



# PRIV-WAR Report – Spain

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## The Regulatory Context of Private Military and Security Services in Spain

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### **PRIV-WAR**

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

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## 1. Introduction<sup>1</sup>

This report on Spanish domestic law with respect to private military and security companies and services is delivered in the context of the PRIV-WAR project: “The existing regulatory context for private military and security services at the national and EU level, report on the domestic legislation in relevant countries” of the project *Regulating Privatisation of “War”: the role of the EU in assuring compliance with international humanitarian law and human rights*.

## 2. Scope of the report

The main focus of this report is to analyse the legal framework of the activities and operations of Private Military and Security Companies (PMC/PSC)<sup>2</sup> in the Spanish context and identify legal avenues to the eventual application of International Humanitarian Law (IHL) and International Human Rights Law (IHRL). In Spain, there are no laws specifically dealing with the operations of these companies abroad, but nothing prevents PSCs from delivering their services to the Spanish Army operating in a third country or to other contractors.

The general practice of the Spanish Army is to deal itself with any issue concerning security and military operations; the only aspects that are subcontracted have to do with the provision of food, cleaning and catering service. Unfortunately, so far the Spanish Government, unlike others such as the Dutch Government, has not systematically and specifically addressed the relevant issue of the involvement of private security companies in Spanish military missions abroad, something that is much needed, especially taking into account the increasing presence of Spanish troops in international missions (especially under the UN and the EU) in countries like Bosnia & Herzegovina, Lebanon, Afghanistan, Haiti or, more recently, Somalia<sup>3</sup>. In fact, Ruiz Arévalo points out that in the most recent armed conflicts in which the Spanish Armed

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<sup>2</sup> Under Spanish domestic law, there is no formal distinction between Private Military Companies (PMCs) and Private Security Companies (PSCs). The distinction has to do with the kind of services they offer, and the territorial scope of their activities, especially as regards operation in third countries in the framework of military missions. For the purposes of our study we will systematically refer to PSCs, since that is the term used by Spanish law to regulate the activities of these companies (“empresas de seguridad” is the term used by the Spanish Law on private security, 30 July 1992, *Ley 23/1992, de 30 de Julio, de Seguridad Privada*).

<sup>3</sup> The Spanish Parliament has just approved the proposal by the Minister of Defence, Carme Chacón, on the participation of Spanish troops to combat piracy in Somalia in the framework of an operation sponsored by the EU, see *EL PAIS*, 22 January 2009, p. 18.

Forces have participated, they have been supported by civilian contractors. Not only contractors, but also personnel from other public bodies, such as the International Co-operation Agency in Afghanistan, have worked in close collaboration with the Spanish Armed Forces<sup>4</sup>.

In words of Lieutenant Colonel Ruiz Arévalo, “like it or not, it does not seem that in the future the military are going alone to fulfil our missions”. This is one of the most realistic contributions to this debate in Spain, since it assumes that military capacities are not fully developed.

From the perspective of International Humanitarian Law, civilian personnel – as private security companies are considered in Spanish Law – have the status of civilians authorised to accompany armed forces. Therefore, they are considered “non-combatants”. The implications of this status are regulated by the Geneva Conventions of 1949. Nevertheless, the services provided by the security companies are not always so transparent that we can state clearly and unambiguously that they are never combatants. Some services could jeopardise their status of non-combatant – which would affect their level of protection.

### 3. The basic legal framework

The main legal instruments on these issues are the Spanish Constitution of 6 December 1978, the Organic Law on the Protection of Citizens’ Security of 21 February 1992<sup>5</sup>, the Law on Private Security of 30 July 1992<sup>6</sup>, and the more recent Organic Law on National Defence of 17 November 2005<sup>7</sup> together with a vast array of regulations that have developed the details of the afore-mentioned regulations.

According to the Spanish Constitution<sup>8</sup> and the Organic Law on the Protection of Citizens’ Security<sup>9</sup>, the responsibility for protecting human rights and fundamental freedoms and the security of citizens lies with the Government and, under its direction, with the security forces. Given that security is one of the essential pillars of a democratic State and is considered one of the most basic human rights<sup>10</sup>, its guarantee is a monopoly of the State. The State carries the ultimate responsibility. However, given the increasing complexity of security issues, the emergence of terrorism as a global phenomenon and the tendency to privatise and externalise many services previously provided by the State, a number of European countries are going through a process of progressive participation of private agents in the procurement of security, and, accordingly, have had to regulate this sector<sup>11</sup>. In the case of Spain, a specific law was adopted by the Law on Private Security of 30 July 1992. As stated in both the Preamble

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<sup>4</sup> Javier Ruiz Arévalo, “Civilian contractors in expeditionary operations. Problems of security and control for the military command”, *Athena Intelligence Journal*, vol. 3, N.1, 2008, pp. 25 - 47, p. 27. Javier Ruiz Arévalo is Lieutenant Colonel of the Army and at the moment is logistics analyst in the Directorate General of Doctrine, Organic and Materiel of the Army.

<sup>5</sup> Organic Law 1/1992 on the Protection of Citizens’ Security, 21 February 1992.

<sup>6</sup> Law 23/1992 of Private Security, 23 July 1992.

<sup>7</sup> Organic Law 5/2005 of National Defence, 17 November 2005.

<sup>8</sup> Article 104.1.

<sup>9</sup> Article 1.1.

<sup>10</sup> See Article 3 of the Universal Declaration of Human Rights (1948): “Everyone has the right to life, liberty and *security of person*” (emphasis added).

<sup>11</sup> Weber, Tina, *A comparative overview of legislation governing the private security industry in the European Union*, ECOTEC, Birmingham, 2002.

and Article 1.1 of this instrument, private security services are considered as “complementary and subordinate”. Taking into consideration this *complementary* nature of private security services, the State seeks to put in place a very strict system of control and strong administrative safeguards on PSCs. Ultimately, the main purpose of this intense regulation is “to protect the fundamental rights of all citizens and guarantee their security”<sup>12</sup>. As established in the substantive provisions of the Law, the private security services will always be conducted with strict respect for the Constitution and the rest of the Spanish domestic legal system, and pursuant to basic principles such as integrity and dignity, correct treatment of persons, and proportionality in the use of the powers and means at their disposal<sup>13</sup>.

The Spanish Constitution proclaims that the “Security Forces and Corps, under the dependency of the government, have as their mission to protect the free exercise of rights and duties and to guarantee security among citizens”<sup>14</sup>. On a doctrinal level, two different conclusions may be drawn from this article. From one point of view, the maintenance of security must be assumed exclusively by the public organs, as a question of principle<sup>15</sup>. From another point of view of doctrine, admitting that this is essentially a public question, the Constitution does not recognise its exclusivity<sup>16</sup>.

