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Regulating the private commercial military sector

Workshop Report

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This document outlines some of the main themes raised during the discussions at a closed off-the-record workshop held from December 1-3, 2005 at the Greentree Foundation Estate, Manhasset, New York. Forming the policy component of the IILJ's research project on the regulation of private military companies, the meeting's key objective was to discuss governance of commercial military firms providing combat services and training. Participants included representatives from four groups — providers, consumers, governments and academics. Contributions were non-attributable. This document is not intended to represent an agreed position of the participants nor to reflect the views of the organizers. Many thanks to Simon Chesterman for helpful comments.

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1 Introduction

The past fifteen years have seen a period of extraordinary growth in the private commercial military sector. Due in significant part to the actions of private military companies (PMCs), an orphaned conflict in Sierra Leone was turned around, the Angolan government retained power despite sustained challenges from rebel groups, and the Croatian Army achieved a decisive victory against Serb forces that made the Dayton Accords possible. Today, it is estimated that tens of thousands of PMC employees in Iraq are operating on contracts with the Iraqi and US government, as well as with private business.

The rise of PMCs as significant actors in military affairs has been ascribed to a number of factors. After the end of the Cold War, the increased chances of internal conflict combined with the reluctance of the key states to intervene in distant conflicts caused weak or failing states to turn to the private sector to fill the security vacuum. Second, the demobilization that accompanied the end of superpower rivalry released a workforce of individuals trained by their national militaries but available to the private market. This coincided with a general enthusiasm for outsourcing, though the economic savings of using PMCs rather than maintaining a large standing army are debated. Third, in states unable or unwilling to provide security to non-state actors, PMCs may be the only option for private companies, multilateral organizations and, increasingly, non-governmental organizations (NGOs).

This expansion of activity has been accompanied by a growing concern about the role of private commercial interests in military affairs, and in particular about the unregulated use of lethal violence through PMC personnel. Publicity surrounding specific abuses has led to periodic calls for reform, but reactive prosecution alone is unlikely to address these more general problems. At base, these questions concern the actual and possible regulation of this important new sector. To what extent are such activities regulated by existing norms, and what role might the market play

in supplementing that normative framework? Until recently, these two dimensions of the problem had followed parallel tracks with human rights and international humanitarian law arguments on one side and laissez-faire liberalism on the other. This report seeks to map out potential common ground between the two and some possible steps forward.

2 The Phenomenon

A prerequisite for meaningful discussion about regulation is clarity about the subject that is to be regulated. Despite the increasing use of PMCs disagreement continues over the nature of their role. Some see PMCs as an opportunity rather than a threat, a market-driven response to a gap in the international security sector; others claim that PMCs are nothing more than modern-day mercenaries, threatening state sovereignty, self-determination and other human rights. The extensive use of PMCs in Colombia and Iraq attests to the first view; the latter is reflected in legislation such as South Africa's Foreign Military Assistance Act, which seeks to establish a tight net of government control over PMC contracts. Much of the dissent over the role of PMCs stems from past efforts to deal with similar actors, but also to a lack of common ground on what it is that PMCs do today.

The catalogs of services PMCs offer on their websites seem fairly straightforward, listing supply operations, logistical support, military advice and training, provision of site and personal security, or the gathering of intelligence. Yet a common source of disagreement is on whether today's PMCs engage in combat. While representatives of firms maintain that the notion of firms fighting in wars is outdated, and that most of the activities provided are protective services and logistical support, many commentators still refer to the idea of PMCs engaging in combat when discussing today's industry. It would be reasonable to assume that most firms, keen to shake off the image of old-school mercenaries, would not advertise combat services openly or indeed decline such a request. However, part of the uncertainty also derives from the difficulty to distinguish both in theory and practice between different activities, in particular between combat

and combat support. For instance, the provision of training to national forces can easily slide into engaging in combat: the firm and its client have arguably a legitimate interest in the firm ensuring that its training translates well into practice. There are also definitional issues — is using a personal firearm in defense combat? Is a civilian contractor operating a weapon system critical for the national forces during hostilities engaging in combat? Solving these problems will be crucial if these activities are to be effectively regulated.

Notwithstanding these ambiguities, most concerns relate to activities involving the potential for the use of force. Although the regulation of unarmed services is also important, such as military or police training, which can have a significant impact on the long-term strategic context, there seems to be agreement that the control of violence through non-state actors should be at the center of any effort to regulate the industry.

