

Latin-America experience and lessons for regulation

Draft Report for the UN working Group on the use of mercenaries

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Private security companies and private military companies (PMSC) appear in the international system and conflicts since the last twenty years, and challenge the state monopoly on the use of force. This report analyzes the situation of this new actor in International Humanitarian Law (IHL); his activities in Latin-America, and explores alternative approaches to regulate the phenomenon.

PMSC an actor without status in IHL

Two options may be used to catalogue PMSC in the IHL: mercenaries or combatants (members of an armed forces or militia):

Mercenaries

The legal meaning of the term “mercenary”, defined in the Additional Protocol I of 1977¹, 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

¹ The definition of mercenaries is similar in the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, the then Organization of African Unity Convention for the Elimination of Mercenarism in Africa.

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.

These six criteria must be fulfilled cumulatively in order for a person to meet the legal definition of being a mercenary; in very few cases is it possible to consider PMSC employees as mercenaries.²

Combatant

Combatant status is tied to membership to the armed forces of a party to a conflict³ or to membership of a militia or volunteer force that belongs to a party to the conflict and fulfils specific criteria.⁴

² Under international humanitarian law, it is not a violation of the Geneva Conventions or Protocols to be a mercenary and mercenarism in and of itself does not engender international criminal responsibility; simply, a mercenary does not benefit from prisoner-of-war status if captured.

³ Article 4A(1) of the Third Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949 (GC III), and Article 43 of Additional Protocol I thereto (P I).

⁴ GC III, Article 4A(2).

In order to consider the PMSC's employees as combatants, it would be necessary to establish whether they are members of the armed forces of a party to the conflict or not. It is thus necessary to assess if PMSC's employees are incorporated within the armed forces of a party to a conflict, as defined in Article 43.1 of Protocol I or Article 4A(1) of the Third Geneva Convention. "It is conceivable that in rare cases they might be. Indeed, if all of them were so incorporated, that would solve all regulation issues and pose no problems for their categorization under international humanitarian law. However, the whole point of privatization is precisely the opposite – to devolve on the private sector what was previously the preserve of government authorities."⁵

The second option to qualify PMSC as combatant (or prisoners-of-war) is to meet the requirements laid down in Article 4A (2) of the Third Convention, which stipulates that the following also are entitled to prisoner-of-war status:

"Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory ... provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;

⁵ Cameron, L., "Private military companies and their status under international humanitarian law", *International Review of the Red Cross*, Vol. 88, No. 863 (September 2006), pp. 573-598.

(d) that of conducting their operations in accordance with the laws and customs of war.”

PMSC may be considered as a militia in very few cases and it is necessary to undertake a company-by-company analysis. Although it is normal and logical, IHL must be applied in such a way as to make it reasonably possible for combatants to comply with it. But if it is virtually impossible for opposing forces to know which PMC employees are combatants or civilians, it could discourage the others combatants any attempt to comply with IHL.

According to IHL every person must be either a combatant or a civilian, and therefore PMSC employees will be considered as civilians. This consideration carries important consequences and risks for both civil and PMSC employees, because it generates confusion between them. Civilians do not have the right to participate directly in hostilities, and if PMSC employees do use arms, then as contended above, this could affect the ability of IHL to protect the civilian population.

PMSC: Possible definition:

PMSC

It is possible to define Private Military and Security Companies (PMSC) in a general form, for example a private business entity that provides military and/or security services abroad for companies, governments and other bodies, including the United Nations (UN) and some

Non-Governmental Organizations (NGOs). These services include, but are not limited to: armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.

But it is possible to make a distinction between PMC and PSC:

Private military companies (PMCs): private business entities that provide military services abroad for companies, governments and other bodies, including the UN and some NGOs, including: advice, training, logistic support, military intelligence, supply of personnel for monitoring roles or deactivating land mines. In some extreme cases combat will be provided.

Private security companies (PSCs): private business entities that provide security services abroad for companies, governments and other bodies, including the UN and some NGOs. These services include: armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention and intelligence services.

Typology

A typology could help to differentiate between the services, but it is difficult to arrive at a satisfactory categorization because these companies cover such a wide range of persons, activities, and services. They can be further qualified in terms of: market capitalization; corporate interrelationships and history; number, qualification, experience, and characteristics of personnel; and even geographic location of their home base, headquarters, and operational zones. However, even if a typology serves for a better understanding of the phenomenon, it does not provide for a satisfactory basis for a definition under a convention.

