

**Recommendations to the Council of Europe  
Parliamentary Assembly for Effective Regulation of  
Private Military and Security Companies**

**Hans Born and Anne-Marie Buzatu  
DCAF, Geneva**

**Geneva, 1 September 2008**



## Summary

The last thirty years have witnessed a paradigm shift of the provision of security from public to private actors, some 1,5 million of which are estimated to be CoE nationals sharing in the \$20-100 billion spent annually on their services. This shift has called into question whether existing laws can effectively regulate these private actors, leading to problems of democratic accountability, impunity and the rule of law. This report considers the current state of private military and security company (PMSC) regulation relative to CoE member states. While most attention is devoted to the more difficult problem of PMSCs exporting security services activities across territorial borders, the problem of domestic private security provision within CoE member states is also considered. After identifying key challenges and good practices in current PMSC regulation, essential elements for the effective regulation of PMSCs are presented using the CoE's concept of 'democratic security' as the point of departure. The report closes with recommendations to the CoE for effective PMSC regulation on both the domestic and international levels.

The authors recommend that:

1. CoE member States reach consensus on those duties which are and are **not** appropriate for PMSCs to perform, such as those that are 'inherently governmental.'
2. Any form of regulation should include the following elements: common standards for obligations and duties of PMSCs; an effective vetting system; licensing and training; effective oversight and investigatory system; effective enforcement system.
3. The CoE draws up non-binding guidelines for regulating private security within CoE member States as a first step for regulating private security within the CoE area.
4. The CoE calls upon member States to regulate the export of private military and security services, such as by including PMSCs in existing arms export regimes.
5. The CoE calls upon its member states to contribute to the formulation of an international convention on PMSC regulation.
6. The CoE calls upon the private security industry and other relevant stakeholders to set up a 'private framework' for regulating PMSCs, such as by creating a PMSC court of arbitration and a PMSC violations investigation team/Ombudsman.



## Summary

### Table of Contents

#### **1. Introduction**

- 1.1. Background
- 1.2. Objectives, Scope and Methodology

#### **2. Key Challenges posed by the PMSC industry**

- 2.1. The erosion of the state monopoly on the use of force
- 2.2. Twin deficits: democratic and accountability
- 2.3. Higher risks of human rights violations
- 2.4. Weakening of national security
- 2.5. Lack of consistent/coherent PMSC standards
- 2.6. The problem of multiple nationalities
- 2.7. Difficulties in conducting investigations abroad
- 2.8. The scope of the PMSC export problem for Council of Europe member States
- 2.9. Lack of minimum standards and regulation of private security within Council of Europe member States

#### **3. International Frameworks regulating PMSC Export**

- 3.1. Overview of international PMSC regulation
- 3.2. Overview of domestic regulation of exported PMSCs
- 3.3. Domestic regulation of imported PMSCs
- 3.4. Current regulation of the export of PMSCs: Gaps and Good Practices

#### **4. Overview of legislation of PMSCs providing domestic security within Council of Europe member States**

- 4.1. Different domestic approaches to regulation of private security
- 4.2. Scope of regulation
- 4.3. Oversight and enforcement

#### **5. The Way Forward**

- 5.1. Common essential ‘elements’ required for effective PMSC regulation
- 5.2. Recommendations for the regulation of the export of PMSC services
- 5.3. Recommendations for the domestic regulation of PMSC services within the Council of Europe
- 5.4. Next steps—A Call to Action

#### **Annex I: Key US Legislation Applicable to PMSCs**

#### **Annex II: Specific recommendations for regulating domestic private security within Council of Europe member States.**



# 1. Introduction

## 1.1 Background

Over the last thirty years the provision of security has undergone a paradigm shift. This has largely been driven by two trends: 1) the shifting of functions traditionally carried out by public actors over to the hands of the private sector, with the United States taking the lead in the 1980s,<sup>1</sup> and 2) the end of the Cold War at the beginning of the 1990s which led to the downsizing of state security forces.<sup>2</sup> Taken together, these two trends have increased pressure on public authorities to make up for security sector shortfalls by contracting them out to the private sector, while making more palatable such choices that run counter to the traditional notion of the state monopoly on the use of force. This shift has created a multi-billion dollar industry, with estimates for annual revenues ranging from \$20-\$100 billion.<sup>4</sup> However, in the course of this shift, the legal framework built to regulate public actors has not been sufficiently adapted to effectively regulate their private substitutes, leaving many questions as to how and to what extent such regulations do and should apply to these private actors.

## 1.2 Objectives, Scope and Methodology

This paper considers the current state of private military and security company (PMSC) regulation relative to Council of Europe (CoE) states. While most attention is devoted to the more difficult problem of PMSCs exporting security activities across territorial borders, the problem of domestic private security provision within CoE member states is also considered. After identifying key challenges and good practices in current PMSC regulation, essential elements for the effective regulation of PMSCs are presented. The

---

<sup>1</sup> Kevin R. Kosar, 'Privatization and the Federal Government: An Introduction', US CRS Report , 28 December 2006

<sup>2</sup> See e.g., Fred Schreier and Marina Caparini, '[Privatising Security - Law, Practice and Governance of Private Military and Security Companies](#)', DCAF Occasional Paper No. 6, p 3 (2006).

<sup>4</sup> Interview with Doug Brooks, August 2008 where he estimated \$20 billion per annum was spent on private security actors. Peter Singer, senior fellow of the US Brookings Institution has put this figure closer to \$100 billion.

report closes with recommendations to the CoE for effective PMSC regulation on both the domestic and international levels.

## **2. Key Challenges posed by the PMSC industry**

With private actors in large numbers performing duties and activities which were previously assumed to be the province of public actors, this poses several important challenges.

### **2.1. The erosion of the state monopoly on the use of force**

Long considered as embodying the very essence of a state<sup>5</sup>, particularly in Western cultures, the state monopoly on the use of force as a means of enforcing its order and to provide for its security has traditionally underlain domestic and international regulation of the use of force, first of all by implicitly assuming that legitimate force will be used by state actors. The shift of this power to private actors, often directed and overseen by private superiors who are not directly accountable to public oversight, raises questions of how a government can effectively protect and defend state interests, including the human rights of its citizens.

### **2.2 Twin deficits: democratic and accountability**

The lack of quality information and transparency regarding the nature and scope of PMSC personnel, practices and applicable laws/regulation contributes to two serious deficits of the provision of private security, the first of which is the lack of democratic accountability for the use of these actors. In contrast to state security providers, PMSCs are not directly accountable to public oversight, but instead answer to a mix of management, company boards and shareholders.<sup>6</sup> Personal accountability for wrongdoing

---

<sup>5</sup> Max Weber sees the use of force as the main defining element of a state, i.e. 'Staat ist diejenige menschliche Gemeinschaft, welche innerhalb eines bestimmten Gebietes – dies: das »Gebiet« gehört zum Merkmal – das Monopol legitimer physischer Gewaltsamkeit für sich (mit Erfolg) beansprucht', [a state is a human community that (successfully) claims the monopoly of legitimate use of physical force within a given territory'. Max Weber, *Politik als Beruf – Vortrag, 1919*, available at: <http://www.textlog.de/2282.html>

<sup>6</sup> Anna Richards and Henry Smith, 'Addressing the role of private security companies within security sector reform programmes', *Journal of Security Sector Management*, Vol. 5, No. 1, May 2007.

is also lacking, as the applicable legal and oversight frameworks regulating the provision of security assume that the providers will be state actors, and are not adapted to non-state agents who provide security services, particularly those requiring the threat of or use of force.

### **2.3 Higher risks of human rights violations**

Under the traditional international law model, only states via their state agents are bound by treaty obligations, including those contained within human rights conventions, which require that they hold non-state agents “within their territory and under their jurisdiction” accountable for behaviours which violate these obligations, typically through domestic criminal law. However, the vast numbers of PMSCs providing these services in areas where they have been given immunity to domestic criminal prosecution has created a perception that they operate in an accountability vacuum. Lack of accountability for committing human rights violations leads to a climate of impunity where such violations are more likely to occur. This has led to claims that one of states’ motivations for contracting such actors is to avoid state responsibility for violations of international obligations, including human rights. However, there has been general agreement that states should not be able to ‘contract out of international legal obligations’ through the use of PMSCs in lieu of state actors.<sup>7</sup> Along similar lines, the European Commission has said that European states are not relieved of their obligations to protect human rights when such violations are committed *on their territory* by non-state actors.<sup>8</sup> While making the link between private actors and human rights obligations, this opinion does not comment on whether such obligations are triggered for a state when its PMSC nationals commit violations outside of its borders. The authors note that such obligations would be triggered if committed by an agent of the state, such as by a member of its armed forces.

---

<sup>7</sup> See e.g., Markus Dutly, ‘The Swiss Initiative on Private Military and Security Companies,’ *Private Security In Africa: Manifestation, Challenges and Regulation*, Monograph No 139, November 2007.

<sup>8</sup> Born, H., Caparini, M., Cole, E., *Regulating private security in Europe: Status and Prospects*, DCAF, Policy Paper nr. 20, 2007, available at [www.dcaf.ch](http://www.dcaf.ch), based on a 2006 study for the CoE Council for Police Matters, nr. PC-PM [2006] 01, Strasbourg 11 September 2006.



