regulating private military companies

options for the UK Government

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INTERNATIONAL ALERT

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Contents

Abbreviations & Acronyms

ANC	African National Congress
DSL	Defence Systems Ltd
DR Congo	Democratic Republic of the Congo
DTI	Department of Trade and Industry
EU	European Union
ITAR	International Traffic in Arms Regulations
MPLA	Movimento Popular de Libertação de Angola (Popular Movement for the Liberation of Angola)
MPRI	Military Professional Resources Inc
NATO	North Atlantic Treaty Organisation
NCACC	National Conventional Arms Control Committee
OAU	Organisation of African Unity
RUF	Revolutionary United Front
UK	United Kingdom
UN	United Nations
UNITA	União Nacional para la Independência Total de Angola (National Union for the Total Independence of Angola)
US	United States

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Executive Summary

The 1998 'arms to Africa' affair in which the British based private military company, Sandline International, signed a contract with the then exiled President of Sierra Leone Ahmed Tejah Kabbah, to supply a 35 tonne shipment of arms, in contravention of a United Nations' (UN) embargo, clearly demonstrates the serious implications private military company activities can have on United Kingdom (UK) foreign policy. The subsequent independent inquiry into the affair, conducted by Sir Thomas Legg, recommended that guidelines be established for UK Government officials when dealing with representatives of private military companies.[1] The Second Report of the Foreign Affairs Select Committee into Sierra Leone went further by calling upon the UK Government to seek amendment of the International Convention against Mercenaries and to outline legislative options for controlling private military companies operating out of the UK.[2] As a result, the then British Foreign Secretary, Robin Cook, announced in April 1999 that the UK Government would produce a Green Paper (policy consultation document) on mercenary activity by the end of November 2000.[3] This report puts forth a reasoned argument as to why the UK Government should take steps to control the activities of mercenaries and private military companies operating out of the UK and proposes options for prospective legislation.[4]

Section II describes the evolution of the mercenary phenomenon from an historical perspective and the growing need to draft legislation to control the activities of private military companies. This includes the shift from the prominence of traditional mercenaries during the 1960s and 1970s independence movements in Africa, to the emergence of their modern counterparts, private military companies, during the post-Cold War era. Whilst the international community has already developed a response to traditional mercenary activities, the way forward is less clear for private military companies. There is, however, growing concern about private military company activities, due to their potentially negative impact on peace, stability and the protection of human rights. Central to this concern is the lack of accountability and absence of any binding legislation to regulate them. The salient need to improve currently lacking accountability of private military companies is a useful foundation upon which the UK government can take appropriate steps towards drafting legislation.

Section III describes the principal actors providing private military services, namely, mercenaries, private military companies and private security companies. These are defined as:

- **Mercenaries** are typically perceived as those who profit from the scourge of war without regard for the suffering that it inflicts on the communities it affects.
- **Private military companies** often employ mercenaries, but they differ as they are legally registered companies often hired by governments, ostensibly to provide public security.
- **Private security companies** share the same corporate attributes and command structures as private military companies; however, they are predominantly concerned with crime prevention and public order.

Clear definitions of each actor or, more precisely, the activities and services they are engaged in are necessary prerequisites for the formulation of legislation. Key to this is the need to make a distinction between mercenaries and private military companies. Examination of the criteria for mercenaries in international humanitarian law is helpful in distinguishing them from private military companies. When private military companies directly participate in hostilities; are not fully integrated into the national armed forces of their clients; cannot demonstrate that their contract is not primarily for profit; then, they do fall within the definition in international law of a mercenary and should be prohibited. If companies' activities are not mercenary in nature and actually do contribute to public security and law and order, then their activities should be seen as legitimate. The legal characteristics of both mercenaries and private military companies as legal persons mean that they should be subject to effective legislative supervision through well conceived regulatory and enforcement procedures. It is conceivable that both the Department for Trade and Industry (DTI) and the Companies Registrar should have special powers conferred upon them in this regard.

Section IV examines the legal basis upon which prospective UK legislation should be formulated, drawing on relevant obligations under international law. The historical evolution of international law relevant to mercenary activities is covered and analysed including the law of neutrality with respect to internal armed conflict; the prohibition against the use of force against the political independence and territorial integrity of other states; and emergent treaty standards which seek to prevent the recruitment, financing, training, and use of mercenaries. Although international law prohibiting mercenary activities has evolved considerably over the last century, there are currently still no instruments that go far enough to prohibit mercenary activity as part of customary international law. There do exist precedents, though, for obligations on the UK to legislate (e.g., the International Convention) against mercenary activity committed by UK individuals and the government should seek to ensure that these are reflected in prospective national legislation. In taking such steps, however, the UK government should also seek to address many of the gaps and ambiguities in relevant international law and provide leadership in this area. Although the legal instruments that have been covered are not applicable to many of the activities of private military companies, there are important lessons that can be taken from these mechanisms in the drafting of national legislation.

Section V looks at the introduction of national legislation and laws in other supplier countries as useful to drawing best practice for such an exercise in the UK. The four categories of national legislation considered include legislation passed to: (1) control mercenary activities in response to the requirements of neutrality laws; (2) deal directly with mercenaries and mercenary activity; (3) regulate the provision of foreign military assistance as opposed to merely regulating mercenary activities and direct participation in conflicts; and (4) regulate military services within arms export control systems. It will be important for the UK to consider existing national legislation when drafting its own legislation to control mercenary activities.The US and South African governments have perhaps the most comprehensive laws which provide important lessons, such as a prohibition on direct participation in conflict, definitions of military services that should be regulated, and the need for transparency.

Conclusions and recommendations

A number of key features of national legislation can be drawn, which could be used to formulate and draft effective UK legislation.The following recommendations are made in light of both the international instruments currently in place to regulate traditional mercenaries and more recent national legislation to regulate private military companies.

Legal basis

The starting point for developing national legislation should be its legal basis, which should include:

International Convention against Mercenaries
The UK Government should ratify the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, and its imperfections and weaknesses must be addressed in the process.

International human rights and humanitarian law
The UK Government should ensure that national legislation reflects relevant international human rights and humanitarian law, so that UK mercenaries and private military companies do not violate these laws.

Foreign Enlistment Act
The UK Government should repeal and replace the outdated Foreign Enlistment Act and replace it with far-reaching legislation, as well as amend other relevant Acts.

Definitions

Prospective legislation would need to define the actors,activities and services to which it would apply, including:

Mercenary
The UK government should adopt, as part of its definition of a mercenary, the criteria found in Article 47 of Protocol I to the Geneva Convention. UK legislation should supplement the Article 47 definition by defining a broader range of mercenary and private military company activities.

Mercenarism and private military activities
The UK government should also draft definitions in prospective legislation in line with the Diplock Report proposition that it is more appropriate and useful to define the purpose for which mercenaries (or private military companies) are hired, rather than by their motivation to fight in armed conflict.

Private military companies
The UK government should make a distinction in prospective legislation between traditional mercenaries and private military companies that have implications for the preservation of public security and law and order.

Policy prescriptions

The UK government should make a clear statement of policy in any prospective legislation, which should include:

Proscribed activities
The activities from which individual mercenaries and private military companies should be proscribed are:

1. direct participation in hostilities;
2. use, recruitment, financing and training of mercenaries;
3. activities that could lead to a lethal outcome;
4. assistance to governments that are not internationally recognized, non-state armed actors, or irregular forces;
5. acts that might lead to human rights violations or internal repression;
6. looting, plunder, and other illicit economic activities such as mineral extraction; and
7. unauthorized procurement and brokering of arms.

Regulated activities
The kinds of activities that require regulation include:

1. military advice and training;
2. arms procurement;
3. logistical support;
4. security services;
5. intelligence gathering; and
6. crime prevention services.

Assessment criteria
Legislation should also state the criteria by which license applications will be assessed,based on whether the activities would *inter alia:*

1. violate international embargoes;
2. contribute to external aggression;
3. undermine economic development; or
4. jeopardize public security and law and order.

Enforcement

It is important that whilst drafting legislation, the means and operational procedures for enforcement are considered; these include:

Punishment
The UK government should state the relevant punishment and the maximum penalties for those found to be involved in offences prohibited under the act.

Extraterritoriality
The UK government should ensure that prospective legislation, as with the legislation in the US and South Africa, has extra-territorial powers, so it applies to acts committed on the territory of the UK and abroad.

Regulatory system

A regulatory system should be set up to administer the implementation of the legislation and, in particular, the registering and licensing of individuals and private military companies wishing to supply military services abroad.

