Report on Swiss-Based Military and Security Service Providers Operating in Crisis and Conflict Regions

Phase II: Comparative Study of Regulatory Approaches

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INTRODUCTION

The brief received for this phase of the project specified that we were to: select and study a number of legislative instruments aimed at the regulation of private security companies working in zones of crisis or conflict; to conduct in-depth analysis of the case studies; and to address a number of questions that were brought out in the brief. The case studies that we have chosen to study and the reasons for studying them are as follows:

> France: the law passed in 2003 is aimed at mercenaries rather than private security or military providers but illustrates the struggle that a country with a well developed judiciary and overseas presence has had in criminalising mercenary activity as defined in article 47 of the First Additional Protocol to the Geneva Conventions.
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> Australia: as in the case of France, the Australian legislation is not aimed at companies but rather at individuals engaging, in this case, in mercenary activity as

defined in the 1989 declaration and as such is illustrative of the difficulty of enforcement of such legislation.

South Africa: the post-apartheid republic of South Africa has equipped itself with legislation that is aimed at preventing South Africans from acting contrary to the values of the republic either by carrying out unauthorised private security or military work overseas or by engaging in mercenary activity. The law has recently been updated in an effort to correct perceived loopholes that had resulted in non-enforcement..

United States of America: the US has a combined legislation regulating the export of military equipment and services aimed at ensuring that such exports do not run counter to the national interest of the US. The legislation is robust, as are the enforcement mechanisms, but there are questions about the legislation's objectives and transparency, as well as the democratic accountability of the application and enforcement of the legislation.

United Kingdom: the United Kingdom makes an interesting study in that the question of how to regulate private military and security providers was looked into at some length by the government beginning over five years ago but no subsequent legislative action has yet been taken. This suggests that, in the absence of specific legislation, the British government may have decided to allow market forces to regulate the industry.

The questions that were posed in the brief were:

a. Is it possible to regulate the export of security and military services without establishing a combined registration system for the domestic and international markets?
b. Would it be best to introduce a dual system incorporating general rules for all overseas provision of security and military services and specific rules for operations in zones of crisis or conflict?
c. With regard to operations in zones of crisis or conflict, is legislation best served by:
    i. determining on a case-by-case basis whether an activity is likely to take place in a context of armed actors?
    ii. defining a set of activities to be banned?
    iii. defining a set of objectives to be used in determining whether to authorise activities?
    iv. banning security and military activities in zones of crisis or conflict?
    v. as iv. above but with the possibility of occasional authorisation?
    vi. allowing for general authorisation with the possibility of occasional prohibition?

In order to respond to question 'a', the case studies were expanded to cover legislation regulating the domestic security markets in the countries in question in order to determine the extent of overlap between regulatory measures in the domestic and external markets and to determine whether the case study countries have successfully, for regulatory purposes, separated the two markets.

In order to respond to question 'b' the case studies were expanded to include study of the general arms export regulations in the case study countries. This was to enable us to determine, in the cases where there has been no attempt to regulate overseas activities of private security and military providers, whether these countries distinguish between exports to zones of crisis and conflict and exports to other zones.

Question 'c' revolves principally around the means used to define the activities to be regulated and the mechanics of the system of licensing. For the purposes of the study therefore the question has been re-phrased in the following way:

d. Is it best to regulate based on the nature of the actor, the nature of the activity, or the context in which the activity takes place?
e. Is it best to assume authorisation, prohibiting as required, to prohibit but allow for authorisation on merit or to introduce blanket prohibition?

Question 'b', which deals with the way that regulation is geographically defined, comes logically after question d, which asks whether such geographical delimitation is suitable. These two questions have thus been reversed and the analysis will address the four questions in the order a, d, b, e.

FRANCE

Arms Export

The broad definitions of arms are provided in article L2331-1 of the Code Défense[1] and articles L2335-2 and L2335-3 of the same code,[2] together with a number of decrees, narrow down the definitions of affected items and restrict their export. In the past France operated a tightly controlled two-stage approval process with exporters requiring approval to (1) enter into negotiations and (2) sign a contract to sell arms. From April 2007, the process became fused and only a single prior authorisation is required from the Commission interministérielle pour l'étude des exportations de matériel de guerre (CIEEMG), the specific committee which gives an opinion in favour or against, or suggesting or allowing for a delay. The Prime Minister, however, retains ultimate decision authority. The decision to require only one prior authorisation for both

[1] http://www.legifrance.gouv.fr/WAspad/UnArticleDeCode?commun=CDAFEN&art=L2331-1
[2] http://www.legifrance.gouv.fr/WAspad/VisuArticleCode?commun=&h0=CDAFENSL.rcv&h1=2&h3=73

negotiation and sale ease the control exercised by CIEEMG, and has been seen as part of a broader effort to boost French arms exports.[3]

No text has been found in the public domain that lays out any guidelines to inform the decision of the CIEEMG, so we can conclude that the principle in drafting this law was likely to maintain as large a margin of operation as possible for the government to decide, on a case-by-case basis, whether or not to allow the export of a given type of equipment. This has clear advantages from the point of view of the government but has the disadvantage that there may be a lack of clarity in the application of the law. Clearly, the development of the EU Code of Conduct on Arms Exports,[4] which establishes commonly agreed criteria to be taken into account when deciding on whether or not to award a licence, provides the Minister with a set of guidelines to follow in making such decisions. France's publicly stated policy with respect to arms exports is that:

> France exercises stringent export control by basing its decisions on a series of criteria. They include respect for the Purposes and Principles of the Charter of the United Nations, human rights, embargoes and other globally-agreed restrictive measures, arms control, and non-contribution to regional instability or to the prolongation of ongoing armed conflicts. France also supports efforts aimed at preventing and fighting arms trafficking.[5]

It remains the case, however, that such criteria are not specifically listed or enshrined in French law.

Domestic Security Market

The functioning of private security companies in France is regulated by law 83-629 of 12 July 1983,[6] updated by law 2003-239 of 18 March 2003.[7] It is clear from these laws that the French government regards the internal French market for private security as distinct from the market for security services provided overseas. Specifically, the French legislation makes no extra-territorial claims, so the actions of French companies and individuals overseas fall outside the scope of the domestic legislation.

Mercenaries

The pertinent French legislation is contained in article 23-8 of the civil code[8] and articles 436-1 to 436-5 of the penal code, provided at Annex A.

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[3] 'How to Boost Arms Exports', *Intelligence Online*, 20 April 2007.
[4] http://www.consilium.europa.eu/uedocs/cmsUpload/08675r2en8.pdf, criteria provided at annex E
[5] 'French Policy on Export Controls for Conventional Arms and Dual-Use Goods and Technologies', available at: http://www.wassenaar.org/natdocs/fr1_fr.doc
[6] http://www.legifrance.gouv.fr/texteconsolide/AAEBW.htm
[7] http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=INTX0200145L
[8] http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm#Section%20I%20-%20Of %20Loss

Article 23-8 of the civil code allows for a French citizen to be stripped of his nationality if, despite having been instructed by the French government to resign, he continues to serve in a foreign army or public service. This law is of incidental relevance to this study as it specifically deals with publicly employed individuals, not those engaged by security companies.

The law introducing articles 436-1 to 436-5 of the penal code was first developed as a bill under the Socialist Jospin government in early 2002 and enacted under the subsequent centre-right Raffarin government in April 2003. The ability of the project to survive a change of government indicates the level of its cross-party support and the lack of controversy surrounding it. This in turn may be said to be indicative of the fact that the law, in reality, changes very little and is largely without teeth. Judging by press reaction to the law, the only real controversy surrounds its inapplicability.[9]

The context of the law is France's signature of the first protocol of the Geneva Convention in 1977, Article 47 of which specifies that individuals engaged in mercenary activity will be stripped of the protection afforded to combatants. This does not make mercenary activity illegal per se, but makes, for instance, the killing of an individual by a mercenary a criminal act of murder or manslaughter rather than a legitimate act of war. It was hoped that this removal of protection would discourage mercenary activity but in reality the definition of mercenary used, which depends on six cumulative criteria, makes it so easy to avoid being classified as a mercenary that, in the words of one observer, 'any mercenary who cannot exclude himself from this definition deserves to be shot -- and his lawyer with him'.[10] The cumulative criteria define as a mercenary someone who:

> (a) is specially recruited locally or abroad in order to fight in an armed conflict;
> (b) does, in fact, take a direct part in the hostilities;
> (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces;
> (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
> (e) is not a member of the armed forces of a Party to the conflict; and
> (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party.

It is interesting to note that in this regard article 23-8 of the Code Civil, mentioned above, effectively removes one of the six criteria as the French state may require an individual to leave the armed forces of another state, so negating any defence based on criterion (e).

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[9] See for instance Barbara Vignaux, 'Le mercenariat est hors la loi, vive le mercenariat!', *Le Monde Diplomatique*, novembre 2004. Available at: http://www.monde-diplomatique.fr/2004/11/VIGNAUX/11674

[10] A frequently quoted opinion, first found in Geoffrey Best, *Humanity in warfare: The Modern History of the International Law of Armed Conflicts*, London: Weidenfield and Nicolson, 1980.

Notwithstanding the difficulty of application of the provisions of Article 47, it was felt in France to be incoherent to have signed the protocol without enacting any domestic legislation to criminalise mercenary activity by French nationals.[11] Section 436 of the penal code, therefore, has as a broad aim the alignment of France's domestic legislation with its international position with respect to mercenaries, the definition of the person to be prosecuted under the law as a mercenary reflecting almost exactly the definition of the person to be stripped of protection under Article 47 of the First Additional Protocol.

The French law also provides for the prohibition of the recruiting and training of mercenaries but, again, relies on the restrictive definition of mercenary that will make prosecution problematic.

During the Senate debate on the law,[12] Michelle Alliot Marie, presenting the bill, made much of negative impact of the privatisation of security and implied that the law represented France's response to this trend. The Senate foreign affairs committee noted in its report, however, that there had not yet been a debate in France on the issue of private security companies, and that the bill does not pre-judge any debate that might take place.[13] Furthermore, M. Michel Pelchat conceded during the debate that 'this project remains limited in its objectives. It is not intended to cover all private sector activities, be they undertaken by individuals or specialist operators, in the military domain' and that further measures, probably taken on the European level, were necessary. M. Jean-Pierre Plancade, for the opposition, agreed that steps were necessary to regulate the international 'privatisation of violence' and that a study on a European level would be the first such step.

The debate in the Assemblée Nationale[14] reflected the spirit of the Senate debate with the exception of M. Gilbert Meyer and M. François Lamy, who pointed out that due to the strict definition of mercenary used it would be virtually impossible to achieve a successful prosecution.

The only known instance of this law being put to use was the arrest in August 2003 of Ibrahim Coulibaly and eleven accomplices in Paris on suspicion of planning a coup in Côte d'Ivoire.[15] Mr Coulibaly and his accomplices were accused not of being mercenaries but of recruiting them. The accused were released on 16 September, a Paris appeal court having decided that there was insufficient evidence to achieve a prosecution either under the then new anti-mercenary law or under anti-terrorist regulations.[16]

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[11] Report of M Marc Jouland to the Assemblée Nationale discussing the bill, 5 March 2003. Available at: http://www.assemblee-nationale.fr/12/cr-cdef/02-03/c0203028.asp#TopOfPage

[12] http://cubitus.senat.fr/seances/s200302/s20030206/s20030206004.html

[13] Senate Foreign Affairs Committee Report n° 142 (2002-2003), presented by M. Melchat to the Senate, 23 January 2003, http://www.senat.fr/rap/l02-142/l02-142_mono.html#toc33

[14] http://www.assemblee-nationale.fr/12/cr-cdef/02-03/c0203028.asp#P37_217

[15] Stephen Smith, 'Un coup de force contre la Côte d'Ivoire aurait été déjoué, samedi, à Paris', *Le Monde*, 27 August 2003.

[16] Stephen Smith and Piotr Smolar, 'La justice française libère l'ex-putschiste ivoirien Ibrahim Coulibaly', *Le Monde*, 18 September 2003.

It has been alleged that the French authorities also considered issuing an international warrant for the arrest of Robert Montoya, an ex French Gendarme implicated in a number of arms trafficking affairs in Africa, for 'participation à une activité de mercenaire'.[17] It seems, however, that no action was taken.

Overseas Security and Assistance

There is no French law that regulates the activities of French private military and security companies (PMSCs) working overseas, although various legislators have acknowledged that the issue needs to be addressed. The state currently dominates and controls the export of commercial military and security services through the establishment of Défense Conseil International (DCI). DCI is a French corporation that is 49.9 percent owned by the French government, and 50.1 percent owned by three public armaments offices: the General Air Office, Sofressa and Ofema. It is staffed by former military personnel, supervised by the Ministry of Defence, and specialises in the transfer of French military expertise, advice and training, including in the use of French equipment, and technical assistance to foreign armed forces. Although described as a private company, DCI is not, strictly speaking, an independent private commercial PMC, but a para-statal corporation. In short, it can be considered a privatised form of French military cooperation. DCI has several subsidiaries, including NAVFCO (Société navale francaise de formation et de conseil), its naval arm which focuses on training foreign naval personnel, and COFRAS (Compagnie francaise d'assistance spécialisée), which works with the French army, gendarmerie nationale and French military health services (and also has its own de-mining subsidiary, Cidev), AIRCO, which works closely with the French aviation industry to offer know-how and training of the French air force to friendly country air forces, DESCO, which provides French training and know-how in defence equipment programmes, and STRATCO (Société Francaise de Stratégie et de Conseil), which is described on DCI's website as 'a strategic think tank' on French defence and its defence industry.

DCI's lines of accountability are unclear. The directors of DCI are named by the French government, and its staff, military and former military, are subordinate to the state. DCI works closely with the Délégation Générale pour l'Armement (procurements board) in the Ministry of Defence and with the Department of Foreign Relations. It has been criticised by Amnesty International as having no clear accountability to either the government or parliament.[18]

According to one observer, SECOPEX is the sole French-based PMC.[19] However, anecdoctal evidence suggests that various others exist, although the industry as a whole in

[17] 'Paris s'oppose aux demandes d'arrestation de Robert Montoya et de deux mercenaires biélorusses', http://www.africatime.com/afrique/nouvelle.asp?no_nouvelle=289513 http://archquo.nouvelobs.com/cgi/articles?ad=etranger/20060223.FAP9454.html&host=http://permanent.nouvelobs.com/

[18] Amnesty International, *Undermining Global Security: the European Union's Arms Exports*, Chapter 8, 'Private Military and Security Services', 1 February 2004.

[19] Loup Francart, 'Sociétés militaires privés: quel devenir en France? *Inflexions: Questions de défense*, janvier-mai 2007, numéro 5, p. 87.

France remains fairly small and weak. The Luxembourg-based Earthwind Holding Corporation, for example, openly presents itself as the only French-speaking alternative in an industry dominated by Anglo-American and Israeli PMCs.[20] Numerous French PSCs can be identified, the majority offering a diverse mix of services that often include 'business intelligence', a French speciality (Atlantic Intelligence considered a noteworthy example), and risk assessment and risk management, although a few others offer extraction and security services overseas that approach PMC-type activities. This latter group includes firms such as GEOS, Group Barril Sécurité, and Risksgroup. According to another observer, the French government has tolerated the formation of export-oriented French PMCs such as Barril and SECOPEX, 'but has taken steps to establish informal ties with these groups to impose the shadow of regulation and maintain informal controls.'[21] French PSCs are also strong in certain niche areas, such as de-mining and safety advice. The often wide operational experiences of former French military personnel also tends to make these individuals appealing for recruitment by US and UK PMSCs.

