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Colombia: Regulating Private Military and Security Companies in a “Territorial State”

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Regulating privatisation of “war”: the role of the EU in assuring the compliance with
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INTRODUCTION

The Colombian conflict has persisted for sixty years and generates instability in certain parts of the country. The new privatization of security at the end of the cold war, and the internal situation led to fertile conditions for the growth of the security market - many Private Military and Security Companies (PMSCs) were formed or deployed in Colombia.

Colombian norms were created to try to control this industry, and a special entity is in charge of reviewing the activities of these companies, but different problems of efficiency occur.

Although the Colombian norms can be regarded as interesting; the practice shows that they fail sufficiently to control the PMSCs. The Colombian institutions generally are not familiar with the phenomenon and the current government does not desire public scrutiny, probably because it sees in these companies an opportunity for putting its security policies in place.

Moreover, part of the PMSC presence in Colombian territory is not subject to these standards because they are employed by the US government under bilateral military pacts. This agreement between the two countries provides US personnel present in Colombia with total immunity.

The objective of this report on Colombian legislation is to analyze how states in whose territory PMSCs operate – territorial States³ – try to confront the phenomenon.

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³ Definition from the Swiss initiative, in the Montreux document on pertinent international legal obligations and good practices for states related to operations of private military and security companies during armed conflict, Montreux, 17 September 2008, available at <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/psechi.html>, visited on September 10th 2009.

The first part of this report seeks to analyze the different facets of the Colombian norms and their actual capacity to control the activities of the PMSCs in the national context. The second part focuses specifically on the use of PMSCs in the framework of the military cooperation between the US and Colombia.

I. HIRING OF PMSCs IN COLOMBIA IN GENERAL

1.1. *The private military and security industry: background and features*

a. PMCs/PSCs registered at national level

Presently, establishing the exact number of companies operating in Colombia is taxing, considering the limited records and lack of research on the topic. However, it is possible to estimate a classification of the Private and Military Security Companies (PMSCs) in Colombia according to their place of origin and the types of services they provide. Observing the PMSCs in this way allows us to describe the industry, and gives us the tools to later present the risks and challenges of their use in the Colombian context.

The PMSCs hired in the country could have a domestic or foreign origin. A significant proportion of the companies with multinational character in Colombia have their headquarters in the US and/or England. Some of the foreign PMSCs operating in the country are Dyncorp, Control Risks, Evergreen Security and ID System. Their branches in Colombia have been contracted by public entities, private enterprises, non-government organizations, and even by people who seek personalized services. The employees of this type of contractor are of various nationalities - these include Colombian personnel.

The number of foreign PMSCs in Colombia and the type of services they offer are unknown. In fact, the public records of PMSCs do not differ whether they are national or not. In addition, these companies in Colombia are not always registered with the relevant authority. This situation creates ambiguity with respect to the multinational corporations that are operating in the country and the amount of contracts handled by them.

Otherwise, the PMSCs of domestic origin are mostly dedicated to work in the national territory. At the same time, they are usually subcontracted by transnational PMSCs to operate in Colombia. The reports of the *Vigilance and Private Security Superintendency (VPSS)*, an official entity in charge of monitoring these companies, indicate that these national PMSC are employed in multiple sectors. Considering the total of registered PMSCs (3392 companies until June 1st of 2009), in the residential sector works the 27% of these companies; in the commercial sector 24%; in the industrial sector 18%; in the financial sector 8%; in the public sector 7%; in the energy sector 5%; in private education 4%; in transport 1% and 2% in other sectors.⁴

Following the type of services offered by domestic and foreign PMSCs, it is possible to distinguish companies in charge of surveillance and security services (this includes security guards for buildings and people); transport values; advisory, consulting and researching service; production, installation, marketing and use of

⁴ Official page of the *Vigilance and Private Security Superintendency, Dimensionamiento nacional del sector de la vigilancia y seguridad privada e impacto económico y social. Oficina asesora de Planeación*, p.4. available at <http://www.supervigilancia.gov.co/?idcategoria=1095&download=Y>, visited on August 4th 2009.

equipment for surveillance and private security, and use of shields for surveillance and private security.⁵

The surveillance and private security sector is divided into two groups: the individuals and corporate entities that create PMSCs to carry out their own protection;⁶ and the PMSCs who offer their services to other companies. The number of the first type of PMSCs has decreased by 40% from 2006 to 2007 according to the working draft of a proposed law to reform the current regulations of the private security sector.⁷ Even so, this kind of company represented in 2007 about 26% over the total number of PMSCs registered in the country and it has served as a way of expediting the proliferation of the security companies according to the requests of their creator.⁸

Other studies categorize these companies according to whether or not they offer military services. On this point, it is possible to differentiate between Private Security Companies – PSCs - focused only in security service, and Private Military Companies – PMCs - geared up to facilitating warfare. The use of PSCs is more common in Colombia. Surely, the Colombian legislation approves the private vigilance and security services, but it does not include a rule which approves private military services. However the companies contracted in the Colombian Plan would be cataloged as PMCs, a topic that will be treated in more detail in the second part of this article.

b. Trends and challenges

In Colombia, the use of PMSCs to execute security and military activities is a growing trend. Their use can be explained by at least two reasons. Firstly, the limited capability of the Colombian armed forces to solve high homicide rates, kidnappings and extortions, augmented the hiring of these companies as a private way to overcome insecurity problems.⁹ Secondly, the PMSCs offer technologic advantages in arms and procedures that result in a more competitive, specialized and attractive response to the demand, compared with the traditional public authorities.