Corporate responsibility
The UK government should ensure corporate responsibility of private military companies under the 1985 Companies Act by requiring a strict examination of its memorandum of understanding and articles of association, so it operates within the scope of the legislation.

Regulatory authority
The UK government should establish a regulatory authority, similar to that which already exists for the regulation of UK arms exports, which could be overseen by the DTI. The DTI could be responsible for issuing licenses for private military companies. An alternative approach would be to have a specialized regulatory body. The regulatory body would also need to have the power to impose administrative sanctions such as withdrawing licenses, winding-up, and seizing of assets. All information should also be made public, as occurs for UK arms sales in the Annual Report on Strategic Exports.

I Introduction

The 1998 'arms to Africa' affair in which the British based private military company, Sandline International, signed a contract with the then exiled President of Sierra Leone, Ahmed Tejah Kabbah, to supply a 35 tonne shipment of arms, in contravention of a UN embargo, clearly demonstrates the serious implications private military company activities can have on UK foreign policy. The subsequent independent inquiry into the affair, conducted by Sir Thomas Legg, recommended that guidelines be established for UK Government officials when dealing with representatives of private military companies.[5] The Second Report of the Foreign Affairs Select Committee into Sierra Leone went further by calling upon the UK Government to seek amendment of the International Convention against Mercenaries and to consider legislation for controlling private military companies operating out of the UK.[6] As a result, the then British Foreign Secretary, Robin Cook, announced in April 1999 that the UK Government would produce a Green Paper (policy consultation document) on mercenary activity by the end of November 2000.[7]

As part of this process, the government has said that it is considering options for the regulation of private military companies that will undoubtedly feature in the Green Paper. The Foreign Enlistment Act, the only UK law of any relevance to the activities of private military companies, has never been enforced since it was enacted in 1870. In late November 2000, however, it became apparent, according to the Financial Times, that the publication of the Green Paper had been delayed for fears that it would re-ignite the controversy surrounding the 'arms to Africa' affair and cause the government further embarrassment before the impending UK general election.[8] In April 2001, the UN Special Rapporteur on mercenaries, Sr. Enrique Bernales Ballesteros, said that the failure to publish the Green Paper was a "serious and deplorable backward step by the British Government."[9]

This report puts forth a reasoned argument as to why the UK Government should take steps to control the activities of mercenaries and private military companies operating out of the UK.[10] The absence of any meaningful laws to control the activities of these individuals and companies not only potentially undermines the achievement of UK foreign policy objectives, but also presents a serious risk to the prevention of violent conflict and the promotion of human rights and humanitarian law in the regions where they continue to operate. The legal framework within which national legislation should be formulated is outlined by way of reference to UK obligations under international law including: international humanitarian law, the laws of neutrality; the prohibition on the use of force, and the international instruments that have been developed to control mercenary activities.

The existing legal instruments to control mercenary activities do not go far enough to address the current problem however, as they were developed as a response to the mercenary phenomenon in Africa during the independence movements of the 1960s and 1970s. The dynamics have changed immensely since the end of the Cold War and although mercenaries are still active in most ongoing conflicts,[11] the 1990s witnessed the rapid growth of their modern counterparts, private military companies. Executive Outcomes, Sandline International, Military Professional Resources Inc. and Defence Systems Ltd, are a few examples of companies offering military services on the world market. These companies show a resemblance to mercenaries since they too profit from war and often employ mercenaries. But distinctions need to be made between private military companies and old style mercenaries. International law has not yet considered the actions of these new players on the international stage, and their activities often fall outside its scope. Supplementary measures are called for in terms of national legislation and are outlined in the recommendations made to the UK government in this report.

II Lack of Accountability and the Need for Regulation

This section describes the evolution of the mercenary phenomenon from an historical perspective, from the prominence of traditional mercenaries during the 1960s and 1970s independence movements in Africa to the emergence of their modern counterparts, private military companies, during the post-Cold War era. Whilst the international community has already developed a response to traditional mercenary activities, the way forward is less clear for private military companies. There is, however, growing concern about their activities due to the potentially negative impact of these on peace, stability and the protection of human rights. Central to this concern is the current lack of accountability and absence of any binding legislation to regulate them.

2.1 Traditional mercenaries and the emergence of private military companies

The international community developed a response to traditional mercenary activities as a result of their destabilising influence during the post-colonial independence period in Africa. Since 1968, the UN General Assembly, the Security Council, the Economic and Social Council, and the Commission on Human Rights, have repeatedly condemned the use of mercenaries as an internationally unlawful act that serves to undermine the exercise of the right of peoples to self-determination and the enjoyment of human rights. In 1987, a UN Special Rapporteur on the use of mercenaries was established whose role it has been to document instances where mercenaries have been involved or implicated in human rights abuses and bring these instances to the attention of the international community when he reports to the UN General Assembly and the Commission on Human Rights. In 1989, the UN General Assembly adopted and opened for signature and ratification the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. Yet despite these efforts and their prohibition under international law mercenaries continue to be active in many ongoing conflicts and a culture of impunity exists for crimes they have committed. Although difficult to track because of the covert nature of their activities, mercenaries have been active in fighting in Afghanistan, Angola, Armenia, Bosnia-Herzegovina, Chechnya, Columbia, Congo-Brazzaville, the Democratic Republic of the Congo (DR Congo), Eritrea, Ethiopia, Georgia, Kashmir, Kosovo, Liberia, Papua New Guinea, and Sierra Leone.

The end of the Cold War in the 1990s, however, and the subsequent mass demobilisation of soldiers, led to the rapid growth in private military companies. Embattled governments have increasingly turned to private military companies to help fight to overcome vicious internal armed conflicts. Previously, internal conflicts had an ideological feature, which guaranteed direct or indirect support to warring factions by allied powers; e.g., in Angola, the Soviet Union and Cuba lent support to the Movimento Popular de Libertação de Angola (MPLA) Government and the United States (US) and Apartheid South Africa lent support to the insurgent group, União Nacional para la Independência Total de Angola (UNITA). The breakdown of this bipolar system caused the disengagement of ideological allies from internal armed conflicts. However,

the conflicts themselves have continued unabated and there is continuing insecurity in many parts of the world, particularly in Africa, where armed conflict rages on without clear political objectives. Rebels or insurgent groups do not necessarily seek to rally popular support by addressing a wider sense of injustice or offering credible alternative programmes of government, (some even force support through brutal acts of violence). Vast weapons arsenals, weapons' lethality, looting, plunder and terror have supplanted the need for legitimate liberation movements. The inability of governments to preserve public life or to protect the public at large leads to gross violations of human rights, the mass exodus of populations and the subsequent collapse of the affected states.

Due to the nature of these murky conflicts, foreign states are less willing (whether by invitation or through the collective security system of the UN) to commit their national forces to assisting foreign governments to protect lives, property, and to restore peace and security. Immense pressure on governments in developed countries not to engage in conflicts in the developing world has led a number of beleaguered governments to resort to contracting private military companies. At the same time private military companies are eager to fill the 'security vacuum' left by this non-interventionist policy. Correspondingly, if governments in developed countries have a legitimate interest in assisting others to quell armed conflict, but cannot deploy their own national forces for political reasons, they may find it convenient to authorise private military companies to provide technical,logistical, and tactical support to the governments concerned, provided these are legitimate and democratic regimes. The US government's military package, Plan Colombia (used to combat the drug wars in Colombia) provides a recent example of such a use of private military ccompanies.

2.2 Responding to the rise of private military companies

The international community has yet to develop an agreed response to the emergence of private military companies and specific polices in this regard. There has been a controversial debate about whether these companies represent a useful instrument for quelling internal conflicts, or whether they present a real danger where they operate not least on ethical grounds. It has been argued that in some cases the use of these companies,particularly by governments, might be a cost-effective way of helping provide stability in the short term and therefore the international community should consider their use as a credible element of conflict resolution.[12] However, critics have sighted a number of concerns associated with the use of private military companies because they:

1. provide only short-term stability in conflicts where they operate and, therefore, do not address the long term and deep-rooted political, economic and social causes of war;
2. are not a viable option to replacing the need to build democratically accountable and disciplined indigenous police and military forces in developing countries;
3. may contravene the foreign policy objectives of their home governments as in the aforementioned case of Sandline International in Sierra Leone, which tainted the UK Government's claim to be implementing a more ethical foreign policy;

4. have been involved in the brokering and trafficking of arms into conflict regions, circumventing existing arms export controls and leaving surplus weapons stocks after they have left that continue to fuel conflict;[13]
5. have been accused of having links with mining companies involved in the illegal extraction of natural resources such as oil and diamonds that are at the heart of many conflicts; and
6. have been implicated in documented human rights abuses including the killing of civilians and the indiscriminate use of weapons.[14]

The UN Special Rapporteur on mercenaries has condemned the use of private military companies on grounds that they are linked to human rights abuses, cannot substitute for collective regional security systems and should not challenge the state's primary responsibility for providing security for its citizens. The Special Rapporteur acknowledges the transformation in the nature of mercenary activity but proposes that international leaders "expose and discuss the problem publicly and to develop regulations clearly establishing which security and military responsibilities can never be usurped from states because they are inherent to states' very existence."[15]

2.3 The importance of accountability and a framework for regulation

Further research and analysis is clearly required for the international community to develop a reasoned policy response to the emergence of private military companies. While policymakers may deem some activities acceptable, others should cause concern. Central to the concerns of policymakers should be the lack of accountability of private military company activities and the potentially dangerous consequences such as those listed above. This lack of accountability arises because these companies have sprung up without adequate national or international legislation to regulate their services. The key aim of any legislation should be to develop a system by which the UK government is democratically accountable for the activities of the private military companies operating from the UK.

