



## Report on the Florence Meeting

European University Institute, 13 March 2009

**National Legislation and Case-law Related to PMSCs**

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13 March 2009

### **PRIV-WAR**

Regulating privatisation of “war”: the role of the EU in assuring the compliance  
with international humanitarian law and human rights

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### Summary and Main Conclusions

#### 1. **Welcome and Preliminary Remarks by Prof. Francesco Francioni, Scientific Director and Introduction by Prof. Eric Myjer, Utrecht University**

Francesco Francioni welcomed all participants to the meeting and thanked the external experts, government representatives and consortium members for their preparation of national reports. Eric Myjer recalled how the examination of national models of regulation of PMSCs at this meeting fits in the larger context of the PRIV-WAR project. The current national systems are quite different; there are several ways in which PMSCs are or could be regulated. There is a need to move forward to perhaps harmonization, in any case towards more transparency. At the next workshop in Sheffield we will look at the international law context and at EU regulation. At a final conference on this topic in Utrecht, we will try and put all these strings together and make some proposals for the future role of the EU in this regulatory process. He also thanked participants for completing the questionnaire circulated prior to the meeting, which addresses some basic questions on the positive aspects and major gaps in the national regulation. The objective of this meeting is to go beyond these points and formulate some first ideas on the way forward.

#### 2. **Presentation of overview of the national reports by Ottavio Quirico (EUI)**

Ottavio Quirico presented an overview of the main points included in the national reports, highlighting some common features and the major differences between the models of regulation adopted in the countries considered (15 EU Member States and 5 third states: Australia, Canada, Russia, South Africa, USA). The comparison demonstrated that the main differences between the regulatory models are related to the basic stance on outsourcing military services (prohibition vs licence systems); the distinction between private military and security services (the latter are often regulated whereas the former are not); the extraterritorial (non-) applicability of national law including those on criminal and civil liability; the linkage with mercenaries; the different legal systems (common law vs civil law); the granting of immunities and the (non-) existence of private codes of conduct. A final version of this overview will also be published on the PRIV-WAR website by the end of April.

### **3. Brief presentations of the reports drawn up by guests from outside the consortium**

#### ***Canada***

In Canada, PMSCs constitute a substantial concern for Canadian special forces and compensation schemes have been brought about to ensure retention of members of the armed forces. However, there is no dedicated regulation for PMSCs; current general regulation exists in the form of arms export control, UN sanctions, and some emergency measures. While criminal law applies to natural and legal persons it has no extra-territorial application with the exception of the War Crimes Act. There is public debate surrounding regulation for corporate misconduct, since the extra-territorial use of PMSCs is increasing. Where PMSCs operate alongside regular forces, they are incorporated into the forces' SOFA, including the same immunities as troops. They are regulated under the military code. So in these cases (which are limited) there is a degree of regulation.

#### ***Czech Republic***

The Czech government does not use PMSCs and has no intention of using them. There is no specific legislation for PMCs/PSCs and the government is passive to the issue considering that there is only one company in the Czech Republic (ABL-AFG operating in Afghanistan). It may be a consequence of the actions of ABL if the government will take the issue more seriously in the near future.

#### ***Portugal***

In Portugal, no specific regulation exists for PMCs and their services. The general domestic civil law applies. Domestic private security is regulated by licensing, with 400 regulated PSCs. Recruitment of mercenaries is illegal. PSCs are subject to criminal law in the same way as other companies and individuals. The main domestic crime relevant to PSCs is the illicit provision of private security activities, e.g. without permits.

#### ***Spain***

There are no specific laws dealing with PMSCs in Spain and that no legislation has been adopted preventing their activity. Support activities such as food and cleaning services are contracted by the Spanish government. In a study conducted in 2007 on the estimation of armed forces and the balance of external support it was concluded that externalisation was needed. The Spanish Constitution is ambiguous as to whether security can *only* be provided by state forces or whether the state does not have exclusive responsibility.

