Proceedings of the Bruges Colloquium

Private Military/Security Companies Operating in Situations of Armed Conflict

7th Bruges Colloquium
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Actes du Colloque de Bruges

Compagnies privées de sécurité opérant en situations de conflit armé

7ème Colloque de Bruges
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SPECIAL EDITION

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Délégation du CICR à Bruxelles

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ALLOCUTION DE BIENVENUE

Prof. Dr. Paul Demaret
Recteur du Collège d'Europe

Accueillant les participants du 7ième Colloque de Bruges, le Recteur Demaret évoque l'excellente coopération qui s'est instaurée depuis plusieurs années déjà entre le Comité international de la Croix Rouge et le Collège d'Europe : celle-ci se manifeste, avec succès, à travers l'organisation conjointe, chaque années, d'un Colloque rassemblant à Bruges des experts internationaux autour d'un problème de droit humanitaire international. En outre, et fidèle là aussi à sa vocation d'institut d'éducation, le Collège et le CICR organisent également chaque année un séminaire de droit humanitaire international ouvert aux étudiants du Collège et d'universités du voisinage – tant à Bruges que sur son campus de Natolin.

"OPENING ADDRESS"

Prof. Jacques Forster
Vice-President, International Committee of the Red Cross

Ladies and gentlemen,

It is a pleasure and an honour for me to join Rector Demaret in welcoming you here today and in opening this year's Colloquium.

In 1999, the International Committee of the Red Cross, the ICRC, had approached the College of Europe to suggest an academic cooperation in the field of International Humanitarian Law, or IHL. The College, who responded with enthusiasm, truly was visionary in the sense that it was not so obvious, seven years ago, that IHL would take such an importance for the European Union on the one hand, and that NATO would become so operational in conflict scenes on the other hand.

The ICRC greatly values the rich collaboration it has built with the College of Europe, a prestigious academic institution involved in high level teaching and researching in matters that concern Europe in the broadest sense of the term. One month ago, the College opened a new department of studies on EU International Relations and Diplomacy, an area where International Humanitarian Law becomes increasingly important both because of developments in the world and because of the evolution of European Union policies. I would recall in this respect the unique and extremely important instrument the EU adopted in December last year, namely the 'EU Guidelines on Improving Compliance with IHL'; a topic which was discussed here, during the 4th Bruges Colloquium in 2003.

Besides the Colloquium, the College of Europe and the ICRC are also proud to offer, with the support of the Swiss Federal Department of Foreign Affairs, a seminar on International Humanitarian Law for students of the College of Europe, but also of other universities of the region that offer a post-graduate programme in European studies. Such seminars have been already organized three times in Bruges, and will be organized this academic year on both campuses of the College of Europe, here in Bruges and for the first time also in Natolin (Poland).

One would think it would be a challenge to find topics for an annual conference that are both of immediate operational interest and also compelling at a more theoretical level – but this does not appear to be a problem for us. We have ranged from discussing current challenges to IHL in the year 2000, to this year's discussion of privatisation of warfare. In between, we

have addressed the impact of IHL on security and defence policies, the relevance of IHL for non-state actors, the balance between the need for justice and the requirements for peace and security. Last year, the topic was the law of occupation. As the Chinese say, we are truly living in interesting times.

I am also delighted to note that year after year we have the chance to welcome outstanding speakers and participants to the Colloquium. The Bruges Colloquium has now certainly become a tradition and has gained the reputation of a high level academic event.

Over the last decade and a half, functions traditionally performed by states' security or military apparatuses have increasingly been contracted out to private military/security companies ("PMCs/PSCs"). Whereas the bulk – in dollar-terms at least – of these contracts used to relate to logistical or administrative support tasks, the past years have witnessed a significant growth in the involvement of these companies in security and military functions in situations of armed conflict. This involvement goes from the protection of personnel, to that of military assets, the staffing of check-posts, the training and advising of armed and security forces, the maintenance of weapons systems, the interrogation of suspects or prisoners, the collection of intelligence and, in some cases, even participation in combat operations.

It is not just states that hire PMCs/PSCs. These companies also provide a variety of services to private corporations, international and regional inter-governmental organisations as well as non-governmental organisations, often in situations of armed conflict, including occupation.

The presence of these relatively new actors in significant numbers has given rise to considerable discussion, not only in the media but also among a variety of other actors, including armed forces, security forces and humanitarian organisations, as well in academic circles. PMCs/PSCs raise a multitude of legal, political and practical questions: what are the rights and obligations of PMCs/PSCs under international law and what are those of the states that hire them or in whose territory they operate? Who has the responsibility to ensure sanctions are taken in case of violations of IHL? What are the consequences of this apparent erosion of states' monopoly of force, which is the foundation of the social contract? What limits, if any, should be set on the outsourcing of governmental activities in this sphere? How can PMCs/PSCs be accommodated within the control and command structures of armed forces? What are the costs and benefits of outsourcing military tasks? Can humanitarian actors ever have resort to private security? How is the industry best regulated – at the international level, the national level or by self-regulation?

In the two days ahead of us we can only attempt to address a small number of these questions – principally those of a legal nature – but we have the benefit of panellists and participants from a variety of backgrounds, with immediate practical experience of interacting with PMCs/PSCs.

We should not forget that we are not discussing an abstract or extinct phenomenon but a sector of activity that is very much alive and kicking today. Accordingly, we considered it essential to include representatives of the industry in our discussions, who will present their views on these and other issues.

I would like to conclude with a few words on the ICRC's interaction with PMCs/PSCs. As is always the case, we take an extremely pragmatic approach and deal with them as we do with any other arms carrier in a situation of armed conflict. The increased presence of these relatively new actors close to the heart of military operations in situations of armed conflict brings them in contact with persons protected by IHL. It is thus natural – not to say mandatory – that the ICRC initiates a dialogue with PMCs/PSCs and with states with responsibilities for their operations. The aim of the dialogue is twofold: first to promote compliance with international humanitarian law by ensuring that PMCs/PSCs as well as relevant states are aware of their obligations. This is a point I wish to highlight. While it is necessary to reflect upon and recall the responsibilities of companies and of their staff, this should not distract attention from the fact that states have concurrent responsibilities. Indeed, a number of states may have responsibilities and a role to play in relation to a particular contract: the state that is hiring the company, the state where the company is operating as well as its state of nationality.

The second objective of the ICRC's dialogue with companies is much more practical and operational. As PMCs/PSCs are increasingly present in countries where the ICRC is working, we wish to ensure that they are aware of and understand the ICRC's mandate and its activities for persons affected by armed conflict.

At an internal level we are reviewing our contractual arrangements for hiring private security in the field. Although the ICRC and, indeed, all components of the International Red Cross and Red Crescent Movement are precluded from resorting to armed protection, there are numerous countries in which we hire private guards to provide unarmed security.

One of our key messages to states and other actors that hire PMCs/PSCs is that they should require the companies to train their staff in international humanitarian law and human rights, provide them with clear standard operating procedures that comply with these norms, and establish internal mechanisms to investigate allegations of wrong-doing. Respect for these

minimum requirements is also important for unarmed security providers, both as a matter of legal obligations, as they are likely to come into contact with the civilian population as well as a matter of perception of the ICRC by those populations. It because we want to make sure that we practice what we preach that we are currently reviewing our own arrangements with security companies.

Finally, at the normative level, the ICRC is pleased to be closely cooperating with the Swiss government in an intergovernmental initiative launched at the beginning of this year that aims to promote respect for international humanitarian law and human rights in relation to PMCs/PSCs operating in situations of armed conflict. We are lucky to have among us one of the persons responsible for this project at the Swiss Federal Department of Foreign Affairs who will present the initiative in the "ways forward" panel tomorrow.

Ladies and gentlemen,

We have a full agenda ahead of us, and like you, I am impatient to hear our experts and your contributions from the floor. I therefore re-iterate my warmest welcome and handover the floor to the first panel.

Session 1
Setting the Scene

Chair person: **Philip Spoerri,** *ICRC, Director for International Law*

"PRIVATE MILITARY AND SECURITY COMPANIES – AN ANALYTICAL OVERVIEW"

Caroline Holmqvist
Stockholm International Peace Research Institute

La question de l'utilisation des compagnies privées militaires et de sécurité dans les situations post-conflictuelles et de reconstruction de la paix s'est progressivement insérée dans les études académiques, qui après avoir débattu de leur existence même, se concentrent désormais sur l'analyse de leurs spécificités. Il est globalement entendu qu'une définition inclusive du terme « compagnie privée militaire et de sécurité » fait référence à une entreprise privée à but lucratif, fournissant des services traditionnellement associés aux aspects militaires et de sécurité d'un État.

Une typologie des compagnies privées de sécurité pourra donc s'attarder sur les types de services offerts par ces dernières, avec, à l'extrémité du spectre, une participation directe à des opérations de combat. La plupart des services s'intègrent toutefois dans une logique de support opérationnel, que ce soit de maintenance des systèmes d'armement, de logistique ou de sécurisation du transport. Il s'agit également des activités de formation à des forces militaires, le plus souvent à la demande des forces occupantes (formations des troupes armées libériennes par une compagnie sous contrat avec le gouvernement américain). Malgré sa valeur politique, la distinction souvent opérée entre types de services offensifs et défensifs apparaît de plus en plus inappropriée puisque la ligne de démarcation entre ces deux activités reste floue. Une simple activité de formation peut en effet avoir un impact militaire ou stratégique parfois conséquent. La protection du personnel et/ou de bâtiments officiel, qu'ils soient militaires ou civils, occupe toutefois une place prépondérante dans le secteur de la sécurité privée. L'utilisation de gardes, le plus souvent armés, pour ce genre de services soulève naturellement la question de l'usage de la force par ces derniers et de leur participation directe aux hostilités. La fluidité et l'imbrication des services proposés par ces compagnies rendent leur catégorisation difficile et problématique, que ce soit d'un point de vue académique ou juridique.

Finalement, le développement des compagnies privées militaires et de sécurité se doit de relever les défis de la légitimité, de la responsabilité et de la pérennité de leur politique de sécurité,

notamment vis-à-vis du monopole exercé par l'État sur l'utilisation légitime de la violence. Une carence en terme de responsabilité et de légitimité pose naturellement la question de la nature du droit, mais aussi des termes liant les contractants.

The purpose of my presentation is to give an overview of the types of services provided by contemporary private military and security companies, and their impact in various different strategic contexts. Broadly, the research that I have carried out points to three main challenges that stem from the use of private military and security companies: challenges of accountability, legitimacy and long-term sustainability of security policy – all bound up with the current lack of regulation of the international industry.

The struggle amongst analysts to adequately define the terms 'private security' and 'private military' is reflective of the industry's multifaceted appearance. Essentially, we are talking about private, for-profit, enterprises that provide services traditionally associated with national militaries or other parts of the state security sector such as police or intelligence agencies. (I will use the term 'private security company' (PSC) as the collective term but in general it makes more sense to define companies by what they do rather than what they are.)

There is a distinct lack of empirical data on the private provision of security and military services, and most research is based on secondary sources and anecdotal evidence. This is due in part to definitional conundrums, and in part to the industry's culture of confidentiality. Moreover, the industry's global reach makes data-gathering difficult, especially as companies are often registered in one country, operate in another and employ staff from a whole range of third countries. Moreover, sub-contracting, joint ventures, spin-off firms and firms that only land one contract and then disband makes for a fluid market.

What is clear however is that the industry is growing and has done so tremendously over the past two decades: one estimate compares figures from the 1991 Gulf War, when the ratio of private contractors to regular forces was about 1 to 50 to the situation in Iraq in 2004 when the ratio allegedly reached 1:10. While it is true that the interventions in Iraq and Afghanistan provided significant boost to the industry (and some even talk of an Iraq bubble), they have also highlighted a trend that was already well underway, notably in Africa and other parts of the developing world.

Various types of services, various types of clients

PSCs provide a wide range of services, with varying proximity to the military 'frontline'. The provision of direct combat operations of course represents the extreme end of the spectrum

– as provided by the South African firm Executive Outcomes and the UK firm Sandline International (best known for operations in Sierra Leone and Angola in the mid to late 1990s). These companies are both defunct today and the provision of such services has in fact been rare. Opinion within the industry at the moment tends very much toward the idea that the days of PSCs being hired explicitly for direct combat are over, but this remains an open question and will likely be determined by the relative demand for such services amongst current and future clients (as well as the success or not of regulation).

Other services that are provided close to the frontline include operational support, both technical support and maintenance of key weapons systems. Such services are crucial for the success of any operation, and favoured targets for outsourcing because they are seen to allow governments to streamline their own organisation and focus on 'core' tasks. What should legitimately be regarded 'core' tasks is debatable however, as we shall see.

The training of foreign militaries and police accounts for a considerable share of the industry, often within donor-sponsored security sector reform (SSR) programmes. According to recent formulations of SSR goals, training and reform of the state security apparatus from being weak, ineffective or corrupt to higher standards of efficiency, transparency and democratic accountability has been made a development goal in its own right. Examples of when SSR has been left in the hands of PSCs are Iraq and Afghanistan, and in those locations the importance and magnitude of that task is particularly clear. Liberia, where the US company DynCorp has been given an infinite-term contract with the U.S. government to recruit and train the new armed forces is perhaps a less high profile case, but given the region's legacy of conflict, hardly a less important one.

Attempts are often made to differentiate between 'defensive' and 'offensive' services, and the terminology continues to be used, much due to its obvious political value. Not only does this distinction not hold up when tested in practice; it also tells us little about the strategic value or impact of a particular task. Military or strategic impact can be significant also for services that are carried out in a classroom setting. The training provided by the US company MPRI training to the Croatian army in 1995 is often cited in this respect, and arguably had a decisive impact on that conflict. The defensive/offensive divide is even more misleading given that the circumstances that a company is contracted to act within may be wrongly assessed, or change rapidly.

Finally, the use of armed guards for the protection of personnel or sites constitutes a central pillar in the industry. For example, UK company Armor Group protects UK Foreign Office and DFID officials in Afghanistan. Numerous cases in Iraq of armed guards facing sustained attacks

by insurgents show the difficulty of adequately defining the parameters of a task beforehand, and the difference of carrying out armed protection in the context of war rather than as a defence against criminal attacks in an otherwise more peaceful environment. This has important implications as regards mandates and rules of engagement of private contractors.

Thus we can see that the categorisation of services is complex. Constructing stable definitions of PSC activity is not merely a complicated academic exercise however; it has clear implications for regulation and the applicability of e.g. international humanitarian law.

A frequent misconception is that it is only governments that contract international PSCs. The industry has a wide range of clients, which besides national governments (and different departments therein), includes intergovernmental organisations such as the UN, the African Union, the EU, NGOs and multinational corporations (MNCs). The UN contracts in most part for logistic support in the context of peace operations, but also discrete tasks such as de-mining. The African Union's mission in Darfur has been supported by two US PSCs, Pacific Architects and Engineeering (PA&E) and Medical Support Solutions (MSS), as was the ECOWAS mission in Liberia in 1993. Neither organisation has a centrally declared policy on the use of international PSCs.

International NGOs (often in the humanitarian sector) frequently contract PSCs for the protection of their staff against attacks or kidnappings. This provides another entry point for the private security industry, but one that brings its own difficulties given that NGOs are no more politically mandated actors than PSCs, and are often careful to uphold a position of neutrality vis-à-vis civilian populations. The case of MNCs, often in the extractive sector, employing private guards raises yet other questions – particularly in areas where the control over natural resources played a central role in causing the conflict in the first place.

Challenges

To return to the main themes that I mentioned at the outset (the challenges of accountability, legitimacy and long-term sustainability of security policy); these relate mainly to conventional assumptions of the state possessing a monopoly on the legitimate use of force. There are significant variations on this theme depending on the context in which the PSC operates: in some instances the use of PSCs is related to state weakness and a lack of functioning state institutions, whereas in other contexts strong states may deliberately choose to use PSCs because they view this as a convenient way of boosting their regular forces and making use of available tools.

The lack of accountability is perhaps the most fundamental challenge posed by the industry's operation, and it relates both to obligations under law and under terms of contract. I will

not go too much into the issue of accountability of PSCs under international law: suffice to say here that IHL applies to *individuals* (detailing their rights and obligations under IHL) but does not assess the lawfulness or otherwise of private security companies as such. There is an important but general point to be made as regards legal accountability: the lack of enforcement. Given that the industry operates in a truly global fashion, oversight and enforcement of applicable law is notoriously difficult. This is something important to bear in mind when discussing further possible measures for regulation. The problem of ensuring accountability under contract points to a slightly different dimension: even if mandates and rules of engagement are stated more clearly than is the present practice, it is important to recognise that PSCs have business interests that also determine their action, and may defect from a task that no longer makes financial sense.

On the question of legitimacy, this essentially boils down to the fact that PSCs are commercial rather than political entities, governed in the first instance by commercial considerations rather than political objectives, yet they carry out inherently political tasks. This may be tempered by close relationships between the company and a contracting government; however, this is a highly imperfect check, and in cases where the contracted PSC does not enjoy such a close relation with the contracting party, this measure of informal control is obviously lessened.

Regulating *companies'* behaviour only addresses part of the story however; also clients contracting PSCs need to take responsibility for doing so. Implementation of security policy can never be entirely free from political interpretation – and for political actors it is imperative to recognise that the use of a private actor to carry out a sensitive task may entail a loss of control. This is clear when looking at e.g. foreign military and police training; traditionally the fruit of a political relationship between states – a relationship that PSCs (by nature) do not have the prerogative to establish.

The question of apolitical actors carrying out politically sensitive tasks also raises wider questions about how the private sector is used, how it relates to the institutions, both security sector institutions and judicial ditto, in the state where it is operating. Warnings have been raised about security provision becoming a project for outsiders in weak states, and when PSCs are used to construct the incipient institutions of a weak state, an inherent tension exists between the private sector acting *at the expense of* building up functioning state institutions rather than *in support of* those institutions.

For the same reasons ensuring the long-term sustainability of policy implementation, it is problematic when PSCs are used. Moreover, very practical concerns still pose a problem; there is still a critical problem within the industry of inadequate vetting and training of personnel,

in the worst cases including past offenders having been hired by PSCs. Beyond the problem of individual transgressors there is also a practical lack of understanding of each others' roles between regular militaries and the private security industry. Weak communication and confusion over identification of PSC personnel in common theatres (such as Iraq and Afghanistan) has even led to exchange of fire between regular forces and PSCs.

Conclusion

The international industry for the provision of military and security services is at present largely unregulated. Although there is applicable law, there are considerable problems in ensuring practicable control over the industry. Much work remains to be done in this area, by both individual states exporting private military and security services , as well as international organisations such as the UN, the African Union or the European Union. In addition, there is a need to ensure that the use of PSCs by international non-state clients (NGOs and MNCs) is adequately controlled and monitored. Regulation, if it is going to succeed, will require an international dimension, where national and regional measures are complemented by self-regulation on the part of the industry and its non-state clients.

In this effort, it is important to recognise that one of the key challenges inherent in regulating the use of PSCs is precisely their political utility; states may not want to bring the industry under higher scrutiny and exigency. There is therefore a particular challenge in the instigation of an international process toward regulation (and this includes bringing in the perspective of receiving states and local populations, not just exporting governments). Efforts are also needed to systematise information about – and thereby control over – the industry. Whatever one might think of the industry and its operation, it is clear that not addressing the question for fear of legitimising PSC activity is counter-productive. Barriers to dialogue are beginning to break down, which is an important step towards a more constructive debate on regulation.

My final point is that while some challenges can be addressed by better regulation and control, others cannot. We should be realistic about the fact that the use of PSCs significantly alters the security landscape and even if it were possible to regulate who hires PSCs and where, how they deliver their services (with adequate vetting of personnel, human rights standards and punishment for individual misconduct) and so on, significant losses still may still be incurred when a private company performs services in this sensitive policy area. Such losses may be intangible, such as in the loss of visible authority, or an estrangement from local conditions on the part of state institutions – but this does not make them any less real.

"RAPPORT DU SÉMINAIRE BELGE SUR LES COMPAGNIES PRIVÉES/ MILITAIRES DE SÉCURITÉ"

Colonel Gérard Loriaux
Centre de Droit Militaire et de Droit de la Guerre

The theme of private military/security companies (PMCs/PSCs) has been the object, a few days before the Bruges colloquium, of another colloquium organised by the Belgian Study Centre for Military Law and Law of War, together with the Belgian Ministry for Foreign Affairs, the Belgian Inter-ministerial Commission for Humanitarian Law and the Belgian Red Cross. This colloquium essentially aimed at highlighting the sociological and political aspects of the privatisation of war, leaving aside the juridical aspect for the Bruges event.

One of the main conclusions of this colloquium was the difference between the way PMCs/PSCs present themselves, how they would like to appear and the way they are actually perceived by the public opinion, the media and some NGOs. The companies that were present defended a deontological approach in the fulfilment of their tasks in the field; they ensured their constant respect in the juridical exigencies and a good practice code. Recruiting former mercenaries for instance would seriously jeopardise their credibility and have a profound impact on the number of their contracts. On the other hand, the image of ruthless members of PMCs/PSCs still persists among the public opinion nowadays, very much accustomed to the figure of mercenaries. Needless however to deny the importance of PMCs/PSCs in post-conflict situations, there is today a need for public debate on the question.

Concerning the role of the State, some of the panellists have pointed out the abnormality, for the State itself, to abandon its very rationale to companies driven by a commercial interest. Simplifying the reality in drawing an extreme image of PMCs/PSCs can also be misleading in the sense that they are not necessarily made up of "desperados" and that regular armies are not always a model in the respect of international humanitarian law and human rights law. Yet, the need for peace and security respond to social necessities and not to commercial ones. That is why, within this new partition of security, States have to remain the ultimate control in the privatisation of its competencies.

Le colloque sur le sujet des *"Sociétés privées de sécurité dans des situations de troubles ou de conflits armés"*, les 12 et 13 Octobre à Bruxelles était une organisation conjointe de plusieurs organismes belges intéressés par le phénomène des Compagnies Privées de Sécurité (CPS).[1]

Il est clair que le rapport que je vous présente est mon rapport, influencé par ce que j'ai entendu et compris. Et que cela reflète au moins en partie mes convictions personnelles et mes a priori. Au colloque lui-même les conclusions ont été faites par M. le professeur Eric David, de la Faculté de Droit de l'Université libre de Bruxelles. En les lisant j'ai été étonné, pour ne pas dire effaré par certaines de ses conclusions et j'en suis presque venu à me demander si nous avions assisté au *même* colloque. Peut-être dirait-il la même chose en lisant mes conclusions. Je ferai néanmoins largement usage de son travail. Les personnes intéressées pourront lire son rapport qui paraîtra, ainsi que les autres interventions au colloque, dans la *Revue de Droit Militaire et de Droit de la Guerre*.[2]

Aspects juridiques

Durant notre colloque les aspects traités jetaient sur le sujet un éclairage à connotation surtout sociologique et politique, avec seulement un court aperçu juridique de la question. Nous nous étions mis d'accord avec le CICR pour que ce dernier aspect soit traité plus en profondeur durant le Colloque de Bruges auquel nous participons actuellement. Et comme certains des intervenants de Bruxelles sur les aspects juridiques sont également ici présent pour faire une présentation je ne leur couperai pas l'herbe sous les pieds en vous racontant dès maintenant ce qu'ils comptent vous dire. Je me ferai seulement l'écho de quelques remarques qui ont été formulées à leur sujet.[3]

Des voix se sont élevées pour dénoncer la trop grande prudence des intervenants dans la définition des obligations légales des CPS, que se soit sous le Droit International Humanitaire ou sous les Droits de l'Homme. II existe aussi bien en droit national qu'en droit international des obligations telles que les règles de la neutralité, de la non-intervention, du respect de la souveraineté des Etats, et d'autres, qu'il s'agit de respecter. Et que la question se pose 'de savoir si les CPS, et leurs agents, sont suffisamment informés des droits et obligations des uns

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1 Les organismes participant à l'organisation du colloque sont: le *Centre d'Etude de Droit militaire et de Droit de la Guerre*; le *Service Public Fédéral des Affaires Etrangères, la Commission interministérielle de Droit Humanitaire*; l'*Université libre de Bruxelles*, la *Faculté de droit; la Croix rouge de Belgique* (*Communauté francophone* et *Rode Kruis Vlaanderen*); la *Katholieke Universiteit Leuven*, *Instituut voor internationaal Recht*; l'*International Association for Humanitarian Policy and Conflict Research*.

2 *Revue de Droit Militaire et de Droit de la Guerre*, Volume 46, 2007, revue de la Société Internationale de Droit Militaire et de Droit de la Guerre, Avenue de la Renaissance 30, 1000 Bruxelles.

3 Voir les présentations de Emanuela-Chiara Gillard et de Michael Cottier qui traitent en particulier des aspects juridiques.

et des autres'[4]. L'existence d'un code de conduite comme celui de l'IPOA (International Peace Operations Association)[5] est certes très utile mais pas nécessairement suffisant.

Reste également la problématique et la portée juridique de l'expression *participation directe au combat*, et ceci même pour des firmes n'assurant que du soutien logistique. Je crois d'ailleurs que le CICR se penche sur la question et nous-mêmes avons programmé une journée d'étude sur le sujet dans le courant de l'année 2007. Laissons donc de côté l'aspect juridique, je vous laisserai le plaisir de découvrir les propos d'Emanuela-Chiara Gillard et de Michael Cottier dont les interventions figurent plus loin dans ce volume.

Présentation et perception des firmes privées de sécurité

Une chose qui m'a beaucoup frappé est la grande différence existant entre la manière dont se présentent les CPS, ou la manière dont elles veulent être perçues, ou dont certaines d'entre elles voudraient être perçues, et la manière dont l'opinion publique, ou les médias, ou certaines ONG, les perçoivent. Et là on a eu droit à l'exposition des extrêmes.

Les firmes présentes à notre colloque[6] se sont présentées comme des firmes sérieuses, honorables, au service du droit et de la paix, offrant aux Etats, aux corporations, aux organisations internationales, ou autres ONG, des capacités et des services que ces organismes ne sont pas en mesure ou n'ont pas la volonté d'assurer eux-mêmes. La panoplie des capacités offertes par les PSC est pratiquement illimitée et s'étend de la fourniture de souliers et le transport de nourriture au profit de militaires ou de réfugiés, à la création d'une zone sécurisée au profit de corporations, d'organismes étatiques (comme des ambassades) ou même d'ONG. Et ceci en respectant toutes les exigences juridiques d'application, en respectant aussi un code de conduite analogue à celui établi par le CICR pour les organisations humanitaires. Les firmes de réputation sérieuses font de plus partie d'organisations professionnelles qui ne tolèrent d'aucune façon des comportements délictueux de la part de leurs membres. Ils ne peuvent pas, d'après leurs dires, se permettre la moindre incartade. Le recrutement d'anciens mercenaires par exemple leur ferait perdre la majorité de leurs contrats du jour au lendemain. Ils se plaignent cependant que quand ils réagissent à certaines exactions de la part de leurs membres en les renvoyant et en les remettant aux autorités judiciaires de leurs pays, celles-ci ne pour-

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4 Conclusions générales, Professeur Eric David in *Revue de Droit Militaire et de Droit de la Guerre*, Volume 46, 2007.

5 International Peace Operations Association, 1900 L St, NW, Suite 320, Washington DC, 20036 USA. Website: www.ipoaonline.org

6 Les firmes présentes étaient :
- Erinys International, United Kingdom, www.erinysinternational.com
- Secopex, France, www.secopex.com
- ArmorGroup International, United Kingdom, www.armorgroup.com

suivent pas. Ils se plaignent par exemple que dans le cas d'Abu Ghraib les poursuites se soient limitées au personnel militaire subalterne et que ni les autorités militaires ou politiques, ni les interrogateurs provenant de firmes privées, n'aient été poursuivis.
Ils se présentent donc comme plus blanc que neige.

