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AN ANALYSIS OF PRIVATE MILITARY AND SECURITY COMPANIES

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Abstract

The increasing relevance of PMCs and PSCs is related to the progressive ‘privatization’ of war in all of its new expressions: the present scenarios of asymmetric warfare are characterised by the actions of non-State armed groups, which reject the traditional military and legally accepted methods of fighting. The present analysis will first assess the type of work performed by private contractors: the focus will be on the real capabilities of the private sector and the challenges it poses. Then, it seeks the reasons for the recent growth of the private sector both in war and in peace-support operations. The point is made that the increased role of private companies in global security is undeniable and in many sectors necessary. With a serious quality certification, security clearance and transparent tendering, they should also be more reliable. Therefore, the issue is not what can be done and where can it be done by the PMSCs or indeed at what price, but how and to whom they must be responsible and accountable.

An Analysis of Private Military and Security Companies

LTG. ITA RET FABIO MINI

1. The Privatization of War and Security

According to the US Army Field Manual,¹ the traditional types of contractors include:

- a) *System Contractors* that support specific military systems throughout the system's lifecycle. They do so across a range of military operations and usually have high level of technical expertise.
- b) *External Support Contractors* working under contracts awarded by contracting officer serving under command & procurement authority of supporting HQ outside theatre (LOGCAP); they can include third Country nationals.
- c) *Theatre Support Contractors* that are hired and operate in a specific operational area; they provide goods, services and minor construction.

The first analytical challenge is whether the above broad categories comprise the variety of private military and security companies (PMSCs). On the basis of the services, they can be distinguished as follows:

- a) *Private Security Companies* (PSCs) which supply a variety of organizational and personal security services; clients may be government agencies, other contractors, NGOs, or individuals.
- b) *Private Military Companies* (PMCs) which provide a wide range of military services to governments and other organizations. This latter category is close to crossing the "mercenary" line.²

The phenomenon of military outsourcing has been associated with mercenarism and therefore the public opinion usually shows a suspicious or reticent attitude towards them. This is understandable due to the bad reputation the category of the *dogs of war* had gained in the past because of psychopathic or merely apocryphal, insane individuals. However, it is not correct to identify mercenaries with thugs and criminals. Companies which offer private services related to the use of armed force may be portrayed indeed as professional mercenaries but the definition does not imply a worrying moral connotation. Instead, we should worry that the monopoly on the use of force is shifting from legal public entities (the States) to private agents.

The increasing relevance of PMCs and PSCs is related to the progressive 'privatization' of war in all of its new expressions: the present scenarios of asymmetric warfare are characterised by the actions of non-State armed groups, which reject the traditional military and legally accepted methods of

¹ FM 3-100.21, *Contractors on the Battlefield*, January 2003; see also Army Regulation 715-9, *Contractors Accompanying the Force*, 29 October 1999.

² For a different categorisation, see the approach by the UK Ministry of Defence, that uses the broader notion of Contractor Support to Operations (CSO). It includes the *Contractors on Deployed Operations* (CONDO), i.e. civilian personnel providing goods and services outside the United Kingdom within a joint operation area as part of the civilian component supporting UK armed forces; *Sponsored Reserves* (SR), i.e. individuals who serve, as members of the workforce of a company contracted to the MoD, in a military capacity; finally, *Private Military Security Companies* (PMSC) which are involved in the supply of security, defence and military services to members of the military and civilian component. Cf. UK Joint Doctrine Note 1/08, *Military Interaction with Private Military and Security Companies*.

fighting.³ The difficulty to match such forms of violence with the laws and customs of war has also been responsible for the diffusion of the idea that PMCs are allowed to exercise an uncontrolled or self-controlled use of force.

In fact, the privatization of war, or the privatization of security, has achieved momentum because of the crisis of States as basic institutions of politics and international relations. If the attempts to regulate PMCs and PSCs with international rules have failed thus far, it is because of a generalized idea that States have lost their importance and their authority. Unfortunately, this is becoming true when the global economic crisis has called on the States and public sectors to rescue the failed or failing private enterprises. This has the result that many actions taken by States to overcome the crisis are seen as the consequence of blackmail by private sectors in order to avoid social disruption or, even worse, they are seen as the new attempt of a private system of power to benefit from a crisis. If this can be justified by ideology, self-interest and basic principles in economy and finance, where the private sector has assumed a leading role at global institutional level, in the realm of security, the main responsibility belongs to States.

International law binds states, supra-national organizations call for state responsibility, global security is in the hands of state authorities that have delegated part of their prerogatives to the United Nations. The UN Charter has abolished war as a means for dispute resolution, it has banned wars of aggression and has legalized the use of force under limited circumstances: as exercise of self-defence or through the authorisation by the Security Council.⁴ Under Article 24, the primary responsibility for the maintenance of international peace and security is entrusted to the Security Council and it is clear that the collective security system is founded on the statehood of the members. As long as this system is in place, any private approach to public security should defer to State authority and responsibility. Any attempt to bypass or circumvent the State authority under an alleged state of necessity should also be intercepted and blocked. A more stringent state-level regulatory regime of the private sector of security should also serve to establish new and clear principles for the public sectors both at international and national levels.

The present analysis will first assess the type of work performed by contractors: the focus will be on the real capabilities of the private sector and the challenges it poses. Then, it seeks the reasons for the recent growth of the private sector both in war and in peace-support operations.

