

Regulating Private Military Companies: The Need for a Multidimensional Approach

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I. Introduction¹

The British Government's Green Paper on private military companies (PMCs) outlines six regulatory options. Rather than favouring one option over another, this paper proposes a multidimensional approach to regulating British PMCs that matches the appropriate kind of response to the variety of activities that might be undertaken by PMCs. Because the nature of PMC activity is so broad and the issues at hand so diverse, it is unlikely that one kind of response would be adequate. The regulatory system proposed includes elements of the outlined options as well as additional measures. While it may be useful for all the measures to come within one piece of legislation, it might be more practical for the Government to take a number of legislative and policy measures to address the issue.

Although the Green Paper sets out options for regulation, the Government is said to be neutral to these and for that matter whether any steps should be taken at all. It is assumed, however, that some kind of PMC regulation is going to be introduced. The Foreign Secretary has been reported as supporting a licensing system and the Government statements there have been on the issue so far have implicitly suggested that it does wish to regulate PMCs. There is in fact broad consensus amongst the industry, analysts and activists of the need for regulation. The challenge is to ascertain what kind of regulatory system is appropriate and, furthermore, can be practically be enforced.

With these assumptions in mind, this paper does not wish to restate the many arguments for and against PMCs that have been discussed elsewhere. Instead it attempts to provide a rationale for taking a particular regulatory approach. As far as possible the structure of the paper follows that of the Green Paper which has already provided a comprehensive overview of the issues and possible regulatory options. Direct quotes from the Green Paper appear in italics.

¹ This paper is based on the collective work and experience of the 'Privatisation of Security and Peacebuilding' project at International Alert that was established in 1999 to address the increasing role of private security and military companies in conflict situations. The project has produced a number of reports on the use such companies in a variety of situations: peacekeeping, corporate security, humanitarian action and the governance of the security sector and has sort to promote effective means of regulating private security actors at the international, national and local levels.

II. Preliminary considerations

Before going on to discuss the purpose of regulation and outlining the proposed regulatory system, a couple of preliminary considerations can be made.

Define activities and their possible consequences, not the actors

The Green Paper highlights the problem of defining mercenary and private military activity. The "*internationally agreed definitions*" of mercenary are "*not necessarily useful*" because they are practically unenforceable and do not apply to PMCs. In fact they can be used to help distinguish mercenaries from PMCs: General speaking, PMCs do not take part in hostilities, are usually associated with particular armed forces, and are not solely motivated by profit because they are concerned with the maintenance of public security. If this is not the case, then legal provisions in international law banning mercenaries do seem to apply.

While there is broad agreement about this distinction, however, labels such as 'mercenaries', 'private military companies' and 'private security companies', or for that matter the many other permutations that have been proposed, are not particularly helpful in terms of regulation. Acceptable definitions are hard to find and the different entities tend to merge into one another. It is widely accepted now that it is more fruitful to define the activities that these entities might be engaged in. The Green Paper is commendable in this regard by referring to the "*wide spectrum of people and companies*" that "*may be involved in the supply of military services abroad.*" It is important that a comprehensive approach is taken to the array of possible activities that may need regulating. In this regard, private security activity should also be included since it too can have implications for British interests abroad.

This paper would like to propose, however, that it is necessary to go one step further than addressing activities by considering the consequences of them being undertaken in different circumstances. This connection has not necessarily been made yet but it is vitally important in terms of regulation. It is not always the activity itself that can be judged as legitimate or not, but rather, in addition to, the consequences of it taking place in a given scenario. Using the analogy of arms sales, there are some weapons (e.g. anti-personnel landmines) that are illegal in any circumstance, whereas for most weapons whether they receive an export license depends on to whom they are sold and how they are going to be used. The same applies to military services.

