

International Institute of Humanitarian Law



International Institute of Humanitarian Law
Institut International de Droit Humanitaire
Istituto Internazionale di Diritto Umanitario

Private Military and Security Companies

STUDI



Politica



FrancoAngeli

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Private Military and Security Companies

35th Round Table on Current Issues
of International Humanitarian Law
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Table of Contents

Preface <i>Fausto Pocar</i>	pag.	9
Opening session		
Introductory remarks <i>Fausto Pocar</i>	»	13
Welcome address <i>Giovanni Berrino</i>	»	17
Keynote address <i>Christine Beerli</i>	»	19
Statement <i>Gianluigi Magri</i>	»	25
Statement <i>Gianni Ghisi</i>	»	30
Statement <i>Gary Motsek</i>	»	36
Statement <i>Gregory Starr</i>	»	39
I. Status and Interrelation of Major Standard Setting Initiatives		
The Montreux Document <i>Philip Spoerri</i>	»	45

The International Code of Conduct and its Oversight Mechanism		
<i>Anne-Marie Buzatu</i>	pag.	49
The UN Draft Convention		
<i>Faiza Patel</i>	»	52
II. Experiences with National Implementation		
South Africa		
<i>Abdul Samad Minty</i>	»	61
France		
<i>Monique Liebert – Champagne</i>	»	67
Venezuela		
<i>Corina Helena Cortés Oliveros</i>	»	72
Switzerland		
<i>Marc Schinzel</i>	»	78
III. Experiences of Industry Implementation		
Industry Standards: ANSI/ISO Standard		
<i>Marc Siegel</i>	»	87
Maritime Security Standards		
<i>Ian Simpson</i>	»	93
IV. Key Legal Questions arising in Armed Conflict		
Status of Private Military Security Companies under International Humanitarian Law		
<i>Nils Melzer</i>	»	99
Detention Activities by PMSCs		
<i>Katherine Gallagher</i>	»	102
International, Corporate and Individual Responsibility for the Conduct of Private Military and Security Companies		
<i>Andrea Carcano</i>	»	108

V. The Challenges of Specific Contexts

Regulating and Monitoring Private Military and Security Companies in United Nations Peacekeeping Operations <i>Stephen Mathias</i>	pag.	121
Regulating and Monitoring PMSCs in NATO Operations <i>Andres B. Munoz-Mosquera and Nikoleta P. Chalanouli</i>	»	128
Regulating and Monitoring the Privatization of Maritime Security <i>Natalino Ronzitti</i>	»	147

VI. Improving Compliance with International Humanitarian Law

IHL Training for and by PMSCs <i>Marc Linning</i>	»	155
Industry Needs and Strategies for IHL Training <i>Sylvia White</i>	»	159

VII. Way Forward

Rights and Accountability in Development <i>Tricia Feeney</i>	»	163
Private Military Security Companies Regulation: the Way Forward <i>Alan Bryden</i>	»	172
Concluding remarks <i>Fausto Pocar</i>	»	177
Concluding remarks <i>Philip Spoerri</i>	»	180
Concluding remarks <i>Valentin Zellweger</i>	»	183

Acronyms	pag.	187
Acknowledgements	»	191

Preface

One of the traditional assumptions of International Humanitarian Law is that conflicts are fought between States or, at most, between States and organized armed groups. Nowadays, the persistent and growing employment, on a large scale, of Private Military Security Companies (PMSCs) in situations of armed conflict seems to put strain on the ordinary structure and conception of International Humanitarian Law.

The need for a strict and clearly established legal framework accepted by States and PMSCs; the importance of effective accountability mechanisms for the conduct of private contractors; the ever blurred distinction between civilians and combatants and the uncertainty surrounding the legal status and obligations of PMSCs, are only some of the issues arising from the increasing use of private contractors in different international scenarios.

The necessity to give further contributions to the international debate on the legal and normative development of private security regulatory frameworks, without forgetting the importance of political and technical considerations, led the International Institute of Humanitarian Law, with the collaboration of the International Committee of the Red Cross, to focus the works of the XXXV Round Table on this important and challenging topic. As is tradition, the Sanremo Round Table gathered together distinguished academics, legal experts, government officials and military commanders for an in depth discussion on whether and how International Humanitarian Law rules applied to PMSCs.

The Sanremo Institute wishes to warmly thank all those who contributed to the success of this event.

I am confident that this publication – which reproduces most of the interventions at the Round Table – will be a useful reference work for all those interested in both theory and practice of International Humanitarian Law and will offer a valuable contribution to furthering academic research on this issue, highlighting the importance of the promotion, dissemination and enforcement of this fundamental branch of International Law.

Fausto Pocar

President of the International Institute of Humanitarian Law

Opening session

Introductory remarks

Fausto Pocar

President, International Institute of Humanitarian Law, Sanremo

Over the past years, the phenomenon of outsourcing military and security services to private entities has experienced a spectacular growth. Today, many States, including the most powerful democratic States, are increasingly relying on private contractors to manage military and security services. While the emergence of private military and security companies (PMSCs) stems from the transformations following the end of the Cold War, the current multiplication of such private entities seems exponential and thus deserves the utmost consideration. Clearly, it would be going too far to consider PMSCs problematic as such. Indeed, for the largest part, this sector is well regulated under domestic law as any other supply of services. However, from an International Law, in particular from an IHL, perspective, various problems arise when private contractors are hired to replace members of the armed forces in situations of armed conflicts, military occupation, peace-keeping, peace-enforcement and peace-building operations.

Similarly, the fact that PMSCs have been and continue to be used in present conflict-scenarios by non-State actors raises the question of whether the current legal framework is adequate or further regulation is needed to ensure full compliance with IHL.

PMSCs offer a wide range of services in armed conflicts and peace-time situations. These services, among other things, may include: guards (armed and non-armed), protection of persons and objects or buildings, patrols, maintenance and operation of weapons systems, clearance of minefields, transport of valuable and commercial goods, prisoner detention and interrogation, intelligence services, risk assessment, military research analysis, advice and training of both local police forces and armed forces, as well as of security personnel.

The unprecedented size and scope of activities carried out today by PMSCs have generated rich academic literature. Much debate has been focusing on the historical and socio-political aspects related to their increasing use around the globe, the link between private contractors and mercenaries, and finally the uncertainty surrounding the legal status and obligations of PMSCs and their employees under International Law. Notably, more recently, particular attention has also been devoted to the implications of the use of private contractors in the fight against piracy as well as in the context of peace-keeping, peace-enforcing and post-conflict institutions building operations.

Besides that, on a more practical level, a certain number of initiatives have been undertaken with the aim of regulating PMSCs and their activities. At the international level, three recent initiatives deserve particular mention.

First of all, let me recall the so-called Swiss Initiative, named after the government which has made this important topic one of its priorities in its agenda. As all of you might be aware, this initiative led to the adoption of the Montreux Document in November 2008, a soft law document, describing International Law as it applies to the activities of PMSCs whenever these are present in the context of an armed conflict. Interestingly, this instrument also contains a compilation of good practices designed to assist States in implementing their obligations under International Law through a series of national measures.

A second valuable initiative is the International Code of Conduct and its oversight mechanism which was signed in November 2010. As a multi-stakeholder initiative convened by the Swiss government, this instrument aims to set private security industry principles and standards based on International Human Rights and Humanitarian Law, as well as to improve accountability of the industry by establishing an external independent oversight mechanism. Notably, as of today, 464 companies coming from 60 different countries have signed this document.

Thirdly, one should not omit to recall the UN Draft of a Possible Convention on Private Military and Security Companies, which was elaborated within the Working Group on the Use of Mercenaries and was presented at the Human Rights Council in December 2010. As we shall see, the first part of this 35th Round Table will be dedicated to the discussion of the current status and implementation of these three instruments.

Along the same lines, other regulatory approaches on PMSCs have been recently adopted at the national, regional and international level. Such developments mainly took place alongside the establishment of industry-specific initiatives as well as codes of conduct by individual business actors. The label “Codes of Conduct” encompasses a variety of initiatives often designated as “voluntary principles”, “ethical codes”, “private regulations”. Basically, private codes of conduct entail voluntary, national and international rules existing in the matter of licensing, contracts, services and resort to force, but they also add complementary norms. Frequently, PMSCs set up such regulation in collaboration with other actors, especially NGOs, States and governments. The fact that there are some firms that employ codes of conduct incorporating Human Rights and International Humanitarian Law is extremely significant. In this regard, I particularly welcome the fact that this year’s Round Table will be hosting some experts of the private sector who will give us useful insights on their

experience in relation to the implementation of these instruments and on the main challenges that yet remain and need to be addressed.

Notwithstanding these recent developments, the employment of PMSCs warrants further scrutiny. Indeed, as this sector is growing rapidly, the risk that some of the activities and functions carried out by such entities remain in a sort of legal loophole is still a reality. Yet, adequate regulation, both internally and internationally, is imperative. It is with this aim in mind, that a substantial part of this Round Table will be devoted to the principal legal questions arising from the use of private contractors in armed conflicts and within specific contexts such as UN peace-keeping and NATO operations, as well as in the context of maritime security.

Finally, special attention will be devoted to the most recent developments in terms of regulation as well as monitoring at the EU level. Arguably, one of the main issues of particular significance is the legal status of PMSCs and their employees and the legal consequences attached to it. As we shall see, a number of questions in this respect are still open.

Let me recall, for instance, the still ongoing debate on whether PMSCs and corporations in general are to be considered subjects of International Law and consequently directly subjected to obligations. It would be highly desirable for PMSCs to be recognised legal personality such as international organizations. Indeed, any actual legal impediment seems to exist in this respect; rather, the ongoing resistance demonstrated by States on this issue reflects a clear lack of political will.

A further issue that raises some concerns is the legal status of private contractors themselves. The fundamental principle of distinction between combatants and civilians is indeed crucial as it determines the rights and the privileges afforded by IHL, and the legal consequences deriving from the conduct of the persons affected by an international armed conflict. Certainly, private contractors may be regarded as falling into several categories, depending on the functions they are assigned to and their relationship with the parties to the conflict. Analogous difficulties arise then when it comes to qualify the status of private contractors in the context of non-international armed conflicts. Allow me to recall, above all, the present uncertainty surrounding the content of the notion of armed group. Are private contractors likely to fall within this category? If yes, what would the consequences be in terms of targeting operations and accountability?

These and other complex legal questions, such as the use of force by PMSCs, the legal framework applicable to private contractors engaged in detention activities, and the international, corporate and individual responsibility of PMSCs will be discussed in depth by prominent experts in the course of this Round Table. Though PMSCs usually profess their compliance with IHL and Human Rights and standards, the possibility that

their personnel might get involved in violations and criminal conduct cannot be excluded. Let me recall, by way of example, the events involving private contractors shooting at civilians in Iraq or the inhuman treatment of prisoners in Abu-Ghraib. Under these circumstances, therefore, a compelling discussion on whether private contractors can be considered liable for war crimes or other violations of International Humanitarian and Human Rights Law seems appropriate. To be sure, International Humanitarian Law and Human Rights Law constrain the activities of private contractors at least in certain circumstances. Though these bodies of law admittedly present some gaps in their application, they do provide mechanisms for potentially finding private contractors liable for crimes against humanity, war crimes and other violations of IHL. Similarly, States themselves may sometimes be deemed responsible for abuses committed by private military companies. On the other hand, it appears to be less clear when International Law could be used against the corporate entity as a whole, as opposed to individual employees.

Our discussion in the next days will be in the end complemented by a close look on current training programmes for PMSCs as well as by a panel discussion aimed at setting up new approaches and future courses of actions in relation to PMSCs around the globe. Lastly, as our common purpose here is to promote the compliance with humanitarian norms, I trust that our last panel will allow us to engage in a fruitful discussion on new ways of promoting the adherence by PMSCs to IHL and, more generally, International Law standards.

In conclusion, the interest in legal issues arising from the use of PMSCs is currently particularly high. The primary aim of this 35th Round Table is to contribute substantially to the international debate on the legal and normative development of private security regulatory frameworks. This objective does diminish the importance of other political and technical considerations. Nevertheless, I hope that it will constitute a valuable basis in terms of further academic research on this issue, providing, more importantly, an additional platform of dialogue on the most suitable legal framework applicable to PMSCs, as well as on mechanisms of monitoring and implementation of the instruments dealing with this issue.

Welcome address

Giovanni Berrino

Assessore, Comune di Sanremo

Vorrei limitarmi a qualche parola per sottolineare la grande soddisfazione ed il sincero orgoglio nel portare il personale saluto del Sindaco e nel porgere, a nome di tutta l'Amministrazione Comunale, il più caloroso benvenuto alle numerose, illustri ed autorevoli personalità che prendono parte a questo importante incontro internazionale.

La Tavola Rotonda di Sanremo rappresenta, ormai da più di trent'anni, un appuntamento internazionale di rilievo, apprezzato in tutto il mondo, che la Città di Sanremo ha l'onore di ospitare nel mese di settembre.

Organizzata congiuntamente dall'Istituto Internazionale di Diritto Umanitario di Sanremo e dal Comitato Internazionale della Croce Rossa di Ginevra e con l'appoggio del Comune, questa Tavola Rotonda, che ogni anno approfondisce le tematiche umanitarie di più pressante attualità, affronterà nei giorni a venire il tema delle "Compagnie Militari e di Sicurezza Private".

Le compagnie militari private, che tutti noi forse ricordiamo meglio con il nome di contractors, svolgono con sempre maggiore frequenza funzioni che tradizionalmente appartenevano alle Forze Armate e di sicurezza degli Stati, trovando impiego in vari scenari in cui persistono situazioni di instabilità e di insicurezza. Nei prossimi giorni saranno discusse le problematiche sollevate dall'impiego dei "contractors" con riguardo agli obblighi a cui sono soggetti sulla base delle vigenti norme di diritto internazionale umanitario.

Sono certo che, con il contributo di rappresentanti di governi, delle principali Organizzazioni Internazionali, di eminenti studiosi ed esperti provenienti dal mondo intero, la Tavola Rotonda di Sanremo sarà ancora una volta l'occasione per uno scambio di punti di vista e di esperienze tra tutte le parti interessate. Nell'odierna realtà internazionale continuiamo ad assistere ad inquietanti scenari di sofferenza e di morte che ci vengono mostrati dai purtroppo numerosi focolai di crisi e di confronto armato in tutto il mondo: il conflitto intestino che dilania la Siria, dove si consumano preoccupanti atrocità contro la popolazione civile, ci ricorda ancora una volta come sia imperativo il rispetto dei principi fondamentali del diritto umanitario da parte di tutti gli attori coinvolti in un conflitto.

L'Istituto di Sanremo, grazie al suo grande prestigio sul piano internazionale, costituisce per la città matuziana – ma anche per il Ponente Ligure e la Regione tutta – una risorsa insostituibile, ricca di potenzialità e positive ricadute sul territorio.

Lo straordinario contesto che Sanremo offre per l'organizzazione di convegni internazionali di questo tipo è ben valorizzato dalle numerose iniziative che l'Istituto organizza e promuove nel corso dell'anno alle quali partecipano autorevoli rappresentanti di governi, insigni studiosi, alti ufficiali delle Forze Armate provenienti dai diversi continenti, confermando la vocazione e la tradizione di Sanremo che si è da sempre distinta come crocevia di scambi e di incontri tra le nazioni.

Sono molto lieto, anche a nome della cittadinanza sanremasca, di esprimere a tutti i presenti il mio augurio di buon lavoro con il più sincero auspicio che, nel corso di questo breve soggiorno, potrete trovare anche il tempo per scoprire le bellezze e le attrattive che offre questa città.

Keynote address

Christine Beerli

Vice-President of the International Committee of the Red Cross,
Geneva

The ICRC has not joined the debate about the legitimacy of using private military and security companies (PMSCs). Indeed, it is not for the ICRC to take a stance on this question. The ICRC is essentially concerned with whether and how International Humanitarian Law (IHL) applies to PMSCs operating in an armed conflict situation and about their compliance with IHL.

It is about this issue and how to address it that I would like to talk to you today. The presence of PMSCs in armed conflict, more than anything else, symbolizes for many people a fall back into private warfare. Today's private contractors operate on a scale that is unprecedented in contemporary armed conflict, performing functions that bring them so close to the battlefield that the traditional assumptions of modern IHL seem to come under strain. One of these is that conflicts are fought between States or, at most, between States and organized armed groups, but not by business corporations.

A number of incidents involving PMSCs have recently caught the public eye. While they are not representative of the general behaviour of these companies, they were of sufficient gravity to draw attention to the lack of clarity about the rules governing their activities, to highlight deficiencies in terms of accountability and to raise questions about the work they are contracted to do.

To illustrate this, let me start with some examples. There have been various reports about the excessive use of force by private contractors leading to civilian casualties – in particular during the conflicts in Iraq and Afghanistan. It also appears that the rules governing the use of force or the instructions given to contractors have sometimes been far from clear. Often, States and contractors have a poor understanding of the legal consequences of PMSCs' activities. In a number of conflicts, PMSCs are employed by States to guard military facilities or to escort military vehicles, sometimes in the midst of on-going hostilities, without being incorporated into the armed forces. The fact that these types of activity are frequently referred to as "purely defensive", means that it is often overlooked that the protection of military personnel and facilities against opposing parties to a conflict amounts to direct participation in hostilities and makes the contractors legitimate targets of attack under IHL.

PMSC personnel have also been contracted by States to work in military detention facilities, including in interrogation roles. There have been reports of private contractors taking part in the ill-treatment of detainees.

States are not the only ones to use the services of PMSCs. Business enterprises active in conflict zones, especially those in the extractive sector, often resort to private contractors to ensure the safety of their personnel and facilities. Unfortunately, some of these companies have been involved in human rights abuses, for instance, in cases where they were associated with violent repression of local communities opposing their activities.

More recently, the maritime security sector has grown exponentially owing to the rise in piracy, in particular, off the Horn of Africa and in Southeast Asia. In these circumstances, private contractors might be called upon to provide armed protection on board merchant ships. Of course, the fate of persons held by pirates is a matter of great concern and acts of piracy must be countered with adequate protective measures. However, the use of armed force at sea by private security guards, like any other use of force, must be strictly regulated in order to prevent abuses.

In light of these examples, a number of humanitarian issues need to be addressed. I will mention only three, which are of particular concern to the ICRC.

The first is the need for a clear legal framework in terms of applicable international rules, but also appropriate domestic legislation and regulations covering the specific activities of PMSCs.

There is no doubt that the personnel of PMSCs are bound by IHL. As we know, States have an obligation to ensure compliance with IHL including by PMSCs and their personnel. In order to do so and depending on the tasks PMSCs perform, clear rules must be established by States, including through domestic legislation, especially on the use of force. Contractors must as well receive adequate instructions and training in that respect.

Secondly, considering that many PMSCs act outside the military chain of command and that coordination of their operations with contracting States has frequently proven to be deficient, there is a need for accountability for wrongdoings.

If PMSCs use excessive force, or if they are involved in abuses towards detainees, who is accountable? The person committing the act? The company? The State contracting the company? To avoid any abuses, it is important to clarify their respective responsibilities. It is also important to ensure that there are no gaps in jurisdiction especially in the domestic legislations of contracting and home States to ensure that employees of PMSCs or the PMSCs can be held accountable in case of wrongdoings. This is particularly necessary as the judicial systems of States affected by

conflict or post - conflict situations are often weak and lack the capacity to effectively address violations.

Thirdly, there is a need to restrict the direct participation of civilian contractors in hostilities: The presence of private contractors carrying out military tasks among the population diversifies and swells the ranks of arms carriers who pose a threat to civilians. It also contributes to blurring the essential line between civilians and combatants.

The tasks that PMSC personnel perform, the equipment they use and wear, and the weapons they carry may easily lead them to be mistaken for combatants. In addition, it is difficult to ensure compliance with IHL when contractors act outside the military chain of command, as they most often do. This leads the ICRC to believe that PMSC personnel should not be contracted to take a direct part in hostilities, even if IHL does not explicitly prohibit it.

Some of the situations described and the publicity surrounding a number of incidents have led to the common misconception that PMSCs operate in a legal vacuum. Thanks to the efforts of many States and organizations, and part of the PMSC industry, this wrong perception should now be vanishing.

The issue today is not so much whether International Law applies to PMSCs as how to ensure compliance with the applicable rules of that law by PMSCs and their staff. Indeed, major problems of implementation and accountability remain owing to the unwillingness or the inability of States and other actors to uphold or enforce existing rules.

In the face of these challenges, there are several possible responses. First, in order to counter the perception of a lawless and unregulated phenomenon, it is important to stress that a relevant international legal framework exists. This was the aim of the Montreux Document of 2008. In order to ensure greater compliance with IHL and Human Rights Law by PMSCs operating in conflict zones and to reaffirm the obligation of States in this respect, the Swiss government and the ICRC launched an initiative in 2005 that led to the adoption of the Montreux Document three years later. This document focuses on the obligations of States, emphasizing that States bear the primary responsibility for ensuring compliance with IHL and Human Rights Law. It specifically addresses the obligations of States that contract the services of PMSCs, States on whose territory PMSCs operate, and States under whose jurisdiction PMSCs are incorporated or registered. The document also sets forth good practices in order to provide guidance for States endeavouring to incorporate their obligations into domestic legislation and regulations. Today, more than 40 States have endorsed this document and last month, the European Union became the first international organization to officially support it.

The ICRC calls on all States to endorse the Montreux Document and to implement the obligations and good practices it sets forth in their domestic

legislation. The Swiss government and the ICRC are ready to assist them in this effort.

A second avenue is self-regulation by the PMSC industry. In November 2010, different representatives of the PMSC industry adopted an International Code of Conduct expressing their commitment to strict standards of conduct with respect both to the use of force and to the treatment of persons detained or otherwise exposed to the activities of PMSCs. Today more than 460 companies are signatory to the Code of Conduct, for which an oversight mechanism will soon be established. While not an alternative to International Law or domestic legislation, the Code of Conduct, with its oversight mechanism, has the potential to contribute to setting strict standards of conduct for PMSCs and their personnel, and thus to improve compliance with IHL and Human Rights Law.

A third possibility would be to regulate the activities and behaviour of PMSCs through an international treaty. This possibility is being discussed within the framework of the United Nations Human Rights Council. Such a treaty would lay down new rules of International Law with regard to PMSCs, and it could also identify activities that would be confined to States and that could under no circumstances be outsourced to private companies.

Initiatives to address the privatization of warfare cannot be limited to PMSCs and the legal framework governing them.

Other companies, in particular those in the extractive industries, are often linked to the activities of PMSCs and their activities may have an impact on armed conflicts as well. The ICRC has been engaged in assisting such companies in their endeavours to apply heightened levels of due diligence. Over the years, it has played a constructive role in numerous multi-stakeholder processes or initiatives seeking to create norms or to offer guidance so that companies do no harm; it has in particular taken part in various UN Global Compact work streams and OECD-supported processes. It has offered occasional input into the work of former UN Special Representative on Business and Human Rights, John Ruggie. It has been an observer and active contributor to the Voluntary Principles on Security and Human Rights, an initiative seeking to provide guidance for companies in the extractive sector wishing to maintain the security of their operations within a framework that ensures respect for IHL and Human Rights. As part of this initiative, the ICRC has been one of four organizations to develop a set of practical tools that help companies transform the resolutions taken under the Voluntary Principles initiative into concrete measures in the field. Finally, let me mention that the ICRC published a booklet some years ago entitled Business and International

Humanitarian Law with a view to helping companies better understand their rights and obligations under IHL.

Through different approaches, all these initiatives pursue the same objective: to ensure that business enterprises working in and around conflict zones adhere to recognized standards of IHL and Human Rights Law, and to contribute to better protection for affected populations.

Let me now turn to another aspect of the privatization of warfare. States are far from being the only or even the main actors in armed conflicts. Non-State armed groups play a major role in almost every on-going armed conflict today. This is a reality with which we all have to contend: it affects our work on the ground and poses a number of very serious challenges.

Of course, the implication of PMSCs in armed conflicts is different from the one of non - State armed groups and the idea here is not to assimilate the two. It is rather to highlight challenges faced by the ICRC in carrying out its mission and activities in an environment where non-State actors are not only multiplying, but also diversifying in terms of nature and activities.

The first challenge is, of course, how to ensure compliance with IHL and to avoid situations in which civilians bear the brunt of hostilities. The ICRC strives to maintain and strengthen dialogue with all armed groups, to ensure that they are aware of their obligations, and to gain access to individuals held by them or to people living in areas under their control. The ICRC therefore has a long history of engaging with non-State armed groups.

Secondly, from the perspective of a humanitarian organization such as the ICRC, the proliferation of non-State armed groups in the battlefield also poses challenges in terms of security and access to people in need. Indeed, these armed groups are often less familiar with the work of humanitarian organizations. Here again, dialogue with these armed groups is a key element in ensuring acceptance, on the ground, of the ICRC and its unique mission, thereby guaranteeing its access to people in need and the safety of its delegates. Engaging with all parties to a conflict is essential if the ICRC is to effectively carry out its neutral and impartial humanitarian mission of protecting and assisting victims of armed conflicts.

Although the ICRC has a long-standing experience of engaging with non-State armed groups, business enterprises are not an actor the ICRC has traditionally engaged with on an operational basis. But the increasing presence of PMSCs in a conflict zone and the proximity of their personnel with hostilities have brought us to pay greater attention to the involvement of business in armed conflict and to engage with them.

Doing business in conflict zones entails considerable risks. The need for a strict and clearly established legal framework, known and respected by States and companies, is obvious. I would like to stress once again the importance of effective accountability mechanisms, especially in view of

the difficulties that the judicial systems of countries in which PMSCs operate may encounter in conflict or post-conflict situations.

In conclusion, activities of PMSCs in armed conflict situations remain an important issue for the ICRC. We will therefore continue to actively promote the Montreux Document, in particular through regional seminars, and to assist States requiring so to implement it in their domestic law. The ICRC is also following with interest developments and discussions in respect to international regulation of PMSCs, in particular the work undertaken within the framework of the United Nations Human Rights Council. Furthermore, from an operational perspective, in some specific regions, ICRC field delegates are engaging with relevant governmental authorities on PMSCs activities, States' obligations in this respect and means of developing effective regulation. They may also engage in dialogue with PMSC personnel on applicable rules of IHL and on the neutral and impartial mission of the ICRC.

Statement

Gianluigi Magri

Under-Secretary of State, Ministry of Defence, Rome¹

Il fenomeno della cosiddetta privatizzazione della guerra è infatti da tempo al centro dell'attenzione internazionale sia nei consessi giuridici sia in quelli più propriamente politici.

La delega a soggetti privati di attività che rientrano nel settore militare e della sicurezza ha assunto un'importanza tale da risultare essere sotto gli occhi di tutti. Si pensi infatti a quelle che sono le missioni internazionali, alla loro portata e alla presenza consistente che in queste hanno i private contractors e da qui si comprende subito l'entità degli effetti che questo fenomeno porta con sé e dunque il suo collocarsi, attualmente, come uno dei problemi centrali. Vedo qui in sala il mio amico, il Generale di Corpo d'Armata Giorgio Battisti: quando dieci anni fa ebbe il primo comando si parlava di circa settanta agenzie a livello internazionale, oggi sono più di cinquecento e questo rende l'idea di quella che è l'importanza, anche dal punto di vista economico, di tale fenomeno.

L'utilizzo di soggetti privati che ricoprono funzioni originariamente appartenenti agli Stati, in particolare in materia militare e di sicurezza, rappresenta un fenomeno antico, senza per questo dover risalire alle compagnie di ventura e ai mercenari. Si ricordi come, solo nel secolo scorso, siano stati numerosi i casi – dalle famose note di C. E. Callwell, alle c.d. small wars e alla c.d. guerra asimmetrica – in cui vi sono stati soggetti non propriamente militari che hanno svolto invece tali funzioni.

Senza andare a toccare terreni che riguardano quello che è l'impegno dell'intelligence, oggi dovremmo rivolgere l'attenzione a quei soggetti privati coinvolti in uno spettro estremamente ampio di funzioni, senza tuttavia ingenerare in confusioni e fraintendimenti, nel momento in cui appare chiaro che quelle che sono le garanzie che uno Stato sovrano dovrebbe offrire conformemente al diritto internazionale vengono rispettate.

Come prima menzionato, una delle ragioni centrali per cui tale fenomeno assume oggi tanta importanza è il suo aspetto economico e questo, per quanto possa apparire meno nobile, porta con sé considerazioni logiche, positive e quindi opportune. La questione del denaro è quindi centrale; appare infatti chiaro che il soggetto privato che si propone di svolgere funzioni militari o di sicurezza al posto di uno Stato sovrano consegue un proprio vantaggio economico. Si pensi a quelli che sono oggi i

¹ Text not revised by the author.

costi di mercato, si consideri il costo giornaliero di un soldato di un'unità convenzionale – non mi riferisco alle forze speciali, ma, ripeto, alle unità convenzionali. Un'unità convenzionale costa circa il doppio di quello che costa quotidianamente un contractor che svolge un'attività analoga, per esempio di vigilanza, sorveglianza o di sicurezza. Questo rende l'idea di come, in casi in cui lo Stato vuole risparmiare o semplicemente si propone di utilizzare al meglio le proprie risorse, dei surrogati possono rivelarsi opportuni.

Ben diverso appare invece il discorso in relazione alla logistica. L'utilizzo in outsourcing di fornitori o prestatori di servizio privati per trasporti, servizi di mensa, lavanderia e tutta una serie di attività che interessano necessariamente le forze militari ma che non sono di loro pertinenza diretta, o comunque non rientrano nelle funzioni specifiche militari, è chiaro che non pone alcun problema. Problema che invece si potrebbe porre nel momento in cui queste funzioni vengano utilizzate impropriamente.

Recentemente è poi sorta una nuova categoria di attività che si propone di rientrare nei servizi, ma che tuttavia si colloca in una posizione border line rispetto a logistica e attività di natura militare: mi riferisco ai dipendenti delle aziende produttrici di armamenti che in molte circostanze operano al fianco delle Forze Armate. Vi sono infatti rappresentanti di industrie operanti nel settore della difesa che seguono l'utilizzo di determinati armamenti, anche per quanto riguarda la logistica, la manutenzione, la sostituzione dei pezzi. Soggetti civili, privati che operano al fianco delle forze militari impegnate in un'operazione per una serie di interventi legati agli armamenti. E questo comporta dei problemi che non riguardano solo il diritto internazionale ma anche l'efficienza ed il comportamento delle Forze Armate.

È evidente che quando c'è una stretta interdipendenza fra militari e fornitori di servizi privati, si possono creare problemi di mentalità che si confrontano, di consapevolezza della necessità di interagire in maniera profonda con soggetti che, per status giuridico e a volte anche per la differente natura dei comportamenti, possono apparire distanti da quelli che sono i canoni delle Forze Armate. Da questo punto di vista, la questione non interessa solo paesi che ricorrono ampiamente ai contractors – pensiamo al Medio Oriente, dove vi sono situazioni nelle quali questi ultimi sono più numerosi delle Forze Armate, o ancora alle agenzie americane: in alcuni settori, gli Stati Uniti hanno utilizzato più contractors che militari sul campo.

Si tratta di un fenomeno che riguarda i singoli Stati anche nel contesto di operazioni multilaterali; e riguarda con sempre più frequenza le organizzazioni internazionali: si pensi alle Nazioni Unite, che tanto spesso hanno criticato e hanno redatto numerosi rapporti contro non solo l'utilizzo

di mercenari ma anche contro il ricorso improprio di soggetti privati, che ormai sovente stipulano contratti con fornitori di servizi privati che risultano più rapidi e più semplici da dispiegare rispetto alle forze multinazionali.

Vi sono tuttavia alcuni aspetti che non possono essere trascurati: innanzitutto, i principi fondamentali dell'ordine internazionale e del monopolio statale nell'uso della forza militare. Sappiamo che le azioni che implicano l'utilizzo della forza armata e le azioni belliche propriamente dette devono rimanere prerogativa di soggetti politici, cioè degli Stati, perché devono restare sotto la piena responsabilità ed il controllo della Comunità Internazionale e di quelli che sono gli obblighi e i doveri degli Stati sovrani. Analogamente quindi, un eventuale ricorso a servizi offerti da privati non può prescindere dalla responsabilità ultima dello Stato che autorizza e, di conseguenza, si rende anche titolare dell'azione dei soggetti privati. Incorreremmo in rischi seri qualora fossero intraprese delle liberalizzazioni che non sottostanno a regole precise, ben determinate e ad un sistema normativo di riferimento il più possibile condiviso.

Vanno quindi respinte e ritenute illegittime le azioni che ricorrono all'utilizzo della forza armata poste in essere da soggetti privati che, direttamente o indirettamente, tendono a pregiudicare la sicurezza interna degli Stati e la stabilità dell'ordine internazionale. Sotto questo punto di vista, è necessario richiamare quelli che sono i doveri della comunità internazionale. Oggi, dopo il periodo della guerra fredda, ci troviamo nell'era delle cosiddette missioni internazionali, in attesa di proseguire secondo i canoni di quella che viene definita come smart defence – bisognerebbe poi stabilire quanto sia smart, ma sappiamo che si tratta ormai di un termine invalso nell'uso comune. L'epoca delle missioni internazionali ci pone ovviamente di fronte a delle questioni importanti. Vorrei solo ricordare quanto fossero preveggenti le parole di Brzezinski, all'epoca dell'amministrazione Carter, quando diceva: "seguirà il periodo della guerra fredda, un periodo in cui non ci saranno più élites economiche o costrizioni della guerra a governare il mondo, ma dovranno esserci operazioni multilaterali che, con un consenso generalizzato, recuperino particolari valori; si pensi, ad esempio a quella che è l'importanza, oggi più che mai, della componente umanitaria nelle missioni internazionali.

Riprendendo quanto inizialmente accennato e consapevole che il ricorso a dei soggetti privati in questo settore è dettato da importanti motivazioni principalmente di carattere economico, tengo a sottolineare che oggi lo Stato italiano impiega lo 0,84% del PIL sul bilancio della difesa. La media europea è dell'1,6 %, quella NATO intorno al 2%. Appare chiaro quindi che l'Italia si colloca ben al di sotto.

Il Ministro della Difesa, quando ha parlato di passare da un modello di 190 mila uomini ad uno a 150 mila, ha affermato che era opportuno e

necessario spendere meno e meglio. Da questo punto di vista è chiaro che è sempre più imperativo dividere quelle che sono le imputazioni economiche proprie di una forza militare da quelle che sono le spese accessorie che non possono essere direttamente riconducibili a quello che è l'esercizio di una o tutte le Forze Armate. Il bilancio italiano della difesa, dopo la spending review, ammonta a poco più di 13 miliardi e 600 milioni di euro l'anno e questo significa che se noi sommiamo la riduzione in termini assoluti alla riduzione del potere d'acquisto avremo, in circa 15 anni, una riduzione in termini reali di circa il 25% delle spese per la difesa. Se poi si va a vedere quella che oggi è la ripartizione del bilancio della difesa italiano, vediamo che circa il 70% viene speso per il personale, il 12% riguarda le spese di esercizio, il 18% gli investimenti. Gli esperti dicono che oggi, per operare in maniera ottimale, almeno il 50% (e non oltre) dovrebbe riguardare le spese per il personale, il 25% dovrebbe andare alle spese di esercizio e ancora un 25% agli investimenti. In proposito, vorrei ricordare che gli Stati Uniti, le cui Forze Armate sono ritenute le più potenti al mondo, spendono per il personale solo circa un terzo del loro bilancio.

Se vogliamo indirizzarci verso modelli di efficienza quindi, il problema appare ben più vasto e la possibilità di ricorrere a soggetti che non siano direttamente dipendenti dallo Stato per operazioni nel settore della sicurezza e delle attività militari può rappresentare un'opportunità di strategia economica.

Un altro argomento merita tuttavia di essere evidenziato. È chiaro che un paese che dichiara una data percentuale di caduti delle proprie Forze Armate e non vi include il numero dei contractors, ha un diverso impatto sui media e quindi sull'opinione pubblica. L'anno scorso, se non ricordo male, le Forze Armate americane hanno avuto in Afghanistan un numero di caduti pari circa al numero di caduti dei loro contractors. La differenza è chiara tra l'affermare "abbiamo avuto 480 perdite" e invece "abbiamo avuto 1000 perdite".

Un ultimo dato: la nostra legislazione. In Italia è, a mio avviso fortunatamente, piuttosto restrittiva per quanto riguarda il ricorso ai contractors. L'Italia ha ratificato tutte le rilevanti convenzioni internazionali in materia, dalla Convenzione internazionale contro il reclutamento, l'utilizzazione, il finanziamento e l'istruzione di mercenari al Documento di Montreux. Abbiamo una normativa stringente ma con aperture verso altre forme riguardo l'utilizzo di soggetti privati. Per fare un paragone, gli Stati Uniti, dove si tende a seguire un indirizzo diverso e le regole sono severe, i soggetti privati ricoprono molte funzioni che non sono di competenza dello Stato. Ad esempio per la gestione della sicurezza delle carceri o delle Ambasciate si ricorre all'utilizzo di soggetti privati che hanno standards, regolamenti e normative estremamente precise e stringenti. Si tratta di settori in cui in Italia non è ammessa la delega a

privati. Tuttavia, un dato importante riguarda la celebre legge anti-pirateria risalente a 14 mesi fa che, ormai giunta alla ratifica, è in questo momento all'osservazione del Consiglio di Stato. Una normativa precisa volta ad autorizzare il ricorso ai contractors e nella quale appare chiaro che questi non sono sostitutivi delle garanzie proprie dello Stato. Possono certamente essere utilizzati in operazioni e supplire le Forze Armate per determinate attività, ma la responsabilità dello Stato non viene assolutamente meno e non viene in alcun modo ceduta.

