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International and Transnational Regulation of Private Security Services: Effective Complementarity

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INTERNATIONAL AND TRANSNATIONAL REGULATION OF PRIVATE SECURITY SERVICES: EFFECTIVE COMPLEMENTARITY?

OTTAVIO QUIRICO*

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ABSTRACT

Regulation is progressively subject to a process of privatization and globalization, so much so that the expressions “global law” and “transnational regulation” are often opposed to the classical distinction between “domestic law” and “international law”. The area of security services is also undergoing this evolution and is increasingly governed by private regulatory initiatives, complementing public norms transnationally. Since security entails the use of force, such a process raises particular issues with respect to fundamental rights, which are crucial to the establishment of a transparent level playing field. A systemic analysis based on contracts, services, compliance, and enforcement mechanisms demonstrates that transnational private regulation theoretically harmonizes with fundamental public norms, but practical implementation is complex, specifically in conflict situations. This is essentially due to the narrow inclusion of fundamental substantive rules in contractual clauses, as well as flaws in the effectiveness and interaction of private and public implementation mechanisms. It is argued that such problems are basically grounded in the fact that private security contractors mostly do not legally qualify as “combatants” in conflict situations: this question should

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be addressed separately, particularly within the framework of the existing conventions on the laws of war. The issue is critical and affects not only the responsibility of Private Security Companies (PSCs) and their personnel, but also their protection and fundamental rights, as well as the liability of third persons.

I. INTRODUCTION: THE MARKET OF FORCE

The contemporary period has been defined as one characterised by the “corporatisation” of security services and the emergence of a profitable transnational market for force as a new form of governance.¹

Security services cover a wide spectrum of activities, which have as a common denominator the potential involvement of the use of force.² They can be basically classified according to two categories: that is, military services, including activities relating to hostilities, and protective services, including activities that relate to the surveillance and protection of persons and goods.³ Examples of military services include combat operational support and possibly protection of military sites, whereas security services encompass activities such as intelligence gathering and crime prevention.⁴

A brief overview shows that private companies have long operated in non-war contexts and are more or less numerous in different states. For instance, a relevant number of security enterprises operate in the U.S.⁵ In contrast, military services have

1. See DEBORAH D. AVANT, *THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY* 26 (2005); P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 188 (2003); Fiona De Londras, *Privatized Sovereign Performance: Regulating the “Gap” Between Security and Rights?* 38 *J.L. & SOC’Y* 96, 102–03 (2011); CHARLES NEMETH, *PRIVATE SECURITY AND THE LAW* 12 (5th ed. 2018).

2. See CARLOS ORTIZ, *PRIVATE ARMED FORCES AND GLOBAL SECURITY: A GUIDE TO THE ISSUES* 48 (2010); Stephanie M. Hurst, “*Trade in Force*”: *The Need for Effective Regulation of Private Military and Security Companies*, 84 *S. CAL. L. REV.* 447, 450 (2011); Elke Krahmann, *Security: Collective Good or Commodity?* 14 *EUR. J. INT’L REL.* 379, 381–83 (2008); Molly Dunigan & Ulrich Petersohn, *Introduction*, in *THE MARKETS FOR FORCE: PRIVATIZATION OF SECURITY ACROSS WORLD REGIONS* 9 (Molly Dunigan & Ulrich Petersohn eds., 2015).

3. Raymond Saner, *Private Military and Security Companies: Industry-Led Self-Regulatory Initiatives versus State-Led Containment Strategies* 5 (2015), http://repository.graduateinstitute.ch/record/293251/files/WP11_CCDP_2015.pdf; Helena Torroja, *Introduction*, in *PUBLIC INTERNATIONAL LAW AND HUMAN RIGHTS VIOLATIONS BY PRIVATE MILITARY AND SECURITY COMPANIES* 3 (Helena Torroja ed., 2017).

4. See FOREIGN AFFAIRS COMMITTEE, *PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION*, 2001-2, HC 577, at 10 tbl.1 (UK); JAMES COCKAYNE WITH EMILY SPEERS MEARS, ET AL., *BEYOND MARKET FORCES: REGULATING THE GLOBAL SECURITY INDUSTRY* 16–17 (2009) (ebook); CHARLES P. NEMETH, *PRIVATE SECURITY: AN INTRODUCTION TO PRINCIPLES AND PRACTICE* 29 (2017).

