Sandline International and Executive Outcomes appeared to be connected to each other; moreover, their contracts were reportedly linked to Sierra Leone's extractive industries



in that payment was to be made through mining concessions. The firms were hired directly by the government of Sierra Leone, indicating that any regime with sufficient means and/or extractable resources could be in a position to hire the military strength needed for its particular purposes.

These underlying issues of accountability and open availability of combat services led to the demise of the briefly resurrected model of the freelance private army. Most firms, and certainly large multifunctional companies with the capacity to support a UN peace mission, complied with the market demands of countries such as Sierra Leone, thus affirming their role as foreign policy instruments of governments that had been pressed to intervene but were aware of the expense and political risk.<sup>32</sup> Instances of freelance activities, says Reno (2009), 'incur the wrath of officials in powerful countries and serve as negative examples to firms that seek to establish long-term markets for their services'.<sup>33</sup> Overstretched by military commitments around the globe, the US became a major employer of PMSCs. According to former US deputy assistant secretary of defence for African Affairs, Theresa Whelan,

we wanted to support [peace] operations [in Africa], however we realized that our forces were tied down elsewhere around the globe and they might not be available for the long-term deployments. ... Consequently, contractors began to play a larger and larger role particularly in the logistical support of sub-regional peace operations.<sup>34</sup>

Thus the US, along with other countries, discovered that in relation to the UN or regional organisations leading peace operations, it could promote the use of PMSCs in cases where it was unwilling or unable to send its own military personnel. As a result, private firms have since been employed to support regional peacekeeping efforts, such as those of ECOWAS, under contract to particular governments which, nominally, are not involved in the operation.

In 1994 BRS moved from its contract with the Somali government to a logistics and supply contract in Rwanda.<sup>35</sup> The UN and ECOWAS have relied on International Charter Incorporated (ICI) for transportation services in Nigeria, Sierra Leone and Liberia.<sup>36</sup> According to ICI vice president, Brian Boquist,

In West Africa and elsewhere, we have worked closely with international peacekeeping forces on behalf of the US government. This 'proxy peacekeeping'

strategy has saved the United States millions of dollars while effectively pursuing peaceful resolutions that save lives and promote democracy.<sup>37</sup>

In 2002–2003 the US contributed to the UN Operation in Côte d'Ivoire (UNOCI) by arranging for the transfer of arms through Pacific Architects and Engineers.<sup>38</sup> Both PAE and Dyncorp operated in Burundi and Sierra Leone during the same period.<sup>39</sup> In 2003, a US-based 'consortium' of PMSCs offered help to 'beleaguered peacekeepers' in the DRC: 'There is another solution. A number of for-profit companies is [sic] offering the most comprehensive package yet assembled to assist UN peacekeeping. In the absence of more efficient UN ... the status quo is a death sentence for millions.'<sup>40</sup>

Ultimately, however, accountability is compromised when private firms are beholden to a third party. Institutional ties to Western governments that are responsible for the agenda and payment of the PMSC imply a convoluted chain of interests and accountabilities. When UN Security Council members take the lead in peace missions, such as those in Somalia and Rwanda, their deployment may be perceived as shifting the balance of power in favour of a particular outcome in line with their own interests. Likewise, PMSCs may deflect attention from the intervention of foreign powers. Most recently, DynCorp has operated under a US State Department contract to provide support to the AU Mission in Somalia (AMISOM).<sup>41</sup> These examples illustrate the difficulty in differentiating between direct PMSC support for peace missions, and indirect PMSC involvement in the related, complementary and often integrated work undertaken by other agencies and actors within these missions.

## THE MARKET FOR PEACE: PEACEKEEPING TRAINING AND SECURITY SECTOR REFORM

Multi-functional peace operations in conflict and post-conflict environments involve a wide spectrum of military, civilian, state, and non-state actors,<sup>42</sup> many of them working in parallel or directly with UN agencies. Such operations need to maintain accountability and reporting structures in relation to foreign donor governments or international organisations. The re-orientation of PMSCs towards a 'more accessible security market' has allowed firms to offer services traditionally associated with development and to operate in conjunction with non-governmental organisations (NGOs).

Some NGOs have shown a willingness to see private military and security companies as legitimate actors. For example, Peter Gantz of Refugees International has written:

If nations with first class militaries refuse to put their troops in harm's way in remote locations, and if the UN is saddled with troops from developing nations that are not up to the task, then perhaps the UN should hire the private sector to save the day.<sup>43</sup>

Thus, in conflict or post-conflict peace operations, where actors evaluate their own security needs and those needs necessary for the completion of their mandate, the PMSC industry has found a market.

It was during the 1990s that private companies first became integrated into international efforts to rebuild countries, in this case countries of the former Yugoslavia. Here, in contrast to the involvement of Executive Outcomes and Sandline International in Sierra Leone, private companies do not appear to have engaged in direct combat operations but rather to have acted in a support role for the US military. In 1995, the 40 000-strong NATO-led Implementation Force (IFOR) replaced the UN Protection Force, highlighting both the growing role of regional organisations and the UN's focus on policing and security sector reform. The UN deployment in Bosnia and Herzegovina in 1995 included three military officers and 2 000 civilian police.<sup>44</sup> Logistics and support for the 20 000 US military personnel in IFOR were outsourced to BRS via a contract worth US\$ 546 million. A few years later, in 1999, the company was tasked with building camps for refugees and with the construction, maintenance and operation of two US military bases with costs estimated at US\$ 1 billion.<sup>45</sup>

Another PMSC, the US-based DynCorp, was contracted to operate as part of the UN Civilian Police International Task Force in Bosnia and Herzegovina and ensure the presence of '150 weapons inspectors, verifiers and observers' in Kosovo in 1998 as part of the Organisation for Security and Cooperation in Europe Kosovo Verification Mission. In Serbia, 45 employees of the US-based company Military Professional Resources Incorporated (MPRI) monitored the border with Bosnia-Herzegovina.<sup>46</sup> In 1995, MPRI trained the Croatian military prior to its 'Operation Storm' and was also responsible for monitoring improvements with regard to Croatia's admission to NATO's Partnership for Peace.<sup>47</sup> Also in 1995, MPRI was hired by Bosnia for a 'train and equip' programme brokered by the

US but financed by Saudi Arabia, Kuwait, Brunei, the United Arab Emirates and Malaysia.<sup>48</sup>

Multi-dimensional peacekeeping opened specialised peacekeeping markets. For instance private companies found a new and lucrative market in the removal of landmines.<sup>49</sup> The majority of UN operations have used contractors for de-mining services.<sup>50</sup> Governments that have funded de-mining and other services in conflict areas appear to view PMSCs and NGOs as equally capable.<sup>51</sup> Both the UK and the US have relied on private operators for de-mining and 'awareness and rehabilitation training'. The de-mining market may be worth up to US\$ 33 billion, while public accolades solidify the legitimacy of PMSCs as 'human security providers'.<sup>52</sup>

Training in peacekeeping work is another (lucrative) area, which the PMSC industry claims as one of its contributions to global peace and security, primarily in Africa. Peacekeeping training has been integrated into wider efforts to reform the security sector. US State Department initiatives incorporate training in democracy, good governance, human rights and peacekeeping principles.<sup>53</sup> In 2010, a DynCorp chief executive officer declared: 'We are honored to continue our work supporting the State Department in contributing to peace and stability in Liberia.'<sup>54</sup> In providing this training PMSCs play a direct role in peace missions, since enhancing regional capacity while reducing outside interventions is one of the aims of African peace and security initiatives.

PMSCs have been involved in US-led peacekeeping training in Africa since 1994. Two organisations that trained troops for deployment in UN missions, the 1994 African Crisis Response Force and its 1996 successor the African Crisis Response Initiative, outsourced significant aspects of their work.<sup>55</sup> Trained UN troops were deployed in Liberia as part of the ECOMOG contingent, where they in turn received logistical support from Pacific Architects and Engineers. The 2004 African Contingency Operations Training and Assistance initiative and the 2005 Global Peace Operations Initiative included the financing of peacekeeping centres in Ghana, Mali and Kenya and contributed to the AU African Standby Force. Several US private military and security companies were contracted by the State Department to deliver these programmes.

US State Department peacekeeping training is part of the larger US security strategy in Africa. Funding provided through the Peacekeeping and Operations Programme in 2010 included support for the following: the Trans-Sahara Counter-Terrorism Partnership; the East Africa Regional Strategic Initiative; the

Comprehensive Peace Accords in Sudan; security sector reform in Liberia and the DRC; the Africa Conflict Stabilisation and Border Security Programme in the Great Lakes and Mano River regions, the Horn of Africa, Chad and the Central African Republic; as well as US\$ 67 million for the AU mission in Sudan. Along with other State Department activities such as Foreign Military Financing, International Military Education, International Narcotics Control and Law Enforcement, Non-proliferation, Anti-Terrorism, De-mining and AFRICOM (the US Africa Command), this US funding represents a significant investment in peacekeeping and in ensuring a US military presence in Africa.<sup>56</sup> In September 2009, Pacific Architects and Engineers, DynCorp, Protection Strategies Inc. and AECOM, were each awarded 5-year contracts with the US State Department. In January 2010 DynCorp's work in Liberia was extended in a US State Department contract worth up to US\$ 20 million, which included maintenance and operation of military facilities and provision of transportation, power and water-related services.<sup>57</sup>

## HYBRID PEACEKEEPING IN LIBERIA AND SUDAN

Liberia and Sudan offer examples of a new type of hybrid peace mission where private military and security companies play an important role alongside other actors within regionally-led operations. The role of DynCorp and Pacific Architects and Engineers in Liberia marks the first instance of a foreign power and private companies working with the UN to restructure a sovereign nation's military and police capabilities.<sup>58</sup>

The UN Mission in Liberia (UNMIL) came into operation following the signing of the Comprehensive Peace Agreement in August 2003. As part of the security reform stipulated by the agreement, a UNMIL contingent of 15 000 was tasked with police-sector reform while the US took responsibility for military reform.<sup>59</sup> In 2004 the US State Department requested a report from DynCorp outlining the requirements for military reforms, and later selected the company to implement its proposal. PAE was contracted to upgrade military installations and train Liberian officers. The US has also engaged DynCorp for its contribution to the UNMIL civilian police, and PAE has worked with the UN Police and has also trained medics, military police, engineers, trainers and officers. Both DynCorp and PAE eventually handed over their operations to the Liberian Ministry of Defence in 2010.<sup>60</sup>

A 2009 report by the International Crisis Group noted that DynCorp had achieved success in a number of areas. The company's initial tasks involved

managing payment procedures for an extensive and unanticipated demobilisation of over 10 000 individuals and the establishment of training facilities. The payment process was reported to have been complete, unbiased and inclusive; the training was also reported to have been successful despite a delay from January 2006 to June 2007 (while the delay was not caused by DynCorp, it resulted in the company spending a disproportionate sum on inactive contractors).<sup>61</sup>

As the contract was never made public, the increased costs resulting from delays remained unspecified.<sup>62</sup> But the problem of how to deal with these increased expenses exposed an underlying issue, namely the accountability structures for PMSCs. The secrecy of the contracts was all the more striking given the transparency demanded of Liberia by the international community. The same report criticised the governmental oversight for its inefficiency and lack of detail in the statement of work.<sup>63</sup>

The issue of transparency would need to be addressed at the governmental level. DynCorp, as a private company, is legally accountable to its employer, in this case the US State Department.<sup>64</sup> Lack of transparency could jeopardise the success of the training programme if it left Liberian officials ill-equipped to oversee an army trained by foreign advisors. This could be detrimental to the establishment of military accountability and transparency.<sup>65</sup> Worryingly, in the 1980s the US and Israel supplied military advisors and arms to Liberia, leading a prominent former Liberian official to point out: '[E]very armed group that plundered Liberia over the past 25 years had its core in these US-trained soldiers.'<sup>66</sup>

DynCorp and Pacific Architects and Engineers are key actors in the deployment of both the AU Mission in Sudan (AMIS) and the AU-UN operation in Darfur. Already in 2003, the US State Department had contracted DynCorp to transport Sudanese delegates in Kenya during the negotiations for the Comprehensive Peace Accords.<sup>67</sup> In 2004, the US State Department allocated US\$ 20 million in private contracts to AMIS in preparation for the arrival of the AU contingent. DynCorp and PAE were tasked with services related to transport, logistics, communication and housing. PAE also furnished personnel for human rights monitoring through a Civilian Protection Team.<sup>68</sup> DynCorp had US State Department African Peacekeeping contracts in Sudan as part of the Assessment and Evaluation Commission monitoring the government of Sudan and the Sudan People's Liberation Movement/Army for compliance with the 2005 Comprehensive Peace Accord, together with Norway, Italy, the Netherlands and the UK. Its Sudan

General Officers Course offered training for Sudan People's Liberation Army officers and assisted the Government of Southern Sudan, while the Sudan Security Sector Transformation initiative supported the Sudan People's Liberation Army in terms of management capacity, operations, civil engineering, equipment maintenance, communications and vehicles.<sup>69</sup>

The issue of accountability surfaced again when it emerged that DynCorp had subcontracted aspects of its commitment to smaller companies. One of these firms was accused by the UN of delivering weapons to Al-Shabaab, a Somali group cited by the US as being a global terrorist group. Another company subcontracted by DynCorp was Badr Airlines, which was employed as a carrier for peacekeepers in Sudan despite the fact that this violated the international arms embargo. The relationship of DynCorp with these firms is troubling, given its key role in peacekeeping efforts in the region.<sup>70</sup>

In another example PAE tried to obtain a training and mentoring contract with the Liberian army that included subcontracting to MPRI. The contract was not awarded, but once again this example raises questions about the accountability and cost-effectiveness of outsourcing.<sup>71</sup>

## CONCLUDING REMARKS: PEACE MISSIONS, MERCENARIES AND PMSCs

During the 1960s and 1970s the UN General Assembly and the Organisation of African Unity (OAU) interpreted the presence of mercenaries in Africa as a threat to national self-determination and national liberation.<sup>72</sup> International law covering this issue was subsequently embodied in the OAU Convention on the Elimination of Mercenaries in Africa (drafted in 1977, binding as of 1985), the Geneva Convention (Article 47 Protocol 1 of 1977) and the UN International Convention against the Recruitment, Use, Financing, and Training of Mercenaries (drafted in 1989, binding as of 2001).<sup>73</sup>

Several problems have become manifest in applying these legal instruments to private military and security companies. One is a lack of motivation on the part of organisations such as the UN, the AU and regional economic communities, as well as individual nations, to effectively implement these instruments. Other problems are the exclusion of foreign advisors; the allowance made for foreign enlisted personnel; and the employment of mercenaries by a sovereign state.<sup>74</sup> In short,

these conventions did not foresee that even states that were signatories to these agreements would hire PMSCs to fight in their civil wars and that powerful states would use them in their foreign interventions, including in those defined by the UN and other international organizations as peacekeeping missions.<sup>75</sup>

In the 1980s, a UN special rapporteur examining the question of mercenaries, consistently framed the issue as a violation of the right of states to self-determination. In 2005, a UN Working Group took over from the rapporteur with a mandate to continue scrutinising private military and security companies. A PMSC industry coalition reacted by declaring:

[PMSCs] are frequently employed by UN member states and the UN own [sic] entities, we strongly recommend that the UN re-examine the relevance of the term 'mercenary'. This derogatory term is completely unacceptable and is too often used to describe legal and legitimate companies engaged in vital support operations for humanitarian peace and stability operations.<sup>76</sup>

Given the widespread employment of these companies, the issues of state control and international regulation have acquired a new urgency. The options tabled include self-regulation, national legislation, and a revised international framework. However all of these are made difficult by the transnational nature of such businesses, which contract globally; establish subsidiaries; and subcontract and deploy personnel in any number of countries, often in countries lacking the institutions or legal frameworks to oversee their activities. At the same time, however, the UN and regional organisations in Africa are faced with increasing pressure to improve their own operations. Short-term outsourcing funded by a third party may appear to be a convenient solution that is acceptable to the states to which these companies are contractually beholden.

As for-profit entities, private military and security companies will necessarily seek to expand their markets. As long as security needs are not addressed, the market for these companies in 'peacekeeping' operations promises to continue. But given the role that PMSCs have played in Liberia and Sudan, their involvement in such missions needs further scrutiny. If human security is to be achieved, any form of intervention must remain determinedly focused on Africa's long-term security needs, as defined by Africans themselves.



As shown in the case of Sudan, the discourse associated with the private security industry ‘places the responsibility for preventing genocide on private actors and presents those who try to suggest alternatives as morally irresponsible’.<sup>77</sup> The industry has become a ‘source of authority’ and PMSCs can exert considerable influence on the orientation of troops trained in peacekeeping and security sector reform programmes. This development means a risk of depoliticisation, whereby decisions are reached privately rather than through an open political process. The status of PMSCs as security experts gives them a privileged position from which to disseminate their own cultural outlooks regarding governance and society,<sup>78</sup> possibly precluding alternative perspectives.

While the nature of the UN makes the reaching of consensus on international legislation a cumbersome process, it is nonetheless imperative that the larger policy considerations are carefully considered if African states are to harness the potential contribution of these companies and limit the negative repercussions.

Our first policy recommendation is that Africa’s regional organisations continue working towards a comprehensive framework governing the use of private military and security companies. Such a framework would allow regional organisations to benefit from the presence of PMSCs while ensuring that the companies are solidly aligned with the AU objectives of peace and human security on the continent. Our second, closely related, policy recommendation is that African states formulate national regulations that support a common continental approach.

Finally, pressure must be maintained to eliminate the demand for the services of PMSCs by means of African-led human security efforts.

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# 3 Moralpolitik and realpolitik

## Seeking common ground on the use of private military and security companies

*Thembanani Mbadlanyana*

### INTRODUCTION

For Africa, the end of the bipolar world of the Cold War led to a proliferation of intermittent armed and violent intra-state, nationalist and ethnic conflicts.<sup>1</sup> In many cases these conflicts erupted due to state fragility and a security vacuum created by the withdrawal of the superpowers from their strategic African spheres of influence.<sup>2</sup> State failure became an inevitability in some countries, especially in the Mano River Union region (Sierra Leone, Liberia and Guinea).<sup>3</sup> Contributing to state failure in Africa was the indifference of former allies and the paucity of overseas development assistance.