Additionally, along the same lines, the new Organic Law on National Defence, passed on November 2005, proclaims as a general principle that any mission in which the Spanish Armed Forces take part must be “in conformity with the UN Charter and must not violate principles of International Law incorporated in its domestic legal order”<sup>17</sup>. These provisions open the door to the application to any member involved in a Spanish mission, including PSCs, of those conventions of IHL and IHRL ratified by Spain<sup>18</sup>.

#### 4. PSCs under Spanish Law

The main domestic instruments as regards private security companies in Spain are the 23/1992 Law of Private Security and a number of Regulations that have developed specific aspects of the Law, specifically the 1994 Regulation of Private Security. These two legal instruments articulate the faculties that citizens have to create and use private security services, thus opening margins for co-ordinated and joint action between the Public Administration and the companies. The private security companies can exclusively deliver the activities and services that are established within the Law. The Ministry of Interior and the Police are the competent national authorities in this respect.

The model adopted in Spain facilitates the maintenance, on the one hand, the power of the companies, and on the other, the obligations imposed on them. The

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<sup>12</sup> Para. 7 of the Preamble of Law 23/1992 on Private Security.

<sup>13</sup> Article 1.3.

<sup>14</sup> Article 104.1 of the Constitution.

<sup>15</sup> Barcelona Llop, J, “Community economic freedoms and private security activity”, in *Studies of Public Economic Rights*. Tribute to Prof. S. Martin-Retortillo, Madrid, 2003.

<sup>16</sup> Izquierdo Carrasco, M., *Private security: Legal-administrative regime*, Lex Nova, 2004.

<sup>17</sup> Article 19.

<sup>18</sup> According to the Spanish Constitution (Article 96.1), those international treaties validly ratified by Spain, once officially published in the Official Gazette, will become an integral part of the Spanish domestic legal system.

Spanish Interior Ministry has stated that collaboration is not equivalent to privatisation since the delegation of ownership does not take place in such a way that public management disappears. Insofar as the objectives of private security are fulfilled, they contribute, at least indirectly, to the attainment of greater public security.

The Law 23/1992 on Private Security gives a narrow concept of private security, understood as a service characterised by the following two elements: on one side, its object – surveillance and security of persons and goods; and on the other side, the subjects who provide it – private persons. However, the concept of private security established in the Law does not mention the end or intentional element of security, which could be interpreted in a broad sense and attain the scope of the security of the Armed Forces.

The term “complementary”, which is not present in other European legal orders, as it is recognised in the Spanish Law 23/1992 on Private Security may not be more confusing, ambiguous and contradictory with the proclaimed “monopoly” of the State. In any case, it legitimises the activity towards the citizens.

The Law 23/1992 on Private Security gives certain flexibility and opens some doors, such as for example, surveillance in housing developments and industrial units, services in response to alarm systems; other doors are half opened, such as vigilance in public buildings and vigilance and protection of Centres and facilities which are either military in nature or which belong to the Ministry of Defence and in which members of the Armed Forces serve or which are destined for use by the afore-mentioned personnel.

It must be emphasised that the legal tool which really opens the door to the eventual participation of PMC is the 1994 Regulation of Private Security of that Act due to the fact that this Regulation contains a Chapter regulating the provision of services with fire arms and establishes an additional condition for their licensing to security personnel<sup>19</sup>. *Lege ferenda* it would be desirable to redefine the functions of private security, in greater accordance with international practice.

#### 4.1. Legal definition of security services

Security companies can only provide or develop the services and activities established in the Law 23/1992 and its Regulation of 1994. We will now proceed to analyse both laws. According to Article 5.1 of the Law on Private Security, they can develop the following activities and services:

- a) Surveillance and protection of goods, establishments and events.
- b) Protection of specific persons, following authorisation.
- c) Deposit, custody, recount and classification of money and objects which, due to their hazardous nature, require special protection.
- d) Transport and distribution of the objects mentioned in the above paragraph, in vehicles designated by the Ministry of Interior, in a way which may not be confused with the Armed Forces nor with the Security Forces and Corps.
- e) Installation and maintenance of security machines and systems.

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<sup>19</sup> According to the Spanish Constitution (Article 96.1), those international treaties validly ratified by Spain, once officially published in the Official Gazette, will become an integral part of the Spanish domestic legal system.

- f) Use of stations for the reception, verification and transmission of alarm signals and their communication to the Security Forces and Corps, as well as providing response services not under the competence of those Forces and Corps.
- g) Planning and advising on the security activities regulated in this Act.

Law 23/1992 indicates that when the security companies provide services for which the use of arms is required, they must adopt measures that guarantee their safe-keeping, use and operation. The Regulation of 1994 regulates more precisely the provision of services with arms, depending on the nature of the services or the characteristics of the establishments, entities, organisations, or buildings to be protected<sup>20</sup>.

In accordance with the same Law, security guards will only carry out a series of services using firearms, among which we can emphasise for the purposes of the present report: those of monitoring and protection of Centres and facilities which are either military in nature or which belong to the Ministry of Defence and in which members of the Armed Forces serve or which are destined for use by the afore-mentioned personnel. Even if Spanish practice does not offer any clear example of the use of this article abroad, it gives the possibility.

The Regulation also refers to the deposit of arms<sup>21</sup> and in this sense, the security guards will not be able to carry the arms outside of the hours and places where they provide the service, with the arms having to be deposited the rest of the time in the armouries of the work-places or, if there are none, in those of the security company.

Exceptionally, at the beginning and end of the security contract, or when there is a need for special or supplementary services or obligatory target practice exercises, they will be able to carry the arms on the way there and back, following authorisation by the head of security or, in his absence, by the person in charge of the security company, who will have to follow the formalities determined by the Ministry of Justice and Interior, handing them over for deposit in the corresponding armoury.

#### *4.2 Personnel (national, foreign, level of skills) and license required for conducting private security or investigation services*

Law 23/1992 on Private Security establishes that activities of private security and services of this nature can only be provided by the security companies and the security personnel. The Law 23/1992 on Private Security distinguishes two actors: private security companies and private security personnel<sup>22</sup>, and in this respect incorporates a series of modifications with the aim of fulfilling the 1999 judgment of the European Court of Justice<sup>23</sup>.

##### *4.2.1. Private Security Companies*

The activity of private security companies (PSCs) is subject to an administrative license by the Ministry of Interior and to the registration of the company in a *Registry of*

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<sup>20</sup> Article 81 of the Regulation.

<sup>21</sup> Article 82 of the Regulation.

<sup>22</sup> Articles 5 to 7 of the Law 23/1992 on Private Security.

<sup>23</sup> Articles 10 to 20 of the Law 23/1992 on Private Security.

