CONTRACTING OUT WAR?: PRIVATE MILITARY COMPANIES, LAW AND REGULATION IN THE UNITED KINGDOM

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I. INTRODUCTION: BEYOND THE ULTRA-MINIMAL

It was Robert Nozick who, distinguishing the classical liberal 'night-watchman State' which protected citizens against violence and enforced contracts on their behalf, conjured instead the 'ultra-minimal State'[1] in which the task of the State is confined to the monopolization of violence rather than the actual provision of security (unless paid for by citizens by choice). On the face of it, it seems that Western governments are increasingly keen to move towards this model of the ultra-minimal State and to allow even the provision of force to be assumed by private enterprise on a contractual model in which the rich or the desperate may choose to avail themselves of fortifications at the going rate while the rest take their chances in life. The ultra-minimal State is left with a residual steering[2] policy role in which the parameters of contractual engagement for protection can be set. In short, it appears that nothing is sacrosanct in the onward march of the principles of neo-liberalism. Even the ultimate bastions of establishment—Her Majesty's armed forces—are not immune from processes of commodification and marketization that have previously been applied to core functions such as policing[3] and imprisonment.[4]

Evidence for this assertion comes, inter alia,[5] from recent policy discussions concerning the use and regulation of private military companies

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[1] R Nozick *Anarchy, State and Utopia* (Basil Blackwell Oxford 1974) 26.

[2] D Osborne and T Gaebler *Reinventing Government* (Addison-Wesley Reading, Mass 1992).

[3] See F Leishman, B Loveday, and S Savage *Core Issues in Policing* (Longman Harlow 1996) ch 4; T Jones and T Newburn *Private Security and Public Policing* (Clarendon Press Oxford 1998); L Johnston and CD Shearing *Governing Security* (Routledge London 2002); M Button *Private Policing* (Willan Cullompton 2002).

[4] See D Schicor *Punishment for Profit* (Sage London 1995); RW Harding *Private Prisons and Public Accountability* (Open University Press Buckingham 1997).

[5] Another example concerns the Private Finance Initiative contract offered by the Ministry of Defence for air refuelling tankers, which, at a cost of £13bn, will be the largest such deal: *The Times* 21 Apr 2003 19. Likewise in the US, Kellogg Brown and Root Services, a division of Vice-President Dick Cheney's former employer, Halliburton Companies, has provided military services since 1992, including the construction of the Guantanamo Bay detention facility.

[*ICLQ* vol 54, July 2005 pp 651–690] doi: 10.1093/iclq/lei021
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https://doi.org/10.1093/iclq/lei021 Published online by Cambridge University Press

(PMCs).[6] Rather like the police, the numbers of PMC personnel who perform functions which could be undertaken by State military personnel may now exceed the public complement.[7] The trend is entirely consistent with current United Kingdom defence strategy, whereby directly employed personnel will be gradually reduced in order to shift resources to more expensive and more remote weapons systems.[8]

This article analyses and explains these developments in the context of neoliberalism and will subject them to a critique based upon principles of constitutionalism. It will therefore explore the implications for democratic accountability of the expansion of the private military industry.

II. THE 'NEW MERCENARIES'

PMCs engage in a range of activities[9] including advice on organizational or operational issues, training, logistic support (procurement, and delivering equipment and services), intelligence-gathering, and the supply of personnel. It is the latter which tends to be the most eye-catching, but the deployment of PMCs in combat is not common. The label 'mercenary' is, perhaps unsurprisingly, given the negative imagery conjured by this word in common parlance,[10] usually now avoided. For commercial reasons, PMCs tend to position themselves as business service providers akin to defence equipment suppliers rather than discredited 'soldiers of fortune' or 'dogs of war'.[11] Exactly where the term 'PMC' should begin and end is difficult to say, and some companies who have taken over some logistical functions previously in military hands, such as catering, would no doubt object to their inclusion within the term. The differences between mercenary, private security company, and private military company, are often blurred, with the latter term

[6] See JL Taulbee 'Mercenaries, 'Private Armies and Security Companies in Contemporary Policy' (2000) 37 International Politics 433; HM Howe 'The privatization of international affairs' (1998) 22 The Fletcher Forum of World Affairs Journal 1; JC Zarate 'The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder' (1998) 34 Stanford Journal of International Law 75; EW Orts 'Symposium: corporate governance, stakeholder accountability, and sustainable peace: war and the business corporation' (2002) 35 Vanderbilt Journal of Transnational Law 549.

[7] The US Department of Defence employs 734,000 private staff and 700,000 governmental employees: House of Commons Foreign Affairs Committee, Private Military Companies (2001–2 HC 922) para 8.

[8] Ministry of Defence, Delivering Security in a Changing World (Cm 6040, London, 2003) para 3.3.

[9] Foreign Office, Private Military Companies: Options for Regulation (2001–2 HC 577) paras 10, 11.

[10] For legal definitions, see below the discussion on First Protocol Additional to the Geneva Conventions of 12 Aug 1949, and Relating to the Protection of Victims of International Armed Conflicts ('Geneva Protocol I') Art 47.

[11] See A Mockler *The New Mercenaries* (Sidgwick and Jackson London 1985); House of Commons Foreign Affairs Committee, Private Military Companies (2001–2 HC 922) para 12.

https://doi.org/10.1093/iclq/lei021 Published online by Cambridge University Press

being of most recent origin and without legal definition in domestic or international law.[12] Yet these boundaries become important if special regulation is to be imposed, as shall be discussed later in this article.

Amongst the leading PMCs in the world are Control Risks; DynCorp; Executive Outcomes (disbanded in 1999); Kellogg; Brown & Root; Military Professional Resources, Inc. (MPRI); and Vinnel Corp. In the main, both their management and operational personnel tend to be drawn from former members of the military forces of France, Israel, South Africa, the United Kingdom and the United States. Since the Cold War, they have been joined by ex-military from central and eastern Europe. Their theatres of operation include Afghanistan, Angola, the Democratic Republic of the Congo and the Republic of Congo, Ethiopia and Eritrea, Iraq, Kashmir, Liberia, Sierra Leone, and the former Yugoslav States. The potential employers comprise not only governments but also business enterprises (such as banks and mining companies), humanitarian agencies and peace-keeping agencies.[13] The demand is thought to be growing. 'Failed' States are characteristic of the neo-liberal capitalist order,[14] where superpower sponsorship is no longer readily available, and national economies in poor countries are increasingly vulnerable to Western market protectionism, enforced privatization and unstable commodity prices.[15]

The trend towards investing State military functions in non-military bodies is not of recent origin. It has been noticeably applied to the guarding functions at military bases in the United Kingdom. For example, alongside the Ministry of Defence Police[16] are wholly private sector guards employed contractually to provide security.[17] Other examples include the privatization of the Royal Ordnance factories[18] and the Royal Dockyards.[19] But the impact of the PMC seems to be growing in pace. For example, it has been reported that:

> Private corporations have penetrated Western warfare so deeply that they are now the second biggest contributor to coalition forces in Iraq after the Pentagon . . . the US military would struggle to wage war without it.[20]

[12] For discussion, see House of Commons Foreign Affairs Committee, Private Military Companies (2001–2 HC 922) paras 31–3; KA O'Brien 'Private military companies: options for regulation' <http://www.fco.gov.uk/Files/kfile/pmcobrien.pdf, 2002>.

[13] See House of Commons Foreign Affairs Committee, Private Military Companies (2001–2 HC 922) para 22.

[14] J Milliken (ed) *State Failure, Collapse and Reconstruction* (Blackwell London 2003).

[15] R Abrahamsen *Disciplining Democracy: development discourse and good governance in Africa* (Zed London 2000).

[16] L Johnston 'An unseen force' (1993) 3 Policing and Society 23.

[17] See Defence Committee, The Physical Security of Military Installations in the United Kingdom (1983–84) HC 397-I; Security at Royal Ordnance Factories and Nuclear Bases (1984–5) HC 217; The Physical Security of Military Installations in the United Kingdom (1989–90 HC 171); Ministry of Defence Police and Guarding (1995–6) HC 189).

[18] See Ministry of Defence: Sale of Royal Ordnance plc (1987–8 HC 162); Ministry of Defence: Further Examination of the Sale of Royal Ordnance plc (1988–9 HC 448).

[19] See Ministry of Defence: Sales of the Royal Dockyards (1997–8 HC 748).

[20] *The Guardian*, 10 Dec 2003 1.

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The high usage of UK and US PMCs in the ongoing conflict in Iraq has drawn public attention to the widespread deployment by governments and corporations of private military services. At least seven hitherto unknown British PMCs are currently operating on behalf of the occupying coalition forces in Iraq.[21] Estimates of the total number of all PMC personnel operating in Iraq varies between 15,000 and 25,000.[22] In order to impose some structure upon the rapidly expanding numbers of commercial and government military security contracts, a UK firm, Aegis Defence Services, was appointed by Iraqi authorities in May 2004 to co-ordinate PMCs in the region.[23] It was estimated in September 2004 that between 20 and 30 private contractors carrying out both armed and unarmed duties have been killed in Iraq,[24] perhaps the most high profile having been the four American employees of Blackwater USA Corporation killed in Falluja in April 2004. The involvement of private contractors in the commission of alleged human rights abuses in Abu Ghraib prisoner of war facility has also been reported.[25] Those revelations have come just over three years after the publication of two important UK Government documents which propose the establishment of a regulatory regime, ostensibly aimed at controlling the activities of PMCs.[26] This paper will analyse the various options proposed during this debate and discuss their implications for subjecting PMCs to public regulation and accountability.

III. UNITED KINGDOM LAW AND PMCS

In the United Kingdom, military adventures are, at present, regulated by the Foreign Enlistment Act 1870,[27] section 4, by which:

> If any person, without the license of Her Majesty, being a British subject, within or without Her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign State at war with any foreign State at peace with Her Majesty, and in this Act referred to as a friendly State, or whether a British subject or not within Her Majesty's domin-

[21] ibid.

[22] *Chicago Tribune*, 4 Apr, 2004, online edition <http://www.chicagotribune.com>.

[23] See *The Daily Telegraph* 29 May 2004 2.

[24] P Bennis and the IPS Iraq Task Force *Paying the Price: the mounting costs of the Iraq war*, (Institute for Policy Studies Washington 2004).

[25] Independent Panel to Review DoD Detention Operations *Final Report* (Department of Defense Washington 2004) 69; Investigation of Intelligence Activities at Abu Ghraib, Report (Department of Defense Washington 2004) 47. In addition, David Passaro, contracted to the CIA, has been charged with assault in connection with the killing of a detainee at a US Army camp in Afghanistan: *Financial Times* 18 June 2004 9.

[26] Foreign Office, Private Military Companies: Options for Regulation (2001–2 HC 577); House of Commons Foreign Affairs Committee, Private Military Companies (2001–2 HC 922).

[27] This Act followed the case of the CSS *Alabama*, a warship built at Laird's yard in Birkenhead in 1862 for use by the Confederate Forces in the American Civil War and including British crew members: see Foreign Enlistment Act 1870 s 8. Compare the previous Foreign Enlistment Act 1819 (passed to limit British involvement in Spanish American colonial conflicts).

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> ions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign State as aforesaid, he shall be guilty of an offence . . .

It is also an offence under section 5 to induce another to go abroad in order to accept any military commission or engagement. The 1870 Act has its shortcomings in the modern age. The definition in section 4 of 'foreign State' includes any foreign prince, colony, province or part of any province or people, or any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people. It does not encompass most guerrilla movements[28] or 'stateless' fighters. The report on the Sierra Leone affair by the Foreign Affairs Committee pointed to the Foreign Enlistment Act 1870 as an 'antiquated piece of legislation . . . passed on the outbreak of the Franco-Prussian war'.[29] Apparently, there has never been a successful prosecution under the Act in connection with illegal enlistment or recruitment, even during the Spanish Civil War in the 1930s and in the heyday of mercenaries in the 1960s and 1970s when adventures in the Congo and Angola provoked much disgust.[30]

The 1870 Act has recently been supplemented by offences in Part VI of the Terrorism Act.[31] Under section 54, which deals with weapons training, a person commits an offence if he provides instruction or training in the making or use of (a) firearms; (aa) radioactive material or weapons designed or adapted for the discharge of any radioactive material; (b) explosives; or (c) chemical, biological or nuclear weapons (as amended by section 120 of the Anti-Terrorism, Crime and Security Act 2001). The offence has its origins in successive Northern Ireland (Emergency Provisions) Acts 1973–96 (latterly section 34 of the 1996 version), but it is now extended throughout the United Kingdom, despite the recommendation otherwise by the Lloyd Report.[32] It is correspondingly an offence under section 54(2) to receive instruction or training, or, under section 54(3), to invite another to receive instruction or training contrary to sub-section (1) or (2) even if the activity is to take place outside the United Kingdom. In this way, the offence also now pertains to recruitment

[28] See J Jaconelli 'The recruitment of mercenaries and the Foreign Enlistment Act 1870' [1990] Public Law 337 at 340.