The development of the PMSC industry has been more reticent in France than in Anglo-American countries. This may be due in part to the traditional view in France that security is the exclusive preserve of the state. Further, in contrast to the extensive outsourcing of former military tasks by Anglo-American states following the end of the Cold War, France has been slower to turn to outsourcing, particularly of major military functions, and associated French firms have in consequence remained comparatively small and confined to narrow sectors of activity.[22] The French state continues to maintain the monopoly of force and continues to resist outsourcing and privatisation in the military domain, at least to an extent that is far below levels seen in the US and UK. Nevertheless, based on the support given to DCI, it is probably fair to say that the French government perceives the export of military and security services as an important vector of French foreign policy.

Conclusion

In conclusion, existing French law limits itself to the prohibition of mercenary activity as defined in the First Additional Protocol, making no attempt to regulate the activities of PSCs or PMCs working overseas. Although French legislators have publicly acknowledged that this area needs to be addressed, no firm action appears to have yet been taken. The French PMSC industry is currently less developed than that in various English-speaking states. However France also has a distinct public-private approach to the export of military training and related services in the form of the para-statal DCI. It is also interesting to note that the idea of French PMSCs competing with Anglo-American ones for influence and markets appears to be gaining more support in France, and some insiders have begun to propose the development of a French industry code of conduct in

[20] http://www.groupe-ehc.com/us/site.html
[21] James Cockayne, 'Principal-agent theory and regulation of PMCs' in Simon Chesterman and Chia Lehnardt, *From Mercenaries to Market* (Oxfor: OUP, 2007), p. 205.
[22] Philippe Chapleau, 'De Bob Denard aux sociétés militaires privées à la francaise', *Cultures et Conflits – Les enterprises para-privée de coercition*, No 52, 4/2003, pp. 49-66.

order to better legitimise French PSCs so that they can help to advance French national interests and present a credible alternative to the pervasive Anglo-American firms now exerting strategic and doctrinal influence around the world.[23]

AUSTRALIA

Arms Export

The relevant texts are the 1901 Customs Act,[24] the Customs (Prohibited Exports) Regulations 1958 (amended),[25] and the Defence and Strategic Goods List.[26]

The Customs Act empowers the Governor General to prohibit the export of goods either absolutely, according to specific circumstances, according to their destination or by specifying conditions or restrictions.[27] This power is then executed through the Customs (Prohibited Exports) Regulations, which includes a range of approaches, such as the absolute prohibition of export of certain materials to countries that are, for instance, under UN embargo and the general prohibition of export of other materials, such as rough diamonds, which cannot be exported unless the minister has authorised their export under the Kimberley process. As far as military equipment is concerned, the Minister for Defence periodically produces an annual detailed schedule of equipment that may not be exported without written permission from the Minister or an authorised representative. This list is known as the Defence and Strategic Goods List. The regulations, however, provide no specific guidance to the Minister as to the circumstances in which he might or might not grant permission.

Domestic Security Providers

The regulatory regimes for domestic Australian security providers vary widely across the states,[28] but it is clear that the domestic and international markets are seen as being separate.

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[23] Loup Francart, 'Sociétés militaires privées: quel devenir en France? *Inflexions: Questions de défense*, janvier-mai 2007, numéro 5, pp. 101-102.

[24] http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/A555029E5CB02D01CA2572AA001C2F58?OpenDocument

[25] http://www.comlaw.gov.au/ComLaw/legislation/legislativeinstrumentcompilation1.nsf/0/180DEC5BDD1066F4CA2572F40015584C/$file/CustomsProhibExport1958.pdf

[26] http://www.defence.gov.au/dmo/id/export/DSGL_2003.pdf

[27] 1901 Customs Act, para 112.

[28] See Tim Prenzler and Rick Sarre, 'Regulating Private Security in Australia' in *Trends & Issues in Crime and Criminal Justice*, No 98, Nov 1998, Australian Institute of Criminology. http://www.aic.gov.au/publications/tandi/ti98.pdf

Mercenaries

The Australian anti-mercenary law, the *Crimes (Foreign Incursions and Recruitment) Act of 1978,*[29] broadly mirrors the provisions of Article 47 of the First Additional Protocol to the Geneva Convention, with a tighter definition of hostilities. The proscribed activities, outlined in Annex B, only become a criminal offence if carried out by an Australian citizen, someone normally resident in Australia, or someone who was in Australia before carrying out the proscribed activity for the purpose of planning or preparing the proscribed activity. From this one can see that the driving imperative behind the act was a wish to ensure both that Australia generally is not tarnished by association with mercenary-type activity, and that Australian domestic law is coherent with Australian ratification of the First Additional Protocol.

The Crimes Act seeks to prevent people from carrying out hostile acts in a foreign state or entering a foreign state with the intention of carrying out hostile activities. Interestingly, hostile activity is defined as any activity, whether or not on the side of the government of the foreign state, but not acting in the armed services of that state, that undermines the government of the state, or causes the public in the state to be in fear of death, personal injury or armed hostilities. This definition is considerably more specific than the one provided in the First Additional Protocol, and suggests a real willingness on the part of Australian legislators to define an effectively applicable law.

There is also an interesting nuance in the definitions of state and government; state includes any land not part of a sovereign state and the government includes any body that exercises effective government control over part of a foreign state. This would therefore seem to prevent Australians from supporting a revolt in its early stages, but once the revolt has established effective governmental control over a section of an otherwise sovereign state, it can be supported militarily under the act. The safeguard here is that the Australian government may proscribe a rebel force, or indeed any other organisation, if there are reasonable grounds to believe that the organisation is engaged in, preparing or planning serious human rights violations, a terrorist act or an act prejudicial to the security of the Commonwealth. Terrorist organisations are, effectively, automatically proscribed without the government having to act, but the government may chose to proscribe a terrorist organisation in order to clarify the situation.

Section 9 of the Crimes Act prohibits the recruitment in Australia of any person to serve 'in any capacity in or with an armed force in a foreign country, whether the armed force forms part of the armed forces of the government of that foreign country or otherwise'. Thus the Crimes Act prohibits recruitment for a foreign armed force, but without prohibiting actual service in or with an armed force in another country. The same section also allows the Australian government to permit recruitment for a particular force or a part of a force if such recruitment would be in Australia's national interest. The Crimes Act could thus be used as a rather blunt instrument to constrain the activities of private

[29] Section 6 of the Act is reproduced at Annex B. For a full text see http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/6ED25B3452AF303ECA2570DD00131629/$file/CrimesForIncursRecr78_WD02.pdf

military and security companies, but only to the extent that they engage in hostile actions in a foreign state and are not serving with or in a foreign armed force.

Applicability

It appears that there have been few prosecutions under the act. A former Australian soldier was prosecuted and jailed under the act in 1987 for attempting to recruit former colleagues to train West Papuan resistance fighters to fight Indonesian forces in Irian Jaya.[30] There is some speculation that David Hicks, the so called Australian Taliban, could face prosecution if returned to Australia, although the Commonwealth Director of Public Prosecutions denies that this is the case.[31] It is, however, instructive to speculate on the regulation's potential applicability in some well known circumstances.

Sandline in Papua New Guinea

The Private Military Company Sandline was contracted in 1996-1997 to support the forces of the government of Papua New Guinea (PNG) in an attempt to end an ongoing conflict with rebels in Bougainville. The mission failed for a number of reasons, and in any event the Sandline subcontractors had no links to Australia so would not have come under Australian jurisdiction. However, it is worth speculating on whether they might, if subject to Australian jurisdiction, have been subject to prosecution under the Australian legislation.

In the first event, they were acting in supprt of a sovereign government, so clauses 6 (2) a, b, c, d, e and f would not apply. Clause 6(2)aa might, however have applied had the operatives engaged in hostilities rather than limiting themselves to training local forces and giving advice. Even had they engaged in hostilities, however, they would have escaped prosecution under 6(4)a, as it had been agreed that for the duration of the contract the operatives would be employed by the PNG government as special constables. The provisions of 6(5)a and b and 6(6)a and b, however, would allow this ruse to be overcome as the Australian government could have proscribed Sandline for the purposes of their operation in PNG.

In summary, the Australian Government, when it learnt of Sandline's intentions, could have classified Sandline as a proscribed organisation, and in doing so it would have been able to prevent Australian citizens or residents from engaging in hostilities in PNG, or could have prevented anyone from visiting Australia in order to prepare such hostilities, but it could have done nothing about personnel providing training or advice to the PNG government in its fight against the rebellion.

Security Personnel Working in Iraq for an Oil Company

[30] Peter Cronau, 'Another Facet of the PNG Debacle', *Canberra Times*, 14 April 1997, p. 9.
[31] Attorney-General Philip Ruddock, interviewed in *Marie Claire*, 1 May 2007, http://au.blogs.yahoo.com/marie-claire/1302/hickss-army/

In the case of an Australian individual engaged by a security company to protect an oil installation in Iraq, he could not be described as acting against the state, so clauses 6 (2) a, b, c, d, e and f would not apply. Once again, the applicable clause would be 6(2)aa, dealing with the intention to engage in armed hostilities. It is arguable that the context of Iraq is such that someone who is employed to protect an oil installation could reasonably expect to engage in hostilities, so would fall foul of this clause. In the person's defence it could also be argued that his intention was to provide an armed presence, so deterring attack, and thus had no intention of engaging in armed hostilities. Clearly, however, were he to go beyond a purely defensive position, and were he to seek to engage with real or perceived attackers, he would become liable to prosecution.

Coup Attempt in Equatorial Guinea

In 2004 there was an attempt to mount a coup against the government of Equatorial Guinea. A number of the plotters faced prosecution in South Africa and Zimbabwe but none fell within Australian jurisdiction. If any had been Australian residents or citizens, or had the accused visited Australia in preparing the coup, they would clearly have been liable for prosecution under the provisions of clause 6(3). Interestingly, however, merely plotting the coup from overseas would not have been an offence and, under clause 6(1) a, they would only have committed an offence once they entered the country.

Conclusion

In conclusion, the Australian government has equipped itself with a piece of legislation that reflects the provisions of the First Additional Protocol but goes further than the French legislation in that it is more specific about the definition of hostile activity. In this way the Australian government, while allowing individuals to engage in bona fide security operations in support of overseas commercial interests that do not infringe the sovereignty of the host state, and while allowing individuals to provide military services in support of a sovereign state, prohibits individuals from supporting rebel movements or engaging in hostilities on any side.

Australia has a relatively small number of PMSCs working overseas, compared to US- or UK-based PMSCs. The number of Australian nationals currently working in Iraq as security contractors is unknown. While deaths of Australian security contractors working in Iraq and Afghanistan attract wide media attention, government representatives have generally refrained from criticising Australians who choose to go there to work for PMSCs. There have been some calls for regulation, including from certain members of the PMSC industry itself. Some calls arise from complaints about the wide variation in qualifications of Australians and others performing security roles in Iraq, from highly experienced former members of the Australian SAS to private security guards with no experience or knowledge relevant to a war zone. Some applicants for security work in Iraq have also allegedly lied about their past military or police experience. These observers support more careful vetting of security contractors and companies that are awarded contracts. Other concerns arise from the perception that the Australian

government is not well informed about the number of Australians working in Iraq as security contractors. However many security contractors resist registering for fear of retribution. Others complain about the existence of 'cowboy operators' and support regulation to reduce their incidence.[32]

Arguments that have been put forward in support of Australian regulation have stated that despite the relatively small number of Australian PMSCs operating overseas, the sector is growing globally and regulation is justified based on the intrinsic nature of the activities rather than the scale on which they are currently occurring. That is, the strongest reason being advanced to regulate Australian PMSCs is 'to prevent individuals and firms acting contrary to Australia's national interests and foreign policy objectives.'[33] An example would be an Australian national or firm assisting a foreign state to take military action that is not supported by the Australian government. Even providing military and police training could be problematic. Australian has an intrinsic interest in ensuring that any training provided by its nationals or firms are of a high standard, and promote the laws of armed conflict, as well as respect for human rights and the rule of law. This cannot be ensured if the training is delivered by an unregulated firm. Australia may also be required to rescue, or even take military action, to recover individuals or firms who are inadequately skilled and have become involved in risky ventures. The feeling is that while there are some professional and reputable firms, there are also some hastily formed ones in which high standards are not observed. The ASPI has called for a 'precision tool – a regulatory regime that controls *what* services can be provided and *when* those services may be provided.'[34] Such a regulatory tool would ostensibly be built on the model of Australia's export controls on military hardware and technology.

SOUTH AFRICA

Background

South Africa's apartheid background gives it a unique position with respect to the international private security and military services market. In the first instance, the apartheid regime's long term campaigns to maintain internal stability while destabilising unfriendly regimes in neighbouring states created a considerable cadre of military personnel with wide operational experience of counter-insurgency and security methods. These personnel, benefiting from a common language and training, could hardly have been better selected to supply the developing private security market. The end of apartheid left many of these people either ejected from the armed services or disillusioned with a service that had changed radically and thus effectively pushed them towards the private sector. The early operations of such organisations as Executive Outcomes testified to the success with which these people adapted to the private sector. Concomitant with this burgeoning of a largely white South African private security sector was the birth of the new republic of South Africa with its constitutional commitments to

[32] Craig Skehan, 'Aussies put lives on line for big payday', *Sydney Morning Herald*, 17 July 2007, p. 14.
[33] Mark Thomson, *War and Profit: Doing business on the battlefield*, Australian Strategic Policy Institute, 2005, p. 47.
[34] Thomson, p. 49.

'human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism',[35] a republic that would naturally be deeply uncomfortable with the idea of its nationals roving the world hiring themselves out to whichever regime or rebel movement felt that it needed them. Given this background it is not surprising that South Africa has attempted to regulate the international private military and security market, though as will be seen the result was less effective than one might have hoped.

Whereas for some other countries the absence of specific legislation covering the export of private military services has necessitated a study of arms export regulations in order to divine the country's philosophy with regard to military exports in general, South Africa's legislation covering the export of military services shows that country's philosophy so clearly that there has been no requirement to make a detailed study of the arms export regulations.

Domestic Private Security

The provision of domestic private security in South Africa is regulated through the Private Security Industry Regulation Act, 2001.[36] This act establishes a governing body, the Private Security Industry Regulatory Authority (PSIRA), as well as laying down requirements for South African security companies. The requirements are discussed below:

Registration

Section 20 of the act specifies that no person may provide security services for remuneration unless they are registered as a security service provider. The registration requirements require that the security service provider must be a South African citizen, at least 18 years old, have undergone appropriate training, have a clean criminal record, be mentally sound and not be a member of the state security apparatus. Ex members of the security apparatus must present clearance certificates. Further, a company may not offer security services unless it is registered, and in order to be registered the management, personnel and owners of the company must be registered individuals.

Registration may be withdrawn by PSIRA if a member is under investigation for certain offences, or is found to be guilty of certain offences. In the event that such a person is part of the management structure, personnel or ownership of a registered company, the company's registration may be withdrawn.

[35] Constitution of the Republic of South Africa, paragraph 1 sub paragraphs a and b, available at http://www.info.gov.za/documents/constitution/1996/96cons1.htm
[36] Act No. 56 of 2001, 25 January 2002, http://www.info.gov.za/gazette/acts/2001/a56-01.pdf

Code of Conduct[37]

The act provides for a code of conduct to be followed by security providers. This code of conduct is separately promulgated by the minister and is binding on all registered security providers. The code of conduct, which runs to 35 pages in its current version, includes a wide variety of considerations such as the requirement to act 'with due regard to the safety, rights and security of … members of the public',[38] to 'treat members of the public with whom he or she comes into contact with the respect and courtesy that is reasonable in the circumstances'[39] and to avoid the use of 'abusive language or language which may be reasonably construed as the advocacy of hatred or contempt that is based on race, colour, ethnicity, sex, religion, language or belief'.

