

Elements for contracting and regulating private security and military companies

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Abstract

Key issues raised by the use and operation of private military and security companies, particularly in conflict areas, are their accountability and how to control them. National regulation, however, is still rare. States have a role to play first as contractors. Considered selection, contracting and oversight procedures and standards may help promote respect for human rights and international humanitarian law by companies and their staff. Secondly, territorial and exporting states may consider adopting regulations to increase control and promote accountability. In view of this still largely unregulated phenomenon, this contribution considers elements of contracting and regulatory options.



The use of private military and security contractors has grown significantly in recent conflicts, and not only in Iraq. Clients include the private sector (probably still the bulk of the industry's revenues in most countries), non-governmental organizations, international organizations and states. Not least due to the reduction of armed forces after the Cold War, governments are increasingly hiring private companies for tasks such as protecting persons and objects, military and

* The contribution reflects the views of the author alone and not necessarily those of the Department of Foreign Affairs. The author would like to thank Emanuela-Chiara Gillard and Marina Caparini for their valuable comments on an earlier draft.

non-military, training and advising armed and security forces, providing expertise on maintaining and operating complex weapons systems, collecting intelligence and, less frequently, participating in combat operations.¹

The transnational sale of private security and military services raises many policy-related, legal and practical issues. Private actors providing such services do not fall neatly within existing concepts and legal frameworks, not least since the international system is based on states and international law primarily refers to states. This modern trend indeed seems to scratch, if not potentially shake the state's (former?) monopoly on the use of force and activities in war.

Arming private contractors raises fundamental issues of transparency, control of the means of violence and accountability of the armed private actors, since their conduct may have serious and even lethal effects on third parties. The issues of control and accountability become particularly acute where such companies operate in conflict and post-conflict situations, since law enforcement in such situations is often ineffective. "Accountability" is understood to mean "being answerable", i.e. having to account for one's conduct. In a legal sense, companies and/or employees are accountable insofar as they can be held legally responsible (by criminal or civil sanctions) for violating the law, regulations or contract. In addition, companies and their employees may also be accountable in a broader political or societal sense, insofar as they are "answerable" particularly to public authorities and/or to victims and others affected by their conduct.

Insofar as private security and/or military services are in fact being used, how can the issues of control and accountability be addressed, and how might respect for, in particular, human rights and international humanitarian law be promoted? Unfortunately, there probably is no single, simple "catch-all" solution to address the multi-faceted issues raised by the transnational provision of private military and security services in conflict and other unstable situations. Recent expert conferences and meetings have generally concluded that complementary policies and mechanisms by different actors are needed.² Ideally, the different layers of control and regulation should complement if not interlock with each other and rely on coherent standards.³

Contracts are a first and most direct way for any client to require the private contractor and their employees to respect certain standards and avoid undesired external effects.⁴ Another way to address certain issues is for the

1 See e.g., Peter W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, 2003.

2 See e.g., Swiss initiative, Expert Workshop of 16–17 January 2006 in Montreux, *Summary of the Chair*, 11 September 2006, p. 5, available at: <http://www.eda.admin.ch/psc> (last visited 18 December 2006). See also Benjamin Perrin, "Promoting Compliance of Private Security & Military Companies with International Humanitarian Law", *International Review of the Red Cross*, Vol. 88, No. 863, September 2006.

3 On the need for a "regulatory ecology" with regard to private military companies, see Kathleen M. Jennings, *Armed Services: Regulating the Private Military Industry*, Fafo-Report 532, 2006, at 11 et seq., available at: <http://www.fafo.no/> (last visited 14 December 2006).

4 See e.g., Laura A. Dickinson, "Contract as a tool for regulating private military companies", in Simon Chesterman/Chia Lehnardt (eds.), *From Mercenaries to Markets: The Rise and Regulation of Private Military Companies*, Oxford University Press (forthcoming 2007). See also W. Hays Parks, *The*

industry to self-regulate, for instance, by adopting company or industry-wide standards such as public codes of conduct and having trade associations effectively enforcing agreed standards.⁵

States do clearly have a role to play, be it individually or on a regional or international level. International law establishes direct as well as due diligence obligations of States. States hiring private security and military companies (“contracting states”) for operations abroad must respect their international legal obligations and cannot elude them by outsourcing activities. For example, they have an obligation to ensure respect of international humanitarian law. In addition, states are responsible for violations of international law and particularly human rights and international humanitarian law committed by private contractors they hire that can be attributed to them.⁶ States on whose territory such companies operate (“territorial states”) as well as states from whose territory their services are “exported” (“exporting states”) must, for instance, punish grave breaches of the Geneva Conventions. Moreover, there may be circumstances in which states must take appropriate measures or exercise due diligence to prevent, punish, investigate or redress the harm caused by the acts of private companies or their staff that impair human rights.⁷ Contracting standards and procedures as well as national regulation laying down conditions companies must satisfy in order to be allowed to operate by the territorial and exporting states may offer ways to ensure control over private security and military companies, increase

Perspective of Contracting and “Headquarters” States, background document prepared for the Expert Workshop of the Swiss initiative of 16–17 January 2006, p. 5–6, available at: <http://www.eda.admin.ch/psc> (last visited 14 December 2006).

- 5 The British Association of Private Security Companies (BAPSC) has adopted a charter, available at: <http://www.bapsc.org.uk> (last visited 18 December 2006), as well as membership criteria. The International Peace Operations Association (IPOA) has elaborated a code of conduct, which currently is in its 11th version, available at: <http://ipoaonline.org> (last visited 18 December 2006). The Private Security Company Association of Iraq (PSCAI) has included a mini code of conduct in section 9 of its recently adopted Charter, even if it may be too short and generally formulated to give much guidance, available at: http://www.psc.ai.org/Docs/PSCAI_Charter_Final.pdf (last visited 9 December 2006). The intention to create a European association of private security companies (being active also beyond Europe) was announced at a roundtable discussion in Brussels on 7 December 2006, see Security & Defence Agenda, *The private security phenomenon: policy implications and issues* available at: <http://www.forum-europe.com/publication/ScD-PrivateSecurity/Dec2006.pdf> (last visited 30 January 2007). In contrast to the relatively new formation of associations of security companies transnationally operating private associations in domestic (and not so much conflict) settings have existed for many years. The Confederation of European Security Services has also elaborated a code of conduct for domestic security contractors, see CoESS/Uni-Europe, Code of conduct and ethics for the private security sector, July 2003, available at: http://www.coess.org/documents/code_of_conduct.pdf (last visited 18 December 2006). See also Andrew Bearpark/Sabrina Schulz, “The Regulation of the Private Security Industry and the Future of the Market”, in Chesterman/Lehnhardt (eds.), above note 4.
- 6 On the question in what cases private contractors’ conduct can be attributed to a state hiring it, see University Centre for International Humanitarian Law, *Expert Meeting on Private Military Contractors: Status and State Responsibility for Their Actions*, 2005, available at: http://www.uchl.org/communication/private_military_contractors_report.pdf (last visited 14 December 2006); Chia Lehnhardt, “Private military companies and state responsibility”, in Chesterman/Lehnhardt (eds.), above note 4.
- 7 See Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 8.

their accountability, and help promote respect for international human rights law and international humanitarian law by them and their employees.⁸

This contribution considers some of the contracting and regulatory options available to states, primarily with respect to the transnational provision of private security and military services, with a focus on the delivery of such services in conflict situations and fragile states. The article, in particular, contemplates possible elements for contracting standards for states hiring such companies and possible elements of regulatory frameworks in territorial and exporting states. Elements considered draw in part on existing contracting practice and existing or planned regulation frameworks relating to the transnational sale of private security and military services and, where international precedents are scarce, also on domestic settings. It is hoped that the present considerations may contribute to and stimulate further comparative analysis of existing regulatory frameworks and the elaboration of practical approaches.

