



# PRIV-WAR Report – France

National Reports Series 11/09

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

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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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## The Regulation of Private Military and Security Services in France

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## 1. Introduction

This report on French domestic law in relation to private military and security services is delivered pursuant to Work Package 7 of the project PRIV-WAR<sup>1</sup>. This work package intends to provide an overview of existing laws and regulations that have been or could be applied to private military and security companies in France<sup>2</sup>.

### 1.1. Scope of the report

To understand the complexities of the legal issue regarding PSCs and PMCs in France, it is essential first to point out some cultural elements.

First - dating back to Napoleon - the conception of security in France which is linked to a strong centralized state remains deeply anchored in both minds and institutions. The military function in particular is considered a sovereign activity, and thus cannot be delegated.

Second (and as a corollary), professions dealing with security or intelligence still greatly suffer in France from a bad press and lingering negative connotations, even more when they are private sector. Finally, regarding the term of PMC, no such official accreditation exists in France and the large majority of companies offering services in this area would rather talk about “hard security” services or simply “security services”. This also explains why PSCs generally prefer to define themselves as “international risk consulting companies” or “firms specialized in risk management” or “business facilitators abroad”. Only Secopex voluntary defines itself as a PMC.

If the military function cannot be delegated, it must nevertheless be noted that the list of the State's essential missions (including the military function and the national defence) has never been drafted in any text. For example, the Constitutional council has stated that only the activities or the enterprises that are not considered as “national public service” or “*de facto* monopoly”, according to the 9<sup>th</sup> *alinea* of the Preamble of the 1946 French Constitution, can be privatised. “National public services” are those considered as necessary by constitutional rules or principles<sup>3</sup>.

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<sup>1</sup> Prepared by V. Capdevielle, Associate researcher, Centre Thucydide, University Paris II (November 2008), with the participation of H. Cherief, Associate researcher, CREDESPO, University of Dijon (January 2009).

<sup>2</sup> Some French relevant works on the subject include: Chappleau, *Sociétés militaires privées. Enquête sur les soldats sans armées*, Monaco, ed. du Rocher, 2005; Hubac, *Mercenaires et polices privées. La privatisation de la violence armée*, Paris, Universalis, 2005; Roche, *Insécurités publiques, sécurité privée. Essai sur les nouveaux mercenaires*, Paris, Economica, 2005; Renou (ed.), *La privatisation de la violence*, Marseille, Agone, 2005; Vignolles, *De Carthage à Bagdad, le nouvel âge d'or des mercenaires*, Paris, Riaux, 2006; Olsson, ‘Vrai procès et faux débats : perspectives critiques sur les argumentaires de légitimation des entreprises de coercition para-privées’, 52 *Cultures et Conflits*, 2003, pp. 11-48; Banegas, ‘Le nouveau business mercenaire’, *Critique internationale*, n°1, automne 1998, pp.179-194; Pelchat, *Rapport sur le projet de loi relatif à la répression de l'activité de mercenaire, au nom de la Commission des Affaires étrangères, de la défense et des forces armées du Sénat*, rapport n° 142, annexé au procès-verbal de la séance du 23 janvier 2003. <http://www.senat.fr/rap/102-142/102-1421.pdf>

<sup>3</sup> Decision n° 86-207 DC, Conseil constitutionnel, 25-26 June 1986, *Loi sur les privatisations*, § 59. This notion appeared for the first time in the 1986 decision but has been often re-used by the council. See decisions n° 86-217 DC, 18 september 1986 (“public service having its foundation in constitutional dispositions”, § 9), n° 88-232 DC, 4 march 1988 (“public service required by the Constitution”, § 39) and n° 96-375 DC, 9 april 1996 (“public services whose existence and functioning would be required by the Constitution”, § 5). However the Constitutional council has been very clear about activities that,

The main difficulty is to identify those “constitutional public services”. This is not an easy task. The Conseil has used that expression only four times. So, there are few cases that could be used to define this notion. However, L. Favoreu and L. Philip tend to consider that the public services of national defence, justice, foreign affairs and policing can easily be reattached to constitutional texts<sup>4</sup>. More precisely, it seems that an implicit reference to the sovereignty functions or to the sovereign powers must be seen: how can a State survive if its own safety (national defence) is given to another institution (national, foreign or even private)? Can this state still be considered sovereign? The fifth Article of the 1958 French Constitution, which specifies that the President of the French Republic is responsible for the “national independency and the territory integrity”, and the thirteenth article of the French Declaration of Human Rights, saying that “the guarantee of the human rights and of the citizen requires a *public force*”, emphasizes the fact that the interdiction to delegate sovereign powers is, above all, a political choice<sup>5</sup> which can only be expressed with difficulty in a legal way.

These difficulties can be seen through the distinction that must be made between the constitutional public services, which absolutely cannot be provided by private persons, and the others. Favoreu and Philip consider that services implying “regalian functions” belong to the first category. For the second one, the obligation of non-privatisation could only prevent the government from delegating all the public services to a private person, and to allow the core of the services to remain under the State’s control<sup>6</sup>. The French government has nevertheless decided increasingly to include the private sector in security and military activities, which proves that there is not real and strict legal prohibition about the delegation of activities concerning the field of the national defence or national security. However, by “outsourcing” (see below in the 4<sup>th</sup> paragraph), the French government tends to prove that no complete privatisation of these activities is envisaged.

That is why it can be said that the French model is rather *Etatist*. This means that the government seeks to align the behaviour of PMCs with the state’s security and foreign policy interests. French governments have, even between the 1960’s and the 1980’s, often gave a tacit authorisation to activities conducted by French mercenaries. The most famous French mercenary, Bob Denard, has for instance convoyed planes, weapons and men for the Biafran army during the Biafran war in 1968, and was never threatened by the “Service de Documentation Extérieure et de Contre Espionnage”. (former name of the D.G.S.E.). Another French mercenary, Faulques, seemed to have received money from the former Elysee’s General Secretary to African affairs Jacques Foccart to recruit mercenaries to fight with the Biafran against the Nigerian army. The involvement of mercenaries was the result of a British-supported attempt to rescue the oil-producing portion of Nigeria from the French influence<sup>7</sup>. The French government was trying to influence the entire region by supporting the Biafran secession.

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according to the council, are not “constitutional public services”: the terrestrial network (86-207 DC, § 56), the public service of the credit are some examples (*idem*).

<sup>4</sup> L. Favoreu and L. Philip, *Les grandes décisions du Conseil constitutionnel*, Paris, Dalloz, 12<sup>ème</sup> édition, 2003, p. 682, § 30.

<sup>5</sup> Favoreu and Philip underline the fact that the interdiction to delegate public could “be deduced from the organization itself of the constitutional system”.

<sup>6</sup> L. Favoreu and L. Philip, *ibid.*, p. 683, § 30.

<sup>7</sup> See G. S. Thomas, *Mercenary Troops in Modern Africa*, London, Westview Press, 1985, pp. 33-45.

As a consequence, prior criminal records of contractors or evidence for human rights received, again today, only vague and unenforceable mentions in the applicable administrative regime: more precisely, no specific regulation is taken to adapt the regulatory framework to the specificity of private securities activities, which does not mean that the State does not control those activities through other regulatory mechanisms such as the social network. For example, if former French soldiers were among the first to provide security services in France, journalists have not hesitated to talk about the “G.I.G.N. connection”<sup>8</sup>: 4 directors of private security companies were indeed former members of the crack force of the Gendarmerie Nationale, and were associated with secret services.

The same proximity to secret services can be underlined with societies providing economic intelligence for major French companies, whose activities are mainly located in foreign countries (Total, Areva etc.). The economic activity and the implantation of these firms overseas further favoured the exchange of information between the French secret services and these societies. But, at the same time, the presence of former members of these services gives the impression that PSC, or even PMC, are not independent companies but, to a certain extent, remain under the control of the French government. This control is easier since the majority of the personnel come from the states’ security services.

However, this type of informal regulation, based on some sort of social ties, finds its limits in three kinds of situations. The first one concerns “simple” employees. The control of the activities of an individual can be very difficult, especially if he works for a security company on the French territory during a short period, and then, goes to a foreign country and works for a foreign company (Dyncorp in Colombia for instance). The second situation concerns the “penetration” of the French security market by foreign societies, especially in the field of the economic intelligence. This is the case of the French branch of an American society named Kroll, specialised in the economic intelligence, which is controlled with difficulty, even by the French secret services. The third situation concerns the PSC/PMC employed by French companies in foreign countries: even if there are close relationships between security companies and security services, the fact that the PSC/PMC work for a private group and not directly for the State makes control missions more complicated for the French agents.

If the alliance of private and public resources to fight insecurity tends to be recognized today by politics and lawmakers, the national debate on these issues has been nevertheless fairly recent and limited compared with the Anglo-Saxon debate, which has been far more advanced and pragmatic. As a result, the privatization of some security and military services in France (and to some extent abroad) has been very slowly translated in legal terms.

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<sup>8</sup> P. Chapleau, *Sociétés militaires privées, enquêtes sur les soldats sans armés*, Paris, Ed. du Rocher, 2005, pp. 169 *et seq.*

## 1.2 Notes

- The French State cannot delegate or outsource “regalian missions”. French law prohibits the outsourcing or externalizing of operational defence activities such as military offensives.
- France has adopted specific regulations regarding PSCs within the national territory but nothing specifically addresses their operating abroad.
- The scope of the law prohibiting mercenaries is limited to some categories of persons and activities. At the same time, this law does not preclude the existence of companies delivering security or military services which are thus in a legal void.
- According to the regulation of arms export and embargoes, the Inter-ministerial Commission for the Study of War Materials exports (CIEEMG) has a right of inspection into some PMCs activities, in particular into supply contracts.
- As every company, PMCs and PSCs are liable to prosecution in accordance with French law; they must also obey Corporate and Labor Law.
- The national framework regulating PSCs and PMCs is insufficient. Their status, legitimacy, scope of action and range of services is not legally defined. Moreover, French law needs to be “polished” by further jurisprudence as thus far only one case has been prosecuted pursuant to the 2003 law against mercenary activities. It must be underlined too that the main purpose of the 2003 law is not to regulate security or private military companies. This law concerns mercenaries’ activities. It seems there are few possibilities for a member of private security or military company to be considered mercenary under French regulation. To be a mercenary under the 2003 law, such a person must not be a member of the French armed forces (art. 436-1, 1° of the French Penal Code), must have been recruited to fight in an armed conflict, must have in fact taken a direct part in hostilities, and must have been motivated primarily by the desire for remuneration that is substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of the Party for which he has to fight (*idem*). If such a person is a French national, however, he will fall outside this definition. If the person has another nationality, the problem will be ascertaining whether he has or has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.
- The issue of PMCs and PSCs - closely linked to the debate on outsourcing some non-essential military services - is still being debated in France.



## 2. Regulation of security activities

### 2.1 Domestic security and investigation services

The regulation of private security services has evolved in fits and starts<sup>9</sup> since the enactment of a law regulating private security activities. This 1983 law<sup>10</sup> has remained fundamental to the regulatory framework.