## 2.4 Weakening of national security

With former police and soldiers—who often leave public life in favor of better-paying security jobs in the private sector—providing much of the PMSC workforce,<sup>10</sup> this strains the remaining police and military forces, requiring that the remaining state actors work more shifts and tours of duty. In the case of a failed state trying to rebuild its own forces, such as in the case of Afghanistan, the presence of private security companies paying 2-3 times more than the state can afford to pay its state security workers hampers efforts to build an effective state force. Another concern relates to the impact private contractors can have on the quality and competence of state forces themselves, such as when they provide training services to soldiers. This practice has even raised the concern of US Defense Secretary Robert Gates, who recently wrote up his misgivings about the “quality, responsiveness and sustainability” of this practice.<sup>11</sup>

## 2.5 Lack of consistent/coherent PMSC standards

While the terms ‘private security contractors’ and ‘private military contractor,’ *inter alia*<sup>12</sup>, are often used interchangeably in the press and academic literature, there has been much debate as to what collection of duties each label refers, and further to what statuses those actors providing such services are accorded under current legal frameworks. This is in large part because, particularly in the current conflict in Iraq, companies calling themselves ‘private security companies’ have performed tasks that have traditionally been within the province of the armed forces, and have allegedly engaged in behaviors that constitute direct participation in hostilities<sup>13</sup> under international humanitarian law (IHL).

---

<sup>10</sup> Interview with Barack Obama, July 2, 2008, accessed on-line 23 July 2008 at: <http://www.defensenews.com/story.php?i=3615116&c=FEA&s=INT>

<sup>11</sup> Erica Werner, “Gates questions combat training by contractors”, *Army Times*, Jul 23, 2008.

<sup>12</sup> Yet another term proposed by Doug Brooks of International Peace Operations Association (IPOA) is ‘contingency contractors’. Others, such as authors Jeremy Scahill and Robert Young Pelton call them by the more provocative term ‘mercenaries.’

<sup>13</sup> Such as guarding legitimate military targets. For further discussion, please see the ICRC Expert Meetings on Direct Participation in Hostilities, available on-line at <http://www.icrc.org/web/eng/siteeng0.nsf/html/participation-hostilities-ihl-311205>.

## **2.6 The problem of multiple nationalities**

Adding to the confusion is the problem posed by the presence of multiple nationalities, which occurs in the common scenario of a contractor of one nationality hired by an entity of another nationality to work on the territory of a third nationality, etc. This leads to the potential extraterritorial application of numerous concurrent and/or conflicting laws and standards to any given PMSC group, usually resulting in none of the laws or standards being applied.

## **2.7 Difficulties in conducting investigations abroad**

Related to the problem of multiple nationalities are the practical difficulties in conducting investigations of alleged violations abroad. As nationality is no longer a defining criterion for choosing PMSCs, countries which otherwise have no connection to an area of operations than the presence of their nationals working for a PMSC are typically not able to conduct investigations of alleged violations of their laws. Such was the case in the recent dismissal of a charge against a Swiss national who worked for Blackwater in Iraq (for further discussion, see section 3.2 *infra*). Swiss law prohibits Swiss nationals from serving in foreign armed services. However, the court was unable to make the determination whether working for Blackwater in Iraq was equivalent to serving in a foreign armed service because they did not have the resources to conduct an investigation on the ground in Iraq. A related problem goes to the high evidentiary standards required by criminal trials: even with complete cooperation of the territorial state, criminal investigators may not be capable of properly collecting evidence that meets sensitive time-limits and chain of custody requirements.

## **2.8 The scope of the PMSC export problem for CoE member States**

A preliminary survey of European PMSCs which export services to areas of insecurity such as Iraq and Afghanistan found more than 40 based within the CoE member state area. Most of these were based in the UK, however PMSCs based in France, Belgium,

Germany, Norway and Poland were also found, as well as collaborations between European-based PMSCs and providers operating outside of the CoE area. However, this snapshot does not provide a complete picture of CoE member state links to exported PMSC activities, which would include CoE nationals working as exported PMSC staff. As PMSCs are private entities often not subject to public reporting requirements, there is little reliable information beyond the anecdotal regarding percentages of which nationalities are employed in what locations performing what duties. Further, as previously mentioned, with nationality no longer a defining or common characteristic of private groups exported to provide security, CoE nationals may be working for the hundreds or thousands of PMSCs with headquarters outside of the greater CoE area. In the absence of a more effective PMSC monitoring framework, the true extent of the CoE member state nexus is unlikely to be known, facilitating the avoidance of traditional mechanisms for regulating the use of force, and hindering democratic governance and accountability of CoE PMSCs. While this argument refers to the export of military services, PMSCs play, as mentioned before, also a major role in the domestic security of CoE member states. While its exact role varies from member to member state, it is fair to say that both the security of public and private spaces in CoE member States cannot be guaranteed without the help of private security firms.<sup>16</sup>

## **2.9 Lack of minimum standards and regulation of private security within CoE member States**

PMSCs also play a substantial role in providing security services within CoE member States. In 2004, PMSC staff outnumbered members of public police forces in Europe, on average, one out of every 500 European citizens was a private security employee.<sup>17</sup>

---

<sup>16</sup> Born, H., Caparini, M., Cole, E., *Regulating private security in Europe: Status and Prospects*, DCAF, Policy Paper nr. 20, 2007, available at [www.dcaf.ch](http://www.dcaf.ch), based on a 2006 study for the CoE Council for Police Matters, nr. PC-PM [2006] 01, Strasbourg 11 September 2006.

<sup>17</sup> Panoramic Overview of Security Industry in the 25 Member States of the European Union, *CoESS and UNI-Europa*, 2004, Chapter Conclusions, p. 1. Available at: [www.coess.org](http://www.coess.org)

Extrapolating this to current CoE population numbers would result in an estimated 1,6 million PMSCs working in the CoE member state area alone. PMSCs are not only expanding in numbers, but also in the types of services they provide. The range of services varies from those provided by private detectives, to guarding the transport of valuables, from private intelligence services to being in charge of the security in shopping and business centres, airports, as well as nuclear and military facilities. Increasingly they provide security in areas which were previously considered the reserved domain of the public police.

The private security sector in the CoE member States area has reached maturity in terms of volume and variety of services delivered. Even if it were considered desirable to outlaw PMSCs, both demand for and supply of such services have reached the point that it would not be possible to do so. PMSCs are omnipresent in many areas of justice and home affairs of CoE member States, as well as in the protection of energy, transportation, communications, internal security, health and emergency response. While it is neither desirable nor feasible to outlaw them, it is at least important to ensure that minimum standards are identified and are integrated into relevant regulations within the CoE area. However, minimum standards for PMSC regulation are currently lacking on the European Level. Furthermore, on the national level, a great variety in legislation exists, ranging from no legislation to full legislation and enforcement across CoE member States (see section IV). Lack of legislation and lack of minimum standards within the CoE area leads to a situation of confusion and unequal protection (or even no protection) of human rights of CoE citizens against interference of PMSCs.

### **3. International Frameworks regulating PMSC Export**

#### **3.1 Overview of international PMSC regulation**

On the international level, there exist several frameworks of law which may apply to PMSC activities. Here follows a brief overview of the international legal frameworks most commonly associated with PMSCs, along with some examples of states reaching

beyond their borders to potentially regulate PMSCs abroad through extraterritorial legislation.

*The Geneva Conventions of 1949.* In force on every territory in the world, the Geneva Conventions of 1949 (GC) have truly universal reach, however their application to PMSCs is dependent upon two factors: 1) the existence of an armed conflict within the meaning of international law, and 2) their direct participation in hostilities or their incorporation into the state forces. The first condition has provoked little controversy, particularly in the situation of an international armed conflict (IAC) which Common Article 2 (CA2) defines as any declared war or armed conflict between two or more states, even if the state of war is not recognised by one of them. The threshold to determine the existence of an IAC is quite low, neither requiring a high intensity nor a long duration.<sup>18</sup> Further, CA2 also applies in ‘all cases of partial or total occupation of the territory’ of a state. Non-international armed conflicts (NIACs) require a higher threshold of intensity and duration in order to distinguish them from less serious incidents, such as riots or other internal disturbances and tensions.<sup>19</sup> An improbable example of a commonly cited NIAC in today’s headlines is the conflict in Iraq.<sup>20</sup>

While straightforward-sounding on its face, the kinds of activities constituting direct participation in hostilities have proven much more elusive to pin down, provoking much debate.<sup>21</sup> While it is generally agreed that PMSCs are civilians and therefore should not be participating in hostilities, in real life these private actors have engaged in behaviours that appear to cross this line, such as providing security services to valid military targets,

---

<sup>18</sup> See e.g., “How is the Term “Armed Conflict” Defined in International Humanitarian Law?” International Committee of the Red Cross (ICRC) Opinion Paper, March 2008.

<sup>19</sup> See e.g., *The Prosecutor v. Fatmir Limaj*, Judgment, IT-03-66-T, 30 November 2005, para. 135-170.

<sup>20</sup> After the transfer of authority from the US-led Coalition Provisional Authority (CPA) to the Iraqi interim government on 30 June 2004, Iraq has been widely regarded as an NIAC in which the US and the Multinational Forces (MNF-1) are present in Iraq *at the invitation* of the Iraqi government. As such the MNF-1 are transformed into ‘honorary Iraqis’, and do not constitute invading foreign forces that would trigger an IAC.

<sup>21</sup> See e.g., the three, soon to be four, reports of ICRC Expert Meeting on the Notion of Direct Participation in Hostilities, available at the ICRC website at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205?opendocument>

or engaging in activities of “escalation of force.”<sup>22</sup> When they act in this way towards civilians who are not participating in hostilities, they violate the ‘principle of distinction’ under the Geneva Conventions, which in contrast to most international conventions is directly applicable to non-state agents. Armed non-state actors are generally considered to be ‘incorporated into the state armed forces’ when the state takes the positive action of notifying the other parties to the conflict that <sup>23</sup> they have accepted the non-state actors into their forces.

