

**European Practices of Regulation of PMSCs and
Recommendations for Regulation of PMSCs through
International Legal Instruments**

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Geneva, 30 September 2008

Summary

The last thirty years have witnessed a paradigm shift of the provision of security from public to private actors amounting to between \$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. 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 Europe is also considered. After identifying key challenges and good practices in current PMSC regulation, essential elements are presented for the effective regulation of PMSCs. The report closes with recommendations for effective PMSC export regulation on the international level.

The author recommends that:

1. The international community achieves consensus on common PMSC definitions and standards.
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 international community establishes an effective international PMSC vetting system.
4. The international community implements an international PMSC licensing system.
5. The international community establishes an international PMSC 'Information Clearinghouse.'
6. Existing international arms export regimes be adapted to include PMSCs.
7. The international community appoints an independent international 'PMSC Ombudsman.'
8. The international community establishes an international PMSC Court of Arbitration.
9. The international community drafts a new convention on PMSCs or an additional protocol to the ICC for PMSC crimes.

Summary

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I. Introduction

Over the last thirty years the provision of security has undergone a paradigm shift, calling into question whether existing laws apply to private security actors. This has led to problems, *inter alia*, of impunity, democratic accountability, and the awkward extraterritorial application of laws that were designed to apply on the home turf. In response, initiatives have been undertaken on both domestic and international levels to regulate these private actors. While some notable progress has been made on these fronts, there are still important ‘grey areas’ and gaps which need to be filled by effective regulatory frameworks on the national and international levels.

1. Background

The shift of security providers from the public sector to the private sector 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,¹ and 2) the end of the Cold War at the beginning of the 1990s which led to the downsizing of state security forces.² 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.³ 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 Kevin R. Kosar, ‘Privatization and the Federal Government: An Introduction’, US CRS Report , 28 December 2006

² 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).

³ 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.

2. Objectives, Scope and Methodology

This paper considers the current challenges posed by private military and security companies (PMSCs) and provides an overview of currently existing regulation on both European and international levels. 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 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 report closes with recommendations to the UN Working Group on the use of Mercenaries for effective PMSC regulation on the international level.

II. Key Challenges posed by the PMSC Industry

Private actors in large numbers are now performing duties and services which were previously assumed to be the province of public actors. This shift poses several important challenges.

1. The erosion of the state monopoly on the use of force

Long considered as embodying the very essence of a state⁴, 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. This assumption also underlies the notion of ‘collective security’ that is at the heart of the UN Charter and the UN security system.⁵ 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 own citizens, as well as use force across state lines in a responsible manner such that the rights of civilians and state forces are respected.

2. Lack of consistent/coherent PMSC standards

‘Private security companies’ v ‘private military companies’

While these terms are often used interchangeably in the press and academic literature, there has been much debate as to what services each label refers, and further to what statuses those actors providing such services are accorded under current legal

⁴ 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>

⁵ José Luis Gomèz del Prado, ‘Impact in human rights of private military and security companies’ activities,’ available online at: <http://www.privatesecurityregulation.net/files/Impact%20in%20Human%20Rights%20of%20Private%20Military%20and%20Security%20Companies'%20Activities.pdf> .

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 even engaged in behaviours that most authorities agree constitute direct participation in hostilities.⁶

The ‘Swiss Initiative,’ (*see section infra*) an intergovernmental initiative on private military and security services led by the Swiss Department of Foreign Affairs and the International Committee for the Red Cross (ICRC) has sidestepped this discussion by adopting the term ‘private military and security companies’, or PMSCs, to denote all private actors who perform security duties within the context of an armed conflict, where the likelihood is much greater that they resort to the use of force.⁷

Other organisations have tended to emphasize the services provided by these actors, defining them according to long lists. For example, some authors have defined *private military companies* (PMCs) as:

businesses that offer specialised services related to war and conflict, including combat operations, strategic planning, intelligence collection, operational and logistic support, training, procurement and maintenance.⁸

In a similar manner, the non-military security-nature of the services provided by *private security companies* (PSCs) has been emphasized in the definition of PSCs, such as those companies offering guarding services, electronic security, sensor and surveillance services, and intelligence and risk management services.^{9,10}

⁶ Such as guarding legitimate military targets.

⁷ See <http://www.eda.admin.ch/psc>

⁸ Geneva Centre for the Democratic Control of Armed Forces, Private Military Companies, DCAF Backgrounder, 04/2006.

⁹ C.J. van Bergen Thirion, The privatization of security: A blessing or a menace?, Pretoria, South African Defence College, 1998; H. Born, M. Caparini, and E. Cole, *Regulating Private Security in Europe* 2007, p. 10. In this Policy Paper, DCAF avoided defining PSCs according to particular service offerings, and opted instead to define them under the more generally ‘as [a]commercial entit[ies] which provide[s] security services for governmental and private clients.’

¹⁰ For another listing of private military and security services, *see the Report by the Swiss Federal Council*

However, defining these terms according to the services provided risks being thwarted by the wily hand of the market, which has a talent for creating or repackaging offerings in terms that might not fall within these listings. Furthermore, many large PMSCs offer both of these kinds of services, defying easy classifications.

