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The Regulatory Context of Private Military and Security Services in Brazil

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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. Scope of the Report

The objective of this report is to identify and describe the regulation that directly or indirectly governs the supply of private military and security services in Brazil. While there are no specific rules regulating the activity of private military companies (“PMCs”) in Brazil, the Parliament and Public Administration have enacted a relatively robust set of laws and regulations concerning private security companies (“PSCs”). The focus of the report is on the latter rules, as they are likely to be applied by analogy to PMCs (should the need arise before courts) and to serve as inspiration to any legislation drafted in the future. The second part of the report addresses the current state of, and the prospects for, regulation of PMCs in Brazil. Reference to relevant fields of the law, such as criminal, labour and private law shall be made as appropriate.

2. Regulation of Private Security Services

Pursuant to the Brazilian Constitution of 1988, promoting public security is a duty of the state.¹ Security is a public service to be supplied by the several police forces the establishment of which are provided for by the Constitution.² Nonetheless, by virtue of the endemic problems with urban violence and criminality Brazil faces, there is a wide market for PSCs in the country. As reported in 2008 by the governmental federal news agency *Agência Brasil*, the number of private security guards in the country has surpassed by 5% the number of military policemen.³ Remarkably, PSCs are hired to supply security services not only to individuals but also to public organs and companies. Two principal statutes govern their activities: Law 7,102 and Law 10,826. These laws are described in the next two subsections.

2.1 The general regime: Law 7,102

Law 7,102 on private security companies and the security of financial institutions lays down the general regime for the supply of security services. Enacted on June 20th 1983, Law 7,102 has been amended and updated by several statutes throughout the years.⁴ It has also been subject to considerable specification through presidential decrees and other implementation rules issued by the Federal Police and other organs of the Public Administration.⁵

Pursuant to Article 10 of Law 7,102, “private security” encompasses the following activities: (1) security of the property of financial institutions and other private or public establishments; (2) security of individuals; and (3) security in the transportation of currency and securities, as well as in the transportation of any other

¹ See Title V, Chapter III on “Public Security”, especially article 144: “Public security, the duty of the State and the right and responsibility of all, is exercised to preserve public order and the safety of persons and property...”. All the legislation referred to in this report is available (in Portuguese) at <<http://www.presidencia.gov.br/>>.

² Pursuant to art. 144, these are the federal police; the federal highway police; federal railway police; civil polices; military polices and military fire brigades.

³ According to data provided by the Federal Police’s Department for the Control of Private Security, there are 431,600 private security guards in Brazil against a number of 411.900 military policemen. The number of guards is also 35% bigger than the number of members of the Brazilian army (320.400). Available at: <www.agenciabrasil.gov.br/noticias/2008/06/02/materia.2008-06-02.6503874769/view>. Accessed on June 4th 2008.

⁴ These statutes are: Law 8,863, enacted on March 28th 1994; Law 9,017, enacted on March 30th 1995; Provisional Measure 2,184-23, enacted on August 24th 2001 and Law 11,718, enacted on 20th June 2008. The Brazilian National Congress is currently discussing a draft bill that, if adopted, will replace the current legislation on private security (*see* draft bill 5247/2009). This draft bill would have the effect of systematizing—rather than of bringing deep modifications to—the current rules.

⁵ In Brazilian law, the Executive Power has competence to issue regulations of a technical character that prove necessary to implement a statute enacted by the Legislative Power. Such regulations may neither widen nor narrow (or otherwise modify) the statute they implement. *See* art. 84, IV of the Brazilian Constitution (conferring upon the President the power to “sanction, promulgate and order the publication of laws, as well as to issue decrees and regulations for the true enforcement thereof”). *See* also Ferraz Júnior, *Introdução ao Estudo do Direito*, p. 231-234.

type of cargo. Paragraph 2 of the same article stipulates that security companies *incorporated as private companies*⁶ may supply security services to individuals; commercial and industrial establishments, and residences; non-profit entities; and public organs or companies.⁷ The incorporation and functioning of such companies are governed not only by the provisions of Law 7,102, but also by the relevant norms of private, commercial, labour, social security and criminal law.⁸ So is the case of other companies which, established to carry out other economic activities, nevertheless entrust employees with the task of providing security.⁹

