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Working Paper no 89

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The Impunity of Private Authority: Understanding PSC Accountability

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**Presented at the International Studies Association Conference
Chicago, 28 February – 3 March 2007**

Draft and comments welcome!!

Abstract

In security, as in other areas, the emergence of transnational private organizations with a central role in governance poses profound challenges to established conceptions of international politics and democracy. This paper discusses one side of this challenge by looking at accountability of private security companies (PSCs). PSCs have become authorities in their own right in the security sphere. This has raised the question of their accountability and also resulted in considerable efforts to improve the accountability of the firms. This paper looks at why these efforts bear so little fruit. It begins by pointing to the tension involved in any effort to hold an authority (private or public) accountable, namely the tension between the centrality of acceptance for authority and accountability measures that necessarily involve contestation. It then proceeds to analyse this tension in the case of PSCs. The paper argues that PSCs' status as experts on risk and entrepreneurs of security mobilizes a favourable bias, making contestation less likely. The difficulty of seeing and/or admitting that PSCs are independent actors in turn makes contestation of their activities seem ill-directed and unnecessary. The point made in this paper that this, rather than sheer complexity or hidden political agendas, is key for understanding the present rather puzzling lack of (democratic) accountability of PSCs and its likely continuation.

The Impunity of Private Authority: Understanding Private Security Contractor (Un-) Accountability

By Anna Leander

Introduction

The emergence of transnational organizations of global governance challenges democracy by altering both representation and accountability (Held 1991). This paper picks up on the accountability side and specifically looks at how accountability works in the global governance of security. More accurately the paper discusses the impunity of private authorities in the field of security. It explores why it is so difficult to hold private security and military firms responsible for their actions.¹ This concern less anachronistic than it may seem. As everyone else with an interest in security I am aware that by contrast to a decade ago, it is certainly no longer possible to write an article about the private military/security industry departing from a statement about the neglect of the industry. If anything today there is a hype surrounding it. Few people will have failed to notice the flurry of books and films about the industry. A central part of the attention has taken the form of a loudly voiced concern with “regulation” and “accountability”. Interest in regulation is no longer confined to insider circles in the armed forces, defence departments or the industry itself. Financial scandals surrounding Halliburton and Vinnell, the much publicized death of contractors in ever growing numbers and the documentation of their role in for example the interrogations in Abu Ghraib, or in arbitrary shooting of civilians while “driving in Iraq” have sparked a far broader awareness of the significance of the problems with accountability in the sector.² The democrats in the US made a thorough checking of private security firms in Iraq a central item in their campaign.

The outcome so far is “underwhelming” (Singer 2007). Although to the industry declares itself (and is) overburdened by multiple, contradictory regulations and codes of conduct, regulatory frameworks remain uneven and patchy. Regulatory reform is slow.³ Central issues (such as the relationship of contractors to politics) by and large fall outside the scope of regulation altogether (Leander 2007). More than this, the impact of the regulation is scarcely felt. Few (if any⁴)

¹ In the context of this paper I only refer to the companies that sell security services (logistics, consultancies/training, or direct armed security provision) in the context of armed conflicts (declared as war or not). There are two reasons for not following convention and calling these firms “military” (Isenberg 2004: 15). One is that many conflicts are not “international” and that those who buy the services are often not public armed forces but NGOs, firms, or governmental agencies. Moreover, the CEOs in the industry are converging around the idea that “after EO”, firms no longer offer military services, only security (for the obvious reason that this is legitimate). For further discussions about definitions which are contentious see Singer (2003: chap. 2) or Leander (2006a: chap. 2).

² The killing of contractors has attracted attention because of the numbers involved, but also because of the spectacular mediatised fashion in which they have been killed as when Blackwater employees were killed, mutilated and hung up on a bridge in Fallujah. The role of CACI and Titan is part of the Tabuga report on Abu Ghraib. The so called “trophy video” shows Aegis employees shooting at civilians on a motorway in Iraq.

³ There are positive signs on the horizon and in particular the extension of the US Military Extraterritorial Judicial Act which makes it possible to prosecute contractors of any us federal agency in all armed conflict and not only when war is formally declared.

⁴ Singer (2007) claims that no contractor has been convicted for anything. This is an overstatement since some contractors actually do get convicted. For example, Bob Denard was recently convicted in a French court, Simon Thatcher and co. stand trial for their involvement in a planned coup in Equatorial New Guinea. Moreover, contractors have been charged for violations of labour laws (DynCorp in relation to sex ring in Bosnia) or for careless use of

contractors have been convicted for wrongdoings in any context. This article explores this strange combination of on the one hand a declared wish to hold firms accountable and further developing existing frameworks for doing this and on the other hand the very modest progress on both accounts.

Most attempts to explain this paradoxical situation refer to the complexity of the regulatory task at hand. They depart from detailed descriptions of existing regulations, discuss the obstacles and potential for improving these and related suggestions for how to move forward (e.g. Holmqvist 2005; Krahmman 2005; Bryden 2006). This work has led to welcome reflection around the issues at stake in the regulation of PSCs. However, this paper takes a different route. It pin-points a range of overarching reasons that are quintessential for understanding the paradoxical situation we see when it comes to the regulation of PSCs. These reasons are more durably and profoundly relevant for understanding the present (and most probably also future) impunity of the private security industry than is complexity as such which security shares with a great number of other areas in the present “globalized” context or the admittedly numerous shortcomings in existing regulation. Hence, the argument in this paper is that the sources of PSCs authority in the field of security have made it difficult to effectively hold them accountable. As the first section argues, it is always difficult to hold authorities accountable. But more than this as the following sections show, the fact that PSCs draw their authority from being experts on risk, from working as entrepreneurs in a market for security services and from acting as agents of authorized principals and mainly states accentuates this difficulty. The underlying reference to a neo-liberally governed risk society where states continue to be central mobilizes a profoundly positive bias towards the firms and their activities. The practical consequence is a tendency to disregard or down-tone the need for regulation in general and accountability in any particular case. Concretely translated it profoundly shapes (or more adequately hampers) attempts to break the trend of PSC impunity.