Taking a look from the point of view from existing applicable international humanitarian law (IHL) and human rights law (HRL), three broad distinctions concerning private security and military contractors should be kept in mind:

1. Those contractors ‘with guns or without’¹¹, or in other words, those contractors who are contracted to perform duties that require the use of the threat of deadly force distinct from those who do not¹²;
2. Those contractors who operate within the context of an ‘armed conflict’ within the meaning of international law, as compared to those who operate within conditions not reaching this threshold.
3. Those contractors who operate in an area of instability, such as designated by a UN security phase of 3 or higher.

The reason for these distinctions goes both to the legal framework(s) that may apply as well as the likelihood that private contractors will use force or engage in hostilities. For example, armed ‘private security contractors’ operating within the context of an armed conflict may be ‘participating in hostilities’ without firing a shot merely for providing defensive services to legitimate military targets,¹³ thereby triggering the application of IHL. Furthermore, those contractors carrying arms have been entrusted with the potential

on Private Security and Military Companies (report to the parliament in response to the Stähelin Postulate 04.3267 of 1 June 2004. Private Security Companies) 2 December 2005.

¹¹ David Isenberg, ‘Challenges of Security Privatisation in Iraq’, in Alan Bryden and Marina Caparini (editors), *Private Actors and Security Governance*, LIT & DCAF, 2006, p. 155.

¹² A further distinction could be made between the types of arms carried by these private actors, whether they are ‘military’ type weapons as distinguished from ‘police’ type service weapons.

¹³ See e.g., *The Second Expert Meeting on Participation in Hostilities.*, p

use of force which is made more likely in an area of instability, requiring a higher level of training and experience to help ensure that force is used appropriately in times of distress.

3. Democratic, state responsibility and accountability deficits

The lack of quality information and transparency regarding the nature and scope of PMSC personnel, practices and applicable laws/regulation contributes to three serious deficits of the provision of private security, the first of which is the lack of democratic accountability for the activities 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,¹⁴ whose profit-making goals may come into conflict with the goals of protecting human rights.

State responsibility for these actors is also often lacking or unclear, with even international tribunals espousing different standards by which a state can be found responsible for activities they assign or contract out to private actors. This has led to suggestions that one of states' motivations for contracting out more duties such actors is to avoid state responsibility for violations of international obligations, including human rights.¹⁵ 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.¹⁶ 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.¹⁷ 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 engage in activities *outside*

¹⁴ 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.

¹⁵ Oliver Jones, "Implausible Deniability: State Responsibility for the actions of Private Military Firms", University of Wolverhampton (2008).

¹⁶ 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.

¹⁷ 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, based on a 2006 study for the CoE Council for Police Matters, nr. PC-PM [2006] 01, Strasbourg 11 September 2006.

its borders in other states. The author notes that such obligations would be triggered if committed by an agent of the state, such as by a member of its armed forces.

A third deficit is found in personal accountability of PMSCs for wrongdoing. This is because applicable legal and oversight frameworks regulating the provision of security assume that the providers will be state actors, and consequently are not adapted to non-state agents who provide security services, particularly those requiring the threat of or use of force. Under normal circumstances, the criminal law of the territory would apply to PMSCs to shore up any gaps, but this is often undermined by either the practice of according these actors *de jure* immunity, such as through status of forces agreements (*see below*), or *de facto* immunity arising from a dysfunctional criminal system due to war or other destabilising factors.

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,¹⁸ this mass exodus strains the remaining police and military forces, requiring that the 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. Afghanistan has responded to this situation by imposing an age limit of 25 for Afghan nationals to join private security firms, and is considering raising this limit to 30.

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

¹⁸ 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>

sustainability” of this practice.¹⁹ Both of these strains on national security not only threaten national security, but also the UN system of ‘collective security’, which as mentioned above assumes that a state will have control of its security forces.²⁰ The dilution of this control by private interests who are motivated in large part by profit could have serious consequences for international security.

5. The problem of multiple nationalities

Adding to the confusion is the problem posed by the presence of multiple nationalities, which occurs in the not uncommon 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 operating PMSC group, usually resulting in none of the laws or standards being applied. This would seem to arise from the enormous obstacles faced by oversight and enforcement of domestic law on the international level which severely limit the effective authority and reach of domestic legal systems abroad.

6. Difficulties in conducting investigations

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 security actors in the private sphere, countries which otherwise have no connection to an area of operations than the presence of their nationals working for a PMSC are often 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 *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

¹⁹ Erica Werner, “Gates questions combat training by contractors”, *Army Times*, Jul 23, 2008.

²⁰ José Luis Gomèz del Prado, ‘Impact in human rights of private military and security companies’ activities.’

state, criminal investigators may not have the resources nor the ability to properly collect evidence that meets sensitive time-limits and chain of custody requirements demanded by criminal trials.

7. Higher risks of human rights violations

As discussed above, and despite recent trends articulating a state's 'responsibility to protect'²¹, many states still interpret their obligation to protect against human rights violations by civilians as stopping at their borders. Applied to PMSCs, states such as Canada and the US have stated that they are not automatically obligated to protect against violations committed by these actors abroad, that instead this duty often runs to the state on whose territory they are operating. However, in areas where insecurity cripples local law enforcement and accountability for committing human rights violations (*see section above*) this helps to foster a climate of impunity where such violations are more likely to occur.²²

²¹ 'The Responsibility to Protect', Report of the International Commission on Intervention and State Sovereignty, International Development Research Centre, Ottawa, Canada, 2001.

²² This has been widely recognised by many observers and authorities such as Amnesty International.

