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THE INCREASING ROLE OF PRIVATE MILITARY AND SECURITY COMPANIES

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Executive Summary

In recent years, private military companies (PMCs) and private security companies (PSCs) have been increasingly employed by large and active military nations for tasks both at home and abroad: generally as a cost-cutting measure, but also to eke out overstretched state resources. A wide range of services are involved, up to and including combat support and post-conflict training and reconstruction. The industry is highly transnational and is rapidly growing in value.

Both ‘strong’ and ‘weaker’ governments can have problems in getting the right private services at the right time and price, and enforcing quality control. However, there is widespread concern about possible abuses by PMC/PSC personnel and the difficulty of bringing them to justice. In reality, many provisions of international humanitarian, human rights, armaments-related, and criminal law do apply to PMC/PSC personnel, and/or to their employers. The challenge lies in obtaining evidence, identifying the precise status and responsibility of individuals concerned, and getting action taken in a responsible jurisdiction.

Added difficulties arise for democratic oversight by parliaments (and NGOs) so long as little directly tailored legislation on PMCs/PSCs has been adopted, either at national or international level, and governments have not defined their executive duties of supervision.

In principle, any corporate actor whose actions affect security can be handled by measures of prohibition, regulation, *ad hoc* executive control, self- and ‘soft’ regulation. In the case of PMCs/PSCs, few states have attempted direct legislation, and none with convincing effects. A Swiss- and ICRC-sponsored international dialogue has yet to reach conclusions and the UN is hampered by operating in the context of ineffective earlier measures on ‘mercenaries’. Lately, business associations in the UK and US have seized the initiative in pushing ideas for oversight and quality control.

The EU might wish to address the issue, either because of concern over possible abuses by PMCs/PSCs operating out of EU territory, or in view of the potential efficiency of this device for common defence and security aims - or both.

This points to two routes for possible EU action. While the defence sector as such is exempt from Treaty rules, several EU measures in ‘restraint’ mode already apply to the export of various specialized private services. More explicit and comprehensive controls could be created by building on these, or by a separate CFSP Common Position. In terms of standards and efficiency, elements of an EU *acquis* already exist regarding the operation of PSCs within EU territory. Further standards and ‘best practice’ for the use of PMCs/PSCs, including for military operational tasks, could be developed, notably in the framework of ESDP and/or by the European Defence Agency. The EU could also seek to inspire and support action by other states and institutional groupings.

The European Parliament could contribute by promoting more debate and study (in partnership also with NGOs), calling for specific legislative measures or other policy decisions in the EU framework, and pressing especially for the inclusion of proper elements of democratic oversight. It can also engage with other players and in potentially useful fora for international action, from the UN downwards.

The Increasing Role of Private Military and Security Companies

1. Introduction and Definitions

1.1 A growing phenomenon

The provision of military services for commercial reward has dominated the European defence scene at some previous stages in history - notably from late medieval times to the seventeenth century. In modern times, however, the accepted model has been for the national authorities to maintain standing armed forces in state employment, either through a conscription system or by individual recruitment under contract. The new, still continuing surge in the employment of private military companies (PMCs) and private security companies (PSCs) (*see definitions in para. 1.4 below*) is an essentially post-Cold War phenomenon in the Western world. In developing countries, where the state may be lacking in capacity to provide security on its territory, such corporate entities have been significant actors throughout.¹

The growing use of PMCs/PSCs by Western, and other, 'strong' states can be attributed to a combination of four main factors:

- the general trend towards neo-liberal models of 'small government', favouring the outsourcing of a range of government functions;
- more overseas military activity in the form both of international peace missions, and actions of 'extended self-defence' (as the US would characterize its campaigns in Afghanistan and Iraq, for example);
- limits on the official funds available for defence, and often also on the manpower available for direct state use in peacetime;
- a general trend in defence planning to move away from large (often conscript) armies with multiple or undifferentiated skills and towards smaller forces focussed upon 'core' military duties - including the special skills needed for overseas operations.

Other international actors also make use of PMCs/PSCs when they have to operate in high-risk locations but want to reduce their own risk exposure (at tolerable cost). One example is the employment of private guards by UN or other institutional representatives who visit or work in violence-ridden environments. Another widespread phenomenon is the resort to private security services by commercial companies who have outposts and extraction/production operations in high-risk countries. Even internationally active NGOs have been known to use private provision for certain, non-combat, services and support functions². As discussed further below, the private companies for their part have responded to

¹ For more details on the difference between 'strong' and 'weak' state patterns of PMC/PSC use, and on many of the matters discussed in this paper, see Holmqvist, C., 'Private Security Companies: The Case for Regulation', SIPRI Policy Paper no. 9 of January 2005, available as a pdf at <http://www.sipri.org>.

² Vaux, T. et al, *Humanitarian Action and Private Security Companies: Opening the Debate* (International Alert, London, Mar. 2002: URL <http://www.international-alert.org/publications.htm>; Press: Oxford, July 2007, pp. 345-373); Spearin, C., *Humanitarian Non-Governmental Organizations and International Private Security Companies: The "Humanitarian" Challenges of Moulding a Marketplace*, DCAF Policy Paper 16, July 2007, text at <http://www.dcaf.ch>.

this rising demand by moving into – and actively creating – new market niches, which include the field of intelligence gathering but also the offer of reconstructive, training and reforming, and humanitarian services.

This phenomenon is often alternatively referred to as part of an ongoing '*privatization*' of security and defence³. The expression draws a useful link with the dynamics of privatization in the civil sphere, which now extends to such security-related fields as prison management, transport of dangerous goods, emergency medical provision or security inspectorates. However, in the military and defence sphere the notion of '*privatization*' is not always a good fit and should be used with care. Strictly speaking, '*privatization*' happens when the national government transfers an asset to - or allows a function to be performed by – private commercial actors: assets and functions that were previously the reserve of the state.

The main alienation of property in the defence field began some time ago when many Western countries moved towards ending or much reducing state ownership of the defence production industry (and sometimes even of defence research). What is drawing attention and concern now is the growing private provision of *active services* in the sphere of defence and security: and in many cases, 'strong' governments are not alienating these functions completely or on a permanent basis. 'Outsourcing' would often be a more precise description for such transactions.

There is, moreover, an important difference between the 'strong' or 'efficient' states - whose use of PSCs is largely one of deliberate choice – and the 'weaker' states on whose territory PSCs generally operate. With regard to the latter, '*privatization*' with its connotation of a *conscious* divestment of governmental power may be an even more misleading term. The presence of international PSCs generally indicates that the security needs of local populations or external actors are not being met by the formal state authorities in the first place, which in turn creates space for international PSCs to 'fill the gap'.

1.2 Roles and responsibilities

As things now stand, the private military and security industry provides a wide range of services, with varying degrees of proximity to the military frontline. Such services include, but are not limited to, the following:

- functions that are no longer seen as 'core' military ones and/or do not require military skills - for example, laundry, food supply, general medical care or giving driving lessons;
- non-combat services in the rear echelon or actual field of operation, such as maintenance of key weapons systems, re-fuelling and vehicle maintenance/repair, delivery of supplies and other logistical and communications support;
- operational support in combat;
- armed protection of persons and places; and
- advice to and training of local forces, often in the context of donor-sponsored security sector reform (SSR) programmes.

³ See for example Wulf, H., '*Internationalizing and Privatizing War and Peace*' (Palgrave Macmillan: Basingstoke, 2005).

In structural terms, the sector is commonly described as consisting of PMCs and PSCs. Both can be defined as private, profit-making companies that carry out tasks traditionally associated with the state security sector and especially with the military, para-military, and intelligence agencies. Both are employed by governments, companies, and individuals at home as well as abroad, including in the rapidly growing 'homeland security' sector.

The precise distinction between PMCs and PSCs is an area of some difficulty, however. In principle, the term PMC is associated with companies carrying out services in close proximity with the military frontline, up to and including engagement in combat. The term PSC is generally used to describe services taking place at a greater distance from the frontline and/or in civilian settings, sometimes but not always involving the carrying of arms. However, it is not unusual for both kinds of services to be offered by the same private companies, especially the larger ones; and lines are being further blurred as companies who used to trade only in defence equipment and technology, or had a purely 'civilian' profile, extend their services into the PMC/PSC part of the spectrum. This is part of a wider phenomenon of re-drawing industrial boundaries, especially in the US, where some of the most profitable defence enterprises have sought to keep their competitive edge by diversifying, not just into services but into IT applications and 'homeland security' functions that might normally be viewed as civilian⁴.