1 Authorities and Accountability

The difficulty of holding PSCs responsible can be read as an expression of a more general difficulty of holding any authority responsible. The relationship between authority and accountability is fraught with tensions and ambiguities. On some readings the very idea of holding authorities accountable is an oxymoron. As I will argue this reading fails to account for the impact of critical (modern, enlightenment) thinking on the relationship between authority and accountability. If authority in a (possibly mythical) past was that which was uncontested, it has today become that which should be critiqued and contested. However, this normative stance in favour of critique (and the related demands for accountability) does not make authority easy to see or to critique. Hence the fundamental tension between authority and accountability in the contemporary context: authority is both that which is incontestable and that which deserves to be critiqued and held to account par excellence.

In her essay on authority, Arendt starts off by stating that “if authority is to be defined at all, then, it must be in contradistinction to both coercion by force and persuasion through arguments” (Arendt 1958: 93). To be in authority means precisely to have a recognised and uncontested position in a specific field or activity which does not have to be argued for or imposed. An authority in international relations for example is a person or institution whose competence, judgement and position is accepted without having to be justified each time or imposed. It is simply taken for

information (AirScan in relation to cluster bombing of Columbian village). But the bottom line is that the cases are few and far between.

granted. Arendt's view on the nature of authority is by no means tied to an idiosyncratic reading of classical thinkers. Rather, an emphasis on acceptance neither imposed by force nor by argument is very often seen as essential for defining authority. It is found for example strongly in the discussions about the role of private authority in international affairs. The editors of one of the volumes on the issue argue in their introduction that

“What differentiates authority from power is the legitimacy of claims of authority. That is, there are both rights claimed by some superior authority and obligations recognized as legitimate on the part of subordinates or subjects to that authority. Having legitimacy implies that there is some form of normative, un-coerced consent or recognition of authority on the part of the regulated or governed, the normative belief by an actor that a rule of institution ought to be obeyed.... if obedience is the counterpart of power, trust is the counterpart of authority” (Hall and Bierstecker 2002: 4-5).

Within this understanding of authority the question of accountability ought not to arise. Holding accountable implies asking for justifications and contesting. To hold accountable is to distrust. If trust was intact there would be no need for accountability. So within this classical understanding of authority there is no accountability issue. If accountability as an issue appears, authority has vanished. Authority in that sense is incontestable and talking about the accountability of authority an oxymoron in the strictest sense. There is much to commend about this classical understanding of authority with its emphasis on the voluntary and uncontested; not least the kind of analytical clarity Arendt spent so much of her life advocating. However, there are also good reasons to move on to specify this notion of authority. Doing so will clarify why authority and accountability are not incompatible as much as they are in tension. This tension pervades the contestation of any authority, and also of private authority in the security sector.

Working with a notion of authority based on voluntary consent and acceptance does not exclude asking where authority came from. Thinking about why and how specific authorities have emerged is an interesting task, not least for those who are concerned with changes in authority such as that which occurs with “the emergence of private authority” in international politics. Looking into this kind of past of authorities might lead one back towards the kind of original, common foundation of community which Arendt saw as the origin of authority. However, it may also not. It may turn out that present authority was established as the authority of the modern state was on Tilly's account, through a struggle between the different bosses of violent crime syndicates where the most effective racketeer eventually prevailed and became accepted and legitimate (Tilly 1985). Or it may turn out that present authority was shaped in Foucaultian fashion by sea-changes in the practices and world view prevailing in society and that possibly the consequence is a decentring of authority which become embedded in individual world views rather than in a person or institution (Foucault 2004).

It is not important for the sake of the discussion here to adjudicate between the considerable varieties of readings of where authorities come from. The point is just that any reading which leads us back to another point than common act of foundation where the basis for authority was laid (in consent) will raise questions about the role of force, exclusion and cruelty in the process of establishing authority. This in turn opens the door to questions of accountability. There is both a specific historical accountability of any given (form of) authority and a more general awareness of the historical and contextually situated nature of authorities which opens to door to contestation and demands of accountability.

Similarly, working with a notion of authority emphasising voluntary consent, does not free one from questions about whose consent matters for “authority” to exist. Few authorities can rely on

the voluntary consent of everyone. Even Arendt's Athenian city-state democracy, Roman republic, or Republican United States were not voluntarily submitted to by everyone. Those from outside these polities did not willingly consent to their authority. But also inside the polities authority has a long history of not being accepted by everyone. Slave revolts in Athens, Rome and the United States are clear indications that authority was imposed and not accepted on a considerable share of those inside the polities as well. Opening up the issue of whose consent and acceptance is required for authority to exist hence opens up the reverse question of who authority is being imposed on. Who is excluded and oppressed by authority and who is it that does not count?

A related issue is if there is a limit (and in that case how to draw it) to how many people authority can be imposed on before it ceases to be an authority. Can an extremely oppressive (for example genocidal) state continue to be an authority provided a certain number of people "voluntarily" accept it? Since in many extreme situations the state has support of at least part of the population, this question is a very practical one. More than this, the submissions of the oppressed and excluded of the state is also often "voluntary" in a perverted sense. Traditional Jewish authority structures were manipulated to facilitate the administration of the Ghetto. Capos were placed in charge of order in the concentration camps. Voluntary is not the right word here. But people making rational choices and following their interests (in given conditions) goes some way to capture the issue at stake. As Bauman points out: "the rationality of the ruled is always the weapon of the rulers" (1989: 144). Whatever the answer to the questions about who has to "voluntarily accept authority" and how oppressive authority can be to exist, the prospect that these questions can be raised clearly leads to issues of accountability. If authorities can be and are oppressive (to some extent) then it is logical that they may be held accountable not only for their history of oppression, marginalization and injustice but for their current practices.

This issue of what "voluntary submission" means, points in the direction of an important twist that authority can be given when and if it is accepted that "authority" may not be the most oppressive when it is openly contested, but precisely when it is not. The silent acceptance of women, slaves and immigrants of Athenian authority might be a better indication of its oppressive nature than the occasional revolt. The Indian caste system was (and largely still is) authoritative for long and indeed it remained by and large uncontested and voluntarily accepted. But it is difficult to conclude from this that its authority was not oppressive, marginalizing or unjust for many (Dumont 1980). Similarly, even if most people accept law in a democratic society, it would be wrong to conclude that the law is not violent (Michaud 1978). The conventional distinction between violence and force is simply untenable as the law and its distinctions and categorizations may be extremely violent (Benjamin 1920/1).

