

WAR FOR HIRE?

ACCOUNTABILITY FOR PRIVATE MILITARY COMPANIES

ABSTRACT

It seems that western governments are increasingly keen to move towards the Nozickean ultraminimal and to allow even the monopolisation of violence to be assumed by private enterprise on a contractual model. The ultraminimal state is left with a residual steering, policy role in which the parameters of contractual engagement for protection can be set. In short, it appears that nothing is sacrosanct in the onward march of the principles of neo-liberalism. Evidence for this assertion comes, *inter alia*, from recent policy discussions concerning the use and regulation of private military companies (PMCs).

This paper will not only analyse and explain these developments in the context of neo-Liberalism but also to subject them to a critique based on principles of constitutionalism. It will therefore explore the implications for democratic accountability when the government is no longer directly responsible for deploying and administering the use of military force abroad.

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1 INTRODUCTION: BEYOND THE ULTRA-MINIMAL

With experiences of conflict in Iraq fresh in our minds, public inquiry has initially focused on the causes of war, sufficient or otherwise. Added to the doubts as to justification or propriety, there are serious concerns about aspects of the conduct of the conflict – the abuse of prisoners, the selection of targets and so on. The states concerned may claim that many problems have been unforeseeable, unforeseen or at least unintended. However, another facet of the conflict highlights a development which is without doubt an intended consequence – the privatisation of conflict. Here, we seem to be witnesses a move towards what Robert Nozick termed the ‘ultramiminal state’ in which the task of the state is confined to the monopolisation of violence rather than the actual provision of security (unless paid for by citizens by choice). On the face of it, it seems that western governments are increasingly keen to move towards the ultramiminal and to allow even the monopolisation of violence to be assumed by private enterprise on a contractual model in which the rich or the desperate may choose to avail themselves of fortifications at the going rate while the rest take their chances in life. In short, it appears that nothing is sacrosanct in the onward march of the principles of neo-liberalism. Even the ultimate bastions of establishment – Her Majesty’s armed forces – are not immune from processes of commodification and marketisation that have previously been applied to core functions such as policing and imprisonment.

I aim in this paper not only to analyse and explain these developments in the context of neo-Liberalism but also to subject them to a critique based on principles of constitutionalism.

2 THE NEW MERCENARIES

PMCs engage in a range of activities, including advice on organisational or operational issues, training, logistic support (procurement, and delivering equipment and services), intelligence-gathering and the supply of personnel. It is the latter which tends to be the most eye-catching, but the deployment of PMCs in combat is not common. The term ‘mercenary’ is - perhaps unsurprisingly given the negative imagery conjured by this term - usually now avoided.

Amongst the leading PMCs in the world are DynCorp, Executive Outcomes (disbanded in 1999), Kellogg, Brown & Root, Military Professional Resources, Inc. (MPRI), and Vinnel Corp. In the main, both their management and operational personnel tend to be drawn from former members of the military forces of France, Israel, South Africa, the United Kingdom and the United States. Since the Cold War, they have been joined by ex-military from central and eastern Europe. Their theatres of operation include Afghanistan, Angola, the Democratic Republic of the Congo and the Republic of Congo, Ethiopia and Eritrea, Iraq, Kashmir, Liberia, Sierra Leone, and the former Yugoslav states. The potential employers comprise not only governments but also enterprises (such as banks and mining companies), humanitarian agencies and peace-keeping agencies. The demand is thought to be growing. ‘Failed’ states are characteristic of the neo-liberal capitalist order, whereunder superpower sponsorship is no longer readily available, and national economies in poor countries are increasingly vulnerable to Western market protectionism, enforced privatisation and unstable commodity prices.

The trend towards investing state military functions in non-military bodies is not of recent origin. But the impact of the PMC seems to be growing in pace. For example, it is reported that private corporations have penetrated western warfare deeply and provide the second biggest contributor to coalition forces in Iraq after the Pentagon.

3 UNITED KINGDOM LAW AND PMCS

In the United Kingdom, mercenary activities are regulated by the Foreign Enlistment Act 1870, section 4, by which:

'If any person, without the license of Her Majesty, being a British subject, within or without Her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign state at war with any foreign state at peace with Her Majesty, and in this Act referred to as a friendly state, or whether a British subject or not within Her Majesty's dominions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign state as aforesaid, he shall be guilty of an offence. . .'

