Report on the Riga Workshop

Riga Graduate School of Law, 29 January 2010

European institutional perspectives in ensuring the enjoyment of human rights as regards activities carried out by PMSCs

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PRIV-WAR

Regulating privatisation of "war": the role of the EU in assuring the compliance with international humanitarian law and human rights

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On 29 January 2010 the Riga Graduate School of Law hosted a workshop on the European institutional perspectives in ensuring the enjoyment of human rights as regards activities carried out by private military and security companies. The workshop took place in the framework of the EU 7th Framework Programme research project research project "Regulating Privatisation of "War": the Role of the EU in Assuring Compliance with International Humanitarian Law and Human Rights" (PRIV-WAR).

The workshop participants were members of the research teams of the seven universities participating in the project,[1] as well as the EU and international organization experts and other invited speakers. The workshop sessions and the informal roundtable discussion took place under the Chatham House Rule. Thus, the present report does not reflect the attribution of views of participants to the respective speakers.

An address was given by the European Commission Directorate for General Research representative, who presented an overview of the research projects related to human rights financed by the EU, and noted the specificity of the PRIV-WAR project in this context.

EU law perspective with regard to activities carried out by PMSCs

It may be concluded that regulation of PMSC activity is of particular importance for the EU. The Swiss Government has carried out a lot of work on the topic. However, the EU has a role to play and responsibilities not only within, but also outside the EU. As for example, anti-piracy operations show the EU's engagement in enforcement of foreign policy. Relevant issues may not only be discussed from the perspective of international humanitarian law, but also from the perspective of substantive EU law.

Role of human rights

With a particular emphasis on the role of human rights the workshop participants discussed the impact of the substantive EU law on the prospective regulation of PMSCs.

[1] European University Institute in Florence, LUISS 'Guido Carli' University in Rome, Justus Liebig Universität in Giessen, Université Pantheon-Assas (Paris II), University of Sheffield, Utrecht University and the Riga Graduate School of Law.

A question may be posed, what does Article 6 of the Treaty on the European Union entail. For its part, the Charter of Fundamental Rights of the European Union is a direct element of the Treaty on the European Union. The provisions of the Charter do not extend in any way the competence of the Union as defined in the Treaties. The *Sopropré* case of the ECJ (C-349/07) has shown the application of human rights in the EU system, namely, that human rights shall be applied within the EU law. The Court refers to the Irish case, stating that, however, if there is no active EU law element, there will be no consideration of human rights. There is nothing in the Charter of Fundamental Rights of the European Union to change this perspective. Thus, human rights enjoy a character of relative rights. Referring to the *Wachauf* case (C-5/88) of the ECJ, the fundamental rights recognized by the Court are not absolute, however, but must be considered in relation to their social function. Thus, economic rights serve as a valid counterbalance to application of human rights. From the case of *Defrenne* (C-43/75) of the ECJ, an argument concerning the operation of PMSCs could be derived; that if Member States have different legal limitations for the operations of PMSCs, this could entail distortion of the EU market for PMSC services. However, this aspect of the *Defrenne* case has not been substantiated by later case law.

EU competence and PMSCs

Article 40 of the Treaty on the European Union stipulates that the implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union, but also that the reverse applies. The old article 47 of the Treaty on the European Union was more limited in stating only the first of these principles, and thus the new article 40 of the Treaty on the European Union reflects a more balanced approach.

As stated by the ECJ in the *Ecowas* case (91/05), since Article 47 of the Treaty on the European Union precluded the Union from adopting, on the basis of the EU Treaty, a measure which could properly be adopted on the basis of the EC Treaty, the Union cannot have recourse to a legal basis falling within the CFSP in order to adopt provisions which also fall within a competence conferred by the EC Treaty on the Community. By making a financial and technical contribution to an ECOWAS initiative concerning the fight against the proliferation of small arms and light weapons, the decision aimed to implement the contested joint action, which the Council had adopted on the basis of Title V of the EU Treaty. In the words of the Court, the decision to make funds available and to give technical assistance to a group of developing countries in order to draft a convention is capable of falling both under development cooperation policy and the CFSP. Thus, the Court concluded that the Council had infringed Article 47 TEU by adopting the contested decision on the basis of Title V of the EU Treaty, since that decision also fell within development cooperation policy.

