

Private Security Companies

The Case for Regulation

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Preface

The prominent use made of private security services by the United States during its Iraq campaign, and the way in which this use has become linked with concerns about both human rights abuses and business ethics, has uncovered the tip of what is in fact a very large iceberg of a problem. The services provided by private companies in the security sector today cover an enormous range, far outstripping and arguably making redundant the traditional definition of a ‘mercenary’. They are drawn upon both by ‘weak’ states and by some of the world’s most powerful governments. It is hard to see how this trend towards the ‘privatization of security’ can quickly be blocked or reversed, given the increasing preference for interventionist modes of security action, the growing scale of ambition of ‘peace-building’ efforts, and the lack of both money and men to increase or even maintain the levels of state-owned defence and security forces.

Building on the best research available, Caroline Holmqvist in this Policy Paper addresses the challenges posed by the manifold activities of private security services today from a notably objective and balanced perspective. She gives as much attention to the way such services are used by strong states, whose democratic credentials are not generally in doubt, as to the more commonly recognized problem of weak states where excessive resort to private services both marks and aggravates the fragmentation of authority. While recognizing the short-term appeal, and even the logic, that such solutions may have in individual cases, she rightly draws attention to the problems that lie in wait if either the local, or intervening, authorities delegate the wrong functions to private providers and fail to define and enforce the right standards of performance. Even in cases where there is no abuse of trust by private companies, it is hard to avoid a loss of transparency, of democratic control and of local ‘ownership’ of security processes in the broader sense.

Having identified where the precise problems and requirements for better regulation of private security activities lie, the final chapter of this Policy Paper discusses a wide range of possible approaches to the challenge. Its recommendations are directed at, and deserve careful attention by, international organizations and multinational companies as well as traditional nation states and their regional groupings. The proposals offered, in particular to the United Nations, the African Union and the European Union, recognize these organizations’ will to improve both the quality and quantity of their conflict-related work—ambitions which, in the given conditions, make it hard for them to avoid at least short-term reliance on private sector help themselves but emphasize how important it is for them to show leadership in defining, and abiding by, the appropriate norms.

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Alyson J. K. Bailes
Director, SIPRI
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Abbreviations and acronyms

ACOTA	African Contingencies Operations Training and Assistance Program
ACRI	African Crisis Response Initiative
AMIS	African Union Mission in Sudan
AU	African Union
BP	British Petroleum
CFSP	Common Foreign and Security Policy
CPA	Coalition Provisional Authority
CSC	Computer Sciences Corporation
CSDP	Common Security and Defence Policy
DDR	demobilization, disarmament and reintegration
DFI	Defense Forecasts Incorporated
DFID	Department for International Development
DOD	(US) Department of Defense
DRC	Democratic Republic of the Congo
DSL	Defence Systems Limited
EC	European Community
ECOMIL	ECOWAS Mission in Liberia
ECOMOG	ECOWAS Monitoring Group
ECOWAS	Economic Community of West African States
EO	Executive Outcomes
ESDP	European Security and Defence Policy
EU	European Union
EUPM	EU Police Mission in Bosnia and Herzegovina
FARC	Fuerzas Armadas Revolucionarias de Colombia
FMA	Foreign Military Assistance
GAO	Government Accountability Office
GWOT	global war on terrorism
HSPN	Humanitarian Security and Protection Network
HUMINT	human intelligence
ICC	International Criminal Court
ICE	Immigration and Customs Enforcement
ICRC	International Committee of the Red Cross
IDIQ	infinite-delivery, infinite-quantity
IMF	International Monetary Fund
IPOA	International Peace Operations Association

IT	information technology
ITAR	International Traffic in Arms Regulation
JHA	Justice and Home Affairs
MDM	Médécins du Monde
MNC	multinational corporation
MPRI	Military Professional Resources Incorporated
MSF	Médécins Sans Frontières
MSS	Medical Support Solutions
NPRC	National Provisional Ruling Council
NEPAD	New Partnership for Africa's Development
NGO	non-governmental organization
OAU	Organization of African Unity
ODTC	Office of Defense Trade Controls
OECD	Organisation for Economic Co-operation and Development
PA&E	Pacific Architects and Engineering
PMC	private military company
PSC	private security company
QDR	Quadrennial Defense Review
RUF	Revolutionary United Front
SAIC	Science Applications International Corporation
SSR	security sector reform
TTIC	Terrorist Threat Integration Center
UCMJ	Uniform Code of Military Justice
UN	United Nations
UNHCR	UN High Commissioner for Refugees
UNITA	União Nacional para a Independência Total de Angola
UNTAET	UN Transitional Administration in East Timor

1. Introduction

It was estimated in March 2003 that 15 000–20 000 private security contractors were working in Iraq, and the conflict there was referred to as ‘the first privatised war’.¹ Since then, both the number and the visibility of contract personnel in Iraq have increased, triggering a broad debate on the role of private companies which provide military and security services to states, corporations and non-governmental organizations (NGOs). However, the phenomenon is neither new nor exclusive to the Iraqi conflict. The past decade has seen the rise and consolidation of a global industry for private security provision, with over 100 companies operating in as many countries worldwide.²

The private provision of security and military services challenges conventional assumptions about the roles of the nation state as the main protagonist in military affairs and as the guarantor of physical security for its citizens. In the absence of effective legal or regulatory structures, such activities raise issues of legality, legitimacy and accountability in the sphere of security policy. This study assesses the impact of ‘the privatization of security’ in various security contexts and examines some of the ways in which the international community might respond to this development.

The emergence of private security companies

According to sociologist Max Weber’s conception of the modern nation state, a defining characteristic is the state’s monopoly on the legitimate means of violence, including the sanctioning, control and use of force.³ Although this view of the nation state continues to inform and underpin most of the debate on international security, state exclusivity in the military realm is, in fact, an exception historically. The incidence of the supply of military services by private actors is as old as warfare itself.

Ancient armies, from the Chinese to the Greek and Roman, were to a large extent dependent on contracted forces, as was Victorian Britain, the Italian city states of the Renaissance period and most of the European forces during the Thirty Years’ War of 1618–48.⁴ Similarly, private actors have played a role throughout US military history: contractors have supported the US military in

¹ ‘Military-industrial complexities’, *The Economist*, 29 Mar. 2003, p. 56.

² For the most comprehensive account of the industry see Singer, P. W., *Corporate Warriors: The Rise of the Privatized Military Industry* (Cornell University Press: Ithaca, N.Y., 2004).

³ Weber, M., ed. T. Parsons, *The Theory of Social and Economic Organization* (Free Press: New York, 1964), p. 154.

⁴ For a comprehensive overview of the history of private military actors see ‘Privatized military history’, Singer (note 2), pp. 19–40; Shearer, D., International Institute for Strategic Studies, *Private Armies and Military Intervention*, Adelphi Paper 316 (Oxford University Press: Oxford, 1998); and Milliard, T. S., ‘Overcoming post-colonial myopia: a call to recognize and regulate private military companies’, *Military Law Review*, vol. 176 (June 2003), pp. 6–8.

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every contingency since the American Revolutionary War of 1775–83.⁵ Characters such as ‘Mad Mike’ Hoare, the former British soldier who during the 1960s headed a group in the Belgian Congo called ‘the Fifth Commando’ (commonly known as ‘Les Affreux’, or The Horrible), and former French soldier Bob Denard, who served alongside Hoare in the Congo and later independently in Biafra, Chad, Morocco and Rhodesia, contributed to the image of the lone mercenary in Africa’s post-colonial wars.⁶ However, instances of mercenary activity during the 1960s were sporadic and limited, with immediate personal financial gain the main motivation. Although isolated mercenary activity is still carried out today, it is related more to the realm of criminal activity than to the broader development of the private provision of security services.⁷

The rise of the contemporary international private military and security industry began in the early 1990s, with the emergence of private security providers with clear corporate structures. A variety of both demand- and supply-side factors have been associated with the rise of the current corporate security sphere, although three factors are most often cited: (a) the dominance of post-cold war free market models of the state, propelling a strong trend towards the outsourcing of traditional government functions; (b) the global downsizing of national militaries, providing a vast pool of trained former military personnel for recruitment by private companies; and (c) the gradual disengagement of the major powers from many parts of the developing world.⁸ Other commentators view the emergence of private security service providers as a logical progression from the privatization of military goods production (the armaments industry) in Europe and North America.⁹

Whereas all these factors have played a part in the broader ‘privatization of security’, the explanations for the industry’s growth vary with the specific security contexts. In weak or failing states, ‘privatization’ is essentially a misnomer, since consumers have turned to the private sector because of the lack of functioning

⁵ Worden, L., ‘Downsizing and outsourcing, we’ve sprung Pandora’s Box’, *The Signal*, 27 June 2004, URL <<http://www.scvhistory.com/scvhistory/signal/iraq/sg062704.htm>>.

⁶ Denard was at one point contracted by the US Central Intelligence Agency to send a team of 20 men to support Jonas Savimbi and his UNITA army against the left-wing regime in Luanda, Angola. Silverstein, K., *Private Warriors* (Verso: London, 2000), pp. 146–47.

⁷ Cases of this sort in 2004 include the activities of former US soldier Jonathan ‘Jack’ Idema in Afghanistan and Pakistan and the alleged plot by mercenaries to carry out a coup in Equatorial Guinea. Peele, M., ‘Equatorial Guinea seeks coup plot evidence from Thatcher’, *Financial Times*, 30 Aug. 2004. The Idema case illustrated how the lines may still be blurred between independent and state-hired security services: even NATO forces believed that Idema liaised with the US Government and on 3 occasions responded to his calls for back-up. Smith, C. S., ‘A tough new face of US abroad’, *International Herald Tribune*, 14 Oct. 2004.

⁸ Between 1987 and 1996, the number of individuals in national armed forces worldwide fell by 6 million. Spearin, C., ‘Private security companies and humanitarians: a corporate solution to securing humanitarian spaces?’, *International Peacekeeping*, vol. 8, no. 1 (2001), pp. 27–28. See also Shearer (note 4).

⁹ E.g., firms selling armaments may increasingly offer accompanying services such as maintenance or training in the use of weapons. Krahnemann, E., *The Privatization of Security Governance: Developments, Problems, Solutions*, Arbeitspapiere zur Internationalen Politik und Außenpolitik (AIPA), AIPA 1/2003 (Lehrstuhl Internationale Politik, University of Cologne: Cologne, 2003), pp. 13 and 17, URL <<http://www.politik.uni-koeln.de/jaeger/downloads/aipa0103.pdf>>.

public sector security institutions. Indeed, in many cases there was little to privatize. This contrasts with the situation in strong or ‘efficient’ states, where private actors have been used to supplement functioning state institutions.¹⁰

Two instances of private security sector engagement were particularly influential in setting the scene for the initial debates about private security and military services: the involvement of the South African company Executive Outcomes (EO) in the conflicts in Angola and Sierra Leone in 1995–97, and that of Sandline International (an international company registered in the Bahamas but with offices in London and Washington, DC) in Sierra Leone in 1997–98.¹¹ Hired by national governments to provide direct military assistance and participate in combat against rebel forces, EO and Sandline and their operations were widely viewed as representing the return of mercenary activity, albeit in a new shape.¹² These ‘pioneer’ companies made no effort to conceal their provision of guns for hire: indeed, it was emphasized that their existence could usher in a new era in the politics of international security in which private companies, in the absence of international intervention, could ‘help end conflicts in places like Africa’.¹³

In reality, there have been few instances of national governments hiring private companies to wage wars, and the two main companies offering ready-to-go forces for combat, EO and Sandline, are now both defunct.¹⁴ In the shadow of the relatively few instances of genuine ‘contract wars’, a wider industry of private security provision has proliferated. Casting the debate as one about the virtues and vices of ‘mercenaries’ has obscured what is in fact a much broader phenomenon and has precluded real critical engagement with the subject of security privatization.

The diversity of firms, activities and clients

Distinguishing contemporary private security actors from their mercenary forerunners is at once a complex and a straightforward task. Mercenary activity is illegal under both the 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries and the 1977 Organization of African Unity (OAU—now the African Union, AU) Convention for the Elimination of Mer-

¹⁰ Krahmann (note 9).

¹¹ For elaborate accounts of EO and Sandline operations in Angola and Sierra Leone see Shearer (note 4); Singer (note 2); and Musah, A.-F. and Fayemi, J. K. (eds), *Mercenaries: An African Security Dilemma* (Pluto Press: London, 2000).

¹² Brooks, D., ‘Mercenaries or messiahs?: the future of international private military services’, *International Peacekeeping*, vol. 7, no. 4 (2000); for an early critical account see Cilliers, J. and Mason, P. (eds), *Peace, Profit or Plunder: The Privatisation of Security in War-torn African Societies* (South African Institute for Security Studies: Johannesburg, 1999), pp. 37–39, URL <<http://www.iss.co.za/Pubs/Books/Blurbppp.html>>.

¹³ See the Sandline Internet site at URL <<http://www.sandline.com/site/>>.

¹⁴ EO has been defunct since 1999, when a new law targeted at mercenary activity was passed in South Africa. Sandline closed its operations in Apr. 2004. However, it is generally agreed by industry commentators that the dissolution of these companies has been followed by the reformation and establishment of new firms.

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cenarism in Africa.¹⁵ However, neither of these international legal instruments is applicable to the activities of private security companies.¹⁶ The United Nations (UN) definition of mercenary activity in the International Convention hinges on a vague, restrictive criterion of individual motivation by financial gain, while the OAU/AU convention specifically targets mercenary activity aimed at the overthrow of governments and of OAU/AU-recognized liberation movements.¹⁷ This leaves the legal parameters for private security provision largely unclear. The lack of agreed definitions has obstructed both analysis of the broader privatization of security and the development of new international legal and regulatory structures.

Most private security companies are like any other private company: they have conventional corporate structures, operate as legal entities, and maintain Internet sites and corporate ties. Many are part of larger industrial conglomerates, some of them included in the Fortune 500 list.¹⁸ Such companies are generally capital-intensive, benefit from regular systems of financing and move effortlessly in the international arena. The services offered by private security and military companies range from the provision of operational support in combat, military advice and training, and arms procurement and maintenance to logistical support, housing,

¹⁵ The International Convention was adopted by the United Nations General Assembly in Resolution 44/34, 4 Dec. 1989, and entered into force on 20 Oct. 2001. For the International Convention see URL <<http://www.un.org/documents/ga/res/44/a44r034.htm>> and for the list of the 16 signatories and 26 parties see URL <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty6.asp>>. For the OAU/AU Convention and the list of 26 signatories and 25 parties see the Internet site of the African Union at URL <<http://www.africa-union.org>>.

¹⁶ Ballesteros, E., 'International and regional instruments', Paper presented at Wilton Park Conference on The Privatization of Security: Framing a Conflict Prevention and Peacebuilding Policy Agenda, 19–21 Nov. 1999 (the full conference report is available on the International Alert Internet site, 'Privatization of security: briefings and conference papers', URL <<http://www.international-alert.org/publications.htm>>); and Singer, P. W., 'War, profits and the vacuum of law: privatized military firms and international law', *Columbia Journal of Transnational Law*, vol. 42, no. 2 (2004), pp. 522–24, URL <http://www.columbia.edu/cu/jtl/Vol_42_2_files/singer.html>. For more on the inapplicability of the 2 conventions to contemporary private security activity see, e.g., Cleaver, G., 'Subcontracting military power: the privatisation of security in contemporary sub-Saharan Africa', *Crime, Law and Social Change*, vol. 33, no. 1–2 (2000), pp. 131–49.

¹⁷ Both definitions derive from Additional Protocol 1 to the Geneva Conventions of 12 Aug. 1949, Article 47, para. 2, available at URL <<http://www.unhchr.ch/html/menu3/b/93.htm>>. Six criteria must be met: 'A mercenary is any person who: (a) Is specifically recruited locally or abroad in order to fight in an armed conflict; (b) Does, in fact, take a direct part in the hostilities; (c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; (d) Is neither a national of a Party to the conflict nor a resident of a territory controlled by a Party to the conflict; (e) Is not a member of the armed forces of a Party to the conflict; and (f) Has not been sent by a state which is not a Party to the conflict on official duty as a member of its armed forces'. Enrique Ballesteros, former Special Rapporteur of the UN Commission on Human Rights on the effects of the use of mercenaries, has repeatedly argued that the UN definition needs to be amended to deal effectively with contemporary private security activity. See Singer (note 16), p. 528.

¹⁸ On the basis of revenue for 2003, Northrop Grumman Corporation was ranked number 55, Halliburton Co. 122 and Computer Sciences Corporation 175. Associated Press (AP), 'List of the Fortune 500', *USA Today*, 22 Mar. 2004, URL <http://www.usatoday.com/money/companies/2004-03-22-fortune-500-list_x.htm>.

communications services, security services, intelligence gathering and crime prevention.

Attempts to subdivide and categorize private actors in the security service sector more precisely have been much debated. A distinction is often made between ‘private military companies’ (PMCs) and ‘private security companies’ (PSCs). PMCs are defined as private companies providing *offensive* services, designed to have a military impact, whereas PSC is taken to refer to companies offering *defensive* services, intended mainly to protect individuals and property. This distinction is problematic on two accounts. First, what is perceived as ‘defensive’ under one set of circumstances may well turn out to have ‘offensive’ repercussions in another. Second, short-term situational demands as well as immediate or medium-term business opportunities lead companies to appropriate new tasks with relative speed and ease, making the ‘offensive–defensive’ or ‘active–passive’ distinctions irrelevant at best and misleading at worst.¹⁹

The obfuscation of terminology is worsened by the frequent reference in the mainstream media simply to ‘contractors’. In the most comprehensive coverage of the industry to date, Peter W. Singer suggests a classification system for firms, based on a military ‘tip of the spear’ analogy in battle space—where the ‘tip’ indicates the front line. He distinguishes between three types of firm: *military provider firms* (type 1), *military consultant firms* (type 2) and *military support firms* (type 3).²⁰ This classification categorizes firms by the range of their services and the level of force used: type 1 firms provide services at the front line, such as command of forces and implementation; type 2 firms offer mainly advisory and training services; and type 3 firms are used for the contracting out of ‘non-lethal aid and assistance’, including logistic functions such as feeding and housing troops and providing transport.²¹

While Singer’s classification is useful because it provides a more detailed picture than the ‘military versus security’ dichotomy and helps to schematize the broad trends within a vast market, most companies defy such clear categorization. Furthermore, the temptation to categorize firms according to their relative proximity to the front line is problematic because the impact on the security context may be significant even for lower-echelon tasks. In other words, the strategic impact of providing, for example, military advice or training (even in a classroom setting) may be as great as that of the direct participation of a private company in combat—indicating the futility of basing analysis on a ‘hierarchy’ of services. This Policy Paper eschews the distinction between ‘military’ and ‘security’ and employs the

¹⁹ The distinction between PMCs and PSCs and between ‘offensive’ and ‘defensive’ is used widely. See, e.g., Makki, S. *et al.*, ‘Private military companies and the proliferation of small arms: regulating the actors’, International Alert Briefing 10 (2001), URL <http://www.international-alert.org/pdf/pubsec/Btb_brf10.pdf>; and Geneva Centre for the Democratic Control of Armed Forces (DCAF), ‘Fact Sheet for the Meeting of the PFP Consortium Security Sector Reform Group, Stockholm, 25–26 Mar. 2004’, URL <http://www.dcaf.ch/pfpc-ssr-wg/Meetings/Stockholm_03.04/Papers/Private_Companies.pdf>.

²⁰ Singer (note 2), pp. 91–93.

²¹ Singer (note 2), p. 93.