It is also an offence under section 5, to induce another to go abroad in order to accept any military commission or engagement. The 1870 Act has its shortcomings in the modern age. The definition in section 4 of 'foreign state' does not encompass most guerrilla movements or terrorist groups or 'stateless' fighters. The report on the Sierra Leone affair by the Foreign Affairs Committee pointed to the Foreign Enlistment Act 1870 as an 'antiquated piece of legislation ... passed on the outbreak of the Franco-Prussian war'. Apparently, there has never been a successful prosecution under the Act in connection with illegal enlistment or recruitment.

The 1870 Act has recently been supplemented by offences in Part VI of the Terrorism Act. By section 54, which deals with weapons training, a person commits an offence if he provides instruction or training in the making or use of (a) firearms, (aa) radioactive material or weapons designed or adapted for the discharge of any radioactive material, (b) explosives, or (c) chemical, biological or nuclear weapons (as amended by section 120 of the Anti-terrorism, Crime and Security Act 2001). It is correspondingly an offence under section 54(2) to receive instruction or training, or, under section 54(3) to invites another to receive instruction or training contrary to sub-section (1) or (2) even if the activity is to take place outside the United Kingdom. In this way, the offence also now pertains to recruitment for training as well as the training itself, arising mainly from concerns about groups seeking (often through the Internet) to recruit individuals for military training abroad. Perhaps the foremost influences during the framing of this legislation were the fears associated with British citizens attending military camps in Afghanistan, Pakistan and elsewhere.

Under the terms of the Export Control Act 2002, the provisions about technology transfers (section 2) and technical assistance controls (section 3) can also be applied on an extra-territorial basis if involving United Kingdom persons. These measures are potentially usable against PMCs to prevent trafficking and brokering in military equipment and on the basis of concern about 'An adverse effect on peace, security or stability in any region of the world or within any country'. Implementation is planned for May 2004, so the impact is yet to be felt.

Another regulation of potential relevance is the Landmines Act 1998. By section 2(1), no person shall (a) use an anti-personnel mine; (b) develop or produce an anti-personnel mine; (c) participate in the acquisition of a prohibited object; (d) have a prohibited object in his possession; or (e) participate in the transfer of a prohibited object. It is also an offence to assist, encourage or induce any other person to

engage in any conduct mentioned in subsection (1). Section 3 makes it clear the bans apply outside the jurisdiction as well as within.

Under the Anti-terrorism, Crime and Security Act 2001, a more direct prohibition on recruitment for conflict is contained in sections 59 to 61, which seek to give United Kingdom courts jurisdiction over offences of incitement to terrorism abroad. By section 59, a person commits an offence if (a) he incites another person to commit an act of terrorism wholly or partly outside the United Kingdom, and (b) the act would, if committed in England and Wales, constitute one of the offences listed in subsection (2). By further amendment in 2003, it is also possible for a United Kingdom national or a United Kingdom resident to be convicted if they do equivalent acts outside the United Kingdom. The only relief is in sub-section (5) by which any person acting on behalf of, or holding office under, the Crown cannot be liable – members of the security services or government may be allowed to assassinate and so on.

Beyond the Export Control Act, PMCs are not the targets of this legislation and are certainly not regarded as the objects of prohibition as are other groups of foreign combatants recruited from the United Kingdom. The publication by the Foreign and Commonwealth Office in February 2002 of a Green Paper ‘Private Military Companies: options for regulation,’ rather than signalling how domestic law might be amended to allow for the proscription of mercenary activities, appears to move the debate in the opposite direction. In other words, the Green Paper, and a subsequent House of Commons Select Committee Report on the subject provides the political rationale for the regulation - the *de facto* legalisation - of PMCs. The following section will discuss the contours and likely outcomes of the proposed regulatory structure, considering first the political impetus behind reform and second the technical detail.

4 THE POLITICAL IMPETUS BEHIND THE GREEN PAPER

The emergence in 2002 of a debate in the United Kingdom on the regulation of PMCs may be explained by a range of (not necessarily consistent) political rationales.

