



The Political, Legal, and Military Implications of Outsourcing to Private Military Companies

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Recurrent and systematic underinvestment (or inadequate management) results in capability shortfalls, that can only be compensated by ‘outsourcing’ to Private Military Companies. While the use of private companies for corporate or logistic functions might be manageable, complementary and legitimate, outsourcing inherently governmental functions as the use of force to hired guns inevitably leads to legal, military and political issues. Even with an adequate management structure, not all military functions can be privatized, since activities or functions linked with the state’s monopoly on the (authorised) use of force as well as core military mission-critical functions should be banned from privatization.

Assuredly, Defence & Security investments deserve a better outcome than keeping the balance sheets of private companies in the green: critical awareness and an independent knowledge base on the good, the bad and the ugly of hiring Private Military Companies can make the difference for our future (austere) defence budgets between proactive investments in the provision of public security or compelled recourse to private capabilities.

INTRODUCTION

Global security and stability requires a significant public investment. Deficiencies and shortfalls in capabilities to ensure security and stability result from underinvestment in defence, assuming that available budgets are efficiently and effectively employed.

Failing to allocate resources to national defence capabilities invariably results in security deficits. Regrets for weak or failing states are often swift and sweeping: loss of sovereignty or a hostile takeover by non-state actors. More sophisticated states will amortise their cost through multilateral Security Organisations like the UN, NATO or the EU: they attempt to “insource” their security needs to other states. Given the very nature of multilateralism though, sharing benefits doesn’t work without sharing the burden. But “sharing the burden” has become more than a political mantra. With global economics as a background, a new trend has set in, exacerbated by the recent downturn in public finances: critical and enabling capabilities are either provided in kind by a partner, or paid for by the others. Failing

to invest in collective defence capabilities subsequently leads to shortfalls, that cannot even be mutualised through multilateral cooperation: recurrent and systematic underinvestment (or inadequate management) result in capability shortfalls, that can only be compensated by “outsourcing” to Private Military Companies (PMC). This article will argue that — while the use of private companies for corporate or logistic functions might be manageable, complementary and legitimate — outsourcing inherently governmental functions such as the use of force to hired guns inevitably leads to legal, military and political issues.

THE ORIGINS OF PRIVATE SECURITY AND OUTSOURCED MILITARY LOGISTICS

Allegiance to a king or to his money has made the distinction between patriots and mercenaries for centuries. Even the Swiss-guard-close-protection-detail of the pope, taking root in 1506¹ can be considered as an early Private Security Company, albeit one with an unpublished balance sheet.

During the World wars, private companies were used for logistics and transportation purposes only. Vietnam saw the first application of civilian technical specialists as maintainers of sophisticated weapon systems. The concept of using civilian specialists “backstage”, i.e. in principle not for combat functions or even close to the frontline, remained applicable during the cold war. This is not to say that paramilitaries led by warlords and mercenaries were not employed by warring parties and sometimes by legitimate governments, especially in Africa.

The (1990-1991) Gulf War can be considered as the first massive application

of Private Companies, routinely embedded in support and maintenance arrangements.

It can also be argued that military operations in Bosnia, Sierra Leone, Kosovo, Afghanistan and Iraq could not have been conducted without the help of contractors.

As was captured by the Geneva Centre for the Democratic Control of Armed Forces (DCAF) in a paper² on the matter: “Not since the 17th century has there been such a reliance on private military actors to accomplish tasks directly affecting the success of military engagements. Private contractors are now so firmly embedded in intervention, peacekeeping, and occupation that this trend has arguably reached the point of no return.”

To understand the origins and the success of private companies, both the viewpoints of demand and supply should be taken into account.

On the one hand, declining budgets compel Chiefs of Defence to shed non-core activities. When these capabilities are then required, outsourcing is often the only option. Since defence establishments cannot afford the “luxury” of avoiding risk by building these own capabilities with buffers and redundancy, they are squeezed into risk management.

On the supply side, the sunset of conscription has professionalised most Armed Forces. To avoid unfavourable pyramids of age in their order of battle, military personnel is often encouraged to leave the ranks and seek civilian career-opportunities. This, together with the downsizing of the armed forces caused by aforementioned budget cuts, floods the job-market with middle age “specialists”

¹ History of the Swiss mercenaries, retrieved 6 Aug 2008 from http://www.vatican.va/roman_curia/swiss_guard/swissguard/storia_en.htm.

² CAPARINI, M. & SCHREIER, F., *Privatising Security: Law, Practice and Governance of Private Military and Security Companies* (Geneva, Centre for the Democratic Control of Armed Forces, 2005).

with a security clearance and an inherent sense of discipline, ready to be enrolled by Private Military Companies.