Contracting states

Contract provisions are a simple tool for regulating contractor behavior with direct impact. The contract specifies the terms of conduct and employment to which the contractor, in order to be competitive and win the bid, must agree and demonstrate capability of compliance. Considered contract awarding procedures, terms and compliance monitoring may therefore contribute to choosing the best services and to promoting the application of the standards desired and accountability by private security and military companies, including with regard to international human rights law and international humanitarian law.⁹

This chapter considers practical issues that may be contemplated with regard to contracting and deliberates possible contract elements and benchmarks against which to measure applicants and their services. Some best practices have already been compiled. The manual for organizations awarding contracts for

8 On the obligations of states in relation to such companies under international human rights law, see Andrew Clapham, *International Review of the Red Cross*; Francoise Hampson, *The Implications of Human Rights Law*, background document prepared for the Expert Workshop of the Swiss initiative of 13–14 November 2006 (on file with author); Cordula Droegge, *Private Military and Security Companies and Human Rights: A Rough Sketch of the Legal Framework*, background document prepared for the Expert Workshop of the Swiss initiative of 16–17 January 2006, available at: <http://www.eda.admin.ch/psc> (last visited 14 December 2006); Alexis Kontos, “Private security guards: privatized force and State responsibility under international human rights law”, *Non-State Actors and International Law*, Vol. 4, No. 3, 2004, p. 199. On the obligations of states in relation to such companies under international humanitarian law, see Emanuela-Chiara Gillard, “Business Goes to War: Private Military/Security Companies and International Humanitarian Law”, *International Review of the Red Cross*, Vol. 88, No. 863, September 2006; Lindsey Cameron, “Private Military Companies: Their Status under International Humanitarian Law and its Impact on their Regulation”, *International Review of the Red Cross*, Vol. 88, No. 863, September 2006. On regulating the industry, see e.g., Caroline Holmqvist, *Private Security Companies: the Case for Regulation*, SIPRI Policy Paper, No.9, January 2005; Kathleen Jennings, above note 3; Fred Schreier/Marina Caparini, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, Geneva Centre for the Democratic Control of Armed Forces, March 2005, p.120.

9 See e.g., Laura A. Dickinson, above note 4. See also W. Hays Parks, above note 4.

private guarding services elaborated by the European Confederation of Security Services (CoESS) and Uni-Europa (trade unions) in 1999,¹⁰ for instance, offers useful recommendations, even if it focuses on guarding services in domestic and peaceful settings. In contrast, the Sarajevo Client Guidelines for the Procurement of Private Security Companies proposes best practices specifically for post-conflict situations in the south eastern European region.¹¹

Information to be submitted by the bidding company

The search for the best private contractor for security or military services should not only focus on the price but also take into account other elements, such as the quality of the service, due diligence, ethics, training of the employees, etc. To facilitate the selection, private security and military companies applying for a contract should be requested to provide relevant information and documents, possibly by a standard procurement questionnaire.¹² Information and documents to be requested could include:¹³

- proof of possession of relevant licenses and authorizations where required by law, which may include:
 - registration or licensing of the company or membership of a relevant industry association in the territorial state, where required by that state's legislation;
 - registration or licensing of the employees in the territorial state or possibly also in an employee's state of nationality, where required by these states' legislation;
- information on the ownership and, if applicable subsidiary corporation relations, as well as on the financial situation of the company, including statements of overall turnover and profits over the last few years, audited accounts and proof of adequate liability insurance;
- information on the qualifications of the management and the operatives, including on the latter's selection and vetting process, training offered, skills and experience, turnover rate and number;
- information on the company's principal services provided in the last few years, generally and in the country concerned, as well as on major contracts awarded for the provision of services similar to those applied for;

10 CoESS and Uni-Europa, *Selecting best value: A manual for organisations awarding contracts for private guarding services*, 10 June 1999, available at: http://www.coess.org/documents/public_tendering.pdf (last visited 9 December 2006). The CoESS has produced several further documents that may be of interest, all available at <http://www.coess.org> (last visited 9 December 2006).

11 South Eastern and Eastern Europe Clearinghouse for the Control of Small Arms and Light Weapons (SEESAC), *The Sarajevo Client Guidelines for the Procurement of Private Security Companies*, available at: <http://www.seesac.org/reports/Procurement%20guidelines.pdf> (last visited 9 December 2006).

12 An interesting example is the Pre Qualification Questionnaire (PQQ) for the procurement of private security services elaborated by UK's Foreign and Commonwealth Office (on file with author).

13 See also CoESS/Uni-Europa, above note 10; SEESAC, above note 11.

- information on quality management mechanisms or certification as well as applicable codes of conduct and other rulebooks of the company;
- professional or trade association membership.

Of course, the mere submission of the information listed above is not sufficient. The applicant company must live up to the claims it makes.

Selection criteria

Criteria for selecting a company could include elements such as the possession of all required authorizations, adequate procedures and standards concerning selection, vetting and training of the employees, rulebooks and standard operating procedures, internal oversight, and compliance and sanctions mechanisms. Membership in an association and adherence to its code of conduct,¹⁴ as well as vetting or accreditation by an independent organization or even a respected trade association could also be an indicator of quality.¹⁵ Disqualifying criteria may include implication in serious crimes by the management or the company's employees, prior grave professional misconduct, the submission of misleading information, or an unsound or non-transparent financial situation and ownership. The CoESS manual on awarding private guarding contracts and the Sarajevo Client Guidelines for the Procurement of Private Security Companies contains systematic schemes facilitating the assessment of tenders according to elements classed into four categories: personnel standards, contract management/operations, contract infrastructure and company standards.¹⁶

Specifying obligations by contract

Once the company has been selected, the contract is a simple and direct tool to specify obligations of the company and its employees. The contract can provide that the company and its employees must comply with the legislation of the state in which they operate as well as all applicable international law, including human rights and, insofar applicable, international humanitarian law.¹⁷ The contractual terms could even provide that private contractors must abide by relevant human rights and humanitarian law rules applicable to governmental actors. Such a provision, in its conception not uncommon to domestic settings, would avoid the uncertainty as to whether a specific private contractor is a governmental actor and therefore legally bound to obey the same rules, and it would, in any event, allow

14 The UK government has stated that adherence to such a code could indeed become a factor in approving the export of private military services, see UK Foreign Affairs Committee, *Response of the Secretary of State for Foreign and Commonwealth Affairs (with regarding to the Green Paper)*, Session 2001–2002, October 2002.

15 Laura A. Dickinson, above note 4.

16 CoESS/Uni-Europa, above note 10, pp. 7–8 and 12–16 and 23–24; SEESAC, above note 11, pp. 5–6.

17 A 2005 US Department of Defense (DoD) instruction provides that contractors “shall abide by applicable laws, regulations, DOD policy, and international agreements,” US DoD Instruction, No. 3020.41, 3 October 2005, §6.1.

for contract enforcement.¹⁸ In terms of standards to be respected by the companies and their employees, reference could also be made to non-binding standards, such as the Voluntary Principles on Security and Human Rights,¹⁹ the UN Code of Conduct for Law Enforcement Officials,²⁰ the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials of 1990,²¹ and best practices developed by companies, civil society or governments, including instruments such as the Sarajevo Code of Conduct for Private Security Companies.²²

The contract could also contain obligations to ensure that all employees are identifiable, at least by way of identity cards, to prohibit any subcontracting or make it dependent on prior approval, to abide by anti-corruption and transparency norms, to avoid activities that would result in a conflict of interests, and a reference to the obligation of confidentiality. Given that the selection of the operatives on the ground is crucial, the contract could explicitly provide for the company to vet all its employees and not to hire or arm anyone with a criminal record or past involvement in human rights or international humanitarian law abuses. The company could be required to provide a list of all employees for further background checks. Persons found to be not in conformity with these criteria would have to be discharged from their tasks immediately.