*Private Security Companies* created within the Ministry of Interior<sup>24</sup>. Both the licensing and the registration of the relevant company are subject to strict requirements established in the Law. Should any company fail to comply with these requirements once registered and operating, the Minister of Interior can cancel the registration and the license to operate<sup>25</sup>. Moreover, every PSC must submit an *annual report* on its activities to the Ministry of Interior. Such a report will contain a list of the contracts with third parties for the delivery of private security services, the name of the person with whom the contract was signed, the nature of the service to be delivered, and any other relevant information. On the basis of the reports submitted by the PSCs, the Ministry of Interior must inform the Spanish Parliament on the functioning of the sector<sup>26</sup>. These reports and the information to be provided to the Parliament, if taken seriously, are excellent means for control of the sector and for the detection of any irregularities in its functioning, with a view to proposing and implementing the necessary changes.

#### 4.2.2. *Private Security Personnel*

Private Security personnel, comprising security guards, security chiefs and private bodyguards, private field guards and private detectives, in order to be authorised to develop their functions, must obtain previously the certificate of authorisation from the Ministry of Interior, having the character of an administrative authorisation, always demanded by the interested person. The candidate must be of adult age, not have reached the maximum age prescribed and pass aptitude tests accrediting the necessary knowledge and capacity to exercise the functions of the position.

#### 4.2.3. *The modifications introduced in Law 23/1992 after the 1998 judgement of the European Court of Justice.*

Law 23/1992 of Private Security was modified in 1999 with the aim of fulfilling the judgement of 29 October 1998 of the European Court of Justice. The Court analysed the compatibility of the regulation established in the Spanish Law of 1992 with Community Law and considered that the exception of public order does not cover in this case the privation of the freedom of circulation of workers, of establishment and provision of services within the Community, anticipated in articles 48, 52 and 59 of its Constituent Treaty.

As a result of this judgment, the articles of Law 23/1992 on Private Security affected by the same were reformed by Royal Decree-Law 2/1999. After the reform, the conditions that security companies must fulfil are as follows:

“In any case, security companies that provide services with security personnel must have the nationality of a Member State of the European Union or of a State participating in the European Economic Area Agreement”<sup>27</sup>.

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<sup>24</sup> Article 5 and Article 7.1 of the Law 23/1992 on Private Security.

<sup>25</sup> Ibid., article 7.3

<sup>26</sup> Ibid., article 2.4.

<sup>27</sup> Royal Decree-Law 2/1999, of 29 January, modifying Law 23/1992, of 30 July, of Private Security, single Article.

Also, according to the principle of free provision of services of the Community Law, the administrators and directors of the security companies, that will appear in the Registry will have:

“To be physical persons resident in the territory of one of the Member States of the European Union or a State participating in the European Economic Area Agreement”.

Royal Decree-Law 2/1999 which modifies Law 23/1992 establishes that obtaining a permit and the provision of services will require “having the nationality of one of the Member States of the European Union or of a State participating in the European Economic Area Agreement, necessary medical fitness and psychological capacity for the exercise of the functions”.

The contracts for provision of the different security services will in any case have to be made in writing, in accordance with the official model, and to be communicated to the Department of the Interior, at least three days prior to the initiation of such services. The 1994 Regulation on Private Security lays out the particular requirements in order to get the permit<sup>28</sup>. For the licensing of the personnel and at all times for the provision of private security services, the personnel will have to meet the following general requirements:

- a) To be of adult age.
- b) To have the nationality of one of the Member States of the European Union or a State participating in the European Economic Area Agreement.
- c) To possess the necessary medical fitness and psychological capacity for the exercise of the respective functions without suffering from any condition that prevents the exercise of the same.
- d) To lack a criminal record.
- e) Not to have been convicted for illegal interference in the area of protection of the right to honour, to personal and family privacy and the rights to one's own image, to the privacy of communications or other fundamental rights in the five years prior to the application.
- f) Not to have been sanctioned in the previous two or four years, respectively, for serious or very serious infractions in questions of security.
- g) Not to have been expelled from service in the Armed Forces or the Security Forces and Corps.
- h) Not to have practised control of the bodies, services or activities of private security, surveillance or investigation, nor of its personnel or means, as a member of the Security Forces and Corps in the two years prior to the application.
- i) To pass the tests that accredit the necessary knowledge and capacities to exercise the respective functions.

The majority of the requirements, we might say, are obvious. Nevertheless, the requirement of not having been expelled from service in the Armed Forces or the Security Forces and Corps is remarkable. We could interpret that whoever has served in the Armed Forces or the Security Forces and Corps is permitted to serve in private security companies as long as they have not been excluded from the public institution.

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<sup>28</sup> Amended by Royal Decree 4/2008, of 11th January.

In the same way, the requirement that in the two previous years personnel should not have undertaken functions of control, services or activities of security as members of the Security Forces and Corps opens up the possibility that those who have worked in the public institutions go on to serve in these private companies.

Under Articles 4 *et seq.* of the Regulation, the authorisation procedure consists of three phases, which require specific documentation and are the object of successive activities and resolutions.

#### *4.3. Spatial or geographical scope of application of the Law of 1992*

The general rule on the scope of spatial application of the Law of 1992 states that “except for the function of protection of the transport of money, documents, goods or objects, security guards will exclusively practise their functions within the buildings or properties which they are in charge of monitoring”. So that, in principle, such functions cannot be carried out in public thoroughfares. However, next, the Law of 1992 introduces an exception, when declaring that “in the case of industrial estates or isolated housing developments, monitoring and protection services can be carried out”. Again we meet the possibility that, via a loophole, these companies can carry out their services in the public thoroughfare. The application of this aspect to Spanish practice should be the object of more exhaustive analysis.

#### *4.4. Professional associations*

In Spain, the Association of Contractor Companies with Public Administration (AESMIDE), includes a great variety of companies, among them infrastructure and facilities companies; general equipment, provisions and services companies; personal equipment or clothing companies and logistic distribution companies. Among the list of companies that belong to the Association AESMIDE we found some whose activity is military and security forecasting, the logistic analysis and programming and studies for the State Administration on the externalisation of non-specifically military or security functions.

The associations that provide private security services in Spain could be classified as follows:

##### a) Private security generally

- AES: Spanish Association of Security Companies.
- FES: Spanish Business Federation of Security.
- APROSER: Professional Association of Private Security Services Companies.
- ADSI: Association of Integral Security Managers.
- SEDS: Spanish Security Law Society.
- ACAES: Catalan Association of Security Companies.
- AESCAM: Association of Security Companies of the Autonomous Community of Madrid.
- AGES: Association of Security Companies of Granada.

b) Private security: installation and maintenance

- APEMESE: Association of Small and Medium-sized Companies of Electronic Security.

c) Private security: monitoring and protection

- AEVS: Spanish Association of Security Guards.

d) Private security: bodyguards

- ASES: Spanish Association of Bodyguards.

e) Private security: security directors

- AEDS: Spanish Association of Directors of Security.
- ACADISE: Canary Islands Association of Directors of Security.

f) Private security: security heads

- AJSE: Spanish Association of Security Heads.

g) Private security: training

- ACS: Spanish Association of Centers of Security Training.