#### ***USA***

The latest developments since the first presentation on the US situation at the workshop held in Rome in November 2008 can be summarized as follows:

- In a law adopted at the end of 2008, it was reiterated that PMSCs should not perform inherently government functions, and *interrogation* was specifically named as one of them;

- In a memo of March 4<sup>th</sup> 2009 an overview of contracts and their appropriateness was called for; a Commission report is due in May 09 to give guidance on when outsourcing is or is not appropriate;
- Within the new administration, there has been a call for stronger oversight and for a decrease in the number of contracts;
- However, in reality an increase of troops in Afghanistan has called for more contractors and practically there seems to be no intention to decrease the use of contractors;
- Criminal charges have been brought against Blackwater contractors with one individual pleading guilty. The other 5 contractors have brought motions to dismiss the cases due to the lack of jurisdiction, arguing that MEJA relates to the department of defence's missions, and they were working for the department of state;
- The new Status of Force Agreement gave Iraq the right to exercise jurisdiction over contracts, sub-contracts and employees and there is the possibility that this may act retrospectively. There is also the possibility of re-negotiating immunity for US troops in Iraq;
- Civil cases brought by victims of several abuses are still pending.

### ***South Africa***

In South Africa, PSCs and PMCs are distinct, and specific regulatory bodies exist for the accountability of each of these categories. South Africa is not a party to the UN Convention on the use of mercenaries, but they are domestically prohibited by the Mercenaries Act, which allows security services although this is not in force yet. The Foreign Military Assistance Act currently regulates security services such as guarding, protection and similar services at the domestic level. The company Executive Outcomes moved outside South Africa after it enacted legislation banning mercenaries.

## **4. Discussion on Substantive Questions (moderator: *Dr. Guido den Dekker, Utrecht University*)**

The discussion focused on the following issues:

- The distinction between the regulation of home state and host state activities and whether regulation should attach to the nationality of companies;
- The distinction between services and circumstances which provide a challenge to the law (e.g. conflict situations are more challenging than non-conflict situations);
- Should there be more focus on defining services, e.g. where contractors are allowed to carry arms?
- Combat actions as opposed to actions short of combat;
- Additional monitoring systems or domestic control authority to detect and prosecute violations of IHL and HRL – by NGOs? A domestic central authority?

- Distinction between commercial services market and market for PMSCs, should the normal business model apply (reliance on reputation, etc) considering the peculiarities of the industry?

### ***Germany***

The German parliament and government do not want to work with PMSCs and consider that there should not be specific legislation as this would legitimise the industry. In response to the question why Germany does not adopt legislation prohibiting PMSC activity, it was suggested that this would not be necessary since all commercial activities must be registered in Germany and a private company offering military services would not receive a license. Further, it is considered that everyone has the right to set up a business, so companies in a “grey area” of PSC activities would not be banned unless their services were clear-cut and obviously military. Concerning the issue of extra-territoriality, German nationals must respect German laws abroad unless the host state has contradictory legislation, giving extra-territorial application of German law. Regarding human rights, there is broad application of public principles to private entities carrying out public work.

Others stressed that it is the common obligation of EU states to regulate PMSCs to ensure human rights. While Germany may not wish to have PMSCs, the UN, NATO and the EU rely on support from such companies and Germany is a member of these international organisations. Could IOs have their own rules? This is a question to be addressed in our research as well.

### ***Italy***

In Italy there is no specific legislation regarding PMCs. Since Italy does not have any operations of the PMSC industry abroad, the issue is not considered urgent. However, Italian domestic PSC legislation does exist for PSCs. In October 2008, a trial against two representatives of the Presidium Corporation started before the Bari Court of Assizes, with the charge of recruiting Italian nationals to fight on behalf of foreigners, under Article 288 of the Criminal Code.

