

Introduction

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The claim to legitimate violence has long been understood to be the exclusive domain of states. Internally, the German sociologist Max Weber used this monopoly to define what a state is; externally, international law on the use of force seeks to regulate what a state does. Mercenaries and the modern phenomenon of private military companies (PMCs) — commercial firms offering military services ranging from military training and advice to combat — challenge this neat schema, a challenge that has achieved greater significance due to the rise in private military activity following the end of the Cold War.

The traditional response, driven in significant part by the post-colonial experience of mercenaries in Africa, has been abolitionist: prohibiting mercenarism or the use of mercenaries. That approach has failed, and in any case bears little relevance to the more recent experience of PMCs playing an increasingly accepted role in armed conflicts. Executive Outcomes turned around an orphaned conflict in Sierra Leone in the mid-1990s; Military Professional Resources Incorporated (MPRI) was instrumental in shifting the balance of power in the Balkans, clearing the way for the Dayton negotiations; in Iraq following the 2003 war PMC employees supporting coalition forces and reconstruction efforts made up the second largest grouping of personnel after the United States military.

Whether or not this extensive use of PMCs is evolutionary or remains exceptional, the growth of the industry shows no signs of slowing down. The privatization of military functions reflects a general enthusiasm for the outsourcing of

state capacities in the industrialized world, but is also a consequence of the growing reluctance on the part of key states to intervene in conflicts that are either not of immediate strategic interest or where domestic support for intervention is lacking. In addition, non-state actors such as transnational corporations and humanitarian organizations operating in fragile states are increasingly targeted by non-state violence, prompting them to turn to the commercial sector for want of other security options.

Despite the growing attention paid to PMCs, however, there has been little sustained examination of the governance of such actors. The majority of the literature tends to focus on either descriptive accounts of incidents involving PMCs or normative arguments based on a relatively narrow human rights foundation. What has been absent is clarity about the phenomenon — in particular the distinction between modern PMCs and traditional mercenaries — and a realistic approach to regulation that addresses both the problems of unaccountable actors wielding potentially lethal force and the interests of the consumers and suppliers of an increasingly established industry.

This book seeks to fill these gaps. It does so by taking seriously arguments that the demand for such services will remain a persistent feature in international affairs and examining the governance issues that arise, particularly in the tension between efforts at regulation and market forces.

Acceptance of that market will largely depend on the reality and the perception of accountability mechanisms to guard against abuse. A useful starting point in the discussion on regulation is, therefore, to focus not on the identity of the actor but on the nature of the acts requiring regulation and accountability. Concerns relate primarily to the use of potentially lethal force by PMC personnel, but also to the impact these actors may

have on the strategic balance of a conflict. Most of the existing regulation — notably international humanitarian law — is directed primarily towards the standing armies of states. As private actors take on more responsibilities a central question is whether the normative framework and accountability structures adequately address the new environment.

Most commentators agree that they do not. Instead, it is often implicitly or explicitly assumed that it is business interests — rather than international and national law — that govern the use and conduct of PMCs. There is, in this context, good reason to be concerned about leaving issues of peace and war, life and death, to purely market mechanisms. It would be naïve, of course, to assume that traditional armed forces are necessarily virtuous and private armies inherently harmful to public interests. But the fact that profit-driven interests play a role in conflict does complicate control, transparency, and accountability issues. Periodic outrage surrounding PMCs and the apparent impunity with which their personnel engage in misconduct supports this view, lending credence to the perception that PMCs fall through the cracks of both national and international law.

And yet this is only part of the story. The anecdotal manner in which discussion on regulation tends to be conducted, with parallel conversations of abolitionists on the one side against practitioners and proponents of a laissez-faire approach on the other, has hampered a serious analysis of the legal framework in which PMCs operate. The purpose of this volume is to address the interaction between regulation and market forces in current and future operations of PMCs. It attempts to shed some light on the existing legal framework, to assess whether more regulation is needed, and in particular what role the market can and should play in regulation.

Contending that most firms provide only “security services” — meaning that they engage only in defensive operations, as opposed to offensive manoeuvres — a distinction is often made between private military companies (PMCs) and private security companies (PSCs). The first category is sometimes said to include only those firms that actually fight wars alongside or in place of national forces, an exceptionally narrow definition that tends to confine the label to the wound-up companies Executive Outcomes and Sandline International. The term private military companies is used here more broadly: it denotes firms providing services outside their home states with the potential for use of lethal force, as well as training and advice of militaries that substantially affects their war-fighting capacities. This definition includes firms engaging in those activities that are the focus of concern on the part of regulators and humanitarian agencies. It also takes into account the difficulty of distinguishing clearly between offensive and defensive operations in low-intensity conflicts where there is no clear front line. Semantically, the term “military” better captures the nature of these services as it points to the qualitative difference between firms operating in conflict zones in a military environment and “security firms” that primarily guard premises in a stable environment.

The book is organized around four sets of questions. First, what is the basis and nature of the concerns raised by the PMC phenomenon? Secondly, how have problems leading to a call for regulation manifested in different regions and contexts? Thirdly, what regulatory norms and institutions currently exist and how effective are they? And fourthly, what role does the nascent market for private security and military services play in regulation, and where is it going?