[29] (1998–9 HC 116) para 92. See also (Diplock) Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries (Cmnd 6569 London 1976).

[30] See A Mockler *Mercenaries* (MacDonald & Co London 1970), *The New Mercenaries* (Sidgwick & Jackson London 1985); W Burchett and D Roebuck *The Whores of War: Mercenaries Today* (Penguin Harmondsworth 1977); M Hoare *Mercenary* (Corgi London 1978), *Congo Mercenary* (Hale London 1991); L Kessler *Whores of War* (Futura London 1982); JC Zarate 'The emergence of a new dog of war: private international security companies, international law, and the New World Disorder' (1988) 34 Stanford Journal of International Law 75 at 81.

[31] See C Walker *A Guide to the Anti-Terrorism Legislation* (OUP Oxford 2002) ch 6.

[32] Inquiry into Legislation against Terrorism (Cm 3420 London 1996) para 14.28. See also Home Office and Northern Ireland Office *Legislation against Terrorism* (Cm 4178 London 1998) para 12.13.

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for training as well as the training itself, arising mainly from concerns about groups seeking (often through the Internet) to recruit individuals for military training abroad. Perhaps the foremost influences during the framing of this legislation were the fears associated with British citizens attending military camps in Afghanistan, Pakistan and elsewhere. By way of interpretation, under section 54(4), 'instructions' and 'invitations' can be general (such as by a pamphlet or via the Internet) or to one or more specific persons. In this way, and in contrast with its predecessor in the Emergency Provisions Act 1996, no identifiable recipient is needed for the offence to be committed. Later legislation[33] has extended the jurisdictional impact of this offence to section 54-type actions abroad by a United Kingdom national or a United Kingdom resident. Perhaps because of these very varied circumstances, the penalties are wide-ranging: on conviction on indictment there may be imprisonment for a term not exceeding ten years, a fine or both; or on summary conviction, imprisonment for a term not exceeding six months, a fine not exceeding the statutory maximum or both.

A more direct prohibition on recruitment for conflict is contained in sections 59 to 61, which seek to give United Kingdom courts jurisdiction over offences of incitement to terrorism abroad.[34] By section 59, a person commits an offence if (a) he incites another person to commit an act of terrorism wholly or partly outside the United Kingdom, and (b) the act would, if committed in England and Wales, constitute one of the offences listed in subsection (2). The listed offences are (a) murder; (b) an offence under section 18 of the Offences against the Person Act 1861 (wounding with intent); (c) an offence under section 23 or 24 of that Act (poison); (d) an offence under section 28 or 29 of that Act (explosions); and (e) an offence under section 1(2) of the Criminal Damage Act 1971 (endangering life by damaging property). Under sub-section (4) it is expressly immaterial whether or not the person incited is in the United Kingdom at the time of the incitement. By further amendment in 2003, it is also possible for a United Kingdom national or a United Kingdom resident to be convicted if they do equivalent acts outside the United Kingdom.[35] The only relief is in sub-section (5) by which any person acting on behalf of, or holding office under, the Crown cannot be liable for incitement to terrorism under section 59 but may still be liable for distinct incitement offences.[36] Corresponding offences to section 59 are set out in section 60 for Northern Ireland and section 61 for Scotland.

[33] Crime (International Cooperation) Act 2003 s 52, inserting s 63A of the Anti-terrorism, Crime and Security Act 2001.

[34] Home Office and Northern Ireland Office *Legislation against Terrorism* (Cm 4178 London 1998) paras 4.18, 4.19.

[35] Crime (International Cooperation) Act 2003 s 52, inserting s 63A of the Anti-terrorism, Crime and Security Act 2001.

[36] Incitement to murder would be unlawful under the Offences against the Person Act 1861, s 4 (which certainly applies against politically motivated incitements such as in *R v Most* (1880–1) LR 7 QBD 244).

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Next, under the terms of the Export Control Act 2002,[37] the provisions about technology transfers (section 2) and technical assistance controls (section 3) can also be applied on an extra-territorial basis if involving United Kingdom persons. These measures are potentially usable against PMCs to prevent trafficking and brokering in military equipment and on the basis of concern about an 'adverse effect on peace, security or stability in any region of the world or within any country'.[38] Implementation was secured in 2004,[39] though the impact is yet to be discerned.[40] Another regulation of potential relevance is the Landmines Act 1998. Under section 2(1), no person shall (a) use an anti-personnel mine; (b) develop or produce an anti-personnel mine; (c) participate in the acquisition of a prohibited object; (d) have a prohibited object in his possession; or (e) participate in the transfer of a prohibited object. It is also an offence to assist, encourage or induce any other person to engage in any conduct mentioned in subsection (1). Section 3 makes it clear that the bans apply outside the jurisdiction as well as within. Despite this restraint, allegations arose in early 2003 that DynCorp Aerospace Ltd., a British subsidiary of Dyncorp, was being employed by the US military to store weapons stockpiles in Bahrain, Oman and Qatar in readiness for the war with Iraq. The stockpiles were said to include the CBU-89 Gator weapon, which scatters anti-personnel mines. Though reported in Parliament, no legal action resulted.[41]

Beyond the Export Control Act, PMCs are not the targets of the foregoing list of legislation and are certainly not regarded as objects of prohibition in the same light as individuals recruited from the United Kingdom who wish to side with the likes of the Taleban or Al Qaida. The publication by the Foreign and Commonwealth Office in February 2002 of a Green Paper 'Private Military

[37] See s 1(2). The legislation followed the Scott Inquiry (*Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* (1996) and the White Paper on *Strategic Export Controls* (Cm 3989 1998). Note also the European Union Code of Conduct for Arms Exports 1998 (Bulletin EU 6-1998) and the Dual-Use Items (Export Control) Regulations 2000 (SI 2000/2620), made in implementation of and pursuant to Council Regulation (EC) No 1334/2000 setting up a community regime for the control of exports of dual-use items and technology. (OJ L 159, 30.06.00, 1).

[38] Export Control Act 2002, Schedule, para 3(2)(B). See Response of the Secretary of State for Foreign and Commonwealth Affairs, Ninth Report of the Foreign Affairs Committee, Private Military Companies (Cm 5642 London 2002) 6.

[39] See Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 (SI 2003/2764); The Trade in Goods (Control) Order 2003 (SI 2003/2765); The Trade in Controlled Goods (Embargoed Destinations) Order 2004 (SI 2004/318)

[40] See for implementation: House of Commons Foreign Affairs Committee, The Government's proposals for Secondary Legislation under the Export Control Act (2002–3 HC 620); House of Commons Foreign Affairs Committee, Strategic Export Controls Annual Report for 2001, Licensing Policy and Parliamentary Scrutiny (2002–3 HC 474); Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 SI 2764; Trade in Goods (Control) Order 2003 SI 2765/2003.

[41] HC Debs. vol 403 col 437w 11 Apr 2003. There are also allegations of evasion of the Act by British companies by setting up manufacturing bases abroad: *The Observer* 17 Jan 1999 9.

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Companies: options for regulation',[42] rather than signalling how domestic law might be amended to allow for the proscription of military activities, appears to move the debate in the opposite direction. In other words, the Green Paper, and a subsequent House of Commons Select Committee Report provide the political rationale for the regulation of PMCs. The following section will discuss the contours and likely outcomes of the proposed regulatory structure, considering, first, the political impetus behind reform and, second, the technical detail.

IV. THE POLITICAL IMPETUS BEHIND THE GREEN PAPER

The Green Paper is partial in its coverage. It concentrates primarily on the regulation of PMCs but remains coy about United Kingdom governmental policy on their engagement. The reasons for the emergence in 2002 of a debate on the regulation of PMCs may be explained by a range of (not necessarily consistent) political rationales.

First, the most direct origins of the Green Paper reside in the House of Commons Foreign Affairs Committee inquiry into the 'Arms to Africa' affair which revealed that the British-based PMC Sandline[43] had broken a UN arms embargo on Sierra Leone by delivering weapons to the Kabbah Government with apparent knowledge and tacit approval of United Kingdom civil servants and with some material help from the Royal Navy.[44] The affair was perhaps the first public scandal to embarrass New Labour in government, and certainly was the first to dent its much vaunted 'ethical' foreign policy.[45] The Government's response in April 1999[46] was to promise stricter legislation on arms controls through licensing regimes and rather more tentatively accede to the demand that it publish a Green Paper on PMCs 'within 18 months'.[47]

A second driving force behind the emergence of the Green Paper is the perennial mantra of 'economy, efficiency and effectiveness'.[48] The use of PMCs in peacekeeping and escort missions is claimed to be cost-effective, and financial economy is a major driver in their increased usage. The Executive Outcomes/Sandline operation in Sierra Leone is reckoned to have cost a total of $35 million for the 21-month engagement. The relatively ineffective, State-

[42] See Foreign Office, Private Military Companies: Options for Regulation (2001–2 HC 577).

[43] See <http://www.sandline.com/>.

[44] (1998–9 HC 116). Service personnel on HMS *Cornwall* helped to repair a helicopter used by Sandline. See also Sir Thomas Legg and Sir Robin Ibbs *Report of the Sierra Leone Arms Investigation* (Stationery Office London 1998).

[45] See House of Lords Debates, vol 580, col 129, 15 May 1997, Baroness Symons.

[46] Cm 4325, 1999.

[47] House of Commons Foreign Affairs Committee, Sierra Leone (1998–9 HC 116) para 96.

[48] See J Raine and M Wilson 'Beyond managerialism in criminal justice' (1997) 36 Howard Journal 80 at p 49.

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based UN observer force cost $47 million for 8 months,[49] while the whole UN Operation in Sierra Leone, UNAMSIL, costs about $600 million a year.[50] On the same lines, the British Government has been using private military companies to guard embassies in many locations.[51] PMCs can be cheaper since they have lower start-up and running costs and do not burden themselves with redundancy or pension payments.[52]

Thirdly, the British Government has expressed disenchantment with international law approaches to PMCs because they concentrate unduly on the aspect of mercenaries and seek prohibition rather than regulation. The Government regards the definition of 'mercenary' used in the UN Convention against the Recruitment, Use, Financing and Training of Mercenaries 1989[53] (described and discussed further below) as too vague and broad.[54] Few other countries have even signed the instrument,[55] and the United Kingdom Government has no intention of doing so.[56] But it is instructive that the opposition to UN prohibition or criminalization of some of the activities of PMCs is most clearly present in the States in which most PMCs are based.[57]

Fourthly, and following directly from the previous point, this rejection of international law is partly based upon a logic of incorporation. The United Kingdom Government argues that there are slender prospects for the complete abolition of private military activities. The logic that follows is that it is safer to bring PMCs into the fold than leave them as loose cannons comparable to the privateers and private company armies of the 17th and 18th centuries.[58] It is an argument that is based upon a belief that the private military industry will, by and large, responsibly self-regulate. Following the argument of 'compliance' theorists,[59] this argument seeks to appeal to the better nature of those corporations and to allow the Government to form alliances with those

[49] Foreign Office, Private Military Companies: Options for Regulation (2001–2 HC 577), para 24.

[50] House of Commons Foreign Affairs Committee, Private Military Companies (2001–2 HC 922) para 59.

[51] See Response of the Secretary of State for Foreign and Commonwealth Affairs, Ninth Report of the Foreign Affairs Committee, Private Military Companies (Cm 5642 London 2002) Annex B.

[52] House of Commons Foreign Affairs Committee, Private Military Companies (2001–2 HC 922) para 99.

[53] A/RES/44/34. See <http://www.un.org/documents/ga/res/44/a44r034.htm>.

[54] Foreign Office, Private Military Companies: Options for Regulation (2001–2 HC 577) para 6.