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term ‘private security company’ to denote all companies within the industry. While it is arguably the case that segments of the industry cover military activity, there can be no clear dividing line in the final analysis, making the term ‘PSC’ more appropriate in the cumulative sense.²² Wherever possible, arguments are substantiated by reference to specific company activities or contracts rather than to the type of firm.²³

Most of the companies in the private military and security sector have limited infrastructure, are highly mobile and make use of a flexible workforce. Larger companies maintain vast databases of former military and law-enforcement personnel, allowing them to keep the size of their permanent staff at a minimum.²⁴ Because companies primarily recruit former military personnel, they seldom need to provide staff training, which helps to limit costs. They are able to quickly assemble a tailored force for each mission or contract, drawing on individuals with the appropriate experience and training. Databases are sometimes shared between companies, and more than one firm may employ the same individual. In addition, PSCs carry the advantage for the client of guaranteed confidentiality and a generally apolitical nature.

The link between PSCs and related but more mainstream industrial undertakings such as goods and services from the arms production, construction, computer, electronics and communications industries has been strengthened in recent years, as a variety of multinational corporations (MNCs) have moved into the security sector. For example, the US firm Military Professional Resources Incorporated (MPRI) was bought in 2003 by the communications giant L-3 Communications, while Northrop Grumman Corporation, which deals not only in defence products but also in electronic systems and information technology, has acquired the US company Vinnell Corporation.²⁵ In March 2003 DynCorp, one of the key players on the private security market, was acquired by Computer Sciences Corporation (CSC).²⁶ The provision of risk analysis, coupled with complete security solutions, is a growing segment within the industry; other notable additions to private security activities are interpretation and interrogation services.

Contrary to popular perceptions, not only governments (and not only African governments) but also international organizations, NGOs, humanitarian agencies, members of the international media and MNCs contract private security services.

²² PSC is also the favoured general term in i.a. Avant, D., *The Market for Force: The Consequences of Privatizing Security* (Cambridge University Press: Cambridge, forthcoming 2005); and Spearin, C., *Ends and Means: Assessing the Humanitarian Impact of Commercialised Security on the Ottawa Convention Banning Anti-Personnel Mines*, YCISS Occasional Paper no. 69 (York Centre for International and Security Studies (YCISS), York University: Toronto, Nov. 2001), p. 1, URL <http://www.yorku.ca/yciss/publications/occasion_main.htm>.

²³ Avant has developed another version of the ‘tip of the spear’ analogy, based on contracts rather than type of firm. Avant (note 22), p. 14.

²⁴ Avant, D., ‘Think again: mercenaries’, *Foreign Policy*, July/Aug. 2004, p. 21.

²⁵ ‘Employment’, Military-Science.com, URL <<http://www.military-science.com/employment.shtml>>.

²⁶ Computer Sciences Corporation (CSC), ‘Computer Sciences Corporation completes acquisition of DynCorp’, CSC press release, 7 Mar. 2004, URL <<http://www.csc.com/newsandevents/news/2025.shtml>>.

The UN has contracted private security service providers in support of a number of peace operations. For example, two South African firms (KZN Security and Empower Loss Control Services) were contracted to provide local intelligence to the UN Transitional Administration in East Timor (UNTAET) in 2001, while DynCorp provided logistics, transport and communications services.²⁷ Similarly, staff of the British Department for International Development (DFID) were under private protection in Iraq in 2004.²⁸ MNCs such as Shell and Chevron have contracted private security firms in Nigeria, as has British Petroleum (BP) in Colombia.²⁹ The diversity of clients using PSCs complicates the clear categorization of the private security industry and, indeed, the assessment of its effects.

Another obstacle to analysing the privatization of security provision lies in the intrinsic difficulty of finding reliable information. Despite operating in an open market and with companies often seeking legitimacy and promoting themselves as professional and reliable entities, the world of private security and military companies still retains an air of secrecy. There is no exhaustive list of companies operating within the private security sector.³⁰ On the basis of an analysis of contract sizes, operating expenditure in military budgets and interviews with investors, Singer estimates that the number of PSCs operating worldwide is in the hundreds and that they account for combined annual global revenues of close to \$100 billion.³¹ Earlier estimates of the scale of the industry indicated global annual revenues of \$55.6 billion in 1990 and, on the basis of compounded annual growth of 7 per cent, projected an increase to \$202 billion by 2010.³²

In many respects, it is the scope and size of the private security industry that make it a potent force in world affairs. The confusion over which services (and companies) constitute the global private security industry, the secrecy that surrounds this work, and the piecemeal growth and consolidation of the industry help explain why both academic and policy circles have been slow to recognize and respond to its development.

²⁷ Singer (note 2), p. 183.

²⁸ Avant, D., 'The privatisation of security and change in the control of force', *International Studies Perspectives*, vol. 5, no. 2 (2004), p. 154.

²⁹ Avant (note 28); and Mandel, R., *Armies Without States: The Privatisation of Security* (Lynne Rienner: London, 2002), p. 54.

³⁰ One source of information on PSC contracts is a database maintained by the International Consortium of Investigative Journalists. See the Internet site of the Center for Public Integrity, Washington, DC, 'Windfalls of war: US contractors in Iraq and Afghanistan', URL <<http://www.publicintegrity.org/wow/>>.

³¹ Singer, P. W., Personal communication with the author, May 2004.

³² Data from the Equitable Securities Corporation, Equitable Securities Research, 27 Aug. 1997, quoted in Vines, A., 'Mercenaries and the privatisation of security in Africa in the 1990s', eds G. Mills and J. Stremlau, *The Privatisation of Security in Africa* (South African Institute of International Affairs: Johannesburg, 1999), p. 47.

Private security services and the new security environment: problem or opportunity?

The frequency with which concerns are raised about the legitimacy of PSC operations signals a seemingly instinctive reluctance to relinquish the state's role as the provider of security. In the words of UN Secretary-General Kofi Annan, 'the world may not yet be ready to privatise peace'.³³ The roots of that scepticism cannot, however, simply be reduced to knee-jerk protectiveness about state power and sovereignty. Apprehensiveness about a global industry for the provision of security services relates in principle to two legitimate and interrelated concerns.

First, although state dominance of security relations has been challenged by a variety of non-state actors, the impact of private security actors on the state's primacy in the provision and guaranteeing of security raises new questions. States have come to recognize and increasingly accept that they are not the only actors to address international security threats; nor is it perhaps fruitful for them to retain a monopoly in this realm. Efforts to tackle 'new threats'—such as transnational crime, environmental hazards or the proliferation of weapons of mass destruction—require states to act largely through or with international or regional organizations and NGOs within a broader structure of security governance.³⁴ This has taken place without a fundamental redefinition of state capacity: states still enjoy the leading role in the international system and are seen as the sole source (if no longer the sole object) of legally binding international regulation. Certainly in the realm of military affairs, states still claim the prerogative of creating and judging political legitimacy.³⁵ If the state is undercut or marginalized in this respect, there is a risk that one of the traditional cores of security governance—states' collective as well as general control of the use of force—will be destabilized, affecting not only the state actor but also the international system itself.³⁶ For the role of the state in military affairs to be maintained in the face of a 'privatization of security', the use of private security and military service providers needs to take place within agreed structures and processes designed to safeguard legitimacy and accountability in military affairs. At present such structures are lacking.

³³ Annan's statement referred to the question that was posed to the UN in 1994 of whether to contract a private company to keep refugees and fighters apart in the Rwanda crisis. Fidler, S. and Catán, T., 'Private military companies pursue the peace dividend', *Financial Times*, 24 July 2003.

³⁴ Bailes, A. J. K., 'Business and security: public-private sector interface and interdependence at the turn of the 21st century', eds A. J. K. Bailes and I. Frommelt, SIPRI, *Business and Security: Public-Private Partnerships in a New Security Environment* (Oxford University Press: Oxford, 2004), pp. 1–23; and Krahnemann, E., 'From state to non-state actors: the emergence of security governance', ed. E. Krahnemann, *New Threats and New Actors in International Security* (Palgrave: New York, forthcoming 2005), p. 9.

³⁵ Guéhenno, J.-M., 'The impact of globalisation on strategy', *Survival*, vol. 40, no. 4 (winter 1998/99).

³⁶ Ballesteros (note 16), p. 50.

Second, the private provision of security sector functions strikes at the core of the debate about security sector reform (SSR).³⁷ In striving to uphold the role of the state as the guarantor of security, the question of what kind of state is to be upheld is crucial. The establishment of functioning law-and-order and security institutions (military, police and intelligence) is often cited as a minimum requirement for stability in states. However, when the objective is broadened to ensuring an equitable distribution of security, the democratic credentials of security institutions are central. Recognition that ensuring ‘security’ is not merely a question of protecting the state but also of protecting its citizens is the basis for the SSR agenda. In this sense, the use of private sector actors for providing security and military services represents a particular challenge. PSCs are responsible to shareholders rather than to voters, and making fundamentally apolitical actors contribute constructively to the establishment of democratic and accountable security institutions is a particularly tough circle to square.

It is often noted that, in many cases, the use of private security services is the only option available. Deborah Avant has made the case that any evaluation of the impact of privatization must compare private alternatives against a common standard—‘most suitably the other available alternatives rather than an unachievable ideal’.³⁸ However, the choice of the standard against which to compare private security providers does not simply constitute an analytical benchmark but also indicates a normative standpoint. The extent to which private security providers can fit into new forms of international security governance will ultimately depend on the extent to which their capacities can be directed towards a higher, long-term goal—one that is governed by politics and law rather than simple economics.³⁹

The crux of the private security sector’s capacity to be a legitimate actor on the international scene thus lies in the relative capacity of states to manage the use of private companies and to ensure that it is compatible with the promotion of good governance, both domestically and internationally. In the current state of affairs, the scope for institutionally weak or unstable states to harness the activities of the private sector in this way is limited. However, even for the strong or institutionally sound state, effective use of private security companies remains partially blocked as long as this challenge is unresolved. The need to take account of the *context* in which private security actors operate also arises from the basic, significant point that the ultimate consumers of the services in the end may not be the actual contract holders or clients of private security firms, but rather the local populations.

The consequences of the provision of security by the private sector are global and involve a reformulation of some of the basic premises of international security politics. In this respect, an analysis based on the perspectives of ‘weak’ versus

³⁷ The definition of security sector reform which is most widely recognized is that of the Organisation for Economic Co-operation and Development (OECD). See OECD, Development Assistance Committee (DAC), *Security Sector Reform and Governance: Policy and Good Practice*, DAC Guidelines and Reference Series (OECD: Paris, 2004), pp. 16–18, URL <<http://www.oecd.org/dataoecd/8/39/31785288.pdf>>.

³⁸ Avant (note 22), p. 6.

³⁹ Singer (note 16), p. 524.

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'efficient' states may help to make sense of a complex and multifaceted issue.⁴⁰ In almost every case of the use of PSCs, both weak and strong states have a stake: the companies generally operate in a weak state but are based in a strong state, paid for by a strong state or used by a strong state to help implement its external policy. Therefore, the impact of reliance on the private sector can be considered from either state-based perspective in virtually all cases. However, by juxtaposing the two contexts or perspectives, different dimensions of the private provision of security may be highlighted. Ultimately, any attempt to respond to the rise of a global industry for security and military services will have to take full account of both perspectives.

⁴⁰ Avant also uses the relative capacity of states as a key variable in the analysis of the privatization of security. Avant (note 24), p. 7.

2. Private security in the weak state

Private security as a symptom of state weakness

Private security and military companies are most immediately associated with the context of weak or conflict-prone states, particularly states on the African continent. Although there is no reliable information on the magnitude of the activity of private security companies in Africa, it is generally agreed that PSC activity is far-reaching, particularly in sub-Saharan Africa.⁴¹ One study shows the involvement of 15 private military companies in conflict areas during the period 1950–89 and of 65 companies in the period 1990–98.⁴² The direct involvement of international PSCs in conflict, however, is only the tip of the iceberg. This excludes the vast number of domestic companies operating on a continuous basis to provide protection of property, assets and individuals in relatively peaceful states. For instance, some 2800 private security companies operate in South Africa, and private security guards outnumber the police forces.⁴³

Private sector involvement in Africa is to a great extent symptomatic of state weakness and the failure of the state to provide physical security for its citizens through the establishment of functioning law-and-order institutions.⁴⁴ In the same way as commentators have characterized the formation of local militias as a cheap popular response to insecurity, private sector security provision may be seen to represent a ‘dictated choice’, with external actors increasingly taking on functions conventionally reserved for state institutions.⁴⁵ One such example is the Israeli firm Levdan, Limited: under a contract with the Congo-Brazzaville Government, Levdan trained the local army and presidential bodyguards.⁴⁶

⁴¹ Most of the early research on private security was conducted by African research institutes and universities. Cilliers and Mason (note 12).

⁴² Musah and Fayemi (note 11), appendix 1, pp. 265–74.

⁴³ Leander, A., *Global Ungovernance: Mercenaries, States and the Control over Violence*, COPRI Working Paper 4/2002 (Copenhagen Peace Research Institute (COPRI): Copenhagen, 2002), p. 6. In the United States, domestic private security companies perform a range of services from the establishment of ‘gated communities’ to the protection of cash transfers between banks. Duffield, M., *Global Governance and the New Wars* (Zed Books: London, 2001), p. 65. For further consideration of domestic private security see Dupont, B., Grabosky, P. and Shearing, C., ‘The governance of security in weak and failing states’, *Criminal Justice*, vol. 3, no. 4 (2003), pp. 331–49.

⁴⁴ Lunde and Taylor argue that the existence of an extensive private security sector, especially if it is indigenous, can serve as an important indicator that state security provision is inadequate. Lunde, L. and Taylor, M., with Huser, A., *Commerce or Crime? Regulating Economies of Conflict*, Fafo Report 424 (Forskningssstiftelsen Fafo: Oslo, 2003), URL <<http://www.fafo.no/pub/rapp/424/index.htm>>. See also Von Tangen Page, M. and Lilly, D., *Security Sector Reform: The Challenges and Opportunities of the Privatisation of Security* (International Alert: London, Sep. 2002), p. 7.

⁴⁵ For further discussion of this point see Reno, W., *Warlord Politics and African States* (Lynne Rienner: Boulder, Colo., 1999); and Ero, C., ‘Vigilantes, civil defence forces and militia groups: the other side of privatisation of security in Africa’, *Conflict Trends* (African Centre for the Constructive Resolution of Disputes), vol. 1 (June 2000), pp. 25–29, URL <<http://www.accord.org.za/ct/2000-1.htm>>.

⁴⁶ Cilliers and Mason (note 12), p. 5.

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However, state incapacity or failure provides only a part of the story of the provision of private security services in the context of weak states. Equally important for explaining the proliferation of PSCs is the establishment of parallel or ‘shadow’ structures of power and authority.⁴⁷ Political cronyism and the corruption of police and military forces are often linked with and reinforced by economic structures of exploitation and elite domination, featuring an inequitable distribution of resources. PSCs often operate at the intersection of these structures and processes, by accompanying MNCs in the extractive business and by protecting weak and ineffectual domestic rulers. One commentator has referred to the establishment of such structures as ‘mortgaging parts of the state’s economy’.⁴⁸

The private security sector has contributed to maintaining the status quo of inequitable security distribution in weak states—a pattern not exclusive to Africa. Colombia, Chechnya (Russia) and Tajikistan are other cases where economic interest in an insecure environment has translated into the growth of the private security sector.⁴⁹

Extensive reliance on private security risks making weak states weaker in three ways: (a) by creating a false image of security in the short term, which distorts proper assessment of security needs; (b) by leading to a skewed distribution of security among populations; and (c) by crowding out the establishment of legitimate and functioning state institutions. Each of these problems is explored in more detail below.

PSCs in conflict: the short-term impact

The operation of PSCs in conflicts on the African continent is often explained with reference to the relative swiftness of deployment and operation which they can offer. The case of EO, hired by the National Provisional Ruling Council (NPRC) government of Sierra Leone President Valentine Strasser in March 1995 to combat the rebel forces of the Revolutionary United Front (RUF), is perhaps the most often cited example. EO forces were highly effective in pushing back RUF forces and retaking the diamond-rich Kono region. However, initial optimism about the stability created by EO operations waned as the company failed in its aim of clearing out the RUF from other areas of the country.⁵⁰ The withdrawal of EO in 1997 was followed by a coup which ousted the government and plunged the country back into conflict.⁵¹ In the same vein, the operations of Sandline International in

⁴⁷ Reno (note 45), p. 2. On the connection between weak government and war see also, e.g., Fearon, J. and Laitin, D., ‘Ethnicity, insurgency and civil war’, *American Political Science Review*, vol. 97, no. 1 (Feb. 2003).

⁴⁸ Von Tangen Page and Lilly (note 44), p. 23. For a discussion of war economies and private firms see Taylor, M., ‘Law-abiding or not, Canadian firms in Congo contribute to war’, 31 Oct. 2003, URL <<http://www.faf.no/nsp/Globecomment311002.html>>.

⁴⁹ See Singer (note 2), pp. 64–66, for a discussion of the criminalization of conflict and private security.

⁵⁰ Spear, J., *Market Forces: The Political Economy of Private Military Security* (Forskningstiftelsen Fafo: Oslo, forthcoming 2005), p. 17.

⁵¹ Spear (note 50), p. 18.

Sierra Leone in 1997–98 were initially hailed as successful but, as the country again descended into violence in 1998, assessments of the effectiveness of PSCs were revised.

The operations of EO and Sandline in the Sierra Leone conflict show how short-term ‘effectiveness’ is outweighed by a failure to have an impact on the medium- to long-term evolution of conflict. Enrique Ballesteros, then Special Rapporteur of the UN Commission on Human Rights on the effects of the use of mercenaries, argued that PSCs created ‘an illusion of stability, but left untouched substantive problems that could never be affected by a service company’.⁵² In this respect, the contrast between the involvement of PSCs in the Sierra Leone conflict and the British military intervention in 1999 is instructive: British military efforts were not only sustained beyond the immediate term but also coupled with international political and diplomatic efforts as well as substantial development aid. For affected governments such as that of Sierra Leone, the attempt to capitalize on the short-term tactical gains of PSC intervention may be made at the expense of a realistic assessment of the strategic situation and balance of power. Similarly, optimistic claims on the part of outside observers that it is possible to ‘write a check, end a war’ through the addition of hired guns are tempered by the necessarily stop-gap quality of PSC operations.⁵³

Furthermore, the weak state risks being further weakened by the hiring of PSCs by rebel groups or other non-state actors party to intra-state conflicts. Rebel groups in Angola, the Democratic Republic of the Congo (DRC) and Sierra Leone have all used PSCs to bolster capacity through training and assistance in the use of high-technology weapons, and all sides of the conflict in Colombia have received support from PSCs.⁵⁴ The Serb military learned a valuable lesson in its underestimation of Croatian capabilities in the spring of 1995, when the Croatian Army launched a surprise attack in Operation Storm. The Croatian Army had been covertly transformed ‘from a ragtag militia into a modern Western-style army’ under the aegis of MPRI.⁵⁵

In sum, the degree to which short-term or stop-gap PSC intervention, whether through the enhancement of military capabilities or through direct participation in combat, can have an impact on the ultimate resolution of a conflict is questionable. Direct combat participation on the part of PSCs is in fact rare and could be prohibited with the enforcement of existing national anti-mercenary laws. However, a broader range of security services are not covered by current regulations, and analysis of their impact—in conflict and other situations—is considerably more intricate.

⁵² Quoted in Vines (note 32), p. 54.

⁵³ Brooks, D., ‘Write a check, end a war: using private military companies to end African conflicts’, *Conflict Trends*, vol. 1 (June 2000), pp. 33–35, URL <<http://www.accord.org.za/ct/2000-1.htm>>.

⁵⁴ Singer, P. W., ‘Corporate warriors: the rise and ramifications of the privatized military industry’, *International Security*, vol. 26, no. 3 (winter 2001/2002), p. 32.

⁵⁵ Singer (note 2), p. 5, and for a detailed account of MPRI’s activities pp. 119–36.

Localizing security

Private security activities also risk worsening the conditions for stability in weak states by contributing to a localized and skewed distribution of security. Contrary to the notion of security as a public good, to which all state citizens should be entitled, security from attack and physical abuse becomes conditioned on the access to financial resources and to willing private partners.