The private military/security industry is genuinely global; both the structure of companies and their mode of operation are transnational. At present, most companies operating internationally are based in 'strong' states such as the US, UK, France and Israel, but they are also found in the former Soviet zone and various developing countries. (The export of military and security services from China is reportedly growing quickly, for instance in Sudan, where Chinese PSCs are accompanying and protecting Chinese oil firms.) A further transnational level is added by the fact that while companies are based in one country and operate in various others, they often employ staff from a range of third countries. This has significant impact on the problems of answerability and regulation (explored below).

In overall economic terms, there can be no question that the private defence and security sector is growing rapidly. Several years of intense study and debate on the issue of how to identify and quantify international PMC/PSC activities have, however, failed to reach conclusive results. The most widely quoted estimate of the industry's size and scope was made by Peter Singer at the Washington-based Brookings Institution in 2004⁵, when he gauged the total annual revenue of the global industry (based on the collection of contracts) to be somewhere in the region of US\$100bn. This figure has often been disputed - including

⁴ Examples of large defence firms buying up service companies are the acquisitions (in the USA) of Military Professional Resources Incorporated, Vinnell Corporation, and DynCorp by L-3 Communications, Northrop Grumman and Computer Sciences Corporation respectively. In 2005, 7 of the 100 largest-selling defence companies in the world were ones that heavily specialized in 'homeland security' products and services (Sköns, E. and Surry, E.A., 'Arms production' in *SIPRI Yearbook 2007: Armaments, Disarmament and International Security*, Oxford University Press: Oxford, July 2007, pp. 345-373). For further references on defence industry development and services see Dunne, P and Surry, E.A., 'Arms production' in the equivalent SIPRI Yearbook for 2006, pp. 415-416.

⁵ Singer, P., 'Corporate Warriors: The Rise of the Privatized Military Industry' (Cornell University Press: Ithaca, N.Y., 2003).

by the industry itself - but the dearth of quantitative analysis has meant that no other estimate has been as widely referred to⁶. Until there is international agreement of some kind about what constitutes a 'security' or 'military' service, the question of the industry's precise magnitude will remain unanswered. Less contentious is Singer's estimate that companies operating internationally are 'in their hundreds', and there are estimates available on the number of companies operating in individual countries.

It is no accident that public attention has focussed on the scale of PMC/PSC activities in Afghanistan and Iraq since the invasions of those countries by US-led coalitions. These are classic cases where a group of intervening 'strong states' have set themselves high ambitions in terms of controlling/transforming large, dysfunctional developing states, but are able or willing to invest only limited official resources for a finite time. The US in particular has resorted freely to the use of (its own and other) private companies, in accord with (now former) Defense Secretary Donald Rumsfeld's concept of using a minimum of actual combat troops for highly focussed professional duties⁷.

Estimates of the numbers of staff in Iraq and Afghanistan are unreliable; in 2004 it was estimated that there were over 20,000 individuals working for international PSCs in Iraq, including Iraqis⁸, but this number has definitely increased since. The US Government Accountability Office reported in 2006 that 60,000 privately contracted personnel were working with US forces (alone) in South-west Asia. These figures also imply an unprecedented increase in the *ratio* of privately contracted to regular, state-employed personnel deployed under US command.

Despite this current focus on US-led operations, it is important not to overlook the fact that the use of PMCs/PSCs is also growing steadily - if on a modest scale and usually in less controversial circumstances - in the practice of several EU member states, such as the UK and France, or in Denmark and Finland for 'peacetime' support. Moreover - and as more briefly mentioned above - international organizations have found it necessary to turn to private providers in more limited and time-specific contexts, even in cases where (as with the UN and the EU itself) they generally take strong normative stands on war, peace and the use of force. Examples are the use made by the EU of British PSCs for close protection of officials in Iraq, and the logistical support provided to the UN mission in Darfur by US-based PSCs. Overall, it is clear that this resort to private provision is a trend that has still to reach its apogee, and its implications for defence governance will also continue to grow and ramify for a good while yet.

⁶ The OECD estimated the annual turnover of the private security sector at \$100-120 billion in its publication 'The Security Economy' (OECD: Paris, 2004) but it is not clear how far its definition of 'security' companies is separate from or overlaps with Singer's estimates.

⁷ US Congressman Henry Waxman claimed in Feb. 2007 that the use of private security personnel for Iraqi reconstruction purposes alone had cost the Administration \$4 billion since 2003: 110th Congress of the United States, House of Representatives, Committee on Oversight and Government Reform (COGR), 7 Feb. 2007, details at the webpage 'Iraqi Reconstruction: Reliance on Private Military Contractors' of the COGR website, URL <http://oversight.house.gov/story.asp?ID=1165>.

⁸ David Isenberg, 'A fistful of contractors', BASIC Report Sept. 2004, <http://www.basicint.org>.

2. Issues and Challenges

The issues raised by the increasing use of PSCs relate mainly to accountability (legal and contractual), legitimacy, and quality and impact – also implying questions about the long-term sustainability of a security policy that relies on such actors. This section will first discuss the distinct challenges of:

- (i) adequacy and availability;
- (ii) cost-effectiveness and financial probity; and
- (iii) problems in applying the usual laws, norms and standards of state-led defence activity.

The problems of democratic oversight and control, including the role of representative institutions, are considered separately later in this section.

2.1 Distinct challenges

2.1.1 Adequacy and availability

As regards *adequacy and availability*, private security/defence service provision follows the laws of the market like any other commercial activity. It will expand if demand is clearly expanding, as now, but cannot always precisely anticipate states' needs when they themselves often decide on operations at short notice. Some assets, such as large-scale commercial sea-lift, are in notoriously short supply. No government can thus be sure of buying or hiring the private assets it needs at the precise time of need, whereas if it maintains the assets permanently itself it can at least count on using them at any time.

A subsidiary problem is that certain services have very few providers, making it harder for a government to 'play the market' to get exactly what it wants at a fair price (see also next point). Once hired, moreover, private providers are not compelled to complete the job by any sworn duty or direct subordination to the state. If they find conditions too risky and their profit margins no longer adequate, they may pull out at any time under penalty - at worst - of paying for the breach of contract. This creates especial uncertainty for the contracting authorities if conditions vary significantly in the course of a mission; something that seems more the rule than the exception these days.

In weaker states the decision on who to work for, and for how long, can give private companies considerable control over events in otherwise very insecure environments. *Vis-à-vis* stronger employers, skilful PMCs/PSCs may still be able to 'force' the pattern of their own employment (and override governments' own initial preferences) to a degree by highlighting apparently attractive new variants of their services, such as humanitarian aid delivery and participation in defence reduction and reform programmes.

2.1.2 Cost-effectiveness and financial probity

Cost-effectiveness and financial probity might seem a paradoxical concern when resource calculations are normally what drive strong states to resort to private partners in the first place. Over the medium to long term, the temporary hire of assets that remain in private possession meanwhile must almost invariably cost a government less than owning the same assets itself. However, in the frame of a specific operation or peace-building effort, private

service providers by no means always cost less head-for-head than state employees, and using them for less-skilled services and for goods supply can be many times dearer than, say, hiring local personnel and buying local goods⁹. This is partly because PMCs/PSCs share the general disadvantages of ‘incomers’ to an unfamiliar environment, and because their employees expect high standards. But there are also documented cases of over-charging, especially where governments have had to hire companies in haste from what is in some ways an immature and imperfect market. For example, the Halliburton subsidiary Kellogg Brown and Root (KBR) was alleged to have overcharged the US government for the provision of oil and services in Iraq¹⁰.

Such conditions also facilitate covert financial abuse by companies, especially where the original contract was insufficiently specific and/or where ‘mission creep’ takes place under changing requirements. The use of ‘infinite-delivery, infinite-quantity’ (IDIQ) contracts is an added hazard in this context: for instance KBR worked under a very broad IDIQ contract in the Balkans from 1995-2004 and DynCorp was awarded an IDIQ in 2003 for training and equipping a new Iraqi army¹¹.

A related issue is the lure of private sector employment for members of the regular armed forces. Both US and British ‘special forces’ have found it necessary to create educational and financial incentives to prevent an exodus of personnel to PSCs¹². In Iraq and Afghanistan, while the recruitment of staff to local police and military forces has lagged, large numbers of appropriately qualified locals are working for international PMCs/PSCs (for instance, the British company Erinys has thousands of Iraqi employees). Similarly, military and civilian mission leaders are frustrated not to be able to hire good local interpreters, drivers, et cetera because PMCs/PSCs are offering the same people better wages.