Some interesting typologies:

Private Military Companies: Options for Regulation 2001-02, Foreign and Commonwealth Office (“Green Paper”)⁶:

⁶Green Paper: UK Foreign and Commonwealth Office, “Green Paper”, p. 10

Activities & services provided	Examples of companies	Main users of services
Combat and operational support	Executive Outcomes Sandline International Gurkha Security Guards	governments
Military advice and training	DSL, MPRI, Silver Shadow Levdan, Vinnell, BDM	governments
Arms procurement	Executive Outcomes Sandline International Levdan	governments
Intelligence gathering	Control Risk Group Kroll, Saladin, DynCorp	governments multinational companies
Security and crime prevention	DSL, Lifeguard, Group 4 Control Risk Group Gurkha Security Guards Grey Security Coin Security	multinational companies humanitarian agencies
Logistical support	Brown & Root, DynCorp Pacific Architects & Engineers	peacekeeping organizations humanitarian agencies

Brooks for IPOA⁷:

IISPs Nonlethal Service Providers	PSCs Private Security Companies	PMCs Private Military Companies
Mine Clearance Logistics & Supply Risk Consulting	Industrial Site Protection Humanitarian Aid Protection Embassy Protection	Military Training Military Intelligence Offensive Combat
PA&E Brown & Root ICI of Oregon	ArmorGroup Wackenhut Gurkha Security Guards	Executive Outcomes Sandline International MPRI

⁷ D. Brooks, "Protecting People: The PMC Potential", *Comments and Suggestions for the UK Green Paper on Regulating Private Military Services*, Alexandria, International Peace Operations Association, 25 July 2002, at www.hoosier84.com/mspconceptualization.html

Or a detailed one undertaken by Herbert Wulf⁸:

Type of activity	Legal and social status	Main users	Main areas of activity
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I. Private Security Companies

Property Protection			
Protection and surveillance	Legal, often not regulated	Private citizens and companies	Urban Centres in many parts of the world
Guarding factories, mines etc.	Legal, often not regulated	Multinational companies	Many countries
Neighbourhood patrol	Legal, unregulated	Private citizens	Urban Centres in many parts of the world
Law and order in public places (subways, malls etc.)	Legal, semi-regulated	Local governments, shop owners, etc.	Many countries
Crime Prevention and Correcting Services			
Kidnap response	Legal, unregulated, often undesired by police	Private citizens and companies	Countries with high kidnapping rates
Management of prisons	Legal, mainly regulated	Governments, armed forces	Industrial countries, post-war societies
Investigation and intelligence gathering	Legal, not regulated	Companies, governments, armed forces	Many countries

II. Defense Producers

Weapons Production			
Research and development	Mainly licensed by governments	Military procurement agencies	Industrialized countries
Production	Mainly licensed by governments	Military procurement agencies	Industrialized countries
Military Assistance			
Military training	Licensed by governments, occasionally illegal	Governments in developing countries, rebel groups	Developing countries, transformation countries, crisis areas
Export of weapons and components	Licensed by governments, occasionally illegal	Governments in developing countries, rebel groups	Developing countries, transformation countries, crisis areas

⁸ In Schreier Fred, Caparini Marina, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, occasional paper - №6, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Geneva, March 2005.

III. Private Military Companies

Consulting			
Threat analysis, strategy development, advice for armed forces	Regulated, occasionally illegal	Official planning authorities, armed forces	Global
Logistics and Support			
Logistics in emergencies and war	Regulated	Defense ministries, humanitarian organizations	Many countries
Mine clearing, refugee camps, infrastructure demobilization, reintegration of soldiers and refugees	Regulated	Humanitarian organizations, UN-agencies, governments	Post-conflict areas
Management of military bases	Regulated	Armed forces	Few governments at home and abroad
Technical Services, Maintenance and Repairs			
Technical services, air control, intelligence gathering, IT-services	Licensed by governments	Armed forces	Many countries
Weapon repair	Licensed by governments	Armed forces	Many countries
Training			
Military training, weapons and special forces training, language training and psychological warfare	Licensed by governments, occasionally illegal	Armed forces, rebel groups	Industrialized and developing countries, conflict areas
Peacekeeping and Humanitarian Assistance			
Logistic for peacekeeping	Regulated	UN	In crises, conflict and post-conflict areas
Disarmament, mine clearing, weapon collection and destruction	UN mandate	UN	In crises, conflict and post-conflict areas
Logistic in complex emergencies	Legal, unregulated	UN agencies, humanitarian organizations	In complex emergencies, refugee camps, conflict and post-conflict areas
Protection of convoys, refugees and humanitarians	Legal, unregulated	UN agencies, humanitarian organizations	In complex emergencies, refugee camps, conflict and post-conflict areas
Combat Forces			
Combat	Mainly illegal, occasionally government-requested	Besieged governments, rebel groups and insurgents, governments wishing a low profile, multinational companies	War-torn societies, developing countries

To conclude the definition section, it is more useful to differentiate between companies that offer a service for combat and others. The idea is to draw a “red line” between illicit and permissible activities, and a good option could be to prohibit the combat service. For this end, the UN convention on mercenaries could be used.

International Convention against the Recruitment, Use, Financing and Training of Mercenaries

The biggest problem of the convention is the definition of mercenaries. In the majority of the cases it is impossible to define PMSC employees as mercenaries. Six criteria⁹ must be fulfilled cumulatively in order for a person to meet the legal definition of being a mercenary; for this reason the definition is considered virtually “unworkable”. In very few cases is it possible to consider PMSC employees as mercenaries.

⁹ 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

d) 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.

The fact that the characteristics and phenomenon of the PMSC are extensive and in constant flux entails that the UN definition is unable to encompass the phenomenon comprehensively. In general, the PMSC contacts do not result in participation in the conflict. Various PMSC are in charge of the security of multinational companies or the logistic of an army base in some state which are not in conflict (e.g. Mexico case or Peru case).