*The International Criminal Court.* The International Criminal Court (ICC) has spelled these out violations of the Geneva Conventions of 1949 as war crimes in a clear-to-understand fashion, enlarging them by incorporating aspects of international customary law.<sup>24</sup> Key to our discussion relating to PMSCs, if PMSCs violate the laws of war such as the principle of distinction within the context of an armed conflict, and they are either a national of, or commit this violation on, the territory of a signatory to the treaty of the ICC, they can be tried for war crimes in their own home state courts, or owing to the principle of complementarity,<sup>25</sup> at the ICC in The Hague.

*The Additional Protocol I of 1977 to the Geneva Conventions of 1949.* Responding to the growing phenomenon of state governments hiring mercenaries to suppress national liberation movements, the Additional Protocol I of 1977 to the Geneva Conventions of 1949 (AP I) specifically addressed mercenaries in article 47, depriving them of the status of combatant or prisoner of war should they be captured by enemy forces. Defining the term ‘mercenary’ according to six cumulative conditions, this definition has been largely

---

<sup>22</sup> As defined by the US Congress in its Congressional Report on Blackwater's operations in Iraq, incidents of “escalation of force” describe activities in which live ammunition was fired. In 80% of these incidents, Blackwater fired first, “Memorandum: Additional Information about Blackwater SA,” October 1, 2007.

<sup>23</sup> Additional Protocol I to the Geneva Conventions of 1949, Article 43(3).

<sup>24</sup> International customary law is created through practice + *opinion juris*, or the opinion that such practice is required under the law, and has a binding status akin to written laws.

<sup>25</sup> Complementarity’, codified in Article 17 of the ICC Statute, allows for the ICC to assume jurisdiction over violations of ICC crimes where the national courts are either ‘unwilling or unable genuinely to carry out the investigation or prosecution.’ This assumption of jurisdiction does **not** require the assent of the divested court.

considered to be ‘unworkable’,<sup>26</sup> and to the authors’ knowledge has never been successfully enforced. However, despite its significant drawbacks, article 47 is remarkable as the first convention dealing explicitly with the legal status of mercenaries, or a type of armed non-state actors for hire, under international humanitarian law.<sup>27</sup>

*The UN Mercenary Convention.* In an effort to give some teeth to article 47 AP I, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (Mercenary Convention) adopted by the General Assembly in 1989 requires state parties to criminalise the very act of being a mercenary as defined in article 47 AP I.<sup>28</sup> Unfortunately, this convention is also largely considered as ineffective, suffering from the same deficiencies as its inspiration in AP I. However, the Mercenary Convention has contributed some significant innovations to regulatory approaches of armed non-state actors, such as criminalising in Article 2 the act of recruiting, using, financing or training of these private fighters, meaning that such persons or companies hiring, or those clients using, non-state armed actors can also be held criminally liable. The Mercenary Convention also includes situations in which armed private actors might participate in a NIAC. The Mercenary Convention is overseen by the Working Group on the Use of Mercenaries, which in recent times has focused on the growing industry of using PMSCs in current conflicts, notably referring to ‘militarily armed private soldiers’ as a new way to define mercenaries.<sup>29</sup>

*The European Union.* While the European Union (EU) has gone to great lengths to develop a common security and defence policy, and has implemented an EU Arms Export regime to regulate how arms are exported from EU member states, PMSCs have largely been ignored in these policies.<sup>30</sup> One reason for this is that despite the private and

---

<sup>26</sup> Lindsey Cameron, ‘Private military companies: their status under international humanitarian law and its impact on their regulation’, *International Review of the Red Cross* No 863 (2006), pp. 573-598.

<sup>27</sup> Edward Kwakwa, *The International Law of Armed Conflict: Personal and Material Fields of Application*, Martinus Nijhoff Publishers, 1992, p 124.

<sup>28</sup> See full text of the UN Mercenary Convention in the section “Dokumentation” in this issue.

<sup>29</sup> Press Release UN Working Group on Use of Mercenaries, ‘Unregulated Activities by Private Military Security Companies is Major Cause of Concern.’ 10 March 2008.

<sup>30</sup> For a listing of EU directives which may possibly affect PMSCs, see Alyson J. K. Bailes and Caroline Holmqvist, *The Increasing Role of Private Military and Security Companies*,

free-market aspects of PMSC export, they have typically been viewed as part of a member state's national defence policy, the transactions for which have been generally exempted from the normal rules of the Single Market and from Treaty provisions Article 296 in the Treaty on European Union.<sup>31</sup> However, in recent times, the European Parliament has also expressed some interest in developing common standards for PMSCs, particularly regarding those actors used in European Security and Defence Policy (ESDP) missions.<sup>32</sup>

*Customary International Law.* There also exists a recognised body of binding international law that is not necessarily found on paper. 'Customary International Law' (CIL) is defined as binding law created by state practice (physical and verbal acts of states and state agents) done with the conviction that such practice is required by law.<sup>33</sup> Such state practice should be 'extensive and representative'<sup>34</sup> of state behaviour. The ICRC has published an extensive study of CIL as applicable to armed conflict, which lists rules they deem to be binding as a matter of customary law. These rules include many that could apply to PMSC activities, such as the prohibition of 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population' (rule 2) and the requirement that 'all feasible precautions must be taken to avoid, in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects' (rule 15).<sup>35</sup>

*The Swiss PMSC Initiative.* Seeking to address gaps in international humanitarian law as it applies to PMSCs, the Swiss government in cooperation with the International

---

EP/EXPO/B/SEDE/FWC/2006-10/Lot4/09, October 2007, pp. 24-25, available on-line at [http://www.isis-europe.org/pdf/2008\\_artrel\\_145\\_07-10-epstudy-pmc&psc.pdf](http://www.isis-europe.org/pdf/2008_artrel_145_07-10-epstudy-pmc&psc.pdf).

<sup>31</sup> For a listing of EU directives which may possibly affect PMSCs, see Alyson J. K. Bailes and Caroline Holmqvist, *The Increasing Role of Private Military and Security Companies*, EP/EXPO/B/SEDE/FWC/2006-10/Lot4/09, October 2007, pp. 24-25, available on-line at [http://www.isis-europe.org/pdf/2008\\_artrel\\_145\\_07-10-epstudy-pmc&psc.pdf](http://www.isis-europe.org/pdf/2008_artrel_145_07-10-epstudy-pmc&psc.pdf).

<sup>32</sup> EP-SEDE meeting, 5 May 2008, at which Chairman Wodarg expressed an interest in conducting a mapping study of the use of PMSCs in ESDP missions.

<sup>33</sup> See e.g., the ICRC's discussion on Customary International Law, last accessed online 26 August 2008 at <http://www.icrc.org/eng/customary-law>.

<sup>34</sup> Ibid.

<sup>35</sup> Please see Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, 2 volumes, Volume I. Rules, Volume II. Practice (2 Parts), Cambridge University Press, 2005.

Committee of the Red Cross (ICRC) recently initiated an intergovernmental dialogue on how to ‘ensure and promote respect for international humanitarian and human rights law’<sup>36</sup> by states and PMSCs operating in areas of armed conflict. While not strictly-speaking an international convention, this initiative has sought to improve international regulation of PMSCs through its stated objectives:

- to contribute to the intergovernmental discussion on the use of private military and security companies:
- to reaffirm and clarify the existing obligations of states and other actors under international law, in particular under international humanitarian law and human rights law;
- to study and develop good practices, regulatory options and other appropriate measures at the national, possibly regional or international level, to assist states in respecting and ensuring respect for international humanitarian law and human rights law.<sup>37</sup>

Praised for its inclusive and even-handed approach<sup>38</sup>, the Swiss Initiative has brought together representatives from governments, human rights NGOs and the PMSC industry to achieve consensus on how to best achieve the above stated objectives. These discussions have resulted in a draft text that reaffirms international legal obligations as they would apply to PMSCs, and offers good practices for states to aid them in fulfilling these obligations. These efforts should culminate in a final text to be endorsed by a High Level Meeting of Legal Advisers of participating governments in mid-September 2008.<sup>39</sup>

### **3.2. Overview of domestic regulation of exported PMSCs**

---

<sup>36</sup> Overview of the Swiss Initiative available on-line at <http://www.eda.admin.ch/psc>.

<sup>37</sup> Outline of the Swiss Initiative, November 2007, p. 2., available on-line at <http://www.eda.admin.ch/psc>.

<sup>38</sup> See e.g., Doug Brooks, “The Swiss Show Some Initiative”, *Journal of International Peace Operations*, Vol. 3, No. 6, May-June 2008, p.4.

<sup>39</sup> This final text, however, is not meant to have the legal status of an international convention. For further information, see the website of the Swiss Initiative at <http://www.eda.admin.ch/psc>

In addition to these supranational frameworks, several states have implemented laws which apply extraterritorially, mostly to their own nationals. With some important exceptions, most of these laws were not intended to apply to private actors providing security services abroad. Domestic regulation of PMSCs operating beyond the countries borders can be broken down into two main categories: 1) regulation that applies extraterritorially to nationals working abroad, and 2) regulation that applied territorially to foreign PMSCs imported into the territory

#### Extraterritorial application of laws

Spanning the gap between the international and national spheres of law are those domestic laws that have the *de jure*, if not *de facto*, effect of replacing the domestic laws of another jurisdiction. Laws that have extra-territorial effect and visiting forces agreements are two such examples.

