

**PRIVATE SECURITY COMPANIES**  
—  
**NORMATIVE INFERENCES**

Report for the UN 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

December 2015

Ottavio Quirico  
oquirico@une.edu.au

## Contents

Introduction.....	1
1. Allowed P(M)SC Activities: Security and (Non-)Military Services.....	1
1.1. Permitted Conduct: Security Services (Police Functions).....	1
1.2. Use of (Armed) Force.....	5
1.3. Military Activities: Prohibited Conduct?.....	6
2. Licensing, Commercialising and Using (Fire-)Arms.....	9
3. Licensing, Authorising and Registering PSCs and Their Personnel.....	11
4. Enforcement: Monitoring and Reparation.....	14
5. Applicable Law.....	18
Conclusion.....	20
Selected References.....	21

## INTRODUCTION

This document compares the stance of different States on the activity of Private (Military and) Security Companies (P(M)SCs),<sup>1</sup> that is, companies engaging in the use of (violent) force.<sup>2</sup>

Along the lines of the Kelsenian distinction between primary and secondary norms,<sup>3</sup> the purpose is to provide a systemic analysis of substantive issues, specifically permitted and prohibited conduct (security services, (armed) force and military services), and procedural issues (licensing, applicable law and enforcement).

The aim is to help clarify key issues in the Draft International Convention on PMSCs and the complementary Model Law.<sup>4</sup>

In light of the fact that it is unclear whether or not, and to what extent, P(M)SCs can take part in hostilities, this document endorses the acronym ‘PSCs’, rather than ‘PMSCs’. Unlike the Draft Convention and Model Law on PMSCs, this stance is based on conduct (‘military’ as ‘war’), rather than subjective qualifications (‘military’ as ‘armed forces’) and aims to possibly facilitate distinguishing prohibited and permitted PSC activities.<sup>5</sup>

The investigation is ultimately intended as a critical ‘commentary’ to key provisions of the Draft Convention and Model Law on PMSCs.

### 1. ALLOWED P(M)SC ACTIVITIES: SECURITY AND (NON-)MILITARY SERVICES

#### 1.1. Permitted conduct: security services (police functions)

Private security contractors are usually allowed to provide police services, such as street patrol and protection of individuals and property from intrusion, harm or unlawful appropriation.

For instance, in the US federal States have adopted legislation governing the provision of security services by private entities, particularly domestically. Thus, ch 440 of the Statutes of Wisconsin (1971) provides:

440.26(1)(h)

‘Private security person’ or ‘private security personnel’ means any private police, guard or any person who stands watch for security purposes.<sup>6</sup>

At the federal level, the types of functions that can be contracted out by US governmental agencies are particularly defined in the Office of Management and Budget Circular No A-76 (2003), which provides that ‘inherently governmental activities’ cannot be outsourced:

Subject: Performance of Commercial Activities

#### 4. Policy.

The longstanding policy of the federal government has been to rely on the private sector for needed commercial services. To ensure that the American people receive maximum value for their tax dollars, commercial activities should be subject to the forces of competition. In accordance with this Circular, including Attachments A-D, agencies shall:

- a. Identify all activities performed by government personnel as either commercial or inherently governmental.
- b. *Perform inherently governmental activities with government personnel* [emphasis added].

---

<sup>1</sup> Database: [http://psm.du.edu/national\\_regulation/index.html](http://psm.du.edu/national_regulation/index.html).

<sup>2</sup> See table 1 on p 10 of the UK *Green Paper on Private Military and Security Companies*, House of Commons, Foreign and Commonwealth Office (2002). See also, implicitly, UN Doc A/HRC/15/25 (2011) [37].

<sup>3</sup> Hans Kelsen, *Pure Theory of Law* (F Deuticke, 1934, trans Max Knight, Peter Smith, 1989) 77.

<sup>4</sup> UN 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, *Draft International Convention on Private Military and Security Companies*, UN Doc A/HRC/15/25, Annex (2011, first draft 2009); José L Gómez Del Prado and Margaret Maffai, ‘Model Law on Private Military and Security Companies’ (2009) 26(4) *Wisconsin International Law Journal* 1078.

<sup>5</sup> See below section 1.3.

<sup>6</sup> For similar provisions, see the Law on Private Security Services of Turkey 1588 (2004) arts 3 and 7, the Private Security Act of Malaysia (1971) art 2, and the National Security and Central Intelligence Act of Sierra Leone (2002) art 19(9).

This broad parameter is narrowed as concerns PSCs by means of a reference to the necessity of taking into account the likelihood of resorting to (deadly) force in public or uncontrolled areas:

Categorizing Activities performed by Government Personnel as Inherently Governmental or Commercial  
An agency shall consider the following to avoid transferring inherently governmental authority to a contractor:

...

(c)(4) The provider's authority to take action that will significantly and directly affect the life, liberty, or property of individual members of the public, *including the likelihood of the provider's need to resort to force in support of a police or judicial activity; whether the provider is more likely to use force, especially deadly force, and the degree to which the provider may have to exercise force in public or relatively uncontrolled areas* [emphasis added]. These policies do not prohibit contracting for guard services, convoy security services, pass and identification services, plant protection services, or the operation of prison or detention facilities, without regard to whether the providers of these services are armed or unarmed ...

In Australia, the ACT Security Industry Act 2003 allows the outsourcing of police services. Article 7 provides:

Carrying on *security activity*

(1) For this Act, a person carries on a *security activity* if, as part of a business or the person's employment, the person does one or more of the following:

- (a) patrols, guards, watches or protects property (including cash in transit);
- (b) guards with a firearm for cash in transit;
- (c) guards with a firearm for protecting property;
- (d) acts as a monitoring centre operator;
- (e) guards with a dog;
- (f) acts as a bodyguard;
- (g) acts as a security consultant;
- (h) acts as a crowd controller;
- (i) sells security equipment;
- (j) carries out surveys and inspections of security equipment;
- (k) gives advice about security equipment;
- (l) installs, maintains, monitors, repairs or services security equipment;
- (m) carries on an activity in relation to security that is prescribed under the regulations;
- (n) trains or instructs in relation to an activity mentioned in paragraphs (a) to (m);

...

Similar provisions are embedded in the Security Industry Act of New South Wales (1997),<sup>7</sup> in the Japanese Security Services Act, No 117 (1972),<sup>8</sup> and reportedly in Chinese regulation.<sup>9</sup>

Security activities are often regulated together with investigative services, for instance, in the Russian Federation and the US State of Vermont.<sup>10</sup>

In order to perform their activities, PSC personnel are usually required to wear distinctive uniforms and badges, as stated, for instance, in the legislation of Italy, Brazil, Victoria and Arizona.<sup>11</sup>

---

<sup>7</sup> Art 4.

<sup>8</sup> Art 2.

<sup>9</sup> Susan Trevaskes, 'The Private/Public Security Nexus in China' (2007-8) 34(3-4) *Social Justice* 38, 38-40. Reportedly, Chinese PSCs are also becoming operative abroad to afford protection against kidnapping and violent attacks ('China's Private Security Companies Go Overseas', *Financial Times* (2013)). See further UNDOC, *State Regulation Concerning Private Security Services and Their Contribution to Crime Prevention and Criminal Safety* (2014) 28-30.

<sup>10</sup> Law of the Russian Federation on Private Detective and Security Activity, 2487-1 (1992) art 3; Statutes of Vermont, title 26, ch 59 (Private Investigative and Security Services) (1981).

<sup>11</sup> Italian RD 1952/1935, art 254; Brazilian Law on Private Guards Services of Financial Institutions, 7.102 (20 June 1983) art 19; Private Security Regulations of Victoria (2005) art 59; Arizona Revised Statutes, title 32, Professions and Occupations, ch 26, Security Guards (1996) art 4, 32-2635.

Sometimes, legislation prohibits PSC personnel from exercising specific powers; for instance, under the law of Michigan private security contractors may only arrest a person without a warrant on the employer's premises:

Michigan Private Security Business and Security Alarm Act 330 of 1968  
S 338.1080 Private security police officers; arrest powers; limitations.  
Sec 30

*A private security police officer, as described in section 29, who is properly licensed under this act has the authority to arrest a person without a warrant as set forth for public peace officers in section 15 of chapter IV of the code of criminal procedure, 1927 PA 175, MCL 764.15, when that private security police officer is on the employer's premises. Such authority is limited to his or her hours of employment as a private security police officer and does not extend beyond the boundaries of the property of the employer and while the private security police officer is in the full uniform of the employer [emphasis added].*

More broadly, art 4 of the Law on Agencies Protecting Persons and Property and Private Detective Activities of Bosnia and Herzegovina (2005) prohibits private security contractors from patrolling streets. By contrast, private security guards in Israel have been conferred special powers to prevent terrorist threats.<sup>12</sup>

In Afghanistan, PSCs used to exercise police functions, but they were banned in 2010 under Decree 62 of 17 August 2010:

Article 1

Based on point 3,4 articles 64 and 66 of the Afghan Constitution, fighting corruption, providing security for all citizens, avoiding public disorder and misusing weapons, uniforms and military equipment by private security companies which cause tragic incidents ... [entail] dissolution of internal and external private security companies within four months ...

Article 2

Individual volunteer members of private security companies, if qualified, can be reintegrated with or without weapons, ammunitions, vehicles and other on-hand equipment after registration into the police and the ministry of interior affairs is assigned to complete the reintegration of the abovementioned companies and finalize it ...

