

The Perspective of Contracting and “Headquarters” States

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Permit me to begin by expressing my gratitude to our hosts for organizing this meeting and, as always is a case with any meeting in Switzerland, arranging it in such a lovely setting.

I learned late last week I was to be panelist and offer remarks. I cobbled together the very informal comments that follow. There was insufficient time to submit my remarks for formal clearance. Therefore a minor edit of the panel’s title is necessary. As is true of each participant, I am appearing in a personal rather than official capacity. Hence the panel’s title should not lead readers to believe my remarks necessarily reflect the views of the United States Government.

Background. I will begin with some general background comments.

Normally a workshop like this is called to address a problem, or what some might view as a problem. In working on this issue for the past twenty-six months, I am not sure there is a problem. I believe it more accurate to refer to it as a trend.

As I noted in a speech in another experts’ meeting in Geneva last October, “Lawyers involved in the development of policy must participate in identifying an emerging trend and effects the law of war may have on the trend, or any possible effect a trend may have on the law of war.”² The employment of Private Military Companies or Private Security Companies (PMC/PSC) may alter the law of war, but that should not necessarily be viewed in a negative sense. Some of the most ardent critics or skeptics have acknowledged advantages to PMC/PSC employment.

The trend I addressed in October was the larger trend of outsourcing what previously were viewed as almost exclusively military duties. I say “viewed,” as civilian contractors accompanying the armed forces is a historic, lawful practice recognized in every law of war official document or treaty since the 1863 U.S. Army General Orders No. 100, commonly referred to as the Lieber Code. Likewise, the history of employment of contracted fighting forces is lengthy and extensive. The British-hired Hessian

¹ International Affairs Division, Office of General Counsel, Department of Defense, Washington, DC. This paper contains informal comments offered to the Expert Workshop for the Swiss Initiative with the International Committee of the Red Cross with regard to Private Military/Security Companies, See Hotel Sonne, Küsnacht am Zurichsee, Switzerland, January 16-17, 2006. The views expressed herein are the personal views of the author, and do not necessarily reflect an official position of the Department of Defense or any other agency of the United States Government.

² “Evolution of policy and law concerning the role of civilians and civilian contractors accompanying the armed forces,” Third Meeting of Experts on “Direct Participation in Hostilities,” Geneva, October 25, 2005.

regiments General George Washington defeated at Trenton in December 1776 during the American Revolutionary War were a private military company, as were the American aviators known as the “Flying Tigers” who flew against Japanese forces over Burma and China during World War II. Clearly PMC and PSC are not a recent event.

The overall increased outsourcing trend is not unique to the United States. It is a product of two circumstances: the end of the Cold War and a commensurate reduction in standing military forces by most governments; and technological increases in military systems requiring maintenance and servicing expertise militaries cannot sustain. This outsourcing is focused primarily in the combat service support area. However, as Peter Singer has detailed in his book, *Corporate Warriors*, private military companies such as the U.S.-based MPRI have played a major role in reorganization and training of the U.S. Army and other militaries.

While Peter Singer’s book may have raised public awareness of private military and security companies, two events brought their employment to the fore. The first was the Coalition occupation of Iraq, which began on or about May 1, 2003, with the conclusion of major combat operations. The second was the murder of four Blackwater USA private security contractors and the hanging of their dismembered and burned bodies from Fallujah Bridge on March 31, 2004.

From my point of view, each event offered a distorted view of employment of private military and security companies. Belligerent occupation imposes upon the Occupying Power the authority and responsibility to govern. With that comes a responsibility to care for the health and safety of the civilian population. This includes maintaining and protecting the national infrastructure. It requires providing public services, such as electricity, water, sanitation, roads, fire protection, and law enforcement.

The rapid defeat and dissolution of Iraqi military forces had effects on the nature of the occupation force. Manpower and expertise had to be found quickly to provide emergency repair and maintenance of critical civilian infrastructure elements. Had Iraqis been available for security and services related to rebuilding and maintaining the infrastructure, there would have been less demand for foreign outsourcing. Had there been a benign occupation, as was the case in the Rhineland following World War I and in Japan and Germany following World War II, outsourcing – in particular, employment of private security contractors – might have been less an issue that it became once resistance by former Ba’athists and others, including criminal elements and foreign fighters, began.