La question de la perception fut introduite par P. Gassmann avec un petit film que je qualifierais de représentatif de l'opinion publique ou des médias, montrant des hommes en tenues quasi militaires, sur des véhicules super armés, jouant aux rambo's, tirant des coups de feux de tous côtés, terrorisant quiconque les rencontrait. Son analyse, un peu plus mesurée et fondée que le film, ainsi que celle de K. Carlier de Handicap international (qui lui était beaucoup plus critique) montrait néanmoins l'existence d'une perception peu positive de ces CPS, certainement dans le monde des ONG et dans l'opinion publique. En somme, des aventuriers profitant d'une situation peu sécurisée pour se faire du fric, en deux mots: des mercenaires.

Que choisir entre ces deux versions?
S'agit-il uniquement d'une question de perception basée sur des faits anecdotiques ou s'agit-il d'a priori ataviques et d'une incompatibilité presque philosophique entre deux mondes? Existe-t-il une multiplicité et une diversité de firmes donnant raison à chacun et suffirait-il d'éliminer l'ivraie du bon grain? (un peu d'ailleurs comme avec les ONG). Etant ancien militaire, il me semble reconnaître parfois des discussions homériques entre le rôle des ONG et les militaires. Suffirait-il d'un dialogue plus poussé et d'une connaissance mutuelle plus profonde pour éliminer ces malentendus? Cela ne ferait certainement pas de mal, mais n'éliminerait pas le problème s'il y a.

Et reste dans ce cadre-ci la question du mercenariat. Pas vraiment en rapport à la définition officielle des Protocoles additionnels aux Conventions de Genève de 1977 ou à celle de la Convention des Nations Unies de 89[7], mais par rapport à une définition plus sentimentale et plus floue qui vit dans le public. Et donc la demande d'une définition des actions que l'on estime admissibles ou pas, d'un cadre juridique dans lequel pourraient se dérouler les activités des PSC.

'Ainsi que P. Gassmann l'a observé, aujourd'hui la privatisation touche un nombre croissant de secteurs traditionnellement confiés au service public: l'enseignement, les transports, les communications, la poste; alors, pourquoi pas la défense, la sécurité et les activités connexes à celles-ci?' D'où la nécessité et l'urgence d'un débat public sur le sujet. (S. Maki)

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7 Convention internationale contre le recrutement, l'utilisation, le financement et l'entraînement de mercenaires, New York, 4 Décembre 1989

Utilité et succès des CPS

On ne peut plus nier l'importance des CPS dans les situations post-conflictuelles et de reconstruction de la paix. Leur clientèle est des plus variée, tout le monde y fait appel. D'où vient ce succès ? Le professeur E. David a noté plus d'une page entière de raisons dans son rapport. Je ne peux les énumérer toutes. Allant de la carence des états dans des pays en situation sécuritaire défaillante, d'une disponibilité et d'une souplesse de compétences et de services variés, d'une sensibilité de l'opinion publique moindre en cas de pertes en vies humaines, d'une sous-traitance beaucoup moins onéreuse, ... ceci pour n'en citer que quelques-unes.

Quant à l'utilisation des firmes par les forces armées un représentant de l'OTAN nous fit savoir ne pas faire appel à des firmes pour des missions de sécurité. Par contre il est fait appel à des firmes pour le soutien logistique. Dans ce cas la situation de ces firmes est en principe prise en compte par le biais des SOFA (Statute Of Forces Agreement) négociés avec les pays hôtes et par le biais du contrat passé avec ces firmes.

La Défense belge n'a pas voulu nous faire part de sa position, celle-ci étant néanmoins quasi-identique à celle de l'OTAN.
L'Union Européenne, dans sa branche militaire, prétendit ne jamais vouloir faire appel à des firmes militaires privées, mais dut reconnaître que dans les autres entités de l'UE toute l'aide fournie à des pays en difficulté était sous-traitée à des organismes divers (e. a. à des ONG) ; sous-traitance qui prend d'ailleurs en compte les aspects de protection et de sécurité. Et finalement: quelle est la différence entre une ONG et une CPS ?

La sécurité, rôle de l'Etat?

Reste la question fondamentale du rôle de l'Etat en matière de sécurité et du rôle que peuvent jouer les CPS dans ce domaine. Sont-elles une alternative crédible au rôle de l'Etat ?

Je citerai le Prof E. David dans ses conclusions[8]:
'Il ne s'agit pas d'arbitrer le débat auquel faisait allusion B. Delcourt entre *pragmatiques positifs* ou *fatalistes*, d'un côté, *pessimistes radicaux* de l'autre. On constate toutefois que la sécurité, la paix, la reconstruction, le développement, la lutte contre les menaces de conflits font partie des tâches les plus essentielles de l'Etat ; elles sont, par excellence, la cause et l'objet de la politique au sens le plus noble du terme, c'est-à-dire, la gestion de la cité. N'est-il pas étrange, voire anormal, comme le suggéraient P. Gassmann et K. Carlier, d'abandonner des fonctions étatiques aussi essentielles à des firmes dont le but premier est non le bien-être

8 Conclusions générales, Professeur Eric David in *Revue de Droit Militaire et de Droit de la Guerre*, Volume 46, 2007.

social mais le profit. (...) Ce qui est anormal, ce n'est pas que les CPS poursuivent un objectif commercial, c'est que l'Etat leur abandonne une fonction qui est la raison même de son existence.'

'Certes, il faut éviter les images simplistes: les CPS ne sont pas nécessairement composées de desperados et de «chiens de guerre»; de même, les armées régulières sont loin d'être toujours des modèles de vertu et de respect du droit international humanitaire ou des droits de l'homme. La réalité est plus complexe et ne se réduit pas à des tableaux en blanc et noir.'
'Il demeure que les besoins de la paix et de la sécurité répondent à des nécessités sociales et non à des nécessités commerciales; il y a donc un conflit d'intérêt entre les premières et les secondes. Si la privatisation apparaît, dans certains cas, comme inévitable (J.-J. Roche), encore faut-il qu'elle demeure sous le contrôle ultime de l'Etat.'
(...)
'Certes, les victimes n'ont pas toujours le choix, et si une CPS peut leur sauver la vie, qu'importe le flacon, seul compte le résultat ; mais un résultat qui dépend des lois de l'offre et de la demande n'est pas la panacée (...). Il n'est cependant pas exclu que dans certains cas, les CPS soient une alternative provisoire pour assurer une transition sécuritaire en attendant qu'un Etat en déliquescence se reconstruise.'

Commentaire

Je voudrais ajouter un dernier point.
Un son de cloche qui nous a manqué est celui des pays recevant, ou subissant, les effets de ces firmes de sécurité. Ce n'est qu'à la fin du colloque qu'une délégation du Cameroun se présenta. Arrivés très en retard, et ne s'étant pas fait connaître, ils n'ont pas pu présenter une motion qu'ils ont remise à la fin et dont je vous donne quelques extraits parce qu'ils sont révélateurs d'aspects auxquels nous n'avons pas ou très peu réfléchi".

La Conférence de Bruxelles est porteuse de nombreux enjeux dont certains se révèlent particulièrement importants pour les Etats africains; ceci, pour plusieurs raisons:

- autant en Occident l'Etat semble parfaitement encadrer et maîtriser les activités des sociétés privées et leurs corollaires, autant en Afrique l'explosion de celles-ci coïncide avec un affaiblissement progressif des capacités opérationnelles de l'Etat et son désengagement progressif de ses missions régaliennes en matière de sécurité;
- face à ce qui apparaît comme une incapacité croissante de l'Etat africain à assurer la sécurité des personnes et des biens, la sécurité est devenue un secteur florissant dont les principaux bénéficiaires sont encore les sociétés occidentales de plus en plus sollicitées, voire subies par les Etats africains ;

- à cause des conflits armés ou des guerres civiles auxquelles sont confrontés de nombreux pays africains, la distinction entre sociétés privées de gardiennage et agences de mercenariat est parfois des plus ténues. D'où le rôle important qui est désormais imputé aux compagnies privées de gardiennage, non seulement dans la précarisation de l'ordre public interne, mais également dans l'exacerbation des guerres civiles qui ont cours en Afrique ou la déstabilisation des régimes politiques."[9]
- …

"Ainsi par exemple, le problème crucial de l'emploi et de l'insertion socioprofessionnelle des jeunes diplômés est en partie tributaire de l'érection de l'activité de gardiennage au rang de pourvoyeur primaire d'emploi : des études menées en 2003 ont révélé que le secteur de la sécurité privée était devenu le premier secteur d'emploi privé, avec des centaines de compagnies répertoriées.

De même, une analyse du profil des personnels de nombreuses compagnies opérant sur le territoire camerounais laisse entrevoir une grande perméabilité des effectifs au profit de personnes de nationalités étrangères, parfois issues des armées ou des milices en déroute des pays frontaliers.

Plus préoccupantes encore pour notre pays, les pressions continues émanant des Etats occidentaux dont les compagnies voudraient sous-traiter la sécurité dans nos ports et les aéroports sont un signe patent des multiples influences que le Cameroun devrait prendre en compte dans son approche en matière d'encadrement des activités des compagnies privées de gardiennage." [10]

9 Fiche technique de la délégation Camerounaise à la Conférence sur les compagnies privées de sécurité dans les situations de troubles ou de conflits armés (Bruxelles, 12 et 13 octobre 2006), Ministère de l'Administration Territoriale et de la Décentralisation, Direction des affaires politiques.

10 Boati Isaac Blaise, Préparation de la conférence de Bruxelles sur les compagnies privées de gardiennage en situation de troubles ou de conflits armés (12 - 13 octobre 2006), Fiche analytique

In spite of the mentioned lack of data, do we have any idea as to the origin of these companies? Could we say that it is presently a purely western phenomenon? Would one find such companies in other parts of the world?

Mrs. Holmqvist points out the variety of explanations for why this industry has grown so much and why it has become an international industry. Those explanations mainly range from those emphasizing the end of the cold war and the downsizing of national militaries, creating a recruitment pool of unemployed former military personnel. Also related to the end of the cold war, others emphasise a withdrawal of the super powers form propping up different regimes in different parts of the developing world and therefore leaving a bit of a security vacuum. The engagement of the international community and the emphasis on weak or failing states has also contributed to the rise of these companies in providing services related to the building up of functioning states' institutions. On the domestic vs. international point, there are, of course, many domestic private security companies in areas where international private security companies operate. However, it is important to maintain a distinction on what makes this problem particular and distinct: it is precisely this international realm in which it operates. Domestic private security companies are usually considered to be a matter for that state to control and deal with. The particularity of this phenomenon is that the companies are based in one state and operate in another and employ people from a third, so that gives it a particular characteristic.

Prof. Hampson adds that it is not just a question of outsiders being involved, and thinks one needs to look both at the issue of whether or not these are outsiders and at what they are doing. In this respect, there should not be a difference between a Cameroon security company defending buildings and people without weapons and a UK based company in Cameroon defending people and properties without weapons. It is the interplay between outsiders and what they are doing. Once it gets to the conduct of fighting, to operating predator drones or to the training of armed forces, there are most probably no Cameroonian companies. Therefore, there is an interplay between foreigners and what is actually being done.

Are the countries that hire these firms sufficiently responsible about what kind of firms they are hiring? Does hiring commercial firms to carry out these missions bring evidence that these companies performing that kind of missions in Afghanistan or in Iraq are any less capable or any less responsible? Why would the countries want to hire companies that do not perform their missions properly?

Mrs. Holmqvist presents one counter argument that is often invoked in this respect, being that regular forces do not always behave well and UN peace operations forces have not always behaved well. Are we then comparing the standards of private security companies against the much higher standards that we have for regular forces? On a general level, the problem is when regular forces behave badly we know where to address our complaints. If a UN peace operation force behaves badly in Congo, this would be addressed to the UN responsible commander. That becomes a problem when it comes to private security companies. In the cases where private companies are responsible for misconduct or abuse, the problem of where to address your complaints is bigger. And this becomes even bigger if it is a non state client that has contracted the company in the first place; there is a lack of a political actor to whom we can address these complaints in case of misbehaviour.

What are the implications of the status of forces agreement, of its applicability and the quasi protection from any jurisdiction by a component, being in this case the contractors? Is the non prosecution of private military contractors in Abu Ghraib linked to an escape on a legal basis or on a political will not to prosecute them?

Colonel Loriaux recalls that when a country sends some troops or some armed forces in another country, called a host country, this happens under the umbrella of the Statute of Forces Agreement (SOFA), which is negotiated between the host country and the sending country and which, most of the time, implies some immunity from prosecution in that host country. It also means that the sending country will keep the responsibility of prosecution if offences are made. Part of this SOFA includes provisions for companies that are hired by the sending country. This implies for these formers to benefit also from some kind of immunity against prosecution in the host country. From the part of the company, if they witness misconduct from their people, they send them back, hand them to the authority, let them go and nothing happens. This is a problem, not for these companies, but of the sending government that has to take responsibility for what happens with these companies.

Prof Hampson mentions the last year report from the UN sub-commission on accountability of international personnel in peace support operations, which looks precisely at this sort of issue. Tinkering with SOFAs is not going to solve the problem because if the state is going to have all the responsibilities, including cost, which it would have without using contractors, then they are not going to use contractors. The very fact that they have privatised some of these functions is to achieve certain effects. That is not necessarily the same meaning that there cannot be an obligation to bring proceedings, but one cannot get rounded by treating these people as though they were members of the armed forces. Taking the example of contracting investigators in a situation like Abu Ghraib, under French domestic law for example,

there would have been no problem in bringing criminal proceedings against French citizens. It would not have relied on the contract; it would have been direct criminal responsibility. This is, generally speaking, the rule in all civil law jurisdictions. However, two different problems are raised. It is partly a political will problem but it is also a practical difficulty. All the evidence is in that foreign place which may be in a situation of conflict. Therefore, gathering the evidence to bring the proceedings in France, informing a French prosecutor that one is alleged to have tortured somebody is not going to be straightforward. There is an interplay between the political will problem and the practical problem. As far as common law jurisdictions are concerned, including Canada, the UK, Australia and the United states, generally speaking, criminal courts do not have jurisdiction for acts committed outside national territory. That is why it is essential for them to have martial courts, in order to trial their soldiers for acts committed abroad. The problems vary depending on different sorts of legal systems and it ought to be possible to find some improvements. One will need a variety of different initiatives, not one, in order to deal with the different aspects of the problem.

Session 2
The International Legal Framework

Chair person: **Philip Spoerri,** *ICRC, Director for International Law*

"THE POSITION UNDER INTERNATIONAL HUMANITARIAN LAW"

Emanuela Gillard
International Committee of the Red Cross

Dans la perspective de la définition d'un cadre légal international face au développement des compagnies privées de sécurité, l'implication du Comité international de la Croix-Rouge se décline à deux niveaux. Il s'agit premièrement de faire en sorte que ces compagnies connaissent le mandat et les activités du CICR sur le terrain et deuxièmement, de les sensibiliser par rapport à leurs obligations dans le cadre légal du Droit International Humanitaire (DIH).

L'absence de réglementation des actes des compagnies privées militaires et de sécurité, et de responsabilité face aux violations qu'elles pourraient commettre, ont souvent amené divers observateurs à déclarer l'existence d'un vide juridique autour de leurs activités. En situation de conflit armé, pourtant, le DIH constitue un ensemble de règles auxquelles le personnel de ces compagnies et de toutes autres parties impliquées doit se soumettre.De ce fait, le statut du personnel de ces compagnies soulève de nombreuses interrogations dans ce cadre légal, à savoir principalement leur rôle dans le déroulement éventuel d'hostilités. De ce rôle dépendra la distinction classique entre "combattant" et "civil", leur donnant ou non droit au statut de prisonnier de guerre. Le fait que ces compagnies sont employées par un État ou non aura également son importance, tout comme la nature des activités qu'elles seront chargées d'accomplir. En ce qui concerne ses responsabilités, le personnel des compagnies privées militaires et de sécurité se doit de respecter le DIH et d'assumer une responsabilité criminelle en cas de violation, comme tout un chacun impliqué dans une situation de conflit armé,

Les États se doivent également de faire face à leurs obligations dans le cadre du DIH. Bien que ces derniers ne représentent qu'une minorité parmi les parties contractant des compagnies privées militaires et de sécurité, ils ne peuvent se décharger de leurs obligations en engageant une compagnie afin de réaliser une tâche particulière. Ils doivent

également faire en sorte que les compagnies qu'ils engagent respectent les principes des Conventions de Genève, notamment par la formation, le contrôle, des procédures d'opérations etc. Les États sont donc tenus responsables des violations commises par le personnel des compagnies sous leur direction et leur contrôle. Enfin, les États sont chargés de mener à bien les poursuites judiciaires dans les cas de violation du DIH commises par ces compagnies, qu'ils en soient les employeurs ou non.

Introduction

As Mr Forster said in his opening statement, for some time now the ICRC has been dealing and interacting with private military companies and also with states that have responsibilities for them; and as he pointed out, we have two objectives. The more operational objective that he highlighted is making sure that these companies know who the ICRC is and what our activities in the field are. Secondly, a more legal debate to make sure that everyone is aware of their obligations under International Humanitarian Law (IHL) and it is on this particular dimension that I am going to focus.

As we were reminded, IHL is but one of the relevant bodies of law and this is what we have to keep in mind as many bodies of law will have an influence on the activities the companies may carry out and also on their responsibilities. As ICRC, I am only touching upon IHL which is possibly the easiest part of the equation. In recent years, PMCs have featured widely in the media and there are often statements that there was a vacuum in the law when it comes to their operations; that there was no body that regulates their activities; that there was no form of accountability for any violations they may commit. The ICRC considers that this is not, in fact, accurate. In situations of armed conflicts, there is a body of law that regulates the activities of the staff of private military/security companies and also of the responsibilities that states or other parties may have for any violations they may commit, and that is IHL. This is something very important to bear in mind; we have got to look at things very broadly. Various different actors may have concurrent responsibilities: the staff of companies, the companies themselves and also states, states that hire them but also other states. Once again let us look very broadly in terms both of applicable law and of possible actors with a responsibility. In case of violations of IHL, there are responsibilities – established as well as a matter of law – of the staff of PMCs and also of the states that hire them. Admittedly, practical difficulties have arisen in starting proceedings in respect of violations, but this problem is not specific to PMCs. It is something noticed across the board in starting proceedings for violations of IHL, either against individuals or even more so against states. An area where it is true that there is a very limited body of law at the national level and absolutely nothing at the international level, is the control of the services the companies may provide and the administrative processes they

have to comply with; either in order to be allowed to operate abroad or in order to be allowed to operate in a particular territory. At present, very few states regulate the activities of their companies. For companies registered in their territory and operating abroad, South Africa has got very strict legislation that we might be familiar with. Some other states are regulating by means of their arms exports control legislation, but this is very limited. Equally few have regulation that specifically addresses private military/security companies that wish to operate in their territory. The examples of states that have such specific regulations are Iraq and Sierra Leone.

In general terms, this is a bit the framework in which we are operating. I propose to only touch on two of the issues I have identified: the status of the staff of PMCs and their responsibilities under IHL, and the responsibilities of states that hire the PMCs.

1 The status of the staff of PMCs

When we look at status, it is often said that PMCs do not have a status under international law. This is a rather misleading statement because companies themselves rarely have a status under international law and definitely do not have a status under international humanitarian law either. But this is just because IHL, as a body of international law does not regulate directly the behaviour of companies, nor their status. However, the staff of PMCs do have a status under IHL; the challenge is that there is no single answer that fits all. Their status depends first on their client, i.e. is it a state or is it someone else? Secondly, if their client is in fact a state, what is their relationship with that state? And thirdly, what is the nature of the activities that they are carrying out? It is therefore something that has to be determined on a case by case basis.

However, in IHL we do find criteria for determining the status as well as clear consequent rights and obligations, once we have determined whether particular staff of PMCs falls within a particular category. I do not propose at this stage to say anything about mercenaries because IHL, although it provides a definition of mercenaries, does not in fact prohibit or criminalise resort to mercenaries or being a mercenary. Instead it focuses on status and merely provides that someone falling within the definition of a mercenary, if captured, is not entitled to prisoner of war status.

Much more pertinent for the purposes of IHL and also with far more immediate consequences for the persons involved is the question of whether the staffs of PMCs are combatants or civilians. “Combatant” is really an artificial term for the purposes of IHL, with very clear consequences, and it is not to be confused with the more general term “fighter”, which some of us sometimes think of when they say “combatant”. So, if the staffs of PMC are combatants within

the meaning of IHL, they can be targeted at all time, but if captured are entitled to prisoner of war status. If they are civilians on the other hand, they may not be attacked. However, they lose this protection from attack if they take direct part in hostilities and if captured, are not entitled to prisoner of war status but have other protection under IHL. So, when can the staff of PMCs be considered combatants? Only the members of a state's armed forces are combatants. Therefore at risk of stating the obvious, it is only PMCs that are hired by a state that are likely ever to be considered combatants. Additionally, the staff of PMCs can only be considered members of a state's armed forces if they form part of these forces. Unfortunately, IHL does not lay down criteria for determining whether someone forms part of the armed forces of a state or not. At least, we could say that the mere fact that someone has been hired to provide assistance to a state's armed forces does not make him a member of the armed forces and similarly, the nature of the activities is not determinative of whether or not they are members of the armed forces. So, even though they might be carrying out activities that amount to taking directly part in the hostilities, which means that they can be targeted, I would not say that this amounts to forming part of the armed forces of a state for the purposes of status definition. In any event, a lot of the outsourcing of the activities formerly carried out by the armed forces is intended to reduce the numbers of armed forces and related costs. And it is likely that there are only very few instances in which the staff of PMCs is integrated into the armed forces to the extent necessary for them to be considered as "forming part of the armed forces" and therefore combatants.

There is a small exception to the principle that it is only members of the armed forces of a state are entitled to prisoners of war status if captured. In addition to the members of the armed forces, article IV.4 of the 3rd Geneva Convention covers a category of persons referred to as "civilians accompanying the armed forces". These are persons who accompany the armed forces without actually being members thereof, such as: civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces. Although this list is not exhaustive, one would think that some of the contractors that are hired by states could fall within this; some but not necessarily all. One might think that the list of people is intended to cover persons not taking direct part in the hostilities. So a contractor who is carrying out activities very close to the heart of military operations might not fall within this category. Again, it is unclear, and again I would venture to say that it is likely that only a small number of the staff of PMCs actually hired by a state would fall within this category.

This leaves us with the position that a significant number of the staff of PMCs hired by states plus all the PMCs hired by entities other than states, which include intergovernmental organisations, possibly NGOs, and businesses, are not considered combatants from the point of view

of IHL. If they are not combatants, the only other possible category under IHL is civilians. Normally when I get to this stage of my presentation, the first thing coming to our mind would be: "how could we consider that these PMCs, which we see armed to the teeth in the field, are civilians?" It is just a question of status, and as I said, while civilians must not be targeted, they do lose this protection from attack if they carry out activities that amount to taking direct part in hostilities. Hence, all those people that one sees in the media might not have protection from attack if they carry out activities that amount to taking direct part in hostilities. This leads to the question: what amounts to taking direct part in hostilities?, – a key concept of international humanitarian law, which unfortunately is not defined in any of the Geneva Conventions or other instruments of IHL. This is a problem that exists across the board and again is not specific to PMCs. I do not propose to go through the various possible activities that the staff of PMCs could be carrying out, in order to determine which side of the line they fall on, but I would like to make two points. First, I would like to respond to an argument that is often made, that PMCs are only providing defensive services and therefore are never to be considered of taking direct part in hostilities. This just does not work from the point of view of IHL. IHL does not draw a distinction between offensive or defensive operations. To give you an example: In Iraq, PMCs are often employed to protect military installations, such as barracks and military hardware. These are military objectives, and defending those amounts to taking direct part in hostilities. So the defensive/offensive services distinction does not hold water for the purposes of IHL.

Secondly, even in circumstances where the staff of PMCs might not be taking direct part in hostilities, they often work in close proximity to members of the armed forces and other military objectives. This obviously puts them at risk of being permissive collateral damage in case of attacks.

2 Responsibilities of the staff of PMCs under IHL

Having briefly outlined the rules relating to status, what are the responsibilities of the staff of PMCs under IHL? Regardless of their status – whether they are combatants, whether they are civilians accompanying the armed forces, or whether they are civilians – like anyone in a situation of armed conflict, the staff of PMCs must respect international humanitarian law and may face individual criminal responsibilities for any serious violation of IHL they may commit.

Moving briefly from the staff of PMCs to companies themselves, the latter do not have clear responsibilities under IHL because it is not addressed to companies, but they obviously have an important role to play in promoting respect for IHL by their staff. Which measures can they take in order to ensure respect for IHL by their staff? Steps that the ICRC identified include vetting of staff to ensure that they are not hiring anyone who has been suspected of having committed violation of IHL or serious violations of human rights in the past. Staff of

PMCs should be provided with general training in IHL, as well as situation and task specific training in accordance with the conflict where they are operating and also with the nature of the contract they are performing. We are sometimes told by companies: "we hire staffs that come from the best units; they have been trained in their previous lives". That is good, but it is not sufficient and it is not relevant to their new activities and their new status. The training must be situation specific and task specific: they are no longer members of the armed forces.

Thirdly, the staff of PMCs should be issued with standard operating procedures, rules of engagement that reflect their obligations under IHL. Finally, companies should establish mechanisms for investigating any alleged violation committed by their staff and for ensuring accountability therefore, including if necessary by blowing the whistle themselves and reporting to the relevant prosecuting authorities.

3 Responsibilities of the states hiring PMCs

Let us now move to the responsibilities of states, and that is something that should not be forgotten. There is a tendency to focus just on the companies and on their staff: states also have concurrent responsibilities, and different states have different responsibilities. I only propose to talk about states that hire PMCs at present. However, we have to bear in mind that states do hire PMCs, but contrary to what is often believed, they only account for a rather small share of the contracts. 80 % of contracts are in fact with non state entities. The responsibilities of states hiring PMCs exist in parallel to the responsibilities of the staffs themselves, and are based in general public international law.
Very briefly, there are four principle obligations:

- First, states cannot absolve themselves of their obligations under IHL merely by hiring a company to carry out particular acts. If a state hires a PMC to run a prisoner of war camp, the state nonetheless remains responsible for ensuring that the standards set out in the 3rd Geneva Convention are met;
- Secondly, states are under an obligation to ensure respect for IHL by the PMCs they hire and the steps that they can take in order to ensure these standards are very similar to those that the companies themselves can take: vetting, requirement of training, standard operating procedures and disciplinary proceedings;
- Thirdly, states are responsible for violations of IHL committed by the staff of PMCs that can be attributable to them. These are the acts of their agents or of persons or entities empowered to exercise elements of governmental authorities, or persons acting on the instructions of a state or under its direction and control. It is, however, by no means clear that all the wrongful acts of a PMC hired by a state would in fact lead to the responsibility of the state. So, this is an area that needs further consideration, because

although the automatic reaction might be to think that from the moment you hire a company, you are responsible for everything it does, this is not necessarily the case;

- Finally, states must investigate and, if warranted, prosecute violations of IHL alleged to have been committed by the staff of PMCs. This obligation exists for all states, not just the states that hire PMCs, but obviously they have all the more responsibility if they have hired the PMCs themselves. Although there is this obligation on all states parties to the Geneva Conventions to investigate and prosecute persons suspected of having committed grave breaches of IHL, in practical terms, we have seen very few prosecutions of the staff of PMCs. Why is this the case? Maybe, because they do not violate IHL, but there might also be a variety of practical reasons that have led to this. On occasion, PMCs and their staff are given immunity from local process. That is exactly what happened in Iraq, where, by means of CPA order 17, they were given immunity by the Iraqi court. In other situations, although they might not formally be given immunity, the courts in the countries where the PMCs are operating might not be functioning because of the conflict. In these circumstances, it is left to third states to investigate or to prosecute persons suspected of grave breaches, but again, there may be practical challenges in doing this. A third state might be unwilling to do so for political reasons. There might also be practical reasons for a reluctance to start proceedings, with all the evidence and the witnesses being in the country where the violations are alleged to have occurred. It is therefore difficult in practical terms to bring proceedings extraterritorially. Although we have this very clear responsibility of individuals and this very clear responsibility of states to bring proceedings, in practical terms this has proven to be difficult.