### ***France***

The need for clear definitions was stressed, as well as a clear position on which services can be delegated to PMSCs and which cannot. PMSCs don't exist in France, so a focus on services is useful.

### ***UK***

The UK does not have any specific legislation but general provisions of UK law may apply. There have been several industry attempts at self-regulation. The extra-territorial application of laws is not admitted, apart from when contractors are incorporated into armed forces, covered by the ECHR (eg UK detention facilities), or under the ICC Act.

### ***The Baltic States and Russia***

The regulatory situations in Latvia, Lithuania and Estonia are all similar, with no specific regulation of PMSCs. Although the Constitution of Estonia does refer to Private Military Organisations, no details are provided. Russia is a party to the UN Convention on the use of mercenaries, but the three Baltic States are not. In Russia, there is no specific regulation of PMCs; however some legislation exists for PSCs.

### **Suggestions arising from the discussion**

Most participants agreed that it would be easier to achieve agreement by addressing specific issues rather than by proposing general rules, because different countries are involved to different degrees in the use of PMSCs. Therefore, many lightly-involved countries will not be in favour of adopting a heavy-handed regulatory regime. There are basic general conceptual differences between countries (e.g Germany and Italy have extra-territorial application of criminal law; this is not so in the UK).

The general opinion was that:

- the distinction between PMCs and PSCs is not useful; the label is irrelevant;
- new forms of regulation should focus on the *services* which the companies provide, making a distinction between military and security services;
- another distinction should be made between services which may involve the use of armed force and those that do not;
- services which are inherently governmental should be distinguished from others; this is helpful in considering whether there can be responsibility of the state for certain acts;
- regulation should focus on changing the behaviour of PMSCs to improve compliance with IHL/HRL;
- regulatory efforts should also focus on prohibited acts, what can be prosecuted and what remedies are available;
- regulation of PMSCs should require that the companies and their employees are duly trained, including on the question in what circumstances is the use of force allowed in self-defence, and when does the use of force cross that threshold?

### **5. Discussion on Institutional Aspects (moderator: Dr. Sorcha MacLeod, University of Sheffield):**

It was noted that most participants are providing black-letter law responses on whether or not their country has relevant legislation. The UK is the only one so far to reference self-regulation. We also need to look at corporate social responsibility and NGOs, civil society.

### ***Belgium***

In Belgium, PMCs and their services are prohibited. However, a specific law on PSCs has been adopted, which provides quite detailed rules for private security services,

including. Civil liability and insurance to ensure compensation of the victim. However, these rules are limited to private security services provided within the national territory.

## **UK**

The decision of the House of Lords (HoL) in the *Al Skeini* case was presented, where the Court did not apply the UK's human rights obligations generally to British soldiers. In fact, the HoL considered a limited set of circumstances in which it would apply the Human Rights Act extra-territorially. It was also mentioned that in the UK, public enquiries have been held, such as the Sandline Affair and Sierra Leone Report. However, these enquiries are limited by their terms of reference which are set by the government. Individuals have limited possibilities to challenge the behaviour of PMSCs. There is an ongoing debate in the UK concerning the *Al Jedda* case and the *Kadi* case (ECJ) in relation to Security Council (SC) resolutions, as well as on the approach of the judiciary to the protection of human rights and the competence of the courts when cases involve SC resolutions. In the *Al Jedda* case, there was no recourse to remedies for the victims in UK courts. The primacy of the SC resolution applied over and above human rights even though this was not stated in the resolution itself. In the *Kadi* case, the fundamental right to judicial protection was affirmed and the EC Regulation implementing SC sanctions was consequently reviewed in light of that fundamental right. However, these cases do not directly involve PMSCs.

There was some discussion on the interpretation of the above judicial practice. While some emphasised the primacy given to SC Resolutions over human rights, others stressed that both the House of Lords in *Al-Skeini* and the European Court of Human Rights in a number of recent cases have accepted the principle of extra-territorial application of human rights obligations; and that, in any event, according to the UN Charter, the Security Council is also bound by human rights itself.

