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NATIONAL REGULATORY MODELS FOR PMSCs
AND IMPLICATIONS FOR FUTURE
INTERNATIONAL REGULATION

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*National Regulatory Models for PMSCs
and Implications for Future International Regulation*

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Abstract

What is the current state of the regulation in the matter of private military and security companies (PMSCs)? This paper aims to provide a brief overview of the existing national legislations concerning PMSCs in a number of Member States of the European Union and third countries, together with some insights concerning the international regulation. It argues that the regulatory regime of PMSCs proves unsatisfactory when the legislation of the “home” state does not apply to the activity of PMSCs abroad and the “host”, or otherwise competent, state does not provide sufficient regulation for PMSCs.

Keywords

Private Military and Security Company (PMSC); National Regulatory Models.

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Introduction

This paper aims to provide a brief overview of the existing national legislations related to private military and security companies (PMSCs) in a number of Member States of the European Union (EU) and third countries. It also supplies some insights concerning the international regulation.¹

The purpose of the analysis is to highlight analogies, differences and problematic issues in the regulatory frameworks of the different legal orders taken into account. First and foremost, this should allow for the drawing of a picture of PMSCs regulation in different parts of the world. Second, this should permit the development of some observations on the exhaustiveness and coherence of the overall regulation. The study is intended as a basis for the development of proposals *de iure condendo*, in order to improve the effectiveness of the regulation concerning PMSCs.

The analysis follows a simple pattern. It begins with the “constitutive” moment of PMSCs (primary rules) and ends up with the issue of “responsibility” (secondary rules).

Within the framework of primary rules, both “external” and “internal” substantive aspects of PMSCs are tackled. In particular, this overview deals with the following questions: (1) how PMSCs and PMSC personnel get to exercise their activity, including especially the constitutive procedure and the hiring contract; (2) the activity of PMSCs and PMSC employees and its regulation; (3) applicable labour law.

Within the framework of secondary rules both criminal liability (4) and civil liability (5) are considered. Specifically, we distinguish the responsibility of the employees from the liability of the corporations as such.

Besides national and international regulation, self-regulation (6) is taken into account.

The criterion for organising the analysis is essentially temporal, therefore dynamic and procedural. All of the substantive aspects are studied in relation to the relevant procedural organs and rules. Specifically, we separate the administrative procedures for controlling the respect of primary rules from the judicial procedures following the breach of secondary rules.

Some preliminary issues must be pointed out.

First, the regulation of PMSCs varies from state to state. Within single states, the regulation can further change, especially when the state has a federal structure.

Second, PMSCs’ activity can basically be divided into two branches: (1) logistical support for military activity (indirect fighting); (2) security services.

Third, a fundamental distinction must be drawn between “home” state and “host” state activity of PMSCs. By “home” state we mean the state where PMSCs have their seat or the hiring state. By “host” state we mean the state where PMSCs act.

Fourth, domestic regulation often applies in the context of regional regulation. In particular, the legislation of EU Member States is subject to the rules governing the Internal Market (first pillar), Common Foreign and Security Policy (second pillar), and Co-operation in Justice and Home Affairs (third pillar). Either the Commission or the Council of the EU is mainly competent to regulate PMSCs’ activities, depending on the area to which such activities relate. Nevertheless, no specific EU regulation currently exists concerning PMSCs.

¹ The overview is based on the national reports prepared by the Universities participating in the PRIV-WAR Project (<http://priv-war.eu>), as well as those submitted by external experts and representatives from different countries. The reports taken into account regard Australia, Brazil, Canada, Russia, South-Africa, the USA, and the following EU Member States: Belgium, Czech Republic, Estonia, Finland, France, Germany, Italy, Latvia, Lithuania, Netherlands, Poland, Portugal, Spain and the UK. A preliminary report on the EU regulation is also considered.

1. How PMSCs get to exercise their activity

1.1) The constitutive procedure of PMSCs: substantive aspects of the licensing regime

PMSCs are legally established private companies providing different types of services, especially in conflict and post-conflict situations.² The phenomenon is not new, given that it is possible to spot cases of private contractors supporting military activities at least since the beginning of the twentieth-century.

PMSCs can be composed of one (agent) or more physical persons, who are frequently people formerly engaged in state military and security activities. In France, for instance, PMSCs are basically composed of persons who previously were state legionaries or part of state commandos. In the UK, PMSCs often include military personnel who left the armed forces and ex-members of the police force. The Czech company ABL-AFG includes ex-members of the Czech Armed Forces, ex-members of the Police Special Unit and ex-French Foreign Legionaries. Thus, to avoid the risk of inappropriate use of knowledge gained while serving in the armed forces, it has been suggested that specific approvals or a cooling-off period should be imposed on former personnel wishing to move into the private sector.³ Alternatively, incompatibilities are set up. For instance, in Germany retired members of the armed forces are prevented from working for PSCs as it is considered against the public interest.⁴

Like all business companies, PMSCs enjoy different degrees of responsibility with regard to their financial obligations (non-limited or limited liability).

For practising military and security services, private contractors are usually required to comply with acknowledged legal standards. Basically, PMSCs and their employees must demonstrate that they satisfy the necessary professional qualifications, do not pose a threat to state security and are clear of judicial condemnation. These requirements are checked via targeted constitutive procedures, which end up with the issuing of a license or a professional certificate, usually temporary (five years on average). Since licensing is essential for allowing PMSCs to exercise their activity, in principle it should be relevant for both the services provided in the “home” state and abroad. Nevertheless, this is a problematic issue.

Common subjective requirements for the correct exercise of activities emerge.

PMSC personnel are generally requested to be clear of (criminal) condemnations and expulsion decisions, clear of acts contrary to the morality and security of the state, clear of conflicting activities, professional and well-trained. Personnel effectively managing security services normally need to satisfy stricter conditions with respect to employees who do not play an active role in the provision of such services.⁵ Beside these common parameters, supplementary criteria can be added under different legislations, such as the French, Italian, Latvian or EU nationality required by the French, Italian, Polish and Latvian systems.⁶

In the EU framework, restrictive requirements for providing security services cannot exceed the limits set up by the principles of the freedom of movement of persons. Limits based on the exercise of official authority or public security cannot apply. Furthermore, PSCs cannot be asked to abide by national requirements, when they already satisfy equivalent requirements in the Member State of origin.

² See *infra*.

³ See the UK Foreign Affairs Committee, Ninth Report – PMSCs, 2001/02, § 115, <http://www.publications.parliament.uk>.

⁴ See the Answers by the German Government to the Parliament, 26 April 2006, Bundestag Printed Paper 16/1269, Answer n. 33, <http://drucksachen.bundestag.de>.

⁵ See, for instance, Articles 5-6 of the Belgian Law on Private Security, 10-01-2005, available at the website <http://www.privatesecurityregulation.net>.

⁶ See, for instance, Article 134 of the Italian Law on Public Security, RD 773/1931, available at the website <http://www.privatesecurityregulation.net>.

1.2) Procedural aspects of the licensing regime

Constitutive procedures of PMSCs are set up according to the standards required for exercising the activity. Such procedures share common features, though they are different according to the system where PMSCs come into being. The complexity of the procedures depends on the social perception of PMSCs and the individual state's structure.

In the USA, the 1976 US Arms Export Control Act, establishing purposes and procedures for the sale of military equipments and related services, provides that US companies offering military advice to foreign nationals, also overseas, must register with and obtain a licence from the State Department. Australian federal regulations set up a quite uniform heavy licensing regime for PMSCs and their personnel operating domestically. In South Africa, licences for the practice of security services are issued by the Security Industry Regulatory Authority, whereas accreditation certificates for personnel aim especially at providing an elevated standard of training. Quite surprisingly, the Canadian regulation allows Canadian citizens to work for PMSCs, especially operating abroad, without any specific permission or licence. This must be understood within the context of the Canadian legislation, which lacks an overarching directive for governing the selection of PMSCs.

Under French legislation PMSCs come into existence by registering with the Register of the Companies and the Prefect. The registration must indicate the professional qualifications of the Company and provide evidence of the fact that the Company is clear of judicial condemnations. The Prefect is endowed with the power of deciding whether or not the PMSC can come into existence. In case of negative evaluation, the procedure stops and the PMSC does not come into being. In the case of a positive answer, the PMSC must take further steps. Specifically, the company must register with the Tax Department, subsequently publish a legal announcement, and finally subscribe to the Register of Trade and Companies. Furthermore, a Clerk of the local Trade Court is committed to check the legality of the activity practised by the PMSC. A similar procedure exists under the Italian legal system, where the exercise of security activities is subject to the authorisation of the Prefect. In particular, licensing is prohibited when the applicant persons are not clear of wilful criminal acts and security measures. The application must indicate the activity that the PSC will perform. PSCs pay to the state a sum established by the Prefect by way of guarantee for the obligations assumed. PSCs must also communicate to the Prefect any and all changes in their structure. The licence may be revoked when a PSC does not fulfil the requirements anymore or for reasons of public security and policy.

In the Netherlands, PMSCs need to register with the Trade Register of the Dutch Chambers of Commerce and are subject to a licence released by the Ministry of Justice. In Russia, PMSCs must register with the State Register for legal entities of the Russian Federation, under the supervision of the Ministry of Taxation.

In Latvia, under the Security Guard Activities Law (SGAL) specific private security services can be performed by natural persons or legal persons that obtain a licence issued by the Ministry of the Interior and register with the State Police. A special licence is required for performing security services related to the use of arms. In any case, PMSCs must be inscribed in the Commercial Register, like all firms exercising commercial activities. Specific licences, requiring a high level of training, are provided also for natural persons exercising security services. Similar rules apply in Estonia.

In Germany, PSCs and their employees must demonstrate the possession of essential skills in the field of security law by passing a test organised by the Chamber of Commerce and Industry. They also have to prove a sufficient level of "reliability". Thus, PSC personnel must hold a "certificate of good conduct" released by competent governmental authorities, proving that they are clear of judicial condemnations and not members of unlawful associations. Licences are released according to the administrative procedures set up by each *Land*. Moreover, PSCs must register with the local Commercial Register.

