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## Private Military Services in the UK and Germany: Between Partnership and Regulation<sup>1</sup>

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### ABSTRACT

*Controversial cases such as the aborted coup in Equatorial Guinea and the employment of private contractors in the Abu Ghraib prison have brought the proliferation of private 'mercenaries' to worldwide attention. However, the privatization of military security is more diverse and complex than generally suggested. Specifically, one needs to distinguish between the use of private mercenaries in developing countries and the privatization of military services in Europe. Focussing on the latter, this article proposes that the privatization of military services in industrialized countries can be understood in terms of a shift from 'government' to 'governance'. As a consequence, the emergence of a private military industry in Europe is not only characterised by distinct forms of governance failure, also have European governments developed new modes of governance to control the industry. Using the United Kingdom and Germany as examples, this article examines two modes in particular: public private partnerships and governmental regulation.*

The emergence of a private military service industry has attracted considerable academic and public attention in recent years. In particular, the controversial involvement of private mercenary companies such as Sandline International and Executive Outcomes in Sierra Leone and Angola and the proliferation of private security contractors in Iraq have spawned a growing literature on the privatization of security and its problems.<sup>2</sup> The main the problems identified in these studies are challenges to state sovereignty, the militarization of societies, criminal activities such as trafficking in arms, and the lack of control, transparency and accountability with regard to these companies in particular when they deal with sensitive issue such as policing and interrogation. Most authors assert that these problems are due to a lack of national and international regulation of private military companies.

The aim of this article is to present a more differentiated perspective of the character of the private military industry and the governance of the sector. Specifically, it suggests that one needs to distinguish between the use of private [p.277] mercenaries by developing countries and the privatization of military services in Europe and North America. While so far most studies have tended to generalize the experiences with private military companies in the Third World, this article focuses on Europe. Two reasons support this focus. First, although the use of mercenaries in Africa has been best publicized, the large majority of private military companies are not only based on Europe and North America, but are also employed by governments in industrialized

countries. Second, while developing countries may be most threatened by the problems associated with the use of private military companies, governments in industrialized countries are best placed to regulate them. Third, the export of private military services such as strategic training to volatile destinations has direct security implications for Europe and North America.

Although this article concentrates on Europe, the use of private military companies by industrialized nations and the export of military services to Third World countries are thus closely linked and will both be examined in order to provide a comprehensive picture of the governance of the private military sector. As will be illustrated below, the relationships between private military companies and their Western home governments frequently contribute to shaping the corporate structure of these firms and thus influence their behavior at home as well as abroad. Similarly, European and North American regulations pertaining to the standards of national private military services are likely to increase the level of their provision overseas. The reverse holds also true. If demand for the regulation of military service exports to other countries increases due to controversial actions, this often also brings the control of national private military services in Europe and North America to public attention and on the political agenda.

In order to understand the nature of the private military industry in Europe and the mechanisms used by industrialized nations to control it, this article builds on the argument that the outsourcing of military services by European and North American states can be understood in terms of a shift from 'government' to 'governance'.<sup>3</sup> As a consequence, governments are developing new means for controlling the increasingly private provision of public services. This article uses the examples of the United Kingdom and Germany to analyze two governance mechanisms in particular: public private partnerships and governmental regulation. The first mechanism involves different types of commercial relations between public and private actors, including outsourcing, joint ventures, and state shareholdings in the defense sector. The second mechanism sets the legislative framework for the national provision of private military services and for their export overseas. The comparison between the two countries is particularly interesting because each has adopted a very different approach towards the governance of private military services.

Before one can turn to an analysis of the private military industry in Europe, it is necessary to clarify what is meant by 'private military companies'. Typically, the literature distinguishes three categories: mercenary firms, private [p.278] military firms, and private security firms based on whether they provide combat services, military training and strategic advice, or logistics and technical support.<sup>4</sup> However, most studies recognize that these categories are at best ideal-types and that many companies provide functions across these areas.

The analysis presented in this article, therefore, focuses on private military services rather than companies. It defines private military services as services directly related to the provision of national and international security which are offered by registered companies. These services can take a variety of forms from combat to military training, advice, and logistics. In Europe, and in this article, they are mainly confined to the latter. The definition also includes services provided by semi-private and

government-owned firms if they take a company structure and operate under corporate law. It does not specifically focus on private policing is so far as it refers to the security of private persons and companies at the domestic level. For this reason, this article prefers the term 'private *military* services' over 'private *security* services' which is also used in reference to private policing.<sup>5</sup>

## **Governance through Public Private Partnerships**

One of the most central mechanisms for the governance of the private military industry in Europe can be subsumed under the heading 'public private partnerships'. The term includes a variety of arrangements which are defined by different relations between governments and private companies in the public service sector. Public private partnerships can range from the outsourcing of single functions or entire service sectors to joint ventures and fully government-owned private companies. Each type of public private partnership is associated with different forms and levels of governmental control. Whereas outsourcing provides supervision through commercial contracts, joint ventures and shareholdings directly involve governments in the provision of public services.

The following sections examine how the United Kingdom and Germany have employed different forms of public private partnerships to shape the outsourcing of military services. It shows that, although both countries have embraced the view that private companies are able to provide military support at better value for money than their national armed forces, they have adopted different positions on whether and how to control their emerging private military service industries.

### *The United Kingdom: From Outsourcing to Private Finance Initiatives*

The outsourcing of military support services to private companies has been one of the most notable features of the reform and transformation of European militaries in the 1990s. One of the frontrunners in this development has been the United Kingdom, where the Labour government under Tony Blair has [p.279] progressively expanded the role of private military companies in the provision of national and international security functions.

The British government has fostered the development of a private defense industry since the mid-1980s. At the time the Thatcher administration began with the privatization of the national armaments industry, including the British Aircraft Corporation, Royal Ordnance, Rolls Royce and the Royal Dockyards.<sup>6</sup> Since then the New Labour government has further advanced the use of private companies with the outsourcing of a growing range of military services. While early projects introduced the private provision of non-military services such as support vehicles, the handling of equipment, and estate management, the scope of public private partnerships was soon extended to include contracts for the privatization military service functions.