During the Cold War, an era of hyper-militarisation in Africa, many countries were of strategic interest to both the Western and Eastern blocs. Foreign assistance was provided for ideological and political reasons,<sup>4</sup> not only as a tool to respond to socio-economic challenges, but also as a way of coping with the political climate of the time. As described by Sending, overseas assistance and security were considered to be separate matters, so foreign assistance was 'only indirectly tied to issues of security in the form of guaranteeing political support and preserving spheres of influence of the two super-powers'.<sup>5</sup> The primary focus

of the policy tools of that assistance was on the balance of power between the West (United States) and the East (Soviet Union), and on securing the political loyalty of developing countries, rather than specifically on reducing the potential for violent conflict through institutional capacity building and sound conflict management mechanisms.<sup>6</sup>

The post-Cold War period was a dismal phase of declining prosperity, increased insecurity in Africa, astounding change and incomprehensible complexities. It was also a time when the United Nations' peacekeeping deployment on the continent saw a gradual increase. As Rochester observes, 'since the UN first deployed a peacekeeping mission in 1948, no decade has seen more UN peacekeeping involvement than the 1990s'.<sup>7</sup> Peacekeeping in Africa in this period accounted for more than 70 per cent of the UN's personnel and resources. The increased UN peacekeeping deployment went hand in hand with the growing 'pluralisation'<sup>8</sup> and/or privatisation of security – what Harker views as a recent tendency in modern and post-modern warfare.<sup>9</sup>

What factors can help us to analyse and understand that growth in the new privatised market for force? The issues often cited are, firstly, demand and supply issues that emanated from the fall of the Berlin Wall<sup>10</sup> and the growth in unemployment due to military downsizing and an abundance of easily available security expertise as a result of that downsizing; secondly, a perception that the UN's traditional peacekeeping was failing to come to terms with the realities of the changing world; thirdly, the growing discontent with the UN failures in the mid-1990s in Srebrenica, Bosnia-Herzegovina, Rwanda and Somalia; fourthly, the reluctance of Western governments to become enmeshed in conflicts that did not directly affect their strategic interests and trade-offs; and lastly, the weakening of state structures post-Cold War and the associated state fragility and security vacuum mentioned above. Of equal importance was the fact that private military and security companies (PMSCs) and other non-state actors successfully interpreted and projected the UN's peacekeeping challenges and African states' incapacities and insecurities as market issues to be exploited.<sup>11</sup>

With a long list of UN shortcomings, the idea of outsourcing UN peacekeeping functions and post-conflict reconstruction duties to private actors began to gain ground amongst private security practitioners and experts,<sup>12</sup> who advocated and lobbied for a paradigm shift towards privatised peacekeeping. Framing their argument against the core functions of UN peacekeeping<sup>13</sup> (which to them were marred by deficiencies), the proponents of the privatisation argument

recommended that some 'soft' and 'hard' peacekeeping functions be outsourced. The 'soft' functions included logistics support, training, intelligence gathering, advisory services, broad security sector reform, aviation services, de-mining, and base or infrastructure protection. 'Hard' functions that 'warranted outsourcing' included combative or warfare activities.

As discussed in the preceding chapters, some aspects of African peacekeeping<sup>14</sup> have become privatised with the deployment of PMSCs in various peacekeeping missions. The UN Mission in Liberia (UNMIL) and the UN-AU Hybrid Mission in Darfur (UNAMID) are the best-known examples.<sup>15</sup> These dramatic changes have given rise to new questions. Should peacekeeping remain the exclusive responsibility of the UN? Or should it be contracted out to commercial security vendors, given that some beleaguered African governments, as well as the UN itself, and its agencies, are already loyal customers of PMSCs? Is there a need for reform and clearer articulation of the doctrinal foundations of UN peacekeeping? The question also arises as to whether PMSCs are simply 'old wine in new bottles', i.e. new versions of mercenaries, even if these contracted forces have turned their backs on the ways of notorious mercenaries of old, such as 'Mad Mike' Hoare. Can the UN and the AU actually reap some rewards by using PMSCs to deliver key peacekeeping functions on their behalf? And lastly, is there a need to revise the existing regulatory frameworks given that non-state actors are involved in the delivery of what used to be a public good, namely security?

In relation to these questions the international community is torn between moralpolitik (what they perceive to be right) and realpolitik (the realities on the ground). Regarding moralpolitik, the involvement of private military contractors has had what Gumedze views as 'a significant bearing on both International Humanitarian Law (IHL) and International Human Rights Law (IHRL)'.<sup>16</sup> Regarding realpolitik, the international community has had to respond to UN deficiencies by weighing up the interests and strategic considerations of nation states against those of powerful non-state actors operating in the new market for force.

Whatever opinion one might have about private military and security companies, they are an integral part of our post-modern global security architecture and wishing them away is not the solution. A condemnatory approach will simply drive these operators underground and produce a new type of mercenary, which could further jeopardise the application of international legal instruments.

The solution is surely the creation of a platform for mature and mutually beneficial debate.

On the one hand, the international community should find pragmatic and innovative ways of tapping into the knowledge, resources and expertise of companies supplying private security and military services, but without loosening regulatory frameworks. PMSCs are notorious for their lack of compliance with international humanitarian human rights law and national regulatory frameworks. Deployment of their perceived expertise should develop in parallel with the building and strengthening of an independent layer of adequate international, regional and national regulation, and enforcement of this regulation should exist alongside PMSCs' self-regulation.

This chapter looks at the involvement of PMSCs in African peacekeeping missions and puts forward some hypotheses about the use of these companies. I propose a 'steering and rowing approach to peacekeeping' (SRAP) as a way of understanding the relationship between the UN and non-state actors in peacekeeping operations in general, and in African peacekeeping in particular. The central point of SRAP is that African peace and security cannot benefit from the current relationship between the UN and AU and non-state actors, because these relations are informed by a reductionist approach (on the part of a segment of the international community) that focuses primarily on what is *not* working rather than on what is working or *might* work. This means a vastly limited scope for mutually beneficial relations and the realisation of goals. From the standpoint of SRAP, this reductionism is most troubling.

SRAP is important in several ways: firstly, it attempts to close the lacunae in the private security literature; secondly, it provides policy makers and practitioners with context-relevant conceptual tools of analysis that can help them to change their mode of thinking about private security issues; and thirdly, it provides researchers and experts in the field with an additional intellectual framework (susceptible to empirical verification) for viewing the involvement of PMSCs in peacekeeping operations.

This chapter starts by exploring key concepts and offering some conceptual clarifications in relation to debates on private security. It then discusses the involvement of private military and security companies, and the intellectual debates surrounding them. Next is a look at regulatory issues and a discussion of the suggested SRAP framework, and finally some key recommendations.

## PUTTING KEY CONCEPTS INTO PERSPECTIVE

### Security and stateness

In the international security and legal discourse from the late 1990s to the early 2000s, the idea of human security dominated scholarly security studies. At the same time private security resurfaced as a fashionable concept. These trends brought into focus the limitations of modern nation states or what Garland calls 'the myth of state sovereignty'.<sup>17</sup>

Before the Cold War period, security was seen as the *raison d'être* of a state. Writing in the 19<sup>th</sup> century, Max Weber viewed the state as that 'entity with the monopoly over the legitimate use of force', implying that security is a defining feature of the state and its provision at the heart of the state.<sup>18</sup> Can that be said of today's notion of security? Boege, Brown, Clements and Nolan<sup>19</sup> argue that today the Westphalian state 'hardly exists in reality beyond the OECD [Organisation for Economic Cooperation and Development]<sup>20</sup> world. ... many of the countries in the "rest" of the world are political entities that do not resemble the model western state.' Hence the state is no longer the guarantor of security, and security is no longer a public good for everyone's benefit. Instead it has been turned into a saleable commodity for the enrichment of the seller and is bought by the willing buyer.<sup>21</sup> Further, the security sector is now a 'pluralized' and contested terrain involving not only state actors but a multiplicity of non-state actors, including private military and security companies.

It is tempting to argue that, where it existed, the Westphalian state is now almost extinct. However, nation states have been re-asserting their authority over the use of force through regional, continental and supranational bodies such as the UN, the AU and the European Union (EU). Recent initiatives, like the Swiss Initiative on PMSCs, which culminated in the Montreux Document, clearly show the renewed commitment of nation states to reclaiming their position in the governance of collective life, and security in particular.<sup>22</sup>

### PRIVATISATION OF SECURITY

The roots of the new trend toward the privatisation of security over the past two decades can be summarised as: radical changes in state-citizen relations; the marketisation of public spaces; the emergence of market states that treat their

citizens as clients or customers; weakened state institutions; and a demise in state centrality. As Small rightfully points out, a growing and widely accepted trend internationally is the increasing 'commodification' and privatisation of all public goods, including security.<sup>23</sup> To Small, the commodification of violence and the outsourcing of state functions typify the steady erosion of the state monopoly over all forms of organised violence.

However, the application of this assertion to post-colonial Africa can be misleading if accepted without scrutiny. In Africa a reading of events simply in terms of an erosion of a state's monopoly over force is not always useful. During the process of state formation in some post-colonies 'the security sector was politicised and the relationship between police, the military and the political elite became an inappropriately intimate one, blurring the distinction between national security and regime security'.<sup>24</sup> In most such cases the monopoly over the use of force was virtually subcontracted to an informal group of presidential associates. More than fifty years after the independence of many African colonies and twenty years since liberation movements became ruling parties, this unfortunate trend continues unabated. To qualify Small's assertion, an erosion of state monopoly by private security vendors is taking place, but this can only be said of situations where the state actually had absolute authority over the delivery of security as a public good. The spreading trend of contracting out state responsibilities, both in the OECD countries and the global South, is a tacit acknowledgement of a capacity gap in state machinery, a gap that private actors are ready capitalise on.

The transfer of ownership and responsibility for service delivery from the public to the private is a relatively new development in the history of nation states. Privatisation is a Western construct, closely linked to 1980s shifts in the economies of the developed world. Privatisation implies formal and institutionalised arrangements between the state and private actors, in this case military and security companies. These companies are in effect service providers on behalf of the state and intermediaries for the state. The beneficiaries are the citizens of a state. As in sectors such as healthcare, privatisation in the security sector is relatively new. However, what is not new is the existence of companies offering private security services. According to Small (2006), 'their involvement in provision of security is not a novelty on the international security landscape, it has undergone many changes, permutations, and alterations over the centuries but it still exists in one form or another'.<sup>25</sup> Small's argument

is supported by Holmqvist (2005), who traces the history of private military services to ancient times. States as diverse as ancient China, Greece, Rome, the Italian city states of the Renaissance, and Victorian Britain, were dependent on contracted forces, as were most of the European forces during the Thirty Years War of 1618–48.<sup>26</sup>

Nonetheless, a distinction needs to be made between the private security providers of the 14<sup>th</sup>–19<sup>th</sup> centuries and those of the 21<sup>st</sup> century. Contemporary providers, organised into legal entities, offer an array of services to countries, individuals, multinational corporations, aid agencies and the UN. These include armed guarding of oil plants and buildings, protection of people and property in both stable and unstable situations, escorting of humanitarian aid organisations in missions, advisory services, intelligence gathering, de-mining and demobilisation, disarmament, rehabilitation and re-integration in post-conflict countries (bundled together as DDRR processes), as was done with UNMIL. Today's private security providers have adopted a more corporate posture, with their business activities determined by slogans like 'the 3 Es' (efficiency, effectiveness and economy). This is what characterises the difference between 14<sup>th</sup>–19<sup>th</sup> century and the 21<sup>st</sup> century private security providers. It is the 21<sup>st</sup> century private security providers that bring us to the current debate about the role of mercenaries, private military companies and private security companies.

While much has been written about mercenaries, and private military and security companies, there remains a lack of clarity about the meaning of various terms used to describe such companies (and their employees). Common referents for mercenaries are 'contractors', 'dogs of war', 'guns for hire', and 'soldiers of fortune'. Are PMSCs any different? Despite specific definitions, there remains a lack of distinction between the terms 'mercenary', 'private military company' and 'private security company'.<sup>27</sup>

## Mercenaries

At a generic level the hiring of private armies or foreign soldiers is known as 'mercenarism'. This is when, for personal financial gain, foreign forces or individual soldiers sell their labour and military services to the highest bidder in a conflict, or on the open market.<sup>28</sup> Gheballi defines mercenarism as 'the practice of foreign soldiers freelancing their labour and skills to a party in conflict for fees higher and above those of soldiers of the state in conflict'.<sup>29</sup>

### Nathan's definition of a mercenary is:

[A]ny 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.<sup>30</sup>

Apart from being recruited for armed conflict, mercenaries may be hired for criminal purposes such as 'destabilisation of legitimate governments, terrorism, trafficking in persons, drugs and arms and any other illicit trafficking, sabotage activities'.<sup>31</sup>

Looking at the history of mercenaries in Africa, Singer argues that shortly after independence, post-colonies' experience of mercenaries became negative when these units directly challenged a number of nascent state regimes, as well as fought against the UN during the UN Operation in Congo (ONUC) from 1960–1964.<sup>32</sup>

The 1960s 'coup spree' by mercenaries underscored the need for the development of legal regimes that would 'delegitimise' mercenarism and guard against threats to state sovereignty. Different international, regional and national legal frameworks were developed, including Additional Protocol I to the 1949 Geneva Conventions (1977), the OAU Libreville Convention for the Elimination of Mercenarism in Africa (1977), the UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989), and the recent South African Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act No. 27 of 2006.

All these international legal instruments provide a comprehensive legal definition of a mercenary. Ghabali states that in particular, Article 47 of Additional Protocol I defines the mercenary through a set of six cumulative elements, qualifying him [her] 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; e) is not a member of the armed forces of a party to the conflict; and f) has not been sent by a state non-party to the conflict on official duty as a member of its armed forces.

The OAU Convention Articles (1), (2) and (3) go further to describe 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 or agency.<sup>33</sup> Despite the prohibition of mercenarism through established legal instruments, mercenary activities persist. An example is the 2004 attempted coup in Equatorial Guinea, sponsored by Mark Thatcher, which aimed at overthrowing the president. This was reminiscent of the old-style mercenarism of the 1960s, where immediate personal financial gain was the main motivation, and is distinguishable from the *neo-mercenarism* that military and security companies are accused of today.

Due to its past and recent history, today, the term ‘mercenary’ is a ‘loaded, subjective one, carrying lots of emotional baggage and connotations ... it is a pejorative term and no government or non-state actor wants to be associated with it and for this reason mercenarism is prohibited outright’.<sup>34</sup>

## Private military companies

Defining private military companies (PMCs) is challenging, because there is a blurring of roles between PMCs and private security companies (PSCs). And unlike the word ‘mercenaries’, the term ‘private military company’ does not exist within any current international legislation or convention.<sup>35</sup> Without these nuances, a private military company could be defined as a firm that provides international services traditionally provided by national militaries. Unfortunately, however, the term has become broader and more complicated. The following general definition of a private military company is offered by Caparini and Schreier:

[A] company that provides, for a profit, services that were previously carried out by a national military force, including military training, intelligence, logistics, and offensive combat, as well as security in conflict zones.<sup>36</sup>

The same authors also offer a broader definition:

[A] registered civilian company that specializes in the provision of contract military training (instruction and simulation programs), military support operations (logistic support), operational capabilities (special forces advisors, command and control, communications, and intelligence functions), and/or military equipment, to legitimate domestic and foreign entities.

According to Small (2006) private military companies 'do not represent a revolutionary development on the international security landscape but rather they are re-constitutions of past forms of mercantile companies'.<sup>37</sup> To Small, private military security in the past took three main forms: the 'freelance mercenary' or individual 'soldier for hire'; the mercenary 'free company' also known as the 'condottiere'; and finally mercantile companies. The freelance 'soldier for hire' refers to individual soldiers who independently market themselves on the black market to the highest bidder; while the 'free companies' or 'condottieres' were essentially bands of fighting men who offered their skills jointly, as opposed to individually.<sup>38</sup>

While often accused of reconstituting the mercenary trade in security, PMCs have done a considerable job in transforming themselves into registered providers of professional services that are intricately linked to both warfare and corporate bodies specialising in the sale of military skills. So far, corporatisation has been a distinguishing factor between PMCs and 'dogs of war'. Today, PMCs are recognised not only for their specialised military skills, but also for their combat operations, strategic planning, intelligence collection, operational support, logistics, training, and procurement and maintenance of arms and equipment. Their expertise is in demand in the new market for force and they have a clientele that includes governments, the UN, multi-national corporations engaged in the mining and energy-extracting sectors, and non governmental organisations (NGOs).

## Private security companies

The activities of private security companies, like those of their private military 'cousins', are not covered in the OAU Libreville Convention for the Elimination of Mercenarism in Africa (1977) or by the UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989). In Holmqvist's definition, private security companies are registered civilian companies that specialise in providing contract security services and protection of personnel

and property, including humanitarian and industrial assets. In other words these companies offer *defensive* services intended mainly to protect individuals and property to domestic and foreign clients. The majority of PSCs are arguably smaller companies mainly involved with crime prevention and ensuring public order, providing security and private guard services domestically.<sup>39</sup>

While PSCs have not been in the market for very much longer than PMCs, their market is a lot bigger and more competitive than the military service one.<sup>40</sup> In some countries the number of people employed in the domestic private security business exceeds the number of employees in public law enforcement agencies, and their overall budgets often exceed those of the equivalent state services. Among the countries in this category are states as diverse as the United States, the United Kingdom, Israel, Germany, Russia, South Africa and the Philippines.<sup>41</sup> Like PMCs, private security companies are operated as for-profit organisations with corporate structures. The domestic law of the host nation often governs their activities.

## PMCs and PSCs: the difference

In the view of Adebajo and Sriram,

there is obviously some blurring between the two terms, and a number of companies offer services that fit into both categories, but it is helpful to think of PSCs as passive defensive/protective companies with private clients and PMCs as more active military companies that cater to state contracts.<sup>42</sup>

According to Caparini and Schreier the two types of companies can be distinguished by looking at the level of their activity: those engaged in combat operations are in the 'active', and those defending territory or providing training and advice in the 'passive' category.<sup>43</sup> Another way of differentiating the two is to see security companies as suppliers of 'soft' services, in the form of passive security, even in high-risk conflict environments (predominately to private companies), and to see military companies as suppliers of 'hard' services, such as military training and offensive combat operations (generally to individual states or international organisations such as the UN). However, this differentiation is not clear-cut, as the personnel of many security companies now carry arms and engage on offensive duties.

