Report on the Sheffield Workshop

The University of Sheffield, 28 May 2009

The Regulatory Frameworks for PMSCs: Problems and Prospects

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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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1. Introduction

On 28 May 2009 the University of Sheffield hosted a workshop on "The Regulatory Frameworks for PMSCs: Problems and Prospects". This was the fourth event organised by the consortium within the framework of PRIV-WAR, after the additional workshop held in Florence in February 2009 organised by the European University Institute.

The workshop was attended by the members of the consortium and distinguished guest speakers. This report provides a brief account of the meeting proceedings, it is not an official or complete record and does not reflect the official views of any of the participants.

2. Workshop Context and Objective

The aim of the workshop was to promote discussion on the problems and prospects of regulation of PMSCs at national, regional and international levels. While at the international level we can identify a number of different legal regimes that are applicable to the activities of PMSCs, there is little by way of actual regulation of these activities. However, international law is not only about the setting of standards, regulatory regimes have been developed for instance in the area of arms control, from which lessons may be learned. While national regulation is present in a number of countries, the extent of procedural and substantive diversity causes problems and concern in what is a global market place, which a greater reference to international standards or bodies might remedy. However, as international law is generally weak in implementation and enforcement even in those areas where it has developed a regulatory regime, attention is drawn to Europe as a more effective source of legal regulation, an issue that will be developed further during the Utrecht workshop in 2010. The Sheffield workshop will start to look at the question of whether Europe can provide an answer in the context of the weaknesses of national laws, revealed during the Florence workshop in March 2009.

3. SESSION 1: NATIONAL AND INTERNATIONAL REGULATORY FRAMEWORKS

A. The Importance of Multilateralism

The aim of the first session was to explore existing national and international regulatory frameworks. In the first place, the moderator stressed the importance of multilateralism, as a lesson learned from the chemical weapons industry where stakeholder involvement has been extremely important. The Organisation for the Prohibition of Chemical Weapons (OPCW) promoted multilateralism when regulating arms control and non-proliferation. Multilateralism was addressed by the 2nd conference of OPCW which

supported the multilateral approach developed by the Secretary General to raise awareness of the Convention (prohibiting proliferation) amongst stakeholders, and to increase national implementation. Multilateralism is relevant at national, regional and international level and constitutes the modern model of international co-operation.

The 'Privwar' consortium has adopted this approach to ensure a multi-stakeholder dimensional reach bringing together key stakeholders from the industry to Government, international organisations and NGOs. Engaging relevant stakeholders in discussion will ensure that the best steps forward are taken with regards to producing policy which will work in practice.

B. Review of National Reports

Introduction

The first presentation sought to provide a review of the Privwar national reports and an analysis of the points which arose at the additional Florence workshop in February 2009. The national reports were produced by the consortium as well as external contributors, and detail existing national regulation applicable to the private military and security industry. The presentation looked specifically at existing national law relating to PMSCs operating in conflicts abroad.

Existing National Regulatory Models

The majority of states surveyed for the review of national reports (Germany, France, Italy, Latvia, the Netherlands, Australia and Canada) do not have legislation specifically regulating PMSCs operating in conflicts abroad. This is due to the small size of the industry in those states, and probably the reluctance of governments to outsource inherently governmental functions in their operations abroad.

Nevertheless, the reports raised interesting questions:

- Whether companies should be regulated or the services that they provide
- The distinction between military and security services
- Whether inherently governmental services should be outsourced at all
- How to improve standards of operation
- How to ensure that individuals have access to justice

The UK does not have specific regulation either, despite the 2002 UK Green Paper which raised 6 options for reform. Only self-regulation has been developed in the UK through the establishment of the British Association of Private Security Companies. This approach was recently endorsed by the FCO Public Consultation published on 24 April 2009. The first part of the proposal indicates that the government will agree a national code of conduct for private military and security companies using its status as a key buyer to enforce standards with an association disciplinary body to investigate breaches. According to the proposal the Association would have a responsibility to publish an annual report detailing membership targets and breaches investigated. The Government will review the situation annually and make a decision in 3 years as to the effectiveness of self-regulation with additional monitoring mechanisms. The second part of the proposal envisages the promotion of international co-operation building on the Montreux Document to establish an international code of conduct enforced by an international secretariat with graduated sanctions. This recognises the international

nature of the industry. The government is consulting on the following questions among others:

- What requirements should the code of conduct stipulate?
- How could the trade association monitor the behaviour of its members to ensure they comply with the code?
- How should the Government monitor the implementation of the code?
- What sanctions are available to the trade association to encourage compliance and penalise non-compliance with the code?
- What extra incentives could be introduced to attract up to 90% of the industry to sign up to the trade association's code of conduct?
- How could accountability and monitoring of the industry through the international initiative be increased?

The government endorsed self-regulation despite the concerns of the industry and the inherent weaknesses of self-regulation such as problems of disciplining the more important members and the lack of legal accountability for wrongful acts of PMSC personnel. The Government identified a number of problems with national regulation based on an export or company-licensing system, whether or not supplemented by a register of Government-approved companies. A licensing regime would place an unwarranted strain on the industry and would be disproportionately costly to small businesses making the risk of re-location of UK PMSCs abroad more likely.

This approach is in contrast to the US regulatory model which provides a number of regulations for PMSCs. Essentially any company providing security services must register and apply for a license with governmental approval necessary for contracts over $50 million. However, the US national report revealed concerns for enforcement of regulations, the fact that approval is not necessary for contracts under $50 million, the lack of clarification of the standards applicable to PMSCs and concerns for individual access to justice. These issues will be looked at more closely in the following presentations along with the risk of re-location and jurisdiction shopping which may be a result of a more restrictive regime such as the South African approach – following a brief overview of general national law provisions relevant to PMSCs.

The Application of General National Law Provisions to PMSCs

Arms control is one of the key legal issues which need to be addressed. The use of arms of any sort, but particularly fire arms, increases the chance of harm from the operation of a PMSC. It is important to differentiate in this area, as in any other, between home and host state in terms of regulation and operation. Arms control in many home states is a well developed part of the domestic criminal law. It falls generally in to two groups, situational controls, or how arms are used, and personal controls, or who uses arms. Situational controls can be seen in the Belgian restriction of arms when operating inside public transportation or the Finnish restrictions on the use of dogs. More generally this approach is taken in the form of a list of activities where arms are permitted. More common are personal controls, by which I mean control of who uses arms as opposed to how. This generally means licensing systems, specific training requirements and specific authorised personal. For example see the report on Australia or South Africa. This clearly relies on the home state's criminal law having jurisdiction. This issue is addressed by others. However, where the home state's criminal law cannot be effective we are reliant on the host state. Obviously, given the focus on the use of PMSCs in war

zones, the host state's law may be comparatively undeveloped or ineffective. In such a situation we are reliant upon the application of international legal standards, particularly human rights, and for this I would direct you to the Latvian legislation.

Finally the third area of control is in the employment contract with the PMSC. This moves liability in to a civil law violation but may currently be the most effective way of controlling PMSC activity, especially outside the home state. This is the main form of control in Canadian law, and I direct you to that report as a good example. Of course, the question of jurisdiction for extra-territorial civil liability remains inconsistent.

The overall picture presented is one of various overlapping legal regimes and controls. Greater coherency or interaction is required to avoid confusion on both the part of the regulators, the regulated, and any potential harm. This is a theme common throughout the PRIVWAR conference, with all parties ultimately desiring clarity.