One of the first steps has been the outsourcing of military training, such as the private sector provision of flight simulators and instructors for the Hawk Synthetic Training Facility in Anglesey in 1998.<sup>7</sup> Another example has been the Medium Support Helicopter Aircraft Training Facility which provides initial and continuation training as well as mission rehearsal for the RAF's fleet of Puma, Chinook and Merlin aircrews.<sup>8</sup> Since then the British Ministry of Defense has signed contracts with a multiplicity of private companies including for the training of pilots for the RAF's attack helicopters, light aircraft, Lynx helicopters and Tornado fighter jets, of crewmen for the Navy's ASTUTE class submarines, and of 16-17 year-old students at the Army's Foundation College.<sup>9</sup>

Originally the majority of public private partnerships involved the outsourcing of military services to private companies. In particular, the 'Competing for Quality' initiative which was initiated during the 1990s 'encompassed 160 areas of business, costing some 1.5 billion annually' half of which were outsourced to private businesses.<sup>10</sup> The British government has thus from the start adopted a market-oriented approach to the emerging private military service industry in the United Kingdom. The outsourcing of military functions to private firms has been designed to draw on the existing expertise of private businesses in producing services at maximum value for money. Governmental involvement in the privatized sector has been perceived as hindering this aim because it would restrict companies' ability to operate according to market principles. Instead, officials were instructed to view private firms as partners which should have an equal input into how services are provided.<sup>11</sup> Contracts have provided the primary means of governance in these schemes. However, while the exclusive reliance on contracts as a control mechanism seemed to be justified by the initially non-military character of privatized services, a number of developments have begun to change the nature of public private partnerships in recent years.

In particular Private Finance Initiatives (PFIs), which were originally announced as the Ministry of Defence's (MoD) 'first choice method of funding new capital projects'<sup>12</sup>, have substantially transformed the relationship between [p.280] the public and the private sector in military affairs. Although the MoD has since the inception of the program become more careful with the use of PFIs and has established strict criteria for the evaluation of their economic and military suitability for individual projects, the MoD had signed 42 Private Finance Initiatives with a value of over £2bn by 2002 and was considering some 50 new projects with an estimated value of £12bn in September 2003.<sup>13</sup> Under the PFI scheme, the British government invites private companies to bid for not only for the servicing, but also the construction and maintenance of military facilities. Private companies finance these projects in return for military service contracts with the British government which typically last between ten and forty years and guarantee continuous income in the form of agreed fees. In addition, some projects allow companies to generate 'third party revenue' from the sale of spare capacities to private customers in the UK and abroad, although the contracts can include controls for sensitive destinations.

Notable about PFIs is that they influence the structure of the private defense sector. In particular, PFIs have facilitated the growth of the private military service industry in the UK. Moreover, since British PFIs require a prime contractor, i.e. a single

company which signs the contract with the government, they have fostered close prime contractor-supplier relations and the creation of consortia specifically designed to compete for MoD projects.<sup>14</sup> The PFI contract for the Medium Support Helicopter Aircraft Training Facility, for instance, is held by CVS Aircrew Training which is a consortium of CAE Electronics, Vega, and the outsourcing specialist Serco. Under the contract CAE designed, built, and operates the facility, while Vega supplies computer or internet-based training products, and Serco provides the training.<sup>15</sup> Many of these consortia are not led by service companies, but by defense corporations which are thus entering the market for military services. In addition, defense corporations are increasingly bidding directly for training, maintenance, and servicing related to their equipment.

Another characteristic of the PFI program has been the growing range of functions which have been taken on by private contractors. While initially outsourcing was confined to non-military support and management, it is including more and more military functions such as logistics and training today. As a consequence, private support operations have moved progressively towards the front line. Although the British government maintains that there is a distinction between combat, which remains the prerogative of its national armed forces, and combat support, which may be delegated to private military companies, this distinction is weakening. In particular, the recent intervention in Iraq has challenged the notion that there is a clear line between armed forces which operate in the field and the employees of private military companies which will not become directly involved in military exchanges. The British MoD has, therefore, developed the idea of 'Sponsored Reserves'.

The Sponsored Reserve concept, which was incorporated into British law in the *Reserve Forces Act* (Part V) in 1996, is designed to enable private companies [p.281] to provide military support services in conflict situations by enrolling parts of their workforces as voluntary 'Sponsored Reservists'.<sup>16</sup> These employees will become members of the Volunteer Reserve Forces and will receive training accordingly. The use of Sponsored Reserves is tightly regulated. When serving with the Armed Forces, they are subject to the Service Discipline Acts and Service regulations. Moreover, Sponsored Reserve employers have no right to appeal against a call out. As with other reserve forces, the maximum call-out period is nine months. However, for Sponsored Reserves the call-out period might be extended with the agreement of the reservist and the employer. So far, Sponsored Reserves have only been used in the Armed Forces Mobile Meteorological Unit.<sup>17</sup> However, in a contract signed in December 2001 further Sponsored Reserves were agreed on for one third of the employees servicing the new Heavy Equipment Transporter. The contract will outsource the transport, deployment, and evacuation of tanks and other heavy vehicles in international crises. More Sponsored Reserves are planned as air and ground crew of the Future Strategic Tanker Aircraft for in-flight refueling, which will at £13bn be the most costly PFI project so far.<sup>18</sup>

With the Private Finance Initiatives, the British government is thus transforming the relationship between the public and private sector. Not only is the growing scope of private military services and the move towards the front line increasing the dependence of the MoD on private firms, prime contracting also facilitates the national and

transnational consolidation of the industry which contributes to reducing the competition among private companies.<sup>19</sup> Moreover, PFIs with their long-term commitments of between ten and forty years place a heavy burden on the design and management of public-private contracts. Most contracts establish a close rapport between the MoD and the private sector companies. However, if this fails, the renegotiation of the initial terms of a contract can be rather expensive. Moreover, while minor reviews occur on average after five years, the majority of contracts include only one major review - usually at half term - which allows for the discontinuation of the arrangement. Since the PFIs mean that the ownership of military service facilities as well as technical expertise remains with private companies, the MoD may find it difficult to opt out of such contracts because it will lack the facilities and staff which could replace the private contractor in the short term. Most crucially, the terms of PFIs are not public. Finally, unlike governmental regulation, PFI contracts do not have to be approved by Parliament - neither, in fact, has the call-out of Sponsored Reserves. Thus, while contracts between the government and private military companies or Sponsored Reserves may give the executive some control, they lack transparency and offer only limited public accountability.