Clearly, where offer and demand for military outsourcing meet, a thriving market has emerged.

A CLASSIFICATION OF DEFENCE & SECURITY RELATED OUTSOURCING

In essence, four types of “entities” to which military or security-related tasks are outsourced can be characterised and distinguished, as follows:

- (1) Private Security Companies (protect against the use of force, defensive in nature);
- (2) Private Militia’s and/or non-state actors (enable use of force, offensive in nature, can significantly impact on strategic situations and regional balance of power);
- (3) Private Military Logistic Companies (PM(L)C — support Defence & Security planning and operations);
- (4) Military Industrial Support Companies (enable future Defence & Security efforts).

Closer analysis of the mission types and tasks, depicted graphically in Fig 1, shows two main axes of differentiation, namely :

- the scale of violence involved in the activities;
- the timescale of the effects they produce.

Some contracts are responsive to an “urgent operational requirement”: hence, they can be promptly awarded and generally do not involve a long term commitment to a particular company, while other affiliations with industrial partners produce long term effects and require a stable, trustworthy business relationship.

Furthermore, as can be seen on the graph below, one strand of outsourced activities *provide* the *capability* for the use of force, while the other is merely intended to *transfer* this capability, but does *not* directly involve any application of violence.

This rather complex, but nuanced way of classifying Private Military activities is necessary, because the definition of a “mercenary” provided in Protocol I of the Geneva Conventions — relevant as it may have been when it was negotiated — raises more questions than it provides answers, when used in today’s security environment with its own political realities. Although international law bans mercenary activities, their definition has not been transformed to reflect the current environment in which they take place: hence, none is universally accepted and would therefore constitute a legal basis for enforcement and prosecution in a court of law. Furthermore, international law and the conventions dealing with the notion of mercenaries do not adequately address the use of PSCs by a sovereign state.



