

III Problems and Prospects

Human Rights and Private Military Companies: A Double-Edged Sword too Dangerous to Use?

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1 Introduction

Around the world there are numerous violent conflicts where human rights are under attack on a daily basis. These conflicts vary in intensity, scale and geographic location, ranging from the Democratic Republic of the Congo and Sudan, to Iraq and Indonesia. People are under threat of death, physical harm, famine, rape, health risks and becoming internally displaced people/refugees. Ethnic cleansing, crimes against humanity and genocide are still being committed more than 50 years after the Universal Declaration of Human Rights. How can large-scale human rights violations in places such as Darfur be stopped? How can security be restored and human rights protection be guaranteed? The global fight against poverty is one way, but action in this regard can often be summed up as ‘too little, too late’.

Violent conflicts develop for a variety of reasons and depending on the local scenario, possible options to improve the situation are peacekeeping or peace support/humanitarian operations. Unfortunately, global players able to organize and execute such operations are hesitant to get involved. The military capabilities of some countries are already stretched to the limit due to involvement in Afghanistan and/or Iraq. At the same time, calling up more reserves for military action in regions not being perceived by the general (national) public as primary spheres of interests is politically dangerous. Financial resources for humanitarian action are also scarce. And although the risk of paying a “blood price” (Tony Blair 2002) was acceptable in the case of the Iraq invasion – regardless of the question of motives or legality – normally it is not for actions in most other places. After the Somalia disaster, where US troops suffered casualties and the public witnessed bodies of US soldiers being dragged through the streets of Mogadishu, the US was not willing to commit meaningful numbers of soldiers to UN missions outside their sphere of interest (Carroll 2004). Likewise, the majority of western countries lack the military capacities or the conviction to act themselves and it seems questionable if capabilities will increase in the foreseeable future to erase that deficit (O’Hanlon 2004).

As long as states remain hesitant to act by increasing their military capabilities and/or using those, an alternative option might be offered in the mission statement of the International Peace Operations Association (IPOA 2005a): “Innocent civilians form an overwhelming majority of the victims in low-intensity conflicts around the world. Alleviating their suffering and bringing long-lasting solutions to these conflicts is one of the most serious challenges facing the foreign policy community in the 21st century. IPOA believes private companies and organizations specializing in peace operations can make a major contribution to [protecting human rights] by providing fast, successful and cost effective solutions.” The IPOA is a lobby organization for private military companies (PMC), mainly from the USA. This industry dealing with military capabilities has developed over the years after the end of the Cold War and the number of PMCs has skyrocketed. IPOA’s reasoning is that since there is a shortage of skills and soldiers for peacekeeping or humanitarian relief operations, a PMC should be employed to undertake a crucial mission to protect human rights under threat in conflict. But with a heavily notorious reputation, can PMCs be trusted to uphold, rather than violate, human rights?

This paper will elaborate on chances and risks of involving PMCs when human rights are being violated on a large scale. In times of violent conflict or in a generally ‘weak’ state, i.e. one failing to provide its citizens with adequate physical security through an operational system of law and order institutions (Holmqvist 2005: 11), could the use of the double-edged sword of PMCs improve the human rights situation?

2 Human Rights

2.1 Human Rights – The Background

In 1948, the Universal Declaration of Human Rights (UDHR) was adopted by the UN General Assembly in the aftermath of World War II, marking the first definition of human rights in international law. Although not legally binding on the signatory states, the declaration provided the starting point for the further development of human rights treaties under UN auspices. The term ‘human rights’ refers to a concept of human beings having universal rights regardless of factors such as ethnicity, nationality, legal jurisdiction or other localizing factors. Today, “[h]uman rights is a subject that is finally coming of age. Once a subject on the margin of many debates but central to none, the concept of human rights now attracts people right across the political spectrum. The idea of human rights seems to many to offer a vital ele-

ment in a world of conflict, competition and seemingly inexorable globalisation.” (Gearty 2005)

Three generations or using a different concept, waves of human rights developed (Klug 2000: 9–12). First was the libertarian wave during the period of enlightenment with the important events of the US Declaration of Independence (1776) and the French Revolution (1789). Rights focused on protection from excesses of the state and were civil and political in nature in order to uphold individual liberty. The horrors of World War II sparked the second wave of rights and in the aftermath of the holocaust the human rights movement of today was born. Governments, the human rights community realized, had to be compelled to recognize and realize socio-economic as well as civil and political rights by positive action. The last decades saw a growing number of conventions and declarations focusing on human rights, e.g., the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. An increasing emphasis on participation and mutuality is the aim of the coming third wave. As Klug (2000: 12) argues, the “net of liability is spreading ever wider”, slowly starting to spread the idea of responsibility but also to create accountability for corporations, charities and private individuals. New tools to further human rights include trade agreements and education as well as litigation (on Human Rights in general Steiner/Alston 2000; Gearty 2003).