Individuals' Access to Justice

It may be possible to hold PMSCs accountable through existing justice systems, rather than by creating a new regulatory and enforcement regime. Some – mostly civil law states apply their criminal code extra-territorially to citizens; some – such as the US and Canada - have enacted legislation extending the home courts' jurisdiction to crimes committed abroad. In the US, MEJA gives the federal court jurisdiction over civilians abroad who commit a criminal offence but where there is no likelihood of domestic prosecution in the host state. It only applies to serious crimes attracting over a 1 year prison sentence, to people employed by the Department of Defence (DoD) or other departments "in support of a DoD mission". This limits the activities to which it is applicable. In Australia, the Crimes (overseas) Act applies to bodies corporate and individuals, engaged by any Government agency (Australian Government or otherwise) on "tasks" abroad – this appears to be broader than the US Act in terms of the scope of "tasks", and the employer. It is still limited, as it does not apply to non-Australian citizen employees of an Australian PMSC.

The problems with both of these Acts are the limited prosecutions under them (lack of resources for investigation), problems in the scope of their application (Government departments only as employers, types of tasks, types of crime covered), and lack of political will on the part of states to use these mechanisms.

There is also a possibility of using the approach of ICC crimes when considering extra-territorial jurisdiction. The ICC statute obliges states to prosecute, resolving the issues of political will. Obviously the ICC itself could not take on the prosecution of smaller crimes of PMSCs/their employees, and third parties are still not given an avenue of access to justice – just states – but it might be a useful viewpoint.

An alternative approach in some states has been to extend military jurisdiction over civilians accompanying the armed forces; again this is not without problems of jurisdictional scope and human rights compliance. Canada and Australia have both done this. The Canadian Code of Service Discipline applies Canadian criminal law, war crimes legislation and sometimes host state law to those accompanying the military. This covers PMSCs hired by the DoD to support the army/navy etc, but not others such as Department of State, NGOs, etc. The Australian Military Justice system applies to "defence civilians" accompanying the Defence Force. It applies to any PMSC employee (or other civilians), not just Australian citizens, but does require consent by the individual to be brought within the system. There is no information on the number

of people who consent. It applies on "operations against the enemy", which may not include post-conflict zones. In the UK, the possibility of applying military justice to civilians arises under the Armed Forces Act 2006 in particular Schedule 15 paragraph 17 (c). The European Court of Human Rights has criticized the application of military justice to civilians; future models must consider ways to "civilianise" the process. Australia and Canada have civil judges/appeal to civil courts.

In addition to the reach of home state criminal and military justice, civil remedies provide an important route for injured third parties to claim damages for losses which they have suffered. This area of the law is less well developed than criminal and military justice, but should not be ignored as a potential avenue of PMSC accountability.

Incorporation of Standards by Industry Bodies

This presentation highlighted the problems with the effectiveness of self-regulation by PMSC industry bodies to incorporate and enforce human rights standards and international humanitarian law. The concept of a regulatory framework focussed around self-regulation is generally seen as problematic as regards accountability, transparency and adequately upholding and enforcing standards. For instance, Blackwater simply withdrew from the IPOA once proceedings were commenced under the IPOA's Charter. Both the IPOA and BASPC have attempted to incorporate standards to differing degrees within their governing documents. The IPOA has a specific enforcement mechanism to address these standards whereas there is no such one within the framework of the BAPSC. The FCO consultation proposed a National Code of Conduct, and proclaimed that 30% of companies follow such standards already, however this is a very low figure and clearly more is needed on a national/international scale in order to regulate effectively. The problem with enforcement raises the question as to how well the self-regulation mechanism works and what should be the role of the state in ensuring the enforcement of standards.

The Risk of Forum Shopping

The home states of PMSCs, in particular the UK, appear reluctant to regulate the activities of PMSCs abroad. In part, this is due to the fear that companies will move their headquarters to more accommodating jurisdictions. In the UK, the registration of PMSCs as a private or public limited company confers certain corporate advantages and responsibilities on PMSCs. For instance registration as a 'private limited company' limits disclosure requirements and establishing a 'group' structure limits the imposition of liability for the parent company. A UK parent company is not required to report in detail on the activities of subsidiary companies registered abroad and it would cause legal and diplomatic problems to apply any UK legislation to subsidiary companies.

The UK corporate structure therefore confers a degree of protection to the PMSC industry especially given the lack of legislation for PMSCs imposing legal limitations on the industry. The fear therefore is that if more burdensome regulation is introduced in the UK, PMSCs might relocate to another jurisdiction or simply register overseas which can be easy to do. For example, South African companies did this after South Africa's prohibition on mercenaries. The situation calls for a balancing between regulation, economic interests and achieving human rights protect and compliance with international humanitarian law by PMSCs.

C. The Extension of Domestic Security Regulation to PMSCs

This presentation drew on the UK experience of regulating private security companies acting domestically within UK territory. The experience has shown that while the idea of regulation is to control an industry, the reality is that there is a more complex relationship between the regulator and the regulated – a negotiated, dialectical relationship with no clear hierarchy.

The aim of UK regulation of domestic security – as set out in the Private Security Industry Act 2001 – was to protect the public from PSCs by reducing criminality, and to protect the public with PSCs by increasing standards within the industry. The mechanisms for achieving this included compulsory licensing for individuals and the 'Approved Contractor Scheme'. All individuals providing services within any of the seven licensable security sectors must apply for a license, which has training and qualification requirements and is renewed every 3 years. There are 300,000 licensed individuals, which is double the police force size. The 'Approved Contractor Scheme' (ACS) is for companies rather than individuals and also contrasts in that it is voluntary. If companies meet certain standards they become 'Approved Contractors' and currently there are 615 such companies.

With regards to the effectiveness of the regulation:

Reduction of criminality has worked to some extent, but the scheme has also pushed existing criminality further underground. Licences have been refused or revoked, written warnings have been issued and there have been 85 successful prosecutions. Enforcement options are criticised as sometimes too weak, they are intelligence-led and can be undermined by loopholes in the system.

Increasing standards has been more successful with CRB checks and qualification requirements definitely raising standards. However, an unintended consequence has been that in some cases companies previously demanding high employee standards have slightly lowered their standards to the minimum standards that are required for licensing.

With regards to extending regulation upwards from the domestic to the international sphere:

The extension of domestic legislation to the international arena would be possible, with the existing basis for this being that UK people with licenses do already work abroad in close protection and security guarding, and so the licenses could become mandatory for working abroad. In this respect, UK companies have been efficient at shifting resources to where demand is active and working in territories abroad. It has been suggested that the SIA could create an 'international officer' category as another licensable sector. However, individual licensing could only cover UK nationals, which would reduce competitiveness of the UK industry. Enforcement would also be a problem with difficulties regarding the flow of evidence to UK headquarters – it would mean sending a team abroad to investigate and collect evidence, which would prove very expensive.

There is a more compelling basis for extending the ACS scheme rather than licensing of individuals. Much of the ACS scheme involves checking UK-based information of the company, so there would be less involvement/expense in the foreign elements. However, enforcement would remain problematic with the loss of ACS accreditation being the only direct sanction.