Application to Private Military Companies

Henri Boshoff[40] argues that as the activities governed by the act are restricted to essentially defensive and protective functions: '(t)he intent of the act is clearly to prescribe the rendering of private security services to private instances and not to military related activities or in situations of armed hostilities, conflict or war'. Clearly, an operation such as Executive Outcome's offensive military campaigns on behalf of the governments of Angola and Sierra Leone would not fall within the remit of the law, but this type of activity now represents a miniscule proportion of the global market for international security or military companies. The bulk of the market is for protection and guarding services that fall firmly within the remit of the legislation.

Extraterritoriality

Section 39 of the act specifies that 'any act constituting an offence in terms of this Act which is committed outside the Republic (of South Africa) by any security service provider, registered or obliged to be registered in the terms of this Act, is deemed to have been committed in the Republic'. Further, the code of conduct specifies in paragraph 2(d) that the code applies to 'the relevant conduct of a security service provider at any place, irrespective of whether the conduct was committed within or outside the republic (of South Africa).' However, section 20 of the act specifies that 'no person… may in any manner render a security service for remuneration, reward, a fee or benefit, unless such a person is registered as a security provider in terms of this act'. It is clear from this that any person who offers security services in South Africa is obliged to be registered, and the fact of being so obliged then means that they must abide by the other provisions of the act, including the code of conduct, when overseas. A South African or other individual or company that offers services exclusively outside South Africa is, however,

[37] http://www.psira.co.za/pdfs/code_of_conduct.pdf
[38] Section 8, subsection 2 para. 9.
[39] Section 8, subsection 2 para. 12 a
[40] Henri Boshoff, *Regulation of Private Military Companies (PMC)/Private Security Companies (PSC): the South African Case Study*, http://www.prio.no/files/file47860_paper_sa_regulation_henry_boshoff.doc

not obliged to register and so falls outside the scope of this law. The majority of South African security companies working outside the country do not also work domestically, so the code of conduct and the other extraterritorial provisions of the act do not apply to them.

The question of extraterritoriality is, however, slightly academic as things currently stand because the PSIRA, which is charged with verifying compliance with the act's provisions, has such limited resources that it struggles to maintain effective control over the domestic market and is not in a position to extend its mandate overseas.[41]

Overseas Security and Assistance

During most of the period in which this report was researched and written, the South African legislation covering the export of military or security services was the Regulation of Foreign Military Assistance Act, 1998.[42] The RFMAA had been widely criticised and preparations were long underway to have it replaced. To this end the Prohibition of Mercenary Activities and Regulation of Certain Activities in Areas of Armed Conflict Bill[43] was approved by majority vote in the Portfolio Committee on Defence on 15 August 2006, and subsequently also after the draft bill was debated in the National Assembly and the Council of Provinces. After a prolonged delay, the Bill was finally signed into law by President Mbeki on 12 November 2007.[44] The new Act replaces the 1998 RFMAA. The Conventional Arms Control Bill, which is primarily directed at the regulation of materiel exports, also has a provision to cover services. The three acts will now be described in turn, following which they will be jointly analysed.

Regulation of Foreign Military Assistance Act, 1998

The preamble to the act refers to paragraph 198 (b) of the constitution which states that 'the resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation'. From this it can be seen that the guiding principle of the legislation is to avoid South African nationals becoming involved in any armed conflict other than as a member of the state's armed forces.

Paragraph 2 of the act prohibits the recruitment, training or use of mercenaries, a mercenary being defined as a person participating as a combatant in armed conflict for private gain.

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[41] Marina Caparini, 'Domestic Regulation: Licensing Regimes for the Export of Military Goods and Services' in Simon Chesterman and Chia Lenhardt, eds., *From Mercenaries to Market: The Rise, and Regulation of Private Military Companies*, Oxford: OUP, 2007.

[42] http://www.info.gov.za/gazette/acts/1998/a15-98.pdf

[43] Original text at http://www.info.gov.za/gazette/bills/2005/b42-05.pdf, version passed by National Assembly at http://www.pmg.org.za/docs/2006/060918b42b-05.pdf

[44] For the text of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Areas of Armed Conflict Bill or Act No. 27, 2006, see South Africa, Government Gazette, No. 30477, 16 November 2007. Also available at www.polity.org.za

Paragraph 3 specifies that a person wishing to offer or render military assistance to any body outside South Africa must have authorisation from the National Conventional Arms Control Committee (NCACC) to do so. Provision of military assistance is defined as 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 the armed conflict by means of —
(i) advice or training;
(ii) personnel, financial, logistical, intelligence or operational support;
(iii) personnel recruitment;
(iv) medical or para-medical services; or
(v) 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,

Paragraph 7 lays down the guidelines for the NCACC to follow in making its decision. These are as follows:

An authorisation or approval in terms of sections 4 and 5 may not be granted if it would —
(a) be in conflict with the Republic's obligations in terms of international law;
(b) result in the infringement of human rights and fundamental freedoms in the territory in which the foreign military assistance is to be rendered;
(c) endanger the peace by introducing destabilising military capabilities into the region where the assistance is to be, or is likely to be, rendered or would otherwise contribute to regional instability and would negatively influence the balance of power in such region;
(d) support or encourage terrorism in any manner;
(e) contribute to the escalation of regional conflicts;
(f) prejudice the Republic's national or international interests;
(g) be unacceptable for any other reason.

Paragraph 9 provides for extraterritoriality, the only acts falling beyond the scope of the law being those undertaken entirely outside South Africa by non South African citizens.

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

The Act avoids definitional problems with the word mercenary by not using the word. Instead, it specifies, under the heading 'Prohibition of Mercenary Activity', that it prohibits participation as a combatant for private gain in an armed conflict; directly or

indirectly recruiting, using, training, supporting or financing a combatant for private gain in an armed conflict; initiating or furthering an armed conflict or a coup d'état, uprising or rebellion; or any activity aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a state.

The new Act also prohibits any South African citizens or permanent residents from enlisting in another country's armed forces without first obtaining permission from the NCACC. Even if such authorisation to join another country's armed forces is granted, the person concerned may not participate in armed conflict as a member of the armed force he has joined if it contravenes the criteria listed in the Act. This aspect of the Act was the subject of extended debate specifically with regard to some 700 South African nationals who joined and are serving with the UK armed forces, but, as it is of little interest to this study, it will not be discussed further.

Aside from the provisions highlighted above, which are not limited by geography, the Act applies to military, security and other forms of assistance in countries in armed conflict and what are described, the terms of the bill, as regulated countries. Under the Act, The NCACC should inform the National Executive if armed conflict exists or is imminent in a country, in which case the President, as Head of the National Executive, would declare that country to be regulated. The NCACC may also recommend regulation for countries that are not in armed conflict but which may warrant regulation.

Anybody wishing to provide any services or assistance to a party in an armed conflict or regulated country, or to offer such assistance or services, must seek the permission of the NCACC. Similarly, anyone seeking to recruit, train, support or finance such activity or to further the military interests of a party to an armed conflict or in a regulated country may not do without the approval of the NCACC. The services and assistance covered by the new Act include humanitarian activities.

The new South African legislation also extends the extra-territorial application of the law. A non-South African citizen, resident or company or body of persons who commits an act that constitutes an offence under the Act and commits it outside the country but against the Republic of South Africa or its citizens, will be considered to have committed the act within South Africa and may be prosecuted.

Conventional Arms Control Act[45]

Section 13 of this Bill, which formalised the legal basis of the NCACC and was aimed primarily at control of equipment export, contains a provision that could apply to private security and military providers. The section reads as follows:

> (2) No person may, in relation to conventional arms, provide a service unless that person is in possession of a permit authorising such service, issued by the Minister with the concurrence of the Committee.

[45] Conventional Arms Control Act 2000, available at http://www.info.gov.za/gazette/bills/2000/b50-00.pdf

In the definitions section conventional arms and services are defined as follows:

> **‘‘conventional arms’’** includes—
> *(a)* weapons, munitions, explosives, bombs, armaments, vessels, vehicles and aircraft designed for use in war, and any other articles of war; and
> *(b)* any component, equipment, system, processes and technology of whatever nature capable of being used in the design, development, manufacture, upgrading, refurbishment or maintenance of anything contemplated in paragraph *(a)*,but does not include a weapon of mass destruction as defined in the Non-Proliferation of Weapons of Mass Destruction Act, 1993 (Act No. 87 of 1993), or an arm regulated in terms of the Arms and Ammunition Act, 1969 (Act No. 75 of 1969);
>
> **‘‘services’’**, in respect of conventional arms, means any services of whatever nature or form to any institution of a foreign country relating to the rendering of—
> *(a)* aid;
> *(b)* advice;
> *(c)* assistance;
> *(d)* training; or
> *(e)* product support,
> and includes clearing services or brokering activities such as acting as an agent for one of the parties in negotiating or arranging contracts, financing, transportation, purchases, sales or transfers, but excludes contractual after sales and warranty services performed under any authorisation granted by the Minister in terms of section 14;

The first interesting point here is that there is no provision for a tightly defined list of armaments equivalent to the US Munitions List (below) or the Australian Defence and Strategic Goods List. This however is likely to have more impact on the regulation of equipment exports than exports of services. The second point is that the definition of services specifies that only services provided to the institutions of a foreign country can be included and this would exclude, for instance, protection of commercial installations, convoying of contractors in a high risk country and such activities.

It is unclear what logic dictated the introduction of this clause in an act that came after the RFMAA, which was specifically intended to regulate the activities that are covered. Independent of this question, however, it is interesting for the purposes of this study to note that the South African government has sought to define overseas military services in terms of the equipment used. The significance of this type of definition will be discussed under the US section below and in the general analysis towards the end of the paper.

Analysis

For simplicity, throughout this analysis the Prohibition of Mercenary Activities and Regulation of Certain Activities in Countries of Armed Conflict Bill, which was still in bill form during the compiling of this report, will be referred to as 'the Bill' and the Regulation of Foreign Military Assistance Act, which has passed into law, will be referred to as 'the Act'. The Conventional Arms Control Act is not discussed in this section.

Definition of Mercenary activity

The first problem to highlight in the Act is that the definition of mercenary is problematic both in that motivation is notoriously difficult to prove in law and in that many members of state armed forces serve for private gain at least as much as for reasons of ideology or patriotism. Various commentators have highlighted this problem, including Boshoff, who writes of 'a lack of clarity on the part of the government as to what constitutes mercenary activity'.[46] The Bill clearly tries to get around this problem by concentrating on the acts that are to be prohibited. This results in a tightened definition, and escapes the difficulty of proving motivation for someone who initiates or furthers an armed conflict, coup d'état or rebellion but still requires motivation to be demonstrated in a court of law for someone who simply participates in an armed conflict.

Interestingly, Boshoff[47] believes that it would be more suitable for South African legislation to be aligned with the international position reflected in the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, which in turn is based on the six cumulative criteria of the First Additional protocol to the Geneva Convention. As has already been mentioned, there are a number of difficulties with this definition, including the need to establish motivation, and while the use of such a definition may align South African law with the international position, it seems likely to ensure that no successful prosecution is ever achieved.

Humanitarian and Other Legitimate Actors

The Act has been widely criticised because the definition section specifies that humanitarian activities 'aimed at relieving the plight of civilians in an area of armed conflict' can not be considered to constitute military assistance in the terms of the act. This loophole has allegedly allowed a number of South African private military and security providers to operate in Iraq and Afghanistan without NCACC permission because they claim, falsely, that they are carrying out demining or other humanitarian work.[48] The Deputy Chairman of the NCACC also criticised the blanket exclusion for humanitarian activities in the Act for placing the burden on the state to prove that they

[46] Boshoff, op. cit., p. 4.
[47] Boshoff, op. cit., pp. 11-12.
[48] Raenette Taljaard, 'Implementing South Africa's Regulation of Foreign Military Assistance Act' in Alan Bryden and Marina Caparini, eds., *Private Actors and Security Governance*, Berlin: Lit Verlag, 2006, p. 169.

were not humanitarian but mercenary.[49] The South African authorities have not provided themselves with the resources necessary to investigate and police false claims, so this provision has become a large loophole in the law.

The Bill seeks to close this loophole by specifically including all humanitarian and other activities in regulated countries or areas of armed conflict. The generalisation of the prohibitions to cover all sorts of humanitarian action, it is argued, forces humanitarian agencies to spend time applying to the NCACC for authorisation for missions in regulated countries. It is also claimed that such a wide ranging set of prohibitions violates section 22 of the Constitution in that it infringes South Africans' rights to engage in legitimate humanitarian and security work overseas. Gumedze,[50] however, cites section 36, which states that the rights enshrined in the constitution may be limited 'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom' to argue that the objection to the bill does not hold as the proper regulation of the international provision of military and security services is reasonable and justified, and thus does not constitute an unconstitutional infringement of rights.

Whether or not the Bill infringes people's rights, it is clear that the Bill contains elements that are problematic. While legitimately seeking to prevent security and military actors from escaping the regulation by claiming to be humanitarian, the original version of the Bill would force humanitarian actors to expend time seeking authorisation to undertaken activities that are often of a highly urgent nature. However the final version of the Bill passed by the Defence Committee and which only recently received Presidential assent is an improvement over the original form. The Bill's initial prohibition against providing humanitarian assistance without authorisation in a country where there is an armed conflict has been significantly amended and narrowed in scope to apply only to South African humanitarian organisations. This remains somewhat ambiguous, however, as it is unclear, for example, whether the ICRC's mission in Pretoria would qualify as South African or not. Moreover South African humanitarian organisations are required by the amended version of the Bill only to register with the NCACC, a less time consuming procedure than the original version's requirement of receiving authorisation from the NCACC.

Also problematic is the Bill's broad definition of 'armed conflict', which raises the possibility that a person legally providing security services in a country may overnight be in breach of the law if hostilities were to suddenly occur in another part of the country.[51]

Further, according to the Bill as currently stands, there is no distinction made according to whom security services are provided for in a conflict zone. All security services

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[49] 'New Mercenary Law to Put Squeeze on Soldiers of Fortune', *Business Day*, 3 August 2005.
[50] Sabelo Gumedze, *New Opportunities, New Challenges : The prohibition of Mercenary Activities and regulation of Certain Activities in Country of Armed Conflict Bill*, ISS, available at http://www.iss.co.za/static/templates/tmpl_html.php?node_id=1860&link_id=30
[51] Webber Wetzel Bowens, 'Amendments to South African Legislation don't go far enough', 23 August 2006.

provided in a country where an armed conflict is taking place require authorisation, regardless of whether or not the security services are being provided to a party to the armed conflict.

Difficulties in Enforcement

Raenette Taljaard[52]makes the point that despite large numbers of South Africans flouting the Act, few cases have made it to court, and that the vast proportion of prosecutions that have been brought have ended in plea bargains because, as the South African prosecuting agency has frankly admitted, it would in almost all cases have been very hard to obtain a successful prosecution. This situation is also reflected in the memorandum to the Bill, which states that 'very few prosecutions have been entered into in terms of the Act. In most cases a conviction followed only after a plea bargain was entered into between the prosecution and the accused'. The reasons for this situation, which are diverse, are discussed below.

There are clearly great difficulties in collecting evidence for the prosecution of crimes committed under legislation such as this, most of which necessarily take place in zones of crisis or conflict far from the prosecuting country. Investigation of alleged mercenary activities and illegal trade in conventional arms are investigated by the Priority Crimes Litigation Unit (PCLU) of the National Prosecuting Authority. The limited means available to the South African government have undoubtedly contributed to the very low level of prosecutions under the act. The PCLU has only five full-time staff in addition to its special director, and is responsible for investigating cases referred by the president or the national director of public prosecutions, which may also include weapons of mass destruction, issues relating to terrorism, the International Criminal Court, and the Truth and Reconciliation Commission.[53]

Taljaard makes the further point that even where there is sufficient evidence for a prosecution, the international nature of the actors involved means that extradition is often necessary to bring them to justice and that it is not hard for them to find a country where the double criminality requirements of an extradition order would not apply.

