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‘Cry “Havoc!” and let slip the dogs of war’: regulating private military and security companies

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Abstract The second biggest contingent in Iraq after US forces, contractors have become something of a staple in contemporary conflict resolution and peacekeeping operations. The rise of private security and military firms is not a recent phenomenon. It has been a given since the end of the Cold War, thanks to a particular momentum in the market for force. Traditional armed forces have had their budgets cut and have sometimes had to undergo drastic economic reforms. At the same time, the market for force has seen the arrival of huge numbers of highly qualified military personnel. These developments have been beneficial to the rise of private military and security companies. However, they have also exposed the weakness of international law and regulation (and EU regulation in particular) when it comes to dealing with these firms.

Keywords Private security | Private military companies | Private security companies | Regular armed forces | Contractor | International humanitarian law | Defence

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Introduction

After the end of the Cold War, most NATO members reduced the numbers of military personnel, while simultaneously tasking their armies with more overseas operations than previously. This often had the result of overwhelming the armies' capacity to respond. The use of the services provided by private military and security companies (PMSCs) therefore presented itself as a viable alternative. It is quite unlikely that this trend will reverse itself in the near future as PMSCs have been diversifying their range of services in order to adapt to evolving contemporary conflicts. This trend and experiences with PMSCs over the last quarter of a century have called into question how states should define their policies concerning these companies.

One of the main arguments used to justify the use of services provided by PMSCs is based on what is strictly a cost-efficiency analysis: they offer a flexible and swift response which is often less costly than the use of regular armed forces. PMSCs offer a wide variety of services, but clients need only pay for the services they request. Another argument for resorting to PMSCs is the growing discrepancy between the renewal of political ambition on the foreign policy scene and the domestic push towards less numerous and boisterous military forces, with the related trend to further abandon military service and conscription. One of the ways to maintain this ambition to have a strong military capacity has been to resort to private security providers when externalising military operations, leaving the core functions of the military profession to the regular armed forces.

In this way, PMSCs have provided solutions to countries and their regular armed forces. But due to the wide range of services they perform and the scandals they have been involved in, they have also raised concerns. As the use of armed force falls under the responsibility of the state, military forces are state institutions that are employed and controlled by the chain of command of the countries they serve. Their purpose is to contain and resolve crises. In contrast, PMSCs are private actors motivated primarily by profit. Because of these differences, states must take into account the moral, ethical and regulatory consequences that arise from dealing with contractors. This article will shed light on the different schools of thought that have tried to provide answers to how legislation in this area should work. It will also present examples of how the use of PMSCs is currently being regulated.

International relations theory

In international relations literature, two schools of thought have emerged to frame the phenomenon of the rise of these private actors. The literature from English-speaking countries places economic arguments at the forefront and justifies the existence and rise of PMSCs. But it also emphasises the tactical aspect, as these actors are able to gather momentum more swiftly than regular armed forces, which often still need to be trained. In contrast, the continental European academic literature is, generally speaking,

more sceptical of such practices. It is wary of the authority of the state being taken over by these private actors.

On 11 September 2001, Western strategic interests—and more specifically, American interests—were targeted by a non-traditional and non-state actor. It was the first attack on US soil since Pearl Harbor. The events of 9/11 could have been the defining moment for the reinvigoration of traditional armed forces, but this did not occur. On the contrary, PMSCs were given a whole new *raison d'être* through the role given to them in the war against terror led by then US President George W. Bush. Today they have become decisive in the launching of military interventions. A growing number of actors on the international stage—whether states or international organisations—could not hope to participate in or launch a military operation without resorting to PMSCs. Private sector employees accounted for the second-largest contingent of armed forces in the 2003 Iraq War, after US forces.

How the soldier became the ‘contractor’: the emergence of a market for force

All markets are subject to friction, with externalities disrupting them, especially when the creation of those markets is still recent. The market for private force is no exception. As with any other market, it is the meeting point between supply and demand. This market was particularly influenced by the historic events that occurred towards the end of the twentieth century. With the end of the bipolar system, the need for large armed forces became less evident, and many conventional armies saw their budgets considerably reduced. This led to substantial numbers of qualified military personnel being laid off. Approximately seven million people suddenly found themselves on the job market (Schreier and Caparini 2005). Furthermore, not only were regular armed forces cut down in numbers, but they also underwent radical reforms in efforts both to modernise them and to increase cost-efficiency.