2.1.3 Laws, norms and standards

The relevance and applicability of existing *laws, norms and standards* is a complex issue that can be handled only summarily here. The basic problem is clear: namely that there is some concrete evidence, and a much more sweeping popular assumption¹³, of PMC/PSC employees committing a wide range of offences against local populations in the course of their work. Actual and anecdotal cases can include reckless killing and wounding (outside the normal right of self-defence), sex crimes, and economic crimes such as gun-running, bribery

⁹ In July 2004 the US Army Central Command calculated that buying food for its Iraq forces direct from Kuwait would have saved up to \$31 m. per year compared with using the company Kellogg Brown and Root. A hearing of the US Congress Committee on Oversight and Government Reform in Feb. 2007 was told that the costs of Blackwater private security employees, themselves paid US\$500 per day, were billed to the contractor at \$1,100-1,500 per day implying an annual cost per head of \$400-540,000 compared with an Army Sergeant’s pay of \$51-69,000. 110th Congress of the United States, House of Representatives, Committee on Oversight and Government Reform, 7 Feb. 2007, as note 8 above.

¹⁰ ‘Bush warns of ‘oil overcharge’ firm’, BBC News Online, 13 Dec. 2003, URL <<http://news.bbc.co.uk/1/hi/business/3312015.stm>>.

¹¹ On mission creep and IDIQs see Homlqvist, C. (as note 1), pp 25-6 and 30.31.

¹² R. Mullen, ‘Special ops retention a problem, witness says’, *Defence Today*, 21 Apr. 2004.

¹³ This is fed by recollections of much-advertised abuses committed by ‘mercenaries’ in some of the developing-country conflicts of the earlier post-Cold War period, notably in the Congo. Modern PMCs/PSCs seek to disassociate themselves from this record and it is fair to say that few if any of the same individuals could be active in the sector as defined today (at least in its ‘strong state’ incarnation).

and extortion, and involvement in other smuggling including ‘conflict commodities’ like illegally traded diamonds.

Relatively well documented examples from recent years are the alleged involvement of DynCorp in prostitution rings in Bosnia-Herzegovina in the mid-1990s; the alleged shootings at civilians by employees of Aegis in Iraq in 2006 (on which the company conducted an internal enquiry but did not release the results); and the involvement of private employees from the CACI International and Titan companies in alleged abuses in Abu Ghraib prison which are still under examination in the US¹⁴.

It is true that national armed forces and even some personnel on international peacekeeping missions have been charged with similar offences in the past. Nevertheless, special concern about the behaviour of PMC/PSC personnel is justified by two main factors: the persistent lack of transparency over their origins and manner of recruitment, their qualifications (training etc.) and their disciplinary and legal status; and the greater difficulty - for this and other reasons - of tracking their behaviour and exposing and punishing misconduct.

The frequently made claim that private contractors operate in a ‘legal vacuum’, thus enjoying a kind of structural impunity, is an oversimplification, however. While PMCs/PSCs as entities are not addressed in public international law, their employees may have responsibilities as individuals, as may the states that contract PMCs/PSCs. The main categories of such legal instruments are listed below.

These may seem wide-ranging, but two key problems of coverage and application can be highlighted at the outset. First, the law as it stands is widely regarded as patchy and incomplete. For international humanitarian law (IHL) to address the activities of PMCs/PSCs explicitly and comprehensively, additions to existing treaties would most likely be required. Second, there is the problem of enforcement. The monitoring and enforcement systems associated with existing international law were not designed for use with corporate entities, and little has been done at any level to ‘capture’ the activities of the latter more effectively. (This point will be taken further in section 3 below.)

International humanitarian law, also referred to as the ‘law of armed conflict’, includes several conventions and treaties, most importantly the 1949 Geneva Conventions and relevant Additional Protocols thereto and the 1980 Convention prohibiting or restricting the use of ‘Certain Conventional Weapons’ (inhumane weapons, such as booby-traps, anti-personnel mines, incendiary weapons etc.). Although companies (as entities) do not have a status under IHL, IHL applies both to the individual staff of PSCs and to states that hire them in all situations of ‘armed conflict’ (as defined in IHL case law such as the Tadic Case and the Geneva Conventions). If IHL is violated in these circumstances, individual PMC/PSC staff have a legal responsibility, including criminal responsibility where applicable, as do the states that hired them. IHL also places obligations on the states in which the companies are incorporated, and those where they operate.

¹⁴ At least two privately employed personnel were found to be involved in these abuses but even the US authorities themselves had trouble tracking who had employed them: see Holmqvist, C., (as note 1), pp.27-8.

The key challenge here is how to ensure that effective proceedings are brought against the responsible party, and this has typically been very hard *inter alia* because of a lack of established practice, lack of transparency, and problems in gathering evidence¹⁵. Added difficulties arise when deliberate steps are taken to block the normal application of relevant laws: thus, the Coalition Provisional Authority (CPA) in Iraq determined in 2004 that international PSCs/PMCs would be exempt from Iraqi national laws under CPA Order 17.

If a state wished to go to the other extreme to ensure a clear legal status - including the normal protection of the Geneva Convention for uniformed combatants - and clear legal answerability for its PMC/PSC employees, it could of course temporarily incorporate them into its armed forces. But this is unlikely to be practical except for limited numbers of personnel directly supporting deployed troops and it would, of course, negate many of the advantages of outsourcing work to PMCs/PSCs in the first place¹⁶.

Secondly, states (and only states) have obligations under the internationally recognized Human Rights Law, and these obligations apply to the same extent if the state has outsourced activities to the private sector, or if human rights violations are committed by a third party (e.g. a PSC) on the state's territory and the state fails to take any action to correct the situation for the affected individual/s. Again the key issues involve the detection and documentation of the offences, and then to secure action in a relevant jurisdiction.

States may also have relevant obligations within the framework of global or regional organizations that limit - if not the supply of defence and security services as such - some practical corollaries of PMC/PSC activities, such as the export, transfer and servicing of military (and dual-use) equipment or the transfer of strategically sensitive technologies. This is the main area in which existing EU jurisprudence already applies to the potential activities of EU-based PMCs and PSCs, as will be fully explained in section 4 below¹⁷.

Finally, international criminal law applies to employees of PSCs as it does to all other individuals, making, for example, the use of torture a criminal offence. The abuses allegedly committed by the two US companies CACI International and Titan Incorporated working at the Abu Ghraib prison in Iraq would fall into this category.

The 1989 UN International Convention Against the Recruitment, Use, Financing and Training of Mercenaries and the 1977 Organisation of African Unity (OAU, now African Union) Convention for the Elimination of Mercenarism are sometimes cited in the critical literature on PSCs, but have little or no relevance to present-day companies and their

¹⁵ For a comprehensive and authoritative treatment of the relevance of IHL to employees of PSCs and states hiring them, see chapter by Emmanuela-Chiara Gillard (Legal advisor to the ICRC) in (eds.) Chesterman, S. and Lehnardt, C., *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (forthcoming, 2007).

¹⁶ A further variant would be for a government to issue IDs to PMC/PSC personnel as 'civilians accompanying the armed forces'. But this legal option is only recognized in the case of *international* conflicts which are more the exception than the rule nowadays.

¹⁷ For an excellent introduction to this aspect see Krahmman, E., 'Regulating military and security services in the European Union' in (eds.) Caparini, M. and Bryden, A., *Private Actors and Security Governance* (Berlin: Lit Verlag and the Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2006).

employees. The Conventions both rely on the definition of ‘mercenary’ found in the 1977 Additional Protocol 1 to the 1949 Geneva Conventions, which is widely acknowledged to be excessively restrictive (for example, the criteria require it to be established that the individual’s motivation is financial, that he/she is not part of the armed forces, and that he/she takes a direct part in hostilities - which is extremely hard to prove in many real-life cases). In practice, these two conventions have not provided a way to call PSC employees to account, even when, as in the case of Executive Outcomes in Sierra Leone and Angola in the mid-1990s, companies have actually been hired to play direct combat roles (fighting against rebel forces on behalf of government forces).

Beyond the basic question of conformity with international legal obligations of individuals and states, another major challenge is that of specifying the *quality standards* for the work the private providers are to perform, the means of monitoring and enforcing those standards, and the commercial penalties should they not be attained. In principle, a ‘strong’ state as employer should be able to look after these matters for itself, but in practice – especially when under time pressure - even the largest governments have often been insufficiently precise in initial contracts, and done too little to enforce compliance.

Hands-on surveillance becomes even harder when PMCs/PSCS are either employed after the departure of the official troops or in a quite separate context and location, for instance, to carry on a longer-term local programme of demobilization, force reconstruction and training. An example would be the contract awarded to DynCorp by the US State Department in 2004 to recruit and train the new Liberian armed forces, a role that DynCorp took on largely outside the framework of the UN peacebuilding operation there. Even leaving aside the issues of probity and efficiency, private advisers and trainers working in such ‘constructive’ modes can never have the depth of experience and authority associated with corresponding state employees. Moreover, by definition, their work cannot produce the kind of lasting understanding and partnership between the ‘providing’ and the ‘receiving’ government that has marked the best cases of military assistance and state- or institution-led SSR in the past.

