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CODES OF CONDUCT FOR
PRIVATE MILITARY AND SECURITY COMPANIES:
THE STATE OF SELF-REGULATION IN THE INDUSTRY.

Carsten Hoppe and Ottavio Quirico

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
ACADEMY OF EUROPEAN LAW

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Abstract

The present paper aims to assess the state of self-regulatory initiatives, often identified under the heading of “corporate social responsibility”, in the Private Military and Security industry. It takes into account substantive regulation and its implementation. The analysis focuses on Codes of Conduct (CoC), including best practices and ethics declarations initiated by firms, designed to apply to the provision of coercive services in contexts of armed conflict.

Codes of Conduct for Private Military and Security Companies: The State of Self-regulation in the Industry

CARSTEN HOPPE^{*} AND OTTAVIO QUIRICO^{}**

1. Introduction

The object of this paper is to present and assess the state of self-regulation initiatives often identified under the heading of corporate social responsibility in Private Military and Security Companies (PMSCs). Specifically, the present paper focuses on Codes of Conduct (CoC), including best practices and ethics declarations initiated by firms. Where pertinent, other initiatives developed outside the industry but applicable to it, including, for example, the Global Compact or Voluntary Principles on Security and Human Rights (VPSHR) will be touched upon.

The analysis addresses the state of self-regulation or corporate social responsibility initiatives developed within the PMSC industry. Corporate social responsibility (CSR), for our purposes, can be defined as “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis”.¹

The focus of the paper, however, is narrower than the complete PMSC industry, in that it specifically addresses only instruments that are designed to, at least in part, apply to the provision of coercive services in contexts of armed conflict. Hence, ethics statements or CoC developed by firms providing exclusively non-coercive tasks, such as food services, as well as those not containing any language specifically relevant to the provision of coercive services have not been considered in detail.

The paper first classifies CoC, and subsequently sets out to analyze them with regard to different mechanisms: licensing regimes, the contract, the activity of PMSCs, resort to force, and risk assessment. Furthermore, issues of liability and different regulatory techniques are explored. Lastly, the paper considers the implementation and enforcement of such CoC. Under this heading the few existing examples of formal enforcement provisions tied to CoC in the industry are considered. Moreover, the paper assesses the viability of initiatives that rely solely on the market to achieve compliance.

2. A Classification of Voluntary Codes of Conduct for PMSCs

The label “Codes of Conduct” encompasses a variety of initiatives that are differently designated as “ethical codes”, “private regulation”, “private codes of conduct”, or “voluntary principles”. Such initiatives have different origins.

The expressions “voluntary principles”, “self-regulation” and “ethical codes” propose the idea that PMSCs willingly submit to regulation that is not (only) imposed by an external public subject. In particular, the reference to “ethical codes” entails a corporate social responsibility approach.² Frequently, PMSCs set up regulation in collaboration with other actors, especially NGOs, states and governmental organisations.

^{*} Ph. D. (EUI), J.D. (Michigan). E-mail: Carsten.Hoppe@eui.eu.

^{**} Ph. D. (Université de Toulouse), Max Weber Fellow (EUI). E-mail: Ottavio.Quirico@eui.eu.

¹ European Commission Green Paper.

² On the definition of CSR see M. Moraru, “A Critical Survey of Mechanisms for Institutionalizing CSR in Business Organisations”, in *The Pluridisciplinary Dimension of Corporate Social Responsibility* (2007), at 203.

The Voluntary Principles on Security and Human Rights (VPSHR) are standards applicable to corporate social responsibility commonly elaborated by the US, UK, Netherlands, Norway, NGOs and private companies.³ They concern business companies operating in the extractive and energy sectors, whereas a specific section lays down fundamental rules when such companies hire private contractors for ensuring security. These principles are a constant reference for PMSCs' CoC. The Sarajevo CoC for PSCs is a set of rules elaborated by PSCs and clients in collaboration with NGOs and governmental agencies (Sarajevo Process).⁴ Mainly "private" by nature, it represents the most developed voluntary regulation specifically targeting PSCs.

For improving the quality and effectiveness of self-regulation, the project of a common CoC for PMSCs has been put forward.⁵ The process of participation in this universal CoC is envisaged as gradual, initially including adhesion only to core duties and exclusion of external monitoring bodies.⁶ Such a Code should combine the interests of the companies, stakeholders, groups in civil society, and it should be internally accepted by the companies. Participation to the common CoC is envisaged as a prerequisite for licensing and awarding of public and private contracts.⁷ A common CoC represents a remedy against the multiplication of voluntary rules, which create fragmented regulation, and is likely to foster predictability and equal competitive conditions.⁸ In fact, common rules are supposed to clarify what is expected from PMSCs, in particular with respect to international humanitarian law (IHL).

The expression "private regulation" sticks to the nature of the subject establishing a determinate regulatory framework, i.e., private companies. Therefore, it defines CoC elaborated exclusively by single private companies (individual codes) or associations of private companies (group codes).

Our analysis focuses on private regulation in the framework of voluntary, national and international regulation. At the basis of private CoC lays the idea that PMSCs have direct knowledge of what happens in the field and thus are able to provide appropriate regulation.

A. *Private Codes of Conduct*

Private CoC have different scopes of application. First, this depends on the nature of the activity provided by the company. In fact, the label "PMSC" covers a very wide range of practices. Some enterprises, often labelled as "PSCs", for instance AECOM, simply offer technical and management support services to a broad range of markets, not necessarily concerned with the security sector. Other companies, e.g., DynCorp, operate exclusively in the security sector. In this respect, the distinction between PMCs, PSCs and other business enterprises looks simplistic. Second, the approach may vary, since some CoC generally target the activity of PMSCs, whereas others concern specific matters, such as armed operations. Third, CoC can have an individual or federative nature.

Our analysis takes into account a relevant range of PMSCs and CoC, with special regard to coercive services that could entail violations of human rights and IHL. Thus, at the level of individual firms' CoC we focus particularly on DynCorp, G4S, Blue Sky Group International, Control Risks Group, Xe, Sharp End International, Secopex and AECOM.

³ See the VPSHR, <http://www.voluntaryprinciples.org>.

⁴ See the Sarajevo CoC for PSCs, <http://www.seesac.org>.

⁵ 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 19 ff.

⁶ *Ibid.*, at 37, 39.

⁷ *Ibid.*, at 39.

⁸ *Ibid.*, at 24.

Dyncorp is a primarily US-based firm providing support for protecting people, helping in humanitarian operations and disaster relief. It also provides technical assistance, including military bases, energy installations and ports.⁹ G4S is a company specialised in outsourced business processes in sectors where security and safety risks are considered a strategic threat.¹⁰ Blue Sky Group International is a UK-based global provider of security risk-management training and consultancy.¹¹ Control Risks Group is an independent UK-based risk consultancy that enables its clients to succeed in complex or hostile business environments.¹² Xe, founded as Blackwater in 1997, is a US based PMC providing a variety of protective services, military training services, governmental installations protection, aviation support, including the ability to develop, test, and manufacture weapons and armour.¹³ Sharp End International is a US-based specialist training company that delivers services in foreign internal defence.¹⁴ Secopex is a French provider of strategic and operational support in facing threats such as crises, terrorism, criminality and civil wars.¹⁵ AECOM is a US-based global provider of professional technical and management support services to a broad range of markets, including transportation, facilities, environment and energy.¹⁶ Its activity ranges from regenerating the framework for the Lower Lea Valley in the London's bid for hosting the Olympic Games to maintenance, repair, modification on a wide range of aviation and ground systems for the US Air Force, Army, Navy, Coast Guard, and Federal Aviation Administration.

At the federative level, in the UK PMSCs operating overseas that satisfy strict disciplinary procedures can join the British Association of Private Security Companies (BAPSC),¹⁷ whose constitution was recommended by the Green Paper on PMSCs.¹⁸ The idea is that a trade association provides assurances of respectability, by promoting business opportunities for lawful companies while outlawing disreputable companies. In fact, according to the BAPSC Charter, the Association aims at: (1) promoting, enhancing and regulating the interest and activities of UK-based firms and companies that provide armed security services outside the UK; (2) representing the interest and activities of the member companies in the matter of proposed legislation. "Armed security services" are broadly conceived of as involving recruitment, training, equipping, co-ordination and employment of persons who bear lethal arms.¹⁹

At the regional level, in the EU the representatives of the Confederation of European Security Services (CoESS) and the Trade Union Federation Uni-Europa issued a Code of Conduct for the companies and employees operating in the private security sector. It is considered that in the near future 20,000 companies will operate in the security sector within the EU, employing some 1,100,000 personnel.²⁰ The aim is to harmonize the rules governing this area of services. CoESS and UNI-Europa wish to emphasize the need for companies and employees to incorporate the principles of the Code in their activities.²¹ The Private Security Company Association of Iraq (PSCAI) gathers PMSCs operating in

⁹ See <http://www.dyn-intl.com>.