Until Iraqi expertise could be identified and hired, contracts were let to foreign corporations and civilian contractors for this manpower and expertise. Security had to be provided for them. Normally one would look to the host nation for security. It did not exist. Similarly, the end of major combat operations brought representatives of the United Nations, governments, the ICRC and various other humanitarian relief organizations or other nongovernmental organizations to Iraq; this in addition to the hundreds of journalists. All expected and demanded security.

Normally diplomatic protection is provided by a combination of sending State, PSC, and host nation security services. Were one to visit the U.S. Embassy in Bern or the U.S. Mission in Geneva, for example, exterior perimeter protection is provided by Swiss military; gate control and entry is the responsibility of a PSC; and interior security is maintained by the U.S. Marine Security Guard. This is the case at every United States Embassy or Mission around the world. In Iraq, host nation security did not exist, increasing dependence on PSC protection until such time as the host nation could assume its responsibilities. In Iraq, the Department of State operated offices facilitating recovery in eleven different cities. Each required protection by a PSC.

The steps taken in Iraq were not entirely new. In the 1918 Allied administration of the Rhineland and the 1945 post-war Allied occupation of Germany and Japan, transformation of the occupation from military to civilian control was rapid and substantial. In each case responsibility was relinquished by military commanders to civilian control as a model of restricted exercise of military power.

I defer to industry representatives present with greater on-the-ground knowledge to describe their missions, either in Iraq or elsewhere. However, it brings me to one of the questions I have raised over the last two years: *Where are we on the conflict spectrum?* It makes a difference, as it determines applicable law. A large portion of PMC/PSC work occurs in peacetime and is conducted for non-State actors.³ This morning's discussion tended to focus on the major combat operations phase of international armed conflict to the exclusion of the areas of the conflict spectrum where most PMC/PSC take place. Reference to the law of war as the standard for conduct is inappropriate.

In this respect I see a danger in the presentations and discussion this morning in frequent reference to the law of war relating to international armed conflict, either as the applicable law or the law to which PMC/PSC should be trained. This brings to mind a quote from Abraham Maslow, "If the only tool you have is a hammer, you tend to see every problem as a nail." We need to avoid establishing the law of war as the proper reference point, given that in all likelihood 99% of PMC/PSC employment occurs outside the major combat operations phase of international armed conflict.⁴

Where armed conflict exists, a major problem I have noted both in lawyer and lay circles is looking at the conflict spectrum as unitary and seamless [SLIDE]. As the slide shows, it is quite the opposite, not only as to the nature of the situation but also as to applicable law. It also relates to our discussions in this workshop.

A second mistake has been that "international armed conflict" frequently is viewed as seamless. One need only look at the provisions of the 1949 Geneva

³ In workshop discussions, one industry expert estimated PSC work consisted of 70% for the private sector, 15% for governments, 10% for non-government organizations, and 5% for the United Nations or other international organizations.

⁴ It was necessary to repeat this point on the second day, as draft conclusions tended to focus on the law of war to a disproportionate degree.

Convention Relative to the Protection of Civilian Persons in Time of War to see its acknowledgment of different phases, and different responsibilities, protections and rights. For example, I have heard the statement that PMC/PSC captured in Iraq would not be entitled to prisoner of war status.

My response has been: *by whom?* PSC employment in Iraq began following conclusion of major combat operations. With enemy military forces defeated and the former government no longer existing, there was no enemy government to exercise the responsibilities set forth in the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. As I indicated, the Occupying Power assumes many of the responsibilities of the defeated government. This includes providing safety and security for the civilian population and national infrastructure until these responsibilities can be returned to competent local authorities, whether military, civilian law enforcement, or other entities. For example, the Iraqi oil pipeline is a critical lifeline for Iraqi reconstruction. In a benign occupation, at a minimum it would have been protected from theft. Lacking local resources, a PSC was hired for this task.

All of this is a long preface to summarizing some of the steps taken within the United States with respect to PMC/PSC in Iraq in the period following major combat operations. It should not necessarily be viewed as a template for PMC/PSC employment outside Iraq.⁵

U.S. PMC/PSC control mechanisms. As a preface to explaining measures the United States takes with respect to PMC/PSC employment, a premise exists that a government may not elude its international legal obligations by substituting a PMC or PSC for its military forces. PMC or PSC hired by a government must comply with applicable international laws.

