



EUI Working Papers

AEL 2009/11

ACADEMY OF EUROPEAN LAW

PRIV-WAR project

REGULATING PRIVATE MILITARY AND SECURITY COMPANIES:
A MULTIFACETED AND MULTILAYERED APPROACH

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The ‘Regulating Privatisation of “War”’: The Role of the EU in Assuring the Compliance with International Humanitarian Law and Human Rights’ (PRIV-WAR) project is funded by the European Community’s 7th Framework Programme under grant agreement no. 217405.

This paper was produced as part of the EUI contribution to Work-Package 1 of the PRIV-WAR Project: *Growth and Relevance of the Private Military and Security Sector: An Analysis of the Phenomenon*

www.priv-war.eu

ISSN 1831-4066

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Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

Abstract

Private military and security companies do not operate in a complete legal vacuum. The inherently transnational nature of the so called market for force, however, makes traditional single state regulation insufficient. Ensuring control over the private military industry is thus a complex endeavour involving a broader network of actors alongside states, such as international and non-governmental organizations, private customers and the industry itself. In order to unravel the challenges produced by the emergence of a PMSI and show the need for a multilayered and multifaceted approach to regulation, this paper will focus on three basic questions. First, it will analyze *what* to regulate, exploring the nature and the activities of PMSCs. In addition, it will explicitly focus on *why* the market should be regulated by drawing on the literature on the control over military force. Finally, it will concentrate on *how* to regulate, approaching the issue from two different standpoints. On the one hand, it will explore the main regulatory tools available to public actors, analyzing the potential of a combined approach based on both legal and informal regulation. On the other, it will look at the challenges and the potential of regulation at different levels. After analyzing the role of home, contracting and territorial states, the final sections will focus on different avenues for international regulation and on the need for EU action, whose potential in regulating the market appears huge and, to date, insufficiently exploited

Regulating Private Military and Security Companies: A Multifaceted and Multilayered Approach

EUGENIO CUSUMANO*

1. Introduction

Although the claim of a legal vacuum has long dominated the first wave of research on private military and security companies (PMSCs)¹, there is now increasing consensus among scholars and practitioners that private military and security companies do not operate in a complete regulatory void. Rather, they are subject to a complex web of international and domestic legal norms, contractual obligations, market pressures and self-regulatory measures. It is no doubt true, however, that the private military and security industry (PMSI) still suffers from a persisting under-regulation, and despite the increasing attention on the issue, the manifold problems arising from the privatization of warfare appears far from being thoroughly unravelled by the relevant fields of literature, let alone solved by the enacting of appropriate regulatory measures.

As Peter Singer has provocatively argued, the PMSI is currently less regulated than the cheese industry.² While this may indeed hold true, these two sectors appear hardly comparable: the so called market for force, where private military and security companies operate, is a huge and fragmented sector characterized by a diversity of firms, activities and customers, whose inherently “transnational nature, low capitalization, fluid structure and lack of commitment to territory all decrease the usefulness of traditional single state regulation”³. Ensuring control over the PMSI is thus a complex endeavour which requires a multifaceted and multilayered approach based on both legal and informal regulatory tools, and involves a broader network of actors alongside states, such as international and non-governmental organizations, private customers and the industry itself.

In order to unravel the challenges produced by the emergence of a PMSI and show the need for a multilayered and multifaceted approach to regulation, this paper will focus on three basic questions.

First, it will analyze *what* to regulate, exploring the nature and the activities of PMSCs, the development of the market for force and the prospects for its future growth. Understanding such a complex market, its origins and its evolution is no doubt crucial in order to enact successful regulation. In addition, it will explicitly focus on *why* the market should be regulated by drawing on the literature on the control over military and security forces.

Finally, it will concentrate on *how* to regulate, approaching the issue from two different standpoints. On the one hand, it will focus on the nature of the main regulatory tools available to public actors, analyzing the potential of a combined approach based on both legal and informal regulation grounded on market incentives and strengthened self-regulation. On the other, it will analyze the challenges and the potential of regulation at different levels. After looking at the role of home, contracting and

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¹ See for instance Singer P. W. 2004, War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law, 42 Columbia Journal of Transnational Law 521

² Singer P.W., 2004, The Private Military Industry and Iraq: What Have We Learned and Where to Next, Geneva: Geneva Centre for the Democratic Control of Armed Forces, p. 14, URL < http://www.dcaf.ch/_docs/pp04_private-military.pdf>

³ Avant D. 2007, The emerging market for private military service and the problem of regulation, in Chesterman S. and Lehnardt C., From Mercenaries to Market: The Rise and Regulation of Private Military Companies. Oxford: Oxford University Press 2007, 181-196, p. 185

territorial states, the final sections will explore different avenues for international regulation and focus on the need and the potential for EU action.

2. What to Regulate: Analyzing the Market for Force

According to Peter Singer, the emergence of private military and security firms stems from a “tectonic shift” which occurred in the international strategic landscape after the end of the Cold War⁴. Although an embryonic private military industry did already exist both in the United Kingdom and the United States, it is true that the transformations triggered by the end of the Cold had a crucial role in the creation of a worldwide market for force for a number of reasons. Firstly, the downsizing of major armies following the transformations in the strategic environment broadened enormously the supply for security services. At the same time, the transformations within Western armies have increased the demand for external contractors in at least two respects. On the one hand, the strain on human resources has encouraged the increasing specialization of military personnel and therefore the outsourcing of functions other than combat. The US Department of Defense, in particular, planned the gradual outsourcing of all non-core functions, that is all the activities not “directly linked to warfighting”⁵. On the other, the increasing use of high-tech weaponry and equipment produced by the so called “Revolution in Military Affairs”⁶ has made Western militaries reliant on levels of technological expertise which appear impossible to be kept within the ranks.⁷

In addition, the end of the Cold War produced a disentanglement of major powers from many areas of the world. The increasing worldwide presence of transnational firms, but also international organizations and NGOs within the territories of weak and failed states has thus fuelled a demand for security which both local and international actors appear incapable of satisfying.⁸

Finally, as authors such as Avant remark, the increasing practice of outsourcing is also driven by the “ideational shift” produced by the rise of neoliberalism and the belief in the superiority of the private versus the public provision of services⁹. The Logistic Civil Augmentation Program, which first paved the way for the US Department of Defense increasing reliance on civilian personnel to support military operations, was established in 1985 as a part of a broader trend towards the privatization of a number of governmental functions.¹⁰

Due to all these reasons, the current provision of private military and security services appears indeed as the outcome of a systemic shift in both the international and the domestic political landscapes, which cannot be easily reversed. While the war in Iraq was famously defined as the first privatized conflict,¹¹ the trend towards the privatization of a number of activities previously performed by active-

⁴ Singer, P.W. 2003, *Corporate Warriors, The rise of the privatised military industry*, Ithaca: Cornell University Press

⁵ US Department of Defense, *Quadrennial Defense Review Report*, 30 Sep. 2001, p. 53, URL <<http://www.defenselink.mil/pubs/pdfs/QDR2001.pdf>>

⁶ Møller B. 2002, *The Revolution in Military Affairs : myth or reality?* Copenhagen : COPRI Working Papers, 2002

⁷ Avant D. 2006, *The Marketization of Security*, in Kirshner Jonathan (ed.) *Globalization and National Security*, London: Routledge, 105-143

⁸ Singer 2003, *Corporate Warriors*; Avant D. 2005, *The Market for force, The Consequences of Privatizing Security*, New York: Cambridge University Press

⁹ Avant 2005, *The Market for Force*

¹⁰ *Logistics Civil Augmentation Program (December 16th 1985)*, Headquarters Department of the Army, Washington DC, URL <http://www.army.mil/usapa/epubs/pdf/r700_137.pdf>

¹¹ *The Economist* (March 25th 2004), *Mercenaries: the Baghdad boom*. For an analysis of the unprecedented US reliance on contractors in Iraq and the subsequent legal problems see Huskey K. and Sullivan S., *Private Military Contractors & U.S. Law After 9/11, Priv-War National Reports Series 02/08*, URL <http://priv-war.eu/wordpress/wp-content/uploads/2009/05/nr-02-08-usa.pdf>

duty military personnel did therefore long pre-exist the War on Terror. It is true, however, that the military operations and the reconstruction of Iraq and Afghanistan have been a formidable source of growth for the industry: the British firm Control Risks Group, for instance, has since increased its revenues fifteenfold.¹² Recent figures forcefully show the unprecedented reliance on contractors to support military operations in Iraq and Afghanistan: in the United States Central Command, which is responsible for both operations, contracted personnel makes up approximately 46% of the Department of Defense total workforce. As of June 2009, DoD contractors in Iraq were approximately 119,706, compared to about 134,571 uniformed personnel.¹³ In Afghanistan, on the other hand, civilian workforce significantly outnumbered military personnel, as the number of contractors amounted to 73,968 units compared to 55,107 US soldiers.¹⁴ It is worth mentioning how while the US Department of Defense is currently the main customer of the private military industry, DoD contractors are far from being the only PMSI employees deployed in the two countries: indeed, PMSCs have been hired also by the State Department, the CIA and other US government agencies, as well as by the British Foreign Office and Ministry of Defence, other governments international organizations, NGOs and private firms.¹⁵ Even now that the market for security services in Iraq and Afghanistan appears to have reached a point of saturation, and commentators predict an end of the “security bubble” which underlay the recent abrupt growth of the market,¹⁶ estimates within and outside the industry predict that the overall demand for private security in the long term is likely to keep surging, although less steadily, fuelled by both the privatization of non-combat activities in major Western armies and the increasing reliance on PMSC of commercial and humanitarian operators working in high-risks environments.¹⁷

Different definitions have been used to break down the PMSI. Classifying the actors operating in the market for force is far from being a merely theoretical and taxonomic issue: on the contrary, breaking down the sector and classifying its players is essential for any attempt to regulate the industry.¹⁸ The very choice of a definition does often reflect a precise regulatory position: while referring to military contractors as new mercenaries clearly suggests a need for a ban on their activities, talking about private security or peace and stability industry reflects a more nuanced regulatory position.

