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Short Articles & Recent Developments

Regulation of the Private Military and Security Sector: Is the UK Fulfilling its Human Rights Duties?

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1. INTRODUCTION

There is a divergence in state practice as regards the regulation of private military and security companies (PMSCs),[1] ranging from outright prohibition, to forms of licensing, to voluntary self-regulation.[2] This article considers the self-regulation model as adopted by the UK in order to illustrate the compatibility of such a regime with international norms, especially those guaranteeing human rights.

The UK is the home state, that is state of registration, for a large number of land-based and maritime PMSCs. The Security in Complex Environments Group (SCEG) was appointed by the UK Government in 2011 as its partner for the development and accreditation of standards for the UK private security industry operating in the land environment overseas.[3] SCEG is a special interest group within Aerospace Defence and Security (ADS), a trade organization advancing the UK aerospace, defence and security industries; SCEG lists over 60 PMSCs as members.[4] Separately, 22 UK registered companies involved in providing security services in

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1 The term PMSCs is used in this article even though the industry and a number of states prefer the term Private Security Companies (PSCs): see statement by SCEG Director, Paul Gibson, to UN Working Group on Mercenaries, 1 December 2015, available at: www.ohchr.org/Documents/Issues/Mercenaries/WG/Event2015 [last accessed 18 February 2016]. Although the trend in the sector is away from offensive military operations being undertaken by PMSCs, in any event armed contractors can use force in self-defence and can, therefore, be drawn into combat.

2 See analysis of regulatory regimes in a number of countries including France, Germany, Italy, the Netherlands, Spain, Sweden, the UK, the USA, Canada, Israel, Russia, South Africa and Australia in Bakker and Sossai (eds), *Multilevel Regulation of Military and Security Contractors* (2012).

3 Extended to include the maritime sector later in 2011.

4 See www.sceguk.org.uk/members/ [last accessed 19 February 2016].

overseas territories or maritime areas are currently listed as members of the International Code of Conduct Association (ICoCA),[5] set up in 2013 to oversee the implementation of a non-binding international code for private security companies, although a much larger number of UK companies signed up to the International Code of Conduct for Private Security Providers of 2010.[6]

Given the UK Government's preference for industry-led regulation rather than any form of statutory regulation of PMSCs, it is important: to consider the origins and development of the system of self-regulation in the UK; to consider how that keys into the international legal system, bearing in mind the UK's commitments under human rights treaties; and to discern the normative framework that applies to PMSCs within the UK, consisting of soft and hard national and international norms. Finally, an evaluation of the main component of that framework is undertaken.

2. THE ORIGINS OF UK SELF-REGULATION

The activities of Sandline International, a UK-based company that ceased operations in 2004, included direct involvement in conflicts in Papua New Guinea and Liberia in the 1990s; but its impact on the discussion of regulation of the PMSC industry appears to be largely confined to its arms activities in Sierra Leone. Arms were delivered by Sandline to the forces of President Kabbah in contravention of an arms embargo on Sierra Leone, an embargo that had been imposed by executive order under the United Nations Act 1946,[7] in fulfilment of the UK's obligations arising from a decision of the Security Council adopted under Chapter VII of the United Nations (UN) Charter.[8] The actions of Sandline, therefore, breached its obligations under UK law and the UK's obligations under international law. The recommendations of the Legg Report, that the Government consider introducing a system of licensing for PMSCs, were a direct outcome of the 'Sandline Affair',[9] and led to a Green Paper outlining the options for regulating those PMSCs operating out of the UK and its dependencies.

The UK Foreign and Commonwealth Office's Green Paper, 'Private Military Companies: Options for Regulation' of 2002, provided a thoughtful examination of the reasons for growth of the industry, including a convincing rationale for regulating what was at the time was a fledgling industry:

> Bringing non-state violence under control was one of the achievements of the last two centuries. To allow it again to become a major feature of the international scene would have profound consequences. Although there is little risk of a return to the circumstances of the seventeenth and eighteenth centuries

5 See www.icoca.ch/en/membership [last accessed 19 February 2016]. But see Ministerial Statement in 2013 that 50 UK PSCs had joined the ICoCA, *Hansard*, Col 51WS, 15 October 2013 (Simmonds). For the ICoCA, see www.icoca.ch/ [last accessed 18 February 2016].

6 See Ministerial statement that about a third of the 500 PMSCs that had signed the ICoC were UK-based: *Hansard*, Col 72WS, 17 December 2012 (Simmonds).

7 Sierra Leone (United Nations Sanctions Order) 1997 (S.I.No 2592).

8 S/RES/1132 (1997).

9 UK House of Commons Foreign Affairs Committee, Second Report on Sierra Leone ('The Legg Report') Session 1998–99, HC116-I.

