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ASSESSING THE IMPACT OF THE INVOLVEMENT OF PRIVATE ENTITIES IN CONTEMPORARY ARMED CONFLICTS ON THE STATE'S MONOPOLY ON THE USE OF MILITARY FORCE

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The active participation of private military and security companies in contemporary armed conflicts has a strong impact on the state's monopoly on the use of military force. Even if there is no possibility to develop and implement a generally valid formula for interaction between states and private actors in the process of ensuring national security and defense, the outsourcing of specific functions of law enforcement and the degree of involvement of private military and security companies substantially affects state sovereignty and is one of the biggest challenges to public international law in general and to the legal mechanisms governing these processes in particular. The mechanisms, procedures and scenarios for collaboration between states and private military and security companies in order to carry out in practice functions that belonged exclusively to state structures are the subject of research in this article.
Keywords: *state sovereignty, private military and security companies, monopoly on the use of force.*

Evaluarea impactului implicării entităților private în cadrul conflictelor armate contemporane asupra monopolului statului de utilizare a forței militare
Participarea activă a companiilor militare și de securitate private în cadrul conflictelor armate contemporane generează un impact puternic asupra monopolului statului de utilizare a forței militare. Chiar dacă nu există posibilitatea elaborării și implementării unei formule general valabile de interacțiune dintre state și actorii privați în procesul de asigurare a securității și apărării naționale, externalizarea funcțiilor specifice organelor de forță și gradul de implicare a companiilor militare și de securitate private afectează substanțial suveranitatea statelor și constituie una dintre cele mai mari provocări asupra dreptului internațional public în general și asupra mecanismelor juridice de reglementare a acestor procese în special. Mecanismele, procedurile și scenariile de colaborare dintre state și companiile militare și de securitate private în vederea realizării în practică a unor funcții care aparțineau exclusiv structurilor etatice formează obiectul de cercetare al prezentului articol.
Cuvinte cheie: *suveranitatea statului, companii militare și de securitate private, externalizare, monopol asupra utilizării forței.*

The fact that the legal status of the PMSC at international level is not clearly defined may pose a complex threat to international and national security.[1] Being

1 Небольсина М. А. Частные военные и охранные кампании в Ираке и Афганистане: аспекты деятельности и механизмы контроля. В: Ежегодник ИМИ. 2012, с. 288–289.

primarily a commercially oriented entity, with a degree of legal independence from the political–military strategy of states, the PMSC often acts as representatives of transnational corporations and, in some cases, may be requested by terrorist organizations, extremists and communities, opposition groups and transnational mafia–type criminal formations.

The legal framework of the PMSC is described by the interaction between international and national law and the instruments characteristic of corporate social responsibility in an extremely sensitive field, at the limit of the prerogatives of public power. This raises the matter of the role of corporate social responsibility and legal norms in regulating PMSC activities and their liability. This interaction involves:

— identification of various mobilization instruments in the favor of using PMSC services;
— regulating the legal status of PMSC employees through hard law and soft law in this regard, and,
— establishing the limits of the corporate social responsibility in the light of the notion of intrinsic or exclusive functions of the state.[2]

Today, in studying the phenomenon of modern private military and security companies, two main approaches can be distinguished that characterize their dual legal essence:

1. Private military and security companies are a modern practice in the historical tradition of mercenarism, which is now recognized by the world community as immoral and qualified as an international crime;[3]
2. Private military and security companies are a kind of autonomous business and in most cases corporate, de facto integrated into the international trading system, de jure regulated only at the national level in a limited number of countries and, as a rule, in offshore[4] zones.

In these circumstances, it is very important to consider the impact of the PMSC's involvement in contemporary armed conflicts on the state's monopoly on the use of military force in particular, and on sovereignty in general.

In the age of globalization, the questioning of the sovereignty of states by private structures but also by supranational organizations, requires us to specify what is meant by sovereignty. For realistic theorists of international relations, the concept of sovereignty was born with the 1648 Treaties of Westphalia, which ended the Thirty Years' War. In order to guarantee peace in a Europe torn by centuries–old conflicts,

2 Fouchard I., La souveraineté étatique à l'épreuve de l'autorégulation: le cas des entreprises militaires et de sécurité privies. En: La RSE saisie par le droit perspectives interne et international, sous la direction de Martin–Chenut K. et De Quenaudon R., Paris: Pedone 2015, p. 237–238.

3 Coady, C A. J. Mercenary Morality. In International Law and Armed Conflict, A. Bradney (ed.). Stuttgart: Franz Steiner Verlag, 1992, Nr. 46, p. 64.

4 Singer P. W. Corporate Warriors: The Rise of the Privatized Military Industry. N.Y.: Cornell University Press, 2007. 351, p. 40.

they enshrine the principle of non–interference in the affairs of another state. To this end, they claim that there is no higher authority than that of nation–states, because they are sovereign.