The presentation ended with some cautionary tales from the British domestic experience:

- Regulation would be interpreted in different ways by different companies. Some would conform, some would dodge and others would flout the legislation.
- Realistically, the objectives of regulation would only ever be partially met.
- There will be unforeseeable unintended consequences.
- A strict and well-resource enforcement policy would serve to limit the all these variables. However, enforcement will inevitably be the main problem for international regulation of this industry.

The presentation also replied on evidence collected in relation to the domestic industry to support the issues raised. The question of controlling selection bias was raised. For instance did only "good" companies respond, which would have reduced the accuracy of the data regarding the effect of decreasing crime? It was submitted that while the data was limited, when asking for company background information for the purposes of the survey, questions such as the size of company and whether the company was ACS were also asked. The answers indicated that responses were given for the survey across the spectrum of companies including the smaller end. Furthermore, some 10% of companies surveyed considered that enforcement was too strong indicating the diversity of companies surveyed.

D. International regulation of PMSC: initiatives at the UN level, the Swiss Initiative and attempts to come to an international code of conduct

There are several initiatives at the international level, including two projects following on from the finalization of the Montreux Document ("MD"). The first project is to promote awareness of the MD, meeting with stakeholders in different regions around the world to exchange ideas on how standards can be increased and how the MD principles apply to them. The MD is open to endorsement by States and as at the date of the workshop, 30 states had done so[1].

The second project following on from the Montreux Document is one to elaborate an 'International Code of Conduct' ("CoC"). The elaboration of this CoC is an industry-led initiative, but with multi-stakeholder input[2]. It seeks to promote adherence to the standards of HR and IHL by PMSCs as well as establish effective accountability mechanisms to enforce it. The CoC is not envisioned to be limited to armed conflict situations, but rather should cover a broader range of PMSC activities, thereby reflecting the expanding and changing nature of the PMSC industry.

Following preliminary discussions with stakeholders on the CoC, emerging areas of agreement include:

[1] These include the original states (Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the UK and the Ukraine), as well as the following States who have also subsequently endorsed it: Macedonia, Ecuador, Albania, the Netherlands, Bosnia and Herzegovina, Greece, Portugal, Chile, Uruguay, Liechtenstein, Qatar, Jordan and Spain. An updated list is kept at: http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html

[2] Stakeholders include the PMSC industry, academics, civil society, clients of PMSCs (including governments, intergovernmental organizations and humanitarian organizations) and those who set standards for the industry (including governments, trade bodies and other voluntary initiatives).

- Setting common international standards can help add clarity
- The CoC should not just apply to armed conflict situations
- The CoC should not be about criminal sanctions - which should remain within the ambit of the state
- Clients have a key role to play in requiring adherence to the CoC in their procurement practices
- Sub-contractors should be included within the CoC so that PMSCs cannot subcontract out of their contractual obligations
- There needs to be enforcement of the CoC, and this enforcement must have "teeth"

The emerging areas for discussion include:

- The scope of the CoC – for example, covering only armed protection or all contingency companies?
- The scope of activities – all those which impact human rights, including social and economic rights, sexual crimes, or limited to core rights? Should it cover companies or individuals?
- Should the CoC set standards at a lower achievable level so as to keep PMSCs within its scope, or should it seek to set high standards that only a few can reach?
- How to ensure compliance – though national legal measures, marketplace reputation, an international body?
- If there is to be an international body, how should it be organised and what should its mandate be? To investigate, license, carry out on-spot checks? Who would fund such a body, the industry or states?
- With their special status under national and international law, how can intergovernmental PMSCs be held accountable?

(Papers on the Montreux document have been published in the Journal of Conflict and Security Law)

Another initiative at the international level is that of the UN Working Group on the Use of Mercenaries. These independent experts receive the support of the General Assembly and the Human Rights Council, however voting patterns within these bodies indicate that they do not receive support from the Western European and Others Group.

The Human Rights Council has mandated the Working Group to consult with stakeholders and report back to it in September 2010 on the progress achieved in the elaboration of a draft convention on PMSCs. With several hurdles, however, including the slow consensus-building methods of the UN, the heavily politicised debate within which the Working Group operates, and the reluctance of the key players to engage with the Working Group, the Working Group has a long way to go.

The value of the Montreux Document was questioned, especially in its focussing on humanitarian law when PMSCs primarily operate in a different context, and its questionable value given that it is not a treaty and does not have any legal effect. It was submitted that the Montreux Document set out what existing law already applied to PMSCs at a time when there was a perception that PMSCs operated in a legal vacuum. Further, it sets out good practices which will be important in establishing the bench mark of standards to be applied to PMSCs. It was never intended to cover every situation. The current follow-up projects seek to build on its success and to establish mechanisms which will be legally binding and hold PMSCs accountable.

E. Review of the Applicable International Law - IHL, HR and Peacekeeping

This presentation sought to redress the issue of which international law standards should be adopted and implemented by any regulatory regime developed for PMSCs. The Montreux Document assumes that IHL and the laws of war provide the starting point when thinking about the legal framework that should govern PMSCs. It is suggested that a re-think is necessary given the fact that most PMSCs will be involved in post-conflict situations – while PMSCs were involved in the conflict situation in Iraq, the reality is that most PMSC deployments will be in non-conflict or post-conflict situations. An international code of conduct should be broader than just IHL and should consider the "law of peace".

The Montreux Document is not the best place to start a code of conduct for post-conflict environments. The view of the Montreux Document is that human rights are applicable during armed conflict, but if you start from a law of peace position, human rights as a whole are potentially applicable. *Jus post bellum* academic work is useful here.

The legal regime governing peacekeeping operations is useful which includes civil, political and military elements within a civilian framework – IHL applies only in exceptional circumstances when contractors are drawn into situations of armed conflict. The 1994 UN Safety Convention provides that UN personnel are non-combatants, protected from attack – this is a presumption of situations which are not armed conflict. The key principles of peacekeeping were revisited in the UN "Capstone Document" and include consent, impartiality and non-use of force. These key principles are legal principles based on basic concepts of international law including sovereignty (consent), non-aggression (non-use of force) and non-intervention (impartiality). Traditional peacekeeping is consensual, non-aggressive and based on negotiation/observation, while the 'darker side' of peacekeeping might involve armed conflict this is not the standard position, the Congo (1960) and Somalia were exceptions. The Brahimi Report of 2000, after Srebrenica and Rwanda, confirmed the fundamental principles of peacekeeping, but emphasised the need for mandates to include Chapter VII elements if necessary for the defence of civilians within the area of operation. Congo (1990) and Darfur included "protection mandates" but neither force used that power, instead they were engaged in a traditional peacekeeping manner, with no capability for war-fighting. The norm for peacekeeping operations is that they are civilian rather than military operations. The Secretary General's bulletin in 1999 applied IHL to peacekeepers only in exceptional circumstances when engaged in armed conflict. The application of these key principles would be a useful place to start when considering an international code of conduct for PMSCs where peacekeepers and contractors are both lightly armed.

There appears to be a schism going forward with different institutions taking different routes. The UN/HRC appears to be taking one approach with the Montreux process going a different way. It will be difficult to bring these together, resolving the political differences in the two processes. It is important to consider regulating civilians in their activities – IHL is not the place to start, as PMSCs are rarely combatants.

F. Advantages and Disadvantages of Regulation at the International and Regional Level

In this presentation it was submitted that from the perspective of human rights and corporations, there is no need to view PMSCs as any different from any other businesses. Emerging rules on corporate social responsibility apply to all companies,

with useful guidance already in existence in this area. The present approach to regulating the industry is diverse and chaotic at best/worst, with different organisations such as the UN and EU developing independent approaches to regulating business.