Quanto detto rileva come si tratta di un fenomeno per cui è importante avere un occhio attento non solo sugli aspetti di natura economica e normativa ma anche su quelli culturali. I contractors non hanno sempre la necessaria preparazione ed un appropriato approccio sensibile agli usi, ai costumi, al pensiero politico o religioso di determinati paesi. Da questo punto di vista le garanzie date, ad esempio, del tutorial mentoring fornito dai nostri carabinieri, risultano estremamente importanti, come d'altronde riconosciuto dallo stesso comandante ISAF, il Gen. John R. Allen.

In conclusione, ritengo che sia estremamente importante ribadire alcuni principi: rispettare il diritto internazionale, intervenire e agire su mandato multilaterale di organismi volti a garantire il rispetto del diritto internazionale e la necessità di una normativa rigorosa, ben definita e condivisa che porti questo fenomeno ad essere di ausilio e non per questo sostitutivo di quella che è l'autorità di un paese sovrano.

Statement

Gianni Ghisi

Coordinatore per il Contrasto della Pirateria Marittima,
Ministero degli Affari Esteri, Roma

Si sta sempre più affermando e così anche in Italia, l'impiego di società private di sicurezza nella protezione del naviglio contro questa peculiare forma di criminalità organizzata costituita dalla pirateria marittima.

Vorrei iniziare con una nota positiva: il 2012 sembra segnare una svolta importante nella lotta alla pirateria nell'area in cui è attualmente concentrata (Golfo di Aden ed Oceano Indiano). Dall'inizio dell'anno ad ora gli attacchi sono stati 67, di cui 13 conclusi con la cattura della nave e dell'equipaggio. Nel 2011 gli attacchi erano stati 231 e 27 i sequestri.

Si tratta di un indubbio successo della strategia di contrasto messa in atto dalla Comunità internazionale. Tale strategia si fonda su tre pilastri: 1) il pattugliamento delle zone ad alto rischio con naviglio militare, 2) l'adozione di efficaci misure di difesa passiva da parte delle imbarcazioni in transito, 3) la presenza a bordo di nuclei di protezione armata, militari o civili. (Per inciso, si tratta di un successo importante, ma non necessariamente irreversibile, fintantoché la pirateria non sarà sradicata dalla Somalia).

La prima risposta della comunità internazionale all'acutizzarsi del fenomeno della pirateria al largo delle coste Somale (che ha raggiunto il suo picco nel 2008) è stata il pattugliamento, a partire dalla missione Ocean Shield della NATO. L'espandersi del raggio d'azione dei pirati (che ora copre il golfo di Aden, l'Oceano indiano occidentale fino al canale del Mozambico ed il mare arabo fino alle coste indiane), insieme alle loro crescenti capacità operative ha reso necessario individuare misure più capillari di difesa, passiva ed attiva: da una parte sono State definite dall'International Maritime Organization (IMO) delle Best Management Practices che armatori e comandanti debbono attuare; dall'altra si è ampiamente diffusa la pratica di imbarcare dei Nuclei di protezione Armata, formati da personale militare (sistema del Vessel Protection Detachment o VPD) ovvero formati da personale civile, a contratto (Privately Contracted Armed Security Personnel o PCASP). Allo stato attuale prevale numericamente – ed è in espansione – il ricorso da parte degli armatori alle compagnie di sicurezza private. La legislazione di alcuni paesi (Italia, Spagna, Norvegia) consente l'impiego sia di VPDs che di PCASP, mentre Francia e Paesi Bassi ritengono che l'esercizio di tali funzioni di protezione armata spetti esclusivamente allo Stato.

Nonostante l'IMO abbia inizialmente scoraggiato lo sviluppo dei PCASP, il mercato ha chiaramente scelto la sicurezza privata, più duttile e

più facilmente disponibile a seconda delle mutevoli esigenze, rispetto alla solidità (ma anche maggiore rigidità) del servizio offerto dalle Forze Armate. Tanto che la stessa IMO, preso atto dell'ampio ricorso ai PCASP, ha riconosciuto la necessità di "mettere un po' di ordine". Lo ha iniziato a fare cercando di fissare degli standard per l'impiego di sicurezza privata a bordo (sui quali ritornerò più avanti).

Ma ci si potrebbe chiedere quale dei due sistemi, VPDs e PCASP, è più efficace? La risposta non è univoca: dipende dalle legislazioni nazionali e dal contesto operativo. Un importante dato di fatto è che nessuna imbarcazione con personale armato a bordo, civile o militare, è mai stata sequestrata. Allora, quale dei due sistemi è più semplice da attuare? Probabilmente il VPD è più semplice nel senso che poggia su una serie di norme di diritto internazionale consolidate e le regole di ingaggio sono saldamente ancorate alle legislazioni nazionali; ma è più complicato per la rigidità di procedure, che talvolta mal si confanno alla flessibilità richiesta dalle esigenze commerciali. Ovviamente, come purtroppo è avvenuto ad un Nucleo di protezione militare italiano in India, se viene meno il rispetto delle norme fondamentali del diritto internazionali sulle quali si regge tale misura di protezione (in particolare la giurisdizione dello stato di bandiera nelle acque internazionali e il principio di immunità funzionale dei militari addetti) tale sistema perde la sua efficacia: per questo il Governo italiano, oltre alla doverosa azione nei confronti dell'Autorità indiana di tutela dei due membri di un VPD indebitamente detenuti, sta sensibilizzando i partners internazionali sulla assoluta necessità che non si creino precedenti negativi di mancato rispetto dei principi fondamentali, che compromettano l'efficacia dell'azione della comunità internazionale nel contrasto alla pirateria.

Rispetto ai Nuclei Militari di Protezione, sicuramente i PCASP sono più duttili, considerando anche la carenza normativa internazionale. E qui sono giunto finalmente al tema specifico di questa tavola rotonda.

La problematica della sicurezza privata a bordo di naviglio commerciale è analoga a quella che si pone in altri contesti, dall'impiego in situazioni di conflitto armato o nel contrasto al crimine. Ho avuto modo di partecipare recentemente, nella mia posizione di Rappresentante Permanente presso le Organizzazioni Internazionali in Vienna al dibattito in ambito UNODC sull'impiego di servizi di sicurezza privati per la prevenzione del crimine e la sicurezza delle comunità, dal quale sono emerse proposte di linee guida (le "Abu Dhabi draft preliminary recommendations on the oversight and regulation of civilian private security services and on their contribution to crime prevention and community safety"). Le best practices sviluppate in un contesto possono essere molto utili a svilupparne analoghe in un altro. Come emerge anche dallo schema di lavori di questo convegno, l'elaborazione di linee guida in un contesto di conflitto armato sono più

avanzate rispetto a quanto sta iniziando ad emergere dal dibattito riguardo alla protezione anti-pirateria.

Vorrei citare, a questo proposito, la circolare dell'IMO del 25 maggio scorso "Interim Guidance to Private Maritime Security Companies providing PCASP on board Ships in the High Risk Area". L'IMO prende in considerazione sia il documento di Montreux che l'ICoC: "The Montreux Document on Pertinent International Legal Obligation and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict and the International Code of Conduct for Security Service Providers are useful reference points for PMSC, but are not directly relevant to the situation of piracy and armed robbery in the maritime domain and do not provide sufficient guidance for PMSC. The Montreux Document, which addresses States, restates the rules of International Law and provides a set of good practices for States, although it should be noted that International Humanitarian Law is applicable only during armed conflict. The ICoC, which addresses the private security industry, identifies a set of principles and processes for private security services providers related to support for the rule of law and respect for Human Rights, but is written in the context of self-regulation and only for land-based security companies, and is therefore not directly applicable to peculiarities of deploying armed guards on board merchant ships to protect against acts of piracy and armed robbery at sea. Da tale considerazioni, l'IMO trae la conclusione che "the prevailing situation of the coast of Somalia therefore necessitates separate and urgent consideration of requirements for the use of PCASP on board ships transiting in the High Risk Area".

L'interim guidance dell'IMO per le società di sicurezza marittima (PMSC) oggetto della citata circolare, è dunque volta a colmare una lacuna ("no international guidance or standards exist at present for Private Maritime Security Companies providing PCASP services in order to improve governance, reduce the potential for accidents, and promote competent, safe and lawful conduct at sea"). Tali linee guida si aggiungono alle precedenti elaborate dall'IMO per l'impiego delle guardie private, vale a dire: "Revised interim guidance to shipowners, ship operators and shipmasters" (Circ. 1405), "Revised interim recommendations for Flag States" (Circ. 1406) e "Revised interim recommendations for port and coastal States" (Circ. 1408). Si tratta di documenti di riferimento, ben lontani dunque dall'essere vincolanti e per di più provvisori, in quanto predisposti nell'urgenza di "mettere ordine" in un fenomeno in rapida crescita in gran parte al di fuori dell'esistente quadro normativo internazionale. Il dibattito è ancora molto aperto ed è condotta in molteplici fori di discussione: oltre che all'IMO e se ne parla al Gruppo di Contatto sulla Pirateria (CGPSC) e in diversi altri organismi intergovernativi,

dall'INTERPOL all'ISO. E c'è chi vorrebbe investire il Consiglio di Sicurezza.

Se ormai è accettata da tutte le parti la necessità di concordare standard minimi in ogni aspetto dell'impiego dei PCASP (dalle procedure di ingaggio, selezione e formazione delle guardie giurate, concessione delle autorizzazioni, al carico transito e uso dell'armamento) nel dibattito continuano a manifestarsi forti resistenze da parte della maggior parte degli Stati costieri al sistema di protezione privato (particolarmente attivi in tal senso sono Arabia Saudita, Egitto, India e Pakistan) preoccupati per l'uso indebito che ne può essere fatto – vicino ai loro confini ed in aree già turbolente e di difficile controllo in relazione all'armamento trasportato da privati; ma anche timorosi per quanto riguarda lo stesso impiego degli addetti alla sicurezza, che essi vedono come delle potenziali forze mercenarie (e alla fine, potenzialmente pericolose quanto i pirati). Nel dibattito, gli Stati costieri chiedono dunque vivacemente che i Governi dei Flag States si facciano carico, assumendosi anche specifiche responsabilità, di vigilare sui comportamenti delle società private e del personale impiegato sulle loro navi commerciali di bandiera. Noto per inciso che tale preoccupazione non è invece mai stata manifestata dagli Stati costieri riguardo all'impiego di militari, evidentemente considerati adeguatamente affidabili grazie alle proprie regole d'ingaggio.

Vi è indubbiamente una serie di lacune da colmare affinché l'operatività delle guardie giurate a bordo abbia un inquadramento giuridico che offra a tutte le parti le stesse garanzie dei militari. Intanto bisognerebbe averne il quadro completo, la lista esaustiva dei gaps, per avere una base comune di discussione: è quanto gli Stati Uniti si sono ora proposti di fare, convocando una riunione (che si terrà il 12 settembre a Washington) sulla "Identification of Foreign Policy Implications and International Law Issues". Cito alcune delle problematiche che mi sembrano rilevanti anche per i lavori di questo convegno:

- *How can/should flag, port and coastal States address questions of jurisdiction over incidents that occur beyond the territorial sea?*
- *How are parties addressing civil and criminal liability claims arising from accidents caused by, misuse of, or misconduct of PCASP?*
- *How can/should States exercise regulation and oversight of emerging phenomena such as private armed escort vessels and floating armories operating beyond the territorial sea?*
- *How do navigation rights and freedoms relate to concerns about PCASP in a territorial sea or Exclusive Economic Zone?*
- *How can we facilitate easier movement of PCASP and firearms to/from vessels and while ships are in port?*

Come spero sia risultato chiaro, ho cercato di mettere in luce i pro ed i contra dell'impiego, a bordo di navi mercantili, di Nuclei Armati di

Protezione composti da militari ovvero di guardie giurate, soffermandomi maggiormente su quest'ultima soluzione, più attinente alla tematica in discussione in questa Tavola Rotonda. Anche se la maggior parte degli Stati che dispongono di sicurezza armata a bordo ha optato per un solo sistema (i più per le guardie private, Francia e Paesi Bassi per i militari), le due modalità possono essere integrate combinando nella gestione i vantaggi dell'una e dell'altra. Quanto all'Italia, nel momento in cui si è dotata di un'apposita legislazione anti-pirateria, questa ha ritenuto che la risposta più efficace al complesso problema dell'autodifesa dalla pirateria marittima consista in un sistema di sicurezza integrato pubblico-privato. La Legge n. 130 del 2 agosto 2011, che il Governo ha predisposto sotto forma di decreto-legge sulla base di un'accurata indagine parlamentare che ha vagliato le misure di auto protezione adottate da altri paesi, prevede infatti l'impiego di Nuclei Militari di Protezione, sulla base di convenzioni da stipularsi tra il Ministero della Difesa e l'armatoria privata italiana. Tali NMP operano in conformità con le direttive e le regole d'ingaggio emanate dal ministero delle Difesa e ad essi sono attribuite le funzioni di polizia giudiziaria riguardo ai reati previsti nella normativa penale italiana in materia di pirateria (art. 1135 del codice di navigazione) e sospetta pirateria (art. 1136). La medesima Legge prevede anche la possibilità per gli armatori, in via sussidiaria, di ricorrere a guardie giurate private, ponendo una serie di condizioni generali che inquadrano il loro utilizzo entro alcuni limiti e tra questi: la nave deve avere adottato almeno alcune delle *Best Management Practices* dell'IMO; le guardie giurate debbono essere autorizzate dal Ministero dell'Interno a svolgere il servizio, ottenere l'apposita licenza per il possesso delle armi e debbono avere superato degli specifici corsi di formazione.

Delle due componenti, tuttavia, sino ad ora è operativa solo quella militare, evidentemente più semplice da attuare, essendo collocata in un contesto istituzionalmente predisposto. Nel primo anno di applicazione, il servizio reso dai Nuclei Militari di Protezione è stato giudicato assai positivamente dagli armatori: è tuttavia emerso un limite nella copertura che è possibile assicurare con i 16 NMP disponibili, copertura inferiore alle richieste (si tenga presente che nel Golfo di Aden e nell'Oceano indiano transitano annualmente circa 1300 navi battenti bandiera italiana, per una media di quasi 4 al giorno, con picchi fino a 10 navi).

I tempi più lunghi per la messa in opera dell'opzione privata sono dovuti alla maggiore complessità delle regole di attuazione della Legge: è stato necessario adeguare la normativa nazionale in materia di compagnie private di sicurezza (calibrate sui servizi di vigilanza a terra), si è posto cura nel soddisfare le esigenze di certificazione delle società e di adeguata formazione del personale. Ferma restando la responsabilità primaria dello Stato, il ricorso alle guardie giurate da parte degli armatori non deve essere

un ripiego, una seconda scelta: il servizio deve mirare a essere di pari qualità a quello ottenibile dal personale militare e lo Stato ne deve creare le precondizioni, se si vuole dare piena attuazione alla legge che ha previsto un sistema integrato.

Le attività di contrasto alla pirateria costituiscono anche per l'Italia un impegno gravoso in termini di gestione e di costi; ma sono attività indispensabili per proteggere importanti interessi nazionali, ma soprattutto vite umane. L'approccio italiano è che per portare avanti efficacemente tale impegno è necessaria una solida partnership pubblico-privato che massimizzi i contributi dei due settori. Questo è l'approccio italiano e in tale partnership ben si colloca l'integrazione dei servizi di protezione militari e civili. Per concludere, vorrei evidenziare come – aldilà del contesto nazionale – rimanga da definire meglio l'inquadramento giuridico internazionale dei servizi privati di sicurezza nel contrasto della pirateria e come sia necessario stabilire procedure globalmente condivise per la necessaria collaborazione tra Stati di bandiera, Stati costieri e di transito.

Statement

Gary Motsek

Deputy Assistant Secretary of Defense, US Department of Defense,
Washington D.C.¹

The use of contractors to enable effective military operations is not new. It has been part of military operations throughout recorded history and remains essential today. Although governments may use private sector capabilities to augment public sector capacity, that does not relieve a government's responsibility to its people and the international community for what and how it is done.

State Monopoly on the Use of Force

Max Weber described a modern State as a community which successfully claims the monopoly of the legitimate use of force within its territory; nevertheless, States may delegate this authority and the use of PSCs can be consistent with the notion of the monopoly on the use of force because PSCs only operate with the authorization of the State on whose territory they operate or with whom they have a contract. However, the issue here concerns the prudent limitations of delegating this authority and how to maintain control over it.

Outsourcing Security

States have always relied on the private sector to support their military capability. This almost always included the ability to generate, deploy and sustain its armed forces. It often included auxiliary combat troops to support their main battle forces. Examples extend to World War II and post-colonial wars of liberation. This use has been consistent with the laws of war, and the use of contractors changed as the law of armed conflict developed.

I should like to make a couple of points in this respect: during the American Civil War, Balloon corps and Pinkerton Detective Service were employed; during the Indian Wars, Scouts were enlisted. Let's think, as an example, of Buffalo Bill Cody who also received a Medal of Honor as a contract scout. Again, during World War II, let's think about the Flying Tigers, the British Overseas Aircraft Corporation (the return combat aircraft to front line and airlift into combat zones), the Vickers (repair of HMS Prince of Wales during combat), the U.S. Air Transportation

¹ Text not revised by the author.

Command (90% of airlifts from civil airlines), the US aircraft manufacturer technical representatives (the Charles Lindbergh flew combat sorties) and the Civil Air Patrol (anti-submarine patrols and guarding US airfield). These are only some of the examples that could be mentioned as a different way to outsource security and, clearly, there is a long and creditable history of “outsourcing” security, even during times of mass mobilization and large scale warfare.

Having said that, although States may prudently use the private sector as a means of meeting their security requirements, they can never outsource their responsibilities. Some careful limits are necessary and taking as a reference the policies followed by the US government, it is important to mention that, generally, combat is an inherently governmental function and may not be contracted out. The role of PSCs is limited to protecting people and property from criminal activity and other unlawful violence. The use of deadly force by these guards is limited to self-defense, the defense of others, and to protect inherently dangerous property or critical infrastructure to avoid loss or destruction which would likely result in civilian deaths. Furthermore, in military support functions, the Department of Defense reviews the use of contractors to identify where we have become dependent on contractor performance – those functions where there is no or minimal military capability to perform essential functions – and then to address those risks.

PMSCs do pose significant threats to the international system, but they may also create opportunities for effective regulation. The best way to address the threats posed by PMSCs may be to reinforce and strengthen the responsibility States have concerning the conduct of private actors. In this regard, accountability appears to be the essential legal concept and the Military Extraterritorial Jurisdiction Act (MEJA), for example, has been passed in order to apply extra-territorial jurisdiction directly to persons accompanying the military, such as employees of PSCs. The MEJA establishes a legal framework for trying civilian contractors abroad in U.S. federal courts for felony that is punishable with more than one year in prison. Recently, the Uniform Code of Military Justice (UCMJ) has been amended to allow for the prosecution of military contractors and some legislative proposals have been issued where the Civilian Extraterritorial Jurisdiction Act is concerned.

To conclude, although governments may contract support for its military and post-conflict operations, it can never outsource the responsibility for operating in accordance with the laws and customs of war or, where applicable, International Human Rights Law. The use of private military companies and private security companies in conditions of armed conflict must be managed in a responsible manner, consistent with national values and commitment to the rule of law. For the United States, this commitment

is expressed in our national regulations, Agency policies, and our commitment to international efforts such as the Montreux Document, the International Code of Conduct, and the business and operational standards for PSC operations. The challenge facing the United States and other countries is the effective implementation of these commitments and responsibilities. Lessons have been learned and more lessons are yet to be learned. This learning and the application of these lessons learned, is a continuous and necessary effort for the prudent use of contractor support and to maintain effective government monopoly of violence.

Statement

Gregory Starr

UN Under-Secretary-General for Safety and Security, New York

The use of Private Security Companies by governments, private companies and International Organizations is controversial, stemming from reports of abuses and lack of management and oversight in places such as Iraq over the last ten years. Yet the industry is still viable, and perhaps vital.

Moving directly to my discussion concerning the use of PMSCs by International Organizations, let me state that my current experience with the UN is relevant to this discussion. Within the UN system, we have worked to progress this issue to a point where we are comfortable with our concepts and the work done to develop a policy on the use of PMSCs, but the point we have reached in the UN system may not be applicable to other International Organizations, INGOs, or NGOs.

The United Nations in the past utilized and today continues to utilize the services of what are termed Private Security Companies. On fairly rare occasions we utilize them for armed security support, which is generally seen to be the crux of the issue we are here to discuss today. However, it should be noted that companies labeled as PSCs are also in the business of providing air support, air operations, aircraft maintenance, shipping, transportation, logistics, life support and other types of services.

Most recently, in a report by NGO Global Policy Forum, the UN was heavily criticized for any use of companies labeled PMSCs. The stance of Global Policy Forum is that PMSCs are “Part of the Problem, not the solution.” I disagree with this assessment, which I find overly simplistic and judgmental, no less so without an in-depth examination of the real issues surrounding the reality we face on the ground in many places the UN must operate.

However, despite the fact I disagree with the stance taken by groups like GPF, and I believe that the UN must have the ability in certain cases to use Private Security Companies for services, there is no doubt that the issue is controversial, no doubt there have been terrible and tragic incidents perpetrated by personnel working for companies such as these, no doubt that management and oversight of these companies has been weak or lacking, and no doubt that if PSCs are employed, particularly by International Organizations, it must be done with due diligence, care and proper oversight.

Within the United Nations we have developed a policy, guidelines and standards, still subject to further approval processes, that provide for the exercise of due diligence should the UN need to resort to the use of PSCs.

Balancing the delivery of effective humanitarian, development, peace-building, and political mandates with the requirement to provide adequate and appropriate levels of safety and security for our personnel is a difficult challenge.

We have determined that we will follow a tiered approach when looking at providing armed security services. First, as always, we rely and depend on the host government to provide the security we need. Should this not be possible or effective, we will look to other member states to support us. If this is not a viable option, we will look at whether we can increase our own organic capability. Should these alternatives not be possible or feasible, we will look at whether the use of contracted services from PSCs is possible.

This last option, the use of PSCs, would be subject to a considerable decision process itself. Areas such as reputational risk to the UN as a whole, reputational risk to UN operations in the intended area of operation, acceptance of this type of service by the government and populace, regulatory and legal frameworks, and other factors must be considered. A serious due – diligence effort must be exercised in any decision to use PSCs by the United Nations, and then, only after all other options have been explored and exhausted.

We have created a policy on the use of PSCs, guidelines, Terms of Reference, a model contract, and a use of deadly force policy, all aimed at ensuring that if we use the PSCs for armed security support we can ensure that we have made every effort from the decision making process itself through to implementation that we are effectively in control of the entire process, in a transparent way.

During this process we have consulted with various entities within the United Nations, including our Human Rights office, as well as with legal offices, procurement offices, and security and political offices throughout the UN system.

We have looked closely at major standard setting initiatives such as the Montreux Document on PMSCs and the industry's International Code of Conduct initiatives in setting our best practices.

All of this is absolutely necessary and proper if we are going to engage PSCs on behalf of the United Nations system to provide armed security support. I would argue that many of the same conditions should be considered when determining whether to use PSCs for the other types of services they can provide, as several of the same risk factors apply.

What is undeniable though is that member states of the United Nations, donors, and populations increasingly affected by instability, extreme environmental conditions, extremism, war, famine, and political crises all expect United Nations personnel to operate and alleviate suffering in more and more dangerous environments. In some cases we are operating where governments cannot protect their own populations, much less UN

personnel. In some areas of conflict, political conditions inhibit participation by member states that could protect UN personnel. For these reasons, if the United Nations is going to remain responsive, effective, and relevant, we may need to call on companies labeled PSCs for a variety of support, as they have shown they can be effective.

In certain settings, under the right conditions, with the proper levels of diligence, management, and oversight, the UN may well utilize PSCs but only if other options are unavailable, and it must be done carefully.

I. Status and Interrelation of Major Standard Setting Initiatives

The Montreux Document

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The Montreux Document is a restatement of existing legal obligations of States related to operations of PMSCs. It also sets forth good practice in this respect. It is the result of an initiative launched by the Swiss government and the ICRC in 2006. It aims to raise awareness of humanitarian concerns at play when PMSCs operate in an armed conflict, and seeks to provide guidance of different legal and practical points raised by PMSCs' activities.

The increased presence of PMSCs in the context of armed conflict raised important humanitarian and legal concerns such as the use of civilians to carry out tasks traditionally reserved for armed forces, the intermingling of heavily armed security guards and civilian population, the status of private contractors under IHL, the respect of the principle of distinction, and flaws in accountability.

Furthermore, when reports of the increasing involvement of PMSCs in armed conflicts, in particular in Iraq and Afghanistan, started to attract public attention, there was an urgent need to counter the misconception too often circulating in the media that PMSCs were operating within a legal vacuum.

All these reasons brought the ICRC and the Swiss government to get involved in an initiative aimed at reaffirming international obligations of States in respect of PMSCs' activities in armed conflict situations and at providing good practice in this respect.

Between 2006 and 2008, four intergovernmental meetings where experts from governments, industry and civil society gathered to discuss this issue were organised. In September 2008, seventeen States adopted the Montreux Document.

This was the first international document to address military and security companies whenever these are present in armed conflict situations.

Four years later, forty-two States and an international organisation (the EU), support the Montreux Document.

To be more precise, the Montreux Document should not be construed as endorsing the use of PMSCs in any particular circumstance or as taking a stance on the broader question of legitimacy and advisability of using PMSCs in armed conflict. It shall not be interpreted as limiting or prejudicing in any manner existing rules of International Law or the development of new rules of International Law. Indeed, the Montreux

Document is neither a treaty nor a soft law, but a restatement of binding law.

Even if the Montreux Document focuses on situations of armed conflict, many of the rules it contains are also applicable outside situations of armed conflict. The good practices it contains can be especially useful in any situation.

Let's give now an overview of the Montreux Document. It focuses particularly on international legal obligations pursuant to International Humanitarian Law (IHL) and International Human Rights Law (IHRL) and on the general principles of State responsibility for internationally wrongful acts.

It contains twenty-seven Statements recalling the main international legal obligations of States in regard to operations of PMSCs during armed conflicts. Each Statement is the reaffirmation of a general rule of IHL, IHRL or State responsibility formulated in a way that clarifies its applicability to PMSCs operations. Statements also recall that PMSCs and their personnel are bound by IHL and must respect its provisions at all times during armed conflicts, regardless of their status.

They highlight the responsibilities of three types of States: Contracting States, Territorial States and Home States. "Contracting States" are States that directly contract the services of PMSCs, including, as appropriate, where such a PMSC subcontracts with another PMSC. "Territorial States" are States on whose territory PMSCs operate. "Home States" are States of nationality of a PMSC, i.e. where a PMSC is registered or incorporated; if the State where the PMSC is incorporated is not the one where it has its principal place of management, then the State where the PMSC has its principal place of management is the "Home State".

However, IHL and IHRL obligations of Contracting States, Territorial States and Home States are not implemented in watertight compartments and various States may have obligations toward one particular PMSC. Therefore, with the aim of ensuring respect for IHL and IHRL and access to remedy for victims, States should cooperate in elaborating and implementing their regulations as to avoid jurisdictional gaps.

Let's turn now to the main rules set forth in the Montreux Document:

1. States cannot absolve themselves of their obligations under IHL and Human Rights Law by hiring PMSCs

State obligations under International Law are not discontinued when it contracts a private company to carry out certain activities. Although International Law does not prevent States from contracting out various activities, failure of a State to meet its international obligations cannot be excused by the outsourcing of a particular task. Therefore, States shall ensure that the respect and implementation of their obligations under

International Law, and in particular under IHL and IHRL, are not impeded by their decision to contract out PMSCs.

2. States are under an obligation to ensure respect for IHL by the PMSCs.

While the responsibility to respect IHL means an obligation for the State to refrain from committing violations through its own authorities and armed forces, the obligation to ensure respect for International Humanitarian Law entails a duty to take measures to prevent and repress violations of Humanitarian Law not only by its armed forces but also by the civilian population, and especially by the industry of PMSCs.

3. States may be responsible for violations of IHL committed by the PMSCs.

Under International Law, the violation of a rule of International Law by certain public or private actors may trigger the responsibility of the State.

For instance, under International Law States will be responsible for wrongful acts committed by:

- a. Their agents: this may include PMSCs personnel if, for instance, they are incorporated into the armed forces or police forces of the State.
- b. Persons or entities empowered to exercise elements of governmental authority: Although there is no clear definition in International Law of "elements of governmental authority", in general, activities such as national defence and foreign policy are commonly understood, to varying degrees, as inherently governmental tasks.
- c. Persons acting on the instructions of a State or under its direction or control.

4. States must investigate and, if warranted, prosecute violations of IHL alleged to have been committed by the staff of PMSCs.

Firstly, States have a clear obligation to provide jurisdiction of their courts over grave breaches of the Geneva Conventions and Additional Protocol I. Secondly, they have an obligation to investigate, prosecute and punish serious violations of IHL if committed by their nationals or on their territory. They can also choose to hand suspects over for trial to another State or to an international criminal tribunal.

It can be noted that in a number of countries, Criminal Law, including statutes on war crimes, does not only apply to individuals, but also to corporations. In these systems, not only the personnel or managers can be prosecuted for crimes, but also the company itself.

In respect to PMSCs personnel, the Montreux Document recalls that: they have to comply with applicable IHL; their status is determined by IHL (this question will be further developed during session 4); if they are civilians under IHL, they may not be the object of attack unless and for such time as they directly participate in hostilities; are subject to prosecution if they commit conduct recognised as a crime under international or national law.

To conclude, the Montreux Document is a restatement of existing legal obligations of States related to operations of PMSCs which aims to raise awareness of humanitarian concerns at play when PMSCs operate in an armed conflict and seeks to provide guidance of different legal and practical points raised by PMSCs' activities. But to be the useful and practical tool it intended to be, the Montreux Document needs to be implemented through effective national measures. States should therefore take practical measures to ensure that PMSCs and their staff respect IHL. The following elements would seem useful:

- Imposing an obligation on PMSCs to vet staff to ensure they have not committed violations of IHL or relevant criminal offences in the past;
- Awareness of IHL: all PMSCs staff should receive a proper training in IHL. It is not sufficient to rely on training they may have received in their previous careers with the armed forces or police;
- PMSCs staff should be issued with standard rules of behaviour and especially rules on the use of force that comply with the relevant rules of IHL and, indirectly, with HR;
- Mechanisms should be established for investigating any alleged violations and ensuring accountability for any violations, including by communicating the results of such investigations to the relevant State authority for prosecution.

In this respect, the Swiss government and the ICRC remain ready to assist States in their efforts to implement the rules and good practices of the Montreux Document in their national regulations.

The International Code of Conduct and its Oversight Mechanism

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The Geneva Centre for the Democratic Control of Armed Forces (DCAF) is a Geneva-based foundation which has as its core business Security Sector Reform (SSR) / Security Sector Governance (SSG). As the private security industry has grown and occupied a more important place within the security sector, it has also grown in importance at our Institution. For the last several years under mandates of the Swiss government, DCAF has acted as project leader and facilitator in efforts to raise further awareness of the Montreux Document as well as to develop an International Code of Conduct for Private Security Service Providers (ICoC). It is this latter area of work that is the subject of this intervention.

As an initial point of departure, it is useful to describe what the ICoC is: a multi-stakeholder process convened by the Swiss government with the participation of private security companies (PSCs), States and civil society organizations that 1) sets out clear responsibilities and operational standards for PSCs based on International Humanitarian Law and Human Rights standards, and 2) launches a multi-stakeholder process to establish effective oversight and governance mechanisms.

On 9 November 2010, after an 18-month project of multi-stakeholder engagement to develop the ICoC, 58 PSCs came to a signatory conference in Geneva to sign the ICoC. The initial uptake exceeded the expectations of those involved in establishing the ICoC. In the nearly two years since this time, adherence to the ICoC continues to increase, with the last two-month period (1 June-1 August) matching the highest number of new signatory companies in a two-month period since the ICoC was finalized. As of 1 August, the total of signatory companies has risen to 464 from 60 different countries¹.

The regional proportions of signatory companies may be surprising to some, with 60% headquartered in Europe, North America and Asia tying at 13%, 7% headquartered in Africa, 5% in Australasia and 2% in Latin America. The regional representation is becoming more diverse as well, with a recent surge of companies signing the ICoC headquartered in Asia and the Middle East.

¹ As of 1 October, the number of signatory companies had increased to 511 from 63 countries. For the list of signatory companies, please visit www.icoc-psp.org.

What does signing up to the ICoC mean for a company? In so doing, ICoC signatory companies commit to operate in accordance with:

- International Humanitarian Law
- International Human Rights Law
- National Laws and Regulations
- The ICoC

More specifically, by signing the ICoC signatory companies commit to operate in accordance with a number of clearly articulated, internationally-recognized human-rights based principles and standards, for example: 1) very limited rules for the use of force², and 2) the prohibition of torture and human trafficking³. Signatory companies also commit to implement management systems and policies, including training, vetting, weapons management and incident reporting, to name a few⁴. Finally, signatory companies commit to, once the Independent Governance and Oversight Mechanism (IGOM) is established, becoming certified and submit to on-going oversight by the IGOM.

Turning our attention to the IGOM, the charter for this body which explains its functions is currently in the last stages of development by a multi-stakeholder temporary steering committee (TSC), with the final version expected in early 2013. However, even if it is not quite finished, it is possible to describe in broad strokes the future activities of the IGOM: 1) It will be governed by a Multi-stakeholder Board that will include Human Rights, civil society, organizations, States as well as member companies; 2) It will offer certification of member company compliance with ICoC-based standards; 3) It will conduct on-going independent monitoring both at company headquarters as well as in the field; and 4) It will develop a system for effective third-party complaints resolution.

Regarding the timeline of the way forward, currently the TSC is engaged in expanded multi-stakeholder outreach and consultations in September and October 2012. It is anticipated that the draft charter for the IGOM will be finalized at a Finalization Conference in early 2013, with the launch of operations of the IGOM scheduled for the first half of 2013. Finally, as provided for in paragraph 70 of the ICoC, the Swiss will convene a review conference for the ICoC once the review mechanisms of the IGOM have been developed.

For the latest news and up-to-date information on the ICoC and the IGOM, please visit www.icoc-psp.org. This website endeavours to support

² These rules for the use of force require that any force used must be strictly necessary and proportionate to the threat and appropriate to the situation. Firearms should only be used in self-defense or defense of others against the imminent threat of death or to prevent a very serious crime involving grave threat to life. [ICoC, para.s 30-31]

³ ICoC, para.s 35-37.

⁴ ICoC, Section G.

the transparency of this initiative, making publicly available the current list of signatory companies as well as other key documents such as the minutes of meetings and reports prepared by the TSC, as well as an updated timeline with upcoming events and activities.

The UN Draft Convention

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The extent and ways in which private military and security companies (PMSCs) have been used by governments in armed conflicts is one of most significant new developments in warfare. In the first Gulf War, for example, roughly 9,200 contractors accompanied U.S. troops and the ratio of contractors to troops was one to fifty-five¹. The recent Iraqi conflict involved over 190,000 contractors – far more than the number of American troops².

Let me start by telling you a little bit about the mandate of the Working Group. The Working Group was established in 2005 by the Human Rights Council³. It consists of five experts – one from each of the regional groups recognized in the UN system – who serve for one or two 3-year terms. The first set of experts has now rotated out and a new group has been appointed. I am from Pakistan and my colleagues on the Working Group hail from Chile, Poland, South Africa and the United States.

In 2008, the mandate of the Working Group was explicitly expanded to cover PMSCs. The Working Group was requested to study the effects of PMSC activities on the enjoyment of Human Rights and to draft basic international principles that encourage respect for Human Rights by those companies in their activities⁴.

The expansion of the Working Group's mandate reflected concern amongst the members of the Human Rights Council about the explosion in the use of private military and security companies. This development has generated enormous debate, both about whether the use of these companies is appropriate and about how they should be regulated. We have heard today about two important initiatives in this regard: 1) the Montreux Document; and 2) the Code of Conduct.

¹ Laura A. Dickinson (2011), *Outsourcing War and Peace*, «Yale Law Journal», 4.

² *Id.*

³ U.N. Commission on Human Rights, Res. 2005/2, *The use of mercenaries as a means of violating Human Rights and impeding the exercise of the right of peoples to self-determination*, U.N. Doc. E/CN.4/RES/2005/2, 7 April 2005.

⁴ Human Rights Council Res. 7/21, *Mandate of the Working Group on the use of mercenaries as a means of violating Human Rights and impeding the exercise of the right of peoples to self-determination*, 2(e), 7th Sess., U.N. Doc. A/HRC/RES, 28 March 2008.

My task is to talk about the third regulatory initiative: the UN Draft Convention⁵ and how it fits with these other initiatives. The Draft Convention seeks to do something quite different from either Montreux or the Code of Conduct: to create new, binding international rules on private military and security companies. But its approach is complementary to the other initiatives. As commentators have pointed out, the successful regulation of non-State actors such as PMSCs requires a multi-layered approach involving international standard-setting, robust national legislation and industry self-regulation.