## **5. Regulation of armed force**

### *5. 1. Possession and use of arms*

In Spain, the possession and carrying of (fire) arms is monopolised and controlled by the government. The 1992 Organic Law 1/1992, of 21 February, regarding the Protection of Citizens' Security regulates the activities related to arms and explosives, allowing the intervention of the State in the entire process of production and sale, as well as possession and use of arms. The same Law recognises the restrictive reach of administrative authorisations. The aim is to safeguard public security.

Accordingly, Organic Law 1/1992 on Protection of Citizens' Security provides that the Administration of the State will establish the requirements and conditions of manufacture, commerce, possession and use of arms and authorises the government to regulate the matter and to establish the necessary measures of control and attributes to the Interior Ministry the exercise of competences in the matter.

Accordingly, Royal Decree 137/1993 of 29 January 1993 approving the regulation of Arms defines and classifies the arms regulated and prohibits the manufacture, importation, circulation, advertising, purchase and sale, possession and use of a series of arms<sup>29</sup>. It regulates the conditions of production and repair of arms, their imitations, and every matter regarding the transit, storage and trade, acquisition, possession and use. It also determines the necessary measures in order to control the accomplishment of the conditions and prohibits the production, import, circulation, publicity and trade of certain arms. There is a licensing system in place (e.g., for sports and hunting).

The competences to intervene and inspect in this area correspond to the Interior Ministry through the Directorate General of the Civil Guard to guarantee public

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<sup>29</sup> Royal Decree 137/1993, of 29 January, which approves the Regulation of Arms, Official Bulletin of the State no. 55, of 5 March 1993. Articles 4.5 and 6 of the Regulation.

security; to the Ministry of Defence in its function to safeguard national security; to the Ministry of Industry in the regulation and management of the licenses of importation and exportation of arms; to the Ministry of Foreign Affairs in the authorisation of transit through Spanish territory of arms and ammunition coming from abroad<sup>30</sup>.

The establishments dedicated to the manufacture, assembly, storage, distribution, sale or repair of any class of firearms or their fundamental parts must adopt the appropriate safety measures established in the Regulation.

With regard to special licenses and authorisations, nobody will be able to carry or possess firearms in Spanish territory without the corresponding authorisation issued by the administrative agencies to which the Regulation gives competence. The application for a permit to bear arms must be presented together with the following documentation: record of current criminal convictions; photocopy of the national identity document; and report on psycho-physical aptitudes. The bodies responsible for the procedure prepare a report on the behaviour and history of the individual in question whose result is passed to the authority competent to resolve it.

The Spanish Penal Code regulates crimes of possession, trafficking and stockpiling of arms, ammunition or explosives<sup>31</sup>.

## 5. 2. *Arms export*

The export of arms from Spain and the transit of military goods across Spain are regulated by various domestic laws and regulations. The rules are based on:

- European Union Code of Conduct on Arms Export of 1998,
- Law 53/2007, of 28 December 2007, on the control of foreign trade in defence and dual-use material<sup>32</sup>,
- Royal Decree 2061/2008, of 21 December 2008, approving the Regulation on the control of foreign trade in defence materials, other materials and dual-use technology<sup>33</sup>.

Beginning with the general legal framework, the Code of Conduct in the matter of arms exportation was approved by the European Council in 1998. It consists of the implantation of eight criteria for the policy of exportation of arms between the Member States. Among others, the criteria are based on non-exportation to countries in conflict or which violate human rights. Also, it includes the obligation to send precise and detailed information to the European Parliament on the defence material exported by each Member State and where it goes.

Law 53/2007, of 28 December, on the control of foreign trade of defence and dual-use material corresponds to Spain's decision to adapt its legislation on foreign trade of defence material and products and technologies of dual use. This section will be

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<sup>30</sup> Article 7 of the Regulation.

<sup>31</sup> Articles 563 to 570 and 577.

<sup>32</sup> Law 53/2007, of 28 December, on the control of the foreign trade of dual-use and defence material, Official Bulletin of the State no. 312, of 29 December 2007.

<sup>33</sup> Royal Decree 2061/2008, of 21 December, which approves the regulation of control of the foreign trade of defence and other material, and of dual-use products and technology, Official Bulletin of the State, 7 January 2009, no. 6, sec. I, pp. 1217 to 1325; Royal Decree 137/1993, of 29 January, which approves the Regulation of Arms, Official Bulletin of the State number 55, of 5 March 1993.

based on what is laid down in the Law. The aim of the Law is to prevent the illicit traffic and the proliferation of armaments and sensitive technologies to States or non-state actors likely to act against peace and security, or to become involved in terrorist activities. Also, it seeks to respond to a significant political and social demand for control of arms trading. The Law establishes a series of measures of control and transparency. In this framework, the Spanish government must send to Parliament each semester the pertinent information on exports. Also, it must appear annually before the Parliament to inform on the statistics for the periods of reference.

Law 53/2007 on the control of foreign trade of defence and double use material contains the eight criteria of the Code of Conduct of the European Union as well as those adopted by the OSCE in the Document on Small and Light Arms of 24 November 2000, so as to fulfil Spain's international commitments and guarantee the general interests of national defence and foreign policy of the State. The Law is applied to any physical or legal person who habitually or occasionally carries out the transactions described in the same in Spanish territory. The transfer of defence and other material, and dual-use technology and products in Article 1 will be carried out via administrative authorisation. For each authorisation, it must be established whether it is appropriate to establish mechanisms for verification, follow-up and collaboration between Governments. Nevertheless, there is no need for administrative authorisation for transfer of defence material that is going to be used by the Armed Forces or Security Forces and Corps of the Spanish State in their manoeuvres or missions that take place abroad in the pursuit of humanitarian operations or support of peace missions.

It falls to the Ministry of Industry, Tourism and Commerce to rule on authorisation requests regulated by Law 53/2007. Authorisation requests will be refused and authorisations suspended or revoked in the following cases:

1. When there are reasonable indications that the defence material or dual-use products and technologies can be used in actions that disturb the peace.
2. When the general interests of national defence and the foreign policy of the State are contravened.
3. When they break the directives decided in the European Union, in particular the criteria of the Code of Conduct, of 8 June 1998, in the question of arms export, and the criteria adopted by the OSCE in the document on Small and Light Arms of 24 November 2000, and other relevant international dispositions of which Spain is a signatory.

With respect to the penal and sanctioning system, besides that established in the Penal Code, Organic Law 10/1995, of 23 November, as regards the traffic of arms, Organic Law 12/1995, of 12 December, Suppression of Smuggling, is applied, which considers as a crime or administrative infraction, the exportation without authorisation, or with fraudulently obtained authorisation, of dual-use or defence material.

