



INSTITUTE FOR INTERNATIONAL LAW AND JUSTICE
NEW YORK UNIVERSITY SCHOOL OF LAW

Regulating the private commercial military sector

Workshop Report & Chair's Summary

This document summarizes the discussions at a closed off-the-record workshop held from March 22-24, 2007 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 the creation of a framework for governance of commercial military and security firms. Participants included representatives from four groups — providers, consumers, regulators, and commentators. 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.

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REGULATION OF PRIVATE MILITARY AND SECURITY COMPANIES

March 22-24, 2007

Greentree Foundation Estate, Manhasset, NY

Workshop Report

This was the second closed workshop on the regulation of the private military and security sector held by the Institute for International Law and Justice at New York University School of Law. The first workshop, which took place in December 2005, focused on the emergence of the market for private military and security services; it sought to develop an accurate picture of current operations and the prospects for regulation, including self-regulation. Building upon the insights from that meeting, the second workshop was convened with the intention of identifying a shared understanding of the elements of a regulatory framework.

The workshop commenced with a plenary session in which participants critically assessed international, regional and national regulatory efforts to date. Particular attention was paid to the Swiss-ICRC initiative, the UN Working group on Mercenaries, the CIS Model Law, the laws in the United States and South Africa, the UK Green Paper, and industry codes of conduct. The afternoon plenary focused on identifying key issues that would need to be addressed during the formulation of a policy framework for regulation of private military and security companies (PMSCs). In particular, conversation focused on the objects and scope of regulation, applicable norms, and relevant institutions. A more in-depth discussion of these issues followed in working groups. Reports of working groups were presented and discussed in a subsequent plenary session.

* * *

Though the question of PMSCs has been on the international agenda for almost two decades, and despite some recent high profile efforts to regulate the industry in whole or in part, regulation remains patchy and inconsistent. Efforts to regulate at the national level tend to be reactive and driven by political embarrassment; debate surrounding the regulation of PMSCs at the

international level continues to be distorted by the conflation of PMSCs and mercenaries, as well as other problems of definition.

To move the issue forward, it may be necessary to situate the regulation of PMSCs within the broader framework of regulating multinational corporations, while recognizing that certain elements are unique to PMSCs and, therefore, may require particular norms and institutions. National and supra-national bodies would have to take the lead in developing an effective regulatory framework, although industry level initiatives are also important and should be encouraged. In constructing such a framework, the following are key questions: *Who are the relevant stakeholders and how can their rights, interests and responsibilities be best represented? What are the relevant norms? And what institutions should be involved and what should be their respective roles?*

States are implicated on multiple levels – as clients, hosts of PMSCs’ activities, and regulators. States’ rights and responsibilities in these differing capacities must, therefore, be taken into account by a regulatory framework. Non-state actors, such as NGOs and inter-governmental organizations, may similarly be either clients or monitors, or even both in cases where one branch of an organization employs a PMSC while another is charged with overseeing contractors’ compliance with various legal or regulatory regimes. Communities, in particular populations affected by PMSC activities, are also key stakeholders whose interests must be taken into account. Finally, the industry itself may not be monolithic in its interests, rights, and obligations – employees, shareholders, directors each have distinct rights and responsibilities, which must be reflected in any comprehensive governance regime. For a regulatory framework to have a sufficient degree of legitimacy to command compliance, each of these and other relevant stakeholders must be part of its development.

Any such framework should begin by recognizing that PMSCs do not operate in a legal vacuum. Gaps exist, whether due to the unwillingness or inability of states to enforce national laws, or the lack of mechanisms to give force to international obligations. While industry codes of conduct are important in guiding behavior of PMSCs employees, in and of itself they are insufficient to guard against abuses and protect the rights of various stakeholders. Further thought, therefore, must be given to measures that encourage good behavior by PMSCs, while providing robust disincentives for misconduct.

States as well as inter-governmental and regional institutions must step up in enforcing and monitoring compliance with legal and regulatory standards. In addition, industry participation in self-regulation is necessary, as is the role of non-governmental entities and civil societies. For a governance regime to be successful and efficient, it must be multi-layered, multi-faceted, and transnational.