Like his predecessors, Max Weber considers that what belongs to the state is not violence, but rather the monopolization of its legitimate exercise. Emmanuel Kant spoke about the legal obligation, which he distinguished from the moral obligation and coercion.[5] Rudolph von Jhering has been using the phrase "monopoly of coercion" since 1877. For him, the state has the power to compel, and the law would then be understood as the discipline of coercion. For Rudolph Sohm, legal coercion is the exclusive monopoly of the state. Any exercise of violence within the state is based on the delegation of this right to public authorities.[6]

The characterization of the state through the monopoly of coercion, but especially through the monopoly of the law adoption, became a theory of the state at the end of the 19th century. Max Weber's originality lies in the fact that he combined a historical approach to state formation, to which he added a sociological analysis of the state. Unlike the thinkers of his time, he believed that the specific goals of the state cannot be identified due to the excessive polymorphism of the tasks assigned to it. Any list of state functions cannot exhaust the reality of the missions that are, will be and have been entrusted to it. What is monopolized during the process of forming the modern state is not so much the force as the "right" to exercise it.

Contemporary analysis sums to the disappearance of the myth of the state power uniqueness, which was a constitutive element of modernity. Without a de facto monopoly on the use of force, the state risks losing its monopoly on its ability to assert subjective rights.

Author Catherine Colliot–Thélène considers that the essence of the state is not the sum of certain key functions, such as defense and security, but rather the exclusive monopoly on the adoption of the law and in particular the right to decide, which includes the right to decide on the use of force.[7]

The American diplomat Richard N. Haass mentioned in his speech to Georgetown University students in January 2003: "Historically, sovereignty has been associated with four main characteristics: monopoly on the legitimate use of force in its territory, is able to defend its interests outside its borders, is free to set its own foreign policy objectives, is recognized by other governments as an independent entity entitled to be free from external intervention. These components of sovereignty have never been absolute, but together they have provided a predictable basis for world order. What is significant today is that each of these components — internal authority,

5 Colliot–Thelene C. La fin du monopole de la violence légitime? En: Revue d'études comparatives Est–Ouest, vol. 34, 2003, Nr. 1, p. 5–31.

6 Anter A. Max Weber's Theory of the Modern State: Origins, Structure and Significance. Translated by Keith Tribe. Palgrave Macmillan, 2014, 261 p.

7 Colliot–Thelene C. La fin du monopole de la violence légitime?, p. 5–31.

border control, policy autonomy and non–intervention — is being challenged in unprecedented ways".[8]

Indeed, today, "sovereignty fictions", as Jackson J. H. calls them,[9] are being challenged. We see that sovereignty is neither absolute nor unconditional. When, in fact, a weak state lacks sovereignty and does not meet a number of conditions, the international community has the right to disrespect its right not to intervene. With the rights come the obligations, and the sovereignty is not absolute, but it is conditioned".[10]

On the international arena, sovereignty is under attack from the private sector and international organizations. And when we talk about the principle of subsidiarity or the principle of the transfer of sovereignty, for example within the European Union, this fact demonstrates the true nature of sovereignty, which would be in establishing the decision–making level for public policies. When we say that we would like some prerogative to be maintained in the sphere of national sovereignty, we are in fact saying that decision–making power must remain in the hands of the national government.

In this sense, the author Krahmann Elke identifies three aspects that emerge from her famous formula: who has the right to use force, what is considered the legitimate use of force and in what circumstances and for what purposes state actors can use force. This is based on the premise that peaceful cooperation and conflict resolution cannot be achieved among all citizens.

If private individuals are prohibited from using force to promote their own interests, then the state must maintain a minimum of force to protect its citizens from national insecurity and international threats. Legitimacy comes from a set of three precepts: the use of armed force against citizens can only be done with their prior consent, decisions must be collective and there must be democratic control and responsibility toward the structures of the force the state exercises. The circumstances shall be governed by legal rules and regulations designed to ensure the legitimacy of the State and to protect against any arbitrary violence by the police or the armed forces.[11]

Along with this very important aspect of the state's monopoly on the use of force and in view of its essence, we must also analyze the state's ability to prosecute those

8 Haass R. N. Sovereignty: Existing Rights, Evolving Responsibilities, Remarks to the School of Foreign Service and the Mortara Center for International Studies, Georgetown University, Washington, DC, 14 janvier 2003. [on–line]. [accessed 29.11.2021]. Available on Internet: <URL: https://2001–2009.state.gov/s/p/rem/2003/16648.htm>.

9 Jackson J. H. Sovereignty–Modern: A New Approach to an Outdated Concept. In: The American Journal of International Law, vol. 97, no. 4, 2003, p. 782–802.