The establishment of privately guarded premises for companies, particularly in the extractive sector, leads in many cases to the creation of unnatural enclaves of security within an otherwise unstable environment. Where the unequal distribution of revenues from natural resource extraction features as a grievance on the part of rebel groups, this may have particularly detrimental effects. Evidence suggests that a deep-rooted sense of alienation and exclusion on the part of civilians goes a long way towards explaining the readiness to take up arms and participate in the illicit transfer of assets, a process recognizable in countries such as the DRC, Liberia and Sierra Leone.⁵⁶

The provision of security for certain segments of a state may give PSCs undue leverage in weak states. The influential position taken by PSCs under these conditions is illustrated by an incident in Nigeria in May 2003, when dozens of British and US oil workers were taken hostage by striking co-workers. PSCs were called upon to intervene before the crisis could be resolved.⁵⁷ The acting company, Northbridge Services, a British PSC, stated that the contract for the operation was awarded by an 'independent company, acting on behalf of one of the governments involved', but it declined to specify which company or government.⁵⁸ The confusion over the Nigerian affair illustrates the way in which security is becoming a project for outsiders in many African states, weakening national governments' effective authority. The contracting by BP of Defence Systems Limited (DSL), a private US company, to train local forces for the protection of company facilities in Colombia is another example of a PSC effectively undermining state authority through its operations.⁵⁹

The capacity of a weak state to use private actors to further good security governance in the country is limited mainly by its lack of influence over who contracts private services. By creating 'secure' areas independently of the state in chronically unstable areas, the presence of a PSC risks exacerbating the grievances that led to the conflict in the first place. Furthermore, the use of PSCs by external actors may

⁵⁶ This is recognized by a variety of authors: see, e.g., Keen, D. 'Incentives and disincentives for violence' and Duffield, M., 'Globalization, transborder trade and war economies', eds M. Berdal and D. M. Malone, *Greed and Grievance: Economic Agendas in Civil Wars* (Lynne Rienner: Boulder, Colo., 2000), pp. 19–42 and 69–90; and Bangura, Y., 'Understanding the political and cultural dynamics of the Sierra Leone war: a critique of Paul Richard's "Fighting for the Rain Forest"', *Africa Development*, Special Issue on Sierra Leone, vol. 22, nos 2 and 3 (1997).

⁵⁷ Vidal, J., 'Oil rig hostages are freed by strikers as mercenaries fly out', *The Guardian* (London), 3 May 2003, URL <<http://www.guardian.co.uk/international/story/0,,948685,00.html>>.

⁵⁸ Vidal (note 57).

⁵⁹ Mandel (note 29), p. 54.

offer a very public demonstration of the state's incapacity in providing security for its population, thereby perpetuating those very structures.

*Crowding out state institutions?*⁶⁰

The arrival of international private security actors in weak states signals the availability of an alternative to the public provision of security. Financial constraints on state resources make the option of hiring private security services attractive to many states precisely because of its temporary quality. Rather than burdening government budgets with fundamental restructuring of standing armies or police forces, rooting out corruption, and ensuring the efficiency and loyalty of public forces, governments may be tempted to resort to the quick fix of private sector intervention.⁶¹

Engaging PSCs carries the 'advantage' of receiving only the service that is immediately demanded, whereas public forces have to be paid even when they are not needed. Furthermore, there is perceived benefit in shifting the burden of costs for protection from the public to the private sector, as MNCs, aid agencies, NGOs and international organizations shoulder the cost of providing for their own protection.⁶² Some countries, such as Angola, even make the entry of MNCs on the domestic market conditional on their bringing their own means of protection.⁶³ This short-term reliance on the private sector may further governments' immediate objectives, but the way in which it tends to crowd out the public security apparatus means that extensive reliance on PSCs in the longer term weakens state authority.

As against this, the role of PSCs in furthering security sector reform in weak states has recently received attention.⁶⁴ Although PSCs are able to provide a quick boost in terms of capacity and capabilities of regular forces, extreme care must be taken to ensure that this is not carried out at the expense of democratic accountability and transparency in the security sector. One aspect of donor-sponsored SSR that has seen a high degree of private sector involvement is the provision of military training in weak states. US-based PSCs trained militaries in more than 42 countries

⁶⁰ The phrase 'crowding out' has also been used by Leander (note 43), p. 10.

⁶¹ For a detailed discussion of national defence reform in Africa see Williams, R., 'National defence reform and the African Union', *SIPRI Yearbook 2004: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2004), pp. 231–49.

⁶² Leander, A., Danish Institute for International Studies (DIIS), *The Commodification of Violence, Private Military Companies and African States*, Working Paper no. 11 (2003), p. 4, URL <<http://www.copri.dk/publications/workingpapers.htm>>.

⁶³ Isenberg, D., *Soldiers of Fortune: A Profile of Today's Private Sector Corporate Mercenary Firms* (Centre for Defense Information: Washington, DC, 1997), p. 4, available at URL <<http://www.cdi.org/issues/mercenaries/merc1.htm>>.

⁶⁴ Von Tangen Page and Lilly (note 44). For an elaboration of security sector reform see Organisation for Economic Co-operation and Development (OECD), Informal DAC Task Force on Conflict, Peace and Development Co-operation, *Security Sector Reform and Development Co-operation: A Conceptual Framework for Enhancing Policy Coherence* (OECD: Paris, Feb. 2000), URL <<http://www.oecd.org/document>>.

during the 1990s.⁶⁵ In Africa, the US State Department and the US Department of Defense (DOD) have outsourced (in whole or in part) military training to Science Applications International Corporation (SAIC), MPRI, Defense Forecasts Incorporated (DFI) and Logicon, among other companies.⁶⁶ Under the USA's African Crisis Response Initiative (ACRI), the private security sector was used for classroom training of several national militaries and continues to play this role under ACRI's successor scheme, the African Contingencies Operations Training and Assistance Program (ACOTA).⁶⁷ For example, the ACOTA training programme in Ghana, both field and classroom, has been conducted entirely by civilian contractors. The British DFID is also increasingly relying on private security actors to implement elements of SSR programmes abroad.⁶⁸

Whether PSCs are contracted directly by a weak state to bolster security capabilities or by a donor government to carry out military training or increase other capacity within security sector institutions, the current deficiency of PSCs in terms of accountability and legitimacy poses a problem. Amnesty International USA has pointed out that there are no requirements for the inclusion of any human rights or humanitarian law content (nor of arms proliferation-related standpoints) in military, security or police force training conducted by private security actors.⁶⁹ In June 2004, MPRI conducted an assessment of Sao Tome's defence requirements in the hope of receiving a contract to provide security assistance to the country's defence establishment, despite the fact that doubts about the human rights record of the Sao Tome armed forces had been raised.⁷⁰ The fact that the training of forces with poor human rights records may lend itself to misconduct on the part of private actors does not seem to be an unfounded anxiety.⁷¹

The outsourcing of military training may be most successful when companies support regular forces rather than assuming full responsibility for the mission. For example, under Operation Focused Relief the USA contracted Pacific Architects and Engineering (PA&E) for training missions in Ghana, Nigeria and Senegal.⁷²

⁶⁵ PSCs have trained foreign militaries in Angola, Bolivia, Bosnia and Herzegovina, Colombia, Croatia, Ecuador, Egypt, Equatorial Guinea, Ethiopia, Ghana, Haiti, Hungary, Kosovo (Serbia and Montenegro), Peru, Liberia, Malawi, Mali, Nigeria, Rwanda, Saudi Arabia, Senegal, Sweden, Taiwan and Uganda (Sudanese forces). Avant, D., 'Privatizing military training', *Foreign Policy in Focus*, vol. 7, no. 6 (May 2002), URL <http://www.fpif.org/briefs/vol7/v7n06miltrain_body.html>. Amnesty International USA also collects information on US companies which train foreign militaries; see Amnesty International USA, 'International trade in arms and military training', URL <http://www.amnestyusa.org/arms_trade/ustraining/students.html>.

⁶⁶ Avant (note 65).

⁶⁷ Wheelan, T., Deputy Assistant Secretary of Defence for African Affairs, 'Remarks to IPOA dinner', Washington, DC, 19 Nov. 2003, URL <www.ipoaonline.org/content/Whelantranscript.pdf>.

⁶⁸ Conference on Private Sector Approaches to Security Sector Reform, International Peace Academy (IPA) and Demos, London, 22 Oct. 2004.

⁶⁹ Amnesty International USA (note 65).

⁷⁰ Belida, A., 'Private US security firm assessing Sao Tomé military', Voice of America News Online, 16 June 2004, URL <<http://www.globalsecurity.org/military/library/news/2004/06/mil-040616-399df0bc.htm>>.

⁷¹ Although US embassies in recipient countries are charged with general oversight, no one has specific responsibility for the monitoring of PSC activities. Avant (note 65).

⁷² Wheelan (note 67).

PA&E then supported both US training staff and the African troops who received training, providing them with military and commercial equipment and general support.⁷³

For the weak state, the use of PSCs can provide a boost to security sector capabilities and provide a quick avenue for donor states to channel support. However, the use of PSCs in this context may be at the expense of the aim of increasing standards of democratic accountability within security sector institutions. From the donor perspective, using private actors to implement SSR programmes in weak states involves certain losses such as knowledge of local conditions and the future interoperability of forces, both with donor states and with their own neighbours. In this way, the use of PSCs to carry out military training or other SSR tasks risks depriving the relationship between donor and recipient of political content and exacerbating the difficulty of securing local ownership in SSR projects by introducing a third, commercial rather than political, actor into the equation.⁷⁴

The promise of private security in weak states?

PSCs supporting peace operations

Initial debates about the ‘new mercenaries’ took place in the midst of a reassessment of UN peace operations during the early 1990s.⁷⁵ Disillusionment because of the failure of UN member states to commit sufficient troops to UN operations was exploited by PSC advocates who argued that any moral qualms about turning to the private sector were undermined by the West’s unwillingness to risk anything of its own.⁷⁶ The 1994 genocide in Rwanda, in particular, strengthened pro-PSC arguments: was not any intervention, even if it was by a private company, better than the international community acting as a bystander to the unfolding horrors? The idea of private security companies providing an alternative to national troop contributions in UN or other multilateral peace operations still continues to be canvassed in some circles.⁷⁷ The International Peace Operations Association (IPOA), a US-based non-profit industry organization for military service providers, has since its inception argued for the use of the private sector to mitigate the international community’s reluctance to intervene militarily and risk its own soldiers’ lives in conflicts.⁷⁸

⁷³ The 5 Nigerian battalions trained under Operation Focused Relief remain cohesive units, and 1 was deployed in Liberia in 2003. Wheelan (note 67).

⁷⁴ For a detailed discussion of the local ownership problems that arise even in a European context see Caparini, M., ‘Security sector reform in the Western Balkans’, *SIPRI Yearbook 2004* (note 61), pp. 251–85.

⁷⁵ Malan, M., ‘The crisis in external response’, eds Cilliers and Mason (note 12), pp. 37–39.

⁷⁶ Duffield, M., ‘Post-modern conflict: warlords, post-adjustment states and private protection’, *Civil Wars*, vol. 1, no. 1 (1998), p. 95.

⁷⁷ Mørup, L., ‘Strengthening African security capacities: a brief on the DIIS conference 16 Aug. 2004’, Danish Institute for International Studies (DIIS), Copenhagen, Oct. 2004, URL <<http://www.diiis.dk/sw2892.asp>>.

⁷⁸ International Peace Operations Association (IPOA) Newsletter, *IPOA Quarterly*, issue 1 (5 Oct. 2004), URL <<http://www.ipoaonline.org>>.

Although the replacement of regular troop contributions to multilateral peace operations by PSC forces is both unlikely and undesirable, the use of PSCs in a supporting capacity in such operations deserves consideration. In the transition from a conflict to a post-conflict environment in weak states, enhancing security has already become a task for outsiders through the commitment of multilateral peace missions. Peace operations increasingly operate under more comprehensive peace-building mandates, including such tasks as the demobilization, disarmament and reintegration (DDR) of former combatants and SSR.⁷⁹ In this context, scepticism about using private actors for state capacity-building tasks in a weak state might be tempered by the degree of political legitimacy conferred on PSCs if employed as part of a UN-sanctioned multilateral operation. Indeed, as mentioned above, the UN has already made significant use of PSCs for logistical and other support in its operations. De-mining is another area where the UN has on repeated occasions contracted companies such as DSL.⁸⁰

African regional organizations have been similarly hampered by the lack of capabilities and adequate resources for addressing peacekeeping challenges, and they have drawn on the private sector for support in peace operations. The Economic Community of West African States (ECOWAS) Monitoring Group (ECOMOG) in Sierra Leone in 1998 contracted Sandline for logistics and transportation support.⁸¹ PA&E, an international logistics company, supported ECOMOG forces in the ECOWAS Mission in Liberia (ECOMIL) in 2003.⁸² The African Union Mission in Sudan (AMIS) is currently supported by two PSCs—PA&E and Medical Support Solutions (MSS)—contracted to prepare bases, set up logistics systems, and provide transport and communication services.⁸³ Part of the funding for the expansion of AMIS is provided by the US State Department, but new tasks are outsourced to DynCorp and PA&E.⁸⁴

When contracted to support missions with clear political support, authority and mandates, private security actors are enlisted in a broader political process. In this respect, the difference between PSCs contracted by an individual state facing inter-

⁷⁹ For a detailed discussion of current peace-building missions see Wiharta, S. and Dwan, R., 'Multilateral peace operations', *SIPRI Yearbook 2005: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, forthcoming 2005).

⁸⁰ Spearin (note 22), p. 1.

⁸¹ Fisher-Thompson, J., 'Private firms have role to play in peace operations in Africa', *All Africa*, 22 Oct. 2003, URL <http://www.sandline.com/hotlinks/AllAfrica-PMCs_Africa.html>.

⁸² Wheelan (note 67).

⁸³ US State Department, 'Important role seen for private firms in African peacekeeping', 15 Oct. 2004, available on the IPOA Internet site at URL <http://www.ipoanline.org/news_detailhtml.asp?catID=3&docID=98>.

⁸⁴ The PA&E and DynCorp contracts with the US State Department are valued at \$20.6 million and are part of a 5-year contract between the State Department and the 2 companies to 'support peacekeeping and conflict management support-related tasks through sub-Saharan Africa'. Under this 'infinite-delivery, infinite-quantity' (IDIQ) contract (see chapter 3), the State Department has also purchased services for both Burundi and Liberia. Lynch, C., '3,200 peacekeepers pledged on mission to Darfur', *Washington Post*, 21 Oct. 2004; and Chatterjee, P., 'Darfur diplomacy: enter the contractors', *CorpWatch*, 21 Oct. 2004, URL <<http://www.corpwatch.org>>. IDIQ contracts have also been awarded to Halliburton for operations in Afghanistan and Iraq.

nal opposition and civil war and companies acting in support of multilateral institutions cannot be overemphasized. The degree to which private security services can be contracted in an open and accountable way increases with the amount of political capital invested. Such political capital is likely to be higher in a multilateral peace operation than when states unilaterally contract PSC support.

The use of PSCs in multilateral operations still indicates a relinquishing of state control over the means of violence and in this sense represents a break with principles of the UN Charter in this context: that member states take responsibility, under UN authority, for the maintenance of peace and security.⁸⁵ The capacity of multilateral institutions to manage such a transferral of responsibility (even in the limited context of the implementation of correctly mandated activities) will have a crucial impact on the legitimacy and effectiveness of private sector support for multilateral peace operations. At present, the UN and regional organizations lack adequate structures to ensure high standards of conduct for PSCs and, above all, the long-term sustainability of operations (see chapter 5).

Private security and aid agencies

Another way in which the private security sector could act as a resource for the populations of weak states is in contracted support for the delivery of humanitarian aid. At present, the administration and delivery of direct humanitarian aid in many countries are severely threatened by security risks to international aid workers. The United Nations High Commissioner for Refugees (UNHCR), the International Committee of the Red Cross (ICRC), CARE USA, the Save the Children Alliance, Médecins du Monde (MDM) and Médecins Sans Frontières (MSF), for example, have all been targets of deliberate physical attack in a range of countries.⁸⁶ The withdrawal of MSF from Afghanistan in June 2004, after 24 years of operation in the country, and the kidnapping and killing in late 2004 of Margaret Hassam, director of CARE International in Iraq (also causing the organization to suspend operations in the country), are illustrative of the targeting of humanitarian workers in conflict-ridden and failed states.⁸⁷

Aid agencies, both governmental and non-governmental, have contracted and continue to contract PSCs in a number of capacities: above all for the physical protection of staff and premises, but also for risk analysis, staff security training and crisis management advice, for example, on how to behave in cases of kidnapping

⁸⁵ UN Charter, Article 2, available at URL <<http://www.un.org/aboutun/charter/index.html>>.

⁸⁶ For more on agencies that have been attacked see Spearin (note 8), p. 24.

⁸⁷ Joyce, M., 'Médecins Sans Frontières pulls out of Afghanistan', 29 July 2004, RUSI News, URL <<http://www.rusi.org/media/ref:N41091FB430BCC/>>; and 'Agency halts aid operations in Iraq', BBC News Online, 20 Oct. 2004, URL <<http://news.bbc.co.uk/1/3758354.stm>>.

and abduction.⁸⁸ For instance, the ICRC has hired DSL for protection in Kinshasa, DRC.⁸⁹

The relationship between the private security sector and the humanitarian aid community is complicated by two much-debated dilemmas facing aid agencies. First, attention has been drawn to a trade-off between upholding the traditional principle of impartiality in delivering aid (set out in the 1994 Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief) and avoiding the risk of becoming and being seen as complicit in the fuelling of conflict.⁹⁰ Second, aid agencies face the difficulty of an increased ‘militarization’ or ‘politicization’ of humanitarian space: as militaries become more involved in the delivery of aid, there is a risk that aid agencies will be suspected of having hidden agendas and will be seen as partial by local populations (which in turn may make aid workers even more likely targets of attack).⁹¹ PSCs cannot of course be equated with regular forces, but by adding to the armed presence and general militarization of the environment they may risk making populations increasingly edgy and insecure and thereby raise the stakes in the conflict.⁹² Furthermore, there is the risk that PSCs will not be perceived as ‘neutral’ actors in the first place. This is especially the case where there is a significant PSC presence tied to the MNCs operating in the extractive industry. As indicated above, in conflicts where natural resources occupy a central role, protected extraction facilities under ‘foreign’ control are likely to further rebel grievances. It may well be that the same PSC provides protection for both an MNC in the extractive industry and aid agencies in a country: as pointed out in one report, it is not hard to imagine this leading to accusations of hypocrisy and the spiralling distrust of humanitarian actors.⁹³

How do PSCs fit into this dual balancing act? In the first instance, there is a very real need to ensure physical protection for humanitarian staff, a task that is going to be sensitive regardless of whether it is carried out by regular forces or private

⁸⁸ Vaux, T. *et al.*, *Humanitarian Action and Private Security Companies: Opening the Debate* (International Alert: London, Mar. 2002), p. 8, URL <<http://www.international-alert.org/publications.htm>>.

⁸⁹ Vaux *et al.* (note 88); and Fisk, R. and Carrell, S., ‘Occupiers spend millions on private army of security men’, *The Independent*, 28 Mar. 2004, reproduced at URL <<http://www.commondreams.org/headlines04/0328-02.htm>>.

⁹⁰ The Red Crescent–Red Cross Code of Conduct is available at URL <<http://www.ifrc.org/publicat/conduct/code.asp>>. On the problems of aid fuelling conflict see Anderson, M. B., *Do No Harm: How Aid Can Support Peace—Or War* (Lynne Rienner: Boulder, Colo., 1999).