The British Green Paper on mercenaries and private military companies clearly differentiates between private military companies and private security companies (see Tables 1 and 2).<sup>44</sup>

**Table 1 Private military companies**

<b>Consulting</b>			
Threat analysis, strategy development, advice for armed forces	Regulated, occasionally illegal	Official planning authorities, armed forces	Global
<b>Logistics and Support</b>			
Logistics in emergencies and war	Regulated	Defence ministries, humanitarian organisations	Many countries
Mine clearing, refugee camps, infrastructure demobilisation, reintegration of soldiers and refugees	Regulated	Humanitarian organisations, UN agencies, governments	Post-conflict areas
Management of military bases	Regulated	Armed forces	Few governments at home and abroad
<b>Technical Services, Maintenance and Repairs</b>			
Technical services, air control, intelligence gathering, IT services	Licensed by governments	Armed forces	Many countries
Weapon repair	Licensed by government	Armed forces	Many countries
<b>Training</b>			
Military training, weapons and special forces training, language training and psychological warfare	Licensed by governments, occasionally illegal	Armed forces, rebel groups	Industrialised and developing countries, conflict areas

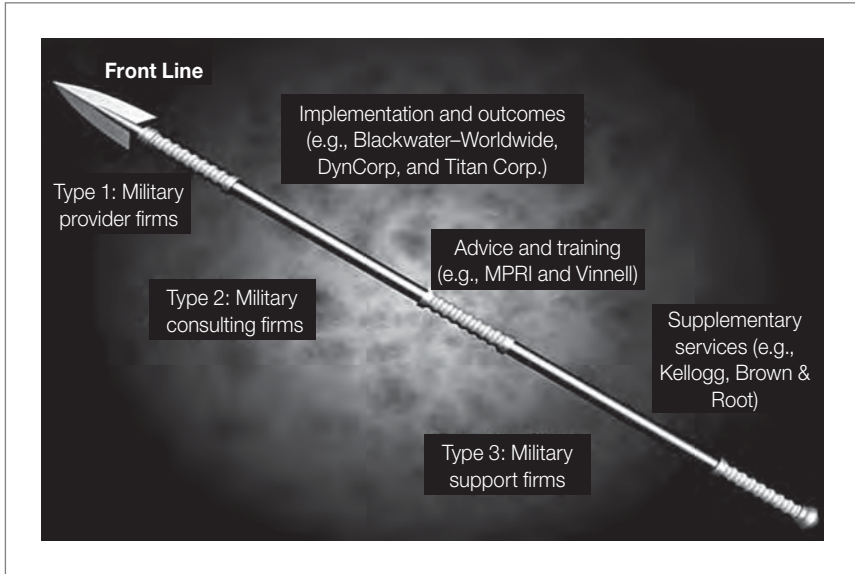
**Table 2 Private security companies**

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

Singer uses a ‘tip of the spear’ analogy to differentiate between PMCs and PSCs, where the ‘tip’ indicates the front line.<sup>45</sup> He distinguishes between *military provider firms* (type 1), *military consultant firms* (type 2) and *military support firms* (type 3). Type 1 firms provide services at the front line, such as command of forces and implementation; type 2 offer mainly advisory and training services; and type 3 are used for the contracting out of ‘non-lethal aid and assistance’, including logistic functions such as feeding and housing troops.<sup>46</sup>

Private security companies fall under type 3 (military support firms) because they are close to the combat zone but their role is non-combative in nature. Private military companies can also serve as private security companies under certain conditions, and PSCs are not necessarily confined to performing defensive tasks only.

**Figure 1 Singers' spear analogy**



*Source* Illustration by Jeffrey W. Taliaferro, PhD, (2008) and published on the website <http://ocw.tufts.edu/Content/58/lecturenotes/726997/727034>

## INVOLVEMENT OF PRIVATE OPERATORS IN AFRICAN PEACEKEEPING

The idea of using private operators for UN peacekeeping has been mooted since the early 1990s.<sup>47</sup> As mentioned in Chapter 2, in 1994 Kofi Annan, who was then head of the UN's Department of Peacekeeping Operations, considered the use of PMSCs to intervene in the Rwanda genocide. He decided that the world was 'not ready to privatise peace'. The question then is whether the world, and Africa in particular, is ready now.

While peacekeeping itself has not been wholly privatised, many of the functions associated with maintaining peace have; these are mainly logistical and support services and some security and police training. According to Caparini and Schreier 'private contractors are now so firmly embedded in intervention, peacekeeping, and occupation that this trend has arguably reached the point of no return'.<sup>48</sup>

While some authors are clearly positive about the use of PMSCs for future peacekeeping operations, others are fiercely critical, arguing that such companies

should be outlawed and shut down.<sup>49</sup> However, as Isenberg rightfully observes, ‘the debates over whether and how to utilize private military and security contractors generates much heat but not much light’.<sup>50</sup> In the opinion of Caparini and Schreier much of the substance of these debates is

distorted and sensationalized, not only repetitive but also highly polarized – aimed at either extolling PMSCs for their presumed efficacy and efficiency, as demonstrated in some instances in Africa, or condemning their mere existence.

This polarized discourse extends to the international community, which finds itself at a crossroads between *moralpolitik* and *realpolitik*. A certain segment of the international community shows an uncompromising aversion to what it sees as the totally wrong practice of using PMSCs in core peacekeeping mission operations. These opponents say that the use of private companies of this sort involves the use of unsavoury and immoral human rights violators in the form of selfish and greedy private security vendors who are interested only in mortgaging state economies. Those supporting this view use legal instruments against what they strongly believe to be wrong and in pursuit of what they think is right. But others do not want to be drawn into right versus wrong debates, which they view as a denial of the reality that is already happening on the ground. As a result, the realists<sup>51</sup> or pragmatists, including a growing number of humanitarian agency officials, have become reluctant allies of the private security actors, saying that private contracting offers the only way to provide safety in regions such as central Africa, where leading nations like the US are unwilling to send their own troops as peacekeepers.<sup>52</sup>

The pragmatists’ case is premised on two linked arguments: the deficiencies inherent in UN peacekeeping operations, and the presumed capacities of PSC/PMCs to provide a viable alternative.<sup>53</sup> To them, what makes private operators of this type a viable option is not only their ability to offer support services that are said to be more efficient, more punctual and cheaper than those provided by state military services but also the fact that they are reportedly more innovative, more flexible and more pragmatic, and that they therefore allow state militaries to focus on their core missions.<sup>54</sup>

Proponents, in arguing for the cost-effectiveness of PMSCs, often point to the role played by Executive Outcomes in Sierra Leone (this company

performed a military task for less than US\$ 40 million, a fraction of the cost of a typical UN operation of a comparable scale). Other often cited instances of the successful use of PMSCs in peacekeeping missions are those of the Economic Community of West African States Monitoring Group (ECOMOG) in Sierra Leone; the UN Mission in Sierra Leone (UNAMSIL); and the UN Mission in Liberia (UNMIL).

According to Brooks and Razook 'the private sector has been revolutionizing international peace operations with unprecedented capacities and expertise and is thus already having an enormous humanitarian benefit'.<sup>55</sup> Taylor argues that the AU suffers from a lack of capacity in training, equipment and support: three critical elements that are necessary for tough peacekeeping missions, all of which private companies can provide. Taylor is of the view that when these three key aspects are in place, they allow the military force to take advantage of critical points of intervention and change the momentum towards a more secure environment. He argues that without these key components of success, even the best mission will find it difficult to achieve its goals. According to Taylor, support services like aviation services are critical to success in Africa but member nations generally find it extremely difficult to contribute in this respect. Writing about UNAMID, the AU/UN hybrid force in Darfur, he argues:

[A]lthough helicopters would make the AU/UN hybrid force in Darfur more responsive, more logistically capable, and far more efficient, no-one was able to provide desperately needed aircraft even after UN Secretary General Ban Ki-Moon extended a plea to all member states.<sup>56</sup>

Contracting out air-support services to military and security companies, in the form of safe aircraft, qualified pilots and complete maintenance packages and provision of armoured vehicles, is, in Taylor's view, the solution to the obvious capacity gaps in both UN and AU peacekeeping missions.

Despite the much-vaunted cost-effectiveness, organisational flexibility, capacity and expertise of the private sector, the UN, the AU and their respective member states have not been convinced about using private military and security companies.<sup>57</sup> There has also been a clear lack of international acceptance.<sup>58</sup> The UN and AU cite 'a plethora of legal and ethical questions resulting from lack of accountability of private security actors'.<sup>59</sup> The Blackwater debacle (the US-based company, Blackwater Worldwide, killed 17 Iraqis in Baghdad in September 2007)



and other incidents are cited as justifying the rejection of private military and security companies in peacekeeping missions.

While most agree that the UN peacekeeping system is in need of financial, logistical and technical help, those who oppose the use of PMSCs in African peacekeeping missions say they have not brought the expected peace dividends. They argue that the use of profit-making companies does not increase Africa's 'security capital'. There is a widely held perception that these companies are driven by narrow commercial interests, and that these interests are in turn informed by the desires of key actors in the globalising world. The implication is that they are not particularly motivated to bring about security and durable peace in conflict-torn African countries.

To the 'moralists', the widespread use of PMSCs raises important underlying questions about the US' role in the global political economy, 'namely the mismatch between US geopolitical ambitions and the resources provided for them'. Howe claims that in certain instances PMSCs have drawn their pay from Western sources – governments or mining companies – and that in some cases it appears to be private corporations, not states, that are funding the operations of some military and security companies. The implication is that these PMSCs are accountable to the corporations rather than to any other entity.<sup>60</sup>

The US is by far the world's largest consumer of PMSC services, and Isenberg claims that the US government often shifts responsibility and blame for actions initiated by the state onto PMSCs.<sup>61</sup> According to the TransAfrica Forum,

since 1994, the US Department of Defence has entered into 3 601 contracts worth \$300 billion with 12 US based private military and security companies, establishing the commercial security industry as the new business face of war.

In 2004, the US State Department paid Blackwater US\$ 833 673 316, compared with Defence Department contracts of US\$ 101 219 261.<sup>62</sup> Collier describes the global commercial security industry as a \$100-billion-per-year business whose largest client is the US government – an industry for which there are virtually no laws or oversight arrangements, and in relation to which there is no public understanding.

Apart from accusations that these companies are serving foreign interests and advancing the agendas of Western governments, they are accused of creating

'illusional stability' in the countries where they operate. According to Cilliers and Cornwell:

[T]he outsourcing and commercialisation of state functions in unconsolidated states have not proven to be a panacea for the lack of capacity, corruption and poor delivery that have characterized the post-colonial state.<sup>63</sup>

In any case the military solutions they purport to be providing are misplaced, since they don't address social problems and are not sustainable.

In summary, there is a profound dilemma about the use of these private operators in peacekeeping missions. This dilemma challenges us to look for new conceptual frameworks through which to find intelligible and workable alternatives. In fact, it compels us to go deeper into the epistemology of peacekeeping, to find what pragmatists and realists refer to as 'the missing link' in the UN peacekeeping system, and to re-examine what moralists view as the incorrigibility of private security actors.

## TOWARDS AN INTELLECTUAL FRAMEWORK

While the use of private companies in peacekeeping missions is increasing, there is limited development of appropriate intellectual frameworks to help guide practitioners on the ground.<sup>64</sup> Little emphasis has been placed on envisaging possible scenarios for African peacekeeping futures in the longer term, or on mapping the future of 'cooperative peacekeeping', or on linking the issue of PMSCs with prevailing debates. To make a contribution in this direction, I introduce here what I have called the steering and rowing approach to peacekeeping (SRAP) as a way of engaging with aspects of the dilemma and with the lacunae in the existing body of work on PMSCs.

These lacunae or gaps are caused firstly by the reductionist approach that many analysts and scholars use to describe the relationship between the UN and private operators. The dominant narrative is one of 'ritualised fighting' between on the one hand the UN, the AU, and the international community and on the other private military and security companies. Through the lens of historical determinism, analysts argue that since in the past the relations between PMSCs and the other parties have been marred by hostility (due to perceived and real breaches of international legal regimes by PMSCs), this incompatibility will

continue to shape future relations. Selected examples are used to generalise about the relationship between the UN and these companies, among which are the Blackwater debacle, Executive Outcomes and blood diamonds in Sierra Leone, and Sandline International and the British Government.

Secondly, some of these gaps are caused by a lack of disciplinary inter-operability. The few scholars who have attempted to explain the privatisation of peacekeeping do so through different analytical lenses, and draw on a variety of intellectual tool kits, epistemological and methodological orientations.<sup>65</sup> The debate would be enriched by bringing in perspectives from other disciplines like conflict/peace studies, sociology, criminology and psychology, which is not to say that the economic, political and legal discourses that analysts in the field largely draw upon are not helpful. For instance, drawing on social conflict theories, we could argue that PMSCs do not respect international humanitarian law and international human rights law because of their employees' innate or socially learned aggressive behaviour. Or that, because human beings are instinctively aggressive,<sup>66</sup> employees of private military and security companies are likely to disregard and breach legal frameworks. Or we may argue that PMSCs breach legal frameworks because some of the countries that contract them, like the US and the UK, want not only to achieve their geopolitical strategic interests but also to inflict injury, harm and violence on other countries.<sup>67</sup>

Thirdly, some of the knowledge gaps in the private security debates are caused by an over-emphasis on the praxis of private security (how they operate) and not enough focus on the theoretical and methodological issues. Many analysts look at how PMSCs have transformed themselves into 'professional' corporate entities, but locate these transformations (or the ongoing transgressions by PMSCs) within theories of organisational behaviour.

## STEERING AND ROWING APPROACH TO PEACEKEEPING (SRAP)

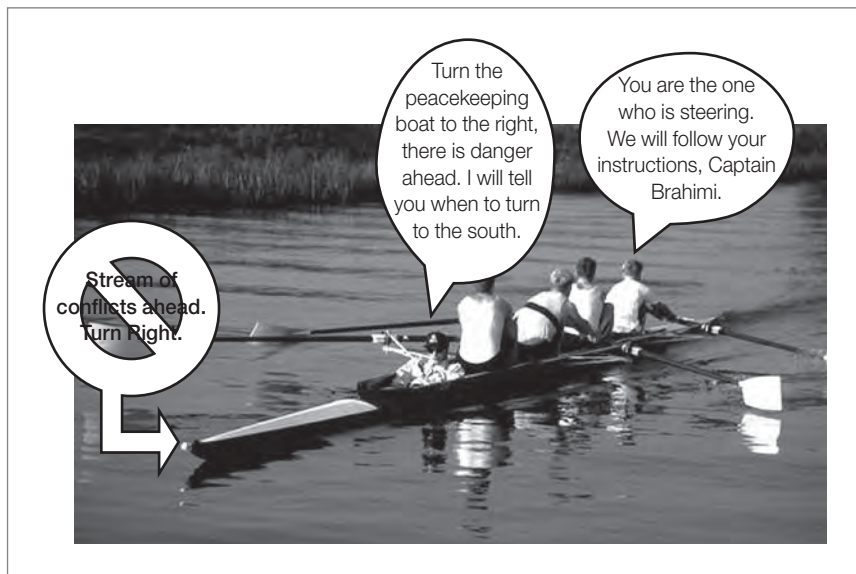
SRAP is an intellectual framework based on a set of propositions, which builds on Morton Deutsch's cooperation and competition theory. The term 'steering' is the root of the original Greek meaning of 'government', which is to steer or provide guidance. In other words, the role of government is to provide leadership and guidance through continuous strategy and policy development. A question then arises: since government's normative role is that of steering, whose business

is it to undertake the ‘rowing’ function (delivery of services and public goods like security)?

Until the 1980s governments delegated the rowing function to designated departments and/or parastatals, or to what in South Africa are called Section 21 institutions. But with the paradigm shift from public administration to public management in the 1980s, many governments started to contract out their ‘rowing’ (service delivery) function to non-state actors or private actors. As Mario Cuomo, a former governor of New York, argues, ‘it is not government’s obligation to provide services, but to see that they are provided’. A number of reasons have been given as to why government should focus only on steering as opposed to both steering and rowing, and these include the following:<sup>68</sup>

- Those who steer the boat have far more power over its destination than those who row it.
- The government’s job is to steer, not to row the boat.
- Delivering services is rowing, and government is not very good at rowing.
- Government can steer more effectively if it lets others do more of the rowing.
- Steering is very difficult if a government’s best energies and brains are devoted to rowing.
- Governments that focus on steering actively shape their communities, states, and nations. They make *more* policy decisions. They put *more* social and economic institutions into motion. Some even do *more* regulating.
- Steering requires people who see the entire universe of issues and possibilities and can balance competing demands for resources.
- Rowing requires people who focus intently on one mission and perform it well.
- Steering organisations need to find the best methods to achieve their goals.
- Rowing organisations tend to defend ‘their’ method at all costs.
- Steering allows for greater *specialisation* of service providers, promotion of *experimentation*, and more *comprehensive* solutions to problems.
- Steering organisations set policy, deliver funds to operational bodies (public and private), and evaluate performance, but seldom play an operational role themselves.

As depicted in Figure 2, steering and rowing a boat is a collective effort needing team-work and a commitment from all members of the team. It is a concerted

**Figure 2** Steering and rowing is a concerted effort

*Source Photograph sourced by author*

effort in which the government in the steering position should provide leadership and guidance from behind to those who are rowing, while the rowers need the government's leadership in order to move in the desired direction. It should be a cooperative rather than a conflictual relationship with elements of interdependency.

On a closer look, the steering and rowing analogy is not radically different from Morton Deutsch's cooperative and competition theory, which characterises and explains group processes and functioning. Deutsch was concerned with understanding group processes; that is psychological and interpersonal processes within and between groups. The theory is concerned not only with the individual and group outcomes of cooperation and competition but also with the social psychological processes that give rise to these outcomes.<sup>69</sup>

In formulating his theory, Deutsch looked at the cooperative grading system in US universities. He concluded that the grades to be received by students within a given group were determined by the level of the group's performance in comparison with other similar groups. In competitive groups, each student's contribution to group performance was ranked in comparison with the contributions

of other group members and each student's grade was likely to be determined by relative rank in the group.<sup>70</sup>

To simplify his theory, Deutsch proposed two basic notions: one related to the type of interdependence among the goals of the people involved in a given situation and the other to the type of actions by the people involved. He identified two basic types of goal interdependence, namely 'promotive interdependency' and 'conjoint interdependence'. In promotive interdependence 'the goals are positively linked in such a way that the amount of goal that a person achieves or the probability of achievement is positively correlated with the amount of the goals that others achieve or to their probability of achieving their goals'. In conjoint interdependence 'the goals are negatively linked in such a way that the amount or probability of goal attainment is negatively correlated with the amount or probability of the others' goal attainment'.<sup>71</sup> In simple terms, promotive interdependence means the parties either swim together or sink together, while conjoint interdependence means if one party is swimming, the other must sink.

Applying this to peacekeeping, if governments and the parties that they work with do not adopt a promotive interdependence approach, the boat is likely to sink or go in the wrong direction. This is also applicable to the UN and its relationships with private military and security companies. Ideally, in the peacekeeping boat or 'democratic republic of peacekeeping', the UN, as a central government/steerer, is supposed to focus on steering (setting the destination of the boat and steering), while UN agencies like the UN High Commissioner for Refugees and the UN Development Programme (and federal states) should focus on rowing (providing strategic, logistic and tactical support to the central government/steerer). In this model, PMSCs should not be treated as pariahs but should be allowed to provide rowing services in the peacekeeping boat, due to their reported expertise/experience. Their rowing services should be limited to purely technical support services and should not assume the steering function (which in this case would be developing policies and engaging in combative services on behalf of the UN).

Unfortunately the relationship between the UN and these companies is currently one of conjoint interdependence, due to the mercenary element in PMSCs, violations of human rights, profit-maximising agendas and PMSC fronting for Western geopolitical interests. In a conjoint relationship, the actions of both parties are not 'effective actions' (improving the chances of attaining a goal), but

rather 'bungling actions' (worsening the chances of attaining a goal). This in turn raises the question as to what the goal of each of these parties actually is. The UN's goal is to maintain international peace and stability by preventing conflicts in conflict-prone countries and resolving them in conflict-torn countries. The goal of private military and security companies is the maximisation of profits for their long-term sustainability.