> when privateers were hard to distinguish from pirates, and corporations commanded armies that could threaten states, it would be foolish to ignore the lessons of the past. Were private force to become widespread there would be risks of misunderstanding, exploitation and conflict. It would be safer to bring PMCs and PSCs within a framework of regulation while they are a comparatively minor phenomenon.[10]

Furthermore, the Green Paper pointed out that the actions of PMSCs went far beyond the commercial field, potentially involving the 'use of force and the taking of lives'; or impacting on stability within a country or a region.[11] Clearly these actions could amount to a violation of a number of human rights, both civil and political (for example, the right to life by the use of lethal force by armed contractors engaged to protect food supplies from looters, freedom from torture by the physical abuse of individuals detained by contractors as threats to security, and freedom of association by contractors engaged in crowd control operations), and economic, social and cultural (for example, if contractors are engaged to protect the delivery of humanitarian aid but do so in a discriminatory manner). In the light of this, the Green Paper outlined a number of options, discussed below.

A full or partial ban on private military activity abroad, was described in the Green Paper as the most direct way of 'dealing with an activity that many find objectionable'.[12] The difficulties of this approach, highlighted in the Green Paper, were some of ones that have eventually prevailed to prevent UK statutory regulation, namely the difficulty of enforcing such legislation due to the problems of assembling evidence and mounting a successful prosecution in British courts (note that the objection was not that the UK limits its criminal jurisdiction to its territory);[13] the problems of defining military activity; that it was an unwarranted interference with individual liberties; that it would deprive beleaguered governments of support; and that it would 'deprive British defence exporters of legitimate business', given that the provision of services is normally a necessary part of export sales.

A ban on recruitment for military activity abroad would be primarily directed at the recruitment of mercenaries and would not work well in the context of companies. However, the Green Paper recognized that this would 'enable the government to

10 UK Foreign and Commonwealth Office, 'Private Military Companies: Options for Regulation', Green Paper, Session 2001–02, HC 577 (Green Paper 2002). Within a short space of time PMSCs changed from being a 'minor phenomenon' to constituting a major one. The situation of violence and conflict that followed the 2003 US/UK invasion of Iraq demonstrated the extent of contractors' involvement: see Stanger, *One Nation under Contract: The Outsourcing of American Power and the Future of Foreign Policy* (2009) at 2–4.

11 Green Paper 2002, ibid. at para 62.

12 Ibid. at para 71.

13 English criminal law is largely based on the territorial principle, which means that the offence must normally be committed in the country; but there are a limited number of exceptions for British nationals, for example, treason, murder, manslaughter and certain sexual offences: see Harris and Sivakumaran, *Cases and Materials on International Law*, 8th edn (2015) at 226. Other exceptions to the territorial principle include a number of terrorist offences: see Walker, *Blackstone's Guide to The Anti-Terrorist Legislation,* 3rd edn (2014) at 229–32. Furthermore, British military law, incorporating large amounts of domestic criminal law, applies to British soldiers wherever they are located in the world: see Rowe, *The Impact of Human Rights Law on Armed Forces* (2005) at 133–4.

prevent the worst kind of interventions by the private military sector',[14] in that, if carefully drafted, it would help to prevent PMSCs from engaging in mercenary-like behaviour or, perhaps more accurately, in the recruitment of mercenaries.

A licensing regime for military services was ultimately the 'hard' regulatory choice for government, as opposed to 'softer' forms based on self-regulation. The Green Paper's outline of such a system is beguilingly simple:

> Legislation would require companies or individuals to obtain a licence for contracts for military and security services abroad. The activities for which licences were required would be defined in the legislation. They might include, for example, recruitment and management of personnel, procurement and maintenance of equipment, advice, training, intelligence and logistical support as well as combat operations. It would be for consideration whether or not to include consultancy services on security measures for commercial premises – a larger number of small consultants exist in this field; or to establish a threshold for contracts so that only those above a specified value required a licence. For services for which licences were required, companies or individuals would apply for licences in the same way as they do for licences to export arms (though not necessarily to the same Government Department). Criteria for the export of services would be established on the same lines as those for the export of arms.[15]

The Montreux Document of 2008, which is a non-binding document agreed to by a number of states identifying existing international legal obligations and recommending good practices for states when engaging or hosting PMSCs, and of which the UK was a key supporter, expresses a preference for a licensing system.[16] Given the support for licensing in both the Green Paper and the Montreux Document, the creation of a licensing system seemed almost inevitable, particularly given the licensing regime that had been introduced for domestic private security operators in the UK by the Private Security Industry Act 2001, after a period of ineffective self-regulation.

Although the Green Paper identified problems in enforcement of a licensing regime, since the licensed activity takes place abroad thereby making it difficult to know or prove that the terms of the licence are being breached,[17] presumably the same problem is encountered in terms of an arms export licence, for instance, one that prohibits the arms exported from being used against a civilian population. In addition, a licence could largely, or in part, be based on ensuring that the PMSC fulfilled certain due diligence duties in the UK, for example, in terms of vetting, training, and assessing the impact of the services it is being contracted to provide on the human rights of individuals in the host country and on the stability of that country.

