BINGHAM CENTRE FOR THE RULE OF LAW

PUBLIC-PRIVATE REGULATION OF THE GLOBAL PRIVATE MILITARY AND SECURITY INDUSTRY

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About the practice notes

The Global Rule of Law Exchange ('the Exchange') is a project of the Bingham Centre for the Rule of Law in London supported by law firm Jones Day. The Exchange aims to address key challenges posed by global development and its relationship to the rule of law. It will consider the place of the rule of law in emerging economies, including on issues such as access to justice, administrative justice and corruption. It will also examine the relationship between formal and informal legal systems and the measurement of success in rule of law interventions.

The Exchange also aims to explore and contribute to the evidence-base on the relationship between development and the rule of law. The Exchange launched a call for practice notes in May 2015 to this end. Among other things, these short documents (around 3,000 words) aim to provide new ideas, identify research gaps and discuss what works and what does not in rule of law interventions. The full list of practice notes touch on a wide array of topics, including corruption, access to justice, legal aid, prison systems and international justice mechanisms, and the impact and measurement of rule of law reforms. The list of published practice notes can be accessed online: http://binghamcentre.biicl.org/ruleoflawexchange/research-to-practice

There are two categories of practice notes in the series: **'Comments'** capture those that analyse a discrete rule of law issue or theme (e.g. access to justice) and **'Field Notes'** tend to be papers that present a new approach or framework to studying rule of law and/or provide new evidence (sometimes drawing on the author's own research).

Public-Private Regulation of the Global Private Military and Security Industry

COMMENT

1. Introduction

Conflict and political instability can be significant impediments to the maintenance of the rule of law and economic development. Indeed, security is a premium commodity for the protection of investments, infrastructure, and personnel in fragile and conflict-affected environments. As a result, private military and security companies (PMSCs) have experienced a rapid growth globally. Yet, despite this growth, their governing global regulatory framework remains nascent, incongruent, and ineffective.[1]

In response, new regulatory instruments are being developed at multiple governance levels within the private military and security industry (PMSI). Principal among these are the 'Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict' (Montreux Document) and the 'International Code of Conduct for Private Security Providers' (ICoC).[2] These initiatives may also eventually be strengthened by a UN-proposed 'Draft International Convention on the Regulation, Oversight and Monitoring of PMSCs'. Yet, as is often the case with legal texts, the challenge is in ensuring that they are properly implemented. Without appropriate resources and expertise, law-on-the-books can fail to become law-in-action in fragile and conflict-affected states.

This practice note addresses the issue of assisting under-resourced states to both implement and enforce international legal obligations within their domestic security sectors, particularly in relation to PMSCs. It draws from safety models in the maritime and international civil aviation industries to propose a competitive auxiliary market for the provision of regulatory functions on behalf of under-resourced states that lack administrative and enforcement capabilities. It is envisaged that after private service providers receive formal accreditation from a global multi-stakeholder industry secretariat, they will work with states to ensure their compliance with their international legal obligations. Potential services that states could outsource to comply with their international legal obligation of due diligence, for example, include the licensing of arms and personnel, the maintenance of registries, and the administration of grievance procedures. This innovation would support states' efforts to strengthen their rule of law during times of fragility and armed conflict.

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[1] See for e.g. Rebecca DeWinter-Schmitt (ed) *Montreux Five Years On: An Analysis of State Efforts to Implement Montreux Document Legal Obligations and Good Practices* (2013).

[2] ICRC, 'Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict', < http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf> (accessed March 2016).

2. The State of Regulation

Regulation within the global PMSI is being developed at the national, transnational, and international levels. This tiered governance structure is necessary because of the assortment of actors involved and the varying range of legal rules and systems that are applicable at any given moment. On an international level, states have public international legal obligations as codified within the Montreux Document. At the transnational level, there is a multitude of codes of conduct, which are slowly being replaced by the ICoC. And at the national level, there are domestic regulatory frameworks that vary in their efficacy, efficiency, and sophistication.[3] State and non-state actors alike have attempted to respond to allegations of there being a "legal vacuum" within which PMSCs operate by trying to produce appropriate laws and standards.[4] However, they have as yet been unable to collaborate in a manner that avoids inconsistency, disunity, and regulatory arbitrage. The result, therefore, is a patchwork of regulations without the congruence and cohesiveness across the three levels of governance necessary for the effective regulation of the global PMSI.