Therefore, the UN convention on mercenary is rendered inconvenient for the regulation of the PMSC phenomenon. But, on the other hand, to ban the combat service (“red line”) which is sometimes offered by PMSC¹⁰, it would be interesting to **amend the convention**.

LatinAmerica experience:

The different type of activities in Latin America can be used to construct a system of regulation. In any country of Latin-America PMSC are regulated. It is possible to see some regulation about national private security¹¹ and the use of arm, but not about PMSC or private militaries activities. In the case of Colombia, the conflict situation implicates different norms on private security (particularly on the topics of paramilitaries¹²) and it is

¹⁰ Like Executive Outcomes in Sierra Leona

¹¹ See national law in <http://www.privatesecurityregulation.net>

¹² In some case it could be interesting to think, to improve the definition, about the difference between paramilitaries and PMSC employees or mercenaries.

probably the country with the biggest number of law which regulation of private security, but none is on PMSC. The fact is that the most part of the PMSC employee's beneficiate of a total immunity, thanks to the accord between USA and Colombia. It will be probably the same situation in Mexico with the implementation of the "Plan Mexico" for the fight against drug traffickers.

Classical mercenaries

Colombian case: Yair Klein

Klein, a reserve lieutenant colonel in the Israel defense forces (IDF) and a veteran of the six-day and Yom Kippur wars, after leaving the IDF in 1982 set up a PMSC called Spearhead. His first contract involved supplying basic army equipment to the Lebanese Christian Phalangists, shortly after their massacre of Palestinians in the Sabra and Chatila refugee camps.

He came to Colombia in 1989 with several other former Israeli officers to train local police, but his work extended to providing paramilitary training and arms to drug lords running international cocaine cartels. He was also accused of training Mafia assassins whose targets have included Colombian politicians.

Klein was found guilty and sentenced in absentia to serve ten years and eight months in prison by the tribunal of Manizales in 2001. He was captured in August 2007 in Moscow by INTERPOL, with a request for extradition filed by Colombian Government. However,

the European Court of Human Rights has ruled that Russia is not permitted to extradite Yair Klein to Colombia, on the grounds argued by Klein's Russian lawyer, namely: "Extradition to Colombia would mean a death sentence."

This is a classic case of a mercenary, and it is not unique, but endemic, in Colombia. It is suspected that during the negotiations between the rebel group the FARC and the government (1998-2002), some mercenaries entered into the demilitarized zone to train the guerrillas.

These examples show that, even if the International Convention against the Recruitment, Use, Financing and Training of Mercenaries is impotent in the regulation of the PMSC phenomenon, **it is nonetheless important to promote the Convention in the international system and condemn the use of mercenaries.**

Recruitment and military training

As observed by the Working Group during their visits to Honduras¹³, Peru¹⁴, and Chile¹⁵, some ex militaries were contracted by PMSC to serve in Iraq, Afghanistan, and in recent

¹³ See: Recruitment and military training of Hondurans and foreigners by private security companies for service in Iraq, paragraph 18 – 34, in the report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination: mission to Honduras (21-25 august 2006).

¹⁴ See: Recruitment and military training of Peruvians by private security companies to provide security services in Afghanistan and Iraq, paragraph 13 – 39, in report of the Working Group on the use of

years in Haiti.¹⁶ For the most part, the ex-militaries were recruited as security guards in these conflict zones. For example, Red Táctica Inc. began recruiting former Chilean military and police personnel in 2003 to work as “independent contractors” in Iraq for the American private military company Blackwater.¹⁷

In another example, Triple Canopy, who won a contract with the Department of State of America in Iraq, “reportedly subcontracted the services of 3D Global Solutions to select personnel. In its turn, 3D Global Solutions subcontracted Gesegur SAC, Gun Supply SA, G4S Wackenhut Peru SA and Defion Internacional SA. The Peruvian authorities made available information supplied by Defion Internacional stating that, in order to be finally recruited as “independent contractors” by Triple Canopy, those selected had to have military training to ensure they could defend themselves, and that this was stipulated as a requirement in a clause of the Defense Base Act insurance policy issued by the United States Department of State”.¹⁸

mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination: mission to Peru (29 January to 2 February 2007).

¹⁵ See: Recruitment and military training of Chileans by private security companies with the aim of providing security services in Iraq, paragraph 15 – 37, in report of the Working Group on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination: mission to Chile (9-13 July 2007).

¹⁶ ““Mercenarios” chilenos en Haití denuncian incumplimiento en contratos” en <http://teletrece.canal13.cl/t13/html/Secciones/Reporteros/355555Ivideoq1.html>

¹⁷ Recruitment and military training of Chileans by private security companies with the aim of providing security services in Iraq, paragraph 15, *Op. cit.*

¹⁸ Recruitment and military training of Peruvians by private security companies to provide security services in Afghanistan and Iraq, paragraph 15, *Op. cit.*

In many cases there appear problems with the contracts: employees have not been provided with life assurance; they have not received the promise salary; and, they have not received the basic condition of accommodation. In the majority of the cases the employees have no possibility to sue the company due to contract limitation. This is demonstrated in the case of Peru: “three of the clauses [of the contract] entail the renunciation of important rights. Article 14 on Applicable law and jurisdiction, stipulates that the contract shall be governed by the laws of the State of Virginia, United States of America. Article 15 states that the authentic text of the contract is the English version. Under the final clause, the independent contractor “renounces some of his legal rights”.”¹⁹

It is possible to see the same phenomenon in Colombia, where various ex militaries were recruited, trained and sent to the armed conflict zones of Iraq and Afghanistan. Similar problems with the contracts occur in Peru, Chile or Honduras.