14 Green Paper 2002, supra n 10 at para 72.

15 Ibid. at para 73.

16 Montreux Document on Pertinent International Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, A/63/467-S/2008/636, Part 2 at paras 54–56.

17 Green Paper 2002, supra n 10 at para 73.

This could be reflected in the terms of the contract itself, particularly if the licensing legislation required it to be subject to UK law. In other words, the licence could be directed at ensuring PMSCs fulfilled their due diligence duties to prevent abuse and, only exceptionally (in cases of obvious breaches, for example, in cases involving the (excessive) use of (lethal) force), would the terms of the licence be enforced by means of criminal prosecution involving investigations in foreign countries in which the PMSC in question operated. This could be combined with the fifth option outlined in the Green Paper, that of having *a general licence for PMCs/PSCs,*[18] which the Paper did not favour by itself.

In other words, rather than suggesting a scheme of 'lite' licensing of PMSCs, the Green Paper seemed to favour a robust scheme, which would reduce the incidence (and costs) of overseas investigations. This would distinguish licensing from the fourth option outlined in the Green Paper, namely that of *registration and notification.* In this framework UK firms wishing to undertake contracts for military or security services abroad would have to register with the Government and notify it of contracts for which it was bidding, thereby enabling the Government to react if such contracts were contrary to UK interests or policy.[19]

The final option for regulation outlined in the Green Paper was *self-regulation: a voluntary code of conduct.* In this soft form of regulation, PMSCs would become members of a trade association, which would be asked by the Government to draw up a code of conduct for overseas work, in consultation with companies, their clients, the Government and non-governmental organisations. Members would have to leave the association if they failed to adhere to the code, which would cover respect for human rights, respect for international law (including international humanitarian law), respect for sovereignty, and provide for transparency by allowing access to monitors while working overseas. The advantages of this least burdensome approach are ultimately the ones that attracted the UK Government towards this form of regulation, namely that membership of the association would ensure respectability; the Government would not be involved in unenforceable (or difficult to enforce) legislation; the industry itself would police it based on superior knowledge of the sort of services being provided, something that could be enhanced by external monitoring; and it would establish standards of behaviour within the industry. The Green Paper outlined some of the difficulties with this approach, namely it could not address the situation where UK PMSCs might damage UK interests by, for example, supporting an unfriendly government; the trade association would not necessarily be better off than the government in discerning what was going on overseas; and the trade association would be in difficulties if it had to discipline one of its most important members.[20]

The 2002 Green Paper provides a backcloth for the subsequent development of self-regulation along the lines of the last approach identified therein, although it was not the one favoured in the Paper. This was also despite the fact that the Foreign Affairs Committee, in considering the Green Paper, recommended later in 2002 that,

18 Ibid. at para 75.
19 Ibid. at para 74.
20 Ibid. at para 75.

while self-regulation would establish better standards of PMSC conduct, it would not by itself prevent rogue or disreputable UK companies from acting against or, indeed, damaging UK interests or policies. Therefore, the Committee recommended a mixed system of general and specific licences.[21] The UK Foreign and Commonwealth Office (FCO) itself estimated that a successful system of self-regulation would cover 90 per cent of the sector,[22] but, even assuming this estimate to be accurate, the remaining 10 per cent would probably be rogue PMSCs amongst which most of human rights abuse occurs. As summarized by Bohm, Senior and White, 'during the late 1990s and early 2000s ... government and parliamentary opinion clearly favoured a stronger regulatory regime as opposed to more laissez-faire approaches'.[23] However, the UK's experience with, and reliance on, contractors during its involvement in both Afghanistan from 2001 and Iraq from 2003 meant that, by the time the Government came to reconsider the matter in 2009, a much more powerful PMSC industry in terms of reach, capability and lobbying influence, combined with a new climate of austerity following the financial crisis beginning in 2008, pushed the Conservative-led Government rapidly towards the least burdensome, least interventionist and, moreover, least expensive option of self-regulation.

3. THE DEVELOPMENT OF SELF-REGULATION IN THE UK

The Government re-engaged with the issue of regulation in 2009 and, despite consultations revealing concern with a system of self-regulation, has proceeded to create a two-tiered system: 'a government-backed system of self-regulation at the national level and adherence to regulatory norms at the international level'.[24] As regards the latter the UK Government has been a keen supporter of the Montreux Document 2008, which provides a non-binding framework for states, as well as the International Code of Conduct for Private Security Providers of 2010, which provides for a non-binding international form of self-regulation for the companies themselves. Although there are binding norms of international law applicable to the UK Government, none of these have been designed to specifically cover PMSCs or their activities, so it is true to say that the system of PMSC regulation being developed by the UK is a purely voluntary one. Given the dangers of private force and violence, pointed to at the outset of the Green Paper of 2002, this is remarkable. Although PMSCs in the UK are only subject to a form of corporate social responsibility, a question has to be asked as to whether the Government's encouragement and facilitation of this form of responsibility is sufficient to say that the UK has fulfilled its positive obligations under human rights treaty law to prevent abuse of human rights by private actors that operate from the UK, even though the abuse occurs in another state's territory?[25]

21 House of Commons Foreign Affairs Committee, *Ninth Report on Private Military Companies*, Session 2001–02, HC 992 at paras 127–137.

