

PRIVATE SECURITY

IN AFRICA

**MANIFESTATION, CHALLENGES
AND REGULATION**

EDITED BY SABELO GUMEDZE

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FOREWORD

The Institute for Security Studies (ISS) is an applied policy research institute whose mission it is to conceptualise, inform and enhance the debate on human security in Africa in order to support policy formulation and decision-making at every level. The ISS undertakes independent research and, where possible, works in collaboration with and through national, sub-regional and regional organisations. The major research done to date by the ISS in the field of the privatisation of security was published in 1999 in a monograph entitled *Peace, profit or plunder? The privatisation of security in war-torn African societies*, edited by Jakkie Cilliers and Peggy Mason (see <www.issafrica.org>). Numerous developments relating to the involvement of the private security sector in Africa have since occurred, including the industry's association with the much-publicised, alleged, foiled coup plot in Equatorial Guinea.

Under the auspices of the ISS Project on Regulation of the Private Security Sector in Africa, this monograph represents the current debate around the subject of the private security industry in the form of private security companies (PSCs) and private military companies (PMCs) operating in Africa. This monograph lays the foundation for another forthcoming ISS monograph, which will focus on the elimination of mercenarism (the darker side of the private security industry) in Africa and is intended to be a feeder for the revision of the 1977 OAU/AU Convention on the Elimination of Mercenarism in Africa. The importance of this monograph is the fact that it is focussed on Africa. This is critical for Africa because peace and security generally remains a pipe dream for the majority of African people.

This monograph does not in any way reject the role of the private security sector, but advocates its effective regulation and control for the sake of peace, security and stability in Africa. It looks at the growth of the private security sector phenomenon in Africa, considers the need for addressing the unprecedented growth of the industry on the continent during peace and war times, and presents different approaches that are specific to Africa. The monograph presents domestic level perspectives on the private security sector phenomenon in two African countries, namely South Africa and

Swaziland. In mapping the way forward the monograph presents the Swiss Initiative on private military and security companies.

This monograph would not have been possible without the generous funding of the ISS Project on the Regulation of the Private Security Sector in Africa by the International Development Research Council (IDRC) of Canada and the United Nations University (UNU) in Japan. The involvement of the Defence Sector Programme (DSP) staff in this project in one way or another was a major contribution to this monograph. I would like to thank the entire DSP staff: Len le Roux, Martin Rupiya, Lauren Hutton, Zingi Zibonti and Amelia du Rand for their immeasurable support in the compilation of this monograph. My sincere appreciation goes to all the contributors, who agreed to write on this complex yet important subject in Africa.

The various chapters resulted from well-researched papers that were presented during a conference hosted by the ISS on the regulation of the private security sector in Africa which was held on 19 and 20 April 2007 at the ISS conference room in Pretoria, South Africa.

The Editor

20 October 2007

ABOUT THE AUTHORS

Sabelo Gumedze is Senior Researcher at the Defence Sector Programme, Institute for Security Studies, South Africa

Dr. Sabelo J. Ndlovu-Gatsheni is Senior Lecturer at the Monash International University, South Africa

Dr. Mpako H. Foaleng is Country Analyst for the Norwegian Refugee Council, Switzerland

J. J. Messner is Director of Programs & Operations at the International Peace Operations Association, United States of America

Andy Bearpark is Director General of the British Association of Private Security Companies, United Kingdom

Sabrina Schulz is Director of Policy at the British Association of Private Security Companies, United Kingdom

Jamie Williamson is Regional Legal Advisor of the International Committee of the Red Cross Regional Delegation for Southern Africa and the Indian Ocean, South Africa

Katherine Fallah is PhD Candidate and Research Officer at the Faculty of Law, University of Sydney, Australia

Prof. Anthony Minnaar is Professor at the Department of Security Risk Management, School of Criminal Justice, College of Law, University of South Africa

Prof. Hamilton Sipho Simelane is Professor at the Department of History, Faculty of Humanities, University of Swaziland

Markus Dutly is Deputy Head of Mission at the Swiss Embassy in Pretoria, South Africa

PART I

INTRODUCTION

CHAPTER 1

TO EMBRACE OR NOT TO EMBRACE: ADDRESSING THE PRIVATE SECURITY INDUSTRY PHENOMENON IN AFRICA

Sabelo Gumedze

Introduction

Writing on the relationship between trans-national privatised security and the international protection of human rights, Creutz (2006:9) observes that '[t]he mixture of state and private actors within the field of security is here to stay and consequently the international community has to find a way, if not to embrace it, at least to cope with it'. The question of whether or not Africa, as part of the international community, should cope with the rapidly growing industry of private security actors is a predicament confronting the continent today. Africa does not seem to have a choice, however, as the industry has permeated all spheres of life and increasingly supplants the state's primary responsibilities. While accepting the fact that Africa was caught unawares by this phenomenon, the need to arrive at a thorough understanding of the dynamics around the private security industry in the African context cannot be overemphasised.

Much has been said about the industry being associated with mercenarism and this has in effect blurred understanding of the sector vis-à-vis its importance in addressing security issues in Africa. Within international law, mercenaries were for quite some time unequivocally associated with the process of armed opposition to decolonisation as reflected in the 1977 OAU Convention on the Elimination of Mercenarism in Africa and the 1989 UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries (Cilliers 1999:1). Little did the drafters of these instruments know that the private security industry (made up of companies/corporations as opposed to individuals) would need to be controlled and regulated towards the close of the 20th century, and thereafter, as they are more likely to get involved in mercenary activities as a result of greed. In this regard, the best example is the now defunct Executive Outcomes and its founder's alleged role in a coup plot that was aimed at toppling President Teodoro Obiang Nguema of Equatorial Guinea and seizing the country's oil riches.

This monograph is a premier collection of scholarly contributions interrogating the private security industry phenomenon in Africa. The topics addressed in

the various chapters provide a wealth of African perspectives on the private security industry. The monograph focuses on four broad aspects of the private security sector. First, it sets the scene by looking at the industry's growth in Africa. Second, it underscores the need for addressing this growth through a variety of regulatory frameworks and an examination of the interplay between international humanitarian law (IHL) and the private security industry with specific reference to Africa. Third, it presents perspectives on the private security industry from South Africa and Swaziland. Finally, the monograph presents the Swiss Initiative on PMCs and PSCs.

The private security phenomenon evokes divergent opinions on the topics of its rapid growth and the approach needed for its containment and regulation. Contributors offer various interesting perspectives on the question of how Africa must cope with the private security industry, which has become part and parcel of the global security architecture.

The growth of the private security industry in Africa

Perhaps the first point to note in this discourse is one that Stead (2006:36) raises, namely that 'Africa remains a turbulent environment [and] is perceived as a continent in continuous conflict, although there are countries and regions where instability is absent'. Any explanation of the situation in Africa (whether during peace or war) should be put into perspective while taking into account a number of issues; in other words, African challenges must always be viewed in context rather than in isolation. Kisiangani (2007) likens the African continent to a forest that cannot be fully appreciated and understood by examining individual trees. The private security industry, which is broadly divided into private security companies (PSCs) and private military companies (PMCs), operates in both stable and unstable environments in Africa. The growth of the private security industry in Africa can be ascribed to a number of reasons, and that being the case, any approach to the challenges brought about by PSCs/PMCs must be informed by an understanding of the industry's growth and of the environment within which it operates.

Opening the discussion, Ndlovu-Gatsheni (chapter 2) addresses the relationship between weak states and the growth of the private security sector in Africa. He argues that the weak African state owes its existence to the end of the Cold War when the demobilisation, disarmament and reintegration (DDR) processes left many soldiers stranded without resources. Accordingly, he argues that the weak African state is 'not just an innocent

political formation in need of humanitarian rehabilitation' but 'a dangerous phenomenon if conceptualised from a security perspective.' This observation is pertinent to the debate in that due to the weakness of the African state, African leaders resort to the private security sector for assistance in order to maintain power. This presents an enormous challenge in terms of regulating an industry that is much utilised by African leaders to ensure that they stay in power.

Taking the debate further, Foaleng (chapter 3) looks at the nexus between natural resources, civil wars and the involvement of the private security sector. Taking Kisiangani's 'forest-Africa' example, Foaleng examines the 'forest' by looking at what lies on the ground in the undergrowth. The presence of the private security industry in this context is therefore informed by the natural resources found in a particular state. The most 'popular' African countries mostly infested with 'soldiers of fortune' include Angola, Mozambique, Sierra Leone, Sudan, Liberia, Congo (Brazzaville), and Democratic Republic of Congo (DRC). All these countries have one thing in common: They are well endowed in terms of natural resources. What makes things worse in these countries is the fact that when conflicts erupt as a result of the 'scramble' for natural resources, civilians shoulder the pain of being internally displaced, seeking refuge, being subjected to human rights abuse, and even being killed. African conflicts have no doubt resulted in an exceedingly high number of refugees.

Foaleng highlights the risk involved in using military companies as security companies, as well as the relationship between natural resources and civil wars. She argues that the nexus between the exploitation of Africa's natural resources and its wars is exacerbated by the intervention by different actors who fan the wars in order to gain access to and exploit natural resources. Presented with the 'get rich or die trying' dilemma, private security actors in Africa are always in favour of the obvious. Economic gain is the only reason why private security actors are operating in Africa; the continent's peace and stability have no place on their agenda. Hence Foaleng's questioning their claim of assisting legitimate African governments. She concludes by stating that in many cases, rather than empowering the state, the engagement of PSCs has been an obstacle to the development the state's capacity to control and manage its national natural resources.

Underscoring the importance of the private security sector in peace and stability operations, Messner (chapter 4) vociferously disputes Foaleng's criticism of the private security actors' claim that they are 'angels' of peace and security in Africa. He makes it clear that the industry has in fact 'rapidly

become an indispensable component of peace and stability operations worldwide'. Messner differentiates between legitimate companies that support peace and stability operations and the illegitimate actors who have participated in some of Africa's conflicts over the past few decades. He argues further that peace and stability operations frown upon the use of the term 'mercenary' because it has not been defined legally and credibly and is often used by the industry's opponents to tarnish its importance and reputation. Throughout his chapter, it is interesting to note that Messner avoids the use of the terms 'private security company/corporation' and 'private military company/corporation' in favour of 'private contractors in peace and stability operations', thereby dispelling their involvement in mercenary and other illegal activities. Their mission in African conflicts is, therefore, to ensure peace and stability. Whether the African continent is now peaceful and stable as a result of inter alia the involvement of private contractors is a matter deserving of thorough investigative scrutiny.

Messner identifies the clients of the private security industry, which includes the United States (US), the United Nations (UN) and the African Union (AU), to name but a few. He notes that there is an important need for private contractors in peace and stability operations in the sense that they offer greater accountability and professionalism. He is however quick to concede that private contractors are not immune to abuses and problems. Despite this, because of their commercial reputation is at stake, private contractors are more 'prone to allocate greater attention to risk management in conflict situations, since jeopardising the life of their employees is, if not anything else, highly unprofitable'. The issue of profitability is what Messner implores serious researchers to appreciate as it is, from a commercial perspective, a concern and an incentive that deter private contractors from jeopardising their business. Messner further discusses the various methods and structures for regulation of private contractors in peace and stability operations and identifies contracts, domestic and international law, and internal industry standards as tools in this regard. In conclusion, Messner steadfastly argues that '[t]he increased use of private companies in peace and stability operations has become a fact of life, and is impossible to reverse.'

Addressing private security sector challenges in Africa

Bearpark and Schulz (chapter 5) present a qualification to Messner's argument that private contractors are rapidly becoming indispensable components of peace and stability operations worldwide and particularly in Africa. Although they accept that the private security phenomenon in Africa presents great

opportunities, Bearpark and Schulz recognise that the industry also poses severe risks. This recognition is important in this discourse since not every PSC that operates in Africa can be said to be interested in peace and stability. They argue that on the one hand, PSCs have the potential of improving the security situation for people where the state fails to do so provided such a service is delivered in a professional and accountable manner. On the other hand, they aver that 'in the absence of professional standards, [the] activities [of PSCs] may aggravate an existing security activity or simply reinforce it through leaving the underlying causes of insecurity untouched'. They note that any effort aimed at regulating the industry must take these risks into account. Perhaps two additional questions should also be considered in this debate: Who determines whether or not private security providers are professional and accountable? And, what benchmarks should be used to examine these providers? Regulation of the private security industry must be coupled with agreed minimum standards below which service providers should not be allowed to operate in the market. Whether this is feasible is another matter.

Bearpark and Schulz also tackle the definitional challenges with regard to private security activity in Africa. They map out the various activities provided by PSCs and divide them into four broad, distinct categories, namely:

- Companies that offer both armed and unarmed private security services in the domestic market
- Companies with headquarters or offices in several countries (in other words, international companies) that offer 'premium' security services, including static armed guarding of embassies, facilities of international corporations, oil fields and pipelines, mines and critical infrastructure
- Companies that offer military services (in other words PMCs)

Bearpark and Schulz point out that the distinction between PSCs and PMCs may be largely semantic reflecting cultural preferences and caveats. They contextualise the challenges of the private security sector in Africa by providing examples from Nigeria, Kenya and Sierra Leone and argue for the need for regulation of the industry in Africa through what they refer to as a 'matrix approach'. The matrix approach consists of regulatory schemes at the national, regional and international levels, as well as at industry level. In conclusion, the authors argue that governments must fulfil their obligations towards their citizens, especially when it comes to the provision of security, and should develop and enforce effective regulatory mechanisms in order

for the industry 'to contribute meaningfully to the creation of a secure and stable environment'.

Presenting a humanitarian dimension to the private security sector debate, Williamson (chapter 6) highlights the position of PMCs and PSCs in international humanitarian law. He discusses the new realities of conflict, including the increased presence of PSCs and PMCs in armed conflict situations, the changing nature of support provided by these companies and the increased presence and increased contact with persons protected under IHL. In his chapter Williamson emphasises the blurring roles of PSCs and PMCs and argues that PSCs/PMCs should be aware of their responsibilities and position under IHL. He argues that states must meet their obligations under IHL in relation to the actions of PSCs/PMCs and notes that there is no legal vacuum in armed conflict situations since IHL is applicable. Williamson outlines what constitutes IHL and depicts conflict as a reality. He then discusses the development of the Geneva Conventions and Additional Protocols and the possibility of viewing PSCs/PMCs as combatants under IHL, defining combatant status in terms of their responsibilities.

Williamson further discusses criminal responsibility, focusing specifically on war crimes, individual criminal responsibility and state regulations. He defines war crimes as grave breaches as covered by the Geneva Conventions and Additional Protocol I and other serious violations, covered in Additional Protocol II, Statutes of International Tribunals and national legislation. He argues that war crimes must be punished and that states must enact national legislation prohibiting and punishing grave breaches. In addition, states must either initiate prosecution proceedings or hand suspects over for trial in another state. Concluding his chapter Williamson reiterates that IHL is adequate and that a pragmatic approach to dealing with complex IHL questions should be adopted. If in doubt about their status, PSCs/PMCs should not take part in hostilities. Finally, he stresses that IHL must be respected at all times in armed conflict.

Following Williamson's chapter, Fallah (chapter 7) takes the debate further by presenting the practical challenges of IHL with regard to the principle of distinction between combatants and civilians, which she views as critical to the conduct of hostilities. It is through this principle that a framework for the regulation of actors (including private security actors) in an armed conflict is formulated. In her discussion, Fallah considers the principle of distinction to be 'a fundamental aspect of IHL' as it operates on the basis that those individuals already legitimately involved in the war effort may be the objects

of attack, whereas those who are not are to be protected. She dissects the principle and considers its significance for the private military industry.

The specific enquiry to which Fallah confines her discussion is whether private security contractors could be said to be participating directly in hostilities and the impact of this enquiry on those private security contractors in terms of the principle of distinction. Fallah looks closely at the meaning of direct participation in hostilities under IHL and the implication thereof on the involvement of private security operators. She concludes her discussion by stating that, owing to the complexities involved in armed conflicts, no useful international legal instrument is capable of providing an exhaustive list of the conduct that amounts to direct participation in hostilities. The law will always rely upon the judgment of actors in an armed conflict but where situations become tricky, the judiciary becomes essential.

Regulation of the private security industry at the domestic level

Two case studies pertaining to the private security sector at the domestic level are presented in this monograph, namely South Africa and Swaziland. Minnaar (chapter 8) considers the notions of oversight and monitoring of non-state/private policing. He focuses on the questions of misconduct, the use of force and criminal activities associated with private practitioners in South Africa. Minnaar acknowledges the fact that the South African private security industry is reasonably well regulated by legislation, but notes that legislation does not make provision for an oversight monitoring body. He lays a foundation by presenting the context within which the private security industry has grown in South Africa, especially after 1994. The South African private security sector remains the fastest growing industry in South Africa and accordingly, the ratio of private security officers to every uniformed police member stands at 2:1.

Minnaar highlights the feelings of insecurity and fear of crime among South Africans as the main reason for the increasing reliance upon the private security sector, whose functions are those which used to be the sole preserve of the public police. He also considers the regulations of the private security sector in South Africa in much detail and goes on to discuss the additional oversight and monitoring problem within the South African context as against international control/monitoring responses. He also considers formal public-private partnerships, oversight and the need for monitoring. In conclusion, Minnaar underscores the need for professional training in policing and the formulation of accountability structures among the private security

providers, which are both essential elements for monitoring and oversight of the industry.

Presenting the Swazi perspective, Simelane (chapter 10) investigates the question of the state, security dilemma and the development of the private security sector in Swaziland. He presents a brief literature review of the growth of the private security industry and argues that Swaziland is no exception in the proliferation of the industry, which is largely informed by the Swazi people's concerns over their personal security. Due to the absence of previous research in this field as it relates to Swaziland, Simelane relies on personal interviews. Stating that since Swaziland does not have any PMCs—owing to its small geographical scale and the fact that it has enjoyed relative political peace—his discussion is confined to PSCs operating at the domestic level. Mapping out the development of the private security industry in Swaziland, Simelane argues that this is largely a post-colonial phenomenon. He indicates that the industry in Swaziland is almost completely confined to the guarding sector.

In so far as the implications of the growth of the security sector on the Swazi state are concerned, Simelane argues that the privatisation of security implies that traditional responsibilities of the state have shifted to the private security industry, which is largely uncontrolled. The growth of the private security industry is an indication of the weakness of the Swazi state. As a result of this weakness, a community police forum has developed but does not have a cordial relationship with state police. He argues that the conflict between these two have not reached a crisis level due to the fact that public security forces still have the upper hand in security-related activities. Simelane concludes his chapter by stating that '[t]he development of the private security sector in Swaziland has had small beginnings but it contains all the trappings of the industry as it has grown in other countries'.

Charting the way forward

Having considered the growth of the private security industry in Africa, the various ways in which it manifests itself and the dilemma it presents in Africa at both the domestic and the international level and in peace and conflict, Markus Dutly charts the way forward by presenting the Swiss Initiative on Private Military and Security Companies. The Swiss Initiative is a response to the ever-increasing number of private military and security companies that are more and more involved in a variety of actions during war/conflict and times of peace across the world. Dutly gives a background of the

Swiss Initiative, an inter-governmental dialogue initiated by Switzerland in cooperation with the International Committee of the Red Cross (ICRC) with a view to ensuring and promoting respect of IHL and human rights by states and security companies. His focus is on the trans-national sector.

Dutly also identifies the main objectives of the Initiative, as follows:

- To contribute to an inter-governmental exchange on the challenges posed by the use of PMCs/PSCs
- To re-affirm and clarify the existing obligations of states and other actors under international law, in particular under international humanitarian and human rights law
- To study options of regulation and other appropriate measures at the national and, where possible, at regional and international levels, and possibly elaborate good practices for states, in order to assist them to meet their responsibilities under international law

He presents an overview of two expert meetings that took place in 2006 with the objectives of discussing the various issues, reflecting on possible answers and elaborating on best practices with regard to PSCs and PMCs. He reports on the outcomes of the meetings and concludes by stating that participants expressed interest in continued study of the options of regulatory models and further elaboration, on the basis of existing obligations, on good practice for states with regard to elements of national (or other) regulation contracts. He gives the assurance that Switzerland and the ICRC will continue the inter-governmental exchange on the important issue of PSCs and PMCs and the elaboration of good practice for states to meet their obligations under IHL and human rights law, and emphasises the particular importance of the perspective and experience of African governments in this regard.

Conclusion

The contributions in this monograph cover a wide range of interesting yet complex issues arising from the involvement of the private security sector in Africa. From its growth, operations, and the challenges it presents at the national, regional and international levels, the contributors offer various options on how to best regulate and control the industry in Africa. While there is no one-size-fits-all answer to the manner in which the industry could be best regulated, it is clear that African states must take the lead

to get involved, collectively and individually, in debates that are aimed at facilitating an understanding of the industry, its advantages and disadvantages and how to address all of these effectively in Africa. Such debates should ensure that African states augment their efforts to provide security to its citizens, especially to those who cannot afford to pay for private security services. African States have an obligation to ensure the security of their citizens and the ever-increasing proliferation of PSCs and PMCs in Africa should be allowed provided that it complement African states' objectives and contribute significantly to peace, security and stability in Africa. Any PMC or PSC with a mission beyond this objective is unwelcome.

The fact that the privatisation of security is going nowhere is a reality that Africa must live with. It is a phenomenon that Africa must address robustly at all levels. This should be informed by a thorough understanding of the industry and, in particular, that it does not necessarily represent mercenarism, which is its darker side. Thus, a distinction should be made between PSCs, PMCs, mercenaries and vigilantes since their roles are potentially overlapping and criss-crossing activities, personnel, and relationships usually blur their roles (Spear 2006:22). Ensuring that the industry does not get into this 'darker side' should be the concern of every African state. This monograph lays down a solid foundation for a further debate on the elimination of mercenarism in Africa, which should be pursued at all costs-mercenarism being what the private security sector is most likely to be trapped into as a result the drive to maximise profit. It is hoped that this premier contribution to the debate on private security in Africa will stimulate further discussions that would, in the long run, be essential to ensuring human security in Africa.

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PART II

THE GROWTH OF THE PRIVATE SECURITY INDUSTRY IN AFRICA

CHAPTER 2

WEAK STATES AND THE GROWTH OF THE PRIVATE SECURITY SECTOR IN AFRICA: WHITHER THE AFRICAN STATE?

Sabelo J Ndlovu-Gatsheni

Introduction

In recent years, specialised private companies have proliferated and expanded within the global security arena. They offer military and police services that were previously the preserve of the state. This phenomenon has changed the traditional role of the state dramatically in that it affects the state's traditional monopoly on the means and resources of violence that distinguished it from all other social formations. More ominously, this trend occurred in tandem with mercenary activities' taking on a corporate form and fishing in the troubled waters of Africa. The danger posed by these private military and police forces is that they operate beyond the realm of legal accountability and public oversight, thereby threatening the state within which they operate, as well as its citizens. Even worse, because these private forces are available for hire, they sell their services to whoever can afford them. In this way, they constitute a serious security risk in Africa.

This chapter looks at the reasons for the proliferation and expansion of the private security sector in Africa and focuses on how the rulers of weak states have contributed in this regard since the end of the Cold War. It addresses the neglected issues of 'comprador states' and the phenomenon of 'imperialism by invitation'. The focus on weak states as a factor in the proliferation and growth of the private security sector is significant in the context of the current 'securitisation' of Africa, that is, the context of defining Africa as a security risk and a zone of conflict. This discourse entered the centre of international politics following the 9/11 attacks on the Twin Towers in the United States when weak states were immediately factored into security analyses as terrorist abodes. Weak states as abodes of private military forces is not emphasised in this discourse despite posing an apparent threat to Africa's security.

The weak African state is not an innocent political formation that requires humanitarian rehabilitation. Conceptualised from a security perspective it is a dangerous phenomenon. The rulers of weak African states have engaged in all sorts of complex survival techniques, including inviting into Africa those companies that sell military skills to the highest bidder. In a bid to outwit their

competitors at power games, leaders of weak states, such as Sierra Leone, the Democratic Republic of Congo (DRC), and Angola, have wilfully transformed their states into what one would term comprador regimes, that is, regimes that do not care about the welfare of their citizens but that serve as agents of foreign interests and foreign businesses (Rodney 1982:12–18). Closson (2006:1) conceptualises the weak state in security terms as ‘an arena for the operations of trans-territorial networks locked in a struggle for resources’. In weak states, sovereignty is highly contested ‘given that the weak state is an arena for local and global actors’. Sovereignty ‘belongs to many and is loosely sanctioned’ (ibid). In this scenario, rulers of weak states are actively engaged in what Michael Doyle (1986:8–12) terms ‘imperialism by invitation’ in that they openly invite powerful private military companies (PMCs), such as the now defunct Executive Outcomes, to help them deal with local rivals who, in turn, may have their own foreign connections and backing.

A traditional argument concerning weak states is that the ‘First World’ is complicit in the weakening of the ‘Third World’. This argument has dominated the analysis of global arms sales, debates on proxy wars waged by the superpowers during the Cold War, current economic debates on the protectionist policies of developed countries in the agricultural sector, and debates on international organisations and transnational corporations implicated in bribing scandals in developing countries. This approach is sympathetic to weak states and presents them as victims of external manipulation while ignoring the dangerous agency of the leaders of these states, and in particular, how they invite private military forces to operate in Africa and engage in African conflicts. Weak states cannot be regarded merely as orphans of the Cold War who are falling prey to the machinations of PMCs and private security companies (PSCs) or as victims of powerful global forces that sap their strength deliberately and compromise their sovereignty and stability in order to exploit resources such as minerals and oil. Robert Rotberg (2002:127) has noted the following:

Failure and weakness can flow from a nation’s geographical, physical, historical, and political circumstances, such as colonial errors and Cold War policy mistakes. More than structural or institutional weaknesses, human agency is also culpable, usually in a fatal way. Destructive decisions by individual leaders have always paved the way to state failure.

The importance of Rotberg’s argument is that it captures the often-ignored human agency and the role of leaders, such as Siaka Steven of Sierra Leone, Mobutu Sese Seko of Zaire and Mohamed Siad Barre of Somalia,

in the weakening of their states. These leaders were responsible for the instrumentalisation of disorder that opened the gates for private military forces to intervene in their countries. If weak states were ever victims of powerful forces that compromised their sovereignty and stability, they must be understood as willing victims presided over by weak but cunning leaders who were able to operate within complex global commercial networks for personal interest, personal gain and regime security. These complex global commercial networks include inviting PMCs into Africa to prop up failing regimes. In this way, weak states and their weak leaders are a major cause in the proliferation and growth of private military forces in Africa. A look at the survival strategies of many leaders of weak states therefore constitutes another avenue for explaining why the private security sector has grown so rapidly in Africa since the end of the Cold War.

The overarching theoretical framework that informs the present analysis is that of the post-modernist constructivist turn in international relations theory, in terms of which structures and agents are viewed as constantly reconstructing and reconstituting each other. Both structures and agents/actors need not be taken for granted but deserve close attention (Biersteker & Weber 1996:31–32). In this paradigm the state is not understood as a given, pre-ordained political structure, but is conceptualised as existing as a paradox, subverted by violence and issues of identity as well as power (Ashley 1987). Statecraft is therefore not studied as a unitary actor, but as an arena of conflict in which a variety of actors and forces impact on the authority over the state, in the process affecting the level of control the government has within the territorial boundaries of the state (Ashley 1988). This approach is useful in facilitating what Cynthia Weber (1998) terms ‘sovereignty that is at the mercy of being simulated by state elites and regimes for purposes of survival’.

This article is organised in five sections. The first section is the introduction that sets the parameters of the issues under discussion. The second section provides the background, highlighting in generic form the factors that fuel the proliferation and growth of the private security sector. The third section focuses on the pertinent issue of the ‘securitisation’ of Africa in the discourse of the War on Terror that engulfed the world following the 9/11 disaster. The theory is commonly associated with what Rita Abrahamsen (2005) terms the ‘Copenhagen School of International Relations Theory’ (the Copenhagen School). There is a need to engage with this theory because it ends up reviving the dangerous and racist argument of seeing Africa as offering nothing but chaos, risk and threats to the supposed ‘peace zones’ of North America and Europe. It ends up justifying the proliferation of the private security sector as a saviour entity serving a continent that is supposedly still in a pre-industrial

age and that is existing in a Hobbesian state of nature where life is nasty, short and brutal. The fourth section grapples with the meaning of the weak state and the dominant discourse on this phenomenon. The fifth section deals with weak states as comprador regimes that wilfully invite the private security sector into Africa. In this section, I deal with the agency of the rulers of weak African states in inviting and using private security forces to maintain power. The concluding section picks up the argument of Michelle Small (2006) that the de-monopolisation of violence by the state contains inherent catastrophic dangers in terms of control, transparency and accountability of the security sector in general as it projects the implications of proliferation and growth of private security on the African state and African security architecture.

A comment on the methodological challenges involved in researching the connections between the phenomenon of proliferation and growth of the private security sector vis-à-vis the phenomenon of weak states is in order here. Firstly, the networks and linkages between weak states and private military firms form part of clandestine economic-military systems that are highly secretive - like all military operations. Secondly, the activities are largely covert, take place outside the law (making them very difficult to investigate), and are dominated by willing victims and willing perpetrators. Weak but cunning African leaders and rebel leaders, such as the late Jonas Savimbi of Angola and warlords such as Charles Taylor of Liberia, are intricately linked to the actions of private military firms in Africa. Thirdly, the linkages are constructed behind the façade of formal statehood. This means that for one to engage in an empirical investigation of this phenomenon, there is need for an extended stay in the state under study to observe the happenings at close range and to win the trust of the people before engaging in interviews. It is similar to investigating such criminal activities as gambling and prostitution where there are willing victims, and requires a combination of journalistic and historical methodologies to unlock the complexities involved. Since I have not yet done fieldwork, this article provides a conceptual and theoretical framework while introducing the neglected issue of how weak states and weak leaders are a serious factor in the invitation to mercenaries and private security forces to operate in Africa.

Background

Many scholars have examined how the end of the Cold War left numerous African states in a very weak position, having been abandoned by their Cold War godfathers and patrons. Some of the African leaders who, because of

external support, seemed to be managing to control and even to suppress internal threats to their power were suddenly left alone, bereft of internal legitimacy but also unable to eliminate or manage military challenges posed by armed local strong men as well as vocal civil society. During the Cold War, it was easy for weak leaders and their weak states to solicit loans and diplomatic and military support based on ideological orientation. With the end of the Cold War support for weak regimes in Africa dwindled drastically, exposing many African states to conflict (Jackson 1990; Migdal 1988; Michaels 1993; Ayoo 1995).

The end of the Cold War inaugurated what has been popularly termed the ‘third wave of democracy’, characterised by long-serving African politicians being challenged by civil society to democratise and one-party regimes crumbling under the challenge from political figures riding the democratic wave (Huntington 1993). Countries like Somalia, Sierra Leone and Liberia crumbled into what became known as ‘failed states’ with various strong men fighting each other for power while tearing the whole state edifice into chaos and disarray. The question here is how some of the rulers of weak states tried to survive in the post-Cold War environment where there was little external support. William Reno (1997a:166) notes that the most hard pressed regimes reworked new ties with outsiders, especially Cold War clandestine commercial ties, to manage and manipulate outsider’s demands, rather than succumb to the ‘failed state’ paradigm. It was within this negotiation of new ties that the phenomenon of the private security sector intervened in Africa to fill the so-called capacity. This gap was opened by the weak states whose rulers needed protection from internal opponents and could not trust local military forces. According to Reno (1997a:167):

Rulers of some weak states use creditor demands to privatise state agencies and liberalise markets as excuses to hire foreign firms that field mercenaries. These foreign soldiers serve the joint interests of foreign firms and weak states’ rulers to control resources and deny them to independent strongmen.

What this indicates is that the post-Cold War international economy has resources that it deploys strategically in connivance with the weak but cunning leaders of weak African states. It is, therefore, important to theorise the concept of the weak state in the context of the search for security, and how the rulers of these states manage to construct such complex networks with foreign firms. It was within this politics that some African leaders deliberately mortgage African natural resources while using the security

firms' military support to suppress political competitors and to procure weapons to sustain their weak regimes.

The Geneva Centre for the Democratic Control of Armed Forces (DCAF), in a background paper on PMCs (DCAF 2006), tried to answer the question of why there is a market for PMCs. It provides general answers to the effect that in the case of weak states, private military forces intervened to compensate for lack of national capacity. PMCs offer high-tech skills in domains where national armed forces can no longer afford to train personnel or create attractive career opportunities. For example, in 1994 the president of Congo-Brazzaville hired a private military provider, Levdan, from Israel to provide security while he was busy dismantling those units loyal to the former president.

Weak African states and their leaders played a major role in facilitating the proliferation of the private security sector in Africa. Besides the phenomenon of weak states and weak African leaders, there were other important factors too such as the massive post-Cold war demobilisation of armed forces across the world and the post-apartheid demobilisation of some of the military units that had been active in destructive wars in Southern Africa. Herbert M Howe (1998:307) and Martin van Creveld (1991:32–35) identify four key factors in their explanation of the proliferation of the private security sector in Africa. These are: post-Cold War withdrawal of foreign patronage, the post-Somalia reluctance of the West and the United Nations to intervene militarily in Africa, heightened external demands for economic and political reform, and the changing nature of African insurgencies that have put additional pressure on already weak African governments. Michelle Small (2006:14) argues that

[w]ith violent challenges from below, from across, from above, and from the military-security apparatus itself, many African governments have turned to the PSI as a means to uphold and defend the state. Destabilising conditions have created a demand and a market opportunity for Private Security Services.