The legal basis of such a regulatory system should be the UK government's obligations under relevant international law, which are covered in section V. However, this section will demonstrate that there are only a few relevant corpus of international law. Wider international human rights standards and humanitarian law are extremely valuable, but there must be a deeper conceptual framework upon which regulation is formulated. The primary justification for regulating the role of private military companies may be sought in fact invidiously from the need to preserve public security and law and order, which are key prescriptions underlying the protection of human rights. When a state is unable to provide public security and maintain law and order for its citizens because of violent conflict, civil strife, or simply because it does not have the capacity, the consequences for the protection of human rights are serious. In some restricted cases, it has been argued that it is justifiable to restrict selected individual rights during particular crises, to the extent authorized by the law of human rights.[16]

Private military companies must therefore be subject to a system of individual and corporate criminal responsibility that measures whether their activities legitimately contribute to public security and law and order. Certain private military company activities may be justifiable if they provide the conditions necessary for establishing peace, stability and the protection of human rights. Services on offer may include military training and advice and policing functions such as guarding vital business installations and prisons. Nevertheless, it is extremely important that, when intervening in the internal affairs of legitimate states,private military companies are subject to obligations reflecting international human rights and humanitarian law. Furthermore, private military companies providing more sophisticated military services need to be judged on whether their activities would not exacerbate public insecurity or violate human rights. Such judgements are extremely difficult to make and, therefore, each contract should be assessed on a case-by-case basis and contracts should not go ahead without sufficient information to make this judgement. Clearly, any response towards private military companies needs to go beyond a decision as to whether these activities are banned or not.

2.4 Conclusion

The international community has already made attempts to control traditional mercenary activities.Their modern counterparts, private military companies, present new challenges to policymakers to which there is still controversy and no agreed response. The salient need to improve currently lacking accountability is a useful foundation upon which governments can take appropriate steps towards drafting legislation.

III Distinguishing Between the Actors

The following section reviews the definitional problems associated with mercenaries, private military companies and private security companies, and the distinctions between them. A clear understanding of the actors involved in the export of military services is a necessary prerequisite for the formulation of legislation. There may be very thin lines between the different actors, but they are not entirely indistinguishable. Prospective legislation should draw distinctions among the actors, which emphasize the extent to which their activities can be justified under international law. The inclusion of clear definitions and distinctions in prospective legislation will leave no ambiguity about what is permitted and what is prohibited.

3.1 Mercenaries

The traditional mercenary is perceived symbolically as a foreign individual fighting for, and motivated by, private gain. A negative stigma is attached to mercenaries because they profit from the scourge of war without regard for the suffering it inflicts on communities. The international position on mercenaries, however, has always been ambivalent. The relevant part of the laws of armed conflict, international humanitarian law, does not outlaw mercenaries. A mercenary is defined in Article 47 to Protocol I of the Geneva Conventions (1977)[17] as 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.

Article 47 denies mercenaries combatant or prisoner of war status, so they are not a protected category within international humanitarian law. Since Article 47 does not make mercenary activities criminal, it, consequently, does not establish criminal responsibility. Moreover, the definition is so narrowly defined in that, if all six criteria are not met, it is very difficult for anyone to fall within the definition. Indeed, this definition has been used to reduce the risk of denying legitimate combatants prisoner of war status.[18]

Even though Article 47 does not specifically prohibit mercenary activity, it is evident from the spirit of the provision that a mercenary is an unprotected person under the laws of armed conflict since they have no right to be treated as a combatant or prisoner of war. The consequence of this lack of status means that there is a deterrent for individuals to engage in mercenary activities because, if they do, they do so at their own risk. A captured mercenary may be protected by only the most basic human rights, such as the right to life, the right not to be tortured or subjected to degrading treatment, the right to a fair trial, and the right to access diplomatic safeguards. Nevertheless, no specific protection in favour of mercenaries can be advanced on that basis since the protection afforded against the loss of life during armed hostilities depends upon the laws of armed conflict as the lex specialis.[19] It could be argued that the lack of protection afforded to mercenaries and their *de facto* lack of legitimacy within international humanitarian law has meant that they have been less inclined to observe humanitarian law. The traditional concept of mercenaries as 'dogs of war' and their observed deplorable conduct in wars supports such a claim.

3.2 Private military companies

Private military companies are registered corporate bodies with legal personalities that often provide military and security services of a different nature and for a different purpose to the activities of mercenaries. Private military companies often employ mercenaries, but they differ in that they are often hired by governments, ostensibly to provide public security where as, non-state armed groups, aiming to undermine the constitutional order of states, generally hire mercenaries.

Examples of private military company contracts

- Papua New Guinea's government signing contracts with Sandline International in late 1997 to try to end the 8-year conflict it had been fighting with separatist rebels on the island of Bougainville;
- the MPLA government in Angola hiring the services of Executive Outcomes from 1994 to 1996 to help end its war with UNITA;
- Sierra Leone's government hiring Executive Outcomes in 1996 to assist it in its war against the Revolutionary United Front (RUF) rebels;and
- Bosnia Herzagovena's government hiring of MPRI in 1995 for a Train and Equip programme.[20]

The services provided by private military companies such as Executive Outcomes, Sandline International, Military Professional Incorporated (MPRI) and Defence Systems Ltd. vary from company to company according to the level and degree of specialisation. The range of services provided include:

- combat and operational support;
- military advice and training;
- arms procurement;
- logistical support;
- security services;
- intelligence gathering; and
- crime prevention.

Currently, there is no requirement or a prevailing duty of disclosure on companies to routinely divulge information on their operational activities. Indeed, there is a distinct lack of transparency in the operations of many private military companies that obviates proper public scrutiny of their activities and causes further controversy about their use.

As corporate bodies, private military companies operate within registered business and management structures. Most companies claim to provide military services under a recognized chain of command structure with disciplinary military procedures that conform to the laws and customs of war. Directors and Boards of Directors usually consist of former military officers who are, in theory, internally accountable to shareholders. However, the personnel structure of the companies is not always clearly defined as they do not have a fixed set of employees and often have to draw upon networks of ex-servicemen or 'soldiers for hire' on the international market. This freelance culture leads to problems of vetting suitable employees and ensuring employees are not hired by less reputable outfits engaged in more traditional mercenary activities.

The Department of Trade and Industry and the Companies Registrar

In the UK, the Department of Trade and Industry (DTI) administers the regulatory aspects of the 1985 Companies Act with respect to the qualifications of directors for private companies. This framework, or one similar to it, could also be used to regulate and monitor the appointment of company directors for private military companies. Registration of any such company that has a presence or has offices in the UK would ensure that only those military and security services that a company is permitted to engage in or supply would be registered as the objects in its memorandum of understanding and articles of association. Company law requires that the objects of a company must be lawful. In particular, under the Companies Act, "if the Registrar is satisfied that the requirements for registration are met and that the purpose for which the incorporation are associated is lawful, he issues a certificate of incorporation."[21] Companies concerned would not be allowed to change their objects unilaterally without the authority of the Companies Registrar and any activity outside the registered objects would also be unlawful.[22]

It is conceivable (see box above) that both the DTI and the Companies Registrar should have special powers conferred upon them for the purpose of regulation by means of registration, licensing, and contractual obligations. The above model of registering private military companies is complicated, however, on two accounts:

(1) These companies have a capacity for mutating from state to state by establishing holding or parent companies (the Bahamas in the case of Sandline International) and operating subsidiary companies (the UK in the case of Sandline International). It should, then, be a requirement that any such company be registered and subject to regulation in the UK, irrespective of whether it is a holding or subsidiary company since their legal characteristics would be the same. To avoid being subject to regulation in the UK would entail relocation to another state. This is a widely voiced argument against the feasibility of introducing legislation. However, under the regulatory models in South Africa and the US (covered in section V), there has not been sufficient evidence of companies moving their operations abroad, making such an argument redundant.