III. Overview of European Regulation of PMSCs providing domestic security

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

1. Different domestic approaches to regulation of private security

Despite similar cultural and historical backgrounds, domestic approaches to the regulation of private security actors varies significantly from state to state. Earlier research (focused on Council of Europe member states),²³ identified four distinct domestic regulatory approaches in the region.

1.1. The absence of regulation of domestic PMSCs

Serbia and Cyprus provide examples of this approach. In these countries, private security forms an unregulated industry risking 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.

1.2. The application of the general commercial regulatory framework to PMSCs

This is the case in, for example, Germany and Austria. There are, however, still questions about this general commercial approach to the regulation of PMSCs because of the specific concerns related to the private security industry which may require the threat of or use of force. In particular, the chamber of commerce may lack the necessary expertise and enforcement capacity to be an effective regulatory authority for dealing with PMSCs,

²³ Hans Born, Marina Caparini and Eden Cole, 'Regulating Private Security in Europe: Status and Prospects,' DCAF Policy Paper no. 20, (2007), p. 38.

where they have to grapple with the public-private security interface as well as the special concerns related to the protection of human rights.

1.3. Decentralised regulation of PMSCs

Examples of this ‘federalised’ approach can be found in Switzerland, the United States, Bosnia-Herzegovina and Italy. This leads situations in which rules for PMCSs vary across the country and may lead to an unequal treatment of private security companies within one country’s borders.

1.4 Specific regulation of PMSCs.

Finally, some CoE member States have adopted laws that regulate PMSCs providing security services within its territory, such as the UK, Ireland, and the Netherlands.

2. Scope of regulation

In most European states, domestic regulation of PMSCs applies to what are commonly considered to be ‘private security services’,²⁴ in peacetime, and not to private military services in the context of armed conflict. Despite this difference, parallels can still be drawn between the efforts to regulate the provisions of domestic civilian ‘police-like’ security, with those to regulate international security services provided in the context of armed conflict and/or situations of insecurity. Typically domestic ‘private security services’ include such activities as providing protective services to transportation of valuables, guarding private property, guarding of public property (e.g. airports, power plants, military bases etc.) 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 providers,
- the control of PMSCs,
- selection and recruitment of private security personnel,

²⁴ Ibid.

- 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,²⁵ 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 approaches can be identified. Firstly, in some states PMSC 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 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 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.²⁶

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

²⁵ An in-depth discussion of these forms of regulation can be found in: Born/Caparini/Cole..

²⁶ 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

security companies. In some states,²⁷ 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.²⁸

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 in place across EU member states, varying from fines, temporary or permanent withdrawal of licences to imprisonment.²⁹

²⁷ 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.

²⁸ Born/Caparini/Cole, p. 21.

²⁹ Specific recommendations from an earlier Council of Europe study of Born/Caparini/Cole for regulating domestic private security within Council of Europe members states has been reproduced in Annex II.

IV. International Frameworks regulating PMSC Export

On the international level, there exist several frameworks of law which may apply to PMSC activities operating across state lines. These range from multinational treaties to the extraterritorial application of domestic law.

1. Overview of international PMSC regulation

Here follows a brief overview of the current legal frameworks most commonly associated with PMSCs in effect on the international level. It is important to note that with some limited exceptions, these international legal frameworks require the existence of an armed conflict in order to trigger their application.

1.1 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. In the situation of an international armed conflict (IAC) the first condition has provoked little controversy. Common Article 2 (CA2) defines an IAC 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.³⁰ 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.³¹ An improbable example of a commonly cited NIAC in today’s headlines is the conflict in Iraq.³²

³⁰ 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.

³¹ See e.g., *The Prosecutor v. Fatmir Limaj*, Judgment, IT-03-66-T, 30 November 2005, para. 135-170.

³² 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.

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.³³ 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 protective services to valid military targets, or engaging in offensive activities of “escalation of force.”³⁴ 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 that³⁵ they have accepted the non-state actors into their forces.

1.2 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.³⁶ Key to PMSCs, if they 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,³⁷ at the ICC in the Hague.

³³ 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>

³⁴ 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.

³⁵ Additional Protocol I to the Geneva Conventions of 1949, Article 43(3).

³⁶ 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.

³⁷ 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.

1.3 *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 considered to be ‘unworkable’,³⁸ and to the authors’ knowledge has never been successfully enforced.

Taking a closer look at the criteria³⁹, many PMSCs would fulfil at least some of these conditions, but likely not all. As one historian famously said, ‘any mercenary who cannot exclude himself from this definition deserves to be shot – and his lawyer with him!’⁴⁰ One example of a major sticking point can be found in subsection (c) requiring that the person be one who is paid or promised payment ‘substantially in excess’ of that paid or promised to comparable combatants. While reports abound of PMSCs receiving far in excess of their counterparts in the armed forces, reports also tell of other PMSCs being paid far less than even the lowest-paid members of the armed forces of the State

³⁸ 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.

