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The Regulatory Context of Private Military and Security Services in the UK

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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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**The Regulatory Context of Private Military and Security
Services in the UK**

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INTRODUCTION

The aim of this report is to provide an account of existing UK national laws and regulations applicable to the private military and security services pursuant to work package 7². The world has witnessed the proliferation of private military and security companies (PMSCs) since the early 1990s. PMSCs are legally established companies which profit from offering military and security-related expertise in conflict or post-conflict situations. Traditionally, such services were considered the preserve of the state but the downsizing of national armies and increasing number of military interventions has led to an increase in demand and resort to PMSCs. This, combined with an ideology of privatization, has created the conditions for an active PMSC market in the UK from which the Government increasingly draws in the post-Cold War era. In the foreword of the 2002 UK Green Paper, *'Private Military Companies: Options for Regulation'*³ the then Foreign Secretary, Jack Straw, recognised that the massive military establishments of the Cold War were a thing of the past and that states and international organisations were increasingly turning to the private sector as a cost effective way of procuring such services⁴. Preceding this, the 1998 Report on the Sierra Leone Arms Affair recognised that 'these companies are on the scene and likely to stay on it'⁵. The recent Foreign and Commonwealth Office Public Consultation on PMSCs, published on 24 April 2009, referred to PMSCs as 'essential', 'inevitable' and 'international'⁶. The main theme of the consultation was to work with the Industry Association to promote self-regulation using the Governments status as a key buyer, and increasing international standards through international cooperation⁷. This endorsed the self-regulatory approach adopted by UK PMSCs in the absence of national regulation despite wide commentary that self-regulation is not sufficient to control an industry which undermines the traditional state monopoly on military force. The lack of progress with regards a formal regulatory regime can be attributed in part to the complex legal issues and conceptual difficulties surrounding the debate including issues of responsibility and accountability which challenge the traditional state dominance of international law.

In writing this report it is necessary in the first place to provide an account of PMSC activity to understand the UK industry, its efforts at self-regulation and the general approach to regulation. The second section of this report details the political debate concerning regulation of the industry with a

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² 'The existing regulatory context for private military and security services at the national and EU level'

³ HC 577, 12 February 2002

⁴ *Ibid.* 4

⁵ Foreign Affairs Committee, Second Report on Sierra Leone, Session 1998-99, HC 116

⁶ FCO Public Consultation Document, 5, Foreword by David Miliband, para 2

⁷ *Ibid.* 3

focus on the proposals of the 2002 Green Paper and subsequent parliamentary debate. An evaluation of the FCO Public Consultation is also included in the second section. The third section focuses on relevant legislation and related legislation including the UK Foreign Enlistment Act 1870 and the new Armed Forces Act 2006. The application of company law, commercial law and employment law is also included with a final focus on the application of regulation covering security companies operating domestically in the UK. The conclusion includes brief reference to the US and South Africa as examples of legislative reform influential in the debate about possible UK legislation.

SECTION 1: THE PRIVATE MILITARY AND SECURITY INDUSTRY

This section will provide an insight into the British private military and security industry detailing the services offered by PMSCs, their activity, and the actors using British companies. It will provide a detailed account of the industry approach to regulation and its efforts at self-regulation. A major step towards self-regulation taken by the British PMSC industry was the creation of the British Association of Private Security Companies⁸ (BAPSC) in 2006. The trade association aims to establish industry codes of conduct by way of the BAPSC Charter⁹ with requisite sanctions to ensure compliance. However, the Charter should be more detailed to achieve such a challenging task and standards must be tested and supplemented by regulatory regimes.

1.1 Types of Services Offered

PMSCs now offer a range of functions from military activities to support of humanitarian operations. The British market is characterised by four areas with some PMSCs attempting to provide all services while others find a niche in the market. The first area comprises more traditional security and risk management services for other private businesses. These services include strategic and operational risk management for companies operating in conflict, post-conflict or risk-prone environments. Typically this includes close protection and asset protection, convoy security, event security, travel security for individuals and other business and investigation services¹⁰. The second area involves support for post-conflict reconstruction efforts as in Iraq and Afghanistan. PMSCs offer personal and site security services to non-military actors including humanitarian agencies, international organisations and NGOs operating in regions characterised by instability¹¹. The related third area demonstrates the expanding nature of PMSC activity into new fields such as state building, supporting and providing humanitarian and disaster relief and development tasks. PMSCs are increasingly becoming involved in humanitarian missions to provide assistance with building infrastructure, redevelopment and communications¹².

The fourth area concerns activities that were previously performed by national militaries which are now outsourced to private companies. These services are offered to home state armed forces as well as foreign regimes. They include the provision of personal security for senior civilian officials in post-conflict environments, military and non-military site and convoy security and training of police and military personnel. PMSCs offer military training, special-forces training, surveillance and intelligence gathering training, aviation security and public security. They provide technical support, maintenance, operate complex weapon systems and provide mine clearance services. The provision of full military services in conflict and post-conflict situations is extremely difficult to monitor and may give rise to infractions of criminal law such as rape, drug/people trafficking and murder. This

⁸ See BAPSC Website <http://www.bapsc.org.uk>

⁹ BAPSC Charter http://www.bapsc.org.uk/key_documents-charter.asp

¹⁰ Bearpark and Schulz, 'The Future of the Market', S. Chesterman and C. Lenhardt, (eds), *'From Mercenaries to Market: The Rise and Regulation of Private Military Companies'* (OUP, 2007) 240

¹¹ *Ibid.* 241

¹² *Ibid.* 241

area is the most controversial giving rise to accusations of war profiteering and unethical behaviour. The ideological climate of the UK and the US which is favourable towards privatisation of public services has enabled this development. Furthermore, the involvement of the UK and US in operations requiring the projection of military force and limited period of service in the British armed forces contributes to the increase in demand and supply for PMSCs¹³.

¹³ *Ibid.* 241-2

1.2 Table of PMSC Activity¹⁴

The following table provides sometimes incomplete examples of UK-based PMSC activity in the period of 1965-2008. It is difficult to obtain an accurate picture of the extent and impact of PMSC deployment and roles as information is often unreliable. Significant early activity was evident in the Nigerian Civil war, Angola, Rhodesia, Sierra Leone and Bosnia and in present times considerable activity is evident in Iraq, Afghanistan and Kosovo.

Date	Country	Company Involved	Recruited by	Objective	Outcome
1965-1980	Rhodesia, Zimbabwe	Former UK soldiers recruited into Rhodesian Light Infantry and Special Forces	Rhodesian Government	To support white minority rule against Mugabe's ZANU and Nkomo's ZIPRA	High casualties Minority government defeated 1980 elections transferred power to Mugabe
1975-	Angola, Zaire	Security Advisory Services Former UK paratroops	Donald Telford	Support CIA backed FNLA in Angola against Moscow backed MPLA and South Africa backed UNITA	Defeated by MPLA Some tried and executed as war criminals
1980s-early 1990s	Mozambique, Sudan, Kenya	Defence Systems Ltd	IOs UN, NGOs World Bank	Installation security Force training	Ongoing
1995	Sierra Leone	Defence Systems Ltd		Military training Mining facilities security	Terminated

¹⁴ See HC 577, 12th February 2002, Annex A for practice from 1965-1998 and contribution by Christy Shucksmith, University of Sheffield, for practice from 1998-2008

1996	Sierra Leone	Sandline International	Government	Military training	
1996	Angola	Defence Systems Ltd Mostly Angolan personnel		Oil facilities, mining facilities, transportation and humanitarian assistance security	
1996	Zaire	British and other mercenaries	Zairean Government	Military support against rebels	Mobuto was defeated White legion disappeared into Congo-Brazzaville
1997	Zaire	Sandline/EO		Military support and training	Failed
1997-1998	Sierra Leone	Sandline International At least 30 personnel		Logistics, intelligence and air support to Nigerian ECOMOG force based in Freetown, military training and logistics for Kamajor fighters	
1998	Sierra Leone	Defence Systems Ltd	UNDP	Security for UN humanitarian convoys	
1998	Angola	IRIS recruited British Personnel	British, South African and US businesses	Military support to UNITA	

1998	Zaire/DRC	Defence Systems Ltd	DRC Government	Oil facilities security Protection of US embassy	
1998- 2003	Iraq	CACI International	US Department of Defense and Department of Interiors	Delivery Orders; provide intelligence and logistics support- 'professional interrogation and analyst support services'. "Blanket-purchase agreement" for the interrogators to also provide inventory control and other routine services to the US army.	In 2004 some of the hired contractors served as interrogators under Abu Ghraib and some were allegedly involved in the abuse of detainees and prisoners for the US Army. The company is facing 2 court cases. The company no longer provides interrogation services in Iraq.
1999	Ecuador	ArmorGroup	ArmorGroup Ecuador	Risk and security management assessment to allow market entry, from a strategic to an operational level. (13 expatriate oil and gas engineers were kidnapped by a mix of Ecuadorian and Colombian delinquents operating in the oil fields.)	ArmorGroup has been working with the client in often very remote and potentially hostile locations in Ecuador for over six years without a major security incident.
2002	China	Group 4 Securicor	IKEA and Raffles City	Security services	

2003	Iraq	Erynys		<p>Provide security for Iraqi oil pipelines and refineries. Trained 16000 local Iraqis to guard the oil sites.</p>	<p>Erynys is now subject to a civil suit in the United States as one of its convoys hit and killed a 19-year-old US army specialist in October 2005. Erynys said it was an accident. When the case was filed in 2007 it was the first against a PMC in the US.</p> <p>Kirkuk Incident: On October 18th 2007 guards opened fire on a taxi near Kirkuk. A man lost his eye and two other people were wounded. Erynys claimed this was self-defence and in compliance with contractual procedures with the US Army.</p>
2003- 2007	Afghanistan	ArmorGroup	UK Foreign and Commonwealth Office and	<p>Provide protective security services to the UK government in Afghanistan, including the Kandahar and Helmand provinces. This includes guard services and mobile security services.</p> <p>Close protection and site security teams for British government personnel and UK organisations. This is all part of the program to reconstruct and redevelop</p>	<p>A suicide vehicle bomb detonated next to a convoy of vehicles, the client was safely escorted back to the British Embassy.</p>

				<p>Afghanistan.</p> <p>Provide off road driving training for the UN. Hostile Environment Awareness Training for the Afghan Police and UK Government Agencies. Provide guard services to the United States Embassy in Kabul.</p>	
2003-2008	Kosovo	Group 4 Securicor		<p>Provide base protection and security at Camp Bondsteel and Camp Montieth in Kosovo.</p>	<p>G4S subsidiaries have been accused of undermining labour and human rights standards in Indonesia, India, Uganda, Israel, Halifax, Nova Scotia and the USA.</p>
2005	Iraq	ArmorGroup (ArmorGroup was acquired by Group 4 Securicor in May 2008) / Global Strategies Group	<p>UN Office for Project Support in support of the UN Electoral Assistance Division (UNEAD) and the Independent Electoral Commission Iraq (IECI).</p>	<p>Provide security support and training for the elections, including electoral infrastructure inspection and liaison with the electoral officers.</p>	

2005	Iraq	ArmorGroup	Ministry of Defence	Protect the British Embassy and Council Offices in Kabul, Afghanistan	
2005	Iraq	Hart		Escorting a variety of non-military personnel, including global media groups and commercial entities. Protection of a 350km power line from theft and insurgent activity. Including employing and training an Iraqi National Force of 1500 which continues to serve the government.	A fire fight in Kut between Iraqi Insurgents and 5 security personnel from the Hart Group. A man was killed when Ukrainian coalition forces failed to respond to pleas for help. Hart entered negotiations to increase fire arms powers in Iraq.
2006	Iraq	ArmorGroup	US Marine Corps Reconstruction Logistics Iraq	Convoy management team to carry out risk assessment and plan how to escort the Iraqi police vehicles from UMM Qasr Port in South Iraq to the Hatten Factory 450kms north.	
2006	Iraq	ArmorGroup	Tetra Tech (a sub-contractor of the US Army Corps of Engineers (USACE)	Provide security for Tetra Tech sites in Iraq.	No known incidents so far. The contract has since been extended.
2006-2007	Kenya	ArmorGroup	UN High Commissioner for	Guard the refugee registration process centres and a number of residential	The troubled presidential election in Kenya on 27 December 2007

			Refugees (UNHCR)	compounds.	resulted in post-election violence of an unprecedented scale and ferocity in the country. Inter-tribal violence
2007	"Middle East" generally	ArmorGroup	American United Logistics	Provide protective security to AUL's logistic convoys in support of US Government programmes.	
2007	Jordan	ArmorGroup	US Government	Diplomatic mission to guard US and UK embassies. Includes training local authorities.	
2007	Sudan	ArmorGroup	United Nations Office for Project Services	General mine action assessment and technical survey programme in support of the UN's mission in Southern Sudan.	
2007-2012	Nigeria	ArmorGroup	US Government	Guard services of the US Embassy in Abuja, Nigeria.	

1.3 Selected Examples of PMSC Incidents¹⁵

In 2003 Erynis International was recruited by Iraqi Ministry of Oil to recruit and train an Oil Protection Force¹⁶. This specialist protection service included provision of an audit of the security requirements of the oil region and the vetting, training and hiring of approximately 14000 Iraqis needed to guard the oil sites¹⁷. The contract to train the guards ended in 2004. In 2007 it was alleged by the War on Want campaign that one of Erynis International's trained guards had opened fire on a taxi near Kirkuk which caused one man to lose his eye and also wounded two others¹⁸. Erynis stated that the incident was carried out in self-defence and in compliance with contractual 'Escalation of Force' procedures specified and agreed with the US Army¹⁹.

Control Risks Group is a provider of security and armed guards for British embassies and consulates²⁰. Their main client is the British Government. For the last 4 years their main contract has been to deliver arms security support to the UK Government in Iraq and Afghanistan. This includes armed close protection operators. These individuals have CRG uniforms and are qualified in weapons handling and safety, close protection services and drive armoured vehicles. There is additional training for team based operations. CRG employees have only used weapons 5 times in the last 4 years and that was because the lives and safety of their clients were at risk²¹.

From 2003-2007 ArmorGroup was recruited by the UK Foreign and Commonwealth Office to provide protective security services in Afghanistan, including the Kandahar and Helmand provinces. This includes guard services and mobile security services, close protection and site security teams for British Government personnel and UK organisations²². This is all part of the program to reconstruct and redevelop Afghanistan²³. The ArmorGroup also provided off-road driving training for the UN and 'Hostile Environment Awareness Training' for the Afghan police and UK Government agencies. In June 2007 a roadside improvised explosive device (IED) detonated next to a convoy of vehicles; the client was safely escorted back to the British Embassy²⁴.