There is increasing consensus in the scholarly literature that PMSCs and their personnel cannot be considered as mercenaries either on formal or on substantial grounds¹⁹. As a number of authors have emphasized, existing international norms on mercenaries appear largely inapplicable to PMSCs.²⁰ In addition, there is also substantial agreement among international security scholars that even if they share some similarities, private military companies or firms represent a substantially new

¹² Hastings M. (August 2nd 2006) We must fight our instinctive distaste for mercenaries, *The Guardian*, URL <<http://www.guardian.co.uk/commentisfree/2006/aug/02/comment.politics>>

¹³ Schwartz M. 2009, Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis, Congressional Research Service Report for Congress 7-5700, URL <http://www.fas.org/sgp/crs/natsec/R40764.pdf>, p. 5

¹⁴ Ibid.

¹⁵ Author's interviews with industry representatives, September 2009

¹⁶ Dominick D. 2006, *After The Bubble: British Private Security Companies After Iraq*, London: Royal United Services Institute for Defence and Security Studies, Whitehall papers

¹⁷ Author's interviews with industry representatives, September 2009

¹⁸ Foreign and Commonwealth Office (February 26th 2002) *Private Military Companies: Options for Regulation*, London: The Stationery Office, HC 577, URL <<http://files.fco.gov.uk/und/hc577.pdf>>

¹⁹ Singer 2003, *Corporate Warriors*; Avant 2005, *The Market for Force*

²⁰ For a debate on the applicability of the definition of mercenary to PMSC see Doswald-Beck L., *Private military companies under international humanitarian law*, in Chesterman and Lehnardt (eds.) *The Rise and Regulation of Private military companies*, Oxford: Oxford University Press 2007; Drews I-I., *Private military companies: the new mercenaries? An international law analysis*, in Jäger and Kümmel (eds.), *Private Military and Security Companies: Chances, Problems, Pitfalls and Prospects*, Wiesbaden: Vs Verlag 2007

phenomenon, which differs from the traditional mercenary ventures active in the postcolonial world during the Sixties and the Seventies. The main difference lies precisely in their nature of legal entities based on permanent corporate structures and with public rather than clandestine patterns of recruitment.²¹ Such a distinction appears far from trivial from a regulatory perspective: given their nature of corporate bodies with a long-standing existence on the market, PMSCs can be subject to a much broader set of both legal norms and informal constraints.

The most widespread distinction used in the literature, that between private military and private security companies appears increasingly controversial for at least two reasons. Firstly, most companies appear to provide an array of difference services, ranging from the provision of logistics, training and intelligence to military and security forces to static, convoy and personal security for institutional, commercial and humanitarian actors. Most companies, therefore, provide *both* private military *and* private security services rather than *either* the former *or* the latter. Moreover, the very distinction between security and military functions appears inherently blurred. This is due first of all to the fact that what is crucial in assessing the military nature of some activity is not only the activity *per se*, but the theatre where it is carried out: providing security for a site or a convoy in a hostile area, under potential enemy fire, is a typically military function.²² Similar objections apply to classifications based on the offensive or defensive nature of the services provided²³ and, to a lesser extent, to the “tip of the spear” classification proposed by Peter Singer, grounded on the distinction between private military provider firms, private military consultancy firms and private military support firms.²⁴

While most of the scholarly and journalistic focus has been on private security contractors carrying arms openly, it should be kept in mind how it is the provision of logistics which accounts for the largest part of the industry revenues. Security services, on the other hand, purportedly account for only 5% of the industry represented by the International Peace Operations Association, the largest PMSI group.²⁵

However, the low level of specialization of most companies, the increasingly technological nature of warfare and the complexities of non-linear, asymmetric conflicts and operations other than war may make the abovementioned distinctions “irrelevant at best or misleading at worst”,²⁶ and can often say little on the sensitivity and the impact of different PMSCs’ activities. For instance, the training and strategic advice provided by MPRI in 1995 boosted enormously the offensive capacities of the Croatian army and had therefore a huge strategic impact despite its not directly operational nature.²⁷ Also, the outsourcing of intelligence and operational support of military weaponry has given contracted personnel working far from the frontline and undertaking activities which may ostensibly be classified as reconnaissance or logistical support a significant responsibility in the use of lethal force. During the operations in Iraq and Afghanistan, contractors reportedly maintained and operated

²¹ Singer 2003, *Corporate Warriors*; Avant 2005, *The Market for Force*; Percy 2006, *op. cit.*; Kinsey C. 2006, *Corporate Soldiers and International Security: The Rise of Private Military Companies*, London: Routledge

²² Caparini M., Schreier F. 2005, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, Geneva DCAF occasional paper, URL <http://hei.unige.ch/sas/files/portal/issueareas/security/security_pdf/2005_Schreier_Caparini.pdf>

²³ Makki, S. et al. 2001, ‘Private military companies and the proliferation of small arms: regulating the actors’, *International Alert Briefing* 10

²⁴ Singer 2003, *Corporate Warriors*, p. 88

²⁵ Author’s interview with representatives of the Industry, September 2009

²⁶ Holmqvist C. 2005, *Private Security Companies. The Case for Regulation*, Stockholm: SIPRI Policy Paper No. 9, p. 5. On the limited usefulness of simplistic dichotomies and classifications see also Mini F. 2009, *Analysis of the Private Military & Security Companies*, *Priv-War Research Papers*

²⁷ Shearer D. 1998, *Private armies and military intervention*, London: International Institute For Security Strategy Adelphi Papers

armed unmanned aerial vehicles until they reached the target of the bombing, being replaced by military personnel only at the moment of firing the button.²⁸

Classifying private military services is therefore a complex operation which escapes gross dichotomies and requires a case-by-case analysis based on the provisions of each contract and the actual activities of the personnel on the ground. Together with the other reports of the Priv-War project, this paper will thus refer to the firms operating in the market for force with the general label of private military and security companies (PMSCs), focusing on the contract and not on the firm as the core unit of analysis,²⁹ and arguing that regulation should be directed at the activities rather than at the actor. A company may thus be subject to different regulatory frameworks according to the different sensitivity of the activities it carries out.³⁰

3. Why Regulate: The PMSI and the Control over the Use of Force

A number of authors have made the case for a strengthening or even a ban on the activities of private military companies by enumerating the major misdeeds involving the private military industry, ranging from the selling of Jihad security packages to radical Islamic groups to the involvement in prostitution rings³¹. Indeed, recent and renowned episodes such as the Nisour Square incident in Baghdad³² or the involvement of CACI and Titan's contractors in Abu Ghraib prisoners' abuses³³ forcefully suggest the need for further regulatory measures. It should again be acknowledged, however, how these episodes involve only a small part of a huge industry, whose role in the strategic environment remain janus-faced and controversial: PMSCs have also been, in some cases, a valuable driver of stabilization in war-torn environments, and a crucial support for humanitarian action and peacekeeping operations.³⁴

Given the paucity of reliable data and quantitative studies, a systematic assessment of PMSCs' compliance with the existing *ius in bello*, their impact on local population and their very efficiency and cost-effectiveness remains to date impossible. It seems indeed true, then, that most of the scholarly debate on the privatization of force has hitherto produced "more heat than light".³⁵ The need for regulation, however, seems to have obtained widespread consensus, increasingly supplanting the call

²⁸ Avant D. 2004, The Privatization of Security and Change in the Control of Force, *International Studies Perspectives* no.5, 153–157. It has been recently found out that unmanned aerial vehicles employed by the CIA against the Taliban in Afghanistan were maintained by civilian contractors working for Xe Services, previously known as Blackwater. See for instance Risen J. and Mazzetti M. (August 20th 2009), C.I.A. Said to Use Outsiders to Put Bombs on Drones, *The New York Times* URL <http://www.nytimes.com/2009/08/21/us/21intel.html?_r=1&th&emc=th>

²⁹ Ortiz C. 2007, The Private Military Company: an entity at the centre of overlapping spheres of commercial activity and responsibility, in Jäger e Kümmel (eds.) *Private Military and Security Companies: Chances, Problems, Pitfalls and Prospects*, Wiesbaden: Vs. Verlag, p. 58

³⁰ O' Brien Kevin 2007, What should and what should not be regulated, in Chesterman and Lehnardt (eds.) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, Oxford University Press 2007

³¹ Holmqvist, op, cit; Caparini and Schreier, op. cit.

³² For a comprehensive analysis see Pinzauti G. 2007, The Blackwater Scandal: Legal Black Hole or Unwillingness to Prosecute? *The XVIIth Italian Yearbook of International Law*

³³ Investigation of the 800th Military Police Brigade (Tabuga Report), [US Army: Washington, DC], 2004), p. 44, URL <http://www.npr.org/iraq/2004/prison_abuse_report.pdf>

³⁴ Avant D. 2007, Selling Security: Trade-Offs in State Regulation of the Private Security Industry, in Jäger and Kümmel (eds.), *Private Military and Security Companies: Chances, Problems, Pitfalls and Prospects*, Wiesbaden: Vs Verlag, pp. 420-421

³⁵ James O. C. Donah 2007, Foreword, in Chesterman S., Lehnardt C (eds.) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*. Oxford: Oxford University Press, p. v

for a ban which had long characterized a substantial part of the literature,³⁶ and appears now as increasingly unfeasible or even undesirable without addressing at its roots the increasing mismatch between the capacities of existing military and security forces and the global demand for security.

The impact of private military and security activities on the enjoyment of human rights and the need to prevent, prosecute and punish IHL infringements is a crucial concern showing the need for further regulation. This section, however, will take a broader perspective, drawing on the insights offered by the literature on the control over the use of military force in order to analyze extensively the potential challenges that the emergence of PMSC posed not only to host countries, but also to home and contracting countries.