22 Foreign and Commonwealth Office, *Consultation on Promoting High Standards of Conduct by Private Military and Security Companies Internationally* (2009) at para 15.

23 Bohm, Senior and White, 'The United Kingdom' in Bakker and Sossai (eds), supra n 2 at 317.

24 Ibid. at 316.

25 On the scope of this obligation, see Davitti, 'Refining the *Protect, Respect and Remedy* Framework for Business and Human Rights and its Guiding Principles' (2016) 16 *Human Rights Law Review* 55 at 65–8.

Apart from its voluntary nature, meaning that rogue PMSCs will not be covered by the system,[26] there are four further problems with self-regulation. First, the industry is essentially being given the task of being a judge in its own cause. This basic injustice has been partly addressed in the regime within the UK by creating a national system of monitoring, inspection and enforcement through SCEG, which is separated from the industry association (ADS). This has also been duplicated at the international level, with PMSC membership of the International Code of Conduct being separate from the system of monitoring and enforcement in the hands of the ICoCA. At national level, the SCEG consists of a mixture of PMSCs, with some legal and insurance industry membership, as well as representatives from the FCO and the Department of Transport; there is no civil society representation. While at the international level, the ICoCA comprises states (Australia, Norway, Sweden, Switzerland, the UK, USA), civil society and industry representatives, with equal representation of the three pillars in the Board of Directors. Clearly it is not the industry, by itself, judging the actions of its members, but a truly independent body would not include the industry at all. It is true that under the voluntary system put in place in the UK, the auditors of UK-based PMSCs will be individuals from bodies accredited by the UK Accreditation Service (UKAS) as being able to measure the management, performance and activities of PMSCs against national (PSC1 US National Standard, 2012),[27] and international standards (ISO 18788, 2015),[28] and these individuals and bodies are presumably approved because they are independent of PMSCs.

The second problem with a voluntary system of self-regulation is that sanctions are limited, with the main one comprising exclusion of a non-compliant PMSC, a sanction that ultimately does not stop the company in question from trading as the transition from ostracized 'Blackwater' to the renamed 'Xe Services' in 2009 and then to 'Acedemi' in 2011 in the USA shows. Thirdly, the question of the standards to be applied is not as straightforward as the documents (International Code of Conduct, PSC and ISO standards) suggest, namely that this system will be upholding human rights, humanitarian law and other applicable principles of international law. Given that these laws are not directly applicable to PMSCs, indeed most are not designed to cover corporate actors, there is then a certain amount of picking and choosing, adapting and interpreting of standards. This is found at the international level, where the International Code of Conduct covers some human rights but not others;[29] and in the adoption of PSC1 (2012) as the national standard and ISO 18788 (2015) as the international standard. These standards are not formulated in inter-governmental fora where the development and application of international norms normally take place; PSC1 being formulated by ASIS (an organization for

26 Bohm, Senior and White, supra n 23 at 322 ('There would be very little incentive for such contractors to sign up to the trade association's code of conduct . . . since they would not be trading on professional reputation but rather a willingness to be unscrupulous').

27 See www.acq.osd.mil/log/ps/.psc.html/7_Management_System_for_Quality.pdf [last accessed 18 February 2016].

28 Preview available at: www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=63380 [last accessed 18 February 2016].

29 See White, 'Regulatory Initiatives at the International Level' in Bakker and Sossai (eds), supra n 2 at 13–6.

security professionals), and approved by the American National Standards Institute (ANSI);[30] while ISO 18788, which is based on PSC1, was produced within the International Organization for Standardization (ISO),[31] a non-governmental international organization consisting of national standard-setting bodies.

Nonetheless, an examination of ISO 18788 (in Section 5 below) shows a genuine engagement with human rights standards, indicating that the structural problem is not that human rights standards do not directly apply to PMSCs, given that the industry seems willing to make a genuine attempt to try and adapt their management and operational activities to them. Rather the fourth problem is that the UK Government shows limited willingness to engage with its positive responsibilities under human rights law to ensure that private actors within its jurisdiction respect human rights in foreign countries in which they operate.[32] Arguably, the Government's presence on both the SCEG at national level and the ICoCA at the international level can address this deficiency but its critical scrutiny of the practices of PMSCs in these fora is difficult to ascertain or gauge.

