Report on the Rome Workshop

LUISS Guido Carli, 28 November 2008

The Challenges to the Regulation of Private Military and Security Companies

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PRIV-WAR

Regulating privatisation of "war": the role of the EU in assuring the compliance with international humanitarian law and human rights

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1. Introduction

On 28 November 2008 the LUISS Guido Carli University hosted a workshop on 'The Challenges to the Regulation of Private Military and Security Companies'. This was the second event organized by the consortium within the framework of PRIV-WAR, following the Symposium organized by the European University Institute together with the European Journal of International Law which took place in Florence in June 2008.

The aim of the workshop was to promote brainstorming among members of the seven research teams, with the participation of distinguished guest speakers. The meeting enabled participants to engage in a frank debate on the growth and importance of the private military and security sector and the challenges posed by private outsourcing to international humanitarian law and human rights law. Finally, the workshop provided an opportunity to open a discussion on the present status of national legislation and case-law.

The workshop was conducted under the Chatham House Rule; thus the discussion was off the record and not for attribution. The present report is a brief account of the proceedings of the meeting: it is not an official and complete record, nor does it reflect the official views of any of the participants.

2. Overview of the role of private companies in military operations

During the first two sessions of the workshop, participants sought to identify the nature of private military and security companies, the task they perform in the context of an armed conflict and the reasons for their extensive use by regular armed forces. The organiser asked experts from different fields to give short presentations to help focus the workshop discussions.

A. A matter of definition

There are numerous terms to refer to the corporate entity which enters into a contract with States, international organisations, other companies or NGOs to provide services in situations of armed conflict. PMSC is the most common acronym used to describe the phenomenon. There was broad agreement among the participants on the need to identify different categories within the general notion of private companies providing military or/and security services.

On the basis of the approach of the UK Ministry of Defence (MoD), one expert proposed that the broader notion of *Contractor Support to Operations (CSO)* be used. The CSO policy of the United Kingdom identifies three types of CSO:

Contractors on Deployed Operations (CONDO): civilian personnel providing goods and services outside the United Kingdom within a joint operation area as part of the civilian component supporting UK armed forces;

Sponsored Reserves (SR): individuals who serve, as members of the workforce of a company contracted to the MoD, in a military capacity;

Private Military Security Companies (PMSC): full range of companies involved in the supply of security, defence and military services to members of the military and civilian component.

Reference was made in this context to the UK Joint Doctrine Note 1/08, entitled *Military Interaction with Private Military and Security Companies*.

During the workshop debate, some participants expressed concern about the use of the term *Contractor Support to Operations (CSO)*, given that it is very broad.

B. The range of services

For a correct understanding of the phenomenon, it is important to focus on the broad spectrum of services provided by private companies. Though private contractors may be hired by other non state actors (including multinational corporations and NGOs) in conflict and post-conflict situations to provide risk-management or security services, the most challenging scenario concerns those activities previously performed by national

militaries that are outsourced to private companies. One of the presentations focused on the types of services offered in the context of military operations.

As for the security services, these include tasks such as the guarding of military bases, checkpoints, work sites and embassies; personal security of high-ranking officials; travel security for individuals; escorts for vehicle convoys moving equipment and supplies; event security; evacuation planning and, finally, security advice and planning. Moreover, private companies are crucial for the collection of information. They offer fact-finding, monitoring and analytical functions. Other activities include military training and technical support, such as maintenance and operation of complex weapons systems and mine clearance services.

In addition, private companies are involved in state-building, since they support humanitarian aid and offer police training and advice for the reform of the national security infrastructure.

Another expert suggested that all these activities be evaluated through a wider focus. He proposed a reconsideration of the tasks performed by PMCSs according to four different perspectives: (a) private security in fragile and weak States; (b) PMSCs as strategic tools; (c) PMSCs in crisis-management operations; (d) mercenary activities.