The private sector on vigilance and security service has undergone a notable expansion since the 1990s. Between 1994 and 2007, this sector grew 360%, with an

⁵ These types of services are classified by Article 4, Decree 356/1994 that contains the statutes of the *Vigilance and Private Security Superintendency and the activities under its control*.

⁶ This includes the security departments, the community service and special service (this last being dedicated to executing the exclusive activities of the military and police organisms).

⁷ This draft was presented by eleven congressmen, in May 2009. Currently, this bill of law has not been debated in the plenary Congress but was approved in the first debate at the second commission in charge of security issues.

⁸ For instance, the VPSS has registered 573 companies which have their own security department such as Pedro Gómez Limited or Cusezar (construction companies); Petroleum Exploration International; Carbones Colombianos del Cerrejón S.A. (a company for extraction and transport of coal); Mineros Exportadores S.A. (a mining company); Unión de Bananeros de Urabá (a banana company); or Postobon (a soda company). See Official page of the *Vigilance and Private Security Superintendency, Security Departments* available at <http://www.supervigilancia.gov.co/?idcategoria=1095&download=Y>, visited on August 4th 2009.

⁹ According to the World Health Organization, Colombia doubled and even tripled the average homicide rates of the Latin American countries, between the 70s and the 90s. See Echandía, Camilo and Luis Salas *Dinámica espacial de las muertes violentas en Colombia 1990-2005*, Program on Human Rights and International Humanitarian Law, Human Rights Observatory, Vice-President's Office of Colombia. Bogotá, March of 2008, p.7.

average increase of 15% per year.¹⁰ The income of this sector has exceeded the profits of other intensive economic activities.¹¹ According to the National Council of Economy and Social Policy (CONPES) this sector generates an operational income three times superior to the hotel sector, twice superior to the banana sector, and one-point-two times higher to the floricultural sector.¹²

On the other hand, the absence of certain laws and efficiency organisms to control this industry has intensified the proliferation of PMSCs without sufficient oversight and control by the state. The available data in the *VPSS* as of June 2009, indicates that there exist a total of 3392 PMSCs offering their services so far as is known by this organization, and another 507 companies are accomplishing their registration (see table 1). In spite of this information, there is significant underreporting about the real number of domestic and foreign companies hired in the country.

Previous situations of corruption, abuse and inefficiency among police officers, incited the quest for private alternatives to overcome the security and technology deficit. This notwithstanding, the civilian population, non-governmental organizations, private enterprises and even public functionaries hire PMSCs that could easily commit illicit acts. The uncontrolled increase of PMSCs in Colombia has also produced civil, labour and penal incidents. Inside and outside of their operations, the employees of these companies have been involved in several abuses and crimes such as drug traffic, rape, excess in the use of the force and the maltreatment of the workforce.

PMSC hiring is not regulated by a legal and judicial system, capable of establishing limits on their activities and sanctions where those limits are exceeded. In Colombia, like in many Latin American countries that receive and import PMSCs, there is not enough regulation to mitigate the negative effect of their use. In fact, in Colombia there is a prevalent lack of public knowledge about the magnitude of the risks associated to this industry. Further, it will be made evident how the legal instruments and the controlling entities of the private security sector require a revision to solve juridical gaps and to expand institutional limits to control their activities and incidents.

1.2. *The PMSC regulation in Colombia*

a. Regulation of security services and arms

According to the Colombian Constitution of 1991, the State has the monopoly of violence though the outsourcing of security functions under supervision of the State is allowed by the decree 356 of 1994. This legal disposition regulates the private security companies in Colombia by reference to the definition of private vigilance and security service; the activities authorized by the State;¹³ the entity in charge of control; duties and rights of the PMSCs; and a sanction regime.

The vigilance and security services are understood as the economic activities of individuals and corporate entities, to prevent disturbances to security and individual tranquility related to life, property and production, installation, marketing and use of

¹⁰ Official page of the *Vigilance and Private Security Superintendency*, Op. Cit., p.1.

¹¹Extend in Ibid., “Listos para el Cambio” – Foro ANDEVIP. Available at www.supervigilancia.gov.co/saladeprensa/presentaciones, visited on August 4th 2009.

¹² CONPES 3521 of 2008. p.11.

¹³ See the type of service mentioned previously as contained in article 4.

equipment for surveillance and private security, transport and shielding for the same purpose.¹⁴

According to the decree, PMSCs are classified in service of surveillance and private security with arms and service of surveillance and private security without arms. The first type includes: companies of surveillance and private security; security departments; cooperatives on surveillance and private security; transportation of valuables; special surveillance services and private security and community services for surveillance and private security. The second type includes: companies of surveillance and private security without arms; companies related to security and surveillance equipment (production, installation, marketing and use); and companies for advisory, consultant and researching security.

In this spirit, the government established the **VPSS**, as the entity authorized to control and certify the companies.¹⁵ This organism is in charge of licensing the operations of PMSCs that fulfill the requirements and processing the renewal of their permits.¹⁶

To obtain a license, the company must report specific certifications and information depending on the type of service offered. Among the basic requirements are: notifying the head office where the company is going to be located; the type of service offered; the equipment and security resources with their technical characteristics; the documents of constitution and the registry of the PMSCs; an insurance policy of civil liability tort, in order to cover the risks associated with the improper use of arms or other elements of surveillance and private security; and an affiliation certification of their personnel to the social security system.