(2) There is the possibility of 'off shore' location by some private military companies as a strategy for avoiding any attempt at the seizure of assets, such as bank accounts, in the event of liability or wrong doing. Tax avoidance may be another reason for choosing this type of location. Whatever the case, prospective legislation must have a sufficient territorial and ex-territorial reach to 'off-shore' locations so action can be taken should private military companies breach the regulatory legislation. The more other states are persuaded or assisted to increase regulatory measures, the more likely that the companies will conform to regulatory systems world-wide.

3.3 Private security companies

Private security companies share the same corporate attributes and command structures as private military companies. A major difference between them is in the range of services provided. Private security companies are predominantly concerned with crime prevention and public order concerns: they might provide private guard services for prisons, airports, installations, and private individuals, as in the case of Group 4 and Securicor in the UK. There are those companies whose activities are borderline and have a bias towards more sophisticated security services, including training local police, securing transport and information routes such as the British company Defence Systems Limited (DSL), which has had extensive contracts in Angola and Columbia. The US company, AirScan, is another example of a private security company that has carried out airborne security operations and missions in Angola since 1995. Those private security companies that operate in conflict situations and supply services that might be considered to be of a military nature, in that they would have an impact on the local conflict, are covered by the scope of this report. They are included in the category of 'private military companies' for ease of reference.

3.4 Distinguishing between mercenaries and private military companies

The practical differences between mercenaries and private military companies have been established. However, for the purposes of establishing clear legal definitions in legislation it is necessary to refer to Article 47 that denies mercenary in international law. The common approach to the criteria laid down in Article 47 is cumulative; i.e., that (a)-(f) should be taken together to define a mercenary. However, in analysing Article 47, the criteria may be divided into two parts: the first part, (a) to (c), defines what a mercenary is; and the second part, (d) to (f), defines what a mercenary is not. Although the cumulative approach to the application of the criteria for the definition of a mercenary is basically correct in its assumption, it does not take account of the relationship of the inclusive and exclusive aspects of the criteria concerning the definition. Adopting such an approach serves to distinguish the traditional mercenary and war bounty hunter from today's more sophisticated corporate private military companies.

The inclusive criteria in Article 47(2)(a) may be related to the exclusive criteria in (d) so that "a mercenary is specially recruited locally or abroad in order to fight in an armed conflict" and "is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict." Mercenaries would, therefore, be distinguished from private military companies by the prohibition on the latter from engaging in the recruitment of foreign nationals locally or abroad (in the way that is envisaged by a series of foreign enlistment type of legislation covered

in Section V). To maintain such a prohibition,the role of private military companies should be restricted to providing security and military services in the local recruitment and training of nationals, on behalf of the state, provided that this does not amount to conscription in general and that of children in particular.

Further application of this comparative analysis of Article 47(2) shows that the inclusive criteria in (b) corresponds to the exclusive criteria in (e) and (f) with the result that a mercenary "does, in fact, take a direct part in the hostilities" and "is not a member of the armed forces of a party to the conflict" and "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." A combined application of this criteria would mean that either private military companies must not take a direct part in the hostilities, in which case the characteristics of a mercenary contained in paragraphs (b), (e), and (f) fall away and do not apply or, if they were to take part in direct combat operations, then they would be incorporated formally into the armed forces of a state. The analogy for this proposition derives from Article 43(3) of Protocol 1, which states,"whenever a party to a conflict incorporates a paramilitary or armed law enforcement agent into its armed forces it shall so notify the other parties to the conflict."[23] Practice exists, albeit in the context of international armed conflicts as well as internal conflicts involving self-determination then for a law enforcement agency to be incorporated into the armed forces of a state engaged in hostilities. An example of this practice is the assimilation of Gurkhas into the British armed forces, which dates back to an agreement made in 1815 between the UK Government and the authorities in Nepal.The same principle could apply to the incorporation of private military companies personnel into the armed forces of their client government. However, because of the short-term nature of the contracts that have been signed,it is unlikely that this would always be the case and, therefore, private military company personnel should be restricted from direct participation in hostilities.

The criteria contained in Article 47(2)(c) characterises the quintessential mercenary by designating private gain as the primary motive for their desire to take part in armed hostilities. A mercenary must be motivated "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." Again, this stipulation may be obviated in the case of private military companies only if it can be demonstrated that: (a) the desire is not essentially for private or corporate gain because of a commitment on the part of private military companies to offer services connected with public security, law and order or national security or (b) private military companies take no direct part in the hostilities but recruit locally and train nationals of the state concerned on its behalf and these nationals are promised compensation to the same extent as that promised or paid to members of the armed forces of a similar rank. Since payment made to private military companies, and in turn which they make to their employees, is likely to be substantially in excess of that paid to members of the armed forces the priority should be for private military companies to demonstrate that their contract would enhance public security and law and order.

3.5 Conclusion

Clear definitions of each actor or, more precisely, their activities and services are necessary prerequisites for the formulation of legislation. Examination of the criteria for mercenaries in international humanitarian law is helpful in distinguishing between them and private military companies. Prospective UK legislation should incorporate these distinctions. When private military companies directly participate in hostilities; are not fully integrated into the national armed forces of their clients;cannot demonstrate that their contract is not primarily for profit; then, they do fall within the Article 47 definition of a mercenary and should be prohibited. If companies' activities are not mercenary in nature and actually do contribute to public security and law and order, then their activities should be seen as legitimate. The legal characteristics of both mercenaries and private military companies as legal persons mean that they should be subject to effective legislative supervision through well conceived regulatory and enforcement procedures. It is conceivable that both the DTI and the Companies Registrar should have special powers conferred upon them in this regard.

IV State Responsibility and Obligations under International Law

This section examines the legal basis upon which prospective UK legislation should be formulated, drawing on relevant obligations under international law. It includes a survey of the historical evolution of international law relevant to mercenary activities which is covered and analysed.

4.1 The responsibility of governments in supplier countries

It is first necessary to justify why it is the primary responsibility of governments in supplier countries to regulate the activities of private military companies operating globally from within their territory. In providing military services to foreign clients, private military companies act across international borders, often at the periphery of international law. The governments that hire the services of private military companies are responsible for their conduct, particularly with respect to international humanitarian and human rights law. Yet despite this obligation, and their transnational nature, governments in countries where private military companies are registered, and/or from where they operate, are, however, ultimately responsible for their activities. This is because states are required to control military actions against the territorial integrity and independence of other states under international law.[24] These requirements are applicable not only to national armed forces, but also to irregular "armed bands" such as mercenaries and private military companies. The consequences for the acts of irregular armed bands may be imputed to the state for which they have assumed responsibility.[25] Governments in supplier countries should ensure that military and security services provided by private military companies only occur at the request of or authorisation by the government in question. In turn, those private military companies wishing to supply services abroad should be required to be licensed to carry out such activities and should be required to apply for authorisation from their host government; i.e., the UK government for those companies operating from the UK. Furthermore, military and security services should only be rendered to states and governments that are internationally recognized. State recognition will be determined by the official policy of the supplier government. Beyond these initial requirements, the legitimacy of a private military company should be based on more specific obligations under international law which will now be discussed.

4.2 Obligations under international law

The major obligations for states in the field of mercenary activity, and those which affect private military companies, arise from: the law of neutrality, the prohibition on the use of force against the political independence and territorial integrity of states, and the prohibition on the recruitment, use, financing and training of mercenaries. Each of these bodies of international law and the obligations they require of states in terms of the development of national legislation will be considered.