In France, the conduct of private security services (i.e., the protection of people or goods, the guarding against the disturbance of the peace on terrains and buildings guarding or the transporting of valuables such as private money or jewels) is separate from the activity of private investigation (private detective). So far, only these two categories of activities have been addressed by the legislation.

The conducting of either of these activities requires registration in the Trade and Companies Register as well as an accreditation delivered by the department Prefect (or by the Police Prefect in Paris). This accreditation can be obtained following a strict process defined by the Council of State and provided certain conditions are met (such as being clear of any condemnation at a magistrate's court). Article 21 of the 1983 Law importantly mentions that the conduct of investigation services cannot be carried out by former policemen or gendarmes before a 5-year period following their cessation of activity. The prefectural authorization can allow the carrying of a weapon when justified by the mission under specific conditions only. Professional training qualifications, identification cards, and uniforms are also part of the detailed regulation.

The 2003 law concerning homeland security<sup>11</sup> (which amends the 1983 Law) sets up a corpus of rules providing a better control of private security activities including:

- Permanent control exercised by police officers and gendarmes.
- Every executive and employee must be accredited in respect of 8 conditions<sup>12</sup>.
- Dissuasive punishment is planned in case of infringement.

The exercise of security duties by private companies suffers from the same lack of regulation that can be underlined for the private security or military companies operating overseas. But at the same time, it is firmly established by the Council of State that any contractual delegation of police prerogatives is illegal<sup>13</sup>. Here again, the doctrine of merely “outsourcing” rather than completely privatising is applicable. In

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<sup>9</sup> The legal evolution has mainly been pushed forward by external events. Following terror attacks in Paris, the 1995 Law of orientation and planning related to security (LOPS) has extended the private security companies' field of competences. Some clauses are incorporated into the Law on daily security enacted after the September 11 attacks.

<sup>10</sup> Loi n° 83-629 du 12 juillet 1983 réglementant les activités de sécurité privée, <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068807&dateTexte=20090727>

<sup>11</sup> Loi n° 2003-239 du 18 mars 2003 pour la sécurité intérieure, <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000412199&dateTexte=>

<sup>12</sup> These eight criteria are: 1. Holding the French or “European” nationality, 2. being clear of specific criminal condemnations, 3. being clear of an expulsion decision, 4. being clear of a receivership, 5. being clear of carrying acts contrary to the honor, integrity, moral standards or against the security of people or goods or the security of the state, 6. being clear of practicing collide activities, 7. not being in the same time a private investigator and security agent and 8. giving proof of a professional activity.

<sup>13</sup> Conseil d’Etat, 17 June 1938, *Ville de Castelnaudary*, rec. p. 191 ; Conseil d’Etat, 1<sup>er</sup> April 1996, *Commune de Manton*, rec. p. 175.

1997, the Council of State has declared illegal a contract entrusting to a private company a mission of video surveillance of *all public streets* on this ground<sup>14</sup>. So it is clear that the main authority responsible for the public order remains the State.

The private security companies are bounded by a principle of speciality, which prevent them from conducting another activity except that allowed by the law. A bodyguard<sup>15</sup> cannot, for instance, be recruited to perform transfer of funds duty. Unlike in other countries (South Africa), private security guards are not free to use their weapons except for the legitimate defence. Moreover, the third Article of the 2003 law specifies that private security guards protecting goods or buildings can only perform their duties inside these buildings or in the limits of the place they have to survey. They can be authorized, by the department Prefect (or by the Police Prefect in Paris), but only for specific purposes, to patrol on public streets in order to prevent theft of or damage to goods or buildings they guard. Once again, it shows that private security companies have limited responsibility.

The regulation of PSCs remains, nevertheless, seriously incomplete since it does not take into account other types of activities assimilated to private security such as “business intelligence”, “strategic intelligence” or “risk management” in spite of their fast growth. Recent scandals involving French private companies conducting due diligence missions with inappropriate methods have prompted the Interior Ministry to think about a new regulation<sup>16</sup>. The provisions compelling business intelligence companies to obtain approval will be integrated into the next Orientation and programming Law for homeland security (LOPSI), which is expected to be passed soon<sup>17</sup>.

Other numerous gaps in the regulation could be emphasized. There are no true efficient control mechanisms that can prevent abuse by private security guards, even if things start to change now. There is no such thing as “permanent control” exercised by police officers or gendarmes for a simple lack of strength. This kind of control can only be effective in certain areas, like airports where the border police can easily supervise the work of private security employees (security guards can only search passengers bags under the control of a police officer). On the contrary, it is not rare that illegal “exchanges” of services or information happen between former colleagues<sup>18</sup>. The mechanism of accreditation is not effectively applied since there is no effective control, and individuals previously convicted are frequently recruited in private security companies or even found a company.

Professional training qualifications are a very important step toward the professionalisation and moralisation of security activities. But the quality and the pertinence of these developments remain uncertain since there is no unanimous definition of the different security activities. Four training certificates are applicable today<sup>19</sup>: one concerns the security and prevention agents, the three others are applicable

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<sup>14</sup> Conseil d’Etat, 29 December 1997, *Commune d’Ostricourt*, Rec. p. 969.

<sup>15</sup> Under Article 3 of Law n° 83-629 (12 July 1983), a bodyguard is a person protecting the physical integrity of another one.

<sup>16</sup> See, among others, the article by Cornevin and Delahousse, ‘Opération “main propres” dans la sécurité privée’, *Le Figaro*, May 11, 2008.

<sup>17</sup> Cf. *Intelligence Online* Confidential letter n°570 dated May 2008.

<sup>18</sup> “Le commissaire Moigne en détention provisoire”, available at [www.lefigaro.fr](http://www.lefigaro.fr), 25 March 2008

<sup>19</sup> Ministerial orders of 18 June 2008 *approving the training certificate*, *J.O.R.F.* 28 June 2008.



to activities related to agents responsible for transfer of funds. But these CQP are just about basic and general training and do not seem to take into account the real diversity of security business. It can be noticed, for example, that the S-NES (security syndicate) has established a list of eleven sorts of agents that can be put under the expression “prevention and security agents”. The fact that the security industry is still in a structuring period, which means very often low pay, and enormous turnover of officers, leads many security executives to consider that costly training is not justified, feasible, or simply not their top priority<sup>20</sup>.

## 2.2 Overseas security and assistance

The French government considers the domestic private security market distinct from the market for security services provided overseas. Companies operating abroad are never specifically addressed in the domestic legislation regulating security and investigation activities.

During the *travaux préparatoires* leading to the drafting of the law prohibiting mercenary activities, UMP Senator Michel Pelchat (now deceased) had publicly talked about the need to regulate the activity of French PSCs operating abroad.

The state currently controls the export of commercial security and military services only through two “semi-public” companies, respectively CIVIPOL Conseil<sup>21</sup> and DCI International (see section 7.2 dealing with Companies which could be categorised as PMCs).

There are different types of services provided or ways to ensure security for companies implanted in foreign countries. It depends on the level of tension in the country (armed conflict, civil wars, terrorism or mere civil disorder) and on the doctrine that security advisers want to apply. It is important, for instance, before employing heavily armed security officers, to determine the characteristics of the site, or to know how many people and what assets require protection etc.. Simple stationary posts combined with security guards patrolling with dogs, but without weapons, and CCTV can be sufficient to ensure the protection of a site. So it must be clear that the security services provided overseas, even in a struggling State, are not inevitably different to those provided on the national territory.

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<sup>20</sup> On this point, see P. P. Purpura, *Security and loss prevention*, B-H, San Diego, 5<sup>th</sup> edition, 2008, pp. 38-39.

<sup>21</sup> CIVIPOL Conseil is the service company attached to the French Ministry of Interior, specialized in advising public authorities in security and in the export of the French savoir-faire in this field. It provides services in the areas of expertise of the French Ministry of Interior, in particular in the fields of homeland security and civil protection. Among other services offered by CIVIPOL: training, initial education and continuous training in civil security, Crisis prevention, communication and management, Logistical and organizational optimization of services, Intervention plans, Rescue and clearing operations, Pilot training (helicopters). CIVIPOL also provides auditing technical support and training missions. These assignments may last just a few days, in the case of audits, or several months, or even years, in the case of more wide-reaching projects. For example, the missions may focus on property and personal protection, migratory control, border surveillance or the techniques of the Criminal Investigation Department.

### 3. Regulation of armed force

#### 3.1 Possession of arms

In France, the possession and carrying of arms is strictly regulated and controlled by the government. The right to produce, trade in, transfer, possess or carry firearms is prohibited.

The carrying of (fire)arms is founded on a general principle of prohibition. The only exemptions allowed in the regulation relate to police officers, gendarmes, soldiers, security agents of state enterprises, specific staff of private companies such as security guards, and – exceptionally - to some persons whose life is threatened<sup>22</sup>. Arms possession is forbidden for employees of companies doing close protection, and it is strictly regulated for employees of companies dealing with guarding (see section 2.1 Domestic security and investigation service). The exception may also apply to the accredited staff of diplomatic and consular corps. The port of these weapons is prohibited, like their transport, without legitimate reason. Finally, there is a licensing system in place (for sports and hunting) which is strictly regulated.

#### 3.2 Arms export

The definitions of arms are provided in article L2331-1 and Articles L2335-2 and L2335-3 of the Defence Code<sup>23</sup>. A number of decrees narrow down the definitions of affected items and restrict their export conditions<sup>24</sup>.

The spirit of these texts is to consider any system, sub-assembly, equipment or component specifically designed or modified for military use as war material, in particular, arms, their munitions and carriers, sub-assemblies and spare parts for these war materials, as well as materials specially designed or modified for their manufacture, their environment and their maintenance, particularly sensitive goods (cryptology, precursors of the most effective war toxins, the main materials or products controlled under the missile technology control system). French arms export control is defined by a strict legislative and regulatory framework. This framework is built according to a prohibition principle<sup>25</sup> and only a State can import French armaments.

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<sup>22</sup> The regulatory part related to weapon carrying is contained in the Décret n°95-589 du 6 mai 1995 relatif à l'application du décret du 18 avril 1939 fixant le régime des matériels de guerre, armes et munitions..

<sup>23</sup> According to Article L. 2331-1, “les matériels de guerre, armes et munitions et éléments désignés par les dispositions du présent titre et relatives au régime des matériels de guerre, armes et munitions sont classés dans les catégories ci- après :

I.- Matériels de guerre : 1re catégorie : armes à feu et leurs munitions conçues pour ou destinées à la guerre terrestre, navale ou aérienne, 2e catégorie : matériels destinés à porter ou à utiliser au combat les armes à feu, 3e catégorie : matériels de protection contre les gaz de combat. II.- Armes et munitions non considérées comme matériels de guerre : 4e catégorie : armes à feu dites de défense et leurs munitions, 5e catégorie : armes de chasse et leurs munitions, 6e catégorie : armes blanches, 7e catégorie : Armes de tir, de foire ou de salon et leurs munitions, 8e catégorie : Armes et munitions historiques et de collection”.

<sup>24</sup> The list of war materials and similar items was drawn up by the Decree of 20 November 1991, modified in 2005. Similar material include equipment that has been specially designed or modified for military use, parts, components, accessories and specific environment materials, as well as various pieces of equipment, software and information.

