



Proceedings of the Conference on Private Military Companies

Organised by:

**Netherlands Institute of International Relations ‘Clingendael’ &
Netherlands Advisory Council on International Affairs**

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Netherlands Institute of International Relations ‘Clingendael’**

1. Rationale

Private military companies (PMCs) play an ever increasing role in modern day conflicts. They provide not only protection services in times of conflict, but some of them have also carved out a role for themselves in the actual fighting. Whereas the American and British army have long-time experiences with PMCs, this phenomenon is rather new to the Dutch armed forces. In order to enhance the Dutch understanding of PMCs, the AIV recently issued a report on the contracting of private military companies, pointing to several dilemma's. The report can be downloaded from www.aiv-advies.nl.

This conference aimed to proceed where the AIV report stopped. More specifically, it hoped to contribute to an understanding as to how to deal with PMCs and how to find solutions to the problems we find ourselves confronted with when hiring or contracting PMCs. After a more general introduction, the group split up in two different working groups. One group discussed the *Questions relating to responsibility and immunity*; the other group examined *The use of PMCs and its impact on SSR and state-building processes in the host countries*. The outcomes of these workshops were discussed in a final plenary session.

Organised by the Clingendael Security and Conflict Programme (CSCP) with the support of the Advisory Council on International Affairs (AIV), the conference took place on Friday, May 23, 2008 at the Clingendael Institute. It was chaired by Maj. Gen. Kees Homan from CSCP. A group of selected individuals was invited to attend, among which were representatives of international NGOs, the Dutch Ministry of Defence and the Dutch Ministry of Foreign Affairs, representatives of companies that provide security services, and the academic field. A list of participants is included.

2. Opening remarks

Mr. Kees Homan opened the meeting by welcoming all participants on behalf of the Director of the Clingendael Institute, Professor Jaap de Zwaan, and on behalf of CSCP and the AIV.

Following Mr. Homan's introductory words, Mr. Alfred van Staden, chairperson of the Commission for European Integration of the Netherlands' Advisory Council on International Affairs (AIV), discussed the content of the AIV report on Private Military Companies. Before doing so, Mr. van Staden pointed to what he believed was a remarkable aspect of the request that prompted the coming into being of the AIV advice: the request for an AIV advice on the PMC issue was submitted *only* by the Dutch Ministry of Defence, and not by the Dutch Ministry of Foreign Affairs, or the Ministry of Justice. Considering the fact that the use of PMCs can influence foreign policy, and also raises questions about responsibility and accountability, Mr. van Staden believed that these two departments should also have shown interest in this issue.

Mr. van Staden also addressed the consequences of hiring PMCs to conduct defense tasks. Employing PMCs may lower the costs for military missions (and thus influences the Ministry of Defense's budget positively), but may also raise the political stakes in the case of an incident or accident that involves PMC's (for instance the case with Blackwater in Iraq). The political fall out may be much more severe when the government has to concede that it has little control over the functioning of PMCs.

Putting PMCs to use requires thus a careful weighing of the costs and benefits. In this respect, Mr. van Staden presented a number of recommendations for the future use of PMCs by governments. The first advice was to bring ambition and abilities into accordance. This means that PMCs should not be hired to achieve lofty and far fetched ambitions. Secondly, Mr. van Staden suggested to collect as much information as possible on the hiring and putting to use of PMCs in order to determine whether PMCs are a suitable surrogate for national forces. This is all the more necessary as the demand for PMCs in conflict areas is rising, not declining. Finally, Mr. van Staden proposed to interpret the concept of judicial accountability as broadly as possible and called on governments to recognize the fact that they are always politically responsible for incidents that occur when making use of PMCs.

After Mr. van Staden's input, Mr. Maarten te Kulve from Prevent International addressed the audience. In his function as managing director of a company that provides security services, Mr. te Kulve spoke why governments hire PMCs and which measures would regulate the work within the industry better. As to the first issue, Mr. te Kulve noted that the reason why governments hire PMCs lies in the fact that governments seek to decrease risks that are attached to defense missions. The concept of risk is understood as the contrasting principles of probability (which consists of the contrast between threat and vulnerability) and impact. In principle, governments hire PMCs to reduce threats, decrease the vulnerability of own forces, and reducing the impact that an attack may have on the functioning of the mission.

With regard to the second issue, Mr. te Kulve noted that the functioning of PMCs is blurred, which means that more transparency is needed to determine whether PMCs abide to applicable law. Also, the sector should not be afraid to set the standard and to include, for instance, respect for human rights in their certification policy. In the absence of directives from policymakers, PMCs are in the position to shape their own standards and codes of conduct. If the industry recognizes that it is a matter of time before governments will require certain 'standards of excellence', it may want to develop such standards while there is still room to manoeuvre. Regulation within the industry currently occurs along stipulated requirements set by the American government; not European 'codes of conduct'. This means that Europe failed to harmonize the conditions under which PMCs can be put to use and that – at least in Europe - incomplete judicial provisions currently apply to the hiring of PMCs. According to Mr. te Kulve, the European Union has let the opportunity pass by to set the norm for PMCs.