Scholars working on globalization and the so called “new works” have often associated the emergence of a market for military and security services with an end of the monopoly of legitimate violence which has long been considered as the defining feature of state entities, and thus with a decline of their sovereignty.³⁷ It is worth mentioning, however, how the public and the private provision of coercion are not necessarily antithetic phenomena: on the contrary, actors such as mercenaries and privateers played a crucial role in the development of the modern state system.³⁸ In addition, a simplistic equation between the emergence of the PMSI and a decline of the state is in danger of overlooking how PMSCs have hitherto supported rather than threatened national armed forces, and the current process of outsourcing is a deliberate political strategy which allows Western states to pursue more flexible foreign policies and otherwise unfeasible military operations. Even weak and failed states, whose sovereignty may be endangered by the activities of PMSCs within their territories, have sometimes benefited of private military companies as a last resort in order to curb enduring conflict and train more effective national security forces.³⁹

Although arguments based on the decline of the state ought to be taken with a grain of salt and flashed out by a comprehensive case by case analysis, the outsourcing of military and security operations may indeed call into question public control over military force in a number of ways. As emphasized for instance by Avant and Leander, the concept of control over the use of military force projected outside a state’s borders can be broken down into three different notions: those of functional, political and social control.⁴⁰

Functional control is based on the need to ensure that the military sector is capable of providing security effectively, protecting the polity from both external and internal threats.

Political control refers to the importance of keeping the security sector under the rule of democratically elected leaders. Security operations have to occur within an institutional process which restrains the arbitrary use of force and ensure democratic accountability over military and security operations.

Social control, finally, implies that the military and security sector should be integrated within the wider social context and act according to established social values.

³⁶ See for instance Francis D. 1999, *Mercenary intervention in Sierra Leone: providing national security or international exploitation?* Third World Quarterly, Vol 20, No 2, pp 319- 338; Musah A. and Fayemi K. 2000, *Mercenaries, An African Security Dilemma*, Sidney: Pluto Press

³⁷ See Crevelde M. 1999, *The Rise and Decline of The State*, New York: Cambridge University Press; Kaldor M. 2006, *New & Old Wars*, Cambridge: Polity Press, Münkler H. 2005, *The New Wars*, Cambridge: Polity Press

³⁸ Thomson J. 1996, *Mercenaries, Pirates and Sovereigns*, Princeton University Press

³⁹ Shearer, op. cit.; O’Brien K. 2000, *PMCs, Myths and Mercenaries: the debate on private military companies*, Royal United Services Institute Journal 145(1), pp. 59-64

⁴⁰ Avant 2007, *The emerging market for private military service and the problem of regulation*. See also Leander A. 2007, *Regulating the role of private military companies in shaping security and politics*, in Chesterman and Lehnardt (eds.) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, Oxford University Press

While Western military and security forces do now respond, to a major or minor extent, to all of these forms of control, the surge of private military and security companies may call each of them into question.

Some have suggested how PMSCs can enhance military capabilities by acting as force multipliers for national armies and providing new and more flexible tools of foreign policy. The emergence of private military companies may nevertheless pose a trade-off: while boosting functional control over the use of coercion, reliance on PMSCs can diminish social and political control.⁴¹ It should however be taken into account, in addition, how the surge of private military and security actors can also engender problems to the functional effectiveness of the military. Firstly, PMSCs have reportedly provided personnel which were unqualified to perform their contractual obligations⁴². Moreover, the presence in a theatre of operations of contracted personnel operating outside military chains of command, may engender problems of C3 – that is, communication, command and control –and requires the establishment of procedures ensuring the interaction between national armed forces and contractors which to date appear to be missing or insufficient. In Iraq, cases of friendly fire and lack of coordination have repeatedly occurred.⁴³ Also, relying on actors with no obligations other than those stemming from their hiring contract can be problematic. Firstly, outsourcing may place the success of military and security operations at the mercy of personnel outside the military ranks, who may quit their jobs without being prosecuted for desertion.⁴⁴ In addition, contracts cannot be easily adapted to unpredicted operational needs stemming from the sudden changes of fluid, war-torn environments.⁴⁵ Finally, the effectiveness of complex military operations like counterinsurgency require a careful balance between the required use of force and the need to prevent collateral damage and the subsequent alienation of the local population, which the presence of contractors outside the military chain of command may alter. According to US politicians, military officials and academics, the conduct of contractors may have hampered the success of the Coalition's counterinsurgency strategy.⁴⁶ In 2007, then Senator Barack Obama argued for instance that the United States "cannot win a fight for hearts and minds when we outsource critical missions to unaccountable contractors".⁴⁷

As abovementioned, in addition, the emergence of a PMSI creates a number of challenges to political, democratic control over the use of force.

While the warning that PMSCs "have paved the way for the multinational neocolonialism of the twenty-first century"⁴⁸ seems at the least excessive, it is true that the use of coercion by PMSCs on behalf of private firms is unaccountable to both territorial and home states' populations, and

⁴¹ Ibid.

⁴² The firm CACI, involved in the scandal related to prisoners' abuse in Abu Ghraib, had for instance provided personnel without any previous experience in human intelligence. On the issue see Chesterman S. 2008, *We Can't Spy ... If We Can't Buy! The Privatization of Intelligence and the Limits of Outsourcing 'Inherently Governmental' Functions*, *The European Journal of International Law* Vol. 19 No. 5, pp. 1055-1074

⁴³ Clark M. K. 2007, *The Soldier & the Contractor: The Interactions of Military & Private Security Company personnel in the field of Combat*, Paper prepared for the annual Meeting of the International Studies Association, Chicago

⁴⁴ Singer 2003, *Corporate Warriors*

⁴⁵ Stober J. 2007 *Contracting in the fog of war*, Jäger e Kümmel, (eds.), *Private Military and Security Companies: Chances, Problems, Pitfalls and Prospects*, Wiesbaden: Vs Verlag 2007

⁴⁶ Singer, P. W. 2007, *Can't Win With 'Em, Can't Go To War Without 'Em: Private Military Contractors and Counterinsurgency*, *Brooking institute policy paper*, URL <www3.brookings.edu/fp/research/singer200709.pdf>

⁴⁷ Hauser C. (October 4 2007), *New Rules for Contractors are Urged by 2 Democrats*, *The New York Times*

⁴⁸ Bernales Ballesteros E. (October 16th 1997) *Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination* UNCHR Report E/CN.4/1997/24, par. 109, URL <<http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/71e8763786cca82a8025666b004e1268?Opendocument>>

democratic oversight over the export of military services to foreign governments also appears insufficient. Reliance on PMSCs, for instance, has reportedly allowed the US government for avoiding the political costs of training foreign militaries with poor human rights records.⁴⁹

The direct use of private military and security companies by contracting states poses further problems, affecting “the institutional checks and balances and democratic practices that have been connected to restraint in military policy”⁵⁰, reducing governmental transparency and strengthening the executive vis-à-vis the legislature. Without adequate legal regulation, PMSCs may offer “alternative mechanisms for the executive body to conduct secret operations without other branches being involved”,⁵¹ allowing the circumvention of political and legal obstacles associated with the deployment of uniformed military personnel.⁵² Finally, with their activity of intelligence, consultancy, training and lobbying, PMSCs may have a say in shaping the security perceptions and the strategic priorities of governmental agency, thereby gaining excessive epistemic influence over foreign policy.⁵³

Social control over the use of force also involves a democratic oversight and a legal discipline of the military and police professionals, aimed at establishing who is allowed to exert violence, their training and their hierarchies. This allows a “sociological regulation” of security forces, ensuring that their organizational cultures are compatible with established social values.⁵⁴ While this is the case in national armies, governments and parliaments lack any voice in recruiting procedures, vetting policies and career paths within the PMSI.⁵⁵ Due to insufficient vetting procedures or need for cheaper workforce, PMSC may employ individuals previously involved in human right violations or other forms of criminal and socially unacceptable behaviour. Fierce criticism has been raised, for instance, for the use of officers involved in the apartheid’s crime or enlisted in the Chilean army during Pinochet’s dictatorship.⁵⁶ Given companies’ huge reliance on local or third country personnel, the assumption that because of their training within Western armed forces PMSCs personnel “has inherited routines in which established military practice and international law and custom are already contained”⁵⁷ may not necessarily be true.

Focusing on this threefold notion of control over the use of force allows grasping the huge magnitude of the challenges posed by the rise and the regulation of PMSCs. Although ensuring the prevention and prosecution of human rights abuses perpetrated in weak states is certainly a priority, this can only be part of a broader regulatory effort, which should be ultimately based on the subjection of the PMSI to the same procedures of control already in place vis-à-vis public military and security forces.⁵⁸

4. How to Regulate: A Multifaceted Approach

The previous two sections have briefly analyzed the nature of the PMSI and the number of problems it may pose to control over the use of force not only in territorial states, but also in home and contracting

⁴⁹ Michaels J. 2004, *Beyond Accountability: The Constitutional, Democratic and Strategic Problems with Privatizing War*, Washington University Law Quarterly 1001-1127

⁵⁰ Avant 2006, *The Marketization of security*, pp. 115-116

⁵¹ Singer 2003, *Corporate Warriors*, p. 214

⁵² Michaels 2005, *op. cit.*, p. 1039

⁵³ Leander 2007, *op. cit.*

⁵⁴ Janowitz M., *The Professional Soldier*, New York: Macmillan 1960

⁵⁵ Leander 2007, *op. cit.*

⁵⁶ *Ibid.*

⁵⁷ Ortiz 2007, *op. cit.*, p. 61

⁵⁸ Percy 2006, *op. cit.*, p. 24

countries. While a ban appears unfeasible, no single regulatory effort can offer a fully-fledged solution to all these problems. Indeed, as Avant argues, maximizing all dimensions of control appears impossible given the inherent trade-offs existing between them.⁵⁹ Regulation, as this section will try to show, may thus be grounded on a pragmatic approach based on three main kinds of instruments: legal regulation to be enacted at both the domestic and the international level, market incentives provided by public demand for private military and security services, and a strengthened self-regulation of the sector.

A. Legal Regulation

Although PMSCs do not operate in a complete legal vacuum, strengthening the existing regulatory regime at both the domestic and the international level appears crucial in order to hold the industry and its employees accountable for their misbehaviour and preventing the erosion of public control over the use of force.

