

**Herausgeber**

Prof. Dr. **Michael Brzoska**,  
Institut für Friedensforschung  
und Sicherheitspolitik an der  
Universität Hamburg (IFSH)

**Dr. Volker Franke**, Bonn Inter-  
national Center for Conversion  
(BICC)

Prof. Dr. **Heiner Hänggi**,  
Genfer Zentrum für die  
demokratische Kontrolle der  
Streitkräfte (DCAF), Genf

Kapitän zur See **Heinz-Dieter  
Jopp**, Führungsakademie der  
Bundeswehr, Hamburg

**Andreas Prüfert**, European  
Consulting, München

**Schriftleitung**

Prof. Dr. **Michael Brzoska**

**Redaktion**

Dr. **Patricia Schneider**  
(V.i.S.d.P.), IFSH

**Sybille Reinke de Buitrago**

Dr. **Martin Kahl**

**Susanne Bund**

**Beirat**

Dr. **Alyson J.K. Bailes**,  
University of Iceland, Reykjavik

Dr. **Detlef Bald**, München

Prof. Dr. **Joachim Betz**, GIGA,  
Institut für Asienstudien,  
Hamburg

Prof. Dr. **Hans-Peter Dürr**, Träger  
des Alternativen Nobelpreises,  
München

Prof. Dr. **Pál Dunay**, Genfer Zen-  
trum für Sicherheitspolitik (GCSP)

Prof. Dr. **Wolfgang Gessenharter**,  
Hamburg

Prof. Dr. **Hans J. Giessmann**,  
Institut für Friedensforschung  
und Sicherheitspolitik an der  
Universität Hamburg (IFSH)

Dr. **Sabine Jaberg**, Führungsaka-  
demie der Bundeswehr, Hamburg

Prof. Dr. **Charles A. Kupchan**,  
Georgetown University,  
Washington, D.C.

Dr. **Martin Kutz**, Hamburg

Dr. **Krzysztof Ruchniewicz**,  
Willy-Brandt-Zentrum für  
Deutschland- und Europastu-  
dien, Wrocław

Prof. Dr. **Susanne Feske**,  
Universität Münster

Dr. **Martina Fischer**, Berghof  
Forschungszentrum für Kons-  
truktive Konfliktbearbeitung,  
Berlin

Prof. Dr. **Sabine von Schorle-  
mer**, TU Dresden

**Bates Gil**, PhD, SIPRI, Stock-  
holm

Prof. **Ljubica Jelusic**, Universität  
Ljubljana, Slowenien

## THEMENSCHWERPUNKT

New Dog, Old Trick: An overview of the contemporary  
regulation of private security and military contractors

Hans Born and Anne-Marie Buzatu\*

**Abstract:** The recent shift of security duties from public to private actors has called into question whether existing laws apply to private security actors, leading to problems such as impunity, democratic accountability, and the awkward extraterritorial application of laws that were designed for domestic use. In response to this criticism, private security industry groups have taken it upon themselves to develop codes of conduct as a form of self-regulation. However, while this certainly represents a step in the right direction, these codes lack any real enforcement mechanisms. This situation has provoked national and international attempts to regulate these private actors. While some notable progress has been made on these fronts, there are still important ‘grey areas’ and gaps that need to be filled by effective national and international regulatory frameworks.

**Keywords:** Private security companies (PSC), private military and security companies (PMSC), mercenaries, private security regulation and oversight

## 1. Introduction

The last thirty years have witnessed a paradigm shift in the provision of security. This has largely been driven by two trends: 1) the shifting of functions traditionally carried out by public actors over to the hands of the private sector, with the United States taking the lead in the 1980s,<sup>1</sup> and 2) the end of the Cold War at the beginning of the 1990s which

led to the downsizing of state security forces.<sup>2</sup> Taken together, these two trends have increased pressure on public authorities to make up for security sector shortfalls by contracting them out to the private sector, while making such choices that run counter to the traditional notion of the state monopoly on the use of force more palatable. However, in making this shift, the legal framework built to regulate public actors has not been sufficiently adapted to effectively regulate their private substitutes, leaving many questions as to how and to what extent such regulations should and do apply to these private actors.