Within the Department of Defense, an effort has been underway to develop new directives with regard to outsourcing. This effort is on-going within each agency of the U.S. Government rather than being unique to the Department of Defense. Congress has laid out objectives and criteria for reducing the size of the federal bureaucracy, leaving it to each agency to determine how best to apply the criteria provided. This is an overall contracting issue rather than one related solely to PMC/PSC.

4 Government directives. Two Department of Defense Instructions have been developed. One was promulgated late last year. It is contained in your reference materials. The second is nearing completion. I will summarize them in reverse order.

The first⁶ provides detailed guidance with respect to what is known as the “Manpower Mix Criteria.” Using the elaborate criteria provided, it assists in identifying

⁵ I agree with the comment made by a participant that the so-called “mercenary” issue is or should be a non-issue in our discussions.

⁶ Draft Department of Defense Instruction 1100.ff.

civilian and military positions that are “inherently governmental” and therefore may not be outsourced. All combat arms positions are inherently governmental, as are other positions where discretionary authority inherent to the application of military force exists. Each of the four U.S. military services has the responsibility to determine which positions are inherently governmental based upon its respective roles and missions. In essence, this instruction assists in determining *when* a position may be or may not be outsourced.

The second,⁷ issued on October 3, 2005, details *how* Department of Defense civilians and civilian contractors may be deployed. It contains information as to training, including law of war training, medical care, dress, and a restriction on issuance of firearms to DoD civilians or civilian contractors except where expressly authorized by the Combatant Commander. Each acknowledges that a civilian contractor may be targeted by enemy military forces in the major combat operations phase during such time he or she is taking a direct part in hostilities.

Pictures of heavily-armed private security contractors in Iraq undoubtedly raise eyebrows as to the restriction on firearm issuance to which I just made reference.

Private security contractors (PSC) are not part of the U.S. military. Nor are they a substitute for U.S. military forces. They fill the vacuum caused by a lack of Iraqi security forces, whether civilian law enforcement or military, such as providing security for food convoys to feed the civilian population, while also executing other vital missions, such as personal security protection for diplomatic representatives, United Nations officials, NGO, and others.

4 Legislative and policy controls. Other United States laws affect PSC employment. The Department of Defense does not issue weapons or ammunition to PSC. Under contract terms, the PMC or PSC must furnish its own. This brings to the fore the Arms Control Export Act (ACEA). The act is implemented by the Department of State through the International Traffic in Arms Regulations (ITAR). The ACEA and ITAR set out detailed requirements for licenses and other authorizations for specific exports of defense articles and services, including firearms and ammunition. Other statutory and regulatory provisions are administered by the Bureau of Alcohol, Tobacco and Firearms with respect to firearms ownership by private companies, including PSC. While in my work my focus has been on U.S.-based PSC, administering these laws and regulations limit export of weapons and other defense-related equipment to nations where the material or services in question could be used in human rights abuses or violations of the law of war. If a PMC or PSC seeks a government contract, it will be carefully scrutinized by the Department of State and other government agencies before it can obtain the weapons and ammunition it needs to perform the contract.

4 Checks and balances through contract provisions. Contracting provisions are perhaps one of the best and simplest tools for regulating contractor behavior, whether utilized by a government agency, international agency, a non-governmental organization,

⁷ Department of Defense Instruction 3020.hh, Contractor Personnel Authorized to Accompany the U.S. Armed Forces.

or the private sector. In essence, well-written statements of work specify terms of conduct and employment. In order to win the job, the contractor must agree to those terms and display the ability to comply with them.

PMC/PSC are a business. The contracting officer can draft standards and other criteria required for contract performance as part of the request for bids. Companies responding must agree to those criteria if they are to be competitive. A company awarded the contract but which fails to perform according to its terms may find the contract terminated and, in severe cases, may be debarred from competing for future contracts. This encourages self-policing, such as through a corporate or industry codes of conduct.

This process should include scrutiny of individuals being hired by PMC/PSC. One concern is with third country nationals hired from a nation with a record of human rights abuses. In such case, a proviso in response to a license request might state, "Company X will not hire or arm third country nationals with felony records or history of involvement in human rights abuse. Upon request, Company X will provide the Department of State names and passport information for further background check. Any persons found to be felons or associated with past human rights abuses will be sent home immediately."