¹⁰ See <http://www.g4s.com>.

¹¹ See <http://www.blueskysc.org/index.asp>.

¹² See <http://www.controlisks.com>.

¹³ See <http://www.xecompany.com>.

¹⁴ See <http://www.sharpendinternational.com>.

¹⁵ See <http://www.secopex.com>.

¹⁶ See <http://www.aecom.com>.

¹⁷ See <http://www.bapsc.org.uk>.

¹⁸ See the Green Paper on PMSCs: Options for Regulation, 2002, <http://www.fco.gov.uk>.

¹⁹ BAPSC Charter, Preamble, http://www.bapsc.org.uk/key_documents-charter.asp.

²⁰ CoESS/Uni-Europa, CoC and Ethics for the Private Security Sector, I, <http://www.coess.org>.

²¹ *Ibid.*, III-15.

Iraq.²² In this case, the federative criterion is the “host” state territory, i.e., the place where the activity of the companies takes place. The association adopted a CoC within the framework of its Charter for PMSCs active in Iraq.²³

At the international level, the International Peace Operations Association (IPOA) aims to improve accountability by promoting high operational and ethical standards for PMSCs.²⁴ The IPOA CoC, firstly adopted in 2001 and lastly revised in 2005, seeks to ensure respect for ethical standards by PMSCs members operating in conflict and post-conflict situations.²⁵

B. A Framework of Analysis

Private CoC are part of the norms governing PMSCs. In order to understand private regulation in the context of public law a classification is necessary. This should allow for some conclusions about their completeness and effectiveness.

According to a temporal perspective, the regulation concerning PMSCs can be divided in multiple stages: (1) the licensing regime of PMSCs and their personnel; (2) the hiring contract; (3) the territorial and extraterritorial activity of PMSCs and their personnel and its control; (4) labour law; (5) criminal liability; (6) civil liability.²⁶

Within this framework, we can conceive of PMSCs’ accountability with respect to “internal” or “external” relationships. Internal responsibility flows from the violation of relationships existing between PMSCs and their employees. External liability flows from the violation of the relationships between PMSCs, on the one hand, states, IOs, private entities and individuals, on the other hand.

From the viewpoint of public law, PMSCs are subject to the regulation of the “home” and “host” state, given the international character of their activity. Specific organs are created or existing organs are committed to check the activity of PMSCs and their employees. Whether or not the legislation of the “home” state applies extra-territorially must be ascertained on a case-by-case basis. The major problem consists in the legal gap existing when national regulatory frameworks are insufficient, particularly when the “home” state regulation has no extra-territorial applicability.

By following the outlined pattern, we present a synthetic overview of the substantive and procedural private regulation in the matter of PMSCs within the context of voluntary, national and international norms.

3. The Content of Voluntary Codes of Conduct: Substantive Rules

A. Compliance with the licensing regime

PMSCs are legal persons composed of one or more physical persons, who are often personnel formerly engaged in state military and security activities. According to national legislations and voluntary CoC, private contractors are usually required to comply with common standards for practicing military and security services. Basically, PMSCs and their employees must satisfy strict

²² See <http://www.pscai.org>.

²³ PSCAI Charter, Section 9, http://www.pscai.org/Docs/PSCAI_Charter_Final.pdf.

²⁴ See <http://ipoaworld.org/eng>.

²⁵ IPOA CoC, Version 12, Preamble, <http://www.ipoworld.org/eng/codeofconduct.html>.

²⁶ See O. Quirico, *National Regulatory Models for PMSCs and Implications for Future International Regulation*, EUI MWP WP 2009/25, at 1.

professional qualifications, not to pose a threat to state security and be clear of judicial condemnations. These requirements are checked via targeted licensing procedures. Private CoC aim to complete the framework. In the following we discuss several examples of private CoC in more detail.

The Sarajevo CoC provides that firms support the application of a transparent and fair licensing system, regardless of the size of the companies concerned. In the absence of a satisfactory regulation, firms are requested to federate in order to self-regulate the licensing regime.²⁷

The IPOA CoC fosters the idea that PMSCs must disclose information to legal authorities, and thus provides that PMSCs support a transparent licensing regime for PMSCs.²⁸ Sharp End International supports accountability and transparency in the military, security, peacekeeping, and stability operations industry.²⁹

The CoESS/Uni-Europa CoC provides that a company active in the sector, or wishing to enter the sector, satisfies the conditions imposed by national regulations, in order to obtain the permits and authorisations needed by the company, its management, and its staff. Professional associations of private security companies must ensure that all of their members comply with this obligation. CoESS and UNI-Europa feel that the licences should be granted on an independent basis, according to fair and transparent procedures, and applied in the same way to all companies, irrespective of their size.³⁰ The Code also envisages that any internal firms' organisational procedures are made transparent and applied without discrimination to all parties concerned.³¹

The BAPSC Charter requires PMSC Members to build and promote open and transparent relations with UK Governmental Departments and relevant International Organisations.³²

As for the licensing of personnel, the Sarajevo CoC submits it to the successful completion of training, especially concerning the use of the (armed) force for employees authorised to carry (fire)arms.³³ Transparency is achieved by requiring firms to register employees including records of background checks and registers of security incidents.³⁴

The CoESS/Uni-Europa CoC states that it is particularly important to select new employees on the basis of objective criteria, allowing a fair evaluation of candidates' professional qualities. Candidates' moral values are also taken into consideration. During the recruitment phase, the company should ensure that security employees possess all of the basic aptitudes for becoming professional private security officers. Moreover, the Code demands the active participation of the public authorities in the selection process and the setting of effective procedures.³⁵ It is particularly important that newly recruited employees receive basic, specific and ongoing training in order to acquire the necessary skills; therefore, national and European regulations or standards must take into account quality vocational training. The Code allows for the granting of licences on the condition that companies can demonstrate not only their own quality and reliability, but also that of their employees through training programmes.³⁶

²⁷ Sarajevo CoC, 2.2.

²⁸ IPOA CoC, 2.

²⁹ See <http://www.sharpendinternational.com/how.html>.

³⁰ CoESS/UNI-Europa CoC, III-3.

³¹ *Ibid.*, III-2.

³² BAPSC Charter, Preamble.

³³ Sarajevo CoC, 2.4.

³⁴ *Ibid.*, 2.20(f)(j).

³⁵ CoESS/UNI-Europa CoC, III-4.

³⁶ *Ibid.*, III-5.

In its guidelines, Xe maintains it recruits highly qualified and skilled personnel. The company looks for people of the highest calibre. Accountability, integrity, and respectability are mandatory requirements for candidates. The applicant may be requested to prove physical fitness, psychological attitudes and specific certifications, depending on the purpose of the employment. Background checks, personal and employer references are completed on all prospective employees.³⁷

B. The Hiring Contract

PMSCs provide services for different subjects, namely: (1) states; (2) international organizations; (3) non-governmental organizations; (4) transnational corporations; and (5) other private entities. According to public and voluntary regulation, agreements normally follow the principle of the freedom of contract, but they cannot be contrary to the foundations of the law and morality. Moreover, specific national rules frame a regulation for the hiring contract, in particular with regard to governmental outsourcing. Private CoC tend to create a complementary regulation from the viewpoint of PMSCs.

The Sarajevo CoC requests that firms reject contracts that violate national or international law.³⁸ It also prohibits unfair relationships with competitors and fosters federation links.³⁹ Confidentiality is strictly protected by the Sarajevo CoC, so much that unlawful or abusive behaviour by private security personnel is envisaged as a reason for terminating contracts.⁴⁰ The VPSHR foresee that contracts between PMSCs and the hiring companies include the rules embodied in the Voluntary Principles and guidelines, where appropriate. Contracts should provide for investigation of unlawful or abusive behaviour as well as appropriate disciplinary action.⁴¹

The IPOA CoC requires PMSCs to contract solely with legitimate and recognized states, IOs, NGOs and private companies, by carefully considering their accountability. Engagement with clients thwarting international peace efforts is prohibited.⁴² The IPOA Code also requires the hiring contract to specify mandate, restrictions, goals, benchmarks, criteria and accountability for withdrawal.⁴³

The CoESS/Uni-Europa CoC states that it is the responsibility of each national federation of private security companies and its members to convince public or private clients to award contracts on the basis of the best value for money.⁴⁴ In this vein, CoESS and Uni-Europa elaborated a guide for the awarding of security contracts.⁴⁵ The CoESS/UNI-Europa CoC also requires firms to act in a manner consistent with the rules of fair competition and morality.

The BAPSC requests PMSCs not to accept contracts which are likely to involve criminal activities and breaches of human rights.⁴⁶ It also compels PMSC Members to decline contracts when the services provided might adversely affect the military or political balance in the country of delivery.⁴⁷

³⁷ See <http://www.xecompany.com/ProfessResources.html>.