⁹¹ Kirsten Zaat, a former UN Liaison Officer in Iraq, expressed this caution in an appeal for the release of Margaret Hassan. ‘Viewpoint: “Margaret Hassan must be released”’, BBC News Online, 28 Oct. 2004, URL <<http://news.bbc.co.uk/1/3955539.stm>>. On the politicization of humanitarian aid see Lilly, D., *The Peacebuilding Dimensions of Civil–Military Relations*, International Alert Briefing Paper (International Alert: London, Aug. 2002), p. 7; and Støre, J. G. (Secretary General of the Norwegian Red Cross), ‘Resolving the conflict between providing security and humanitarian support’, Paper presented at the Defence Academy Food for Thought Lunch, Swindon, 14 Oct. 2004.

⁹² Lilly, D., *The Privatization of Security and Peacebuilding: A Framework for Action* (International Alert: London, Sep. 2000), URL <<http://www.international-alert.org/publications.htm>>, p. 25.

⁹³ Vaux *et al.* (note 88), p. 17.

security personnel. Perhaps paradoxically, the PSC option may be the less sensitive one: rather than being associated with one party or side in the conflict, PSC protection could be seen as the enlisting of an ‘impartial’ actor. In such cases, thought needs to go into the degree of distance (perceived and real) between PSCs and national militaries, as well as the nationality of PSC employees, to ensure that an image of partisanship is not conveyed. In the second instance, there is the need to take into account the sustainability of operations, in this case the aid agencies’ staying power. It is easy to see the short-term rationale for the contracting of private security services by aid agencies to keep their personnel safe and allow them access to relief-dependent areas, but in the long term it may make the delivery of aid dependent on an external variable—the market.⁹⁴

The main problems with PSCs used in support of aid delivery relate to the conduct of the firm itself. A report published by International Alert set the ground for debate to determine and outline appropriate ethical, political, professional and public accountability standards that PSCs need to uphold in order to be a legitimate resource for aid agencies.⁹⁵ These issues have yet to be addressed in a comprehensive way by the international aid community (see chapter 5).

The state at the centre

Both the promise and the peril of PSC action in the weak state relate to the lack of a functioning public security apparatus and democratically accountable law-and-order institutions. In cases where the weak state itself contracts PSCs—whether to intervene in an internal conflict or to bolster its security sector capacities—the risk is that it will do so with a view only to short-term ‘hard’ security. The aim of equitable security governance risks being demoted to a secondary objective, with PSCs effectively colluding in the establishment and maintenance of a system of security for the few at the expense of the many. Similarly, what may appear as collusion between MNCs, PSCs and weak regimes in resource extraction risks throwing the process of democratic state building off track and, indeed, generating further sources of popular grievance.

The use of PSCs in support of multilateral peace missions and aid agency operations holds at least some promise for the weak state, although it is argued above that great caution and sensitivity—formalized under regulatory structures—is required in order to capitalize on this opportunity. However, using PSCs engaged by an external actor risks further marginalizing the host (weak) state, because placing the source of legitimacy and of delivery in outsiders’ hands distances the state from the normal system of national and international security governance. In building structures to govern the international use of private security services, there is a need to ensure that weak states have some leverage in that process and that they maintain influence over PSC operations on their territory. Above all, the use

⁹⁴ The effect of market forces is considered in more detail in chapter 3, below.

⁹⁵ Vaux *et al.* (note 88), p. 8.

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of PSCs should be directed at building up the weak state. In this respect, successful handling of the large presence of PSCs in weak states requires elements of both preventive and responsive action, including the build-up of state institutions to preclude over-reliance on private actors. Against the background of well-functioning state law-and-order institutions, the use of private security services is likely both to be more efficient, equitable and accountable and to help create the conditions for its own phasing out.

3. Private security and the 'efficient' state

The use of private security providers is not associated exclusively with the inability of weak states to effectively fill a security vacuum. Just as most international PSCs are based in (or have grown out of) developed states, so are strong, or 'efficient', states among the key employers of private security personnel.⁹⁶ For the efficient state, outsourcing of health care, transport and other government functions has effectively paved the way for the privatization of defence sector-related tasks.⁹⁷ Although this process is starting to spread in many European states, it is most apparent in the USA. In the UK, for instance, combined revenues for British security firms have risen fivefold since the start of the war in Iraq in 2003, from \$350 million before the war to nearly \$2 billion as of April 2004.⁹⁸ This chapter concentrates on examples of the USA's use of PSCs, but the observations apply to 'efficient' states generally.

The USA's trend of contracting out its military tasks abroad gained momentum over the past decade. Since the 1991 Gulf War, when the ratio of contractors to US active-duty personnel was 1 : 50, the ratio has consistently diminished. With the terrorist attacks of 11 September 2001 and the ensuing US reassessment of international security threats, a basic incompatibility of aims arose: lowering the number and exposure of US troops, while at the same time increasing the use and impact of US strength abroad.⁹⁹ The outsourcing process, underway for more than a decade, gained momentum with the military campaigns in Afghanistan (Operation Enduring Freedom) and Iraq (Operation Iraqi Freedom).¹⁰⁰ The ratio of US troops to PSC personnel in the 2003 war in Iraq has been estimated at 1 : 10, and since the formal ending of the war in May 2003 the number of contractors has increased.¹⁰¹ Although there is no definitive word on the number of PSCs active in Iraq, one analyst estimated in November 2004 that well over 20 000 private

⁹⁶ 'Efficient' is used here to indicate states that have demonstrably functional institutions of government and are generally able to enforce a coercive monopoly on force while adhering to democratic standards.

⁹⁷ Krahmann, E., 'Private firms and the new security governance', Paper presented to the International Studies Association 43rd Annual Convention, 23–27 Mar. 2002, New Orleans, available at URL <<http://www.isanet.org/noarchive/krahmann.html>>.

⁹⁸ Murphy, C., 'Iraq's mercenaries: riches for risks', BBC News Online, 4 Apr. 2004, URL <<http://news.bbc.co.uk/1/3590887.stm>>.

⁹⁹ O'Hanlon, M. 'Rebuilding Iraq and rebuilding the US Army', *Middle East Memo*, no. 3 (4 June 2004), URL <<http://www.brook.edu/views/op-ed/ohanlon/20040604.htm>>.

¹⁰⁰ The British Government has contracted widely in both Iraq and Afghanistan. E.g., Babcock International provides logistics support to British troops in Afghanistan under a £20 million contract. Krahmann (note 9), p. 18.

¹⁰¹ Isenberg, D., *A Fistful of Contractors: The Case for a Pragmatic Assessment of Private Military Companies in Iraq*, British American Security Information Council (BASIC) Research Report 2004.4 (BASIC: London, Sep. 2004), p. 7, URL <<http://www.basicint.org/pubs/Research/research.htm>>.

personnel, employed by over 60 firms, were carrying out military functions.¹⁰² Neither the US DOD nor the Coalition Provisional Authority (CPA) in Iraq kept a complete register of all contracts awarded to PSCs in the country.¹⁰³

Given the element of deliberate policy design, it would seem fair to assume that the use of private security services by an efficient state is conducted in a more regulated or contained fashion than when it is resorted to by a weak state. However, the efficient state also faces numerous problems in its contracting out of security, although of a significantly different nature from the problems faced by an institutionally weak state.

Challenges in outsourcing policy implementation

The tasks carried out by private security companies (mainly US and British) in Iraq range from the feeding and housing of troops and the armed protection of oil facilities, power lines and above all high-level officials (both coalition and Iraqi), to the maintenance of key weapon systems such as M-1 tanks, Apache helicopters and B-2 stealth bombers. The occupation of Iraq also brought attention to new areas of private security sector activity, such as interpretation and interrogation services. During his tenure in Iraq, L. Paul Bremer, Presidential Envoy to Iraq and Administrator of the CPA, was under the protection of Blackwater Security Consulting, a US-based company. Similarly, President Hamid Karzai and other high-level officials in Afghanistan continue to rely for their protection on DynCorp security guards.¹⁰⁴ Vinnell Corporation, a subsidiary of Northrop Grumman Corporation, has been awarded a \$48 million contract to train the nucleus of a new Iraqi army,¹⁰⁵ and DynCorp has been contracted to recruit and train the new Iraqi police force.

The use of private security and military services by an efficient state can at one level be assessed according to criteria similar to those applied for the outsourcing of other government functions. To what extent are the delivered services of the same quality as when they are provided by the state? How do they compare in terms of cost-effectiveness? What is the measure of control exercised over operations? These questions need to be addressed in any examination of the impact of

¹⁰² Singer, P. W., *The Private Military Industry and Iraq: What Have We Learned and Where to Next?*, DCAF Policy Paper (Centre for the Democratic Control of Armed Forces (DCAF): Geneva, Nov. 2004), URL <http://www.dcaf.ch/publications/Publications%20New/Policy%20Papers/PP4_Singer.pdf>.

¹⁰³ Radden Keefe, P., 'Iraq: America's private armies', *New York Review of Books*, 12 Aug. 2004. The CPA was established in June 2003 to provide for the temporary governance of Iraq, until the country gained sovereignty in July 2004. Although the CPA attempted to compile a list of PSCs which are active in Iraq, this has been of limited consequence: only 8 of the c. 60 companies present in Iraq at the time were listed under contracts with the CPA. See Letter to US Secretary of Defense Donald H. Rumsfeld from Ike Skelton (Dem.), 2 Apr. 2004, and Response from Rumsfeld to Skelton with attachment 'Discussion paper: private security companies operating in Iraq', 4 May 2004, available at URL <<http://www.house.gov/skelton/pr040504a.htm>>.

¹⁰⁴ Isenberg, D., 'Security for sale in Afghanistan', *Asia Times Online*, 4 Jan. 2003, URL <<http://www.atimes.com>>.

¹⁰⁵ See the Vinnell Internet site at URL <<http://www.vinnell.com>>.

private security services. A problem in much of the debate, however, is that the issues have been set aside or treated as distinct from the broader issue of how the use of private actors affects political legitimacy.

It is significant that PSC activity in the cases of Afghanistan and Iraq takes place in tandem with a large international military force presence. The US Government's relationship with the private security sector is premised on the guiding principle that as much as possible should be outsourced, with the exception of 'core government' or 'mission-critical' functions.¹⁰⁶ In the 2001 Quadrennial Defense Review (QDR), core functions are defined as those 'directly related to war fighting'.¹⁰⁷ This distinction is based on classical models of the nature of warfare, however, and it breaks down in a context where post-war reconstruction and enhancement of economic and political stability are equally important for military success.¹⁰⁸

Four central problems in the efficient state's use of private security services are considered here: (a) the problem of establishing clear mandates, (b) the lack of PSC accountability, (c) problems of oversight and control in a skewed market, and (d) problems of basic and practical coordination of efforts both among private actors and between PSCs and regular forces.

Unclear rules of engagement and mandates

The highly insecure environment in both Afghanistan and Iraq has meant that companies operating there have had to respond to significantly more dangerous situations than were initially envisaged. Because modern PSCs are malleable entities and can take on new tasks at short notice, they can often meet such situational demands. However, this can result in an increasing lack of control over the precise nature of PSC operations. Although basic stipulations are made—for instance, whether or not contractors will carry arms—initial mandates for PSCs are often insufficiently detailed or are not appropriately updated. Furthermore, rules of engagement and PSC mandates are clouded by basic subjectivity of interpretation.

The problem of the lack of clearly established mandates manifests itself in what can be called private security 'mission creep'. There have been frequent reports of trigger-happiness on the part of security contractors ostensibly employed for 'defensive' guarding tasks. Allegations have also been made that PSC employees in Iraq have claimed that they have authority to detain people, erect checkpoints without authorization and confiscate identity cards.¹⁰⁹ For example, the US private security company DynCorp was employed under a \$50 million contract with the State Department to provide 1000 advisers to help organize Iraqi law enforcement and criminal justice systems.¹¹⁰ When it was revealed that four DynCorp employ-

¹⁰⁶ US Department of Defense, *Quadrennial Defense Review Report*, 30 Sep. 2001, p. 53, URL <<http://www.defenselink.mil/pubs/qdr2001.pdf>>.

¹⁰⁷ US Department of Defense (note 106), p. 53.

¹⁰⁸ Schadlow, N., 'War and the art of governance', *Parameters*, autumn 2003, p. 91.

¹⁰⁹ Murphy (note 98).

¹¹⁰ Merle, R., 'DynCorp took part in Chalabi raid', *Washington Post*, 4 June 2004, p. A17.

ees had taken part in Iraqi police raids on the home and offices of former exile leader Ahmed Chalabi in June 2004, the picture was drastically altered. The contractors not only wore body armour and carried rifles but also were effectively directing the raids—a task that may well be considered beyond their official mandate.¹¹¹

To some extent, investing PSCs with a measure of discretion in executing their tasks is endemic to the way in which the private security industry operates. It is perhaps not surprising that private security contractors may take the liberty of deciding for themselves what action is required in order for them to fulfil their contractual obligations in an area of great physical insecurity; on this showing, the blame assigned to individual companies for acting beyond their mandate may be overstated. When Hart Group Limited, a London-based PSC, was hired to provide protection for CPA staff, this was intended to be a limited and ‘passive’ task. If they came under direct attack by Iraqi insurgents, company employees were instructed to call on military support from regular coalition forces. The managing director of Hart Group has testified that on several occasions this assistance was not forthcoming, and company employees consequently found themselves obliged to hold positions for considerable periods of time, effectively engaging in a strategically sensitive task.¹¹²

A sensible engagement of PSCs by the efficient state must thus reasonably begin with clarity and agreement on their mandate and scope for action. Clearly established limits on what are and are not acceptable methods for carrying out, for example, a guarding service, constitute the basic premise for holding PSCs accountable. In particular, the question of what constitutes ‘mission-critical’ activities (requiring that they be kept under the direct control of the state or international authorities) demands rethinking. In particular, in the context of a ‘battle for hearts and minds’, conventional assumptions about what constitutes mission-critical activities are less than clear-cut.¹¹³ As one commentator remarked on the subject of protecting President Karzai and CPA Administrator Bremer, ‘it doesn’t get much more mission-critical than that’.¹¹⁴

¹¹¹ Such problems are not exclusive to the Iraqi scene; officially employed to provide pilot training and technical support for the Colombian National Police’s eradication of illicit plants in the south of the country, DynCorp personnel have several times been reported as being actively involved in counterinsurgency in areas controlled by the FARC movement. Burton-Rose, D. and Madsen, W., ‘Corporate soldiers: US privatizes the use of force’, *Multinational Monitor*, vol. 22, no. 3 (Mar. 1999).

¹¹² BBC Radio 4 File on 4 programme, broadcast at 20.00, 25 May 2004, full transcript available at URL <http://news.bbc.co.uk/1/hi/programmes/file_on_4/3708232.stm>.

¹¹³ Combelles Siegel, P., ‘A debacle in the battle for hearts and minds’, *Foreign Policy in Focus*, 13 May 2004.

¹¹⁴ Priest, D. and Flaherty, M. P., ‘Under fire, security firms form an alliance’, *Washington Post*, 8 Apr. 2004, p. A01.

Accountability under law

Holding PSCs accountable under law for their actions in the current state of affairs is problematic even for the 'efficient' state.¹¹⁵ The task of holding individuals accountable for misconduct or even war crimes falls on national governments—either in the state where the company is registered or in the state in which it operates. In the case of Iraq, contractors are effectively granted immunity from local prosecution under CPA Order 17 (issued in June 2003 and renewed on 27 June 2004 to remain in force for the duration of the mandate authorizing the Multinational Force).¹¹⁶

Even when the 'home state' in theory assumes responsibility for holding contractors accountable under law, this has so far been largely hypothetical—even in the United States, which in theory possesses the capacity to establish and enforce legal constraints on individuals employed to work abroad. Despite the fact that the regulation of PSCs is better developed in the USA than in most other countries, the failure to hold individual contractors accountable for crimes has met with sustained criticism. The case of DynCorp employees implicated in sexual abuses in the Balkans in the mid-1990s is often cited in this respect, but the problem is common to US PSC activity elsewhere.¹¹⁷ DynCorp continues to be trusted as one of the main recipients of contracts from the US DOD.¹¹⁸

The failure to hold individual contractors, much less company entities, accountable for misconduct has been replicated in Iraq, with PSC complicity in the abuse of Iraqi prisoners at the Abu Ghraib prison a case in point. Individuals working for the US companies CACI International and Titan Incorporated provided interpretation services and partook in the interrogation of Iraqis at Abu Ghraib. The official US inquiry launched by Major General Antonio M. Tabuga in January 2004 found that at least two private contractors were 'either directly or indirectly responsible for the abuses', but so far none has been brought to justice.¹¹⁹ The US Government struggled to locate the contract under which the individuals were serving at Abu Ghraib: initially, it was thought that CACI interpreters were hired by the US DOD, only to later emerge that it was the National Business Center of the US

¹¹⁵ The US model of regulation is considered in depth in chapter 5.

¹¹⁶ See Coalition Provisional Authority (CPA), Coalition Provisional Authority Order number 17 (revised): status of the Coalition Provisional Authority, MNF–Iraq, certain missions and personnel in Iraq, CPA/ORD/27 June 2004/17, 27 June 2004, URL <<http://www.iraqcoalition.org/regulations/#Orders>>. Immunity for contractors has been granted in Colombia, at the instigation of the US State Department.

¹¹⁷ Smith, C. S., 'A tough new face of US abroad', *International Herald Tribune*, 14 Oct. 2004.

¹¹⁸ Ratnam, G., 'Some US firms wary of security', *Defence News*, 24 May 2004.

¹¹⁹ *Article 15-6 Investigation of the 800th Military Police Brigade* (Tabuga Report), ([US Army: Washington, DC], 2004), p. 44, available at URL <http://www.npr.org/iraq/2004/prison_abuse_report.pdf>; and Von Hall, G., 'Vakter tar over soldaters roll' [Guards take over soldiers' role], *Svenska Dagbladet*, 31 Aug. 2004. However, David Passaro, accused of having beaten a suspected Taliban sympathizer to death in a Pakistani prison in June 2003, faced criminal charges. Chaffin, J. and Sevastopulo, D., 'Contract worker indicted over death of detainee', *Financial Times*, 18 June 2004.

Department of the Interior that had enlisted the company's services.¹²⁰ Despite allegations of misconduct, CACI International was awarded yet another contract, valued at an estimated \$23 million, to provide interrogation services in Iraq.¹²¹

Legal loopholes in the control of private security sector activity need to be closed at the international level. As a first step, however, existing laws governing PSC employees working abroad under government contracts from the USA, the UK or other countries with relevant jurisdiction and regulatory instruments must be enforced.

Accountability under contract

The difficulty in holding private firms accountable when they are under contract centres on the fact that they are not politically but commercially motivated actors. As in any instance of outsourcing or contracting for a service, a certain level of trust must be established that a contract will be fulfilled.¹²²

A failure on the part of PSCs to deliver on contracts could arise as a result of either the company as a whole 'defecting' or of individual employees doing so. In the first instance, a change in the conditions for operation, whether related to security or financial considerations, might lead to a change in a company's ability or willingness to carry out the mission for which it was contracted.¹²³ Although many of the larger and more established PSCs are mindful of their reputation, there is ultimately no guarantee that a company will deliver on a contract. With the number of contractors targeted for attacks in Iraq consistently on the increase, the likelihood is high that some PSCs might simply find the job too risky and terminate contracts. Indeed, such concerns are being expressed from within the industry itself.¹²⁴ In one instance of deliberate targeting, DynCorp offices in Kabul were attacked in August 2004, killing seven people.¹²⁵ US estimates of the number of contractors killed in Afghanistan and Iraq have varied greatly: according to a member of the US congressional House Armed Services Committee, in June 2004 the number was in the range of 50–60 deaths.¹²⁶ By November the estimate had risen to 150 killed and more than 700 wounded in Iraq.¹²⁷

¹²⁰ Radden Keefe (note 103).

¹²¹ McCarthy, E., 'CACI gets new interrogation contract', *Washington Post*, 5 Aug. 2004.

¹²² Singer (note 2), pp. 151–69.

¹²³ Another problem is that companies may abandon a contract for fear that they will not be paid for their services. Sandline International had signed up for a contract with the Papua New Guinea Government in 1997, but the mission was never carried out because the company doubted the client's ability to pay. This type of consideration, however, is obviously less of a problem for PSCs working for a rich state.