Existing literature has hitherto focused on two major legal tools to be enacted or strengthened by home states, where firms have their headquarters: a control on the export of armed services based on a licensing system and the establishment of extraterritorial jurisdiction on private military and security contractors.⁶⁰ The provision of extraterritoriality, however, may be suitable only for the prosecution of major PMSCs crimes, as it is hampered by a number of substantial problems. Investigating a company's operation requires facilities, manpower and financial resources that home countries' courts may lack, and is challenged by the difficulties in collecting evidence and witness statements in foreign, war-torn environments.⁶¹ In addition, as already emphasized by the literature on transnational firms, PMSCs may escape hostile domestic regulations by moving their headquarters into states with less stringent legislation. For these two reasons, most authors have emphasized the need for regulation at the international level, based on the drafting of a new international convention addressing the private military industry and the establishment of international bodies capable of monitoring and prosecuting companies' misbehaviour.⁶²

All these measures will be further analyzed below, in the sections dedicated to domestic and international legal regulation. The following sections will instead be dedicated to informal avenues to regulation, showing how market incentives and strengthened self-regulation may effectively strengthen and complement existing and forthcoming legal provisions.

B. Market Incentives: Public Actors' Demand as a Regulatory Instrument

While many have focused on PMSCs nature of business entities driven by corporate profit rather than public interest to warn against the challenges posed by their emergence, few scholars have hitherto explored how their commercial *raison d'être* may also provide new avenues for regulation, making them subject to a basic, extra-legal kind of pressure: consumer demand. It is common wisdom in the literature on industrial relations that public demand is a very effective tool in the regulation of a market. The PMSI may be no exception: as Avant emphasizes, since home governments are among

⁵⁹ Avant 2007, *Selling Security: Trade-Offs in State Regulation of the Private Security Industry*, p. 419

⁶⁰ Percy, *op. cit.*, O' Brien K., What should and what should not be regulated, Chesterman and Lehnardt (eds.) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, Oxford University Press 2007

⁶¹ Percy, *op. cit.*, p. 37

⁶² *Ibid.* See also Singer 2004, *War, Profits, and the Vacuum of Law*

the major customers of security services, PMSCs may chose to abide by regulation to preserve their governmental contracts”.⁶³

The effectiveness of public consumers demand as a regulatory tool, however, is deeply dependent on the structure, the number of players and the dynamics of each market. A brief overview of the PMSI, to date largely overlooked by other policy papers, appears therefore crucial in order to investigate the impact of such extra-legal instruments of pressure. The lack of transparency of the PMSI, its fragmentation and the hitherto insufficient research hamper comprehensive knowledge of the market dynamics. According to a set of interviews with representatives of the industry, three main processes appear however clear.

Firstly, while it is far from operating in a perfectly competitive market, the PMSI has lately developed increasing levels of competition. Following the abrupt surge in the demand stemming from the occupation and reconstruction of Iraq and Afghanistan, a huge number of new players has entered the market.⁶⁴ The supply of security services has thus soon grown to match the demand, so that many firms have reported growing financial trouble due to stronger competition and the purported explosion of the Iraqi security bubble.⁶⁵ This increased competitiveness appears ideal in order to enhance the effectiveness of both consumers demand and self-regulation of the sector, which will be analyzed below.

Secondly, while the demand for commercial security represents a valuable share of the industry revenues, public contracts awarded first of all by governments and secondly by international organizations appear fundamental. In 2007, only about 15% of firms responding to the annual IPOA Survey were not providing services for some governmental actor.⁶⁶ Although the British industry is reportedly less reliant than its US counterpart on their own government’s contracts, the services it performs for states and international organizations are also a very valuable source of profit. Overall, the revenues stemming from public contracts appear therefore as a crucial incentive for the PMSI.

Finally, while some niche for smaller, specialized companies remain, the market appears also to be subject to a process of concentration characterized by mergers and acquisitions. Group4 for instance, to date the biggest private security company, has purchased Wackentut in 2002, Securicor in 2004 and has taken over the renowned British PMSC ArmorGroup in 2008.⁶⁷ While the creation of a small number of private security giants may reduce competition, it should be emphasized how bigger firms with an enduring existence on the market can be more easily subject to both market and legal regulation than smaller companies for at least two reasons. Firstly, small companies with almost no assets and permanent personnel, often described as little more than a website and a database of available personnel to be recruited on *ad hoc* basis,⁶⁸ can much more easily move offshore or underground, or dissolve and re-open under different names in order to escape regulation and circumvent prosecutions. In addition, smaller firms are more likely to act as “single-shot players” whose aim is obtaining one single lucrative contract before closing their doors, which are much less vulnerable to reputational pressures and market incentives promoting good behaviour.⁶⁹

⁶³ Avant 2007, *Selling Security: Trade-Offs in State Regulation of the Private Security Industry*, p. 421

⁶⁴ Messner J.J. and Gracielly Y. 2007, *POI Report, State of the peace and stability operation industry, second annual report*, p. 16, URL <http://peaceops.org/poi/images/stories/poi_rp_industrysurvey2007.pdf

⁶⁵ Author’s interviews with industry representatives

⁶⁶ Messner and Gracielli, *op. cit.*, p. 21

⁶⁷ Power H. (23rd March 2008), *Troubled ArmorGroup secures sale to G4S*, the Daily Telegraph, www.telegraph.co.uk/money/main.jhtml?xml=/money/2008/03/21/cnarmor121.xml

⁶⁸ Singer 2003, *Corporate Warriors*

⁶⁹ Cockayne J. 2007, *Make or Buy? Principal-agent theory and the regulation of private military companies*, in *Chesterman and Lehnardt (eds.) From Mercenaries to Market: The Rise and Regulation of Private Military Companies*. Oxford: Oxford University Press 2007

The evolution of the market underlying the three abovementioned phenomena does therefore offer new avenues for informal regulation, and appears to strengthen the importance of consumer demand as a valuable tool of control. Although it cannot replace the need for further legal regulation, the award, renewal and termination of public contracts may provide both incentives and deterrents for the industry, preventing some of the major problems associated with traditional domestic regulation. The prospect of losing lucrative state contracts clearly raises the costs of escaping regulation and provides crucial incentives to comply with major national and international legal norms as well as home states' foreign policy and values. Legal and financial tools of control are indeed mutually reinforcing, as without a public market of the services which should be controlled regulation is likely to have a minor impact. Since "the ability of individual states to regulate the market... is tied to their consumption",⁷⁰ a home state which is at the same time a contracting state, like the United States and to a lesser extent Australia, Canada or the United Kingdom seems in an ideal position to control PMSCs effectively through a synergy of legal regulation and market pressure. The increasing privatization of military and security functions to PMSCs, while raising a number of concerns, appears thus suitable to strengthen control over the industry and complement legal regulation with market incentives and deterrents. A few crucial caveats need however to be raised.

Firstly, even though the increasing use of PMSCs by state actors allows for the exertion of stronger leverage on their behaviour, some kinds of services should not be privatized. The provision of offensive services, where the discretionary use of coercion is most likely, should be performed by national military personnel subject to a chain of command, a system of military justice and an institutional framework ensuring civilian authority. The same applies to at least some intelligence services, which have instead been massively privatized in the United States.⁷¹ Due to the sensitivity of the information collected or to the high risks of abuses during human intelligence activities, this sector appears as too controversial to be privatized even if it is not directly related to warfigthing, as clearly shown by the scandals involving employees of the firms CACI and TITAN operating in Abu Ghraib as translators and interrogations.⁷² Outsourcing, therefore, should occur within the framework of a clearly stated and publicly debated governmental policy, establishing no-go areas and ensuring transparency and oversight.

In addition, it should be emphasized that in order for states' demand to develop its potential in shaping the industry behaviour, governments should use their procurements consistently, taking into account companies' good conduct as the major driver of contracts award and renewal. Strikingly, this seems to not always be the case: despite the abovementioned scandals and its provision of untrained personnel, for instance, CACI was awarded yet another contract for the supply of interrogation services in Iraq.⁷³

In absence of clear governmental policies disciplining outsourcing, different governmental agencies may award contracts solely according to a logic of cost effectiveness, thereby encouraging a race to the bottom in the quality of the services and the personnel provided by PMSCs trying to offer lower and lower bids while keeping some margins of profit.⁷⁴ Relying on the purchase of military and security services as a regulatory tool requires the elaboration of instruments to monitor, assess and rate firms' effectiveness and compliance with contractual provisions, their respect of domestic and international law and their recruiting and operating policies.

⁷⁰ Avant 2007, The emerging market for private military services and the problems of regulation

⁷¹ On the US trend towards the privatization of intelligence see Chesterman S. 2008, op. cit.

⁷² Investigation of the 800th Military Police Brigade (Tabuga Report) 2004, US Army:

Washington, DC, p. 44, URL <http://www.npr.org/iraq/2004/prison_abuse_report.pdf> See also Chesterman, op. cit.

⁷³ McCarthy, E. (August 5th 2004), 'CACI gets new interrogation contract', The Washington Post

⁷⁴ Authors' s interview with representatives of the industry, September 2009

This section will thus briefly analyze the management and oversight of contracts disciplining the provision of PMSCs' services,⁷⁵ which are also a crucial tool in the regulation of the market and the control over the industry activities. It is indeed astonishing how, while further regulation still need to be enacted, states have often failed to make the most of the basic legal tools at their disposal. Contracts awarded in Iraq have often been "strikingly vague", not incorporating crucial public law values including human rights, transparency and anti-corruptions norms.⁷⁶ In addition, most of these contracts "possess so few guidelines, requirements, or benchmarks that they effectively contain no meaningful evaluative criteria".⁷⁷ Governmental oversight, finally, was also stunningly insufficient: according to a 2004 DOD Inspector General Study, more than half of the contracts had not been adequately monitored.⁷⁸ Interestingly, both the industry and its opponents agree that the dramatic increase in the number and total value of PMSCs contracts in the US has not been matched by an adequate increase in governmental resources and personnel dedicated to the management and oversight of contractors.⁷⁹

In order for governments to exert market as well as contractual pressures transparently and effectively, ensuring public scrutiny and parliamentary oversight, effective monitoring and assessment criteria need to be enhanced. In addition, greater clarity is needed on what governmental agency is responsible for the drafting and the monitoring of each contract and the budget used to purchase PMSCs services. The contract ensuring the provision of interrogation services by CACI had surprisingly been signed by the Business Centre of the US Department of Interior instead than the DoD.⁸⁰

It is clear, therefore, that the effectiveness of market pressure rests on a broader set of regulatory tools. While Avant is correct in arguing that public consumers' demand can boost states' influence on firms and be crucial in ensuring compliance with regulation, the opposite also holds true: the use of public demand for PMSCs services as a source of financial incentives and deterrents for the PMSI requires a degree of transparency and oversight which both the industry and its customers do not possess yet, and needs to be enforced by more effective and comprehensive monitoring policies, a strengthening of existing legal regulation and a more effective self-regulation of the sector.