In the case of Parliament v. Commission regarding border security in the Philippines (C-403/05), the ECJ took a step towards a more balanced approach, asking to go to the second pillar, as the decision pursued an objective concerning the fight against terrorism and international crime. Also, the criminal penalties case, Commission v. Council (C-176/03) contributes to the discussion by stating that in this case third pillar measure is linked to the second pillar. A question may be asked, whether Article 40 of the Treaty on the European Union would change these conclusions, where the answer is - probably not. It was clarified that in each particular case, as it is demonstrated in the *Ecowas* case, one has to keep in mind the existence of each specific project. This judgment does not mean that measures have to be further taken either in the first or in the second pillar.

In the case C-514/03, the ECJ stated that private security services were not harmonized at the Community level and that Member States remained competent to define the conditions for the pursuit of the activities in that sector. In such a case they must respect the basic freedoms guaranteed by the Treaty. The Services directive (directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on services in the internal market) stipulates that it does not apply to PMSCs. However, one cannot on this basis make a conclusion as to whether there is competence to regulate PMSCs or not.

Joint Action 2000/401 under the second pillar on control of technical assistance related to certain military end-uses, may foresee competence for regulating PMSCs activity, namely services related to military equipment. However, this would only apply to export of goods and the associated services. It was concluded that this could be a question for jurisprudence of the Court.

According to Articles 347 and 348 of the Treaty on the Functioning of the European Union, Member States do have power to take measures in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security. They have to be coordinated with the Commission, which indicates that since the articles provide an exemption for Member States, there must in general be a competence for the EU to regulate the profession of PMSCs.

Viking Line case and proper legal basis

In the *Viking Line* case (C-438/05) referred to the principle established in case law, including the *Grogan* case, under which Member States are free to regulate activities, which fall outside the EU competence, as long as there was no negative impact on the EU principles. However, the *Viking Line* case may also be read as making a wider statement, under which, when regulating in areas that fall outside the Community competence, the Member States shall in all cases comply with the Community law. If this wider understanding is applied, the question of EU competence to regulate PMCS

becomes less important, as Member States will in any case be subject to EU principles, including those of human and fundamental rights.

As for the regulation PMSCs, this may fall under the internal market in accordance with the Treaty on the Functioning of the European Union or international peace keeping, directly under the Treaty on the European Union. It would seem clear from case law that there can be no dual legal basis, and thus, a choice has to be made between internal market and peacekeeping as the legal basis.

It seems clear that it is not possible to adopt a legislative act in the normal sense under the peace keeping provisions, as any such act could not have direct effect. It was suggested that in cases of PMSC activity, different aspects may have to be regulated in different manners, depending on whether the activities are directly linked to armed conflict or to supporting services. For example, in Afghanistan, PMSCs are hired to protect the EU building.

By entering into force of the Lisbon Treaty, any preference for proper legal basis has been removed. Thus, regulating PMSC activity is purely an EU technical matter. There could be no concurrent legal basis. If the issue concerns internal market, there could be two legal basis, having competing elements. It was also suggested to take into consideration that hiring by the EU is not an unknown phenomenon.

It was therefore recommended not to consider the companies as such, but to consider the individual services that may fall under either the internal market or the common foreign and security policy. Another view was expressed to look at the aim of a regulatory measure when choosing the appropriate legal basis. The goal should be to prevent violations of human rights and international humanitarian law by PMSCs. By preventing these kind of violations states comply with their due diligence obligation.