#### *Germany: Between Selective Privatization and Shareholdings*

In recent years many European countries have looked to the UK as a model for the outsourcing of military services and have embarked upon similar [p.282] measures.<sup>20</sup> Germany has taken steps towards the use of private companies through the reform of the Bundeswehr since the mid-1990s. The approach taken by the German government in the outsourcing of military services, however, has been quite distinct from that of the United Kingdom. Although the German government planned to introduce market principles into the Bundeswehr as early as 1994, it has been much more cautious in the outsourcing of military functions than the UK. Not only has privatization been slower, the German government also has tried to maintain direct control over military support services through full or partial government ownership.

The first steps towards the use market mechanisms were made in 1994 when the German Minister of Defense ordered for the entire military services to be redesigned and - 'where appropriate' - to be privatized. However, significant progress has only been made since the signing of the Framework Agreement 'Innovation, Investment and Efficiency in the Bundeswehr' between the Minister of Defense and representatives of the German economy on 15 December 1999.<sup>21</sup> By 2003 nearly 700 private companies in Germany had signed up to the Framework Agreement which identified fourteen pilot projects for privatization ranging from information technology to military training and logistics.<sup>22</sup>

The projects envisaged under the Framework Agreement take the form of conventional outsourcing of military services to private companies. In these outsourcing schemes the Bundeswehr maintains the ownership of military assets, while private firms are taking over associated services such as management, operation, and training. However, only a limited number of pilot projects have been implemented successfully.

They include private military support for the Army Combat Training Center (*Gefechtsübungszenrum*) Altmark and training for the Eurofighter aircraft.

In 2001 the first three-year € 75m contract for the Army Combat Training Center went to GÜZ-System-Management Ltd., a company owned in equal shares by STN Atlas Elektronik<sup>23</sup>, EADS/Dornier, and Diehl. The second contract from 2003 to 2008 has been granted to Serco and SAAB Training Systems. Under the terms of the contract, the private contractors provide management, logistical support, facility maintenance, and technical support for training reviews and meetings. Military leadership and the training itself, however, have remained within the remit of the Bundeswehr.<sup>24</sup>

The Eurofighter project has involved the initial training by EADS Military Aircraft of pilots and ground crew, as well as the creation and management of a flight simulation center.<sup>25</sup> As part of the former, EADS Military Aircraft provides ‘instruction using functional models, training sessions in the various simulators and active flight hours on the Eurofighter aircraft’.<sup>26</sup> Unlike the outsourcing of flight training in the UK, however, EADS Military Aircraft has only been hired to train the first rounds of Luftwaffe pilots who will then become instructors for the German Air Force and replace the private contractors.[p.283]

In some aspects these two projects are comparable to the early outsourcing of military services in the United Kingdom. The main control mechanism in these public private partnerships are short-term contracts with private service providers. However, the relatively short duration of the contracts in comparison to similar projects in the UK presents a controlling factor which not only seeks to prevent long-term dependence of the Bundeswehr on a single service provider, but also can act as an enforcement mechanism because the continuation of the public private partnership is based on the satisfaction of the Bundeswehr.

Moreover, while these projects envisage the private provision of individual military services on the basis of case-by-case market testing assessments, the German government has taken a different approach with regard to the management of three core segments of the Bundeswehr: white fleet, clothing supplies, and information technology.<sup>27</sup> To evaluate the options for public private partnerships in these and other areas, the German government created a private company, the Corporation for Development, Procurement and Operations (*Gesellschaft für Entwicklung, Beschaffung und Betrieb*, GEBB), in 2000.<sup>28</sup>

Unlike the British MoD, the fully government-owned GEBB appears to have been keen to maintain a direct involvement in the provision of military services. While the GEBB admits that the outsourcing of the three core areas to private companies would achieve the highest possible efficiency, it has repeatedly made the case that privatization finds its limits where military services of ‘strategic relevance’ are concerned.<sup>29</sup> In particular, the GEBB has argued that the German constitution requires that the Bundeswehr preserves a control and coordination function over the private provision of military services.

For the management of the white fleet the GEBB has, therefore, created the BwFuhrparkService company, a joint venture owned to 75.1 percent by the GEBB and to 24.9 percent by the Deutsche Bahn AG, the government-owned German train

company. The joint venture sufficiently takes into account the size and strategic importance of the white fleet by reserving strong intervention rights and options for the government. Specifically, the arrangement contractually safeguards the steering authority of the government and places representatives of the Bundeswehr on its board of chairmen.<sup>30</sup>

The provision of clothing supplies for the Bundeswehr by the LHBundeswehr Bekleidungsgesellschaft follows the same model, but with the greatest contribution of the private sector among the three core areas so far. In this case, the GEBB has set up a semi-privatized company with a government minority shareholdership of 25.1 percent. The remaining 74.9 percent are owned by a consortium of the German subsidiary of the American corporation Lion Apparel and the Osnabrück-based Hellmann Worldwide Logistics.<sup>31</sup>

The third sector, the IT provision of the German armed forces, is currently being investigated under the project name 'HERKULES'. Given the sensitivity of IT for the Bundeswehr, the government is considering a similar corporate [p.284] setup, but with a significantly higher government share of 49.9 percent. Further public private partnerships and outsourcing projects are currently explored in the areas of food services, logistics, and training.<sup>32</sup>

In contrast to the United Kingdom, the German government is thus using corporate shareholding and joint ventures as mechanisms for the control of private military services. Rather than relying exclusively on contractual obligations, these public private partnerships enable the Bundeswehr to exert immediate control over these companies and determine how services are provided. This ability is crucial where, as the GEBB asserts, strategic concerns are more important than cost efficiency. Moreover, through governmental shareholding the Ministry of Defence becomes publicly accountable for the operation of private military services. In spite of its advantages, however, the governmental shareholder model as it has been developed by the GEBB has run into problems. Specifically, the Higher Superior Court of Düsseldorf has ruled on 30 April 2003 that even companies with a governmental minority ownership, such as the LHBw Bekleidungsgesellschaft, are subject to public procurement procedures.<sup>33</sup> The ruling thereby eliminates one of the main cost reducing effects of government shareholdings and may result in pushing the Bundeswehr towards full privatization and conventional outsourcing.