Identify the scale and nature of the problem

The Green Paper, by its own admission, has not advanced assessments of the extent of private military company/mercenary activity. There simply has not been any systematic estimation of the scale of the problem, yet this is vitally important in terms of what sort of regulation is required. International Alert, like many others, has identified and monitored a number of individuals and companies, but has not been able to make a quantitative estimate of the number of individuals and companies that there are nor the scale of their activities. There are useful figures for the global security industry, but it is difficult to disaggregate the activities that are of concern. No such exercise has been undertaken for private military activity. In their evidence to the Foreign Affairs Select Committee Inquiry into the Green Paper, the head of a well-known British PMC

estimated that there were probably only six private military companies operating out of the UK. This is probably as fair an assessment as can be made. It is important that the proposed Regulatory Impact Assessment (RIA) identifies the scale of the activities that may need to be regulated.

It is possible, however, to make a qualitative assessment of the nature of the problem, which has changed quite radically in recent years. As noted in the Green Paper, "*the number of major combat operation which PMCs have undertaken is limited*" and may well "*turn out to have been a one-off phenomenon.*" The well known examples of PMC activities in Papua New Guinea, Angola and Sierra Leone were arguably the result of a particular set of historical factors, and subsequent pressure from the international community has simply not allowed them to continue. The debate, at least in the media and in Parliament, since the publication of the Green Paper has unfortunately focused on the use of PMCs in UN peace support operations and in combat roles. While the PMC activity of the 1990s was a symptom of the failings of UN interventions at the time, it is highly unlikely that the UN will use PMCs in the foreseeable future (the Brahimi made no mention of them or the idea of a UN standing force) for military tasks, although logistical and other support functions will probably continue to be provided by such companies.

It is likely, however, that "*the number of PMCs will grow as governments outsource functions previously performed by the military.*" This is trend that has not reversed since the 1990s and looks set to continue. It is important that the debate on PMCs be reframed in terms of security sector reform activities and support to peace operation, rather than peace enforcement and combat roles that are unlikely to occur in the future. In this regard, the Government will soon have to state whether or how it is prepared to use PMCs to conduct its military missions abroad.

III. The purpose of regulation

It is important to clarify what the purpose of regulation should be as this will have a strong bearing on the kind of the system that is introduced. Any prospective legislation will clearly have to set out in its preamble or articles the powers of Government in relation to PMCs. There are two clear purposes that regulation should fulfil.

To control undesirable PMC activities

The Government is clearly concerned about PMCs because of the possibility that they may impact on British national interests abroad. Indeed the definition of regulation is to control private sector activity in the interests of the public good. In this regard the Green Paper provides an excellent overview of the concerns and issues that have been raised in relation to PMCs, including: accountability, sovereignty, economic exploitation, vested interested in conflict, human rights, underlying problems of stability, proxies for governments, moral objections, double standards, and PMCs and international operations. The Green Paper, commendably, provides a balanced overview of the debate that has put PMCs in a favourable, as well as a less so favourable, light. It is not necessary here to rehearse any of these arguments for or against PMCs. It is fair to say that there have been concerns about PMCs in each of these areas, although it would be wrong to make generalisations that tarnish all PMCs. The challenge and purpose of regulation, as stated in the Green Paper, is therefore "*to*

distinguish between reputable and disreputable private sector operators, to encourage and support the former while, as far as possible, eliminating the later." For such a distinction to be made, the articles of possible legislation or criteria of a licensing system need to address each of these concerns. It is important, however, that the debate on PMCs (as is occurring in this forum) begins to take place in relation to regulation rather than around particular examples and issues that will always be contested.