3 Regulatory Context

Despite the lack of clarity as to the actual subject of regulation, a number of applicable norms on both the domestic and international level can be identified, providing a basic legal framework within which PMCs operate: International humanitarian law and human rights law determine the limits of activities of PMCs and the responsibilities of home and host states. On the domestic level, criminal and tort law can in principle regulate and discipline PMCs and contractors, while licensing and authorization systems allow states to control their activities. In addition, some firms and industry associations have established their own Codes of Conduct. These norms provide the regulatory framework for PMCs, and can be taken as a starting point for discussion as to what aspects, if at all, need improvement, and what role the market can play in regulation.

International Law

Foreign policy is subject to international law, whether it is conducted by state organs or by “proxies”: States cannot avoid their international obligations merely because of the fact that the activity in question has been undertaken by a private actor. Depending on the circumstances a state might be responsible because the private conduct is, in fact, treated as conduct of the state, such as where a PMC acted on state instructions. Under international human rights law abuses by private actors can give rise to state responsibility if the state fails to show due diligence in preventing and responding to human rights violations.

International humanitarian law (IHL) determines the status and the resulting rights of individuals in armed conflict. The disagreement about the role of PMCs is, not surprisingly, reflected in views about what provisions of IHL apply to PMCs. Those who see PMCs on a continuum with mercenaries maintain that the core legal framework is the Mercenary Convention or Art 47 of Additional Protocol I to the Geneva Conventions. However, one size might not fit all — a distinction between those willing to abide by the law and those avoiding regulation appears to be in order. It might be argued that the definitions in the aforementioned conventions have been created on different premises — on the idea of individuals fighting against governments and recognized movements of national liberation. By contrast, many, if not most of the PMCs operating in Iraq, Africa, Latin America and elsewhere are actually sanctioned by a government in one way or another: they have been issued licenses by their home states or are hired or accepted by the state where they work. It is possible that the volume of literature on the flawed definitions in those conventions does not reflect the actual relevance of that question to problems arising in the field.

With regard to the remaining IHL framework, the combat question is important because it determines the status of contractors under IHL. If PMC personnel take direct part in hostilities, this has consequences for their rights and protection. Unless integrated into the regular forces, PMC employees will be typically counted as civilians, meaning that if they directly participate in

hostilities, they lose protection from attack that civilians normally enjoy and are, as unlawful combatants, subject to criminal prosecution at least for their conduct during their participation. However, under what circumstances can they be said to take direct part in hostilities? Would the defense of persons or objectives qualify as such? It is already difficult to distinguish between reactive and offensive operations. One possibility would be to determine the question based on the terms or the purpose of the contract, though the matter would then be decided solely by the parties to the contract, allowing them to use the contract as a tool to bypass the applicable legal framework. Under a more traditional IHL approach, the question would be a factual one: whether the violence in question is connected to the conflict.

Regulation through Domestic Law and Licensing Regimes

In theory the civil and criminal law of the state in which activity takes place (the “host state”) can discipline PMCs and their employees. In practice, however, foreign personnel are often protected from civil and criminal prosecution through immunity provisions, as is the case in Iraq. Even if no such order or agreement exists, the fact that PMCs operate in weak states makes enforcement and prosecution through host governments unlikely. Exporting countries generally have more leverage and enforcement capacities. This, however, raises issues of extraterritorial jurisdiction. The US Military Extraterritorial Jurisdiction Act (MEJA) gives US Federal Courts jurisdiction to try criminal offences committed by civilians hired by the Department of Defense and other US agencies supporting a DoD mission, but it does not cover individuals working for other clients such as the CIA. Another practical obstacle is that crimes committed outside the US will remain simply undiscovered, or that agencies will have no interest in prosecuting a case for political reasons.

This unwillingness is also reflected in the fact that incidents implicating PMC have been brought before US courts, if at all, through the victims. Recently, the two contractors involved in the Abu Ghraib torture incidents have been sued by the Iraqi victims on the basis the Alien Tort Claims Act (ATCA). One can doubt whether the prosecution of these crimes — which would normally

be tried before the host state's criminal court or fall under the hiring state's military jurisdiction if committed by members of the regular forces — through tort law alone is appropriate.