However, those human rights are under attack daily in regions of armed conflict, destroying civilian lives. Infrastructure and institutions are obliterated and necessities such as education, water, health and justice become things of the past. “Almost without exception, the world’s worst human rights and humanitarian crises take place in combat zones.” (Human Rights Watch 2004: 1) At the same time, those crisis zones are, by definition, often the workplace for PMCs, lending their military knowledge to further their employers’ cause.

2.2 *Human Rights in Armed Conflict and Private Military Firms*

There are many incidents of human rights abuses by PMC employees. Only a handful of examples shall be given: (1) DynCorp employees, hired by the US government to work in the Balkans, were involved in illegal sex and arms trade in the Balkans. Girls as young as 12 were ‘owned’ by Dyncorp employees. When another employee complained to the Dyncorp management he was fired (Capps 2002; Barnett 2001); (2) CACI International and Titan private contractors were involved in the practices of torture as well as cruel, inhumane and degrading treatment of prisoners during the Abu Ghraib torture scandal (BBC 2004a); (3) Erinys employees hired to protect Iraqi oil facili-

ties have been accused of having abused an Iraqi boy after he tried to steal (Barnett 2004); (4) In Iraq the fear of suicide car attacks on convoys has led private contractors to take action against cars considered a threat. The judgment – if the car approaching is dangerous or not – is made in a split second and is often wrong. Thus, action taken against innocent civilians ranged from civilians being threatened off the street by weapons-waving contractors, telling the Iraqis to clear the road by the sign of a clenched fist, to cars being pushed off the road or, in the worst case, salvos fired at them. Casualties have been reported (Miller 2005); and (5) In Angola, security companies having a stake in local diamond mining have been accused of killings and beatings of local miners (Pearce 2005). These are just a very limited number of examples. Discussing PMCs, though, raises the question of what this term actually means.

3 The Private Military Business

3.1 The Recent Boom of the Industry and Terminology

Hired soldiers or mercenaries were party to most conflicts until the growth of the modern nation-state with standing armies. The current boom only began after the end of the Cold War when the demand for military skills, a huge pool of unemployed labor and the notion of privatization being applied to the military of nation-states created this new industry. (Schreier 2005: 3–6; Singer 2003b)

Today, PMCs are hired by governments, multinational companies, non-governmental organizations (NGO) and non-governmental humanitarian agencies (NGHA). Examples include CARE, World Food Programme, UNICEF, Caritas and many more. From 1994–2002, the US government alone spent more than 300 bio. USD on US-based companies (Singer 2003b), indicating the global turnover of the industry. Companies are already being traded at stockmarkets; e.g., Armourgroup or L-3, the owner of MPRI, illustrating the change from being ‘rogues’ and ‘dogs of war’ to corporate entities concerned about investor relations with their shareholders.

As for terminology, there is a lively debate amongst scholars (e.g., Schreier 2005: 33–44; Singer 2003a: 88–101). However, since private security companies, i.e. companies focusing on defensive services, also use military knowledge, technology and capabilities, the distinction between offensive and defensive services is often very difficult. Therefore, for the sake of this paper the term PMC shall encompass the complete spectrum of private offensive, defensive, consultancy or support services.

3.2 *Today's Position and 'El Dorado' Iraq*

PMCs have permeated the entire military sector. Many western armies rely heavily on them, with the most important example being the US armed forces. In the last couple of years, the Department of Defence (DoD) entered into about 3,000 contracts with PMCs, privatizing many support tasks, e.g., they maintain B-2 stealth bombers, take care of the laundry and also operate missile-defence systems of Army and Navy (Singer 2005a). The current situation is undeniably dominated by the Iraq conflict. An estimated 20,000–35,000 private soldiers currently work in Iraq (Hazan 2004; Almond 2005) – a mere estimate, since the US-administration did not keep track and the Iraqi government now is simply unable to. The British Army, at the same time, has just around 8,000 servicemen and women on the ground. With conflicts looming on the horizon while some of the current ones are still not under control, the UN and its member states are increasingly called to intervene, but the outlook regarding willingness and ability is bleak. Therefore many PMCs hope to make inroads at the UN operations and humanitarian operations in general. Even if the current 'El Dorado' (the Iraq crisis) will be under control at some point, the industry is likely to grow indefinitely. After establishing a picture of the position of today's PMC industry, the question now is whether their capabilities can be used to benefit human rights.