[55] It came into force only on 20 Oct 2001.

[56] Foreign Office, Private Military Companies: Options for Regulation (2001–2 HC 577) para 68.

[57] G Robertson *Crimes Against Humanity* (Penguin Harmondsworth 2000) at 200.

[58] Foreign Office, Private Military Companies: Options for Regulation (2001–2 HC 577) para 62. Notable examples of old include the Virginia Company of London, the Hudson's Bay Company, the East India Company and the British South Africa Company. See JE Thompson *Mercenaries, Pirates, and Sovereigns* (Princeton University Press Princeton 1994).

[59] F Pearce and S Tombs *Toxic Capitalism: corporate crime in the chemicals industry* (Ashgate Aldershot 1998); D Whyte 'Regulation and Corporate Crime' in J Muncie and D Wilson *Student Handbook of Criminology* (Cavendish London 2004).

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members of the military business sector which the Government assesses to be morally upstanding. If some PMCs remain 'off the leash' they may be tempted into conflicts which contradict British foreign policy objectives. As Foreign Office Under-Secretary Denis McShane has explained: 'I am nervous of making the best the enemy of the good.'[60] The Foreign Secretary adopts this approach but frames it slightly differently, arguing that 'it may be possible to distinguish between reputable and disreputable private sector operators, to encourage and support the former while, as far as possible eliminating the latter'.[61] According to this language, there is no *a priori* moral objection to the existence of persons who 'kill (or help kill) for money'.[62]

Fifthly, is the distinctly utilitarian rationale that the private defence industry as a whole remains one of the United Kingdom's most important in terms of generating external revenue. Promotion of British PMCs in a competitive world market is likely to contribute to the good fortunes of military exports. Although the Green Paper failed to discuss this point, it did feature in the regulatory impact assessment, included as an appendix to it:[63]

> An outright ban on the provision of all military services would deprive British defence exporters of contracts for services of considerable value. Since exports of defence equipment are frequently dependent on the supplier being able to provide a service package a large volume of defence export sales would be lost in addition to the value of the services themselves. It is not possible to estimate what this could amount to but it is clear that the cost to British industry would be considerable. Significant losses could also impact on the defence industrial base to the detriment of our defence capability.

The legitimization of PMCs is thus significant because it stimulates the defence industry generally. The current Government's enthusiastic support for the success of the industry extends to its refusal to legislate against British nationals exporting small arms when operating in foreign locations, most recently in the Export Control Act 2002.[64]

A sixth advantage for the United Kingdom Government is the role that PMCs can play in reducing political exposure when forms of military intervention are undertaken. Here, the attraction lies in allowing private corporations rather than States to absorb material and political exposure when the body bags start coming home. It is easier to minimise media coverage when PMC personnel rather than regular soldiers are killed. By the same token, war crimes and human rights abuses have been relatively difficult to uncover when

[60] House of Commons Foreign Affairs Committee, Private Military Companies (2001–2 HC 922) para 23. See also Foreign Office, Private Military Companies: Options for Regulation (2001–2 HC 577) para 63.

[61] House of Commons Foreign Affairs Committee, Private Military Companies (2001–2 HC 922) para 12.

[62] ibid para 73.

[63] ibid Annex C para 10.

[64] See s 1(2).

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the perpetrators are employed by private military contractors.[65] The process of regulation therefore has a key role in assisting Western States to achieve expansionist foreign policy goals. In the US, the experience has been that the regulation of military services means that where US private companies provide 'logistics' and training to pariah or internationally condemned regimes, they provide the same services that the Government would, without—as we note above—the public repercussions. Consequently, the US Government, through close relationships with those companies, can conduct 'foreign policy by proxy'.[66] As Shearer has noted, in the context of arrangements such as the United Kingdom's collaboration with Saladin in the training of Oman's military forces: 'In many cases the countries are either carrying out foreign policy directly, or at the least working within acceptable boundaries.'[67] The US experience is that licensing regimes facilitate this relationship.[68]

Seventhly, and relatedly, a further rationale can be found at the level of international governance. In international peacekeeping missions, for example, it is claimed that the direct employment of PMCs may also offer the UN the promise of more control than it would have over composite national military forces[69] precisely because private military forces are relatively unaccountable. The UN has sometimes found it difficult to persuade Member States to commit peace-keeping troops in battle.[70] Already some UN institutions are using PMCs.[71] NGOs, NATO and the European Union are also known to have used PMCs routinely.[72]

Finally, and closely related to the previous point, the employment of PMCs by Western States can result in a degree of evasion of the scrutiny of their military activities by the international community and by their own domestic constitutional structures. The 'dirty work' argument, as Gary Marx depicts it in the context of private policing,[73] provides an incentive to State use of private security. This comes in two forms: if the activities that the PMC is asked to carry out border on the illegal, then public agents can place nuances

[65] D Whyte 'Lethal Regulation: State-corporate crime and the United Kingdom's New Mercenaries' (2003) 30 Journal of Law and Society 575 at 597.

[66] K Silverstein 'Privatising war' (1997) The Nation 28 July/4 Aug 11 at 12.

[67] D Shearer *Private armies and military intervention* (Adelphi Paper 316, International Institute for Strategic Studies London 1998) at 37.

[68] E Sapone 'Have rifle with scope, will travel: the global economy of mercenary violence' (1999) 30 California Western International Law Journal 1 at 25.

[69] Foreign Office, Private Military Companies: Options for Regulation (2001–2 HC 577) paras 58, 59, and 60.

[70] See, eg, Report of the Secretary-General pursuant to General Assembly Resolution 53/35, *The Fall of Srebrenica* (A/54/549, <http://www.un.org/peace/srebrenica.pdf> 1999) para 96.

[71] See A Vines 'Mercenaries, human rights and legality' in A Musah and JK Fayemi (eds) *Mercenaries: An African Security Dilemma* (Pluto Press London 2000) at 184.

[72] House of Commons Foreign Affairs Committee, Private Military Companies (2001–2 HC 922) minutes of evidence, appendix one, memorandum from General Sir David Ramsbotham.

[73] G Marx 'The interweaving of public and private police in undercover work' in C Shearing and P Stenning (eds) *Private Policing* (Sage London 1987) 183–4.

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on the instructions given or claim misinterpretation by their agents. In addition private companies have some forms of legal protection and rights that are not available to public authorities. These include exemption from various standards of public life, rights against self-incrimination and shelter under a corporate shield. Those issues raise constitutional questions for the accountability of private corporations carrying out core State functions, especially when those functions may be coercive. We shall return to those questions in more detail below.

Overall, and at the heart of the policy agenda, is the construction by the United Kingdom Government of a particular ideal of the national interest and a broad view of how to enhance Britain's position on the world stage. The weapons industry is to be promoted with vigour; the State's diplomatic role is to be ever more closely linked with the expansion of British capital; a strong, flexible, and less visible military presence is required to promote British interests overseas; and accordingly—contra the claims of the globalization thesis[74]—those interests may obscure any responsibilities or loyalties to the international community. Whether pursuing humanitarian or expansionist policies, it seems that PMCs have been given a central role in realizing the United Kingdom's foreign policy ambitions.[75] It is those political rationales that shape the contours of the regulatory regime proposed in the Green Paper.

V. THE EMERGENCE OF A REGULATORY REGIME?

It follows from these political considerations that two possible policy options are rehearsed but hardly left open by the Green Paper. Those options are, first, to attempt a complete ban on private military activity and, second, to do nothing. Each option will now be considered in turn.

While willing to sponsor national legislation on PMCs, the United Kingdom Government seems to find arguments aplenty against a complete ban on the use of PMCs even in combat operations. There is the fear of evasion or capital flight—that PMCs can relocate abroad if a national regulatory regime is not palatable—[76] though there may be reluctance to do so given that PMCs rely upon their close relationships with domicile States, not least because this smoothes the path for recruiting senior military personnel, for client introductions and for maintaining a 'clean' reputation.

Though a complete ban seems very unlikely, there is more deference shown

[74] See S Tombs and D Whyte 'Corporations Beyond the Law? Regulation, Risk and Corporate Crime in a Globalised Era' (2003) 5 Risk Management 9.

[75] See Ministry of Defence, Delivering Security in a Changing World (Cm 6040 London 2003) Annex 20.

[76] Foreign Office, Private Military Companies: Options for Regulation (2001–2 HC 577) para 65.

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to the conclusion of the Diplock Report[77] that there should be legislation directed against activities in the United Kingdom to recruit people to take up service abroad in armed forces which would be prescribed by order from time to time. The idea neatly avoids jurisdictional limitations and can deter the recruitment of freelance mercenaries in particularly sensitive conflicts.

The option to do nothing is equally unlikely, given that the expanding market, as the preceding discussion indicates, is encouraged by the United Kingdom Government and holds out prospects for developing 'partnership' contracts with PMCs. There is a consequent demand for intervention, though in a 'light footprint'[78] way. Even in the absence of formally enforced regulations, the United Kingdom Government does retain some measure of disciplinary control. The influence of military professional cultures (with PMCs employing many ex-service personnel) and the more pragmatic knowledge that governments are major potential paymasters, make it very unlikely that, for example, a British PMC would embark upon a mission contrary to United Kingdom foreign or defence policy. To some extent this was established in the fall-out over Sandline's abortive foray into Papua New Guinea (PNG) in order to restore to the government lucrative copper mines in the rebel-held island of Bougainville.[79] The contract between Sandline and the PNG Government of Julian Chan, which collapsed as a result of the scandal, prompted the international community to question the United Kingdom Government over whether this had occurred with or without their approval.[80] Sandline's subsequent policy of seeking informal prior approval from the British Government for their activities is instructive in relation to the argument for formalizing relationships.

In between prohibition and passivity is the strategy of regulation, and that is the focus of the Green Paper. Its purposes and variants will be considered next. PMCs themselves broadly support the principle of regulation and are also prominent in pushing to the fore this approach in current international and domestic policy debates. But at the outset it is made clear that a light touch will be applied out of concern for the costs of regulation and the restriction of the mobility of PMCs.[81] Accordingly, several levels of regulation are offered as overlapping options.

[77] (Diplock) Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries (Cmnd 6569 London 1976).

[78] The term is associated with US Defence Secretary, Donald Rumsfeld: *The Times* 31 Mar 2003 5.

[79] See G Ebbeck 'Mercenaries and the "Sandline Affair"' (1998) 113 Australian Defence Force Journal 5 at 16.

[80] See S Miller 'Soldiers of misfortune' *The Guardian* 27 Mar 1997 12; D Bazargan 'High risk business' *The Guardian* 1997 T2. Whether the agreement was unenforceable on grounds of illegality resulted in litigation in *Papua New Guinea v Sandline International Inc* (unreported, 30 Mar 1999) (Sup Ct (Qld)); see D Sturzaker 'The Sandline affair: illegality and international law' (2000) 3 International Arbitration Law Review 164.

[81] Foreign Office, Private Military Companies: Options for Regulation (2001–2 HC 577) para 65.

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The most intrusive form of statutory licensing regime proposed by the Government would require companies or individuals to obtain a licence for each contract for defined military services abroad. The recruitment and management of personnel, procurement and maintenance of equipment, advice, training, intelligence and logistical support as well as combat operations would be within the regulatory sphere, but there is more doubt about the possible inclusion of consultancy services on security measures for commercial premises because of the large number of small-scale consultants (and contracts of relatively small value) in this field.[82] A specific issue arising from this level of regulation would be the likely insistence of companies that they be able to maintain commercial confidentiality with regard to military plans. However, a subsequent government response has explicitly stated that 'for any regulatory regime to be successful, disclosure will be necessary'.[83] Government officials also appear to share the concerns of PMCs that this approach would also slow the timescale for PMCs finalizing commercial deals.[84] Whilst this licensing regime is regarded as intrusive, at the same time, the commercial concerns of PMCs are bringing some influence to bear upon the policy debate. Despite those issues, it is this regulatory format that was preferred by the House of Commons Foreign Affairs Committee as the most 'rigorous',[85] albeit alongside institutional licensing (discussed below). The Committee would also embrace a complete ban on combat operation.[86]

Another regulatory option would require United Kingdom firms to register as PMCs with the Government and then to notify designated officials of contracts for which they were bidding. In this lighter regulatory format: 'Under normal circumstances the government would not react; but it would retain reserve powers to prevent the company from undertaking a contract if it ran counter to UK interests or policy.'[87] For example, there might be 'states of concern' with whom contracts did require specific consent, whereas contracts with, say, European Union States could be assumed to be acceptable.[88]

An even lighter touch approach might involve licensing the PMC alone, still allowing the State to set general rules across the sector, such as non-

[82] ibid para 73.