Lack of Parliamentary Oversight

Under the terms of the Act, the NCACC, which is an appointed body, has little executive power, only being mandated to make recommendations to the Minister of Defence, who takes decisions in consultation with the committee, and to make quarterly reports on the register of applications to the national executive, Parliament and Parliamentary Committees on Defence. While there is a degree of parliamentary oversight of the process, therefore, the legislature has no input into the authorisation procedure. Under the

[52] Ibid., pp. 174-181.
[53] Peter Honey, 'National Specialist Services: Quietly Making Waves', *Financial Mail* (South Africa), 16 March 2007, p. 10.

terms of the Bill, the NCACC has executive authority to accept or refuse applications to provide assistance or services and, as Doug Brooks[54] has pointed out, there is no right to appeal against these decisions. While the NCACC still has to make quarterly reports to parliamentary bodies, this lack of democratic or input into the decision process is clearly troubling. Furthermore, as the NCACC is a body composed of Ministers and Deputy Ministers appointed by the President, critics maintain that the authorisation process would be essentially political in nature rather than administrative.[55]

Authorisation and Approval Process

Aside from the lack of parliamentary oversight or possibility of appeal cited above, the approval and authorisation process has come under specific criticism because the guidelines are inadequate, the fee structure is unclear, there is no time limit specified for decisions.

The guidelines provided for the committee in making its decision whether or not to authorise the provision of services defined as foreign military assistance have been criticised as being 'vague and subjective, raising the possibility that the courts may consider them to be vague and invalid.'[56] As the US regulations and the EU code of conduct contain similar lists of guidelines, it is felt that the merits of the South African guidelines would be better assessed against these others, so this subject will be covered in the comparative analysis section of the paper.

Malan and Cilliers[57] argue that the Act (which had been in bill stage at the time of their comments) is defective in that there is insufficient control of the fees to be paid for submissions to the NCACC. Specifically, they argue that the Minister, by making fees unaffordable for certain types of application, may easily subvert the intentions of the act. Although such a suggestion may seem far fetched, it does seem appropriate that there should be some formal provision in the law for a fee structure that covers no more than reasonable government administrative costs.

The same writers also argue that the lack of a clear time frame for the decision process provided for under the Act may be harmful to some applicants. It is also possible that this may be open to abuse by the NCACC in that unreasonable delay could cause an applicant to lose a contract. This question of delay is addressed under the Bill in that the President may grant exemption from the provisions of the Act for a humanitarian relief effort. There is also provision for the chairperson of the NCACC to grant interim authorisation

[54] Doug Brooks, President of the International Peace Operators Association in his submission on the bill, available at http://ipoaonline.org/en/gov/051028FinalIPOASALegislationComment.pdf
[55] See remarks by the Democratic Alliance during the Portfolio Committee on Defence debate of 15 August 2006 in *This Week in Parliament*, 18 August 2006.
[56] Andre Stemmet, 'National Legislation: the Development of "Best Practice"' in *The Privatization of Security: Framing a Conflict Prevention and Peacebuilding Policy Agenda,* Wilton Park Conference, 19-21 November 1999, p. 43.
[57] Mark Malan and Jakkie Cilliers, *Mercenaries and Mischief: The Regulation of Foreign Military Assistance Bill*, ISS Occasional Paper 25, September 1997, available at http://www.iss.co.za/Pubs/PAPERS/25/Paper25.html

for humanitarian work, with that interim authorisation being ratified by the whole committee within 30 days. For non-humanitarian actors, though, the Bill specifies no time span for the decision process, which could, as for the Act, be damaging to commercial interests. This point has been raised by Sabelo Gumedze,[58] who argues that the approval process should be made as rapid as possible and that the Bill, if passed into law, should take care not to undermine the economic benefits that accrue from the export of legitimate security services.

Legitimisation of Military Contractors

When examining any legislation that aims to regulate private military and security providers one has to ask whether the legislation aims to put the industry outside the law, and so suppress it, or whether it aims to gather parts of the industry inside the law, and control it in that way. There is general confusion about the intentions in this regard of the South African legislation.

Raenette Taljaard seems to be clear that the aim of the South African legislation is to 'sideline'[59] the industry, but that the actual combined effect of, on one hand, an antagonistic relationship between the legislators and the industry and, on the other, poorly resourced implementation efforts has been to criminalise an industry without having any perceptible effect on its operation. There is also an argument that if it was the intention to delegitimise the industry then it was an error to allow for a licensing regime as the possibility of being awarded a licence held out the prospect, for the private military and security industries, of being given sanction by the government. Although a state's decision to issue a licence to operate to a contractor does not seem to entail state legal responsibility for the actions of the contractor,[60] there is a very clear normative principle that in licensing an activity under a legal regime the state legitimises that activity. To introduce legislation which provides for the issue of licences by a state organ to a certain type of contractor would thus represent a curious means of delegitimising that type of contractor. Both the existing Act and the Bill can clearly be seen as attempts to delegitimise those parts of the industry that engage in pure mercenary activity, that support terrorism, endanger peace or infringe human rights. Unless those parts of the private security industry that do not engage in these types of activity are all to be classed as 'unacceptable for any other reason',[61] however, it is hard to sustain an argument that the legislation seeks to delegitimise them, although the application of that legislation may well have that intended effect.

In the event, it was reported by the Deputy Chairman of the NCACC in briefing the defence committee on NCACC activities for 2003-4 that very few companies have

[58] Sabelo Gumedze, *New Opportunities, New Challenges: The Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Bill*, ISS, available at http://www.iss.co.za/static/templates/tmpl_html.php?node_id=1860&link_id=30
[59] Taljaard op. cit., p169
[60] Chia Lehnardt, 'Private Military Companies and State Responsibility' in Simon Chesterman and Chia Lenhardt op. cit.
[61] RFMAA section 7 para 1 (g).

applied for authorisation to operate abroad. Only two applications were received by the NCACC for companies wanting to operate abroad in 2003 and these were refused. A further two cases in 2003 were referred to the National Prosecuting Authority for prosecution, but could not be due to difficulties in obtaining the evidence.[62] Overall, it seems that even if there was some ambiguity in the letter of the law, given the adversarial context of relations between the mainly apartheid era military veterans of the security industry and the stated values of the new republic, there can have been little doubt that the legislators were seeking to put the industry firmly outside the law, rather than to legitimise even limited sections of it.

Non-implementation of the Law

While many of the above arguments point towards shortcomings in both the Act and the Bill, it is hard to escape the conclusion that the lack of successful prosecutions owes itself as much to a lack of enthusiasm on the parts of official South Africa. It is possible that once the reforming zeal of the new South African republic had been allowed to burn itself out the government returned to a world in which the growth in the private military and security trades actually meant that large numbers of South Africans who might not have been well equipped to fit into the new republic went abroad instead to generate foreign exchange revenue. This, along with other such prosaic influences as a struggling economy and a worsening internal security context have probably diverted the attention of the South African administration away from the policing of what was always going to be a very hard law to implement and enforce. Furthermore, while the PCU of the NPA has become responsible for alleged mercenary and arms trafficking violations, the lack of any specifically designated enforcement agency in legislation diffuses responsibility for initiating, investigating and prosecuting contraventions of the law. The main significance of these factors for this study lies in the cautionary note that the failure of the Act to achieve its stated aims may not lie entirely in the text of the Act and that the Act and the Bill remain useful examples of legislation regulating private security providers.

Conclusion

The new South African republic has equipped itself with separate laws to cover the internal and external security industries but the fact that the law to cover the internal market asserts extraterritorial jurisdiction implies that there is a perception of overlap between the two fields. The law covering the external market, which has had little effect on the realities of the market, has been extensively criticised and a new Bill is currently being examined with a view to updating the legislation. There is considerable debate surrounding the merits of the proposed new legislation and it is unclear whether it will represent an improvement on the old. Whatever legislation is in force, however, it will have minimal effect on the market if the law is not properly enforced and it seems to be that case that the body holding responsibility for implementing the regulations covering the internal market is overstretched. Responsibility for initiating investigations and

[62] 'New Mercenary Law to Put Squeeze on Soldiers of Fortune', *Business Day*, 3 August 2005.

prosecutions of alleged violations should also be more clearly set out. It is submitted that a robust organisation clearly tasked and capable of collecting evidence in difficult circumstances and pursuing successful prosecutions would demonstrate that neither the current nor the proposed legislations are as full of holes as commentators would have one believe.

UNITED STATES OF AMERICA

The Legislation

Foreign Military Sales

Section 3 of the Arms Export Control Act covers transfers of military equipment and/or services from the US government to foreign governments under a programme known as the Foreign Military Sales programme (FMS). The provisions of this section are used by companies working with the government to export US military equipment or services. The government, through the Defense Security Cooperation Agency (DSCA),[63] negotiates with foreign governments wishing to procure US equipment or services, then procures the services itself from a US provider before reselling to the foreign government. The sense of the transaction may be reversed, in that a supplier intending to export to a given client contacts the DSCA and asks it to act as a sales agent. The DSCA charges a fee of three percent of the value of the order to cover its own administrative costs. Executive Order 11958 delegates the bulk of the president's powers under section 3 of the act to the Secretary of State, but he in turn, re-delegates those powers to the Under Secretary for Arms Control and International Security, a State Department Official.[64] The execution of the programme, though, is run through the DSCA, which is part of the Defense Department.

Goods and services can only be exported under FMS if,

- 'the President finds that the furnishing of defense articles and defense services to such a country or international organisation will strengthen the security of the United States and promote world peace';[65]
- 'the country or international organisation shall have agreed that it will maintain the security of such article or service and will provide

[63] DSCA website, http://www.dsca.mil/about_us.htm
[64] Delegation of Authority 293: Organization, functions, and authority delegations: Director of Foreign Assistance, et al, http://www.state.gov/s/l/treaty/authorities/69286.htm
[65] AECA section 3, a, 1

substantially the same degree of security protection afforded to such an article or service by the United States Government';[66]

- the country will not transfer the material or technology to a third country that the US would not normally supply;
- the country does not have a track record of violating the terms of FMS agreements.[67]

Furthermore, section 32 of the act instructs the President to 'exercise restraint in selling defense articles and defense services' to Sub-Saharan Africa on the grounds that 'the problems of sub Saharan Africa are primarily those of economic development and … United States policy should assist in limiting the development of costly military equipment in that region'. Section 35 of the act directs that any country suspected of diverting development aid towards military purposes in such a way as to interfere with its development shall become ineligible for further military sales. This section of the act is significant to this study in that it provides guidance based on geography. The implications and advantages of geographically defined regulation will be discussed in the analysis section.

Any export contract with a value greater than $50 million needs to be placed before Congress within a period of thirty days, or fifteen days in the case of exports to NATO countries, Japan, Australia or New Zealand, during which time Congress may block the export by means of a joint resolution.[68] The President can, however, circumvent this thirty day oversight period if he certifies that an emergency exists that demands immediate consent for the transfer, and that such consent would be in the US national interest.

International Traffic in Arms Regulations

Section 38 of the Arms Export Control Act, enacted as US Code 2778, authorises the President to control the import and export of defence articles and services. It provides for the controlled items and services to be defined in the US Munitions List and instructs the President to 'take into account whether the export of an article would contribute to an arms race, aid in the development of weapons of mass destruction, support international terrorism, increase the possibility of outbreak or escalation of conflict, or prejudice the development of bilateral or multilateral arms control or non-proliferation agreements or other arrangements'.

This section of the act also specifies that any person engaging in the manufacture, export or brokering of any defence article or services must register with the relevant agency of the US governments.

[66] AECA section 3, a, 3
[67] AECA section 3, c, 3, A
[68] AECA, section 3, d.

Executive Order 11958 provides for the delegation of certain of the president's functions. The functions that are of interest to this study are delegated to the Secretary of State except that, in agreement with the Secretary of State, the Secretary of Commerce may assume responsibility for certain aspects of enforcement.

The International traffic in Arms Regulations (ITAR)[69] provide for the execution of the act. These regulations include the definition of a defence service as 'the furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles or the furnishing to foreign persons of any technical data … whether in the United States or abroad' as well as specifying that the Office or Department of Defence Trade Controls (subsequently renamed the Directorate of Defense Trade Controls or DDTC) will be charged with implementation of the regulations. DDTC has a complement of around seventy Department of State (DOS) personnel, eight military officers and about forty contract personnel and has an operational budget of approximately $10 million.[70]

The regulations also contain the US Munitions List, which defines the military materials that are subject to export control. The munitions list also defines the services to be subjected to export control in terms of their association with specific equipment. Category I of the list thus specifies the types of firearms that are to be subject to control and also specifies that 'technical data (as defined earlier in the regulations) and defence services (as defined above) directly related to the defense articles enumerated in (this category)' are to be subject to the same controls as the equipment itself. There is thus an interesting loophole in the regulations in that any services that are not related to a specified equipment could escape the legislation. It is entirely possible to conceive, for instance, of a high level military training or consulting service that was designed such as to be so general in nature that it could not be described as being related to any controlled equipment and would thus escape control. Discussions with managers of US private military companies confirms the rather loose nature of this licensing structure built around US Munitions List categories, admitting that some of their services require licenses while others do not, all depending on the circumstances of the contracted service. In reality, the relationship between US suppliers of military and security services and their government is such that suppliers are unlikely either to need or to want to use such a loophole but it might be worth taking into account when considering equivalent legislation in a less consensual and cooperative environment.

The ITAR also lay down the procedures for authorisation of exports. As specified in the act, all organisations engaging in the export of military equipment or services must register with the DDTC. In addition to being registered, they must also obtain a licence for each contract for the export of equipment and a technical assistance agreement for the

[69] http://www.fas.org/spp/starwars/offdocs/itar/p120.htm
[70] http://www.thefreelibrary.com/End-use+monitoring+of+defense+articles+and+defense+services...-a0163703249, End-Use Monitoring of Defense Articles and Defense Services Commercial Exports, http://www.fas.org/asmp/resources/govern/109th/StateEUMfy04.pdf

export of defence services. These applications are examined by the DDTC who will decide whether or not to award a license and may impose conditions on the license. These conditions may be as detailed as insistence on the alteration of specific information contained in PowerPoint presentations for training courses.[71] The approval process may be internal to DDTC or may include consultation with other government departments, in which case the investigation is described as a 'staffed' review.

Similarly to the FMA, exports under ITAR that exceed $50 million are subject to Congressional approval.

Application

Both ITAR and FMS are set up with robust enforcement mechanisms, each having its own dedicated agency to manage the examination of applications, the issue of licences and the investigation of breaches. Given this robust framework and the US administration's global reach and intelligence gathering capabilities it is unsurprising that the regulations are significantly better policed than those in South Africa.

The enforcement of ITAR exports is generally run through a project known as Blue Lantern. Blue Lantern is run by the DDTC in conjunction with the US Customs service and aims to verify correct end use of equipment and services exported under ITAR. This enforcement includes background checks before issue of a licence, a procedure which reportedly often results in applications being denied and applicants being put on a State Department operated watch list, and post contract end user verification. Of around 60 000 export transactions undertaken every year approximately 500 are subjected to Blue Lantern Checks.[72] A knowledge base has been established which allows DDTC staff to target the Blue Lantern checks towards those transactions that are most likely to be in contravention of the results. In 2004 18 percent of the checks returned unfavourable results.

A US State Department website records that in 2001 there were 50 arrests for AECA violations of which 39 resulted in convictions.[73] Government interest in arms exports became more intense after 2001 and it was reported on the same website that during the first six months of 2006 there were 86 arrests and 32 convictions.