With regard to the Montreux Document, the focus on IHL is not useful regardless of what services PMSCs sell, they are doing business and businesses have human rights obligations. PMSCs are obviously more likely to encounter IHL issues, but human rights and corporate social responsibility should still be the focus.

Additionally, there is also too much focus on accountability rather than prevention.

A hybrid approach from the national, regional and international levels is required to cover all potential problems.

Advantages of international regulation:

- Coherence and consistency
- States agreeing to particular standards
- Flexibility and soft law potential
- Prevention of forum shopping?
- Operationalise guidelines
- Potential for enforcement/implementation through individual complaints to be made re certain standards
- Consistent enforcement
- Truly multi-stakeholder involvement

Disadvantages of international regulation

- Emphasis on breach not prevention
- Difficulty for state to reach agreement on a convention
- Hard law can be very inflexible
- Lowest common denominator problem
- Businesses have obligations as well as states
- Disparate application of the law by states
- National regulation is still necessary implement international law
- Needs the political will of states to come together which can be difficult to achieve

The point of the necessity of political support among states to agree an international agreement was endorsed, wanting an international legal framework within a certain timescale leads to a poor treaty negotiated in a hurry that does not do its job properly or achieve its aims.

G. Additional Points arising from Questions and Discussion

Complex nature of the situation

The presentations made in this first session emphasised the chaotic nature of the present situation with too many different approaches and objectives; the promotion of self-regulation, IHL, HRs, traditional approaches of governments with regard to regulation. Most of these approaches perpetuate the problem and in order to find a solution we must address two questions:

1) What is the objective of regulation? Corporate/company law regulation of the business entity, or the activities of the companies, suggested that focus should be on the activities of companies.
2) We have been misled by the Iraq situation, which was the exception rather than the rule. In future we will rarely see armed conflict. Deployments will be police-type situations of operation, possibly not even in post conflict situations. Montreux takes an IHL approach and this is the deficit of the document – the real problems lie elsewhere.

This point was supported – we must define PMSC services to be regulated rather than potentially broadening the scope.

However, while the situation may be described as "diverse and disparate", the complex nature of the situation requires a lot of solutions to each problem and there may not be just one answer.

Private military company perspective:

- Supported the call for a multi-stakeholder response and emphasised the need to engage more PMSCs in the process of regulation.
- In relation to existing regulations, for example the US, regulation should cover contracts under the value of $50 million otherwise the majority of contracts will remain unregulated.
- Licensing and regulation typically reflect statements of intent, there needs to be a focus on effective accountability and sanctions to ensure enforcement.
- Extra-territorial application of civil and criminal law would be welcomed by Control Risks. The extension of military jurisdiction over civilians is more problematic beyond CONDO
- Regarding forum shopping, a private limited company is a legitimate form of commercial entity, generally reflecting the lack of need to raise money on the stock-market. Public companies (i.e. those raising money on the stock-market) are subject to the profit motive of external shareholders, while privately owned companies are not and so may represent a "healthier" model where ownership is broad and employee-based. Off-shoring is typically used for commercial and tax reasons rather than regulation evasion.
- The approved contractor scheme may serve to commoditise (ie appear to standardise) services whereas differentiation remains key. Clients have to make informed differentiating decisions on service providers through quality/cost evaluations oriented to the former.
- In relation to codes of conduct is must be emphasised that codes of conduct do not constitute accountability. The more extensive the span of regulation, the less realisable.
- With regard to Nigel White's discussion of codes of conduct, for the operator in the field, standards and obligations need to prevail irrespective of whether there is a conflict zone, peace operation of post-conflict situation, the status of which may well be determined, and argued, after the fact.
- Corporate social responsibility is equally relevant to PMSCs. Control Risk can also find itself encouraging clients to achieve and mandate higher standards.

- More complex challenges face PMSCs outside Iraq and Afghanistan, where complicity issues may arise in regards to government and commercial operations.
- For those not motivated by altruistic goals, the application of law and the profit motive are powerful incentives.

Responsibility and Compensation for victims

We need to look at compensation for victims from those who are responsible, as well as issues of extra-territorial application of criminal law. Is the Government client responsible, is the PMSC itself responsible, is there a procedure to claim civil law damages? This was considered key, responsibility lies not just with the PMSC, but with the employer whether that be states/organisations. The Montreux Document takes a narrow view of responsibility.

4. SESSION 2: THE PROSPECTS OF EUROPEAN REGULATION

A. Introduction

In view of the weaknesses of national and international regulation identified in the first session, the aim of this session was to introduce the arguments for and against European regulation, its prospects and the issue of the applicable European legal framework.

B. Outline of the Existing European Legal framework

There are a number of questions to be addressed in considering the possibility of European regulation of PMSCs.

1) Legal basis of EC/EU action and competence

Is competence treaty-based? PMSCs do not come within specific regulation as yet but could they be considered as commodities and services to fall within internal market European regulation? Yes and no – the PMSC industry sits on the outer limits of the single market. The single market is the best known product of European integration, but there are other pillars, such as the common foreign and security policy (CFSP), which is subject to a specific decision-making regime and is more inter-governmental than the rest of European regulation. Furthermore, could PMSCs fall within European procurement regulations?

Due to the lack of explicit European regulation, the focus is on the national context. National rules are, however, subject to the single market freedoms, of persons and services. It is important to know whether something has been decided under the single market or CFSP pillar – if the correct competence has not been assumed the ECJ will hold the measure void. European institutions are traditionally very vigilant on their respective competences and they will bring cases before the ECJ to ensure the correct legal competence, for example, the ECOWAS Small Arms case. In this case the Commission brought an action for annulment against a measure to combat the spread of small arms adopted by the Council under the CFSP pillar which therefore did not require the scrutiny of the Commission and Parliament. However, when adopting the measure the Council described it as important for development policy which provided the basis of the ground of annulment by the ECJ. The case thereby raised the possibility of a potentially larger role for the Commission and Parliament in adopting regulation.

2) Regulation of security services at EU level

The current problem is the extent to which internal market rules apply to PMSCs? Internal market rules regarding goods, services and people apply to the private security sector, with exceptions for military and defence, based on nationality. Because of the private nature of the sector, the ECJ has found against Member States trying to use this exception to include PMSCs.

Private security services are excluded from the General Services Directive 2006/123/EC. Nevertheless, the Commission has undertaken to assess potential harmonization measures. There are two existing frameworks for security-related export controls including regulations on dual-use goods and arms export, which provide good examples of EU measures on security.

3) Public procurement and defence

Directive 2004/18/EC on procurement applies to public contracts, including defence contracts. Exceptions are permitted according to Article 296 EC for specific military services although the ECJ is vigilant to ensure the exception is not used in an expansive manner.

Finally, in relation to guidelines for promotion of IHL compliance, there is crisis-management at EU-level under both the CFSP and ESDP, single market regulation has not been concerned with IHL.

C. Advantages & Disadvantages of the Potential European Approaches

This presentation also gave a European perspective on the possibility of European regulation and asked the question – is it possible to use the internal market extension of services within the Services Directive to regulate PMSCs? If so, European Parliament would have a major say in the content. There are foreign policy issues involved in such regulation, and the European Council has the foreign policy nexus within the EU, which would involve Parliament less than using other channels. Parliament is the most open of the EU institutions, partly because of re-elections every 5 years – many different matters come onto the agenda of the parliament, and the discussion here channels the agenda for the other institutions.

