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FROM BOSNIA TO BAGHDAD THE CASE FOR REGULATING PRIVATE MILITARY AND SECURITY COMPANIES

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Private military and security companies (PMSCs) have earned a place in the spotlight recently due primarily to charges of human rights abuses in Iraq. However, the industry has been growing rapidly for over two decades, and has had significant impact on conflicts in Sierra Leone, Bosnia, and Papua New Guinea, among others. This article examines the difference between modern military companies and mercenaries. It then outlines the factors that gave rise to the PMSC industry and analyzes the threats and opportunities associated with PMSC presence. Four case studies are presented and factors associated with positive PMSC intervention are identified. The current state of policy regarding private militaries is reviewed, and the paper closes with suggestions on future policy directions.

INTRODUCTION

On September 16, 2007, violent gunfire erupted in Nisoor Square, Baghdad. When the smoke cleared, officials confirmed that 28 innocent Iraqi civilians had died in the incident. Guns had been fired – not by coalition troops, nor by insurgents – but by employees of Blackwater, a private company selling military services.

More than ten years earlier, in 1995, the Revolutionary United Front (RUF) amassed forces outside the capital of Sierra Leone. They threatened to topple the government, creating chaos and instability. The RUF's plans

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were disrupted, not by UN or ECOMOG troops, but by soldiers from Executive Outcomes, another private military company. Executive Outcomes' interventions stabilized the government and permitted democratic elections to be held.

Over the last 20 years, the private military and security industry has grown rapidly, in terms both of the number of active private military and security companies (PMSCs) and of the range of activities in which PMSCs are involved. The policy environment in which PMSCs operate, on the other hand, has remained static. This article argues that, given the widespread presence of PMSCs and the variety of potential outcomes from PMSC intervention, it is essential to develop a uniform policy framework within which PMSCs can operate. The first section of the article draws a distinction between PMSCs and mercenaries and describes the evolution of the former. The second section outlines a selection of PMSC interventions, as well as criteria associated with success in PMSC operations. Finally, the current policy environment is considered and policy recommendations are made.

MERCENARIES: PAST AND PRESENT

Hired soldiers have a long history. Their presence in warfare can be traced to circa 1294 B.C., when King Ramses hired Numidians to fight in the battle of Kadesh between Egypt and the Hittites (Taulbee 1998, 145). At some points in their history, mercenaries have been reviled. After the Hundred Years' War, Machiavelli accused the mercenary 'Free Companies' of fighting only 'bloodless battles' – of attempting to avoid engagement with opposition troops (Howard 1976, 17). In other situations, however, mercenaries have gained honor and distinction. The Swiss pike soldiers, for instance, originally fought to keep invaders out of Switzerland. They subsequently hired out their services to parties throughout Europe. In 1502, a regiment of Swiss soldiers was hired to fill out the troops of Pope Julius II. They gained distinction and evolved into the modern Papal Swiss Guard (Singer 2003, 27). The use of mercenaries was not restricted to pre-Westphalian Europe. In the late 1700s, Britain hired German Hessian troops to subdue the American colonies. This policy was not particularly successful – at the end of the Revolutionary War, one third of the Hessians deserted to remain in America (Mockler 1969, 127). The British East India Company and Dutch East India Company hired private armies to protect their commercial interests (Singer 2003, 34).

Is Blackwater the modern day Swiss Guard? Is it akin to the violent Hessians? Or are private military firms distinct from their predecessors?

This section will first provide definitions of mercenaries and private contractors and then delineate the differences between the two.

Mercenaries

Mercenaries are generally defined as foreign soldiers who fight for pay, as opposed to loyalty. Specifically, the Geneva Convention Additional Protocol I Article 47 defines mercenaries as follows:

A mercenary is any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

The above definition is cumulative, that is, a mercenary is someone to whom all of the criteria above apply. The Geneva Convention definition is widely accepted: it is broadly similar to definitions used by other international treaties, such as the UN Convention on the Recruitment, Use, Financing, and Training of Mercenaries. It also informs domestic legislation: the Russian Federation and Uruguay, among others, claim that their local legislation against mercenary activities is based on the above definition (ECOSOC 1999, 6-7).

Domestic policy makers point out several flaws with this definition. The UK Foreign and Commonwealth Office noted, for example, that the definition is unworkable for practical purposes: it is difficult, if not impossible, to prove the motivation of a person accused of mercenary activities (FCO 2002, 7).

Private Military and Security Companies

Private Military and Security Companies (PMSCs) provide specialized expertise or services of a military nature (Singer 2003, 120). The U.S.

government defines contractors as “persons or businesses... that provide products or services [to the military] for monetary compensation. A contractor furnishes supplies, services or performs work ... on the terms of a contract” (U.S. Department of the Army, FM 100-121, 1-1).