4 Training. Workshop discussions considered mandating law of war and human rights training for PMC/PSC personnel. The draft Department of Defense Directive 2311.aaE requires contractors "to institute and implement effective programs to prevent violations of the law of war by their employees and sub-contractors, including law of war training and dissemination."

I expressed concern with any general training approach. The Department of Defense and the four military services use general training only at the accession level. Thereafter the training is, as the law of war program states, "commensurate with each individual's duties and responsibilities."

In the case of law of war and/or human rights law training for PMC/PSC, there are several issues. One is the employer. Using the rough figures provided by one workshop participant, 70% of the PMC/PSC workforce works for the private sector. Unless the PMC or PSC is employed by a government agency, it is subject to domestic laws rather than the law of war or human rights law.

Human rights law holds governments responsible for implementation and violations. Similarly, the law of war places responsibilities (and rights) on governments and the military during armed conflict, with different rights and responsibilities for international and non-international armed conflict, and different rights and responsibilities existing for different phases of an international armed conflict, as the slide indicates.

In essence, one size does not fit all. It would be a tremendous waste of corporate time and effort to provide general law of war or human rights law training for each and

every PMC/PSC employee. Tailored briefings similar to threat briefings prior to entry into a specific country or mission would be of greater benefit.

4 PMC/PSC corporate ethos and code of conduct. That being said, a pre-deployment briefing should be backed by a corporate ethos, published as a corporate or industry code of conduct. Any corporation should set forth in clear and unequivocal terms what it expects of its employees. One PSC representative offered a view of this approach in the workshop. Two codes of conduct were offered in our workshop – one by a particular company, another by an industry organization. A solid corporate code of conduct sets the tone for corporate and individual performance in accordance with applicable law. For reasons stated above, the operative word above is “applicable” law. Workshop discussion focused too much on human rights law or the law of war as the basis for a corporate or industry code of conduct or training. As PMC/PSC employment in a combat environment is likely to be the exception rather than the rule, this is not the best reference point.

4 Investigation and prosecution of violations. Another step taken has been to review our ability to report, investigate and bring to justice contractor personnel who commit crimes and, in particular, violations of the law of war.

The Department of Defense promulgated its first directive providing overall law of war guidance in 1974. It is subject to periodic updates. In final draft, Department of Defense Directive 2311.aaE, requires adherence to the law of war by military personnel, Department of Defense civilians, contractors and subcontractors. It requires reporting of any reportable incident. A *reportable incident* is defined as “A possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict.”

4 Domestic criminal jurisdiction. Two legislative steps over the past decade – the War Crimes Act (1996, and amended 1997) and the Military Extraterritorial Jurisdictional Act (2000) – sought to close jurisdictional gaps for civilians accompanying the armed forces or otherwise employed by the U.S. in areas where U.S. forces are engaged in military operations. We are reviewing each to ensure there are no jurisdictional loopholes with respect to civilian personnel accompanying military forces.

Lacking this legislation, a host nation (such as Iraq became following the conclusion of the occupation on June 28, 2004) could seek criminal jurisdiction over private contractors, and a status-of-forces agreement for any or all foreign military forces. This could have a potential negative effect on Iraqi reconstruction.

In summary, government reliance upon PMC or PSC entails:

–Determining *when* PMC or PSC use is feasible, and when it is not. In the U.S. view, warfighting remains a government and military responsibility.

—Where a PMC or PSC is employed, criteria are established by regulation and contract terms as to *how* they are to perform.

—Existence of other checks and balances, such as in implementation of the Arms Control Export Act, as I have described.

—There should be a mechanism for reporting, investigation, and prosecution of misconduct by the government of its military personnel, contractors or other agents, and for reporting of misconduct of others.

—PMC/PSC – either individually or through an industry association – should be encouraged to develop core values in a code of conduct. Industry and/or governments should be encouraged to review a PMC or PSC’s code of conduct and adherence to it in considering its employment.

The explosion of PSC during the occupation phase was an anomaly. As one expert remarked this morning, the past three years’ experience has brought industry maturation. There also has been government maturation, as indicated by the new directives I summarized.

Thank you.