In Portugal, PSCs possessing a regular certificate of commercial registration must hold a permit from the Ministry of the Interior for exercising their activity. In addition, PSC personnel are required to complete special professional courses, which are divided into two modules. A first module includes training in law, surveillance techniques and deontology. A second module provides instruction for surveillance, escort, defence, protection of persons, including training in sociology, physical security, administrative techniques and matters related to drug addiction and alcoholism. A similar procedure is

adopted for PSCs licensing in Spain, where PSC personnel must also obtain a certificate from the Ministry of the Interior in order to perform security activities. In Finland, special licences are required for PSCs and their personnel guarding sites and persons, but not necessarily for other security services.

In the Czech Republic, companies providing security services come into existence simply by acquiring a trade licence for performing business activity and being recorded in the Commercial Register. By contrast, special five year permissions, issued by the Ministry of Industry and Trade, are required for carrying on business related to military material.

In the UK, the 2002 Green Paper on PMSCs puts forward some proposals for regulating PMSCs *de iure condendo*. It envisages that PMSCs obtain specific licences in order to conclude contracts for providing military and security services abroad.⁷ PMSCs should apply for licences in the same way as they do for exporting arms, by submitting a request to the competent State Department. Transparency conditions should be preferably included in the licence, in order to facilitate effective control on the activity of PMSCs. Thus, it is suggested that for obtaining their operative licence PMSCs should disclose information to the government regarding their structure and recruitment policies. Alternatively, a general licensing regime could be set up for allowing a PMSC to exercise a range of activities in a specified list of countries, providing details of the standards that a company should meet. Such a regime is fostered by the Foreign Affairs Committee recommendations.⁸ Nevertheless, the need not to create an excessively burdened procedural regime is highlighted. Thus, especially in case of licence renewal, terms should be fixed for approval, denial and appeal, whereas applications by companies with unblemished records of compliance could be expedited.

At the regional level, the 2006 EU Directive on Services in the Internal Market envisages the adoption of specific proposals for harmonising private security services by 28 December 2010.⁹ These proposals are driven by economic considerations rather than compliance with international humanitarian law (IHL) and human rights law.

At the international level, Part 2 of the *Montreux Document on PMSCs* provides general rules requiring states to properly regulate the market of PMSCs.¹⁰ In spite of the fact that the document is not binding, states are expected to comply with the obligations that it sets up.

1.3) The contractual relationship: the subjects hiring PMSCs (with special regard to governmental outsourcing)

PMSCs can operate in favour of various subjects, namely: (1) states; (2) international organizations; (3) non-governmental organizations; (4) trans-national corporations; (5) other private entities. Thus, the following relationships can be envisaged: PMSC – state, PMSC – international organisation, PMSC – non-governmental organisation, PMSC – private entity. For instance, UK PMSCs offer their services to the United Nations (UN), EU, non-governmental organisations (NGOs) and multinational corporations.

The hiring subjects and the quantitative resort to PMSCs vary from state to state. Specifically, a state's resort to PMSCs is related to the social perception of the companies and their activities.

In the aftermath of 9/11, the USA largely resorted to PMSCs. The Office of Management and Budget (OMB) defines the type of governmental functions that may be contracted by governmental agencies (Circular A-76). The criterion to allocate state functions to PMSCs is rather broad, since only "inherently governmental" activities cannot be outsourced. Such a parameter is vague and hardly useful to establish a clear distinction; basically, it creates discretionary power for allocating services to PMSCs. It is then up to the governmental agencies to decide what functions can be allocated to different PMSCs.

The UK increasingly resorted to PMSCs after the end of the cold war. In fact, PMSCs, chiefly regarded as mercenaries and associated with human rights violations in the 1960s and 1970s, were

⁷ See the *Green Paper on Private Military Companies: Options for Regulation*, 2002, <http://www.fco.gov.uk>.

⁸ See the UK Foreign Affairs Committee, Ninth Report – PMSCs, §§ 127-129.

⁹ See the Directive 2006/123/EC, Services in the Internal Market, 12 December 2006, Article 38, <http://eur-lex.europa.eu>.

¹⁰ See the *Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict*, <http://www.icrc.org>.

subsequently perceived in a more positive light. PMSCs are still considered as a potential threat by the government and it is thought that a nation should rely upon its own forces for security. Nevertheless, PMSCs' services are currently likely to constantly grow, so much so that to date about 80% of military training is provided by private contractors.

In other countries the perception of PMSCs seems rather negative and resorting to their services is therefore limited. Among the common law countries, Australia has a cautious approach to the range of activities that can be devolved to PMSCs and tends to exclude the outsourcing of services involving lethal force. Among civil law countries, in France, Germany, Italy, Portugal, Finland and the Netherlands military activities are considered to be the exclusive competence of the state.¹¹ As a consequence, PMCs are fairly rare or even non-existent.¹² In Belgium, PMCs have been banned from the national territory since 1934.¹³ In the Czech Republic, no PMC operating abroad existed until January 2009, when the enterprise ABL-AFG started acting in Afghanistan as a branch of the national company ABL-Inc.; moreover, the government never resorted to PMCs. As a tendency, PMCs services are tolerated only in post-conflict situations, for purposes of stabilization. However, also in post-conflict situations the services of PMCs are perceived as a violation of the state's monopoly of armed force. This is furthermore regarded as a dangerous way of blurring the distinction between civilians and combatants set up by the Geneva Conventions. Instead, PSCs are much more tolerated, since they confine themselves to offering logistical support and do not act directly in the theatre of conflict. Nevertheless, activities involving the significant exercise of public powers cannot be outsourced. Thus, the legislation of Russia and Estonia prevents PSCs from providing national defence functions. In France, the allocation of state functions to PSCs is often done on the basis of the criterion of their "reversibility". "Reversibility" means the possibility to withdraw the allocation to private companies and re-establish the competence of the state. Therefore, PSCs end up concluding contracts mainly with non-state organs, such as international organisations or multinational corporations. In Germany, according to the constitution only governmental responsibilities related to internal security can be outsourced to PSCs, not tasks concerning external security.¹⁴ In practice, the government outsources non-core military external activities, mainly concerning backup support. In Finland, reforms are planned that would possibly allow PSCs to undertake assignments related to the maintenance of public order and security.

The hiring subject has special relevance for defining the status of PMSC personnel under IHL. When they provide their services to actors other than states and civilians resisting an occupying power, PMSC employees should qualify as civilians.¹⁵ By providing their services to states, they can exceptionally be appointed as temporary "military personnel".¹⁶ Such is the case of medical and interpreter-translator personnel under the Dutch legislation. When they have a card from the accompanied forces, they should qualify as "persons accompanying the armed forces".¹⁷ In most cases, PMSC employees basically remain as a separate private corps, clearly distinguished from the state and its armed forces; therefore they qualify as "civilians". Such is, for instance, the opinion of the German, Dutch, Spanish and Lithuanian governments on the matter.

1.4) The hiring contract

Basically, hiring procedures revolve around the hiring contract, which is composed of the act-source and the subsequent relationship between the hiring subject and PMSCs. This is the moment when the proposal and acceptance meet *iure privatorum* in order to create and regulate the

¹¹ See, for instance, the Answers by the German Government to the Parliament, 26 April 2006, Bundestag Printed Paper 16/1296, Answer n. 6.

¹² Examples of PMCs are Secopex, Global Dutch Dynamics and Prevent International.

¹³ See the Law Prohibiting Private Militias, 29 July 1934.

¹⁴ See the Answers by the German Government to the Parliament, 26 April 2006, Bundestag Printed Paper 16/1296, Answer n. 4.

¹⁵ See Article 50 of the Additional Protocol I to the Geneva Conventions.

¹⁶ See Article 43 of the Additional Protocol I to the Geneva Conventions.

¹⁷ See Article 13 of the Geneva Conventions I-II and Article 4(A) of the Geneva Convention III.

relationships between the PMSC and the beneficiary of its activity. The proposal can come from states, international organizations, non-governmental organizations, trans-national corporations and other private entities. The acceptance is expressed by the PMSC, or vice versa. The contractual scheme can be more complex, but this is its constant essential structure.

Organs and procedures exist for controlling that the contract respects some fundamental parameters. For instance, the UK Green Paper suggests that PMSCs register their contracts with the government, so as to prevent a company from undertaking an agreement contrary to UK interest or policy. The basic idea is to increase the state's knowledge of PMSCs' engagements in order to prevent potential problems. Nevertheless, this is not always the case; in Germany, for instance, there exists no obligation for a PMSC to notify the government of a contract. In fact, such a duty would be regarded as an interference with the freedom of commerce.¹⁸ In any case, when PMSCs are hired by non-state actors, especially by foreign non-state actors, it can be difficult to keep track and control of their existence and activity. In such a case, the tax revenue service is the best way to obtain information on PMSCs' activities.

Agreements are normally regulated on the basis of the principle of the freedom of contract, but they cannot be contrary to the foundations of the law and morality. Private security contracts are usually service agreements, not entailing an obligation of result. Nevertheless, they sometimes have a "mixed" nature, including both obligations of conduct and obligations of result.

Grave breaches of the contract can constitute a ground for immediate termination. Agreements may provide PMSCs with the power to terminate the contract or decide not to renew it, which is one of the reasons why PMSCs cannot fully substitute governmental forces.

Governmental outsourcing policies follow precise procedures, especially dictated by state security and defence strategies.

Within the common law context, in the USA PMSCs can be hired either through the guidance of Pentagon officials or according to the Logistic Civil Augmentation Program (LOGCAP). The LOGCAP provides that hiring PMSCs must respond to the specific objective of resolving unit shortfalls and providing additional units in case of need. In Canada, lacking a comprehensive regulation, the state can hire PMSCs by ensuring competition and the tendency develops to make state agencies responsible for their recruitment, though monitoring of contracts in theatres of operation remains a practical challenge.