First, the most direct origins of the Green Paper reside in the House of Commons Foreign Affairs Committee inquiry into the ‘Arms to Africa’ affair which revealed that the British-based PMC Sandline had broken a UN arms embargo on Sierra Leone by delivering weapons to the Kabbah government with apparent knowledge and tacit approval of United Kingdom civil servants and with some material help from the British Navy.

A second driving force behind the emergence of the Green Paper is the perennial mantra of ‘economy, efficiency and effectiveness’ in public services. The use of PMCs in peacekeeping and escort missions is undeniably cost effective, and financial economy is a major driver in their increased usage. A commonly cited example is that of the Executive Outcomes/Sandline operation in Sierra Leone which cost \$35 million for a 21 month engagement. The relatively ineffective, state-based UN observer force cost \$47 million for 8 months

Third, allied to economic management is risk management. The use of PMCs can allow for some redistribution of risks associated with armed conflict from public to private sector. This shift becomes feasible in the context of the world order created after the collapse of the Soviet bloc and competition between superpowers and their allies based ultimately on mass military structures and the mass destruction of them. In that era, it seemed that only states could play the grand military game.

Fourth, the British government has expressed disenchantment with international law and its capacity to regulate PMCs. Following directly from the previous point, this rejection of international law is partly based upon a logic of incorporation. Given that there are slender prospects for the complete abolition of mercenary activity, it is safer to bring PMCs into the fold than leave them as the loose canons comparable to the privateers and private company armies of the seventeenth and eighteenth centuries.

Sixth is that the private defence industry as a whole remains one of the United Kingdom's most important in terms of generating external revenue. The legitimisation of PMCs is thus significant because it stimulates the defence industry generally.

Seventh, the process of regulation has a key role in assisting western states to achieve expansionist foreign policy goals. In the US, the experience has been that the regulation of military services means the US government through close relationships with those companies can conduct 'foreign policy by proxy'. The US experience is that licensing regimes facilitate this relationship.

A closely related consequence is that the employment of PMCs by western states can result in a degree of evasion of the scrutiny of their military activities by the international community and by their own domestic constitutional structures. The 'dirty work' argument, as Gary Marx depicts it in the context of private policing, provides an incentive to state use of private security. This comes in two forms: if the activities that the PMC is asked to carry out border on the illegal, then public agents can place nuances on the instructions given or claim misinterpretation by their agents. In addition private companies have some forms of legal protection and rights that are not available to public authorities.

5 THE EMERGENCE OF A REGULATORY REGIME?

It follows from these political considerations that two possible policy options are rehearsed but not really left open, even in the context of a slow-moving and open-textured Green Paper. Those options are, first, to attempt a complete ban on mercenary activity and, second, to do nothing.

While willing to sponsor national legislation on PMCs, the United Kingdom government seems to find arguments aplenty against a complete ban on the use of PMCs even in combat operations. There is the fear of evasion or capital flight – that PMCs can always relocate abroad if a national regulatory regime is not palatable.

The option to do nothing is equally unlikely, given the rapid growth of the sector. An expanding market, as the preceding discussion indicates, is encouraged by the United Kingdom government and holds out prospects for developing 'partnership' contracts with PMCs. There is a consequent demand for intervention, though in a 'light footprint' way. Even in the absence of formally enforced regulations, the United Kingdom government does retain some measure of disciplinary control. The influence of military professional cultures (with PMCs employing many ex-service personnel) and the more pragmatic knowledge that governments are major potential paymasters make it very unlikely that, for example, a British PMC would embark upon a mission contrary to United Kingdom foreign or defence policy.

In between prohibition and passivity is the strategy of regulation, and that is the focus of the Green Paper. Its purposes and variants will be considered next. PMCs themselves broadly support the principle

of regulation and are also prominent in pushing to the fore this approach in current international and domestic policy debates. But at the outset, it is made clear that a light touch will be applied out of concern for the costs of regulation and the mobility of PMCs. Accordingly, several levels of regulation are offered as overlapping options.

The most intrusive form of statutory licensing regime would be the requirement that companies or individuals must obtain a licence for each contract for defined military services abroad. A specific issue arising from this level of regulation would be the insistence of companies that they be able to maintain both commercial confidentiality with regard to military plans. Government officials also appear to share the concerns of PMCs that this approach would also slow the timescale for PMCs finalising commercial deals. Despite those issues, it is the regulation format preferred by the House of Commons Foreign Affairs Committee as the most 'rigorous', albeit alongside institutional licensing (discussed below). The Committee would also embrace a complete ban on combat operation.