## **Netherlands**

The Dutch courts recently decided a few cases against the state by victims of the Srebrenica massacre and/or their family members. The Court took a cautious approach. In the 2001 Milosevic case, the Court said that obligations arising from Article 103 of the UN Charter automatically override other international obligations. But in 2008 the Court refined the argument, considering that there are situations where customary norms would apply regardless of Article 103. Although in this case, the acts were not attributable to the state, the state is not always immune.

## **Other points addressed during the discussion**

Several other questions were raised which will require further discussion:

- The scope of Article 296 of the Treaty on European Union (TEU), according to which the 'security of the state' argument can be used to justify an exception to internal market rules. Can this exception also be invoked with respect to trade in services and to procurement laws, which apply to PMSCs?
- The application of military codes to PMSCs. Could PMSCs be treated as military reserves?

- Would expansion of export controls to military services be helpful in regulating private military services?
- Access to justice needs to be ensured to victims; remedies and accountability for breaches;
- PIIV-WAR project specifically addresses the context of conflict, not outsourcing of domestic security/provision of food.
- We should look at a responsibility matrix<sup>7</sup> – who is client, what rules apply, what level of accountability exists?
- Use of arms, or use of coercion, should be the key for regulation;
- Experience shows that national legislation is not enough, even for countries whose criminal codes apply extra-territorially; we need EU regulation;
- Companies must have civil liability insurance – could the Belgian example be a useful precedent?
- The starting point is the state monopoly on the use of force. States react to this in different ways (Italy prohibition, US open attitude, etc.) How to move on? The focus on services is important, but not the end of the matter. We have international conventions already, such as the ECHR, and need to use these.

## 6. Discussion on the Way Forward (*Moderator: Prof. Nigel White, University of Sheffield*)

It was proposed to address the following questions: What should national legislation look like? Should the home and host states have the same legislation? Is harmonisation of national legislation possible? Or are the different legal traditions (common law, civil law etc) too different? Should we look at core human rights issues that all states can sign up to? What should the content be of national legislation: responsibility for breaches; remedies; best practice; minimum requirements?

There was broad consensus on some points, even though they require further consideration:

- The distinction between home and host state is important, but also legislation in the contracting state is needed. Host states often have little or no legislation. Ideally, European legislation should also be enforced against individuals abroad, regardless of the location;
- Also the judicial process is a key issue. Ways of private enforcement by victims should be ensured, even of international law;
- Uniform standards should be set for licences, recognising that we are not dealing with the old concept of mercenary but with companies and employees;
- Activities which may be outsourced by states should be defined and perhaps those activities with a high probability of abuse should be banned (such as interrogation, guarding of military equipment);
- Regulation should provide clear guidance to change behaviour in the field, to comply with human rights and IHL standards;
- Regulation should apply both to companies and to individuals;



- The benefits of a European approach need to be clarified. These may include: international law can be difficult to enforce; it is more difficult to achieve consensus at the international level; not all states ratify international conventions; regional legislation is more focused; regional European instruments could be a better way forward such as by way of directive within the European Union;
- European regulation could include Directives to ban certain forms of activity which are inherently governmental, including interrogations; Community regulation using the common market for services as a legal basis could also be considered;
- The role of the EU in the wider international arena should also be included in our proposals;
- The aim of the research is to take a holistic approach to the phenomenon of PMSCs, thus a number of prospects could be proposed, not just one strategy.