2. A Short Historical Overview

PMCs as well as PSCs are not a new phenomenon of the Gulf Wars or the fight against terrorism after 9/11. The American company DynCorp, funded in 1946 by World War II veterans, is recognised as one of the first PMC: it provided “technology and logistics support for the American army in Korea, Vietnam, Grenada, and the Gulf War⁵”. During the Cold War, the creation of private military

³ See inter al., R Thornton, *Asymmetric Warfare: threat and response in the twenty-first century* (Cambridge: Polity Press 2007); T Pfanner, ‘Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action’ (2005) 87 *Intl Rev Red Cross* 149.

⁴ See *inter al.* N Ronzitti, ‘The Current Status of Legal Principles prohibiting the Use of Force and Legal Justifications of the Use of Force’ in M Bothe, ME O’Connell & N Ronzitti (eds.) *Redefining Sovereignty: the Use of Force after the Cold War* (Transnational: Ardsley, NY 2005) 91.

⁵ J R Davis, *Fortune’s Warriors: Private Armies and the New World Order* (Vancouver and Toronto: Douglas & McIntyre, 2000) at 157; D Isenberg, *Shadow Force: Private Security Contractors in Iraq* (Westport, CT: Praeger 2009) at 2.

companies was interconnected with the rise of mercenarism. In the period of decolonisation, mercenaries proved to be a valuable tool for both legitimate governments and for insurgent groups.⁶ The leaders of the first PMCs had all military background at the highest level. In 1967, Sir David Stirling, who founded the Special Air Services (SAS) in 1941, then formed the company Watchguard International, which provided military and security services to State clients in Africa and the Middle East (Oman, Saudi Arabia Yemen). In 1981, Defence Systems Limited (DSL) was created in Britain by another former SAS officer, Alastair Morrison: it soon became a reputable company and was hired by governments, corporations and international organisations.⁷

But the rise of private military really owes its growth to the end of the Cold War, which has resulted in the appearance of dozens of PMCs. Through the hyper-violent 1990s, PMCs trained the militaries of 42 nations and took part in more than 700 conflicts.⁸ Executive Outcomes (EO), which ceased its activities in 1998, appeared to be successful in keeping the peace in Sierra Leone, where the UN had previously failed.⁹ Campaigns in Africa comprised about 90% of Sandline's financial and client corpus.¹⁰ In February 2000, Sandline International announced that it had become a registered supplier of the UN Common Supply Database which is available to 12 UN and UN-related organisations, including the UNDP, UNHCR, UN/FALD (Field Administration and Logistics Division), UN/PD (Procurement Division), UNOPS, UNRWA, IAEA, ILO and WFP, when they seek contractual suppliers.¹¹ This recognition came despite Sandline had transferred thirty-five tonnes of military equipment from Bulgaria to ECOMOG forces in Serra Leone, in contravention of the UN Security Council sanctions imposed to that country.¹²

The US firm MPRI played an important role in the Balkans: in 1994, it was hired by Croatia to train its armed forces that profited from that relationship, as shown by Operation Storm of 1995, the offensive against Serb army in the Krajina region.¹³ It was reported that both commanders and officers of the Kosovo Liberation Army were trained and organized by MPRI.

PMCs, with their extensive military experience and connections have become popular alternatives not only for failing governments and insurgent groups, but also for Western governments drawn into endless and expensive wars. Furthermore, the need for peace-keeping and the alibi of peace for conducting low intensity conflicts has developed a growing market for corporate logistics and quasi-peace-keeping services. For instance, DynCorp's services are also integrated into several US agencies:

⁶ See generally, A Mockler, *The New Mercenaries* (London: Sidgwick & Jackson 1985); J Thompson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Princeton: Princeton University Press 1994) at 93; W. Burchett and D. Roebuck, *The Whores of War* (London: Pelican Special, 1977), at 166.

⁷ K O'Brien, 'PSCs, Myths and Mercenaries', in *Royal United Service Institute Journal*, February 2000.

⁸ See inter al., D. Shearer, *Private Armies and Military Intervention* (Oxford: The Oxford University Press, 1998).

⁹ D. Francis, 'Mercenary Intervention in Sierra Leone: Providing national security or international exploitation' (1999) 20 *Third World Quarterly* 319- 338; H. Howe, 'Private Security Forces and African Stability: The Case of Executive Outcomes,' (1998) 34 *The Journal of Modern African Studies* 307-331

¹⁰ PW Singer, *Corporate Warriors: the Rise of the Privatized Military Industry* (Ithaca, NY: Cornell University, 2003)

¹¹ D. Lilly, 'The Privatization of Peacekeeping: Prospects and Realities'[3-2002] *Disarmament Forum* 55-56.

¹² PW Singer, *Corporate Warriors*, above note 12, 115.

¹³ See UK Foreign and Commonwealth Office, *Private Military Companies: Options for Regulation*, February 2002, available at http://www.fco.gov.uk/resources/en/pdf/pdf4/fco_pdf_privatemilitarycompanies, 13.

among others, Drug Enforcement Agency, Department of Justice, Environmental Protection Agency, Federal Communications Commission, Internal Revenue Service and Treasury Department. The company is also active in the peace-keeping market. It provided support services for famine aid in Somalia in 1992, and has been supporting UN peacekeepers in Angola since December 1997. In January 2007, the US Department of State contracted DynCorp “to equip, deploy, sustain, and train all African Union peacekeepers from the Ugandan and Burundian contingents of AMISOM. The initial task was to equip and transport the vanguard force of 1,650 Ugandan Peoples Defense Force (UPDF) soldiers into Mogadishu¹⁴”.

In the Iraqi scenario Blackwater emerged as the most powerful and controversial company. The Nisoor Square incident on 16 September 2007, when Blackwater employees killed 17 Iraqi civilians,¹⁵ revealed a pattern of violence perpetrated by private contractors. In addition, the implication of PMCS’s personnel in the 2004 Abu Ghraib detainee abuse scandal raised the issue of the lack of accountability for such crimes.