<sup>25</sup> Decree no. 2004-1374 of 20 December 2004 codified in the Defence Code, establishes the fundamental principle that the export of war materials is prohibited except as authorized. Moreover, the

In the past, France operated a tightly controlled two-stage approval process with exporters requiring approval to (1) enter into negotiations and (2) sign a contract to sell arms. Since April 2007, a single prior authorization is required from the Inter-ministerial Commission for the Study of War Materials exports (CIEEMG)<sup>26</sup>. CIEEMG is the specific committee which gives an opinion in favour or against an export, or suggests or allows for a delay in the process. CIEEMG is helped by the advice given by two distinct bodies within the Ministry of Defence<sup>27</sup>. The ultimate authority lies with the Prime Minister.

Export decisions are made according to criteria determined in the framework of international treaties, conventions, and instruments France has ratified, specifically the European Code of Conduct on Arms Exports and the Wassenaar arrangement<sup>28</sup>.

The regulation of exports of dual-use goods and technologies is based on a Council Regulation<sup>29</sup>. This Regulation defines the different types of export licenses and establishes the list of goods concerned. The controls apply to all exports to territories outside the European Union. With the exception of certain highly sensitive goods included on a specific list found in an annex to the regulation, transfers within the territory of the EU are not subject to these controls.

### 3.3 PMCs' contracts and armed force

France remains very hostile to any form of direct participation of private security/military companies in fighting. However, their actions within the framework of a stabilization phase, once national armies can quit the theatre of operations (as opposed to fighting), is accepted.

Besides, relationship and/or contracts between the French government and private French companies operating in the defence/security area abroad are usually not disclosed for reasons of protection of operational and personal data, confidentiality and often *raison d'Etat*. Officially, there is no such link but it is widely known that the French government has regularly resorted to private companies or individuals to achieve foreign affairs' objectives and protect national interests abroad, especially in Africa<sup>30</sup>.

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production, trade and stockpiling of war materials can be done only with authorization from the State and under its control. This authorization is given by the Ministry of Defence after an investigation by security services.

<sup>26</sup> The simplification of the process is part of a broader strategy to boost French arms export.

<sup>27</sup> The procurement board – the General Armament Delegation (DGA) - is charged with the sales case' instruction and the Directorate for Strategic Affairs (DAS) controls the sales' appropriateness and establishes the synthesis positions of the Ministry for Defence before the presentation of the file at the CIEEMG, under cover of the General Secretary of National Defence (SGDN).

<sup>28</sup> They include respect for the Purposes and Principles of the Charter of the United Nations, human rights, embargoes and other globally-agreed restrictive measures, arms control, and non-contribution to regional instability or to the prolongation of ongoing armed conflicts. France also supports efforts aimed at preventing and fighting arms trafficking. Source: "French Policy on Export Controls for Conventional Arms and Dual-Use Goods and Technologies",

Informations provided by France to the Wassenaar Arrangement on Export Control. Available at <http://projects.sipri.se/expcon/natexpcon/France/frenchpolicy.htm>.

<sup>29</sup> See EC Regulation 1334/2000, 22 June 2000.

<sup>30</sup> X. Renou (dir.) La privatisation de la violence. Mercenaires et sociétés militaires privées au service du marché, Dossiers noirs, Agone, Marseille, 2005.

## 4. Government outsourcing

### 4.1 Government policy on outsourcing armed force, security and military services abroad

#### - Guiding principles

As other European countries, France had to resort to outsourcing<sup>31</sup>. The Ministry of Defence outsourcing doctrine is mainly based upon 2 documents: a ministerial Directive published in 2000 and an Outsourcing guide. It is noteworthy that a rhetorical distinction is made between “externalizing” and “outsourcing” though only the latter exists in the law. The ministerial Directive defines outsourcing “as an old management mode which consists, for the administration, in entrusting an external partner with a function, an activity or a service which was hitherto provided by the State”<sup>32</sup>.

It mentions that the regalian activity of the various structures of the Ministry of Defence is considered as something which cannot be delegated and thus is ruled out of the outsourcing sphere. However, in order to keep some leeway, no list has been established and outsourcing decisions are made on a case-by-case basis. Two of the principles attached to outsourcing are “*reversibility and transferability*”. This implies the preservation of minimal competence in order to reintegrate the outsourced activity if need be and also to plan some arrangements preventing any dependence on a contractor<sup>33</sup>.

Outsourced activities mainly concern “support activities”. The four main categories for outsourcing are training, support, equipment and real estate. Except for the legitimate acts of violence from decision and command up to implementation on the field (fighting) - everything in these four areas can be outsourced to a certain extent depending on the context and, above all, on the geographical parameter. Because of the French conception of sovereignty, outsourcing is indeed very limited abroad.

The official posture is that if tasks like training, support or real estate transactions can be entrusted within the national territory to private operators without raising specific problems, it is important to maintain within the armies the necessary competence to carry out missions in an external theatre. No operational task such as peace-keeping or counter-intelligence can be outsourced or delegated. Only tasks assimilated to “external operation support” such as equipment maintenance, troop transport, catering, plane supplies or even communication networks maintenance can be contracted with private companies. Regarding equipment, only those not to be used on the front line can be dealt under public-private partnerships.

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<sup>31</sup> Outsourcing some military services has appeared necessary for the defense Minister in order to face the challenges inherent to the defence reform (end of conscription, modernization and Europeanization) and global changes (internationalization, “new threats”...). Politics, military authorities and jurists agreed that the need for the professionalized armed forces to focus on military engagement implied to “externalize” some functions previously carried out internally.

<sup>32</sup> Ministerial Directive n° 30 892, 3 August 2000.

<sup>33</sup> See Parliament Information Report n°3595, 12 February 2002, on the outsourcing of some tasks of the Ministry of Defence, pp. 36 to 45.

- Prospects for outsourcing<sup>34</sup>

The annexed report to the 2003-2008 Military programming law plans the pursuit and strengthening of the outsourcing policy and mentions that, “*the armed forces can reduce the weight of tasks which are not of an operational nature or the non essential tasks in times of crisis, by contracting with public or private persons. For operations, they can also resort to externalization of capacities they do not have or in a limited way - within the framework of the installation, the support and the disengagement of the forces*”<sup>35</sup>.

The annexed report goes further by promoting the notion of alternative financing solutions within the public-private framework of partnerships. These solutions could “*consist in carrying out experiments in some significant fields such as armament programs, real estate transactions or purchase of services or even of capacities*”. The Orientation and Planning Law for Homeland security (LOPSI) enacted in 2002<sup>36</sup> had already introduced the possibility for the Ministry for Defence to resort to such innovative solutions in real estate transactions.

Debates on outsourcing which have been influenced by the extensive American outsourcing in Iraq<sup>37</sup> are still in progress in France. The issue of PMCs and PSCs has been broached within the debates run by the national Defence and Security Commission led by Jean-Claude Mallet that was set up to elaborate the new White Paper on defence and national security. Allusions to PMCs are hardly found in the publication though, and never in strategic terms. In a paragraph underlining the increasing role of non-state actors, it is acknowledged that some PMCs grow up outside regular armed forces<sup>38</sup> but nothing is said regarding collaborating or outsourcing with PMCs.

Government policy on outsourcing to PSCs and PMCs is likely to change in the coming months since the Ministry of Defence has just started again an assessment on the possibility of outsourcing some logistic functions to the private sector. The cabinet of the Defence Minister, Hervé Morin, recently asked the Delegation for Strategic Affairs (DAS) to examine the kind of functions that may be outsourced to PMCs – among others in logistics and combatant support<sup>39</sup>.

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<sup>34</sup> See the Parliament Information report n° 3591 on the outsourcing prospects for the Ministry of defense, January 17, 2007.

<sup>35</sup> See the section 2.5.1 (d) on outsourcing: 2003-2008 Military programming Law n°2003-73 of 27 January 2003.

<sup>36</sup> Orientation and planning Law for homeland security of 22 August 2002, Article 3, I: “Par dérogation aux dispositions des articles 7 et 18 de la loi n° 85-704 du 12 juillet 1985 relative à la maîtrise d'ouvrage publique et à ses rapports avec la maîtrise d'œuvre privée, l'Etat peut confier à une personne ou à un groupement de personnes, de droit public ou privé, une mission portant à la fois sur la conception, la construction, l'aménagement, l'entretien et la maintenance d'immeubles affectés à la police nationale, à la gendarmerie nationale, aux armées ou aux services du ministère de la défense”.

<sup>37</sup> A working group has been launched in 2004 attached to the Army general Staff to learn from the American experience of outsourcing which does not only deal with support missions but also certain tasks traditionally ensured by the Special Forces (bodyguards, transport of personalities in danger zone for ex.). Source: Leymarie, ‘Défenses européennes en voie d'externalisation’, *Le Monde Diplomatique*, November 2004.

<sup>38</sup> See the “Livres blancs sur la défense et la sécurité intérieure”, p. 24 (available on the Prime Minister website : [http://www.defense.gouv.fr/livre\\_blanc](http://www.defense.gouv.fr/livre_blanc)).

<sup>39</sup> See the Confidential letter of *Intelligence Online* n°576 of 28 August – 10 September 2008.



## 4.2 Government procurement options

To adapt to the outsourcing practice, the legal framework has evolved with the publication in January 2004 of a new Public Procurement Contracts Code<sup>40</sup> followed by an enforcement decree related to contracts concluded for defence requirements<sup>41</sup>.

A new legal tool was established the same year with the creation of the “private-public partnership” (PPP)<sup>42</sup>. Specific orders must define the PPP contracts and other contracts concluded between a public entity and a private one.

Outsourcing can be contractually made by the Ministry of Defence in 3 different ways though public contracts:

- **Public contracts** are intended to meet the needs as regards to work, supplies or services<sup>43</sup>. The administration acts within a client-supplier relationship. Being acquisition contracts (and not partnerships as legally defined), these kind of contracts are adequate when the externalized function consists in acquiring a service or a certain quantity for a fixed price.

- **Delegations of public service** aim at the transfer - from a public law moral body to a third party - of the management and exploitation charge of a public service. In the case of defence, it is difficult to gather all the conditions necessary to delegate a public service because of the sovereign nature of these activities.

- **Partnership contracts with the State**<sup>44</sup> which have been implemented in 2004 are not subjected to the Public Procurement Contracts Code but to the European public procurement legislation. Inspired by the English “Private Finance Initiatives”, PPP make it possible for a public community to entrust a company with the global mission to finance, conceive, maintain and manage works, equipment and services contributing to the missions of the administration. They are based on a shared division of risks between the contracting parties.

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<sup>40</sup> Décret n° 2004-15 du 7 janvier 2004 portant code des marchés publics, (<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000005763472&dateTexte=20090727>).

<sup>41</sup> Décret n° 2004-16 du 7 janvier 2004 pris en application de l'article 4 du code des marchés publics et concernant certains marchés publics passés pour les besoins de la défense. (<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000244195&dateTexte=>)

<sup>42</sup> Ordonnance n° 2004-559, 17 juin 2004 sur les contrats de partenariat, Article 1-I, (<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000438720&dateTexte=>) : “Le contrat de partenariat est un contrat administratif par lequel l'Etat ou un établissement public de l'Etat confie à un tiers, pour une période déterminée en fonction de la durée d'amortissement des investissements ou des modalités de financement retenues, une mission globale ayant pour objet la construction ou la transformation, l'entretien, la maintenance, l'exploitation ou la gestion d'ouvrages, d'équipements ou de biens immatériels nécessaires au service public, ainsi que tout ou partie de leur financement à l'exception de toute participation au capital.