4.3 The law of neutrality

The law of neutrality historically grew out of the Fifth Hague Convention Respecting the Rights and Duties of Neutral States (1907), which sets out the rights and duties of neutral powers in international armed conflicts under customary international law. It is the duty of a neutral state to prohibit the recruitment of mercenaries on its territory. Article 4 of the Hague Convention formulates this duty in the following manner: "Corps of combatants cannot be formed, nor recruiting agencies opened, on the territory of a neutral power to assist the belligerents." Article 4 would be breached if a state permitted the recruitment of corps of mercenaries within its territory and possibly if it allowed the departure from its territory of individuals who have already enlisted, on grounds that they represent a corps.[26]

The principle of neutrality applies to both international and internal conflicts. An original basis for this application stemmed from the obligations arising from the recognition of belligerency in the Convention Concerning the Duties and Rights of States in the Event of Civil Strife (1928).[27] The rules contained in this Convention were subsequently included and amplified in the UN Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States (1970) in accordance with the UN Charter.[28] The declaration reflects customary law and addresses, amongst other principles of law, the prohibition on the threat or use of force against the political independence and territorial integrity of states under the UN Charter. The declaration should be read in tandem with the UN Resolution on the Definition of Aggression (1974), which describes what is understood to be belligerency in international affairs.[29]

In the event of the recognition of belligerency in civil wars or internal armed conflicts, the obligations of neutral states came into effect to regulate the conduct of other states, so they would not permit the recruitment of mercenaries on their territories. Recognition of belligerency in civil wars, as Francoise Hampson[30] observes, had the effect of placing the neutral (recognising) state under an obligation not to allow the organisation or enlistment of troops in its territory on behalf of one or both belligerents, provided that the grant of recognition was not premature. If recognition was premature, the recognising state would not be regarded as neutral by the belligerent government, as, for example, occurred when Tanzania and Zambia recognized Biafra prematurely in 1967.

However, the recognition of belligerency cannot be relied upon as a sound basis for adopting a posture of neutrality for the purpose of the prohibition on the recruitment and enlistment of mercenaries by neutral states, as very few states now recognise belligerency. As already stated, the Convention Concerning the Duties and Rights of States in the Event of Civil Strife incorporated the law of neutrality in internal armed conflicts. Indeed, Brownlie[31] has drawn attention to how the Convention was adopted in part because of the concern that "incidents between the South American Republics were often the result of intrigues by groups of rebels and political refugees carried on across uncertain borders and frontier zones with no policing system," concluding that the Convention was an expression of customary law.[32]

The aspect of the Convention that directly relates to the prohibition of mercenarism by neutral states is contained in Article 1, which obliged the states parties to observe certain rules with regard to civil strife in any one of their territories. These rules oblige states to:

- use all means at their disposal to prevent the inhabitants of their territory, nationals or aliens, from participating in, gathering elements, crossing the boundary or sailing from their territory for the purpose of starting or promoting civil strife; thus mercenaries would be included in this prohibition; and
- disarm and intern every rebel force crossing their boundaries, the expenses of internment to be borne by the state where public order may have been disturbed.[33]

4.4 The prohibition on the use of force

The traditional application of neutrality laws only forbade neutral states from permitting the enlistment and recruitment of mercenaries with the consequence that non-neutral states fell outside the ambit of that prohibition. Principle 1 of the Declaration of the Principles of International Law Applicable to Friendly Relations Between States 1970, however, which represents an advance in international law on the question of mercenaries, closed this loophole and led to a general application of the prohibition on mercenaries by stating:

"(e)very State has the duty to refrain from organising or encouraging the organisation of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State."[34]

State responsibility for breach of the prohibition of force was further developed in the case of Nicaragua vs. United States (see box below) which has given one of the few examples of how these obligations can be applied.

International Court of Justice, Nicaragua vs. United States

In Nicaragua vs. the United States,[35] the International Court of Justice held that any act of sending armed bands across the frontier of another state constituted a breach of the prohibition on the threat or use of force against the political independence and territorial integrity of a state. The way in which state responsibility for breach of this principle is engaged is, however, still unclear in the application of international law. In the case of Nicaragua vs. the United States, the Court found that the support alleged to have been rendered to the Contra rebels by the US against the Sandanista government during the 1980s, whilst in breach of the principle, was insufficient to establish liability or agency with the US government.

4.5 The International Convention Against Mercenaries

The evolution in the laws of neutrality and the prohibition on the use of force led to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries adopted by the UN in 1989.[36] As aforementioned, the Convention was drafted in response to the expansion of mercenary activities in post-Colonial Africa and elsewhere in the 1960s and 1970s and aimed to consolidate the principles of neutrality and the protection of states from the unlawful use or threat of force against the political independence and territorial integrity of states.The Convention is the only international instrument applicable to the activities of mercenaries and private military companies and thus provides the best starting point for the domestic implementation of international standards prohibiting mercenaries into national legislation. To enter into force, the Convention must be ratified by 22 UN Member States. To date, 21 have ratified and a further 9 have signed (but not yet ratified) the Convention.[37] The UK government has no plans to sign the Convention due to doubts concerning its legal enforceability in the UK.[38]

The Convention does not impose a total ban on mercenarism; it only prohibits those activities aimed at overthrowing or undermining the constitutional order and territorial integrity of states.[39] The underlying premises of the Convention, stated in its preamble, postulate awareness about the requirements of neutrality and state responsibility. The activity of the recruitment, use, financing and training of mercenaries is seen as a violation of the basic principles of international law, notably: sovereign equality; political independence; the territorial integrity of states; and the right to the self-determination of peoples. The terms of the Convention seek to prohibit and, to that end, establish as punishable offences, the recruitment, use, financing and training of mercenaries. The Convention requires that the state in which the alleged offender is found must exercise universal criminal jurisdiction or extradite the alleged offender to another state.

Although the Convention has captured evolving developments in international law in relation to mercenary activity, it has been criticized.[40] Currently, the Convention's scope only extends to the country where the mercenary activity has taken place, which means that it is difficult for states to take measures against other states acting in breach of the Convention. There is also no monitoring or enforcement mechanism attached to the Convention so its application relies on individual member states. Therefore, the measures contained in the Convention are inadequate to combat the scourge of mercenaries and do not go far enough to curtail or regulate the activities of private military companies. In particular, since the Convention employs the Article 47 definition of mercenary, most of the activities of private military companies fall outside its scope.

However, despite these concerns,the entering into force of the convention would represent an important step in the development of a comprehensive regulatory framework applicable to mercenaries and would act as an important deterrent to private military companies engaging in mercenary activities. Furthermore, it is important to consider the obligations and principles contained in the Convention when drafting and formulating national legislation and, since the obligations are quite small (because the Convention is so narrowly drawn), the risk to the UK that it would be unenforceable are correspondingly quite limited. Critically, governments must

realise, as was pointed out by the Report of the Foreign Affairs Committee, that the inadequacies of the Convention do not preclude member states introducing more feasible national legislation.[41] Domestic legislation could improve upon some of the standards set out in the Convention whilst still acceding to its principle purposes.

4.6 The Organization of African Unity Convention

Although this paper is primarily concerned with the development of national legislation in the UK, it is important to look at the Organization of African Unity (OAU) Convention for the Elimination of Mercenarism in Africa 1977. While the UK and other countries outside Africa do not have any obligations under the OAU Convention, it is the only international instrument applicable to mercenary activity in force and it provides some useful lessons for the development of national legislation.The OAU Convention augments the provisions of the International Convention and is, in many respects, more advanced. In particular, it contains in Article 1, a definition that adds to the one found in Article 47 of Protocol I and the International Convention by defining the elements of the crime of mercenarism; i.e., what a mercenary is hired to do rather than who they are. The OAU Convention essentially converts some of the preamble principles of the International Convention into substantive provisions. Also established in the OAU Convention is the much-criticized category of the general criminal responsibility of states and their representatives. Articles 5 and 6 elaborate on the content of the obligations of states parties to: eradicate mercenary activities in Africa; fortify extradition against refusal; and establish the duty to prosecute as the exception to such refusal.

However, the OAU Convention does not establish universal jurisdiction,although there is an obligation on state parties to take all necessary legislative and other measures to ratify the instrument and incorporate it into domestic law. While the OAU Convention came into force in 1985, it has rarely been enforced.The OAU Convention can be regarded as an improvement on the International Convention for dealing with mercenaries by going beyond the prohibition on recruiting, use, financing and training of mercenaries to the substantive prohibition of the elements of mercenarism. Like the International Convention, though, it does not cover the activities of private military companies, nor does it include corporate criminal responsibility, which may emerge as a crucial aspect of controlling their activities.The binding scope of the OAU Convention is also limited to Africa, although this regional limitation to its application does carry the advantage that its framework legally affects any mercenary activity perpetrated in Africa,whatever its source. The advantage of the OAU Convention over other international instruments, however, in its description of mercenary activities is something that should be reflected in UK legislation.