Training

A key element to ensure respect for human rights, international humanitarian law and adequate conduct on the ground is adequate training of the employees. The company should therefore be required by contract to ensure that each employee carrying out the services concerned has received sufficient training, both generally and in a context- and task-specific manner adapted to each assignment. Training should generally be provided in the standard operating procedures in the situations to be expected; in conduct vis-à-vis persons showing violent behavior, including self-defense and defense of others; in the relevant standards of national and international law, including human rights and, where relevant, international humanitarian law; particularly in a transnational context in cultural sensitivity (appropriate conduct vis-à-vis persons of a different cultural, religious or other background); in rules concerning bribes and conflicts of interest; and possibly also in first aid and health risks. Furthermore, the contract should require that any employees carrying a weapon be adequately trained in its use, know the respective operational rules, and that all weapons be duly registered.

18 Laura A. Dickinson, above note 4.

19 Available at: <http://www.state.gov/g/drl/rls/2931.htm> (last visited 9 December 2006).

20 Adopted by UN General Assembly Resolution 34/169 of 17 December 1979.

21 Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, 27 August – 7 September 1990, available at: http://www.unhcr.ch/html/menu3/b/h_comp43.htm (last visited 9 December 2006).

22 UNDP SEESAC, *The “Sarajevo Process Code of Conduct”*, 2006, available at: <http://www.seesac.org/reports/Code%20of%20conduct.pdf> (last visited 9 December 2006).

A 2005 US Department of Defense instruction on Contractor Personnel Authorized to Accompany the U.S. Armed Forces provides that prior to deployment all contractors must “validate or complete any required training (e.g., Geneva Conventions; law of armed conflict; general orders; standards of conduct; force protection; personnel recovery; medical; operational security; anti-terrorism; nuclear, biological and chemical protective gear; country brief and cultural awareness; and other training as appropriate).²³

Monitoring

Appropriate monitoring and oversight, both internally by the company and by the contracting authority and/or others, are crucial to promoting accountability. The company can be required by contract to monitor and sanction misbehavior itself, for instance through an internal compliance mechanism that envisages “whistleblowers” within the company. Furthermore, the contract should spell out reporting obligations of the company, including periodical reports on contract performance to the contracting authorities; reports following particular incidents, such as the use of violence, changes in the employee pool or a possible, suspected or alleged violation of the law; reports upon request of the contracting authority; and reports to the local authorities in case of a violation of the applicable law.

To effectively monitor contract performance as well as compliance with applicable codes and rules, government oversight would need to include trained and experienced governmental contract monitors. Potential performance indicators could include no-show rate; misuse of force; violations of agreed standards or procedures, company or industry codes of conducts or best practices, or the law; other violations of the contract terms; and complaints.²⁴

A particular challenge is that the company operates far away from the contracting authority, often in conflict zones. Therefore, information from third parties, such as the territorial government, other clients, or also civil society, organizations and the media, may be valuable but would likely be occasional at best. Clients might consider externalizing some audit or inspection and monitoring functions to an independent commission, company, organization or team with experience in the areas of international and particularly human rights law, business practices, and security and/or the military. Given that the local population may neither know nor have the means to file a complaint with authorities or courts in the contracting state, a challenge is to give them a voice and allow them to access courts or alternative grievance procedures established by the client, the contractor or a professional association.²⁵

Transparency and external oversight over the regulator’s practice can be advanced by regular reports to parliament with lists of current contracts between governmental departments and private military and security companies. Also,

23 US DoD Instruction, No. 3020.41, 3 October 2005, §6.2.7.1.

24 See SEESAC, above note 11, p. 8.

25 On the feasibility of creating third-party beneficiary rights, see Laura A Dickinson, above note 4.

centrally holding information on contracts between governmental departments and private military companies²⁶ may help establish coherent standards within the same government. Information, for example, on misconduct (blacklisting) might also be exchanged, particularly with the state on whose territory the contractor operates and possibly with other clients.

Sanctions and criminal jurisdiction

For breaches of contract, the contract can provide for penalties, including fines, termination of the contract and exclusion from entering or raising the benchmarks for entering future bidding processes. States should ensure that there is a mechanism for reporting, investigating and prosecuting any misconduct. They must ensure that their courts have the jurisdiction to prosecute crimes under international law, such as war crimes, crimes against humanity and torture, particularly if the security or military services are to be carried out in conflict situations or weak states that may not offer an effective criminal justice forum.²⁷ Employees responsible for crimes under international law, such as grave breaches of the Geneva Conventions, must be brought to justice or extradited for that purpose insofar as they are found on the hiring state's territory. In addition, hiring states should consider whether they would have jurisdiction over foreign employees of the security or military company they have hired, insofar as these employees commit crimes abroad and remain abroad.²⁸ One way to help prevent criminal behavior may be by establishing the criminal responsibility of company managers for crimes under international law (such as war crimes, crimes against humanity or the crime of torture) committed by their employees and resulting from the managers' negligence. The hiring state might also consider providing jurisdiction over complaints regarding a company's civil liability or even the criminal responsibility of its employees or directors.

The circumstances under which managers and directors of private military and security companies may bear individual criminal responsibility for international crimes committed by their employees merits further analysis and research. Article 28(b) of the 1998 Rome Statute on the International Criminal Court indeed suggests that superiors, such as company directors or managers, may become criminally

26 This has also been recommended by the UK's Foreign Affairs Committee, *Private Military Companies: Ninth Report of Session 2002–02* (on the Green Paper), Session 2001 – 2002, recommendation (a).

27 In Iraq, the Coalition Provisional Authority (CPA) has even granted immunity from the Iraqi legal process to contractors for acts performed by them pursuant to the terms of a contract or a sub-contract thereto with states providing personnel, etc., to the CPA, the multinational forces or with other specific international links, CPA Order No. 17 (revised). Granting such immunity makes it necessary, in order to avoid impunity, to ensure the availability of an effective alternative law enforcement and jurisdictional mechanism, in particular in the contracting or possibly also the exporting state.

28 Many states subject the exercise by their own courts of universal jurisdiction over crimes under international law to the presence of the accused on their territory. If such a state hires a company for services abroad, and, where these employees are nationals of another state and commit crimes under international law, the hiring state potentially could incur state responsibility for crimes attributable to it, while its own courts would be unable to initiate proceedings against the perpetrators.

responsible for crimes committed by their subordinates where they fail to take reasonable measures to prevent or repress these acts. However, several cumulative conditions (that need interpretation) must be met for this. Most importantly, the subordinates must be under the superior's "effective authority and control"; the crimes must concern activities within the superior's "effective responsibility and control"; he or she must know or consciously disregard information; he or she must fail to "exercise control properly" and not take "all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution"; and, finally, this must result in at least a higher risk of such crimes.²⁹

Territorial states

States on whose territory private security and military companies operate may adopt regulations, *inter alia*, in order to control the use of force and protect their population from undesired consequences that may potentially arise from the operation of private security and military companies. Such a set of authoritative rules provided by the government and overseen by an agency contributes to the setting of standards.

Existing regulations in territorial states

Most European states have adopted regulations of one type or another that determine preconditions for private security companies to operate on their territory.³⁰ The regulatory frameworks, however, differ significantly. Some states have adopted specific private security laws, such as France or the United Kingdom.³¹ Others have different regulations for different parts of the federal system, such as in Switzerland where there are endeavors to elaborate common standards and harmonize the regulations.³² In still others, the regulatory framework is based on general commercial law.³³

29 See e.g., Kai Ambos, "Superior Responsibility", in Antonio Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2002, p. 823.

30 For an overview of existing regulations, see CoESS and UNI-Europa, *Panoramic overview of private security industry in the 25 Member States of the European Union*, 2004, available at: <http://www.coess.org/studies.htm> (last visited 14 December 2006); Tina Weber, *A comparative overview of legislation governing the private security industry in the European Union*, ECOTEC Research and Consulting, Birmingham, 2002; SEESAC, *SALW and private security companies in South Eastern Europe: A Cause or Effect of Insecurity?*, Belgrade, 2005, available at: <http://www.seesac.org> (last visited 14 December 2006); European Committee on Crime Problems, *Regulating Private Security in Europe: Status and Prospects (Report by the Geneva Centre for the Democratic Control of Armed Forces, forthcoming in 2007)*.

