

REGULATING GLOBAL PRIVATE MILITARY COMPANIES: POLITICAL IMPLICATIONS AND LEGAL MECHANISMS

Executive summary

In the first Gulf War of 1991 there was 1 private contractor for each 100 conventional military personnel. In 2003 Iraq War the ratio was 1 to 10. It is not to say that the numerical size of the US and other militaries had reduced drastically, it is to illustrate how private security market grew up throughout last 2 decades. The most comprehensive military-related statistical guide, Sweden-based Stockholm International Peace Research Institute (SIPRI) provides impressive figures: about 15000-20000 private military contractors made up to 10% of anti-Iraqi coalition manpower by 2004¹, and this is only one particular case. In financial terms, the PMCs are the fastest growing industry on the globe. By 2010, the total revenue of PSCs worldwide is likely to grow to USD 202 billion².

Not only overwhelming growth of private military sector in size and incomes constitutes the need for thorough and problem-based academic research. No less questionable are their activities they carry out in, as some say, weak or failed states, and also in post-war countries like Iraq and Afghanistan. Today, although some regulative mechanisms have yet been established with PMCs no longer operating in legal vacuum and the issue of regulation definitely lacks more public and governmental attention to de-shadow those companies and make them more responsible and accountable security actors.

Whereas it is still doubtful whether PMCs are ipso facto [international] actors as state-of-the-art phenomenon, their direct participation in hostilities and constant presence in conflict zones worldwide along with decent military capabilities possessed by many of such companies like *Xe* (re-branded *Blackwater*) or *Aegis* raise questions on elaboration of legal and political constraints as to their military and security activities. The rise of private military actors is to be investigated and analysed in detail through scientific perspective to offer effective, thought-out and realistic solutions to be put into practice.

In this paper we will outline the emergence of PMCs, put them in systematised order according to their nature, scope of activities and capabilities they provide, and, more importantly, share our vision on regulation mechanisms be it existing ones, drafted or due to elaboration. An attempt to identify some PMCs as international actors will also be made, despite of the fact that privatisation of certain inherently governmental functions (i.e. security and defence) cannot still be taken as viable trend even in their host realm, the West.

¹ Caroline Holmqvist. *Private Security Companies: The Case for Regulation*. SIPRI Policy Paper No.9. January 2005.

² Hans Born, Marina Caparini, and Eden Cole. *Regulating Private Security in Europe: Status and Prospects*. Geneva Centre for the Democratic Control of Armed Forces (DCAF) Policy Paper No.20. P.1.

I. PRIVATE MILITARY AND SECURITY COMPANIES: DEFINING THE PHENOMENON

1.1. Terminology and classification

There is a general consensus in the research community regarding the term “private military (and security) companies” or PMCs. Other terms such as “private military firms” or “private military contractors” are also present, but for the sake of clarity the initial one is employed. It is far more accurate and concise in sharp contrast with publicly known “private armies” or “guns for hire” common for superficial media reports and among the public. In addition, “private military companies” is also in use of various internationally recognised organisations such as the ICRC³ whose task is, among others, to highlight challenges of modern battlefield and reveal new means and methods of warfare.

This term is applied regardless of how the companies identify themselves. Many of them are rejecting to be termed “military” offering “security” or “consulting” meaning instead to avoid public pressure and operate more freely not falling under existing legal norms. Andrew Bearpark, now one of the top British PMC lobbyists suggests that

In the UK, we refer to private security companies rather than private military companies. It better expresses the wide range of services companies are offering, but it also obviously has to do with cultural reservations with the term private military companies, which may imply that services at the front lines in conflicts are included.⁴

In that sense, clear and correct classification of actors playing on the private security market is critical for application of relevant legal and ethical norms; that application in fact covers two dots provided in the research: status of private military companies under International Law which concerns their qualification as international actors as well, and also setting out realistic regulation criteria upon the activities of private military companies.

Likewise, making use of linguistic approach to commence analysing the phenomenon of PMC per se, semantics does matter. It is to define what to term “security” and less controversial, and what comes as “military”, more dangerous and deserving more expertise. In fact, the differentiation between security and military services the companies offer is uneven. Private *security* service finds itself in peacetime or at post-conflict reconstruction and involves no actions related to use of the armed force or taking direct part in hostilities. As a rule, private security contractors are unarmed or armed for the purpose of self-defence, and provide mainly static facility protection, convoy escort, and technical maintenance for military personnel in conflict zones. According to Doug Brooks, President of US-based International Stability Operations Association (ISOA), some Western

³ See, for instance, Lindsey Cameron. *Private military companies: their status under international humanitarian law and its impact on their regulation*. International Review of the Red Cross. Volume 88, Number 863, September 2006. P.545.

⁴ Interview with Andrew Bearpark. International Review of the Red Cross. Volume 88, Number 863, September 2006. P.451.

PSCs do take active part in internationally mandated peace-building activities through providing law enforcement, humanitarian mine clearance and infrastructural projects⁵. In those cases a provisional formula from Article 4.4 of the Third 1949 Geneva Convention relative to the Treatment of Prisoners of War may be applied qualifying them as

Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, **supply contractors, members of labour units** or of **services responsible for the welfare of the armed forces (emphasis ours)**, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

In simple words, a static guardsman or patrol team member or civilian technician who serve at a military compound pose less threat to global security environment and existing world order not mentioning their status under the laws of war or their role to play in a particular armed conflict.