¹²⁴ This may further the debate about the regulation of contractors. As pointed out by Pierre Chao, defence analyst at the Centre for Strategic and International Studies, Washington, DC, the risk that companies might think twice about bidding for contracts might prompt governments to think harder about defining roles and responsibility. Ratnam (note 119).

¹²⁵ The attack was later claimed by the Taliban. Mayar, W., 'Blast hits US firm in Kabul', CNN Online, 30 Aug. 2004; and Otis, J., 'Kabul blast kills 2 from US', *Houston Chronicle*, 30 Aug. 2004.

¹²⁶ Worden (note 5).

¹²⁷ Singer (note 102).

The risk of individual employees defecting from missions aggravates the problem of ensuring the accountability of PSCs. Security personnel do not fall under the 1951 Uniform Code of Military Justice (UCMJ) unless the US Congress has made a formal declaration of war, meaning that there is effectively no guarantee that private contractors will stay in a hostile environment.¹²⁸ After insurgents north of Baghdad killed two South Korean subcontractors in December 2003, 60 of their colleagues left their positions for fear of suffering similar fates.¹²⁹ Herein lies a dilemma over relying on contractors even for seemingly uncontroversial tasks, such as feeding troops: if a corporate actor decides to withdraw staff to keep it safe from attack, regular troops find themselves in difficulty and have little leverage over the situation. Concerns about the growing use of PSCs among national militaries often centre on the likelihood or risk of this type of situation arising.

Finally, PSC accountability is severely compromised by inadequate vetting of personnel. In Iraq, US and British firms turned to local and other foreign nationals to fill the demand for personnel, and the influx of third-country personnel has been high. Private security personnel in Iraq currently include individuals from Fiji, Nepal (Gurkhas), Serbia and Montenegro, and Bosnia and Herzegovina, to name a few. This lessens the accountability of PSCs in two respects: (a) employing staff from a third country complicates procedures for prosecution in the event of misconduct; and (b) the 'gold-mine mentality' associated with the Iraqi private security market also attracts individuals with less than perfect human rights records.¹³⁰ Concerns about the quality of recruitment are not voiced merely by outside observers but are also being raised from within the industry.¹³¹ Blackwater Security Consulting, a strategic division of Blackwater USA, exemplifies this trend: as the company has grown by 300 per cent over each of the past three years, high demand has translated into slack procedures of recruitment. The company's chief executive, Gary Jackson, has confirmed that commandos have been recruited, for example, from former forces loyal to Chilean President Augusto Pinochet for work in Iraq.¹³²

¹²⁸ Zamparelli, S. J., *Contractors on the Battlefield: What Have We Signed Up For?*, Air War College Research Report (Air University, Air War College: Maxwell Air Force Base, Ala., Mar. 1999). For the UCMJ see URL <<http://www.au.af.mil/au/awc/awcgate/ucmj.htm>>. In 2000 the US Congress attempted to rectify this oversight by invoking the Military Extraterritorial Jurisdiction Act, intended to extend federal US law to people 'employed by or accompanying the armed forces outside the United States'. Public Law 106-523, 22 Nov. 2000, URL <<http://www.pubklaw.com/hi/pl106-523.pdf>>. However, this extension applies only to contractors hired by the DOD.

¹²⁹ Surowiecki, J., 'Army Inc.', *New Yorker*, 12 Jan. 2004.

¹³⁰ This has also been a problem with PSCs operating in Colombia, where US PSCs have made the hiring of personnel from other Latin American countries a common practice, thereby evading congressional control, which applies only to US citizens working in the country.

¹³¹ Kenn Kurtz, chief executive of Steele Foundation, a multinational PSC with a significant presence in Iraq, has stated that he seriously doubts the general quality of individuals employed in the country. Leyne, J., 'The business of war in Iraq', BBC News Online, 25 May 2004, URL <<http://news.bbc.co.uk/2/hi/americas/3744489.stm>>.

¹³² Arun, N., 'Outsourcing the war', BBC News Online, 2 Apr. 2004, URL <http://news.bbc.co.uk/2/hi/middle_east/3591701.stm>.

Problems of transparency and oversight on an unlevel playing field

One of the most frequently voiced arguments in favour of outsourcing security and military services is that private security provision is always the cheaper option.¹³³ However, the effectiveness of market forces in ensuring that costs are kept down in the security industry is disputable. For market forces to lead to cost depression, there needs to be effective competition.¹³⁴ The private security market, however, suffers from several impediments to perfect market conditions and as such more resembles a skewed market or ‘unlevel playing field’.

One impediment to perfect market conditions is found in the highly personalized nature of relations within the industry. PSC executives, often with high-level experience from national militaries, are often well connected both with governments and among themselves. Among US PSCs operating in Iraq, senior directors of Diligence LLC, the Steele Foundation and CACI all enjoy such positions.¹³⁵ Furthermore, significant lobbying and political campaign donations on the part of PSCs have been shown to have a bearing on the awarding of contracts.¹³⁶ One source estimates that only 40 per cent of US DOD contracts between financial years 1998 and 2003 were awarded on the basis of ‘full and open competition’. This figure drops to 36 per cent if those ‘full and open’ contracts that attracted only one bidder are deducted.¹³⁷

In an example of questionable tendering processes, in June 2004 one of the largest companies in the industry, DynCorp, lost out to a small and relatively new British company, Aegis Defence Services, in the bid for the then largest Iraqi security contract. The contract, valued at \$293 million, stipulated the coordination of work and intelligence sharing between up to 50 other PSCs in the country, as well as the provision of security teams for the US Project Management Office.¹³⁸ In response, in July 2004 DynCorp submitted a formal protest to the US Government Accountability Office (GAO).¹³⁹ Similarly, the formidable dominance of the Halliburton conglomerate in Iraq has prompted debate and accusations of cronyism in the George W. Bush Administration, fuelled by the multiple investigations of the

¹³³ Brooks (note 12); and Shearer (note 4).

¹³⁴ Markussen, A., ‘The case against privatizing national security’, Paper presented at the 2001 Meeting of the International Political Studies Association, University of Oklahoma, 20 Mar. 2001; and Krahnmann (note 4), pp. 20–21.

¹³⁵ Isenberg (note 104), p. 8.

¹³⁶ Isenberg (note 104). The International Consortium of Investigative Journalists (ICIJ) estimates that private contractors in Iraq donated more than \$500 000 to George W. Bush’s 2004 presidential campaign. See ‘Windfalls of war’, URL <<http://www.publicintegrity.org/icij>>.

¹³⁷ Makinson, L., ‘Outsourcing the Pentagon: who benefits from the politics and economics of national security?’, 29 Sep. 2004 (International Consortium of Investigative Journalists, ICIJ), available at URL <<http://www.publicintegrity.org/pns/report.aspx?aid=385>>.

¹³⁸ Griffin, T., ‘Irish–Americans target Iraq contract’, *Asia Times*, 30 July 2004, URL <http://www.atimes.com/atimes/Middle_East/FG30Ak03.html>; see also ‘Aegis latest information’, URL <<http://www.aegisdef.com>>.

¹³⁹ Griffin (note 138).

company over allegations ranging from overcharging the US Government in Iraq and Kuwait to paying bribes in Nigeria.¹⁴⁰

Competition between firms in the private security sector makes transparency within the industry difficult to achieve, both during tendering processes and in terms of oversight once a contract is granted. The industry is characterized by a climate of confidentiality, and firms frequently retain their right to keep the consideration of contracts secret. In a further complication, there is a general trend towards awarding so-called 'infinite-delivery, infinite-quantity' (IDIQ) contracts, also known as 'umbrella contracts', where a price is fixed in advance to cover an unspecified number and nature of tasks for a certain period.¹⁴¹ Kellogg, Brown and Root—a US engineering and construction company, private military contractor and a subsidiary of Halliburton—has been operating under an IDIQ contract in the Balkans since 1995. The contract was extended twice, in 1997 and 1999, and now runs until 2004; it contains only very broad work descriptions, such as 'freedom to use latest commercial practices and techniques to meet requirements successfully'.¹⁴² An IDIQ contract has also been awarded to DynCorp for the training and equipping of the new Iraqi army.¹⁴³ IDIQ contracts have been criticized for being particularly open to abuse and over-charging, lowering the level of transparency in the contracting of PSCs.

Oversight of the contracting process is further complicated by the extent of subcontracting between PSCs. According to one estimate, the USA has awarded some 2800 contracts in Iraq, valued at more than \$11.7 billion, but has very little influence over the subcontracting process.¹⁴⁴ Mark Whyte, of Pilgrims Security Services, a UK-based PSC operating in Iraq, testifies that large numbers of security staff are not recruited directly by the companies active in the country but are employed as freelance 'consultants'.¹⁴⁵ Subcontracting leads to a further dispersal of authority in policy implementation and leaves the original 'client' with limited means of oversight.

Finally, problems of oversight under skewed market conditions can also manifest themselves in a depletion of state resources. Given that the state has no influence over salaries or other conditions of employment in the private sector, it has no leverage over the ability of the private sector to entice away highly trained individ-

¹⁴⁰ Catan, T., 'Halliburton emerges as the biggest recipient of Iraqi oil money', *Financial Times*, 16 July 2004; and Catan, T., 'Kerry vows to target Bush over Halliburton', *Financial Times*, 12 Aug. 2004.

¹⁴¹ Chatterjee (note 84). The incidence of IDIQ contracts has increased in the USA, as opposed to the UK, where there has been an increasing emphasis on fixed contracts. E. Krahmann, Conversation with the author, 25 Nov. 2004.

¹⁴² US General Accounting Office (GAO), *Contingency Operations: Army Should do More to Control Contract Cost in the Balkans*, Report to the Chairman, Subcommittee on Readiness and Management Support, Committee on Armed Services, US Senate (GAO: Washington, DC, 2000), p. 7, cited in Krahmann (note 9), p. 22.

¹⁴³ 'Iraq reconstruction contracts for firms from supporting nations', memo from Deputy Secretary of Defense Paul Wolfowitz, Determination and Findings, 5 Dec. 2003, available at URL <<http://www.acronym.org.uk/docs/0312/doc07.htm>>.

¹⁴⁴ Worden (note 5).

¹⁴⁵ Arun (note 132).

uals from state service, especially in special operations forces.¹⁴⁶ Concerns about a ‘brain drain’ of special operations forces as recruits begin to desert to private companies have been voiced by members of the US congressional House Armed Services Subcommittee on Terrorism, who warned that the US military may be losing covert forces faster than they can be replaced.¹⁴⁷ Such is the level of exodus from both US and British special forces that military commanders are finding themselves obligated to formulate new financial and educational incentives to retain personnel.¹⁴⁸

Lack of coordination and practical stumbling blocks

Oversight of PSC operations is further complicated by basic practical obstacles to effective public–private partnership. To some extent, the problem of integrating diverse resources and interests in long-term strategic planning is of course a general one, even within regular forces.¹⁴⁹ However, coordination between regular forces and PSCs operating in the same theatre is further complicated by a disparity in organizational culture and even mutual suspicion.

One obstacle for practical coordination arises from the simple issue of identification. Many security guards prefer to keep a low profile by travelling in unmarked vehicles and dressing in civilian clothes. The lack of established practice on identification in the field poses obvious problems, especially when contractors are drawn from different nationalities and there is no immediate way of identifying someone as ‘on the coalition side’, for example. In extreme cases this has led to an exchange of ‘friendly fire’: an employee of the Hart Group recalls how colleagues travelling through the country on an inspection mission were mistaken for adversaries by US troops. The troops opened fire on the convoy, killing two people.¹⁵⁰

Moreover, PSCs sometimes come to the field ill-equipped. Reports of company employees lacking even the basic tools of the trade, such as maps or functioning long-range radio devices, compound problems of communication and impede PSC operations.¹⁵¹ The current practice, whereby contractors rely on informal contacts with members of the regular forces for access to both material support (such as maps) and information, is untenable. There is a clear need to develop formal and established procedures for the practical interaction between private and public forces as well as other actors in the field, especially in post-conflict situations.

¹⁴⁶ The problem of retaining qualified staff within the military, with private sector competition for personnel, was acknowledged in US Department of Defense (note 106), pp. 8–10.

¹⁴⁷ Jelinek, P., Associated Press, ‘Many elite soldiers leave for better pay’, 20 July 2004, URL <<http://webserve.govst.edu/users/ghrank/Political/Not-So-Great%20Expectations/civilian.htm>>; and Mullen, R., ‘Special ops retention a problem, witness say’, *Defense Today*, 21 July 2004.

¹⁴⁸ Isenberg (note 101), p. 8.

¹⁴⁹ Isenberg (note 101), p. 10.

¹⁵⁰ The 2 individuals killed happened to be Iraqis, contracted by Hart as interpreter and chauffeur. BBC Radio 4 (note 112); and Wilson, J., ‘Private security firms call for more firepower in combat zone’, *The Guardian*, 17 Apr. 2004, URL <<http://www.guardian.co.uk/international/story/0,,1193718,00.html>>.

¹⁵¹ BBC Radio 4 (note 112).

Such procedures will have to be carefully considered and will ultimately end up being a balancing act between the different interests and working philosophies involved.

Who pays the price for the efficient state's private security failures?

When the state fails to carry out its hoped-for role in the implementation of policy, the price for extensive reliance on the private sector is high in practical and political terms. The cost of failure is compounded when the efficient state's policy is being exercised in a foreign country. In such cases it is not simply the government, as the contracting party, that is the consumer of PSC services: local populations are also affected. Although the aim of this chapter is to consider PSC reliance from the point of view of the efficient state, two further reflections are made about the effects of a strong state imposing a large private security presence on foreign populations.

The missions in Afghanistan and Iraq can be conceived as attempts to re-establish the fundamental social contract using largely private means. The long-term effects on the attitudes of local populations can at this point in time only be guessed at, given the unprecedented degree of PSC activity. However, it is clear that the US-led coalition's degree of success in managing its private partners in both countries will provide a basis for lessons to be discussed and learned in the future.

In the words of one commentator, the outsourcing of so many responsibilities risks being seen as 'an attempt to create a distance between the coalition's actions and the consequences of its actions, between its physical occupation and the political ramifications of the occupation'.¹⁵² Concerns that the USA is seen to lack rigour in its practice of outsourcing have been voiced even from within the US Congress.¹⁵³ Although PSC conduct necessarily varies, there is a risk that a job half-done will provoke significant resentment among local people. In this respect, criticism that the new Iraqi police and army have been sold short as a result of training under PSC auspices may prove particularly compromising.¹⁵⁴

The influx of tens of thousands of foreign workers into Iraq will have an impact on conditions in the emerging labour market. As international PSCs have realized the advantages of hiring local staff, in particular because of the local knowledge and lower salary demands, there has been a surge in their employment of Iraqis. One international security services and risk consultancy company, Erinys International, now employs 14 000 Iraqis throughout the country.¹⁵⁵ As international PSCs have become increasingly wary of the rising costs and difficulty in retaining

¹⁵² Isenberg (note 101); and O'Neill, B., 'A new kind of private war', Spiked Online, 16 Apr. 2004, URL <<http://www.spiked-online.com>>.

¹⁵³ Isenberg (note 104).

¹⁵⁴ Calbreath, D., 'Iraqi army, police fall short on training', *San Diego Union-Tribune*, 4 July 2004, URL <http://www.signonsandiego.com/uniontrib/20040704/news_mz1b4iraqi.html>.

¹⁵⁵ See the Erinys International Internet site at URL <<http://www.erinysinternational.com>>; and Isenberg (note 101), p. 7.

staff from their countries of origin, PSC influx is already creating a two-tier workforce in the local security sector, divided between highly paid recruits from Western special services and cheaper echelons drawn from local populations.¹⁵⁶ Even the latter, however, normally earn considerably more than those in the state security services, let alone their fellow citizens in other branches of work.

Finally, as discussed in chapter 2, PSC presence detracts from the local input into and ownership of institution building. In both Afghanistan and Iraq it has been difficult to recruit competent personnel for the new national armies and police forces, as local people prefer taking up employment with foreign PSCs.¹⁵⁷

Responsible for the implementation of a large share of US policy in Iraq and elsewhere, PSCs need to be held accountable under both law and contract. Failure to do so will have a significant impact on the implementation of policy, giving the phrase ‘mission failure’ a whole new content.¹⁵⁸ The following chapter considers another facet of the USA’s use of the private security sector, where it is not drawn upon to complement regular forces but rather to replace the application of public resources on an ongoing basis and in non-conflict-related spheres.

¹⁵⁶ Cha, A. E., ‘Underclass of workers created in Iraq’, *Washington Post*, 1 July 2004, p. A01.

¹⁵⁷ Vendrell, F., EU Special Representative in Afghanistan, Personal conversation with the author, 14 June 2004.

¹⁵⁸ Campbell, G. L., ‘Contractors on the battlefield: the ethics of paying civilians to enter harm’s way and requiring soldiers to depend on them’, Paper presented to the Joint Services Conference on Professional Ethics, Springfield, Va., Jan. 2000, URL <<http://www.usafa.af.mil/jscope/JSCOPE00/Campbell00.html>>.

4. The global war on terrorism and privatization of security

US counter-terrorism strategy and the attractiveness of the private security sector

Although industry commentators generally agree that the global war on terrorism, (GWOT) has led to an increased use of private security companies, little analysis has so far been devoted to the specific nature of these tasks or to their effects.¹⁵⁹ While experts disagree on whether terrorism in the 21st century is qualitatively or even quantitatively new, it is clear that the issue will remain at the top of the international agenda for the foreseeable future.¹⁶⁰ While the US operations in Afghanistan and Iraq are declared to be part of the wider GWOT, in the foregoing chapters they are considered as cases of military intervention and occupation. This chapter examines the increased use of the private sector in the more elusive (low-profile and covert) aspects of the GWOT.¹⁶¹ Again, the focus is on the United States and its strategic outlook, but the findings have generic relevance for efficient states generally.

The main document setting out the US approach to the GWOT—the Quadrennial Defense Review of 30 September 2001—lists seven strategic tenets for achieving defence policy goals, three of which have a direct bearing on the role of the private sector in the GWOT: (a) the focus on risk management, (b) the development of a capabilities-based approach, and (c) the transformation of the US military and defence establishment.¹⁶²

Risk management starts from the assumption that challenges are constantly changing. This plays out as a fundamental tension between preparing for the risks of the future and addressing the threats of the present. The recognition that some risks are less than well understood is fundamental to a risk management approach to security politics and clearly sets it apart from earlier threat-based approaches, which were built on available intelligence about a particular and identifiable adver-

¹⁵⁹ Hasham, M., 'Public wars, private profit', *World Today*, June 2004, URL <<http://www.theworldtoday.org>>.

¹⁶⁰ On problems in accurately charting the global incidence of terrorist activities, including a critique of the US State Department's 2003 Patterns of Global Terrorism report, see Krueger, A. B. and Laitin, D., "Misunderestimating" terrorism', *Foreign Affairs*, Sep./Oct. 2004, pp. 8–14. On the effect of the Sep. 2001 attacks on US strategic consciousness see Morgan, M. J., 'The origins of the new terrorism', *Parameters*, spring 2004, p. 41.

¹⁶¹ 'The activities of these [private companies] follow the traditional logic of covert action.' Guéhenno (note 35), p. 12.

¹⁶² The other US strategic tenets are: defending the United States and projecting US military power, strengthening alliances and partnerships, maintaining favourable regional balances and developing a broad portfolio of military capabilities. US Department of Defense (note 106), pp. 13–14 and 57–65.

sary.¹⁶³ Risk management is amenable to private sector use precisely because it requires responding to (or pre-empting) risks at short notice and with little institutional preparation.