³⁹ Article 47 of the First Protocol Additional to the Geneva Conventions of 1949 reads as follows:

Article 47-- Mercenaries

1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. A mercenary is any person who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;

(b) does, in fact, take a direct part in the hostilities;

(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;

(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

(e) is not a member of the armed forces of a Party to the conflict; and

(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

⁴⁰ G. Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts*, p. 383 (1980).

who hired them, with such payment being nevertheless far more than they could earn in their own State of nationality or residence.⁴¹

Another significant ambiguity is its requirement that the person be ‘specially recruited locally or abroad in order to fight in an armed conflict,’ which it qualifies further by requiring that s/he ‘does, in fact, take a direct part in the hostilities.’ As ‘fight’ is not a recognised legal term under IHL, there has been much debate surrounding the precise meaning of the term, as well as whether or not it equates taking a ‘direct part in the hostilities,’ which is a recognised (if not clearly articulated) term under IHL. These ambiguities only serve to add to the confusion surrounding the definition of ‘mercenary’, and to the author’s knowledge it has never been successfully invoked against an armed non-state actor.

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.⁴²

1.4 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.⁴³ Unfortunately, this convention is also largely considered as ineffective, suffering from the same legal construction deficiencies as its inspiration in AP I, as well as from a politically contentious and divisive past which traditionally has resulted in it being boycotted by Western states (among which are those states most active in the PMSC industry). Furthermore, PMSC industry representatives object to the use of ‘mercenaries’ as a term to describe their personnel because of the derogatory connotations associated

⁴¹ Given the large differences in economic standards among countries, it seems to the author that this would be a more appropriate standard for determining whether or not a person qualified as a ‘mercenary’.

⁴² Edward Kwakwa, *The International Law of Armed Conflict: Personal and Material Fields of Application*, Martinus Nijhoff Publishers, 1992, p 124.

⁴³ See full text of the UN Mercenary Convention in the section “Dokumentation” in this issue.

with the word. This is particularly significant because, perhaps surprisingly, it is the PMSC industry which is one of the most strident voices calling for effective, enforceable regulation and accountability of PMSCs at this moment—*even more loudly than states*⁴⁴—such that alienating representatives of PMSC industry could dampen the momentum for international regulation to the point that it does not materialise.

On a positive note, 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. This throws some of the spotlight on those entities hiring, or those clients using, non-state armed actors, highlighting their role and responsibilities in bringing PMSCs into the areas of armed conflict and instability.

1.5 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.⁴⁵ Such state practice should be ‘extensive and representative’⁴⁶ 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).⁴⁷

⁴⁴ This became apparent at the September 2008 meeting at the Swiss Initiative in Montreux, where PMSC industry representatives repeatedly called for concrete action to make the principles and obligations in the initiative enforceable. In comparison, state reluctance to embark on such a path was obvious.

⁴⁵ 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> .

⁴⁶ Ibid.

⁴⁷ 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.

1.6 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 Committee of the Red Cross (ICRC) recently engaged in a two-and-a-half year-long intergovernmental dialogue on how to ‘ensure and promote respect for international humanitarian and human rights law’⁴⁸ by states and PMSCs operating in areas of armed conflict. While not an international convention strictly-speaking, 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.⁴⁹

Praised for its inclusive and even-handed approach⁵⁰, 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 the ‘Montreux Document’, a 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. The Montreux Document was endorsed by a High Level Meeting of Legal Advisers of participating governments in mid-September 2008.⁵¹ Notably, members of the PMSC industry constituted one of the loudest voices of the

⁴⁸ Overview of the Swiss Initiative available on-line at <http://www.eda.admin.ch/psc>.

⁴⁹ Outline of the Swiss Initiative, November 2007, p. 2., available on-line at <http://www.eda.admin.ch/psc>.

⁵⁰ See e.g., Doug Brooks, “The Swiss Show Some Initiative”, *Journal of International Peace Operations*, Vol. 3, No. 6, May-June 2008, p.4.

⁵¹ For more information about the Swiss Initiative, including a the text of the Montreux Document, please visit: <http://www.eda.admin.ch/psc>

Initiative applauding the Montreux Document and calling for more enforceable regulation ‘with some teeth.’

1.7 International Human Rights Treaties

As mentioned previously, questions have been raised as to whether human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) would incur responsibilities directly to PMSCs. States have been reluctant to accept responsibility for the actions of PMSCs they have contracted with to perform services abroad, emphasizing their non-state “civilian” status and their lack of ‘effective control’⁵² over PMSCs. There is consensus that the territorial state on which PMSCs are operating would be bound to protect rights contained in human rights treaties to which they are signatory, which they would normally oversee and implement through their domestic criminal law system. However when this system is dysfunctional, such as is often the case in areas of insecurity or armed conflict, and the territorial government is unable to fulfil its obligations to protect human rights, this creates a *de facto* human rights protection vacuum. Recently, efforts such as the ‘Responsibility to Protect’⁵³ have been made to fill this gap, however this doctrine has not been extended to incur responsibility to a state for human rights violations committed by PMSCs it contracted and sent abroad to support peace operations.

2. Overview of domestic regulation of exported PMSCs

In addition to these supranational frameworks, several states have implemented laws which apply mostly to their own nationals extraterritorially. 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

⁵² ‘Effective control’ was the standard set by the ICJ for the attribution to a state conduct by non-state actors acting ‘on the instructions’, or ‘under the direction’ or ‘under the control’ of the state. *Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U.S.)*, 1986 ICJ 14, 122, 237.

⁵³ “The Responsibility to Protect”, International Commission on Intervention and State Sovereignty, December 2001. Available online at <http://www.iciss.ca/report2-en.asp>.

2.1 Extraterritorial application of domestic 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 company 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)⁵⁴ are one kind of extraterritorial application of domestic law which is agreed to in an international treaty. These VFAs are typically agreed upon 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

2.2 Examples of extraterritorial legislation of selected countries

2.2.1 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 of a lack of enforcement of a complex and copious agglomeration⁵⁵ 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

⁵⁴ 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.