Even when people act without direct constraints they may be reproducing authority structures that do them enormous harm. The consequences can be rather drastic as Amartya Sen points out in his critique of utilitarianism referring to the fact that 10 million women are missing largely because they voluntarily subordinate themselves to traditional ideas about things like sharing food, distributing money (for health care e.g.) and education (Sen 1990). Pierre Bourdieu coined the term "symbolic violence" to capture the very real violence involved when victims perpetuate their own oppression. But we have a long string of sociological terms designed to capture this kind of process ranging from Marxian false consciousness to Foucaultian self-discipline. For the sake of the discussion here, the point is that oppression and power may figure on the reverse side of the voluntary submission and acceptance shining on the front side of the coin of authority. Looking merely at the shining front of the coin featuring voluntary acceptance and consensus will not reveal this. But, turning the authority coin around and studying its backside, opens a range of accountability questions regarding the authorities' invisible power and oppression.

I am suggesting that even if one works with a notion which emphasises the consensual and voluntary aspect of authority there may be considerable scope for raising accountability issues. There is a long tradition for disagreeing with this. Arendt for a start is very explicit on the fact that she thinks of authority as that which is not and by definition cannot be contested. But she is not alone. There is a tendency to want to separate authority in this sense from other notions of authority. Krieger for example tries to do so by introducing history and arguing that the different notions of authority have to be seen as historically sequential. He argues that

“In the early stages of the idea's development its [authority's] predominant meaning was the acknowledged capacity of certain persons to evoke from others a voluntary submission to acts and opinions over and above the compelling force inherent in those acts and opinions themselves. In its later stages the idea of authority has come predominantly to mean the acknowledged capacity of certain persons to evoke from others submission to imposed acts and opinions by any means whatsoever. In its early form authority was an independent idea, lying between power and freedom in the spectrum of human relations; it was a pressure upon men to conform in ways to which they could not be ordered or compelled by the possessor of power and in things to which they did not freely consent or contract for good reasons or adequate compensation... In its later form, however, authority became a dependent idea, a quality of power connoting merely its legitimacy or rightful title to command and to compel obedience to its commands (Krieger 1977: 251).

He proceeds to develop a theory about the cyclical shifts between these two understandings in Western history. Similarly, Foessel tries to uphold the distinction by introducing disciplinary distinctions. According to him, in political philosophy (from Hobbes to Agamben) authority is power which is legitimated by fear and is perfectly compatible with (if not inseparable from) extreme abuses of power. By contrast he argues that in sociology authority is bestowed on an institution that in Durkheim's formulation can “work out certain representations which hold good for the collectively”. Here the voluntary and consensual aspect of authority is retained (quoted by Foessel 2006: 308).

However, there is an equally well established tradition for critically inquiring authority and for treating issues of accountability and of authority as linked (Raz 1990: 1). Raz underlines the centrality of critical perspectives on authority exploring its origin and its consequences. The critique of authority is an absolutely central part of critical thinking. One might argue that the critique of established authorities and the sources of their authority have been essential from the enlightenment onwards. Faith in the emancipatory potential of reason has motivated thinkers to approach and critique authorities of different kinds. Turning the coin of authority and looking at its links to hierarchies and power, holding it accountable for them, is a very essential enlightenment activity. In this sense, assorted constructivists, reflectivists and the post-structuralists who strive to speak from the margins and unveil neglected power-knowledge relations are following a well established path (as underlined by e.g. Baumann 1992). They are however also radicalizing the critical quest as they question not only the source a specific authority but the secure foundations of any authority. There is no longer an abstract scientific ground from in which knowledge can be authoritatively grounded. Or perhaps more adequately that ground is constantly shifting. The critique of the oppression of one kind of authority leads to the establishment of new authorities. Authority (just as modernity) has become “liquid” to use Bauman's expression (Bauman 1992). Authority is constantly shifting

location, form and sources. Dislocating and destabilising it further is the objective of much critical thinking.⁵

This complex relationship between authority and critique makes for a general tension in the relationship between authorities and accountability in the contemporary world. Authority is still tied to voluntary submission. It continues to be that which is not contested. At the same time, in critical thinking, there is an acute awareness that precisely that which is incontestable most needs to be contested and held accountable for its unjust and oppressive effects. This explains the efforts to turn the coin of authority, to shed lights on its dark sides. However, these efforts do not necessarily translate in authorities being held accountable or in discourses shifting. The critique may not appear persuasive for the good reason that it is directed at an authority. Authorities have in other words become that which should be held accountable but precisely because they are authorities they tend to remain unaccountable. The argument in this paper is that the paradoxical impunity of private security contractors can usefully be understood as an expression of this tension. While the establishment of PSCs as authorities in security has made them the object of rapidly growing demands for accountability, they have become authorities and this makes it very difficult to actually hold them accountable. The rest of this paper is geared to showing concretely why and how this is the case.

2 Experts on Risk

One of the reasons it is so difficult to develop and use rules and regulations to hold PSCs accountable is that PSC are expert authorities on risk. PSCs exist because they protect their clients against a range of risks. In fact, they are specialised in assisting their customers planning against risks. They can help them discover and see dangers they were hitherto unaware of. Some firms, such as Control Risks, live mainly off expert risk assessment and the development of the related contingency plans. They establish the contacts between firms, governments, NGOs – or whoever their customer is – and the relevant security provider firms. As this section argues, this emphasis on risk and on expertise matters. It gives PSCs and their activities an unquestionable importance which makes it difficult not only to develop the instruments of regulation necessary for effective accountability but also to apply these instruments effectively. There is a positive bias towards experts working with risk that makes thorough accountability difficult.

Risk has become pivotal to the way that contemporary societies think of themselves. The success of Ulrich Beck's work on the transition towards a society geared essentially towards the management and distribution of risk, the "risk society" (Beck 1992) which he subsequently renamed "world risk society" (Beck 1999) to capture the increased (as he saw it) scale and "incalculability" of risks confronted is best understood from this perspective. For Beck, the threat of catastrophic risks in all areas ranging from the Bird Flue and Aids to Nuclear War and Global Warming is the key for understanding economic political and indeed broadly speaking social processes in the contemporary world. Beck is by no means the one and only exponent of this view. On the contrary, politics and the world of the economy is imbued with risk thinking. The 2007 Davos Economic Forum renewed its insistence on the importance of risk preparedness and the significance of developing the global risk network it created in 2004.⁶ There have been serious discussions for example about the development of risk preparedness and prevention at the global

⁵ Arendt would probably not disagree with this assessment. But she would draw different implications from it. In fact, she squarely states that "authority has vanished from the modern world" (Arendt 1958: 91).