[83] Response of the Secretary of State for Foreign and Commonwealth Affairs, Ninth Report of the Foreign Affairs Committee, Private Military Companies (Cm 5642 London 2002) 5.

[84] House of Commons Foreign Affairs Committee, Private Military Companies (2001–2 HC 922) para 119.

[85] ibid paras 121 and 123. Some of the problems of delay might be eased by having a category of non-contentious work which does not require specific licensing as well as by various other methods such as fast-tracking for reputable companies: para 124.

[86] House of Commons Foreign Affairs Committee, Private Military Companies (2001–2 HC 922) para 114. But this is questioned by the Government; Response of the Secretary of State for Foreign and Commonwealth Affairs, Ninth Report of the Foreign Affairs Committee, Private Military Companies (Cm 5642 London 2002) 5.

[87] Foreign Office, Private Military Companies: Options for Regulation (2001–2 HC 577) para 74.

[88] House of Commons Foreign Affairs Committee, Private Military Companies (2001–2 HC 922) para 128.

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involvement in certain countries and a prohibition on the employment of specified activities and individuals.[89] But such a level of disengagement would run the danger of lending official credibility to companies whose operations were not disclosed. It would also run into definitional problems—it may be easier to specify permitted or forbidden activities than 'private military companies' or 'military services'.[90] An obvious candidate for forbidden activities would be direct participation in combat operations, and this is indeed proposed by the House of Commons Foreign Affairs Committee despite Foreign Office misgivings about the fluid boundary between guarding and combat.[91]

If institutional licensing were to be adopted, then further consideration would have to be given to the intended relationship between any PMC regulatory regime and that under the Private Security Industry Act 2001. That Act extends in the main only to England and Wales (section 26), though 'security consultants' are within the scheme (Schedule 2 paragraph 5) and some PMC consultancy work could take place within this jurisdiction.

Alongside statutory regulation, another option is to establish a system of self-regulation through a voluntary code of ethics (perhaps comparable to the British Security Industry Association in the domestic security market). The Government views this idea as a possibility for 'reputable PMCs'.[92] It is a measure of the degree to which the corporate social responsibility debate has shifted ground that the concept of self-regulation can be even thought of as a possible solution to companies that are commonly established for one purpose—military or security services—and often are disbanded after a tour of duty. However, the Government points out that self-regulation alone will not suffice, not because of any problem with applying the concept to this industry *per se*, but because it 'would not meet one of the main objectives of regulation, namely to avoid a situation where companies might damage British interests'.[93]

A subsequent Government pronouncement on the issue of PMCs, in response to the Foreign Affairs Select Committee report in October 2002, appears to indicate a preference for regulating PMC activities, even combat, but remains decidedly cautious as to details. The Government's conclusion is that it requires further information, including consultation with EU allies.[94]

[89] Foreign Office, Private Military Companies: Options for Regulation (2001–2 HC 577) para 75.
[90] House of Commons Foreign Affairs Committee, Private Military Companies (2001–2 HC 922) para 133. Nevertheless, the Select Committee approved of institutional licenses: para 134.
[91] ibid paras 34, 37, 107, and 108.
[92] Response of the Secretary of State for Foreign and Commonwealth Affairs, Ninth Report of the Foreign Affairs Committee, Private Military Companies (Cm 5642 London 2002) 6.
[93] Foreign Office, Private Military Companies: Options for Regulation (2001–2 HC 577) para 76.
[94] Response of the Secretary of State for Foreign and Commonwealth Affairs, Ninth Report of the Foreign Affairs Committee, Private Military Companies (Cm 5642 London 2002) 2 and 3. This initial policy review concluded against legislative change (see Foreign Affairs Committee Report, Foreign Policy Aspects of the War against Terrorism (2003–04 HC 441) para 30). But the Foreign Office is still conducting an internal review of policy options, based upon the Green Paper, and is scheduled to report by the end of the summer 2005 (Foreign and Commonwealth Office, personal contact with Whyte, 21 April 2005).

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VI. NATIONAL LEGAL COMPARISONS

Though few other countries have extensive legislation on PMCs,[95] it is significant that two of the countries where the private military industry is strong have imposed regulation. South Africa also presents us with an important recent example, since this country did have a private military industry of considerable importance but, under mounting public pressure, went some way towards imposing a prohibition regime using national, as opposed to international, legal instruments.

In South Africa, the Regulation of Foreign Military Assistance Act 1998[96] prohibits the participation of South African nationals in private 'mercenary activity' (section 2), defined as 'direct participation as a combatant in armed conflict for private gain' (section 1). The Act otherwise regulates rather than prohibits 'foreign military assistance' which includes (section 1):

> (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, but not humanitarian or civilian activities aimed at relieving the plight of civilians in an area of armed conflict . . .

Thus, the South African Act seeks to impose a distinction similar to that advocated by the Foreign Affairs Committee. All contracts for permitted types of operations require authorization from the Minister of Defence (sections 3–5). This extent of State control was unpalatable to Executive Outcomes, which closed down on 1 January 1999, though due in the main to an extensive business network of United Kingdom based PMCs and 'shell' firms,[97] the company has spawned a network of other security-related companies beyond the reach of South African legislation. Of course, those who remain resident in South Africa may become subject to these controls, as recently demon-

[95] See Foreign Office, Private Military Companies: Options for Regulation (2001–2 HC 577) Annex B.

[96] No 15. Prior legislation consisted of the Defence Act 1957 (No .44), s 121(A) of which prohibited members of the SADF from serving as mercenaries or providing mercenary services. EO was licensed in South Africa as a private security company (see National Keypoints Act (Act No 102 of 1980), Security Officers Act 1987 (No 92, as amended), and the Second Amendment to the Penal Code 1992 (No 126)).

[97] See A Musah and JK Fayemi (eds) *Mercenaries: An African Security Dilemma* (Pluto Press London 2000), especially the figure on p xvi.

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strated by the conviction of Sir Mark Thatcher for involvement in the financing of a coup led by Simon Mann and Nick du Toit against the Government of Equatorial Guinea.[98]

The US regulatory system has been much longer established. The Arms Export Control Act 1968[99] and the International Traffic in Arms Regulations (ITAR)[100] require State Department approval for the sale of military equipment and related services (including training) between US companies and foreign States. Manufacturers and providers of defence goods or services for export must register with the Office of Defense Trade Controls in the Department of State, from whom must be sought a license. Any letter of offer to sell defence articles or services for $50m or more, any design and construction services for $200m or more, or any major defence equipment for $14m or more must be notified by the State Department to Congress,[101] a degree of legislative accountability not likely to be mirrored in the United Kingdom.[102] But the level of public information can be, and often is, limited for reasons of national security, so that only lists of countries and the defence articles are disclosed.

The level of scrutiny and control created by the US licensing regime, where every detail of the contract is approved by the State Department's Office of Defence Trade Controls,[103] potentially enables close control and knowledge of PMC activity. However, PMCs can also contract directly through the Defense Department's Foreign Military Sales (FMS) programme, which does not require any licensing. Instead the Department of Defense serves as an intermediary, arranging procurement, logistics and delivery and often providing product support and training to the relevant foreign government, which in turn reimburses the Pentagon for its payments to the private contractor. Vinnell's contract to train the Saudi Arabian National Guard (the employees of which were a recent target of attack)[104] and several of MPRI's contracts to train the Balkan militaries came under the FMS program.[105]

[98] *The Guardian* 14 Jan 2005 2. Mann was convicted of arms offences in Zimbabwe (*The Guardian* 11 Sept 2004 1), while Nick du Toit was convicted in Equitorial Guinea (*Daily Telegraph* 1 Dec 2004). Simon Mann and Nick du Toit were previously involved in Executive Outcomes, and Mann was a founder of Sandline. Mann was latterly operating through a company, Logo Logistics, based in Guernsey.

[99] 22 US Code s 2751 et seq.

[100] 22 CFR Parts 120–30.

[101] 22 US Code s 2776.

[102] At present, there is no central record kept by any governmental department of all contracts with PMCs, a situation which is criticised by the Foreign Affairs Committee: House of Commons Foreign Affairs Committee, Private Military Companies (2001–02 HC 922) para 17.

[103] <http://pmdtc.org/>.

[104] *The Times* 14 May 2003 1. The contract has existed since 1975: JC Zarate 'The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder' (1988) 34 Stanford Journal of International Law 75 at 103.

[105] JC Zarate 'The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder' (1988) 34 Stanford Journal of International Law 75 at 106.

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Like the Foreign Enlistment Act 1870, the (US Federal) Foreign Relations Act of 1988[106] places a prohibition on any US citizen who, 'within the jurisdiction thereof, accepts and exercises a commission to serve a foreign prince, State, colony, district, or people, in war, against any prince, State, colony, district, or people, with whom the United States is at peace'.[107] Intent to travel and serve as a mercenary for a foreign power at peace with the US and preparatory acts are forbidden by sections 959 and 960. Given that these offences apply whenever there is 'peace' between the United States and a foreign State, this is where the similarity with the 1870 Act ends. In the context of terrorism or low-intensity conflict, it may be difficult to judge whether there is 'peace'. In *US v Elliott*,[108] the US district court applied the statute to a conspiracy to destroy a railroad bridge in Zambia, because the United States was 'at peace' with Zambia. But in *US v Terrell*,[109] weapons supplied to the Nicaraguan Contras was not a breach, since the United States was not 'at peace' with Nicaragua.

The US regulatory regime is therefore close to the emerging contours of a regime currently gaining favour in the United Kingdom Government, and more explicitly supported by the Foreign Affairs Committee.[110] To some extent, this is unsurprising, given the current trajectory of United Kingdom foreign policy. First, the United Kingdom probably has a private military sector with a greater overall capacity than any other country outside the US. Secondly, the United Kingdom increasingly views its military role as a bit player in international coalition forces where, as the preceding discussion indicates, the PMC debate is being driven by the ability of States to do 'dirty work' without the repercussions, or more simply, the attraction of transferring risk of political exposure. Thirdly, it is instructive within the wider defence debate that the United Kingdom Government sees its future military strategy being linked more closely to US military strategy.[111] Comparable regulatory structures will allow UK Governments to conduct military activities according to the same ground rules as the US whether this means committing State military forces or domiciled PMCs.

[106] 18 US Code ss 958 and 959. Note also s 959(b) by which conspiracy to destroy the property of a foreign State is also forbidden. The legislation can be traced back to the Neutrality Act 1794: see JC Zarate 'The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder' (1988) 34 Stanford Journal of International Law 75 at 134. An overt act must occur in the US: *Wiborg v US* 163 US 632 (1896). These offences were not used in 2002 against John Walker Lindh after his detention in Afghanistan (for the indictment against him, see <http://www.usdoj.gov/ag/2ndindictment.htm>).

[107] 18 US Code ss 958.

[108] 266 F Supp 318 (DNY 1967).

[109] 731 F Supp 473 (SD Fla 1989).

[110] House of Commons Foreign Affairs Committee, Private Military Companies (2001–2 HC 922) para 28.

[111] Ministry of Defence, Delivering Security in a Changing World (Cm 6040 London 2003) paras 2.11, 6.2.

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What is less prominent in academic and government discourse on the PMC industry is the meagre extent to which the US regulatory system guards against the commission of unlawful killings of combatants, or indeed is able to protect US civilians employed by PMCs. Aside from the evidence from Iraq cited earlier, in Colombia US PMCs are engaged in armed action with FARC rebels in which at least 14 US private contractors and an unknown number of local people and rebels have died since 1997.[112] Such facts have not yet provoked sustained discussion in public, nor have there been legal reactions. Much the same can be said of Dyncorp's alleged involvement in human and arms trafficking in Bosnia, of Airscan's bombing of villages in Colombia, or its involvement in the removal of an elected government in Congo-Brazzaville.[113] As this paper has already indicated, the transferral of military responsibilities from public to private sector has profound implications for the accountability of PMCs and their employees. It is to those questions of constitutionalism that the discussion now turns.