One way to achieve the necessary congruence and cohesiveness would be to align all regulatory instruments with the ICoC. The ICoC is a transnational instrument administered by a multi-stakeholder association that brings together states, PMSCs, and civil society organisations. It seeks to facilitate communication across legal regulatory systems and to produce both uniform and universal standards and mechanisms for the sector. This includes certification procedures, standards on the selection and vetting of personnel, as well as the development of appropriate grievance procedures. The ICoC Association also works in close collaboration with the Montreux Document's 'Advisory Forum' of participating states to advise on the development of the PMSI's standards and procedures.

This progress at the transnational level could be complemented at the international level by the development and adoption of the 'Draft International Convention on the Regulation, Oversight and Monitoring of PMSCs' that is aligned with the ICoC.[5] Such an international treaty is critical for the goal of achieving effective governance within the global PMSI. This is because treaties establish international legal rights and obligations between state parties whose duty it is to then translate these standards into their domestic law. It can only be hoped that states will further develop and finalise this treaty.

Notwithstanding such a possible advance, effective implementation and enforcement of the convention would remain an important hurdle. In this regard, the potentially positive effect of a treaty for states experiencing conflict and political instability, as manifested by high PMSC

[3] See 'National Legislation Studies' conducted by the UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/WGMercenariesIndex.aspx> accessed March 2016; see also DeWinter-Schmitt, *Montreux Five Years On*, note 1.

[4] For more on the allegations of there being a "legal vacuum" within the PMSI, see Peter Singer, "War, Profits, and the Vacuum of Law: Private Military Firms and International Law" (2004) 42 Columbia Journal of Transnational Law 521 and Caroline Holmqvist, "Private security companies: The case for regulation", SIPRI Policy Paper No. 9 (2005).

[5] Drafted on 13 July 2009, its development is currently under the mandate of a UN Human Rights Council Open-ended intergovernmental working group. See : <http://www.ohchr.org/EN/HRBodies/HRC/WGMilitary/Pages/OEIWGMilitaryIndex.aspx> (accessed March 2016).

activity, could be negated if those states do not have the necessary resources to implement it. Fragile, conflict-affected states that become parties to this treaty would still remain fragile after ratifying it. Without additional interim resources for those weaker countries, actors within the domestic security sector would continue to be inefficiently and ineffectively regulated.

One way to assist these countries as they build state administrative, judicial, and policing capacity within the security sector would be to enable private actors to temporarily provide these services in collaboration with states. Indeed, it is possible to assist under-resourced states by creating a transnationally regulated and competitive auxiliary market for the provision of administrative security sector services.

At present, the ICoC envisages a system whereby PMSCs contractually undertake to adhere to and internalise international human rights and humanitarian law standards into their company policies and structures. This undertaking is to be certified by private organisations that have been accredited by the ICoC Association.[6] Technically and legally, however, this certification remains a private contractual arrangement between PMSCs and the ICoC Association on a transnational level. The issue of state responsibility remains tangential. States' international legal obligations of due diligence and their obligation to protect, respect, and fulfil international human rights law, for example, remain squarely on their shoulders, unaffected by this transnational arrangement. While PMSCs voluntarily undertake to respect the rule of law by abiding by international human rights and humanitarian principles through contractual obligations, under-resourced states remain handicapped in trying to fulfil their roles as national arbiters and guardians of the rule of law.

To address this situation, I propose the following measures: first, to allow private companies to provide and manage state administrative mechanisms for the direct implementation and enforcement of state international legal obligations to regulate their domestic security sectors where states may require such services; and second, to do this through the already constituted ICoC Association. The ICoC Association would serve as the global secretariat that would accredit private actors who wish to perform this function. It would vet the private actors to ensure that they have the necessary resources and expertise to perform state functions in accordance with requirements under public international law. Moreover, by conducting this process through the ICoC Association, we are able to leverage the legitimacy of the global industry's broad, participatory multi-stakeholder initiative, and to ensure both uniformity and universality in the development of regulatory standards applied in all states. The necessary connection required would be for the ICoC and the eventual international convention to be in direct communication with each other, citing, complementing and supplementing one another. Their cross-citation would link actors, actions, and standards together across governance levels, thus further strengthening the efficacy of the global PMSI's regulatory framework. In demonstration of how this could look, the following sections will draw in part from the safety models within the maritime and international civil aviation regimes. The maritime safety model highlights the legal framework and the civil aviation model shows us

[6] Art. 11, ICoC Articles of Association. Pursuant to Art. 11.2.1, the ICoC Association's Board of Directors recently recognised ANSI/ASIS PSC.1-2012 as a national standard that is consistent with the ICoC for certification purposes. At present, failure to comply will result in suspension and possible termination of membership to the ICOCA.

the potential benefits of allowing private actors to provide administrative services to under-resourced states.