Simultaneously, a growing number of actors suddenly needed to resort to private firms for the security of their assets in third countries. This included governments, multinationals, international organisations and even high-level individuals. In 2008 actress Mia Farrow contacted Blackwater,¹ the largest US PMSC, on behalf of the human rights group she represents, Dream for Darfur. She was looking for advice after experiencing frustration with what she considered to be unnecessary delays by the UN in deploying a peacekeeping force in Darfur.

Due to the heterogeneous nature of their clientele, PMSCs provide a variety of services, ranging from tasks associated with internal security (peacekeeping within

¹ Blackwater is one of the most well-known private security providers worldwide. It was founded in 1997 by Erik Prince, a former US Navy SEAL. It was renamed Xe Services in 2009, and then became Academi when it was acquired by a group of private investors.

borders) to external security (border protection). While a few firms are prepared to intervene directly in combat, private military companies generally offer three types of service with regard to external security: operational support, counsel and military training. In terms of internal security, private security companies offer services from site surveillance to crime prevention to the gathering of intelligence. The distinction between a security and a military company coincides with that between internal and external security. However, some contracts do not allow for this distinction to be absolutely clear-cut, and this means that the companies which carry them out cannot be easily categorised. For example, it is not clear whether special services such as counter-insurrection or counterterrorism should be considered to belong to internal or external security. Blackwater is a case in point. Its methods are similar to those of special police forces, and its targets are generally international crime suspects rather than other armed forces. Both points make it difficult to categorise its methods as those of either the military or the police. The growing demand for such services demonstrates the wariness of states that are facing international crime organisations and the increasingly blurred lines between internal and external security.

To support the idea that the market for force should be allowed to develop away from state intervention, neo-liberalists regularly advance the argument that the market will eventually rid itself of ‘unworthy’ elements. This will be achieved through procedures such as the naming and shaming of organisations that have been prone to wreaking havoc or have been unable to deliver on their contracts. Such procedures will then bring about the economic failure of these companies. Therefore, its supporters believe that the laissez-faire method will gradually stabilise the market for force and thus help to prevent a repetition of the scandals that have been reported in the media in the last few years.

A legal no man’s land beneficial to the rise of PMSCs

There have been incidents in which private contractors in Iraq have opened fire on and killed innocent civilians, and have not consequently been prosecuted (Leander 2006). Such scandals have made it clear that PMSCs operate in a grey area. Under international law, the use of private military force is regulated by two instruments:

- Article 47 of the additional Protocol of 8 June 1977 to the Geneva Convention subject to the protection of victims of international armed conflicts (Geneva Convention 1977); and
- the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989 (International Committee of the Red Cross 1989).

Article 47 defines a mercenary as an individual who is recruited locally or abroad to fight in an armed conflict, is motivated to do so through financial gain and is a national of neither party to the conflict. An individual that provides a client with his or her military expertise is not, however, automatically categorised as a mercenary under Article 47. However, the Article does deny that individual the status of prisoner of war should he or she be captured in conflict.

The definition provided by the international convention uses Article 47 as a starting point, but goes further, as it categorises the individual as a mercenary not only in ‘armed conflict’ situations, but also in ‘any other situation’. Though they are promising starting points, neither of the definitions provided by international humanitarian law encompasses the full scope of the activities executed by PMSCs. Rather, these definitions only focus on individuals, thereby ignoring the entrepreneurial dimension of the companies they work for.

As international law has proven to be too broad and thus unenforceable,² to the point that it appears to have allowed certain employees of PMSCs to act in all impunity, national parliaments have had to step in, to discuss and question the legality of contractors’ conduct, and pass their own legislation. Clear acts of human rights abuse perpetrated by private contractors in foreign countries have been pushed aside, even by the states that are responsible for bringing them to justice. However, some recent high-profile cases, such as the sentencing of four Blackwater guards (Apuzzo 2015) for the Nisour Square massacre,³ could point to a new direction being taken that would diminish the state of impunity within which these private security providers have previously operated.