VII. CONSTITUTIONALISM AND PMCS

A. Parliamentary accountability

Whilst regulation is intended to improve standards and to avert major wrongdoing, constitutional norms, especially respect for human rights and international law, and the accountability of the Government for the design and application of regulation, should also be advanced. In regard to the democratic accountability of the Government, the Green Paper contains the brief observation that:[114]

> If the Government decided to adopt a licensing or other regulatory regime for the export of military services, it would be logical for this to be subject to the same reporting requirements *vis-à-vis* Parliament as is the case for arms export licences.

The House of Commons Foreign Affairs Select Committee is more vociferous on the subject. It repeats the idea of parity with arms export licences, except that it demands prior parliamentary scrutiny of any licence application that might involve PMCs in armed combat services.[115]

[112] S Fidler and T Catan 'Private Companies on the Frontline' (2003) 11 August, *ft.com*.

[113] D Whyte 'Lethal Regulation: State-corporate crime and the United Kingdom's New Mercenaries' (2003) 30 Journal of Law and Society 575 at 597.

[114] Foreign Office, Private Military Companies: Options for Regulation (2001–2 HC 577) para 77.

[115] House of Commons Foreign Affairs Committee, Private Military Companies (2001–2 HC 922) para 160.

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B. Accountability in domestic law

As for the legal accountability of PMCs and their participants, established domestic criminal law in the United Kingdom has been of little use in bringing to book illegal activities. Whether this is a result of the weakness of the law per se, or whether it is rather more connected to the political will of the State to enforce the law, is debatable. But it is instructive that no prosecution has ever been made successfully under the Foreign Enlistment Act 1870. Equally, the likely forum conveniens, the State in which the wrong was committed, is implausible as the site for effective legal action. As the Green Paper recognises:[116]

> Soldiers who commit war crimes together with their military commanders and political superiors who bear responsibility can be prosecuted in national courts and (once it is in operation) the International Criminal Court. This liability under international humanitarian law would also apply to employees of PMCs who became involved in armed conflict. In many cases however this is a highly theoretical proposition—a weak government which is dependent for its security on a PMC may be in a poor position to hold it accountable.

Civil liability appears to be a more likely form of legal accountability. The possibility of extra-territorial application to armed forces has been demonstrated in *Bici v Ministry of Defence*.[117] The High Court concluded that British soldiers in Kosovo had been negligent in the killing of two Kosovan Albanians in Pristina; negligence was alleged by two survivors of the incident. The High Court examined the possibility of a common law immunity arising from the existence of a combat situation, but aside from doubts as to whether there was an existing conflict at the time of the incident in 1999 (not long after the Serbs had withdrawn), the common law doctrine did not grant full immunity but required the payment of damages or compensation, save where the loss is the result of inevitable necessity such as might be dictated by the disposition of the opposing forces.[118] Interestingly, the Ministry conceded that it was vicariously liable for any wrongs committed by any of the soldiers, even if abroad and even if acting under the auspices of the UN. One assumes a United Kingdom forum can easily be seen as convenient in comparison to the chaos often reigning in the post-conflict locations concerned.

An extension of liability along these lines might be envisaged in two directions. First, for 'forces of the Crown' read 'PMCs acting on behalf of the Crown'. Secondly, as well as tortious liability, one might look to the broader liability under the Human Rights Act 1998, not just for infringements of rights

[116] Foreign Office, Private Military Companies: Options for Regulation (2001–2 HC 577) para 34.
[117] [2004] EWHC 786. Cf *Mulcahy v Ministry of Defence* [1996] QB 732; *Bell & Others v Ministry of Defence* [2003] EWHC 1134.
[118] *Burma Oil Co Ltd v Lord Advocate* [1965] AC 75. The application of the Crown Proceedings (Armed Forces) Act 1987 was not considered.

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committed in combat situations but also for putting life at risk through, for example, providing military weapons, technology and advice.[119] It is not known whether contract compliance is expressly imposed in this respect, so the question considered here is whether the United Kingdom courts may still demand observance of human rights standards by PMCs acting abroad at the behest of the Government. This aspect raises questions as to whether the PMC is exercising functions of a public nature under section 6. The answer will of course vary according to the function being carried out by the PMC—the delivery of cabbages to the army kitchens might be distinguishable from providing an armed guard for a public building or utility.

The application of the European Convention to conflict out of jurisdiction was recently considered by the European Court in *Bankovic and others v Belgium and others*, where a complaint under Articles 2, 10 and 13 was brought against the European members of NATO whose forces had bombed the main TV station in Belgrade.[120] The European Court declared the application to be inadmissible on grounds that the actions of the Member State were not within their jurisdictions under Article 1. This decision discourages the extension of human rights to sites of external conflict. It may be criticised as adopting an untenable view of 'jurisdiction' and as being inconsistent with previous and later decisions,[121] most notably in *Issa v Turkey*.[122] One might argue that the Court would have done better to adopt a version of the doctrine of forum conveniens in relation to Article 1 rather than to seek to impose an absolute ban on the scrutiny of foreign activities of Member States. Yet, as things stand, the judgment places a shadow over any developments under the Human Rights Act 1998 since, under section 2, the United Kingdom courts must take account of judgments of the European Court.

The extent of that shadow has now been explored by Lord Justice Rix in *R (Al-Skeni and others) v Secretary of State for Defence*.[123] An action for judicial

[119] In *Tugar v Italy* (App. No 22869/93 18 Oct 1995), the applicant, an Iraqi mine-clearer lost a leg when an anti-personnel mine supplied under contract with the Italian government by an Italian company to the Iraqi government in 1982 exploded. The applicant claimed that the knowing supply of, or failure to protect from, landmines which were used indiscriminately was a breach of Article 2. The claim was inadmissible. At the time, there was no arms export regulatory regime in Italy and landmines were not prohibited weapons, so the injury was seen as too remote from the actions or inactions of the Italian Government. Both circumstances have now changed in the United Kingdom (and Italy), as there is express authority both to regulate and not to traffic landmines.

[120] App No 52207/99, 2001-XII.

[121] See K Altiparmak '*Bankovic*: an obstacle to the application of The European Convention on human rights in Iraq? (2004) 9 Journal of Conflict & Security *Law* 213; M O'Boyle 'The European Convention on Human Rights and extra territorial jurisdiction: a comment on life after *Bankovic*' in F Coomans and MT Kamminga, (eds) *Extraterritorial Application of Human Rights Treaties* (Intersentia Antwerp 2004).

[122] App No 31821/96, 16 Nov 2003. See N Mole '*Issa v Turkey*: Delineating The Extra Territorial Effect of the European Convention On Human Rights' [2005] European Human Rights Law Review 86.

[123] [2004] EWHC 2911 (Admin).

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review arose from six killings of Iraqis by British soldiers, five in combat operations and one (Baha Mousa) during custody in military detention. Seeking to reconcile, with some difficulty, what he viewed as inconsistent Strasbourg jurisprudence, Lord Justice Rix emphasised that Article 1 of the Convention (and the Human Rights Act follows suit in much the same way) accords jurisdiction on an essentially territorial basis, subject to exceptions.[124] One exception is where the Member State exercises effective control over another area (as recognised in *Bankovic*). However, this exception should be understood, contrary to some dicta in *Issa*, as strictly confined to other areas within the territory of a contracting State so that no 'vacuums' are created within the Convention *espace juridique*.[125] Jurisdiction could otherwise arise only in 'exceptional and limited' circumstances, as where the United Kingdom assumed discrete and quasi-territorial control or acted in some capacity by consent and under international law such as by setting up diplomatic premises.[126] The holding of a prisoner for three days in military custody did establish jurisdiction, but the circumstances of the other five cases did not. In conclusion, while the *Al-Skeni* judgment emphasises jurisdictional restraint, the door is opened for litigation under the Human Rights Act, as claims will arise from conflicts across the world that they fall within the 'exceptional and limited' circumstances, and those claims will not be deterred where it is PMCs acting under government contract who have committed the wrong.

C. Accountability to international human rights law

In the international law arena, the debate on PMCs remains more polarised, with pressures towards prohibition as strong as those favouring regulation. The United Nations General Assembly has repeatedly recorded its opposition to some of the activities of PMCs, namely, the use of mercenaries and remains:

> *Convinced* that, notwithstanding the way in which they are used or the form they take to acquire some semblance of legitimacy, mercenaries or mercenary-related activities are a threat to peace, security and the self-determination of peoples and an obstacle to the enjoyment of human rights by peoples.[127]

Despite the regular use of PMCs by some of its agencies, albeit in ancillary rather than combat roles, the UN General Council has signalled its persistent concern by the appointment in 1987 of a Special Rapporteur on the use of mercenaries as a means of impeding the exercise of the rights of peoples to self-determination.[128] The UN Special Rapporteur on Mercenaries, Enrico Ballesteros, has argued that: 'The participation of mercenaries in armed

[124] ibid paras 245 and 301.
[125] ibid paras 248, 249, and 265.
[126] ibid para 270.
[127] See, eg, A/RES/56/232 of 26 Feb 2002.
[128] See <http://www.unhchr.ch/html/menu2/7/b/mmer.htm>.

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conflicts… always hampers the enjoyment of the human rights of those on whom their presence is inflicted.'[129]

The concern of the General Assembly arises principally from the rise in the use of PMCs in Africa where, it is claimed, they have had a deleterious impact on the ability of States to maintain order and have encouraged the militarization of civil society, the rapid growth of markets in small arms, and a rise in the use of all weaponry.[130]

> Mercenary activity arises in the context of situations that violate the right of peoples to self-determination and the sovereignty of States. In practice, mercenaries commit atrocities and impede the exercise of human rights. The mere fact that it is a Government that recruits mercenaries, or contracts companies that recruit mercenaries, in its own defence or to provide reinforcements in armed conflicts does not make such actions any less illegal or illegitimate.

The Foreign Office response is that this is an 'extreme point of view' in the light of national rights to self-defence and self-determination.[131]

Aside from the impact of international human rights law on PMCs themselves, human rights law imposes obligations upon States to control PMCs. Under international law, it is the responsibility of States to bring under control conflict and terrorism, whether State-directed or not.[132] And the International Court of Justice has ruled that a State will breach the international law principle of non-intervention against another nation by 'organizing or encouraging the organization of irregular forces . . . for incursion into the territory of another State'.[133] At the moment, it is arguable that States are both entitled and obliged to contain within their boundaries any individuals they suspect may be intending to commit war crimes in a foreign country,[134] though State responsibility for those PMC actions which do take place depends on nuances within the levels of State responsibility, ranging from direct sponsorship to a negative duty not to support, or even a positive duty to investigate, prosecute and punish, as defined by the relevant instrument.[135]

[129] Report of the Special Rapporteur on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (E/CN.4/1999/11, Jan 1999, UNHCHR, Geneva, 1999) para 101.

[130] K O'Brien 'Military-advisory groups and African security' (1998) 5 International Peacekeeping 78.

[131] Foreign Office, Private Military Companies: Options for Regulation (2001–2 HC 577) para 37.

[132] See, eg, United Nations General Assembly Resolutions 40/61 of 9 Dec 1985; 49/60 of 9 Dec 1994.

[133] *Nicaragua v US* [1986] ICJ 14 at 18.

[134] G Robertson *Crimes Against Humanity* (Penguin Harmondsworth 2000) 102.

[135] eg Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Doc A/39/51 (1984)) States that responsibility for torture arises 'when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. Under common Article 1 of the Geneva Conventions, High Contracting Parties undertake to respect and to ensure respect for the Conventions in all circumstances. See JJ Paust 'The Link between Human Rights and

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More specific responsibilities to respect rights arise under instruments relating to torture and genocide, which can certainly be applied across jurisdictions both to individuals, as in the *Pinochet* case,[136] and to organisations.[137]

D. Accountability to international humanitarian laws

There are several problems concerning the application of humanitarian law to PMCs.[138] Indeed, as shall be shown, there is a strand of policy and legal development which seeks to disapply humanitarian laws, in contrast to the overall policy of granting greater protection to civilians. For these purposes, the examination of international humanitarian laws will principally be directed towards the availability of combatant and prisoner of war status under the Geneva Third Convention relative to the Treatment of Prisoners of War 1949 (hereafter 'Geneva III')[139] and the First Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts ('Geneva Protocol I').[140] If employees of PMCs can bring themselves within the relevant terms of these instruments, then any policy of criminalization against them would have to be curtailed, and there would arise immunity for combatants (in other words, those who directly engage in hostilities in accordance with international law and are not simply acting in self-defence)[141] for killings and acts of destruction. Civilians accompanying armed forces may still be able to claim prisoner of war status but must not engage in combat, and civilians who are outside that category must be considered non-combatant and have no special privileges. If prisoner of war status is not available either for combatants or for support or other staff, either because they fail to meet the relevant pre-conditions or because the conflict is not international, then other forms of protection must be considered under the Geneva Convention relative to the Protection of Civilian Persons in

Terrorism and its Implications for the Law of State Responsibility' (1987) 11 Hastings Int'l & Comparative L Rev 41

[136] *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (Amnesty International and others intervening) (No 3) [2000] 1 AC 147. See also *Demjanjuk v Petrovsky* 776 F.2d 571 (6th Cir 1985); *Kadic v Karadzic* 70 F.3d 232 (2d Cir 1995).