How then can these different goals be made to complement and reinforce each other? The UN depends on private operators for expertise and technical support like aviation services and the maintenance of armoured vehicles in peacekeeping missions. PMSCs, while not completely dependent on the UN for contracts, do depend on the organisation and its member states for credibility, legitimisation and licensing (in countries like South Africa the work of PMSCs is governed by domestic legal frameworks).

SRAP can be used to reconcile the goals of both the UN and PMSCs. At its core is the idea that for African peacekeeping, the UN (with assistance from the AU and member states) should be the *only* steerer/captain of the peacekeeping boat and private military and security companies should provide *only* rowing – that is support services (logistics, technical support and training). This will help in the following ways:

- The UN will have a monopoly and more power over the destination of the peacekeeping boat.
- The UN will steer more effectively if it lets private operators do more of the rowing.
- If it focuses on steering, the UN will be able to actively shape the policy/strategy direction of member states in relation to peacekeeping and can make more policy decisions.
- The UN will have more time to focus on addressing grey areas and gaps in international legal frameworks, especially as these relate to the development of a standard definition, not only for mercenaries but also of private military and security companies.
- The UN will be able to do more regulating.
- Private military and security companies will be able to focus on their rowing function, and not have to worry about uncertainties in their categorisation by international legal instruments.

- Meanwhile, the UN can invest more energy, resources and time in finding best methods to achieve its peacekeeping goals.
- This will also allow other non-state actors to focus on specialisation, promotion of experimentation, and testing more comprehensive solutions to peacekeeping problems.
- It will also allow the UN to develop new doctrines, set policy, deliver funds to operational bodies (public and private), and monitor and evaluate performance of PMSCs and other non-state actors.
- At the end, provided that the UN is doing its policy development role and is monitoring implementation and compliance of the rules on an ongoing basis, it can focus on bringing about durable peace in conflict-torn countries. At the same time private military and security companies, provided that they comply with the rules, can get the profits, legitimacy and credibility they want. It can be a positive sum game.

Gumedze says the involvement of private military and security companies in African peacekeeping operations raises a plethora of legal and ethical questions that are often left unresolved.<sup>72</sup> According to Singer, current international law is too primitive to handle complex issues such as the involvement of private military and security companies in peacekeeping missions.<sup>73</sup> By focusing on steering only, the UN at an international level would be able to respond to a number of conceptual, legal and ethical issues which, as pointed out by Gumedze, are often left unresolved. At a continental level, the AU would be able to embark on a holistic review and broadening of the legal frameworks, including the 1977 OAU Convention on the Elimination of Mercenaries in Africa. Apart from clarifying issues, this could help to manage the 'neo-mercantilist' tendencies and 'transformed mercenarism' seen in the activities of some PMSCs.

As a steerer of the peacekeeping boat at a continental level or as a federal state in the 'democratic republic of peacekeeping', the AU could define the parameters of engagement for PMSCs as rowers and look at ways of guarding against threats to state sovereignty by making delivery of core and traditional peacekeeping functions by PMSCs illegitimate. An AU focus on steering only could help in three other respects:

- It would guard against the perceived strategic 'rip-off' of African governments by PMSCs and other non-state formations.



- It would address gaps in the existing regulatory framework, especially clarifying the distinction between mercenary activities and legitimate private/corporate security engagement, which is often blurred.
- It would establish clear modalities on how the UN, the AU, and member states could engage in mutually reinforcing partnerships with legitimate PMSCs – those interested in contributing to the global public good as opposed to acting as conduits for the strategic interests of corporations and foreign governments.

The UN Capstone Doctrine (2008) rightfully pointed out that the protection of civilians requires concerted and coordinated action among the military, police and civilian components of UN peacekeeping operations. The Doctrine also pointed out that UN humanitarian agencies, NGOs, and in some circumstances PMSCs, also undertake a broad range of activities in support of the protection of civilians. It acknowledges that:

[C]lose coordination with these actors is, therefore, essential and the challenge of managing an integrated mission is thus further compounded by the need to ensure that there is some degree of coordination between the UN and the range of non-UN actors who are often present in conflict and post-conflict settings.<sup>74</sup>

## CONCLUSION

Peacekeeping operations in Africa are going to be with us for many years to come. So will the ongoing debates among experts, analysts, policy makers and practitioners on whether peacekeeping should be privatised and whether private military and security companies should be allowed to perform traditional peacekeeping roles. The international community is divided on the issue, finding itself at a crossroads between *moralpolitik* and *realpolitik*. Those who argue against the use of private operators cite the perceived association of PMSCs with neo-mercenarism; the use of PMSCs by Western governments such as the US for the purposes of fronting and pursuing their own vested strategic interests; and the record of violations of international human rights and human rights law by PMSCs in conflicts such as Iraq. Those arguing for PMSCs often cite the limited capacity of the UN and AU to carry out peacekeeping missions. They point to PMSCs with expertise and experience

as flexible, innovative and cost-effective. The disagreement is compounded by the fact that international legal frameworks provide no legal definitions for private military and security companies, although they are more vocal on mercenaries.

As captured by the steering and rowing analogy and Deutsch's cooperative and competitive theory, relations between the UN and PMSCs have become conflictual in nature. This is unfortunate in the sense that the UN and these companies need each other: the UN as a result of its capacity problems, and PMSCs to overcome their licensing and legitimisation problems. In proposing SRAP, I argue that these relations can be turned into ones of promotive interdependence. SRAP does not advocate the total privatising of peacekeeping, but a more cooperative approach. I believe that since PMSCs are here to stay, and they have the expertise needed in African peacekeeping missions, the time has come to explore what they can bring to African peacekeeping.

## RECOMMENDATIONS

The following recommendations are made to experts, policy makers and practitioners in the field:

- Restructure the international system of conflict resolution to include a legitimate and restricted context-based use of PMSCs in both international and African peacekeeping. This can be done through developing the contracting-out strategy at UN level.
- Let the UN remain in control of the peacekeeping system and do not privatise its core peacekeeping functions. This means that troop deployment and engagement in combat zones should remain the responsibility of the UN or the AU only and should not be rented out. PMSCs should not be used even as troop multipliers, since that means that they would have to be involved in warfare activities.
- The UN as a 'steerer of the peacekeeping boat' should focus more on steering (including developing an international code of ethics for private military and security companies) and providing leadership and guidance.
- Drawing on SRAP (and other frameworks if they exist) the UN and PMSCs should move away from relations of 'constrict' interdependence to 'promotive' interdependence. The working relationship between the UN and PMSCs should be based on established policy guidelines.

- More theoretical frameworks should be developed for understanding private military and security companies so as to help practitioners to ground their work in theory.
- Private military and security companies should continue with their own self regulatory mechanisms, while at the same time adhering to the UN rules, and respecting IHL and IHRL.

## NOTES

- 1 United Nations, *Peacekeeping Operations: Principles and Guidelines* (Capstone Doctrine document), United Nations Department of Peacekeeping Operations & Department of Field Support, 2008.
- 2 During the Cold War many African countries were receiving military support from the Western and Eastern blocs. At the height of the Cold War, sub-Saharan Africa absorbed military equipment worth more than US \$5 billion in some years. What was left after the Cold War were weak, ineffective and poorly equipped militaries and security apparatus. According to Peter Lock the implications of the end of the Cold War were clearly shown in the arms procurement figures, which reflected the downgrading of sub-Saharan Africa in the foreign/military policy agendas of the leading powers which were the main suppliers to and paymasters of the region's militaries (Africa military downsizing and the growth in the security industry, J Cilliers and P Mason (eds), *Peace, profit or plunder? The privatization of security in war torn African societies*, Institute for Security Studies, Pretoria, 1999). According to Caparini & Schreier, a further result of the decline in superpower support for clientele states in the developing world has been increasing impoverishment and diminished capacity for states to ensure the security of their citizens (See Marina Caparini and Fred Schreier, *Privatising security: Law, practice and governance of private military and security companies*, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Occasional Paper 6, 2005.)
- 3 Some people like Herbert Howe argue that the end of Cold War has had contradictory effects on African security. According to Howe, southern Africa and Ethiopia clearly benefited from the end of superpower rivalry, whereas central and western Africa saw an upswing of violence during the 1990s. (see Herbert M Howe, *Private security forces and African stability: The case of Executive Outcomes*, *Journal of Modern African Studies* 36(2) (June 1998), 307–331).
- 4 J Sending, *The political dynamics of the security-development nexus*, Paper delivered at the Standing Group for International Relations of the European Consortium for Political Research, The Hague, 9–11 September 2004.
- 5 Ibid.

- 6 See T Mbadlanyana and J Cilliers, 'Development and the relationship with peace and security in Africa: Observations from the Joint Africa-EU Strategy', in Antonio Nunez (ed), *European and African answers to the security problems in Africa*, Spanish Institute of Strategic Studies (IEEE) Booklet, 2010.
- 7 Christopher M Rochester, *White Paper: A private alternative to a standing United Nations peacekeeping force*, Peace Operations Institute, Washington, 2007.
- 8 Drawn from Clifford Shearing's work on policing, the term 'pluralisation of security' in this chapter means the move by states over the past several decades to increase their access to resources that can be deployed in the governance of security by mobilizing a variety of non-state knowledges and capacities. See Clifford Shearing, *Paradigms for Policing*, Paper presented at Consolidating Transformation Conference, Gordon's Bay, February 2005, 7–8, <http://www.csvr.org.za/confpaps/shearing.htm>.
- 9 John Harker, *Private power, public insecurity: The growing reality of security-for-profit*, *The Ploughshares Monitor* 19(3) (1998).
- 10 According to Sam Vaknin, *Private Armies and Private Military Companies (PMCs)*, Washington: United Press International, 2008, and Singer, *The Cold War was a historic period of hyper-militarization*, 2001. Its end sparked a chain of military downsizing, resulting in more than 6 million soldiers being released all over the world between 1987 and 1994. Professional soldiers, suddenly unemployed in a hostile civilian environment, resorted to mercenarism and a few became rogue freelancers destabilizing other countries.
- 11 Michelle Small, *Privatization of security and military functions and the demise of the modern nation-state in Africa*, ACCORD Occasional Paper Series 1(2), 2006.
- 12 Victor-Yves Ghebali, *The United Nations and the dilemma of outsourcing peacekeeping operations*, in Alan Bryden and Marina Caparini (eds), *Private actors and security governance*, Berlin LIT Verlag (2006), 213–230.
- 13 According to the UN Capstone Doctrine, these include: creating a secure and stable environment while strengthening the State's ability to provide security, with full respect for the rule of law and human rights; b) facilitating the political process by promoting dialogue and reconciliation and supporting the establishment of legitimate and effective institutions of governance; and providing a framework for ensuring that all United Nations and other international actors pursue their activities at the country-level in a coherent and coordinated manner.
- 14 The term 'African peacekeeping' presupposes that there is a European or Western peacekeeping. Does it refer to peacekeeping in Africa, or to African-led peacekeeping, or to Africa's ownership of the latter? There are some contradictions in the concept of African peacekeeping, mainly discrepancies about ownership and continuing dependence on external support. Even AMISOM cannot be said to be an African peacekeeping because much of the support comes from outside actors. The narrow definition used here is that of peacekeeping missions on African soil, not necessarily owned by Africa. For more on African ownership of peacekeeping see Esmenjaud, Romain and Franke, Benedikt (2009).

- 15 According to Mark Malan (see Security sector reform in Liberia: Mixed results from humble beginnings, Strategic Studies Institute, 2008), DynCorp International was contracted to provide basic facilities and basic training for the Armed Forces of Liberia (AFL), while Pacific Architects and Engineers (PAE) won the contract for building some of the bases for the AFL and its component units, and for providing specialized and advanced training, including mentoring of the AFL's fledgling officer corps and non-commissioned officers corps. According to recent media reports, the US contracted DynCorp (working under the NATO banner) to ferry some 1 700 Ugandan troops into Mogadishu, Somalia, in response to an African Union request for transportation support for the African Union Mission in Somalia (AMISOM). The airlift, which ran from March 5 to March 16, was conducted by DynCorp International. It was also reported that the airlift flew 850 Ugandan troops out of Mogadishu.
- 16 Sabelo Gumedze, Addressing the use of private security and military companies at the international level', ISS Paper 206, Institute for Security Studies, 2009.
- 17 In writing about crime and crime control strategies, David Garland comments on the inability of states to control crime, or what he sees as the limits of state sovereignty. According to him modern states resort to 'responsibilization' – the contracting out of government's responsibility to non-state actors. See David Garland, The limits of the sovereign state: strategies of crime in contemporary society, *British Journal of Criminology* 36(4) (1996), 448–449.
- 18 Weber says this in his 'Politics as a vocation' (Politik als Beruf), a lecture given by him to the Free Students Society/Movement of the Munich University in January 1919 during the German Revolution of 1918–1919. Available at [http://en.wikipedia.org/wiki/Max\\_Weber](http://en.wikipedia.org/wiki/Max_Weber) (accessed 13 March 2010). Also see Small, Privatization of security and military functions and the demise of the modern nation-state in Africa, 2006. According to Gumedze the Swiss Initiative was launched in 2006 by the Swiss Federal Department of Foreign Affairs and the International Committee of the Red Cross in order to give clarity on existing legal obligations of the private security/military actors and to develop non-binding good practice for PMSCs. (see Sabelo Gumedze, The privatization of security in Africa and its regulation, ISS Paper, Institute for Security Studies, 2009.)
- 19 V Boege, A Brown, K Clements and A Nolan, Building peace and political community in hybrid political orders, *International Peacekeeping* 16(5) (2009), 599–615.
- 20 The OECD, set up in 1961, is a forum for member governments to share experiences and seek solutions to common problems. It has 34 member countries from all continents except Africa and includes the major EU countries, Japan and the United States.
- 21 Eric Scheye, State-provided services, contracting out, and non-state networks: Justice and security as public and private goods and services, Paper jointly commissioned by the Partnership for Democratic Governance and the International Network on Conflict and Fragility, 2009.

- 22 See 'Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict' (17 September 2008), a joint initiative between the International Committee of the Red Cross and Swiss Federal Department of Foreign Affairs, <http://www.eda.admin.ch/psc> (accessed 10 July 2010).
- 23 Small, Privatization of security and military functions and the demise of the modern nation-state in Africa.
- 24 T. Mbadlanyana and FC Onouha, Peacekeeping and post-conflict criminality: Challenges to the (re-)establishment of rule of law in Liberia, ISS Occasional Paper 190, Institute for Security Studies, 2009.
- 25 Small, Privatization of security and military functions and the demise of the modern nation-state in Africa.
- 26 Caroline Holmqvist, Private security companies: The case for regulation, SIPRI Policy Paper 9, Stockholm International Peace Research Institute, 2005.
- 27 Gumedze, The privatization of security in Africa and its regulation.
- 28 A Adebajo and CL Sriram (eds.), *Managing Armed Conflicts in the 21st Century* 7(4) (2000), 4.
- 29 Ghebali, The United Nations and the dilemma of outsourcing peacekeeping operations.
- 30 L Nathan, Trust me I'm a mercenary. The lethal banger of mercenaries in Africa, 'Privatisation' of peacekeeping, Seminar paper, Institute for Security Studies [online], 20 February 1997, [http://ccrweb.ccr.uct.ac.za/archive/staff\\_papers/laurie\\_merc.html](http://ccrweb.ccr.uct.ac.za/archive/staff_papers/laurie_merc.html) (accessed 1 March 2010).
- 31 Ghebali, The United Nations and the dilemma of outsourcing peacekeeping operations, 222.
- 32 According to PW Singer the most notable of these mercenaries during this period were known by the nickname 'Les Affreux' (the terrible ones) and included the Irish-born commando 'Mad' Mike Hoare and Frenchman Bob Denard, who would later lead a series of violent coups in the Comoros Islands and Seychelles. (see Profits and the vacuum of law: Privatized military firms and international law, *Colombia Journal of Transnational Law* (January 2004))
- 33 Ghebali, The United Nations and the dilemma of outsourcing peacekeeping operations, 221.
- 34 Sabelo Gumedze, 'Pouring old wine into new bottles? The debate around mercenaries and private military and security companies, in Sabelo Gumedze (ed.), *Elimination of Mercenarism in Africa: A need for a new continental approach*, ISS monograph 147, 25.
- 35 Tony Vaux, Chris Seiple, Greg Nakano and Koenraad van Brabant, Humanitarian action and private security companies: opening the debate, *International Alert*, 2009.
- 36 Marina Caparini and Fred Schreier, Privatizing security: Law, practice and governance of private military and security companies, Occasional Paper 6, Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2005.

- 37 Small, Privatization of security and military functions and the demise of the modern nation-state in Africa, 6.
- 38 Ibid. 4–5.
- 39 Holmqvist, Private security companies: The case for regulation.
- 40 Caparini and Schreier, Privatizing security: Law, practice and governance of private military and security companies.
- 41 Holmqvist, Private security companies: The case for regulation.
- 42 A Adebajo and CL Sriram (eds.), *Managing Armed Conflicts in the 21st Century* 7(4) (2000), 2.
- 43 Caparini and Schreier, Privatizing security: Law, practice and governance of private military and security companies.
- 44 HC 577 Private military companies: Options for regulation 2001-2002, Foreign and Commonwealth Office.
- 45 See (1) PW Singer, Corporate warriors: The rise of the privatized military industry and its ramifications for international security, *International Security* 26(3) (Winter 2001–2002), 186–220; (2) Gumedze, The privatization of security in Africa and its regulation; (3) Holmqvist, Private security companies: The case for regulation.
- 46 Singer, Corporate warriors: The rise of the privatized military industry and its ramifications for international security.
- 47 John Harker, Private power, public insecurity: The growing reality of security-for-profit, *The Ploughshares Monitor* 19(3) (1998).
- 48 Caparini and Schreier, Privatizing security: Law, practice and governance of private military and security companies.
- 49 Caparini and Schreier, Privatizing security: Law, practice and governance of private military and security companies.
- 50 David Isenberg, Private military contractors and US grand strategy, *PRIO Report* 1 (2009).
- 51 They believe that the interjection of morality and values into these debates causes reckless commitments, rigidity in the debates, and the escalation of conflict. To them all actors in the international system including UN member states are not inherently benevolent but rather self-centred and competitive, and the relations amongst actors in the international system will always be conflictual unless conditions are created for coexistence and complementarity.
- 52 Robert Collier, Iraq: Global security firms fill in as private armies, *San Francisco Chronicle*, 28 March 2004.
- 53 Ghebali, The United Nations and the dilemma of outsourcing peacekeeping operations, 213–230.

