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Letting Others Lead

European Approaches to the Regulation of International Military Markets

Europeans – Norwegians included – often assume that their countries take a restrictive approach to the regulation of commercial military services, and that the regulatory glitches that continue to occur must be attributable to the permissive regulations of other states, particularly the USA and the UK. These assumptions, however, are unfounded. Europe's 'letting others lead' approach to regulation is directly co-responsible for the absence of effective regulation, as this policy brief sets out to explain. First, over-confidence in the restrictiveness and sufficiency of the existing regulatory framework blinds Europeans to the level of commercialization permitted by their regulations and justifies the patchy and ad hoc nature of the European approach to international regulation. Additionally, European states have relegated responsibility for regulation to other actors, and in so doing have encouraged the fragmentation of overlapping and contradictory sets of rules. Accordingly, the brief concludes that Europeans are accentuating rather than countering the ineffectiveness of regulation, and that European states' acknowledgement of their responsibility for regulation is both necessary and long overdue.

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Military markets are remarkably poorly regulated. Few contractors of any kind ever seem to be held accountable for anything, be it human rights abuses – such as those in Abu Ghraib that involved the companies Titan and CACI – or overcharging – as documented, for example, in relation to the operations of Halliburton subsidiary Kellogg Brown & Root. This is often taken to prove that such companies operate in a regulatory vacuum, which is not the case at tall. A wide range of overlapping, sometimes contradictory, rules and regulations cover the activities of these types of companies. The reason for the poor accountability record is the difficulties that regulators face when seeking to use or develop already existing regulations. A lively debate has been taking place in the USA and the UK regarding the origins of these difficulties and how best to deal with them. But, in contrast, in the nine European countries covered by the PRIO project on the *Commercialization of Security in Europe*, the matter is a non-issue. Military markets are approached in a silent and irresponsible manner. Hence, even though markets are making and shaping the international engagements of European states, Europeans have no approach to international regulation or – to put it better – the European approach to regulation is to 'let others lead'.

The Illusion of Restrictive Regulations

This readiness to let others lead the development of regulation rests on the confidence Europeans have in the restrictiveness of their own regulatory frameworks. However, such confidence is misplaced. European regulations are not only more permissive than is often assumed; they also develop in a reactive ad hoc fashion, accentuating the fragmentation and inconsistencies of the existing regulatory frameworks for military markets.

Assumed Restrictiveness

European states have diverging traditions for organizing their militaries and face varying challenges at the present time. However, they do share a common self-perception: they all regard themselves as being restrictive when it comes to military markets because *they do not allow commercial actors to take on core military/security tasks*. This idea is repeated in all relevant contexts, ranging from parliamentary debates – as when the Swedish minister of defence was asked about contracting in Afghanistan – to national constitutions – as, for example, in Article 87(a) of Germany's Basic Law. However, such a concept of restrictiveness is more common than is assumed by the European countries studied. *Indeed, both the USA and the UK insist on exactly the same principle*. They do not allow contractors to take on 'inherent state functions', as the US phrase puts it, any more than Europeans do. As always, the devil is in the details. General principles have to be translated into practice unless they are to remain vacuous.

What exactly is understood by 'core military tasks'? Transporting people and materiel, interpreting images, or providing logistical support – all innocuous tasks, routinely outsourced to contractors by all European states – are also sometimes core military activities. When the transported soldiers/materiel, the interpreted images (e.g. those taken by drones) and the logistical support (e.g. repairing, refuelling or operating aircraft) are used in combat, the innocuous becomes the core. In other words, the functional banality of transportation, picture-taking and logistics is no guarantee that such activities do not overlap with core state functions. *The oft-reiterated blanket assurance that no core military functions are outsourced is therefore no assurance at all*. It is necessary to specify what exactly is meant by 'core military functions'. However, the assumption within Europe that the existing regulations are restrictive makes it difficult to ask what core state functions are: the question appears unnecessary. Similarly, the assumption that regulation is restrictive obfuscates the market expansion in Europe: the markets appear to be non-military.