C. Self-regulation

The last part of this section will be dedicated to a brief analysis of industry self-regulation and how it can be upheld by public actors support.

In recent years, both single firms and major industry associations have produced a number of codes of conduct, best practices, and ethics declarations. The two major industry associations, the British Association of Private Security Companies and the International Peace Operations Association, mention "compliance to the law of the countries in which members operate"⁸¹ or "high operational and ethical standards"⁸² among their main statutory goals, and consider membership conditional to the

⁷⁵ The regulatory potential of contract has been analyzed by M. Cottier, "Elements for contracting and regulating private security and military companies 2006, *The International Review of the Red Cross* 88, pp. 637-663

⁷⁶ Laura A. Dickinson, *Contracts as a tool for regulating private military companies*, in Chesterman and Lehnardt (eds) pp. 217-239, p. 218

⁷⁷ *Ibid.*, p. 220

⁷⁸ Office of the Inspector Gen., *Us Department of Defense 2004, Acquisitions: contracts Awarded for the coalition Provisional Authority by the Defense Contracting Command*, Washington, Report no. D-2004-057, p. 24

⁷⁹ See for instance *Oversight of Contingency Contractors*, IPOA Report R-2009-10, or *United States Government Accountability Office (April 28th 2009)*, *DoD can improve its management and oversight by tracking data on contractor personnel and taking additional actions*, GAO-09-616T

⁸⁰ Holmqvist 2005, pp. 27-28

⁸¹ *British Association of Private Security Companies Charter*, http://bapsc.org.uk/key_documents-charter.asp

⁸² <http://www.ipoaworld.org/eng/aboutipoa.html>.

respect of various norms and codes of conduct. Corporate social responsibility and collective self-regulatory efforts are analyzed comprehensively in other Priv-War reports.⁸³ What is worth mentioning here is that while self-regulation alone is insufficient and the substantial or merely declaratory nature of some efforts may be controversial, overlooking it would be a mistake. Indeed, given the nature and the evolution of the market, meaningful efforts towards self-regulation can be taken seriously as they appear to be in the self-interest of the industry itself. The literature on industrial relations and corporate social responsibility has shown how there may be, in a number of markets, a strong business case for self-regulation.⁸⁴ Due to its legitimacy deficit, its increasing competitiveness, its strong reliance on public contracts, the PMSI appears far from being an exception. Meaningful self-regulation allows companies:

1. saving the legal and reputational costs stemming from scandals and litigations. The renowned case of the four Blackwater contractors killed in Falluja, shows how a company providing insufficient labour and security standards for its employees is increasingly exposed to legal problems. Similarly, the suits following Nisour Square's incident show the business risks of gross human right violations.⁸⁵ While quantifying their impact on the firm's revenues is impossible, the costs of both these episodes appear huge
2. gaining a competitive advantage vis-à-vis market rivals. In an increasingly competitive industry with low entrance barriers, firms cannot compete on prices alone, and will necessarily attempt to differentiate themselves in other ways.⁸⁶ Like in other markets, corporate social responsibility, credible best practices and codes of conducts may thus be an increasingly valuable strategy of brand differentiation
3. whether enhanced by public authorities or established by firms themselves, regulation can be a strategic tool to soften or restrict competition and establish entrance barriers to the market. Firms can thus "drive out small operators by voluntarily surrendering to more stringent regulation signalling corporate social responsibility",⁸⁷ in exchange for privileged access to the revenues stemming from major public contracts
4. Finally, the establishment of effective self-regulation allows the industry to influence, soften or prevent further legal regulation enacted by state actors⁸⁸

The abovementioned factors show how there is a business case for a meaningful self-regulation of the sector. While it remains clear that PMSI efforts *per se* are exposed to a number of problems, which call into question their effectiveness, public authorities can do a lot to improve the effectiveness of industry self-regulatory measures. Firstly, as asked by representatives of PMSCs themselves, states can enact legislation that enables industry associations to develop teeth, providing meaningful oversight and credible sanctions against non-complying members.

To date, the complaint mechanism established by IPOA, based on a permanent committee that hears and investigates stakeholders' complaints, has two major problems: firstly, members have no obligation to cooperate with the investigation by providing information and disclosing documents; secondly, the absence of independent monitors from outside the industry hampers credibility of the

⁸³ See Hoppe C. and Quirico O. Codes of Conduct for PMSCs: The State of Self-Regulation in the Industry, EUI Working Papers, AEL 2009/28.

⁸⁴ See for instance Crane A. et al. (eds.) *The Oxford Handbook of Corporate Social Responsibility*, Oxford: Oxford University Press

⁸⁵ Pinzauti G. 2007, *The Blackwater Scandal: Legal Black Hole or Unwillingness to Prosecute?* XVII *The Italian Yearbook of International Law*

⁸⁶ Jeffrey Herbst 1999, *The regulation of Private security Forces*, in Mills G. and Stremlau J. (eds.), *The Privatization of Security in Africa* Johannesburg: SIIA Press

⁸⁷ Cockayne 2007, *op. cit.*, p. 215

⁸⁸ *Ibid.*, See also Avant, *The emerging market for private military services and the problems of regulation*

oversight mechanism.⁸⁹ Legal provisions undertaken at state level can, at least to some extent, overcome these limitations. Initiatives such as the creation of an independent ombudsman investigating complaints against PMSCs' activities, proposed by the BAPSC to the British Government, can be a valuable step in that direction.⁹⁰

In addition, states as well as international organizations can enhance the effectiveness of collective self-regulation by making the award of major public contracts conditional to membership of the major industry associations, which would help making the expulsion of non-complying members a more costly sanction. The fact that the British PMSC Aegis was awarded and renewed the major CPA security contract in Iraq despite being rejected as a member of IPOA⁹¹ clearly damaged the credibility of the association and the effectiveness of its self-regulatory efforts. It is true, however, that the credibility of industry associations is inherently stymied by the fact that membership is neither universal nor compulsory, and still excludes some major players on the market.⁹² On the one hand, this makes such associations unable to promote self-regulation across the whole sector; on the other, it decreases the effectiveness of the major sanction they can provide to non-complying members, that is expulsion. Moreover, since membership is voluntary, a company may simply resign in order to avoid the reputational costs of industry investigations over its activities and exclusion from the association, as already done by Blackwater, which withdrew from IPOA after an enquiry over its behaviour in Iraq had started.⁹³ The most decisive contribution to strengthen self-regulation would therefore come from making membership compulsory for firms in order to operate on the market or at least being awarded public contracts. This could be, according to Percy, a first step towards the establishment of national or international domestic associations which provides licenses to operate on the market for both firms and individual employees and are headed by a professional body which ensure oversight of members activities and training and vetting of companies' personnel.⁹⁴

Finally, it is worth mentioning that when PMSCs provide commercial security for the private sector, self-regulation and corporate social responsibility can be promoted at both sides of the contractual relationship. The Voluntary Principles on Security and Human Rights, drafted by the governments of the United States, the United Kingdom, Norway and the Netherlands, together with a few companies operating in the extractive and energy sectors and some major non-governmental organizations, addresses the issues of transnational firms' use of the PMSI, covering training, policy development and transparency of policies, monitoring, recording and reporting on allegations, contracting and vetting of PMSCs' employees⁹⁵. While such principles have been to date signed by a limited numbers of firms and lack oversight and enforcement mechanisms, so that their impact may have been feeble,⁹⁶ they are a step forward to be further encouraged. The Voluntary Principles, as it was proposed, may be included as a compulsory clause for private firms' contracts with PMSCs.⁹⁷

⁸⁹ Hoppe and Quirico 2009, op. cit.

⁹⁰ Beapark and Schulz, op. cit., p. 248

⁹¹ Alexander K. and White N., *The Regulatory Context of Private Military and Security Services in the UK*, University of Sheffield: Priv-War National Report 2009, available at www.priv-war.eu/publications.

⁹² Percy, op. cit., p. 59

⁹³ Hoppe and Quirico 2009, op. cit.

⁹⁴ Percy, op. cit., p. 61

⁹⁵ Voluntary Principles on Security and Human Rights, URL <<http://www.voluntaryprinciples.org/principles/private.php>>. See also MacLeod S., *International Initiatives for Holding Corporations to Account and their Viability with regard to PSMCs*, EUI Working Papers, AEL 2009/29.

⁹⁶ Holmqvist, op. cit., p. 48

⁹⁷ Spear, J. 2005, *Market Forces: The Political Economy of Private Military Security* (Forskningssstiftelsen Fafo: Oslo), p. 17

5. How to Regulate: A Multilayered Approach

As Alexander Wendt observes, “since states are the dominant form of subjectivity in contemporary world politics, this means that they should be the primary unit of analysis for thinking about the global regulation of violence”⁹⁸. While states’ control remains the core of any regulatory effort, it is however no longer the only one: one of the crucial features of the emergence of a PMSI is precisely that it diffuses and redistributes the control over violence,⁹⁹ involving a broader network of public and private actors in the governance of global security.¹⁰⁰

In addition, as a few authors emphasized, referring merely to states is hardly helpful when addressing the issue of the impact and the regulation of the PMSI. Different countries are affected by the emergence of PMSCs in very different ways, and have, as abovementioned, very different needs and regulatory capacities which ought to be taken into account when analyzing how they can contribute to the regulation of the PMSI. A qualified notion of state is therefore more appropriate. This paper will adopt the solution already adopted by the other Priv-War reports, which appears the most comprehensive: a distinction between home states, where a PMSC has its headquarters, contracting states, which rely on the services it provides, and host or territorial states, where the activities of the PMSC take place. The following sections will briefly look at regulation at both the territorial state and the home and contracting state level.