## 7. Conclusions and Questions for Sheffield Workshop

Some of the main points addressed at the meeting were the current problems with national regulation, which vary from strict regulatory regimes to *laissez faire* situations. The need for regional and international regulation was highlighted and some elements for ideal types of regulation were mentioned. The viewpoint of the victim and how they can enforce their rights was underlined, as well as the distinction between home state, host state and contracting state. The application of military law and justice as a way of controlling PMSCs was also put forward. Other points raised were the distinction between a domestic PSMC and a PMSC acting abroad; the question whether PMSCs should be regulated or rather the services they provide; and which services are inherently governmental; the role of national and European procurement law for state employers; and the question whether different states could adopt different regimes. The project can suggest different methods of regulation, including European directives and harmonisation; and incorporation of international standards.

The aim of the Sheffield Workshop in May 2009 is to further consider the problems and prospects of regulation of PMSCs at national, regional and international levels. It will also address the question whether the EU can play a role in achieving more effective legal regulation

Francesco Francioni closed the meeting thanking all participants for their reports and active engagement in the discussion. He reminded all of the need of a timely completion of the reports in view of their publication in advance of the forthcoming meeting in Sheffield on 28 May 2009.

## Annex I

### Priv-War Project

#### Meeting on National Legislation and Case-law Related to PMSCs

*Florence, 13 March, 9.00- 17.00*

#### Agenda

1. Welcome and Preliminary Remarks by *Prof. Francesco Francioni, Scientific Director* and Introduction by *Prof. Eric Myer, Utrecht University*
2. Presentation of comparative analysis of the national reports by *Dr. Ottavio Quirico (EUI)*
3. Brief presentations of the reports drawn up by guests from outside the consortium (*Canada, Czech Republic, Portugal, Spain, USA, South Africa*)
- 3A. Comments from Priv-War project partners

**Coffee Break:** 11.00 -11.15

4. Discussion on Substantive Questions (moderator: *Dr. Guido den Dekker, Utrecht University*), such as:

- Need for specific national legislation aimed at regulating PMSCs?
- Advantages of a specific regime compared to general legal provisions (criminal law, labour law, commercial law, etc)
- Positive points of different regulatory models
- Major gaps in existing regulation

**Lunch:** 13.15 – 14.00

5. Discussion on Institutional Aspects (moderator: *Dr. SORCHA MacLeod, University of Sheffield*), including:

- Role and Attitude of Legislature, Executive, Judiciary

6. Discussion on the Way Forward: (moderator: *Prof. Nigel White, University of Sheffield*)

- Minimum requirements for national regulation
- Is harmonization of national legislation desirable?
- Role for the EU in harmonizing national approaches?

**Coffee Break:** 16.00 – 16.15

7. Conclusions and Questions for Sheffield Workshop

## **Annex II**

### **List of Participants**

#### **University of Sheffield:**

Nigel White  
Sorcha MacLeod  
Kerry Alexander  
Alexandra Bohm

#### **Paris II, Centre Thucydide:**

Nicolas Haupais  
Julian Fernandez  
Hamza Cherief  
Hélène Bovyn

#### **Utrecht University:**

Eric Myer  
Guido Den Dekker

#### **LUISS, 'Guido Carli', Rome:**

Natalino Ronzitti  
Mirko Sossai  
Andrea Atteritano

#### **Riga Graduate School of Law:**

Ieva Miluna

#### **Justus Liebig Universität Giessen:**

Thilo Marauhn  
Faustin Ntoubandi

#### **External experts:**

Joana Abrisketa (Un of Deusto, Bilbao)  
Amelia Bester (Consultant, South Africa)  
Micaela Frulli (Un. Of Florence)  
Don Hubert (Un of Ottawa)  
Kristine Huskey (Un of Texas)  
Mateus Kowalski (Portugal, Ministry Foreign Affairs)  
Federico Lenzerini (Un of Siena)  
Petra Ochmannova (Czech Rep, Ministry of Defence)

#### **European University Institute, Florence:**

Francesco Francioni, Ottavio Quirico, Carsten Hoppe, Alexandra Gatto,  
Chiara Altafin, Lucas Lixinski, Eugenio Cusumano, Susanna Greijer, Christine Bakker, Anya  
Titsina (guest)