\* D. Hans Born is a Senior Fellow at the Geneva Centre for the Democratic Reform of Armed Forces (DCAF); Anne-Marie Buzatu, J.D., LL.M., coordinates the Privatisation of Security Programme at DCAF.

1 Kevin R. Kosar, ‘Privatization and the Federal Government: An Introduction’, US CRS Report, 28 December 2006

2 See e.g., Fred Schreier and Marina Caparini, ‘Privatising Security - Law, Practice and Governance of Private Military and Security Companies’, DCAF Occasional Paper No. 6, p. 3 (2006).

This article considers the current state of regulatory frameworks as they may apply to private military and security companies (PMSCs). A closer look will be taken at some efforts to regulate PMSCs, both in the international and domestic spheres. Finally, the article closes with recommendations for more effective PMSC regulation and oversight.

## 2. The need for effective PMSC regulation

Long considered as embodying the very essence of a state<sup>3</sup>, particularly in Western cultures, the state monopoly on the use of force as a means of enforcing its order and to provide for its security has traditionally underlain domestic and international regulation of the use of force, first of all by implicitly assuming that legitimate force will be used by state actors. As such, legislation and regulations that apply to security providers were written with that assumption in mind, with considerations of appropriate private vs. public functions as well as the primary motivation behind such actions – for the public good vs. for profit – not considered relevant. However, it is precisely these distinctions that have come to the forefront of the current debate on how to handle PMSCs under existing regulation, highlighting the need for common standards and definitions.

While the terms ‘private security companies’ and ‘private military companies’<sup>4</sup> are often used interchangeably in the press and academic literature, there has been much debate as to what services each label refers to, and further about how current legal frameworks apply to those actors providing such services. This is in large part because, particularly in the current conflict in Iraq, organisations calling themselves ‘private security companies’ have performed tasks that have traditionally been within the province of the military – even engaging in behaviour that could constitute direct participation in hostilities under international humanitarian law (IHL).<sup>5</sup>

In a similar manner to the ‘Swiss Initiative’ (*see infra*) this article uses the moniker ‘PMSC’ to refer to all non-state actors for hire providing security-related services. However, regarding the nature of these actors, two broad distinctions should be kept in mind:

1. *The context of PMSC operations*: whether or not within an ‘armed conflict’ as defined under international law;
2. *The nature of PMSC duties*: those contractors ‘with guns or without’<sup>6</sup>, i.e., those contractors who are contracted to perform duties that require the use or threat of deadly or coercive force, as distinct from those who do not.<sup>7</sup>

3 Max Weber, ‘Politics as a Vocation’, Duncker & Humblodt, Munich (1919).

4 Yet another term proposed by Doug Brooks of International Peace Operations Association (IPOA) is ‘contingency contractors’. Others, such as authors Jeremy Scahill and Robert Young Pelton call them by the more provocative term ‘mercenaries.’

5 Such as guarding legitimate military targets. For further discussion, see the ICRC’s Expert Meetings on Direct Participation in Hostilities, available online at <http://www.icrc.org/web/eng/siteeng0.nsf/html/participation-hostilities-ihl-311205>.

6 David Isenberg, ‘Challenges of Security Privatisation in Iraq’, in Alan Bryden and Marina Caparini (eds.), *Private Actors and Security Governance*, Münster: LIT, 2006, p. 155.

7 A further distinction could be made between the types of arms carried by these private actors, whether they are ‘military’ type weapons as distinguished from ‘police’ type service weapons.