As for the civil law countries, in France, three categories of state contracts are provided: (1) partnership, based on a shared division of risks; (2) public contracts, based on public acquisition of services; (3) global delegation of services. Contracts differ with regard to the time factor. In fact, they can: (1) be permanent; (2) be based on a fixed term; (3) set a mission of 24 months maximum. Nevertheless, such a regulation is not applicable to the activity of PMSCs abroad. An Inter-Ministerial Commission for the Study of War Material controls the regularity of the contracts.

In the Netherlands, security services related to military activities are provided by PMSCs hired by the Ministry of Defence. Resort to PMSCs must be decided on the basis of strict criteria, in particular: (1) the maintenance of the state's monopoly on the use of force; (2) the importance of the mission and tasks outsourced; (3) the security risk to which the personnel are exposed; (4) the degree of operational dependence on PMSCs; (5) the existence of military alternatives; (6) state responsibility; (7) the scope for monitoring the outsourced tasks; (8) financial and economic issues. The government generally supports hiring or subcontracting to locals, since they are usually more familiar with the situation in the field. The hiring of armed contractors is assessed on a case-by-case basis, in the light of non-disclosed criteria set up by the Director of Operations after advice from the Directory of Legal Affairs (Ministry of Defence). Some services, like interrogating prisoners, cannot be outsourced.

Under the Spanish regulation, services offered by PSCs are considered as "complementary and subordinate" with respect to state action. This leads to the establishment of a relationship of collaboration rather than delegation.¹⁹

¹⁸ See the Answers by the German Government to the Parliament, 24 June 2005, Bundestag Printed Paper 15/5824, Answer n. 38.

¹⁹ Preamble and Article 1.1 of the Law on Private Security 23/1992, <http://www.privatesecurityregulation.net>.

In the EU framework, public procurement is submitted to the principles of the free market. In order to implement these principles, for contracts above a certain value (162.000 EUR) Community coordination of national procedures is provided. Exceptions exist with respect to the production and trade of military products, which must nevertheless be interpreted in a very restrictive sense. Furthermore, the European Defence Agency (EDA) elaborated a non-binding Code of Conduct aimed at fostering free competition in the field of Defence Procurement.²⁰ By contrast, no specific regulation exists governing the hiring of private contractors directly by the EU, which is supposed to resort only to civil forces belonging to the police in crisis management, according to the relevant 2010 Headline Goal.²¹

At the World Trade Organization (WTO) level, although rules seek to liberalize trade, some barriers influence the market of private military and security services. This is the case of the limits imposed to prevent environmental damage and the spread of disease.

2. The activity of PMSCs and its regulation

2.1) The activity of PMSCs: territorial and extraterritorial military and security services

PMSCs offer a wide range of services, either in the “home” state or in the “host” state.

When they operate abroad, the place where PMSCs’ activities take place depends on the interests of the hiring subject at stake, in particular on states’ spheres of influence. Thus, the USA resorted to PMSCs especially in order to compensate shortages of military personnel in Iraq and Afghanistan. The UK exploited PMSCs’ activities in different African zones, namely Zaire, Sierra Leone and Angola. France resorted to the services of PMSCs especially to defend national interests in Africa. The Netherlands resorted to PMSCs in Afghanistan. More generically, states often resort to PSCs to ensure security for their missions abroad. At the regional level, so far the EU has resorted to private security guards only within the embassy in Baghdad and incidentally for civilian missions.

Different classifications of PMSCs’ activities exist according to the practice of different legal systems. Scholars also put forward various categorisations.²²

Overall, PMSCs’ services can be divided in two categories: (1) logistical support for military activity (indirect fighting); (2) security services. This observation is valid regardless of the nature of the hiring subject.

Under the first category fall all the services that prepare the combat, but do not engage directly in combat. By considering the “closeness” to combat activity, “logistical support” includes, for instance, military equipment production, weapons transportation, strategic intelligence, training military and police units (especially in Iraq), communication management, food preparation, bathing accommodation, support for post-conflict reconstruction, state building, humanitarian assistance, peace operations.

The second category can be defined as the surveillance and protection of persons and goods. It comprises activities such as guarding sites, escorting individuals, security advising and planning. Different classifications are nevertheless possible. For instance, the Finnish regulation separates the activity of guarding sites and persons from security services, consisting in planning security arrangements, including the installation of monitoring systems.²³ However, the concept of “security”, which is a quality of the overall legal system, is broad and entails *grosso modo* all activities related to avoiding threats and violations of rights. In fact, according to the Portuguese legislation the concept of

²⁰ See the EDA Code of Conduct on Defence Procurement, <http://www.eda.europa.eu>.

²¹ See the EU Headline Goal, 2010, <http://ue.eu.int>.

²² See, for instance, C. Ortiz, “The Private Military Companies: an Entity at the Centre of Overlapping Spheres of Commercial Activity and Responsibility”, in T. Jäger, G. Kümmel, *Private Military and Security Companies* (2007), at 55.

²³ See the Private Security Services Act, 282/2002, Chapter 1, Section 2, <http://www.finlex.fi>.

“security” encompasses that of “crime prevention”.²⁴ “Security” activities can assume a “military” connotation when they relate to military objects or persons, e.g. in case of protection of military bases.

Investigation services, though submitted to a strict regulatory framework, usually fall outside the category of security services. “Investigation” encompasses activities such as: collection of data on law suits, collection of information for business negotiation, enquiries on illegal competition, enquiries into biographies of employees and contractors of companies, the search for people claimed to be missing, recovering of lost property. In Belgium and Poland, for instance, PSCs must be authorised by the Interior Minister to carry on private investigations and the activity is regulated by specific legislation. Similar regulation applies in Russia and Latvia. By contrast, under the legislation of South Africa and Lithuania, investigative services qualify as “security services” and thus they are submitted to a common regulatory regime.

Finally, the subjective denominations “PMCs” and “PSCs” do not necessarily follow the objective qualification of their activity. For instance, companies providing logistical support to military personnel classify as PMCs in the US, whereas they are considered PSCs in France. In Spain, companies providing military and security services qualify indifferently as PMCs or PSCs. As a result, it is impossible to draw an absolute distinction between the categories of PMCs and PSCs.

2.2) *The national and international regulation of the territorial and extraterritorial activity of PMSCs*

The activity of PMSCs is regulated in different ways by different legal systems. This depends mainly on the constitution of the legal orders, the social perception of PMSCs and the quantitative resort to their services. As a consequence some states, Brazil for example, rule security services, but not military services.²⁵ However, it is possible to think that the regulation of security services applies by analogy to military services.

A fundamental distinction must be drawn between the activity practiced by PMSCs in the “home” state and the activity practiced in the “host” state.

France strictly regulates the activities of French PMSCs in French territory,²⁶ but it is rather permissive for the activity of PMSCs abroad. The Latvian and German legislations regulate the domestic activity of PSCs, but not the services provided by PSCs abroad, nor the activity of PMCs. The Netherlands, Spain, Portugal, Latvia, Estonia, Russia and many other European countries do not regulate PMSCs’ services abroad. This is valid for both possible legislation *ad hoc* and general rules. For instance, Article 288 of the Italian Criminal Code, which prohibits the recruiting or arming of citizens for fighting at the service of foreigners, is applicable only “within the territory of the (Italian) State”.²⁷ The EU itself does not provide any regulation governing the activity of PMSCs abroad. The Canadian regulation does not govern the services of PMSCs abroad either, even though Canada is among the leading contributors to the global private military and security industry. In these cases the activity of PMSCs is regulated according to the principle of territoriality: the conduct of PMSCs and their personnel falls under the law valid in the territory where they act. Additional regulation can be set up via contractual clauses, at least in case of governmental outsourcing, as in the case of the Australian practice.

By contrast, the proposals of the UK Green Paper on PMSCs are mainly concerned with the activity of PMSCs abroad. Within this framework, the conduct of PMSCs should fall under the law of the “home” state, according to the principle of “nationality”.

Generally speaking, PMSCs cannot act beyond the rights that any citizen holds and outside of the competence that the law expressly confers on them. Furthermore, specific limits can be set up.

²⁴ See Article 1(3)(a) of the Decree-Law 35/2004, <http://www.privatesecurityregulation.net>.

²⁵ See the Brazilian Law on Private Security Companies and the Security of Financial Institutions, 7.102 of 20 June 1983, <http://www.dji.com.br>.

²⁶ The basic regulation is incorporated in the Law on Private Security Activities, 83/629 of 12 July 1983, available at the Web Site <http://www.privatesecurityregulation.net>.

²⁷ On Article 288 of the Italian Criminal Code see *infra*.

According to the Belgian regulation, for instance, PSCs are prevented from intervening in political disputes and labour conflicts, as well as in relation to acts having a political nature.²⁸

Special regulation usually exists with respect to the trafficking and brokering of goods that can relate to PMSCs' activities, such as arms, dual-use goods and technologies (especially nuclear materials), and strategic goods (for example, global navigation satellite systems receiving equipment). To a different extent, this is the case in the USA, UK, Canada, Australia, Russia, Germany, Poland, Finland, Latvia, Estonia, Lithuania and the Netherlands, among others states. This commerce is submitted to special licensing regimes and specific controls. Congressional notification is required before the US government approves exports of defence services worth in excess of \$ 50 million. In addition to that, specific restrictions can be imposed on the export of such goods (and other goods) to particular countries. At the EU level, a strict licensing regime is set up for exporting arms and arms brokering.

