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Meeting Summary: International Law Programme

Regulation of Private Military Security Companies in Armed Conflict

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Elizabeth Wilmshurst:

In 2005, Chatham House held a similar discussion group: 'Private Military Companies – a legal vacuum?' The fact that regulation of Private Military Security Companies (PMSCs) was still being discussed indicated the difficulty of choosing the means of national regulation and of enforcing existing international law.

Dr Hannah Tonkin:

Overview and evolution of the industry

The recent proliferation of PMSCs challenges the conventional assumption that the legitimate use of force is the exclusive domain of states. Today, tens of thousands of private contractors provide military and security services to a variety of clients, including states, corporations, NGOs and even the United Nations. Many PMSCs operate in zones of armed conflict, where they carry out functions that were formerly the exclusive domain of the armed forces. This boom in private security has been most evident in Iraq and Afghanistan, where the US has become dependent on PMSCs to carry out its operations.

The US Department of Defence (DOD) now has more contractor personnel in Afghanistan and Iraq than uniformed personnel.

The total expenditure on PMSCs in Iraq and Afghanistan between 2005 and 2010 was of \$146 billion, which is about 18 percent of total war spending for operations there:

- \$33.9 billion on contracts for the Afghanistan theatre.
- \$112.1 billion on contracts for the Iraq theatre of operations.

The modern private security industry emerged in the early 1990s, although it has changed significantly since that time.

Like other corporations, modern PMSCs are registered corporate bodies with legal personalities and hierarchical management structures. They often have sophisticated websites providing information about their various services.

There are four broad categories of services that PMSCs have performed in armed conflict since the early 1990s: offensive combat; services involving military and security expertise; armed security; and military support.

Offensive combat (1990s)

In the 1990s the South African company Executive Outcomes and the British company Sandline International provided offensive combat services to the governments of Angola and Sierra Leone. These companies' operations were crucial in quelling hostilities and compelling the rebels in each country to negotiate settlements. Some commentators praised them, saying that they were highly professional and were willing to take on messy tasks of intervention that developed states and the UN were unable or unwilling to tackle. Some commentators even suggested that PMSCs could undertake peacekeeping operations to assist the UN and governments of developing countries

However, there was a strong negative reaction from many people who were fundamentally opposed to the idea of a private company providing offensive combat services for money. For many people, this basic notion was abhorrent.

In 1997, when Sandline was hired by the government of Papua New Guinea (PNG) to quell domestic unrest, there were huge protests on the streets of PNG and there was an outcry in the international media, certainly in the Australian press. Widespread media reports describing private security contractors as 'mercenaries' tarnished the image of PMSCs, and in 1998 South Africa enacted legislation severely restricting PMSC activities in a deliberate attempt to crush the local private security industry.

In the face of this international opposition, the provision of offensive combat services clearly became bad for business, and this eventually led both Executive Outcomes and Sandline to dissolve, and deterred other companies from offering offensive combat services on the open market.

Following these instances of private offensive combat in the 1990s, the industry shifted in an attempt to distance itself from the controversy. Today, no company will provide offensive combat services on the open market.

Instead, a huge private security industry has boomed around the world focusing on the other three categories.

Military and security expertise

Military and security expertise contracts involve the provision of high-level technical or strategic capabilities to military/security forces. These contractors are generally unarmed and they are not authorised to use force, but the application of their expertise may still have an immense impact on an ongoing armed conflict.

Examples of services in this category include:

- Advice and training: eg the Coalition Provisional Authority hired Vinnell Corp to train the Iraqi army following the 2003 invasion.
- Maintenance and operation of complex weapons systems.
- Mine clearance services: a number of companies clear cluster bombs and other unexploded weapons.
- Intelligence: many PMSCs provide specialist intelligence services including satellite and aerial reconnaissance and photo interpretation and analysis.

The US outsourced its prisoner interrogation in Iraq. Following the 2003 invasion of Iraq, the US government hired CACI to provide several interrogators to work at detention centres in Iraq, including the notorious Abu Ghraib prison. Following the Abu Ghraib prisoner abuse scandal in 2004, it emerged that 50 percent of the interrogators involved in the scandal were private contractors. US policy is now not to use private contractors to conduct interrogations, but instead to use solely members of the armed forces.

Armed security

Armed security contracts involve the physical protection of persons or property in zones of armed conflict.