⁶ See <http://www.weforum.org/en/initiatives/globalrisk/index.htm>.

level involving amongst other things the creation of “ministries of risk” at the national level that could collaborate internationally. Also in academia much effort has gone into analyzing the sense of risk and danger that are developing in the society of perpetual fear (for a good illustration see Massumi 1993). Risk analysis courses are offered routinely at universities and textbooks are published in the subject. In clear, “risk” has become essential for our societies.

But more than risks in general, security risks in particular have become increasingly central in political thinking. Baumann suggested more than a decade ago that that this tendency to displace risk towards physical security was inherent in late modernity. Bauman’s argument was that the sense of risk in fact runs much deeper. It is linked to a loss of firm and permanent authorities (religious or otherwise) in the contemporary world which leaves individuals deprived of clear answers to the big issues in their lives. This is further aggravated by the insecurity that comes from the growing instability in social and economic life tied to the lack of stable and controllable economic structures (more on which below). Bauman ties this to globalization and the spread of a global liberal economy. Since there are no available remedies that might sooth these two forms of insecurity, there is a tendency to displace the sense of insecurity and focus instead on physical insecurity stemming from crime or war simply because this is a sense of insecurity we think we have the remedies to: law and order (Bauman 1997: argument on Freud). Hence Bauman likens the current focus on security to a drunk man looking for his glasses under a lamp post for the simple reason that that is the only place there is light. Whether Baumann is right or not about the reasons is of secondary importance to the argument here. One might tie the growing focus on physical security risks simply to the need of security establishments and the private industry tied to them to find new roles for itself in the wake of the cold war (Haggerty and Ericson 1999; Bigo 2000), or perhaps more likely to a combination of these.

The point that matters for the argument here is that security risks are increasingly central. Not only strategic thinking and military experts are concerned with so called “new threats”. So are policy-makers who are eager to prevent what Kaplan (1994) referred to as the “coming of anarchy” which he argues will emerge when assorted terrorists, guerrillas and mafiosi have undermined states and taken control the use of force into their own hands. The post-cold war period and even more strongly in the wake of 9/11 there is rampant concern about the security risks emerging with the “new” actors. This locates the management of security risks high on the agenda in a range of different contexts. More than this the centrality of the security is confirmed by those who seem ready to stretch the notion of security threat ever to cover an whole range of “modern multi-dimensional security challenges”. On their account, security risk is no longer confined to risks that are related to the use of force and violence but are extended to any threat to security including those that arise from natural disasters such as a Tsunami or a Hurricane Katarina as well as those that stem from the spread of HIV aids or tuberculosis (Bailes 2006).

A correlate of the focus on security risk has been an increasing awareness of the importance of prevention. In view of the many risks (and the capacity to understand these) it would be irresponsible not to try to prevent risk, not to exercise precaution. Hence, the context of the war on terror is far from unique. Just as the US administration has tried to argue for the legitimacy of preventive action to stop terrorists before they strike, so in insurance is there an emphasis on the importance of “prevention” (on the precautionary principle) (Ericson and Doyle 2004: 147). Individuals, companies and associations including non-governmental organizations in conflict or disaster areas, are explicitly asked to take precautionary action against risks that may (or may not) be actualized if they wish insurance companies to ensure them and their employees. There is a marked trend to responsabilize individuals and organizations when it comes to risk. They are responsible for adopting adequate precautionary measures for themselves. For this they need experts that can both estimate the risks surrounding them. This is the background for the

Foucaultian claim that the centrality of “expert driven risk analysis” is what distinguishes liberalism from neo-liberalism (O'Malley 2000: 465). But more than experts on risk analysis, the precautionary principle also demands measure of prevention, measures effectively designed to avoid that identified risks are verified in practice.

The trends rendering risk analysis and prevention pivotal in a wide range of areas and activities greatly advantage firms working in the PSC business. They can rely on a rapidly growing demand for their services. They offer precisely the kind of risk analysis and actual prevention expertise that is so much in demand. A significant part of what the sector does is “analyse” risks and suggest solutions to them. The Olive Group for example advertises itself by offering a “portfolio of security services and cutting edge technology to meet the growing risks, threats and challenges facing business governments and individuals in a highly dynamic and rapidly changing world” (IPOA 2007). Similarly, the French firm SECOPEX tells its potential clients that its “aim is to provide answers and responses to a whole range of ill-defined risk areas (terrorism, crisis, criminality, civil conflict...)” (www.secopex.com). All firms in the sector analyse risk pictures. The risk may be those of an NGO which runs the risk of being racketed in a in Garamba National Park, of an oil firm whose installation may be the object of attacks from a rebel group resenting the resources the government draws from the installation or it may be the risk of humanitarian disaster in refugee camps in Darfur. The principle is the same. The firms analyse the situation and suggest what needs to be done. Usually some package of measures and usually involving as much as possible of the firms own services. The centrality of expertise is no doubt changing practices in all sectors with wide ranging consequences with everything from firm organization to contracting practices (Teubner 2006).

In the security field, the centrality of expertise is closely related to the development of the PSC sector. The rampant demands for PSC services, is not merely something that is “happening” to the PSC sector from without; something driven by the mysterious and overwhelming forces that move us from modernity to late- or post-modernity or from class society to risk society. The PSCs actively contribute to the changes and bolster them. “Risk analysis” and expert suggestions may well arrive unsolicited. Firms make companies, individuals, states and armed forces aware of the importance of risk and prevention. This is advertisement and lobbying for contracts. Both are logical and expected activities in any market. For example, firms working on military related surveillance technology strive (and in many cases and contexts succeed) to convince the police that also they could greatly benefit from their expertise. Hence, in the wake of the Cold war, the “the military influence on police work does not necessarily arrive donned in helmet and jackboots, but can appear clad in the more reassuring attire of lab-coat or business suit” (Haggerty and Ericson 1999: 246). Likewise, the PSC sector has made strong inroads in the development sector where focus has moved “from inequality to insecurity” with a related redistribution of resources (Buur, Jensen et al. 2007). By way of illustration half (50% that is) of the funds the US Congress decided to use on reconstruction in Liberia in 2004

“were allocated to the US private military company, DynCorp, to train and equip just 2000 Liberian soldiers, while the balance is divided between services from judicial reform to education, healthcare, sanitation, infrastructure repair, civil society development, integrating ex-combatants into society and rebuilding war-affected communities” (Nyepon 2006).