There is no regulation about the level of skills of PMSC personnel, even so, the decree in the article 64 includes the responsibility of the surveillance and private security service of the professional training of employees contracted to execute the authorized services. Beyond the specific articles, the current legislation specifies the final goals of private security as the reduction and prevention of threats affecting life, personal integrity or the legitimate exercise of rights in property, without altering or disrupting the exercise of public rights and freedom and without infringing the activities reserved to the public authorities.¹⁷

Regardless of these general topics, a law reform to modify and amplify the content of the decree was approved in the first debate by the Congress of the Republic. The main aims of this new regulation are to provide an extension of the force of the licenses and the possibility of renewal with less formality; to extend the duties and rights related with human rights and international humanitarian law;¹⁸ to specify new functions of the **VPSS**; to detail the type of equipment that should be registered by the Superintendence; and including the figure of ‘specialized service’ as the activities that are in the charge of the State but could be delegated to private services.

¹⁴ Article 2 of the Decree 356 /1994.

¹⁵ Article 7 of the Decree 356 / 1994.

¹⁶ See Articles 11 and 14 of the Decree 356 / 1994.

¹⁷ Decree 356 of 1994.

¹⁸ The new duties of the PMSC in terms of human rights and international humanitarian law would be related with the adequate training in this matters and the corresponding certification. The rights would be oriented to guarantee the labour rights of the employees.

Despite the changes proposed by the bill and the details of the decree in force, some important topics at the operational and supervisory levels are excluded. On the one hand, both dispositions lack a division between State and PMSC liabilities; a deep definition and limitation of the foreign PMSCs in Colombia; rules about the export and import of military and security services; and a regulation of the sub-contracting of PMSCs in Colombia. On the other hand, it is not clear about the monitoring of personnel or demands made of the PMSCs. Precisely, there is no oversight of the type of hired personnel, or controls about the type of actors who can use PMSCs and the subsequent obligation to report the contracts undertaken in order to supervise the active companies; and finally, also omitted are provisions on the accountability to the civilian society and the Congress on the evolution and incidents of the whole industry.¹⁹

Otherwise, the possession and use of arms is other area of regulation leaving much to be desired. The Colombia Constitution and Decree 2535 of 1993 stipulate the appropriate control parameters. Article 223 of the Constitution clarifies that only the government can introduce and produce arms, war munitions and explosives, but that authorized entities by law could use arms under government's supervision. Decree 2535 introduces the term, "cession of the use of arms" and, it differentiates the types of arms according to the use. This disposition is a defining tool controlling access of the private security sector to arms.

Firstly, this decree identifies *the arms of war or arms of restricted use for the public force*, as the arms whose purpose is to ensure independence, national sovereignty, territorial integrity, and to guarantee the public rights and liberties and the constitutional and public order. In this sense, these arms are for the exclusive use of the national security organism.²⁰ Secondly, the decree mentions the *arms of restricted use* that are for the public forces; but in an exceptional way, the Arms Commission²¹ can authorize the use of these arms to the PMSCs with the previous approval of the VPSS.²² Finally, the decree states the *arms of civil use*²³ classified as arms of self-defence; sport arms; and collectable arms.

The regulation of the access of the PMSCs to arms of restricted use has not included a proportionate rule to avoid the excessive use of weapons in their operations, in spite of the significant number of armed PMSCs. The State through the VPSS makes a sub-classification of PMSCs depending on whether the weapons are used or not. Until June 2009, the companies registered as armed PMSCs were calculated as about 500 and without arms as about 80.²⁴ This information gives an idea of the PMSCs with the

¹⁹ Comments made by the Academic Network on the Use of Mercenaries –Colombia chapter- to the second commission of Congress of the Republic about the current law and the new proposal.

²⁰ Article 8 of Decree 2535 / 1999

²¹ Organism of the Ministry of Defence in charge of authorizing the possession and use of restricted arms to public functionaries and members of the surveillance and private security sector. Casas, P. (November 2006). *Violencia Crimen y tráfico ilegal de armas en Colombia* Oficina de Naciones Unidas contra la droga y el delito. Bogotá, p. 52.

²² Article 10 of Decree 2535 / 1999

²³ Article 11 of Decree 2535 / 1999

²⁴ See the list and details of armed and unarmed PMSCs at the official page of the *Vigilance and Private Security Superintendency, Authorized services*. Available at <http://www.supervigilancia.gov.co/?idcategoria=1096> visited on August 4th of 2009.

normal use of arms in their service, in comparison with the PMSCs which employ other tools to develop their work.

Finally, it is important to emphasize that the import and export of arms is monopolized by the government following Article 57 of this decree. Only the national government can import and export arms, ammunition, explosives and accessories, in accordance with the regulations issued by the National Government through the Ministry of National Defense.²⁵ Nonetheless, this regulation does not adequately address the illegal traffic in arms and related resources. In Colombia there is a ‘grey market’ where arms legally imported by official forces and PMSCs end up in the hands of illicit actors. 80% of the arms in this market are ultimately destined for guerrilla and paramilitary groups, and 20% for crime groups and common delinquency.²⁶ This suggests as well, the need for additional measures in the handling of arms by these companies to avoid this unwanted traffic.

b. Labour, civil and criminal liability

The liabilities of the PMSCs and their personnel at the labour, civil and criminal level, are contained respectively in the ‘substantive code of work’, the ‘civil code’ and the ‘penal code’. The principles and articles of these codes are the guidelines for contracts; but at the same time, these codes govern tortuous issues.