Some of the more concrete suggestions are presented in the Chair's Summary below.

APPENDIX I

Chairman's Notes from the Greentree Conference on Regulation of Private Military and Security Companies, March 22-24, 2007 ("Greentree Notes")

Private military and security companies (PMSCs) are companies that provide military and/or security services. The industry is at an early stage of development and there are different views on the appropriate breadth and depth of regulation. The discussion that these chairman's notes summarize took place in the context of other processes, including the Swiss-ICRC intergovernmental initiative for which there was general support. The following notes outline areas in which there appears to be broad agreement, areas in which action needs to be taken, and areas in which further discussion is required.

Common Ground

1. The clients of PMSCs include states, intergovernmental organizations such as the United Nations, and private entities such as corporations and NGOs.
2. PMSCs do not operate in a legal vacuum. There are, however, gaps in the applicable laws and problems of implementation due to the unwillingness or inability of states and other actors to operationalize and uphold applicable laws.
3. Parties that contract with PMSCs may remain responsible for actions taken by those PMSCs.
4. The fact that states, in particular, contract out certain activities does not remove their legal responsibilities. States are responsible under international law for the wrongful acts of PMSCs that can be attributed to them.
5. Public international law potentially applicable to activities of PMSCs includes:
 - a. *Human rights law*: States have direct responsibility for compliance with human rights law. States also have responsibility for protecting those within their jurisdiction from certain types of harm at the hands of third parties.
 - b. *International humanitarian law (law of armed conflict)*: States must respect and ensure respect for international humanitarian law; the acts of all persons — regardless of status

- carried out in the context of, and associated with, armed conflict must comply with international humanitarian law.
- c. *International criminal law*: Individuals may be liable for crimes under international criminal law such as genocide, war crimes, and crimes against humanity.
 - d. *International labour law*: States hiring PMSCs must respect relevant international labour law standards.
 - e. *Obligations under regional organizations*: States may have further obligations through regional organizations, such as the European Union (for example procurement regulations), the African Union, etc.
6. Domestic law — including criminal law, civil law, and public or administrative law — of the following states may have an impact on the activities of a PMSC: (a) the state entering into a contract; (b) the state of incorporation or nationality of the PMSC; (c) the state of which its personnel are nationals; (d) the state in which it operates.
 7. Other norms relevant to PMSCs include (a) international standards on law enforcement and use of firearms;¹ (b) other international guidelines such as the Voluntary Principles on Security and Human Rights; and (c) industry codes of conduct. These may be sources of binding law if incorporated into domestic law, or included in licensing regimes or contracts.
 8. Further regulation of the private military and security sector should distinguish between the various activities of PMSCs.
 9. Development of a regulatory framework must recognize the rights, interests, and/or responsibilities of states and other clients, the industry (including personnel), international and national oversight bodies, and affected communities.
 10. Effective state oversight capacity is necessary but insufficient to address all concerns about PMSCs.
 11. Self-regulation is necessary but insufficient to address all concerns about PMSCs.

¹ See, eg, the UN Standard Minimum Rules for the Treatment of Prisoners (1955); the UN Code of Conduct for Law Enforcement Officials (1979); the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).

Action Required

12. Victims of wrongdoing by PMSCs should have access to a remedy. If a victim does not have access to a remedy in the territory in which the wrong occurred, he or she should have access to a remedy in the state of incorporation of the PMSC or in the contracting state.
13. Immunity should not normally be granted to PMSCs. Where it is granted, immunity in one jurisdiction must never result in impunity.
14. States must exercise oversight of contracts for private military and/or security services.
15. States should report on their contracts for private military and/or security services to an appropriate national oversight body, such as a parliament.
16. Non-state clients of PMSCs (such as intergovernmental organizations, NGOs, corporations) should be transparent in their dealings with PMSCs and develop best practices for such contracts.
17. A global code of conduct should be adopted.
18. A short handbook of obligations of PMSC personnel should be drafted and widely disseminated.