Often the PSC sector does not need to advertise or lobby itself. Others do it for them by requesting that their services be used. Hence insurance companies may impose precautionary actions on their clients in order to insure them. For example, to insure ships in Sri Lanka Lloyds demanded radically changed security procedures to ensure against the risks tied to terrorism in the harbour of Colombo.

A major contract for Trident Maritime was the result. Likewise, the US government strategy of outsourcing “non-essential” activities to private firms translates as an obligation for the public armed forces have to find private contractors for a long range of tasks.

The centrality of expertise in security risk for PSC activities casts a positive light on the activities of the firms in the sector. The wide consensus surrounding the importance of these activities and the demand for them grants the industry legitimacy. It is against this backdrop that one can understand that the key lobby organization aiming at extending private firm involvement in international operations (originally only peace keeping operations but now more generally) – the IPOA (the “International Peace Operations Associations”) in the US – can successfully rename the PSC sector and call it the “peace and stability industry” (www.ipoaonline.org). The explicit claim is that the sector does essential work for peace and stability as it expertly deals with risk. The implicit message is that PSCs work in an area which is key in contemporary societies and for which individuals, firms and states are individually responsible namely in the area of risk management.

Who could possibly be opposed to peace and stability? Who could possibly want to stand as an obstacle for all those individuals and organizations in need or experts that can advice and protect them against “ill-identified” risks? Those who would like to develop effective regulations and demand accountability are often charged with doing exactly this. This is no easy position to be in and is probably one of the explanations for why accountability is so underwhelming and impunity so widespread. The step from codes of conduct, self-regulation and coordination with few (if any) binding consequences is difficult to take.

3 Entrepreneurs in Security Markets

Holding the PSC sector accountable is rendered more difficult by the fact that firms are not only experts at risk. They are also entrepreneurs working in security markets. This role is in no way contradictory with that of being an expert at risk. The greater and more “incalculable” and unpredictable risk appears to be, the more the markets for offering analysis, prevention and remedies seems to expand and reinforce the impression of omnipresent risk (pace Ulrich Beck see e.g. 1999). This market expansion is directly dependent on customers’ eagerness to resort to markets and the entrepreneurs in them. As this section will point out, this eagerness is rooted in the confidence that markets enjoy. It is increasingly taken for granted in a variety of contexts that governance through markets is the most effective way of governing. Just as being an expert on risk carries with it a range of positive connotations that are linked to understandings that go far beyond the industry itself, so does working as an entrepreneur working in security markets tie up to a set of equally positive connotations.

The positive connotation attached to markets is tied to the neo-liberal revolution (Feigenbaum, Henig et al. 1999). Beginning in the late 1970s early 1980s the conventional idea that states should be governing markets and make them socially useful was increasingly replaced with the idea that markets should be relied upon to govern states. States and public administrations were increasingly thought of and read from a neo-utilitarian perspective (Evans 1997). The emphasis was on the self-serving nature of state hierarchies, the temptation of corruption became a prominent issue with the emphasis on the state / public side of the equation. This in turn was contrasted with the effectiveness of markets in resolving governance issues. Neo-liberal thinking took a first stride into politics with Reagan and Thatcher, and was further through the development of the Asian NICs and the fall of “communism” in Eastern Europe both read as confirming the ineffectiveness of states and the potential of markets (Amsden, Kochanowicz et al. 1994). By the mid-1990s, policies in the bulk of the OECD world relied heavily on governance through privatization and outsourcing. New

Public Management thinking in constant transformation had made market mechanisms essential for policies in all areas confounded, including inside states (Bislev, Hansen et al. 2002; Hansen and Salskov-Iversen 2005; Sable 2007 forthcoming). Official development consensus was moving from the Washington Consensus to the even more radical Good Governance consensus, where the creation of markets was no longer sufficient but public institutions were required to keep out of the created markets and the markets, in turn, expected to work as checks on public power (Duffield 2002).

This “radicalisation” of liberalism went in pair with an emphasis on entrepreneurship. While classical liberalism emphasized the limitation of direct state intervention, its neo- version emphasised that order should be manufactured without centralised intervention in the affairs of society through the creation of quasi-markets. It added an entrepreneurial twist to the general liberal hands-off approach to government by emphasising the entrepreneurial values and the virtue of the “creative” uncertainty of markets (O'Malley 2000: 461). With neo-liberalism, self-governance through entrepreneurs becomes essential:

“Entrepreneurial governments promote competition between service providers. They empower citizens by pushing control out of the bureaucracy into the community. They measure the performance of their agencies, focusing not on inputs but on outcomes ... They decentralize authority, embracing participatory government. They prefer market mechanisms to bureaucratic mechanisms. And they focus not simply on providing public services but on catalyzing all sectors – public, private and voluntary – into action to solve their community’s problem” (Du Gay 2002: 17-8).

As persuasively shown by Boltanski and Chiapello this form of government is central to the “New Spirit of Capitalism” including down to the level of the work place where the individual employee becomes a “projemployées” working temporary on a project competing in internal and external markets (Boltanski and Chiapello 2005).

In this context it is less surprising that also security has been touched by the shifts in thinking about governance and governance techniques than that it took so long (until the end of the cold war) for it to really mark the sector. Clearly there was already a market for security services before the end of the cold war. However, that market was strongly marked by state intervention and dominated by political considerations of states. With the end of the Cold War, firms are pushed to behave more as firms in other sectors competing and establishing alliances. Concerns with efficiency and costs enter when the unconditional political support of the sector ends (Kaldor, Albrecht et al. 1998; Markusen 1998; Spear 2006). This reshaped conditions for the entire security service industry. For example “military technoscience infrastructure, which had previously had the political status of a sacred cow, was increasingly portrayed as a fattened cow rightfully headed for slaughter” (Haggerty and Ericson 1999: 243). Practices conventional in other markets become vital also in the security market. The firms have to find clients that find their services worth paying for.

In this context the emphasis on local empowerment and self-governance that is inherent to neo-liberalism is of essence. It effectively creates a demand for the services offered in the market for force. It creates a clientele for the PSC sector services which would not exist if security services remained the monopoly of the state and was effectively provided through it. The PSC, expectedly, court this clientele by emphasising the cost-effectiveness of their services. They do so in part by explaining the cost-effectiveness of the specific services they offer. The police-administration or the peacekeeping operation investing in unmanned vehicles and other military surveillance technology for example, does so largely on the grounds that it allows them to economise scarce resources PSCs

have successfully convinced police administrators that technology is essential for efficiency and for saving money (Haggerty and Ericson 1999: 248).