P.W. Singer outlines a classification for services provided by PMSCs. He defines three types of PMSCs: (1) Military Provider Firms, (2) Military Consultant Firms, and (3) Military Support Firms. Military Provider Firms provide troops who engage in combat/protection activities or commanders who direct local troops. Examples of such firms include Executive Outcomes and Sandline. Military Consultant Firms provide advisory and training services that are integral to the operation of an armed force. Examples of this type of firm include MPRI (Military Professional Resources Incorporated) and Levdan. Military Support firms provide logistics, transportation, and operational capability to troops on the battlefield. Examples of such companies include Kellogg, Brown and Root, Olive Group, and Supreme Group.

What's the Difference?

At first glance, mercenaries may seem only marginally different from PMSCs; however, the two differ significantly in terms of organization, legal status, range of services, and status of employees.

The Geneva Convention definition of ‘mercenary’ refers to single individuals. When Additional Protocol I and the Convention on Mercenaries were drafted, private militaries were characterized by individuals such as Mad Mike Hoare who operated small outfits on the black market. In the 1990s, however, private military activity became corporatized. Companies such as Blackwater and Triple Canopy operate according to corporate organizational structures and take part in a global market for force.

Unlike mercenaries in the mold of Mike Hoare, PMSCs are legitimate legal entities. Blackwater and MPRI are registered in the U.S., and companies such as Aegis and ArmorGroup are registered in the UK. This means that, unlike under-the-table arrangements with mercenaries, contracts drawn up with PMSCs can be enforced through legal means.

Traditional mercenaries provided one service: troops on the battlefield. PMSCs provide a wide array of services, particularly the Military Consultant Firms and the Military Support Firms. Supreme, for example, provides catering, supply, and distribution of products from fuel to fruit, duty free shops, and quality control. MPRI provides training and consultancy services. Blackwater provides services including cargo, aviation mobility, other transport including road construction, troop transport, ship logistics,

and even recruitment.

Finally, the Geneva Convention definition of mercenaries excludes most PMSCs. Most employees of Blackwater are U.S. citizens and the U.S. is a legitimate party to the conflict in Iraq. Since the Geneva Convention definition of mercenaries excludes those who are nationals of a party to the conflict, Blackwater employees who are U.S. citizens cannot be mercenaries (Gatson 2008, 233). In addition, PMSCs are generally hired to provide services such as consulting, training or personal protection in a war zone, not to take direct part in fighting (please note that Executive Outcomes is an exception). Moreover, the Geneva Convention requires that mercenaries be hired to take direct (offensive) part in conflict, and since employees of PMSCs are hired to play defensive roles, they cannot be defined as mercenaries (Gatson 2008, 233). PMSCs therefore do not fulfill two conditions of the Geneva Convention definition of ‘mercenary.’

How did PMSCs Evolve?

The development of PMSCs arose from specific changes in the global market for force. The most important of these factors are the end of the Cold War, the push for privatization, and the changes created by information technology.

During the Cold War, states maintained a monopoly over force. As the Cold War ended in the 1980s a range of new circumstances arose. Without the two superpowers controlling failed states, the number of conflicts, particularly internal conflicts, rose rapidly (Kaldor 2005, 491). The demise of the USSR flooded the international market with arms (Singer 2003, 54). The end of apartheid in South Africa introduced highly skilled former South African Defense Forces personnel into the labor market. The UN tried to counteract some of these threats by increasing the number of humanitarian interventions; however, it was plagued by lack of troops, lack of political will, and a structure that is not fitted to military intervention, exemplified by Rwanda (Mbongo 2000, 10-13). Following nation-building setbacks in Somalia, the sole superpower, the U.S., was unwilling to intervene in the world’s conflict areas (Dobbins et al 2006, 89). Superpower unwillingness to resolve conflict left a void which PMSCs were happy to fill.

Another contributing factor was the rise of privatization in the 1980s and 1990s. Margaret Thatcher and Ronald Reagan instituted far-ranging de-nationalization plans, which were widely (though not universally) considered successful (Economist 1996, 8). Although in the 1980s, privatization did not touch the military, the 1990s saw a change in military

structures. Governments sought to preserve defense by contracting private companies to provide support to the military in fields such as technology, examples include AeroSpatiale in France and Rolls Royce in the UK (Held et al. 1999, 103-123). They also sought to outsource non-essential services such as logistics and catering through programs such as the U.S. Logistics Civil Augmentation Program (LOGCAP) (Pelton 2007, 100-101). As the military outsourced more activities and while also experiencing severe budget constraints, the number of personnel they employed was reduced. Highly trained and skilled soldiers left the military and looked for new employment, often in PMSCs (Lock 1999, 14-15). PMSCs made use of skilled personnel who could not find a place in an army coping with shrinking budgets. For instance, Blackwater and DynCorp are staffed by former U.S. Special Forces members, and Aegis and ArmorGroup hire former British Special Air Service soldiers. The tendency to outsource provided demand for PMSCs, and the availability of skilled ex-soldiers gave them a marketable product.