States tend to exclude PMSCs from the possibility of taking a direct part in hostilities. As a consequence, resort to (armed) force is confined to very specific cases.²⁹ In most countries, such as the USA, Russia, France, Spain, Finland and the Netherlands, and in general all EU countries, direct engagement in fighting is considered illegal or undesirable conduct. This is due to the fact that military activity is the supreme security service concerning the state as a whole, and thus it is regarded as an exclusive prerogative of the state. In Canada, private contractors are supposed to be used for "perimeter security", but not for "offensive operations". In the UK, where PMSCs are still largely deregulated, the debate is open. Nevertheless, the prevailing idea is that of outlawing the direct engagement of PMSCs in hostilities. In fact, the 2002 Green Paper on PMSCs discusses the possibility of outlawing all or a limited range of military activities. The main orientation maintains that a complete ban on military activities abroad is the preferred solution. This approach was also fostered in the subsequent parliamentary debate.³⁰ Nevertheless, procedural problems are highlighted in relation with such a view, in particular the difficulty of enforcing a total ban and collecting the necessary evidence for prosecuting PMSCs in British courts. In addition, a general ban on combat activities would reduce the usefulness of PMSCs in peacekeeping operations. In the latter case, it seems that the "positive" aim of an overall military campaign could justify the direct engagement in hostilities of PMSC personnel. In South Africa, no specific regulation exists concerning the activity of PMSCs in armed conflicts. Nevertheless, according to the proposals for a new regulatory framework, the South African government should be empowered to prevent PMSCs from acting in conflict zones. Finally, the well-known problem remains of clearly defining the extent of the expression "direct participation in hostilities".³¹

At the international level, some initiatives aim at promoting respect of basic rules by PMSCs. Thus, the UN seeks to define a general framework for regulation via the *Norms on the Responsibilities of Trans-national Corporations and Other Business Enterprises with Regard to Human Rights*.³² A Draft International Convention on PMSCs was developed in 2008 by experts for Regional Consultation (Eastern Region Group and Central Asian Region).³³ Part 1 of the *Montreux Document on PMSCs* sets up general rules requiring states and PMSCs to comply with human rights and humanitarian law.³⁴ Furthermore, States, such as Canada and Australia, often promote respect of human rights rules and IHL by PMSCs. Finland made it clear that outsourcing state functions cannot permit the avoidance of human rights and the standards of humanitarian law. At the EU level, the 2005 Guidelines ask the EU to encourage internal and external compliance with IHL, which can be of interest for PMSCs.³⁵

²⁸ See Article 11 § 1 of the Law on Public Security, 10-01-2005.

²⁹ See *infra*.

³⁰ See the Foreign Affairs Committee, Ninth Report – PMSCs, § 114.

³¹ See J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law* (2005), Rule 6, at 22-23; Y. Sandoz, C. Swinarski, B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), at 618-619.

³² See the UN Doc. E/CN.4/Sub.2/2003/12, <http://www.un.org>.

³³ See <http://www.unwg-rapn.ru/en/main.htm>.

³⁴ See the *Montreux Document*.

³⁵ See the EU Guidelines on Promoting Compliance with IHL, <http://eur-lex.europa.eu>.

2.3) *The regulation of the activity of PMSC personnel*

At the individual level, PMSC personnel are submitted to the law of the state where they are active. When they operate “abroad”, whether or not the legislation of the “home” state applies must be ascertained on a case-by-case basis.³⁶

PMSC personnel are normally required to wear distinctive uniforms and hold identification cards for practising their activity. This is provided, for instance, by the legislation of the Netherlands, Italy, Estonia, Poland and Brazil.³⁷

A special regime can be set up for specific activities. Thus, the legislation of Belgium provides that security agents operating inside public transportation companies can only be armed with a small neutralising spray and a pair of handcuffs. In Finland, temporary workers cannot be accompanied by dogs.³⁸

Sometimes, PMSC personnel are deprived of specific powers to which public officers are entitled. For instance, under the legislation of South Africa private security agents do not have the power of arrest, search and seizure afforded to public police officers.³⁹

The faculty of carrying and using (fire) arms is confined to specific hypotheses. In general, carrying and using (fire) arms is: (1) authorised only for a narrow list activities; (2) subject to a licensing system; (3) permitted only to people having received due training in arms handling; (4) authorised only under specific circumstances.

In Germany, the right to carry weapons is regulated by the German Weapons Act, according to which PSC personnel are authorised to carry the (fire) arms that are necessary for protecting objects or persons. In Latvia, the SGAL strictly regulates the acquisition, possession, carrying and use of (fire) arms. In the USA, the 2007 Operational Law Handbook provides that PMC personnel contracted to act in a security context are allowed to carry (fire) arms only following explicit approval and basically for pre-emptive purposes. In Finland, temporary workers cannot carry firearms.⁴⁰ Dutch outsourcing contracts authorise PMSCs to resort to armed force only in extreme emergency situations, under circumstances that are more restrictive than those imposed on national armed forces.

Outside the above-mentioned limits, the use of (fire) arms is a criminal breach. Nevertheless, it is exceptionally permitted in the specific case of self-defence. Self-defence constitutes a negative element of the illegal conduct and is strictly regulated under criminal law. According to the Dutch, French and Italian law, for instance, self-defence excuses only when it is necessary and proportionate to an imminent and unjustified attack (not supposed, but likely) directed towards the defendant, a third person or his property.⁴¹ Thus, even though the parameters for the existence of self-defence are subject to interpretation, they contribute to defining the limits of using (fire) arms for PMSC employees in a rather strict way.

PMSC personnel must also abide by domestic and international rules that apply in wartime to military personnel, in particular concerning health, security, safety and relations with locals, especially civilians. Particular importance is paid to the respect of human rights. For reasons of clarity, such rules are normally embodied in codes, such as the US Code of Military Justice.

2.4) *The direction and control of the activity of PMSCs and their personnel*

Different countries set up different mechanisms for directing and controlling the activity of PMSCs and their personnel, according to their respective constitutive elements. In general, specific organs are created or existing organs are committed to check the activity of PMSCs and their employees. In the

³⁶ See *supra*.

³⁷ See, for instance, Articles 230 ff. of the Italian RD 635/1940 as modified by the DPR 153/2008, available at the Web Site <http://www.privatesecurityregulation.net>; Articles 18-19 of the Brazilian Law on Private Security Companies and the Security of Financial Institutions, 7.102 of 20 June 1983.

³⁸ See the Private Security Services Act, 282/2002, Section 31.

³⁹ See the Criminal Procedure Act 51 of 1977, <http://www.info.gov.za>.

⁴⁰ See the Private Security Services Act, 282/2002, Section 29.

⁴¹ See, for instance, Article 122-5 of the French Criminal Code.

case of a breach of rules governing the conduct of PMSCs and their personnel, the state and military commanders are often allowed to relieve PMSCs and their personnel from functions as well as to revoke clearances and facilities.

Control procedures are basically shaped in accordance with the general law of the state. A considerable exception is represented by Canada, where, due to the lack of regulation in the matter of PMSCs, the control of the activity is established on a case-by-case basis via contractual clauses.

In the USA, an Army Procurement Contracting Officer is primarily responsible for directing the activity of PMSC personnel in the theatre of action. In addition, PMSC personnel must abide by the orders given by military commanders. However, unlike state military personnel, PMSC personnel do not respond primarily to military commanders. General control is assigned to different departments of the state, in particular the State Department and the Department of Defence. Given the high number of PMSCs to which the USA resorts, special procedures have been set up for coordinating, managing, investigating and finally holding PMSCs accountable. In fact, it is difficult for the departments of the state to have a clear view of what PMSCs do in the theatre of war; therefore, under their authority additional liaison officers have been created to control the activity of PMSCs. Specific databases are also provided, containing information concerning PMSC personnel.

The French legislation provides that PMSCs are submitted to the control of a Police Officer.⁴² The Inter-Ministerial Commission for the Study of War Materials export has the right to inspect PMSCs' activities. As an ultimate resort, the Constitutional Court controls that military activities involving engagement in fighting remain a state prerogative and are not delegated to PMSCs.

In Italy, PSCs are submitted to the supervision of the state agents of Public Security and they are ultimately monitored by the Questore, endowed with the power to modify the rules of the service for reasons of public interest. For this purpose, PSCs must keep a register carefully describing their daily activities and the persons with whom they interact.⁴³ Furthermore, PSCs and their agents must perform their activities in favour of the state, when so requested.⁴⁴

In Portugal, the Ministry of Interior controls the activity of PSCs with the advice of a Private Security Council.⁴⁵ Similarly, in Finland and Estonia the Interior Minister is responsible for monitoring PSCs, which are furthermore submitted to the control of the police forces. In Belgium, PMSCs and their personnel undergo the control of the civil servants.

3. Labour Law

3.1) General framework

By being legal persons, PMSCs entertain not only "external" legal relationships with other subjects of the relevant legal orders, but also "internal" relationships with the physical persons that constitute them (PMSC – personnel). The contract between the company and its physical persons governs their reciprocal relationships.

Different types of contracts exist depending on the qualification of the subjects employed and the functions performed. It is clear, for instance, that the position of a manager is different from that of a person providing services in the field.

Workers can be hired on a temporary or a permanent basis and the regulation of the relationship with the PMSC can be more or less homogeneous depending on the legislation applying. In Portugal, three types of contract exist: fixed term contracts, contracts for commission of services, part-time contracts. In the Netherlands, Latvia and Estonia there is not much difference in the regulation of temporary and permanent workers, who should be granted equivalent conditions.

When PMSCs operate abroad, the contractual relationship normally incorporates law applicable on the territory of the business activity.

⁴² See the Law on Internal Security 239/2003, <http://www.privatesecurityregulation.net>.

⁴³ See Article 135 of the Law on Public Security, RD 773/1931.

⁴⁴ See Article 139 of the Law on Public Security, RD 773/1931.

⁴⁵ See Articles 20 ff. of the Decree-Law 35/2004.

PMSCs can also hire independent, non-subordinate contractors for a job, in which case the rules governing the assignment apply, rather than the norms governing employment; thus, the relationship is “external”, no longer “internal”.

Since this paper provides a basic overview of the applicable rules, our analysis will not enter into detailed distinctions.