The cost-effectiveness is also frequently established against the background of public security provision which is assumed to be expensive and ineffective. Chris Taylor's remarks to the students of George Washington University are characteristic of the tone and the tenor of the arguments

“Three thousand African Union troops were deployed in Darfur where violence is widespread and the range of human rights violations is inconceivable. These 3000 AU troops deployed to areas where not 300 yards away, unimaginable violence was being visited on innocent, defenceless victims but the AU troops were specifically prevented from intervening and protecting the helpless. Their mission was to protect UN observers [...] Send 10.000 UN troops to Darfur? A colossal waste of money. You do not create security and peace by throwing more mediocre, uncommitted people into the fray. 1000-2000 professional contractors could perform those same stability operations, safely turning over the operation to the UN and other NGOs to perform post-conflict operations. That is what they do best.” (Taylor 2005)

Note how Taylor uses a reference to the inactivity of AU troops which he first (fairly) attributes to the nature of their mission but then ignores this and simply uses it as a background for casting professional (private) troops in a positive light. It may not be surprising that Chris Taylor who was vice-president for strategic initiatives at Blackwaters at the time of the speech should do these kinds of slides. More surprising is that they abound also in speeches of public officials and of people working for the voluntary sector (e.g. Mann 2006; Whelan 2003)

This bias is all the more easy to sustain as the criteria for cost-effectiveness are far from clear. In part this is for the banal reasons that different standards are systematically employed to measure the cost-effectiveness in the public and in the private. Markusen (2003) for example shows that in the US, the cost of private sector services to the public is usually assessed in a way which excludes public costs (such as investments, monitoring and non-economic costs) that go into the use of these services. Even more surprising, calculations are often based on prospective figures (what the PSCs promised) rather than on retrospective one (what they did). But perhaps most relevant is the way results are used “anecdotes about successful cases [of privatization] are often reported as the basis for advocating further privatisation. Although one hears about failures, it is difficult to find written accounts similar to those available from independent analysts working on other sectors” (Markusen 2003: 483). The public sector is treated almost in the reverse. Anecdotal cases of failure are used to support arguments about the overall failure of the public provision of services in the sector.

But more than systematic bias is involved in the difficulty of establishing clear criteria of cost effectiveness. Indeed, to some extent the lack of clear criteria is a general feature of neo-liberal forms of governance. Somewhat paradoxically while success becomes essential the criteria for measuring become increasingly unclear. As part of the reliance of markets the criteria of success themselves are left to the markets to define. But since “markets” can value complex combinations of achievements in a way that is neither predictable nor transparent, this effectively means that a high degree of uncertainty surrounds the success criteria themselves (Boltanski and Chiapello 2005). This “blending of private and public, informal and formal, skills and resources reduces the value of more or less objective criteria of by means of which subjects could measure the value of their qualifications and contributions” (Hartmann and Honneth 2006: 50).

In the field of security the uncertainty about the criteria of evaluation is doubled by the constant reference to the uncertainty about what cost effectiveness means in conflict situations. The “fog of war” clouds the view of what action, material and measures (and hence costs) will be the best in a given situation. The consequence is that security contractors often work with one version or another of so called cost-plus contracts. They make a cost estimate for their client but retain the liberty of adding unforeseen costs to the final bill and tend to do so liberally.⁷ The PSC market operates with a “moral hazard” of sorts. Moral hazard is mostly used to describe when government insurance/intervention makes it possible for firms to engage in risky behaviour they would otherwise refrain from. In the PSC market the moral hazard is engendered by the fact that fear of risk guarantees firms the equivalent of a constant bail-out, independently of how expensive they are or badly they work, because there will be a constant demand for their services. The moral cost of this economic hazard is high as “risk, security, market responsibility and so on are not only technical terms used ... but also part of the everyday lexicon of self-governing subjects” (O'Malley 2000).

These difficulties of actually proving that PSC are effective entrepreneurs in combination with the abundance of cases where firms in the sector have certainly proven ineffective on any account has done surprisingly little to undermine the image of the PSC as entrepreneurial and cost effective. Not only “the Pentagon's current, supposedly business-minded leadership seems to have forgotten Economics 101” (Singer 2005), the amnesia is widespread. It is simply assumed that PSCs are more effective than the public counterparts. Characteristically Bailes concludes her discussion of the role for the private sector in security provision by arguing that: “It may suffice to mention the relevance of notions of comparative advantage and cost-effectiveness to successful security provision” (Bailes 2006). It is simply assumed that contractors embody and help promote these virtues. This raises a second major hurdle to serious attempts at holding contractors responsible. Not only do they – hurdle one – do essential things (analyse and protect us from a wide range of risks) but they – hurdle two – do so far more effectively and with more entrepreneurial creativity than could any public bureaucracy hampered in its activities by red-tape and tedious procedures. Who would want to seriously impede this by pushing for regulation which would make firms just as bureaucratically overburdened as are states? Especially since – hurdle three – the PSC are acting legitimately, in accordance with existing norms ruling the use of force.

4 Agents of Authorized Principals

A third and final hurdle to any serious challenge to the impunity of private contractors is that not only have firms in the sector gained a position of authority because of their expertise on risk and their entrepreneurial work in security. It has proved very difficult to actually see PSCs as independent actors at all. Rather, the firms in the sector are often thought of as agents of other authorised principals, rather than as actors in their own right. As one observer argues “it is perhaps better to approach the military companies as a weapons system, which is what they are [...] In fact, the risk is lesser because expertise can be withdrawn whereas weaponry remains as the property of a purchaser” (Shearer 1998: 89). It makes little sense to hold weapon systems accountable for their acts. Those who use weapons are the adequate target of any measures imposing accountability.

⁷ Actual contractual practices are unorthodox to express things mildly. A partial investigation into contracts between PSC contractors and US government agencies in Iraq revealed that only 3 of 16 contracts were based on an initial cost plan, only in 7 of 16 cases did the contractors regularly provide security-related cost information reports to their mandators while 15 of 16 contract had costs exceeding billings for expenditure (GAO 2005: 16-18).

Translated to the world of PSC activities the implication is that those who employ the companies rather than companies themselves should be held responsible for their actions; a view which obviously makes developing effective accountability measures aimed at PSCs exceedingly difficult.