³⁸ Sarajevo CoC, 2.1.

³⁹ *Ibid.*, 2.17.

⁴⁰ *Ibid.*, 2.19.

⁴¹ See <http://www.voluntaryprinciples.org>.

⁴² IPOA CoC, 4.

⁴³ *Ibid.*, 8.1.

⁴⁴ CoESS/Uni-Europa CoC, III-12.

⁴⁵ See <http://www.securebestvalue.org>.

⁴⁶ BAPSC Charter, 4-5.

⁴⁷ *Ibid.*, 7.

Sharp End International declares that it supplies services and training only to legitimate Governmental Bodies and lawful organizations.⁴⁸ Control Risks details the process to follow prior to the acceptance of a client and a particular engagement, including the risk assessment for every potential engagement. The policy stipulates that any ethical concerns must be referred to the Ethics Committee for consideration and revision.⁴⁹

The Code of Practice of Blue Sky Group International promotes a client-oriented attitude.⁵⁰ It fosters an independent, strategic, and holistic approach to customers' requirements, assessing all possible implications of the situations they face. It also supports impartiality and confidentiality. Likewise, Secopex generally fosters clients' satisfaction.⁵¹ Xe too makes decisions with a commitment to customer satisfaction foremost in mind, focusing on finding the most economical and effective solutions to the requests of its customers.⁵²

C. The Activities of PMSCs and its Regulation

In the following we provide an analysis of the way in which CoC regulate PMSCs' activities, either in the "home" state or in the "host" state.

According to the VPSHR, firms should observe the policies of the contracting company in the matter of ethical conduct and human rights, the law of the "host" state, emerging best practices, and human rights. The Principles also require that firms do not violate the right of freedom to association, peaceful assembly, collective bargaining and other rights of company employees recognized by the Universal Declaration of Human Rights (UDHR) and the ILO Declaration on Fundamental Principles and Rights at Work.⁵³ The Sarajevo CoC requires that firms refrain from acting in a manner that would be contrary to the letter and the spirit of international law or the national law of the "host" country.⁵⁴ Specifically, it requires compliance with the Universal and European Declarations of Human Rights.⁵⁵ The Project for a common CoC envisages the basic respect for the right to life, bodily integrity, the ban on torture, freedom of movement and non-discrimination.⁵⁶

Private CoC oblige PMSCs to comply with voluntary rules, national and international law, especially international human rights and international humanitarian law.

The IPOA CoC fosters respect for human rights and IHL by PMSCs and their personnel. Specifically, it requires compliance with the UDHR of 1948, the Geneva Conventions of 1949, the Additional Protocols of 1977, the Chemical Weapons Convention of 1993 and the VPSHR. The Code also requires PMSC personnel to behave humanely with honesty, integrity, objectivity and diligence.⁵⁷ More broadly, respect for ethical imperatives is considered essential for effective security and peace.⁵⁸

The CoESS/Uni-Europa CoC requires firms and their personnel to respect and improve the regulation of PSCs' activities existing in the EU. In those countries where national regulations are non-existent or

⁴⁸ See <http://www.sharpendinternational.com/how.html>.

⁴⁹ See Control Risks' Corporate Governance Framework, <http://www.controlisks.com>.

⁵⁰ See <http://www.blueskysc.org/index.asp>.

⁵¹ See <http://www.secopex.com/index.php/ethique>.

⁵² See <http://www.xecompany.com/ProfessResources.html>.

⁵³ See <http://www.voluntaryprinciples.org>.

⁵⁴ Sarajevo CoC, 2.1.

⁵⁵ *Ibid.*, 2.7.

⁵⁶ N. Rosemann, *Code of Conduct*, at 30.

⁵⁷ IPOA CoC, 6.13.

⁵⁸ *Ibid.*, 9.

underdeveloped, the CoC maintains that it is the responsibility of companies and employees and their representatives to promote the development of appropriate regulations, within the framework of their representative organisations.⁵⁹

The PSCAI CoC recognizes that its Members must operate within the law of Iraq. PMSCs are required to further the aims of the democratically elected Government and of the nations contributing to the reconstruction of Iraq. They are also requested to improve the quality of life of the Iraqi people. According to the Code, the role of PMSCs consists primarily in deterrence, so that firms and their employees may not conduct law enforcement functions. PMSCs are required to recognize Iraqi law enforcement officials and their role in enforcing security within Iraq. PMSCs must promote acceptable practices based on the fundamental respect for the rights and dignity of the Iraqi people. They must also insist upon behaviours consistent with norms and conventions of the international community.⁶⁰

The BAPSC Charter imposes respect for the UK law, the “host” state law, and international law, particularly humanitarian law and human rights. It specifically requires that PMSCs exercise a high level of professional skill and expertise, by recognising that “host” countries may have inadequate legal frameworks. In general, according to the Charter, PMSCs must balance the provision of security services with the legitimate concerns of persons who can be affected by the delivery of such services. The Charter also requests transparent involvement of PMSCs Members in IOs, governments, public and private bodies that share common interests.⁶¹

The Code of practice of Blue Sky Group International fosters respect for international law, in particular the Geneva Conventions, the UDHR, and the laws of the country in which the company acts. Such a principle applies both to the company and its employees. Personnel are expected to conduct themselves with honesty, integrity, objectivity and diligence. In doing so, they must act at all times in a manner that protects and projects the standards and reputation of Blue Sky and the clients they represent.⁶²

Sharp End International generically states that it conducts itself lawfully and legally, abiding by UN sanctions and International Law.⁶³ G4S too promotes respect of human rights and compliance with the law.⁶⁴

According to its declaration of ethics, Secopex respects the UDHR, the Geneva Conventions, the Convention against the Recruitment, Use, Financing and Training of Mercenaries, the fundamental principles of the UN, the decisions of the UN and the EU.⁶⁵

Control Risks operates in a manner that meets the highest corporate governance values. It ensures compliance with UK corporate governance standards, especially the 2003 Revised Combined Code on Corporate Governance. At the international level, Control Risks fosters respect for human rights, specifically abiding by the UDHR and the VPSHR.⁶⁶

Interestingly, G4S promotes a set of environmental standards, in particular by asking PMSCs to: (1) continuously review their impact on the environment; (2) introduce business processes to reduce their carbon footprint; (3) actively target carbon output reductions; (4) systematically measure the carbon footprint of the group; (5) establish performance indicators enabling the setting of targets and

⁵⁹ CoESS/Uni-Europa CoC, III-1.

⁶⁰ PSCAI CoC, Article 48(a-e).

⁶¹ BAPSC Charter, Preamble and 6.

⁶² See <http://www.blueskysc.org/index.asp>.

⁶³ See <http://www.sharpendinternational.com/how.html>.

⁶⁴ G4S, Corporate Responsibility Report – Policies, at 4 ff.

⁶⁵ See <http://www.secopex.com/index.php/ethique>.

⁶⁶ See Control Risks’ Corporate Governance Framework, <http://www.controlisks.com>.

tracking of progress; (6) implement processes for reducing carbon emissions across the organisation, including areas such as fuel consumption, energy consumption, water usage; (7) make use of environmentally-friendly products wherever possible; (8) seek to reduce waste and recycle materials where possible when the means to recycle materials exist; (9) seek to use modern communications techniques to reduce the need for air travel; (10) encourage and enable staff to make a positive contribution to improve the environment; (11) engage with customers and suppliers on environmental initiatives; (12) communicate the progress of the Climate Action Programme to all of stakeholders in an open and transparent manner.⁶⁷

Specific regulation is usually elaborated with regard to the trafficking and brokering of goods possibly related 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). The main purpose of these controls is to limit the supply of technology or strategic goods to countries proscribed, principally for reasons of proliferation, security or terrorism. Thus, the DynCorp CoC fosters governmental licensing and authorisation for export, especially by conferring with the US Trade Compliance Department before export operations.⁶⁸ The Code of practice of Blue Sky Group International requires compliance with the export controls imposed by the UK Government and the European Community, which affect products in its overseas markets.⁶⁹

D. *Resort to (Armed) Force*

States tend to exclude PMSCs from direct participation in hostilities. Therefore, resort to (armed) force is officially possible only in very specific cases. In general, carrying and using (fire)arms is authorised only for a narrow list of activities, subject to a licensing system and permitted only to people having due training in arms handling. Outside these limits, the use of (fire)arms is a criminal breach, exceptionally permitted solely in the case of self-defence.