Problem of competence

The workshop participants discussed whether there may be a problem of competence for the EU. It was suggested that there was no impact on the competence of the EU.

Implications of the Viking Line case

The *Viking Line* case affirms the horizontal direct effect of Article 43 of the Treaty on the Functioning of the European Union. There is no position on the direct effect of human rights as obligation for individuals. It may only be relevant, if there is a negative impact on the EU policy, although the *Viking Line* case may also be given a wider reading as discussed above.

What can be implied from the *Defrenne* case is that if one Member State regulates the activity of PMSC and the other Member State does not, it may incur different treatment.

Allowing disrespect for human rights could upset equal competition between PMSC established in different Member States. However, an important distinction is that there is no separate EU policy on human rights, as opposed to equal pay in *Defrenne* and to free movement of goods in the French strawberries case.
PMSCs may be viewed as emanations of state, exercising state power, rather than just supplying a commercial service. But using this concept would again only concern protection of rights in cases of implementing EU policies and in cases of conflicting with EU policies.

The issue arises whether Member States may oblige PMSCs to respect human rights in their operations also outside the EU. There is potential impact on the internal market parallel to state aid and public procurement, and thus the *Defrenne* perspective might be applied. Also, the general obligation of the Member States to ensure EU norms might be argued based on either the *French strawberries* case perspective or the emanation of state perspective.

EU human rights regime

The workshop participants discussed the basic structure of the EU human rights regime, namely, the role of the ECJ, the European Court of Human Rights, the Charter of Fundamental Rights of the European Union as well as the EU anti-discrimination legislation.

It was concluded that the ECJ's reliance on the European Court of Human Rights is continuously increasing. In the context of operation of PMSCs the Contracting State obligations under the European Convention on Human Rights and the Court's (extra-territorial) jurisdiction were discussed. Reference was made to the *Osman v. the United Kingdom* case, where the Court was faced with the question of weather the failure of authorities to appreciate the threat posed to one private party by another private party amounted to a violation of the State's positive obligation to protect the right to life. The workshop participants discussed the necessary criteria for establishing State responsibility, namely, that 'the authorities knew or ought to have known' of the existence of a risk, that there was 'real and immediate risk' to the life of an individual, and criterion of failing to take measures within the scope of their powers.

The workshop participants next turned to discussion of extraterritorial jurisdiction issue, and the *Bankovic* case with the Court's essentially territorial understanding of jurisdiction. Together with the case of *Issa v. Turkey*, where the Court stated that the State may be held liable for violations of the Convention, if its agents are operating, either lawfully or unlawfully in the other State, the European Court of Human Rights sets rather strict jurisdictional criteria. The recent case regarding Iraq may serve as a catalyst to change the Court's understanding of jurisdiction stipulated in the Convention. The case of *Al-Saadoon and Mufdhi v. the United Kingdom* regarding two individuals was declared admissible. The admissibility decision referred to the existence

of total and exclusive control by the United Kingdom at the prison in Iraq. The Court referred to the place under the UK's control, rather than territory, namely, jurisdiction over person was sufficient to establish jurisdiction.

EU Charter of Fundamental Rights

The EU Charter of Fundamental Rights contains fundamental rights that apply to all people, irrespective of their nationality. Since the Charter does not extend the field of application of the EU law, in a prospective case the ECJ would be faced rather with the interpretation of the EU law than with the Charter itself. It is doubtful, whether the Charter would be capable to implement the anti-discrimination legislation on its own. It is also unlikely that the Charter will enjoy extraterritorial application. It was discussed that the nationality requirement may be not relevant as PMSCs go where there is a source of finance.

It was suggested to have a careful distinction in using the concepts of human rights and fundamental rights, as the EU Charter of Fundamental Rights goes beyond the minimum standard. 'Minimum protection' does not give a *carte blanche*. It was also suggested that fundamental rights within the EU mean fundamental principles of the EU law, thus, in the EU perspective there is no conflict between the concepts.