Il peut également avoir pour objet tout ou partie de la conception de ces ouvrages, équipements ou biens immatériels ainsi que des prestations de services concourant à l'exercice, par la personne publique, de la mission de service public dont elle est chargée”.

<sup>43</sup> Details can be found in the Circulaire n° ECOM0620004C du 3 août 2006 portant manuel d'application du code des marchés publics.

<sup>44</sup> For a legal definition of the PPP, see footnote 43.

Although, the PPP tool is most used<sup>45</sup>, this PPP option remains limited and so far only concerns the French territory. Since 2004, only three major projects have been carried through (or are still in process), all of them in France. Among the four projects which are currently under assessment, a “strategic maritime transport” project aims at acquiring logistic capacities for force projection in a crisis situation<sup>46</sup>.

In July 2008, the Constitutional Council partly invalidated a law aiming at extending the conditions of use of these PPP which could then only be used in case of complex projects and emergency situations. A cost criterion was added (a partnership contract could be signed if more cost-effective than other contracts) and resorting to PPP was made easier for sectors in need of urgent investment such as security<sup>47</sup>.

#### 4.3 Policy limitations on government outsourcing

The main policy limitation on government outsourcing lies with the principle that “regalian activity” (such as Police or Defence power) can be neither outsourced, nor delegated. The highest constitutional authority in France, the Constitutional Council, considered that Article 6 of law n°2003-591 of July 2, 2003 - authorizing the Government to “simplify” law - could not be read as allowing the delegation of the conducting of a sovereignty mission to a private person<sup>48</sup>. If one considers that this formulation constitutes a new and general constitutional law principle, legal limitations that will be attached to PPPs are easy to grasp, especially if the extent of “sovereignty missions” is not clearly defined.

The French government has repeatedly made it clear it would not subcontract or outsource strategic operational tasks to PMCs, especially in a conflict situation. PMCs’ activities during stabilization phases (following a military intervention) continue to be considered an infringement of the principle of the state monopoly on armed force but are also thought to cause a dangerous blurring in the combatants’/participants’ identities. This opinion is formalized in a short paragraph underlining the privatization of armed violence in the White Paper on defence and national security<sup>49</sup>.

Outsourcing is further hindered by the absence of a doctrine elaborated within the military High Command.

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<sup>45</sup> Information report n°3591 on the outsourcing prospects for the Ministry of Defence, National Defence and armed forces commission, 17 January 2007.

<sup>46</sup> See the parliamentary question n° 14688 and answer dated 15 January 2008 available at the Defence Ministry Communication Center ([http://www.defense.gouv.fr/defense/enjeux\\_defense/defense\\_au\\_parlement/questions\\_parlementaires/\(of\\_fset\)/180](http://www.defense.gouv.fr/defense/enjeux_defense/defense_au_parlement/questions_parlementaires/(of_fset)/180)).

<sup>47</sup> Decision n° 2008-567 DC of 24 July 2008, Loi relative aux contrats de partenariat, *Recueil*. p. 341.

<sup>48</sup> Decision n° 2003-473 DC of 26 June 2003, Loi autorisant le Gouvernement à simplifier le droit, *Recueil* p. 382.

<sup>49</sup> V. *Livre blanc*, *op. cit.* p 28: “The privatization of armed violence is developing. Parallel to the generalization of the militia phenomenon in the most fragile States, some private military companies are created outside or beside regular forces. These companies provide companies present in unstable areas (as in Africa) with security. But they also play an increasingly obvious direct role in the stabilization phases that follow international military interventions. This evolution goes against the legitimacy principle of the official monopoly on armed force. The uniformed soldier is not any more immediately easily assimilated with a combatant acting within a multinational framework. The blurring of the identity of forces using an international mandate is thus to be added to the confusion resulting from the militia proliferation.”

## 5. Corporate and Labour law

On the national level, PSCs and PMCs are subjected, like every company, to the common law regulating economic activities. In addition, when contracting with public authorities, they have to conform to government procurement rules and procedures (see section 7. Government procurement).

### 5.1 Corporate Law: Registration and purpose

In France, every owner of a business (incorporated business as one-man businesses) must register with the Tax department, publish a legal announcement and register with the Trade and Companies Register. The company's objects must be lawful and not opposed to public order and moral standards.

All the formalities must be undertaken with the Trade Court Clerk where the corporate headquarters are located. The Clerk ensures the legality of the request. He checks the conformity of the statements with the legislative and regulatory measures and their compliance with the documentary evidence and acts deposited in the appendix. The requested documents vary according to the legal form of the applicant company. Only when the whole process is completed, can the registration be done.

Establishing a PSC requires a specific authorization from the Police Prefet<sup>50</sup>. Moreover some activities of PSCs are subjected to specific rules. (See section 2. Regulation of security activities).

### 5.2 Labor Law

PSCs and PMCs are subjected, like every company, to labour law. A key condition mentions that their employees cannot be militaries. Different kinds of employment contracts are possible in France, namely:

- Permanent contracts<sup>51</sup> ;
- Fixed term contracts<sup>52</sup>;
- Mission contracts: for a mission abroad, the validity period cannot exceed 24 months;
- Temporary workers: labour contracts can be concluded with temporary workers only through a dedicated temporary work agency<sup>53</sup>. Each mission imposes the conclusion of a contract of provision between the temporary work agency and the operator, known as

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<sup>50</sup> See loi n° 83-629, *op. cit.*, Article 5 and Décret n°2005-1122 du 6 septembre 2005 pris pour l'application de la loi n° 83-629 du 12 juillet 1983 réglementant les activités privées de sécurité et relatif à l'aptitude professionnelle des dirigeants et des salariés des entreprises exerçant des activités de surveillance et de gardiennage, de transport de fonds et de protection physique des personnes.

<sup>51</sup> Cf. Article L1221-2 and the Section III regulating the breach of permanent contract of the French Labour Code : “ Le contrat de travail à durée indéterminée est la forme normale et générale de la relation de travail. Toutefois, le contrat de travail peut comporter un terme fixé avec précision dès sa conclusion ou résultant de la réalisation de l'objet pour lequel il est conclu dans les cas et dans les conditions mentionnés au titre IV relatif au contrat de travail à durée déterminée”.

<sup>52</sup> Refer to Title IV of the French Labour Code regulating the breach of contract for fixed term contracts.

<sup>53</sup> See the regulation in Articles L1251-1 to L1251-4 of the French Labour Code.

"company user" as well as a work contract, known as a "contract of mission", between the temporary employee and his employer (the temporary work agency).

A "detached contract" can also be concluded with temporary workers through temporary work agencies when the latter place an employee at the disposal of a "user company"<sup>54</sup>.

In France, the employment tribunal named, *Conseil des Prud'hommes* is the competent jurisdiction for first degree litigation linked with the execution or breach of labour contracts<sup>55</sup>.

The national labour laws on personal health and safety have been granted extraterritorial application in recent national jurisprudence<sup>56</sup>.

In France, the legal person as well as employees and corporate managers can all be prosecuted on the civil and/or criminal level for a failure pertaining to the obligation of safety/security<sup>57</sup>. The obligation to "*take the necessary measures to ensure the safety and to protect physical and mental health of all employees, including temporary workers*" (Article L 230-2 of the French Labour Law) which constrains the corporate manager has been particularly extended.

The case-law concerning the Karachi terror attack committed against the bus transporting the semi-public shipyard constructor DCN (La Direction des Chantiers Navals) in 2002 has transformed the security obligation for the employer in an obligation to achieve results and not only to provide the means to achieve these results.

## 6. French PSCs and PMCs

The French private military market is less advanced and less mature than the Anglo-Saxon one. Although largely dismantled or impaired, some "old style" private security companies<sup>58</sup> and independent "dogs of war" - mainly made up of former legionaries, former paratroopers or commandos - remain active.

Another kind of security market has been flourishing this last decade with plenty of companies offering a large range of activities going from "risk country assessments" for investors up to advice to governments on military organization or purchase of equipment. These services also include site securing or close protection as well as logistic assistance for humanitarian or peace operations. (See section 7.1 Companies which could be assimilated to PSCs).

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<sup>54</sup> See Articles L1251-42 to L1251-47-4 of the French Labour Code.

<sup>55</sup> The Book IV of the Labour Code is entirely dedicated to the litigation resolution by the Conseil des Prud'hommes.

<sup>56</sup> See the various decisions made by the Cassation Court on 22 February 2002, 26 November 2002; 16 September 2003 and 1 July 2003.

<sup>57</sup> Civil responsibility (see the French Civil Code) allows the person who endured a damage to obtain compensation (damages according to the tort law) by way of damages. Here the fault is by a defect of prudence or diligence, by the absence of the minimum checks which would have prevented an erroneous decision. The criminal responsibility does not exclude a penal sanction. It can be engaged based on the Criminal Code if the violation created damage (see Articles 123 and following of the French Criminal Code) or, against the corporate executive on the base of a failure to the Labour Code in the case of infringement of a rule of hygiene and/or safety.

<sup>58</sup> See Chapleau, 'De Bob Denard aux sociétés militaires privées à la française', 52 *Cultures & Conflits*, Winter 2003.

Some French companies thus offer some kind of military services<sup>59</sup> but usually these activities only represent a marginal share of their sales turnover. As a general Staff officer underlined, it is more appropriate to talk in France about “*private security companies that sometimes fulfil tasks of a military nature than private military companies*”<sup>60</sup>. Only a handful of them could indeed be assimilated as PMCs and only SECOPEX actually defines itself as the “*only French PMC*”. None of them officially shows an ambition to participate in direct conflict. (See section 7.2 Companies which could be assimilated to PMCs).

Being unable to rely on important contracts with the French government, French companies must deal with commercial clients – whether organizations (companies, communities, international organizations or NGOs) or individuals (companies CEO, VIP). Along with other reasons mentioned in the introduction section, this explains why French companies operating in this security/military area are pretty different from their Anglo-Saxon counterparts<sup>61</sup>.

### 6.1 Companies which could be assimilated to PSCs

There are plenty of companies positioned in this security area (in the broad acceptance of the term)<sup>62</sup> and most often their activities overlap - especially in risk management, a fast growing area. Notwithstanding this overlapping of activities, five main niche areas can be distinguished to give a quick overview of the activities carried out by French companies:

- security: close protection (AICS, Groupe Barril Sécurité,...), security advice for protecting people (Risk&Co, Sécurité sans Frontière...) or travellers' security (Crisis Consulting), sites and assets securing (GEOS, AICS...);
- business or strategic intelligence (Risk&co, Salamandre, C4IFR, CEIS, I2F...);
- training and advice (DCI, GEOS, Risk&Co..);
- technical assistance (SOFEMA, International Instruction Corp...)
- mine-clearing (Géomines, Hamap...).