⁵⁵ Please see the attached Annex prepared by Kevin Lanigan of Human Rights First containing key US legislation applicable to PMSCs.

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'⁵⁶ or, perhaps more bluntly, a lack of 'political will to investigate and prosecute cases of criminal misconduct by contractors.'⁵⁷

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 over 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.⁵⁸

2.2.2 *France.* Following the lead of the Mercenary Conventions, the French law Relative to the Repression of Mercenary Activities⁵⁹ 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 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 fulfil 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.

⁵⁶ Kevin Lanigan, 'Legal Regulation of PMSCs in the United States: The Gap between Law and Practice', *Sicherheit und Frieden*, Fall 2008, p 4.

⁵⁷ 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>.

⁵⁸ 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>

⁵⁹ 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).

At the time of this writing, the author knows 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 model⁶⁰ 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.

2.2.3 Switzerland. The Swiss military penal code makes it a crime for Swiss nationals to take up service in a foreign army.⁶¹ Recently, this law was the basis for the attempted prosecution of a Swiss citizen who worked as a security contractor for Blackwater 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 whether Blackwater was acting on the behalf of the American Army, and the Swiss military justice system was not able to conduct such investigations.⁶² The court went on to fine the accused for subsequently attempting to join the French Foreign Legion.

⁶⁰ *E.g.*, the Private Military Company Sécopex.

⁶¹ Article 94, Code Pénal Militaire Suisse du 13 juin 1927.

⁶² 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=>

This Swiss case vividly 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 Blackwater 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 capacity to perform.

3. Overview of 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 instability 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.

3.1 Case study Afghanistan:⁶³Background

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

⁶³ 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.

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.

3.2 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:

3.2.1 Lack of an effective international vetting process. 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 criminal record certificates from Interpol, as well as the human rights certification from the Afghan Independent Human Rights Commission were found not to exist, these requirements were waived, weakening efforts to vet PMSCs and raising the spectre that prior violations and crimes committed outside the state of nationality would not be discovered.

3.2.2 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.

3.2.3 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.

4. Effective Regulation of PMSCs: Considerations and Gaps

Taking the foregoing discussions as a whole, several gaps in the current regulatory approaches for PMSCs can be ascertained. As a general rule, gaps in the applicability of regulation stem from the prevailing view that PMSCs are ‘civilians’ or 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.

4.1 International regulation of PMSCs

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 Geneva Conventions of 1949 (GC) 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 humanitarian 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 International Criminal Code (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 own nationals. The other international conventions attempts to discourage private actors from performing military and security duties for hire have largely failed, most likely due to unwieldy and unworkable definitions, underlying political tensions, a lack of incentives

for states to join them, as well as their use of the derogatory term ‘mercenary’ to label armed non-state actors for hire, thereby alienating PMSC industry members causing them to withdraw their considerable influence and support for international regulation along these lines.

4.2 Domestic regulation of imported PMSC

States where armed conflict or other instability reign face enormous obstacles in holding imported PMSCs accountable, not least of all because these states are often lacking effective oversight mechanisms compromised by situations of insecurity, as well as the difficulties inherent in vetting PMSCs hailing from other states. The case of Afghanistan provides a clear example of how the weakest links (vetting, oversight and enforcement) in the regulatory chain can hinder or prevent an otherwise well-structured regulatory system from being effective.

Another common obstacle to local oversight and accountability of imported PMSCs is often found in bilateral agreements, such as the SOFAs described above, which seek to prevent the domestic legal system from holding foreign security providers accountable under local laws in local courts. This has been tragically illustrated in the case of Iraq and the September 2007 events involving Blackwater in Nisoor Square.

4.3 Domestic extraterritorial regulation of exported PMSCs

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,⁶⁴ 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,⁶⁵ recent reports indicate that courts may have more to say on this issue in the near future.

5. Effective Regulation of PMSCs: Considerations and Good Practices

5.1 'Inherently governmental' functions

One corollary to the state monopoly on the use of force is the determination of *how* private actors should be allowed to provide security services, or in other words which duties should they be allowed to provide within which contexts. One approach is to use human rights such as those contained in the ICCPR as a guidepost, barring the privatisation of those roles most likely to impact upon human rights. This would seem to be the logic behind the US Federal Activities Reform (FAIR) Act of 1998, which defines 'inherently governmental functions' as those military, diplomatic and other activities that 'significantly affect the life, liberty or property of private persons.'⁶⁶ This would correlate somewhat with current interpretations of inherently governmental functions as including criminal investigations and armed combat.

Despite this law's presence on the books, it has not significantly restrained the growth of the US PMSC industry to that of the largest in the world, perhaps pointing to weaknesses in this approach. For example, activities that 'significantly affect the life, liberty or property of private persons' may vary significantly according to the *contexts* in which they are performed, making the listing of such activities difficult. Prominent leaders in the PMSC industry make a distinction between the use of 'defensive force' from that of 'offensive force,' the latter of which they unhesitatingly proclaim to be inappropriate for

⁶⁴ 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)..

⁶⁵ 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.

⁶⁶ US Federal Activities Reform (FAIR) Act of 1998, 31 USC 501.