I have identified the responsibilities of the state that hire PMCs, but there are two other key states that have an important role in ensuring respect for IHL by PMCs and their staffs: these are the states where the companies are operating and also, to some extent, the states of nationality of the staffs. I do not propose to go into this now, this being a discussion that we can have later on this Colloquium.

"RESPONSIBILITY IN THE HUMAN RIGHTS FRAMEWORK"

Prof. Françoise Hampson
Essex university

Plusieurs questions préliminaires se posent dans le cadre d'une étude sur les perspectives d'une approche juridique des compagnies privées militaires et de sécurité. Il s'agit avant tout d'être en mesure de clarifier la nature de leurs activités, mais aussi d'identifier si l'État où travaille un employé d'une compagnie est son État d'incorporation ou un autre État. Dans le cadre juridique des droits de l'Homme, la responsabilité de l'État doit être sérieusement mise en perspective puisque ce cadre n'oblige que ceux-ci. Il serait dénué de sens, d'un point de vue juridique, d'affirmer que les compagnies privées aient une responsabilité en matière de droits de l'Homme. L'essentiel dans ce cadre est donc de se concentrer sur ce que font les États face à ces compagnies privées militaires et de sécurité et face à leurs employés.

La responsabilité de l'État sur le territoire duquel une violation présumée des droits de l'Homme a eu lieu, revêt une importance particulière dans le sens que les États ont l'obligation de protéger le droit à la vie dans leur juridiction. Cela concerne aussi bien les actes de ses agents que les actes de tierces parties, comme les compagnies privées militaires et de sécurité. Dans la procédure d'instruction, les circonstances de la violation, de l'usage légitime de la force ou de la proportionnalité de la réponse seront analysées en fonction des standards nationaux et des règles d'engagement. L'obligation de protéger le droit à la vie pour les acteurs non étatiques soulève donc également la responsabilité de l'État dans son rôle de prévention et de répression. Les droits de l'Homme requièrent en effet d'un État qu'il s'engage à mettre en place des mesures dissuasives à l'usage inapproprié de la force, ainsi que des règles adaptées dans ses systèmes de droit pénal et civil.

Se pose également la question de la responsabilité d'un État sur le territoire duquel une compagnie privée militaire et de sécurité est incorporée mais dont les activités de cette dernière sont exercées en dehors de cet État. Dans cette situation, il est clair que l'État en question n'assume pas la responsabilité éventuelle d'une violation des droits de l'Homme par la compagnie dans un État "x", même s'il doit être en mesure de permettre à une personne victime de violations dans cet État d'intenter une poursuite judiciaire devant ses juges nationaux. L'État reste donc clairement responsable du contenu de sa législation.

Une régulation des compagnies privées militaires et de sécurité existe donc dans le cadre des droits de l'Homme. Le rôle et la responsabilité de l'État – sur le territoire duquel une compagnie mène ses activités et, dans une moindre mesure, où une compagnie est incorporée – s'intègrent dans une base légale peu utilisée, mais bel et bien existante.

As we have seen so far, there is an extraordinary range of companies. "Private Security Company" is not a technical term, and the different types of companies need to be kept separate because the law applicable to their activities is likely, in practice, to vary depending on exactly what the company is doing. A second preliminary point is that you always need to consider whether the employees of the company are working in the state of incorporation of the company or in a different state, because again, the legal questions that arise and the probable practical outcomes will vary depending on where they are working, in relations with the state of incorporation. Only when these factual issues have been answered can actually be addressed the implications of the human rights law framework in a particular case, rather than in the abstract. These questions: "what are exactly these people hired to do?" and "where are they doing it?" would arise when considering the application of any international law framework, whether it is IHL, human rights law, or ordinary state responsibility. This serves to emphasise that IHL is part of public international law; it is not some free standing source of legal obligation.

General international law generally determines in what circumstances, or why a state may bear responsibility. It is vital to consider the issue of state responsibility because it has obviously got important ramifications when you are talking about the privatisation of what used to be military functions. One cannot assume, simply because an activity is being carried out by a private company, that a state will not bear responsibility for it. So, you have to turn to the general law on state responsibility to determine in what circumstances, why, or when a state will bear responsibility. You then turn to human rights law to determine for what activities the state bears responsibility. So, one has to separate out the question of: "is there state responsibility?", which is answered by general international law, and "for what is the state responsible?", where you look at humanitarian law and human rights law.

Turning specifically to the human rights law framework, again there is a preliminary issue. You have got to distinguish the application of general human rights law in the particular case of a private military company and its employees and what human rights law has to say specifically about that issue. The first question, "how does existing general human rights law have an impact on private security companies and their employees?" is normally part of treaty law. As it happens, the issue of "how does the human rights framework deal with PMCs and their activities" is not yet part of treaty law but is part of the human rights law framework.

It is important to remember that, in contrast with humanitarian law, human rights law only binds states. Therefore, you cannot say, and it would be legally nonsensical, that a private security company has an obligation under human rights law or that its employees have legal obligations under human rights law. I am therefore going to concentrate on what states should do with regard to private security companies, and separately with their employees. I would start by looking at the obligations of states under general human rights treaty law provisions, namely the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Inter-American Convention on Human Rights and the African Charter.

Let us start by looking at the **responsibility of the state in whose territory the alleged human rights violation has taken place**. States have an obligation to protect the right to life of those in their jurisdiction. In other words, they do not just have a responsibility not to engage themselves in arbitrary killings, but they also have a positive obligation to protect the right to life, that includes an obligation, for example, to maintain security. There is a distinction, under human rights law, between the state's responsibility for the acts of state agents and the state's responsibility with regard to the acts of third parties. First of all, what does the obligation to protect the right of life require, in relation to those who are acting in the name of the state? This may, in certain circumstances, include the employees of companies employed by ministries of defence and possibly even intelligence agencies. So, one will have to use general international law to determine whether a particular individual counts as working in the name of the state. But in that case, what is the human rights law obligation?

Human rights bodies examine separately first the conduct of an operation and, within that framework, they look first at whether, in the circumstances, it was justified to resort to potentially lethal force and second, if so, whether the force resorted to was proportionate. When they are looking at proportionality, it is the context of human rights law, which is not the same as humanitarian law. It is not proportionality in relation to a military advantage to be gained; it is proportionality in relation to the threat posed by the person that you have probably just shot. Human rights bodies also look at the planning of an operation and its context. It is possible for human rights bodies to say that the person who opened fire was acting lawfully, but that in the planning of the operation, not enough was done to protect the right to life. That is precisely what happened in the notorious "Gibraltar killings" case. In that case, the European Court of Human Rights did not find that the individual soldier who opened fire had violated the Convention; they found that the planning of the operation had violated the Conventions. When they are looking at the planning of an operation, it is to see whether the planning was such as to maximise the chance of not needing to resort to potentially lethal force. A human rights body will therefore look at what were the standards in domestic law, what were the rules of engagement, what was the training for the operation. The third aspect that human rights

law bodies look at is a procedural obligation of states after the killing. They are required to carry out an effective investigation to determine whether or not there has been a violation of human rights law. They scrutinise the investigation very carefully, baring in mind not only the domestic law on investigations, but the general domestic practice and the practice in the particular case. For example, there is a mass of European Court of Human Rights case law dealing with both Turkey and Russia with regard to the situation in Chechnya, in which violations have been found of the obligation to investigate.

That is a framework where one is dealing with state actors. What is the **position with regard to the obligation to protect the right to life in the case of non state actors**? Here, the state is not being held responsible for its own acts resulting in the risk of death. The issue here is what the state has done to prevent and punish acts of third parties resulting in the risk of death. It is clearly a less onerous obligation, but this does not mean that there is none. Human rights law, regarding the protection of the right to life, requires the state to put in place deterrents to the inappropriate use of force and effective action after the event. The state therefore needs to have appropriate rules in its criminal law and civil law systems. It needs to provide effective policing, investigation and prosecution. I would refer to that collection of obligations as a due diligence requirement. So, if an armed individual happens to work for a private security company, and the state simply applies its ordinary criminal law to that employee, how has the state discharged its obligations with regard to due diligence? I would suggest that under human rights law, it has not fully discharged its obligations, because the effective protection of the right to life requires both effective measures in relation to individuals and also the regulation of the companies, including requirements that companies train their employees and that there should be certain contract terms.

So far, I have been looking at what happens in the state in whose territory the alleged violation has occurred. Is that affected by the fact that there is a conflict going on? Does that change the human rights law? No, because the principle of human rights law to which I have so far been referring, the protection to the right to life, is not affected by the existence of an armed conflict. However, the way in which you interpret whether a killing is arbitrary, or what is required for an effective investigation may well be affected by the context of conflicts. I would suggest to use a similar structure of analysis, that is to say direct responsibility for the acts of state agents, and an indirect due diligence from third parties in other areas (as other rights may be violated by non state actors). Other potentially relevant rights would be the infliction of torture, cruel and human-degrading treatment and invasions of privacy involved in intrusive searches.

What about the **responsibility of a state in whose territory a company is incorporated, but where the company or its employees are working outside that state**? Clearly in that situation, the state has got no responsibility at all for a killing carried out by an employee of a private security company in a third state. But, there may be an issue under human rights law with regard to making available a remedy in domestic courts. Treaty human rights law includes the right to a remedy. When a company is incorporated in a state "A", but is acting in state "B", human rights law may require state "A" to ensure that the victim of a human rights violation can bring proceedings before the domestic courts of state "A". The state is clearly responsible for the contents of its law, including its rules on jurisdictions. So, a state may be responsible under human rights law if its rules on civil jurisdiction do not permit a foreign plaintiff to bring an action against a domestically incorporated private security company, even if it has been acting abroad. If one is bringing a human rights case in this context, what one would be invoking is primarily the right to a remedy. Furthermore, if the alleged violation was of such gravity as to constitute an international crime, the state may be responsible in human rights law if it fails to investigate the employees of the company incorporated in its jurisdiction and if it fails to bring criminal proceedings. There may be a problem for certain jurisdictions if the employee was a foreigner. If you had a Russian working for a British incorporated company, in the Democratic Republic of Congo for example, and if the Russian was alleged to have committed a crime against humanity, there may be a human rights obligation on the UK because the company is incorporated in its jurisdiction, to launch an investigation. So, that is how general human rights law impacts on private security companies and their employees.

Let us now move to what human rights law has to say specifically about private security companies. Within the framework of the old Commission on Human Rights and the Human Rights Council, there has been an examination of two issues that are relevant to our consideration:

- The first is the examination that is being made regarding mercenary activities. Originally, there was a special rapporteur reporting on mercenary activities particularly in the context of self-determination, which has now become a working group. Let us indicate very briefly the mandate of the working group in order to see the way in which this may have an impact here. Part of that mandate is to elaborate and present concrete proposals on possible new standards. Another part is to study and identify merging issues. The most important bit of this mandate is finally to monitor and study the effects of the activities of private companies offering military assistance, consultancy and security services on the international market on the enjoyment of human rights particularly the right of people to self determination and to prepare draft international basic principles that encourage respect for human rights on the part of those companies and their activities. Private security companies shall therefore be keeping an eye on the activities of this working group.

- The other area that the Human Rights Council has inherited is concerned about the activities of trans-national corporations and other business enterprises. Obviously, this covers all the range of trans-national corporations, not just private security companies. Again, certain elements in the mandate shall be highlighted. The mandate of the special Representative of the UN Secretary General includes elaborating on the role of states in effectively regulating and adjudicating the role of trans-national corporations and other business enterprises with regard to human rights. A second element is to develop materials and methodologies for undertaking human rights impact assessment of the activities of trans-national corporations. Another element in the mandate is to compile a compendium of best practices of states and trans-national corporations and other business enterprises.

Hence, there are two areas of activity that are reporting to the Human Rights Council and the private security companies need to keep an eye on them. The third area is not specific to private security companies but is going to have an impact on them: that is the issue of impunity. That is generally seen as a significant human rights theme.

By way of conclusion, the first point I want to emphasise is that simply because the rules appear not to be enforced, this does not mean that there are no rules. It is important to distinguish the question of whether in international law there is any existing legal basis on which states can be regarded as accountable for the activities of PMCs from the question of whether in practice they are discharging their obligations. Under existing general human rights law, it would be possible to bring a variety of actions with regard to the state in whose territory these activities are occurring and also a limited range of cases could be brought against the state in whose territory a private security company is incorporated.

Although I am convinced that there are gaps in the law, I do not think there is a legal vacuum. The key problem is that the cases that could be brought have not yet been brought.

"QUESTION TIME"

Prosecuting people outside the country where the crimes happened might be problematic, but looking at the international criminal law and the current trial of Mr. Lubanga at the International Criminal Court, we can see that this problem can be overcome. Moreover, it can be even easier to trial these people outside their respective states. Are you aware of any cases with private contractors violating international humanitarian law?

Ms. Gillard is not aware of any prosecutions as such, but rather proceedings in relations to some of the interrogators in Abu Ghraib who were, in fact, private contractors.
Prof. Hampson adds that when looking at prosecutions or proceedings outside the territory where the harm happened, there are two different states to be considered. Are the proceedings happening in the state of nationality of the perpetrator or are they occurring in a third state? That does make a huge difference to the practical difficulties. One also needs to consider what the nature of the actor is. For example, the United Kingdom has no legal difficulty in bringing court martial against soldiers for acts committed in foreign countries: it is the whole reason why it has court martial jurisdiction. It is to enable the armed forces to bring legal proceedings in those circumstances. There can then be a practical problem about moving around witnesses. In practice, if the state is trying to bring criminal proceedings against its own armed forces, it is very much in its interest to bring witnesses and it has indeed happened in the UK. There was a court martial at Colchester in which various civilian Iraqi witnesses were brought. The means exist and that is very different from what would happen in the third state, because there, one would need judicial cooperation as the state with the evidence is the state in whose territory it occurred; and if the act in question was carried out by a member of the armed forces, those armed forces may have some of the relevant information. If it is simply an employee of a private security company, then there is clearly going to be a problem with gathering the information, because there is no nexus. The only connection is the issue of nationality. Again, one has to distinguish criminal proceedings from civil proceedings. The advantage with civil proceedings is that, first of all, the standard of proof should not be as onerous and these main practices have an implication on the burden of proof. If civilian proceedings are brought, it is not normally worth bringing them against the private employees if they do not have sufficient economic assets. Usually, civil proceedings are brought in relation to a company and many countries, both civil law and common law countries, allow foreign plaintiffs to bring claims. A foreigner can, for example, bring a claim against a British incorporated company in the UK, if he is bringing a civil claim. Therefore, a claim could be brought against the company, but again the problem is that in this sort of situations, one is dealing with destitute plaintiffs who do not know any British lawyers. You therefore need the British lawyers to go out to the

country in question. A group of civilians shot in Iraq during the period of belligerent occupation are subject to proceedings against the Ministry of Defence before the House of Lords. Their defenders are claiming ultimately that the killings were unlawful but saying that there has not been an effective investigation under the Human Rights Act. Prof. Hampson points out that it would therefore be a very good idea to gather together the existing case law in different national jurisdictions.

When it comes to civil claims, there is a great divide between the countries of the civil law tradition and the common law tradition on one issue. In a country of the civil law tradition, one would always try to have a claim against the state, somehow to say that the very responsible is the state, as it is much easier to get your money in an administrative procedure than in a civil claim. I understood that you would rather try, in the United states and in the UK as well, to say that the company was purely private and the state did not, at all, tell them to interrogate or to torture because if the state is responsible, then, there is sovereign immunity and therefore there is no chance. In the US, this brings a very strange situation as the companies insist that they were acting for the state - because then the case is out of court.

Prof. Hampson underlines that when looking at the available tools in a situation, one may need to weigh up competing advantages and disadvantages. So, let us take a specific hypothetical situation. Let us imagine that an Iraqi has been shot by an employee of a private security company that is working in Iraq, and let us assume that by some miracle the family of that Iraqi has got access to a full range of United Kingdom legal advice. The first question would be: was the private security company sufficiently closely linked to the British military effort for it to be regarded as an act of the British state? If the answer to that is yes, then the range of proceedings will include the ability to bring proceedings, under the human rights act, against the United Kingdom. The big downside with that is the human rights act applies Strasbourg's levels of compensation, which is very low compared to other possibilities. If it is not part of the state, then clearly you cannot bring an action against the state, but you would still be able to bring a civil claim, because civil courts have jurisdiction to entertain claims against British incorporated companies brought by foreigners. What, however, if the private security company was acting for the government of Iraq and was closely connected with the government? And that is the only situation in which you would hit a problem of sovereign immunity. However, there is no problem in the UK about bringing cases against the UK. Foreigners can bring civil proceedings in British courts for acts of the UK government.

What if a state gives a certain task through a contract to a company but does not give any instruction to the company on how to do it? Is this falling under effective global control by the simple fact that they pay for the task and they are therefore responsible for their acts, or is it

only a due diligence obligation because our normal knowledge of the rules on state responsibility is very much either instruction for the unlawful act, or global or effective control over the behaviour?

Ms. Gillard estimates that rules of attribution under state responsibility are a complex matter. This very question on the extent of the responsibility of a state for a private security company it has hired is something that is merely discussed. The response depends on the nature of the relationship between the state and the company it hires. Can it be considered an agent? Have they been empowered to exercise elements of governmental authority, which leads us to think: what is governmental authority and what level of formality is required in order for it to be empowered to exercise it? Should they just be considered as persons acting on the instructions of a state, under its direction and control? Is the mere contract sufficient or is more necessary? It also makes a very practical difference to know under which head of liability the PMC can fall, because if they can be considered agents or persons empowered to exercise elements of governmental authority, even their acts carried out could give rights to state responsibility; while on the other hand, if they are just considered persons acting on the instructions of a state or under its direction or control, any violations that they commit would not give right to state responsibility. So, it does make a difference but we do not have a clear answer.

States have responsibility to protect the right of life in their territory. Does this also apply to occupied territory like in Iraq?

Prof. Hampson mentions that in occupied territory, it is the consistent view of the European Court of Human Rights, the Human Rights Committee and the International Court of Justice that where a state is in occupation of territory, then all its normal human rights obligations apply within that territory. But the context in which that has been examined has been principally what you call "stable occupations", like Cyprus or the Israeli occupation of Gaza and the West Bank. I think it is less clear what happens whilst you are establishing your occupation and where the occupation is encountering a significant disorder. So, it is as though, for the purposes of human rights law responsibility, the occupied territory were the equivalent of national territory because within that territory, the state exercises the same kind of powers as it exercises in its own territory. If the territory is not occupied, then there are circumstances in which it is generally agreed that there is responsibility under human rights law. For example the United Kingdom reluctantly accepts that there is human rights law responsibility for the treatment of detainees outside national territory. What is more controversial is whether human rights law responsibility applies to the conduct of military operations, bearing in mind that human rights law responsibility only applies to the state in this context. The US would claim to be a persistent objector to this notion that human rights obligations apply extra-ter-

ritorially as would Israel. However, the recent case law of the International Court of Justice makes it clear that in occupied territory, it is normal human rights responsibility and the other human rights bodies make it clear that in non occupied territory, there may be some human rights responsibility for the acts of state agents, not private security companies if they are not working for the state.

Does the part of the mandate of the Special representative of the Secretary General in a country in crisis (which includes the monitoring of human rights violations committed by transnational companies) come from a Security Council resolution, or is it systematically for any Special representative of the Secretary General? If the monitoring is done correctly, does the Special representative have the right to investigate in the country?

Concerning the Special representative of the Secretary General on transnational corporations (TNC), Prof. Hampson argues that the Commission on Human Rights, which has now become the Human Rights Council, has the capacity to appoint special representatives, working groups or special rapporteurs. The Commission can give them a mandate, which has an impact on all UN members, even if they are not members of the Commission or the Human Rights Council. What the mandate involves depend on the mandate itself. The mandate on TNCs was the Commission's response to receiving a list of draft norms from the sub commission, which was a basic framework based on the sub commission's view of existing human rights and IHL requirements. It is dealing with transnational corporations globally, and can have an impact on them particularly on activities with regard to mercenaries (resolution 2005/69 of the Commission on Human Rights).

Session 3
Existing National Approaches

Chair person: **Emanuela Gillard,** *ICRC, Legal Adviser*

"LEGAL FRAMEWORK FOR BRITISH COMPANIES"

Peter January
Foreign and Commonwealth Office

Malgré son exportation conséquente de services militaires et de sécurité et l'impact que cela peut avoir à différents niveaux – politiques, droit international humanitaire, droits de l'Homme – la Grande-Bretagne connaît toujours un certain vide juridique en la matière. Depuis 2001, l'industrie britannique de sécurité est régulée par une agence du ministère de l'Intérieur: l'Autorité de l'Industrie de Sécurité. La régulation de l'industrie nationale est ainsi en mesure d'opérer à trois niveaux. Alors que le premier concerne les agents de sécurité individuels, qui doivent être en possession d'une licence leur permettant d'exercer leur activité, tout comme les contractants qui les emploient, le second consiste en l'établissement d'un registre de compagnies homologuées. Le dernier niveau, quant à lui, consiste à autoriser par le biais de licences, l'exportation de services militaires et de sécurité.

Le premier niveau de régulation, accordant une licence aux opérateurs individuels de services militaires et de sécurité, est actuellement mis en place en Grande-Bretagne, ces derniers se trouvant sur le territoire britannique. Une grande partie de ces employés étant issue de pays tiers (le plus souvent Afrique du Sud, Bangladesh, Fiji…) ce type de réglementation constitue un atout pour l'industrie bénéficiant ainsi d'un registre d'opérateurs dont elle peut bénéficier. Pour les autorités gouvernementales, ce n'est toutefois pas un outil d'une grande utilité.

Le second niveau, reprenant l'idée d'un registre de compagnies privées militaire et de sécurité homologuées, est aussi un atout pour l'industrie qui pourra bénéficier d'un aval gouvernemental officiel sur base de critères objectifs d'évaluation. Un certain nombre de difficultés subsistent pourtant, notamment en ce qui concerne le type de compagnies pouvant prétendre à cette homologation, mais aussi du fait qu'apparaître sur ce registre équivaudrait à un certain "droit d'exercer" implicite délivré par le gouvernement.

Enfin, en ce qui concerne l'autorisation individuelle de services contractés, une définition stricte des types d'opérations pouvant faire l'objet d'une licence est nécessaire, tout comme une liste du matériel militaire autorisé par les autorités britanniques (sur des critères équivalents à ceux déjà définis par l'Union européenne).

Nowadays, the United Kingdom has become a major exporter of military and security services. The companies concerned have therefore acquired a significant impact on the British balance of payments. However, the provision of military/security services has far wider potential implications in areas such as politics, security, human rights, international humanitarian law etc., than almost any other type of commerce.
Yet, for the United Kingdom, a regulatory gap still remains. The Sandline affair in Sierra Leone in 1997-1998, which hit the headline in the United Kingdom, appeared as a turning point. This led to various parliamentary enquiries and to a green paper of possible options which was put before Parliament in 2002. The sensitivity of such an issue has naturally brought up difficulties in coming up with an easy and effective solution.

Since 2001, the British domestic security industry has been regulated through an Agency of the Home Office, the Security Industry Authority. This point is relevant for two reasons. First because some companies in the UK engage both in domestic security and also in the export of security services overseas, so that the habit of some part of the security industry being regulated has now been set. The regulation of the domestic industry also provides, through the Private Security Act of 2001 and the Export Control Act of 2002, with three regulatory models that can be analysed.

- First of all, individual operatives (such as individual guards on night clubs or bars) have to have a licence, as does the individual who employs these guards. So, one possible model is therefore the licensing of individual operatives.
- The other model which this law provides is that it is now establishing a register of approved companies. This appears as a second regulatory model we can look at and see how it can be applied to the export of military/security services.
- The other area to be pointed to is that, at least since 1939, and probably before, the UK has had export controls regulating the export of military goods and related dual use goods. Since 2002, through the Export Control Act, controls have been extended to trafficking and brokering activities by UK nationals or by people linked with the UK, i.e. the transferring of listed military goods from one third country to another. That is another possible model: the license of the actual service.

We are in a situation where there is a regulated domestic security service industry, and the export of military goods and related dual use goods is regulated, but there is no regulation of the export of military/security services. To list a few other factors, which also bear on this situation, anti-mercenary legislation, dating from 1870, does exist. But this law is considered absolutely unenforceable by lawyers. In 136 years, there have been no prosecutions of anyone enlisted to fight abroad in a non-British force. About 30 years ago an enquiry was set up (the Diplock Report) which recommended that the law should be withdrawn or rewritten, but nothing has happened. Another point to be made is that of course, where United Nations or European Union sanctions apply, which include provisions relating to military/security services; these are transferred into UK law through ordering council.

To a certain degree, one might also say that some regulation through contracts actually exist, in that the British government, for the security of its missions in Iraq, Afghanistan, Saudi Arabia etc., and also for some project (e.g. training) activities, hires private security companies. In their contracts with Her Majesty's Government, those companies, which guard the British missions, do have explicit rules of engagement based on those applying to Her Majesty's Forces.

Sometimes of course, powerful factors such as the media or the public opinion can influence a company to, at least, review the activities of its members on the ground. It is also sometimes possible to put official political pressure on companies or advise them not to embark on a particular operation. Some do take advices from the Foreign and Commonwealth Office and keep it informed of their actions. Going further than that, a few years ago a particular company was called in by the Foreign Office to talk about the various operations it proposed to mount in several west African countries; the company's response was to challenge the government to specify which law it had broken.

Going back to the beginning of this presentation and looking at the regulatory models that have been drawn out: the licensing of individual operatives (which is deployed in the domestic security industry in the UK now); a register of approved companies (which is also being introduced in the domestic security industry) and the licensing of individual exports (which is operating for the export of military goods and related dual use goods), the question remains which of these can be most effectively applied to the provision of private military and security services overseas.
The licensing of operatives for the regulation of the domestic security industry is currently being tried in the United Kingdom, since most operatives in this sector used to be domiciled in the UK, even if illegally and even with criminal records (in which cases they might now not get a license). Obviously, in the case of UK companies who export private military/security

services, a lot of people from third countries are being employed, traditionally South Africans but also Bangladeshis, Fijians… So, in terms of regulation of the exported security sector, there may be a useful role in having a register of UK based operatives for the benefit of the industry, but licensing individual contractors is not a useful regulatory tool.