In Colombia, the labour liabilities only apply in the relationship between the companies and their personnel. For this reason, the principal goal of the ‘substantive code of work’ is to assure just treatment between employers and employees. This code applies to the national territory at large, and applies even to foreign people. At the labour level, in Colombia, every company must guarantee respect for the content of the code which includes a correspondent salary; respect of working hours and overtime, affiliation to social security; and right to strike, among others. Although there are no specific rules on PMSC services or labour conditions, Decree 356 of 1994, which covers the surveillance and private security sectors, establishes the liability of PMSCs in the professional and personal training of their employees. They can be trained by a department created by the PMSC or by an external department authorized by the VPSS.²⁷

Nevertheless, the conditions of the labour contract and the decree are not enough to guarantee that PMSC personnel are suitable. For example, Human Rights and International Humanitarian Law are issues not included in the basic knowledge of these personnel and the decree does not render people with criminal records unfit for work in PMSC. Likewise, these dispositions are not sufficient in terms of salary and labour conditions. In particular, some employees of the PMSCs have denounced a differential

²⁵ In addition, the Decree establishes that “the import of explosives and raw materials under paragraph 3 of article 51 of this Decree, could be undertaken under the request of individuals for commercial reasons, except in circumstances of defense and national security. The government agency responsible for these operations may not receive any utility charge and only administration and management costs”. See article 57 of Decree 2535 / 1999

²⁶ Casas, P. (November 2006). *Violencia Crimen y tráfico ilegal de armas en Colombia* Oficina de Naciones Unidas contra la droga y el delito. Bogotá, p. 31.

²⁷ Article 64 of Decree 356 / 1994.

treatment and superior payments to foreign employees, excess in working hours and abuses by their bosses.²⁸

On the other hand, commercial and civil liability applies between the PMSCs and their contractors, which includes contractual and non-contractual responsibilities.²⁹ In Colombia, any company which offers services, including the PMSCs, are mandated to use their capabilities and resources in accordance with a specific purpose, but it does not guarantee that they are not going to incur in the commission of harm over people or possessions in the accomplishment of the final contract objective. These situations require the application of the civil liability. For example, a PMSC contracted to guard a building has to react to a robbery, and at the same time causes material harm in the building or in the neighborhood. Although the company's performance followed the completion of the contract, the PMSC has to answer for its inappropriate conduct or events.

When the personnel breach the contract, or cause an incident, the PSMCs have to answer for the failures of their employees whether the negligence or fault are proved in the development of the activities for which they were hired. In this context, an insurance policy for civil liability could be used, whenever a civil judge determines the company's liability in the incident. Nonetheless, it is a common risk that the liability would be extend to the particular or public contractor, depending on the damage and the affected party.

In contrast with civil liability where the PMSCs can be legally responsible, the criminal liability in Colombia is only personal. Incidents occurring outside contracted activities, such as violations of human rights, generate a criminal liability for the people implicated in the events. Therefore, the criminal responsibility of corporations is not recognized, and the PMSCs as corporate entities are exempt from criminal liability.

Depending on the case, the PMSCs' workers are not always the only responsible parties to a crime, considering that the directors or managers of the PMSCs and even the directors of the contracting entity can be considered instigators or accomplices.

In spite of the possibility of judging PMSC's employees, the Colombian judicial system is not coherent to the regulation of these issues. The penal justice system is considered inefficient in terms of congestion, slowness and impunity.³⁰ This lack of an adequate judicial administration belies serious deficiencies in establishing the truth of events, allowing the judicial access of the victims, and guaranteeing an integral reparation process. As a result, the penal dispositions applicable to the criminal acts of PMSC's employees are not backed by a sufficient capability to capture and punish those responsible for the crime.

The main characteristics of the labour, civil and criminal liabilities of the PMSCs permit the conclusion at this point, presenting numerous gaps in Colombian regulations to attend to the risk and particularities of this industry. The labour abuses and the occurrence of civil and criminal incidents by the personnel of these companies

²⁸ PMSC's employee, June 22th, 2009, I. Cabrera interviewer.

²⁹ While the contractual liability is related to the explicit conditions of the contract, establishing the tort liability entails determining many details, for instance, whether the personnel were acting in the exercise of their functions; whether or not they were under license; whether or not the contract is in force; and the place where the incident was committed.

³⁰ González, F., Posada, C. (June 2001). "Criminalidad, violencia y gasto público en defensa, justicia y seguridad en Colombia" en *Revista de Economía Institucional* vol.3 no.4, Bogotá.

have not had a great deal of attention regardless of the recurrent use of force and the employment of violent arms. These conditions suggest that the social risk of their activities deserves the development of more precise tools to establish where the liability of these companies and their personnel begins and ends.

Another problem is that only part of the PMSCs present in Colombia is subjected to the Colombian legislation. The other part engaged by the US works under “Plan Colombia” and benefits from a special status.

II. US PMSC in PLAN COLOMBIA

Another form of intervention of PMSCs in Colombia is with the participation of the US in the war on drugs and the setting up of Plan Colombia³¹ in 1999. This Plan starts with collaboration between Pastrana’s administration in Colombia and Clinton’s administration in the US.

However, as will be examined in the following section, the collaboration between the US and Colombia has existed for a long time, and Plan Colombia is merely a continuation and a deepening of this close relation.

The military cooperation agreement with the US disables Colombian criminal jurisdiction over crimes that may be committed by US personnel. This suggests that illicit acts as such as homicide, rape and trafficking by an American PMSC employee cannot be judged in Colombia, and that their victims should seek legal alternatives outside the country, to access due process and obtain their redress.

2.1 Plan Colombia and US-Colombia agreements

a. US historic agreements and Immunity

Some military agreements between the two countries date from after the Second World War, like the American Treaty of Reciprocal Assistance signed in 1947. However it was only in 1959 with Law Number 24 that all the military agreements were legalized.