Small then proceeds to analyse the context of the emergence and proliferation of the private security sector and identifies a broad normative shift in international relations towards privatisation and the outsourcing of state functions. She notes that 'inextricably bound up with the shift in market forces, [is] the growing and glaring malfunctioning and weakening of the state with regard to fulfilling its social contract' (Small 2006:19).

In a recent article, Sabelo Gumedze (2007:1) also grapples with what is termed the 'marketplace purveyors of armed forces'. He identifies a number

of factors that have facilitated the proliferation of the private security sector in Africa. These include the general human insecurity in Africa and the marketisation of the public sphere.

However, what is more problematic than the reasons for proliferation is the issue of defining PMCs and PSCs. DCAF defines PMCs as businesses that offer specialised services related to war and conflict, including combat operations, strategic planning, intelligence collection, operational and logistical support, training, procurement and maintenance (DCAF 2006:2). Wairagu et al (2004:3) prefer to use the term industry with reference to private security. It is an industry that operates openly in the global market, and is fully organised along corporate lines. Singer (2004:91–93) tries to solve the definition conundrum by means of a classification system of military and security firms based on a hierarchy of services provided by them. He distinguishes between three types of firm: military provider firms (type 1), military consultant firms (type 2), and military support firms (type 3). However, Singer's classification system does not solve the military versus security dichotomy, hence my preference for the more neutral term 'private security sector' to designate both PMCs and PSCs.

PMCs and PSCs share a common, distinguishing feature with mercenaries in that both are motivated primarily by imperatives of profit rather than political reasons. Secondly, both groups are very active in areas where there is conflict. This means that they make profit out of conflict and crisis. Previously, those forces that were motivated by the imperatives of personal gain were designated as mercenaries (Musah & 'Kayode Fayemi 2000; Cilliers & Mason 1999; Arnold 1999). Holmqvist (2005:3) has argued that '[d]istinguishing contemporary private security actors from their mercenary forerunners is at once a complex and a straightforward task'. It is important to point out that mercenary activity is illegal under both the 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries and the 1977 Organisation of African Unity (OAU) -now African Union (AU) -Convention for the Elimination of Mercenarism in Africa. However, both the United Nations (UN) and the AU definitions are vague with the AU convention specifically pointing to mercenary activity aimed at overthrowing governments and recognising liberation movements.¹ PMCs and PSCs are not covered in these conventions. What is clear is that PMCs and PSCs operate like other ordinary commercial company with a corporate structure, legal status and corporate ties. Furthermore, many PMCs and PSCs operate as part of large industrial conglomerates that are capital intensive, benefit from a regular system of financing and operate in the international arena.

Private military forces today do not like to be described as mercenaries and make a strong argument that they act out of patriotic concern and a desire to maintain peace. This standpoint was clearly articulated by Eeban Barlow, the Director of Executive Outcomes, who stated: 'Our company's role in Sierra Leone-as it was in Angola-is to give support to a country moving towards democracy. No one could dispute the fact private military companies were a stabilizing factor in Africa' (Hooper 1996:45). What is notable here is how PMCs strive to portray themselves as agents of peace, stability and democracy in Africa rather than mercenaries. In search of legitimacy and acceptance, they focus on making a quick impact by pushing rebels out of cities and areas with strategic minerals. Their quick victories are used to advertise their services.

The War on Terror and the securitisation of Africa

The issue of weak states and contemporary global security is widely discussed but mainly in the context of the US's global War on Terrorism. Africa is factored into the US security analysis as a continent with the highest number of weak states conducive to terrorist operations. This point was explicitly argued by Robert I Rotberg (2002:127) when he wrote that

... [i]n the wake of September 11, the threat of terrorism has given the problem of failed nation-states an immediacy and importance that transcends its previous humanitarian dimension ... Although the phenomenon of state failure is not new, it has become much more relevant and worrying than ever before. In less interconnected eras, state weakness could be isolated and kept distant. Failure had fewer implications for peace and security. Now, these states pose dangers not only to themselves and their neighbours but also to peoples around the globe.

In this argument Rotberg is joined by Francis Fukuyama (2004:92), who wrote that 'since the end of the Cold War, weak and failing states have arguably become the single-most important problem for international order'. US Secretary of State Condoleezza Rice reiterated this train of thought when she declared that nations incapable of exercising 'responsible sovereignty' had 'a spill over effect' taking the form of terrorism, weapons proliferation, and other dangers (Garfinkle 2005:47–50). This thinking was influenced by the operations of al-Qaeda in Afghanistan (Patrick 2006:27). Weak states are discussed alongside failing and failed states. Writing about the dangers posed by these types of states, Marina Ottaway and Stefan Mair (2004:1) had this to say:

Failing and failed states present a grave danger to international stability as well as to the well-being of their populations. Internationally, they can become safe havens for terrorist organisations, centers for trade of drugs and arms, and breeding grounds for dangerous diseases. Regionally, they can spill instability well past their borders and create a conflict dynamic affecting neighbouring countries. Domestically, they cannot provide security for their citizens or deliver essential public goods.

This characterisation of weak, failing and failed states and the dangers they pose was done in relation to the security concerns of the West who were said to be ‘poorly prepared to deal with [these]’ (ibid). The main weakness in the argument that connects weak states with global terrorism is that the security of Africa itself is not emphasised. What is emphasised is the security of Western nations. This was clearly noted by Rita Abrahamsen (2005:65–67) when she argued that Africa was being framed as a security threat to the West. Abrahamsen engaged with the crucial issue of how since 9/11 the Copenhagen School, with its emphasis on security as the outcome of specific social processes like underdevelopment and poverty, came to be espoused by the West and America when engaging with African issues. Traditionally, Africa was regarded as a humanitarian and a development problem, but after 9/11, Africa became a risk continent in a globalising world. Abrahamsen terms this ‘the politics of securitization of Africa, concretized through securitizing speech acts’, such as like former British Prime Minister Tony Blair’s definition of Africa as a ‘scar on the conscience of the world’ (Abrahamsen 2005:55–80).

Securitisation as understood by the Copenhagen School refers to a specific act of speech in which an issue is framed as an ‘existential threat’ that requires extraordinary measures, beyond the routines and norms of everyday politics. Buzan et al (1997:26) note that the ‘existential threat’ is dramatised and presented as an issue of supreme priority. The clearest example of the construction of a security threat is the American and British military intervention in Iraq against Saddam Hussein. In Africa the dramatisation is summarised as ‘terror thrives in Africa’s rich ruins’, which encapsulates the Western presentation, perception and narration of anything happening in Africa in terms of a threat to security (Abrahamsen 2005:65–70). In this discourse Africa is seen as a free trading zone for the underworld and constituting a threat to the Western and American zones of peace.

Huysmans (1998:569–589) makes the point that securitisation is not merely a question of representation, nor a symbolic act, but has clear political

implications. For instance, identifying Africa as a security issue is not an innocent practice because it changes the mode of engagement between the rich North and Africa. If approached as a security issue, Africa may encourage fear and unease, precipitating policy interventions of a more militarised and illiberal nature (Abrahamsen 2005:16). In this discourse, Africa is generally viewed like the Arabs and the Arab world-as associated with terror and terrorists.

It is therefore important to avoid securitising Africa in an endeavour to explain how the phenomenon of weak states in Africa constitutes an enticement for PSC and PMC operations. We need to be specific about the aspects of the weak state that make it prone to private military intervention. Furthermore, we must be vigilant against invoking the racist argument that deems weak states, such as Zimbabwe, Somalia, Liberia, Sudan, and DRC, as reflecting the African Hobbesian image of a nature state where there is no order and where citizens live in continual fear and danger of violent death. We also need to be vigilant lest we fall prey to the anti-terrorism mantra that seems to be defining the whole of Africa as a zone of chaos prone to barbarism, anarchy and arbitrary violence.

Weak African states and the problem of defining state weakness

Informed by the dominant rational choice model/neo-institutional and ideational paradigms, four broad approaches have been used in the study of weak states and their connection to international security. The neo-institutional approach is akin to the development-inspired ethos that focuses on the institutions within a state and the elite's ability to govern (Brock at al 2005; Sorensen 2006; Jackson & Rosberg 1982; Clapham 1996). The second approach is the conflict-oriented approach. It focuses on regimes as abusers of the state and is dominant in post-colonial studies of the African state as a weak state (Clapham 1996; Reno 2000a). The third approach is the recent terrorism-inspired approach that attempts to provide a taxonomy of states, ranging from collapsed to strong, in an effort to determine when a state is on the brink of failure (Rotberg 2004). The final approach is the ideational approach that focuses on the state as a legitimate actor that is expected to provide its citizens with security and protection. It assumes state-society cohesion as the foundation of a state's strength (Buzan 1991; Holsti 1996). All four approaches are compromised by their foundation in the Weberian instrumentalist approach, which causes them to focus more on the symptoms of state weakness than on the underlying causes. Here the concern is with the connections between weak states and the phenomenon of the private security sector in Africa.

The connections between weak states and the proliferation of private security sector in Africa are dangerous, complex and often hidden. The debate is complicated even further because state weakness cannot be taken for granted and is not homogenous throughout Africa. As noted by Rotberg (2002:131), '[s]ome rush to the brink of failure, totter at the abyss, remain fragile, but survive.' He adds:

Weakness is endemic in many developing nations-the halfway house between strength and failure. Some weak states, such as Chad ... exhibit several of the defining characteristics of failed states and yet do not fail. Others, such as Zimbabwe, may slide rapidly from comparative strength to the very edge of failure. A few ... may suffer vicious, enduring civil wars without ever failing, while remaining weak and susceptible to failure (Rotberg 2002:131).

It is interesting that in his analysis Rotberg includes Zimbabwe as a weak state that is rapidly sliding into failure. Indeed, Zimbabwe is the one country in Southern Africa that has been growing steadily weaker since 1997. The news circulating in private e-mails and some electronic media is that since the beginning of the opposition's confrontations with President Mugabe's regime in March 2007, the regime has invited Angolan militias to help it fight the opposition. Even more disconcerting are the rumours of Chinese weapons and Israeli military instructors destined for Harare. If these rumours are true Zimbabwe will soon be using mercenaries to prop up an unpopular regime. An internal conflict between the state and its citizens is brewing in Zimbabwe (Hammar et al 2003; Ndlovu-Gatsheni 2006:49–81). So far, the situation in Zimbabwe is subject to too much speculation for one to make any definite link between the weakness of the Zimbabwean state and with the proliferation of the private security sector. What is beyond doubt is that Zimbabwe is today one of the weakest Southern African states with a clear potential to endanger the security of the region.

What needs to be emphasised is the fact that without a clear definition of a strong state it is not readily apparent what a weak state looks like. Rotberg (2002:132) notes that strong states are marked by their capability to control their territories and deliver a high order of political goods to their citizens. Secondly, strong states perform well according to standard indicators such as per capita GDP, the UN Human Development Index, Transparency International's Corruption Perception Index, and Freedom House's Freedom in the World Report. Thirdly, strong states offer a high level of security against political and criminal violence, ensure political freedom and civil liberties, and create an environment conducive to the growth of economic opportunities. Finally, strong states are supposed to be places or zones of peace and order.

After tabulating the key indicators of the strong state, Rotberg (2002:132) proceeds to contrast it with weak and failing states. Weak states are marked by tension, conflict and a perpetual sense of danger. These are some of the additional characteristics of weak states:

- Rise in criminality and political violence
- Loss of control over borders
- Rising ethnic, religious, linguistic and cultural hostilities
- Civil war
- Use of terror against their own citizens
- Weak institutions
- Deteriorated or insufficient infrastructure
- Inability to collect taxes without undue coercion
- High levels of corruption
- Collapsed health system
- Rising levels of infant mortality and declining life expectancy
- End of regular schooling opportunities
- Declining levels of GDP per capita GDP
- Escalating inflation
- Widespread preference for foreign currencies
- Basic food shortages leading to starvation
- Rising attacks on fundamental legitimacy
- Rulers working exclusively for themselves
- Key interests groups showing less and less loyalty to the state

- People's sense of political community weakens and citizens feel disenfranchised and marginalised
- Social contract between the people and the state is ruptured and forfeited
- Animosity becomes the order of life

A failing state and a weak state are one and the same thing. However, a collapsed or failed state is a different social formation altogether and, apart from Somalia, is hard to find. A failed state is a shell of a polity that remains only as a mere geographic expression, with borders but without effective means to exert authority within those borders. Sub-state actors take over what was previously the preserve of the state (Rotberg 2002:133–134). A weak state becomes a medium for the operations of trans-territorial networks locked in a struggle for resources, in which the networks replace legitimate channels of communication (Linz & Stephan 1996).

Patrick (2006:29) also grapples with the issue of defining weak and failing states. He explores weaknesses in the security, political, economic and social domains. In the security realm, he notes that weak states struggle to maintain a monopoly on the use of force. It is this weakness that becomes an enticement for the proliferation and growth of the private military sector.

Atiku-Abubakar and Shaw-Taylor (2003:168–185) carried out what they termed an 'empirical profile of weak states in Sub-Saharan Africa'. Basing their information on the Minorities at Risk Database (MAR), which is maintained by the Center for International Development and Conflict Management at the University of Maryland and supported by the National Science Foundation, the Carnegie Corporation, the US Institute of Peace, the Hewlett Foundation and the State Failure Task Force, they defined weak states as having a prevalence of structural inequality, the components of which include economic differentiation, cultural (or social) inequality and political inequality. They used this approach to try and predict inter-communal conflict in Africa. Their core argument can be summarised as follows:

[S]tate weakness can be described or captured by measuring structural inequalities within the state ... Structural inequality is based on political, cultural and economic differentiation or inequality within states. In other words, political incoherence, ethnic stratification, and the unequal distribution of wealth are the core dimensions of structural differentiation in Sub-Saharan Africa. The proliferation of

small arms and light weapons exacerbates the structural inequalities of these societies. The influx of light weapons or small arms may be seen as an opportunistic social disorder facilitated by domestic structural vulnerabilities and contradictions. In fact, the proliferation of these weapons may be seen as undermining the state's claim to the monopoly of instrument of coercion or violence (Atiku-Abubakar & Shaw-Taylor 2003:171).

Though prone to making sweeping generalisations about the whole of Sub-Saharan Africa, Atiku-Abubakar and Shaw-Taylor's attempt to come up with an empirical profile of weak states in Sub-Saharan Africa was important. Ultimately, however, they admitted that 'the overall construct did not perform well in predicting inter-communal conflict' (Atiku-Abubakar & Shaw-Taylor 2003:182). The main weakness of their approach is that it became too structural and too statistical as they sought direct correlations between their model and the actual realities of inter-communal conflict in Sub-Saharan Africa.

Chazan et al (1999:66) identified a number of indicators of state weakness around their concept of 'relative weakness of government'. The key indicators they isolated included scarcity of resources, politicised patterns of social differentiation, over-expanded state structures, insufficient state legitimacy, inadequate state power, and lack of adaptation of institutions to local conditions. Because of these factors, the weak African state is marked by its inability to organise and exploit material and human resources for the benefit of citizens. A weak state is unable to mobilise even its citizens for productive purposes and finally it fails to come up with and implement policies for greater societal growth (Englebert 1997; Dia 1996; Chabal & Daloz 2001). In the face of these weaknesses, leaders of weak African states become dangerously enterprising by issuing an open invitation to PMCs, such as Executive Outcomes, to enable them to hang on to power.

Weak states, comprador regimes and the private security sector

As long as weak states exist the efforts to regulate the private security sector in Africa will remain a mammoth task. A closer look at the politics of weak states, and particularly at the survival tactics of the leaders of weak states, reveals the crucial issue of who invites private military forces to operate in Africa. At the time that South African legislation against mercenaries, such as the Regulation of Foreign Military Assistance Bill of 1997, began to bite, the founder and director of Executive Outcomes expressed that he was not all

that concerned because '[t]hree other African countries [had] offered [them] a home and a big European group [had] even proposed buying [them] out' (Zarate 1998:11). This statement was very important because it meant that while some African states like South Africa were busy trying to regulate and even abolish companies associated with mercenaries other African states were inviting the same mercenaries to their countries. The emergence of Lifeguard in Sierra Leone immediately after Executive Outcomes was legally challenged and closed in South Africa indicates that Executive Outcomes did not die; it metamorphosed and relocated to Sierra Leone, where it took a new name. Lifeguard was made up of many of Executive Outcomes' former employees, maintained some of its old corporate ties, and operated in its former zones (Singer 2004:535).

Sierra Leone is one example of a comprador state in that in the face of extreme state weakness, the leaders of this West African country invited Executive Outcomes to the country. The initial deployment of this private military outfit was for the purpose of securing the capital city and mineral areas that were falling into the hands of rebels. Since the arrival of Executive Outcomes in Sierra Leone, the leaders of that country have found themselves heavily dependent on shared interests with foreign businesses. This entailed the state being transformed into an agent of foreign imperatives. Michael Doyle (1986) coined the concept 'imperialism by invitation' with specific reference to a situation in which leaders of weak states recruit or invite outside help to deal with local rivals. On this topic, William Reno (1997b:182) wrote that: 'in the era of formal imperialism, partnerships with foreigners centralised power in the hands of the collaborating faction that controlled the distribution of economic opportunity.'

All of this happens as the leaders of weak states use a foreign partnership to compensate for the lack of great-power patronage (Reno 1997b:227). In the period from 1995 to 1996, the Sierra Leonean government depended entirely on private military forces provided by Executive Outcomes as the rebels of the Revolutionary United Front (RUF) that had been fighting against the Republic of Sierra Leone Military Forces (RSLMF) were encroaching on the capital city. The fact that after the rebels had been cleared out of the diamonds fields, the beleaguered Sierra Leonean government signed over huge diamond concessions to foreign private firms aligned with Executive Outcomes (for example, Branch Energy), led Herbert M Howe to consider Executive Outcomes a 're-colonising force'. This is how he put it: "'Recolonisation" involves highly advantageous concessions, support for pro-EO politicians, and the permanent retention of foreign security personnel' (Howe 1998:318).

In January 1996, the International Crisis Group (ICG) sent a mission to Sierra Leone. It unearthed a myriad of complex links among security firms, mining houses and mining concessions (Harker 1998:2). The mission even concluded that the crisis in Sierra Leone was not the 'rebel war' but weak governance and economic mismanagement punctuated by complex involvement of PMCs. Sandline International, a big private security company, was involved in the conflict that pitted President Kabbah against the rebels. It provided weapons and skills to the forces loyal to Kabbah who had been ousted by his own military in May 1997 (Harker 1998:2). Rita Abrahamsen and Michael C Williams, in their recent Country Report on Sierra Leone, note that:

While the recent conflict (1991–2002) provides the immediate context for the expansion of private security provision, the use of private security has a long history in Sierra Leone. As early as 1936 the Sierra Leone Selection Trust, a De Beers subsidiary, was allowed to field a private 'security force' of 35 armed men to patrol its diamond concession in the Kono area. Much later, in April 1995, the Strasser government hired the South African Executive Outcomes to fight the Revolutionary United Front (RUF), an arrangement that was continued by President Kabbah until January 1997. Both the extraction of Sierra Leone's mineral wealth and the survival of its elite have thus historically been crucially dependent on the involvement of international private security actors, a relationship which continues, albeit in different ways, in the current post-conflict situation.

According to the Sierra Leonean Office of National Security (ONS), a government agency responsible for the private security sector,² over 30 different PSCs have been operating in Sierra Leone. The companies include Mount Everest, which is the largest and employs approximately 1 600, followed by Pentagon with over a thousand employees, and Hughes Security with 800 employees (Abrahamsen & Williams Report nd).

The example of Sierra Leone indicates how rulers of weak states use apparent weakness as a political resource, standing on its head the Weberian notion that state viability is proportional to its claim on a monopoly on violence (Reno 1997a:184). Sierra Leonean leaders privatised violence and outsourced the accumulation of wealth and the disciplining of wayward politicians and social groups to reliable foreigners. As long as weak states and their weak leaders continue to accommodate foreign financiers and fighters as an alternative security measure, it will remain very hard for Africa to speak with one voice on the issue of regulation of the private security sector. The private security sector is vital to the security of leaders of weak states who

use more reliable foreign mining firms and foreign private mercenary armies to marginalise threatening local strong men.

William Reno (1997b, 1998 & 2000) has ably demonstrated how leaders of Angola and Sierra Leone have used private military forces to collect revenue, defend territory, and conduct diplomacy with other states. The use of private security forces by rulers of weak states forms what Reno (1998:9) terms ‘regime innovations for managing’ internal threats.

Concluding remarks

Recent years have seen growing concern over the proliferation and growth of the private security sector in Africa. Africa was familiar with isolated colonial mercenaries who were hired by colonial regimes to fight against liberation movements. Post-Cold War Africa has awoken to the reality of highly organised, corporate type companies that provide military and police services to any entity able to pay for the services. This reality dawned in tandem with the post-Cold War liberalisation and privatisation processes. African states that, like any other state, had enjoyed a degree of control over the means and resources of violence are now challenged directly by the proliferation and growth of the private security sector.

As a result of this development that has caught Africa napping and without a ready legal framework to deal with and regulate it, serious efforts are being made to determine the causes of this proliferation and growth as well as innovative ways to regulate it. The present study focused on how weak states and their rulers have deliberately invited the private security sector to be part of their innovative strategies for survival and compensation for weakness. Even such well known warlords as Liberia’s Charles Taylor, Angola’s Jonas Savimbi and Somalia’s Mohamed Aideed managed to survive through the privatised pursuit of power, mimicking sovereign states within states and entering into complex relations and networks with private providers of military services. They were joined in this business by the recognised heads of weak states who also competed for PMCs’ protection. The leaders of Angola, Sierra Leone, DRC and other weak states are well known for inviting private military forces to prop up their precarious position.

In the face of the reality that some African leaders rely heavily on these private military providers for their survival, the option to abolish the private security sector is ruled out. Sabelo Gumedze (2007:16) noted that for any effective regulation of the private security sector, must be preceded by research to

determine the extent of this sector, the impact of the privatisation of security on vulnerable groups, the advantages and disadvantages associated with the sector, possibilities of partnership between private and public security bodies, the impact of the private security sector on the African security architecture, and the extent of mercenary presence and operations in Africa. This article added the element of how weak states and their rulers invite mercenaries to Africa and how they factor in this sector in their survival tactics and strategies. This is very important because as long as rulers of weak states regard the private security sector as a prop rather than a danger to their power they will not cooperate with efforts to regulate the sector. As long as these customers of the private security sector exist, its proliferation and growth will continue unabated. African leaders need to consider seriously how the existence of weak states constitutes a security issue in Africa, much as Westerners view poverty and underdevelopment in Africa as constituting fertile ground for terrorist recruitment. Countries such as the US and Britain consider the weak or failing African state extremely dangerous to international peace and security. However, African leaders seem unconcerned about weak states as a direct enticement to the entry, proliferation and growth of the private security sector in Africa.

Notes

- 1 The Additional Protocol to the Geneva Convention of 12 August 1949 provides an exhaustive definition of a mercenary. Its definition contains six criteria: a mercenary is any person who (a) is specifically recruited locally or abroad to fight in an armed conflict; (b) does, in fact, take direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by desire for private gain and, 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 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 conflict on official duty as a member of its armed forces.
- 2 As Sierra Leone has reconstituted itself and is on the road to recovery from conflict, it has since put in place legislation aimed at regulating the operations of the private security sector.

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CHAPTER 3

PRIVATE MILITARY AND SECURITY COMPANIES AND THE NEXUS BETWEEN NATURAL RESOURCES AND CIVIL WARS IN AFRICA

Mpako H Folang

Introduction

According to a report (Special Rapporteur 1997, §21(h)) on the use of mercenaries:

There are the modern private security companies which provide many different kinds of service, economic advice and sophisticated military training but which are covers for former professional soldiers and mercenaries offering themselves as a solution, in exchange for large sums of money, to countries experiencing instability and armed conflicts and the consequent impossibility of developing their enormous natural resources. Such companies ... today represent the biggest and most sophisticated threat to the peace, sovereignty and self-determination of the peoples of many countries.

The end of the Cold War and the collapse of the apartheid regime in South Africa lead to the downsizing of the military in many countries. As a result, a substantial number of regular officers and soldiers sought employment in conflict-affected countries. As 'Kayode Fayemi (2000:17) puts it, 'in no time, a lot of these soldiers found themselves in wars in Angola, Mozambique, Sierra Leone, Sudan, Liberia, Congo (Brazzaville), Congo (Kinshasa) and the Great Lakes region.' There is an ongoing debate on how to categorise and distinguish between old mercenaries and new ones, or how to differentiate between mercenary groups and private military and security companies, a differentiation which would allow establishing their accountability through the regulation of their activities. It is considered that the majority of private military and security companies provide military training and security services. Using the term private military firms, Singer (2004:1) sees them as 'business providers of professional services intricately linked to warfare'. Private security companies are supposed to be distinct from military companies in that they are limited to 'provide armed protection, most often for other companies rather than States' (Schreier & Caparini 2005:16) and in being restricted to specific

areas and tasks. They are not supposed to provide military assistance. Given the paucity of information about the nature of their activities, it has proved difficult to differentiate between the role played by private military and private security companies. This difficulty is even more visible in situations of conflict where there is a nexus between the exploitation of natural resources and the war.

The 1990s witnessed a change in the way in which wars were fought (Kaldor 1999: 2). The amount of available weaponry increased and the types of non-state actor engaged in conflicts multiplied (Ghebali 2001:32; Foaleng 2005:61–74). Non-state actors such as private military and private security companies are not new to world politics. Yet, during the last decade of the 20th century, they commanded unprecedented attention due to the increased interest in the role they play in internal conflicts and in the work of international institutions in peace maintenance.¹ The nexus between natural resources and civil wars in Africa also became more visible during the 1990s and reshuffled the classical understanding of armed conflicts by opposing the political motive to the economic motives of non-state armed groups (Duffield 1995:56; Keen 1998:29–31; Collier & Hoeffler 2001:3). The exploitation of natural resources became a dynamic behind the inception and continuation of civil wars and the operational activities of private security and military companies (Foaleng 2007:23–106).

This chapter seeks to highlight the risk constituted by the use of military companies as security providers and the link between natural resources and civil wars.² The goal of the chapter is to contribute further to the discussion on how the privatisation of public security constitutes an obstacle to the development of states' capacity to control, regulate and manage their natural resources. The chapter is divided into four parts. The first part introduces the reader to the nexus between natural resources and civil wars in Africa, while the second looks into the historical relationship between this nexus and mercenarism. The third part tracks the growing role of private military and security companies since the end of the Cold War and how their activities are relevant to the nexus between civil wars and the exploitation of natural resources in Africa. The final part discusses the influence such a growth has on African states' consolidation process including their full control of the exploitation and management of and trade in natural resources. The feature concludes by arguing that although there are certain positive aspects in the activities of private military and security companies and given the nature of many African states, the privatisation of public security in civil wars cannot be considered as an alternative to multilateral conflict management.

Natural resources and civil wars in Africa³

A number of countries that experienced armed conflicts during the 1990s, such as Liberia, Sierra Leone, Congo (Kinshasa) and Angola saw their natural resources-mainly mineral ones-at the heart of the dynamic behind these conflicts. The nexus between the exploitation of natural resources and wars is established by the use-by different actors involved-of revenues obtained from such exploitation to wage war and/or, conversely, the use of war to access and exploit natural resources and other wealth, in order to get rich. The nexus is also a sum of connections between the unbridled political and economic ambitions of the different types of actor and a variety of trades, for example in weapons, natural resources and other kinds of wealth, which finance civil war. It is a vicious circle. From within the country, actors using violence can capitalise on predation, pillage, extortion, robbery and the control of trade. The wealth thus collected, including natural resources in the form of minerals like diamonds, gold, timber, cobalt, coltan and other commodities, can then play a role in the inception and continuation of war.

The nexus under consideration can be divided into two phases, which do not necessarily follow one another. One is the exploitation of natural resources in order to acquire arms and a military arsenal. In this case, natural resources in the form of diamonds, timber, gold, or any other commodity that can be extracted, are used as a means to barter for military training, equipment and assistance. Natural resources can also be used to gain financial revenues necessary for such acquisitions. Access to the international black market, arms and military equipment and the building up of financial assets abroad all call for the maintenance of a set of internal and international connections and contacts. In the other phase, actors use the acquired military equipment and professional paid soldiers (in kind or cash) to wage war.

The link between the exploitation of natural resources and civil wars was brought to the attention of the international community by the work of the United Nations (UN) sanctions committees and a number of NGOs at the end of the 20th Century. The economic dimension of civil wars became an important factor in all attempts at conflict management and resolution, especially on the African continent.⁴ A wide spectrum of non-state actors have been involved in civil wars, building the channels and networks that nurture the nexus between wars and the mainly illegal exploitation of natural resources. Internal actors, states and non-state armed groups rely on external actors to be able to wage their wars. The external non-state actors include mercenaries, both in their old and in their contemporary form.

The evolution of mercenarism and the nexus between natural resources and civil wars

A myriad of organisations are involved in the supply of military and security services in their country of origin and in many countries around the world, mostly in Africa. Originally, they were all referred to as mercenaries and defined as ‘soldiers of fortune’ or ‘dogs of war’. A more recent definition considers mercenaries as ‘individuals who fight for financial gain in foreign wars ... [and who are] primarily used by armed groups and occasionally by governments’ (Center for Humanitarian Dialogue 2004:2). According to Goddard, who has a broader view, a mercenary is ‘an individual or organization financed to act for a foreign entity within a military style framework, including conduct of military-style operations, without regard for ideals, legal, or moral commitments, and domestic and international law’ (Goddard 2001:8). International law bans mercenary activities even though there is no one commonly accepted definition of what a mercenary is. Considered non-exhaustive, Article 47 of Additional Protocol I to the Geneva Conventions of 12 August 1949 gives a definition of a mercenary (Goddard 2001:8)⁵ which is repeated almost verbatim by the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.⁶ However, the attempt to find a consensual legal definition has proven to be difficult. The current definition is considered approximate because it no longer reflects the historical evolution of mercenary activities.

Mercenarism is not historically new in Africa. It is as old as colonialism and dates back to the late 18th Century when ‘many served as advance guards in the colonial scramble for Africa’s trade and territories’ (‘Kayode Fayemi 2000:17). During the 1960s and 1970s (‘the golden age of mercenaries in Africa’)⁷ mercenaries were known across the continent for their involvement in almost all the major battlefronts, *coups d’état*, and human rights abuses associated with the fight against communism, instability, white supremacy, secessionist movements, and attempts to preserve quasi-colonial structures (Schreier & Caparini 2005:16).

The involvement of this category of non-state actors in the nexus between civil wars and the exploitation of natural resources is not a new phenomenon, either. The first famous example goes back to the period of 1960 to 1965 when the Congo recruited the Belgian company Union Minière. With the blessing of the Belgian government, the Katangese secessionists and the US Central Intelligence Agency (CIA), Western mercenaries fought against the Congolese armed forces and the UN peacekeeping force. Their involvement in the war was clearly related to the maintenance of control

over the natural resources of Katanga by Western companies which found it difficult to accept the independent status of the Congo. Since then, mercenaries have been a permanent presence throughout the difficult evolution of many African countries. These have themselves outlawed the use of mercenaries although many regimes have resorted to mercenaries to fight internal rebellions and to maintain control.⁸ Moreover, multinational companies have used mercenaries to 'protect' their extractive activities, insecure regimes have used them to squash internal rebellions and former colonial powers have used mercenaries as 'foreign policy proxy' (Frances 1999:333–334), to fight 'unfriendly regimes' or rebellions, and to defend their national interest abroad—in other words, to maintain control over the resources of the countries concerned.⁹

Mercenary activities underwent gradual changes during the 1990s. These changes came about in parallel with and as a result of transformations of civil wars and the growing importance of the conflicts' economic dimension—represented by the use of natural resources. Traditional mercenaries started to disappear: 'The misfit professional soldier who acted on his own initiative to form a gang to do dirty work on behalf of a third party' became more sophisticated in his actions and was 'channelled back through the façade of modern management and service companies' (Special Rapporteur 1997, §21(h)). However, the activities of many of these 'new' management companies, categorised as military and security enterprises, remained very much linked to the exploitation of the natural resources for which many African territories have been coveted for centuries.

The growth of private security companies/private military companies

With the end of the Cold War and the subsequent restructuring of intra-state systems on the African continent, a number of non-state actors came to occupy the scene, especially in situations of armed conflict characterised by the nexus under consideration. Among the non-state actors involved in and taking advantage of the networks underlying this nexus were private security companies (PSCs) and private military companies (PMCs). PSCs provide protection services for individuals and property and are used by extractive national or multinational companies, humanitarian organisations and individuals, mainly in situations of armed conflict, violence or instability. Since the 1990s, PSCs have undergone a rapid growth, providing guards and police-type security services and eventually outnumbering national police forces. Theoretically, the activities of such companies are not supposed to have an impact on the course of the conflict, but this is not always the case.