2.2 Challenges for democratic control and oversight

In a state-led system of defence and security, the correct choice and conduct of operations, correct application of resources, and general and individual behaviour of the troops are all matters that can and do come under the scrutiny of official and non-official institutions acting as ‘checks and balances’. Even if national parliaments tend to have fewer direct rights of enquiry and control in the defence sphere than elsewhere, they can and do exercise rights - varying from country to country - of general budgetary control, prior debate on and approval of new operations in peacetime, subsequent debate and judgement on the rationale and conduct of military actions, and the highlighting and condemnation of specific abuses¹⁸. The European Parliament can play at least some of these roles in regard to collective actions taken under the European Security and Defence Policy (ESDP) (more on this below), while NATO

¹⁸ On parliamentary oversight see the publications of DCAF at <http://www.dcaf.ch>, notably Born, H., Fluri, P. and Johnsson, A., *Parliamentary Oversight of the Security Sector – Principles, Mechanisms and Practices* (a DCAF Handbook), and Born, H and Haenggi, H., *Governing the use of force under international auspices: deficits in parliamentary accountability*, SIPRI Yearbook 2005: Armament, Disarmament and International Security, pp. 199-222 (OUP: Oxford, 2005).

and the Organization for Security and Cooperation in Europe (OSCE) have their own parliamentary assemblies, albeit with far fewer powers.

The United Nations (UN) is somewhat of an ‘odd institution out’ in not having a comparable parliamentary arm. And although the General Assembly might, in principle, seek to play a role of oversight and judgement on UN-led peacekeeping operations (PKOs), its members have complained of finding this very hard to do in practice even when they are among the nations contributing forces to the given action. This lack of detailed answerability may, among other things, explain how the UN has been able to develop a quite widespread practice of employing PSCs for its own needs without ever opening this up to debate or even declaring a general policy on the issue (more on this below).

Parliamentary oversight and control of defence operations is backed up, at least in democratic countries, by a number of non-governmental organizations (NGOs) and other civil security actors who take a special interest in the legitimacy and ethics of defence work in general, or in specific aspects such as inhumane weaponry, nuclear weapons, or abuses of human rights (including the plight of women and children). These organizations, and the written international codes and obligations in the relevant fields of governance which they use as their points of reference (or seek to expand and strengthen), were created and designed initially to keep watch on governments and, where relevant, inter-governmental organizations.

To the authors’ knowledge, no NGO or civil society movement has yet appeared that dedicates itself primarily and in a parallel way to the challenge of PMCs/PSCs. There has indeed, been considerable non-governmental study and advocacy work over related abuses, but it has generally come from NGOs and groups having a wider remit or has been expressed through the investigative media and other general channels of public opinion. Initially, such civil society critics have tended to address themselves to *governments* with the call not to use PMCs/PSCs or at least, to regulate them better. Thus, the broadly focussed NGOs Saferworld and International Alert have both carried out specific and extensive programmes on PSC issues, including lobbying the UK Government in 2002 when it published a ‘Green Paper’ on PMCs/PSCs¹⁹. Saferworld also drew up the ‘Sarajevo Principles’ for *self*-regulation of PSCs active in South-eastern Europe. Human Rights Watch, in a report on Liberia in 2004, not only offered recommendations to the governments of Liberia, aid donors and the UN, but added a section directed to DynCorp regarding its contract to train the armed forces.

What *leverage* NGOs may be able to apply over PMCs/PSCs themselves in such cases is another question. The kind of appeals for consumer boycotts that have been effective in many other ethically sensitive fields are unlikely to affect the companies’ less scrupulous employers, and would need to be somewhat re-thought to reach the most sensitive spots of more scrupulous ones. As the larger companies active in the field start to become somewhat more transparent in their corporate practices, it may be worth considering whether a new route for civil society pressure could be opened up by targeting their shareholders.

¹⁹ British Foreign and Commonwealth Office (FCO), *Private Military Companies: Options for Regulation*, HC 577 (HM Stationery Office: London, Feb. 2002), URL <<http://www.fco.gov.uk/Files/KFile/mercenaries,0.pdf>>.

The difficulties facing national and institutional parliaments in regard to oversight and control of PMCs/PSCs are an amalgam of those facing governments and civil society. The first is lack of information and the general - often deliberate - opacity of the whole sector. The owners, corporate structures, interlocking partnerships and financial flows of PMCs/PSCs have for most of recent history been extremely hard to identify. The small size and shifting forms of many companies in the past helped them to avoid the normal disciplines of cooperative governance for publicly registered enterprises. This part of the problem is lessening somewhat as larger companies (and companies having such services as only part of their profile) emerge on the market and are prepared to expose themselves to greater scrutiny - sometimes even seeking public exposure in order to defend their image (see below, on 'self-regulation'). However, the growing public and parliamentary concern about PMC/PSC abuses could have the contrary effect of driving smaller and less reputable companies further into obscurity, encouraging them to base themselves in the most chaotic locations, and so forth.

Overall, the picture of PMC/PSC activities accessible to a normal parliament is likely to be dominated by the best-reported cases of abuse (including misuse of funds), making it extremely difficult to gain the more complete perspective that would be desirable for planning any remedial measures. This problem is of course aggravated when parliaments have no, or inadequate, research and fact-finding capacity under their own control.

The largest single set of problems for parliamentary oversight arises from the absence, already mentioned, of *clear laws and codes* governing the operation of PMCs/PSCs and their employees, either at international or national level. Parliaments can of course lobby for such laws to be introduced, or extended to PMCs/PSCs - and this will recur as a proposition in sections 4-5 below. But so long as no legal enactments exist, parliaments cannot exercise their strongest traditional functions of 'oversight' and 'control' such as debating and negotiating legislative texts, voting any finance required, monitoring implementation, deliberating over accession to international legal instruments, and (where appropriate) exploring and monitoring the national execution of international obligations.

To the extent that an international entity like the EU does not legislate, or (as in this case) has only specialized and disaggregated provisions touching on some parts of the issue, an institution like the European Parliament faces similar limitations. Finally, insofar as national governments have not generally tried to extend other forms of *executive/administrative control* over these companies, parliaments do not have a clear basis for calling the government authorities to account for this part of the exercise of their duties.

As regards the companies themselves; in the absence of specific laws and rules tailored to the security and human rights impact of their operations, parliaments stand in the same relationship to them as they do to commercial enterprises in general - which is rarely if ever one of direct oversight and case-by-case enquiry. Many of the regulatory and normative issues that do lead parliaments to scrutinize company business, such as state subsidies and competition rules, state shareholding, industrial relations, insider trading and bribery, simply do not seem to arise (even if they theoretically could) in relation to PMCs and PSCs.

The one important exception that has been opened up recently, as already noted, is the considerable effort deployed by the US Congress to investigate the US authorities' employment of private contractors in Iraq, where the 'peg' for scrutiny was provided by the large amount of public finance devoted (and seen to have been devoted) to their operations. Few openings for such parliamentary intervention have arisen elsewhere either because the country employing PMCs/PSCs did so on a relatively small (and/or undisclosed) scale, or because the employers were in 'weak' states where properly constituted parliaments may not exist at all, let alone have adequate powers of scrutiny and control.

This points to another difficulty that PMCs/PSCs share with much of the business world in a globalized environment; namely that the countries where they are registered or physically based are not always those making most use of their services, and their most questionable activities occur in the most remote and chaotic locations. In other spheres of potential corporate abuse, such as financial corruption or the sex industry, nations have sought to tackle similar problems by some combination of globally enacted - legally or politically binding - standards, and national legislation that is designed to have an extra-territorial application to national citizens and nationally-based companies. Within the EU, however, Sweden is the only state that has legislated to give itself control - primarily by means of licensing - over all 'training with a military purpose' carried out by companies registered under its jurisdiction²⁰.

3. The Range of Governance Solutions

PMCs and PSCs are far from being the only form in which the modern corporate sector impacts on the sphere of defence and security. The largely privatized nature of defence industry production, and production for 'homeland security', has already been noted; and new more interactive forms of private-public partnership continue to emerge in the 'hardware' field as governments strive to reduce their costs and liabilities (e.g. equipment leasing or buy-back, new forms of multilateral procurement and mixed ownership). Even in the specific context of armed conflict, companies other than PMCs and PSCs can have major roles to play for good or ill. There is a large literature on the problems of 'conflict diamonds', and on the way that the foreign installations of (especially) raw material extractive companies can aggravate local violence through complicity with warlords or oppressive governments²¹.