(a) The first category includes private companies providing security services in post-conflict situations, where domestic institutions remain weak and there is a high risk of corruption and organised crime. This is the typical playground for doubtful companies. In this context, the role of private security personnel in the Western Balkans was stressed. A comparison was made between their number and that of police officers: it was observed, for instance, that in Serbia the former number 30,000 and the latter 27,000. Another scenario of interest is Sub-Saharan Africa: it was estimated that 2,000 private security companies are working in Nigeria, in particular for the private sector.

(b) The second perspective considers PMSCs as strategic tools for the States' regular armed forces: nowadays, private companies are able to provide a full range of highly qualified services and personnel, including special forces units, combat engineering and technical assistance. It was argued that in some cases their development should be seen as being in line with the national strategic policy of their home country.

(c) Under the third perspective, the point was made that PMCs are critical for crisis-management operations. There was much discussion during the workshop at LUISS on the various reasons why the employment of private contractors has become so fundamental and why their number has grown so rapidly.

(d) There was also discussion of whether PMCs fall within the category of mercenaries under the relevant international conventions (see below, paragraphs 4 and 6).

C. Reasons for the growing use

The total number of contractors operating in Iraq under a US government-funded contract was between 190,000 - 196,000 working for well over 100 PMSCs. There was general consensus among the participants that there are two main reasons for the growing use of PMCs: on the one hand, the changed character of crisis-management operations and, on the other, the limited resources available to the regular armed forces as part of a general trend towards the privatisation of public functions in Western countries.

One expert submitted two additional points: first, the outsourcing of certain 'sensitive tasks' (including interrogation and intelligence gathering) represented an opportunity for democratic societies to avoid oversight and accountability for the wrongful use of lethal force. A second important consideration is the 'hidden death tolls': companies rarely acknowledge their losses and in any case the statistical databases do not appear significant to the public opinion because casualties among private contractors are from dozens of different countries with a high number of deaths and injuries among local employees (see Iraq).

D. ESDP operations and PMSCs

One of the issues addressed during the workshop was whether private contractors have been used in the course of ESDP operations. Currently there are 14 ongoing ESDP operations in four different regions of the world: most of these are civilian crisis-management operations, and only three of them have a military component. Experience from the field shows that there has been cooperation with private security companies during support operations for security sector reform (SSR). An interesting case-study is

the EU Police mission in Afghanistan (EUPOL AFGHANISTAN) launched in mid-June 2007. The mission builds on the efforts of the GPPO (German Police Project Office) and other international actions in the field of policing and the rule of law: the aim is to contribute to the establishment of sustainable and effective civil policing arrangements. The USA superseded Germany in the field of police training: it is noteworthy in this context that EUPOL cooperates with three companies hired by the US (Dyncorp, MPRI, Blackwater) to carry out the mandate. Several participants commented on this point. One participant questioned whether there is a difference in the training approach, while others raised the point of the kind of oversight exercised by the EU mission on the PSC companies there.

In general, the absence of an official EU policy regarding the use of PMSCs in ESDP operations was emphasised. However, the main principles followed in practice (unofficial policy elements) can be summarised as follows: (a) avoid using PMSCs where possible; (b) responsibility of the host nation; (c) in situations of necessity, preference should be given to European PMSCs and European employees; (d) if necessary, private contractors should be unarmed; (e) avoid using local companies; (f) PMSCs should be screened for quality and training; (g) no immunity should be granted from the national law of the host state.

As for the preference for EU companies and employees, one of the participants argued that this could violate the criteria of equal treatment, non-discrimination and transparency. Regarding the principle of non-immunity from host State jurisdiction, others raised the question of how this could be reconciled with the absence of a functioning judicial system or a lack of minimum standards in judicial proceedings in the host country, especially in post-conflict situations.

E. Problems related to the increasing role of PMSCs

The debate in Rome focused on the underlying problems related to the increasing outsourcing of military and security functions to private contractors.