In 2004 Aegis was awarded a lucrative contract by the US Pentagon (See below). In November 2005 a trophy video appeared on the website of a former Aegis employee showing PMC

¹⁵ Christy Shucksmith and Kerry Alexander, University of Sheffield

¹⁶ Company Website <http://www.erynysinternational.com>; Erynis, 'Specialist Protection Services,' Erynis International, <http://www.erynysinternational.com/Services.asp>

¹⁷ Erynis International Signature Project <http://www.erynysinternational.com/Experience-SignatureProject.asp>

¹⁸ Corporate Mercenaries <http://www.waronwant.org/Corporate%20Mercenaries+13275.twl>; Guards 'undermine' US Iraq aims http://news.bbc.co.uk/1/hi/world/middle_east/7052273.stm

¹⁹ Response to allegations made by War on Want against Erynis <http://www.waronwant.org/download.php?id=679>

²⁰ Company Website <http://www.crg.com>

²¹ Chris Sanderson Director of Government Support at Control Risks Group

²² ArmorGroup Introductory Presentation from August 2007 <http://www.armorgroup.com/mediacentre/mediakit/>

²³ Redevelopment of Afghanistan <http://www.armorgroup.com/globalreach/middleeast/case/middleeastcasestudies/>

²⁴ Employee Awarded Prestigious Bravery Honour for Iraq Rescue <http://www.armorgroup.com/mediacentre/newsarchive/?id=33234>

employees randomly shooting automatic weapons at civilian cars on the road to Baghdad airport. The video shows cars being hit by bullets fired from the PMSC vehicle and then skidding off the road, one crashing into another car²⁵. In June 2006, Aegis announced the results of its own investigation into the incident, confirming that the man in the video was one of its employees operating in Iraq but complained that the images were taken out of context. In a statement sent to Business & Human Rights Resource Centre of 27th February 2008, Aegis disregarded the video as a homemade compilation posted by a former disgruntled contractor in a malicious attempt to discredit the company. Investigation by the US Army and Independent Panel of Aegis found that the video was taken out of context and all of the circumstances, when seen in context, were within approved and accepted rules for the use of force. The conclusion was that no crime had been committed and that there was no case to answer²⁶.

The London based PMSC Hart Group Limited was hired in 2005 to provide protection for CPA staff in Iraq, which was intended to be a 'passive' task. If they came under direct attack by Iraq insurgents the employees were instructed to call on military support from regional coalition forces. However, the managing director of Hart Group testified on many occasions that such support was not forthcoming consequently putting his employees in circumstances where they were obliged to hold positions of a strategically sensitive nature²⁷. This indicates the difficulties inherent in the execution of PMSCs tasks when the dangers they face cause them to become engaged in situations that go beyond their mandate. While PMSCs may be able to meet such situational demands, unclear rules of engagement and mandates result in an increasing lack of control over the precise nature of PMSC operations²⁸.

1.4 PMSC Personnel

A pool of highly skilled individuals is available to PMSCs including fully-trained military personnel who have left the armed forces and ex-members of the police service. Also, given the diversification of PMSC activity they now recruit former expert staff from governmental departments, NGOs and humanitarian organisations thereby widening the category of persons employed by PMSCs.

The British Association of Private Security Companies (BAPSC) claims that PMSCs are becoming more diligent in the recruitment of personnel ensuring that individuals are properly vetted. As part of the requirements of membership PMSCs must maintain employee records containing up to date information on disciplinary and grievance information and full employment history²⁹. PMSCs are becoming unwilling to employ ex-servicemen with a dishonourable discharge or criminal record and membership requirements for the BAPSC include the non-criminal history of the PMSC director³⁰. The BASPC Charter requires that PMSCs and their

²⁵ The video can be seen along with other footage of PMSC activity in Iraq at www.waronwant.org/pmsc

²⁶ Aegis statement regarding "Trophy video" allegations to *Business & Human Rights Resource Centre* available at

www.business-humanrights.org/Documents/Aegis-statement-trophy-video-27-Feb-2008.doc

²⁷ BBC Radio 4 File on 4 programme, broadcast at 20.00, 25 May 2004, full transcript available at URL <http://news.bbc.co.uk/1/hi/programmes/file_on_4/3708232.stm>.

²⁸ Private Security Companies, The Case for Regulation, SIPRI Policy Paper No.9, Caroline Holmqvist available at http://books.sipri.org/product_info?c_product_id=191

²⁹ BASPC Self Assessment Workbook 39 <http://www.bapsc.org.uk/downloads/BAPSC%20Self-Assessment%20Workbook.pdf>

³⁰ *Ibid.* iii

personnel observe all rules of international law, humanitarian and human rights law and all relevant international protocols and conventions although it does not specifically state the necessary obligations. By becoming members of the BAPSC, PMSCs accept the obligation to promote compliance with UK values and interests and with the laws of the countries in which its members operate. To this end, the BAPSC Charter requires that PMSCs must provide guidance on the substance and the need to comply with international legal statutes, to ensure that personnel are appropriately trained, and that precautions are taken to protect staff including the provision of protective equipment, adequate weapons, medical support and insurance³¹. In order to become a full member to the BAPSC, PMSCs must ensure that a defined disciplinary procedure is in place to monitor the activities of personnel³².

1.5 Actors using British PMSCs

Governments, military and civil departments and their agencies make use of the services offered by PMSCs as a cost effective way of procuring services. International organisations including the UN and the EU, multi-national corporations and NGOs use PMSCs in their operations in hazardous zones. UK companies have provided services globally to the Governments of Africa, Sierra Leone, Angola, Afghanistan, Iraq and the US.

For example AEGIS is a registered and active UN contractor, a major security provider to the US Government and security advisor to the Lloyds Joint War Risk Committee. AEGIS was awarded a \$293 million contract by the Pentagon in May 2004 to act as the 'coordination and management hub' for the companies involved in the US-funded reconstruction effort in Iraq and the private security companies protecting them. In December 2005, that contract was worth in excess of \$430 million and it was renewed in September 2007 for an additional two years and \$475 million. AEGIS also contributed seventy-five teams of eight armed civilians each to assist and protect the Project Management Office of the US and provided protection for the Oil-for-Food Program inquiry³³.

The BAPSC Charter requires that PMSCs must decline to accept contracts which will conflict with human rights legislation or where there is a likelihood that the service under contract will involve criminal activity³⁴. PMSCs further commit not to contract where the provision of services might adversely affect the military or political balance of the country of delivery or to provide lethal equipment where there is a possibility that human rights will be infringed³⁵.

1.6 Self-regulation and the Industry Approach to Regulation

In the absence of legislation PMSCs have adopted a self-regulatory approach to the conduct of their activities. The British Association of Private Security Companies (BAPSC) was launched on 9th February 2006 by leading members of the private security industry under the chairmanship of Andrew Bearpark. Prior to this, Mr Bearpark was Deputy Special Representative of the Secretary General in charge of the European Union Pillar of the United Nations Mission in Kosovo (UNMIK) from 1998 to 2003. Previously, he was Deputy Special Representative of the Secretary General in charge of the European Union Pillar of the United Nations Mission in Kosovo (UNMIK) and before this he was Deputy High Representative based in Sarajevo and

³¹ BAPSC Charter http://www.bapsc.org.uk/key_documents-charter.asp

³² BAPSC Self Assessment Workbook 42

³³ See AEGIS website www.aegisworld.com

³⁴ BAPSC Charter governing principles 4 and 5

³⁵ BAPSC Charter governing principles 5-8

responsible for the Reconstruction and Return Task Force. In his early career, Mr Bearpark held a series of senior positions in the UK, including Head of the Information and Emergency Aid Departments of the Overseas Development Administration (ODA) and Private Secretary to Prime Minister Margaret Thatcher.

The formation of the BAPSC was the first step towards self-regulation of the industry in recognition of the need to raise operational standards through the establishment of industry codes of conduct. The purpose of the BAPSC is to promote, enhance and regulate the interests and activities of UK-based PMSCs providing armed security services in countries outside the UK. The BAPSC represents the interests and activities of its members in matters of proposed or actual legislation with the aim to influence the political process and establish a firm legal basis for the activities of British PMSCs. It believes that raising operational standards of the industry to ensure compliance with international humanitarian law and human rights standards will be best achieved through effective self-regulation in partnership with the UK Government and international organisations. To this end the members note that their activities will be enhanced by an active and transparent involvement with international organisations, governments and private and public bodies that share common interests³⁶.

Membership of BAPSC is restricted to UK based security firms providing armed security services overseas³⁷. All UK based firms may apply for membership subject to the membership criteria and the principles of the Charter. The BAPSC Charter commits the members to transparency implying that they must disclose corporate structures and relations with offshore bases³⁸. Provisional membership is granted after a series of 'Basic Checks' by the BAPSC Membership Committee, chaired by the Director General of the BAPSC and including executive members elected by the General Assembly. Full BAPSC membership is granted by the Membership Committee on completion of 'Due Diligence Documentation' and 'Self Assessment Workbook' designed to ensure adherence to BAPSC standards and to promote best corporate practice³⁹.

The BAPSC promotes an 'aggressive self-regulatory'⁴⁰ approach to improve industry standards. It suggests that it could exert pressure on members to comply with standards by imposing financial sanctions, introducing compulsory training courses and site inspections, and suspending or withdrawing membership rights. It has lobbied the Government for the introduction of an effective complaint system such as an independent ombudsman to collect complaints, investigate and process them.

The industry recognises that regulation is indispensable to raise standards and thereby enhance the respectability and legitimacy of the industry by putting industry operations on a firm legal basis and outlawing disreputable companies. It argues that self-regulation has the potential to be an efficient and effective means of social control but must be complemented by national or international regulatory schemes with the necessary political will to cooperate. A matrix of international codes of conduct, national regulation and industry self-regulation complementing each other would be the best form of control⁴¹. The industry considers that

³⁶ BAPSC Charter

³⁷ BAPSC Self Assessment Workbook ii

³⁸ Bearpark and Schulz, 'The Future of the Market', S. Chesterman and C. Lenhardt, (eds), *'From Mercenaries to Market: The Rise and Regulation of Private Military Companies'* (OUP, 2007) 247

³⁹ BAPSC Self Assessment Workbook iv

⁴⁰ Bearpark and Schulz 248

⁴¹ Bearpark and Schulz 250

the Government is avoiding any reputational risks of being associated with PMSCs or condoning illegal contracts by not committing to regulation. In the meantime, it is felt that self-regulation is fundamental for the setting of industry standards and the Government is urged to take into account legitimate business interests to ensure that the British PMSC industry is not placed at a disadvantage⁴². However, it must be stressed that any regulatory regime must strike a correct balance between corporate interests and human rights protection since the latter is often neglected in such equations.

1.7 The 'Montreux' Document

The BAPSC supported and has stated that it will incorporate the good practices contained in the 'Montreux Document on Pertinent International Legal Obligations and Good Practices of States Related to Operations of Private Military and Security Companies during Armed Conflict'. This was agreed on 17 September 2008 following participation by 17 Governments⁴³ and the International Committee of the Red Cross (ICRC) with support from NGOs and industry representatives. The Montreux Document promotes respect by states and PMSCs for international humanitarian law (IHL) including the Geneva Conventions and Additional Protocols and human rights law (HRL). It contains separate guidance for contracting states, territorial states and home states but also aims to provide valuable guidance for PMSCs in their interactions with Government clients and host states. The document is not legally binding but seeks to clarify the applicable law and thereby strengthen compliance with IHL and respect for HRLs. However, it is problematic in that it infers positive as well as negative obligations on states, which will have to commit the necessary resources. It is limited primarily to situations of armed conflict, when in many circumstances PMSCs are deployed to post-conflict zones which do not cross the threshold of 'armed conflict' for the application of IHL. It also presumes that PMSC personnel are civilians under IHL and therefore normally enjoy a protected status, and only have to comply with HRL 'to the extent they exercise governmental authority'.⁴⁴ Its impact on international law, given its relatively narrow representative base, remains to be seen.

Part 1 re-affirms the obligations of contracting, territorial, home and all other states under international law and international human rights law. For instance, contracting states must not contract PMSCs to carry out activities which IHL explicitly assigns to a state agency. This may include exercising the power of the responsible officer over prisoner of war camps.⁴⁵ Contracting states must ensure PMSCs and their personnel are aware of their obligations under IHL and trained accordingly.⁴⁶ In order to achieve this territorial⁴⁷ and home⁴⁸ states must disseminate, as widely as possible, the text of the Geneva Convention and norms of IHL among PMSCs. Contracting states must not assist in and take appropriate measures to prevent violations of IHL⁴⁹ and must have necessary oversight mechanisms to repress violations of IHL

⁴² *Ibid.*

⁴³ Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, 17 September 2008; Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the UK, the Ukraine and the US.

⁴⁴ Montreux Document, part 1 para 26.

⁴⁵ *Ibid.* Part 1 para 2

⁴⁶ *Ibid.* Part 1 para 3a

⁴⁷ *Ibid.* Part 1 para 9a

⁴⁸ *Ibid.* Part 1 para 14a

⁴⁹ *Ibid.* Part 1 para 3b

by way of military regulations, administrative orders and judicial sanctions.⁵⁰ This obligation extends to territorial States⁵¹, home states⁵² and all other states.⁵³ Contracting states must implement obligations under HRL including appropriate measures to prevent, investigate and provide effective remedies for misconduct of PMSCs and their personnel⁵⁴. This includes an obligation to enact legislation necessary to provide effective penal sanctions for persons committing or ordering grave breaches of the Geneva Convention (and Additional Protocol 1 where applicable), to search for persons alleged of such crimes and, regardless of nationality, bring them before their own courts, extradite to another court or to an international criminal tribunal in accordance with international and national law.⁵⁵ Similar obligations extend to territorial states⁵⁶, home states⁵⁷ and all other states.⁵⁸ The obligation to investigate, prosecute and extradite also extends to persons suspected of committing other crimes under international law such as torture.⁵⁹ Part 1 attributes responsibility to contracting state for crimes committed by PMSCs when they are incorporated into the states regular armed forces, or organised forces under the under the command responsibility of the state, or where PMSCs are empowered to exercise governmental authority, authorised by law or regulation to carry out functions conducted by organs of the state.⁶⁰ The obligation of contracting states to provide reparation for violations of IHL and HRL caused by the wrongful conduct of PMSCs attributable to the contracting state is also included.⁶¹

Part II contains over 70 good practices assisting states to comply with their international legal obligations when working with PMSCs. For instance, when determining services which may be contracted to PMSCs contracting states must take into account whether the service could cause the PMSC to become involved in direct participation in hostilities.⁶² Contracting states should assess the capability of PMSCs to carry out activities in conformity with national law, IHL and HRL⁶³ and must adopt criteria for the selection of PMSCs ensuring selection according to quality indicators rather than the lowest price.⁶⁴ Contracting states should take into account the past conduct of PMSCs and their personnel including no reliably attested record of involvement in serious crime such as organised crime, violent crime, sexual offences, IHL violations, bribery and corruption.⁶⁵ Contracting states should take into account the good practices of PMSCs such as the obtaining of licences for personnel⁶⁶, the maintenance of

⁵⁰ *Ibid.* Part 1 para 3c

⁵¹ *Ibid.* Part 1 para 9 b and 9c

⁵² *Ibid.* Part 1 para 14b and 14c

⁵³ *Ibid.* Part 1 para 19 and 20

⁵⁴ *Ibid.* Part 1 para 4

⁵⁵ *Ibid.* Part 1 para 5

⁵⁶ *Ibid.* Part 1 para 11

⁵⁷ *Ibid.* Part 1 para 16

⁵⁸ *Ibid.* Part 1 para 20

⁵⁹ *Ibid.* Contracting states part 1 para 6, territorial states part 1 para 10, home states part 1 para 17 and all other states part 1 para 21.