PMSCs to carry out.⁶⁷ However, this splitting of the use of force into offensive and defensive components is only appropriate in peacetime, where the threat of attack is very low. By contrast, it is not at all appropriate to make this distinction within the context of an armed conflict, where the fundamental distinction lies between those who ‘directly participate in hostilities’⁶⁸ from those who do not, with the former encompassing both the defensive and offensive uses of force. Lying between these two operational contexts are those (often domestic) situations of insecurity in which violent clashes occur on a more or less frequent basis, with a higher frequency of violence approaching similar considerations to those inherent in an ‘armed conflict.’

5.2 The likelihood that force will be used

The salient point that emerges from these discussions is *the likelihood that private actors in the course of their duties will have to use force*. From this vantage point, it becomes abundantly clear that the chances that a Securitas employee will use force while providing body guard services within Geneva are exponentially lower than those of a Blackwater contractor providing body guard services within Iraq, even if their job descriptions are substantially similar. The situation faced by a body guard providing protective services within the ‘violent peace’⁶⁹ of the Democratic Republic of Congo (DRC) may occupy another place along the spectrum of the likelihood of the use of force, although in the case of a failed state⁷⁰ it may lie closer to the situation found in an armed conflict. One main difference between the situation of a ‘violent peace’ from that of an armed conflict is that IHL would most likely *not* apply.⁷¹

⁶⁷ This distinction has been cited repeatedly by both Doug Brooks, President of International Peace Operations Associations and Andy Bearpark, Director of the British Association of Private Security Companies.

⁶⁸ The commentary to Article 43 of the Additional Protocol to the Geneva Conventions states that ‘[d]irect participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place,’ although the exact activities that fall within this definition have been hotly contested. Currently, the ICRC is working on a report on direct participation in hostilities which Philip Spoerri, ICRC Director for International Law and Cooperation, says should be released by December 2008.

⁶⁹ Aust & Jaspers 2006, quoted in Meike de Goede, ‘Private And Public Security In Post-War Democratic Republic Of Congo’ ISS July 2008, p 39.

⁷⁰ Ibid.

⁷¹ Note that there would be a higher likelihood that the law of armed conflict **could** be triggered by an escalation of hostilities or by the entry of another state into the conflict.

One further wrinkle in the situation of the PMSCs is the extent to which their actions are perceived as promoting security or insecurity. For example, in the case of the DRC, the private security actors in this country are perceived as providing **more** security than the corrupt state security actors.⁷² This, however, contrasts with public perception of PMSCs in Afghanistan who are perceived as contributing to **insecurity**. A perhaps significant difference between the private provisions of security within these two contexts is that the PMSCs in the DRC are primarily locals who have left state and rebel armed forces, whereas the negative perception with PMSCs in Afghanistan would appear to be largely linked to the strong presence of foreign private security companies in Afghanistan.

5.3 Link licensing to operational context

Given the difficult nature of determining which body of law could at any given point apply to a violent clash, e.g., whether or not it is regulated by IHL, it is perhaps more protective of human rights to tie licensing and training requirements of PMSCs to the likelihood that violent clashes will occur in the areas where they are performing services. In other words, in order to provide services in areas where there is an armed conflict or high likelihood that violence will erupt, PMSCs have to be specially trained and licensed to operate in these kinds of areas. Along similar lines, private contractors supporting the operations of armed forces or of armed PMSCs operating in situations of armed conflict or insecurity would also have to undergo training / licensing to cope with these situations would help to reduce instances where the human rights of civilians are violated.

In determining the level of security in an area, some clarity could be brought to bear by classifying the situation according to one of several security threat rating systems that have been developed by various countries and international organisations, such as the UN Security Phase system. For example, only those private contractors who have passed the training and licensing requirements for providing services in a Security Phase 3 (or 4 or 5) environment would be allowed to provide services in an area so designated. This would help to ensure that only those actors allowed to operate in areas where levels of danger

⁷² Meike de Goede, 'Private And Public Security In Post-War Democratic Republic Of Congo' ISS July 2008, p 39.

and/or stress are high are those who have been appropriately trained to do so, thereby reducing the risk that they commit human rights violations.

V. Recommendations for the Way Forward

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. The ICCPR should be seen as setting minimum standards for regulating the conduct of PMSCs.

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 five following elements:

1. Common standards for obligations and duties of PMSCs, including articulation of appropriate duties and operational contexts.
2. An effective PMSC vetting system.
3. Licensing and training requirements for PMSCs and contractors operating abroad.
4. An effective oversight and investigatory system.
5. Effective enforcement mechanisms that hold accountable those persons and entities that violate human rights and international humanitarian law obligations.

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 initiatives at the international level. While the order of these initiatives is not strict, there are many interlinkages, therefore they are presented in an order which would seem to naturally flow from one to the next.

2.1 Achieve international consensus on common PMSC definitions and standards.

Effective regulation of PMSCs will require that clear standards and definitions are set forth to describe and limit PMSCs, their staff / personnel, the activities they are allowed to carry out and the contexts within which they are allowed to perform services. These standards should keep in mind the key distinctions of:

- Those contractors who are contracted to perform duties that require the use of the threat of deadly force as distinct from those who do not⁷³;
- Those contractors who operate within the context of an ‘armed conflict’ within the meaning of international law, as compared to those who operate within conditions not reaching this threshold.
- Those contractors who operate in an area of instability, such as designated by a UN security phase of 3 or higher.