## **Governance through Regulation**

The preceding sections have illustrated how public private partnerships can be used to structure and steer the private military service sector in Europe. Nevertheless, public private partnerships are not always a sufficient mechanism for ensuring the transparency, accountability, and control of private military companies. In particular, when private military services are provided to non-governmental customers domestically or abroad there appear to be few safeguards. In particular, military service transfers are a contentious issue as shrinking relative defense budgets and the limited size of national defense markets in Europe have increased in the importance of exports



during the 1990s. In the armaments sector this has been evident in the rising proportion of exports in most major European countries.<sup>34</sup> So far no data is available on the export of private military services. However, in particular the UK government appears to expect that private military companies will achieve some cost-savings from the sale of excess capacities to third parties within the country or abroad. In addition to the spread of armaments and dual-use goods, the international community thus increasingly faces risks from the proliferation of military knowledge and expertise, including tactical advice and training, among non-state actors domestically and overseas.

In response to these threats, European governments have used national regulation as another governance mechanism to control their emerging private military industries. In particular, three sets of controls are relevant for the [p.285] private military industry: the regulation of private policing, the licensing of armaments and dual-use exports, and the regulation of mercenaries and private military companies.

The regulation of private policing is one area which potentially shapes the provision of private military services in Europe. Whether and to what degree it does so mostly depends on the definition of private policing or security services embraced by different countries and the scope of national regulation. A comparison of national legislation conducted by the European Confederation of Security Services (CoESS) shows significant differences.<sup>35</sup> Some European countries, such as Denmark, Finland, France, Portugal and Spain, have strict and comprehensive controls. Others, such as Italy, have only narrowly defined regulations.<sup>36</sup> Some countries have had laws controlling the private security services since the early 1980s. Whereas the United Kingdom and Ireland have for a long time favored a self-regulation of the sector and have introduced national legislation as late as 2001.<sup>37</sup> With the growth of the industry, however, most governments have taken a more proactive approach towards the regulation of private policing and security services. This both, the United Kingdom and Germany have recently strengthened their controls.

The second set of regulations which have an impact on the private defense industry are national armaments and dual-use export controls. Although these controls have traditionally focused on equipment, in recent years there has been a growing recognition that non-proliferation policies need to be adapted to include services. Part of this development has been the licensing of the electronic transfer of sensitive technologies. In addition, the spread of small arms has given rise to strengthened controls on the trafficking and brokering of weapons.

Finally, the United Kingdom has been the first European government to investigate the possibility of regulating of mercenaries and private military companies. The process has led to the publication of a Green Paper 'Private Military Companies: Options for Regulation' in February 2002.<sup>38</sup> However, so far the British government has failed to announce a timetable for the drafting and implementation of such controls.

Examining each set of regulations in the United Kingdom and Germany, the following analyses to what degree they allow both countries to control the domestic provision and the transfer of private military services.

*The United Kingdom: High Profile, Less Punch*

At first sight the British government appears to have the broadest range of regulatory measures to supervise private military services at home and their export abroad. Not only has the United Kingdom regulations for private policing services, it has also recently expanded its controls for armaments, and it is considering the licensing of private military companies. Nevertheless, the high profile legislation which has been introduced by the New [p.286] Labour government seems to be less strict than controls which have been used by other European countries for some time.

Notably, the United Kingdom only introduced regulations for private policing services in May 2001. The Private Security Industry Act 2001 has set the basis for the governance of domestic private security services. However, by 2004 it was not yet fully implemented and therefore difficult to assess.<sup>39</sup> The Act has established a Security Industry Authority (SIA) which has specified licensing criteria for door supervisors, wheel-clampers, security guards, and events security. It is still in the process of setting those for keyholders, private investigators, and security consultants. So far the criteria include a criminality check, although a previous conviction does not preclude a license but will be evaluated on a case-by-case basis, and basic training requirements of on average 30 hours.<sup>40</sup>

As far as private military services are concerned, the Act includes a number of regulations which may contribute to the governance of the sector. However, it needs to be noted that these regulations will only apply to services offered within the UK. As soon as a British company operates in another European Union member state, a different national law applies. In particular, the private military industry is affected by the vetting and training of security personnel falling under the categories 'security guards' and 'security consultants'. However, the Private Security Industry Act fails to regulate services related to or personnel engaged in strategic training, military logistics, and management. The export of military services to customers overseas is also not covered by the legislation.

Potentially more effective controls over private military service exports have been included into the British legislation of armaments transfers which underwent a major review in 2002. The new British Export Control Act 2002 for the first time controls the provision of technical assistance abroad as well as the brokering and trafficking of arms.<sup>41</sup> The Export Control Act 2002 replaces the Import, Export and Customs Powers (Defence) Act of 1939 and brings current British legislation in line with requirements of the European Union and international obligations. Specifically, the act implements the Statement of Principles on trafficking and brokering published in the Third Annual Review of the EU Code of Conduct on 11 December 2001<sup>42</sup>, and the European Joint Action of 22 June 2000 on the provision of technical assistance<sup>43</sup>.

Specifically, private military services fall under the specifications of the new Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 which prohibits 'any technical support related to repairs, development, manufacture, assembly, testing, "use", maintenance or any other technical service [...] in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological

or nuclear weapons or other nuclear explosive devices, or the development, production, maintenance or storage of missiles capable of delivering such weapons' outside the European Community.<sup>44</sup>[p.287]

In addition, the services of private military companies are affected by the Trade in Goods (Control) Order 2003 and the Trade in Controlled Goods (Embargoed Destinations) Order 2004 which regulate trafficking and brokering of controlled goods to embargoed and non-embargoed destinations.<sup>45</sup> The former prohibits UK persons or companies and persons in the UK from trafficking and brokering in 'any restricted goods, where that person knows or has reason to believe that his action or actions will, or may, result in the removal of those goods from one third country to another third country'.<sup>46</sup> The latter requires that no UK person or company and person in the UK 'shall directly or indirectly (a) supply or deliver; (b) agree to supply or deliver; or (c) do any act calculated to promote the supply or delivery of, any controlled goods to any person or place in an embargoed destination'.<sup>47</sup>

However, while the new controls affect some forms of private military services and prohibit trafficking and brokering of certain goods to embargoed destinations which is sometimes conducted by private security companies, the Export Control Act 2002 does not explicitly concern itself with the regulation of the private military service industry. The main imperative for the extension of export controls to the transfer of military services such as technology and technical assistance is the growing perception of threat from the proliferation of weapons of mass destruction (WMDs). Consequently, the proposed regulations only require licensing if these services are linked to WMDs. The provision of technical assistance and technology related to conventional weapons generally remains unregulated. In addition, the current definition of 'technical assistance' does not mention military consulting and training.