3. *Ensuring Safety Standards in the Maritime Industry*

Safety in the maritime industry is regulated by the 'International Convention for the Safety of Life at Sea Convention 1974' (SOLAS).[7] It ensures that ships travelling under the flag of a state party to the convention comply with minimum safety standards in construction, equipment, and operation. These safety standards are maintained by 'classification societies' – non-governmental organisations that establish and maintain the requisite maritime industry standards.[8] To be clear, while states maintain international legal obligations towards ensuring the safety of ships travelling under their flag,[9] states are able to delegate the performance of this responsibility to private actors – the classification societies. This is provided for in the 1998 amendment to the SOLAS Convention:

> In addition to the requirements contained elsewhere in the (SOLAS) regulations, ships shall be designed, constructed and maintained in compliance with the structural, mechanical and electrical requirements of a classification society which is recognised by the Administration in accordance with the provisions of Chapter XI/1, or with applicable national standards of the Administration which provide an equivalent level of safety.[10]

The designation of this responsibility, however, is conditional upon the flag state notifying the International Maritime Organisation (IMO) of the specific responsibilities and conditions of the authority delegated to the classification society.[11] Moreover, flag states that choose to exercise this option must ensure that the nominated classification society has the adequate resources in terms of technical, managerial, and research capabilities to accomplish the tasks being assigned, in accordance with the 'Minimum Standards for Recognized Organizations Acting on behalf of the Administration'.[12] Once these procedural requirements have been fulfilled, the nominated classification society is cleared to conduct the necessary safety inspections and to issue certificates of seaworthiness.

As evidenced by these international maritime instruments, private actors can be incorporated into the formal legal framework for the purposes of administering state responsibilities imposed by international law. Through the provision of information about the nominated private party to the IMO, there is an attempt to provide assurances that an international minimum standard of seafaring safety is attained.

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[7] 1184 UNTS 3 [SOLAS]. Other applicable conventions include the International Convention on Load Lines 1966, the International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978, and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978.

[8] See International Association of Classification Societies, *Classification Societies: What, Why and How?* (2011).

[9] Art. 94 UN Convention on the Law of the Sea, *Duties of the Flag State*.

[10] SOLAS Chapter II-1, Part A-1, Reg. 3–1.

[11] SOLAS Chapter 1, Part B, Surveys and certificates, Regulation 6 (b)(ii), Inspection and survey : "The Administration shall notify the Organization of the specific responsibilities and conditions of the authority delegated to nominated surveyors or recognized organizations."

[12] IMO Resolution A.739(18), Annex. 2.1.

Given that this system is provided for by international instruments, an assessment of the benefit to states that would otherwise not have the resources to conduct these safety audits on their own would be inconclusive. To thus assess the potential of private actors providing this kind of service to states, statistics from the international civil aviation safety regime are revealing.

4. *Ensuring Safety Standards in the International Civil Aviation Safety Regime*

The maintenance of safety in international civil aviation is provided for in the 'Convention on International Civil Aviation of 1944' (Chicago Convention).[13] According to Article 37, states are expected to ensure that they maintain "the highest practicable degree of uniformity in regulations, standards, [and] procedures … in all matters in which such uniformity will facilitate and improve air navigation". In order to help achieve this goal, Article 37 further provides that the International Civil Aviation Organisation (ICAO) "shall adopt and amend from time to time … international standards and recommended practices … concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate."[14] Consistent with its obligation towards the implementation of safety standards, in 1999 the ICAO established the Universal Safety Oversight Audit Programme (USOAP). The programme aims to assist states in achieving global aviation safety by determining the extent to which they have been able to implement ICAO's Standards and Recommended Practices (SARPS) within the area of civil aviation safety.[15] To this extent, each state is responsible for ensuring that its civil aviation framework meets the international minimum standard, *inter alia* by implementing their own safety audit programmes that airlines and their aircraft must undergo.