Finally, Ms. Anne-Marie Buzatu, Privatisation of Security Programme Coordinator at DCAF, pointed to, what her organisation believes, are two main challenges for the Dutch government and parliament. The first challenge is to increase the parliamentary oversight over the functioning of PMCs; the second is to improve the content of the regulations that apply to the work of PMCs. In addition, Ms. Buzatu argued for a four-pronged response to the challenges that come from the hiring of PMCs. Next to a *Feasibility Study on Monitoring and Registration Systems for Dutch PMSCs*, a *Mapping Study on the use of PMSCs in Coalition Missions* should be initiated. In addition, a *Code of Conduct for PMSCs in International Coalition Missions* should be established and a *Feasibility Study for European Regulation of PMSC Export Services* should be undertaken.

Finally, Ms. Buzatu stressed the need for governments, specifically the Dutch government, to join the Swiss Initiative and help shape the debate on PMCs. .

3. Working Groups

3.1 Working group on *Questions relating to responsibility and immunity*

Report prepared by Mr. Cedric Ryngaert

Two speakers gave an interesting introductory presentation on issues relating to accountability of PMCs for abuses: Avril McDonald and Bibi van Ginkel.

Avril McDonald set out the legal accountability gap which follows from the contractual relationships between contractors, clients (contractees), and the interface of the PMC. The missing link in terms of accountability is the link between clients and contractors.

Ms. McDonald went on to observe that international law does in fact not have much to say about regulating PMCs.

Firstly, the international law of armed conflict (law of war, Geneva Conventions and Additional Protocols) does not specifically refer to PMCs - although contractors could in some circumstances be characterized as combatants (if incorporated into the armed forces), civilians, or even mercenaries. In addition, contractors may be active in situations which do not qualify as armed conflicts, with the attendant inapplicability of the law of armed conflict.

Secondly, international human rights law, while applicable in all situations and often non-derogable, only applies to State actors, and not to non-State actors such as PMCs, with the exception of jus cogens norms.

Thirdly, the Draft Articles on State Responsibility for Internationally Wrongful Acts are only concerned with the responsibility of States, although it should be kept in mind that acts of non-State actors could sometimes be attributed to the State, for instance when PMCs acted on the instructions or under the control of States.

In the final analysis, accountability mainly depends on national criminal and civil law. In the U.S., military law may be an avenue to be explored (Uniform Code of Military Justice), although constitutional concerns may militate against the trial of civilians by courts-martial. Other applicable U.S. penal statutes are the Military Extraterritorial Jurisdiction Act, the Patriot Act, and the War Crimes Act. Tort statutes, such as the U.S. Alien Tort Claims Act, may also be an option.

Bibi van Ginkel focused on the immunity from legal process in the host State which PMCs often enjoy. In order to prevent impunity, she proposed a system of reversed complementarity. Under such a system, the hiring State should commit itself to investigating and prosecuting the abuses committed by contractors whom it hired within a given time. If it fails to do so, the host State, on whose territory the abuses occurred, has the right to exercise its complementary jurisdiction.

In the discussion, various topics were touched upon. It was, amongst others, proposed to focus on contractual liability, although the question arose to what extent liability could lie between subcontractors and contractees. In this context, it was observed that PMCs often do not have employees in the legal-technical sense, but rely on independent contractors to do the job.

The question also arose as to whether States do not have a duty under international human rights law to supervise the activities of the PMCs they hire. The problem here is, however, that these PMCs are active overseas, and thus that they do not fall 'within the jurisdiction' of the hiring State. As a result, there would be no human rights duties of the hiring State vis-à-vis the victims of PMC abuses.

Furthermore, it was not entirely clear how the system of reversed complementarity would work in practice, as it is not very likely that the hiring State, to which the contractor will often have returned, would be willing to extradite the contractor to the host State, after finding that there is insufficient evidence to charge him with a crime or after considering it politically inconvenient to initiate investigations.

Although an overarching conclusion could not be reached, it was nevertheless clear that more political willingness, especially on the part of the hiring State, to genuinely investigate allegations of PMC abuses, and prosecute the perpetrators if the abuses are proven; would go a long way to providing adequate accountability for those abuses.

3.2 Working group on the use of PMCs and its impact on SSR and state-building processes in the host countries: indications from a selected group of case studies

Report prepared by Mr. Evert Kets and Mr. Jort Hemmer

Mr. Simon Rynn started his presentation by briefly outlining Private Military Companies (PMCs), Security Sector Reform (SSR) and some linkages between the two. He emphasized that SSR should be viewed as a process, containing many different activities and actors performing those activities, including actors from the private sector. PMCs taking part in SSR is a relatively new phenomenon and, as a consequence, is frequently overlooked when assessing the activities that the donor community undertakes to improve the security situation in (post)conflict societies. That private contractors are engaging in SSR is a fact, however, and it remains to be seen if and how it works. Rynn is positive that PMCs can indeed contribute to SSR, but states that (national *and* extraterritorial) regulation is key in this regard.