Examples of these contracts include:

- static (site) security—protecting fixed or static sites, such as housing areas, reconstruction work sites, or government buildings;
- convoy security—protecting convoys travelling through unsecured areas;
- security escorts—protecting individuals travelling in unsecured areas; and
- personal security details—providing full-time protective security to high ranking individuals – eg DynCorp for Afghan president Harmid Kazai.

Whilst these security contractors are armed, they are restricted in the types of weapons that they may carry and they are authorised to use force only in limited circumstances – generally in self-defence and the defence of people/property specified in their contracts.

Nonetheless, security guards often work in extremely hostile environments and they often protect facilities or personnel that are themselves military targets.

Therefore it is not surprising that armed security guards working in these environments sometimes face combat-like situations. This is particularly true in low-intensity conflicts such as Iraq, where the line between 'offensive combat' and 'defensive security' can easily become blurred on the ground.

To illustrate this point, according to official figures from the US DOD, the casualty rate among armed private security guards hired by the DOD was 2.75 times higher than the casualty rate for US troops in Afghanistan in 2009 and 2010. This shows how dangerous these activities can be.

Military support

This involves the provision of general logistics and other support services to military forces in conflict zones. These services include transport, food, laundry, the assembly and disassembly of military bases and camps, and the repatriation of bodies.

These services represent by far the largest sector of the private security industry today – over 70 percent of PMSC personnel working for the US DOD in Iraq are performing military support services. They are clearly crucial to the success of military operations, but they are generally less dangerous and less controversial than the other services that PMSCs have provided in armed conflict.

Why does the US outsource so much?

- The US DOD considers that private security contractors can provide significant operational benefits to the US government.
- Serve as a force multiplier for the military, freeing up uniformed personnel to perform combat missions. DOD considers this to be crucial in the current climate when the military is overstretched.
- One of the main benefits identified by the DOD is that contractors can be hired, deployed and then fired more quickly than military personnel, so can allow federal agencies to adapt more easily to changing environments around the world.
- This can also save the government money, as contractors can be hired when a particular security need arises and then fired when their services are no longer needed. Hiring contractors only as needed can be cheaper in the long run than maintaining a permanent in-house capability.
- In some cases, security contractors may possess unique skills that the government workforce lacks.

In addition to these operational benefits identified by the DOD itself, commentators have pointed to certain political reasons why governments might choose to outsource to PMSCs.

The main reason is that the use of PMSCs helps to reduce the costs of war that are visible to the public. It is far less damaging for the government when private contractors are coming home in body bags rather than national troops, and these deaths are not generally counted in official death toll figures presented to the public. This can make it easier for the government to go to war in the first place as well as making it easier to sustain an unpopular war like that in Iraq.

Concerns surrounding PMSCs

One of the main concerns about PMSCs is the fact that they are not subject to adequate mechanisms of control and accountability. For example, when a state chooses to outsource its military activities to a PMSC, in general the state then has less control over those activities than it would if it had used its armed forces.

This has led to inadequate screening and training standards for PMSCs hired by the US government (eg 35 percent of the contractors working as interrogators at Abu Ghraib had no formal interrogation training).

And where a PMSC employee engages in misconduct in the field, eg if he shoots a civilian and was not acting in self-defence, there are concerns that the mechanisms to hold the private contract accountable for his conduct are inadequate.

These concerns could be at least partly alleviated by improved regulation to increase state control over PMSCs and improve the available mechanisms of accountability in cases of PMSC misconduct.

International legal obligations

States have legal obligations to control PMSCs and ensure that they are held accountable for misconduct. There are three key categories of states: the hiring state, the host state and the home state.

Positive obligations to control PMSCs and ensure accountability

1) International Humanitarian Law (IHL)

The law provides an obligation to ensure respect for IHL in all circumstances, an obligation to protect the civilian population, and an obligation to suppress or repress violations of IHL.

There are also the obligations of occupying powers under Article 43 of the Hague Regulations. In practice this requires states to take positive measures to ensure that private actors such as PMSCs comply with IHL in the field.

It is important to note, however, that no court to date has found a state responsible for a mere failure to take positive action to ensure respect for IHL by private actors. In Nicaragua the US incurred responsibility for a violation of Common Article 1 on the basis of its 'encouragement' of the rebel contras to act in violation of Common Article 3. As there was sufficient evidence to prove that the US had actively supported the prohibited activities of the contras, the Court did not need to consider whether a state's mere failure to take positive action to prevent or punish those activities could constitute a violation of Common Article 1. Nonetheless, the Court did not exclude the possibility of state responsibility on this basis, and in principle this interpretation is certainly strong.