Law 7,102 also creates the legal category of the “private security guard” (*vigilante*), i.e., the employee hired by the company to undertake the functions of security.¹⁰ Pursuant to Article 16, the private security guard must fulfill the following requirements: (1) have Brazilian nationality; (2) have the minimum age of 21 years; (3) have completed at least the fourth year of elementary school;¹¹ (4) have attended and successfully completed a course tailored for the training of private security guards; (5) have undergone the relevant physical and psychological examinations; (6) have clear criminal records; (7) have fulfilled electoral and military duties pursuant to the respective laws. It is incumbent on the Federal Police Department to supervise the fulfilment of these requisites by the private security guards; accordingly, Law 7,102 imposes on PSCs the duty to register before the Federal Police all the hired private security guards, presenting on this occasion documentary evidence that the latter meet the legal requirements.¹²

Article 19 of Law 7,102 confers upon private security guards some prerogatives. They shall wear¹³ a special uniform provided (and paid for) by the PSC; carry a weapon while on duty; receive special treatment if criminally convicted for an act committed in the discharge of their functions; and have life insurance at the expenses of the PSC.

As to the administrative regime to which private security services are subject, Law 7,102 stipulates that PSCs can only operate upon the authorization of the Brazilian Ministry of Justice,¹⁴ which plays a supervisory role with regard to them. Included in the regulatory authority the statute explicitly confers on the Ministry of Justice are the power to approve the design of the uniform for private security guards; the power to fix the number of private security guards PSCs may hire in each state of the federation; and the power to supervise courses created for the training of private security guards, as well

⁶ See Book II (Company Law, arts. 966-1195) of the Brazilian Civil Code (Law 10,406, enacted on 10th January 2002) and Brazilian Law on Corporations (Law 6,404, enacted on December 15th 1976).

⁷ Law 7,102, enacted on June 20th 1983, art.10 §2.

⁸ *Id.* §3.

⁹ *Id.* §4.

¹⁰ *Id.* art. 15.

¹¹ Normally at the age of 10.

¹² *Id.* art.17.

¹³ *Id.* art.18.

¹⁴ *Id.* art. 20, I(a).

as to formulate their syllabus.¹⁵ The Ministry of Justice is also competent to apply the administrative sanctions foreseen in Article 23. Under this provision, and depending on the gravity of the violation, PSCs that breach their obligations under Law 7,102 may receive a warning, incur a fine, be temporarily prohibited to operate or have their authorization to function cancelled.¹⁶

A last feature of Law 7,102 worth highlighting here is the prohibition on the supply of security services that is imposed upon foreign companies.. Article 11 proscribes foreign ownership and management of PSCs.¹⁷ The thrust of this prohibition lies in the idea that, under Brazilian constitutional law, the service of private security is complementary to the service of public security. As noted by a commentator, by virtue of the “public component” of private security, it is necessary to limit property in and control of PSCs to Brazilian nationals.¹⁸ In this respect, it is important to recall that not only the owner and managers of PSCs must be Brazilian, but so must the private security guards hired by these companies.

2.2 Law 10,826: The regime of firearms

As mentioned in the previous section, Law 7,102 authorizes private security guards to carry firearms. Article 21 of the same statute prescribes that such firearms are the property and responsibility of the PSC concerned, while Article 20 entrusts the Federal Police with the competence to authorize the acquisition of the arms and ammunition by PSCs, to supervise and control their use, and to regulate the number and type of the arms PSCs may own.¹⁹ Furthermore, the acquisition and use of firearms by PSCs are subject to the general regime of firearms established by Law 10,826 of December 22nd 2003—the so-called “Disarmament Statute” (*Estatuto do Desarmamento*).²⁰ This statute outlaws the ownership and use of firearms in Brazil but for in certain exceptional cases, one of which is precisely that of PSCs.²¹ Accordingly, Article 7 of Law 10,826 mirrors Article 21 of Law 7,102 by stipulating that the firearms used by employees of PSCs are the property and responsibility of the latter. The provision prescribes, in addition, that these arms can only be used while on duty and that PSCs must abide by the regulations for the use issued by the competent organs.