Some of the most famous French companies are:

- Sécurité Sans Frontière (SSF), was established in 1994 by Frédéric Bauer who recently retired. SSF has been run since May 2008 by retired General Pierre-Jacques Costedoat who joined the company in 2003 (when it belonged to the Compagnie de Conseil Saint-Honoré of the LCF Rothshild group). SSF has endured financial difficulties for 2 years and could be dissolved in the near future.

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<sup>59</sup> Cf. PMCs activities typology made by Francart, in ‘Sociétés militaires privées, quel devenir en France ?’, Mutations et invariants, Partie III, Humanitaire et militaire, nouveaux mercenariats, questions de défense, *La Documentation française*, n°5, Jan-May, 2007, p 89-92.

<sup>60</sup> Babinet, Pallud and Etienne, ‘Sociologie des sociétés militaires privées et conséquences sur les armées régulières’, *Centre d’Etudes en sciences sociales de la défense*, Feb. 2006, p 319.

<sup>61</sup> See Auzou, *Vers des Sociétés militaires privées à la françaises?*, Master thesis, IEP Toulouse, 2008.

<sup>62</sup> Cf. the table worked out by the Security Directors Club (CYNDEX) last updated in January 2008.



- RISK&CO, run by Bruno Delamotte, is the result of a merger in 2006 of BD Consultants (Bruno Delamotte) specialized in business intelligence and Atlantic Intelligence (Philippe Legorjus) which focused on protecting people and assets.
- AMARANTE INTERNATIONAL (subsidiary of SERENUS CONSEIL) is managed by Alexandre Hollander, a former intelligence officer (from DGSE, the French intelligence service). The company has just inaugurated a department dedicated to the protection of infrastructures against the terror attack risk.
- SOS INTERNATIONAL, founded by Pascal Rey-Herme and Arnaud Vaissié, is one of the top world companies in medical assistance. In July 2008 SOS International has launched a joint venture with Control Risks, a British company considered a PSC, intending to become a leader in security management for travellers and expatriates.

## 6.2 Companies which could be categorized as PMCs

- DÉFENSE CONSEIL INTERNATIONAL (DCI) is a private company in French law but it is supervised and controlled by the Ministry of Defence. Specialized in the transfer of French Defence know-how, DCI has developed - for more than 30 years activities - in training, assistance and consulting in order to optimize the use of equipment acquired by friendly armed forces (DCI is the oldest company of this kind in France). To accomplish these missions, DCI has several specialized subsidiaries among which: COFRAS (Compagnie Française d'Assistance Spécialisée)<sup>63</sup>.

The first operational branch of DCI, COFRAS - the army component of DCI - was formed in 1972 (further to a contract between GIAT Industries and Saudi Arabia regarding the supply of AMX-30 tanks) to provide friendly nations' forces with technical assistance in the implementation, operational use and support of army and army aviation equipment<sup>64</sup>. The supervisory control of COFRAS is reinforced and implies the Defence Ministry, the Army High Commands and the Procurement Board (DGA). COFRAS staff is composed of military in active service detached to the company, former military and civilians; they act according to a "letter of assignment" written by the Defence Ministry and can under no circumstances be involved in active military engagements.

In 1997, CIDEV (*Conseil International et développement*)<sup>65</sup> became a COFRAS subsidiary. CIDEV undertakes studies and actions which are part of peace-building projects (professional redeployment and training of military personnel, mine clearance, cleanup, quality control, demobilization and reintegration, etc.).

The 1997 report of the Special Rapporteur on the question of the use of mercenaries positioned COFRAS at the same level as genuine Anglo-Saxon PMCs such

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<sup>63</sup> Other DCI subsidiaries include NAVFCO, its naval arm which trains foreign naval personnel, AIRCO, which works closely with the French aviation industry to offer know-how and training of the French air force to friendly country air forces, DESCO, which provides French training and know-how in defence equipment programmes, and STRATCO (Société Française de Stratégie et de Conseil), which stands for 'a strategic think tank' on French defence and industry. Details can be found on DCI website.

<sup>64</sup> To have a detailed overview of COFRAS activities, refer to DCI website and a document published by the Confidential Letter TTU: "DCI-COFRAS dedicated to training" ("DCI-COFRAS au service de la formation").

<sup>65</sup> CIDEV was established in 1995 to deal with "economic and social rehabilitation activities for friend countries".

as Executive Outcomes or MPRI<sup>66</sup>. DCI lines of accountability are not very clear as some experts point out<sup>67</sup>.

However, DCI is clearly a semi-public company. The French State is the major shareholder<sup>68</sup> and thus tightly controls DCI's financial plan. In addition, the French government names all DCI directors. DCI staff - be it military, former military or civil - is fully subordinate to the government. Finally, all DCI missions are controlled by the Ministry of Defence, the Procurement Board (DGA) and the Army High Command so that we can hardly speak about a PMC here. Considering DCI a "*privatized form of French military cooperation*"<sup>69</sup> seems more accurate. A Member of Parliament defined DCI companies as auxiliaries of the Defence Ministry<sup>70</sup> as they provide him with effective and not very expensive support (from the technical point of view). Clearly, DCI also offers an advantage concerning French foreign politics and the support of armament exports.

- SECOPEX, C.S.A International, created by Claude Arbiol and Jean-Pierre Perez (2 former non-commissioned army officers), remains until now the only French company to be clearly positioned in the niche of military services - but without resorting to offshore contracts so as to remain in conformity with the law of 2003 prohibiting mercenary activities<sup>71</sup>. SECOPEX which is believed to have a very limited number of employees, did not achieved significant results in France and was unable to conclude the contracts to which the company aspired.

- GEOS is undoubtedly the most famous French "modern mercenary company" and also the first ranked in terms of financial results. However GEOS does not define itself as a PMC but as a PSC. Created in 1997 by Stéphane Girardin, an alleged former intelligence officer, GEOS primarily addresses companies willing to establish (or already present) in high risk zones. The company focuses on the international scene (it covers more than 30 countries). Within the "crisis management" line of service, which implies the detachment of experts on the ground, GEOS concluded a partnership with the insurance company AXA (GEOS conducted, in particular, a private hostages' recovery operation at sea in 2000). The company became famous following the evacuation of French citizens during the 2003 crisis in Côte d'Ivoire. The group intends to develop outsourcing missions for international institutions (in summer 2007, GEOS

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<sup>66</sup> Article 39 of the Report stated: "Mercenaries were not, however, an exclusively African phenomenon. Although Executive Outcomes was registered in Pretoria, its holding company, Strategic Resources Corporation (SRC), was also registered in London. The United States of America had its Military Professional Resource Institute, made up of at least 7 retired army generals and 140 former officers; France its Cofras company; and Great Britain, the British Defence Systems Limited (DSL). These companies were able to operate normally because of gaps and lack of precision in the legislation at both the international and internal levels. They had always worked for foreign Governments and under contract so far, but could become a real threat if they decided to work for armed opposition movements attempting to destabilize Governments".

<sup>67</sup> DCI has been criticized by Amnesty International as having no clear accountability to either the government or parliament

<sup>68</sup> DCI is 49.9% owned by the French government and 50.1% owned by the three public armaments offices, namely the General Air Office (10%), SOFRESA (10%) and SOFEMA (30%).

<sup>69</sup> Elomari, 'DCI: privatisation de la coopération militaire française et commerce des armes', pp.70 to 74, in *Le boom du mercenariat : défi ou fatalité, Survie, actes du Colloque du 30 novembre 2000 sur le mercenariat*, Les documents de Damoclès, 2001.

<sup>70</sup> Jean-Claude Sandrier in the Information Report n°2334 on the control of armament export, April 25, 2000.

<sup>71</sup> See the Confidential Letter TTU n°517 of 24 November 2004.

carried out a protection and assistance mission for European Union officials supervising the legislative elections in Angola)<sup>72</sup>.

- AICS founded by Nicolas Courcelle and run in France by Christophe Bonamy is apparently the only French company operating in Iraq where it offers protective services for French journalists or equipment (such as armoured vehicles). AICS is a subsidiary of the group “Eleven”<sup>73</sup> and partner of SECOPEX.

- PREVENTION RISK GROUP has been the French subsidiary of G4S Global Risks Limited<sup>74</sup> since 2004. Prevention Risk Group will continue to operate under the G4S banner until July 2009 but a few months ago all the company shares were acquired by Ewald Wolfe who intends to run the company himself<sup>75</sup>. A former member of the 3rd Regiment of marine parachutists (3rd RPIMa), Ewald Wolfe had taken part in the creation of SECOPEX in 2003. Since July 2007, the executive vice-president of Prevention Risk Group is Henri Poncet, a retired general responsible among others for the Special Operations Command (COS). He was sanctioned in 2005 for covering up the shooting of a “highway bandit” by soldiers of the “Licorne troop” he then commanded.

Other companies pretending to offer military services exist such as ALLIANCE INTERNATIONALE DE SECURITE and INTERNATIONAL PROTECTION respectively managed by Didier Alary and Hervé Benkemoun but no information could be found on these companies.

### 6.3 Companies founded by French citizens but registered abroad

Except for the Earthwind Holding Corporation Group, very little information only could be found regarding companies created by French nationals but registered abroad.

- The Earthwind Holding Corporation Group (EHC) was established in 1999 by former French Army officers. EHC advertises itself as the “only francophone company registered in the United States of America”. The group claims to be the most liberalized French PMC and the closest to the Anglo-Saxon model of PMCs. EHC used to be member of the International Peace Operations Association, the private security lobbying association but no sign of this membership could be actually found on the IPOA website<sup>76</sup>. EHC asserts it is specialized in technical and operational assistance, from armed protection to logistics and to the benefit of 400 immediately operational persons. A matter of importance is that the English PSC “Northbridge” can apparently recruit some French staff through EHC.

- ODYSSEY (registered in Switzerland or the USA) was set up in 2000 in Abidjan (Côte d’Ivoire) by Frédéric Roussey De Larche and Lamadieu, two former French gendarmes. A small French team is believed to be among the 12 employees<sup>77</sup>.

<sup>72</sup> See Le Pelletier, ‘Renforcement du capital à Géos’, *L’Express*, 10 October 2008.

<sup>73</sup> Confidential Letter *TTU* n° 516, 17 November 2004.

<sup>74</sup> G4S is an Anglo-Danish company offering logistic and security services which acquired last year ArmorGroup.

<sup>75</sup> See *Intelligence Online* Confidential Letter n°569, 24 April 2008.

<sup>76</sup> <http://ipoaworld.org/eng/>

<sup>77</sup> See Gillet, ‘Odyssey: une société bi-culturelle sur le marché de la sécurité’, *Delphes*, 11 February 2005.

- [ASPIC](#) (registered in the Seychelles) is run by Frenchman Bruno Aurelle.
- ZOOM DSS was established by French Jean Louis Zanardo.
- [Defense Control](#) (registered in Luxembourg)

#### 6.4 Self-regulation efforts

Some of the most established industry players operating in the security sector are eager to see a regulatory framework more adequate to the reality. They advocate more formalized control of the private sector so as to protect their reputation and differentiate themselves from “darker elements”. Nevertheless, they generally prefer not to see any additional control if this control were to pose a threat to their objective of profits.