⁶⁰ *Ibid.* Part 1 para 7

⁶¹ *Ibid.* Part 1 para 8

⁶² *Ibid.* Part 2 para 1

⁶³ *Ibid.* Part 2 para 2

⁶⁴ *Ibid.* Part 2 para 5

⁶⁵ *Ibid.* Part 2 para 6

⁶⁶ *Ibid.* Part 2 para 8

accurate and up to date information of personnel and property⁶⁷, the internal policies of PMSCs relating to IHL and HRL taking into account whether PMSC personnel are sufficiently trained⁶⁸ and whether PMSCs obtain equipment lawfully.⁶⁹ PMSC contracts should reflect these requirements⁷⁰ including PMSC subcontracts.⁷¹

In relation to territorial states, the Document states that PMSCs or should obtain authorisation to provide military and security services on the territory by way of an operating licence. A corporate operating licence would be valid for a limited and renewable period while a specific operating licence would be valid for specific services.⁷² Individuals should also register or obtain a licence to carry out military or security services for PMSCs.⁷³ Equally, home states are encouraged to have an authorisation system for the provision of military and security services abroad.⁷⁴ A central authority should be designated for granting authorisations⁷⁵ with adequate resources⁷⁶ to determine whether the PMSC has the capacity to comply with national law, IHL and HRL.⁷⁷ Transparency of the authorisation procedure should be ensured by public disclosures.⁷⁸ The criteria for granting an authorisation include: respect for IHL and HRL by PMSCs⁷⁹; notification of any subcontractors which must be able to demonstrate conformity with national law IHL and HRL⁸⁰; investigation of any past conduct of PMSCs and disciplinary measures taken to rectify any situation⁸¹; the keeping of up to date personnel and property records⁸²; meeting the training⁸³ and welfare⁸⁴ needs of personnel; respect for international organisations and regulation especially rules on the use of force and firearms as well as policies against bribery and corruption⁸⁵; the lawful acquisition of weapons.⁸⁶ States must also ensure systems are in place to monitor compliance with the terms of authorisation⁸⁷, to impose

⁶⁷ *Ibid.* Part 2 para 9

⁶⁸ *Ibid.* Part 2 para 10

⁶⁹ *Ibid.* Part 2 para 11

⁷⁰ *Ibid.* Part 2 para 14

⁷¹ *Ibid.* Part 2 para 15

⁷² *Ibid.* Part 2 para 25(a)

⁷³ *Ibid.* Part 2 para 25(b)

⁷⁴ *Ibid.* Part 2 para 54

⁷⁵ *Ibid.* Part 2 para 26

⁷⁶ *Ibid.* Part 2 para 27

⁷⁷ *Ibid.* Part 2 para 28

⁷⁸ *Ibid.* Part 2 para 29

⁷⁹ *Ibid.* Part 2 para 30

⁸⁰ *Ibid.* Part 2 para 31

⁸¹ *Ibid.* Part 2 para 32

⁸² *Ibid.* Part 2 para 34

⁸³ *Ibid.* Part 2 para 35

⁸⁴ *Ibid.* Part 2 para 38

⁸⁵ *Ibid.* Part 2 para 35

⁸⁶ *Ibid.* Part 2 para 36

⁸⁷ *Ibid.* Part 2 para 46

sanctions on PMSCs for violations⁸⁸ and to ensure accountability mechanisms are in place⁸⁹. Equivalent provisions are contained for the home state authorisation system.⁹⁰

The fact that the UK Government was one of the 17 states behind the Montreux Document adds to the weight of expectation that it should finally address the issue of national regulation of PMSCs.

1.8 Other Industry Associations

UK PMSCs also seek to become members of the International Peace Operations Association (IPOA) and the Private Security Company Association of Iraq (PSCAI). The IPOA (based in the US) believes that the prospect for long-term and sustainable world peace in hostile environments increasingly depends on skilled private companies and organisations specialising in peace operations. IPOA is a non-profit trade association founded in April 2001 by Doug Brooks who is an advocate of ethics, industry standards, regulation and transparency for legitimising the role of the private sector in peace and military endeavours. The IPOA aims to improve accountability by promoting high operational and ethical standards of firms active in the 'Peace and Stability Industry', and by engaging in constructive dialogue with policy-makers throughout the world about the growing and positive contribution of PMSCs to the enhancement of international peace, development, and human security⁹¹. Aegis has been rejected for membership of IPOA presumably due to the conduct of its personnel. However, Doug Brook, president of the IPOA, declined to reveal why the first application of Aegis was rejected and who re-invited Aegis for membership referring to the matter as an 'internal matter'⁹². Nevertheless, this has not prevented Aegis from being awarded the above-mentioned lucrative contract with the Pentagon, which gives the company considerable power and influence over the safety and effectiveness of the other PMSCs including many IPOA members thereby undermining the IPOA initiative.

The PSCAI is another non-profit organisation formed to discuss matters of mutual interest and concern to the PMSC industry conducting operations in Iraq. The PSCAI seeks to work closely with the Iraqi Government, Coalition Governments and Coalition forces to promote transparency, legitimacy, and accountability for the private military and security industry. It conducts plenary meetings every three weeks or when required and promotes an inclusive approach with attendees from the industry itself, the Iraqi Ministry of Interior, the US Embassy and the Regional Security Office amongst others. The PSCAI is a strong advocate for accountability in the private security company industry and according to its Charter 'will insist upon behaviours consistent with norms and conventions of the international community'. It is currently involved in efforts to enforce standard rules and regulations as guidelines for conducting private security operations in Iraq and is working with the Government to ensure fair, consistent, and transparent licensing and registration procedures. This approach is endorsed by the US Government to the extent that companies providing security services should be registered by the Ministry of Trade, and be licensed, or be in the process of licensing with the Ministry of Interior⁹³. A number of British PMSCs working in Iraq have become

⁸⁸ *Ibid.* Part 2 para 48

⁸⁹ *Ibid.* Part 2 para 50

⁹⁰ *Ibid.* Part 2 paras 54-73

⁹¹ See IPOA Website <http://ipoaworld.org>

⁹² See <http://www.corpwatch.org/article.php?id=12829>

⁹³ See PSCAI website <http://www.psc.ai.org>

members to the PSCAI. However, doubts over the impact of the PSCAI given the number of incidents involving PMSCs in Iraq undermine the efforts of self-regulation.

1.9 Summary

This first section demonstrates the efforts of the British PMSC industry in its search towards respectability and self-regulation to raise overall operational standards. The table of PMSC activity indicates the growing reliance of the UK Government on the services of PMSCs. However, the examples of human rights violations committed by PMSC personnel demonstrate how easy it is for PMSC personnel to abuse their position. The formation of BAPSC and self-regulation of the industry covering human rights and international humanitarian law has been a necessary control for the growing industry given the lack of legislation by the UK Government despite increasing resort to PMSCs. However, as the examples in this report indicate, self-regulation is not sufficient and debate surrounds the effectiveness of industry associations and voluntary regimes. Claims that self-regulation is improving conduct must be tested with further empirical work. Regulation will improve the effectiveness of self-regulation and supplement voluntary codes of conduct. The Government's support for international initiatives such as the Montreux Document of 2008 appear inconsistent with its failure thus far to regulate the British private military and security industry.

SECTION 2: POLITICAL DEBATE

This section will detail political discussion on the regulation of PMSCs starting with the Sandline Affair and the 2002 Green Paper to subsequent and more recent parliamentary debate. This section includes a summary of the UK FCO Public Consultation Document on PMSCs which was published on 24 April 2009 providing a weak response to the concerns apparent in political debate, the industry and commentators at large.

2.1 The 'Sandline Affair'

The 'Sandline Affair' concerned the delivery of arms by the British company, Sandline International, to Sierra Leone for use by President Kabbah's forces in contravention of a UN arms embargo implemented in the UK by Orders in Council. The Orders in Council⁹⁴ made the export of arms to Sierra Leone an offence punishable by up to 7 years imprisonment. The affair focussed unwanted attention on the British private military and security industry and caused considerable furor in the UK Foreign and Commonwealth Office. There was confusion surrounding the meaning of the Security Council (SC) Resolution 1132 imposing the arms embargo and over the interpretation of the UK law implementing the resolution. The view of the Foreign Affairs Committee⁹⁵ was that Mr Spicer of Sandline International should have known of the law about arms sales to Sierra Leone. However, the only fair conclusion was that Mr Spicer had every reason to believe that the FCO was aware of the nature of his business with President Kabbah because of his dealings with the High Commissioner and representative of Queen and Government in Sierra Leone (Mr Penfold). It was only reasonable for Mr Spicer to assume Mr Penfold was acting with the full authority of HMG and had the FCO machinery been working properly once a matter had been reported to Mr Penfold it should have been reported to Government⁹⁶. In order to avoid the problem of 'oral licence defence' the Second

⁹⁴ Made at a Privy Council on 30 October 1997, laid before Parliament the following day, which came into operation on 1 November

⁹⁵ Foreign Affairs Committee, Second Report on Sierra Leone, Session 1998-99, HC 116

⁹⁶ *Ibid.* para 27

report recommend that any future Order in Council dealing with arms embargoes must specify that any licence must be given in writing⁹⁷.

The Second report made a number of conclusions and recommendations to improve UK constitutional procedures and more specifically in relation to the PMSC industry. It recommended that the Government should reconsider seeking to amend the existing UN Convention against the Recruitment, Use, Financing and Training of Mercenaries. The Government has not ratified the Convention because it regards the definition of mercenary as impossible to use in British courts. The Second report, while accepting that the definition of mercenary as one 'motivated to take part in the hostilities essentially by the desire for private gain' is vaguely drafted, stressed that the UN Treaty need not be adopted *verbatim* and primary legislation need not follow the precise words of the Convention. A tighter definition of mercenary could be adopted in British law to allow ratification of the Convention⁹⁸. If that could not be achieved, the Second report recommended that the Government take the lead in European initiatives aimed at drawing up a new international legal instrument on the activities of mercenaries⁹⁹ and on the trafficking or brokering of arms subject to an arms embargo¹⁰⁰. The report also recommended that in the case of mercenary activities, the Government should publish a Green Paper outlining legislative options for the control of private military companies which operate out of the UK, its dependencies and the British Islands¹⁰¹.

2.2 The 2002 Green Paper, 'Private Military Companies: Options for Regulation'¹⁰²

Necessity of Regulation

The subsequent Green Paper recognised that regulation was necessary because supply and demand for PMSCs would continue to increase. The industry was not merely a passing phenomenon following the end of the Cold War, increasing the supply of PMSCs given the reduction in the size of Western armies and the change of regime in South Africa. The outsourcing of military functions by governments contributes to increased demand with the British Government outsourcing many tasks once considered the preserve of the state, including 80% of army training involving civilian contractors. The Royal Navy also conducts most of its shore-based training in partnership with a commercial consortium (Flagship Training Limited) which provides training packages to meet Government requests. The Green Paper recognised that a strong and reputable private military industry would be a cost effective way of procuring services for states and international organisations unable to keep large military establishments themselves, especially the UN. Many countries have legitimate military and security needs but inadequate capabilities to deal with problems of internal instability and turn to PMSCs given the lack of intervention by the UN or regional organisations¹⁰³.

The Green Paper considered that debate had moved forward from the bad reputation attributed to PMSCs in the 1960s and 1970s when they were considered as mercenaries and

⁹⁷ *Ibid.* para 37

⁹⁸ *Ibid.* para 93

⁹⁹ *Ibid.* para 93

¹⁰⁰ *Ibid.* para 95

¹⁰¹ *Ibid.* para 96

¹⁰² HC 577, 12 February 2002

¹⁰³ *Ibid.* para 56

associated with human rights abuses and secessionist movements¹⁰⁴. However, the presently unregulated position was untenable for a number of reasons. Firstly, without regulation PMSCs lack clear lines of accountability unlike national armies, which are accountable domestically through the political process. Soldiers and their military commanders can be prosecuted in national military courts and the International Criminal Court (ICC). The Green Paper only saw it as a proposition that PMSCs could be held accountable under IHL¹⁰⁵. Secondly, PMSCs may be considered a threat to national sovereignty and act contrary to the structures of the national state¹⁰⁶. In the 1960s and 1970s mercenaries were a real threat to legitimate governments and self-determination but this has not been the case with PMSCs of the 1990s. The Green Paper considered that although there is a theoretical risk that PMSCs could become a threat to the Government employing them, it is difficult to see what modern PMSCs would gain from trying to take control of a country. Their reputation would be damaged and prospects of obtaining business elsewhere reduced. On the other hand, it is felt that a nation should not rely on a foreign force for its security. However, the fact that a force is private or foreign should not prevent it from being under the control of the state. PMSCs may not be ideal but constitute less of a threat than unchecked rebel movements. Furthermore, PMSCs may be considered a threat to sovereignty, however - in countries such as Angola, Sierra Leone and Zaire governments pay for PMSCs by mortgaging future returns from mineral exploitation. However, this ensures that PMSCs get paid so that the country is not left vulnerable to rebel movements, and an interest in mineral extraction gives PMSCs an incentive to bring the conflict to an end.

The third concern over human rights abuses may have been well founded in the 1960s and 1970s but the position is less clear in the 1990s. There are limited reports of misconduct but the Green Paper considers that human rights abuses are not inherent in the nature of PMSCs as they are in mercenaries since they have a greater incentive for discipline and reputation¹⁰⁷. Fourthly, the impact of PMSCs on underlying problems and stability is doubted since stability is often fragile and fundamental political and socio-economic issues which prompted the conflict remain unaddressed. However, the function of PMSCs is to create an environment where it becomes possible to tackle such problems. Finally, there is a moral objection to those who kill or help to kill for money, but a state under threat from armed insurgents must re-establish its monopoly on violence and the temporary use of PMSCs may be the only option available¹⁰⁸.

Advantages of Regulation

The Green Paper recognised that regulation is necessary where services involve the use of force and taking of lives going beyond the nature of normal commercial transactions. Regulation would bring non-state violence under control and PMSCs within a framework of regulation. It would help reduce the risk that the activities of PMSCs could undermine Britain's policies and interests abroad and minimise any risk of misinterpretation that the Government supports irregular conduct. Regulation would set guidelines for the industry providing an indication of what was expected and creating a more respectable and employable industry. A

¹⁰⁴ *Ibid.* para 32

¹⁰⁵ *Ibid.* para 34

¹⁰⁶ *Ibid.* para 37 and United Nations: Economic and Social Council. Commission on Human Rights. The right of peoples to self-determination and its Application to Peoples under Colonial or Alien Domination or Foreign Occupation: Report on the question of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, submitted by Mr Enrique Ballesteros (Peru), Special Rapporteur, pursuant to Commission Resolution 1998/6. E/CN.4/1999/11,13 January 1999.

¹⁰⁷ HC 577, 12 February 2002, para 44

¹⁰⁸ *Ibid.* para 53

reasonable regulatory regime would encourage compliance by the industry and help marginalise disreputable companies¹⁰⁹.