Areas for Discussion

19. There may be limits to the aspects of state authority that may be outsourced. Additional limits on what could be outsourced should be considered. (This is without prejudice to the responsibility of states under international law for wrongful acts that can be attributed to them.)
20. States should consider enacting laws requiring contracts with PMSCs to include appropriate training, vetting of personnel, provision for insurance, and other terms.
21. States should consider adopting and implementing extraterritorial jurisdiction over wrongdoing by PMSCs, comparable to jurisdiction asserted over war crimes, human trafficking, and child prostitution.
22. Consideration should be given to creating an independent body to address complaints against PMSCs. This should not limit access to other remedies.

APPENDIX II

AGENDA

THURSDAY, MARCH 22, 2007 — WELCOME

7:00pm - Welcome Reception and Dinner

FRIDAY, MARCH 23, 2007

8:00am - Breakfast

9:00am - Welcome

Introduction & Definitions

Simon Chesterman, New York University School of Law

9:15am - I: Efforts at Regulation to Date

This session will provide context for the discussion that follows. In addressing the questions each speaker is asked to make brief remarks of at most ten minutes in length. Please keep in mind the broader questions of the meeting: what can be learned from previous efforts at regulation, what should be the objects and scope of regulation, what are the applicable norms, and what institutions are best suited to the PMC/PSC question? Commentators are asked to make a brief response to the presentation as a provocation to discussion.

Reasons for Regulation: *What has driven attempts to regulate the PMC/PSC sector? What has been the focus of the regimes developed (prohibiting mercenarism, monitoring PMCs/PSCs, licensing individual contractors, punishing specific individual or corporate wrongdoing, etc)? Who are the beneficiaries of such efforts at regulation? What are the perceived gaps that require additional regulation? Is this the same as accountability?*

Kevin O'Brien, Consultant on PMSCs, Department of Foreign Affairs, Canada

Comment: Dominick Donald, AEGIS

International: *What are the strengths and weaknesses of regulatory efforts at the international level? What lessons can be drawn from the process, the outcome, and subsequent practice? Are there lessons to be drawn from efforts to regulate other industries?*

James Cockayne, International Peace Academy

Comment: John Holmes, Maj. Gen. (ret.), Erinys International Ltd

Regional: *What are the strengths and weaknesses of regulatory efforts at the regional level (Africa, the Commonwealth of Independent States, etc)? What lessons can be drawn from the process, the outcome, and subsequent practice? Are there lessons to be drawn from efforts to regulate other industries?*

Marina Caparini, Senior Research Fellow, Geneva Center for the Democratic Control of Armed Forces (DCAF)

Michael Cottier, Department of Foreign Affairs, Switzerland / Emanuela-Chiara Gillard, Legal Advisor International Committee of the Red Cross (I am not sure but I do think they spoke before lunch – and Emanuela briefly presented the ICRC initiative)

Comment: Ambassador James Jonah, Ralph Bunche Institute for International Studies

National: *What are the strengths and weaknesses of regulatory efforts at the national level (South Africa, the United States, Britain, etc)? What lessons can be drawn from the process, the outcome, and subsequent practice? Are there lessons to be drawn from efforts to regulate other industries?*

Sabelo Gumede, Institute for Security Studies, South Africa

Chris Mayer, Defense Reconstruction Support Office, United States

Comment: Jacqui Currie, Conflict Issues Group, Foreign Commonwealth Office

10:45am - Coffee Break

11:00am - I: Efforts at Regulation to Date (continued)

Industry: *What are the strengths and weaknesses of self-regulatory efforts at the industry-level (IPOA, BAPSC, etc)? What lessons can be drawn from the process, the outcome, and subsequent practice? Are there lessons to be drawn from efforts at self-regulation in other industries?*

Doug Brooks, International Peace Operations Associations

Andrew Bearpark, British Association of Private Security Companies

Comment: Andrew Michels, Interlocutor LLC

11:30am - II: Considering a Regulatory Framework

In this session and the one after lunch, presentations by speakers will be followed by a wider discussion moderated by a facilitator, who will also synthesize the discussion. Rapporteurs will keep track of points of consensus and disagreement, to be discussed further in the breakout groups that follow.