[137] See *Doe v Unocal Corporation* 110 F Supp. 2d 1294 (CD Cal 2000); *Wiwa v Royal Dutch Petroleum Company* 226 F 3d 88 (USCA, 2000).

[138] See L Hinds 'The legal status of mercenaries: a concept in international humanitarian law' (1977) 52 Philadephia Law Journal 395. For the position relating to other unofficial combatants, see L Zegveld *The Accountability of Armed Opposition Groups in International Law* (CUP Cambridge, 2002).

[139] 75 UNTS 135.

[140] 1125 UNTS 3. See E Kwakwa 'The Current Status of Mercenaries in the Law of Armed Conflict' (1990) 14 Hastings Int'l & Comp L Rev 67 at 88–9.

[141] See K Ipsen 'Combatants and non-combatants' in D Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflicts* (OUP Oxford 1995) 66 and 90. Breaches of international law may result in punishment in a regular military court or war crimes: Geneva III, Arts 82 and 84.

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Time of War 1949 ('Geneva IV')[142] or the Second Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ('Geneva Protocol II').[143]

Looking in more detail at Geneva III, its applicability to many of the low intensity conflict situations in which PMCs operate may be precarious. By Article 2, 'the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'. It follows that there are two relevant conditions which need to be satisfied. The first is that the level of disturbance required by the phrase 'armed conflict' goes beyond, for example, sporadic banditry or riot[144] and requires a rebel force which has coherence and significant scale in terms of its own organization and operations.[145] Secondly, two State parties must be involved so that a purely internal rebellion rather than international conflict does not qualify.[146] If the conditions are satisfied, mercenaries employed by one of the State Parties could be eligible as a 'militia' forming part of the armed forces of the State (Article 4(A)(1)).[147] Other State-contracted PMC personnel might fall within Article 4(A)(4) as:

> Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

Those PMC employees acting for a resistance movement which is sponsored by a State party in enemy-occupied territories might be encompassed by Article 4(A)(2) as:

[142] 75 UNTS 287. In addition, there is a fundamental guarantee to humane treatment under Protocol I, Art 75.

[143] 1125 UNTS 609.

[144] RR Baxter 'Ius in bello interno' in J Norton Moore *Law and Civil War in the Modern World* (Johns Hopkins Press Baltimore 1974) 525.

[145] A Rosas *The Legal Status of Prisoners of War* (Suomalainen Tiedeakatemia Helsinki 1976) 239 and 275; M Veuthey 'Some problems of humanitarian laws in non-international conflicts and guerrilla war' in MC Bassiouni and VP Nanda *A Treatise on International Criminal Law* (Charles C Thomas Springfield Illinois 1973) 426; L Moir *The Law of Internal Armed Conflict* (CUP Cambridge 2002) 34.

[146] Nor are rebel groups allowed simply to declare themselves sovereign, a tactic attempted by the Palestine Liberation Organisation in 1969: A Rosas *The Legal Status of Prisoners of War* (Suomalainen Tiedeakatemia Helsinki 1976) 208. However, it is not essential that the State sponsoring the rebels is recognized by the detaining power: Art 4(A)(3). Furthermore, there may be wider application in the case of a disintegrating State such as Yugoslavia: T Meron 'The humanization of humanitarian law' (2000) 94 American Journal of International Law 239 at 257; *Prosecutor v Delalic* No IT-96-21-T (16 Nov 1998).

[147] See HW Van Deventer 'Mercenaries at Geneva' (1976) 70 American Journal of International Law 811.

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(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) That of being commanded by a person responsible for his subordinates;
(b) That of having a fixed distinctive sign recognizable at a distance;
(c) That of carrying arms openly;
(d) That of conducting their operations in accordance with the laws and customs of war.

A State affected by disturbance will often be most reluctant to recognise the application of Geneva III, and will usually wish instead to avoid international scrutiny and to pursue a policy of the punishment of rebels and their aides, even if there is a reciprocal denial of status for mercenaries employed by the Government and falling into rebel hands.

Geneva Protocol 1 seeks to make humanitarian law less narrowly drawn.[148] Accordingly, it is applicable not only in the situation described in Article 2 of Geneva III but also under Article 1(4) of Geneva Protocol 1 to 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination. . . .' The effect is to allow nationals of a State of a colonial, alien or racist nature to engage in legitimate combat even if the conflict is wholly internal. The circumstances in which Article 1(4) might apply are described further by the UN General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation amongst States in accordance with the Charter of the United Nations ('the Friendly Relations Resolution').[149] The Resolution requires State support for 'peoples' acting in pursuit of their right to self-determination, but this is qualified under Article 1(4) to the three contexts outlined, and these are generally interpreted narrowly so as to avoid 'encouraging secessionist movements within existing States'[150] or 'struggles waged for the partition of existing States . . . even if in the conflicts there might be some ethnic and/or cultural differences between

[148] For its history, see F Kalshoven 'Reaffirmation and development of international humanitarian law applicable in armed conflicts' (1972) 3 Netherlands Yearbook of International Law 18; (1977) 8 Netherlands Yearbook of International Law 107; (1978) 9 Netherlands Yearbook of International Law 107; RR Baxter 'Humanitarian law and humanitarian politics' (1975) 16 Harvard International Law Journal 1; M Bothe, KJ Partsch and WA Solf *New Rules For Victims Of Armed Conflicts* (Nijhoff Dordrecht 1982); Y Sandoz *et al* (eds) ICRC, *Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Nijhoff Geneva 1987); H McCoubrey and ND White *International Organizations and Civil Wars* (Dartmouth Aldershot 1995).

[149] GA Res 2625 (XXV).

[150] WT Mallinson and SV Mallinson 'The juridicial status of privileged combatants under the Geneva Protocol of 1977 concerning international conflicts' (1978) 42 Law & Contemporary Problems 4 at 16.

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the parties.'[151] There remains also the difficulty of the level of intensity required for the establishment of an 'armed conflict', which requires more than 'civil disturbance'.[152]

If Geneva Protocol 1 is applicable,[153] under Article 43, those claiming privileged status as combatants (and the 'primary' status of combatant in turn leads to the 'secondary' status of prisoner of war under Article 44(1) for those falling into enemy hands)[154] must be part of a body listed below:

> 1. . . . organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.
> 2. Members of the armed forces of a Party to a conflict … are combatants, that is to say, they have the right to participate directly in hostilities.
> 3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

These conditions may pose problems both for State and sub-State groups – organisation and discipline are not the hallmarks of low intensity conflicts. However, some leeway is afforded by Article 44(2) to the condition of 'compliance with the rules of international law applicable in armed conflict:

> While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

Paragraphs 3 and 4 relate to the wearing of distinguishing marks (if not a uniform) and the open carrying of arms (at least during each military engagement and during such time as the combatant is 'visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate'). No such concessions are made in regard to the protection of civilians. According to Article 51(2): 'The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or

[151] A Rosas *The Legal Status of Prisoners of War* (Suomalainen Tiedeakatemia Helsinki 1976) 266; G Cleaver 'Subcontracting military power' (2000) 33 Crime, Law and Social Change 131 at 132.

[152] See APV Rogers 'Armed forces and the development of the law of war' (1982) 21 Review de droit Pénal Militaire 201 at 203.

[153] Note that the Protocols have not been ratified by the US though many of their provisions are considered to be indicative of customary international law. See AD Sofaer 'Agora: The US Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims' (1988) 82 AJIL 784.

[154] See K Ipsen 'Combatants and non-combatants' in D Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflicts* (OUP Oxford 1995).81.

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threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.'

The Geneva Protocol 1 is less explicit about the status of PMC technical support staff, but Article 50(1) states that: 'A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian. Presumably, since such staff fall within the unmentioned Article 4(A)(4), they must be treated as 'civilians' for the purpose of the Protocol. Under Article 51(3): 'Civilians shall enjoy the protection [against dangers arising from military operations], unless and for such time as they take a direct part in hostilities.' It is arguable that a range of employees of PMCs could fall within the proviso to the Article and not just those who are actually carrying weapons, though 'hostilities' should be understood as confined to acts which by their nature and purpose are intended to cause actual harm to opposing forces.[155]

In so far as Geneva Protocol 1 would otherwise appear applicable to the operations of mercenaries, whether employed by governments or rebels, there is an important proviso in Article 47(1) which states that '[a] mercenary shall not have the right to be a combatant or a prisoner of war.' In this context:

> (2) A mercenary is any person 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;
> (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;
> (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
> (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.

The result for those falling within the definition may be trial and punishment for the consequences of combat, such as killings.[156] Yet, there are several reasons for doubting whether the cumulative conditions of Article 47 will actually deprive many mercenaries of potential combatant status.

[155] ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Nijhoff Geneva 1987) para 1944.

[156] The same applies under Geneva III and for examples of trials, see: MK Hoover 'The Laws of War and the Angolan trial of mercenaries' (1977) Case Western Reserve Journal of International Law Review 323; GH Lockwood 'Report on the trial of mercenaries: Luanda, Angola, June 1976' (1977) 7 Manitoba Law Journal 183; M-F Major 'Mercenaries and international law' (1992) 22 Georgia Journal of International and Comparative Law 103 at 134.

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First, if individuals are regular employees of a company, they cannot be regarded as having been recruited 'specially' for a particular conflict, in line with the Geneva definition.[157] Seemingly, members of the Gurkhas or the French Foreign Legion are beyond Article 47.

Secondly, those who provide non-combat services—fulfilling roles supporting, rather than taking a 'direct part in the hostilities' (Article 47(2)(b)) are not covered.[158] This itself is a problematic distinction for two reasons: abuses and acts of terror can be committed in the planning and assistance to combat rather than its commission; and often other roles, such as guarding installations, can draw PMC employees into combat situations.[159]

Thirdly, Article 47(2)(c) insists upon private gain as the motivation for mercenaries, as opposed to, for example, political or religious principle. In this sense, we can speculate that the British citizens alleged to be fighting in Iraq against US forces on ideological grounds could not be defined as mercenaries.[160] But even where individuals are being paid, the problem arises of separating this motivation from moral or political ideals. As the Diplock Report concluded, 'any definition of mercenaries which required proof positive of motivation would . . . either be unworkable or . . . haphazard'.[161]

Fourthly, it is relatively easy to evade the conditions in Article 47(2)(d) and (f), that a mercenary, 'is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict . . . and . . . [is not]on official duty as a member of its armed forces.' In the past this has been done in several ways: by the host State immediately conferring nationality on PMC employees (as in the case of two of Executive Outcomes/Sandline helicopter pilots in Sierra Leone) or by establishing an ambiguous link to the host country's armed forces (for example, in Sandline's contract with Papua New Guinea, the PMC force were designated as 'Special Constables').[162] Moreover, given that Article 47 does not specify a particular timeframe for enlisting for duty, it is possible for mercenaries to enlist in the armed forces of the host State for the duration of the conflict.

[157] G Cleaver 'Subcontracting military power' (2000) 33 Crime, Law and Social Change 131 at 133; D Shearer *Private Armies And Military Intervention* (Adelphi Paper 316, International Institute for Strategic Studies London 1998) at 17–18.

[158] M-F Major 'Mercenaries and international law' (1992) 22 Georgia Journal of International and Comparative Law 103 at 111.

[159] D Whyte 'Lethal Regulation: State-corporate crime and the United Kingdom's New Mercenaries' (2003) 30 Journal of Law and Society 575 at 594–5.