As a crude indicator of the costs involved in monitoring the ITAR system, we can compare the DDTC budget of around $8.7 million for 2005 with the total exports under ITAR for that year of $24 billion in equipment and $27 billion in services.[74] Although it is unclear to what extent the costs of other agencies contributing to DDTC investigations

[71] Correspondance with DDTC agreement officer cited in Marina Caparini op. cit.
[72] End-Use Monitoring of Defense Articles and Defense Services Commercial Exports, http://www.fas.org/asmp/resources/govern/109th/StateEUMfy04.pdf
[73] http://www.state.gov/t/pm/rls/fs/68550.htm
[74] Report by the Department of State Pursuant to Sec. 655 of the Foreign Assistance Act Of 1961, as Amended Direct Commercial Sales Authorizations for Fiscal Year 2005, http://www.sipri.org/contents/armstrad/atlinks_gov.html

are reflected in these figures, they do give a crude indication that for every $3000 of authorised export the government spends $1 on administration of the ITAR licensing procedure. Clearly, these calculations do not apply to the FMS procedure, under which the supplier pays a three percent fee to cover government expenses.

While the Blue Lantern project has clearly had some success in detecting contraventions of the act, it is much less clear to what extent enforcement measures have involved private military and security companies providing armed protection in conflict zones. Deborah Avant notes that State Department officials have been reluctant to oversee contracts involving private military and security contractors. Moreover, due to the fluid movement between government and industry in the U.S., those individuals responsible for monitoring the delivery of private military and security services to their foreign clients on the ground – usually U.S. defence attachés – have often found themselves '"overseeing" past bosses – and feeling quite uncomfortable with the idea', undermining effective oversight.[75]

There is also a suspicion that where US national interest is concerned the licensing process may get speeded up to the extent that pre licence investigations are not a realistic proposition. In the cases of applications for licenses in support of Operations Enduring Freedom and Iraqi Freedom, for instance, it is reported that the targeted turnaround time for licence applications has been reduced to 2 days for unstaffed (i.e. not subjected to interdepartmental review) ITAR applications and 4 days for staffed applications.[76] While this may seem extreme, it could also be argued that, in the context of a set of regulations that are intended to serve the national interest, it is entirely coherent to reduce red tape that might slow up private contribution to a high profile government operation. In this context, and accepting the goals of the legislation, one could thus argue that the executive's flexibility to fast track licence application represents a bonus rather than a shortcoming.

Accountability

It is arguable that the greatest common shortcomings of the two systems established under the AECA lie in the lack of democratic accountability and transparency of the procedures. In the case of an arms export valued at under $50 million the licensing procedure is exclusively managed by the executive with no legislative input and even export contracts having a value over $50 million can, if desired, be broken into smaller packages so as to fall below the threshold of congressional approval.

In addition to the lack of congressional input into the decision making process there are shortcomings in the reporting process. Section 38 (f) of the act requires Congress and the relevant Committees be informed of any changes to the US Munitions List and section 36

[75] Deborah Avant, *The Market for Force: The Consequences of Privatizing Security*, Cambridge: Cambridge University Press, 2005, p. 151.
[76] GAO, 'Defense Trade: Arms Export Control System in the Post 9/11 Environment', February 2005, cited in Caparini op. cit.

requires the President to make quarterly reports to congress both of offers to sell equipment to foreign countries and of export licences awarded. The reporting requirements specified under section 36 are laid out in the table below.

	FMS	ITAR
Defence Equipment not described as major and defence services.	Total value of articles and services sold to each country	Total value of licenses per country
Major defence equipment less than $1M	Total value of articles and services sold to each country	Total value of licenses per country
Major Defence Equipment greater than $1M	Listing of letters of offer and sales, specifying description, quantity, dollar value, country of destination and US govt. agency conducting the sale	Numbered listing including description, quantity, price and name and address of end user
Defence services greater than $50M	Congressional Approval, with report detailing description, destination, recipient, cost and date of and reasons for transfer	Congressional Approval, with report detailing description, destination, recipient, cost and date of and reasons for transfer

It will be noted above that there is no requirement to disclose the names of companies that have registered as arms exporters and nor is it necessary to report which companies are exporting services or equipment. In the case of contracts valued at more than $50M, however, one suspects that it would not take a determined investigative journalist long to make the link between supplier and contract. The ITAR[77] specify that the destination country and dollar value and nature of any defence export may be withheld from the public if the President decides that disclosure would be contrary to the national interest. There is provision for the quarterly reports made to Congress to be classified, so it would seem that the national interest clause limits transparency to the public rather than the democratic accountability of the process. It is also reported that 'in May 2002, the Justice Department issued new guidelines allowing companies to challenge the release of information about them to the public under the Freedom of Information Act, further hindering public disclosure',[78] which would indicate another shortfall in public visibility if not in democratic oversight.

Conclusion

[77] ITAR 126.10(b)

[78] Laura Peterson, *Privatizing Combat, the New World Order*, the International Consortium of Investigative Journalists, http://www.publicintegrity.org/bow/report.aspx?aid=148

The United States has a dual system of arms export control that allows executive oversight and licensing of a wide range of defence related equipment and services. The legislation is intended to ensure that US persons and companies providing military services and equipment overseas do so in such a way as to support, or at least not to undermine, US foreign policy. It is thus unsurprising that, aside from a few provisions covering such areas as arms races and the diversion of development aid, there is little emphasis on humanitarian or human rights related considerations. It is also unsurprising that the legislation and ensuing regulations give wide ranging responsibility to the executive to the detriment of legislative input or oversight and that public scrutiny of the trade is kept to an absolute minimum. All this makes reliable assessment of the effectiveness of the implementation of the regulations difficult, but it does seem clear that the departments that are specifically tasked with implementation and enforcement of the legislation and which can call on the support of other government agencies, have had some success in preventing and prosecuting contraventions. Given the scale of US presence and capability overseas the enforcement net is wider than could be managed by any other country. Furthermore, the nature of the relationship between the US government and its suppliers of military equipment and services is such that there is a strong commercial disincentive for suppliers to contravene the regulations. Notwithstanding this it is, of course, impossible, to judge how much illegal trade does get through the net.

UNITED KINGDOM

Regulation of Domestic Security Providers

The British domestic private security industry is governed by the Private Security Industry Act 2001[79], the extent of which is specifically limited to the United Kingdom and contains no provisions for extraterritorial application. The act provides for the formation of an oversight and management body, called the Security Industry Authority and allows for licensing of operatives and registering of providers as 'approved contractors'.

For the purposes of this study, however, the act is of interest only in so far as that it demonstrates that the domestic market is seen as being entirely separate, for legislative purposes, from the international market.

Arms Export Control

The Arms Export Control Act 2002[80] provides for the Secretary of State at the Department of Trade and Industry to provide or alter schedules of goods whose export is prohibited, such as the commonly referred to 'military list'.[81] The Secretary of State may also prohibit the export of specified goods to specified locations by means of an order,

[79] http://www.opsi.gov.uk/acts/acts2001/10012--a.htm#26
[80] http://www.opsi.gov.uk/acts/en2002/2002en28.htm
[81] http://www.dti.gov.uk/files/file32522.pdf

such as in the case of the Trade in Controlled Goods (Embargoed Destinations) Order 2004.[82] These prohibitions are not, however, absolute and the Secretary of State may grant a licence for the export of any scheduled goods.

The legislation provides no guidance for the secretary of State in scheduling goods or granting licences, though the consolidated criteria announced by Peter Hain, Foreign & Commonwealth Office Minister, on 26 October 2000[83] which combine the UK criteria and the EU Code of Conduct do provide guidance for the scheduling of and award of licences to export arms. The situation in the UK can thus be seen as being close to those prevailing in France and Australia.

Regulation of PSCs and PMCs Operating Overseas

The United Kingdom has a number of legislative instruments that could be applied, in certain circumstances, to private military and security providers operating overseas but no legislation specifically dedicated to their regulation.

In February 1998 the private military company Sandline sent a shipment of arms to Sierra Leone in support of a democratically elected regime but in violation of a UN arms embargo that was nominally supported by the UK. In the subsequent furore Sandline's management claimed that the British government was aware of the shipment and had unofficially approved it. This caused considerable embarrassment to the new Blair government, which had claimed that it would operate an ethical foreign policy. One result of this affair was the decision to publish a Green Paper discussing options for regulation of private security companies. The Green Paper was substantially delayed and, when it did come out, made few concrete recommendations. The general spirit of the paper indicates that a decision to regulate would come as a result of national interest concerns rather than any particular worries about ethical or human rights led motivations. There has been no perceptible movement in government circles since the publication of the Green Paper in 2001, and it is probably safe to say that regulation is now unlikely in the absence of a fundamental shift in UK policy.

This section will limit itself to a discussion of the extant legislation that could be applied to private security and military providers and to the nature and effectiveness of the self regulation scheme set up by the industry under the auspices of the British Association of Private Security Companies. The Green Paper, which is a very significant document, discussed a number of options, none of which have been implemented. A full discussion of the options outlined in the Green Paper will be reserved for the comparative analysis section of this study.

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[82] http://www.opsi.gov.uk/si/si2004/20040318.htm

[83] http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1014918697565

Current Legislation

Foreign Enlistment Act, 1870

The objective of this act was to discourage UK subjects from engaging in foreign armed forces that were likely to act contrary to UK national interest. Specifically, there was a desire to avoid seeing UK subjects fighting against UK armed forces.

In order for a person to be liable to prosecution under the act they must fulfil the following conditions;

> If a British Subject, irrespective of location, serve or agree to serve in the military service of a state that is at war with a foreign state at peace with the UK.
>
> If on UK territory, irrespective of nationality, induce someone to serve in the military service of a state that is at war with a foreign state at peace with the UK.
>
> To induce another to go abroad in order to accept a military engagement.

There has, apparently, never been a successful prosecution under the act, although prosecutions were considered during the Spanish Civil War. As far as this study is concerned, the act is of limited interest as the provisions are concerned with service in a foreign armed force rather than for a commercial organisation. As with article 28-3 of the French civil code, however, which allows the French government to prohibit an individual from continuing to serve in a foreign armed service, the 1870 act might conceivably be used against a PSC/PMC employee who was engaged in the forces of a government client in order to escape being defined as a mercenary. This use of the act, though a theoretical possibility, is unlikely to be applied in practice because, among other considerations, it is rare for PSC/PMCs to be engaged by states to fight other states.

Terrorism Act 2000[84]

Like the 1870 act, this act is not aimed at regulating private security and military providers, but it might allow the prosecution of certain individuals.

Section 54 makes it an offence to provide training in firearms or explosives, to receive training in firearms or explosives, or to invite another to receive training in firearms or explosives. There are questions about the applicability of this regulation to PSCs as it is a defence to show that the actions were intended for a purpose other than terrorism, but the definition of terrorism is such that an action, wherever undertaken, involving the use of firearms or explosives in support of any political or ideological cause and which causes serious damage to person(s) or property, wherever located, is a terrorist act. It is thus not

[84] http://www.opsi.gov.uk/Acts/acts2000/20000011.htm

hard to conceive of circumstances under which a PSC employee, himself being trained or engaged in training others for combat operations, would be guilty of an offence under the act. Given the intentions of the act, though, and the difficulties involved in collecting evidence, it is unlikely that it would be used to prosecute PSC or their employees.

Section 60 prohibits the incitement of certain actions that are prohibited under the offences against the person act, and internationalises UK jurisdiction with respect to such incitement provided it involves a terrorist act. As with section 45, however, even though PSC activities may well fall within the definition of terrorism, it is unlikely that the act will be used against PSCs. Furthermore, persons acting on behalf of the crown can not be prosecuted under this section, so any PSC employee on a government contract would presumably be excluded.

Export Control Act 2002

Section 2 provides for the control of technology transfers and section 3 provides for technical assistance control. The circumstances in which the act may come in to play are when an activity could threaten UK national security, have an adverse effect on peace, security or stability in any region of the world or within any country, facilitate contraventions of the international law of armed conflict, or lead to internal repression in any country or breaches of human rights. In these circumstances the Secretary of State may outlaw transfers or assistance by order.

The application of this law to private security and military providers will, however, have limitations as they are more likely to come under the technical assistance provisions than the export or transfer provisions, and the technical control provisions can only be applied if directly related to an export or transfer control. This means that the Secretary of State would appear to have no power to prohibit, for instance, a PSC from providing small arms training in a given state if there is no regulation prohibiting export of small arms to that state.

Landmines Act 1998[85]

Under this act, it is an offence to use, develop, produce, acquire or transfer an anti personnel landmine or to assist any other person to do so. This law applies in the UK for all persons and corporate bodies and outside the UK to UK subjects and UK incorporated corporate bodies. It is therefore clear that a PSC wishing to provide assistance and training in the use of anti personnel mines can indemnify itself by establishing a presence in an appropriate jurisdiction and using non UK employees for that particular contract.

Walker and Whyte[86] report that DynCorp Aerospace, a UK subsidiary of DynCorp, contravened the act in the run up to the invasion of Iraq, but were never pursued in the

[85] http://www.opsi.gov.uk/acts/acts1998/19980033.htm

British courts, which may indicate a lack of governmental enthusiasm for prosecutions of certain private military and or security companies.

The Current Situation

Whatever the facts of who said what to whom, the Sandline affair illustrates the broad nature of the relationship between the UK government and PSCs. Certain companies are deemed to be acceptable and their activities are not interfered with by the government as long as they remain broadly acceptable. Other companies, deemed less acceptable, may find life difficult in the UK. Certainly, the government is a big enough consumer of PSC services to reduce any one company's wayward tendencies, in addition to which the provisions listed above give the attorney general scope to make life at least awkward for PSCs that are deemed unacceptable. Alongside these considerations lies the fact that the bulk of PSC personnel come from a public service background and would likely be uncomfortable acting against the wishes of the government.

Perceptions of what constitutes an acceptable security or military provider may evolve with changing governmental priorities, but broadly it implies a requirement to act in a generally responsible way as far as human rights and international law are concerned and specifically not to act against perceived UK national interest.

Partly in response to this need to be readily identified as acceptable, a number of British security and military providers have formed a trade association called the British Association of Private Security Companies (BAPSC). This organisation was launched in February 2006 with the aim of working 'to promote the interests and regulate the activities of UK based firms that provide armed defensive security services in countries outside the UK'.[87] Member companies are required to sign up to and abide by the association's charter, provided at Annex C, and the association is wholly funded by subscribing members. The association is inevitably seen as a lobbying organisation for the industry, acting as 'a collective voice of our industry to engage government',[88] but it is also intended to act as a mechanism for self regulation.

This form of self regulation has the advantage, particularly in the laissez faire context of the British industry, that membership of the association would be a signal that a company has a track record of compliance with international humanitarian law and relevant international legal statutes, has undertaken not to involve itself in criminal activities or with criminal organisations, engages only in protective and defensive security tasks and provides adequate training for its staff. The mechanism has the further advantage that the burden of proof required to expel a company from the association for breaches of law would be much lower than the burden of proof required in a court of law. As has already

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[86] Clive Walker and Dave Whyte, 'Contracting out War? Private Military Companies, Law and Regulation in the United Kingdom', *International and Comparative Law Quarterly*, Vol. 54, July 2005.

[87] From BAPSC website, http://www.bapsc.org.uk/default.asp

[88] Tim Spicer, quoted in 'U.K.: War's fertile grounds for soldiers of fortune', Peter Almond, *The Sunday Times*, 30 October 2005

been shown in the South African case study, the collection of evidence to secure prosecutions can be problematic so regulation through membership of a trade association, with its lower burden of proof, may actually be more effective than regulation through the law. This advantage is further strengthened when one raises the possibility of it being a requirement of membership that members cooperate fully with association enquiries, which is not a provision of BAPSC membership.