By means of a jurisdictional link (usually through nationality or state of incorporation), laws with extraterritorial effect provide that they apply to the person or entity's actions in another territorial jurisdiction. For example, as discussed in greater detail below, several countries have enacted laws attempting to regulate the behaviour of PMSCs working abroad, even providing for criminal sanctions. Visiting forces agreements (VFAs), also variously known as Status of Forces Agreements (SOFAs) and Status of Visiting Forces Agreements (SOVFAs)<sup>40</sup> are a kind of extraterritorial application of domestic law which is agreed to in an international treaty. These VFAs are typically agreed bilaterally between two states, when the visiting state has an armed forces presence on the territorial state. VFAs also provide for the extraterritorial application of the visiting state's laws, with the important addition that the territorial state has agreed that its own laws will not apply to visiting forces

#### Examples of extraterritorial legislation of selected countries

*United States.* While much has been said in the US about the current lack of regulation applicable to PMSCs hired by the US, a more accurate complaint would be

---

<sup>40</sup> SOFAs are commonly used to denote agreements entered into between the US and other states, SOVFAs to those between Australia and other states, and VFAs to those entered into between the UK and other states.

of a lack of enforcement of a complex and copious agglomeration<sup>41</sup> of extraterritorial US legislation potentially applicable to PMSCs. This lack of enforcement is ostensibly due to two reasons: 1) a lack of clarity as to how the laws—most of which were not drafted with PMSCs in mind--can be practically applied to PMSCs, and 2) a lack of effective oversight procedures and mechanisms in order to properly investigate and try/prosecute alleged violations committed abroad. However, this may not fully explain the dearth of PMSCs who have been held accountable under the many laws--some authors have termed the failure of the US to hold its contractors accountable as the gulf between the ‘law on the books’ and ‘law in action’<sup>42</sup> or, perhaps more bluntly, a lack of ‘political will to investigate and prosecute cases of criminal misconduct by contractors.’<sup>43</sup>

The infamous September 2007 incident involving Blackwater in which 17 civilians were killed sheds harsh light on the difficulties in prosecuting PMSCs under US extraterritorial laws. Now nearly a year later, during which time a grand jury has been reportedly investigating the incident, no contractors have yet to be charged for the shootings. However, there are hints that this could soon change. Recent reports indicate that federal prosecutors have sent ‘target letters’ (often one step before indictment) to six contractors involved in the shootings.<sup>44</sup>

*France.* Following the lead of the Mercenary Conventions, the French law Relative to the Repression of Mercenary Activities<sup>45</sup> criminalizes the taking or attempting to take direct part in hostilities by persons who have no national or State agency relation to an armed conflict, and who do so “in order to gain a personal advantage.” In so doing, this

---

<sup>41</sup> Please see the attached Annex prepared by Kevin Lanigan of Human Rights First containing key US legislation applicable to PMSCs.

<sup>42</sup> Kevin Lanigan, ‘Legal Regulation of PMSCs in the United States: The Gap between Law and Practice’, *Sicherheit und Frieden*, Fall 2008, p 4.

<sup>43</sup> Erica Razook, « Online-debate on Private Security Contractors, » Council on Foreign Relations, 13 December 2007, last accessed 26 August 2007 at: <http://www.cfr.org/publication/15032>.

<sup>44</sup> Del Quentin Wilber and Karen De Young, ‘Justice Dept. Moves Toward Charges Against Contractors in Iraq Shooting’, *The Washington Post*, 17 August 2008, last accessed online 25 August 2008 at: <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/16/AR2008081601967.html?hpid=moreheadlines>

<sup>45</sup> LOI n° 2003-340 du 14 avril 2003 relative à la répression de l'activité de mercenaire (French Law Relative to the Repression of Mercenary Activities ).

legislation significantly broadens the motivational aspect of the Mercenary Convention by dropping the requirement that such persons must be paid more than their state counterparts. This change in language increases the likelihood that a person could actually fulfill the criteria to be classified as a mercenary, but it does not remedy other weaknesses in the definition, particularly those relating to the ambiguous definition of prohibited duties, namely that so-called mercenaries are “specially recruited to fight”, with “fight” undefined under the convention or under other sources of international law. At the time of this writing, the authors know of no French citizens who have been prosecuted under this law.

Although France maintains a strong tradition of the state monopoly on the use of force, even prohibiting most domestic private security guards from bearing arms, for over 30 years the Ministry of Defense has overseen the export of security-related services such as training, technical assistance and consulting services by both state and non-state actors through the parastatal entity *Défense Conseil International*. Recently, the traditional monopoly on the use of force by France has been challenged even further, with the emergence of PMSCs operating on the anglo-saxon model<sup>46</sup> which claim to offer the full gamut of PMSC services, including providing security to NGOs in areas of insecurity. It is unclear to what extent these new businesses operate in accordance with the French mercenary law.

*Switzerland.* The Swiss military penal code makes it a crime for Swiss nationals to take up service in a foreign army.<sup>47</sup> Recently, this law was the basis for the attempted prosecution of a Swiss citizen who worked as a security contractor for Blackwater during the recent conflict in Iraq. Essentially, the main question considered by the court was whether working for the PMSC Blackwater was equivalent to working for a “foreign army” within the meaning of the law. Unfortunately, the charge was dismissed without answering this question. The court reasoned that in order to make such a determination, investigations would have to be conducted on the territory of Iraq in order to determine

---

<sup>46</sup> *E.g.*, the Private Military Company Sécopex.

<sup>47</sup> Article 94, Code Pénal Militaire Suisse du 13 juin 1927.

whether Blackwater was acting on the behalf of the American Army, and the Swiss military justice was not able to conduct such investigations.<sup>48</sup> The court went on to fine the accused for subsequently attempting to join the French Foreign Legion.

This Swiss case illustrates two problems common to domestic regulation potentially applying extraterritorially to PMSCs: 1) most legislation makes the assumption that providing military/security services will be done by public bodies, such as the state armed forces (consequently leaving unanswered the question whether or not a PMSC is equivalent to a ‘foreign army’); and 2) the practical evidentiary requirements for making this and other relevant determinations typically requires costly investigations conducted abroad, for which most domestic tribunals do not have the capability to perform.

### **3.3 Domestic regulation of imported PMSCs**

The territorial state upon which foreign contractors provide services is in a good position to regulate and oversee PMSCs, however this presupposes the questionable fact that the state is not too weakened by war or other conflict to perform these duties. Domestic regulation of imported PMSCs can alleviate some of the more troublesome weaknesses inherent to laws applying extraterritorially from far away, such as easier access to the areas where violations are alleged to have taken place in order to conduct investigations, and physical custody of the alleged offender. As a major PMSC “importing” state, Afghanistan has recently attempted to develop a domestic regulatory framework of imported foreign PMSCs in order to bring this burgeoning market under some kind of control.

---

<sup>48</sup> Denis Masméjan, « Le droit militaire n’est pas adapté au problème du mercariat », *Le Temps*, 8 August 2008, available online at <http://www.letemps.ch/template/suisse.asp?page=5&contenuPage=&article=237272&quickbar=>

Case study: Afghanistan.<sup>49</sup>

The recent attempts of the Afghan government to put in place a regulatory regime of foreign PMSCs opens a window onto the challenges faced by domestic regulation of these imported actors. A recent study estimated that there were a minimum of 90 PMSCs operating in Iraq with between 18,500-28,000 staff wielding some 43,750 weapons. Perhaps partially in response to an overwhelmingly negative public opinion of such actors in Afghanistan, the Afghan government recently began a campaign to put in place PMSC legislation. However, subsequent conflicts among the various ministries that thwarted such legislation--even leading to a brief outright ban on the use of PMSCs in Afghanistan--resulted in the MoI developing an administrative regulatory framework that would temporarily regulate PMSCs until a law could be passed by the Afghan parliament.

*Procedures for Regulating Activities of the Private Security Companies in Afghanistan* was completed by the MoI in February 2008, resulting in a licensing framework for foreign PMSCs. The regulation established a High Coordination Board (HCB) to oversee licensing, and to which all licensed companies are required to report their performance and activities quarterly. Companies are required to be licensed, with separate licenses required for each weapon and armoured vehicle operated by PMSCs. Foreign staff are required to submit a certified document from their home country and Interpol attesting that they have no criminal record, and should not be suspected or accused of human rights violations committed within Afghanistan as confirmed by the Afghanistan Independent Human Rights Commission. PMSC staff must also undergo training, including on the use of and maintenance of weapons (which should not exceed a diameter of 7.62 mm). Rules for the use of deadly force--including explicit prohibitions against its use under certain circumstances--have been elaborated, and limitations have been placed on the security duties they may perform.

---

<sup>49</sup> The information for this section was largely drawn from Susanne Schmeidl, "Case Study Afghanistan – Who Guards the Guardians?" Pp.14-45 in *Private Security Companies and Local Populations: An Exploratory Study of Afghanistan and Angola*. Swisspeace report, November 2007, and Stephen Brooking and Susanne Schmeidl, "When nobody guards the guards: The quest to regulate private security companies in Afghanistan," *Sicherheit und Frieden*, vol. 4, Fall 2008.

### Case Study Afghanistan: lessons learned

However, while the regulation is a valiant attempt to oversee private actors operating within Afghanistan, with particular strengths lying in its attempts to licence PMSCs and limit the activities they can perform, the regulation has already missed key deadlines in its implementation with the net effect that PMSCs are still operating in an unregulated environment. This is largely due to the following weaknesses in the regulation and its implementation:

*Lack of an effective international vetting processes.* This raises a key difficulty caused by the shifting of roles traditionally performed by public actors to private substitutes, particularly when state lines are crossed. When a state vets persons it wishes to hire to perform duties requiring the threat of or the use of force, it typically has access to relevant national sources of information which provide indications about candidates' fitness to use force (criminal records, civil complaints alleging human rights violations, etc.). Such national sources are often not available during the vetting process of foreign PMSCs, depending upon the cooperation of their foreign states of nationality. Furthermore, as the certificates from Interpol, as well as from the Afghan Independent High were found not to exist, these requirements were waived, raising the spectre that prior violations and crimes committed outside the state of nationality would not be discovered.