31 See e.g., France, *Loi réglementant les activités privées de sécurité du 12 juillet 1983*, modifié le 10 mars 2004; United Kingdom, *Private Security Industry Act of 2001*, available at: <http://www.the-sia.org.uk> (last visited 14 December 2006).

32 See e.g., *Concordat du 18 octobre 1996 sur les entreprises de sécurité de la Conférence Latine des chefs des Départements de Justice et Police*, available at: <http://www.eda.admin.ch/psc> (last visited 14 December 2006).

33 See European Committee on Crime Problems, above note 30.

However, many states on whose territory armed conflicts take place or have recently taken place lack such regulations. Exceptions include the requirement of licenses under Section 19 of Sierra Leone's National Security and Central Intelligence Act of 4 July 2002,³⁴ the Coalition Provisional Authority's (CPA) Memorandum No. 17 of 26 June 2004 on Registration Requirements for Private Security Companies desiring to carry out private security services in Iraq and at this moment continuing to be applied,³⁵ and the Kurdistan Regional Government's guidelines on Private Security Company Requirements for Iraqi Kurdistan dated 7 December 2005,³⁶ which must be read together, most particularly, with the CPA Memorandum No. 17 and CPA Orders Nos. 3 (Revised) (Amended), 17 (Revised), and 100. Moreover, the governments of Iraq and Afghanistan are currently drafting national regulations on the matter.

Developing a model regulatory framework on licensing private security (and possibly even military) services for countries in conflict or transition that lack regulation could be considered as a way to assist the relevant governments to develop regulation. Such a model might also be useful to occupying powers or with regard to UN-administered territories.

Options and possible elements of regulation in territorial states

States wishing to increase their control and oversight over companies carrying out armed security or military services on their territory may take two principal approaches to specific regulation. They may either prohibit private contractors from carrying out certain military or armed security activities, and/or determine preconditions such companies and operatives must meet in order to be allowed to carry out such activities. For the latter option, a licensing regime may be considered, in particular where the government seeks to promote good standards and improve the control over and accountability of private security and military contractors operating in its territory. We will consider four different options that can be combined in different ways:

- a ban on private contractors carrying out certain security or military services in the state's territory or jurisdiction;
- the company must obtain an operating license to be allowed to undertake defined (armed) security or military services (company licensing);
- the company must obtain approval for individual contracts relating to the provision of defined (armed) security or military services (contract licensing or notification); and/or
- each individual operative must obtain an operating license to be allowed to carry out defined (armed) security or military services.

34 Available online at <http://www.sierra-leone.org/Laws/2002-10.pdf> (last visited 14 December 2006).

35 Available online at <http://www.cpa-iraq.org/regulations> (last visited 14 December 2006).

36 An English version is available online at http://www.psc.ai.org/Docs/Foreign_Security_Company_Guidelines.pdf (last visited 14 December 2006).

Banning certain activities

Private contractors could be prohibited from carrying out certain military, policing and other armed security activities. Section 9(1) of CPA Memorandum No. 17, for instance, precludes private security companies and their employees from conducting any law enforcement activities. A different approach could be to prohibit mercenary activities, even if such a prohibition would hardly be an effective means to address many of the issues raised by private military and security services.³⁷

Licensing regimes

Company licensing

The first option of “company licensing” is a typical mechanism to control commercial activity by which a specific company is authorized to engage only in a defined commercial activity in a state’s jurisdiction with the approval of the governmental authorities. Such a license could be granted for a limited timeframe. Again, the security and military activities concerned would need to be clearly defined.³⁸ A crucial element will be the establishment of workable procedures and the provision of the necessary resources, authorities and training to the administrative entity examining licensing requests. Other issues to consider may include whether the licensing requirements should be identical for local and foreign companies. In the case of foreign companies whose state of nationality requires an operating license for the sale of such services abroad, the domestic operating license could be linked to proof of a valid export license.

³⁷ Mercenarism is very restrictively defined by both the UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989 and the African Union’s Convention for the Elimination of Mercenarism in Africa. The required cumulative elements in the definitional first article of both conventions include the individual’s motivation “to take part in the hostilities essentially by the desire for private gain” and the individual being “specially recruited ... in order to fight in an armed conflict.” Hence, it would be very difficult to prosecute successfully anyone for the crime of mercenarism, which is why observers have raised doubts about the prohibition’s effectiveness. Moreover, outlawing mercenary activities would not provide answers to issues raised by the use of armed force by the vast majority of employees of private military companies that would not seem to fall under that definition. See UK Foreign and Commonwealth Office (FCO), *Private Military Companies: Options for Regulation* (the so-called “Green Paper”), p. 23; Peter W. Singer, “War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law”, *Columbia Journal of Transnational Law*, Vol. 42, No. 2, 2004; Juan-Carlos Zarate, “The Emergence of a New Dog of War: Private International Security Companies and the New World Disorder”, in *Stanford Journal International Law*, Vol. 34 (1998), pp. 93 and 121; International Alert, *The Mercenary Issue at the UN Commission on Human Rights: the Need for a New Approach*, 2001, pp. 28–29.

³⁸ Section 19(9) of Sierra Leone’s National Security and Central intelligence Act defines “private security company” as a “company providing security services, including armed escort services, to persons, homes, businesses or institutions, whether public or private.” For a definition of “manned guarding” with regard to domestic private security contractors, see e.g., the UK’s Private Security Act 2001, Schedule 2, section 2.

Criteria such as the following could be required to grant an operating license or could be written into the contract, similar to the contracting elements considered above:

- existence as a legal person, including, where applicable, proof of registration and/or a general business license;³⁹
- provision by the company of sufficient information to evaluate its reputation and financial situation, to identify its managers, stakeholders and home state, nature of services it intends to offer, etc;⁴⁰
- qualification of company managers and employees, including passing employee background checks by the company itself, the authorities, or both,⁴¹ and adequate training;
- good company management and ethics requirements, including for instance appropriate codes of conduct and rulebooks and internal compliance as well as internal disciplinary and sanctions mechanisms. An obligation to investigate allegations of misconduct and breaches of law and to report them under certain circumstances to the authorities should be written into the license. Membership of recognized associations and adherence to industry codes of conduct⁴² may be a plus;
- a sound financial situation, as well as proof of adequate insurance cover, and/or the submission of a bond that is forfeited if the contract terms or the law are violated;⁴³

39 Section 2(1) of CPA Memorandum No. 17, for instance, requires that private security companies first need a “Business Licence” (issued by the Ministry of Trade) granting a general right to carry out business in Iraq and, second, an “Operating Licence” issued by the Ministry of Interior under the Memorandum. Prior to being granted both licenses, the same section envisages the alternative option of a “Temporary Operating License”. Paragraph 4(b) of the same section requires “proof of registration of the company, and if the PSC is registered in a state other than Iraq proof of registration of the company in its home state.”

40 Section 2(4) of CPA Memorandum No. 17 requires, *inter alia*, the following information: “(b) the full names of all employees, company officers and directors ...; (c) details of the work PSC will be carrying out in Iraq, including any relevant documentation (e.g. a copy of any contracts for services or statement of intent to hire the PSC, including the details of number of employees and customers).” Section 19(3) of the 2002 National Security and Central Intelligence Act of Sierra Leone requires similar information for a licensing application, including information on “(b) financial resources ..., (c) the particulars of the applicant and other promoters, directors, and other officers of the company, and (d) other information as [the licensing authority] may require.” Section 3 of the Kurdish Regional Government Private Security Company Requirements additionally requires specification of the companies or individuals that the security company is contracted to protect, and the areas that the company will physically operate within, as well as lists of all expatriate personnel’s names and countries of origin, of local personnel, and of all company vehicles.

41 Section 2(5) of CPA Memorandum No. 17 foresees that officers and employees must pass vetting by the Ministry of Interior. Possible criteria for such vetting are described with regard to the option of a licensing regime for individual operatives further below.

42 For a code of conduct of the European domestic private security industry, see CoESS/Uni-Europa above note 5, *Code of conduct and ethics for the private security sector*, July 2003, available at: http://www.coess.org/documents/code_of_conduct.pdf (last visited 14 December 2006).