There are 3 pressures for Parliament to take a stand on PMSCs:

1) ESDP missions – civil, political, military, large and small. A number of cases raise the issue of how/whether ESDP should hire private security/military companies for protection duties, civil missions and humanitarian missions. There is an urgent need for clarity on this.

2) The business regulation approach – especially within CFSP – the question is being asked, whether arms controls should be extended to cover services.

3) The NGO community, especially those worried by breaches of HR and IHL, argue that there is a normative gap in legal terms.

What has Parliament done in relation to this?

The Committee on Foreign Affairs, the Sub-Committee on Security and Defence, and the Sub-Committee on Human Rights would all be involved in drafting/debating any resolution on PMSCs. The various committees are in the process of producing a report, and are attempting to push the Council to act on this issue. The sub-committees have

had hearings and for example have produced an expert study by Holmqvist and Bailes on this matter. The Human Rights Sub-Committee visited the Geneva UN Working Group on Mercenaries pushing it to continue its efforts on the EU agenda.The Parliamentary sub-committee (human rights) workshop was held together with academics, the US industry and the ICRC. The result has been an increased motivation to move the process forward. There is also support for the Montreux Document within the HRSC, and also from two resolutions from the current legislature – one on arms controls and a code of conduct (it was recommended that the scope of this was widened to include services), and the other on the EU policy on Iraq and the question of whether PMSCs should be employed.

If the EU is going to move forward on this subject, a basic requirement is that the main Member States must agree on the issue – in relation to actions within CFSP, the smaller states must also agree. The European Parliament liked the Montreux Document and there is a lot of support for it within the EU. Consensus is required for the next step to try to devise an additional document to harmonise the way normative standards are implemented and to establish accountability mechanisms. Parliament would like to keep the ball rolling and urges the Council to speed up on the issue.

Parliament would also be involved in first pillar regulation. However, private security services were intentionally left out of the General Services Directive. It would be difficult to get political will and consensus among Member States to push through any amendment. The bridge between goods and services is also difficult to accomplish. Nevertheless, there are indications that progress may be made, at the recent Brussels seminar on light weapons which aimed to tackle the illicit trade through the bottleneck of air transportation, the suggestion that this could be used to govern PMSCs – as most of them also need air transportation to function. This is a potential area for regional regulation.

D. PMSC's and the ESDP Legal and Regulatory Framework

This presentation sought to address the regulation of the use of private military and security companies in view of the legal and operational framework of the European Security and Defence Policy (ESDP). The presentation gave an overview of the main institutional structures underpinning the ESDP and the extent they participate in the decision-making process leading to the employment of private contractors in the framework of the EU-led crisis management operations.

- Each military operation has an Operations Commander (OC), who provides the detail for force generation by way of an Operation Plan. This might envisage the use of PMSCs. The OC is also responsible for awarding and entering into contracts and ultimately responsible for hiring private contractors.
- On the civilian side, the person with functions comparable to the OC is the Head of Mission, who is responsible to the Civilian Operations Commander, and who has a contract with the Commission to implement the given budget.
- The Council of the European Union retains overall responsibility for civilian missions and all crisis management, even though the Commission is directly involved. PMSCs are hired directly by the mission, although the Commission (in charge of a particular mission) retains the documentation. The Head of Mission is responsible for mission security, and is therefore responsible for hiring PMSCs.

- The Council of the European Council concludes SOFAs and SOMAs with the host state, on behalf of the EU. These contain a standard clause that EU personnel shall respect host state law and not undertake activities incompatible with the mission. "EU personnel" does not include local contractors/PMSCs.
- The Head of Mission has jurisdictional control over contracted persons, and has soft-law guidance to prosecute for HR/IHL violations.

Major emphasis is placed on the political-strategic level (i.e. Council of the EU, Political and Security Committee) and on the operational level (i.e. Operation Commanders, Heads of Mission), in light of their crucial role in the planning and conduct of the operations. As these include, *inter alia*, the preliminary identification of the capabilities needed, ensuring the security of personnel deployed, and fulfilling the contractual obligations related to the operations, it is submitted that any effective regulatory solutions as to the hiring of PMSCs in the context of the ESDP should ultimately be aimed at the aforementioned EU bodies, and tailored to their specific functions, procedures and tools.

In the questions and discussion the point was raised in relation to developing EU regulation of PMSCs with regard to ESDPs, in particular standard clauses for contracts with PMSCs, such as training and reporting procedures. What would be the legal basis of the proposal, possible directive or joint action? How would this work and who would decide the content of the standard clauses?

E. Additional Points arising from Questions and Discussion

Problems with establishing competence within the Community

The workshop talks have highlighted the problem of establishing the correct competence within the European Community or else face annulment. The competence must be attributed to the Council of the European Union, the Commission or Parliament and then the pillar under which the regulation will fall must be identified.

Would a European approach be necessary?

In view of the structure of the industry and the reasons for regulation, is there evidence of a specific problem that needs regulating from a European perspective.

In principle, we can solve this problem at the European level simply by recruiting local people and dealing with issues of responsibility and compensation. It can't be "the EC", because as an entity it is immune from jurisdiction.

The EU as a buyer/beneficiary of PMSC services

The EU can influence as a buyer and on weapons export control and could also perhaps encourage/legislate for nations top exercise national law extra-territorially.

There is a need to define standard terms for contracts, eg for training requirements.

There are 2 perspectives of the EU – that of supervisor/regulator of business (unlikely to be able to initiate a major change in the Services Directive to include PMSC services) and that of purchaser of PMSC services (more likely we can get something done here).

The issue is of the EU as a beneficiary/employer is relevant to the Privwar project – we need to address this coupled with HR/IHL. Will the laws on export control of goods help?

Small incidents

We should also look at the wider picture in that it is generally only the major incidents that are reported whereas minor incidents go unreported. We rely on journalists, NGOs and companies to bring complaints. However, there shouldn't be a major incident in order to spark a reaction. There are numerous incidents of business violating human rights which fly under the radar, just because we don't know it is happening doesn't mean it isn't. The problem of trying to find cases that do not make the news is counterfactual. It is reasonable to assume that PMSCs will violate HRs etc as much as armies in the same situation. We therefore don't need specific reports, we just need to be able to hold PMSCs accountable as much as armies. Do we need a new way to regulate, or just do what we are doing?

Article 38 General Services Directive

We should focus on how the EU can regulate its own use of companies as well as how Member States should use them. Article 38 of the General Services Directive indicates that the Commission shall assess by December 2010 the possibility of proposals for harmonising this matter. The EU is therefore obliged to consider regulation. The task of Priv-war is to propose possible ways of such regulation, such as a directive or joint actions to address the concerns of transparency, accountability, and compliance with human rights and IHL, including through adequate training of PMSC personnel.

This mirrors the route taken with regards to the Health Services Directive although it is doubtful that there will be sufficient coherence by the end of 2010 given the fact that Member State political will and Parliamentary willingness would be necessary.

Agreement on the Services Directive (sovereignty exceptions) was particularly difficult to achieve, it would take a very long time and would probably assume a very narrow definition of PMSCs, not covering all of our concerns regarding services.