This Law allows the Colombian government

to conclude contracts or conventions with the representatives, duly authorized, of international organizations or specialized agencies, or with the public or private agencies national, foreign or international, with the specific objective to ensure the use or the service of technical assistance or the supply of elements or other facilities necessary for the formulation or execution of plans or programs of economic development, social, cultural, medical or other related matters.

This paragraph will be used as the basis for futures agreements.

The most important of these agreements is the General Convention on Economic Aid and Technique, between the Government of the Republic of Colombia and the Government of the US, was signed in 1962. This agreement represented the first step towards the immunity of US personnel in Colombia. Article III states:

³¹Plan Colombia: Plan for Peace, Prosperity, and the Strengthening of the State (usually referred to by its shortened form, Plan Colombia)

The Government of Colombia will receive a special mission and personnel to carry out the duties of the Government of the US according to the present Agreement and will consider the personnel of this special mission as part of the Diplomatic Mission of the Government of the US in Colombia, with the purpose to concede them the privileges and immunities that are granted to this mission and to personnel of equal rank.

Law 24 of 1959 was abolished by a decree in 1976, but the Colombian government found a new strategy to avoid any control on the signing of new military agreements with the US: complementary or simplified agreements. The simplified agreements are conventions between two States which develop or carry out the contents of outline treaties and whose conclusion does not require approval of the respective Congresses.

In the case of the military collaboration between Colombia and the US, the objective was to develop the convention of 1962. The immunity of US personal was reiterated in the Bi-national Agreement, elaborated September 17, 2003, in the following terms:

For the aims in the present Agreement the expression “person of the United States of America” means any government employee, employee (including any contractor), or member of the army, present or past, member of the Government of the that enjoyed immunity against the penal jurisdiction by virtue of the international law, anyway is subject to the jurisdiction of the State that It sends (the United States of America).

This reform extends immunity to any person subject to the jurisdiction of the US.

Finally, Colombia, as well as another ninety states, signed bilateral immunity agreements with the US. These agreements exempt US citizens from prosecution by the International Criminal Court (ICC). This agreement completes and extends the immunity of US citizens, and obviously the PMSC contractors working in Colombia, to the international justice system.

b. Plan Colombia

Plan Colombia was conceived by the Pastrana administration in Colombia and the Clinton administration in the US at the close of the 90s. The objectives and the strategy of Plan Colombia: Plan for Peace, Prosperity, and the Strengthening of the State (usually referred to by its shortened form, Plan Colombia), was simple: economic development, security, and peace are directly linked. For this reason Plan Colombia includes human rights, social development enforcement measures, and economic and armed conflict negotiation advice, but its main purpose is military (over 70% of the total aid package): “taking the money generated by drugs out of the market reduces the war-making capacity of all three terrorist groups [FARC; ELN and AUC³²], thereby reducing the level of

³² Fuerzas Armadas Revolucionarias de Colombia (FARC); Ejército de Liberación Nacional (ELN); Autodefensas Unidas de Colombia (AUC). All three defined as terrorist group by US.

violence and enhancing the prospects for peace.”³³ Then, “it tended to the intensification of fumigation operations in areas where illegal substances are produced.”³⁴

As Veillette says, the objectives of Colombia and the US for Plan Colombia differ in some aspects.

The primary U.S. objective is to prevent the flow of illegal drugs into the United States, as well as to help Colombia promote peace and economic development because it contributes to regional security in the Andes. The primary objectives of Colombia are to promote peace and economic development, and increase security.³⁵

It was possible to see the first results in 2002, by the end of Pastrana’s term: the Colombian army was larger, more aggressive, better led, organized, trained, motivated, and equipped.³⁶

However, since its beginning, the Plan was subject to a great amount of criticism on one hand, to report the risk of a military upscaling, and on the other, the Plan’s real objective. It wasn’t very clear if it was a plan for fighting drug-trafficking or a plan to assail illegal actors, especially the guerrillas. Efforts were concentrated in the south of the country precisely where the FARC is the strongest illegal groups.³⁷

Another relevant point of the Plan is the militarization of the US intervention in Colombia. In the 1990s, the fight against drugs was mainly a Police problem. The United States provided equipment, supplies, and other aid for the counternarcotics efforts to the Police but since 2001 they provide it to the Colombian military.³⁸

As well as militarization, the fight against drugs started to privatize; although the presence of *Dyncorp* has been noted³⁹ since 1988, its concrete actions have been acknowledged since 1994. Its contracts depend directly on the US State Department and it is present in Colombia “to work in anti-drug projects with the Anti-drug Direction and the Colombian National Police’s Air Forces, as well as to support the National Army’s Air Forces”.⁴⁰ The real privatization started with Plan Colombia, in 2002, an estimated US\$150 million was paid to PMSCs, almost 50% of the total US\$370 million the US assigned to Colombia during 2002 to finance military and police operations.

It is important to acknowledge that at the beginning of 2002, with the end of the negotiations between the Colombian government and the FARC, the funding allocated to the fight against drugs could have also been used to fight the guerrillas. The consequence for the contractors is that the advice they gave against drug trafficking

³³ Marcella, G., (May 2003). *The United States and Colombia: the journey from ambiguity to strategic clarity*, Strategic Studies Institute, Available at <http://www.strategicstudiesinstitute.army.mil/>

³⁴ Massé, F., (2003). *Les Etats-Unis et l’Europe face au conflit colombien*. Paris: Les Études du CERI, Centre d’études et de recherches internationales, Sciences Po. Author’s translation.