On the other side, private finance and commerce is often crucial for post-conflict reconstruction and normalization, and - when it helps promote healthy growth and better distribution of its benefit - it may even help to avert potential conflicts in the first place. There is growing interest at the moment in ways of better integrating the whole economic dimension into the peace-building strategies of international organizations, including the EU itself.

²⁰ This provision is included in the Swedish legislation implementing the Council Joint Action 2000/401/CFSP of 22 June 2000 'concerning the control of technical assistance related to certain military end-uses' (Official Journal L25 (30.6.2000)); for the original text see <http://www.sipri.org/contents/expcon/krigmlag.html>. For more on this and other EU Joint Actions see section 4 below.

²¹ See e.g. the chapter by Adejumobi, S., and the chapters on business and conflict in Part III of *Business and Security: public-private sector relationships in a new security environment*, (OUP: Oxford, 2004).

Across this whole field of private sector engagement, four main tools exist to construct a clear, equitable and effective system of regulation and to clarify legal answerability:

(i) Prohibition of private sector engagement in a given activity, or of the employment of private actors by state authorities in the same field;

(ii) International and/or national *regulation* falling short of prohibition, which may for instance define the legitimate scope of application of private means and agents, set out norms and standards for the professional actions involved and for the general corporate governance and transparency of corporate entities providing them (including where necessary standards for individual employees), and make clear where violations and abuses in all these respects can be brought to account and judged;

(iii) *Ad hoc* and case-by-case controls: these can include the detailed actions taken by governments to apply general regulations (for instance, individual licensing decisions) but also secondary legislation such as safety regulations, or administrative codes on matters such as information flows and protocols for government-business contact in various types of *ad hoc* emergency. As already argued above, it is vital in this context for governments also to understand and fully exploit the means of *ad hoc* control proper to the private sector, above all the precise design and strict enforcement of contracts. Making the existing rules of corporate governance - including new rules to be developed e.g. in the climate and energy context - bite harder on private companies in the defence and security sector could be an important area to explore;

(iv) Various forms of ‘*soft*’ *regulation* and *self-regulation* within the private sector: As a result of the growing media coverage, as well as policy and academic interest in the role of PMCs/PSCs, some measures have been attempted in the interest of furthering insight into and control over the industry’s operations. They include attempts at regulation, both from the ‘supply side’ (i.e. from the point of origin of the companies) and the ‘demand side’ (i.e. the locations where they operate, when different).

The following sections outline some of the main recent initiatives relevant to any future EU/EP action, with a focus on the ‘supply side’, since this is the main area of responsibility for ‘stronger’ states including the Europeans. Measures within this range can be aimed either at regulating *actors* (i.e. companies clearly specializing in this work, and their employees), or *activities* i.e. the export and delivery of relevant services by private entities of any kind. In practice, all these approaches need to be combined for effective coverage.

A few states have attempted controls at the *national* level, aimed at establishing guidelines and safeguards for these states’ own contracting of PMCs/PSCs and/or for the export of such services from their territory/jurisdiction. The US and the UK are generally agreed to be amongst the most important exporters of private security services in the world at the moment, while South Africa has a legacy of private military and security service activity: steps taken by these three governments are summarized below.

The UK, as mentioned above, published a Green Paper in 2002 that outlined six options for national government regulation: a ban on military activity abroad; a ban on military recruitment abroad; a licensing regime for military services; registration and notification; a general licence for PMC/PSCs; and self-regulation²². However, despite lengthy deliberation (including much interest amongst Members of Parliament), the Green Paper has not been followed by a White Paper opening the way for relevant legislation, and the UK Government has not so far taken any other formal steps on the issue. A self-regulatory body has been established by a group of PMCs/PSCs, based in the UK (see below), but the Government has not so far seen fit to grant it any formal (e.g. consultative) status; thus, as things stand, the UK has no formal regulatory control over British companies either acting on contract for the government or providing services to other parties abroad.

The US has gone the furthest in establishing national control over companies based on its territory. The US regulatory system contains many different elements and cannot be covered comprehensively here²³. A fundamental element is the International Trafficking in Arms Regulation (ITAR), which establishes a licensing system that in theory should control the export of services in the same way as the export of arms. There are numerous problems with the ITAR system, however: it is often described as idiosyncratic, with a lack of clarity over how the Administration obeys its own rules in practice, and in particular the grounds on which licences are approved for contract. It includes some provisions for oversight by Congress, but this is limited to contracts worth more than \$50m²⁴. Recently, the US Military Extraterritorial Jurisdiction Act (MEJA) and Uniform Code of Military Justice (UCMJ) have been extended to cover offences by employees of government-contracted PMCs in contingency operations (as well as war), and by Pentagon-contracted private companies, respectively, but their fields of application are limited and the practicality of enforcement doubtful. Overall, the lack of transparency in the US regulatory system is often an obstacle in itself to the independent - or even official - monitoring of licensed activities.

South Africa has taken the most radical approach with its 1998 Foreign Military Assistance Act (FMAA), and new draft legislation that was passed by its parliament in 2006 (but not yet signed into law) under the title of the Prohibition of Mercenary Activity and Prohibition and Regulation of Certain Activities in an Area of Armed Conflict Bill. The FMAA set the tone of the South African approach, which is that of a virtual ban on all PMC/PSC activity abroad. In practice, the FMAA proved largely ineffectual, however, and the new Bill was intended to provide clarification and close loopholes in existing legislation: but instead it has become widely seen as unrealistically harsh. The main criticism is that as a result of trying to cover as wide a range of services as possible, the Bill - if enacted - would effectively prohibit South African firms and NGOs from carrying out *any* tasks, including humanitarian assistance or de-mining, in a deemed 'conflict zone' without the express permission of the South African

²² FCO, *Private Military Companies: Options for Regulation*, op. cit., pp. 22-27.

²³ For a comprehensive treatment of the US regulatory mechanisms, see the chapter by Marina Caparini in (eds.) Chesterman and Lehnardt (as note 16 above, forthcoming, 2007); and on ITAR in general, Schroeder, M and Stohl, R., *US export controls* in SIPRI Yearbook 2005 (as note 19 above).

²⁴ See Percy, S. *Regulating the Private Security Industry*, Adelphi Paper no. 384 (International Institute for Strategic Studies (IISS): London, 2006), pp. 25-30.

Government²⁵. The UK Government has also been reported to fear that the Bill could obstruct recruitment of South African citizens by other regular armed forces.

As is clear from the US, UK and South African attempts, obstacles to effective national regulation are both substantial and political. Regulatory measures tend to be aimed at extremes, producing all-or-nothing approaches as in the South African case; while political factors include one branch of government trying to gain ground at the expense of another in terms of leverage over the industry. It is also clear that for states to regulate their own use of PSCs and the export of services to other clients, very precise service-level definitions are needed of the specific tasks to be regulated or banned. Only on this basis can general company standards be defined, notably for recruitment, vetting and training of personnel, and can control through licensing work in a precise and transparent way. Thus far, most states have been reluctant to take even such initial steps towards the regulation of services for export, not least (as the UK Green Paper admits) for fear of placing their own industries at a comparative disadvantage internationally.

One significant effort has been made recently for *inter-state* dialogue on regulating the international private military/security industry, under the joint stewardship of the Swiss Government and the International Committee of the Red Cross (ICRC)²⁶. Aside from promoting dialogue in its own right, the main ambition of this initiative is to reaffirm and clarify the obligations of states and individuals under existing international law (IHL and Human Rights Law). It seeks also to promote dialogue on further regulation, and to study and develop good practices and other regulatory models. Two inter-governmental meetings of selected state representatives were held in January and November 2006, with a conscious effort to draw in those states with a special stake in the issue: the main exporters of private security services (states of incorporation), states that have frequently been host to international PMC/PSC activity, and states whose citizens have often been employed abroad by international PMCs/PSCs. While the Swiss-ICRC Initiative has gradually expanded the number of states involved, it has not yet led to any concrete agreement. The initiative is set to continue, most likely with another meeting at the end of 2007.

The Swiss-ICRC initiative is notable for having also sought from the outset to involve the international private security industry itself, represented by directors of the US and UK industry associations respectively (see below). The initiative has also been given added authority by the involvement of the ICRC. The ICRC has publicly engaged with the issue of PMC/PSCs since 2004, after finding itself increasingly often encountering companies in the field: its position is based on affirming its commitment to safeguard the respect for IHL by all parties in situations of armed conflict, for example through the dissemination of information about individual rights and obligations under this law. The ICRC is engaged in dialogue with PMC/PSCs on a regular basis; for instance PSC staff have been employed to guard prisoner of war camps in Iraq, where the ICRC has needed to ensure access in order to document

²⁵ For more detail, see Taljaard, R., 'Implementing South Africa's Regulation of Foreign Military Assistance Act' in (eds.) Caparini, M. and Bryden, A., *Private Actors and Security Governance* (Berlin: Lit Verlag and the Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2006).