I will talk about the UN Draft Convention from a schematic perspective focusing on its basic purposes.

Who is covered?

The Draft Convention covers the activities of PMSCs, which are defined as corporate entities providing military and/or security services. Unlike the Montreux Document, its rules would apply regardless of whether these companies were operating in an armed conflict.

Reflecting the wide range of activities performed by PMSCs, the definition of covered services is equally broad. Military services means: specialized services related to military actions including: strategic planning, intelligence activities, flight operations and satellite surveillance, knowledge transfer with military applications and material and technical support to armed forces and related activities. Security services are defined as including: armed guarding or protection of people or buildings, any kind of knowledge transfer with security and policing applications, the development and implementation of informational security measures and related activities.

While one might quibble with particulars of this definition, a broad definition is appropriate because while most people think of PMSCs in the context of Iraq and Afghanistan, in fact they operate in many spheres. They are used to provide security for extractive industries, as part of drug eradication efforts in Latin America, and surveillance operations in Africa. The UN uses them to provide armed and unarmed security and logistics support to its missions around the world. Humanitarian groups and NGOs also rely on them. When thinking about PMSCs it is important to recall that we are not just talking about war zones, but also areas where there are other kinds of instability.

⁵ Human Rights Council, *Submission by the Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination*, UN Doc. A/HRC/WG.10/2/CRP.1, 6 August 2012.

Government Functions

The Draft Convention takes the view that there are certain inherently governmental functions that simply should not be outsourced. The list of functions in the Draft Convention goes well beyond the International Humanitarian Law requirement that States must themselves perform certain duties – e.g. exercising the power of the responsible officer over prisoners of war and internment camps. The functions listed in the Draft Convention as non-outsourcable are:

- Direct participation in hostilities
- Waging war and/or combat operations
- Taking prisoners
- Law-making
- Espionage
- Intelligence
- Knowledge transfer with military, security and policing application
- Use of and other activities related to weapons of mass destruction
- Police powers, especially the powers of arrest or detention including the interrogation of detainees.

It is well accepted among States that several of these functions should not be outsourced. For example, if one canvasses national laws and Statements of policy it seems that States by and large agree that direct participation in hostilities and/or combat operations should not be outsourced. Similarly, most States' legal systems would prevent them from delegating law-making to private companies. Other categories could gain acceptance if narrowed. For example, while "police powers" may be too broad a category to ban in a world where prison privatization is becoming common place, some States have taken positions suggesting that at least certain types of interrogation should only be performed by government employees.

But there is no doubt that there are functions currently listed in the Draft Convention that several States would not agree to ban from private companies – intelligence operations and knowledge transfer for example. These would be a point of negotiation.

Governance

The Draft Convention also includes a number of provisions that oblige States to proactively regulate PMSCs. These obligations would extend not just to the territorial State (which is likely to suffer from instability or a diminished rule of law requiring the use of PMSCs in the first place), but also to the home States of PMSCs. The imposition of specific obligations on home States stems from International Humanitarian Law and from States' International Human Rights obligations to ensure the protection of Human Rights and prevent rights violations. One of the big problems in this

field is that there is no international standard requiring States to control PMSCs. Given that PMSCs perform functions that were traditionally performed by highly regulated State entities such as militaries and police forces, the development of such a standard is essential. The international community needs to agree on the due diligence obligations of States vis-à-vis this sector.

In this regard, the Draft Convention requires States to establish a comprehensive domestic regime of regulation and oversight, including:

- establishing a register of PMSCs;
- developing a national licensing regime which would cover the import and export of military and security services;
- ensuring that personnel of PMSCs are properly vetted;
- ensuring that PMSC personnel are trained to respect relevant International Human Rights and International Humanitarian Law and are trained to use equipment and firearms; and
- establishing national rules on the use of force and firearms.

The need for licensing and registration is axiomatic – many PMSC home States require domestic security companies that operate in stable environments with strong rule of law to be licensed and strictly regulate their activities and use of firearms. To allow PMSCs to operate in volatile environments and with sophisticated firepower – with all the risks to Human Rights and Humanitarian Law that such operations entail – seems like an abdication of basic due diligence.

Another important way in which the Draft Convention seeks to define the content of States' International Human Rights obligations is to require States to take legislative, administrative and other measures to ensure that PMSCs and their personnel are held accountable for violations. In particular, each State would be required to enact legislation prohibiting certain activities to PMSCs (the non-outsourcable functions discussed above) and prohibiting PMSCs and their employees from violating International Human Rights, Humanitarian and Criminal Law and restrictions on the use of firearms. Each State must establish jurisdiction over these offences when committed on its territory, by one of its nationals or when the victim is a national.

In addition, each State must take measures to investigate, prosecute and punish violations and to ensure effective remedies to victims and ignore immunity agreements when they purport to cover violations of Human Rights or Humanitarian Law. This is an important provision directed at increasing accountability for violations by PMSCs. The reality is that despite the many well-known cases of PMSC employees committing gross violations of Human Rights – from running a prostitution ring in Bosnia to killing civilians in Iraq – prosecutions in PMSC home States are extremely rare, leading to the perception that these companies operate with impunity.

This perception is only strengthened by the fact that many of the companies allegedly involved in abusive and criminal behavior have subsequently been given large government contracts.

Notably, the civil liability aspect of accountability has not been particularly useful either. In the last several years, we have seen a number of civil suits brought in the United States against contractors, but these suits face jurisdictional hurdles and are often dismissed due to government assertions of secrecy. For example, lawsuits against the PMSCs, Caci and Titan for torture, abuse and sexual violence at the Abu Ghraib prison were dismissed on the grounds that the contractors were essentially operating like soldiers and thus were entitled to immunity from suit⁶. Another major civil suit against contractors – this time for complicity in extraordinary renditions to torture – was dismissed because the U.S. government asserted that adjudication would necessarily result in the exposure of sensitive national security information⁷.

International Supervision

Although the Draft Convention recognizes the centrality of national regulation in controlling PMSC activities, it also provides for a modest level of international supervision modeled on UN Human Rights treaties. It establishes an Oversight Committee of international experts to receive reports from States on the legislative, administrative and other measures they have adopted to give effect to the Convention and allows the Committee to comment on them. It includes confidential inquiry procedures for cases where there is reliable information containing well-founded indications of grave or systematic violations of the Convention. Individual and group petitions are allowed if States opt into that procedure.

Having laid out the basic provisions of the Draft Convention, let me now turn to the process for moving it forward.

It is obvious that there are a number of important interests at stake in discussions about regulating PMSCs – both national and commercial. In 2010, the Human Rights Council established an open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework for PMSCs, including the option of elaborating a legally binding instrument based on the elements and draft text proposed by the Working Group⁸. Several States – including major host and contracting States – were staunchly opposed to the establishment

⁶ *Saleh v. Titan. Corp.*, 580 F.3d 1 (D.C. Cir. 2009), cert. denied, 131 S. Ct. 3055, 2011.

⁷ *Mohamed v. Jeppesen*, 614 F.3d 1070, 1075–76 (9th Cir. 2010), cert. denied, 131 S. Ct. 2442, 2011.

⁸ Human Rights Council, *Report of the Working Group on the use of mercenaries as a means of violating Human Rights and impeding the exercise of the right of peoples to self-determination*, p. 19, 15th Sess., UN Doc. A/HRC/15/25, 5 July 2010.

of this group. Nonetheless, they participated constructively in the two meetings that were held by the intergovernmental group. Much of the conversation at these meetings was focused on whether we need an international convention at all or whether current International Law was sufficient.

My Working Group, which served as a resource person for the consultations, took the view that the Draft Convention filled two key gaps: 1) defining what activities were non-outsourcable (beyond the limited categories of the Geneva Conventions); and 2) providing specific content to international obligations *vis-à-vis* PMSCs⁹. The second meeting of the intergovernmental group, which was held in Geneva in August 2012, concluded with a consensus that the conversation about the regulation of PMSCs, including the need for a PMSC treaty, should go on for another two years.

The fact that this conclusion was reached by consensus is a significant step forward and I hope it reflects a greater willingness among States to consider the benefits of a PMSC treaty rather than reflexively rejecting regulation. I anticipate that the Human Rights Council will mandate the continuation of consultations at its session in March 2013.

These consultations will provide an important forum to move forward the consideration of a PMSC treaty and explore the difficult – although not insoluble – issues that it raises.

⁹ *Supra* note 5.

II. Experiences with National Implementation

South Africa

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South Africa's constitutional and foreign policy imperatives derived from a long national liberation struggle that required the Mandela Government, elected in 1994, to act in order to prohibit mercenary activities and regulate the actions of South African companies and nationals in areas of armed conflict. Of special concern was the undermining of the stability, growth and democracy of the African continent by military companies operating from South Africa and using the service of South African nationals as mercenaries.

The most effective method of regulation was through domestic legislation: South Africa became one of the first countries in the world to adopt legislation to prohibit mercenarism and to control the activities of companies providing military-related services.

South Africa remains concerned about the use of mercenaries in conflicts, especially Africa, and is of the view that more effective international control mechanisms should be put in place.

South Africa has participated in the negotiation of the Montreux Document on pertinent legal obligations and good practices for States related to operations of private military and security companies during armed conflict. South Africa welcomes its reconfirmation of the applicability of the norms of International Humanitarian Law to all actors in armed conflicts, but considers it only as a starting point for the elaboration of a binding international instrument for the control and regulation of the actions of PMSCs, and to hold them accountable for violations of International Humanitarian Law and Human Rights Law.

South Africa has noted the work of the UN Working Group on Mercenaries in this respect and its adoption of the draft UN Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies. This represents a starting point for the development of an effective legally-binding international instrument.

South Africa urges the International Humanitarian Law community to strengthen the application and implementation of International Humanitarian Law by focusing their efforts on the development of such an instrument.

South Africa is currently at the forefront in this respect and we are chairing the Human Rights Council's Open-ended Inter-governmental Working Group with the mandate "to consider the possibility of elaborating

an international regulatory framework, including, inter alia, the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of private military and security companies, including their accountability, taking into consideration the principles, main elements and draft text as proposed by the Working Group on the use of mercenaries as a means of violating Human Rights and impeding the exercise of the right of peoples to self-determination". The Working Group had a successful meeting in Geneva in August 2012.

The Current Regional and International Frameworks

The following international instruments are relevant to the control of mercenaries:

1. OAU Convention for the Elimination of Mercenarism in Africa, 1977
 - Only 30 ratifications, entered into force in 1985, South Africa did not ratify as the definition of mercenaries contained in the Convention is more limited than the definition contained in its national legislation. However, the South African liberation movements supported this Convention in principle.
 - Limited scope: the crime of mercenarism covers only activities committed "with the aim of opposing by armed violence a process of self-determination, stability or the territorial integrity of another State" (Art 2(a)).
2. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2012) (not in force):
 - Criminalises mercenarism and places this crime under the expanded criminal jurisdiction of the Court.
3. International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989:
 - 32 ratifications, entered into force in 2001, South Africa did not ratify.

Legislative and policy steps taken in South Africa to ensure compliance by PMSCs with standards of conduct derived from IHL and Human Rights Law

1. Regulation of Foreign Military Assistance Act, (Act No. 15 of 1998)
 - The Constitution provides in Section 198(b), in one of the principles guiding national security, that the resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally and

internationally, except as provided in terms of the Constitution or national legislation.

- The new democratic government elected in 1994 declared its intent to base its foreign policy on the principles of Human Rights and to strive to enhance international peace and security.
- Besides these Constitutional and policy imperatives, the activities of South African PMSCs (e.g. Executive Outcomes) in especially African but also other countries, and the trade in arms between South African companies and countries in conflict necessitated action by the government. In this respect, South Africa's decades-long military actions in neighbouring States resulted in a highly-trained cadre of military operatives, who then morphed into private military companies, operating from South African territory and recruiting South African nationals, creating permanent organisations that could enter into contracts with foreign entities for the provision of a wide range of mercenary-related services. The actions of these entities, especially in Africa, often linked to destabilising conflicts on the continent, required the South African Government to take effective action to establish an integrated and transparent system to address the issues of mercenaries, PMSCs and the conventional arms trade. While it was always the South African position that a legally-binding international instrument should be negotiated, the immediate concerns about the actions by South-African registered companies and nationals required effective national control, and the Regulation of Foreign Military Assistance Act was enacted, which:
 - a. prohibits mercenary activity (defined as the direct participation as a combatant in armed conflict for private gain) as well as related activities: the recruitment, use, training or financing of mercenaries, or engagement in mercenary activities (Section 2);
 - b. regulates the rendering of, or the offer to render, foreign military assistance to any State, organ of State, group of persons or other entity or persons, by requiring that authorisation must have been obtained from the NCACC (Section 3).
- "Foreign military assistance" widely defined as: "military services or military-related services, or any attempt,

encouragement, incitement or solicitation to render such services, in the form of:

- a. military assistance to a party to an armed conflict by means of: advice or training; personnel, financial, logistical, intelligence or operational support; personnel recruitment; medical or para-medical services; procurement of equipment;
 - b. security services for the protection of individuals involved in armed conflict or their property;
 - c. any action aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a State;
 - d. any other action that has the result of furthering the military interests of a party to the armed conflict, but not humanitarian or civilian activities aimed at relieving the plight of civilians in an area of armed conflict".
- Except in cases of actions aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a State, the trigger for applicability is the existence of an armed conflict.
 - Extraterritorial application: jurisdiction by South African courts over acts committed outside the Republic, as long as there is a link to South Africa.

2. *Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, 2006 (Act No. 27 of 2006)*

- Intended to replace the Foreign Military Assistance Act, not yet in force.
- Provides for a State to be proclaimed as a regulated country by the NCACC: where an armed conflict exists or is imminent, the assistance is regulated in both the regulated country and other countries in armed conflict.
- Enlistment of South African citizens/ permanent residents in armed forces other than the South African National Defence Force prohibited, unless authorised by NCACC.
- Regulations aimed at preventing the recruitment of South African nationals by PMSCs abroad must still be drafted and have delayed its entry into force: this is at present a major concern as the South African authorities do not know enough of how they are being recruited.

3. *Implementation of Geneva Conventions Act, 2012 (Act No. 8 of 2012)*

- Incorporates the Geneva Conventions and Additional Protocols into South African domestic law.
- Criminalise contraventions of the Conventions inside the Republic and contraventions by citizens of the Republic outside the Republic (extraterritorial jurisdiction).

4. *Usefulness of the Montreux Document in this endeavour*

The South African legislation was adopted before the Montreux Document was finalised.

5. *Difficulties faced in developing law and policy in this area*

South Africa was one of the first countries to develop legislation, and as there were few international precedents, had to develop a new system of control, and new definitions in its legislation.

- Investigations and prosecutions done by a specialised unit of the National Prosecuting Authority (NPA).
- Practical problems faced by the NPA:
 - a. Witnesses: operators in this industry form a band of brothers who act in solidarity and do not split on one another, getting an insider as a witness is almost impossible;
 - b. Violations of the prohibitions often take place in countries in conflict: difficult and dangerous to investigate;
 - c. Recruitment often takes place abroad which complicates investigations;
 - d. Proving the existence of an armed conflict (trigger in both the Acts): to proclaim a country a regulated country in terms of the new act is diplomatically sensitive, in a situation where there has not been such a proclamation, the existence of an armed conflict must be proved in court, expert witnesses must be called;
 - e. Inadequate international cooperation: States themselves use PMSCs and are often not willing to cooperate in investigations;
 - f. Government is often in a difficult position: must often provide consular assistance to families of PMSC personnel under investigation if they get problems in countries where they operate!

- g. PMSCs are big business: many companies just do not apply in order not to run risk of losing lucrative contracts;

Impact of those measures

- Some companies (like EO) did disband after the 1998 legislation or started to operate from other countries;
- The disastrous “Wonga Coup” where a 2004 plot to overthrow the government of Equatorial Guinea and in which former British Prime Minister Margaret Thatcher’s son, Mark, was involved, went wrong and the mercenaries were arrested in Zimbabwe and Equatorial Guinea, and subsequent prosecutions appears to have had the effect to at least stop this type of mercenary activities from being planned and organised from South African territory.

Besides the Montreux Document, what other tools could help States implement their international obligations and what other recommendations could be made in this respect?

- While the effective implementation of national legislation may face obstacles, more domestic control in more States will close some of the regulatory gaps that presently exist.
- Effective mutual legal assistance is imperative for successful investigation and prosecution of crimes (international cooperation on drugs an example of an effective system).
- A distinction should be drawn between the activities of Private Security and Private Military Companies, also as concerns the legal regulation thereof: this is the case in South Africa.
- Self-regulatory systems are not enough: for effective regulation, a binding international instrument must be developed, which must also provide for the rights of victims, reparations and the obtaining of justice.
- Foreign States and companies must respect the South African law and refrain from recruiting South African nationals. The fact that many South Africans have double citizenship makes it easier for foreign companies to recruit them and turn a blind eye to the South African legislation. The disrespect for national law strengthens the case for a binding international convention.

France

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Ainsi que l'ont bien montré les interventions passionnantes qui ont précédé, la question de l'activité des sociétés militaires et de sécurité privées (SMSP) pose à tous les Etats de très nombreuses questions. D'abord utilisées dans le cadre d'opérations extérieures, en appui technique des forces armées, ces sociétés ont procuré ensuite un appui armé. Certaines ont enfin élargi leur activité à la lutte contre la piraterie maritime, en embarquant des agents sur des navires qui traversaient une zone à risque.

Dans un cadre des opérations extérieures déployées en Afghanistan, l'emploi des SMSP par les différents membres des alliances a divergé: nos alliés américains et britanniques les ont fréquemment employées, la France ne les a pratiquement pas utilisées sauf pour la manutention ou le convoyage et le gardiennage de biens. De même en mer, les SMSP ne peuvent assurer la sécurité de navires battant pavillon français.

Je vais développer deux points: la position de la France est prudente sur l'emploi des SMP, elle souhaite un cadre juridique sécurisé.

I. Cadre juridique actuel et évolutions éventuelles:

La France n'a pas de législation pour les sociétés exerçant hors de son territoire, mais elle participe activement aux travaux internationaux.

Suite à l'accord de tous les pays sur le document de Montreux (obligations et bonnes pratiques pour les Etats en ce qui concerne les SMSP, en septembre 2008), la France a engagé une réflexion au sujet de l'emploi de SMSP que nous définissons comme des sociétés qui portent des armes pour l'exercice de leur activité et qui agissent à l'extérieur du territoire français.

Pour ce qui concerne la position de la France sur le plan interne, en premier lieu, elle autorise l'activité des entreprises privées de sécurité sur le territoire national depuis l'adoption d'une loi en 1983 ; Cependant

- les activités sont énumérées par la loi (convoyage de fonds, missions de sécurité, gardiennage)
- elles peuvent détenir des armes et munitions mais pas d'armes de guerre (un revolver mais pas de kalachnikov...)
- elles sont contrôlées par un Haut Conseil, (sous la tutelle de l'Etat) qui donne des agréments, autorisations, cartes professionnelles, et exerce la discipline sur les entreprises avec des pouvoirs de sanctions administratives ou financières.

En second lieu, même si la France n'autorise pas l'embarquement de gardes armés privés sur des navires battant pavillon français, elle a adopté une réglementation locale sur le transit et l'accès aux ports des navires étrangers embarquant des équipes militaires privées.

Ces arrêtés ont été adoptés en raison du recours de plus en plus fréquent par les navires privés étrangers faisant escale dans les ports de Mayotte et de la Réunion à des SMSP embarquées, afin de se prémunir contre les actes de piraterie. L'objectif principal de ces dispositions est de prévenir tout usage inapproprié de la force par les membres des SMSP sur le territoire français. Les dispositions qu'ils prévoient peuvent être regroupées en deux catégories:

- La première concerne une interdiction d'usage des armes et leur éventuelle mise sous scellé.
- La seconde est relative à l'obligation d'information des autorités françaises qui est faite au commandant de navire ayant à son bord une équipe armée de protection.

En revanche, la France n'a pas adopté de loi sur les sociétés exerçant hors de France.

L'emploi de SMSP afin d'assurer la sécurité de navires battant pavillon français est pour le moment impossible. Les navires français qui s'estiment menacés par des actes de piraterie peuvent faire une demande de protection assurée par la marine nationale. Cependant, 30 à 40% de ces demandes de protection ne peuvent actuellement être satisfaites.

L'emploi de la force par les ESSD déployées dans le cadre de missions terrestres en dehors du cadre de la légitime défense l'est également. L'armée française les emploie cependant afin d'assurer des missions de soutien logistique et technique sur terre.

Pour ce qui concerne, en particulier, la position de la France sur le plan international, elle suit activement toutes les réflexions au niveau international:

- elle a avalisé totalement le document de Montreux
- elle suit les travaux du groupe de travail du Conseil des droits de l'homme
- elle suit également avec attention les travaux d'élaboration du code de conduite international (ICOC), mais nous n'avons pas participé à la cérémonie de signature en novembre 2010
- la France est un partenaire attentif des travaux de l'Organisation maritime internationale.

Ces réflexions ont mené à la rédaction de deux rapports (interministériel et parlementaire) sur les adaptations législatives nécessaires à l'emploi de SMSP par des personnes publiques ou privées. Cette réflexion ne s'est pour le moment pas matérialisée en un cadre juridique. Pourquoi? Trop de problèmes juridiques demeurent.

II. La France souligne 4 problèmes juridiques et politiques essentiels liés à l'emploi de SMSP

1) La définition française de la légitime défense est très restreinte par rapport à celle d'autres Etats.

La France a une définition de la légitime défense qui s'éloigne de la définition anglo-saxonne. Pour la France, la légitime défense doit être bien sûr nécessaire, proportionnée (si on vous attaque avec un bâton, vous ne pouvez pas riposter avec une arme) et n'est possible que si elle est immédiate (vous ne pouvez pas riposter le lendemain). La jurisprudence de nos tribunaux est très stricte.

Contrairement à la définition française, la définition anglo-saxonne est moins exigeante et englobe même potentiellement la légitime défense préventive. Or c'est la définition anglo-saxonne qui est retenue dans un grand nombre de documents, dont le Code de conduite international (ICOC). Les autorités françaises ont souligné à de nombreuses reprises la nécessité entière de respect des principes de nécessité et de proportionnalité dans l'usage de la force en légitime défense. La France s'inquiète de la mise à l'écart dans les instances internationales tant du principe d'immédiateté de la riposte (lequel, il est vrai, n'est pas universellement reconnu), que de celui de proportionnalité, ce qui paraît plus dangereux. La seule limite à l'usage de la force en légitime défense qui est systématiquement et exclusivement mise en avant au niveau international est seulement le critère de nécessité de la riposte. Or ce critère subjectif est insuffisant pour garantir les droits des personnes.

La France ne cherche pas à imposer aux autres Etats sa propre définition de la légitime défense: elle propose que, dans tous les documents internationaux, un renvoi aux droits nationaux soit intégré. Cela permettrait de ne pas mettre en avant une utilisation du droit de légitime défense qui, selon la France, est trop extensive et peut favoriser la commission d'incidents impliquant des victimes innocentes.

2) La France fait la distinction entre les activités qui relèvent d'un Etat et celles qui peuvent être exercées par une société privée.

Le maintien de l'ordre, l'usage de la force sont des prérogatives des Etats. Mais en France également le transport et l'interrogatoire de détenus.

L'ICOC, par exemple, envisage l'exercice de ces activités par des sociétés privées. Ceci est contraire à notre Constitution (telle qu'interprétée par la jurisprudence constitutionnelle). Mais la France estime que cela pourrait aussi être estimé contraire à certaines obligations des Etats en droit international humanitaire et notamment à l'article 12 de la Convention de Genève relative au traitement des prisonniers de guerre, selon lequel "les prisonniers de guerre sont au pouvoir de la Puissance ennemie, mais non des individus ou des corps de troupe qui les ont fait prisonniers". Cela

signifie que ces personnes ne peuvent être détenues par des gardes armés privés, sans contrôle effectif de la part des armées. Ce point a besoin d'être précisé, et la détention de prisonniers par des salariés de SMSP strictement définie.

De même, les gardes privés embarqués à bord de navires ne peuvent capturer et détenir des pirates présumés que sous l'autorité du capitaine du navire. Ils ne pourront pas prendre de mesures de contrainte qui ne seront pas demandées par le capitaine, qui est le représentant de l'Etat sur le navire.

3) La France est très inquiète du contrôle de l'acquisition et de l'utilisation d'armes et surtout d'armes de guerre.

C'est un problème que tous les Etats connaissent et qui est une préoccupation majeure de la communauté internationale.

Dans l'éventualité où la France se prononcerait en faveur d'une réglementation de l'activité des SMSP, la réglementation sur les armes leur sera bien sûr applicable, avec la délivrance notamment des autorisations d'achat, de détention et d'exportation d'armes. Mais la question centrale n'est pas dans la législation de l'Etat siège des sociétés. C'est le respect de la législation de l'Etat sur le territoire duquel la SMSP réalise sa prestation, qui doit prévaloir.

De façon générale, toutes les normes non contraignantes s'appliquant aux SMSP, ou les systèmes mis en place en vue de la régulation ou du contrôle de leur activité, devraient souligner l'aspect fondamental du respect du droit de l'Etat hôte.

Il a parfois été négligé dans le cadre de l'activité des SMSP sur les territoires afghan et irakien dans les années 2000. L'Egypte par exemple s'en préoccupe vivement, pour le transit sur le canal de Suez. Ainsi les armes doivent être débarquées à l'entrée du canal, acheminées par voie terrestre et reprises par les navires à la sortie du canal. Le gouvernement afghan a notamment pris des mesures afin de limiter le déploiement de SMSP étrangères sur son territoire en se fondant sur le fait que, selon ses statistiques, 40% de ces SMSP ne se conformaient pas à la réglementation locale en matière d'armement.

4) Si l'Etat certifie des entreprises, celles-ci doivent pouvoir être contrôlées.

La certification doit aller de pair avec un contrôle efficace. Les Etats sont incités à rendre obligatoire une certification. La certification peut être le fait d'un organisme national ou international. Différentes modalités sont envisageables, en fonction du caractère privé ou public de l'organisme concerné, du degré de contrôle de l'organisme privé par une autorité

nationale, de la composition de l'organe certificateur. Mais qui dit certification, qui dit « normes ISO », dit contrôle et audit.

Or toute la question est: comment un Etat va-t-il contrôler les activités d'une société qui n'exerce pas sur son territoire ? C'est le droit local qui s'applique et la souveraineté de cet Etat qui doit être garantie. Et si la certification est le fait d'un organisme certificateur, quel contrôle, quel audit pourront attester de son efficacité?

Il y a en fait deux cas de figure distincts: la contractualisation d'un Etat avec une SMSP, et la contractualisation entre une société privée et une SMSP.

- Si c'est l'Etat qui emploie la société, il peut la contrôler par le biais du contrat qu'il passe avec elle. Les modalités opérationnelles, le respect des droits de l'homme et le contrôle auquel la société sera soumise peuvent figurer dans le contrat, et l'Etat peut assumer sa responsabilité au regard du droit international.
- Si le contrat est passé entre sociétés privées, la loi peut obliger à insérer certaines clauses obligatoires dans le contrat. Mais qui va contrôler ?

5) L'Etat du siège de la SMSP a-t-il une responsabilité du fait de la certification?

Tout Etat doit remplir son devoir de vigilance en vue de la prévention des actions qui pourraient violer le droit international. Dans l'éventualité où un Etat utiliserait des SMSP, il serait dans l'obligation d'encadrer leur activité afin de prévenir les dommages que le comportement des gardes armés pourrait causer aux tiers. A défaut, la responsabilité internationale de l'Etat pourrait être engagée.

Si l'Etat accorde une certification, quelle est l'étendue de sa responsabilité ? Il est clair que toute la responsabilité ne peut incomber à l'Etat hôte. L'Etat dans lequel la société a son siège a également un rôle à jouer. Le Document de Montreux le souligne à juste titre.

Mais de manière concrète, comment l'Etat du siège de la société peut-il être responsable de ce qui se passe sur le territoire de l'Etat-hôte, sur lequel il ne peut exercer aucun contrôle sans violer le principe de souveraineté?

La mise en place d'un système de certification et de contrôle est-elle la garantie de la satisfaction des engagements internationaux d'un Etat, ou bien ces systèmes pourraient-ils au contraire entraîner l'engagement de la responsabilité étatique dans l'éventualité d'une défaillance? L'existence d'un organisme privé établi par les pouvoirs publics dispense-t-elle l'Etat de l'engagement de sa responsabilité au niveau international dans l'éventualité où cet organisme n'aurait pas assuré l'objectif avec rigueur? Ces questions méritent d'être posées et il n'y a pas encore été donné de réponse.

Venezuela

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Latin America could be considered one of the continental areas where administrative and political instabilities lead to the manifestation of various adverse conditions that not only endanger national security but also the implementation of public policies conducive to ensuring peace and quality of life as its own governance.

In this regard, the region over the years has been characterized by the following conditions: (1) Militaristic path of not so old data: Virtually all countries lived railway dictatorships during the first half of the 20th century (2) A wide range of proliferation of paramilitary and irregular armed groups (3) Corruption (4) Currently a growing expansion of organized crime in all its aspects.

All this has led to the situation that in many of these countries public security policies are considered insufficient to cope with the demonstration of violence and the categorization of certain types of criminal conduct that because of their repetition and spectrum make it difficult to consider them as common criminal behaviour.

The Bolivarian Republic of Venezuela is one of these cases. By the year 2010, the Institute of Coexistence and Citizen Security Research wrote the following report: "In Public Safety matters, during the first quarter violence intensified during weekends, registering extremely high data related to homicides; evidence of presence of criminal networks involved in complex crimes materialized each day more in rates of robbery and theft, especially in shipments of chemicals and medicines in national Security Device was applied and counted with a significant investment of human and economic resources to attack the delinquency problem in the country, mainly on a perspective of containment and control".

According to this, the Device was an operative method applied all around the country where policy as well as National Security Guards executed efforts regarding inspection, capture, inquiries and any other activity intended to dismantle organized gangs and common delinquency. All this comes along with a range of irregular situations occurred during the last year related to penitentiary system; in this sense, public administration has been confronting strikes, manifestations, irregular groups confrontations prison riots where armament has been seized.

However, this has led the country to the creation and appliance of instruments related to the creation, recognition and operability of private

security groups in order to decentralize and delegate surveillance and national prevention systems.

In order to understand how the Bolivarian Republic of Venezuela operates we must make reference to the National Constitution; the Constitution of the Bolivarian Republic of Venezuela. According to our Constitutional structure, in 1999 during the change of the text a new title was introduced receiving the name of "National Security" and in it you can find the basis of comprehensive development and its defence is the responsibility of natural and juridical people inside the geographical space. All these terms are contained in the following articles.

- Article 322: "National security is an essential competence and responsibility of the State, based on the overall development of the latter, and its defence is the responsibility of all Venezuelans, as well as of all public and private law natural and juridical persons within the geographical limits of Venezuela".
- Article 324: "Only the State shall be permitted to possess and use weapons of war; any such weapons which now exist or are manufactured in or imported into the country shall become the property of the Republic, without compensation or proceedings. The National Armed Forces shall be the institution of competence to regulate and control, in accordance with the pertinent legislation, the manufacture, importing, exporting, storage, transit, registration, control, inspection, marketing, possession and use of other weapons, munitions and explosives".
- Article 325: "The National Executive reserves the right to classify and control disclosure of matters directly relating to the planning and execution of operations concerning national security, on such terms as may be established by law".

As we may see, private security companies, private military companies, or any type of organisms which may operate inside the Republic are submitted not only to the Constitution but to any other instrument related to the National Armed Forces. However, we may find a contradiction in these articles when we see that article 321 expressly informs that defence is the responsibility of all Venezuelans of public and private law. One of the most obvious threats inside national security is which are the limits of this responsibility related to defence.

Also within Chapter II, Title VII we may find an important topic and it is the Principles of National Security. This is written in Article 326

- Article 326: "National security is based on shared responsibility between the State and civil society to implement the principles of independence, democracy, equality, peace, freedom, justice, solidarity, promotion and conservation of the environment and

affirmation of Human Rights, as well as on that of progressively meeting the individual and collective needs of Venezuelans*, based on a sustainable and productive development policy providing full coverage for the national community. The principle of shared responsibility applies to the economic, social, political, cultural, geographical, environmental and military spheres”.

This article is extremely important especially when we can extract the following topics:

- First of all, there is a special recognition constitutionally speaking, of civil society in national security but it is directed to the implementation of principles which are related to Human Rights and International Human Rights as we can see.
- Secondly, it is the final phrase where the military sphere is included in the final phrase on the sharing of responsibility for national security and the obedience to the principles related to Human Rights.
- In Article 332 we can find the Civilian Security Organs
- Article 332: "The National Executive, in accordance with law, to maintain, and restore public order; protect citizens, homes and families; support the decisions of the competent authorities and ensure the peaceful enjoyment of constitutional guarantees and rights, shall organize: (1) A uniformed national police corps (2) A scientific, criminal and criminological investigation corps (3) A civilian fire department and emergency management corps (4) A civil defence and disaster management organization”.

Organs of civilian security are of civil nature and shall respect human dignity and Human Rights, without discrimination of any kind. The functions of the civilian security organs constitute a concurrent competence with those of the States and Municipalities, on the terms established in this Constitution and the Law.

So, in this case we find that as well as number 3 and number 4 we find the reference of organizations and corps. It is an article that can be widely interpreted specially according to these emergency management corps.

As an example: during the years 2002 and 2003 in the Bolivarian Republic of Venezuela an emergency management corps called “Reservists”, started to operate which were partially private security military corps created by the Executive in order to prevent social implosions.

Analysing all the Articles related to National Security we could conclude that:

- In many of them we can observe a dichotomy in its content on the one hand because the Constitution claims that national security is an exclusive matter of the State so this could suppose that we are in front of the obligatory need of the establishment and functioning of public policies but private and public, natural and juridical persons are mentioned; so we could as well understand that national security is a matter of joint policies.
- On the other hand, we find that all topics related to public safety, national security and the appliance of any type of system related to it has a Constitutional range in all the aspects of Human Rights and International Human Rights principles and values.
- Also, especially in article 332, we can observe the transcendence inside a constitutional article of principles like dignity, Human Rights, non-discrimination and obviously the existence of organizations related to citizen security for topics related exclusively to civil protection and disaster management.

Summarizing, the Bolivarian Republic of Venezuela has made an effort and important progress when it establishes Human Rights and International Human Rights principles in a constitutional range because it binds not only the State in its public affairs but also society to obey and accomplish them under penalty of unconstitutional behaviour.

Related to other rules, the only other regulation concerning the Bolivarian Republic of Venezuela besides the Constitution is Resolution N° 070: Rules of Performance in Private Escort. This Resolution is attributed to the Ministry of Population Power of Internal Affairs and Justice and its duty is to dictate prevention, control and mitigation plans and programs on criminal activities.

In the case of this resolution, the major reason is the State's need to assign material and human resources to organisms and Institutions in Civil Prevention and Security to regulate escort and custody services that are performed by civilians. These citizens must have been inside the military service and have specific restrictions regarding the carrying of weapons and their use.

As a consequence of all these matters, on September 30th 2004 the "Pilot of City Security" was also created at the Metropolitan District of Caracas. This plan had the mission of planning and executing preventive measures of effective control to counteract crime situations. 1800 officers of different police corps, private security corps and 1200 National Guard Officers were incorporated. Still, there was a key point in this case and it is the following: "During the performance of this action plan no discrimination was set regarding criminal types, committing models, geographical locations or source of records and data base."

This is a very delicate point, because many innocent civilians not only were arrested but were murdered, tortured or disappeared during confrontations with security corps. Besides that, data related to weapon traffic were placed over the discussion table of national security.

However, there was a step forward and it had to do with the design, development and implementation of control instruments which were applied as social surveys in order to set a data base on victims. This instrument collects information related to: general conditions of life and habitability, public services, household census, Institutions and Organizations cooperating in the region.

All these also allowed setting a record where information concerning homicides, rapes, traffic, drug dealing, kidnapping and recruitment was analysed.

Now, if we must evaluate the effectiveness of rules and measures related to National Security and International Human Rights in the country we must refer to the Criminologist and Criminal Law expert Luis Gerardo Gabaldón who has analysed the security context in Venezuela establishing the following indicators.

Between 1990 and 2000 the crime rate increased from 13% to 33% and in 2002 it rose to 21% resulting in a crime rate of 54% by 2004.

Related to crimes concerning civilians such as rape, the decrease was only 16% by 2009 while kidnapping and traffic increased to 75%. This statistic is the general data because according to the report only 34% reports the crime while 54% doesn't trust the security corps, neither the public nor the private corps.

On the other hand, the performance of security corps, where violence and citizen security between 2003 and 2004 are concerned, police executed 87% of death cases in confrontations between civilians and the corps. 9% of them are claimed to be the responsibility of the National Army and by 2006 death as a result of confrontations with regional police corps were 42.3%, while mortal victims in hands of the security corps was 20.7% by 2010.

The author indicates that the expansion of the presence of police security corps and the alliance with private security organizations are not necessarily helpful or effective regarding control of violence and safety.