³⁵ Veillette, C., (May 9, 2005). *Plan Colombia: a progress report*, Congressional Research Service, The Library of Congress, Washington.

³⁶ Marcella, G., *Op. Cit.*

³⁷ Massé, F., *Op. Cit.*

³⁸ Serafino, N. M. (2001). *Colombia: Plan Colombia Legislation and Assistance (FY2000-FY2001)*. Washington: CRS Report for Congress, p. 2.

³⁹ *Freedom of Information Act (FOIA)* en <http://jeremybigwood.net/>

⁴⁰ *Mercenarios*, (13 August 2001). *Semana*, n°1002, Bogotá. Author’s translation

transformed into counter-insurgent training.⁴¹ Then the use of the PMSCs becomes a means of decreasing the participation of the US Government in the Colombian conflict, as direct participation of the US in Colombia would not find support in either of the two countries.⁴²

2.2 Activities and effects of the PMSC in Colombia

a. Activities of the PMSC

In 2006, approximately twenty-five PMSCs were working under the US State Department and the Department of Defense⁴³; a good method to describe the activities of these PMSCs in Colombia is to categorize their involvement in the conflict using Singer's typology⁴⁴, starting with the least involved.

In the Colombian case, as for the cases all over the world, the category *Military Support Firms* represent the biggest market; the majority of the PMSCs working for the US State Department and the Department of State undertake actions on this matter. For example, the PMSC's *Virginia Electronic Systems, Inc* (VEC) and *Air Park Sales and Service, Inc.* (APSS) had to deliver and install communication equipment for the Navy's Air Forces in 2002.⁴⁵ Many of the *Lockheed-Martin* contracts are logistical, as this company is the main provider of these services in Colombia.

In 2006, *Oakley Networks* was in charge of internet surveillance; *Telford Aviation* supports the logistics of two reconnaissance airplanes; *ITT* and *ARINC* are in charge of some radars; *Chenega Federal Systems* maintains an intelligence database.⁴⁶

After the *Intelligence Authorization Act* of November 2003⁴⁷, intelligence services provided thanks to Plan Colombia's budget, can be used not only for the fight against drug trafficking but also for the fight against terrorism.⁴⁸ Then, the current intelligence activities are fundamental not only for the fight against drug trafficking but also to fortify and increase the capacity of the Colombian military to fight irregular groups.

⁴¹ Feickert, A. (2005). *U.S. Military Operations in the Global War on Terrorism: Afghanistan, Africa, the Philippines, and Colombia*. Congressional Research Service. Washington: The Library of Congress.

⁴² Vauters, J., & Smith, M. L. (2006). A Question of Escalation - From Counternarcotics to Counterterrorism: Analysing US Strategy in Colombia. *Small Wars and Insurgencies*, 17 (2), 63–196.

⁴³ The United States Department of State. (2007). *Report to Congress On Certain Counternarcotics Activities in Colombia*. Washington.

⁴⁴ See Singer, P. W. (2003). *Corporate Warriors, The Rise of the Privatized Military Industry*. Ithaca and London, Cornell University Press.

⁴⁵ El Tiempo, June 20th 2003.

⁴⁶ Report to Congress on Certain Counternarcotics Activities in Colombia prepared by the United States Department of State.

⁴⁷ In its 313th section “*use of funds for counterdrug and counterterrorism activities for Colombia*” the act authorizes the use of intelligence funds used in counterdrug activities to be used in counterterrorism activities against FARC, ELN, and AUC, with the objective of protecting health and human life in emergency situations, including rescue operations. Senate of the United States of America, (2003), FY2004 Intelligence Authorization Act, Report 108-163.

⁴⁸ Veillette, C. (2005). *Andean Counterdrug Initiative (ACI) and Related Funding Programs: FY2005 Assistance*. Washington: Congressional Research Service & The Library of Congress.

A first example of PMSCs in the *Military Consultant Firms* category is the contract for military training that *Military Professional Resources Incorporated* (MPRI) started in 2000 to help restructure the Colombian Armed Forces in their fight against drugs⁴⁹ and then to work with the Army and National Police to train them in psychological operations, intelligence, and logistics.⁵⁰

In 2006, the PMSC *ARINC, Inc.* signed a US\$20 million contract financed by Plan Colombia fund to develop personnel training activities, maintenance, and logistical support for the *Colombian Air Bridge Denial* program.⁵¹

Only two PMSC's hired in the context of Plan Colombia (*Northrop Grumman* and *DynCorp*) developed activities that have *Military Provider Firms* characteristics, meaning companies that offer military operations services and participate directly in combat.

Northrop Grumman was hired for US\$30 million⁵² as a subsidiary of the *California Microwave Systems Inc.* company. Their activities consist in flying over the Colombian jungle with aircraft equipped with infrared cameras with the objective of making reconnaissance flights over illegal activities related to drugs or guerrilla movements;⁵³ in 2003, the last job undertaken by *Northrop Grumman* in Colombia before being replaced by a new PMSC, *CIAO*⁵⁴, led to several attacks by the FARC against airplanes and some of the PMSC's pilots were killed.

DynCorp currently holds the most important contract of the State Department in Colombia. Its tasks include participation in illegal culture fumigations, training, air transport, aircraft maintenance, reconnaissance, and search and rescue operations⁵⁵ which are focused on locating and shutting down aircraft or hostile actions taken by drug producers or traffickers.