²⁶ For details about the Initiative, see URL <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/psechi.html>.

conditions. As with all the ICRC's operational dialogues, its engagement with PMC/PSCs is on a confidential basis.

With regard to international *institutions* that may claim insight into and oversight of the international private military/security industry, the UN clearly holds first place. The UN's engagement with the issue has, however, been severely hampered by its attachment to the aforementioned 1989 UN Convention on mercenaries, which has until recently dominated the organization's official engagement with the issue.

The UN appointed a Special Rapporteur on Mercenaries reporting to the Commission on Human Rights in 1987, a function that remained in place until 2005. In 2005 the Special Rapporteur position was abolished and replaced by a Working Group made up of five regional independent experts, to stand for a period of three years. The Working Group was given an extended mandate to report not only on mercenary activity but also on the activities of PMC/PSCs. Since then, the Working Group has stated its ambition to 'elaborate concrete proposals and advisory opinions on standards'²⁷.

Meanwhile, the PMC/PSC sector has created its own voluntary business associations in the US and UK. These two national organizations serve as interesting, but rather different, examples of how self-regulation on the part of the industry may develop, with implications for the handling of the issue both at regional and international level²⁸. Companies' motives for such initiatives are of course not purely altruistic but include an interest in driving 'rogue' competitors out of the market and, perhaps, moving towards some kind of professional recognition or 'certification' that could give them and their employees concrete privileges²⁹.

In the UK case, the lack of governmental action has meant that the British Association of Private Security Companies (BAPSC), established in January 2006, has become the lead protagonist in national debates. It includes most leading UK companies in the field. The BAPSC Charter obligates its members to meet standards set for joining and continuing membership of the Association³⁰. At its first annual conference in November 2006, the BAPSC called for the appointment by the Government of an independent 'Ombudsman' to verify the Association's own role and to ensure that appropriate investigative work was done. As already noted, however, so far the UK Government has declined to take any action in response, and it seems likely that the BAPSC will continue developing its own initiatives to fill the void created by the lack of official measures.

²⁷ For more detail and reports submitted by the Working Group, see URL <<http://www.ohchr.org/english/issues/mercenaries/index.htm>>. For more discussion of the UN's record of debate on this issue, see Ghébal, 'The United Nations and the dilemma of outsourcing peacekeeping operations', in (eds.) Caparini and Bryden, 2006 (op. cit.).

²⁸ A European Association of PSCs is planned for launch at end-2007, to include EU Member States, Norway and Switzerland. It will cover companies working overseas to avoid duplication with the existing confederation of internal security service companies (para 4.4 below). Contact point is abearpark@yahoo.com.uk.

²⁹ Clearer legal regulation would also make the application of civil law easier: in a current US case, the families of four Blackwater employees killed in Iraq in 2004 are having great trouble in bringing home a suit for compensation due to confusion over the contractual background.

³⁰ For further detail, see URL <<http://www.bapsc.org.uk>>.

The US-based industry association, the International Peace Operations Association (IPOA), has a different role given that the US Government *does* have some regulation in place, and consequently has not had to develop the same kind of informal norm-setting role. Although the IPOA has elaborated some standards for its members (including a ‘code of conduct’) its functions remain more those of an advocacy body for the industry. Moreover, there are some notable absences of leading US-based companies in its list of members³¹.

If this range of solutions is compared with the range of PMC/PSC-related challenges discussed in section 2 above, it will be noted that most of them tend to focus on the challenge of avoiding and, where necessary, punishing *abuses* by PMCs/PSCs (and by those who hire them, or serve in them). Only the self-regulatory bodies, like BAPSC and IPOA, have a second implied agenda of developing *good performance* in the more positive sense of ensuring they offer a competitive range of appropriate services; reasonable pricing and cost-effectiveness; good contract discipline, and so forth.

It is hard to avoid the conclusion that this part of the problem is above all the responsibility of the ‘demand-side’, i.e. the governments and institutions which choose to employ such private services. For the most part, the appropriate remedies will also be *executive, ad hoc* ones that draw on the disciplines of the private market sector, as well as those applying to the responsible use of public finance. The crucial importance of drawing up good, tight contracts that include a clear definition of tasks, monitoring arrangements, and specific penalties for under-performance or cost over-runs has already been stressed. Before even that point is reached, governments individually and jointly could do more to ensure that their private-sector agents are chosen on the basis of past performance both bad and good (the equivalent of a ‘black list’ and ‘white list’), including experiences of the economic cost-benefit balance of employing them.

A kind of ‘reverse cartel’ arrangement among developed-country governments to avoid driving up prices by over-paying for private services would also be very desirable, although maybe not realistic. Practical arrangements for monitoring and feedback during the PMCs/PSCs’ execution of their duties ought to be easier to devise: and special attention could be given to those cases where PMCs/PSCs are ‘left behind’ without direct employer supervision, notably for training and reconstruction tasks. A procedure that checks the ‘customer satisfaction’ of the local state or other constituencies intended to benefit from this indirect foreign assistance is an obvious prerequisite in such conditions.

Finally, it should be recalled that the correct use and disciplining of PMCs/PSCs forms just one part of a complex and constantly ramifying strategic interface with the private sector. Governments’ actions elsewhere in this field may affect, for example, the demand from the private sector itself for PMC/PSC assistance, or the relative profitability of PMC/PSC activity compared with direct arms production and export. The private sector itself has some right to expect that the rules laid down, and executive choices made, by any given government or international organization regarding the sector’s different security-related functions - many of which might be combined within a single large corporation - are not actually contradictory, and not so Byzantine as to make it impossible for law-abiding companies to do their job and make a profit.

³¹ For further detail, see URL <<http://www.ipoaonline.org>>.

4. An Issue for Europe

The case can be made for the EU to take an active role - and even a lead - in regulating PMCs/PSCs, from the point of view both of those who oppose and those who accept the use of such companies.

If the emphasis is placed on the evils that may flow from using PMCs/PSCs, and especially from the deficit in legal answerability, then Europe, as a region where many of them are based and used, has a responsibility to do what it can to remedy the problem. The EU's concern to help 'weak' states in crisis, who tend to suffer the worst effects of 'privatizing' security, points the same way.

Conversely, if it is conceded that outsourcing services from PMCs/PSCs can - under proper control - be a helpful element in modern defence management, easing constraints especially on deployable resources and manpower, the EU's common defence ambitions would point towards seeking a common understanding on the pros and cons of this device and best practice for applying it. The case is clearest in relation to ESDP operations, where troop contributing states may or may not wish to take private personnel on contract with them. But, in any case, all contributors will have to operate in an environment marked by other players' use of such companies.

The work of the European Defence Agency (EDA) would arguably provide another context to address the place of PMCs/PSCs in planning both for official force profiles and the desirable evolution of the private defence sector³².

Finally, if the EU's own organs have found it necessary to hire private personnel (i.e. guards) for some of their own activities as noted above, this should not happen in the absence of a clearly defined policy including 'no go areas'.

So long the EU does not take action on these matters, it cannot be assumed that some other Europe-based institution will answer for them vis-à-vis the UN and elsewhere. After checking with responsible officials, SIPRI has found no indication that the idea of adopting rules/policies on PMCs/PSCs has been raised officially in the OSCE, even if the phenomenon has been referred to in some OSCE meetings. NATO uses PSC services in at least one case - for protection at the al-Rustamiya base on the outskirts of Baghdad - and probably elsewhere, but has held only one official meeting to discuss related practice with results that have not been disclosed.

An additional point for the European Parliament to consider is that demand is mounting from NGOs, civil society representatives and think-tanks for the EU to take a hand in this issue³³.

³² In its Long Term Vision document of October 2006 ('Initial Long-Term Vision Report for European Defence Capability and Capacity', text at <http://www.eda.europa.eu/genericitem.aspx?area=Organisation&id=146>) the EDA has recognized the need for EU armaments planning to take account of international-legal constraints and normative considerations in other dimensions. The EDA has not so far, however, commented officially on the PMCs/PSCs issue.

³³ For the academic discussion see notably Krahnemann, E., 'Regulating Private Military Companies: What Role for the EU?', *Contemporary Security Policy*, vol.26, no.1 (2005); and the issue is reviewed on pp. 55-57 of Holmqvist, C., op. cit.

