PRIVATE MILITARY COMPANIES: A LEGAL VACUUM?

A summary of discussion at the International Law Programme Discussion Group at Chatham House on 16 March 2005; participants included lawyers, academics, and representatives from Embassies, international organisations, the military and government departments.

Introduction

One speaker quoted Macchiavelli: "Mercenaries and auxiliaries are useless and dangerous. If a prince bases the defence of his State on mercenaries he will never achieve stability or security. For mercenaries are disunited, thirsty for power, undisciplined and disloyal; they are brave among their friends and cowards before the enemy; they have no fear of God, they do not keep faith with their fellow men; … in peacetime you are despoiled by them, and in wartime by the enemy."

The speaker questioned whether such a jaundiced assessment held true in more recent times. It was noted that the existence of private military companies (PMCs) and the options for their regulation gave rise to complex and difficult legal issues. PMCs now undertake a very wide range of activities. It was pointed out that most of these activities are security-related rather than overtly military. How can one draw a distinction between those activities that have foreign policy and human rights implications and those that merely enhance military capability?

The speaker referred to the UK Government Green Paper on the subject which had been partly prompted by the activities of Sandline International in Sierra Leone. Since then the contribution made by private security/military firms in protecting both governmental and commercial buildings in Afghanistan and Iraq had given the industry a more positive image. Conversely the uncovering of links between private military business and a *coup* plot in Equatorial Guinea had underlined the potential for embarrassment to Governments and the need to ensure that PMCs did not undermine national foreign policy interests or take part in human rights violations. The challenge is how to achieve this objective but, at the same, channel the potential benefits that PMCs can offer to the general good. The need for regulation did not rest solely with OECD countries; the *coup* plot in Equatorial Guinea had shown that African mercenaries too could be involved.

While one speaker wondered whether there was a real problem and whether there was a need for regulation at all, most speakers considered that regulation was needed, but in the formulation of any proposals the problem lay in distinguishing between the good and the bad.

International Regulation

The position of PMCs under international law was discussed. One speaker commented that such companies and their personnel were often equated with individual mercenaries. Mercenaries have a long history and attempts to define the term “mercenary” have proved problematic. One attempt appears in the 1977 Additional Protocols to the Geneva Conventions where the definition of mercenary in Article 47 of Protocol 1 includes the criterion that the person be “motivated to take part in the hostilities essentially by the desire for private gain.” The same approach is adopted in the 1989 UN Convention against the Recruitment, Use, Financing, and Training of Mercenaries. This definition was criticised by a number of speakers as ignoring the complexity of motives that may be involved both in private and State military activity and also as being impossible to prove.

One speaker argued that the traditional rather negative image of mercenaries and the linking of that image with PMCs was inappropriate and failed to take into account the incorporation and permanent structure of such companies. Such factors must, to some extent, render PMCs more accountable and keen to preserve a good reputation. The existing international definitions had been formulated before the emergence of PMCs and their security counterparts as a legitimate business. As such they represented only part of the picture.

Another speaker referred to ongoing work within the United Nations in the Expert Working Group on Mercenaries and PMCs, conducted under the auspices of the Commission for Human Rights. The Working Group had examined the links between individual mercenaries and PMCs and had found the line between them a difficult one to draw. In practice, the latter recruited the former and, at its third meeting, the Working Group recommended a new definition of mercenary which would include legal as well as natural persons. It had also recommended the removal of motivation as a part of any definition, although such motivation might be an aggravating factor in determining the application of any sanction.

The Working Group had also acknowledged the fact that mercenaries could sometimes be nationals of the State in which they were operating and had considered ways in which such nationals could be made liable to the same extent as their foreign counterparts. There had been some discussion within the Working Group as to the form any regulatory international framework might take and, in particular, the establishment of a specific body with responsibility for monitoring the activities of PMCs and maintaining a database. The imposition of a requirement for States to report on PMCs operating or incorporated in their territory had also been discussed. Other more general issues under consideration included the question of a State’s responsibility for violations of human rights by PMCs operating in its territory, state responsibility for actions committed abroad by its nationals or PMCs incorporated in its territory, and the possibility of drawing up model national legislation. In this connection the Working Group had looked at the regulatory legislation in South Africa and the US Export Arms Control model. It had also considered the analogy with the activities of NGOs which are often incorporated in one state, operate mainly abroad, but remain subject to some extent to the oversight of a regulatory body within the State of incorporation e.g. the Charity Commission in the UK.