DynCorp has an offensive role when it fumigates illegal culture. The aircraft that is in charge of dropping the glyphosate is always accompanied by two or three combat helicopters to protect them.⁵⁶ The aircraft involved in fumigation are subject of numerous attacks. Between 2001 and 2002, around ten attacks per month took place, but the numbers increased and in 2003 they reached their peak: 73 attacks. These numbers have since decreased and rest at an average of 26 attacks per month.⁵⁷ *DynCorp* uses helicopters "that have a mixed crew composed of both contractors and members of the *National Police*",⁵⁸ which are armed and open fire on the aggressors.

⁴⁹ *La guerra privatizada*, (November 10th 2002) *Semana*, n° 1071, Bogotá.

⁵⁰ Adams, D., & De La Garza, P. (December 3rd, 2000). *Military aid . . . from the private sector*. *St. Petersburg Times*.

⁵¹ The United States Department of State. (2007). *Report to Congress On Certain Counternarcotics Activities in Colombia*. Washington

⁵² Vargas, A. I. (February 26th 2002). *Colombia: Una amenaza conveniente*. *Semana* (1034).

⁵³ Forero, J. (14 de February de 2004), *Private U.S. Operatives on Risky Missions in Colombia*, *The New York Times*.

⁵⁴ *Idem*.

⁵⁵ *DynCorp-State Department Contract*, (2001) en <http://www.corpwatch.org>

⁵⁶ United States Government Accountability Office, G. (2004). *Drug Control, Report to the Honorable Charles E. Grassley, Chairman, Caucus on International Narcotics Control, U.S.Senate*. Washington: GAO. p9.

⁵⁷ *Ibid.*, p. 1.

⁵⁸ *Mercenarios*, (August 13th, 2001). *Semana, Op. Cit.*, author's translation

The SAR team, would be the second example of *DynCorp's* involvement in the Colombian conflict. In 2001, it was estimated that the SAR had participated in about 15 rescue missions.⁵⁹

The US Embassy does not effectively oversee *DynCorp's* activities. The PMSC is in charge of hiring the employees, and providing the necessary material - the US government is interested only in outcomes.⁶⁰

b. PMSC and immunity: a risky bet

The presence of PMSCs in the context of Plan Colombia can be justified economically, militarily and politically. The interest in using such firms comes from the US as well as from Colombia, the first wanting to reduce the production and traffic of illicit drugs, and the latter trying to gain military expertise to confront its internal conflict. These reasons could be enough to understand this strategy as appropriate. But the participation in the Colombian conflict and the protection that US employees enjoy bring different problems for justice in Colombia.

For example, in August, 2007 an American soldier and a PMSC contractor working in the Tolemaida base, raped a twelve year old girl.⁶¹ The Colombian judicial system opened an investigation, but there is a very high probability that nothing will be achieved. A similar case happened in 2004; contractors from the same base recorded a pornographic movie with minors.⁶² Colombian justice cannot act, it is impossible to summon the defendants and also to make a request for extradition. The two cases currently still remain unanswered, in Colombia as well as in the US.

DynCorp employees, involved in heroin trafficking in 2001, also enjoyed total immunity.⁶³ The Colombian police tried to start an investigation, but quickly the investigators were gagged. The legal authorities in the US and Colombia were not interested in the case. The US congresswoman Shakowsky reacted to this case in 2001 criticizing the accuracy of the US policy of war against drug, however 8 years later impunity is still relevant today. PMSC employee impunity cases in Colombia reduce credibility in Colombian justice in military aspects, already weakened by several problems related to Human Rights violations and Armed Forces.

Colombian military personnel were accused in several cases of aiding paramilitary groups and violating human rights, but starting in 1998, an institutional restructuring took place, where most of the military personnel were professionalized and the number of soldiers increased.⁶⁴ But in spite of this 1998 reform, human rights violations by the armed forces in the community are still high and the Colombian military justice system is trying to win credibility.

The impunity to which PMSC employees are entitled, does even more harm to the judicial system in Colombia. But the difference lies in the fact that in cases where

⁵⁹ *Mercenarios*, (August 13th, 2001). *Semana*, *Op. Cit.*

⁶⁰ US Embassy in Bogotá employee, May 4th, 2007, A. Perret interviewer.

⁶¹ *Investigan a dos militares de E.U. por violación de niña de 12 años en Comando Aéreo de Melgar*, (October 7th, 2007). *El Tiempo*.

⁶² Murcia, D., (April 19th, 2007), *Corporación Colectivo de Abogados*, A. Perret interviewer.

⁶³ *Mercenarios*, (August 13th, 2001). *Semana*, *Op. Cit.*

⁶⁴ Leal Buitrago, F. (2006), *La Inseguridad de la Seguridad, Colombia 1958-2005*, Bogotá: Planeta, p. 204.

military personnel are involved it is possible to rectify previous actions, while in the case of contractors it is more difficult as there is still no regulation on the activities they perform.

This injustice should be analyzed and compared with Plan Colombia's objectives and, in a more general way, with US-Colombia cooperation. In the US, the main objective of Plan Colombia is to "combat illegal narcotics traffic".⁶⁵ In Colombia, if the anti-narcotic component is clear, the Police and Army strengthening is also a vital element to justify the Plan.

To some extent, Plan Colombia can be considered successful, not because of the fight against drug traffic for in this area the Plan was a complete failure⁶⁶, but thanks to the strengthening of public forces and to the rebuilding of the Colombian State's legitimacy. But if the technical capacity of the Colombian Public Force truly improved, human rights violations and military justice problems are still a serious concern. In this context, it is legitimate to ask if the use of PMSCs with immunity acts to the benefit or detriment of the main interests of Plan Colombia.⁶⁷

CONCLUSION

The use of PMSCs in Colombia became a common practice in the end of the 1990s. The rise of the market of security at the international level and the internal conflict situation reigning in Colombia made this country propitious for the installation of foreign PMSCs and the creation of national PMSCs.