On the administrative level, the inability or reluctance of host governments to regulate and control PMCs in their territory makes also adequate licensing regimes and contract practices in home countries particularly important. Yet, if existent at all, oversight regimes through home governments appear inadequate. The US International Traffic in Arms Regulation Act (ITAR) requires PMCs to apply for licenses issued by the State Department if a contract involves the export of arms. Officials look, *inter alia*, at the applicant company, the recipient country and end-users. A number of countries are excluded from receiving arms from the US, such as Burma and Cuba. What could in principle constitute a tight net of governmental control, however, can be bypassed through the Department of Defense's Foreign Military Sales Program, under which the Pentagon pays the firm for services offered to a foreign government, which in turn reimburses the Pentagon. What criteria are applied in this program is unclear. In addition, once a license is granted, there is no systematic follow-up procedure and monitoring. Whether this is caused by lack of willingness or capacities, oversight and monitoring appear to be among the key problems: The South African Foreign Military Assistance Act, which includes extraterritorial application, makes it an offense to render foreign military assistance without authorization by the South African government. Yet the presence of an unspecified number of South African PMCs in Iraq without government approval illustrates the difficulties of monitoring and enforcing compliance.

Regulation through Contract

As commercial firms providing services to their clients PMCs are also regulated by the terms of their contract: The activities of PMCs are first defined by the terms of the contract which forms the basis of their presence in the field. Apart from problems resulting from unequal negotiating positions, at least when a weak government seeks to contract a firm, can contract be an adequate tool of regulation given the highly unstable and rapidly changing environment PMCs operate in?

And how can a contract account for the fact that PMCs as commercial actors respond not only to the demands of their contract partners, but also to those of the market? PMCs have first and foremost business interests, which is making profit. This is one of the principal moral objections against PMCs, but raises also very practical concerns: Business interests and public interests can clash. This can result in either a firm engaging in conduct required by its client but illegal, or refusing to fulfill its contractual obligation when its financial interests appear at risk. Recent examples include a firm closing down the airport in Baghdad that it was supposed to guard over disputes over pay. This issue is closely related to that of accountability: In the market, a firm is accountable to who pays for its services. Is that adequate in an environment of conflict and violence? Have PMCs any responsibility to the local people, the host government, or the international community?

Regulation through Market Mechanisms

These questions exemplify the fundamental problems with an approach that overestimates the role of the market. Market mechanisms are weak at protecting particular standards, since they respond to market preferences, making them unsuitable as an adequate tool of regulation. An additional problem is the relative underdeveloped state of the market: There are not enough repeat players with enough capacity to do different jobs — reputational costs are therefore only of limited value as a regulation mechanism, since non-renewal of contract is often not an option in the absence of enough competitors with adequate capacities to do a given job. This may be the reason why the Pentagon renewed the contracts of the two firms implicated in the Abu Ghraib incidents, although it is also possible that the firms' close relationships to government or simply the Pentagon's assessment that they are the best to do the job triggered the decision. Finally, it might be that "cowboy firms" are precisely hired because of their reputation. All of this underscores the fact that the "laws" of the market do not provide a working, much less an adequate regulatory framework.

4 Steps forward

The above analysis demonstrates that effective regulation does not need to start from scratch. There is no “legal vacuum,” as is occasionally suggested, although the existing legal framework is neither clear nor sufficient. On the international level, the frequent conflation of traditional mercenaries and PMCs is, for the purpose of regulation, unhelpful as it diverts attention from the problems actually arising in the field — distinguishing between old-days mercenaries and PMCs hired or accepted by governments will be essential for effective regulation and monitoring. The US licensing regime demonstrates that states have the possibility to control the activities of PMCs in principle, and contract law can potentially be one tool of regulation, determining acceptable responsibilities and establishing appropriate oversight. Yet the regulation of the administrative loops PMCs must go through before being allowed to operate in a given conflict, and the determination of adequate contract standards through administrative procedures, as well as effective monitoring systems appear to be flawed or non-existent.

This lack of control and oversight is closely tied to the larger question of accountability. As noted above, states cannot evade international responsibility by relying on PMCs. The question, then, is how states can ensure that the contractors they hire act in accordance with their international obligations. Integrating them in the military structure and thus in the chain of command can be part of the answer. Currently, it seems that in most cases individuals are liable to their employers only, which in turn are accountable to their clients. This might not suffice both from an international law and practical standpoint: Incidents where employees of PMCs were mistaken as paramilitary forces by the local population only highlight the importance of much greater clarity of their roles in the field.