At the meantime, private *military* contractors do in many cases substitute functions inherent to conventional armed forces, though in much smaller scale. Certain PMCs are capable of conducting wide variety of purely military operations, to name some: urban warfare, close quarter battle, reconnaissance gathering, sniper warfare, counter-insurgency and the so-called military consulting. Moreover, such overwhelming strength related to the warfare has evolved to no exhibition purpose and the first PMCs came to the spotlight in mid-1990s in the Balkans. Some of them had and are having decisive impact on the process and outcomes of modern armed conflict and even on political orientation in certain post-war societies. To put an example, in 1995 a militarily weak Croatian army conducted surprisingly well-planned and successful Operation Flash against the Serbian Krajina Army, outmanoeuvred it and gained control over the entire region. Military observers qualified Croatian actions as precisely conforming with the NATO tactical doctrine in every single detail revealing further that it were *Military Professional Resources Inc* (MPRI) employees, all retired US high-ranked army officers who trained and guided Croatian command staff, and planned the operation in charge of private military consulting service⁶.

Such raises questions on accountability, legitimacy and ownership of those companies. As said above, the most important issue is setting correct classification and even more important that the industry itself and the international authorities adopt it as an obligatory guideline for the regulation of PMCs and their activities.

Contemporary private military companies as we know them now have arisen as a result three dynamics: end of the Cold War, transformation of modern warfare and the nature of war that vanished the lines between combatants and civilians, and a generalised trend toward privatisation and outsourcing of classical government functions across the globe. These three factors are well interconnected and

⁵ Doug Brooks. *The Private Sector in Stability Operations*. Skype lecture delivered before HSE students on November 7, 2012.

⁶ Maj. Gen. Nikolai Uvarov, *Business Serves with Pentagon*. Foreign Military Review, Vol. 5, 2009. P.3.

interdependent among each other. With the global-scale confrontation between the United States and the Soviet Union becoming history, professional militaries around the world have been downsized. At the same time, increasing global instability after the collapse of Soviet-provided security umbrella created a demand for more troops. Warfare in the developing world also became more chaotic and less professional involving forces ranging do they all offer the exact same services.

The industry might be divided into three basic sectors allowing enough criteria for classification of PMCs by services they offer.

1) ***Military provider companies*** (also known as "private security firms") which offer on-the-ground tactical military assistance, including actual combat services, to their clients. This group includes, for instance, former Blackwater, DynCorp and Erynis International.

2) ***Military consulting firms***, which employ retired officers to provide strategic advice and military training on operational level. The latter does not imply providing tactical training for client to improve combat skills; military consulting is a more serious approach to overseas security business. Consulting PMCs like Military Professional Resources Inc or Blackwater USA (also offering this service) are contracted when clients, mostly governments that wish to modernise or westernise their militaries, police and security services or re-build military strategic thinking whereas consulting PMC's host state (in majority of cases the US) wishes to offer those hired services calmly on political reasons.

As regards the abovementioned MPRI, some experts note its active involvement into NATO-run Georgia Train and Equip Program (GTEP). MPRI experts drafted doctrinal policy papers for Georgian Armed Forces (GAF) and played significant role in converting Georgian staff officers' strategic thinking from Soviet-originated⁷ to that of NATO. MPRI is also likely to carry out operational planning for Georgian Armed Forces' invasion into South Ossetia in August 2008⁸.

Another example of how military consulting firms operate is Blackwater contracted programmes in the Caspian region.

The United States' strategic interest in hydrocarbon reserves indeed has not begun with the 1991 Gulf War or the invasion of Iraq in 2003. While Iraq and the ongoing "Global War on Terror" have dominated America's security policy, the US government and American corporate interests have long been quietly engaged in a parallel campaign to gain strategic influence over the Caspian Sea region supposed to accommodate over 100 billion barrels of oil⁹.

Two regional powers – Russia and Iran – are also neighbours to the Caspian Sea and view the US latent infiltration into the area as a rather unwelcomed

⁷ Lt Gen Devi Chankotadze, Georgian Chief of Joint Staff from March 5, 2009 to October 8, 2012 has been trained at the Tbilisi Artillery School (1978–1982) and undergone command and staff courses in NATO Defence College. Source: <http://mod.gov.ge/> (visited August 22, 2011).

⁸ Mikhail Barabanov, Viacheslav Tseluiko and Ruslan Pukhov. *The Tanks of August*. Centre for Analysis of Strategies and Technologies, 2010. P. 11.

⁹ Jan H. Kalicki, "Caspian Energy at the Crossroads". *Foreign Affairs*, September/October 2001.

trend. American oil companies such as *Amoco*, *Unocal*, *Exxon*, and *Pennzoil* have invested billions of dollars in Azerbaijan and plan to invest same amounts in the subsequent years. The list of private American actors seeking to develop long-term strategic investment project in Azerbaijan's oil sector or to boost such investment are former Secretaries of State Henry Kissinger and James A. Baker III, former Defence Secretary Dick Cheney, former Senator and Treasury Secretary Lloyd Bentsen, former White House chief of staff John H. Sununu, and two national security advisers, Brent Scowcroft and Zbigniew Brzezinski¹⁰.

In May 2001, Dick Cheney's energy task force estimated that proven oil reserves in Azerbaijan's of the Caspian alone equalled "about 20 billion barrels"¹¹.

The Cheney Group suggested that if the United States could gain control over a hub pipeline flowing West from the Caspian Sea – outside Russia's territory – daily regional export to the world markets could go as high as 2.6 million barrels per day by 2005¹². The Bush administration set out protection projects for the pipeline in each country it passed through. While US Department of Defence boosted military and military-technical cooperation with Georgia under the banner of supporting Georgian intentions to enter NATO and therefore become interoperable with the alliance's militaries, it faced a decade-long US Congress veto on similar military assistance to Azerbaijan, where the oil would be extracted. This has made the DoD resorting to private tools of securing US foreign policy objectives.