To regulate this development of private security the State tries to control their operations by imposing certain limitations, such as the possession of weapons or by controlling their activities. A special entity is in charge of oversight of the activities of these companies. However in practice this oversight is not effective; in Colombia there persists significant problems of knowledge and registration as well as companies operating without license; the Vigilance and Private Security Superintendency does not act with decentralized entities to inspect the PMSC's activities; and the illicit acts committed by the PMSC's personnel are only processed with many difficulties.

In Colombia, surveillance and private security services have become more regulated, while the military dimension or potential of these companies has been underestimated. This situation has perpetuated negligent ignorance of the use of arms and the type of arms utilized for each operation; few controls over the armed capabilities of their personnel; and even the difference between the military forces' duties and the PMSCs' obligations in some cases is fading.

The major attention and regulation of PMSCs in Colombia is concentrated in the national operations. This trend fails to respond to the need caused by the expansion of this industry when foreign companies are frequently required and hired in the country. At the same time, there is no way to control completely the type and objectives of the

⁶⁵ Plan Colombia: Plan para la Paz, la Prosperidad y el Fortalecimiento del Estado, available at <http://usembassy.state.gov>.

⁶⁶ For details on the drug production in Colombia see the UN report: "*Colombia: monitoreo de cultivos de Coca*", *Oficina de las Naciones Unidas contra la droga y el delito, junio 2009*, available at <http://www.unodc.org/colombia/es/index.html>

⁶⁷ Perret, A. (2009), *Las compañías militares y/o de seguridad privadas en Colombia: ¿una nueva forma de mercenarismo?*, Pretexto n°34, Universidad Externado de Colombia.

services executed by these companies, considering the backwardness of the legislation and the deficiencies of the control and judicial organisms.

On the other hand, PMSCs are present in Colombia in the frame of a military agreement between the US and Colombia. For more than half a century, the US has been collaborating on the military level with Colombia and since the 1999 set up of the “Colombia Plan”, this collaboration has been reinforced. Part of these activities, until then confined to US soldiers, were outsourced to PMSCs, increasing the quantity of PMSCs present in Colombian territory.

The agreements between the two countries provide that the US personnel present in Colombia benefit from total immunity. It is impossible for the Colombian justice system to take any action against US personnel who flout the law. This immunity or gap in the law is reinforced in the case of the PMSC’s employees because they are not subject to the Colombian legal system or to the military justice of the USA.

The Colombian case, as a territorial state, shows several facets of the problem. The lack of will from the state to regulate effectively the companies is obvious. In spite of the existence of a law purporting to control the phenomenon of private security, the Colombian government does not regard the phenomenon as a possible problem. PMSCs are considered a new tool able facilitating good progress of security policy, and not as possible competitors of the use of force or as a threat against the civil society. However, many cases of violation of human rights show that stricter control by the authorities is necessary.

The disinterest of the government in the field can be noted at several levels. First of all there is no reference in Colombian legislation to the crime of recruiting, using or training mercenaries. Colombia has not signed or ratified the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989. Subsequently it has not yet authorized an official visit from the UN’s working group on mercenaries, which has been requested since 2005.

Colombia did not participate in the Swiss initiative. And finally, during the preparation of a political debate on the subject with the Colombian senate, the government did not recognize the phenomenon.

At the same time the countries exporting security services (in this case mainly the US); do not really promote control and accountability of the PMSCs and their activities. The immunity for the PMSC employees is a decision of the home state. In this case, where the principal objective declared in military cooperation is the reinforcement of the local institutions to make zones safe and to fight against organized crime or terrorism, it is not very probable that blocking local justice is helpful.

Finally, the responsibility returns to the home state because it is the home state which imposes the conditions under which the PMSC will work, but it is probably not the best option for a real and effective control of the phenomenon.

Table 1: Number of PMSC by type of service

SERVICE OF PRIVATE SECURITY	No.	% OF SERVICES OF PRIVATE SECURITY	% OF THE TOTAL OF SERVICES
ARMED SECURITY COMPANIES	97	32,90%	14,70%
UNARMED SECURITY COMPANIES	6	5,00%	2,20%
COOPERATIVES ON SURVEILLANCE AND PRIVATE SECURITY	0	3,30%	1,50%
TRANSPORTATION OF VALUABLES		0,40%	0,20%
SECURITY DEPARTMENTS	68	50,90%	22,60%
COMPANIES OF SHIELD SERVICES	0	1,30%	0,60%
ADVISORY COMPANIES	3	0,90%	0,40%
COMMUNITY SERVICES FOR SURVEILLANCE AND PRIVATE SECURITY		0,00%	0,00%
TRAINING COMPANIES	2	4,10%	1,80%
LEASING COMPANIES OF ARMoured VEHICLES	8	1,20%	0,50%
TOTAL OF SERVICES ON PRIVATE SECURITY	510	100%	44,50%
OTHER SERVICE OF PRIVATE SECURITY	No.	% OF OTHER SERVICES OF PRIVATE SECURITY	% OF THE TOTAL OF SERVICES
TRAINING DEPARTMENT	1	0,60%	0,30%
ADVISORY, CONSULTANT AND RESEARCHING	364	72,50%	40,20%
INSCRIPTIONS IN REGISTER	07	26,90%	14,90%
TOTAL OF OTHER PRIVATE SECURITY SERVICES	882	100%	55,50%
Source: Database of the office of planning of the VPSS until June 1st of 2009			
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