It remains that the most impressive aspect is the number of contractors personnel hired by the US agencies in Iraq and Afghanistan, as they constitute Contractors 53% of DOD’s workforce in the two countries. It is significant that, in the period 2003-2007, DoD’s obligated \$76 billion for contracts performed in the Iraq theatre; the US Agency for International Development (USAID) and the Department of State (DoS) obligated \$5 billion and \$4 billion, respectively, for contracts in Iraq over the same period.¹⁶

The use of contractors in Iraq and Afghanistan has raised a number of issues, including: what tasks should be entrusted to contractors in contingency operations; whether the US Department of Defense is correctly analyzing the data on the use of contractors; what DoD should do to improve contract management and oversight; and the extent to which contractors are included in military doctrine and strategy.¹⁷

3. Analysis of the Current Military/Security Private Sector

Even if the purpose of this paper focuses on PMSCs dealing with the use of force, it is important to underline that the privatization of security is not related only to the operatives on the ground wearing uniforms, T-shirts and dark sunglasses while carrying weapons or even driving armoured vehicles. There are many other private actors that deal with security working for public and private entities. They include research institutes, think tanks, consultants, advisors, experts. The so-called “emerging” private sector of security can therefore be categorised as follows:

Private Military Companies or PMCs. They are also known as “Military Firms”, “Military Service Providers” (MSPs), “Privatized Military Firms” (PMFs), “Transnational Security Corporations” (TSCs), and “security contractors”. All of these terms, however, describe the same phenomenon: firms

¹⁴ DynCorp International, *Contingency Operations for Somalia Peacekeeping*, available at <http://www.dyn-intl.com/>

¹⁵ P Kennedy *et al.*, ‘Report of the Secretary of State’s Panel on Personal Protective Services in Iraq’, 23 October 2007.

¹⁶ US Congressional Budget Office, *Contractors’ Support of US Operations in Iraq*, August 2008, at 3.

¹⁷ M Schwartz, ‘Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis’, US Congressional Research Service R40764, 14 December 2009.

offering security and military-related services that up to the 1980s used to be considered the preserve of the state. "PMCs" are legally established businesses offering services that involve the undertaking of various kinds of support, such as military actions both defensive and offensive, protection, risk management, and security tasks.

Private Security Contractors/Companies, (PSCs) or "Security Contractors" are terms commonly used to refer to private companies offering security services or any kind of services to Security and military forces. The terms have been widely used since the onset of the Iraq conflict and sometimes erroneously overstretched to refer to "contractors" in general, a large proportion of which participate in activities that have nothing to do with security or the military.¹⁸ Risk Consultancy Firms may fall into the same category because the offering of security solutions and risk management services is on many occasions intertwined with operational services, particularly when firms operate in conflict and post-conflict environments. Private Security Companies (PSCs) are part of a fast-expanding international security industry rooted in strong demand and offer inherent in the proliferation of security privatization trends since the late 1980s, globally. In this expansion, PSCs increasingly overlap areas of Private Military Company (PMC) service provision and *vice versa*, resulting in the terms PMCs and PSCs used indistinctly by some commentators or the more generalized Private Military and Security Companies (PMSCs).

Research centres and think-tanks whose members and projects cover issues relevant to the privatization of security debate. They may or may not agree with and support the privatization, they may be private enterprises or public institutions. They may or may not call themselves non-profit organizations. However, all of them pursue a "profit" at political, ideological and even at confessional level. The privatization process of security has drawn great benefit from the studies and the debate about it, led by these centres. The publicity given to the issue has not contributed neither to the understanding of the phenomenon nor to the efforts to regulate it. Instead it has attracted more those looking for ambiguous services than those requesting transparency.

4. A More Balanced Approach: 'what they say vs. what they do'

Comparing what the PMSCs say they can do with the evidence of what they actually do gives a more balanced picture of their contribution to security. Many truths emerge along with risks and challenges while many myths collapse. The advantages tend to give way to the disadvantages. However, it should be noted that the presence of the private companies in security and in military fields is not virtual: it is a reality that absent myths and self-celebration is even more and more meaningful. The pace of the growing trend of their presence depends on how the many plain facts will be considered in the political, industrial, military and financial framework that policy-makers have to consider when deciding whether to wage war and start peace support operations as well as any other kind of security operations.

The numerous facts include the following: private companies tend to assume any kind of tasks. Since it is impossible to own permanent staff and employees in order to provide prospect clients with the multitude of services they offer, the companies must group, jointly venture, and assemble or sub-

¹⁸ As of September 2009, 58% of DoD contractors in Iraq performed logistic functions such as maintaining the grounds, running dining facilities, and performing laundry services; security was the second most common service provided, with 11% of contractors. For instance, the British firm Aegis provide a variety of services, including security escort teams, personal security, static guards and anti-terrorist force protection. Cf. Special Inspector General for Iraq Reconstruction, 'Oversight of Aegis's Performance on Security Services Contracts in Iraq with the Department of Defense', SIGIR-09-010, 14 January 2009, 9.

contract in order to acquire such capabilities. They are very flexible and this becomes essential when risk is high and time short. However, grouping different professional skills available on the market can be expensive without ensuring the best quality required. PMSCs contract before and often without having at hand what is needed. The general rule is you ask and we provide: whatever that might would be. Below, I try to discuss some of the most common assumptions regarding PMSCs.

Higher professional skill. The skill of the contractors does not come from nothing. It is drawn from professionals discharged from the military and public security forces. In some instances they have been rejected by public institutions. Therefore the best they can offer has the same level of quality without the same capability to be up-to-date, sufficiently regulated and restrained from abuses.