Along these lines, the VPSHR recommend that firms adopt rules of engagement, specifically concerning the use of force. In case of resort to armed force, PMSCs should make medical aid available for their personnel and the offenders. More generally, the VPSHR require PMSCs to provide only pre-emptive and defensive services. Therefore, the Principles ban the participation of PMSCs in activities that are the exclusive competence of state military or law enforcement authorities. The VPSHR also require firms to maintain high levels of technical and professional proficiency with regard to the use of (fire)arms. They demand that (armed) force is used only when strictly necessary and in a manner proportionate to the threat.⁷⁰ Similar regulation has been set up by the Sarajevo CoC.⁷¹ The VPSHR and the Sarajevo CoC recommend compliance with best international practices in terms of use of the (armed) force, in particular the UN Principles on the Use of Force and Firearms by Law Enforcement Officials and the UN Code of Conduct for Law Enforcement Officials. Specifically, the Sarajevo CoC points out that detailed guidelines should be set up by PMSCs for the use of weapons, whether fire-arms or less-lethal arms, such as chemical sprays and shock equipments. Standard Operating Procedures (SOPs) are envisaged for: (a) the usage, storage, accounting, maintenance, ownership and registration of weapons; (b) the safe loading and unloading of firearms; (c) accurate record-keeping; (d) incident reporting.⁷² The Project for a common CoC envisages resort

⁶⁷ G4S, Corporate Responsibility Report – Environment, at 16 ff.

⁶⁸ DynCorp CoC, Fairness and Honesty in Business, 4.

⁶⁹ See <http://www.blueskysc.org/index.asp>.

⁷⁰ See <http://www.voluntaryprinciples.org>.

⁷¹ Sarajevo CoC, 2.4.

⁷² *Ibid.*, 2.6.

to (armed) force only by way of self-defence, since an absolute ban on offensive use of the armed force is not likely to be accepted by PMSCs.⁷³

According to the IPOA CoC, PMSCs potentially involved in armed hostilities must establish with clients appropriate “rules of engagement”,⁷⁴ aiming at minimizing casualties and damage, though preserving the individual right to self-defence.⁷⁵ PMSCs must also recognize relief organisations⁷⁶ as well as support IOs, NGOs and other humanitarian entities.⁷⁷ With respect to arms control, the IPOA CoC engages PMSCs to account for and control weapons and ammunitions utilized by their employees.⁷⁸ Only “appropriate” weapons, common to military, security and law enforcement operations are allowed, according to the principle of proportionality.⁷⁹ By taking care of the 1993 Chemical Weapons Convention, PMSCs are requested to refrain from the resort to illegal arms, especially toxic, chemical and long-term effect weapons.⁸⁰

The PSCAI CoC compels PMSCs operating in Iraq to comply with the rules on the use of force as defined within the laws of Iraq and the laws of armed conflicts, ensuring that all security staff is trained in these regulations.⁸¹

According to its pre-emptive aims, the BAPSC Charter provides that PMSCs’ services are designed primarily to deter potential aggression and avoid armed exchange. Therefore, the use of weapons is allowed only in a defensive mode as a last resort against an armed attack or for evacuation.⁸² Furthermore, the BAPSC Charter compels PMSCs not to provide governments or private bodies with lethal equipment when human rights are likely to be infringed.⁸³

The Code of Practice of Blue Sky Group International envisages that the company will never become involved in the prosecution of active military or quasi-military operations. This holds true in spite of the fact that Blue Sky, by operating in remote or dangerous regions of the world, considers itself to be legitimately involved in training, conflict prevention, post-conflict reconstruction, support of humanitarian and other neutral organisations.⁸⁴

E. Labour Law

1. General Regulation

PMSCs can provide their services by themselves or by subcontracting tasks. Two kinds of relationships come therefore into account: employment and assignment.⁸⁵

⁷³ N. Rosemann, *Code of Conduct*, at 30-31.

⁷⁴ IPOA CoC, 9.2.1.

⁷⁵ *Ibid.*, 9.2.2.

⁷⁶ *Ibid.*, 9.3.1.

⁷⁷ *Ibid.*, 9.3.2.

⁷⁸ *Ibid.*, 9.4.1.

⁷⁹ *Ibid.*, 9.4.2.

⁸⁰ *Ibid.*, 9.4.2.

⁸¹ PSCAI CoC, Article 48(f).

⁸² BAPSC Charter, 1.

⁸³ *Ibid.*, 8.

⁸⁴ See <http://www.blueskysc.org/index.asp>.

⁸⁵ On CSR in the matter of labour law see M.-A. Moreau, “The Role of Labour Law in a Pluridisciplinary Approach of CSR”, in *The Pluridisciplinary Dimension*, at 220 ff.

In the matter of assignment, according to the VPSHR, private companies should preferably subcontract to firms' representative of local populations. They are expected to review the background of the firms to be hired. For this purpose, they must consult with other companies, "home" country officials, "host" country officials, civil society and to assess previous services provided to the "host" government.⁸⁶ In the vein of the Sarajevo CoC,⁸⁷ the IPOA CoC acknowledges the possibility that a PMSC subcontracts services to other companies in order to fulfil its contractual duties.⁸⁸ The selection of partners and subcontractors must be done with the utmost care, due diligence and by ensuring compliance with recognised ethical standards.⁸⁹ Similarly, the Code of practice of Blue Sky Group International envisages the possibility of working with a number of carefully selected partner companies and engaging subcontractors for specific tasks. Associate companies must be selected with the utmost care and due diligence in order satisfy the high ethical standards of the chosen company.⁹⁰ Control Risks provides that the employment of subcontractors is strictly governed through a clear process for the selection, preparation, engagement, training and management, in order to ensure that subcontractors meet exacting ethical and quality standards.⁹¹

As for employment, national legislation often provides that PMSC employees benefit from the guarantees applying to the personnel of other companies. Instead, no specific regulation exists concerning PMSC personnel.⁹² Therefore, fundamental principles apply such as: the equal right of access to jobs, the obligation of good faith in contracting, the physical and psychological adequacy of the personnel to perform their duties.

The Sarajevo CoC acknowledges the crucial importance of maintaining good and human working conditions,⁹³ specifically via tasks optimisation.⁹⁴ The Code states that labour contracts must remunerate acceptable standards of work with appropriate payment in timely fashion.⁹⁵ The Sarajevo CoC establishes an internal training system aiming to provide personnel with a good grounding in relevant national and international law, issues of cultural sensitivity, first aid, gender issues.⁹⁶ The VPSHR ask firms to provide a high level of technical and professional efficiency and also not to employ individuals credibly implicated in human rights abuses.⁹⁷ The Project for a universal CoC should properly address the issues of social security, discrimination and child labour. Recruitment, initial and ongoing training of personnel are also targeted.⁹⁸

According to the IPOA CoC, PMSCs must check that the recruited personnel are physically and mentally apt for practicing military and security activities,⁹⁹ trained, prepared, equipped,¹⁰⁰ and free of criminal convictions.¹⁰¹ A general engagement is also required to act responsibly towards

⁸⁶ See <http://www.voluntaryprinciples.org>.

⁸⁷ Sarajevo CoC, 2.16.

⁸⁸ IPOA CoC, 10.1.

⁸⁹ *Ibid.*, 10.2.

⁹⁰ See <http://www.blueskysc.org/index.asp>.

⁹¹ See Control Risks' Corporate Governance Framework, <http://www.controlrisks.com>.

⁹² See O. Quirico, *National Regulatory Models*, at 12.

⁹³ Sarajevo CoC, 2.9.

⁹⁴ *Ibid.*, 213.

⁹⁵ *Ibid.*, 2.10.

⁹⁶ *Ibid.*, 2.4 and 2.5.

⁹⁷ See <http://www.voluntaryprinciples.org>.

⁹⁸ N. Rosemann, *Code of Conduct*, at 30, 32.

⁹⁹ IPOA CoC, 6.2.

¹⁰⁰ *Ibid.*, 6.3 and 6.11.

¹⁰¹ *Ibid.*, 6.5.

employees.¹⁰² Finally, appropriate insurance policies on health and life are demanded.¹⁰³ Similar regulation is provided by the BAPSC Charter.¹⁰⁴

The CoESS/UNI-Europa CoC recognizes that good working conditions constitute a crucial component in the development of the sector's companies and the potential of its workers. It requires firms to commit themselves to applying and improving all of the legislative and contractual provisions governing working conditions. The Code also stresses the importance of constructive social dialogue between trade unions and employers' organisations at all levels (European, national, company), especially through mutual recognition between company management and trade unions represented at the company.¹⁰⁵ The Code encourages the parties involved in salary negotiation to set remuneration levels that respect and recognise the work performed as well as the particular conditions under which it is performed, while ensuring the company's competitiveness.¹⁰⁶ It also fosters equal opportunities and combats all types of discrimination.¹⁰⁷ Overall, an appropriate balance is supported between, on the one hand, job security as well as quality of life and, on the other hand, the needs of clients.¹⁰⁸

The PSCAI CoC generically sets up the duty for PMSCs operating in Iraq to care for their employees and contractors.¹⁰⁹

The Code of Practice of Blue Sky Group International envisages that each and every employee is selected against, and fully briefed on, each client's particular requirements and the ethical standards of the company. In addition, all employees are individually briefed on what is expected of them before a particular assignment. In the case of overseas deployments, this includes briefings on local legal, cultural, and religious sensitivities as well as those of the clients involved.¹¹⁰

The DynCorp CoC obliges it to recruit, develop, promote and retain well-qualified workforce, regardless of race, colour, religion, gender, age, national origin and other discriminating criteria.¹¹¹ For preventing the dissemination of reserved information, it fosters the maximum care and respect for law in recruiting former government employees, military personnel and former employees of international organisations.¹¹²

In more detail, G4S, by respecting the ILO conventions, is committed to: (1) never employ children or allow any form of forced labour; (2) work to change markets in which business is awarded at the expense of employee terms and conditions; (3) respect employees' need for time away from work, while acknowledging that many want to maximise their income; (4) boost long-term job security by creating new solutions to meet customers' business needs; (5) strive for diversity in their workforce to draw on all available talents; (6) value employees as unique individuals while respecting and listening to their collective voice; (7) help employees develop so that they can perform well and take advantage

¹⁰² *Ibid.*, 6.6.