To make PMCs accountable for their activities

The other principal purpose of regulation is to improve accountability which is a major "*problem associated with PMCs.*" The personnel of PMCs are individually liable under international humanitarian law and in addition the UN Declaration of Human Rights and other aspects of international criminal law. However this is a "*highly theoretical proposition*" as PMCs usually operate in weak states that do not have adequate legal and judicial systems, even if they are made accountable for hiring PMCs by entering into a contract with them. Furthermore, the company, as opposed to the individuals that work for them, do not fall within many aspects of international law and would not for instance come within the Statute of the International Criminal Court. The most appropriate means therefore for holding PMCs accountable is by making their home government (i.e. the UK government) responsible for their activities. This is the principal function of regulation that should make British PMCs an agent of the state. Rather than the company structure of PMCs being seen as a hindrance to accountability, however - as is often seen as the case - it should on the contrary be viewed as a vehicle for making PMCs more accountable. By applying the Companies Act (1985), legal requirements can be made to give the UK government the powers to hold them accountable. Further provisions to ensure transparency of PMCs' corporate structure can, in addition, be made part of the licensing system - as is discussed later.

III. A multidimensional approach to regulating PMCs

The proposed multidimensional approach to regulating PMCs seeks "*ways of combining some of the features of the different options*" outlined in the Green Paper, as it does not support any of these in their entirety. It has three principle elements:

- A ban on unlawful participation in armed conflict abroad (options 1 and 2).
- A licensing and authorisation system for military services (options 3, 4, and 5).
- The promotion of codes of conduct for security services (option 6).

These are now discussed in turn. They draw on UK obligations in international law and are very closely associated with the regulatory systems that currently exist in the US and South Africa, arguably the only countries with comprehensive legislation on PMCs.

a) A ban on unlawful participation in armed conflict abroad

The UK Foreign Enlistment Act (1870) is in the spirit of the Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (1907) and was introduced to prevent British nationals fighting in foreign wars for a country at peace with the UK. As Annex 1 of the Green Paper shows, most

countries have such neutrality laws. Unlike the Hague Convention, which only referred to recruitment within the territory of the State parties, the Foreign Enlistment Act actually has extraterritorial application, although it has never been enforced. The concept of neutrality applies to internal conflict as well as international wars because of the definition of belligerency found in the Convention Concerning the Duties and Rights of States in the Event of Civil Strife (1928). The UN Declaration of Principles on International Law concerning Friendly Relations and Co-operation built on these neutrality laws and referred for the first time to mercenaries by calling on States parties to prevent "irregular forces or armed bands, including mercenaries, for incursion into the territory of another State" This was to the extent that such incursions violated international norms of non-interference, the right to self-determination, territorial integrity and political independence. The UN Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989) is in a similar vein to these neutrality laws, but is specifically related to mercenaries as defined in the Convention (taken from Article 47 of the Additional Protocol to the Geneva Conventions).

The upshot of these legal instruments is that there are strong obligations within international law for the UK government to introduce a 'ban on unlawful participation in armed conflict abroad'.² In fact such a ban already exists in the Foreign Enlistment Act; it just needs to be repealed and made up-to-date. By adopting this approach the Government can overcome the problem of defining mercenary in the way found in the UN Convention on mercenaries, which as noted by the Green Paper is "*unworkable*" because *inter alia* it includes the motive of profit that is impossible to prove legally, but at the same time capturing the key concerns about mercenary activity.³ In effect, such a crime refers to any individual that intervenes in another sovereign state and exercises the use of force, in so doing breaching established international norms of non-interference and territorial integrity as well as aggravating the conflict. This should be for any individual that can not demonstrate a stake in the foreign conflict on the grounds of nationality. The involvement of British citizens fighting for the Taliban in Afghanistan brings into focus the difficulties, but also the need to address, such cases. Participation⁴ would be deemed 'unlawful' unless an individual had received prior approval from the Government (e.g. under a licensing system as described below) which it should be stated would be unlikely for those wishing to directly participate in conflict, assist non-state actors, fight in embargoed countries or any other proscribed activities made unlawful by legislation.

Such an approach would not represent an infringement of individual liberty, as argued by the Diplock Report, as the Human Rights Act (1998) allows the restriction of movement in the interests of public order and security. The UK government should, contrary to the Diplock Report, also have extraterritorial powers to enforce a ban on such activities. The Diplock Report was drafted at a time when states were not as

² This proposal has been made by Professor Françoise Hampson, University of Essex and Member of the UN Sub-Commission on the Promotion and Protection of Human Rights in her writings on the subject as well as at the second of two expert meetings recently organised by the UN on revising the current definition of mercenary.