- 54 Adebajo and Sriram, *Managing Armed Conflicts in the 21st Century*, 5.
- 55 D Brooks and E Razook, Private Security, Online Debate, 2007, <http://www.cfr.org/afghanistan/private-security-contractors/p15032> (accessed 1 April 2010).
- 56 C Taylor, African peacekeeping and the private sector, *African Security Review* 18(1) (2009).
- 57 Isenberg, Private military contractors and US grand strategy.
- 58 Damian Lilly, The Privatization of peacekeeping: Prospects and realities, *Disarmament Forum* (3) (2000).
- 59 Gumedze, The privatization of security in Africa and its regulation.
- 60 Herbert M Howe, Private security forces and African stability: The case of Executive Outcomes, *Journal of Modern African Studies* 36(2) (June 1998), 307–331.
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- 63 J Cilliers and R Cornwell, Mercenaries and the privatisation of security, *Africa Security Review* 8(2) (1999), <http://www.iss.co.za/pubs/asr/8No2/Cilliers.html> (accessed 27 April 2010).
- 64 Sam Makki, The politicisation of humanitarian action and staff security: The use of private security companies by humanitarian agencies, *International Workshop Summary Report* (2001).
- 65 Although Debora Avant has linked private security debates to theories of international relations, very few scholars in the field have transcended disciplinary divides.
- 66 This theory argues that aggression is a biological-genetic issue. The founder of this school of thought was Sigmund Freud who, in his *Beyond the Pleasure Principle* (1920), traced man's aggression to a death instinct-drive called Thanatos, as distinct from Eros, the drive or tendency towards survival and life fulfilment (see Freud, 1973; Dugan, 2004; and Buss, 1961). Freudian theory postulates that the death instinct compels humans to engage in risky and self-destructive acts directed against the self and that could lead to their own deaths. Writing in 1966, Lorenz built on Freud's instinct argument. Like other ethnologists and socio-biologists, Lorenz took the instinct-aggression argument further by arguing that the animal world provides a good opportunity for a clearer understanding of human aggression (Dugan, 2004). To him, 'aggression is the fighting instinct in beast and man which is directed against members of the same species' (Lorenz, 1966; Clare, 1969).
- 67 Institutionalised aggression, defined as the injury, harm and violence indirectly inflicted upon one group of individuals by another group of individuals through institutions and structures of the society (Kim, 1976; Galtung 1969).
- 68 Also see Betsy Pratt, and Scott J VanDeWoestyne, Catalytic government: Steering rather than rowing, presentation delivered at Drake University, MPA PADM, 2009, 282–801,



- [http://www.powershow.com/view/368c-Y2E2M/Catalytic\\_Government\\_Steering\\_Rather\\_Than\\_Rowing\\_flash\\_ppt\\_presentation](http://www.powershow.com/view/368c-Y2E2M/Catalytic_Government_Steering_Rather_Than_Rowing_flash_ppt_presentation)
- 69 M Deutsch, Conflict resolution: Theory and practice, *Political Psychology* 4(3) (1983), 431–453.
- 70 Ibid.
- 71 Ibid.
- 72 Gumedze, Addressing the use of private security and military companies at the international level, 8.
- 73 Singer, Profits and the vacuum of law: Privatized military firms and international law.
- 74 UN Capstone Doctrine 2008.

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# 4 Private military/ security companies and peacebuilding in West Africa

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## INTRODUCTION

Violent conflict has engulfed the West African sub-region since the early 1990s with the intensity of conflict leading to warnings that the sub-region was becoming a strategic threat to international peace and security.<sup>1</sup> Combatants have moved across international boundaries, as happened between Sierra Leone and Liberia after the outbreak of violence in Liberia in 1989; or between Guinea and Côte d'Ivoire after fighting began in 2000 in Guinea.<sup>2</sup> The violence and instability in Liberia and Sierra Leone, which have been described as 'West Africa's tragic twins', resulted in nearly 250 000 deaths and over a million refugees spilling across borders.<sup>3</sup> The humanitarian crises in Sierra Leone, Guinea Conakry, Côte d'Ivoire and Nigeria have led to the failure of state institutions, poverty, social decay, politicisation of the security sector, forced recruitment of refugees as fighters, recruitment of children as soldiers, the illicit flow of small arms and light weapons, gross violation of human rights, and the presence of mercenaries.<sup>4</sup>

As post-conflict societies with critically weak institutions, these countries now face the enormous tasks of reforming their security sectors, resettling

internally displaced persons and refugees, and reconciling warring factions – hence the huge market for private military and security companies (PMSCs).

Worldwide there are more than a hundred private military and security companies operating in over a hundred countries.<sup>5</sup> The growth of the private military and security industry (PMSI) has been one of the major developments in national and international security over the last thirty years with an annual turnover of US\$ 100 billion.<sup>6</sup> As an illustration of the sums involved, the United States government outsourced its post-conflict involvement in Liberia to two US-based companies, Dyncorp International and Pacific Architects and Engineers (PAE), to the tune of \$95 million. The task of these private operators was to vet, recruit and provide basic training to the new Liberian armed forces, as well as provide specialised advanced training, equipment, logistics and basic services.<sup>7</sup> With a depot in Freetown, Sierra Leone, PAE provided logistical support for regional peacekeeping in the West African sub-region.<sup>8</sup>

This chapter examines the relationship between the activities of PMSCs and peace-building in West Africa. It looks at the challenges posed by the activities of PMSCs in relation to peace and security in the sub-region; the presence or absence of a legal framework under which PMSCs operate in the sub-region; the extent to which these companies respect or violate these laws; the extent to which the activities of PMSCs contribute to, or hamper the prospects for durable peace, security and stability in the sub-region; and the lessons that can be learnt from the activities of PMSCs in the West Africa sub-region from a peace-building perspective. Finally, policy recommendations are made for regulating the activities of PMSCs, drawing from best practices in other countries.

## DEFINING AND CATEGORISING PMSCs

Private military and security companies are corporate entities specialising in providing expertise in military assistance, covering the areas of tactical combat operations, strategic planning, intelligence gathering and analysis, operational support, troop training and technical assistance.<sup>9</sup> These PMSCs are contracted to provide a wide range of services ranging from the provision of military supplies, technical support and other non-lethal activities.<sup>10</sup>

The Montreux Document defines PMSCs as:

Private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.<sup>11</sup>

The Geneva Centre for the Democratic Control of the Armed Forces (DCAF) defines PMSCs as:

[B]usinesses that offer specialized services related to war and conflict, including combat operations, strategic planning, intelligence collection, operational and logistical support, training, procurement and maintenance.<sup>12</sup>

PMSCs can be categorised into three groups according to their field of operation. Using the visual image of a spear, one can say that the *military provider firms*, which provide implementation and command services, represent the tip of the spear; the *military consultancy firms*, which provide advisory and training services, represent the middle, or shaft, of the spear; and the *military support firms*, which provide non-lethal aid and assistance, represent the base of the spear.<sup>13</sup>

## PEACEBUILDING AND THE ROLE OF PMSCs

The general human insecurity experienced in Liberia and Sierra Leone has meant that some African leaders relied heavily on PMSCs for security, and this has led to a proliferation of PMSCs undertaking several peace-building programmes in these countries.<sup>14</sup>

But what do we really mean by peace-building and how do the activities of PMSCs fit into the peace-building matrix in West Africa? In the UN report *An Agenda for Peace* (referred to in Chapter 2), the former UN secretary general, Boutros Boutros-Ghali, defines peace-building as 'action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict'.<sup>15</sup> In practice this means: disarming warring parties; restoring order; decommissioning and destroying weapons; repatriating refugees; providing advisory and training support for security personnel; monitoring elections; de-mining and other forms of demilitarisation; providing technical assistance; advancing

efforts to protect human rights; reforming and strengthening institutions of governance – including assistance in monitoring and supervising electoral processes; and promoting formal and informal participation in the political process.<sup>16</sup>

In essence, the goal and function of peace-building, as described by Metz, is to stop violent conflict, and to develop long-term political, legal and economic systems and institutions that can forestall future outbreaks of violent conflict.<sup>17</sup> Metz argues that peace-building must proceed on three parallel tracks. The first is continued political, economic and policy reform. The second is the continuation of programmes to augment conflict prevention, response and resolution capabilities. The third is the provision of some sort of bridge for states to build their own capacity.<sup>18</sup>

## PROBLEMATISATION OF THE PMSC PHENOMENON IN WEST AFRICA

The fundamental question is whose interests do these private operators seek to protect or promote. It is quite evident that several PMSCs operating in West Africa, particularly in Liberia, Sierra Leone, Guinea and Nigeria, do not subject themselves to the rules and regulations of their host countries. In Sierra Leone, in what became known as the ‘arms to Africa scandal’, the PMSC Sandline International in the course of helping restore Tejan Kabbah to power, was reported to have imported some 35 tons of assault rifles, ammunition and mortars into the country, in clear violation of UN Security Council Resolution 1132. In exchange for this assistance, Kabbah agreed to hand over 30 per cent of the country’s diamondiferous land, worth US\$ 200 million.<sup>19</sup>

In the long run peace-building programmes undertaken by PMSCs jeopardise security, because of the absence of democratic oversight and accountability. These companies represent the strategic interests of the donor countries rather than the security concerns of the recipient countries.<sup>20</sup> As Zedeck observes,

The operations of PMSCs in conflict regions have historically been problematic. Lack of transparency, democratic oversight and accountability inevitably lead to a decreased perception of legitimacy on the part of these actors in the eyes of local governments and civilian populations. Increasingly, civilian populations perceive PMSCs as showing disdain for human rights, operating outside the framework of the rule of law and without accountability to the state in



which they operate or regulation by the state in which the company originates (predominately the United Kingdom and United States). This culture of impunity leads to resentment of PMSCs who profit from war in these regions.<sup>21</sup>

Against this backdrop we now examine the activities and impact of these companies in West Africa, particularly in Liberia, Sierra Leone, Guinea Conakry, Côte d'Ivoire and Nigeria. While the need for peace and stability is generally given as the reason for outsourcing core military and security tasks, the secrecy surrounding the activities of PMSCs, their reputation for exploiting resources, and their insulation from parliamentary oversight at the national level pose a grave strategic threat to human and national security.<sup>22</sup>

Over the past three decades, despite the questionable operations of certain PMSCs in resource-rich countries such as Sierra Leone and Liberia, these states continue to outsource core military and security functions to such companies.<sup>23</sup> The material interests of the companies are not always compatible with bringing about long-term security and, as illustrated, may include the awarding of rights to strategic mineral resources on behalf of corporations.<sup>24</sup> While there is evidence to show that in the short term PMSCs can help restore stability, their first priority is the maximisation of profit, which raises serious concerns about the wisdom of using them in the long term.<sup>25</sup>

## PULL AND PUSH FACTORS FOR PMSCs

In 1994, the then US President Bill Clinton signed Presidential Decision Directive (PDD) 25, which outlined the new US policy on peacekeeping and peace enforcement. The essential change in the policy was that extensive and direct US involvement would be a last resort.<sup>26</sup> The directive paved the way for the commercialisation of military and security services by contracting PMSCs in several parts of the world. As pointed out by the former US deputy assistant secretary of African Affairs, Theresa Whelan:

We wanted to support peace operations in Africa, however we realized that our forces were tied down elsewhere around the globe and they might not be available for the long-term deployments. ... Consequently, contractors began to play a larger and larger role particularly in the logistical support of sub-regional peace operations.<sup>27</sup>

## Brooks points out the logic of the US government approach:

With the reality that the West is reluctant to commit its militaries, the only way Africa is going to acquire military capability to end its many conflicts is to contract the services elsewhere. Fortunately, these private services are readily available at a remarkably affordable price.<sup>28</sup>

As indicated in these two statements, the increasing prominence of PMSCs is an offshoot of the global phenomenon of outsourcing as practised by powerful financial and political interests.<sup>29</sup> For peace support operations and peace-building in the West African sub-region, PMSCs bridge the gap arising from the ineffectiveness of states and sub-regional organisations such as the Economic Cooperation Organisation of West African States (ECOWAS) in the area of military and security support and training. Although ECOWAS began as a mechanism for economic cooperation, as a result of the decades of violent conflict in the sub-region, the organisation expanded into the security realm.<sup>30</sup>

Other factors that have contributed to the dominance of PMSCs in West Africa include the weak institutional capacity of African states, the inability of states to effectively respond to security threats or to ensure a successful transition from war to peace, and a need to reform and professionalise the military and police.<sup>31</sup>

From a peace-building standpoint, PMSCs have played a prominent role in preventing the collapse of authority and a slide into anarchy in the Mano River Union. In Sierra Leone, Executive Outcomes and International Charter Incorporated (ICI) were involved in combat operations in support of government forces, and they ferried personnel and troops during the violent conflict that engulfed the country.<sup>32</sup> PAE and DynCorp were involved in the provision of logistical support to the UN Mission in Sierra Leone. In Liberia, ICI and PAE provided military aviation support to ECOMOG – the ECOWAS Monitoring Group involved in peace support operations.<sup>33</sup> The ECOMOG forces were ill-equipped in terms of helicopters, gunships, trucks and tanks, ambulances, communication technology, uniforms and medical supplies, which led to an unprecedented reliance on PMSCs for military and security services.<sup>34</sup>

At the same time the actions of PMSCs have been associated with a succession of human rights violations and a proneness to mercenary activities.<sup>35</sup> Other than Sandline's embroilment in the 'arms to Africa scandal', Life Guard – a PMSC protecting the diamond fields of Sierra Leone during the war – was accused of

shipping arms to the rebel forces in clear violation of an existing UN arms embargo. In Liberia, personnel of DynCorp International, a major PMSC in charge of implementing security sector reform within the context of a larger post-conflict peace-building process, were accused of buying and selling prostitutes and young girls, as well as videotaping the rape of women. These incidents of illicit activity blur the distinction between PMSCs and mercenaries.<sup>36</sup> To complicate the issue, PMSCs that assist leaders in eliminating rebels that challenge their authority are seen by some to be advancing the cause of peace, while others would consider this to be mercenary action.<sup>37</sup>

Nevertheless PMSCs are here to stay, and in view of the overwhelming security challenges and the weak institutions in West Africa, the region needs to come to terms with this.<sup>38</sup> As Isima observes:

[T]he ascendancy of PMSCs and other private actors in security governance has come to be represented as an 'inescapable' reality of globalisation which cannot be gainsaid, but one with which the state has to live and negotiate the shifting terms of authority.<sup>39</sup>

## AGENDA FOR ACTION

Since their establishment in 2005, the UN Peacebuilding Commission, Peacebuilding Fund, and Peacebuilding Support Office have dominated the debate on peace-building at national, regional and global levels.<sup>40</sup> Much attention has been placed on the activities of states, supra-national organisations and civil society organisations in peace-building, yet it is PMSCs that are currently holding sway. Despite the fact that these companies are viewed by the international community as an unattractive option, the refusal or reluctance of states to commit their national forces to interventions means that the use of PMSCs is the best available alternative.<sup>41</sup>

In light of the realities and challenges to PMSCs and peace-building in the sub-region, and the absence of a sub-regional framework for regulating their activities, the following recommendations are offered:

- Countries that make up the sub-region should ensure that they develop a framework for regulating the activities of PMSCs. For its part, ECOWAS should

take an active role in the existing UN Draft International Convention on PMSCs so as to ensure its interests are taken into consideration before the Convention comes into effect.

- The African Union should work towards a revision of the Organisation of African Unity (OAU) Convention on the Elimination of Mercenarism in Africa, to ensure it takes into account the prevailing reality of the proliferation and influence of PMSCs in the African continent, especially since all member states of ECOWAS are also members of the AU.
- In light of the fact that some PMSCs working in diamond-rich countries in the sub-region such as Liberia and Sierra Leone are also involved in illicit diamond trade, governments at the national, sub-regional and regional and global levels should ensure strict adherence to the Kimberley Certification Scheme. This scheme has been designed as a surveillance mechanism to prevent unethical trade in conflict diamonds.
- PMSCs should be accountable to both the states that contract them and the states in which they operate. Currently there are no internationally recognised parameters for accountability or codes of conduct for PMSCs. Compliance with such parameters should be a precondition for outsourcing military and security services to PMSCs in West Africa.
- Partnerships between states and PMSCs are needed so that these states can achieve goals rather than simply allowing PMSCs to undertake their activities unchecked and unregulated. Thus, a grouping of recipient states should be able to carry out oversight on the activities of PMSCs to ensure they operate within the guidelines stipulated in their contracts.
- The experience of PMSCs in West Africa shows that they have the capacity to both undermine and assist the peace-building and stabilisation efforts of ECOWAS. Thus organisations such as the AU and the UN should not allow PMSCs to monopolise peace-building tasks. They should instead show strong commitment to funding the stabilisation efforts of states in the sub-region by ensuring the creation of an ECOWAS standby force that is well-trained and equipped to respond to emergencies with a high degree of efficiency and effectiveness.
- Civil society organisations should establish monitoring mechanisms to regulate the activities of PMSCs (as legal persons) and their employees (as natural persons) to ensure they operate in accordance with the principles of the relevant national law, international human rights law and international

humanitarian law. This would guarantee that PMSCs are held responsible for any crimes they commit in violation of human rights and humanitarian laws.

- Member states of ECOWAS should put in place mechanisms for the compensation of victims (both individuals and states) of human rights abuses by PMSCs and their employees.
- States in the West African sub-region in which PMSCs operate should strengthen their legal and justice institutions, as part of their commitment to long-term peace and security.

## CONCLUDING REMARKS

The search for peace, security and stability is the most pressing challenge for West African states. PMSCs can play a role in addressing these challenges if they are effectively regulated. Only then will they be able to build the capacity of the security sector to provide security for both states and people, and avert relapses into the violent conflicts that have plagued the West African sub-region.

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# 5 Legal perspective

## Do private military companies have a legitimate place in peacekeeping?

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### INTRODUCTION

This chapter considers whether private military and security companies (PMSCs) should be deployed in peace-support operations, and if so, how this should be done. The question of accountability and the legality of deployment of these companies in peacekeeping operations is examined from the perspective of the legal frameworks of the United Nations (UN), the African Union (AU), host state law, and international human rights and humanitarian law. The chapter navigates the 1989 UN International Convention Against the Recruitment, Use, Financing and Training of Mercenaries ('UN Convention') as well as the 1977 AU Convention on the Elimination of Mercenaries in Africa ('AU Convention'). The key question is how to ensure that armed security contractors comply with international human rights and humanitarian norms, and respect the core tenets of peacekeeping in host states. Insights are offered on how a contract between a client state and a private military and security company can regulate the company's activities and ensure oversight vis-à-vis the tenets of peace support operations, particularly: neutrality, restraint on the use of force, and respect for local law.

The premise throughout is that a state cannot outsource accountability and that peace support operations do not constitute 'business as usual'. If peacekeeping business goes to an armed private operator, then there is a need to expand the conceptual frontiers of regulatory norms. This inquiry focuses on the question of the neutrality of peacekeepers by exploring: (1) the extent of direct participation in hostilities by PMSCs and the blurring of the 'principle of distinction' and its implications; (2) the grey zone regarding accountability mechanisms for PMSCs; and (3) how to enforce compliance by PMSCs to human rights and humanitarian obligations as well as host state law.

Given the increased use of private military and security companies and the very broad range of tasks contracted out to them, concerns are growing about violations of both host state law and international humanitarian law. The failure of states to establish workable accountability mechanisms and the paucity of regulation governing the 'commercial military sector' is resulting in an increase in the number of serious incidents where PMSCs violate human rights and international humanitarian law.