5. SESSIONS 3 AND 4: STAKEHOLDER RESPONSES AND VIEWS

A. Introduction

The final two sessions aimed to get stakeholder perspectives on the prospects of regulation at national, regional or international levels, the issue of self-regulation and the question of accountability for violation of international and other standards.

B. **British Association Private Security Companies** *Response to Prospect/Idea of Regulation*

There has been little progress in the conferences attended by BAPSC. At the conference today, however, there has not been one mention of mercenaries and little debate on the interpretation of IHL and combatants. This indicates that debate is moving into the real world and suggests a real prospect for progress.

Control of the industry is important and necessary to prevent harm from being caused. The industry supports the idea of regulation by the British Government. However, this is a diverse industry, operating in various different circumstances, which demands a hybrid of controls in order to achieve the objectives of regulation. Self-regulation has a part to play but so does government regulation and international regulation. If self-regulation is going to work, it must be aggressive self regulation, which should be intrusive including inspections, fines and an independent ombudsman – and this will need to be funded.

The BAPSC Charter represents the very core of beliefs of BAPSC members, together with the Code of Conduct of the BAPSC. The code has not yet been publicised partly due to the delay in the Government's proposal on PMSCs. Codes of Conduct are useful, but only as statements of intent. Transparency, accountability and sanctions mechanisms are all important to ensure the code is adhered to. A universal accepted Code of Conduct is too far away to be realistic.

The BAPSC will respond to the FCO consultation to say that self-regulation is discredited in most professions in the UK including the legal profession and MPs! BAPSC suggests a Government ombudsman or Inspector-General or other oversight mechanism. Although the feeling here today is that Iraq was a unique situation and most PMSC use will not be in situations of armed conflict, it is still possible that such a situation will be repeated. Whilst clients are very important, there are good and bad clients – the Somalia fishing industry wants to use PMSCs – private entities and quasi-governments. So we must regulate PMSCs, as we can't expect all clients to be "good" clients.

Regulation must be careful to control the right things. The "PMSC" industry is too broad, one company may have 5% of PMSC-style activities, and 95% non-PMSC activities, it is important to unpick the parts required to be regulated. Two areas are of vital importance:

1) Private companies when they directly support military activities (this happens in the US, not yet in the UK), where a core of IHL standards must be applied;

2) People undertaking activities with armed force in fragile states, such as Blackwater in Iraq. It is important to control any person who is allowed to use a gun.

However, the effectiveness of a European approach was questioned, as the industry tends to operate from outside Europe in non-European countries, so international regulation is needed over and above European.

C. International Peace Operations Association Response to Prospect/Idea of Regulation

The vast majority of industry employees are hired from the local population and are always subject to local law. At the same time, too many analysts ignore the reality that most of the industry is involved in reconstruction and mission support, not security. Using locals makes sense because it develops local capacity, encourages local populations to have a long-term stake in the future and helps wage earners support their families. At the same time locals bring vast advantages to the peacekeeping or stability operations since local employees speak the local language, understand the cultural norms and they are significantly less expensive than transporting and housing expensive foreign labour.

Too much effort is also spent sensationalizing the personnel and size of the industry. Industry personnel are civilians and should not be confused or grouped with military combatants. Even personnel doing security do not have the rights of combatants under international law, and terms like "PMC" and "PMSC" imply industry personnel are military, which makes for more interested journalistic articles and academic papers, but clouds issues of legality and accountability. Nor should the size and value of the industry be exaggerated. The value is closer to $20 billion, not $100 billion or more - as is often claimed - and historically the size expands and diminishes depending on demand.

The stability operations in Iraq and Afghanistan have been the best supported and best supplied military operations in history due to effective utilisation of the stability operations industry. Such support does not guarantee success, but in any peacekeeping or stability operation such support does improve the chances of a positive outcome. Multinational peacekeeping missions could not even begin without private sector support and are finding increasing value in outsourcing many services. The West has largely abrogated any responsibility to provide their own military personnel to international peace operations, and the militaries from less developed countries that actually do peacekeeping require equipment, specialized skills and services that are provided from the private sector. The private sector support for humanitarian peace operations includes not just transportation and logistics, but security services in many cases, and has proven to be less expensive and more professional than expected.

There can be problems with host government licensing and regulation since the operations normally take place in weak and failed states, so home government licensing and/or regulation is still essential. For example, in Iraq a 6-month license to provide security services can take 8 months to obtain, necessitating an application for renewal even before receiving the initial license. There are also corruption issues that are common to all conflict and post conflict operations that should be taken into account.

Good regulation and good oversight are beneficial to the better companies, as effective regulation will enhance competition and weed out the less capable and less professional companies. IPOA has the most robust and elaborate self-regulation in the industry, based on its Code of Conduct which was written and regularly upgraded in partnership with the NGO community and academics. It has developed procedures and a Standards Committee to ensure Member enforcement. Even so, a trade association can only be a supplement to effective governmental regulation and legal accountability. IPOA can effectively penalize member companies in violation of the Association's Code of Conduct financially but obviously does not have the power to incarcerate individuals. Because the industry is quite small compared to other industries (about $20 billion for the greater industry, $4 billion for security companies) IPOA encourages non-industry personnel working in the field to submit complaints if they observe IPOA member companies operating unethically and in violation of the Code of Conduct. To support this, IPOA has developed an outreach campaign to enhance awareness among NGOs, journalists and others.

In terms of criminal accountability for private sector operations, the United States has developed the Military Extraterritorial Jurisdiction Act (MEJA) which offers some direction for other governments. Unfortunately, while there have been 5 or 6 published MEJA cases, there are reportedly more than 50 MEJA cases pending at the U.S. Department of Justice. DoJ publishes very little information on these ongoing cases, something that seriously undermines MEJA's effectiveness. A more transparent legal

process would vastly benefit victims as well as individuals working in the industry. A number of private sector personnel have essentially been convicted in the press with no opportunity to make their case or clear their names. In order to enhance accountability in conflict and post-conflict operations there must be transparent legal mechanisms.

With regard to IPOA enforcement of the code of conduct, anyone can bring a complaint to the Association. When a complaint is received it first goes to a panel from the standards committee which determines whether the complaint is indeed related to the IPOA Code of Conduct. The Standards Committee then requests the company in question to provide information and if there is indeed a violation, the Committee will require that the company address the problem. Should a company refuse to comply, they can ultimately be expelled from the association. While IPOA has rejected membership applications on a number of occasions, no Association Member has yet been expelled from the Association due to non-compliance with the Code of Conduct. IPOA is a committed supporter of the Montreux Document and ongoing process, and continues to work with governments, the NGO and academic communities to refine and enhance its enforcement process and an ombudsman would be a useful extension of this process. Ultimately, the most powerful driver of improved standards are clients who hire the more ethical and professional companies instead of defaulting to the lowest bidder.

D. Legal Practice Perspective on the Need for Regulation

PMSCs provide services in hostile environments because there is demand to supply and companies have a monetary incentive to meet that demand. The PMSC industry is extremely broad, including armed services such as close protection and convoy protection, but it is also more than this – training people, forensic analysis, due diligence. Fundamental human rights principles are engaged here, whether or not there is any involvement in armed services abroad.