SECURITY POLICY BRIEF

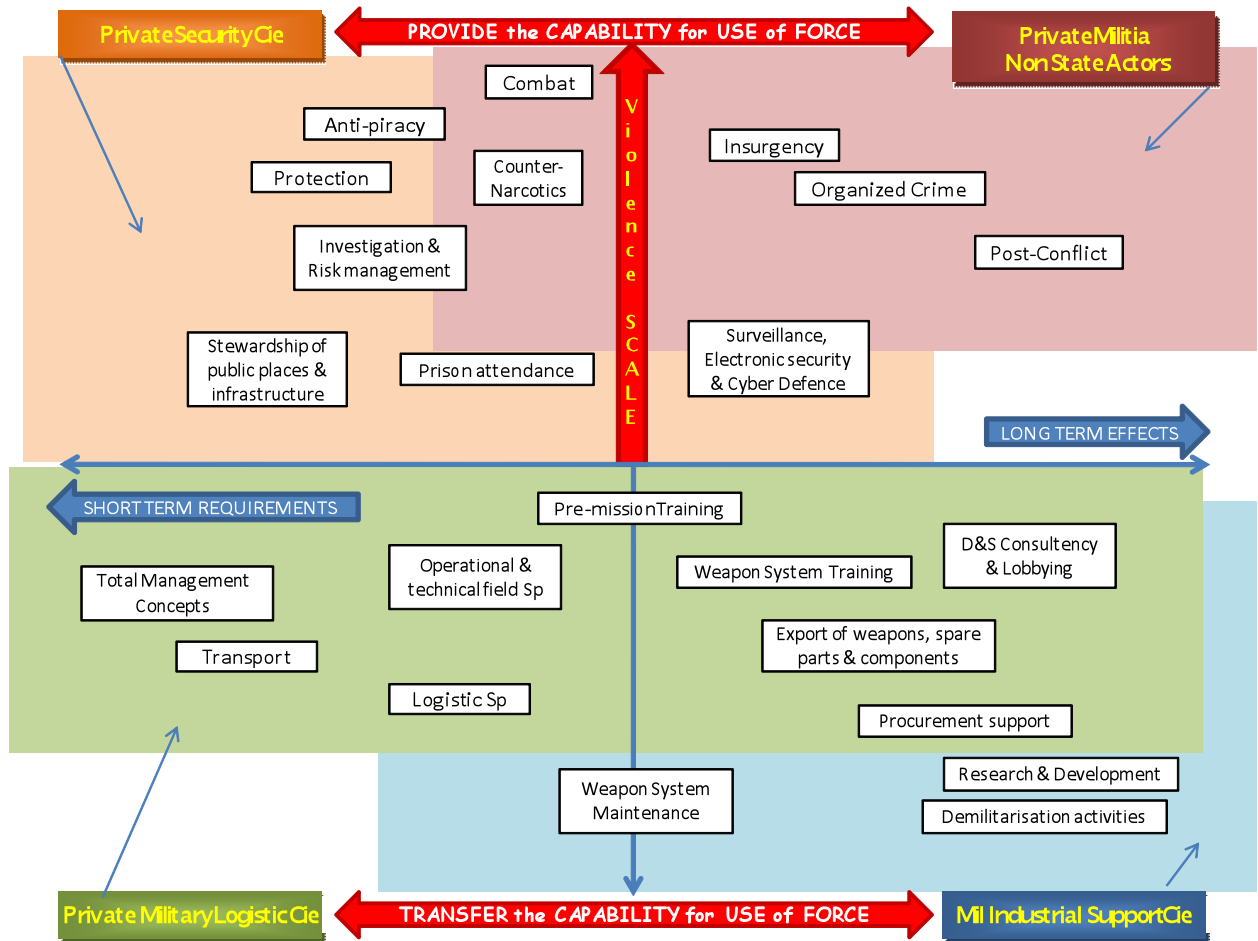


Figure 1: Graphical taxonomy of defence & security related outsourcing



SECURITY POLICY BRIEF

A MILITARY ANALYSIS OF THE USE OF PMCS IN OPERATIONS

One of the first observers to grasp the impact of PMCs on military operations was Peter W. Singer. In his landmark essay³, he develops the perspective of “Corporate Warriors”, with the Balkan wars and a plethora of African conflicts as a background.

After several incidents had involved Private Security Companies in Iraq and Afghanistan with negative media fallout toward American efforts on both theatres, the US Congress decided to investigate the outsourcing operations by the State Department and the Department of Defense.

During the Committee hearings⁴, the tone on the utility of outsourcing to the military effort was set with following statement by Congressman Tierney: “Outsourcing seems to increase the costs, not decrease it. [...] It seems to be harming the very counterinsurgency effort that General Petraeus seems to want to implement, and we have far too few Government managers to oversee the situation.”

The incidents attributed to Blackwater in the congressional findings should indeed be analysed against the background of the manual on Counterinsurgency written by

Gen. Petraeus⁵ on behalf of the US Army in 2006: “Counterinsurgents that use excessive force to limit near term risk alienate the local populace. They deprive themselves of support or tolerance of the people. This situation is what insurgents want. It increases the threat they pose.”

Analysis of the Congressional hearings further reveals that Blackwater and other companies conducted their missions in ways totally opposed to the highest military commander’s intent (coincidentally, General Petraeus at the time) without renegeing their contractual obligations.

The fact that contractors in the Area of Operations are not under direct control of the military command obviously goes against one of the first principles of military operations — unity of command — and is therefore not only inefficient and dangerous, but unacceptable, if executive accountability is to be achieved at any rate.

As recognised by David Isenberg⁶, checks and balances that apply to national armed forces can seldom be applied with equivalent strength to PMC-employees. Since PM(L)C-employees are exempt of military command and justice, they are under no obligation to operate at risk and can suspend a contract if — either in financial or physical terms — the situation is judged “too risky”. Furthermore,

³ SINGER, P., *Corporate Warriors: the Rise of the Privatized Military Industry* (Ithaca, Cornell University Press, 2003).

⁴ Committee Hearings of the House of Representatives — Hearing on Blackwater USA on 2 Oct 2007. Retrieved 3 Aug 2008 from: www.oversight.house.gov/documents/20071127131151.

⁵ US Army Field Man 3-24, Counterinsurgency. (Petraeus, 2006) retrieved 24 Aug 2008 from: www.usgcoin.org/library/doctrine/COIN-FM3-24

⁶ ISENBERG, D., *A Fistful of Contractors: The Case for a Pragmatic Assessment of Private Military Companies in Iraq* (London, BASIC, 2004).

PM(L)Cs face no real risk of prosecution, if they or their employees defect without regard to any military rationale from their contractual obligations.

All of this makes the use of PMCs in combat situations ineffective and even dangerous, especially if regular troops are to protect them.

A POLITICAL ANALYSIS OF THE USE OF PMCs

The events involving PMCs in the Balkans, Iraq and Afghanistan have not only prompted the US Congress⁷ and the Government Accountability Office⁸ to increased scrutiny, but also other legislators, notably Canadian⁹ and Dutch¹⁰.