*Lack of effective oversight.* PMSCs providing services abroad are operating in the not uncommon situation where both territorial, as well as country of nationality, oversight is weak or nonexistent. The regulation sought to fill this gap by the creation of the HCB, but due to inadequate staffing as well as considerable reported corruption, it has not been able to meet the demands or deadlines of the regulation. Furthermore, related to the problem above, states of PMSCs nationality are typically unable to provide any effective oversight of their nationals on foreign territory. This contrasts with the state armed forces whose conduct is overseen by their military superiors, and whose alleged violations may be tried abroad by military courts.

*Lack of effective enforcement.* With all of the above failures, it is no surprise that the regulation has not effectively been enforced. Reports abound of local police extolling bribes from PMSCs as a kind of alternative ‘license’ casting doubt on the local authorities willingness to enforce the regulation. Once again, this contrasts with the state armed forces who typically have a system of military justice to hold soldiers accountable for violations of the military code, including those of human rights.

### **3.4 Current regulation of the export of PMSCs: Gaps and Good Practices**

Taking the foregoing discussions as a whole, both gaps and good practices in the regulation of PMSCs can be ascertained. As a general rule, gaps in the applicability of regulation stem from the prevailing view that PMSCs are non-state agents/actors, even as they are hired to perform roles that have been traditionally performed by state agents. Regulatory frameworks on both international and national levels have each their strengths and weaknesses in their ability to oversee and hold PMSCs accountable, which will be discussed in greater detail below.

#### International regulation

International regulatory frameworks are most effective in governing those situations where two or more states have interests, and therefore are best adapted to respond to the problem of multiple nationalities that is often found in PMSCs. However, the current international regulatory frameworks which could apply to PMSCs do not apply fully to the wide range of activities PMSCs are currently entrusted with on the international market. On the one hand, the GC of 1949 apply universally, and therefore apply equally to persons regardless of their nationality. However, because PMSCs are generally regarded as ‘civilians’ within the meaning of international law, their activities are only regulated under a fairly narrow set of circumstances, namely when they directly participate in hostilities within the context of an armed conflict. The ICC strengthens the enforcement of the GCs by restating violations of its obligations into distinct crimes, and by setting up an internationally-agreed framework through which crimes are investigated and prosecuted. It has also defied conventional wisdom that the international community

will not agree in large numbers to new treaties, perhaps in part by giving states primacy (but not a monopoly) in prosecuting crimes alleged to have been committed by their nationals. The other international conventions attempts at discouraging private actors from performing military and security duties for hire have largely failed, most likely due to unwieldy and unworkable definitions, underlying political tensions, as well as a lack of incentives for states to join them.

### Domestic regulation

The fact that very few PMSCs have actually been held accountable under domestic regulation applying abroad points to some significant obstacles encountered when trying violations in a venue distant from where they were committed. For example, conducting a criminal investigation in foreign territory – even with the full cooperation of the foreign state – faces strong difficulties in meeting the high evidentiary requirements of criminal trials. However many national courts simply lack the resources to conduct these investigations, such as was the case in Switzerland, meaning that the laws go unenforced. These problems are less of an issue when applied to the armed forces, who typically bring their own military code with them when deployed, often including a system of travelling military courts that are equipped to try soldiers on active duty abroad. However, there has been reluctance to try civilians, including PMSCs, in military courts where rights and protections may be lesser than in civil courts. There have been some recent legislative efforts in the US to bring PMSCs under the jurisdiction of military codes,<sup>50</sup> and therefore potentially under the jurisdiction of locally-based military courts. While PMSCs have not so far been held accountable under these codes for war crimes,<sup>51</sup> recent reports indicate that courts may have more to say on this issue in the near future.

---

<sup>50</sup> US extension of Uniform Code of Military Justice to contractors of the DoD, and possibly to other state agencies in the U.S. John Warner National Defense Authorization Act for FY2007 (P.L. 109-364)..

<sup>51</sup> For further discussion, *see* Kevin Lanigan, ‘Legal Regulation of PMSCs in the United States: The Gap between Law and Practice’, *Sicherheit und Frieden*, Fall 2008.

## **4. Overview of legislation of PMSCs providing domestic security within CoE member States**

Domestic regulation of PMSCs acting within a given state's territory where no armed conflict exists is more common and is easier to effect than international regulation. However, no single model exists for regulating domestic PMSCs in CoE member States. On the contrary, due to historical, cultural and legal political factors as well as the specific security situation, states have adopted different approaches.

### **4.1 Different domestic approaches to regulation of private security**

Earlier research (focused on Council of Europe member states),<sup>52</sup> has distinguished four domestic regulatory approaches. Firstly, some CoE member States do not have any regulation of domestic PMCSs in place, e.g. Serbia and Cyprus. In these countries, private security forms an unregulated industry with the risk of leading to various undesirable consequences such as: links between organised crime and private security; an undesirable accumulation of functions by private security companies, and unclear relations between private security companies and public police. Secondly, other countries apply their general commercial regulatory framework to private security companies. This is the case in, for example, Germany and Austria. There are, however, still questions about this general commercial approach to the regulation of PMCSs because of the specific concerns related to the private security industry. In particular, the chamber of commerce as regulatory authority may lack the necessary expertise and enforcement capacity to deal with the public-private security interface as well as the special concerns related to the protection of human rights. Thirdly, another group of states does not possess one single national regulatory framework, but leaves the regulation to subnational authorities, e.g. in Switzerland, the United States, Bosnia-Herzegovina and Italy. This leads to a situation in which rules for PMCSs vary across the country and may lead to an

---

<sup>52</sup> Hans Born, Marina Caparini and Eden Cole, 'Regulating Private Security in Europe: Status and Prospects,' DCAF Policy Paper no. 20, (2007), p. 38.

unequal treatment of private security companies within one country's borders. As last group of CoE member States has adopted laws that regulate PMSC providing security services within its territory, examples are UK, Ireland, Netherlands.

## 4.2 Scope of regulation

In most CoE member States, the domestic regulation of PMSCs refers to what are commonly considered to be 'private security services'<sup>53</sup> in peacetime, and not to private military services. Typically domestic regulation of private security refers to companies providing services in the area of guarding of valuable transportation, guarding of private property, guarding of public property (e.g. airports, power plants, military bases etc.) as well as body guarding, maintaining order at public events, and the prevention and detection of theft, loss, misappropriation of valuables.

While the specific form and content of regulation may differ from state to state, domestic regulations tend to deal with the following aspects of PMSCs: links between private-public security, the control of PMSCs, entrance requirements, selection and recruitment of private security personnel, training of PMSCs, identification of private security personnel, use of firearms by PMSCs, and search and seizure powers of PMSCs. Without elaborating on each of these aspects of domestic regulation,<sup>55</sup> it is important to identify to what extent PMSC employees enjoy special powers that could impinge upon essential human rights, such as the right to use or threaten deadly force, to search persons or objects, as well as to arrest persons. With regards to these special powers, two basic policies can be identified. Firstly, in some states PMCS employees have no more powers than other citizens, e.g. in the Netherlands, Cyprus, UK, Germany, Czech Republic and Finland. Secondly, in other countries PMSC employees are granted with limited powers, e.g to arrest persons who violate the law who have illegally entered a guarded object (Latvia). In particular it is important to have strict regulations enforced concerning the possession and use of firearms. While in some states PMSC employees are prohibited

---

<sup>53</sup> Ibid.

<sup>55</sup> An in-depth discussion of these forms of regulation can be found in: Born/Caparini/Cole, *supra* note 37.

from carrying and using firearms (e.g. France, Ireland, UK, Denmark and the Netherlands), in other states PMSCs are allowed to carry and use light firearms under specific circumstances. Within the European context, it is hard to identify a state with “the best” regulation. Some states may have very strong regulation of one aspect but are weak in other aspects of private security regulation. For example, Austria imposes strong requirements for recruitment but has no regulation for training of private security personnel.<sup>56</sup>

### **4.3 Oversight and enforcement**

The enforcement of the legal framework is of particular importance. To this effect, various states have set up oversight institutions which monitor PMSCs activities. Within the EU, a great variety of oversight institutions exercise oversight of domestic private security companies. In some states,<sup>57</sup> PMSCs come under control of the local police (e.g. in Greece, Denmark, Hungary and Slovakia); in other states local civil authorities are responsible for controlling the sector (e.g. Germany, Italy and Sweden); the Minister of Interior controls the sector in Slovenia, Poland, Italy and the Netherlands; the Minister of Justice in Luxembourg. Ireland and the United Kingdom form an interesting case in point as these countries have established a specialised security authority which oversees the domestic private security sector. Oversight is highly fragmented in those states that have a federal form of government with varying rules and oversight institutions on the sub-national level.<sup>58</sup>

Another issue is how oversight is exercised. Is the oversight limited to ‘paper’ control only, i.e., requesting that the PMSCs submit yearly reports? Or does oversight include inspection visits, both announced and unannounced? Another option is that oversight is complaint-based, triggering investigations of particular PMSCs. A last aspect of control is the availability of sanctions if wrongdoing is detected. Different sanction regimes are

---

<sup>56</sup> Tina Weber, ‘A comparative overview of legislation governing the private security industry in the European Union’, CoESS/UNI Europe, Brussels, 11 April 2002, p. 32

<sup>57</sup> The information on the states listed in this section are based on: ‘Panoramic Overview of private security industry in 25 member states of the European Union’, CoESS and UNI-Europa, 2004.