The reason for these distinctions concerns both the nature of the services provided as well as to the legal framework(s) that may apply. For example, without firing a shot, armed ‘private security contractors’ operating within the context of an armed conflict may be ‘participating in hostilities’ (thereby triggering the application of IHL) merely for providing defensive services to legitimate military targets.<sup>8</sup>

Another difficulty in regulating PMSCs is the problem posed by multiple nationalities, which occurs in the common scenario of a contractor of one nationality hired by an entity of another nationality to work on the territory of a third nationality, etc. This leads to the potential application of numerous concurrent and/or conflicting laws to any given PMSC, usually resulting in none of the laws being applied. While these ambiguities in legal status and conflicts in legal standards applicable to PMSCs point to the larger problem of the lack of effective PMSC regulation, it is worthwhile to first consider what is currently in effect and on the books.

## 3. Regulation on the international level

As PMSCs are increasingly acting on the international stage, often in groups where multiple nationalities perform security duties together, it makes sense that effective regulation should be on an international level. A brief overview of the current international regulation most commonly associated with PMSCs follows.

### 3.1. The Geneva Conventions of 1949<sup>9</sup>

In force on every territory in the world, the Geneva Conventions of 1949 (GC) have truly universal reach, however their application to PMSCs is dependent upon two factors: 1) the existence of an armed conflict within the meaning of international law, and 2) their direct participation in hostilities.<sup>10</sup> The first condition has provoked little controversy, particularly in the situation of an international armed conflict (IAC) which Common Article 2 (CA2) defines as any declared war or armed conflict between two or more states, even if the state of war is not recognised by one of them. The threshold to determine the existence of an IAC is quite low, neither requiring a high intensity nor a long duration.<sup>11</sup> Further, CA2 also applies in ‘all cases of partial or total occupation of the territory’ of a state. Non-international armed conflicts (NIACs) require a higher threshold of intensity and duration in order to distinguish them from less serious incidents, such as riots or other internal disturbances

8 See e.g., The ICRC Second Expert Meeting on Participation in Hostilities (2005), *supra* note 5.

9 For further discussion of the application of the Geneva Conventions to PMSCs, see the article by Andreas Schüller in this issue.

10 Or their ‘incorporation into the state forces’ a complex determination that is beyond the scope of this article.

11 See e.g., “How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?” International Committee of the Red Cross (ICRC) Opinion Paper, March 2008.

and tensions.<sup>12</sup> An example of an NIAC in today's headlines is the conflict in Iraq.<sup>13</sup>

While straightforward-sounding on its face, the kinds of activities constituting direct participation in hostilities have proven much more elusive to pin down, provoking much debate.<sup>14</sup> While it is generally agreed that PMSCs are civilians and therefore should not be participating in hostilities, in real life these private actors have engaged in behaviours that appear to cross this line. When they act in this way towards civilians who are not participating in hostilities, this violates the 'principle of distinction' under the Geneva Conventions.

### 3.2. The International Criminal Court

The International Criminal Court (ICC) has spelled these out violations of the Geneva Conventions of 1949 as war crimes in a clear-to-understand fashion, enlarging them by incorporating aspects of international customary law.<sup>15</sup> Key to our discussion relating to PMSCs, if PMSCs violate the laws of war such as the principle of distinction within the context of an armed conflict, and they are either a national of, or commit this violation on, the territory of a signatory to the treaty of the ICC, they can be tried for war crimes in their own home state courts, or owing to the principle of complementarity,<sup>16</sup> at the ICC in The Hague.

### 3.3. Additional Protocol I of 1977 to the Geneva Conventions of 1949

Responding to the growing phenomenon of state governments hiring mercenaries to suppress national liberation movements, the Additional Protocol I of 1977 to the Geneva Conventions of 1949 (AP I) specifically addressed mercenaries in article 47, depriving them of the status of combatant or prisoner of war should they be captured by enemy forces. Defining them according to six cumulative conditions, this definition has been largely considered to be unworkable,<sup>17</sup> and to the authors' knowledge has never been successfully enforced. However, despite its significant drawbacks, article 47 is remarkable as the first convention dealing explicitly with the legal status of

mercenaries, or a type of armed non-state actors for hire, under international humanitarian law.<sup>18</sup>