In Colombia is important to note that in some cases the militaries that went into Iraq were dismissed from the army because of their illegal activities or relations with paramilitaries.

These examples of the activities of the PMSC illustrate the **necessity for a international mechanism for regulation that includes, on the one hand, the protection of the employees, and on the other hand, a system for monitoring them and for the prevention of those militaries who do not respect human rights and criminals who could use arms and work in the security service.**

¹⁹ Ibid, paragraph 30.

PMSCs and security of other companies

The use of PMSC by other companies for the protection and the security of the companies' site and/or his personnel are more and more common.

For example in Mexico with the sector petroleum reform, new oil companies come into the country and use PMSC for their own security. One of the principal risks is the use of the PMSC for repression of the local population, as was the case in Chile. Chilean private security companies, which were contracted by forestry companies, were implicated in incidents against indigenous communities, especially the Mapuche population in the south of the country.²⁰

In Colombia a similar case occurred, *British Petroleum* contracted the PMSC *DSL* to train the local police in the fight against the guerrillas.²¹ For this end, *DSL* used former soldier professionals of the British Special Forces (SAS), and sometime after these operations, the group of trained policemen were accused of violating human rights.

Another example in Colombia was the use of the PMSC *Airscan*, by the Colombian company *Ecopetrol*, for the vigilance and security of a pipeline in the region of Arauca. The contract consisted of providing high technological surveillance to monitor the

²⁰ The involvement in social conflicts of private security companies that provide protective services to forestry companies paragraph 48 – 53 in report of the working group on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination: mission to Chile (9-13 July 2007).

²¹ Vallette, J., & Chatterjee, P., “Guarding the Oil Underworld in Iraq”, *CorpWatch*, 5 de septiembre de 2003, en <http://www.corpwatch.org/> consultado el 20 de agosto 2007.

movement of the guerrillas, with the objective of providing information to the Colombian Army for strategic attacks. Between 1997 and 2001 about sixty bombings occurred against the National Army of Liberation (ELN) guerrillas with the support of *Airscan*. In December 1998, based on misinformation from *Airscan*, a Colombian air force helicopter bombard the village of Santo Domingo, located 50 kilometers from the company resulting in the death of 17 civilians died.

These examples demonstrate the necessity of **national control and a monitoring system**.

PMSC in conflict

The Colombian case:

The activities of these PMSC's in Colombia will be analyzed in order to understand their involvement in the conflict. For this, Singer's typology²² will be used, starting with the least involved.

In the Colombian case, as for the cases all over the world, the category *Military Support Firms* represent the biggest market; the majority of the PMSC's working for the US State Department and the Department of State undertake actions on this matter. For example, the

²² In Singer, P. W. (2003), *Corporate Warriors, The Rise of the Privatized Military Industry*. Ithaca and London: Cornell University Press.

PMSC's *Virginia Electronic Systems, Inc* and *Air Park Sales and Service, Inc.* had to deliver and install communication equipment for the Navy's Air Commando in 2002.²³ Many of the *Lockheed-Martin* contracts are logistical, for this company is the main provider of these services in Colombia.

In 2006, *Oakley Networks* was in charge of internet surveillance; *Telford Aviation* supports the logistics of two reconnaissance airplanes; *ITT* and *ARINC* are in charge of some radars; *Chenega Federal Systems* provides day-to-day maintenance to an intelligence data base.²⁴

If generally this category falls out of the security privatization's studies because they apart themselves from the definition of mercenaries²⁵, it is important to acknowledge that these PMSC's have an important role in the development of conflicts. According to a PMSC employee, the military role is very small compared to the logistic role, and for a country it represents even more because all these logistic companies that don't get involved in the conflict manage every fundamental aspect for national security. Furthermore, after the *Intelligence Authorization Act* of November 2003²⁶, intelligence services provided thanks to the Plan Colombia's budget, can be used not only for the fight against drug trafficking

²³ El Tiempo, June 20th 2003.

²⁴ Report to Congress on Certain Counternarcotics Activities in Colombia prepared by the United States Department of State.

²⁵ Singer, P. W. (2003). *Op. cit.*

²⁶ In its 313rd section "*use of funds for counterdrug and counterterrorism activities for Colombia*" the act authorizes the use of intelligence funds used by counterdrug activities to be used in counterterrorism activities against FARC, ELN, and AUC with the objective of protecting health and human life in emergency situations, including rescue operations. Senate of the United States of America, (2003), FY2004 Intelligence Authorization Act, Report 108-163.

but also for the fight against terrorism.²⁷ Then, the current intelligence activities are fundamental not only for the fight against drug trafficking but also for the correct conflict resolution.