## **6. Criminal Responsibility**

### *6.1. Breaches ruled by Law 23/1992 on Private Security*

In the first place we will analyse the dispositions of Law 23/1992 on Private Security on the sanctioning regime regarding security companies and the personnel who carry out security functions. The infractions which companies may commit are not the same as those which the security personnel can, for this reason the law establishes this

differentiation. In both cases the infractions of the norms contained in the Law can be of three types: very serious, serious and mild. The distinction between the three types of infractions is based on the legal interest protected.

As regards the infractions which the security companies can incur, among the most serious are the provision of security services to third parties, without the necessary permit, or the breach of the normative provisions on the acquisition and use of arms. Among the serious infractions we note the provision of services of security without formalising the corresponding contracts or communicating them to the Interior Ministry. Mild infractions are identified with the actions of the personnel of security without due uniformity or breach of the procedures laid down in the Law which do not constitute a serious or very serious infraction<sup>34</sup>.

With regard to the personnel who perform functions of private security, they can incur very serious infractions by providing security services to third parties without belonging to a security company and or without the necessary permit. Serious infractions are associated with the provision of functions or services that exceed the permit obtained. And the slight infractions include acting without the uniformity or media laid down in law<sup>35</sup>.

In the area of the Administration of the State, the sanctioning power provided for in Law 23/1992 corresponds to the Minister of the Interior when it is a case of imposing penalties of cancellation of permits; to the Director of State Security to impose other sanctions for very serious infractions; to the General Director of the Police, to impose penalties for serious infractions and to the Sub-delegates of the Government (organs which represent the Spanish government in each of the Autonomous Communities).

## *6.2. Legislation on mercenarism/enlistment of nationals in foreign armed forces*

Spanish Law does not prohibit mercenary activity as such nor enlistment of nationals in foreign armed forces. Voluntary participation by a Spanish national in an armed conflict abroad or voluntary enlisting in a foreign army of a state with which Spain has no (imminent) armed conflict is not prohibited. Spain has not indicated that it will support (or become party to) the 1989 UN Convention against recruitment, use, financing and training of mercenaries.

The Spanish Penal Code governs the crimes of treason against peace or the independence of the State, and regarding national defence. The offence refers to the following activities: a Spanish national who induces a foreign power to declare war on Spain; a Spanish national who facilitates an enemy entry to Spain; the seizing of a position, military post, ship or aircraft of the State or stockpile of stores or armament. A Spanish national who deserts to the enemy ranks when Spain is involved in an armed conflict; a Spanish national who gives the enemy arms, or other means to attack Spain; one who gives information to a foreign State in order to help it<sup>36</sup>.

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<sup>34</sup> Article 22 of Law 23/1992 of Private Security.

<sup>35</sup> Article 23 of Law 23/1992 of Private Security.

<sup>36</sup> Spanish Penal Code articles 581 to 588 govern crimes of treason.

### 6.3. Individual criminal responsibility

Spanish criminal law is applicable to individuals committing the crimes defined by the Penal Code.

Among the common crimes that would be imputable to members of private security companies, it is notable that the Spanish Penal Code refers to crimes in case of armed conflict as “offences against persons and goods protected in case of armed conflict”. In this frame, the following persons are considered protected persons: 1) Wounded, sick and shipwrecked; 2) prisoners of war protected by the III Geneva Convention and Protocol I; 3) civilian population and civilian persons protected by IV Geneva Convention and Additional Protocol I; 4) persons *hors de combat*; 5) parliamentarians and persons accompanying them, protected by II Hague Covenant of 29 July 1899; 6) United Nations personnel and associated personnel, protected by the United Nations Treaty on the Safety of United Nations Personnel and Associated personnel, of 9 December 1994; 7) any other person who meets that condition on the basis of Additional Protocol II of 1977 and other related international Treaties ratified by Spain<sup>37</sup>. Taking this article into account, we can say that Spanish domestic law has properly introduced International Humanitarian Law into internal law.

According to the Spanish Penal Code, the one who, during an armed conflict, mistreats or puts in danger the health or the integrity of any protected person, commits torture or inhumane treatment, included biological experiments, will be sanctioned with prison<sup>38</sup>.

Furthermore, the Organic Law of Judicial Power<sup>39</sup> (the Act referring to judicial power) refers to Spanish jurisdiction in the penal area. Regarding the extent and limits of the competence of Spanish jurisdiction, article 23 of the Organic Law of Judicial Power establishes that cases due to crimes and misdemeanours committed in Spanish territory or on board Spanish ships or airships, correspond to Spanish jurisdiction, except as laid down in international treaties to which Spain is party<sup>40</sup>. Next, the same article indicates that Spanish jurisdiction will cover acts laid down in Spanish penal laws as crimes, although they may have been committed outside the national territory, whenever the criminally responsible persons may be Spanish or foreigners who have acquired the Spanish nationality after the commission of the act, and the following requirements are fulfilled:

1. That the act is punishable in the place of commission, unless by virtue of an international Treaty or a normative act of an international Organization to which Spain belongs, this requirement is unnecessary.
2. That the injured party or the Fiscal Ministry denounce or places a complaint before the Spanish Courts.
3. That the delinquent has not been acquitted, pardoned or punished abroad, or, in the last case, has not served the sentence<sup>41</sup>.

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<sup>37</sup> Spanish Penal Code articles 608 to 614, amended by Organic Law 15/2003, of 25 November.

<sup>38</sup> Spanish Penal Code articles 609 to 614, amended by Organic Law 15/2003, of 25 November.

<sup>39</sup> Organic law 6/1985, of 1 July, Judicial Power, Official Bulletin of the State of 2 July 1985, article 23.

<sup>40</sup> Organic law 6/1985, of 1 July, Judicial Power, article 23.1.

<sup>41</sup> Organic law 6/1985, of 1 July, Judicial Power, article 23.2.

Article 23, paragraph 4 of the Organic Law of Judicial Power includes the principle of universal applicability of Spanish jurisdiction as regards a list of crimes committed outside Spain, irrespective of the nationality of the perpetrator. These listed crimes are related with the most grave breaches of International Law - genocide, terrorism, piracy, counterfeiting, drug trafficking, and any others that, according to international treaties or convention, must be pursued in Spain.

The Spanish Criminal Law recognises criminal responsibility only to individuals, so it does not recognise penal responsibility to companies as such. However, the Penal Code stipulates different cases of subsidiary civil liability for entities (article 120.4). Among them, subsidiary civil liability is determined when legal entities dedicated to any type of industry or trade, commit offences due to their employees performing their obligation or services. The offence must be committed in the framework of the company's activity. There must be a legal relationship between the worker and the entity<sup>42</sup>.

#### *6. 4. Command responsibility and PMCs/PSCs*

In principle, Spanish Military criminal and disciplinary law is only applicable to members of the armed forces exclusively. The power to command is conferred by the person's rank and function. The responsibility of the Commander cannot be resigned or transferred. Command may, within its limits, be delegated, but this does not imply the transfer or diminution of responsibility, which always remains with the competent command.