First, the participants discussed the question of which activities were unsuitable for privatisation. The unavoidable test-case was the United States, where the debate focused on the notion of 'inherently governmental' function. It was observed that determining

the contours of the definition was quite a challenge, since the available documentation from the US Administration offered little guidance. In particular, regarding the increasing security function of PSCs, other related issues were identified: (a) economic remuneration of PSC personnel; (2) whether the increased use of PSC personnel weakens military readiness; (3) the attrition rate of PSCs. In this context, the problem of lack of transparency was stressed, with regard to both the numbers of PMSCs and their personnel and their responsibilities.

The second issue was the legal status of PMSCs and their personnel in the situation of an armed conflict. One of the crucial questions is whether they are civilians or combatants, under the principle of distinction in international humanitarian law. For the US Department of Defence, contractors are considered 'persons who accompany the armed forces', according to the relevant provisions of the 1949 Geneva Conventions, as long as they receive 'authorization' and carry Government ID cards. On this specific point, one of the presentations addressed the issue of the notion of 'direct participation in hostilities', to which this report will return in paragraph 6.

The third problematic aspect was the use of force by private contractors. One of the participants raised the point of whether the personnel of private contractors are allowed to carry and use weapons in armed conflicts: events of excessive violence by contractors in Iraq were recalled in this context. Other experts stressed that the possession of small arms for self-defence purposes was not prohibited by international law.

With regard to incidents involving personnel of PMSCs hired by States, experience has shown a lack of independent investigations; lack of oversight and control by State authority and, finally, lack of accountability. The place of private contractors within the military chain of command is also a matter of concern and some speakers expressed the need for a more effective command and control structure.

As far as the exercise of criminal jurisdiction is concerned, it was recalled that contractors operating in Afghanistan and Iraq were granted immunity under local law for actions within the scope of their employment relative to their contract with the US. The debate focused on the recent new status of forces agreement (SOFA) negotiated between the United States and Iraq. Prior to that agreement, contractor employees working for the US Government in Iraq were granted immunity by Coalition Provisional Authority Order No. 17. Article 12 of the SOFA lifts immunity from

jurisdiction as it provides that 'Iraq shall have the primary right to exercise jurisdiction over United States contractors and United States contractor employees'. One of the speakers questioned whether the loss of immunity covered all the US contractors in Iraq, including those working for the Department of State, since the SOFA defined them as 'non-Iraqi persons or legal entities, and their employees, who are citizens of the United States or a third country and who are in Iraq to supply goods, services, and security in Iraq to or on behalf of the United States Forces under a contract or subcontract with or for the United States.' Moreover, the point was made that the question of defining PMSCs remains an important issue; and that the issue of lifting immunity as foreseen in the new SOFA for Iraq is a critical one, in particular in view of the insufficient guarantees of the local judicial system.

The issue of compensation for victims constituted another point of discussion. One of the experts pointed out that the attribution to the hiring State of the contractors' conduct could prevent individuals from obtaining compensation, given the current discipline on State immunity from civil jurisdiction. It was also argued that the same would be true for PMSCs working for international organisations (though the issue of attribution in this context is problematic).

In this context, a recruitment problem was recognised by several experts. One need only look on the internet to realise that PMSCs risk attracting unstable persons.

Others stressed demand-side problems: it was recalled that PMSCs are used not only by democratic governments but also by rebel groups, drug cartels and dictatorial countries.

Finally, the issue of PMSC reliability was emphasised. As they are business-oriented actors, some speakers recalled the risks of fraud, or transfer of sensitive information and technology.

F. Contract as an essential tool of regulation

It was a shared view among the participants that contracts are an essential tool of regulation for the activities of PMSCs. However, an analysis of available contracts concluded in the early stages of the Iraqi occupation shows that the language used was often vague, as it did not clarify precisely the tasks of the contractors and the standards they had to follow.