5. See *Security Services Industry in the U.S. – Statistics & Facts*, STATISTA, <https://www.statista.com/topics/2188/security-services-industry-in-the-us> (last visited June 23, 2018); A. Claire Cutler, *The Legitimacy of Private Transnational Governance:*

been traditionally provided worldwide, mainly by state agents.⁶ This scenario changed with the relatively recent breakthrough of private enterprises providing security services in military contexts.⁷ Some prominent examples are Aegis, G4S, L3, Sabre International Security, GardaWorld, and Slavonic Corps, operating in topical contexts such as Iraq, Afghanistan, Syria, Yemen and Libya.⁸

The outsourcing of security functions to private enterprises in military contexts prompted the development of regulation by private security service providers in a field that involves the application of fundamental norms and has traditionally been governed by public regulation.⁹ This phenomenon is in line with the growing “transnationalisation” of norms within the context of global law.¹⁰ In order to understand the importance of these developments, it is sufficient to consider that the International Code of Conduct (CoC) for Private Security Service (PSS) Providers, that is, a private regulatory instrument, is the reference in the field.¹¹ By contrast, after years of work, the UN is still discussing the possible adoption of a Convention on Private Military and Security Companies (PMSCs).¹² Both instruments holistically address PSC conduct in war and non-war contexts. Such a trend nevertheless raises concerns with respect to existing fundamental rights, which are

Experts and the Transnational Market for Force, 8 SOCIO-ECON. REV. 157, 158 (2010); CHRISTOPHER SPEARIN, PRIVATE MILITARY AND SECURITY COMPANIES AND STATES 2 (2017); NEMETH, *supra* note 1, at 12, 139–41.

6. Cutler, *supra* note 5, at 157–58; HIN-YAN LIU, LAW’S IMPUNITY: RESPONSIBILITY AND THE MODERN PRIVATE MILITARY COMPANY 3 (2015); Dunigan & Petersohn, *supra* note 2, at 1.

7. SARAH PERCY, REGULATING THE PRIVATE SECURITY INDUSTRY 25–40 (2013).

8. See *Private Military & Security Companies (PMSC)*, GLOBAL POL’Y F., <https://www.globalpolicy.org/nations-a-states/private-military-a-security-companies.html> (last visited June 23, 2018); Cutler, *supra* note 5, at 158; Saner, *supra* note 3, at 26; Torroja, *supra* note 3, at 2; Stuart Wallace, *Private Security Companies and Human Rights: Are Non-Judicial Remedies Effective?*, 35 B.U. INT’L L.J. 69, 74–75 (2017); NEMETH, *supra* note 1, at 14.

9. See LIU, *supra* note 6, at 3; SPEARIN, *supra* note 5, at 2; Dunigan & Petersohn, *supra* note 2, at 7–8.

10. See Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, 38 J.L. & SOC’Y 20, 20–23 (2011); Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 16 (2005); Peer Zumbansen, *Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power*, 76 L. & CONTEMP. PROBS. 117, 117–18 (2013).

11. *International Code of Conduct for Private Security Service Providers*, INT’L CODE CONDUCT ASS’N ¶ 20 (Nov. 9, 2010), https://www.icoca.ch/sites/all/themes/ical/assets/sicoc_english3.pdf.

12. José Luis Gomez Del Prado (Chairperson/Rapporteur), *Rep. of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination*, at 2, UN Doc. A/HRC/15/25 (July 2, 2010) [hereinafter Gomez Del Prado, *Rep. of the Working Group*]. Assuming that security services involve the use of force in war and non-war contexts, the notion of “PSC” encompasses that of “PMC”.

crucial to defining a transparent level playing field.¹³ Issues arise not only with respect to first generation human rights, that is, individual claims such as the basic rights to life, equitable process and freedom from torture, but also with regard to second generation human rights, that is, welfare claims, such as labour rights.¹⁴

This article considers the evolving concept of “transnational private regulation”¹⁵ from the standpoint of both “substantive” and “procedural” norms,¹⁶ with a particular focus on proceedings. The ultimate aim is assessing whether the progressive transnational “privatization” of regulation in the field of security is effectively consistent with fundamental public rules and apt to create a transparent level playing field.¹⁷ Along the lines of existing private regulation, particularly the CoC for PSS Providers, and public instruments, notably the UN Draft Convention on PMSCs, the analysis holistically considers PSCs operating in war and non-war contexts, proceeding in two steps. The study first outlines the private regulatory framework for security services and its interaction with public rules against the background of basic human rights standards. Contracts, services, and particularly compliance and enforcement mechanisms are taken into account. Secondly, the article assesses the practical effectiveness of such a regulatory framework by considering key cases in and outside conflict situations. It is eventually argued that private and public rules are complementary in the sector, but flawed effectiveness is a serious obstacle to the creation of a transparent market, particularly owing to the ambiguous legal status of private security contractors as ‘non-combatants’ in conflict situations.