Generally speaking, PMSC employees benefit from the guarantees and regulations applying to the personnel of other companies.⁴⁶ By contrast, there is no specific comprehensive regulation concerning PMSC personnel. Therefore, fundamental principles apply such as: the equal right of access to jobs, the obligation of good faith in contracting, the physical and psychological competence of the personnel to perform their duties.

Since national labour legislation has often no extra-territorial validity, as in the case of the Netherlands and Finland, the labour law applying to PMSCs overseas can be problematic. Thus, also with respect to labour law the distinction between “home” state and “host” state activity of PMSCs is fundamental.

3.2) *Ad hoc rules*

Given the kind of environment in which PMSCs operate, particular guarantees are sometimes offered to their personnel. In this sense, some legislation and contracts tend to establish for PMSCs the obligation to ensure the safety and health of their employees. In Portugal, general rules on health and safety apply to PMSCs. In Finland, the employer is obliged to arrange working conditions for preventing threats or incidents in so far as possible. In France, this is regarded as an obligation of result, rather than a simple obligation of means, to which extraterritorial validity has been attributed by recent case law. In Spain, superiors are accountable for deploying their subordinates in zones where they cannot serve with a “minimum acceptable risk”. Furthermore, guarantees concerning labour accidents and incapacitation are covered by special agreements for Social Security. According to Polish legislation, PMSC personnel must periodically undergo medical, psychological and psychiatric tests.

Furthermore, specific rules exist sometimes for labour law in the field of military and security services. Thus, in Finland temporary workers in the security sector enjoy fewer rights than permanent workers.⁴⁷ According to the legislation of South Africa the Security Industry Regulatory Authority is committed to protect the employees that might be exploited within the industry.⁴⁸

The amount of salary paid by PMSCs to their employees is controversial. In the USA, it seems that Blackwater and Dyncorp personnel earn up to \$ 1,222 a day or \$ 445,000 a year. By contrast, an Army sergeant earns \$ 140 to \$ 190 a day, i.e. a total of \$ 51,100 to \$ 63,350 a year.⁴⁹ The question therefore arises whether such a treatment constitutes a violation of the principle of equality. The Congressional Budget Report negates that PMSC personnel are paid unnecessarily exorbitant salaries. Such an evaluation considers that the state military personnel are also paid during peace time. Furthermore, the mentioned salaries would include costs for vehicles and other materials.⁵⁰ In 2005, Canadian Joint Task Forces officers were allowed financial benefits up to \$ 27,000 a year additional to regular pay in order to prevent their shift to the private sector.⁵¹

⁴⁶ See, for instance, Article 10.3 of the Brazilian Law on Private Security Companies and the Security of Financial Institutions, 7.102 of 20 June 1983.

⁴⁷ See *supra*.

⁴⁸ Private Security Industry Regulation Act 56 of 2001, <http://www.info.gov.za>.

⁴⁹ See the US Congressional Budget Office (CBO), Report, *Contractors' Support of US Operations in Iraq*, August 2008, at 14, <http://www.cbo.gov>.

⁵⁰ *Ibid.*

⁵¹ See the Canadian National Defence Web Site: <http://www.forces.gc.ca>.

4. Criminal Liability

4.1) Crimes and jurisdiction

PMSC employees operate in unstable environments and do not necessarily qualify as combatants under the Geneva Conventions. Therefore, they are especially likely to incur criminal responsibility for violation of both international and domestic law.

Customarily, obligatory universal criminal jurisdiction (*aut dedere aut iudicare*) exists as a minimum for war crimes, torture, piracy, and some forms of terrorism.⁵² Concerning other breaches, not touching upon the international community as a whole, the principles of territoriality (*locus commissi delicti*), active/passive nationality and State interest apply in determining competent domestic jurisdictions.

Systematic crimes against humanity, genocide and war crimes perpetrated by individuals can be prosecuted by the International Criminal Court at the international level with relative effectiveness.

Therefore, criminal conduct is subject to a plurality of prosecutions. This is valid also for PMSCs as such, when domestic legal orders provide for the responsibility of legal persons, including private corporations.

The application of these principles should ensure that the activities of PMSCs and their personnel are reasonably well regulated. Problems arise, nevertheless, when the legislation of the “home” state does not regulate the activity of PMSCs abroad and the “host”, or otherwise competent, state does not provide sufficient domestic regulation for PMSCs.

In some legal systems, it is possible that civilians are employed by the state as military personnel. This is, for instance, the case of the Latvian legislation, according to which civilians can be temporarily employed as state military personnel and hold the position of soldier.⁵³ In such a case, they are subject to the rules establishing responsibility for military personnel. Otherwise, by qualifying as civilians, PMSC employees are bound by criminal law in the same way as normal citizens. Therefore, they should be subject to criminal jurisdiction without any restriction.

Killing, torturing, association in terrorism, taking over a state, illegal exportation of arms, (intending to engage in) acts against the state or that expose the state to the risk of war, engaging of civilians in forbidden military services are examples of crimes that can be perpetrated by PMSC employees. The evaluation of the gravity of such acts varies. For instance, in the UK and the Netherlands it is felt that violating rules that govern the trafficking or brokering of arms is one of the most damaging activities that is likely to be perpetrated by PMSCs and their personnel.

In practice, it is reported that civilian contractors supported Spanish armed forces in recent conflicts.⁵⁴ Since under the Spanish legislation private contractors are not part of the armed forces, their conduct could result in the perpetration of crimes. Under these circumstances, the problem arises of establishing the autonomous responsibility of a private contractor for conduct that would normally amount to “collaboration” under domestic criminal law.⁵⁵

Some crimes are violations of obligations specifically binding PMSCs. This is the case of the crime consisting in the illicit provision of private security activities established by the Portuguese, Spanish and Finnish penal legislation.⁵⁶ The illicit provision of private security activities includes conduct such as carrying out security activities by PSCs and their personnel without due licence or training. Under the legislation of South Africa, PMSC managers face criminal responsibility for violation of specific rules governing the private security industry, such as the obligation to renew the registration of the

⁵² See A. Orakhelashvili, *Peremptory Norms in International Law*, 2006, at 265; C. De Than, E. Shorts, *International Criminal Law and Human Rights* (2003), at 20.

⁵³ See Article 61(1) of the Military Service Law.

⁵⁴ See R. Arévalo, “Civil Contractors in Expeditionary Operations. Problems of Security and Control for the Military Command”, *Athena Intelligence Journal* (2008), at 13 ff., <http://www.athenaintelligence.org>.

⁵⁵ Note of the author.

⁵⁶ See, for instance, Article 22 of the Spanish Law on Private Security 23/1992.

company.⁵⁷ Australian legislation lacks specific crimes for PMSCs' activities, and has been the subject of calls to rectify this.

4.2) Mercenarism

The activities of PMSCs could overlap particularly with mercenarism. Essentially, mercenaries are: (1) recruited to fight; (2) promised excessive material compensation; (3) non-nationals of a party or non-residents of a territory controlled by a party to the conflict.⁵⁸ Though it is possible that PMSC personnel fulfil these conditions and thus qualify as mercenaries, this is not necessarily the case.

Some states show the tendency to neatly separate the question of PMSCs from that of mercenarism, whereas in other legal systems the distinction between PMSCs and mercenaries is more blurred.

In France, mercenaries are defined in a very narrow way and they are clearly distinguished from PMSCs, in the light of the Additional Protocol I to the Geneva Conventions.⁵⁹ The Russian penal code prohibits the participation in conflict of mercenaries as well as the recruitment, financing, training and support of mercenaries. Article 288 of the Italian Criminal Code forbids providing arms or recruiting citizens, within the Italian State, to fight on behalf of or at the service of foreigners. On this basis, a proceeding has been undertaken against the Italian representative of "Presidium Corporation". In the course of this process the judges ascertained that the status of "mercenary" exists also when Italian citizens are not incorporated in a foreign army, but carry out military activities in an organized manner, so also at the service of PMSCs. Likewise, under Polish legislation, Polish citizens cannot serve in foreign armies or military organisations.

The South African Foreign Military Assistance Act (FMA), currently under revision, prohibits the involvement of South Africans in mercenary activities abroad without due authorisation released by the National Conventional Arms Control Committee (NCACC). Mercenary activities are broadly defined in order to include logistical support. This regulation was inspired by the controversy on the activities of South African PMSCs, in particular Executive Outcomes. The Latvian regulation allows civilians to participate in Latvian military units and provides that civilians can serve in foreign military forces with a permission issued by the government. According to the German legislation, German citizens can join foreign armed forces only if authorised by the competent authorities. The same regime applies under the legislation of Estonia and Lithuania. The Czech legislation allows Czech citizens to enrol in foreign armies only when they hold permission from the President of the Czech Republic.

In the USA, the Federal Criminal Statute prohibits US citizens to enlist or recruit others from within the USA to serve a foreign party that is at war with a government at peace with the USA. In the UK, the 1870 Foreign Enlistment Act makes it an offence for a British subject without a licence from Her Majesty to enlist in the armed forces of a foreign state that is at war with another foreign state at peace with the UK. It also makes it illegal for any person in Her Majesty's dominions to recruit persons for such a service. Equivalent legislation has been adopted by Canada. Nevertheless, this regulation is limited and rather problematic. Therefore, in the light of the *Sandline Affair*, in 1999 a Report ordered by the House of Commons suggested that the UK government considers the possibility of adopting a tight definition of mercenarism and fosters initiatives for strictly defining mercenarism at the international and European level.⁶⁰ In this vein, the Green Paper suggests that PMSCs should be defined as an autonomous legal category clearly distinguished from mercenaries.

The Spanish and Finnish regulations are more liberal, since they do not prevent civilians from enrolling in the armies of a foreign state that is not at war respectively with Spain or Finland; nevertheless, such conduct can constitute treason.⁶¹

⁵⁷ See Article 38 of the Private Security Industry Regulation Act 56 of 2001.