Another regulatory option would require United Kingdom firms to register as PMCs with the government and then to notify officialdom of contracts for which they were bidding. In this lighter regulatory format, 'Under normal circumstances the government would not react; but it would retain reserve powers to prevent the company from undertaking a contract if it ran counter to UK interests or policy.' For example, there might be 'states of concern' with whom contracts did require specific consent, whereas contracts with, say, European Union states could be assumed to be acceptable.

An even lighter touch approach might involve licensing the PMC alone, still allowing the state to set general rules across the sector, such as non-involvement in certain countries and a prohibition on the employment of specified activities and individuals. But such a level of disengagement would run the danger of lending official credibility to companies whose operations were not disclosed. It would also run into definitional problems – it may be easier to specify permitted or forbidden activities than 'private military companies' or 'military services'. An obvious candidate for forbidden activities would be direct participation in combat operations, and this idea is duly proposed by the House of Commons Foreign Affairs Committee despite Foreign Office misgivings about the fluid boundary between guarding and combat.

The reform of the Foreign Enlistment Act 1870 remains as unfinished business after the Diplock Report of 1976. On the basis that extra-territorial legislation has become more viable in the current era of greater international legal co-operation, the House of Commons Foreign Affairs Committee calls for reform. It is no use having well-ordered PMCs in the United Kingdom and then to allow British citizens to be recruited by unregulated foreign PMCs. The Committee is also concerned about the employment by PMCs of British soldiers after official service and therefore suggests the Government goes into the PMC business based on retired servicemen – if you can't beat them, join them! This development seems unlikely in the era of private finance initiatives (not least since it may not allow for a re-distribution of risk) and one wonders whether any reform of the 1870 Act is on the cards.

The latest government pronouncement on the issue of PMCs, a response to the Foreign Affairs Select Committee report in October 2002, appears to indicate a preference for regulating PMC activities, even combat, but remains decidedly cautious as to details. The government's conclusion is that it requires further information, including consultation with EU allies.

6 CONSTITUTIONALISM AND PMCS

A Parliamentary accountability

Whilst regulation is intended to improve standards and to avert major wrong-doing, constitutional norms, especially respect for human rights and international law, and the accountability of the government for the design and application of regulation, should also be advanced. In regard to the democratic accountability of the government, the Green Paper contains the brief observation that:

‘If the Government decided to adopt a licensing or other regulatory regime for the export of military services, it would be logical for this to be subject to the same reporting requirements *vis à vis* Parliament as is the case for arms export licences.’

The House of Commons Foreign Affairs Select Committee is more vociferous on the subject. It repeats the idea of parity with arms export licences, except that it demands prior Parliamentary scrutiny of any licence application that might involve PMCs in armed combat services.

B Accountability in domestic law

As for the legal accountability of PMCs and their participants, existing domestic criminal law in the United Kingdom has been of little use in bringing to book illegal activities. Whether this is a result of the weakness of the law *per se*, or whether it is rather more connected to the political will of the state to enforce the law is debatable. But it is instructive that no prosecution has ever been made successfully under the Foreign Enlistment Act 1870. Equally, the likely *forum conveniens*, the state in which the wrong was committed, is implausible as the site for effective legal action. As the Green Paper recognises: ‘In many cases however this is a highly theoretical proposition – a weak government which is dependent for its security on a PMC may be in a poor position to hold it accountable.’

Civil liability appears to be a more effective form of legal accountability. The possibility of extra-territorial application to armed forces has been demonstrated in *Bici v Ministry of Defence*. The High Court concluded that soldiers in Kosovo had been negligent in the killing of two Kosovan Albanians in Pristina; negligence was alleged by two survivors of the incident. Interestingly, the Ministry conceded that it was vicariously liable for any wrongs committed by any of the soldiers, even if abroad and even if acting under the auspices of the UN. One assumes a British forum can easily be seen as convenient in comparison to the chaos often reigning in the post-conflict locations concerned.