³ Although not using the definition contained in the UN Convention against mercenaries, this could also enable the UK to ratify the instrument as long as it is in the spirit of its intention.

⁴ This could be defined as when an individual or company assumes combatant status under international humanitarian law.

responsible for the actions of their citizens abroad as they are today when the forces of globalisation bring far greater scrutiny upon the conduct of British people abroad. There are growing precedents for the UK government to be responsible for its citizens abroad as has been shown in the case of the trafficking of arms, particularly chemical and biological, and the International Criminal Court (ICC). A similar case could be justified for the unlawful participation in armed conflict abroad. It is true that the Foreign Enlistment Act has not ever been enforced. This has not been the case in other countries though with similar laws. It is a question of having the right kind of legislation and exercising the necessary political will to enforce it.

b) A licensing and authorisation system for military services.

Although the above section has proposed a ban on unlawful participation in armed conflict abroad, this is not inconsistent with the fact that States have a legitimate right to self-defence that they may legitimately seek from foreign individuals and companies. To ensure that such external assistance is lawful, however, the legal responsibility of the individual or company should be imputed to the State from which it has come, otherwise it could represent an unlawful intervention as described above. To complement, or as an additional aspect of, prospective legislation on participation in armed conflict abroad, there should therefore be, as proposed by the Green Paper, a licensing regime that "*would require companies or individuals to obtain a licence for contracts for military and security services abroad.*" This should include a system that both licenses companies to operate in the first place as well as granting the Government powers to authorise each contract that a provider of military and security services wishes to enter into. A similar system already applies to UK arms exports. It is not inconceivable that such a system could be developed for the provision of military services.

Scope of licensing system

The scope of the proposed licensing system should cover all those military services that are outlined in the Green Paper. The way forward for "*security measures for commercial premises*" is not so clear cut as this is a far more prevalent activity than military services and is probably impractical to regulate in its entirety. The establishment of a "*threshold for contracts*" does not really rectify this problem as the monetary value of services provided is not necessarily a key factor in determining its likely impact. A better approach would be to identify the scope of security services that should be covered. A distinction can be made, for instance, between security services provided where law and order has broken down, as compared to armed conflict. Security services provided in a military situation can potentially have far more serious consequences than when they are used in a crime prevention scenario. Whether security personnel carry weapons is another serious consideration. In most countries where private security companies are prevalent (often, as noted by the Green Paper, outnumbering conventional police forces) there are usually domestic laws governing their use although these are quite weak. It is important therefore that the licensing system covers security services provided in the situations described above.

Licensing of companies

As suggested by the Green Paper, a general license should be an "*additional measure*" to a licensing regime or more precisely an integral part. For PMCs to operate in the

first place they should be required to obtain a license from the Government. All companies already have to register themselves under the Companies Act (1985). The Government should extend its powers under the Companies Act to outline what sort of activities PMCs may provide and require these to be articulated in their memorandum of understanding and articles of association. Any company found to have reneged on these provisions would have their license revoked. Particular concerns have been raised about the ownership structure, employment procedures and commercial interests of PMCs. In terms of the "*standards it expected the companies to meet*" it is important that the licensing system ensures that the Government is as accountable for PMC personnel as it is for members of the British armed forces. All British soldiers, for instance, must abide by the Armed Forces Act. It is likely that most British PMC personnel will have had such training, although this could be a stipulation of a general licence being granted. The greatest danger is if a PMC employees someone that with a record of misconduct. It is probably unrealistic for a PMC to be required to register all the names of its employees, although this would be desirable. Instead, the onus should be on the PMC to introduce appropriate vetting procedures to demonstrate to the Government that they are taking sufficient safeguards for who they employ. The introduction of such procedures could be a requirement of obtaining a license. A publicly available register of British PMCs should also be created to provide public scrutiny of their activities as well as setting standards that companies should try to meet.