4 Advantages of Hiring Private Military Companies, Options of Use and the Impact on Human Rights

4.1 *Advantages of PMC Use*

One main reason to consider PMCs for operations to uphold human rights is the lack of political commitment by powerful nation states. Therefore the vast majority of peacekeepers come from developing nations with their limited military abilities (UNPD 2005). This leads to understaffed missions with often outdated equipment and insufficient training, as in the UN Mission in the Democratic Republic of the Congo (Bernath 2003: 11; O'Hanlon 2004: 80f.). Seeing the sheer number of tens of thousands private contractors in Iraq now illustrates the possibility of PMCs substantially contributing to fill the gap and deliver, on the average, better trained and equipped soldiers. Important also is to use PMCs specializing in logistics and training of military forces to increase tactical and technical abilities to strengthen, professionalize and thus optimize the available military means of developing nations.

Once the political decision has been made, PMCs will most likely send in troops faster, as is evidenced by EO's 1994 offer regarding Rwanda in 1994

or IPOA's concept paper to monitor a peace agreement in Sudan (IPOA 2005b). According to the UN Peacekeeping Department it takes 3–6 months to send regular troops into a hotspot. PMC costs are likely to be lower as well, e.g., costs of PMC operations in Sierra Leone amounted to only about 4% of the costs of following UN operations (Fidler 2003).

4.2 *Options of Use*

Several scenarios are possible. Currently the most frequent use of PMCs happen in the support/logistics sector, e.g., supplies logistics, construction and maintenance of military bases. Using PMC abilities for coercive pressure on the other hand, e.g., to form a rapid reaction force in a crisis needing urgent action, would take PMC use to a different level. Such force could be deployed within a few weeks to get 'boots on the ground' and take control of the situation until the regular UN peacekeepers deploy. PMCs could also be used as the 'muscles and teeth' of an operation, i.e. the majority of soldiers would be regular UN peacekeepers, but the superior equipped and trained PMC employees would be providing some threat potential to keep factions from restarting the armed conflict. With between 20,000–35,000 soldiers in Iraq now, PMCs will be able to provide one or two quality regiment sized forces (i.e. appr. 1,500 men) once less manpower is needed in Iraq although to outsource an entire peacekeeping operation, such as in the DRC, seems unlikely due to its sheer size. Small peace operations, however, could possibly be outsourced to a large extent. Yet, political obstacles were hindering this at the turn of the century (Lilly 2000a: 7) and currently little seems to have changed with regards to political support.

Besides focusing on support for military forces to control a conflict, another area of growing importance is the use of PMCs in humanitarian relief support work. Relief work is vital to protecting human rights of vulnerable and weak people in a conflict, that have been robbed of the protection of state authorities, infrastructures such as hospitals, schools and provision of water. In recent years NGHAs faced a deterioration in respect for the protection of civilian populations. In some conflicts it was clear military strategy to disable civilian support for the opponent, thus humanitarian action might have undermined the achievement of military objectives (Vaux 2002). This led to a security crisis for humanitarian aid workers. Since 1992 several hundred UN civilian staff and NGO workers have been killed (International Alert 2001: 1; Singer 2004b). Previously, NGHAs operating in zones of conflict remained impartial and sought the political consent of belligerents for their work. To be perceived as taking sides would have rendered the NGHAs 'fair game' for the opposing warring faction, thus ultimately resulting in the agency having

to pull out completely – e.g., Save the Children (BBC 2004b). With the growing threat, some NGHAs decided to provide for their own security by hiring PMCs for expertise to assess the situation, suggest and implement security measures (International Alert 2001: 4; Deen 2004).

4.3 *Result*

This brief outlook at the options shows the numerous possible positive aspects of employing PMCs. The impact could make a vital difference, since in conflict, human rights could be upheld and situations stabilized. However, a look at the flipside of the coin is just as instructive.

5 Problems of Private Military Companies' Involvement

The list of problems is rather long and some of them shall be dealt with only briefly, since other chapters in this book approach those questions more in-depth.

5.1 *Problems for NGHAs Employing PMCs*

Using PMCs in regions of violent conflict to support humanitarian relief operations is very controversial with regards to the perception of neutrality. Even more so since most western military forces also acquired a humanitarian facette by now to 'win over hearts and minds', leading to the "blurring of humanitarian space" compromising NGHAs ability to provide humanitarian assistance (Archer 2005: 1, 5). According to Caroline Green, Oxfam, "communities that we work with have become confused as the lines between aid agencies and the military have become blurred [in Afghanistan]" (Deen 2004). At the same time, hiring PMCs to protect NGHAs assets such as cars and storage facilities could lead to crime displacement (Vaux 2002: 12f.).