Misrecognized Regulatory Permissiveness

The misrecognition of the regulatory permissiveness in Europe can be seen in the *narrowing interpretation of what forms of contracting would be inadmissible under prevailing regulations* and would therefore require rules to be revised. In 2005, the German government asserted that maintenance and repair belonged to the 'essential military core capabilities' that are as a matter of principle excluded from commercial contracting. Yet, in Afghanistan, both types of services were regularly supplied by private companies without this triggering any debate. Similarly, Denmark's Ministry of Foreign Affairs has contracted a company to provide security services in relation to the country's embassy in Kabul, but assumes that this does not involve an outsourcing of core functions – even though this kind of security was previously provided by Denmark's special forces and intelligence services. As this shows, even the commercialization of tasks previously considered explicitly or de facto core military tasks triggers no regulatory change or discussion.

The permissive nature of the way in which existing regulations are interpreted is also palpable in the prevailing *administrative and legal laxness*. In part, this laxness is driven by practical difficulties. Because procedures are not updated to deal with practice, regulators find themselves with *glaringly inadequate resources* both in terms of guidelines and regulations and in terms of staff and competencies. In Romania, a considerable share of the established procedures for awarding contracts for military-related services are routinely cancelled. One of the main reasons cited is 'administrative difficulties', including the difficulty of formulating, negotiating and managing the tendering process. The Romanian authorities obviously do not have the resources necessary to handle the processes. Such a situation must logically also leave traces on the contracts that are finally passed. Their content, management and monitoring is bound to be far from optimal. The problem is echoed across other European contexts, albeit to a lesser extent, as public procurement procedures are more solidly anchored elsewhere.

European laxness also stems from *the circumvention of regulation when it clashes with practice*. For example, a 1955 French law prohibiting security guards from using armed force internationally is routinely disregarded, including by public institutions and contractors closely linked to the state, such as *Gallice Security* or *Secopex*. This neglect of existing rules creates uncertainty about what rules really do apply. Often, the more permissive interpretation wins even in court. One illustration can be seen in the unravelling of the Italian judicial process as a consequence of the kidnapping and killing of Fabrizio Quattrocchi in Iraq. In this case, two contractors – Salvatore Stefio and Giampiero Spinelli – were first viewed as having violated Article 288 of the Italian Penal Code pertaining to the supply of provisions to the enemy in a time of

war, but were subsequently acquitted.

Ad Hoc Regulatory Reforms

Finally, the permissiveness of the regulation in European contexts is accentuated by ad hoc regulatory changes that compound the fragmentation, contradictions and inconsistencies of the existing regulatory framework. These ad hoc relaxations of regulation are mostly seen as *minor and pragmatically justified adjustments*. Sweden, for example, extended diplomatic status to the contractors providing security services for its embassy in Kabul to solve a range of practical problems. However, this was a remarkable decision, as it granted privately employed security contractors a type of immunity that was never intended for them. Individuals enjoying diplomatic status can bring things in and out of a country without any control and are placed above the host-country's law. Considering past cases of contractors involved in trafficking people, arms and drugs, the bet that security contractors hired by the Swedish embassy can be trusted never to engage in these kinds of activities would seem foolhardy. More than this, the extension of diplomatic immunity generates (and accentuates) the confusion characterizing the regulation of military markets. Those contracted by the embassy for security coordination enjoy diplomatic status, while the security guards who protect Swedish International Development Cooperation Agency personnel do not. It is difficult for everyone involved to ascertain which guards belong where, and when.

Ad hoc regulatory relaxation not driven by pragmatic practical concerns is mostly driven by *controversies surrounding contractors*. One example is the controversy surrounding the Danish Air Ark project, where a Lithuanian company (Adagold) was chosen over a Danish company (CimberAir) to provide air transport for the Danish Ministry of Defence on a lease basis. By contesting the decision to grant the Lithuanian company the contract, those advocating CimberAir pushed the government to proceed to a clarification, reinterpretation and invention of rules on a range of issues. These included how to deal with the requirements of security clearances when foreign employees of private companies were involved in military activities, and how to deal with the overlap between military and civilian air regulations triggered by the project, since the company was operating under civilian regulations while the activities were clearly military in nature. Solutions were found and the contract continued: regulatory development took place in a characteristically ad hoc fashion.