Difficulties that Regulation would have to Overcome

The Green Paper also stressed the difficulties that regulation would have to overcome. Regulation would place an administrative and financial burden on both the Government and private sector which would have to commit resources for enacting and complying with legislation. The effectiveness of legislation depends on effective oversight and enforcement mechanisms, requiring resources which Governments may not readily commit. The impact of legislation is doubtful when it concerns an activity abroad which falls outside the normal scope of British law, thereby making suspected prosecutions difficult to mount¹¹⁰. Further difficulties arise from the international nature of the services provided by PMSCs, which could relocate their business to avoid constraints on their operations and select the least arduous national regulatory regime.

The Green Paper also discussed the definitional problems which any regulation would have to overcome such as defining the people and activities included. For example, the British Government regarded the definition of mercenary in the First Additional Protocol of 1997 to the Geneva Conventions as unworkable because it would be difficult to prove the motivation of someone accused of mercenary activities and contracts would be drafted so that people fell outside the narrow legal definition. Internationally agreed definitions are often arrived at to suit the agenda of the drafters and are not necessarily useful¹¹¹.

Furthermore, there is a range of operators who provide a spectrum of military activities abroad. Regulation would need to distinguish PMSCs from mercenaries, volunteers and defence industry companies which might provide very similar services. The regulation would need to distinguish between different PMSC activities which may cover anything from advice on restructuring armed forces to advice on purchasing equipment. PMSCs offer services such as training, logistic support, supply of personnel for monitoring roles and demining. However, the distinction between combat and non-combat operations is often artificial and the different activities all contribute to war fighting capability. It would be difficult to devise different labels according to the activities concerned when the intention behind them and the effect they might have in practice will merge together. Choosing the right definitions will be a major challenge and should be free of political influence¹¹².

2.3 The Green Paper's Options for Regulation

The Green Paper outlined several options for regulation with the aim to promote debate on the options of control for PMSCs. The options include:

- A ban on military activity abroad
- A ban on recruitment for military activity abroad
- A licensing regime for military services
- Regulation and notification
- General licences
- Self regulation

¹⁰⁹ *Ibid.* para 62

¹¹⁰ *Ibid.* para 65

¹¹¹ *Ibid.* para 16

¹¹² HC 577, 12 February 2002, para 9

A Ban on Military Activity Abroad¹¹³

A direct ban on military activity abroad would be the most direct way of dealing with PMSC activity, which could apply to all or a limited range of activities. However, a total ban would be difficult to enforce and it would be difficult to assemble the necessary evidence to mount a successful prosecution in British courts because the activity takes place abroad. The legislation would face definitional problems and if it applied only to active participation in combat it would be open to a charge of inconsistency since training, strategic advice and other support may be vital to military operations. If the ban extended to the provision of services to combatants, it might apply to medical services making the activities of some humanitarian organisations illegal. It would also be difficult to determine whether military activity should be defined to include guarding property for example.

In the 1970s the Diplock Committee¹¹⁴ was established as a direct inquiry into mercenarism following the growing involvement of British citizens in the Angolan conflict. It took the view that a blanket ban would be an unwarranted interference with individual liberty and could deprive weak but legitimate Governments of needed support, which the international community is often unable or unwilling to offer. A blanket ban would deprive British defence exporters of legitimate business of considerable value and it would lead to the demise of many of the small PMSCs.

A Ban on Recruitment for Military Activity Abroad¹¹⁵

In 1976 the Diplock Report recommended legislation directed against activities in the UK to recruit people to take up service abroad in specified armed forces. Those giving publicity to recruitment would be liable for prosecution as well as those directly concerned. The Report recommended that the legislation should be in the form of an Enabling Act empowering the Government from time to time to specify particular armed forces for which it should be illegal to recruit. This would avoid some of the difficulties in legislating for activities that take place abroad and the Government could only intervene when there were compelling policy reasons to do so.

However, this proposal was directed primarily towards the recruitment of freelance mercenaries and might not work so well in the case of PMSCs. It might enable the Government to prevent the worst kind of interventions by the private military sector but would do little to contribute to the creation of a respectable and responsible industry. Plus, it might be possible to evade such measures today by using an offshore centre and advertising through the internet. Rigorous policing to ensure breaches were discovered would be expensive, time-consuming and would not be cost-effective given the small scale of recruitment activity.

A Licensing Regime for Military Services¹¹⁶

A licensing regime would require companies or individuals to obtain a licence for contracts for military and security services abroad. The legislation would define the activities requiring a licence and might include recruitment and management of personnel, procurement and maintenance of equipment, advice, training, intelligence and logistical support as well as combat operations. Consultancy services might be included and perhaps would constitute a threshold for contracts requiring a licence.

¹¹³ *Ibid.* para 71

¹¹⁴ Diplock Committee, Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries. Cmnd 6568, HMSO, London, August 1976

¹¹⁵ HC 577, 12 February 2002, para 72

¹¹⁶ HC 577, 12 February 2002, para 73

For services requiring a licence, the companies or individuals would apply in the same way as they do for licences to export arms (though not necessarily to the same Government Department) with similar criteria. It may be logical for the Government to licence to export of military services since it already licences the export of military goods. The US licensing system of over two decades has not given rise to any major problems and this approach would be more flexible than an outright ban.

However, the Green Paper also recognised a number of problems associated with a licensing regime. The problem of enforcement with activities undertaken abroad makes it difficult to know and prove whether the terms of the licence have been breached, although transparency conditions could be included in the licence. The circumstances under which a licence is issued may change creating uncertainty when the political situation changes on the ground. The industry would need reassurance on the question of commercial confidentiality and issues of military security would arise. Companies not wishing to be subject to a licensing regime could move their operations offshore although this would mark them as possibly being less than wholly respectable. Licensing could cause delays disadvantaging both British companies and their customers. A licensing regime could put British defence exporters at a competitive disadvantage although this could be avoided by including a provision for associated services in arms export licences or using an open general licence allowing companies to support UK equipment that has already been exported under a licence.

Registration and Notification¹¹⁷

Legislation could require UK firms wishing to accept contracts for military or security services abroad to register with the Government and to notify them of contracts for which they were bidding. Under normal circumstances the Government would not act but it would retain reserve powers to prevent the company from undertaking a contract if it ran counter to UK interests or policy. This would be a light regulatory framework and would only impose minimal burdens on most companies. It would increase the Government's knowledge of the sector and would provide an opportunity to deal with potential problems before they arose.

However, this option is essentially an automatic licensing system whereby a licence is automatically granted unless the Government takes action to withhold it. It is subject to the difficulties of the aforementioned licensing regime of enforcement, changing circumstances, confidentiality and evasion. However, the risks of delay would be less and costs would be lower although it would confer less benefit in terms of helping establish a reputable industry.

A General Licence for PMC/PSCs¹¹⁸

Instead of issuing licences for specific contracts the Government could licence the company itself for a range of activity possible in a specified list of countries with details of the expected standards that the companies should meet. This option might be useful in conjunction with other options and perhaps as an alternative or additional measure to licensing individual service contracts. However, this approach risks the Government lending credibility to companies of whose operations it knew little or whose character might change.

¹¹⁷ *Ibid.* para 74

¹¹⁸ HC 577, 12 February 2002, para 75

Self-regulation: A Voluntary Code of Conduct¹¹⁹

The Green Paper also suggested that private military and security companies should become members of a trade association (the BAPSC as referred to above). The Government would consult with the association, the companies, their clients and NGOs to draw up a code of conduct for work overseas. Members of the Association would undertake to adhere to this and those who did not would have to resign from the Association. The code of conduct would include respect for human rights, respect for international law including international humanitarian law and the laws of war, respect for sovereignty and matters of transparency, including access for monitors or government representatives. As has been noted, the BAPSC drew up such a Code in 2006.

The Green Paper recognised that self-regulation would help establish standards of behaviour within the industry and would enable outsiders to identify respectable business partners. Membership of the Trade Association would provide an assurance of respectability, which would promote business opportunities for legitimate companies abroad while outlawing disreputable companies. The government would not be involved in unenforceable legislation and it would be a relatively unburdensome form of regulation for the industry. The voluntary code would be policed by the industry which has a better idea of what is happening in the field although the provision of external monitoring could provide a further check.

However, self-regulation would not meet one of the main objectives of regulation to avoid a situation where companies might damage British interests. The lack of legal backing would mean that the Government might be compelled to watch while a company pursued a contract contrary to public interest. Furthermore, the industry association could find itself in difficulties either because of an inability to be sure exactly what was going on abroad; or if it was obliged to discipline one of its more important members.

The Green Paper noted that different options could be applied to different services provided by PMSCs to outlaw the most undesirable PMSC activities while allowing certain operations subject to the regulatory regime. However, the paper declined to express a policy preference indicating that the intention was to point out the pros and cons of the different options and to encourage debate.

2.4 Subsequent Parliamentary Debate

The Ninth Report of the Foreign Affairs Committee and Secretary of State's Response

Self-regulation by the industry appears to have been the only progress thus far, as demonstrated in the first section. In other respects the 2002 initiative has lost momentum with the UK Government failing to introduce legislation. This is so notwithstanding the fact that the Government has increasingly drawn upon PMSCs to sustain its post-conflict reconstruction efforts, and has supported the Montreux Document which contains recommendations for national regulation.

In its Ninth Report of 2002¹²⁰, the Foreign Affairs Committee recognised the potential of PMSCs to make a legitimate and valuable contribution to international security. The Committee recommended that information on PMSC contracts with the Government should

¹¹⁹ *Ibid.* para 76

¹²⁰ Ninth Report of the Foreign Affairs Committee, Session 2001-02, *Private Military Companies*, HC 922

be held centrally¹²¹ and in response, the Secretary of State provided a list of current contracts overseas with PMSCs but felt it did not have time or resources to collect such information from the Ministry of Defence¹²². The Committee recommended the Government prohibit PMSCs from using names similar to those of British regiments or fighting units, or any emblem or symbols of the British armed forces to avoid any misrepresentation of any link between PMSC and Government¹²³. The Committee recognised the value of PMSCs suggesting that the Government should carefully consider whether the greater use of PMSCs in UK humanitarian and peace operations would reduce military overstretch, which was well received by the Secretary of State¹²⁴. The Committee concluded that an outright ban on all military activity abroad by PMSCs would be counterproductive but felt that a distinction between combat and non-combat activities should be drawn for the purposes of regulation notwithstanding the inherent difficulties addressed in the Green Paper¹²⁵. In his response, the Secretary of State agreed that a workable distinction would be an important element of any regulatory regime¹²⁶. The Committee recommended that private companies should be expressly prohibited from direct participation in armed combat operations and that firearms should only be carried by company employees for purposes of training or self-defence¹²⁷. However, in his response the Secretary of State considered that the use of firearms by PMSCs might be necessary in their role of supporting weak Governments such as protecting border points¹²⁸. The Committee proposed that the Government should carefully consider imposing a complete ban on recruitment by PMSCs for combat operations and other activities considered illegal under UK law. That a complete ban should extend to the recruitment for such activities of UK citizens by overseas based or offshore PMSCs although the Secretary of State felt that this would require careful consideration¹²⁹. The Committee also suggested that the Government should impose restrictions on former British service personnel subjects who wish to move into related activity in the private sector such as an approval by the Ministry of Defence or introduce a cooling-off period similar to that which applies to former civil servants and government advisors. This would prevent the risk of inappropriate use of knowledge gained through employment in the British armed forces¹³⁰.

Licensing and Regulatory Regimes

In respect to licensing regimes, the Foreign Affairs Committee recommended in its Ninth Report that each contract for military or security operations abroad should be subject to a separate project specific licence (with the exception of companies engaged in the provision of

¹²¹ *Ibid.* para 17

¹²² Response of the Secretary of State to the Ninth Report of the Foreign Affairs Committee (2001-2002), Session 2001-02, *Private Military Companies*, HC 922 para 7

¹²³ Ninth Report of the Foreign Affairs Committee, Session 2001-02, *Private Military Companies*, HC 922, para 71

¹²⁴ *Ibid.* para 101

¹²⁵ *Ibid.* para 107

¹²⁶ Response of the Secretary of State to the Ninth Report of the Foreign Affairs Committee, Session 2001-02, *Private Military Companies*, HC 922 4

¹²⁷ Ninth Report of the Foreign Affairs Committee, Session 2001-02, para 108

¹²⁸ Response of the Secretary of State 4

¹²⁹ Ninth Report of the Foreign Affairs Committee, Session 2001-02, para 114

¹³⁰ *Ibid.* , para 115

non-contentious services for which the Government considers a general licence would suffice)¹³¹. The Secretary of State felt that this would be a useful component of any regulatory framework but stressed the need for any licensing regime to strike a balance between what needs covering and avoid unnecessary burdens on the industry¹³². In its Ninth report, the Committee suggested that clear guidelines should be issued which should be regularly updated to help companies assess their own applications before submission. The grading of projects according to sensitivity and fast track procedures such as renewal of an existing licence could also improve the efficiency of application submission. The guidelines should provide a target period for approval or denial and a time limit for appeal, and applications by reputable companies with unblemished records of compliance with licence terms could be expedited¹³³. This was in recognition that PMSCs should be able to operate with the necessary speed without compromising the effectiveness of the vetting process¹³⁴. The Committee felt that a lighter regulatory framework of registration and notification with licenses granted automatically could only be justified as an exemption to specific licensing for projects carried out under the auspices of the organisations such as the UN, NATO the EU or UK Government¹³⁵. It welcomed the establishment of general licences as an addition to project specific licences and a general register of PMSCs, which the Secretary of State considered an important component of any regulatory regime¹³⁶. However, the Committee warned against the potential for misjudging a company's character and a misinterpretation of the Government lending credibility to companies whose operations it knew little about¹³⁷. It recommended that PMSCs be required to obtain a general license before undertaking any permitted military or security service abroad and that as part of the application procedure for registration they should disclose information to the Government regarding company structure, the experience of personnel, recruitment policies and other relevant information¹³⁸. The Secretary of State said that it would consider a general licence requirement and in particular careful consideration of the information disclosure that would be necessary¹³⁹.

The Committee recognised in its Ninth Report that self-regulation and voluntary codes of conduct would help establish standards of behaviour but concluded that it would be insufficient to regulate the industry because it would not enable the Government to prevent the activities of disreputable companies which were detrimental to the UK's interests¹⁴⁰. The Secretary of State considered self-regulation would be in the interests of reputable PMSCs and adherence to a voluntary code of conduct could be a factor in any decisions taken under a regulatory regime¹⁴¹. The Committee concluded its Ninth Report by recommending the

¹³¹ *Ibid.* para 129

¹³² Response of the Secretary of State, 5

¹³³ *Ibid.* para 117

¹³⁴ *Ibid.* para 124

¹³⁵ *Ibid.* paras 127-129

¹³⁶ *Ibid.* para 130

¹³⁷ *Ibid.* para 133

¹³⁸ *Ibid.* paras 134-135

¹³⁹ Response of the Secretary of State 6

¹⁴⁰ Ninth Report of the Foreign Affairs Committee, Session 2001-02, para 137

¹⁴¹ Response of the Secretary of State 6

Government to give careful consideration of how to ensure an appropriate system of monitoring and evaluation¹⁴².