Part one sets the context for the subsequent discussion of regulation. A basic

question is the relationship between traditional mercenaries and PMCs, and whether PMCs should be banned altogether. Proponents of abolition argue that PMCs are old-style mercenaries in a modern guise, suggesting that their very nature and their use are morally problematic. Sarah Percy examines these arguments in chapter one and shows how they continue to influence the discussion of PMCs and regulation, in particular the approach to the topic within the United Nations. She argues that a continuum traceable from mercenaries to PMCs does exist and that therefore the ethical objections against PMCs will be difficult, if not impossible to overcome — but that those concerns might usefully serve as an additional check on the use of PMCs alongside regulation. Both regulators and the industry, Percy notes, would be well advised in taking these ethical worries seriously.

A second prerequisite for meaningful discussion of regulation is clarity as to the subject to be regulated. Serious analysis in this area is often frustrated by the lack of agreement as to what it is that PMCs actually do. Kevin O'Brien surveys the industry in chapter two and creates a typology of private actors in the military environment. He then proposes a theoretical model of regulation, establishing the tightest oversight of military operations aimed at altering the strategic environment. A combination of licensing and registration regimes, O'Brien suggests, would provide the most adequate solution on the national level, though its effectiveness would depend on complementary action on the international level.

Chapter three, by Anna Leander, argues that given the way PMCs shape security concerns and more generally political priorities, civil-military relations as a regulatory concern has been strangely ignored in the debate on regulation. She suggests that

preoccupation with security professionals' role in shaping politics is as important when these professionals are privately organized in PMCs as it is when they are enrolled in public armed forces. Leander shows that existing regulation has not been adjusted to account for this fact and that the significance of regulating the role of PMCs in shaping politics is profoundly underestimated. She therefore argues that putting the issue of regulating "civil-PMC relations" on the agenda is essential.

These ethical, definitional, and political problems are compounded by practical differences in the situations where PMCs have taken on significant roles. There is a difference, for example, between a state that retains the services of a PMC because it lacks effective control over its own territory, and a state that brings in private actors to reduce certain public and political costs of conducting hostilities. Part two of the volume looks at three different regional contexts in which mercenaries and PMCs have emerged as significant actors in conflict and post-conflict environments.

Although one of the main concerns with PMCs today is that they constitute a threat to the state's monopoly of violence, the involvement of the now defunct PMC Executive Outcomes in Sierra Leone and Angola in the mid-1990s tells a different story. The firm is credited with supporting governments challenged by powerful rebel groups and, unusually, reconfirming the state's control by temporarily questioning it. This use of PMCs points to a shift in the role of private military forces in Africa, as Angela McIntyre and Taya Weiss observe in chapter four, though their support came at a hefty price. Contrary to the frequent assumption that the African experience of mercenaries and PMCs are aberrations of the past, the authors demonstrate that the problems arising out of private military involvement in African conflicts continue to have implications for the

discussion of regulation. Analyzing the convoluted relationships between PMCs, transnational corporations, and governments, McIntyre and Weiss conclude that shifts in political and commercial accountability, rather than legislative action, have been instrumental in the transition from mercenaries to PMCs in Africa.

The use and conduct of PMCs in Iraq, by contrast, have posed different problems and challenges to regulation. This is illustrated most starkly by the difference in treatment of individuals implicated in the Abu Ghraib torture incidents, depending on whether they were part of the US forces or PMC employees. David Isenberg analyses in chapter five how PMCs operating alongside the coalition forces — but outside the military chain of command — have complicated civil-military relations. He argues that this has created problems of coordination and created opportunities for the US government to evade public accountability for certain aspects of the Iraq conflict.

In chapter six, Elke Krahnmann looks at the role of PMCs in security sector reform (SSR) and problems arising from their involvement for transitional states and donor governments respectively. While the work of PMCs in this sector has often been professional and efficient, the comparative disadvantages of PMCs in relation to a state's own armed or police forces lies in their private nature: the latter are in a position to establish military relations and have the authority and legitimacy to implement reform. As a consequence, Krahnmann concludes that for a holistic approach to SSR donor countries should reconsider what role their own uniformed personnel might play.

Part three turns squarely to the question of norms. In considering an adequate regulatory framework for the use and conduct of PMCs, it is important to take into account the transnational nature of the industry. When discussing the role of international

law in governing the use and conduct of PMCs, many commentators have focused on the flawed mercenary conventions of the United Nations and the Organization of African Unity (OAU) and the ambiguous status of PMC personnel under the Geneva Conventions; many have concluded that international law is hopelessly incapable of dealing with these new actors. Chapter seven, by Louise Doswald-Beck, shows that this is at best a partial account of the position of PMCs personnel under international humanitarian law. A crucial question in this context is the circumstances under which PMC may be said to “take direct part in the hostilities”.