5.2 *How to Reap the Benefits of Privatization*

To reap the benefits of employing PMCs ('faster, cheaper, better, available') will only be possible if properly administered. Procedures regarding tenders as well as checks and balances of performances are required, otherwise cases like overcharging by Halliburton will reoccur (Morgan 2005). Scarce funds would thus be wasted.

5.3 *A Wolf in Sheep's Clothings?*

Remembering the history of mercenaries as 'dogs of war' especially in the liberation wars in Africa where prominent examples fought in support of the colonial regimes, many critical voices are heard warning that employing PMCs will lead to disaster (e.g., Hazan 2004). However, many companies pride themselves on employing ex-soldiers with clean human rights records and strong sets of morals and values. MPRI, for example, employs almost entirely former US military personnel that in the company's view "have devoted their lives to the nation and who now apply their skills, experience and deeply-held values" to the new security challenges (MPRI 2005; Cilliers 1999: 113).

Still, the cases that became publicly known do not shed a good light on some companies regarding their action against employees, e.g., Dyncorp simply fired the people involved in the sex trade in the Balkans and sent them home. This shows the tendency within the industry to rather 'hush up' incidents to not hurt its public relations (Singer 2003b). Still, this is not in contrast to traditional forces (the US was reluctant at first to admit any wrongdoings in Abu Ghraib before it started prosecuting military personnel responsible). However, traditional soldiers can expect punishment according to their military penal code and face trial for human rights violations. PMC employees on the other hand operate in legal twilight.

5.4 *Legal Accountability - International Legislation*

Several international treaties (or articles of treaties) exist dealing with mercenaries: Article 47 of the Additional Protocol I of 8 June 1977 to the Geneva Convention; Convention of the OAU for the Elimination of Mercenarism in Africa 1977; International Convention against the Recruitment, Use, Financing and Training of Mercenaries 1989. As the titles indicated, dealing with mercenaries after World War II until the end of the Cold War mostly meant prohibiting them. However, these treaties never came close to achieving their goals due to many inherent flaws. Today, with the revolution from the individual mercenary to a whole new PMC industry, this international legislation is hopelessly outdated (Sandoz 1999b: 201–226; Singer 2004e: 525–534).

The International Criminal Court however, established in 2002, is a more promising option of accountability in the international sphere. It focuses on the crimes of genocide, war crimes and crimes against humanity. Should PMC employees commit the abovementioned crimes, the individuals could be prosecuted in The Hague if national courts are unwilling or unable to investigate or prosecute such crimes. Importantly, however, the extremely narrow focus on specific crimes limits this option of international accountability to a minimum with regard to PMCs. Thus, the primary responsibility to exercise jurisdiction over alleged criminals still remains with the individual states.

Adding to this is the lack of legal subjectivity of companies in international law (Barcelona Traction, Light and Power Co., INT.GERI 3, para.70). Domestic legislation, however, is more influential. Several countries, including South Africa and the US, have passed relevant laws to regulate PMC, also to avoid abuse.

5.5 Legal Accountability – Criminal Law in Domestic Legislation

South Africa's 1998 Regulation of Foreign Military Assistance Bill (B 54–97) focuses on PMCs, not the individual, but has a very broad definition of mercenary activity (Malan 1997: 10). The bill's intention, according to the preamble, is to prohibit "any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in the Constitution or national legislation". The distrust of the South African government against companies stems from the fact that they were initially founded, run and staffed with former apartheid agents. Shortly after the bill was passed, EO relocated and then closed down. Several new companies, setting up offices outside South Africa, were rumored to be 'spin-offs' of EO (Singer 2004e: 539–540). Thus the South African government only won a pyrrhic victory, because legislation only managed to drive PMCs from its then locus to other shores. Several thousand (estimates reach 20,000) South Africans are still working in the security sector in Iraq today (Schmidt 2005; Webb 2006), causing Defense Minister Lekota to draft a new Prohibition of Mercenary Activity and Prohibition and Regulation of Certain Activities in an Area of Armed Conflict Bill (Taljaard 2005). Recently, Siviwe Njikela, the Defence Department's Acting Director of Legal Services, said that "if you keep dangerous animals in your yard (...) you have a responsibility to ensure they don't go out and start harming people" (Webb 2006), indicating the need for the new legislation. In the current form, the bill has been considered unconstitutional and would have a negative impact on conflict preven-

tion, peacekeeping operations and enforcement, post-conflict reconstruction and humanitarian operations (Webb 2006).