So, we must ask ourselves. Have rules, policies, practices and principles been effective in the prevention and restoring of security in the Bolivarian Republic of Venezuela related to these joint security corps or institutions?

No. One of the reasons is the lack of information related to the recognition of International Humanitarian Law. The performing of humanitarian institutions in Venezuela is directly subject to State regulations and you can observe certain distrust from public forces and organs. Initially, mistrust of the private sector makes the appliance of any

security or contingency plan suffer limitations more from bureaucracy performance than rules themselves.

Secondly, there is a misperception regarding humanitarian matters and interests and, of course, a certain apathy when it comes to the implementation of humanitarian plans.

Thirdly, corruption has led the general population not to trust any type of security system either the State or private corps specially because impunity where responsibility for committed crimes against civilians are ignored or justified by the call of duty.

Finally, rules and instruments establishing ethics, values and principles in International Humanitarian Law – besides the Constitution - are recognized or promoted sending the population to ignorance and indifference.

After analysing the behaviour of security and International Humanitarian Law in Venezuela, we propose the following recommendations:

- The existence of instruments of control and inspection on the performance of security forces from both public and private indicators based on transparency, respect and citizen guarantees and humanitarian values.
- The existence of recruitment systems where direct measurement criteria applied related to performance in environments where public safety is at stake in order not to incur in bureaucratic measures whose cronyism or irregular mechanisms prevail.
- The creation of training programs in the field of International Humanitarian Law in all its aspects. These programs must be dictated by the agents of humanitarian institutions and must be directed not only to law enforcement but to the general administration and the population.
- The development of comprehensive training programs for citizens on International Humanitarian Law. This would imply a change in the legislation related to education in all its aspects in order to approve the inclusion of topics related to international humanitarian values along with feasible projects by the student population.
- The recognition of the active participation of civil society (NGOs, foundations, associations) and the establishment of legal instruments that allow humanitarian work to be more effective.
- The review and modification of the internal norms regarding criminal liability for committing crimes involving humanitarian citizenship.

Switzerland

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What legislative and policy steps have been taken in your country to ensure compliance of PMSC with standards of conduct derived from International Humanitarian Law and Human Rights Law?

How was the Montreux Document useful in this endeavour? First, it is important to know that in Switzerland, as a federal State, most of the competences in the field of internal security and police matters reside with the 26 Cantons, except for matters with international implications. The Cantons have different regulations with regard to Private Security Companies, but these regulations are always limited to companies active on their own (small) territories. Companies operating beyond the Swiss borders are not affected by these Cantonal regulations.

Due to its deeply rooted federal system, eight years ago Switzerland did not have any substantial and reliable information about the number and the significance of PMSCs operating on its territory. Much less information existed on internationally active PMSCs residing in Switzerland. One could even talk of a “black hole”.

Therefore, the first step Switzerland took in 2005 on a national level was an effort to get a comprehensive survey on the situation.

In December 2005, based on an intervention in the Swiss Parliament (Stähelin Postulate of 1 June 2004), the Federal Council adopted an initial report on private military and security companies. Based on the conclusions of this well received report, the Federal Council decided to go forward with three follow-up actions:

- Firstly, a Federal ordinance on Private Security Companies executing protection tasks for Federal authorities was elaborated.
- Secondly, the Federal Council appointed the Federal Department of Justice and Police to examine the advisability of subjecting military or security service providers operating in crisis or conflict zones to an authorization or registration obligation.
- Thirdly, the Federal Council explicitly welcomed and supported the joint efforts of the Federal Department of Foreign Affairs and the International Committee of the Red Cross to recall and strengthen the international regulations on PMSCs.

In May 2008, the Federal Office of Justice issued a report on the examination of a compulsory registration system for private security companies operating in crisis or conflict zones. Based on this report, the

Federal Council decided to provisionally waive a regulation. It justified its decision on Switzerland's low attraction, as a market, and by the disproportion of controls to be introduced, bearing in mind the marginal nature of the phenomenon.

The factual situation changed, however, considerably in 2010. Media reports made public that in spring 2010, the company AEGIS Group Holdings SA was entered in the Register of Commerce of the Canton of Basel City. This provoked strong reactions from the media and reopened the political debate on the challenges of regulating PMSCs. The political and public debate particularly focused on the mercenary question.

In December 2010, the Federal Department of Justice and Police issued a report concerning a possible regulation on security companies operating from Switzerland in crisis or conflict zones. According to the research of the Federal Office of Justice, at the end of 2010 around 20 security companies operating or likely to operate in crisis or conflict zones were established in eight different Cantons. The establishment of AEGIS Group Holdings SA in the Canton of Basel City also shows that foreign companies, including very large international companies, may be interested in having a company in Switzerland. Within the scope of its inquiries, the Federal Office of Justice also noted a considerable development of the security market at international level, a development of the international regulation instruments and the existence of a legal void in Swiss law with regard to companies providing private security services abroad from Switzerland.

The Federal Office of Justice reached the conclusion that there were now sufficient grounds for justifying the adoption of a federal regulation on the provision of private security services abroad. The Federal Council approved these conclusions and charged the Federal Office of Justice with the elaboration of a federal law on the provision of private security services abroad. From January to March 2012, a preliminary draft was sent to the constitutionally required public consultation. Political parties, companies and associations concerned with the matter and any other interested circles could express themselves on the proposed regulations. The Federal Council took note of the results of the public consultation at the end of August 2012. A revised version of the draft law should be ready to be submitted to the Federal Council at the end of this year.

The Montreux Document adopted in autumn 2008 was and still is an essential reference point for the elaboration of the Swiss draft law.

Not least for this reason the drafters in the Federal Office of Justice are in a close exchange with the specialists in the Federal Department of Foreign Affairs.

I shall now have a look at some of the essential provisions of the Swiss draft law, with special focus on the relevant regulations of the Montreux Document.

Essential Aspects of the Swiss draft law on the provision of private security services abroad with special focus on the Montreux Document

The Montreux Document addresses itself to contracting States, territorial States as well as home States of PMSCs, and – within their power to ensure respect for International Humanitarian Law – to all other States as well. The Swiss draft law deals with Switzerland as a Contracting State and a Home State of private security providers. The draft law does not embrace the territorial aspect insofar as private security companies operating within Switzerland are not subject to it, but fall under the regulation power of the Cantons. The application scope of the Swiss draft law covers only activities of security providers linked to the offering of services abroad, i.e. beyond our borders.

Much more than the aspect of Switzerland as a Contracting State, the potential status of our country as a host State of PMSCs is the main focus of the draft law. The governmental Ordinance of 2007 already sets up the necessary regulations for federal authorities mandating private security companies. Due to the small size of our country, Switzerland's relevance as a contracting State of Private Security Companies is rather limited. With the apparently increasing attractiveness of our country for the establishment or the registration of globally operating PMSCs in our country, however, the necessity to draft specific regulations became eminent.

Scope of application

The draft law applies to natural persons, legal persons and partnerships (persons and companies) which provide private security services for other countries from Switzerland. The scope of the draft law also covers related services such as the recruitment, the training or the provision of security personnel for operations abroad. Further, the draft law regulates activities such as the establishment, the operation or the management of companies in Switzerland which provide private security services abroad. An important point is the application to companies which do control, from Switzerland, private security service providers abroad.

System of preliminary information combined with specific prohibitions

The Swiss draft law provides for a system of preliminary information combined with specific prohibitions, partially based on the law itself, partially pronounced by a Federal authority. In our view, the proposed information and prohibition system is a fully equivalent solution to the

authorization system promoted by the Montreux Document. Since the share of sensitive private security services provided from Swiss-based companies abroad is still very modest, Switzerland is interested in establishing an efficient control mechanism with the least possible bureaucratic obstacles.

The draft law provides that private security service providers have to declare all their services designed for clients abroad to the competent federal authority in advance. The declaration procedure must be kept simple, since the vast bulk of these trans-border activities should not at all be problematic for our country (e.g. security guards for real estate active in the close border area of Switzerland).

The prohibitions proposed in the draft law are intrinsically tied to the aims of the law. The first article of the draft law defining its aims is therefore of particular importance for the whole regulation system. The following four aims are laid down:

- preservation of the internal and external security of Switzerland;
- implementation of the objects of Switzerland's foreign policy;
- preservation of Swiss neutrality;
- observance of International Law, particularly of Human Rights and International Humanitarian Law.

The last-mentioned aim corresponds with the obligation set forth in paragraphs 3, 9 and 14 of the Montreux Document for Contracting States, Territorial States and Home States to ensure respect for International Humanitarian Law.

The draft law stipulates two sorts of prohibitions: legal prohibitions and prohibitions pronounced by the Federal authority which gathers and examines the declarations on security service provisions abroad.

Legal Prohibitions

Prohibited by the law shall be activities deemed to be completely irreconcilable with one of the aims of the law. In these cases, there will be no need for further examination. The following two legal prohibitions are proposed:

- Firstly: Prohibition of a direct participation of private security personnel in hostilities abroad. Hostilities are defined in the sense of the Geneva Conventions. It shall also be prohibited to set up, establish, operate, manage or control a company in Switzerland which makes available security personnel for direct participation in hostilities abroad.
- Secondly: Prohibition to provide, from Switzerland, private security services associated with serious violations of Human Rights.

These two categories of prohibitions can be considered as irrefutable legal presumptions for an infringement of the aims of the law, i.e. for a

violation of essential national interests of Switzerland. The direct participation in combat situations or the provision of military and security personnel for such a purpose clearly run contrary to the Swiss policy of neutrality, which is a cornerstone of Swiss foreign policy and of our country's self-conception. The prohibition to provide security services associated with serious violations of Human Rights does not aim at the violation itself. It applies to activities which, *per se*, are legitimate but become problematic if provided in a context of serious Human Rights violations. An example would be the operation of a prison by private security personnel, when it is used by State officials to commit acts of torture.

Prohibitions pronounced by the authority

Except for the two activities mentioned before (direct participation in hostilities, security services in association with serious Human Rights violations), all other private security service provisions abroad are basically and *prima vista* legal. The competent federal authorities, however, must closely examine whether generally admitted activities are consistent with the aims of the draft law, i.e. whether they are in line with the essential national interests laid down there.

Some private security services can be perfectly legitimate in one situation but inadmissible in another. The draft law enumerates different contexts where the provision of a security service could be problematic, for example, the provision of security services in armed conflict or other situations of violence.

The competent federal authorities shall decide whether the security service is compatible with the aims of the law. If their conclusion is negative, they have to pronounce a prohibition.

Concluding my remarks on the Swiss draft law on private security service provisions abroad, I would like to mention that all security service providers subject to the law shall have an obligation to sign the International Code of Conduct for Private Security Service Providers and to observe its regulations.

What difficulties did you face in developing law and policy in this area?

In my view, one of the biggest difficulties we face in Switzerland from the beginnings of the process to regulate private security services abroad is the distinction between reasonable legal solutions and the politically contaminated mercenary concept. Politicians and media in Switzerland are focused on the mercenary phenomenon, based on recent events as well as on well-known reminiscences of Swiss history.

Nevertheless, the mercenary terminology proves to be inadequate for developing legal regulations on private security service providers in Switzerland. With respect to this point, a great deal of explanatory work and persuasive power will still be necessary on the part of the Swiss government.

Can you already see an impact of those measures?

The legislative process in Switzerland to regulate private security service provisions abroad is still going on and has not yet led to the adoption of a law. Therefore, it is not possible to give an assessment of the measures proposed in the draft. However, based on the participation and the results of the external consultation on the draft law, the following two conclusions can be made: the public interest in the proposed regulation is high and a broad consensus exists that Switzerland should act and adopt firm and sustainable measures to regulate trans-border activities of private security service providers.

Besides the Montreux Document, what other tools could help States to implement their international obligations? Recommendations?

When it comes to the regulation of private security service providers, the different power positions, cultures and historical experiences of countries around the world are important factors to be considered. I, therefore, think that the development of national legislations based on the rules of Humanitarian Law and the Montreux principles is indispensable to make further progress in this area. Equally important is a regular international exchange on the various national legislations. National regulations could thus serve as inspiration for others.

III. Experiences of Industry Implementation

Industry Standards: ANSI/ISO Standard

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Standards for Quality Assurance & Risk Management

ASIS International is developing a series of standards to support accountability for the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict (09/2008) and the International Code of Conduct for Private Security Service Providers (11/2010). The standards provide auditable criteria for PSCs to demonstrate that their operations are consistent with respect for Human Rights, legal obligations and good industry practices related to their operations in conditions where governance and the rule of law have been undermined by conflict or disaster.

The purpose of the series of standards is to improve and demonstrate consistent and predictable quality of services provided by PSCs while maintaining the safety and security of their operations and clients within a framework that aims to ensure respect for Human Rights, national and international laws, and fundamental freedoms. The standards build on the principles found in existing International Human Rights Law and International Humanitarian Law.

The ANSI/ASIS PSC.1-2012 standard provides auditable criteria for PSCs, and their clients, to demonstrate accountability that Human Rights and fundamental freedoms are adhered to, and untoward, illegal, and excessive acts prevented, documented and remediated. Third party attestation and certification will allow PSCs to demonstrate accountability to the Montreux Document and the ICoC. The standards emphasize identifying, assessing and managing risks so PSCs can establish and implement policies and practices to minimize risks and prevent undesirable and disruptive events. The standards are compatible with the ISO 31000:2009 Risk management–Principles and guidelines and the ISO 9001:2008 Quality management systems–Requirements, so PSCs can build on existing business management practices for quality and risk management to provide more cost effective services supporting a culture that promotes respect for Human Rights.

The standards are the product of an international effort. The Technical Committee for the ANSI/ASIS PSC.1-2012: Management System for Quality of Private Security Company Operations–Requirements with Guidance, was comprised of more than 200 members from 25 countries. In

order to assure balanced input of stakeholder perspectives there was equal representation of user of PSC services; providers of security services; and Human Rights and civil society organizations and other interested parties. Meetings were conducted by WebEx to enable worldwide participation. The standards have already become a requirement for government contracting.

The series of management system standards are comprised of:

1. ANSI/ASIS PSC.1-2012: Management System for Quality of Private Security Company Operations–Requirements with Guidance. This ANSI standard has been published and provides principles, auditable requirements, and guidance for a Quality Assurance Management System to provide quality assurance in all security related activities and functions while demonstrating accountability to law and respect for Human Rights.
2. ANSI/ASIS PSC.2-2012: Conformity Assessment and Auditing Management Systems for Quality of Private Security Company Operations, also published, provides the criteria for certification bodies to conduct fair and transparent audits to validate conformance to the PSC.1 standard. The PSC.2 standard also provides requirements for auditor competence to assure auditors working for certifications bodies have the necessary knowledge and skills to evaluate conformance to the PSC.1 standard’s requirements and the effectiveness of their implementation.
3. ASIS PSC.3-201X: Maturity Model – Phased Implementation of a Quality Assurance Management System for Private Security Service Providers is currently out for balloting for approval and public comment. This standard provides guidance to help PSCs phase in the PSC.1 standard in a business sensible fashion while meeting the objectives of protecting the security, safety and Human Rights of individuals and communities. The maturity model is a tool for PSCs to evaluate where they are in relation to conforming to the PSC.1 standard and determine a path forward to reach full conformance.
4. ASIS PSC.4-201X: Quality Assurance and Security Management for Maritime Private Security Companies–Guidance. The final standard in the series is a guidance document to address the special circumstances, laws and conditions for PSCs operating on the high seas. The ANSI/ASIS PSC.1-2012 standard emphasizes the sanctity of human life. Therefore, the standard seeks to protect the security, safety and rights of not only the local and impacted communities but also clients and the providers of security services. The risk assessment and management approach covers:

- Risk related to Human Rights;
- Risks related to impacted communities;
- Risks related to security and protection of the client, assets and persons being protected;
- Risks related to the security and safety of the security providers; and
- Security management risks related to services including protection of assets (human, tangible and intangible – reputational and information risk is huge in this industry).

PSCs operate in inherently dangerous and high risk environments. They must manage risk to the client while also managing risk to the organization and impacted communities. A risk assessment provides an understanding of risks, their causes, likelihoods and consequences. The risk assessment provides the basis for minimizing and mitigating risks to both internal and external stakeholders.

The risk assessment and management is a dynamic process. There is on-going communication and consultation with internal and external stakeholders including users of security services, providers of security, and persons and communities impacted by security services. There is also on-going situational monitoring emphasizing anticipation and prevention of undesirable and disruptive events. The organization evaluates both likelihood and consequences of undesirable and disruptive events to prioritize risk based on impact and develop strategies to mitigate, respond to and remedy incidents. The risk assessment approach emphasizes that the provision of security and respect for rights are inseparable.

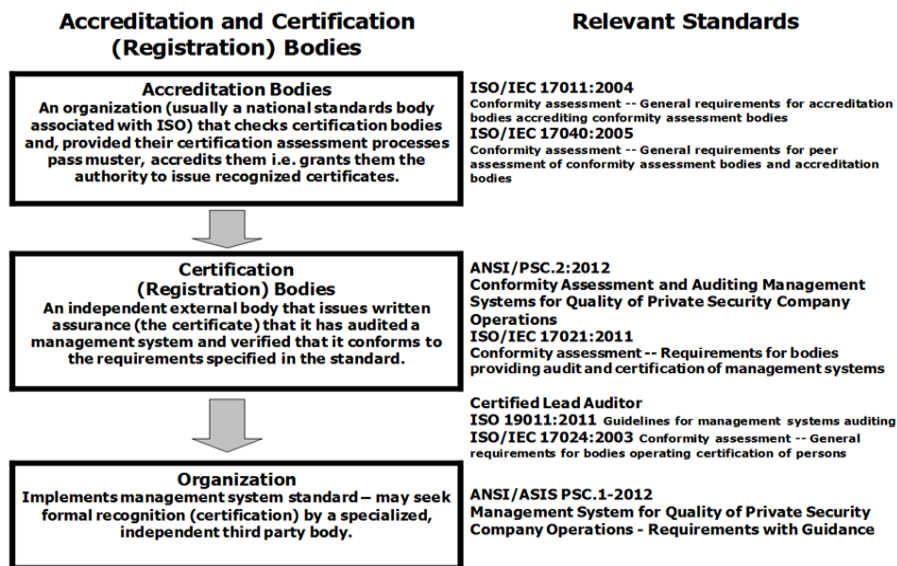
PSCs and their clients have a legal and ethical obligation to follow all applicable International Humanitarian, Human Rights, and customary law and agreements. It is incumbent on an organization to identify the relevant laws and determine how the requirements apply to their operations. These laws and their importance must be stressed to all employees and subcontractors involved in operations.

Objectives should be established and documented. It should include internal and external expectations for the organization and its contractors and supply chain. The objectives should be derived from, and remain consistent with, the quality assurance management policy, the risk assessment, and respect for International Law, local law, and Human Rights. Organizations should establish quality assurance programs for achieving its objectives and risk treatment goals.

The certification process is well choreographed building on existing best practices for auditing and certification programs articulated in the ISO/IEC 17021:2011 Conformity Assessment – Requirements for bodies provide auditing and certification of management systems.

The ISO/IEC standard is supplemented by the ANSI/ASIS PSC.2-2012: Conformity Assessment and Auditing Management Systems for Quality of Private Security Company Operations which raises the bar by hardwiring the requirements for auditor competence and address issues related to protection of Human Rights, complaints mechanisms, integrity of information and background screenings.

The figure below illustrates the certification process.



Every step of the process is well defined and controlled by a set of standards requiring conformance to a set of specifications standards. Starting at the bottom of the figure, the PSCs implement and conform to ALL the requirements of the PSC.1 standard.

Conformance of the standard is validated by an independent third-party accredited certification body. In order for a certification body to give a recognized certification, it must first become accredited by an independent accreditation body who validates that the certification body is in full conformance with the ISO/IEC 17021 and ANSI/ASIS PSC.2 standards and that they are using certified competent PSC.1 auditors that have been credentialed by a training provider that is certified to the ISO/IEC 17024 standard.

There is on-going monitoring of conformance and performance evaluation at each level of the certification process. There is also the opportunity for external parties to provide feedback and report concerns at all levels of the certification process. Therefore, it behoves civil society and

human rights organizations to actively engage in the different levels of the process to lend expertise and input into the activities of the certification and accreditation processes.

Other pieces of the puzzle are also being developed to support the PSC series of standards to achieve their goals of providing quality security services while assuring respect for human rights. These include:

- Developing an auditor competence scheme based on the requirements of the PSC.2 standard to assure that auditors are competent to conduct audits evaluating the conformance and effectiveness of the implementation of the PSC.1 standard;
- Training and certifying competent auditors to assure they are using a consistent, repeatable, fair and transparent auditing process;
- Guidance and training on implementation and operation of the management system to help PSCs implement the standard and understand their obligations to respect legal requirements and Human Rights;
- Advice on implementing the standard;
- Certification bodies will need to recruit certified competent auditors and be accredited to conformance with the ISO/IEC 17021 and ANSI/ASIS.PSC.1 standards;
- Work still needs to be done to complete the development of the maturity model standard and the maritime security guidance, both of which are nearing completion;
- Implementation of the PSC.1 standard by the PSCs. Until a PSC has implemented ALL the requirements of the PSC.1 standard it cannot become certified; and
- Internationalization of the standards will be beneficial. Currently, there are no Technical Committees within CEN or ISO with the scope, expertise or appropriate mix of stakeholders to develop standards that address security and the protection of rights.

The breadth of country representation and depth of expert representation cannot be replicated with international standards bodies. This is a serious problem for internationalization of the standards. There is no technical committee in ISO which has the scope or expertise in this area. For the internationalization of the standards within ISO, there is a need for an open, transparent process which includes extensive outreach to attract all the appropriate stakeholders. In the interim, ASIS International holds the copyrights and is willing to share the ANSI standards with any National Standards Body, CEN or ISO.

As a final thought, it is important to ask what the potential impact of the PSC standards on clients and NGOs is. There is now a national standard documenting industry best practice. There are also major clients who have indicated they will require the standard in their contracting process.

Therefore, what are the liability implications of being a client or NGO and not requiring the standard when you contract a PSC and something happens – negligence? Given that we are at the beginning of this process, it is hard to predict the implications for not using the standards. But from a client's or a PSC's perspective, isn't it better to implement a standard that improves business management and promotes a culture of respect for Human Rights?

Maritime Security Standards

Ian Simpson

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Firstly, may I thank the President and staff of the IIHL and Red Cross for the chance to address such a distinguished audience and to present the Private Security Providers side of the debate. I aim to show you that we in the maritime security industry are not “mercenaries” but a necessary requirement that operates within shipping industry and national guidelines.

The area that we operate in is the Indian Ocean, from Suez in the North, Cape Town in the South, the Western Coast of Africa and over to the Southern tip of Sri Lanka.

As 90% of world trade is moved by sea it is imperative that shipping companies enjoy free passage across the high seas. The piracy threat within the High Risk Area (HRA) has severely disrupted the freedom of the seas and this has led to many companies avoiding the region completely. Those companies that do transit the HRA had increased their normal cruising speed from around 12 knots up to 18 knots plus, resulting in a doubling of fuel consumption. Insurance premiums have also been driven up due to the hijackings and hostage taking over the years.

The average time spent as a hostage of the Somali Pirates is currently 7 months, and this time is spent in horrific conditions often face down on the floor in un-sanitary conditions. The released hostages’ reports and accounts have led to a dramatic effect on the welfare and morale of merchant seamen with mariners refusing to transit through the HRA.

The military initiatives within the region have been successful in policing the piracy in the region, however, there is a clear overstretch of the Navies involved with EU NAVFOR. The vast expanse of the Indian Ocean means that EU NAVFOR would need to be many times its current size in order to cover the region and the amount of merchant ships operating there. This overstretch has led to shipping companies employing PSC to supplement the Best Management Practice 4 security procedures in order to operate safely and at a reasonable cost in the current economic climate.

The Flag, Coastal and Port States within the region have all issued regulations in response to the piracy threat and the use of maritime PSC. These regulations have given a clear framework to operate within but do get amended on a regular basis. The ICoC and the Montreux Document also provide operational and ethical guidance for PSC.

The *Modus Operandi* of the Pirates has developed and the use of Dhows and mother ships has seen the area of operation grow from 165 nautical miles off the Somali coast in 2005, to over 1200 nautical miles.

There are many government and civil organisations that are involved in countering and monitoring piracy and we work with or send reports to the following; UK Maritime Trade Operations (UKMTO), Maritime Security Centre Horn of Africa (MSCHOA), EU NAVFOR, International Maritime Organisation (IMO) and International Maritime Bureau to name a few.

In the UK there is a body called the Security in Complex Environments Group (SCEG) and this is a special interest group within the Aerospace, Defence and Securities Group (ADS) that is the UK Governments industry partner for the regulation of PSC.

The maritime security have a range of guidelines that they must operate to and these form the framework for due diligence and vetting that is conducted on them by clients and third party agencies. The guidelines are:

- IMO MSC 1405, Ship-owners, operators and Masters
- IMO MSC 1406 & 1444, Flag States
- IMO MSC 1408, Port and Coastal States
- IMO MSC 1443, Private Maritime Security Companies
- UK Government Interim Guidance
- Best Management Practice 4
- BIMCO GUARDCON
- Voluntary Principles on Security and Human Rights
- International Code of Conduct

I have extracted the requirements from the above documents amongst others, and identified 7 key areas that are identified throughout:

- Governance companies need to prove that they are a registered and incorporated business with a structured business model, ideally hold ISO9001.
- Insurance – levels as per BIMCO GUARDCON
- Legal advice – access to 24 hour legal advice
- Recruitment and Vetting
 - Seven years minimum service to include operational tours; this ensures a knowledge of firearms safety and measured response to conflict
 - Criminal Record Background checks
 - Mental and physical health check – an assessment of potential Post Traumatic Stress is made by a qualified practitioner
 - Fitness to handle firearms
 - Knowledge of piracy situation
 - References and military testimonial
- Training
 - STCW95
 - Maritime Firearms Competency Course
 - Safe handling of all company firearms

- RUF
 - ISPS
 - Flag State regulations
- Maritime Security Operators
 - ISPS Code
 - Navigation
 - Flag State laws
 - SOLAS
 - ICoC, Montreux Document and VPSHR
 - IMO and National Guidelines
- Enhanced medical (Trauma) – each team will have at least one enhanced medic
- Team Leaders – a separate course that enhances knowledge and covers extra navigation, RADAR and legal subjects
- Continuation and Refresher – conducted during transits
- Firearms procurement, movement and storage – all firearms and equipment are purchased and exported with a current Open General Trade Control Licence. Firearms are stored in Police or military armouries and accounted for at all times; these are escorted by the authorities to/from each vessel and the armoury and added to the vessel's bill of lading.
- Rules for the Use of Force (RUF) – these are as per the BIMCO GURDCON (guidance) and ensure that the industry has a standard and graduated response to any aggressive approach.

The Standard Operating Procedures (SOP) for Neptune Maritime Security have been developed as a result of all the above and these are given to the client for discussion to ensure agreement on the following areas;

The Master's authority – our teams are on the vessel as supernumeraries and, therefore, part of the crew. The Master will be advised of all security situations and he will decide when firearms may be loaded and if required, discharged.

RUF – a graduated response that is proportionate to the threat is agreed on and adhered to. In the vast majority of occasions we have found that merely standing on the deck and raising firearms above the head has resulted in suspicious/pirate vessels turning away. When fired at, a warning shot to no closer than 50m at the pirate vessel has forced the pirates to change course and depart.

- BMP4 contains guidance for the protection of vessels that is followed by the teams, they also contain reporting procedures and templates for communication with the UKMTO. These reports ensure that all potential and actual incidents are logged and communicated to the relevant agencies

- Firearm locations are always known as they are checked and reported when moving from the Police/Military armoury and this checked against the firearms allocation issued to the Team Leader and ship's Master prior to the task. A complete equipment list is then sent to the company HQ and checked against the firearms database– prior to disembarking the list is sent to the receiving agent and military body – firearms are then placed in the armoury and a receipt is sent to the company HQ and cross referenced against the database.
- Applicable Flag, Coastal and Port State laws and regulations are updated from the International Chamber of Shipping and by in country agents and these regulations are passed to the teams and operations managers to ensure compliance therein.

There are currently guidelines, as listed, for the maritime security industry, however, the IMO have linked with the International Standards Organisation (ISO) to produce an ISO specifically for the industry. Work is currently underway to produce ISO28007 "*Procedures for Maritime Private Security Companies*" and the aim is to have this completed by the end of November 2012. This will then enable PSC to be audited and certified against quantifiable standards, and so raise standards where needed.

IV. Key Legal Questions arising in Armed Conflict

Status of Private Military Security Companies under International Humanitarian Law

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As we all know, IHL does not foresee any particular status for corporate actors, such as PMSC. Except for the unlikely case where a PMSC, as such, becomes an independent non-State party to an armed conflict, its rights and obligations as a corporate actor, therefore, will not be defined by IHL, but by national law including, where applicable, Corporate Criminal Law. To some extent, the absence of direct international legal obligations for corporate actors under IHL is mitigated by the self-commitment of hundreds of ICoC-Signatory Companies¹ to compliance with the standards set by IHL when operating in contexts of armed conflict.

The question of status, rights and obligations under IHL is much more relevant with regard to the individual employees and contractors of PMSC (PMSC-personnel). All PMSC-personnel carrying out activities for reasons related to an armed conflict are bound by IHL and criminally responsible for serious violations (war crimes), irrespective of their status. Individual status becomes relevant primarily for determining the entitlement of PMSC-personnel to a particular regime of protection or treatment under IHL.

Which regime will be applicable then depends on whether the individual contractor or employee qualifies as a “civilian”, “civilian accompanying the armed forces”, or “civilian directly participating in hostilities”, or whether he qualifies as a “member of the armed forces”, a privileged “combatant” entitled to “prisoner of war” status, a “civilian internee” protected by the Fourth Geneva Convention or, rather, a “mercenary”. Under IHL, all of these categories of persons have a particular status, to which certain rights and obligations are tied. While these categories cannot be discussed in detail here, it is worth highlighting a few important points.

First, it is uncontested today that the majority of PMSC personnel operating in armed conflicts are not members of the armed forces and do not directly participate in hostilities and, therefore, enjoy civilian status and protection against attack. Nevertheless, their proximity to the armed forces and the hostilities may expose them to increased risk of incidental death or injury. In international armed conflict, PMSC personnel formally authorized to accompany the armed forces remain civilians but are entitled

¹ August 2012: 464

to prisoner of war-status upon capture. Just as any other civilians, however, they are not entitled to combatant privilege and, thus, do not have the right to directly participate in hostilities.

Where PMSC-personnel have been incorporated into the armed forces of a belligerent party, they can no longer be regarded as civilians and private actors but become members of that party's armed forces. In this context it is important to note that such incorporation can take place either through a formal procedure (*de jure*), which results in membership in the regular armed forces in accordance with national law, or simply by being authorized to directly participate in hostilities on behalf of the contracting State (*de facto*), in which case one becomes a member of an irregular militia or group belonging to a belligerent party. In international armed conflict, such PMSC-personnel would be entitled to combatant privilege and prisoner of war status according to the same criteria as any other member of the armed forces.

Finally, the question of PMSC-personnel assuming combat function for belligerent parties also raises the delicate question of "mercenarism". While the threshold of the mercenary definition in Art. 47 Additional Protocol I is very high, it cannot be excluded that some PMSC-personnel may fit the definition. Indeed, where PMSC-personnel are specifically contracted to directly participate in hostilities in return for compensation significantly exceeding the pay level of regular armed forces, they will probably have to be regarded as mercenaries under IHL unless they are nationals of the contracting or the territorial State or incorporated into the armed forces of the contracting State. As mercenaries, they could lawfully be attacked but would not be entitled to combatant privilege and prisoner of war status.

This being said, what is the practical relevance of the whole status question in the context of PMSC-personnel? As we have seen, under IHL, individual status has consequences in two areas: the conduct of hostilities and protection after capture.

The question of status determines whether someone constitutes a legitimate military target or a person protected against direct attack.

This distinction corresponds to the one between civilians and members of the armed forces. While civilians are protected against attack (unless and for such time as they directly participate in hostilities), members of the armed forces constitute legitimate military targets (unless and for such time as they are *hors de combat*). Note that the exceptions of direct participation in hostilities and *hors de combat*, are based on individual conduct, not status. In the context of hostilities, any status other than civilian and member of the armed forces is irrelevant. Even combatant privilege does not matter here, because its only consequence is to provide the combatant with immunity from prosecution for lawful acts of war, which becomes relevant only after capture.

Second, as far as protection after capture is concerned, different regimes apply depending on status under IHL.

While combatants cannot be prosecuted for having engaged in lawful acts of war, non-combatants do not enjoy such immunity. While prisoners of war can be interned until the end of the hostilities solely based on status, without trial or review, persons interned under the Fourth Geneva Convention are entitled to an individual review procedure at least twice a year, which must determine whether the security threat which justified the internment continues to exist and requires the extension of such internment. Finally, persons qualifying as mercenaries enjoy neither prisoner of war status nor combatant privilege.

But how relevant is this in practice given that combatant privilege, POW-status and the mercenary definition of Additional Protocol I apply only in international armed conflicts, but that 95% of contemporary armed conflicts are of non-international character?

In these contexts, the main practical relevance of the status question concerns the conduct of hostilities, the distinction between legitimate military targets and persons protected against attack. Once a person has fallen into the hands of the enemy, IHL governing non-international armed conflicts does not foresee distinct categories or status but entitles everyone who does not or no longer directly participate in hostilities to the basic protection of humane treatment and judicial guarantees.

So from a practical perspective it is the area of targeting in hostilities which is most relevant, and it is in this area where the presence of thousands of PMSC-personnel have caused a considerable amount of confusion. What are their functions? Why are they armed? What is the distinction between civilian security and military defence in terms of convoy or infrastructure protection? The fact that non-State armed groups are intermingling with the civilian population has for decades been deplored as blurring the distinction between civilian and combatant. However, aren't States contributing to exacerbating this problem when they start inserting large numbers of PMSC-personnel into a growing grey-zone between military and civilian functions? What will be the long-term consequences of such policies, though admittedly not prohibited as a matter of law, for the recognition of, and respect for, the most fundamental principle of IHL, namely the principle of distinction? Are we not in the process of undermining, perhaps by negligence much more than intent, one of the greatest achievements of human history? This is my greatest concern here today, and I hope we will have a fruitful discussion in this respect.

Detention Activities by PMSCs

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This presentation addresses the legal challenges of holding private military contractors legally accountable for their participation in egregious violations of International Law, including torture and war crimes, which occurred in the context of detention activities.

Using three cases litigated in the United States as case studies – *Saleh v. Titan*, *Al Shimari v. CACI*, and *Al-Quraishi v. Nakhla and L-3* – which were brought by Iraqis held in U.S.-run detention centers, including Abu Ghraib¹, I will address (1) the legal framework used by the plaintiffs to seek accountability; (2) the legal framework in place in the United States at the time and discuss what limitations, if any, were placed on the activities carried out by contractors, what the contractual and regulatory framework required of contractors in terms of their conduct and their supervisory structure; (3) legal defenses raised by the contractors, including government contractor defense, battlefield preemption, derivative immunity and the political question doctrine; and finally (4) the current status of legal accountability efforts in U.S. courts.

Among other related points that I will briefly mention in this discussion are the role of code of conducts in the litigation, immunity provisions in the host State, the status of contractors under International Law, and holding corporations accountable for International Law violations and extra-territorial jurisdiction questions currently pending before the U.S. Supreme Court in the *Kiobel v. Royal Dutch Petroleum* litigation in the context of the Alien Tort Statute².

The cases related to the alleged torture and other serious mistreatment of Iraqi civilian detainees against two private military contractors, under contract with various components of the United States government, for acts committed in U.S. run detention facilities in Iraq, including Abu Ghraib. CACI provided interrogation services, and Titan, which has changed its name twice (L-3 Services and currently Engility Corporation), provided translation services and then also interrogation services. As found in U.S. military investigations into the severe mistreatment of detainees at Abu

¹ Pleadings and other information about these proceedings can be found at: www.ccrjustice.org/ourcases/current-cases/saleh-v-titan (*Saleh v. Titan*); www.ccrjustice.org/ourcases/current-cases/al-shimari-v-caci-et-al (*Al Shimari v. CACI*); and www.ccrjustice.org/ourcases/current-cases/al-quraishi (*Al-Quraishi v. Nakhla and L-3*).

² U.S. Supreme Court Case No. 10-1491. Information about *Kiobel*, including pleadings, can be found at: www.ccrjustice.org/ourcases/current-cases/kiobel.

Ghraib, CACI and Titan employees were involved in the torture and other serious mistreatment of detainees³.

In each of the three cases, plaintiffs have brought claims of war crimes, torture and cruel and inhuman and degrading treatment, as well as common law claims of assault and battery, sexual assault and negligent hiring and supervision, against the two private contractors for their alleged role in a conspiracy to torture. Between the three cases, more than 335 Iraqi civilians assert that the two international corporations violated the law, including the Geneva Conventions and U.S. law, by sending employees to Abu Ghraib and other detention centers where they directly and indirectly participated in the torture of detainees and participated in covering up or otherwise remaining silent about the torture. All plaintiffs were released from detention without charge.