<sup>58</sup> Born/Caparini/Cole, *supra* note 7, p. 21.

in place across EU member states, varying from fines, temporary or permanent withdrawal of licences to imprisonment

## **5. The Way Forward**

The CoE key concept of "Democratic Security" is the point of departure for regulating of PMSCs providing private security services. Democratic security implies the adoption of regulation, practices and policies that promote democratic accountability, commitment to the rule of law and respect for human rights in the area of private security. Regarding PMSCs providing private security services, the European Convention for Human Rights should be treated as a minimum standard for regulating PMSCs.

### **5.1. Common essential ‘elements’ required for effective PMSC regulation**

Having taken a look at the various existing regulatory frameworks that could apply to PMSCs, it would be folly to complain of a dearth of regulation. Rather, what is lacking are effective regulatory mechanisms that contain the following elements:

- Common standards for obligations and duties of PMSCs, including prohibitions on PMSCs performing ‘inherently governmental’<sup>59</sup> duties;
- An effective PMSC vetting system;
- Licensing and training requirements for PMSCs who threaten or use force;
- An effective oversight and investigatory system;
- Effective enforcement mechanisms that hold accountable those persons and entities that violate human rights and international humanitarian law obligations.

---

<sup>59</sup> ‘Inherently governmental’ duties have been defined in US law as those ‘means a function that is so intimately related to the public interest as to require performance by Federal Government employees’, typically interpreted as including direct participation in hostilities, criminal investigations and interrogations. *See, e.g.,* Federal Activities Inventory Reform (FAIR) Act, Pub. L. 105-270, 112 Stat. 2382 (1998).

<sup>72</sup> Such as the EU Arms Control Export system, or the US Arms Export Control Act. The UNGA voted in October 2006 in favor of developing a UN Arms Export Control Treaty, and such a treaty is expected to be voted on sometime in 2009.

## **5.2. Recommendations for the regulation of the export of PMSC services**

In order to effectively apply these elements to the export of PMSC services across territorial borders, we would propose the following approaches:

### International convention on PMSC regulation

Such a convention would set common international standards for the duties performed by PMSCs—regardless of their particular nationality—as well as uniform training and licensing requirements to be ideally overseen by an international multistakeholder (state, industry, civil society) commission which would conduct investigations into alleged violations and facilitate trials. Operating according to a system of complementarity would protect individual state interests .

Advantages:

- Most reliable legal mechanism by which to hold PMSCs and staff accountable for criminal violations;
- Vehicle most able to contain all of the ‘elements’ listed above;
- States take back the ‘monopoly on the use of force’ through their implementation of the convention.

Disadvantages:

- PMSCs would not be subject to direct obligations;
- Onerous process of treaty implementation could mean that it will not regulate PMSCs uniformly for a long time.

### ‘Private’ framework for regulating PMSCs

As state functions shift to the private sector, this recommendation envisages a private-sector mechanism for resolving complaints adapted to fit the particular situation of PMSCs. Inspired by arbitration models, this vehicle would consist of a code of PMSC conduct as well as a formal dispute resolution mechanism specially formulated to hear complaints of PMSC wrongdoing, with investigations led by, for example, a ‘PMSC Ombudsman’ and/or investigation team. The code would be developed by representatives from PMSC industry, civil society and states, and PMSCs would formally

agree to be bound by the code, and to attend hearings when claims of violations have been made against them. Tribunal “judges” would be composed of a panel that includes persons with experience in PMSC issues (staff of PMSCs, civil society and states)

Advantages:

- In contrast to an international convention, PMSCs would be directly bound by obligations contained in the PMSC code;
- Flexible nature of framework should allow it to contain all of the ‘elements’ listed above;
- Decisions rendered in arbitral tribunals are usually enforceable in most jurisdictions;
- PMSCs would likely prefer to have complaints decided by persons who are familiar with the particular issues surrounding PMSCs.

Disadvantages:

- Unclear that such a venue could be fashioned to meet the minimum requirements of fair criminal trials;
- Supports the erosion of the state monopoly on the use of force by ‘privatising’ oversight and accountability mechanisms

### PMSC Export Regimes

Arms export regimes<sup>72</sup> can inform and influence the export of PMSCs – indeed what is the difference between exporting arms and military/security services to conflict zones? For example, a ‘PMSC export regime’ could prohibit the export of PMSCs to areas where there is a clear risk that sending such actors could provoke or prolong an armed conflict, or where there is a "clear risk" that the PMSC services would be used aggressively against another country.<sup>73</sup>

Advantages:

- Would provide for some standards and oversight of PMSCs crossing borders
- Could be implemented by including PMSC services in existing arms control frameworks (EU and UN) without need to invent a new framework;

---

<sup>73</sup> See the EU Code of Conduct on Arms Exports of 8 June 1998, available online at <http://www.consilium.europa.eu.uedocs/cmsUpload/08675r2en8.pdf>

- Existing arms export regimes could inform and advance international standards on appropriate PMSC export.

Disadvantages:

- By itself it does not create an effective regulatory framework of the export of PMSCs.
- Does not adequately address the above-mentioned elements of common PMSC standards and duties, effective vetting systems, training requirements and accountability and enforcement mechanisms.

International PMSC Code of Conduct / Guidelines

To be effective, such an instrument would need to restate international law obligations in the light of PMSC duties, offering clear direction on how PMSCs can provide security in accordance with these obligations.

Advantages:

- Would offer PMSCs clear guidelines on how and when they can use force in accordance with international law;
- PMSCs would have incentives to adopt them as a legitimisation of their services.

Disadvantages:

- By itself it does not create an effective regulatory framework of the export of PMSCs;
- Does not adequately address the above-mentioned elements of effective vetting systems, democratic accountability and oversight, licensing/training requirements and personal accountability for violations of human rights standards.

By regulating PMSCs who provide PMSC services across borders under a unified regime at the international level, as opposed to multiple regimes at the domestic law level, this simplifies oversight and enforcement, reduces the opportunities for corruption and obstruction such as is the case in Afghanistan, and contributes to the development and consolidation of common standards across multiple jurisdictions, bringing clarity to the duties and standards of these actors thus removing the 'grey areas' of uncertainty.

### **5.3 Recommendations for the regulation of domestic PMSC services within the Council of Europe**

In order to effectively apply these elements to the domestic use of PMSC services, we would make the following recommendations:

- Annex 2 includes the recommendations for regulating private security within CoE member States, as suggested by an earlier study commissioned by the CoE Council for Police Matters. These recommendations vary from regulating vetting of PMSC employees, training of PMSC employees, licensing of PMSCs, corporate accountability, oversight over PMSCs and relations with public police as well as transnational PMSCs. At a minimum, CoE member states should regulate the licensing, vetting, training, oversight and powers of PMSCs and their employees.
- Three options are available to regulate PMSCs providing private security services in CoE member States:
  - o Not to change the current situation of great difference of PMSC legislation within the CoE region, leading to an uneven protection of citizens' human rights and fundamental freedoms against undue interference by PMSCs;
  - o To adopt non-binding CoE guidelines for the regulation of PMSCs in CoE member States;
  - o To adopt a CoE convention that would set binding CoE minimum standards for regulating PMSCs
- In addition to options for regulation, we recommend to organise seminars and workshops with the objectives to underline the scope and urgency of PMSC regulation among CoE parliamentarians and their staff

#### **5.4. Next Steps—A Call to Action**

All of the above recommendations for export of PMSCs would require the next step of convening an international conference composed of representatives of states, PMSC industry and civil society to build consensus on common PMSC standards and appropriate PMSC duties. In crafting a new international convention or the more unorthodox ‘private framework’ for regulating PMSCs, as well as a PMSC export regime, developing an effective international vetting network for both private companies as well as their individual staff members is crucial to their success, and would require cooperation between states. While recognising that the CoE is a regional organisation, it nevertheless is one with wide reach and influence. Beginning the discussions on the important issue of PMSC regulation among PMSC stakeholders is an important step towards promoting the rule of law and other fundamental human rights in regards to PMSCs within the greater CoE area, and could serve as an important stepping stone to achieving common international standards within the CoE and beyond. With this goal in mind, we strongly urge that the CoE begin taking concrete steps towards crafting and implementing international PMSC regulatory frameworks.

