CHATHAM HOUSE INTERNATIONAL LAW DISCUSSION GROUP

PRIVATE MILITARY AND SECURITY COMPANIES

A summary of the Chatham House International Law discussion group meeting held on 22 January 2008.

The meeting was chaired by Elizabeth Wilmshurst. Participants included legal practitioners, academics, NGOs, and government representatives. The meeting was held under the Chatham House Rule.

The event was sponsored by the British Red Cross.

Background

Private military companies and private security companies (PMSCs) are becoming involved in situations of armed conflict increasingly more often and in roles ever closer to the heart of military operations. Whilst formerly all services to the armed forces were provided internally by personnel of military rank, today many ancillary roles, from catering to guarding bases, are performed by private contractors. This 'privatisation of war' is partly due to staff shortages in the armed forces, in particular in developing states. The meeting considered the position of PMSCs from an international and domestic legal perspective. It was noted that at its meeting in March 2005 the International Law Discussion Group had concluded that although there was no international legal vacuum in respect of PMSCs, there were deficiencies on the domestic legal front.

International Legal Framework

The International Committee of the Red Cross (ICRC) has analysed the position of PMSCs under international law when used in the course of armed conflict or occupation. (See section VI of 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' at http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5TALFN/$File/Reaf%20and%20dev-Main%20report-Oct%202003.pdf) The ICRC's interest in PMSCs stems from its concern with the humanitarian impact of these additional actors in armed conflicts. The ICRC has refrained from opining as to the legitimacy of PMSC involvement. Its view was that it was for governments to debate whether the use of PMSCs in fact perpetuated violence and if it was right to privatise war in this way.

Status of PMSC personnel

IHL imposes obligations on PMSC employees rather than PMSCs themselves. It was noted that, although much maligned, in fact PMSC employees did not breach IHL more than any other group of actors.

The media has portrayed PMSC personnel as modern mercenaries. This is not wholly accurate from a legal perspective. The IHL definition of mercenary is (deliberately) very narrow and means that only a tiny minority of PMSC employees fall within its criteria. For example, the mercenary definition excludes nationals of a party to the conflict and those who do not directly participate in hostilities. However, most PMSC staff are neither direct participants nor non-nationals of state parties. Indeed most PMSC employees in Iraq were Iraqi, US or UK nationals and so cannot be classed as mercenaries.

Under IHL the only consequence of classification as a mercenary is that although the individual will still be a civilian he will not qualify for prisoner of war status and protections under IHL. Outside IHL some states have ratified UN and African treaties that oblige parties to criminalise and prosecute mercenaries. It was noted that the practical impact of such treaties would be limited given that PMSCs' host, contracting and home states are rarely parties.

IHL does not provide any particular category for PMSC employees who are not mercenaries. Generally IHL regards PMSC employees either as civilians accompanying the armed forces and therefore prohibited from participating in the hostilities, or in exceptional circumstances as combatants. In the rare event that PSMC employees are integrated into the armed forces of a party, under IHL they will be members of those forces. Alternatively PMSC employees may be members of a militia belonging to a party to the conflict. However, to date no PMSC has fallen within the four "belonging to" criteria, namely being subject to responsible command, having a fixed distinctive sign, openly carrying arms and obeying the laws and customs of war. One participant in the discussion explained that despite the various IHL categories the status of some PMSC employees was still unclear and not enough attention had been given to date to ascertaining the status of certain PMSC roles, such as guarding military bases.

Obligations of States in relation to PMSCs

All PMSC employees are individually liable for their breaches of IHL. The role of states in this area is paramount as they carry the responsibility for the enforcement of IHL obligations. It was noted that under common Article 1 of the Geneva Conventions all states are obliged to ensure respect for IHL and that, in contrast to human rights law, IHL places no territorial limit on this obligation. In theory, the law provided full state coverage of IHL obligations, but in practice enforcement was hampered by the realities of armed conflicts.

The meeting discussed the three PMSC-state relationships that give rise to obligations under international law, namely host, contracting and home state relationships.

(i) Host States

PMSCs operate in states such as Iraq, Afghanistan, Angola and Colombia. These host states have the strongest obligations under international law in respect of the activities of PMSCs as all states are obliged to ensure the protection of human rights

and respect for IHL within their jurisdiction. However, because of the ongoing conflict within their territory host states are likely to be unable to fulfil their obligations in practice; hence a practical rather than legal vacuum has emerged.

The discussion also considered the remedies available to a civilian in a host state. Provided that no immunities had been granted, a PSMC employee who commits a crime against a civilian in a host state should be subject to prosecution under the laws of the victim's state. Depending on the crime, the employee's state of nationality might also have jurisdiction. The meeting agreed that host state nationals rightly expect that if PMSC employees are not able to be prosecuted in the host state they should be brought to account in their home state. Under Coalition Provisional Authority Order 17 US contractors had been given immunity from the Iraqi legal process but contractors were not being tried in the United States. It was noted that the Iraqi parliament was in the process of repealing Order 17 and acknowledged that, although it was important for victims to have redress, PMSC employees in Iraqi and Afghanistan feared host state justice, in particular the death penalty.