## THE MOVE TOWARDS PRIVATISATION

The idea of peacekeeping was born out of frustration within the UN organisation at its own inability to enforce peace as envisaged in the UN Charter. The provision in Article 43 of the Charter, which provided for a standing UN peacekeeping force, became moribund. Instead, UN member states now contribute troops to UN peacekeeping missions as and when the need arises. However, fatigue has set in among some states, especially in prolonged yet volatile crises such as the one in Somalia. The reluctance of some member countries to deploy adequate numbers of troops has led to an increased tendency to outsource peace-support activities to private operators. This privatisation of military functions reflects both a general enthusiasm in the industrialised world for outsourcing state functions, and a reluctance on the part of key states to intervene in conflicts that are not of immediate strategic interest, or where domestic support for intervention is lacking.<sup>1</sup>

From a socio-economic perspective, the increased privatisation is hardly surprising, given the trend towards increasing outsourcing of traditional state functions combined with the growing range of commercial opportunities in the 'war business'.<sup>2</sup> Business opportunities for PMSCs are increasing as a result

of the diversification, 'technologisation', civilianisation and criminalisation of warfare.<sup>3</sup> Whether they are viewed as corporate mercenaries or private armed forces, the prominence of PMSCs in the performance of core military tasks is now widespread.

By their very presence in armed conflict zones, and the nature of their activities, PMSCs increasingly come into contact with both civilians and combatants. Apart from the issue of accountability, a problem arises when PMSCs perform core peacekeeping functions, given that neutrality and impartiality are a prerequisite. Legally PMSCs fall into a grey zone in which the 'principle of distinction' in warfare becomes blurred. While these companies can be categorised as 'force multipliers', the employees of such companies do not fall neatly into either the category of 'civilians' or that of 'combatants'. This means, in effect, that the rapid growth of PMSCs has outpaced regulation of the industry.<sup>4</sup>

The reckless and irresponsible conduct of certain armed military contractors, many of which enjoy immunity from local prosecution, undermines any 'hearts and minds' campaigns or security interests of states. Their culture of impunity not only angers local populations but also weakens military missions and sets the stage for further abuse by such companies. In short, when private companies are not held accountable, their operations, rather than enhancing humanitarian objectives, put them in jeopardy.

## THE CONCEPT OF PEACE SUPPORT

Peace support operations are generally understood to be multifunctional operations, conducted impartially – normally in support of an internationally recognised organisation such as the UN, AU, or Southern African Development Community (SADC) – and involving a combination of military forces and diplomatic and humanitarian agencies.<sup>5</sup> Designed to achieve a long-term political settlement or other specified conditions, peace support operations include peacekeeping and peace enforcement as well as conflict prevention, peacemaking, peace building and humanitarian relief. The generic term 'peace-support operations' is used to cover all such tools of conflict resolution.

Because of the reluctance of key states to intervene in some conflicts, the participation of private companies in peacekeeping operations is already fairly widespread. Another development driving the use of these contractors is that humanitarian agencies operating in conflict zones or fragile states are increasingly

coming under attack, prompting them to turn to PMSCs for services that traditionally have been provided by national militaries.

Companies that export military and security services blur the dividing line between the public and private sectors. They are essentially profit-driven yet often present themselves as humanitarian or peace-building organisations. As pointed out in the report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, dated 13 February 2008, PMSCs are neither humanitarian actors nor peace builders, and are basically motivated by commercial considerations.<sup>6</sup>

It is, therefore, logical to assert as Trevor Findlay (1996) does, that PMSCs should not be deployed as peacekeepers, since peacekeepers 'have no enemies, are not there to win and can use force only in self-defence. [Their] effectiveness depends on voluntary cooperation.'<sup>7</sup> Another key tenet of peacekeepers is the maintenance of an impartial, non-discriminatory stance towards all the parties in a conflict. This is where the use of private companies becomes tricky since it is business interests – rather than legal concerns or altruism – that govern the conduct of PMSCs.

PMSCs can be defined as corporate entities that provide military or security services on a commercial basis.<sup>8</sup> They offer specialised services related to war and conflict, including combat operations, strategic planning, intelligence collection, operational and logistical support, training, procurement and maintenance.<sup>9</sup> According to Mlambo (2010):

It is important [...] to make a clear distinction between private security companies (PSCs) and private military companies (PMCs), even though many people use the two terms interchangeably. The former includes security guards, on-site security and other safety device specialists and surveillance companies, while the latter includes military escorts for politicians, weapons and de-mining experts and mercenaries. The distinction is important because PSCs are already well regulated by national and international law.<sup>10</sup>

For the purposes of this discussion, the focus will be on those civilian firms that provide international services traditionally provided by national militaries in situations of armed conflict. The distinction between individual actors and those working for private companies is important for assigning responsibility.



Individuals operating on their own are properly called ‘mercenaries’ and as such they usually lack oversight and accountability. On the other hand, employees of a PMSC sell their services to the company, which in turn sells those services as part of its corporate offering. In this case, the PMSC is responsible in every sense for its employees. This includes screening their backgrounds against acceptable criteria of hiring and employment, and being liable for the activities of employees, including during operations.

Mercenaries by definition do not fight for a cause or a country but for personal gain. The AU Convention defines a mercenary as any person who: (a) is specially recruited, locally or abroad, in order to fight in an armed conflict; (b) takes part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and is promised material compensation by or on behalf of a party to the conflict; (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) is not sent by a state other than a party to the conflict on an official mission as a member of the armed forces of the said state.<sup>11</sup> Both the UN and AU Conventions against mercenaries deal with measures to eliminate the practice of mercenarism and to overcome the abhorrent activities of mercenaries against the political independence and territorial integrity of states.

As a criterion in the definition of mercenary, Article 47 of Additional Protocol I requires that the person is ‘motivated to take part in the hostilities essentially by the desire for private gain’. The same approach is adopted in the 1989 UN Convention against Mercenaries. The conventionally applied definition does not help much to categorise PMSCs and their staff, as it not only ignores the complexity of motives that may be involved, but it is also difficult to prove. However, the fact that their interests are profit-driven does complicate control, transparency, and accountability issues where PMSCs are concerned.

The claim to legitimate violence has long been understood to be the exclusive domain of states.<sup>12</sup> Mercenaries and the modern phenomenon of PMSCs challenge this neat schema. In light of this, outsourcing military services to private business corporations (in other words, privatising warfare) changes the rules of international politics and warfare. With the growth of the global commercial military services industry, the state’s monopoly in the security sphere has been eroded.<sup>13</sup>

While the lines between economics and warfare were never clear-cut, the general assumption is that warfare is engaged in by public militaries, fighting for

a common cause.<sup>14</sup> There is a consensus that national defence is best carried out by a tax-financed government force.<sup>15</sup> Unlike private companies, national armed forces ideally are loyal to their governments and comply with international obligations to which their states have agreed. However, the loyalty of PMSCs is only governed by their terms of contract and not by any greater or permanent cause of duty. They are involved in warfare or peace support simply as an occupation that benefits from such operations. This, according to Singer (2003), puts them at risk of relinquishing moral attitudes towards both warfare and humanitarianism.<sup>16</sup> National military personnel are bound by standard operating procedures; they serve a higher purpose on behalf of the state and thereby fulfil a societal need. A strict code of ethics sets them apart from private military and security companies. National military professionals 'deal in life and death matters, and the application of their craft has potential implications for the rise and fall of governments'.<sup>17</sup>

This brings us back to the question of whether or not PMSCs can conduct peace-support operations professionally. This question can be answered if we consider the assertion by the former UN secretary general, Dag Hammarskjöld, that peacekeeping is not a job for soldiers but only soldiers can do it. While peacekeeping primarily involves policing functions, the crucial issue for PMSCs in this role is that it brings a profit motive into humanitarian operations. This raises complex questions about neutrality and impartiality.

It is not that PMSCs are not regulated by law. Local law and international humanitarian law (IHL), *inter alia*, regulate their activities and the activities of their employees, as well as the responsibilities of the states that hire them, host states and their states of nationality. However enforcement of the law is another matter. It is impeded among other things by a lack of extraterritorial jurisdiction, by dysfunctional courts in host states, by the challenges of jurisdiction and evidence, as well as by the immunity granted to PMSCs, usually in host states. All these factors mean that PMSCs (and the organisations that contract them) are not sufficiently accountable. This deprives victims of redress and fuels further violations.

Although there is a specific reference to mercenaries in international humanitarian law, there is no reference to private military and security companies, nor are PMSCs regulated by customary international law.<sup>18</sup> In short, there is no specific regulation of these companies as such, but it is not accurate to say that there is no law applicable to them at all. Depending on the circumstances, certain aspects of established law will apply to PMSCs. Some issues, however, remain

unclear in the law, hence the need for revision of the extant law. The question we have to consider here is: who is responsible for regulating the activities of these companies in the course of peace support operations?

Key areas of regulation are: the contract between a PMSC and its client; individual accountability of PMSC personnel; the status of forces agreement between the UN and host nations; and between the territorial state and the states of nationality of PMSCs. Given that some companies tend to present the activities of their mercenaries as private security activities, there is a need to revise both the AU and UN Conventions to close the loopholes that allow mercenaries to escape the reach of the law.

## **A price for peace: can peacekeeping really be a business?**

The use of private contractors in peacekeeping operations has both advantages and disadvantages. One advantage, for example, is that PMSCs can rapidly mobilise and disband without political implications. A disadvantage is that it is risky to use PMSCs in peace operations, as their main objective is to please shareholders, so their commitment to the task of establishing sustainable peace and security is limited. Accountability is another area to consider. By and large, the law of armed conflict in international humanitarian law is directed primarily towards the standing armies of states. As private operators take on more responsibilities on the battlefield, the question that arises is whether the accountability structures adequately address the evolving environment. PMSCs have tended to assert that their operations do not fall within an existing legal framework and that therefore their industry is self-regulated.<sup>19</sup> This does not mean, however, that national militaries are inherently virtuous and PMSCs inherently harmful to public interests.

The point of departure for thinking about this issue is that PMSCs are businesses first and foremost.<sup>20</sup> There is, therefore, legitimate cause for concern about leaving issues of humanitarianism to purely market mechanisms. The challenge is to find a realistic approach to political accountability and legal liability, which addresses the problems of unaccountable actors wielding lethal force while accommodating the interests of the consumers and suppliers of what is now an established industry. Whenever the provision of a public service depends on private actors, balancing private and public interests is a key consideration. This balance is particularly imperative in situations where private interests affect fundamental state functions such as national defence, and the claim to legitimate violence.<sup>21</sup>

One difficulty for clients contracting the services of private operators is that the services they are buying are crucial for their security. There may be tension between the security goals of a client state and a private company's desire for profit.<sup>22</sup> A contractual process to regulate PMSCs is therefore extremely important, especially when the classic 'monopoly of violence' is ideally intended to reside in the hands of publicly accountable officials. This is particularly true in peace-support operations where PMSCs perform humanitarian functions: regulating their activities is imperative in order to ensure public accountability and transparency.

Private military and security companies claim to ensure the professionalism of their operators by thorough vetting, ongoing training, and appropriate liability insurance policies. However, none of these measures guarantees the prevention of gross misconduct or the violation of international humanitarian law. The prevention of such incidents has to be at the core of all regulatory and standard-setting initiatives for PMSCs, primarily in their contracts with clients.<sup>23</sup> If these companies wish to develop and retain the same degree of public trust and legitimate use of public violence that citizens bestow on their states, then they must accept the same degree of public accountability required by state institutions.<sup>24</sup> This would also go a long way to legitimising their activities and distinguishing them from 'traditional' mercenaries, and the negative connotations of that label.

In the absence of international will to commit the resources necessary to stabilise fragile states, or domestic will to keep the use of armed force exclusively under government control, 'mercenaries' will continue to go where there is a market.<sup>25</sup> For these reasons, one option that has been advanced is to create an international body to govern and regulate the activities of PMSCs.<sup>26</sup> Since peace-support operations are not 'business as usual', it is incumbent upon the UN and the regional bodies that sanction such operations to initiate a proactive regime for such regulation.

## Are PMSC employees civilians or combatants?

While PMSCs do operate in peacetime, they are normally hired in situations of armed conflict. Most often they are hired by a state party (as opposed to a non-state party) to an internal conflict, or by a company seeking to protect its business operations in a country where a conflict is taking place. Nevertheless, as confirmed in the *Nuclear Weapons Advisory Opinion*, the principle of distinction

between combatants and civilians is the keystone of international humanitarian law and ‘these fundamental rules are to be observed by all states whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law’.<sup>27</sup> In the same vein, Article 48 of 1977 Additional Protocol I to the Geneva Conventions of 1949 states:

[I]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

The *quid pro quo* for the special protected status enjoyed by civilians is that they are strictly prohibited from participating in hostilities – except in the exceptional case where they are participating in a *levee en masse* (mass conscription). In this case they shall be regarded as belligerents, provided that they carry their arms openly and respect the laws and customs of war,<sup>28</sup> and if they do not bear their arms openly, they shall not be entitled to prisoner-of-war status upon capture.<sup>29</sup> The recent increase in outsourcing of military tasks has put more employees of PMSCs into direct contact with people protected by international humanitarian law. The prominence of these companies in warfare – whether viewed as corporate mercenaries or private armed forces – raises two threshold questions. Firstly, are they civilians or combatants (and if combatants, are they liable to be targeted)?<sup>30</sup> Secondly, are they entitled to prisoner-of-war status upon capture? A determination of the status of PMSCs also has a bearing on state responsibility for their actions.<sup>31</sup>

When private companies work as ‘force multipliers’, employees of PMSCs are not civilians in the strict sense of the term, nor are they soldiers. The question therefore arises as to whether – and if so, how – PMSCs can be deployed in peace-support operations to complement national militaries. Unlike members of national armed forces, employees of PMSCs seem to be outside the military chain of command and not subject to a military code of justice, nor are they accountable to the people and parliament of a particular state.

In an international armed conflict, Article 51(3) of Additional Protocol I encapsulates the principle of civilian protection, and its conditionality that civilians shall enjoy protection ‘unless and for such time as they take a direct

part in hostilities'. Similarly, for a non-international armed conflict, Article 13(3) of Additional Protocol II provides that '[c]ivilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities'. It follows that, unless they are part of the armed forces of a state, the staff of PMSCs are civilians and accordingly, they cannot be targeted and may not take direct part in hostilities.<sup>32</sup> This means that if they played a direct part in combat, they would lose any civilian immunity from attack and could be prosecuted for their activities. If they were captured, they would not be entitled to prisoner-of-war status. However, according to Article 4(4) of the Third Geneva Convention of 1949, certain civilians who accompany the national armed forces, including PMSCs, have a right to be treated as prisoners of war. In such cases, they must have authorisation from the armed forces in question, and carry a special identity card.

While Additional Protocol I in Article 48 provides for the distinction between combatants and civilians, 1977 Additional Protocol II to the Geneva Conventions of 1949 does not recognise the status of combatancy during non-international armed conflicts. The implication is that aside from members of a state's armed forces, all persons taking up arms during a non-international armed conflict, including PMSC personnel, are legally civilians and not combatants. Thus where PMSC personnel are involved in combat of a non-international character, they have no privileged combatant status under international humanitarian law and are technically 'unlawful' or 'unprivileged' combatants<sup>33</sup> – that is, civilians who are unlawfully engaged in combat and who may be punished by the national authorities for that fact alone.<sup>34</sup> There is no legal distinction between combatants and civilians during a non-international armed conflict, so fulfilment of the fundamental rule of protection of genuine civilians during such a conflict depends on an understanding of what actions trigger a loss of the protected status of civilians and expose them to legitimate attack.<sup>35</sup>

In practice, there are two clearly distinguishable types of private military and security company: 'those with guns and those without' – or security contractors and logistics contractors.<sup>36</sup> Many firms that specialise in protecting personnel and property, as opposed to engaging in combat activities, prefer to identify themselves as private security companies. Nonetheless, in areas where the frontline (i.e. the fighting zone) is blurred, it is difficult to distinguish between combat (offensive) roles and protective (defensive) roles. The distinctions between 'security' and 'military', and between 'defensive' and 'offensive' operations are thus rather

artificial.<sup>37</sup> Even so, Article 49 of Additional Protocol I does not provide room for the classification of the company – whether it calls itself a private military company, or private security company, and whether it is involved in so-called ‘offensive’ or ‘defensive’ operations.<sup>38</sup>

While a semantic distinction between ‘security’ and ‘military’ contractors might serve a political function, it is not useful for determining the exact nature of operations and the status of actors under international humanitarian law.<sup>39</sup> In Doswald-Beck’s view, PMSCs should be seen as being ‘recruited to fight’ if they are to defend a military objective against enemy forces, as opposed to using force merely in self-defence, or in defence against common criminals.<sup>40</sup> In this connection, whether the operations are seen as ‘offensive’ or ‘defensive’ makes no difference if the activity falls within an armed conflict situation with sufficient connection to the conflict itself. Hence, the rules of engagement issued to the PMSC would be pivotal. Even if the contract only states the training of military personnel, what is important is the actual activity undertaken. Given that peacekeepers are not parties to a conflict and only use force in self-defence, it is easy to confine a contract to peacekeeping functions.

The question that remains is whether PMSCs are combatants or civilians. As stated earlier, under Article 51(3) of Additional Protocol I (for international armed conflicts) and Article 13(3) of Additional Protocol II (for non-international armed conflicts), civilians shall enjoy protection from attack unless and for such time as they take a direct part in hostilities. The question of whether a certain activity amounts to ‘direct participation in hostilities’ is one which, by its very nature, can only be assessed in the fog of war. If the support role of a PMSC is of such a nature as described in Article 4A(4) of Geneva Convention III as persons accompanying the armed forces, this category is perceived of as civilians not involved in ‘direct participation in hostilities’. Direct participation involves an act of war, which by its nature or purpose is designed to cause actual harm to the personnel and equipment of the enemy armed forces.<sup>41</sup> It is only by such participation that a civilian loses his immunity and becomes a legitimate target.<sup>42</sup> Despite this clarification, questions remain as to what constitutes acts of war, or an attack, given the multifaceted roles of PMSCs.<sup>43</sup>

There is a grey zone as to whether or not employees of PMSCs are combatants or civilians under international humanitarian law. For peacekeeping operations, this grey zone has serious consequences. Unlawful participation by private operators in armed conflict jeopardises peacekeepers’ own security and safety, and

also exposes innocent civilians to danger, both directly and indirectly by weakening the principle of distinction.<sup>44</sup> Thus, there is a risk that the grey area caused by PMSCs will erode the fundamental distinction between civilians and combatants; a distinction that is crucial under international humanitarian law (IHL), both for the conduct of military operations and for humanitarian fieldwork.<sup>45</sup> Thus as a matter of principle, PMSCs should not take a direct part in hostilities, while at the same time peace-support operations are too complex and politically sensitive to be left to PMSCs. Let blue helmets be blue helmets. In fact, private military and security companies operating in peace-support operations should be called 'armed security contractors' (ASCs) and not PMSCs, which they will be called for the remainder of this chapter. To call them PMSCs seems to condone, rather than condemn, mercenarism.