¹⁵ *Id.* art. 20, V, VI, VII.

¹⁶ *Id.* art. 23.

¹⁷ *Id.* art. 11.

¹⁸ See Ives Gandra da Silva Martins. Proibição Legal para que Empresas Privadas Especializadas em Segurança, Serviços de Vigilância e de Transporte de Valores Sejam Constituídas por Estrangeiros—Constitucionalidade da Vedação. 5 *Revista de Direito Privado*, jan.-mar. 2001, p. 231-242.

¹⁹ *Id.* art. 20, VII, VIII, IX, X.

²⁰ Article 6, VIII stipulates that the acquisition and use of weapons by PSCs are subject to the provisions of Law 10,826. The later statute was amended by Law 10,867, enacted on May 12th 2004; Law 11,118, enacted on May 19th 2005; Law 11,191, enacted on November 11th 2005 and by Law 11,706, enacted on June 19th 2008.

²¹ *Id.* art. 6.

In order to acquire firearms, companies must produce documentary evidence that each one of the private security guards carrying an arm meets the requirements listed in Article 4 of the statute.²² These are the following: (1) proof of moral probity, consisting of clear criminal records and evidence that the private security guard concerned is not being investigated or prosecuted for any crime; (2) proof of the lawful profession of the private security guard as well as proof that he or she has a permanent residence; (3) proof of technical and psychological aptitudes for the use of firearms.²³

Finally, PSCs have the duty to provide the National System of Arms (*Sistema Nacional de Armas*—SINARM)²⁴ with a list of private security guards carrying a weapon they are currently hiring. This list must be updated every six months.²⁵

2.3 Aspects of criminal law

The Brazilian Penal Code is fully applicable to private security companies pursuant to Article 10, §3 of Law 7,102. Besides, Law 10,826 foresees a crime committed specifically by owners or managers of PSCs: paragraph 1 of Article 7, coupled with the single paragraph of Article 13, criminalizes the conduct of the owner or manager when the company fails to report to the Federal Police, within 24 hours, the stealing or loss of registered firearms. The owner or manager to whom this omission is attributable incurs a penalty of detention²⁶ from one to up to two years combined with a fine.

2.4 Aspects of labour law

The principal legal instrument governing labour relations in Brazil is the “Consolidation of the Laws of Labour” of May 1st 1943.²⁷ Pursuant to Article 10, §3 of Law 7,102, this compilation of provisions that regulate in detail the relationship between employers and employees in Brazil is applicable to PSCs and private security guards. So are other statutes the scope of which is to regulate labour performed in Brazil.

2.5 Aspects of civil liability

Pursuant to Article 932 of the Brazilian Civil Code,²⁸ the employer is liable, for the purpose of providing reparation, for all the actions and omissions committed by her

²² *Id.* art. 7 §2.

²³ *Id.* art. 4.

²⁴ The National System of Arms was instituted by article 1 of Law 10,826.

²⁵ *Id.* art. 7 §3.

²⁶ *See* art. 33 of the Brazilian Penal Code.

²⁷ Law-Decree 5,452, enacted on May 1st 1943.

²⁸ Law 10,406, enacted on 10th January 2002.

employees in the exercise of the labour under contract.²⁹ Moreover, under Article 927, civil liability is entailed—independently of fault—when the activity of the agent causing the damage implies, by its nature, risks to other people’s rights. Whereas under Brazilian law employers are subject to a strict regime of civil liability, and whereas the supply of security services is an inherently risky activity, it seems fair to conclude that PSCs would be fully liable for violations committed by one of their agents.

3. The Regulation of Private Military Services

3.1 General context

There are no laws or administrative regulations governing the activity of PMCs in Brazil. Given the lack of regulation, the argument could be made that Law 7,102 would apply by analogy to the supplying of private military services.³⁰ To the extent public companies and organs of the public administration are authorized by Article 10 of Law 7,102 to contract security services, there seems to be no legal prohibition on the hiring of military services by the Brazilian government. The conditions under which military services could be hired — in particular the requirement that the owners or managers of the companies be Brazilian nationals — would be the same established for security services.

