U.S. Government Perspective on Managing Private Security

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Guiding Thought

PSCs are a necessary force for good, but only if they are regularly established, registered, well regulated, rigidly disciplined, properly staffed with carefully selected operating personnel. Discipline is of paramount importance and no deviation from clear rules may be tolerated*

*Brigadier Anthony Hunter-Choat OBE, British Army
Background

- That certain well established rules of international law apply to States in their relations with PMSCs in their operation during armed conflict
  - That these may also be instructive for post-conflict and other-comparable situations
  - These may be of value for other entities such as international organizations, NGOs and commercial entities that contract for PMSC services

The Montreux Document on Pertinent Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict
What is a PMSC?

“PMSCs” are private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.

Private Military Companies AND Private Security Companies

- Divided by Function

- Contractor Provided Military Services:
  - provide services unique to military operations: Technical support of weapons systems; training or advice to military and public security forces
  - Typically work for States

- Private Security Services: Not particularly military in nature
  - Provide protection against criminal activity or other unlawful violence
  - Typically work for private sector (3/4 or more of all contracts)
Guiding Principles for PSCs

• Not qualified belligerents under the laws and customs of war
• Should not act as combatants*
  – However, direct participation in hostilities NOT a violation of the laws of armed conflict
• Self defense or the defense of others against violence that is prohibited under the law of armed conflict is not a belligerent act and does not violate the non-combatant status of the PSC or its personnel.**
• Subject to laws appropriate for civilians or civilians accompanying the armed forces

* except as provided for under the existing laws of armed conflict

** ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law
Proper Employment Does Not Compromise Non-Combatant Status

The following shall not be considered as belligerent acts or otherwise compromise the non-combatant status:

- equipped with individual weapons for their own defense or for that of others under their protection
- Providing guards, pickets, sentries, or escorts for non-combatant activity, installations, or inherently dangerous property;
- That members of the armed forces or other combatants are co-located or travelling with them
- That security services are carried out under the direction or control of military authorities;
- co-operation with military personnel in the performance of security services, or that some military personnel are co-located or traveling with them;
- That the performance of security services may incidentally benefit non-combatant military functions.

(Derived from Additional Protocol I to the Geneva Conventions of 1949)

US Government Policy on PSCs

Contracted private security functions are a legitimate and effective method for providing non-inherently governmental protection of personnel, property, and activities in armed conflict, post-conflict, and other, comparable situations where the use of military or other government security forces are unavailable, insufficient, or inappropriate.

• The use of deadly force in such protective services is limited to self-defense and defense of others against unlawful attack.

• Services must be provided using methods and techniques that promote, and do not undermine, long-term stability and security of the region in which these services are performed.

• Misconduct on the part of any PSC affects the ability of all PSCs to operate. Therefore, contracted security functions should be performed to quality standards common to all private security providers, regardless of contracting entity.
Tools for Regulation and Management

- Laws and regulations
- Contract award and management
- National and International Standards
U.S. Practices Pre-Date Montreux

- Prohibition of combat, detainee control, and identification of other inherently governmental and military functions
- Consideration of history and prior performance, background checks/vetting, licenses
- Registration of personnel, weapons and other equipment;
- Specific training in Rules for the Use of Force; Law of Armed Conflict; cultural awareness; measures against bribery and corruption
- Procurement of weapons
- Implementation of relevant labor law
- Specially trained contract management personnel
- Flow down of requirements to subcontractors
- Uniforms and markings
- Contract penalties
- Accountability under law (MEJA, ATS, UCMJ)
Pre- Montreux Document Sources (Partial)

- OMB Circular A-76: Performance of Commercial Activities
- International Trade in Arms Regulation (ITAR)
- Public Law 110-181 Section 862 (Private Security Companies)
- 10 USC. 802(a)(10) (Application of UCMJ)
- 18 USC. Sec. 3261 (Military Extraterritorial Jurisdiction Act)
- 28 USC Sect 1350 (Alien Tort Statute)
- 48 CFR 9.104-1 (Federal Acquisition Regulation: Contractor capacity)
- 48 CFR 15 (FAR: Contracting by Negotiation)
- 48 CFR 52.222-50 (FAR: Combatting Trafficking in Persons)
- 48 CFR 225.74 (Defense Federal Acquisition System: Overseas Contracts)
- 48 CFR 252.222-7002 (DFARS: Compliance with local law and labor laws)
- DoDI 1100-22 Workforce Mix
- DODI 3020.41 Contractors Accompanying the Armed Forces
- CJSCI 3121.01B Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces

Determination of Services

• OMB Cir. A-76, OMB P.L. 11-01, and DODI 1100-22
  – Combat operations are exclusive to military forces
  – Guarding prisoners of war, civilian internees, retained persons and other detainees is inherently governmental
  – Security of persons and resources may or may not be inherently governmental depending on threat and risk
  – Combatant Commander assesses risk and determines whether security is military exclusive or may be contracted

• Combatant Commander Orders forbid contractors from direct participation in combat operations, combat-like operations, offensive operations, quick reaction force missions, cordon and search operations, or other uniquely military functions.
DoD Contract Activity Since and in Support of Montreux

- DODI 3020.50 Private Security Contractors (PSCs) Operating in Contingency Operations
- Revision of Federal Acquisition Regulations, Defense supplements, and Combatant Commander Orders
  - 48 CFR 252.225-7039 Contractors Performing Private Security Functions
  - 48 CFR 252.225-7040 Contractors Accompanying the Armed Forces
- Review and revision of PSC contracts and international agreements
PSC Operations Standard

• Captures provisions of the Montreux Document, quality management good practices, and in-field performance assessment
• Developed consistent with process described in ICoC
  – Included 200+ experts from 20+ countries: Governments, Security industry, Private sector purchasers, and broader Civil-Society
  – First auditable standard to include human rights
• Incorporates 52 of the 54 good practices of the Montreux Document applicable to PSCs
• Required by U.S. Defense Acquisition Regulations and British ministerial statement
• ISO version passed international ballot. Publication expected this year.

“The purpose of this Code [the ICoC] is to set forth a commonly agreed set of principles for PSCs and to establish a foundation to translate those principles into related standards as well as governance and oversight mechanisms”
Accountability Under the Law

PSCs are not immune from criminal or civil liability!

- Military Extraterritorial Jurisdiction Act
- Uniform Code of Military Justice
- Host Nation Laws
- War Crimes/Crimes Against Humanity
- Alien Tort Statute
Lessons to Be Learned

- Operational Control:
  - The experience of the Contractor Operations Center

- Specialized training requirements

- Shared understanding among Allies and within our own Government
  - Common perspective on Rules for the Use of Force

- Public Information
Summary

- PSCs are NOT a replacement for military personnel
  - PSCs are not PMCs
  - Most PSCs work for the private sector
- PSCs do NOT relieve a government of responsibility or derogate its authority to regulate the use of force
- PSC roles and activities must be well understood within a regulating government and among its allies, partners and the international community
- Effective controls, oversight, and accountability are essential