Cheaper services. The problem of costs is highly controversial. The service *per se* can be cheaper if one does not count: 1) that the expenses for training, social security and operational expertise have been already provided by public institutions and taxpayers; 2) the tax evasion and elusion most of the companies achieve by incorporating in tax havens; 3) the hidden cost of consequences management related to mistakes, misbehaviour and malpractice; 4) the political cost of the loss of state credibility and reputation due to the expansion of the private sector into the institutional real.

Better ability to cope with Fourth Generation War. The 4th GW patterns have been used by private companies to take advantage of the inertia of the military to understand and cope with them. Now the non-linear battlefields and asymmetrical methods of warfare that characterize more contemporary armed conflicts have become the foggy justification for a sort of deregulation of war, with no distinction between military and civilian, combatant and non-combatant forces. In such an environment the private companies can make a huge profit allowing abuses with almost no responsibility and accountability.

PMSCs provide services that used to be military. In fact, in many cases they are unauthorized. They also provide services that should remain in the field of state institutions. It is very worrying that private companies formed only a few years ago claim to possess high professionalism in fields whose technology, procedures, methods, and equipment should not be available to private entities: especially to entities that do not respond to the law and do business with rogue states, perform unlawful activities and illegal trading. From what PMSCs say, it seems that in the last few years private security firms have inherited from the public sector an immense patrimony of knowledge, technology and training. If this is an advantage for the private companies it is a tragedy for the public sector that in addition to the loss of such patrimony, the public sector has to pay to require it. If this is not true, the private companies are just pretending to have these capabilities and so they earn a lot of money for nothing or something already available at public level.

PMSCs hire personnel according to strict ethical standards. The record is not good and unfortunately they attract also unexperienced personnel with severe psychological instability. Those individuals contribute to the myth of private warriors as well as to the discrediting of the category. The selection process is normally very stringent, however for skills related to violent or highly technical tasks as well as trivial jobs, the standards are not set according to ethical requirements. The fact is that normal and well-trained soldiers that retain their psychological balance on and off duty are difficult to get and those who have lost it pose a great risk. When they really offer high quality personnel it is because they have hired high quality military, security or elite professionals. These individuals are taken away from the institutional circuit and so they are not a gain but a loss for the community.

PMSCs cause fewer friendly casualties than government-operated military forces. Considering that 90% of private contractors in Iraq provide logistical and technical services within military installations, the casualties suffered there have been very high. In addition, the injured represent an additional social cost the private companies deflect to the taxpayers.

PMSCs perform defensive roles while the military has the monopoly of the offensive. This is neither true nor reassuring. Private companies have compromised military operations even performing defensive tasks¹⁹ or technical tasks. Furthermore, if they handle drones or intelligence they are on the offensive. In fact, intelligence-gathering is an area where PMSCs are taking a larger role in what was formerly the purview of government agencies. PMSCs have increasingly provided a range of services, from interrogation to strategic intelligence, in a key aspect of warfare.²⁰

6. Challenges posed by Privatization of Military and Security Tasks

The extensive role of the PMSCs in an unregulated environment poses several challenges. From a conceptual point of view, reserving to themselves the right to self-regulate and even to elude or circumvent existing laws is a sort of privatization of regulation. Since they currently serve all actors of war, crisis response and humanitarian intervention in any field of safety and security there is the risk of leaving no room for public service delivery on the global level, and therefore no room for global humanitarian action. If not appropriately regulated, private military companies operating through transnational networks of financial, governmental, social, legal and military power could render security a commodity available only to those with sufficient financial, social or political power.

The issue affects also the credibility of the nations. Security is what people expect from national state authorities and global security is what they expect from national and international organizations. However, they expect to contribute to security. They know that if they delegate their own security to private and even to foreign actors they will relinquish their right and duty to control the government and the politicians. It is a matter of morality and democratic principle.

From the military point of view, and in particular from the perspective of commanders of international contingents, the full integration of contractors in the theatre support structure is necessary. They tend to assume that a unified command and control system can solve the problem, however, this is not as easy as it may appear and it is as viable as one might think. The challenge lies in the complex nature of international operations and the composite legal framework. A military commander can operationally have a single chain of command to report through, but he is subject to a variety of legal obligations stemming from international law, national law, host country law, international agreements like SOFA, code of military conduct, rules of engagements, national caveats etc. He is also limited by the national laws of subordinate units. Therefore, unless a unified Code of War and Peace support operations is established at global level, the commanders must refer to all the existing and relevant instruments. With regard to the civilian contractors, the military commanders simply do not have command authority to exercise over contractors and cannot order them to do anything. They may take action to

¹⁹ Reference could be made to the incident occurred in Fallujah on 31 March 2004, when Iraqi insurgents attacked a convoy escorted by Blackwater personnel: four of them died. Cf. US Committee on Oversight and Government Reform, *Report: Private Military Contractors in Iraq - An Examination of Blackwater's Actions in Fallujah*, February 2007, at 17: "The documents reviewed by the Committee indicate that Blackwater embarked on this mission without sufficient preparation, resources, and support for its personnel. According to these documents, Blackwater took on the Fallujah mission before its contract officially began, and after being warned by its predecessor that it was too dangerous. It sent its team on the mission without properly armored vehicles and machine guns. And it cut the standard mission team by two members, thus depriving them of rear gunners. Blackwater took all of these actions before sending the team into an area known to be an insurgent stronghold".