Finally, advances in IT contributed to the development of PMSCs. Major military forces, such as that of the U.S., are dependent on information systems. Yet, the information systems used by the military are developed by civilians (Singer 2004, 65). Often, even after the military has bought an IT package, they retain civilian maintenance contracts: that is, they do not develop independent IT capacity (Little 2002). PMSCs can easily develop tools as sophisticated as, if not better than, those used by state militaries (Adams 1999, 103-116).

During the 1990s, PMSCs grew to maturity. They received weapons due to the end of the Cold War, soldiers due to the privatization trend, and technology due to developments in civilian IT. A rapidly expanding market for their product was readily available in the developing world.

PMSCs Today

The prevalence of PMSCs in both developed countries and international organizations is unprecedented. The U.S. Department of Defense cannot specify the number of contractors it employs in Iraq, but estimates range between 100,000 and 180,000 (Singer 2003, 245). In a domestic capacity, the U.S. government hired Blackwater to provide emergency services after Hurricane Katrina (Ehrenberg 2005). The Canadian Army has outsourced all of its military logistics support to PMSCs (Singer 2003, 183).

The Executive Outcomes offshoot Saracen provides de-mining operations support to the United Nations in Angola (International Campaign to Ban Land Mines 1999) and the PMSC DynCorp provided police to

the UN peacekeeping mission in Bosnia (Lilly 2000, 57). In 1996, the UNHCR proposed that PMSCs be used to maintain security at the camps for Rwandan refugees in Goma (Vaux et al 2001, 11), and NGOs such as CARE use PMSCs to provide armed escorts for food convoys (Vaux et al 2001, 11). These examples show that PMSCs have gained a footing, not only in domestic militaries, but also with other transnational actors.

PMSCs have undergone significant evolution in the aftermath of the Cold War, and this evolution is likely to continue, since the PMSCs of today are flexible entities that respond to customer demand. An example of PMSC response to market forces is Blackwater's recent re-branding exercise, whereby the company changed its name to Xe in order to avoid the effects of the bad publicity incurred by its activities in Iraq (Associated Press 2008). The changes in PMSCs are not only in image but also in substance. Saracen began de-mining activities in order to profit from a gap in the market in Angola, and similarly, the increase in the number of PMSCs in Iraq reflects a response to market forces. In the absence of a regulatory framework, the future of PMSC activity will be shaped by customer demand.

PMSC INTERVENTIONS

Positive Interventions

SIERRA LEONE

In 1991, fighting started between the government of Sierra Leone and the Revolutionary United Front (RUF), a group of rebels backed by Liberia's Charles Taylor. By April 1995, the RUF had built up support and was amassing troops outside Freetown, the capital. The government's attempts to bolster the military had failed. Government troops lacked training and resources: they used child soldiers and provided rations in the form of marijuana and rum. Captain Valentine Strasser, the leader of Sierra Leone, hired Executive Outcomes (EO), a Military Provider Firm, on a one year contract which was extended for another nine months. EO was paid \$35 million to re-establish government control over the country. Within nine days, the EO force stopped the rebel advance and sent them back 126 kilometers. They soon cleared the diamond fields and captured the RUF stronghold in Kangari Hills. The EO intervention stabilized the country and permitted democratic elections. The winner of the elections, Ahmed Kabbah, chose to discontinue the use of EO's services, since the UN had promised to deploy troops and an ECOMOG force was present. EO warned that their premature departure would destabilize the country, and

predicted that a coup would occur within 100 days after their departure. The UN troops were never deployed, and despite the presence of ECOMOG troops, a coup did occur on the 95th day after the company's departure, and chaos resulted (Singer 2003, 110-117; Pelton 2007, 261-263; FCO 2001, 12; Ruben 1997, 44-55; Montague 2002, 229-237).

The use of PMSCs in Sierra Leone proved to be cost effective and efficient. It is generally agreed that without EO's presence, the RUF would have invaded Freetown and generated instability (Shearer 1998). The EO intervention permitted democratic elections within months – the UN had not accomplished this goal after years of effort. The \$35 million budget of EO was a fraction of Sierra Leone's domestic military budget. The EO operation was a fraction of the UN deployment, both in terms of size and costs (Brooks 2000).

What were the factors that made the EO intervention in Sierra Leone successful? The success can be described in terms of the contract, the skills of the company, and the situation itself. EO had a time-limited contract to provide, not a general service, but specific outcomes. It was given unified command over the mission. Its troops were also composed of highly trained members of the South African Defense Force's 32nd Battalion, a special forces battalion consisting of soldiers from South Africa, Namibia, and Angola. They were knowledgeable not only in tactics but also in the conduct of war. Sierra Leone itself did not have a functioning military, so there was no possibility of conflict between two militaries fighting for the same party. In addition, Sierra Leone paid for the EO intervention out of the military budget. These factors were crucial to the success of the EO intervention in Sierra Leone. One of the primary criticisms of the intervention, however, arose from the lack of legitimacy of EO. While the intervention was successful in the short term, and helped create enough stability to hold elections, the president elected in those elections, Ahmad Tejan Kabbah, chose to terminate the contract of EO shortly after his election. This decision was motivated, at least in part, by the widely-held perception that EO was an illegitimate actor in the Sierra Leonean conflict (Fortna 2009).