As for the minimum standard, participants pointed out that contracts should include provisions regarding the use of force and respect of international humanitarian law and human rights law, and they should establish specific requirements for training and recruitment.

In the definition of contract standards, UK experience constitutes an essential test-case. Essential normative references are DEFCON 697 and DEFSTAN 05-129 (Contractors on Deployed Operations: Processes and Requirements), which provide standards for recruitment, training, personnel equipment, discipline and contract monitoring.

3. National legislation on PMSCs: focus on the United States

The LUISS workshop offered a preliminary contribution to the PRIV-WAR research goal of conducting a systematic and comprehensive analysis of existing relevant domestic legislation. The workshop focused on the present regulatory framework in the United States.

One of the presentations was devoted to that topic. First, the speaker provided a qualitative and quantitative analysis of the use of PMSCs by the US since 9/11: in particular, the number of contractor personnel working overseas, the governmental departments and agencies which have entered into contracts with them, the cost of contractor operations, and the various roles played by contractors.

The speaker then offered an overview of the statutes and guidelines that provide for both the process of contracting with the US Government and the review and oversight of military contractors. It was stressed that the one of the most common critiques faced by the US Administration was that each department (i.e. Department of Defense and State Department) did not possess a clear view of the activities of contractors for which they were directly responsible and that they were not aware of the activities of the other. In that regard, a Memorandum of Agreement between the Department of Defense and the State Department was significantly signed on 5 December 2007, aimed at the management of PSC personnel and the coordination of PSC operations outside secure bases and US diplomatic property.

The core of the presentation addressed the criminal and civil legal regimes to hold PMSCs and their personnel accountable for misconduct perpetrated abroad in a zone of armed conflict.

It was observed that three statutory regimes could be used to prosecute PMSC personnel: first of all, federal statutes grant US courts 'special maritime and territorial jurisdiction' (SMTJ), which enables courts to exercise their jurisdiction for acts perpetrated on US military bases. Second, the Uniform Code of Military Justice (UCMJ) was amended in October 2006 to extend jurisdiction over persons 'serving with or accompanying an armed force in the field' during 'contingency operations'. Finally, PMSC personnel could also be charged under the United States War Crimes Act, which implements US obligations under the Geneva Conventions.

Finally, reference was made to the civil suits for monetary damages against PMSCs and their contractor personnel for injury or death caused by negligence on the part of their personnel, the PMSCs in hiring the personnel, or in some cases, fraud on the part of the PMSCs.

4. The activities of the UN Working Group on the Use of Mercenaries

The third session of the workshop focused on international initiatives launched to improve the regulation of PMSCs: in particular the work of the UN working group on the use of mercenaries and the Swiss Initiative, jointly launched by the Government of Switzerland and the International Committee of the Red Cross.

The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, was established by the Commission on Human Rights in 2005. Its mandate was widened to include the supervision and the study of the impact of the activities of PMSCs on the enjoyment of human rights.

Between 2005 and 2008 the Working Group conducted country visits (Chile, Fiji, Honduras, Ecuador, Peru and the United Kingdom) and convened regional consultations. These initiatives were aimed at collecting information on the practices of private military and security companies in armed conflict or post-conflict situations and on steps taken by States in the different regions to adopt measures to regulate and

monitor the activities of such companies. In addition, the Working Group received information from governments, NGOs and individuals concerning situations involving mercenaries, mercenary-related activities and PMSCs. In that regard, this body sent communications to Australia, Colombia, Iraq, Israel, Mexico and the United States.

In the Working Group's opinion, the activities of some private security companies are new manifestations of mercenarism. It was observed that former military or police personnel recruited to provide 'passive or static security' in Afghanistan and Iraq, rapidly switched to active security when attacked by the insurgency. It was argued that in those situations it was impossible to distinguish between offensive and defensive operations: there, they are neither civilians nor combatants.