A ‘capabilities-based approach’ to strategy reinforces the attractiveness of private sector security service provision. Underpinning this approach is the view that the USA cannot know with confidence which actor (state or non-state) will pose a threat to vital interests. Accordingly, the focus shifts to how an adversary might fight rather than the identity of the adversary or the location where confrontation might occur.¹⁶⁴ This approach relies on ‘surprise, deception and asymmetric warfare’ in the face of an unknown adversary and demands a refocusing of the armed forces’ mission.¹⁶⁵ If the private sector not only takes over the many basic tasks of operation but also shoulders a large part of the costs for the development of new technologies, resources are freed up for a more streamlined defence sector.¹⁶⁶

Third, the QDR sets out the transformation of the US military and defence establishment itself as involving ‘experimentation with new approaches to warfare, operational concepts and capabilities, and organisational constructs’ and general ‘innovation in Department of Defense (DoD) processes’.¹⁶⁷ The view that ‘only those functions that need be performed by the DoD should be kept by the DoD’ has already led to a significant increase in outsourcing and will continue to do so in the conceivable future.¹⁶⁸

Although the three tenets described above do not do justice to US defence strategy as a whole, they are important in indicating reasons for an increased privatization in the context of the GWOT. While the new threat perception has opened up and highlighted numerous roles for the private sector and for public–private interaction—for example, in the control of terrorist financing and movement, technology leakage and the protection of critical infrastructure—this discussion focuses on the particular role of private provision of intelligence in support of counter-terrorist policy.¹⁶⁹

¹⁶³ Gormley, D. M., ‘The limits of intelligence: Iraq’s lessons’, *Survival*, vol. 46, no. 3 (autumn 2004), p. 8. US Secretary of Defense Donald Rumsfeld’s assessment of the current security climate demonstrates the USA’s increased risk aversity in the wake of the 2001 attacks: ‘there are known knowns; there are things we know we know. We also know that there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don’t know we don’t know’. Quoted in ‘Rum remark wins Rumsfeld award’, BBC News Online, 2 Dec. 2003, URL <<http://news.bbc.co.uk/2/hi/americas/3254852.stm>>.

¹⁶⁴ US Department of Defense (note 106), pp. 13–14.

¹⁶⁵ US Department of Defense (note 106), p. 14.

¹⁶⁶ For a detailed discussion see Hagelin, B., ‘Science- and technology-based military innovation: the United States and Europe’, *SIPRI Yearbook 2004* (note 61), pp. 285–304.

¹⁶⁷ US Department of Defense (note 106), p. 32.

¹⁶⁸ US Department of Defense (note 106), pp. 53–54.

¹⁶⁹ Counter-terrorism is distinct from anti-terrorism, which covers a wider range of activities. For a comprehensive coverage of ways in which the private sector is increasingly engaged in anti-terrorist activity see eds Bailes and Frommelt (note 34).

Private security and intelligence gathering

Preventive counter-terrorist strategies place emphasis on intelligence functions. This was of course the case before the attacks of 11 September 2001, but since then the issue has moved swiftly up the US foreign policy agenda. The recognition of intelligence failures both in predicting the attacks and in the lead-up to the war in Iraq prompted renewed debate on intelligence needs and organization.¹⁷⁰ Although the prime strategic importance of human intelligence (HUMINT) in the context of the GWOT has been established both in numerous US government documents and in independent analysis, the means by which an adequate, agile and reliable HUMINT force can be generated have been widely contested.¹⁷¹ Some argue that the traditional shape of intelligence agencies, exhibited through formal, hierarchical and compartmentalized information strategies, needs to be replaced with ‘flexible, decentralized networks of public and private information providers, analysts and users’.¹⁷² This trend is reflected in the more specialized intelligence activity of PSCs.

Frequent links between PSCs and companies within the information technology (IT) and electronic systems industries make private security actors seem well placed for the technology-intensive aspects of intelligence gathering. Indeed, many of the important actors within the ‘intelligence branch’ of the private security sector have originated as IT or telecommunications companies, only to then diversify their portfolios to cover security-related services.

PSCs are today used for a wide variety of intelligence tasks: from the gathering of intelligence from satellites and sophisticated sensors, to interpreting and analysing results and distributing information among relevant government bodies. Air Scan, a Florida-based company, has provided aerial intelligence-gathering services in Angola, the Balkans, Colombia and Sudan.¹⁷³ The US State Department hired PSCs to provide intelligence on rebels of União Nacional para a Independência Total de Angola (UNITA, National Union for the Total Independence of Angola) in Angola and to investigate the guns-for-gems trade in Africa; even the International Monetary Fund (IMF) has contracted private firms for intelligence.¹⁷⁴ DynCorp is another US PSC involved in intelligence provision, in this case working for the Colombian Ministry of Defence to provide intelligence on

¹⁷⁰ See, e.g., *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (US Government Printing Office: Washington, DC, 2004), URL <<http://www.gpoaccess.gov/911/>>; and *Review of Intelligence on Weapons of Mass Destruction* (Butler Committee Report), HC 898 (Stationery Office: London, 2004), URL <<http://www.butlerreview.org.uk/>>.

¹⁷¹ US Department of Defense (note 118), p. 38; and Steinberg, J. B., Graham, M. and Eggers, A., *Building Intelligence to Fight Terrorism*, Brookings Institution Policy Brief no. 125 (Brookings Institution: Washington, DC, Sep. 2003). The US 9/11 Commission brought about the resignation of CIA Director George Tenet and set the stage for a major restructuring of the intelligence community. See also Black, C., ‘The security of business: a view from the security industry’, eds Bailes and Frommelt (note 34), pp. 173–82.

¹⁷² Steinberg, Graham and Eggers (note 171), p. 2.

¹⁷³ Singer (note 2), p. 16.

¹⁷⁴ Singer (note 2), p. 182.

rebels of Fuerzas Armadas Revolucionarias de Colombia (FARC, Revolutionary Armed Forces of Colombia).¹⁷⁵ The chief financial officer of CACI International stated in January 1998 that ‘the intelligence community would be a great marketplace for us’; one acquisition and 10 months later, the company proclaimed a significant boost in revenue owing to its landing intelligence contracts worth a total of \$29 million.¹⁷⁶ Since then the company has continued to expand its intelligence services capacity and, despite embroilment in the scandal over abuse at the Abu Ghraib prison in Iraq, is one of the key players in this new segment of the market for private security.

PSCs are also increasingly used in the realm of human intelligence. This involves primarily smaller companies supplying former intelligence agents as actual ‘bodies on the ground’ in sensitive locations, notably in Pakistan, which US soldiers have been forbidden to enter in their search for al-Qaeda leader Usama bin Laden.¹⁷⁷ The private sector has also been awarded contracts in the realm of cyber terrorism, setting up businesses to monitor suspicious Internet sites—what US Deputy Defense Secretary Paul Wolfowitz calls ‘cyber sanctuaries’.¹⁷⁸ An example of this is the Search for International Terrorist Entities Institute, operating out of (undisclosed) locations in the USA and Israel.¹⁷⁹

In further testimony to the proliferation of private sector intelligence, private placement companies that specialize in supplying talent to international PSCs have sprung up in recent years, and the US Department of Homeland Security has announced that it might seek a private vendor to provide intelligence research and operations specialists for its Immigration and Customs Enforcement (ICE) agency.¹⁸⁰

Political legitimacy in the global war on terrorism

Strong emotional reactions worldwide to the attacks of September 2001 set the stage for widespread contention over what the strategic goals of the GWOT should be. The USA has in various official documents affirmed a commitment to dealing with the root causes of terrorism, identifying in particular the problem of failed

¹⁷⁵ Quintanilla, J., ‘The invisible US war in Colombia’, Scoop Media Online, 1 July 2004, URL <<http://www.scoop.co.nz/mason/stories/WO0407/S00009.htm>>.

¹⁷⁶ McCarthy, E., ‘Intelligence work comes to CACI via acquisitions’, *Washington Post*, 8 July 2004, URL <<http://www.globalsecurity.org/org/news/2004/040708-caci-intell-work.htm>>.

¹⁷⁷ Chaffin, J., ‘US turns to private sector for spies’, *Financial Times*, 17 May 2004; US deepening of counter-terrorist cooperation (primarily intelligence) with the Philippines is set out in the US National Security Strategy (NSS), published in Sep. 2002. See URL <<http://www.whitehouse.gov/nsc/nss.html>>, p. 26. See also ‘US concerned about group in Philippines linked to al-Qaeda’, Reuters and AP, published in *Taipei Times*, 28 June 2004.

¹⁷⁸ Lipton, E. and Lichtblau, E., ‘Even near home, a new front is opening in the terror battle’, *New York Times*, 23 Sep. 2004.

¹⁷⁹ Lipton and Lichtblau (note 178).

¹⁸⁰ Chaffin, J., ‘US turns to private sector for spies’, *Financial Times*, 17 May 2004; Dizzard, W. P., ‘DHS eyes outsourcing intelligence work’, Government Computer News, GCN.Com, 5 Oct. 2004, URL <http://www.gen.com/vol1_no1/homeland-security/27527-1.html>. For more on the ICE see the agency’s Internet site at URL <<http://www.ice.gov>>.

states and launching a number of initiatives to this effect, such as the East Africa Counterterrorism Initiative.¹⁸¹ At the strategic level, counter-terrorism policy cannot be reduced to responsive action or even deterrence of terrorist action but ultimately boils down to a converting of opinions. In a contest that is by its very nature a ‘contest for hearts and minds’, the way in which policy is implemented carries significant political weight.

The use of the private security sector can, by its very nature, only focus on short- to medium-term counter-terrorist measures. Over-concentration on this short-term aspect of the problem can combine with excessive reliance on commercial sector actors to convey an image of disengagement and disinterest in addressing root causes of terrorism on the part of the USA.¹⁸² There is, in the words of one commentator, a risk that ‘strategy’s goal becomes not identifying the best possible outcome and finding the means to attain it, but keeping as many options open for as long as possible to maximise tactical flexibility’.¹⁸³ If the GWOT is to be conceived of in the context of global security governance, where state and non-state actors act together, the use of PSCs needs to be much more visibly incorporated into a political strategy that also invokes and explores the capacity of the private sector as a whole to play more creative and non-zero-sum roles in security building, within a strong normative framework.¹⁸⁴

More actors, more problems?

The inadequacy of inter-agency communication has been pointed out in recent investigations into the performance of both US and British intelligence agencies.¹⁸⁵ Clearly, the proliferation of private actors within the intelligence world further complicates the picture, and ensuring that the right information reaches all relevant parties and is put to the right use becomes increasingly difficult. The classic problems of intelligence gathering and interpretation also require reconsideration in the light of the use of PSCs: infiltration, methods proliferation and human resource

¹⁸¹ Shinn, D. H., ‘Fighting terrorism in East Africa and the Horn’. *Foreign Service Journal*, Sep. 2004, p. 42. On similarities of root causes of internal conflict and root causes of terrorism see Richmond, O. P., ‘Realizing hegemony?: symbolic terrorism and the roots of conflict’, *Studies in Conflict and Terrorism*, vol. 26, no. 4 (July/Aug. 2003), pp. 289–309, available at URL <http://www.polisci.taylorandfrancis.com/ter_content.html>. The US National Security Strategy establishes the security threats posed by failed states (see note 177). For a critique of the lack of strategy to implement this focus see Rice, S., *The New National Security Strategy: Focus on Failed States*, Brookings Institution Policy Brief no. 116 (Brookings Institution: Washington, DC, Feb. 2003), URL <<http://www.brookings.edu/comm/policybriefs/pb116.htm>>.

¹⁸² ‘There is usually no question about the level of US resolve and interest if there are US troops on the ground. If we only provide contractors, while they might be really effective in terms of mission accomplishment, they can lead to charges of US ambivalence or lack of interest.’ Wheelan (note 67).

¹⁸³ Guéhenno (note 35), p. 14.

¹⁸⁴ Bailes, A. J. K., ‘Business and the security agenda: victim, accomplice or ally?’, Opinion, Centre for Transatlantic Relations, Oct. 2004, URL <<http://transatlantic.sais.jhu.edu/Publications/opinions/>>.

¹⁸⁵ ‘CIA slated over Iraq intelligence’, BBC News Online, 9 July 2004, URL <<http://news.bbc.co.uk/2/hi/americas/3878969.stm>>; see also Quintanilla (note 175).

mismanagement apply to public and private sectors alike.¹⁸⁶ The Tabuga Report pointed out that the hiring of third-country nationals for intelligence collection was particularly problematic.¹⁸⁷ There are no guarantees that individual employees hired by a PSC to perform intelligence tasks will be favourably disposed towards the client's broader agendas.

As early as 26 December 2000, the US Army indicated its awareness of the risks associated with outsourcing intelligence in a memorandum issued by Patrick T. Henry, Assistant Secretary of the Army.¹⁸⁸ The memorandum argues that, at the operational, strategic and tactical levels, the intelligence function 'should be exempted from private sector performance on the basis of risk to national security'.¹⁸⁹ Specifically, the memorandum cautions that contractors 'may be acquired by foreign interests, acquire or maintain interests in foreign countries or provide support to foreign customers'.¹⁹⁰ PSCs frequently operate on a global basis and provide services to a number of clients at a time, varying in nationality and including other interest groups, such as the corporate sector itself. In an example of dubious intelligence provision, several Islamic groups and charities sued the Search for International Terrorist Entities Institute, a company working on cyber terrorism, for defamation.¹⁹¹

Fundamentally, the use of PSCs in the intelligence sector means the introduction of a new 'protagonist' in security politics. All aspects of intelligence gathering require interpretation, and when actors whose main responsibility is not to voters and democratic institutions but to shareholders perform this, there is reason for concern.

Losing competence?

The repercussions of losing competence in the realm of intelligence gathering vastly outweigh the potential detriment of private sector dependence in the area of, for example, logistic support, given the central role occupied by intelligence services in the current security climate. From the perspective of the firms themselves, the temptation to recruit directly from government agencies is easily explained: such individuals have been thoroughly trained, are knowledgeable about the functioning of public intelligence agencies and possess the additional advantage of possessing relevant security clearances.¹⁹²

¹⁸⁶ Sorel, M., 'Who let the dogs out?: the intelligence risks of United States private military firms', Unpublished paper, Yale University, New Haven, Conn., 8 May 2004, marc.sorel@yale.edu.

¹⁸⁷ Worden (note 5); and the Tabuga Report (note 119).

¹⁸⁸ US Department of the Army, Office of the Assistant Secretary, Manpower and Reserve Affairs, 'Memorandum Thru Administrative Assistant to the Secretary of the Army, Director of Army Staff', available on the Internet site of the Center for Public Integrity, URL <<http://www.publicintegrity.org/wow/report.aspx?aid=328>>.

¹⁸⁹ US Department of the Army (note 188).

¹⁹⁰ US Department of the Army (note 188).

¹⁹¹ Lipton and Lichtblau (note 178).

¹⁹² Bamford, J., 'This spy for rent', *New York Times*, 13 June 2004.

Interestingly, however, private sector activity in the area of intelligence gathering also provides positive opportunities in the context of risk management. With limited resources and a demonstrated lack of competence in foreign languages, the intelligence world needs to quickly find ways of boosting capacity. Private actors in general (including companies not in the business of security) operating in politically sensitive or unstable areas often possess a wealth of information about local conditions and events on the ground which could be very useful for governments. As it stands, the private intelligence sector operates largely in a vacuum, with the associated risks both of intelligence misuse and of intelligence not reaching relevant parties. A new, clear structure for public–private interaction in this field would be needed to draw out this potential in a way that avoids or offsets the problems mentioned above.¹⁹³ Innovation in terms of public–private partnership models was made a priority for the United States in the 2001 QDR but so far has yielded little practical result. One interesting, but largely untried, initiative in this respect is the US Terrorist Threat Integration Center (TTIC), whose purported purpose is to ‘close the “seams” in intelligence analysis’.¹⁹⁴

If intelligence is not properly integrated or falls into the wrong hands, the effects will be hugely detrimental to security. The case for drawing PSCs into a clearer and more robust structure of security governance demands that their use is conducted in an open, transparent way and that proper accountability is ensured. Each decision on possible outsourcing should carefully balance the potential value added by using PSCs against the risk of value being lost. As one commentator pointed out, ‘just because we can privatise doesn’t mean we should’.¹⁹⁵

¹⁹³ Black (note 171).

¹⁹⁴ Chaffin, J., ‘US turns to private sector for spies’, *Financial Times*, 17 May 2004.

¹⁹⁵ Singer (note 2), p. 242.

5. International, regional and national responses

Some critics of the provision of security by private firms have argued that regulating the industry would confer undue legitimacy on what are inherently illegitimate actors.¹⁹⁶ These critics advocate a total ban on PSCs and the renationalization of security and military service provision. The extent of the demand for and supply of private security services around the world indicates, however, that a ban is unrealistic: it would be impossible to enforce and, importantly, would work against the aim of greater transparency and accountability in the security sector by increasing the likelihood that the industry would be pushed underground. Furthermore, most would agree that, even if it were practically possible, entirely banning PSCs is undesirable. The establishment of a global private security industry is a fait accompli and to eschew any engagement with it would mean the waste of a potentially useful resource.

At the other end of the spectrum, a few commentators have argued that the market's invisible hand will ultimately ensure an informal punishment of 'bad' private security behaviour and that for this reason regulation is unnecessary. This line of argument is equally untenable: the putative magic of the market has so far not been sufficient to discourage rogue behaviour by individual firms and, even if it were, this market would not be capable of addressing the wider questions of accountability outlined above.¹⁹⁷

Realistic responses to the growth of the private security industry need to be found at intermediate levels. The push for regulation of PSC activity has accelerated with the war in Iraq. The international community should therefore seize the opportunity to capitalize on this momentum.¹⁹⁸

Issues, interests and options

The effects of reliance on the private security sector depend on the nature of the state that contracts PSCs and the strategic environment in which they are used. If PSCs are to be constructively engaged in a broader system of security governance by state and non-state actors, three main issues need to be addressed. First, there is

¹⁹⁶ The view was expressed in eds Musah and Fayemi (note 11), where it was argued that PSCs stemmed directly from old-style mercenaries and have no place in conflict management and peace-building. See also Adejumbi, S., 'A view from Africa', eds Bailes and Frommelt (note 34), pp. 242–53.

¹⁹⁷ Nossal, K. R., 'Global governance and national interests: Regulating transnational security corporations in the post-cold war era', *Melbourne Journal of International Law*, vol. 2, no. 2 (2001), p. 459.

¹⁹⁸ Evans, S., 'Privatised wars "need new laws"', BBC News Online, 10 May 2004, URL <http://news.bbc.co.uk/2/hi/middle_east/3699957.stm>; and Lovell, J., 'Iraq makes it a boom time for former dogs of war', Reuters, 22 Sep. 2004, URL <<http://in.news.yahoo.com/0409222/137/2g71g.html>>.

the question of accountability. Without legal accountability of individual contractors, the use of PSCs will continue to be viewed with suspicion. Second is the wider question of legitimacy. If PSCs are to take an active part in the construction of security governance, they need to be viewed as legitimate actors by other state and non-state actors, as well as by the people who are the ultimate objects of the systems and services supplied. More than just theoretical legal accountability is needed to ensure that appropriate PSC action is perceived as legitimate—whether through the sanctioning of operations by states or by other actors. The legitimacy of PSCs will also depend on having adequate levels of transparency and democratic standards in terms of the companies' operations, finances and conduct. Third, practical impediments to effective PSC action need to be addressed, and systems for public–private interaction on the international level need to be developed. This will require PSCs increasingly to work *with* states, rather than at the expense of states, as well as in concert with other actors such as international and regional organizations, NGOs and other non-state actors.

A variety of interests must be balanced in order for private security use to be both effective and equitable.¹⁹⁹ First and foremost, the interests of the 'host state' (the state where PSCs operate) and its population must be taken into account. This applies particularly to weak states, where PSCs are likely to be operating under contracts from external actors. Second, the 'home state' (the state of origin of a particular company) needs to have influence over where, how and for whom a PSC operates. Third, industry actors themselves need to see the benefit of regulatory and legislative measures guiding their use as a means of ensuring that good PSC behaviour is rewarded and rogue conduct penalized.²⁰⁰ Only by taking into account the interests of all parties can regulation have both practical and normative effect.