The starting point should be to consider what is the aim of the regulation? When thinking about the aim of regulation, it is important to consider who needs protection and support. For example, if the Department of Defence contracts with AMEC to build a road, a 375 page contract will contain 126 pages of insurance and RUF. AMEC might then contract with a UK sub-contractor, and pass on these 126 pages of information, which include the right to use lethal force. The UK sub-contractor employs a UK national who uses lethal force to protect the mission, which leads to death, according to the universal jurisdiction principle such use of force would be illegal and he would face criminal liability. Cf Philippinos and Afghanis for neither of whom would the use of lethal force be illegal. When considering regulation, this example demonstrates how such a system might or might not be applied on the ground.

Any system of regulation should recognise that training is absolutely vital with and demonstratable delivery of that training essential. One way to control behaviour would be for regulation to make their behaviour affect their ability to win contracts. The 'Approved Contractor Status' scheme could be effective in this regard – a contract could not issued to a company unless it is approved and therefore, satisfies the requirements to be approved. All companies would have to achieve 'approved' status otherwise they could not compete for the contract thereby hurting them financially where they are most concerned

Insurance for the UK PMSC industry is also facing difficulties following the Blackwater affair, with the estimated cost going beyond $30 million, insurance companies are asking if it is worth the risk now that they recognise insuring the PMSC industry it is not like providing motor insurance.

The government as the purchasers of PMSC and other clients are key to improving standards. It is the norm that state clients will usually require a company to be a/b/c type of company, carrying out only d/e/f type of activities which they are constitutionally allowed to outsource.

Having said that, opportunities for the private security industry will never be the same again post-Iraq, which was an exceptional case. In Afghanistan, far more local contractors are used – the Afghan Government licenses PMSCs operating within the territory and there are 39 licensed operators. This suggests that we should nurture developing country regulation of PMSCs as host states to ensure regulation works in their territory and respecting their territorial sovereignty rather than leaving regulation entirely up to US/UK/Europe realm. We should not develop inflexible international regulation that does not allow new states to emerge from the conflict. This might mean listening to the legitimate government when operating in their environment and conceiving regulation that respects their traditions.

Afghanistan has a licensing system, the Ministry of the Interior administers licences but there are accusations of corruption, favouritism, or just peculiarities. The system is enforced well in Kabul with officers making spot-checks as well as intelligence-led investigations. However, the system is less effective outside Kabul because officers do not want to travel outside of the city because they do not feel safe. This demonstrates an attempt by the host government to take control of the situation. However, in the context in which PMSCs operate it may be difficult to determine if the government is legitimate government and whether it should be responsible for registration/licensing.

Furthermore, in Iraq a license to work for a 6 month period has an 8 month application period, and the license fee keeps going up.

E. Operational (Military) Views on Regulation

In order to think about regulation we must be clear about the intent of regulation. What are we actually trying to achieve? We must think about the effect that PMSCs have on people. Are we thinking about PMSCs killing/driving badly/abusing powers/fiddling contracts/not delivering employers' instructions? Should we be thinking about the deaths of local contractors vs those of foreign PMSCs/soldiers?

Operational imperative – the British Military could not deploy operations safely without PMSCs. The African Union is developing 5 regional peacekeeping teams which will probably be fully supported by PMSCs.

Business imperative – PMSCs generally deliver the output efficiently and effectively. There is nothing particularly special about PMSCs against any other business which might violate human rights.

Language imperative – when considering the terminology of missions which might involve PMSCs, the term "peace support operations" is a more useful term to represent the complex nature of the mission as compared to pre/post/non/armed conflict situation. Situations on the ground can change quickly between all of these, as demonstrated in Kosovo/the Balkans. Contractors need to be able to react quickly to the situation. They

cannot just sign a contract based on peacekeeping then suddenly find themselves in a situation of warfare and unable to defend themselves/others.

More and more private military companies are moving on to provide humanitarian assistance in the building of refugee camps, hospitals, infrastructure etc instead of just being the protecting company.

In terms of capability, there is a physical component (good equipment and an ability to deploy it around the world), a conceptual component (understanding how companies operate and use their equipment) and a moral component (the justice and righteousness of the action – leadership, ethics, application of IHL, ROE etc). One of the problems of hiring people from the military is that the physical and conceptual components are fine but the organisations themselves do not necessarily have any ethos – regulation of the industry should/must regulate the moral component. However, regulation of the moral component is difficult, as demonstrate by the moral carnage in the finance boardrooms despite extensive financial regulation already, and by the way in which MPs interpreted the system of expenses in the House of Commons – which may have been legal but was not legitimate/ethical.

Activity on the ground must be driven by ethics and morals not just a regulatory framework.

F. British Red Cross Society Perspective on the Need for Regulation

The presence of civilians in conflict zones is not a new concept. However, the nature of conflict has changed. There is no longer a battle field with a front line – there are no boundaries and disorder and violence can easily spiral into conflict. The boundaries between law enforcement and armed conflict have disappeared. Internal conflicts and international conflicts can easily merge into one another. There is a rainbow of different types of violence and PMSCs operate in all of these conditions. This gives rise to confusion amongst PMSC personnel as to the legal framework under which they work which may change according to the situation. There may be issues over whether home or host state law applies, SOFA problems with failed states/weak governments, and the extra-territorial influence of human rights law.

More training must be provided given the nature of the tactics sometimes employed by PMSCs and the increasing scope of activities they carry out. Training is very important and must be specific to the situation. Many of the personnel employed by PMSCs have a military background and are trained as combatants but they are now operating as civilians with different rights and responsibilities. The BAPSC could not reach agreement with the British Red Cross on a training package, as it was difficult to find something to cover everyone in view of the fact that some PMSCs provide security services in conflict areas while others do not.

In the past civilians, including contractors, accompanying British forces in, for example, Germany have been covered by a SOFA agreement to limit the jurisdiction of the German Courts and to allow them to appear in front of military courts. Subjecting PMSC personnel to military jurisdiction is faced with human rights difficulties and evidential problems with collecting evidence in a host state. Cooperation would be required from the host state while this exercise of jurisdiction by the home state could present sovereignty issues for the host state. However, the Armed Forces Act 2006 continues to allow for military jurisdiction over certain civilians. It also continues and extends the practice of having a civilian court with a civilian magistrate, a civilian judge

and civilian assessors to deal with civilian accused for minor offences. This concept could be developed to deal with more serious crimes in an all judge court but again this would be costly and dependent on cooperation from the host state.

A degree of vision would be needed by the industry and government including a monetary commitment from the Government.

G. NGO Response and Views on the Need for Regulation

This presentation aimed to give a perspective from a grassroots level. War on Want started working on the issue of PMSCs 3 years ago, as part of a bigger project on the role of companies in conflict zones and their effect on civilians/vulnerable people – mostly within the extractive industry.

Companies have normalised what has happened to the people of Iraq and the government has legitimised what is not a legitimate industry – bringing PMSCs in "from the shadows".

In 2006, War on Want published its groundbreaking report *Corporate Mercenaries* which detailed the rapid expansion PMSCs capitalising on the massive money making opportunities presented by the situation in Iraq. The report called on the UK government to introduce legislation to regulate PMSCs as a matter of urgency. There are currently tens of thousands of mercenaries working for PMSCs outside legal or democratic control. War on Want believes legislation should be introduced to outlaw PMSC involvement in all forms of direct combat and combat support (understood in the broadest sense). War on Want believes that self-regulation by the industry is not a viable option.