(ii) Contracting States

Contracting states are obliged to ensure respect for IHL and will be responsible for the activities of private actors where PMSCs exercise elements of governmental authority or operate under the direction of control of that state. If a PMSC is generally under the control of a contracting state that state remains liable even if a violation of IHL occurs whilst a PMSC employee is acting outside that state's instructions. Moreover states cannot contract out. Under IHL an occupying power has certain responsibilities in respect of welfare of population, such its education and health. Even if an occupying power contracts out these obligations to a PMSC, it remains liable to ensure the performance of its duties. For example, a detaining power retains overall responsibility under IHL for the treatment of prisoners of war even if a PMSC has a contractual obligation to run the detention facilities.

It was unlikely that contracting states would be liable for PMSCs under human rights law unless the contract was performed within the contracting state. The key issue was jurisdiction as human rights law imposes the principal obligation on the state in whose jurisdiction the incident occurs i.e. Afghanistan would have the primary obligation to ensure respect for human rights within Helmand province not the United Kingdom.

(iii) Home States

International law imposed the weakest set of obligations on home states. There would generally be no obligations under human rights law in respect of PMSCs abroad because the state would lack both jurisdiction and control. The position was less clear in respect of IHL because of the generic obligation in Common Article 1. In addition states had both an obligation and universal jurisdiction to prosecute war crime. It was noted that there were no IHL courts of law to adjudicate on breaches of IHL, but that states were free to impose domestic regulation in this area (see below).

Domestic Proposals

The meeting then discussed the domestic regulation of PMSCs, a topic currently under consideration by the UK government. The discussion covered the use of PMSCs within armed conflict and in other situations. Although it was not the impetus

for the UK's review, the Blackwater scandal in September 2007 had brought the question to the attention of the general public.

In addition to humanitarian and human rights considerations under international law (see above), regulation would be in the UK's interests from a political perspective. First, regulation would reduce the risk that PMSC operations might negatively impact on UK foreign or security policy and on its reputation. Secondly, even though the UK is not a principal contracting state, it does use PMSCs to guard its missions abroad. It was in the UK's interests as a consumer, in particular given that the UK's use of PMSC was likely to increase in future, that the disreputable elements of PMSC be eliminated. (In this respect regulation was also clearly in the interests of PMSCs themselves.) Even if future governments shied away from contracting with PMSCs, there would still be a market for private contractors as the extracting and infrastructure industries would still want to guard their personnel and plant.

It was noted that some element of regulation was possible by contract. The meeting also considered the merits of regulation by legislation: through the licensing of individual operatives, of companies or of activities/projects. It was noted that to date the UK has not been embarrassed by the activities of PMSCs, so that the UK should be wary of imposing unnecessary levels of regulation.

In respect of the first option, the licensing of individuals, comparison was made with the UK's approach to the regulation of the domestic security industry. The licensing of individuals in the domestic industry had not been without problems, as highlighted by the press stories in autumn 2007 that revealed that numerous illegal immigrants had been hired by government agencies as security guards. It was anticipated that this problem would be exacerbated in the field of PMSCs which operate and recruit on a global basis. In particular, given the range of nationalities of employees, it would be very difficult to operate effectively any system that sought to vet every individual.

Regulation of PMSCs themselves through a register of authorised companies was a second option. The meeting raised three concerns that would need to be addressed if such an approach was chosen. First, in order to accommodate European law the register could not explicitly exclude companies in other member states or amount to an approved list of favoured parties for UK government contracts. Secondly, the definition of the entities to be registered would need detailed scrutiny. It was noted that the companies involved did not necessarily refer to themselves as either "military" or "security" companies and had adopted a range of descriptors e.g. "consultancy". A third concern was securing a system which was both worthwhile but which could withstand the risk of judicial review. Disappointed PMSCs would be expected to challenge the refusal of an application due to the inevitable commercial benefit of registration (and the correlative detriment of being unlisted). In order to withstand judicial review the criteria for registration would need to be clear, objective and defensible in court. It was foreseeable that in certain circumstances, such as where a director had an unsavoury past, the government would want to retain discretion to refuse an applicant that fulfilled all the formal criteria (such as full insurance, training programmes and full company books).

It was noted that in 2002 the UK government had published a green paper, *Private Military Companies: Options for Regulation*, which had concluded that there was limited public benefit in licensing PMSCs themselves. In particular, the government would be exposed to an international incident and/or a breach of IHL if a licensee were free to engage in projects without further government approvals. A further

question was whether licensing should be compulsory; what should be done about unlicensed companies?