Beginning in July 2004, Blackwater operators have been contracted to work in Azerbaijan as civil consultants, where they would without attracting too much attention train a local Azerbaijan's elite forces modelled after the US Navy SEALs and establish a Special Operations compound on the north of the Iranian border as part of a US foreign and security policy in the region¹³. Instead of deployment of a contingent (which would in fact be nearly unthinkable given regional power balance significantly complicating US-Russia relations in post-Soviet context) in strategically important Azerbaijan of active US, the DoD deployed "civilian contractors" from Blackwater and other firms to set up a "civil" operation that served a dual purpose: protecting the West's new oil supply route and securing gas stocks in a region historically influenced by Russia. Particularly in Baku, Blackwater subcontracted local construction companies to re-build and modernise a Soviet maritime special operations training facility that Pentagon planners

¹⁰ Stephen Kinzer, "Azerbaijan Has Reason to Swagger: Oil Deposits," *The New York Times*, September 14, 1997. Available at <http://www.nytimes.com/1997/09/14/world/azerbaijan-has-reason-to-swagger-oil-deposits.html> (Visited November 14, 2012)

¹¹ Report of the National Energy Policy Development Group, "Reliable, Affordable, Environmentally Sound Energy for America's Future," released by the White House in May 2001. Available <http://www.netl.doe.gov/publications/press/2001/nep/chapter1.pdf> (Visited November 14, 2012)

¹² Ibid.

¹³ Jeremy Skahill. *Blackwater: The Rise of the World's Most Powerful Mercenary Army*. Nation Books, 2007. P. 167.

envisioned as a prospective command centre modelled on those used by the Department of Homeland Security.

That military cooperation programme called Caspian Guard Initiative was highlighted in the media as government-to-government one¹⁴, but was in fact carried out from the American side by private military entity, the Blackwater USA. The operation itself may be perceived as a classical military consulting activity.

3) *Military support firms*, which provide logistical support, intelligence gathering and maintenance services to conventional armed forces, allowing the latter's soldiers to concentrate on combat and reducing their government's need to recruit more troops or mobilise reserves. Such private military companies operate in more than 50 countries on every continent except Antarctica¹⁵.

1.2. Emergence of PMCs: Roots and background

To better understand the phenomenon of private military sector one needs to envision it within an evolving trend of governmental outsourcing. Political and economical prerequisites constitute the historical evolution of either private military companies or the entire trend.

The advent of modern private military and security companies (PMSCs) is likely to be a phenomenon of early nineties. However, throughout history various kinds of hired warriors came to be known, from East Indian Companies with their own freelance armies and clandestine services to Sir Cecil Rhodes' of British colonial administration in Rhodesia and Paul von Lettow-Vorbeck, German imperial army general who successfully fought the British in African theatre during World War I commanding a small army comprised of over 3000 paid or volunteer local warriors called *askari*¹⁶.

Nevertheless, those were rare examples and rather exceptions than systemic trend. New birth of private military service have been given in late 1980s with the emergence of Executive Outcomes (EO), a South African private military company providing professional military and advisory support after the apartheid regime commenced to dissolve. Not much is known about their on-the-ground operations in South Africa itself as well as in neighbouring Angola and Namibia except few controversial activities made public through leaked media reports. In 1992 Executive Outcomes operators were involved in direct armed action against UNITA rebel forces in charge of Angolan government. The EO became widely known at the time for its documented attempt to assassinate the then rebel leader

¹⁴ Russ Rizzo, "Pentagon Aims to Bolster Security in Caspian Sea Region," Stars and Stripes, August 10, 2005. Available at <http://www.stripes.com/news/pentagon-aims-to-bolster-security-in-caspian-sea-region-1.36759> (Visited November 14, 2012)

¹⁵ Peter W. Singer, "Corporate warriors: the rise of the privatized military industry" (2003).

¹⁶ Von Lettow-Vorbeck. *Mein Leben. Biberach an der Riss: Koehlers Verlag*. 1957. – My Life. Loves Park, IL: Rilling Enterprises, 2012. First English translation.

Jonas Savimbi¹⁷, and the so-called *Sandline affair* as well, when Executive has been subcontracted by Britain-based PMC, the *Sandline International* to oust rebel forces in Papua New Guinea.

However, the emergence of modern private military and security market in early 1990s has not shaped in a day. It is rather a result of several coinciding trends of global and economic nature worth more sophisticated analysis. To better understand this phenomenon one should also look at the rise of PMCs in terms of post-Cold War conflicts, emergence of the non-state actors on modern battlefield, labour opportunities, instruments and transformation in the nature of warfare.

1) The End of the Cold War

The end of the Cold War created a vacuum in the global and regional security environment which became able to feed both the supply and the demand. Global threats and challenges turned into more diverse, complex and dangerous ones whereas the conventional responses to insecurity and conflicts were at their weakest. That transformation set foundation under a wider phenomenon of state collapse and resulted in new areas of instability. Massive military demobilisations, in turn, provided a large pool of labour for the PMC industry and cheapened the created capital. With this vacuum, PMCs were eager to present themselves as respectable entities with a natural niche in the current, often complicated new world order.

According to British Army Colonel Tim Spicer, an industry executive:

“The end of the Cold War has allowed conflicts long suppressed or manipulated by the super powers to re-emerge. At the same time, most armies have got smaller and live footage on CNN of United States soldiers being killed in Somalia has had staggering effects on the willingness of governments to commit to foreign conflicts. We fill the gap”¹⁸.

2) Post-Cold War conflicts

The increase of local armed conflicts since the Cold War came to the end was one of the major impetuses for the privatisation of warfare-related services. Wars are usually the consequence of power and security vacuum which is typical for transition periods in international affairs. While many hoped for a “new world order” and spoke even of the end of the history after 1989, the real world order that came about was that of “*peace in the West, war in the rest.*”¹⁹ A particular outcome was the dramatic increase in the number of domestic armed conflicts occurred. The incidence of civil wars has doubled since the Cold War’s end and by the mid-1990s was actually five times as high as at its

¹⁷ Forsyth, Al J. Venter. *War dog: fighting other people's wars: the modern mercenary in combat* (1. ed.). Philadelphia, Pa.: Casemate.