Harmonisation thus requires striking a balance between extended and limited police powers.

Police functions should also provide a basis for allowing PSC operations in cyberspace.<sup>13</sup> A comprehensive approach seems to be already allowed under domestic regulation, such as art 4 of the Law on Agencies Protecting Persons and Property and Private Detective Activities of Bosnia and Herzegovina:

*The activities of protection of person and property shall include the tasks related to security of persons and property, carried out by way of providing physical and technical protection [emphasis added].<sup>14</sup>*

---

<sup>12</sup> Powers for Maintaining Public Security Law (2005) art 1, cited in Yaël Ronen, 'Israel: Going Private: the Use and Regulation of Private Military and Security Companies in Situations of Armed Conflicts', in Christine Bakker and Mirko Sossai, *Multilevel Regulation of Military and Security Contractors* (Hart Publishing, 2012) 431, 445 ff.

<sup>13</sup> Cyberspace is an interactive environment consisting of computer networks and electronic impulses: to what extent is it different from physical reality? See Herman T Tavani, (2007), 'Regulating Cyberspace: Concepts and Controversies' (2006) 25 *Library Hi Tech* 37 ff.

<sup>14</sup> See also the ACT Security Industry Act (2003) art 7 (i)-(m), quoted above, and the Law on Private Security of Spain No 5 (2014): 'Article 5 – Allowed Private Security Activities ... (f) Installation and maintenance of security systems connected to alarm, control and video-surveillance centres; (g) Managing the connection, reception, verification, response and transmission of alarm signals, monitoring complementary alarm signal systems, for protecting persons, goods and communicating with competent Security Forces ... Article 6 – Lawful Activities – This law does not apply to ... 4. Security services consisting of selling, delivering, installing or maintaining technical security equipments which are not connected to security alarm, control or video-surveillance centres'.

The Draft Model Law on PMSCs does not include police services among proscribed PSC activities and leaves States free to define permitted activities, in light of the necessity of respecting human rights:

V. Regulating Activities Appropriate for Outsourcing to PMSCs

A. The Task Force would establish, publish, and make widely and freely accessible to the public and to PMSCs a list of activities that can be appropriately and legally conducted.

The Draft International Convention on PMSCs allows PSCs to perform police functions, but imposes specific limits.

Article 9

Prohibition of delegation and/or outsourcing of inherently State functions

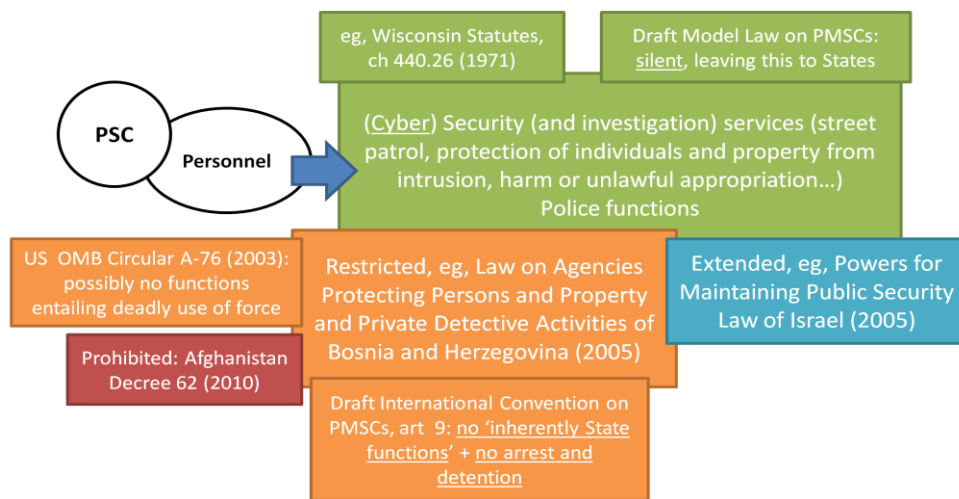
Each State Party shall define and limit the scope of activities of PMSCs and specifically *prohibit the outsourcing to PMSCs of functions which are defined as inherently State functions, including ... police powers, especially the powers of arrest or detention including the interrogation of detainees* [emphasis added] ...

The Draft Convention is therefore more restrictive than the Draft Model Law; in this respect, the two instruments are incoherent, particularly as to the exclusion of the power to arrest and detain a person, which is often intertwined with self-defence.<sup>15</sup>

Under art 2(c) of the Draft Convention on PMSCs, the concept of ‘security’ also encompasses ‘implementation of informational security measures’, and can thus include cyber security.

*Conclusion:* Where permitted, PSC personnel can perform police functions. This should possibly also provide guidance to regulate PSC operations in cyberspace. Specific activities are nevertheless prohibited in some States, whereas in others PSC powers are extended. The Draft Convention on PMSCs excludes PSCs from ‘inherently State functions’; arguably, a list of core permitted and/or prohibited activities should be provided, so as to avoid excessive discretion, balancing extended and limited powers and prohibition of private security activities. The Draft Model Law should also provide a (non-exclusive) list of core permitted and/or prohibited PSC activities.

**PSCs – Permitted activities: police services (security)**



<sup>15</sup> See the UK Criminal Law Act (1967) part I, 3(1) and section 1.2 below.

## 1.2. Use of (armed) force

From the above, it can be inferred that the use of (armed) force is allowed to the extent that it is necessary for PSC personnel to perform security functions,<sup>16</sup> basically for the purpose of protecting oneself, a third person or property,<sup>17</sup> which tends to correspond to the limits of self-defence.<sup>18</sup> This can also provide a basis for regulating private cyber security.<sup>19</sup> Not many pieces of legislation make this explicit; amongst those, meaningfully, s 28 of the 2002 German Weapons Act provides:

### Section 28

Acquisition, possession and carrying of guns or ammunition by security operators and their personnel

(1) The need for security operators (Section 34a of the Trade Regulation Code) to acquire, possess and carry guns shall be recognized if they can credibly demonstrate that *security contracts are being or are to be performed which require guns in order to protect a person in danger as defined in Section 19 or an endangered property* [emphasis added]. Sentence 1 shall apply accordingly to security services within a commercial enterprise. A proven need pursuant to sentence 1 and 2 shall also cover acquiring and possessing the ammunition intended for such guns.

Some States, for instance, Japan, further restrict the use of armed force by PSCs.<sup>20</sup>

Along these lines, the International Convention on PMSCs provides:

### Article 18

Regulation of use of force and firearms

1. Each State Party shall take such legislative, judicial, administrative and other measures as may be necessary to establish rules on the use of force and firearms by the personnel of PMSCs,
2. State parties shall ensure that in providing military and security services, *employees of PMSCs shall, as far as possible, apply non-violent means before resorting to the use of force and firearms* [emphasis added].
3. Whenever the use of force and firearms is unavoidable, PMSCs personnel shall:
  - (a) Exercise restraint in such use and act in proportion to the seriousness of the offence;
  - (b) Minimize damage and injury, and respect and preserve human life;
  - (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;
  - (d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.
4. In providing military and security services, employees may use force or firearms only in the following circumstances:
  - (a) To defend him/herself or other employees of the company against what he/she believes to be an imminent unlawful threat of death or serious bodily injury, in respect of the exercise of the essential right of self-defence.
  - (b) To defend persons whom he/she is under a contract to protect against what he/she believes to be an imminent unlawful threat of death or serious bodily injury,
  - (c) To resist what he/she reasonably believes to be an attempt to unlawfully abduct him/her, other employees of the company or a person whom he/she is under contract to protect,
  - (d) To prevent or put a stop to the commission of a serious crime that would involve or involves a grave threat to life or of serious bodily injury.
- 5) In the circumstances defined under article 18 (4), the personnel of PMSCs shall identify themselves as such and give a clear warning of their intent to use firearms, if the situation permits.

The Draft Model Law, s IV.A.3 provides:

### IV. Activities Fundamentally Inappropriate for Outsourcing to PMSCs

A. 1. Minimum standards to be considered when ranking companies would include:

3. Weapons and explosives: *firing without having been actually fired upon or any use of explosives, search and recovery, or construction-related demolition are military activities. It is not appropriate for contractors to fire weapons except in training and defensive circumstances* [emphasis added].

---

<sup>16</sup> UNDOC (2014) 31.

<sup>17</sup> House of Commons, Foreign Affairs Committees, *PMSCs*, Ninth Report of Session 2001-02 [108].

<sup>18</sup> *R v Beckford* (1988) 1 AC 130.