Criticism for Lack of Legislation

The Defence Select Committee's Sixth Report of 2005¹⁴³ criticised the Government for failing to enact legislation three years after the publication of the Green Paper. It urged the Government to bring forward proposals for the regulation and stressed that current reliance on contracts is insufficient. The report suggested that the FCO enter into discussions with the Security Industry Authority (SIA)¹⁴⁴ to find ways in which its offices could be used and once a mechanism has been established to regulate these companies, Parliament should consider how it could best undertake the necessary oversight. Politicians and commentators share a general conclusion that self-regulation is open to numerous claims of ineffectiveness and is unsuitable in a sector where life is at risk.

Beyond a National Approach

In its Ninth Report of 2002¹⁴⁵, the Foreign Affairs Committee recommended that further information on the views and experiences of other countries and international institutions was necessary before taking any view on the way forward on regulation of PMSCs. The report recommend that in considering options for regulation the Government develop a new draft international convention to regulate PMCs which might replace the existing UN Convention¹⁴⁶ and examine carefully the United States' regime for regulating and monitoring the activities of private military companies¹⁴⁷. The need to consult multilateral agencies and bilateral partners has also been stressed by the Parliamentary Relations and Devolution Department¹⁴⁸.

Most Recent Debate

¹⁴² Ninth Report of the Foreign Affairs Committee Session 2001-02, para 157

¹⁴³ <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmdfence/65/6508.htm>

¹⁴⁴ The Security Industry Authority is a non-departmental public body set up in 2003 in response to the United Kingdom Private Security Industry Act 2001. The mandate of the SIA is to reform and regulate the UK private security industry and to restore consumer confidence and to this end it has introduced the requirement that all industry employees must hold a valid SIA issued licence. The effects of the SIA's mandate are becoming evident, with disreputable contractors being prosecuted. The categories of licensing include Door Supervision, Manned Guarding, Public Space Surveillance using CCTV, Close Protection, Key Holding, Cash in Transit and Wheel Clamping. However, the scope of the SIA does not presently include PMSCs. The categories of licensing include Door Supervision, Manned Guarding, Public Space Surveillance using CCTV, Close Protection, Key Holding, Cash in Transit and Wheel Clamping. See further section 3.11 below.

¹⁴⁵ Ninth Report of the Foreign Affairs Committee, Session 2001-02, *Private Military Companies*, HC 922

¹⁴⁶ UN Convention Against the Recruitment, Use, Financing and Training of Mercenaries, see Ninth Report of the Foreign Affairs Committee, Session 2001-02, *Private Military Companies*, HC 922, para 25

¹⁴⁷ Ninth Report of the Foreign Affairs Committee, Session 2001-02, *Private Military Companies*, HC 922 para 28

¹⁴⁸ *Letter to the Clerk of Committee from the Parliamentary Relations and Devolution Department, Foreign and Commonwealth Office, 12 December 2002*

There appears to be consensus among politicians and the industry that PMSCs must not be allowed to take part in direct combat operations¹⁴⁹. However, there is also resistance to outlawing the use of PMSCs in view of their strategic usefulness and their importance to UK economic interests. Nevertheless, in a recent early day motion in Parliament¹⁵⁰, the House of Commons welcomed the 'War on Want'¹⁵¹ Report with 103 signatories. 'War on Want' is an anti-poverty charity based in London which highlights the needs of poverty stricken areas around the world. It lobbies governments and international agencies to tackle problems and raise awareness of the concerns of developing nations focusing on the root causes of poverty rather than its effects. The 'Corporation and Conflict' campaign is specifically concerned with companies that make a profit from conflicts¹⁵².

The Report endorsed by the signatories recommended that the UK Government move towards legislation to control the growing PMSC industry as an urgent priority and that self-regulation was not an option. Legislation must outlaw PMSC involvement in all forms of direct combat and combat support, understood in their widest possible context. All other PMSC activities must be made subject to individual licensing requirements open to parliamentary and public scrutiny. An open register of PMSCs should be made available to provide an opportunity to filter out companies with poor records. The Report recommended stricter controls on senior defence or security officials or ministers of state who should not be allowed to take up any lobbying role for a PMSC five years after completing Government service. Finally, it recommended that any Government department which outsources services to a PMSC must remain fully responsible for the conduct of that PMSC. Investigations of human rights abuses by PMSC employees must be accorded the same importance as investigations against members of the armed forces¹⁵³.

The signatories expressed concern over the exponential growth of PMSCs since the invasion of Iraq and the fact that PMSCs work alongside regular soldiers providing combat support in conflict situations while remaining unregulated and unaccountable, leaving open the potential for human rights violations. They expressed disappointment that UK legislation remains absent almost five years after the problems posed by the proliferation of PMSCs were highlighted in the 2002 Green Paper. Self-regulation was not considered appropriate and the Government was urged to move towards binding legislation.

2.5 Government Policy on Contacts with PMSCs

In a written Ministerial Statement in February 2007¹⁵⁴, the Minister of State for Foreign and Commonwealth Affairs, Kim Howells, confirmed that the options for regulation of the private

¹⁴⁹ Donald, D., *After the Bubble: British Private Security Companies After Iraq*, Whitehall Paper 66, Royal United Services Institute, 2006

¹⁵⁰ EDM 690 Private Military and Security Companies 22nd January 2007

¹⁵¹ F. Mathieu and N. Dearden, 'Corporate Mercenaries, the Threat of Private Military and Security Companies' War on Want website (2006) www.waronwant.org

¹⁵² See War on Want Website <http://www.waronwant.org>

¹⁵³ F. Mathieu and N. Dearden, 'Corporate Mercenaries, the Threat of Private Military and Security Companies' War on Want website (2006) www.waronwant.org

¹⁵⁴ Written Ministerial Statement by the Minister of State for Foreign and Commonwealth Affairs (Kim Howells) 28 Feb 2007 : Column WS131

military and security industry remained under consideration and that the guidelines for officials should remain in place. The guidelines were issued by the Foreign and Commonwealth Office in Circular 040/004 following a recommendation in the Legg report into the Sandline affair in 1998¹⁵⁵. The guidelines required officials to request permission for contacts with PMSCs whenever possible and for the FCO to consider the impact of those contacts before granting that permission.

The guidelines have been periodically revised and reissued to reflect changes in the industry. For instance a revised set of guidelines were approved to deal specifically with the situation in Iraq¹⁵⁶, where a large number of private contractors are employed in essential security work. The revisions recognise that PMSCs play an important role in protecting UK citizens and officials in Iraq and that contact with PMSCs protecting overseas staff is inevitable. The revisions concede that liaison with companies providing security to other diplomatic missions and international organisations is an essential operational requirement. However, it is also recognised that it is important that dealings with PMSCs are transparent and accountable to Parliament and the public.

The revised guidelines for Iraq apply to all FCO officers in Iraq whether or not working directly for the FCO, to members of other Government Departments working in FCO posts and to individuals contracted by the FCO. Essentially, the revision allowed free contact i.e. permission for contacts is not required in the circumstances listed. Officers may have free contact with any contractor working directly for HMG to provide security in the context of that security contract, including AmorGroup and Control Risks Group. Officers may have free contact with any PMSC providing security services in Iraq when required for operation of security reasons including PMSCs providing security services to an agency to which an official is seconded or responsible for the security of a location that an FCO official is visiting. In most cases, a brief summary of substantive discussions on policy, political or legal issues should be reported to Iraq Directorate and United Nations Department (UND). Officers may also have free contact with UK nationals employed by any PMSCs in order to supply the normal range of consular assistance and contact with PMSCs to discuss consular issues.

However, the guidelines also provide safeguards for contacts between officers and PMSCs. When contacts take place officers should be alert to the legal framework in which the companies are operating such as UK national legislation on export controls, Iraqi law and applicable international law. They must consider how the activities in which the companies intend to engage will impact on conditions in the wider context of Iraq such as respect for human rights and the rule of law. Further, the officers are encouraged to consider that any contact will be scrutinised by Parliament, the media, foreign Governments and potentially in legal proceedings. Officials are also required to report to the FCO any suspected illegal or unethical activity. Furthermore, officials are still required to seek to permission for contacts with PMSCs seeking commercial advice or assistance in bidding for new contracts in Iraq, in

¹⁵⁵ Foreign Affairs Committee, Second Report on Sierra Leone, Session 1998-99, HC 116

¹⁵⁶ Foreign and Commonwealth Office, Dealing with Private Military and security Companies in Iraq, 7 July 2004, 11 DEP2004/558

accordance with the guidelines in Circular 040/004. In relation to social contacts, officers are advised to seek clearance from HMA Baghdad who will at his own discretion seek advice from Iraq Directorate and UND. Officers must be careful not to discuss sensitive issues and should report substantive contacts to HMA Baghdad who will inform Iraq Directorate and IPU.

2.6 The FCO Public Consultation on PMSCs

Most recently, the FCO Public Consultation on PMSCs was published on 24 April 2009, seeking views from stakeholders and interested parties on its proposal to improve standards across the private military and security industry globally. Despite the foregoing discussion, the main theme of the consultation is to work with the Industry Association to promote self-regulation using the Government's status as a key buyer, and increasing international standards through international cooperation¹⁵⁷. The Government showed a very positive attitude towards PMSCs, describing the industry as 'essential', 'inevitable' and 'international'¹⁵⁸. It sought to promote the positive and legitimate role of PMSCs and from the onset the Government made clear that it was not consulting on the introduction of a licensing regime¹⁵⁹. The Government dismissed the notion of licensing as disproportionately costly to small businesses and unlikely to meet its policy objectives¹⁶⁰.

The aim of the policy proposal is to reduce the risk that the activities of PMSCs might give rise to human rights or humanitarian law concerns, assist internal repression or provoke or prolong internal or regional tension¹⁶¹. The Government considers that standards could be best improved through industry self-regulation and the international promotion of higher global standards¹⁶².

Part 1 of the proposal envisages the Government working with the Association to agree a 'national code of conduct' to establish high national standards for all members. This would enable PMSCs to address instances of malpractice in a flexible, localised and proportionate manner as compared to Government regulation which would be more likely to place a disproportionate restraint on the operations of PMSCs. However, the proposal did not explicitly address the disadvantages of a voluntary code of conduct. In the first instance, it only aims for 90% membership of PMSCs. The remaining 10% of PMSCs are likely to constitute the rogue companies that commit human rights abuses most in need of regulation. The Government suggests that a voluntary code will give the greatest geographical scope because it is administered and enforced by the industry whenever and wherever the company operates but the approach is undermined given the problems with the enforcement mechanisms¹⁶³.

The Association would be responsible for enforcement of the code by way of a disciplinary committee appointed by the membership of the Association but separate from the administrative committee. An experienced legal adviser should also be available to review

¹⁵⁷ FCO Public Consultation Document, 3.

¹⁵⁸ Ibid, page 5, Foreword by David Miliband, para 2.

¹⁵⁹ Ibid, page 3, Scope of Consultation, para 3.

¹⁶⁰ Ibid, para. 6.

¹⁶¹ Ibid, para. 2.

¹⁶² Ibid, para. 3.

¹⁶³ FCO Public Consultation, Response by Sheffield University, School of Law, Priv-War Research Team, 2.

decisions and act as court of appeal¹⁶⁴. However, a disciplinary committee funded by the membership (likely to be 20-30 companies¹⁶⁵) would face serious resource problems for reporting and investigating to ensure the effective enforcement of the code. It is doubtful that the Association would be able to establish a permanent disciplinary committee with the capacity to conduct proper investigation of complaints abroad and to process company reports thoroughly. It would be necessary to publish the activities of the disciplinary committee on a website specifically set up for the committee for purposes of transparency to improve public perceptions of the industry, which places greater financial strain on the proposal¹⁶⁶. The system should also permit individual complaints which would add to the financial burden. In this respect, the Government has failed to commit sufficient resources to the proposal simply passing the problem back to the industry. Furthermore, there is doubt over the effectiveness of the graduated sanctions available to the committee which would range from fines to expulsion, when expulsion is recognised as a mark of a failed system¹⁶⁷.

The Government and the Association would jointly monitor the effectiveness of self-regulation by way of performance indicators¹⁶⁸ including membership targets of 90% of the UK industry and a reduction in the number of complaints upheld¹⁶⁹. This would be published in an annual report subject to government review with a decision in three years as to whether it was proving equal to the task¹⁷⁰. It is suggested that the Government should be more involved in the monitoring process to be able to make an informed evaluation of whether the Association is achieving its objectives. This is in addition to the commitment of greater resources and the provision of greater incentives to encourage PMSCs to commit to the standards¹⁷¹.

Part 2 of the Government proposal advocates an extension of the national initiative to agree an 'international code of conduct' to establish a 'Global Security Benchmark'¹⁷². This would promote international cooperation and build on the Montreux Document recognising the international nature of the industry¹⁷³. However, the self-regulatory approach suggested in the proposal lies in contrast to the recommendation in the Montreux Document that states should adopt a licensing or authorising regime¹⁷⁴. There are further problems concerning the Montreux Document in that it does not identify the applicable law and standards with sufficient precision, it is confined to situations of armed conflict whereas PMSCs are usually deployed in post-conflict or humanitarian situations where different regimes may be applicable, it has a very narrow attributability test for imputing the liability for PMSC misconduct to states contacting them, and it is difficult to build an effective enforcement regime around a soft-law instrument in view of the fact that the Montreux Document is not a

¹⁶⁴ Impact Assessment, para. 53.

¹⁶⁵ FCO Public Consultation, Response by Sheffield University, School of Law, Priv-War Research Team, 2.

¹⁶⁶ FCO Public Consultation, Response by Sheffield University, School of Law, Priv-War Research Team, 13.

¹⁶⁷ *Ibid.* 19.

¹⁶⁸ FCO Public Consultation Document, para. 15.

¹⁶⁹ Impact Assessment, para 55.

¹⁷⁰ FCO Public Consultation Document, para. 13.

¹⁷¹ FCO Public Consultation, Response by Sheffield University, School of Law, Priv-War Research Team, 14.

¹⁷² FCO Public Consultation Document, para. 19.

¹⁷³ *Ibid.*, para. 17.

¹⁷⁴ Montreux Document Part 2, para. 54-6.

binding treaty¹⁷⁵.

The Government envisages the creation of an international secretariat to ensure enforcement of the international code of conduct paid for by an annual license fee levied on PMSCs¹⁷⁶. This would help to establish uniform international standards to ensure that obligations are even among states and thereby reduce the risk of forum shopping. However, it would be more expensive, cumbersome and more difficult to achieve an international monitoring and enforcement system. The most effective place for ensuring accountability is at national level where compliance methods and enforcement mechanisms are much stronger. It is suggested that by not proposing a national licensing or authorising regime, the Government is attempting to pass the problem to the international system in the hope that it will remain unresolved¹⁷⁷.

The International Secretariat would monitor overall standards and ensure compliance with an effective and impartial transparent complaints mechanism¹⁷⁸. However, the right to lodge a formal complaint against a PMSC for a specific incident would reside with the host state¹⁷⁹. Reliance on states to bring complaints under human rights treaty regimes has proved to have had very limited impact. The victims of human rights or humanitarian law violations by PMSCs should have direct access to justice. Treaty commitments allowing individual complaints have had a much greater impact¹⁸⁰. The International Secretariat would have a system of graduated sanctions for companies found in breach such as: placing additional conditions on contracts such as protective measures to control activities of PMSC for a period of time; official warning with the company name and allegation published on an official website so that contracting and host states are aware of the company history; financial sanctions agreed and imposed by the International Secretariat; suspension or removal of the PMSC from the Global Security Benchmark¹⁸¹. However, these sanctions are weak; international sanction regimes show that financial sanctions against companies can only be enforced against companies at national level and expulsion is seen as a mark of a failed system¹⁸².