Finally, the Working Group is considering how best to make proposals for the elaboration of national and international regulation mechanisms to address the activities of PMSCs: it was recalled that one possibility would be to propose a new convention; another would be to draft a protocol to the UN Convention against Mercenaries, though this latter option was viewed as less likely. The most practical means would appear to be the elaboration of soft law guidelines. However, the discussion is ongoing.

5. The Montreux Document on Pertinent International Legal Obligations and Good Practices of States Related to Operations of Private Military and Security Companies during Armed Conflict

The 'Montreux Document on Pertinent International Legal Obligations and Good Practices of States Related to Operations of Private Military and Security Companies during Armed Conflict' was agreed on 17 September 2008. It represents the outcome of the so-called Swiss Initiative, a joint initiative by the Government of Switzerland and the International Committee of the Red Cross launched in early 2006, with the participation of 16 other governments (Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, the UK, the Ukraine and the US).

The Montreux Document is not intended to be a comprehensive effort; rather it adopts a pragmatic approach aimed at promoting respect by States and PMSCs for international humanitarian law and human rights law. Part One recalls 27 core international

obligations of States and PMSCs and their personnel, while Part Two provides States with 73 good practices to promote compliance with international humanitarian law and human rights law during armed conflict. It was stressed that the document does not create new law: it contains separate guidance for contracting States (countries that hire PMSCs), territorial States (countries on whose territory PMSCs operate) and home States (countries in which PMSCs are based). In addition, it provides guidance for PMSCs in their interactions with Government clients and host States.

The aim of the States involved in the Swiss Initiative is to broaden consensus among a wider group of States on the principles endorsed in the Montreux Document. Thus, it has been widely disseminated among the various stakeholders: States, the private sector, and NGOs. At the intergovernmental level, it reached NATO, OECD, OAS, and the UN, including the Working Group on the use of mercenaries.

The point was made that the Montreux Document considers the use of private contractors as an undeniable aspect of present-day warfare: thus, it was not intended to pass judgment on PMSCs or to confer or deny legitimacy in any form to them. Moreover, it was stressed that the document implies that the employees of PMSCs usually enjoy civilian status under the Geneva Conventions. Therefore, attacking them is illegal unless and for such times as they directly take part in hostilities.

During the debate at the LUISS workshop, some participants raised the point of the legitimacy of the Swiss Initiative and its outcome, since it was composed of a relatively small number of States. In this context, it was noted that the UN working group on mercenaries was not invited to participate in the initiative.

There was general agreement among the participants on the need for coherence among the various initiatives at international level and broad support among States for any new regulatory framework. Various experts argued that there was no real need for additional rules: the international legal framework already exists. Rather, most pressingly, States need to apply these norms, but there seems to be a lack of political will.

6. Private contractors and international humanitarian law: the issue of direct participation in hostilities

One of the presentations focused on the controversial notion of 'direct participation in hostilities'. As far as the employment of PMSCs during armed conflict is concerned, a clear understanding of what taking direct part in hostilities entails, is crucial, for at least three reasons: (a) the notion is included in the definition of mercenaries under Article 47 of Additional Protocol I; (b) it contributes to the definition of the rights and obligations of PMSC personnel (i.e. protection from attack; status of POW); (c) it determines the legal consequences deriving from their conduct (i.e. if they are civilians, they may be prosecuted for the mere fact of having directly participated in hostilities, under domestic criminal law).

It was recalled that an expert working group instituted in 2003 by the International Committee of the Red Cross and the TMC Asser Institute was mandated to examine the notion of 'direct participation'. Between 2003 and 2005 three reports were published: the expected outcome is the drafting of interpretative guidelines.

The first observation was that the definition of mercenaries under international humanitarian law and relevant conventions is very narrow: the reality of PMSCs is too broad and complex and it cannot be completely understood through the mercenarism perspective.