## Annex I: Key US Legislation Applicable to PMSCs

<b><u>Legal Provision</u></b>	<b><u>Comment</u></b>
<b>Federal Statutes</b>	
Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, <a href="http://www4.law.cornell.edu/uscode/28/1350.notes.html">www4.law.cornell.edu/uscode/28/1350.notes.html</a>	Provides federal court jurisdiction over any civil action by an alien for a tort (civil wrong), committed in violation of the “law of nations” or a U.S. treaty.
Anti-Torture Act, 18 U.S.C. §§ 2340-2340B, <a href="http://www.law.cornell.edu/uscode/18/usc_sup_01_18_10_I_20_113C.html">www.law.cornell.edu/uscode/18/usc_sup_01_18_10_I_20_113C.html</a>	Implements the obligation to criminalize torture under Article 5 of the United Nations Convention Against Torture and Cruel, Inhuman and Degrading Treatment, applying only to prohibited acts attempted or committed outside U.S. territory, but applying to U.S. nationals found anywhere in the world, and to anyone found in the United States.
Arms Export Control Act (AECA), 22 U.S.C. § 2778, <a href="http://www.law.cornell.edu/uscode/html/uscode22/usc_sec_22_00002778----000-.html">www.law.cornell.edu/uscode/html/uscode22/usc_sec_22_00002778----000-.html</a>	Controls the export (and import) of certain defense-related articles and services, including PSC services.
Federal Activities Inventory Reform (FAIR) Act, Pub. L. 105-270, 112 Stat. 2382 (1998), <a href="http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_public_laws&amp;docid=f:publ270.105">frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_public_laws&amp;docid=f:publ270.105</a>	Requires identification of federal government functions that are not “inherently governmental” as a predicate for private contracting.
Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), <a href="http://www.law.cornell.edu/uscode/html/uscode28/usc_sup_01_28_10_VI_20_171.html">www.law.cornell.edu/uscode/html/uscode28/usc_sup_01_28_10_VI_20_171.html</a>	Permits private parties to sue the U.S. government in a federal court for most torts committed by persons acting on behalf of the United States.
Foreign Assistance Act (FAA), 22 U.S.C. §§ 2301-2349bb-4, <a href="http://www.law.cornell.edu/uscode/html/uscode22/usc_sup_01_22_10_32_20_II.html">http://www.law.cornell.edu/uscode/html/uscode22/usc_sup_01_22_10_32_20_II.html</a>	Authorizes (with AECA, above) the Foreign Military Sales (FMS) program, which regulates some U.S. PMSC military- and police-training operations abroad.
Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. §§ 3261-67, <a href="http://www.law.cornell.edu/uscode/18/usc_sup_01_18_10_I_20_212.html">www.law.cornell.edu/uscode/18/usc_sup_01_18_10_I_20_212.html</a>	Permits the prosecution in U.S. federal court of certain persons who commit acts that would be crimes under the SMTJ punishable by imprisonment for more than a year, had the conduct occurred within the United States, including employees and contractors of all US government agencies (excluding citizens and “usual” residents of the territorial state) “to the extent such employment relates to supporting the mission of” DoD.
Special Maritime and Territorial Jurisdiction (SMTJ) Act, 18 U.S.C. § 7, <a href="http://www.law.cornell.edu/uscode/18/usc_sec_18_00000007----000-.html">www.law.cornell.edu/uscode/18/usc_sec_18_00000007----000-.html</a>	Expands jurisdiction of U.S. courts to cover “buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of [U.S. government] missions or entities, irrespective of ownership” in a foreign state, with respect to certain enumerated offenses committed by or against a US national.
Torture Victims Protection Act (TVPA), PL 102-256, 106 Stat. 73 (1992), <a href="http://thomas.loc.gov/cgi-bin/query/D?c102:5:./temp/~c102HPEin0::">thomas.loc.gov/cgi-bin/query/D?c102:5:./temp/~c102HPEin0::</a>	Permits the filing of civil suits in the U.S. courts against individuals who, acting in an official capacity for any foreign nation, committed torture or extrajudicial killing.
Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801-946, <a href="http://www.law.cornell.edu/uscode/10/usc_sup_01_10_10_A_20_II_30_47.html">www.law.cornell.edu/uscode/10/usc_sup_01_10_10_A_20_II_30_47.html</a>	U.S. criminal law and procedure applicable to the U.S. military; in 2006 Congress amended the UCMJ to expand the U.S. military’s already-existing authority to prosecute crimes committed by civilians “serving with or accompanying” the armed forces to include civilians serving in a “contingency operation,” the current doctrinal term for the sorts of military operation in which the United

	States is currently engaged in Iraq and Afghanistan.
Victims of Trafficking and Violence Protection Act (VTVPA), Pub. L. 106-386, 114 Stat. 1464 (2000), <a href="http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_public_laws&amp;docid=f:publ386.106">frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_public_laws&amp;docid=f:publ386.106</a>	Requires the inclusion of clauses in federal contracts, grants and cooperative agreements for “major functional project, programs, or activities abroad,” allowing termination if the primary contractor or any subcontractor engage in trafficking, procuring a commercial sex act, or using forced labor.
War Crimes Act (WCA), 18 U.S.C. § 2441, <a href="http://www.law.cornell.edu/uscode/18/uscode_sec_18_0002441---000-.html">www.law.cornell.edu/uscode/18/uscode_sec_18_0002441---000-.html</a>	Authorizes the prosecution of war crimes committed anywhere in the world by or against a U.S. national or member of the U.S. armed forces.
<b>Federal Regulations</b>	
Defense Federal Acquisition Regulation Supplement (DFARS), <a href="http://www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html">www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html</a>	Provides additional regulations (beyond the FAR, below, that applies to all federal agencies) that DoD must apply in its PMSC and other contracts.
Federal Acquisition Regulation (FAR), <a href="http://www.arnet.gov/far/loadmainre.html">www.arnet.gov/far/loadmainre.html</a>	Provides detailed requirements governing U.S. government agency contracts with PMSCs (and other contractors), spanning the development of requests for contract proposals through termination of contracts.
International Traffic in Arms Regulations (ITARs), <a href="http://www.pmdtc.state.gov/official_itar_and_amendments.htm">www.pmdtc.state.gov/official_itar_and_amendments.htm</a>	Requires (under authority of the AECA, above) export licenses for U.S. PMSCs that do business abroad, and in connection with their business wish to ship and use certain weapons, protective equipment or electronics.
<b>Federal Agency Instructions, Field Manuals, Circulars &amp; Memoranda</b>	
Department of Defense Instruction Number 1100.22, <i>Guidance for Determining Workforce Mix</i> (Sep. 11, 2006; incorporating Change 1, Apr. 6, 2007), <a href="http://www.dtic.mil/whs/directives/corres/pdf/110022p.pdf">www.dtic.mil/whs/directives/corres/pdf/110022p.pdf</a>	DoD’s identification of its “inherently governmental” activities (required by OMB Circular No. A-76, below).
Department of Defense Instruction Number 3020.41, <i>Contractor Personnel Authorized to Accompany the U.S. Armed Forces</i> (Oct. 3, 2005), <a href="http://www.dtic.mil/whs/directives/corres/pdf/302041p.pdf">www.dtic.mil/whs/directives/corres/pdf/302041p.pdf</a>	Prescribes DoD policies and procedures concerning DoD contractor personnel authorized to accompany the U.S. military.
Department of Defense Instruction Number 5525.11, <i>Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members</i> (Mar. 3, 2005), <a href="http://www.dtic.mil/whs/directives/corres/pdf/552511p.pdf">www.dtic.mil/whs/directives/corres/pdf/552511p.pdf</a>	Details policies and procedures, and assigns responsibilities, for DoD support to and cooperation with the Department of Justice (DoJ) for MEJA implementation.
Department of the Army Field Manual No. 3-100.21, <i>Contractors on the Battlefield</i> (Jan. 3, 2003), <a href="http://www.afsc.army.mil/gc/files/fm3_100x21.pdf">www.afsc.army.mil/gc/files/fm3_100x21.pdf</a>	Defines U.S. Army doctrine regarding planning, management, and use of PMSCs in areas of operations.
Office of Management and Budget (OMB) Online Circular No. A-76 (Revised) (29 May 2003), <a href="http://www.whitehouse.gov/omb/circulars/a076/a76_incl_tech_correction.pdf">www.whitehouse.gov/omb/circulars/a076/a76_incl_tech_correction.pdf</a>	Requires (under the FAIR Act) U.S. government agencies to use government personnel and not private contractors to perform “inherently governmental” activities.
Memorandum from Gordon England, Deputy Secretary of Defense, to Secretaries of the Military Departments, <i>et al.</i> , SUBJECT: <i>Management of DoD Contractors and Contractor Personnel Accompanying US Armed Forces in Contingency Operations Outside the United States</i> (Sep. 25, 2007), <a href="http://acc.dau.mil/CommunityBrowser.aspx?id=171478">acc.dau.mil/CommunityBrowser.aspx?id=171478</a>	Provides guidance to U.S. military commanders regarding lines of command responsibility for oversight and management of DoD contractors and for discipline of DoD contractor personnel.
Memorandum from Robert M. Gates, Secretary of Defense, for Secretaries of the Military Departments, <i>et al.</i> , SUBJECT: <i>UCMJ Jurisdiction over DoD</i>	DoD’s implementing guidance for UCMJ criminal jurisdiction over certain contractors and other civilians, as

<p><i>Civilian Employees, DoD Contractor Personnel, and Other Persons Serving with or Accompanying the Armed Forces Overseas During Declared and in Contingency Operations</i> (Mar. 10, 2008), <a href="http://www.fas.org/sgp/othergov/dod/gates-ucmj.pdf">www.fas.org/sgp/othergov/dod/gates-ucmj.pdf</a></p>	<p>expanded by Congress in 2006.</p>
<p>Memorandum of Agreement between the Department of Defense and the Department of State on USG Private Security Contractors (Dec. 5, 2007), <a href="http://www.defenselink.mil/pubs/pdfs/Signed%20MOA%20Dec%205%202007.pdf">www.defenselink.mil/pubs/pdfs/Signed%20MOA%20Dec%205%202007.pdf</a></p>	<p>Provides some definition over the two agencies' relative areas of authority and responsibility for the accountability and operations of U.S. government PSCs (in Iraq only), and requires establishment of some coordination mechanisms.</p>



## **Annex II: Specific recommendations for regulating domestic private security within CoE member States**

In 2006, CoE Council for Police Matters of the European Committee on Crime Problems, commissioned a study on ‘Regulating Private Security Companies in Europe.’<sup>74</sup> The study resulted in 14 recommendations which are listed below.

### **I. Regulation of entities providing private security services**

The harmonisation of PSC-specific regulation should be justified not only in terms of human rights protection, but in the interest of making security measures more effective and promoting the professionalism of the industry. Relevant Council of Europe norms should be rigorously applied (pp.11-19).