To improve their image, most companies express their commitment to respect moral, ethical and deontological rules as well as laws in force, human rights and international conventions such as the Geneva Conventions and additional Protocols including the plans to fight against the recruiting, using, financing, and instructing mercenaries<sup>78</sup>.

Many of them go further by formalizing these values and operative standards in a charter of ethics or an ethics code. For example, GEOS Ethics Code enshrines seven fundamental principles: transparency of structures and assignments, independence through financial autonomy as well as position takings, respect for commitments, approval of international principles, partnership based on mutual confidence with the client, confidentiality, and quality of the personnel. Interestingly, the Charter of ethics elaborated by the EHC group bases the rules of engagement of the group on the double principle of necessity and proportionality<sup>79</sup>.

Establishing ethical or supervisory committees to check good practices has also become a common practice. These dedicated bodies often comprise government officials from the Defence Ministry, the Interior Ministry of the Foreign Affairs Ministry, as well as political figures, journalists, experts, academics, executives... For example, GEOS has set up a Supervisory Committee to “*ensure that the activities of GEOS are in compliance with the Group’s Ethics Code, to monitor the regularity of the*

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<sup>78</sup> For example: “SECOPEX sees itself duty-bound to operate always at the highest standards of honesty, integrity, openness and professionalism. These values are incorporated into the framework of our basic principles, as are: a respect for all applicable laws; a refusal to interfere in the political arena; the rejection of corruption in all its forms, whether public or private, active or passive; the satisfaction of our clients; unity of purpose within the company. SECOPEX adheres to: the principles of the Universal Declaration of the Rights of Man ; the Geneva Convention of 1949 ; the 1989 international convention against the recruitment, use, financing and training of mercenaries ; the basic conventions of the International Labour Organisation ; the principles of the world-wide pact of the United Nations Organisation ; and acts in conformity with all relevant decisions of the UNO and the European Union.” Source: SECOPEX website. “EHC Group carries on its activities in total respect with international standards outlined by the Geneva Conventions. The company does not take any direct or indirect part in conflicts. EHC Group only works for legal institutions or companies. EHC Group has recently signed and adopted the “Code of Conduct” of the International Peace Operations Association (I.P.O.A)”. Source: EHC group website.

<sup>79</sup> EHC Chart of ethics stipulated rules of commitment as follows: “When authorized by the article 122-5 of the French penal code to use strength, and more particularly weapons, EHC Group staff can only resort to it in a strictly necessary and proportional way considering the objective. To prevent an offense or a crime against property of people, the staff, after notice, can do anything as long as it is proportional to the gravity of the aggression”. The whole EHC Charter of ethics can be seen at the website.

*accounts of the Group and to encourage discussion and debate on the role of the private sector in the security field*". This group is led by Lieutenant-General of the Land Forces (Ret) Jean Heinrich. Heinrich was director of the "Action Service" of the DGSE (French external intelligence services), founder of the Directorate of Military Intelligence (DRM - French DIA) and also former advisor to three Ministers of Defence. Other members include a former Director of the DCN and DGA (Daniel Reydellet), and French Ambassador to Germany and Algeria François Scheer, a former Secretary General of the French Ministry of Foreign Affairs<sup>80</sup>.

## 7. Criminal responsibility

### 7.1 Mercenary activity

The pertinent French legislation is contained in Article 23-8 of the Civil Code and articles 436-1 to 436-5 of the Criminal Code (detailed below).

Before international treaties, the resolution 2465 (XXIII) made clear that, "using mercenaries against a National Liberation Movement [...] is a criminal act [... M]ercenaries themselves are criminal"<sup>81</sup>. But it is the famous Resolution 3314 (XXIX), adopted by the UN General Assembly, that has established the first link between an international obligation (the prohibition of armed force and, more precisely, the prohibition of aggression defined by these resolutions) and mercenarism. The use of mercenaries is defined as a form of aggression by Article 3 g) which specifies that "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the act listed above<sup>82</sup>, or its substantial involvement therein".

Those two texts are very interesting as they criminalized, in a juridical form, mercenary activities. But there are several questions that have been shelved. Firstly, it is not clear whether, under those two texts, mercenarism is an infraction in itself, or just a practice, among others, which falls within the notion of aggression. Secondly, the jurisprudential value of UN General Assembly resolutions is not clear. They primarily are just recommendations creating, in principle, no legal obligations<sup>83</sup>. But a resolution, not in itself binding, may prescribe principles of international law and be, or purport to be, merely declaratory and, at the same time, "provide a means for corralling and defining the quickly growing practice of States while hortatory in form"<sup>84</sup>. It could be the case when resolutions touch on matters that deal with the UN charter as, for instance, the prohibition of the use of force.

The question of the juridical value of the resolutions is particularly important in the case of a State like France, which is not party to the Convention of 4 December 1989 against the "recruitment, use, financing and training of mercenaries". The first additional Protocol of June 8, 1977 to the Geneva Conventions, to which France is party, does not have as its main purpose the incrimination of the mercenary. Article 47

<sup>80</sup> See the composition of the supervisory Committee on GEOS website (<http://www.geos.tm.fr/>).

<sup>81</sup> Resolution 2465 (XXIII) of the United Nations General Assembly, 20 December 1968.

<sup>82</sup> That is to say invasion or attack by armed forces, military occupation, bombardment etc. See resolution 3314 (XXIX) of the United Nations General Assembly, 14 December 1974.

<sup>83</sup> I. Brownlie, *Principles of Public International Law*, Oxford, Clarendon Press, 1990, p. 699, and judge Lauterpacht, sep. op., *South West Africa case* (voting procedure), ICJ Reports, 1955 (pp. 67, 118-119 and 122).

<sup>84</sup> I. Brownlie, *idem*.



was mainly drafted because of the attitude of some mercenaries: they were recruited to fight against National Liberation Movements. The statute resulting from these texts is not very clear because of the opposition between States that did not want to allow mercenaries to be considered as combatants, and the others. Nevertheless, this Article cannot be used directly to regulate mercenarism, rather it is a means to discourage the individual from becoming a mercenary. By passing the 2003 law, the French Parliament made it possible to fill in a gap in French legislation.

**Section 436 of the Criminal Code** was introduced following the passing of a law prohibiting “active mercenary activity”. The discussion to set up a legal device specifically addressing the exercise of mercenaries formally began in 1997 and succeeded 6 years later in the form of a criminal law repressing “mercenary activities” committed by French nationals or residents in France either within the French territory or abroad.

This law incorporates the legal definition of “mercenary” into the French Criminal Code according to the qualification of mercenary given in the first additional Protocol of June 8, 1977 to the Geneva Conventions<sup>85</sup>. Prior to this instrument, the French legislation was not adequate in terms of mercenaries<sup>86</sup> so this law partly filled a void with important measures:

- Prohibiting individual “active mercenary” activity (Article 436-1)

Article 436-1-1 addresses any person who takes (or tries to take) a direct part in hostilities in order to obtain a personal advantage or a payment. This provision of Article 436-1 thus represses the traditional activity of the mercenary but also the attempt to commit an infringement, in accordance with Article 121-4-2 of the Criminal Code which imposes, in criminal matter only, a specific legislative measure to punish the attempt.

Article 436-1-2 punishes the involvement in a concerted violent act designed to overthrow institutions or to attack the territorial integrity of a State. This idea of consultation refers more to the assumption of a takeover, carried out from the interior or outside of the territory, than to mercenaries’ activities in the primary meaning of the term.

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<sup>85</sup> Article 47 defines Mercenaries as follows: “1. A mercenary shall not have the right to be a combatant or a prisoner of war. 2. A mercenary is any person who: (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; (e) is not a member of the armed forces of a Party to the conflict; and (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.”

<sup>86</sup> Those activities were beforehand mainly prosecuted on the base of:

- Articles 412-7 and 413-1 of the Criminal Code regarding criminal conspiracy;
- Article 432-13 regarding military staff;

- Articles 23-8 and 25 of the Civil Code that can lead to the loss of French nationality for the mercenaries.

- Prohibiting the act of recruiting, employing, financing, equipping or providing military training to a person described in Article 436-1 (Article 436-2)

Interestingly, this Article is geared towards companies or structures considered groups, not the individual who committed an infringement but the organizers (corporate body or natural person) who would not directly participate in the conflict but would be operative at the organizational level.

- Prosecution of acts committed abroad (Article 436-3)

Article 436-3 is a key rule extending the competences of French jurisdictions when the crimes are committed abroad. It states that *“lorsque les faits mentionnés au présent chapitre sont commis à l'étranger par un Français ou par une personne résidant habituellement sur le territoire français, la loi française est applicable par dérogation au deuxième alinéa de l'article 113-6 et les dispositions de la seconde phrase de l'article 113-8 ne sont pas applicables”*<sup>87</sup>.

French Criminal courts can thus not only prosecute offenses committed in France but also crimes and offences committed by a French National abroad (or someone who generally resides in French territory) or crime and offences committed abroad to the detriment of a French National<sup>88</sup>. It is also essential to note that public prosecution can be launched without the lodging of a complaint.

- Possibility to incriminate a natural person or legal person and to impose additional penalties (Article 436-4 and 436-5)

Article 436-4 deals with additional penalties on natural persons guilty of infractions defined in articles 436-1 and 436-2. Article 436-5 relates to additional penalties that may apply to legal persons guilty of infringement described in 436-2.

The Senate foreign affairs committee Rapporteur (M. Michel Pelchat) conceded during the debate leading to the adoption of the law that *“this project remains limited in*

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<sup>87</sup> See too: French Criminal Code, Article 113-6: *“La loi pénale française est applicable à tout crime commis par un Français hors du territoire de la République. Elle est applicable aux délits commis par des Français hors du territoire de la République si les faits sont punis par la législation du pays où ils ont été commis. Il est fait application du présent article lors même que le prévenu aurait acquis la nationalité française postérieurement au fait qui lui est imputé”*

The article 113-8 states : *“sans préjudice de l'application des articles 113-6 à 113-8, la loi pénale française est également applicable à tout crime ou à tout délit puni d'au moins cinq ans d'emprisonnement commis hors du territoire de la République par un étranger dont l'extradition a été refusée à l'Etat requérant par les autorités françaises aux motifs, soit que le fait à raison duquel l'extradition avait été demandée est puni d'une peine ou d'une mesure de sûreté contraire à l'ordre public français, soit que la personne réclamée aurait été jugée dans ledit Etat par un tribunal n'assurant pas les garanties fondamentales de procédure et de protection des droits de la défense, soit que le fait considéré revêt le caractère d'infraction politique.*

La poursuite des infractions mentionnées au premier alinéa ne peut être exercée qu'à la requête du ministère public. Elle doit être précédée d'une dénonciation officielle, transmise par le ministre de la justice, de l'autorité du pays où le fait a été commis et qui avait requis l'extradition”.

<sup>88</sup> According to **Article 113-7** of the French Criminal Code : *“la loi pénale française est applicable à tout crime, ainsi qu'à tout délit puni d'emprisonnement, commis par un Français ou par un étranger hors du territoire de la République lorsque la victime est de nationalité française au moment de l'infraction”*

*its objectives. It is not intended to cover all private sector activities, be they undertaken by individuals or specialist operators, in the military domain”<sup>89</sup>.*

- The legal scope is restricted to some specific categories of persons.