The need for stronger EU-wide regulation

Though regulation exists to some extent, tougher regulation within the EU in lieu of national legislation could pave the way to better conduct on the part of PMSCs. Regulation would identify the better practices of PMSCs. And going by the neo-liberal argument, the market would then make irrelevant those companies that did not comply. In response to the increasing public scrutiny of its activities, the industry has already made various efforts to adopt self-regulation and codes of conduct, such as the *International Code of Conduct for Private Security Service Providers* (International Code of Conduct Association 2010).⁴ The gaps in legislative action have also been filled by regional regu-

² According to a famous quote by Geoffrey Best in *Humanity in Warfare: The Modern History of the International Law of Armed Conflict*, ‘any mercenary who cannot exclude himself from this definition deserves to be shot—and his lawyer with him!’ (Best 1983, 328).

³ On 16 September 2007, contractors of the private firm formerly known as Blackwater opened fire on civilians in the highly congested Nisour Square, Baghdad, fatally wounding 17 Iraqi civilians.

⁴ This code is the result of a ‘multi-stakeholder initiative launched by Switzerland with the over-arching objectives to articulate human rights responsibilities of private security companies (PSCs), and to set out international principles and standards for the responsible provision of private security services’ (International Code of Conduct Association 2010).

lations, such as the International Stability Operations Association (2011) code of conduct in the US, and the Code of Conduct and Ethics for the Private Security Sector,⁵ which was signed between the Confederation of European Security Services and UNI Europa⁶ (2003). As of 2013 the latter code covers about a quarter of the 41,300 companies registered in the 28 member states and 3 other countries (Turkey, Bosnia and Herzegovina, and the former Yugoslav Republic of Macedonia). These regulations were adopted by the PMSCs themselves, out of a desire to bring about an atmosphere of professionalism within the sector, to enhance their public image and to improve public confidence in the private sector (Born et al. 2007).

While there is no EU-level regulation for the private security industry, the European Court of Justice has established its competence over matters of private security services. The Court monitors them under internal market rules (i.e. the freedom of establishment and the freedom to provide services), and national controls and requirements (the obtainment of a specific administrative licence at the national level, a minimum number of staff, minimum share capital, etc.). This makes it more difficult for foreign security services to operate in other member states.⁷ While the specific character of such services may justify the recourse to special administrative controls, member states must take due account of the administrative controls in place in the country of origin (Curia Europa 2015). However, while the internal market works very well when it comes to establishing a level playing field for member states, providing any political harmonisation falls outside its remit.

In the absence of harmonised EU regulation, there have been a number of national initiatives to regulate the use of services provided by PMSCs. These initiatives have tended to concentrate on the security aspect, as it has been shown that private security companies have encroached upon policing activities (UN Development Programme South Eastern and Eastern Europe Clearinghouse for the Control of Small Arms and Light Weapons 2005).⁸

Conclusion

The use of private contractors offers a plausible excuse for policymakers to turn a blind eye: be it in cases of human rights abuses or in the numbers of casualties, as the number of deceased contractors in combat is rarely touched upon in the press or on social media. However, due to scandals such as high-profile cases of human rights abuses

⁵ This code was signed on 18 July 2003.

⁶ UNI Europa is the European services workers' union.

⁷ See InfoCuria (2006), point 55 of the judgment, citing founding case-law on this matter.

⁸ According to a UN Development Programme South Eastern and Eastern Europe Clearinghouse for the Control of Small Arms and Light Weapons report (2005, 29), the lack of police in small towns has favoured private security companies being hired by local communities, as was the case in the village of Varbitza in Bulgaria, wherein the local police had declined the mayor's proposition to increase its presence.

or the plain inefficiency of hired security services (e.g. the services rendered by G4S during the London Olympics (Neate 2013), dubbed a ‘disaster’ by the media), the question of legislative or at least political oversight of these firms’ services has been posed several times. So far only regional and national regulations have tried to respond to these preoccupations.

As already noted, PMSCs operate in a legal no man’s land on the international scene. A certain good will on the part of the industry is noticeable, as there are a growing number of codes of conduct that these companies have adopted. Further regulation, especially through the EU’s internal market—such as the code of conduct which in 2013 encompassed about a quarter of the 41,300 PMSCs registered in the EU and 3 other countries—should be the way forward to ensure a stable market for force that is better able to separate the wheat from the chaff.

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