A number of factors, as many authors have argued, erode the effectiveness of traditional single state regulation. On the one hand, territorial states where PMSCs operate may lack the institutional capacity to hold PMSCs accountable under domestic and international law. On the other, due to the transnational nature of the industry, the possibility for firms to avoid hostile regulation by moving offshore and the difficulties of extraterritorial investigation and prosecutions, home states’ regulation alone is hardly a silver bullet for the regulation of the sector.

There is indeed little doubt, as Percy argues, that an industry which operates transnationally, thereby challenging domestic regulatory efforts, can be best regulated at the international level.¹⁰¹ International regulation, however, is hampered by the well known difficulties of states’ collective action and by the diverse role and interests that different states have vis-à-vis the market. The last section will explore the main avenues of regulation and the difficulties and the potential of different regulatory options on the international stage.

A. Regulation at the Domestic Level

Given the transnational nature of the industry, the low institutional capacity of most territorial state and the problems related to extraterritorial monitoring and prosecution of PMSCs, domestic regulation alone cannot address all the challenges produced by the emergence of the PMSI. In the absence of relevant international action, single states’ regulation remains however the most indispensable tool to regulate PMSCs. This section will focus largely on home and contracting states, which are often those with the highest regulatory capacities vis-à-vis the industry. A brief look at weak territorial states, whose regulatory attempts may be frustrated by their low institutional capacity, will however be provided below.

⁹⁸ Wendt, Alexander 1999, *Social Theory of International Politics*, Cambridge: Cambridge University Press, p. 6

⁹⁹ Avant 2006, op. cit.

¹⁰⁰ Krahmman E. 2003, *The Privatization of Security Governance: Developments, Problems, Solutions*, Arbeitspapiere zur Internationalen Politik und Außenpolitik (AIPA, Lehrstuhl Internationale Politik, University of Cologne: Cologne

¹⁰¹ Percy 2006, op. cit., p. 63

1. Territorial States

While this is not always the case, territorial states often lack the capacity to hold PMSCs and their personnel accountable for the violation of domestic as well as international law. In some cases, territorial states' jurisdiction may be explicitly circumvented, as ensured by the renowned Order 17 of the Iraqi Coalition Provisional Authority, establishing that "contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto"¹⁰², and recently replaced by a Status of Forces Agreement (SOFA) between the US and the Iraqi governments.¹⁰³ Although in most other cases contractors are no doubt subject to domestic legislation, the lack of monitoring and enforcement capabilities hampers host state capacity to ensure their legal liability.¹⁰⁴

Due to their insufficient enforcement capabilities, strengthened regulation by territorial states is thus unlikely to make any substantial difference. While territorial states may lack the capacity to effectively monitor, let alone prevent and prosecute the activities of PMSCs within their territories, they can however find allies in other transnational actors operating within their territories. Media, non-governmental organizations, charities and humanitarian operators may act as fire alarms, signalling PMSCs abuses. In addition, global civil society actors may create transnational advocacy networks, that is networks of activists "bound together by shared values, a common discourse and dense exchange of information and services",¹⁰⁵ whose ability to exert pressure on both states and transnational companies has long been shown by international relations theory. In the case of the PMSI, transnational advocacy networks may help territorial states and their local population to denounce and punish PMSCs' misbehaviour in a number of ways, such as exerting pressure on home and contracting states', affecting the reputation of the company and providing the financial resources and the expertise needed to access home countries' legal remedies and ensure the prosecutions of contractors. The support of the US Center for Constitutional Rights, for instance, allowed the families of the Iraqi civilians killed in Nisour Square to undertake a civil lawsuit against Blackwater.¹⁰⁶

Transnational civil society's support can however offer a limited response to the threat of PMSCs' misbehaviour in territorial states. As it was correctly argued, the protection of weak states is indeed the most important reason for establishing an international framework ensuring the monitoring and the prosecution of PMSCs.¹⁰⁷

2. Home and Contracting States

While home states' regulation is insufficient to regulate an industry which is inherently transnational, it appears to date as the most effective instrument. The British Green Paper on the regulation of private military companies, still considered as a benchmark for further governmental actions both in the UK and in other countries, has distinguished five different regulatory approaches, ranging from a ban on

¹⁰² Coalition Provisional Order 17, §4, as amended June 17, 2004, URL <http://www.cpairaq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf. See also Huskey and Sullivan, op. cit., p. 15

¹⁰³ Ibid., p. 16

¹⁰⁴ Bakker C., Positive Human Rights Obligations of the Host State of Private Military and Security Companies, EUI Working Papers, AEL 2009/20.

¹⁰⁵ Kekk M. and Sikkink K. 1999, Transnational Advocacy Networks in International and Regional Politics, International Social Science Journal Unesco, no. 159: 89-101, p. 89

¹⁰⁶ Ulam Weiner R. 2008, The Hidden Costs of Contracting: Private Law, Commercial Imperatives and the Privatized Military Industry, Unpublished paper, December 2008, URL http://belfercenter.ksg.harvard.edu/publication/18725/hidden_costs_of_contracting.html. For a comprehensive analysis of the incident see also Pinzauti, op. cit.

¹⁰⁷ Percy 2006, op. cit.

PMSCs to a system based solely on the self-regulation of the sector¹⁰⁸. The provision of a licensing system, considered an intermediate regulatory option, appears to date as the most viable option to a number of authors.¹⁰⁹

Two major regulatory systems based on the licensing of the export of armed services are to date in place: the US International Traffic in Arms Regulation and the South African Foreign and Military Assistance Act. Examining them in detail is beyond the scope of this paper. It is important to note, however, how although these two acts are crucial benchmarks in today's regulatory landscape, they both suffer from some major shortcomings which need to be taken into account by forthcoming legislation.

The South African Foreign Military Assistance Act of 1998 is based on the distinction between mercenary activities, defined as direct participation as combatant in armed conflicts for private gain and banned altogether, and foreign military assistance, which is conditional to the provision by the National Conventional Arms Control Committee of a license which can be revoked at any time.¹¹⁰ Often mentioned in order to show the problems associated with very stringent regulation, the FMAA appears doubtlessly unsuccessful. Firstly, it suffers from major enforcement problems, and has hitherto led to a very low amount of prosecutions.¹¹¹ Even more importantly, such a kind of strict regulation, unaccompanied by any market incentives to comply with domestic legal provisions and by broader international regulations, appears only to have moved companies further away of governmental influence, pushing the South African industry across borders or underground.¹¹²

The US International Traffic in Arms Regulation, which is part of the Broader Arms Export Control Act, regulates the export of arms services as well as armaments abroad by making it conditional to the provision of a license provided by the Office of Defense Trade Control within the Department of State. While considered to date the most effective piece of legislation on the export of Armed Services, the ITAR suffers from two major problems.

Firstly, the licensing process is described as idiosyncratic, inconsistent and not transparent,¹¹³ as the number of offices involved and the criteria used to assess PMSCs' requests remain unclear. In addition, the licensing process has been charged with being excessively exposed to firms' lobbying actions.¹¹⁴

Secondly and most importantly, the process suffers from insufficient democratic oversight, as Congress is notified only contracts exceeding a threshold of 50 million dollars, and even major procurements can be easily unpacked into different contracts in order to escape Congressional control.¹¹⁵

Disciplining the export of armed services is a basic regulatory starting point, ensuring that governments have a degree of scrutiny on the export of armed services and their compatibility with

¹⁰⁸ Foreign and Commonwealth Office, op. cit., pp. 22-27

¹⁰⁹ Caparini M. 2007, *Domestic Regulation: Licensing regimes for the export of military good and services*, in Chesterman and Lehnardt, *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*. Oxford: Oxford University Press 2007; Percy 2006, op. cit., O' Brien 2007, op. cit.

¹¹⁰ Caparini 2007, op. cit.

¹¹¹ Avant, *Selling Security: Trade-Offs in State Regulation of the Private Security Industry*; Caparini, op. cit; Holmqvist, op. cit.

¹¹² Avant, *Selling Security*, p. 432

¹¹³ *Ibid.*, p. 425. See also Caparini 2007, op. cit.

¹¹⁴ Avant 2005, op. cit ; Leander, op. cit.

¹¹⁵ Avant 2006, op. cit.

national foreign policies, domestic democratic constraints and international commitments.¹¹⁶ While it is very likely that governments are aware of major PMSCs activities even when official consent provided by the award of a license is absent, established, bureaucratized procedures like those established by ITAR and FMAA are needed in order to avoid the ambiguities of an informal system of notification. Such ambiguities were clearly shown, for instance, by the renowned Arms to Africa Affair, when the British Cabinet denied its awareness of the operations carried out by the PMSC Sandline in Sierra Leone after the firm had been found in violation of a UN arms embargo, in spite of substantial evidence of both Foreign Office and Ministry of Defence involvement.¹¹⁷ Established mechanisms of licensing armed services to foreign governments prevents home countries from keeping an attitude of plausible deniability on firms' activities,¹¹⁸ which hampers both international and domestic accountability over foreign policy.

The shield of plausible deniability which governments may enjoy when using PMSCs as tools of foreign policy by proxy reflects a broader problem which forthcoming regulatory efforts need to carefully take into account: the abovementioned impact of the PMSI on democratic control over the use of force. While escaping these constraints may allow more flexible foreign policies, circumventing for instance Western public opinions' reluctance to deploy troops for humanitarian operations, it appears problematic on constitutional and moral grounds.