¹⁸ Colonel Tim Spicer, founder of British PMC *Aegis* is quoted in Andrew Gilligan, “*Inside LT. Col. Spicer’s New Model Army,*” Sunday Telegraph, November 22, 1998.

¹⁹ National Defense Council Foundation, *World Conflict List 2001*. Available at http://ndcf.dyndns.org/ndcf/Conflict_List/World2001/NDCFWorldConflictCount2001.htm (Visited November 15, 2012)

mid point. The broader number of conflict zones has roughly doubled²⁰. The failures of local governance in conflict-affected states resulted in new spaces for private military actors to operate.

3) Emergence of the non-state actors

Regarding the emergence of non-states in violent conflicts, the rapid change in global security paradigm facilitated by globalising world economy and new stateless zones also led to the emergence of new conflict groups, not subject to jurisdiction of any one state. The new conflict actors vary from terrorist networks like *al-Qaeda* or *Hizb-at-Tahrir* to transnational drug cartels.

Many of non-international armed conflicts that have popped up since the Cold War are in fact of criminalised nature in sense of relations of those non-state actors with state sovereignty (for example, in Colombia, Liberia, Sierra Leone and Tajikistan). Such “stateless” zones not only breed greater conflict but also local actors whose very existence is defined by violence²¹.

The growth of these non-state conflict groups shows zero sign of reduction and the activity of these groups has opened the market for PMCs both on the supply and the demand sides. Some companies have gone to work for non-state conflict groups, assisting them to gain greater military capabilities. Rebel groups in Angola, Sierra Leone and international criminal organisations have all received military help from such private companies which have provided specialised military skills, such as training, and the use of advanced military technologies²². States, in turn, have also contracted PMCs to combat those groupings or organise sufficient crackdown. Thus, the military market for PMCs is stimulated by both the appearance of non-state armed actors and the breakdown of the Western powers to effectively combat them with conventional military means, be it post-war Iraq or Afghanistan on the threshold of NATO-ISAF withdrawal from the country in 2014.

4) Labour opportunities

Another major aspect on the global military market was the flood of ex-soldiers onto the open market because of downsizing and the dissolution of states after the end of the Cold War. Thus, the private military labour pool for both conflict groups and private military companies have broadened and cheapened. Similar to the financial effect of changes in the interest rate, these developments influenced both the demand and the supply. The half-century of the Cold War was an historic period of excessive militarisation. The end of it sparked a global chain of downsizing conventional armed forces. Those cuts were particularly strong in the former Warsaw Treaty countries, as the Soviet state and many of

²⁰ “*Internal Conflict: Adaptation and Reaction to Globalization*,” Cornerhouse, Briefing 12, 1999.

²¹ Ralf Peters. “*The New Warrior Class*,” Parameters 24 (Summer 1994).

²² Andre Linard, “*Mercenaries SA*” Le Monde Diplomatique, August 1998, 31.

its allies' forces essentially weakened. Most of the Western powers have also drastically reduced the sizes of their militaries.

The U.S. military has one third fewer soldiers than at its Cold War peak, while the British Army is as numerically small as it has been in almost two centuries²³. These massive demobilisations in the two major Western military powers have impulse an oversupply of dislocated military skilled labour. Complete units were cashiered out and a number of the most elite, unsure of their futures, kept their structure and formed private companies of their own. With the reduction of state militaries have also come fewer opportunities for progression and promotion within ranks.

It was not simply the matter of getting rid of conscripts, but also the downsizing of professional, career soldiers. The consequence was a sharp boost in military expertise available to the private sector²⁴. Another important feature of the changes in state military structures was the functional areas in which they took place. Large portion of the cuts took place in back-end areas. For example, the US Army Material Command also was reduced by 60 percent²⁵. However, the frequency of military deployments grew greater than forecasted, widening a gap in the ability of the United States to support the increased number of its new post-Cold War interventions²⁶. This gap has been the beginning of the multibillion dollar military logistic outsourcing industry.

5) Instruments (easy access to weapons)

Military downsizing has meant that not only are trained military personnel excess on the world market but also that the resources and tools became available for all types of private actors. Enormous arms collections have become available to the open market. Now many private forces have the most sophisticated weapons systems money can purchase including aircrafts and advanced artillery, and can even outgun state forces. Much of the stocks ended up in the hands of arms brokers who have no concerns about their destination or use. The consequence was that governments tend to lose control over the main means of war, which once was the only monopoly of the states. Easy availability of both sophisticated weapon systems and inexpensive small arms represent, in view of some experts, a broader weakening of the state as the subject of international relations in many parts of the world²⁷.

6) Transformation of the warfare

²³ David Shearer. *Private Armies and Military Intervention*. Oxford University Press, 1998. P.27.

²⁴ C.J. Van Bergen Thirion, "The Privatization of Security: A Blessing or a Menace?" South African Defense College Paper, May 1999.

²⁵ Stephen Zamparrelli, "Contractors on the Battlefield: What Have We Signed Up For?" Air War College Research Report, March 1999.

²⁶ Donal T. Wynn, "Managing the Logistic-Support Contract in the Balkans Theater," *Engineer* (July 2000).

²⁷ Martin van Creveld. *The Rise and Decline of the State*. Cambridge University Press, 1999. P.28.

As far as van Crevelde is mentioned, correct understanding of the changing nature of war paves way to understanding emergence of PMCs themselves.