In the Spanish Doctrine of Logistic Support there is no disposition that makes the military command responsible for the security of contracted civilian personnel. Nevertheless, it is remarkable that the logistic doctrine anticipates that, for reasons of security, the zones of action and type of mission in which this personnel can act may be limited. "Civil participation will be limited territorially to the areas in which they can serve with a minimum acceptable risk"<sup>43</sup>. The problem is that to determine the "minimum acceptable risk" in contemporary conflicts is complex, or indeed impossible. The preoccupation with the aspect of security and the determination of command is placed in relief in the latest manifestations of the Doctrine of the Army.

### **7. Civilian Liability in Contract**

#### *7.1. Introduction*

In Spanish law a contract concluded between the Spanish armed forces and PSC is private in nature. The public nature of the Spanish armed forces may lead to the wrongful application of the rules that govern public contracts. However, this conclusion does not take into account the fact that the public or private nature of a contract (even if entered into by a State) does not depend on the public or private nature of the contracting parties, but on the role in which they are acting. If the State or, in this case, the Spanish armed forces, are acting as a private person, the contract is private in nature. It is clear that such a contract cannot be public in nature, and thus subject to the rules of

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<sup>42</sup> Sentence of the Supreme Court, 29 October 1994, 8330/1994 and 12 April 1995, 3379/1995.

<sup>43</sup> Systems of Support for Civilians to logistics. Externalisation. Doctrine of Logistical support. DO 2 - OO5 Chap. 12-10. Control of Training. Army Doctrine 2007.

administrative contracts, characterised by the principles of competition, publicity and transparency.

Another remark must be made, related to the distinction between an internal contract and an international one. An internal contract is one in which every single aspect of the contractual relationship is connected with the Spanish territory. However, any connection with a foreign element will be enough to qualify the contract as international (the nationality of any contracting party, the place of conclusion of the contract, the place of action...).

### *7.2. International contracts*

The identification of the Law that governs the contract between the Spanish armed forces and PSC depends on the Rome Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980<sup>44</sup>. According to this legal instrument, the applicable law is determined by a choice of law made by the contracting parties. In this sense, they may choose the law of the State that best protects their interest<sup>45</sup>.

In the absence of a choice of Law, the contract will be governed by the Law of the State most closely connected with the contract. Barring evidence to the contrary, this closest connection is identified with the State where the service provider (PSC) has its principal place of business or, in the case of a body corporate or unincorporated, its central administration at the moment of conclusion of the contract<sup>46</sup>.

Furthermore, certain mandatory rules may be applied irrespective of the choice of law or of the applicable law<sup>47</sup>. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

### *7.3. Internal contracts or international contracts governed by Spanish Law*

There are no special civil law rules on PSC activities. The Law 23/1992 of Private Security does not expressly regulate contractual liability of PSC. In the absence of special regulation, contractual liability of PSC is subject to the general rules of the Spanish Civil Code, especially to articles 1101 to 1112. In general terms, Spanish law allows great freedom to the contracting parties. However transactions contrary to public order by their nature or content are void<sup>48</sup>.

The cornerstone of Spanish contractual civil liability is Article 1101 of the Civil Code, which states that a party incurs liability when it breaches its obligations or

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<sup>44</sup> Official Journal L 266, 9.10.1980. From 17 December 2009, Rome Convention (hereinafter, RC) will be replaced by Regulation 593/2008 (OJ L 177, 4.7.2008). However, Regulation 593/2008, also named as Regulation Rome I, doesn't introduce relevant differences on the rules that govern this kind of contract, and the way of determining the applicable law will be basically the same.

<sup>45</sup> Article 3 RC and Regulation Rome I.

<sup>46</sup> Article 4 RC and Regulation Rome I.

<sup>47</sup> Article 7 RC and Article 9 Regulation Rome I.

<sup>48</sup> Article 1275 Spanish Civil Code.

otherwise fails in performance. This is quite different from liability issues arising from tort.

### 7.3.1. *Wilful misconduct*

The Spanish Civil Code establishes an extension of liability in any circumstance where there is a finding of wilful misconduct in the action or omission of a party at fault. It specifically provides that the liability arising from wilful misconduct can be claimed at all times and that any waiver of that liability is null and void<sup>49</sup>.

### 7.3.2. *Negligence*

Negligence is defined in the Spanish Civil Code as the omission of an expected duty of care, whose standards are to be measured in view of the prevailing factual circumstances<sup>50</sup>. These circumstances include the nature of the obligation, the peculiarities of the parties entering into the contract, and other aspects relevant in terms of analysing the different degrees of breach or performance. That means that the level of negligence involved in each case may be determined by the courts, which also take into account the liability exposure.

### 7.3.3. *Force majeure*

As a general principle, contracting parties will not be held responsible in cases of unexpected events or unavoidable events beyond their reasonable control<sup>51</sup>.

### 7.3.4. *Economic compensation*

Compensation for damages and loss of profit are identified as the general remedy in case of breach. Moral damages meanwhile are increasingly being accepted by into legal doctrine. The compensation for which a faulty party may be held liable depends on the degree of its own negligence. Compensation in cases of wilful misconduct renders the party at fault fully responsible for any and all damages sustained by the party not at fault. However, in cases involving negligence, compensation is limited to those damages that could reasonably have been foreseen at the time the obligation was undertaken<sup>52</sup>.

In terms of civil liability there is no provision under Spanish law limiting the damage exposure of a contracting party. The Civil Code in fact establishes a principle of universal recourse where all assets of the parties, including future assets, are inevitably affected by the payment of damage compensation in case of breach, unless otherwise agreed upon by the parties in certain cases<sup>53</sup>. While contractual liability is theoretically unlimited as to the amount, the parties may try to eliminate, limit or increase, as the case may be, their otherwise general exposure.

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<sup>49</sup> Article 1102 Spanish Civil Code.

<sup>50</sup> Article 1104 Spanish Civil Code.

<sup>51</sup> Article 1105 Spanish Civil Code.

<sup>52</sup> Article 1107 Spanish Civil Code.

<sup>53</sup> Article 1911 Spanish Civil Code.

### 7.3.5. *Period of limitation*

The period for filing a claim on contractual liability is 15 years<sup>54</sup>.

## 7.4. *Civil liability in tort*

### 7.4.1. *Introduction*

Liability in tort deals with responsibility for any damages which may occur with the PSC and third parties that have nothing to do with the Spanish armed forces connected with the performance of the contract.

Once again, a remark should be made when the tort relationship is international in nature, that is, when the extra-contractual relationship involves any foreign element (e.g., the place where the damage occurred, the nationality of the victim...). In this case, the first step to be taken is the determination of the applicable law under Regulation 864/2007, on the law applicable to non-contractual obligations (hereinafter, Regulation Rome II)<sup>55</sup>. According to Regulation Rome II, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur<sup>56</sup>. However, the tort action may be governed by the same law applicable to the contract because it is closely linked to it<sup>57</sup>.