Ensuring democratic control over the use of PMSCs thus requires enhancing transparency over states' use of PMSCs and strengthening both *ex ante* and *ex post* parliamentary powers vis-à-vis private military and security activities.¹¹⁹ Firstly, parliaments should be involved in the decision over what can be privatized and what should be instead considered as inherently governmental: the decision to outsource appears as inherently political, and needs, therefore, to be publicly debated. In addition, all contracts between governmental agencies and PMSCs need to be notified to the relevant parliamentary commissions, specifying the numbers, the activities and the casualties of contracted personnel deployed abroad, as well as the disciplinary actions taken against them in case of misbehaviour. Such provisions were foreseen by the Transparency and Accountability in Military and Security Contracting Act proposed by then Senator Obama in February 2007, and never passed into law.¹²⁰ Specific parliamentary powers of auditing, interrogation, enquiry and oversight vis-à-vis both contracts and PMSC employees should also be foreseen.

B. Regulation at the International Level

Due to the transnational nature of the industry, the possibility for firms to avoid hostile regulation by moving offshore, the difficulties of extraterritorial monitoring and oversight, domestic regulation alone cannot fully account for the oversight and the prosecution of the PMSI. A comprehensive regulatory attempt should therefore comprise regulation at both the domestic and the international level. A template for a successful regulation of the PMSI may be the regulatory framework in place for civil aviation, based on the establishment of an international authority and a set of international

¹¹⁶ Singer 2003, *Corporate Warriors*; Avant 2005, *The Market for Force*

¹¹⁷ Kargbo, M. 2006, *British Foreign Policy and the Conflict in Sierra Leone, 1991-2001*, Peter Lang: Bern; see also Williams P. 2005, *British Foreign Policy Under New Labour 1997-2005*, Houndmills: Palgrave Macmillan

¹¹⁸ O' Brien K., *PMCs, Myths and Mercenaries: the debate on private military companies*. *Royal United Services Institute Journal*, 145(1) February 2000 p.59-64

¹¹⁹ On parliamentary control over foreign and defence policy see for instance Born, Hans & Hänggi Heiner 2004, *The Double Democratic Deficit. Parliamentary Accountability and the Use of Force under International Auspices*, Aldershot: Ashgate

¹²⁰ *Transparency and Accountability in Military and Security Contracting Act*, URL <www.opencongress.org/bill/110-s674/show>

conventions complementing domestic regulation and helping to overcome the problems associated with the extraterritorial enforcement of domestic law.¹²¹

The prospects for international regulation, however, seem far from rosy. As Avant argues, intergovernmental cooperation is hampered by the different roles various governments play in the market: “when what each government wants to control is very different, it is hard to get them to institute standard regulatory schemes together”.¹²² Collective action at the international level is further stymied by a range of pragmatic problems, related to the nature and the costs of different international regulatory frameworks.

While such a problem is no doubt true, there seems to be evidence showing an increasingly convergent approach towards the PMSI and its need for regulation. The Montreux Document on Private Military and Security Companies, drafted under the initiative of the Swiss government and the International Committee of the Red Cross in September 2008, and establishing recommendations and states’ good practices, was finalized and supported by both the major home and contracting states, such as the United States, the United Kingdom and South Africa, and some of the territorial states most affected by PMSCs’ activities, such as Iraq, Afghanistan, Angola and Sierra Leone.¹²³ It should be acknowledged, however, how the contents of the Montreux documents are not legally binding, and apply only to situations of armed conflict.¹²⁴

This section will look at the different international regulatory options available, looking at the problems arising from the increasing use of PMSCs by international organizations and at the contribution that major IOs can offer to regulation. A more comprehensive analysis will be dedicated to the European Union, whose potential in regulating the market appears huge and, to date, insufficiently exploited.

1. Avenues and Challenges for International Action

As it was argued, “if there is a regulatory vacuum regarding PSCs, it exists under international law”.¹²⁵ Such a claim may appear slightly misleading, since PMSCs and their employees are subject to IHL like all other actors. It is true, however, that international law lacks norms explicitly designed to regulate PMSCs and the application of IHL over PMSCs is stymied by legal ambiguities and enforcement problems.¹²⁶ The problems related to the application of IHL to PMSCs and their employees have been comprehensively fleshed out elsewhere and will not be analyzed in this paper.¹²⁷

The long maintained claim that the private military industry operates in a legal vacuum, at least at the international level, arises from the substantial inapplicability of the international legal instruments directed against mercenaries. While these cannot be examined in detail here, it is sufficient to mention that Article 47 of the First Protocol additional to the Geneva Convention of 1977, the Convention for the Elimination of Mercenarism in Africa entered of 1985, and finally the United Nation International

¹²¹ Percy, *op. cit.*, p. 38

¹²² Avant 2007, *The emerging market and the problem of regulation*, p. 194

¹²³ The Montreux Document On pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, URL <[http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/\\$FILE/ICRC_002_0996.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/$FILE/ICRC_002_0996.pdf)>

¹²⁴ Cockayne et al. 2009, *Beyond Market Forces: Regulating the Global Security Industry*, New York: International Peace Institute, URL <http://www.ipacademy.org/media/pdf/publications/beyond_market_forces_final.pdf>

¹²⁵ Percy, *op. cit.* p. 41

¹²⁶ See Francioni F. 2008, *Private Military Contractors and International Law: An Introduction*, *The European Journal of International Law* Vol. 19 no. 5

¹²⁷ Cameron L. 2007, *Private Military Companies: Their Status Under International Humanitarian Law and Its Impact on Their Regulation*, *The International Review of The Red Cross* 88, 573-598. See also Doswald-Beck, *op. cit.*; Drews, *op. cit.*;

Convention Against the Recruitment, Use, Financing and Training of Mercenaries entered into force in 2001 all make the status of mercenary conditional to a number of requirements which PMSCs can easily escape, and appear often inapplicable to mercenaries themselves.¹²⁸

An answer to this problem may be a redrafting of such pieces of legislation, starting from the revision of the UN Convention long advocated by the Rapporteur on Mercenaries Enrique Bernales Ballesteros.¹²⁹ Such a solution, however, appears unsatisfactory for at least two reasons.

Firstly, the original Convention itself, entered into force only in 2001 due to the low number of ratifications, has hitherto been ratified by only 32 states and signed by other 10, none of which is a permanent member of the UN Security Council.¹³⁰ Moreover, while an improved convention may receive greater support and both PMSCs and mercenaries do need to be disciplined, they are different actors requiring different levels of regulation and tailored legal instruments. Treating mercenaries and PMSCs differently would therefore enhance the clarity and the effectiveness of the regulatory instruments designated to address each of them, and seems indispensable to obtain the support of both the industry and major home and contracting states¹³¹.

Furthermore, effective international regulation and prosecution of PMSCs, often operating in weak states lacking the capacity to enforce their own domestic legislation, would require not only the drafting and the ratification of an *ad hoc* international convention supported by the major players involved in the PMSI, but also the establishment of some international body monitoring and prosecuting PMSCs' activities. Two different solutions may be foreseen.

On the one hand, the monitoring of PMSCs' contracts and activities may be assigned to an already existing United Nations body. The UNCHR Working Commission on Mercenaries, made of five regional experts who supplanted in 2005 the previously existing Special Rapporteur, is already involved in the oversight of the PMSI¹³². While it may appear to be a suitable monitoring body given its competency, some major concerns can be raised given the intransigent approach long maintained within this body, grounded on the analogy between PMSCs and mercenaries and the scepticism of both major Western players as well as of the industry, let alone the doubts regarding its actual monitoring capacities.

Alternatively, the oversight of the PMSI and its activities may be assigned to an *ad hoc* international body. Such an office, as Singer proposed, may undertake a systematic contract review and monitor the activities of the industry on the ground by teams of independent observers. Sanctions against the company as well as the prosecution of employees' crimes, may be ensured either by the ICC or by an *ad hoc* court¹³³. According to Percy, the latter solution ought to be preferred, due to the problems of ICC's jurisdictions over firms and US contractors.¹³⁴

Similar bodies, let alone the doubts related to their substantial effectiveness, may indeed have a potential in prosecuting and punishing PMSCs' misbehaviour and addressing the problems arising from extraterritoriality.

While not foreseeing the creation of an *ad hoc* criminal court, Cockayne has recently proposed a comprehensive international regime designed to help states keeping the PMSI accountable, and based

¹²⁸ Doswald-Beck, *op. cit.*; Drews, *op. cit.*; Caparini and Schreier, *op. cit.*; Holmqvist, *op. cit.*

¹²⁹ Bernales Ballesteros 1997, *op. cit.*

¹³⁰ Caparini and Schreier, *op. cit.*; Holmqvist, *op. cit.*

¹³¹ Percy, *op. cit.*

¹³² Holmqvist, *op. cit.*

¹³³ Singer, *War, Profits, and the Vacuum of Law*, pp. 543-546

¹³⁴ Percy, *op. cit.*, p. 51

on a global watchdog monitoring PMSCs activities, an accreditation regime, an arbitration court, a harmonization scheme and a global security industry club.¹³⁵

The creation of all the abovementioned bodies, however, appears ambitious and costly. International relations theory shows how the establishment of new international regimes is an extremely difficult endeavour.¹³⁶ In this case, the problem is not only that of finding the international consent required for the drafting of a new international Convention, which appears complex given the different interests that states' have vis-à-vis the use and the regulation of PMSCs, but also that of collecting the financial and institutional resources needed in order to ensure the effective monitoring of PMSCs activities on the ground and prosecution of crimes committed by firms' employees. According to representatives of the industry, "no grouping of global powers will be willing to invest large amounts of money and manpower in the creation and maintenance of a major regulatory body".¹³⁷ It can be argued that a solution to the abovementioned objection may lie precisely in a financial contribution from the PMSI,¹³⁸ which may share the costs of this international regulatory body with its customers by the provision, for instance, of an additional charge to be applied to each contract. The problems related to a fair division of the costs among the players or their excessive heaviness, which may alienate the industry willingness to cooperate, remain to be addressed.