Concerning the register of approved companies, we are aware that the industry itself would actually favor this option as the potential benefits for the industry are obvious: it would benefit from a certain number of checks and gets the government's approval, which would be commercially highly desirable for competing with companies that have not got 'approved' status. However, all sorts of problems may appear here, for instance: how can those companies which are eligible for inclusion on the approved list be defined? They would have to be defined in terms of activities (i.e. any company which exports one or more of the following list of things must be registered). But, once the company was on the approved register (with the possibility of a renewal on a two years period basis), it would be associated with the UK and, unless there was some other mechanism whereby individual operations were monitored by the UK government, all activities carried out by the 'approved' companies, subsequent to their approval would be perceived as having the government's "benediction", whether the government knew about them or not. What precisely would be the penalty for a company which carried on operating after moving abroad whilst continuing to advertise in the UK through the global net? How could any penalties be enforced?

Coming on to the area of licensing of every contracted operation, a strict definition of the types of operations that were going to be licensed would be necessary. Something similar to the export control act would be required; including also a schedule of the types of military and security services, which would require a licence. At very least we would have to engage the British Ministry of Defence in detail in terms of drawing up such a list – though obviously it would be a less easy activity than drawing up and defining a list of scheduled goods.

The criteria for this form of regulation might be relatively straight forward as the EU criteria already define licensing criteria for the licensing of military goods e.g. the possible impact on the human rights situation, on internal and regional stability. Indeed it would actually be much easier to establish criteria for the export of individual service operations than it would be for the register of companies. Criteria would have to be defensible before judicial review and would have to be clear and objective. (In the case of company registration, would the criteria be anything more than the technical ticking of boxes, like: "has this company got global insurance"?) In some ways, criteria for the export of individual services would be more straightforward. But all sorts of other issues may arise. For instance, are there activities we would wish to ban (for instance, direct involvement in combat)? The problems of enforcement

would also have to be faced. For instance, when trying to enforce controls on the export of goods, the actual offence usually takes place at e.g. Dover or at Heathrow, where the goods are leaving the UK jurisdiction. In the case of services, the breach of the licence i.e. providing services without a license or going beyond the terms of a licence is likely to happen in another jurisdiction. We are then faced with whole range of problems of enforcement such as: investigation, obtaining evidence, cooperation with the local police authorities and prosecution.

And how would we measure the success of such legislation? It would clearly be very difficult to get a successful prosecution. There are basically two schools of thought about this. The first led by experts in regulation would declare that any legislation which cannot prove itself by the number of effective investigations which lead to prosecution is "bad law". On the other hand, there is a school of thought that defends the idea that defining the success of legislation by prosecutions is not the only solution; and that to some extent, the point of law is deterrent. This debate does go on but ultimately, it becomes a political decision as to whether ministers want to take the risk of introducing a law whose enforcement aspects would be particularly difficult and whose success would also be difficult to quantify.

Finally, all of these options – regulating operatives, regulating companies and regulating the export of services – miss one of the points which would always hit the press and this is the one of mercenaries. None of these presented models would deal with a situation where someone with no British links but based abroad would recruit people in the UK for some kind of private fighting activity which would highly interest the British press. The conclusion is that this issue has to be treated as a separate one. The objective of this presentation has been to look at options for the regulation of companies. If ministers also wish to look again at as whether a new legislation which makes the recruitment illegal in the UK would be required, that should be pursued as a separate exercise. In some ways, the regulation of companies and the regulation on the mercenary recruitment are treated as two separate things.

"UNITED STATES DEPARTMENT OF DEFENSE DIRECTIVES ON THE USE OF PMC/PSC IN COMPLEX CONTINGENCIES"

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Dans le cadre de leur utilisation par le Ministère américain de la Défense, les compagnies privées militaire et de sécurité visent à fournir des services essentiels de sécurité infaisable ou inopportun pour ses forces armées, et ce dans un environnement où ni la police nationale locale ni d'autres structures de sécurité ne sont en mesure d'assurer une protection efficace à l'aide humanitaire et à la reconstruction.

Engagées à promouvoir l'État de droit, les directives des États-Unis vis-à-vis des compagnies privées militaires et de sécurité se doivent d'être conformes au droit de la guerre en situation de conflit armé ou de tout autre opération militaire. Les États-Unis n'emploient toutefois pas de compagnies privées pour des opérations de combat, visant à se substituer aux forces armées. Elles seront plutôt utilisées dans le cadre d'un État de droit renversé, que ce soit par une catastrophe naturelle, une guerre, une corruption massive ou la chute d'un gouvernement. Dans ces situations, le rôle des compagnies privées employées par le gouvernement américain se concentre sur la protection des personnes et des lieux menacés par une conduite criminelle ou par une violence illégitime, sans être associées à des opérations de combat planifiées, qui restent une fonction exclusive des forces armées du gouvernement américain (les opérations actuelles en Irak et en Afghanistan ne constituent pas à ce jour des situations d'importantes opérations de combat).

Les directives du ministère de la Défense insistent sur le fait que les contractants accompagnant les forces armées américaines se doivent de d'agir conformément au droit de la guerre (DOD 2311.01). Il leur est ainsi demandé d'implémenter des programmes de formation et de prévention à destination de leur personnel et de rapporter toute violation du droit de la guerre américain afin de mener d'éventuelles enquêtes et poursuites judiciaires. Les compagnies privées autorisées à porter des armes sont sujettes à des réglementations et à des instructions additionnelles (DOD 3020.41). Il s'agit essentiellement d'une exigence additionnelle en ce qui concerne la formation du personnel au droit de la guerre, avec une attention particulière portée à l'usage de la force au sein de l'environnement dans lequel ils sont envoyés. Il est également demandé aux

compagnies d'enquêter sur le passé de leurs employés et sur leur autorisation de port d'arme. Enfin, une directive (DOD 5525.11) vise à établir les procédures pénales afin de juger les employés civils de ces compagnies privées militaires et de sécurité dans le cadre d'une violation présumée des droits de l'Homme ou du droit international humanitaire.

Introduction

The subject of this paper is the U.S. Directives on the use of Private Military Companies and Private Security Companies. While there are distinctions between the two, I will use the acronym "PSC" as a general reference for armed contractors, while PMC will refer to the broader category of contractors providing other support to military forces. Since the subject of this colloquium is PSCs Operating in Situations of Armed Conflict, my remarks are focused on the employment of these companies by the US Department of Defense in contingency operations where violence or the potential for large scale violence threatens reconstruction or stability operations. My remarks do not necessarily apply to the use of security contractors in benign environments, such as guarding US military facilities in the United States or NATO.

The United States is committed to promoting the rule of law as fundamental for a peaceful and stable society. When engaged in international operations, whether major combat operations, complex contingencies, or humanitarian interventions, the actions of the United States must conform to the law of war and model the rule of law the United States seeks to promote. PSCs provide essential security services that are either infeasible or unsuitable for our armed forces, in an environment where local national police and other security structures are unable to provide security for humanitarian relief and reconstruction. The directives of the United States vis a vis Private Security Companies are ordered to promote compliance with the law of war, maintain governmental authority regarding the use of armed force, and to avoid placing PSC employees in the position of acting in a manner inconsistent with their civilian status.

Starting with the last of these first, Department of Defense directives covering PSC employment are intended to conform to U.S. law of war obligations. It is the policy of the Department of Defense that its units and personnel – including civilian personnel – will "comply with the law of war during all armed conflict, however such conflicts are characterized, and in all other military operations." (DoDD 2311.01E, p2.) Pursuant to that policy, the United States of America does not employ Private Security Companies in combat or as a substitute for combat troops in major combat operations. PSCs are employed in contingency areas where the rule of law has been subverted, whether through natural disaster, war, corruption, or government collapse. In these environments the proper role of private security firms is to protect people,

places, and things from criminal conduct and other unlawful violence not associated with planned combat operations. This activity includes, but is not limited to, protective security details for government employees, site protection of buildings and other facilities, and operational staff-work that directly support reconstruction and relief operations in a complex contingency. (DOD Testimony to HGRC 13 Jun 06). Combat, on the other hand, is an inherently governmental function and combat on behalf of the United States is reserved for the military forces of the US Government. This policy is specified the DOD Guidance for the use of Manpower (DOD Guidance for the use of Manpower) and in Defense Instruction 3020.41 – which I will refer to again later. Pursuant to this policy, armed contractors are restricted from guarding U.S. or coalition military supply routes, military facilities, military personnel, or military property in association with major combat operations. (DODI 3020.41 p17.) In regards to present operations in Iraq and Afghanistan, the situation in those countries does not constitute major combat operations or interstate armed conflict. Therefore, the restrictions I just mentioned are not applicable regarding PSC operations in these countries. However, even when responding to unlawful violence, the United States does not employ PSCs in traditional combat roles such as offensive combat operations.

DODD 2311.01: DOD Law of War Program

Current Defense Directives also make it clear that contractors accompanying the Armed Forces of the United States must comply with the law of war. This is consistent with our national values and in accordance with our law of war treaty obligations (DODD 2311.01 p2.) Defense Directive 2311.01. The Department of Defense Law of War Program, requires all contractors to institute and implement effective programs to prevent violations of the law of war by their employees and subcontractors, including law of war training and dissemination. (DODD 2311.01 p4.) This same directive reminds contractors that violators of the Law of War are subject to prosecution. All U.S. military forces in theater, as well as the contractors themselves, are required to report all incidents of possible violations of the Law of War involving U.S. civilians, contractors or subcontractors assigned to or accompanying the Armed Forces, or their dependents, through the Secretary of the Army to the GC, DoD, for investigation and, if determined appropriate, for prosecutory action under the criminal jurisdiction of the United States. (DODD 2311.01 p5.) Pursuant to this, one U.S. contractor was recently tried and convicted of manslaughter in a U.S. court as a result of his acts while working in Afghanistan. These rules are applicable to all contractors accompanying the force, not just Private Security Companies.

DODI 3020.41: Contractors Accompanying the Force

In October, 2005 DOD issued new guidance for contractors accompanying the armed forces of the United States. For the first time, this instruction specifically addressed armed security contractors. These contractors – authorized to carry and use arms – are subject to additional

regulation or instruction. The reporting requirements I mentioned previously are augmented in a way that provides more direct oversight by the military commander regarding armed contractors in his area or supporting his operations. Contracts now specify that contractor employees will report all incidents to the commander of the force they are accompanying. (DODI 3020.41 p15.)

Further, contractors are specifically charged with responsibility for complying with theater orders, and applicable directives, laws, and regulations, as well as the maintenance of employee discipline. Contingency contractor personnel shall conform to all general orders applicable to DoD civilian personnel issued by the ranking military commander. Commanders have the authority to take certain actions affecting contingency contractor personnel, such as the ability to revoke or suspend security access or impose restriction from installations or facilities. The Department of Justice may prosecute misconduct under applicable Federal laws. Contractors are also subject to local law, subject to any SOFA that may be in effect in that country. The instruction also notes that the use of lethal force by contractors is not protected by any SOFA currently in force. (DODI 3020.41 p16.)

DODI 3020.41 also describes standards for training, weapons issuance, vetting, and directs some operational issues regarding armed contractors:

Training. Contractors are required to provide and document training in the Law of War as described in the directive I mentioned earlier, with particular attention to the use of deadly force by civilians. This includes the requirement to train PSC employees in the differences between military and civilian rules of engagement. This is very important as most PSC employees come from military or police backgrounds and need to be indoctrinated into the new legal environment in which they will use tools they have long been familiar with. Weapons training provided by PSCs must also include rules for the use of deadly force and host nation laws for the use of such force, with the reminder that they are subject to those laws. (DODI 3020.41 p17.) This is important as those laws may be more or less restrictive than those in the United States or a third country the PSC employee is hired from. However, it is also the policy of the United States, and defined in Instruction 3020.41, that everyone has the inherent right to self defense. (DODI 3020.41 p7.)

Vetting and weapons issuance. Contractors are also required to conduct background investigations of prospective employees and verify that they are not prohibited by U.S. law from possessing firearms. This would include a felony conviction of any kind or a misdemeanor conviction of domestic violence. The contractor must certify that they have conducted the necessary investigation before a weapons authorization card can be issued. (DODI 3020.41 p18.) The weapons and ammunition used by a PSC in support of U.S. government missions also require review and approval for compliance with applicable laws and regulations.

Operational Issues. Any proposal to employ armed contractors in contingency operations will include concept descriptions for rapid identification, coordination movement through high-risk areas and avoidance of military combat – sometimes called "kinetic" operations. Proposals will also include a communications plan for exchanging threat information between military forces and security contractors and procedures for rendering assistance from military forces to contractor personnel in hostile fire situations. (DODI 3020.41 p17.)

Training and vetting records I mentioned are inspectable items under the terms of any Department of Defense contract for private security services and are now written into all Department of Defense contracts for armed security services. Implementation of the operational requirements is still evolving. The reconstruction operations center in Iraq is a dynamic model for working many of these issues. Observations obtained from the day to day coordination of PSC activity by this operations center provide lessons that are learned and incorporated in the MNFI fragmentary orders and contract modifications.

DODI 5525.11 Criminal Jurisdiction Over Civilians Employed by or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members

DoD Instruction 5525.11, "Criminal Jurisdiction Over Civilians Employed by or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members", is the enforcement mechanism for these directives. It establishes the policies and procedures, and assigns responsibilities under the "Military Extraterritorial Jurisdiction Act of 2000". As I mentioned earlier, the United States recently obtained its first conviction under this Act. Other cases are under investigation.

Conclusion

The use of PSCs by the United States in complex contingencies and the post conflict environment is both new and a challenge to our national values and commitment to jus in bello. The use of PSCs is sometimes cited as undermining widely held conceptions regarding a state monopoly of the use of organized force and operates at the edge of some international law regarding armed conflict. The directives I have cited are intended as a means to employ PMCs in a manner that promotes, rather than undermines the rule of law, that enhances governmental authority regarding the use or organized violence, and meets the requirements of complex contingencies where traditional armed forces may be inadequate or inappropriate.

"OVERVIEW OF NATIONAL REGULATORY SYSTEMS FOR THE COMMERCIAL EXPORT OF MILITARY AND SECURITY SERVICES: THE UNITED STATES AND SOUTH AFRICA"

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Très peu d'États réglementent leur exportation commerciale de services militaires et de sécurité, essentiellement pour des raisons de coût associés aux programmes de délivrance de permis, à leur contrôle et à leur mise en application. Il existe pourtant certaines bonnes raisons pouvant inciter un État à contrôler ce type d'exportation, notamment l'impact que les compagnies privées militaires et de sécurité peuvent avoir sur leur réputation et sur l'accomplissement de leurs objectifs en terme de politique étrangère.

Ce papier vise avant tout à décrire les efforts déployés par deux fournisseurs importants de services militaires et de sécurité, à savoir les États-Unis et l'Afrique du Sud, pour le contrôle et la réglementation de l'exportation commerciale de ces services.

Ce sont les États-Unis qui se sont montrés les plus enclins à la privatisation des fonctions militaires et de sécurité et consécutivement, leur réglementation en la matière est considérée comme la plus développée. Celle-ci se base sur la supposition fondamentale que les exportations relatives à la défense sont une composante principale de l'assistance en terme de sécurité et soutiennent par conséquent les objectifs nationaux de politique de sécurité. Il existe, dans le système américain un contrôle considérable des ventes d'articles et de services de défense, faisant de sorte que ces intérêts nationaux soient préservés. Un manque de transparence rend toutefois la surveillance de ce système difficile, notamment en ce qui concerne la vente de services de défense.

L'approche sud-Africaine vis-à-vis d'une réglementation est clairement différente en ce sens que le pays a du faire face à une période post-apartheid marquée par des programmes de désarmement, de démobilisation et de réintégration de son personnel militaire. L'image donnée par la compagnie "Executive outcome", employée dans de nombreux conflits dans les années 1990 a été à l'origine de l'effort de régulation impulsé par le gouvernement sud-Africain et concrétisé par la loi de 1998. La difficulté de ces compagnies à se conformer à cette loi dans la pratique a récemment mené à

un nouveau projet de loi sur la prohibition des activités de mercenariat, cherchant à combler les lacunes de la loi de 1998.

This contribution briefly outlines and assesses two national systems for regulating commercial exports of military and security services by private actors.[1] Despite the rapid growth in private military and security activities throughout the world, a number of which occur transnationally in conflict zones and other high-risk areas, very few states which are the country of origin of private military and security companies (PMSCs) regulate the services they export – i.e. the sale of contract military and security services to foreign actors. One reason may be the costs associated with implementing effective licensing, monitoring and enforcement programmes. Governments also face fewer moral, legal and other incentives to strictly regulate such exports. This is due to the generally lower profile and weaker domestic political impact of exported private military and security services in the domestic context of the firm's home state, especially when compared to the use of public funds for outsourcing the state's own security functions to commercial entities.

Yet, there are several good reasons why states might want to control the commercial export of defence and security services. The main argument in favour of regulation is the potential impact that PMSCs can have on a country's reputation. Since PMCs and private security companies (PSCs) have this potential to undermine a home state's foreign policy, regulating them offers a means of mitigating that risk by exerting more control over how and where they operate.

This paper will focus on the efforts of two key supplier states – the United States and South Africa – to control and regulate the commercial export of military and security services abroad. However even though motivated by the same general desire to constrain the repercussions of exported defence and security services on national foreign policy objectives, these two regulatory systems have markedly different results in terms of their effectiveness and in the relations they produce between industry and government regulators – largely as a result of differences in context, resource allocation, and the principles or philosophy underlying the regulatory approaches.

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1 This paper is based on the chapter by Marina Caparini, 'Domestic regulation: licensing regimes for the export of military goods and services' in Simon Chesterman and Chia Lehnardt, eds., *From Mercenaries to Market: the Rise and Regulation of Private Military Companies* (Oxford: Oxford University Press, 2007).

US system

The US has gone the furthest in outsourcing military and security-related functions to the private sector. The US is also a major source country of PMSCs that sell their services to foreign actors. Its regulatory approach is considered the most developed and comprehensive regime at the national level, closely tying arms export controls to its foreign and national security policy interests. Beyond the obvious mechanisms of control, there are strong informal ties and incentives for US companies to comply with US foreign policy objectives and interests. As a major client of these firms for both outsourced services to support US military and security services and for foreign military assistance programs, the US government wields significant capacity to encourage compliance by PMSCs with its principles and interests.

The US regulatory approach is based on the fundamental assumption that defence exports are a primary component of security assistance and should support US foreign and national security policy objectives. The regulatory approach preserves the control of the executive branch over sales of defence services. Exports of defence services are regulated by a two-pronged system. Under the ITAR (International Traffic in Arms Regulations) process, companies sell directly to foreign entities on the basis of an approved export license, whereas under the Foreign Military Sales (FMS) program transfers of defence articles and services are conducted through government-to-government sales. Whether exports are licensed under ITAR or non-licensed under FMS, the government remains closely involved in the process.

ITAR – International Traffic in Arms Regulations

The ITAR process is based on the Arms Export Control Act, and is administered by the Department of State through the Directorate of Defense Trade Controls (DDTC). Companies seeking to export defence services must first register with the DDTC, then apply for a licence for each specific sale. Defence services would normally fall under a Technical Assistance Agreement (TAA), a type of licence which is valid up to 10 years.

Applications for export licenses are reviewed to ensure that the entity applying is legitimate and reliable, and that the proposed export is consistent with US policy. Any proposed exports to embargoed countries will automatically be rejected. While the majority of license applications are reviewed only by DDTC, in one-third of cases applications undergo more involved interagency or 'staffed' review. In a staffed review, a risk assessment is conducted by relevant bureaux and offices in the Department of State and in whatever other federal agencies and offices are considered relevant to determine the impact of the proposed sale on US policy, including the Department of Defense, National Security Agency, Department of Commerce, etc. A pre-licence check of proposed the foreign end-user/buyer is conducted to assess likelihood of compliance with restrictions, and the State Department maintains a watchlist of suspect organizations and individuals.

ITAR enforcement is also a responsibility of the Department of State through the Directorate of Defense Trade Controls (DDTC). DDTC is responsible for investigating suspected violations and can suspend, deny or revoke licence approvals. It can undertake criminal prosecutions and civil action.

The 'Blue Lantern Program' is a mechanism to enforce end-use restrictions on exported defence articles and services. However, the Blue Lantern Program encounters some problems regarding the monitoring and enforcement of conditions on licenses for exported defence services. First, the Blue Lantern Program is focused on those articles most susceptible to misuse or diversion into the grey arms trade, such as firearms, ammunition, spare parts for military aircraft, as well as electronics and communications equipment. There is also little public information available concerning the extent to which the Blue Lantern Program actually checks on firms selling defence and security services such as training or advice.

The ITAR licensing system has a number of problems from the perspective of public accountability. First, the ITAR licensing process is hidden from public view and lacks transparency. As a consequence, it is unclear on what grounds licensing decisions were taken. ITAR reporting also lacks clarity. Although the DDTC must report quarterly and annually to Congress, there is little information on the specific types of defence services that receive licenses. Similarly, minimal information is provided in reports. This is in part a function of the possible classification of ITAR licenses under a diverse range of USML categories. Little information is required by firms to be made publicly available. Moreover, data on licensed exports collected by DDTC for its annual consolidated reports to Congress have been criticized by GAO as incomplete, imprecise, and unreliable due to miscoding.

Another problem with the ITAR process is that legislative oversight is stronger in theory than in practice. The State Department is required to inform Congress of licence requests for defence services exceeding $50 million to non-NATO and non-allied countries (this threshold amount is higher for partners and allies). Congressional notification can trigger greater scrutiny and may require a detailed assessment of various aspects of the proposed sale, increasing the chances that a proposal may be opposed. However, this mechanism has not proven an effective check because, first, many contracts fall under threshold level or can be broken up to avoid reaching it and triggering congressional notification. Second, even if Congress is notified of a proposed sale, it faces significant obstacles in blocking a sale. If dissatisfied with the proposed sale, Congress can block it by means of a joint resolution of disapproval; this must be done within 30 days for sales concerning non-NATO and non-allied countries. In practice this mechanism has almost never been successfully used by Congress to block an arms sale. It is very difficult to produce a joint resolution of disapproval in that time frame. And even if

achieved, the President could veto the legislation, which could only be overridden by a 2/3 majority in Congress. There is also apparently a lack of interest and awareness by members of Congress in most proposed defence sales.

A further aspect of the US regulatory approach results from a general characteristic of the wider US political environment, namely the permeability of government decision-making to special interest groups. As with other major industry groups and firms, US PMSCs are active in lobbying political decision-makers and make substantial donations to election campaigns. Aside from exerting influence through lobbying, a common feature in this particular sector is the employment of many former senior ranking civilian and military officials by PMSCs.
This characteristic has become known as the 'revolving door', and involves former senior military, political and administration officials taking up jobs in industry and using their prestige, professional networks and knowledge to help influence sales and licensing decisions, and in some cases aspects of US foreign policy.

FMS – Foreign Military Sales

The other means by which the US regulates commercial exports of defence services is through the government-to-government programme called the Foreign Military Sales (FMS) programme. Under FMS foreign countries use the Pentagon as intermediary to purchase US defence articles and services. No licence is required because DSCA (the Defense Security Cooperation Agency) within the Department of Defense directly negotiates and purchases the item or service from US firms. A three percent surcharge for administrative costs is charged, and other surcharges may apply, so FMS generally appears more expensive than a direct commercial sale requiring an ITAR licence. However, the benefits of using the FMS route include being able to draw on the expertise of DOD negotiators and acquisitions personnel, and the economies of scale that can be gained from the DSCA grouping of sales together, as well as the development of close working relationships between purchasing country officials and US officials. FMS is also considered to have greater transparency than ITAR, a factor that is important for some countries prone to corruption in defence procurement. FMS has the same requirements regarding congressional notification, and encounters the same limitations in terms of congressional oversight.

Thus, the US regulatory approach is characterised by considerable executive branch control over commercial sales of defence articles and services to ensure that US interests and policy objectives are supported. A lack of transparency makes it difficult to assess to what extent compliance is actually monitored, particularly with regard to sales of defence services. Congressional oversight is weak in practice and Congress allows broad discretion to the executive arm in authorizing defence sales. The US regulatory system promotes a voluntary close alignment of defence and security firms with US foreign policy. This is due to a strong culture of

outsourcing in the US government. Consequently, it is in the US-based PMSCs' self interest to maintain a good image in the eyes of government and the public (and not to undermine US foreign policy in their activities abroad) if they wish to preserve their access to the lucrative domestic market in outsourced defence services.

South Africa

The South African context differs greatly from that of the United States, and this is reflected in its regulatory approach to exports of private military and security services. The highly militarised apartheid-era regime created political and socio-economic legacies that continue to be felt today. High numbers of former soldiers and ex-combatants constitute a pool of potential recruits. DDR (disarmament, demobilisation, and reintegration) programs have been flawed and often ineffective, which has contributed to the high rates of unemployment and social marginalisation of former soldiers and former liberation fighters. Perhaps the main factor distinguishing the South African approach from that of the US, however, is the effort of the democratic regime to draw a clear line between itself and the former regime in its foreign policy. The continuing involvement of South African citizens in conflicts across Africa has constituted an embarrassment for the African National Congress (ANC) government, whose foreign policy is committed to establishing peace and stability across the region.

Regulation of Foreign Military Assistance Act (FMAA) of 1998

The South African firm Executive Outcomes, which famously employed former members of apartheid-era South African Defence Forces in a series of conflicts and interventions, was the initial catalyst for the South African state's effort to regulate such activities. The key features of the FMAA, which at time of editing (mid-2007) remains the law in force in South Africa, are first, that it is triggered by the declaration of an area of armed conflict by the executive. Second, it prohibits mercenarism, making it an offence to recruit, use or train persons for, or finance or engage in mercenary activity, which is defined as 'direct participation as a combatant in armed conflict for private gain'. Third, the FMAA seeks to regulate the provision of foreign military assistance to a party to an armed conflict, where 'foreign military assistance' is defined as the provision of advice and training; personnel, financial, logistical, intelligence and operational support; personnel recruitment; medical or paramedical services; or procurement of equipment. It also seeks to regulate 'security services for the protection of individuals involved in armed conflict or their property'. Finally, it establishes a two-stage system of 'licensing' (more precisely, authorisation and approval) for firms and individuals seeking to provide foreign military assistance and security services.

In the first stage of the regulatory process, any South African citizen, firm or resident must seek authorisation to offer military assistance – i.e. they must receive approval to enter into

negotiations to provide military assistance. The person or firm applies for authorisation to the National Conventional Arms Control Committee (NCACC), which scrutinizes the request, sends its recommendation to the minister of defence, who then takes the final decision about whether or not to grant authorisation. The minister can also grant a conditional authorisation. In the second stage, after receiving authorisation to offer military assistance, the firm or individual must submit an application for approval of the contract or agreement to render military assistance. The same process is followed as in the first stage.

There are allegedly several serious problems with the legislation that have made it an ineffective means of regulating the export of commercial military and security services. First, it contains several loopholes that have enabled SA citizens and firms to sell their military services abroad without seeking authorisation. For example, it includes a blanket exclusion of 'humanitarian and civilian activities aimed at relieving the plight of civilians in an area of armed conflict'. In consequence, various firms have registered as demining companies in order to side-step the remit of the legislation. Another problem concerns the definition of 'security services for the protection of individuals involved in an armed conflict or their property', which is not sufficiently specific.

As a result of these ambiguities and problems in enforcing the law, there has been wide non-compliance with the law – for example, in 2003 only 2 companies had submitted applications for those looking to provide military services abroad. Both were rejected. However by 2004 some 10 South African firms were in Iraq, with estimates of between 1500 and 8000 South African citizens working in Iraq. A major impediment to prosecuting those providing such services without authorisation is the difficulty faced by the South African prosecuting authority in being able to gather the evidence necessary to secure convictions. There has consequently been little enforcement of the law, with a very low number of prosecutions and convictions under the FMAA. Furthermore, in the handful of cases that have been prosecuted to date, two individuals faced fines of 10,000 Rand (about $1400). Higher fines for individuals involved in the attempted coup in Equatorial Guinea constituted a more credible deterrent. It is notable, however, that no one has ever been sent to jail under the FMAA, and all cases brought under this law have been settled by plea bargain.