13. *Id.* at 10; COCKAYNE, *supra* note 4, at 18–21.

14. Federico Lenzerini & Francesco Francioni, *The Role of Human Rights in the Regulation of Private Military and Security Companies*, in *WAR BY CONTRACT: HUMAN RIGHTS, HUMANITARIAN LAW, AND PRIVATE CONTRACTORS* 55 (Francesco Francioni & Natalino Ronzitti eds., 2011); Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 *EUR. J. INT'L L.* 749, 751 (2008).

15. Cafaggi, *supra* note 10, at 20.

16. That is, primary and secondary Hart's rules. See H.L.A. HART, *THE CONCEPT OF LAW* 79 (3d ed. 2012).

17. See George Andreopoulos & Shawna Brandle, *Revisiting the Role of Private Military and Security Companies*, 31 *CRIM. JUST. ETHICS* 138, 148 (2012). According to both authors, “such [peer assessment] mechanisms and procedures are not and cannot be substitutes for legal accountability. In fact, the challenge here would be to explore ways in which legal and peer accountability could interact in mutually reinforcing ways.” *Id.* Along similar lines, see Daniel Warner, *Establishing Norms for Private Military and Security Companies*, 40 *DENV. J. INT'L L. & POLY* 106, 116 (2012).

II. A HYBRID REGULATORY FRAMEWORK

A. *Private Regulatory Initiatives in the Field of Security Services*

There is currently no international or regional public regulation comprehensively addressing Private Security Companies (PSCs). At the international level, the UN Draft Convention on PMSCs provides guidelines for regulation, but is not yet a binding instrument.¹⁸ Regionally, Articles 2(2)(k) and 38 of Directive 2006/123/EC of the European Parliament and the Council on Services in the Internal Market¹⁹ excluded, up until 2010, a decision on the development of uniform rules in the matter of security in the EU.²⁰ Despite the expiration of the deadline and relevant practical problems, for instance, in the matter of licensing,²¹ such a decision has not yet been adopted.²²

At the national level, existing or suggested rules vary from state to state, based mainly on their constitutional foundations, the social perception of PSCs, and quantitative resort to security services.²³ In states where protective services have traditionally been provided by private firms, such as the U.S., public regulation exists, addressing the phenomenon.²⁴ In contrast, rules governing military services have been traditionally framed worldwide to address public legal persons, but not private enterprises, with the exception of mercenaries, who nevertheless constitute a separate category.²⁵ Thus, PSCs active in the military sector initially operated in the

18. Gomez Del Prado, *Rep. of the Working Group*, *supra* note 12.

19. Council Directive 2006/123/EC arts. 2, 38, 2006 O.J. (L 376).

20. See Nigel D. White & Sorcha MacLeod, *EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility*, 19 EUR. J. INT'L L. 965, 981–84 (2008).

21. See Case C-189/03, *Comm'n v. Netherlands*, 2004 E.C.R. I-9291; Case C-171/02, *Comm'n v. Portugal*, 2004 E.C.R. I-5674; Case C-514/03, *Comm'n v. Spain*, 2006 E.C.R. I-993.

22. Mark Button & Peter Stiernstedt, *Comparing Private Security Regulation in the European Union*, 28 POLICING & SOC'Y 398, 399 (2016); *MEPs Call for EU Rules on Private Security Companies*, EUR. PARLIAMENT (May 3, 2017), <http://www.europarl.europa.eu/news/en/press-room/20170502IPR73109/meps-call-for-eu-rules-on-private-security-companies>.

23. See *e.g.*, MULTILEVEL REGULATION OF MILITARY AND SECURITY CONTRACTORS: THE INTERPLAY BETWEEN INTERNATIONAL, EUROPEAN AND DOMESTIC NORMS (Christine Bakker & Mirko Sossai eds., 2012); *National Regulations*, PRIV. SECURITY MONITOR, http://psm.du.edu/national_regulation/index.html (last visited June 23, 2018).