The activities of PMCs, on the other hand, do have a major impact on the course of armed conflict. PMCs provide military services designed to significantly influence a given situation for the benefit of one or the other protagonist. They are generally contracted by governments. Unlike PSCs, the activities of which may not be aimed openly at influencing the course of warfare, PMCs are a direct protagonist in conflict. Both the security and military sectors underwent significant transformation in the 1990s, becoming privatised and business-oriented. To refer to Schreier and Caparini (2005:7), 'representing the evolution of private actors in warfare and of the mercenary trade, this new industry is different from the classical type of mercenaries. The critical factor is their modern corporate business form. In other words, the activities of private actors in warfare and the mercenary trade evolved in the sense that they increasingly took on a corporate form. Companies of this type, which began to operate in Africa and elsewhere, are often led by former military officers and soldiers of fortune, be they national or foreign, and they build their activities on close ties with diplomatic and intelligence services.

Activities of private security companies/private military companies relevant to the nexus

In many conflict situations in Africa, the activities of private military and private security companies have been linked to the presence of multinational or national extractive companies. Extractive companies are actors based in or outside the conflict zone. They may be involved in conflict by supporting some parties through economic interaction. Their participation in war is not politically motivated; private economic gain is their main interest. Hardly ever do they appear on the scene of war as protagonists, but they bargain their position with each belligerent. Consequently, they appear to be one of main actors in the networks that sustain the nexus.

The presence of multinational or national corporations is welcomed by rebel armed forces. Corporations, paying for the possibility of exploiting natural resources, constitute one of rebels' main financial resources. Security for the companies in conflict situations is essential for securing and thus enabling their activities. In situations of armed conflict, national private security companies called—depending on the circumstances—private guard services, protection forces or protection companies, can easily be transformed into militia groups (Liberia Report 2005, §21). In the case of Liberia, for instance, during the Taylor regime and the country's civil war, the permanent state of insecurity made timber companies seek to provide their own protection forces. These forces soon became militia groups engaging in the conflict

itself and adding to the number of armed non-state actors already involved. It should be recalled that militias represented one of the largest sources of violent conflict in rural Liberia (Liberia Report 2004b, §18). Sometimes former combatants took advantage of their experience to become business persons. During the lull in the conflict, a number of former generals ran timber companies and used company funds to pay the wages of the security companies that provided protection for their activities. Some of the timber companies were implicated in smuggling arms and ammunitions not only for their security forces, but for government forces as well (Liberia Report 2004a, §124). Arrangements between timber companies and security companies included the latter providing security to the former, which ensured a steady supply of revenue for Taylor, gave employment to a number of combatants who had fought with Taylor's forces and ensured a loyal security force at the major ports which, if necessary, could be used to control the regular army. Similarly, timber companies paid the wages of soldiers and managers of protection companies. The protection forces, which participated in activities falling far beyond protection, were accused of human rights violations and of intimidating local people and owners of other companies in order to gain access to forests and to make sure that their logging company had better access to the ports. Moreover, they looted and recruited fighters in neighbouring countries such as Côte d'Ivoire (Liberia Report 2004a, §115).

Armed groups also use natural resources as a means of attracting PMCs or, vice versa, PMCs are attracted by natural resources controlled by non-state armed groups. For instance, in the case of the Angolan conflict, the rebel group *União Nacional para a Independência Total de Angola* (Unita) followed the strategy of using rough diamonds rather than cash or bank deposits as the primary and preferred means of stockpiling wealth. Unita's ability to exchange rough diamonds and to sell them was a means of sustaining its political and military activities (UN Security Council 10 March 2000, §15-17, 46). Indeed, the rebel group used diamonds exploited in the area under its control to purchase arms, weapons and military equipment as well as to fund military training from foreign actors and from neighbouring countries such as South Africa and Namibia. Whether all the providers of military training, arms and weapons acted on behalf of PMCs or were freelancers is not clear. The UN panel of experts on sanctions against UNITA was could not confirm the presence of mercenary companies, but only that of foreign military personnel assisting the rebel group. At the same time, however, a report of the Special Rapporteur on mercenaries' activities mentioned the presence of mercenaries in UNITA's control area and in the government forces, which at the beginning of the 1990s only exercised control over the coastal areas of Angola. According to the Special Rapporteur, there was a profusion of sophisticated weapons in

Angola and mercenaries were involved in training troops and fighting (Special Rapporteur 1994, §39). The control UNITA exercised in the eastern part of the country allowed it to facilitate the arrival of mercenaries from Zaire. The government of Angola resorted to companies like the now defunct Executive Outcomes, which had previously fought alongside UNITA, to fight against the rebel group (Special Rapporteur 1994, §40).

In situations of civil war, governments generally welcome the presence of multinationals when the states' natural resources can be used as the main source of revenue to fund the crisis. Governments use natural resources, be it in nature or as revenues derived from their exploitation, as a mode of payment to companies whose activities are in reality of a military nature. Multinationals bargain their access to and concessions for the exploitation of natural resources and participate in the nexus as intermediaries that facilitate contact among the different actors taking advantage of the nexus. Most of the time, individuals (nationals or foreigners) working for these companies are businesspersons who often supply arms to all sides of the conflict in exchange for access to the revenue from the exploitation of natural resources or who facilitate the transformation of natural resources into financial revenue. The role of these individuals is not always well elucidated because it is not clear if they act as individuals or as employees of those companies.

There is yet another category of non-state actors that has become increasingly important in triggering and perpetuating armed conflicts, defining protagonists' strategies and *coups d'état*. In this chapter they are called African 'independent soldiers'. They become involved in conflicts abroad operating individually, through military or security companies, or through rebel group affiliations at the sub-regional level. 'Independent soldiers' engage in armed conflict purely for economic interest. Sometimes they are not-yet-demobilised former combatants from neighbouring countries, for example Liberians in Sierra Leone and Côte d'Ivoire.

In summary, the presence of PSCs and PMCs securing the exploitation of natural resources in situations of armed conflict poses a risk as it contributes to the militarisation of society. In addition, these companies facilitate arms proliferation and, by influencing the balance of military power, exacerbate tensions among protagonists. Furthermore, the dividing line between trading in arms and military training is difficult to determine. During the last decade of the 20th Century, the world discovered the phenomenon of proliferation of weapons-on the African continent mainly small arms. This proliferation was brought about in part by major weapon producing countries' decision to sell off their stockpiles. A number of actors, including

PMCs, got involved in the traffic surrounding arms trading. In many cases, PMCs were involved in trading arms trade alongside many other sellers and buyers, which gave easier access to weaponry to a broader variety of non-state actors directly involved in the conflict. This, in turn, made it easier for PMCs to profit from the nexus between civil wars and the exploitation of natural resources:¹⁰ 'Confident that most of the groups in desperate need of their services are not in a position to pay in cash, "security firms" demand payments in the form of mining concessions and oil contracts' ('Kayode Fayemi 2000:23).

Impact on states' consolidation process

At this stage of the analysis, the question arises about the impact of PSCs and PMCs on the state consolidation process. The wide spectrum of non-state actors involved in civil wars and in the nexus as such leads us beyond the motives of these actors to the question on the nature of the state in which private security and military companies are able to operate.

The nature of African States

The realist school of thought, which is based on a state-centric paradigm of international relations, has always been applied with difficulty to the African continent. 'Failed states' (Rotberg 2004), 'weak states' (Jackson & Rosberg 1986:259–282), 'collapsed states' (Zartman 1995:301), 'shadow states' (Reno 2000:45), 'quasi states' (Jackson 1990:13–48)-these are some of the labels used to describe the nature of post-colonial African countries. The term 'collapsed state' describes an exceptional situation where the state as a functioning institution ceases to exist and its territory is left without any recognised political structure, as in the case of Somalia. It is in this sense that the concept 'failed state' has been regularly used. Liberia and Sierra Leone have often been cited as examples of failing or failed states which 'ceased for at least a time to function as states' (Pham 2004:272). It is, however, very subjective to use the adjective 'failed' to qualify a state. The concept of a failed state is a negative one. It means that the state has failed to keep the Weberian characteristic which is that the state holds the monopoly on the use of violence on its territory. The following characteristics constitute the monopoly on violence:

- A consolidated territory
- A specialised, disciplined and hierarchical army and administration,

the soldiers and employees of which are recruited based on their qualifications and expertise

- A strong separation between the private and the public
- Control over the exploitation and trade of natural resources and other wealth

African countries have often been qualified on the basis of structural, political and socio-economic factors, which can also be used to explain why civil wars in some countries have an important economic dimension. When one talks about the breakdown of state cohesion in some African countries it is based on the assumption that right after gaining independence these states were well consolidated from the Western or Weberian point of view. This view ignores the fact that many African states are still in the initial phase of the process of their formation. The first African power holders were left with territories (which, in most cases, no longer reflected the political entities that existed before colonisation and with an economy based on the extraction of natural resources to be exported to the colonial power) to be transformed into viable states.

From the theoretical point of view, a state is an independent and internationally recognised entity that has at its disposal a territory within which it enjoys sovereignty and an organised political authority exercised over a population.¹¹ From the Western point of view, the features of the international system are traced back to the Westphalian framework which entailed a set of sovereign political entities ruled by leaders who of necessity exercised total control over the territory recognised as belonging to those states. In addition, 'the Westphalian system was grafted on the strict recognition of the legal equality of each and every State' (African Studies Centre 2003:3). Thus, three main elements characterise the Western state: population, territory and effectiveness.

Although many postcolonial countries in Africa did not necessarily fulfil these criteria, they have been considered states and accepted as part of the international community. Theoretically and pragmatically, the functioning state should have control over its territory including its natural resources and citizens. As such, the functioning state is able to exploit its resources and to deliver a full range of public goods and services to its citizens. These goods and services include security, justice, confidence and rule of law, and citizens are people who identify themselves as those represented by the state. If, from the UN¹² and a legal point of view, African countries were undoubtedly states,¹³ in reality few of them ever completely fit into this definition. Therefore, the problem is not so much in these countries but in

the definition of the state. The attributes of the state are still an objective to attain at least in Africa understood as a geographical area. Those who are of the view that African states have failed have misunderstood the fact that these countries are actually struggling-be it consciously or not-to consolidate their institutions and that war is part of this process.

Some are of the view that 'several other members of the Westphalian system located in the former Third World relapsed or now threaten to relapse into what might be deemed a "premodern" phase of State evolution in which there is no question of sovereign control or an effective monopoly of violence but many parallel and competitive manifestations of exercising power over people and territory' (African Studies Centre 2003:4). Rather than accepting this view with respect to newly independent African states, we argue that many of them have always been part of the premodern phase of western state model construction. Far from being part of an already consolidated state-system that is now supposedly decaying, several African countries were awarded 'full statehood' status too soon. They are actually struggling to acquire it now, including control over their resources and wealth. In Africa, the prerequisite for recognition and integration within the Western state system is the adoption of the formal structure of a state (Tilly 1990:195).

The nature of African states is questioned here since it is at the centre of the reality of and struggle for state consolidation, which involve a multitude of non-state actors and violence. The interests of non-state actors, such as PMCs and PSCs, do not always coincide with the state's need for survival and consolidation.

The impact

The idea persists that many African countries have lost the ideal Weberian attributes of the state which, by definition, include the monopoly on violence. This argument assumes that if African states had enjoyed these attributes before losing them. In reality, some of them, for instance Angola and Mobutu's Zaire, have never had the monopoly on the use of violence since other non-state armed groups have been continuously active, despite the states' efforts to gain full control. In addition, as pointed out before, in many cases governments have themselves resorted to mercenaries to secure their regimes. Consequently, states have not been able to monopolise the use of violence. The variety of activities undertaken by private military and private security companies in some countries have helped fuel 'the privatisation of political violence which undermines-or makes more difficult-the reestablishment of the state monopoly on legitimate violence' (Schreier & Caparini 2005:5).

It has been argued that the privatisation of security in many African countries can help to prevent or defend civilians from being subject to widespread violence by uncontrolled armed groups during armed conflicts. This argument stems from the understanding that a government unable to fight the rebels on its own calls PSSCs or PMCs to assume some of its responsibilities and provide security for the state and protection for civilians. Private companies provide weapons, serve as military trainers, or plan and conduct small-scale military operations. However, in reality, private military and security companies often provide security for the rulers so that these can secure the resources for themselves and prevent their opponents from accessing them. It usually happens in countries with high levels of corruption. For instance, during the 1960s the regimes of Strasser in Sierra Leone and Mobutu in the Congo adopted the strategy of giving foreign firms independent sources of income in return for military security. PSCs are engaged to protect diplomats and other foreign workers in some countries as if there were no forces and no need to train and form a national army, national security service or police forces capable of defending the state and provide protection and safety for its residents. In some cases, state security is limited to the security of foreign firms that extract the natural resources that constitute the main source of revenue for the state. The revenue is needed to maintain internal ties and patrimonial system networks during the war. Furthermore, state security in many cases is limited to the mining operations and the security of the elite in power. An example is the Taylor regime in Liberia between 1997 and 2003.

International appeal for the intervention of PMCs and PSCs is also based on the supposed strategic impact they may have on a conflict situation. The argument is that the superior military capability of these companies has a strong impact on the political and security environment of the countries in which they operate, which can stabilise a crisis and coerce a negotiated settlement (Shearer 1998:9). The use of military companies is considered as an alternative for peace enforcement, especially in cases where international institutions, such as the UN, the AU or sub-regional organisations, are not willing or are taking time to act and intervene to protect civilians. The examples often cited by way of illustration are Sierra Leone and Angola where the governments relied on corporate military companies to fight rebellions and to regain control over diamond-rich areas. This permitted the governments to maintain a certain level of 'development' although the countries were at war (Shearer 1998:9). However, it should be remembered that PMCs are not the only military forces at scenes of war. Thus, the impact of their activities should be evaluated in relation to the whole scene and put into the broad context of the conflict management process. Indeed, in the case of Sierra Leone, the defunct Executive Outcomes' claim to have returned

stability was short lived because in May 1997 the newly elected government was overthrown in a military coup d'état staged by the Armed Forces Revolutionary Council (ARFC). When Sandline International intervened on behalf of the government in exile to fight against the unrecognised ARFC/Revolutionary United Front military regime, other elements on the scene included forces of the Economic Community of West Africa (ECOWAS), different militia groups and the UN arms embargo that had been put in place. The embargo did not prove effective. However, the fact that it was in place eliminated some potential arm dealers from engaging in the traffic.

'Old' mercenaries have a long history of helping unpopular and dictatorial regimes in Africa. That is why African states and the UN insist that mercenary activities be condemned. It is difficult to believe the claim by the 'new' corporate companies that they want to assist and help legitimate governments. At the basis of their interest in African countries are money, resources and business. Their involvement falsifies the internal endogenous evolution of the state in its consolidation process.

Conclusion

There are certain legitimate and acceptable roles for PMCs and PSCs acting in accordance with national and international law. Various initiatives, such as that of the Swiss, will certainly help to broaden existing knowledge and highlight gaps in terms of such firms' accountability. However, it should be kept in mind that there have been situations in which certain services performed by these companies have increased, prolonged or exacerbated conflicts, facilitated human rights abuses and contributed to slowing down of the consolidation process of African states. In many cases, rather than empowering the state, the engagement of these companies has been an obstacle to the development the state's capacity to control and manage its national natural resources. It is not a secret that some of these corporate companies 'fight their battles not only for cash but for strategic minerals on behalf of a corporate establishment' (Schreier & Caparini 2005:i).

The privatisation of public security cannot be considered an alternative to multilateral conflict management. The private nature of PMCs and PSCs and the fact that their very existence is based on cold financial calculations are in contradiction to multilateral efforts to resolve conflict (Musah & 'Kayode Fayemi 2000:260). Many of these companies are involved in armed conflict situations because of natural resources. They do not contribute to the re-establishment and/or the consolidation of the power of the state. The transfer of public security

to the private sector is 'at best the manifestation of the failure of common security and at worst the avant-garde of attempts at corporate recolonisation. Controlled by mining multinationals, the major private companies ensure that beleaguered African leaders have guns pointed at their heads while signing away the cheap mineral concessions to mercenary-backed mining concerns' (Musah & 'Kayode Fayemi, 2000: 261). That is how 'private military security shields become more expensive to the weak States if considered against the fact that the cost of multilateral peace enforcement is not borne by the State in conflict' (ibid). The whole point is that the privatisation of public security has always been part of the network of commercial alliances directly related to the exploitation of natural resources of African states. Instead of trying to promote the use of PSCs and PMCs as an alternative in conflict management, one should use the resources needed for such promotion to empower the UN and regional¹⁴ and sub-regional institutions of conflict resolution which are progressively put in place by African countries themselves.

Notes

- 1 See, for instance, *Full Proceedings* of the Conference on Engaging Non-State Actors in a Landmine Ban: A Pioneering Conference, held on 24 and 25 March 2000 at the International Conference Centre of Geneva. The Proceedings were published by the Conference Organisers in Quezon City in 2001 and comprise 186 pages.
- 2 Civil war in this chapter is considered as a conflict that mainly opposes one or more internal actors of and in the territory of a country, with at least one of them aiming at overthrowing and replacing the power holder. It is a conflict of mixed character since in many cases it has an international dimension owing to the implication of a number of external actors.
- 3 The link between natural resources and civil war is referred to in this chapter as the 'nexus'.
- 4 In the conflicts in Angola, Congo (Kinshasa), Liberia, Sierra Leone and Côte d'Ivoire, the UN Security Council established panels of experts with the mandate to investigate the violation of its sanction measures, which targeted *inter alia* the economic dimension of the conflicts.
- 5 Article 47 of Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 states that:

A mercenary is any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
 - (b) does, in fact, take a direct part in the hostilities;
 - (c) is motivated to take part in the hostilities essentially by the desire for private gain and, 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 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.
- 6 See the definition given in article 1 of the Convention, A/Res/44/34 adopted by the General Assembly and the 27th Plenary Meeting on 4 December 1989. This definition does not include the provision of Article 47(b) of Additional Protocol I on the Protection of Victims of International Armed Conflicts.
- 7 Ibid.
- 8 Indeed, the OAU Conventions for the Elimination of Mercenarism in Africa of 3 July 1977, states in article I that:
1. The crime of mercenarism is committed by the individual, group or association, representatives of a State and the State itself with the aim of opposing by armed violence a process of self-determination or the territorial integrity of another State that practices any of the following acts:
 - a) Shelters, organises, finances, assists, equips, trains, promotes, supports or in any manner employs armed forces partially or wholly consisting of persons who are not nationals of the country where they are going to act, for personal gain, material or otherwise;
 - b) Enlists, enrolls or tries to enrol in the said forces;
 - c) Allows the activities mentioned in paragraph (a) to be carried out in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operations of the above mentioned forces.
 2. Any person, natural or juridical, who commits the crime of mercenarism as defined in paragraph 1 of this Article commits an offence considered as a crime against peace and security in Africa and shall be punished as such.
- 9 One of the most notable agents of mercenary activities in Africa has been the French Foreign Legion which has operated in Algeria, Cameroon, Chad, Djibouti, Morocco, Congo-Brazzaville, Congo-Kinshasa, Somalia, Angola and Benin. Mercenaries also

intervened in the Nigerian civil war (1967–1970). Most of the *coups d'état* in former French colonies were orchestrated by mercenaries. Individuals who won notoriety for their mercenary activities include Frenchman Gilbert Bourgeaud (known as Bob Denard), who was involved in the Comoros in 1975, 1978 and 1995; Irishman 'Mad' Mike Hoare, who was involved in the Seychelles in 1977 and 1982; and the German Colonel 'Black' Jacques Schramme.

- 10 About this connection see Special Rapporteur pursuant to Commission Resolution 2001/3, 10 January 2001, Report on the Question of the Use of Mercenaries as Means of Violating Human Rights and Impeding the Exercise of the Rights of People to Self Determination, Document E/CN.4/2001/19, § 60, 61.
- 11 For a legal definition see for instance, J Crawford, 1976–1977.
- 12 Immediately after their independence, African countries were given membership of the UN.
- 13 Indeed, Jackson and Rosberg argue that 'by enforcing juridical statehood, international society is in some cases also sustaining and perpetuating incompetent and corrupt governments. Perhaps the best example in sub-Saharan Africa is the international support that has gone into ensuring the survival of the corrupt government of Zaire' (see Jackson & Rosberg 1982:22). We agree with this argument only if the idea is to question the fact that the international community of mainly non-African governments and multinationals have prevented endogenous attempts, either by rebel groups or by governments in power, to structure and consolidate state institutions, for instance by assassinating the independentist leader Patrice Lumumba, thereby disrupting the probable state building programme he may have put into place. Zaire is just one example among many others.
- 14 At the continental level, those defined within the framework of the Constitutive Act of the AU. In order to enhance its role in maintaining peace and security, the AU established a Peace and Security Council that is tasked with identifying threats to and breaches of peace. To this end, the AU recommended the development of a common security policy and, by 2010, the establishment of an African Standby Force (ASF) capable of rapid deployment to keep (or enforce) peace. The ASF would comprise standby brigades in each of the five regions of the continent, and contain police and civilian expert capacity. See the Policy Framework for the Establishment of the African Standby Force and the Military Staff Committee, adopted by the African Chiefs of Defence Staff, Addis Ababa, 15–16 May 2003.

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CHAPTER 4

ETHICAL SECURITY: THE PRIVATE SECTOR IN PEACE AND STABILITY OPERATIONS

J J Messner*

Introduction

The private sector has rapidly become an indispensable component of peace and stability operations worldwide. The expansion of the industry has had significant consequences for Africa, both in terms of its effective use on the continent, and its employment of Africans in support of operations conducted by the United Nations (UN), North Atlantic Treaty Organisation (NATO) and the African Union (AU). As the role of private contractors in support of peace and stability operations has increased, so too has public discourse on the efficacy of using contractors in conflict and post-conflict zones. The existence and utilisation of such companies has become an undeniable fact. The legitimate demand for private contractors in peace and stability operations has increased significantly in recent years simply because there is a critical need from the world's militaries.

This reality is due to a number of reasons. Though the private sector has been involved in military operations for almost as long as war itself has existed, reliance on private companies has increased recently largely as a result of the significant downsizing of many of the world's militaries-particularly in the US and Europe-since the end of the Cold War. Worse, in many countries only a small fraction of their militaries can actually be deployed abroad without major structural or legal changes. This drop in capacity has led to a critical need to outsource many previously state-owned functions. Organisations such as the UN, NATO and the AU are currently overstretched, committing an unprecedented number of peacekeeping personnel to peace operations around the world (UN 2007a). The world's largest military power, the US, is no different, with much of its resources being committed to missions in Iraq and Afghanistan.

* The author is grateful to Doug Brooks, Robert Vainshtein and Denitza Mantcheva for their assistance with this paper.

Issues of terminology

As the use of the private sector in peace and stability operations increases, so does apprehension. Much of this hesitation stems from confusion between legitimate private companies supporting peace and stability operations, and illegitimate actors who have participated in some of Africa's conflicts over the past few decades. In a handful of these conflicts, various parties have employed the services of non-governmental and often illegitimate actors, referred to by some as 'mercenaries'. This is despite the lack of a solid definition of what actually constitutes a 'mercenary'.

It is important to understand exactly what is meant by the term. There is currently no credible, legally recognised definition, and its use has tended to be of a more pejorative nature. Recently, the term has been applied to the private peace and stability operations industry by opponents of the industry, who have used the term either because they simply do not fully understand its meaning, or because of an ideological desire to tarnish and prejudice the perception of the industry. The peace and stability operations industry shies away from the term not least because of the fact that there is no acceptable definition, but also because it carries such powerful negative connotations that bear no relevance to the industry.

Clients and activities

The nature of the client is a key difference between the operations of the legitimate peace and stability operations industry and the activities of illegitimate actors. Legitimate companies are bound by a mixture of laws, industry ethics and accountability to owners or shareholders. As a result, firms only contract with legitimate governments, international organisations or private entities. Even then, companies will tend to turn down contracts that do not fit their corporate ethos, and may impact on their long-term reputation or ability to win future contracts. Others will not conduct services that are of questionable or unclear legality. Generally, incentives ensuring appropriate behaviour are very strong.

To be sure, Africa has experienced a number of incidents involving illegitimate actors in conflict. In every conflict, foreign groups and organisations have been invited to take part in the conflict on behalf of one protagonist against the other. It is only when these incidents include 'whites and Westerners' that we get the perception of the 'soldier of fortune' or 'mercenary'. Certain actors in each of these incidents have nearly universally been referred to as 'mercenaries' in the

historical literature. It is therefore instructive to examine these incidents, as this sort of activity exemplifies what is meant by the term.

A number of these incidents have involved rebel groups hiring 'white and Western' foreign actors to assist with the conduct of their war efforts against incumbent governments. An early example of this is the attempt by the mineral-rich south-eastern province of Katanga to secede from Congo in 1961. The Katanganese forces hired a contingent of between 20 and 100 foreigners to assist them in their conflict against the Congolese army (Tickler 1998: 20). In 1967, and again in 1968, Biafra, another secessionist African province, this time in south-eastern Nigeria, hired two different foreign forces to assist them in its bloody conflict against the Nigerian federal Army (Mockler 1987:123, 132). All three foreign forces achieved varying levels of accomplishment, but all were ultimately unsuccessful in defeating the government forces in Congo and Nigeria respectively. In all instances, the foreign forces contracted with rebel groups enjoying varying levels of legitimacy. Biafra, for example, was recognised as an independent nation by a handful of countries. Katanga, on the other hand, was fought by UN peacekeeping forces. In both instances, it could be difficult to categorise either Katanga or Biafra as legitimate governmental entities.

While rebel groups have called upon the services of foreign non-governmental entities to fight incumbent governments, the reverse is also true. In 1964, the Congolese government hired foreign forces to assist with their repulsion of rebel forces-known as the Simbas-from the eastern provinces of the country (Tickler 1998:40). In most instances, the foreign forces were fighting alongside Congolese government forces (ibid:30). In 1996–97, foreign forces were again engaged in Congo, by both Mobutu Sese Seko's government forces and Laurent Kabila's rebel group, the Alliance of Democratic Forces for the Liberation of Zaire (AFDL). The definition of 'mercenary' becomes even muddier in these instances, since the client is an internationally recognised government.

Other incidents have involved attempts at overthrowing an incumbent government from outside of the country. Such attempted coup d'état occurred in the Comoros in 1975 and 1978, the Seychelles in 1981, and Equatorial Guinea in 2004. In these incidents, involvement from foreign governments attempting to execute a covert political end was suspected and even on occasion admitted or proven. Two coups that took place in Comoros were believed to have been clandestinely supported by the French government in order to oust presidents it did not favour (Bakar 1988:187). Similar to the Comoros case, in the failed Seychelles coup, the majority of the participants were South African, and when they returned from the abortive coup, they

were released after a short period of detention. However, in the wake of international uproar, South African authorities eventually arrested, tried and imprisoned the participants, albeit for comparatively short terms (Tickler 1998: 108, 113). This soft treatment of the coup's participants, the fact that at least one of the participants was found to be a South African National Intelligence Service officer and the South African government's obstruction of a UN Commission sent to investigate the incident were interpreted by some as a sign of South Africa's official involvement in the coup attempt. Indeed, official South African involvement in the coup was later confirmed by then President P W Botha (ibid:111). Other accounts allege varying levels of influence by the CIA, from instigation to mere acquiescence (Ellis 1996:174). Foreign government involvement in Equatorial Guinea is not as clear as in the Seychelles or Comoros, and as such has never been proven. However, the Spanish government is widely believed to have been the primary supporter of the operation, and allegations have also been made against the American, British and South African governments for at least tacitly approving of the venture (Roberts 2006:175, 204). A major problem arises here in defining 'mercenaries' as somehow acting outside the international system since in all these instances the operations were supported by legitimate governments, generally of Western nations, to effect regime change.

Modern-day private contractors in the peace and stability operations industry would tend to decline contracts such as these, where transparency, accountability, legitimacy and effective legal frameworks are lacking. Participation in operations such as these would inflict extensive damage on the reputation of a company, and would significantly decrease its ability to remain a viable candidate for future contracts, especially for clients beyond their home government. These commercial incentives are too often ignored by even serious researchers.

The private peace and stability operations industry contracts with a variety of different clients. Approximately 62 per cent of private operations are under contract to various governments; 29 per cent of operations are under contract to non-governmental organisations; and the remainder involves private companies or individuals (Messner et al 2006:11). Companies will also tend to contract with clients from multiple fields-indeed, roughly 93 per cent of companies contract with governments, and 50 per cent contract with at least one non-governmental organisation (ibid).

Contrary to popular belief, more than 90 per cent of the industry comprises companies that provide logistical support and/or training rather than armed security. The widespread misconception that the industry

involves exclusively military operations stems from the explicit media focus on photogenic armed security and the common neglect of logistics support services primarily performed by private contractors. Accurate representation of private sector operations in conflict and post-conflict environments and an expansion of public understanding of this industry's capacities and capabilities are essential if policy makers are to be enabled to make rational decisions about the best utilisation of the private sector in support of conflict alleviation.

Private contractors are currently providing critical services in support of peace and stability operations in countries such as Afghanistan, the Democratic Republic of Congo (DRC), Haiti and Iraq, to name a few. Other recent examples include the protection of key oil infrastructure in the Middle East and Africa, the 'War on Drugs' in Colombia, and the protection of key world leaders such as Afghan President Hamid Karzai and many of the foreign diplomats in Iraq. Meanwhile, in non-security operations, private companies have been engaged in military and police training in Iraq, have supported the US Army's worldwide logistical needs and have provided similar support to the UN and AU in Africa. Other companies fill niche roles, such as worldwide GPS tracking of contractors and supporting the Regional Operations Command Center in Iraq, an installation itself managed by a private firm. These are but a few of examples that shed light on the capabilities and opportunities that the private security industry has to offer.

The need for private contractors

A significant motive for utilising the private security sector is the fact that some services, such as heavy aviation, are not readily available to most of the world's militaries, and thus are often outsourced to private contractors. In other cases militaries have the in-house capability but outsource because the private sector can do the job faster and cheaper. For instance, private contractors played a crucial role in Operation Desert Storm, Operation Enduring Freedom and Operation Iraqi Freedom, providing much-needed logistical support, such as construction, transportation and maintenance of equipment (Kidwell 2005). The US military has a long tradition of utilising the services of private security companies; indeed, there were over 80 000 private contractors at any one time supporting the US military in the Vietnam War, when the military was at Cold War strength (Zamparelli 1999). Given the past reliance on the private sector when the military was larger than it is now, no one should be surprised at the current trend.

To maximise the benefits offered by the private sector, the US Army established the Logistics Civil Augmentation Program (LOGCAP) in December 1985 to incorporate the use of private security companies into combat operation planning. Since then, the US military has made extensive use of the services that the private sector has to offer, for example contracting to private companies to provide vital logistics and unprecedented support and comforts to US troops in Bosnia in 1995 and to support US military operations in Timor-Leste. They built bases and refugee camps, managed cafeterias and operated power, water and sewage systems, vastly reducing the strain on the active military.

In peace operations, private contractors provide services needed in military operations in a professional and efficient manner-services that the militaries themselves are lacking in capacity or will to provide. The UN, for example, relies on voluntary contributions of troops by member countries, thus, subject to its members' generosity and mere chance. Events such as the 1994 Rwandan genocide or the 1995 Srebrenica massacre, both of which happened before the very eyes of UN peacekeepers, are a grave testimony to the severe shortcomings of UN peacekeeping capacities. As some countries have become disillusioned with UN intervention, scandals such as the UN Oil for Food Program, and regular allegations of sexual abuse by UN peacekeepers in Cambodia, Congo, Haiti, Mozambique, Sierra Leone and elsewhere only add to the apparent limitations of the UN and emphasise its inability to adequately train, control and even vet its peacekeepers. The private sector is increasingly utilised to make operations more capable and cost effective, thus reducing the required size-and problems-of interventions.

Private contractors offer greater accountability and professionalism. Most companies comprise ex-military and professionally trained personnel equipped with the appropriate skills and expertise and astonishing levels of experience. Furthermore, while private contractors are not immune to abuses and problems, the nature of private competition itself is underrated as a mechanism for the future regulation and preclusion of such mischief. Ethical concerns aside, private companies have their commercial reputation to preserve. Moreover, private companies are prone to allocate greater attention to risk management in conflict situations, since jeopardising the life of their employees is, if not anything else, highly unprofitable. Serious researchers need to understand these concerns and incentives from a commercial perspective.

Consequently, the question for policy makers should not be whether or not to utilise private contractors, but rather how best to tap the enormous potential of the industry while ensuring effective regulation and controls. The answer to the latter is to be found in the nature of the private sector itself.

Methods and structures of regulation

Regulation by contract

Private operations are first and foremost subject to contractual constraints. Contractors' performance is largely dependent on and gauged by their contractual agreements. Companies strive to fulfil their contractual obligations to the best of their abilities as successfully fulfilled tasks increase the likelihood that they will be employed again in the future. Thus, it is up to the employing organisation (whether governmental, non-governmental, or international) to establish the framework and set the limits to private contractors' activity and to insist on accountability. This is a logical arrangement, since private contractors should, by their nature, be contractually accountable to their clients (Dickinson 2006:5).