### 3.4. UN Mercenary Convention

In an effort to give some clout to article 47 AP I, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (Mercenary Convention) adopted by the General Assembly in 1989 requires state parties to criminalise the very act of being a mercenary as defined in article 47 AP I.<sup>19</sup> Unfortunately, this convention is also largely considered as ineffective, suffering from the same deficiencies as its inspiration in AP I. However, the Mercenary Convention has contributed one significant innovation to regulatory approaches of armed non-state actors: criminalizing in Article 2 the act of recruiting, using, financing or training of these private fighters, meaning that such persons or companies hiring, or those clients using, mercenaries can also be held criminally liable. The Mercenary Convention is overseen by the Working Group on the Use of Mercenaries, which in recent times has focused on the growing industry of using PMSCs in current conflicts, notably referring to 'militarily armed private soldiers' as a new way to define mercenaries.<sup>20</sup>

### 3.5. The Swiss Initiative

Seeking to address gaps in international humanitarian law as it applies to PMSCs, the Swiss government in cooperation with the International Committee of the Red Cross (ICRC) recently initiated an intergovernmental dialogue on how to 'ensure and promote respect for international humanitarian and human rights law'<sup>21</sup> by states and PMSCs operating in areas of armed conflict. This initiative has two stated objectives:

1. 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;
2. to study and develop good practices, regulatory options and other appropriate measures at the national, possibly regional or international level, to assist states in respecting and ensuring respect for international humanitarian law and human rights law.<sup>22</sup>

Praised for its inclusive and even-handed approach<sup>23</sup>, the Swiss Initiative has brought together representatives from governments, human rights NGOs and the PMSC industry to achieve consensus on how to best achieve the above stated objectives. These discussions have resulted in a draft text that reaffirms international legal obligations as they would apply to PMSCs, and

12 See e.g., *The Prosecutor v. Fatmir Limaj*, Judgment, IT-03-66-T, 30 November 2005, para. 135-170.

13 After the transfer of authority from the US-led Coalition Provisional Authority (CPA) to the Iraqi interim government on 30 June 2004, Iraq has been widely regarded as an NIAC in which the US and the Multinational Forces (MNF-1) are present in Iraq *at the invitation* of the Iraqi government. As such the MNF-1 are transformed into 'honorary Iraqis', and do not constitute invading foreign forces that would trigger an IAC.

14 See e.g., the three, soon to be four, reports of ICRC Expert Meeting on the Notion of Direct Participation in Hostilities, available at the ICRC website at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205?opendocument>

15 International customary law is created through practice + *opinion juris*, or the opinion that such practice is required under the law, and has a binding status akin to written laws.

16 'Complementarity', codified in Article 17 of the ICC Statute, allows for the ICC to assume jurisdiction over violations of ICC crimes where the national courts are either 'unwilling or unable genuinely to carry out the investigation or prosecution.' This assumption of jurisdiction does not require the assent of the divested court.

17 Lindsay Cameron, 'Private military companies: their status under international humanitarian law and its impact on their regulation', *International Review of the Red Cross* No 863 (2006), pp. 573-598.

18 Edward Kwakwa, *The International Law of Armed Conflict: Personal and Material Fields of Application*, Martinus Nijhoff Publishers, 1992, p 124.

19 See full text of the UN Mercenary Convention in the section "Dokumentation" in this issue.

20 Press Release UN Working Group on Use of Mercenaries, 'Unregulated Activities by Private Military Security Companies is Major Cause of Concern.' 10 March 2008.