24. See *National Regulations*, *supra* note 23; NEMETH, *supra* note 1, at 22.

25. Marina Mancini et al., *Old Concepts and New Challenges: Are Private Contractors the Mercenaries of the 21st Century?*, in WAR BY CONTRACT, *supra* note 14, at 399.

absence of specific regulation, within a “legal vacuum”.²⁶ Such a gap prompted the enactment of a relevant set of rules by private security firms, targeting security as a whole, including war and non-war contexts. This phenomenon is a particular aspect of global private regulation.²⁷

Private regulation in the field of security services encompasses a variety of initiatives, differently identified as “codes of conduct,” “ethical codes,” “private codes of conduct,” or “voluntary principles.”²⁸ These norms operate at the regional, national, and transnational levels, and have a different origin and scope of application.²⁹ The main regulators are PSCs themselves, often acting in conjunction with governmental and non-governmental organisations.³⁰

Some multi-stakeholder initiatives by states, international organisations (IOs), non-governmental organisations (NGOs), and private enterprises, established along the lines of collaborative rule-making between public and private actors,³¹ target the conduct of corporations at large, and thus, also set up a transnational regulatory framework for private companies operating in the security sector.³² In particular, the United Nations Global Compact (UNGC) developed ten principles and a number of practical resources to support participating companies in adopting and implementing conflict-sensitive business practices.³³ The

26. See Nathaniel Stinnett, *Regulating the Privatization of War: How to Stop Private Military Firms from Committing Human Rights Abuses*, 28 B.C. INT'L & COMP. L. REV. 211, 212, (2005); Sorchia MacLeod, *Private Security Companies and Shared Responsibility: The Turn to Multistakeholder Standard-Setting and Monitoring through Self-Regulation-Plus'*, 62 NETH. INT'L L. REV. 119, 126 (2015).

27. See DAVID J. BEDERMAN, *GLOBALIZATION AND INTERNATIONAL LAW* 23–25, 148–152 (2008); Sarah McCosker, *The “Interoperability” of International Humanitarian Law and Human Rights Law: Evaluating the Legal Tools Available to Negotiate Their Relationship*, in *INTERNATIONAL LAW IN THE NEW AGE OF GLOBALIZATION* 146, 170 (Andrew Byrnes, Mika Hayashi & Christopher Michaelsen eds., 2013).

28. See MacLeod, *supra* note 26, at 127–28; Evgeni Moyakine, *From National and International Frustrations to Transnational Triumph? Hybrid Transnational Private Regulatory Regimes in the Industry of Private Military and Security Companies and Their Effectiveness in Ensuring Compliance with Human Rights*, 28 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 209, 211 (2015); Wallace, *supra* note 8, at 86.

29. COCKAYNE, *supra* note 4, at 134–70; Carsten Hoppe & Ottavio Quirico, *Codes of Conduct for Private Military and Security Companies: The State of Self-Regulation in the Industry*, in *WAR BY CONTRACT*, *supra* note 14, at 363–65; EVGENI MOYAKINE, *THE PRIVATIZED ART OF WAR: PRIVATE MILITARY AND SECURITY COMPANIES AND STATE RESPONSIBILITY FOR THEIR UNLAWFUL CONDUCT IN CONFLICT AREAS* 139–46 (2014).

30. See Moyakine, *supra* note 28, at 212–14.

31. Cafaggi, *supra* note 10, at 36–37.

32. See Moyakine, *supra* note 28, at 212; Wallace, *supra* note 8, at 98–102; NEMETH, *supra* note 4, at 137.

33. White & MacLeod, *supra* note 20, at 980; Karen Ballentine & Virginia Haufler, *Enabling Economies of Peace: Public Policy for Conflict-Sensitive Business*,

Organisation for Economic Co-operation and Development (OECD) drafted the Guidelines for Multinational Enterprises as a set of non-binding corporate social responsibility (CSR) rules established by governments for private enterprises, which can voluntarily endorse them.³⁴ Notably, efforts are underway in the OECD to deal with risks arising for companies active in conflict zones, which may have important implications for PSCs.³⁵

Other multi-stakeholder initiatives specifically target the activity of PSCs on a transnational scale. The International CoC for PSS Providers was elaborated under the auspices of the Swiss Confederation and recently adopted and signed by numerous PSCs.³⁶ It is the most relevant and comprehensive private regulatory initiative in the field and targets the conduct of both PSCs and their personnel.³⁷ The Code specifically focuses on the use of force and weapons, personnel training, and the prohibition of acts particularly dangerous for fundamental rights, such as torture and forced labour.³⁸ The Voluntary Principles on Security and Human Rights (VPSHR) have been commonly drafted by the U.S., UK, Netherlands, Norway, NGOs and private companies, and outline a CSR framework for enterprises active in the extractive and energy sector.³⁹ They include a specific section addressing PSCs operating on behalf of extractive and energy enterprises, focusing on respect for the rule of law, the use of force, and personnel background checks.⁴⁰ Another fundamental reference is the Sarajevo CoC for PSCs, a set of rules developed by the non-governmental organisations Saferworld (UK) and Centre for Security Studies.⁴¹ This Code is based on European and international best practices and provides fundamental principles for voluntary adoption by PSCs when national regulation is either weak or absent. At the regional level, within the EU, the basic framework for CSR has been

UN GLOBAL COMPACT 49 (Feb. 2009), https://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Enabling_Economies_2009.pdf.