### **II. Vetting of PSC personnel**

After having verified the identity of job-applicants, background checks of prospective employees (pre-employment screening) should be conducted, including checks for a criminal record, as well as professional and personal reference checks (past employment verification, driver's license check). This process assumes a written application for employment. In line with Recommendation R (84) 10 on criminal record and rehabilitation of convicted persons, the responsible parties within the criminal justice system are best placed to do this.

### **III. Entrance requirements for PSC employees**

A minimum age, the absence of serious criminal offences on his or her record, identifiable insignia for personnel – a uniform and an identity badge/card – should be enforced as basic requirements for any entry level PSC staff. Special conditions, such as training and instruction use of armed force and its legal requirements, should apply for those employees who are armed. Some particularly sensitive sectors (e.g., health care) may stipulate drug screening and/or psychological profiling to the same standard as the company's or facility's regular workforce. This may also be governed under a separate body of regulations, such as those governing health care facilities and standards. Concerning the issue of criminal records of job applicants, Recommendation R (84) 10 on criminal record and rehabilitation of convicted persons, should be taken into account.

### **IV. Licensing of private security investigators**

More rigorous entry conditions should be required for specialised private security personnel, such as private security investigators. In addition to not having a criminal record, passing background checks, establishing proof of citizenship, confirmation of

---

<sup>74</sup> CoE Council of Police Matters, *Regulating Private Security Companies in Europe: Status and Prospects*, draft report by Hans Born, Marina Caparini and Eden Cole, Report nr. PC-PM (2006 ) 01, Strasbourg, 11 September 2006. Reprinted with the permission of the CoE as: Hans Born, Marina Caparini and Eden Cole, *Regulating Private Security Companies in Europe*, DCAF, Geneva, 2007, available at [www.dcaf.ch](http://www.dcaf.ch)

training or past work as police investigator or other investigator, and passing an oral or written exam, should all be compulsory. These are common features for a licensing process. The licensing process must also include a decertification procedure – i.e. when a license is removed or revoked from an individual or firm deemed unfit for its purpose (e.g., has committed a serious crime, betrayed the public trust, failed to exercise minimum competencies).

#### V. 'Moonlighting'

Countries should address the issue of moonlighting by police officers in part-time private security jobs. Some businesses see past or present police experience as an advantage in providing private security personnel with needed skills and experience, and this is a common pool of potential employees for PSCs. However, criticisms of moonlighting include the argument that moonlighting police personnel bring their police-work attitudes and assumptions with them when working in a private security capacity, including being able to arrest persons and apply the necessary level of force.

#### VI. Training of private security personnel

Standardisation of pre-assignment training, certification requirements, and in-service training, is necessary. Industry minimum standards in terms of selection, training, and supervision of security personnel should be identified and enforced in order to increase the professionalism of the sector generally.

Topics that may be addressed in basic training include, the role of security officers and their legal powers and limitations, communications and report writing, public and client relations and customer service, diversity, and ethics and conduct. Other issues may include, emergency and disaster management, access control, safety and hazardous materials and other topics specific to certain sectors.

Further in-house training and refresher courses should be encouraged, as well as special training for private security supervisors.

A record of the training, reflecting when an employee received training, what that training consisted of, and the form of testing and its results, should appear in the employee's personnel file. In the event of a subsequent critical incident, this documentation enables the company to demonstrate how employees were trained to follow policies and procedures. In addition to helping to raise minimum standards, this practice could also help to limit the company's liability for any misconduct by an employee.

Ethics training is especially important here, since security workers often have access to confidential information and have opportunities to commit unethical behaviour (theft). One way to do this could be through a system of 'formalised peer sanctions' – i.e. internal scrutiny.

An industry code of ethics, standards of professional conduct, identification of criteria for admission of new members, establishment of mechanisms to hear, investigate and clear/sanction complaints against members for sub-standard performance or misconduct should be established. There should be a code of ethics for private security employees, and a similar but separate code for private security management.

## VII. Limitations on what private security officers are entitled to do

The limitations of PSCs' ability to intervene and interfere in the public sphere should be clearly delineated, with three key issues addressed:

- a) Search, and seizure (searching a person's property without consent, searching a suspect's person without his or her consent);
- b) Use of necessary force to restrain an individual until police are called; and,
- c) Types of weapons and firearms PSCs can carry (if any) and how they may be used.

PSCs are automatically subject to the European Convention on Human Rights, but confusion regarding their powers can lead private individuals to assume – in a Pavlovian response to uniforms or other visible markers of similarities to public police – that PSCs are police or other law enforcement agents. Clear limitations on the supposed powers of PSCs should be outlined in order to inform the public as much as to regulate the industry itself.

## VIII. Relations with police

Consensus should be sought on which functions of the public police can be contracted out, and which should not. For example, there is generally a public preference for police to focus on crime control, but usually this accounts for less than 20 percent of their time. Very often, use of the public police for transporting prisoners, court security, traffic control and serving summonses is viewed as too expensive an option for public security budgets. These support roles can be and often are filled by private security personnel. But their roles must be clearly defined and regulated. It is important to have public debate on how PSCs can be complimentary to the police in terms of working together, sharing of information and engaging in a dialogue, as well as setting up partnerships in crime prevention.

## IX. Security against terrorism, catastrophes

Critical infrastructure protection is now a growing concern. While much attention has focused on cooperation among state agencies, the private security industry also plays an important role because of its involvement in providing the day-to-day security of many public and private facilities. Increasing emphasis and attention should be conferred on the sharing of information, and developing effective emergency responses and network relationships.

## X. Privacy

In line with Article 8 of ECHR, the 'Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data', and mindful of Recommendation No. R (87) 15 regulating the use of personal data in the police sector, and Recommendation No. R (91) 10 on communication to third parties of personal data held by public bodies, PSCs involved in providing proprietary and investigative services must be bound to respect appropriate privacy guarantees.

Those private security personnel involved with internal loss prevention may employ technologies or techniques that affect the privacy of individuals and other employees of the firm. To help ensure that a company will meet its privacy obligations, security professionals or designated privacy officers first need to know what the laws require. They then need to be able to convey to senior management some sense of the risks of non-compliance. From a regulatory aspect, this includes the requirement that the firm respects laws regarding privacy and ensures that security measures do not infringe on privacy rights of clients or employees. Safeguards and guarantees should be in place to ensure that the privacy of data subject is not unduly prejudiced (Recommendation N° R (91) 10).

## XI. Self Regulation

The fact that legislation differs greatly from country to country makes it difficult to propose a harmonised legal framework for the private security industry. Nevertheless, self-regulation at the agency and industry level may be the most practical way forward and a first step towards the harmonisation of the legislation at a regional level. It appears important, therefore, to encourage voluntary self regulation, and to advocate that PSCs with a minimum number of employees adopt a mandatory code of conduct. Furthermore, codes of conduct should be included in the job contract as the terms of employment, as well as mechanisms that would help to ensure that if the code is not respected, disciplinary action can be legally taken. This is what is suggested for instance in the model code of conduct for public officials of the CoE. The aforementioned model code, as well as the CoE European Code of Police Ethics could serve as a model for what a code of conduct for private security should entail. They contain several relevant provisions, which are elaborated in the section on the Council of Europe legal instruments. Self regulation cannot replace or limit human rights of CoE citizens as stipulated in domestic legislation as well as CoE Conventions, notably the ECHR.

## XII. Transnational PSCs

Wherever PSCs are legally based, those that operate transnationally are required to respect the rule of law of the state where they operate as well as CoE norms and regulations. It is important that the issue of accountability (see below) of transnational PSCs and their employees is adequately addressed.

## XIII. Corporate Accountability

As citizens, PSC staff are already accountable in law for any of their actions which result in a criminal offence. PSCs may, as a corporate entity, undertake actions which render the organisation liable for a breach of the law. In this regard, Recommendation No. R (88) 18 on the liability of enterprises having legal personality for offences committed in the exercise of their activities, and Recommendation No. R (82) 15 on the role of criminal law in consumer protection, both help stress the necessity of enforcing the corporate accountability of PSCs for their actions.

#### XIV. Establish clear legal frameworks and a national regulator

Overall, PSCs should ideally be regulated by a regulatory framework such as the Private Security Industry Act (UK), identifying clear standards and binding legal frameworks. As a component, a Statutory National Regulator should be established as a security industry authority, ensuring transparency and accountability across the sector. Licensing, monitoring, scrutiny of annual reports, public complaints mechanisms, relationship with public police and the interaction with other democratic institutions (ombudsmen and the judiciary), wherever they are located, should be the core functions of such an agency. The agency should also interact with relevant parliamentary committees, community policing boards, police standards authorities, and hold public briefings. The outcomes of vetting processes should also be recorded on a statutory basis by this agency.

Recommendation No. R (87) 19 on the organisation of crime prevention already explicitly mentions the private security industry, and could serve as the basis for common regulatory standards, recommending that governments:

- a) enact, revise and if necessary, complete regulations governing initial authorisation, periodical licensing and regular inspection, by public authorities at the appropriate level, of security or surveillance companies, or encourage the profession to adopt its own regulations;
- b) in cases where such companies supply staff, lay down minimum standards, providing in particular that the staff shall wear a uniform different from that of the police, carry identification documents and have adequate training, including a basic understanding of criminal law, knowledge of surveillance and security techniques and of the rights, obligations and responsibilities of such staff, as well as of the norms of appropriate behaviour, in particular *vis-à-vis* the public; and,
- c) encourage positive relations between the police and surveillance and security companies in order that, within the limits of their activities, the latter may assist the former in preventing crime.<sup>75</sup>

---

<sup>75</sup> Rec.N° R (87)19, Principle V.