CROATIA

In the aftermath of the conflict in former Yugoslavia, breakaway republics such as Croatia were unstable, with weak, under-resourced militaries. In 1994, the Pentagon referred the Croatian Ministry of Defense to MPRI, a Military Consultant Firm. MPRI was contracted to reform the defense department of the country. The success of MPRI's training programs

could be seen in Operation Storm, a Croat offensive against Serb rebel groups within the country that was extremely effective. Although officially MPRI denies involvement in Operation Storm, the connection between the company and the event is clear: in the week before Operation Storm, the CEO of MPRI, a former U.S. Army General, visited the Croatian Ministry at least ten times (Singer 2003, 120-133; FCO 2001, 13; Thompson et al 1996; Silverstein 1997). It should be noted that the success of the offensive was marred by the commission of human rights violations against the Serbs.

The MPRI contract was successful in terms of the desired outcomes. Without MPRI training, it would have taken longer for the Croatian army to gain control over Serbian rebels (Silber & Little 1997, 357). MPRI's services helped to minimize instability and to create a successful Croatian government. However, the political goal of developing stronger local militaries in the former Yugoslavia can be questioned – critics claim that providing military training to the Croats would not simply balance Serb power, but also encourage local conflict (Vlasek 2000).

Although MPRI's goals may have been questionable, their success in reforming the Croat military was remarkable. This case shares many of the factors that made EO successful in Sierra Leone. The objective of the contract was clear and MPRI had unity of command. The firm employed highly trained professionals (most had served previously in the U.S. Army), and they were working directly with the local military, so there was no conflict of interest. Finally, the government paid MPRI from military funds.

Negative Interventions

PAPUA NEW GUINEA

“Operation Contravene,” the Sandline intervention in Papua New Guinea (PNG), occurred in 1997. The leader of PNG, Dr. Julius Chan, hired Sandline, a Military Provider Firm, to train its army and gather intelligence on a secessionist group, the Bougainville Revolutionary Army (BRA). The decision to hire Sandline was approved by the PNG National Security Council, but without either public discussion or parliamentary notice, and Sandline was paid, not out of the military's budget, but out of cuts to public funding. After Sandline troops arrived, the general in charge of the PNG military, Jerry Singirok, condemned the Sandline contract. A political battle between Singirok and Chan ensued, and demonstrations broke out in the capital. Sandline stood at the sidelines, since it had no part in the battle between the President and the General. Due to these

disruptions, Sandline did not intervene against the BRA, but it held the PNG government to its financial obligations, putting a lien on the state's assets and receiving a judgment in its favor from an international arbitration panel (Singer 2003, 191-195; Pelton 2007, 265-269; BBC 1999).

The Sandline operation in PNG was clearly unsuccessful. Sandline was hired to minimize the effects of the conflict between the government and the BRA. Instead, it created new tensions between different factions of the government, and it did not take any action to deter the BRA. In addition, the contract caused PNG financial hardship, since it had to pay Sandline for a service the company never provided. The operation in PNG was unsuccessful largely because of divisions in the party that hired Sandline. The battles between Chan and Singirok – who were supposed to be a part of a unified contracting party – incapacitated Sandline.

IRAQ

In 2003, the U.S., the UK and a coalition of the willing invaded Iraq in order to disarm Saddam Hussein and institute regime change in Iraq. Following the invasion, a transitional government known as the Coalition Provisional Authority was instituted. This authority remained in place until June 2004, when it transferred power to the Iraqi Interim Government. Since the invasion, the coalition has maintained a strong military presence in Iraq, both for counterinsurgency and for nation-building purposes. The military presence consists both of national troops and of PMSC personnel.

PMSCs have played an active and visible role in Iraq. In 2007, an internal Department of Defense (DoD) census found that almost 180,000 private contractors were employed in Iraq, compared with 160,000 total U.S. troops at the time (Miller 2007). The unregulated expansion of PMSCs has given rise to an endless array of scandals. Notably, PMSC employees participated in the torture of Iraqi prisoners at Abu Ghraib (Benz 2004); employees of PMSCs, including Blackwater and Crescent Security, gunned down Iraqi civilians in cold blood (Thompson & Risen 2008). Amnesty International and Human Rights Watch have condemned the behavior of PMSCs toward Iraqis; the families of Blackwater employees killed in Iraq have sued the company for irresponsibility toward their employees (Pelton 2006, 139; Fainaru 2008, 166); some PMSC employees have been taken hostage and killed due to company negligence (Fainaru 2008, 85-121; Pelton 2006, 118-142). Thus, the poor management of PMSCs has had dramatic consequences, both for underprepared employees and for innocent Iraqi civilians.

Why did Iraq result in such catastrophe when interventions in Sierra Leone and Croatia were so promising? The failure of PMSCs in Iraq can be attributed to (1) poor contracting practices and (2) lack of legitimate domestic legal accountability. In the case of some PMSCs, the situation was exacerbated by lack of appropriate skills and training.