## What roles can ASCs perform in PSOs?

From the above, considering the myriad functions that can be carried out by armed security companies in peace-support operations, any assessment as to what constitutes core military roles must be pragmatic. This means examining the nature of the functions, their closeness to actual military operations, their affiliations, and the existence of chains of command.<sup>46</sup> Rogers (1996) is of the view that '[t]aking a direct part in hostilities must be more narrowly construed than making a contribution to the war effort and it would not include taking part in arms production or military engineering works of military transport'.<sup>47</sup> As a guiding principle, armed security companies should refrain from taking direct part in hostilities and performing core military roles.<sup>48</sup> And where such companies form part of a state's armed forces, the state should take necessary steps to clarify the position by notifying the other parties to the conflict in the same way that it is obliged to do in relation to paramilitary groups or law enforcement agencies that are incorporated into its armed forces.<sup>49</sup>

Classifying the status of armed security companies will enable so-called PMSCs to properly abide by international humanitarian law. It will also put such companies in a better position to assert their status under IHL and promote the protection of civilians in peace-support operations.<sup>50</sup>

A proper understanding of international humanitarian law is crucial if states are to ensure that they are not involved in any form of criminal enterprise by engaging an armed security company or by instructing such companies to



undertake prohibited operations.<sup>51</sup> On its part, the UN Advisory Council on International Affairs (3 June 2004) posits:

[T]he basic political and military precondition for the employment of PMCs is that the state's monopoly on the use of force be maintained. This serves not only to guarantee domestic law enforcement but also to curb the collective use of military force in foreign countries and ensure that it remains an occasional and unfortunately unavoidable exception to the general prohibition. Only states are entitled to use force, only under certain circumstances, and every state is and remains responsible and liable for the use of force – either directly or by others on its behalf – in or against another state. This responsibility cannot be evaded through contracts with PMCs [...] this would amount to 'capitalism in uniform' and that is a very risky combination.<sup>52</sup>

The point is that a state cannot outsource or delegate inherently governmental functions. The core military roles that are governmental functions, include, but are not limited to: direct participation in hostilities; waging war and/or combat operations; taking prisoners; law-making; espionage; intelligence; use of, and other activities related to weapons of mass destruction; and police powers, especially the powers of arrest or detention including interrogation of detainees.<sup>53</sup> Again here, the terms of the contract can play a crucial role in articulating roles, and thus in defining the status of armed security companies in peace-support operations. It is, therefore, important for states engaging in contracts with ASCs to be aware of the principle of distinction so that the contract can be properly drafted, limiting the functions of such companies to the roles prescribed by international humanitarian law.

## **WAY FORWARD: HOW CAN ASCs OPERATE IN PEACE SUPPORT?**

The commonly held view is that use of force is a monopoly domain of states because there is a chain of accountability from democratically elected leaders down to the soldiers – a factor that is absent for private companies. As contractors rather than direct government employees, these companies fall into a grey zone between international law, state of nationality, and host state legislation.<sup>54</sup> In the current normative framework, with no clear legal safeguards, companies

providing armed personnel are self-regulating, which means that they set their own limits. Thus, everything depends on the firms' own values of human rights and humanitarian standards. Clearly self-regulation is insufficient, as there have been allegations that civilians working for ASCs have committed serious abuses, including assault, torture, sexual abuse and shooting of civilians in armed conflict zones.<sup>55</sup>

Recently, in cases where civilians have been killed, security companies have made monetary payments instead of conducting an investigation or holding their personnel accountable. Within these companies, the most serious consequence for misconduct seems to be a fine or dismissal.<sup>56</sup> This raises questions about the responsibility of states for the conduct of ASCs contracted by them. Given that dysfunctional courts and immunity from prosecution are often prevalent in states where peace-support operations are taking place, this leads to other questions: Can the activities of these companies and their staff be properly controlled in situations where the courts of the state in which they are operating are non-functional? What action can be taken if the government hiring the ASCs is unwilling to take action or has conferred extensive immunity to ASCs from local prosecution?<sup>57</sup>

## Can contracts check the accountability deficit?

Private companies may increase a government's flexibility to circumvent political constraints, such as political or other limits on military action.<sup>58</sup> However, going by the decision in *Costello-Roberts v. the United Kingdom*, governments cannot absolve themselves of their international obligations by contracting armed security companies,<sup>59</sup> and in any case, a state remains responsible for ensuring that these companies meet relevant standards. Given that the activities of armed security companies are either tacitly or explicitly sanctioned by governments and have resulted from the transfer of functions from the public to the private sector, the question of the accountability of such companies is very much one of the accountability of the state.<sup>60</sup> A state exercises the functions of an agent and trustee for the individual human beings who are affected by the consequences of state action.<sup>61</sup> This view is supported by the fact that relationship between the state and its citizens is that of a 'trust'.<sup>62</sup>

Granted, the Geneva Conventions assign collective responsibility to all States Parties to the Conventions for ensuring compliance with their provisions. This

principle is embodied in Article 1 common to the Geneva Conventions and is considered to be customary law,<sup>63</sup> including the duty to prosecute perpetrators of violations. As the obligations of states include the duty to abstain from violations of international humanitarian law in situations of armed conflicts, the responsibility for educating and training the staff of armed security companies in the content and application of international humanitarian law lies primarily with the companies themselves but also with the states that hire them.<sup>64</sup> Should the staff of an armed security company commit violations of international humanitarian law, the state that has hired the company may be responsible, if the violations can be attributed to it, in addition to the armed security company itself and its staff. This means that the states on whose territory such companies are located, or those having control of such companies, should be particularly vigilant to ensure that the staff of security companies respect international humanitarian law. States should not hesitate to investigate serious cases involving such companies or, where necessary, to bring charges against senior management.<sup>65</sup> Moreover, states must ensure that mechanisms exist for making the staff of ASCs suspected of violating humanitarian law accountable. An act of the state that is unlawful under international law is a 'behaviour' that amounts to a violation of an international obligation binding on that state, and behaviour attributable to the state under international law may be 'an act or an omission'.

Territorial sovereignty 'has as its corollary a duty – the obligation to protect, within the territory, the rights of other States, in particular their right to integrity and inviolability in time of peace and in time of war'.<sup>66</sup> For example, a state must not abrogate its obligations to citizens, especially on one of its core functions, such as providing security. This points to the need for states to take preventive measures in contracts with armed security companies, to ensure the accountability of these companies and to punish individual offenders. In addition, states have to develop and enforce effective regulation of armed security companies by incorporating all applicable international law, including statutory and customary international humanitarian law, and international human rights law. States are obliged to implement and enforce these laws within their own jurisdictions.

It is the legal duty of states to regulate armed security companies registered in their territories, in order to ensure that they respect international humanitarian law. In this sense, states may need to provide mandatory standards in areas such as safety, as well as in respect of issues such as insurance, vetting procedures for the hiring of staff, criminal checks, proper training in international

humanitarian law, standard operating procedures and rules of engagement that comply with IHL, and internal disciplinary procedures.<sup>67</sup> A state's duty to ensure respect for international humanitarian law in all circumstances includes a duty to train anyone it hires. Therefore, if there is a violation by a company hired by the government and the government did not train it, or ensure that it knew the rules, then it will be responsible for its own omission in not properly fulfilling any specific requirement in the treaties.<sup>68</sup> An armed security company becomes an extension of government policy and when operating in peace-support missions, such a company is the government's diplomat on the ground. As such, the armed company's reputation can precede it and therefore can implicate the state as well. Thus, when selecting such companies for peace-support work, states should keep in mind the public reputation of such companies.<sup>69</sup> States, as troop-contributing countries in peace-support operations, should therefore take the lead in approaching the challenge of using ASCs in peace-support activities and avoid putting the fox with the chickens, i.e. anticipate when increased suffering of innocents will be the inevitable result.<sup>70</sup>

States in whose territory armed security companies are incorporated or operate are in a particularly influential position to affect their behaviour. One way to exercise some control and oversight is to establish a licensing or regulatory system. The regulatory framework can specify a requirement that armed security companies obtain operating licences based on meeting certain criteria. Then, for states that hire ASCs, these criteria can be incorporated in the contract. The regulatory framework or the contract can prohibit certain activities, such as direct participation in hostilities, unless ASCs are incorporated into the armed forces.

Other key elements of contractual control include provisions for ASCs to train their staff in international humanitarian law; to adopt standard operating procedures/rules of engagement that respect IHL; to adopt appropriate disciplinary measures; to require authorisation for every contract (depending on the nature of the proposed activities and the situation in the country where they will operate); and to impose sanctions for operating without having obtained the necessary authorisations or in violation thereof.<sup>71</sup> There should also be compensation and complaints procedures for victims of unlawful actions by these companies. For example, contracts should provide for ASCs to conduct an internal investigation and co-operate fully with investigations by the competent authorities. If they do not, the state should be able to terminate the contract.<sup>72</sup> The contract should

also provide for withdrawal of operating licences, loss of bonds, and criminal sanctions. Such a regulatory system and the contractual obligations should be complemented by a functioning system for bringing to justice those accused of having committed violations of IHL. In short, a state should only hire an ASC if it is able to control the way in which it performs its agreed task, bearing in mind the history of poor accountability for violations by ASCs in armed conflicts.<sup>73</sup>

Violations of international humanitarian law constitute civil wrongs under national law, which can also be viewed as torts (wrongful acts) or crimes. Thus, for example, where armed security companies kill people, murder charges can be levelled against individual employees and/or a tort claim for loss of life can be instituted against the company. Civil suits against ASCs can therefore have a powerful demonstration effect and may compensate victims.<sup>74</sup> If this option is spelt out in the contract, it may help to prevent violations. Through contractual control, states that hire ASCs can set up contractual obligations for the companies to comply with IHL obligations, failing which they can be made accountable.

Nonetheless, as is usual in business contracts, any sanction for non-compliance normally consists of economic leverage rather than legal procedure. Perhaps the most pervasive and effective non-legal sanction would be a refusal to deal with the other party in future. Not repeating an order constitutes the strongest measure likely to follow from contractual non-compliance.<sup>75</sup> This brings to the fore the significance of self-regulation for armed security companies. The most convincing form of self-regulation would be if they voluntarily conformed to a code of conduct that laid down standards with which they would have to comply, on pain of 'ex-communication'. ASCs may well be wary of reputational risk if customers put a premium on a flawless record of service. Thus, self-regulation, (corporate and individual) accountability and compensation would also make useful contributions if imposed as conditions in contracts. It could, therefore, be a pre-condition that states will only employ companies that subscribe to such self-regulation codes and are subject to accountability.<sup>76</sup>

## Can ASC employees be individually accountable?

States should bear in mind that their contracts cover only their relationship with the ASC as a company. Technically, members of staff of the ASC have no formal

legal ties with the hiring state although they are under contract with their employer. According to the law of contract, the hiring state only has as much control over the ASC as is determined by the contract.<sup>77</sup> Even so, the ASC staff (and the ASC company itself) do not operate beyond the scope of international humanitarian law. Regardless of who hires them, if the staff of ASCs violate international humanitarian law in situations of armed conflict they can be held individually responsible, in terms of both IHL as well as the general rules governing criminal and civil responsibility. As far as sanctions for violations of IHL are concerned, the rule of individual responsibility and that defining the responsibility of superiors apply.<sup>78</sup>

However, questions arise as to who is to ensure that companies observe those rules. The fact that responsibility for the punishment of breaches of IHL lies primarily with each party to a conflict in respect of offences committed by its own combatants is all too frequently overlooked. The responsibility of the ASC itself becomes much greater if it is no longer subject to the control of the public authorities. In addition, it is difficult to imagine how the ASC can exercise the responsibility it has incurred.

This problem takes on a new dimension in the event of grave and repeated violations of international humanitarian law, as opposed to occasional transgressions. In such cases, primary responsibility must be sought at the highest level, either from the state that hired the ASC or the ASC providing the service. Serious cases would have to be referred to the courts in the ASC's state of nationality, or even to the International Criminal Court, subject to jurisdictional requirements. But the question again is who is going to refer such a situation? ASCs are in theory subject to the laws of the state in which they operate, but they tend to operate in states with dysfunctional or biased legal systems. At times they may even be given specific immunity from local laws. This is why attention tends to be focused on the domestic law of the sending state (the state where the ASC is registered and its management is based). Even here, although the state may have criminal jurisdiction over ASCs and their employees, in the absence of an institutional capacity to investigate offences abroad this jurisdiction may be impossible to carry out.

The international community has regained its political will to demand individual accountability for serious violations of IHL during wartime, even when committed by leading government officials on behalf of the state. Today, national sovereignty no longer guarantees immunity and impunity.<sup>79</sup> In an

armed conflict, individual members of ASCs will be personally liable if there is sufficient evidence that an individual authorised or perpetrated grave breaches of the Geneva Conventions and the Additional Protocols, which include wilful killing, torture or inhuman treatment, or causing serious injury.<sup>80</sup> Grave breaches are subject to universal jurisdiction, meaning that any state may prosecute any individual of any nationality, irrespective of where the offence was committed. States Parties to the Geneva Conventions and their Protocols are under an obligation to prosecute or to extradite alleged perpetrators of grave breaches. Subject to relevant jurisdiction prerequisites, international penal institutions such as the International Criminal Court are not barred from following the evidence wherever it leads simply because it might result in charges against a governmental official.

Against this backdrop, when drafting a contract for an ASC, the hiring state should bear in mind that impunity for serious forms of misconduct is unacceptable *a fortiori* when it comes to prosecution for grave breaches of IHL.<sup>81</sup> Considering that protection of human rights is the core issue of contemporary humanitarian operations, contracts with ASCs in peace-support operations should provide for the obligation that ASCs and their personnel must respect human rights and IHL, as well as protect civilians. Thus, ASCs must have the capabilities to vet their own training and supervision mechanisms and capabilities, and have rigorous internal disciplinary systems. These companies must co-operate with states or other relevant law enforcement authorities investigating criminal violations of IHL and violations of contract provisions. Violation of IHL should be subject to fines, suspension or termination of contracts, and debarment from future contracts.

Another issue that is brought to the fore by the prominence of private operators is whether command and control, such as in the regular armed forces, effectively exists. Under the principle of command responsibility, superiors may be held responsible not only for crimes committed in the carrying out of their orders but also where they failed to prevent or punish their subordinates when they had reason to know that they were about to commit or committed crimes.<sup>82</sup> This means that the responsibility for grave breaches by employees of ASCs can be attributed to an immediate superior as well as further up the chain of command. It could be argued that chief executive officers as well as managers of ASCs could be held responsible as superiors for violations committed by personnel of their companies even though they may not themselves have been in the peace-support operation zone.<sup>83</sup>

## Can the Red Cross play a role in ensuring compliance?

The purpose of the intervention by the International Committee of the Red Cross (ICRC) in armed conflict situations is, *inter alia*, to ensure prevention of violations of IHL, promote the protection of protected persons (civilians), and the *hors de combat*; and to improve safe access to victims by humanitarian organisations.<sup>84</sup> Where armed security companies operate in peace support, therefore, the Red Cross ought to ensure that the contracts between ASCs and states include compliance with humanitarian norms. Both the Geneva Conventions and their Additional Protocols entrust the International Committee of the Red Cross with a broad right of initiative as well as the authority to offer its services as a substitute for protecting powers in armed conflicts in which such powers have not been designated. This role involves ensuring that the parties to armed conflicts fulfil their obligations under IHL, specifically the humane treatment of all persons under their control, observance of the rules pertaining to occupied territories, and compliance by their armed forces relating to the conduct of hostilities.

The Red Cross plays its role as ‘guardian of IHL’ in a large proportion of ongoing conflicts.<sup>85</sup> This means that when the parties to a conflict are incapable of taking the necessary steps, the ICRC appeals to the international community. The presence of so-called PMSCs in armed conflicts and potentially volatile situations calls for very careful scrutiny by the Red Cross committee.<sup>86</sup> It is for this reason that Sandoz has suggested that the ICRC should lead the dialogue with security companies in order to ensure that their staff members are familiar with and abide by international humanitarian law.<sup>87</sup> Such contact does not of course imply the endorsement of any issue related to the conflict in question.

In the contemporary business world, where the predominant philosophy is that outsourcing is economically advantageous, contractual control should be seen as an expression not just of private control by ASCs but also of control of ASCs by larger market forces and social forces. Contractual control is the voluntary use of private law by ASCs, but it is also a response to external demands that they take responsibility for performing an inherent function of a state.<sup>88</sup> The Red Cross can shape practice in this regard by drafting model contracts for use between states and ASCs involved in peace support to ensure compliance with international humanitarian law.



## How can states check the operations of ASCs?

As mentioned earlier, armed security companies working in armed conflict situations are obliged to respect host state law as well as human rights and IHL. Although the limits of international law are evident in this area, the fact remains that these companies do not operate in a legal vacuum. What needs to be done is not necessarily the creation of new norms but rather the strengthening of existing instruments such as contracts and state supervision of the commercial military sector. On its part, the UN needs to include the obligation to ensure compliance with fundamental human rights and IHL in Status of Forces Agreements by host state and troop-contributing countries applicable to armed forces as well as ASCs.

One of the principal differences between PMSCs and mercenaries is that the activities of PMSCs are usually sanctioned openly by states, in one way or another. This is to be expected since it is usually states that hire, license or permit the activities of these companies. In South Africa, for instance, the Regulation of Foreign Military Assistance Act regulates foreign military assistance by South African companies and bans mercenary activity by South African nationals.<sup>89</sup> In the US, there is strict federal law and state legislation that any company has to obtain government sanction before any commitment is made to provide security or military goods and services to a foreign client. Armed security companies go where their presence is either requested or accepted by the state.<sup>90</sup>

The UN Articles on Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility) govern the conditions and the legal consequences of international wrongful acts by states.<sup>91</sup> According to Article 34, this may take the form of restitution, compensation and satisfaction. However, victims may not always be able to bring claims against the state for violations of international humanitarian law, either in domestic or in international courts, because there are sometimes procedural impediments hampering individuals from being allowed the necessary standing in courts to enforce their rights against states.<sup>92</sup> Pursuant to Article 1, state responsibility can arise from actions or omissions of PMSCs as well as situations where PMSCs are directed or controlled by a state. It is not necessary that a state issue specific orders or instructions relating to illegal acts.<sup>93</sup> A state can also be held responsible for failure to intervene or assume responsibility, as happened in the Iranian hostages case.<sup>94</sup>

Thus, under certain conditions, a state may be held liable for a breach of IHL by private security operators. States cannot shift their responsibility over ASCs

because of a contract.<sup>95</sup> However, it may be difficult to attribute an unlawful ASC act to a state, given that ASCs may be hired by the same state to assist in ‘the discreet execution of their foreign policy, thus creating a cover of plausible deniability’.<sup>96</sup> Thus, while international law provides the legal parameters for state responsibility, attribution may not always be easy to establish, so states may continue using ASCs as smokescreens while evading accountability. It is not possible to outsource accountability, so where ASCs are deployed in peace-support operations, the state that hires them has a duty to take all due care that the ASC acts in accordance with international law.<sup>97</sup>

In cases where the actions of armed security companies cannot be attributed to a state, the state may nevertheless incur responsibility if it failed to exercise due diligence regarding an ASC.<sup>98</sup> When an ASC operates in a peace-support situation where it may pose a threat to life or human dignity, the state’s obligation of due diligence is even greater. The same is true for the outsourcing of military tasks by a state to an ASC with a dubious record.