21 Outline of the Swiss Initiative, November 2007, p. 2, available on-line at <http://www.eda.admin.ch/psc>.

22 Outline of the Swiss Initiative, November 2007, p. 2., available on-line at <http://www.eda.admin.ch/psc>.

23 See e.g., Doug Brooks, "The Swiss Show Some Initiative", *Journal of International Peace Operations*, Vol. 3, No. 6, May-June 2008, p.4.



offers good practices for states to aid them in fulfilling these obligations. These efforts should culminate in a final text to be endorsed by a High Level Meeting of Legal Advisers of participating governments in mid-September 2008.<sup>24</sup>

### 3.6. The European Union

While the European Union (EU) has gone to great lengths to develop a common security and defence policy, and has implemented an EU Arms Export regime to regulate how arms are exported from EU member states, PMSCs have largely been ignored in these policies.<sup>25</sup> One reason for this is that despite the private and free-market nature of PMSCs, they have typically been viewed as part of a member state's national defence policy, the transactions for which have been generally exempted from the normal rules of the Single Market and from Treaty provisions Article 296 in the Treaty on European Union.<sup>26</sup> However, in recent times, the European Parliament has also shown some interest in developing common standards for PMSCs, particularly regarding those actors used in European Security and Defence Policy (ESDP) missions.<sup>27</sup>

### 3.7. The Council of Europe

In the greater European area, PMSCs – particularly the companies which export 'military' services to areas of armed conflict – have not received much attention. Responding to these gaps, in June 2007 the Member States of the Parliamentary Assembly of the Council of Europe (PACE) passed a Motion for a Resolution to study the problem of the proliferation of private military and security firms with a view to its impact on the state monopoly on the use of force and the potential need for new regulation at the national and/or international level. This led to the November 2007 appointment of Dr. Wolfgang Wodarg, a member of the German Bundestag, as the Special Rapporteur of the Political Affairs Committee to study this issue. As part of its efforts to improve parliamentary oversight and democratic governance of PMSCs, the committee is currently studying ways to best regulate PMSCs, both at the individual member state as well as the pan-European levels.<sup>28</sup>

### 3.8. Extra-territorial application of laws and visiting forces agreements

Spanning the gap between the international and national spheres of law are those domestic laws that have the *de jure*, if not *de facto*, effect of replacing the domestic laws of another

jurisdiction. Laws that have extra-territorial effect and visiting forces agreements are two such examples.

By means of a jurisdictional link (usually through nationality or state of incorporation), laws with extraterritorial effect provide that they apply to the person or entity's actions in another territorial jurisdiction. For example, the US and South Africa have recently enacted laws attempting to regulate the behaviour of PMSCs working abroad, even providing for criminal sanctions.<sup>29</sup> Visiting forces agreements (VFAs), also variously known as Status of Forces Agreements (SOFAs) and Status of Visiting Forces Agreements (SOVFAs)<sup>30</sup> are agreements usually reached bilaterally between two states, when the visiting state has an armed forces presence on the territorial state. VFAs also provide for the extraterritorial application of the visiting state's laws, with the important addition that the territorial state has agreed that its own laws will not apply to visiting forces. The fact that very few PMSCs have actually been held accountable under extraterritorial laws points to some significant obstacles encountered when trying violations in a venue distant from where they were committed. For example, conducting a criminal investigation in foreign territory – even with the full cooperation of the foreign state – faces strong difficulties in meeting the high evidentiary requirements of criminal trials. These problems are less of an issue when applied to the armed forces, who typically have their own military code and a system of *ad hoc* tribunals that are equipped to try soldiers on active duty abroad. Despite some efforts to bring PMSCs under the jurisdiction of military codes,<sup>31</sup> they have not so far been held accountable under these codes for war crimes.<sup>32</sup>

## 4. Domestic regulatory regimes

Domestic regulation of PMSCs acting within a given state's territory where no armed conflict exists is more common and is easier to effect than international regulation. However, no single model exists for regulating domestic PMSCs. On the contrary, due to historical, cultural and legal political factors as well as the specific security situation, states have adopted different approaches.

### 4.1. Different domestic approaches to regulation of private security

Earlier research (focused on Council of Europe member states)<sup>33</sup> has distinguished three domestic regulatory approaches. Firstly, some countries do not have any regulation of domestic PMSCs in place, e.g. Serbia and Cyprus. In these countries, private security forms an unregulated industry leading to various un-

24 This final text, however, is not meant to have the legal status of an international convention. For further information, see the website of the Swiss Initiative at <http://www.eda.admin.ch/psc>.