The failure of the British Export Control Act 2002 to regulate the export of private military services is the more remarkable since the consultations about the act have been conducted parallel to the drafting of the British Green Paper 'Private Military Companies: Options for Regulation', its discussion in the Ninth Report of the House of Commons Foreign Affairs Committee and the subsequent response of the British government.<sup>48</sup>

The Green Paper, which is the first and so far only attempt by a European government to explore legislation on mercenaries and private military companies, lists a variety of options for their regulation, their advantages and disadvantages.<sup>49</sup> Specifically, the Green Paper examines three policy options: (1) a national and international ban on mercenary activity, (2) national licensing of private military companies and exports and (3) the self-regulation of the industry.

The first option would be the most effective, but is dismissed both by the Green Paper and the Foreign Affairs Committee Report on the grounds that it would be too difficult to enforce because of the problem of defining mercenary activities, because it would 'deprive weak but legitimate governments of needed support', and because it would deny British defence exporters legitimate business.<sup>50</sup>

The second option appears to be favored by both documents. The Green Paper specifically discusses the licensing of contracts for military and security [p.288] services abroad. It states that activities for which licenses were required might include

‘recruitment and management of personnel, procurement and maintenance of equipment, advice, training, intelligence and logistical support as well as combat operations. [...] For services for which licenses were required, companies or individuals would apply for licenses in the same way as they do for licenses to export arms (though not necessarily to the same Government Department). Criteria for the export of services would be established on the same lines as those for exports of arms’.<sup>51</sup> In addition, the Green Paper raises the possibility of a registration of private military companies, the notification of the government of contracts for which companies are bidding, and a general license for private military services to a specified list of countries.<sup>52</sup> It seems most skeptical of the last option which it argues ‘would provide little protection for the public interest’.<sup>53</sup> However, the Green Paper admits that a general license could be used in conjunction with other regulatory measures.

The Foreign Affairs Committee broadly follows this line by recommending that ‘each contract for a military/security operation overseas should be subject to a separate licence, with the exception of companies engaged in the provision of non-continuous services for whom the Government considers a general licence would suffice’.<sup>54</sup> However, the Committee also supports that ‘private military and security companies be required to obtain a general licence before undertaking any permitted military/security activities overseas’.<sup>55</sup>

The third option of encouraging the self-regulation of the private security industry is considered insufficient in both documents because it would prevent the government from restraining private security companies which were acting contrary to British national interests abroad.<sup>56</sup>

However, while the British government has examined some of the options for the regulation of mercenaries and private military companies, so far no progress has been made on the drafting of these regulations. In fact, if the lengthy process which led to the regulation of the private security industry can serve as a model, British controls for private military services cannot be expected for some time.

In conclusion, the regulation of private military services in the United Kingdom has expanded, but remains fragmented and incoherent with different elements contained in a number of laws. Moreover, the failure of UK government to explore the implementation of the Green Paper following its publication appears to indicate a reluctance of the British government to fully exploit available governance mechanisms for the control of private military services. [p.289]

### *Germany: Long Standing, Low Key*

The German government has regulated private policing and the export of armaments more consistently over the past and has also stronger controls than the United Kingdom. The government has thus a number of mechanisms at hand with which to further assert its existing influence over its private military sector. Private security and policing services have been regulated by the German Trade Code (*Gewerbeordnung*) since 1927 as well as by special legislation for security services (*Bewachungsgewerberecht*) since 1995.<sup>57</sup> The Trade Code proscribes the assessment and licensing of service companies,

whereas the regulations of private security services which have been strengthened most recently in 1999 and in 2002<sup>58</sup>, define further requirements such as training hours, a written and oral test on legal and other requirements, sufficient insurance and other obligations for private security personnel. As services, private military services are also regulated by the Trade Code. Moreover, the private security regulations specifically refer to private military services where they concern the protection of military facilities.

In addition, private military services are partially regulated by the German Export Control Order (*Aussenwirtschaftsverordnung*). Specifically, the recent extension of export controls to technical assistance for the development of weapons of mass destruction and, unlike in the UK, for goods with military end-uses in a country on the German country list 'K' or subject to a national or international embargo has direct implications for the provision of private military services abroad. According to the German export control regulations, 'technical assistance' includes military services such as the repair, development, construction, montage, testing, maintenance, as well as teaching, training, and the supply of know-how. As in the UK, the restrictions apply to all German residents as well as to non-resident Germans.<sup>59</sup> However, licenses for technical services in relation to weapons of mass destruction and military end-uses in embargoed countries are also required where the assistance is provided in oral form, such as consulting or training, inside the European Community.<sup>60</sup> Finally, the German export control regulations demand authorization for the trafficking and brokering of arms on the national control list 'K' or to countries subject to an embargo where conducted by German residents.<sup>61</sup>

In sum, the German regulations concerning private military services domestically and abroad are as fragmented as in the UK, but more comprehensive. In particular, the German law has a broader definition of 'technical assistance' which explicitly includes the provision of know-how. It also does not distinguish between private military services, such as the training of personnel operating military equipment in embargoed countries, being provided by German nationals abroad or by residents at training facilities within Germany. Moreover, the German controls apply to services related to WMDs as well as other controlled goods. However, unlike the UK the German government has for far failed to consider a specific law which [p.291] would combine and consolidate current regulations regarding private military services.

## **Conclusion**

The preceding analysis has illustrated that European governments have a range of governance mechanisms at hand with which to control the growing private military service industry. Most of these mechanisms have a direct influence on the provision of military services not only in Europe, but also overseas. However, whether and how governments use these measures depends on their understanding of the dangers involved in the privatization of military functions and their willingness to inhibit the free operation of the market in the military service sector. Since there is often a perceived trade-off between the two, the question remains a political one.