One reason for casting PSC activities in these partly self-contradictory is linked to the more general difficulty of accepting and dealing with private authority in international affairs. Traditionally only states have been subjects of international law and it seems to be very difficult for international lawyers to even conceive of private authorities in the international politics let alone extend accountability measures that might involve them. The internal logic of legal discourse rests on strict separations of spheres where the public and private, the inside and the outside (of states) are strictly separated. Legal authority is public and especially in the international sphere it resides with states and is imposed through their institutions. But more than this, the normative foundations (including democratic theory) on which legal theory rests would have to be revisited if such a step was taken since “liberal theories of the state and of international law associate political authority with the public realm of government” (Cutler 2002:32-3). There are hence strong normative and political reasons to stick to a legal “formalism”, where the “ought” from the view point of the lawyer is confused with the “is” of actual practice. There is a tendency to (vainly) search for a legal unity and coherence that no longer exists (Fischer-Lescano and Teubner 2004; Teubner 2004).

The general difficulty is accentuated when the activities concerned involve the use of force. Since the mid 19th century, private uses of force internationally have been treated as illegal (Thomson 1994). Contractors and private firms have had a continuous role to play. Many of today PSC firms worked as contractors during previous wars. Vinnell for example was “our army in Vietnam” (Silverstein 2000). This is acknowledged by most observers. But to be legitimate, this role should be placed under the authority of states. The spectre of weakening this centralization of control and authority over the use of force is associated with a descent into a Hobbesian war of all against all. States may be oppressive, unjust and extremely violent but the alternative could be even worse. In the grand narrative where violent states and generalised violence figure as the two available alternatives for handling the question of violence (Sofsky 1996) states prevail. The difficulty of recognizing (let alone dealing) with private authorities inherent in liberal theory is doubled by a “realist” concern with order, whether the order is normatively justifiable or not (Walker 1993).

“Realism” further contributes to the difficulty of seeing the PSCs as independent agents through its inherent state centrism. For many realists and possibly more relevant here for the community of international diplomats imbued with a view on international politics as constituted by relations between states, it is simply close to unimaginable that states would voluntarily give up (or allow the loosening of) their monopoly on the legitimate use of force (Nossal 2001). As in other areas diplomatic culture may indeed be the greatest obstacle to the development of global governance (Ashley 1989; Neumann 2007). From this vantage point it is difficult to admit or even imagine that states and armed forces would ever allow PSCs to operate if it were not that the PSCs acted in prolongation of states; if they were not acting in defence of “the national interest”. The extent to which PSCs operate in a genuine market is simply brushed aside. The (very) close links to politics and public armed forces are used to emphasise the many overlaps and to simply brush aside the significance of markets. When firms ostensibly act on their own initiative it is either declared an exception to the general rule or explained away as in fact reflecting (hidden) national interests. The classical problems of “plausible denial” have returned but in reversed fashion. The problem used to be that states could use PSCs for their own purposes but then (plausibly) deny responsibility for their actions by referring to them as independent companies which created uncertainty and friction between states and eventually led European rules to outlaw mercenarism (Thomson 1994: 96). Today statesmen can (plausibly) deny the independence of any PSC and tie it to its country of

origin. This sometimes causes friction among states, but more centrally it effectively prevents the recognition of the agency capacity of the firms in the sector and hence the need for regulatory measures.

Finally, there is a conservative bias that weighs against the recognition of independent private authority over the use of force. The pragmatic argument is advanced both by political theorists and by layers that as long as there are no convincing alternatives (not even in theory) to a state monopoly over the legitimate use of force, it is best not to proceed to reformulation existing rules and regulations. These may not make it possible to hold PSCs responsible and to impose adequate accountability but they do serve other important functions which could be undermined by any rush to reform not carefully thought through. For example even when an where lawyers are acutely aware of the limitations of existing legal instruments they may be exceedingly hesitant to admit this and even more to actually engage a process of modifying them for the good reason that the consequence might simply be that there would be no legal instrument. This has for example been the Red Cross attitude towards any discussion of changing the Geneva Conventions. These may have important holes and imperfections the argument goes but they do serve an essential purpose; opening up for a renegotiation would be reckless (Leander 2006b). A conservative worry about the risk of “perversity” inherent in reform weighs against alterations of existing regulations and the creation of new ones that might help developing rules that would make accountability easier (Hirschman 1991)

The combined consequence of the difficulty of admitting private authority in international politics, particularly in security, the plausible denial of firm independence and a general conservative fear that reforms may have perverse effects, makes it truly difficult to admit that PSCs are (at least some time and to some extent) independent actors and that existing rules and regulations must be adjusted to this reality if they are to be effectively accountable for their actions. There is a stubborn attachment to the thin illusion that PSC are acting as agents of other principals who are accountable in international law and that consequently there is no need to undertake major changes to hold PSC firms accountable. To the extent that private firms are involved in the sector they are (or should be) covered by existing procedures and are also expected to contributed to the development in the field.

“in the life-and-death business of security there can ultimately only be one set of *values* that guides all sectors, it would be counterproductive to assume that business can never internalise and defer to those values, and unfair to claim even that business has nothing to contribute to those values itself” (Bailes 2006: 59).

The illusion is so thin that not even its key advocates manage to hold on to it. A spontaneous and often private form of legal development has gained a strong momentum. One can perhaps read this constant regulatory innovation in the sector as an equivalent of Polanyi’s “spontaneous self-defence of society” where a number of measures that run straight against the established doctrines (in Polanyi’s case liberalism) are taken “spontaneously” which Polanyi uses to underline the uncoordinated, unreflected and half unconscious nature of the counter movement provoked by the banal necessity for society to survive (Polanyi 1957). Clearly, the analogy is on a smaller scale and merely serves to underline that it very much seems as if everyone dealing with the PSCs seem to find it increasingly hard to dispense with adequate regulation.