The Government considered that self-regulation combined with national and international codes of conducts would empower the industry to regulate itself. The proposal could be introduced quickly and be easily adapted¹⁸³. The proposal is based on standards and reputation promoting competition between respectable companies and improving business opportunities for legitimate PMSCs. PMSCs expelled from the global security benchmark would not be able to contract with other parties to the agreement diminishing the business opportunities of rogue companies¹⁸⁴. However, certain buyers hiring PMSCs to do their dirty

¹⁷⁵ FCO Public Consultation, Response by Sheffield University, School of Law, Priv-War Research Team, 18.

¹⁷⁶ FCO Public Consultation Document, para. 22.

¹⁷⁷ FCO Public Consultation, Response by Sheffield University, School of Law, Priv-War Research Team, 18.

¹⁷⁸ FCO Public Consultation Document, para. 21.

¹⁷⁹ Ibid.

¹⁸⁰ FCO Public Consultation, Response by Sheffield University, School of Law, Priv-War Research Team, 19.

¹⁸¹ FCO Public Consultation Document, para. 22.

¹⁸² FCO Public Consultation, Response by Sheffield University, School of Law, Priv-War Research Team, 19.

¹⁸³ Impact Assessment, para. 68.

¹⁸⁴ FCO Public Consultation Document, para. 22.

work will not be looking for adherence to high standards. The companies presently responsible for violations of human rights and international humanitarian law will not commit to the standards and will remain outside the ambit of enforcement bodies. Certain actors wishing to utilise the services of these companies will continue to do so. This problem is exemplified by the fact that the US government contracted with AEGIS despite its failure to secure membership to the International Peace Operations Association (IPOA).

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. These include problems with collecting evidence for a prosecution, extradition difficulties, the issue of no extra-territorial application of regulation of companies by states other than that of their incorporation and the possibility of challenge under EU law. The Government further considered that a government approved register would be difficult and costly to create, maintain and update. Licensing 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 likely¹⁸⁵. Regulation would impose costs which would outweigh any benefits and create economic distortions. However, the Government has made little attempt to monetise the benefits of different options for reform thereby failing to provide a full analysis of proposal and undermining its justification that self-regulation is the best way forward. There is not enough information in the Impact Assessment to understand the value of the different options to be able to make an informed choice as to the best solution¹⁸⁶.

The Government states that it will re-consider intervention if self-regulation proves to be unsuccessful after the 3 year review period¹⁸⁷. This appears to parallel the Government approach to the domestic security industry where regulation followed an unsuccessful self-regulatory approach. It is clear from the onset that the hybrid model suggested by the proposal, where national self-regulation is buttressed by an international mechanism based on the Montreux process, is not strong enough given that it combines weak elements of the national and international systems¹⁸⁸. The hybrid model should be supplemented by regulation at the national level to bring the whole of the PMSC industry within a legal framework, including the rogue 10% presently not covered by the proposal. National enforcement is most likely to be effective given the relative strengths of national legal systems compared to the international one. A regulatory regime requiring a company to have a licence for the provision of private military and security services or perhaps an approved contractor scheme would give greater accountability to PMSCs and could include requirements for annual social reporting and compulsory training. Any attempt at regulating PMSCs should also take note of ongoing developments taking place within the sphere of Corporate Social Responsibility. The risk of forum shopping also necessitates a strong international system. Ideally this should be based on a treaty rather than a soft law instrument supervised by an international secretariat and at the least it should allow for individual complaints¹⁸⁹. There are various combinations of national and international models which would produce a more robust hybrid system of regulation and accountability than what is proposed in the FCO Public Consultation Document¹⁹⁰.

¹⁸⁵ FCO Public Consultation Document, para. 24.

¹⁸⁶ FCO Public Consultation, Response by Sheffield University, School of Law, Priv-War Research Team, 4.

¹⁸⁷ Impact Assessment, para 48.

¹⁸⁸ FCO Public Consultation, Response by Sheffield University, School of Law, Priv-War Research Team, 20.

¹⁸⁹ *Ibid*, 21.

¹⁹⁰ *Ibid*, 22.

2.7 Summary

Government policy indicates that there has been an acceptance of the role of PMSCs in international conflicts as an important provider of security for UK citizens and officials operating in hostilities abroad. Indeed the most recent FCO Public Consultation promotes the work of PMSCs as essential and inevitable. However, there is increasing frustration by politicians and commentators over the lack of governmental commitment to legislation. The Government has faced questions on the issue of PMSCs from members of Parliament across the political spectrum. In the Parliamentary session 2006/2007 over 100 MPs signed Early Day Motion (EDM) 690 urging the Government to move towards binding legislation to bring the PMSC sector under democratic control. In the parliamentary session 2007/08 EDM 785 calls on the Government to make legislation in this area an urgent priority. The voluntary code of conduct proposed in the Public Consultation Document does not provide a satisfactory response.

The value of initiatives at the regional and international level is also becoming more apparent. Political debate provides considered options for regulatory regimes which, along with the Guidelines for Government officials, should be evaluated when developing proposals for national or European reform.

SECTION 3: RELEVANT AND RELATED UK LEGISLATION

Despite debate on the activities of PMSCs, no specific or effective UK legislation exists to regulate or prevent their recruitment or participation in international conflict.

3.1 The UK Foreign Enlistment Act 1870

The 1870 Foreign Enlistment Act makes it an offence for a British subject without licence from Her Majesty, to enlist in the armed forces of a foreign state at war with another foreign state which is at peace with the UK; or for any person in Her Majesty's Dominions to recruit any person for such service. However, no prosecutions under the 1870 Act, or its predecessor of 1819, have concerned enlistment or recruitment. It appears that the Director of Public Prosecutions considered prosecution in connection with enlistment for service in the Spanish Civil War but abandoned this because of the practical difficulty of assembling evidence of an activity taking place abroad. Furthermore, it is questionable whether the Act would cover internal conflicts such as those in Africa today. The Diplock Committee 1976, having examined the question in some detail, concluded that the Act was ineffective and should be repealed or replaced with legislation containing extra-territorial application. Finally, the Act is paradoxical in that, were every country to adopt a similar law, it might mean that the recruiting activities of the British Government in Nepal and other countries would become illegal¹⁹¹.

3.2 The Application of UK Export Controls

PMSCs are subject to the provisions of arms export control legislation, including the observance of arms embargoes. It is suggested that regulation controlling exports of arms could be extended to include controls on security and military services. The guidelines dealing

¹⁹¹ HC 577, 12 February 2002

with PMSCs in Iraq alerted FCO officers in contact with PMSCs to the legal framework in which PMSCs operate including UK national legislation on export controls¹⁹². In the UK Green Paper, the Government noted that arms exports and PMSC services often go hand in hand when commenting on the likely impact of a ban on PMSC activity abroad¹⁹³. The Foreign Affairs Committee's Ninth report¹⁹⁴ felt that improving controls over the trafficking and brokering of arms would curb some of the most damaging activities of PMSCs, that such controls could be possible given improved international intelligence and cooperation.

The Export Control Organisation (ECO)¹⁹⁵ was established as the UK's strategic export licensing authority to **promote global security through strategic export controls and to facilitate responsible exports**. ECO operates in close conjunction with other UK Government departments including the FCO, the Ministry of Defence (MOD), the Department of International Development (DFID) and Her Majesty's Revenue and Customs (HMRC), which form the 'Export Licensing Community'. The FCO, MOD and DFID each play a key role in licence decisions as guided by the Consolidated EU and National Arms Export Licensing Criteria.

The ECO has the responsibility of assessing and issuing export licences for specific categories of controlled goods. A range of items fall under Export Control Legislation including military goods (such as firearms and ammunition), so called dual-use goods (which are civilian goods but with a potential military use or application such as nuclear, chemical or communication goods) and products used for torture and repression. The UK Strategic Export Control List consists primarily of the UK National Military List and the EU Dual-Use List (for goods/technology which may have both military and civilian applications)¹⁹⁶.

A licence to any destination, including EU countries, is necessary if an item is listed on the UK Military List or the most sensitive items on the EU Dual Use List. A licence is needed for export outside of the EU if the item is a less sensitive item on the EU Dual-Use List. Other items may require a licence for destination countries that are subject to embargoes or sanctions. The supply of any goods on the UK Military List to embargoed destinations is controlled extraterritorially where the destination is listed on the Trade in Controlled Goods (Embargoed Destinations) Order 2004¹⁹⁷. The order came into force on 3rd March 2004 and includes all destinations currently under the full scope of EU, OSCE and UK National arms embargoes¹⁹⁸. Destinations subject to UN sanctions are controlled by specific UN Legislation, adopted pursuant to the United Nations Act of 1946

¹⁹² Foreign and Commonwealth Office, Dealing with Private Military and security Companies in Iraq, 7 July 2004, 11 DEP2004/558, 2

¹⁹³ HC 577, 12 February 2002, 22

¹⁹⁴ Ninth Report from the Foreign Affairs Committee, Session 2001-02, *Private Military Companies*, HC 922, para 149

¹⁹⁵ See <http://www.berr.gov.uk/whatwedo/europeandtrade/strategic-export-control/about-eco/index.html/strategic-export-control/about-eco/index.html>

¹⁹⁶ See <http://www.berr.gov.uk/whatwedo/europeandtrade/strategic-export-control/control-lists/index.html>.

¹⁹⁷ See countries currently appearing on the Embargoed Destinations order at www.dti.gov.uk/export.control including Burma, Democratic Republic of the Congo, Iran, Iraq, Sierra Leone, Sudan and Zimbabwe amongst others.

¹⁹⁸ See <http://www.berr.gov.uk/whatwedo/europeandtrade/strategic-export-control/sanctions-embargoes/by-country/index.html>).

The ECO also issues trade control licences for the trafficking and brokering of arms. The Export Control Act 2002 introduced a new general power allowing controls to be imposed on trafficking in arms and other sensitive equipment. The bulk of the new controls introduced by the Act came into force on 1st May 2004, which placed controls on commercial activities which may not have been previously caught. In particular the Act was intended to impact on trafficking and brokering activities which facilitate the movement between two overseas nations of controlled military goods which will never come into the UK. The new controls only affect suppliers of (or customers of) controlled military and certain explosives-related goods which would be moved between two overseas nations. They do not impact on intended exports from the UK which remain subject to export control legislation. Trade controls on 'restricted goods' will apply to UK persons operating overseas as well as any persons within the UK including long range missiles or unmanned aerial vehicles (UAVs) and any specifically-designed components; equipment already banned for export from the UK due to evidence of its use in torture including electric shock batons, electric shock shields, stun guns, and specifically designed components of such devices; leg irons, gang-chains, shackles (excluding normal handcuffs and electric shock belts designed for the restraint of a human being).

A range of licences may be issued for the export of goods by the ECO. Anyone may apply for an Open General License (OGEL) provided they meet all the licence conditions, which simply requires regulation for each licence they may wish to use. 35 licences cover a wide range of circumstances including military and dual use goods. A registered OGEL user is then subject to regular compliance visits. If the good or destination is not covered by the OGEL a Standard Individual Export Licence (SIEL) may be issued by the ECO. This is company and consignee specific for a set quantity or value and supporting documentation must be submitted with the application. An Open Individual Export Licence (OIEL) may be available which is designed to cover long-term contracts, projects and repeat business. This will be subject to regular compliance visits from ECO and only minimum supporting documentation is necessary. Other licences cover trafficking and brokering activities.

An exporter has various responsibilities to ensure solid export control systems and procedures in place in terms of record keeping, training and lines of responsibility. The ECO undertakes compliance visits and penalties may be enforced such as de-registration of licence, fines and potential prison terms if a licensee does not adhere to export control obligations. The ECO has a clearly defined service and performance code which outlines the obligations and responsibilities of ECO and exporters alike¹⁹⁹.

3.3 The Application of the UK Human Rights Act 1998

The *Al-Skeini* case decided by the highest English Court – the House of Lords – in 2007,²⁰⁰ decided that the Human Rights Act of 1998 (which incorporated the European Convention on Human Rights into English law) applies to British controlled detention facilities abroad. Although the abuse in that case (leading to the death of one Iraqi civilian - Baha Mousa) was carried out by British soldiers, it is not difficult to imagine such abuse being carried out by employees of private firms contracted to run detention facilities. There are 11 privately run prisons in the UK and as the Ministry of Defence looks to privatize non-combat functions this trend may be continued when detention facilities are required as part of British military

¹⁹⁹ See <http://www.berr.gov.uk/whatwedo/europeandtrade/strategic-export-control/about-eco/page10942.html>

²⁰⁰ *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26

deployments overseas.²⁰¹ In the *Al-Jedda* case, again decided by the House of Lords in 2007,²⁰² the right to liberty of a detainee was said to be set aside by Chapter VII obligations imposed by the Security Council under Resolution 1546, on the basis that these obligations prevailed over those in the European Convention by reason of Articles 25 and 103 of the UN Charter. Their Lordships indicated that the erosion of the right should only be to the extent necessary to maintain security in Iraq. Assuming that the acts of PMSCs in such circumstances could be attributed to Britain, and assuming there is no over-riding Security Council imposed obligation, individuals being subject to human rights abuse by employees of private companies while in detention have the right to bring case against the British Government before the English Courts.

3.4 The Application of UK War Crimes Legislation

In addition to the possible application of ordinary English criminal law to acts outside the UK,²⁰³ an employee of a private military company suspected of war crimes, crimes against humanity or genocide could be prosecuted in English courts for violation of the International Criminal Court Act 2001. Of the soldiers convicted by Court Martial for abuse of prisoners in Iraq (at Camp Bread Basket and at the British detention facility in Basra), one has been convicted of committing a war crime under the Act after admitting inhumane treatment. Again this related to the treatment of Iraqi prisoners while in detention in Basra, treatment that led to the death of Baha Mousa.²⁰⁴ S.1 of the International Criminal Court Act states that it 'is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime' in England or Wales, or 'outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction'. Individuals employed by a PMSC working for the Ministry of Defence may well not be subject to British service jurisdiction, but if they are British nationals, they are subject to the jurisdiction of English courts under the 2001 Act, as well as to the International Criminal Court if Britain is unable or unwilling to try the individual.

3.5 Immunities for PMSCs in Conflict Zones²⁰⁵

Immunity of PMSCs as contractors depends on the particular agreements governing their presence in a particular conflict zone. In Iraq, after the initial invasion of 2003, the Coalition

²⁰¹ But see Montreux Document 2008 para 2 which states that states have 'an obligation not to contract PMSCs to carry out activities that international humanitarian law expressly assigns to a State agent or authority, such as exercising the power of the responsible officer over prisoner of war camps or places of internment of civilians in accordance with the Geneva Conventions'. This of course does not apply to places of detention not governed by IHL, indeed it does not prevent the contracting out of lower levels of prison work to guards for instance as long as the responsible officer is still a member of the armed forces or an agent of the Government.