25 For a listing of EU directives which may possibly affect PMSCs, see Alyson J. K. Bailes and Caroline Holmqvist, *The Increasing Role of Private Military and Security Companies*, EP/EXPO/B/SEDE/FWC/2006-10/Lot4/09, October 2007, pp. 24-25, available on-line at [http://www.isis-europe.org/pdf/2008\\_artrel\\_145\\_07-10-epstudy-pmc&psc.pdf](http://www.isis-europe.org/pdf/2008_artrel_145_07-10-epstudy-pmc&psc.pdf).

26 For more information, see Alyson Bailes' article in this issue.

27 EP-SEDE meeting, 5 May 2008, at which Chairman Wodarg expressed an interest in conducting a mapping study of the use of PMSCs in ESDP missions.

28 DCAF is currently under mandate from this committee to study this problem.

29 For further information, see contributions in this issue by Kevin Lanigan on legal regulation of PMSCs in the United States, and by Daniel R. Kramer on South African regulatory efforts.

30 SOFAs are commonly used to denote agreements entered into between the US and other states, SOVFAs to those between Australia and other states, and VFAs to those entered into between the UK and other states.

31 US extension of Uniform Code of Military Justice to contractors of the DoD, and possibly to other state agencies in the U.S. John Warner National Defense Authorization Act for FY2007 (P.L. 109-364).

32 For further discussion, see K. Lanigan's, *supra* note 32.

33 Hans Born, Marina Caparini and Eden Cole, 'Regulating Private Security in Europe: Status and Prospects,' DCAF Policy Paper no. 20, (2007), p. 38.

desirable consequences such as: links between organised crime and private security; an undesirable accumulation of functions by private security companies, and unclear relations between private security companies and public police. Secondly, other countries apply their general commercial regulatory framework to private security companies. This is the case in, for example, Germany and Austria. There are, however, still questions about this general commercial approach to the regulation of PMCSs because of the specific concerns related to the private security industry. In particular, the chamber of commerce as regulatory authority may lack the necessary expertise and enforcement capacity to deal with the public-private security interface as well as the special concerns related to the protection of human rights. Thirdly, another group of states does not possess one single national regulatory framework, but leaves the regulation to subnational authorities, e.g. in Switzerland, the United States, Bosnia-Herzegovina and Italy. This leads to a situation in which rules for PMCSs vary across the country and may lead to an unequal treatment of private security companies within one country's borders.

Beyond Europe's borders, several other states have taken steps to regulate this industry domestically. One recent notable example is Afghanistan, which has crafted an elaborate PMSC licensing scheme. However, implementing this framework has run into significant obstacles, including lack of effective international vetting mechanisms, and corruption.<sup>34</sup>

## 4.2. Scope of regulation

In most states, the domestic regulation of PMSCs refers to what are commonly considered to be 'private security services'<sup>35</sup> in peacetime, and not to private military services.<sup>36</sup> Typically domestic regulation of private security refers to companies providing services in the area of guarding of valuable transportation, guarding of private property, guarding of public property (e.g. airports, power plants, military bases etc.) as well as body guarding, maintaining order at public events, and the prevention and detection of theft, loss, misappropriation of valuables.

While the specific form and content of regulation may differ from state to state, domestic regulations tend to deal with the following aspects of PMSCs: links between private-public security, the control of PMSCs, entrance requirements, selection and recruitment of private security personnel, training of PMSCs, identification of private security personnel, use of firearms by PMSCs, and search and seizure powers of PMSCs. Without elaborating on each of these aspects of domestic regulation,<sup>37</sup> it is important to identify to what extent PMSC employees enjoy special powers that could impinge upon essential human rights, such as the right to use or threaten deadly force, to search persons or objects, as well as to arrest persons. With regards to these special powers, two basic policies can be identified. Firstly, in some states PMCS employees have no more