The last five years have seen several informal hearings and seminars on the Parliament's own premises, and a seminar addressing the challenges of regulation was held by the Security and Defence Agenda think-tank in April 2007³⁴. It is fair to say that most independent commentators are concerned - sometimes intensely - with the darker side of private companies' activities. However, interest has also been shown by European professional associations whose members are engaged in private security work or who could be deployed on EU missions where PMCs/PSCs are present, and who would naturally like to see a clearer EU 'line' on the implications.

4.1 The Status Quo

The framework for considering EU action is set by two dividing lines: (a) between production/activity with a clear defence (military) character and security-related production/activity of a more 'civilian' nature; and (b) between the exchange of services within the Single Market and their export to state or non-state customers abroad.

On (a): as is well known, the application of EU Treaty rules to production, public procurement and trade for military purposes is curtailed by Article 296 of the Treaty. There are no EU instruments governing the exchange of (military) defence services among member states, any more than on the exchange of armaments. The European Court of Justice has, however, ruled that the EU has competence within the 'first pillar' to regulate the provision of private *security* services used within the Single Market, notably for corporate security and in support of domestic policing³⁵. There is in fact extensive regulation of such activity at national level³⁶, involving registration and licensing for all relevant companies, minimum standards for personnel selection and training, regulation of the use of firearms, and so on.

It does not appear that any regulation has yet been tabled creating a single set of EU standards for this sector but the European Parliament has supported this idea in the past and so have the Confederation of European Security Services (CoESS) and the trade union federation Uni-Europa³⁷. Insofar as the existing, and any future, regulations succeed in improving companies' governance and standards; this should also logically improve their conduct abroad.

As regards distinction (b), between intra-EU trade and export, the EU has been led by both strategic, and humanitarian consideration to adopt several measures in the Common Foreign and Security Policy (CFSP) framework that ban or limit *specific* services which EU-based

³⁴ 'Security Sector Reform: Public-Private Priorities' (16 April 2007), report available at <http://www.securitydefenceagenda.org/Publications/tabid/336/Default.aspx>. This event was co-sponsored by the Geneva-based Centre for Democratic Control of Armed Forces (DCAF), which has worked for some time on the relationship between PMCs/PSCs and Security Sector Reform, and has directed its attention more closely to the EU's relevant policies as the latter moves towards adopting its own SSR concept. See Fluri, P. and Spence, D., 'The European Union and Security Sector Reform', (Harper's, Forthcoming in 2007).

³⁵ Court of Justice of the EU, Case Law, Rulings C-114/97 (vs. Spain), C-355/98 (vs. Belgium), C-283/99 (vs. Italy) and C-189/03 (vs. Netherlands).

³⁶ See the CoESS website <http://www.coess.org> which includes a survey of national regulations at <http://www.coess.org/studies.htm>, and the CoESS/Uni Europa voluntary 'Code of Conduct and Ethics for the Private Security Sector'.

³⁷ This section and much of para. 4.4.1 are based on Krahnemann, E., 'Regulating Military and Security services in the European Union', op. cit., Footnote 17.

PMCs/PSCs might provide outside the Single Market, and specific items they might wish to use or transfer for the purpose. The main examples are (with authors' italics):³⁸

(*explicitly covering services*)

- EU Council Joint Action 2100/401 of 22 June 2000 committing member states to control the provision of *technical services* [official or private] related to items 'which are or may be intended for use in connection with *weapons of mass destruction* or missiles for the delivery of such weapons';
- EU Council Regulation 1334/2000 requiring control and licensing of the export of '*dual-use*' goods, which includes the provision of technical assistance, consulting services etc. (N.B. however that 'dual-use' currently applies to items with a possible *military* as well as a civilian application, not to those exported for police or other 'security' purposes);
- EU Council Regulation 1236/2005 banning the export of certain goods that 'could be used for *capital punishment, torture* or other cruel, inhuman or degrading treatment', and requiring licensing for the export of certain other related goods *and technical assistance*;
- A number of *ad hoc* EU Council decisions imposing *embargoes* on the export of military equipment *and related technical assistance* to specific state or non-state destinations: the definition of 'technical assistance' used here is broad and covers all types of military and security support services, official or private;

(*explicitly covering private arms transfers*)

- EU Council Common Position 2003/469/CFSP of June 2003 requiring member states to control *arms brokering* taking place from their territory, and also encouraging them 'to consider controlling brokering activities outside their territory carried out by brokers of their nationality resident or established in their territory';

(*constraining any export/transfer of certain goods and technologies*)

- the EU Code of Conduct on Armaments Exports adopted at Brussels on 5 June 1998 which (albeit in non-legally binding form) calls on member states to control the export of all *types of conventional military equipment* by means of licensing, in accord with seven general principles, and to exchange and publish information on their related decisions. Some EU member states, especially the newer ones, have included in their national implementing legislation the power to license equipment-related *services* such as equipment repair, maintenance and use;
- EU Council Joint Action 2002/589/CFSP covering various actions to curtail the transfer and spread of *small arms and light weapons*.
- It must be noted, however, that all these measures are equipment-related and thus apply first and foremost to the *external* activities of the EU-based *defence equipment* industry. They do not regulate - or oblige states to regulate - the export of military and security services in their own right, which is what the bulk of today's PMC/PSC activity is about.

In sum, the EU has claimed to regulate the provision of private security services within the Single Market but not their export; and has passed measures limiting what the private sector

³⁸ For a more detailed account of these and of related national legislation see Krahnemann, E., *Ibid.* On Regulation 1236/2005 (torture equipment) see Anthony, I. and Bauer, S., 'Transfer controls' in SIPRI Yearbook 2006: Armament, Disarmament and International Security (OUP: Oxford, 2006).

may do in certain (equipment-related) defence contexts abroad, but not at home. While many national and institutional considerations - of profit, principle, or priority - must have played a part in creating this picture, its logic in legal terms is best explained by the need to skirt around Article 296 of the Treaty. In theory, a case could be made that the Article does not explicitly extend to services as distinct from products, so that the Commission would be free to regulate the military as well as the security service industry directly. This would, however, surely be a non-starter, not just because of likely member states' reactions, but because of the increasing difficulty (as explained above) of disentangling the corporate structure of service provision in this field from the main defence production sector.

If this is acknowledged, it follows that the problem of regulating PMCs/PSCs - at least in the EU as such - is unlikely to be solved by any single instrument or in the style of a typical European 'sectoral' or 'commercial' policy. Nor would it be practical to roll back the history that caused the existing, specialized and incomplete controls to emerge in several different CFSP and first-pillar contexts.

The most constructive way forward could, therefore, be based on the dual logic of EU action as proposed above. There is a case for the EU to *restrain* unacceptable and damaging manifestations of PMC/PSC activity abroad; just as it has constrained certain exports and uses of defence equipment/technology without confronting the Treaty blockage on regulation of the industry as such. This path forward implies the possible extension of existing CFSP instruments or creation of new ones. There may also be a case for the EU to *promote the efficiency and efficient use* of PMCs/PSCs in at least certain contexts, at home as well as abroad. This path has two branches: action building on the existing jurisprudence concerning domestic security services, and action in the ESDP framework. Most likely, some combination of all these approaches - and perhaps others still - would give the best overall coverage that may be hoped for in the near to medium term. Each of them will be discussed here in a little more detail.

4.2 Paths for EU Action

Under the logic of *restraint*, previous EU measures in spheres such as arms control, export control and humanitarian law have sought the ever closer approximation of member states' practices not just in the service of common norms, but for the practical reason that the free movement of relevant goods in the Single Market would otherwise allow any loopholes of weak national practice to be exploited by determined exporters. The same reasoning applies to the work of PMCs/PSCs. Any EU member state creating tough national standards (as Sweden has already taken the power to regulate all exports of such services) could in principle find firms moving away from its territory in search of greater freedoms elsewhere. Conversely, a state that does not wish to lose the profits made by its PMCs/PSCs may be more willing to consider restraints if they are simultaneously imposed on all European potential competitors, thereby preserving a 'level playing field'.