4.7 Enforcement

As well as reflecting UK obligations under international law, it is also important that prospective national legislation in the UK is designed so that it has the necessary powers and mechanism to ensure its effective enforcement. The International Convention has a requirement for state parties to cooperate to effectively prosecute known mercenaries. As the Pinochet case showed, extradition has become a viable means of surrendering those who are sought after by other states in connection with crimes of an international character. Having established this powerful precedent in the sphere of crimes against humanity in political contexts, the UK should be as vigilant about the use of extradition in relation to mercenary and private military company activities abroad where UK nationals are involved. However, both prosecution and extradition presuppose an adequate or corresponding prescriptive domestic legislation in the country where the offence has occurred. It is problematic that there are few states that possess domestic legislation under which mercenaries can be prosecuted. States, in which mercenary activity takes place, must currently resort to prosecuting the perpetrators for treason, sedition, or conspiracy offences, which bear more far reaching consequences than any prospective mercenary legislation. The willingness to prosecute mercenaries will depend on whether the offence of recruiting, use, financing and training of mercenaries has been committed within their territories or have involved their nationals.

The International Convention includes, however, mutual judicial assistance in criminal proceedings brought against mercenaries as well as notification of the final outcome of such proceedings to the Secretary General of the UN.The UN Special Rapporteur could play a useful facilitating role in ensuring prosecution of cases involving UK mercenaries and private military companies. Development assistance packages in the area of law reform to developing countries would also help. Even so, it is important that any prospective UK legislation has an extra-territorial provision, in view of the potential inadequacies of laws in the countries where crimes may be committed.This provision will not only ensure that the legislation will be effectively enforced, it will also ensure that perpetrators have protection under UK law. There are growing precedents for such extra territorial powers in the UK that already exist; e.g. the Chemical Weapons Act of 1996 and the Landmines Act of 1998. Such considerations are also being made in relation to the issue of arms trafficking and brokering in the Export Control and Non-Proliferation Bill, which faces similar challenges concerning enforcement.

In addition to individual criminal liability, another factor affecting enforcement is private military companies' status as legal entities that have signed contracts. It would be important,in a prospective registration system, therefore, for companies to be required to name their Boards of Directors. However, a new category of corporate liability for private military activity may also need to be established, similar to the one proposed for corporate killing that stemmed from the Southall rail accident, which pointed to the need to establish more effectively the criminal responsibility of the company, Railtrack, for the negligence that occurred. An essential element in such legislation would be the identification doctrine of an officer or employee of a private military company, which holds the company itself accountable.

4.8 Conclusion

Although international law prohibiting mercenary activities has evolved considerably over the last century, there are currently still no instruments that go far enough to prohibit mercenary activity as part of customary international law. There do exist precedents, though, for obligations on the UK to legislate (e.g., the International Convention) against mercenary activity committed by UK individuals and the government should seek to ensure that these are reflected in prospective national legislation. In taking such steps, however, the UK government should also seek to address many of the gaps and ambiguities in relevant international law and provide leadership in this area. Although the legal instruments that have been covered are not applicable to many of the activities of private military companies, there are important lessons that can be taken from these mechanisms in the drafting of national legislation. However, in the absence of any clear direction on private military companies under international law, it is important to examine different national legislations that exist in various countries.

V Types of National Legislation

Although a number of countries have domestic laws on mercenary activity, only a few have recognized legislation relevant to private military companies. However, examining the experiences and laws that exist in other supplier countries is useful to draw best practice for such an exercise in the UK. This section presents four categories of national legislation, those passed to: (1) control mercenary activities in response to the requirements of neutrality laws; (2) deal directly with mercenaries and mercenary activity; (3) regulate the provision of foreign military assistance as opposed to merely regulating mercenary activities and direct participation in conflicts; and (4) regulate military services within arms export control systems.

5.1 Neutrality laws and the UK Foreign Enlistment Act

The first, and by far the oldest, category of legislation to be passed relevant to mercenary activities were in response to the requirements of neutrality laws covered in Section IV. These laws aimed to ensure the neutrality of western states in the event of an armed conflict in which they were not involved. Neutrality legislation was generally enacted under the title of foreign enlistment laws, as in the UK and the US. In some cases, such as the relevant laws found in France and Sweden, criminal codes carried provisions, which made the foreign enlistment of nationals a criminal offence. Examples of Foreign Enlistment legislation include:

- the Neutrality Act 1794 and the New Neutrality Act 1939 of the US;
- the Foreign Enlistment Act 1870 of the UK;
- Article 85 of the French Penal Code; and
- Chapter 19 of the Swedish Penal Code.

Foreign enlistment laws do differ in that some totally prohibit the enlistment of foreign armed forces who are nationals of states at peace with the state where as others prohibit the enlistment without the consent of the state of nationality. The recruitment of nationals to fight as mercenaries in foreign wars in this type of legislation is, therefore, within the framework of the general prohibition on foreign enlistment.

Under Section IV of the UK Foreign Enlistment Act 1870, the offence of 'Illegal Enlistment' applies to any person that:

"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 dominions, 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…."[42]

Other offences classified under the title of 'Illegal Enlistment' include: leaving Her Majesty's dominions with intent to serve a foreign state (S.5); embarking persons under false representations as to service (S.6); and taking illegally enlisted persons on board ship (S.7).

The Foreign Enlistment Act is actually a rare exception amongst neutrality laws in that it applies to offences committed outside the territory of the UK in such a way that there is within it a corresponding warrant of the removal of offenders to the UK (Ss. 16 and 18). In view of the preceding analysis it is important that such extraterritorial powers are retained within the drafting of UK legislation.

However, the Foreign Enlistment Act is so outdated that it is rendered redundant. The laws of neutrality upon which it is based have been superseded and integrated into an important component of the prohibition on the use of force by states. Individuals who may be targeted for enlistment now no longer leave by boat alone as is stipulated in the Act which was probably more the case in the context of the 1870's when the Act was developed. Her Majesty's dominions, to which the Act refers, have also since become independent states and often members of the Commonwealth. As a result of these realities, the Act has never really been enforced since it was enacted.

The Diplock Report

The inadequacy of neutrality driven legislation was exposed in the case of the UK by the Diplock Report.[43] The Report examined the role of British mercenaries in Angola who were publicly executed in the 1970s. The Report found that the Foreign Enlistment Act was no longer appropriate in contemporary circumstances and found that the motive of private gain should no longer be a relevant criterion to define mercenary, recommending that it is more significant to look at the purpose for which they are hired.[44] In terms of private military companies, it is, therefore, better to address the purpose for which they have been contracted and make an assessment of the consequences along the lines of the concerns noted earlier in order to decide whether such activities are acceptable.

The Diplock Report also concluded that prevention of British citizens from working abroad as mercenaries was an unjustified infringement of individual rights and freedoms. The Report's assertion may not, however, have paid regard to the European Convention on Human Rights (1950). In the context of the Human Rights Act (1998), the report is certainly no longer valid. The Report states that freedom of movement may be restricted in the interest of public order, public security and public health, provided that the restrictions are justified and reasonable.[45] Restrictions aimed at prohibiting persons from recruiting and being recruited as mercenaries could not be justified in the interests of public or national security under the Human Rights Act and the Fourth Protocol to the European Convention on Human Rights (1950).

The Report was also inward looking, in that it recommended that only the recruitment of persons in the UK to fight as mercenaries abroad should be an offence, instead of as argued for here the need for extraterritorial powers. The Report proposed that a legal system be introduced to prevent British nationals from enlisting in a designated 'black list' of countries. Few of its recommendations were enacted, though. There are important lessons to be taken from the Diplock Report, although its conclusions are not so relevant to the present-day and, in particular, to the emergence of private military companies. Perhaps the most important lesson is that the UK Government must take action so as not to find itself in another embarrassing situation like the 'arms-to-Africa' affair. As a start, the UK Government should repeal the Foreign Enlistment Act and seek the introduction of new legislation.

5.2 Mercenary legislation

The second category of legislation deals directly with mercenaries and mercenary activity. An example can be found within Belgian law. In 1979, Belgium enacted legislation that prohibited the recruitment (in Belgium) of mercenaries and the act of becoming a mercenary. The specific acts are punishable with a term of imprisonment. Exceptionally, effect is given to certain Security Council Resolutions (SC Res.161,169 (1961)), which were passed during the period of involvement of Belgian mercenaries in the Congo in the 1960s. These experiences account for the character and attractive quality of Belgian legislation in terms of legislating against mercenary activity. Interestingly, revisions made to the penal codes of the Russian Federation and countries of Eastern Europe after the break-up of the former Soviet Union have criminalized mercenary activity in that region as well.[46] However, despite the useful models provided by the Belgian model of mercenary legislation, few other countries, as the UN Special Rapporteur has noted, have introduced such legislation as is required under the International Convention.