[160] See House of Commons Foreign Affairs Committee, Private Military Companies (2001–2 HC 922) para 18.

[161] (Diplock) Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries (Cmnd 6569 London 1976) para 7.

[162] G Ebbeck 'Mercenaries and the "Sandline Affair"' (1998) 113 Australian Defence Force Journal 5 at 17. But the International Court of Justice has indicated it will look beyond the legalistic position in regard to nationality and require a genuine link to the nation to be established: *Nottebohm* (*Liechtenstein v Guatemala*) 1955 ICJ Reports 4.

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Fifthly, Article 47 targets individual mercenaries. Thus, it does not seek to outlaw State use of those services or the recruitment of individuals paid for by a State who might fall within the protection of Protocol 1, Article 43(3) (above). The result is to condone State demand for private military services. It may also be noted that the supply side is also left unregulated. For all intents and purposes, corporations are invisible to the Geneva Conventions, and those who provide the personnel who might breach the Geneva Law do not directly infringe any article.

Turning to other forms of protection for those who are deemed not to merit combatant or prisoner of war status, the applicability of the bulk of Geneva IV is problematic for the same reasons as Geneva III, as the Article 2 requirement of 'armed conflict' is common to both. But the conditions in Article 3 are otherwise easier to fulfil, for it is applicable in 'the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . .'.[163] Nevertheless, the reluctance of governments to recognise its fulfilment remains a constant.[164] If it is accepted as pertinent (and States are encouraged to be generous by the Statement that the 'application of the . . . provisions shall not affect the legal status of the Parties to the conflict'), then Article 3(1) provides for persons taking no active part in hostilities to be treated 'humanely', with the following activities being expressly prohibited:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) Taking of hostages;
(c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

It should be noted that, even if these provisions are observed, Article 3 does not prohibit treating PMC employees as criminals worthy of punishment.[165]

Article 3 has had an impact far greater than originally expected in 1949, but it is rather curt as a 'Convention in miniature'. Therefore, Geneva Protocol II attempts to develop and supplement its protections. Protocol II is a limited instrument because 'internal armed conflicts . . . are seen as a matter first and foremost for the concern of the State in whose territory a given conflict occurs'.[166] This delicacy is reflected in its Article 3 which expressly asserts

[163] Art 3 is also a common clause. See Report of the Committee of Privy Counsellors appointed to consider authorized procedures for the interrogation of persons suspected of terrorism (Cmnd 4901 1972) para 4.

[164] AP Rubin 'The status of rebels under the Geneva Conventions of 1949' (1972) 21 ICLQ 472; L Moir *The Law of Internal Armed Conflict* (CUP Cambridge 2002) 67.

[165] JE Bond 'Application of the Law of War to internal conflicts' (1973) 3 Georgia Journal of International and Comparative Law 345 at 373–4.

[166] F Kalshoven 'Reaffirmation and development of international humanitarian law applicable in armed conflicts' (1977) 8 Netherlands Yearbook of International Law 107 at 109.

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sovereignty, national unity and territorial integrity and disavows any claim by outside States to intervene in the armed conflict or in the internal or external affairs of the affected State. Subject to those apprehensions, applicability is dealt with by Article 1:

1. This Protocol . . . shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

It should be noted that the element of control of territory is explicit in this case, and that the level of armed conflict is likewise required to be more than isolated or sporadic, so that there may be conflicts within common Article 3 which do not fall within the intensity and endurance required for Protocol II.[167] Protocol II can also only apply to conflicts between official and unofficial forces and not between opposing unofficial factions.[168]

Protocol II may be regarded as providing helpful humanitarian guidelines on humane treatment in regard to modes and targets of attack (Article 4), conditions of detention (Article 5) and prosecutions and punishments (Article 6). But in practice (and given that many States have not ratified it), its overall impact is again 'most disheartening'.[169]

In conclusion, the Geneva Convention rules affect only national government authorities or sizeable, organized and sustained insurgency forces which are clearly recognized and capable of acting in accordance with international humanitarian law, and even in those cases, the effect is often by concession.[170] The problems relate, first, to scope and applicability, with many situations in which PMCs are operative likely to be treated as wholly internal matters not reaching the level of international law and with grey areas relating to the status of those who provide non-combat support services. Secondly, the policies embodied in international humanitarian law at times pull in opposite directions, with the exclusion of mercenaries under Article 47 of Protocol 1 sitting

[167] See RR Baxter 'Humanitarian law and humanitarian politics' (1975) 16 Harvard International Law Journal 1; A Cassese 'The status of rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 30 ICLQ 416 at 418; G Robertson *Crimes Against Humanity* (Penguin Harmondsworth 2000) 181; L Moir *The Law of Internal Armed Conflict* (CUP Cambridge 2002) 102.

[168] ibid 104.

[169] ibid 131.

[170] MH Hoffman 'Emerging combatants, war crimes and the future of international humanitarian law' (2000) 34 Crime, Law & Social Change 99 at 104.

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uneasily with the more general policy of encouraging compliance on all sides with the spirit of international humanitarian law.[171]

E. Accountability to special international laws against mercenaries[172]

The Organization of African Unity's Convention for the Elimination of Mercenarism 1972[173] and the UN-sponsored International Convention Against the Recruitment, Use, Financing and Training of Mercenaries 1989[174] seek to outlaw the use of mercenaries on an increasingly broad basis.

In an effort to 'take all necessary measures to eradicate from the African continent the scourge that the mercenary system represents' (Preamble), the Organisation of African Unity's Convention for the Elimination of Mercenaries of 1972 has a broader definition than under Article 47 of Geneva Protocol 1. Article I defines 'mercenaries' as non-nationals employed by

> … a person, group or organization whose aim is:
> (a) to overthrow by force of arms or by any other means the government of the Member State of the Organization of African Unity;
> (b) to undermine the independence, territorial integrity or normal working of the institutions of the said State;
> (c) to block by any means the activities of any liberation movement recognized by the Organization of African Unity.

Thus, the Convention does not interdict the use of mercenaries by recognized States (except against their equally recognized neighbours and except by racist regimes as existed in Rhodesia and South Africa). In addition, it seems that financial motivation does not have to be proven. The actions of a mercenary as defined above constitute international crimes against the peace and security of Africa, and anyone who recruits or takes part in the recruitment of a mercenary, or in training him, or in financing his activities, or who gives him protection, also commits a crime (Article 2), these restrictions going well beyond previous international laws such as Geneva Protocol 1.

[171] E Kwakwa 'The current status of mercenaries in the law of armed conflict' (1990) 14 Hastings International & Comparative Law Review 67 at 69; G Ebbeck 'Mercenaries and the "Sandline Affair"' (1998) 113 Australian Defence Force Journal 5 at 9, 18.

[172] For a wider history, see M-F Major 'Mercenaries and international law' (1992) 22 Georgia Journal of International and Comparative Law 103 at 119.

[173] Organization of African Unity Convention for the Elimination of Mercenaries in Africa, OAU Doc CM/433/Rev L, Annex 1 (1972). The Convention entered into force in 1985. See P Mourning 'Leashing the dogs of war' (1982) 22 Virginia Journal of International Law 589 at 599.

[174] International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, GA Res A/44/34, UN GAOR, 44th Sess, Annex, Agenda Item 144, UN Doc A/RES/44/34 (1989), reprinted in 29 ILM 89. Prior to the Convention, the UN General Assembly had declared certain uses of mercenaries to be criminal: Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (UN GA Res A/2464, UN Doc A/7218 (1968). See P Mourning 'Leashing the dogs of war' (1982) 22 Virginia Journal of International Law 589 at 608.

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The UN International Convention Against the Recruitment, Use, Financing and Training of Mercenaries of 1989, adopts in Article 1(1) all but one (the requirement to take a direct part in the hostilities) of the difficult conditions of Article 47 but goes beyond them in Article 1(2):

1. A mercenary is any person who:
   - (a) is specially recruited locally or abroad in order to fight in an armed conflict;
   - (b) 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 rank and functions in the armed forces of that party;
   - (c) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
   - (d) is not a member of the armed forces of a party to the conflict; and
   - (e) 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.
2. A mercenary is also any person who, in any other situation:
   - (a) is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at :
     - (i) overthrowing a Government or otherwise undermining the constitutional order of a State; or
     - (ii) undermining the territorial integrity of a State;
   - (b) is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
   - (c) is neither a national nor a resident of the State against which such an act is directed;
   - (d) has not been sent by a State on official duty; and
   - (e) is not a member of the armed forces of the State on whose territory the act is undertaken.

The effect is a more wide-ranging coverage than Article 47; by Article 1(2), support staff can be included (at least if involved in the support of operations and not logistics or general training)[175] and activities short of armed conflict are restricted, including actions on behalf on national liberation movements.[176]

The UN Convention establishes offences in relation to an individual mercenary who, in the circumstances of Articles 1 or 2, 'participates directly in hostilities or in a concerted act of violence' (Article 3) or in relation to any person who recruits, uses, finances or trains mercenaries (Article 2). In addition, and in line with the OAU Convention, the UN Convention also turns its attention to the activities of States Parties. They shall not recruit, use, finance

[175] See D Kassebaum 'A question of facts—the legal use of private security firms in Bosnia' (2000) 38 Columbia Journal of Transnational Law 581 at 596.
[176] The reversal of policy is marked: ibid at 590.

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or train mercenaries and shall prohibit their activities (Article 5); they shall take measures to prevent preparations in their territories (Article 6); they shall facilitate legal action against crimes within their territory (Article 9—but there is no requirement of universal jurisdiction). A proviso appears in Article 16 to the effect that: 'The present Convention shall be applied without prejudice to…(b) The law of armed conflict and international humanitarian law, including the provisions relating to the status of combatant or of prisoner of war.' This means that the wider scope of the Convention in relation to individual mercenaries cannot readily take effect.

The approach of these conventions is prohibitory rather than regulatory, and they have both been marked by a widespread lack of political will necessary for implementation. For example, the UN Convention has been ratified by only 26 States. Whilst this lack of political will may be partly explained by a general lack of urgency on the part of States to eradicate mercenaries, the lack of support for prohibition is also undoubtedly linked to the use of PMCs by an increasing number of both client and domicile States. It is also instructive in this respect that, as we have already noted, the UN retains the services of a range of PMCs for escort and guarding work.

F. Accountability to residual international law

More generalized notions of infractions of international laws, such as crimes against humanity, can now be seen as codified to a fair extent for enforcement purposes in the rules of the International Criminal Court.[177] But, while the United Kingdom Government ratified the Rome Statute in 2001,[178] there is the major difficulty that the United States refuses to ratify the ICC statute, because it is concerned that its political and military leaders may become targets for war crimes prosecutions. As a result, it has sought to arrange for bilateral treaties of immunity with States where its soldiers operate, and it is notable that this exemption has been sought for PMCs in operation in Afghanistan and Bosnia.[179] There is also the limitation that the jurisdiction of the International Criminal Court is limited by Article 5(1) of the Rome Statute to 'the most serious crimes of concern to the international community as a whole' which comprise genocide, crimes against humanity, war crimes and the crime of

[177] Rome Statute of the International Criminal Court, 17 July 1988, UN Doc A/CONF.183/9, (1998) 37 ILM 999, Arts 7, 20. See KD Askin 'Crimes within the Jurisdiction of the International Criminal Court' (1999) 10 Criminal Law Forum 33; D McGoldrick 'The Permanent International Criminal Court' [1999] Criminal Law Review 627; MH Arsanjani 'The Rome Statute of the International Criminal Court' (1999) 93 American Journal of International Law 22; VP Nanda 'The Establishment of a Permanent International Criminal Court: Challenges Ahead' (1998) 20 Human Rights Quarterly 413; W Schabas *An Introduction to International Criminal Court* (CUP Cambridge 2001).

[178] See International Criminal Court Act 2001.

[179] *The Independent* 30 June 2003 3. See further American Servicemembers' Protection Act 2002 (22 USC s 7401).