Yet, the regulatory context of private military security in Brazil is one of lack of regulation. This may be in part explained by the fact that — to the best knowledge of the authors — there are no PMCs incorporated or based in Brazil. Nor there is any indication that the Brazilian government has ever resorted (at least in modern times) to the service of private military contractors in carrying out military operations — e.g., when it took the leading role in the United Nations Stabilization Mission in Haiti established by UN Security Council Resolution 1542 of April 30th 2004.

A stronger interest in regulating the activity of PMCs is likely to arise, however, as Brazilian citizens are increasingly recruited by PMCs to take part in armed conflicts abroad. This phenomenon has been frequently reported by the Brazilian press. For example, in January 2007, Brazilian magazine *Carta Capital* denounced the recruitment of mercenaries by a PMC founded by Italian nationals.³¹ It was reported that over 30 reserve soldiers had been trained with the collaboration of a general of the Brazilian army. Although the alleged objective of the training was to prepare the reserve soldiers to work as private security guards in Brazil, it was eventually unveiled that they were about to be sent to Iraq. Already in 1999, national magazine *Istoé* had published information on the recruitment of Brazilian reserve pilots to fight against the guerrilla

²⁹ *Id.* art. 932.

³⁰ According to article 4 of the Introductory Act to the Civil Code (Law-Decree 4,657, enacted on September 4th 1942), analogy is one of the techniques judges may resort to in the case of a legislative lacuna.

³¹ Mercenários made in Brazil. *Carta Capital*. January 31st 2007. p. 34-41.

(FARC) in Colombia.³² The magazine reported that a pilot's relatives had been induced into signing a document that excluded the company's civil liability for damages caused to his life and security.

The increasing recruitment of Brazilian mercenaries—especially to work in Iraq—has attracted the attention of the Brazilian Agency of Intelligence (ABIN). As reported by the Brazilian newspaper *O Globo*, the agency has been working on this issue since the end of 2004.³³ New developments in the field remain to be seen.

3.2 Aspects of criminal law

There is no reference in Brazilian legislation to the crime of recruiting, using or training mercenaries. Brazil has neither signed nor ratified the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989, and does not otherwise criminalize the relevant conduct in its Penal and Military Criminal Codes.³⁴ As pointed out by Military Public Prosecutor Antonio Carlos Gomes Facuri,³⁵ it is currently impossible to prosecute individuals involved in the recruitment and training of mercenaries for PMCs due to the lack of legislation criminalizing such acts.

3.3 Aspects of labour law

Remarkably, labour law is the legal field that currently presents the greatest potential for the regulation of the hiring of Brazilian workers by foreign PMCs.³⁶ Law 7,064 of December 6th 1982 applies to the situation of workers hired to work abroad, stipulating several conditions that must be complied with by foreign companies seeking to recruit Brazilian workers. First, foreign companies must obtain authorization from the Ministry of Labour for the hiring of the workers.³⁷ Second, they must bear the travel expenses of, and contract life insurance for, the Brazilian employees, as well as provide them with adequate and gratuitous healthcare.³⁸ Third, pursuant to Article 16, workers may not be recruited to work abroad for a period of more than three years, unless the employer assures them the right to spend annual vacations in Brazil and pays for the correspondent travel expenses. Fourth, the foreign employer has the obligation to return

³² Chimatovitch, Mario. Mercenários made in Brazil. *Isto é*. October 16th 1999. Available at: <<http://www.terra.com.br/istoe/brasileiros/1999/10/16/001.htm>>. Accessed on 4th June 2009.

³³ Ministério Público pede informações sobre Mercenários. *O Globo*. February 11th 2005.

³⁴ The Brazilian Penal Code was instituted by the Decree-Law 2,848 of December 7th 1940, which has been subsequently amended several times. The Military Penal Code, on its part, was enacted by Decree-Law 1,001 of October 21st 1969.

³⁵ Dr. Facuri was interviewed by the authors on 4th June 2009.

³⁶ *See supra*.

³⁷ Art. 12. Pursuant to article 13, only companies 5% of the shares of which is owned by a Brazilian natural or moral person may hire Brazilian workers.