Authorisation of contracts

For the reasons given above, it is important that the Government authorise each contract that a PMC wishes to enter into as the circumstances in which military services are provided are as important as the services themselves. A General License or notification scheme (as proposed by the Green Paper) would not suffice. An authorisation procedure could work in a similar way as for UK arms exports. In fact amendments were drafted for the inclusion of 'military services' in the Government's Strategic Export Control Bill that is currently being debated in Parliament, although these were subsequently dropped.⁵ Secondary legislation to the Strategic Export Control Bill would appear to be the most logical place to introduce PMC legislation. The Government is proposing, for example, secondary legislation on arms brokering agents which will require them to obtain a license and authorisation to operate; something very akin to the measures proposed for PMCs. The combination of arms brokering and PMCs is in fact how the regulatory system operates in the US. This may be precluded, though, because military services were not included in the primary legislation.

In order to grant individual contracts, the Government should develop a criteria upon which applications will be assessed on a case-by-case basis. Many of the provisions in the EU Code of Conduct on Arms Exports and the UK government's own guidelines on British arms sales (e.g. those relating to embargoed destinations, external aggression, human rights, and sustainable development) would also be relevant to PMC contracts. In addition, criteria should be developed related to many of the issues noted in the Green Paper such as sovereignty, links to economic resources, etc. The key consideration in relation to the legitimacy of PMC contracts is whether they contribute to public security and law and order.

⁵ Technical assistance that accompanies arms sales, which PMCs may undertake, are covered by the Bill.

Enforcement

It would make sense that the Department for Trade and Industry (DTI) - as it is already for arms exports - be responsible for a licensing and authorisation system. If this is not the case then a similar regulatory authority should be established in the Foreign and Commonwealth Office (FCO) or other government department. Like a ban on the unlawful participation in armed conflict abroad, it is important that the Government have extraterritorial powers to enforce the licensing and authorisation of military services. Indeed, because PMC activities occur abroad it is hard to see how this could not be the case. There has been a lot of scrutiny of the conduct of British PMCs. Where as it may be difficult to obtain credible information necessary for a legal case, there is likely to be enough information at hand to deny the granting of further contracts. The operation of the US regulatory system would appear to support such an assertion. Client confidentiality should not be used as an excuse by PMCs to provide adequate information about a prospective contract to the Government. It is unlikely, however, that "*companies not wishing to be subject to a licensing regime could move their operations offshore.*" This has not been the case for: the British PMCs whose activities have been curtailed in the last few years, the South African PMCs when a licensing system was introduced there in 1998, nor in the US where a licensing system has worked for a number of years.

Reporting and parliamentary scrutiny

It would seem sensible that the export of military services "*be subject to the same reporting requirements vis a vis Parliament as is the case for arms export licenses.*" As part of a licensing system, PMCs could be required to report against the contracts that they have fulfilled in order to ensure compliance. This would provide the Government with the necessary information to include details of these contracts in its Annual Report on UK Strategic Exports. Client confidentiality would not be compromised as the information would be provided after the completion of the contract. Proposals have also been made for a system to be established by which a parliamentary committee is given the powers to scrutinise sensitive arms exports from the UK before authorisation is granted. If Parliament assumes such powers in the future, it would be important that PMC contracts also come within the scope of such a system of parliamentary scrutiny.

c) Codes of conduct for security services

There are those security services that are likely to fall outside the scope of the proposed licensing and authorisation system because they are not so directly concerned with the use of force and the Government may not practically have the powers to regulate them. For these activities, industry-wide codes of conducts may be represent a more appropriate regulatory response. There is a tendency to see government and self-regulation as alternative approaches to regulation, where as often they are complementary and even work together.