The contracting processes used to hire PMSCs in Iraq were flawed. The process of awarding contracts was complicated by conflict of interest. This is exemplified by the close relationship between Dick Cheney and Halliburton, whereby Cheney received roughly two million dollars from the company after becoming Vice-President (Rosenbaum 2004). Once contracts were awarded, there was no punishment for poor performance. Some of the worst contract performers in the U.S. military contract portfolio include Halliburton-KBR, DynCorp, and Fluor Corp. These companies were being investigated for 29 cases of serious misconduct, including fraud, and conspiracy to launder money in 2007 (Tiron 2007). Yet, this same year, all three companies were jointly awarded the new LOGCAP contract, potentially worth up to \$150 billion (Tiron 2007). Conflict of interest issues were also rampant in management of contractors. The DoD contracted MPRI, a private company, to write the field manuals governing contracting on the battlefield (FM 100-10-2 and FM 100-21) (Singer 2003, 123-124). Effectively, a private company wrote the rules by which contractors are governed.

After the invasion of Iraq, there was no unified domestic authority and no legal framework. In addition, the command structure in Iraq was not clear. Unlike Sierra Leone or Croatia, the rules governing contractors were not drawn up by a legitimate (or quasi-legitimate) domestic authority, but instead by the provisional coalition government. Order 17, issued by the Coalition Provisional Authority under the direction of Paul Bremer in 2004 clearly states that contractors were not subject to Iraqi law: Section 4 Article 2 states that “Contractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their Contracts,” and Article 3 states that “Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract.” Both of these articles clearly state that contractors are not subject to any laws, and they promote a lack of accountability among PMSCs. This lack of accountability was confirmed by Memo 17, the document outlining conduct for PMSC employees. The first sentence of the protocol on the use of force reads, “*nothing in these rules limits your inherent right to take action necessary to defend yourself,*” thus implicitly condoning all actions of PMSC employees.

In addition to the lack of legal framework, there was no unity of command in Iraq. U.S. Army missions ran parallel to PMSC operations, and there was often lack of clarity about responsibilities. In one example at Al Kut, a Coalition Provision Authority office was guarded by a lightly armed PMSC responsible for defense of the building. The U.S. military was responsible for fighting counterinsurgents. When the CPA office was attacked by counterinsurgents, ill-equipped PMSCs were denied backup from the U.S. military because there was no clarity about responsibilities and command structures (Pelton 2006, 154-165).

Lessons from PMSC Interventions

It can be seen from the examples above that successful PMSC interventions are characterized by three criteria: (1) clear contracts with specific, achievable objectives and unity of military command, (2) a unified contracting party, and (3) a highly skilled and trained PMSC. These three factors must converge within a legitimate legal framework that demands accountability in order for a PMSC operation to be successful. While the EO intervention in Sierra Leone and the MPRI aid in Croatia fulfilled all of the above criteria, the operation in Papua New Guinea failed due to divisions within the contracting party. In Iraq none of the conditions for success are present, therefore PMSC presence has been disastrous.

THE CURRENT STATUS OF POLICY ABOUT PMSCs

What is at Stake?

Why is it important for policymakers to quickly develop and implement policies that promote successful PMSC intervention? Firstly, PMSCs are firmly entrenched – it is not possible to attempt a total ban on their services. In addition, poor management of PMSCs has dramatic humanitarian consequences, such as those seen in Iraq. Finally, successful PMSC policies may increase the cost-effectiveness and the feasibility of military intervention.

PMSCs now play an established role in the militaries of developed countries. The size of the LOGCAP contract in the U.S. demonstrates this: the most recent contract has an estimated value of \$150 billion (Tiron, 2007). PMSCs are so widespread that they can halt military activities, as demonstrated by the following example. “In July 2000, the GTS Katie, a contracted military transport ship was carrying back from Bosnia a unit of Canadian army soldiers ... Due to a financial dispute between two subcontracting agents, the ship began sailing in circles outside Canadian

waters. Until the matter was resolved, the ship refused to make the delivery, essentially holding about one-third of the Canadian army's entire equipment and soldiers hostage" (Pugliese 2000). PMSCs are so deeply involved in military actions that it will be difficult to eliminate them.

Furthermore, misuse of PMSC has dramatic humanitarian consequences. The current activities of other security companies in Iraq show that without adequate regulation, PMSCs will not follow humanitarian laws. Self-policing mechanisms such as the Private Security Company Association of Iraq (PSCAI) have not prevented breach of humanitarian laws (Fainaru 2008, 18-35). If policy makers do not regulate the industry, innocent civilians will continue to suffer.

If, on the other hand, clear regulation with adequate enforcement mechanisms is implemented, then the gains may be large. The EO experience in Sierra Leone shows that PMSCs may be able to provide cheaper, more effective military intervention. EO's interventions in Sierra Leone and Angola both provided humanitarian benefits, and effective implementation of PMSC policy may allow international organizations to take advantage of PMSC presence for humanitarian ends (Lilly 2000, 53-62).