10 Haass R. N. Sovereignty: Existing Rights, Evolving Responsibilities, Remarks to the School of Foreign Service and the Mortara Center for International Studies.

11 Krahmann E. Private security companies and the state monopoly on violence: a case of norm change? Peace Research Institute Frankfurt, 2009, 40 p.

who prove to be responsible for disrespecting the rules of international humanitarian law by committing international crimes.

The biggest changes are to be made by the national criminal law of the states, which will have to undertake specific legal and other measures in order to establish its jurisdiction over the crimes committed by PMSC employees in the process of performing their professional duties and to ensure the enforcement of jurisdiction over such crimes, both before the courts of the offender's country of origin and before the courts of the State in whose territory the offender committed the offense.

This practice, combined with well–established national and international procedures for the extradition of offenders and the transfer of criminal proceedings from one state to another, could significantly affect the reduction of the "judicial immunity" zone limits of PMSC employees, which is widespread, especially in modern armed conflicts practice.[12]

Elke Krahmann has the merit of bringing here the argument of political responsibility. The state, which is entrusted with the monopoly of establishing the right to use force, is the only entity that must be held responsible for its actions before the entire nation and before the persons affected by its action, not only before customers or shareholders, and the legitimacy of force could become a legal issue and not just a political one. In a context in which the increasing use of private actors in the field of defense and security is transforming the fundamentals and normative practices of ensuring security, this move would require a reconsideration of existing national and international legislation.[13]

Even if using the services of private military and security companies by states affects their monopoly on the use of force, the outsourcing of tasks and responsibilities, which until recently belonged exclusively to the state, is a reality of the 21st century, and the tasks of defense and security are not exception.

In the light of the above, it is necessary to define the phenomenon of outsourcing state tasks, with an emphasis on those with military specific. As regards the definition of outsourcing, the Ministry of Defense of France, by its directive of August 3rd, 2000, defines it as "a contractual management mode compatible with the involvement of external partners for the administration of activities or functions previously performed by the ministry".[14]

The "Outsourcing Guide" of the French Ministry of Defense provides the following definition: "Outsourcing may be defined as a management mode compatible with the

12 Волеводз А. Г. О формировании международно–правового регулирования деятельности частных военных и охранных компаний и участии в нем России [on–line]. [accessed 29.11.2021]. Available on Internet: <URL: http://viperson.ru/wind.php?ID=641697&soch=1>.

13 Krahmann E. Private security companies and the state monopoly on violence: a case of norm change?

14 Dasseux M. Rapport d'information n°3595 sur l'externalisation de certaines tâches relevant du ministère de la Défense, 12 février 2002. [on–line]. [accessed 29.11.2021]. Available on Internet: <URL: https://www.assemblee–nationale.fr/rap–info/i3595.asp>.

participation of an external operator, specialized in performing a function, activity or service provided by the government, based on quality criteria or quality costs. It differs from the contract by the existence of a real partnership between the company and the state administration and by an approach of mutual gains based on the ratio between means and results and on a strategic management of the relationship".[15]

In addition to the existing definitions, which are too diverse and lack practical criteria, the French Court of Auditors, as an institution empowered to verify the efficiency and correctness of the use of public money, including in the field of defense, has adopted a pragmatic approach compatible with the qualification of different specific situations of "outsourcing", when they meet the requirements and criteria of the analysis grid based on the following elements: redefining the perimeter of state activity, monopolist right of the defense mission, total or partial abandonment of functions, a delegation entrusted to a private operator that is located in continuity of a public service in which they compete, the involvement of the employees of the Ministry as supervisors of the works, identified profits that were used to strengthen the core of the ministry.[16]

In order to define the volatile limits of outsourcing the state functions and tasks and to determine the negative effects of this mechanism on the state's monopoly on the use of military force, the content of the special commission decision created by the American legislator to do so should be analyzed.

This bipartisan legislative commission tasked with studying contracts in armed conflicts in Iraq and Afghanistan has produced a report of interest to the subject under review.

By a hearing on June 18th—21st, 2010, the Commission on War Contracting, founded by the U.S. Senate in 2008, considered whether private security companies accomplish government–specific functions and where the boundary between tasks that must be carried out only by the army or which of these tasks could be performed by civilian employees. The set of participants consisted of two representatives of think tanks, two theoretical experts, a representative of an industry association and a consultant specializing in public procurement matters. After two days of hearings, the commission identified three different concepts for setting the limits of outsourcing by: setting the tasks inherent in the state, determining the core competencies that would belong exclusively to the state and the peripheral ones that could be outsourced, and by determining the critical tasks for each mission.[17]

15 Dasseux M. Rapport d'information n°3595 sur l'externalisation de certaines tâches relevant du ministère de la Défens.,

16 Cour des Comptes, France. Le coût et les bénéfices attendus de l'externalisation au sein du ministère de la défense, 1er janvier 2010. [on–line]. [accessed 29.11.2021]. Available on Internet: <URL: https://www.vie–publique.fr/sites/default/files/rapport/pdf/194000172.pdf>.