²⁰² *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58.

²⁰³ English criminal law is largely based on the territorial principle meaning that the offence has to be committed in the UK; only a small number of offences when committed abroad can be prosecuted on the basis of the British nationality of the offender – see D.J. Harris, *Cases and Materials on International Law* (London: Sweet and Maxwell, 6th ed. 2004), 267-8. A British soldier though is subject to military law while abroad and this may include a large element of English criminal law – P. Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge University Press, 2005) 133-4

²⁰⁴ *R v Corporal Donald Payne* 2007 unreported. 'UK Soldier Jailed Over Iraq Abuse', <http://news.bbc.co.uk/1/hi/uk/6609237.stm> 30 April 2007

²⁰⁵ Contribution by Alexandra Bohm

Provisional Authority (CPA) was set up by the US, UK and coalition partners, as occupying powers, in a letter to the Security Council dated 8 May 2003.²⁰⁶ CPA Order No. 17²⁰⁷ gave contractors immunity under local laws for actions in the scope of their employment with the multinational force (MNF) and other entities²⁰⁸ CPA Order No. 17 also established a waiver of immunity in certain circumstances, so that the sending states' domestic courts could commence legal proceedings against individuals if desired.

The scope of the immunity did not cover acts not performed pursuant to a contract. In some cases, it will be obvious what is and what is not within the scope of a contract. For example, contrast driving over the speed limit to chauffeur a diplomat in safety which will be within the scope of a contract to guard that diplomat, with taking part in sex trafficking, as Dyncorp were accused of doing in Bosnia,²⁰⁹ which will clearly not be within the scope of the contract. However the degree to which force may be used, and still considered to be pursuant to the contract, is less clear.

CPA Order No. 17 was extended to cover the operations of the MNF acting under Security Council Authority once the CPA ceased to be the governing body in Iraq. The Order provides that it 'shall remain in force for the duration of the mandate authorizing the MNF under U.N. Security Council Resolutions 1511 and 1546 and any subsequent relevant resolutions'. Security Council Resolution 1790²¹⁰ gave the MNF a mandate until 31 December 2008, but stated that the mandate would not be renewed beyond this point. In anticipation of this, the US and Iraqi governments negotiated a 'status of forces' agreement (SOFA) governing the presence of the US forces and contractors. This commenced on 1 January 2009. The UK is still in the process of negotiating a SOFA with Iraq to govern the presence of their troops (and, presumably, contractors).²¹¹

CPA Order No. 17 provides that it 'shall not terminate until the departure of the final element of the MNF from Iraq, unless rescinded or amended by legislation duly enacted and having the force of law'. As the UK troops and contractors are still present in Iraq as part of the MNF, they are arguably still governed by this Order. It has not been possible to find any legislation enacted to repeal CPA Order No. 17.

3.6 The Application of the UK State Immunity Act 1978²¹²

The State Immunity Act 1978²¹³ provides that state immunity will be granted for acts of a sovereign nature, but not for acts of a state which are of a commercial nature.²¹⁴ Typical commercial proceedings include contracts for the supply of goods and services, often in

²⁰⁶ S/2003/538, at <<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Iraq%20S2003538.pdf>>

²⁰⁷ Dated June 2003 and amended on 17 June 2004

²⁰⁸ CPA Order 17 refers to Foreign Liaison Missions and Diplomatic and Consular Missions, for example

²⁰⁹ See, for example, <<http://www.guardian.co.uk/world/2001/jul/29/unitednations>>

²¹⁰ 18 December 2007

²¹¹ See <<http://www.fco.gov.uk/en/fco-in-action/uk-in-iraq/iraq-why-uk-there/>>

²¹² Contribution by Alexandra Bohm

²¹³ This Act follows the UK's ratification of the European Convention on State Immunity in 1976, and is separate from the UN Convention on State Immunity 2005, which has not yet entered into force.

²¹⁴ Section 3 State Immunity Act 1978

relation to airlines, shipping companies or banks. If the MOD contracts with a PMSC to guard an embassy, this would be a contract for the provision of services. However the nature of the contract, the provision of diplomatic security, is of a sovereign nature, with the MOD entering into the contract as a state entity rather than a private entity. It is therefore possible that the MOD would be granted immunity from the jurisdiction of the English court in a case brought against it by a PMSC.

3.7 The Application of UK Military Law

If PMSC personnel have de facto or de jure immunity from local courts, it is necessary to ensure that there is an alternative form of jurisdiction. International jurisdiction is expensive and unsuitable for all but the most serious cases and national jurisdiction faces legal difficulties in relation to jurisdiction over the person and the crime. Ordinary soldiers are subject to military discipline and can be dealt with by their national authorities if they commit offences. It has been suggested that military jurisdiction over civilians could provide a solution to ensure the accountability of PMSC personnel.

Military jurisdiction over civilians has a long history in the UK. It used to be limited to civilians accompanying the armed forces overseas on active service but was extended in 1955 so that the requirement for active service was dropped in most circumstances. According to s. 70 of the Army Act 1955 and equivalent provisions in the other Service Discipline Acts, those accompanying the armed forces could be tried before military courts for any criminal offence under the law of England and Wales. In 1976 a Standing Civilian Court (SCC) was introduced with jurisdiction over minor offences such as shoplifting and minor vandalism in areas with concentrations of civilians. The SCC forms part of the military jurisdiction system which enabled civilians to be tried under military law before what is essentially a civilian court.

Military jurisdiction has the advantage that it can be applied to any nationality and can be held in the territory of the host state subject to agreement with that state. However, there have been recent human rights concerns over the application of military jurisdiction to civilians. In *Martin v United Kingdom*²¹⁵, the ECHR stated that the 'power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation, and if so only on a clear and foreseeable legal basis. The existence of such reasons must be substantiated in each specific case'. This has placed a formidable obstacle before the military authorities and it is currently under review by the Ministry of Defence.

Nevertheless, a new Armed Forces Act 2006 which is due to come into force this year, raises interesting questions on the application of military law to private contractors. It updates the concept of the Standing Civilian Court as the Service Civilian Court and revises the list of those persons who are subject to service jurisdiction under s. 370 of the Act and Schedule 15. The relevant part of Schedule 15 states:

'Persons working for specified military organisations

5 (1) A person is within this paragraph (subject to paragraph 11) if—

(a) he is employed by or in the service of a specified naval, military or air-force organisation of which the United Kingdom is a member;

²¹⁵ *Martin v. the United Kingdom*, no. 40426/98 (Sect. 4) (Eng) – (24.10.06)

- (b) he is so employed by reason of the United Kingdom's membership of that organisation; and
- (c) he is outside the British Islands.

(2) In this paragraph "specified" means specified by order of the Secretary of State under this paragraph.

Persons in designated area who are members or employees of other specified organizations

6 (1) A person is within this paragraph (subject to paragraph 11) if—

- (a) he belongs to or is employed by a specified organisation; and
- (b) he is in a designated area.

(2) In this paragraph "specified organisation" means an organisation which—

- (a) does not fall within paragraph 5; and
- (b) is specified by order of the Secretary of State under this paragraph.

Persons designated by or on behalf of Defence Council

7 (1) A person is within this paragraph (subject to paragraph 11) if—

- (a) he is designated for the purposes of this paragraph by or on behalf of the Defence Council or by an officer authorised by the Defence Council; and
- (b) he is outside the British Islands.

(2) A person may be designated for the purposes of this paragraph only if it appears to the Defence Council or the authorised officer that it is desirable to do so—

- (a) in the interests of the person;
- (b) for the protection of other persons (whether or not members of any of Her Majesty's forces); or
- (c) for the purpose of maintaining good order and discipline.

(3) In deciding whether to designate a person for the purposes of this paragraph, the Defence Council or the authorised officer must have regard in particular to—

- (a) the characteristics of the justice system (if any) in any country or territory where the person is or is likely to be;
- (b) the terms of any treaty, agreement or arrangement relating to the legal status, or the treatment, of visiting forces to which the United Kingdom and any such country or territory are parties;
- (c) the likelihood of the person's being subject to the law applicable to the armed forces of any country or territory outside the British Islands.

(4) A designation under this paragraph—

- (a) may designate persons by name or by description;
- (b) may provide, in relation to any person designated by it, that it applies to him only for a specified period or in specified circumstances;
- (c) may be withdrawn by any person entitled to make designations under this paragraph.

(5) In sub-paragraph (4) “specified” means specified by the designation.

The equivalent sections of the current Service Discipline Acts have been used in the past to make contractors subject to service jurisdiction which provides a possible way forward. However, there are a number of difficulties. Firstly, the provision as presently drafted only applies to a limited range of persons although it could be extended for instance to cover any company working on behalf of the Government. Secondly, there are human rights concerns on making civilians subject to military jurisdiction although it might be possible to ‘civilianise’ the process so that jurisdiction is effectively exercised by civilians within the structure of military law. For instance, a ‘civilian’ court martial made up entirely of civilians, as opposed to military officers. However, the members would inevitably be Crown Servants and therefore subject to challenge on human rights grounds. A further possibility is to extend the scope of the Service Civilian Court so that it has the power to deal with more serious offences. Much depends on the review of the use of military jurisdiction over civilians currently being conducted by MOD. A feasible system compliant with human rights standards might give rise to the possibility of using military jurisdiction to close the accountability gap for civilian contractors and in particular private security companies²¹⁶.

3.8 The Application of UK Company Law

When private military and security companies are fully incorporated by registration at Companies House according to UK Company law they assume separate legal personality²¹⁷. A company, as a legal person, may be prosecuted for offences for which it has direct responsibility or for offences for which it incurs liability indirectly through the imputation of states of mind and actions of others to the company. There are no particular problems associated with the prosecution of companies for offences of strict liability or for offences for which the legal person assumes vicarious liability but there is a limited application of this concept in the criminal law. This is problematic given the likely criminal nature of the offences committed by the employees of PMSCs, assuming that the personnel of PMSCs are regarded as employees not contractors.

Difficulties occur when seeking to impose corporate criminal liability for an offence which requires proof of *mens rea*. *Mens rea* is the guilty intent or knowledge or other state of mind. The judiciary have developed concepts of attribution and identification to engage the liability of companies. Attribution is a general theory whereby the intent of somebody is attached to the company giving the company the necessary intent. Identification is based on the ‘directing mind and will’ of the company which is sought in the person of somebody who may be called an agent of the company and is really the directing mind and will of the company²¹⁸. However, this does not encompass mere junior employees of the company²¹⁹. Lord Denning likened the company to a human body with a brain and a nervous system that controls what it does. The hands of the people are mere servants that do the work and cannot be said to reflect the mind

²¹⁶ Charles Garraway presentation ‘Accountability and Private Security’ March 2008

²¹⁷ *Salomon v Salomon & Co Ltd* (1896), [1897] A.C. 22 (H.L.)

²¹⁸ *Lennard's Carrying Co Ltd v Asiatic Petroleum* [1915] AC 705

²¹⁹ *Tesco Supermarkets Ltd v Natrass* [1972] AC 153

and will company²²⁰. Thus, the identification and attribution doctrines limit the criminal liability of the company particularly PMSCs where the personnel carrying arms on the ground would be regarded as mere servants of the company.

This has been the source of much frustration in UK Company law. While the courts have given a more generous interpretation in some cases with much criticism of the identification doctrine²²¹, the issue was resolved in *AG's Reference (No2 of 1999)*²²². The prosecution challenged the Court of Appeal to change the law by asking whether a legal person could be prosecuted in the absence of establishing and identifying guilt on part of a human person. The Court of Appeal confirmed the identification theory and in doing so rejected the aggregation theory which involved taking the fault of a number of individuals. The directing mind and will of the individual who is the embodiment of the company remains the only basis of common law criminal liability so that PMSCs do not have corporate liability for the crimes committed by its individual employees.

However, reform has been suggested in relation to the attribution of liability to the company for gross negligence manslaughter, which could be applicable to the actions of PMSC personnel where operations have not been planned properly for instance and deaths result, as distinct from murder by PMSC individual personnel. The Corporate Manslaughter Bill & Corporate Homicide Bill 2006 was introduced to make it easier to prosecute companies/government bodies when their gross negligence leads to death. According to Section 1 the new offence would apply where a corporation causes death by a gross breach of duty of care where the breach is attributable to a failure in the management of the organisation not resting on identification or attribution. The new offence applies where there has been a breach of duty including in the supply of services (Section 2) and thereby applicable to the supply of private security and military services. This aims to rectify a key defect in the present law that means that organisations can only be convicted of manslaughter if a single individual at the very top of the company is personally liable. The offence will be clearly linked to existing health and safety requirements and if management has a safe system it will not be liable if one individual acted wrongly. The result would be that private military and security companies could face unlimited fines and remediation orders to put things right if they do not have proper health and safety, and operational, procedures. However, the Bill has yet to become law and so the current legal position remains one of the 'directing mind and will'. If the Bill did come into force prosecutions against individuals would continue to be possible for existing offences - including manslaughter/culpable homicide and health and safety offences - where individuals are personally at fault.

3.9 The Application of UK Commercial Law²²³

²²⁰ *Bolton Engineering v Graham* [1957] 1 QB 159

²²¹ Lord Hoffman in *Re Ready Mixed Concrete Ltd* [1995] 1 AC 456, *Ajou v Dollar Land Holding Plc* [1994] 2 All ER 685, *Meridian Global Funds Asia Ltd v Securities Commission* [1995] WLR 413

²²² *AG's Reference (No2 of 1999)* [2000] 3 All ER 187

²²³ Contribution by Alexandra Bohm, University of Sheffield

English courts generally uphold the parties' contractual choice of law.²²⁴ In the absence of an express choice, the governing law will be that with which the contract is most closely connected.²²⁵ It is assumed that in contracts between the MOD and UK PMSCs, the choice of law is English law, however the contents of the MOD contracts, including choice of law, are not known. The English courts will also uphold the parties' choice of forum for dispute resolution. If the parties' contract provides for arbitration of disputes, the courts will order that any litigation proceedings be stayed pending the outcome of the arbitration.²²⁶

Contracts may be discharged by frustration. This doctrine operates to set aside a contract if an event occurs outside the control of either party which renders performance impossible.²²⁷ Destruction of the subject matter of the contract is likely to render the contract frustrated,²²⁸ unless one party agrees in the contract to bear the risk of destruction of the property. It is easy to imagine PMSCs being contracted to guard property at risk of destruction, but it is not known whether the FCO/MOD-PMSC contracts contain an allocation of risk for this event, so that the doctrine of frustration would not apply.

No-fault termination means that, other than as provided for in the contract, parties can terminate a contract upon reasonable notice. Factors influencing what is a 'reasonable' period include the length of the existing relationship between the parties, any notice requirements up the contractual chain (if the FCO/MOD or other PMSC employer has any upward contracts, for example with the US or Iraqi governments), the importance to the smaller party of the contract and the length of any contractual notice provisions for termination for breach.²²⁹

Repudiatory breach signifies that, other than as provided for in the contract, a party can terminate the contract if the other party commits a breach of a fundamental term of the contract or breach where the consequences are such that they substantially deprive the innocent party of the entire benefit intended by the contract. If such a breach occurs, the innocent party may either accept the repudiation, in which case the contract is ended, or it can affirm the contract and demand performance by the other party.