There is also an obligation incumbent on contracting entities when hiring private companies to operate in conflict and post-conflict zones. Often, contracting services to the private sector will tend to favour the lowest bidder. In few industries is this effective practice, and particularly less so in the private peace and stability operations industry. When governments or organisations award contracts, quality matters and they should never base their decisions solely on price. Like any product or service, you get what you pay for. When a contract goes to the lowest bidder, operating at the lowest cost possible, this necessarily implies a risk that the personnel and equipment hired would be of a lesser quality than more expensive but legitimate companies. Contracting entities must assume their own share of the responsibility as to which companies they hire.

Regulation by domestic law and international convention

The private peace and stability operations industry itself is a leading advocate for greater regulation, something that is useful in weeding out less capable and especially less reputable firms. But it is important that a balance be struck between sensible regulation and unreasonable, draconian laws. While gaps remain, there are already strong legal frameworks in place that apply to much of the industry's operations around the world. Key questions, such as to who companies are accountable, and the rule of law as well as which laws should and can be applied in conflict or post-conflict environments, must be answered by sensible regulation. It is incumbent upon governments to ensure that private companies are able to operate within a clearly defined legal and regulatory framework. This only rewards better, more professional

companies, as the tighter the regulation, the more difficult it becomes for less reputable companies to continue to operate.

Currently, private contractors are subject to myriad laws worldwide. The US has a particularly well-developed system for gaining the most from contractors, and firms are bound by a variety of laws and regulations, such as the Military Extraterritorial Jurisdiction Act of 2000 (Public Law 106-778) (MEJA), which allows US authorities to prosecute 'persons employed by or accompanying the Armed Forces' (US Government 2000), in other words, private contractors, for criminal offences; the International Trade in Arms Regulation (ITAR), which regulates the import and export of firearms and security services; and the Federal Acquisition Regulations (FAR), which regulate every aspect of contracting between the US government and private firms. At this stage, no fewer than seven new bills that affect the industry directly have been proposed by various members of Congress.

Though some legislation on the issue exists in other countries, the US currently possesses the most advanced legal framework for utilising private companies in the peace and stability operations industry. There has been some legislative movement in the United Kingdom on the issue of companies in the industry, and the Swiss government, in conjunction with the International Committee of the Red Cross, has sponsored conferences and research to address the proposed establishment of a coherent legal framework to regulate the industry. One of the most notable legislative initiatives affecting the industry concerns South African legislation proposed in 2005 to prohibit 'mercenary' activity throughout Africa.

The South African legislation, the Prohibition of Mercenary Activity and Prohibition and Regulation of Certain Activities in an Area of Armed Conflict Bill of 2005 (B42-20051)-though a positive development in attempting to improve the legislative framework governing the private sector in peace and stability operations-initially suffered from definitional problems. The bill experienced significant opposition from industry stakeholders and NGOs in both committee hearings and parliamentary debates, due in no small part to its overly broad scope and onerous requirements on companies as well as licensing requirements even for humanitarian NGOs.

The South African bill was drastically revised after extensive criticism from a wide range of interest groups including the International Peace Operations Association (IPOA), Amnesty International, the Catholic Church and the International Committee of the Red Cross. For example, the original bill would have given South African authorities universal

jurisdiction over any individual of any nationality anywhere in the world, but after intense pressure its jurisdiction was limited to South African nationals or to activities conducted within South Africa. The original bill also severely restricted humanitarian activity, and where it was allowed, called for a highly onerous permit regime. The legislation would have impacted heavily not only on the private sector, but also on humanitarian organisations and foreign armed forces employing South African nationals.

The bill has been passed by the South African Parliament and by the National Council of Provinces; it has been awaiting presidential assent ever since. Though the bill has been delayed significantly, it has already had an impact on the private industry. Indeed, a major private security firm fired over 100 South African employees operating on a US government contract in Iraq based simply on the feared implications of the South African legislation. Though robust legislation is welcomed, legislative frameworks that are unwieldy, overly sweeping and draconian should be avoided. The private sector is able to make significant contributions to peace and stability, and legislation should support this and not hinder it unreasonably.

International attempts at regulation have been less successful, due in no small part to the continuing confusion regarding the definition of 'mercenary'. One definition is provided by the Geneva Conventions:

2. A mercenary is any person who:
 - a. Is specially recruited locally or abroad in order to fight in an armed conflict;
 - b. Does, in fact, take a direct part in the hostilities;
 - c. Is motivated to take part in the hostilities essentially by the desire for private gain and, 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 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 (Geneva Conventions 1949).

This definition is replicated almost entirely (save for a few grammatical changes immaterial to the meaning or intent of the definition) in the 1977 Organisation for African Unity Convention for the Elimination of Mercenarism in Africa. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries, adopted by the UN in 1989, provides a slightly different definition:

1. A mercenary is any person who:
 - a. Is specially recruited locally or abroad in order to fight in an armed conflict;
 - b. 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 rank and functions in the armed forces of that party;
 - c. Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
 - d. Is not a member of the armed forces of a party to the conflict; and
 - e. 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.

2. A mercenary is also any person who, in any other situation:
 - a. Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
 - i. Overthrowing a Government or otherwise undermining the constitutional order of a State; or
 - ii. Undermining the territorial integrity of a State;
 - b. Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
 - c. Is neither a national nor a resident of the State against which such an act is directed;
 - d. Has not been sent by a State on official duty; and
 - e. Is not a member of the armed forces of the State on whose territory the act is undertaken (UN Mercenary Convention 1989).

The definition of a 'mercenary' provided by either convention is problematic due to its broad scope. The conventions could be just as applicable to a British Gurkha soldier as to a private contractor or the classical 'soldier of fortune'. Any person who serves in any kind of war or contingency operation-even

for their own country's military-could easily be included in the definition of a person who is recruited locally or abroad in order to fight in an armed conflict. The definition could also easily apply to just about any peacekeeper in any UN, AU, Economic Community of West African States (ECOWAS) or NATO peacekeeping mission. Any international intervention will, by its nature, consist of nationals whose countries are not party to the conflict. Although this issue is addressed by a subsequent qualification that exempts official duty members of the armed forces of a state which is not party to a conflict, it does not exempt private contractors who are sent by governments to fulfil the exact same role.

A further definitional issue arises when determining how a person takes part in hostilities. A contractor protecting a road convoy in Iraq, for example, seeks at all costs to avoid conflict, so best to protect the asset. However, if that convoy is attacked by insurgent elements and the contractor acts to defend the asset, that contractor must then surely be defined as taking part in the hostilities, even though the key responsibility of that contractor is conflict avoidance. A definition that encompasses motivation to take part in hostilities being predicated on personal gain is similarly inadequate. Such a definition could include many types of person who would be commonly accepted as a legitimate actor in conflict. An American, for example, could join the US military in order to gain generous government entitlements such as tuition, retirement and veterans benefits (US Army 2006). A Mexican citizen could join the US military in order to benefit from the fast-tracked US Citizenship Program available to foreign nationals serving with the US armed forces (Thompson 2006, §1).

In short, it is very difficult to regulate the industry effectively at an international level if such conventions continue to focus on the mythical concept of 'mercenaries' and fail to address properly the reality of the modern day private peace and stability operations industry. The industry has been positively engaged in forging suitable international frameworks. Nevertheless, it is next to impossible to regulate something that is ill defined.

Regulation by internal industry standards

Beyond these contractual and legal frameworks, a group of prominent companies within the industry have agreed to bind themselves to an internal industry code of ethics. These companies are members of the International Peace Operations Association (IPOA), and all have voluntarily agreed to be bound by IPOA's Code of Conduct, a convention that outlines companies' responsibilities in the fields of human rights, transparency, arms, safety

and workplace relations. The IPOA Code of Conduct was adopted in early 2001, resulting from earlier discussions between private companies, non-governmental organisations, human rights lawyers and academics involved in the conflict in Sierra Leone during the 1990s. Since its inception, it has been revised ten times and, since 2005, has settled into a two-year revision cycle. With every revision, input is actively sought from all stakeholders in conflict and post-conflict environments.

Abidance by the IPOA Code of Conduct is a responsibility that is not taken lightly. The IPOA Code of Conduct is an actionable document, such that signatory companies can be investigated and potentially punished for proven systemic violations of the code's provisions. Indeed, IPOA, as a trade association of private contractors, is one of the few trade associations in the world to advocate for more and better regulation of their industry. Membership of IPOA has rapidly become highly valued by companies within the industry, and as such, members of IPOA are increasingly being viewed as representing the gold standard of the private peace and stability operations industry. From an industry perspective, the better the regulation, the greater the marginalisation of potentially unethical or unprofessional operators. Thus, clients gain a level of confidence by utilising IPOA companies.

Nevertheless, internal industry regulation should never be considered as a substitute for good regulation at the governmental level. No matter how thorough and comprehensive the IPOA Code of Conduct or other forms of internal regulation may be, IPOA and other such organisations are not courts of law and as such are unable to regulate as comprehensively as governments. Despite these constraints, efforts at internal regulation should be encouraged as a method for keeping high ethical standards within the industry as a voluntary measure.

Conclusion

The increased use of private companies in peace and stability operations has become a fact of life, and is impossible to reverse. The industry contributes significantly to the success of peace operations worldwide, and assists the international community in ending suffering in some of the world's most brutal conflicts. It is in the interests of Africa and the international community that the positive contributions of the private sector be openly supported, within a robust, legal and ethical framework. Cooperation with the industry can do much to increase transparency, accountability and effectiveness.

For the industry to move forward, it must be properly regulated. Good regulation can only come about through an honest, unprejudiced and unbiased assessment of the industry, and such frameworks will only be weakened when the industry is incorrectly associated with illegitimate actors. The private sector is supportive of good regulation as such robust frameworks greatly assist good companies in competition and make clients more comfortable utilising industry services to a far greater extent. Though the industry has made significant advances toward strong internal regulation, this can never be a substitute for action at the governmental level.

Not only do private contractors contribute to the sustainability of peacekeeping operations, but they also possess the ability to respond to critical situations in a much faster and impartial way, lacking the heavy bureaucracy and political impediments of international bodies such as the UN. But, by no means are private contractors a replacement for the UN or the world's militaries. Nor are they decision-makers. Private contractors are an effective and efficient enhancement for the world's peace and stability operations but will never be a substitute. For the UN, NATO, the AU and militaries worldwide to remain relevant and effective, the private sector offers vast capabilities to support their operations.

The private sector will continue to have a central role in helping militaries carry out national and international policies. By understanding the industry's potential, recognising how to ensure effective oversight and control, and fully utilising tools such as contracts and trade associations, even small militaries can find their missions achievable, or at the very least, significantly easier to achieve. The humanitarian benefits are enormous and this can only be a positive trend in international efforts at ending conflicts globally.

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PART III

**ADDRESSING PRIVATE
SECURITY SECTOR
CHALLENGES IN AFRICA**

CHAPTER 5

THE PRIVATE SECURITY CHALLENGE IN AFRICA: PROBLEMS AND OPTIONS FOR REGULATION

Andy Bearpark and Sabrina Schulz

Introduction

The chapters in this monograph clearly demonstrate that the private security phenomenon in Africa provides great opportunities but also poses severe risks. On the one hand, private security companies (PSCs) have the potential to improve the security situation for people where the state fails to live up to its duties. This is if PSCs deliver their services in a professional and accountable manner. On the other hand, in the absence of professional standards, their activities may aggravate an existing security situation through leaving the underlying causes for insecurity unresolved. Moreover, private security activity may be counter-productive if security comes at a price that only the rich can afford thus excluding a majority of the population from its benefits. Such developments risk undermining long-term development efforts as well as fundamental tenets of the human security paradigm. Any effort to regulate the private security industry must take these dangers into account.

This chapter addresses some of the challenges arising from private security activity in Africa from a policy-oriented perspective. It also makes suggestions as to how PSCs in Africa could be regulated in an effective and meaningful way. Although a rich body of academic literature on the options for the regulation of the private security industry is currently emerging (for example, Chesterman & Lehnardt 2007; Bryden & Caparini 2006; Kinsey 2006; Percy 2006) there seems to be a real need to add the perspective of a regulatory agency. The British Association of Private Security Companies (BAPSC) is the self-regulatory body of the private security industry in the UK, one of the biggest export markets for private security worldwide. Because of the presence of its members in more than 100 countries, the BAPSC has developed expertise in a wide range of regulatory issues.¹ Some of the lessons learnt will be introduced in this article, and it is hoped that they will provide a useful perspective on the regulatory challenges in the African context.

This article will first address some of the definitional problems regarding private security activity in Africa. It will then take a 'big picture perspective'

and address the broader structural and historical context of the emergence of private security activity in African countries. Subsequently, the article will draw on three empirical cases—the Niger Delta, Sierra Leone and Kenya—to illustrate the complexity and diversity of the African private security landscape. Against this background, a ‘matrix approach’ for the regulation of PSCs in Africa will be introduced. It is based on the private security industry’s experience with different regulatory regimes as well as ongoing exchange with industry representatives who wish to remain anonymous. With the matrix concept this chapter seeks to provide guidelines for the implementation of regulatory frameworks that are both specific to the local context and compatible with international standards-setting initiatives.

Private security in Africa—definitional challenges

The value of any policy recommendations for the regulation of PSCs depends, first and foremost, on an appropriate definition of the different activities in the private security sector. Regulation only makes sense if the activities that are to be subject to control are well delineated and understood.

The regulatory debate, be it in the public sphere or at the expert level, sometimes runs the risk of conflating several highly distinct areas of private security activity. It certainly cannot be denied that the transition between different types of private security service is sometimes seamless. According to the laws of the country, private security activity may be armed or unarmed; private security services may be offered on a strictly local basis or exported across national borders; they may be coupled with other specialist services such as risk consultancy; or they may help with kidnap and ransom situations, or provide training for either armed forces or civilians in hostile environments. The nature of the services provided also depends on the client groups of a PSC; these can be governments, international organisations (IOs), non-governmental organisations (NGOs), private businesses or wealthy individuals. Furthermore, a clear distinction has to be made between services mirroring activities of the police and those mirroring activities of the military. Police-like tasks are almost always domestic in nature and include patrolling, riot control and tasks that have been outsourced from a country’s penal services, such as running a private prison. Military-type tasks are usually services that have been outsourced from the armed forces, such as training, the maintenance of military equipment, or military aid to other governments.

Against this background, there are, therefore, at least three distinct categories of company that offer private security services. Firstly, there are PSCs

offering both armed and unarmed private security services to the domestic market. The case studies in this chapter largely refer to these companies. As to the regulation of PSCs that operate domestically it is certainly the task of the relevant government to determine the most appropriate regulatory framework. Nevertheless, an international perspective may spur on the debate and the implementation of regulation. The last part of this chapter will show how domestic and international regulatory efforts can complement each other meaningfully.

Secondly, there are international PSCs with headquarters or offices in several countries. They usually offer what the industry refers to as ‘premium’ security services, which include, for example, the static armed guarding of embassies, facilities of international corporations, oil fields and pipelines, mines and critical infrastructure. Moreover, companies in this second group also protect politicians and foreign dignitaries and offer convoy protection services. Usually, their personnel have a distinguished military or law-enforcement background and substantial experience in hostile environments. Their image of professionalism is usually ensured by means of thorough vetting, ongoing training of operators and appropriate liability insurance policies for their operations. This does not, of course, exclude the possibility of acts of gross misconduct or the violation of human rights and international humanitarian law (IHL) by individual operators. The prevention of such incidents has to be at the core of all regulatory and standards-setting initiatives for international PSCs. The last part of this chapter will explore the options for the regulation of international PSCs in more depth.

The last category of companies offering private security services are private military companies (PMCs). The label usually refers to companies that offer support services to the armed forces of either their own or a foreign country. The distinction between PSCs and PMCs may be largely semantic and reflect cultural preferences and caveats. Whereas the term PMCs may be perfectly acceptable for US companies working directly for the US government, the same is not true for the UK. This is largely because up to 90 per cent of the client base of UK companies consist of private and commercial actors and only a maximum of 10 per cent of all contracts are performed for the government. In the US, this ratio would roughly be the reverse. Another reason why some companies prefer the term PSC is their claim that they would only ever use armed force for defensive purposes. Yet whenever armed force has to be used in an operational environment the distinction between offensive and defensive action may be hard to establish. This means that it is hard to distinguish between PSCs and PMCs with regard to legal, regulatory and standards-setting questions. As a rough guideline it

may, however, be safe to say that PSCs would refrain from offering combat services to any client, including their own government.

Structural conditions for private security activity in Africa- the problems of statehood and weak state capacity

In order to develop useful and relevant policy recommendations for PSCs in Africa it is vital to understand the specific historical and socio-economic context in which PSCs first emerged in African countries. Some of the many reasons that are usually given to explain why private security activity emerged in Africa are the downsizing of the armed forces after the Cold War, global processes of market liberalisation, the proliferation of arms and small weapons and a general situation of insecurity (see, for instance, Gumedze 2007). One of the most important enabling factors for the emergence of private security forces is supposedly weak state capacity and the concomitant security vacuum in large parts of Africa. This means that PSCs can be seen as the product of long-term historical development rather than a phenomenon of relatively recent origin.

As Clapham argues, weak state capacity is due largely to both indigenous and colonial 'projects of territorial statehood' (Clapham 1999:27). The Weberian model of the modern, territorial nation-state with its monopoly over the legitimate use of force has not always proved to be an appropriate way of providing security to the citizens of African states. During colonial rule, 'traditional' ways of providing security at a sub-state level were deliberately eliminated. According to Clapham (1999:25F) '[i]t was ... one of the key projects of colonial rule to ensure that security derived, and was seen to derive explicitly from the central state, and that any mechanism through which African communities might seek to maintain "their own" security was systematically destroyed or strictly subordinated to the colonial authorities'. Although these undertakings did not necessarily prove successful, non-colonial African states emulated the concept of the territorial state, not least in order to defend local independence against potential colonialist endeavours (ibid:27). These processes bear hardly any resemblance to the creation of the nation-state and the concomitant emergence of a sense of national identity among the European colonial powers themselves. As a result, national cohesion and the perceived legitimacy of the state may be somewhat less developed than in many other, especially Western, countries of the world.

Further reasons for weak state capacity in Africa and its decline from the late 1980s onwards and throughout the 1990s are the failure of economic

liberalisation and structural adjustment programmes that were imposed by international donors, such as the World Bank and the International Monetary Fund (IMF) (Mkandawire & Soludo 1999; Simon 1995). This is not to say that these actors are directly to blame for Africa's development problems. Rather, 'Africa's own rush towards development ... amid an unforgiving capitalist world economy' (Chan 2007:94) can explain many of the challenges to state capacity in contemporary Africa. This means, however, that the reasons for Africa's security problems are embedded in the structural framework of a globalised world economy to which African states cannot always respond efficiently and effectively.

These structural factors produced not only the strained economic situation and high degrees of unemployment, but also the proliferation of small arms and light weapons which together form the backdrop to the private security phenomenon in Africa. The combination of these phenomena has led to a sharp increase in violent crime that public security forces are often unable to tackle due to inefficiency, corruption, and insufficient training (Global Coalition for Africa 1999/2000).

When state capacity is lacking and a country's legitimate security forces are unable to provide security, alternative security structures must be put in place. This may, of course, come at the price of sacrificing the nature of security as a public good (see Kaul et al 1999; Ostrom et al 2002), which, in the absence of appropriate state policies, may reinforce rather than alleviate existing social divisions and tensions. Since private security does not necessarily tackle the causes of insecurity, it cannot replace the state as a provider of security but, if handled wisely, it may complement official policies and measures.

Empirical insights and the need for regulation

It is also clear, however, that meaningful recommendations for the regulation of PSCs in Africa can only be made on the grounds of sound empirical data. The current dearth of empirical insights into the private security market in Africa is, therefore, more than unfortunate. Research remains sketchy and, up to this day, only one major comparative research project has been conducted, by Abrahamsen and Williams (2005a, 2005b, 2005c). The project has produced fresh data and novel insights into the domestic private security industries in four countries, namely South Africa (not published at the time of writing), Nigeria, Sierra Leone and Kenya. The authors' research also demonstrates clearly that there is no one-size-fits-all

solution to the regulatory challenges for the industry in the whole of sub-Saharan Africa.

Common problems in all case studies concern a pervasive sense of insecurity, a low level of trust in public security forces, general poverty and the exploitation of security guards through long working hours and extremely low salaries, thereby making them prone to involvement in criminal activity. Yet there are also distinct features in every country that require tailor-made solutions for the regulation and control of private security activities. Evidence for this claim is provided through the following summaries of case studies on the role of PSCs in the Niger Delta, Sierra Leone and Kenya respectively.

The private security sector in Nigeria is largely shaped by the increasing need for professional security services in the Niger Delta and the presence of international PSCs providing these services to other international or multi-national businesses. The conflict in the Delta has become a medium-scale insurgency that requires a comprehensive political solution. Because the local population does not reap any benefits in terms of either security or prosperity from the presence of international companies in the Delta the security situation is deteriorating steadily. Bunkering (i.e. large-scale oil stealing) is one of the gravest problems in a country that depends on oil for 95 per cent of its export earnings and 80 per cent of total government revenues (Piazza 2007).

As a US Department of Defense official pointed out recently, militant groups in the Delta now appear to be operating with complete impunity (CSIS 2007). The deteriorating security situation has led to a reduction of the overall on-shore oil production by 500 000 barrels per day, which equals a loss in revenue of \$1 billion per month and attacks are now also moving off-shore (ibid). As to the effects on individual oil companies, Shell reported 54 attacks on its installations and 11 kidnappings in 2006 alone (ibid).

The official armed forces in Nigeria are unable to deal with the insurgency because the troops are underpaid, poorly trained and large parts of their equipment are inoperable. The Navy's readiness rate is down to 12 per cent; this means that it is virtually non-operational (ibid). Consequently, there has to be a comprehensive solution to the situation in the Delta, combining political and military means, to re-establish security. The role of PSCs will have to be addressed in any attempt to resolve the conflict.

The current security structure in the Niger Delta, of which PSCs are part and parcel, is characterised by a complex and intricate network of actors and the

boundaries between them are grey at best. Since the use of firearms by PSCs is prohibited, close relationships have been formed among state security forces, PSCs and oil companies respectively. It is common, for instance, for members of the Mobile Police (MoPol) to be permanently seconded to PSCs to function as an armed component to their operations (Abrahamsen & Williams 2005b:11, 13). MoPol officers are not directly answerable to the PSCs but they are bound to comply with the companies' codes of conduct and other internal standards (ibid: 13), which does not, of course, guarantee their legitimate and professional behaviour.

The Nigerian Ministry of Internal Affairs is currently unwilling or unable to regulate the private security industry. Against this background, standards for PSCs and their operations are most likely to impose themselves through increased competition because clients, such as oil companies, wish to work with respectable and reliable companies, not least to protect their own reputation (ibid:16). A standards-setting process may be promoted through industry associations. However, while there are several competing industry associations in Nigeria, every one of them is currently pursuing its own agenda. There seems to be agreement among the companies on the need for regulation through a regulatory authority (ibid:9f). However, at the same time, most local companies fear the competition of foreign PSCs whose 'high levels of professionalism' may threaten their own existence (ibid:10). It may, therefore, be an option to rely on foreign PSCs as the drivers of regulation and standard-setting initiatives, but this is probably not an ideal scenario.

Several aspects of the Nigerian situation are also common features of the private security markets in other Sub-Saharan African countries. Security problems related to the extraction of natural resources, for instance, are equally prominent in Sierra Leone. Like elsewhere in Africa, there is little trust in public security forces and, hence, we witness an increasing demand for private security services. At the same time, however, the case of Sierra Leone is very specific because of the consequences of the civil war which lasted from 1991 to 2002. The private security sector is one of the few growth markets in the country and PSCs offer some of the scarce employment opportunities for ex-combatants (Abrahamsen & Williams 2005b:7, 12).

Furthermore, because of the UN arms embargo that was imposed on Sierra Leone in 1997, non-state actors, including PSCs, are not allowed to buy arms and there is considerable controversy as to whether this should remain the case or not (ibid:16ff).

These doubts are not least due to the lack of sufficient state capacity to provide effective regulation and oversight. Against this background, international PSCs operating in Sierra Leone could, again, function as the driving forces in a standards-setting process. With international businesses and aid agencies as their main client base it is not inconceivable for them to implement standards that go beyond what is required from them by local law, for instance in the area of employment. It is already the case that state authorities scrutinise foreign companies far more frequently and rigorously than their local competitors (*ibid*: 13). Moreover, local companies might perceive a standards-setting process driven by foreign companies as a threat to their business advantages, in particular in that their services are cheaper than those of their international competitors.

Abrahamsen and Williams suggest self-regulation as a possible way of introducing minimum standards in the private security industry in Sierra Leone but they concede that it would not solve all its problems, in particular as far as the enforcement of labour laws is concerned (*ibid*:18). One of their key demands is therefore that the private security sector be incorporated into ongoing security sector reform (SSR) programmes, not least because PSCs could potentially have a major impact on the improvement of Sierra Leone's security situation (*ibid*:19).

Considerable regulatory challenges also exist in Kenya where the private security industry is one of the fastest growing sectors (Kamenju et al 2004:1). Yet, at the same time, PSCs themselves are frequently perceived as a major source of insecurity (Abrahamsen & Williams 2005a:3, 17; Kamenju et al 2004:107). The introduction of regulation is therefore seen as urgent and the government seems to be planning to establish a Private Security Industry Regulatory Authority mirroring the South African and the British models for the licensing and monitoring of domestic private security services (Abrahamsen & Williams 2005a:9). Concerns have been voiced, however, that the draft bill does not cover some of the most important issues, such as training and wages, and there are also doubts regarding its effective enforcement (*ibid*).

The ongoing dispute over the enforcement of the minimum wage and other labour laws for the usually unarmed security guards is currently one of the biggest issues for domestic regulation. Other, non-domestic, regulatory challenges facing the Kenyan industry stem from the export of private security services to neighbouring countries. Because of the comparatively highly developed private security market in Kenya and because of the country's strategic geographical position, Kenya serves as a hub for the

export of private security services to the entire Horn of Africa, Sudan and DRC (ibid:8). International agencies as well as the extractive industry are increasingly relying on the services of Kenyan PSCs, which adds weight to the call for regulation. But it also complicates the situation because of the cross-border dimension of the problems involved.

A seminal study on the private security sector in Kenya by Jan Kamenju et al (2004) calls for effective government regulation through licensing and monitoring schemes. In addition, it recommends the formation of professional associations through which security operators could be represented in official committees and voice their legitimate concerns (ibid:106). At the same time, these associations could promote self-regulation and the professionalisation of the sector (ibid).

As these three brief case studies have demonstrated, national private security markets reflect the overall socio-economic circumstances, the political situation and the strategic challenges of a country. It is, therefore, close to impossible to suggest a one-size-fits-all template for the regulation of these diverse national markets. The chapter will, therefore, now introduce an intellectual framework for the coordination of regulatory efforts in different countries, not only in Africa but worldwide.

A matrix approach to regulation-lessons learnt for Africa?

In order to tackle the challenges arising from both the domestic and the trans-border trade in security services, this chapter suggests a 'matrix approach' to the regulation of PSCs. As the examples above have demonstrated, the private security industry in any given country reflects political and social national idiosyncrasies. Moreover, there are also huge differentiations within the sector in any given country. At the same time, the delivery of private security services transcends borders with considerable ease. This applies both to African companies operating in neighbouring countries and to international, i.e. Western, PSCs who offer their services to mostly other Western businesses in African countries. Therefore, any regulatory framework has to address national characteristics and the trans-national nature of the private security industry simultaneously.

A matrix approach to regulation would, therefore, consist of regulatory schemes at different levels, namely the national, the regional and the international, as well as within the industry. These different regulatory schemes would have to be complementary and, ideally, mutually reinforcing.

Rather than covering every single one of these levels it is essential to ensure that different regulatory frameworks are interlocking. For instance, industry self-regulation may be inappropriate in a specific national context and regulation through regional organisations may not always be feasible.

National regulation, most importantly, has to incorporate all applicable international law, including both statutory and customary IHL and international human rights law. States are obliged to implement and enforce these laws within their own jurisdiction, so regulating its national private security industry can be seen as a state's legal duty. Comprehensive national regulation would also comprise mandatory standards in areas such as health and safety and other employment-related issues such as minimum wage, insurance, vetting and training. Moreover, it may comprise provisions such as criminal record checks in accordance with existing national company law. Further components of national legislation could be licences for individual companies or for specific contracts when private security services are exported to other countries. An essential aspect of national legislation would be effective enforcement mechanisms through means such as regular audits and inspections.

National regulation, if it exists, may be complemented by industry self-regulation. In the absence of national legislation, self-regulation would have to serve as a stop gap and replace legislation at least temporarily. Self-regulation can be highly effective where official, state-run monitoring systems are failing or likely to fail. Moreover, trade associations of the industry usually have a better understanding of the needs for certain standards and may, therefore, considerably improve the overall quality of the services delivered. Companies may also have a substantial incentive to closely monitor their competitors through a self-regulatory scheme, especially if lawful and legitimate behaviour are a requirement for the acquisition of contracts from public authorities and international clients.

A self-regulatory scheme for the private security industry is currently being developed in the UK by BAPSC. Alongside the US and South Africa, the UK is one of the most important export markets of private security services worldwide. The effective control and regulation of the UK industry could therefore serve as an example and a template for other countries that wish to impose better control on their national industries.

Although the British government considered options for the regulation of the private security industry in a Green Paper as early as 2002 no action has been taken (UK Foreign and Commonwealth Office 2002). With the boom of private security activity in Iraq between 2003 and 2005 and the

substantial presence of British PSCs in that country, the regulatory debate has, however, gained new momentum. PSCs themselves realised the need for regulation and, in the absence of government action, formed an association to work towards the introduction of standards and a regulated environment for the delivery of their services.

More specifically, the BAPSC aims to regulate the export of armed defensive security services. Because the export of these services is extremely difficult to monitor and control, the association's approach to regulation is twofold. Firstly, it aims to drive up standards in the industry and thereby decrease the likelihood for violations of IHL, international human rights law, and all other legal frameworks that apply to a company's operation overseas. Compliance with these standards will be monitored, with sanctions-ranging from financial fines used to improve training in a company to the exclusion of the company from the association-being imposed on members that are in breach of the BAPSC Charter and the Code of Conduct.

The Code of Conduct is currently being developed in cooperation with other stakeholders in the regulatory debate, such as the government, NGOs and academic experts. The BAPSC Charter commits the members of the association to transparency, insisting that they have to disclose their corporate structures and their relations with their offshore bases, partners and sub-contractors. Before being admitted as members, companies also have to undergo a thorough vetting process, performed by external reviewers, to ensure their transparency and integrity. Furthermore, members commit themselves to follow all relevant rules of international, humanitarian and human rights law, as well as all standards of good behaviour formulated in the Code of Conduct. They also pledge to avoid any armed exchange in their operations, except in self-defence; to take all reasonable precautions to protect staff in high-risk operations; to decline contracts that may be in conflict with international human rights legislation or potentially involve criminal activity.

Apart from these 'preventative' measures the association is currently putting mechanisms in place whereby cases of alleged misconduct or criminal offences can be reported and prosecuted, in particular if they occurred in countries whose legal systems cannot deal with them effectively. In addition to internal processes to ensure the accountability of companies and the punishment of individual offenders, the BAPSC is calling for the nomination of an independent ombudsman within a government department. The ombudsman, as an independent actor, would collect complaints against companies, investigate and process them.

Voluntary self-regulation that is complemented by the institution of an ombudsman can be an effective and credible mechanism to control an industry that transcends national borders with considerable ease. Self-regulation could further function as a stepping stone to comprehensive regulation through legislation to which all companies in a national industry will have to submit. In this case, companies that have actively shaped the standards-setting process in a self-regulatory regime would have a real market advantage in that they would comply with mandatory standards earlier than their competitors.

The biggest hurdles that industries in several African countries would have to overcome when considering self-regulation are the competitive nature of the industry and the risk of competing trade associations vying for privileged access to government. As the case of Kenya demonstrates, self-regulation may not necessarily be a feasible option (Kamenju et al 2004). Yet in other cases, such as Sierra Leone, self-regulation may indeed be the way forward. Because of insufficient public funds and state capacity, the establishment of a national Security Industry Regulatory Authority, which was suggested by the South African risk management company Quemic in 2003, may even be counterproductive. Such a body may be vulnerable to inefficiency and corruption or only solve part of the problems of the private security sector (Abrahamsen & Williams 2005c:18).

A further level of regulation would be the regional one, comprising the statutory or self-regulatory schemes of several countries. Because of the trans-national nature of the industry an international element certainly needs to complement national regulation. Ideally, it would also enable the cooperation of the law-enforcement and judiciary bodies of several countries in case of an offence under any national regulation or IHL.

An African code of conduct sponsored, for instance, by the African Union (AU) may offer both the intellectual framework for national regulatory regimes and practical recommendations on how to improve and enforce standards in the industry. Such a code could and indeed should be drafted with the support of international actors, such as the International Committee of the Red Cross (ICRC), industry associations and governments that have successfully introduced regulatory frameworks. Such a process would ensure the transfer of expertise and best practice, some degree of international coherence of rules and standards, as well as a degree of legitimacy through the buy-in of the international community.