Addressees of human rights obligations

The workshop participants discussed the addressees of human rights obligations, namely, the EU, Member States and individuals. There is no doubt that the EU is bound by human rights obligations. The EU has set a high standard in protection of human rights in the case of *Kadi*, where the level of protection of human rights is beyond what is respected by the European Court of Human Rights jurisdiction. In that respect the case contrasts with *Behrami/Saramati* case at the European Court of Human Rights. However, the constitutional law of the EU cannot be considered as a sufficient explanation of the judgment in the *Kadi* case.

Horizontal applicability of human rights obligations

Direct *Drittwirkung* is not required by the European Convention on Human Rights. Opinions differ as to the permissibility of indirect or *'mittelbare' Drittwirkung*, i.e., the notion that human rights could guide the interpretation of private law rules. *Schmidberger* case is an example here.

Judicial remedies

The workshop participants discussed judicial remedies in cases of human rights violations by PMSCs. The European Court of Human Rights was considered as a viable

solution, whereas the EU system was described as relevant and useful, though incomplete.

Whether the EU is bound by general international law

A question may be posed whether the EU is bound by general international law and has EU any obligations under international law. It was suggested that there can be no possible discussion of obligation to respect public international law, but it does not resolve the competence problem.

The fact that Member States are carrying out peacekeeping or contracting out certain functions to PMSCs, will not substantially change the Member State obligations. There are dual obligations of Member States: obligations under the European Convention on Human Rights and obligations under EU and the EU Charter of Fundamental Rights. In cases when Member State is a home state of PMSC, these would have positive obligations. However, in cases of Iraq and Afghanistan, the PMSCs may operate outside the link with the state.

EU's accession to the European Convention on Human Rights

A working group was set up to contribute to the discussion of going through the EU's accession to the European Convention on Human Rights. There is discussion on possible EU Judge being appointed at the European Court of Human Rights. Thus, European Court of Human Rights will be the final human rights court in Europe. The European Convention on Human Rights is the minimum standard for the EU institutions, though the EU Charter of Fundamental Rights goes beyond the European Convention on Human Rights.

Role of the European Court of Human Rights

Relevant principles and methodology of the European Court of Human Rights in adjudicating human rights violations between private parties

It was discussed that the consortium must seek for a regulation of PMSC activity relevant for the EU Member States. However, the European Convention on Human Rights reaches beyond that scope. The key question is whether States Parties to the European Convention on Human Rights may oblige the EU Member States to respect the European Convention on Human Rights. Legislation in the EU Member States never excludes that State Party's obligations might be answered by courts. In that respect, both the ECJ and the European Court of Human Rights have been active. One has to differentiate, whether it is for the legislator to answer the question or whether it is for courts. In adjudicating in a case that concerns relations between private parties, much will depend on the existence of the right, for example, the right to life. In these kind of

cases it may be necessary to balance general interests and the ones of an individual. In different kind of cases the approach/test taken by the court would be different. It was suggested to consider the fact that the European Court of Human Rights is not a robot or a machine. In case of loss of life a state who has contracted out certain functions to PMSCs will not be held responsible for the actual loss of life. The state will be held responsible for procedural guarantees that had not been implemented in the national legal order. There is a difference between an obligation to act and lack of procedural guarantees. Much will depend on the fact whether State authorities have received any information from victims concerning the actions of case. In that case the *Osman* case criteria may apply.

In state responsibility imputability test is less rigid. A company is not a public law entity. The case of private educational establishments in the United Kingdom may serve as an example that even outsourcing important state functions, the State shall still be held responsible.

The case of *J.A. Pye (Oxford) v. the United Kingdom*, 2007 concerned responsibility of government in case which involved two individuals (a land owner and a squatter), a case not of direct responsibility, but it might be, could contribute to the argument that it is rather responsibility for legislators. Courts are more comfortable, if there is a legislative framework. Courts would do what they ought to do.