One of the reasons why international law is repeatedly dismissed as irrelevant in the discussion of governance of PMCs is the fact that it largely focuses on states. As a result, despite the fact that governments constitute one of the major clients of PMCs or authorize their operations in foreign states, the question of under what circumstances the misconduct of PMCs engages the responsibility of states has received surprisingly little attention. Chia Lehnardt addresses this issue in chapter eight. She argues that the fear that PMCs might be used by Western governments to conduct “foreign policy by proxy” is only partially warranted: from an international law perspective, states cannot evade responsibility merely by hiring a private actor to carry out certain functions. The conduct of PMCs is under certain circumstances attributed to the state, making that state responsible for any violation of international law committed by PMC personnel. Even where no such attribution exists, the state might still be responsible for lack of due diligence to adequately regulate and control PMC conduct. Like Doswald-Beck, Lehnardt concludes that claims of a “vacuum” in international law are overstated, although factual power relationships between the PMC, the host state, and the exporting state remain

unaddressed on the international level.

This points to the importance of regulation at the domestic level. It is primarily here that states have to take action in order to fulfil their international obligations. Moreover, domestic regulatory regimes are more likely to have an impact on the development of the industry, in particular by providing incentives for PMCs to establish best practices and positioning themselves as responsible actors in the sector. Given that PMCs operate mostly in weak states without the capacity or willingness to regulate and control their conduct, more emphasis falls on states exporting their goods and services. Such a regulatory system must walk the thin line between enabling the state to control and monitor PMC operations effectively on the one hand, while allowing PMCs to fill security gaps quickly and efficiently where needed. Of the key exporting states only three — the United States, South Africa, and Israel — operate licensing regimes controlling the export of commercial military services. In chapter nine, Marina Caparini examines two of these regimes with very different underlying principles. She shows that the regulatory system adopted in South Africa has proven ineffective due to its overly burdensome approach, causing firms either to circumvent it or to relocate altogether. By contrast, the US approach reflects the different perceptions of the industry as a potential tool for foreign policy. What both regimes have in common, however, is the power shift to the executive and the lack of sufficient resources to ensure enforcement.

The fourth and last part turns on the role of market mechanisms in regulation. The commercial military sector falls short of being a fully developed market in several areas. Chapter ten, by Deborah Avant, examines the emergence of this market, focusing on the peculiarities of the industry — in particular the lack of competition and transparency, and

the tendency of individuals to move easily between firms — and the limitations of market mechanisms when applied to extreme situations where the security of a state is threatened. The lack of other regulatory tools has increased the importance of the market, but this potential tool is too weak to maintain specific standards, since clients tend to disagree about the relevant benchmarks. The diversity of interests among PMC clients therefore significantly diminishes the importance of reputational costs of the industry.

The diversity of both the industry and its clients and the resulting variety of potential costs in the case of misconduct is taken up again by James Cockayne in chapter eleven. Drawing on insights from principal-agent theory in economics and political science, he examines the relations between PMCs and their clients and regulators, arguing that states use a variety of methods to try to make PMCs their “agents”, including employment, national regulation, and the promotion of soft norms. PMCs in turn respond, Cockayne suggests, by trying to maximize their own power through a variety of strategies, including playing off different principals against each other — for example by encouraging national executives to use PMCs to escape parliamentary, judicial, and electoral accountability — and in extreme cases asserting their own principality. These contending strategies intersect with industry consolidation, market incentives, and the shadow of litigation to produce a transnational hybrid state-market regulatory model, raising difficult questions about private regulatory power and its role in determining and providing public goods.

If such regulation is to have any effect at all, however, both states and interested NGOs will need to think more broadly about possible forms that regulation might take. Laura Dickinson in chapter twelve draws an analogy with existing domestic contract

regimes and argues that the market, despite its underdeveloped state, can be significantly regulated by contract law. She argues that contracts, an archetypal private law tool, can be utilized to protect public interests and establish an ongoing oversight role of the hiring or host government.

Any attempt to regulate this rapidly developing sector will have to take into account what new fields of activity will become more important in the years ahead. In chapter thirteen Andrew Bearpark and Sabrina Schulz consider the future of the market. They acknowledge that a delicate balance must be struck between legitimate business interests and those of the public and turn to the regulatory tool favoured by the industry itself: self-regulation. They argue that this is both a realistic approach to current regulatory gaps and will be embraced as a competitive advantage for those firms accepting self-regulation, using the example of the British market as a case study.

The appropriate balance between private and public interests is a key question whenever the provision of a public service depends on private actors. Achieving this balance is imperative in situations where those private interests affect fundamental state functions such as national defence, warfare, and the claim to legitimate violence. Although the move of commercial military forces from mercenaries to market-driven, state-sanctioned, private military companies tests traditional legal systems, which are premised on the assumption that states are the only legitimate actors in military affairs, a key insight of this volume is that an applicable legal framework does already exist. Although this framework is patchy, insufficient, and inadequately implemented, it provides a valuable starting point for progress. The conclusion, by the editors, seeks to map out the contours of this normative environment, as well as the incentives and

disincentives that shape the manner in which PMCs operate. Moving forward, governance of the commercial military sector will depend on the interaction between these regulatory and market forces.