17 United States Government Accountability Office, Statement before the Commission on Wartime Contracting in Iraq and Afghanistan, 04.25.2011, [on–line]. [accessed 29.11.2021]. Available on Internet: URL:https://www.globalsecurity.org/military/library/report/gao/d11580.pdf..

These three approaches were reflected in the Center for Security Studies at ETH University in Zurich.[18]

The fact that PMSC are often created by the former militaries of a state that maintains close ties with it, implies that such entities will not act against the interests of that state or that they will act in the interest of a state for commercial purposes. Some experts even talk about "foreign policy by proxy" or "hidden wings of governments".[19]

As for the first approach, it is considered that security and defense tasks must be undertaken only by the state. The approach supposes that the tasks inherent in the state belong exclusively to the state, while other services can be provided by private actors. The advantage of this approach is that it sets a clear limit. If a task is classified as exclusive or inherent in the state, it cannot be outsourced, but it is not specified what the limits of this delimitation are.

For example, the United States, which has a rather restrictive view of the state, outsources considerably more tasks to private companies than most Western European countries. The offensive combat tasks are, for example, tasks that are traditionally inherent in the state. This approach ensures the security of long–term planning, but at the same time it generates examples of the PMSC involvement in military operations that confirm the substantial decline of the affected states' monopoly on the use of military force, such as Military Professional Resources Incorporated (MPRI) in preparing the Albanian paramilitary organization of the Kosovo Liberation Army, which was noted in connection with al–Qaeda in the late 1990s[20] and has repeatedly been reasonably suspected of trafficking in human organs. MPRI was accused of participating in the genocide of Serbs on Croatian territory in 1995 during Operation Storm.

Another US campaign, "DynCorp", was audited by the US government on the basis of a report drawn by Special General Inspector for the Reconstruction of Iraq on the misuse of weapons of $ 2.5 billion and the construction of facilities for Iraqi police, which led to an investigation of fraud.[21] the DynCorp campaign has been also the subject of a major scandal and subsequent investigation into human traffick-

18 Privatisation de la sécurité: limites de l'externalisation militaire, Center for Security Studies (CSS), ETH Zurich, Nr. 80, septembre 2010 [on–line]. [accessed 29.11.2021]. Available on Internet: URL:https://css.ethz.ch/content/dam/ethz/special–interest/gess/cis/center–for–securities–studies/pdfs/CSS–Analysen–80–FR.pdf.

19 Adams T., The New Mercenaries and the Privatization of Conflict. In: Parameters, vol. 29 (2), 1999, p. 103; O'Brien K., PMCs, Myths and Mercenaries: The Debate on Private Military Companies. Royal United Services Institute for Defense Studies, vol. 145 (1), 2000, p. 59–64.

20 Moran M. Terrorist Groups and Political Legitimacy. Council on Foreign Relations [on–line]. [accessed 29.11.2021]. Available on Internet: URL:https://www.cfr.org/backgrounder/terrorist–groups–and–political–legitimacy.

21 Glanz J. U.S. Agency Finds New Waste and Fraud in Iraqi Rebuilding Projects. In: The New York Times, 2007. [on–line]. [accessed 29.11.2021]. Available on Internet: <URL: https://www.nytimes.com/2007/02/01/world/middleeast/01reconstruction.html>.

ing and the organization of child prostitution,[22] and has been charged with serious environmental offenses in southern Colombia in connection with airfield spraying herbicides on agricultural lands.[23]

The expected functionality of national legislation in the implementation of PMSC status at national level and the ability to conduct constructive international discussions should be based on certain state registration and licensing mechanisms of these companies, as well as the dynamic adaptation of PMSC's legitimate status to international relations change and, in particular, in the context of ongoing global human rights influences and restrictions.

Depending on the position of the set limit, considerable savings are also possible. A narrow interpretation of the tasks inherent in the state increases the room for maneuver, and a broader interpretation reduces it. The disadvantage of the approach is the particularly high risk of becoming dependent on private providers. Even non–state tasks can be critical to the execution of a military mandate. The health service is not necessarily a task inherent in the state, but a necessary component for the execution of mandates for an entire army. If the provider no longer provides these services and the armed forces cannot quickly take over on their own, this will lead to a loss of efficiency.[24]

Hypothetically speaking, depending on the approach and attitude of a state, on the limits of its own sovereignty and its implication in everyday life, this paradigm may prove to be extremely different from one state to another. From the point of view of public international law, all States are equal in rights and independent in their actions within the limits set by mandatory and conventional rules adopted through strictly established procedures.