³⁸ *See* articles 15, 21 and 22 of Law 7,064.

the workers to Brazil once the contract of labour has expired or been terminated, or when this becomes necessary by virtue of the employee's health condition.³⁹

With a view to ensuring the effectiveness of those provisions, Law 7,064 stipulates that the Ministry of Labour can only authorize the hiring of Brazilian workers if a moral person established in Brazil owns at least 5% of the shares of the foreign company.⁴⁰ This moral person is, according to Article 19, concurrently responsible for any violation of the rights of the employees. The foreign company must, in addition, appoint a representative in Brazil with powers to be summoned on its behalf, in case an action against the foreign company is filed in Brazil.⁴¹ Finally, Article 20 prescribes that the foreign companies or their representatives that hire Brazilian workers in violation of Law 7,064 shall be held responsible for the crime of “instigation for the purposes of emigration”; this crime is typified in Article 206 of the Penal Code, and entails the penalty of up to three years of detention combined with a fine.

An example of how labour law might regulate the hiring of Brazilian workers by foreign private military companies is provided by *Termo de Compromisso N° 12/05* (Terms of Commitment # 12/05).⁴² These Terms of Commitment were a result of the investigation by a public prosecutor of the Office of the Labour Public Prosecution of the involvement of a Brazilian company that supplies military training/shooting services in the recruitment of Brazilians to work in Iraq. As it was ultimately established that the company had merely held preliminary talks with some individuals, and that no specific training for the purpose of working in Iraq had been provided, the public prosecutor did not find it necessary to sue the company for a breach of labour law. Rather, she had the company sign the afore-mentioned Terms of Commitment, whereby the latter promised not to intermedicate the hiring and training of Brazilian workers for national or foreign suppliers of security services in Iraq, unless these workers were guaranteed all the rights and protections of Brazilian labour law. The Terms of Commitment determine a fine of 10,000 Brazilian *Reais* (about €4,000) for every worker sent abroad.

³⁹ *Id.* art. 17.

⁴⁰ *Id.* art. 13.

⁴¹ *Id.* art. 18.

⁴² *Termo de Compromisso N° 12/05 Procedimento Investigatório n° 90/05* (on file with the authors). The relevant excerpt of the Terms of Commitment reads as follows: “A empresa X compromete-se a: 1. Abster-se de intermediar a contratação e treinamento de trabalhadores brasileiros para empresas nacionais ou estrangeiras (pessoas físicas ou jurídicas) que prestem serviços no Iraque em atividade de segurança ou similar em instalações militares estadunidenses, que sejam encaminhados sem o prévio registro em carteira de trabalho (CTPS) e a garantia dos direitos assegurados pela legislação laboral pátria; 2. Multa. Pelo descumprimento do compromisso assumido perante o Ministério Público do Trabalho, a empresa fica sujeita ao pagamento de multa no valor de R\$ 10.000,00 (dez mil reais) por trabalhador encaminhado em descumprimento ao contido na cláusula anterior, reversível ao Fundo de Amparo ao Trabalhador (FAT), instituído pela Lei 7.998/90, nos termos dos art. 5º, § 6º e 13 da Lei 7.347/85; 3. O compromisso assumido é passível de fiscalização pelo pela Delegacia Regional do Trabalho (DRT) ou pelo Ministério Público do Trabalho; 4. A cobrança da multa não desobriga a empresa da obrigação de não fazer contida no termo; 5. O presente termo de compromisso de ajustamento de conduta produz efeitos legais a partir da data de sua celebração e terá eficácia de título extrajudicial, conforme disposto nos artigos 5º, § 6º da Lei 7347/85 e artigo 876 da CLT.”

3.4 Aspects of civil liability

The same norms that govern the civil liability of PSCs (section 2.5 *supra*) would apply, *mutatis mutandis*, to private military companies.

4. Concluding Remarks

While regulation of private security services in Brazil is relatively robust, Brazilian law does not regulate the activities of private military companies that take part in armed conflict. The very legality of the use by the government of private military services is not yet a settled question. As the problems posed by the phenomenon of “privatization of war” become more salient, and as Brazilian citizens are increasingly approached by foreign PMCs, new developments in the regulation of the field are expected.