In a written Ministerial statement on 'promoting high standards in the private military and security company industry' in 2011, the Government confirmed that:

> Following further consultations, ADS have been appointed the Government's partner in developing and implementing UK national standards for PMSCs. ADS have established a special interest group, the Security in Complex Environments Group (SCEG) which will support the Government in the transparent regulation of companies which operate in this sector. Membership of the SCEG is open to all UK-based PMSCs who have signed the International Code of Conduct on regulation for Private Security Providers.
> We are in the forefront of countries working to establish national standards derived from the International Code which was signed in Geneva in November 2010. 125 PMSCs, of which 45 are UK-based, have now signed up to the International Code and more are in the process of joining. At an international level, the UK, along with the Swiss, US and Australian governments is now working with NGO and industry partners according to a published work plan to establish a mechanism to monitor compliance with the code .... There will be no duplication between UK national and international standards. The UK Government will use its leverage as a key buyer of PMSC services to promote compliance with the International Code and to encourage other PMSC clients to do likewise.[33]

SCEG's aims are stated in its terms of reference:

> The Security in Complex Environments Group (SCEG) is a group for UK-based Private Security Companies working both in complex environments on

30 See supra n 27.
31 See supra n 28.
32 Davitti, supra n 25 at 65–8.
33 *Hansard,* Col 7WS, 21 June 2011 (Bellingham).

> land and in high risk areas at sea. The Group has been established by the ADS Group Ltd to partner with the UK Government to promote professional standards across the UK private security industry, and to provide for their enforcement through effective monitoring and sanctions.[34]

Although phrased in terms of 'support' for government in the regulation of the sector, SGEG's role in the system of self-regulation is central. Its terms of reference state that SCEG provides:

> Support to the UK Government in the regulation of companies who operate in this sector, and a level of confidence that these companies operate at a high professional and ethical standard. This will be undertaken through encouraging adherence to voluntary codes and association coupled with independent third party accredited certification against approved international standards and to monitor Members' compliance. The SCEG Executive Committee is committed to the success of the International Code of Conduct Association.[35]

Given the prominence of the industry in SCEG, the nature of the 'independent third party accredited certification' process needs further examination. PSC1 (2012) has been adopted by the UK Government as the standard applicable to PSCs operating in complex environments,[36] and the evidence is that the UK has now adopted ISO 18788 (2015) as it is a development at international level of PSC1.[37] SCEG's webpage on accredited certification indicates that UKAS had informed SCEG on 17 March 2014 that accreditations had been granted to two certification bodies: Intertek and MSS Global for PSC 1/ISO 18788 (Land) and MSS Global for ISO 28007 (the equivalent maritime standard); and on 16 May 2014 accreditation was granted to RTI Forensics for ISO 28007. These certification bodies can issue accredited certificates to PMSCs and, according to SCEG, 'several SCEG companies have been awarded accredited certification'.[38] An examination of the websites of the certification bodies does not reveal anything about their qualifications, processes or experience, so it is difficult to judge whether such bodies properly audit human rights compliance by PMSCs. Furthermore, the fact that only 'several' PMSCs, at least those belonging to SCEG, have been certified is not suggestive of huge penetration of the UK-PMSC sector by the accredited certification process. In fact, according to SCEG, five land-based PMSCs, that are members of SCEG, have been given accredited certification, while 11 land-based PMSCs who are not members of SCEG (all but one from outside the UK) have also received it. The figures for maritime-based PMSCs are 24 SCEG members and 34 non-SCEG members (again mostly from companies outside the UK).[39] As regards the international level it was

34 SCEG Terms of Reference 2015 at para 1.1, available at: https://www.adsgroup.org.uk/pages/19813174.asp [last accessed 19 February 2016].

35 Ibid. at para 1.2(a).

36 Ministerial statement, *Hansard*, supra n 6.

37 Gibson, supra n 1.

38 See www.adsgroup.org.uk/pages/95837038.asp [last accessed 19 February 2016].

39 See www.adsgroup.org.uk/pages/59063357.asp [last accessed 19 February 2016].

anticipated that the ICoCA would begin processing requests for certification based on PSC1 in early October 2015, although there is no indication yet that this process has begun.

Nonetheless, the Director of SCEG has recently outlined a more robust audit process than is apparent from the available information:

> The key to the success of these standards has been the identification of independent 3rd party accreditors who ensure that companies claiming to comply with the standard do so fully and in a properly auditable fashion. The United Kingdom Accreditation Service has accredited 4 certification bodies and they conduct rigorous third party audits of companies to certify them against PSC1 and ISO 28007.
>
> As part of their audits the certification bodies will assess how well the company's human right impact assessments have been incorporated into their management processes. The audits will also examine the legal framework in which the companies are operating including examination of the licences issued by the host nations.
>
> These auditors visit head offices, regional offices, hubs and outlying places where private security companies operate. The auditors put on their flak jackets, helmets and life jackets and examine what is happening on the ground. Their investigations include how the company cascades down its obligations to its sub-contractors. They check that 'third country' and local nationals understand all the core policies, operational directives and processes. Auditors talk to clients and to civil society and human right organisations. The auditors have been trained by human rights experts and often deploy with them. These audits are conducted every 6 months or sooner if required.[40]