This article has sought to show how this question has been resolved in the United Kingdom and Germany. The comparison is interesting because both countries have approached the governance of private military services in different ways. While the British government has placed considerable trust in the privatization of the sector and has only recently strengthened governmental regulation, the German administration has been careful to maintain its steering capabilities through public private shareholding of key military functions and through stricter legislative controls.

Since both countries have only relatively recently expanded their use of private military services, it is too early to evaluate the effectiveness of the different governance mechanisms adopted by the United Kingdom and Germany. Existing studies by the British National Auditing Office (NAO) and the US General Accounting Office as well as reports about Halliburton overcharging the United States government for services in Iraq indicate some problems with the reliance on contracts as a governance tool. These problems can range from loss of efficiency and lack of control, to insufficient transparency, and public accountability. The NAO, for instance, observed in its analysis of the British peacekeeping operation in Kosovo that inflexible contracts meant that the MoD had to pay damages for changing specifications and demands during the course of the operation.<sup>62</sup> The American experience with more flexible agreements, such as the indefinite-delivery, indefinite-quantity contract with Brown and Root in the Balkans, showed that the company used its freedom to oversupply the army and set higher specifications than would have been required - at full cost to the Department of Defense.<sup>63</sup> In addition, contractual governance can be criticized for its essentially nonpolitical nature. In particular, the contractual regulation of exports to sensitive destinations is not subject to parliamentary approval and thus lacks public transparency and accountability.

Regulation would be a more suitably mechanism for addressing these problems. However, current regulations are too young, fragmented, and [p.291] inconsistent to offer direct insights into the effectiveness of different types of national controls. Although the existing German controls surpass those of the United Kingdom regarding the sale of military services nationally and abroad, the prospective regulation of mercenaries in the UK might change this imbalance.

A positive outlook for the governance of the private military industry seems nevertheless justified by the observation that, as far as governmental regulation is concerned, the policies of the United Kingdom and Germany appear to have been converging over the past years. One explanation for this development is policy transfer due to the growing recognition of the dangers involved in the use of private military force at the national level and the export of private military services to third countries. After years in which the British government hoped for a successful self-regulation of private policing services, the failure of national service organizations to agree on and enforce common standards for the industry, the UK has thus turned to public regulation. In addition, the Sandline Affair, in which the Foreign and Commonwealth Office was accused of having had knowledge of the illegal export of arms to Sierra Leone by the London-based private military company Sandline International, led the British government to reconsider its armaments export controls and investigate the possibility of regulations for mercenaries and private military companies. Another explanation is

increasing pressure within the European Union to harmonize the regulation of private policing and military services in order to ease the transfer of services within the Community and to eliminate competitive disadvantages arising from differences in national export controls.<sup>64</sup> Independently of the underlying reasons, the current scope and prospects for the regulations of private military services in Europe and the developing world appear better than commonly assumed.

## Endnotes

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<sup>1</sup> The research for this article was funded by grants from the German Academic Exchange Service and the United States Institute of Peace.

<sup>2</sup> David Isenberg, 'A Fistful of Contractors: The Case for a Pragmatic Assessment of Private Military Companies in Iraq', Research Report 2004.4, London: BASIC, September 2004, at: <http://www.basicint.org/pubs/Research/2004PMC.pdf>, accessed 17 March 2005; Robert Mandel, *Armies Without States: The Privatization of Security*, Boulder, CO: Lynne Rienner, 2002; Kim Richard Nossal, 'Global Governance and National Interests: Regulating Transnational Security Corporations in the Post-Cold War Era', *Melbourne Journal of International Law*, vol. 2, no. 2, 2001, pp. 459-476; Peter W. Singer, 'Corporate Warriors: The Rise and Ramification of the Privatized Military Industry', *International Security*, vol. 26, no. 3, 2001/2, pp. 186-220; Juan Carlos Zarate, 'The Emergence of a New Dog of War: Private International Security Companies, International Law and the New World Disorder', *Stanford Journal of International Law*, vol. 34, no. 1, 1998, pp. 75-162.

<sup>3</sup> Elke Krahnemann, 'Conceptualizing Security Governance', *Cooperation and Conflict*, vol. 38, no. 1, 2003, pp. 5-26; Elke Krahnemann, 'National, Regional and Global Governance: One Phenomenon or Many?', *Global Governance*, vol. 9, no. 3, 2003, pp. 323-46.

<sup>4</sup> Gerry Cleaver, 'Subcontracting Military Power: The Privatization of Security in Contemporary Sub-Saharan Africa', *Crime, Law & Social Change*, vol. 33, no. 1-2, 2000, pp. 131-49, 136; Thomas K. [p.292] Adams, 'The New Mercenaries and the Privatization of Conflict', *Parameters*, Summer 1999, pp. 103-16; Doug Brooks, Doug (2000) 'Messiahs or Mercenaries? The Future of International Military Services', *International Peacekeeping*, vol. 7, no. 4, pp. 129-44, 129; Singer, 'Corporate Warriors'.

<sup>5</sup> See for instance Jaap De Waard, 'The Private Security Industry in International Perspective', *European Journal on Criminal Policy and Research*, vol. 7, no. 2, 1999, pp. 143-74.

<sup>6</sup> Martin Edmonds, 'Defense Privatisation: From State Enterprise to Commercialism', *Cambridge Review of International Affairs*, vol. 13, no. 1, 1998, pp. 114-29, 121; John Lovering, 'Rebuilding the European Defence Industry in a Competitive World: Intergovernmentalism and the Leading Role Played by Companies', in Mary Kaldor, Ulrich Albrecht and Geniève Schméder (eds.) *Restructuring the Global Military Sector. The End of Military Fordism*, pp. 216-38. London: Pinter, 1998, p. 227.