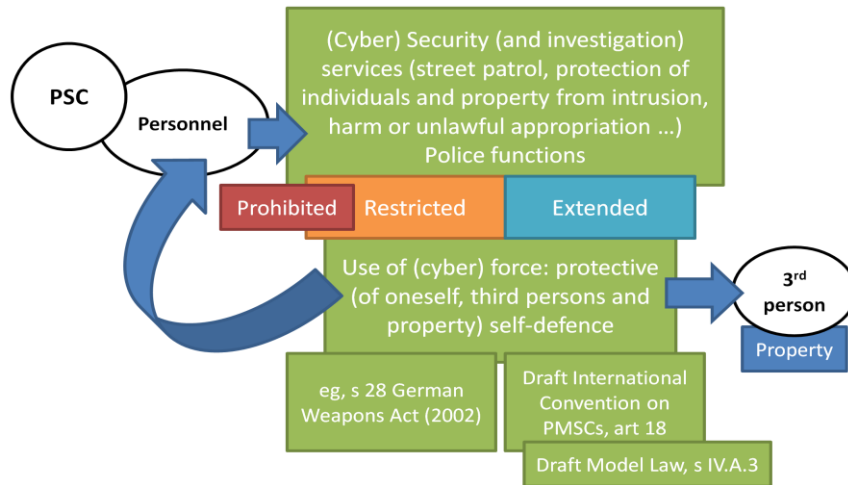
<sup>19</sup> Herbert S Lin, 'Offensive Cyber Operations and the Use of Force' (2010) 4 *Journal of National Security Law and Policy* 63; Ottavio Quirico, 'Legal Challenges to Cyber Security Institutions', in Hatoshi Nasu and Kim Rubinstein, *Legal Perspectives on Security Institutions* (2015) 308, 318-9.

<sup>20</sup> Law Controlling the Possession of Firearms and Swords, Act No 6 (1958) arts 3-4 and Security Services Act (1972).

*Conclusion:* Domestic law allows the use of force to the extent that it is necessary to perform permitted (security) services, basically in self-defence of oneself, others or property, which entails an imminent peril and proportionate use of force. This should also provide a basis for regulating the use of force in cyberspace.

Also the Draft International Convention and Model Law on PMSCs allow the use of force based on self-defence; possibly, State legislation further restraining the use of force should be taken into account.

### PSCs – Permitted use of force



#### 1.3. Military activities: prohibited conduct?

Functions that cannot be outsourced vary from State to State.

After 9/11, the US began to resort to PSCs for the provision of military services in conflict areas, particularly in Afghanistan and Iraq. Initially, PSCs performed support activities such as transport of supplies and maintenance of facilities for military personnel, but they soon moved to physical protection on the ground.<sup>21</sup> However, this should preferably be prohibited, in light of the notion of ‘inherently governmental functions’ specified in Circular A-76<sup>22</sup> and further instruments prohibiting participation in combat, notably Policy Letter 11-01 adopted by the Office of Federal Procurement Policy in 2011.<sup>23</sup>

In the UK, the debate about the limits of outsourcing focuses on the notion of ‘direct participation in hostilities’.<sup>24</sup> Nevertheless, the distinction between direct and indirect participation in hostilities is blurred, with respect to both international and non-international armed conflicts.<sup>25</sup>

In the Russian Federation, PSC personnel cannot engage in combat operations, including planning activities.<sup>26</sup> In Germany, engagement in hostilities cannot be outsourced.<sup>27</sup>

<sup>21</sup> See UN Doc A/HRC/15/25 (2011) [13] ff.

<sup>22</sup> See section 1.1 above.

<sup>23</sup> OFPP, *Performance of Inherently Governmental and Critical Functions*, Policy Letter 11-01, 76 Fed Reg 56 (2011) 63. See also US Army Regulation 715-9 (2011) s 4-2, cited below (section 4).

<sup>24</sup> House of Commons, Foreign Affairs Committees, *PMCs*, Ninth Report of Session 2001-02 [102]-[108]; House of Commons, Foreign and Commonwealth Office, *Private Military Companies: Options for Regulation* (2002) [71].

<sup>25</sup> See Giulio Bartolini, ‘Private Military and Security Contractors as “Persons Who Accompany Armed Forces”’, in Francesco Francioni and Natalino Ronzitti, *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (OUP, 2011) 218, 224-5; Nils Melzer, *Interpretive Guidelines on the Notion of Direct Participation in Hostilities under IHL* (CUP, 2009) 45.

<sup>26</sup> Sugne Zaharova, ‘Russian Federation’, in Bakker and Sossai (2012) 461, 469-71.

<sup>27</sup> See the Answers by the German Government to the Parliament, Bundestag Printed Paper 16/1296 (26 April 2006) answer No 6.



The Constitution of South Africa also takes a restrictive approach:

199. Establishment, structuring and conduct of security services

1. The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.
2. *The defence force is the only lawful military force in the Republic* [emphasis added].
3. Other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national legislation ...

This challenges the definition 'PSC'/'PMC'.

The opinion of Afghanistan, Angola, Australia, Austria, Canada, France, Germany, Iraq, the People's Republic of China, Poland, Sierra Leone, South Africa, Sweden, Switzerland, Ukraine, the UK and the US is stated in 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 (2008):

I. Determination of services

...

24. To determine which services may or may not be carried out on their territory by PMSCs or their personnel – *In determining which services may not be carried out, Territorial States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities* [emphasis added].

VI. Rules on the provision of services by PMSCs and their personnel

...

43. To have in place appropriate rules on the use of force and firearms by PMSCs and their personnel, such as:  
a) *using force and firearms only when necessary in self-defence or defence of third persons* [emphasis added] ...

This is not crystal clear: should PSC personnel be prohibited from direct participation in hostilities or should they only be allowed to participate to a limited extent?

The Draft International Convention on PMSCs excludes direct participation of PSCs in hostilities and other war-related conduct as 'inherently State functions':

Article 4 – State responsibility *vis-à-vis* private military and security companies

...

3. No State Party can delegate or outsource *inherently State functions* to PMSCs [emphasis added].

Article 8 – Prohibition of the use of force

1. Each State party shall take such legislative, administrative and other measures as may be necessary to *prohibit and make illegal the direct participation of PMSCs and their personnel in hostilities* [emphasis added], terrorist acts and military actions aimed at, or which States have grounds for suspecting would result in:

- (a) The overthrow of a Government (including regime change by force) or undermining of the constitutional order, or the legal, economic and financial bases of the State;
- (b) The coercive change of internationally acknowledged borders of the State;
- (c) The violation of sovereignty, or support of foreign occupation of a part or the whole territory of State ...

Article 9 – Prohibition of delegation and/or outsourcing of inherently State functions

Each State Party shall define and limit the scope of activities of PMSCs and *specifically prohibit the outsourcing to PMSCs of functions which are defined as inherently State functions, including direct participation in hostilities, waging war and/or combat operations, taking prisoners, law-making, espionage, intelligence, knowledge transfer with military, security and policing application, use of and other activities related to weapons of mass destruction, police powers, especially the powers of arrest or detention including the interrogation of detainees, and other functions that a State Party considers to be inherently State functions* [emphasis added].

The Draft Model Law on PMSCs takes a broader stance, prohibiting PSC participation in 'military activities':

IV. Activities Fundamentally Inappropriate for Outsourcing to PMSCs

A. The Task Force would establish, clearly articulate, and make known to the public and to all government contractors in the form of a widely, and freely accessible written document that *there are some functions that the State alone may perform.*

The Task Force would compile an exhaustive list of activities prohibited to private companies and their employees. Suggested prohibited activities are, but are not limited to:

1. *Military operations: Whether acting as soldiers or in support positions, it is not appropriate to utilize private contractors in military activities, such as tactical combat roles, static and mobile security, defending facilities, escorting convoys, and people in situations of low intensity armed conflict* [emphasis added] ...

‘Military activity’ has been differently interpreted as ‘all the movements and activities carried out by armed forces related to hostilities’<sup>28</sup> or ‘movements, maneuvers and other action taken by the armed forces with a view to fighting’.<sup>29</sup>

The Draft Model Law also includes in ‘military activities’ security services usually provided by military personnel, such as affording ‘armed escorts to government vehicles’.<sup>30</sup> This approach is based on subjective scrutiny (qualification of a person), whereby ‘military’ refers to ‘armed forces’, which leads to adopting the label ‘PMSCs’<sup>31</sup> and further compels the use of the problematic notion of ‘inherently State functions’.<sup>32</sup> However, is it correct to qualify ‘security’ services as ‘military’ activities in light of the fact that they are performed by military personnel? Cannot military personnel perform security services? Isn’t it paradoxical to qualify PSCs as military companies because they perform security services, which are also provided by military personnel?

Alternatively, the adjective ‘military’ could be interpreted as referring to ‘war’, in light of objective considerations (conduct), particularly based on art 48 Additional Protocol I (1977) to the Geneva Conventions (1949), according to which ‘military personnel’ are ‘combatants’, and thus ‘have the right to directly participate in hostilities’ under art 43 of the same Protocol, as opposed to civilians.<sup>33</sup> This should facilitate distinguishing prohibited and permitted PSC activities. Indeed, the acronym ‘PMSCs’ seems to be inconsistent with the obligation imposed on PSCs not to take part in hostilities,<sup>34</sup> which excludes the possibility of considering PSC personnel part of the ‘armed forces of a party’ as ‘groups and units which are under a command responsible to that Party’ in international armed conflicts, under art 43(1) Additional Protocol I.<sup>35</sup> The same reasoning applies to non-international armed conflicts under art 1(1) Additional Protocol II to the Geneva Conventions, although nuances should be considered based on the interaction between international law and domestic law in determining legal positions.<sup>36</sup>

Conclusion: There are basic problems: (1) defining the concept of ‘war’ (as a species of the notion of ‘security’); and (2) defining the concept of ‘P(M)SC’.

There is a trend towards excluding PSCs from (direct) participation in (international and non-international) armed hostilities. Normatively, this should exclude the qualification of PSCs as ‘military’ entities under the law of war. Furthermore, this approach is questionable with respect to activities such as guarding sites in conflict zones or intelligence-gathering: even if PSC personnel are not on the frontline, could this be

---

<sup>28</sup> Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff, 1987) [1936].