By contrast, the US legislation tries to accommodate PMC work. Recently proposed legislation, the Transparency and Accountability in Security Contracting Act draft bill by US Senator Price, tries to facilitate PMCs by stipulating a minimum requirement of individual suitability regarding training, abilities and past criminal activity in order to work for PMCs hired by the US administration. Although the bill also focuses on the problems of privatization and no legal accountability or the protection of human rights is mentioned, it encourages responsible PMC work. Besides a licencing system already in place, the US legislation also includes accountability measures, albeit very sketchy in the beginning. The 2000 Military Extraterritorial Jurisdiction Act was intended to fill a gap in accountability by opening application to civilians working for the DoD serving in military operations outside the US Congress amended the Act in early 2004, further broadening application to civilian contractors of any federal agency supporting a DoD mission overseas. Since a gap remained with regards to contractors not on a support mission for the DoD (Brown 2005), congress again amended the law in 2005, largely closing that gap (Schaller 2005: 18; Schmitt 2005: 41–47).

However, should a PMC employee violate one of those laws, general problems arise for US and South African law agencies; enforcement will be very difficult since the vast majority of those crimes are not likely to be committed domestically, but extraterritorially, e.g., in Iraq. Many crimes might go unnoticed in the first place, since there are not enough “eyes and ears on the ground in foreign states to discover violations abroad” (Singer 2004e: 536). The criminal law of the host state on the other hand also is a rather weak tool for several reasons, as can be shown in the case of Iraq. Here, PMCs were actually part of the coalition forces fighting the state authority- the Saddam Hussein regime. Clearly, the state in this case was unable to prosecute (Singer 2004e: 537). After the surrender of Iraq to the coalition forces led by the USA, the installed Coalition Provisional Authority (CPA) in Order No. 17 (CPA 2004a) decreed that local criminal law was not applicable to foreign PMC employees, also including US-Americans. It thus granted immunity from application of Iraqi law to personnel working for the coalition forces or international organisations. This order is still in force regardless of the handing over of power to the Iraqi administration due to Order No. 100 (CPA 2004b). Even if this last order should be revoked and local criminal law would become applicable, Iraq could remain unwilling to generally prosecute in order to avoid tensions with PMCs, because the companies are instrumental in furthering the host state’s goals. Also, in this area of conflict

with the insurgency still unbroken, state authority is weak and a prosecution would be very difficult.

5.6 *Legal Accountability - Civil Law Litigation*

Besides the regular civil law claims for compensation in domestic jurisdiction (e.g., the UK law of negligence), the most important legislation in the near future will be the US Alien Tort Claims Act (ATCA). It grants federal district courts “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”. This unique piece of legislation has been applied to violations of certain core principles of human rights – principles that are considered part of customary international law – by private individuals and corporations.

In 1980, the case *Filartiga v. Pena-Irala* (1980 and 1984) was a landmark trial for human rights litigation, opening the door to American courts for civil liability claims against perpetrators. This law has become an important tool for plaintiffs seeking to sue corporations for their complicity in human rights violations (Collingsworth 2004). So far eight ‘torts’ have been recognized under the ATCA: torture, summary execution, genocide, war crimes, disappearance, arbitrary arrest and imprisonment, cruel, inhumane or humiliating treatment and slave labor (Anderes 2000: 178). The ATCA is not beyond criticism. It has been under fire since the *Filartiga* decision, e.g., in 1984 in the case of *Tel-Oren v. Libyan Arab Republic* (1984). However, the act has survived all attempts to make it obsolete including particularly strong opposition from business organizations (National Foreign Trade Council 2004). And in early 2005, after the judge in a crucial decision allowed the trial to continue, Unocal decided to settle a lawsuit against villagers from Myanmar (Eviatar 2005) – a big victory for the claimants, as well as the human rights community advocating the use of ATCA. PMCs in violation of the law of nations could therefore be held accountable in a civil lawsuit in the US by foreigners.¹ Clearly, jurisdictional issues will be hard to overcome, but this legislation has been instrumental in human rights litigation. The UK law of negligence is also of importance, since a large number of British PMCs are among the largest companies in the market. Still, it seems hardly appropriate and sufficient, that chances of compensation hinge on such complicated litigational efforts that at best can reclaim financial means. However, ‘beggars are no choosers’ and in the current legal situation, this chance of accountability should not be underrated.