Efforts of the industry to regulate themselves through Codes of Conduct are commendable, although the existence of this regulatory framework, as patchy and unclear it might be, also means that self-regulation of the industry and voluntary codes can only build on existing legal standards, but not replace them. Industry associations can determine in detail appropriateness of

clients, transparency, internal accountability, hiring practices, training and sanctions for violation of codes of conducts. In particular, the industry can work on ensuring that only well-trained individuals are allowed to work for them. Under the existing system, many individuals are on several rosters, making it possible that one employee fired by one firm will be hired by the next. This undermines firms' investment in their reputation and increases the importance of proper background vetting and some sort of collective action, like information-sharing, although views on the use of blacklisting of individuals vary. Alternatively, some sort of "positive" licensing of individuals either through industry associations or an international body is possible.

The problems that any attempt to regulate will encounter are considerable. PMCs are a moving target — they can shift locations easily and adapt themselves to the needs of the market. Two things follow from this. First, regulation that is too restrictive and procedurally cumbersome will not only rob PMCs of their comparative advantage but may make itself irrelevant in practice, driving firms underground or causing them to relocate elsewhere. On the other hand, care must be taken to avoid a rush to the bottom. This is also in the interest of exporting states, since licensing procedures and adequate contract practices allow them to retain control over military goods and services provided by private actors outside the country. Second, due to the transnational nature of the business, national legislation alone will not suffice to regulate PMCs. Regulation and some sort of monitoring on the international level is critical. The UN might provide monitoring capacities, especially where contractors are used in UN peace operations; NGOs may act in the capacity of watchdogs.

Efforts on the international level, however, will have to grapple with the differences in governments' interests and capacities. The current lack of implementation, enforcement, and oversight through national governments is a reflection of both the unwillingness and inability to monitor and control PMCs. There are states which retain PMCs on capacity grounds, as Sierra Leone did in the 1990s, which are rarely in a position to control providers effectively. Others use them to escape scrutiny through their domestic constituencies and the international community, as is arguably the case with the use of PMCs in Iraq. In addition, hiring a firm rather than sending more soldiers to conflict zones is politically more palatable. Finally, the experience of

the South African efforts to control firms and contractors illustrates the practical difficulty of enforcing an ambitious legal regime.

Among the industry there seems to be agreement that the determination of best practices and effective regulation of their activities would bring increased legitimacy to the industry and is therefore in the interest of its long-term sustainability. However, there is also the fear that yet another layer of law and bureaucracy will make their operations impossible. Instead, firms are in favor of translating the applicable law into practical operational guidelines — do's and don't's in the field. This might help contractors understand the regulatory framework they operate in. Nonetheless care must be taken that the existing legal framework is not undermined or watered down in the process. Any clarification or modification of the law must not result in mere adjustment to the perceived needs of PMCs in the field.

Who will be at the forefront of leading the discussion and taking action? The initiative by the Swiss government, setting off a dialogue on an intergovernmental level and aiming at reaffirming and clarifying existing obligations of states, companies and individuals under international law, is one step in the right direction, though action on the intergovernmental level alone is unlikely to suffice. Beyond this, it is essential for progress that the dialogue between the four key groups identified here — consumers, providers, regulators and commentators — continues, and that the center of discussion moves beyond a dialogue between governments, or among PMCs, and involves all stakeholders. Furthermore, clients must discuss the use of PMCs openly. This is true for governments, but also for multilateral organizations and other non-state clients. Some departments of the UN, for example, do use PMCs — at least for securing premises and personal security — though no coherent policy has emerged as to when and under what terms PMCs may be used. The same discomfort can be detected among NGOs, some of which hire PMCs as armed guards for their convoys, raising fundamental questions about the distinction between the humanitarian and military space. Still, of course, maintaining a dialogue is not sufficient. An agreement on the purpose of regulation and acceptance of the already existing applicable legal regimes is essential for moving the discussion forward towards an effective regulatory framework.

5 Conclusion

The emergence of PMCs in military affairs poses challenges to both law and to thinking about international security. Regulation in this context has long been based on the assumption that states are the sole legitimate providers of security. Increasingly, however, activities are being outsourced to PMCs, though this outsourcing has not been accompanied by corresponding checks and oversight. At the same time, it is likely that discussion has passed the point where the very use of PMCs can be questioned. The current trend of outsourcing will continue, though in different states it is driven by different factors. Multilateral organizations, NGOs and private business operating in weak states must often provide for their own security. In the process, the stigma of PMCs and their use evaporates. All this indicates that PMCs are here to stay. In coping with this new environment, a useful starting point is to avoid assumptions that private actors are inherently suspicious or that public forces are necessarily virtuous. Since both groups play a role in military affairs, the activities of both need to be subject to regulation and accountability.