An extension of liability along these lines might be envisaged in two directions. First, for ‘forces of the Crown’ read ‘PMCs acting on behalf of the Crown’. Even if vicarious liability on the part of the Crown is not established, then the PMC itself can be brought to court. Second, as well as tortious liability, one might look to the broader liability under the Human Rights Act 1998. It is not known whether contract compliance is expressly imposed in this respect, so the question considered here is whether the English courts may still demand observance of human rights standards by PMCs acting abroad at the behest of the government. This aspect raises questions as to whether the PMC is exercising functions of a public nature under section 6. The answer will of course vary according to the function being carried out by the PMC – the delivery of cabbages to the army kitchens might be distinguishable from providing an armed guard for an important public building or utility.

The application of the European Convention to conflict out of jurisdiction was recently considered by the European Court in *Bankovic and others v Belgium*, where a complaint under articles 2, 10 and 13 was brought against the host of NATO whose forces had bombed the main TV station in Belgrade. The European Court declared the application to be inadmissible on grounds that the actions of the member State were not within their jurisdiction under article 1. This decision discourages the extension of human rights to sites of external conflict. It may be criticised as adopting an untenable view of ‘jurisdiction’ and as being inconsistent with previous and later decisions. One might argue that the Court would have done better to adopt a version of the doctrine of forum conveniens in relation to article 1 rather than to seek to impose an absolute ban on the scrutiny of foreign activities of member States. Yet, as things stand, the judgment places a shadow over any developments under the Human Rights Act 1998, since, by section 2, the English courts must take account of judgments of the European Court.

Perhaps the most significant problem which places limits upon the prospects for the effectiveness of domestic legal regulation, whether existing or proposed, is the lack of visibility and transparency which characterises PMCs. The following exchange during the Select Committee proceedings perhaps illustrates this point:

‘Andrew Mackinlay MP: “...It is like sand going through your fingers. Companies dissolve, ownership is vague and the soldiers themselves are not known or named. ...
Denis McShane (Parliamentary Under Secretary of State for the Foreign and Commonwealth Office) They are very protean, they are like amoeba, they come and go.’”

C Accountability to international human rights law

In the international law arena, the debate remains more polarised, with pressures towards prohibition as strong as those favouring regulation. The United Nations General Assembly has repeatedly recorded its opposition to the use of mercenaries, despite the regular use of PMCs by some of its agencies, the UN General Council has signalled its persistent concern by the appointment in 1987 of a Special Rapporteur on use of mercenaries as a means of impeding the exercise of the rights of peoples to self-determination. The UN Special Rapporteur on Mercenaries, Enrico Ballesteros, has argued that ‘The participation of mercenaries in armed conflicts... always hampers the enjoyment of the human rights of those on whom their presence is inflicted.’

D Accountability to international humanitarian laws

There are a series of problems when it comes to the application of humanitarian law to PMCs, with the exception of the direct employment under state license of a PMC, such as the deployment of MPRI by the US in the Balkans. Indeed, it seems to be an emergent determination that it should not generally apply, in contrast to the overall policy of granting greater protection to civilians.

Looking in more detail at Geneva III, its applicability may be questioned in many of the low intensity conflict situations in which PMCs operate. Those PMC employees acting for organised resistance movements in occupied territories might fall within Article 4(A)(2) as:

‘(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

- (a) That of being commanded by a person responsible for his subordinates;
- (b) That of having a fixed distinctive sign recognizable at a distance;
- (c) That of carrying arms openly;
- (d) That of conducting their operations in accordance with the laws and customs of war.’

But several obstacles present themselves to the extension of prisoner of war status to mercenaries under Article 4(A) acting for rebels in other circumstances. First, the conflict involving PMCs is often purely internal rather than international and so involves only one state Party. Second, the level of disturbance required by the phrase, ‘armed conflict’, probably goes beyond, for example, sporadic banditry and requires a rebel force which has coherence and significant scale in terms of its own organisation and operations. Therefore, a state affected by internal disturbance of this nature will often be most reluctant to recognise the application of Geneva III, and will usually wish instead to avoid international scrutiny and to pursue a policy of the punishment of rebels and their aides, even if there is a reciprocal denial of status for mercenaries employed by the government and falling into rebel hands.