The period following the establishment of the USOAP was marked by a proliferation of auditing standards both nationally and transnationally. The International Air Transport Association (IATA), a private trade association, saw a market opportunity and set out to develop an auditing programme that would "standardise, harmonise and rationalise existing airline audits and auditing standards" in the international civil aviation industry.[16] Between 2001 and 2003, it worked with twelve task forces, each composed of suitably qualified IATA member airlines and regulatory authorities, to produce the IATA Operational Safety Audit (IOSA). The IOSA is an internationally recognised evaluation system that assesses the operational management and control systems of an airline. It has two aims: (1) to improve airline operational safety through the audit programme using internationally harmonised standards; and (2) to improve airline efficiency by eliminating redundant audits.[17] By and

[13] Convention on Civil Aviation ("Chicago Convention"), 7 December 1944, (1994) 15 UNTS 295.

[14] Art. 37 Chicago Convention.

[15] See International Civil Aviation Organisation, *Making an ICAO Standard: Implementation of SARPS/Universal Safety Oversight Audit Programme*, online: <http://www.icao.int>.

[16] IATA, *Terms of Reference: IATA Operational Safety Audit (IOSA) Advisory Group (IAG)* (International Air Transportation Association, Montreal, 2001) at 1.

[17] Md Tanveer Ahmad, *Adapting the Existing Regime for the Contemporary World to Achieve Global Civil Aviation Safety: A Developing Country Perspective* (LL.M Thesis, McGill University Institute of Air and Space Law, 2009) [unpublished].

large, the IOSA Programme has been able to achieve this as it is recognised and accepted by national civil aviation authorities and has in many cases removed the need for airlines to satisfy the requirements of other audit programmes.[18]

Under the IOSA programme, IATA accredits an Audit Organisation (AO) to conduct the audit of the airline.[19] The AO's team is composed of suitably qualified experts that are certified by IATA. Prior to conducting the audit, the AO pays IATA an accreditation fee and a flat fee for each audit that it conducts,[20] and the airline undergoing the audit pays the audit fee to the AO. After the audit is completed, the AO submits the audit report to IATA, and this is then entered into a central IOSA database so that any interested party can refer to and utilise the audit to fulfil its own requirements for an audit of the relevant airline.[21] The results of the audit are then entered into the IOSA Registry and are valid for a period of twenty-four months.[22]

The IOSA programme has been of benefit in many ways. Beyond assisting in the harmonisation of safety auditing, its stringent criteria have relieved states from the burden of conducting audits on airlines themselves so as to be compliant with their international legal obligations. Moreover, the cost is incurred by the airline as the audit is a condition of its membership to IATA. This can be of significant benefit to states struggling with a lack of resources. And beyond cost, there are clear safety benefits too. Figure One below from the ICAO 2015 Report shows regions where national civil aviation authorities' safety standards fall below the USOAP global average.

If left to their own devices, states with under-resourced civil aviation authorities would be responsible for more aircraft accidents. This is a conclusion that can be drawn from the 2014 IOSA Report. It shows how IATA members from underperforming regions, as shown in Figure Two, have better safety records than those that are not members.[23] This difference is particularly noticeable for the regions where states have sub-average USOAP scores i.e. scores below what is required of them under the average expected under the Chicago Convention (see Figure Two).

[18] David Hodgkinson, "IOSA: The Revolution in Airline Safety Audits" (2005) 30:4-5 Air & Space Law 302.

[19] IATA, *IATA Operational Safety Audit Programme Manual*, 2nd ed. (International Air Transport Association, Montreal, 2004), clause 7 [IATA APM].

[20] IATA APM, note 19, clauses 8(b), 11, 12 and Schedule C. Clause 1 of the Accreditation Agreement provides that 'Accreditation Fee' means the fee payable by an AO to IATA in relation to Accreditation.

[21] Note 19, page 302.

[22] Hodgkinson, note 19, page 327.

[23] IATA Safety Report 2014, issued April 2015.