5.3 Private military assistance

The third category of legislation regulates the provision of foreign military assistance as opposed to merely mercenary activities and direct participation in conflicts. The principal and most recent example of such legislation is South Africa's Regulation of Foreign Military Assistance Act, passed in July 1998. The Act was introduced in response to the continued involvement of South African mercenaries in a number of African wars and the exploits of Executive Outcomes and other South African-based private military companies, which had caused the newly elected Africa National Congress (ANC) government embarrassment since it came to power in 1994. The scope of the Act covers natural and juristic persons, including individuals and private military companies, which provide foreign military services from within the territory of South Africa or engage in mercenary activities abroad.

The Act is an attempt to develop a legal instrument to address both traditional mercenaries and emerging private military companies. A distinction is made within the legislation between mercenary activity and the provision of foreign military assistance. The Act does not use the definitions of a mercenary and mercenarism that are found in the International and OAU Conventions, but instead defines mercenary activity simply as, "direct participation as a combatant in armed conflict for private gain."[47] Engagement in mercenary activity including recruitment, use, financing and training is, however, prohibited by the Act (s.2) within South Africa or elsewhere, suggesting it has extra-territorial effect.[48] It is not clear whether the employment of this definition will enable South Africa to ratify the International Convention or whether it has the intention to do so.[49]

In regard to the provision of foreign military assistance, the Act defines this under S.1[50] as military or military-related services, which include:

(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 paramedical services;or
    (v) procurement of weapons

(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; and
(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.

The rendering of foreign military assistance is not proscribed under the Act but instead controlled by a licensing and authorisation procedure under the competence of the National Conventional Arms Control Committee (NCACC), which also covers South African arms exports. Approval for a contract is not granted if it would be against the national interest of South Africa or would contravene stated criteria in the Act.These criteria are based on obligations under international law and are similar to the criteria used to govern arms exports in a number of large arms producing countries. Individuals or companies wishing to supply foreign military assistance are required to be registered with the relevant authorities and apply for a license before entering into a contract. The Act includes extra-territorial application and punitive measures for those that do not abide by it.

The Act is a laudable attempt to legislate against both traditional mercenaries and modern private military companies. In particular, it has extra-territorial affect and has sufficiently wide scope to include the activities of private security companies, as well as military companies, as was argued was important in section III although this should only concern activities relevant to conflict situations.The Act has, however, received criticism for the definitions it employs, and it is thought to be more of a symbolic, rather than a realistic, deterrent. The definition of a mercenary is problematic on a number of counts:

1. It is too general as to be open to abuse in its application;[51]
2. It is inconsistent with the definitions used in international instruments and fails to bring mercenary activities within the scope of the laws of armed conflict. Even though these definitions are recognisably weak, great care should be taken not to erode the benchmark established by the laws of armed conflict. It is a contradiction in terms to seek to prohibit mercenaries and yet define them in ways that would legitimize their participation and protection as combatants under the laws of armed conflict;
3. It does not overcome the pitfall of defining who mercenaries are by their motivation. As has been argued, it is more useful to look to address the act of mercenarism and the purpose of their use, which are the real concern rather than the fact that they fight for financial again; and finally
4. It is imprecise and too wide as to make its application impractical. Clause (c) draws on the aims of the International and OAU Conventions and refers to the purpose for which mercenaries are hired, which looks misplaced in comparison to the other specified military activities.

It was initially anticipated by South African private military companies that they would operate within the legislation, but after over two years of the Act being in force, only a few companies have registered and there have been few contracts that have received a license. Executive Outcomes ceased business at the beginning of 1999 and, although it did not cite the Act as a reason, it was almost certainly a strong consideration. The potential use of South African private security companies in the context of the UN peacekeeping mission in East Timor in 1999 caused concern that this might have contravened the Act.[52] In April 2001, the Financial Times reported that the South African authorities are investigating a company in Zimbabwe, Avient, run by a former British soldier, whose activities in the Democratic Republic of Congo might have breached the Act. Cases such as these should provide lessons for how such legislation can be effectively enforced in the UK. If there had have been legislation in place already, it probably could have helped investigations into the Avient case.

5.4 Military services within arms export control systems

The fourth category of legislation includes military services within arms export control systems. The activities of US private military companies are regulated within its arms export control systems, which supplement its foreign enlistment legislation. Those companies wishing to enter into contracts with foreign governments to provide military services are[53] dealt with in the same way as those companies supplying arms and/or other military equipment.[54]
The relevant legislation is the International Traffic in Arms Regulations (ITAR), introduced in March 1998. A similar system preceded the ITAR, which administered contracts to the private military companies (including Vinnell and its contract in Saudi Arabia). The ITAR is part of the US Arms Export Control Act of 1968[55] and is overseen by the Department of State's Office of Defence Trade Controls in the Bureau of Political-Military Affairs. The relevant clause states that:

"every person (other than an officer or employee of the US Government acting in official capacity) who engages in the business of brokering activities with respect to the manufacture, export, import, or transfer of any defence article or defence services… shall register with the United States Government agency charged with the administration of this section."[56]

This requirement applies to any US citizen, wherever located, giving the regulation extra-territorial effect. The ITAR covers the activities of private military companies because it applies to the US Munitions List, which includes military training and activities such as defence services. Under the system, registered companies must apply for licenses before signing contracts with foreign clients and failure to do so is a punishable offence. Each application undergoes an internal assessment process involving a variety of bureaus within the State Department, as well as regional embassies before a license is granted. Exceptions are: contracts with NATO countries who do not require assessments and contracts with countries under embargoes (i.e. on the State Department Reference Chart) are automatically rejected. There is also a 'presumption of denial' for the provision of military services, if they would lead to a lethal outcome. Such an approach is consistent with the analysis in this paper, namely, that private military companies should be prohibited from engaging in direct combat. However, it is very difficult to judge whether a contract would lead to a lethal outcome, as was the case with the one issued to MPRI for its Train and Equip programme in Bosnia. Controversial cases are referred to the Assistant Secretary who makes the final decision, as was the case when MPRI's contract to train the Angolan army was revoked in 1994.

The US government has perhaps the most mature relationship with private military contractors. The ITAR is consequently probably the most developed and comprehensive regulation system, which appears to capture the activities of most private firms in the US supplying defence services abroad. Importantly, the ITAR prevents private military companies from engaging in combat duties and in training that might lead to a lethal outcome. It has been argued, however, that the system is more concerned with ensuring the effective implementation of US foreign policy than taking into account the obligations within international law.[57] Furthermore, the ITAR has no formal oversight process once a license has been granted and no provisions to ensure transparency with the exception of licenses granted for contracts in excess of $50m. When contracts exceed $50m, Congress must be notified before licences are granted and has the right to demand additional information about the proposed contract. Arguably, public scrutiny of the activities of US private military companies is not as developed as that for defence manufactures. The outsourcing to US private military companies, as part of Plan Colombia, has heightened awareness of the need to develop the public scrutiny of private military companies.[58]

5.5 Conclusion

It will be important for the UK to consider existing national legislation when drafting its own legislation to control mercenary activities. The US and South African governments have comprehensive laws which provide important lessons, such as a prohibition on direct participation in conflict, definitions of military services that should be regulated and the need for transparency.

VI Conclusions and Recommendations: Key Features of National Legislation

A number of key features of national legislation can be drawn from the analysis in this paper, which could be used to formulate and draft effective UK legislation. The following recommendations are made in light of both the international instruments currently in place, relevant traditional mercenaries and more recent examples of national legislation to regulate private military companies.

6.1 Legal basis

The starting point for developing national legislation should be its legal basis, which should (1) be based on UK obligations under international law and (2) aim to close loopholes in current national laws, including:

International Convention against Mercenaries
The UK Government should, as recommended by the Foreign Affairs Committee, ratify the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. Ratification should be supplemented by the canvassing of other states to ratify, so the instrument enters into force. The development of a cooperative mechanism with other state parties should ensure effective enforcement. Although the International Convention should be incorporated into domestic law, its imperfections and weaknesses must be addressed in the process.

International human rights and humanitarian law
The UK Government should ensure that national legislation reflects relevant international human rights and humanitarian law, so UK mercenaries and private military companies do not violate these laws. The UK government should also expedite the introduction of Statute of the International Criminal Court (1998) into domestic law, so that UK mercenaries and private military companies may be tried under the crimes that the Court covers.

Foreign Enlistment Act
The UK Government should repeal the outdated Foreign Enlistment Act and replace it with far-reaching legislation. This would also require amendment of the War Act, the United Nations Act, the Terrorist Act, the Air Aviation Act, the Customs and Excise Act, the Asylum and Immigration Act and should be consistent with the Human Rights Act (1998).