This suggests that the self-regulation system is working reasonably well and, therefore, that the industry is fulfilling its corporate social responsibility. Nevertheless, given that the International Code of Conduct was adopted in 2010 and PSC1 in 2012, the rapid implementation of such soft voluntary standards that might be expected (as opposed to the slower process of implementation that might be expected for harder forms of legalization) does not appear to have materialized, especially in PMSCs specializing in land-based security services. However, detailed evidence of scrutiny and review of the process in terms of the wider UK-PMSC sector is hard to find, so any data is hard to contextualize and assess. Improvements in the transparency of the auditing, accreditation and scrutiny processes involved in UK and international voluntary regulation of PMSCs would lead to increased legitimacy of the system. Furthermore, evidence that the UK Government takes an active role in ensuring that the self-regulation process is robust enough to provide for the effective prevention of human rights abuse by UK-based PMSCs working abroad would increase its legitimacy further, as well as indicating that the UK has fulfilled its positive obligations under human rights treaty law.

40 Gibson, supra n 1.

4. THE UK'S OBLIGATIONS UNDER INTERNATIONAL LAW

The UK Government is clearly of the view that the system of voluntary regulation put in place in the UK fulfils its international human rights obligations.[41] This is largely explained by the fact that the Government sees the international legal framework applicable to addressing human rights abuse by UK-based PMSCs as being embodied in the International Code of Conduct for Private Security Providers of 2010 and in the UN's Guiding Principles on Business and Human Rights of 2011 (the 'protect, respect and remedy' framework).[42] In other words, the UK Government does not appear to accept that any binding treaty or customary human rights obligations applies to it in relation to the oversight of the PMSC industry based within its jurisdiction but whose services are delivered overseas. As related by MacLeod when discussing the UK's PSC1 pilot scheme introduced in 2013:

> A pilot scheme commenced in August 2013 in the UK to 'road-test' PSC1 as part of the UK Government's self-described commitment to industry self-regulation. The UK has been actively involved in the drafting of the ICoC and the development of the ICoCA and its participation follows many years of regulatory inaction in this area. In doing so, the UK Government considers itself to be meeting its obligations to ensure human rights protection through its support for 'robust' regulation. Specifically, it regards its adoption of the PSC1 certification standard with eventual ICoCA oversight as helping the UK to fulfil its 'commitments' under the UN Guiding Principles on Business and Human Rights as set out in the UK National Plan. The pilot scheme was supported and closely followed by the UK Foreign and Commonwealth Office. In addition, the UK Accreditation Service, which was to certify approved Certification Bodies to carry out PSC1 audits, was actively involved in monitoring and the auditing process both in the UK and at audited project sites.[43]

In addition to utilizing UKAS (a non-profit private company) and certification bodies (private companies), none of which are organs of state,[44] the Government may be guilty of hiding behind the soft-law façade of the International Code of Conduct and UN's Guiding Principles when, in fact, the 'protect' pillar of the latter is based on states' having hard (that is, binding) positive obligations under international human rights law to prevent human rights abuse by private actors, as well as

41 Ministerial statement, *Hansard,* supra n 5: 'We believe the twin-track approach of certification to agreed standards and ICoCA oversight can help fulfil the UK's commitments under the UN guiding principles on business and human rights.'

42 A/HRC/17/31 (2011). See generally Addo, 'The Reality of the United Nations Guiding Principles on Business and Human Rights' (2014) 14 *Human Rights Law Review* 133.

43 MacLeod, 'Private Security Companies and Shared Responsibility: The Turn to Multistakeholder Standard-Setting and Monitoring through Self-Regulation Plus' (2015) 62 *Netherlands International Law Review* 119 at 135. See further UK Government, 'Good Business: Implementing the UN Guiding Principles on Business and Human Rights', CM 8695, 4 September 2013 ('National Action Plan').

44 Although UKAS could be argued to be performing governmental functions and therefore its conduct could be attributed to the UK: see Article 5 ILC Articles on States for Internationally Wrongful Acts 2001.

punish transgressors, and provide for access to justice for the victims.[45] The 'respect' pillar, on the other hand, is based on private actors fulfilling due diligence duties as regards human rights and is not, by itself, binding on PMSCs. While the Government's encouragement of self-regulation in the UK can be said to be helping PMSCs fulfil the second pillar of the Guiding Principles it cannot, by itself, fulfil the first or, at least, it cannot ensure that the UK Government avoids any legal responsibility when human rights have been violated by a UK-based PMSC.