Additionally, these standards should be developed through discussions of the various PMSC stakeholders, including specifically members of PMSC industry, civil society and states. Examples of such standards and definitions could include distinctions between those PMSCs providing only ‘police-like’ security functions within domestic peacetime contexts (e.g., ‘Domestic PSCs’), those PMSCs providing non-force support to armed forces (e.g., ‘Private Military Support Personnel’), those PMSCs providing services requiring the threat of or use of force (e.g., ‘Armed PMSCs’) as well as for all contractors providing services in areas of insecurity (e.g., UN security phase 3 or higher) or armed conflict, whether or not they use or threaten force.

2.2 Establish an effective international vetting system.

One key component of such a system would allow for the exchange among interested states of relevant information, such as criminal records and reports of human rights

⁷³ A further distinction could be made between the types of arms carried by these private actors, whether they are ‘military’ type weapons as distinguished from ‘police’ type service weapons.

abuses. This would require the creation of an international criminal record network putting in place standard procedures for exchanging records pertinent to vetting for prospective PMSC staff/personnel. One example of such a record exchange system on the European level is Europol, which allows member states to share and pool information from local law enforcement bodies in order to combat crimes occurring on the international level, with an emphasis on combating organised crime. Another international organisation for combating international crimes is Interpol, whose much larger state membership would seem to make it an ideal framework for conducting the kinds of criminal and human rights background checks appropriate for contractors who hail from and work in multiple states. However, as recounted in the case study of Afghanistan, Interpol is not currently operating so as to provide this information relative to PMSCs. Further study would be required to determine whether and how an effective vetting system could be implemented within these pre-existing international policing organisations, or whether it would be more effective to create a separate vetting system devoted exclusively to PMSCs.

Another aspect of PMSC vetting that deserves further attention is psychological testing. Currently, several organisations hiring from a comparable international applicant pool use psychological testing as part of their vetting of potential candidates, such as the PMSC DynCorp⁷⁴ as well as the French Foreign Legion.⁷⁵ Psychological testing should be appropriately developed and standardised as a part of a PMSC vetting system.

2.3 Implement an international PMSC licensing system

In order to be effective, an international PMSC licensing system would first need to articulate common standards for PMSC definitions, duties and training. Once again, both the duties and the environmental context in which the PMSC operates should dictate the kinds of training and experience required for licensing. For example, PMSC licensing

⁷⁴ Major General Robert Rosenkranz (US Army, Retired), “Private Security Firms: Standards, Cooperation and Coordination on the Battlefield,” US Committee on Government Reform Subcommittee on National Security, Emerging Threats, and International Relations, June 19, 2006.

⁷⁵ Interview with Maj-Gen. (ret) Guy de Haynin de Bry, Senior Fellow at the Geneva Centre for the Democratic Control of Armed Forces, September 2008.

could operate on a multi-tier level, with all PMSCs required to undergo a kind of ‘basic training,’ the successful completion of which would result in the contractor being awarded a license to provide services abroad in contexts of relative security (UN security phase 1 or 2). Those PMSCs who use or threaten force would need to complete additional training equivalent to what comparable members of the state armed forces undergo before they are deployed. Contractors who provide services in places of insecurity (UN security phase 3 and higher) would be required to undergo additional training to operate in these areas. Contractors who previously underwent equivalent training in the armed forces could get an exemption from such training requirements, but may need to take a ‘refresher course’ or pass a practical exam.

2.4 Establish an international PMSC ‘Information Clearinghouse’

In order to increase transparency regarding PMSCs, their personnel, missions and practices, a ‘PMSC Information Clearinghouse’ could be established which would serve as a focal point for information exchange regarding PMSCs. Such a clearinghouse could: 1) provide a centralised location for registration of PMSCs and 2) offer a client feedback service whereby PMSC clients can report on their experiences with various PMSCs, including level of professionalism, quality of services, etc. PMSCs would have an opportunity to respond to the reports. In order for it to be effective, this clearinghouse would need to be seen as independent and neutral, not favouring representatives of PMSC industry, civil society or states.

2.5 Adapt existing Arms Export Regimes to include PMSCs

Arms export regimes⁷⁶ 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,

⁷⁶ 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.

or where there is a "clear risk" that the PMSC services would be used aggressively against another country.⁷⁷

A 'PMSC Export Regime' would help to crystallise standards for PMSCS crossing borders, providing for some oversight. It could be implemented by amending existing arms control frameworks, such as in the EU or UN, to include PMSCs without inventing one from scratch, perhaps facilitating implementation. However, this kind of regime would only be effective after common PMSC standards and licensing requirements have been developed.

2.6 Appoint an independent international 'PMSC Ombudsman'

A 'PMSC Ombudsman,' would receive complaints from all interested PMSC stakeholders regarding PMSC services, perform preliminary investigations to help determine which complaints deserve further attention as well as which authorities would be best suited to pursue them. For example, civil complaints of breach of contract or torts could be directed to the appropriate civil courts, while criminal allegations could be referred to the appropriate criminal court or prosecutor. Importantly, the PMSC Ombudsman would monitor the progress of the resolution of complaints. By keeping such allegations and complaints in the public eye, they would help ensure that aggrieved parties receive appropriate resolution, restitution and accountability.