Given the cumulative nature of the six criteria defining a mercenary, the French law is not very effective: it is difficult to apply the six criteria, at the same time, to the same person. A wide category of persons is excluded (such as logisticians, technicians or worse: people/societies employed by a regular legal army). Though a somewhat broad reading of Article 436-2 could lead to incriminating PMCs, those PMCs are not legally defined.

It is clear that the definition adopted by Article 436-1 suffers from the same drawbacks as international treaties. The criterion of the desire for “private gain” and of “material compensation substantially in excess of that promised or paid to combatants”, for instance, can be easily avoided. This criterion brings, otherwise, the difficulty of the proof to light. According to Th. Garcia, “cette loi permet de dissimuler facilement la véritable nature de l’intéressé pour qui, de surcroît, l’appât du gain n’est pas toujours le seul motif de son activité”<sup>90</sup>.

For obvious political and operational reasons, the French government removed the word “official”, after the word “mission” (second and third subparagraphs of Article 436-1 of the Criminal Code)<sup>91</sup>. Thus, people benefiting from state protection will not be prosecuted.

The Article 486-1 also suppresses the reference made by Article 47 of the 1977 Protocol to the fact that a person who is “a resident of a territory controlled by a Party to the conflict” cannot be considered a mercenary. For the French deputy M. Joulaud, it can be explained by the purpose of this law, which is only to prohibit mercenary activities of French residents in foreign States<sup>92</sup>. By not mentioning the quality of resident, Article 436-1 prevents the suspected persons from submitting the fact that they

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<sup>89</sup> *Op. cit.*

<sup>90</sup> Th. Garcia, ‘La loi du 14 avril 2003 relative à la répression de l’activité mercenaire’, *R.G.D.I.P.*, 2003, pp. 681.

<sup>91</sup> **Article 436-1** (Inserted by Act no. 2003-340 of 14 April 2003. Art. 1 Official Journal of 15 April 2003) states that : “est puni de cinq ans d'emprisonnement et de 75 000 Euros d'amende le fait :

1° Par toute personne, spécialement recrutée pour combattre dans un conflit armé et qui n'est ni ressortissante d'un Etat partie audit conflit armé, ni membre des forces armées de cet Etat, ni n'a été envoyée en mission par un Etat autre que l'un de ceux parties au conflit en tant que membre des forces armées dudit Etat, de prendre ou tenter de prendre une part directe aux hostilités en vue d'obtenir un avantage personnel ou une rémunération nettement supérieure à celle qui est payée ou promise à des combattants ayant un rang et des fonctions analogues dans les forces armées de la partie pour laquelle elle doit combattre ;

2° Par toute personne, spécialement recrutée pour prendre part à un acte concerté de violence visant à renverser les institutions ou porter atteinte à l'intégrité territoriale d'un Etat et qui n'est ni ressortissante de l'Etat contre lequel cet acte est dirigé, ni membre des forces armées dudit Etat, ni n'a été envoyée en mission par un Etat, de prendre ou tenter de prendre part à un tel acte en vue d'obtenir un avantage personnel ou une rémunération importants. .”.

<sup>92</sup> Joulaud, *Rapport fait au nom de la Commission de la défense nationale et des forces armées sur le projet de loi, adopté par la Sénat (n° 607), relatif à la répression de l’activité mercenaire*. A.N., n° 671, p. 16.

normally live in States where a conflict breaks out, to justify their will, on personal grounds, to fight without being a member of the armed forces of those States<sup>93</sup>.

- The legal scope is restricted to some kind of activities.

As a criminal law, all activities that are not specifically prohibited are authorized. Activities such as training, and operational preparation are thus excluded from the repressive contours of the law.

Besides, the constitutive elements of the crime are very close to the wording of Article 47 of the Additional Protocol I, but do not differentiate between involvement in international or non-international armed conflicts.

The 2003 law suffers from two other major drawbacks. The first limit is that this text does not deal with private security or military companies. According to the former French senator M. Pelchat, “il faut observer que le projet de loi ne préjuge en rien de l’attitude que pourraient adopter les pouvoirs publics. Il laisse une place éventuelle à de telles sociétés, dès lors qu’elles ne seraient pas spécialement sollicitées pour participer à un conflit donné ou qu’elles ne seraient pas directement impliquées dans les hostilités, dans un cadre qu’il resterait alors, si cette voie était suivie, à organiser et à réglementer”<sup>94</sup>. The position of the French government toward the regulation of PMC remains ambiguous and, sometimes, not very clear. For M. Pelchat, the fact that there is no real debate on the intervention of private specialised societies can explain this gap. The former minister of the Defence, M. Alliot-Marie, considered that the most reprehensible manifestations of mercenarism must be punished. But, at the same time, she clearly recognized that the government would not hinder any possibility to strengthen the State’s security<sup>95</sup>. While being well aware of the possible threats caused by mercenaries’ activities or non-regulated private security business (and also by the involvement of PMC/PSC in mercenarism), it shows that the French State considers the use of private security companies a possible means to assure the national security.

Secondly, Article 436-1 does not take into account indirect participation in an armed conflict. Under this Article, the mercenary is, indeed, the person who only takes a *direct* part in a conflict whereas the 1989 Convention does not consider this direct participation as a criterion to recognize a mercenary. This “omission” is mainly explained by the French government’s apprehension about people being sent as experts, technical or military advisers, to the profit of foreign governments, who could be considered as mercenaries. It can be considered a vain fear since the main international or national texts agree to consider that “any person who is sent by a State which is not a Party to the conflict on official duty as member of its armed forces” is not considered a mercenary. Moreover, the 2003 law does not mention the word “official” and considers that a mission is official as soon as it has been decided by the State. Even if the person is not a member of the army, the criterion of direct participation in a conflict or of private gain could be fulfilled with difficulty. For M. Alliot-Marie, the fact that that French militaries or secret agents often act without the public authorization of the State<sup>96</sup> is the

<sup>93</sup> Garcia, *supra* note 97, p. 681.

<sup>94</sup> Pelchat, *Rapport au nom de la commission des affaires étrangères de la défense, et des formes armées sur le projet de loi relatif à la répression de l’activité de mercenariat*, Sénat, n° 142, session de 2002-2003, p. 19.

<sup>95</sup> See <http://www.senat.fr/seances/s200302/s.200030206/s200030206004.html>, p. 2.

<sup>96</sup> See <http://www.senat.fr/seances/s200302/s.200030206/s200030206004.html>, p. 9.

main reason that explains this omission. This gap could however have a negative impact for individuals sent by France in foreign countries, since they could be considered mercenaries for participating indirectly in an armed conflict.

Th. Garcia underlines another point that can explain the non-reference to the indirect participation in an armed conflict: the risk for industrials linked to arming. Being, according to T. Garcia, “involved in the mercenarism chain, [they] are for France a foreign policy tool in general and of armament policy in particular. Their number and their role, especially in African States”<sup>97</sup> is proof of their importance. The danger, in this situation, is to see a technician or an advisor working for such a company being considered as mercenary. Such a qualification would involve such personels’ own hierarchy, or even State’s officials, if it is established that the company employing him is under direct or indirect control of the government (as D.C.I. for instance).

In spite of these weaknesses, France is considered - with the law of April 14, 2003 - one of the States having the most advanced and most rigorous legislation against mercenary activities.<sup>98</sup> The youth of the law and the lack of jurisprudence still limit the effectiveness of this legislation.

It is possible to consider, for instance, that the 2003 law is more efficient than some international texts, especially the 1989 Convention. In the first place, the 2003 law mentions only “remuneration” when it deals with the desire for private gain, whereas the 1989 Convention (the same can be said about Article 47 of 1977 Protocol (see Art. 47, c)) underlines the necessity of “material” remuneration. In the second place, and this point is more important, Article 1-b of the 1989 Convention makes clear that a mercenary is a person motivated by “the desire for a private gain *and, in fact, is promised etc.*”. Article 436-1 specifies on this point that a person must be motivated by the “the desire for private gain *or* remuneration substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party”. It appears that the French text does not require the addition of the two conditions (it does not matter if there is none promised in fact) and, so, can be easier to enforce, at least on this particular point.

It must be emphasized too that the 2003 law has extended, *ratione loci*, the repression. Article 436-3 departs from the principle of territoriality by establishing unconditional application of French law to the facts occurring abroad and by extending the territorial competence of the French jurisdiction. However, the effectiveness of this Article can be dramatically reduced by the implementation of foreign legislation, even if the conflicts of competence that would occur could be resolved by diplomatic negotiations.

#### - Articles of the Civil Code

Article 23-8<sup>99</sup> and 25-6<sup>100</sup> of the Civil Code set out that French citizen can lose their nationality when a serious crime is committed.

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<sup>97</sup> Th. Garcia, *supra* note 97, p. 684. See also, Joulaud, *Rapport fait au nom de la Commission de la défense nationale et des forces armées sur le projet de loi*, p. 12.

<sup>98</sup> P. Quilès, in *Compte rendu analytique officiel de la session ordinaire de l'Assemblée nationale de 2002-2003*, 76ème jour de séance, 185ème séance, 1ère séance du jeudi 3 avril, p. 7

<sup>99</sup> According to **Article 23-8** of the Civil Code “perd la nationalité française le Français qui, occupant un emploi dans une armée ou un service public étranger ou dans une organisation internationale dont la France ne fait pas partie ou plus généralement leur apportant son concours, n'a pas résigné son



According to Article 23-8, a French citizen can be stripped of his nationality if, despite having been instructed by the French government to resign, he continues to serve in a foreign army or public service. This clause specifically deals with publicly employed individuals, not those engaged by security companies.

It is interesting to note that this Article removes one of the six criteria used to define a mercenary (namely as someone who is not a member of the armed forces of a Party to the conflict) since the French state can require a French citizen to leave the armed forces of another state. In this case, the defence plea founded on criterion (e) is negated.

### *7.2 Individual criminal responsibility*

French Civil and Criminal law apply to French citizens committing certain crimes wherever they are. In addition, individuals are subjected to the criminal law of the state where the offence is committed.

In spite of a potential diplomatic immunity, the individual is - in no manner - protected from the consequences of the acts he commits. He does not benefit from immunity, including when his company works under a contract with the United Nations for example.

### *7.3 Criminal responsibility and companies*

In France, the principle of legal persons' criminal liability has been admitted since 1992 by the Criminal Code. PSCs and PMCs liability could be involved for acts committed on their account by their organs or representatives. This criminal liability does not exclude that of any natural persons who are perpetrators or accomplices to the same act<sup>101</sup>.