The following section will provide some examples of domestic and international policy concerning PMSC, and the paper will conclude with recommendations on the future direction of PMSC policy.

Domestic Policies

Currently PMSCs are regulated primarily by national governments. While some governments attempt to outlaw any private military activities, others try to develop regulation mechanisms for PMSCs. At the moment, there are only two policy approaches to PMSCs. The first approach, exemplified by South Africa, is to treat these organizations as illegal entities, indistinguishable from mercenaries and the second, demonstrated by the U.S., is to keep the policy environment unspecified. Table n°1 attached provides an overview of different countries' policy approaches toward PMSCs.

South African legislation makes no distinction between mercenarism and PMSCs. It forbids any private military activity, and punishments for engaging in such activity include fines, imprisonment, and seizure of related assets (armaments, vehicles, etc). Individuals can be fined up to 100,000 Rand or be imprisoned for up to five years for engaging in mercenary activity. The South African legislation specifies extraterritorial application: that is, the law applies to any South African citizen, regardless of his country of residence. The legislation does, however, provide for exceptions, if the individual or company in question demands authorization for rendering

of foreign military assistance (Republic of South Africa 1998).

The U.S. has no official policy on contractors. PMSCs are regulated through two field manuals: FM 100-10-2 and FM 100-21. These manuals were drawn up by the contractor MPRI, so there may be conflict-of-interest concerns (Singer 2003, 123-124). They cover practical issues associated with contractors, rather than policy considerations. However, they confirm that PMSC operations are not limited to logistics but “span the spectrum of combat support functions ... to include offence and defense ... in major theatres of war” (U.S. Department of the Army FM 100-121, 1-1). The manual also points out gaps in the current structure: Paragraph 4-45 states that “Contractor employees are not subject to military law under the UCMJ when accompanying U.S. forces.” (U.S. Department of the Army FM 100-121, 4-12). The contractors are also not a part of the military chain of command, therefore the military hierarchy has no control over their actions. General Petraeus tried to correct this issue in his Counterinsurgency Field Manual, where he stressed the importance of unity of command that applies to both military and civilian units (U.S. Department of the Army FM 3-24, 2-2). The field manuals, although they highlight some issues associated with contractors, do not provide practical policy recommendations.

The UK Foreign and Commonwealth Office (FCO) drew up a Green Paper on the regulation of PMSCs in 2002. The FCO recognized that the growth of PMSCs is difficult, if not impossible, to impede, particularly since the UK military itself uses PMSCs. The FCO Green Paper proposes six policy options: (1) a ban on PMSCs, (2) a ban on recruitment for military activity abroad, (3) a licensing regime for military services (that is, a license is required for each individual operation), (4) registration and notification requirements for PMSCs, (5) a general license for PMSCs (that is, the company, rather than each activity, is licensed) and (6) self-regulation. Some options are clearly not viable. The lack of success of the PSCAI eliminates option 6, and the rapid growth of PMSCs during the Iraq invasion eliminates options 1 and 2. While the UK has put forward three viable plans for regulating PMSCs and has considered the advantages and disadvantages of each plan, it has neither chosen an option nor implemented any regulation.

International Policies

The UN has attempted to address the issue of mercenaries through its Convention Against the Recruitment, Use, Financing or Training of Mercenaries. This document suffers from the same challenge as many

domestic policies: it does not make a distinction between mercenaries and PMSCs. In addition, it attempts to prohibit PMSCs despite their presence in militaries throughout the world. The document was supported by a wide array of African states, but has not achieved widespread ratification (Gatson 2008, 232). The UN Convention on Mercenaries is of limited usefulness because it does not attempt to address the new corporatized form of privatized security. In addition, the Convention is not widely accepted: only 22 states have both signed and ratified the convention, with an additional 9 that have signed but not yet ratified it.

A recent attempt to address the complex challenges posed by PMSCs is the Montreux Document.¹ This document, issued in September 2008, is the product of an initiative launched cooperatively by Switzerland and the International Committee of the Red Cross. It identifies relevant legal obligations, and outlines the responsibilities of the contracting state, the home state and the territorial state (that is, the state that contracts the PMSC, the state on whose territory the PMSC operates and the state in which the PMSC is registered, respectively). The Montreux Document assigns responsibility for compliance with international humanitarian law (IHL) primarily to the contracting state. The contracting state has the obligation not to contract a PMSC to violate IHL, and to create contracts that ensure respect for IHL. The Montreux Document also sets out best practices with regard to PMSC contracts. It suggests contracting procedures that minimize conflicts of interest, emphasizes the importance of monitoring and evaluating PMSC performance, and outlines authorization procedures for territorial states.

Although the Montreux Document represents a practical and thorough approach to the regulation of PMSCs, it has some weaknesses. It draws out obligations as they refer to states, and does not attempt to outline a code of conduct to which the PMSCs themselves can subscribe. In addition, it was drawn up by only 17 states, and has not achieved widespread consensus. Also, the Montreux Document is not legally binding and specifically states that it does not limit or enhance the obligations of states.