One speaker asked what the position was in a situation of armed conflict. In reply it was noted that PMCs and their personnel were bound by international humanitarian

law in the same way as regular military forces, civilians and NGOs etc. If personnel had been formally incorporated into the military/security forces of the hiring State, their position would be the same as the regular forces. If, on the other hand, they were not so incorporated and nevertheless played a direct part in combat, they would lose any civilian immunity from attack and could be prosecuted for their activities. If they were captured, they would not be entitled to POW status.

It was generally agreed that there was no vacuum in international law. The problems were ones of enforcement of the law, control and accountability, and of establishing an effective chain of command.

How can the activities of PMCs and their employees be properly controlled in a situation where the courts of the State in which they are operating are often not functioning or where the hiring Government is unwilling to take action or has conferred extensive immunity from local prosecution? Order 17 of the Coalition Provisional Authority in Iraq had done the latter. Even where the State in which the PMC is incorporated is willing to take proceedings there may be difficulties in obtaining evidence and access to witnesses.

Many speakers doubted whether further international regulation was needed. The relevant international humanitarian law was there. The problem was one of enforcement. This was bound to be difficult given the nature of the activities in question. It was necessary to minimise the likelihood of infringements of international humanitarian law by PMCs and their personnel and one means of achieving this objective lay in national regulation. It was suggested that even if the UN took action, it would in practice have to rely on national governments for effective enforcement. One speaker suggested that training in international humanitarian law for PMCs and their personnel should be a priority.

National Regulation

There was discussion of the regulatory position in the UK. The 1870 Foreign Enlistment Act had proved to be largely unenforceable and had no practical application to modern military/security firms. There was a similar vacuum in other States apart from South Africa and the USA. The latter had, effectively, linked their regulation to their defence export legislation. South Africa was considering revising their own Act , partly because of the inadequacy of the sanctions it imposed. The UK Green Paper (http://www.fco.gov.uk/Files/kfile/mercenaries,0.pdf) had considered a number of options for regulation.

One option was self-regulation with the creation of a specific trade association with an appropriate Code of Conduct. It was suggested that the effectiveness of such an organisation would depend on how comprehensive its membership proved to be. Even then, there remained a question as to the sanctions such an organisation could impose. Expulsion was likely to be its most serious sanction and was hardly adequate. Self-regulation might prove useful as a supplement or under-pinning to government regulation but was not a substitute.
There remained the question of what form any national regulation should take. Should companies or contracts be licensed? Whichever option was chosen, it would be necessary to consider the relevant criteria for rejection or revocation. Such criteria would need to be transparent, objective and defensible politically and for the

purposes of judicial review. How would such companies or contracts be monitored effectively, given that companies would be operating abroad ? Any licensing system would need to be very adaptable and capable of reacting to changed circumstances. If it was decided that PMCs themselves should be licensed, which PMCs would be selected? Those incorporated or those operating in the UK? How would multinationals be dealt with? If licensed, would the PMC be licensed to do anything or just a range of services to a range of States? What services should be included? How would the system deal with foreign subsidiaries? One speaker emphasized the ability of companies to “mutate” and remove themselves from the jurisdiction.

It was acknowledged that the regulation of contracts rather than companies might prove to be a more practical way forward but even here there were choices to be made. The current DTI regime on export of military goods might provide a useful template in this regard with its range of responses, including total ban, single export licence, open individual export licence, and open general export licence.
A further issue in discussing options for regulating PMCs was that of individual mercenaries. A licensing system for PMCs would not deal with UK nationals enlisting with companies abroad. It was a separate but related question.

Concluding remarks

It was pointed out that these were not new issues. The problems relating to the regulation of PMCs had been around a long time. But the fact that they were still being discussed indicated the difficulty of choosing the means of national regulation, and of enforcing existing international law.