New draft bills

The original draft bill was created in response to the flouting of the law by significant numbers of South Africans going to Iraq to work for PMSCs, as well as the embarrassment caused by the involvement of some 70 South African nationals in the failed coup attempt in Equatorial Guinea in 2004. The draft bill was introduced in September 2005, revised, and approved in its revised form by parliament. However, at the time this publication has gone to print in mid-

2007, the revised bill has still not received presidential assent and therefore has not entered into force.

The revised bill attempts to close the loopholes of the FMAA and is especially notable for clarifying the definitions of foreign military assistance and security services. As with the FMAA, the new legislation would take effect once an area is declared by the President to be an area of armed conflict. It also prohibits mercenary activity – i.e. South African citizens acting as combatants for private gain in armed conflict, and also forbids the recruitment, training, supporting or financing of such combatants. In seeking to regulate military-related assistance and services, and as a corrective to the FMAA, it provides an extensive list of the activities included in the definition of security services. A new element is that it would regulate the enlistment of South African citizens in foreign states' armed forces, specifying that no South African citizen or permanent resident may enlist with a foreign armed force unless permission is granted. This controversial provision, strongly opposed by the UK government, is apparently aimed at some 700 South Africans who are members of the UK Armed Forces, some of whom have been sent to Iraq. Further, it would regulate the provision of humanitarian assistance by a "South African humanitarian organisation". The organisation must be registered with the NCACC for the particular activity it wants to undertake in an area of armed conflict. However the President can grant an exemption to a humanitarian organisation in order to facilitate the delivery of humanitarian aid without delay to civilians in an armed conflict.

If the revised bill becomes law, South African citizens enlisted in foreign armed forces will have to apply for authorisation within 6 months of the coming into force of the Act or face a fine and/or imprisonment. Anyone else involved in an activity that was not an offence under the FMAA (for example, companies providing specific security services as delineated in the revised bill, or South African humanitarian organisations operating in conflict zones) will have to apply for authorisation within 6 months or face a fine and/or imprisonment not exceeding 5 years.

It should be noted that two highly controversial provisions were dropped in the redrafted version of the bill. First, it dropped the provision for extraterritorial application; the original draft bill would apply even to non-South African nationals who had provided security or other support services in designated combat zones. In the original version, such persons could find themselves subject to prosecution if they visited South Africa or boarded a South African-registered airplane or ship. In addition, the redrafted bill dropped an exemption for 'freedom fighters' or those who had joined liberation movements from the requirement of getting authorisation for provision of military or security services abroad. The inclusion of this provision in the original version was credited to the recognition of the role foreigners had played in supporting the African National Congress when it had been outlawed under apartheid.

However, the redrafted bill remains controversial and problematic. In attempting to close the loopholes that became apparent in the previous legislation, the net seems to be cast too widely now. For example, humanitarian organisations are concerned that the proposed legislation would impede their ability to respond quickly and effectively. The bill is also criticised for the considerable level of executive discretion that would flow directly from the President's office in exercise of foreign policy prerogatives, while allowing a minimal role for parliament. Finally, there remains the difficult issue of enforcement, specifically whether the responsible South African prosecuting authority has sufficient resources, in terms of budgets and personnel, backed by sufficient political will, to effectively investigate alleged violations of the law and bring prosecutions against offenders.

Conclusion

At first glance, there are numerous similarities between the US and South African systems for regulating commercial defence and security exports. Both systems aim to ensure that the government's foreign policy objectives are supported and are not undermined by such exports. Both systems are based on existing systems for arms export controls. Further, both involve a form of registration and application for license or approval to carry out activities, and both include penalties that can be applied for non-compliance. In their effects, both systems give the executive branch much discretion in deciding who to license and on what grounds, while legislative oversight is relatively weak in practice.

These two systems have significant differences in several key areas. First, the underlying rationale of the US system for regulating export of commercial defence services differs in important ways from that of the South African system. The US system is clearly based on the view that sales of defence and security services can and should serve its foreign policy interests. Industry and government regulatory structures are closely linked in terms of personnel, cooperation, and the harmonisation of interests and approaches. In contrast, the South African system is reactive and based on concerns that individuals and firms selling military/security services could harm democratic South Africa's reputation and undermine its foreign policy.

Industry and government relations tend to be more antagonistic in South Africa, while they are more inter-related in the US. The incentives for the industry to respect South African foreign policy interests are weakened by the fact that South Africa does not have as large a domestic outsourcing market as clearly exists with the US government.

The US system is sufficiently resourced to review and process licence applications under the ITAR system, and to arrange for purchases under the FMS. It has been weaker on monitoring and enforcement with regard to defence services as provided by PMCs and PSCs, although there

are no indications that this is due to lack of resources. 'Good faith' relations exist between industry and government regulators. While the South African government has claimed to be monitoring its citizens involved in private military and security work abroad, it is not clear to what extent this occurs, and it has only weakly enforced its legislation governing the export of private military and security services.

This comparison of the South African and US regulatory approaches to the commercial export of defence and security services suggests generally that a regulatory mechanism must be workable, with definitions and phrasing in legislation that avoid ambiguity and create legal loopholes. The legislation must be enforceable and enforced to be effective and credible. Monitoring and enforcement also requires adequate funding, skilled personnel and political will. The regulatory mechanism in both the US and South African cases reinforces executive power vis-à-vis the legislative. Any country considering introducing such a mechanism should take into account the impact of the regulatory mechanism on the relationship between executive and legislature. Finally, a regulatory system consists of more than the formal rules and procedures involved in gaining a licence or authorisation for a sale, monitoring of conditions and enforcement of legislation. Other factors such as cultural attitudes, historical experiences and socio-economic dynamics will likely play an important role in influencing how the system operates, what it is meant to achieve, and ultimately how effectively it achieves its objectives.

Concerning the issue of the enforcement, a large part of the problem is practical. However, there is an issue when there is a gap in the law and when the law does not allow to bring proceedings. Surely no government can say that enforcement is difficult when they are talking about a gap in the law, because they are actually responsible for the law.

Mr. January fully agrees with this comment on the enforcement side and on the fact that monitoring is very difficult, not particularly in Iraq or Afghanistan because the British troops and the media are there, but more in the upstream bits of Africa.

In case of a violation by a foreign employee of a private security company, would some form of US military court have jurisdiction over the foreigner? Does the 2000 Act not merely create offences, but gives jurisdiction over a foreigner? And if so, would it be under the UCMG and a form of military jurisdiction, or would it be ordinary criminal jurisdiction?

A foreign employee can indeed be tried in the United States. If his own sending State does not try him, then the U.S. can, not in a military court but in a civil court. There are some people including members of the industry who are actually advocating trial under military court martial. So far the Supreme Court has said that, excepting cases of declared war, this was not suitable.

A recent article in the Times described a private military company doing works on the road between Kabul and Kandahar. It was mentioned that in the past three months, they had actually killed 30 insurgents, in self-defence. These companies are working in such a hostile environment that they appear to be on the borderline of combat. There is a line where these companies are sent into areas where they are then subject to such constant attacks that they, in the end, end up to something close to combat.
Is there a proper definition of self-defence?

Col. Mayer underlines that the companies are usually escorting a convoy form point A to point B. Is there really a difference between a regular armed force that we should be defending against and a band that may just be there to shoot things up or to capture whatever the convoy is transporting so that they can resell it? This would only be the difference between combat and protection from an unlawful violence.

There was a case in Iraq, where the United States contracted with a private security firm that was composed of Peshmergas (the Kurdish militia). They received fire from outside, left the compound, hit the attackers and came back. They were strictly advised not to do that again, because the difference is that they cannot go out and do it. One has to wait for the enemy to come and then, defend yourself or those you have been tasked to protect. On the other hand, any pre-emptive act shall be considered as a military operation. However, it does not always work perfectly, as we are dealing with human beings in a highly stressful environment.

At what level of the company are the prosecutions done? Is it targeting the staff member who was him/herself responsible or is there any way of going up the chain of command to the superiors to make the company aware of its responsibilities?

Col. Mayer argues that initially, prosecutions are going after the individuals, those who we can clearly demonstrate were the ones who performed the act. It is probable that, as time goes on and as the common law corpus develops, they will also target officers of the companies when the proven misconduct of the individual can be attributed to criminal negligence of the staff. In between now and then, there is also the opportunity to bring civil suits for wrongful deeds, among other issues. There are in fact a couple of civil suits already under work in the United States against one or more private security companies.

Because the U.S. outsourcing has gone quite far, and perhaps some people in the Pentagon had not realised how far it had gone until the Afghanistan and Iraq operations began, do you have the sense that there is a sort of push back from the military against the way the contractors are being used?

In Col. Mayer's opinion, there is indeed a tremendous push back every time the US decides to contract out or civilianise a specific aspect of military operations. The military themselves being fairly conservative, there is a tendency to push back and only grudgingly accept changes. In Iraq, one of the things that we did to prevent any difficulties was to establish what became known as the Reconstruction Operation Centre (ROC), the primary purpose of which was to coordinate and de-conflict the operations of private security companies and military operations throughout Iraq. Individual companies are required to register with the ROC, to declare their movements (where they are leaving from, where they are going, what they are trying to do) and to be reconnected with the local military commander so as to make sure that they are not running into major military operations. At the same time, it provides a mechanism where by if they get hit, they can be assisted by military forces that are in the area. By coordinating with each other, they are able to avoid places where we know we are going to plan combat operations.

About the exclusion of conduct of hostilities and major combat operations, a distinction was made between lawful and unlawful violence. Private security companies may be involved into resisting to unlawful violence but not to lawful violence. Such an approach may still be possible as long as the same philosophy of the law of international armed conflict to an internal armed conflict is applied – because in an internal armed conflict, the violence by the enemy is always unlawful. Under domestic law of the country where the conflict happens, only criminals attack the armed forces. If humanitarian law wants to survive in such a situation, a distinction shall be made between what is a police operation (in which private companies may be involved) and what is a military operation (in which they may not be involved in the conduct of hostilities).

Col. Mayer notes that it is indeed very difficult to determine the difference between a recognised internal armed conflict and otherwise, since the people we are fighting do not want to follow the laws recognising who we consider as lawful combatants. It becomes very difficult to know what is the difference between somebody who is going to blow up an oil pipeline because he does not like the occupying authority or the government authority, and somebody who is going to blow up the pipeline because he is blackmailing the manager of distribution. What is therefore favoured is to clearly restrict the definition and try not to make a differentiation in that case.

Session 4
Regulation by Good Practice

Chair person: **Prof. Marco Sassoli,** *University of Geneva*

"SELF-REGULATION BY THE INDUSTRY"

Andrew Bearpark
British Association of Private Security Companies

Pouvant être conçue comme un des moyens de répondre à leur développement, la question de l'auto-réglementation par les compagnies privées militaires et de sécurité présuppose plusieurs questions préalables. La première serait de savoir si cette auto réglementation est en mesure de jouer un rôle au sein de l'industrie des services militaires et de sécurité elle-même. La seconde viserait quant à elle à définir les limites de ce rôle.

L'auto-réglementation pourrait effectivement jouer un rôle d'importance si elle s'inscrivait dans un système incluant une régulation à la fois au niveau international, régional, national et finalement au niveau de l'industrie elle-même. La loi seule ne représente pas un code de conduite, ni un ensemble de critères qui permettraient à l'ensemble de ces opérateurs d'acquérir une certaine forme de transparence: l'auto-réglementation ne se comprendrait par conséquent qu'au sein d'une approche "stratifiée". L'un des avantages de cette forme de réglementation est le fait que l'industrie des services militaires et de sécurité semble la mieux placée pour établir ce code de conduite, mais aussi que cette dernière est véritablement à la recherche d'une amélioration de son image qui s'est progressivement détériorée au cours des années 1990.

Certains inconvénients pourraient toutefois subsister, comme le choix possible de certaines compagnies de ne pas se soumettre à cette-auto réglementation impliquant un code de conduite. Seules les compagnies membres d'une organisation décidant la mise en place d'un code de ce type seraient en mesure de s'y conformer. Un certain manque de crédibilité de la part de l'opinion publique et des autorités pourra également subsister vis-à-vis de l'auto-réglementation, ce qui ouvre le champ sur la question plus générale de la perception des compagnies privées militaires et de sécurité.

It is a pleasure and a privilege to tell you a little bit about our views on self-regulation.

I would actually rather like to tell you about our views on a whole load of other subjects as well. Misconceptions about the industry, the way it is developing and what it really does. But for today, there are two issues that I would like to cover. The first one is: Is there a role for self-regulation in the PSC industry? And then the second one which of course presumes the answer yes, is: What are the benefits, and what are the limitations of that self-regulatory role?

But before I move into what self-regulation is, I would like to step back a moment and try to identify what the real objective is. It seems to me that the real objective is quite simply stated. It is to prevent bad things from happening, to hold people accountable when those bad things happen and to provide redress for the people who those bad things happen to. That is the actual objective and that is the business we are in. And on that basis, I am afraid I am the one who has to break the bad news to all the lawyers here. You are really not that important, you know. The law may be useful, but it is certainly not sufficient to achieve that overall objective. And I would like to give you just two examples to support that point.

The first one is that there is a quite famous BBC series which is probably available here in Brussels as well, which every week looks into bad things that are happening. The most recent one was on bailiffs. And to tell you very briefly the story, if you start off being fined £80 for not paying the congestion charge in London, within a month you can end up with people breaking your door down, seizing your telephone, your car and your television and you owe them £2,000. This is 'cause célèbre' stuff, and there is a programme every week about that sort of things. But the important point from my perspective is that all these activities are illegal, there is nothing legal about them. Bailiffs are not allowed to break into your house in the UK in those circumstances, they are not allowed to seize your goods, and they are not allowed to intimidate little old ladies. They are breaking the law by doing so. So, having laws that prevent that sort of thing is not sufficient. You need other things to prevent bad things happening.

And the other bit of bad news – but it is not bad news, its just realistic news – is that there is one word that has hardly been mentioned today which terrifies my members far more than the law. None of my members wake up in the morning worrying about International Humanitarian Law. If you invite them to a conference like this they will happily pay lip service to the subject, but they do not wake up in the morning worrying about it. They do wake up in the morning worrying about insurance premiums because that is the single biggest problem they have got in terms of paying money out. So in fact, the insurance industry has a greater effect on the behaviour of a PSC operating out of the UK than any body of laws has at the moment.

So, is there a role for self-regulation? Well, the simple answer is yes. Because there is no one silver bullet in this system. What we have is a complex web of arrangements which can create that better behaviour and provide that redress. And I look at it as two sets of things. The first one is that we require "regulation" at every level. We require something internationally, we require something regionally, we require something nationally and we require something at an industry level. And it is only when you have got all of those things that you actually have the web that can create that control.

Then, if one looks at the functions, the things that should be happening: Yes, you need laws and you need people to interpret those laws properly. You need codes of conduct. Laws are not codes of conduct, but codes of conduct can be very important. You need agreed standards, you need critics and observers to look at the industry and one thing you desperately need, which I freely admit we have not got enough of, is transparency. It is very difficult to see what the industry is doing. So if you offered me the choice between the perfect international law to deal with PSC's or a greater degree of transparency, and made it an either or choice, I would actually be voting for more transparency so that people can see what is going on, they can criticise it and they can then take one of that range of actions to deal with it.

In summary for the first point, my argument is not that self-regulation is a silver bullet, it is not, I do not claim it to be; but it is part of – I think in a conference with the ICRC earlier this year I described it as a 'Matrix of Activities' – today, I have used the word 'web'. It is probably slightly better even to think of it as a laminated approach, where you have layers which reinforce each other whilst giving you that transparency that you desperately need. My argument today, which I will happily defend, even to the lawyers, is that self-regulation does have a role to play. But, if we are going to have self-regulation I think the two questions we need to address, and we are not going to solve them in 15 minutes, but the two questions that I have to grapple with every day are: What are the advantages of self-regulation? And, what are the limitations of self-regulation? Because it is only through addressing those questions that we will see where self-regulation can fit into this web of activities.

There are essentially three sorts of advantages.
The first is that the industry actually understands itself rather better than outsiders tend to understand it. So, if one is looking to do things like drawing up codes of conduct, drawing up standards for training, drawing up this, drawing up that, drawing up the other – the industry is probably the only place where the expertise really exists where that can happen. And an obvious worry is that the industry would be trying to avoid the problems through doing that. It would be going for the lowest common denominators, it would be going for the code of conduct that is called 'mother had an apple pie' and does not require a second sentence. But

in fact, my experience has been that the industry does not behave that way. Peer pressure actually works. It is very difficult as we heard for the American Government, it would certainly be almost impossible for the British Government to monitor something that is happening in the Congo. But company 'A' knows exactly what company 'B' is up to in the Congo because it desperately wants to win the contract off them. And if they are doing anything wrong, they will find a way of writing rules to prevent that happening.

Therefore, the first argument is that the industry understands itself.

The second group of advantages comes down to the fact that at this moment in time, and I will not argue this will be true in 50 years time, or that it was true 50 years ago – but at this moment in time, the industry desperately wants to clean its act up. It desperately wants to drive the cowboys out. Not through any altruistic reason whatsoever. It wants to do it because it wants to make even more money. The Iraq bubble has burst and the companies have to look for other forms of activity, other forms of income generation, and they know better than anybody that they have got an image problem. So they are delighted by anything that will help drive out those cowboys, that will catch those people who are engaging in criminal type activities. It's pure, good, commercial sense.

I would love to think that my members joined the BAPSC because of the high intellectual standard, our moral rigour and a whole host of other reasons. I suspect the reason they joined is to get some reputational advantage when they are out there bidding in a very difficult marketplace. But the fact that they want those objectives for commercial reasons is no reason for us not to take the benefits. Let us seize this opportunity while they are behaving in that way.

So that is the second area. And the third one is trite but true: the great thing about self-regulation is that it is free. It does not cost anybody anything apart from the industry itself. You do not have to pay for courts, you do not have to pay for this, you do not have to pay for that. It means that 100% of the cost of self-regulation is borne by the industry itself rather than the taxpayers.

So those three groups, those three areas indicate the advantages that self-regulation can bring to bear.

But what about the disadvantages and I would love to say there are none. Of course there are disadvantages. They fall into two areas.

The first thing is that how on earth can self-regulation cope with those who do not wish to be self-regulated? By definition, an agency such as mine can only regulate its members; it cannot regulate its non-members. So there is an insuperable problem there, there is no point in pretending otherwise, there is no point thinking there is a way around it, there is no way around it. Any voluntary organisation can only regulate the activities of those who chose to be a member of that organisation.

Is it that important? Well I would actually argue that it is not. That by becoming transparent, by enabling the purchasers of the services to see what is going on, they are able to make informed decisions and say no, we will not buy services from people unless they have submitted themselves to self-regulation. So in fact you have immediately outcast the people who do not wish to do that. And, does one even worry about that? No, there will always be people who will operate outside the law. Whether the law is the law as we think of it in terms of statute law, criminal law, commercial law, self-regulatory law, whatever it may be. There will always be people who are prepared to invade Equatorial Guinea for relatively small amounts of money. It is a rather stupid thing to do and you pay a very high price. But the point is that those people will behave in that way regardless of any legal system. They are criminals. It is as simple and as straightforward as that.

So I think we have to recognise the problem but I do not think in reality it is such a big problem.

The second disadvantage, the second problem I think of self-regulation is that there will always be either a perceived or in some cases, a real lack of credibility - that observers will be able to look at it and say, "no, it is a self serving system". And, up to a point, I just have to accept that and say, yes that is the case, there is a drawback here and I cannot wish it away.

There is a very concrete example. When the videos came out of EGIS staff in Iraq at the end of last year, EGIS came to me and said would we, the BAPSC investigate the allegations that had been made. We had to say, sorry, at this stage of our development we do not have the capacity to undertake that investigation. So EGIS undertook that investigation. Now, I know how thoroughly they conducted that investigation, I know how difficult it was, I know how seriously they took it. And the people who did the investigation were very, very highly qualified, very, very highly experienced people who were actually independent of EGIS. Well, tough luck. They were still paid by EGIS and there is nothing I can do about that and EGIS would be the first to put their hands up and say they desperately wish that I could have paid for it, but I could not so they had to do it. So they knew that they were producing a report which would not be as credible as it would otherwise have been.

The other problem linked there, is the perception. Not the reality, just the perception. And of course journalists, critics are always going to ask, where do you get your money from? It is the private security companies who pay you, when are you going to be rude about them? Well I think you will have heard today that I have no problems with being rude about them whatsoever. But perception is a difficult thing and the whole image of self-regulation has taken a bit of a pasting in the UK in recent years. And I would like to say I am sorry, but I am not. To say that the most egregious example of all that I see plastered throughout the British press is how the solicitors have so totally and utterly failed in their duty of self-regulation. That was cruel but it happens to be true, I am quoting from The Times. But what it does mean is that self-regulation will always have an image problem and there is no point in denying that.

What we are trying to do is find ways, not of denying it, not even of countering it but trying to make it work regardless. And one idea which will not come as a shock is that we will be calling for a government appointed ombudsmen to ultimately investigate allegations of wrong doings by the Private Security Companies. And our theory will be simply that we will never be considered credible enough. We can do the investigation but we will always be considered biased. So what we want is the British Government to pay the barrister, the QC, who will finally view the report and say, "yes this is okay" or "no, that is not okay". We are not trying bypass, we are not trying to twist, we are trying to face up to the reality that as a trade association we will always be open for an accusation of partiality and therefore we need a government funded person.

So in conclusion, do I think that self-regulation is essential? Yes. Do I think that self-regulation is sufficient? No. But I do think that the laminated approach will work.

"PRIVATE MILITARY/SECURITY COMPANIES OPERATING IN SITUATIONS OF ARMED CONFLICT: TO WHAT EXTENT CAN THE ISSUE BE ADDRESSED BY MEANS OF CONTRACT?"

Antonio Ortiz
NATO Policy Planning

L'insertion graduelle des compagnies privées de sécurité dans le paysage des opérations militaires a progressivement déplacé le débat de leur raison d'être, ou de leur nature conceptuelle, à la réglementation de leur présence en tant que partie prenante de l'environnement sécuritaire. L'externalisation de services de sécurité n'est pas un phénomène récent pour l'Alliance atlantique, qui a contracté une compagnie à des fins logistiques pour sa force d'implémentation en Bosnie (IFOR), en 1995. Aujourd'hui, l'OTAN est impliquée sur le théâtre irakien dans la formation, l'équipement et l'assistance technique des forces de sécurité irakiennes, et son interaction continue avec les compagnies privées de sécurité, malgré l'absence d'une approche réglementaire et d'un contrôle global au niveau international.

Certaines tâches essentielles de l'OTAN sont ainsi externalisées par plusieurs pays, essentiellement des activités de soutien. Ces compagnies se substituent parfois aux forces alliées pour des missions clés de l"OTAN, telle que la formation des troupes en Irak. Aujourd'hui toutefois, l'externalisation est perçue par certains militaires comme un moyen essentiel pour eux de se concentrer sur leurs tâches primordiales, notamment les opérations de combat. De nombreuses répercussions peuvent donc être observées en matière de coûts pour les opérations, de doctrines opérationnelles, mais aussi de coopération civilo-militaires.

Certaines limites peuvent pourtant être identifiées dans cette tendance à l'externalisation, en tête desquelles la mesure avec laquelle des intérêts de sécurité peuvent être traduits en terme de marché. Le danger existe que des zones moins profitables pour ces compagnies deviennent de véritables brèches sécuritaires. Les questions de réglementation et de transparence sont également des défis majeurs auxquels l'OTAN pourrait répondre de façon pragmatique, comme l'ont fait les États-Unis via leur système de licences. Ses capacités de contrôle d'un tel système seraient toutefois relativement limitées et son mandat ne ferait pas de l'OTAN un organe de réglementation appropriée. La question reste ouverte quant à savoir si les Nations Unies, voire l'Union européenne ou l'OSCE dans un cadre régional, pourraient jouer ce rôle.

Introduction

The use of private security companies (PSCs) has grown significantly over the last years. Civil contractors are now so embedded in ongoing operations that their presence has reached a point of no return. Therefore, the debate no longer focuses on PSCs' raison d'être or their conceptual nature, but rather on regulating their presence as a part of the security environment.

For NATO, the question is: Where do PSCs fit in a multilateral security framework? So far, NATO has, however, not integrated this new reality into its mission models. Outsourcing is still very much perceived as a failure to draw on national contributions and share the risks of operational deployment. Calling upon contractors is often interpreted as a specific breakdown of the force generation process. There is no political consensus on resorting to PSCs, there has been no process of standardisation and there has been limited conceptual development.

However, the reality of the field is somewhat different. Outsourcing is not new to the Alliance. As soon as NATO started to get involved in stabilization operations in the Balkans in the mid-1990s, it had to interact with PSCs. Actually, one of the biggest contracts in the sector's history at the time was awarded for the provision of logistical support to the deployment of one NATO national contingent in Bosnia in 1995, as part of NATO's Implementation Force (IFOR), which then became the Bosnia Stabilization Force (SFOR). A few years later, in 1998, the same company was asked to set up a series of camps to house refugees fleeing repression in Kosovo and to run the supply system for a number of NATO forces in the region. During years, the same company has been managing a number of KFOR bases and barracks and sustaining national contingents in Kosovo. All this confirms that NATO has not escaped the general trend of increased privatization and that outsourcing has been used in the Balkans by specific NATO contingents.

The Iraq Case

Iraq increased the awareness of the issue within NATO. In response to a request by the Iraqi Government, NATO established a Training Mission in Iraq (NTM-I) and is running a training centre for senior security and defence officials on the outskirts of Baghdad. NATO is involved in training, equipping and in providing technical assistance to Iraqi security forces, although it does not engage or assists in combat operations. It is in this context, that the issue of private security companies re-emerged at NATO in 2005.

This could be seen as yet another indication that the organisation needed to develop increased interaction with other security providers, be it other international organisations, the coalition force, or indeed private companies. The question is why what was acceptable for the Balkans became contentious in the case of Iraq. Of course, every situation must be assessed

against its operational and political background and from the outset the consensus over Iraq was fragile to say the least. Iraq exemplified in a very vivid way the global trend of security privatization and the rise of PSCs, to the extent that The Economist qualified the Iraq war as "the first privatized war". However, all things considered, there was a large degree of dramatization at NATO and the issue was somewhat politically tainted. After all, NATO Member States and other international organisations have resorted to outsourcing in the past and are doing it at present in Iraq and elsewhere. What this controversy showed is that regulation by simple practice – by contracting – and a pragmatic approach, driven by practical considerations – essentially security – is insufficient to resolve the issue.

Implications for NATO

In addition to the latent underlying debate over Iraq, the discussion over outsourcing reflected the clash of two cultures at NATO on how to deal with private security companies and outsourcing in general. In this regard, NATO has had to put up with the lack of a comprehensive international regulation on PSCs and the lack of global controls. More importantly, the debate reflected the profound differences in national approaches and the divergent legislative initiatives among Allies. This is further complicated by the fact that Allied nations vaguely perceive PSCs as an extension of their foreign policy and consider their support or defense as an elusive and defused form of promoting their national interest.