War on Want was initially heartened to hear that after a seven-year delay, the UK government was finally revealing its plan for dealing with the industry in a consultation published in late April 2009. However, we were deeply dismayed when we saw the government's recommendation that mercenary groups will be left to sign up to a voluntary code of conduct allowing them to police their own operations. Self - regulation could leave civilians in war zones such as Afghanistan and Iraq exposed to further abuse by mercenaries working for British firms. The UK troops' planned withdrawal from Iraq increases the need for strict regulation of mercenaries who will still work there and in other war zones.

In launching the consultation in April 2009, the Foreign Secretary praised PMSCs for their "important role" and hailed the industry as "essential" for Britain's future military operations abroad. He did not mention the hundreds of allegations of human rights abuses committed by mercenaries over the past six years in Iraq, including mercenaries working for UK group Erinys opening fire on a taxi near Kirkuk and wounding three civilians, employees of UK company Aegis Defence Services randomly shooting civilian cars out of the back of their vehicle on the road to Baghdad airport, the involvement of private military contractors in the Abu Ghraib torture scandal and the Blackwater killings, which left 17 Iraqis dead. The rights of people working for these companies are also important – 3rd party nationals from poor countries, working in another, poor, country. Harm to such individuals is easily dismissed – the US does not mind body bags going back to, say, Pakistan, where it would not permit the same level of harm to come to its own citizens.

War on Want believes the decision to reject all forms of regulation is a dereliction of duty on the government's part. It is also out of step with the positive action being taken by other states to crack down on PMSCs. Both the Iraqi and Afghan governments have passed laws restricting or banning private military groups while President Obama himself has been one of the USA's most outspoken critics of the industry's lack of accountability. The steps taken by the US to legislate on this issue puts the British government's record to shame.

The British government has jettisoned all the available regulatory options in favour of the worst possible alternative: a voluntary code which, by definition, companies are free to ignore if they wish. Legally binding regulation is the only meaningful way to hold this controversial industry to account.

H. Additional Points arising from Questions and Discussion

Quantifying risk is important for regulation

90% of PMSC tasks do not produce issues of HR/IHL, it is the 10% of the industry that is the problem area which we are most interested in. We need to identify specific tasks (and the industry is best placed to do this) and services done on the ground, to find a common language for these, rather than trying to divide the industry into 3 areas of 90/5/5.

Moving on from Mercenarism

While mercenaries are an underlying issue (the fear of uncontrolled, private violence) in addressing "the industry", there is a lot of abstraction with different companies and services.

Operational perspective

Training is the input, behaviour is the output, and the results of training need testing. Selecting the right people to start with (on the basis of qualifications, skills, experience and character) is more important than training. Control Risks do not seek immunity from prosecution nor do we welcome it. There are many areas where rule of law is questionable/arbitrary, but it is important for managers and staff to remain aware throughout of their personal accountability/responsibility. If we were not willing to be subject to demanding legal systems, we wouldn't take on work in those countries. On legitimacy, there are 2 issues – 1) is what we do legal, and 2) is it acceptable in public opinion? If a particular task did not meet these 2 requirements we would not undertake the task. Legitimacy is not conferred by government regulation.

Agreed need for proper statistics on PMSC performance/incidents

Depending on company, pay/dividends can be relatively modest, sector not homogeneous

Legitimacy is provided by acting legally and in a manner acceptable in the broad court of public opinion, it is not conferred by government regulation

Separately, self-regulation is not enough

On command and control the distinction is between discipline (up to the company, regulation isn't important) and criminal activity (different from mere discipline, this is important and does need to be addressed).

Agreement on the point on recruitment on character rather than training.

Reigning-in the industry

War on Want believes that we need to reign in the industry as a whole because a small proportion of it is not legitimate. An international framework would be ideal, at the UN level. And because the UK is the second-biggest producer of this industry, national regulation in the UK is also important. The US has recognised this and acted to regulate. War on Want believes that companies shouldn't operate in combat, combat support, or intelligence-gathering. All other services are ok in principle. However, democratic oversight and rights of redress are extremely important.

Preventing abuse rather than mechanisms for redress

It is important to regulate to prevent abuse rather than set up mechanisms of redress once someone is injured. Monitoring by a government body would be the best way to do this, because the industry says it is not best placed to do so.

Who will enforce discipline?

6. Conclusions

- The meeting was very fruitful meeting with useful stakeholder input.
- Much was clarified, with little reference to mercenaries.
- HRC may change views with the new members on board, the US president's policy is likely to change.
- From the Bush era, Cuba is also changing – it is a false perspective to see PMSCs as mercenaries.
- The problem remains as to what situations we should regulate. International responsibility (IHL, HRL) for companies employed in many different situations (peacekeeping, peace enforcement, post-conflict zones).
- Because of this variety, we can't make regulation just from a single perspective. From this point, the Montreux document is limited because of its IHL perspective.
- The interest from the EU is increasing – CoE may have solutions?
- Is EU regulation desirable? In principle, yes – even those wanting self-regulation are actually implying that regulation is necessary.
- We need soft law and treaty law combined, across all countries.
- Legitimacy problem is difficult to solve – and important when a company is selling its services. The role of the host government is important, because PMSCs can sell to all governments across the world. If a government in power is genocidal, it is unlikely that you would or could sell your services to this government, since it is forbidden by a jus cogens prohibition. National regulation is important here, such as weapons export which forbids selling weapons to such regimes. Similar to the terrorist problem/insurgents as clients.

Here we might rely on customary international law on non-intervention – aggression by proxy is still aggression and is illegal.

- Some kind of regulation is needed, and international regulation does not exclude EU and national regulation.

There have been some new ideas and a clearer indication of possible outcomes of the project.

1. The object of regulation? There is an emerging consensus is to regulate activities – which activities should not be outsourced by states, which activities are more challenging with regard to the risk of HR violations and undermining the traditional state monopoly on the use of force? Focus on the real risk of private violence.
2. Normative standards. The framework of our project is still valid – how to increase compliance with HR and IHL standards. The issue of the relevance of IHL in situations where PMSCs operate given that the nature of conflicts has changed and with the greater picture of the changing nature of warfare.
3. Importance of guaranteeing access to justice in cases of violations including criminal and civil liability. The approach is preventive – regulation should prevent violations rather than just simply provide access to justice after the event. Licensing is still an option although problematic in new states, such as Afghanistan. Also improving public procurement law, the state as a client becomes a crucial player in how to regulate companies. The issue of export controls is still at the core of our discussion – regulation at EU level here?
4. Code of conduct – a code of conduct is a tool for people operating on the ground and could be very useful to inform people how to deal with a particular situation where you may end up using force, to prevent a HR violation. A code is useful to improve compliance with HR/IHL with regard to discipline, how to recruit people, certification/labelling of companies.
5. Enforcement options – international body to monitor? Voluntary contributions to fund? There may be various levels for enforcement – multi-level regulation is a good idea but difficult to pursue by international convention, as we have seen from the HRC problems. A possible outcome for the project is related to the role of the EU which provides 2 ways of possible regulation – 1) harmonisation of private security sector within the internal market pillar, with the competence/legal basis of the internal market. There is space for an Act under the second pillar, close to a code of conduct for the export of military goods. GdD/PC had examples of second pillar acts to deal with analogous situations. 2) The EU as beneficiary of services - on a case by case basis resort to private companies is not satisfactory. It is feasible for us to propose a more coherent concept on the use of PMSCs in peace operations.