### 7.4.2. *Negligence*

Spanish law provides that liability in tort may be imposed on individuals not only for their own actions but also for the actions of their dependent people<sup>58</sup>. Liability in tort is governed by Articles 1902 and hinges on three elements:

- a) A fraudulent or negligent act or omission by the defendant (PSC);
- b) The plaintiff's suffering direct damages, which may include detriment ("*daño emergente*"), loss of gain ("*lucro cesante*"), and moral damages ("*daños morales*");
- c) The defendant's act or omission causing the plaintiff's damages.

The plaintiff has traditionally had the burden of proving the negligence of the person causing the damage, but under recent Supreme Court case law, it is now presumed that the person causing the damage acted negligently. Defendants now have the burden of proving that they behaved with due diligence.

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<sup>54</sup> Article 1964 Spanish Civil Code.

<sup>55</sup> Official Journal L 312, 31.7.2007.

<sup>56</sup> Article 4.1 Regulation Rome II.

<sup>57</sup> According to article 4.3 Regulation Rome I "*Where it is clear from all the circumstances of the case that the tort /delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort/ delict in question*".

<sup>58</sup> Article 1904 Spanish Civil Code.

#### 7.4.3. *Economic compensation*

There are no special civil law rules on PSC's liability in tort. In principle, PSC are responsible for their own actions and must themselves compensate any victim of their actions. Law 23/1992 of Private Security does not expressly regulate non-contractual liability of PSC. Only article 7.2.d) states the compulsory nature of arranging for an insurance policy. Apart from that, civil liability in tort is regulated in general by article 1,902 of the Spanish Civil Code.

Application of the Resolution of 20 January 2009, of the Directorate General of Insurance and Pension Funds, which publicises the amounts of compensation for death, permanent injury and temporary incapacity which they will apply during 2009, the system for valuation of the damages caused to people in traffic accidents<sup>59</sup> may serve as a guideline for quantifying the economic compensation to be paid to the victims of the PSC.

#### 7.4.4 *Period of limitation*

Period for filing a claim on liability on tort is 1 year after the damage occurs<sup>60</sup>.

#### 7.5. *Civil jurisdiction over contract claims*

Jurisdiction rules over contractual claims depend on the national or supranational character of the contractual relationship:

- a) When all the elements are connected with Spain, according to article 45 and 50.1 of the Law of Civil Judgement, the plaintiff should bring the action before, in the first instance, the courts of the defendant's domicile.
- b) When any foreign element is involved, the legal instrument applicable to determine jurisdiction will depend on the defendant's domicile<sup>61</sup>:

1. If the defendant is domiciled in a EU Member State, jurisdiction is governed by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, also named Regulation Brussels I (hereinafter, Regulation 44)<sup>62</sup>. According to this Regulation, the plaintiff may bring the action in the courts of the defendant's domicile<sup>63</sup> or in the place in a Member State where, under the contract, the services were provided or should have been provided<sup>64</sup>. That is unless the contracting parties have agreed that a court or the courts of a Member State are to

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<sup>59</sup> Official Bulletin of the State, n.º 28, 2 of February of 2009.

<sup>60</sup> Article 1968 Spanish Civil Code.

<sup>61</sup> For the purposes of Regulation 44, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its (a) Organic seat, or (b) central administration, or (c) principal place of business (article 60).

<sup>62</sup> Official Journal L 12, 16.1.2001.

<sup>63</sup> Article 2 Regulation 44.

<sup>64</sup> Article 5.1 Regulation 44.

have jurisdiction to settle any disputes which have arisen or which may arise in connection with their particular contractual relationship<sup>65</sup>.

2. If the defendant is domiciled in a non-member State, jurisdiction is governed by Article 22 of the Organic Law of Judicial Power (hereinafter, LOPJ). According to this Regulation, the defendant may be sued in Spain if his domicile is located in Spain, or if the contract has been concluded in Spain, or if the contract has to be performed in Spain, that is, unless the contracting parties have agreed that Spanish courts are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with their particular contractual relationship.

### 7.6. *Civil jurisdiction over tort claims*

Jurisdiction rules over tort claims also depend on the national or supranational character of the relationship in tort:

- a) When all the elements are connected with Spain, according to Articles 45 and 50.1 of the Law of Civil Judgement, the plaintiff should bring the action in the first instance before the courts of the defendant's domicile.
- b) When any foreign element is involved, the legal instrument applicable to determine jurisdiction will depend on the defendant's domicile<sup>66</sup>:

1. If the defendant is domiciled in a EU Member State, jurisdiction is governed by Regulation 44. According to this Regulation, the plaintiff may bring the action in the courts of the defendant's domicile<sup>67</sup> or in the courts of the place where the harmful event occurred or may occur<sup>68</sup>. That is unless the parties have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with their particular relationship.

2. If the defendant is domiciled in a non-member State, jurisdiction is governed by Article 22 of the Organic Law of Judicial Power (hereinafter, LOPJ). According to this Regulation, the defendant may be sued in Spain if his domicile is located in Spain, or if the contract has been concluded in Spain, or if the harmful event occurred in Spain, or if the victim and the person that cause the damage both have their habitual residence in Spain. That is unless the contracting parties have agreed that Spanish courts are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with their particular relationship.

## 8. Labour Law

There are no specific rules on PMC in Spanish Labour Law. Regarding private security companies, we must distinguish, on the one hand, contracts undertaken between

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<sup>65</sup> Article 23 Regulation 44.

<sup>66</sup> As explained before, for the purposes of Regulation 44, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its (a) Organic seat, or (b) central administration, or (c) principal place of business (article 60).

<sup>67</sup> Article 2 Regulation 44.

<sup>68</sup> Article 23 Regulation 44.

the private security companies and their workers, and on the other, contracts undertaken between the private security companies and the public Administration.

Focusing on the labour relation between private security companies and their workers, the Private Security Companies signed the State Collective Agreement for Security Companies for 2005-2008<sup>69</sup>, which is being negotiated for the period starting January 2009. While it is being negotiated, the afore-mentioned agreement will remain in force. The Agreement was signed on one part by the business associations APROSER<sup>70</sup>, FES<sup>71</sup>, AMPES<sup>72</sup> and ACAES<sup>73</sup> and the unions UGT<sup>74</sup> and USO, representing the affected labour group. This Agreement establishes the bases for relations between the Surveillance and Security Companies and their workers. It includes in its field of material application all companies dedicated to the provision of surveillance and security of “any class” of premises, goods or people, as well as services of transport or transfer with accredited media and vehicles.

However, the territorial scope of that agreement is exclusively Spanish territory. For this reason, as regards labour, we must go to article 1.4 of the Statute of Workers, which establishes a norm of extension, applicable to multinational companies with their headquarters in Spain and branches abroad.