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aggression. It follows that lower order abuses such as 'terrorism' committed during fighting may not be covered. The explanations for this omission have included the recognition that the core crimes were of greatest concern to States, were of higher priority for the ICC and had clearer status and definition, and that the inclusion of 'terrorism' would hinder the ratification process and the development of the ICC.[180] Finally, the utility of the ICC is limited in the context of PMCs because, by Article 25(1): 'The Court shall have jurisdiction over natural persons pursuant to this Statute.' Corporate liability is nowhere mentioned because of objections during debates on the draft Rome Statute. Though corporate liability could be one possible route for PMC accountability, the idea was rejected because of doubts about scope, problems of representation and the fear of impact of third party rights.[181]

Alongside the new international criminal code, there is an emergent jurisprudence, arising from the jurisprudence of the International Criminal Tribunals for Rwanda and for the former Yugoslavia,[182] that customary international law can now be invoked to overcome many of the technical or political limitations of international humanitarian law.[183] The effect has been to alter the degree of control by States before there can be attribution to them of the misdeeds of individuals, a shift which in turn can affect whether the conflict can be viewed as international. In addition, the jurisdiction regarding crimes against humanity applies to widespread and systematic attacks against civilians, thus going beyond armed conflict,[184] and this jurisdiction is likely to be triggered only in the grossest of situations.[185]

G. Market accountability

Although the principle of market accountability is not explored fully by the

[180] See L Martinez 'Prosecuting terrorists at the International Criminal Court: possibilities and problems' (2002) 34 Rutgers Law Journal 1 at 18. The UK Government views the ICC as unsuitable in that context because of difficulties of definition and the production of sensitive evidence. See Government Response to the Foreign Affairs Committee, Foreign Policy and Human Rights (Cm 4299 London 1999) 3.

[181] See S Kabel 'Our business is people (even if it kills them)' (2004) 12 Tulane Journal of International and Comparative Law 461.

[182] See *Prosecutor v Tadi_* (1996) Case IT-94-1-AR72, 35 *ILM* 32 (appeal on jurisdiction), (1997) Case IT-94-1-T, 36 *ILM* 908 (judgment), (1999) Case IT-94-1-A, 38 *ILM* 158 (appeal); *Prosecutor v Erdemovi_* (1996) IT-96-22-T; *Prosecutor v Marti_* (1996) Case No IT-95-11-R61; *Prosecutor v Delali_ et al* (1998) Case No. IT-96-21-A; *Prosecutor v Kupreski_ et al* (2000) Case No. IT-95-16-T, Judgment, ICTY TC (judgment), (2001) Case No IT-95-16-A, Judgment, ICTY AC (appeal); *Prosecutor v Kordi_ & Cerkes* (2001) Case No IT-95-14/2-T; M Bohlander 'Prosecutor v Dusko Tadic: waiting to exhale' (2000) 11 Criminal Law Forum 217.

[183] See L Moir *The Law of Internal Armed Conflict* (CUP Cambridge 2002) ch 4.

[184] See G Mettraux 'Crimes against humanity in the jurisprudence of the International Criminal Tribunals for the former Yugoslavia and for Rwanda' (2002) 43 Harvard International Law Journal 231.

[185] The limit to 'natural persons' also remains: Statute of the International Criminal Tribunal for the former Yugoslavia (S/RES/827, 1993) Art 6; Statute of the International Criminal Tribunal for Rwanda (S/RES/955 (1994)) Art 6.

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Green Paper, the provision of a competitive market, both for home and overseas consumption, is an abiding concern. The industry itself has argued that contractual vulnerability and the protection of market position is enough of an incentive to produce good conduct, and according to the tone of its policy Statement, the Foreign Office appears to agree. However, the mechanisms by which a market penalty is threatened do not look very fierce.[186]

A likely impact of regulation may well be to open the existing market for PMC activities to a range of new players and to spawn new markets in violence. A comparison here may be made with the impact of the recent Private Security Industry Act 2001 which '. . . has created opportunities for upwardly mobile entrepreneurs of violence who were previously restricted to unambiguously criminal markets'.[187] The difficulties of market regulation are well known to observers of private policing, who refer to the 'commercial compromise of the State'.[188] An apposite question for market accountability therefore is whether it can provide adequate protection for weak governments and their citizens. In particular, the implications of governments paying for security by mortgaging future returns from mineral exploitation carry huge economic and political risks to relatively weak States.[189] But the Foreign Office cost/benefit analysis is that 'if a government is faced with the choice of mortgaging some of its mineral resources or leaving them entirely in the hands of rebels, it may be legitimate for them to take the former course'.[190]

Next, in the operation of a market for violence, a client/customer line of accountability is likely to encourage a political economy of violence where the relationship between means and ends is likely to be unclear. Informal justice and wider discretionary power may encourage a displacement of the public interest with the immediate interests of private military companies' managements and shareholders. For example, we have to confront the possibility that suspects and captives will be dealt with by the private company themselves rather than handed over to the public authorities. It is not beyond our imagination to suggest that information valuable to the achievement of contractual objectives or the safeguarding of corporate assets might be obtained but other sources of information may be ignored or suppressed.

[186] Foreign Office, Private Military Companies: Options for Regulation (2001–2 HC 577) para 17. An example of both market power and limited sanctions concerned the Foreign and Commonwealth Office's recent warnings to British PMC Northbridge Services Group regarding its potential involvement in the Ivory Coast; see <http://www.northbridgeservices.com/Pressrelease>.

[187] D Hobbs et al *Bouncers: Violence And Governance In The Night-Time Economy* (OUP Oxford 2003) 366.

[188] N South *Policing For Profit: The Private Security Sector* (Sage London 1988) at 92.

[189] A Musah and JK Fayemi (eds) *Mercenaries: An African Security Dilemma* (Pluto Press London 2000).

[190] Foreign Office, Private Military Companies: Options for Regulation (2001–2 HC 577) para 40.

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Legal controls in this sense may appear increasingly privatized and individualized. As a compromise, tort law, it has been suggested, may offer a median avenue for accountability. However, jurisdictional issues make it difficult, though not insurmountable,[191] to bring suits against PMCs in their 'home' State, though both in civil[192] and criminal[193] jurisdictions there have been moves towards a trans-jurisdictional remit. The net effect of the forms of regulation likely in the United Kingdom may well trigger a substitution of legal tools of accountability from public law (criminal law and humanitarian law) to contract and torts law.

Whatever its shortcomings, and no matter which route the government follows, market accountability is likely to remain the prime mechanism of corporate governance in the PMC sector. These companies are to be held more indirectly accountable by market conditions which make them acceptable as contractors. All of this leaves one wondering whether the net effect of a shift to the market accountability model will be to reduce public scrutiny and the observance of human rights and humanity to optional contractual terms.

VIII. CONCLUSION

The use of PMCs in several contexts sits uneasily with existing law, both domestic and international. Political sensitivities are raised on the domestic scene, while the relevant doctrines of human rights law and humanitarian law were not designed with private or corporate protagonists in mind. Within this law-accountability vacuum, we are left with a market model of accountability which is expected to provide safeguards against humanitarian and human rights abuses, backed by private rather than public law.

Perhaps the most insidious problem which places limits upon the prospects for the effectiveness of domestic legal regulation, whether existing or imagined, is the lack of visibility and transparency which characterizes PMCs. PMCs have been known to establish subsidiary firms for particular operations and then dissolve the firm as soon as the operation is over. Often they are, or establish, subsidiaries which are domiciled in obscure offshore locations. In addition, PMCs tend to be 'asset light', retaining few permanent full-time employees and moving easily from one jurisdiction to another, relatively hidden. These features obstruct legal accountability, in the sense that it is difficult to trace the protagonists in a conflict after the event. An example might be the South African-based Executive Outcomes. As already related, the company was formally disbanded in 1999. Its personnel are, nevertheless,

[191] C Forcese 'Deterring "Militarized Commerce": The Prospect of Liability for "Privatized" Human Rights Abuses' (1999–2000) 31 Ottawa L Rev 171.
[192] See *Adams v Cape Industries* [1990] Ch 433.
[193] See, eg, Criminal Justice (Terrorism and Conspiracy) Act 1998 s 5.

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closely involved in successor PMCs.[194] The following exchange during the Select Committee proceedings illustrates this point:[195]

> ANDREW MACKINLAY MP: 'It is like sand going through your fingers. Companies dissolve, ownership is vague and the soldiers themselves are not known or named. Again is this not a problem? What do you think of that?'
> DENIS MCSHANE (Parliamentary Under Secretary of State for the Foreign and Commonwealth Office) 'They are very protean, they are like amoeba, they come and go.'

Thus, despite the claims to legitimacy and openness which have accompanied the emerging corporatization of the PMC, the mantle of becoming officially recognized as a properly incorporated company also can be used as a corporate veil. In addition, PMCs seem to be increasingly linked to large multinational conglomerates, many of which have asset holdings greater than some governments and may pursue independent agendas.[196]

The dominant view in the literature is that the increasingly frequent use of PMCs by Western governments implies a privatization of the State's military functions, a process which implies a reduction of the State's capacity to act politically, to intervene in markets and so on. It is a scenario which—as we noted in the introduction—conjures up Nozick's ultra-minimal State.

The reconfiguration and redistribution of State/market power is, however, a more complex process, for the use of PMCs expands rather than restricts the coercive capacity of, and the military options open to, the State. On the evidence here provided, the market governance sought by the State over PMCs does not represent an overall loss of power or a diminution of sovereignty but is better described as 'State rescaling'.[197] This term describes the process through which the State's scope for intervention, its institutional boundaries and ensembles are shifting[198]—a concept which can provide a corrective to theoretical traditions that have wrought fixed distinctions between the State and civil society.[199] Although it may not be fashionable to talk about the State any more, given the well-worn association with its reductionist analytical application, if we move beyond a liberal (superficial polemic and indeed mythical) view of a two-dimensional public/private distinction where the public is narrowly embodied in the State institutions and the private in every-

[194] Closure of Sandline International was announced on 16 Apr 2004 <http://www.sandline.com/>, but it has been followed by the rise to prominence of Aegis Defence Services <http://www.aegisdef-webservices.com/> and Logo Logistics, both described earlier.

[195] House of Commons Foreign Affairs Committee, Private Military Companies (2001–2 HC 922) Examination of witnesses, q 158.

[196] N Hertz *The Silent Takeover: The Rise of Corporate Power and the Death of Democracy* (Heinemann London 2001).

[197] B Jessop *The Future of the Capitalist State* (Polity Cambridge 2002) at 193.

[198] L Weiss 'Globalisation and the Myth of the Powerless State' (1997) 225 New Left Review 3.

[199] R Coleman *Reclaim the Streets: surveillance, social control and the city* (Willan Collumpton 2004), see ch 3 in particular.

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thing else, then the notion of State power need not restrict our analysis. Moreover, the idea that the State, and by implication the rule of law, is in retreat under the neo-liberal conditions of deregulation and privatization becomes difficult to sustain. The opening up of legitimate markets to PMCs looks less like a transfer of power from the public to the private sector than the re-regulation of security provision, a shift in the form of regulation from international human rights or humanitarian law to contract and civil law. As this paper has argued, there are two elements of this process of re-regulation (which in this case also implies legitimization of the industry) that are significant in constitutional terms: the transfer of institutional responsibility for absorbing risk, both in financial terms and in terms of political exposure, and the undermining of public democratic accountability that this shift implies.

The latter is not to imply that the executive branch has, or ever can, 'contract out' democratic accountability. Governments and their institutions in modern democracies cannot function without some level of popular legitimacy. In this sense, the privatization of some military functions masks, rather than dissolves, government responsibility for foreign policy. To the extent that governments can now distance themselves from the body bags, human rights abuses and war crimes, the use of PMCs provides new opportunities to mystify the State's directing role in military violence and to blur the lines of public-private accountability.[200]

Finally, PMCs afford the possibility of greater adventurism in foreign policy and allow a Western-constructed order to be imposed on a much wider range of conflicts, to be settled according to the interest of Western States which can foster and afford the services of PMCs. If the United Kingdom Government does follow the road to re-regulation/legalization of the industry, a looming constitutional fissure in the mantle of democratic accountability must also be addressed. In their current form, the proposals do not address this fissure and, as such, the risk is that regulation will institutionalize a law-accountability gap, rather than impose a system of effective control.

[200] The claim by Senator Edward Kennedy that 'Iraq is George Bush's Vietnam' (*Washington Post* 6 Apr 2004 A4) becomes even less tenable if much of the personnel involved are privately contracted volunteers, though the possibilities of contracting for police, prisons and other criminal justice services may eventually prolong US involvement in former conflict zones

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