Another aspect is the genuine concern, especially on the part of smaller Allies, that regularizing the issue may open the door for a broad use of PSCs, resulting in a substitution of Allied forces. Indeed, many of the tasks smaller nations perform in NATO operations – generally supporting tasks – are normally outsourced by the U.S. in its own operations. However, in other instances what is outsourced is actually the core NATO task. For example, in Iraq, NATO's main activity is training of Iraqi military forces. But, training of foreign military happens to be one of the most heavily outsourced sectors. Actually, the role of some PSCs in training Iraqi security forces is much more relevant than that of NATO. The same could be said about the NATO Mission in Darfur, where the Alliance is providing airlift for African Union (AU) troop rotations and training AU troops in strategic-level planning and operational procedures.

A different aspect is the role of PSCs in military transformation in which NATO is deeply engaged. Today's reality indicates that PSC support is not just an ad hoc capability to fill force generation gaps. PSCs have become an integral element of military transformation in a way that goes much beyond traditional maintenance and logistics functions. Outsourcing is seen by many militaries as something that helps focusing on core tasks through improved operational availability and combat efficiency, one that improves "the combat edge".

Outsourcing has also changed a number of operational doctrines. For example it has the ability to transform the way armies approach civil-military co-operation – something NATO is currently working on through such concepts as Comprehensive Planning and Effects Based Approach to Operations (EBAO). Finally, outsourcing can revolutionize the way international organisations deal with peacekeeping and peace support operations. So, altogether, NATO would benefit from a more strategic discussion on the wider implications of the role of PSCs in NATO operations and its impact on NATO's ongoing political and military transformation.

One feature that also plays an ambivalent role with regard to outsourcing is the issue of funding and resource implications of NATO operations, especially those where the NATO Response Force (NRF) is deployed. The current practice of 'costs lie where they fall' acts as a sort of reverse lottery, by which the country or group of countries that is providing troops to the NRF at a given moment has to bear the costs of the deployment. This often works as a disincentive for force generation, which, in some cases, creates critical capability shortfalls. One alternative NATO is exploring, is to increase the areas where common funding is possible.

However, there is pressure on the part of the NATO military authorities and commanders in the field to get more authority for special expenditures that may include outsourcing. This could eventually work as an incentive to develop a more sophisticated NATO approach to PSCs. The funding issue is important in a situation of shoestring budgets, where national defence spending in Europe is limited and the NATO budget follows Zero Real Growth logic. This is meant to reduce inefficiency and enforce prioritisation in the use of resources. In this regard, one clear alternative is outsourcing.

The Limits of Contracting and Other Possible Options

The current pragmatic approach of simply contracting obviates the debate on the major politico-military implications, but it also has a number of consequences of a more technical nature. One is reliability: private security companies are likely to adapt to alterations in the security environment to the extent that this proves to be profitable. The question is to what extent security interests are translated into market terms. In this regard, PSCs can walk away from less profitable areas, leaving a security gap. That gap will be all the more difficult to bridge as outsourcing also acts as a disincentive for the development of specific capabilities that would eventually disappear from the Allies' toolbox. It is not clear how contracting can actually resolve this problem and in any event it would require a rather complex and constraining system of clauses.

Another issue is subcontracting by PSCs themselves, which as illustrated in Iraq and elsewhere may result in security risks. Contracts are clearly not enough to ensure transparency

and a proper regulation may be required to improve accountability and oversight. Therefore, NATO would greatly benefit from an internal debate on the politico-military implications of outsourcing as well as from the development of a common doctrine, a code of conduct, or common standards on outsourcing to PSCs. The conclusion is that regulation by contract is a limited option, one which does not address the complex issues of outsourcing for an organisation like NATO.

One easy pragmatic option for NATO would be to follow the U.S. system of licenses, by which PSCs would obtain approval from NATO, through an agency or an appropriate NATO body, before selling their services to the Alliance. However, as experience has shown, oversight of the process and of the contracts themselves is far from comprehensive and it is not clear that NATO would have the means to carry out an effective oversight. In addition, this approach would not overcome the existing clash of national cultures and would result in a cumbersome system that could seriously limit the options of operational commanders. Finally, regulation by means of contract can resolve a number of technical aspects, but it does not address the political implications of resorting to PSCs.

In connection to this, there is the issue of the degree of political legitimacy of the regulating body. The United Nations has made extensive use of PSCs in support of peace operations. The experience of such a universal international organisation, which has the primary responsibility for the maintenance of international peace and security, could offer some positive solutions to the problem of regulation. However, to achieve this, the UN must first develop a clear policy on the role and conduct of PSCs. The universal political legitimacy of the UN would confer some degree of authority to private security actors and offer an acceptable model of regulation or at least interaction with PSCs for other international organisations. Still it seems unlikely that the UN may come up with a solution anytime soon.

The European Union would probably be better placed to address the issue of regulation due to the specifics of European regional integration, its solid legal basis and the wider range of EU action. However, given the likely difficulties to reach an agreement on regulation at UN level, the EU should at least have the ambition to propose a solution that would be universally acceptable; not only for obvious political reasons, but also to ensure an acceptable degree of practical implementation. A number of options that have been proposed, such as the 1998 EU Code of Conduct on Arms Exports or the harmonization of national laws on private policing regulated under the Internal Market, would offer an EU-wide, but not a global perspective. One fundamental point in this regard is the need to avoid a Trans-Atlantic difference over PSCs regulation. In this context, NATO offers an appropriate forum for such Trans-Atlantic

discussion. One could think that the EU and NATO would sit down together and work on a joint approach that could later become universally acceptable.

Another possible alternative would be to promote an initiative through the Organisation for Security and Co-operation in Europe (OSCE). One advantage of the OSCE is its wide membership, including the Russian Federation. In the past, the OSCE has usefully supported Euro-Atlantic comprehensive security through contributions such as the Vienna Document on CSBMs, the Code of Conduct or the Small Arms and Light Weapons Document. A similar politically binding document could be developed that would offer a framework to countries and eventually international organisations in their interaction with PSCs.

What kind of authority would the proposed ombudsman actually have? How intrusive would his powers be? On what kind of standards would that ombudsman investigate?

Mr. Bearpark argues in favour of the ombudsman because of the importance of an independent credibility. One should be looking at a very well respected legal figure, who would be able to form a judgement as to whether a process has been satisfactorily carried out. The range of penalties that the ombudsman would then be able to impose is a very open question. From this perspective, one does not need the ombudsman to impose the penalties, but rather to give an independent credibility. There would therefore be a wide range of sanctions that could be applied to individual companies which go all the way from financial penalties to exclusion. For example, if it was to be discovered that one of their operatives had committed a human rights abuse, as a result of not having been really trained properly in humanitarian law, then you could easily envisage a system whereby a fine would be imposed which would essentially consist in a training audit of that company and their agreement that they would implement the proposed recommendations. However, one should not speculate on the possible relationship between this ombudsman and the legal system.
If he or she were comparing activities set down by the British Association of Private Security Companies (BAPSC) that would only be because the body had not yet laid those standards down.

Has the European Defence Agency (EDA) ever talked with private security companies, especially regarding the creation of the EU battle groups and the growing implication of the EU in peacekeeping operations? Is it something foreseeable in the near future?

According to Mr. Bearpark, there is a dialogue between the private security company industry and the European Commission. BAPSC has regular and very intense discussions, with the Directorate General for Humanitarian Aid (ECHO) and certainly other Directorates as well. So far, there appears, however, to be no debate going on with the EDA.

Concerning regulations at the EU level, you mentioned an argument regarding a solid legal basis for an EU regulation. Could this aspect be further developed?

By "solid legal basis" Mr. Ortiz highlights a pragmatic approach combining different elements, like the interest of the industry or the contract based regulations. The EU, in this regard, is better place in the sense that it has a legal tradition that NATO lacks.

The ICRC's experience in Afghanistan, particularly on the question of the conduct of hostilities and specifically detainee handling has lead us to realise that the dialogue and the policies are national contingent responsibility. Would that not also apply to the employment of contractors? Those contractors who are employed, for instance, within the U.S. forces, will they not, by stealth, be part of the NATO approach in Afghanistan?

In this respect, Mr. Ortiz argues that national contingents would still address each of them from their own national perspective. Outsourcing goes beyond the operational requirements. It has clearly a political impact and the call for a NATO approach on the issue is not necessarily a regulation but a standardisation of the outsourcing, or a code of conduct to address the political implications that outsourcing has. At the operational level, outsourcing is indeed realised by national contingents.

The private security company industry seems to have a transparency problem; but it was argued that no one understands the industry better than the industry itself. How would you improve this transparency problem?

According to Mr. Bearpark, the industry is trying to address this question and it is worth looking at why the industry is secretive. Some of it is commercial confidentiality and would apply in any industry. Some of it is because you do have to be operationally secure in terms of not being transparent. But a lot of it is just bad reasons and happens to be just the way it is. However now, a number of companies are prepared to be very transparent and to discuss various ranges of issues with different actors.

Why is there a particular problem to get the enforcement of the standards through the enforcement of the contract itself?

Mr. Ortiz points out that the limit lies in who enforces the contract. One would still need a mechanism for an oversight of the contract. The limit of the contract is therefore the oversight and the transparency. There is something beyond the legal aspect which is this politico-military implication of outsourcing that needs to be addressed. Security is not really a marketable good as other goods may be. You need a plus of regulation precisely to ensure a plus of transparency.
Mr. Bearpark adds a couple of problems in this respect. The first one is the permanent feeling that States are the main clients. One possible reason is that this can be the case in the United States, where the Department of Defense and the State Department have such enormous budgets that they could be the unique source of a very large and successful American private security/military company's contracts. In Europe, no company gets more than 10% of its fun-

ding from the State. Another problematic point is that the group of people who we are trying to protect are not a party to the contract.

Finally, the European Commission stresses that there is no single solution for all the issues that were identified. We have to adopt a laminated approach taking different approaches to deal with the different issues that have been raised. For example, a contract might be a solution or a step toward enhancing respect for the law. The contracts are not going to be very useful to any potential victims though. To assist we need national law to allow them to either bring civil suits or prosecutions to be brought in respect to the violations they have suffered. Regulation plays an important role both in enhancing respect for the law as well as for allowing States to exercise some oversight as to what their national companies are doing abroad. All these issues have to be addressed and one needs to look at the various different tools and different fora for doing so. It is not possible, at this stage, to think of a single instrument adopted universally that could address all of these problems and it might be necessary to take a regional approach to address some of the issues in some parts of the world separately.

Session 5
The Possibility for Regional Regulation

Chair person: **Emanuela Gillard,** *ICRC, Legal Adviser*

"IS THERE A POSSIBILITY FOR SOME REGULATION AT THE EU LEVEL?"

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Les conventions internationales existantes visant à réglementer les compagnies privées de sécurité semblent souffrir d'un manque d'intérêt certain de la part des États, notamment en ce qui concerne leur ratification. Au-delà de la légitimité de ces réglementations, aux niveaux international ou régional (Union européenne, Union africaine), leur succès reste à relativiser à la lumière de la façon dont les compagnies s'y conforment. Le problème semble résider dans la définition des compagnies elles-mêmes alors que le contrôle devrait naturellement se concentrer sur la typologie des services que l'on souhaite contrôler. Il s'agit essentiellement des services de type formation au combat, qui peuvent avoir un rôle stratégique certain.

Dans le cadre de l'Union européenne (UE), trois réglementations sont déjà en place dans le but de contrôler des services particuliers et leur exportation hors de l'Union. Il s'agit du code de conduite sur le courtage des armes, d'une action commune du Conseil de l'UE sur les services liés aux armes de destruction massive et d'une action commune sur le contrôle des exportations vers les destinations subissant un embargo.

Plusieurs avantages sont à dénombrer dans le cadre d'une réglementation au niveau régional de l'Union européenne, à la tête desquels se trouve l'impossibilité pour une compagnie d'échapper aux règles en passant d'un pays à un autre. La vague d'élargissement de l'UE et la signature du code de conduite de nombreux pays non membres ont considérablement accru la couverture de cet instrument. L'UE, en tant qu'acteur international est également en mesure d'exercer une certaine pression sur d'autres organisations, telles les Nations Unies, afin de promouvoir ses propres réglementations en la matière. Aujourd'hui, l'implémentation de ce code de conduite et de ces actions communes dans les États membres de l'UE est à relativiser par le nombre de pays ayant effectivement décidé d'appliquer ces actes. A l'heure actuelle, des contrôles sont effectués dans 19

États membres sur les activités de courtage, dans 13 concernant l'assistance technique pour les armes de destruction massive et dans 6 sur le contrôle des armes et de l'assistance militaire, alors que le scénario idéal l'imposerait dans chacun des 27 États membres de l'UE.

From what has been presented so far in this colloquium, it seems that the most rational solution to the issue of private military companies is to look at international means of regulations. I would like to explore in particular the potential for regulating private military companies at the European Union level. To go through the structure of my presentation, I will start with the problems of international regulation in general because they will inform on what can be better done at the EU level. The second point is the move beyond the definition of mercenaries or private military companies to a service based definition of the kind of regulation that we want. The third is looking at specific regulations that already exist at the EU level, including the fact that with this service based definition, there are broader regulations than many people are currently aware of. Finally, I will talk about the advantages of EU regulations and I will conclude by proposing how EU regulations can be developed further.

To start up with the problems of international regulations, the two main regulations that we know of are the United Nations and the African Union Conventions on mercenaries. The problems of those widely known kinds of regulation are the broad definition of mercenaries, and the apparent lack of interest from the states, especially in the ratification process of the UN Convention. So, it seems that governments are quite careful about international regulations. Finally, there is the trans-national character of the companies themselves, meaning that even though regional regulations at the EU or AU level would be useful, they are also limited in the sense that companies try to escape from these regulations. My argument is that one of the problems is in trying to define mercenaries or private military companies. It seems indeed much more fruitful to move beyond that and to actually look at what do we want to control. What we are concerned about are not private military companies themselves but rather the services they provide. We are concerned about services like combat training that have strategic value in certain situations like in the former Yugoslavia. We are also concerned about certain destinations, such as training provided in countries like Liberia, that are weak, sensitive and do not have democratically controlled armed forces. Our regulations should therefore also focus on those things rather than on private military companies in general. I would also argue that it is possible to come up with a list of services. If, for instance, one looks at the regulations in the arms control sectors, there are lists and these lists are being constantly revised with regards to the evolutions in technology. The same argument can be used for services. The list will most probably never be complete or perfect and will have to be regularly revised,

but it can work on the same basis. In this regard, I have drawn up a short list of a few points that might be included in these kinds of lists: combat; military training; technical support for military operations; procurement, trafficking, brokering of military equipment… If this kind of service-based approach is adopted, you actually realise that there is already much more control available on the ground than what is commonly noticed by the literature and in the debates.

My focus being on the EU, there are three kinds of regulations already in place at the EU level that regulate particular services and the export of these services outside the EU. The first one is the code of conduct on the regulations of arms brokering. All these regulations, even though the impetus came from the EU level, are implemented through the national governments; and most of these regulations have therefore led to national laws and the governments are then also in charge of implementing and controlling the laws and also of giving the licences. The second two sets of regulations have come through the EU common foreign and security policy (CFSP) process and regard services related to weapons of mass destruction, the missiles that are capable of delivering these weapons and, in some instances, embargoed destinations. The third one is generally exports controls to particular destinations, meaning that ad hoc CFSP regulations are being set up if there are particular countries we are concerned about (a decision is taken at the EU level on arms exports, and also eventually includes an embargo on technical services related to those arms).

To go into each of those into more detail, the EU code of conduct started in 1998 and its aim was to set high common standards in terms of regulating and controlling the exports of arms. It also tries to increase and facilitate the exchange of information among the EU Member States about the denial of arms exports and licences so that companies could not move from one country to another to escape those export denials. The EU code of conduct also set up the request of annual reports on arms exports. These are showing that, over the past few years, it has become a huge catalogue becoming more and more detailed with more and more information available every single year. It shows how useful the EU code of conduct as a process has become. One of the key elements of the code of conduct is the COARM, the Council of the EU's committee in charge of discussing these kinds of issues. It has taken a leading role in bringing about new regulations, and I hope that it will extend its leading role with regard to private security companies and the services we are concerned about.

The EU code of conduct has already led two controls at national level, of particular kinds of services that are linked to private military companies, namely legislation on armaments brokering. It came about in 2003 in the Council common position 468, setting out a range of permissions for the regulation of arms brokering and requires that Member States have

national laws to regulate this kind of issues. In particular, it requires that Member States "will take all necessary measures to control brokering activities taking place within their territory". Obviously, that is quite limited but it also "encourages Member States to regulate brokering outside their territory", if it is carried out by either nationals or residents. If you look at the regulation actually in place in different EU Member States, you will find that quite a number of them have taken up with this encouragement and have gone beyond the regulation of brokering taking place on their territories to control nationals. This is quite an interesting part because you are moving towards controlling people outside your national territory. There is therefore some kind of precedent here showing that it is possible to control nationals, even if they act outside the national territory.

The second part of interesting services that apply to private military companies or that could be a model for regulating the services that they provide is the EU Council Joint Action 2000/401 of 22 June 2000. It controls "technical assistance related to weapons of mass destruction, missiles and to certain destinations i.e. embargoed countries. The interesting bit here is the question how the EU defines "technical assistance". It says that "technical assistance is defined as technical support related to repairs, development, manufacture, testing, maintenance or any technical services and may take forms such as training transmission, transmission of working knowledge, skills or consulting services". If one thinks about this, it really includes almost all the kinds of private military services that we are concerned about. The only problem is that currently it is linked to equipment rather than technical services standing alone.

The third part deals with the control of technical services to embargoed destinations. If it comes to EU CFSP embargoes, it usually means that those kinds of services are actually prohibited from export, so it is not just a licence that is required. We currently have embargoes towards the Democratic Republic of Congo, Ivory Coast, Liberia, Myanmar, Somalia, Sudan, Uzbekistan and Zimbabwe. This is something that has quite evolved since the mid-1990s and that has progressed. Previously, similar embargoes have been placed on Afghanistan, Ethiopia, Eritrea, the former Yugoslavia, Libya and Nigeria. These are actually very good measures and very specific as they deal with particular kinds of conflicts that we are concerned about and particular destinations. Some of these embargoes have actually been in place for quite a long time, like the one on Yugoslavia stretching over a number of years. These are *ad hoc* restrictions, but what is interesting is that the definition of technical assistance or technical services has become broader and broader. So if we take this definition of technical services and compare it to the definition of technical assistance I presented earlier, it means all technical training or assistance related to the provision, manufacture, maintenance or use of arms related to all kinds of weapons, ammunitions, military vehicles, equipment etc. The

definition of technical services has therefore become broader in terms of the services that we are concerned about.

What are the advantages of EU regulation? Obviously, the main advantage is that if you have controls at the EU level, in a regional scope, you prevent companies from escaping regulation by moving just to another country. Previously, this harmonisation of control used to be national. There is also the element of the EU's enlargement to take into consideration, as we are dealing with a growing number of states. We also have an increasing range of cooperation agreements with non-EU countries that have signed up to the code of conduct for various reasons (either because they have close relations to the EU, or because they want to join the EU in the future). Turkey, Canada and Croatia have joined the EU code of conduct. There are also pressures of the EU as a collective actor in international organisations like the UN where the EU has taken the approach of trying to promote its own regulations, its own standards, at the broader international level.

How far has this actually gone? What has been achieved in terms of national regulation through these kinds of measures? In terms of brokering, there are controls in 19 EU Member States so far, which means national regulation of brokering activities. Whether a licence is given or not is decided therefore by the national authorities. We also have controls on technical assistance related to weapons of mass destruction. They are prohibited or controlled in 13 EU Member States so far. And there is a requirement in every piece of legislation. So eventually, there should be 27 Member States but it is just taking longer in some countries than in others. There is also technical assistance to embargoed countries which is controlled or prohibited in ten EU Member States. Finally, and this is something that is currently not required at the EU level, we have controls of technical assistance related to all types of military weapons or equipment and that is controlled in six EU Member States. This concerns essentially new Member States, who have the tightest regulation in terms of private military services. There are also five Member States who control or licence military training and that is something that most people are not aware of. These are Estonia, Hungary, Italy, Poland and Sweden.

The question is then where do we go from here? As I have mentioned before, one of the amazing things about the EU regulation is that it has actually progressed. We can see an increasing scope and density of regulation over the past 10 years. However, there are still a number of gaps, and some services that do not fall under this. Ideally you would have controls that apply to all kinds of military services. There are several policy options based on the current regulations. I am not trying to come up with something entirely new; but enlarging what is already there on a step by step basis comes to the level where it can actually be effective. There is a number of options based on existing controls such as the harmonisation of national licensing

of private military and security companies. Virtually, all of the EU Member States have controls and licensing of private security companies operating nationally. There are various training requirements; there are also requirements for insurance, for registration etc. A report from the Association of Security Companies actually summarises these national controls. A further step which the EU is looking at is to harmonise those national regulations, because technically we have a free market of goods and services which means that there should be some EU recognition or harmonisation of national licensing. That obviously does not apply to companies exporting military services overseas. One of the options is therefore a common list of controlled services that could be added to the EU code of conduct in general. It would be a first step to promote common grounds among the Member States as regards the export of military services. More specific would be the inclusion of the phrase "related services" into the already existing list of goods. A fourth option would be to have an EU CFSP common position as we have with the example of brokering, which would be the most effective one by requiring Member States to have regulation of private military services. The last one would be to have, within the frame of the EU code of conduct, information exchange on licence denial.

Pre-empting the question on how likely this is to happen, the European Parliament report on the code of conduct will contain this year a paragraph on private security companies (point 41) noting that "the EU has extended its legislation on the control of military exports over private security companies and therefore calls for the EU to consider similar steps to extend the 1998 code of conduct".

"REGULATION OF PRIVATE SECURITY AT THE AFRICAN UNION LEVEL"

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Au coeur de nombreuses situations de conflits armés, le continent africain n'a pas été isolé du développement des compagnies militaires privées. Le besoin de sécurisation de multiples contextes a amené le secteur privé à s'implanter dans des zones économiquement et politiquement fragiles, exacerbant les principaux dangers de cette tendance: recherche de maximisation des profits, responsabilité des employés, droits de l'Homme etc.

A un niveau régional, l'Union africaine, alors Organisation de l'Unité Africaine, a établi une Convention pour l'élimination du mercenariat en Afrique dès 1997, dans le cadre de son objectif de promotion de la paix, de la sécurité et de la stabilité du continent. Cette Convention offre un cadre juridique pour la réglementation du secteur de la sécurité privée mais apparaît toutefois désuète aujourd'hui, ne représentant qu'une obscure partie de ce phénomène de privatisation. La définition du "mercenaire" proposée par la Convention ne s'applique d'ailleurs techniquement en aucun cas aux employés des compagnies privées militaires et de sécurité. A l'heure actuelle, l'Union africaine n'a pas entrepris de réglementer le secteur de la sécurité tel qu'il existe en Afrique aujourd'hui, malgré l'identification des problèmes qui lui sont directement liés et leurs conséquences sur la paix et la stabilité. La Convention doit ainsi faire l'objet d'une révision adéquate afin de répondre aux défis contemporains posés par la nouvelle architecture de la sécurité privée en Afrique.

1 Introduction

The involvement of the private security sector is the most recent and interesting development in warfare. Africa, being the most conflict-prone continent has certainly not been insulated from this new global phenomenon. The private security sector may be broadly divided into two categories, namely, Private Military Companies (PMCs), sometimes referred to as Privatized Military Firms (PMFs), and Private Security Companies (PSCs). This paper looks into the issue of how Africa, at least at the regional level, has addressed the issue of PMFs operating in armed conflicts. Otherwise referred to as 'corporate warriors',[1] PMFs are 'business organisations that trade in professional ser-

1 See generally, Peter W Singer *Corporate Warriors: The Rise of the Privatized Military Industry* (2003).

vices intricately linked to warfare.'[2] They are private business-oriented and profit-driven warriors who offer diversified professional services bordering on security issues. As a broad-based grouping, they provide specialized services which include military advice and training, arms procurement, maintenance of arms and equipment, intelligence gathering, logistical and medical support, combat and military operational support, humanitarian action and the list is not exhaustive.

From the onset, the context within which PMFs operate in Africa must be understood for the purpose of informing the manner in which control and regulatory mechanisms may take form. PMFs customers are ranged across the moral spectrum from 'ruthless dictators, morally deprived rebels and drug cartels' to legitimate sovereign states, respected multinational corporations, and humanitarian NGOs.'[3] On the one hand, PMFs play a role in the waging of armed conflicts and on the other hand, they also play a part in giving support to peace missions and to humanitarian aid workers in conflict zones. The more conflicts occur in Africa, the more PMFs are involved and so are humanitarian aid workers. The security threat, which aid workers normally face in a conflict zone, has led both public and private aid organisations, and even UN organisations like UNHCR, UNICEF, UNDP and WFP, to hire PMCs and PSCs to ensure the protection of their operations and personnel in unstable areas.[4] On one hand the same industry wages war yet on the other it is relied upon for protection and keeping the peace. This presents a dilemma in terms of its regulation.

Perhaps Africa has not been ready to address this new phenomenon as evidenced by the absence of any effective mechanism, at least at the African Union level, for the regulation of this industry. Even at the sub-regional level, the problem of regulation has been identified but not necessarily addressed.[5] It is for this reason that NGOs such as the Institute for Security Studies initiated a project on the regulation of the private security sector in Africa.[6] This paper shall map out the need for the private security sector in Africa especially in conflict situations, and thereafter consider the regulation of the sector at the African Union level. The question, which always arises from this point, is how to control and regulate the industry in order to ensure peace and security in Africa.

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2 As below 8.

3 As below 9.

4 Fred Shreier & Marina Caparini 'Privatising Security: Law, Practice and Governance of Private Military and Security Companies' *Geneva Centre for the Democratic Control of Armed Forces (DCAF) Occasional Paper No. 6*, (March 2005) 5.

5 For instance, in terms of part 6.6.1. (vi) of the SADC Strategic Indicative Plan for the Organ on Politics, Defense and Security Cooperation, it is acknowledged that the public security sector still faces the challenge of controlling and regulating the private security companies for the elimination of mercenary activities, among others.

6 See the Institute for Security Studies' website at www.issafrica.org (accessed 12 October 2006).

2 The Need for the Private Security Sector in Africa

It is without any doubt that Africa, being a continent continuously facing security threats, needs the private security sector in order to foster peace and security in Africa. No other continent is in such dire need for better security than Africa and in this context the legitimacy of the private security sector is without question. On this point, it has been argued that 'PMCs have come to acquire a de facto legitimacy and feature prominently in today's security setting.'[7] The use of PMFs is also seen as a more cost effective and cheaper peacekeeping alternative because they have the capacity for rapid deployment in a conflict situation and can affect strategic military balance[8]. PMCs have also been extremely useful in ensuring security for local companies and guarding oil installations like in Angola for example.[9] Since PMFs are contract-bound, they deliver on their contracts and zealously guard against their reputation for future engagement opportunities. Hence they uphold their professionalism in ensuring efficient delivery of their security products and services. Having mentioned these positive features of the private security industry, there is, however, a continuous call for its outright rejection. This results from the PMFs' potential of becoming a 'force' in themselves. One problem with such a call is that even if one were to reject the 'need' for the private security sector in Africa, the bottom line is that the industry is here to stay. After all, it is one of the fastest growing industries in the world, let alone in Africa.