Each State as a subject of public international law has the possibility, through the adoption of normative acts specific to its form of government and political regime, to adopt through its competent structures an exhaustive list of tasks and functions inherent in it and which cannot be outsourced or delegated to other entities than the state ones. In this case, the state's monopoly on the use of force in general and the use of armed force in particular is not affected.

The determination of the core competencies that would belong exclusively to the state and the peripheral ones that could be outsourced is done by establishing the core competencies of the state and recognizing that a task may be critical to the

22 Heikkila P., Veyret J. Camp Bastion: Afghans at British base beg for protection. In: The Guardian, 2008. [on–line]. [accessed 29.11.2021]. Available on Internet: <URL: https://www.theguardian.com/world/2008/aug/12/afghanistan.military>.

23 Bolkovac K. The Whistleblower: Sex Trafficking, Military Contractors And One Woman's Fight For Justice. In: The Guardian, 2011. [on–line]. [accessed 29.11.2021]. Available on Internet: <URL: https://www.amazon.com/Whistleblower–Trafficking–Military–ContractorsJustice/dp/0230115225>.

24 Privatisation de la sécurité: limites de l'externalisation militaire, Center for Security Studies (CSS), ETH Zurich, Nr. 80, septembre 2010.

execution of mandates of the armed forces, although not inherent in the state. In this case, the limits of outsourcing depend largely on the mandates assigned to the armed forces. Based on this, core competencies are defined as essential skills for the execution of mandates. An army serving exclusively for classical national defense, for example, should not have strategic airlift capabilities. However, these skills are essential for the armed forces conducting missions abroad. This approach allows for outsourcing that meets those needs. Skills are divided into core and peripheral skills, the latter of which can be outsourced. This process helps maintain flexibility. As the boundary between central and peripheral competences is not defined by a normative conception of the state, it is easier to adapt in case of changing needs dictated by hostilities or the mandate assumed by the armed forces of the state.

In this context, it is important to note that the PMSC is trying to dispel suspicions by arguing that they will only work for legitimate governments. However, what states perceive to be in their best interests is not necessarily in line with international law. Even "legitimate" governments do not always act in accordance with international law. If PMSC are a convenient tool for pursuing foreign policy goals without the involvement of the state, the incentive for states to use these services to circumvent international obligations or to save costs in complying with them is obvious. It is often assumed that the transfer of functions to the PMSC also involves a transfer of responsibility.

First, there seems to be little effort to maintain effective control over their activities.[25] The US General Accounting Office (GAO) has highlighted a significant lack of oversight by employing structures over the PMSC in Iraq.[26] During the occupation, no US agency even kept track of the number of companies operating in the field.[27]

On the other hand, legislators who do not openly support the idea of using companies that would carry out military activities have contributed to the continued absence of formal control mechanisms. In the United Kingdom, another PMSC

25 Singer P. W. Corporate Warriors: The Rise of the Privatized Military Industry, p. 152.

26 United States Government Accountability Office, Military Operations — Contractors Provide Vital Services to Deployed Forces but Are Not Adequately addressed in DOD Plans, GAO–03–695, June 2003, p. 20, [on–line]. [accessed 29.11.2021]. Available on Internet: <URL:https://www.gao.gov/assets/gao–03–695–highlights.pdf>; United States, Taguba Report, Findings and Recommendations, Part. II, par. 30 [on–line]. [accessed 29.11.2021]. Available on Internet: <URL: https://casebook.icrc.org/case–study/united–states–taguba–report>; Schooner S. L. Contractor Atrocities in Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government. In; Stanford Law & Policy Review, vol. 13, 2005, p. 549.

27 United States, Congressional Research Service, Private Security Contractors in Iraq: Background, Legal Status, and Other Issues, updated august 25, 2008, p. 2 [on–line]. [accessed 29.11.2021]. Available on Internet: <URL: https://sgp.fas.org/crs/natsec/RL32419.pdf>; Holmqvist C., Private Security Companies; The Case for Regulation; SIPRI Policy Paper No. 9, Stockholm International Peace Research Institute, Janvier 2005, p.24 [on–line]. [accessed 25.09.2021]. Available on Internet: <URL: https://www.sipri.org/sites/default/files/files/PP/SIPRIPP09.pdf.>

service exporter, the debate over regulation has stalled due to outrage of members of parliament receiving the FCO Green Paper outlining regulatory options.

Secondly, in cases where international obligations were found to have been violated, governments explicitly or implicitly denied any responsibility for such a violation, not on the grounds that no violation of international law had taken place, but because no connection can be demonstrated.[28]

Thirdly, although domestic enforcement of international obligations is often a necessary means to fulfill them, the misconduct of contractors is rarely prosecuted at the state level.