Methodology

There is a tendency to outsource state functions, not only in military and security cases. Distinction underlines the area of application. The issue arises how law is applied between two private parties. For example, if there is a case between two private individuals and if it concerns application of Article 1 of Protocol 1 of the European Convention on Human Rights, a state should not be punished too much. A question may be asked how do governance principles applied to public authorities work in the practice of outsourcing public functions. To answer a question, how should a state behave should be answered by the legislator rather by courts. These issues concern delicate legislative measures, where principle of private autonomy is paramount. What is that has to be regulated? Are there obligations of states to require that cases are reported back to the Ministry? Whether state observes overall control? The *Al-Saadoon and Mufdhi v. the United Kingdom* case that concerned guarding the prisons shall not be compared with the *Bankovic* case. However, *Kadi* case at the ECJ may give an inspiration for the European Court of Human Rights.

Interface of human rights law and international humanitarian law in the regulation of PMSCs

It was concluded that there is a role attributed to international humanitarian law to regulate PMSCs. International humanitarian law cannot be separated from human rights,

as there is a coincidence of purpose and object of both. The workshop participants pointed out to consistent interpretation of both, as both regimes are complementary. Practice of regional monitoring bodies was assessed in that respect. The Inter-American Court of Human Rights has full competence to deal with human rights violations. The scope of convention cannot be hindered by difficulties existing during the armed conflict. There is a role for the Inter-American Court of Human Rights to deal with international humanitarian law, the Court serves as an interpretative tool. However, the Inter-American Court of Human Rights has never accepted that international humanitarian law may restrict human rights. The African Commission on Human and Peoples' Rights stipulates that human rights are applicable unconditionally in situations of armed conflict. The European Court of Human Rights in the *Isayeva* case has established that human rights are applicable in internal armed conflict. International humanitarian law may be used as a tool for interpretation (*Varnava v. Turkey*). In the case of *Kononov v. Latvia*, the European Court of Human Rights applied international humanitarian law.

Human rights provide more avenues for victims than international humanitarian law. Practice is paving the way to humanization of armed conflicts. Thus, it may be considered that *opinio juris* is developing. It was recommended to keep in mind that under international humanitarian law human rights cannot be suspended, however, human rights can suspend application of international humanitarian law (Article 15 of the European Convention on Human Rights). The European Convention on Human Rights may not apply in certain cases. However, the *Wall* case suggests that both international humanitarian law and human rights may be applicable at the same time. A question may be raised whether the International Covenant on Economic, Social and Cultural Rights may be applicable in occupied territories. It was suggested that *lex generalis* and *lex specialis* distinction has to be taken into consideration. In conflicting situation international humanitarian law shall still be applied as *lex specialis*.

However, the ICJ in its order of 2008 has taken a position that in certain cases human rights shall apply even if international humanitarian law exists. A higher degree of protection needs to be attributed to a cluster of fundamental rights that are essential. One also has to keep in mind customary international human rights.

Two philosophies may be identified at the European Court of Human Rights when dealing with the issue of application of international humanitarian law and human rights. The first one approach supports the view that in either international or non-international armed conflicts the European Convention on Human Rights has to be applied in a way that keeps in mind standards of international humanitarian law. The other approach is supported by the Chechen cases that the mandate of the Court is to apply the European Convention on Human Rights and one may or one may not look for interpretation at international humanitarian law. Regarding right to life there is a different standard in human rights law, though casualties may happen in international

humanitarian law. In a different case the result would have been different. However, none of the Chechen cases has gone to the Grand Chamber.