Governments with both strong political, military and economic ties to Africa and a significant private security industry (operating both at the domestic and the international level) of their own-such as the UK-may be best suited to

advise a standards-setting process in Africa. Britain's interest in African security and stability has repeatedly been emphasised and the 1998 Strategic Defence Review as well as the 2001 New Chapter are evidence of this. The current degree of Britain's defence and security assistance to African countries, as well as its involvement in SSR in places such as Sierra Leone, exceeds that of most other countries with a meaningful security industry of their own. Therefore, assisting the drafting of a regulatory framework for the private security industry may be a significant element of Britain's current agenda for Africa.

Yet, although the buy-in of individual governments would ensure a degree of international legitimacy, an independent international regulatory process is indispensable. It would possibly consist of a code of conduct summarising all relevant stipulations of existing IHL and human rights law as they apply to PSCs in conflict and post-conflict situations. The ongoing joint initiative by the ICRC and the Swiss government to promote respect for IHL and human rights law among PSCs operating in conflict regions would provide the foundation for such an international code of conduct.

Conclusion

Thus, as this chapter has argued, the introduction of regulation for PSCs in individual African states has to be matched by similar initiatives in other countries in the region. At the same time, any regulatory initiative should ideally be embedded in a broader, international regulatory process. Yet, before starting such a process it is essential to clearly define the commercial entities that are to be subject to regulation and control. Equally, the services the companies are offering have to be well understood and classified. It would further be helpful to address regulation alongside a broader set of issues, such as SSR and strategies for development, when attempting to regulate PSCs.

In a nutshell, the chapter maintains that provided there is sufficient and enforceable regulation, PSCs can contribute to improving the security situation in African societies and thereby also further economic development. This must not, however, come at the price of further damaging social cohesion whereby security becomes a commodity that only the wealthy can afford and whereby the disenfranchised remain the disenfranchised. Without undivided access to security for all members of society development remains close to unattainable. The private security market alone cannot meet these challenges, even if the necessary funds were made available. Governments must not abrogate their obligations to their citizens, in particular when it comes to one of the state's core

functions-that of providing security. Most importantly, governments have to develop and enforce effective regulation for their national private security sector in order for the industry to contribute meaningfully to the creation of a secure and stable environment.

Note

- 1 BAPSC members are present in several African countries as well, namely Nigeria, Sierra Leone, Uganda, Sudan and Somalia.

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CHAPTER 6

PRIVATE SECURITY COMPANIES AND PRIVATE MILITARY COMPANIES UNDER INTERNATIONAL HUMANITARIAN LAW

Jamie Williamson*

Introduction

Gone are the days when conflicts merely pitted the armed forces of one state against the armed forces of another, when all ‘fighters’ were clearly distinguishable from civilians not taking part in hostilities. In today’s conflicts, the number and nature of actors is ever changing, with soldiers, peacekeepers, humanitarians, and private contractors, to name but a few, present in the field of combat. In particular, the most recent conflicts, such as those in Afghanistan and Iraq, have seen a greater presence of private security companies (PSCs) and private military contractors (PMCs).¹ The functions of PSCs/PMCs vary, and seem to include the provision of logistics, the protection of convoys and personnel for companies, the staffing of checkpoints, and in some situations even the interrogation of prisoners, the collection of intelligence, and direct participation in combat operations. Today, the activities of certain PSCs/PMCs appear to move away from the traditionally accepted ‘service support functions’. Indeed, on occasion, private contractors risk assuming core military functions.² By their very presence in zones of armed conflict, and given the nature of their activities, PSCs/PMCs increasingly come into contact with both civilians and belligerents.

While certain commentators have argued that these new actors seem to act in a legal penumbra, where the applicable legal regimes appear ambiguous, it is clear that in times of armed conflict, there is no legal vacuum as such. Indeed, in these contexts, a corpus of law known as international humanitarian law (IHL) (also referred to as the laws of warfare) is applicable. The core rules and principles of IHL are to be found in the four Geneva Conventions of 1949 and their Additional Protocols of 1977, which are specifically intended to solve humanitarian problems arising from international or non-international armed conflict. At the time of writing, the Geneva Conventions have been universally ratified and more than 160 states have ratified Additional Protocols I and II.

* The views and opinions expressed in this paper are those of the author alone and do not necessarily reflect those of the ICRC.

IHL, as a body of law, affords protection to persons or property affected by the conflict and limits the rights of the parties to a conflict to use methods and means of warfare of their choice. It does not question the lawfulness of a conflict (*jus ad bellum*) but merely reflects a universal idea expressed by many cultures to limit the suffering caused during hostilities (*jus in bello*). IHL is applicable in both international and non-international armed conflicts. The present chapter will summarily review the question of distinction between civilians and combatants in determining the place of PSCs/PMCs in international armed conflicts. It will also highlight certain issues in relation to state and individual responsibility under IHL pertinent to PSCs/PMCs.

The place of private security companies and private military companies under international humanitarian law

Whilst PSCs/PMCs are not explicitly mentioned in the Geneva Conventions and their Additional Protocols, they are nonetheless bound to respect the norms of IHL. Their responsibilities, status and protection will depend to a large extent on whether, under IHL, they are deemed to be combatants or civilians. During armed conflicts, a distinction must be made between civilians and civilian objects on the one hand, and military targets on the other.

Civilians are defined as all persons who are not members of the armed forces of a party to the conflict or members of volunteer corps and resistance movements, not participants in a *levée en masse* and not combatants in general. As persons not taking part in the hostilities, they enjoy protection against the dangers of military operations (Geneva Convention IV; Protocol I, art 50). Civilians cannot be targeted as such, and the parties to the conflict must take the necessary precautions to ensure that no harm comes to civilian persons and objects (Protocol I, arts 57, 58). However, where a civilian takes part in the hostilities, the protection afforded to the individual against the effect of the hostilities falls away. If captured, a civilian is not entitled to prisoner of war status and may be tried for having participated in hostilities.

Combatants, in contrast to civilians, possess in international armed conflicts a so-called 'combatant's privilege', an entitlement to take part in the hostilities and to fight the 'enemy'. The flip side of this coin is that they are considered legitimate military objectives and can also be targeted. However, once placed *hors de combat*, for instance due to injury, surrender or capture, minimum treatment and conditions are to be afforded to them.

The Geneva Conventions and Protocol I list specific categories of individual who are to be treated as prisoners of war if captured. The Protocol goes further to describe specifically those entitled to combatant status and thus allowed to participate in the hostilities (Geneva Convention III, art 4(A); Protocol I, art 43). Members of the armed forces of a state are described as all organised armed forces, groups and units that are under a command responsible to that state for the conduct of its subordinates, and in most situations, they are easily identifiable. Although IHL does not exhaustively specify the characteristics of members of the armed forces, they have usually been conscripted or voluntarily enrolled, must be subject to an internal discipline system and under responsible command, wear uniforms and carry the necessary identification cards. It is in the best interest of a state to identify and distinguish its armed forces in times of armed conflict to ensure their protection under IHL.

Besides regular armed forces, IHL also considers members of militia or volunteer groups that join armed forces as combatants. Members of other militias, volunteer corps and resistance movements are also to be treated as prisoners of war if captured, provided that they are under responsible command, have fixed a distinctive sign recognisable at a distance, carry arms openly and conduct operations in accordance with the laws and customs of war (Geneva Convention III, art 4(A)). Accordingly, if a state considers a PSC/PMC to form part of its armed forces, then that state should take the necessary steps to clarify this, for instance by notifying the other parties to the conflict, as it is obliged to do in relation to paramilitary groups or law enforcement agencies that are incorporated into its armed forces (Protocol I, art 43(3)). Where a PSC/PMC asserts its right to take part in hostilities and engage in combat on behalf of a state that is a party to the conflict, it should do so only on sure legal footing and not merely rely on that state's apparent approval. To fall outside the limited categories of those entitled to fight, deprives the individual of the so-called combatant's privilege as well as prisoner of war status if captured.

Finally, IHL envisages that prisoner of war status is to be granted to persons accompanying the armed forces without actually being members thereof, such as supply contractors and members of services responsible for the welfare of the armed forces. To be within this category, the concerned individuals must have been authorised by a party to the conflict to accompany its armed forces and are to be issued with the necessary identity cards. Failure to obtain such express authorisation and identification cards to accompany the armed forces may trump the possibility of benefiting from prisoner of war status.

As mentioned earlier, individuals who do not fall in the above categories are deemed to be civilians and cannot be the object of attack. However, if they do take a direct part in the hostilities,³ this protection falls by the wayside for the duration of their participation, and, as a consequence, they can be attacked and prosecuted for such participation. There is no straightforward answer as to whether or not members of PSCs/PMCs fall within any of the above categories. Given the possible myriad of functions and contractual relationships, any assessment must be pragmatic, looking at the nature of the functions, their closeness to core military activities, the existence of chains of command, affiliations and so on. That which should be borne in mind is that irrespective of one's affiliation or capacity in times of conflict, the provisions of IHL must be respected. It is therefore in the interests of all those involved in conflict zones to be fully aware of and to respect the relevant IHL norms at all times.

Responsibility under international humanitarian law

States bear the primary responsibility for ensuring that IHL is respected, and for punishing individuals who commit 'war crimes'. In addition, businesses, such as PSCs/PMCs, operating in armed conflicts may attract legal liability if they, or their staff, act counter to the provisions of IHL.

Individual criminal responsibility

IHL, as reinforced by the jurisprudence of the various international criminal tribunals, is unequivocal inasmuch as the commission of grave breaches entails, as a matter of convention and custom, individual criminal responsibility. Members of PSCs/PMCs who commit such offences can therefore be brought to book whether they are acting on behalf of a party to the conflict or working for civilian entities, such as multinational companies.

Under IHL, individuals can be held criminally responsible for the most serious violations of the Geneva Conventions and the Additional Protocols,⁴ commonly referred to as grave breaches, which include wilful killing, torture or inhuman treatment, and wilfully causing serious injury.⁵ Grave breaches are subject to universal jurisdiction, whereby any state may prosecute any individual of any nationality, irrespective of where the offence was committed. States party to the Geneva Conventions and their Protocols are under the obligation to prosecute or to extradite alleged perpetrators of grave

breaches.⁶ Prosecutions for grave breaches and other war crimes may also be held before the permanent International Criminal Court, subject to the relevant jurisdiction prerequisites being met.

Moreover, IHL provides that commanders are to be held responsible not only for war crimes committed pursuant to their orders but also where they failed to prevent or punish their subordinates when they had reason to know that the same were about to commit or committed war crimes. This responsibility is applicable to both military and other superiors, including civilians (Protocol I, art 86, 87; Rome Statute, art 28). In practice therefore, in the case of PSCs/PMCs that form part of the armed forces of a state party to the conflict, responsibility for acts violating IHL committed by employees can be attributed to the immediate superior as well as further up the chain of command.

In relation to civilian superiors, international justice has widened its net, for instance even holding a director of a tea factory liable for acts of his employees during the genocide in Rwanda in 1994.⁷ With these jurisprudential developments, theoretically, both the CEO of a company that has contracted the services of a PSC/PMC in a zone of international armed conflict, as well as the manager of the PSC/PMC, could therefore be held responsible as ‘superiors’ for war crimes committed by personnel of the PSC/PMC even though the CEO may never have set foot in the conflict zone. The cases against Slobodan Milosevic in The Hague, Jean Kambanda in Arusha and Charles Taylor before the Special Court for Sierra Leone are evidence that those at the very top of the pyramid, including heads of state and government, can be held accountable for acts of their ‘subordinates’.

The responsibility of states to ensure respect of international humanitarian law

Under common article 1 to the Geneva Conventions, states undertake to respect and ensure the respect for the Conventions in all circumstances. States must not only themselves respect the provisions of the Conventions, but are also obligated to ensure that all those under their authority or jurisdiction do not fall foul of said provisions.⁸ Where PSCs/PMCs are active in times of international armed conflict, the onus is therefore on states to give effect to this provision, and to ensure that PSCs/PMCs operate within the confines of IHL. How this is achieved in practice depends in part on the relationship of the state with the concerned PSC/PMC, for example, a hiring

state, a state on the territory of which the operations are conducted, the state of the company's registration or the state of nationality of employees of the PSC/PMC.

So as to meet their IHL obligations to ensure the respect of IHL, it is therefore incumbent on states to adopt the necessary civil and criminal legislation to ensure that serious violations of IHL do not go unpunished. In addition, states should look into codes of conduct and regulations to ensure that PSCs/PMCs over which they have jurisdiction are cognisant of the applicable laws, in particular IHL, in times of armed conflict. A number of states have recognised the need for regulation in this domain, for instance the UK, the US, South Africa and Switzerland. Representatives of PSCs/PMCs, such as international peace operations and the British Association of Private Security Companies, likewise consider some form of regulation of the industry vital. Recently, an intergovernmental process was initiated by the Swiss Federal Department of Foreign Affairs Government, with the involvement of the International Committee of the Red Cross, as custodian of IHL. The initiative, which is a process between states, is looking into the *role of states* in promoting respect for IHL and human rights law by PSCs/PMCs.

The official objectives of the initiative are, *inter alia*, to contribute to an inter-governmental discussion on the issues raised by the use of PSCs/PMCs, and to reaffirm and clarify the existing obligations of states and other actors under international law, in particular under IHL and human rights law. The initiative will look into developing regulatory models and other appropriate measures at the national, and possibly at the regional and international levels, and to making, based on existing obligations, recommendations and drafting guidelines to best assist states in ensuring respect for IHL and human rights law.

Conclusion

In the eyes of many, conflict zones are seen as multi faceted, lacking order and regulation, often in a state of chaos, with PSCs/PMCS operating in a legal vacuum. However, during international and internal armed conflicts, IHL is applicable, and it provides a universal and binding legal framework that aims at protecting civilians and others not taking part in the conflict from the effect of the hostilities. As many PSCs/PMCs come into contact with the vulnerable and other persons protected by IHL, it is essential for them to know and respect this body of law.

Notes

- 1 For the purposes of the present chapter, the terms PMCs and PSCs will be used interchangeably.
- 2 For instance, see Lieutenant Colonel Paul Christopher (Ret) (*Journal of International Peace Operations*, 2(2):9): ‘As a private contractor working in Iraq for the past two years, I have observed confusion over the roles of the military and the private sector. In one case, while responsible for the perimeter security of an Iraqi military base, our staff were instructed by senior U.S. military officers to conduct combat patrols up to 10 kilometres outside the perimeter, and apprehend and interrogate civilians. Not only were such actions clearly outside the terms of our contract, but they would also have been violations of our charter as civilian security employees.’
- 3 The ICRC is at present undertaking a process to clarify the meaning of ‘a direct part in hostilities’. The ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 4787, suggests a possible objective standard as being ‘acts of war that by their very nature or purpose struck at the personnel and material of enemy armed forces’.
- 4 The International Criminal Tribunal for Rwanda (ICTR) has confirmed that for an offence to be considered a war crime it must be committed in conjunction with the armed conflict and that the perpetrator must have acted in furtherance of or under the guise of the armed conflict. See for instance the ICTR Appeals Judgment in the case of *The Prosecutor v Georges Rutaganda*.
- 5 Grave breaches are listed in Geneva Convention I, article 50; Geneva Convention II, article 51; Geneva Convention III, article 130; Geneva Convention IV, article 147; Protocol I, articles 11, 85).
- 6 In terms of the four Geneva Conventions and Protocol I, a state must enact national legislation prohibiting and punishing grave breaches-either by adopting a separate law or by amending existing laws. Such legislation must cover all persons, regardless of nationality, committing grave breaches or ordering them to be committed and including instances where violations result from a failure to act when under a legal duty to do so. It must cover acts committed both within and outside the territory of the state.
- 7 See the ICTR case of *The Prosecutor v Alfred Musema*, Case no ICTR-96-13-T, 20 April 1999.
- 8 As explained in the ICRC’s Commentary on the First Geneva Convention: “The Contracting Parties do not undertake merely to respect the Convention, but also to ensure respect for it. The wording may seem redundant. When a state contracts an engagement, the engagement extends *eo ipso* to all those over whom it has authority [...]. The use of the words “and to ensure respect” [...] were intended to emphasize and strengthen the responsibility of the Contracting Parties”.

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CHAPTER 7

REGULATING PRIVATE SECURITY CONTRACTORS IN ARMED CONFLICTS

Katherine Fallah

Introduction

The distinction between combatants and civilians is of critical importance to the conduct of hostilities. International humanitarian law (IHL, sometimes referred to as the law of armed conflict or *jus in bello*) uses the foundational principle of distinction to provide a framework for the regulation of actors in armed conflict. There is at present a great deal of confusion as to the position of private security contractors under IHL. Perhaps most importantly, many actors in armed conflict, including security operators themselves, do not know whether private security contractors are civilians or combatants for the purposes of IHL.

One key consideration in determining the rights and responsibilities of private security contractors in armed conflict is the question of whether the contractors take a direct part in hostilities. Indeed, if private security contractors are civilians under IHL, their direct participation in hostilities deprives them of many protections and potentially exposes them to criminal liability under domestic law. The focus of this chapter is to examine the significance of the definition of 'direct participation in hostilities' under IHL. I shall provide an overview of the legal definition of direct participation in hostilities, flagging areas of current contention, and will outline some of the conditions under which a security contractor can be said to be participating in hostilities. I shall explain the consequences for security contractors in the event that they do take a direct part in hostilities.

An understanding of these legal questions is an essential step in the regulation of the private security sector. The existing state of international law must inform new regulatory processes at domestic, regional and international levels. It is also critical that security contractors presently operating in theatres of armed conflict are aware of their rights, protections and responsibilities under international law.

Regrettably, this area of the law is marked by a dearth of judicial decisions and other forms of legal clarification. The question of whether certain

activity amounts to direct participation in hostilities is one which is, by its very nature, most often assessed in the heat of battle. These spur of the moment decisions are very rarely scrutinised by courts, especially because the international war crimes jurisprudence is still a very young legal tradition. This chapter presents a textual analysis of the conventional law dealing with the notion of direct participation in hostilities, in an attempt to clarify its meaning and consequences. In the absence of a significant body of jurisprudence on the topic, this work necessarily presents some extrapolation on how the conventional law might properly be construed and implemented. To this end it also points to other legal commentary, particularly the reports of the recent Expert Meetings on direct participation in hostilities under international law, convened by the International Committee of the Red Cross (ICRC) and the TMC Asser Institute.¹ While the reports of these meetings make frequent reference to points of contention among the experts and are by no means authoritative statements of the law, this author stands in agreement with a number of propositions contained in the reports, which are cited here with approval.

The principle of distinction

Introducing the principle of distinction

The principle of distinction is a fundamental aspect of IHL. It operates on the basis that individuals who are legitimately involved in the war effort may be the object of attack, whereas those who have no part in the prosecution of armed conflict are to be protected. There are often said to be two parts to the principle of distinction. First, the principle involves distinguishing between civilians and combatants. Second, it requires a distinction between civilian objects and military objectives. The principle is conveniently summarised in article 48 of the First Additional Protocol:

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

This provision is said to be ‘the keystone of the whole set of interconnected provisions on the protection of the civilian population’ (Kalshoven & Zegveld 2003:97) and the principle of distinction is ‘the foundation on which the codification of the laws and customs of war rests’ (Pilloud & Pictet 1987a:598).

Indeed, in its recent study on customary IHL, the ICRC opened with an enunciation of the principle of distinction. The study sets out to analyse IHL issues 'in order to establish what rules of customary international law can be found inductively on the basis of State practice' (Henckaerts & Doswald-Beck 2005:xxx). It is telling that of 161 rules in the study, the first reads (ibid:3):

Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.

As we can see from this statement, the principle of distinction accords combatants and civilians different rights and protections. Combatants have the right to directly participate in hostilities, whereas civilians must refrain from so doing. So long as civilians do not take a 'direct part' in hostilities they enjoy immunity from attack, holding, in the words of article 5(1) of the First Additional Protocol, a 'general protection against dangers arising from military operations'. Combatants, on the other hand, may legitimately be the object of attack. Upon capture or surrender, combatants are entitled to prisoner of war status, whereas most civilians are not (there are some exceptions); civilians taking part in hostilities may be interned and prosecuted under national law for any crimes they commit, such as murder, assault or destruction of property.

Significance of the principle of distinction for the private military industry

When considering the novelty of the prominence of the private security industry in armed conflict, it is tempting to declare that an established legal regime such as IHL has no role to play in regulating the conduct of private security contractors. Private military contractors have tended to assert that their operations do not fall within an existing legal framework and that therefore their industry is 'self regulated'. For example, before shutting down its operations in 2004, Sandline International asserted, 'In the absence of a set of international regulations governing Private Military Companies, Sandline has adopted a self-regulatory approach to the conduct of our activities'.¹ On the flipside, however, insistence upon the notion of an 'international legal vacuum' in respect of the private security industry has the effect of removing contractors from the law's protection. Indeed, to place private security contractors outside the law of armed conflict serves with one hand to remove the restraints that regulation would ordinarily impose upon actors in the field of operations, but with the other hand denies the contractors legal privileges which would ordinarily protect them from attack or ill treatment.¹

IHL provides a general framework to regulate and protect different actors in armed conflict. Without specifically referring to the private security industry, the law extends to individual contractors, whether as combatants or civilians, or some sub-set of these groups, such as civilians accompanying the armed forces. In chapter seven of this monograph, Wilkinson addresses the position of private security contractors under IHL. In this chapter, I confine myself to the very specific question of whether contractors can be said to directly participate in hostilities, and the impact this might have for contractors in terms of the principle of distinction.

There are a number of reasons for us to concern ourselves with the question of direct participation in hostilities; here, I highlight four. First, it is crucial that contractors themselves are aware of the category within which they fall. IHL is highly prescriptive when it comes to delineating between permissible and impermissible conduct in situations of armed conflict. This law applies to African contractors operating in situations of armed conflict at home and abroad², as well as foreign contractors operating within the continent.³ Contractors must be aware of their status so that they may properly abide by the laws of armed conflict. Certainty as to their status will also leave contractors in a better position to assert their rights under IHL, not only on the battlefield but also in situations such as internment by an adversary.

Second, other actors in armed conflict must be clear on the relevant contractor's status. The present conflict in Iraq, for example, has seen a high incidence of 'friendly fire' between US coalition forces and private contractors. On 5 January 2007 at the Camp Anaconda air base north of Baghdad, US forces shot and killed a civilian contract truck driver in what the army described as an 'escalation of force incident' (*Sydney Morning Herald* 2007). Less than a month earlier, in a strikingly similar scenario, Australian soldiers in the Green Zone in Baghdad shot and killed a KBR truck driver after he failed to stop at a security checkpoint near the Australian embassy (Banham 2007). A clear demarcation between combatants and civilians, as well as clear identification of different parties to the conflict, can serve to reduce a great number of these friendly fire incidents. They will also create certainty as to when adversaries are permitted to attack contractors and will help to ensure that contractors receive the maximum protection available to them under IHL.

Third, legislators and executive regulators need to understand the law as it stands so as to be able to effectively regulate the industry. New regulatory instruments must be sensitive to the form and substance of the existing law, avoiding both duplication and contradiction. Finally, governments engaging in contracts must be aware of the principle of distinction so that

the contracts can be properly drafted, limiting the function of the contractors to the roles prescribed by IHL. A proper understanding of the law is also crucial if government representatives are to ensure that they are not involved in any form of criminal enterprise, either in engaging the contractors or in commanding that contractors undertake prohibited operations.

Avoiding some common traps

There is no blanket response to the question of whether private security contractors are civilians or combatants for the purposes of IHL. The law does not directly contemplate the role or prominence of the private security industry; rather, it sets down a broad framework for determining the status of individuals in armed conflict. For the most part, this framework is straightforward and a matter of customary international law.

Similarly, in understanding the position of security contractors under the law as it presently stands, we are misdirected if we seek to determine whether private contractors 'should be' combatants or civilians at international law. Rather, the question to be answered is whether contractors are, as a matter of fact, combatants or civilians. Once we have determined the contractor's status, we are in a position to explore the question of whether the contractor has met his or her responsibilities and received the relevant protections under IHL.

As a matter of practice, the key factors for determining whether contractors are civilians or combatants will relate to the functions performed by the individual contractors. In other words, it is critical to examine the specific conduct of the contractors. Importantly, neither the name a company gives itself nor the classification ascribed by a national government is of any consequence when assessing the status of a security contractor in armed conflict. This is so, despite the conviction with which some firms seek to distinguish themselves from 'mercenary' firms and 'private military' contractors.⁴ Indeed, there is no concept of a 'private security contractor', 'private military contractor' or 'private military firm' under IHL. While political commentators have presented definitions or descriptions of the expressions (for example Singer 2001:186; Avant 2005; Cleaver 2000:133), they are terms of art rather than of law (Fallah 2006:602). Accordingly, it is beyond the scope of this chapter to speculate upon what might be an appropriate legal definition. Insistence on a semantic distinction between 'security' and 'military' contractors might serve a political function (for example Clapham 2006:299–300), but does not assist us in determining the exact nature of operations and the status of actors under IHL.

Direct participation in hostilities under international humanitarian law

Introducing the principle of direct participation in hostilities

By definition, combatants have the right to participate directly in hostilities. Article 43(2) of the First Additional Protocol makes this explicit, stating:

Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

Civilians, on the other hand, are not entitled to take direct part in hostilities. If and for such time as they do, they retain their civilian status,⁵ but lose special IHL protections to which they would have been entitled as civilians (such as the civilian immunity from attack). This means that where private security contractors are not members of the armed forces of a party to the conflict they should refrain from taking direct part in hostilities. The notion of 'direct participation in hostilities' appears in a number of places in IHL. Common article 3 of the 1949 Geneva Conventions lays down the basic protections available to people in situations of non-international armed conflict. Relevantly, paragraph 1 provides:

Persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

Common article 3 explicitly protects such persons against violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, hostage taking, outrages upon personal dignity and the passing of sentences and the carrying out of executions 'without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples' (common article 3(1)(a)–(d)).

While common article 3 uses the expression 'active part in hostilities', there is general consensus that, in this context, the terms 'active' and 'direct' can be taken as synonyms (Quéguiner 2003:2; First Expert Meeting 2003:3). In its decision in the *Akayesu* case⁶ a Trial Chamber of the International

Criminal Tribunal for Rwanda held that ‘these phrases are so similar that, for the Chamber’s purposes, they may be treated as synonymous’ (1998:§629).

Article 13(3) of the Second Additional Protocol also applies to situations of non-international armed conflict and provides that civilians are to enjoy protection against the dangers arising from military actions ‘unless and for such time as they take direct part in hostilities’. Article 51(3) of the First Additional Protocol provides that in situations of international armed conflict, too, civilians are to enjoy protection against the dangers arising from military operations ‘unless and for such time as they take a direct part in hostilities’.

These provisions mean that where private security contractors are not members of the armed forces of a party to the conflict, that is, where the contractors are civilians rather than combatants, they lose their civilian protections if and for such time as they participate directly in hostilities. This legal test is deceptively simple. As many commentators have recognised, the question of what amounts to direct participation in hostilities is one of the most problematic aspects of the principle of distinction (e.g. Hampson 2005:148). This is in large measure due to the lack of a definition of the concept, as well as a dearth of judicial decisions on the matter, which would otherwise serve to clarify the meaning of the phrase.

The definition

There is no express definition of ‘direct participation in hostilities’ under IHL. This is largely the result of concerted effort at the drafting stages to ensure that the phrase would meaningfully reflect the various contingencies of armed conflict and could be appropriately adapted to different situations. A flexible approach was favoured over a highly prescriptive test for direct participation in hostilities. The *travaux préparatoires* indicated that some government experts suggested that the phrase remain undefined but that the principle be illustrated by examples, such as ‘spying, recruitment, propaganda’ and ‘transport of arms and of military personnel’ (ICRC 1972:143, §3.116). As we can see from the final wording of the article, the drafters rejected the notion of an illustrative list of examples.

The matter was revisited at the recent Expert Meetings on direct participation in hostilities under international law. The meetings’ organisers initially favoured the retention of an abstract definition of the notion of ‘direct

participation in hostilities', possibly alongside a list of illustrative examples of what would or would not constitute direct participation in hostilities. As the proceedings progressed, however, a closer examination of the question 'gave rise to serious doubts as to whether an abstract definition, with or without a list of examples, could actually cover the vast variety of conceivable situations and whether it could sufficiently reflect the complexity of the legal issues at stake' (Third Expert Meeting 2005:5).

Private security operators experience first hand the difficulties associated with the lack of a definition of 'direct participation in hostilities'. This chapter highlights some of the uncertainties associated with the definition and attempts to strike a balance between presentation of the law as it stands, and extrapolation upon the activities that may be considered to amount to direct participation in hostilities.

In pursuing this aim, it is important to note that where the phrase does appear, it is always expressed as a composite term. Accordingly, there is limited utility in seeking to clarify the meaning of the phrase by examining the definition of its components. When broken down, the individual components might take on entirely different meanings, affected by the contexts in which they appear. Nevertheless, the meanings given to different words in the phrase can provide some guidance in its interpretation.

The meaning of 'hostilities'

The term 'hostilities' appears frequently in the Geneva Conventions and their Additional Protocols,⁷ however the Conventions do not contain a definition of the term. Pietro Verri, in his *Dictionary of the international law of armed conflict* (1992:57), provides the following definition of 'hostilities':

Acts of violence by a belligerent against an enemy in order to put an end to his resistance and impose obedience. Positive international law does not define hostilities but often uses the word in, for example, the phrases: 'Opening of hostilities, conduct of hostilities, acts of hostility, persons taking or not taking part in hostilities, effects of hostilities, end of hostilities'.

A great concentration of these references to hostilities appears in the Hague Regulations annexed to Hague Convention IV respecting the Laws and Customs of War on Land (1907). Section II of those Regulations is titled 'Hostilities'. The section deals with both permissible and prohibited conduct,

although it is reasonable to infer that the activities mentioned in the section are examples of, or relate to, 'hostilities' for the purposes of IHL. The first chapter of this section deals with means of injuring the enemy, sieges, and bombardments, and addresses a number of activities which, due to their location in Section II, might reasonably be considered to relate to hostilities within the meaning of the Regulations. These activities include a series of expressly forbidden conduct: the use of poison and poisoned weapons; killing or treacherously wounding individuals belonging to a hostile nation or army, or enemies who have surrendered; declarations that no quarter will be given; the use of arms, projectiles, or material calculated to cause unnecessary suffering; the improper use of certain flags, insignia, uniforms and symbols; the destruction of the enemy's property, unless such destruction or seizure is imperatively demanded by the necessities of war; and declarations that the rights and actions of the nationals of the hostile party are abolished, suspended, or inadmissible in a court of law (reg 23).

Other conduct falling within the 'Hostilities' section of the Regulations includes: intelligence gathering, or 'ruses of war and the employment of measures necessary for obtaining information about the enemy and the country' (reg. 24); sieges and bombardments 'by whatever means' (regs 25–27), including attacks on or bombardments of undefended towns, villages, dwellings or buildings (reg. 25); and spying (regs 29–31). The section contains chapters on flags of truce (regs 32–33), capitulations (reg. 35), and armistices (regs 36–41), which we might reasonably presume are intended to enunciate some outer limits of the concept of hostilities (namely, the cessation of hostilities).

While the Hague Regulations can be said to list examples of activities that constitute 'hostilities', the Geneva Conventions and their Additional Protocols do not. The commentary to the Geneva law does provide some guidance, as it sets down a test for determining the meaning of 'hostilities'. In particular, the commentary on article 51(3) of the First Additional Protocol states: 'Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces' (Pilloud & Pictet 1987b:618, §1942).

It is apparent from the preceding passage that 'hostilities' in the sense of 'direct participation in hostilities' is intended to have some nexus to an armed conflict. This is a contextual, rather than express, component of the phrase 'direct participation in hostilities'. IHL's scope is limited to situations of armed conflict, including occupation. So we can reasonably infer that the term 'hostilities' refers to hostilities involving belligerents, as distinct from inter-civilian violence. I shall deal with the issue of inter-civilian violence at a later stage.

In assessing the meaning of ‘hostilities’ it is necessary to determine whether the term incorporates the planning or preparatory stages of an attack. The official commentary to article 51(3) of the First Additional Protocol suggests that the preparatory stages might amount to ‘hostilities’, stating: ‘it seems that the word “hostilities” covers not only the time that the civilian actually makes use of a weapon but also, for example, the time that he is carrying it as well as situations in which he undertakes hostile acts without using a weapon’ (Pilloud & Pictet 1987b:618–619, §1943). This commentary therefore indicates that the conventional reference to participation in ‘hostilities’ includes participation in a ‘hostile act’ (but cf Third Expert Meeting 2005:17). It also suggests the conventional meaning of hostilities is broad in temporal scope.

Accordingly, where a private security operator is engaged in any act that, in the context of an armed conflict, is intended to harm the personnel or equipment of the armed forces, he or she can be considered to be taking part in hostilities. This is as far as the conventional law takes us. A number of questions remain unanswered. For example, does the notion of intent in this context incorporate the carrying of arms with the intent to engage in violent defensive action if the contractor happens to come under attack? Former US Secretary of Defense Donald Rumsfeld (2004:3) has sought to quieten public opposition to the use of contractors in Iraq by insisting that they ‘provide only defensive services’. There is strong support for the proposition that this can, in fact, amount to participation in ‘hostilities’. Under IHL (as opposed to criminal law),⁸ there is no distinction between offensive and defensive attacks. Article 49(1) of the First Additional Protocol makes this clear, stating that “‘attacks” means acts of violence against the adversary, whether in offence or in defence’.