Figure One: USOAP State Performance

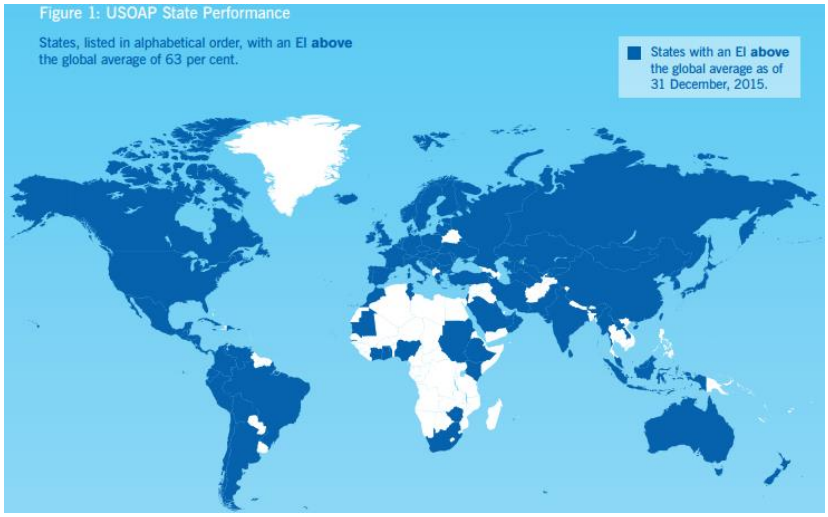
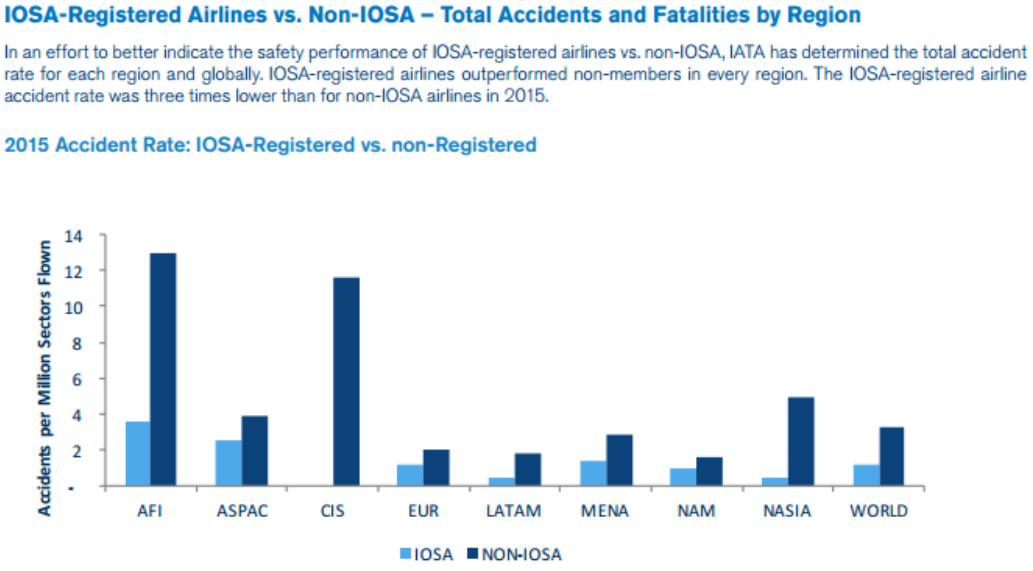


Figure Two: IOSA Registered Airlines vs Non-IOSA



5. Conclusion

PMSCs have become ubiquitous in conflicts globally. Their services help to ensure security for the protection of investments, infrastructure, and persons, particularly during times of political instability or armed conflict. Consequently, PMSCs can be important strategic partners for states in their efforts to maintain the rule of law during such times. However, it is important to ensure that states can regulate PMSCs themselves in accordance with their international legal obligations. This is not always feasible for under-resourced states with poor regulatory infrastructure. Therefore, creating an auxiliary market of private actors who can temporarily perform some of these regulatory functions for states performs two key functions. First, it ensures that under-resourced states remain compliant with their international legal obligations

while those states build up their regulatory capacity. Second, it helps to advance the construction of the necessary global regulatory networks for this industry. Moreover, a benefit to states choosing this option is that the private actors would incur their costs of certification, as is the case in the maritime and civil aviation industries. Such innovation would help to strengthen the rule of law by ensuring the state's capacity to comply with international law and, through that, improve the ability of states to protect fundamental human rights.

A possible challenge that policymakers may encounter pertains to funding for oversight. It will be important to ensure that there is an effective international oversight system of the private actors who will assume the regulatory roles. The ICoC Association, as a global multi-stakeholder association, would be a good structure to facilitate this. However, it would need a commitment of resources to perform this function from its members.

Relatedly, some commentators have legitimate reservations about the increasing trend of outsourcing services considered to be inherently governmental. Such reservations are indeed valid. The purpose of this proposal is merely to provide a possible functional solution to address regulatory challenges faced by under-resourced states that may be experiencing conflict and fragility. Addressing fully the normative questions of such a proposal, however, would have to be the subject of another paper.

In conclusion, this proposal challenges the traditional public/private divide on regulation through a promise of improved efficiency and effectiveness. Overall, the net gain is a strengthening of the state actor, a critical player in any global governance framework.

The Global Rule of Law Exchange

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