2) International human rights law (IHRL)

There are several examples of positive obligations recognised in the case law:

- Obligation on States to take special preventive measures targeting recurring violations or individuals who are known to be dangerous (eg Blackwater).
- Obligation to plan and control security operations to minimise risk to life.
- Obligation to protect detainees in state custody.
- Obligation to protect individuals whose lives are at risk.
- Special obligation to protect women and children.

State responsibility

Two possible pathways can lead to the responsibility of a state for breaches of IHL or IHRL.

1. The contractor was an agent of the hiring state in which case the misconduct is attributable to the hiring state.

2. The state had a positive obligation to prevent or punish contractor's misconduct in which case the state may be responsible for failing to prevent or punish.

Conclusions

International law imposes clear obligations on states requiring them to take action to prevent and punish misconduct by PMSCs. States cannot evade international responsibility simply by conducting their military policy through private companies.

In practice, states should take the following measures: The hiring state should consider carefully whether and to what extent to outsource to PMSCs; ensure PMSC personnel are adequately screened and trained; ensure PMSCs are supervised in the field; impose regular reporting requirements; provide contractual penalties and criminal punishment for misconduct.

The host state and home state should institute licensing schemes for PMSCs based or operating in state territory.

Ian Ralby:

Regulation of the industry

Since the term 'Private and Military Security Companies' is somewhat controversial it is used in a non-technical but colloquial sense to encompass the type of companies in categories two, three and four that Hannah Tonkin discussed.

To illustrate the practical challenges, take a hypothetical case. The US hires BlueSky International to train Colombian forces in anti-narcotics. Colombian forces, accompanied by personnel from BlueSky wearing company uniforms and carrying arms, cross the Ecuadorian border in pursuit of a drug lord. They find him and his men and the Colombian forces attack the compound. During the ensuing fire fight (in which the drug lord is killed, Ecuadorian forces arrive and, not pleased with the obvious breach of their territory, engage the Colombians in an effort to forcibly repel them. At no time do any of the BlueSky Personnel fire their weapons, but they do shout instructions to the Colombians. One BlueSky employee becomes separated from the rest of the group and an Ecuadorian soldier intentionally shoots him in the leg and takes him prisoner.

This hypothetical example illustrates a few issues that remain uncertain under international law. It is assumed that the hostilities constituted an international armed conflict. The following questions are raised. What is the status of the BlueSky employees? Are they civilians? Are they mercenaries? Are they contractors accompanying the armed forces? Are they volunteer core or militia or are they part of the armed forces? What is the effect of the contract between the US government and BlueSky International? Does this mean that the US was involved in an IAC against the Ecuadorians?

The ICJ Nicaragua case tells us that 'effective control' is a key element. But who had effective control: the Colombian government, or the US government? The BlueSky employees were shouting orders; were they in control?

What is the status in terms of prisoner of war protections for the BlueSky employee? If the BlueSky employee was a civilian, is the Ecuadorian soldier guilty of a war crime for targeting a civilian?

What effects can PMSCs have on the character and nature of an armed conflict? Can they internationalize an armed conflict? Can they be considered an armed organized group for the purposes of the law relating to non-international armed conflict? In fact the ICRC has suggested that theoretically PMSCs can indeed be a party to an armed conflict.

If PMSCs can affect the status of an armed conflict when hired by a state, what happens if the same company does the same thing when acting for a private company, or by NATO or another international organisation?

National regulation

In 2002 a UK Green Paper identified six main options for regulation:

- A complete ban on military activity
- A ban on recruitment for overseas military activity
- A more flexible option provides for general license for overseas private military providers
- A specific license
- A reporting and notification scheme
- Self-regulation via industry association and required companies to adhere to a voluntary code of conduct

The last option is what has been selected as the way forward in the UK. Other countries have taken different approaches.

South Africa has attempted to implement a dual licensing regime. While the South African government continue to claim that there are no private military companies from South Africa operating overseas, that might be true only in a very technical sense; there are many South Africans involved in the industry, so the effectiveness of that regulatory regime remains questionable.