<sup>29</sup> Nils Melzer, *Targeted Killing in International Law* (OUP, 2008) 273. See further Bartolini (2011) 226.

<sup>30</sup> Gómez del Prado and Maffai (2009) 1080: ‘... if a company acts overseas in the performance of contracts which require employees to be armed, to use force against civilian populations, to provide armed escorts to government vehicles, or any other tasks traditionally performed by the military and outsourced to the private sector, such a company is considered a private military company for the purposes of this document.’

<sup>31</sup> UN Doc A/HRC/15/25 [72]

<sup>32</sup> Ibid, [82].

<sup>33</sup> See further Mirko Sossai, ‘Status of Private Military and Security Company Personnel in the Law of International Armed Conflict’, in Francioni and Ronzitti (2011) 197, 198 ff.

<sup>34</sup> The ambiguous expression ‘PMSC’ may be interpreted so as to confer upon PSCs the status of military entities under the law of war, implying the right to take (direct) part in hostilities. Vice-versa, the definition ‘PSC’ does not necessarily exclude (exceptional) participation in hostilities, ultimately grounding such a right in the law of war.

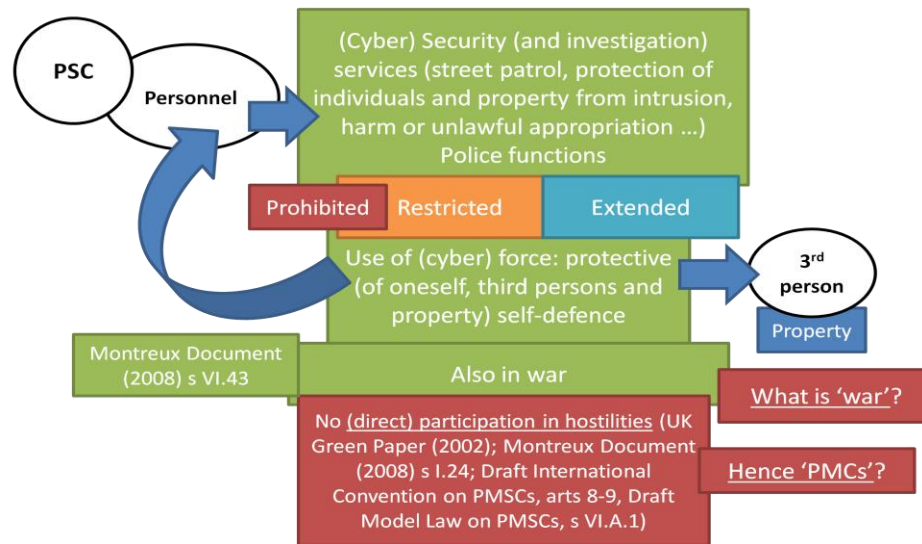
<sup>35</sup> See Melzer (2009) 34 and Sossai (2011) 201.

<sup>36</sup> Luisa Vierucci, ‘Private Military and Security Companies in Non-International Armed Conflicts: Ius ad Bellum and Ius in Bello Issues’, in Francioni and Ronzitti (2011) 235, 248-51.

regarded as a form of (direct) participation in hostilities?<sup>37</sup> This is particularly problematic with respect to the development of non-traditional types of war, such as ‘cyber war’<sup>38</sup> and the ‘war on terror’.<sup>39</sup> Should security guards be allowed to protect sites potentially targeted by terrorist attacks? Should they be employed in anti-terrorism operations? Answering these questions is basic and preliminary to further determining what actions PSCs can perform in more detail.

In order to disentangle this issue, a possibility is interpreting the adjective ‘military’ objectively, as relating to ‘war’, based on the law of armed conflicts, rather than subjectively, as relating to ‘military personnel’. PSCs would thus be non-military entities and their personnel would be non-combatant, therefore not allowed to take (direct) part in hostilities under arts 43(2) and 48 Additional Protocol I and art 1(1) Additional Protocol II to the Geneva Conventions.

### PSCs – Prohibited activities: military services



## 2. LICENSING, COMMERCIALISING AND USING (FIRE-)ARMS

Legislation aims to control trafficking and brokering arms, by means of special licensing, particularly based on the absence of prior criminal records.<sup>40</sup>

In this respect, for instance, the Law on the Handling of Weapons of Latvia (2005) provides:

Section 36. Regulations Regarding Commercial Handling of Weapons, Munitions, Explosives, Explosive Devices, Special Means and Pyrotechnic Articles

(1) In order to engage in the manufacture (production) of weapons, munitions, explosives, explosive devices, special means or Class 1, 2, 3 and 4 pyrotechnic articles, individual components or accessories of such items, as well as in the repair of weapons and special means (except gas sprays for self-protection), in the organisation of commercial exhibitions of such articles, in distribution in the wholesale or retail trade thereof, export, import or transit or to provide services in relation to the referred articles, a merchant shall have a special permit (licence) for individual types of commercial activities ...

<sup>37</sup> See, in particular, the Model Law on PMSCs, s IV; art 49(1) Additional Protocol I to the Geneva Conventions, Melzer (2009) 47; Sossai (2011) 206 ff; Bartolini (2011) 222 ff. In *Saleh et al v TITAN et al*, the US District Court of Columbia held that ‘serving as a translator for the interrogation of persons detained by the US military in a combat zone is an activity that clearly has a “direct connection with actual hostilities”’ (Memorandum Order of 11 June 2007, 18).

<sup>38</sup> Tallin *Manual on the International Law Applicable to Cyber Warfare* (CUP, 2013a).

<sup>39</sup> Helen Duffy, *The War on Terror and the Framework of International Law* (CUP, 2005).

<sup>40</sup> House of Commons, Foreign Affairs Committees, *PMCs*, Ninth Report of Session 2001-02 [149]; UNDOC (2014) 44-5.

(2) Individual merchants or commercial companies, the shareholders, managers and persons holding positions in the administrative bodies who are Latvian citizens or European Union citizens, or citizens of European Economic Area States who have reached at least 21 years of age ... and the employees of which are directly related to the production (manufacture), repair, realisation, possession, transportation of the items referred to in Paragraph one of this Section and the provision of services or security related thereto, and are Latvian citizens, or European Union citizens, or citizens of European Economic Area States who have reached at least 21 years of age (if the restrictions specified in Section 20 do not apply thereto) and if the State security institutions do not have information that the activity of the relevant merchant is directed against the security of the Republic of Latvia or such merchant violates the restrictions included in the international agreements or specified by the international organizations, are *entitled to receive special permits (licences)* [emphasis added].

Section 37. Special Permits (Licences)

(1) *The Ministry of the Interior shall issue the special permits (licences) referred to in Section 36 of this Law, which grant the right to manufacture (produce), repair, display in exhibitions, realise, export, import or repair or transport in transit* [emphasis added]:

1) Category A weapons and munitions ...

Section 38. Procedures of Wholesale and Retail Trade, Export, Import and Transit of Weapons, Munitions, Explosives, Explosive Devices, Special Means and Pyrotechnic Articles

(1) Merchants have the right to realise weapons, special means, munitions or pyrotechnic articles only in specially equipped shops or from warehouses the address of which has been specified in the special permit (licence) ...

Section 39. Manufacture (Production), Repair and Possession of Weapons and Special Means, as well as Manufacture (Production) and Possession of Munitions, Pyrotechnic Articles, Explosives and Explosive Devices, Provision of Blasting and Pyrotechnic Services

(1) Merchants shall manufacture (produce), repair or possess weapons and special means, as well as manufacture (produce) or possess munitions, pyrotechnic articles, explosives and explosive devices only at the place the address of which has been specified in the relevant special permit (licence) or the address of which has been specified by the Ministry of Interior performing the registration referred to in Paragraph three of this Section ...

Section 44. Transportation of Firearms, Munitions and High-energy Pneumatic Weapons Across the Border of the Republic of Latvia

(1) A permit issued by the State Police for weapon or munitions import, export or transit shall be necessary for the transportation of firearms, firearm munitions or high-energy pneumatic weapons across the border of the Republic of Latvia,

Section 47. Removal of Weapons, Munitions, Explosives, Explosive Devices, Special Means and Pyrotechnic Articles

(1) The State Police shall remove the weapons, munitions, explosives, explosive devices, special means or pyrotechnic articles of natural or legal persons and cancel the relevant licences and permits if:

1) procedures for the handling of weapons, components of firearms, munitions, explosives, explosive devices, special means and pyrotechnic articles have been violated ...

Section 51. Liability for Violation of Regulations for Handling of Weapons, Components Thereof, Munitions, Explosives, Explosive Devices, Special Means and Pyrotechnic Articles

A person shall be held liable in accordance with the procedures prescribed by law for violation of the provisions specified in this Law and other regulatory enactments regarding the handling of weapons, components of firearms, munitions, explosives, explosive devices, special means or pyrotechnic articles.

When such legislation exists, PSCs cannot traffic in arms, unless they are authorised to produce and commercialise weapons.