Extraterritorial jurisdiction and human rights bodies

Particular focus was placed on assessment of extraterritorial jurisdiction and human rights bodies in comparative perspective. Jurisdictional clauses in the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights and the American Convention on Human Rights were assessed. The ICCPR has the strictest test of jurisdiction, namely, 'within its territory and subject to its jurisdiction'. However, the UNHRC does not understand jurisdiction to be limited to territory but to 'power or effective control' and it does not consider human rights as an all-or-nothing issue. The Inter-American Commission of Human Rights applies similar test to the UNHRC, namely, 'authority and control test',. This is done not so much in terms of territorial interpretation of the test, but rather of personal interpretation of the test. The 1999 case of *Alejandre v. Cuba* serves as one of examples. The jurisdiction of the European Court of Human Rights with the notion 'within their jurisdiction' is not limited to the territory, though the notion of jurisdiction is primarily territorial. The applicable test to determine extraterritorial jurisdiction includes: a) diplomatic premises; b) on board craft and vessels; c) effective overall control (spatial); d) specific authority or control (personal). There is an ambiguity about the legal space test and about whether human rights is an all-or-nothing issue.

It was discussed that we have to distinguish obligations that may be extended abroad, where different test of attribution would be applicable. Ultra due diligence obligations do not require territorial jurisdiction.

Soldier and performance of combat tasks

One of the workshop participants contributed on the issue why specifically soldier is the one who is to perform combat tasks, assuming that in principle it is not prohibited to outsource defence tasks. Military discipline is to be regarded as having *sui generis* character. Soldiers are subjected to criminal responsibility for disobeying the orders. Cases of *Engels v. The Netherlands* and *Kalač v. Turkey* confirms the *sui generis* character of the military discipline. Outsourcing, however, is based on a civil law contract containing a list of responsibilities. There is a reliability of soldiers and PMSCs for task performance. Order's unconditional performance prevents diversion from given task. In military discipline this has a certain impact. A comparison was made with the PMSCs, where the task is given, but what makes a difference is unconditional performance. If PMSCs were acting under military chain of command, they would be the weakest link. To examine the reliability that the task will be carried out the contributor discusses suitability check by correlating legal responsibility and control and suitability check by correlating the risk of a human rights violations and the status of the relevant subject. Discussing the control elements, it was examined that direct control

was to be considered as the strictest type of control. As to the issue, who is more reliable, a conclusion was made that the one, who is acting under direct control of his commander. And only soldier is obliged to obey the commander's orders unconditionally. Limited control of subordinates and lack of military discipline increases the probability of human rights and international humanitarian law violations. Thus, conclusions were made that using PMSCs in combat tasks was a threat to state sovereignty. Knowing that there is no direct state control over PMSCs' activity could trigger establishing state responsibility.

It was emphasized that still PMSCs could perform functions that are not combat functions. For example, the Third Geneva Convention prescribes the existence of persons not performing combat functions, but accompanying armed forces and further enjoying PoW status. Functions of PMSCs may come close to combat functions that need to be regulated. It was also suggested that obedience of orders was restricted to criminal law and soldiers should be seen as an instrument in the hands of commander. However, there is a reservation if the order is obviously violating the rules, soldier is to be punished in the same way as the commander.

PMSCs as right holders under the European Convention on Human Rights

It was discussed whether PMSCs can be considered as right holders under the European Convention on Human Rights and whether there is limitation to rights of corporations involved in exercise of public authority. Article 34, sentence one of the European Convention on Human Rights prescribes that the Court may receive applications from any natural person, non-governmental organisation or group of persons (including legal persons) claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. Corporations may claim rights, which are applicable to them by their nature. It was demonstrated that private / commercial function is sufficient to assume that a state-owned corporation is non-governmental. The cases of Radio France v. France and Islamic Republic of Iran Shipping Lines v. Turkey may be referred to as examples. It was stated in the Iran Shipping Lines case, where the Iran Shipping Lines were fully controlled by the Islamic Republic of Iran, that public law entities shall be considered as NGOs, as long as they do not exercise public function.