Plaintiffs brought these civil actions in U.S. federal court under the Alien Tort Statute (18 U.S.C. § 1350) and State law. The ATS allows non-U.S. citizens to bring tort claims for violations of the “law of nations” in U.S. federal courts. The U.S. Supreme Court has found that violations of the law of nations include violations of Human Rights or International Criminal Law that are specific, universal and obligatory⁴. Plaintiffs assert that their claims of war crimes, cruel, inhumane and degrading treatment, and torture, which include allegations of rape, forced nudity and sexual violence, satisfy this standard.

At the time the contractors were hired by various U.S. agencies, U.S. federal regulations required that all private military contractors abide by U.S. laws, including the War Crimes Statute (18 U.S.C. § 2441) and the Torture Statute (18 U.S.C. § 2340), and that contractors retained the responsibility of supervising and disciplining their employees. U.S. regulations made clear that contractors were non-combatants, and as such, fell outside the military chain of command and the military system of discipline⁵.

CACI employees were required to abide by a CACI code of conduct. Defendants have argued, however, that they were essentially soldiers in all but name, and should enjoy the same legal protections bestowed on

³ See, e.g., Taguba A., art. 15-6: *Investigation of the 800th Military Police Brigade* (2004). Plaintiffs also rely on the court martial testimony of military co-conspirators and statements of other detainees.

⁴ The first modern Human Rights case brought under the ATS is *Filártiga v. Peña-Irala*, 630 F.2d 876, 884 (2d Cir. 1980). The Supreme Court upheld the use of this law in such cases in *Sosa v. Alvarez-Machin*, 542 U.S. 692 (2004).

⁵ Two *amicus* briefs were filed by retired military members explaining the fundamental principles of International Humanitarian Law applicable to contractors, the military structure and military disciplinary system, and the distinction between corporate contractors and members of the armed services. See, e.g., *Al Shimari v. CACI, Brief of Amici Curiae Retired Military Officers in Support of Petitioners*, 20 December 2011.

members of U.S. military. Plaintiffs have strongly challenged this characterization, citing both U.S. and International Humanitarian Law provisions which place these for-profit, employees-at-will outside the military structure.

To date, none of the cases have been adjudicated on the merits. Rather, the litigation has focused primarily on whether certain defenses claimed by the private military contractors can serve as a bar to liability or a bar to suit. These defenses, invoked primarily in relation to the State law claims, have included the government contractor defense, battlefield preemption, derivative sovereign immunity and the political question doctrine.

The government contractor defense is a judge-made defense that developed in the products-liability context⁶. Under this defense, a government contractor cannot be held liable for State law claims when, first, there is a conflict between State law and federal law, and second, the contractor acted in compliance with the instructions and specifications ordered by the government. In the context of providing interrogation and interpretation services, rather than a product, the contractors have argued that the common law tort claims such as assault and battery should be preempted under the “combatant activities” exception of the Federal Tort Claims Act – a statute which explicitly states that it does not apply to contractors. In response, plaintiffs have argued that there is no conflict between State and federal law, since it seeks to prevent and punish acts of torture, and that the government required that the contractors comply with the legal prohibitions on torture, and thus any act of torture conflicted with the instructions of the government.

“Battlefield preemption” developed in the context of the *Saleh v Titan* litigation. On appeal, a two-judge majority of the Court of Appeals of the District of Columbia found, in essence, that there could be no room for tort law in the context of war, and that the application of tort law must be preempted so as not to hamper the battlefield commanders.

This novel form of preemption evolved out of another theory of preemption, namely field preemption, under which it is recognized that federal law can “occupy the field” (such as in the context of recognition of a foreign State or immigration), leaving no room for the application of State law. There is a mixed record of courts accepting this defense.

Defendants have argued that because they have been hired by the United States, which enjoys sovereign immunity, and working with the military, they are entitled to a form of “derivative immunity.” Plaintiffs have argued that the various reasons underlying sovereign immunity, under either International Law or domestic law, are inapplicable to for-profit

⁶ The lead case for the government contractor defense is *Boyle v United Technologies Corp.*, 487 U.S. 500, (1988).

corporations. To the extent that contractors have argued that they should enjoy the same immunities of U.S. officials, plaintiffs have argued that U.S. officials are not given automatic immunity, but must show that they were acting within the scope of their employment. To date, this argument has not been successful in the torture contractor cases.

The political question doctrine is well established in U.S. law⁷. Under this separation-of-powers doctrine, cases may be deemed non-justiciable because, in essence, adjudication would require the judicial branch to overstep its role and intrude on matters constitutionally committed to the executive or legislative branches. Notably, the United States has not moved to have any of these cases under the political question doctrine. This argument has been unavailing to date.

As for the claims brought under the Alien Tort Statute for violations of International Law, defendants have challenged these claims on numerous grounds. First, defendants have argued that non-State actors, including corporations, cannot be held liable for violations of International Law including torture and war crimes. (The issue of corporate liability under the ATS is currently pending before the U.S. Supreme Court; four Courts of Appeal have found corporations can be held liable, while one Court of Appeal has found, in a 2-1 decision, that they cannot.)

Defendants have also argued that plaintiffs are improperly asserting that the acts alleged are private acts, in which case they fall beyond the scope of International Law, as well as that the acts alleged involve State action, in which case, defendants assert that the acts should be immunized under sovereign immunity. Defendants have also challenged whether cruel, inhuman and degrading treatment is recognized with the sufficient specificity and universality to constitute a norm of International Law under the ATS.

These defenses and arguments have been, or are currently being, adjudicated in the context of three cases. The current status of each case and the responses to legal arguments raised are as follows.

The first case, *Saleh v. Titan*, was filed in the district court in the federal District of Columbia in 2004. The district court judge dismissed the ATS claims, finding merit in the defendants' argument that non-State actors could not be held liable for torture, and that if the plaintiffs were alleging State action, particularly in the context of torture, that the defendants would then enjoy immunity for these claims.

Following limited discovery, the district court found that CACI did not enjoy the protections of the government contractor defense, because it retained some supervisory capacity over its employees working at Abu Ghraib. The court found that the defense was applicable in the case of

⁷ See *Baker v. Carr*, 369 U.S. 186 (1962).

Titan/L-3, which provided interpreters, because the court found that these contractors were integrated into the military chain of command. On appeal, a majority of the Court of Appeals for the District of Columbia found, over a strong dissent, that all claims must be dismissed under a broad “battlefield preemption” theory. Plaintiffs petitioned the Supreme Court to review the case. After the Obama Administration’s Acting Solicitor General submitted an amicus brief arguing that the legal issues related to private military contractor liability should be allowed to “percolate” in the courts of appeal and were not yet ripe for Supreme Court review, the plaintiffs’ petition was denied in June 2011 and the case was closed⁸.

Al Shimari v CACI and *Al-Quraishi v. Nakhla and L-3* were both filed in June 2008. In March 2009, the district court in *Al Shimari*, which was filed in the Eastern District of Virginia, rejected the defendants’ argument that the case should be dismissed at the outset based on the government contractor defense, derivative immunity or the political question doctrine. The judge did, however, dismiss the plaintiffs’ ATS claims based on the finding that “tort claims against government contractor interrogators are too modern and too novel to satisfy the *Sosa v. Alvarez-Machain* requirements for ATS jurisdiction”. The district court judge in the *Al-Quraishi* case, being heard in Maryland, denied the defendants’ efforts to dismiss the case at the outset. In so doing, Judge Peter Messitte found that claims for torture, war crimes, and cruel, inhuman and degrading treatment could be brought under the ATS against the corporate defendants.

The defendants in both the *Al Shimari* and *Al-Quraishi* decisions appealed the decisions of the district court judges. Plaintiffs challenged the appeal as premature. In September 2011, in a 2-1 decision, a panel of the Court of Appeals for the Fourth Circuit found that it had jurisdiction over the appeal, and that both cases should be dismissed under what amounted to a broad “battlefield preemption” theory. Plaintiffs sought review of this decision before all fourteen judges of the Fourth Circuit sitting *en banc* and such an appeal was heard in January 2012.

In May 2012, in an 11-3 decision, the Fourth Circuit dismissed the defendants’ appeals, remanding the cases to the district court for discovery. Notably, the United States submitted an *amicus* brief in the *en banc* review, in which it argued that, first, the appeal was premature, and second, while the government contractor defense based on the “combatant activities exception” can be invoked to preempt certain State law claims under

⁸ The district court is available here: ccrjustice.org/files/6.29.06%20Order.pdf; the Court of Appeals decision is available here: www.ccrjustice.org/files/2011-1220%20Amicus%20Brief%20of%20Retired%20Military%20Officers%20Supporting%20Plaintiffs.pdf; the amicus brief submitted by the United States is available here: [ccrjustice.org/files/091313%20Titan%20US%20Br%20\(2\).pdf](http://ccrjustice.org/files/091313%20Titan%20US%20Br%20(2).pdf).

particular circumstances, it was inappropriate for this defense to be used when the allegations constitute torture, as defined under federal law⁹.

Upon remand to the district courts, the two cases have diverged: 71 plaintiffs and defendants reached a settlement in the *Al-Quraishi* case in October 2012 and the case was thereby voluntarily dismissed. The *Al Shimari* case is set to begin discovery and a trial date is likely to be set for spring or summer 2013. The *Al Shimari* plaintiffs submitted a motion for reconsideration of the dismissal of the ATS claims, which is currently pending.

These cases illustrate the various legal issues that have been raised in the context of civil litigation against private military contractors operating in U.S.- run detention centers, as well as the different approaches taken to the cases by judges reviewing what many consider to be novel questions of law.

Decisions taken in the *Al Shimari* case will likely serve to clarify many of these questions. It remains to be seen whether there will be interventions or actions taken by either the legislative or executive branches, or indeed international bodies, that could help guide the court in this case, and impact the extent to which private military contractors that are alleged to have conspired in torture and other serious violations of International Law can be held liable.

⁹ The U.S. *amicus* brief, filed in January 2012, is available here: <http://ccrjustice.org/files/US%20Brief%201.14.12.pdf>.

International, Corporate and Individual Responsibility for the Conduct of Private Military and Security Companies¹

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1. The quest for international accountability and its limits

The recourse to private military and security companies (PMSCs), which is particularly significant in situations of armed conflict and military occupation, to perform functions ranging from combat activities to the protection of diplomatic personnel is not an entirely new phenomenon². What is largely unprecedented is the scale of the use of private contractors, and the dangers that their often reckless conduct poses for local populations³. Operating under a veil of secrecy and anonymity, often protected by immunities from local jurisdictions, members of PMSC have, at times, committed crimes and, not infrequently, States have used them to skirt their obligations under International Law⁴.

Speaking from a normative perspective, tackling these problems requires, as the Montreux Document laudably tries to do, protracted efforts in two domains:

¹ This paper purports to sketch some key legal issues that arise in matter of accountability for the conduct of private contractors in International Law. The goal is to arrive at a more comprehensive paper containing an updated appraisal of the status of accountability for conducts of private contractors in International Law (having regard to both international and non-international armed conflicts and dedicating one specific section to the debate as to whether private companies should be held directly accountable under International Law), and undertake a critical reflection on the contribution that the Montreux Document may give to ensure a mechanism of effective accountability.

² Singer W. Peter (2003), *Corporate Warriors: The Rise of the Privatized Military Industry*, Cornell University Press, pp. 19-39; Doswald-Beck Louise (2007), *Private Military Companies under International Humanitarian Law*, in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Markets: The Rise and Regulation of Private Military Companies*, Oxford University Press, pp. 120 - 3.

³ Isenberg David (2007), *A Government in Search of Cover: Private Military Companies in Iraq*, in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Markets: The Rise and Regulation of Private Military Companies*, Oxford University Press, pp. 82-93; Gillard Emanuela - Chiara, *Business Goes to War : Private Military Security Companies and International Humanitarian Law*, «International Review of the Red Cross», 88, pp. 525-572 ; Francioni Francesco (2008), *Private Military Contractors and International Law: An Introduction*, «European Journal of International Law», 19, pp. 961-2.

⁴ Singer Peter (2004), *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, «Columbia Journal of Transnational Law», 42, pp. 521-6.

(i) the articulation and clarification of a set of substantive rules that can govern and restrain the conduct of PMSCs; and (ii) the identification and concrete application of procedural/enforcement rules (or secondary rules under Herbert Hart's terminology) that can ensure an effective system of accountability⁵.

My presentation focuses on the latter of these two aspects, namely, identifying and applying procedural and enforcement rules⁶.

If we look at contemporary International Law as a whole and we consider International Law as it is and not as we think it should be, it must be realistically admitted that it alone cannot ensure full accountability for PMSCs.

As a normative system of States, by States, for States, International Law does not bind those that are not its subjects. PMSCs are not – at present – neither active nor passive subjects of International Law– and hence, unless States agree otherwise (for instance via a specific agreement imposing obligations on them), the PMSCs are bound by International Law only indirectly through national laws, or when their conduct is attributed to a subject of International Law such as States⁷. Also for this reason,

⁵ Focusing on this effort see : Cameron Lindsey (2006), *Private Military Companies: their Status under International Humanitarian Law and its Impact on their Regulation*, «International Review of the Red Cross», 88, pp. 573-598; Johnson Kathryn R. (2012), *Shields of War: Defining Military Contractors' Liability for Torture*, «American University Law Review», 61 (5), pp. 1417-1431; Hoppe Carsten (2008), *Passing the Buck: State Responsibility for Private Military Companies*, «European Journal of International Law», 19 (5), pp. 989-1014; Gillard Emanuela (2006), *Business goes to War: Private Military/Security Companies*, «International Review of the Red Cross», 88, pp. 525, 549-572; Zarate Juan (1998), *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, «Stanford Journal of International Law», 34, pp. 75-161; Schooner Steven (2005), *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced, Government*, «Stanford Law and Policy Review», 16, pp. 549; and Dickinson Laura (2010), *Military Lawyers, Private Contractors, and the Problem of International Law Compliance*, «New York University Journal of International Law & Politics», 42 (2), pp. 355-388.

⁶ It deals with the circumstances under which the PMSCs themselves; the States and corporations hiring on them; and the individuals (and their superiors—whether military or civilian) employed in a PMSC can be held accountable in contemporary International Law.

⁷ See in this regard: International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, 2001, Supplement No. 10 (A/56/10) 40–9 (Draft Articles Commentary). The matter of the responsibility of international organizations (an issue raised by one of the participants) for the conduct of private contractors was not part of the topic of the presentation. Tackling the issue will, of course, require a distinct paper as the matter is complex and the related legal regime has yet to consolidate in a clear set of norms. One key issue is whether the regime of responsibility of international organizations should follow the model of State Responsibility or be a *sui generis* one keeping into account the specificities of the status of international organizations and the functions they perform. On the responsibility of international organisations for the conduct of private actors see: International Law Commission, *Seventh Report on*

International Law would not normally govern the transaction between a private corporation and a PMSC. Therefore, a full accountability mechanism requires an orderly division of labour: International Law must be complementary to, and work in concomitance with, norms issued by regional organizations such as the European Union, and, most important, domestic laws⁸.

On the other hand, it should be equally stressed that, by virtue of the principle of individual criminal responsibility, the personnel of PMSCs is directly responsible *qua* private individuals (including their civilian and military superiors) under International Law and liable – when the relevant criteria are met – to charges of war crimes and, eventually crimes against humanity⁹. Operating both at the international and domestic level, the principle of individual criminal responsibility is probably the sharpest arrow in the quiver of international accountability. But for a number of reasons – some of which will be recalled here – the full potential of this “weapon” is difficult to unleash.

2. *The Montreux Document and the Draft Articles on State Responsibility*

Articles 4 to 8 of the 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Draft Articles) set out the conditions under which a given conduct can be attributed to a State. Clearly based on, and inspired by the Draft Articles, Articles 7 and 8 of the Montreux Document provide for the conditions under which a State may be responsible for the conduct of PMSCs and their personnel for violations of IHL, Human Rights, or other rules of International Law. I would argue that the solutions adopted in the Montreux Document and proposed to the attention of States– constitute a sort of *lex specialis* that, operating in

Responsibility of international Organizations, UN Doc. A/CN.4/610, 27 March 2009, 8-14. See also for some pertinent remarks: White Nigel, MacLeod Sorcha (2008), *EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility*, «European Journal of International Law», 19 (5), pp. 965-988.

⁸ See in this regard: Kristine A. Huskey Kristine A. and Scott Sullivan (2012), *United States: Law and Policy Governing Private Military Contractors after 9/11*, in Sossai Mirko and Bakker Christine (eds), *Multilevel Regulation of Military and Security Contractors: the Interplay Between International, European and Domestic Norms*, Hart, pp. 331-380. Walker Clive and Whyte David (2005), *Contracting out War? Private Military Companies, Laws and Regulation in the United Kingdom*, «International and Comparative Law Quarterly» 54, pp. 651-689. See also in general Pinzauti Giulia, "Adjudicating Human Rights Violations Committed by Private Contractors in Conflict Situations before the European Court of Human Rights", in Francioni F. and Ronzitti N. (2011), *War by Contract: Human Rights, Humanitarian Law and Private Contractors*, pp. 149-170.

⁹ As well discussed in Lehnardt Chia (2008), *Individual Liability of Private Military Personnel under International Criminal Law*, «European Journal of International Law», 19 (5), pp. 1015-1034.

accordance with customary International Law, can specify and qualify the content of the rules of State responsibility in the peculiar field of armed conflict and PMSCs¹⁰. I shall discuss the relevant provisions of the Montreux Document in turn.

3. Responsibility for de jure or de facto incorporation into the armed forces

Under letter (a) of Article 7 of the Montreux Document, the responsibility of a State is engaged when a PMSC acts as an “organ of the State”. The incorporation of a PMSC into the armed forces of a State may happen not merely because of the existence of a contract, but because of what is provided in the contract, which must be issued in accordance with the domestic legislation of the State¹¹.

Under letter (b) of Article 7, the Montreux Document provides for the responsibility of States also in cases where a PMSC or its personnel are *de facto* incorporated in the armed forces of States “because they are members of organised armed forces, groups or units under a command responsible to the State”¹². This is the case of irregular armed forces, which are not

¹⁰ One of the participants at the Round Table aptly raised the problem of the relationship between the IHL regime of State responsibility and the general rules on State Responsibility. This is an important point that requires serious reflection. In my view, the Montreux Document draws on the Draft Articles on State Responsibility. Accordingly, this paper seeks to show where there is an import from those rules into the field of IHL and where there is a departure from them based on the specificities of IHL. The approach adopted in the Montreux Document may suggest that the State responsibility regime in matter of violations of international humanitarian law is not a ‘self-contained regime’ operating independently from the Draft Articles on State Responsibility. Whether the approach adopted in the Montreux Document is convincing from a normative perspective and should thus be endorsed as such that is without modifications require further analysis and research. This will be undertaken in future versions of this paper. On this topic, for some pertinent analysis see: Sassoli Marco (2002), *State Responsibility for Violations of International Humanitarian Law*, «International Review of the Red Cross», 84, pp. 401-433. See also: Hoppe Carsten (2010), *Private Conduct, Public Service?: State Responsibility for Violations of International Humanitarian Law committed by Individuals providing Coercive Services under a Contract with a State*, in *Les règles et les institutions du droit international humanitaire à l’épreuve des conflits armés récents*, «Académie de Droit International de la Haye», pp. 411-483.

¹¹ Under Article 7(a) of the Montreux Document Contracting States are responsible for violations of International Humanitarian Law, Human Rights law, or other rules of International Law committed by PMSCs or their personnel where such violations are attributable to the Contracting State, in particular if they are: incorporated by the State into their regular armed forces in accordance with its domestic legislation.

¹² This formulation reproduces verbatim the formulation contained in Article 43 of Additional Protocol I, which does not distinguish between regular and irregular forces. See in Article 43 of Additional Protocol: International Committee of the Red Cross, *Customary International Humanitarian Rules* (CUP 2005), vol. 1, and pp. 11-14.

incorporated within the internal law of the State, but still may be involved in combat activities alongside with States¹³.

The test articulated in letter b of Article 7 that is "of being under a command responsible to the State is different from the test articulated in the field of State responsibility". In its judgement of 26 February 2007, in the Genocide case, the ICJ stated: "persons, groups of persons or entities may for the purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument"¹⁴.

While the wording employed in the Montreux Document is clearly different, I would submit that the differences should not be exaggerated. The test used in the Montreux Document is a 'tailor made' test, which suits the context of an armed conflict. It is an example of how the Montreux Document insofar as it accords with customary International Humanitarian Law operates as *lex specialis* in respect of the Draft Articles on State Responsibility.

(i) Official versus private capacity

Once the conduct of a PMSC is attributed to a State because the PMSC is incorporated *de iure* or *de facto* in its armed forces, the problem arises of delimiting the purview of such responsibility. In the field of State responsibility, the responsibility of a State as concerns the 'organs of the State' or entities equated to it, is triggered by conducts committed in a seemingly official capacity. But the distinction between official and private conduct is less pressing in the field of IHL where humanitarian concerns are clearly at the forefront¹⁵. The Montreux Document does not provide an explicit answer on this point. A specific answer may be found in Article 91

¹³ Private contractors are not necessarily members of the armed forces of a party to a conflict whether regular or irregular. If they do not perform combat activities, they could, on a case by case basis, be deemed to fall under the category of those accompanying the armed forces (such as aircraft crews, war correspondents, supply contractors, members of labour units). This category is defined in Article 4A(4) of Geneva Convention III. This category covers "persons who accompany the armed forces without actually being members thereof". See in this regard: Bartolini Giulio, "Private Military and Security Contractors as Persons Who Accompany the Armed Forces" in War by Contract: HR, IHL and Private Contractors, Francioni F. and Ronzitti N. (eds), 8, 218-234, 2011.

¹⁴ Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007, ICJ Reports 2007, para. 392.

¹⁵ The French-Mexican Claims Commission in the *Caire* case excluded responsibility only in cases where "the act had no connection with the official function and was, in fact, merely the act of a private individual". See *Draft Articles Commentary* (n 7) 42.

of Additional Protocol I, which reflects customary International Law¹⁶. Article 91 reads: "A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces".

This approach found recent confirmation in the ICJ's judgment of 19 December 2005 in the Armed Activities Case (Congo versus Uganda) where the ICJ held that: "According to a well-established rule of a customary nature, as reflected in Article 3 of the Fourth Hague Convention (...) as well as in Article 91 of Protocol I additional to the Geneva Conventions of 1949, a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces"¹⁷.

I would then conclude on this point by stating that once a PMSC is incorporated *de iure* or *de facto* within the armed forces of a State, that State will be responsible for the whole conduct of the PMSC insofar as a PMSC is part of its armed forces, including cases in which a PMSC acts contrary to the instructions received, or exceeds its authority in accordance with Article 7 of the Draft Articles on State Responsibility.

(ii) The problem of immunity

Nothing would be more misleading than assuming that once a given conduct of a PMSC is attributed to a State, then full accountability is realised. Not only, the process for the activation of State Responsibility is complex, if not cumbersome and an injured State, which is willing to activate it, needs to emerge. But also the identification of a PMSC's conduct with that of a State, particularly in the situation of armed conflict, may trigger immunity mechanisms at the domestic level, preventing the exercise of jurisdiction over the private contractors. This is what happened in the *Caci* case¹⁸.

In a judgement issued on 11 September 2009, the US Court of Appeals for the District of Columbia dismissed the suits brought against two military contractors that were involved in the interrogation of prisoners at Abu Ghraib because essentially the contractors were part of a "military

¹⁶ Case concerning Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*) 19 December 2005, ICJ Reports 2005, para. 214.

¹⁷ Ibid.

¹⁸ *Haidar Muhsin Saleh et al. v. Titan Corporation*, *Caci International*, United States Court of Appeals, 11 September 2009.

mission acting under military command"¹⁹. They were subject to military direction, said the Court, even if not subject to normal military activity²⁰.

The Federal Court of Appeals remarked that "the Federal Tort Claims Act, while providing a course of action against the acts of the US government, maintains immunity for any claims arising out of the combatant activities of the military or armed forces"²¹. And, then, it elaborated the following test: "during wartime where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities should be pre-empted"²².

The Court of Appeals observed that the plaintiffs are unwilling to assert that the contractors are State actors because it would virtually concede that the contractors have sovereign immunity²³.

4. Exercise of governmental authority

Under letter c of Article 7 of the Montreux Document, a State may be responsible for the conduct of a PMSC – without incorporating it within its forces – when empowering the PMSC to 'exercise elements of governmental authority'. The conferral of governmental authority may happen through a contract based on a State law or regulation. It is the law of the State that must empower a given entity to exercise elements of governmental authority even if it is not an organ of the State. A State may also entrust governmental authority to a PMSC when it is acting in compliance with the provisions of an international treaty. As to the latter, one example is the obligation of an occupying power to maintain public order and safety under Article 43 of the Hague Regulations. Where the protection of oilfields, for example, is viewed as a specific duty necessitated under Article 43 of The Hague Regulations, entrusting their protection to a PMSC by an occupying power may be seen as a transfer of governmental authority.

A key hurdle is, of course, to define what governmental authority means. In a sense virtually everything that the military does is a governmental function. But, whilst there is no question that PMSC personnel hired to guard military persons or objects in armed conflict is

¹⁹ For the Court of Appeals there was "no dispute that they were in fact integrated and performing a common mission with the military under ultimate military command". *Caci Decision* at 11.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Caci Decision*, at 16.

²³ *Ibid.* The Court remarked that the "appellants are caught between Scylla and Charybdis cannot allege the contractors acted under color of law for jurisdictional purpose while maintaining that their action was private when the issue is sovereign immunity", at 28.

exercising governmental authority, arguably, the same may not be said in the case of a PMSC that is hired by a State to guard the installations or personnel of a private company in a conflict zone. This situation would be unlikely to fall within letter c of Article 7 since the purpose of the activities is to protect the employees of a private firm rather than government officials²⁴.

5. *PMSCs acting under the instructions or control of a State*

Letter d) of Article 7 of the Montreux Document provides for the responsibility of States if the PMSCs or their personnel are: (i) "[a]cting on the instructions of the State (that is the State has specifically instructed the private actor's conduct); or under its direction or control (that is actual exercise of effective control by the State over a private actor's conduct)"²⁵. This norm essentially reproduced Article 8 of the Draft Articles on State Responsibility. It adopts the effective control test devised in the Nicaragua case²⁶ whose customary nature was recently reaffirmed by the ICJ in the Genocide case²⁷. The Montreux Document is right in endorsing the Nicaragua test. But, it should not be overlooked that the 'Nicaragua test' may be under "scrutiny". This is not only because of the case-law of the ICTY speaking of 'overall control'. But because other courts, namely the Special Court for Sierra Leone and, significantly, the ICC have adhered to "the overall control test' in their case-law"²⁸.

I shall now turn to the field of individual criminal responsibility.

6. *Individual criminal responsibility*

(i) Individuals

As said in the Nuremberg judgement, crimes are committed by individuals not by abstract entities²⁹. Personnel of a PMSC may incur

²⁴ Tonkin Hannah (2011), *State Control over Private Military and Security Companies in Armed Conflict*, Cambridge University Press, 108.

²⁵ Article 8 of the Draft Articles reads: "The conduct of a person or group of persons shall be considered an act of a State under International Law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct". Nyamuya Maogoto Jackson and Sheehy Benedict (2009), *Private Military Companies & International Law: Building new Ladders of Legal Accountability & Responsibility*, «Cardozo Journal of Conflict Resolution», 11, pp. 99.

²⁶ Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, 27 June 1986, ICJ Reports 1986, para. 115.

²⁷ *Genocide Case* (n 14) para.s. 402-7.

²⁸ *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, 29 January 2007, para. 210-212.

²⁹ Judgment of the International Military Tribunal, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22, London, 1950, p. 447.

individual criminal responsibility directly under International Law if they commit violations of IHL or Human Rights that are crimes under International Law³⁰. Individual responsibility is direct. It operates without the interposition of the State, but it is not automatic. Not every crime committed during an armed conflict is a war crime and thus not every person who commits a crime during an armed conflict is a war criminal.

Provided that there is an armed conflict, individual criminal responsibility operates whether or not a private contractor is incorporated in the armed forces of a party to the conflict. For the conduct of a private contractor to be considered a war crime, it is necessary to establish a nexus between that conduct and the armed conflict. The armed conflict need not to have been the cause of the commission of the crime. However, the existence of the armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed³¹. Hence, if it can be established that the perpetrator acted in furtherance of, or under the guise of the armed conflict, his acts could be seen as closely related to the armed conflict and hence the required nexus would be established³².

(ii) Responsibility of Superiors

Under customary International Law, the rules of command responsibility apply not only to military commanders but also to civilian superiors. In the language of the Appeals Chamber of the ICTY in the *Celebici* case:

The Appeals Chamber does not consider that the rule is controversial that civilian leaders may incur responsibility in relation to acts committed by their subordinates or other persons under their effective control³³.

Article 28 of the Statute of the International Criminal Court reflects these developments. And so does Article 27 of the Montreux Document,

³⁰ Cerone John, "The Vanishing Relevance of State Affiliation in International Criminal Law: Private Security Contractors and Other Non-State Actors", in *Research Handbook on International Criminal Law*, Bartram S. Brown (ed), Edgar Elgar Publishing, 17-3, 2011; Quirico Ottavio, "The Criminal Responsibility of Private Military and Security Company Personnel under International Humanitarian Law" in *War by Contract: Human Rights, Humanitarian Law and Private Contractors*, Francioni F. and Ronzitti N. (eds), 8, 423-447, 2011.

³¹ *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Appeal Judgment), IT-96-23 & IT-96-23/1-A, ICTY Appeals Chamber, 12 June 2002, para. 58.

³² Section 23 of the Montreux Document reads: "The personnel of PMSCs are obliged to respect the relevant national law, in particular the national Criminal Law, of the State in which they operate, and, as far as applicable, the law of the States of their nationality

³³ *Prosecutor v. Zdravko Mucica ka "Pavo", Hazim Delic. Esad Landzo aka "Zenga", Zejnir Delalic* (Appeal Judgement), IT-96-21-A, ICTY, 20 February 2001, para. 668.

which reads: "Governmental officials, whether they are military commanders or civilian superiors" or "directors or managers of PMSCs" may be liable for crimes under International Law committed by PMSC personnel under their effective authority and control, as a result of their "failure to properly exercise control over them, in accordance with the rules of International Law".

Some of the choices made in Article 27 of the Montreux Document puzzle me, however, and leave me with questions. Article 27 does not contain the key wording "failure to prevent or punish" as articulated in Article 87 paragraph 2 of Additional Protocol I. It mentions that a superior could be held responsible for "crimes under International Law" because of "the failure to properly exercise control over them, in accordance with the rules of International Law". But the problem is to understand the nature of the command responsibility envisaged in Article 27. Is it a responsibility for omission? Is Article 27 requiring superiors "to exercise proper control over their subordinates" as an additional duty to the customary duties of preventing or punishing the commission of crimes? Or, is the exercise of "proper control over their subordinates" a component of the general duty to prevent the commission of crimes?

And, why does Article 27 not mention the duty to punish the commission of crimes of subordinates under their control? A clear reaffirmation of this duty would require military and civilian superiors – at the highest level – to take immediate action when learning of the commission of crimes or to be held responsible (if not accomplice) for failure to do so.

This would require establishing an internal review and accountability mechanism and/or inform the competent authorities as the commission of crimes as the case may be. By failing to mention this customary duty of superiors, there is the risk, it is submitted, that Article 27 may relax the standard of command responsibility already enshrined in customary International Law. It may be giving a sort of 'normative discount' to military and civilian superiors of PMSCs making accountability for the commission of crimes more difficult to ensure.

7. Some concluding thoughts and a proposal

I would like to conclude by underscoring that States remain (and may continue to be so in future) a key "consumer" of the services of private contractors, and it is States that may be prone to shield the private contractors working for them in one way or another. It was an order of the CPA, the occupation administration in Iraq that granted full immunity from Iraqi courts to private contractors in Iraq, an immunity that lasted until 2008.

At the 2009 Naples Session, the *Institut de droit international* issued a resolution where it held that "the removal of immunity from proceedings in national courts is one way by which effective reparation for the commission of international crimes may be achieved"³⁴. It clarified that under customary International Law "No immunity from jurisdiction other than personal immunity in accordance with International Law applies with regard to international crimes". And recommended that "States should consider waiving immunity where international crimes are allegedly committed by their agents".

I suggest that the Montreux Document should follow a similar approach. It should point out that under customary International Law, functional immunity, as opposed to personal immunity, does not cover international crimes. Perhaps, this could be a step-though by no means the only one towards a more effective system of international and national accountability for PMSCs and their personnel.

³⁴ 2009 Naples Session, *Resolution on the Immunity from Jurisdiction of the State and Persons who act on behalf of the State in case of International Crimes*.

V. The Challenges of Specific Contexts

Regulating and Monitoring Private Military and Security Companies in United Nations Peacekeeping Operations

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The nature of United Nations (UN) peace operations means that UN operations will often be deployed in areas where there are serious security concerns, not only for local populations, but also for the UN operations themselves. Attacks on UN operations are becoming more and more common. Over the last ten years, there have been significant attacks on UN operations in Iraq, Afghanistan, Nigeria and Algeria. While in the past, the UN symbol provided a measure of protection, increasingly, it is becoming a target. This disturbing trend underlines the need for effective security wherever the UN is deployed, and has led to an increased use of armed private security companies.

The topic for my presentation is “regulating and monitoring private military and security companies in UN peacekeeping operations”. At the outset, I should note that the UN does not use private security companies for the purpose of providing personnel to serve in UN operations as “UN peacekeepers”. Members of military contingents, i.e., the “blue helmets”, are always provided by Member States.

That said, the UN has a long history of using private security companies. Almost all UN operations use private security companies for some purpose. For the most part, these are unarmed local contractors who provide static access control at UN premises and at the residences of staff in field locations. However, over the last 10 years, the use of private security companies has expanded in a few cases to include mobile security to relief and humanitarian convoys. Today, the use of armed private security companies is becoming more common, though it is strictly limited to high-risk duty stations and as a matter of “last resort”.

Regulatory framework

One of the questions that I have been asked to address is “what policies, or instruments, if any, have been developed to ensure compliance of private security companies with standards of conduct derived from International Humanitarian Law and Human Rights Law in the context of UN operations?” This question is very timely as the UN has very recently developed a policy with respect to its use of armed private security

companies, which includes mechanisms to encourage respect for International Human Rights and Humanitarian Law.

Before I describe the policy, I will briefly outline the legal framework of peace operations, so as to provide some context against which the policy can be understood.

UN peace operations are usually established pursuant to a mandate from the Security Council and with the consent of the host State. While the host State agrees to cooperate with the UN operation and provides it with certain privileges and immunities so that it can function in the host State, the operation and its members are also required to respect local laws and regulations.

In addition, the host State agrees to provide security for the UN operation, its members and associated personnel, and to apply the provisions of the Convention on the Safety of UN and Associated Personnel. This legal framework is set out in the status-of-forces/mission agreement (SOFA/SOMA)¹ entered into with the host State. Members of UN peace operations comprise persons with whom the Organization has a direct contractual relationship² and personnel provided *en bloc* by governments, such as members of military contingents and members of formed police units. These personnel are accorded certain privileges and immunities under the SOFA/SOMA.

The UN regularly engages contractors to provide a range of goods and services to its peace operations³. Depending on the needs of the particular operation, these may include armed private security companies. Contractors are not considered “members” of the peacekeeping operation, but as independent third-parties who provide goods or services to the UN operation under the terms of a commercial contract. Although the model SOFA/SOMA of 1990 does not include third-party contractors in any of its provisions, more recent SOFAs and SOMAs concluded with host governments routinely setting forth certain facilities for them. These include, for example, facilities with respect to obtaining visas, exemption from taxes and duties on goods which are for the exclusive use of the UN operation, and freedom of movement. However, contractors are not accorded any immunity from local jurisdiction. As such, when contractors

¹ See *Model status-of-forces agreement for peacekeeping operations* (SOFA), UN document A/45/594 of 9 October 1990. As per paragraph 2, the model, *mutatis mutandis*, may also serve as the basis for an agreement with the host country in operations where no United Nations military personnel are deployed, and will be referred to as the “status-of-mission agreement” (SOMA).

² Members of the operation with whom the Organization has a direct contractual relationship include “UN officials” and “experts on mission”, such as staff officers, military observers, and individually recruited police officers.

³ Such goods and services may include, for example, the supply of equipment, provisions, fuel, spare parts and means of transport for the UN operation.

provide services for UN operations, they and their personnel are subject to the laws of the host State, and to its jurisdiction in the event of any wrongdoing.

As such, in basic terms, the regulatory framework for the use of private security companies derives from the commercial contract between the UN and the company, and the laws of the host State.

UN policy

Until recently, the UN did not have a common policy concerning the use of private armed security services and the conditions under which such services should be engaged. Instead, companies were engaged on an *ad hoc* basis, whenever other options were either unavailable or insufficient to meet the UN's needs.

The lack of a policy was noted by a working group of the Human Rights Council, which in August 2010 reported to the General Assembly that the "UN lacks a firm system-wide policy governing the hiring of private military and security companies, including issues related to the vetting and monitoring of the companies and their personnel". It advised the Organization to "take precautionary measures to ensure that when it outsources its security and protection functions, it does so in accordance with the Charter of the United Nations and with International Human Rights standards and (...) with proper management and oversight"⁴. In May 2011, following broad consultations, the Secretary-General decided on a policy for the use of armed private security companies which requires that the use of such companies be governed by a clear accountability framework. The policy is limited to the UN engaging security and protective services provided by armed private security companies.