The right to carry and use (fire-)arms is also usually subject to a licensing system, particularly based on training in the use of firearms. An example is the Statutes of Vermont, title 26, ch 59, para 3175c (2009):

§ 3175c. Firearms training and certification

(a) *A licensee seeking a firearms certification shall meet the following requirements* [emphasis added]:

(1) An applicant for a private investigator or security guard license to provide armed services shall demonstrate to the board competence in the safe use of firearms by successfully completing a firearms training program approved by the board.

(2) An applicant shall pay the required fee.

(3) An applicant shall obtain the age of majority.

(4) An applicant shall receive a satisfactory federal background check.

(b) *No licensee may possess a firearm while performing professional services unless certified and in good standing under this section [emphasis added].*

§ 3179. Penalties

(a) A person who engages in the practice or business of a private investigator or security guard without being licensed under to this chapter shall be subject to the penalties provided in 3 V.S.A § 127(c) [‘unauthorized practice shall be punishable by a fine of not more than \$5,000.00 or imprisonment for not more than one year, or both’].<sup>41</sup>

The Draft International Convention on PMSCs states:

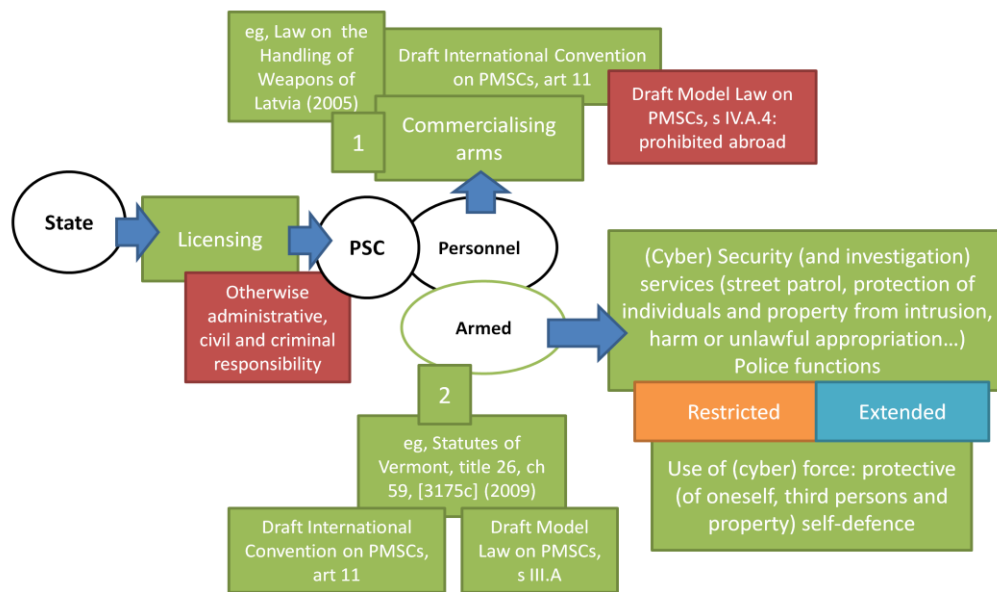
Article 11 - Prohibition on illegal acquisition, possession and trafficking in Firearms, their Parts and Components and Ammunition

1. Each State Party, bearing in mind the principles and standards of international law, shall establish and maintain an effective system of licensing or other authorization, which prohibits PMSCs, their personnel and any sub-contracted personnel from trafficking in firearms, their parts, components or ammunition.

The Draft Model law on PMSCs provides that training as to ‘rules of engagement’ in the use of force can be part of the requisites for licensing (s III.A). Section IV.A.4 also establishes that ‘it is absolutely not appropriate for a contractor to supply arms to foreign nationals under any circumstances.’

*Conclusion:* Regulation is in place in several countries to license using and commercialising (fire-)arms, including administrative, civil and criminal procedures in the case of a breach. The Draft International Convention on PMSCs gives States a wide margin of discretion in regulating the matter. Domestic regulation provides a valid blueprint for the Model Law on PMSCs.

**PSCs – Licensing arms**



**3. LICENSING, AUTHORISING AND REGISTERING PSCs AND THEIR PERSONNEL**

In the majority of States where private companies traditionally provide security services, procedures exist for granting licenses. In particular, PSCs must demonstrate appropriate financial capacities, accurate and up-to-date personnel and property records (with particular regard to weapons and ammunitions), no record of involvement in serious crimes and, to the extent that a PSC or its personnel engaged in past

<sup>41</sup> See also the Law on Private Security Services of Turkey 1588 (2004) art 8.

unlawful conduct, capacity to appropriately deal with such conduct through investigation, disciplinary measures and collaboration with public authorities.<sup>42</sup> Sometimes, licensing is exclusively open to citizens.<sup>43</sup> In this respect, the Private Security Agencies (Regulation) Act of India (2005) provides:

4. Persons or Private Security Agency not to engage or provide private security guard without licence. *No person shall carry on or commence the business of private security agency, unless he/she holds a licence issued under this Act* [emphasis added] ...

5. Eligibility for licence. An application for issue of a licence under this Act shall only be considered from a person after due verification of his antecedents.

6. Persons not eligible for licence. (1) A person shall not be considered for issue of a licence under this Act, if he/she has been:

(a) convicted of an offence in connection with the promotion, formation or management of a company (any fraud or misfeasance committed by him in relation to the company), including an undisclosed insolvent; or

(b) convicted by a competent court for an offence, the prescribed punishment for which is imprisonment for not less than two years; or

(c) keeping links with any organisation or association which is banned under any law on account of their activities which pose a threat to national security or public order or there is information about such a person indulging in activities which are prejudicial to national security or public order; or

(d) dismissed or removed from Government service on grounds of misconduct or moral turpitude.

(2) A company, firm or an association of persons shall not be considered for issue of a licence under this Act, if it is not registered in India, or having a proprietor or a majority shareholder, partner or director, who is not a citizen of India.

13. Cancellation and suspension of licence. (1) The Controlling Authority may cancel any licence on any one or more of the following grounds, namely: (a) that the licence has been obtained by misrepresentation or suppression of material facts ...

20. Punishment for contravention of certain provisions. (1) Any person who contravenes the provisions of section 4 shall be punishable with imprisonment for a term which may extend to one year, or with a fine which may extend to twenty-five thousand rupees, or with both.

22. Offences by companies. (1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly ...

PSCs are mostly licensed by the Ministry of Internal Affairs.<sup>44</sup>

Granting licenses to PSC personnel is particularly subject to proof that personnel are professional and well-trained, specifically as to the use of force and weapons, and clear of criminal convictions and acts contrary to the security of the State, or conflicting activities.<sup>45</sup> For instance, the Statutes of Vermont, title 26, ch 59, para 3174 (1981), provide:

§ 3174. Security guard licenses

(a) *No person shall engage in the business of security guard or provide guard services in this State without first obtaining a license* [emphasis added]. The board shall issue a license after obtaining and approving all of the following:

(1) An application filed in proper form.

(2) The application fee.

(3) Evidence that the applicant has attained the age of majority.

(4) Evidence that the applicant has successfully passed the examination required by section 3175 of this title.

(b) The board may inquire of the Vermont criminal information center for any information on criminal records of the applicant, and the center shall provide such information to the board. The board, through the Vermont criminal information center, may also inquire of the appropriate State criminal record repositories in all States in which it has reason to believe an applicant has resided or been employed, and it may also inquire of the Federal Bureau of Investigation, for any information on criminal records of the applicant. When fingerprinting is required, the applicant

---

<sup>42</sup> See House of Commons, Foreign and Commonwealth Office, *Green Paper on PMSCs* (2002) [73] ff and UNDOC (2014) 36-8.

<sup>43</sup> See, for instance, the Law on Agencies Protecting Persons and Property and Private Detective Activities of Bosnia and Herzegovina (2005) art 4.

<sup>44</sup> See the Law on Private Security Services of Turkey 1588 (2004) art 5, the Iraqi PSCs Registration Regulation (2015) and the websites of GardaWolrd and Erinys Iraq.

<sup>45</sup> UNDOC (2014) 33-6.

shall bear all costs. The board may also make additional inquiries it deems necessary into the character, integrity, and reputation of the applicant.

(c) The board shall require that the person has had experience satisfactory to the board in security work, for a period of not less than two years. Such experience may include having been licensed as a security guard in another State or regularly employed as a security guard for a security agency licensed in this or another state, or been a sworn member of a federal, State, or municipal law enforcement agency.

(d) An application for a license may be denied upon failure of the applicant to provide information required, upon a finding that the applicant does not meet a high standard as to character, integrity, and reputation, or for unprofessional conduct defined in section 3181 of this title.

#### § 3179. Penalties

(a) A person who engages in the practice or business of a private investigator or security guard without being licensed under this chapter shall be subject to the penalties provided in 3 V.S.A § 127(c) [unauthorized practice shall be punishable by a fine of not more than \$5,000.00 or imprisonment for not more than one year, or both].<sup>46</sup>

Complex situations have nevertheless been reported in some States, for instance, Angola, Somalia and China, where PSCs allegedly provided or provide services without being duly licensed.<sup>47</sup>

The Draft International Convention on PMSCs follows the legislative model applying in most countries, giving States a margin of regulatory discretion:

#### Article 14 – Licensing

1. *Each State Party shall take such legislative, judicial, administrative and other measures as may be necessary to ensure that PMSCs and their personnel carry out their activities exclusively under the respective licences and authorizations* [emphasis added].