This legal position is useful because it neutralises the frequent marketing claims of companies that seek to avoid the reach of IHL or to render their activities politically palatable. For example, in the context of ongoing lobbying to secure a contract in Sudan, Blackwater’s Vice-President for Strategic Initiatives stated: ‘We can provide the defensive security and provide a defensive perimeter for the humanitarian organizations to follow’ (Witter 2006). But Robert Young Pelton rebuts Blackwater’s claim of being confined to defensive action. Commenting on Blackwater’s 2004 proposal to quell hostilities in Sudan, he argues (Witter 2006):

The problem is, if you look at the presentation, it includes not only men with guns. They’re offering helicopter gunships, a fighter bomber that has the capacity to drop cluster bombs and [satellite-

guided weapons], armored vehicles. You say: 'Wait a minute? That's a lot of offensive force.'

Article 49(1) of the First Additional Protocol renders moot these arguments, and directs us instead to consider the exact nature of the firm's conduct.

Many security contractors will contend that they are engaged in safeguarding a civilian person or site against criminal activity and do not hold the intent to engage in violent defensive action against members of the armed forces of a party to the conflict. This may well assist the contractor in establishing that merely carrying a weapon does not amount to direct participation in hostilities, but a contractor who does come under attack and who fires back at a member of the armed forces will certainly, at that point, be taking a direct part in hostilities for the purposes of IHL. We can probably assume the existence of a *mens rea* requirement here, which would mean that the contractor must know or be reckless to the fact that the attacking party belongs to a member of the armed forces and was not a civilian engaged in criminal activity. However this question only really becomes relevant at the point of a judicial investigation into the contractor's activities. In the heat of the battle, there is little time to make such assessments and the contractor may well become a legitimate military target regardless of whether such a *mens rea* requirement is satisfied.

Taking 'direct' part

The commentary to article 51(3) of the First Additional Protocol states that "direct" participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy forces' (Pilloud & Pictet 1987b: 619, §1944). However, the commentary goes on to stress that there 'should be a clear distinction between direct participation in hostilities and participation in the war effort' (§1945). The classic example used to illustrate this distinction is that of the worker in the munitions factory: he or she is certainly assisting the war effort and building the capacity of the armed forces to defeat the enemy, however such a worker is said not to be directly participating in hostilities for the purposes of IHL. The commentary to article 51(3) provides an explanation of the rationale for this distinction. In stating that there is a difference between direct participation in hostilities and participation in the war effort, it explains: 'The latter is often required from the population as a whole to various degrees. Without such a distinction the efforts made to reaffirm and develop IHL could become meaningless. In fact, in modern conflicts, many activities of

the nation contribute to the conduct of hostilities, directly or indirectly; even the morale of the population plays a role in this context' (Pilloud & Pictet 1987b:619, §1945).

The Inter-American Commission on Human Rights (1999: §53) has upheld this view and, in an attempt to clarify the distinction between 'direct' or 'active' and 'indirect' participation, it stated:

Civilians whose activities merely support the adverse party's war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve acts of violence which pose an immediate threat of actual harm to the adverse party.

The Geneva Conventions specifically contemplate that civilians will accompany the armed forces to assist with logistics and other matters. Article 4A(4) of the Third Geneva Convention states that 'persons who accompany the armed forces without actually being members thereof [that is, civilians], such as ... supply contractors, members of labour units or of services responsible for the welfare of the armed forces' are entitled to prisoner of war status, provided they have 'received authorization from the armed forces which they accompany'. The list in article 4A(4) is illustrative, as demonstrated by the use of the words 'such as'; the commentary to the convention states that 'the text could therefore cover other categories of persons or services who might be called upon, in similar conditions, to follow the armed forces during any future conflict' (De Preux 1986:64). Professor Michael Schmitt draws out some of the general principles which might be said to have underscored the selection of the enunciated examples. He notes (2005:532) that 'none of the individuals cited are involved in any direct way with the application of force. Nor do the provisions distinguish between government employees and contractors. The sole relationship criterion is that they "accompany" the armed forces.'

Regardless of any lack of certainty in determining who falls within the purview of article 4A(4), it is clear that these days private contractors quite frequently perform the functions expressly articulated in the paragraph. Performance of logistics operations, such as the construction of military

bases and providing food to members of the armed forces, falls within the notion of mere 'participation in the war effort' and thus does not amount to direct participation in hostilities. However, problems arise where there is a diversification of the functions performed by private contractors. As soon as contractors also engage in activities such as guarding military installations or acting as look-outs, they move from assistants in the war effort to direct participants in hostilities.

One point that seems clear is that an activity need not be geographically proximate in order to be 'direct'. Increasingly, we are seeing the use of technology that allows for remote military operations, such as computer network attacks and the deployment of unmanned aerial vehicles (Sherman 2005; Heaton 2005:159–168). As the experts at the ICRC Third Expert Meeting (2005:39) indicated, it is certainly the case that in some situations civilians directing a weapons platform or facilitating air strikes are 'assuming a distinctly military function', which undoubtedly amounts to direct participation in hostilities.

Rather than requiring geographic proximity, the concept of 'direct' participation encompasses a causal element. The commentary to the First Additional Protocol (De Preux 1987:516, §1679) states that 'direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place.' In non-international armed conflict, the notion of direct participation in hostilities 'implies that there is a sufficient causal relationship between the act of participation and its immediate consequences' (Junod 1987:1453, §4787). Indeed, it was acknowledged during the ICRC's Expert Meetings that 'giving up the causal proximity requirement would mean that any activity amounting to "hostilities" would automatically also amount to "direct participation in hostilities"' (Third Expert Meeting 2005:30). However, bearing in mind the immediacy of decision-making on the battlefield, some experts held the view that elements such as nexus, intent and causal proximity would only have to be evaluated in the case of doubt as to whether certain conduct amounted to hostilities. They stated (2005:30) that this 'solution would avoid overburdening the armed forces with the obligation of evaluating nebulous elements such as "causal proximity" and "intent" before taking action. After all,' they posited, 'the criteria for "direct participation in hostilities" not only had to be sufficiently precise to allow the prosecution of the civilians in question after capture, but also simple and clear enough to remain understandable for the persons actually confronted with an operational situation.'

Specific instances of direct participation in hostilities

Certain conduct instinctively springs to mind when we think of 'direct participation in hostilities'. The US Air Force Commander's Handbook (1980: §2–8), for example, states that an individual is liable to attack if he or she 'personally tries to kill, injure or capture enemy persons or objects'. The Military Manual of the Netherlands (1993:V–5) provides illustrative examples of hostilities aimed at hitting enemy personnel or materiel: firing at enemy troops, throwing Molotov cocktails or blowing up a bridge used for the transport of military materiel.

Other conduct that might traditionally be associated with security rather than military operations can also amount to direct participation in hostilities. There is general consensus that the guarding of military installations also amounts to direct participation in hostilities. For example, Ecuador's Naval Manual (1989: §11.3) and the US Naval Handbook (1995: §11.3) state that 'civilians serving as guards, intelligence agents or lookouts on behalf of military forces' may be attacked for directly participating in hostilities.

Intelligence-gathering is widely considered to amount to direct participation in hostilities, insofar as the intelligence-gathering has a direct connection to attack or defence in the context of an armed conflict (e.g. Third Expert Meeting 2005: 22–21). The US Air Force Commander's Handbook (1980: §2–8) states that 'civilians who collect intelligence information, or otherwise act as part of the enemy's military intelligence network, are lawful objects of attack.' It further states that 'members of a civilian ground observer corps who report the approach of hostile aircraft would also be taking a direct part in hostilities'.

However, not all intelligence-gathering will amount to direct participation in hostilities. Professor Michael Schmitt (2005:534) demonstrates this point with the following examples:

Rendering strategic-level geopolitical estimates is certainly central to the war effort, but will have little bearing on specific combat missions. By contrast, tactical intelligence designed to locate and identify fleeting targets is the sine qua non of time-sensitive targeting; it is an integral component of the application of force against particular targets. Civilians providing strategic analysis would not be directly participating in hostilities, whereas those involved in the creation, analysis, and dissemination of tactical intelligence to the 'shooter' generally would.

Rescue operations are also said to constitute direct participation in hostilities. The US Air Force Commander's Handbook (1980: §2–8) states:

The rescue of military airmen downed on land is a combatant activity that is not protected under international law. Civilians engaged in the rescue and return of enemy aircrew members are therefore subject to attack. This would include, for example, members of a civilian air auxiliary, such as the US Civil Air Patrol, who engage in military search and rescue activity in wartime.

Consistent with this position, the rescue of civilian or military hostages in situations of armed conflict might also amount to direct participation in hostilities. Professor Louise Doswald-Beck (Second Expert Meeting 2004:12) has stressed that care must be taken when concluding that rescue operations constitute direct participation in hostilities, because article 18 of the First Geneva Convention encourages the civilian population to care for wounded military personnel. Medical personnel, too, are frequently involved in such rescues, without taking part in hostilities. In line with this concern, the US Air Force Commander's Handbook (1980: §2–8) goes on to note 'that care of the wounded on land, and the rescue of persons downed at sea or shipwrecked, are protected activities under international law.'

As I have noted previously, traditional roles performed by security guards could, outside situations of armed conflict (including occupation), seem quite unremarkable. However, if a security contractor is attacked by a member of a party to the conflict, any defensive armed response would amount to direct participation in hostilities. This is of particular import where contractors are guarding a civilian site that is likely to come under attack by members of a party to the conflict, such the commercial guarding of mines and other industrial premises in mineral-rich states like Angola, Sierra Leone and the Democratic Republic of Congo, which have been the sites of prolonged armed conflict (e.g. Cleaver 2000:140). This phenomenon, which is not new in many parts of Africa, has received increased attention in light of the present situation in Iraq. For example, at the ICRC's Second Expert Meeting (2004:13), W. Hays Parks, chairperson of the US Department of Defence Law of War Working Group, made the following point about the private security industry in the Middle East:

Iraq is a special situation because it entailed belligerent occupation. Contractors were only present in significant numbers once the country was occupied. They were intended to provide services to the civilian population related to that occupation and for the

reconstruction of Iraq. Each reconstruction contractor had to provide for his own security. As the insurgency increased and reconstruction security changed in nature, the phenomenon of armed security contractors reached an unprecedented scale.

While there is little opposition to the notion that some contractors are clearly engaged in armed combat, and were in fact hired to undertake such operations, it is still important to engage with the question of purely defensive private security operations. The latter group of contractors is likely to invoke a more sympathetic response from the public, but in order to retain civilian protections under IHL, such contractors must refrain from taking part in hostilities. IHL requires security contractors to distinguish between civilian policing activities and military operations, and to refrain from participating in the latter. In complex armed conflict situations, this can prove a very difficult task. However, it is a responsibility that the contractor assumes upon entering an armed conflict situation.

This is not to say that all security and policing activities in situations of armed conflict will amount to direct participation in hostilities. Some instances of suppression of inter-civilian violence will be a matter for policing rather than examples of participation in hostilities. These include the policing of situations where civilian prison guards violently or sexually abuse civilian prisoners, where civilians participate in violent riots and demonstrations or where criminals take advantage of the chaos of armed conflict in order to loot civilian property or rape, physically assault or murder other civilians (Third Expert Meeting 2005:8). However, sometimes it can be difficult to differentiate between a criminal act, committed in a purely personal capacity, and criminal conduct that serves a military purpose and might therefore amount to direct participation in hostilities. In this vein, the ICRC's Third Expert Meeting (2005:8) found that, 'in certain cases of inter-civilian terrorist acts, of hostage-taking or of "ethnic cleansing" the answer would probably be less clear.' The experts properly identified the significance of these questions relating to the status of inter-civilian violence, noting it was necessary to determine 'whether civilians committing acts of violence against peaceful fellow civilians in situations of armed conflict could be directly attacked while so doing, or whether they had to be dealt with according to law enforcement principles' (2005:8). One matter that is the subject of wide agreement is that if any violence, including inter-civilian violence, is to be considered 'direct participation in hostilities', it must be linked to military operations or 'hostilities' in the context of an armed conflict. It is important to note that this nexus test

applies regardless of whether the facts in question might be considered to be inter-civilian violence.

In situations where contractors are called upon to police inter-civilian violence, it is important to note that they must pursue the offenders according to law enforcement principles, rather than attack them as military targets. That is to say, any use of force, particularly lethal force, must be in line with standard policing procedure. In determining whether a matter is dealt with according to law enforcement principles, it is appropriate to have recourse to both domestic criminal procedural law and international human rights law. In most jurisdictions, this requires the authorities to attempt to arrest the offender before using lethal force (see, e.g. Third Expert Meeting 2005:11, but cf *Targeted Killings Judgment*, §40).

Consequences of direct participation in hostilities

Loss of immunity from attack

An important distinction between combatants and civilians taking direct part in hostilities is the temporal scope of their lack of immunity from attack. At the ICRC's First Expert Meeting (2003:7), there was general agreement with the notion that, since combatants are entitled to take up arms at any time, they can be targeted in a wide variety of situations, including while on leave, on holiday, assigned to duties unrelated to the armed conflict, and even while sleeping.

In contrast, the conventional law provides that civilians lose their immunity from attack 'for such time as they take direct part in hostilities'.⁹ As discussed earlier, this will, in some instances, encompass the preparatory stages of an attack and, so long as the civilian holds the requisite intent to inflict actual harm on the personnel and equipment of the armed forces, it also includes the time that the contractor bears arms. During this time, and for this time alone, the civilian becomes a legitimate military target. As the commentary to article 51(3) of the First Additional Protocol (Pilloud & Pictet 1987:619, §1944) notes, 'Once he ceases to participate, the civilian regains his right to the protection under the Section, i.e., against the effects of hostilities, and he may no longer be attacked.' This legal situation has been criticised by some commentators (e.g. Second Expert Meeting 2004:22–23; Schmitt 2005:535–536) who suggest that it gives rise to a 'revolving door' problem, whereby an individual repeatedly participates in hostilities, losing his or her civilian protections for such time as he or she directly participates, but regaining civilian protections in between military operations.

Conditions of capture, internment and trial

Article 45 of the First Additional Protocol spells out the protections available to persons who have taken part in hostilities. Importantly, any person who takes part in hostilities and falls into the power of an adverse party is presumed to be a prisoner of war, and is to be protected by the Third Geneva Convention, so long as 'he claims the status of prisoner of war or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power' (art. 45(1)). In the case of doubt as to the person's entitlement to prisoner of war status, he or she continues to have such status 'until such time as his status has been determined by a competent tribunal' (art. 45(1)). Any person who has fallen into the hands of an adverse party for an offence arising out of the hostilities is entitled to have the question of his or her prisoner of war status adjudicated by a judicial tribunal (art. 45(2)). Procedurally, this is to occur, whenever possible, before any criminal trial (art. 45(2)). The article provides that 'the representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held in camera in the interests of State security' (art. 45(2)).

In situations of occupation, a person who has taken direct part in hostilities and is not entitled to prisoner of war status, 'unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth [Geneva] Convention, to his rights of communication under that Convention' (art. 45(3)).

Article 5 of the Fourth Geneva Convention provides that in situations of occupation, where the occupying power is satisfied that an individual protected person (such as a civilian) is definitely suspected of or engaged in activities hostile to the security of the state, 'such individual person shall not be entitled to claim such rights and privileges under the [Fourth Geneva Convention relating to civilians and situations of occupation] as would, if exercised in favour of such individual person, be prejudicial to the security' of the state. In situations 'where absolute military security so requires', such individuals are deemed to have forfeited rights of communication under the Fourth Geneva Convention (art. 5(2)). Nonetheless, these individuals still receive protections under the Fourth Geneva Convention. Article 5(3) provides that:

In each case, such person shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person

under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

At a minimum, civilians who take direct part in hostilities are entitled to the fundamental guarantees articulated in article 75 of the First Additional Protocol. Article 43(5) of the First Additional Protocol explicitly states that where a person has taken part in hostilities, is not entitled to prisoner of war status and does not benefit from more favourable treatment in accordance with the Fourth Geneva Convention, he or she has the right at all times to the protection of article 75. The guarantees set out in this article are extensive and include the right to be treated humanely in all circumstances and the right to be protected against murder, torture, corporal punishment and outrages upon person dignity. Article 75(4) guarantees the right to a fair trial and due process in respect of penal offences.

Criminal liability for direct participation in hostilities

A combatant who takes part in hostilities is entitled to immunity from prosecution for that participation, to the extent that he or she abides by the laws of war during such participation. Civilians, on the other hand, do not enjoy such immunity. So, for example, if a civilian takes a direct part in hostilities and kills a combatant, the civilian may be prosecuted for murder under domestic law. Similarly, if the civilian is engaged in the commission of genocide or a crime against humanity, then he or she may be held to account at international criminal law. However, direct participation in hostilities does not, in and of itself, constitute a war crime for the purposes of IHL.¹⁰ To revisit the previous example, a civilian who kills a combatant does not, *ceteris paribus*, commit a war crime because the combatant enjoys no immunity from attack. However, the civilian remains liable for any breaches of domestic law, or any distinct breaches of international criminal law, and is not entitled to prisoner of war status.

Closing remarks

A broad or narrow definition of direct participation in hostilities? The contextual undercurrent

The current debate over the suitability of a broad or a narrow definition of direct participation in hostilities is informed by an unspoken contextual undercurrent: the 'war on terror'. There have been significant moves to

take a broad view of the concept of direct participation in hostilities, in order to make it easier to attack and prosecute members of so-called terrorist organisations. An example of this undercurrent is the suggestion that the notion of direct participation in hostilities should be understood to incorporate a 'membership approach'. This approach holds that persons who are not members of the armed forces within the meaning of article 43 of the First Additional Protocol may, nevertheless, belong to an armed group using military force on a regular basis, and that membership of a group directly participating in hostilities could be deemed a sufficient criterion for loss of immunity from attack (First Expert Meeting 2003:7–8). The Israeli Supreme Court relied on the membership approach in the *Targeted Killings Judgment*. The judgment, which has been criticised for its 'non-analytical' reasoning (Even-Khen 2007:213), asserted (§39, citing Statman 2004:195):

... a civilian who has joined a terrorist organisation which has become his 'home', and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack 'for such time' as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility.

The debate over the suitability of a membership approach to the notion of direct participation in hostilities is almost certainly informed by a push to broaden the scope of direct participation so as to cover membership in designated terrorist organisations. However, as many experts at the ICRC's Third Expert Meeting (2005:58) have noted, such an approach is incompatible with the text and substance of the Geneva Conventions, which provide that 'civilians-contrary to combatants-could not be attacked based on their status, but only based on individual conduct amounting to direct participation in hostilities.' The experts go on to accurately contend (2005:58): 'If "membership", whether in armed groups or in armed forces, was equated with "direct participation in hostilities", then there would no longer be any difference between status and conduct.'

The moves to broaden the definition and to reduce the protections available to civilians in armed conflict might indeed have a short-term benefit for the 'Coalition of the Willing' in its prosecution of the war on terror. However, adoption of the membership approach would also have the effect of reducing the protections available to the security contractors supporting coalition forces, so long as the contractors could be said to be members of an organisation that is repeatedly engaged in taking part in

hostilities. This is but one area in which attempts to reduce the rights of terror suspects is likely to impede the protection of private contractors in situations of armed conflict.¹¹

In settling upon an adequate definition of direct participation in hostilities, we must seek to draw out legal principles, rather than merely attempt to apply the law to specific factual situations. Any legal construction of the phrase must be in line with the fundamental principles of IHL and must, at all times, strive to minimise suffering in situations of armed conflict. The realisation of this aim involves two things: first, actors in armed conflict must be aware of their responsibilities under IHL, and should not exercise force in impermissible situations; and second, the law must protect those actors, so far as is possible.

Future directions

This brief survey of the law related to direct participation in hostilities has highlighted some of the difficulties associated with and inadequacies of the current definition and application of the principle. In light of these difficulties, the clarifying work of the ICRC's Expert Meetings is particularly encouraging. At the Third Expert Meeting, participants agreed that in order to clarify the notion of direct participation in hostilities they should publish a document to provide interpretive guidance. The experts accurately noted, however, that states (and not individual experts) are charged with the responsibility for making international law. Accordingly, the aim of the clarification process could not be to 'progressively develop' the law, but needed to remain limited to interpreting the notion of direct participation in hostilities within the framework of the *lex lata*.¹²

Considering the unavoidable limits on the work of the ICRC's Expert Meetings, it is even more important for states to look towards a *legal* solution to the uncertainty. This could take any number of forms, but two of the most useful legal responses would be: first, the drafting of a new international legal agreement, amending and clarifying the meaning of direct participation in hostilities under IHL (this option seems unlikely for the time being); or second, adjudication of specific questions relating to direct participation in hostilities, whether that adjudication be by domestic or international courts and tribunals. The latter is a particularly important legal response and would help to ensure that the law remains dynamic and adapted to changing circumstances in armed conflict. Indeed, respected international jurist Antonio Cassese commends the Israeli Supreme

Court for its attempt at setting out a method for determining whether particular conduct amounts to direct participation in hostilities. He notes (2007:342):

As things stand, since individual states are unlikely to pass legislation at the domestic level to define these international standards with a view to their implementation and application by national courts, it falls to judicial bodies to try to flesh out those provisions of international humanitarian law as much as possible, by setting out guidelines which give content to the restrictions on the broad freedom of states in this area.

No useful international legal instrument can provide an exhaustive list of the conduct that amounts to direct participation in hostilities. The law will always call for judgment on the part of actors in armed conflict; indeed, most combatants are trained in IHL and are continually required to make split-second decisions in its application. It is certain that there will be tricky cases: this is where the standing practice of states and the work of the judiciary are essential.

What remains clear is that, absent any changes to the conventional law, states are bound to apply the law as it stands. Accordingly, judicial and practical interpretations of IHL provisions relating to direct participation in hostilities must align with the general principles contained in the existing law. As tempting as it might be to construct the law in a way that gives one group an immediate strategic advantage, a short-sighted failure to operate within the existing legal framework will undermine the fabric of IHL and could compromise the protections guaranteed by the principle of distinction.

Notes

- 1 ICRC (International Committee of the Red Cross), *Report on Direct Participation in Hostilities under International Law* (Geneva, September 2003) ('First Expert Meeting'); ICRC and TMC Asser Institute, *Report of the Second Expert Meeting on Direct Participation in Hostilities under International Humanitarian Law, The Hague, 25–26 October 2004* ('Second Expert Meeting'); ICRC and TMC Asser Institute, *Summary Report: Third Expert Meeting on the Notion of Direct Participation in Hostilities, Geneva, 23–25 October 2005* ('Third Expert Meeting') (collectively, 'Expert Meetings').
- 2 The extent and nature of protection is dependent upon the individual contractor's status under international humanitarian law (IHL).

- 3 For example, Blackwater, which has a heavy presence in Iraq, currently employs former servicemen and women from African nations, particularly from Uganda (see *Indian Ocean Newsletter* 2007).
- 4 See, for example, Cleaver 2000. Operating alongside Pacific Architects and Engineers, DynCorp has secured a contract to provide 'logistical services' in South Sudan, building barracks, providing telecommunications and training the former Sudan People's Liberation Army (*Sudan Tribune* 2006) and is simultaneously retraining and recruiting for the Armed Forces of Liberia (Dickinson 2006). Blackwater and other firms continue to lobby for more involved military contracts in Sudan (Hemingway 2006; Witter 2006).
- 5 For consideration of whether private military contractors meet the legal tests for mercenary status, see generally Fallah 2006.
- 6 See, for example, ICRC 1972:114, §3.120; but cf Dinstein 2004:27.
- 7 *The Prosecutor v Jean-Paul Akayesu*, Case no. ICTR-96-4-T (2 September 1998).
- 8 For example common article 3; article 17 of the First Geneva Convention; articles 67, 118 and 119 of the Third Geneva Convention; articles 44, 49, 130, 133, 134 and 135 of the Fourth Geneva Convention; articles 33, 34, 45, 47, 59 and 60 of the First Additional Protocol; articles 1–3 of Hague Convention (III); articles 22–41 of the Regulations annexed to Hague Convention (IV); title of Hague Convention (VI). See Verri 1992:57.
- 9 For example, article 31.1(c) of the 1998 Rome Statute for the International Criminal Court states that there is no criminal responsibility where: 'The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected.'
- 10 Article 51(3) of the First Additional Protocol; article 13(3) of the Second Additional Protocol; customary international humanitarian law Rule 6 (in Henckaerts & Doswald-Beck 2005:19).
- 11 At the First Expert Meeting (2003:9), 'No one contested that direct participation in hostilities by a civilian could not be considered a war crime'. See also Quéguiner 2003:10; Schmitt 2005:521.
- 12 Other examples include the problematic construction of international humanitarian law in an attempt to justify the detention, mistreatment and prosecution of terror suspects at Guantánamo Bay.
- 13 The law as it is, rather than *de lege ferenda* or the law as one would wish it to be (Third Expert Meeting 2005:5–7).

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PART IV

**REGULATION OF THE PRIVATE
SECURITY INDUSTRY AT THE
DOMESTIC LEVEL**

CHAPTER 8

OVERSIGHT AND MONITORING OF NON-STATE/ PRIVATE POLICING: THE PRIVATE SECURITY PRACTITIONERS IN SOUTH AFRICA

Anthony Minnaar

Introduction

While the South African private security industry is reasonably well regulated by means of the Private Security Industry Regulatory Authority Act (No 56 of 2001) (the most recent piece of legislation dealing with regulating the South African private security industry), this legislation does not specify setting up an oversight monitoring body-only an inspectorate and a complaints line which deal more with working conditions (labour issues) and service complaints from clients than actual private policing actions. There is no formal body to serve the South African private security industry such as the Independent Complaints Directorate (ICD) that monitors the behaviour and sanctions misconduct by the South African Police Service (including Metro Police agencies). This 'non-oversight/unmonitored' situation has consistently raised questions around control of private/non-state policing with regard to reporting lines, i.e. who has ultimate authority over actions, especially when it comes to such issues as use of force, control of firearms and shooting incidents, powers of arrest and seizure, collecting of evidence and, finally, to whom are the personnel of a private security company ultimately accountable-the client, the company bosses or the officials of the regulatory body?

Within this context there are a number of questions that arise, namely: with regard to monitoring, which body-police oversight (complaints authority) or private security authority inspectorate-should be active in monitoring these private policing activities? With regard to imposing sanctions the question is not so much who should do it, but would implementation and enforcement be feasible? The latter question is also linked to ensuring that private security providers adhere to a code of conduct/ethics. Again this raises the issue of enforcement which, in any case can, only be imposed on licensed/registered operatives and companies. It also raises the question of who would with fly-by-night companies and illegal/unregistered/unlicensed persons and companies in the private security industry.

The situation is complicated further by the lack of role clarification: Exactly what exact policing services (extent) provided by the private security industry

need to be independently monitored? And, what about the ‘privatisation of crime control’ (e.g. security villages and gated neighbourhoods)? In addition to the above, there is the issue of fragmentation and differentiation of services provided by the private security industry as a whole-on a specific level there is, in fact, no one ‘thing’ called ‘private policing’.

This chapter then is an attempt to formulate practical answers to some of these questions as they pertain to the South African situation. The chapter starts off by giving background context to the private security industry in South Africa, its size and growth post-1994 and then moves on to outline what ‘private’ policing is, and how and where it has ‘infiltrated’ traditional public policing activities. It then looks at how the private security industry is being regulated (the relevant legislation and, in particular, the Code of Conduct and some of the problems in terms of enforcement of the provisions of this code) in South Africa with an overview of specifically monitoring and oversight problems (as opposed to the current Private Security Industry Regulatory Authority (PSIRA) work inspections). The chapter also looks at international responses to the monitoring of private policing activities and then puts forward a model based on the principle of public/private partnerships in order to address the existing gap where no monitoring at all occurs of private policing activities (currently in South Africa only public or state police conduct is being formally monitored). The chapter concludes with an overview of why oversight and monitoring of private security policing activities is important and highlights that in public/private partnerships the emphasis is on co-operation among all partners (irrespective of the value or contribution each brings to the partnership), co-ordination of activities and sharing of resources.

Background context

Over the last 30 years the private security industry has grown exponentially worldwide. This growth was accompanied increasingly by calls in various countries for the imposition of regulation on the private security industry. Broadly speaking, regulation in the international sphere assumed three forms, namely full regulation, partial regulation or self-regulation (alternatively, no regulation at all).

South Africa has a relatively long history of state attempts to improve control over the private security industry in the country. This was motivated by various factors other than the obvious one of its rapid growth and its outstripping (in sheer numbers) of the national policing service. These ‘other’ factors included distrust of the private security industry harboured by the

post-1994 government with regard to such sensitive matters as the guarding of national key points, the industry as a whole in the mid-1990s consisting of former military and police officers (at management level); government fears of the industry's ability to destabilise any security situation, especially in the light of employing highly trained operatives allowed to be legally armed. These factors fed into the shortage of resources and manpower experienced by the South African Police Service (SAPS) as well as their inability to police effectively. In part, the growth in the private security industry was seen as necessary to fill the perceived 'vacuum' in policing services and to provide the public with a feeling of being secure and safe, especially in the view of continued high levels of crime. Poor service delivery in the police was not helped by the fact that a moratorium was imposed on new recruitment for the SAPS. (It was lifted only in 1999.) All of this, coupled with retrenchment packages and transformation issues, led to large-scale resignations with police numbers dropping from a high of around 146 000 in 1995 to a low of 123 000 in 2002 (Minnaar & Ngoveni 2004:42). Many of these police officers gravitated towards managing and running or even setting up their own security companies all over South Africa.¹ What then has been the rate of actual growth in the South African private security industry?

Growth of the private security industry in South Africa, post-1994

The rapid growth and expansion of the private security industry in South Africa² is now an accepted fact that cannot be ignored, argued or wished away. Since the 1970s the South African private security industry has grown at anything up to 30 per cent per annum.³

In 1990 the private security industry in South Africa was valued at R1,2 billion, by 1997 this figure was put at R6 billion (Reynolds 2003), and by 1999, including vehicle security and tracking and in-house security (at large mining houses, banks, insurance companies, etc), the value of the private security industry was estimated to be R9 billion. In January 2004 this value was estimated to be more than R14 billion with estimates as high as R18 billion to R20 billion also being mentioned (Albert 2004:56). The latest estimate, done by PSIRA in March 2007, put the estimated annual turnover of the industry in excess of R30 billion (US\$4,25 billion). At a rate of 13 per cent per annum the private security industry remains one of the fastest growing industries in South Africa (Badenhorst 2007).

The biggest growth in terms of numbers, particularly over the last ten years, has been in the guarding sector. This sector has also seen the largest increase

in the number of vehicles: currently more than 70 000 response vehicles are in use. The alarm and response sector is the second biggest with just under 35 000 vehicles. The largest number of guards appears to be in the in-house sector (which includes municipalities, large mining houses, oil companies and banks) followed by contract guarding services and the alarm response sector.

Exact figures for active guarding personnel for each sector (as above) cannot be provided although estimates by Jenny Irish in 1999 put these in the order of 175 00 for the in-house sector, 165 000 for guarding services and 50 000 for the alarm response sector (Irish 1999:1, 6, 7). This was the situation before the new legislation was implemented, which required the registration of every service provider and security officer (including in-house security personnel).⁴ Approximately 25 000 to 30 000 new trained security officers enter the market every year. According to Julie Berg (2004:6) 102 168 new security officers entered the industry between December 1999 and June 2003. The number of active security officers increased from 115 331 in 1997 to 210 000 in 2002 (Smit 2003:10). However, because of the oversupply of lower-end security officers, poor working conditions and low wages there is a large turnover of personnel in the industry with large numbers becoming inactive (unemployed) or leaving the industry every year.

By the end of March 2007 the whole private security industry had approximately 900 000 persons registered⁵ with PSIRA of which only 301 584 were termed as 'active security officers'. The majority (51%) of these registered security practitioners are in Gauteng Province (153 868)⁶ (Badenhorst 2007).

In addition, although a peak was reached in 1997 with 4 437 registered security service providers, by June 2004 this number had dropped to 3 553 service providers registered with PSIRA (including security training centres countrywide) (PSIRA 2004).⁷ This reduction in numbers (for instance, almost 1 000 installers had been reduced to 300) was due mainly to buyouts and mergers (Smit 2003:10). However, the number of companies registered with PSIRA has increased once again to 4 833, with the majority (1 939 or 40 %) being registered in Gauteng Province. There are also 22 security associations that looking after the interests of particular parts of the private security industry.

In contrast to the private security industry, on 1 March 2007 a total of 129 126 uniformed police officers were employed by the SAPS (this number excludes civilians-the total number of persons employed is approximately 155 000) (SAPS 2007). Of these uniformed police officers approximately

116 000 are termed 'operational' police officers who perform policing functions. Therefore the current ratio of active private security officers to uniformed police members in South Africa is 2:1.⁸ As at the end of March 2007 the national police to population ratio was 1:367 (which is actually below the International Association of Chiefs of Police (IACP) recommended benchmark standard of 1:400)⁹ but, by comparison, the private security to population ratio would be in the order of 1:233. However, it should be borne in mind that only a small proportion of the population can actually afford comprehensive security services-it has been estimated that the ratio of paying clients to private security officers is in the region of 1:20 (or even lower).