For example, if the UK Government ignores persistent and well-evidenced use of unlawful lethal force by a UK-based (or UK-contracted) PMSC in a foreign country it will have failed to fulfil its obligations to prevent human rights violations,[46] even though that PMSC might have received accredited certification under the system now established in the UK. The contention that such abuse has occurred beyond the UK's jurisdiction is a little disingenuous since the UK could have taken steps in the UK to prevent or stop such abuse, and punish it, by taking action in enforcement of national laws against the company. If the UK had a statutory-based compulsory system of licensing and regulation it would be able to argue that it has taken necessary steps to prevent abuse on the basis that positive obligations are obligations of conduct not of result.[47] This means that a licensing system would reduce the incidence of abuse, it would not eliminate it but, if sufficiently robust, and revised regularly to address obvious gaps in its provisions, such a licensing system would fulfil the UK's obligations to protect human rights. It is very difficult to see how promoting a system a voluntary self-regulation albeit one with government involvement, where the main sanction is expulsion of an abusing company, no matter how sophisticated the system is, can do no more than partly fulfil the UK's obligations under international law.

It is clear that existing UK legislation that may have some application to the PMSC sector when operating abroad does not provide a strong enough statutory framework to regulate PMSCs, namely the Foreign Enlistment Act 1870 (intended to combat mercenaries but not enforced); the Human Rights Act 1998 (which has been extended extraterritorially to the acts of state agents in cases like *Al-Skeini*,[48] but not yet to the acts of non-state actors); the International Criminal Court Act 2001 (that could apply to PMSCs but only when they commit core crimes—war crimes, crimes against humanity, genocide or aggression); the Private Security Industry Act 2001 (that applies to domestic security within the UK); and the Armed Forces Act 2006 (whereby contractors may, in certain circumstances be subject to military law and, therefore, their acts can arguably be seen as acts of the UK). The premise of this article is that the positive obligations to protect human rights, placed

45 A/HRC/17/31 (2011) Commentary on Principle 1.

46 Francioni, 'The Role of the Home State in Ensuring Compliance with Human Rights by Private Military Contractors' in Francioni and Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law and Private Contractors* (2011) at 105–7.

47 Marks and Azizi, 'Responsibility for Violations of Human Rights Obligations: International Mechanisms' in Crawford, Pellet and Olleson (eds), *The Law of State Responsibility* (2010) 729; Heathcote, 'State Omissions and Due Diligence: Aspects of Fault, Damage and Contribution to Injury in the Law of State Responsibility' in Bannelier, Christakis and Heathcote (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case* (2012) 308.

48 *Al-Skeini and Others v United Kingdom* Application No 55721/07, Merits, 7 July 2011.

upon the UK by human rights treaties to which it is a party,[49] apply to require the government to put in place legally enforceable regulatory measures to ensure that private actors registered in the UK have structures and systems that embed respect for human rights even when they operate overseas. The inadequacies of the existing general legislative framework, even when combined with the specific self-regulatory regime for PMSCs, to address human rights abuse by PMSCs when operating abroad, when considered in the light of the obligations the UK has under international human rights law, point to a statutory scheme of licensing and regulation as fit for purpose, and not what has been called a 'self-regulation plus',[50] or 'robust', system of voluntary regulation.[51]

MacLeod describes the 'plus' ('robust') element as being located in oversight by the Government and civil society and not consisting simply of self-regulation by the industry,[52] but she goes on to state that 'what remains unclear, however, is the extent to which states are fulfilling their international human rights obligations by choosing the softer option of self-regulation plus and omitting legislative options'.[53] Furthermore, it is very difficult to judge the level of oversight by governments and civil society of the self-regulation process, particularly when accreditation itself is sub-contracted to UKAS, which then authorizes certification bodies. There is a sense of the Government remaining at (several) arms lengths from UK-based PMSCs and, indeed, ones it contracts with, as it does not accept that contracting by itself can give rise to state responsibility.[54]

5. A HUMAN RIGHTS EVALUATION OF ISO STANDARD 18788 (2015)

Given the UK Government's current reliance on a voluntary system of self-regulation for PMSCs, the human rights provisions that are being applied by auditors, as overseen by SCEG at national level and the ICoCA at the international level, are provided by the national (PSC1) and international standards (ISO 18788). Although there is evidence of significant human rights penetration into PSC1 and ISO 18788, the interpretation and application of human rights provisions in these non-binding documents, reflect both substantive and structural problems in terms of human rights compliance. Some of the main instances of these problems, as found in the ISO standard 18788 of 2015, are given here.

ISO 18788 'provides a means' for PMSCs and for 'those who utilize security services' to 'demonstrate commitment to the relevant legal obligations, as well as the good practices provided' in the Montreux Document 2008; and conformity with the 'principles and commitments outlined' in the International Code of Conduct 2010. ISO 18788 states that 'it is the sole responsibility of the user of this International

49 As identified in Davitti, supra n 25 and Francioni supra n 46.

50 MacLeod, supra n 43 at 129.

51 Ministerial statement, *Hansard*, supra n 33.

52 MacLeod, supra n 43 at 126.

53 Ibid.

54 Montreux Document 2008, supra n 16 at Part I para 7 ('entering into contractual relations does not in itself engage the responsibility of Contracting States').