The argument about the need for the private security sector is always clouded by the perils of privatising security in general, which is traditionally the sole responsibility of the state. This paper highlights a few of these. As the industry is profit-driven, there are concerns around the disregard of the client's needs in favour of profit maximization. For instance, that it was not uncommon for a PMF to abandon a 'lukewarm' contract for a more lucrative one to the detriment of the client's needs. Assuming a PMF contracted by a state to fight against a rebel organisation is also approached by the very same rebel organisation to assist in the overthrowing of that state at a more lucrative prize. There are no safeguards for 'crossing the floor' and working for the client's opponent in this regard. The PMF is therefore more likely to jeopardize the state's objectives in question. It is for this reason that a call is made for addressing this issue by means of contract.

Another downside of the private security sector is the issue of selection and accountability. It has been argued that PMFs recruit 'effective, but not necessarily congenial workers [and]

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7 Michelle Small 'Privatisation of Security and Military Functions and the Demise of the Modern Nation-State in Africa' *Occasional Paper Series: Volume 1, Number 2*, 2006 p.4.
Wairagu et al *Private Security in Kenya* (2004) 3.

8 David J Fransis et al, *Dangers of Co-deployment: UN Co-operative Peacekeeping in Africa* (2005) 6.

9 As above 114.

many former members of the most notorious and ruthless units of the Soviet and Apartheid regimes have found employment in the industry.'[10] The problem associated with the issue of selection and recruitment is that employees coming from these regimes or who were supporting these regimes are more prone to violate humanitarian law principles. This results from the very nature of the warfare in which they were involved before being recruited by the PMF. The South African Apartheid government, for example, undertook a chemical and biological weapons (CBW) defense program, which reportedly also included offensive research and use of CBW agents against opponents of that government.[11] Recruiting agents who are knowledgeable in both chemical and biological warfare to operate in conflict situations may be lethal and in violation of humanitarian law, assuming they continue to apply such skills in their operation.

Over and above violating humanitarian law, PMFs with unscrupulous employees are more likely to violate fundamental human rights in conflict situations, especially in the absence of an effective work ethic. As it is well known, women and children become more vulnerable in conflicts and their rights are always seriously violated, sometimes at the hands of operating PMFs employees. The notorious DynCorp employees are always cited in illustrating this point. For instance, reference is made to two past DynCorp's operations wherein several of DynCorp employees were accused of 'engaging in perverse, illegal and inhumane behavior [and] purchasing illegal weapons, women, forged passports and [committing] other immoral acts'[12]. It has been suggested that that it is incumbent upon the client engaging the PMF to ensure the proper vetting and screening of the firms before it hires it. Furthermore, an approach has been proposed that the UN and/or umbrella aid organisations to establish a database of vested and financially transparent firms that have met international standards.[13] Accordingly 'this database would have to be constantly updated with attachments of military contracts, recruiting and operations.'[14] Perhaps at the AU level, an undertaking should be made for a thorough discussion and appreciation of the nature of the problem before any meaningful regulation can take place, including the establishment of the PMFs database.

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10 PW Singer 'Should Humanitarians Use Private Military Companies?' *Humanitarian Law Review* (2004) 16.

11 See the South Africa Profile by the Nuclear Threat Initiative (NTI) at http://www.nti.org/e_research/profiles/SAfrica/index.html (accessed 12 October 2006).

12 John Crewdson 'Sex Scandal Still Haunts DynCorp' http://www.corpwatch.org/article.php?id=11117 (accessed 9 October 2006).

13 Singer (n 10 above) 17.

14 As above.

3 Regulation at the Regional Level

The private security sector, as the name suggests, is a security issue and it must be understood within that context. In establishing the AU, the Member States of the then Organisation of African Unity (OAU) were "Conscious of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of our development and integration agenda.[15]"

Article 3 of the AU Treaty provides that one of the objectives of the AU is to 'promote peace, security, and stability on the continent.'[16] The private security sector, therefore, should be seen in the light of bringing into operation the promotion of peace, security and stability on the continent. At the regional level this responsibility solely rests upon the AU. It is for this reason therefore that the AU should spearhead the regulation of the private security sector at the regional level and as means of promoting peace and security in Africa.

It is therefore within this context that the regulation of the private security sector (if any) at the AU level should be understood. The first attempt to regulate military actors in Africa was through the 1977 OAU Convention for the Elimination of Mercenarism in Africa (Convention).[17] To date the Convention has been ratified by 27 out of 53 African States.[18] The number of State parties to the Convention speaks volumes in terms of the political will in the fight against mercenarism in Africa.[19] It must be noted that mercenarism is the darker side of the private security sector. Given the number of the states parties to the Convention, it becomes questionable whether African States are indeed committed to address the problem of mercenarism in Africa, let alone to regulate the private security sector. The AU has recently adopted the African Union Non-Aggression and Common Defence Pact[20] (not yet in force), which, inter alia, establishes the African Union Commission on International Law. The Commission's objectives shall, among others, be to study all legal matters relating to the promotion of peace and secu-

15 Preamble to the AU Treaty, para 8. See the AU Treaty at http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm (accessed 1 August 2006).

16 Article 3 (f) of the AU Treaty.

17 O.A.U. Doc. CM/433/Rev. L. Annex 1 (1972), adopted 3rd day of July 1977, entered into force April 22, 1985. http://www1.umn.edu/humanrts/instree/1977e.htm (accessed 2 August 2006).

18 See list of countries that have signed, ratified/acceded to the Mercenary Convention at http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm (accessed 12 October 2006).

19 Regarding the United Nations International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, very few African States are State Parties. See status of ratification at http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=530&ps=P (accessed 13 October 2006). Again, this Convention focuses on individual mercenaries and not on PMFs and PMCs.

20 Adopted in Abuja, Nigeria, 31 January 2005. Available at http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm (accessed 1 October 2006).

rity in Africa. It is hoped that this Commission, once the Pact comes into force, will consider the challenges presented by the existence of the private security sector in Africa.

That the Convention is outdated is without question and its successful application on PMFs would be an exercise in futility. In fact, it can be argued that technically not one PMF or PSC falls within the ambit of the definition provided in the Convention. While article 1 (1) of the Convention only defines a mercenary as a 'person who' undertakes an activity, PMFs and PSCs are firms or companies. In this way, they cannot be liable under the Convention as companies/corporations/firms since they are not persons in the literal sense. In law, they may be regarded as having a legal personality; however, it would seem that this is not what was envisaged in the wording of the provision.[21] While this provision gives a definition of a mercenary, it fails to give the definition of 'person' within its definition provision. Even if an employee of a PMF were to commit the crime of mercenarism, in law the principle of vicarious liability would apply, i.e. the act of the employee would be imputed to the PMF which is the employer and is according to article 1 (1) of the Convention not 'a person'. That is if such a commission is within the course and scope of that employee's defined work. The question of criminal liability also arises. The employee is employed by the PMF, which is contracted by a client. Assuming the employee does undertake the act of mercenarism, the question of who then becomes criminally liable is not addressed. Should it be the individual employee or the PMF itself or the client with which the contract is entered into? Or should every legal person be criminally liable, whether individual or corporate? Article 1 (2) of the Convention further provides for the actors in the 'game' of mercenarism being 'the individual, group or association, representative of a State or the State itself'. Again companies/corporations/firms do not feature in this regard. Hence they are technically absolved from liability under the Convention. This 'brainteaser', however, does not end there. Article 1 (3) of the Convention provides that '[a]ny person, natural or juridical who commits the crime of mercenarism as defined in paragraph 1 of this article commits an offence considered as a crime against peace and security in Africa and shall be punished as such.' The more one reads this article, the more confusing it becomes. The paragraph 1 referred to in article 1 (3) of the Convention only defines the 'mercenary' and not 'the crime mercenarism'. It is only in paragraph 2 that 'the crime of mercenarism' is defined. Reference to paragraph 1 in this article is therefore misleading and no attempt has been undertaken to address this anomaly. After all, approximately half of the African States associate themselves with this Convention. As if this is not enough, article 1 (3) of the Convention attempts to include a juridical person, which may arguably include a PMF and/or PSC. Thus, the definition of the mercenary is 'a person' in terms of article 1 (1) of the Convention while the crime is capable of being committed by 'any person, natural or juridical' in terms of article 1 (3) of the same, which may include a PMF and/or a PSC.

21 Otherwise the use of the words 'a person which' could have been included.

Article 1 of the Convention identifies mercenaries directly by referring to the purpose of their employment, specifically if they are hired for purposes of overthrowing governments or OAU/AU-recognized liberation movements.[22] This is of course not explicit but implied. Article 1 (2) provides that the crime of mercenarism must be aimed at 'opposing by armed violence a process of self determination, stability or the territorial integrity of another state' by practicing certain acts which are listed therein. One problem associated with this provision is that not all PMFs and PSCs are employed with the abovementioned aim. But instead, their aim ranges widely and largely depends on the individual client's needs. Given their wide range of products and services, not all PMFs and PSCs alike are recruited to 'fight in an armed conflict' or 'hostilities'. Again the Convention overlooks this fact. Assuming a PMF has been contracted by the International Committee of the Red Cross to guard its premises in a conflict zone, there are no regulations in place for its operation in that conflict zone. Assuming the PMF does get recruited and participates in a 'fight in an armed conflict' or 'hostility' within the meaning of the Convention, the question is whether it should be regarded as 'a mercenary' within the meaning therein? If it is, then in terms of Additional Protocol 1 to the 1949 Geneva Conventions of 1977, its employees do not have 'the right to be a combatant or a prisoner of war'.[23] Assuming PMFs fall within the ambit of the definition (resulting from the inclusion of the word 'juridical' person), only those that are working towards realising these objectives may be liable under this Convention. With this in mind, there is no regulation whatsoever for the operation of PMFs working outside the opposition 'by armed violence [to] a process of self determination, stability or the territorial integrity of another state'. The process of 'self-determination' is not defined and one is left guessing on whether it is external self-determination, relating to the right to secede and form a new state, and/or internal self-determination, relating to the right to choose an own political status, to freely pursue a particular economic, social and cultural policy and to choose and participate in the government of the state.

The fact that article 1 (1) of the Convention requires the 'mercenary' to be 'neither a national of a party to the conflict nor a resident of a territory controlled by a party to the conflicts' introduces yet another problem. Given their power and influence, PMFs can easily facilitate their employees' nationality/citizenship or residency status and also register their company within the state of operation to suit their needs and to escape any possibility of being branded as mercenaries. If their operation is well connected to the State, this becomes even easier, especially given the prevalence of corrupt practices in many African states. The Convention does not safeguard this problem. It has been argued that the intention of the drafters of the Convention to 'allow African governments to continue to hire non-nationals, as long as they

22 PW Singer 'War, Profit and the Vacuum of Law: Privatized Military Firms and International Law (2004) 42 (2) *Columbia Journal of Transnational Law* 528.

23 Article 47 of Additional Protocol 1 of 1977.

were used to defend themselves from "dissident groups within their own borders," while disallowing their use against any other rebel groups that the OAU supported [such as the African National Congress]' was evident.[24] It has further been observed that the OAU/AU governments were still legally allowed to hire mercenaries for use against their own rebel groups, and many, such as Angola and Zaire, did so.[25] Again, it is clear that no regulation of the private security sector was envisaged in this regard.

4 Conclusion

The AU has not made any attempt to regulate the private security sector, as it exists in Africa today. Neither has it undertaken a study to achieve more understanding of the nature of the problem. Much of what was envisaged in the Convention does not address the contemporary problem posed by the industry. While the Convention attempts to outlaw mercenarism (being the darker side of the private security sector), it fails to do so in its entirety. The issue of defining a 'mercenary' and understanding the purpose of the 'crime of mercenarism does not address the operation of both private military and security companies in situations of armed conflict, at least at the AU level. Furthermore, the Convention does not even come near to what can be referred to as 'regulating the private security sector in Africa.' The operation of both the PMFs and PSCs in Africa unfortunately lies outside the domain of almost all the legal instruments under the AU. While the problem associated with the private security sector operating in armed conflict has been identified and the solution discovered (at least in the abstract sense), being the control and regulation of the industry, the AU is now faced with a daunting task of ensuring how this industry can be effectively controlled and regulated. This should be in line with its objective of ensuring peace and security in Africa. Inevitably, the 1977 Convention needs a thorough 'overhaul' and revision in order to address the contemporary challenges posed by the private security sector in Africa. It is therefore in this regard that civil society should play a significant role in conceptualising this phenomenon and recommending effective ways, which the AU should put in place in order to control and regulate this growing yet risky industry in Africa. At the moment, the journey is still a long one.

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24 Singer (n 23 above) 529.

25 As above.

"QUESTION TIME"

The issue of private security/military companies is a very sensitive one. In this respect, should we not first see whether there is a regulatory framework at the national level or regulatory approaches which can be considered as "common"? When we talk about harmonisation or establishing a regulatory framework at the European level, this is very far reaching. In practical terms there can be hesitations even concerning the legal basis (between first and second pillar) but also on what should be regulated and finally, on the procedural requirement of the EU to agree on such a legal act, which is the rule of unanimity among the Member States.

Ms. Krahmann agrees that it would be very difficult to reach something at the EU level that combines all these aspects in one regulation. It is however possible to use existing regulations and add little bits to them that apply to private military services. It would be a sort of laminated approach within the EU, but nothing would happen in terms of a proper regulation by the EU. It would always be done through the Member States, but the EU can take a role in encouraging regulation through them.

Prof. Hampson adds that when one is looking at the question of regulation, one has got to distinguish different sorts of issues. The obvious one is the relationship between the state and the regulated company in indicating the criteria for regulation. One has also got to consider in what circumstances the regulations are going to be regarded as applicable. But there is another issue in the fact that if you get an increasing level of regulation, it may surface and that would be the commercial equivalent to flags of convenience. If you find certain states adopting very rigorous regulations, there is presumably the possibility that companies will chose to be incorporated in the regulatory equivalent of i.e. Liberia and in that case, in addition to the internal contents of the regulation, you are going to need to internationally regulate the use of companies by approving regulations, so that those states that have too light approaches are not approved regulators. You are then going to have to require states to make it a crime for nationals and national companies to use unapproved companies and to serve in an unapproved company. So you are going to need to regulate regulations.

In addition, Mr. Gumedze points out that one is going to need strong financial support to implement those regulations and, given the situation in Africa, instead of diverting that money into development, it will be diverted into regulating regulations, which can become a problem.

Re-launching the debate, Prof. Sassoli noted the basic idea according to which private companies necessarily strive for profit and do not respect human rights and humanitarian law. That preconceived idea should be checked because in other fields, this is not a starting point. The staffs of such companies are professionals and on the other hand, some government staff is not striving for the common best at all - but either corruption or ideological idea - and therefore systematically violates humanitarian law and human rights. Taking the example of food, which is an essential human right, why does no one say that food is such a serious thing that we cannot give that to the private sector? Shall all supermarkets be run by the state because if supermarkets are run by the private sector, they will strive for profit? In which respect will regulation or the absence of regulation influence the way the employees behave?

Ms. Gillard underlines that indeed, one should not assume that the private sector is more likely to commit violations. An interesting follow-up to that is to what extent the insurance companies can be brought into it, by making a link between respect for the law and profits. Obviously they have a clear effect on how companies are going to behave. The insurance industry could also be promoted to require measures that will enhance respect for the industry, so that is perhaps someone else we should consider engaging with.

The problem of former South African soldiers whose military carriers date back to apartheid times was mentioned in the presentation. How far is that problem just resolving itself with time? Is there a suggestion that this pool of people might be replenished by people of a similar mindset who did not serve before 1992 because they were too young?

Mr. Gumedze argues that there might be a possibility of these ex-soldiers making improper use of their knowledge and experience. If there is a client interested in such soldiers, the first thing he would do is to look for them. It will then take time and effort to resolve that problem.

To what extent is the African Union Secretariat interested in moving on from the 1977 mercenary convention, given the almost emotional attachment, which some people in Africa have had to this convention on mercenaries because of its connotation with the fight against imperialism?

Concerning the 1977 mercenary convention, the African Union is very much willing to see this project through, because there have been debates about revising it. The doors are therefore open to engage with them.

Session 6
Ways Forward

Chair person: **Prof. Marco Sassoli,** *University of Geneva*

"THE SWISS INITIATIVE IN CLOSE COOPERATION WITH THE ICRC"

Michael Cottier
Federal Department of Foreign Affairs"
Emanuela Gillard
International Committee of the Red Cross

Le manque de coordination et de dialogue entre les États sur l'externalisation de leurs fonctions de sécurité a amené le Département fédéral des Affaires étrangères de la Suisse à organiser, avec le Comité international de la Croix-Rouge, un atelier d'experts gouvernementaux en janvier 2006, visant à favoriser un échange de vues sur les questions posées par le développements des compagnies privées militaires et de sécurité. L'autre objectif de cette initiative était la réaffirmation des obligations des États et autres acteurs du droit international dans le cadre du droit international humanitaire et des droits de l'Homme. Finalement, cet atelier, comme première étape de cette initiative, a permis une discussion portant sur des modèles de réglementation aux niveaux national, régional et international et l'élaboration de certaines recommandations. Les États visés sont principalement ceux qui emploient ces compagnies, ceux sur le territoire desquels ces dernières sont déployées, ainsi que leurs États d'origine.

Plusieurs éléments ressortent de ces recommandations, préparant le terrain à des lignes directrices sur une réglementation. Il s'agit essentiellement de la détermination des activités pouvant ou ne pouvant pas faire l'objet d'une externalisation vers le secteur privé, mais également des obligations en matière de formation, de contrôle des employés de ces compagnies et de règles d'engagement claires. Le travail en cours autour de ces recommandations pourrait par conséquent aboutir à un document d'initiative intergouvernemental, sous la responsabilité des États en tant qu'acteurs principaux du droit international et des droits de l'Homme. Ce document réaffirmerait leurs obligations juridiques, ainsi que celles des compagnies privées et suggérerait un ensemble de projets visant à aider les États à promouvoir le droit international humanitaire. Un cadre réglementaire devrait ainsi permettre de promouvoir la transparence de ce secteur et un certain niveau d'homogénéité entre les États.

We would like to structure the presentation as follows

1 a general overview of the initiative and what has been done until now, especially the January workshop of governmental experts

2 a reflection on the substance that we hope we will be able to bring into this initiative, that is possible best practices recommendations for states that are contracting and possible guidelines recommendations for states of incorporation and states on whose territory private security companies are operating

A general overview of the initiative

This initiative started over two years ago when we witnessed that in current conflicts, private actors had been mandated with armed security and also military services. Hence apparently, when there were some alleged breaches, there were also structural and legal difficulties to bring them to account, to promote sanctions. We also realised that there were certain issues raised by the operations and the increased mandating of such functions to private actors. One of this is the outsourcing of security tasks that are generally perceived as core functions of a state. To some degree, it was surprising to realise that there was no intergovernmental dialogue going on precisely on this issue. We found out later that most persons that were dealing with the issue within the different governments did not know who their counterpart would be in other national administrations. We thought that it would be useful if Switzerland would try to promote and facilitate dialogue on the issue and we were therefore very glad to know that the ICRC was willing to cooperate and to bring in its own expertise. After first contacts, we organised a Governmental Experts Workshop in January 2006.

The first general goal of this initiative is simply to contribute to intergovernmental discussion and exchange on the issues raised by the use of private security and military companies. Secondly, to reaffirm and clarify, if necessary, the existing obligations of states as well as other actors in international law, with a special focus on international humanitarian law (IHL) and human rights law. Indeed, the maybe too long title of our initiative carries these general objectives in its heading. The third more practical objective is to study and discuss possible options and regulatory models and other appropriate measures at the national and possibly regional and international levels. We hope that through this process, some recommendations and guidelines could be elaborated for states to meet fully their obligations and responsibilities under international law with regard to this issue.

As a very brief background, in Switzerland, our Federal Council actually confirmed that the Foreign Affairs ministry should go forward with this initiative in a report published on 2 December 2005. The January 2006 workshop was a first step of the initiative and we received rather positive feedback from the experts of the governments and the representatives of the industry with regards to the initiative. We also felt a general encouragement and to go forward

with this process in trying to promote dialogue. We tried to invite those states that are most affected by the topic, either through contracting such companies for providing security or military services abroad (as we are focusing on the trans-national provision of such services), or states on whose territories such companies operate. Thirdly, we invited states in whose jurisdiction those companies are incorporated or registered.

Hence, the January workshop was conceived as an informal opportunity for the governmental experts to exchange their views, it was not a meeting of diplomats with full-fledged powers to conclude a treaty. At the moment, we are not focusing on arriving at international legal obligations even if we do not exclude that those debates will prove useful in order to look at this issue.

The workshop produced a couple of substantive results that may be of interest. One conviction was that we should not focus too much on whether particular firms should be labelled as a private security or a private military company, as we know that the same company can actually provide both services. In the end, what counts is what services are actually contracted for. Another result was that research might be useful on the empirical facts; as it is rather difficult to know how big this industry is and what companies precisely do in which countries. Another issue that has been mentioned was the view of the population that may be affected in crisis and conflict regions by such companies. Frequently, the question of where to complain in a case of mistreatment by a private security/military company has also been raised.
We concluded that it would be good to continue the dialogue on this basis, trying to speak to the key actors and to find out what are the issue at stakes. Participants also generally agreed that states indeed have obligations under international law; obligations that cannot be circumvented by the use of private security/military companies, such as the prohibition of the use of force or interference in internal affairs, and that there are other obligations under IHL and human rights law that must be respected. Participants concluded that there may be a role for regulation to address current issues with regard to the trans-national use of private security/military companies and that appropriate regulation might help states to meet their obligations under international law, IHL and human rights law.

The next step planned is another governmental experts meeting on 13/14 November 2006 in Montreux, again as an informal exchange to build upon what we have discussed until now and to see what can be done in the future. One of the possible fora to discuss certain aspects of the initiative could be the International Conference of the Red Cross and the Red Crescent, at the end of November 2007.

Looking at the future

Hence, what could be elements of these recommendations guidelines for regulation, primarily for states? I would start by looking at possible guidelines for states that are contracting and then Mrs. Gillard will follow up on the states of incorporation and the states on whose territory such companies operate.

With regard to contracting standards, possible elements of regulation brought up at the January workshop were first the determination of the activities that may or may not be outsourced by any state that is contracting such companies abroad. This means requiring the company to vet its employees, to train them in IHL and human rights and also to the specificity of the context and of the tasks in which they will be assigned. Companies should also provide their employees with clear operating procedures and rules of engagement that comply with international law and also national law, to give their employees precise indications on what they are allowed to do and what not, because in the end it is the employees whose conduct and behaviour we wish to have an impact on. Furthermore, it is very important for companies to have a system of internal compliance and foresee disciplinary sanctions for misbehaviour and that they then take measures in case of allegations of misbehaviour. We also discussed that there should be a reminder of accountability for violations of international law and, what is very important for states contracting is how to monitor and enforce the compliance with the contract, sanctions for violations and a system to bring to justice perpetrators of international crimes.

In Switzerland, we are currently working on contracting standards for any private security company that is employed by the Federal authorities abroad, as well as in the domestic arena. Some of the questions that we are looking at are very similar to what I just presented but we have also reflected on additional criteria, for instance condition to have an adequate insurance in case there is a certain liability due to misconduct for instance. Before contracting a company, we would ask them to provide us with information that allows us to evaluate the financial situation but also the reputation and the past conduct of the company. There is one particular legal question that we have been confronted with: let us suppose that Switzerland would employ armed security providers abroad, with the contracted company employing foreign employees. If these foreign employees engage in war crimes, in Switzerland we would have no criminal jurisdiction because it has happened abroad by a foreigner against foreigners. However, at the same time we could incur state responsibility for the misbehaviour, which proves to be a certain gap.

As pointed out before, we are currently thinking about a suitable outcome document for this intergovernmental initiative. Obviously, it is for states to decide what they want to do but

it is a document that has to be based on international humanitarian law and human rights obligations as well as the more general obligations in relation to state responsibility. Even if at this stage, we are really not envisaging a binding document at all, we see this document as possibly consisting of two parts. The first part would just be a reaffirmation of existing obligations of states, of staff and of the companies themselves under IHL and human rights law. I think the second part of this outcome document is the more innovative part, as we are suggesting a set of blueprints, always for states, to assist them to promote respect for IHL. The first part would be best practices when a state itself is hiring a company, but what about other states? Not only the states that hire private security/military companies have responsibilities, and this is important because only 20% of contracts are concluded with states. What about the rest of them? Is there no state involvement, no scope for states to exercise some form of control on what is actually going on? If we look at it through an IHL prism, all states have a responsibility to respect but also to ensure respect for IHL by others. In relation to private security/military companies, some states are in a particularly good situation to do so, namely the states where these companies operate and the states of nationality of those companies. This obligation to ensure respect for IHL, that we find in the common article 1 of the Geneva Conventions is very much a soft obligation. There is no particular indication of what steps states must do in order to meet these obligations and they are definitely not in violation of the Geneva Conventions if they fail to do something. There may, however, be a stricter obligation under human rights law, at least in respect to those states in whose territories the private security/military companies are operating; but using this soft obligation to ensure respect for IHL has a hook in our initiative. We thought that one possible way of promoting respect for IHL would be by adopting a regulatory framework. This regulatory framework could first be used as a means of enhancing respect for IHL and human rights law by the companies by including requirements for them such as vetting, training etc. Obviously, this dimension would not be the only advantage of a regulatory framework. It would enable states to address many of the issues concerning the operations of the private security/military companies, i.e. what activities should never be allowed. In respect of the states of nationality of the company that wishes to operate abroad, a regulatory framework could avoid foreign policy embarrassment by enabling the home state to determine which operations abroad would be authorised and which would not. With regard to the states where they are operating, a regulatory framework would obviously be important to avoid negative impacts on the local populations by carrying out activities which can potentially include the use of force by actors over whom they have no control. Finally, a regulatory framework could also promote transparency of the industry and a certain level of homogeneity.

We are therefore putting forward blueprints for possible regulations at the national level, slightly different blueprints for the host state and for the state of nationality. We are only

providing extremely general guidance in the key areas and leave it to the states to decide what elements to include and also, more importantly, how to implement this at the national level in terms of procedure.

In addition to this framework, we are also giving suggestions, such as the accountability framework. All states have an obligation under the Geneva Conventions to search for, investigate, prosecute or extradite persons suspected of grave breaches, of war crimes. This already exists as a treaty obligation, whether or not in practice is a different question. Is this enough or are there other suggestions we could make to states in order to enhance the accountability mechanisms in terms of starting proceedings? An element that we are suggesting is extraterritorial civil jurisdiction. This would be important in order to be able to bring proceedings against the companies. Although some states have extraterritorial jurisdiction over civil matters, this is by no means uniform across the board. Another dimension we are looking at is the possibility of establishing some form of superior responsibility for the directors of the companies. Proceedings are indeed often brought against the staff members, because they are in fact the ones who have committed the violations; but are this really enough to hold the company responsible? Should there not be some form of directors' criminal responsibility for what their staff members do? These are the elements we are currently thinking of in the blueprints addressed to other states.

The issue of superior responsibility for the people who run private security/military companies is very interesting, in particular the fact that these persons wake up in the morning not worrying about the principles of IHL, but rather about their insurance companies. Do you think a prosecutor could get those managers to jail on the basis of general criminal principles that already exist in criminal legal systems?

Ms. Gillard argues that in this respect, one has to look at the different legal systems. Not much is available at the international level apart from conspiracy and association in committing a war crime, but one has to be creative and see to what extent there is already a directors' liability/responsibility for the acts of their staff. In some jurisdictions, there might already be something; but if not, do we need something new or can we use existing concepts such as conspiracy?

Prof. Sassoli adds that, as far as international crimes are concerned, the concept of superior responsibility by civilian superiors is in the ICC's statute. It is a separate concept from the one of military superiors, it is a lower standard but nevertheless we should not forget that.