These thorough reviews provide significant insight in all the potential problems and issues of outsourcing security in a broader and possibly multi-lateral context. Analysis of their findings demonstrate that outsourcing private security has as many profound implications as apparent motives:

- When used to **circumvent the need for backing** by parliament and public, political check-and-balance mechanisms are often shunted, but seldom for good reasons. Multilateral consultation and support is emptied of its contents, while the need to justify intervention vis-à-vis the international community is avoided;
- If the **capability-calculus** is **negative** without outsourcing, overstretch will likely follow, either in economical terms (when the taxpayers start asking

questions) or in military terms (when body bags start to affect recruitment and public support);

- When misused to seek official **deniability**, both political and public scrutiny are negated. This, in turn, undermines the credibility of the government and trust between executive branches, since the links closest to the contractor tasking authority will be most vulnerable to media exposure and legal action;

- When justified by **budget** considerations, outsourcing should go hand in hand with open bidding practices and contractual orthodoxy, for the lack of either will lead to squandering of public money, mismanagement, and will ultimately shortchange defence budgets, that could otherwise be spent on transforming official Armed Forces, in other words on “insourcing”;

- When **optimising operational capabilities** is the motive, cost management is the key to its added value, since private companies have but one motive: profit. The mechanics of profit being rather simple, either more quantity (i.e. more conflict) or less quality (i.e. less security) are the two most natural culprits of deficient cost management;

- When **transparency** is being eschewed through outsourcing, it normally follows a political decision by the executive power. Military control and civilian oversight — the only mechanisms that can restore it — will have been curtailed or neutralised. Resulting political damage will induce negative perceptions of both mechanisms and their associated leadership, but history has shown that legal action will usually not address the ones that ordered the stealthiness;

- When **accountability** is shunned, political and legal liabilities often ensue. International law has it that the conduct of “agents operating within the scope of a state’s

⁷ Congressional Research Service Report Private Security Contractors in Iraq: Background, Legal Status and Other Issues. Retrieved 31 Jul 2008 from www.fas.org/sgp/congr_research_serv/natsec/RL32419.

⁸ DOD’s *Extensive Use of Logistics Support Contracts Requires Strengthened Oversight* (Washington, GAO, 2004).

⁹ *Employing Private Military Companies* (The Hague, Adviesraad Internationale Vraagstukken, 2007).

¹⁰ Canadian Department of National Defense, *Evaluation of the Canadian Forces Contractor Augmentation Program*, 2006.

authority” is attributable to its government. Transparency and accountability being the main hallmarks of good governance, they can safeguard the sending state of legal complications if they are enshrined in its outsourcing practices. Failing to enforce them however, can significantly curtail the political leeway of that state (as negotiations for a Status Of Forces Agreement [SOFA] in Iraq demonstrated, when PMC’s were explicitly denied immunity);

- The same can be said when outsourcing is used to perform **inherently governmental functions**. If the sending state fails to prosecute criminal or fraudulent activities of its contractors or to suspend the execution of the contract when the scope of its authority is exceeded, political and legal difficulties are to be expected. Indeed, beside a generic international legal framework, specific legal arrangements tailored to regional & local circumstances are necessary to harmonise different levels of jurisdiction and a legal framework that has not adapted to the security realities of failed states and actors that play by their own rules.

CONCLUSIONS

Providing policies and practices with regard to outsourcing security are granted sufficient regulatory attention and specific treatment (i.e. not as any-other-contract), specialised multilateral agencies such as European Defence Agency (EDA) and NATO Maintenance and Supply Organization (NAMSA) seem to provide the best guarantees against undue “pork-barrel” politics. Furthermore, through a consolidated multinational approach, smaller nations can leverage capabilities, which they would otherwise not have committed and the UN is in a better position to seek adhesion from less-

developed countries to their peacekeeping endeavours.

But improving outsourcing outcomes requires a “management model”, if not one common to the different Security Organisations (NATO, the EU, the United Nations, ...), then certainly a trustworthy “interoperable model”, that nations can easily plug into.

Finding political consensus for this model would probably be perilous in any of the organisations that may be concerned by it. But precisely the need for consensus is the most likely reason that concerted and timely action will be the exception rather than the rule.

Arguably, if the arrangements on Permanent Structured Cooperation in the Treaty of Lisbon¹¹ are to be realistically fulfilled, groups of nations that will join in initial action *within a period of five to 30 days with support elements including transport and logistics*, shall only be able to do so if they are supported by contractors and *be extended up to at least 120 days* if they can subsequently handover to multilateral partners ... and (more) contractors.

All told, one overarching conclusion and recommendation seems to emerge from the analysis:

<p>If you cannot control Private (Military) Companies, don't hire them !</p>
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¹¹ Article 1 of the Protocol on permanent structured cooperation established by article 42 of the Treaty on the European Union

Dr. Patrick Wouters is a Brigadier General in the Belgian Air Force. The views expressed by the author are strictly his own and do not necessarily coincide with the policy of the Belgian Defence or any of the organisations cited.

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