43 Section 3 of CPA Memorandum No. 17 requires a minimum refundable bond of \$25,000 or more, depending on the number of company employees, as well as evidence of sufficient public liability insurance. The bond is forfeited if the company fails to provide information every six months or upon request, or if employees or the company breach Iraqi or other applicable law. Section 3 of the Kurdish

- identification of employees, as a minimum by means of an identity card to be shown upon demand, in order to increase accountability and potentially allow for lodging complaints;
- periodic reporting on contract performance as well as incident reporting. The company might periodically be subjected to a limited evaluation or obligation to submit reports, for example any time a significant change (e.g. with regard to company structure, type of services, employee recruitment changes etc.) or incident occurs;⁴⁴
- obligation to conduct operations in accordance with specified rules, including codes of conduct and operational rules on the use of force;⁴⁵
- the authority should re-affirm in the license the obligation of the company and its staff to respect national law, including criminal, corporate, labor, immigration and tax law, as well as applicable international standards, including human rights and, where relevant, international humanitarian law;⁴⁶

Contract licensing or notification

Given the sensitivity of armed security or even military services, in addition to issuing company licenses for the type of services envisaged, consideration might be given to subjecting each contract or transaction of a certain kind or amount to prior approval by governmental authorities. It would, however, need to be seen whether such a “transaction by transaction” control is realistic and how many additional administrative resources it would require. The period of time necessary for the authorities to process a license request should not become excessive.

Alternatively, an obligation of simple notification could be envisaged, whereas the authorities would have the right to intervene should the contract not comply with requirements.

Possible considerations for the approval of a specific contract or “transaction” might, for instance, include the likelihood of the services being used to facilitate violations of international law and standards, in particular human rights, as well as national laws, the envisaged positive or negative impact of

Regional Government Private Security Company Requirements requires a company insurance certificate and (apparently only under certain circumstances) an original bond certificate drawn on an Iraqi bank.

44 Section 7 and 3(2) of CPA Memorandum No. 17 require information to the authorities every six months on financial and employment records, contract status and weapons data. Failure to provide such information may result in the forfeiture of the bond.

45 Section 9(4) of CPA Memorandum No. 17 specifies that operations must be conducted in accordance with rules on the use of force annexed and a code of conduct for private security companies operating in Iraq, both annexed to the memorandum. The rules on the use of force for instance require treating civilians with dignity and respect, maintaining a current weapons training record and not joining coalition or multi-national forces in combat operations except in self-defense or in defense of persons as specified in the contracts. Section 8 of the Kurdish Regional Government Private Security Company Requirements lays out a number of conduct obligations of the licensed company.

46 Section 9 of the CPA Memorandum No. 17 specifies that private security companies must comply with all applicable criminal, administrative, commercial and civil laws and regulations.

the activities on the public interest (e.g., regional security and stability, sustainable development and institution-building, disarmament, demobilization and reintegration of combatants, and humanitarian issues such as de-mining) and the risk of the service being used against governmental or other actors.⁴⁷ Such criteria might also to some degree be inspired by instruments relating to the export or trade of arms, such as the EU's Code of Conduct on Arms Exports Control or the draft framework convention on international arms transfers of 25 May 2004 worked out under the auspices of a group of Nobel Peace Laureates⁴⁸ as well as, of course, other national regulations on the domestic private security industry.⁴⁹

Licensing of individual operatives

In addition to company (and possibly contract) licensing, territorial states may consider requiring each individual carrying out certain security and/or military services to first obtain a personalized operating license. This would allow some control and oversight over those who carry out the respective activity on the ground and may assist in excluding undesirable individuals. All licensed individuals should receive an identification card.

Criteria to issue such a license could include passing a background check (including the absence of criminal history), a certain age limit and adequate training.⁵⁰

Requirements relating to weapons

Requirements with regard to the possession, carrying and use of weapons by a private security company could be considered for any of the described licensing regimes, unless general regulations apply satisfactorily. Most states have enacted regulations on the conditions for individuals to possess and use weapons. With regard to private security companies, controls relating to weapons could include limitations on the types of weapons that private contractors may use; a requirement that the company (or its operatives) duly register all weapons with

47 Section 19(5) of Sierra Leone's National Security and Central Intelligence Act of 2002 lists "the public interest" as a (very general) criterion to be taken into account when examining a company's application for a license. In section 19(7), the same act specifies that when the application is refused, a written statement shall state the reasons for that refusal, which is subject to appeal.

48 Available at: http://www.iansa.org/documents/2004/att_0504.pdf (last visited 12 December 2006).

49 See above notes 28–30.

50 Section 2(5) of CPA Memorandum No. 17 for instance provides that the company as well as their officers and employees "will be vetted by the [Ministry of Interior] to ensure that any criminal or hostile elements are identified and to prevent attempts by illegal organisations (e.g. criminal organisations, illegal militias) to legitimise their activities." Vetting criteria in Section 2(6) include a minimum age of 20, mental and physical fitness, willingness to respect the law and all human rights and freedoms of all citizens of the country, a background check that confirms compliance with the "De-Baathification of Iraqi Society" policy, no prior criminal convictions, no history of involvement in terrorist activity, and minimum operations and weapons training. For non-Iraqi employees, however, section 2(7) provides for the possibility of a waiver of the vetting criteria if a copy of a comparable certification from a foreign governmental authority can be produced.

the relevant governmental authority and possibly provide a list of these weapons to the licensing authority;⁵¹ provisions relating to the import of weapons; the need for a mandatory weapons authorization card; as well as requirements to ensure specific weapons training and operating procedures to limit as much as possible the potential risk to third persons.⁵²

Monitoring and sanctions

Again, monitoring will be crucial in ensuring accountability and compliance with standards and license conditions. A body vested with inspection and/or auditing competences may be crucial for effective monitoring of compliance with the contract and the law.⁵³ To promote transparency, lists of current licenses could be made available to the parliament and possibly to the public. Also, in addition to access to courts, particularly for affected individuals, territorial states might consider establishing or promoting alternative grievance procedures. Reference can be made to what was said with regard to monitoring by contracting states.

Establishing criminal and civil jurisdiction

Besides possibly regulating the provision of private security and military services on its territory, territorial states should ensure that they can effectively bring to justice individual employees alleged to have committed serious violations of human rights and international humanitarian law. In addition, they may also consider establishing criminal responsibility of company directors for violations by employees that result from the directors' negligence, in particular for serious violations of human rights and international humanitarian law.⁵⁴ Non-criminal liability and also criminal liability of the company for torts arising out of crimes by their employees or directors may also be considered.⁵⁵

51 For licensing applications, Section 2(4) of CPA Memorandum No. 17 requires information, *inter alia*, on “d) details and serial numbers of all weapons that may be used by the PSC.” Section 19(3) of the 2002 National Security and Central Intelligence Act of Sierra Leone requires information on “any arms and ammunition, whether or not licensed under the Arms and Ammunition Act, 1955, intended to be used for the business or operations of the company.”

52 CPA Order Number 3 (Revised) (Amended) as well as Section 6 of CPA Memorandum No. 17 establish standards, for instance, with regard to licensing, the possession and use of weapons by private security companies, the obligation of employees to possess and carry with them a weapons card, and a ban on using privately owned weapons for private security duties. See also section 19(3) of the 2002 National Security and Central Intelligence Act of Sierra Leone.

53 Section 8 of CPA Memorandum No. 17 foresees the establishment of an independent oversight committee responsible for carrying out general inspection and audits of private security companies concerning the implementation of the memorandum. Also, all private security companies are liable to periodic audits verifying the vetting standards and carried out by an independent auditing firm engaged by the Ministry of Interior.