There are, however, a number of reservations that have to be voiced about this mechanism. The first concerns the willingness of the industry, in the absence of any government involvement in the trade association, to regulate itself. If it became clear that the association was failing in its duty to investigate breaches of the charter then the system, which is based on the credibility of the association, would collapse. In the particular case of the BAPSC this is a worry as there is no indication of any systematic process of audit or investigation of alleged breaches of the charter and nor is it clear how welcome intrusive investigations would in reality be. A second concern is the self funding nature of the organisation. Companies pay subscriptions that are related to their size and this situation means that the relationship between the association and its larger paymasters, whose activities it is supposed to oversee and whom it might be required to expel, is less straightforward than might be ideal.

Summary

The UK government is a proponent of free market liberalism and withdrawal from many of those areas that are regarded as the exclusive domain of state actors. Coherent with these philosophies, much traditional military activity has been and is being privatised and the private security sector, which generates considerable governmental revenue in its own right as well as enjoying a symbiotic relationship with the wider arms industry, is left substantially to respond to market forces. At one level there is an acceptance that a fully regulated industry would be more satisfactory, but working against this is a feeling that effective regulation will be difficult to enforce and that the chosen combination of Darwinian market forces and occasional gentle nudges from the government results in an industry and a market that acts broadly in accordance with ethical and legal norms, generates revenue, and allows private sector activities to be aligned with national interest considerations.

SWISS ARMS EXPORT LEGISLATION

The legislation covering export of arms from Switzerland is contained in the federal armaments (matériel de guerre) law,[89] the armaments ordinance,[90] and indirectly, the federal law on the application of international sanctions.[91]

The federal armaments law provides for the Federal Council (Conseil Fédéral) to establish, by ordinance, a list of equipment that is covered by the definition or armaments and to designate a single agency to implement the law. The list is provided at Annex 1 to the ordinance and the agency charged with implementation of the law is the Secrétariat d'Etat à l'économie or SECO.

The underlying principle of the operation of the law is that no manufacturer or broker of armaments may export any item that is on the list of armaments without authorisation, initially to offer for sale and then to enter into a contract.

Article 18 of the law specifies that, in general, exportation will only be authorised to governments or companies working for governments, and that a guarantee must be provided that the armaments will not be re-exported. Article 5a of the ordinance states that anyone wishing to export arms to someone other than a government or a company working for a government will only receive authorisation if they can demonstrate that the import of the arms into the country concerned has been approved by the government of that country.

Article 20 of the law specifies that similar authorisation is needed for the export of intellectual property and services required for the development, fabrication and exportation of arms. There is, however, no need for a specific authorisation if the contract is for installation or routine repair and maintenance of arms whose export has been subject to an authorisation. The criteria against which an application for the export of such services is judged are laid down in article 5 of the ordinance and they specify that the decision must take into account the following considerations;

a. The maintenance of peace, international security and regional stability
b. The situation in the destination country, with particular reference to respect of human rights and the use of child soldiers
c. Switzerland's efforts in the areas of cooperation and development
d. The destination country's attitude to the international community, particularly its respect of international law
e. The policy of countries which, like Switzerland, are signed up to international arms control regimes.

[89] RS 514,51, http://www.admin.ch/ch/f/rs/514_51/index.html#id-1
[90] RS 514,511, http://www.admin.ch/ch/f/rs/514_511/a2.html
[91] RS 946,231, http://www.admin.ch/ch/f/rs/946_231/index.html

Article 22 of the law specifies that authorisation for the export of material should be given unless it would be contrary to international law, contrary to Swiss foreign policy or contrary to Switzerland's international obligations and article 26 specifies that exportation to a country covered by the embargo law should not be authorised. The terms of Article 22 are interesting as they lay the burden of proof on the government, which has to demonstrate that there is good reason not to export the arms.

The authorisation process operates in two stages, with an initial authorisation being required to construct armaments or for anyone intending to export them and a specific authorisation being required for each export contract.

There is a geographical element to the regulation in that Annex 2 of the ordinance provides a list of countries, limited to North America, Argentina, Japan and Europe, to which armaments and technical knowledge may be exported by persons or organisations holding only the initial authorisation but not the specific authorisation.

Conclusion

In conclusion, the Swiss arms export regulations follow the general model in that they establish a list of equipment the export of which requires a licence and allows for regular updates of the list. The decision whether or not to award a licence is based on international law, Swiss foreign policy and Swiss international obligations. The process involves two stages, with an initial licence being required for the manufacture of arms or for anyone intending to export them and a specific authorisation being required for each export contract. Exports to North America, Argentina and a number of European countries do not need the specific authorisation.

ANALYSIS

Separation of Domestic and External Markets

The first observation to make here is that four of the five case study countries have established legislation covering the domestic security market that does not cover overseas activities. The fifth, South Africa, includes an extraterritoriality provision in its internal legislation but does not make use of this provision, which is in any case ambiguous as concerns South African companies operating exclusively overseas. The second observation is that the two countries that have legislated to regulate their overseas operations of their private security and military companies have done so without reference to their domestic markets or the legislation that covers them. One conclusion that can be drawn is that there is no requirement to establish a register of domestic providers in order to regulate the overseas market.

Analysis of the actors involved would seem to back up this conclusion. Security operations in Switzerland are so different from security and military operations in areas of crisis or conflict that the skills that a company gains in the domestic market are unlikely to be of significant use to them in the overseas market, and habits formed in the Swiss market may even become a hindrance when working overseas. This is reflected in the very small number of developed world companies that provide armed protection and security services both in their domestic markets as well as in zones of crisis or conflict.

The answer to this question, then, is that it is possible to regulate the export of security and military services without establishing a combined registration system for the domestic and international markets.

Defining the Object of Regulation

The first question to be addressed here asks whether regulation should be aimed at actors or actions. There have been a number of attempts to establish a typology that differentiates between legitimate actors and those that might merit regulation. In this context commentators often make a distinction between Private Security Companies, which are described as offering essentially defensive services, and Private Military Companies, which may offer to participate in more traditional military type operations, even taking the offensive if required. There are a number of difficulties with such typologies, one of which is that any given company is likely to offer a range of services spanning different definitions and another is that the nature of a company's operations, and its interest to regulators, is likely to be defined as much in terms of the context of operation as the nature of the operational objective. The protection of a cash delivery in Zurich or even Khartoum may be a relatively innocuous operation while the same operation undertaken in Baghdad may have very different connotations. To quote the British Government's Green Paper:

> …the problem of definition is not merely one of wording. The internationally agreed definitions have been shaped to suit the agendas of those drafting them and are not necessarily very useful. The fact is that there are a range of operators in this field who provide a spectrum of military services abroad. It is possible to devise different labels according to the activities concerned, the intention behind them and the effect they may have; but in practice the categories will often merge into one another.[92]

It is thus recommended that regulation be aimed directly at types of activity, rather than at a classification of actors that is based on their business profiles or the range of services they offer.

[92] Foreign and Commonwealth Office, Green Paper, *Private Military Companies: Options for Regulation*, London: The Stationary Office, 2002, p.9. Available at http://www.fco.gov.uk/Files/kfile/mercenaries,0.pdf

Mercenary Type Activity

The Australian and French systems provide models for the outright banning of mercenary activity, using definitions that are based in different international conventions. The activities described by either of these conventions are so universally regarded as reprehensible that there is probably a good case for legislation to criminalise them, even claiming a degree of extraterritorial jurisdiction, without having to get involved in debates about unfair restriction of freedoms. It may thus be opportune to include provisions similar to those contained in the French or Australian laws in any legislation that covers private security and military provision, but it should be borne in mind that such legislation is likely to be so difficult to enforce as to render it largely symbolic.

Private Security and Military Companies

Clearly, in defining the activity to be regulated the challenge is to cast the net wide enough to allow the government to catch all the activity that it wishes to limit but not so wide as to waste government resources and impede the activities of bona fide actors. It may also be desirable to maintain some margin for the government to examine each proposed action on a case-by-case basis and to approve or not according to the requirements and interests of the ruling government. For this reason it may be best to introduce a two stage approach: the first stage consisting of a net wide enough to be sure of catching all potentially undesirable activity and the second stage allowing the government to sort through this catch to determine precisely which activities are suitable at the time and in the prevailing circumstances and which activities should be prohibited. This recommends establishment of a licensing system, with the first stage identifying those activities that need to be licensed and the second defining those that are awarded the licence. In the event, however, of a decision to opt for outright banning of private security and military companies worldwide or in defined zones, the range of activities to be banned will substantially resemble the range of activities that would, under a licensing system, need to be licensed. This section will discuss the means that might be used to set the limits of the first net which would be used in either a licensing regime or an outright ban.

The South African legislation as it currently stands gives a wide ranging definition of military and security services and assistance that would probably cover all the activities that the Swiss government would wish to regulate but leaves a hole in the net by exempting ‘humanitarian or civilian activities aimed at relieving the plight of civilians in an area of armed conflict’. The definition of 'security services' provided in the Regulation of Foreign Military Assistance Act of 1998 is also considered too broad. The South African government’s past failure to enforce the Act makes assessment of its real effectiveness problematic. What does seem clear, however, is that the correction enshrined in the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006, which specifically requires South African humanitarian organisations to have successfully applied to register with the licensing body to provide humanitarian assistance in regulated countries, will incline law abiding

humanitarian organisations to spend time and, possibly, money becoming registered. There is also a definitional problem in that it is unclear whether the Act will apply to all humanitarian organisations with an office in South Africa, or only those which are headquartered there. This dimension would be of particular relevance to Switzerland, which hosts a number of humanitarian organisations. It is also noteworthy that the new South African legislation provides a much clearer and more comprehensive definition of 'security services' to be regulated than the previous legislation. Nevertheless, in the absence of more robust enforcement than has been the case with the prior legislation, the new Act is unlikely to impact on the activity of private security or military providers in South Africa.

The US legislation has a two part definition of the services that need to be regulated in that services must include 'the furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles' and must relate to a defence article as defined in the US munitions list. This could be transferred to the Swiss context relatively easily by taking the above definition of defence service and linking it to the list contained in annex 1 of the *Ordonnance sur le matériel de guerre*.[93]

This procedure might need some tuning of the list at annex 1, for instance, the removal of the exemption that would otherwise allow the use of non repeating rifles, and if such tuning could not be made to meet the requirements of the arms export regulation then a second list might have to be developed.

It was mentioned in the section on US legislation that the procedure of defining defence services based on the equipment used might allow certain consultancy and training services to escape the law in that they are not directly associated with the defined equipment. If the US model were to be adopted consideration would have to be given to the question of whether, under Swiss law, a consultant who gives advice about the restructuring of a military force, for instance, would be considered to be 'furnishing assistance in the operation of' any item listed at annex 1. Consideration might also be given to the specific inclusion of work with dogs, which is another form of security or military provision that is not associated in any way with the listed equipment.

Whichever system is adopted it might be useful to consider granting exemption from licensing for servicing, training and maintenance contracts that are directly linked to licensed exports of Swiss manufactured military equipment. It is reasonable to suppose that if the government is happy to licence the export of an item of equipment it would also be happy for Swiss personnel to provide support services as part of the package, as often happens, and making such support activities subject to a second authorisation would probably constitute a needless administrative burden.

In conclusion, therefore, a licensing regime could perhaps best be designed either based on clear definitions of military and security services but excluding humanitarian activity,

[93] http://www.admin.ch/ch/f/rs/514_511/app1.html

as in the cases of the earlier South African Act, or based on a definition on the US model that classifies an activity as military according to the equipment used.

Geographical Definition of Licence Requirements

As discussed above, the geographically defined context in which an activity takes place can be as important as the nature of the activity itself in deciding whether it warrants regulation, and this fact is reflected in the *plan directeur's* suggestion that a two tier licensing system based on geography could be used. There are essentially two ways to enshrine geography in legislation, the first being best illustrated by the South African bill and the second by certain elements of the US and Swiss legislation.

In the case of the South African legislation, the National Conventional Arms Control Committee may designate a country as being suitable to be 'regulated' under the terms of the Act. The President may then proclaim that country as being regulated, after which point the licensing requirements apply. The legislation specifies that a country should be regulated if an armed conflict exists or is imminent in the country and the committee believes that the country 'should be proclaimed a regulated country.' This seemingly satisfactory formula has been criticised on the grounds that, in the case of Iraq, the President took around two years to proclaim the country as regulated, thus leaving a substantial window during which it was unclear whether the Act could be applied. It is, however, possible that this problem was caused as much by Presidential vacillation as by the law itself.

If such a model is to be adopted consideration should be given to a precise definition of armed conflict and possibly to other factors that might make the activation of the licensing regime appropriate. Such factors might include the collapse or failure of a state, with or without armed conflict, the presence of very high levels of violent crime or a general category of 'instability'. These widened criteria for the declaration of a regulated country would not only make the situation clearer but would enable the government to apply licensing regulations without having to take the sometimes diplomatically sensitive step of giving an opinion as to whether an armed conflict is taking place.

An alternative model, which is used in section 32 of the US Arms Export Control Act, takes note of the special circumstances that apply in Sub Saharan Africa and requires that the executive, in selling of arms to this sub region, should 'assist in limiting the development of costly military equipment in that region'. This requirement is contradicted by the US administration's current policy in the region, especially as regards US military support of and sales of defence equipment to countries engaged in the war on terror. The reality is that in certain cases US actions do not 'assist in limiting the development of costly military equipment in that region' but rather inject military equipment and training to support US strategic national interests. This situation illustrates the problems inherent in enshrining fixed geographical considerations in primary legislation, even though the background conditions, in this case developmental difficulties in sub Saharan Africa, may seem more than transitory.

A nuance of the US model is to be found in the *Swiss Ordonnance sur le matériel de guerre* which lists 25 countries, essentially European with the addition of Argentina, North America and Japan,[94] for which an arms export licence is not required. The principle differences between this list and the US act's section 32 are that this list is positive, in that it allows rather than restricts free export, and that it is contained in an executive order, so is easier to change than the US provision regarding sub-Saharan Africa, which could only be amended by Congress.

In light of these considerations, it is recommended that, if geographical considerations are to be included in deciding which activities need to be licensed, the US model described above be avoided in order to maintain as much room for manoeuvre as possible in the future and to minimise the risk of inconsistent policy statements such as is being experienced currently in the US. It may be considered, for reasons of coherence, desirable to mirror the Swiss model contained in the *Ordonnance sur le matériel de guerre* but it is recommended that consideration be given to following the South African model which starts from the presumption that all countries in the world are exempt from licensing requirements and then takes countries off the exempt list as circumstances dictate. This system has the advantage over the Swiss system that it allows greater flexibility in setting the size of the net and avoids administrative costs that would otherwise accrue from applications to export to, say, Australia.

The Mechanics of the Regulatory system

The Selection of Criteria

In the last two sections we discussed the criteria for the initial stage of a regulatory system designed to catch all those who merit regulation. In this section we will discuss, so to speak, what to do with the catch once it has been netted.

There are, essentially, two options. One is to discard them all, banning all private security and military activity in whatever zone has been geographically defined and the other is to sort through the catch, awarding licenses to some and not to others. These two options will be discussed in turn.

Outright banning of private security or military type activity may seem attractive to a country such as Switzerland that currently has a very small share of the global market and may be concerned about the damage that a Swiss company engaging in such an activity might do to its international reputation. The relatively low administrative burden of a ban as opposed to a licensing regime might also make the ban appear attractive. The disadvantage of a ban, however, would be that the initial net would have to be set with extraordinary care in order to avoid inadvertently banning bona fide activities such as humanitarian missions, civilian companies supporting Swiss military operations abroad, the sales of Swiss military equipment, or even competitions involving firearms. The most

[94] The list is available at http://www.admin.ch/ch/f/rs/514_511/app2.html

common examples of such total bans are the various types of anti mercenary law, three of which we have studied. The general experience with such laws is that in order to avoid catching bona fide actors the mouth of the net is set so narrowly that it catches nothing at all and the legislation serves no practical purpose.