Key drivers behind the regulation frenzy are the PSCs themselves and their lobby organizations. For them, regulation is in part an attractive instrument for sorting out the good companies from the bad ones. In the words of Doug Brooks (IPOA president): “The industry has often made the point that the more comfortable policy-makers are with levels of accountability, the

more likely quality companies – such as IPOA’s members – are to win contracts” (IPOA 2007: 4). It also no doubt an instrument for obtaining a more formal recognition of the role of the contractors and to enlarge that role by pushing countries who have not (yet?) privatised and outsourced to do so. Hence the recently created British Association of Private Security Companies sees as its key aim to promote “effective self regulation in partnership with the UK Government and International Organisations” (www.bapsc.org.uk/). It prioritises the development of standards at the EU level (Leander 2006b). But more than this, firms in the industry multiply the signs that they are concerned with accountability issues by signing up to an ever growing number of codes of conduct and voluntary regulations. The Armorgroup e.g. declares to adhere to “amongst other”, “the IPOA Code of conduct; the Voluntary Principles on Security and Human Rights; the Code of Conduct of the International Red Cross and Red Crescent; the US Foreign and Corrupt Practices Act; the UK Anti-Terrorism, Crime and Security Act; and the UN Mine Action Standards” (IPOA 2005). DynCorp employs a full time human rights lawyer. In fact, most larger PSCs have a publicly stated ethical policy including adherence to codes of conduct.

Along very similar lines states, NGOs and firms are also involved in pushing for various forms of regulatory initiatives. The key states from which foreign contractors operate have all recently reviewed their regulations. The democrats in the US had on their recent electoral ticket a promise to pushing that process further specifically with regard to security companies in Iraq. The UK, France and Belgium have also gone through processes of updating their regulations (Foreign and Commonwealth Office 2002; Sénat 2002). The strongest action has come from South Africa which has formulated rules to control South African security professionals working abroad with an explicit intent to curb their activities (Avant 2005). Similarly, there are clear signs that also NGOs are concerned with the development of codes of conduct and guidelines for the sector. NGOs working in conflict contexts are increasingly striving to adopt internal guidelines for relations with the PSC sector (Spearin 2006). The Red Cross is even collaborating with the Swiss Foreign Ministry on an initiative confirming the application of existing human rights law to private contractors in conflict zones and advising governments on how to deal with the firms (www.swissinfo.org/eng/front/detail/Swiss_target_private_military_firms.html?siteSect=105&sid=7178144&cKey=1161270917000 and Emanela Chiara Gilliardi??).

This rather frantic regulatory activity clearly shows that there is a strongly felt need among virtually all actors concerned to have more effective accountability tools working in the sector. This is obviously at odds with the idea that the PSC are covered by existing regulation since they are in fact mere agents of other principals. It is puzzling indeed that many observers and PSC exponents firm believe *both* that PSCs are mere agents *and* that more regulation is needed if for them to be effectively accountable. The puzzle is all the greater if one considers the extent to which any likening between PSCs and weapon systems goes against the other key elements of central to the self-understanding of participants in the sector discussed above. Unlike weapon systems, PSCs can and do act on their own initiative. As experts on risk they are charged with informing would be principals. As entrepreneurs in security market they are (by definition) enterprising. One way of explaining this, may be to point out that the contradiction is not really there. The kind of regulation sought takes its point of departure in the view of PSC role as an agent. This is indeed very often the case and it is part of the problem discussed here. If initiatives only address situations PSCs as agents they are bound to leave the trend of PSC impunity largely intact. More importantly they are likely to reinforce the existing difficulty of even voicing the need to address the PSCs as independent actors. In this sense rather than diminishing PSC impunity the regulatory innovation may reinforce it.

Conclusions:

This paper departed from the puzzling situation we are in with regard to PSC accountability. The clamour surrounding PSC impunity, attention to accountability and regulatory innovations have resulted in virtually no effective increase in the accountability of PSCs. Few cases are brought against the firms in the sector. But even when cases are brought against it, the consequences are limited. Firms with established records of mismanagement (Halliburton, Vinnell) or human rights abuses (Aegis, DynCorp, CACI, TITAN) receive major contracts including through states and enjoy seemingly unhampered growth. This paper has argued that to understand this situation reference to the complexity of contradictory and overlapping regulations legal standards provides only a very limited part of the answer. If existing standards were used and reformed to keep PSCs accountable, impunity would certainly decline sharply. The essential difficulty is that it this is not done. This paper has suggested a key to understanding why NOT. It as emphasised that in part the reason is that holding an authority accountable is always difficult. But more than this it has suggested that the sources of PSC authority as entrepreneurs with an expertise on risk working legitimately for public (or publicly recognized authorities) impedes attempts to effectively break the prevailing impunity. Ultimately the reason is that PSCs and activities mobilize a positive bias which is very strong as it relates to central aspects of contemporary self-understanding. Risk expertise makes the activity essential, entrepreneurship in markets connotes efficiency and the lack of independent agency makes the activities legitimate.

Without reference to these overarching reasons it is difficult to explain the lame progress with regard to the accountability of PSCs. It is increasingly difficult to locate critical voices genuinely concerned with accountability. Even the sources from which one would most expect such concern to come seem to find it difficult to critically analyse the sector and to suggest concrete steps. Just to illustrate this point consider Alison Bailes assessment (all of which has already been cited separately in the text above) of how to deal with the private sector.

“While it is reasonable to argue that in the life-and-death business of security there can ultimately only be one set of *values* that guides all sectors, it would be counterproductive to assume that business can never internalise and defer to those values, and unfair to claim even that business has nothing to contribute to those values itself [**the private security business is acting for an authorized principle**]. It may suffice to mention the relevance of notions of comparative advantage and cost-effectiveness to successful security provision [**the business is effective**]; and to recall that business creates the wealth without which we neither have something to defend nor something to defend it with. Against the background of both traditional and modern multi-dimensional, security challenges [**the business defends us from risks and fills a necessary function**] we may return to the old human adage that one should not kill the goose that lays the golden eggs: even in the name of saving it from a flue” [**we should not regulate it too tightly**] (Bailes 2006: 59-60).

The quote is drawn from a DCAF (Centre for the Democratic Control over the Armed Forces) publication and Alyson Bailes is director of SIPRI (Stockholm Peace Research Institute). DECAF and SIPRI are the kind of independent institutions that should be at the head of suggesting concrete measures to ensure the accountability of private contracts. However, the citation illustrates the difficulties even those most susceptible of critique have to circumvent the three hurdles just discussed to advocate effective accountability in the PSC. Advocates of the further development of the PSC sector often lament the prejudices against mercenaries that they encounter. If the argument in this article is right although prejudices against mercenarism may have played a role in the past,

the situation has changed beyond recognition. The PSC now encounter a strongly positive bias which they actively and effectively cultivate. Characteristically for authorities they can count on a voluntary acceptance and trust which effectively hampers the effectiveness of those questioning PSC authority by questioning their impunity.

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