1 For an overview of literature on and cases brought under the Alien Tort Claims Act see www.business-humanrights.org/Search/SearchResults?SearchableText=alien+Tort+claims+act

5.7 *PMCs as a Threat to the State as the Guarantor of Security?*

One of the prime fears encountered when discussing PMCs is the question of the monopoly of the state with regard to provision of security as part of its core responsibilities. What are the political implications? Will using PMCs to privatize parts of that core responsibility lead to a deterioration of security in the long run? There are many merits to that fear. However, within the conflict scenario of peace keeping or peace building with follow-on reconstruction efforts, affected states largely lack the structure to provide for security, either prior to or due to the conflict.

Still, PMCs should only be used to create initial security in such scenarios. Then, the state as the guarantor of security with democratic checks-and-balances needs to be (re-)installed in order to ensure an equitable distribution of security through its institutions such as military, intelligence and police (Holmqvist 2005: 9). PMCs clearly will have to contribute in the process, but, as Holmqvist points out, PMCs “are responsible to shareholders rather than to voters, and making fundamentally apolitical actors contribute constructively to the establishment of democratic and accountable security institutions is a particularly tough circle to square”. As she continues, the ability of PMCs to direct their capacities towards the long-term goal of installing the state as provider of security governed by law and politics instead of economics are crucial, but questionable (Holmqvist 2005: 9). In addition to that, legitimacy (and thus influence) of the weak state could further be weakened if security is perceived as being provided not by the weak state, but by a foreign donor through the PMC (Holmqvist 2005: 21). The success, therefore, largely depends on the capacity of states to steer PMC use towards (re-)building democratic institutions – a capacity that remains doubtful for weak states that could focus on short term rather than long term goals.

Summing up, at the moment PMCs could create initial security, but their ability to build a democratically legitimate security apparatus remains doubtful. Furthermore, meaningful international accountability does not exist and the domestic sphere is ambiguous, suffering from (a) lack of or flawed legislation; (b) the ability of PMCs to evade domestic legislation by relocation; (c) the problems of extraterritorial law enforcement; and (d) the weakness of local authorities to enforce domestic host state law (if applicable). Thus, general legal accountability in scenarios like Iraq is almost non-existent, leaving human rights unprotected. At best, there are rare individual cases that come under scrutiny and prosecutions follow. However, several grave problems have been identified and for PMCs to play a positive role in helping to further human rights in conflicts, implementable and sustainable solutions are needed.

6 Possible Remedies

Although PMCs have already and could potentially cause more trouble, simply banning them is unachievable due to their list of clients, amongst them immensely powerful countries and corporations. To them, PMCs are by now simply indispensable and used to guard the 'Green Zone' in Baghdad and provide security for natural resource extraction around the world. A meaningful domestic prohibition is also out of reach since many countries would welcome PMCs shifting locus and current host states largely do not contemplate a ban anyway. Thus, there is a need for change with regards to the current situation.

6.1 *(Re-)Establishing Security Provided by a Democratic State*

In order to achieve the goal of establishing democratic security institutions, thereby answering to voters and not shareholders, this has to be a main priority for PMCs from the first day of their engagement. Since PMCs are contracted by governments or corporations from strong states to act in weak countries in conflict (Holmqvist 2005: 10), those parties must ensure that this vital long-term goal does not succumb to short-term interests of the weak state. However, this policy would best be implemented by the donor's own military after initial PMC involvement to create sustainable long-standing donor-recipient relationships of political, and not commercial, nature. During the initial phase, some control must be given to the weak state for it to be seen as the provider of security through the PMC (Holmqvist 2005: 21, 58), thereby protecting its own legitimacy, but also lending some to the PMC actions.

6.2 *The Need for Regulations*

Even in industry sectors with occupations less likely to cause physical harm human rights violations occur. So to have the private military sector, dealing with military knowledge, skills and action, almost entirely unregulated is not acceptable. Examples of criminal conduct show the need for regulation. Following the approach of this paper, such regulation should in the first instance, create legal accountability for firms and individuals to prevent, or at least punish, criminal acts. Further, it should regulate them in order to enable utilization in a meaningful and safe way to further human rights in peace operations missions. Measures should include hard law (enforceable regulations) and soft law (voluntary regulations) of international, regional and domestic

nature, to complement each other. Some ideas shall briefly be presented (Schreier 2005: 116–134; Lilly 2002; see Chapter IV on Regulation).