2. Each State party shall ensure that all licences and authorizations issued to PMSCs and their personnel shall be registered in the general Registry of the State and shall be granted following a transparent and open procedure.

3. Each State Party shall establish criteria for granting licences and authorizations to PMSCs, taking into account in particular any records or reports of human rights violations committed by the companies, providing and/or ensuring training in international human rights and humanitarian law and robust due diligence measures.

#### Article 15 – Licensing import and export of military and security services

1. Each State Party shall take such legislative, judicial, administrative and other measures as may be required to ensure that PMSCs and their personnel import and export their services only under the appropriate licences and authorizations.

#### Article 16 – Registration and accountability

1. Each State Party shall take such legislative, judicial, administrative and other measures as may be necessary to establish:

a. Specific and obligatory procedures on governmental registration of PMSCs;

b. Specific legal requirements for persons employed by PMSCs concerning inter alia their training and experience;

c. A ban on the registration of PMSCs offshore.

2. Each State Party shall establish and maintain a general State Registry of PMSCs operating in their jurisdiction, including details of any subsidiaries or holding companies of each registered PMSC.

The Draft Model Law on PMSCs provides similar guidelines:

#### III. Interagency Task Force on the Use and Regulation of PMSCs

A. States intending to establish judicial, administrative, and investigative oversight on PMSCs activities should create an Interagency Task Force responsible for adopting legislation and set up regulatory mechanisms to control and monitor their activities, including *a system of registering and licensing that would authorize these companies to operate and allow them to be sanctioned when the norms are not respected*. When establishing *such regulatory systems of Registration and licensing of private military and private security companies and the individuals working for them*, mechanisms should be put in place to determine minimum requirements for the obligatory transparency and accountability of firms, provide for the background screening and vetting of private military and private security company personnel, ensure adequate training of such personnel on international human rights and international humanitarian law, as well as rules of engagement consistent with applicable law and international standards, and establish effective complaint and monitoring systems, including parliamentary oversight [emphasis added].

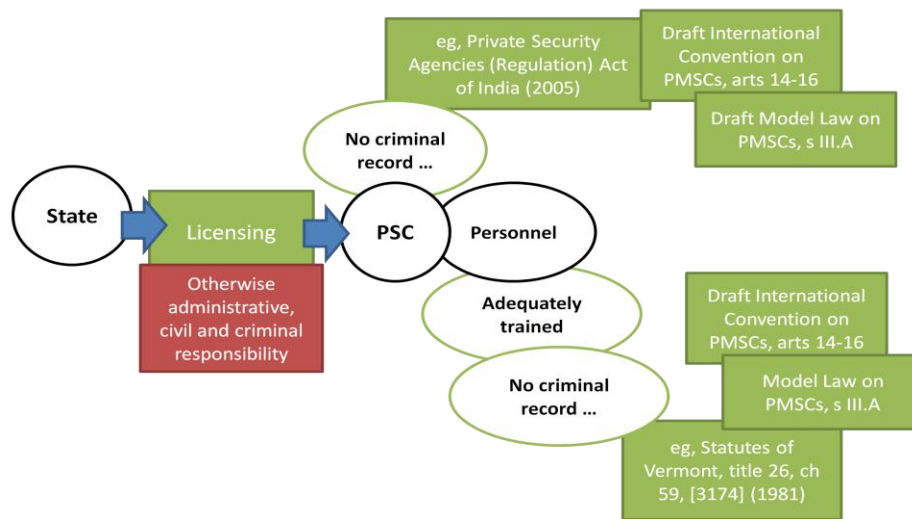
*Conclusion:* In several countries, regulation is in place to license PSCs and their personnel. The Draft International Convention and Model Law on PMSCs build upon this, giving States a margin of regulatory discretion.

<sup>46</sup> See also the Law on Private Security Services of Turkey 1588 (2004) art 14.

<sup>47</sup> See Rafael Marques de Morais, *Private Security Companies and a Parallel State in Angola* (2007); ‘Ministry of National Security Adopts New Regulation towards Private Security Firms’, *Somali News* (27 September 2014); Trevaskes (2007-8) 1.

The situation of States where licensing is ineffective and the causes of such inefficiency should be taken into account.

### Licensing PSCs and their personnel



## 4. ENFORCEMENT: MONITORING AND REPARATION

The enforcement of regulation concerning PSCs takes place via administrative, civil and criminal procedures.

Administrative organs usually monitor PSCs; for instance, in Spain PSCs are controlled by the Ministry of the Interior and the General Director of Police.<sup>48</sup> In China, PSCs operate under the control of local and central security organs of the State.<sup>49</sup> In Malaysia, PSCs are controlled by the Ministry in charge of Security.<sup>50</sup>

Illegal conduct by PSCs may give rise not only to administrative proceedings and sanctions, but also to civil and criminal responsibility, particularly because of the use of force.

Specific violations by private security contractors consist of practising security services beyond the scope permitted by law and failing to be duly licensed, to provide compulsory minimum training in firearms, or to renew due registration.<sup>51</sup> This, as we have seen,<sup>52</sup> leads to applying administrative sanctions.

In this respect, for instance, the New Hampshire Statutes, ch 106-F, 14 (1977) provide:

Section 106-F:14 Suspension or Revocation; Cessation of Operation.

I. *The Commissioner of Safety may revoke or suspend a license issued under this chapter* [emphasis added], after a hearing, if the licensee:

- (a) Violates any provision of this chapter [Detective Agencies and Security Services] or any rules adopted under this chapter.
- (b) Is convicted of fraud, deceit or misrepresentation.
- (c) Makes a material misstatement in a license application or application for license renewal.<sup>53</sup>

Otherwise, PSCs and their personnel are subject to civil and criminal responsibility, like all other legal persons (subject to the possibility of holding corporations criminally accountable).

<sup>48</sup> Law on Private Security Services of Spain No 5 (2014) art 12.

<sup>49</sup> Trevaskes (2007-8) 41

<sup>50</sup> Private Security Act of Malaysia (1971) art 2.

<sup>51</sup> See, for instance, the Law on Private Security Services of Turkey 1588 (2004) arts 19 ff and the Private Security Companies (Regulation and Control) Ordinance of Punjab, LXIX (2002).

<sup>52</sup> See above sections 2 and 3.

<sup>53</sup> See further UNDOC (2014) 49-55.



PSC personnel may particularly commit offences relating to the use of force in non-conflict situations, for instance, resorting to unauthorised violence in breaking up protests.<sup>54</sup> This can be aggravated in war contexts; for example, in the US civil actions have been brought against PSC personnel for acts of torture allegedly committed in Abu Ghraib<sup>55</sup> and criminal proceedings for killing allegedly committed in Nisoor Square, Baghdad, Iraq.<sup>56</sup> PSC personnel operating under the direction and control of military commanders have benefitted from the government contractor defence.<sup>57</sup> In the *Nisoor Square* case, four PSC contractors have been convicted for voluntary manslaughter.<sup>58</sup>

There is also a possible overlap between the activities of PSCs and mercenarism.<sup>59</sup> A narrow definition of mercenarism is provided for in art 47 Additional Protocol I to the Geneva Conventions, the Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989) and the Convention for the Elimination of Mercenarism in Africa (1972). Against this background, some States adopt a more or less restrictive definition of mercenarism,<sup>60</sup> whereas others do not regulate the issue, as in the case of Sweden.<sup>61</sup> The trend, however, is for distinguishing PSC personnel from mercenaries.<sup>62</sup> Particularly, unlike mercenaries, in principle PSC personnel are not recruited to take (direct) part in hostilities. However, the unclear distinction between direct and indirect participation in hostilities blurs the divide between mercenaries and P(M)SC personnel.<sup>63</sup> For the time being, PSC personnel and mercenaries share a similar condition under the law of war, since they are not combatants and their status as prisoners of war is problematic.<sup>64</sup>

States that also rely on PSCs for supporting military activities often set out additional regulation. Thus, according to the legislation of the US, PSC personnel active in conflict zones are subject to control by specific military authorities; Army Regulation 715-9 (2011) provides:

4-1. Contracting authority and oversight

*d. Oversight of contractor personnel.* Contractor personnel are not part of the operational chain of command. They are managed in accordance with terms and conditions of their contract. Commanders have direct authority over CAAF and non-CAAF working on military facilities for matters of administrative procedures and requirements, force protection, and safety of the force. Commanders may restrict contractor access to specific battlefield locations and/or facilities and installations (or portions thereof) based on the operational situation; however, the commander must inform the appropriate contracting authority of these access restrictions as soon as practical, preferably prior to

---

<sup>54</sup> Trevaskes (2007-8) 49.

<sup>55</sup> US District Court of Columbia, *Saleh et al v TITAN et al*, civil actions Nos 05-1165 and 04-1248; US District Court for the Eastern District of Virginia, *Al Shimari et al v CACI Premier Technology et al*, civil action No 1:08cv827.

<sup>56</sup> US District Court for the District Court of Columbia, *US v Slough et al*, criminal action No 1:08-cr-360-RCL.

<sup>57</sup> See, for instance, US District Court of Columbia, *Saleh et al v TITAN et al*, Memorandum Order of 11 June 2007, 23.

<sup>58</sup> US District Court for the District Court of Columbia, *US v Slough et al*, case 1:08-cr-360-RCL, Verdict (2 October 2014).