This total dependence can be problematic for these PMSC's are the ones who have control over vital information and the contract is signed with the US Government, not with the Colombian, which implies that the US has and can use information that Colombia doesn't have of its territory. Singer talks about the risk of depending on PMSC's in intelligence issues using the economic term "*ex-post holdup*", which means in this case: putting the wholeness of strategic plans in a private actor's hands.²⁸

This example could show **a limit, for States, to the use of PMSC**: in certain case the privatization of security could serve interest of a power state to subjugate others states.

A first example of PMSC's in the *Military Consultant Firms* category is the contract for military training is the one that *Military Professional Resources Incorporated* (MPRI) gave starting on 2000 to help restructure the Colombian Armed Forces against drugs²⁹ and then to work with the Army and National Police to train them in psychological operations, intelligence, and logistics.³⁰

²⁷ Veillette, C. (2005). *Andean Counterdrug Initiative (ACI) and Related Funding Programs: FY2005 Assistance*. Washington: Congressional Research Service & The Library of Congress.

²⁸ Singer, P. W. (2003). *Op cit.*, p. 148.

²⁹ La guerra privatizada, (november 10th 2002) *Semana*, n° 1071, Bogotá.

³⁰ Adams, D., & De La Garza, P. (December 3rd, 2000). Military aid . . . from the private sector. *St. Petersburg Times*.

In 2006, the PMSC *ARINC, Inc.* signed a US\$20 million contract financed by the Plan Colombia funds to develop personnel training activities, maintenance, and logistical support for the *Colombian Air Bridge Denial* program.³¹ But in order to avoid that *ARINC, Inc.* employees be involved in the conflict, they were forbidden to fly in combat missions.

Recently, in April 2007, the Colombian Ministry of Defense contracted Israelis in order to “improve intelligence and command and control processes”.³² They are a group of former Israeli officers composed of a General, two colonels and a low ranking officer, accompanied by translators, which advised Israel’s Government. “They are a sort of psychoanalysts. They ask us questions and help us see the problems we have and that we cannot see”.³³ The contract, which has an estimated value of over US\$10 million³⁴, apparently has been successful. Lately, several military operations based on a great amount of intelligence work gave good results.

Although other successes³⁵ that could be linked to the Israeli group’s advice have been notified, several critics rose. For example in Washington D.C. and London, although “officially, everybody accept it [...], in many intelligence agencies there is discomfort for

³¹ The United States Department of State. (2007). *Report to Congress On Certain Counternarcotics Activities in Colombia*. Washington.

³² Author’s translation, De Tel Aviv a Tolemaida, (April 8th 2007), *Semana*, n°1318, Bogotá.

³³ *Idem*.

³⁴ *Idem*.

³⁵ See, for example: the attack of the camp of Raul Reyes (n°2 of the FARC).

while those countries' governments help Colombia with their taxes, the Government is paying millions of dollars to these Israelis".³⁶

According to Vauters and Smith, in Colombia's recent history three PMSC's, *Northrop Grumman*, *Airscan*, and *DynCorp* developed activities that have *Military Provider Firms* characteristics, meaning companies that offer a military operations service and that participate directly in combat.³⁷

See above (in PMSCs and security of other companies) for the description of the activities of *Airscan*.

Northrop Grumman was hired for US\$30 million³⁸ as a subsidiary of the *California Microwave Systems Inc.* company, and its activities were similar to those developed by *AirScan* (providing high technology surveillance to monitor guerrilla movements). The job consists in flying over the Colombian jungle with aircraft equipped with infrared cameras with the objective of making reconnaissance flights over illegal activities related to drugs or guerrilla movements.³⁹ In 2003, the last job made by *Northrop Grumman* in Colombia before being replaced by a new PMSC, *CIAO*⁴⁰, several attacks by the FARC against airplanes killed some of the PMSC's pilots. In this same year, an accident killed a contractor and three other were kidnapped by the FARC. One month later, another accident

³⁶ Author's translation, De Tel Aviv a Tolemaida, *Semana. Op. Cit.*

³⁷ Vauters, J., & Smith, M. L. (2006). *Op. Cit.*, p. 178.

³⁸ Vargas, A. I. (February 26th 2002). Colombia: Una amenaza conveniente. *Semana* (1034).

³⁹ Forero, J. (14 de February de 2004). Private U.S. Operatives on Risky Missions in Colombia. *The New York Times*.

⁴⁰ Idem.

killed two.⁴¹ The PMSC sent, after the first accident, airplanes to look for the kidnapped but it wasn't possible to find them. Although the families of the kidnapped criticized the American Government for not doing anything to achieve their freedom, at the US Embassy in Bogotá they are always present. A small "department", *Search and Rescue*, known as SAR, is in charge of searching and rescuing kidnapped citizens. This department hires the PMSC for executing its job and although "it is not well known what they do; the three contractors' situation is the main concern".