Two main types of response to the privatization of security are conceivable: legal and regulatory. Both these frameworks are, in theory at least, amenable to operating at three different levels: national, regional and international. Legal frameworks are advantageous given their capacity for retribution. In addition, legal frameworks have been shown to have a deterrent effect.²⁰¹ Regulatory frameworks, in contrast, have so far been largely non-enforceable and can be said to be primarily preventive, taking an inclusive approach to the industry and encouraging good practice generally.²⁰² In formulating responses to PSC activity, consideration needs to be given to the continuum between 'hard' versus 'soft' law and the development of norms and codes in relation to multinational corporations more broadly.²⁰³ Differ-

¹⁹⁹ Lilly, D., 'Green Paper submission: private military companies: options for regulation', *International Alert*, July 2002, p. 3, available at URL <<http://www.international-alert.org/publications>>.

²⁰⁰ This is alluded to in, e.g., Kinsey, C., 'Regulation and control of private military companies: the legislative dimension', *Contemporary Security Policy* (forthcoming 2005).

²⁰¹ Akhavan, P. 'Beyond impunity: can international criminal justice prevent future atrocities', *American Journal of Law*, vol. 95, no. 1 (2001).

²⁰² UN Security Council Resolution 1540, 28 Apr. 2004, on the non-proliferation of weapons of mass destruction, indicates an important new direction here. For the resolution see URL <<http://www.un.org/documents/scres.htm>>.

²⁰³ Vagts, D. F., 'The UN norms for transnational corporations', *Leiden Journal of International Law*, vol. 16 (2003), pp. 800–802; and Chinkin, C., 'Normative development in the international legal

ent response measures will target the privatization of security from different directions—from the targeting of the companies themselves and their employees, to that of prospective or actual clients of companies. These two strands are necessarily complementary: companies need to behave according to certain standards, but consideration must also be given to the circumstances and conditions under which PSCs should be contracted. The fragmented nature of the industry and the diversity of its clients make it unlikely that any one instrument will capture all activities of the private security sector. A combination of mutually reinforcing incentive mechanisms could provide a network of overlapping structures of regulation that stand some chance of capturing a large part of private security and military service provision.

The inadequacy of international legal instruments

The benefits of addressing the privatization of security at the international level are clear, given the transnational nature of companies themselves, their fields of operation, the identity of clients and the effects of security privatization. The most frequently cited international legal documents in the literature on private security are the UN and OAU/AU conventions on mercenary activity.²⁰⁴ Neither convention is ultimately applicable to the activities of contemporary PSCs, even where PSCs have been hired for combat services in the context of armed conflict.²⁰⁵ The lack of practical applicability of the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries is reflected in the fact that it took 12 years for it to be ratified by the required minimum of 22 countries and to enter into force. None of the major Western powers are signatories.

Amending these two conventions by redefining ‘mercenaries’ to include private contractors is unlikely to be particularly effective in mitigating the wider consequences of private security provision.²⁰⁶ First, there are inherent definitional problems. The distinction between ‘combat’ and ‘non-combat’ tasks is tenuous, and a ban on clear-cut ‘mercenary’ activity might be seen as not only inconsistent but also hypocritical since it would leave unaddressed such tasks as training, strategic advice and operational support—all of which are central to military missions and can be instrumental in the outcome of conflict.²⁰⁷ Furthermore, direct participation

system in commitment and compliance: the role of non-binding norms’ ed. D. Shelton, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press: Oxford, 2003).

²⁰⁴ See chapter 1 and note 15.

²⁰⁵ Singer (note 16), pp. 530–32.

²⁰⁶ The AU is reportedly considering the possibility of updating the Convention for the Elimination of Mercenarism in Africa (see note 15) to make it more relevant to present-day circumstances. However, there have been no results so far. Boshoff, H., Institute for Security Studies, Pretoria, South Africa, Personal conversation with the author, Nov. 2004.

²⁰⁷ The definitional problems are also considered in British Foreign and Commonwealth Office (FCO), ‘Annex A: Mercenaries: Africa’s experience 1950s–1990s’, *Private Military Companies: Options for Regulation*, HC 577 (Stationery Office: London, Feb. 2002), URL <<http://www.fco.gov.uk/Files/KFile/mercenaries,0.pdf>>, p. 23. Furthermore, the Diplock Committee, in its 1976 report

in combat or the effective replacement of regular troops with PSCs is now comparatively rare and such a ban would address only a very small segment of private security activity. Second, agreement between states on amending international legislation is slow, as indicated by the slow pace of ratification of the existing International Convention. Third, even when enacted, international legislation is notoriously difficult to enforce.

Although it is possible to try individual contractors who have transgressed international humanitarian or human rights law in international courts such as the International Criminal Court (ICC), effective responses to private security companies must also be directed at the company level.²⁰⁸ Some scholars have suggested widening the scope for prosecuting corporate entities in international courts, but this is so far untried.²⁰⁹

The failure to establish the precise legal status of PSCs in international law, as well as the meagre prospects for fruitfully amending (and implementing) international legal definitions, makes national legislation a more effective means in the near term. However, instruments that are regulatory rather than legally binding should also be considered at the international level.

UN approaches to private security companies and prospects for an international regulatory body

The United Nations is the primary actor responsible for the maintenance of international peace and security. A clear UN stance on the issue of PSCs and their conduct would carry important normative weight, even if it would not carry the force of law. As the highest international authority, the UN's role as a promoter of norms cannot be overstated. Moreover, the organization has a clear need to respond to the new reality and extent of international private security.

As a starting point, the UN could address the issue of its own use of PSCs. As pointed out above, the UN has made extensive use of PSCs *in support of* peace operations, and this Policy Paper argues that such use by a legitimate international organization may be one of the most fruitful ways of capitalizing on private sector resources.²¹⁰ However, the significance of accountability and legitimacy standards in peace operations runs both ways: just as the general political legitimacy of UN efforts confers legitimacy on private security actors, a lack of PSC accountability may reflect badly on the UN itself.

following the involvement of British mercenaries in Angola, took the view that a blanket ban on private military activity abroad would be an 'unwarranted interference with individual liberty'. British FCO (note 232), p. 23; and Singer (note 16), p. 532.

²⁰⁸ On developments in the ICC see Wiharta, S., 'Post-conflict justice: developments in international courts', *SIPRI Yearbook 2004* (note 61), pp. 191–206.

²⁰⁹ See, e.g., Kamminga, M. T. and Zia-Zarif, S. (eds.), *Liability of Multinational Corporations under International Law* (Kluwer Law International: The Hague, 2000).

²¹⁰ This is not to suggest any replacement of national troops for peace operations, which is both undesirable and highly unlikely. Lilly (note 199), p. 7.

The UN needs to develop and make public standards for PSCs which they must observe in order to qualify for contracts with the organization. PSC support of peace operations needs to be made open and transparent. A first step would be to maintain a publicly accessible list of companies contracted by the UN, specifying their tasks and mandates, ‘rules of engagement’, contract size and area of deployment. This would permit public scrutiny of companies engaged in support of peace operations and would challenge the general acceptance of ‘client confidentiality’ that currently prevails within the industry and which blocks discussion of company conduct and operation. Standards for contracting companies should be considered carefully but should at a minimum include compliance with international humanitarian law, unconditional respect for human rights, the ensuring of transparency and accountability of individual contractors, sufficient vetting and training of staff, and the exclusive use of companies with established track records in these regards. Contracting of PSCs in conjunction with peace operations could thus provide a first avenue for drawing private security actors closer into a system of international security governance premised on inter-sectoral criteria for legitimacy.

A UN review of the PSCs used for international peace operations could also be seen as a basis for developing international regulation of PSCs when they are contracted by parties other than the UN itself.²¹¹ Suggestions have been made for a regulatory body for international contracting of private security services to be set up either under the auspices of the UN Secretary-General’s Special Rapporteur on Mercenarism²¹² or under a separate body, replacing the role of the Special Rapporteur rather than enhancing it. A body set up under the UN could keep a register of PSCs that conform to agreed standards of operation and thereby ‘accredit’ such companies with a certain degree of legitimacy, thus allowing international state and non-state clients to make a better-informed choice among suppliers before contracting. Another possibility would be for the UN to act in an audit capacity by, for example, sending independent agents to verify the standards of conduct of individual companies and contracts. However, this is likely to be costly, it would run up against differences in the general legal environment for company regulation in different jurisdictions, and it would be reliant on state action for enforcement in the case of revealed abuses.

Self-regulation: the industry and its international non-state clients

Another potential way of regulating the operation of the private security industry at the international level might be through international voluntary agreements. Such mechanisms would not carry the force of law, and compliance would essentially be voluntary; they could be targeted at either the industry itself or at clients of the industry.

²¹¹ Milliard (note 4); and Singer (note 16), pp. 545–47.

²¹² Singer (note 16), p. 545.

Self-regulation of the private security industry would entail the formulation of codes of conduct, setting standards to which companies would have to conform in carrying out contracts. Clients would then be able to make an informed choice about the general conduct and behaviour of a specific company before deciding on whether or not to hire it for the delivery of a particular service.²¹³

Industry members themselves could, in a concerted effort, draw up such codes of conduct. The participation of individual PSCs in this process could be motivated by such factors as prestige and reputation concerns as well as 'peer pressure' within the industry. Such an initiative has been taken by the IPOA, which currently has a membership of 12 PSCs. The draft IPOA Principles of Conduct, while vague, address some of the most important issues of PSC action such as standards regarding human rights, transparency, accountability, acceptable clients, safety and employee protection, rules of engagement, arms control (weapons only to be obtained legally), and the health and quality of employees. Furthermore, the organization has drafted 'minimum standards and training requirements for private security professionals'.²¹⁴ Although the draft IPOA Principles need to be subject to much wider debate as well as considerable refinement, they are commendable as a first step towards self-regulation of the industry. Specific attention must be given to the risk of PSCs contributing to the spread of arms; the sensitivities of particular areas of operations; and the definition of acceptable clients (currently defined in the IPOA draft as 'legitimate, recognised governments, international organisations, NGOs and lawful private companies').

For companies to be motivated to participate in voluntary self-regulation, the normative standing conveyed by the scheme must be considerable. The endorsement of voluntary codes for private security industry behaviour by actors external to the industry itself is likely to increase the prestige associated with company compliance. This is one of the most important shortcomings of the IPOA Principles: unless they are sanctioned by states or international organizations, they are likely to be a very weak instrument.²¹⁵ It is worth noting that a few companies have drawn up codes of conduct or codes of ethics, but they are often unhelpfully vague and suffer from being directed at the individual company rather than the industry level.

A more comprehensive way of approaching self-regulation of the private security industry is through models that target industry actors but are binding at the state level, such as the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (general to all corporate actors)

²¹³ This would mean an instrument akin to the environmental certification scheme drawn up under the International Organization for Standardization (ISO).

²¹⁴ The IPOA membership, Principles of Conduct and Standards are all available at URL <ipoaonline-iraq.org/>.

²¹⁵ In this respect, self-regulation within a framework such as the UN Global Compact (which also stipulates standards for corporate behaviour but is drawn up by actors external to the industry itself) is likely to be more effective in conferring legitimacy on the IPOA Principles and thereby encouraging compliance. The Global Compact has not so far explicitly dealt with its members' responsibilities in the security field, either when directly carrying out security tasks or through indirect impact. See the Global Compact Internet site at URL <<http://www.un.org/Depts/ptd/global.htm>>.

and the Kimberley Certification Process (dealing specifically with one industry, in this case the international trade in rough diamonds).²¹⁶ Regulating the private security industry through the voluntary compliance of states implementing national legislation or regulation would carry the additional advantage of including more actors and thereby increasing the prestige gains associated with compliance. The Kimberley Process is particularly instructive in that guidelines were drawn up after several international meetings where government officials worked together with representatives from the industry and NGOs and because it is subject to periodic reviews, including observers from a variety of groups.²¹⁷

Self-regulation could also be carried out by international *clients* of PSCs, notably MNCs and NGOs. So far, there has only been one attempt at regulating industry clients: an initiative by the US, British and Dutch governments for agreement on a set of principles to govern the use of PSCs by MNCs in the extractive and energy sectors under the 2000 Voluntary Principles for Security and Human Rights.²¹⁸ The Voluntary Principles received high-level endorsement, not only from governments but also from MNCs and NGOs engaged in the process, and are significant as a first attempt at regulation of the industry by targeting a segment of its clients.²¹⁹ PSCs were excluded from the process, however. The principles call for the observance of the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials;²²⁰ consultations on and the monitoring of private security providers; and the hiring only of companies that ‘do not attempt to replace state military and law authorities’.²²¹

However, the Voluntary Principles are weakened by the permissive language used to define the circumstances and conditions for private security use by MNCs and by a lack of monitoring mechanisms.²²² The effects of the Voluntary Principles have not been chartered, and the conspicuous infrequency with which they are mentioned in the literature on private security regulation indicates both that they have so far had a feeble impact and the generally compartmentalized nature of the

²¹⁶ For the OECD Guidelines see URL <http://www.oecd.org/department/0,2688,en_2649_34889_1_1_1_1_1,00.html>. On the Kimberley Process see URL <<http://www.kimberleyprocess.com:8080/site/?name=home>>.

²¹⁷ Bone, A., ‘Conflict diamonds: the De Beers Group and the Kimberley Process’, eds Bailes and Frommelt (note 34), pp. 129–39, explicitly advocates wider use of this method. See also Le Billion, P., ‘International instruments of enforcement’, Governance of Natural Resources Revenues Project, Paper no. 5, University of British Columbia (unpublished, n.d.), pp. 37–38.

²¹⁸ Voluntary Principles on Security and Human Rights, Statement by the Governments of the United States of America and the United Kingdom, 2000, URL <http://www.state.gov/www/global/human_rights/001220_fsdr1_principles.html>.

²¹⁹ Gagnon, G., Macklin, A. and Simons, P., *Deconstructing Engagement: Corporate Self-Regulation in Conflict Zones: Implications for Human Rights and Canadian Public Policy*, University of Toronto, Public Law Research Paper no. 04-07, Jan. 2003, p. 81, URL <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=557002>.

²²⁰ The Basic Principles, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 Aug.–7 Sep. 1990, are available at URL <http://www.unhcr.ch/html/menu3/b/h_comp43.htm>.

²²¹ Lilly (note 199), p. 13. See also Maze, K., ‘Regulating the private security industry: zones of accountability’, Unpublished thesis, McGill University, Montreal, Canada, 2003, p. 30.

²²² Maze (note 221).

debate. However, if sharpened, refined and picked up by a wider audience, the Voluntary Principles would provide a good means for addressing the use of PSCs by a specific segment of users—multinational corporations. Both the Norwegian Fafo Institute for Applied Social Science and the International Peace Academy have suggested that the Voluntary Principles should be included as a standing clause in contracts with PSCs.²²³

A final variant of self-regulation of the private security industry would be the design of codes for the humanitarian aid sector in the hiring of PSCs by NGOs. Although there has been a reluctance on the part of NGOs and the humanitarian aid community to be involved in the issue of private security, many actors are now waking up to it, and some of the stigma that has surrounded the debate has worn off.²²⁴ For example, the ICRC has indicated that it wants to engage with the private sector to ensure that acceptable humanitarian standards are met.²²⁵ International Alert has suggested setting up an information-sharing database between humanitarian aid agencies to inform their choice of PSCs for protection.²²⁶ Two network forums were suggested: the US InterAction Security Working Group; and the Humanitarian Security and Protection Network (HSPN) hosted by VOICE in Europe.²²⁷ So far, however, there appears to have been little practical progress.

Costs and benefits of self-regulation

The various mechanisms and bodies through which self-regulation could be conceived should not be seen as mutually exclusive. There would be virtue in establishing overlapping forms of regulation, targeting the proliferation of the international private security industry from different directions: the behaviour of PSCs themselves; and the choices made and conditions imposed by international, non-state and governmental customers of security services. However, such mechanisms should be mutually reinforcing rather than conflicting or duplicating, so that different regimes can work towards a broad international consensus on the use and operation of private security actors.

There are clear upsides to self-regulation, whether targeted at PSCs directly or through their clients. Under ideal circumstances, self-regulation would mean that PSCs that do not conform to the accepted behaviour would eventually go out of business and that clients of PSCs who hire disreputable firms, in inappropriate circumstances, would be shunned internationally. Although self-regulation leaves

²²³ Spear (note 50), p. 54.

²²⁴ NGOs have been reluctant to engage with this issue in a systematic way because they shun association with the use of weaponry in general, which strikes at the normative distinction they see between themselves and other actors. Vaux *et al.* (note 88), p. 27.

²²⁵ International Committee of the Red Cross (ICRC), 'The ICRC to expand contacts with private military and security companies', Press release, 4 Aug. 2004.

²²⁶ Vaux *et al.* (note 88), p. 19.

²²⁷ International Alert and Feinstein International Famine Center, Tufts University, *The Politicisation of Humanitarian Action and Staff Security: The Use of Private Security Companies by Humanitarian Agencies*, International Workshop Summary Report (Tufts University: Boston, Mass., Apr. 2001), p. 5, URL <<http://www.international-alert.org/pdf/pubsec/Tuftrep.pdf>>.

legal accountability aside, it may serve to increase the *legitimacy* of PSCs and thereby serve to draw them into an emerging web of international governance within the security sector.

However, focusing on the conduct of NGOs and MNCs in the hiring of private security actors or on PSCs themselves can arguably be seen as accepting the growing marginalization of the state as the primary security actor—taking for granted that non-state actors on the international scene should have to provide their own security in one way or another. There are inherent limits to this approach and, like regulation under UN auspices, it needs to be complemented by state action and legislation. Furthermore, it places a high burden of cost for regulation on the actors themselves. Finally, the same general concern applies here as with many other self-regulation schemes: that such instruments will become (or be perceived as) an alternative to the development of enforceable (legal) instruments.

Existing national legislation: models for replication?

The reasons for addressing the issue of regulation of PSCs through national legislation are twofold. First, this perspective affirms the centrality of state actors within international security relations. If countries that are home to the largest number of PSCs, the USA and other Western states (efficient states), take responsibility for the export of security services, this would go some way towards ensuring the accountability of PSC operations also at the international level. As indicated, PSCs are often perceived as an extension of a state's foreign policy even when not operating under contract with their home state, and it is therefore in the interest of the state to regulate firms operating from its territory.²²⁸ Second, national legislation stands the best chance of being enforced.

However, with few exceptions, national laws ignore the existence of the private security industry.²²⁹ The USA and South Africa are two of the few countries to have in place national legislation on the industry, and their models therefore merit consideration. These two countries are among the biggest producers of PSCs so it is perhaps not surprising that they have come the farthest in regulating the industry. The UK initiated a policy discussion in 2002 with a Green Paper²³⁰ but has so far failed to follow up with legislation. When it recently emerged that a Swedish company, Dynamic Solutions, was recruiting and training former military personnel for

²²⁸ A clear example is the 'arms to Africa' affair in 1997 when, despite a UN embargo, Sandline International was found to have sold arms to the Sierra Leone Government, reflecting badly on the British Government. The notion of the use of PSCs amounting to 'foreign policy by proxy' is discussed in Silverstein, K., 'Privatizing war: how affairs of states are outsourced to corporations beyond public control', *The Nation*, 28 Aug. 1997, available at URL <<http://www.mtholyoke.edu/acad/intrel/silver.htm>>; and Whyte, D., 'Lethal regulation: state-corporate crime and the United Kingdom's new mercenaries', *Journal of Law and Society*, vol. 30, no. 4 (2003), pp. 590–91.

²²⁹ Singer (note 16), p. 524. The issue of regulating private security and military service providers was raised recently in the German Bundestag, indicating that new thought is beginning to be given to the issue at the national level. Krahmann, E., Personal communication with the author, 25 Nov. 2004.

²³⁰ British FCO (note 207).