6.3 *Quid Pro Quo – International Licensing and Monitoring*

An international licensing agreement under UN auspices with compulsory measures is a very promising option: an independent international body would create rules for a licensing scheme. The body could be under the supervision of the Special Rapporteur on Transnational Corporations John Ruggie, since the mandate of Special Rapporteur on Mercenarism of Shaista Shameem ended in 2005. All parties, countries, corporations and PMCs, would benefit from this model. PMCs would agree to an independent monitoring and auditing scheme setting minimum standards of conduct to receive a license. Requirements should be transparency of business conduct, a workforce with mandatory training in humanitarian and human rights law and credentials free of serious criminal offences against others. A common database with information on the licensed PMCs would enable customers to make educated choices. Drawing on UN experts for this is advisable, but also external specialists, e.g., the International Committee of the Red Cross now offers legal training to PMCs to “ensure that they know and respect international humanitarian law” (ICRC 2004). In case of misconduct, the independent authority should be able to temporarily/permanently revoke the license.

Subsequently, PMCs would be licensed by this independent UN body and thus elevated above the previous negative perception. This would open new markets by increasing the possible clientele that would feel more confident hiring PMCs due to the suggested measures. Besides the threat of revoking the license for misconduct, criminal acts infringing human rights must also have individual consequences.

6.4 *Criminal Accountability and Law Enforcement*

A minimum standard of criminal accountability in international law for PMC workers could be created through international treaties under the UN system. That would prevent a simple shift of locus to evade domestic legislative action. Otherwise legislation would be hardly more than lip service. The standard should include measures to ensure enforcement, e.g., including the mentioned experts monitoring the conduct and, in case of findings, passing those on to domestic law enforcement agencies. The independent body could support local legal proceedings with funds, expertise and personnel. This model would largely avoid problems regarding state sovereignty and jurisdictional issues.

The International Criminal Court (ICC) that has been suggested as an institution to generally prosecute PMC crimes (Singer 2004e: 546) is an unlikely option. Should the ICC prosecute not only ICC statute crimes (genocide, crimes against humanity, war crimes) it would weaken its elevated position as being solely responsible for the 'prime' crimes that are strongly entrenched in international law. The ICC could get embroiled in prosecutions of 'minor' crimes, squandering scarce resources. Furthermore many PMCs are US-based and/or have US employees, with the current US administration being strongly opposed to the court.

6.5 *Domestic Action*

Much of the international action suggested so far is not likely to be realized in the coming decade since building support internationally by lobbying decision-makers in governments and companies takes time. Thus, domestic action must be realized sooner to lead the way to international regulation. Successful domestic legislation, especially in the US and the UK, could lend momentum to the international drive. Many prominent companies also support the move towards legislation, believing it will facilitate the industry while regulating it.

As for the goal of legislation, a licensing system as suggested under UN auspices would also be of advantage domestically. It would again benefit all parties involved, including the larger companies that have close ties with their home governments and are deeply rooted in their country. This would prevent most companies from leaving to less regulated shores. Even if some companies emigrated, to have binding rules for the majority of PMCs domestically would greatly improve the situation, regardless of some PMCs 'dropping of the radar'.

6.6 *Voluntary Standards and Corporate Social Responsibility*

An important part of the soft law are voluntary measures. The concept of Corporate Social Responsibility (CSR) is still a fairly broad term indicating a responsibility of a corporation towards society that can be defined as "simply making a profit and abiding by the laws, regulations and customs of a country, environmental conduct, working conditions of foreign subcontractors, to human rights in general" (Segerlund 2005). Both presently existing industry associations, the US-based International Peace Operations Association and the British Association of Private Security Companies (BAPSC), support voluntary measures and regulation of the industry. BAPSC director-general Andy Bearpark thinks that regulations are necessary, because "the old days

are gone” (Almond 2005). In its charter (BAPSC 2006) the association proclaims, that all members “agree to follow all rules of international, humanitarian and human rights law that are applicable as well as all relevant international protocols and conventions and further agree to subscribe to and abide by the ethical codes of practice of the Association”. It continues to lay down ten principles as corporate governance guidelines, e.g., prohibiting contracts that could lead to conflicts with human rights legislation, involve criminal activity or that might be contrary to UK values and interests.

Of course all voluntary standards suffer from obvious deficits. First, such agreements often are the smallest common denominator or, if too invasive in the view of companies, lack members. Second, the standards are voluntary instead of legally binding rules. Third, there are problems of enforceability of standards. However, in the absence of laws, voluntary codes (‘soft law’) have a positive influence on different industry sectors. They can also be a first steps towards legislation. The last two decades have seen a vastly growing number of standards (e.g., UN Global Compact, Extractive Industry Transparency Initiative).