Under English law, there is no vicarious liability of an employer for acts of independent contractors (unlike acts of employees).

3.10 The Application of UK Employment and Health and Safety Law²³⁰

English employment law is derived from a variety of sources, including express contractual terms agreed between employer and employee, statutory protection of employees, and terms implied by common law. Little is known about the express terms agreed between PMSCs and

²²⁴ Article 3, 1980 Rome Convention on The Law Applicable To Contractual Obligations. This was adopted into English law by s 2(1) of the Contracts (Applicable Law) Act 1990

²²⁵ Article 4 of the Rome Convention provides that the place with which the country is most closely connected will be the place of incorporation of the party responsible for characteristic performance of the contract (e.g. provision of goods or services)

²²⁶ Section 9, Arbitration Act 1996

²²⁷ *Krell v Henry* [1903] 2 KB 740

²²⁸ *Taylor v Caldwell* (1863) 3 B&S 826

²²⁹ *Concourse initiatives Ltd v Maiden Outdoor Advertising Ltd* [2005] EWHC 2995

²³⁰ Contribution by Alexandra Bohm, University of Sheffield

their employees. With regard to implied terms, the following may be relevant to PMSCs operating within conflict zones:

- 1) Employers must not take any action which might undermine the relationship of trust and confidence with their employees;²³¹
- 2) Employees must serve their employer honestly and faithfully²³² and work with reasonable care²³³; and
- 3) Employees must obey lawful and reasonable orders²³⁴ and must disclose misconduct to their employer (if part of their role involves seeing that the business is conducted honestly - for example a manager).²³⁵

Employers are vicariously liable for negligent acts or omissions of their employees during the course of employment. They are therefore responsible for damage caused to third parties by their employees, unless the employee was not acting within the course of business at the time.²³⁶

The extent to which English employment and health and safety law is applicable to PMSCs carrying out work in conflict zones depends on the territorial scope of the particular statute:

- 1) The Employment Rights Act 1996 is limited in scope to Great Britain, although employees whose base is in Great Britain but who often work abroad can still claim unfair dismissal.²³⁷
- 2) The Health and Safety at Work Act 1974, which requires an employer to take reasonable care of the health and safety of employees, and to take reasonable steps to provide a safe workplace, is limited in territorial scope to Great Britain.²³⁸
- 3) The terms implied by common law have no territorial limit.

PMSCs may choose to hire self-employed individuals as contractors rather than taking on individuals as employees, as this can give the individual a better position for tax purposes. In this case, the majority of employment rights would not apply to the individual unless it was later found that this person was in fact an employee.

Whether someone is a contractor or employee depends on the facts of each particular situation; the factors used to assess the question include who has control over the individual (e.g. could the individual send a substitute to work instead), provision of benefits and whether the individual is paid for work done or on a monthly basis.

²³¹ *Malik & another v. Bank of Credit and Commerce International SA (in compulsory liquidation)* [1988] AC 20

²³² *Faccenda Chicken Limited v. Fowler* [1986] 3 WLR 288; *Attorney General v. Blake* [1988] 2 WLR 805

²³³ *Harmer v. Cornelius* (1858) 5 CBNS 236

²³⁴ *Peake v. Automotive Products* [1977] IRLR 105; *Gregory v. Ford* [1951] 1 All ER 121; *Walmesley v. Udec Refrigeration Limited* [1972] IRLR 80

²³⁵ *Swain v. West (Butchers) Limited* [1936] 3 All ER 261

²³⁶ *Rose v. Plenty* [1975] 1 WLR 141

²³⁷ *Serco Limited (Respondents) v. Lawson (Appellant), Botham (FC) (Appellant) v. Ministry of Defence (Respondents), Crofts (Respondent) and others v. Veta Limited (Appellants) and others and one other action* [2006] UKHL 3

²³⁸ Section 84(3) Health and Safety at Work Act 1974, the Health and Safety at Work Act (Application outside Great Britain) Order (SI2001/2127) extended the Act's provisions to offshore installations such as oil rigs and pipelines

If the individuals are contractors rather than employees this will have implications for the individuals' potential status as mercenaries, because pay for work done rather than monthly pay might bring their motivation to work within the definition of a mercenary.²³⁹

3.11 The Application of UK Domestic Security Legislation²⁴⁰

The activities of private security companies operating in Britain are directly regulated by a single item of legislation: the *Private Security Industry Act 2001*.²⁴¹ The objective of this legislation, broadly speaking, is to protect the British public from the negligent and unprofessional practices of private security companies by reducing criminality and raising standards within the private security industry. The centrepiece of this legislation is the creation of the Security Industry Authority (SIA) – a non-departmental public body (NDPB) accountable to the Home Secretary which is charged with the responsibility of administering, monitoring and enforcing private security regulation. After a twelve-month period of consultation and institution building, the SIA became operational midway through 2004 and started phasing in regulation from 2005 onwards.

The coverage of the SIA regulatory regime can be defined with reference to both geography and private security sector. In geographical terms, the SIA was initially responsible for regulating private security provision in England and Wales. In June 2006, however, the regulatory regime was extended to Scotland, and during the course of 2009 the regime will be further stretched to cover Northern Ireland. In sector terms, the SIA is responsible for regulating 'contract' private security in the following sectors: security guarding, door supervision (i.e. bouncers), close protection (i.e. bodyguards), cash and valuables in transit, public space surveillance (CCTV), key holding and the immobilisation, restriction and removal of vehicles.²⁴² It is also important to note that in the cases of door supervision and the immobilisation, restriction and removal of vehicles, both contract and in-house providers are regulated.²⁴³ Taken together, then, these seven sectors comprise the 'private security industry' from the perspective of the SIA. This said, the amended version of the *Private Security Industry Act 2001* also allows for the regulation of private investigation services, security consultants and precognition agents (i.e. the interviewing of witnesses in civil and criminal proceedings). At present, however, these three sectors are not actively being regulated.

In order to reduce criminality and raise standards across these seven sectors of the private security industry in Britain, the SIA has two primary regulatory tools. The first is the compulsory licensing of all security staff working within these sectors, from street level operative up to director level. To obtain a license, each of these individuals must initially

²³⁹ Article 1, 1989 Convention against the Recruitment, Use, Financing And Training Of Mercenaries. Note that the definition of mercenary also requires participation in an armed conflict, rather than simply presence in a conflict zone

²⁴⁰ Contribution by Dr Adam White, School of Politics, University of Sheffield

²⁴¹ *Private Security Industry Act 2001* (c.12) (London: HMSO)

²⁴² 'Contract' private security refers to those companies which sell security services to other organisations on a contract-by-contract basis

²⁴³ 'In-house' private security provision refers to those companies which recruit their security staff internally, as opposed to recruiting their staff externally from 'contract' providers

undergo a full criminal records check conducted by the Criminal Records Bureau so as to ensure that he or she qualifies as a 'fit and proper' person. In addition, each of these individuals must also demonstrate a minimum competency requirement, which can be only accomplished by attaining an SIA-approved qualification. Failure to meet either of these two conditions means that the licence will not be awarded, in turn making it illegal for the individual to gain employment in any of the regulated sectors. Licences are renewed every three years and can be revoked or suspended at any point within this period. Working in a licensable role without a valid licence can result in a maximum of six months imprisonment and/or a fine of up to £5,000. The scale and penetration of this licensing system is accurately illustrated by the following statistics, which were released on 6th January 2009. At this time, the SIA had: issued 294,240 valid licences; recognised 502,718 approved qualifications; refused 12,892 licence applications; and revoked 10,727 licences.²⁴⁴ Furthermore, the *SIA Annual Report and Accounts 2007/08* indicates that compliance with the compulsory licensing scheme in the security guarding and door supervisor sectors – which together account for 88 percent of the valid licences issued – stands at approximately 90 percent.²⁴⁵

The second regulatory tool available to the SIA is the Approved Contractor Scheme (ACS). In contrast to the licensing system, the ACS is voluntary (as opposed to compulsory) and targets private security companies (as opposed to individuals working within the industry). This system functions on the basis that companies which successfully meet certain standards of quality and best practice in the services they provide can apply to the SIA for approved contractor status. There are three main incentives for companies to strive for this status: first, the company will be listed on the Register of SIA Approved Contractors, which is publicised by the SIA to a range of security purchasers; second, the company will be given permission to use a special SIA accreditation mark on their publicity materials; and third, the company will be able to legally contract out security staff whose licence applications are being processed (whereas for non-ACS companies it is illegal to contract out security staff before their licence applications have been fully completed). Similar to the licensing scheme, ACS status must be renewed every three years and can be revoked at any point within that period. By 5 January 2009, 576 private security companies had successfully attained approved contractor status. And to date, only 10 private security companies have had their approved contractor status revoked.²⁴⁶

Despite the fact that the SIA regime focuses on the regulation of British private security providers, its regulatory framework does have notable connections to European Union law. In particular, the SIA is compliant with European Directive 2005/36/EU on the Recognition of Professional Qualifications, which came into force on 19th October 2007.²⁴⁷ This means that

²⁴⁴ Security Industry Authority, *Licensing Statistics*, 6th January 2009 – accessed online on 9th January 2009 at: www.the-sia.org.uk/home/licensing/stats_2.htm. It is important to mention that the issuing of 294,240 valid licences does not mean that there is this number of employees legally operating in the private security industry. This is because, with certain exceptions, each licence is limited to a specific sector. An individual working as a security guard, for instance, will require a security guarding licence, whereas an individual working as a vehicle immobiliser will require a vehicle immobiliser license, etc. It is possible, however, to hold more than one licence. This in turn means that an individual working in two sectors may hold two valid licences, one for each sector. Once this is taken into account, the number of employees legally operating in the private security industry will be lower than the number of licences issued.

²⁴⁵ Security Industry Authority, *Annual Report and Accounts 2007/08* (London: HMSO, 2008), p.29

²⁴⁶ Security Industry Authority, *Register of Approved Contractors*, 5th January 2009 – accessed online on 9th January 2009 at: <http://www.the-sia.org.uk/home/acs/roac.htm>

²⁴⁷ *Directive 2005/36/EC of the European Parliament and of the Council on the Recognition of Professional Qualifications* (5th September 2005)

EEA nationals with recognised security qualifications from other EU member states do not have to apply for an SIA licence in order to gain temporary employment in Britain. Instead, they can write a declaration to the SIA confirming their qualifications, which will in turn allow them to operate as a private security operative in Britain for up to one year. This directive thus theoretically facilitates greater labour mobility among private security staff within the European Union – although there are at present no statistics which show how often foreign private security employees have utilised this Directive in order to work in Britain over the past fifteen months.

While SIA does, then, have a nominal regulatory relationship with private security companies and employees based outside of the territorial borders of Britain, its regulatory framework does not cover in any form whatsoever the regulation of international PMSCs and their employees. To be sure, in official circles the SIA has in recent years been speculatively linked with the regulation of PMSCs.²⁴⁸ Yet, contrary to this suggestion, in its official documentation the only instance of the SIA referring to PMSCs relates not to the construction of a system of statutory regulation but rather to the improvement of a system of self-regulation among PMSCs. The *SIA Annual Report and Accounts 2005/06* notes, for instance, that: ‘...we have been involved in discussions with those engaged in the self-regulation of private military (security) companies who operate overseas to support their self-regulation proposals and aspirations’.²⁴⁹ At this time, then, it appears as though the idea of regulating PMSCs using the existing SIA regulatory framework has not progressed very far.

3.12 Summary

The 1870 Foreign Enlistment Act is the only UK legislation directly related to the overseas activity of PMSCs and is largely ineffectual with general agreement that it should be repealed. Provisions of the Export Control Act, and human rights and war crimes legislation can be applied to PMSCs but specific legislation aimed at PMSCs would improve standards and provide clearer lines of accountability. The Human Rights Act 1998 and the International Criminal Court Act 2001 have relevance, but have limitations of both jurisdiction and substance. The application of military law with the new Armed Forces Act 2006 raises interesting questions for PMSCs in the UK but the ramifications of this piece of legislation are as yet unclear. Although the Private Security Industry Act of 2001 regulates the industry within the UK (by virtue of s.26), by providing for a licensing and approvals Authority for activities such as guarding, door supervision, and security consultancy, there is no legislation directly applicable to the overseas activities of PMSCs.

CONCLUSION

There is little regulation of the private military and security industry in the UK despite the widening scope of application of PMSCs and increasing reliance on the industry by the UK Government. Industry efforts at self-regulation have made a start at standard setting but it is generally considered among the industry and political groups that regulation is absolutely necessary. The recent FCO Public Consultation Document endorses the self-regulatory approach in the UK. Essentially, the proposal includes national and international codes of

²⁴⁸ See for instance: HC 922 (2001-02) *Ninth Report of the House Of Commons Defence Committee: Private Military Companies* (London: HMSO, 2002), p.Ev62 and pp. Ev83-84

²⁴⁹ Security Industry Authority, *Annual Report and Accounts 2005/06* (London: HMSO, 2007), p.44

conduct with enforcement by a disciplinary committee established by the industry at national level and an international secretariat at international level. In view of the weaknesses of the respective enforcement mechanisms, it is suggested that the hybrid approach should be supplemented with national legislation to ensure the accountability of PMSCs. The proposal is likely to fuel frustration at the lack of national progress with regards to establishing a proper legal framework for PMSCs. The benefits of a European approach are beginning to be appreciated in the debate, as there may be some progress to be made in suggesting European legislation to overcome problems of enforcement among the European States. European legislation which provides a consistent regulatory framework across the member states will make it more difficult for PMSCs to relocate to a Member State with a less arduous national regime.

Nevertheless, this report offers commentary of the useful debate on the issues that legislation should address and the inherent difficulties of such a task. Any regulation should take into account the pros and cons of the different regulatory regimes identified in parliamentary debate. In particular future regulation must give careful consideration to the definitional problems, since choosing the right definitions will be a major challenge any regulatory regime and should be free of political influence.

This report indicates that the only existing UK legislation, the 1870 Foreign Enlistment Act, is largely ineffectual. The Act should be repealed with specific legislation to regulate PMSCs to strengthen the application of the relevant provisions of the Export Control Act, and human rights and war crimes legislation. The application of domestic security law and the application of military law with the new Armed Forces Act 2006 raise interesting questions for PMSCs in the UK. The FCO proposal in its Public Consultation document fails to provide a satisfactory legal framework for the activities of PMSCs.

The definitional problems faced in the UN context (where the focus has traditionally been on mercenaries) should be acknowledged in the drafting process of European legislation. Loopholes and insignificant penalties have undermined the effectiveness of the US and South African regimes and contrasting opinions on the value of each approach draws further attention to the difficulties of reaching agreement on the way forward. It is necessary to consider the UN, US and South African approaches with and further amendments in mind to produce legislation more suitable to the industry as it develops. The different models of regulation from the heavily regulatory regime of South Africa, to the licensing regimes of the US and the laissez faire approach of the UK should be drawn upon in the search for appropriate regulation of the private military and security industry. A European approach which takes into account these difficulties while pertaining to the minimum standards contained therein will reduce relocation of PMSCs, encourage compliance with the legislation and outlaw disreputable companies.