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

Firstly, both existing IOs and *ad hoc* groupings of states as well as non governmental actors, like the signatories of the Montreux Document, are crucial arenas shaping the international discourse and building the agreement needed to undertake substantive action. A pragmatic approach based on the acknowledgement that PMSCs are legitimate actors whose activities require further regulation seems a better starting point than maintaining an analogy between PMSCs and mercenaries, which would polarize the debate and alienate both the industry and Western home and contracting states. The United Nations insistence on the mercenary nature of PMSCs, for instance, appears to have seriously hampered their role in the regulation of the PMSI.¹³⁹

In addition, major IOs such as various UN specialized agencies, the World Bank Group and NATO are robust consumers of private security.¹⁴⁰ Thus, they also have a chance to use market incentives in order to drive the industry towards increased level of self-regulation, transparency and compliance with domestic and international law. The prospect for a greater involvement of PMSCs in peacekeeping operations, first raised by Kofi Annan in 1998,¹⁴¹ can be used as a formidable incentive for the industry to develop higher standards in exchange for gradual access to a new, lucrative segment of the market. Like national governments, however, international organizations should be more transparent and consistent in their use of PMSCs. The example of the United Nations, whose Rapporteur for Mercenaries repeatedly condemned the activities of PMSCs while a few UN

¹³⁵ Cockayne et al. 2009, *Beyond Market Forces: Regulating the Global Security Industry*, p. 3

¹³⁶ Among many see Hasenclever, A., Mayer P., and Rittberger V. 1997, *Theories of international regimes*, Cambridge studies in international relations ; 55. New York: Cambridge University Press; Haggard, S and Simmon B. 1987, *Theories of International Regimes*. *International Organization* 41 (3):491-517; Young O. 1989, *International cooperation : building regimes for natural resources and the environment*, Ithaca: Cornell University Press

¹³⁷ Schulz and Beapark, op. cit., p. 244

¹³⁸ Singer 2004, *War, Profits, and the Vacuum of Law*, p. 543

¹³⁹ Percy, op. cit.; Holmqvist, op. cit.

¹⁴⁰ Author's interviews with representatives of the industry, April 2008

¹⁴¹ Annan K. (June 26th 1998), Ditchley Foundation lecture, URL <<http://www.ditchley.co.uk/page/173/lecture-xxxv.htm>>

specialized agencies were already contracting out different services to these companies is a paradoxical case in point.

A further degree of caution is required as the use of private military and security personnel contracted either directly by an International Organization or by a member state like the United States – which has outsourced its provision of international police officers and border monitors¹⁴² – raises additional problems related to the legal liability and the democratic accountability of the use of force at the international level. The involvement of Dyncorp employees in a child prostitution ring during their operational support for the operation IFOR in Bosnia provides a forceful example¹⁴³. As the use of force by IOs has already been considered as affected by a democratic deficit¹⁴⁴, reliance on private military personnel is in danger of creating a further layer of opacity and inaccountability. International organizations' use of PMSCs should therefore be as transparent as possible, envisaging mechanisms for the oversight, the investigation and the prosecution of companies' activities and, wherever possible, a role of the parliamentary assembly of the organization or of the national parliaments of the states which are party of it.

C. Regulation at the Regional Level: The European Union

While many authors have called for a greater role of the European Union in the regulation of the PMSI, it is worth mentioning that the European Union is already limitedly involved in the regulation of the industry in at least three respects. Firstly, the EU has been a driver of harmonization of members' domestic regulation on private policing, which has been recognized by the European Court of Justice as an economic activity subject to the rules of the Common Market.¹⁴⁵ Secondly, the EU Code of Conduct on Armaments Exports drafted in 1998 has produced greater transparency and encouraged increasing harmonization of national armed services as well as arms exports legislation¹⁴⁶. Finally, a few CFSP Joint Actions and Common Positions have been used to restrict the supply of some kind of activities, such as the services related to weapons of mass destruction and to control the export of private military services to certain destinations.¹⁴⁷

It is true, however, that a case can be made for the EU to take a much more direct role or even a lead in regulating the PMSI, and that its greater involvement appears necessary for a number of reasons. Firstly, the EU has an unprecedented regulatory capacity among regional organizations, and constitutes a huge pool of demand as well as supply for military services. In addition, regulation at the European level may find the support of both national governments, as it would be more cost effective and easier to implement, and of the industry itself, since it would avoid the ambiguities of different regulatory frameworks and the risks of unfair competition and competitive disadvantages across nations.¹⁴⁸

¹⁴² Caparini and Schreier, op. cit.

¹⁴³ Ibid. See also Singer 2003, op. cit.

¹⁴⁴ Born and Hanggi, op. cit.

¹⁴⁵ Krahmman E. 2005, *Regulating Private Military Companies: What Role for the EU*, *Contemporary Security Policy*, 26:1, 103 – 125, p. 117

¹⁴⁶ Ibid., pp, 115-116 . See also H. Born, M. Caparini & E. Cole, *Regulating private security in Europe: status and prospects*, DCAF Policy Paper 20, 2007

¹⁴⁷ Den Dekker, G., *The Regulatory Context of Private Military and Security Services at the European Union Level*, *Priv-War National Report 04/2009*, pp. 11-12, available at www.priv-war.eu/publications. See also Krahmman, *Regulating Private Military Companies: What Role for the EU*, p.11

¹⁴⁸ Ibid.

Moreover, given its capacity to act as a “norm entrepreneur” on the international stage,¹⁴⁹ a direct role of the EU would greatly enhance the prospects for further international regulation, encouraging other actors to address the issue. An explicit European policy vis-à-vis the use and the regulation of PMSCs appears particularly necessary since an increasing reliance on private military services by both the EU and the national militaries of its members appears almost inevitable.¹⁵⁰ Indeed, the EU has already limitedly relied on PMSCs services for the guarding of its embassy in Baghdad¹⁵¹ and during operations such as the EUPM mission in Kosovo.¹⁵² Given the difficulties hitherto experience by the EU in collecting the financial and human resources needed in order to pursue a more active involvement in crisis management outside its borders, reliance on private military companies may indeed appear as a valuable option, whose potential has already been acknowledged by some authors.¹⁵³ Javier Solana himself advocated the outsourcing of logistics for European crisis management operations as a way to “release military personnel which are badly needed for operations in the field ... save money while enhancing overall logistics performance... compensate for the absence of support assets of the Member States”.¹⁵⁴ Finally, a reluctance of the EU to directly address the regulation of PMSCs would be at odds with the role of civilian¹⁵⁵ or normative¹⁵⁶ power that underlies the European foreign policy identity and the commitment to “upholding and developing International Law”.¹⁵⁷

As a priority, the EU may therefore pursue further actions through a twofold approach. On the one hand, it may regulate the export of private military and security services by specific CFSP common positions requiring members to implement certain standards of control, or by revising the abovementioned EU code on the export of Arms in order to cover more extensively the export of armed services.¹⁵⁸ On the other hand, the EU may promote standardized rules for member states’ use of private military companies, defining the limits of outsourcing and devising procedures for the oversight of contracts and the accountability of firms and their employees.

Furthermore, the EU should be clearer and more transparent in its present use of PMSCs and the role that these actors may play in the future development of its military capabilities. It is crucial, then, that the EU engagement with PMSCs responds to a clearly defined policy specifying the extent and the limits of outsourcing and the paths ensuring oversight, legal liability and democratic accountability. Such a policy should be the outcome of a debate involving specialized actors such as the European

¹⁴⁹ On the role of the EU as a norm entrepreneur see Hill C. and Smith M. 2005 (eds.), *International Relations and the European Union*, Oxford: Oxford University Press, The New European Union Series. A comprehensive catalogue of the influence of the EU on international law is provided by Hoffmeister F., *The Contribution of EU Practice to International Law in Cremona*, M. (ed.) *Developments in EU External Relations Law*, Oxford: Oxford University Press, 2008

¹⁵⁰ White N. and MacLeod S. 2008, *EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility*, *European Journal of International Law* Vol. 19 no. 5;

¹⁵¹ Den Dekker, *op. cit.*, p. 21

¹⁵² Holmqvist, *op. cit.*, p. 57

¹⁵³ Wither, J. 2005, *European Security and Private Military Companies: The Prospects for Privatized ‘Battlegroups’*, *Connections: The Quarterly Journal*, PfP Consortium, Vol. 4, No. 2, pp. 107–126

¹⁵⁴ Solana J. (February 27th 2008), *Opening Address, European Defence Agency Conference “Commercialising logistics”*, Brussels, URL <<http://www.eda.europa.eu/WebUtils/downloadfile.aspx?fileid=376>>

¹⁵⁵ Duchêne F. 1972 “Europe in World Peace”, in: Mayne R. (ed.), *Europe Tomorrow*. London: Fontana-Collins, 32-49; Smith K. 2005, *Beyond the Civilian Power EU Debate*, *Politique européenne*, 17: 63-82

¹⁵⁶ Manners I. 2002, *Normative Power Europe: A Contradiction in Terms?*, *The Journal of Common Market Studies*, 40 (2): 235-58; Sjursen H. 2006, *The EU as a “normative” power: how can this be?*, *Journal of European Public Policy*, 13 (2) 235-251

¹⁵⁷ *A Secure Europe in a Better World. European Security Strategy*. Brussels, 12 December 2003, p. 9, URL <<http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>>, p. 9

¹⁵⁸ Bailes A., Holmqvist C., *The Increasing Role of Private Military and Security Companies*, EP/EXPO/B/SEDE/FWC/2006-10/Lot4/09, October 2007

Defence Agency as well as the European Parliament, whose already very limited role in European foreign and defence policy may be further called into question by the reliance on private military and security actors.

6. Conclusions

Due to space constraints and the complexities of the issue, this policy paper could provide nothing but a short overview of the major problems posed by the surge of the PMSI, and an enumeration of few pragmatic regulatory solutions based on the awareness that international security governance is an increasingly polycentric issue which involves a growing network of actors. For this reason, legal regulation enacted at the state level, while still crucial, appears insufficient in ensuring comprehensive control of an inherently transnational industry, whose emergence raises a number of concerns related to human rights and democratic accountability over the provision of coercion. While no single regulatory strategy appears capable of completely overcoming each of these problems, a multifaceted and multilayered approach based on both legal and informal instrument on the one hand and on national, regional and international action on the other, appears suitable to embed the PMSI in an increasingly tighter regulatory web, which would allow shaping the future evolution of the market and preventing a further erosion of public control over the use of force.