While the Montreux Document represents progress with regard to regulating PMSCs, some legally binding framework must be put in place in order to change the behavior of PMSCs in the field.

POLICY RECOMMENDATIONS

PMSCs are currently in a regulatory void – domestic regulation is either out of date or non-existent and international regulation is weak. The UN and countries such as South Africa do not acknowledge the existence of

modern, corporatized PMSCs – their legislation is directed at individual mercenaries. The U.S. and the UK recognize that PMSCs pose challenges but the U.S. does not propose any policy suggestions to address these challenges. While the UK has outlined potential legislative frameworks for PMSCs, it has made no progress in implementing these frameworks. The Montreux Document addresses the practical issues associated with PMSCs; however, because it is not legally binding, its effectiveness is limited. At the moment, a gap exists in policy toward PMSCs, both within domestic governments and in the international community. Policy makers responsible for closing this gap must explicitly consider the challenges created by the international nature of PMSCs, the need to engage the PMSCs themselves in the regulatory process and the importance of enforcement mechanisms in achieving policy outcomes.

The fluid structure of PMSCs makes it imperative that a binding international policy structure be created to regulate these companies. The history of Executive Outcomes demonstrates the ineffectiveness of domestic regulation alone as an instrument of policy. Executive Outcomes was based in South Africa when the country implemented strong anti-mercenary regulation. In response to the regulation, Executive Outcomes did not shut down or limit its operations – it simply dissolved and reformed into new firms headquartered in other countries (such as Saracen, the company that provides de-mining operations to the UN in Angola). Another firm, Erinys, is headquartered in the British Virgin Islands with subsidiaries in various countries. This corporate structure was chosen both to maximize tax benefits and to circumvent domestic regulation of PMSCs. Because many PMSCs have flexible configurations that enable them to avoid domestic regulation, effective policy measures to regulate PMSCs will involve international commitment.

Internationally binding regulation of PMSCs may take the form of binding multilateral treaties whereby many countries agree on minimum standards to be imposed on these firms. Such standards may include: (1) PMSC compliance with international humanitarian law, (2) PMSC adherence to an industry-defined Code of Conduct, and (3) standards to determine conflict of interest (that is, a description of the types of activities that would be considered conflict of interest for a PMSC headquartered in a country that has signed & ratified the treaty). Any treaty attempting to govern mercenaries must be widely accepted by countries that host and countries that use PMSCs. Without such buy-in, it will be possible for PMSCs to re-locate to countries that are not a party to the treaty and to continue to avoid regulation. The proposed policy framework would

differ from the Montreux Document in that it would explicitly lay out standards by which conflicts of interest are determined, it would define the minimum standards of a Code of Conduct, and it would be legally binding. The framework created must be legally binding, because without this obligation, neither host countries nor home countries will have an incentive to implement the terms of the treaty.

The second policy recommendation is to actively engage PMSCs in the regulatory process. Information about PMSCs is currently difficult to obtain. Companies such as Aegis and Erinys are private, with no obligation to make financial records or contracts public. Similarly, companies that are public, such as MPRI, are a part of larger groups (L-3). While information may be available about the larger group, detailed breakdowns about PMSC operations are seldom provided (Avant 2005). The lack of information about PMSC activities, costs, and revenues makes it difficult to create robust policy. One way in which governments can overcome this challenge is to engage the PMSCs in the regulatory process. PMSCs have information about the minimum skills required for employees, the training that employees ought to receive, and the minimum standard of equipment that should be permitted in the field. They can use this information to draw up a realistic Code of Conduct that sets out rules and standards for PMSCs. Such a Code may include elements such as adherence to international humanitarian law and adequate training and equipment standards. A Code of Conduct would allow PMSC clients to make more informed decisions about the suppliers they choose: they will be able to pick suppliers that have committed to upholding the principles of international humanitarian law and to maintaining a minimum quality of service. The Code of Conduct may also act as a contract between supplier and client, and the client can use the Code to impose penalties on the supplier in the case of failure to comply with international legal standards.

Both regulatory mechanisms (multilateral treaties and Codes of Conduct) must be supported by enforcement mechanisms. Robust international policy is difficult to achieve because, unlike in a domestic environment, there is no authority that can enforce punishment for parties that do not meet their contractual (or treaty) obligations. There are three solutions to this problem. The first is for every participant in the treaty to explicitly accept the jurisdiction of an international body such as the International Criminal Court (ICC). The ICC or a similar adjudication body would provide a relatively impartial forum that could impose penalties on countries or PMSCs for failure to comply with regulation. The second solution to the enforcement problem would involve the implementation of uniform

regulation among all countries who sign the treaty. This level of coordination may be difficult to achieve, since it involves not only the international political arena, but also the domestic theatre. Finally, it would be possible to set up an independent arbitration panel to judge any disputes about PMSC performance.