¹⁰³ *Ibid.*, 7.

¹⁰⁴ BAPSC Charter, 2 and 3.

¹⁰⁵ CoESS/UNI-Europa CoC, III-7.

¹⁰⁶ *Ibid.*, III-8.

¹⁰⁷ *Ibid.*, III-10.

¹⁰⁸ *Ibid.*, III-11.

¹⁰⁹ PSCAI CoC, Article 48(h).

¹¹⁰ See <http://www.blueskysc.org/index.asp>.

¹¹¹ DynCorp CoC, Respect for Co-Workers, 1.

¹¹² *Ibid.*, Working with Integrity, 3.

of opportunities to progress.¹¹³ Similarly, Secopex generally declares its respect for the ILO conventions.¹¹⁴

2. Risk Assessment

Given the kind of environment in which PMSCs operate, particular guarantees are offered to their personnel. In this sense, some legislation, voluntary principles and contracts tend to establish for PMSCs the obligation to ensure the safety and health of their employees. In particular, the Sarajevo CoC requires a high level of safety and health standards, as well as the regular revision of related norms by the competent authorities and the industry.¹¹⁵

Accordingly, the IPOA CoC recognizes the high level of risk inherent in conflict and post-conflict situations. The Code requires PMSCs to strive to operate in a safe, responsible, conscientious and prudent manner.¹¹⁶ Thus, PMSCs must inform their personnel of the risk they incur as well as the terms, conditions and significance of their contracts.¹¹⁷

The CoESS/Uni-Europa CoC provides that all firms must ensure minimum health and safety standards for private security officers, in order to guarantee the maximum possible prevention of professional risks.¹¹⁸

The BAPSC Charter requests PMSCs to provide all reasonable precautions for the protection of the staff in high risk and life threatening operations.¹¹⁹

The DynCorp CoC recognizes that employees deserve a safe and healthy work environment, free of violence or threats. This is envisaged in the context of respect for health and safety laws and regulation. In particular, attention is paid to the necessity of creating a drug-free workplace through screening and testing. Care is taken also to spot potential environmental hazards.¹²⁰

G4S takes care of employees' physical and mental wellbeing, especially in harsh or hostile environments.¹²¹

F. Liability

Pursuant to national legislation, PMSC employees might incur criminal responsibility for violation 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. Offences that do not qualify as criminal are often sanctioned via administrative procedures and entail sanctions such as fines and cancellation of permits.

In particular, the activities of PMSCs can overlap with mercenarism. Thus, it has been suggested that voluntary CoC adopt their own notion of "mercenarism," in order to foster clarity in the matter, concerning both the individuals and the companies.¹²² Nevertheless, this remains problematic. In fact,

¹¹³ G4S, Corporate Responsibility Report – Employees, at 7.

¹¹⁴ See <http://www.secopex.com/index.php/ethique>.

¹¹⁵ Sarajevo CoC, 2.11.

¹¹⁶ IPOA CoC, 5.

¹¹⁷ *Ibid.*, 6.1.

¹¹⁸ CoESS/Uni-Europa CoC, III-9.

¹¹⁹ BAPSC Charter, 3.

¹²⁰ DynCorp CoC, Respect for Co-Workers, 2, 3.

¹²¹ G4S, Corporate Responsibility Report – Employees, at 7.

¹²² See N. Rosemann, *Code of Conduct*, at 28.

since profits are the core aim of PMSCs, self-limitation seems hardly achievable. By contrast, it is realistic to demand transparency of payments, specifically by including personnel's wages in contracts.

Civil responsibility of PMSCs and their personnel arises for damages caused by breaches of contractual obligations, be they internal or external. It can also arise from breaches of extra-contractual obligations (tortious responsibilities). 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 this vein, the Sarajevo CoC states that companies insure their staff against risks associated with their work, e.g., through life insurance schemes.¹²³

The Sarajevo CoC prevents PSC personnel from using confidential information for personal gain and entering in conflict of interest with their company.¹²⁴ It also prohibits firms and their employees to affiliate with political movements or parties, paramilitary or criminal groups, national justice and security agencies, in any manner that contravenes national law.¹²⁵

The Project for a common CoC envisages the responsibility of the companies for omission of control on violations perpetrated by employees¹²⁶ and specifically provides for a ban on corruption.¹²⁷

The IPOA CoC recognizes the importance of clear lines of accountability.¹²⁸ Liability of PMSCs is particularly stressed for the use of weapons and ammunitions by employees during operations.¹²⁹

Individual CoC make special reference to the importance of fairness and honesty in business. Thus, the DynCorp CoC imposes compliance with antitrust rules¹³⁰ and the duty not to promote restrictive international trade practices.¹³¹ More generally, the Code establishes the obligation for employees properly to use the company's assets and facilities,¹³² as well as to protect Company information¹³³ and the Company image.¹³⁴ In the context of the Sarajevo CoC,¹³⁵ the AECOM CoC and the DynCorp CoC establish and detail the obligation for PMSC personnel not to give or accept bribes in any form or manner.¹³⁶ The DynCorp CoC also requires employees to avoid conflicts of interest with the Company,¹³⁷ especially concerning political contributions and lobbying.¹³⁸ Secopex proscribes all forms of private and public bribery.¹³⁹

¹²³ Sarajevo CoC, 2.10.

¹²⁴ *Ibid.*, 2.8 and 2.15.

¹²⁵ *Ibid.*, 2.18.

¹²⁶ N. Rosemann, *Code of Conduct*, at 36.

¹²⁷ *Ibid.*, at 31.

¹²⁸ IPOA CoC, 3.1.

¹²⁹ *Ibid.*, 9.4.1.

¹³⁰ DynCorp CoC, Fairness and Honesty in Business, 2.

¹³¹ *Ibid.*, Fairness and Honesty in Business, 5.

¹³² *Ibid.*, Protection of Company Assets, 1.

¹³³ *Ibid.*, Protection of Company Assets, 3.

¹³⁴ *Ibid.*, Protection of Company Assets, 7.

¹³⁵ Sarajevo CoC, 2.8.

¹³⁶ AECOM CoC, The Need and Care for Honesty; DynCorp CoC, Fairness and Honesty in Business, 3.

¹³⁷ DynCorp CoC, Working with Integrity, 1, 2.

¹³⁸ *Ibid.*, Working with Integrity, 4.

¹³⁹ See <http://www.secopex.com/index.php/ethique>.

The Code of practice of Blue Sky Group International sets up the duty not to pay bribes or financial inducements for provision of services or information, other than legitimate professional consultancy or referral fees. Employees are required to avoid any situation that could create a conflict of interest or threaten the legitimate confidentiality of either the company or its clients, especially when operating abroad. Personnel are expected to guard against accepting bribes or anything that could be used as an inducement or pressure to influence the proper delivery of the services or breach the confidentiality of information.¹⁴⁰

Control Risks has a policy of strict political neutrality, and thus it does not make donations to any political parties, organisations, or individuals engaged in politics.¹⁴¹

G. Remarks on Regulatory Techniques

Private CoC differ in their origin, scope and aim. It is natural that the structure and language of a group code is not the same as that of an individual code. A few common remarks are nevertheless possible.

Private CoC basically exploit two different techniques for regulating behaviour. A first technique consists in recalling rules set up by other legal instruments. In fact, private CoC tend to follow common patterns, by embodying national and international law in force, human rights and acknowledged moral rules.¹⁴² In particular, private CoC constantly refer to the Geneva Conventions. They also stick to well recognized voluntary regulation, specifically the VPSHR. The clearest example is the declaration of ethics of Secopex, including exclusively references to international conventions.¹⁴³ Issues of utility and interpretation arise, both at the corporate and individual levels.