54 On the criminal responsibility of superiors, see above note 27.

55 For instance, the United Kingdom's Private Security Industry Act 2001 (which, however, does not envisage the sale of private security services abroad) establishes in its section 23 that “[w]here an offence under any provision of this Act is committed by a body corporate and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of a) a director,

Exporting states

Currently, only very few states have adopted regulations specifically concerning the export of private armed security or military services. The United States' main set of regulations governing the licensing of the export of defense services is the International Transfer of Arms Regulations (ITAR), which implements the US Arms Export Control Act.⁵⁶ The US exporting regime has been qualified as being increasingly structured to facilitate trade to allies, partners and areas of foreign policy priority, with a more profound acceptance of using private military companies to deliver services formerly provided by state institutions than elsewhere, creating a "good faith" atmosphere between regulators and industry.⁵⁷ The South African Regulation of Foreign Military Assistance Act has taken a very different, rather restrictive approach, albeit it has been observed to be under-enforced, *inter alia*, because of a lack of resources for monitoring compliance extraterritorially, a lack of confidence in the viability of prosecutions and possibly also because of the rather antagonistic approach.⁵⁸ Other states are considering regulating the export of private security and military services, including the United Kingdom⁵⁹ and Switzerland.⁶⁰

As mentioned above, all states, including exporting states, have a general duty to ensure respect for international humanitarian law and for human rights law. Regulating the export of services that may result in the use of force may contribute to promoting respect for international law by controlling who exports what services and where they are exported to, and by establishing standards that would hopefully marginalize disreputable companies and individuals. Additional reasons for a state to consider regulating the export of military or security services may include the possibility that the activities of companies or nationals from that state negatively reflect on its reputation. Also, their actions may not conform to

manager, secretary or other similar officer of the body corporate, or b) any person who was purporting to act in any such activity, he (as well as the body corporate) shall be guilty of that offence and liable to be proceeded against and punished accordingly." Section 9 of the CPA Memorandum No. 17 specifies that a licensed company shall be responsible for the actions of its employees.

56 See Marina Caparini, "Domestic regulation: licensing regimes for the export of military goods and services", in Chesterman/Lehnhardt (eds.), above note 4.

57 See Caparini, *ibid*.

58 See Caparini, *ibid*; Raenette Taljaard, "Implementing South Africa's Regulation of Foreign Military Assistance Act", in Alan Bryden/Marina Caparini (eds.), *Private Actors and Security Governance*, Geneva Centre for the Democratic Control of Armed Forces, 2006, p. 167.

59 See UK FCO, *Green Paper*, above note 37; UK Foreign Affairs Committee, *Ninth Report*, above note 26; UK Foreign Affairs Committee, *Response*, above note 14; Christopher Kinsey, "Regulation and Control of Private Military Companies: The Legislative Dimension", *Contemporary Security Policy*, Vol. 26, April 2005, p. 84; Elke Krahmman, "Private Military Services in the UK and Germany: Between Partnership and Regulation", *European Security*, Vol. 14, No. 2, June 2005, p. 277.

60 The Swiss government has mandated its Federal Department of Justice and Police to review the advisability of requiring providers of military or security services based in Switzerland with operations in crisis and conflict zones to obtain approval, or of subjecting them to a licensing system, Report by the Swiss Federal Council on Private Security and Military Companies of 2 December 2005 (unofficial English translation), available at: <http://www.eda.admin.ch/psc> (last visited 9 December 2006), section 6.3, para. 4.

the state's foreign policy objectives or go against other interests or even its own forces.⁶¹ Challenges include not overburdening the industry as well as the public authorities with impractical administrative procedures that result in delays, and making regulation and its monitoring effective, given that the actual activities will take place abroad.

Options and possible elements for regulation by exporting states

States wishing to regulate the “export” of private military and security services to conflict or post-conflict situations have four regulatory options:

- ban on exporting certain military services;
- general licensing of companies;
- licensing of individual contracts; and/or
- licensing of individual operatives.

Many arms export control regulations, including the US Arms Export Control Act, provide for a double licensing approach. To be granted an application, it would first be necessary for the company to obtain a general license. Secondly, the specific contract must be licensed. Exporting private military or security services without a license would be subject to sanctions. Such export licensing regimes can also be combined with a ban on exporting specified military services.

Extending arms export controls to military and security services

One approach for regulating the export of military and security services is to extend existing arms export control instruments and mechanisms to include the export of such services. In the same vein, a recent report of the European Parliament's Committee on Foreign Affairs proposes that the European Parliament adopt a resolution containing the following paragraph calling for the EU to consider extending the EU's Code of Conduct on Arms Export to cover certain private and military security services:

“[The European Parliament] Notes that the United States has extended its legislation on the control of military exports to cover private security companies, and therefore calls for the EU to consider similar steps to extend the 1998 EU Code of Conduct so that it covers private security services; as a first step the EU could add to the Common Military List the following activities and services requiring a license for export: armed personnel and site protection, armed transport security, military weapons and equipment training, strategic and tactical training, security sector reform, military and security consultancy, military logistics, counter-intelligence services and operational support.”⁶²

61 See also UK FCO, *Green Paper*, above note 37, pp. 20–21.

62 Committee on Foreign Affairs of the European Parliament, Report on the Council's Seventh and Eighth Annual Reports according to Operative Provision 8 of the European Union Code of Conduct on Arms Exports (2006/2068(INI)), A6-0000-2006 (final), 28.11.2006. Options for the EU to act, such as the

Such an extension of the non-binding EU Code of Conduct, which nonetheless has had a real impact on the regulation of EU members,⁶³ would provide a chance to promote common standards and approaches on the issue.

However, the export of services is not quite the same as the export of physical goods, and thus may raise different issues, even if arms export regulations often also regulate the provision of a range of services connected to arms exports, such as maintenance, operation or training in the use of the exported arms. The export of arms can be relatively easily controlled when the physical objects cross borders, which also serves as the evident trigger of the regulation's application. Services are less evident and easy to control since they are delivered in a destination state, far from the jurisdiction and central authorities of the licensing state, and over time the nature of each service may change.

Banning the export of certain military services

A sweeping ban on exporting any military services would be very broad, and it would raise definitional difficulties. The UK's Green Paper took the view that such a general ban would excessively restrict individual liberty, could deprive weak but legitimate governments of needed support and would deprive defense exporters of legitimate business, since services are often a necessary part of export sales of military goods.⁶⁴

Several states prohibit the recruitment in their territory of foreign armed forces, or prohibit their own nationals from joining or fighting for foreign armed forces, sometimes against the background of neutrality. These prohibitions vary, sometimes applying to any foreign governmental armed forces,⁶⁵ or only to armed forces engaged in warfare against the own state⁶⁶ or a friendly state,⁶⁷ or of a state that potentially could become an adversary. These prohibitions are usually based on the nationality of the individuals involved but could possibly be adapted to apply to companies based in or exporting from that state. The mentioned prohibitions stem, however, generally from a different era. Not only is their applicability

creation of a European framework, a set of unified standards and extending the EU's Code of Conduct on Arms Export, were discussed by participants including EU representatives at Roundtable on 7 December 2006, see Security Defence Agenda, above note 5. On the options available to the EU, see Elke Krahmann, "Regulating Military and Security Services in the European Union", in Bryden/Caparini (eds.), above note 58, p. 189; *idem*, "Regulating Private Military Companies: What Role for the EU?" in *Contemporary Security Policy*, Vol. 26 (2005), p. 1. The UK Foreign Affairs Committee had recommended working towards the inclusion of services provided by private military companies in the existing EU Code of Conduct for Arms Exports, Foreign Affairs Committee, *Ninth Report*, above note 26, recommendation (d).

63 Krahmann, above note 62, p. 116.

64 See UK FCO, *Green Paper*, above note 37, No. 71.

65 See e.g., General Civil Penal Code of Norway of 1902, article 133.

66 See Swiss Military Penal Code, Arts. 90 and 94.

67 See Canadian Foreign Enlistment Act, Revised Statutes of Canada 1985, c. F-28, Art. 3-5.

to the contemporary phenomenon of private military companies not entirely clear, but also they have essentially become redundant.⁶⁸

States parties to the UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989 or the African Union's Convention for the Elimination of Mercenarism in Africa of 1977 are required to prohibit activities related to mercenarism, and particularly the recruitment of mercenaries on their territory.⁶⁹ There have been only very few prosecutions, however, and as mentioned, it is doubtful whether prohibitions against the recruitment of mercenaries would be very effective,⁷⁰ even if it is inherently difficult to measure any potential deterrent effect.