Emotional bursts in the West with Russia defeated in the Cold War created a false feeling that the UN, when possible and NATO, when necessary would manage armed conflicts efficiently ended up with operational disappointments in Bosnia, Somalia, and Rwanda.

There were two underlying trends, without which privatisation of the military service was unlikely to have occurred. The first was that warfare itself was undergoing revolutionary changes. Those transformations are, according to post-Clausewitz theorist Martin van Crevelde: diversification, technologisation, civilianisation, and criminalisation²⁸, each of which created opportunities for private military companies to play a role. The second was that at the high intensity level of warfare the requirement of advanced technologies and combat skills has dramatically increased the need for specialised expertise available in the private sector.

1.3. Supply and demand factors of military outsourcing

To understand the development of private military companies as part of privatisation of certain government functions, a bit of background on services and government responsibilities is required. In a traditional understanding the government provides all its citizens with certain services generally paid through taxation. This occurs in what is known as the public sector. On the contrary, in the private sector individual citizens, now known as consumers, buy needed goods and services in an open market, paying with their own optional funds. This market is made up of private companies motivated by profit. Therefore, the distinctions between these two sectors are the nature of the relationship between provider and user, the sources of funding, and the employment status of the deliverers.

Occasionally governments have found it advisable to delegate some of their public responsibilities to the private sector. They do so because of issues of cost-efficiency, quality or changing conceptions of governmental duties. Education, police, penitentiary system, health care, postal services, garbage collection, utilities, tax collection, and so forth are all examples of services that have been shifted to the private market. The terms “privatisation” and “outsourcing” are used interchangeably to describe this shift often at the same time. Nevertheless, the governments understood that the military – the armed force that protects society from outside threats – was government’s sole responsibility which must be carried by government alone. In other words, providing for the security of the citizens is one of the most essential tasks of a government. As a result, the military has long been the area where there has never been any question of privatising or outsourcing.

²⁸ Martin van Crevelde. *Transformation of War: The Most Radical Reinterpretation of Armed Conflict since Clausewitz*. Free Press, 1991.

The military differs from any other profession and is specific because it comprises specially trained and educated individuals, men of war, who are able to make us of organised coercion. As professionals, military officers are bound by a code of ethics or traditions, serve a higher purpose, and fulfil a societal need. Their craft distinguishes them from other professionals in that the application of military power is not comparable to a commercial service.

Military professionals deal in life and death matters, and the application of their craft has potential implications for the rise and fall of governments²⁹.

However, throughout the time some of military's responsibilities were transferred to private hands which led to the growth of private military companies. The end of the Cold War was a key point in the emergence of the privatized military industry. The consequential effect on the supply and demand of military services formed a "security gap" that the private market was eager to fill.

Besides it, two other necessary factors played remarkable roles and both contributed to the emergence of the industry. Both were long-term developments that under laid the transfer of military services to private entities and the reopening of the market. The first cause was the wide transformations taking place in the nature of conflict itself. These have created new demands and new market opportunities for PMFs. The second factor was the "privatisation revolution," which provided logic, legitimacy, and models for the entrance of markets into formerly state domains. The confluence of these factors led to both the emergence and rapid growth of the privatised military industry³⁰.

PMCs have not only grown up but also have become global in both their scope and activities. Beginning in the 1990s, they have been decisive players in several conflicts, and now are often the ultimate factor. Private military companies have been active in conflict zones and post-conflict environments throughout the world often with strategic impact on both the process and outcome of conflicts.

As state-of-the-art phenomenon, modern PMCs are business organisations that trade in professional services related to warfare. This resume suffices to reveal why they have to be regulated and with what mechanisms.

II. ISSUES ON REGULATING PRIVATE MILITARY COMPANIES AND THEIR ACTIVITIES

2.1. The need for regulation

To understand the institute of regulating PMCs one clear and concise question must be addressed: whether those companies are subject to any regulation and whether the necessity for such regulation exists. The answer is indeed affirmative –

²⁹ Bruce Grant, "U.S. Military Expertise for Sale: Private Military Consultants as a Tool of Foreign Policy," *National Defense University for National Security Studies*, Strategy Essay Competition, 1998. Available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a344357.pdf> (Visited November 16, 2012)

³⁰ Carsten Hoppe. *Passing the Buck: State Responsibility for Private Military Companies*. *European Journal of International Law* (2008), Vol. 19, No.5. P.991.

private military companies have to be regulated, controlled and held accountable for violations of existing legal and ethical norms.

A number of authors opined for even a ban on PMCs activities citing cases of serious abuses by their personnel, for instance selling of “Jihad security packages” to radical Islamist groups³¹. Indeed, such episodes as involvement of *CACI* and *Titan*’s contractors in Abu Ghraib detainees’ abuses³² suggest the need for further regulatory measures. It should again be acknowledged, however, how these episodes involve only a small part of a huge industry, whose role in the strategic environment remain two-faced and controversial: some PMCs have also been, in certain cases, a valuable factor of stabilisation in post-war environments, and a crucial support for humanitarian action and peacekeeping operations.

Because of lack of reliable qualitative and quantitative data, a systematic review of PMCs’ compliance with the *jus in bello* norms in force, their impact on course of conflict and their efficiency is hardly possible. Also, it seems that the majority of the scientific debates on the privatisation of military activities generates, let us say, “more heat than light”.

That necessity of regulation is based upon 2 core factors. First, it is of grave concern that PMCs operate in a legal environment that can easily be called vacuum. Although there are several treaty and customary rules either in International Law or in the Law of Armed Conflict allowing for certain legal qualification of PMCs’ status and imposing some constraints on their conduct, those rules were tailored for conventional war known sixty years ago. Now, as we mentioned above, nature of modern warfare has changed drastically, and there are existing legal gaps in law applicable to PMCs.