²⁰ See recently E. Rosenbach and A. Peritz, "The Role of Private Corporations in the Intelligence Community" in *Memorandum: Confrontation or Collaboration? Congress and the Intelligence Community*, Belfer Center for Science and International Affairs, Harvard Kennedy School, July 2009.

remove them from duties/area; revoke/suspend security access, but may not order them to stay on a job or in an area. They have limited administrative jurisdiction over PMCs as well. The Sending-State courts have the same criminal jurisdiction over contractors as they do over other civilian employees accompanying Sending-State forces overseas.

In the meantime, unregulated or self-regulated PMSCs pose real risks to the military forces and the organizations they work for, to the local population and to themselves. The major risks come from:

Legitimacy. PMSCs have not always been angelic: evidence indicates that in many instances, they did not oppose the illegitimate use of their services, as well as they tended to violate IHL and anti-mercenary international agreements. The very use of a PMC can undermine the legitimacy of the effort.

Security. They are likely to attempt of hostile infiltration, they cannot ensure that some of them defect or sell information to the opposing forces, they are subject to direct and indirect pressure, they can be easily intimidated by threats and risks where they consider the risks of non-compliance too high.

Unity of effort. PMSCs often have parallel or divergent operations and objectives according to their commercial nature, they adopt a stovepipe employment scheme and lack interoperability with the military, local authorities, International organizations, NGOs and other PMCs. The need for homogenous and transparent international regulations is challenged by the experience showing that unifying laws and rules is a difficult exercise even for a national system. In 2000, the US Congress sought to rein in civilian contractors by passing the Military Extraterritorial Jurisdiction Act (MEJA).²¹ Under MEJA, DoD contractors “employed by or accompanying the Armed Forces” could be brought back to the United States and tried in federal court for any crime that would be a felony under US law. MEJA entrusted the US Department of Justice with the prosecution of these crimes. Military and civilian lawyers alike heralded the 2000 law as a means of regulating contractors’ actions in a theatre of operations. In practice, however, MEJA has had little visible effect. Given the evidentiary difficulties facing stateside civilian prosecutors with regard to criminal investigations in overseas combat zones, it is no surprise that US Attorneys have been hesitant to prosecute under MEJA. The holes in MEJA became especially apparent during the Abu Ghraib scandal of 2004, when a civilian interrogator from Titan Corporation and a civilian interpreter from CACI International faced no punishment, despite their incrimination in the official report.²² These civilians were technically working for the US Department of the Interior, rather than the DoD, thus shielding them from MEJA’s reach. Their military colleagues had no such protection from court -martial, however.

Since MEJA, the US government and its representatives in Iraq have applied limited and sometimes contradictory methods of keeping contractors in line. In 2001, the USA Patriot Act granted federal jurisdiction over crimes committed by or against American citizens on certain US government property. Not all combat-zone offenses occur within the walls of an embassy compound, however. US officials in Iraq have largely left contractor discipline in the hands of the contracting companies and have even worked to ensure that contractors are safe from prosecution in Iraqi courts. In June 2003, CPA Administrator Bremer issued an order that granted civilian contractors sweeping immunity

²¹ See K. Huskey and S. Sullivan, ‘The American Way: Private Military Contractors & U.S. Law After 9/11’, PRIV-WAR National Reports Series 02/08 <http://priv-war.eu/wordpress/wp-content/uploads/2009/05/nr-02-08-usa.pdf>

²² Human Rights First, *Private Security Contractors at War: Ending the Culture of Impunity* (2008) available at <<http://www.humanrightsfirst.info/>>, 52.

against local prosecution.²³ A year later, he extended the contractors' protection until the election of a transitional Iraqi government, which in turn adopted Bremer's order during the subsequent transfer of authority. Finally, in November 2008, the so called SOFA between US and Iraq amended that discipline by providing in art. 12 that "Iraq shall have the primary right to exercise jurisdiction over United States contractors and United States contractor employees"²⁴.

Given the Department of Justice's inaction under MEJA, Congress awarded the role of enforcing contractor discipline to the military. Under the 2007 National Defense Authorization Act, Congress amended the UCMJ (Uniform Code of Military Justice), expanding the Code's jurisdiction to civilian contractors "[i]n time of declared war or a contingency operation"²⁵. By statutory definition, a "contingency operation" is an "operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force" or an operation that involves the federal call-up of the reserves or National Guard. Operation Iraqi Freedom and Operation Enduring Freedom are contingency operations, according to this definition. Senator Lindsey Graham commented that this modification of the UCMJ would "give military commanders a more fair and efficient means of discipline on the battlefield" by placing "civilian contractors accompanying the armed forces in the field under court-martial jurisdiction during contingency operations as well as in times of declared war"²⁶. The expansion of the UCMJ's jurisdiction now provides a means of regulating contractor behaviour, whatever the contracting company's mission is in the combat zone. In doing so, the 2007 legislation has fundamentally changed the military-civilian relationship in stability operations. To ensure contractor accountability now and in future stability operations, the military needs to define the limits of the UCMJ's jurisdiction, in terms of personnel, substance, and enforcement authority.

This is an important improvement for the US. The question remains for dozens of contracting companies that within the same theatre do not accompany the US military and the thousands of contractors that do not answer to the US authorities. The problem remains also where martial law has lapsed (like in Iraq) or never existed (like in Afghanistan). The problem remains for non-US military commanders of multinational operations.

The legal fog has been obviously welcomed by the contracting companies and also by international organizations, agencies and many military commanders who would rather deal with unregulated private companies than confront the variety of legal and operational constraints on the use of their own soldiers. In a perverse loop the lack of regulation promotes further expansion of unregulated operations.

PMSCs are also responsible for drawing soldiers away from regular forces. PMSC employees can typically earn US\$500 to US\$1,500 per day, compared with an infantry soldiers wages of as little as

²³ *Coalition Provisional Authority Order 17*, par. 4: "Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto".