The Geneva Protocol 1 seeks to make humanitarian law less narrowly drawn. The effect is to allow nationals of a state of a colonial, alien or racist nature to engage in legitimate combat and so to be recognised as combatants even if the conflict is wholly internal. The circumstances in which Article 1(4) might apply are described further by the UN General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation amongst States in accordance with the Charter of the United Nations (‘the Friendly Relations Resolution’). The Resolution requires state support for ‘peoples’ acting in pursuit of their right to self determination, but this is qualified under Article 1(4) to the three contexts outlined, and these are generally interpreted narrowly so as to avoid ‘encouraging secessionist movements within existing states’ or ‘struggles waged for the partition of existing states ... even if in the conflicts there might be some ethnic and/or cultural differences between the parties.’ There remains also the difficulty of the level of intensity required for the establishment of an ‘armed conflict’, which requires more than ‘civil disturbance’.

If Geneva Protocol 1 is applicable, under Article 43, those claiming privileged status must be part of a body listed below:

- ‘1 ...organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.
- 2. Members of the armed forces of a Party to a conflict ... are combatants, that is to say, they have the right to participate directly in hostilities.
- 3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.’

These conditions may pose problems both for governments and rebels – organisation and discipline are not the hallmarks of low intensity conflicts. However, some leeway is afforded by Article 44(2) to the condition of ‘compliance with the rules of international law applicable in armed conflict: ‘While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an

adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.’ Paragraphs 3 and 4 relate to the wearing of distinguishing marks (if not a uniform) and the open carrying of arms (at least during each military engagement and during such time as the combatant is ‘visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate’).

The Geneva Protocol 1 is less explicit about the status of PMC technical support staff, but Article 50(1) states that ‘A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian’ Presumably, since such staff fall within the unmentioned Article 4(A)(4), they must be treated as ‘civilians’ for the purpose of the Protocol. By Article 51(3), ‘Civilians shall enjoy the protection [against dangers arising from military operations], unless and for such time as they take a direct part in hostilities.’

In so far as Geneva Protocol 1 would otherwise appear applicable to the operations of mercenaries, whether employed by governments or rebels, there is a major proviso in Article 47(1). which states that ‘[a] mercenary shall not have the right to be a combatant or a prisoner of war.’ In this context:

‘(2) A mercenary is any person who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;

(b) does, in fact, take a direct part in the hostilities;

(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;

(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

(e) is not a member of the armed forces of a Party to the conflict; and

(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.’

The result for those falling within the definition may be trial and imprisonment for crimes and even execution for killings. Yet, there are several reasons for doubting whether the cumulative conditions of Article 47 will actually deprive many mercenaries of potential combatant status. Thus, one commentator has noted, ‘...any mercenary who cannot exclude himself deserves to be shot – and his lawyer with him.’

First, if individuals are regular employees of a company, they cannot be regarded as having been recruited ‘specially’ for a particular conflict, in line with the Geneva definition. Seemingly, members of the Gurkhas or the French Foreign Legion are beyond Article 47.

Second, those who provide non-combat services – fulfilling roles supporting, rather than taking a ‘direct part in the hostilities’ (Article 47(2)(b)) are not covered.

Third, Article 47(2)(c) insists upon private gain as the motivation for mercenaries, as opposed to, for example, political or religious principle. In this sense, we can speculate that the British combatants alleged

to have been fighting in Afghanistan defending the Taliban regime on ideological grounds could not be defined as mercenaries.

Fourth, it is relatively easy to evade the conditions in Article 47(2)(d) and (f), that a combatant, ‘...is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict... and...[is not]on official duty as a member of its armed forces.’ In the past this has been done in several ways: by the host state immediately conferring nationality on PMC employees or by establishing an ambiguous link to the host country’s armed forces.

Fifth, Article 47 targets individual mercenaries. Thus, it does not seek to outlaw state use of those services or the recruitment of combatants paid for by a state who might fall within the protection of Protocol 1 Article 43(3) (above).

Added to all these difficulties is the fact that the USA refuses to ratify the First Protocol.

It may be concluded that it is only national government authorities or sizeable, organised and sustained insurgency forces which are clearly recognised and capable of acting in accordance with international humanitarian law. The Geneva Protocol 1 actually seeks to exclude mercenaries from the coverage of humanitarian laws. This is a worrying precedent, and the policy it represents may be counterproductive in terms of encouraging compliance on all sides with the spirit of international humanitarian law.