The Abu Ghraib case provides a clear illustration of the various responses to violations of international law, depending on whether the violation was committed by state bodies and the PMSC: none of the contractors named in the Taguba and Fay Reports as "directly or indirectly responsible for the abuse" were charged with the offenses,[29] while their Army and Navy counterparts were sentenced to prison by military courts. Consequently, the involved contractors were tried only after the Iraqi victims filed a collective action.[30] As private trade actors turn into important military actors, serious questions arise about the viability of a legal system based on the assumption that states are conducting war, ensuring internal and external security, and organizing their army. This cognitive dissonance could explain the current tendency to reject international law as largely irrelevant[31] and to move on to discussing voluntary instruments or contracts as more promising means of regulating the use and conduct of PMSC.

However, efficiency gains are moderate in this approach, as the category of core competencies is broader than that of the competencies inherent in the state. The positive point of the approach is the low risk to the market. As outsourcing decisions are guided by the current needs of the armed forces, and the skills absolutely necessary to perform specific functions must in any case be available. The potential loss of efficiency in removing a private provider is therefore lower than in the previous approach, but it can still be considerable, as core skills are not the only skills that are crucial to the success of a mission, especially in the realities of contemporary armed conflict.[32]

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28 Walker C., Whyte D., Contracting Out War? In: International & Comparative Law Quarterly, vol. 54, 2005, p. 661–662.

29 United States Government Accountability Office, Actions still needed for improving the use of Private Security Contractors, GAO 06–865T, 13 June 2006, 17 p. [on–line]. [accessed 25.09.2021]. Available on Internet: URL:https://www.gao.gov/assets/gao–06–865t.pdf.

30 Saleh et al. v. Titan Corporation et al., Case No. 04 CV 1143 R (NLS), [on–line]. [accessed 25.09.2021]. Available on Internet: <URL: https://ccrjustice.org/home/what–we–do/our–cases/saleh–et–al–v–titan–et–al>.

31 United States Government Accountability Office, Actions still needed for improving the use of Private Security Contractors, 13 June 2006, p. 16.

32 Privatisation de la sécurité: limites de l'externalisation militaire, Center for Security Studies (CSS), ETH Zurich, Nr. 80, septembre 2010.

This approach is proving to be more flexible and offers the state a wider opportunity to outsource some specific or necessary services to the armed forces. This procedure would allow the state to save resources by giving up some services that prove to be necessary only in the event of active hostilities, but increase the risk of regular forces relying on service providers and thus reduce their capacity and speed of response, which are increasingly important elements in the specific hostilities of contemporary armed conflicts, which can substantially affect the realization of the state's monopoly on the use of military force when the state needs it.

The third approach, by determining the critical tasks for each mission, focuses on determining the critical needs for each mission, which would ensure the autonomous provision of all the skills needed for a specific successful mission and not for the whole system of functions specific to the state as for ensuring security measures in the field of security and defense.

For example, training tasks are not basic skills, but they are essential for the success of peacebuilding and peacebuilding missions. The approach starts with the question of what missions (traditional war scenarios, peacekeeping, etc.) must be performed by the armed forces and what skills are needed to do so. This method guarantees high efficiency because the armed forces can act relatively independently of the market. On the other hand, the potential of cost savings and efficiency gains continues to decline as core skills are even more comprehensive and cost–effective than core skills, respectively.[33]

Assuming the preconditions that the state is neutral or not involved in active hostilities specific to an armed conflict, is not hit by internal tensions and disorders, has a stable political and economic system, then this approach would prove to be the more efficient and more pragmatic, as the resources would be used exclusively for the basic functions and activities and maintenance of the armed forces, and if necessary, when circumstances dictate, the specific tasks of a mission or mandate may be outsourced. This approach admits the greatest degree of risk to the state's monopoly on the use of military force.

If to admit the observance of the preconditions set out above, this approach proves to be the most economically efficient, only that the existence of these preconditions does not ensure our perpetuation in time. Despite the initiatives and concentrated efforts of international society and public international law to ensure world peace, international armed conflicts, non–international conflicts, internal tensions and disorders generated and guided from the outside, which aim at destabilizing the internal situation of a state in order to impel the will of another state, are part of the realities of the 21st century.

These three approaches are not mutually exclusive. A mixed form is often applied in practice, which ultimately does not answer the question of what criteria should be

33 Privatisation de la sécurité: limites de l'externalisation militaire, Center for Security Studies (CSS), ETH Zurich, Nr. 80, septembre 2010.

for outsourcing decisions. Outsourcing logistics, for example, as a non–state task, can lead to considerable savings in peacetime. But this ability can be critical to missions. The weakness of the presented approaches is that a division of competences into categories does not allow a flexible assessment of the advantages and disadvantages of outsourcing but already obliges us to opt upstream for efficiency or effectiveness".[34]

The private security market is characterized by a lack of structure and its recent developments, thus requiring more control and regulation. Three solutions have been developed: regulation by the market, by the association of companies and stakeholders, and legal control by states. The first solution sees the market as an intrinsic regulator. In particular, the companies have supported the creation of professional associations producing standards, such as the British Association of Private Security Companies (BAPSC) or the International Stability Operations Association (ISOA).