<sup>59</sup> José L Gómez del Prado, 'Private Military and Security Companies and the UN Working Group on the Use of Mercenaries' (2008) 13(3) *Journal of Conflict and Security Law* 429; Marina Mancini, Faustin Z Ntoubandi and Thilo Marauhn, 'Old Concepts and New Challenges: Are Private Contractors the Mercenaries of the Twenty-First Century?', in Francioni and Ronzitti (2011) 321.

<sup>60</sup> Criminal Code of France, arts 436-1 to 436-5 (2003); Criminal Code of Germany, s 109(h); Foreign Military Assistance Act of South Africa (1998); Criminal Code of Italy, art 288. Unlike France and Germany, Italy has signed and ratified the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. South Africa is not a party to the International and African Conventions on Mercenarism.

<sup>61</sup> Andreas Bergman, 'Sweden', in Bakker and Sossai (2012) 293, 304.

<sup>62</sup> House of Commons, Foreign and Commonwealth Office, *PMCs: Options for Regulation* (2002) [3] ff.

<sup>63</sup> Furthermore, unlike art 47 Additional Protocol I to the Geneva Conventions and art 1(1)(b) of the Convention for the Elimination of Mercenarism in Africa, according to which mercenaries take 'direct part in hostilities', the International Convention against the Recruitment, Use, Financing and Training of Mercenaries refers to either 'participation in hostilities' (art 1) or 'direct participation in hostilities' (art 3). Therefore, allowing PSC personnel to indirectly participate in hostilities under the Draft Convention on PMSCs creates overlap between P(M)SCs and mercenaries, if the latter qualify as such under the International Convention on Mercenaries even if they only take indirect part in hostilities (art 1).

<sup>64</sup> Article 43(2) Additional Protocol I to the Geneva Conventions (1977) and Geneva Convention (III) relative to the Treatment of Prisoners of War (1949); Sossai (2011) 215-6; Bartolini (2011) 228 ff.

imposing such restrictions to ensure that they do not impede the ability of the contractor to meet designated performance requirements and/or to mitigate any contractor performance issues caused by the US Government. Contractor safety violations that do not put the military force at risk will be handled through the appropriate COR, onsite contractor manager, and the contracting officer.

#### 4–2. Legal and disciplinary considerations

*a. International law and contractor legal status.* Under applicable law, contractors may support military contingency operations in a noncombat role if they have been designated as CAAF by the force they accompany, and are provided with an appropriate identification card under the provisions of The Geneva Conventions of 1949, International Committee of the Red Cross, Convention (III) relative to the Treatment of Prisoners of War and DODD 4500.54E.

Human rights standards<sup>65</sup> apply to PSCs by means of private codes of conduct.<sup>66</sup>

State enforcement should be coordinated with enforcement mechanisms established by PSCs.<sup>67</sup> Private enforcement mechanisms, though, have often proved inefficient, especially in conflict situations.<sup>68</sup>

In light of this, the Draft International Convention on PMSCs correctly fosters harmonisation of offences likely to be committed by PSCs and their personnel under domestic law.

#### Article 19

Criminal, civil and/or administrative offences in the sphere of private military and security services

1. Each State party shall ensure that the acts of carrying out inherently State functions, as specified in article 9 of this Convention by PMSCs and their personnel are offences under its national law.
2. Each State Party shall ensure that the unlawful use of force and firearms, unlawful use of certain arms and illicit trafficking in arms by PMSCs and their personnel, pursuant to articles 8, 10, 11 and 18 of this Convention, are punished as criminal offences under its national law.
3. Each State party shall ensure that all activities of PMSCs occurring without the required licence and authorization, including the export and import of military and security services, pursuant to articles 14 and 15 of this Convention, are offences under its national law.
4. Each State party shall take such legislative, judicial, administrative and other measures as to ensure, in accordance with their obligations under international human rights law, international criminal law and international humanitarian law, that individual criminal responsibility is established and that PMSCs and their personnel are held accountable for any violations of the law, that no recourse is taken to immunity agreements, and that effective remedies are provided to victims.
5. In relation to imposing penalties for offences established in this article, due consideration should be paid to offences committed against vulnerable groups.

#### Article 20

Liability of legal persons and entities

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons and entities for the offences established in accordance with article 19 of this Convention.
2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative, or a combination of these.

The Draft Convention does not address the relationship between P(M)SCs and mercenaries.

---

<sup>65</sup> Cf UNDOC (2014) 79 ff.

<sup>66</sup> See, for instance, G4S, *CSR Commitments*; Secopex, *Nôtre Ethique*.

<sup>67</sup> See the International CoC for Private Security Service Providers (2010) Oversight Mechanism (2012).

<sup>68</sup> Human Rights First, *Report – Private Security Contractors at War: Ending the Culture of Impunity* (2008). International enforcement mechanisms, notably the International Criminal Court, play a complementary role with respect to domestic jurisdictions. The responsibility of PSCs may also entail that of States and international organisations, particularly in light of art 8 of the International Law Commission's Draft Articles on State Responsibility and art 9 of the Draft Articles on the Responsibility of International Organisations. This should be taken into account in view of the adoption of the Convention on PMSCs and the acceptance of the complementary Model Law.

Although there seem to be no specific provisions as to reparation for victims in national legislation, the Draft Convention on PMSCs provides:

Article 28 - International Fund for the rehabilitation of victims

1. States parties shall consider establishing an international Fund to be administered by the Secretary-General to provide reparation to victims of offences under this Convention and/or assist in their rehabilitation;
2. The establishment of such a Fund shall be without prejudice to the obligation of PMSCs and/or the individuals criminally liable to directly compensate victims of violations.

This provision is helpful, but what is its specific rationale? Other conventions that aim to harmonise domestic law, for instance, the Convention for the Suppression of Terrorist Bombing, should then also create special funds. Perhaps, the rationale is the possibility that PSCs commit offences in (conflict) areas where it may be difficult to obtain reparation.

General guidelines for the establishment of institutional monitoring mechanisms are also outlined in the Draft International Convention on PMSCs:

Article 13 – National regime of regulation and oversight

Each State Party shall:

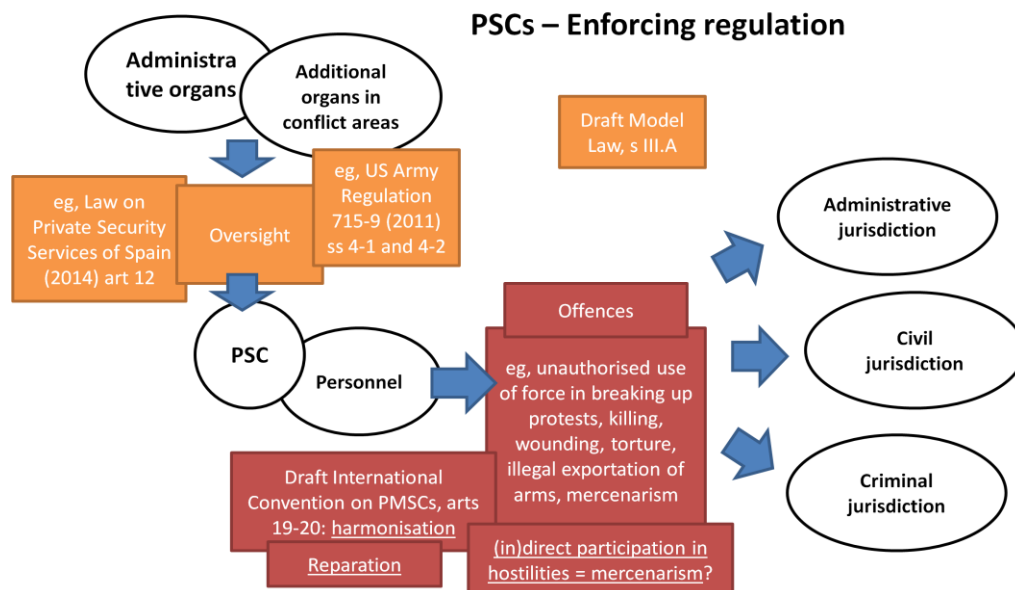
- (a) Establish a comprehensive domestic regime of regulation and oversight over the activities in its territory of PMSCs and their personnel including all foreign personnel, in order to prohibit and investigate illegal activities as defined by this Convention as well as by relevant national laws ...

The Draft Model Law on PMSCs does not deal with offences substantively, but provides broad institutional guidelines for monitoring:

III. Interagency Task Force on the Use and Regulation of PMSCs

- A. States intending to establish judicial, administrative, and investigative oversight on PMSCs activities should create an Interagency Task Force responsible for adopting legislation and set up regulatory mechanisms to control and monitor their activities ...

*Conclusion:* Enforcement mechanisms are in place under administrative, civil and criminal law in States that allow the operation of PSCs. The Draft International Convention on PMSCs provides minimum guidelines to harmonise PSC offences and procedural responses domestically: is this enough to address issues of effectiveness? The Model Law on PMSCs should also provide at least minimum guidelines. Specific oversight mechanisms exist in States that resort to PSCs in conflict areas. However, the unclear notion of ‘direct/indirect participation in hostilities’ blurs the distinction between P(M)SC personnel and mercenaries.



## 5. APPLICABLE LAW

With regard to the scope of application of regulation concerning PSCs, State regulation generally applies domestically. For instance, art 288 of the Italian Criminal Code prohibits the recruiting or arming of citizens for fighting in the service of foreigners ‘within the territory of the (Italian) State’.