The policy, which remains in the process of implementation, requires that the UN only engage armed private security companies when all other options are unavailable. In this connection, I should note that not all UN peace operations include military components. Primary responsibility for the security and protection of UN personnel, premises and property rests with the host government. In situations in which the operation does not have a military component and the host government is unable to provide security protection, security services may be provided by an alternate member State. A current example of an alternate State providing security for a UN operation is that of the "International Security Forces", led by Australia, which provides security support for UNMIT, the UN's peacekeeping operation in Timor-Leste.

⁴ *Report of the Working Group on the use of mercenaries as a means of violating Human Rights and impeding the exercise of the right of peoples to self-determination*. UN document A/65/325, para. 31.

However, where that is not possible, armed private security companies may be engaged by the Organization on an exceptional basis in high-risk environments when the threat conditions and programme-need warrant it. The policy specifies that the UN may only use services provided by armed private security companies for the following two purposes: (i) to protect UN personnel, premises and property; and (ii) to provide mobile protection for UN personnel and property.

The UN recognizes that there are significant risks associated with the use of private armed security companies, particularly in insecure environments, in which local law and order may have broken down. Unlike members of military contingents who participate in UN operations as “blue helmets”, personnel who provide security services are not subject to a military chain of command and national accountability mechanisms. In order to mitigate such risks, which include not only risks to the local population, but also to the image and credibility of the UN, the UN’s policy requires that certain measures of due diligence are undertaken to ensure that the companies to which it outsources security and protection functions, are reputable, regulated, and may be held accountable.

In this connection, detailed mandatory selection requirements have been developed for engaging an armed private security company, as well as a model contract which sets out the obligations of such companies, including standards of conduct for their personnel.

In preparing the policy, the UN has benefitted from the excellent work that the Swiss Government, in cooperation with the ICRC, has done to develop best practices and guidelines to be followed by States and private security companies. The “Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict” and the “International Code of Conduct for Private Security Service Providers” which emerged from these efforts, serve as a very useful aid for the UN in the selection of an armed private security company.

Based on these documents, as well as on the various inputs received from within the UN system of organizations, the policy sets forth certain requirements which must be met in order for companies to be considered eligible to provide services for the UN.

As a pre-condition for being considered a “qualified vendor” and thus able to bid for the provision of services to the UN, a prospective company must meet the following criteria:

- It has subscribed to the *International Code of Conduct for Private Security Service Providers of 9 November 2010*;
- It has been in the business of providing such services for at least 5 years;

- It is currently licensed to provide its services in its “home State”, that is, the place of registration/incorporation;
- It is currently licensed to operate as a private security company in the territory where the UN requires its services, including licenses to import, carry and use firearms;
- It screens personnel for criminal convictions, including for any breach of International Criminal or Humanitarian Law, and confirms that the personnel employed by the private security company to deliver services to the UN have been subject to such screening;
- It provides regular relevant training to its personnel, for example, with respect to the International Code of Conduct, the Use of Force Policy, Weapons training and management, Human Rights Law and application, as well as on preventing sexual harassment.

With respect to the use of force, the UN requires the armed private security company to develop a “use of force policy” appropriate for the conditions where it is required to operate. The policy must be consistent with the applicable local laws and to the extent possible, consistent with the “use of force policy” of the Organization. In this regard, the private security company’s use of force policy must be at least as restrictive (and more restrictive if required by local law) as the Organization’s use of force policy.

The UN’s use of force policy is quite restrictive. Any use of force by a UN security officer must be reasonable and proportional to the threat and the minimum required to negate that threat. The officer must also determine that the force is necessary, under the circumstances known at that time, to negate the threat and that there is no other reasonable alternative available. Use of deadly force may only be used for self-defence or to protect other persons against imminent threat of harm. Deadly force cannot be used to protect property.

These requirements are set forth and further elaborated in the model contract that has been developed to engage private security companies. The model contract also contains provisions requiring the private security company to prevent sexual exploitation or abuse by its personnel; to warrant that it is not engaged in any practice inconsistent with the Convention on the Rights of the Child; and that it is not engaged in the sale or manufacture of anti-personnel mines or components utilized in the manufacture of such mines. The contract also provides that a breach of any of these requirements entitles the UN to terminate the contract without liability for termination, or any other liability.

Monitoring and accountability

With respect to monitoring and accountability, the policy requires that any armed private security company contracted by the UN will come under the authority and direction of the appropriate UN entity. This means that once engaged by the UN, armed private security companies are subject to regular oversight and review by the applicable UN staff in the duty station where the services are provided.

Such oversight includes UN review of the company's performance and contract implementation. Such review would encompass compliance with the terms of the contract, including the conduct of the contractor's personnel and their compliance with the applicable standards of conduct as set out in the contract. As mentioned earlier, these include applicable local, national and international laws, the International Code of Conduct, the provisions concerning child labour and the sale/manufacture of anti-personnel mines, and the measures to prevent sexual exploitation and abuse by the employees or persons engaged by the contractor. As noted, if the contractor fails to meet the conditions specified under the contract, the UN has the right to terminate the contract.

There are also other forms of accountability. Personnel employed by such companies will be subject to the laws and jurisdiction of the host State. In the event that the States of nationality of such personnel have extended the jurisdictional reach of their laws, such personnel may also be subject to the criminal jurisdictions of their States of nationality. The companies themselves might also be subject to legal action in the States in which they are incorporated. Any failures by such companies to comply with the terms of their licenses may also result in the loss of their licenses.

Implementation

Finally, I have been asked to address how successful have these steps been in preventing non-compliance, and whether there is a need for additional instruments / tools / support in this area. As I mentioned earlier, this is a very new policy, which remains in the process of being implemented. As such, it still has to be put to the test. However, I am confident that close attention will be paid to the implementation of the policy, both within the Organization and within the larger international community.

As noted earlier, the UN's use of armed private security companies is strictly limited to high-risk duty stations and as a matter of last resort. The UN would of course prefer to use personnel contributed by member States to address its security needs. However, in circumstances where this is not possible and the UN is required to use private companies, the policy which I have outlined brings together a number of important elements, which if implemented effectively, may make a significant contribution towards

preventing misconduct and in ensuring accountability. If prospective companies are subject to rigorous screening with respect to their previous conduct prior to their engagement by the UN, are held to the International Code of Conduct, including training requirements, and their conduct is closely monitored when they perform their services, the scope for misconduct and any breaches of International Human Rights and Humanitarian Law is greatly reduced.

Concerning criminal accountability, the UN is not, of course, generally in a position to be able to exercise criminal jurisdiction itself in respect of breaches of the law. The exercise of criminal jurisdiction is a matter for the host State, or the State of nationality of a contractor, if such State has extended the jurisdictional reach of its laws. However, the Organization would cooperate with national authorities to ensure criminal accountability, and may, depending on the circumstances in a given case, terminate its contract with the company in the event that a company fails to cooperate with national authorities. In this connection, it is important that the broader international community work together with the UN to ensure that contractors may be held accountable.

Regulating and Monitoring PMSCs in NATO Operations

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The issue of companies that provide Private Security Services has been increasingly discussed in academia and has drawn wide public attention. Much has been said about their nature, their legal personalities and legal status within an armed conflict as well as their responsibilities within such crisis situations.

In academic doctrine and in practice, PSCs have been identified by different names. When they first rose to public awareness, they were mostly characterized as PMSCs, later as PSCs and finally, the term adopted by the International Code of Conduct (ICOC), PSSPs. These terms are indicative of the complexity of their nature and of the services that they provide and how their nature is understood. While they are not to be confused with mercenaries one could find in various sources mention of mercenaries alongside the aforementioned terms.

The link presented between the term of mercenaries and private security (and in some cases nations military) service providers is either of historical nature¹ or the consequence of the effort to systematize and regulate in an efficient way the use of PSCs by incorporating them into an existing category². There are the following reasons for this choice.

First, it is to PSC that the Allied Command Operations (ACO) Directive on contracting with PSCs refers to. Second, and more substantial reason, is that the services that currently NATO accepts and outsources are security services. There is no military involvement of the companies that are directly contracted by NATO in the NATO operations. This is a conscious choice and the current NATO documents addressing the issue underline it³.

Further efforts within and outside the Alliance have been taken in order to break down the nature of the PSCs. These efforts are mostly analyses that provide background information on the PSCs, whilst underlining the nature of their use and the possible related problems. The point where most

¹ See Dunigan M. (2011), *Victory for Hire, Private Security Companies' impact on military effectiveness*, Stanford University Press, Stanford, p. 125-151.

² The UN Working Group on Mercenaries has incorporated the issue of PSCs/PMSCs in their work to the extent that special attention is given to the issue within the group activities: <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/NationalRegulatoryFramework.aspx> (Last accessed on 30 October 2012).

³ NATO Policy on contractor Support to Operations C-M (2007) 0004, ACO Directive concerning the contracting with Private Security Companies, 060-101.

attention is drawn to is the nature of their services and their division into military and security ones. However, PSCs often enough might aim to provide “full scale services”.

In those cases the question that arises is: how can PSCs undertake activities that have been traditionally attributed and recognized only to States? For this reason, before entering into the particularities of using PSCs’ services within a multinational framework of an international organization, we will first examine the philosophical basis of the attribution of services that one could argue PSCs are currently sometimes undertaking, to the State. We will follow by examining the steps that are being taken in regulating the use of those companies, first by the industry itself and then by non-binding instruments. We will finish the present paper with the overview of the regulatory efforts of international organizations that enter into contracts with PSCs, such as NATO.

I. The theoretical framework of attribution of force pertaining to Peace and Security to the State.

A. The philosophical framework

Security and protection of the citizens of a State has been a function that has been attributed to the State⁴. The names and philosophies of Weber, Hobbes and Rousseau have been brought forward in linking this function to the State. Weber considers that the “monopoly of the legitimate use of physical force within a given territory” belongs to the State. Consequently, in Weber’s theory the State exercises the exclusive control over its territory and thus, within its sovereign attributes, is ensuring its protection through military means⁵. Others attribute this prerogative to the State through an indirect way, linking it to the social contract, a covenant that has been achieved between the members of the society. This is the covenant, the commonwealth, made between the people, each individual, who has given up their “individual right” to fight and protect themselves individually, and a sovereign. According to Hobbes the meaning of this is that such tasks to protect the entire community have been recognized to a collective authority that is represented by the Sovereign. This is especially true to matters that

⁴ Krahnemann E. (2010), *States, Citizens and the Privatization of Security*, Cambridge University Press, Cambridge, p. 21, p. 305; Dunigan M., supra note 2, p.22 ; Ostensen A. (2011), *In from the cold? Self-legitimizing the market for private security*, «Global Change, Peace and Security», 23, pp. 369-385, p. 369.

⁵ Gerth H. and Wright Mills C. (1946), *Max Weber: Essays in Sociology*, Oxford University Press, New York, pp. 77-128, p. 77. Originally a speech at Munich University, 1918, published in 1919 by Duncker & Humblodt, Munich: *Politik als Beruf, Gesammelte Politische Schriften* (Muenchen, 1921), pp. 396-450.

concern the common peace and safety⁶. Matters of common peace and safety according to Hobbes have been conferred to one man or to an Assembly of men to act on behalf of all people in peace and in war.

Rousseau also spoke of the issue of security as being part of the general Social Contract among the citizens. In a sense, the creation of society creates the need for a collective means of ensuring security. Effective security can be achieved through ensuring the existence of collective means of control of the State and the armed forces⁷. In a sense Rousseau's ideas show the interlink between the State-collective responsibility and the individual. The individual surrenders the individual right to private use of force to the democratic State, since he/she decides to enter in the Social Contract. By doing this the individual becomes part of a whole, which in turn has the reciprocal responsibility to ensure the security of the individuals it consists of. Finally, to ensure the correct use of this armed force the individual must again become part of the collective troops. The fact that the citizens create the contract among themselves further illustrates that these elements are envisioned in a democratic setting and a democratic government⁸.

This brief overview of philosophical views on the formation and use of armed forces to ensure peace and safety allows us to bring to the surface the theoretical reasoning that lies behind the criticism in the use of PSCs by nations and subsequently by international organizations.

B. Security as a public good

1. Private entities as enablers of democratic advancement

Security is considered to be a public good, provided by the State for the public. In the international sphere, ensuring international security becomes a global public good, since the cooperation of several States is needed and the people benefiting from its provision are part of those nations, members of the international community⁹. Ensuring security through private corporations could be envisioned, however, the risk is that the good of security would then become a private good that would be provided only to those that can afford it and, in a way, would require a great reinterpretation of the contract between the individual and the society. The individual, as we saw, when in a society has given up the right to use individual force in

⁶ Hobbes T., *Leviathan*, The Second Part, Of Commonwealth XVII: Of the Causes, Generation, and Definition of a Commonwealth, McMaster University Archive of the History of Economic Thought, p.106; see also Dunigan M., supra note 2, p. 22.

⁷ Rousseau J.J., *Social Contract, Principles of Political Rights*, pp. 79-80. Available at www.ucc.ie/social_policy/Rousseau_contrat-social.pdf (last accessed 30 October 2012).

⁸ Krahmman E., supra note 5, pp. 26-27.

⁹ Engerer H. (2011), *Security as a public, private or club good: Some fundamental considerations*, «Defence and Peace Economics», 22, p. 140, pp. 135-145.

order to ensure the good of security. This good is to be provided in a communal way. Hence the use of private corporations to provide this good should be monitored and regulated within a public framework and the right equilibrium between the accepted services should be sought.

Another question that arises is: what is the use of a private corporation providing security services if the formation of regular forces is done in order to ensure the protection of the democratic society? This question becomes more complicated if the corporation provides more than security services and crosses the line of military or operational services. The problem is that these are functions of public responsibility. The democratic element in the formation of responsibilities of the public order could lead to a possible understanding of the situation. The approval of their contracting is done through the approval in the institutional structures of the State or of the International Organization. However, the companies are not part of the social contract previously achieved. The monitoring and the prevention of abuse of the collective force are still controlled through the citizens of a democratic society. Approving through a legislative forum of the contract of a PSC does not guide to the abandonment of the prerogative of the citizens to ensure that no abuse of the collective force is taking place¹⁰.

Neoliberalism, as this has been linked to Friedman's writings, provides here an argument for the use of private entities in security. According to Friedman the inclusion of the market in areas that would be under the control of the State, allows for a balance of power, since he states that "capitalism is a necessary condition of political freedom" and that "the relation between political and economic freedom is (...) by no means unilateral". This means that capitalism is not the sole condition to political freedom. Friedman bases this specific argumentation through historical examples, citing societies which were open to a free market, such as Tsarist Russia, and comparing them to societies where totalitarian regimes blossomed, such as Nazi Germany, where "economic totalitarianism is combined with political totalitarianism". In the latter the market appeared to be severely constrained¹¹.

2. The integration of private entities into the traditional military structure

What would become problematic would be the hypothetical scenario where the citizens collective force, the regular army were completely replaced by companies providing the collective military and security services, as the latter are not members to the social covenant. Hence a

¹⁰ This especially applies in cases when the legislative's role is the general approval of outsourcing as this appears in the military budget. For a critique of the approval process under a US perspective see : Avant D. and Sigelman L. (2010), *Private Security and Democracy: Lessons from the US in Iraq*, «Security Studies», 19, pp.230-256, p. 249.

¹¹ Friedman M. (1962), *Capitalism and Freedom*, The University of Chicago Press, Chicago, p. 4.

careful examination of the services that are to be provided and how those are going to be regulated and structured within the overall strategic planning is essential.

This becomes apparent through the examination of the following historical examples. While as we saw the provision of security is currently a State responsibility of public order, contracting services to defend a territory against an enemy is not a new reality. Such was the case in Italy in the 13th century with the Condottieri, which evolved to such an extent that their leaders were becoming part of the political order. The nature of their military services evolved and they were to some extent integrated into the regular military forces. This was proven to be both beneficial and disadvantageous since it led at times to diminished military effectiveness while providing larger military force in numbers. The Hessians is another example of military formation providing the benefit of force multiplier to the British forces in the 18th Century in their battles in the American Revolution. However, their tactics in recruitment by force and their cruelty were factors that hindered their contribution to the British forces.

Unethical actions from both the Condottieri and the Hessian forces created disadvantages to the regular armies to which they were contributing¹². A significant difference between the two is that the Hessians were not formed within a private structure. They were a force which when contracted produced revenue for the State and were under the ruling of one of the six German Rulers who provided their forces to the British during the American Revolution in exchange for money. Based on the particularity of their nature they would not have fitted under the contemporary term of mercenaries nor of PMSCs, PSCs or PSSPs.

The historical examples provided above illustrate that contracting of forces other than the regular military forces does not lead to their integration into the regular forces and it should not be so. Such integration would create theoretical as well as practical problems. In the philosophical sphere, based on our analysis above, in practice, the activities and the training that are being undertaken by the regular forces cannot be undertaken by the PSCs. Even in cases of stabilization efforts, linking the military to private contractors, could negatively impact the interaction of the forces with the local population and raise issues of authority and cooperation with them¹³ as well as problems in the coordination of the forces¹⁴. Such situations create difficulty in establishing trust and building peace and obtaining successful transition. As a result, the moral could be hindered and contracting would be proven ineffective if clear lines and

¹² Dunigan M., supra note 2, p. 151.

¹³ Dunigan M., supra note 2, p. 151.

¹⁴ Ibid, p. 83.

roles between the military forces and the PSCs were not drawn. Additionally, blurred lines between the responsibilities of the PSCs and the military force have legal implications which we will examine in the third part of the present paper.

II. Legitimization of the PSCs through regulation of their activities

The concept of legitimacy itself has been linked to political actors or political decisions, justifying them and presenting them as just. Legitimacy is especially sought after, when new practice emerges. It appears that legitimacy is sought after by every entity that has not established roles in the existing status quo. However, lately legitimacy is being sought not only from entities that have authority in the political sphere, but from other non-State actors such as Non-governmental Organizations¹⁵ and currently from PSCs as well.

The philosophical and historical arguments that have been presented in the previous section have created a specific idea of the operations of PSCs and they are often viewed under a negative prism. For these reasons, PSCs themselves aim to change the public's perception of them in order to gain a level of acceptance and ultimately legitimization of their activities. Such legitimization can be achieved by applying and abiding by a certain regulatory framework. In this context of regulatory efforts are included the development of Corporate Social Responsibility from the industry actors themselves as well as efforts initiated by States in the form of non-binding documents and International Organizations in the form of internal policy and regulatory documents mapping out the responsibilities that each party has to abide by.

A. Legitimacy through Regulatory Efforts

1. The role of Social Corporate Responsibility

These regulatory efforts are welcomed from the industry because they bring them legitimacy¹⁶ before the public opinion¹⁷. At the same time obtaining the desired legitimacy brings PSCs more into contractual relationships with desired clients such as States and International Organizations. Such contracts elevate their level of legitimacy before the

¹⁵ Maragia B. (2002), *Almost there, Another Way of Conceptualizing and Explaining NGOs' Quest for Legitimacy in International Politics*, «Non-State Actors and International Law», 2, pp. 301-332.

¹⁶ Ostensen A., supra note 5; Palazzo G. and Scherer Andreas (2006), *Corporate Legitimacy as Deliberation: A Communicative Framework*, "Journal of Business Ethics", pp. 71-88.

¹⁷ In a sense they bring them legitimacy before the parties of the Social Contract, the citizens. In other terms, "a social license to operate" by Emtairah T. and Mont O. (2008), *Gaining Legitimacy in Contemporary World: Environmental and Social Activities of Organizations*, «International Journal of Sustainable Society», 1, pp. 134-148.

public, but they also elevate the standards that the PSCs apply in their internal structure in order to abide by the contractual obligations and high standards set by their sought after clients.

This is the *raison* by which the PSCs themselves aim to abide by established and new practices, even though those are not binding law. At the same time they undertake internal principles in accordance with the contemporary practices of corporate social responsibility (CSR). This term is used to express when a private entity is taking into consideration the effects of its activities to external actors. Usually those external actors are referred to be either affected or have an interest in the activities of the corporation and are referred as stakeholders. As the term has become more and more mainstreamed, it has been understood to include general societal interests and weighing them against financial interests¹⁸. This is a significant point, since it indicates how financial interests respond to the needs and the values of society through CSR, illustrating further the power that the public has in financial activities¹⁹.

The concept and the outreach of CSR has developed further and it has been linked to the protection of Human Rights. This has been promoted through the work that has been achieved by the United Nations in this field²⁰. The connection between the acts of international corporations and the respect of Human Rights was initially brought forward in the Ogoni case²¹ which was not related to the activities of the PSCs. The impact of the case, concerning the rights of the Ogoni people who were faced with changes in the lands that they had been occupying ignited discussions on the protection of their Human Rights and forced companies to study and publish reports on their activities in connection to the respect of Human Rights.

¹⁸ Corbett August (2008), *Corporate Social Responsibility, Do We Have Good Cause to be Sceptical About It ?*, «Griffith L. Rev.», 17, pp. 413-432, p. 414.

¹⁹ Van Marrewijk M. (2003), *Concepts and Definitions of CSR and Corporate Sustainability: Between Agency and Communion*, «Journal of Business Ethics», 44, pp. 95-105, p.100.

²⁰ Res. 2003/16 of 13 August 2003, in *Draft report of the Sub-Commission on the Promotion and Protection of Human Rights*, Fifty-fifth session, *Draft Provisional Agenda and Adoption of the Report*, 14 August 2003; Hillemanns C. F. (2009), *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, «German Law Journal», 4, pp. 1065-1080.

²¹ Commission on Human and Peoples' Rights (ACommHPR): 2001, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, Communication No. 155/96: "(Nigeria is in violation) of local people's rights to (...) health (...) and life (by) breaching its duty to protect the Ogoni people from damaging acts of oil companies", para. 59. The case was brought against Nigeria, since claims against private corporations cannot be examined within the African Commission on Human and Peoples' Rights. However, it has been an important element in developing CSR for Human Rights.

Similarly to the work of the United Nations, the OECD has developed the OECD Guidelines for Multinational Enterprises²². They provide guidance and a reaffirmation of respect of domestic and International Law by governments and corporations alike. They are to be perceived as suggestions by States to corporations by the OECD nations as well as Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania on issues extending from the battle against corruption and bribery to employment and consumer interests, competition and taxation. They also provide implementation guidelines and commentaries to the articles of the OECD guidelines. The guidelines, even though they do not create legal obligations, had such an impact on the industry that they have prompted multinational corporations to develop internal bylaws, regulating issues related, amongst other things, to the respect of Human Rights. These internal business guidelines are taking into consideration International Conventions and Declarations, officially agreed or recognised guidance from international organizations and privately developed principles, such as those developed through ISO standards²³.

Corporate social responsibility has been developed to such an extent that companies might initiate proposals to include in their contracts CSR provisions. Even the development of oversight governance mechanisms of the PSCs could be attributed to the will of the PSCs to regulate themselves and demonstrate their commitment to abide by the highest international standards.

2. Non-binding documents for PSCs. Soft-law breaking through

Efforts initiated by States, such as Switzerland²⁴, concerning the drafting of the “International Code of Conduct for Private Security Service Providers” (ICOC)²⁵ and the “Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to

²² The updated 2011 edition is available at:

<http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationaleenterprises/48004323.pdf> (last accessed on 29 October 2012).

²³ *Annual Report on the OECD Guidelines for Multinational Enterprises, Overview of Selected Initiatives and Instruments Relevant to Corporate Social Responsibility*, 2008, pp. 235-260, p. 240, where it is especially mentioned that the efforts developed from different actors have an impact on how governments face CSR.

²⁴ Switzerland has distributed this text in international fora and IOs such as the United Nations: A/63/467-S/2008/636 was distributed as an Annex to the letter sent by the Swiss Permanent Representative to the United Nations General Assembly on its Sixty-third session on the Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts, Letter dated 2 October 2008 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary-General. Available at http://www.un.org/ga/search/view_doc.asp?symbol=A/63/467 (last accessed 29 October 2012).

²⁵ 9 November 2010, available at <http://www.icoc-psp.org> (last accessed on 29 October 2012).

Operations of Private Military and Security Companies During Armed Conflicts” (Montreux Document)²⁶, have drawn further attention to the request for the establishment of a framework within which these providers should operate and respect. Both documents are non-binding (soft law) but aim at providing the guidelines on how P(M)SCs should operate in accordance with International Law and what those contracting them should examine when entering into a contract with them. The Montreux Document is open to States' and IOs' signature and the ICOC is open to the industry. The latter has specific provisions on an oversight mechanism which will provide certification to the Companies that are signatories to the ICOC that they indeed operate within the framework and the principles enshrined in it. While it is not a binding document and no direct legal consequence and financial burden derive out of it for the Companies that aim to adhere to it, the certification that they abide by the ICOC principles provides the legitimacy that is sought after.

Both documents have had an impact on the PSC industry and have been used as guidance on how to regulate themselves and to respect the principles they incorporate²⁷. As well-researched initiatives they have drawn the attention of International Organizations and they are being discussed academically within IOs such as NATO²⁸.

Furthermore, the “independent governance and oversight mechanism” of the ICOC, if developed carefully, will be another step towards granting more legitimacy to the industry. This is to be developed by a Steering Committee which includes, as will the mechanism, representatives from States, Civil Society (NGOs) as well as the Industry. The concern is that it is difficult to guarantee the sought after independence, when there are only a limited number of representatives from each stakeholder community. Questions arise as to how those representatives are being chosen and how they can remain independent and avoid situations of conflict of interest, when they are very likely to be involved in contractual relationships. The creation and development of the mechanism has gone through a lengthy

²⁶ The document has been adopted by the UN GA, A/63/467-S/2008/636, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/63/467 (last accessed 29 October 2012).

²⁷ The American Standards Institute has developed Standards for the conduct of PSCs where it specifically cites the ICOC and the Montreux Document as sources for the drafting of the Standards along with the principles of International Law, Human Rights and Humanitarian Law. The same applies for the “Conformity Assessment and Auditing Management Systems for Quality of Private Security Company Operations”. Both documents are very detailed. The first serves as guidance on the standards and rules that have to be followed by PSCs and the second provides a certification mechanism to Companies that abide by those standards, thus aiming again at the legitimacy of the industry.

²⁸ Randall Thomas (2008), *Ins and Outs of the Use of Civilian Contractors during Operations*, «NATO Legal Gazette», 17, pp. 19-22, p. 22.

process and the Steering Committee responsible for the creation of the Charter of the mechanism have invited all the stakeholders to bring forward their suggestions and considerations in an effort to address the criticism and create a mechanism that would enjoy approval and legitimacy amongst all relevant actors. The outcome of the work, the Draft Charter, reports and the meetings of the Committee responsible for bringing together the necessary elements for the oversight mechanism is regularly updated and published in the electronic site of the ICOC.

III. Outsourcing of PSCs.

A. The Relationship between PSCs and International Organizations

Within the framework of NATO Operations PSCs are not considered to be organs or agents of the Organization. Article 2 (c) and (d) of the Draft articles on the responsibility of international organizations²⁹ (Draft articles) defines as an "organ of an international organization (...) any person or entity which has that status in accordance with the rules of the organization", and as an "agent of an international organization (...) an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts". Based on the commentary of the Draft Articles³⁰, the important element in these definitions defines the rules the organization indicates. As rules are perceived the decisions, resolutions and other acts of the Organization that give functions to organs or agents in accordance with the constituent instruments of the International Organization³¹.

PSCs do not fall under this definition as this has been analysed above. There are not instruments that regulate the functions of PSCs and PSCs are not recognised as organs or agents³². The only instrument in place is the contractual relationship between the two entities, the PSCs and the International Organization. PSCs, being counterparts in a contractual

²⁹ Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10).

³⁰ Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10). The report, which also contains commentaries to the draft articles (para. 88), appears in Yearbook of the International Law Commission, 2011, vol. II, Part Two.

³¹ For NATO specifically the Commentary of the draft Articles specifically accepts that "the fundamental internal rule governing the functioning of the organization – that of consensus decision-making – is to be found neither in the treaties establishing NATO nor in any formal rules and is, rather, the result of the practice of the organization", supra note 31, p.11, par. 17.

³² PSCs personnel is not covered by the NATO personnel status.

relationship, do not receive direct orders as the members of the regular forces would. What they do abide by are their pre-set contractual obligations that they are expected to perform in good faith. This contractual relationship between an IO and the PSCs, does not lead to a relationship of the traditional chain of command. One could bring forth the contrary argument but that is untrue since the required Command and control link to the PSCs is missing. Although within the contract one could insert provisions, requesting informing the contracting IO of possible incidents, the employees of PSCs, report directly to their supervisors³³.

In practice the lack of a Chain of Command relationship between the two “inspired” the decision for developing ACO Directive 60-101 that regulates how to contract and monitor the contracting of PSCs, while not directly interfering with the internal structures or the decisions taken by the PSCs.

In this respect, the Advisory Opinion of the International Court of Justice on Reparation for Injuries Suffered in the Service of the United Nations³⁴ does not apply to the independent contractual services provided by PSCs to International Organizations. The aforementioned opinion applies for personnel categories whose actions are a reflection of the actions of the organization and whose actions are produced within their functions.

Another aspect to be taken into consideration especially when contracting within a NATO framework is the unique structure of the Alliance.

The member States in NATO have a significant role and they retain significant aspects of the operational command throughout the lifespan of a NATO operation as they hold all decision-making authority and participate on a daily basis in the governance and functioning of the organization³⁵. This is especially connected to the moment the North Atlantic Council (NAC) takes the decision to initiate a NATO-led operation as its contribution to the International Community efforts in a given crisis. Following such a decision the NATO military authorities establish an operational plan that must in turn be approved by the NAC. This operational plan will be executed by fully respecting applicable

³³ According to the ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, "the concept of a superior is broader and should be seen in terms of a hierarchy encompassing the concept of control". Sandoz Y., Swinarski C. and Zimmerman B. (1987), *ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, International Committee of the Red Cross, 1987, p. 1013

³⁴ I.C.J. Reports 1949.

³⁵ A/CN.4/637.

international public law in the framework of the correspondent United Nations Security Council Resolution(s).

In the theatre of operations many PSCs are present in a NATO operation not because of an existing contract with NATO, but because of a contract between a member State and the corporate entity. In those cases, the sovereign State which is the contracting party is the legal entity that maintains the contractual relationship and responsibilities, and these cannot be extended to NATO, since this would make other member States accept indirectly contractual responsibilities and potential liabilities to which they never acquiesced.

IV. The specificities in contracting with PSCs within the NATO context

A. The identification of the outsourcing need

NATO's contractual relationship to PSCs is not that of military services and PSCs are not to take over military forces' roles. The Alliance's principles entail that it will cover its needs through its NATO Command Structure which is the permanently established headquarters and supporting organizational elements and through the NATO Force Structure, which consists of allied national and multinational deployable forces. The new NATO Strategic Concept³⁶ requires an agile Alliance³⁷ that is able to efficiently and through cooperation with other international partners³⁸, international organizations achieve its goals. Outsourcing is not the norm and is limited to services that cannot be covered within means of the Alliance.

The NATO Defence Planning Process serves to specifically develop and deliver the necessary forces and capabilities needed to achieve the Organization's objectives. Through this process the needs of the Organization have to be identified through the development of the NATO Capability Targets and NATO nations assist in the fulfilment of those Targets in their Defence Planning Capability Surveys³⁹.

³⁶ Active Engagement, Modern Defence, Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization, Adopted by Heads of State and Governments at the NATO Summit in Lisbon, 19-20 November 2012. Available at www.nato.int (last accessed 29 October 2012).

³⁷ *ibid*, preface p.5.

³⁸ *ibid*, Core Tasks and principles, paragraph 4.c "cooperative security" underlines this point of partnership with countries and other international organizations in order to "enhance international security", p. 8.

³⁹ Ciocan F. (2011), *Perspective on interoperability integration within NATO Defense Planning Process*, «Journal of Defense Resources Management», 2, pp. 53-66, p. 64, diagram 2.

Covering NATO needs through outsourcing in general and specifically within an operational context requires the approval of the member States. In order to achieve this, first the requirement has to be identified.

Once this has been identified the search for it to be covered within the means and capabilities of the Alliance and its member States is set in motion. Nations identify through Defence Planning Capability Surveys the capabilities that can be covered by them. Inability to do so brings the general requirement for approval before the relevant resource committees for approval of the need to search outside the structure of the Alliance. In practice this means that a task is created for a contracting officer to commence the outsourcing procedure.

This outsourcing will have to follow the general and specific requirements related to outsourcing for services provided by PSCs. As a solution it should be cost-effective along with being agile, sustainable and in accordance with NATO's level of ambition (LoA).

B. ACO Directive 60-101 on contracting with Private Security Companies

1. General Overview

NATO's use of PSCs has been minimal and with no involvement in hostilities. In any case, due to the sensitivity of the matter, there is a need for the safeguarding of certain important guarantees that these providers should give, especially since they are present in a theatre operations where uncertainty and risk are constants in the conflict equation. The issue of PSCs has been addressed briefly in NATO Multiple Futures Project in 2009⁴⁰ and since then it has been further developed, explored and analysed in internal reports. The most important development in this field is the drafting and adoption of the ACO Directive concerning the contracting with Private Security Companies 060-101.

Contracting with PSCs, requires careful vetting of the qualifications and the services that the PSCs will be required to provide. Blurring the lines, even if it is to include non-security or military services, moves the contract to an uncategorized territory. Besides security considerations and those related to the handling of claims, situations of unfair advantage and unfair competition also come into place in such instances. However, even documents that aim to establish the highest standards for the PSCs industry and when dealing with it, such as the ICOC, they define as PSCs, companies that might provide from armed protection and prisoner detention to maintenance and training activities to local personnel.

⁴⁰ NATO Multiple Futures Project-Navigating towards 2030, Final Report-April 2009, available at http://www.iris-france.org/docs/pdf/up_docs_bdd/20090511-112315.pdf (last accessed on 30 October 2012).

The title of AD 060-101 indicates its aim, i.e., to regulate the contracting of PSCs within ACO. It is not directly imposing obligations on the PSCs. There is a contractual relationship that prescribes their obligations in terms of the delivery of the services. This is the reason why they fall under the general NATO Contractors Policy. Hence the most efficient way to regulate not only the relationship of NATO, but also the extent of what they provide to NATO was drafting a directive with special focus on all precautionary steps that an ACO contracting officer has to take into account when entering into contracts with PSCs after previous approval of the North Atlantic Council (NAC).

Outsourcing security services, as a matter of fact, is a sensitive issue with a large number of potential repercussions. It appears that the primary effective control over the contracting of PSCs has to be achieved in the beginning, when the outsourcing process begins. This permits dictating the terms of the contract through the description of the duties required and the constraints and restraints. These can be incorporated in every step of the outsourcing process, from the drafting of the call for bid to the drafting of the contract and the realization of the planning. Through these processes clear boundaries on the responsibilities of the PSC are chartered before deployment on theatre.

Another benefit in focusing on the steps of the outsourcing process is that the conduct of the contracting officer in fulfilling all the requirements during the contracting procedure can be best monitored/supervised. Providing clear guidance for the contracting officer on the lines that are required to be followed has two additional benefits: a) it sets clear and transparent mechanisms for the contracting of PSCs; and b) it allows, to a certain degree, to distinguish the contracting with PSCs from the general contracting policy⁴¹.

Whilst the general contracting documents remain in force, focusing on the peculiarities of contractors for theatre, PSCs outsourcing allows to focus on the issues that are often brought forward by contemporary scholars as the main legal risks related to contracting PSCs. Of great concern, in the contemporary history of PSCs, has been the legal risks, liabilities and democratic dangers of utilizing PSCs in a way that armies from sovereign nations have been used, granting them more authority and room to undertake military tasks. Such a scenario potentially brings issues of command responsibility, of personal and corporate liability and the attribution of criminal responsibility in cases of breaches of law.

The focus on properly regulating the outsourcing processes and setting the strict limits of what services the PSCs are requested to provide, is

⁴¹ Bi-Strategic Command Procurement Directive 60-70, dated 22 December 2004, available at www.aco.nato.int/resources/20/finance/dir60_70.pdf (last accessed 30 October 2012).

further in accordance with initiatives and documents produced by other international organizations. The Draft of a possible Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies⁴² includes a prohibition of a delegation or the outsourcing of “*inherently State functions*”⁴³, such as direct participation in hostilities, use and other activities related to weapons of mass destruction and police powers⁴⁴. Violation of this prohibition can result in State Responsibility. Although a draft and by far not a binding document it is yet another example indicating the importance of setting the initial boundaries when entering into a contracting relationship with a PSC.

2. The structure of the provisions of ACO Directive 060-101 (AD 060-101)

The first section of AD 060-101 is dedicated to the definitions of the document. The definition of PSC includes purposefully what “Security Services” are. At the same time it is not an enumerating and excluding definition. Serving as an internal document of the Organization, the way it is drafted provides enough guidance and at the same flexibility to the contracting officer.