The companies find a guarantee of respectability in joining an association and a commitment to respect their code of conduct. The latter assert themselves both as representatives and as industry regulators, where corporate responsibility and reputation become market criteria. However, this self–regulation is insufficient, as the market is unable to control its own excesses through internal mechanisms, especially in the very particular case of the monopoly on the use of force, and raises questions of legitimacy. It was therefore necessary to reintroduce the states around the table, in a logic of government.[35]

In this regard, it is necessary to analyze the British experience. In its Communication to the National Assembly's Committee on Finance, General Economy and Budgetary Control, the Court of Auditors noted: "Launched in 1979, Outsourcing policy has grown massively since the late 1990s when the British government used it as a financing tool for the large equipment the country needed. Education and public health were the public services that benefited the most from this new form of investment. But the Ministry of Defense has also made a massive appeal, in a twofold sense: to inform the militaries about this opportunity and to facilitate the realization of important investments through new ways of trade, financing and operation. Outsourcing has thus taken the form of service contracts, traditional public–private partnerships (for limited investment), Private Financing Initiative (PFI) contracts for very important investments and the privatization of certain services.[36] As explained in the Informative Report no. 3595, the private financing initiative is a reproductive process regarding the financing by the private sector of public equipment, which allows the execution of public expenditures to be transferred to a private operator,

34 Privatisation de la sécurité: limites de l'externalisation militaire, Center for Security Studies (CSS), ETH Zurich, Nr. 80, septembre 2010.

35 Magnon–Pujo C. La souveraineté est–elle privatisable? : La régulation des compagnies de sécurité privée comme renégociation des frontières de l'État. En: Politix, vol. 95, no 3, 2011, p. 129.

36 Cour des Comptes, France. Le coût et les bénéfices attendus de l'externalisation au sein du ministère de la défense, 1er janvier 2010.

whose share varies between investments and the risks associated with it. Limited by these constraints, the public budget can be better controlled. The company that finances the public equipment then uses its public power.[37]

When it comes to reviewing its policy and despite a fairly favorable position on outsourcing, the ministry acknowledges some limitations: "SME participation is very weak and competition tends to decline with the establishment of quasi–monopolies in all areas. The ministry loses its technical competence and the ability to define its needs when they are complex. Moreover, the fixed rate of outsourcing in the defense budget is now very high, and the ministry is irreversibly committed for several decades. The use of PFI contracts is increasingly resembling a tool for overcoming budgetary obstacles, accepting financial sources that could be overly expensive.

Security activities in the national territory create few legal difficulties to the extent that there is cooperation between the State of registration or headquarters of the PMSC and the state in which these companies operate, the application of a single national legal framework which favors the possible questioning of their responsibility or that of their employees.

The difficulties are greater when it comes to transnational companies providing military services abroad. In fact, when they work abroad, it is most often in the context of armed conflict or situations of extreme instability, even where their presence is necessary to ensure in particular "military security and protection and the protection of persons and objects such as convoys, buildings and other places, the maintenance and operation of weapons systems, the detention of detainees and the counseling or training of local forces and local security personnel".[38]

In 2006, the "Swiss Initiative" was launched, which is an ad–hoc procedure aimed at better supervising and monitoring the activities of private security and defense actors. Regulation then takes place through contractual and market mechanisms, but within "multi–stakeholder governance" involving companies, non–governmental organizations and employers. This is the meaning of the Montreux Document, which, without having any legal or binding value, reminds states of their obligations and lists the "best practices" to be followed with regard to contracting.

A second document complemented the 2010 Montreux document, the International Code of Conduct for Private Security Companies, the result of a multi–stakeholder deliberative process that brings together all those involved. However, the document has no value under international law and no sanctioning mechanism in case of violation. Finally, we have seen a return of the State, the only body capable of

37 Dasseux M. Rapport d'information n°3595 sur l'externalisation de certaines tâches relevant du ministère de la Défense, 12 février 2002.