Because of such concerns the third option might be preferable, akin to that used for the export of military goods i.e. the licensing of individual projects rather than individuals or companies. It was envisaged that there could be a sliding scale that would allow for an open licence where operations were to take place in a relatively safe destination but greater scrutiny for activities in conflict zones. Again the problem of drafting a definition was raised. It was suggested that regulation should focus on services with potential for direct lethal impact, such as those involving armaments or any action that enhances military capacity. The scope of the licensing regime would also have to be wary of mechanisms that could be used to avoid regulation, such as the use of offshore subsidiaries to fulfil contracts.

It was noted that the 2005 Hampton review on regulation in the United Kingdom had found that were was too much regulation. It had also highlighted lack of enforceability of regulations as a principal flaw. This problem was endemic in the field of PMSC operations which make enforcement by home states difficult as the relevant activities take place overseas and outside the jurisdiction. Monitoring, a key element in enforcement, is difficult in a foreign jurisdiction even in times of peace. It was noted that it had been easier in Iraq because of the media attention but other areas where they operate, such as Africa had little scrutiny and in some areas few embassies. Any new regulatory regime should meet the test of proportionality: was the burden imposed by the new regime proportional to the existing harm.

A twin track regime – vetting both companies and projects – had the advantages of both but most of the problems.

Amongst other options the 2002 Green Paper had considered self-regulation as an alternative to compulsory regulatory regime i.e. a code of conduct agreed through the co-operation of the government and a trade association. Alternatively there could be a non-compulsory register. The danger of any voluntary system was that, as in the case when the domestic security registration first appeared, those you most wanted to discipline could escape unregulated. The meeting considered a code of conduct and envisaged that whilst its content would be determined by the government its terms would be enforced by a trade association. The advantages of such an approach included speed of delivery and industry cooperation. There were, however, significant limitations, in particular with respect to sanctions. It was noted that far from a regime of self-regulation the Export Control Act 2002, which regulates the export of goods, imposed a regime of imprisonment and fines.

It was noted that over the years the United States, a major PMSC contractor, had established various extraterritorial mechanisms which extended to PMSCs to some extent, though not to the Blackwater employees. For example, under the War Crimes Act US citizens who commit certain breaches of IHL can be prosecuted and the Military Extraterritorial Jurisdiction Act allows those employed or accompanying the armed forces to be prosecuted for felonies. There has, however, been only one known prosecution of PMSC employees under these Acts, namely the 2007 prosecution of David Passaro, a CIA contractor, for the assault of a detainee in Afghanistan under the special maritime and territorial jurisdiction which specifies that certain crimes are prosecutable if committed by or against US citizens on US overseas facilities. The US were amending their law to make it less restrictive. The US approach under the Alien Tort Claims Act was also noted and its potential application to PMSC employees. The Act allows certain victims of human rights

abuses that take place outside the US to bring an action in the US against the perpetrators. It was noted that if the Blackwater employees had been UK citizens, UK jurisdiction would have extended to them in relation to murder charges and war crimes, if appropriate.

The extraterritorial reach of Schedule 15 of the UK Armed Forces Act 2006 was also raised at the meeting. It was explained that Schedule 15 extends the jurisdiction of court martials to "civilians subject to service discipline". Schedule 15 is expected to come into force in January 2009 and will mean that a civilian (including a non-UK national) who is working for/with the armed forces overseas or who is designated by an officer under Schedule 15 may be liable to prosecution under UK service jurisdiction for acts committed abroad. While Schedule 15 itself would only be appropriate for the very small number of contractors who are associated closely with the Ministry of Defence it was suggested that a model similar to Schedule 15 might be used to govern the liability of PMSCs. It was however pointed out that the problem of regulation of PMSCs could not be solved in the UK merely by the extension of UK criminal law, if only because extraterritorial prosecutions were very rarely brought.

The meeting discussed extraterritoriality more generally. It recognised that common law states tended to have more limited extraterritorial jurisdiction provisions than civil law states such as Germany. Furthermore, in addition to the inherent problem of the collection of evidence outside the jurisdiction, any proposal to extend jurisdiction should be approached with caution due to the potential for reciprocity by other states.

A Swiss initiative had been launched in cooperation with the ICRC to develop best practices to assist states in respecting and ensuring respect for international humanitarian law and human rights law in relation to PMSCs; a number of meetings were being held for this purpose.

At the conclusion of the meeting, a brief comment was made on three cases in 2007 which sought to bring governments to account under human rights law for actions of their agents overseas. In the *Al-Skeini* case in the UK the House of Lords had recognised that the Human Rights Act could have extraterritorial application in certain circumstances. In contrast in *Behrami v France* the European Court of Human Rights had held that ECHR parties' actions in Kosovo were outside its jurisdiction as being under a United Nations authorisation. It was noted that the UK had attempted unsuccessfully to rely on *Behrami* in the *Al-Jeddah* case before the House of Lords at the end of 2007.

Summary prepared by Katie Dilger