The presence of *DynCorp* is mentioned in Colombia for the first time in 1988⁴² thanks to some work done on fight against drug traffic. Then, after 1994, it is hired directly by the US State Department but has direct relations with the *Narcotics Affairs Section* (NAS) in the US Embassy in Bogotá, "the office that canalizes the resources approved by the US Congress to combat drug traffic".⁴³

DynCorp currently holds the most important contract of the State Department in Colombia. Its tasks include participation in cocaine's culture fumigation, training, air transport, aircraft maintenance, reconnaissance, and search and rescue operations⁴⁴ which are focused on locating shot down aircrafts or hostile actions taken by drug producers or traffickers.⁴⁵

The US Embassy does not make a real follow-up of *DynCorp*'s activities. The PMSC is in charge of hiring the employees, and providing the necessary material, for the only interest

⁴¹ Northrop Grumman (2003) Annual report, Los Angeles.

⁴² *Freedom of Information Act* (FOIA) published by Jeremy Bigwood en <http://jeremybigwood.net>

⁴³ Mercenarios, (august 13th, 2001). *Semana, Op. Cit.*

⁴⁴ *DynCorp-State Department Contract*, (2001) en <http://www.corpwatch.org>

⁴⁵ Mercenarios, (august 13th, 2001). *Semana, Op. Cit.*

of the US Government is results. This allows *DynCorp* to subcontract another PMSC, *Eagle Aviation Services and Technology*, created in the 1980's to provide clandestine air transport to the American Government in sensitive military operations, such as the handing in of weapons to the contras in Nicaragua.⁴⁶

The first example of when *DynCorp* has an offensive role is when it fumigates cocaine's culture. The aircraft that is in charge of dropping the glyphosate are always accompanied by two or three combat helicopters to protect them.⁴⁷ It is true that the aircraft involved in this are subject of numerous attacks. Between 2001 and 2002, around ten attacks per month took place, but the numbers increased and in 2003 they reached their peak: 73 attacks.

As a defense, *DynCorp* uses helicopters "that have a mixed crew composed of both contractors and members of the National Police"⁴⁸ that are armed an open fire on the aggressors. It is also suspected that some paramilitaries in 2001, before the demobilizing operations, associated with *DynCorp*'s operations in order to "clean" zones were it was going to fumigate⁴⁹, but these facts could not be proven.⁵⁰ Other sources mention that the presence of a soldier group (from *DynCorp*) who first go on the field and eliminate threats

⁴⁶ Gómez, I., Paez, A., Reyes, L., Rodrigues, F., Smyth, F., Peterson, L., y otros. (2001). *Colombia: Outsourcing War*. Washington: International Consortium of Investigative Journalists

⁴⁷ United States Government Accountability Office, G. (2004). *Drug Control, Report to the Honorable Charles E. Grassley, Chairman, Caucus on International Narcotics Control, U.S.Senate*. Washington: GAO. p9.

⁴⁸ Mercenarios, (august 13th, 2001). *Semana, Op. Cit.*

⁴⁹ Penhaul, K. (April 16th2001). Making a Deal with the Devil. *U.S. News & World Report (US)*, pp. 28-29.

⁵⁰ Penhaul quotes a paramilitary commander "Wilson", who says the Plan Colombia couldn't have worked without the paramilitaries' help, Penhaul, K. (April 16th, 2001). *Op. Cit.*

so ensure the aircrafts' work, action that doesn't respect the US Congress prohibition to American contractors not to get involved in combat.⁵¹

An event that occurred in 2001 can be relieving on this matter: a *DynCorp* SAR team was involved in a combat against FARC in the Curillo municipality⁵²; apparently, the contractors, most of them former soldiers of the American Special Forces, were heavily armed.⁵³

These examples demonstrate the **absolute necessity of a national control** (from state and parliamentary), the result of the use of PMSC in conflict without a strong control may be really problematic, especially when occur contacts between population and PMSC employees who are working without any control.

In other hand, the last example of the *Dyncorp* activities could be prohibited, the contract includes a direct contact with the guerrilla, then a direct participation in **combat. This type of activities may be considered like mercenary's activities and not security or military services.**

⁵¹ Veillette, C. (2005). *Op. cit.*

⁵² Isacson, A. (2002). *Colombia's human security crisis*. Washington: Human Security in Latin America, Disarmament Forum.

⁵³ Tamayo, J. O. (February 22nd, 2001). Colombian Guerrillas Fire on US Rescuers. *The Miami Herald*.

All these examples in the Latin-American region show that, for an efficient response to the phenomenon of the PMSC, it is necessary to **create different level (national, regional and international) of control, licensing and monitoring**. It is possible to learn different facets of the phenomenon of PMSC from the Latin-American experience and conclude these points below:

Limits of the outsourcing of the security

For the population and States it is important to define the limits of the outsourcing of the security.

The Colombian case shows that the privatization of security could serve the interest of a foreign power to subjugate other states. The violation of the sovereignty is huge but relatively discrete. This limit or problem could eventually be gotten over if the international mechanism of regulation force centralized the control of the contract in the States on whose territory PMSCs operate.