Second, it is more and more likely that certain powerful PMCs had and are having significant impact on conflict and political processes in countries where they operate, if not on the entire sub-regions. That ensues of their overwhelming military capabilities, highly professional personnel recruited and carte-blanche of not being bound by legal or political rules of play. As illustrated above, many notorious PMCs like Blackwater are all-round private militaries with sophisticated weaponry, equipment and command and control chains. In certain cases they may outnumber conventional forces of the weak states not mentioning guerrilla or rebel groupings. At the same time, such privately-owned military strength is out of any control which, in turn, raising questions on their impact on global and regional security. If involved into foreign and military policy, private military and security companies operate in black holes that are hard to reveal.

³¹ Charles Holmqvist. *Private Security Companies. The Case for Regulation*. Stockholm: SIPRI Policy Paper No.9. P.5.

³² The so-called Abu-Ghraib case. *Investigation of the 800th Military Police Brigade (Tabuga Report)*. US Army: Washington, DC. P.44. Available at http://www.npr.org/iraq/2004/prison_abuse_report.pdf (Visited October 17, 2009)

In addition, there is a customary rule of international security agenda that any use of force, or capability to use force outside the home state must be kept an eye upon and stay under institutional and provisional control.

However, several implications for regulation mechanisms still exist.

Private military and security companies or “contractors” replace members of the armed forces³³ in a variety of situations related to an armed conflict, prolonged military occupation, peacekeeping, and territorial administration in post-conflict areas and intelligence gathering.

The phenomenon, of course, has not led to the complete privatisation of military service. It remains rather limited in scope as compared to the operations of state armies around the globe. Nevertheless, it has intensified with the wars that are ongoing today – Afghanistan and Iraq, led by the United States in particular – and it is being fed by further involvement of the European Union in international administration of critical territorial situations and peacekeeping operations, from Kosovo to the Middle East to Africa. Moreover, even in its present modest dimensions, the privatization of military and security services entails a variety of important consequences.

In political sense, engaging PMCs rather than conventional militaries undermines efficiency of national mechanisms of control over armed forces, as required in theory for constitutional democracies. It offers the possibility of not being subject to governmentally approved procedures for authorisation of specific missions and services, or of going beyond limits on the number of personnel to be deployed abroad or allowed to operate on the ground. In legal sense, the question concerns the very status of PMCs under International Law and importantly, under the Law of Armed Conflicts. Can they be qualified as mercenaries, and in what context? Are they part of the armed forces? Under what circumstances do their services amount to a direct participation in hostilities? Is their conduct subject to the scope of International Humanitarian Law? And if they are not part of the armed forces, are they still bound by basic norms of International Human Rights Law and International Humanitarian Law that protect life and dignity? And when private military companies commit abuses in the course of their conduct, what jurisdictional opportunities are available in order to provide civil remedies to victims and/or criminal prosecution of possible offences? Addressing the questions reveals those black holes of the law, both international and national.

In sense of International Law, the extent to which constraints on resort to armed force apply to the conduct of private military companies remains unclear. First, there is no consensus among legal practitioners and theorists as to whether private actors may be subject to public rules. Second, because the conduct of these actors usually takes place outside territorial jurisdiction of the states and therefore outside the territorial and jurisdictional sphere of application of International Law norms. Consequently, a state may not be held responsible for the failures to prevent abuses by PMCs. While for the members of national militaries such control is *in re*

³³ “Members of the armed forces” term is used in sense of Article 4.1. of the Third 1949 Geneva Convention relative to the Treatment of Prisoners of War..

ipsa since they are part of the organic governmental system with a chain of command, subordination and mechanisms of enforcement that make them directly accountable to the state – private military companies are only in a civil contractual relations with those who hire. Thus their actions are not acts of state but acts of private persons, even though their services often imply possession and use of weapons and exposing other individuals to the risk of injury or even death. The problem of accountability becomes even more complex when private military companies' personnel is in charge of international organisations such as UN, EU or NATO. In this case their conduct may affect the institutional responsibility of intergovernmental organisations, a point which is now researched for prospective codification by the International Law Commission.

As for the national legislative and jurisdictional mechanisms, legal tools to secure effective regulation and monitoring of private military companies on national level are even more uneven. Domestic laws of the states vary significantly with respect to the lawfulness of military outsourcing: some countries do prohibit such outsourcing; others even criminalise working of nationals for such companies as such service is assimilated with mercenarism³⁴. In other legal systems providing military or security services is subject to licensing for individual employees³⁵, while certain states PMCs activities are be treated as integral element of free liberal economy. Even where licensing procedures are codified, cases of accountability may be situational. Such variety of legal regimes does not contribute to closing the regulatory and monitoring gap found to a certain extent at the international level. Legal indictments against private military companies and their employees for violations of the IHL or Human Rights Law are relatively rare and occur mostly in the US, where the *Alien Tort Claims Act (ATCA)* is in force, at least theoretically, to provide a basis for international law claims.

But the efforts based on the act have not been that effective so far. Similarly, criminal prosecution of PMCs' employees for the abuses committed are rare facing a number of obstacles that ensue from immunity in the territorial state where the abuse was committed (as in the case of Iraq and US private military companies).

2.2. Existing mechanisms

As regards existing mechanisms for regulating private military companies, a multifaceted approach should be brought into practice. Those mechanisms vary in their scope of application, instrumental effect and level of execution.

- *Legal tools and “good practices”*

Although PMCs do not operate in a complete legal vacuum, adjusting current regulatory tools at both the domestic and the international level is crucial in order to hold the private military sector and its players accountable for their

³⁴ For instance, the *South Africa Foreign Military Assistance Act of 1998*. Available online at: <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/Law/SouthAfrica6.pdf>.