⁵⁸ See Article 47 of the Additional Protocol I to the Geneva Conventions.

⁵⁹ See Article 23-8 of the French Civil Code and Articles 436-1 to 436-5 of the French Criminal Code.

⁶⁰ The Sandline Affair concerns the 1997 delivery of arms by the British Company "Sandline" to Sierra Leone for use by President Kabbah's forces, in contravention of a UN arms embargo criminally implemented in the UK by Orders in Council.

⁶¹ See the Spanish Penal Code, Articles 581-588; Finnish Penal Code, Chapter 12, Section 3.

In Brazilian legislation there is no reference to the crime of mercenarism.

At the international level, the definition of “mercenarism” is very strict and the attempt to broaden it in order to include PMSCs in the 1989 Convention found no consensus.⁶² However, in 2008, the Human Rights Council extended the mandate of the UN Working Group on the Use of Mercenaries. The Working Group is now committed to study the impact of PMSCs’ activities on human rights and to prepare a draft promoting respect of human rights by private contractors⁶³. The activity of the Working Group could lead to the adoption of new international regulatory instruments concerning PMSCs and their services.

4.3) Exceptions to criminal liability

Some legal or practical exceptions (excuses) to criminal liability are likely to apply to military and security agents as well as to the companies themselves.

First, it is possible that PMSC employees qualify as “combatants”, depending on the relationship existing between the subject hiring and the PMSC. This is the case of civilians temporarily recruited as military personnel according to the regulations of Latvia and Estonia. Such a qualification excludes criminal responsibility for direct engagement in hostilities.

Second, state personnel functional immunity could apply to PMSC employees, though the extent of such immunity is controversial.

Third, the state employing the PMSC and the state where the PMSC operates can conclude special agreements, in order to exclude the criminal responsibility of PMSC employees. Such a practice is normally adopted by the Netherlands and Canada. This is also the case of the agreements stipulated between the USA, Iraq and Afghanistan in order to grant immunity from criminal jurisdiction to PMSC personnel deployed by the USA in the Iraqi and Afghan territories (Status of Forces Agreement (SOFA)). This immunity can be granted also through the adoption of domestic legislative acts *ad hoc*. In Iraq, immunity has been preserved by the Coalition Authority via an order (17/2004) granting exclusion of criminal prosecution for PMSC employees.⁶⁴

Fourth, the criminal rules of a specific legal order can have limited extra-territorial validity. Such is the case of the UK, Canada and Australia, where only a small number of offences perpetrated overseas can be prosecuted on the basis of the nationality of the offender.

Finally, the unwillingness of states to prosecute foreign citizens undermines the effectiveness of criminal law.

All together, these circumstances considerably limit the criminal liability of PMSC personnel and the companies themselves. In fact, it is significant that the case law related to the criminal responsibility of PMSCs and their personnel is rather inconsistent.

In theory, a good reason for states to prosecute PMSCs and their personnel is the fact that often PMSC personnel in the field are perceived as state military personnel. Therefore, not prosecuting PMSC personnel for their crimes could reduce the credibility of the hiring state. Moreover, the activity of PMSCs could involve state responsibility, in the light of the ILC Articles.

4.4) The subjective scope of criminal liability

Responsibility usually exists according to the “internal” hierarchical relationships that link the different physical persons of a PMSC. Such is the case, for instance, in the USA, France and the Netherlands. In fact, according to the criminal rules of these legal systems, when the employees of a PMSC accomplish criminal acts, different types of responsibility come into being. First, there exists

⁶² See Article 47 of the Additional Protocol I to the Geneva Conventions. See also the OUA Convention on the Elimination of Mercenarism of 1972 and the UN Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989.

⁶³ See the Human Rights Council, Resolution 7/21, 28 March 2008, Mandate of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, <http://www.ohchr.org>.

⁶⁴ See <http://www.cpa-iraq.org>.

the direct responsibility of the employee and his eventual accomplices. Second, there is the “vicarious” liability of the superiors that have not prevented the criminal act. Such responsibility is normally established on the basis of recklessness or gross negligence, exceptionally via co-perpetration, as in the case of Russia.⁶⁵ Differences in the attribution of responsibility can arise when the labour relationship is based on assignment rather than employment. Vice versa, superior orders can constitute an excuse for subordinates executing them, as expressly provided under the legislation of Lithuania and Russia.⁶⁶

In some domestic systems liability is confined to physical persons. Such is the case in Italy, Spain, Russia and the Czech Republic, where the principle applies according to which *societas delinquere non potest*. This principle maintains that only physical persons are able to act consciously and willingly, and thus they are subject to criminal jurisdiction. Therefore, the only way to hold a plurality of subjects responsible for the same crime is co-perpetration or vicarious liability.

In other legal systems the responsibility of corporations is provided to a different extent. In Latvia, even though companies may not be considered criminally responsible, they undergo coercive measures.⁶⁷ On the other hand, in the USA, Finland, Estonia, Lithuania, Australia, Canada, France, Poland and the Netherlands corporations can be held criminally liable for specific crimes.⁶⁸ In the latter cases, the principle applies according to which the acts (and often the mind) of the personnel (governing authority) of the company are at the same time acts of the legal persons. Usually, the responsibility of the corporation is also engaged when the constitutive statute or the hiring contract provides for the accomplishment of criminal acts by the employees in the performance of their services. This case, for instance, is explicitly provided for by the Latvian legislation.⁶⁹ Under such circumstances, the aim of the company is criminal in itself. This danger should nevertheless be avoided by the rules regulating the constitution and the hiring contract of PMSCs and the subsequent procedures of control.⁷⁰

Physical or legal subjects recruiting, financing and equipping PMSCs should also be held responsible for the criminal acts of PMSC employees. This can be achieved by way of complicity, in the absence of specific regulation. It is noteworthy that, by following this logic, the responsibility could in the end be extended to the state. Holding the state (criminally) accountable for the acts of PMSC employees would be an effective way to avoid impunity. Nevertheless, the possibility of holding the state accountable varies from system to system. Thus, the French State cannot be criminally tried by French jurisdictions. Instead, the British government can be held responsible before English courts, especially in the case of violations of human rights. In the matter of state responsibility, the relationship between domestic law and international law assumes special importance. In the international legal order, still basically based on the mechanism of counter-measures, effective procedures lack for holding a state criminally responsible.

4.5) Criminal procedures

Criminal procedures vary from system to system.

In the European context, PMSCs and their employees are tried through strictly criminal procedures. Thus, for instance, in France PMSCs and their personnel are subjected to ordinary criminal tribunals. By contrast, they cannot be tried by military jurisdictions. Such an approach flows from the perception of PMSCs and their personnel as subjects clearly separated from military personnel.

Outside the European context, the possibility exists to try PMSCs and their personnel through military procedures. In the USA, PMSCs' crimes are in principle subject to the judgment of Federal Courts. Though Federal jurisdictions cannot exercise their power beyond state borders, recent

⁶⁵ See the Russian Criminal Code, Chapter 7 (Complicity in Crime).

⁶⁶ See Article 26 of the Criminal Code of Lithuania; Chapter 8, Article 42 (Execution of Orders or Instructions) of the Russian Criminal Code.

⁶⁷ See Sections 12 and 70.1 of the Latvian Criminal Code.

⁶⁸ See, for instance, Article 121-2 of the French Criminal Code.

⁶⁹ See Section 70.3 of the Latvian Criminal Code.

⁷⁰ See *supra*.

legislative acts (Military Extraterritorial Jurisdiction Act – MEJA, War Crimes Act) extended their effectiveness overseas. Military commanders can notify crimes perpetrated by PMSC personnel to the Department of Justice for prosecution before Federal Courts. It is doubtful, instead, whether or not crimes of PMSC personnel can be subject to the jurisdiction of military tribunals. This seems to be hardly conceivable when PMSC personnel do not qualify as “military personnel”, because military jurisdictions do not provide the necessary guarantees for civilians in terms of fair trial. For example, verdicts of conviction are taken on the basis of a majority vote, not by way of unanimity as in non-military procedures. Nevertheless, in 2006 the jurisdiction of military courts over civilian personnel accompanying military personnel was extended by switching from the parameter of “declared war” to that of “contingency operations”.⁷¹ Therefore, it is more likely that crimes perpetrated by PMSC personnel are submitted to military jurisdiction. When crimes of PMSCs are subject to multiple jurisdictions, the problem arises of determining the competence of the different courts, thus avoiding overlap.

In Canada, PMSC personnel are subject to the Code of Service Discipline (CSD), providing offences such as “example mutiny” rather than “disobedience to a lawful command”. Thus, they can be submitted to martial jurisdictions, though decisions of the Martial Appeal Court may be ultimately brought in front of the “civilian” Supreme Court of Canada. The possibility that PMSCs and their personnel are tried by criminal and military jurisdictions depends largely on the positive perception of PMSCs as useful military tools.

Specific procedures can also be enacted in order to prevent the perpetration of crimes. These can be general or targeting specifically PMSCs. In the UK, for instance, the Export Control Act of 2002, as amended in 2003, introduced and successively strengthened a new domestic and extra-territorial power allowing controls on trafficking arms and other sensitive equipment.⁷²

4.6) Criminal sanctions

Sanctions for crimes perpetrated by PMSC personnel are rather uniform.

Basic sanctions for physical persons include primary punishment and secondary punishment. Primary punishment consists of imprisonment and fines. Secondary punishment varies from the loss of nationality to the exclusion from public commitments.