AD 060-101 on contracting with PSC has been built in sections that address these issues that have been raised time and again in NATO documents providing insight on the PSC phenomenon and its use by NATO nations and NATO itself, while combining and respecting the already general NATO Policies, as previously mentioned.

a. Responsibilities before the conclusion of the contract

The contracting officer has a number of responsibilities in connection with the vetting of the contract. There are processes that have to be followed before, but also during and after its conclusion. The general principles of contracting, in terms of transparency, accountability and value for money⁴⁵ apply in PSCs contracting as well. Additionally, the liability issues related to this form of contracting require background vetting of the PSCs credentials and the keeping of full records of their performance.

Obstacles in the full monitoring of previous performance are the third party confidentiality and personal data protection.

⁴² A/HRC/WG.10/1/2.

⁴³ Article 4(3) of the draft convention. The title of Article 4 is “State responsibility vis-à-vis private military and security companies”. Despite this title the provisions of that article focus on all the necessary conditions for contracting with PSCs.

⁴⁴ Article 2(i) of the draft convention defines the inherently State functions.

⁴⁵ As those principles are described in section 1 of Bi-Strategic Command Procurement Directive 60-70, supra note 44.

Previous performance and even incidents that might have occurred are limited to the authorization of the third party involved to communicate them to the requesting party. Incidents that have been resolved through arbitration or closed proceedings are covered by confidentiality and by the agreement resolving the difference. Personal data protection is related to the right to privacy of the personnel employed by the PSCs. Non-binding documents aimed at regulating the industry, such as the ICOC⁴⁶, contain articles specifically requesting for the PSCs to take special attention to the background and criminal records of the personnel during the recruitment process. However, a third party contracting with a PSC cannot go as far as to enter into the realm of personal protection. At the same time it is important to ensure that the highest standards have been applied during the contracting procedure. On the one hand, contracting with companies that are hiring personnel that could raise security concerns would lead to liabilities; on the other hand, accessing personnel files could lead to basic rights violations. Possible solutions would be for the PSCs to request their personnel to accept the release of their personnel files to the third parties or request information on the standards and the procedures applied for the recruitment of the personnel of the PSC and its ongoing training, the application of domestic labour and business law relating to the treatment and contracting of the personnel in the PSC structure. Consequently, the internal structure and the previous performance of the PSC can provide guarantees for their credentials.

During the implementation of the contract, the level of services and the fulfilment of the contract have to be monitored; especially entities that regularly contract PSCs should hold full records of the previous performance, but also study the internal structure and mechanisms of the PSCs.

An issue that could create legal risks and could tarnish the legitimacy of the PSCs is subcontracting. The approach when dealing with this issue has to be pragmatic as well as regulatory. Subcontracting is a current reality in the general provision of services and has also been part of the PSC industry. However, it could lead to lack of transparency in their operations and it could place the original contracting parties in a situation where responsibilities have to be attributed to the entity that is actually operating on the ground. In an industry where subcontracting is a reality the most viable and realistic solution when dealing with this issue, is to monitor the subcontracting.

⁴⁶ Paragraph 63 of the ICOC, supra note 26, has specific examples of what kind of information should be shared. It also requires for the PSC to conduct an internal investigation.

Being aware of the exact date the subcontract enters into force, requiring a notification of the contract and requiring the same respect of the rules that the original contracting company respect with a pecuniary provision of termination of the original contract, is the most efficient way to monitor and be aware of all the actors that are finally involved in the project and protect against possible unauthorised subcontracts.

b. Issues of special consideration

(i). Carrying of arms

In addition to the issues raised before that pertain mostly to the correct vetting of the PSC, issues such as the carrying of arms and the settlement of claims are of equal importance and need some monitoring during the execution of the contract. As far as the issue of arms is concerned, it appears to be a contentious and diverse issue. NATO documents pose strict conditions. The issue of arms has to be approved by the NATO Commander, and only to serve for self-defense, when there is no available military personnel to provide for protection. The ICOC appears more flexible (so the standards here are lower than the current NATO ones), providing that the carrying of arms can be achieved through the standard registration of firearms and the required training and does not place any restrictions on their use when in self-defense.

The issue of the carrying of arms and their subsequent use brings forward the risk of the PSC employees losing their civilian status. They are to be treated as civilians accompanying the force⁴⁷. They are not mercenaries, and they should not be considered as such. In an international armed conflict PSC contractors should be treated in accordance with article 4A(4) of the Third Geneva Convention relative to the Treatment of Prisoners of War (12 August 1949)⁴⁸. To enjoy this they should not take direct participation in the hostilities. From the moment they engage in hostilities, there is the very clear danger of possible legal repercussions that could lead to the PSC personnel being subject to the country where the contract is being performed.

This last point is especially important because it indicates that although the PSCs are in a contractual relationship with an International Organization, they do not enjoy the legal status of the personnel of the International Organization.

For this reason, following a strict approach towards the granting of arms is the best option and limits possible accusations of Human Rights violations. This approach should be linked to the added requirements of registration of firearms, their maintenance and the relevant training of the

⁴⁷ C-M (2007)0004, NATO Policy on contractor support to operations.

⁴⁸ Available at <http://www.icrc.org/ihl.nsf/FULL/375> (last accessed 30 October 2012).

personnel by the PSCs, which includes education on principles of International Humanitarian Law⁴⁹. These conditions cannot be imposed, because, in order to be truly efficient (mentioning what the training should entail, how and where the registration should be made) one might risk interfering with the internal structure of the PSC; in an equal contractual relationship this is not possible. These standards have to be already in place and upholding regular arms training should not be interpreted as hindering the civilian status of the PSC employees.

The guarantees that can be achieved in terms of this issue are hence during the first step of the outsourcing process. It falls within the responsibilities of the contracting officer to examine to what extent the company follows procedures consistent with the highest standards and include in the contracting provisions that the standards followed when entering the contract will not diminish during the performance of the contract. The latter would be in violation of the contract and of the principle of good faith, even if such a provision is not included.

(ii) Settlement of Claims

In terms of claims that can derive from incidents covered by the PSCs. In the case of NATO, NATO insurance does not cover the PSCs or their employees⁵⁰. The PSCs and their employees do not enjoy the privileges and immunities that the organization they are contracted with does. This guarantees that they will be prosecuted if needed by the State under whose jurisdiction they fall or where the incident occurred⁵¹. NATO or any other contracting partner could in case of an incident terminate the contract for violation of contract or demand reparations.

Conclusion

The previous points illustrate that the lack of a uniformed regulatory framework does not lead to impunity or to an inconsequential violation of the law by the PSCs. There are steps that need and can be undertaken to regulate them more effectively.

⁴⁹ Here the NATO documents remain stricter than paragraphs of non-binding international documents, such as article 31 of the ICOC.

⁵⁰ Indicative of this separation of liabilities recognised by all the stakeholders is article 69 of the ICOC, supra note 26.

⁵¹ This is reiterated in UN Doc. A/59/710 (2005), dated 24 March 2005, where it is stated in article 17 that "individual contractors and consultants are also employed by peace-keeping missions. They are subject to local law and are bound by the standards set out in the Organisation's standard conditions of contract for individual contractors and consultants". Available at <http://www.un.org/en/peacekeeping/resources/reports.shtml> (last accessed 30 October 2012).

When talking of such a framework one should bear in mind what the end result should be. Whether the issue is to be able to attribute responsibility in case of misconduct or incident or simply regulate how the PSCs operate. The latter is being done by their respective Home States, or the State where they are registered and operate, and one should bear in mind that International Organizations cannot intervene on the regulation, registration (granting of license, training requirements of PSC personnel) of PSC within their Home States⁵².

An issue that International Organizations can work towards, which could lead to a regulation of the PSCs, is monitoring, drafting and reviewing policies relating to contract support to a given operation while developing a specific policy or policies on the use of PSCs.

The issues underlined before in terms of the internal structure and the domestic regulation of PSCs have to be taken into consideration at that point. NATO documents already mentioning PSCs and their possible use have to be up to date to include current developments and the highest standards.

The industry regulating itself, although it might appear to be contradictory at a first glance, it will lead to positive results in terms of minimizing legal risks and augmenting the guarantees on complying with International Human Rights Law and International Humanitarian Law.

This is one of the reasons why the ICOC has within its monitoring mechanism and the Steering Committee responsibilities for developing and documenting the initial arrangements for the independent governance and oversight mechanism including bylaws or a charter which will outline mandate and governing policies for the mechanism, stakeholders included.

To a certain extent this practice brings legitimacy to the operation of the PSCs that actually receive certification that they have been operating in accordance with the highest standards in the industry and in International Law, Human Rights Law and Humanitarian Law.

⁵² Within the EU States the PSCs are being legally treated as corporations with no specific attention to the services they are providing and the possible implications that this might have.

Regulating and Monitoring the Privatization of Maritime Security

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I have dealt with the problem of PMSCs (Private Military and Security Companies) in the essay published in the book on PMSCs edited by myself and Francioni.

The main findings were as follows:

- After the 1856 Paris Declaration on the abolition of privateering, the control of violence at sea is in the hands of States;
- Both the 1958 Geneva Convention on the High Seas and the UN Convention on the Law of the Sea (UNCLOS) entrust the function of policing the seas to warships and to other government vessels licensed to perform such services. The conventional provisions are regarded as declaratory of customary International Law;
- International Law prohibits arming private vessels for pirate-hunting. To do so, a private ship should be converted into a warship according to the requirements established by Hague Convention No. VII of 1907. However, in this case, a fully commissioned officer should be in command and the crew should be under military discipline;
- The above provisions regard the law of armed conflict at sea, including the law of neutrality;
- However, the monopoly of force by States in counter-piracy operations has been reaffirmed both by the Geneva Convention on the High Seas and by UNCLOS:
- There are no specific prohibitions against the use of security guards for protecting private shipping and using force in self-defence;
- This affirmation, which opens the way for employing PMSCs against pirates, should be reconciled with the law of the sea and the possibility for PMSCs to be on board private ships in territorial waters, when the ship is innocent passage through the territorial sea, or international straits and on the high seas. An additional question is whether it is possible to dispatch an escorting vessel with PMSCs on board in order to protect transiting private shipping.

I answered those questions in this way in the essay previously referred to:

- a) A merchant ship with armed team on board is entitled to traverse foreign territorial waters and the presence of the armed team does not constitute an infringement of the rules on innocent passage;

- b) The same is true (and even more so) for transit passage through an international strait;
- c) PMSCs are forbidden to arm vessels for pirate-hunting. However, they are permitted to arm a vessel for escorting merchant shipping. If attacked by pirates, they are entitled to react;
- d) The rationale for using force is the law of self-defence.

I was asked by our Chairman to focus in my presentation on Human Rights and on the necessity to draft an instrument for maritime PMSCs along the model of the Montreux Code of Conduct.

UNCLOS establishes a duty of co-operation in fighting piracy on the high seas and States are the holders of rights and obligations (Article 100). The provisions on the right of visit contain duties in case of unjustified stopping of a vessel suspected of piracy. Provisions are dictated for the right to punish pirates and for the restitution of property to lawful owners. Human Rights are not mentioned in UNCLOS. However, the relevant instruments apply.

As far as the European Convention on Human Rights is concerned, warships flying a flag of a State party should abide by its provisions on the high seas and also in foreign territorial waters whenever entry is permitted by the coastal State, in order to fight armed robbery at sea. International Humanitarian Law is to be applied should warships and armed teams take action on land as, for instance, envisaged by paragraph 6 of the UN Security Council Resolution 1851 (2008).

Human Rights problems might arise for the temporary custody of captured pirates on board the warship and if they are transferred to a foreign coastal State tribunal in order to be punished.

Have the above provisions any impact on PMSCs? I see two points.

The first is the exercise of the right of self-defence if a private ship is attacked. This right should be contained within the limit of necessity and proportionality. It is thus a human right problem and has to be examined in connection with the right to life and the prohibition of inhuman and degrading treatment. Moreover, if a PMSCs team captures the assailant pirates when resisting a piratical assault, the question of handing over captured pirates to a warship or a coastal State arises, as well as the issue of the temporary custody of pirates.

The second point is connected with action on land aimed at destroying piratical sanctuaries. As already mentioned, there is a problem of observance of International Humanitarian Law (IHL) if PMSCs are employed by the intervening State.

In principle the Djibouti code of conduct, which is an instrument of soft law, does not deal with PMSCs, but only with the States of the Region

(Indian Ocean and Gulf of Aden)¹. Article 6, paragraph 1, addresses law enforcement or other authorized officials from warships/military aircraft leaving no room for PMSCs. Paragraph 2 of the same Article, however, takes into consideration the cooperation with States and other stakeholders and may be interpreted as containing an opening for PMSCs.

The 1988 SUA Convention (Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation) and its Additional Protocol on Fixed Platforms were made for coping with maritime terrorism and the hijacking of the Achille Lauro in mind. As can be inferred by the Preamble, the SUA Convention does not deal with piracy but rather with acts of terrorism, which differ from piracy in several respects.

For instance, the requirement of two ships, which is an ingredient of piracy, is often lacking when an act of terrorism is committed and terrorism is motivated by political ends and not by *animus furandi* as piratical acts. Be that as it may a number of Security Council resolutions against piracy take note of the SUA in order to recommend the application of the criminal legislations adopted by State parties to implement that Convention and to strengthen the duty of cooperation against piracy².

There is no international convention regulating PMSCs. There is an instrument of soft law, i.e. the Montreux Code of Conduct, which addresses this important issue. The Montreux Document is not tailored for the employment of PMSCs at sea³.

The same is true for the International Code of Conduct for Security Companies (ICoC) adopted on 9 November 2010 under the auspices of the Swiss government, even though a broad reading of this document may lead to a different conclusion.

The draft convention on PMSCs currently being negotiated within the Human Rights Council does not seem to be an instrument applicable to PMSCs providing security services at sea.

The use of armed personnel on board private shipping to fight piracy is gaining currency among shipping companies. Some flags employ private guards, others employ military personnel. Spain only allows private guards, while French trawlers stationed in the Seychelles have military people (*fusilliers de marine*) on board. The Italian law allows both: the use of military teams and private guards (*guardie giurate*)⁴.

¹ *Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden*, 29 January 2009 (Djibouti).

² See for instance S/Res/ 2020 (2011).

³ *Montreux Document on Pertinent International Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict*, Montreux, 17 September 2009.

⁴ See Article 5 of the Law 2 August 2011, No. 130.

At the beginning, the International Maritime Organization (IMO) was against the employment of armed personnel on board ships and was of the opinion that non-lethal defences were preferable (for instance, barbed wire along the external side of the ship, powerful hydrants, water cannons, a citadel where the crew might seek refuge pending the intervention of a warship in the vicinity). The IPTA (International Parcel Tanker Association), gathering ship owners, has requested the IMO safety Committee to enact provisions concerning the employment of armed guards on board commercial shipping.

The IMO has enacted two circulars, clarifying, however, that it does not officially endorse the practice of having armed personnel on board (Circulars 1405/Rev. 1, 1406/Rev. 1 and 1408, of 16 September 2011). States and ship owners are invited to set out proper rules if they deem necessary the employment of Privately Contracted Armed Security Personnel (PCASP), according to the jargon used for armed guards on board instead of the acronym PMSCs.

The latest IMO Circulars are 1405 /rev. 2 (25 May 2012) and 1443 (25 May 2012). The latter enacts an “Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Personnel on Board Ships in the High Risk Area”. BIMCO (Baltic and International Maritime Council) has published a Model contract for the employment of security guards (Guardcon), which includes a “Guidance on the Rules for the Use of Force (RUF) by Privately Contracted Armed Security Personnel (PCASP) in Defence of a Merchant Vessel (MV)” released in 2012⁵.

There is, therefore, enough material for drafting a code of conduct along the lines of the Montreux Document, including a commentary and a collection of best practices. A number of issues need to be clarified such as uniform rules on self-defence, the master’s responsibility, rules of engagement, stowing of weapons, status of armed guards at ports of call and custody of captured pirates during navigation and their hand over to a coastal State. The issue of self-defence deserves to be accurately assessed.

We should refer to law governing police action at sea rather than to the right of self-defence as embodied in Article 51 of the UN Charter. In this connection one very important point to be clarified is whether self-defence may be resorted to only for protecting persons from attacks or also to protect property, for instance, the ship and the cargo on board. There is a need to compare domestic legislations in order to find a common approach. The use of lethal force should be avoided and should be used only as a last resort. This is said, for instance, in the BIMCO document that contains detailed provisions on the issue. Reference should also be made to a number of relevant instruments, including law of the sea conventions (for

⁵ See: <https://www.bimco.org/20132/03/28GUARDCON.aspx>.

instance, Article 22 of the 1995 UN Fish Stocks Agreement), soft law documents (for instance, the ICoC) and the Law of the Sea Tribunal Case-Law.

Another important issue is the status of military personnel embarked on private shipping. As mentioned earlier, France employs military personnel on board fishing boats and Italian law allows embarking both military teams and private contractors. Does military personnel enjoy functional immunity/immunity *ratione materiae* – which I would deem to be the case – since they have law enforcement officers status (according to Italian law) and are performing a task in the interest of the international community? The issue is pending before the Supreme Court of India in connection with the incident of the *Enrica Lexie* transiting off the coast of Kerala⁶. Also the responsibility of States licensing private armed guards should be clarified. Is there an obligation of due diligence incumbent on the licensing State even when the armed team is only made up of private persons who are not State organs?

Last but not least, a forum should be chosen to draft a Montreux-like document for armed guards on private shipping. Is IMO the best forum or should the lead be taken by a State (as the Swiss government did with the Montreux Document) or should this issue be debated within the United Nations?

⁶ Functional immunity belongs to State organs. The question might arise in connection with the determination of State organ, whose conduct is attributed to the State. Article 4 of the *Draft Articles on responsibility of States for internationally wrongful acts, adopted by the International Law Commission (ILC) in 2001* and widely regarded as declaratory of customary International Law, after having attributed to the State the conduct of its organs (paragraph 1), affirms in paragraph 2 that "An organ includes any person or entity which has that status in accordance with the internal law of the State". It is thus undisputed that the status of organ is determined by the internal law of the State.

VI. Improving Compliance with International Humanitarian Law

IHL Training for and by PMSCs

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Looking at the use of P(M)SCs by States, it is often the latter's desire to decrease the military footprint of their armed forces on the ground while seeking to continue influencing and supporting certain armed/security actors, that drives them to contract P(M)SCs to act as their force-multipliers. The ICRC interest in them is twofold:

Firstly, it looks at the P(M)SCs' own behaviour, e.g. when using force and directly participating in hostilities and how these actions fit with applying provisions of IHL. The impact of such direct activities on the front line of ICRC operations is a connected concern here for ICRC and thus then also the need for meaningful and effective training.

Secondly, ICRC interest in P(M)SCs revolves around the training content that P(M)SCs use when they themselves give training to armed/security actors on IHL/IHRL related matters of ICRC relevance (e.g. detention, Use of Force (UoF), crowd control, use of weapons).

The repercussions of such training on the behaviour of armed actors towards the civilian population in an armed conflict context or another situation of violence, as well as its impact on parallel ICRC training efforts to these armed actors are of particular interest to ICRC.

Training of P(M)SCs-ICRC's position on meaningful training

Taking the example of the use of force, today, P(M)SCs active in armed conflict and other situations of violence use force primarily, if not exclusively, for defensive security tasks, such as personal security, mobile security and static infrastructure security. Nevertheless, their respect of rules on the use of force gives rise to ICRC concern.

“Self-defence” as a “one size fits all notion” justifying a maximalist UoF interpretation is as misleading and false as the notion that P(M)SCs cannot defend themselves when protecting a military compound and must wait before returning fire until being shot at. Being aware of and adequately acting accordingly to the IHL/IHRL rules that apply is not a given. For example, the different notions of proportionality applying depending on the legal norms covering a given situation of the defence, when lethal force is allowed at the outset or when there needs to be a non-lethal escalation of force (IHRL context), the arms and ammunition used etc. are all aspects that require comprehensive training. The integration of these aspects into the end-product, i.e. the eventual behaviour on the ground is much easier said than done.

In relation to an armed conflict scenario, IHL regulates the activities of P(M)SC staff including the P(M)SC staff's legal status. Former State armed forces military personnel now working as P(M)SC contractors have a civilian status in most cases and are not combatants. There are crucial differences to be taken into account as a result.

IHL therefore requires to become part and parcel of the mind-set of such companies, e.g. when it comes to operational decision-making. Shaping the mind-sets of the P(M)SC, also of senior and middle-management staff that shape the mission and tasks as well as the staff that implements neither happens overnight nor does it occur in the course of sporadic lectures on IHL.

Based on a long-term ICRC study looking at the 'Roots of Behaviour in War, Understanding and Preventing IHL Violations' amongst arms carriers, the ICRC approach has evolved and thereby expanded the spectrum of activities applied to translate knowledge into behaviour. Indeed, lacking IHL knowledge had not been the issue, what had been the issue was the transposition of knowledge into military processes and the anchoring of 'IHL reflexes' in the decision-making processes throughout the chain of command.

For example, one main finding focussed on the vastly higher retention percentage of theoretical norms learned via practical exercises and the crucial importance of an effective and applied sanctions system to meaningfully enforce the application of these IHL compatible practices.

These factors are crucial and not replaceable when it comes to shaping behaviour according to norms that are known and understood but without this practical integration into military reflexes and a realistic deterrence factor, still not applied when it matters. Also, training needs to start early, prior to deployment and then needs to be 'kept alive' in applied behaviour via undergoing it on a continuous basis and adapted to the evolution of the P(M)SC tasks in a given context. However, training and sanctions are but two elements to instil adequate behaviour in armed conflict and other situations of violence.

Training forms part of a (hopefully) virtuous circle that also contains relevant doctrine (e.g. SOPs). The latter sets the basis on what the a/m training subsequently focuses on. Doctrine is then also the subsequent basis on which sanctions and disciplinary measures should be applied. It provides for a transparent and predictable mechanism to ensure compliance with basic IHL/IHRL norms. Lessons learned and After Action reviews will provide ongoing input for revised directives and thus also for revised or newly fine-tuned training curricula. Adapting and often increasing the scope of P(M)SC activities without corresponding doctrine, training (including practical/exercise-based training) and sanctions systems that are taught and integrated into P(M)SC staff's mind-sets has been conducive to

violations. The repercussions are significant, first and foremost for the persons affected by it but, as one could see in Iraq, also for the entire war (e.g. COIN) effort as well as for the branding of the P(M)SC.

In the past, insufficiently stringent and transparent Command and Control mechanisms leading to inadequate command climates within a P(M)SC have paired up with often toothless penal and disciplinary sanctions systems by States and companies respectively and then created conducive environments for repeated violations of applicable legal norms; thus the need to improve oversight. PMSC senior management in PMSC HQs or regional hubs are as crucial as PMSC detail leaders in the field (as direct superiors to staff whose behaviour we seek to positively influence) when it comes to create the necessary command climate that renders the respect for the applicable rules part of the corporate culture everybody adheres to. The development of the ICoC and/or the American National Standard to ensure and monitor P(M)SC compliance with appropriate legal provisions and in accordance with the provisions stipulated, for example, in the Montreux Document are promising. But, it is the way these measures are applied on the ground that will determine their success.

Training by P(M)SCs

While training conducted by P(M)SCs to others often happens far away from any front lines and thus seems *per se* unproblematic, the fact that there is so far little oversight into it e.g. by the contracting States, is concerning. Also, current oversight mechanisms do not sufficiently cover P(M)SCs training of armed/security actors. What is, for example, the training content given to third parties active in conflict and are the adequate standards and necessary integration processes of IHL applied to meaningfully shape the military behaviour of the recipients of such training? Taking P(M)SCs in East Africa as an example, it would be interesting to know what exactly they train on regarding IHL and how in-depth their training of it is, e.g. with AMISOM troop contributing countries in Burundi and Uganda that then deploy to Somalia and engage in hostilities with Al-Shabaab. The spreading of unregulated and unchecked military practice via potentially wrong or insufficient training will shape generations of soldiers and thus affect generations of civilians faced with the ensuing effects.

Looking beyond East Africa, thousands of UN blue-helmet peacekeepers worldwide are today trained, e.g. on IHL via P(M)SCs. With UN Peacekeeping having evolved and their tasked activities getting much closer to persons protected by IHL, e.g. in DRC where MONUSCO is party to the conflict and where Peacekeepers are today actively using force to protect civilians in the Kivus, the training they receive (ideally at Troop Contributing Country level) is crucial in shaping their behaviour. Not only

does it shape their own behaviour *vis-à-vis* one of the most vulnerable civilian population on the planet, but it also determines their ability to identify IHL violations when perpetrated by spoilers. Training given by P(M)SCs is thus a crucial component in promoting IHL and ensuring that it is respected in order to protect victims of armed conflict. Having a coherent and tested application of it and having it overseen by credible oversight mechanisms (industry-driven ones but also crucially by the responsible States) is a must.

ICRC and Training by P(M)SCs

Coordination and exchange of info on P(M)SC training to third party armed/security forces with the contracting State, organisation and/or P(M)SC itself is in the interest of ICRC. Field experience shows that unfortunately, P(M)SCs (and relevant States/orgs) often do not understand that what they are teaching or paying to be taught. Contracting countries even admit they do not know what is being taught on their behalf. ICRC would want to make sure P(M)SCs have a basic understanding themselves of ICRC and especially IHL, so that it can be incorporated into general combat training towards others as necessary. We would want to have P(M)SCs sensitized as to what IHL subject matter should be taught to troops deploying on operations. ICRC would also want to ensure that its own bilateral IHL training injects/support rests incorporated into the overall programme for troops' pre-deployment training.

When dialoguing with P(M)SCs and related stakeholders, it goes without saying that associated perception risks with e.g. national authorities or the armed opposition need to be taken into account by ICRC, e.g. when sharing training platforms with P(M)SCs or when dealing with them in general. Also, the increased use by e.g. Western P(M)SCs of subcontracted local/national 'P(M)SCs' complicate the approach and a potential ICRC dialogue with them is not straight forward. These 'P(M)SCs' are often an ambiguous mass not always easy to interact with without considerable security risk.

Nevertheless, it is clear that P(M)SCs will continue to operate in a way that is of interest to ICRC and that they are likely to, for example, even increase their training activities on ICRC relevant issues. P(M)SCs are global shapers of armed actors' behaviour in situations of violence that influence IHL/IHRL environments and thus the protection of persons by IHL/IHRL. ICRC can act as supporter/advisor towards the integration of IHL/IHRL into P(M)SC doctrine, education, training and internal disciplinary sanctions measures. ICRC is not able and willing though to substitute States and industry in these efforts – it supports them in an impartial and operations-driven manner while avoiding any kind of instrumentalisation. As set out by the Montreux Document, States remain the accountable actor to control the adherence of P(M)SCs to relevant legal standards.

Industry Needs and Strategies for IHL Training

Sylvia White

General Counsel, Aegis Group, London

Aegis was founded in 2002 and is a leading provider of private security services such as stabilisation, transition and reconstruction support for government agencies and corporate clients. The Company also has a consultancy operation branded as Aegis Advisory which not only supports all the Company's operational activities but also provides due diligence and risk assessments and to a wide range of corporate clients including banks, insurance companies and natural resource companies. In addition, Aegis has built and continues to grow a steady number of training contracts for governments across four continents.

The industry sector of which Aegis now forms a significant part is much misunderstood, from both a regulatory and operational perspective. The Company has taken great care to position itself such that its operational activities are absolutely compliant from a legal perspective, and to maintain the highest level of ethics and transparency in its business activities. The Company specialises in providing a wide range of risk management and mitigation strategies to recognised governments, international bodies such as the UN, World Bank and the European Union and certain corporate clients that meet strict eligibility standards. Aegis seeks to offer real value added services through its ability to provide solutions to complex problems which may encompass such issues as command, control, communications and intelligence tailored to specific circumstances, or alternatively for example, which may involve community affairs and "hearts and minds" support roles in post conflict environments. Whilst in certain circumstances in specific countries, the Company may have a requirement to arm its personnel, this is uniquely for defensive purposes and this activity is always overseen and regulated by the most stringent procedures and oversight.

I have been General Counsel at Aegis since 2007. Prior to that time I worked in the Pharma/healthcare sector and the telecoms sector – both "in-house" roles. Since joining Aegis I have taken an active role in all areas of the business including, specifically, in the furthering of the Company's aims on national and international regulation. The Company has spent a considerable amount of time and money supporting the case for clear and transparent regulation; I was personally deeply involved in the development and signature of the ICoC from the initial planning stages post Montreux. As a Company we have consistently worked closely with governments and industry associations to promote high standards and increase levels of transparency and accountability.

Early on in the company's history the "Iraq bubble" came into play. Immediately the industry (as it quickly became) was populated with a large number of small players operating in the market with minimal corporate focus on compliance, internal systems and control. Aegis thinks "doing the right thing" makes for good security – we also think understanding the environment in which we operate and forging relationships with the local community is key to supporting our clients by enabling their mission, adding to their security and their business's success.

Part of our commitment to doing the right thing means we must ensure that all our personnel understand what is expected of them and this is as relevant in relation to Human Rights as any other area of our business. We make it clear to our personnel that they are no longer in the military, and that if they deploy armed they can act only in a defensive capacity. There have been several references to the historic immunity in Iraq provided by the CPA during this conference. I want to stress that Aegis never assumed any such immunity and briefed all personnel accordingly as well as making it clear contractually. All personnel we engage receive a briefing on applicable laws, including the Law of Armed Conflict (notwithstanding that we only ever act in a defensive capacity and consider that we are non-combatants under the Geneva Convention). We build the principles of legal compliance respect for local customs and IHL into our standard operating procedures and we exercise the necessary leadership and management to ensure adherence. We believe it is important that all our personnel understand the high degree of responsibility entrusted to them in the special circumstances in which they operate, not just when they are armed, including an understanding of the Universal Declaration of Human Rights and other key documents such as the UN Charter and Trafficking in persons regulations.

The industry we now participate in has made great strides with the signature and acceptance of the ICoC but Aegis remains committed to the process of continuous improvement because we are not there yet. Commercial decisions will always be based on commercial imperatives but if we all truly desire to raise standards across our industry and compete on a level playing field then there must be an enforceable minimum relevant standard that all companies adhere to. The PSC-1 ANSI standard is but one piece of this jigsaw. A workable oversight mechanism that is relevant, realistic, scalable and achievable and which is also recognised as the applicable benchmark by all stakeholders and all users of our services is also necessary to secure the future of an industry which is still treated with more suspicion than trust. We, as a company and I, as an individual member of the ICoC Temporary Steering Committee, continue to work closely to meet this aspiration and goal.

VII. Way Forward

Rights and Accountability in Development

Tricia Feeney

Executive Director, Rights and Accountability in Development (RAID), London

Rights and Accountability in Development (RAID) welcomes the opportunity to share the experience of victims of Human Rights violations with the working group. RAID is a research and advocacy non-governmental organisation that promotes respect for Human Rights and responsible conduct by companies. Over the past 10 years RAID has interviewed numerous victims of Human Rights abuses carried out by private military and security companies (PMSCs); expatriate employees of PMSCs; senior managers in companies that employ PMSCs; and government officials who have had contractual arrangements with PMSCs. RAID participated in the development of the International Code of Conduct for Private Security Providers. RAID has worked closely with affected communities and non-governmental organisations to try to hold private military and security companies and/or their employees to account for Human Rights violations and in some cases alleged complicity in war crimes. In most of these cases, victims are denied justice and corporate actors responsible for the abuses escape with impunity.

RAID is a longstanding contributor to the debate on corporate conduct during and after the devastating war in the Democratic Republic of Congo (DRC). In 2004, it released a comprehensive report on unanswered questions arising from the work of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo¹. Four of the cases examined were of British companies accused of supplying arms or logistical services to rebel or government forces, often in exchange for diamonds and minerals, and in one case of having participated in military operations. The UN Security Council had called for a full investigation of all cases referred by the UN Panel to member States. But no action was forthcoming by States.

This presentation briefly describes the OECD Guidelines for Multinational Enterprises and the experience of using its complaints procedures in cases related to PMSCs. It examines the limitations of the process and outcomes. It concludes with some suggestions as to how these procedures might be adapted to deal with alleged breaches of the International Code of Conduct for Private Security Service Providers (ICOC).

¹ RAID *Unanswered Questions: Companies, Conflict and the Democratic Republic of Congo*, May 2004.

1. The OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises are government-backed recommendations to enterprises regarding responsible business conduct in their worldwide operations. The Guidelines cover a range of topics including Human Rights, employment, environment, disclosure, corruption and taxation. The complaints mechanism is one of the few avenues available for addressing corporate misconduct overseas.

The Guidelines are described as ‘voluntary standards and principles’, but they are not optional not only because the countries adhering to the Guidelines make a binding commitment to implement them but also because many of its clauses are codified in international or domestic law. The Guidelines apply to all global operations of enterprises operating in or from the 43 OECD and adhering countries, and to all sectors of the economy.

The OECD Guidelines for Multinational Enterprises are recommendations on responsible business conduct addressed by governments to multinationals operating in or from their territories. The OECD Guidelines cover a broad range of issues, including: due diligence in the supply chain; disclosure; Human Rights; employment and industrial relations; environment; combating bribery; consumer interests; science and technology; competition; and taxation. They do not include any reference to International Humanitarian Law, although there are references in the OECD Due Diligence Guidance for Responsible supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2011)².

Governments that adhere to the Guidelines must establish a National Contact Point (NCP) to promote the Guidelines and handle complaints about ‘specific instances’ of alleged company misconduct. The ‘specific instance’ complaint procedure is focused on finding a resolution between the parties through mediated dialogue. If mediation fails, NCPs can make Statements determining whether the Guidelines have been breached and make recommendations to ensure that the Guidelines are observed. All 34 OECD member countries and 9 non-OECD adhering countries are required to have a functioning NCP³. Although all NCPs are government officials, the NCPs are not structured uniformly⁴.

² Annex II.

³ OECD members : Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, South Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States. Non-OECD members: Argentina, Brazil, Colombia, Egypt, Latvia, Lithuania, Morocco, Peru, Romania.

⁴ The UK NCP is based in the Department for Business, Innovation and Skills (BIS) and is also partly funded by the Department for International Development (DFID). There is a Steering Board to monitor and guide the work of the UK NCP which is composed of

The procedures for filing a complaint

Any ‘interested party’ can file a complaint. This includes trade unions, NGOs, workers, communities and individuals that are negatively impacted by an enterprise’s activities. Complaints can be filed against companies from or operating in an OECD or adhering country regarding their worldwide activities. This includes any adverse impacts through their supply chains and business relationships for any alleged breaches covered in the Guidelines.

Complaints should be filed at the NCP of the country in which the alleged violation occurred. If the host country does not have an NCP, the complaint should be submitted to the NCP of the country where the company has its headquarters. NCPs are committed to dealing with complaints in a timely fashion and they aim to conclude cases within a year. OECD Guidelines complaints can bring about changes in corporate behaviour, raise public awareness and provide a non-judicial mechanism for remedying grievances

There are three phases in the complaint process, outlined below:

- A written complaint is submitted to an NCP, which carries out an initial assessment to decide if the case merits further examination. Some NCPs publish their initial assessment.
- If admissible, the NCP uses good offices to bring the complainants and the company together to resolve the case through mediation, sometimes using outside mediators.
- The NCP issues a final Statement agreed to with the parties outlining the alleged breaches and how the issue has been settled. If mediation fails, the NCP issues a final Statement which may include recommendations on the implementation of the Guidelines. Some NCPs make a determination as to whether there has been a breach of the Guidelines.

Over 200 complaints have been filed by unions and NGOs, since the complaints mechanism was established in 2000.

2. Experience of OECD Procedures in PMSC-Related Cases

PMSCs, including logistic companies, have carried out a range of activities in recent conflicts on the African continent. In the DRC they were involved in supplying combat troops and even engaging in hostilities. Complaints were brought against two British-based carriers, Avient and DAS Air with mixed results.

In October 2003 the *Avient* case was referred to the UK National Contact Point (NCP) by the UN Panel of Experts since they were of the

representatives of government departments and four external members nominated by the CBI, MPs, TUC and NGOs.

view that *Avient* had breached the OECD Guidelines on Multinational Enterprises. In April 2004, RAID filed a complaint against *Avient* but was not allowed to participate in the process. No investigation was undertaken into the allegations relating to *Avient*'s possible involvement in Human Rights violations and war crimes.

Avient Ltd a private military company, run by an ex-British Army Officer, first came to public attention in October 2002, when it was named by a UN expert panel investigating the illegal exploitation of resources and the conduct of private companies during the war in the DRC⁵. The allegations against *Avient* relate to events which took place at the end of 1999 to July 2000. Two principal allegations were made by the UN Panel of Experts that: (i) *Avient* was contracted by the DRC Government to organize bombing raids into Eastern DRC; and (ii) the company provided planes, attack helicopters and Ukrainian crews to the Congolese Air Force and the Zimbabwean Defence Force⁶. Information from a range of sources including Statements from former employees indicated that *Avient* had dropped hand-made fuel bombs from the back of Antonov cargo planes, from an altitude of 24,000 feet without trajectory charts.

Towards the end of November 1999, the town of Ikela became an object of strategic importance, because of its links to Mbandaka by the Tshuapa river and to Kisangani by road. Rebel forces surrounded the town's airport where more than 2,000 Zimbabwean and Namibian soldiers, allied to the DRC Government, were stationed. To break the siege of the garrison, troops from Zimbabwe and Kinshasa used helicopters, airplanes (including Antonov bombers) and boats to bombard the rebel positions at Bokungu 64 km to the North West of Ikela. The attack on Bokungu was described at the time as the biggest military operation since the signing of the Lusaka Peace Accord.