An alternative to prohibiting mercenarism, which might address some of the underlying concerns, could be a ban on military services to any non-governmental forces, a ban on participation in any overthrow of a government, or a ban on contracts involving active participation in hostilities or combat.⁷¹ Also, the prohibition of certain military services could be limited in time and/or with regard to certain countries or parties to a conflict.

While these prohibitions are a very direct way for national legislators to try to prohibit objectionable activities abroad by their citizens (or companies of that state), they do not set standards for the export of other military or security services, nor do they establish oversight for such activities.

Licensing of companies

Instead of or in addition to a non-flexible ban of the export of certain activities, companies could be required to apply for a general license permitting the company to export a defined range of security or military activities to all or some countries or clients. The company license then may specify the type of services, destinations and/or potential range of clients for which the license has been granted. The Green Paper argues that a general license on its own may not be effective for protecting the public interest (since not scrutinizing individual exports) and may lend credibility to companies about whose operations the government may know little or whose character might change. But the Green Paper considers that a general company license might be useful and credible in conjunction, for instance, with licensing individual service contracts.⁷²

Such a double licensing approach is applied in the United States. US companies seeking to export defense services first need to register, and only thereafter can apply to obtain a license for a specific sale. The same double licensing requirement exists under many national arms export controls. Under the

68 See International Alert, *Regulating private military companies: options for the UK Government*, 2001, p. 28 f.

69 See e.g., South Africa, Regulation of Foreign Military Assistance Act, 1998.

70 See the remarks on prohibiting mercenarism by territorial states, above note 37.

71 UK Committee on Foreign Affairs, *Ninth Report*, above note 26, recommendations (e), (j), (k) and (l).

72 See UK FCO, *Green Paper*, above note 37, pp. 25–26.

Swiss Federal Law on War Material of 13 December 1996, for instance, a company license is issued insofar as the company offers the necessary guarantees of regular business conduct and insofar as the foreseen activity is not contrary to Swiss interests. The company license is valid only for the war material mentioned in the application and can be limited in time, subjected to conditions and revoked if the basis for granting the license no longer exists.

Criteria to take into account when evaluating an application for a company operating license may include those considered above with regard to the approval of company operating licenses by territorial states.⁷³ The US Directorate of Defense Trade Controls strongly advises registered exporters and manufacturers to have in place a compliance and monitoring mechanism and lists some recommended elements of such a compliance program in a manual.⁷⁴

Licensing of individual export contracts

In addition to or also instead of company licensing, state authorities could require a company to obtain a license for contracting to provide certain military and security activities abroad. Such a license requirement would have the advantage of permitting the authorities to take into account current circumstances, including the recent evolution of the situation in the destination state or region and the nature of the potential clients when determining whether to grant the license. Also, specific conditions and standards can be attached to the license for the export of certain military or security services to certain states, regions or clients. For example, a specific condition for an export license for military training may go as far as requiring the alteration of the training curricula.⁷⁵ The overall objective is, again, to prevent exports of military and security services that could have undesirable consequences.

The definition of the military and security services covered by the licensing regime will need to be clearly defined.⁷⁶ The 2005 draft South African legislation defines security services as one or more of the following services or activities:

- “(a) Protection or safeguarding of an individual, personnel or property in any manner;
- (b) giving advice on the protection or safeguarding of individuals or property;
- (c) giving advice on the use of security equipment;
- (d) providing a reactive response service in connection with the safeguarding of persons or property in any manner;
- (e) providing security training or instruction to a security service provider ...;

73 See above, pp. 648–650.

74 See <http://pmdtcc.state.gov/compliance.htm> and http://pmdtcc.state.gov/docs/Compliance_Programs.pdf (both last visited 30 January 2007).

75 Caparini, above note 56.

76 A list of possible military and security services is, for instance, contained in Schreier/Caparini, above note 8, p.120.

- (f) installing, servicing or repairing security equipment;
- (g) monitoring signals or transmissions from security equipment;
- (h) making a person or service of a person available, directly or indirectly, for the rendering of any service referred to in paragraphs (a) to (g); or
- (i) managing, controlling or supervising the rendering of any of the services referred to in paragraphs (a) to (h)”.⁷⁷

With regard to security services, one option could be to cover only armed security services. The US International Traffic in Arms Regulations (ITAR) provides an example of a definition of “defense services” that essentially covers services connected to arms export and military training.⁷⁸ The extent to which this definition and thereby ITAR’s export control licensing regime also applies to typical security services, such as the protection of individuals or objects, is not very clear.

Criteria for granting licenses for individual exports

Certain procedures and criteria applied in granting licenses for the export of goods could also be used in the licensing of the export of services. The UK Green Paper indeed suggested that criteria for the export of services would be established along the same lines as those for exports of arms.⁷⁹ The non-binding EU Code of Conduct on Arms Exports, for instance, includes, *inter alia*, the following criteria:

- respect for the international obligations of the exporting state, particularly UN or EU sanctions, agreements on non-proliferation;
- respect for human rights of the country of final destination, including an assessment of the risk that the proposed export might be used for international repression, exercising “special caution and vigilance in issuing licenses, on a case-by-case basis and taking account of the nature of the equipment to countries where serious violations of human rights have been established ...”;
- an evaluation of the risk of provoking or prolonging armed conflicts or aggravating existing tensions or conflicts in the country of final destination;

⁷⁷ Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in Areas of Armed Conflict Bill, 24 October 2005, section 1(1).

⁷⁸ That Regulation defines a “defense service” requiring an export license as: “(1) The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarisation, destruction, processing or use of defense articles [including, for instance, firearms and ammunition]; (2) The furnishing to foreign persons of any technical data [such as classified information relating to defense articles and defense services, information required for the production, operation, repair or maintenance of defense articles, or software directly related to defense services] whether in the United States or abroad; or (3) Military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational or information publications and media of all kinds, training aid, orientation, training exercise and military advice.” International Traffic in Arms Regulations, 22 CFR 120–130, 1 April 2001, §120(9).

⁷⁹ UK FCO, *Green Paper*, above note 37, No. 73.

- for the sake of preserving regional peace, security and stability, evaluation of the risk that the intended recipient would use the proposed export aggressively against another country or to assert by force a territorial claim;
- evaluation of the behavior of the recipient country with regard to the international community, particularly concerning its attitude to terrorism, the nature of its alliances and respect for international law;
- the potential effect of the proposed export on the defense and security interests of the licensing state and those of friends, allies and other EU members.

The draft framework convention on international arms transfers of 25 May 2004⁸⁰ suggests the following in its draft article 3:

“A Contracting Party shall not authorize international transfers of arms in circumstances in which it has knowledge or ought reasonably to have knowledge that transfers of arms of the kind under consideration are likely to be:

- a. used in breach of the United Nations Charter or corresponding rules of customary international law, in particular those on the prohibition on the threat or use of force in international relations;
- b. used in the commission of serious violations of human rights;
- c. used in the commission of serious violations of international humanitarian law applicable in international or non-international armed conflict;
- d. used in the commission of genocide or crimes against humanity;
- e. diverted and used in the commission of any of the acts referred to in the preceding sub-paragraphs of this Article.”

In addition, draft article 4 provides that:

“In considering whether any international transfer of arms may be authorized in accordance with Article 1 of this Convention, Contracting Parties shall take into account whether transfers of arms of the kind under consideration are likely to:

- a. be used for or to facilitate the commission of violent crimes;
- b. adversely affect regional security;
- c. adversely affect sustainable development; or
- d. be diverted and used in a manner contrary to the preceding sub-paragraphs and in such circumstances there shall be a presumption against authorization.”