At the individual level it is possible to regard physical persons as the primary addressees of some international obligations, especially in the light of several recent instruments concerning criminal responsibility.¹⁴⁴ Nevertheless, the question arises as to what extent individuals are bound by international obligations. An exemplary case is that of the Geneva Conventions, the applicability of which to PMSCs' personnel is rather controversial. In fact, the Geneva Conventions set up different classifications of subjects in regulating the law of armed conflicts. In particular, a fundamental distinction is drawn between "civilians" and "combatants".¹⁴⁵ Therefore, it must be established to which category of subjects PMSCs' personnel belong, because different consequences flow from different classifications. For instance, civilians are not legitimate targets of attacks and cannot directly participate in hostilities. The recall of the Conventions included in private CoC is fairly general. It does not approach the issue in a technical way, and thus it cannot help to establish the extent of the applicability of such legal rules. For instance, the declaration of ethics of Secopex states that the company "*d'une manière générale adhère à la Convention de Genève de 1949*".¹⁴⁶ The Code of ethics of Sharp End International affirms that the company "abides by all UN sanctions, international law and its interpretations".¹⁴⁷ Legally, such references must be considered rhetorical or a simple

¹⁴⁰ See <http://www.blueskysc.org/index.asp>.

¹⁴¹ See Control Risks' Corporate Governance Framework, <http://www.controlisks.com>.

¹⁴² See, for instance, IPOA CoC, Preamble.

¹⁴³ See <http://www.secopex.com/index.php/ethique>.

¹⁴⁴ See F. Francioni, "Four Ways of Enforcing the International Responsibility for Human Rights Violations by Multinational Corporations", in *The Pluridisciplinary Dimension*, at 161-163.

¹⁴⁵ See Articles 43, 48 and 50 of Additional Protocol I to the Geneva Conventions.

¹⁴⁶ See <http://www.secopex.com/index.php/ethique>.

¹⁴⁷ See <http://www.sharpendinternational.com/how.html>.

manifestation of good will. However, the clarification of the applicability of the international instruments is ultimately a task of states and international law, rather than a duty of PMSCs.

At the corporate level, international subjectivity is highly controversial. The issue whether corporations are directly bound by international conventions is debated. This is due to the fact that international law is traditionally conceived of as a matter of state entities. The controversy is general and maintained also in the field of human rights. For instance, the fact that the UDHR addresses “all nations, [...] every individual and every organ of society” is not unanimously considered a statement sufficient directly to bind private corporations.¹⁴⁸ In the case of a negative answer, the reference of private CoC to international instruments, especially in the matter of human rights and IHL, would be insignificant. In the case of a positive answer, the question arises once again as to what extent international instruments are applicable to PMSCs. This is particularly important considering that international jurisdictions lack the means to enforce human rights violations perpetrated by private corporations. Given this background, the value of the contribution that private CoC bring to the debate by simply referring to international instruments is doubtful. Therefore, one might wonder what the legal effect is of the statement that Control Risks “supports the Universal Declaration of Human Rights” and “abides by the Voluntary Principles on Security and Human Rights”.¹⁴⁹

A second technique adopted by voluntary CoC consists in directly governing conduct. This could help to add binding rules when the applicability of existing legal norms is uncertain. Nevertheless, the language employed is not really rigorous. As a result, it seems that voluntary CoC prove hardly helpful for creating a significant legal framework for PMSCs.¹⁵⁰

An example is the individual Code of Practice of Blue Sky Group International in the matter of professional standards. The Code provides:

Customer Focus: We put our customers first and tailor all of our work to the customer’s specific requirements. In doing so, we take an independent, strategic, and holistic approach to our customers’ requirements, assessing *all possible* implications of the situations they face. *We then tell the customers what they need to know, not just what they want to hear.*

Confidentiality: As security professionals, we *fully* understand and respect the need for client confidentiality. We go to *great* lengths to understand each client’s particular security requirements and protect information and documents entrusted to us [*emphasis added*].¹⁵¹

The language employed is broad, so that the content of the rules is not clearly defined. The tendency to generalisation is stressed by redundant adjectives and adverbs such as “all possible”, “fully”, “great”. It is also difficult to ascertain the exact meaning of expressions such as “what they need to know” rather than “what they want to know”. On the one hand, it is certainly difficult to elaborate a detailed regulatory framework. On the other hand, the regulation is void if the content of obligations is elusive.

Naturally, distinctions must be taken into account. For instance, the group CoC issued by CoESS and Uni-Europa is an example of a fairly well drafted regulation. In the matter of relations with clients, for instance, the Code provides:

It is the responsibility of each national federation of private security companies and its members to convince clients (public or private) to award contracts on the basis of the best value for money. Private security companies must also ensure that client companies ensure the respect of the principles of equal opportunities and non-discrimination with respect to the security officers made

¹⁴⁸ For an exhaustive presentation of the debate in the matter see F. Francioni, “Four Ways”, in *The Pluridisciplinary Dimension*, at 163-169; P. Acconci, “Accountability of Multinational Enterprises for Human Rights: Is Anything Going Differently?”, in *The Pluridisciplinary Dimension*, at 121 ff.

¹⁴⁹ See Control Risks’ Corporate Governance Framework, <http://www.controlisks.com>.

¹⁵⁰ For a comprehensive view of the problems related to the language of private CoC see C. Hoppe, “Corporate Social Responsibility at the Frontline? The Case of the Private Military Companies”, in *The Pluridisciplinary Dimension*, at 82-84.

¹⁵¹ See <http://www.blueskysc.org/index.asp>.

available to them, the respect of good working conditions for employees, and their well being at their places of employment.¹⁵²

This regulation does not enter into details which would be probably excessive for a group code, but it provides a sufficiently strict framework for regulation, coordinated with national regulations. It is nevertheless true that a certain level of generalisation, necessary at the federative level, is not tolerable for individual CoC.

Overall, from the legal viewpoint CoC are problematic, especially if one thinks that the main reason for the need of private rather than public regulation in the matter of security is the fact that the industry has better knowledge of the field. However, they are interesting as ethical instruments, from the perspective of CSR.

4. Procedural Rules

A. *Enforcement Provisions Built into Existing Initiatives*

Industry-driven self-regulation initiatives such as the CoC we have already introduced presuppose that firms include obligations in CoC that they may otherwise not be formally required to uphold. Examples include human rights treaties. Other obligations, such as provisions of national law, while formally binding on them, may be difficult to enforce due to problems of the local legal system in the conflict-ridden areas in which PMSCs routinely operate. However, the inclusion of obligations in a code of conduct will in any event only be credible and effective in adding to the accountability of a given firm, if it is tied to an additional enforcement mechanism.¹⁵³ Accordingly, a code of conduct cannot be effective if both the act of committing to a code of conduct *and* the compliance with it are entirely voluntary, and breaches remain without consequence. Enforcement in this regard may simply mean that the firm would face a credible risk of damaging its reputation if it violates the provisions of its code of conduct. Yet, by for example, tying the code of conduct into contracts with clients, it could also be mandated that such a firm will face e.g., a contractual penalty on top of existing other legal and non-legal consequences, which will add an incentive to comply with the norm in question. Presently, there are very few examples of clear enforcement mechanisms in the industry. Taken at face value, most initiatives seem to rather rely on market mechanisms to ensure compliance. As we will discuss below, this reliance may often be misplaced. Thus, with a view to achieving more effective and credible CoC, the inclusion of enforcement mechanisms beyond mere market control is highly desirable.

Regarding the two existing group CoC, great differences become immediately apparent, with the BAPSC's Charter not containing any specific mechanism, and IPOA's Code of Conduct being tied to an elaborate, if not very strict, enforcement mechanism. The BAPSC has a process in place designed to screen new members and to promote provisional members to full membership status.¹⁵⁴ However, there are no additional means of implementation of the Charter of the BAPSC in the members' internal operations. Similarly, the initiative lacks any external mechanisms offering incentives for compliance of members, or to reprimand members or otherwise enforce violations of the BAPSC Charter. There is no formalized way of addressing complaints. Related to the absence of implementation processes, the BAPSC Charter lacks any formal monitoring procedures, and no efforts regarding transparency, oversight mechanisms and third-party stakeholder input into the process are apparent.

¹⁵² See CoESS/Uni-Europa CoC, III-12.

¹⁵³ The term "enforcement mechanism" is used here in a broader sense than "legally enforceable". We use it to refer to means that compel observance of or compliance with a norm. In that sense, a code of conduct that does not formally refer to any other enforcement mechanism likely assumes that enforcement will be by way of market pressure and/or public opinion.

¹⁵⁴ See http://bapsc.org.uk/membership-membership_criteria.asp.