²⁴ *Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq*, 17 November 2008, available at <http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf>.

²⁵ See D. L. Snyder, 'Civilian Military Contractors on Trial: The Case for Upholding the Amended Exceptional Jurisdiction Clause of the Uniform Code of Military Justice' (2009) *Texas International Law Journal* 65.

²⁶ The text is reproduced by M. Lindeman, 'Civilian Contractors under Military Law' [Autumn 2007] 37 *Parameters* 83

US\$70 per day. An Italian soldier in Afghanistan paid around 140 euro per day is closer to a mercenary than to a US soldier. This is the main reason for the queue of soldiers asking to deploy abroad. However this is also the reason the private military is becoming more competitive. Salaries of well over US\$100,000 have reportedly been offered to special operations personnel if they change career, with assignments paying US\$1,000 a day. The high salaries on offer in Iraq have reportedly caused record numbers of elite soldiers from the UK and US to retire early from their regular forces. It was reported that the British army was compelled to increase pay for Special Air Service (SAS) and other special forces personnel by 50% to stem defections to PMSCs.²⁷

The military is beginning to succumb to market forces and their capabilities tend to diminish. It is believed that the UK and USA would never struggle to wage war or any other major operation without PMSCs operating as their paramilitary partners. Through the analysis of PMCs' stated performance and offered services and the comparison with actual operations it has become clear the interconnection between all the companies and the biggest multinationals dealing with natural resources, energy, technology, communications, transportation and armaments. The huge lobbying system supporting the security sector surpasses that once created by food, tobacco and the drug industry. Furthermore the use of PMSCs is rapidly evolving from outsourcing some services to outsourcing national and international responsibilities to the private sector.

7. Reasons of the Increased Reliance on PMSCs

Challenges and difficulties seem not to affect the growth of the privatization of security. Some objective reasons of the trend can be found in the general benefits of using contractors in military and peace support operations. For instance, if they do not excessively drain the military, they let the military maintain high-tech, low density skills, provide capabilities that the military need not permanently retain, enhance military deployment capabilities providing essential support, can allow soft or unofficial insertion in theatres during diplomatic negotiation, increase combat-power in force-constrained environments (e.g., host nation limits to uniformed strength) and let soldiers focus on combat operations.

An area of real excellence is the technical support ensured by the manufacturing companies provided it does not become a rope around the neck and does not affect the autonomy of the military. The same can be said for the general logistical support. Well trained PMSC staff can quickly mobilize and establish sophisticated military hospitals, give psychological support as well as rapidly building and efficiently running food facilities, bases, recreational areas, etc.

In the combat and combat-support fields, today's mercenaries still fight for money, but in the context of global capitalism, some well directed groups are becoming less morally objectionable. PMSCs' increasing efficiency is influencing the way legitimate governments view modern mercenaries as additional instruments of state policy. Keeping in mind the many reservations and challenges previously illustrated and using them as a stimulus to regulate and amalgamate the private sector to fulfil the public interests of states and international organizations, PMSCs can be seen as a functional complement to the state capability. Some of the best and most powerful armed forces in the world (US and UK, in particular) have dismissed many traditional military activities because PMCs can perform

²⁷ M. Smith, 'SAS get 50% pay to halt quitters', *Sunday Times*, 6 August 2006, quoted in F. Mathieu and N. Dearden, *Corporate Mercenaries: The Threat of Private Military and Security Companies*, War on Want, November 2006, 12.

them in most cases better and cheaper. With the generalised professionalism of modern armies, military recruits are difficult to find and expensive to enlist, train and reenlist. The military budgets have constantly shrunk or have recently shifted resources to technological investments and war expenses leaving the personnel with a basic pay easily outdone by civilian competition. In fact, PMCs are competing with the regular forces at the time of reenlistment, when training has already been paid by public money. In other cases, instead of competition, we can see the PMCs as a natural prosecution of the military career when age limits, disciplinary problems or force reductions make professionals available to the private market. Some former exclusive military specialties today can be found mainly, and in a few cases only, in the private market, like de-miners, interpreters, human intelligence etc. Private companies have therefore become necessary operational assets for the military.

Coalition operations and in particular peace-keeping operations need international participation and while national armies are not always designed to integrate with other armies and civilian actors, the PMCs have the ability to hire internationally and can help internationalize the missions.

There are also political reasons that led to the growing role of the PMSCs. The end of the Cold War gave states a reason to downsize their military forces, freeing up millions of former military personnel from a wide variety of countries, many of them Western. Some of these personnel were highly trained. At the same time, the end of the Cold War lifted the lid on many long simmering conflicts and unblocked the brakes to military intervention which was extensively used for any kind of emergencies and under any pretext. The so-called “other than war operations”, “international police operations”, “humanitarian wars” and peace support operations” were just some of the ambiguous operations the military had to face thinking they were not war and so did not require highly trained combat forces, but only increased operating tempos. As a matter of fact after a few years of downsizing and low profile training, the old soldiers dismissed by the respective countries were far better trained and motivated than the new soldiers. Even nowadays elder ex-regular soldiers are better than the average of most developing countries’ armies.

Another fact is that even in some developed countries the combat operational capability has been severely degraded. It is unsurprising if elite units do not find themselves at ease in the current armies and prefer to join the private companies. Money is still a driving factor but motivation and adventure are important. Coupled with the now-decades long push for privatization of government functions that has been sweeping much of the world, the emergence of PMCs was inevitable.