Penalties incurred by legal persons for felonies or misdemeanours are described in Article 131-37 to 131-39 of the French Criminal Code. Besides a fine that can reach

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emploi ou cessé son concours nonobstant l'injonction qui lui en aura été faite par le Gouvernement. L'intéressé sera, par décret en Conseil d'Etat, déclaré avoir perdu la nationalité française si, dans le délai fixé par l'injonction, délai qui ne peut être inférieur à quinze jours et supérieur à deux mois, il n'a pas mis fin à son activité. Lorsque l'avis du Conseil d'Etat est défavorable, la mesure prévue à l'alinéa précédent ne peut être prise que par décret en conseil des ministres,"

<sup>100</sup> **Article 25** of the French Civil Code precises that "l'individu qui a acquis la qualité de Français peut, par décret pris après avis conforme du Conseil d'Etat, être déchu de la nationalité française, sauf si la déchéance a pour résultat de le rendre apatride : 1° S'il est condamné pour un acte qualifié de crime ou délit constituant une atteinte aux intérêts fondamentaux de la Nation ou pour un crime ou un délit constituant un acte de terrorisme ; 2° S'il est condamné pour un acte qualifié de crime ou délit prévu et réprimé par le chapitre II du titre III du livre IV du code pénal ; 3° S'il est condamné pour s'être soustrait aux obligations résultant pour lui du code du service national ; 4° S'il s'est livré au profit d'un Etat étranger à des actes incompatibles avec la qualité de Français et préjudiciables aux intérêts de la France".

<sup>101</sup> See Article 121-2 of the French Criminal Code : "Les personnes morales, à l'exclusion de l'Etat, sont responsables pénalement, selon les distinctions des articles 121-4 à 121-7, des infractions commises, pour leur compte, par leurs organes ou représentants. Toutefois, les collectivités territoriales et leurs groupements ne sont responsables pénalement que des infractions commises dans l'exercice d'activités susceptibles de faire l'objet de conventions de délégation de service public. La responsabilité pénale des personnes morales n'exclut pas celle des personnes physiques auteurs ou complices des mêmes faits, sous réserve des dispositions du quatrième alinéa de l'article 121-3"

the amount of €1,000,000<sup>102</sup>, additional penalties can apply such as dissolution, prohibition to exercise, placement under judicial supervision for a maximum period of five years, permanent closure or closure for up to five years of the establishment, disqualification from public tenders, prohibition, either permanently or for a maximum period of five years, to make a public appeal for funds<sup>103</sup>.

#### 7.4 *International responsibility*

At the international level, it is not clear that the international responsibility of the State or the individual responsibility of the political leaders will be engaged at least for the simple recruitment or use of mercenaries. Firstly, the International Law Commission, for instance, has first considered that mercenarism was a crime against peace (in the 1990 session), before assessing that it was not enough a serious offence to be part of the list of crimes against peace and security (1996). Secondly, few States have ratified the 1989 Convention against use of mercenaries, and, thirdly, the International Criminal Court statute specifies:

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations<sup>104</sup>.

#### 7.5 *Self-defence*

French courts have developed a general theory of self-defence based on the provisions contained in Articles 122-5 to 122-7 of the Criminal Code. To defend oneself or other persons against an attack is assimilated to self-defence, and it is now accepted that self-defence may also be justified in case of an attack against one's goods. Conditions making a person not criminally liable are relative to both the attack and the act of defence<sup>105</sup>.

Regarding the attack, it must be “*present or imminent*” - meaning that a threat or a risk of aggression does not justify a premature defence. The imminence of the aggression is measured according to the actuality of the danger. This leads sometimes to a delicate *a posteriori* evaluation. In this regard, courts have developed a distinction between “likely” and “supposed” aggression (*aggression vraisemblable/putative*): only the first justifies the defence. In addition, the aggression must be “*unjustified*”: an “aggression” imposed by law – as for instance one falling within the scope of Article 73 of the Code of Criminal Procedure does not justify a counterattack<sup>106</sup>.

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<sup>102</sup> **Article 131-38** mentions: “le taux maximum de l'amende applicable aux personnes morales est égal au quintuple de celui prévu pour les personnes physiques par la loi qui réprime l'infraction. Lorsqu'il s'agit d'un crime pour lequel aucune peine d'amende n'est prévue à l'encontre des personnes physiques, l'amende encourue par les personnes morales est de 1 000 000 Euros ”

<sup>103</sup> To see the complete additional penalties, cf. **Article 131-39** of the French Criminal Code.

<sup>104</sup> Article 5, 2 of the ICC Statute.

<sup>105</sup> Cf. W. van Gerven, P. Larouche, J. Lever, Cases, Materials and Text on National, Supranational and International Tort Law, Oxford, Hart Publishing, 2000.

<sup>106</sup> See the judgement of the Criminal final Court of Appeal (cassation), 6 October, 1979, *Gaz. Pal.* 1980.I.306.

Regarding the act of defence, it must be strictly necessary as well as proportionate to the attack (which means that an excessive counterattack will not be justified). Article 122-5(1) of the Criminal Code provides that self-defence is no ground for excluding liability if there was a disproportion between the means used for the defence and the gravity of the attack. A similar proportionality requirement is laid down in Articles 122-5(2) and 122-7 of the same Code<sup>107</sup>.

## 8. Commercial law/civil liability

PSCs and PMCs' liability could be involved for acts committed in their name by their employees; their dissolution could be pronounced in accordance with the Law.

## 9. Case-law

Until today, only few individuals have been prosecuted for alleged mercenary activities and only one case took place under the 2003 Law.

### 9.1 The “Coulibaly case» under the 2003 law

A group of 13 persons was arrested in France on the 23<sup>rd</sup> of August 2003 on grounds of fomenting a coup against the President of Cote d'Ivoire, Laurent Gbagbo. The defendants were brought before the courts under the anti-mercenary law; they were also incriminated with the offense of “*criminal association in relation to a terrorist undertaking*”.

Being the first implementation of the brand new anti-mercenary law, no judicial precedent existed to guide the Court which was also confused by unclear parliamentary debates. The main difficulty though lay with the “preventive” nature of the arrests made by the French police in Paris and rural areas that were made while the “*conspirators*” were about to leave for Côte d'Ivoire. Thus the question: was the operation only in the preparatory phase - which would exclude pursuits - or was it really at the execution stage?

The team leader, Ibrahim Coulibaly, was condemned by Contumacy to a 4-year prison custodial sentence. The Court estimated he “*had financed the phase of recruitment and part of the planned operation*” and was, consequently, guilty according to the French law<sup>108</sup>.

Seven defendants were condemned to sentences ranging from a 10-month suspended sentence up to 30-month custodial sentences for the preparation or running of a “*joint action of violence aiming at overthrowing institutions and undermining a State*”

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<sup>107</sup> **Article 122** states that “n'est pas pénalement responsable la personne qui, devant une atteinte injustifiée envers elle-même ou autrui, accomplit, dans le même temps, un acte commandé par la nécessité de la légitime défense d'elle-même ou d'autrui, sauf s'il y a disproportion entre les moyens de défense employés et la gravité de l'atteinte. N'est pas pénalement responsable la personne qui, pour interrompre l'exécution d'un crime ou d'un délit contre un bien, accomplit un acte de défense, autre qu'un homicide volontaire, lorsque cet acte est strictement nécessaire au but poursuivi dès lors que les moyens employés sont proportionnés à la gravité de l'infraction”. **Article 122-7** continues: “N'est pas pénalement responsable la personne qui, face à un danger actuel ou imminent qui menace elle-même, autrui ou un bien, accomplit un acte nécessaire à la sauvegarde de la personne ou du bien, sauf s'il y a disproportion entre les moyens employés et la gravité de la menace”

<sup>108</sup> See the judgment of the 16th Criminal Court Chamber of Paris, 4 June 2008.

*territorial integrity*<sup>109</sup>. The 5 other defendants (former legionaries) were discharged of the offense of mercenarism.

### 9.2 The “Bob Denard” case

Famous French mercenary Robert Denard was condemned in July 2007 by the Supreme Court of Paris<sup>110</sup> to a 4-year prison suspended sentence including a 1-year custodial sentence and a 100 000 euro fine for a coup attempted in Comoros in 1995. The prosecution appealed the decision first handed down in June 2006 claiming he was a recidivist and that the decision was “*illegal*” as a result<sup>111</sup>. His accomplices were 26 other defendants prosecuted for “*criminal association in preparation of a crime*”. They received suspended sentences varying from four months to three years. Neither they nor the prosecution appealed following their condemnation in first instance.

### 9.3 Discharge of Jean-Jacques Fuentès

Jean-Jacques Fuentès was arrested in Bordeaux under a European (arrest) warrant issued by Malta. Fuentes was accused of illegally exporting weaponry (a “Stricke Master” plane) to Gbagbo’s security forces in 2004 in violation of Malta’s custom legislation.

The lawsuit aimed at knowing if this aircraft was, linked with the preparations of the raid launched on November 6, 2004 by the national Ivorian army on the French high school in Bouaké which was used as the general headquarters of the detachment of the “Licorne French operation” (a raid which caused the death of 10 French military soldiers). Discharged by Malta justice, Fuentes was freed in France in January 2008.

It has been alleged that the French authorities also considered issuing an international warrant for the arrest of Robert Montoya, a former French Gendarme suspected to be involved in a number of arms trafficking affairs in Africa. Montoya used to own a security company in Lomé (Togo) called SAS TOGO<sup>112</sup>. It seems, however, that no action was taken.

## 10. Conclusion: the French government’s position on the status of PSCs and PMCs

An evolution is observable as several legal documents<sup>113</sup> and political speeches<sup>114</sup> have officially valued the important role played by PSC in domestic

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<sup>109</sup> The maximum punishment for this offense according to Articles 436-1 and 436-2 of the Criminal Code is a 5 to 7 year prison sentence.

<sup>110</sup> The prosecution contended that Denard was ineligible for a suspended sentence for his 1995 failed effort because he had already received a suspended prison term two years earlier - for another coup attempt, in the West African country of Benin. Indeed under French Law (article 132-30 of the Criminal Code), suspended sentences serve as a warning that condemn convicts to jail time without actually requiring them to serve it. Convicts with suspended sentences who commit a second crime within five years of the initial sentence are no longer eligible for a suspension. When tried, they must either be acquitted or sent to prison.

<sup>111</sup> In June 2006, the Criminal court condemned him to a 5-year prison suspended sentence but he had previously received a similar sentence in 1993 for a coup committed in Benin in 1977.

<sup>112</sup> See ‘SAS TOGO vendue à la société de sécurité Vision (Abidjan)’, *La Lettre du Continent* n°535, 3 April 2008.

<sup>113</sup> Loi n° 95-73 du 21 janvier 1995 d’orientation et de programmation pour la sécurité intérieure.

security. The companies dealing with surveillance, safekeeping, transporting money or protecting people in France are now recognized by the law as partners of the state in the elaboration of a security strategy; their participation in this mission is submitted to obligations and checks.

So far, this recognition does not apply to PSCs and PMCs operating abroad. French authorities - who have not yet faced up to the management of a conflict situation requiring collaboration from these companies - seem reluctant to take a stand on PMCs because it would imply an acknowledgment of their role.

Nothing of substance has changed since the 2003 law prohibiting mercenary activity. After long ignoring those companies and then tolerating them, French authorities seem to have reached the stage of accepting their existence. No doubt it will take time before they come up with a legal recognition and status. The debate on PMCs in France is actually closely linked to the outsourcing issue.

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<sup>114</sup> During the Villepinte Colloque held in 1997, both the Prime Minister and the Interior Minister recognized that PSCs as co-producers of homeland security.