2.7 Establish an international PMSC Court of Arbitration

As state functions shift to the private sector, this recommendation envisages the creation of a dispute resolution mechanism commonly used to resolve disputes arising out of business transactions, adapted to fit the particular contours of the PMSC industry. Inspired by arbitration models, this vehicle would consist of a formal dispute resolution mechanism specially formulated to hear complaints of PMSC wrongdoing, with investigations led by, for example, the 'PMSC Ombudsman' mentioned above and/or a special PMSC investigation team. A 'Code of PMSC Conduct and Business Practices'

⁷⁷ 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>

could be developed by representatives from PMSC industry, civil society and states in order to guide the decisions of the court. PMSCs would formally agree to be bound directly 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).

In contrast to international conventions which traditionally apply only to states and their agents, PMSCs and their staff/personnel would be directly bound by obligations contained in the PMSC code, solving some of the problems with PMSC personal accountability. Furthermore, decisions rendered in arbitral tribunals are enforceable in most jurisdictions, including such awards as punitive or exemplary damages for non-appearance. Such a tribunal presided over by persons familiar with the particular issues surrounding PMSCs would also likely be preferred by PMSC stakeholders. However, a PMSC arbitral court may not be an appropriate venue to try individuals accused of crimes, because of the different criminal standards for the burden of proof, evidence and criminal intent, and because criminal prosecution is one of the ‘inherently governmental’ functions of states.

2.8 Draft a new convention on PMSCs or an additional Protocol to the ICC for PMSC crimes

In order to implement an effective convention on PMSCs, it will be of paramount importance to have a clean break from the negative associations with the earlier Mercenary Convention. Such a convention could take the form of a completely new convention on PMSCs, or possibly an additional protocol to the ICC for PMSC crimes. This new instrument would set forth common international standards for the duties performed by PMSCs—regardless of their particular nationality—and would articulate clear crimes along with appropriate punishments for them in order to satisfy the requirements of fair criminal trials. The new convention/additional protocol would be ideally overseen by an international multi-stakeholder (state, industry, civil society) commission which would conduct investigations into alleged violations and facilitate trials. Operating according to a system of ‘complementarity’ similar to that of the ICC

would simultaneously protect individual state interests vis-à-vis their own nationals, as well as the interests of the victims. Also, as such a convention would be agreed to among states, this would keep criminal prosecution fundamentally a state function, while recognising that some crimes have international implications in like manner to the ICC.

VI. Conclusions

Recent years have seen the re-emergence of private actors into the theatres of war and areas of instability, challenging cherished beliefs about the State's monopoly on the use of force, and bringing into question effective oversight and accountability of these actors. The recommendations above strive to provide some responses to these questions, beginning with the 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. As an international organisation spanning all world regions, the UN is uniquely situated to take the lead on the global concern of PMSC export. 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, and could serve as an important stepping stone to achieving common international standards. With this goal in mind, we strongly urge that the UN take concrete steps towards building international consensus around PMSC standards with a view to crafting and implementing effective international PMSC regulatory frameworks.

Annex I: Key US Legislation Applicable to PMSCs

<u>Legal Provision</u>	<u>Comment</u>
Federal Statutes	
Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, www4.law.cornell.edu/uscode/28/1350.notes.html	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, www.law.cornell.edu/uscode/18/usc_sup_01_18_10_I_20_113C.html	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, www.law.cornell.edu/uscode/html/uscode22/usc_sec_22_00002778----000-.html	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), frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_public_laws&docid=f:publ270.105	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), www.law.cornell.edu/uscode/html/uscode28/usc_sup_01_28_10_VI_20_171.html	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, http://www.law.cornell.edu/uscode/html/uscode22/usc_sup_01_22_10_32_20_II.html	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, www.law.cornell.edu/uscode/18/usc_sup_01_18_10_I_20_212.html	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, www.law.cornell.edu/uscode/18/usc_sec_18_00000007----000-.html	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), thomas.loc.gov/cgi-bin/query/D?c102:5:./temp/~c102HPEin0::	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, www.law.cornell.edu/uscode/10/usc_sup_01_10_10_A_20_II_30_47.html	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), frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_public_laws&docid=f:publ386.106	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, www.law.cornell.edu/uscode/18/usc_sec_18_00002441_---000-.html	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.
Federal Regulations	
Defense Federal Acquisition Regulation Supplement (DFARS), www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html	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), www.arnet.gov/far/loadmainre.html	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), www.pmdtc.state.gov/official_itar_and_amendments.htm	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.
Federal Agency Instructions, Field Manuals, Circulars & Memoranda	
Department of Defense Instruction Number 1100.22, <i>Guidance for Determining Workforce Mix</i> (Sep. 11, 2006; incorporating Change 1, Apr. 6, 2007), www.dtic.mil/whs/directives/corres/pdf/110022p.pdf	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), www.dtic.mil/whs/directives/corres/pdf/302041p.pdf	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), www.dtic.mil/whs/directives/corres/pdf/552511p.pdf	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), www.afsc.army.mil/gc/files/fm3_100x21.pdf	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), www.whitehouse.gov/omb/circulars/a076/a76_incl_tech_correction.pdf	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), acc.dau.mil/CommunityBrowser.aspx?id=171478	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), www.fas.org/sgp/othergov/dod/gates-ucmj.pdf</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), www.defenselink.mil/pubs/pdfs/Signed%20MOA%20Dec%205%202007.pdf</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 Council of Europe 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.’⁷⁸ 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

⁷⁸ 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

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.⁷⁹

⁷⁹ Rec.N° R (87)19, Principle V.