Today, contractor logistics support is routinely imbedded in most major systems maintenance and support plans. It has been pointed out that “the notion, much less the requirement, of placing contractors on the battlefield is the cumulative effect of reduced government spending, force reductions/government downsizing, privatization of duties historically performed by the military, low retention rates - particularly in high technology positions, reliance upon increasingly complex technology, higher mission requirements, low military salaries, and recruitment shortfalls all within a booming economy and budgetary surplus projections²⁸”. Now we know that the booming economy was an inflated balloon and that the surplus was of debts and not currency, so we have another strong reason to rethink at privatization. There are of course economic factors that influence the growth of the private sector even though some of them are more myth than reality.

²⁸ G. Campbell, ‘Contractors on the Battlefield: The Ethics of Paying Civilians to Enter Harm's Way and Requiring Soldiers to Depend upon Them’, paper prepared for presentation to the Joint Services Conference on Professional Ethics 2000, Springfield, VA, 27-28 January 2000, available at <http://www.usafa.edu/isme/JSCOPE00/Campbell00.html>

The alleged cost-effectiveness of the private sector has still to be proven. In the meantime, effective as outsourcing can be, doing things in-house is often easier and quicker. “You avoid the expense and hassle of haggling, and retain operational reliability and control, which is especially important to the military. No contract can guarantee that private employees will stick around in a combat zone. After the Iraq war, some contractors refused assignments to dangerous parts of the country. That left American troops sitting in the mud, and without hot food... In addition to that, outsourcing works well given genuine competition among suppliers; that’s when the virtues of the private sector come into play. But in the market for big military contracts the bidders tend to be the usual suspects: many of the contracts for rebuilding Iraq were handed out on a no-bid basis. And many of them are “cost-plus” contracts. This means that the contractors’ profit is a percentage of their costs, which gives them an incentive to keep those costs high. That’s hardly a recipe for efficiency or rigor²⁹”.

Whatever geo-political, economic, social or military reason might drive the growth of PMSCs, none of them is as relevant as the old-fashioned opportunistic reasons. Since the Second World War, Western states and public opinion have shown an increasing unwillingness to accept the costs of conflict, especially the death and personal loss war entails. It was observed that “[t]his public resistance to the cost of military operations is often referred to as “Vietnam syndrome”, or its updated variant “Mogadishu syndrome”. Yet Western governments have shown an undiminished appetite for military interventions to further their national interests around the world³⁰”.

PMSCs booming coincided with the time when conflicts seemed to be remote, not affecting Western states, short, mixed with humanitarian and peace-keeping rhetoric, conventional, medium/ low intensity, fought by professionals and not by draftees. These elements did not justify the expenses of public money to recruit, train, retain and ready a large permanent force. Neither were they worth the personal sacrifice of citizens. The first Gulf war was fought and stopped because of the prevalence of the “Zero Option” of friendly fatalities. And the Gulf war never ended, like all others initiated under false premises. Wars have become endless and heavily outsourced also because the only viable alternative was pooling required capabilities within alliances and coalition members. Since pooling means saving money and integrating policies the option was often cited but never considered. The current economic crisis should spur cooperation, money-saving and pooling capabilities as well as seriously trying to bring all conflicts to an end, but still this is not the case. To overcome the tension between disengagement and resource-burning, Western governments are increasingly turning to PMSCs to take on conflicts that are too costly — in terms of resources or public opinion — to undertake themselves, with the advantage that lines of accountability become increasingly blurred.

As a matter of fact, the public sector is training and preparing resources for the private sector. Instead of retaining the monopoly on the use of force and protecting its patrimony of knowledge and skill, the public sector is acting as intermediary between the owners of public capital and the private sector. Another modern feature is that states are driven by private interests towards the delegation of small and endless wars to private companies in order to prepare the military for highly expensive and long term star wars. Since the big corporations of military procurement are the same that have PMSCs as subsidiaries, their profit is double as well as the burden on the tax payers.

²⁹ J. Surowiecki, ‘Army, Inc.’ *New Yorker*, 12 January 2004, reproduced in D. Isenberg, *Shadow Force: Private Security Contractors in Iraq*, above note 5, 19.

³⁰ F. Mathieu and N. Dearden, *Corporate Mercenaries: The Threat of Private Military and Security Companies*, above note 27, at 11.

8. Conclusion and Way Forward

The increased role of private companies in global security is undeniable and in many sectors necessary. Not much for saving money or improving efficiency but because the companies are real and readily available. With a serious quality certification, security clearance and transparent tendering, they should also be more reliable. Therefore, the issue is not what can be done and where can it be done by the PMSCs or indeed at what price, but how and to whom they must be responsible and accountable. The unregulated private sector of security is jeopardizing state sovereignty. But until another world order is founded, our socialization and our international organization are based on the state system. If we regulate the private sector according to the only existing point of legitimacy, the State, we can also avoid the growing risk of a monopoly of violence which rivals or even supplants that of the state. Where State authority is weak, the theoretical risk can quickly translate into practical usurpation. The same happens, yet in a softer and painless way, where the state is already an operational appendix of the private enterprise: a subsidiary useful to collect the money from the taxpayers and deliver it to the enterprises while keeping the taxpayers happy and ignorant. A similar situation of state fallacy regards the many parts of the world today where state authority is dependent on protection by and from private military companies, warlords and predatory criminal networks.

However, the conceptual boundary separating public and private is purely academic. As in the XV century, the private and the public sectors are linked and private social activity generates and sustains the state even through rapacity. Unfortunately, the law system is still based on the separation between private and public. This is particularly true for the international law, with its rigid differentiation of the international (the inter-sovereign public) and the national (the private realm of the sovereign), the political (public) and the commercial, religious and familial (private).