E Accountability to special international laws against mercenaries

The Organisation of African Unity’s Convention for the Elimination of Mercenarism 1972 and the UN-sponsored International Convention Against the Recruitment, Use, Financing and Training of Mercenaries 1989 seek to outlaw the use of mercenaries on an increasingly broad basis. As such, they court the danger that they may render irrelevant the responsibilities of PMCs and paymaster states under international law since the conventions will either be evaded or not ratified in the first place.

In an effort to ‘take all necessary measures to eradicate from the African continent the scourge that the mercenary system represents’ (Preamble), the Organisation of African Unity’s Convention for the Elimination of Mercenaries of 1972 has a broader definition than under Article 47 of Geneva Protocol 1. Thus, the Convention does not interdict the use of mercenaries by recognised states (except against their equally recognised neighbours and except by racist regimes as existed in Rhodesia and South Africa). In addition, it seems that financial motivation does not have to be proven. The actions of a mercenary as defined above constitute international crimes against the peace and security of Africa, and anyone who recruits or takes part in the recruitment of a mercenary, or in training, or in financing his activities or who gives him protection, also commits a crime (Article 2), these restrictions going well beyond previous international laws such as Protocol 1.

The UN International Convention Against the Recruitment, Use, Financing and Training of Mercenaries of 1989, adopts in Article 1(1) all but one (the requirement to take a direct part in the hostilities) of the difficult conditions of Article 47 but goes beyond them in Article 1(2): The effect is a more wide-ranging coverage than Article 47; by Article 1(2), support staff can be included (at least if involved in the support of operations and not logistics or general training) and activities short of armed conflict are restricted, including actions on behalf on national liberation movements.

The approach of these conventions is prohibitory rather than regulatory, which may be why there is a failure of political will necessary for implementation. For example, the UN Convention had been ratified by only 24 states (by mid-2002). As for the policy they embody, one can only hope that the value of humanity which is generally supported by international humanitarian law will be conceded, though the experience of many internal conflicts attest to the preference for inhumanity on all sides.

F Accountability to residual international law

More generalised notions of infractions of international laws, such as crimes against humanity, can now be seen as codified to a fair extent for enforcement purposes in the rules of the International Criminal Court. But there is the major difficulty that the United States refuses to ratify the ICC statute, because it is concerned that its political and military leaders may become targets for war crimes prosecutions. As a result, it has sought to arrange for bilateral treaties of immunity with states where its soldiers operate, and it is notable that this exemption has been sought for PMCs in operation in Afghanistan and Bosnia. There is also the limitation that the International Criminal Court cannot deal directly with 'terrorism' such as might be committed by mercenaries. Nevertheless, the deeds of terrorists may fall within admissible heads of its jurisdiction, such as crimes against humanity.

Alongside the new international criminal code, there is an emergent jurisprudence that customary international law can now be invoked to overcome many of the technical or political limitations of international humanitarian law, including Protocol II. The effect is that there may be no need to prove the existence of 'armed conflict' as a condition of prosecuting for customary international law crimes, such as crimes against humanity relating to the protection of civilians and the ban on horrific weapons. But this jurisdiction is likely to be triggered only in the grossest of situations and probably cannot be applied to corporations.

G Market accountability

Market accountability is not explored fully by the Green Paper, even though the provision of a competitive market, both for home and overseas consumption, is an abiding concern. Nevertheless, the industry itself has argued that contractual vulnerability and the protection of market position is enough of an incentive to produce good conduct, and the Foreign Office tends to agree, but the mechanisms by which a market penalty are threatened do not look very fierce.

A likely impact of regulation may well be to open the existing market for PMC activities to a range of new players and to spawn new markets in violence. An apposite question for market accountability here is whether it can protect weak governments against PMCs, as well as the individuals they come into conflict with. Some have argued that it is wrong for governments to pay for security by mortgaging future returns from mineral exploitation. But the cost/benefit Foreign Office analysis is that 'if a government is faced with the choice of mortgaging some of its mineral resources or leaving them entirely in the hands of rebels, it may be legitimate for them to take the former course.'