It is important to note that while the implementation of an international policy framework will set out minimum standards for PMSC performance, and may help to ensure adherence to humanitarian laws, it will not provide guarantees as to the cost-effectiveness of PMSCs. There is debate about the economic benefits of PMSCs. While certain PMSC interventions such as the Executive Outcomes interventions in Angola and Sierra Leone seem much less expensive than comparable UN peacekeeping missions, the cost of Blackwater interventions in Iraq seems relatively greater than the cost of using domestic military forces. The economic effectiveness of PMSCs depends on the contracts between companies and customers, and will vary depending on demand and supply for PMSC services as well as contractual incentives for cost-reduction.

CONCLUSION

The three aspects necessary for successful PMSC intervention are (1) good contracting practices, (2) unity within the contracting party, and integration between the PMSC and contracting party troop, and (3) highly skilled PMSC employees. While it can be difficult to ensure unity within the contracting party, it should be possible to promote minimum standards and appropriate skills through policy. Policy regulating PMSCs must have widespread international acceptance in order to be effective. PMSC co-operation in the development of a regulatory framework is also important, given the paucity of information about PMSC activity. Finally, enforcement can become a particularly complex policy issue.

Today's private military companies are radically different from the mercenaries of the past. Whereas private mercenaries were previously lone gunslingers, Blackwater and DynCorp demonstrate that today, private soldiers are both organized and omnipresent. The benefits of the new global market for force can be seen in Sierra Leone. The serious threats associated with PMSCs are vividly demonstrated by countless incidents of human rights abuses in Iraq. Although the weaknesses of PMSCs are clear, there has been only little movement to regulate this new industry. Only one question now remains for policy makers: Should we implement practical policies to regulate PMSCs, or should we remain blind to their presence and risk the lives of innocent civilians?

Table n° 1: Policy approaches toward PMSCs

<u>Country</u>	<u>Party to UN Convention?</u>	<u>Domestic Legislation?</u>	<u>Live Legislation?</u>	<u>Maximum Im-prisonment?</u>	<u>Note</u>
Australia	No	Yes	Yes	No Data	In 1998-1999 5 charges were laid
Austria	No	Yes	No	No Data	
Belgium	No	No	Not Applicable	Not Applicable	
Canada	No	Yes	No	No Data	
Denmark	No	Yes	No	2 years	
Finland	No	Yes	No Data	No Data	
France	No	Yes	No Data	No Data	
Germany	Signed but not Ratified	No	Not Applicable	Not Applicable	
Greece	No	Yes	No Data	No Data	
Italy	Signed but not Ratified	Yes	No	14 years	
Japan	No	No	Not Applicable	Not Applicable	
Netherlands	No	Yes	No	4 years	

Table n° 1: Policy approaches toward PMSCs Con't

<u>Country</u>	<u>Party to UN Convention?</u>	<u>Domestic Legislation?</u>	<u>Live Legislation?</u>	<u>Maximum Im-prisonment?</u>	<u>Note</u>
New Zealand	No	No	Not Applicable	Not Applicable	
Norway	No	Yes	No	No Data	
Portugal	No	Yes	No	No Data	
Russia	No	Yes	No Data	8 years	
Spain	No	No	Not Applicable	Not Applicable	
Sweden	No	No	No Data	6 months in peacetime 2 years in wartime	There is no anti-mercenary legislation, but there is punishment for entering the service of another military without the permission of the government
Switzerland	No	Yes	17 people sentenced between 1994 and 2000	3 years	
Ukraine	Signed & Ratified	Yes	No Data	10 years	

Table n°2 : Case-study overview

Country	PMSC	Type of PMSC	Success?	Contract Clarity?	Unity of Contracting Party?	Skill of PMSC?
Sierra Leone	Executive Outcomes	Military Provider Firm	High short-term success rate.	Very clear with two clearly delimited goals: (1) to clear the rebels from Freetown, and (2) to clear the rebels from mining areas.	Unified. Government allied with Branch Heritage Mining Company.	Very skilled. Recruited from elite SADF battalions.
Croatia	MPRI	Military Consultant Firm	High short-term success rate.	Very clear contract.	Unified.	Very skilled. Employees of MPRI include former U.S. Army Generals.
Papua New Guinea	Sandline	Military Provider Firm	Very low. No intervention, increased domestic tension.	Clear contract with a specific aim (to repel the BRA rebels).	Not unified. The executive branch of the PNG government was at odds with the leader of the army.	Very skilled.
Iraq	Multiple (Blackwater, DynCorp, Aegis, among others)	Various	Varied results.	Varied.	Not unified. Many different contracting parties operating with a variety of PMSCs.	Varied.

NOTES

¹ More information about the Montreux Document can be found at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908>. The Montreux Document reaffirms the obligation on States to ensure that private military and security companies operating in armed conflicts comply with international humanitarian and human rights law. The document also lists some 70 recommendations, derived from good State practices. These include verifying the track record of companies and examining the procedures they use to vet their staff. States should also take concrete measures to ensure that the personnel of private military and security companies can be prosecuted when serious breaches of the law occur.

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