

Putting Round Pegs into Square Holes: US Government Oversight and Regulation of Private Military and Security Contractors

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David Isenberg gave this presentation at the [Regulating Private Military and Security Companies](#) panel at the [International Security Forum](#), on 27 October 2006 in Zurich, Switzerland. His remarks are derived from the chapter he wrote for the recently published book [Private Actors and Security Governance](#) published by the Geneva Centre for the [Democratic Control of Armed Forces](#).

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Presentation

Private military and security firms, herein referred to as private military companies (PMCs), are extremely difficult to generalize about. While they have attracted growing attention from governments, and even appear with increasing frequency in pop culture there is still little agreement on how to define them, let alone regulate them.

But governments and NGOs better start working more on that. For one thing is, at least to me, indisputable; namely, that we are going to see more of them. For example, a couple of weeks ago I was contacted by a U.S. State Department official. The gist of the conversation was that they are looking to contract a PMC to help with security for humanitarian operations in Lebanon. And, given the announcement earlier this year at an international conference in Amman, Jordan, by Cofer Black, vice chairman of Blackwater USA, a major US PMC, that it is offering itself up as an army for hire to police the world's trouble spots and that Blackwater stands ready to help keep or restore the peace anywhere it is needed, it is not difficult to see PMCs working around the world in the future.

Thus, in that regard I am happy to see the Swiss government and the ICRC working together to promote respect for international humanitarian law and human rights law with regard to private military and security companies operating in conflict situations.

Iraq has elevated world attention on the role of PMCs to new heights. Since the initial invasion by the U.S.-led coalition in 2003 Iraq has become the poster child for the private military and security sector. Certainly, the role of such firms has inspired a torrent of popular and academic writing on the subject. Moreover, most people nowadays will at least recognize the names of firms like Halliburton, Blackwater, DynCorp, ArmorGroup, Triple Canopy, et cetera; something that would not have been the case just three years ago.

We all know that reliance on PMCs increased greatly after the initial major combat operations phase. But the U.S. administration miscalculated and did not anticipate the emergence and growth of the insurgency. Since U.S. forces were not available to protect those doing reconstruction work, such firms had no choice but to turn to private security contractors in order to protect their employees. Put another way, while PMCs provide valuable services in Iraq, monumentally poor planning created the need for them; these are not exactly the sort of market conditions the industry can or should count on in the future.

What is worth remembering about PMCs in Iraq is this. Most of what you think you know is wrong. The private security sector there is very diverse. Yes, there are thousands of Westerners carrying arms but there are also more host nationals, as in Iraqis, and third country nationals, doing the same.

Rather than working directly for the U.S. government or the Coalition Provisional Authority (CPA), most PMCs are subcontracted to provide protection for prime contractor employees, or are hired by other entities such as Iraqi companies or private foreign companies seeking business opportunities in Iraq. This obviously makes PMC accountability difficult.

From a PMC perspective most activities have been of a tactical, not a strategic nature. That is, their day-to-day actions are not serving to transform the overall political, military, and social environments in which they operate. Their actions are straightforward for the most part. The one possible exception in Iraq where PMCs could help effect a strategic change would be in the training program of Iraqi military and security forces. The creation of competent, professional, and trusted forces will be essential for the formation of a central government that is necessary if there is to be a future state of Iraq.

From the perspective of providing security, for Iraqi society PMCs play only a small part. The true center of gravity in the effort would be the reconstruction effort itself. Unfortunately, there is reason to believe that effort has been as badly bungled as the planning for post-invasion military operations was.

It is often said that such firms are more cost-effective and efficient than the public sector but the simple truth is that nobody knows for sure.^[1] There is no empirical data to confirm such assertions and there has been enough evidence of cost overruns, inflated invoices, and fraud and abuse to be somewhat skeptical. What this implies is that whether or not a PMC is cost-effective will depend heavily on how the contract between the client and PMC is structured and what incentives it contains.^[2]

In terms of importance and influence the PMC sector has overall been transforming itself into a more mature industry-i.e., an industry that has concentrated itself, where there are fewer firms overall but the ones that exist are increasingly very big ones, employing many hundreds, if not thousands of contractors around the world, and receiving multi-hundred million, if not billion, dollar contracts. They are also increasingly politically well connected, hiring former government officials to their staff or boards of directors to help them bid for contracts.

If, looking at the traditional world of military contracting, past is prologue, these developments are both a sign of the emergence of the PMC sector as a significant industry, insofar as all industries seek to influence government for their personal advantage and a worrisome development, insofar, as it puts them squarely in the midst of the favor trading game, where payoffs and corruption, rather than merit, frequently influence contract awards.