⁵ *Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo* (hereafter 'UN Panel Report'), 16 October 2002, S/2002/1146, para. 55. *Avient Air* was listed by the Panel in Annex III to its report, comprising *Business enterprises considered by the Panel to be in violation of the OECD Guidelines for Multinational Enterprises*. While the UN Panel refers to *Avient Air*, Andrew Smith, in his reply to the Panel, responds on behalf of 'Avient' and the letterhead refers simply to 'Avient'. According to the UK NCP, "the company has denied ever being incorporated as *Avient Air* and for the purposes of this process the U.K. NCP has conducted all dialogue with representatives of *Avient Ltd*". (See Statement on *Avient*, op cit.).

⁶ *Report of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo*, 16 October 2002, para. 55.

UN's Office for the Coordination of Humanitarian Affairs and the press reported heavy civilian casualties. This indiscriminate bombing contributed to the injury and loss of civilian life, in Equateur province as well as massive population displacement. According to the UN and humanitarian agencies, as a result of the intensity of the land and air bombardments, an estimated 250, 000 people were internally displaced in Equateur at this time. The civilian population had no protection from the air strikes and had to improvise air raid shelters.

Evidence that AN-12 aircraft, manned by *Avient* crews, were used on bombing missions comes from the Statements of *Avient* ex-employees. The company denied that *Avient* "organised" bombing raids. It admitted that *Avient* leased aircraft to the Zimbabwean Government for use in the DRC and that *Avient* provided engineering, training and crews for the Congolese Army ("FAC"). The NCP had a copy of the Crewing Agreement for the AN-12 which confirmed *Avient*'s military role:

- The crew "will operate on behalf of the Military on Operational Missions".
- "The aircraft's home base will be Kinshasa but it will deploy for periods within the DRC".
- "The Crew will be advised that they will be operating along and behind enemy lines in support of Ground Troops and against the invading forces".
- "The aircraft will operate on a military call sign"

The UK NCP's final Statement discounted documents supplied by the UN such as the Crewing Agreement and a letter from the DRC Air Force which clearly implicated *Avient* in military campaigns on behalf of the DRC government. Instead, the NCP accepted *Avient Ltd*'s contention that "they were working within a contractual arrangement with the officially recognized governments in the area". The NCP found that "although owned and partly managed by a former military person, *Avient Ltd.* is not a military company". Moreover, the NCP accepted *Avient*'s claim that the service it provided "was not a tactical or military role but a supply function"⁷. The UK NCP's final Statement issued in September 2004 essentially recorded *Avient*'s response to the allegations and effectively exonerated the company⁸.

Dairo Air Services (DAS Air) was a privately owned cargo carrier with its main operational base in the UK⁹. It used Entebbe, Uganda as its main hub for routes into Africa. According to the Panel, DAS Air had been involved in the transport of coltan from Bukavu and Goma to Europe via

⁷ UK NCP Final Statement, September 2004.

⁸ UK NCP Final Statement, Avient 2004.

⁹ <http://www.dasairusa.com/intlofc.htm> (visited 17 December 2003).

Kigali, although local representatives of the company deny that DAS Air flew to Bukavu and Goma. There were also allegations that DAS Air was not only engaged in the lucrative trade of Congolese minerals but also arms trafficking to conflict areas in Eastern Congo¹⁰.

RAID reactivated the complaint against DAS in 2005 and provided the British Government with crucial evidence from the archive of the Ugandan Judicial Commission of Inquiry (known as the Porter Commission) proving that DAS Air made regular flights into Eastern DRC. The flights contravened international aviation conventions banning civil air traffic from flying into conflict zones. Several flights coincided with a Ugandan military offensive which was found by the International Court of Justice to have been in violation of International Humanitarian Law¹¹.

The International Court of Justice (ICJ) found the Republic of Uganda "by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for Human Rights and International Humanitarian Law in Ituri district, violated its obligations under International Human Rights Law and International Humanitarian Law".

After a long delay the complaint against *DAS Air* was examined by the UK NCP. In 2008 the NCP noted that many of the *DAS Air* flights into Eastern DRC occurred shortly after the Ugandan army had occupied the specific area during Operation 'Safe Haven'. The NCP also noted that the ICJ concluded that Operation 'Safe Haven' was not consonant with self-defence and that Uganda violated the sovereignty and territorial integrity of the DRC. It concluded that "*DAS Air* flights between Entebbe and DRC were in direct contravention of the Chicago Convention". It found that the destination airports in Eastern DRC were situated in an area in North Eastern DRC that was under Ugandan army occupation and Human Rights abuses were recorded by NGOs in the area during 2001. It concluded that *DAS Air* had failed to exercise due diligence as regards the origins of the minerals it transported:

DAS Air did not try to establish the source of the minerals they were transporting from Kigali and Entebbe, stating they were unaware of the potential for the minerals to be sourced from the conflict zone in Eastern

¹⁰ *International Peace Information Service European Companies and the Coltan Trade*, September 2002.

¹¹ International Court of Justice, Case Concerning Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*), 19 December 2005, Judgement.

DRC. The NCP finds it difficult to accept that an airline with a significant presence in Africa including a base in Entebbe would not have been aware of the conflict and the potential for the minerals to be sourced from Eastern DRC. In addition, the 35 DAS Air flights between Entebbe and DRC (including several flights to the conflict zone itself) between 1998 and 2001 recorded by the Porter Commission, adds support to *DAS Air* having an intimate understanding of the situation and the conflict¹².

In 2008, by the time the NCP issued its final Statement, *DAS Air*, had gone into administration. The strongly worded final Statement concluded that the company had breached Human Rights and had failed to undertake due diligence with regard to its supply chain. It did not, however, examine *DAS Air*'s alleged role in support of Uganda's military offensive in Eastern DRC¹³.

The different treatment of the two cases shows that where there is political will non-judicial mechanisms such as the OECD Guidelines can gather and examine information on PMSCs and reach a determination on some aspects of their activities. But the procedures have a number of deficiencies including a lack of resources and a mandate to conduct investigations. Despite some laudable improvements in the structure and organisation of some NCPs –in the UK, Norway and the Netherlands – NCPs are not sufficiently independent of governments and have little or no training in International Human Rights Law or International Humanitarian Law.

As a voluntary procedure, NCPs find many companies unwilling to engage. Even when they do, the emphasis on mediation and confidentiality inevitably weakens the usefulness of the mechanism as a deterrent with the additional problem that NCPs do not have any means of enforcing settlements. The OECD procedures, despite the undoubted importance of a final Statement from a government body with a determination on the conduct of PMSCs in relation to the OECD Guidelines, cannot be seen to offer the victims of Human Rights violations an effective remedy.

3. Could the Procedures be strengthened to deal with ICOC complaints?

The primary focus of the OECD process is on mediation between the parties which may not be appropriate for PMSCs.

In ICOC cases, the objective should be to reach a clear and reasoned finding on the substance of allegations and whether they represent a breach of IHL and Human Rights Law (as set out in the ICOC), based on an assessment of the available facts. A final public Statement should be issued which, depending on the circumstances, should offer practical

¹² *UK NCP Final Statement, DAS Air 2008*, paragraph 49.

¹³ Statement by the UK National Contact Point (NCP) for *OECD Guidelines for Multinational Enterprises* (NCP): *Das Air*.

recommendations to help improve compliance with the Code, or impose a penalty, including, in the most serious cases, a recommendation for the termination of the status of a Signatory company. Unlike the OECD Guidelines, the engagement of a company should not be a problem, given that Signatory Companies agree to be subject to the oversight of the International Accountability Mechanism (IAM), which in its turn has to institute the means by which to investigate, deliberate and determine allegations of non-compliance with the ICoC or of misconduct (in the context of activities and issues covered by the ICoC) made against Signatory Companies.

The following suggestions draw on recommendations for improvements to the OECD Procedures submitted in 2006 to the British Government by a Working Group (the Joint Working Group), chaired by Lord Mance (now a member of the UK Supreme Court) whose members included company representatives, academics, lawyers and NGOs:

1. In cases concerning alleged breaches of the ICOC, the NCP should appoint a suitably qualified individual or panel to assess the available material, consider arguments and produce a report, on the basis of which the NCP would make a determination and issue a final Statement on the substance of the allegations and application of the ICOC, with appropriate recommendations to promote good practice and improve compliance. It might also impose a penalty.
2. This assessor/panel would carry out the initial examination of the material available, hear arguments from both sides, and resolve issues of fact as far as possible. The assessor/panel would issue a report to the NCP on the substance of allegations and whether they represented a breach of the Code, along with a summary of the information and arguments presented and appropriate comments and practical recommendations. The parties should have the opportunity to view the report at the draft stage and make comments within a limited time for the assessor/panel to include in his or her consideration. The NCP would then review the report and use it to make a final determination and Statement, which would be made public.
3. The assessor/panel should have suitable experience and be impartial and able to command the confidence of the parties, with no previous involvement in the complaint or links to either side. The assessor/panel should be chosen from a list of suitable candidates and should be given adequate funding and support for their work.
4. The process should operate with the best available information about the circumstances of an alleged breach. Given the voluntary and non-judicial status of the process, the main source of

information will be the submissions and material provided by the parties. However, the assessor/panel should make whatever efforts it properly can to resolve questions of fact, including *in situ* visits. The assessor/panel should be able to call on experts to provide advice on particular issues and to request information from persons or organisations outside the process, so long as this is shared with the parties.

5. The assessor/panel should be able make requests to parties to provide relevant information. Parties should also be able to make proportionate and reasonable requests for information, which would be formally submitted to the other party.
6. The assessor/panel should reach a clear finding on the substance of the allegations, based on a thorough assessment of the available facts. If there is insufficient information to substantiate the allegation the complaint should be declared unproven.
7. The parties to this process should be able to ask questions and challenge the arguments, witnesses and any other material presented. Where one of the parties wishes to present material in person before the assessor the other party should have the opportunity to participate. The standard of proof of any non-compliance should be high, but appropriate to the non-judicial nature of the proceedings; i.e. a civil standard.

Private Military Security Companies Regulation: the Way Forward

Alan Bryden

Head-Designate, Public-Private Partnership Division, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Geneva

This panel is about the way forward. Where you stand on that question depends on where you sit. An important part of the work of my organisation – the Geneva Centre for the Democratic Control of Armed Forces (DCAF) – is to provide support for initiatives and activities that bring together public and private actors with shared goals to ensure that security provision contributes to the promotion of Human Rights and International Humanitarian Law (IHL). My perspective therefore comes from two angles:

first, DCAF has provided and continues to provide support to Swiss-led initiatives to develop and implement the Montreux Document on pertinent legal obligations and good practices for States related to operations of private military and security companies during armed conflict (the Montreux Document) as well as the International Code of Conduct for private security service providers (ICoC)¹. We also have Observer status within the Voluntary Principles on Security and Human Rights. In sum, the success of the regimes that are the subject of this roundtable is very close to our heart.

And second, if we are doing this it is because we see the regulation of private military and security companies (PMSCs) as part of a much wider picture – the need to address the evolving nature of how security is provided (and by whom) and the consequences of shifting roles and responsibilities for security, development and the rule of law.

In line with the wishes of the organisers I will address briefly progress to date on PMSC regulation. I will then discuss the need for new tools and approaches to make regulation stick. Finally, I will touch on challenges and opportunities moving forward.

What has been achieved so far?

In short, a lot has been achieved in a relatively short period of time. We have witnessed a very impressive period of norms and standards setting. Not only that, in the case of both the Montreux Document but in particular the ICoC, these norms have transferred and started to take root in the

¹ Further details on these processes can be found at: www.dcaf.ch/Programmes/Private-Security-Governance.

policies and practice of different stakeholder groups: States, industry, civil society, international and regional organisations etc. And when compliance becomes a stipulated requirement in contracts with clients, soft law becomes increasingly hard.

Less talked about but nonetheless highly significant is that major gaps in our knowledge have already been filled.

The contours of the PMSC industry and how it is evolving has become much more clearly visible. Facile assumptions about who actually delivers security are being challenged. The reality in both the global North and the global South is not that of a Weberian State with a monopoly over the provision of legitimate violence. It is more often than not a hybrid, often fragmented system composed of a diverse array of public and private actors.

In terms of bringing knowledge together, I should highlight the Private Security Monitor web portal recently launched by DCAF and the University of Denver². This independent research project serves as a one-stop source for public information on the worldwide use of private security services. It provides a database of international and national regulation, laws, and regulatory efforts; data, statistics, reports, and analysis on PMSCs. I can only encourage you to consult it as it offers an important resource for governments, policy-makers, journalists, industry, and researchers.

Intimately related to these advances has been the nature of the process to promote PMSC regulation. For both the Montreux Document and the ICoC, there has been a conscious effort to learn from experience in multi-stakeholder initiatives such as the Kimberley Process on conflict diamonds and the Voluntary Principles. The ground-breaking Guiding Principles developed by Professor John Ruggie, as United Nations representative for business and Human Rights, has also been influential³.

Two very practical process lessons are worth highlighting:

- Don't put off difficult governance decisions until later. Decision-making modalities, the scope of obligations and resource issues will only become trickier if postponed;
- Acknowledge the centrality of the multi-stakeholder dynamic to the progress already made. As a consequence, make every effort to maintain positive interactions amongst companies, States and civil society. This foundation of both expertise and goodwill will be essential to address implementation challenges downstream.

² See: <http://psm.du.edu>.

³ Full title: *Report of the Special Representative on the issue of Human Rights and transnational corporations and other business enterprises*, Ruggie John. *Guiding Principles on Business and Human Rights: Implementing the United Nations «Protect, Respect and Remedy» Framework*, A/HRC/14/31, 21 March 2011.

Further steps / measures in the future

So how can new and emerging norms, standards, laws and policy frameworks relating to PMSC regulation be operationalized? First of all, you can't truly address the question without asking the stakeholders concerned. A further outreach period geared not so much to awareness-raising but to implementation requirements is certainly necessary for both Montreux Document signatory States and primary ICoC stakeholders.

And second, it is not rocket science to realise that systems and tools are necessary to support implementation in practice. One key task will be to turn agreed principles and rules into programming guidance that shape behaviour. If implementation is to equate to effectiveness, this will require new approaches and innovative partnerships. A continuation of the political momentum that has carried the process this far is also essential.

From the perspective of the Montreux Document, the promotion of national level regulation of PMSCs will require a focus on the development of good practices. But the requirement goes beyond that. Developing models to support the drafting of national laws, regulations, contracting procedures and policies are important. But for this to stick at the domestic level, it will need to be accompanied by doctrine, training, improved management and oversight practices. And hard won experience from around the world tells us that this works best if it is derived from regionally-relevant experience.

For the more than five hundred companies that have signed up to the ICoC since it was agreed in 2010, this association has been relatively cost free to date⁴. However, this period has seen an intense effort to develop an international governance and oversight mechanism for the Code. Once the charter setting out these requirements is agreed, this will bring a number of obligations for companies which the new oversight mechanism will be responsible for applying.

Critical to the credibility of the Code will be the ability to support, encourage, enforce and measure compliance. And these obligations will need to be calibrated to companies that range from major multi-nationals to small, locally grown companies. An independent performance assessment regime is clearly essential. Monitoring at headquarters level but also incorporating provision for the conduct of field visits will be necessary. Modalities will need to strike a careful balance. As with verification in other fields, effective monitoring will need to be balanced with respect for concerns of national ownership as well as commercial and legal considerations for the companies concerned. And once the framework is agreed, finding people with the right skills to support that task will be essential.

⁴ A regularly updated list of ICoC signatory companies is available at: www.icoc-psp.org.

Challenges

Implementation challenges are numerous, touching on issues of capacity, political will, interests and the more mundane problem of bureaucratic inertia. One key to success is making these initiatives relevant to the global South. The current high profile of PMSC regulation provides an opportunity to bring new attention to the importance of national regulation and related policy concerns. To take just one region as an example – West Africa – you can find a range of challenges across very different contexts:

- For the regional superpower big numbers attract the eye. The cost of security for Shell is reported to be the equivalent of the 3rd biggest national defence budget on the African continent. 40% of this colossal sum is alleged to go to the Niger Delta. The scale of that investment and the fact that it is used to support a mix of both public and private security forces shows that you can't think about national security in Africa without taking into account the role of major multinationals.
- In countries emerging from conflict such as Côte d'Ivoire, the private sector is a source of employment for demobilised ex-combatants. Unfortunately, in the absence of proper vetting, we know that this can include former militias and child soldiers. But because of the lack of transparency and accountability in relation to security provision and management, what this means for the disarmament, demobilisation and reintegration process, for the individuals concerned or for those on the receiving end of such security services is unclear.
- In Liberia, following the overthrow of Charles Taylor, the United States took responsibility for supporting military reform – in particular the rebuilding of the Liberian national army. The implementation of this task, a first in Africa, was outsourced to a private contractor⁵. This posed a number of problems in practice. The reform model initially proposed for the army was not grounded in Liberian realities, values and priorities. The process was de-linked from parallel efforts to reform the national police so coherence across the security sector was an issue. And finally, the lines of accountability for this work ran between the contractor and the US Government. National ownership of security reforms was undermined by the failure to provide accountability to the nascent Liberian executive, parliament or civil society.

⁵ For more on this case see: A. Ebo., *The Challenges and Opportunities of Security Sector Reform in Post-Conflict Liberia*, «DCAF Occasional Paper n. 9», available at: www.dcaf.ch/publications.

What can be drawn from these different examples? On one level, there has been a burgeoning, albeit largely invisible, privatisation of security in West Africa. This has largely taken place in both a regulatory void but also with a *laissez-faire* approach in policy terms. Governments are unaware of the size, mandates, weapons holdings or ownership structures of private security companies. At the same time, little attention is given to the human security implications of this phenomenon. Is this the private sector filling gaps in public security provision or is this actually marginalising the poor and vulnerable and displacing insecurity? On another level, these examples highlight the need to better understand the kinds of instruments and approaches that are most appropriate to different tasks. Of course, the point of departure is whether the capacities we employ are effective in and of themselves. But when this forms part of international support to reconstruction efforts in complex environments, the imperative to build local capacities and reinforce (rather than undermine) national authorities becomes at least as important.

Conclusion

PMSC regulation is an important contemporary issue of international concern. But the added value of different initiatives in this field can be much more than the sum of its parts. Significantly, what is emerging across different initiatives and stakeholder groups is the outline of a layered approach to PMSC regulation in practice:

- ICoC membership and compliance is becoming a stipulated requirement in contracts for security services;
- The development of national standards is one way to deliver on international obligations under the ICoC;
- Clear synergies are apparent across different initiatives. For example, insistence on compliance with the ICoC by States in their dealings with PMSCs can demonstrate fulfilment of a good practice obligation under the Montreux Document.

Influential international actors such as the Organisation for Economic Cooperation and Development and the World Bank continue to highlight the need for smart partnerships between public and private sectors. Developments in PMSC regulation are important exactly because here is a concrete case of States, companies and civil society working together in practice. Maintaining this kind of cooperation as these initiatives are implemented is both a challenge but also a major opportunity to promote security, development and the rule of law.

Concluding remarks

Fausto Pocar

President, International Institute of Humanitarian Law, Sanremo

Once again this annual Round Table has gathered eminent experts and its various panels have proven to be a success. Clearly, our discussions have revealed a number of open-ended issues that need to be addressed but I am confident that they will form an invaluable basis for further research and debate at all levels.

I would thus first like to thank all the distinguished speakers coming from different backgrounds – academics, experts in International Humanitarian Law, international Criminal Law and Human Rights Law, practitioners and representatives of armed forces, international organizations, NGOs as well as representatives of PMSCs - for their extraordinary insights and engaging presentations. I would also like to warmly thank all the participants for their invaluable input to the panel debates and for their pro-active attendance to this important event. Once more, the International Institute of Humanitarian Law of Sanremo has proved to be an excellent platform for dialogue and I trust that all of you have appreciated the high-quality of the discussions held in these past days.

One of the key points that emerged from the discussions we have had in the course of these last two days and half is certainly the utmost necessity of compliance with International Law, and in particular with IHL, by PMSCs and their employees.

Arguably, the current legal framework applicable to private contractors represents an important achievement and constitutes a fundamental step towards a comprehensive regulation of the phenomenon of PMSCs – let me recall the instruments that we have discussed in depth these days, namely: the Montreux Document, the International Code of Conduct, the UN Draft of a Possible Convention on Private Military and Security Companies, the ANSI/ISO Standards, the Voluntary Principles on Security and Human Rights and Corporate Policies of Contracting Private Security, and finally the Maritime Security Standards. These important developments, indeed, reflect a common need, that is, whatever the responsibility attached to such private companies may be, it is first and foremost necessary that these actors comply with International Law and in particular with International Humanitarian Law, when such companies are involved in situations of armed conflicts and other situations of armed violence.

How can that primary objective be effectively implemented? During these past days, our prominent speakers have illustrated the variety of mechanisms existing today. As we have seen, a number of monitoring and certification mechanisms and standards have been recently adopted or are

currently under examination. Clearly, it still remains to be seen whether these procedures will be effective. As correctly underlined by a number of speakers, the lack of a common monitoring and certification mechanism for private companies is actually still a reality and thus further efforts are needed. In other words, while the variety of solutions proposed so far constitutes precious attempts to provide solutions to different problems, a certain degree of uniformity in this field is desirable and necessary. A common understanding of the specific requirements private companies shall satisfy in order to operate in full compliance with the applicable legal framework would be extremely useful. This would result in a clear improvement of the legal regime both for the private companies themselves and the operators dealing with the activities of these actors. Furthermore, while I would certainly welcome the various self-regulation initiatives of private companies, it seems essential that independent monitoring/certification mechanisms are also established.

In order to implement what I just mentioned, different activities have to be carried out. One of these is certainly training.

In fact, a more comprehensive approach to training – ensuring that PMSCs personnel are appropriately made aware of their legal obligations under International Humanitarian Law or other relevant international norms, and that the responsibility that the standards are met lies on both sides, States and the industry – is actually already required by all the regulatory attempts we have discussed these days.

The main question is thus: how can we make such training a reality? To be sure, a number of questions are still open and deserve further consideration.

- Firstly, we all need to further discuss which might be the appropriate form and content of an effective training for and by PMSCs. As we have seen in the course of our discussions, specific training programmes appear to be necessary, especially designed according to the diversity of the activities carried out by private contractors.
- Secondly, we do need to ask ourselves what kind of criteria of certification these training activities would provide for PMSCs.
- Thirdly, particular attention should be paid to the question of what would the role of States, international organizations, NGOs or qualified training institutions be in this respect.
- Fourthly, we need to foresee and develop feasible programmes capable of offering such training support in practice.

Clearly, we – and when I say “we” I include everybody, experts of International Law, training experts coming from armed forces, practitioners, NGOs, officials from international organizations, academics, shall all use our capacities to work in that direction.

As stated by some distinguished colleagues here, I particularly welcome the idea of launching a new platform for dialogue in this respect. A constructive debate on how we can implement all the above-mentioned suggestions is indeed of utmost importance at this stage. Furthermore, allow me to say that the International Institute of Humanitarian Law, taking into account its long experience as an independent and high-level centre of research and training, would certainly look forward to playing a role in this regard.

I apologise for not having included many specific aspects debated during this Round Table in these concluding remarks, yet I am confident that the wealth of debates has been well captured by means of our rapporteurs' excellent work. As is tradition the Institute will be publishing the contributions and outcomes of the Round Table. We are looking forward to this. Let me thank you all once more: the ICRC for having organized with us this important event, the Municipality and the Casino of Sanremo for having, once again, hosted the annual round table, the speakers, participants, interpreters and colleagues.

Concluding remarks

Philip Spoerri

Director for International Law Cooperation, International Committee of the Red Cross, Geneva – Member, IIHL

Once again, the annual Sanremo Round Table has shed light on a number of important issues arising from today's armed conflicts and on the challenges they pose for International Humanitarian Law (IHL) and other bodies of International Law. One of these issues is clearly the role played by private military and security companies (PMSCs). The ICRC is therefore very glad to have co-organized this event.

Let me start by thanking all the speakers for the quality of their presentations and all the participants for their valuable contributions, which has enabled us to have a lively and meaningful debate. I would of course also like to thank the Institute for its continued commitment to the promotion of IHL and for hosting this unique event.

During the presentation I gave on the Montreux Document at our first working session, I pointed out, along with other speakers, that PMSCs were not a new phenomenon. From the *condottieri* of the Italian Renaissance through to the privateers of colonial empires and up to contemporary military and security companies, private contractors have been present in the theatre of hostilities throughout history. However, the nature and scale of the PMSC industry have evolved tremendously over the past decade and a half.

Today's private contractors operate on a scale that is unprecedented in contemporary armed conflict. The range of tasks they perform is broad and some of their activities bring them close to military operations (training, maintenance of weapons systems, intelligence gathering) and to the battlefield itself. Although these activities probably represent only a fraction of what they do, the mere presence of numerous PMSCs in conflict zones has implications that require careful analysis and regulation.

Whatever the services these companies offer, a number of facts need to be established when it comes to the application of IHL. What is the status of private contractors? What services do they provide? For whom are they working?

All things considered, however, the ICRC is still comfortable with the "PMSC" terminology used in the Montreux Document, which was drafted with a view to encompassing all possible tasks carried out by private contractors, be they military or security contractors.

With the rise of the PMSC industry about a decade ago, in particular in Iraq and Afghanistan, ICRC field delegates started to encounter armed

individuals acting outside military chains of command and working for private companies. This led the organization not only to engage with these individuals but also to join efforts with others in addressing the problem from a humanitarian perspective.

In 2006, when the Swiss government and the ICRC started the initiative that led to the adoption of the Montreux Document, the misconception that PMSCs were acting in a legal void was still widespread among the media and the general public. Up to then, no international document existed that specifically addressed the activities of PMSCs.

Today, 42 States and the European Union have signed the Montreux Document.

My personal conviction is that, four years after the adoption of the Montreux Document, this is actually a good result, all the more so when one considers the number of initiatives – as described during the Round Table – Montreux has sparked in other forums.

The Montreux Document has been a vector for the development of other initiatives such as the International Code of Conduct for Private Security Service Providers. Other standards and policies developed by States or by the industry itself have also built on the Montreux Document and make reference to it. The progress achieved in developing such standards and the extent to which it is now possible to discuss practical measures aimed at implementing the principles and good practices set forth in the Montreux Document are quite interesting.

Feedback received from international organizations such as the United Nations, NATO and the EU is interesting and encouraging. Again, the Montreux Document has been instrumental in this respect. It has also inspired organizations such as the IMO to explore the possibility of drafting a document addressing the issue of piracy and maritime security within the framework of the law of the sea.

One can also look at what has been called the other leg of the chair, that is to say the work undertaken within the United Nations Human Rights Council and the project of developing an international convention to regulate the activities of PMSCs. This process is certainly complementary to the Montreux initiative. There are, in fact, many different angles from which the issue of PMSCs can be approached, and none of these should be overlooked.

The advances made since we first became involved in the Swiss initiative that led to the adoption of the Montreux Document are significant: four years on, it is clear that Montreux has been a driving force behind efforts to regulate the activities of PMSCs.

Another point I would like to make is that various IHL-related questions that have been raised during our Round Table discussions have been left unanswered. We noted many grey areas, in particular during the session

that was devoted to the status of private contractors, their use of force and their involvement in detention activities. We also acknowledge that further thought must be given to key issues relating to the implementation of IHL. The ICRC will certainly continue to reflect on these issues.

Training was also seen as a major factor in ensuring respect for IHL and Human Rights Law and in promoting implementation of the rules, principles and standards set forth in the Montreux Document and related codes of conduct. Such initiatives would remain dead letters if they were not translated into good practices. The ICRC will therefore continue to explore with its delegations in the field where and how it can contribute to these efforts and encourage initiatives in this regard.

In conclusion, the activities of PMSCs in armed conflict raise important issues and humanitarian concerns. This Round Table has provided a welcomed opportunity to discuss many of them, but has also raised numerous questions that have yet to be answered. I hope that the discussion begun here in Sanremo will not end with the conclusion of our meeting but will instead prompt further reflection and exchanges. I can assure you that the ICRC will continue to take an active part in this process.

Concluding remarks

Valentin Zellweger

Director, Directorate of International Law, Federal Department of Foreign Affairs, Bern

The discussions during this Round Table have revealed a number of overarching themes. I cannot attempt to summarize all of them, but I would like to highlight four aspects which appeared to be recurring.

Firstly, only very few activities cannot be contracted out as a matter of law, more specifically of International Humanitarian Law. An often quoted example is the supervision of prisoner-of-war camps and of places of internment in international armed conflicts. However, States may – or perhaps even should – consider limiting further the services which can be outsourced to private military and security companies (PMSCs). From different participants we heard that direct participation in hostilities, combat operations or other operations of a military nature should not be contracted out. It is argued that these are inherently State functions which need to be performed by armies or police, consistent with the principle of the State monopoly on the legitimate use of force. Regardless of the difference of views on this point, it is not disputed that the responsibility for such acts cannot be outsourced. In addition, a prohibition of outsourcing of certain core activities of States would also reduce the risk of blurring the principle of distinction between civilians and combatants.

Secondly, different layers of regulations are necessary to address different aspects. They also need to be mutually reinforcing (the picture of a Rubik's cube was used during the conference). International regulations – be they binding or non-binding – have to be complemented by national legislations or policies. The Montreux Document spells out existing obligations of States as well as good practices under International Law, but these rules need to be translated into national law or policies. We have heard about different approaches and experiences from a variety of countries, but a lot still needs to be done to complement and further refine existing rules at the national level. In particular, Home States may increasingly wish to regulate not only the activities performed by PMSCs on their own territory, but also abroad.

Self-regulation of the industry is an additional – and complementary – layer of regulation. Effective implementation of the International Code of Conduct for Private Security Service Providers (ICoC) by the industry is therefore an important part of the regulatory framework. Signing the Code is only the first step in the process leading to full compliance. Once in

place, a multi-stakeholder mechanism should aim to ensure effective oversight of the services performed by private security companies.

If all clients of private security service providers require in their contracts that all services be performed in accordance with the Code, this 'soft law' instrument will progressively become mandatory. One could go one step further: not only Contracting States, but also Home States and Territorial States may require by law that all PMSCs headquartered or active on their territory sign up to the Code. Such rules would further strengthen the movement towards the universal and mandatory regulation of the activities of PMSCs.

The draft law, which will be debated by the Swiss Parliament next year, may provide an interesting example of such an ambitious approach, as it requires all PMSCs based in Switzerland to subscribe to the ICoC.

A third recurring theme was that of jurisdiction and accountability. States have to establish jurisdiction and take all other measures that may be necessary to enable them to effectively investigate and prosecute private military and security companies for possible violations of International Humanitarian and Human Rights Law. Such laws would not only allow States to guarantee accountability for violations, but also to provide for effective remedies for victims. Clearly, inter-State cooperation to overcome jurisdictional boundaries and enhanced mutual legal assistance regulations, including procedures for extradition, will be crucial.

A fourth topic that was mentioned several times was the challenge of effectively controlling compliance on the ground. The verification and monitoring of activities of PMSCs outside the reach of the Home or the Contracting State may prove to be very difficult in practice. Nevertheless, all stakeholders will have to work hard to find more convincing solutions to this problem if we are to maintain the credibility of the whole system. In this regard, a lot of hope rests in the oversight mechanism of the ICoC that is to be established.

The Montreux Document will celebrate its fifth anniversary next year. This will provide us with an opportunity to continue the discussion on many of the issues debated during this Round Table and to bring them one step further. The Swiss Government therefore intends to organize – in cooperation with the ICRC – a "Montreux+5" Conference in December 2013.

The conference will focus on the challenges faced, the progress made, and the methodologies used by States and international organizations in implementing their international legal obligations related to the operations of PMSCs. But apart from analyzing the first five years of Montreux, the conference should also look ahead: what needs to be done to widen the circle of States (and international organizations) supporting the Montreux Document and to further its implementation. In fact, the conference could assist us in identifying the most adequate legislative or policy tools to help

States and international organizations implement their international obligations. We intend to invite not only the Montreux States, but also other interested countries and stakeholders.

During this Round Table, several speakers invited the Swiss Government – together with the ICRC – to continue its work on PMSCs. That is – as I have just mentioned – our firm intention. We invite States, international organizations, the industry and all other stakeholders to join us in this endeavour and to continue our common work on this important issue in the future.

Acronyms

AI	Artificial Intelligence
API	Additional Protocol I to the 1949 Geneva Conventions
ASAT	Anti-satellite
ATM	Automated Teller Machine
CCCPA	Cairo Regional Center for Training on Conflict Resolution and Peacekeeping in Africa
CCW	Convention on Prohibition or Restriction on the Use of Certain Conventional Weapons
CCWC	Prohibition or Restriction on the Use of Certain Conventional Weapons Convention
CD	Conference on Disarmament
CDMA	Cyber Defense Management Authority
CIA	Central Intelligence Agency
CICR	Comité International de la Croix-Rouge
CNA	Computer Network Attacks
CNE	Computer Network Exploitation
CNO	Computer Network Operations
CNAD	Conference on National Armament Directorate
DARPA	Defense Advanced Research Projects Agency
DCDC	Development, Concepts and Doctrine Centre
DCI	Defense Capabilities Initiative
DMZ	De-militarized zones
DNA	Deoxyribonucleic acid (gene)

DoD	Department of Defense
ETAP	European Technology Acquisition Programme
EU	European Union
EU/LOI	European Union/Letter of Intent
G8	Group of Eight
GMLRS	Guided Multiple Launch Rocket System
GPS	Global Positioning Systems
HQ	Headquarters
HTV-2	Hypersonic Test Vehicle 2
HUMINT	Human Intelligence
IAF	Israeli Air Force
ICBM	Intercontinental Ballistic Missile
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICT4Peace	Information and Communication Technology for Peace
IDF	Israel Defense Force
IDP	Internally Displaced Person
IHL	International Institute of Humanitarian Law
IMPACT	International Multilateral Partnership Against Cyber Threats
IOM	International Organization for Migration
ISAF	International Security Assistance Force
ISR	Intelligence, Surveillance and Reconnaissance
IT	Information Technology
ITU	International Telecommunication Union
JAG	Judge Advocate General
JOC	Joint Operations Command
JOCs	Joint Operational Command Centers

LED	Light-Emitting Diode
LEO	Lower Earth Orbit
LOAC	Law of Armed Conflict
LOI-ETAP	Letter of Intent-European Technology Acquisition Programme
LTBT	Limited Test Ban Treaty
LTTE	Liberation Tigers of Tamil Eelam
MAD	Mutual Assured Destruction
MLRS	Multiple Launch Rocket System
MOD	Ministry of Defence
NAD	National Armaments Directorate
NATO	North Atlantic Treaty Organization
NATO RTO	North Atlantic Treaty Organization's Research Technology Organisation
NDPP	NATO Defence Planning Process
NEO	Network Enabled Operations
NGO	Non-Governmental Organisation
NLCs	Non-Lethal Capabilities
NLWs	Non-Lethal Weapons
OCCAR	Organisation Conjointe de Coopération en matière d'Armement
OIM	Organisation internationale pour les migrations
PAROS	Prevention of an Arms Race in Outer Space
PMSC	Private Military Security Company
R&D	Research and Development
R2P	Responsibility to Protect
RMA	Revolution in Military Affairs
ROE	Rules of Engagement
SCUD	Short-range nuclear capable missile

SLA	Sri Lankan Armed Forces
START	Strategic Arms Reduction Treaty
TV	Television
UA	Unmanned Aircraft
UAV	Unmanned Aerial Vehicle
UCAV	Unmanned Combat Aerial Vehicle
UCV	Unmanned Combat Vehicle
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environment Programme
UNHCR	United Nations High Commissioner for Refugees
UNITAR	United Nations Institute for Training and Research
UNOSAT	United Nations Operations Satellite Applications Programme
UNSMIL	United Nations Support Mission in Libya
US	United States
USA	United States of America
USAF	United States Air Force
USMA	United States Military Academy
WW I	World War I
WW II	World War II

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NORTH ATLANTIC TREATY ORGANIZATION
QATAR RED CRESCENT
REGIONE LIGURIA

Private Military and Security Companies

Private Military and Security Companies have been operating for several years now in different situations of local or regional insecurity, also in support of international peacekeeping operations, and have even been directly or indirectly involved in armed conflicts. The involvement of private actors in armed conflict is not at all a new phenomenon. The presence of private contractors on the theatre of hostilities has historically been a fact of life. However, during the last decade the involvement of PMSCs in armed conflicts evolved tremendously in scale and function thus increasing their impact on the humanitarian domain.

The book includes the contributions submitted by international experts, scholars and practitioners to the XXXV Round Table on current issues of International Humanitarian Law. They tackle a number of crucial questions concerning International Humanitarian Law and Private Military and Security Companies, inter alia, the status, rights and obligations of PMSCs, their clients and employees, and the regime of responsibility under International Law.

The **International Institute of Humanitarian Law** is an independent, non-profit humanitarian organization founded in 1970. Its headquarters are situated in Villa Ormond, Sanremo (Italy). Its main objective is the promotion and dissemination of International Humanitarian Law, human rights, refugee law and migration law. Thanks to its longstanding experience and its internationally acknowledged academic standards, the International Institute of Humanitarian Law is considered to be a centre of excellence and has developed close co-operation with the most important international organizations.