'Private' policing in the South African context

It is a given fact that the 'privatisation of crime control' has in the last few years become far more evident in South Africa. The public in many of the more affluent neighbourhoods complain about the disappearance of 'visible' policing from their neighbourhoods, i.e. they only see the personnel of private security companies parked on the street corners while the SAPS appear to be conspicuous by their total absence from residential neighbourhoods. In some areas private security is replacing or has replaced public police. These private security companies often 'sell' or market themselves not only as a replacement but also as a supplementary service to the SAPS. A case in point has been the provision of armed response services to private alarm systems.

The feelings of insecurity and fear of crime among most South African citizens continue to permeate public perceptions (this is confirmed by a number of public surveys by various marketing and research survey companies) and an ever-increasing number of the South Africans are making use of private security companies to protect themselves, their families and their homes. As a result, post-1994, the South African private security industry has increasingly begun 'performing functions which used to be the sole preserve of the police' (Irish 1999:1).

Private policing is not a new form of policing that only developed in the last decade or two to fulfil demands posed by new forms of crime and the use of technology in committing crime; it has been around for many years. These days the term 'private policing' is used interchangeably and synonymously with 'private security' even though the majority of the security industry is involved in purely guarding functions. There is a great distinction between private policing and guarding operations, whereas the term 'policing' implies an overall role of guarding, protecting by means of crime prevention

patrolling), reaction (responding to a crime in progress) and investigations (securing a crime scene and collecting evidence and information from witnesses). Private security activities do not generally have all these 'policing' functions being implemented as part of overall integrated functions but they do sometimes exist in a separate form.

Modern security requirements dictate that 'policing' activities very similar to those of the public or state policing agencies are undertaken by private security practitioners, namely managing security risks (potential crime), risk (crime) profiling, risk (crime) analysis (identifying vulnerabilities), risk reduction, investigating any breaches of security and collecting information/intelligence as well as evidence of breaches in the provision of security (which might well be the perpetration of a crime against the organisation/company) and the protection of assets, property and people.

Moreover, some of the functions, such as securing premises, patrols, responding to alarm calls or crime reports, and crowd management, are very similar for both forms of policing. Private policing involves more than just patrol and guard duties. Many of the allied activities to these two functions involve protection of assets or people-establishing perimeter security and other protective barriers and security measures-and are essentially also designed to prevent insiders and outsiders from committing crimes, in other words, pure and simple crime prevention. Furthermore, many security companies have developed investigative capacities and collect information and evidence, interview suspects and develop a criminal case (which is usually handed over to the authorities for prosecution) in the process of investigating 'incidents'.

In the implementation of both forms, where is the overlap/interface between 'the fight against crime' as opposed to the mere provision of private security versus public safety? A 2004 report from the UK on plural policing found that:

[There was] considerable evidence of public frustrations with traditional levels of 'public' policing and apparent inadequacies of police responses to calls [call outs], particularly in residential sites. This perceived lack of sufficient or appropriate police response was identified by many citizens, local politicians and business people as the primary driving force in creating a market for additional security and policing services (Crawford et al 2004:1).

I emphasise here the call for additional 'policing services'. This quote encapsulates many of the issues and problems that have in recent times led to the growth of so-called private policing or the provision of policing activities

by paid security operatives. Furthermore, it highlights a number of trends (that seem to be generic the world over) or implies a number of reasons for this growth, namely: The gap in public policing service delivery (in other words the run down of services, cuts in funding, manpower shortages and the increase in crime). Allied to this have been demands by the private security industry for greater involvement in policing and crime prevention activities. Further linked to these two reasons has been the changed role of private security in the actual provision of 'policing' services with the concomitant growing infiltration of private security in these policing activities. This growth has, *inter alia*, been fuelled by the creation of a market (commercial gain) for security services (private policing) outside traditional industrial and private security, for example in various crime prevention programmes such as the installation and operation of closed-circuit television (CCTV) surveillance in central business districts (CBDs). The final factor in this growth has been the aspect of public funding (business levies) other than private individuals who pay for additional private policing services, and the contracting by local governments of private security practitioners for such 'private' policing.

Accordingly the growing use of private security in crime prevention and other policing functions has led to an increased blurring of the lines between private and public police.

Regulating the private security industry in South Africa

Although the private security industry in South Africa is reasonably well regulated (it compares favourably with both the UK and the Australian¹⁰ regulatory regimes, and is even stricter in certain respects) there are specific lacunae in the regulations when it comes to oversight and monitoring of behaviour and conduct of operatives on the ground. South African legislation does not specifically outline the kind of policing activities mentioned above. There is thus an obvious current need to revise our current legislation.¹¹

In the late 1980s the state became aware of the growth and expansion of the private security industry in South Africa and the fact that it was largely unregulated or under-regulated. Moreover, the state recognised that this industry was increasingly performing duties previously within the ambit of the public police and consequently needed a greater degree of regulation and control.

Subsequently, the Security Officer's Act (No. 92 of 1987) was passed (but only promulgated in 1989). The primary objective of the Act was to establish the Security Officers' Board (SOB) to deal with and exercise control over the

career occupation of security officer and to maintain, promote and protect the status of the occupation of security officer. The SOB, as the regulatory body for the industry, not only registered companies but also undertook the registration of every employee (a levy contribution every month by each employee was required for registration). This first piece of legislation merely stipulated that this was applicable to all companies and individuals who provide 'security services' for reward without unpacking this term in any detail.

However, the major achievement of this first SOB was the promulgation of a Code of Conduct to regulate ethical behaviour. This Code of Conduct provided a certain amount of protection to both the consumer and employee that they had not had before. In practice, however, the Code of Conduct remained a dead letter without any strong powers of sanction, or the ability to enforce disciplinary measures such as expulsion/suspension or fining. The other notable achievement was the creation of an inspectorate to 'enforce regulations'.

The Security Officers' Act (No 92 of 1987) was amended by the Security Officers' Amendment Act (No 25 of 1990) and the Security Officers' Amendment Act (No 119 of 1992) that were both an attempt by the government and the industry to institute some form of stricter regulation of the industry. In 1997 the legislation was again amended and The Security Officers Amendment Act (No 104 of 1997) was passed. In terms of the amended legislation, every company and individual that/who provides a security service was required to register with the regulatory authority. Broadly speaking, some of the SOB's most important functions as outlined in the new amendment (and that are relevant to this chapter) were to:

- Develop a registration system and maintain a computerised data base consisting of all registered security officers and security business
- Undertake fingerprint classification of all those wanting to enter the security industry both as employers and employees, to ensure that people with serious criminal convictions do not enter the security industry¹²
- Undertake inspection and prosecution of security businesses that which break the law, especially fly-by-night companies

In 2001, in recognition of the lack of compliance with the existing Code of Conduct the Security Officers' Interim Board promulgated supporting regulations as the Improper Conduct Enquiries Regulations, 2001, which provided for any complaints and charges of misconduct or criminal activities to be submitted to the Board whereupon an enquiry hearing would be held.

These regulations also made provision for hearing procedures whereby witnesses could be called, evidence led, and legal representation for parties be provided. In addition, these regulations also made provision for sanctions and fines to be imposed. For the first time the regulatory body for the private security industry had the legal ability to formally sanction and impose fines. Previously, if any registered company or security officer was guilty of misconduct, the most that could happen was suspension of the company and deregistration of the individual security officer involved. With the new legislation (see below) that enforced the registration of every security officer and every security company in South Africa, the official control and regulating of the industry was greatly enhanced.

In 2001 the final piece of legislation on the further regulation of the private security industry was passed as the Private Security Industry Regulation Act (No. 56 of 2001). Essentially this Act set up the Private Security Industry Regulatory Authority (PSIRA) and also obliged every security company, including of in-house security, to register as a 'security service provider' and register its personnel as well. The Act incorporated provisions for a new Code of Conduct and the Improper Conduct Regulations. Furthermore it established an inspectorate with increased powers of inspection of all registered security service providers and powers of reporting and prosecution of charges of misconduct. This legislation was supported by the finalisation and signing of the regulations for the new Code of Conduct in February 2003.

The stated purpose of this Code of Conduct was 'to provide binding rules that all security service providers and employers of in-house security officers *must obey*' [my emphasis] (Code of Conduct 2003: chapter 1(s1)). A further purpose is to: 'promote, achieve and *maintain compliance* by security service providers with a set of minimum standards of conduct' (Code of Conduct 2003: chapter 1(s1b)). Interestingly the Code is applicable to all security service providers who render a security service, whether they are registered with PSIRA. Furthermore it is applicable to all conduct irrespective of whether the conduct was committed within or outside South Africa (Code of Conduct 2003: chapter 1(s 2a, s 2d)). The Code of Conduct (chapter 2(s 8(3)) also obligates a security service provider to 'endeavour' to:

- Prevent crime
- Effectively protect persons and property
- Refrain from conducting himself or herself in a manner which will or may in any manner whatsoever further or encourage the commission of an

offence, or which may unlawfully endanger the safety or security of any person or property

In terms of private policing activities the following ‘obligations’ contained in the Code of Conduct (chapter 2 (s 8(2b))) are relevant with regard to monitoring these activities:

... may not break open or enter premises, conduct a search, seize property, arrest, detain, restrain, interrogate, delay, threaten, injure or cause the death of any person, demand information or documentation from any person, or infringe the privacy of the communications of any person, *unless* such conduct is reasonably necessary in the circumstances and is permitted in terms of law [my emphasis].

In addition, the Code of Conduct states that a security service provider ‘may only use force when the use of force as well as the nature and extent thereof is reasonably necessary in the circumstances and is permitted in terms of law’ (Code of Conduct 2003: chapter 2(s 8(2b))).

All of these are, of course, particularly applicable to those kinds of security service that can be termed ‘private’ policing.

In terms of firearms control the Code of Conduct allows for security practitioners to possess and carry a firearm but only if such conduct is lawful. They are also permitted to use a firearm but again only in circumstances and in a manner permitted by law (Code of Conduct 2003: chapter 2(s 8(6–7))).

One final Code of Conduct ‘obligation’ I would like to mention in this context is the one that states that a security service provider ‘may not act in any manner that threatens or poses an unreasonable risk to the public order or safety’ (Code of Conduct 2003, chapter 2 (s 8(8))) [my emphasis].

But over all this, the question arises as to what kind of sanctions and penalties can be imposed for non-compliance with these standards of conduct. The Code of Conduct merely says that PSIRA can do the following in respect of ‘improper conduct’ by a security service provider:

- Issue a warning or a reprimand to any one found guilty of breaching the Code of Conduct
- Suspend the PSIRA registration as security service provider for a period not exceeding six months

- Withdraw such registration
- Impose a fine not exceeding R10 000, which is payable to PSIRA itself
- Publish (in a 'name and shame' manner) details of the conviction of improper conduct and of any penalty that was imposed for the specific breach (Code of Conduct 2003, chapter 5 (s 25(1a–e)).

The only other threat of sanction that PSIRA can impose is to hand over cases for criminal prosecution to the relevant authorities.

However, none of the South African legislation above stipulates or mentions any direct involvement in policing services (joint or partnership policing) or crime prevention (other than the general endeavour to 'prevent crime' where this would involve the provision of security to a client by means of monitoring electronic equipment, installing alarm systems and providing an armed response service). Crucially, no mention is made of any of the additional powers or peace officer privileges¹³ requested by the South African Security Association (SASA) in the 1997 submissions to the Amendment Act.¹⁴ It therefore still remains the prerogative of the SAPS to enter into formal agreements for co-operation, outsourcing or joint policing operations with the private security industry. The National Commissioner of the SAPS may still, under the Criminal Procedure Act, delegate the powers of a peace officer to private security officers in certain circumstances.

This is where current regulation stands. The above lack of mention of 'policing activities' in regulation remains at the heart of the whole issue regarding the proper monitoring and oversight of the conduct of security practitioners involved in public policing activities (as opposed to PSIRA merely inspecting premises and checking that employees of security companies are registered with them and are being paid properly at the wage levels set by the Department of Labour (DoL)).

In theory, all private security companies were required to register and comply with rules and regulations. Companies that did not comply with regulations had to pay fines, and those that were found to have breached the law were handed over to the South African Police Service.¹⁵ But, in practice, although the Regulator conducted its own investigations through its inspectors and criminal cases were handed over to the SAPS, there were large flaws in the system. First, the level of enforceability was constrained by the fact that there were a considerable number of vacancies in the inspectorate in all provinces. Consequently inspections

just did not occur and those that did occur concentrated on checking the PSIRA registration of employees and that companies were meeting DoL conditions of employment (for example paying at least the minimum wage in each category). Second, there was an even greater shortage of trained investigators (especially for suspected criminal cases). Added to this was the fact that poor evidence collecting resulted in little or no information on which to build cases for handing over to the SAPS for prosecution. Third, there was a general paucity of accurate databases and minimal accurate information collection (for example the fingerprinting database, accurate addresses of personnel (particularly of small companies) and no database of companies that had deregistered or been suspended. The latter led to suspended persons being able to register new companies successfully since there was no 'block' linked to their personal particulars. Fourth, investigations were largely complaints driven, and then mostly complaints from members of the public. The majority of complaints dealt with labour issues, such as working conditions or low wages, and were received from staff members, or were service-related complaints lodged by clients. Complaints from the public were few since members of the public were largely uninformed not only of the existence of the complaint channels but also that complaints could be made to a regulatory body dedicated to the private security industry. Criminal complaints were even fewer in number and so were complaints about misconduct involving excessive use of force.

Allied to the above problems was the lack of enforceability of imposed sanctions. For labour-related breaches fines could be imposed by the DoL in the Labour Court, while criminal cases were handed over to the SAPS for prosecution. Where security companies and/or their personnel breached the regulations of PSIRA they could be fined or be deregistered. But the inability of PSIRA to enforce such sanctions on fly-by-night companies or companies that declared themselves bankrupt to avoid paying fines points to potential problems for implementing strict monitoring of the behaviour of companies involved in policing activities and then enforcing sanctions for any misconduct along the lines of excessive use of force, illegal detentions and arrest, seizure of goods, contamination of crime scenes by tampering with or improperly collecting evidence, and shooting incidents resulting from improper use of firearms. Efforts to impose stricter monitoring of these kinds of activity are not helped by the fact that adherence or subscription to the existing PSIRA Code of Conduct largely remains a 'matter of conscience' and commitment, even though the regulations use terminology along the lines of 'must obey'. (There has been talk of instituting a 'name and shame' system but more in the realm of poor service delivery and to oust 'fly-by-night' operations.)

Additional oversight and monitoring problems

Returning to the problem of stricter monitoring of private policing, a number of other problems arise. Generally, over the last few years, there has been an absence of any official co-operative and regulatory framework between the SAPS and private security companies. Most private policing has occurred as or ends up being ad hoc or small local initiatives. Furthermore, issues around control have arisen consistently. In other words, who has ultimate authority over actions, and what are the reporting lines and accountabilities?¹⁶ Finally, there has been a lack of co-ordination of activities between public and private policing entities.

If we look at monitoring per se, the question that arises immediately is which body-the police complaints authority or the private security authority inspectorate-should be responsible for actively monitoring private policing activities. The second question in this context is that of imposing sanctions, not so much who should do it but regarding its implementation and enforcement.

The above is also linked to ensuring that private security providers adhere to and implement the conduct outlined in the 2003 Code of Conduct. This again raises the issue of enforcement, which can in any case only be done in the case of licensed/registered operatives and companies. It also raises the question of who should deal with fly-by-night companies and illegal/unregistered/unlicensed persons and companies.

Overarching these issues is the lack of clear roles, namely exactly what policing services (extent) are to be provided by private security and the entire issue of 'privatisation of crime control' (e.g. security villages and gated neighbourhoods). Another problem in this regard is fragmentation and differentiation of the services provided by the private security industry as a whole. The utilisation of short-term security contracts coupled with the lack of government funding/support for 'private' policing services complicate the matter even further.

One additional issue (often raised by members of the public police themselves) is the issue of legitimacy. (What should be paramount, the public police oath to serve the public and maintain law and order or the self-interested economic motive of private security and clients' interests?)

Finally, the crux of the oversight issue lies with accountability. Broadly speaking, the main function of public police agencies is to protect the public at

large. In contrast, the private security industry operates on profit and is directly accountable to citizens only if they are clients and certainly not to the public at large. In fact, the industry is accountable to the client only insofar as providing a security service and to their shareholder insofar as making money. But when public monies, taxes and business levies are used by local government or non-profit organisations to contract (as in the case of city improvement districts (CIDs)) private security companies to provide policing of CBDs (such as CCTV, foot patrols, investigation and arrests), questions of public accountability and monitoring of those activities are inevitable and in the public's interest.

There is one extremely 'grey' area that I would like to mention and add to the discussion as a further complication when we look at 'private' policing. It concerns the role of private investigators and, more specifically, the ancillary issue of ethical issues, such as of access to information for legitimate purposes (for example governments using licensed agents to test fraudulent insurance claims), protection of privacy, accessing of confidential information, trespassing and harassment (intimidation) in the course of private investigations or interviewing of suspects, undercover surveillance, and tapping of telephones.

International control/monitoring responses

One of the main responses in developed countries has been increased regulation of the private security industry and the establishment of private security regulatory authorities. Full regulation however is a recent phenomenon in many developed countries (e.g. the UK legislation was only formulated in 2001 and regulations and licensing only implemented in 2004 with the deadline for registration of guards only on 20 March 2006).¹⁷ Stricter regulation is usually accompanied by licensing of all service providers. (In the UK a fee is charged for licensing and licenses must be renewed every three years while in Australia security officers (all categories) and security services providers are annually re-licensed.) In some countries licensing is linked to background checks, especially for a criminal record, on all registered security personnel. In states in the US private security operators and agencies are bonded and bonds are forfeited on the grounds on the grounds of misconduct. This has furthermore been coupled in both the public and the private sectors with more effective civil remedies (that is, civil litigation) for misconduct.

Increased regulation in the private security industry has led to concomitant improvement of procedures for screening, training and managing civilian

specialists. One of the outcomes of increased regulation, improved procedures and the industry's infiltration of public policing spheres of operation has been an emphasis on increased professionalisation of the private security industry (e.g. unit standard setting, learnerships and tertiary qualifications). To deflect this infiltration some jurisdictions have implemented systems and structures, such as neighbourhood wardens (UK) and the block watch system to supplement public policing (in other words, affordable private security that is community based). A state-funded option implemented to deflect private security usurpation of policing functions was the implementation of community support officers (CSOs) in the UK during 2002/2003. (CSOs are dedicated patrol officers in uniform with limited powers.)

One of the international responses has been the privatisation, civilianisation and outsourcing of certain police functions. Usually only non-core policing functions are outsourced (e.g. guarding and transport of prisoners to court; serving summons, guarding government buildings and, in the US, even guarding (securing) of a crime scene and forensics). However, these support services are monitored by the local outsourcing police agency (particularly in the US, by sheriffs departments, highway patrol, municipal police, etc) and have not required the extension of policing powers (for example powers of arrest and detention, searching and questioning) to outsourced personnel.

Overall, in dealing with the entry of private security personnel into the public policing domain, a number of developed countries have relied on the establishment of effective public-private partnerships (PPPs) or 'partnership policing'.¹⁸ PPPs are often underpinned by the formulation of so-called information sharing protocols. In other words, the exchange of crime information in effective partnerships is governed by predetermined protocols that identify where disclosure is strictly justified. These protocols can improve data exchange between the parties and enhance trust and confidence. They also lay down the 'rules' for the co-ordination of information collection activities and can lead to the establishment of formal databases, i.e. an information node where all information can be collected, collated and analysed.

In addition, PPP operations, activities and deliverables need to be underscored and supported by service level agreements (SLAs). These are specific service contracts that outline exact functions, responsibilities, limitations on authority, reporting lines, pooling and sharing of crime information, etc. PPP functions are often made more successful by

instituting regular partnership meetings and structured briefings, since these can lead to a better understanding of the limitations and constraints on the actions of the partner organisations.

Formal public-private partnerships

Most PPPs are controlled by police agencies (as the recognised 'senior' or 'major' partner), but the emphasis should still remain on co-operation among all partners (irrespective of the value or contribution each brings to the partnership), co-ordination of activities and sharing of resources. Operations will usually have a public police officer in charge so that civil liability issues will be channelled through official policing authorities (joint patrols and crime prevention projects).

In PPPs shared policing activities typically involve the following:

- Responding jointly to crimes in progress
- Investigating crimes
- Sharing of crime intelligence
- Joint crime intelligence gathering (for example by means of joint surveillance teams or CCTV operations)
- Sharing of expert knowledge (for example on the latest technology (private sector) or training methods (police))
- Accessing of and supplying official crime information
- Joint planning and policing of special events
- Assistance with training (for example in computer forensics by the private sector companies or in collecting and correct control of evidence at a crime scene by the police)
- Crime prevention advice (sharing of risk analysis and audit information)

In all these partnership activities there is an obvious need the development of clear guidelines and accountability structures for each activity, and especially for strictly 'policing' activities.

One of the issues in partnership policing is the form such partnerships should take, and the type of relationship that is built with each partner, for example equal sharing partnerships, or one partner dominant.

One of the main problems in the formation of local-level partnerships between the police and private security has been accountability (and not so much funding or resources). This, in turn, is linked to the issue of sanctions and disciplinary procedures to be instituted in case of misbehaviour, use of excessive force or abuse of powers by the private sector members the partnership.

One of the other main stumbling blocks to establishing partnerships is police fear of a loss of autonomy and the implied association of private security personnel with private interests, which would lead to contradictory demands on activities.

Nevertheless, the partnership approach gained momentum in developed countries in the mid-1990s, linked as it was to the development of community policing and the emphasis on community safety and crime prevention. The narrow interpretation of crime prevention as the sole preserve and responsibility of the (public/state) police also became obsolete. The broad notion of community safety was premised on the assumption that this would lead to greater participation in crime control and crime prevention by ordinary members of communities in the fight against crime. It was also felt that use of the term 'safety' meant that it was wider than just crime per se, encompassing the wider physical and social impact of crime and feelings of insecurity associated with the perpetration of crime against communities on the whole.

Partnership policing has been most successful where it has been an extension of a national initiative and part of government policy. Moreover, its success is enhanced when it is coupled with regional and local oversight within a framework of strategic co-ordination and operational and frontline co-operation (at grassroots level).

Oversight

Generally speaking, private sector operatives are subject to a much less stringent system of scrutiny than public police. In addition, when looking at oversight of private policing and the private security industry the issue that always comes to the fore is that of 'public' interest versus the client's (paid for) needs.

In Australia one of the problems regarding control and monitoring of misconduct was the lack of understanding by private security operatives of the laws that regulate their activities. This linked to a lack of compliance as well as lack knowledge of the penalties for breaches of the law.

The following questions are posed with regard to oversight:

- What private policing activities should be monitored to the same *standards* and *accountabilities* as public police?
- How should that monitoring occur, in other words what body should be doing the monitoring?
- Is consumer satisfaction not adequate 'oversight' for the provision of private policing (in other words, setting of service delivery as the standard) or should monitoring extend to misconduct and the imposition of sanctions through a court of law?

The need for monitoring

Worldwide the monitoring of private policing (as opposed to the mere regulating of the private security industry) is a relatively new demand. Given the uneven co-ordination, weak accountability and segmented regulation of policing all over the world, formal oversight arrangements are a prerequisite to protecting public interest. One aspect of this is to institute a closely regulated private industry as a counter to existing public policing oversight. The Plural Policing Report of October 2004 found that 'there [was] an urgent need to consolidate and clarify relations [between private security industry role players and public police]' and that 'suitably robust forms of governance and regulation [had to be implemented] to ensure [private] policing [was] delivered in accordance with democratic values of justice, equity, accountability and effectiveness' (Crawford et al 2004:1).

The underlying principle in establishing policing partnerships between the private security industry and the police should not be whether the former replaces policing functions but rather where it can supplement and be supportive of overall policing actions. In addition, there can be no talk of the provision of security outside the formal structures of the state. It is certainly not a question of privatising crime control but co-operating in the fight against crime and co-ordinating joint efforts in this regard. The bottom line is that the police afford or be seen to abdicate policing responsibilities and line

functions. Moreover, one must bear in mind that while the security industry has a vast amount of expertise and manpower that it will make available only if there is a counter benefit for the industry itself (or if it is paid, as is the case in most CIDs in Cape Town) and if such co-operative actions are covered/protected by the law.

Without a doubt most professional security officers see themselves in essence as 'crime fighters'. In order to better utilise them in crime prevention there is a need to establish a more formal national forum¹⁹ where representatives from public police and private security can discuss and formulate solutions to their perceived problems in improving co-operation. More importantly, this forum can provide the opportunity for setting up a national think tank to research, test and recommend policy that can lead to the development of a formal framework within which partnership policing can operate to the benefit of the community at large. The forum can also assist government in formulating the requisite legislation, in order not only to formalise the varied ad hoc and informal co-operation that is occurring in some areas but also to establish appropriate structures for partnership policing to occur on a sustainable and effective level.

Conclusion

As Alison Wakefield (2003:234) has stated:

... the growing role of a regulated private security industry in the policing of areas of mass private property, residential areas and even town centres should, therefore, not be seen as unpalatable so long as attention is paid to the powers and tools they are given for controlling their territories, the training they receive and the accountability structures that provide a check on their practices. [Furthermore] in relation to the exchange of information, standards must be set and safeguards must be laid down to ensure that such information remains confidential ...

The passage quoted recognises a number of issues pertaining to oversight, including the need for professional training not only in security but also in policing, and the need for a formal framework of accountability so that such private police officers will understand their responsibilities as well as the limitations on their actions when providing private policing services. These aspects essential are to monitoring and oversight of the activities of private security operatives.

Notes

- 1 For example, on his retirement at the end of 1999, the former National Commissioner of the SAPS, George Fivaz, established the company George Fivaz & Associates with a number of retired colleagues from the SAPS employed to provide investigative, forensic and security services.
- 2 The South African private security industry has broadly been divided into a number of security sectors, namely Security guards (industrial, residential and commercial); Specialised security guards (cash in transit); Security guards (reaction service/armed response); Security guards (national key points); Security consultants; Special events security; Security training; Body guards (including VIP protection); Security control room operators; Security loss control (including crime risk analysts) and Entertainment venue control. Other sectors refer to small specialisations, such as locksmiths, security technology and installers of security equipment. Specialisation also occurs in the guarding sector industry, for example, casino, airport, hospital and campus security.
- 3 For a more detailed discussion of the main reasons for this growth pre 1990, see Minnaar and Ngoveni (2004). See Shaw (1995:4–5) for details on private security companies protecting national key points as a factor in the early growth.
- 4 Current PSIRA registrations do not give a breakdown of the various sector registrations.
- 5 This is the total number of registered persons whose names are contained in the PSIRA database.
- 6 The second biggest province numberwise is KwaZulu-Natal with 48 587-16 per cent, followed by the Western Cape with 34 462-11 per cent, the Eastern Cape with 20 134-7 per cent, Mpumalanga with 13 675-5 per cent, Limpopo with 13 007-4 per cent, North West with 9 821-3 per cent, the Free State with 6 009-2 per cent, and the Northern Cape with 2 021-1 per cent (Badenhorst 2007).
- 7 As of 1 June 2004 of this total 554 had been suspended. Included in this total were 673 Security Training Centres (PSIRA 2004.)
- 8 Take note that this ratio would have provincial variations where a high density province like Gauteng not only has the highest number of police officers (approximately 30 000) but also the highest number of registered companies and security officers (approximately 150 000).
- 9 The International Association of Chiefs of Police (IACP), using annual police census data for all US policing jurisdictions (collected by the US Department of Justice's Bureau of Justice Statistics) recommend a benchmark ratio of one police officer per 400 members of the population as the optimal number to be effectively served by a policing agency. See IACP nd.

- 10 See Minnaar (2006) for a comparative review of regulations in South Africa, the UK and Australia.
- 11 For more detail on the legislation see Minnaar and Ngoveni (2004).
- 12 This was aimed at 'rooting out' suspected infiltration of the industry by criminal elements, the idea being that before registering its personnel each company has to do a comprehensive background check to ensure that no one had a criminal record. The fingerprinting database would then in turn be used to run a check with the SAPS' Criminal Record Centre.
- 13 Security practitioners have very few powers or authority outside those of any private person. These are defined in section 42 of the Criminal Procedure Act. There are very limited exceptions to this in terms of key point security and the Minerals Act but for all intents and purposes they are not of much practical use. In terms of the Criminal Procedure Act the Minister of Justice may declare anyone to be a peace officer. This category of person then has considerably enhanced authority and may search and arrest in much wider circumstances than a security officer. At present a security officer acting with the same powers as any private individual can make an arrest under certain circumstances, but the arresting person must then summon a Police Officer to take the matter further. In 1997 SASA requested the Minister that security officers of Grade B upwards be granted additional peace officer powers. However, this in effect would mean that the average guard on duty in a store or at an access point would not be eligible and supervisory personnel would have to be available to deal with any problems that require a peace officer. Furthermore, in granting these additional powers it was accepted that a distinction would have to be made for example between the actual act of arrest and the search and detention of arrested persons. The possibility that these powers could be abused also existed and their application in respect of the Constitution and the Bill of Rights could also be problematic. The SASA request for the extension of peace officer powers to certain grades of security officer did not appear to have considered or taken into account legal implications, especially concerning civil liability for the SAPS. Moreover, their interpretation of the extension of peace officer powers by the Minister was not correct since this could only be done under certain clearly defined circumstances for specific situations. In any case the grade of guard to which these powers were to be extended only covered about 8 000 security personnel (1997 figures)-in the scheme of things this would be a very small number of people to be empowered to assist the SAPS. Furthermore, little cognisance seemed to have been taken of wider issues, such as the questions of accountability, responsibility and line of command.
- 14 See Minnaar (1997, annexures).
- 15 This statement and the analysis in the following paragraph is based on preliminary results obtained from research (interviews and questionnaire) conducted by the Department of Security Risk Management at Unisa for a research project funded

by the Open Society Foundation (South Africa) titled *A review of the functions and role of the Private Security Industry Authority (PSIRA) in controlling, regulating and monitoring the activities of the private security industry in South Africa*.

- 16 The issue of accountability is discussed in more detail later on in the chapter.
- 17 See Minnaar (2006) for more detail on UK regulations.
- 18 PPPs are discussed in more detail further on.
- 19 This forum is to be other than the PSIRA Board, which is not a forum in any sense but rather concentrates on professionalising the industry by setting training standards, sending out inspectors to check on registrations and working conditions, and implementing the Code of Conduct.

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CHAPTER 9

THE STATE, SECURITY DILEMMA, AND THE DEVELOPMENT OF THE PRIVATE SECURITY SECTOR IN SWAZILAND

Hamilton Sipho Simelane

Introduction

Human history has always been punctuated with societal concerns for security at both the individual and collective levels. This has particularly been the case because security touches strongly on economy and peoples' livelihoods (Hyden, 1995). Wairagu, Kamenju and Singo have defined security as "freedom from danger, that is, protection from physical or direct violence, and freedom from fear, that is, a sense of safety and relative well-being in political, legal, socio-economic and cultural terms, that is, a measure of protection from structural violence" (Wairagu, Kamenju and Singo, 2004: 16). Attempts to provide such security has evolved over time depicting changing circumstances and conditions of human existence. One of the first attempts by human society to address the issue of security was the formation of the modern nation state. From about the seventeenth century, the dominant notion was that of the state operating as some kind of a protective shield against internal and external threats for all people under its jurisdiction (Tilly, 1987). The relationship between the state and security arose from the point that the state was singled out as the only legitimate and recognized provider of security (Hutchful, 2000). As notions of a state were influenced by the views of M. Weber, the provision of security was viewed as the most fundamental obligation and task of the state as the 'Weberian State' was perceived to enjoy the monopoly of the legitimate use of physical violence.

However, perceptions of security have changed overtime largely because of the manner in which the state has performed its task of providing security to the general public and private concerns. Evidence suggests that even during the time when the provision of security was considered to be the main obligation of the state, other actors, such as Private Military Companies (PMCs) and Private Security Companies (PSCs) were already on the scene and their presence tended to increase over-time. From the seventeenth century people were not fully convinced that security should remain the monopoly of the state but instead that other players, in addition to what the state does, should become actors in the security sector.

Goddard has pointed out that “A Private Security Company is a registered civilian company that specializes in providing contract commercial services to domestic and foreign entities with the intent to protect personnel and humanitarian and industrial assets within the rule of applicable domestic law”(Goddard, 2001: 8). Evidence suggests that the growth of PSCs has been visible throughout the world. For instance, it is estimated that in 1999 there were about 500,000 guards working for 10,000 PSCs among European Community member states (CoESS, 1999). North America, particularly the United States, has also experienced a high rate of growth of PSCs. Africa has also not been immune to such developments. Different scholars have come up with different explanations of why PSCs have grown to unprecedented levels in different parts of the world whether it is under conditions of weak states or highly capable states.