It should be remembered that market forces have in fact been most effective to date at regulating PMCs, as has already been pointed in the paper of Henry Cummins. Market forces have meant that logistical support, training and advice, and corporate security are arguably the services that most commercially viable and which the public and the Government are prepared for private firms to provide. Faced with criticism,

some British PMCs have already taken self-regulatory steps by having stated ethics as part of their marketing. There have been cases of mis-information in some instances. However, efforts by PMCs to self-regulate should be encouraged as a complement to government forms of regulation.

For its part, the UK Government has already been active in promoting codes of conduct relevant to the international private security industry. For the last couple of years it has facilitated and supported, along with the US Government and latterly that of the Netherlands, the Voluntary Principles on Security and Human Rights. This initiative with corporations in the extractive sector and human rights organisations led to the adoption of a set of non-binding principles⁶ in December 2000 with the aim "to guide companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights." Madeline Allbright, US Secretary of State at the time, heralded the Voluntary Principles as a "landmark in corporate social responsibility." One of the three sections of the Voluntary Principles relates to the hiring of private security firms by outlining guidelines to ensure their appropriate use by corporations. It is specifically stated that "private security should provide only preventative and defensive services and should not engage in activities exclusively the responsibility of state military or law enforcement authorities." This provides an important demarcation of the sorts of activities that are covered by the Voluntary Principles. It can be inferred that services that do not fall within this definition should be regulated by government forms of regulation.

The role of the US and UK governments have been key to the success of the Voluntary Principles as well the industry-wide approach that has ensured high standards. It is important that more governments, companies and NGOs become part of the initiative if it is to continue to be successful, as well as participants finding a method by which compliance can be measured as this currently does not exist. Private security companies have not explicitly been part of dialogue, although some have publicly stated that they support the Voluntary Principles. Other companies should be encouraged to do likewise through the British Security Industry Association or other such forum.

As noted in the Green Paper, however, such a voluntary system of regulation would not give the Government legal recourse if a British private security company was found to have damaged British interests abroad. It could be in time that the Private Security Industry Act (2001), recently introduced by the Government to regulate the domestic private security industry in the UK, could in time be amended to apply to companies operating overseas as well.

IV. International regulation

There are a number of legal obligations relating to mercenary activity in international law that, while deficient, do provide guidance for the Government and have cited here. These do not relate to PMCs, though, and an international regulatory regime "is

⁶ The participants are Chevron, Texaco, Freeport MacMoran, Conoco, Shell, BP, Rio Tinto, Human Rights Watch, Amnesty International, International Alert, Lawyers Committee for Human Rights, Fund for Peace, Prince of Wales Business Leaders Forum, International Federation of Chemical, Energy, Mine and General Workers Unions.

still some way off". Although appealing, it is highly unlikely that the UN would be able to establish a regulatory system for PMCs. It could, as in the case of the UN Register on Arms, play an important part in improving transparency in the PMC market, but it is unlikely ever to have the powers to authorise PMC contracts of a military nature - this responsibility resides with the Member States.

In view of the problems with international legislation on mercenary activity, there is in fact work under way under the auspices of the Office of the UN High Commissioner for Human Rights, which has been tasked with organising two expert meetings to seek amendments to the current definition of mercenary in international law. Now that the International Convention has entered into force, it could be that it is amended or a Protocol added to it to cover activities that current fall outside its scope. Indeed this was the recommendation of the second of the two expert meetings that was recently held in Geneva, which also "urged consideration of a possible monitoring mechanism that would bolster accountability among private security and military companies."⁷ It is important that the UK Government support these efforts as the political will for such changes will be hard to muster.

V Conclusion

The Green Paper has provided a comprehensive overview of the PMC debate and options for regulation. This paper has provided comments on the proposals made and has proposed a multidimensional regulatory system that is in part a combination of the six options for regulation that are outlined in the Green Paper, with additional measures. It is hoped that this offers "food for thought" for the seminar on the 24th June, as well as useful input into any subsequent White Paper or legislation on British PMCs that the Government may chose to introduce - a step that would certainly be supported from the proposals made here..

⁷ U.N. Press Release, May 22