The US has a licensing regime for specific overseas activities. It does not regulate conduct overseas, but provides a gateway to acting overseas. A perceived lack of transparency as to licensing somewhat hurts the credibility of this regime, but it remains one of the most common. Other relevant laws include the Foreign Corrupt Practices Act, and the Alien Tort Claims Act which has been an effective way of trying to hold some individuals or companies accountable under US law, but again it is highly imperfect. Criminal prosecutions are possible under the Uniform Code of Military Justice in some circumstances, but highly unlikely in practice and other Acts, such as the Military Extraterritorial Jurisdiction Act and the Special Maritime and Territorial Jurisdiction Act (expanded by the 2001 USA PATRIOT Act) have had limited success in providing a functional mechanism of accountability. It remains to be seen whether the Civilian Extraterritorial Jurisdiction Act will have any effect.

The most promising recent effort is to develop formal standards that will be required in procurement processes, in other words a company must be certified to formal standards in order to even be considered a potential contractor for government.

International regulation

In 2006 the ICRC with the International Law Division of the Swiss Federal Department of Foreign Affairs initiated the Montreux process to develop a document that would restate international legal obligations on states for their interaction with PMSCs in armed conflict. It was launched on 17 September 2008 by 17 initial states signatories; an additional 19 states have signed which brings the total up to 36 countries.

The Montreux document provides 27 paragraphs, summarizing legal obligations on home states, territorial/host states and contracting states. It provides legal guidance for PMCs themselves. The provisions are very broad. For example, states must abide by IHL, and must fulfill their obligations under human rights law.

While the document is good in providing some guidance on certain things, eg a paragraph provides that the contractors should be considered civilians in a majority of cases of armed conflict settings, it fails on the whole to provide an

answer to the questions brought up by the BlueSky International hypothetical case mentioned previously.

The document provides 73 paragraphs on good practices for these different states; the legal significance of these good practices might end up being greater than those of the legal obligation section itself, because if implemented and followed rigorously, the best practices, which provide some clear guidance, could eventually become customary practice and develop into customary international law.

In 2009, the Swiss government launched a process to develop an International Code of Conduct for Private Security Service Providers (ICoC). The Code, which was formally established on 9 November 2010, provides aspirational principles for the operation of PMSCs; by 1 October 2011 it had 211 signatories.

The document requires signatory companies to engage with states, clients and other stakeholders (eg NGOs, humanitarian organisations) in order to develop international standards and an international governance and oversight mechanism (IGOM). The standards are being developed by ASIS International under the formal rules of the American National Standards Institute (ANSI). The Technical Committee for the Standard has over 200 participants from 26 different countries and the aim is to draft a standard that will become international. The development of the IGOM is ongoing. At this time, it appears that it will have a board of directors that will provide advice and response to incidents as they occur. It will also include a secretariat, to maintain and update the code when necessary, and a plenary of all the signatories' companies that are charged with making the final decisions on amendments and policy changes. It also provides therefore a forum for the companies to share lessons learned.

There are some key challenges:

- Funding – nobody wants to fund it.
- Liability – this is not an international organization, it can be only a private entity. It remains a question as to whether a state will be willing to provide a sort of liability shield.
- Legitimacy and uptake – it remains unclear thus far whether governments will start requiring certification under this IGOM. If they do not, there is no business incentive for PMSCs to become certified under it. While the Code has been met with broad interest and while the standards are likely to have substantial uptake, as well, there is no

sense that the IGOM will be successful. Interestingly with regard to the Code, all the major companies contracted by the US DoD have signed; but several large security providers contracted by the US Department of State have not. It would be wrong of governments to require signature of an aspirational Code, but if they start requiring certification under the standards, it may begin to put pressure on non-governmental clients to only hire PMSCs certified to that standard, as well. This could create a claim of negligence against a client which hires a PMSC that has not been certified to the standard.

The issue of maritime security presents another challenge. The broad aspirational principles are similar, but they arise in different legal and operational circumstances.

Conclusions

1. States are going to have to do more. This is an issue that states have created and are going to have to deal with. Things are moving but they are moving slowly.
2. The legal gaps need to be addressed. No matter how much the non-legal accountability efforts try to accomplish, they can never be fully successful without facing the difficult legal questions and uncertainties.
3. Armed conflict is the easy part. Situations where there is not an armed conflict present serious issues in countries that are unstable and where the rule of law has broken down or in maritime operations on the high seas. International humanitarian law at least provides a framework for addressing the armed conflict settings.