It is therefore recommended that, rather than an outright ban on private security or military operations, even in limited zones, a licensing system be introduced.

One of the first observations to make with respect to a licensing regime is that, whereas there is a need for clearly understood and applicable rules defining whether or not a given activity needs to be licensed, the decision about whether to grant the licence can be based on far more subjective criteria. This calls for the legislating authority to have very clear ideas about why it is regulating a given activity and what the objectives of the regulation are.

It was suggested in the *plan directeur* that some thought should be given to the question of whether licensing criteria should be defined in terms of activities to be banned or of government objectives to be achieved. It will have been noted that the criteria suggested for the first stage, the net, were based on assessment of the activities to be prohibited, albeit through the measure of the equipment to be used, while the criteria suggested for the second stage, the sorting of the catch, were largely based on government objectives to be achieved.

The first example from which we can draw conclusions is the French fire arms export legislation which, until the introduction of the EU Code of Conduct on export of arms (discussed below) gave the minister absolute authority to decide, according to whichever criteria seemed to him to be appropriate, to award or deny licences. Under the US system the executive has broad autonomy within the limits set by the legislation that require that the issue of licences take into account US national interest and other somewhat vague considerations such as the need to avoid regional arms races. The South African model makes use of a set of criteria, provided at Annex D, which are based in government objectives to avoid human rights abuses and promote peace and stability generally. These criteria have been criticised as being ‘vague and subjective’ but they might at least form a starting point from which criteria suited to the Swiss context could be derived. The EU Code of Conduct for Arms Exports, provided at Annex E, contain criteria that are broadly based on the behaviour of the receiving government, the internal situation in the country of destination, the need to promote regional stability and the need to avoid undermining the foreign policy interests of other member states.

It is suggested that the best means of deciding which contracts should be granted licenses and which should not would be to embed a set of objective based criteria, broadly following the South African and EU models, in the legislation and leave it to an executive agency to interpret the guidelines in the light of prevailing circumstances. It is felt to be beyond the scope of this report to make specific suggestions as to the criteria that the Swiss government might like to employ.

There is a further question concerning the stage at which a licence is required. Under many systems there is a requirement to obtain authorisation at the stage of initial offer as well as at contract signature. Although the double authorisation process may appear to be expensive in terms of government resources it is probably necessary in order to enable successful commercial exchange. Removing the first step would mean that suppliers would be forced to engage in pre-contract negotiation with clients without knowing whether the contract will be authorised, a process that would probably involve an intolerable level of risk both for the suppliers and their clients. The initial authorisation, however, is unlikely to be adequate in itself as the terms of the contract could change significantly between initial offer and contract conclusion. Further, if the initial authorisation is properly staffed the second authorisation will only require examination of the contract terms that have changed during the negotiation and so will constitute only a limited administrative burden.

Overall, then, it is suggested that as an overall ban would be difficult to implement, operations should be licensed both at the initial offer stage and at the contract signature stage. The criteria for the granting of a licence should be based on objectives enshrined in the legislation to be interpreted by a suitable executive agency with delegated authority to grant or deny licences.

Delegation of Responsibility

Another factor to be taken into account is the decision as to who will grant licences and the degree of legislative accountability that is thought to be appropriate. In the case of the US system there is minimal legislative oversight of the procedure. Congress receives quarterly reports describing the export of equipment and services in frankly sparse terms and only being consulted in the case of contracts valued at over $50 million, a requirement that is easily sidestepped. The South African legislation provides for the National Conventional Arms Control Committee (NCACC), an appointed body which as of 2002 has the status of a statutory body, to make recommendations to elected individuals, who have executive authority, as to whether an armed conflict exists and whether the country should be declared to be regulated. The new legislation empowers the NCACC to decide to refuse, grant or withdraw/amend an authorisation to provide services in a regulated country. It also requires the NCACC to make quarterly reports to the executive and the parliament on the register it maintains of regulated countries, authorisations issued, and exemptions made by the President.

Based on the failure to effectively enforce the previous law in the South African case and the relative success of enforcement in the US, it is suggested that any legislation should make provision for a single agency tasked to award licences to companies wishing to offer services overseas, to ensure that licence conditions are obeyed and to investigate any unlicensed exports. It is also suggested that this agency have close links with federal and cantonal intelligence and law enforcement agencies. Experience from South Africa and the US underscore the importance that the body that is responsible for monitoring, investigating and, if necessary, prosecuting violations of a law regulating the provision of

commercial military or security services abroad be clearly tasked, and have sufficient personnel and budgetary resources to perform these functions. It is, however, beyond the scope of this report to make specific suggestions as to the constitution of this body and the levels of legislative input and oversight afforded to the process.

Licence Conditions

A further advantage of the licensing system that delegates the decision to a suitable agency would be that, in addition to being able to decide when, where and under which circumstances Swiss private security and military providers can operate, it would allow the government to set licence conditions that would further control the provider's behaviour.

One such condition might be a requirement for transparency and reporting, possibly even including a requirement to facilitate government inspections and audits, in order to ensure that the activity being undertaken corresponds to the contract that has been licensed and that other licence conditions are being respected.

A second set of licence conditions might resemble the South African code of conduct for domestic security provision. Such a code of conduct would have to be realistic, taking into account the prevailing conditions in the country of operation, but would probably be the means to ensure, at least, compliance with the requirements of international humanitarian law. The standard licence conditions might also provide for contractors to exercise due diligence when recruiting engaging operatives. Both these sets of conditions could be standardised and enshrined either in the legislation or an associated executive order.

Conditions specific to the circumstances of the operation being licensed could also be set in such a way as to ensure that the potential for compromising behaviour by the licensee is minimised. These could take into account the tactical and political situation prevailing in the proposed area of operations and might include such factors as the designation of certain areas as out of bounds or restrictions on the types of weapons to be used.

Administrative Considerations

There are a number of administrative considerations that would need to be addressed when drafting a legislation to cover such a licensing system. The first, which is highlighted in the UK Green Paper, would be the possibility of circumstances changing during the course of the licence period. The very nature of the zones in which licences might be necessary dictates that the political and security conditions are susceptible to change and consideration would have to be given to the possibility that, during the period of a licence, conditions could become such that the Swiss government would no longer wish to have a security or military provider operating in the zone. This could be overcome through the use of a regular review process, or the issue of only very short term

operating licences in particularly unstable zones. Both these options are likely to have negative effects on commercial organisations' enthusiasm as the possibility of having a licence revoked would constitute an additional commercial risk. Perhaps more palatable would be the inclusion of a clause that the licence decision is subject to review and possible revocation due to a change in the circumstances under which the licence was originally granted. This is indeed the case of the new South African legislation, which allows the licensing body, the NCACC, to 'at any time withdraw or amend an authorisation'.

The subject of fees was mentioned in the context of the South African legislation and it is worth noting that, in the event of a fee being charged to recover the administrative costs incurred in overseeing the licensing procedure, such a fee structure should be as clear and open as possible.

Another subject that has been mentioned in the context of the earlier South African legislation and which is taken up by the UK Green Paper is the time taken to process a licence application. Clearly there is a balance to be struck between the commercial interest in achieving a quick turn around in deciding whether to issue a licence, and the need to exercise due diligence. It is suggested that the current US practice of turning applications in support of Operations Enduring Freedom and Iraqi Freedom within two days may not be appropriate in the Swiss context. Some form of guaranteed turn around time would, however, allow commercial organisations to plan around the process.

The South African system under the initial law, the RFMAA, was criticised for its lack of an appeal procedure but it is not alone in this matter. An appeal procedure would be unusual for a regulation of this type but the Swiss government might like to give thought to the possibility. At the very least, it is recommended that negative decisions be accompanied by a full justification. It is interesting to note that the new South African legislation enables the applicant to request a written explanation for the licensing decision that was reached. Further, the new legislation states that nothing prevents the applicant from seeking judicial review of a licensing decision.

CONCLUSION

We have examined two sets of legislation aimed at criminalising mercenary type activity, one set of legislation that limits commercial security and military-related services on the basis of the equipment used, one that attempts to define the activities to be regulated and four sets of legislation that regulate the export of armaments. The conclusions of these studies, as applied to the Swiss context, are as follows:

a. It is possible to separate the regulation of internal and external markets and it is not necessary to maintain a complete register of domestic security providers in order to regulate external activities.

b. An outright ban on security or military provision in zones of crisis or conflict presents serious definitional problems and is likely to result either in the effective criminalisation of bona fide actors, or a regulation that is so narrowly defined that it will have little practical effect.

c. A licensing regime is probably the most appropriate form of regulation. It could be comprised of the following elements:

i. A definition of activities to be licensed based either on a description of the activities themselves or a list of military and security-related equipment the use of which constitutes an activity to be licensed.

ii. A geographical definition of the areas in which the above defined activities would be subject to licensing. This could be positive, in the sense of a list of countries in which licensing is not required, in which case annex 2 of the Swiss *Ordonnance sur le matériel de guerre* would be an appropriate model. The list could also be negative, taking the form of a list of countries considered to be in crisis or conflict and in which a licence is required. In either case the inclusion or removal of a country should be an executive function and no geographical definition should be included in the text of the law.

iii. A set of objective based criteria which would be employed by an executive agency to interpret the intentions of the legislature in deciding whether or not to award a licence.

iv. A set of standard licence conditions requiring recipients of licences to operate in such a way as to be easily monitored by the licensing authority, to meet certain standards as determined by the state, and to behave in a manner consistent with the values of the Swiss Federation.

v. The possibility of further licence conditions specific to the circumstances surrounding a given operation.

vi. A robust executive agency charged with the implementation and enforcement of the licensing system.

It may also be considered appropriate to include an outright ban on mercenary activity which would be defined either in terms of article 47 of the first additional protocol to the Geneva Conventions or in terms of the 1989 Convention on Mercenaries. It must be accepted, however, that the difficulties inherent in securing a prosecution under either of these models would be so great as to make this section of the legislation largely symbolic.

Annex A: French Code Pénal Article 436

Article 436-1

Est puni de cinq ans d'emprisonnement et de 75 000 Euros d'amende le fait :

1º Par toute personne, spécialement recrutée pour combattre dans un conflit armé et qui n'est ni ressortissante d'un Etat partie audit conflit armé, ni membre des forces armées de cet Etat, ni n'a été envoyée en mission par un Etat autre que l'un de ceux parties au conflit en tant que membre des forces armées dudit Etat, de prendre ou tenter de prendre une part directe aux hostilités en vue d'obtenir un avantage personnel ou une rémunération nettement supérieure à celle qui est payée ou promise à des combattants ayant un rang et des fonctions analogues dans les forces armées de la partie pour laquelle elle doit combattre ;

2º Par toute personne, spécialement recrutée pour prendre part à un acte concerté de violence visant à renverser les institutions ou porter atteinte à l'intégrité territoriale d'un Etat et qui n'est ni ressortissante de l'Etat contre lequel cet acte est dirigé, ni membre des forces armées dudit Etat, ni n'a été envoyée en mission par un Etat, de prendre ou tenter de prendre part à un tel acte en vue d'obtenir un avantage personnel ou une rémunération importants.

Article 436-2

Le fait de diriger ou d'organiser un groupement ayant pour objet le recrutement, l'emploi, la rémunération, l'équipement ou l'instruction militaire d'une personne définie à l'article 436-1 est puni de sept ans d'emprisonnement et de 100 000 Euros d'amende.

Article 436-3

Lorsque les faits mentionnés au présent chapitre sont commis à l'étranger par un Français ou par une personne résidant habituellement sur le territoire français, la loi française est applicable par dérogation au deuxième alinéa de l'article 113-6 et les dispositions de la seconde phrase de l'article 113-8 ne sont pas applicables.

Article 436-4

Les personnes physiques coupables des infractions prévues par le présent chapitre encourent également les peines complémentaires suivantes :

1º L'interdiction des droits civiques, civils et de famille, suivant les modalités prévues par l'article 131-26 ;

2º La diffusion intégrale ou partielle de la décision ou d'un communiqué informant le public des motifs et du dispositif de celle-ci dans les conditions prévues par l'article 131-

35 ;

3º L'interdiction de séjour, suivant les modalités prévues par l'article 131-31.

Article 436-5

Les personnes morales peuvent être déclarées responsables pénalement, dans les conditions prévues par l'article 121-2, de l'infraction définie à l'article 436-2.

Les peines encourues par les personnes morales sont :

1º L'amende, selon les modalités prévues par l'article 131-38 ;

2º Les peines mentionnées à l'article 131-39.

L'interdiction mentionnée au 2º de l'article 131-39 porte sur l'activité dans l'exercice ou à l'occasion de l'exercice de laquelle l'infraction a été commise.

Annex B: Sections 6 and 9 of the Australian Crimes (Foreign Incursions and Recruitment) Act 1978

6 Incursions into foreign States with intention of engaging in hostile activities

(1) A person shall not:

(a) enter a foreign State with intent to engage in a hostile activity in that foreign State; or

(b) engage in a hostile activity in a foreign State.

Penalty: Imprisonment for 20 years.

(2) A person shall not be taken to have committed an offence against this section unless:

(a) at the time of the doing of the act that is alleged to constitute the offence, the person:

(i) was an Australian citizen; or

(ii) not being an Australian citizen, was ordinarily resident in Australia; or

(b) the person was present in Australia at any time before the doing of that act and, at any time when the person was so present, his or her presence was for a purpose connected with that act, or for purposes that included such a purpose.

(3) For the purposes of subsection (1), engaging in a hostile activity in a foreign State consists of doing an act with the intention of achieving any one or more of the following objectives (whether or not such an objective is achieved):

(a) the overthrow by force or violence of the government of the foreign State or of a part of the foreign State;

(aa) engaging in armed hostilities in the foreign State;

(b) causing by force or violence the public in the foreign State to be in fear of suffering death or personal injury;

(c) causing the death of, or bodily injury to, a person who:

(i) is the head of state of the foreign State; or

(ii) holds, or performs any of the duties of, a public office of the foreign State or of a part of the foreign State; or

(d) unlawfully destroying or damaging any real or personal property belonging to the government of the foreign State or of a part of the foreign State.

(4) Nothing in this section applies to an act done by a person in the course of, and as part of, the person's service in any capacity in or with:

(a) the armed forces of the government of a foreign State; or

(b) any other armed force in respect of which a declaration by the Minister under subsection 9(2) is in force.

(5) Paragraph (4)(a) does not apply if:

(a) a person enters a foreign State with intent to engage in a hostile activity in that foreign State while in or with an organisation; and

(b) the organisation is a prescribed organisation at the time of entry.

(6) Paragraph (4)(a) does not apply if:

(a) a person engages in a hostile activity in a foreign State while in or with an organisation; and

(b) the organisation is a prescribed organisation at the time when the person engages in that hostile activity.

(7) For the purposes of subsections (5) and (6), prescribed organisation means:

(a) an organisation that is prescribed by the regulations for the purposes of this paragraph; or

(b) an organisation referred to in paragraph (b) of the definition of terrorist organisation in subsection 102.1(1) of the Criminal Code.

(8) Before the Governor-General makes a regulation prescribing an organisation for the purposes of paragraph (7)(a), the Minister must be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering:

(a) a serious violation of human rights; or

(b) armed hostilities against the Commonwealth or a foreign State allied or associated with the Commonwealth; or

(c) a terrorist act (as defined in section 100.1 of the Criminal Code); or

(d) an act prejudicial to the security, defence or international relations of the Commonwealth.