We should look for a general consensus on the basic need to regulate the private military sector acting within the existing legal system and we can do a lot just proposing a few changes to relevant definitions. If we start with the word “Military”, one of the many possible threads can develop as follows:

“Military” refers to the “organized responsible use of force by a state for external public security”. The term “State” includes international organizations with state-like status or formed by internationally recognized states. “Public security” deals with threats to the vital public interest of the state and collective security of the citizens. “External” means that threats materializing beyond the legal borders/jurisdiction of the state. The “state responsibility” identifies the military in all of state-owned forces. However, outsourced forces can be included when and only when a state assumes responsibility and liability for the scope, objectives, strategy, tactics, logistics, procedures and behaviour of the outsourced individuals and units. “Organized” means that the units are under the full command and control system whose hierarchy reports directly to legal state authorities. “Force” refers to legal use or threat to use instruments of violence such as weapons and other coercive methods. “Use” includes planning, preparing, equipping, training, employing and supporting the units. Military forces as defined can also act within the state borders addressing internal threats to security in support to and/or in place of police and internal security forces according to each state laws.

According to this thread of definitions the private companies providing security services cannot call themselves “military” until and unless they are hired by state authorities that take responsibilities for their acts. In such a case, the private companies are subject to a Double Binding System (DBS): they respond to the hiring states according to state laws and the terms of contract while the states themselves account for their acts to the international community according to the International Humanitarian Law.

Private companies acting for and on behalf of states which do not assume full responsibility and liability for their acts are in fact “paramilitary”. Paramilitary is a force with civilian status organized like a military force. They should be subject to the law of the states where they are registered for all

the activities performed out of DBS contracts including planning, equipping and training. Their active use of force against anyone is illegal. Their carrying and using of weapons are subject to local laws where they are registered or stay. If this simple notion were applied to contractors working for the military engaged in current conflicts and peace support operations, it would solve the issues of responsibility, accountability, legitimacy, security and unity of efforts.

However, in order to guarantee quality, standards and interoperability with the military and with the civil organizations, each company should be certified for specific tasks, services and methods. If the PMSCs offer services that used to be performed by the military, it should not be a problem. However many practices become familiar, traditional and routine should be banned forever. PMCs offer also “services” that regular armies cannot and must not perform. They offer special services to States and non- states, to open and underground, legal and illegal organizations. In turn they do not ask where their pay comes from and they do not balk at payment in kind (gold, diamonds, mine concessions, oil, women, children and drugs). They do not hire only former soldiers, but everybody “declares” willingness and ability to do “something” in a military or paramilitary environment. The PMCs form the natural and best labour market for the thousands that became jobless in Eastern Europe because of the demise of the Soviet Union. In Hong Kong, the Ghurkhas, one of the best military forces, had to go private because of the withdrawal of the British forces at the reunification of the territories with China. Thousands of soldiers had to leave the armies of the Asian countries struck by the financial crisis: many of them joined certain private security companies that in reality were serving criminal organizations. A similar phenomenon has spurred piracy at sea when organised crime recruited fishermen impoverished by the Tsunami.

The PMCs, as in the past, have kept and improved the unique role of running “dirty jobs” and “hair-triggering” new conflicts. Their natural environment is any kind of destabilized situation managed not always for the sake of peace, but, on the contrary, often in the search of increased instability. In the past, they specialised in duties that required no “specialization” and skills other than the use of hand weapons and brute force. They still perform in that way even though the sophistication of weapons requires slightly improved ability. When technology and/or specific knowledge are paramount they have developed new technical capabilities, but always preserving ruthless behaviour even when handling satellite reconnaissance or prisoner interrogation. If triggering a war became more complex for the old Private Companies of mercenaries after Westphalia and after Rousseau declared that the state of war is a matter of States, today war itself has been privatised. States are not the only stakeholders in war and many private organizations, including the PMCs but not only them, have the capability to trigger or provoke a conflict, a rebellion, a coup, a repression, retaliation and retribution by force. There is no “dirty job” anymore, just the “job”. The PMCs and the organizations alike offer “results”. And they are requested even by regular states and democratic authorities to give results no matter how. Torture, corruption, theft, mass murder, use of forbidden weapons, death squads and so forth are all means the contracting parties tolerate as long as the requested “effects” and results are delivered. The PMCs and their contracting agents and political or business sponsors call all this “pragmatism”. But in a global society brought to civilization by the rule of law, solidarity, human rights and mutual respect we cannot leave sectors of security so important, so necessary and so dangerous like those left by the States in the hands of PMCs and PSCs without rules. Neither we can afford to leave them in the hands of those who consider themselves above such rules.

On the side of the military commanders, especially at international level, it has to be clarified that purely military or purely humanitarian operations do not exist. Often, the military want to have control only over military personnel. They tend to uniform everybody. However this is not possible especially in peace-keeping operations where military and civilian must combine and coordinate without being militarized or civilized. This is a new challenge for the military but also for the civilian agencies. If militarization is not possible or viable, it is necessary to establish a combined command and control structure and to train commanders to deal with uniformed personnel according to the relevant laws and regulations and the civilian according to a different set of regulations. This is

particularly necessary when civilian contractors provide logistics services not related to military operations.

Civilians providing direct support to the military operations should fall under direct control of the military. Contractors providing armed security to civilian authorities, organizations, NGOs and private corporations should fall under the authority and coordination of law enforcement authorities either military (in time of military occupation and where law enforcement is a task assigned to the military) or civilian (non-military). The real challenge for new generation commanders is not to know how to kill or annihilate the enemy, but how to legally and efficiently draw the greatest benefit from all components under his command military and civilian, combatant and non-combatant, local and international avoiding disconnection, interference or mutual rejection.