While general characteristics of the growth can be identified the context and peculiarity of each country and each region remain important. Some commentators have argued that the growth of the private security sector in Africa is “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” (Holmqvist, 2005: 11). Others have emphasized the point that PSCs will grow where there is the establishment of parallel structures of power or authority (Reno, 1999). The proliferation of explanations is an indication of the fact that PSCs have grown to challenge state dominance of security relations. Their growth has given rise to a number of serious questions about the capacity of states to provide security to their citizens. Because of the impact PSCs might have on the state, and because security remains one of the major concerns of all people in all states, the need for research into this field can hardly be overemphasized.

As is the case in all countries, the citizens of Swaziland are highly concerned about their security and this concern has been indicated by the growth of PSCs. The last decade has seen a proliferation of PSCs in a country of a little more than one million people. The presence of these companies is conspicuous in the premises of both private and public sector companies. In spite of the visible nature of PSCs in Swaziland, there is presently no research or study that has been devoted to them. This is in spite of the fact that in both urban and rural areas security matters are largely in the hands of private actors than in those of the state.

The focus of this chapter is on PSCs because, presently, Swaziland does not have PMCs possibly because of the geographical scale of the country, and

because up to now the country has enjoyed relative political peace in a region that has experienced conflict and internal strife. The chapter will analyze the development of the private security sector in Swaziland by concentrating on the growth of PSCs. The chapter will argue that the failure of the Swazi state to provide security to its citizens has provided an opportunity for PSCs to become actors in the Swazi security sector, and it has forced communities to organize themselves into private security groups to protect themselves against physical violence and loss of their property. The chapter will also show that as PSCs grow, the role of the state in providing public security becomes more and more obscure. It is hoped that the chapter will provide a challenge for more research into this neglected aspect of Swazi history and also go a long way in closing the existing research gap.

The Development of PSCs in Swaziland

The development of PSCs in Swaziland is a post-colonial phenomenon. The colonial period has no evidence of the establishment of private security structures to any elaborate extent. This was the case because the colonial state was organized into militaristic formation and provided a typical example of the monopolization of the means of coercion in its maintenance of law and order. The police force was the only establishment entrusted with the obligation of maintaining law and order and provision of security to the general public. It must be noted that the concept of security under colonialism was defined in a very limited manner. For instance, security was viewed in terms of prevention of revolts by the indigenous population and anything that was viewed as a threat against the continuation of colonial rule. The protection of the indigenous population at individual and corporate levels was not viewed as a priority of the colonial government. The colonial regime was more concerned with its security rather than the security of the subject population.

There is however, evidence to indicate that even in the colonial period individual white settlers did hire guards for their homes. Oral evidence produces different views on why white settlers hired private guards. Jonathan Smith whose parents arrived in Swaziland in 1933 said:

During the colonial period in this country white people feared that the indigenous population could perpetrate criminal acts against them. In more general terms crime was one of the most feared threats whether real or perceived. It was felt that it was much safe to hire a private guard for your home during the day and also during

the night. The guards could raise an alarm in case of an attack. As a result, most settler houses had guards recruited by individual white home owners. Most whites must have copied this practice from colonial officials whose houses were always under guard. The argument was that the indigenous population was prone to criminal actions (Jonathan Smith, Interview, 28 November, 2006).

Although it is difficult to determine the crime rate during the colonial period, evidence suggests that the beginnings of private security during this period were motivated by the fear of property loss or possibilities of physical violence. Fear of the indigenous population was based on awareness of the poor relations it had with the white settler population.

A different view although not necessarily opposing the above view is that the hiring of guards by white settlers was integrated into the colonial determinants of status. According to this view, the hiring of guards was more of a social issue rather than an issue of security. Alex Forbes expressed this view:

We should always be aware that colonial society was very complex. This is the case because it contained dynamics that crafted relations between the colonized and the settlers, and also between the settlers themselves. Some things were not done for financial gain or any other purpose, but for status. The manner in which colonial society was organized, I doubt if whites seriously needed security guards in their homes. Although Swaziland was some how different from South Africa, it was still extremely difficult to find indigenous Swazis moving up and down white occupied areas. Whites derived prestige and status from hiring security guards. It gave them pleasure and satisfaction to have their home gates opened and closed by hired guards. To a large number of them it bequeath a better social status. This sense of self importance was even more gratifying as they called their guards 'boys' (Alex Forbes, Interview, 28 November, 2006).

Private security guards were therefore, the founding blocks of PSCs in Swaziland. With time, a transition was made from security guards recruited and paid by individuals, to PSCs. It was only in the post-colonial period that PSCs began to be established in Swaziland. For the first two decades of independence, these companies remained very few. The motivators for the transition are not very clear as they are not documented anywhere. Oral evidence suggests that the transition came about because of the challenges individual employers faced. Alan Fawcett said:

The coming of independence came with numerous challenges for the employers. While in the colonial period settler employers had latitude of having their way as far as labour issues were concerned, in the post-colonial period workers received a lot of sympathy from officials and labour laws changed. Security guards were challenging their employers on wages and individual employers were called upon to be conversant with the labour laws of the country. Faced with numerous disputes and having to spend a lot of time attending to these disputes and being called to the labour department created a lot of discomfort for most employers. I am not sure what happened exactly, but it appears that individual employers were ready to give this responsibility to companies. In this way they were assured that they would no longer worry with all the problems associated with recruiting and attending to the wage disputes by security guards (Allan Fawcett, Interview, 19 January, 2007).

A few years after independence PSCs began to appear in Swaziland. The first Private Security Company in the country was Swaziland Security Services (SSS) established in about 1970 by Teffy Price, an Irishman who had settled in the country since the 1940s. It is very difficult to find information on the company as there are no available records. In 1974 Price sold the company to Allan Fawcett who is running it up to today. This company monopolized the industry for some years as it took some time for other similar companies to emerge. The second oldest security company to be established in Swaziland was Guard Alert. This company was established in 1981 to provide professional security services to commercial, industrial and residential premises throughout the country. In 1985 the company developed cash security services to transport cash and other valuables under armed escort using armoured vehicles. From these humble beginnings, the private security sector in Swaziland has grown. Presently, there are more than fifty PSCs in the country, but unfortunately there is no register of such companies in the country, as the registration of companies is not classified according to function or type. The sector is well spread across the country but most dominant in the urban areas. Today, many leading international companies and local ones depend on PSCs for the security of their investments. The security services provided by these companies are well integrated in the business and domestic spheres of Swaziland.

The domestic private security industry in Swaziland is almost completely the guarding sector. Just as has been the case in other parts of the world

(Schreier and Caparini, 2005), these companies have become responsible for public safety and protecting public and private property in a widening variety of locations, including high-risk areas such as power plants, banks, embassies and airport. These are profit-driven organizations that trade in professional services linked to internal security and protection. They are small companies predominantly concerned with crime prevention and ensuring public order, providing security and private guard services domestically. These companies are growing so fast that the number of their employees has become very significant. However, public security employees still outnumber private security employees. As it has been observed in other areas, even in Swaziland, "From the time of their establishment, these companies have undergone changes, permutations, and alterations" (Small, 2006: 14).

The rise in the number of these companies in Swaziland may be due to the fact that anybody can start a security company at any time. Mr. Fawcett, the owner of Swaziland Security Services stated:

I have been in this business more than anybody in the country. I am conversant with all aspects of the industry. From the time of independence there has never been any guidelines on the formation of private security firms. Consequently, a security company can be formed by anyone at any time. May be this is because Swaziland operates along the principles of free market economies. All you need to do is to register your company with the Deeds Office and you are in business.

There are presently no restrictions on the formation of PSCs and there are no stated pre-conditions or requirements for their establishment. One of the most interesting aspects of Swazi security companies is that although they are increasing in number, they are completely un-regulated. Presently, there is no regulation or policy framework relating to the legal and procedural operations of PSCs. However, this is not unique to Swaziland as such a state of affairs has been observed in other African countries (Wairagu, Kamenju, and Singo, 2004). The absence of a regulatory framework for PSCs puts the operations of these companies beyond government scrutiny. Under such conditions there can be no protection of public as well as state interests. What is of major concern is that under such conditions there is no evaluation of the service delivery programmes of the companies. Presently, there is no standardization of the quality of service of the security companies and they virtually do as they please only circumvented by the general laws of the country. There is a danger in the present un-regulated nature of the operations of the companies as they could easily develop into some

monster that has the freeway to prey on the unprotected general public and business community.

Recruitment of the people who eventually become guards is usually done through adverts in the daily newspapers. The recruits are from all segments of the Swazi population but the majority of them seem to be between the ages of twenty and forty. Although no study has dealt with the gender composition of the guards, evidence indicates that PSCs employ both men and women. There is still need for in-depth research into this area so as to find out the types of responsibilities given to the different sexes, and the whole issue of the working conditions of the guards. What is important for Swaziland is that PSCs have given equal opportunity of employment to both men and women even though anecdotal evidence indicates that men far outnumber women. The people employed as guards are not required to satisfy any level of education on recruitment, except that they should be able to read and write English. Our research revealed that some owners of security companies were not in favour of employing educated security guards. One owner of a company said

My experience has shown over the years that there is no need for having educated guards. The less educated the better. The uneducated ones tend to make better guards but they should be able to read and write. All the security companies in the country do not have a stipulated level of education for employment. Personally, I am very suspicious of a young person who has gone through Form V and wants to be a security guard. The majority of the educated ones hate the job. They may take the job but they continue to hate it. I think any company is better off with an uneducated guard (Allan Fawcett, Interview, 19 January, 2007).

There is also no clear policy regarding the training of security guards. For a long time, whatever training guards received was on the job but did not amount to much. Some of the security companies requested members of the RSP to train their staff on certain issues but such training is not accredited. Some people involved in the private security sector were critical of the training the guards were receiving from the police:

The training by police is very limited and does not make the people adequately ready for their guarding activities. First, the police are very limited on the concept of security and their training is bound to produce guards who have a poor conceptualization of security. The Police concentrate on criminal procedure which does not really

adequately prepare people for guarding. I think what guards need to be trained in guarding and that can best be done by people trained in security matters not just policing (Michael Dlamini, Interview, 15 January 2007).

Some of the companies have employed retired police officers to be head supervisors and therefore provide training through supervision. It is only recently that institutions for training private security personnel have emerged. They are very few in the country and one of the major ones is Sibhamu Security Training Centre established in 1998. This security training company train people who want to make a career in the security industry particularly in the guarding sector. They are trained in a number of things including human behaviour, court procedure, communication, arresting procedures, public relations, and role and function of security. The majority of the trainers are South African trained, in institutions such as Goldfields Security, Coin Security, and Anglo American Corporation Security Division.

Generally, the training of security guards is not coordinated and there is no legal obligation for the security companies to train their staff. It is only recently that there could be a collaborative training programme for them. It has been suggested that the South African Police will provide a short course on crime scene management for local security companies. This has arisen out of the fact that the discovery of physical evidence at crime scenes plays a crucial role in securing the conviction of perpetrators in a court of law.

Presently, security guards are not empowered by law to carry guns while on duty. Instead, they carry knob-sticks, *sjamboks*, and buttons irrespective of the environment of their line of duty. This has continued in spite of the fact that criminals carry firearms and they frequently use them against the guards. This was observed by one business person who said:

Some of the crimes that have been occurring in this area are shocking. Some of the criminals come brandishing heavy arms and the security guards have to face them with their *sjamboks* and knobkerries. The lives of the security personnel are placed at serious risk. At times the criminals assault and bungle them into the corner before they continue to loot our businesses. This is serious (The Swazi Observer 2 January, 2007).

These comments are based on practical cases of physical violence against private security personnel perpetrated by criminals. For instance, in November 2004 two private security guards were shot at by criminals who intercepted a car sending money to the bank (The Swazi Observer, 10 November, 2004).

Such cases occur several times a year. This has motivated the business community to call upon the Swaziland Government to allow security personnel to carry loaded firearms. It was suggested that if this were to be allowed, there should be a mechanism put in place to ensure that the firearms do not end up in wrong hands.

Dynamics behind the development of PSCs in Swaziland

Different scholars have juggled with the reasons behind the development of PSCs in different countries of the world. Much as similarities can be identified it is not adequate to make sweeping generalizations. In the case of Swaziland, there are several factors behind the growth of PSCs, but they tend to revolve around state, market, politics, and corruption issues.

At an elementary level the development of security companies in Swaziland had a lot to do with the desire by individuals to ensure personal safety and that of their families and properties. From the time of colonialism into the independence period citizens were being attacked, robbed and in some cases killed while in their homes or conducting their business endeavours. There is therefore, a direct correlation between the growth of the private security sector and the rising level of crime. In the post-colonial period the Press has carried different stories of grisly crimes of physical violence against innocent people and this has resulted in an increasing number of people seeking private security. One business man noted, "I have lost thousands of Emalangenani [i.e. Swazi currency] since I arrived here. There has been break-ins in both of my shops. I have experienced two break-ins at Sanibonani and the other one occurred at the main shop. What worries me is that the thugs are granted bail far below the value of the items stolen" (Times of Swaziland, 27 January 2007).

The level of insecurity has been increased by a large number of firearms in the hands of unlicensed individuals. Although these crimes have frequently been linked to Mozambican refugees, there is evidence showing that the locals are also responsible for these crimes. A source of concern has been the inability of the state to deal with the increasing level of crime and individuals have been forced to shift more and more to private security.

From the time of independence in 1968 the Swazi state was characterized by weaknesses, which rendered it unable to discharge its obligation of being a protective shield for its citizens. The post-colonial period experienced the emergence of numerous sources of security threats to the general

Swazi population. These were threats which the state failed to handle. This was especially the case with the emergence of non-state forms of organized violence that included criminal syndicates, gangs, and general lawlessness. These security threats were, to a large extent, a product of social fragmentation and economic disparity. Such a plethora of sources of insecurity proved to be above the capacity of the newly independent Swazi state. The state had no capacity to effectively deal with the security concerns of the citizens in both the rural and the urban areas. Such evolving security threats worked to explain the rise of alternative private security agents who were willing to fulfill that security vacuum. Commenting on the failure of the state to provide security Hleziphi Shongwe said:

When we are faced with the problem of cattle rustling across the border to South Africa, it stands to reason that the state should protect our property. However, the Swazi state has been a disappointment on this issue and other issues of crime. The state has even failed to engage border patrols using the armed forces to curb the loss of property along the southern border with South Africa. The residents of the area are left to the mercy of South African cattle smugglers and their Swazi collaborators (Interview, 13 December, 2006).

The state's diminished capacity to deliver on its promise of security has been justified by some Swazi citizens:

It is true that the basic notion at the beginning of the state system was that it should protect citizens in terms of property and person. My understanding is that this was at a time when there were still wars and individuals could not protect themselves against attacking states. This means that sources of insecurity were still very narrow. Today the functions of the state have expanded. In addition, the development of the national economy has taken unprecedented dimensions. It is no longer possible for the state to effectively execute its function of being a security shield or for it to monopolize violence. New actors in the security sphere were bound to emerge (Samson Dlamini, Interview, 11 December, 2006).

What is clear is that in the post-independence period, the Swazi state was incapable of providing security for its citizens. The state lost its monopoly over violence, and consequently could not monopolize security issues. Because of its weakness, and because security demands have dwarfed state security institutions, the Swazi state is visibly on the retreat in terms of security provision. Some commentators have observed that "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" (Holmqvist, 2005: 1).

The failure of the state to provide security provoked different responses from Swazi citizens. While in the urban areas the main response was to turn to PSCs, in the rural areas the main response was to form Community Police Forums. These forums are community based security agencies that to a large extent operate outside the parameters of state security institutions. The main motivating factor behind the formation of community police forums is an escalation of crime that has resulted in the loss of property especially cattle (Simelane, 2005). The residents of these areas became increasingly impatient with the inefficiency and bureaucracy of state security institutions such as the Royal Swaziland Police (RSP), and Umbutfo Swaziland Defense Force (USDF) (Khumalo, 2004). The community took their security into their own hands and in the process formed a vigilante structure that was operating outside the legal structures of the country. It is clear that in the urban areas the shift from state provided security to private security took a more formal and organized pattern, while in the rural areas it was less coherent and tended to conflict with the national criminal justice system. What is worrying is that Community Police tend to perpetrate violence in their attempt to deal with crime. For instance, in October 2004 Community Police brutally killed a 22 year-old man at KaKhoza on allegations of stealing a cell phone. It was reported that:

Philani was dragged all over the two notorious locations, kaKhoza and Newvillage where he was moved from home to home in search of the alleged stolen items. He was subjected to huge frightening and unbearable torture for the whole night. He cried until his voice could not come out of his mouth. Residents who had a chance of seeing him in this state have revealed that they tried to talk to the community police officers into releasing him but they did not budge claiming that they wanted to teach him one or two lessons and these lessons qualified him to his death (Time of Swaziland SUNDAY 17 October, 2004).

The development of PSCs in Swaziland, especially from the 1990s onwards, has been influenced by a shift in international thinking and practice on security. This has been especially the case with the marketisation of the public sphere which has come in the form of the 'privatization revolution' (O'Brien, 1998). This has gone hand in hand with the principle of globalization and most nations of the world have been affected. Privatization is based on the

belief that nations can maximize their efficiency and effectiveness through comparative advantage and competition. It symbolizes a belief in the superiority of the marketplace over government in the provision of services. The main result of this has been an upsurge in outsourcing of service provision. Today, a large number of services that were traditionally provided by the state are now performed by private companies. Security has been one of the services the state has left to PSCs. Even some state institutions have turned to the private sector for their security requirements. This has been the case with guarding services which are dominated by PSCs within state institutions.

Although, the 'privatization revolution' had an impact on Swaziland, its role in the growth of PSCs should not be over-emphasized. This is the case because of a general failure in the functioning of public sector security institutions and the citizens had long turned to the private sector for their security needs. At the end of the day, there was actually very little to be privatized by the state in the security sector.

In some countries it has been observed that the growth of PSCs has been partly motivated by the downsizing of the police force. In the case of Swaziland this has not been the case, but alleged police corruption has been a crucial factor. Citizens feel the police are corrupt and therefore, can not be trusted as providers of security. Such allegations have come mainly from the general public and also from the business community:

The issue of crime in Swaziland has become a very complicated one and it has become big business in which our police officers fully participate. Today you stand a good chance of recovering your property if you do not report to the RSP but to the community police. We believe that this is because when the police conduct the investigation they also inform the criminals about what is happening and the criminals are always ahead of the justice system (Vusumuzi Ndlela, Interview, 15 December, 2006).

The most vocal expressions of such allegations have come from rural communities. In discussing issues of crime prevention and the role of the police Jabulani Ntuli said: "We soon became disappointed because the police were failing to come up with positive results. It became a waste of time and money to report crime matters to the police because nothing would come out of such reporting"(Interview, 13 December, 2006). The general perception is that members of the RSP are heavily involved in corrupt acts to be trusted in the prevention of crime and provision of security to the general

public. The loss of property in the rural areas especially livestock, has made rural dwellers conclude that public security institutions have failed to provide security because of corruption.

For many rural residents, the failure of the state to provide security has had a negative impact on the rural economy. Lack of security is directly linked with growing poverty. One resident of Shiselweni in the southern part of the country stated:

I am not sure what is happening in the urban areas but in our rural area the state provides no security for the protection of our property. This is even in those cases where the problematic issues are identified. The lack of security has made it very difficult for people to redeem themselves from poverty, in fact most of us are becoming more poor. Our cattle are taken by cattle rustlers from South Africa and we lose hundreds of them each year. These are cattle that always play a crucial role in alleviating poverty at household level. Without them we can not educate children and we can not provide for the general needs of our families (Nozipho Hlongwa, Interview, 17 December, 2006).

The State and the Development of the Private Security Sector

The development of the private security sector has certain implications on the Swazi state, especially in its capacity to deliver rudimentary security to the citizens. This is based on the premise that one of the traditional responsibilities of the state is to provide security to its citizens. The privatization of security, therefore, implies a creation of a sector that is not controlled by the state. This in-turn implies that the power of the Swazi state is shrinking because its control over security companies is very limited (Musah, 2002; Sandoz, 1999). From the beginning of the private security sector, the Swazi state had no control over the hiring processes of PSCs and in fact, the Swazi state has no control over the finer workings of the PSCs. This development whereby the power of the state is limited, has not been unique to Swaziland as it has been generally observed that the development of the private security sector, "alters the capacities of the state..." (Leander, 2004: 6). In fact there is always the danger that the Swazi state will continue to be weaker as the private security sector grows. This is the case because their presence creates "a false image of security in the short-term, which distorts proper assessment of security needs" (Holmqvist, 2005: 12). Also, they may lead to uneven or biased distribution

of security among the population. This trend is already evident in that rural populations are almost outside the realm of the operations of PSCs. The state may also become weaker as PSCs may frustrate the establishment of legitimate and functioning state institutions.

It has been observed elsewhere that the growth of the private security sector is to a large extent a sovereignty issue if related to the traditional responsibilities of the state (Small, 2006). PSCs are hired because of the ineffectiveness of state institutions, and this in-turn points to their weakness. PSCs are an indication of the erosion of the power of the Swazi state. It should be noted that the development of PSCs is just one of the indications of the weaknesses of the Swazi state and the extent to which its sovereignty is limited. Most public functions of the Swazi state are being privatized because the state has shown lack of capacity to perform these functions. The lack of capacity of the state is usually a result of the lack of the necessary competency and the fact that corruption is crippling the state and pushing it towards insolvency.

The issue of security in Swaziland is now a contested issue and much of this development has to do with the development of PSCs. The contest is not just between the public and the private, but the public has developed a new strand, that of community policing. What has emerged, are clear lines of conflict between the three. Presently, there is a precarious balance of power between, public security as represented by the RSP and the USDF; PSCs; and community police. At the moment the rivalry between the three is not highly pronounced but is bound to grow and create social tensions. The state has made several attempts to bring community police forums under the arm of the RSP, but this has had very little success as most rural communities are showing preference for community police. The conflict has not reached crisis levels because public security forces still have an upper hand as they enjoy government funding, while such funding is still denied for Community Police Forums.

Conclusion

The history of the state shows that over centuries it has gone through several phases of transformation. These changes overtime have been a result of the expansion and growing complexity of the responsibilities of the state. Evidence indicates that overtime some public functions of the state have been privatized giving rise to PSCs whose presence has been witnessed in almost all the countries of the world albeit under different conditions.

Both powerful and weak states have witnessed the expansion of the private security sector at the expense of the public security sector.

The development of the private security sector in Swaziland has had small beginnings but containing all the trappings of the industry as it has grown in other countries. In the colonial period white settlers created the foundations for the development of PSCs as they individually hired private guards, as they feared violence from the indigenous population. Evidence suggests that private security in colonial Swaziland was also associated with status as some settlers hired security guards to demonstrate a level of affluence. However, this social dynamic of the development of the security sector did not diminish the reality of security concerns over loss of property and physical violence.

It was in the post-colonial period that the provision of security at the private level was institutionalized. After independence there was a shift from individually hired guards to reliance on PSCs. There were several dynamics behind this shift, but it appears that issues such as complications associated with hiring and maintaining guards; increasing crime rates; and expansion of economic activities were the most fundamental ones. From about 1974 when the first private security company was born in Swaziland, the number of such companies has grown and they are still growing. The growth in the number of such companies has, however, not gone hand in hand with their regulation. Evidence suggests that from formation to operation, the private security sector in Swaziland is not regulated. This is bound to create problems in the future as citizens are left in the mercy of the companies in terms of the quality of their product. For instance, there is no monitoring and evaluation of the activities of the companies and there is no minimum standard of the quality of their work.

The growth in the number of PSCs, and the general development of the private security sector, has a lot to do with the weakness of the Swazi state. Evidence indicates that the Swazi state does not have the capacity to adequately and efficiently address the security needs of its citizens, and those of the investors. In both the rural and urban areas the state has failed to protect property and citizens have had their property looted. For instance, the Swazi state has even failed to patrol the borders of the country and rural communities have lost property to cross-border thieves. Businesses have been looted, a tendency that has militated against the attraction of investors. A major response to this has been reliance on PSCs.

While PSCs have been an answer to the security needs of the citizens and investors, their growth and development have certain implications for the state. The state has abdicated its responsibility of providing security to its

citizens. The inefficiency of its institutions entrusted with the task of providing security has forced it to shift responsibility to the private sector. In so doing it has allowed itself to be undercut and its sovereignty to be limited. Because the failure of the state security is a contested issue in Swaziland and the main actors in this contest are the public sector, the community security endeavours, and the private security sector, this contest is bound to create conflicts in the future and it demonstrates that the Swazi state is on the retreat.

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PART V

CHARTING THE WAY FORWARD

CHAPTER 10

THE SWISS INITIATIVE ON PRIVATE MILITARY AND SECURITY COMPANIES

Markus Dutly

Ladies and Gentlemen,
Distinguished Colleagues,

Thank you for the invitation and for the possibility to present the initiative, which Switzerland, in close cooperation with the International Committee of the Red Cross (ICRC), has launched in order to promote respect for international humanitarian law and human rights with regard to private military and security companies (PMCs/PSCs) operating in conflict areas.

Background to the Swiss Initiative

Since the 1990s, PMCs/PSCs have increasingly been used for logistical, technical, security and also military tasks in conflicts across the globe. Well known are the examples of the conflicts in Iraq and Afghanistan, where tens of thousands of private security contractors have been used. In many other conflicts, and periods or areas where insecurity reigns, including in Africa, such companies have been used by various actors, including states, international organisations, transnational businesses and humanitarian actors, to gain security.

However, private security companies are not only used in times of conflict. In fact, the overwhelming part of private security services takes place in times of peace, or in periods or areas just below the armed conflict threshold, where insecurity reigns for various reasons, such as common criminality. This is true for Africa, with, for instance, tens of thousands of security personnel in South Africa; this is true for Europe, including Switzerland; and this is true for many other countries world wide.

Observers generally agree that transnational and probably also domestic military and security services will increasingly be used in the foreseeable future.

However, private security may have both a considerably positive as well as a negative impact on human rights and human security. As private security may involve the potential use of force and lead to lethal injuries, their extensive

use raises several issues. How, for instance, does one ensure appropriate control over the services and the accountability of the companies and individuals concerned?

In Europe, many states, though by far not all, have regulated the domestic private security sector. In Switzerland, while regulation exists in some of our cantons (Switzerland is a federal State), in others the sector is not regulated. However, the Swiss government has advised the cantons to consider regulating the domestic private security sector.

On the other hand, up to now, very few countries, among others South Africa, have regulated the trans-national security industry. As these companies often operate in fragile states, where the law enforcement institutions are still weak, particular attention is required from the clients and other actors to ensure appropriate accountability. This is why a number of countries, including Switzerland, are currently also considering regulating the transnational private security industry. Nonetheless, so far, there has been very little inter-governmental exchange on the subject.

This is why Switzerland, in cooperation with the ICRC, have initiated an inter-governmental dialogue on how to ensure and promote increased respect for international humanitarian law and human rights by states and companies with regard to the operation of PMCs/PSCs in conflict areas, with a focus on the trans-national sector.

Objectives of the Swiss Initiative

This initiative which-I must point this out again-is conducted in cooperation with the ICRC, has three main objectives, namely:

- To contribute to an inter-governmental exchange on the challenges posed by the use of PMCs/PSCs
- To re-affirm and clarify the existing obligations of states and other actors under international law, in particular under international humanitarian and human rights law
- To study options of regulation and other appropriate measures at the national and, where possible, at regional or at international level, and possibly elaborate good practices for states, in order to assist them to meet their responsibilities under international law.

The discussion of issues arising from resorting to PMCs/PSCs and of ways of promoting respect for international humanitarian law and human rights, is not intended to legitimise the use of such companies. We do not endorse their use. However, given the fact that these actors have become a reality in a number of conflicts, the envisaged process aims to prevent or reduce potential adverse consequences.

As a first step, Switzerland invited governmental experts from states with particular experience on the topic as well as representatives of the industry, academics and other experts to two informal workshops which took place last year. Objectives of the meetings were to discuss the issues, reflect on possible answers and to elaborate some best practices. Participants were governmental experts from states that contract PMCs/PSCs, the states of nationality of these companies as well as states on whose territory private companies operate. Among others, representatives of states such as Afghanistan, Iraq, Canada, France, the UK and the US participated in the meetings. Countries from Africa were represented by Angola, Sierra Leone and South Africa.

The outcome of the expert meetings

One central conclusion of the various presentations and discussions at these meetings on the applicable law was that international legal obligations cannot and must not be circumvented by states through the use of PMCs/PSCs. Moreover, violations of international law by PMCs/PSCs may, under certain circumstances, become the contracting state's responsibility.

A first obligation under international law that must not be circumvented by the use of private actors is the prohibition of the use of force against another state, which constitutes a cornerstone of international law.

As the employees of such companies are often presented as 'modern mercenaries', this issue was also addressed. Since the issue of mercenarism only relates to a small part of the contemporary phenomenon of PMCs/PSCs, however, there was general agreement that it should not be the focus of the initiative.

While some states are bound by the AU Convention of 1977 for the Elimination of Mercenarism in Africa and the UN Convention of 1989 against the Recruitment, Use, Financing and Training of Mercenaries, there is no universal prohibition of mercenarism.

Moreover, as the distinguished representative of the ICRC explained this morning, states have the obligation to respect and ensure respect for international humanitarian law (IHL).

Besides IHL, international human rights law (ICCPR) and soft law standards (eg the UN Code of Conduct for Law Enforcement Officials or the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials) may also be of relevance to the activities of PMCs/PSCs. Moreover, individuals who commit serious violations of international humanitarian law or gross violations of human rights, may incur criminal responsibility directly under international law and may be prosecuted by national or international tribunals.

Regulation (and contracting standards)

While the existing international and national (eg criminal law) legal framework addresses many issues raised by PMCs/PSCs, the key challenge in practice remains how to enforce and ensure respect for the relevant standards by all actors. In this context, there seemed to be general agreement that regulation may serve to address these issues. It is therefore an aim of the Swiss Initiative to elaborate, through an inter-governmental process, best state practices on how to address the issue, and to develop regulatory options at national or maybe even regional level.

Contracting states and other ‘clients’

At the meetings, as well as in other exchanges, different options of elements of regulation were brought up. Possible aspects that may be considered by ‘clients’ who contract such companies include requiring the company by the terms of the contract to:

- Vet its employees (background checks)
- Adequately train its employees in all laws applicable to security services as well as-where applicable-in human rights law and IHL, provide training in de-escalation, and training in the responsible use of weapons, etc.
- Adopt standard operating procedures and rules of engagement in compliance with national and international law and in accordance with their mandate under the contract

- Provide for internal disciplinary sanctions and take measures to allow affected persons to complain about misconduct
- Obtain the approval of the 'client' for any sub-contracting of contract tasks

Another possible aspect that may be considered when contracting such companies is the introduction of measures to monitor performance and enforce compliance with the contract and the law (eg supervision of performance, sanctions for violation of the contract, and in the case of states, ensuring there is a system to bring to justice alleged perpetrators of international crimes).

In Switzerland, for instance, we have created an inter-ministerial working group to study criteria and guidelines to be applied when governmental authorities contract private security companies, at home and abroad. A first draft of a directive is currently being finalised by my colleagues in Berne.

Territorial ('host') states

Regulation may also be considered by states on whose territory PMCs/PSCs operate to control the provision of armed services and ensure accountability of PMCs/PSCs and their staff on their territory. Options of elements for national regulation that were discussed included the following:

- A requirement to obtain a general operating licence for companies to provide specified security/military services in the state's territory
- Determining specific activities that PMCs/PSCs can be licensed to carry out within the state's territory
- Conditions for the approval of licenses for specific activities
- Establishing systems for monitoring compliance and measures to promote transparency

Sanctions for operating without registration or license or in violation thereof

- Establishing mechanisms for holding perpetrators of crimes accountable under law
- In Switzerland, several cantons are currently considering adopting regulations to control the operations of PSCs.

'Home states'

Several of the elements I have just mentioned with regard to territorial states, were considered as potentially relevant in a regulatory framework that could be adopted by the states of nationality of PMCs/PSCs offering services in conflict situations abroad.

While the export of arms is regulated in most states, the export of military or security services generally is not. Experts have suggested that existing arms export regulations, be they national or international, such as the EU Code of Conduct on Armament Exports, could serve as a model or even be extended to cover the export of military services (maybe even armed security services) as well. Reflection along those lines is also taking place in Switzerland.

The way forward

Participants at the Swiss Initiative's two expert meetings have expressed interest to further study options of regulatory models and to elaborate, on the basis of existing obligations, good practices for states with regard to possible elements of national (or other) regulation and contracts. Advantages of an inter-governmental dialogue include harmonisation and coherent approaches in different countries, which will lead, *inter alia*, to a level playing field and render it more difficult for PMCs/PSCs to escape national controls.

Switzerland and the ICRC will continue the inter-governmental exchange on the issue and elaborate good practices for states to meet their obligations under IHL and human rights law. The perspective and experience of African governments and experts is of particular interest and importance to us.

We hope that the Swiss Initiative will make a valuable contribution to the exchange on the issue of PMCs/PSCs. It is hoped that the best practices studied and elaborated on, will stimulate reflection and the consideration of regulation also in the regional organisations and states on your continent.

Further information about the Initiative, which you may take with you, is available here in this room, as well as on the website dedicated to the Swiss Initiative.

I thank you very much for your attention.