Taking voluntary measures a step further, a multi-stakeholder initiative involving PMCs, NGOs (e.g., International Alert) and host state governments to create the necessary checks and balances within the initiative is promising. The ‘role model’ in a sense are the Voluntary Principles on Security and Human Rights. The extractive industry in 2000 working with NGOs as well as the US, UK and Dutch governments drafted those principles that gave guidelines for risk assessment and for interactions between companies and private or public security. A PMC industry standard should be created following that model, trying to achieve the same goals envisaged in the proposed licensing scheme. Having the support of host state governments is important, since they are not only major customers, but might also lend some credibility and legitimacy to the PMC standard, encouraging them to join the process. Furthermore, a strong secretariat at the center of the initiative is vital, since it should be tasked with monitoring and enforcement, screening critically and alert to breaches of standard. The secretariat will also facilitate discussions on developing the standards and the question of membership. However, as a rule, ‘naming and shaming’ should only be used after having followed procedures for consultations to first allow the PMC to correct its errors.

Such standards would only live up to their potential if used with determination by parties to the initiative, especially PMCs. BP, a party to the Voluntary Principles on Security and Human Rights, can serve as a positive example since it has made extensive use of the standards. BP included them in the joint statement contract with the host governments on the Baku-Tbilisi-

Ceyhan pipeline project (BP 2003; Grofe 2005: 27) together with other standards such as the OECD Guidelines for Multinational Enterprises, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the European Convention on Human Rights. Those standards are therefore contractually binding between the parties. Even though it does not create criminal individual accountability, it does create civil legal accountability for BP and its subsidiaries. Also, during BP's Tangguh project in Indonesia, the Voluntary Principles were important, resulting in the Field Guidelines for Joint Security Measures within the Work Area of the Tangguh LNG Project (BP 2004). The document was used to reshape the relationship between BP and local police (Grofe 2005: 30). Vice-versa, such a standard could shape the PMC-client relationship.

Using a PMC industry standard in such fashion shows the potential of a multi-stakeholder CSR standard. PMCs willing to be legally held accountable should preferentially be hired, since that would send a strong signal of commitment to other PMCs. Of course, another important function of CSR for business is its positive effect on public relations and the hope to open up new markets as BAPSC and IPOA are lobby organizations of a commercial industry looking for profit. This hardly surprising non-altruistic motive nevertheless does not diminish the possible positive outcome of voluntary codes of conduct.

7 Conclusion

In Iraq there are more than 20,000 private contractors currently working for PMCs. Clearly, their contribution to creating/upholding public order by supporting the Iraqi government and its allies is immense. Still, the situation of the companies being largely unrestrained might lead to further infringements of human rights protection. Regardless of more informal pressure on contractors to curb their aggressive methods now, rules are still missing even though there are "daily reports of contractors running Iraqis off the road or injuring or killing innocent people" (Tyson 2005). Abu Ghraib and other cases such as Dyncorp in the Balkans should be a warning and a reason to make sure to control these companies. Among the private contractors are people like Deon Gouws. He was a member of the Apartheid death squad 'Vlakplaas' and at the Truth and Reconciliation Commission admitted to having killed at least 15 and petrol-bombed more than 40 homes of anti-apartheid activists. Although he obtained amnesty (Tromp 2004; Pompey 2005), should men like Gouws be trusted to uphold security while still respecting human rights?

The trend towards a weaker state partly giving up its monopoly on violence, a worrisome fact for the human rights community, seems irreversible.

PMCs will continue to appear in conflicts. To make sure they do not turn into 'dogs of war' again they need to be 'put on a leash', i.e. legal accountability and enforcement. Regulations need to be drafted to make use of those new tools for the benefit of human rights, since the lack thereof is a large obstacle to the hiring of PMCs for humanitarian/military operations.

The double-edged sword of PMCs has its inherent danger to the goals it is supposed to help achieve in peace operations, i.e. peacekeeping, peace building and humanitarian efforts. However, this sword at the same time offers the option to use military know-how to NGHAs, state actors and the international community in general. When handled with caution and restraint, facilitated by regulations, it could provide an option to act in regions of conflict where people suffer from violence, injustice and drastic poverty. Few countries are willing to contribute substantially more soldiers to UN peacekeeping, therefore there is a dire need for an alternative. To advance human rights by using military capabilities to bring stability and humanitarian help into regions of conflict is an opportunity.

During the Rwanda genocide, UN Secretary General Annan considered using a private company to end the fighting and separate fighters and refugees. He found no support, concluding that "the world may not be ready to privatize peace" (Fidler 2003). Looking at Iraq, the world on the other hand has clearly been ready to (partly) privatize war. It is time for this imbalance to change. To create legal accountability and safeguards is a necessity and moral duty. And so is to cautiously, but with determination, explore options of using PMCs in peace operations for the sake of human rights.