Finally, ad hoc regulatory innovations are triggered by *the occasional scandal that erupts around contractors*. In Norway, for example, scandal surrounding a Norwegian patrol in Afghanistan that assisted wanted civilian bounty hunter Jonathan 'Jack' Idema in a house search that ended with the latter taking civilian prisoners triggered a discussion of the guidelines for interacting with others on the ground. Members of the patrol had acted as they did because they did not realize who Idema was and assumed he was part of an allied force. The prevailing 'own best judgment' guidelines were in dire need of updating to make them more suitable for the composite mix of actors engaged in Afghanistan.

The regulatory restrictiveness of the European states is largely illusive. Not only are European rules rather permissive, they are also part of the framework for regulating commercial military markets internationally. The belief among many Europeans – experts and the public alike – that regulating commercial security is none of their business is little more than a self-delusion with the convenient implication that responsibility and blame can be shifted onto others.

Relegating the Initiative to Others

The supposedly self-interested and nationalistic Europeans are surprisingly prone to handing over responsibility for the regulation of commercial military markets to others. They seem ready to hand over regulation not only to other states but also to stakeholders and companies.

Relegating to Other States

It should perhaps come as no surprise that European countries trust other states – and particularly their allies – to regulate. However, the *extent* to which they do so is surprising. The strongest indication is possibly *the absence of clearly articulated positions on ongoing international regulatory initiatives*. Tellingly, researchers in the PRIO study found it difficult to find any public indication of their respective countries' standpoints on core international regulatory initiatives such as the UN Mercenary Convention (or the proposed revision currently under debate) or the 'Montreux Document', which seeks to set out the implications of the Geneva Conventions in situations where contractors play a core role. More generally, although France, Germany, Poland and Sweden joined the 'Swiss Initiative' that produced the Montreux Document, they did so late in the process, while Italy, Denmark and Hungary signed the Document only after it had been released. For their part, Romania and Norway still have not signed, though it is unclear whether this should be seen as expressing a stance against the Document or merely uncertainty about what stance to take and/or simple indifference.

Europeans also appear willing to *let other states regulate their own military contracting*. For example, 'with few exceptions', Polish institutions do not negotiate, sign or manage contracts with the private sector in relation to the country's military operations in Afghanistan. Instead, they either rely on 'indirect contracting' of services – that is, the services provided for a base or an ally, from which they benefit by virtue of carrying out activities jointly – or, alternatively, allow their allies to manage the contracting for them entirely. Along similar lines, the Danish Ministry of Defence contracted UK-based PMSC ArmorGroup International to protect civilian development and reconstructions workers in Afghanistan. However, this contracting went through the UK. The Danish Ministry of Defence and the UK Foreign and Commonwealth Office established an arrangement whereby the latter was made responsible for the relations with the company. This arrangement no doubt solved thorny legal and political issues for the Danish side, but it also placed the regulatory responsibility and control on the UK side.

Relegating to 'Stakeholders'

European states also relegate regulatory initiatives to other stakeholders. It seems to be both *politically and economic convenient to let those who request security services in conflict contexts pay for them*. Even countries with staunch statist traditions in military matters do not hesitate to let various non-state actors, including development workers and private companies, cater for their own security. In France, the very cradle of standing armies and the *levée en masse*, a multitude of small companies offering military services survive only or

mainly through the demand from non-state clients. Similarly, the Central European countries push various agencies to take on the costs for their own security. In Afghanistan, for example, the two main Hungarian NGOs – Hungarian Baptist Aid and Hungarian Interchurch Aid – are involved in the publicly initiated development assistance programme in Baghlan Province. To ensure their own security, *they* employ unarmed Afghans.