Mr. Walter Kemp saw many advantages (such as the effectiveness and politically neutral stance of PMCs) as well as some disadvantages (such as the risk of "cherry picking") concerning the use of private contractors in SSR. He agreed with Mr. Rynn that the issue of regulation is the most important one to address. In his view, SSR should entail a comprehensive approach that ought to be under the control of the state. A government can decide to outsource SSR-activities to PMCs, but in the end these activities should be tied to state objectives. In this regard, Kemp stressed that PMCs should augment and not erode or replace state efforts to bring about SSR.

After both speakers delivered their contribution, all the participants engaged in a lively discussion. The effectiveness and public perception of PMCs; their future role in SSR; the importance of good and transparent contracting; and the problem of coherence and coordination, were subjected to debate. All participants seemed to agree that PMCs can potentially be a very useful tool in the process of SSR. However, how to fully exploit that potential remains to be seen and deserves further research.

4. Conclusion

The members of the two working groups discussed in a final plenary session the findings of their workshops. In addition, a discussion took place on a number of issues that surfaced as the most pressing. First, there is the issue of the, oftentimes, negative image that sticks to PMCs. In order to improve this picture, members of the sector indicated that certain processes are underway that aim to regulate the industry and to certify those members that adopt and abide to certain codes of conduct. That said, the PMC industry also admitted that it is still looking for best practices to see what works, making a true regulation problematic. It was also noted that governments sometimes do not follow the actions of the umbrella organization of PMCs. For instance, governments occasionally hire PMCs that were removed as a member of the PMC umbrella organization – an action on which this organization has little influence. It was argued that governments should not hire PMCs that were expelled as a member from the umbrella organization.

The question was also raised why NGOs do not act as a ‘watchdog’ and critically monitor the conduct of PMCs. The response was that NGOs are believed to be hesitant to take on such a role as it may jeopardize their independence. Whether or not this is actually the case was left unanswered.

Another reason for the shadowy image that the industry has is the fact that is unclear how PMCs receive their assignment. PMCs function as a clearing house. They frequently do not work with long term contracts, but only with contracts that apply only to the particular assignment. Effective control over the work of PMCs is further complicated through this working method.

Finally, apart from the question whether regulative measures come from within the industry or are imposed by national or international governing bodies, it is critically important that governments disclose all information vis-à-vis parliaments, who have the role of exerting parliamentary control. Now, it appears to be the case that governments are reluctant to give full openness about the extent of contribution that PMCs provide. This is due to the fact that it may influence and eventually alter the parliament’s positive stance with regard to missions undertaken with the assistance of PMCs.

Done at the Clingendael Institute,
August 6, 2008

Frank Kuipers

List of Participants

Privatization of Security: Issues of responsibility and democratic control

Friday 23 May 2008, The Clingendael Institute, The Hague

1. Mr. E. Bakker	Clingendael Institute
2. Mr. J. Buirma	Dutch Ministry of Defense
3. Ms. A. Buzatu	DCAF
4. Mr. G. den Dekker	De Brauw, Blackstone, Westbroek N.V.
5. Mr. S. Derix	
6. Mr. L. van de Goor	Ministry of Foreign Affairs
7. Mr. H. J. van der Graaf	
8. Ms. A. Heather Coyne	Center for Mediation and Conflict Resolution
9. Ms. M. Hector	Ministry of Foreign Affairs
10. Mr. T. Herkemij	LSG
11. Mr. J. Hemmer	Clingendael Institute
12. Mr. R.K.K. Hiemstra	Acestes
13. Mr. C. Homan	Clingendael Institute
14. Mr. F. Kuipers	Clingendael Institute
15. Mr. M. te Kulve	Prevent International
16. Mr. J.M.D. van Leeuwe	AIV
17. Mr. R.M. Lutje Schipholt	AIV
18. Ms. A. McDonald	T.M.C. Asser Institute
19. Mr. S. van der Meer	Clingendael Institute
20. Mr. M. Mezzera	Clingendael Institute
21. Mr. E. Molenaar	
22. Ms. C. Rees	Leiden University
23. Ms. E. Rennie	Leiden University
24. Mr. C. Ryngaert	Utrecht University
25. Ms. M. Rogier	Clingendael Institute
27. Mr. S. Rynn	Saferworld
28. Mr. T. Schelfhout	Clingendael Institute
29. Mr. A. van Staden	AIV
30. Ms. S. Stone	British Association of Private Security Companies
31. Mr. M. Zwanenburg	Ministry of Defence
32. Mr. P. White	Institut für Friedensforschung und Sicherheitspolitik, Hamburg