Formally, IPOA follows a very different model with an intricate procedure ostentatiously dubbed “Enforcement Mechanism”. As regards external enforcement, the IPOA Code of Conduct already threatens that members who fail to uphold a provision “may be subject to dismissal from IPOA”.¹⁵⁵ Moreover, the Code incorporates the so-called “IPOA Enforcement Mechanism”, a system allowing complaints by third parties. The IPOA Enforcement Mechanism in principle allows anyone to lodge a written complaint against a member of IPOA for violations of the IPOA Code of Conduct.¹⁵⁶ In addition, the Enforcement Mechanism provides a process – not legally binding – in which the Standards Committee of the International Peace Operations Association (SCIPOA) addresses complaints against a member company. The SCIPOA is composed of designees of the members.

Complaints are received by a Chief Liaison Officer designated by IPOA, and initially screened by a three-member “Task Force” of the SCIPOA, no member of which may be affiliated with the company to which the complaint relates. The task force can then decide to throw out the complaint as “specious or irrelevant to the Code’s provisions.”¹⁵⁷ Otherwise the complaint will be forwarded to the full SCIPOA for review. Rejections by the Task Force can be appealed by complainants.¹⁵⁸

The full SCIPOA, composed of designees of all firms elected to the IPOA Board, can then decide to either impose corrective measures and sanctions, or reject the complaint.¹⁵⁹ Appeals by companies subject to complaints, but not by complainants, are possible.¹⁶⁰ Final decisions of the SCIPOA are to be publicized upon the conclusion of the hearings.¹⁶¹

Sanctions to be imposed by the SCIPOA may include probation, or exclusion from IPOA or “other disciplinary measures”.¹⁶² Sanctions (presumably other than suspension or exclusion) are to be monitored by a Compliance Monitoring Committee.¹⁶³ The decision to exclude a member is subject to appeal, must be ratified by the Board of IPOA and IPOA Executive Committee, can be subsequently rescinded, and the member can be readmitted to IPOA after six months.¹⁶⁴ All participants in the Enforcement Mechanism (except the complainant) have to sign non-disclosure agreements.¹⁶⁵ While submissions by the complainant are deemed public unless a special request for confidentiality is made, all submissions by IPOA members are deemed confidential absent a special waiver by the member.¹⁶⁶

A crucial weakness of the mechanism is that a member company that withdraws from IPOA before or even while a complaint is being addressed will not be subject to the process, and can thus avoid the “noisy breakup” that represents the only true enforcement mechanism available to IPOA. This happened, when the first member company threatened with dismissal, Blackwater, withdrew its membership just after investigations into its business by IPOA were started, and accordingly all investigations into its conduct by the SCIPOA were halted. The only public statement by IPOA regarding the issue was a press statement acknowledging the withdrawal, and declaring that

¹⁵⁵ *Ibid.*, para. 11.

¹⁵⁶ IPOA Enforcement Mechanism, available at <http://ipoaworld.org/eng/enforcementv01eng.html>, at para. 2.1.

¹⁵⁷ *Ibid.*, at para. 2.2.10.

¹⁵⁸ *Ibid.*, at paras. 3.3.-3.13.

¹⁵⁹ *Ibid.*, at para. 4.2.4.

¹⁶⁰ *Ibid.*, at para. 4.6.

¹⁶¹ *Ibid.*, at para. 2.1.

¹⁶² *Ibid.*, at para. 5.6.

¹⁶³ *Ibid.*, at para. 6.1-6.10.

¹⁶⁴ *Ibid.*, at paras. 6.13-6.14; 6.16, 7.7.

¹⁶⁵ *Ibid.*, at Section 8.

¹⁶⁶ *Ibid.*

Blackwater was a member in good standing before it withdrew from IPOA.¹⁶⁷ Moreover, it has been pointed out that neither the Code of Conduct, nor the so-called Enforcement Mechanism obliges Members to react to a complaint by submitting information regarding the alleged conduct. Lastly, neither the Code of Conduct nor the Enforcement Mechanism provide for internal or independent monitoring of compliance with the Code of Conduct and the norms referred to in it.

Besides the two group CoC by the BAPSC and IPOA, the industry has brought about numerous CSR initiatives by individual firms. As we have seen, most of those statements contain broad language that is concerned with customer relations and employee welfare and remain largely irrelevant to the specific risks PMSC activities pose in terms of violations of Human Rights (other than, potentially, the rights of the employees), and violations of International Humanitarian Law. Similarly, those individual CoC do not contain specific enforcement mechanisms, with the exception of Blue Sky, which advertises that its activities are overseen by an Ethical Overview Committee. According to company publications, the Overview Committee consists of “individuals of international standing and unimpeachable integrity who are neither shareholders nor employees of Blue Sky”. Specifically, the three individuals currently composing the committee are Martin Bell, former BBC international correspondent and Member of Parliament, Dr David Shattock, a retired police Chief Constable, and General Sir Rupert Smith, former NATO Deputy Supreme Allied Commander.

The Ethical Overview Committee reviews all Blue Sky operations, and has the power to veto any activity undertaken by Blue Sky if it deems the activity runs counter to Blue Sky’s ethical standards. Blue Sky also operates an appeals process open to “anyone with a legitimate involvement in its operations (whether as sponsor, client, employee or in any other capacity)”. It is not clear whether this mechanism would allow for complaints by third party victims of harmful conduct of Blue Sky personnel.

B. Challenges for Purely Market-Based Enforcement

In what follows, we seek to discuss factors that will tend to limit the effectiveness of CoC as means to achieve greater compliance with, and greater accountability for violations of human rights and international humanitarian law in the PMC industry. First, we will discuss incentive problems for initiatives that do not include enforcement mechanisms but rather seek to rely entirely on the market, such as reputation costs, in order to ensure compliance with the norms they seek to promote. Second, monitoring problems that will tend to undermine the effectiveness of CoC will be discussed.

PMSCs are corporate entities motivated, at least among other things, by profit. They operate in a market, and this market will to a large degree guide their decision-making. The market brings together supply and demand. However, it has been suggested that the PMSC industry does not face a competitive market.¹⁶⁸ This has important implications: only if clients actually value compliance with human rights or international humanitarian law obligations expressed in CoC, and if clients have sufficient market power to bargain for it will firms compete in terms of that value. On the one hand, as has been suggested for the PMSC industry, if clients face a sellers’ market, so that there is simply little or no alternative for a given provider, there is no competition, and hence firms will escape with as few obligations as possible. This in turn would mean that firms would not subscribe to CoC, or at least not to those ensuring effective enforcement. On the other hand, even if there is some competition, it is not clear that clients will bargain for efficient CoC with respect to human rights, IHL or other norms. One does not have to go as far as to suggest that clients of PMSCs do specifically contract with firms with

¹⁶⁷ IPOA Statement Regarding the Membership Status of Blackwater USA, available at http://ipoaonline.org/php/index.php?option=com_content&task=view&id=156&Itemid=80.

¹⁶⁸ See, e.g., J. Cockayne, *Commercial Security in Humanitarian and Post-Conflict Settings: an Exploratory Study*, International Peace Academy (2006), at 10.

a bad reputation in that regard, but clients may simply be indifferent to these values. If that is the case, firms will have little incentive to compete in terms of compliance with these norms.

The fact that there are some firms that employ CoC incorporating human rights and IHL obligations cannot without more dispel these concerns, as PMSCs could simply be engaging in window-dressing. Much depends on whether the potential stigma stemming from a violation of human rights or international humanitarian law will in fact be passed on to the client. Assuming the stigma is not passed on, for example because the majority of such incidents are usually not highly publicized, clients will have very little incentive to put pressure on PMSCs to comply. On the other hand, recent reports of PMSCs allegedly flouting IHL and Human Rights, such as the shooting at Nisoor Square in Iraq, suggest that public awareness of PMSCs' abuses is rising.