38 Le Document de Montreux sur les entreprises militaires et de sécurité privées ; Rapport de la Conférence régionale en Afrique francophone et lusophone sur le Document de Montreux, DCAF, Genève, 2015, [on–line]. [accessed 25.09.2021]. Available on Internet: <URL: https://www.montreuxdocument.org/pdf/regional/2014–06–04–Rapport–de–la–Conference–regionale–en–Afrique–francophone–et–lusophone.pdf>.

guaranteeing the effectiveness of the regulation, by guaranteeing its application and by pronouncing possible sanctions. Cyril Magnon–Pujo considers that this return of the state can also be explained by the fact that it is the regulation of an activity that continues to be perceived as a fundamental sovereign state monopoly, which leads to "questioning the material and symbolic effectiveness regulation by the market".[39]

The United States has introduced "last resort" ad hoc regulatory mechanisms, such as the Military Extraterritorial Jurisdiction Act, the Uniform Code of Military Justice, or the Management System for the Quality of Private Security Operations published by the Wartime Commission.

What is certain is that, although progress is still being made, where the standards of international humanitarian law, international human rights law and international criminal law exist at the domestic and international level and apply to crimes that may be committed by PMSC employees, major obstacles remain in the effective way for states to implement their international obligations.

The space left free by the states was taken over by these companies themselves, which led to the development of soft law standards that regulate their activities. This is even if, according to the United Nations, "the services provided by the PMSC should not be considered as ordinary commercial services that are suitable for self–regulation. These are very special and dangerous services that involve the purchase and sale of a wide range of military and security services, which requires the development of international standards and surveillance.[40]

Hence, we finally see a reaffirmation of the state, which is necessary if it wants to maintain its capacity to secure subjective rights, but it seems that the standards and rules governing the practice of security are no longer set unilaterally by states and are in reality the result of consultation between the state and private actors in the field of security and private defense.

The sovereign function proves to be the decision–making function of the part left to the public sector and the one entrusted to the private sector. As Margaret Levi said: "The extent to which the state has a monopoly on physical force and the extent to which the use of physical force is legitimate are variables, not elements of a definition".[41]

In terms of outsourcing analysis, the German system is characterized, in part, by the preference given to setting up joint ventures to manage the most important outsourcing. In addition, all operations undertaken are subject to very strict control

39 Magnon–Pujo C. La souveraineté est–elle privatisable? : La régulation des compagnies de sécurité privée comme renégociation des frontières de l'État.

40 UNGA, 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, § 35. [on–line]. [accessed 25.09.2021]. Available on Internet: URL:https://www2.ohchr.org/english/issues/mercenaries/docs/A.HRC.15.25.pdf A/HRC/15/25.

41 Avant D. D. The market for force: the consequences of privatizing security. Cambridge University Press, 2005, 328 p.

by the Bundestag, given their commitment in the case of multi–annual contracts of more than EUR 100 million. The Finance Committee requests the Federal Court of Auditors for an opinion on these contracts and follows most of its recommendations. The Federal Court of Auditors has drawn up, on the basis of its partial observations, a kind of "code of good practice" for ministries that would launch new projects to provide recourse to private funding.[42]

Ideally, the different "layers" of control and regulation should complement each other or even be interconnected and based on homogeneous standards.[43] For customers, contracts with service providers are one of the main and most direct ways to require private companies and their employees to meet certain standards and avoid unwanted deviations.[44]

Another way to solve some problems would be self–regulation by the stakeholders themselves: private service providers could, for example, adopt — in each company or in the whole sector — standards such as public codes of conduct, could ensure that professional associations effectively apply mutually agreed standards.

In the light of the specific elements of contemporary armed conflict and the exorbitant speed of technical and scientific progress, especially in the military field, determining a list of functions and tasks exclusive to state structures, including in the field of security and defense, proves to be a risky initiative as long as contemporary armed conflicts are no longer in line with classical scenarios, and most operations to influence and impose the will of one state against another are built through the use of new methods and means of conducting war in densely populated locations, where compliance with the rules and regulations of international humanitarian law is difficult to observe.

The methods and means of conducting war are changing at a rate that does not allow the state the luxury and peace of drawing up an exhaustive list of tasks that would belong exclusively to it. One solution in this regard would be to develop the most flexible legislative and intervention mechanisms and procedures, which would allow the proportionality of the decision–making mechanism to increase proportionately to the new challenges and, if necessary, the massive, correct and well–controlled involvement of the private sector in performing the tasks of utmost importance for ensuring the security of the state and for the efficient accomplishment of some tasks that until the occurrence of the respective risk or threat, were considered to be exclusively state ones.

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42 Cour des Comptes, France. Le coût et les bénéfices attendus de l'externalisation au sein du ministère de la défense, 1er janvier 2010.

43 Jennings, K.M. Armed Services: Regulating the Private Military Industry, Fafo report nr.: 532, Oslo: Fafo, 2006, 62 p. [on–line]. [accessed 05.11.2021]. Available on Internet: URL:https://www.fafo.no/media/com_netsukii/532.pdf.

44 Dickinson A.L. Contract as a tool for regulating private military companies. In: From Mercenaries to Market: The Rise and Regulation of Private Military Companies, Oxford Scholarship Online, January 2009, 287 p.