Essential sanctions for PMSCs as corporations consist of dissolution, fines, confiscation and limitation of rights, e.g. the prohibition to exercise an activity and the suspension of the activity.⁷³ Within the systems that do not provide for the criminal responsibility of legal entities, these measures can classify as civil sanctions.⁷⁴

Offences that do not qualify as criminal can be sanctioned via administrative procedures and entail sanctions such as fines and the cancellation of permits. The power of imposing such sanctions normally belongs to the administrative authority that controls PMSCs’ activities.⁷⁵ According to the Belgian regulation, for instance, PSCs’ licences can be withdrawn or suspended for a period of maximum six months by the Ministry of the Interior.⁷⁶ In Brazil, PSCs might incur warnings, fines, suspension and withdrawal imposed by the Ministry of Justice.⁷⁷

Overall, it seems that specific sanctions targeting PMSCs and their personnel are ineffective in crucial systems, for instance the USA and South Africa. In fact, given the insignificant penalties currently applying to violations of the FMA, in South Africa new legislation has been proposed entailing graver sanctions such as the loss of South African citizenship. Nevertheless, this provision

⁷¹ See the National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364).

⁷² See the Export Control Act at the Web Site <http://www.opsi.gov.uk>.

⁷³ See, for instance, Section 70.2 of the Latvian Criminal Code; Articles 46-47 of the Penal Code of Estonia.

⁷⁴ See, for instance, Article 61 of the Civil Code of the Russian Federation.

⁷⁵ See *supra*. See also Article 30 of the Spanish Law on Private Security 23/1992.

⁷⁶ See Article 17 of the Law on Private Security, 10-01-2005.

⁷⁷ See Article 23 of the Law on Private Security Companies and the Security of Financial Institutions, 7.102 of 20 June 1983.

has been strongly criticised by the International Peace Operations Association (IPOA)⁷⁸ as a threat to the peace and stability of industry worldwide.

5. Civil Liability

5.1) Substantive and procedural aspects

PMSCs and their personnel are subject to the general regime of civil liability provided by the national legislation. Therefore, they are responsible for damages caused by violations of legal obligations.

Civil liability can arise from criminal or non-criminal violations of extra-contractual legal obligations committed by PMSC personnel (tort claim); it is particularly likely to flow from criminal violations perpetrated against persons and their property. For instance, tort claims can arise from killings committed by PMSC personnel, as in the case of the Blackwater “shootout” in Nisoor Square in Baghdad and the Abu Ghraib torture involving private contractor interrogators and translators.⁷⁹

Claims can be submitted by the direct victims themselves or the entitled survivors. In particular, they can be brought against PMSCs and their personnel by civilians, military personnel and PMSC personnel. Claims can also be brought against the hiring state, especially for failure to prevent and prosecute crimes perpetrated by PMSC employees.

Nevertheless, in principle states enjoy immunity from foreign jurisdiction, although the interpretation of its extension varies. Likewise, the possibility to raise civil claims against a state in front of its domestic courts differs from one jurisdiction to another, especially with regard to acts perpetrated abroad by its agents. In this vein, under some legislations PMSCs are likely to oppose various defences. In particular, according to the regulation of the USA PMSCs can allege the immunity for breaches or the non-justiciability of the controversy. Immunity is invoked by considering that the acts of PMSCs perform government directives or fulfil combat activities. Non-justiciability is invoked by claiming that breaches by PMSCs are political issues, and thus not subject to jurisdictional proceedings. Furthermore, civil liability can be excluded via the adoption of SOFAs. According to German case law, claims for reparation against a state can be brought only by other states on the basis of diplomatic protection, not by individuals.⁸⁰

Civil claims can be autonomously raised before domestic civil jurisdictions or jointly with criminal claims before penal jurisdictions, depending on the procedural legislation of the state where the claim is submitted.

If a crime is prosecuted by the International Criminal Court, issues of restitution and compensation can also be submitted to it.⁸¹

In the USA, claims can be submitted on the basis of either the Foreign Claims Act (FCA) or the Alien Tort Statute (ATS), or can be brought as common law tort claims. The first is an administrative instrument mainly exploited by third civilian parties for injuries caused by members of the armed force. With one exception, the FCA has yet to be used to obtain compensation for injuries caused by PMSC personnel. On the other hand, the ATS and common law tort claims have been brought by third civilian parties, military personnel, and PMSC personnel for injuries caused by PMSC companies and personnel. However, in addition to the numerous legal defences available, the ATS claims, which are based on customary international law, impose restrictive criteria.⁸²

In the European countries, civil claims against PMSC personnel, the companies and the state can be brought before ordinary civil jurisdictions and arbitral tribunals.

⁷⁸ See *infra*.

⁷⁹ See D. Johnston, J.M. Broder, “FBI Says Guards Killed 14 Iraqis without Cause”, *The New York Times* (14 November 2007); S. Makki, “Sociétés militaires privées dans le chaos Irakien”, *Le Monde Diplomatique* (November 2004), at 22 ff.

⁸⁰ See BGH III ZR 190/05, § 6, <http://www.bundesgerichtshof.de>.

⁸¹ See Article 75 of the International Criminal Court Statute.

⁸² See the US Supreme Court, *Sosa/Alvarez Machain*, 124 S. Ct. 2739, 2004.

Civil liability can also arise from non-compliance by PMSC and their personnel with contractual obligations. In such a case, the hiring subject is authorised to bring a claim against the PMSC. It is not unlikely, for instance, that states put forward civil claims against PMSCs for non-compliance with the due performances.⁸³

Vice versa, civil responsibility can arise out of non-compliance with contractual obligations by the hiring party. For instance, in 1998 the Papua New Guinea government hired Sandline International services in order to suppress the Bougainville Revolutionary Army movement. The contract was prematurely terminated and this generated a contentious case at the end of which Papua New Guinea was condemned to pay US \$ 18 million to Sandline International for contractual insolvency.⁸⁴

Finally, civil liability can arise from violations of “internal” relationships. For instance, under the Latvian legislation employers are allowed to claim compensation for losses caused by employees for lack of due care.⁸⁵

Specific organs and procedures can be set up for judging violations of labour law. In France, for example, these controversies are dealt with by the *Conseil de Prud’hommes*, as a first instance. The *Conseil de Prud’hommes* extended French labour regulation to the activity of PMSC personnel operating abroad.⁸⁶

Unfortunately, it is unlikely that problems related to “external” or “internal” contractual responsibility are brought before domestic courts when the hiring subject is not a state and the contract is “covered”. This is likely to happen, for instance, when PMSCs train forces of an armed opposition group.

Civil responsibility can be attributed on the basis of the chain of the “internal” relationships binding the personnel of a PMSC, especially on the basis of vicarious liability and negligence. Thus, the Spanish, Finnish, Latvian and Brazilian legislations provide the civil responsibility of the superiors for the actions of their subordinates. For instance, the liability of the employer is engaged for losses caused by employees in case of failure to exercise due care in the choice of the personnel.⁸⁷ This happens also in the case of assignment, for faults by the subcontractor pursuing the PMSC business. In fact, the Dutch legislation provides that the main PMSC contractor is responsible for his subcontractor,⁸⁸ although issues of liability can be settled in the hiring contract.

It is likely that cases involving PMSCs present an international aspect. This depends on the extra-territorial character of the legal situation at stake, such as the place of the activity or the nationality of the subjects. Under private international law the determination of the competent forum and applicable law follows the criteria established by domestic legislations. The priority in the application of such criteria varies from state to state. The criteria can consist in the choice of the contracting parties, the domicile or nationality of the parties, the place where the legal persons have their statutory seat registered, the place where the tort took place, the place where the hiring contract was concluded, the law most close to the contract, etc. The application of these principles should ensure that the activity of PMSCs and their personnel is regulated. Nevertheless, it is possible that the legislation of the “home” state does not apply to the activity of PMSCs abroad. This can be the case for the Australian law of tort, which has no extra-territorial application, since Australia has no legislation approximating the US ATS. A lack of remedies therefore arises when the “host” (or otherwise competent) state does not provide sufficient domestic regulation for PMSCs civil liability.

⁸³ See the Dutch Civil Code 6:74.

⁸⁴ See T. McCormack, “‘The Sandline Affair’: Papua New Guinea Resorts to Mercenarism to End Bougainville Conflict”, *YIHL* (1998), at 292-300.

⁸⁵ See Section 79 of the Latvian Labour Law, 1 June 2001.

⁸⁶ See the Book IV of the French Labour Code, <http://www.legifrance.gouv.fr>.

⁸⁷ See Article 1782 of the Civil Law of Latvia.

⁸⁸ See the Dutch Civil Code 6:171.

5.2) Civil sanctions

Civil sanctions basically consist of restitution, where possible, and compensation.

The liability of PMSCs is shared between the companies and their personnel according to their constitutive statute (non-limited or limited liability).⁸⁹ Specific rules can be set up by reason of the risks connected with the activity practiced by PMSCs, especially concerning the insurance and division of risk between the PMSC and the beneficiary of its activity.

In the Netherlands, contracts make it clear that the state is not responsible for the damages provoked by PMSCs and their personnel. Therefore, PMSCs have to compensate victims and are obliged to arrange for insurance covering the risk that the companies and their employees run, the costs of which are calculated in the price of the contract. According to the Belgian legislation, PSCs civil liability is covered by an insurance company, which gives to the prejudiced party a direct claim against the insurer. In Latvia and Spain, PSCs must insure civil liability for damages inflicted to life, health and property of third persons.⁹⁰

6. Voluntary Codes of Conduct

6.1) Genesis

In addition to state regulation, voluntary Codes of Conduct (CoCs) are elaborated by PMSCs in order to rule their own activity. The idea is that the PMSC industry has a better knowledge of what happens in the field and thus is able to provide appropriate regulation.

The area encompasses a variety of initiatives that are differently labelled as “ethical codes”, “private regulation”, “private codes of conduct”, rather than “voluntary principles”. The references to “voluntary principles” and “self-regulation” are the most convincing, since they propose the idea that PMSCs willingly submit to a regulation that is not (only) imposed by an external public subject.