Although there is no publicly available data, anecdotes and common sense suggest that the use of lethal force by regular military personnel, though accidents and errors, is far greater than that by PSC employees. U.S. military rules of engagement favor "force protection" over any obligation to protect innocent life.^[3] There are far more shootings of innocent civilians by soldiers manning checkpoints than all the known killings of civilians by PSC personnel.

Examples of controversial incidents involving private security staff include the following:

In March 2006, Kays Juma, an Australian resident and a professor at the University of Baghdad, was shot dead in Baghdad when private security guards mistakenly fired on his vehicle.^[4]

In February 2006 private security workers under contract with the U.S. State Department shot and killed two Iraqi civilians city of Kirkuk.^[5]

One of the bigger controversies occurred when an alleged "trophy" video appearing to show security guards in Baghdad randomly shooting Iraqi civilians. The video, which first appeared on a website that has been linked unofficially to Aegis Defence Services, contained four separate clips, in which security guards open fire with automatic rifles at civilian cars. All of the shooting incidents apparently took place on "route Irish", a road that links the airport to Baghdad. There are no clues as to the shooter or the company that he and the rest of the detail worked for. While there has been much hue and cry over the shootings it is far from clear that the guards did anything wrong. The results of an investigation by the U.S. military, released June 10, determined that no one involved will be charged with a crime.^[6]

And yet it is worth noting that Aegis itself conducted an investigation but will not release it publicly. Nor was the military report released.

Finally, the Los Angeles Times reported in December 2005 that private security contractors have been involved in scores of shootings in Iraq, but none have been prosecuted despite findings in at least one fatal case that the men had not followed proper procedures. Instead, security contractors suspected of reckless behavior are sent home, sometimes with the knowledge of U.S. officials, raising questions about accountability and stirring fierce resentment among Iraqis.

In terms of regulation the British Association of Private Security Companies (BAPSC) has been formed by leading members of the private security industry to promote, enhance and regulate the interests and activities of UK based firms and companies that provide armed security services in countries outside the UK. The BAPSC is not as well known as its American equivalent, the International Peace Operations Association (IPOA), as it was launched only on 9 February 2006, but given that British PSCs are second only to those headquartered in the United States in terms of overall numbers and worldwide presence it will likely have significant influence. Furthermore, as the British government is more enthusiastic about transparency than the U.S. government BAPSC, by virtue of its stated goal of working towards the "promotion of transparent relations with UK government departments and international organisations" may therefore be able to influence contractor-client relations to some degree.

Concerns over accountability and regulation of PMCs have long been a staple in academic discussion of the industry.^[7] However the widespread use of PMCs in Iraq brought increased publicity to and discussion of the issue.^[8] The past few years has seen the issuing of a great many federal statutes, directives, and regulations dealing with contractors.

Aside from international legal controls, private security firms working for the U.S. government and U.S. based private firms are also accountable to the War Crimes Act of 1996, Victims of Trafficking and Violence Protection Act of 2000, Anti-Torture Statute, Defense Trade Controls Act, Arms Export Control Act, Gun Control Act, Export Administration Regulations, International Traffic in Arms Regulations, Defense Base Act, Foreign Corrupt Practices Act, and the General Orders of the Central Command, multi-National Corps - Iraq and Combined Joint Task Force (CJTF) 76. However, the problem with many of these is that they aren't really relevant until after there is a problem.

In Iraq the problem for PMCs has not been a lack of relevant laws, but of means. Regulations existed but were not implemented because the relevant administration existed mainly on paper. The legal infrastructure was shattered. The Ministry of Interior, for example, simply did not have the means to handle the paperwork and could not enforce the laws.

The real impact of this has largely been lost in public discussion. People have overlooked the fact that without immunity security contractors simply were not going to work in Iraq due to the likelihood of arbitrary legal treatment of their employees.

The impact of all the above is ambiguous. Theoretically, even with the immunity granted by the CPA contractors could still be prosecuted under various legal authorities, especially the Military Extraterritorial Jurisdiction Act. But, until recently, federal prosecutors were not that interested in using it and local prosecutors in the states where PMCs are headquartered, and for whom MEJA holds greater relevance, normally do not have sufficient resources to use it.

Despite these rules and regulations it is unlikely that the activities of PMCs in Iraq, numerous as they are, offers many permanent lessons for the industry as a whole. From an industry perspective, nobody believes that they are going to see another Iraq. The United States could not intervene in another country on the same scale as Operation Iraqi Freedom, even if it wanted to. The industry recognizes that whatever contracts they get in the future are going to be in countries and situations that will be quite different from those in Iraq.