The matter is covered by the rules on the conflict of laws (‘private’ international law), determining competent forums and applicable law. Thus, as to criminal responsibility, well-established general principles determining competent jurisdiction and applicable law are: *locus commissi delicti*, active and passive nationality, protective principle and (compulsory) universal jurisdiction.<sup>69</sup> In non-criminal matters, the choice of the parties, *lex loci actus*, or the most connected place should determine the competent forum and applicable law.<sup>70</sup>

The Draft Convention on PMSCs follows these lines (although the protective principle is not taken into account explicitly):

### Article 21 – Establishment of jurisdiction

1. Each State party shall take such measures as may be necessary to establish its jurisdiction through its domestic law over the offences set out in article 19 when:

- (a) The offence is committed in the territory of that State;
- (b) The offence is committed on board a vessel flying the flag of that State or an aircraft registered under the laws of that State at the time the offence is committed; or
- (c) The offence is committed by a national of that State

2. A State party may also establish its jurisdiction over any of the offences set out in article 19 when:

The offence is committed against a national of that State; or

- (b) The offence is committed by a Stateless person who has his or her habitual residence in the territory of that State;

3. This Convention does not exclude any additional criminal jurisdiction exercised in accordance with national law...

5. Each State party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set out in this Article in cases where the alleged offender is present in its territory and it does not extradite such person to any of the States parties which have established their jurisdiction in accordance with paragraphs 1 or 2 of this Article.

### Article 22 – Jurisdiction over other crimes

1. Each State party shall take such measures as may be necessary to establish its jurisdiction over other crimes committed by the personnel of PMSCs in providing their services in the territory of another State party or State not party to this Convention.

### Article 23 – Obligations related to prosecution

1. Each State party shall take such measures as are necessary to investigate, prosecute and punish violations of the present Convention [~~rectius: violations of the law adopted under the present Convention?~~ The Convention binds States], and to ensure effective remedies to victims.

2. Each State party, in the interests of justice, shall take such measures as necessary to ensure that no immunity agreement from prosecution for PMSCs and their personnel for violations of international human rights law and international humanitarian law is enforced.

3. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 19 is found shall in the cases contemplated in article 21, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

If subject to restrictive conditions, the mechanism of compulsory universal jurisdiction is not necessarily an effective remedy.<sup>71</sup>

For the purpose of completeness, guidance should also be provided as to non-criminal acts and offences.

---

<sup>69</sup> See *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v UK)* [1998 ICJ Rep 3].

<sup>70</sup> *Phillips v Eyre* [1870] LR 6 QB 1; *Bronyhton v Commonwealth* [1951] AC 201; *Re United Railways of the Havana and Regla Warehouses Ltd* [1960] All ER 332; Convention on the Law Applicable to Contractual Obligations (Rome I, 1980), subsequently developed into EC Regulation 593/2008, arts 3-4; EC Regulation 864/2007 on the Law Applicable to Non-Contractual Obligations, (Rome II), particularly arts 4, 6, 8 and 10.

<sup>71</sup> See, for instance, German Federal Supreme Court, Prosecutor General, *Criminal Complaint against Donald Rumsfeld et al*, 3 ARP 156/06-2 (Decision of 5 April 2007) 8.

The Draft Model Law is basically silent on this point.

States that resort to PSCs abroad tend to extend regulation extraterritorially, with particular regard to military services. Thus, the UK Green Paper on PMCs elaborates proposals mainly concerned with the activity of PMCs abroad and seeks to extend the law of the home State to acts committed by P(M)SC personnel in the host state, based on the principle of nationality.<sup>72</sup> In the US, some legislation applies or has been extended so as to cover conduct of legal persons abroad, including PSCs and their personnel. Particularly, the Alien Tort Claims Act allows foreign nationals to commence proceedings in US courts for specific violations of the law of nations.<sup>73</sup> The Uniform Code of Military Justice also applies to ‘persons serving with or accompanying an armed force in the field’ in contingency operations.<sup>74</sup> Theoretically, these rules should derogate from general principles on competent forums and applicable law only to the extent that they are embedded in international treaties (unless a State takes a dualist approach to international law). The Draft Convention on PMSCs, though, resolves the problem by (consensually) allowing alternative criteria to establish jurisdiction under art 22.

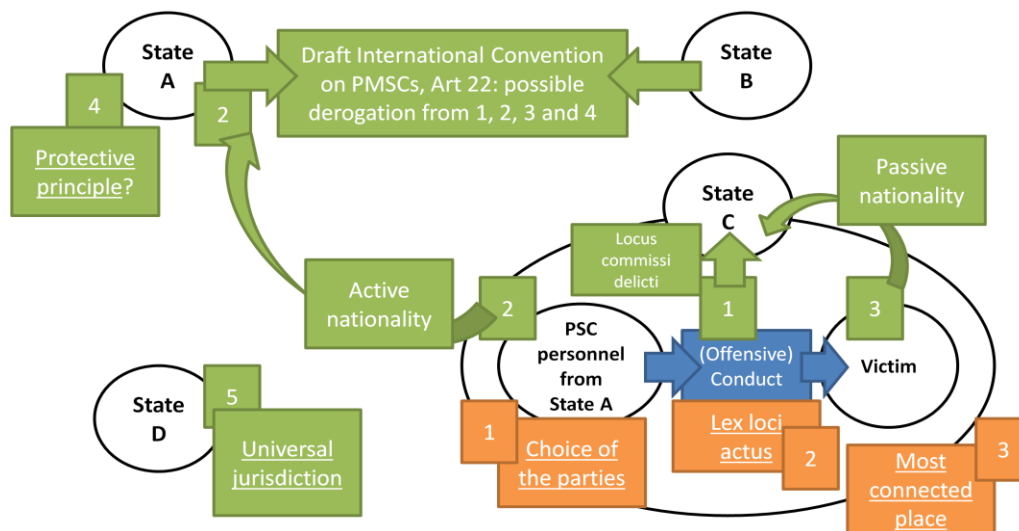
*Conclusion:* The competent forum to adjudicate upon PSCs and their personnel and applicable law are determined based on general law principles:

- criminal matters: *locus commissi delicti*, active and passive nationality, (protective principle) and (compulsory) universal jurisdiction.
- non-criminal matters: choice of the parties, *lex loci actus*, and most connected place.

Article 22 of the Draft Convention on PMSCs allows alternative criteria between the parties, but its application to third States may prove problematic. The Convention should also probably focus on non-criminal conduct. The Draft Model Law should provide guidance in view of harmonisation too.

More generally, the Draft Convention and Model Law on PMSCs correctly facilitate harmonisation of domestic laws, so that, whatever forum and law apply, PSCs are covered by minimum standards.

### PSCs – Applicable law



<sup>72</sup> UK Green Paper on PMSCs (2002) [65] ff.

<sup>73</sup> 28 US Code § 1350 (1948).

<sup>74</sup> 100 US Code § 802(a)(10) (2006).

## CONCLUSION

Problems concern substance, rather than procedure.

### *Substance*

The main issue is defining what activities PSCs can perform. In order to answer this question, the concepts of ‘security’ and ‘war’ should be clearly outlined.

The alternative notion of ‘inherently governmental functions’ and the included distinction between ‘direct’ and ‘indirect participation in hostilities’ are not crystal clear, so much so that the Draft Convention and Model Law on PMSCs take a different stance on prohibited hostility-related conduct. This blurs the divide between P(M)SCs and mercenaries.

In light of their constant evolution, defining and distinguishing ‘security’ and ‘war’ is a complex issue. Arguably, the question concerns conduct, and thus the regulation of the law of war, rather than PSCs as specific legal persons.

Within this context, following the general practice of States, the Draft International Convention and Model Law on PMSCs only aim to allow PSCs to perform (security) services that entail the use of force for protective purposes, that is, fundamentally, in self-defence of oneself or third persons and property, under the international law of both peace and war. The rationale is that a different choice would risk jeopardizing the State monopoly on the use of force. This approach should lead to the exclusion of private security contractors from military activities.

### *Procedure*

The Draft International Convention and Model Law on PMSCs are essential for harmonising licensing, applicable law and enforcement. Domestic regulation provides fundamental guidance, but the structure and scope of these procedures ultimately depend on the definition of permitted PSC activities.

## Selected References

### Documents

[http://psm.du.edu/national\\_regulation/index.html](http://psm.du.edu/national_regulation/index.html)

*International CoC for Private Security Service Providers* (2010)

José L Gómez del Prado and Margaret Maffai, 'Model Law on Private Military and Security Companies' (2009) 26(4) *Wisconsin International Law Journal* 1078

*Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict* (2008)

UN 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, *Draft International Convention on PMSCs*, UN Doc A/HRC/15/25, Annex (2011)

UNDOC, *State Regulation Concerning Private Security Services and Their Contribution to Crime Prevention and Criminal Safety* (2014)

### Bibliography

Bakker, Christine and Sossai, Mirko (eds), *Multilevel Regulation of Military and Security Contractors* (Hart Publishing, 2012)

Francioni, Francesco and Ronzitti, Natalino (eds), *War by Contract – Human Rights, Humanitarian Law, and Private Contractors* (OUP, 2011)

Kelsen, Hans, *Pure Theory of Law* (1934, trans Max Knight, Peter Smith 1989)