### *8.1. Personnel health and safety*

The signatory parts of the collective agreement consider it essential to protect the security and health of workers against risks in their work by means of the establishment of effective policies of labour risk prevention. Consequently, in the light of that laid down in Law 31/1995, of 8 November, Prevention of Labour Risks, they consider it necessary to improve working conditions and continuing to strive for permanent improvement of the levels of training and information of the personnel inasmuch as it can contribute to elevating the level of protection of the security and health of workers in the sector.

On the other hand, considering that these are high-risk professions, the guarantees as regards labour accidents and incapacitation are covered in the so-called Special Agreements of Social Security.

### *8.2. Is there any specific legal discipline on training?*

The companies that have signed the collective Agreement submit to the system of continuous professional training regulated in Royal Decree 1046/2003, of 1 August, and the Ministerial Order of 13 February 2004, as well as to any developments of contract programs for worker training.

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<sup>69</sup> Resolution of 18 of May of 2005, of the Directorate General of Work, laying down the inscription in the registry and publication of the state collective agreement of security companies, 2005-2008, Official Bulletin of Spain n. 138, 10 June 2005.

<sup>70</sup> Professional Association of Private Security Services Companies ([www.aproser.org](http://www.aproser.org)).

<sup>71</sup> Spanish Federation of Security Enterprises ([www.fes.es](http://www.fes.es)).

<sup>72</sup> Association of Professional Media and Security Companies.

<sup>73</sup> Catalan Association of Security Companies (ACAES).

<sup>74</sup> General Workers' Union (UGT)

There is established a Mixed Commission on Continuous Professional Training of the Private Security Sector, to develop whatever initiatives are necessary in the scope of training activity. The companies submit to the procedures established in this Agreement and must inform the Representatives of the workers of the plans for professional training to be carried out, under the general objective of the best adaptation of the company to the circumstances of the market.

## 9. Government policy on the status of PMCs/PSCs and to other aspects

(Brief presentation of government policy, if any, on the status of PMCs/PSCs under IHL, or on other aspects not covered in the above points).

During the preparation of this report it has been shown that, for the Spanish government, the question regarding the hiring of companies of private security, military or otherwise, is extremely delicate. To that extent, we can state that there is no clear position on the matter, nor a structure or procedure to formulate proposals or to give content to the current legal void.

The Higher Centre for National Defence Studies ([www.ceseden.es](http://www.ceseden.es)) in 2007 published a Monograph entitled “The externalisation of the Armed Forces: the balance between internal and externalised logistical support”. This study was prepared by a working group composed, in its majority, of members of the Armed Forces<sup>75</sup>. We cannot affirm that this is the general position of the Spanish government since we have been unable to obtain more information on the matter. What is true is that the Higher Centre for National Defence Studies, as contemplated by Spanish Law of the Military Career, belongs to the Ministry of Defence of the Spanish government and has the function of giving courses in Higher Studies of National Defence as well as developing research in the area of defence. The report is published on the Internet, being the most significant advance in this matter as regards Spain. In any case, this is a significant contribution, although it has not been adopted as the policy of the Spanish government on the matter.

This recent work has served us as a guide to help identify the position of the Spanish government. The document opts for externalisation and declares that external support services, in the first stages of force deployment, in the absence of what is known in the North Atlantic Treaty Organization (NATO) as HNS (Host Nation Support), “is essential since it facilitates a faster deployment, normally obtained through local contractors and personnel”.

In the Monograph it is declared that “the use of these private companies, in zones that are not actually in combat or in proximity to it, can be advisable, giving the capacity to offer services quickly and flexibility, so as not to be placed under limitations, procedures and legislation to which public organisations are subject and not

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<sup>75</sup> Higher Centre of National Defence Studies, “Externalisation in the Armed Forces: Balance between internal and externalised logistical support”, number 90, Ministry of Defense, p. 21. The working group that has developed this work consists of its President: FERNANDO MOSQUERA SILVÉN, *Lieutenant General, Air Force (Ret.)*; Secretary: JUAN ANTONIO DEL CASTILLO MASETE, *Major General, Air Force*; Members: JUAN ANTONIO DEL CASTILLO MASETE, *Major General, Air Force*; JESUS DEL OLMO PASTOR, *Auditor General (Ret.)*; ROSENDO ESCRIBANO NAVARRO, *Brigadier General, Army*; MIGUEL ANGEL RUIPÉREZ BALLESTEROS, *Director of Services and Logistic Systems (INDRA)*, JOSE MARIA ESCARIO PASCUAL, *Advisory Delegate of the SLi & UNION GROUP*; JUAN CARLOS GRACIANO REGALADO, *Professor of Political Economy and Public Property, Law Faculty of the Complutense University of Madrid*.

requiring, in general, important organisational structures". The work also takes into account the practical and negative aspects of the presence of the contracted civilian personnel. Civilian personnel, in the light of International Humanitarian Law, have the status of civilians authorised to accompany the forces, being, thus, non-combatants. This can be a complication for the head of the force deployed since he would have to provide protection for the civilian personnel, whereas the soldiers protect themselves. Another of the disadvantages invoked is that of not being able to count on them in compromising situations, as they are not authorised to use arms due to the legal problems that could ensue<sup>76</sup>.

Hypothetically speaking, it affirms that the authority of the commander of the force would be limited, since he would have to act in the terms established in the contract, whose director would not be in the deployment zone. Nor would the Code of Military Justice be applicable to the civilian personnel, unless there was a formal declaration of war, which is unusual<sup>77</sup>.

It is proposed to analyse firstly what activities are susceptible to being externalised, and secondly the conditions of contracting. In the monograph it is proposed to conserve those activities that constitute the essence or nucleus of the Armed Forces, that is to say, the accomplishment of the operational missions that are entrusted to them both in peacetime and in situations of armed conflict. However, it is added that some, if not all, operations that are carried out in peacetime could be susceptible to externalisation if there were civil companies capable of carrying them out. To assure the operational capacity of the force by means of logistical support generally and the maintenance of the weapon systems are services susceptible to externalisation<sup>78</sup>.

Finally, in conclusion, the Higher Centre for National Defence Studies declares that the challenge lies in defining those essential functions and distinguishing between combat and non-combat operations. The difference between one and the other has become more and more indistinct. No problems are found in terms of outsourcing support to military activities carried out in national territories, except for any amendments required in contractual laws in different countries. There are as yet no specific laws in Spain governing the provision of services by PMC in areas of armed conflict. Therefore the contract is the main source of the legal relationship between the hiring entity and the private firms. We note that the tendency to externalise is increasing. Spain must face the situation with realism and analyse the problem in depth to identify the resources available in the future and proceed in a planned way.

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<sup>76</sup> Ibid., pp. 21 to 23.

<sup>77</sup> Higher Centre of National Defence Studies, pp. 21-22.

<sup>78</sup> Higher Centre of National Defence Studies, pp. 21-22.