As a complement, Mr. Cottier adds that when drafting the superior responsibility of civilian persons, what most negotiators had in mind was civilian authorities i.e. the governor of a region, but in the text, there is nothing preventing the application to other civilians insofar as they meet the necessary requirements.

Prof. Hampson explains that concerning the question of civilian command responsibility, there are some jurisdictions that have got a massive problem with imposing criminal responsibility on company directors when it is an employee that has committed the act in question. The likely objections can be short circuited by those who do not properly know IHL, who are going to say that we cannot possibly hold a company director responsible. If one is saying they are responsible for the acts of the employees or for the omissions of the directors failing to train – or if one is focusing on command responsibility, it may be a way of addressing this that would not otherwise be open.
On the nature of the regulation, Prof. Hampson is in complete agreement that one needs something that would be ultra-soft, but ultra-soft means that the state is free to choose amongst the range of options and that a due coercion is not put with regard to the choice they make. For a state to make an informed choice, it needs to know that in this area, there are millions of issues to be addressed and unless those are identified with rigour, there is a

risk that even states that would be willing to go further will not have the information on the basis of which to do it. While some states are well equipped, other states have got very limited resources for tackling the issue. It is therefore important not to confuse the hardness or softness of the international framework when states are encouraged to act.

A very important point is the translation of the standards of humanitarian law into what it practically means for a company. The question that arises is: can one do that generally or does one have to do it specifically for every company? After all, one should go simply through the rules of humanitarian law, thinking what they do mean for companies.

Ms. Gillard explains that the aim, in this regulation, was to identify all the issues that the states should consider addressing and to leave them the liberty on how to do so. It is a challenge to bring together all the different issues that need to be considered by different bodies of law and also to turn them into a document that is digestible for all concerned.

At the moment, the EU has two very successful operations. The first one is Althea in Bosnia-Herzegovina and the second one is EUFOR RD Congo, where military forces from all the Member States and certain third states are as well deployed. Both operations have a joint action for legal basis, and as an attachment to the joint action, we have the so-called "operation plan", including texts like the Guidelines on torture, the Guidelines on children in armed conflicts etc. Part of the operation plan is also the SOFA (status of forces agreement), the rules of engagement and the standards of behaviour. All these very sensitive documents have to be dealt with by all the military forces, and it is running very good. Therefore, how should it be dealt with in terms of the so-called privatisation of military service?

Prof. Sassoli points out that even the UN Secretary General has raised the question of whether he should engage private companies, because the real problem is that states do not give enough contingents, i.e. in Darfur. The question was raised in order to know whether the UN would not be better off using private companies rather than doing nothing. The downsizing of national armed forces makes it more difficult to have contingents at one's disposal.

Concerning transparency, one has to clarify what states have to require from companies. Best practices are, in Prof. Sassoli's view, something that either goes beyond legal obligations or draws up the best ways to implement them; he expresses his contentment to hear that the ICRC itself wants to be an example, thinking about guidelines of hiring when it hires private security companies. If public, this could be an example for NGOs, which could use these guidelines and therefore represent a signal to other humanitarian actors.

Concluding remarks

Philip Spoerri
Director for International Humanitarian Law
International Committee of the Red Cross

I would first like to thank the College of Europe. We have been working together for many years, they provide a fantastic venue in a beautiful city and we are very much indebted to their work. I would also like to thank all of you for your participation in this event.

I would like to just quickly pass in review the sessions of this Colloquium and sum them up. My reading of it was the importance of the issue if "vacuum". Is there something out there, something totally new and unregulated? We have seen that this could be resumed as an issue of "gaps". The other concept I would like to highlight is this "laminated" approach where all these various elements we have heard here form a part of the big picture and have to be brought together and developed to reach better standards and regulation of this multi-faceted issue.

When we go to the various points, we had the stage part of Ms. Holmqvist who drew clearly to our attention that this is a phenomenon which has grown considerably. She gave the numbers of 1 to 50 from the first Gulf war, as the proportion of private security companies to regular armed forces. Now, the ratio would be at 1 to 10. In her part, she summed up the key challenges as the ones of accountability, legitimacy and finding sustainable answers. Of course, the issues were mentioned keeping in mind that one of the downfalls is that private security companies look for commercial interests. We had quite a number of reactions to this, including some pointing out the fact that we should not have so much distrust in private companies. However, this is an area where the States have to make sure they protect their responsibilities.

There were a few elements, described by Colonel Loriaux, on the seminar that took place a week ago in Brussels. I just picked out a few points, pointing out to the importance of containing regulations, to have clear lines on the status of forces agreement. His perception of the seminar made him perceive reluctance from various governments to invoke IHL and human rights in this domain. He also reported these divergent views with, on the one hand, some people looking at it as a group of adventurers working in the field, but on the other hand that the distinction sorting out bad ones and good ones was another type of approach.

We came then to the session from which a lot was expected because it was only addressed in this colloquium, namely the legal issues and the international legal framework. Facing the issue of gaps, Emanuela Gillard reassured us that in terms of IHL, the legal framework does exist. She had to invoke the problem of the enforcement of control, which is a general problem of IHL, and how to make sure that more can be done in that field. She invoked the important distinction to be made in classifying the members of private security companies: are they fighter combatants or are they civilians? A general conclusion would lead us to categorise them as civilians. There, a field where more work has to be done is in defining more clearly what 'direct participation in hostilities' is. Having a better view on this issue would allow us to clarify the moment they would lose their protection. When it comes to their role, she referred to the problem of where they are used for military purposes and if they risk becoming a military objective. The principle of common article 1 of the Geneva Conventions was invoked, namely the rule to respect and to ensure the respect of IHL in all circumstances and the important duty to prosecute grave breaches of the Geneva Conventions.

Françoise Hampson pointed out the great importance of human rights in this field. Probably in the entire scope, that is to say in the 100 countries where private security companies operate, it is the relevant law in the largest part of the situation, the scope of IHL being probably smaller. With an amazing amount of details, she explained on the one hand that there is already existing jurisprudence at the national level, but even on the level of international or European courts. An important thing I realised is that there was some consent amongst the participants to this colloquium that great hope is actually being put in the field of civil litigation, bringing better prospects than the penal repression, as there is an easier way to seek litigation for civil law suits. The conclusion of this part was the fact that if rules are not being enforced, this does not mean that they do not exist. So, again, we came to the term that we actually do not have a legal vacuum even though the great problem of enforcement remains.

When we came to the next session on existing national approaches, Mr January explained how the process had gone on in England to set off, after the Sandline scandal in 1997, the Green paper in 2001. This demonstrated the relative slowness in the UK, compared to the US, where the national approaches started much earlier. We learned that the UK sector is being regulated, but there is no regulation of the export of private security companies and that the regulatory models which have to develop are in the fields of licensing, registering and also the licensing of individual services.

I found the presentation on how this issue is dealt with in the United States particularly rich and fruitful, explaining the U.S. directives on this issue. This is a system that has considerably evolved. It was mentioned that elements of the law of armed forces are contained in the directives of the Department of Defense (DoD) together with the fact that private security companies are not allowed to engage in combat operations, leaving them just the right for self-defense. Of course, it was mentioned in the discussions that some of these notions would have to be precised, but these rules also mention that violations of IHL are subject to prosecutions. Colonel Mayer also pointed out that there is experience to be gathered, but it is a learning process and the term of prosecution is something ongoing which will most probably gain in vigour in the coming years. It is important to say that these directives apply to all contracted forces and prohibit within the status of forces agreement, the use of lethal force by private security companies.

When we came to the third panellist within this session, Ms. Caparini compared the national approaches (South Africa and the US). Each time these legislations are part of the foreign policy of these countries, they do have different objectives. In South Africa, the aim was a complete ban of these companies whereas in the United States, it was rather to include them in this industry. In the United States, you had some idiosyncrasies which were mentioned as well, sometimes perceived as downfalls, sometimes as positive points. On the one hand, one can notice the desire of companies to behave in accordance with the law because they are also seeking many contracts with the US government, but on the other hand there remains a certain lack of transparency.

The fourth session was dedicated to the regulation on good practices, with a fascinating presentation by Andrew Bearpark, putting the relevance of the lawyers into perspective in the eyes of the companies' executives. In contrast, he also pointed out the importance of insurance companies, which is a point to be retained. He presented and very much supported a laminated approach, meaning that regulation would be needed on all levels (laws, code of conduct…). He then came to one issue that I found key, which is the issue of transparency, being the one which he would choose amongst all these various levels. Various problems were mentioned, such as how to deal with non members who do not want to comply with all those frameworks. This naturally leads to the issue of self-regulation, but also the downfalls of self-regulation that made him address the possibility of setting up an ombudsman.

In this part, there was also a presentation by Mr. Ortiz, referring to the practice of NATO. We actually saw that, despite the various cases it had to face, NATO has not expended very far in this domain. The question of looking whether there would be a possible joint work with institutions like the UN or the EU has been raised, but was mainly answered with the fact that the main solution would be to work on solutions at the national government level.

We then came to the fifth session and the question of possible regional regulations. From the presentation of Ms. Elke Krahmann, we received a sort of blueprint for the next ten years, with the harmonising of licensing, a common list of common services, the inclusion of related services in dual use and military technical lists, the CFSP common position regarding national legislation on military civil exports and also the reference that the information exchange on license deals should be expended.

When we went on to the situation in the African Union, Mr. Gumedze came straight to the point and said that unfortunately, there was an absence of regulation in Africa. The 1977 mercenary law was mentioned as an outdated tool that does not adequately address the issues of today. The way forward in terms of what can be better done certainly requires a certain support by the examples given, such as the European Union and other supports. Establishing a regulatory framework will require means of control and these means will require money.

In terms of the ways forward, we very much look forward to the formulation of guidelines and the concrete proposals issued by the Swiss initiative presented by Ms. Gillard and Mr. Cottier.

In all fields, it did not appear to me that we should have great illusions. There is a lot of work to be done until all this grasps together: an elaborate framework for IHL and human rights, both regarding civil law suits and prosecution, a lot will have to be done; the national approaches together with regional or international approaches; self regulation and the crucial issue of transparency.

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Private Military/Security Companies Operating in Situations of Armed Conflict

7th Bruges Colloquium
19-20 October 2006

Simultaneous English/French translation will be provided
Traduction simultanée anglais/français

DAY 1: Thursday 19th October

09.00-09.30 Registration and Coffee

09.30-09.45 Welcome address by **Prof. Paul Demaret**, Rector of the College of Europe

09.45-10.00 Opening address by **Prof. Jacques Forster**, ICRC, Vice-president

Session One: Setting the Scene

Chair person: **Philip Spoerri**, ICRC Director for International Law

10.00-10.20 *Analytical overview of the issue of PMC/PSC:* **Caroline Holmqvist**, Research Associate, Stockholm International Peace Research Institute

10.20-10.40 *Report of the Belgian seminar on PMC/PSC:* **Col. Gérard Loriaux**, Centre de Droit militaire et de Droit de la guerre

10.40-11.00 Discussion

11.00-11.30 Coffee break

Session Two: The International Legal Framework

Chair person: **Philip Spoerri**, ICRC, Director for International Law

11.30-11.50 *The position under International Humanitarian Law:* **Emanuela Gillard**, ICRC, Legal Advisor

11.50-12.10 *Responsibility in the Human Rights framework:* **Prof. Françoise Hampson**, Essex University

12.10-13.00 Discussion

13.00-14.30 Sandwich lunch

Session Three: Existing National Approaches

Chair person: **Emanuela Gillard**, ICRC, Legal Adviser

14.30-14.50 *Legal framework for British companies:* **Peter January**, Foreign and Commonwealth Office

14.50-15.10 *US Directives on the use of PMC/PSC:* **Col. Christopher Mayer**, Chief of Staff, Defense Reconstruction Support Office, Pentagon

15.10-15.30 *Overview of national approaches to regulating the commercial export of military and security services:* **Marina Caparini**, Senior Fellow, Geneva Centre for the Democratic Control of Armed Forces

15.30-16.00 Discussion

16.00-16.30 Coffee Break

Session Four: Regulation by Good Practice

Chair person: **Prof. Marco Sassoli**, University of Geneva

16.30-17.00 *Self-regulation by the industry:* **Andrew Bearpark**, Director General, Bristish Association of Private Security Companies

17.00-17.30 *To what extent can the issue be addressed by means of contract?:* **Antonio Ortiz**, Adviser, NATO Policy Planning – Office of the Secretary General

17.30-18.00 General Discussion

19.30-22.30 Dinner at the Residence of the Governor of West Flanders (on registration)

DAY 2: Friday 20th October

Session Five: The Possibility for Regional Regulation

Chair person: **Emanuela Gillard**, ICRC, Legal Adviser

9.00-09.20 *Is there a possibility for some regulation at the EU level?:* **Elke Krahmann**, Senior Lecturer, Bristol University

09.20-09.40 *Regulation at the African Union or African sub-regional level:* **Sabelo Gumedze**, Senior Researcher, Institute for Security Studies, Pretoria

09.40-10.30 Discussion

10.30-11.00 Coffee Break

Session Six: Ways Forward

Chair person: **Prof. Marco Sassoli**, University of Geneva

11.00-11.30 *The Swiss initiative in close cooperation with the ICRC:* **Michael Cottier**, Chef adjoint de section, Département Fédéral des Affaires Etrangères and Emanuela Gillard, Legal Advisor, ICRC

11.30-12.15 General Discussion

Concluding remarks

12.15-12.45 Concluding remarks and closure by **Philip Spoerri**, ICRC Director for International Law

CURRICULUM VITAE DES ORATEURS
SPEAKERS' *CURRICULUM VITAE*

Paul Demaret

Le Prof. Paul Demaret est Docteur en droit et Licencié en sciences économiques de l'Université de Liège, où il a également obtenu un diplôme d'études spécialisées en droit économique. Il a ensuite poursuivi ses études aux Etats-Unis, et est titulaire d'un Master of Law de l'Université de Columbia et d'un Doctorat of Juridical Science de l'Université de Californie à Berkeley. Le Professeur Demaret a enseigné des matières juridiques ou économiques dans de nombreuses universités, notamment celles de Genève, Paris II, Pékin et Coimbra, ainsi qu'à l'Académie de Droit européen de Florence et au Colegio de Mexico. Il est actuellement Recteur du Collège d'Europe.

Spécialiste des aspects juridiques et économiques de l'intégration européenne, le Professeur Demaret est l'auteur ou l'éditeur d'ouvrages et de nombreux articles sur ces questions. Son expertise en matière de commerce international a été sollicitée par diverses institutions, dont l'Organisation Mondiale du Commerce, où il a servi dans deux panels.

Jacques Forster

Jacques Forster est Vice-président du Comité international de la Croix-Rouge (CICR) et Professeur à l'Institut universitaire d'études du développement (IUED) de Genève. Après un doctorat en sciences économiques de l'Université de Neuchâtel, il a été consécutivement chargé de cours à l'Institut de relations internationales de l'Université des Indes occidentales de Trinidad et Tobago ; Professeur et Directeur de l'IUED de Genève.

Dans le domaine de la coopération au développement, Jacques Forster a été, entre 1972 et 1977, Chef de la section Amérique latine au sein de la Direction de la coopération au développement (DDA) du Département fédéral des affaires étrangères du Service de la Coopération technique, Suisse.

Le Professeur Forster est également, depuis 1983, Membre du Comité exécutif et Vice-Président (1985-1990) de l'Association européenne des instituts de recherche et de formation en matière de développement (EADI). Il a été Membre du Curatorium de l'Institut tropical suisse à Bâle (1990-1999) et Président de INTERCOOPERATION à Berne (1990-1999).

Philip Spoerri

Philip Spoerri, Director for International Law and Cooperation within the Movement at the International Committee of the Red Cross (ICRC), was born in 1963 in Zurich. He was trained as a lawyer in Germany where he acceded to the bar in 1992. Before commencing as a delegate for the ICRC at the beginning of 1994, he worked as a criminal defence lawyer. In 2000, he

was awarded with a PhD for a thesis on international humanitarian law from the University of Bielefeld, Germany.
Following a first mission for the ICRC in Israel/Palestine, he served as a delegate in Kuwait and in Yemen. From 1998 to 1999 he worked for the ICRC in Afghanistan as a protection coordinator, in charge of ICRC activities for the protection of detainees, reestablishment of family links and tracing activities in the country. Then, he spent 18 months as an ICRC Head of mission in the Democratic Republic of Congo. From December 2000 until April 2004, he worked as a lawyer at the ICRC headquarters in Geneva and headed for two years the legal advisers to the operations' department. He returned to Afghanistan as the ICRC Head of delegation from May 2004 to January 2006.

Caroline Holmqvist

Caroline Holmqvist is currently a PhD Candidate in the Department of War Studies, King's College London. She has previously worked as a Research Associate in the Armed Conflict and Conflict Management Programme at the Stockholm International Peace Research Institute (SIPRI) and holds a BSc and MSc in International Relations from the London School of Economics and Political Science (LSE). She has published several texts on armed conflicts and the role of non-state actors, including *Private Security Companies: The Case for Regulation*, SIPRI Policy Paper No. 9 (Jan. 2005) and chapters in the *SIPRI Yearbook* for 2005 and 2006.

Colonel d'Aviation (e.r.) Gérard Loriaux

Après des études d'ingénieur civil en télécommunications à la section Polytechnique de l'Ecole Royale Militaire à Bruxelles, Gérard Loriaux passe comme officier technicien à la Force Aérienne belge. Il y occupe successivement des postes d'officier de maintenance, de chargé d'enseignement, d'officier de projet et de responsable de la qualité pour le suivi des contrats dans l'industrie aéronautique belge et étrangère. Il effectue également une mission d'observation en ex-Yougoslavie pour l'ECMM.
Il passe les dernières années de sa carrière militaire comme conseiller de faculté au Collège de Défense de l'OTAN à Rome. Il y est responsable des cours pour les officiers PfP (Partnership for Peace) et les exercices de gestion de crise. Il est de plus le point de contact pour le CICR et le Vatican.
Après être passé à la retraite il devient Directeur de Session au Centre d'Étude de Droit militaire et de Droit de la Guerre. Il organise ainsi de multiples journées d'étude et des colloques au profit de la formation continue des officiers conseillers en droit des conflits armés.
Il maintient également le contact et la collaboration avec les organismes liés au droit des conflits armés.

Emanuela-Chiara Gillard

Emanuela-Chiara Gillard is a Legal Adviser in the Legal Division of the International Committee of the Red Cross (ICRC), where she is responsible, *inter alia*, for legal issues raised by displacement, the protection of civilians, women and children in armed conflict, occupation, multinational forces and private military and security companies. In 2003 and 2004, she spent several months on the field as legal adviser to the ICRC's operations in Iraq.

Prior to joining the ICRC in 2000, Emanuela Gillard was a Legal Adviser at the United Nations Compensation Commission, in charge of government claims for losses arising from Iraq's invasion and occupation of Kuwait. From 1995 to 1997, she was a research fellow at the Lauterpacht Research Centre for International Law at the University of Cambridge.

Emanuela Gillard is a solicitor of the Supreme Court of England and Wales and member of the Executive Council of the American Society of International Law. She holds B.A. and LL.M. degrees from the University of Cambridge.

Françoise Hampson

Françoise Hampson is a Professor in the Law Department and Human Rights Centre of the University of Essex, where she teaches, i.a., a postgraduate course on the law of armed conflict. She was an Academic Adviser for the Instructors' Materials, to accompany the ICRC Military Manual. She was on the Steering Committee for the ICRC's study on Customary Humanitarian Law and supervised the British State practice report and the consolidated report on persons in the power of the other side. She is currently on the ICJ's Commission of Inquiry into the conflict between Israel and Hizbullah. Since 1998, she has been a member of the UN Sub-Commission on the Promotion and Protection of Human Rights, where her reports have included accountability of international personnel in UN-endorsed peace support operations, reservations to human rights treaties and the relationship between IHL and human rights law. She has litigated many cases before the European Court of Human Rights, including cases arising in situations of conflict (e.g. Ergi, *Akdeniz & others*, *Issa and others* against Turkey and *Bankovic and others* against the 17 members of NATO party to the ECHR).

Peter January

Peter January was born in 1952. He graduated in Modern History and Italian at the University of Reading; as part of this course he studied for a year at the University of Padova. He then trained as a schoolteacher and taught for five years in Kent. Between 1980 and 1983 he researched for the degree of Doctor of Philosophy at the University of London; his thesis was on the military organisation of the Republic of Venice between 1560 and 1630. He joined the Foreign Office in 1983. He has served in the British embassies in Budapest and Maputo, and was British Ambassador in Tirana from 1999 to 2001. His jobs in the Office in London have covered South East Asia, Bermuda and the Caribbean Dependent Territories, non-proliferation,

intelligence, and the OSCE and the Council of Europe. His interest in Private Security Companies began in 2004 when he was commissioned to produce a review of policy options for the regulation of the private security sector.

Colonel Christopher Thomas Mayer

Colonel Christopher Mayer, United States Army, is the Chief of Staff for the Defense Reconstruction Support Office (DRSO), Office of the Secretary of Defense, Washington D.C. The DRSO is responsible for coordinating interagency support for coalition efforts in both Iraq and Afghanistan and reports to Congress on security and stability in Iraq. From April 2004 to January 2005, Colonel Mayer served in Baghdad as the Chief of Staff of the Coalition Provisional Authority's Program Management Office (subsequently known as the Project and Contracting Office), responsible for planning, programming, and executing the strategic reconstruction of Iraq. His duties included establishing an operations center responsible for maintaining situational awareness of Private Security Companies supporting the reconstruction effort. COL Mayer has a Master's Degree in Education, is a graduate of the U.S. Air Force War College, and is adjunct faculty to the Naval War College.

Marina Caparini

Marina Caparini is Senior Fellow in the Research Division of the Geneva Centre for the Democratic Control of Armed Forces, where she coordinates the Working Group on Internal Security Services and the Working Group on Civil Society. In this capacity, she provides analysis on topics relating to issues of accountability and oversight in security sector governance. Her areas of interest include civil society and media engagement with the security domain, reform and oversight of the armed forces and internal security services (police, security intelligence services, border security agencies), and the privatisation of security functions. Recent publications include *Borders and Security Governance*, Marina Caparini and Otwin Marenin, eds (LIT, 2006); *Civil-Military Relations in Europe: Learning from Crisis and Institutional Change*, Hans Born, Marina Caparini, Karl Haltiner, Jürgen Kuhlmann, eds. (Routledge, 2006); and *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, Fred Schreier and Marina Caparini, DCAF Occasional Paper no. 6, 2005.

Marco Sassòli

Marco Sassòli, a national of Switzerland and Italy is, since March 2004, Professor of international law at the University of Geneva, Switzerland. He chairs the boards of the Geneva Academy for International Humanitarian Law and Human Rights and of Geneva Call, an NGO with the objective to engage armed non-State actors to adhere to humanitarian norms. He is a member of the board of the International Council of Human Rights Policy.

From 2001-2003, Marco Sassòli has been professor of international law at the University of Quebec in Montreal, Canada, where he remains Associate Professor. He graduated as Doctor of

laws at the University of Basel (Switzerland) and is member of the Swiss bar. He has worked from 1985-1997 for the International Committee of the Red Cross at the headquarters, *inter alia* as deputy head of its legal division, and in the field, *inter alia* as Head of the ICRC delegations in Jordan and Syria and as protection coordinator for the former Yugoslavia. He has also served as executive secretary of the International Commission of Jurists and as registrar at the Swiss Supreme Court.
Marco Sassòli has published widely on international humanitarian law (inter alia *How Does Law Protect in War?* 2nd ed., Geneva, ICRC, 2006, 2473 pp. (with ANTOINE BOUVIER), human rights law, international criminal law, the sources of international law and state responsibility.

Andrew Bearpark

Andrew Bearpark is Director General of British Association of Private Security Companies. Adviser to Governments, International Organizations and the commercial sector on Post Conflict Reconstruction. Formerly: Director of Operations and Infrastructure, Coalition Provisional Authority, Iraq (2003-2004); UN Deputy Special Representative of the Secretary General and EU Representative with responsibility for economic development, Kosovo (2000-2003); Deputy High Representative, Reconstruction and Return Task Force, Sarajevo, Bosnia (1998-2000); Head of Information and Emergency Aid Departments, Overseas Development Administration and Press Secretary to Minister Baroness Chalker (1991-1997); Private Secretary and later Chief of Staff to Prime Minister Margaret Thatcher (1986-1991).

Antonio Ortiz

Since August 2004, Antonio Ortiz is Policy Adviser at Policy Planning, in the Office of the Secretary General, NATO Headquarters, Brussels. In 2005 he also worked as adviser on relations with the UN, OSCE and international organizations at NATO's Political Affairs and Security Policy Division. From 1998 to 2004 worked as Senior Programme Officer for OSCE field activities in the Balkans in the Conflict Prevention Centre of the OSCE Secretariat in Vienna. From 1993 to 1998, Antonio Ortiz worked as a private lawyer in Madrid and for the OSCE Mission to Bosnia-Herzegovina in 1996-97.

Elke Krahmann

Dr. Elke Krahmann is Senior Lecturer in International Relations in the Department of Politics at the University of Bristol. She received her PhD from the London School of Economics and was previously a DAAD Fellow at Harvard University. She is has published widely on international foreign and security policy, including *New Threats and New Actors in International Security* (Palgrave, 2005) and *Multilevel Networks in European Foreign Policy* (Ashgate, 2003). Her articles have appeared in *International Affairs, International Studies Review, Cambridge Review of International Affairs, Review of International Studies, Global Governance, Cooperation and Con-*

flict, European Security, Contemporary Security Policy, and Conflict, Security and Development. Her forthcoming research monograph examines the privatization of military services in Europe and North America, while a new ESRC-funded project will turn to the theoretical implications of the commodification of security.

Sabelo Gumedze

Sabelo Gumedze is a Senior Researcher at the Institute for Security Studies (Pretoria, South Africa) responsible for a project on the Regulation of the Private Security Sector in Africa. Sabelo holds an LLM in Human Rights and Democratization in Africa from the University of Pretoria, a LLB and a BA in Law from the University of Swaziland. He taught at the University of Swaziland (Swaziland), Universities of Limpopo and the Witwatersrand (South Africa). Sabelo Gumedze is an admitted Attorney of the High Court of Swaziland.

Sabelo Gumedze is also pursuing a PhD at Åbo Akademi University (Finland). His PhD research topic is "The Prospects of the African Union in the Promotion and Protection of Human Rights in Africa".

Michael Cottier

Michael Cottier, a Swiss national, studied law at the Universities of Fribourg in Switzerland and Madrid. He was a research and teaching associate at the Chair for Public Law and Public International Law at the University of Fribourg from 1995-1998.

After earning his LL.M. at NYU Law School in 1999, Mr. Cottier researched and published most particularly in the areas of international humanitarian law and international criminal law and worked as a consultant for international human rights NGOs such as the International Commission of Jurists and Human Rights Watch. From 1997 to 2000, he participated in the diplomatic negotiations on the Rome Statute of the International Criminal Court.

In 2002, Mr. Cottier joined the Swiss Federal Department of Foreign Affairs (DFA). After a first year as a desk officer for Central and Eastern Europe, he worked at the Swiss Embassy in Indonesia in 2003/2004. He currently holds the position of Deputy Head of the Section for Human Rights and Humanitarian Law within the Directorate of International Law of the DFA.

Mr. Cottier's responsibilities include the coordination for Switzerland of its Initiative in Cooperation with the ICRC to Promote Respect for International Humanitarian Law and Human Rights Law with regard to Private Military and Security Companies Operating in Conflict Situations.