³⁵ See, for instance, “*Public Private Partnership im Bereich des Bundesministeriums der Verteidigung*”, at: <http://www.bundeswehr.de/pic/pdf/reform/PubPrivPartnership.pdf>

misbehaviour and anticipating erosion of public control over the non-state use of force.

The doctrine and academic studies are focused on two major legal tools to be used or developed by those states where PMCs base: the control over the export of military services based on a licensing and extending extraterritorial jurisdiction over PMCs personnel³⁶. The rule of extraterritoriality, however, may be suitable only for the indictments for serious war crimes committed by PMCs due to many obstacles. For instance, investigating a company's activities requires technical capabilities, human resources and financing that home states' courts may be lacking of, and is challenged by the difficulties in collecting evidences and witness statements in foreign, often conflict environments. In addition, PMCs may avoid falling into unwelcomed domestic legislation by moving their headquarters into states with less strict legal regime legislation. For these two reasons, most authors have emphasised the need for regulation at the international level from above, particularly by drafting a new international convention on private military industry and the establishment of supranational institutions capable of monitoring and prosecuting companies' misbehaviour³⁷.

All these measures will be analysed below, in the section focusing on international legal regulation. The other sections will be dedicated to informal tools of regulation, showing how market incentives and strengthened self-regulation may effectively back-up existing and forthcoming legal provisions.

- *International regulation*

Due to the transnational nature of private military industry, the possibility for PMCs to avoid hostile regulation by using offshore tactic, difficulties of extraterritorial control, international regulation alone cannot fully account for the regulation of PMCs. A comprehensive effort should comprise regulation at both the domestic and the international level. However, the scope of this article limits us to only international mechanisms of setting regulatory agenda on PMCs' activities.

However the prospects for international regulation are in fact, uneven. As some authors argue, inter-state cooperation is hampered by the diversity of roles countries play in the sector: "*when what each government wants to control is very different, it is hard to get them to institute standard regulatory schemes together*"³⁸. Collective action at the international level is resisted by a range of pragmatic problems related to the nature and the costs of different international

³⁶ Kevin O' Brien. *What should and what should not be regulated*. Chesterman and Lehnardt (eds.) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, Oxford University Press 2007.

³⁷ Lindsey Cameron. *Private military companies: their status under international humanitarian law and its impact on their regulation*. *International Review of the Red Cross*, Volume 88, No.863, September 2006. P.25.

³⁸ David Avant. *The emerging market for private military service and the problem of regulation*, in Chesterman S. and Lehnardt C., *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*. Oxford: Oxford University Press 2007, 181-196, P.185.

regulatory frameworks.

While such is the case, increasingly significant steps forward has been made towards regulating PMCs. The *Montreux Document on Private Military and Security Companies*, drafted by the Swiss government and the International Committee of the Red Cross in September 2008 sets out recommendations and states' good practices. It was further completed and supported by both the major home and contracting states, such as US, UK and South Africa, and some of the territorial states most affected by PMSs' activities, like Iraq, Afghanistan, Angola and Sierra Leone³⁹. It should be borne in mind, however, that the provisions of the Montreux document are not legally binding and apply only in situations of armed conflict⁴⁰.

As it was argued in the literature, "if there is a regulatory vacuum regarding PSCs, it exists under international law"⁴¹. Such claim is, in our view, misleading since PMCs and their employees are subject to IHL like all other actors present in a situation of armed conflict. It is true, however, that International Law lacks norms explicitly designed to regulate PMCs and the application of IHL is limited by legal ambiguities and enforcement problems. The problems related to the application of IHL to PMCs and their employees have been comprehensively fleshed out elsewhere and will not be analysed in this article⁴².

The long-run debates on whether private military industry operates in a legal vacuum, at least at internationally, comes from the substantial inapplicability of the international legal instruments related to mercenarism and mercenaries. While it is not an object of our detailed research, it is worthwhile to mention that Article 47 of the *Protocol Additional I to the 1949 Geneva Conventions*, the *Convention for the Elimination of Mercenarism in Africa* of 1985, and finally the *United Nation International Convention Against the Recruitment, Use, Financing and Training of Mercenaries* entered into force in 2001 all make the status of mercenary conditional to a number of requirements which PMCs can easily escape, and are often inapplicable to mercenaries themselves.⁴³

An answer to this problem may be revision of the *UN Convention* long

³⁹ The *Montreux Document On pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict*. Available at [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/\\$FILE/ICRC_002_0996.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/$FILE/ICRC_002_0996.pdf).

⁴⁰ Cockayne et al. 2009. *Beyond Market Forces: Regulating the Global Security Industry*. New York: International Peace Institute. Available at http://www.ipacademy.org/media/pdf/publications/beyond_market_forces_final.pdf

⁴¹ Caparini M., Schreier F. 2005, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*. Geneva DCAF occasional paper. Available at http://hei.unige.ch/sas/files/portal/issueareas/security/security_pdf/2005_Schreier_Caparini.pdf.

⁴² Lindsey Cameron. *Private military companies: their status under international humanitarian law and its impact on their regulation*. International Review of the Red Cross, Volume 88, No.863, September 2006. P.25.

⁴³ Louise Doswald-Beck. *Private military companies under international humanitarian law*, in Chesterman and Lehnardt (eds.) *The Rise and Regulation of Private military companies*, Oxford: Oxford University Press 2007;

advocated by the Rapporteur on Mercenaries Enrique Bernales Ballesteros⁴⁴. Such a solution, however, appears unsatisfactory for at least two reasons.

Firstly, the original Convention itself, entered into force only in 2001 due to the low number of ratifications, has been ratified by only 32 states and signed by other 10, none of which are permanent members of the UN Security Council. Moreover, while an improved convention may receive greater support and both PMCs and mercenaries do need to be disciplined, they are different actors requiring different levels of regulation and tailored legal instruments. Treating mercenaries and PMCs differently would therefore enhance the clarity and the effectiveness of the regulatory instruments designated to address each of them, and seems indispensable to obtain the support of both the industry and major home and contracting states⁴⁵.