Next, there is a rather obvious point that in a market for violence, a client/customer line of accountability is likely to encourage a political economy of violence where the relationship between means and ends is likely to be less clearly defined than in policing. Informal justice and wider discretionary power allow and indeed encourages private security companies to displace the public interest with the immediate interests of their managements and shareholders. For example, it perhaps becomes more likely that suspects and captives will be dealt with by the private company themselves than handed over to the public

authorities so that information valuable to the achievement of contractual objectives or the safeguarding of corporate assets can be obtained but information relevant to wider public interests may be ignored or suppressed.

Legal controls in this sense may appear increasingly privatised and individualised. As a compromise, tort law, it has been suggested, may offer a median avenue for accountability. However, jurisdictional issues make it difficult, though not insurmountable, to bring suits against PMCs in their 'home' state, though both in civil and criminal jurisdictions, there have been moves towards a trans-jurisdictional remit. The net effect of the forms of regulation likely in the United Kingdom may well trigger a substitution of legal tools of accountability from public law (criminal law and humanitarian law) to contract and torts law.

Whatever its shortcomings, market accountability is likely to offer the prime mechanism of corporate governance in the PMC sector. PMCs seem to be increasingly linked to large multi-national conglomerates. These companies can therefore be held indirectly accountable by market conditions which makes them acceptable as contractors. All of this leaves one wondering whether the net effect of a shift to the market accountability model will be to reduce observance of human rights and humanity to contractual terms. In any event, it is a model of accountability that on the face of things, appears to correspond to a shift towards Nozick's ultra-minimal state.

8 CONCLUSION

The dominant view in the literature is that the increasingly frequent use of PMCs by western governments is a privatisation of the state's military functions, a process which implies a reduction of the state's capacity to act politically, to intervene in markets and so on. It is a scenario that conjures up Nozick's ultra-minimal state.

The reconfiguration and redistribution of state/market power is, on closer inspection, a more complex process. In many ways, the use of PMCs expands rather than restricts the military options open to the state. On the evidence here provided, the market governance sought by the state over PMCs does not represent a direct loss of power or a dispersal of sovereignty but is better described as 'state rescaling'. This term describes the process through which the state's scope for intervention, its institutional boundaries and ensembles are shifting – a concept which 'can provide a corrective to theoretical traditions that have wrought fixed distinctions between the state and civil society.' Although it may not be fashionable to talk about the state anymore, given the well worn association with its reductionist analytical application, if we move beyond a liberal (superficial polemic and indeed mythical) view of a two dimensional public/private distinction where the public is narrowly embodied in the state institutions and the private in everything else, then the notion of state power need not restrict our analysis.

Moreover, the idea that the state, and by implication the rule of law, is in retreat under the neo-liberal conditions of deregulation and privatisation begins to look rather misleading. From this perspective, the opening up of legitimate markets to PMCs looks less like a transfer of power from the public to the private sector, but the re-regulation of security provision, from international human rights or humanitarian law to contract and civil law. There are two elements of this process of re-regulation (which in this case also implies legitimisation of the industry) that are significant in constitutional terms: the transfer of

institutional responsibility for absorbing risk, both in financial terms and in terms of political exposure, and the undermining of democratic accountability that this shift implies.

The latter is not to imply that the executive branch has, or ever can, 'contract out' democratic accountability. Governments and their institutions in modern democracies cannot function without some level of popular legitimacy. In this sense, what the privatisation of some military functions does is mask, rather than dissolve, government responsibility for foreign policy. To the extent that governments can now distance themselves from the body bags, human rights abuses and war crimes, the use of PMCs provides new opportunities to mystify the state's directing role in military violence. What this process of mystification does imply is that lines of public-private accountability are increasingly blurred.

Finally, PMCs afford the possibility of greater adventurism in foreign policy and allow a western-constructed order to be imposed on a much wider range of conflicts to be settled according to the interest of western states which can foster and afford the services of PMCs. If their technical success masks underlying socio-political problems, then they cannot be blamed, but we must be careful to avoid the impression that the official paymasters also incur no responsibilities. If the United Kingdom government does follow the road to re-regulation/legalisation of the industry, a looming constitutional fissure in the mantle of democratic accountability must also be addressed.

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