

CHAPTER 4
ETHICAL SECURITY:
THE PRIVATE SECTOR IN PEACE
AND STABILITY OPERATIONS

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Introduction

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

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

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Issues of terminology

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

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

Clients and activities

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

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

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

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

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

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

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

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

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

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

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

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

The need for private contractors

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

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

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

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

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

Methods and structures of regulation

Regulation by contract

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

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

Regulation by domestic law and international convention

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

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

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

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

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

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

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

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

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

2. A mercenary is any person who:
 - a. Is specially recruited locally or abroad in order to fight in an armed conflict;
 - b. Does, in fact, take a direct part in the hostilities;
 - c. Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
 - d. Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
 - e. Is not a member of the armed forces of a Party to the conflict; and
 - f. Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces (Geneva Conventions 1949).

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

1. A mercenary is any person who:
 - a. Is specially recruited locally or abroad in order to fight in an armed conflict;
 - b. Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
 - c. Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
 - d. Is not a member of the armed forces of a party to the conflict; and
 - e. Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

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

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

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

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

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

Regulation by internal industry standards

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

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

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

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

Conclusion

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

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

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

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

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