The Latin-America experience is interesting, not only in the sphere of the use of PMSC in conflict, but in the urban security sphere. In the most part of Latin-America country there is a privatization of the security in the city, and it is possible to see that the rich part of the cities benefit from the biggest part of the security. The privatization of the security has an effect of concentration of the security and discriminates a part of the population who cannot pay for it. States must be careful about that because the effect could be contrary with the goals

set by the UN to fight against poverty. It may be opportune to call attention about this problem.

Limits of Self-regulation

Self-regulation implies that the PMSC would be governed by conduct codes adopted in a voluntary way. The main argument of defense is centered in that the provision of security in charge of these companies, as any economic activity can be governed under the supposition of the good operation of the market.

The materialization of self-regulation alternative can be observed for example in the code of conduct of the International Peace Operation Association (IPOA), which specify behavior lines to foment the respect of the human rights, certain transparency so far as possible, and the rejection of contracts with suspicious clients.

The adoption of a code of conduct by the PMSC could generate good practice and may create a commercial incentive; the prestige of the company could be affected if it does not respect the codes. For this reason it could be interesting to promote code of conduct.

In other hand self-regulation may help the harmonization of the legislation at international and regional level and it is convenient to encourage it.

But self-regulation has, before everything, a commercial interest to select or contract a PMSC that do a work of quality. Nevertheless, this mechanism does not offer the sufficient guarantees, like Colombian case and the Latin-America experience illustrate, the self

regulation could not be sufficient in case of violation of basic human right standard. In big part of the case mentioned above, which are in impunity, was realized by PMSC member of the International Peace Operation Association (IPOA) who have his code of conduct and is the principal promoter of self regulation.

To conclude about the self-regulation it' is important to see that the lack of legal backing may entail that Governments or International Organizations are compelled to watch while a company pursues a course that is plainly contrary to public interest. There are very important reasons why PMCs should be regulated, Kinsey mention eight⁵⁴:

- to ensure they do not adversely impact on peace, security and conflict resolution;

- to ensure that their use is both legal and legitimate and does not contravene human rights;

- to ensure that they do not undermine government policy;

- to prevent them from causing economic damage to their commercial clients;

- to ensure that they are made accountable both for their actions and for those of their employees;

⁵⁴ Kinsey, C. (2002). Regulation and Control of Private Military Companies: The Legislative Dimension, Contemporary Security Policy, Vol.26, No.1 (April 2005), p.88.

- to make certain that they are as transparent as possible;
- to prevent them from shifting between legal and illegal pursuits; and
- to guarantee that they do not in any way undermine the sovereignty of states.

A proposal of regulation

A mechanism for regulation of private security and military service⁵⁵ could be based on the model mechanism for control of armament. This mechanism includes a registration system and a license system, and since 2004 a Draft Framework Convention on International Arms Transfer.

A convention on private security and military service must include different elements, first, some basic standards for states and PMSC, and second, a mechanism for registration, licensing and monitoring of PMSC activities. Finally the convention may include some accountability mechanisms.

⁵⁵ I use the term of “private security and military service” to try to include all the security and military service, not just the enterprise which could specialize them in these services. In this case it necessary to clarify that the individual security and military service is forbidden.

Basic standards for states and PMSC should be developed. For this end, the Swiss initiative could provide for a good base:

Swiss initiative

17 countries participated in the initiative: Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, Ukraine, the United Kingdom and the USA.

The document recounts existing State and PMSC legal obligations and their personnel (Part One), and provides States with good practices to promote compliance with international humanitarian law and human rights law during armed conflict (Part Two).

The document underlines the necessity for having a staff vetting procedure, training personnel in humanitarian and human rights law, drawing up standard operating procedures and rules of engagement that comply with the law and setting up internal procedures to discipline personnel who break the law.

The greatest deficiency of the document is that it is not a legally binding instrument, but it is a first step in creating a PMSC regulation system. What is of particular interest is that it

is the first agreement regulating the use of PMSC and includes “Contracting States”⁵⁶, “Territorial States”⁵⁷, “Home States”⁵⁸ and PMSC representing.

To envisage an efficient and universal PMSC regulation system it should be a requirement to collaborate with the Swiss initiative group. Therefore, the document could be used strategically for a basis of standards for states and PMSCs, but it could be more pertinent not to differentiate between Contracting States, Territorial States and Home States. In the case of an UN convention the form could be States; Contracting Entity and PMSCs,

Good practice⁵⁹:

1- Selection of PMSCs (Contracting States)

Not just the lowest price – IHL respect indicators

Due diligence in selection

Selection to ensure minimum IHL standards, and facilitate choice amongst PMSCs

Past conduct

Financial and economic capacity

Technical capacity

Management capacity

⁵⁶ States that directly contract for the services of PMSCs

⁵⁷ States on whose territory PMSCs operate

⁵⁸ States of nationality of a PMSC

⁵⁹ Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict

Personnel rights

Impact on the concrete environment

Expertise needed in selection of PMSCs

2- Contractual content (Territorial States)

Contractual performance requirements

Ongoing performance and management of PMSC and personnel

Financial and economic situation

Technical performance

Pricing and duration of the contract

Identification of personnel

Guidance on law

Sub-contracting

3- Contract administration and contractor accountability (Home States)

Sanctions and liability options

Mechanisms for contract management

Accountability mechanisms – PMSC

Accountability mechanisms – contracting States

Transparency and oversight

Surveillance group at international and national level

The **second part the proposed convention on private security and military services** would create a surveillance group at international level that would be in charge of following the activities of the PMSC. To improve the efficiency of the vigilance it is possible to imagine a geographical division similar to the existent division in the Working Group of United Nations. This division should allow a monitoring of the PMSC activities in each region, and further, a specialization of this surveillance for the areas.