The most important factor in the risk-management trade is choosing and training the right people. PMCs generally subject potential employees to rigorous vetting.^[9] PMCs usually have codes of conduct for their staff, but there is no uniform check of these by government agencies. In the United

States, contractors to the government are theoretically liable to prosecution but as yet this has never happened. Disciplining contractor personnel is seen as the contractor's responsibility.

The CPA set some initial minimum standards for regulating PMCs and subsequently the Iraqi Ministries of Interior and Trade adopted new mandatory guidelines to vet and register PMCs.

While the Iraqi government is, in a de jure sense, in charge especially since the end of the Coalition Provisional Authority and handover of sovereignty back to the Iraqi government, it is a sovereignty that is still largely theoretical, given the challenges posed by the insurgency and its lack of resources. Thus, from the viewpoint of the PMC sector, doing business with the relevant Iraqi ministries is extremely difficult.[\[10\]](#)

One question worth pondering is the potential for PMCs to create an insecure environment by training Iraqi forces without the guarantee that they will have sustainable employment in the future. Beyond the training of members of the Iraqi security forces, PMCs are training men and equipping them with a set of military skills. These men are earning two, three or more times what the average Iraqi earns. But what happens after Western forces and reconstruction workers leave and those Iraqis no longer have a job and can no longer make a high wage. Are we training the next insurgency force? While firms such as DynCorp include civil-military relations in their training they focus their efforts on the Iraqi police. Other firms likely train Iraqis for future subsidiaries they hope to establish and it is unclear if such issues are recognized or addressed.

In concluding let us consider some specific questions. First, how effective has been the use of PMCs/PSCS instead of national staff to train Iraqi military and police? With respect to the military the answer seems to be not much. Training national military forces was never one of their big tasks. Providing personal security for reconstruction work was a far bigger task. Also, this was primarily a task that the U.S. military and other coalition forces reserved to themselves, even though, in the case of the United States, it initially did not spend much time and effort on it.[\[11\]](#)

Second, what were the implications that training has had for civil-military relations post intervention? Does it make any difference whether PMCs or national armed forces were used, in particular with regard to the potential threat of military coup?

There is little evidence to date that use of PMCs for training Iraqi police and security forces has had any adverse effects. While I have not seen any of the training materials used by PMC personnel such as the trainers employed by DynCorp, press reports indicate that such key principles as rule of law, the importance of human rights, and subordination of the military and security forces to civilian leadership are taught. As for a possible coup the Iraqi military is currently so small that the prospects of them carrying one off, especially in light of the presence of the U.S. military and Shiite and Kurdish militias, seem vanishingly small. In that regard the use of PMCs for training, especially as they did so much less than regular U.S. military forces, seems irrelevant.

Third, a key principle of democratic security sector governance is that of local ownership as a precondition for sustainable reform and reconstruction of the security sector. What can be said about the roles of PMC/PSCs in Iraq from the point of view of accountability, transparency and the consequent implications for nascent Iraqi governance institutions?

This was probably the least successful aspect of PMC/PSC operations in Iraq. This is because most accountability and transparency issues were between the companies and the U.S. government and not the Iraqi government. After all, when PMC/PSCs first started operated in Iraq the Iraqi government was mostly theoretical. Companies were, in theory, only being supervised by the CPA, which took fairly little interest in their activities. More importantly, U.S. governmental agencies and regulators who are charged with acting as neutral judges were far too often too few in number, little trained, too overburdened in terms of contracts to be monitored, and kept on the job too little time to gain the experience they need to adequately monitor contract performance.

Furthermore, there was the widespread, though not often publicly voiced perception among PMCs, that they could not trust the Iraqi government, as its military, police, intelligence, and security services are infiltrated by members of the insurgency. While this may be true such a view has likely caused increased suspicion of PSCs by Iraqi officials.

Iraq has served to highlight and publicize the existence and role of private security actors in a way that would have been unimaginable if the war had not occurred. Tactical lessons to be learned include how to coordinate with each other and regular military forces, standardizing operational procedures, gathering and analyzing intelligence, improving vetting procedures for hiring personnel, and, at least for the United States, improving some of its laws to provide better oversight and accountability of PMCs, there is little of an enduring nature to be learned.

Some suggest that a strategic lesson to be learned from Iraq is the need to improve oversight and accountability of PMCs working in the field. That, however, is false. The problem is not one of means, but of political will. Those who criticize PMCs would do well to focus their attention on governments, which are, after all, the ones who set the standards by which PMCs must abide.