CoCs are elaborated by single private companies or associations of companies. Exemplary, in the Czech Republic, a country lacking proper regulation of PSCs’ activity, PSCs associate and formulate CoCs for regulating their own activity. In the UK, PMSCs operating overseas that satisfy exigent disciplinary procedures can join the British Association of Private Security Companies (BAPSC), whose constitution was recommended by the Green Paper. The idea is that a Trade Association provides assurances of respectability, by promoting business opportunities for lawful companies while outlawing disreputable companies. The BAPSC Charter imposes respect for international law, especially humanitarian law and human rights, UK law and the law of the countries where PMSCs operate.⁹¹ In the EU frame, the representatives of the Confederation of European Security Services (CoESS) and the Trade Union Federation Uni-Europa issued a Voluntary Code of Conduct for the companies and employees operating in the private security sector. The aim is to harmonize the rules governing this area of services.⁹²

At the international level, organisations such as the International Peace Operations Association (IPOA) or the Private Security Company Association of Iraq (PSCAI) aim at improving accountability by promoting high operational and ethical standards for PMSCs.⁹³

PMSCs can collaborate with NGOs, states and governmental organisations in the elaboration of CoCs. For instance, the Voluntary Principles on Security and Human Rights (VPSHR) are standards applicable to corporate social responsibility commonly elaborated by the US, UK, Netherlands,

⁸⁹ See *supra*.

⁹⁰ See, for instance, Article 7(1)(f) of the Spanish Law on Private Security 23/2992.

⁹¹ See the BAPSC Charter, <http://www.bapsc.org.uk>.

⁹² See CoESS, CoC and Ethics for the Private Security Sector, <http://www.coess.org>.

⁹³ See the IPOA CoC, <http://ipoaworld.org/eng>; PSCAI Guidelines, <http://www.psc.ai.org>.

Norway, NGOs and private business companies.⁹⁴ The Sarajevo CoC for PSCs is a set of rules elaborated by PSCs and clients in collaboration with NGOs and governmental agencies.⁹⁵

6.2) Content

Voluntary CoCs have different scopes of application. First, this depends on the nature of the activity provided by the company. Some enterprises, often labelled as “PSCs”, for instance AECOM,⁹⁶ simply provide technical and management support services to a broad range of markets, not necessarily concerned with the security sector. Other companies, e.g. DynCorp,⁹⁷ operate strictly in the security sector. In this respect, the distinction between PMCs, PSCs and other business enterprises looks simplistic. Secondly, the approach may vary, since some CoCs generally target the activity of PMSCs, whereas others concern specific matters, such as armed operations.

CoCs usually follow common patterns, by requiring PMSCs and their personnel to respect the domestic and international law in force, acknowledged moral rules, human rights and especially the Geneva Conventions. Thus, they tend to embody pre-existing standards. For instance, the DynCorp CoC requires compliance with the “home” and the “host” state law.⁹⁸ In particular, CoCs constantly refer to the Geneva Conventions. They also stick to well recognized self-imposed regulation, specifically the VPSHR. As a result, voluntary CoCs do not have autonomous legal existence and appear as fragmented instruments, embodying general statements rather than precise rules. CoCs elaborated by way of collaboration can set up “direct” regulation or “indirect” rules requiring the adoption of further norms by PMSCs.

The attitude of PMSCs with regard to voluntary CoCs is variable. Statistically, a recent overview revealed that only 30% of PMSCs profess compliance with normative values.⁹⁹ This means that self-imposed regulation is not yet accepted by the majority of the industry. Also when general statements of commitment are put forward, companies keep an ambiguous position towards self-regulation.

At the level of secondary rules, voluntary CoCs are limited from the viewpoint of both the sanction and its enforcement. Codes elaborated by private companies in collaboration with governmental parties are likely to have a higher impact than those resulting from a process completely internal to private companies. It is also reasonable to maintain that codes set up by way of association have a stronger impact than those created by single companies. Moreover, the fact of labelling them as “ethical codes”, rather than “codes of conduct”, tells us something about their effectiveness. However, mechanisms of control are often “internal” and sanctions are mainly disciplinary, usually consisting in the exclusion from associations, so that these instruments have dubious effectiveness.¹⁰⁰ Sometimes, “external” organs are set up for supervising the lawfulness and respect of voluntary CoCs. Thus, in the UK the BAPSC lobbied the government for the establishment of an independent Ombudsman to collect, investigate and process violations of its Charter. In France, an Ethical Committee, essentially composed of Public Defence Officers, was committed to control the respect of voluntary CoCs.

De iure condendo, the idea of a universal voluntary CoC has been put forward. It should be based essentially on the patterns provided by the existing voluntary codes. Adhesion should be a prerequisite for licensing and awarding of contracts. External mechanisms of enforcement are also envisaged. This should foster clarity and effectiveness in the voluntary regulation for PMSCs.¹⁰¹

⁹⁴ See the VPSHR, <http://www.voluntaryprinciples.org>.

⁹⁵ See the Sarajevo CoC for PSCs, <http://www.seesac.org>.

⁹⁶ See <http://www.aecom.com>.

⁹⁷ See <http://www.dyn-intl.com>.

⁹⁸ See DynCorp, Code of Ethics and Business Conduct, at 2, <http://www.dyn-intl.com>.

⁹⁹ See N. Rosemann, *Code of Conduct: Tool for Self-Regulation for PMSCs*, Geneva Centre for the Democratic Control of Armed Forces – Occasional Paper n. 15 (2008), at 21-22.

¹⁰⁰ See *ibid.*, at 5 ff.

¹⁰¹ See *ibid.*, at 19 ff.

Conclusion

The level of regulation of the activity of P(M)SCs is more or less extensive in different legal systems, but common features emerge. Within this framework, a fundamental distinction must be drawn between the activity practiced by P(M)SCs in the “home” state and the activity practiced in the “host” state.

From the viewpoint of primary rules, PMSCs come into legal existence when they satisfy specific parameters and at the end of targeted licensing procedures. Also PMSC personnel are required to comply with determined standards in order to be allowed to exercise military and security activities. This requirement aims at ensuring state control over the companies.

Once they have come into existence, PMSCs can offer their services to: (1) states; (2) international organizations; (3) non-governmental organizations; (4) trans-national corporations; (5) other private entities.

Governmental outsourcing policies follow precise material and formal guidelines, especially dictated by state security and defence strategies. Whereas European governments and Australia seem quite cautious in their outsourcing policies, the USA and Canada seem to follow less restrictive criteria. In general, “inherently governmental functions” cannot be outsourced, but the criterion is far from establishing a clear-cut distinction.

Regardless of the nature of the hiring subject, PMSCs services can be divided into two categories: (1) logistical support for military activity (indirect fighting); (2) security services. Nevertheless, on this basis it is impossible to draw a clear distinction between “PMCs” and “PSCs”, since such denominations are employed in a different sense in different countries. As a tendency, PMCs are mostly based in the USA, Canada, South Africa and the UK, whereas in other states PSCs flourish rather than PMCs. Although the question is debated, the prevailing idea is to outlaw direct engagement of PMSCs in hostilities.

National legislations provide that PMSCs cannot act beyond the rights that any citizen holds, nor outside the competence that the law expressly confers on them. Special regulations usually exist with respect to the trafficking and brokering of goods that can relate to PMSC activities, such as arms, dual-use goods and technologies (especially nuclear materials), and strategic goods.

Rules targeting the activity of PMSC agents provide specific frameworks, especially confining the faculty of carrying and using (fire) arms to precise circumstances. In general, carrying and using (fire) arms is: (1) authorised only for a narrow list activities; (2) subject to a licensing regime; (3) permitted only to people having received due training in arms handling; (4) authorised solely under specific circumstances. The extreme limit for resorting to (fire) arms is represented by self-defence.

Special organs are created or existing organs are committed to check the activity of PMSCs and their employees. In the case of a breach of rules governing the conduct of PMSC personnel, the state and military commanders are usually allowed to relieve PMSCs and their personnel from functions as well as revoke clearances and facilities.

Ordinary rules regulating labour relations apply. However, strong emphasis is put on the necessity that PMSCs ensure a safe and healthy environment for their personnel, as a consequence of the fact that PMSCs often operate in dangerous situations.

From the viewpoint of secondary rules, PMSC employees are especially likely to incur criminal responsibility for violations of both international and domestic law. This is valid also for PMSCs as such, when domestic legal orders provide for the responsibility of legal persons. In principle, by qualifying as civilians, PMSC employees are bound by criminal law in the same way as normal citizens. In particular, it could happen that PMSC personnel fulfil the conditions to qualify as mercenaries. The relevant state regulation is more or less stringent. At the international level, the UN Working Group on the Use of Mercenaries has considered the issue of PMSCs as part of its mandate since March 2008. Many circumstances exclude the criminal liability of PMSC personnel and the companies themselves, in particular the unwillingness of states to prosecute. From the procedural viewpoint, PMSC employees can be tried by national and international criminal jurisdictions, but in some legal systems they are also likely to be submitted to military jurisdictions.

Civil liability can arise from contractual or non-contractual violations of law perpetrated by PMSC personnel. Claims can be submitted by direct victims or entitled survivors. They can be brought by

civilians, military personnel and PMSC personnel against PMSCs, their personnel and the hiring subjects, including states. Civil sanctions basically consist of restitution, where possible, and compensation. However, states and PMSCs are likely to oppose immunity for the breaches or the non-justiciability of the conduct.

The regulatory regime of PMSCs proves particularly unsatisfactory when the legislation of the “home” state does not regulate the activity of PMSCs abroad and the “host”, or otherwise competent, state does not provide sufficient regulation for PMSCs.

PMSCs set up voluntary Codes of Conduct, often through professional associations. These initiatives are useful but not sufficient for controlling an activity that goes beyond normal commercial transactions, involves lethal force, and may have an impact on the stability of countries.

By way of conclusion, it must be remarked that the need of a comprehensive regulatory regime for PMSCs is often invoked. A matrix of international, regional, national and industry regulation seems particularly suitable for this purpose. In fact, this would permit the development of a uniform regulation, making it more difficult for PMSCs to relocate to a state with a less arduous legal regime.

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