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- <sup>7</sup> See 'Hawk Synthetic Training Facility', at: <http://www.rafvalley.org/Flying/HSTF.htm>, last accessed 17 March 2005.
- <sup>8</sup> See CAE, 'HRH, The Duke of York Inaugurates CAE's Medium Support Helicopter Aircrew Training Facility', Press Release, 17 July 2000, at: [http://www.cae.com/www2004/News\\_Room/pressReleases.cgi](http://www.cae.com/www2004/News_Room/pressReleases.cgi), last accessed 17 March 2005.
- <sup>9</sup> A database of MoD Private Finance Initiatives which is regularly updated can be found at: [http://www.mod.uk/business/ppp/pfi\\_database.htm](http://www.mod.uk/business/ppp/pfi_database.htm), last accessed 17 March 2005.
- <sup>10</sup> 'Public Private Partnerships in Defence', speech by the Minister of State for the Armed Forces, John Stellar MP to the Defence and PFI Seminar, 14 March 2000, at: [http://news.mod.uk/news/press/news\\_press\\_notice.asp?newsItem\\_id=489](http://news.mod.uk/news/press/news_press_notice.asp?newsItem_id=489), last accessed 17 March 2005.
- <sup>11</sup> MoD, *PFI Guidelines: Case Studies*, at: [http://www.mod.uk/business/pfi/guidelines/case\\_studies.htm](http://www.mod.uk/business/pfi/guidelines/case_studies.htm), last accessed 6 June 2004.
- <sup>12</sup> 'What Do You Know About...? The Private Finance Initiative', at: <http://www.mod.uk/aboutus/keyfacts/factfiles/pfi.htm>, last accessed 6 June 2004. Conversely, more recent statements argue that '[t]here is no predisposition towards either public or private sector' and that the MoD is taking a 'pragmatic' approach. See 'Public Private Partnerships in the MoD', at: <http://www.mod.uk/business/ppp/intro.htm>, last accessed 6 June 2004.
- <sup>13</sup> 'What Do You Know About...? The Private Finance Initiative', at: <http://www.mod.uk/aboutus/keyfacts/factfiles/pfi.htm>, last accessed 6 June 2004.
- <sup>14</sup> Ron Matthews and Judith Parker, 'Prime Contracting in Major Defense Contracts', *Defense Analysis*, vol. 15, no. 1, 1999, pp. 27-42, p. 28, p. 32.
- <sup>15</sup> 'Medium Support Helicopter Aircrew Training Facility (MSHATF)', at: <http://www.mod.uk/dpa/projects/mshatf.htm>, last accessed 6 June 2004.
- <sup>16</sup> *Reserve Forces Act 1996*, at: <http://www.hmsso.gov.uk/acts/acts1996/1996014.htm>, last accessed 17 March 2005.
- <sup>17</sup> 'Sponsored Reserves', at: <http://www.mod.uk/business/ppp/reserves.htm>, last accessed 17 March 2005.
- <sup>18</sup> Ibid. See also 'Future Strategic Tanker Aircraft', at: <http://www.mod.uk/dpa/projects/fsta.htm#updated>, last accessed 17 March 2005.
- <sup>19</sup> Matthews and Parker, 'Prime Contracting in Major Defense Contracts', p. 33.
- <sup>20</sup> John G. Roos, 'Bundeswehr embraces defense reform. Troop cuts, out-of-area operations spur German MoD's pursuit of 'partnership' with industry', *Armed Forces Journal International*, July 2000, at: [http://www.afji.com/AFJI/Mags/2000/july/indt\\_tech.html](http://www.afji.com/AFJI/Mags/2000/july/indt_tech.html), last accessed 17 March 2005.
- <sup>21</sup> Bundesministerium der Verteidigung (BMVg), *Die Bundeswehr der Zukunft. Sachstand der Reform*, 15. Juni 2001: Bundesministerium der Verteidigung.
- <sup>22</sup> 'Innovation, Investition und Wirtschaftlichkeit in der Bundeswehr' Rahmenvertrag zwischen dem Bundesministerium für Verteidigung und der Industrie, 15. Dezember



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1999, at:

<http://www.bundesregierung.de/Anlage250872/Sicherheitspolitik+Dezember+1999.pdf>, last accessed 17 March 2005.

<sup>23</sup> STN Atlas Elektronik was split in 2003 into ATLAS Elektronik GmbH (ATLAS) and Rheinmetall Defence Electronics GmbH (RDE).

<sup>24</sup> Interview with the Bundesamt für Wehrtechnik und Beschaffung.[p.293]

<sup>25</sup> 'Simulators are go', *ETSNEWS*, at: [http://www.ets-news.com/eurofighter\\_typhoon.thm](http://www.ets-news.com/eurofighter_typhoon.thm), last accessed 6 June 2004.

<sup>26</sup> 'Successful Training of Eurofighter Flight Instructors', *Defense-Aerospace*, 26

February 2004, at:

<http://www.eads.net/frame/lang/en/xml/content/OF00000000400004/4/57/29423574.html>, last accessed 17 March 2005.

<sup>27</sup> A fourth area - estate management - was also considered for privatization, but was eventually withdrawn from the list. The GEBB argued that the management of the Bundeswehr estates was too heterogeneous and strategically too important for a wholesale privatization. However, plans by the GEBB to split the estate management into different sections which would have allowed for the outsourcing of single service elements to private companies failed because they proved too complex.

<sup>28</sup> 'Von Grund auf', at: <http://ministerium.bundeswehr.de/presse/146.php>, last accessed 6 June 2004.

<sup>29</sup> 'Public Private Partnership im Bereich des Bundesministeriums der Verteidigung', at: <http://www.bundeswehr.de/pic/pdf/reform/PubPrivPartnership.pdf>, last accessed 6 June 2004.

<sup>30</sup> BMVg, *Die Bundeswehr der Zukunft*, p. 20.

<sup>31</sup> LHBw Bekleidungsgesellschaft, at: [http://www.lhbw.de/index\\_lhbw.php](http://www.lhbw.de/index_lhbw.php), last accessed 17 March 2005.

<sup>32</sup> Ulrich Horsmann (Managing Director, GEBB), 'Evaluating the Options for Public Private Partnerships in Germany', at:

[http://www.gebb.de/Downloads/Reden\\_und\\_Vortraege/g.e.b.b\\_presentation\\_DP04\\_March\\_10th\\_2004.pdf](http://www.gebb.de/Downloads/Reden_und_Vortraege/g.e.b.b_presentation_DP04_March_10th_2004.pdf), last accessed 17 March 2005.