Discharging responsibility for security goes hand in hand with delegating responsibility for regulation. While the Hungarian NGOs have so far opted to employ unarmed guards, there is no guarantee that they will continue to do so, or that others will adopt a similar approach in future. Indeed, there seems to be considerable pressure in the opposite direction. For instance, when employees of the French nuclear energy group Areva were kidnapped in Niger in 2010, they were under the protection of the French company Epée – created by Colonel Jacques Hogard, a former Foreign Legion paratrooper. The company was immediately accused of amateurism for not having dealt with the situation adequately. Accusations focused particularly on the fact that the company had chosen not to allow its guards to be armed, something it was suggested a 'real' private military and security company would have permitted. Not only was it implied that the question of whether to arm guards (and hence whether to respect the French regulation prohibiting arming them) was one that should be left up to the partners in the market; the case was also indicative of the pressure on those hiring security and those selling it to offer armed guarding.

The overarching willingness to devolve regulation is perhaps most clearly expressed in the passive but supportive stance of European states towards codes of conduct and other regulatory initiatives from such stakeholders. Hence, the Geneva Centre for the Democratic Control of Armed Forces (DCAF) has initiated and now oversees a code that has become an integral part of the (state-based and public) Swiss Initiative through which the Montreux Document was negotiated. However, the DCAF code did not emanate from states but from a multi-stakeholder process. Furthermore, unlike the Montreux Document, it is not an international legal document but a code of conduct formulated and signed by private companies. This willingness to support a clearly non-state initiated, negotiated and managed form of regulation is characteristic of the willingness of governments to relegate regulation not only to other states but also to market stakeholders, including organizations such as DCAF.

Relegating to Markets: 'Self-Regulation'

It is perhaps not surprising that responsibility for regulation is also relegated to the private security industry itself. *Industry self-regulation, including through standard-setting, occupies a central place in European regulatory frameworks.* References to self-regulatory arrangements span the spectrum of the legal debate, and even formal legal texts refer to such an approach. The Montreux Document, for example, urges states to take the 'internal organization and regulations' of companies into account (in §12a–b). Politicians debating regulation in parliament also do so. For instance, when asked about Vesper Group's contract in Afghanistan, Swedish Minister of Foreign Affairs Carl Bildt answered that the security coordinators and the team of bodyguards that they supervised had pledged to abide by the company code that specifies that 'security staff shall abide by Swedish and local [Afghan] regulation, as well as international law'.

This readiness to relegate regulation to the industry itself is yet another sign of *the normalization of military markets*. As in other markets, the growing complexity of market organization has prompted companies to develop implementable rules and governments to support them. This approach has accentuated the criss-cross of overlapping and heterogeneous layers of regulation that lawyers often liken to a 'global constitution' through which regulation works – or does not work. (In military markets, the latter is often the case.) Through their readiness to devolve regulation, Europeans are contributing to and reinforcing the criss-cross of overlapping and often ineffectual regulation of commercial military markets.

Policy Implications for Norway

- **Reassess Norwegian regulation** to make them consistent with current military commercialization.
- **Ensure coherence** between regulation and the resources necessary for implementing it.
- **Articulate a position** on existing international regulation including the Montreux Document and a proactive position on international regulatory developments.

Find Out More

- Leander, Anna (ed.) (2012) *The Commercialization of Security in Europe: Consequences for Peace*. Abingdon & New York: Routledge.
- Geneva Centre for the Democratic Control of Armed Forces (DCAF) (2011) *Privatisation of Security*; available at www.dcaf.ch/DCAF. ■

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THE PROJECT

The brief draws on a research project funded by the Norwegian Ministry of Foreign Affairs, *Commercialization of Security: Consequences for Peace and Security*. The project analyses the commercialization of security and peacekeeping operations in Norway and eight European countries, drawing on examples from those countries' engagement in Afghanistan.

PRIO

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