Second, effective international regulation and prosecution of PMCs, often operating in weak states lacking the capacity to enforce their own domestic legislation, would require not only the drafting and the ratification of an *ad hoc* international convention supported by the major players involved in the private military market, but also the establishment of relevant international institution monitoring and prosecuting PMCs' activities. Here, two different solutions may be foreseen.

On the one hand, the monitoring of PMCs' contracts and activities may be assigned to an already existing United Nations body. For example, *UNCHR Working Commission on Mercenaries*, made of five regional experts is already involved in the monitoring of the private military industry. While it may appear to be a suitable monitoring group given its competency, some major concerns can be raised grounded on the analogy between PMCs and mercenaries and the scepticism of both major Western players as well as of the industry, let alone the doubts regarding its actual monitoring capacities.

Alternatively, the monitoring and the control of PMCs and their activities may be assigned to an *ad hoc* international body. Such institution may undertake a systematic contract review and monitor the activities of the industry on the ground by independent observers. Sanctions against the company as well as the prosecution of employees' crimes may be imposed either by the International Criminal Court (ICC) or by an *ad hoc* court⁴⁶. The latter might be preferred, due to the problems of ICC's jurisdictions over companies and US contractors.

Similar bodies, not mentioning doubts related to their effectiveness, may

⁴⁴ Enrique Bernales Ballesteros. (October 16th, 1997) *Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*. UNCHR Report E/CN.4/1997/24, par.109. Available at: <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/71e8763786cca82a8025666b004e1268?Opendocument>.

⁴⁵ Caparini M., Schreier F. 2005, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*. Geneva DCAF occasional paper. Available at http://hei.unige.ch/sas/files/portal/issueareas/security/security_pdf/2005_Schreier_Caparini.pdf.

⁴⁶ David Singer. *War, Profits, and the Vacuum of Law*. PP. 543-546.

indeed have a potential in prosecuting and punishing PMCs' misbehaviour and addressing the problems arising from extraterritoriality.

The creation of those institutions, however, is ambitious and costly. International relations theory shows how the establishment of new international regimes is an extremely difficult endeavour. In this case, the problem is not only that of finding the consent of the states required for drafting of a new international convention, which appears complex given the different interests that states have vis-à-vis the use and the regulation of PMSCs, but also that of collecting financial and institutional resources needed to ensure the effective monitoring of PMCs activities on the ground and prosecution of crimes committed by their employees. According to representatives of the industry, no grouping of global powers will be willing to invest large amounts of money and manpower in the creation and maintenance of a major regulatory body. It can be argued that a solution to the abovementioned objection may lie precisely in a financial contribution from the PMCs themselves, which may share the costs of this international regulatory body with its customers by the provision, for instance, of an additional charge to be applied to each contract. The problems related to a fair division of the costs among the players or their excessive heaviness, which may alienate the industry willingness to cooperate, remain to be addressed.

The number of challenges briefly mentioned above shows scepticism vis-à-vis the establishment of this system in the close future. Even before more ambitious frameworks for the enhancement of international regulation can be drafted, there is however significant room of action for existing international organisations.

First, both existing intergovernmental organisations and *ad hoc* groupings of states as well as non-governmental actors like the signatories of the Montreux Document shape the global political discourse and build the agreement needed to take action. A pragmatic approach based on the acknowledgement that PMCs are legitimate actors whose activities require further regulation seems a better starting point than equating PMCs and mercenaries that would polarise the debate and alienate both the industry and Western home and contracting states. The United Nations insistence on the mercenary nature of PMCs, for instance, appears to seriously hamper their role in the regulation of the PMCs⁴⁷.

In addition, major international organisations such as various UN agencies, the World Bank Group and NATO are themselves robust consumers of private security. Thus, they also have a chance to use market incentives in order to drive the industry towards increased level of self-regulation, transparency and compliance with domestic and International Law. The prospect for a greater involvement of PMSCs in peacekeeping operations, first raised by Kofi Annan in 1998⁴⁸, can be used as a remarkable incentive for the industry to develop higher standards in exchange for gradual access to a new segment of the market. Like

⁴⁷ Kofi Annan. (June 26th 1998), Ditchley Foundation lecture. Available at <http://www.ditchley.co.uk/page/173/lecture-xxxv.htm>

⁴⁸ *Ibid.*

national governments, however, international organisations should be more transparent and consistent in their use of PMCs. The example of the United Nations, whose Rapporteur for Mercenaries repeatedly condemned the activities of specialised agencies were already contracting different services to these companies is a paradoxical case.

A further degree of caution is required as the use of private military and security personnel contracted either directly by an international organisation or by a member state like the United States – which has outsourced its provision of international police officers and border security experts – raises additional problems related to legal liability and accountability of the use of force at the international level. The involvement of DynCorp employees in a child prostitution ring during their operational support for the operation IFOR in Bosnia provides a forceful example⁴⁹. As the use of force by international organisations has already been considered, reliance on private military personnel is in danger of creating a further layer of opacity and inaccountability. International organisations' use of PMCs should therefore be as transparent as possible, envisaging mechanisms for the oversight, the investigation and the prosecution of companies' activities.

- *UN Working Group on mercenaries and the Draft Convention on PMCs*

⁴⁹ Peter W. Singer. 2004, *The Private Military Industry and Iraq: What Have We Learned and Where to Next*. Geneva: Geneva Centre for the Democratic Control of Armed Forces, P.14. Available at http://www.dcaf.ch/_docs/pp04_private-military.pdf