It was concluded that PMSCs exercising military and security functions, including the use of armed force, shall be considered as exercising public function. PMSCs can be distinguished from state-owned companies by the fact that they have a commercial organisation and they exercise public function in contrast to state-owned companies which have a public organisation but exercise commercial functions. PMSCs are in organised in the form of private bodies, however, they exercise public functions if they take over security tasks on behalf of states. If PMSCs are not exercising public functions, they will come under the scope of Article 34 of the European Convention on Human Rights.

Omission to legislate

A question may be asked whether an omission to legislate may lead to invocation of state responsibility. In the case of *L. v. Lithuania* of 2007, it was decided that the right to have a gender change exists under Article 8 of the European Convention on Human Rights. Normally the court acts when the legislation is in place. And *Osman* criteria would stand in the case. There were certain cases, where responsibility for domestic violence was established (cases versus Slovakia, Bulgaria and Turkey). There was an excellent judgment in a case versus Turkey, where there was no legislation in course.

EU institutions and international organisation perspectives in regard to operation of PMSCs

EU Guidelines on promoting compliance with international humanitarian law and their implementation

Upholding rule of law is identified as one of the objectives in implementation of policies of external relations. On 1 December 2009, an update of the Guidelines on promoting compliance with international humanitarian law with additional new references was adopted. Promotion international humanitarian law is thus part of the policy objectives. Article 15 of the Guidelines stipulates cooperation with the ICRC. The ICRC president meets regularly with the PSC (Foreign Policy Ambassadors), and there are numerous contacts at working level. Reporting is integrated in crisis management. Article 16 of the Guidelines stipulates EU political dialogue with third countries. During Bush administration there was an intense dialogue with the US, Mr John Bellinger regarding fight against terrorism. The EU legal advisers will continue the dialogue.

It was suggested to reconsider the definition of relationship between international humanitarian law and human rights in Article 12 of the Guidelines. Also, the concept of naval warfare does not appear anywhere notwithstanding the fact that the EU has certain missions in combating piracy. It was clarified that the object of the Guidelines was not an exhaustive legal examination, but to make them serve as a practical tool to address the issue of compliance with international humanitarian law by the third states. Crisis management operations were not examined in great detail, but would be addressed in the coming months.

When violations of international humanitarian law are reported, the EU should consider making demarches and issuing public statements, as appropriate, condemning such acts, as stipulated in the Guidelines. The cases of Srilanka, Yemen, Middle East were mentioned as examples. In June 2009, the Council adopted conclusions on Middle East and in October 2009 on Yemen.

Initiatives

It was concluded that there were no proposals on regulating PMSCs and no discussion at the Council. Briefings on the Montreaux process were held at the two working groups of the Council – Public International Law working group and Arms export controls working group. The EU institutions are contracting PMSCs. There has been a study and a discussion at the European Parliament, however, the European Parliament has no competence in this.

What could be the possible regulatory measures for PMSCs within the EU is licensing of PMSCs based in the EU, as well as controls of export of services by PMSCs (like arms export). The EU is using PMSCs in the third countries as support to crisis management operations (Afghanistan) and for the protection of EU delegations and Heads of Missions as well as EU Special Representatives. The use of security companies inside the EU is not covered by foreign and security policy.

The potential goals of potential regulation could be ensuring compliance with international humanitarian law and human rights, regulating the growing industry, ensuring quality of services. For creating a playing field for PMSCs based in Europe common licensing requirements, export controls, as well as criteria for contracting by the EU could be considered. The Montreaux document that has been signed by 12 out of 27 Member States would fit in the prospective regulatory system.

The European Parliament in its study has made recommendations for the EU regulation in CFSP framework. There is an agreed list of activities what is to be regarded as military and security services. The Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment could be taken as an example and adapted to situation of PMSCs. However, some of the criteria might not be suitable as PMSCs are used in conflict situations. Moreover, PMSCs operate under local laws. What should be taken into consideration during the selection process of PMSCs: quality control before price, terms of reference by the Council Security Office and mission, whether the company will observe human rights and international law, as the EU reputation is at stake.