powers than other citizens, e.g. in the Netherlands, Cyprus, UK, Germany, Czech Republic and Finland. Secondly, in other countries PMSC employees are granted with limited powers, e.g. to arrest persons who violate the law who have illegally entered a guarded object (Latvia). In particular it is important to have strict regulations enforced concerning the possession and use of firearms. While in some states PMSC employees are prohibited from carrying and using firearms (e.g. France, Ireland, UK, Denmark and the Netherlands), in other states PMSCs are allowed to carry and use light firearms under specific circumstances. Within the European context, it is hard to identify a state with "the best" regulation. Some states may have very strong regulation of one aspect but are weak in other aspects of private security regulation. For example, Austria imposes strong requirements for recruitment but has no regulation for training of private security personnel.<sup>38</sup>

## 4.3. Oversight and enforcement

The enforcement of the legal framework is of particular importance. To this effect, various states have set up oversight institutions which monitor PMSCs activities. Within the EU, a great variety of oversight institutions exercise oversight of domestic private security companies. In some states,<sup>39</sup> PMSCs come under control of the local police (e.g. in Greece, Denmark, Hungary and Slovakia); in other states local civil authorities are responsible for controlling the sector (e.g. Germany, Italy and Sweden); the Minister of Interior controls the sector in Slovenia, Poland, Italy and the Netherlands; the Minister of Justice in Luxembourg. Ireland and the United Kingdom form an interesting case in point as these countries have established a specialised security authority which oversees the domestic private security sector. Oversight is highly fragmented in those states that have a federal form of government with varying rules and oversight institutions on the sub-national level.<sup>40</sup>

Another issue is how oversight is exercised. Is the oversight limited to 'paper' control only, i.e., requesting that the PMSCs submit yearly reports? Or does oversight include inspection visits, both announced and unannounced? Another option is that oversight is complaint-based, triggering investigations of particular PMSCs. A last aspect of control is the availability of sanctions if wrongdoing is detected. Different sanction regimes are in place across EU member states, varying from fines, temporary or permanent withdrawal of licences to imprisonment.

## 5. Self-regulation

In response to current regulatory shortcomings, PMSC industry groups have taken it upon themselves to develop their own codes of conduct. These codes have the advantage of being de-

34 See article by Brooking and Schmeidl in this issue.

35 Ibid.

36 Some notable exceptions include South Africa and Israel, which regulate the export of services which could be considered more 'military' in character.

37 An in-depth discussion of these forms of regulation can be found in: Born/Caparini/Cole, *supra* note 32.

38 Tina Weber, 'A comparative overview of legislation governing the private security industry in the European Union', CoESS/UNI Europe, Brussels, 11 April 2002, p. 32

39 The information on the states listed in this section are based on: 'Panoramic Overview of private security industry in 25 member states of the European Union', CoESS and UNI-Europa, 2004.

40 Born/Caparini/Cole, *supra* note 32., p. 21.

veloped by organisations that are familiar with the particular challenges inherent in providing private military and security services. Most prominent of these are the British Association of Private Security Companies (BAPSC) and the International Peace Operations Association (IPOA).<sup>41</sup> Other notable attempts to provide guidance for provision and procurement of domestic PMSC services in peacetime have been made by the European Confederation of Security Services (CoESS) and Uni-Europa,<sup>42</sup> and the South Eastern and Eastern Europe Clearinghouse for the Control of Small Arms and Light Weapons (SEESAC).<sup>43</sup>

These codes of conduct have generally been viewed as a step in the right direction, although some have criticised the absence of clear guidelines to operationalise the values and standards contained within the codes.<sup>44</sup> A more serious shortcoming is their lack of enforceability and the ability to hold member PMSCs accountable for violations of the codes in an appropriate fashion. This was illustrated vividly in the aftermath of the Blackwater shooting incident of September 2007 in which a reported 17 civilians were killed. As a founding member of IPOA, Blackwater had pledged to adhere to IPOA's code of conduct, but when questions were raised about Blackwater's conduct during the incident, they quietly withdrew their membership from the organisation. To date, no contractor has been charged in the shootings.<sup>45</sup>

## 6. Conclusions and recommendations

The recent shift of security services from the public sphere to the private marketplace has brought into question whether and how non-state substitutes can be held accountable under existing regulations designed for public security actors. While attempts have been made to regulate these actors on the international, and more successfully, on the national levels, there still exist important gaps which require new regulation that is adapted to this new security sector, particularly in the export of PMSC services.