The due diligence obligation is supported by Common Article 1 of the 1949 Geneva Conventions, which requires a state to respect and ensure respect for international humanitarian law in ‘all circumstances’. This obligation of states also means that states have to ensure that IHL is respected ‘in all circumstances’ by certain private actors, including ASCs.<sup>99</sup> The exercise of due diligence in the context of IHL requires a state to prevent violations of IHL and to prosecute and punish such violations if they occur. This means that a state that hires ASCs has to ensure that ASC employees are properly trained for their missions and fully aware of their obligations under IHL, and ensure that ASCs engaged in peace support operate according to clear rules of engagement incorporating the state’s obligation under IHL. The state also has to take measures necessary to suppress all acts contrary to IHL – to investigate, prosecute and punish those who commit IHL violations, and compensate the victims.<sup>100</sup> As stated in Adebajo and Sriram (2000):

If and when [ASCs] are to be utilized [...] they should be used with a number of safeguards. The company should first have an international mandate for its activities. Rules of engagement and operation should be predetermined in a contract between the [ASC] and the international organization or its home state. The international organization or home state of the [ASC] must take ultimate responsibility for the company’s actions and the sponsor should be

prepared to take political and legal actions against the company should it stray from its mandate. Finally, the [ASC] should be required to accept experienced military monitors at every level of their operations, from planning to field actions. The monitors would ensure the mandate is followed and humanitarian needs are safeguarded [...] necessary safeguards and regulations are not complex or unworkable.<sup>101</sup>

The fact that a state conducts its policies through proxies, rather than through state organs, does not render international law inapplicable. To ignore state responsibility is to dismiss the central role of states in the context of force, and might ultimately result in an abdication of responsibility for peace, international security, and the protection of individuals. The monopoly of deployment of national armed forces by troop-contributing countries is due to the fact that states can effectively place limits on the use of force by their troops.<sup>102</sup> Given the quantitative shift in the activities of companies supplying military and security services, if the law of state responsibility fails to take account of the altered military landscape, this gravely diminishes the capacity of international law to regulate the impact of both state and non-state actors on international security, conflict resolution and human rights.<sup>103</sup>

The difficulty here is that armed security companies thrive in weak and failing states, which have little bargaining power and are unlikely to be in a position to monitor and restrict their conduct, or to enforce the possibility of another hiring state. Yet within the limitations set by the state-centeredness of international law, there is room for manoeuvring by lowering the threshold for attribution, and increasing due diligence requirements where the private activity is inherently risk-prone, or where fundamental rights are at stake. Hence, there exists a jurisdiction gap between national and international courts because of the absence of a body with compulsory jurisdiction to enforce compliance of private operators with the law and the non-self-executing nature of international humanitarian law in certain states, or the assertion of sovereign immunity.<sup>104</sup>

Thus relying on the responsibility of states as a way of addressing the problems arising from the expanding role of suppliers of military and security services is necessary, but it is not sufficient.<sup>105</sup> This points to the importance of regulation at the domestic level, both by the states where these companies are registered, and by states that import their services and where they operate. It

is primarily in these areas that states can and should take action to fulfil their international obligations. Domestic regulatory regimes are more likely to have an impact on the development of the armed security industry, in particular by providing incentives for ASCs that operate in peace-support operations to establish best practices. Given that these companies work in situations where there is no (or weak) state machinery to regulate and control their conduct, greater emphasis falls on the 'sending states'. Troop-contributing countries in peace-support operations can exert influence on the behaviour of ASCs to comply with international humanitarian law through contractual control. In the same vein, Status of Forces Agreements should be drafted in such a way that they leave no cracks for ASCs to slip through with impunity.

For its part, the UN should impose and implement an international ban on all mercenary activities and impose sanctions on countries that supply and support the activities of mercenaries. As a general rule, mercenaries should not be allowed to operate in peace-support operations. The UN should encourage states to exercise the utmost vigilance against the menace posed by the activities of mercenaries, and to take legislative measures to ensure that their territories and territories under their control are not used for mercenary activities. This points to the need to tighten loose ends in the UN Mercenary Convention. The UN may also need to establish clear oversight mechanisms to monitor the activities of ASCs and enforcement mechanisms in case of violations of international human rights and humanitarian standards by ASC personnel.<sup>106</sup> The UN may also assist in security sector reform and building the capacity of armed forces in fragile states so that these states can regain full control over the use of force.

## LOOKING AHEAD

Under common Article 1 to the Geneva Conventions, States Parties undertake to respect and ensure the respect for Conventions in all circumstances. States must not only themselves respect the provisions of the Conventions, but are also obligated to ensure that all those under their authority or jurisdiction do not violate these provisions either. Where armed security companies are active in peace support, the onus is on states to give effect to the provisions of international humanitarian law and to ensure that armed security companies operate within the confines of such law. It is the duty of the hiring state, the host state and the

state where security companies are registered or their employees are nationals, to ensure that these companies and their employees respect international and local human rights legislation.

Like armed groups in non-international armed conflicts, armed security companies may be held liable for human rights violations – especially if they have acted in complicity with states. Thus, if litigation relating to violations of international humanitarian law is to succeed, it needs to target ASCs – domestic, foreign and multinational – in such a way that the prospect of litigation and damages deters these companies from offering their services to foreign states. States should consider expanding their courts' jurisdictions to increase avenues for claiming against violations by ASCs, as indeed the US has done. Vicarious liability of the armed security company rather than its employees is probably preferable, since individual criminal responsibility already exists at the national as well as supra-national levels; coupled with the fact that ASCs have deeper pockets for compensation, which means holding them accountable can have an impact on their practices. States need to establish criminal and civil liability of ASCs for serious violations of international humanitarian legislation and grant courts extra-territorial jurisdiction in respect of such acts.

While domestic legislation can influence and channel the operations of armed security companies, there is little chance that in the heat of the battle, outside the borders of the state of nationality, such legislation will have much effect on profit-driven ASCs. In this scenario, legal control of their social impact can be exercised through private law as well as through state regulation, and it can be exercised by business itself.<sup>107</sup> Thus, a pragmatic response must focus on developing a governance regime that strikes a balance between legitimate business interests and the public interest, as well as between voluntary and imposed regulation, to oversee the activities of ASCs and punish the 'corporate warriors' for abuse. If ASCs are to be entrusted with humanitarian functions on behalf of the state, it is only logical that they accept the same degree of public accountability that state institutions are subjected to. Just as government soldiers are subject to public scrutiny, so should ASCs be when performing public functions.<sup>108</sup> Measures to ensure the observance of law in prospect, rather than penalisation of violations, are important in preventing violations. Hence states involved with ASCs and those who head them should ensure effective application of the law, and likewise it is in the interest of ASCs to promote respect for the law by their employees so to avoid allegations of vicarious responsibility.

To guard international humanitarian law, the Red Cross should draft model contracts for those ASCs that are involved in armed conflicts. Where such companies are used in peace-support operations, there has to be a strict onus on the clients to put safeguards in place. There should be an unequivocal contractual obligation to comply with human rights and international humanitarian law as well as a clear definition of the non-military roles to be performed by ASCs. The concept of 'acceptable risk' has to be used to decide the parameters of inherently state functions that cannot be outsourced to private companies in peace-support operations.<sup>109</sup> State theatres of combat operation should be reserved for the total control of national military commanders with established military structures.

The self-regulatory scheme for the private security industry developed by the British Association of Private Security Companies (BAPSC) provides a useful blueprint. The BAPSC Charter and Code of Conduct obliges PMSCs, *inter alia*, to decline contracts that may be in conflict with international human rights and IHL or potentially involve criminal activity.<sup>110</sup> This, coupled with the joint initiative by the Red Cross and the Swiss government, provides the foundation for underlying principles to guide state practice and ASCs to respect human rights in humanitarian operations. The intersection of private business interests with public security interests in peace-support operations presents real dangers of potential loss of control, oversight and accountability.<sup>111</sup> Market-based sanctions are not a sufficient deterrent for controlling actions by ASCs, hence the importance of contractual control and Status of Forces Agreements. Wherever possible, private contracting should be kept out of critical peace-support operations, and training in international humanitarian law for ASCs and their personnel should be a priority.

While an international treaty could fill the legal lacunae to regulate ASCs and strengthen state responsibility, the ratification and implementation of such a treaty would be slow. In the meantime, contractual control and Status of Forces Agreements are potential tools for ensuring compliance of IHL by ASCs in peace support operations. As a minimum, several steps are needed by the international community: (a) redefine the concept of PMSCs and agree on a standard definition of PMSCs (commercial arm-bearers operating in peace support operations should rather be referred to as 'armed security contractors' to maintain the principle of distinction in IHL); (b) identify the context in which ASCs operate, to restrict the activities that can be outsourced to ASCs and to adopt legislation and establish national as well as international supervisory machinery in respect of such activities; (c) transform voluntary codes into binding codes that establish a registration

and licensing regime and penalties; (d) institute an effective vetting system for employees of ASCs; (e) formulate a legal obligation to provide employees of ASCs with proper training that encompasses human rights and humanitarian standards; (e) establish an international body to oversee the activities of ASCs that can investigate and address complaints emanating from such activities; (f) develop an international criminal code applicable to ASCs; and (g) formulate a legal obligation to present period reports on the activities of ASCs.<sup>112</sup> In summary: ASCs operating in peace-support operations need clearly defined non-military roles, a stricter code of ethics, and a close supervisory mechanism.

## NOTES

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- 58 Advisory Council on International Affairs, *Employing private military companies – a question of responsibility*, 14.
- 59 (1) *Costello-Roberts v the United Kingdom*, European Court of Human Rights (ECHR), 25 March 1993. at para. 27; (2) General Comment No. 31 of the UN Human Rights Committee, which monitors compliance with the International Covenant on Civil and Political Rights (ICCPR), 26 May 2004, UN doc.CCPR/C/21/Rev.1/Add.13, para. 8.

- 60 (1) The International Peace Operations Association (IPOA), the US trade association for PMCs, concludes that national governments are the largest consumers of PMSC services (62 per cent). Others include the private sector (29 per cent), non-governmental organisations (3 per cent) and individuals (6 per cent); (2) see International Peace Operations Association, *State of the peace and stability operations industry survey*, Washington, DC: International Peace Operations Association, 2006, 11.
- 61 (1) H Grotius, *De Mare Liberum*, Ch V, R D Magoffin (trans.) 1916, 1609; (2) See also Hersch Lauterpacht, *The Grotius tradition in international law. British Yearbook of International Law* 1 (1946), 27.
- 62 (1) J Locke, *The Second treatise of Government*, ch. XIII, 149, in P. Laslett (ed.), *Two treatises of Government* 1690, 1988; (2) C Stahn, *The responsibility to protect*, *The American Journal of International Law* 101(1) (2007), 99,111.
- 63 (1) The 1949 Geneva Conventions. Common Article 1, and Protocol I, Art. 1; (2) see also Y Sandoz, *Private security and international law*, in J Cilliers and P Mason (eds), *Peace, profit or plunder? The privatisation of security in war-torn African societies*, 1999, 201–26, 212.
- 64 Global Policy Forum, *Private military/security companies 'acknowledge humanitarian law obligations'*, 2.
- 65 (1) Cf. Sandoz, *Private security and international law*, 212; (2) *Report of the International Law Commission on the Work of its 48th Session*, 6 May – 26 July 1996. General Assembly, Official Records, 51st Session, Supplement No. 10 (A/51/10), 121–32.
- 66 *Island of Palmas (The Netherlands v. United States of America)*, (1928) 2 E. Int'l Arb. Awards, 829, 839.
- 67 Bearpack and Schulz, *The private security challenge in Africa and options for regulation*, 82.
- 68 Doswald-Beck, *Private military companies under international humanitarian law*, 133.
- 69 Singer, *Corporate warriors – the rise of the privatized military industry*, 236.
- 70 McDonald, *The challenges to international humanitarian law and the principles of distinction and protection from the increased participation of civilians in hostilities*, 33.
- 71 See also Advisory Council on International Affairs, *Employing private military companies – a question of responsibility*, 34.
- 72 Ibid.
- 73 Ibid., 31.
- 74 Chesterman and Lehnardt, *From Mercenaries to Markets: The Rise and Regulation of Private Military Companies*, 252.
- 75 D McBarnet and M Kurkchiyan, *Corporate social responsibility through contractual control? Global supply chains and 'other-regulation'*, in D McBarnet et al (eds), *The new corporate accountability – corporate social responsibility and the law*, 2007, 59–92, 79, 82.

- 76 Advisory Council on International Affairs, *Employing private military companies – a question of responsibility*, 22.
- 77 *Ibid*, 34.
- 78 See 1977 Additional Protocol I. Art. 85.
- 79 Cf Art. 27 of the Rome Statute of the ICC on the irrelevance of official capacity.
- 80 (1) See Geneva Conventions, Articles 50, 51, 130, and 147 respectively; (2) Additional Protocol I, Articles 11 and 85.
- 81 Advisory Council on International Affairs, *Employing private military companies – a question of responsibility*, 42.
- 82 See Protocol I. Articles 86 and 87 and the Rome Statute, Article 28.
- 83 (1) *Prosecutor v. Alfred Musema*. Case no. ICTR-96-13-T, 20 April 1999; (2) Cf. Williamson, Private security companies and private military companies under international humanitarian law, 92–93; (3) see also J Clough, Bridging the theoretical gap: the search for a realist model of corporate criminal liability, *Criminal Law Forum* 18 (2007), 267–300.
- 84 Global Policy Forum, Private military/security companies ‘acknowledge humanitarian law obligations’, 1.
- 85 See *Handbook of the International Red Cross and Red Crescent Movement*, ICRC and International Federation of Red Cross and Red Crescent Societies, Geneva, 1994, 422.
- 86 See the 1949 Geneva Conventions, common Article 3; see also the ICRC Statutes, Article 5 (g).
- 87 See Sandoz, Private security and international law, 63.
- 88 McBarnet and Kurkchian, Corporate social responsibility through contractual control? Global supply chains and ‘other-regulation’, 92.
- 89 Government of the Republic of South Africa, Act 15 of 1998.
- 90 Cf. *Case Concerning the Factory at Chorzów. Claim for Indemnity, Merits* (No. 13), [1928] PCIJ (Series A- No. 17), 29, [www.icj-cij.org/pcij/serie\\_A/A\\_17/54\\_Usine\\_de\\_Chorzow\\_Fond\\_Arret.pdf](http://www.icj-cij.org/pcij/serie_A/A_17/54_Usine_de_Chorzow_Fond_Arret.pdf) (accessed 2 March 2010).
- 91 Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10, 2001.
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- 93 *Prosecutor v Tadić*, Judgment, Case No. IT-94-1-A. Appeals Chamber, 15 July 1999, para. 145; but see *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, (*Nicaragua v. United States of America*), Merits, Judgement of 27 June 1986 [1986] ICJ Rep 1986, para 115.

- 94 (1) *United States Diplomatic and Consular Staff in Tehran (Iranian Hostages Case)*, *Judgment*, ICJ Reports, 1980, 3; (2) see also Advisory Council on International Affairs, *Employing private military companies – a question of responsibility*, p21.
- 95 Cf. Articles on State Responsibility. Articles 4, pp5 and 8.
- 96 Ibid. p5.
- 97 A McDonald, *Guns 'n butter for hire: some legal issues concerning private military companies*, *Conference on privatisation of warfare*, Clingendael Institute, 2 June 2004, [www.ikv.nl/docs/200409091531239981.doc?username=gast@ikv.nl&password=9999&groups=IKV](http://www.ikv.nl/docs/200409091531239981.doc?username=gast@ikv.nl&password=9999&groups=IKV) (accessed 1 March 2010).
- 98 (1) University Centre for International Humanitarian Law, *Expert meeting on private military contractors: status and state responsibility for their actions*, International Conference Centre, 29–30 August 2005, 33–40 (hereinafter 'Report of the Expert Meeting on PMCs'), [www.ucihl.org/communication/private\\_military\\_contractors\\_reoport.pdf](http://www.ucihl.org/communication/private_military_contractors_reoport.pdf) (accessed 1 March 2010); (2) cf. *Social and Economic Rights Action Centre v. Nigeria*, Communication No. 155/96(2001).
- 99 Cf. Doswald-Beck, *Private military companies under international humanitarian law*, 133.
- 100 (1) See the Geneva Conventions. Common Article 1 (responsibility to respect and ensure respect); (2) Geneva Convention III, Article 129 (requiring states to search for and bring before their courts, perpetrators of grave breaches against POWs); (3) Geneva Convention IV, Article 146 (requiring states to search for and bring before their courts, perpetrators of grave breaches against protected civilians); (4) see generally, Sassòli, *State responsibility for violations of international humanitarian law*, 92, 411–12.
- 101 A Adebajo and C L Sriram (eds), *Messiahs or mercenaries? The future of international private military services*, *International Peacekeeping*, 7(4) (2000), 129–144.
- 102 Lehnardt, *From Mercenaries to Markets: The Rise and Regulation of Private Military Companies*, 157.
- 103 Ibid. 142.
- 104 E C Gillard, *Private military/security companies: the status of their staff and their obligations under international humanitarian law and the responsibilities of states in relations to their operations*, *PMC/PSC Workshop, Swiss Initiative*, 16–17 January 2006, 9, [www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0015.File.tmp/PMSCsPraesentationen-PrivateeMilitarySecurityCompanies-humanrights.pdf](http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0015.File.tmp/PMSCsPraesentationen-PrivateeMilitarySecurityCompanies-humanrights.pdf) (accessed 1 March 2010).
- 105 Lehnardt, *From Mercenaries to Markets: The Rise and Regulation of Private Military Companies*, 142.
- 106 United Nations Human Rights Council, *The use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, Resolution 10/11, para 3, 26 March 2009.
- 107 McBarnet and Kurkchiyan, *Corporate social responsibility through contractual control? Global supply chains and 'other-regulation'*, 92.

108 Singer, *Corporate warriors – the rise of the privatized military industry*, 242.

109 Determining state functions that cannot be outsourced requires an assessment of the risks involved using the following criteria: (i) the importance of the mission and the tasks that are to be outsourced; (ii) maintenance of the state's monopoly on the use of force; (iii) the security risks to which the personnel in question will be exposed; (iv) the degree of operational dependence on PMSCs; (v) the existence of military alternatives; (vi) the legal framework pertaining to state responsibility; (vii) the scope for monitoring the implementation of the tasks to be outsourced; and (viii) the financial and economic issues. See Advisory Council on International Affairs, *Employing private military companies – a question of responsibility*, 32.

110 See also Bearpack and Schulz, *The private security challenge in Africa and options for regulation*, 83.

111 Cf. Singer, *Corporate warriors – the rise of the privatized military industry*, 235.

112 Cf. UN Report of the Working Group on the Use of Mercenaries, para 13.

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