Even if the stigma is actually passed on, i.e., a client will be connected to the violation, there are still two possibilities: either the client cares about its reputation in that respect, or not. Here, we can envision several scenarios, depending on the nature of the client, be it a state, a corporation, or even an NGO. At least for states and corporations, plausible illustrations can go either way. An unpopular government of a failing state, could care less about its reputation with respect to human rights, and might be happy to run the risk of violations to hire the cheapest PMC available. On the other hand, a solid democracy with a healthy civil society might well care a lot about its reputation, and be willing to pay a premium to be able to contract private military services that reliably conform to its values. At the least we would expect the latter to ensure plausible deniability in case violations still occur. Similarly, we would expect to encounter corporations on either end of the spectrum, depending on the importance of their brand name for their operations. As for NGOs we may, if somewhat naïvely, hope that they would mostly fall on the side of a real interest in accountability of PMSCs, not only because they likely will have a brand name that would be damaged. However, there are numerous anecdotal accounts of NGO personnel in the field hiring security without inquiring into their human rights records. A key difference between these players may, however, be that states, unlike corporations or NGOs, may be held responsible internationally if their conduct falls below a certain threshold and/or violates a norm of international law, which may add an incentive for them to bargain for effective human rights and IHL protection.¹⁶⁹

What we loosely referred to as “passing on stigma” immediately above, can be more properly framed as the issue of whether, in turn, the client of the PMC cares for either a market (in the case of a corporate client) or a civil society (in the case of states and NGOs) that values compliance with human rights and international humanitarian law. However, even taking this for granted,¹⁷⁰ a second assumption necessary for such pressure to be exerted is the availability of information about the market and its players. Anyone who has researched in the PMSC field can attest to the fact that this is far from the case. While some PMSCs are forthcoming with information, most industry representatives still stress that the nature of their business does not allow them to discuss information contained in their contracts. Moreover, obtaining information about the subject in issue here, i.e., violations of human rights or international humanitarian law in a conflict situation, is inherently very difficult, even though NGOs and the press, with the help of modern technology, help to fill this gap. Accordingly, even if a client would be inclined to assess performance of a contract on the basis of compliance with a code of conduct that includes a commitment to human rights and international humanitarian law, reliable information may be lacking. Even assuming competition, and clients who bargain for human rights and IHL compliance, the industry reportedly still contains a significant amount of firms that are not repeat players. If a firm is thus able to reorganize, and in the process loses its tainted reputation, it has no incentive to honour its human rights commitments.

¹⁶⁹ For a discussion of PMSCs and state responsibility see C. Hoppe, “Passing the Buck: State Responsibility for Private Military Companies (January 1, 2009)”, *European Journal of International Law* (2008), Vol. 19, pp. 989-1014.

¹⁷⁰ For a discussion of the limits of brand value and hence effective CSR pressure see J. Liubicic, “Corporate codes of conduct and product labelling schemes”, 30 *Law and Pol'y Int'l Bus.* 111 (1998), at 139.

In sum, we find that the market in which PMSCs operate shows many signs that tend to counteract PMSCs' incentives to submit to effective CoC with respect to human rights and IHL. However, we currently lack the data to test these findings empirically. What we can take away from this discussion, however, is that we have a strong indication that the market for PMSCs cannot, with respect to incentives, be easily compared to, for example, the apparel industry, where such players as Nike or Levi's have faced tremendous pressure to submit to CoC with respect to labour rights. The imperfections in the market suggest to us not that CSR initiatives and CoC could not play a beneficial role, but rather that, for the time being, firms will have to rely on enforcement mechanisms beyond the market alone if their CSR efforts are to be taken seriously.

C. One More Caveat: Monitoring

A second crucial aspect that sets the PMC industry apart from others is the difficulty effectively to monitor the conduct of PMC employees. Firstly, monitoring in a conflict zone generally proves very difficult. This will of course vary depending on the service provided. It will be much easier to monitor activities that take place indoors or in a small, confined area, and in groups, such as the detention services provided by PMSC personnel. Monitoring becomes increasingly difficult as activities approach the frontline, are conducted covertly and/or over a widespread area and by individuals, such as mobile protection services. The above points are especially valid if we envision external monitoring provided by accounting firms or NGOs, which would in turn have to be protected in the theatre of operations, creating substantial additional costs.

Accordingly, the financial burden to ensure effective monitoring may simply become too high, especially for small operators. In a competitive market in which clients care about human rights and IHL, those operators should be priced out of the market. While we have already outlined our doubts as to the composition of the market at present, this may be a point where growing consolidation will likely help, in that bigger companies, being able to provide somewhat better monitoring, have an incentive to compete in that regard and thus push the benchmark up.

Lastly, we should address problems of monitoring related to PMC personnel: first, the quick personnel fluctuation in the industry will complicate effective monitoring, as an employee may already be employed for a different company potentially in a different geographic region, which makes inquiries into allegations difficult. Moreover, PMC personnel may seek out employers that subject them to less control, either out of fear of liability or simply to increase job security. This effect is especially significant in the PMC industry where a key objective of the CoC goes beyond the traditional CSR concern for labour rights namely to the benefit of the employees, and rather addresses violations of human rights and International Humanitarian Law primarily bestowed upon others. Similarly, where CoC incorporating human rights and international humanitarian law are already in place, there is a danger that PMSC personnel will not report abuses for fear of job losses or tainting the reputation of their firm.¹⁷¹

Having demonstrated that, both with respect to incentives for firms to submit to effective CoC and with respect to monitoring, we find strong indicators that suggest to us that effective CSR will be difficult to achieve in the PMSC industry, and, particularly, that reliance on the market alone seems to be misplaced.

¹⁷¹ For a discussion of these effects in other industries see J. Liubicic, *ibid.*, with further references.

5. Conclusion

The present paper assessed the state of self-regulation initiatives in the Private Military and Security industry. Specifically, it focused on Codes of Conduct (CoC), including best practices and ethics declarations initiated by firms. The focus, however, is narrower than the complete PMSC industry, in that it specifically addressed only instruments designed, at least in part, to apply to the provision of coercive services in contexts of armed conflict.

Different categories of private CoC exist. Basically, these initiatives can be divided into federative and individual. Federative codes are created by associations of PMSCs at the international, regional and national levels. Individual codes are autonomously elaborated by single companies and designed to match the federative regulation, if the firm subscribes to any. Private CoC tend to refer to voluntary, national and international rules existing in the matter of licensing, contracts, services, resort to force, labour law, and liability. They also add complementary norms.

As for the licensing regime, transparency is supported both from the standpoint of the corporations and their personnel. Contracts are envisaged only with carefully selected subjects practicing legal activities. For regulating the provision of the services, private CoC make constant reference to human rights instruments, especially the Geneva Conventions and the VPSHR. Specific controls are fostered for allowing resort to (armed) force. Labour rules tend to create proper working conditions and pay critical attention to the risk incurred by the personnel in the security sector. In the matter of liability, much attention is devoted to financial issues, aiming to foster honesty and fairness in business; corruption, conflict of interests and confidentiality are particularly targeted.

Technically speaking, the language of the Codes is often vague, therefore problems of interpretation arise. In fact, on the one hand references to existing public and voluntary regulation do not specify the extent to which such norms apply to PMSCs and their personnel. On the other hand, it is difficult to define precisely the content of autonomously established rules.

With respect to enforcement provisions, great differences become immediately apparent regarding the two existing group CoC, with the BAPSC's Charter not containing any specific mechanism, and IPOA's Code of Conduct being tied to an elaborate, if not very strict, enforcement mechanism. The BAPSC, which has a process in place designed to screen new members and to promote provisional members to full membership status, yet lacks any additional means of implementation offering incentives for compliance of members, or to reprimand members or otherwise enforce violations. Formally, IPOA follows a very different model with an intricate procedure ostentatiously dubbed "Enforcement Mechanism". As regards external enforcement, the IPOA Code of Conduct already threatens that members who fail to uphold a provision may be subject to dismissal from IPOA. Moreover, the Code incorporates the so-called "Enforcement Mechanism", a system allowing complaints by third parties. This system in principle allows anyone to lodge a written complaint against a member of IPOA for violations of the IPOA Code of Conduct. Yet, one crucial weakness of the process is that a member company that withdraws from IPOA before or even while a complaint is being addressed will not be subject to the process, and can thus avoid the "noisy breakup" that represents the only true sanction available to IPOA.

Besides the two group CoC by the BAPSC and IPOA, the industry has spawned numerous CSR initiatives by individual firms which remain largely irrelevant to the specific risks PMSC activities pose to Human Rights and International Humanitarian Law. Similarly, these individual CoC do not generally contain specific enforcement mechanisms.

We have furthermore seen that numerous challenges for purely market-based enforcement remain. In that regard, it has been suggested that the PMSC industry does not face a competitive market. Thus, if clients face a sellers' market, so that there is simply little or no alternative for a given provider, there is no competition, and hence firms will get away with the minimum of obligations. The fact that there are some firms that employ CoC incorporating human rights and IHL obligations cannot without more dispel these concerns, as PMSCs could simply be engaging in window-dressing. Much depends on whether the potential stigma stemming from a violation of human rights or international humanitarian law will in fact be transmitted to the client, with recent reports of PMSCs allegedly interfering with IHL and Human Rights, such as the shooting at Nisoor Square in Iraq, suggesting that public awareness of PMSCs' abuses is rising. Even if the stigma is actually passed on, i.e., a client is connected to the violation, the desired effect will only be achieved if the client cares about its reputation, which is apparently not always the case. Similarly, concerns about lack of information and non-repeat players remain, as do the inherent difficulties of monitoring in a conflict environment. In sum, we find that the market in which PMSCs operate shows many signs that counteract against PMSCs' incentives to submit to effective CoC with respect to human rights and IHL. The imperfections in the market suggest to us not that CSR initiatives and CoC cannot play a beneficial role, but rather that, for the time being, firms must rely on enforcement mechanisms beyond the market itself if their CSR efforts are to be taken seriously.