Standard to determine the applicable laws and abide by them'.[55] It becomes clearer in ISO 18788 that, unless there are any national human rights laws that expressly apply to PMSCs, international human rights law does not apply to PMSCs, so that the human rights references found throughout the document are not based on obligations but on ideas of corporate social responsibility.[56] ISO 18788 accepts that a number of core human rights must be upheld by PMSCs, namely the prohibitions on torture, sexual exploitation and human trafficking,[57] but it fails to include other core rights to life (not to be taken arbitrarily)[58] and to freedom from arbitrary detention, as well as core socio-economic rights such as the rights to food, water, shelter, education and health.

Lethal force is confined to that necessary in 'self-defence', which is defined in the ISO standard as the 'protection of one's person or property against some injury attempted by another',[59] and is seen as 'inherent' in ISO 18788, when it should be compliant with the national laws of the host state and with standards found in human rights laws, for example, on the right to life. There is also an assumption that a contract can by itself give a right to carry weapons to contractors and that those weapons can be used for lethal and non-lethal purposes.[60] In addition to 'inherent' self-defence and defence of others, lethal force is envisaged when absolutely necessary to protect dangerous property.[61] It is interesting to note that defence of property is not defined by the more generous standard applicable under the law of armed conflict (which the ISO 18788 correctly states is not normally applicable to contractors except when they directly participate in hostilities), but may be sufficiently limited to comply with human rights law standards, where circumstances can be envisaged in which defence of dangerous property (weapons, chemicals, nuclear material, etc.) may, in the last instance, arguably necessitate the use of lethal force.

The carrying of weapons by private actors must at least accord with national laws and cannot be based solely on a contractual right. ISO 18788 states that in the absence of authorized Rules on the Use of Force, PMSCs shall base their operations on the UN's Basic Principles on the Use of Force and Firearms by Law Enforcement Officials of 1990,[62] a document that is indeed widely used by states and the UN, but it constitutes a direction to state police (and by extension UN police) not to private actors. ISO 18788 does restrict PMSCs to law enforcement only when authorized by a state,[63] but this should have been confined to *host* state authorization. Besides which, the standard also envisages contractors having a right to apprehend and search individuals even when not operating as authorized law enforcers,[64] surely powers that only a state can have or delegate.

55 ISO 18788 (2015), supra n 28 at 1 'scope'.
56 Ibid. at 6.1.2 'legal and other requirements'; 8.1.3 'respect for human rights'; but see 8.1.1 'operational planning and control'.
57 Ibid. at 7.2.2 'competency identification'.
58 See ibid. at 8.1.4(c) 'prevention and management of undesirable or disruptive events'.
59 Ibid. at 3.60, 'terms and definitions', stating the source to be Black's Law Dictionary.
60 Ibid. at 8.3.4 and 8.3.5 'less-lethal force' and 'lethal force'.
61 Ibid. at 8.3.5 'lethal force'.
62 Ibid. at 8.3.1 'use of force'. See also A/RES/45/121 (1990).
63 Ibid. at 8.3.6 'use of force in support of law enforcement'.
64 Ibid. at 8.4 'apprehension and search'.

There is a statement in the 'Guidance' to ISO 18788 that PMSCs help protect the 'human rights of people to be secure' and that, in the absence of an effective government, recourse may be had to 'commercial providers of security services'.[65] As a basis for private actors to have and use weapons this statement raises the problems of private violence identified in the Green Paper of 2002, namely that unleashing private force may lead to the loss of the state's monopoly over the use of force which, in turn, will lead to escalating lawful private violence. Furthermore, there is no requirement in ISO 18788 for PMSCs or their auditors to report violations to the host state or home state.[66] Human rights risk analysis (HRRA) is not prescribed and no model for HRRA is provided.[67] Finally, there is very little detail on the complaints system that a PMSC should have in order to comply with the standard, nor on any remedial mechanisms, nor the standards by which reparations to victims are to be measured.[68]

6. CONCLUSION

While the UK system of 'robust' voluntary self-regulation of PMSCs is progressing, and is certainly better than the previous *laissez-faire* approach, the lack of transparency and clear governmental oversight mean that it is not possible to conclude that the UK has provided a complete system to prevent, address and remedy human rights abuse by PMSCs. It follows that there must be considerable doubts raised as to whether the UK system demonstrates that the state is fulfilling its obligations under the UN's Guiding Principles or, more accurately under international law, to protect human rights.

65 Ibid. at Annex A, A.1 'general'.

66 Ibid. at 9.1.2 'evaluation of compliance'; 9.2 'internal audit'.

67 Ibid. at Annex A, A.6.1.2.3 'human rights risk analysis'.

68 Ibid. at 7.4.4 'communicating complaint and grievance procedures'; 8.8.2 'incident monitoring, reporting and investigations'; 8.8.3 'internal and external complaint and grievance procedures'. See also Annex A, A.8.8.3 'internal and external complaint and grievance procedures'.