This group would be in charge of creating and maintaining a daily public scrutiny list of all the PMSCs authorized to act in the international system. The criterion of the authorization would depend upon respect of the PMSC to the basic standard and good practice enumerated in the first part of the convention.

In principle, this registration would apply to all the companies that offer services of security, excluding the combatants, because in this case the company would be considered a mercenary service and therefore prohibited under the 1989 UN convention on mercenaries. (See above for the possibility of an amendment to the convention in this way).

States would have an obligation to use the list to contract PMSC. This obligation would force the PMSC to respect basic standard, if they do not adhere to them, then they would be out of the market for security.

On the other hand, the vigilance group needs to create a similar list, which in this case would not be made public to the employees. Given the nature of the security market, this

list is necessary to realize better monitoring of the PMSC activities and the use of subsidiary, and the creation of a new company.

Some basic information categories that could form part of the data base are:

Company information: name, history (date founded, number of employees and evolution), country of origin, type(s) of work, countries of operation, subsidiaries, subcontractors used; personnel policies: selection, recruiting, formation, management and disciplinary practices; contract information: contracting entity, times and repetition, complaint.

Employee Information: Name, Nationality, Age, formation and Background (with PMSC and other security/military entities), Disciplinary history (Human Rights History).

It would probably necessary to do a data base of country which contract PMSCs and received their operations.

From another perspective, accounting for the fact that military errors do occur, the PMSC would not be rejected from the list of international monitoring when one of their employees commits a violation, if and only if the PMSC collaborate with the justice of the country in which the violation occurs. In the case of non-collaboration, the PMSC would be taken off the list.

If the justice system of the country in which the PMSC operates does not include the potential to sue the PMSC employee, the PMSC should be relocated to the country from where they come, namely the contracting States or home States.

For improve the accountably of PMSC it will be necessary promote corporation law, at the national and international level.

All States (Contracting States, Territorial States and Home States) have numerous responsibilities for controlling PMSC activities. For example, they should guarantee the application of international law and the ability for justice to act in the eventual case of violation. For this reason, every contract needs the approval of the Territorial States. This means that if a company, an NGO or an International Organization wants to hire a PMSC, and then it is necessary that the State to which the contract applies has knowledge of and certain control of such contact.

Additionally, at a national level, it is necessary to include a complementary level of surveillance. Governments need an external control to guarantee the good monitoring of the PMSC activities. As well as government granting a license to export or import weapons, the parliament should supervise the use of PMSC. For this objective the convention on private security and military services could propose a “**Model Law**” which consolidates the basic standards and States and PMSC good practices, and validates the reasoning behind the PMSC monitoring mechanism and the data base.

In most cases congress could undertake this monitoring, but in some cases this would be insufficient. To rectify this, it is necessary to implement a complains or allegations

mechanism. Therefore, the existing system of the Office of the High Commissioner for Human Rights, and particularly the UN Working group on mercenaries one, could be the easiest system to apply. Within the confines of this system, civil society could help the international vigilance groups perform their jobs effectively.

Lastly, a convention on private security and military services could create a model contract. The contracts, as direct and concrete legal link between PMSC and the contractors, could establish obligations, rights, and other effects. Until solution mechanisms come into place, the contacts could reduce the risk of and problems occurring in case of violation. The convention could include a model contract, encompassing basic standards and good practices for States and PMSCs.

Other options of regulation:

New and separate Convention about Multinational Enterprises

New and separate Convention about Multinational Enterprises: with a special chapter about the security market. This could be made in collaboration with the Special Representative of the Secretary-General on business and human rights, Mr. Ruggie. The main interest of this option is that it is probably easier to persuade PMSC to collaborate with this type of regulation. It is possible to imagine a similar convention and mechanism of licensing and

monitoring than above but which include all the enterprises, in this case it could be adequate do a special chapter on security and military companies.

The disadvantage of this option is that it transforms the “security and military service” in a “current service”.

Include PMSC in the register of conventional arms

Another option is to include the **PMSC phenomenon as an arms trade**, and consequently it would pertinent create a new category in the actual system of regulation of the arms. In 1991 the General Assembly creates a universal and non-discriminatory register of conventional arms⁶⁰, and currently the register contains seven categories of arms. The option is create a new one, to include PMSC in this register. The principal interest of this option is the existence of the system, but, in the same time it could be more difficult to realize a good monitoring of the PMSC’s activities for technical reason, and the difference between arms (object) and PMSCs (human service).

By the way, the Draft framework Convention on international Arms Transfers⁶¹ could a good support to think a convention on security and military services.

⁶⁰ <http://disarmament.un.org/>

⁶¹ Available at http://www.iansa.org/documents/2004/att_0504.pdf