*Elaborate common PMSC standards.* In order to help ensure that PMSCs are properly selected, common PMSC standards should be elaborated regarding such aspects as selection, vetting and

recruitment of private security personnel, training of PMSCs, identification of private security personnel, the control of PMSCs, use of firearms by PMSCs, the links between private-public security providers, search and seizure powers of PMSCs, as well as for any other PMSC duties that have the potential to affect human rights (e.g., right to life, right to privacy, right to freedom of movement, etc.).

*Develop PMSC export regimes.* Furthermore, the impact that the export of PMSCs has on international peace and security should be considered. In this respect, arms export regimes<sup>46</sup> can inform and influence the export of PMSCs – indeed what is the difference between exporting arms and military/security services to conflict zones? For example, a 'PMSC export regime' could prohibit the export of PMSCs to areas where there is a clear risk that sending such actors could provoke or prolong an armed conflict, or where there is a "clear risk" that the PMSC services would be used aggressively against another country.<sup>47</sup>

*Develop effective PMSC oversight and enforcement frameworks.* Finally, effective oversight of PMSCs requires that structures be put in place that hold those who misuse force accountable. At the domestic level, this would be most successfully done by a public body that is familiar with the particular challenges posed by the PMSC industry, such as is the case in Ireland and the UK. At the international level, effective oversight would require that common standards for selection and duties of PMSCs be elaborated and agreed to in an international instrument guiding oversight, investigations and enforcement of PMSC legal obligations. Such a regime could then address the problem of multiple nationalities, applying equally to all nationals of member states. One possible contemporary model for such an international regulatory regime is the International Criminal Court (ICC). The ICC treaty has successfully forged international consensus on war crimes and crimes against humanity, which it enforces through a system of *complementarity*. While preserving the primacy of the state to prosecute its own nationals for criminal violations, such a body can also step in to 'fill in the gaps' and hold an accused PMSC accountable in a court of law when his or her own national courts either can or will not.

The discussions surrounding the regulation of PMSCs according to human rights and humanitarian law have identified the salient points and gaps, as well as many common areas of international agreement. Now is the time to take the next step, and craft effective PMSC regulatory frameworks to help ensure that these armed non-state actors truly provide security.

41 For further information, see article by Andrea Schneiker in this issue. See full text of the IPOA Code of Conduct in the section "Dokumentation".

42 See 'Selecting best value – A manual for organizations awarding contracts for private guarding services', CoESS and Uni-Europa (1999), available on-line at [http://www.securebestvalue.org/ftp/man\\_en.pdf](http://www.securebestvalue.org/ftp/man_en.pdf).

43 See 'The Sarajevo Client Guidelines for the Procurement of Private Security Companies,' available online at <http://www.seesac.org/reports/Procurement%20guidelines.pdf> and 'The Sarajevo Code of Conduct for Private Security Companies', both published by SEESAC in 2006, available online at <http://www.privatesecurityregulation.net/documents/SEESAC-sarajevo-code-conduct-private-security-companies.pdf>.

44 Amnesty International, "Private Military and Security Contractors: Questions and Answers", March 2008, available online at <http://www.amnestyusa.org/business/pdf/pmscsqa3-08.pdf>

45 K. Lanigan, *supra* note 32.

46 Such as the EU Arms Control Export system, or the US Arms Export Control Act. The UNGA voted in October 2006 in favor of developing a UN Arms Export Control Treaty, and such a treaty is expected to be voted on sometime in 2009.

47 See the EU Code of Conduct on Arms Exports of 8 June 1998, available online at <http://www.consilium.europa.eu.uedocs/cmsUpload/08675r2en8.pdf>