<sup>33</sup> Oberlandesgericht Düsseldorf, Verg 67/02, 30 April 2003.

<sup>34</sup> See SIPRI, *Trends in Arms Exports in the USA, the UK and France, 1990-1998*, at: <http://projects.sipri.se/milex/aprod/trendstab3.html>, and SIPRI, *National Arms Sales and Arms Exports, Western Europe 1990-2000*, at: <http://projects.sipri.se/milex/aprod/trendstab1.html>, last accessed 6 June 2004.

<sup>35</sup> Tina Weber, *Vergleichender Überblick über die Rechtsvorschriften zur Regelung des Wach- und Sicherheitsgewerbes in der Europäischen Union*, Birmingham: ECOTEC, 2002; CoESS, *Panoramic Overview of Private Security Industry in the 25 Member States of the European Union*, Wemmel/Paris: CoESS, 2004, at: <http://www.coess.org/studies.htm>, last accessed 17 March 2005.

<sup>36</sup> Weber, p. 5.

<sup>37</sup> Weber, pp. 7-13.

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<sup>38</sup> Foreign and Commonwealth Office (FCO), *Private Military Companies: Options for Regulation*, HC577, London: The Stationary Office, 2002, at: <http://www.fco.gov.uk/Files/kfile/mercenarys,0.pdf>, last accessed 17 March 2005.

<sup>39</sup> HMSO, *Private Security Industry Act 2001*, London: The Stationary Office, 2001, at: [www.hmso.gov.uk/acts/acts2001/20010012.htm](http://www.hmso.gov.uk/acts/acts2001/20010012.htm), last accessed 17 March 2005.

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<sup>41</sup> Department of Trade and Industry (DTI), *Export Control Act 2002*, London: The Stationary Office, 2002, at: <http://www.hmso.gov.uk/acts/acts2002/20020028.htm>, last accessed 17 March 2005.

<sup>42</sup> DTI, *Consultation Document on Draft Orders to be made under the Export Control Act 2002*, p. 7, at: <http://www.dti.gov.uk/export.control/legislation/>, last

<sup>43</sup> CFSP (2000/401), *Council Joint Action of 22 June 2000 concerning the control of technical assistance related to certain military end-uses*, Official Journal of the European Communities, L159/216, 30.2.2000, at: [http://europa.eu.int/eur-lex/en/archive/2000/l\\_15920000630en.html](http://europa.eu.int/eur-lex/en/archive/2000/l_15920000630en.html), last accessed 17 March 2005.

<sup>44</sup> DTI, *Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003*, Statutory Instrument 2003 No. 2764, at: <http://www.legislation.hmso.gov.uk/si/si2003/20032764.htm>, last accessed 17 March 2005.

<sup>45</sup> DTI, *Trade in Controlled Goods (Embargoed Destinations) Order 2004*, Statutory Instrument 2004 No. 318, at: <http://www.legislation.hmso.gov.uk/si/si2004/20040318.htm>; DTI, *Trade in [p.294] Goods (Control) Order 2003*, Statutory Instrument 2003 No. 2765, at: <http://www.legislation.hmso.gov.uk/si/si2003/20032765.htm>, last accessed 17 March 2005.

<sup>46</sup> DTI, *Trade in Controlled Goods (Embargoed Destinations) Order 2004*.

<sup>47</sup> DTI, *Trade in Goods (Control) Order 2003*.

<sup>48</sup> Foreign and Commonwealth Office (FCO), *Private Military Companies: Options for Regulation*, HC577, London: The Stationary Office, 2002, at: <http://files.fco.gov.uk/und/hc577.pdf>; Foreign Affairs Committee, *Ninth Report 'Private Military Companies'*, HC 922, London: The Stationary Office, 1 August 200, at: <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmcaff/922/92202.htm>; Response of the Secretary of State for Foreign and Commonwealth Affairs, Ninth Report of the Foreign Affairs Committee, 'Private Military Companies', October 2002, at: <http://www.fco.gov.uk/Files/kfile/cm5642.pdf>, last accessed 17 March 2005.

<sup>49</sup> FCO, *Private Military Companies: Options for Regulation*, pp. 22-26.

<sup>50</sup> FCO, *Private Military Companies: Options for Regulation*, p. 23; Foreign Affairs Committee, *Ninth Report 'Private Military Companies'*, #102.

<sup>51</sup> FCO, *Private Military Companies: Options for Regulation*, p. 24.

<sup>52</sup> *Ibid.*, pp. 24f.

<sup>53</sup> *Ibid.*, p. 25.

<sup>54</sup> Foreign Affairs Committee, *Ninth Report 'Private Military Companies'*, #123.

<sup>55</sup> *Ibid.*, #134.

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<sup>56</sup> FCO, *Private Military Companies: Options for Regulation*, p. 26; Foreign Affairs Committee, *Ninth Report 'Private Military Companies'*, #137.

<sup>57</sup> BGBl (1995-2002) *Verordnung über das Bewachungsgewerbe vom 7. Dezember 1995* (geändert durch Gesetze vom 16. Juni 1998 (BGBl. 1 5. 1291), vom 10. November 2001) BGBJ. 1 5.2992) und durch Gesetz zur Änderung des Bewachungsgewerberechts vom 23. Juli 2002 (BGBl. 1 8.2724), at: <http://www.mkw-security.de/bewachv.htm>, last accessed 17 March 2005; Weber, *Vergleichender Überblick*, p. 71.

<sup>58</sup> BGBl (2002) *Gesetz zur Änderung des Bewachungsgewerberechts vom 23. Juli 2002*, Bonn: Bundesgesetzblatt, Teil I, Nr. 51, 26. Juli 2002, at: <http://217.160.60.235/BGBl/bgb11f/bgb1102s2724.pdf>, last accessed 17 March 2005.

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<sup>61</sup> Ibid., p. 13.

<sup>62</sup> National Accounting Office (NAO), *Report by the Comptroller and Auditor General, Ministry of Defence, Kosovo: The Financial Management of Military Operations*, HC530 Session 1999-2000, London: The Stationary Office, 2000, p. 5, at: [http://www.nao.gov.uk/publications/nao\\_reports/9900530.pdf](http://www.nao.gov.uk/publications/nao_reports/9900530.pdf), last accessed 17 March 2005.

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