These arguments would point to exploring the following options in the CFSP framework:

- a separate and specific EU Council Common Position requiring action by governments to implement generic rules and standards for the export of private military and security services outside the EU's territory, to both state and non-state end-users, on the model

mutatis mutandis of the Common Position on trafficking (and, like the latter, urging also the control of services offered by EU nationals or EU-registered companies from an external base);

- extension and adaptation as necessary of the Code of Conduct for conventional arms exports to explicitly cover the supply of such services to the type and range of destinations affected by that Code, which would imply equivalent modifications to national implementing legislation and licensing systems (the effect would of course be even stronger if the Code could be given a legally binding form, as already discussed at length among member states);
- the creation, as a component for either of these measures or as a free-standing enterprise, of an agreed list of the types of activity to be defined as ‘military and security services’ for the purposes of monitoring and regulation in the EU, national, or other contexts;
- an agreement to extend and tailor national case-by-case licensing arrangements to the export of private military and security services, as an adjunct to any of the measures above or possibly as an independent measure (N.B. that states might go further in standardizing such licensing procedures and decisions, and in general transparency between governments and their publics, in the case of PMCs/PSCs than for normal equipment exports);
- extension of specific and *ad hoc* EU embargoes on defence-related trade and cooperation to cover, explicitly, the export of (non-equipment related) private military and security services to the same destinations;
- *ad hoc* embargoes covering the activities of PMCs/PSCs only, for instance if the aim is to remove or reduce this specific element in a conflict situation rather than to stop official military and security cooperation with legitimate authorities in the conflict area;
- a ‘bench-marking’ type of measure concerning the efforts to be made by the governments of EU member states, within their respective jurisdictions, to make relevant IHL provisions ‘grip upon’ individuals employed by PMCs/PSCs - based in their territories and/or employed by their governments - when accused of the relevant abuses.

Turning to measures that would aim rather at *professionalizing the standards* of EU-based PMCs/PSCs and further *exploiting their potential*, the obvious starting point would be to complete the application of EU jurisprudence to private security services supplied within the Single Market by introducing a Regulation setting a single standard for the registration, licensing, personnel practices, and legal responsibility of such companies.

While this would already have useful ‘knock-on’ effects for the companies’ performance when operating abroad, the idea of going on to extend this type of first-pillar regulation also to the export and the delivery abroad of EU-based companies’ security services would need more careful reflection. Several problems of definition would arise, starting with how to distinguish a ‘security’ from a ‘military’ service in external environments (all the trickier, of course, when the same companies are now habitually delivering both). The carrying of weapons is not the key since it may be permitted for the guarding of (civilian) persons and valuables, commonly regarded as a ‘security’ service. Conversely, unarmed civilians may be employed to train or restructure armed forces abroad, as well as providing many direct support services for their own and foreign militaries.

Defining a ‘military’ service simply as one that is provided to a ‘military’ customer/end-user could lead to many contradictions because it would ignore the great differences in the nature, the legal environment, and the practical consequences of a given service delivery depending on whether it happens at home in peacetime or in a dangerous conflict situation abroad where ‘civilian’ customers and partners could be important agents of conflict in themselves. The very definition of a ‘military’ end-user may be difficult to agree upon in circumstances of civil conflict or general disorder dominated by non-state players.

In short, it would seem all too easy for anyone opposed to such regulation to argue that it would be almost impossible to draft without infringing the limits of the Article 296 exception, and/or straying into the territory of arms control and humanitarian constraints, that would be better handled through development of the CFSP *acquis*. It is worth considering, however, whether these problems could be made more manageable by framing a regulation initially to cover external delivery of one or two types of service that are relatively easy to define, such as private policing, bodyguard duties or the guarding of civilian installations.

The second variant of the ‘efficiency’ route would base itself on the presumed common European interest in efficiency and consistency in the execution of ESDP operations, as promoted *inter alia* by the EDA. The development of EU codes and standards for the governmental employment and application of private services could be considered along the lines of other decisions adopted in the ESDP framework for interoperability, effectiveness, transparency and general good practice. Such action could be imagined in three different directions:

- standardized rules or codes for government use of PMC/PSC services on EU member states’ own territory, e.g. for provision of specialized military and civilian services to national forces in peacetime, or for the regulation of PMC/PSC activities (notably training) that may be provided within EU states’ territory but for outside customers. A further option here would be to adopt joint concepts for the involvement of PMCs/PCSs (and other types of private providers) in the planning and exercising phases for EU Battle Groups;
- joint concepts and plans for the employment of PMCs/PSCs, and especially the terms and extent of their employment, during operations undertaken abroad in the name of ESDP by EU members (and possibly, by other contributing states);
- rules, codes or standards for the direct employment of PMCs/PSCs by the central institutions of the Union.

Under all these approaches, a number of sub-components of regulation and standardization could be relevant such as ‘white lists and black lists’ of companies based on known performance; rules on the qualifications of PMC/PSC personnel (and identity checks, etc.); common illustrative or indicative price scales; model contracts; ‘rules of conduct’ for PMC/PSC personnel in their various incarnations (preferably close to, and no less strict than, those applied to EU official personnel carrying out similar duties); ‘best practice’ models for monitoring and assessment of PMC/PSC performance; and possibly, common protocols and mechanisms for the handling of disputes (including allegations of abuse) over private personnel employed by the EU and by its nations when on EU business.

These three broad lines for action do not exhaust the scope for initiative by the EU and its institutions, however. Given the EU's 'soft power' and its practical significance both as a base for PMC/PSC activities and supplier of overseas interventions, any positions taken by the Union will be carefully noted by other world players including other regional groupings and global institutions with a *prima facie* competence and duty to regulate PMCs/PSCs and their behaviour. EU member states could thus, for example, adopt a CFSP Joint Action that would consist of pressing the UN itself to adopt suitable guidelines, providing a draft model for such rules, and lobbying other important 'strong' states, 'weak' states and regional organizations to support the initiative. Similarly, the EU could propose the adoption of such rules *mutatis mutandis* by concerned multilateral groupings such as the African Union or ASEAN, and/or propose mutual exchange of, and respect for, the standards defined in each forum.

These are more than just technical expedients to palliate the limitations on the EU's own legal competence. They would have the substantial merit of drawing in other committed partners for the cause - including some of the states who have suffered most from PMC/PSC abuses - and opening up the prospect of more wide-reaching or even globally applicable enactments along the lines desired. Moreover, once the EU had established its own standards and credentials in this field, it would be a short step to incorporating corresponding 'good governance' and 'best practice' demands in its dealings with candidate states, near neighbours (such as the post-Soviet states some of whom are significant bases for PMC/PSC activity), recipients of European development aid, and other states seeking *ad hoc* agreements and advantages (on the model of the WMD-related 'non-proliferation clause' introduced in 2004)³⁹.

5. Conclusion: A Check-List for the European Parliament

If the European Parliament concludes that any or all of the possible EU lines of action discussed in the previous section are desirable and even necessary, it will initially have three main modes of action open to it:

(i) To commission more fact-gathering and analysis (preferably targeted on the PMC/PSC phenomenon within the EU); and to stimulate/facilitate more discussion with all interested players and stakeholders - for instance, by assisting, initiating or sponsoring further public seminars, not necessarily restricted to Brussels. Such activities could include outreach to the service sector's own representatives, or - if that is a bridge too far - representatives of European industry generally and of the defence industry. The role and enforcement of existing law could also be debated with European lawyers' representatives.

(ii) To use all relevant procedures and modes of influence, inside and outside Brussels, to stimulate the other institutions and member states of the EU to draft and adopt specific measures of the sort set out above - restraint-motivated options and/or efficiency- and best practice-motivated options.

³⁹ On the 'non-proliferation clause' see the chapter by Quille, G. and Keane, R. in Kile, S. (ed.), 'European and Iran: perspectives on non-proliferation' (OUP: Oxford, 2005).

(iii) To take up contacts with interested constituencies (other parliamentary assemblies, NGOs) outside the EU circle, for instance those interested in the possibilities for UN and for other regional regulation, in order both to convey Europe's concern and sense of responsibility about the problem and to create 'reflex pressure' upon the EU's own officials and member states.

If EU measures of any kind are adopted, the nature and form of the related decisions will determine what role the Parliament plays in co-decision or in comment and debate upon the texts concerned. Broadly speaking, the Parliament's own *prima facie* interest should be to encourage the adoption of at least some measures in the regular, legally binding forms of Community legislation, and to promote the inclusion of provisions that give to itself some role in monitoring and assessing their implementation – and in executing any 'outreach', 'dialogue' and 'partnership' elements that are added to the concept.

If these objectives prove hard to attain in such a sensitive (and experimental) field – and especially, in relation to any steps taken within the ESDP framework – the Parliament may also wish to reflect on the merits of (a) encouraging the incorporation of provisions that give a role to national parliaments, and (b) encouraging general transparency provisions, which at least will hold out the prospect of a better flow of information from (and between) EU governments than exists at present.

Finally, it is open to the Parliament to consider to what extent the adoption of measures *in other international settings than the EU* may be an alternative to, or even – in the IHL connection – preferable and superior to action by the Union itself. If that is the case, the Parliament can use all its relevant lines of communication, dialogue and partnership to influence the other bodies concerned in the desired direction.

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