6.2 Definitions

UK legislation would need to define the actors, activities and services to which it would apply. This should include:

Mercenary

The UK government should adopt, as part of its definition of a mercenary, the criteria found in Article 47 of Protocol I to the Geneva Convention. The problems with this definition have been noted, but it is important that national legislation does not veer away from the only international agreed definition. Furthermore, the Geneva Convention is the only mechanism to which the UK has subscribed that defines mercenary activities. The definition of a mercenary contained in the South African Foreign Military Assistance Act is vague. Although Article 47 of Protocol I is narrowly drawn, UK legislation could supplement the Article 47 definition by defining a broader range of mercenary and private military company activities (see below).

Mercenarism and private military activities

The UK government should draft definitions in the prospective legislation in line with the Diplock Report proposition that it is more appropriate and useful to define the purpose for which mercenaries (or private military companies) are hired, rather than by their motivation to fight in armed conflict or by other such characteristics that are very difficult to legally prove. For example, it is important that any prospective legislation contains detailed definitions of the crime of mercenarism as articulated in the OAU Convention.

Private military companies

The UK government should make a distinction in legislation between traditional mercenaries and private military companies that have implications for the preservation of public security and law and order. It should not,however, be necessary to define private military companies *per se* but rather the activities that they become engaged in.

6.3 Policy prescriptions

The UK government should make a clear statement of policy in legislation,outlining activities deemed prohibited or where there would be a 'presumption of denial' if individuals or companies apply for a license to engage in them. Other acceptable activities would also require a license from a relevant regulatory authority (see below), depending on the circumstances of the proposed contract, which should be judged on a case-by-case basis. Such a division of activities would include:

Proscribed activities

The activities from which individual mercenaries and private military companies should be proscribed are:

1. Direct participation in hostilities;
2. Use, recruitment, financing and training of mercenaries;
3. Activities that could lead to a lethal outcome;
4. Assistance to governments that are not internationally recognized, non-state armed actors, or irregular forces;
5. Acts that might lead to human rights violations or internal repression;
6. Looting, plunder, and other illicit economic activities such as mineral extraction;and
7. Unauthorized procurement and brokering of arms.

Regulated activities

The activities for which individual contractors or private military companies should be required to apply for a license from a relevant regulatory authority requires further analysis. The kinds of activities that require regulation, however, include:

1. Military advice and training;
2. Arms procurement;
3. Logistical support;
4. Security services;
5. Intelligence gathering; and
6. Crime prevention services.

Assessment criteria

Legislation should also state the criteria by which license applications will be assessed, which should draw on those that feature in the South African and US models of regulation. Useful precedents can also be taken for those criteria recently developed for arms exports in the UK including Guidelines for UK Arms Export 1997 and EU Code of Conduct on Arms Exports 1998. Criteria would be based on whether the activities would inter alia:

1. Violate international embargoes;
2. Contribute to external aggression;
3. Undermine economic development; or
4. Jeopardize public security and law and order.

6.4 Enforcement

It is important that whilst drafting legislation, the means and operational procedures for enforcement are considered; these include:

Punishment

The UK government should state the relevant punishment and the maximum penalties for those found to be involved in offences prohibited under the act. The legislation should provide for both individual and corporate criminal responsibility when there is a breach of the legislation. As part of the requirements of a fair trial, the power to investigate and to prosecute should reside in the Crown Prosecution Service.

Extraterritoriallity

The UK government should ensure that prospective legislation, as with the legislation in the US and South Africa, has extra-territorial powers, so it applies to acts committed on the territory of the UK and abroad. In matters of extradition, it should be stated that use could be made of the UK Extradition Act, Commonwealth Extradition Act (1968), and existing bilateral extradition agreements. Additionally, provisions should be made for mutual assistance programmes in criminal matters and transfer of criminal proceedings concerning mercenaries and private military companies.

6.5 Regulatory system

A regulatory system should be set up to administer the implementation of the legislation and, in particular, the registering and licensing of individuals and private military companies wishing to supply military services abroad.

Corporate responsibility

The UK government should ensure corporate responsibility of private military companies under the 1985 Companies Act by requiring a strict examination of its memorandum of understanding and articles of association, so it operates within the scope of the legislation. No act by private military companies should be *ultra vires* or outside the scope of authorized activity. Any unilateral change of the memorandum,articles, or objects without prior authorisation should be punishable.

Regulatory authority

The UK government should establish a regulatory authority, as already exists for the regulation of UK arms exports, which could be overseen by the DTI.The DTI could be responsible for issuing licenses for private military companies, but as part of the assessment process, the DTI should coordinate consultation with the Foreign and Commonwealth Office, the Ministry of Defence, and the Department for International Development. An alternative approach would be to have a specialized regulatory body. Indeed, the recently adopted Police and Private Security Bill to regulate the private security industry in the UK has established a vetting authority, which must issue licences to private security companies or providers before they can operate in the UK.This body, or another similar to it, could be established to regulate private military companies and provide oversight on their registration and operations.

The regulatory body will possess the power to impose administrative sanctions such as withdrawing licenses, winding-up, and seizing of assets. Provisions should also be made to provide for internal controls,which determine the composition and qualification of Boards of Directors.The DTI is currently responsible for assessing the qualifications of the Board and other general company assessments such as their shareholding arrangements (including preferential and ordinary shares), voting practices, and duties of public disclosure in respect of these matters. All information should also be made public as occurs for UK arms sales in the Annual Report on Strategic Exports.

Endnotes

1 Sir Thomas Legg KCB QC, Sir Robbin Ibbs KBE Report of the Sierra Leone Arms Investigation.
2 Paragraph 93, Foreign Affairs Committee, Second Report, 3 February 1999.
3 Response of the Foreign Secretary to the Select Committee for Foreign Affairs'Second Report on Sierra Leone, April 1999.
4 Sir Thomas Legg, *ibid.*
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7 *Financial Times*, 30 November 2000.
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9 Although the principal focus of this paper is to arrive at key proposals for the content of legislation in the UK, the arguments being made are also relevant to other governments in other supplier countries including South Africa, the United States, Israel, and a number of other European countries in addition to the UK.
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26 Ian Brownlie, 5 ICLQ 1956, *op cit.,* p 570 and ICLQ 1958, *op cit,* p 712.
27 Text: 134 L.N.T.S 47; entry into force 1928.
28 G.A. Res. 2625 (XXV), 24 October 1970.
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31 Ian Brownlie, 5 *ICLQ* 1958, *op cit*, p 724.
32 *Ibid*, 1956, p 577.
33 Text: 134 L.N.T.S 47; entry into force 1928.
34 G.A. Res. 2625 (XXV), 24 October 1970.
35 Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua vs USA), ICJ Re(1986), pp61-65
36 UN General Assembly Resolution 44/34, December 1989.
37 The following twenty-one states have ratified the Convention: Azerbaijan, Barbados, Belarus, Cameroon, Croatia, Cyprus, Georgia, Italy, Libya, Maldives, Mauritania, Qatar, Saudi Arabia, Senegal, Seychelles, Suriname, Togo, Turkmenistan, Ukraine, Uruguay and Uzbekistan. The following nine states have signed but have yet to ratify the Convention: Angola, Congo, Democratic Republic of the Congo, Germany, Morocco, Nigeria, Poland, Romania, and Yugoslavia.
38 UK House of Commons Hansard, 4450, 8th June 1998.
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[47] Sec 1 (iv) Regulation of Foreign Military Assistance Act, 15 of 1998.
[48] Sec 1 (iv) Regulation of Foreign Military Assistance Act, 15 of 1998.
[49] Conversation with South African government official.
[50] Sec 1 (iii) Regulation of Foreign Military Assistance Act, 15 of 1998.
[51] G. Abraham, *op cit,* p 104.
[52] Press Statement by Brig. General Philip Schalkwyk MP, Defence Spokesman, Democratic Party, 31 October 1999.
[53] Different laws and oversight procedures apply to private contractors singing a contract with the US government.
[54] In the UK the Government in March 2001 published the Export Control and Non-Proiliferation Bill to overhaul its antiquated arms export controls. As well as physical arms the Bill covers technical assistance to exported weapons. However, it is unclear whether controls with be extended to military services supplied by private military companies.
[55] Arms Export Control Act, Title 22, United States Code, and International Traffic in Arms Regulation, Title 22, Code of Federal Regulations, Parts 120-130.
[56] See Sec 151 Brokering Activities Relating to Commercial Sales of Defence Articles and Section 38(1)(A).
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