The speaker then discussed whether PMSC personnel could be combatants in an international armed conflict: it was argued that they could fall within the category of militias and volunteer corps, under Article 4A of the 1949 Third Geneva Convention; alternatively, they could be members of the armed forces within the meaning of Article 43 of the 1977 Additional Protocol I. In any case, it is necessary to demonstrate that they fulfil at least the following two essential conditions: that of being under a command responsible to a Party of the conflict for the conduct of its subordinates; that of having an internal structure and a disciplinary system.

One of the few examples of a private military company specifically hired by a State to carry out combat operations is the British firm Sandline International which entered into a contract with Papua New Guinea in 1997. Different interpretations of the legal status under IHL of its employees have been given: some experts supported their inclusion

within the category of mercenaries, while others held that the link established by that agreement led to their incorporation within the armed forces of that State.

In an international armed conflict, PMSC employees who are not legitimate combatants are civilians: they are not allowed to take direct part in hostilities, and if they do so, they lose the benefit of immunity from attack. It is noteworthy that the United States and NATO consider private contractor personnel as civilians accompanying the armed forces: under Article 4A(4) of the Third Geneva Convention, such persons are accorded prisoner-of-war status, once certain conditions have been satisfied.

It was noted that the situation is different in the law of non-international armed conflicts, where there is no recognition of combatant privilege. What is at stake in this case is whether PMSC personnel could be considered as members of an organised armed group (within the meaning of Additional Protocol II) which does not enjoy protection from attack. This would be the case of private contractors involved in an internal armed conflict on behalf of an organized armed group (for example, a well-known PMC proposed to work on behalf of South Sudan in the civil war there).

Given that the notion of 'direct participation in hostilities' is applicable in both international and internal armed conflicts, the speaker pointed out that there is no definition in treaty law and the relevant commentaries. Several constitutive elements of the notion were identified by the ICRC expert group. An essential aspect is that there should be a link between a certain conduct and the conflict. Therefore, defensive acts against attacks from common criminals should not be regarded as direct participation. However, the so-called 'terrorism trap' arises in this context: the Iraqi scenario demonstrates that it is not easy to distinguish who is fighting against the Government.

This entails that the infliction of harm to the enemy both in offense and defense is covered by the definition of 'direct participation in hostilities'. However, it is not limited to combat operations involving the use of weapons: as the Commentary to the Additional Protocol I makes clear, 'to restrict this concept to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad'. It was observed that there is a broad grey area between those two extremes: defending military personnel and materials should be considered as directly participating in hostilities; while the transport of food for the troops falls outside the notion. Less clear is the well-known case of the driver of an ammunition truck.

The right of PMSC employees to carry weapons and the qualification of personal self-defense were widely discussed during the debate at LUISS Guido Carli. One expert argued that neither State practice nor international humanitarian law is clear on the question of PMSC employees carrying weapons. Several participants noted that the case of an individual civilian using force in response to an unlawful attack should not be considered direct participation in hostilities.

7. Conclusions

On the whole, the Rome workshop provided an extremely useful opportunity for an open exchange of views with different actors who are directly involved in the 'arena' of PMSCs, their use and their regulation. Many issues were addressed, and several unresolved questions were identified.

The conclusive remarks touched upon the following points:

(a) Presentations from experts on strategic issues showed that the phenomenon of PMSCs is not 'disappearing', but continues to be a significant presence is likely to increase;

(b) The research should question the trend towards the increasing employment of PMSCs: when and where do they constitute a real necessity?

(c) Although PMSCs do not operate in a legal vacuum, there seems to be a lack of *clear* standards;

(d) States should maintain a central role in the oversight of the conduct of PMSC personnel; they remain the most effective guarantors of compliance with human rights and international humanitarian law;

(e) Drafting satisfactory standards is only part of the solution: political will on the part of States to implement and enforce existing international rules remains essential, otherwise adopting new guidelines makes little sense;

(f) Enhancement of cooperation between States and dialogue with the relevant stakeholders: one of the expected goals of the PRIV-WAR project is to assess how the EU can contribute to this process.