Objects and Scope: *How should a regulatory framework apply to different actors? These might include, for example, the individual contractor, the PMC/PSC, the contracting state, the home state of the PMC/PSC, the state of nationality of the individual contractor, and so on.*

Should the regulatory framework distinguish between different activities of PMCs/PSCs (e.g., combat, humanitarian relief, security support, logistical support, infrastructure and repair, prison administration, etc.)? What role should the industry as a whole play? What are the principal needs of victims in this context? What role can affected populations play in structuring the PMC/PSC governance regime?

Facilitator: Kevin O'Brien, Consultant on PMSCs, Department of Foreign Affairs, Canada

Rapporteur: Dominic Arpin, Department of Foreign Affairs, Canada

Michael Bonser, Department of Foreign Affairs, Canada

Sean McFate, Interlocutor LLC

Jarisse Sanborn, Brig. Gen. (ret.), U.S. Air Force

Jim Schmitt, ArmorGroup America

1:00pm - Lunch

2:00pm - II: Considering a Regulatory Framework (continued)

Norms: *What legal and regulatory norms and models could/should apply? What is the role of international law? Domestic criminal law? Contract law? Licensing regimes? Industry codes of conduct? Other models of governance, such as corporate social responsibility? Can incentives be put in place to reduce bad behavior and increase accountability when bad behavior occurs?*

Facilitator: Simon Chesterman, NYU

Rapporteur: Caroline Holmqvist, King's College

Michael Cottier, Department of Foreign Affairs, Switzerland

John Holmes, Maj. Gen. (ret.), Erinys International Ltd

Francoise Hampson, University of Essex

Institutions: *Which institutions, if any, are best equipped to create, monitor and enforce any regulatory regime? What are the responsibilities of the various international organizations with respect to PMC governance? What is the role of the United Nations? Regional institutions (e.g., EU, CIS, AU)? What is the role of NGOs? What is the role of industry associations? What is the relationship between domestic institutions, international institutions and industry organizations and associations? What mechanisms could be used to eliminate barriers to enforcement of the regulatory regime and ensure accountability of all parties? How can a regulatory framework be structured to offer a*

useful remedy to those harmed by PMC/PSC misconduct?

Facilitator: Raenette Taljaard, The Helen Suzman Foundation

Rapporteur: James Cockayne, International Peace Academy

Manuel Bessler, United Nations

Lee Van Arsdale, Triple Canopy Inc.

Katherine Haver, Center on International Cooperation, New York University

Joe Mayo, EOD Technology, Inc.

Marina Caparini, DCAF

4:00pm - Coffee Break

4:15pm - III: Elements of a Regulatory Framework - Breakout Groups

In this session three breakout groups are tasked with drafting elements of a policy framework that could become the point of reference for future discussions of regulation of the PMC/PSC industry. To the extent possible, the draft should draw on the preceding discussion and be aimed at taking debate over regulation of the industry forwards. Each group will be led by the facilitator from the previous session who will lead discussion and a rapporteur who will track the discussion and draft the elements on a laptop.

Breakout Group A: Objects and Scope

Room: “Yellow Room”

Facilitator: Kevin O’Brien, Consultant on PMSCs, Department of Foreign Affairs, Canada

Rapporteur: Dominic Arpin, Department of Foreign Affairs, Canada

Breakout Group B: Norms

Room: “Chintz Room”

Facilitator: Simon Chesterman, NYU

Rapporteur: Caroline Holmqvist, King’s College

Breakout Group C: Institutions

Room: “Billiard Room”

Facilitator: Raenette Taljaard, The Helen Suzman Foundation

Rapporteur: James Cockayne, International Peace Academy

6:15pm - Facilitators and Rapporteurs Meeting

Facilitators and rapporteurs meet with conference organizers to compile the drafts into a single document to present to the plenary on Saturday.

Room: M-1, "Camilla's Room"

7:00pm - Reception and Dinner

SATURDAY, MARCH 24, 2007

8:00am - Breakfast

9:30am - Discussion of the Draft

Rapporteurs present the findings of the three breakout groups.

Objects and Scope

Norms

Institutions

11:15 am - Coffee Break

11:30am - Next Steps

Assuming there is agreement, how can the framework be promoted? What is necessary for its advancement? What are questions/issues that remain unanswered and what should be the next steps in addressing them?

1:00pm – Lunch

2:00pm – Departures

APPENDIX III

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