Assessment of the U.S. court decisions

The workshop participants discussed the two U.S. court decisions regarding company Xe, the former Blackwater. The case concerned 16 September 2007 shooting in Nisour Square, Baghdad, where 17 Iraqis were killed and 20 wounded. Reports on this case have been extremely confusing. The Indictment listed 6 Blackwater guards that were

contracted by the U.S. Department of State and not the Department of Defence. One of them pled guilty. Indictments were based on statements of the same guards. It was the first attempt by the U.S. to hold PMSC criminally accountable for crimes committed outside the U.S. Despite the 2004 Amendment to the Military Extraterritorial Jurisdiction Act, the jurisdiction is debatable. The Extraterritorial Jurisdiction Act would cover PMSC employees employed by the Department of Defense, as well as civilian employees and the ones employed under the Iraqi Provisional Authority to the extent such employment relates to supporting the mission of the Department of Defense overseas. On a preliminary basis the court established jurisdiction despite the fact that Blackwater was employed by the Department of State and not the Department of Defense. In Iraq from 170 000 to 196 000 are being employed as contractors, where 17-20% are Americans, 36-50% Iraqis and 33-44% other. The proportion between the number of contractors and soldiers in Iraq is 1:1.

With regard to immunities, PMSCs enjoyed immunities in Iraq. However, as of 1 January 2009 due to new SOFA PMSCs are now under the jurisdiction of Iraq. The case of *USA v. Slough* of 31 December 2009 was dismissed. Statements were given by guards under pressure of dismissal. They cooperated with the prosecution due to a reason of promise of immunity. The case could be re-filed if independent evidence were available.

7 January 2010 a civil case against Blackwater was also dismissed. It is thought that 100 000 USD was paid to each family of the dead and 30 000 USD to each wounded. Pursuing possible action by Iraqi Government in the U.S. courts is not likely to succeed.

In Germany there had been several Parliamentarian queries to the Federal Government. However, there is no specific legislation regulating PMSC activity in Germany. There is a well-established security service industry in Germany, but no PMSCs. A license is required for security companies as for a normal commercial business activity. There a strong weapons regulation on the Federal level, the Germans Weapons Act. There is no specific regulation of private security activities outside Germany. The German Constitution stipulates that PMSCs cannot perform governmental responsibilities abroad. There is a concept of ‘core competences’, where these cannot be transferred to private companies.

Combatancy tasks

An issue of ‘combatancy tasks’ was raised, as in cases when civilians not being a party of armed forces, were involved in combatancy tasks, but due to the fact that they were civilians, victims could not get compensation.

Taking into consideration the UN treaty monitoring bodies taxonomia of respect and protect, it was suggested that it might be helpful to sort out the different levels of obligations involved. It was recommended to look at piece of John Ruggie who stipulates direct obligations of States in their jurisdiction that are in their power to respect human rights. From this we may derive the duties that we have: to license, etc.

Interim solution or harmonization of Member States legislations

A question was raised among the workshop participants whether an interim solution or harmonization of national legislations would be favoured. Contracts with PMSCs will surpass thresholds of public procurement law, despite that there are certain exceptions in terms of military and security issues in public procurement. There is a Code of conduct for public procurement that stipulates eligibility criteria, contract performance criteria. Human rights and ensuring of human rights could be one of the factors to be assessed.

Prospective role of the EU in regulating PMSCs activities

It was concluded that the question of awareness of the issue at the political level had been stipulated. However, the European culture is careful and that gives a perspective. It is combined with the concern of Europe to have a certain name and prestige associated with the EU, rule of law and human rights. It was considered that it was the high time for the EU to act. The U.S. has done so, at least there is some kind of regulation. Services will be in demand across the world. Whether initiatives are to be stipulated in the EU Code of Conduct or Guidelines, these would be policy statements. The Montreaux document tries to do the same. It was concluded that forceful presence of the EU was necessary.