Strategically, we have not learned any new strategic insights from the experience of PMCs in Iraq that we did not already know. While it may be new to the general public all the relevant issues, coordination with regular military forces, compliance with domestic and international laws, preventing human rights abuses and corruption in the contracting process had already been extensively discussed previously and, if not solved, at least marked off as an issue meriting special effort and attention in the future.

Calls for increased regulation of the industry are met by industry replies that while it is not against regulation there are already numerous laws and regulations on the books. But the truth is that many of those laws and regulations are either about setting standards or providing legal authority to prosecute someone if they break the law. What is really needed is a mechanism that provides transparency and oversight while a PMC operation is ongoing, not after the fact.

To the extent that PMCs will seek to work as part of future operations conducted by regular military forces it is necessary to know what went right and wrong. There are enough examples of friction between the two in Iraq to suggest that there are still issues of control and coordination, as evidenced by the number of friendly fire incidents that need to be worked out. Thus, an exhaustive lesson learned report needs to be compiled. Those compiling such a report would need access to records from all the PMCs operating in Iraq. In addition, access to records from all government agencies that interacted with PMCs would also be needed.

A final major policy lesson that Iraq offers is that currently international law is insufficient to address all the legal, humanitarian, and ethical issues raised by PMC activity. While improved national legislation by the states that PMCs are headquartered in is necessary, it is insufficient as a PMC can always relocate to another state if it feels burdened by some state's laws.^[12] Thus, considerably more work needs to be done on harmonizing international legal standards relevant to PMC activities, either by revising existing law or creating new ones, or by creating a common international PMC standard for registration and licensing.

NOTES

1. See Eric J. Fredland, "Outsourcing Military Force: A Transactions Cost Perspective on the Role of Military Companies," *Defence & Peace Economic*, June 2004, Vol. 15 Issue 3, p. 205-219.
2. See Moshe Adler, "Sometimes, Government Is The Answer," *Los Angeles Times*, March 4, 2006.
3. Andrew J. Bacevich, "What's an Iraqi Life Worth?," *Washington Post*, July 9, 2006, p. B1.
4. Nick Butterly, Sam Riches, "Aussie dies in bungle Baghdad security mix-up," *Hobart Mercury*, March 30, 2006, p. 4.
5. Jonathan Finer, "State Department Contractors Kill 2 Civilians In N. Iraq," *Washington Post*, February 9, 2006, p. 18.
6. Jonathan Finer, "Contractors Cleared In Videotaped Attacks: Army Fails to Find 'Probable Cause' In Machine-Gunning of Cars in Iraq," *Washington Post*, June 11, 2006, p. 18.

7. See, for example, Paul Jackson, "War Is Much Too Serious a Thing to be Left to Military men': Private Military Companies, Combat and Regulation, *Civil Wars*, Vol. 5, No. 4, Winter 2002, pp. 30-55.

8. See Jennifer Elsea and Nina M. Serafino, *Private Security Contractors in Iraq: Background, Legal Status, and Other Issues*, Congressional Research Service, RL32419, May 28, 2004. Some illustrative articles from law journals are Devin R. Desai, "Have Your Cake and Eat It Too: A Proposal for a Layered Approach to Regulating Private Military Companies," *University of San Francisco Law Review*, 39 U.S.F. L. Rev. 825, Summer 2005; James R. Coleman, "Constraining Modern Mercenarism," *Hastings Law Journal*, 55 *Hastings L.L.* 1493, June 2004; Mark W. Bina, "Private Military Contractor Liability and Accountability After Abu Ghraib," *The John Marshall Law Review*, 38 *J. Marshall L. Rev.* 1237, Summer 2005; Martha Minow, "Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy," *Boston Law College Review*, 46 *B.C.L. Rev.* 989, September 2005; and Laura A. Dickinson, "Government For Hire: Privatizing Foreign Affairs and The Problem of Accountability Under International Law," *William & Mary Law Review*, 47 *Wm and Mary L. Rev.* 135, October 2005.

9. James Glanz, "Modern Mercenaries on the Iraqi Frontier," *New York Times*, April 4, 2004.

10. Michael Schwartz, "A Government with No Military and No Territory: Iraq's Sovereignty Vacuum (Part 1)," *TomDispatch.com*, March 9, 2006, <http://www.tomdispatch.com/index.mhtml?pid=66969>.

11. Anthony Cordesman, *Iraqi Force Development: A Current Status Report, July 2005-February 2006*, Center for Strategic and International Studies February 15, 2006, http://www.csis.org/media/csis/pubs/060215_iraqforceupdate.pdf.

12. Detail on this will be in the future book based on the papers presented at the "Market Forces: Regulating Private Military Companies," March 23-24, 2006 conference, Institute for International Law and Justice, New York University School of Law.