9 Recruiting persons to serve in or with an armed force in a foreign State

(1) A person shall not, in Australia:

(a) recruit another person to serve in any capacity in or with an armed force in a foreign State, whether the armed force forms part of the armed forces of the government of that foreign State or otherwise;

(b) publish an advertisement, reckless as to whether the advertisement is for the purpose of recruiting persons to serve in any capacity in or with such an armed force;

(c) publish an advertisement containing any information:

(i) relating to the place at which, or the manner in which, persons may make applications to serve, or obtain information relating to service, in any capacity in or with such an armed force; or

(ii) relating to the manner in which persons may travel to a foreign State for the purpose of serving in any capacity in or with such an armed force; or

(d) do any other act or thing with the intention of facilitating or promoting the recruitment of persons to serve in any capacity in or with such an armed force.

Penalty:

(a) if the person is a natural person -- $20,000 or imprisonment for 7 years, or both; or

(b) if the person is a body corporate -- $100,000.

Annex C: Charter of the British Association of Private Security Companies.

The purpose of the British Association of Private Security Companies ("the Association") is to promote, enhance and regulate the interests and activities of UK-based firms and companies that provide armed security services in countries outside the UK and to represent the interests and activities of Members in matters of proposed or actual legislation.

In the context of this Charter, the term 'Armed Services' is defined as any service provided by a Member of the Association that involves the recruitment, training, equipping, co-ordination, or employment, directly or indirectly of persons who bear lethal arms.

The Members of the Association shall provide such services with high professional skill and expertise whilst recognising that the countries where they are operating may have inadequate legal frameworks. The Members note that their activities will be enhanced by an active and transparent involvement with International Organisations, governments and private and public bodies that share common interests. They agree to follow all rules of international, humanitarian and human rights law that are applicable as well as all relevant international protocols and conventions and further agree to subscribe to and abide by the ethical codes of practice of the Association.

Members accept without reservation the aims and objectives of the Association as stated in the Charter. Hence, they accept fully the obligation:

- to build and promote open and transparent relations with UK Government departments and relevant International Organisations;
- to promote compliance with UK values and interests and with the laws of the countries in which its Members operate;
- to issue guidance on the substance of and the need to comply with international legal statutes, with due regard for ethical practice and standards of governance, balancing the provision of security services with the legitimate concerns of those that are or may be effected by the delivery of those services;
- to require that Members meet the standards set for Membership of the Association and that such standards are maintained for continuing Membership.

The Association determines that it can only achieve its objectives through effective self-regulation and transparent engagement with UK Government departments and relevant International Organisations. The Association believes that it is only through effective self-regulation that the Members will enhance their position and be able to achieve differentiation from non Members in the same industry sector.

Given the Membership commitment to enhance and promote the interests of the industry, it undertakes to be governed by the following principles in particular:

1. Provide security designed primarily to deter any potential aggressor and to avoid any armed exchange. This concept allows the use of weapons to protect clients or

security personnel in a defensive mode and only where there is no other way to defend against an armed attack or to effect evacuation.

2. Ensure that all appropriate staff shall have been trained to the standards commensurate with each assignment and in accordance with applicable laws of the appropriate country.
3. Ensure that all reasonable precautions are taken to protect relevant staff in high risk and/or life threatening operations including the provision of protective equipment, adequate weapons and ammunition, medical support and insurance.
4. Decline to accept contracts for the provision of security services where to do so will conflict with applicable human rights legislation.
5. Decline to provide security services where there is a likelihood of the provision involving criminal activity.
6. Decline to provide security services that might be contrary to UK values and interests.
7. Decline to provide security services in circumstances where there is a possibility that those services might adversely affect the military or political balance in the country of delivery.
8. Decline to provide lethal equipment to governments or private bodies in circumstances where there is a possibility that human rights will be infringed.
9. Submit to the rules and regulations of the Association and to sanctions imposed by the Association for breach of said rules and regulations.
10. Commit to provide funding as may be determined by the Association from time to time to enable the Association to carry out its activities.

Annex D: Section 9 South Africa's Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in Country of Armed Conflict Act, 2006

Criteria for authorisation or exemption

9. An authorisation in terms of section 7(2), and exemption in terms of section 13, may be given, unless it –
(a) is in conflict with the Republic's obligations in terms of international law;
(b) would result in the infringement of human rights and fundamental freedoms in the territory where the assistance or service is to be rendered or the exemption granted;
(c) endangers the peace by introducing destabilising military capabilities into the region or territory where the assistance or service, or humanitarian aid, is or is likely to be, provided or rendered;
(d) would contribute to regional instability or negatively influence the balance of power in such region or territory;
(e) in any manner supports or encourages any terrorist activity or terrorist and related activities, as defined in section 1 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004);
(f) contributes to the escalation of regional conflicts;
(g) in any manner initiates, causes or furthers an armed conflict, or a coup d'état, uprising or rebellion against a government; or
(h) prejudices the Republic's national or international interests.

Annex E: EU Code of Conduct on Arms Exports[95]

CRITERION ONE

Respect for the international commitments of EU member states, in particular the sanctions decreed by the UN Security Council and those decreed by the Community, agreements on non-proliferation and other subjects, as well as other international obligations.

An export licence should be refused if approval would be inconsistent with, inter alia:

a) the international obligations of member states and their commitments to enforce UN, OSCE and EU arms embargoes;
b) the international obligations of member states under the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention;
c) their commitments in the frameworks of the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group and the Wassenaar Arrangement;
d) their commitment not to export any form of anti-personnel landmine.

CRITERION TWO

The respect for human rights in the country of final destination

Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, Member States will:

a) not issue an export licence if there is a clear risk that the proposed export might be used for internal repression.
b) exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of the equipment, to countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the EU;

For these purposes, equipment which might be used for internal repression will include, inter alia, equipment where there is evidence of the use of this or similar equipment for internal repression by the proposed end-user, or where there is reason to believe that the equipment will be diverted from it stated end-use or end-user and used for internal repression. In line with operative paragraph 1 of this Code, the nature of the equipment will be considered carefully, particularly if it is intended for internal security purposes. Internal repression includes, inter alia, torture and other cruel, inhuman and degrading

[95] A full version of the code of conduct is available at http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1014919016078

treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.

CRITERION THREE

The internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts.

Member States will not allow exports which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.

CRITERION FOUR

Preservation of regional peace, security and stability.

Member States will not issue an export licence if there is a clear risk that the intended recipient would use the proposed export aggressively against another country or to assert by force a territorial claim.

When considering these risks, EU Member States will take into account inter alia:

a) the existence or likelihood of armed conflict between the recipient and another country;
b) a claim against the territory of a neighbouring country which the recipient has in the past tried or threatened to pursue by means of force;
c) whether the equipment would be likely to be used other than for the legitimate national security and defence of the recipient;
d) the need not to affect adversely regional stability in any significant way.

CRITERION FIVE

The national security of the member states and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries

Member States will take into account:

a) the potential effect of the proposed export on their defence and security interests and those of friends, allies and other member states, while recognising that this factor cannot affect consideration of the criteria on respect of human rights and on regional peace, security and stability;
b) the risk of use of the goods concerned against their forces or those of friends, allies or other member states;
c) the risk of reverse engineering or unintended technology transfer.

CRITERION SIX

The behaviour of the buyer country with regard to the international community, as regards in particular to its attitude to terrorism, the nature of its alliances and respect for international law

Member States will take into account inter alia the record of the buyer country with regard to:

a) its support or encouragement of terrorism and international organised crime;
b) its compliance with its international commitments, in particular on the non-use of force, including under international humanitarian law applicable to international and non-international conflicts;
c) its commitments to non-proliferation and other areas of arms control and disarmament, in particular the signature, ratification and implementation of relevant arms control and disarmament conventions referred to in sub-para b) of Criterion One.

CRITERION SEVEN

The existence of a risk that the equipment will be diverted within the buyer country or re-exported under undesirable conditions.

In assessing the impact of the proposed export on the importing country and the risk that exported goods might be diverted to an undesirable end-user, the following will be considered:

a) the legitimate defence and domestic security interests of the recipient country, including any involvement in UN or other peace-keeping activity;
b) the technical capability of the recipient country to use the equipment;
c) the capability of the recipient country to exert effective export controls;
d) the risk of the arms being re-exported or diverted to terrorist organisations (anti-terrorist equipment would need particularly careful consideration in this context).

CRITERION EIGHT

The compatibility of the arms exports with the technical and economic capacity of the recipient country, taking into account the desirability that states should achieve their legitimate needs of security and defence with the least diversion for armaments of human and economic resources.

Member States will take into account, in the light of information from relevant sources such as UNDP, World Bank, IMF and OECD reports, whether the proposed export would seriously hamper the sustainable development of the recipient country. They will consider in this context the recipient country's relative levels of military and social expenditure, taking into account also any EU or bilateral aid.

Annex F: International Peace Operations Association Code of Conduct

Preamble: Purpose

This Code of Conduct seeks to ensure the ethical standards of International Peace Operations Association member companies operating in conflict and post-conflict environments so that they may contribute their valuable services for the benefit of international peace and human security.

Additionally, Signatories are encouraged to follow all rules of international humanitarian law and human rights law that are applicable as well as all relevant international protocols and conventions, including but not limited to:

Universal Declaration of Human Rights (1948)
Geneva Conventions (1949)
Convention Against Torture (1975)
Protocols Additional to the Geneva Conventions (1977)
Chemical Weapons Convention (1993)
Voluntary Principles on Security and Human Rights (2000)

Members of IPOA are pledged to the following principles in all their operations:

1. Human Rights

1.1. In all their operations, Signatories will respect the dignity of all human beings and strictly adhere to all relevant international laws and protocols on human rights.

1.2. In all their operations, Signatories will take every practicable measure to minimize loss of life and destruction of property.

2. Transparency

2.1. Signatories will operate with integrity, honesty and fairness.

2.2. Signatories engaged in peace or stability operations pledge, to the extent possible and subject to contractual and legal limitations, to be open and forthcoming with the International Committee of the Red Cross and other relevant authorities on the nature of their operations and any conflicts of interest that might in any way be perceived as influencing their current or potential ventures.

3. Accountability

3.1. Signatories understand the unique nature of the conflict/post-conflict environment in which many of their operations take place, and they fully recognize the importance of clear and operative lines of accountability to ensuring effective peace operations and to the long-term viability of the industry.

3.2. Signatories support effective legal accountability to relevant authorities for their actions and the actions of company employees. While minor infractions should be proactively addressed by companies themselves, Signatories pledge, to the extent possible and subject to contractual and legal limitations, to fully cooperate with official investigations into allegations of contractual violations and violations of international humanitarian law and human rights law.

3.3. Signatories further pledge that they will take firm and definitive action if employees of their organization engage in unlawful activities.

4. Clients

4.1. Signatories pledge to work only for legitimate, recognized governments, international organizations, non-governmental organizations and lawful private companies.
4.2. Signatories refuse to engage any unlawful clients or clients who are actively thwarting international efforts towards peace.
4.3. Signatories pledge to maintain the confidentiality of information obtained through services provided, except when doing so would jeopardize the principles contained herein.

5. Safety

5.1. Recognizing the often high levels of risk inherent to business operations in conflict/post-conflict environments, Signatories will always strive to operate in a safe, responsible, conscientious and prudent manner and will make their best efforts to ensure that all company personnel adhere to these principles

6. Employees

6.1. Signatories ensure that all their employees are fully informed regarding the level of risk associated with their employment, as well as the terms, conditions, and significance of their contracts.
6.2. Signatories pledge to ensure their employees are medically fit, and that all their employees are appropriately screened for the physical and mental requirements for their applicable duties according to the terms of their contract.
6.3. Signatories pledge to utilize adequately trained and prepared personnel in all their operations in accordance with clearly defined company standards.
6.4. Signatories pledge that all personnel will be vetted, properly trained and supervised and provided with additional instruction about the applicable legal framework and regional sensitivities of the area of operation.
6.5. Signatories pledge that all their employees are in good legal standing in their respective countries of citizenship as well as at the international level.
6.6. Signatories agree to act responsibly and ethically toward all their employees, including ensuring employees are treated with respect and dignity and responding appropriately if allegations of employee misconduct arise.
6.7. Where appropriate, signatories should seek employees that are broadly representative of the local population.
6.8. Payment of different wages to different nationalities must be based on merit and national economic differential, and cannot be based on racial, gender or ethnic grounds.
6.9. In the hiring of employees engaged in continuous formal employment, signatories agree to respect the age-minimum standard of 15 years of age as defined by the International Labor Organization Minimum Age Convention (1973).
6.10. No employee will be denied the right to terminate their employment. Futhermore, no signatory may retain the personal travel documents of its employees against their will.
6.11. Signatories agree to provide all employees with the appropriate training, equipment, and materials necessary to perform their duties, and to render medical assistance when needed and practical.
6.12. Employees will be expected to conduct themselves humanely with honesty, integrity, objectivity, and diligence.

7. Insurance

7.1. Foreign and local employees will be provided with health and life insurance policies appropriate to their wage structure and the level of risk of their service as required by law.

8. Control

8.1. Signatories strongly endorse the use of detailed contracts specifying the mandate, restrictions, goals, benchmarks, criteria for withdrawal and accountability for the operation.

8.2. Contracts shall not be predicated on an offensive mission unless mandated by a legitimate authority in accordance with international law.

8.3. In all cases-and allowing for safe extraction of personnel and others under the Signatories' protection-Signatories pledge to speedily and professionally comply with lawful requests from the client, including the withdrawal from an operation if so requested by the client or appropriate governing authorities.

9. Ethics

9.1. Signatories pledge to go beyond the minimum legal requirements, and support additional ethical imperatives that are essential for effective security and peace related operations:

9.2. Rules of Engagement

9.2.1. Signatories that could potentially become involved in armed hostilities will have appropriate "Rules of Engagement" established with their clients before deployment, and will work with their client to make any necessary modifications should threat levels or the political situation substantially change.

9.2.2. All Rules of Engagement should be in compliance with international humanitarian law and human rights law and emphasize appropriate restraint and caution to minimize casualties and damage, while preserving a person's inherent right of self-defense. Signatories pledge, when necessary, to use force that is proportional to the threat.

9.3. Support of International Organizations and NGOs/Civil Society and Reconstruction

9.3.1. Signatories recognize that the services relief organizations provide are necessary for ending conflicts and alleviation of associated human suffering.

9.3.2. To the extent possible and subject to contractual and legal limitations, Signatories pledge to support the efforts of international organizations, humanitarian and non-governmental organizations and other entities working to minimize human suffering and support reconstructive and reconciliatory goals of peace operations.

9.4. Arms Control

9.4.1. Signatories using weapons pledge to put the highest emphasis on accounting for and controlling all weapons and ammunition utilized during an operation and for ensuring their legal and proper accounting and disposal at the end of a contract.

9.4.2. Signatories refuse to utilize illegal weapons, toxic chemicals or weapons that could create long-term health problems or complicate post-conflict cleanup and will limit themselves to appropriate weapons common to military, security, or law enforcement operations.

10. Partner Companies and Subcontractors

10.1. Due to the complex nature of the conflict/post-conflict environments, companies often employ the services of partner companies and subcontractors to fulfill the duties of their contract.

10.2. Signatories agree that they select partner companies and subcontractors with the utmost care and due diligence to ensure that they comply with all appropriate ethical standards, such as this Code of Conduct. 10.3. The future of the peace operations industry depends on both technical and ethical excellence. Not only is it important for IPOA member companies to adhere to the principles expressed in this Code, each member should encourage and support compliance and recognition of the Code across the industry.

11. Application

11.1. This Code of Conduct is the official code of IPOA and its member organizations. Signatories pledge to maintain the standards laid down in this Code.

11.2. Signatories who fail to uphold any provision contained in this Code may be subject to dismissal from IPOA at the discretion of the IPOA Board of Directors.

11.3. Member companies will endeavor to impart the basic principles of the IPOA Code of Conduct to their employees.

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