US and other PSCs operating in Iraq, experts differed on the legal status of such activity.²³¹

The United States

Under the US model, the key piece of legislation is based on the connection between arms exports and the export of security and military services. The US State Department issues licences for assistance (including training) to foreign persons, whether in the United States or abroad, in the use of arms under the same export guidelines as for the export of armaments. The International Traffic in Arms Regulations (ITAR) constitute the key piece of legislation and require the application for licences by companies providing knowledge, services or goods within the military realm with the Department of State's Office of Defense Trade Controls (ODTC).²³² Applications are then subject to an internal review involving various offices. Commentators generally agree that the ITAR licensing scheme is inadequate or even idiosyncratic: contracts are administered by various departments and offices without procedural consistency.²³³

In terms of oversight and control, once a contract is granted, the provisions of US legislation (while fuller than most) are meagre. The US GAO provides some oversight of the awarding and implementation of PSC contracts, but this is limited.²³⁴ Congress is notified of contracts valued at more than \$50 million, a threshold generally considered too low to ensure sufficient democratic accountability. Contracts are frequently split up or partially subcontracted to avoid congressional oversight.²³⁵

A new form of regulation was proposed by the US DOD and published in the US *Federal Register* in March 2004.²³⁶ It would give military commanders more power over contractors used in conjunction with national force deployment. For example, it would ban private personnel from carrying privately owned weapons unless authorized by a military commander, and it would authorize the combatant commander to issue weapons and ammunition to PSC employees.

Despite its omissions, the US system of licensing exports of military and security services along the same lines as the export of goods provides a relevant model for national legislation elsewhere. Lessons should be learned primarily from the problems of ensuring oversight once a contract is granted and from the limits to

²³¹ Letmark, P., 'Svenska befäl värvas som livvakter i Irak' [Swedish officers recruited as bodyguards in Iraq], *Dagens Nyheter*, 12 Dec. 2004. In particular, concerns were raised about the political consequences of a presence of Swedish former military personnel in Iraq, given that Sweden did not join the US-led coalition in the war.

²³² Maze (note 221), p. 24; Nossal (note 199), p. 467; and Isenberg (note 103), p. 40. ITAR can be found on the ODTC's Internet site at URL <<http://www.pmdtc.org/reference.htm>>.

²³³ Avant (note 65).

²³⁴ E.g., General Accounting Office (GAO), *Rebuilding Iraq: Fiscal Year 2003 Contract Award Procedures and Management Challenges*, GAO-04-605, URL <<http://www.gao.gov/cgi-bin/getrpt?gao-04-605>>.

²³⁵ Isenberg (note 101), p. 11; and Avant (note 65).

²³⁶ 'Contractors accompanying a force deployed', *Federal Register*, vol. 69, no. 56 (23 Mar. 2004), available at URL <http://www.access.gpo.gov/su_docs/fedreg/a040323c.html>.

accountability when a foreign client rather than a US government department contracts a US PSC directly.

South Africa

In the wake of the controversy surrounding the operations of Executive Outcomes in the mid-1990s, in May 1998 South Africa passed the Regulation of Foreign Military Assistance (FMA) Act to clamp down on private security activity.²³⁷ The purpose of the act was twofold: to ban ‘mercenary activity’, defined as ‘direct participation as a combatant in armed conflict for private gain’; and to regulate military assistance abroad. Taking a wide sweep at the private security industry, the FMA Act stipulates that any sort of military assistance (including advice, training, personnel, logistics, finance, operations, recruitment, procurement of equipment and ‘any other action that has the result of furthering the military interests of a party to the armed conflict’) requires companies to obtain permission from the National Conventional Arms Control Committee before accepting a contract.²³⁸

Although this represents the strictest existing form of national legislation on private security service exports, the South African Government is currently considering extending the FMA Act to cover all war-zone work by its nationals.²³⁹ This would in effect entail a ban on exports of private security services to war zones. However, the record for enforcement of the existing legislation is extremely poor.

An extension of this kind faces problems both with regard to the constitutional right of South Africans to freely choose their trade, occupation or profession, and in terms of practical enforceability.²⁴⁰ Furthermore, most would agree that a complete ban on work in war zones is undesirable. However, the South African discussions on private security regulation are instructive in that they recognize the indivisibility of the private security sector and the futility of drawing clear lines between ‘controversial’ and ‘non-controversial’ services or between ‘defensive’ and ‘offensive’ services.²⁴¹

British suggestions and other options for national control

The UK does not currently have legislation that effectively covers the private security and military service sector. In recognition of this, in 2002 the British Government published a Green Paper outlining the options for regulating the industry. Although giving rise to substantial debate at the time, including submissions from

²³⁷ For the act see URL <<http://www.up.ac.za/publications/gov-acts/1998/act15.pdf>>.

²³⁸ Nossal (note 197), p. 466.

²³⁹ Reed, J., ‘South Africa considers block on all war zone work under anti-mercenary law’, *Financial Times*, 10 Sep. 2004.

²⁴⁰ Reed (note 239).

²⁴¹ Isenberg recognizes the grey zone between the formal role of, e.g., private bodyguards in Iraq and the realities of operating in a de facto combat zone. Isenberg (note 101), p. 48.

various NGOs, industry members and the Foreign Affairs Committee, the Green Paper has so far not led to any changes in existing national legislation.²⁴²

The Green Paper suggests ways in which regulation of British PSCs could be addressed, including amending existing legislation banning military activity abroad (and recruitment for military activity abroad), to include the activities of contemporary PSCs.²⁴³ It also considers self-regulation of the industry. Banning PSCs at the national level is not likely to have any real effect since companies would simply shift bases and register abroad. Between these two ‘all or nothing’ approaches the Green Paper sets out three different types of licensing schemes for the export of private security services.²⁴⁴ There appears to be a broad consensus in the British debate that some form of licensing scheme is best suited for national legislation for PSCs.²⁴⁵

One option is the introduction of a licensing regime for the export of military services whereby activities for which licences were required would be defined in legislation and criteria for the export of services would be established along the same lines as for those for exports of arms.²⁴⁶ This would mean a system with close affinities to the licensing regime operating in the USA. A second option outlined is legislation requiring British companies which want to take up contracts abroad to register and notify the government of contracts for which they were bidding. This would mean a less intrusive intervention by the state in the functioning of the industry: the government would only intervene to prevent British PSCs from taking up contracts that run counter to British interests or foreign policy.²⁴⁷ A third option suggested in the Green Paper for the licensing of British PSCs suggested the creation of a general licence for companies themselves. Rather than considering private security provision on the basis of individual contracts, companies would apply for a general licence to provide a list of specified activities under subsequent contracts. This option is analogous to the above-mentioned US IDIQ contracts and poses the same *prima facie* problems.

Of the three licensing options suggested in the Green Paper, the first is likely to have both the greatest effectiveness and the widest purchase. Basing regulation on the export of military and security services on models governing the export of armaments capitalizes on existing mechanisms, understanding and experience (e.g., regarding likely effects in the receiving country or problems of end-user definition) and allows for contract-by-contract assessment. Importantly, such a scheme would take into account the fact that the impact of private security services varies with the context in which it is used. Although many of the provisions governing the British Government’s guidelines apply directly to PSC service licensing (e.g., relating to

²⁴² British FCO (note 207). There have, however, been ad hoc decisions, e.g., the decision by the British Government in Oct. 2003 to grant permission for the export of sub-machine guns and pistols for the use by private security firms in Iraq. Isenberg (note 103), p. 48.

²⁴³ See British FCO (note 207), pp. 22–23.

²⁴⁴ British FCO (note 207), pp. 24–26.

²⁴⁵ Kinsey (note 200), p. 13.

²⁴⁶ British FCO (note 207), p. 24.

²⁴⁷ British FCO (note 207), p. 25.

embargoed destinations and respect for human rights), additional concerns about the particular circumstances in which PSC operation might be appropriate would also have to be addressed.

All of the above options face significant problems in terms of oversight and control, in much the same way as the regulatory systems that are in place in the USA and South Africa. The question of monitoring would also have to be addressed at the national level, which is likely to be both costly and cumbersome.²⁴⁸ The US GAO is in a unique position in terms of its available resources, but even this body has limited capacities and tends to focus on the largest contracts.

Nevertheless, a decision taken by the British Government on the issue of legislation is likely to be influential as the first systematic engagement with the issue on the part of a European government. It could act as a precedent for deliberations in other European countries and in the institutional context of the European Union (see below). In an analogy to the linkage between export controls on arms and controls on security and military services, one analyst has also proposed that existing laws on private policing (regulating the domestic use of private security companies) could be extended to cover the export of these same services.²⁴⁹ This approach has merit in that it also draws on existing legislation and would be particularly informative when it comes to standards for the vetting and training of staff. However, the issues raised by the international use of PSCs, particularly by clients other than the home state, are considerably more complex: private policing laws alone could only provide a very thin baseline for legislation governing the conduct and impact of international PSCs and their wide range of activities.

Shortcomings of national legislation

Legislation on private security activity at the national level is undoubtedly the most effective and most easily enforced, but it is insufficient to address private security activity for three main reasons: (a) because of the ability of PSCs to adapt in order to circumvent or evade legislation; (b) because of the problem of extraterritorial enforcement; and (c) because of the lack of adequate mechanisms for oversight of companies operating abroad.²⁵⁰ The companies' transnational nature and operations mean that they are able to shift location to a state with less or no control over their activities with relative ease. Indeed, Sandline International was registered in Bahamas, allowing the company to benefit from tax advantages as well as to evade existing British legislation and public scrutiny.

²⁴⁸ Krahnmann, E., Conversation with the author, 25 Nov. 2004.

²⁴⁹ Krahnmann, E., 'Regulating the private security sector: what role for the EU?', *Contemporary Security Policy*, vol. 26, no. 1 (forthcoming 2005). The establishment of the Security Industry Authority (SIA) in the UK in Apr. 2003 provides an interesting case study in this respect. The SIA was set up to manage the licensing of the domestic private security industry in England and Wales and to promote professionalism and spread best practice in the industry. See the SIA Internet site at URL <<http://www.the-sia.gov.uk>>.

²⁵⁰ Singer (note 16), pp. 535–36.

Furthermore, an inherent problem with regulating the industry from an exporter's perspective is the difficulty of ensuring that sufficient account is taken of the effect of the services on the recipient or 'host' state. This will require intimate knowledge of, and sensitivity to, local conditions. As a necessary, but not on its own sufficient, measure, national legislation needs to be complemented by other measures, such as self-regulation along the lines described above. Another way of addressing the inherently limited reach of national legislation is through the harmonization of national laws at the regional level, effectively creating a private security 'regime' for nations that share a single market for the development of private sector activity in general or have common policies and activity plans in the field of external security.

Regulation at the regional level

Short of a global enforceable regime covering the activities of private security companies, regulation by and through regional organizations can offer wider scope and purchase than regulation at the national level alone. Two regional organizations stand out in this respect: the African Union and the European Union.

The AU could provide a useful framework for responding to the development of the international private security industry for a number of reasons. First, the sheer extent of PSC activity in Africa makes the issue impossible to ignore. Second, much PSC deployment in Africa takes place under contracts with external actors such as foreign governments or MNCs. The AU needs to work in this context to safeguard the interests of the weak state in the face of PSC proliferation. This is especially important given the extensive use of PSCs within the framework of security sector reform, an aim which is endorsed by the AU. Third, for the same reasons as indicated with respect to PSC use in support of UN peace operations, the AU needs to review its own use of PSCs when organizing peace missions.

The AU currently has a limited institutional capacity to address the use of PSCs. However, a first step would be to work with the international community in drawing up minimum standards for PSCs to be considered for contracts with the AU itself and possibly with sub-regional actors to which it delegates tasks (along the lines described above). Deliberations within the AU would provide the necessary 'weak state' perspective and, even though such regulatory mechanisms would not carry legal force, they would be endowed with additional legitimacy if approved by African states or sub-regional groups. The Peer Review Mechanism established under the New Partnership for Africa's Development (NEPAD) is another forum in which the use of PSCs on the continent should be discussed.²⁵¹ Although the Peer Review Mechanism is voluntary, largely untried and not likely to become particularly effective in the immediate future, it could provide a suitable forum for the airing of experiences and concerns and lay the groundwork for further international debate.

²⁵¹ Williams (note 61).

By comparison with other regional bodies, the European Union (EU) has a very strong institutional capacity. For this reason, besides the presence of the UK and other lesser European PSC providers within the EU's membership, addressing the question of PSC regulation in an EU context provides an interesting avenue.²⁵² The EU's unique integrative model makes the regulation of its members' economies and governance systems, not excluding private sector elements, a part of its core competence. EU enlargement and the increasing emphasis placed on the EU's external policy and crisis-management operations, *inter alia* in direct support of the UN and in partnership with other regional groups, indicate that the EU has both an incentive and imperative to address the issue. If the EU could successfully implement a regulatory scheme for PSC services emanating from its territory, this would address a large portion of the international private security industry that is currently not covered under either national or international legislation, as well as setting a useful precedent for regulation of PSC activity elsewhere.

Although the trade in security-related services is not explicitly mentioned in the 1957 Treaty Establishing the European Community (EC Treaty), there are several ways in which the EU could address the question.²⁵³ First, following from the discussion of national legislation, the EU could address PSC activity in terms of export controls. Expanding the 1998 European Union Code of Conduct on Arms Exports to include the export of security and military services is a logical extension of the discussion of national legislation (and is indeed mentioned in the British Green Paper).²⁵⁴ The control over arms brokering indicates that the EU already regulates services which overlap with those offered by PSCs.²⁵⁵ The export of dual-use goods (goods that have both civilian and military use) is also regulated to ensure that civilian trade does not undermine the security interests of member states; there is no reason why this thinking should not be extended to consider the export of private security services.²⁵⁶ Second, PSC activities could be regulated separately under the Common Foreign and Security Policy (CFSP), through Joint Actions, Common Positions or Decisions, although such regulation would be ad

²⁵² For these points the author is indebted to Krahnmann (note 249). However, the EU framework has been alluded to by a few other commentators, e.g., Lilly (note 17). For the application of the EU's multi-level and multi-sector competence to another new challenge, transnational terrorism, see Burgess, N. and Spence, D., 'The European Union: new threats and the problem of coherence', eds Bailes and Frommelt (note 34), pp. 84–102.

²⁵³ British FCO (note 207), p. 27. Article 296 of the EC Treaty allows members to take measures necessary for the production of essential interests of its security but refers only to the production of and trade in arms, munitions and war material; services are not included.

²⁵⁴ For a discussion of recent developments in the EU Code of Conduct and for the text of the document see Bauer, S. and Bromley, M., *The European Union Code of Conduct on Arms Exports: Improving the Annual Report*, SIPRI Policy Paper no. 8 (SIPRI: Stockholm, Nov. 2004), URL <<http://editors.sipri.se/recpubs.html>>.

²⁵⁵ For a discussion of EU controls on arms brokering see Anthony, I. and Bauer, S., 'Transfer controls and destruction programmes', *SIPRI Yearbook 2004* (note 61), pp. 737–62; for a detailed discussion of the possibilities for strengthening the Code see Saferworld, *Taking Control: The Case for a More Effective European Union Code of Conduct on Arms Exports* (Saferworld: London, Sep. 2004).

²⁵⁶ Council Regulation (EC) no. 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology, 22 June 2000, *Official Journal of the European Communities*, L 159/1 (30 June 2000), URL <<http://trade-info.cec.eu.int/doclib/html/111418.htm>>.

hoc, temporary and country-specific.²⁵⁷ Third, the EU could address the issue of PSCs through the harmonization of national laws on private policing, regulated under the Internal Market.²⁵⁸

Furthermore, as argued with regard to the UN and the AU, the EU needs to be clear about the circumstances and conditions under which it might consider contracting private security services, and it needs to ensure that this is done to the highest standards of accountability, transparency, respect for human rights and general mindfulness of the delicate nature of international security relations. There are likely to be several situations in which the EU might consider the use of PSCs: in support of crisis management or other European Security and Defence Policy (ESDP) operations (where the issue will arise even if substantial use is to be made of PSCs by individual contributing nations) in the context of the delivery of humanitarian aid in insecure areas and for the protection of diplomatic representatives and delegations abroad. Indeed, the EU has contracted PSCs for close protection and bodyguard services, for example, for officials serving under the EU Police Mission in Bosnia and Herzegovina (EUPM).²⁵⁹ Finally, any prospects for EU legislation or extension of the EU Code of Conduct on Arms Exports should be cross-referenced with the measures for control used in the USA, as a step towards the establishment of an international consensus on the use of PSCs. Moreover, they should be discussed with the AU in the context of EU support for local peacekeeping and security-building processes in Africa as well as with the EU's other national and regional CFSP dialogue processes as appropriate.

The prospects for regulating PSC activities within the EU framework have so far received insufficient attention. This should be redressed: the formidable capacity of the European Union as well as its role as an international norm promoter makes it well placed to instigate the creation of a model regional, best-practice regime. The regulation of PSCs within an EU framework could be seen to underline the need for dialogue and coordination between the EU Justice and Home Affairs (JHA) Department and the CFSP more generally.

²⁵⁷ Krahmman (note 256), pp. 14–16. See also Anthony, I., 'European Union approaches to arms control, non-proliferation and disarmament', *SIPRI Yearbook 2001: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2001), pp. 599–614, on mechanisms of EU decision making.

²⁵⁸ Krahmman (note 249), pp. 13–14.

²⁵⁹ Officials of the Secretariat of the Council of the European Union, Conversations with the author, Nov. 2004.

6. Conclusions: the limits of regulation

The starting point of this Policy Paper is a recognition of the existence of the industry and the implausibility of doing away with it. From this premise, it calls for more coherent and directed thinking on the issue and sets out options for regulation as the pragmatic next step.

Substantive issues are raised by the use of private security actors that simply cannot be addressed through regulation. Even if the processes by which companies are hired were formalized (e.g., in open and clear tendering processes) and if it were possible to regulate who hires them to operate and where, and how firms deliver their services (with adequate vetting of personnel, human rights standards and punishment for individual wrongdoers), there still remain significant losses when a private company performs services in this sensitive area of policy. These losses are for the most part intangible—loss of knowledge of local conditions by the primary donor and of personal relationships between donor and recipient (especially in cases of foreign military training); loss of visible authority and prestige; and, above all, a weakening of long-term commitment and sustainability of security and military relationships. Long-standing relationships between donor and recipient states need to be political as well as personal, and they can never be replaced by an anonymous private actor or be reduced to questions of ‘management’. Private security companies can only contribute to the furthering of such relationships if they are brought into such close and formal relationship with governments as to effectively make them ‘quasi-governmental’ bodies. This is unlikely to occur on any significant scale as it would compromise the independence and flexibility of the companies, and the very point of using the private sector would be lost.

These problems are endemic to any style of action by private rather than public actors in the security sphere and jeopardize control over the political dimension in security relations. As argued in this study, short-term gains from the use of PSCs need to be balanced against possible long-term losses at every instance of outsourcing. The problem in this respect is that isolated decisions are taken without a wide perspective on the cumulative effects of privatizing security.

The ‘efficient’ states have a particular responsibility to shoulder and should take the lead in discussions about the long-term changes to the international system and international security relations. North American and European states can afford to choose whether or not to outsource, whether to aid SSR projects in weaker states and whether to sustain efforts to create secure environments (e.g., in Afghanistan and Iraq) after military interventions.²⁶⁰ If they take their responsibility seriously in these respects, the hiring of PSCs need not be seen as dictated by necessity.

²⁶⁰ O’Hanlon, M. E. and Singer, P. W., ‘In Afghanistan, a job half done’, *Boston Globe*, 15 Sep. 2002, available at URL <<http://www.brookings.edu/views/op-ed/ohanlon/20020915.htm>>.

For the weak state, the risk that privatization will lead to a disenfranchising of the state remains. Every effort must be made to encourage the establishment of functioning and democratic state security institutions in the first place. Only by escaping from the short-term 'tyranny of the market' can weak and strong states alike harness the burgeoning international security industry with the aim of countering threats and promoting equitable security governance.

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