The risk assessment conducted under the US ITAR licensing regime for the commercial export of defense services similarly takes into account national security, arms proliferation concerns and foreign policy considerations, such as regional stability, human rights and multilateral controls.⁸¹ The Directorate of

80 Available at: http://www.iansa.org/documents/2004/att_0504.pdf (last visited 12 December 2006).

81 Nancy Meyer, Directorate of Defense Trade Controls, Powerpoint presentation, February–March 2006, available at: [http://www.industry.gov.au/assets/documents/itrinternet/ITAR_overview\(DoS\)20060316094050.pdf](http://www.industry.gov.au/assets/documents/itrinternet/ITAR_overview(DoS)20060316094050.pdf) (last visited 14 December 2006). The Swiss Decree on War Material of 25 February 1998 establishes similar criteria for authorizing individual exports in its Article 5 and provides that if the arms

Defense Trade Controls also applies a pre-license check of the proposed foreign end-users, assessing their reliability and likeliness to comply with end-use restrictions, maintaining to that end a watch list of suspicious organizations and individuals.

Administrative implementation and monitoring

A governmental agency with adequate resources would need to administer the granting and management of export licensing for services and monitor and promote compliance with the relevant legal rules and licensing conditions by the companies. To avoid an excessive burden for minor or unproblematic contracts, a “fast track” procedure could be envisaged for less problematic services (e.g., “non-lethal” as opposed to potentially “lethal”),⁸² regions or clients such as certain governments and international organizations. The US Directorate of Defense Trade Controls,⁸³ for instance, automatically denies licenses to embargoed countries while generally expediting the licensing process for key NATO allies and friendly countries.⁸⁴

Monitoring adherence to the licensing conditions is a challenge, particularly because the activities take place far away from the agency in another state’s jurisdiction.⁸⁵ The United States has mandated its embassy personnel to take on enforcement tasks, make pre-license checks and monitor end use of licensed exports under the so-called “Blue Lantern Program”. This program particularly targets defense articles and services most susceptible to diversion or misuse, but it is unclear to what extent military training contracts or other services are monitored.⁸⁶ The US Directorate of Defense Trade Controls can conduct investigations, undertake criminal prosecutions and civil action in case of suspected ITAR violations, and penalties for violations include suspending or revoking license approvals, fines, imprisonment, a ban on contracting with the government for up to three years or enhanced scrutiny in the future.⁸⁷ Concerns have been voiced, however, about the transparency of the whole ITAR export regime. Public information about the export of private military services is scarce. Service export is not clearly differentiated from the export of defense goods, and there appears to be a “revolving door” effect with

are not exported to a foreign government or a company working on its behalf, the company must demonstrate that it possesses the required authorization of the final destination state or that it does not need such an authorization.

82 Deborah D. Avant, *The Market for Force: The Consequences of Privatizing Security*, 2005, p. 150.

83 See <http://pmdtc.state.gov/> (last visited 30 January 2007).

84 See Caparini, above note 56.

85 Measures comparable to contract oversight may be taken, see above, pp. 644–645.

86 Arms Exports Control Act, Section 40A; “End-Use Monitoring of Defense Articles and Defense Services: Commercial Exports FY 2005”, available at: http://www.pmdtc.org/docs/End_Use_FY2005.pdf (last visited 14 December 2006); Caparini, above note 56.

87 Caparini, above note 56.

individuals changing between government and company employments. Moreover, Congressional oversight is limited.⁸⁸

To promote transparency of the industry and political oversight, annual reports to parliament could help, as is the case with arms export controls in many countries.⁸⁹ Also, sharing information about licenses that were refused may contribute to weeding out the black sheep.

Licensing of individuals providing military or security services abroad

The fact that the employees of a company based in a regulating state are citizens of many different countries poses a challenge to licensing individual operatives. Also, the employees may never be physically present in the territory of the regulating state. Licensing of the company's own nationals contracting for military or security services abroad would raise other issues, including to some extent "legitimizing" conduct, the monitoring of which would be very difficult, if not unrealistic.⁹⁰

Concluding remarks

The phenomenon of the transnational sale of private security and military services raises many complex issues. However, as this contribution has tried to show, there are some tools that may help promote respect for desired standards by such companies and increase their accountability and control over them. When considering regulation of the transnational phenomenon of private security and military companies, the domestic private security market and its regulation offer particular lessons that until now have received (too) little attention. It has also become apparent that the regulation of the export of such services may draw on frameworks that exist in most states, such as arms export controls. Ideally, a particular state's regulations of the domestic and the export-oriented private security market and possibly also the contracting of such companies will apply coherent and harmonized standards and procedures.⁹¹ The companies based in one state may well be active both within and outside that state.

88 US Government Accountability Office, "State Department Needs to Resolve Data Reliability Problems that Led to Inaccurate Reporting to Congress on Foreign Arms Sales", GAO-05-156R, 28 January 2005, pp. 15–16 (no. 3), available at: <http://www.globalsecurity.org/military/library/report/gao/d05156r.pdf> (last visited 14 December 2006); Caparini, above note 56; Avant, above note 84, pp. 150–151.

89 See e.g., Art. 32 of the Swiss Federal Law on War Material of 13 December 1996.

90 This view was expressed by certain participants at the Swiss initiative's Expert Workshop of 13–14 November 2006 in Montreux.

91 See Christian Schaller, "Private Sicherheits- und Militärfirmen in bewaffneten Konflikten: Völkerrechtliche Einsatzbedingungen und Kontrollmöglichkeiten", SWP-Studie 2005/S24, September 2005, available at: http://www.swp-berlin.org/common/get_document.php?id=1387 (last visited 8 December 2006).

Still, since the transnational provision of private security and military services to a considerable extent is beyond the control of one single state, there is a need for international dialogue on how to approach the issues. A common understanding of the issues and on how to approach them could contribute to coherent, complementary and even interlocking layers of regulation and control, which apply the same or at least consistent (minimum) standards.

Given the lack of specific intergovernmental exchange on the issue of private military and security companies, Switzerland, in cooperation with the International Committee of the Red Cross (ICRC), has initiated an intergovernmental dialogue on how to ensure and promote respect for international humanitarian and human rights law by such companies operating in conflict and post-conflict areas.⁹² This process aims:

- “1. to contribute to the intergovernmental discussion on the issues raised by the use of private military and security companies;
2. to reaffirm and clarify the existing obligations of states and other actors under international law, in particular under international humanitarian law and human rights law;
3. to study and develop options and regulatory models and other appropriate measures at the national and possibly regional or international level; and
4. to develop, on the basis of existing obligations, recommendations and guidelines for states to assist them in meeting their responsibility to ensure respect for international humanitarian and human rights law, including by national regulation.”⁹³

Participants at the two meetings of governmental and other experts in January and November 2006, a first step of the initiative, shared the view that states have to respect international law when using private military and security companies and cannot circumvent their international legal obligations by resorting to their services. Also, they agreed that states may incur responsibility for violations of international humanitarian law and human rights committed by private military or security companies if their conduct is attributable to them according to the international rules on state responsibility.⁹⁴

At the November 2006 meeting, participants discussed relevant international law and elements of (non-binding) good practices to assist states in promoting respect for international humanitarian law and human rights in their relations with private military and security companies. The organizers of the initiative intend to pursue and deepen this discussion. Ultimately, the initiative aims to reduce any adverse humanitarian effects that may arise from the operation of private military and security companies. A possible venue for discussing the issue, including relevant international law, is the International Conference of

92 See <http://www.eda.admin.ch/psc> (last visited 14 December 2006).

93 Swiss initiative, Outline, 22 November 2006, available at <http://www.eda.admin.ch/psc> (last visited 14 December 2006).

94 Swiss initiative, Expert Workshop of 13–14 November 2006 in Montreux, Brief Summary, <http://www.eda.admin.ch/psc> (last visited 14 December 2006).

the Red Cross and Red Crescent Movement scheduled for the end of November 2007.⁹⁵

Given the current quest by a number of states to regulate private military and security companies, it is hoped that the Swiss initiative may stimulate international debate on best practices and contribute to coherent and complementary practices by the industry as well as other non-governmental clients.

95 Ibid.