34. Guidelines for Multinational Enterprises, OECD (2011), <http://www.oecd.org/corporate/mne> (last visited June 23, 2018).

35. *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones*, OECD 3 (2006), <https://www.oecd.org/daf/inv/corporateresponsibility/36885821.pdf>; White & MacLeod, *supra* note 20, at 978.

36. *International Code of Conduct for Private Security Service Providers*, *supra* note 11.

37. MacLeod, *supra* note 26, at 121.

38. *International Code of Conduct for Private Security Service Providers*, *supra* note 11, at ¶¶ 35–37, 40.

39. *What are the Voluntary Principles?*, VOLUNTARY PRINCIPLES ON SECURITY & HUM. RTS., <http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/> (last visited July 2, 2018).

40. *Id.*

41. SEESAC, *THE SARAJEVO CODE OF CONDUCT FOR PRIVATE SECURITY COMPANIES* (2006), <http://www.seesac.org/res/files/publication/544.pdf>.

set out by the representatives of the Confederation of European Security Services (CoESS) and the Trade Union Federation Uni-Europa, thus overcoming Directive 2006/123/EC. This led to the adoption of the CoESS/Uni-Europa Code of Conduct and Ethics for the Private Security Sector.⁴²

Often, private security regulation is exclusively industry-driven,⁴³ and thus set up by PSCs themselves, either individually or collectively, especially on a transnational basis. These rules seek to complement each other and also integrate multi-stakeholder initiatives. They encompass a wide range of conduct and address activities having a different nature, because some enterprises, often labeled “PSCs”, for instance AECOM, simply provide technical and management support services to a broad range of markets, including the security sector, whilst other companies, for instance, Xe Services LLC, Dyncorp, and Aegis, operate exclusively in the security sector.⁴⁴ Industry-driven regulation has a different scope of application. At the federative level, in the UK, PSCs operating overseas that satisfy strict disciplinary standards can join the British Association of Private Security Companies (BAPSC).⁴⁵ On a regional scale, based on the criterion of the “host” country, the Private Security Company Association of Iraq (PSCAI) adopted a Charter for PSCs operating in the Iraqi State.⁴⁶ On a global scale, the International Stability Operations Association (ISOA) adopted rules on CSR that seek to ensure respect for ethical standards by PSC members operating in conflict and post-conflict situations.⁴⁷

B. Contracts, Services, and Fundamental Rights

PSCs may enter into contracts with states, governmental and non-governmental organisations and other private entities. Specific administrative procedures are usually established for publicly outsourcing military services, for instance, the US Logistic Civil

42. Europa & Confederation of European Sec. Servs., *Code of Conduct and Ethics for the Private Security Sector*, PRIV. SECURITY MONITOR (July 18, 2003), http://psm.du.edu/media/documents/industry_initiatives/coess_code_of_conduct.pdf.

43. Cafaggi, *supra* note 10, at 32–33.

44. Saner, *supra* note 3, at 25; *see also* AECOM, <https://www.aecom.com> (last visited July 2, 2018).

45. BRIT. ASS'N PRIV. SECURITY COMPANIES, <http://www.bapsc.org.uk> (last visited July 2, 2018).

46. *See* PRIVATE MILITARY, http://www.privatemilitary.org/security_associations.html#VywbWiHkXHo (PSCAI was disestablished on December 31, 2011) (last visited July 2, 2018).

47. *See* INT'L STABILITY OPERATIONS ASS'N, <https://stability-operations.site-ym.com/> (including different versions of the Code of Conduct) (last visited July 2, 2018).

Augmentation Program (LOGCAP).⁴⁸ Otherwise, freedom of contracts applies when the hiring subject is a private entity.⁴⁹ So far, the major number of contracts have been entered into by the U.S., Canada and the UK, where the perception of the use of force as a state monopoly is not absolute.⁵⁰ Basic private rules establish that PSCs are allowed to contract solely with legitimate and recognised states, international organisations, non-governmental organisations, and private companies, by carefully considering their accountability.⁵¹ More fundamentally, PSCs are required not to engage in contracts that might violate CSR rules governing the provision of services, with respect to substance, compliance, and enforcement issues.⁵² In fact, PSC personnel are usually compelled to behave humanely and with integrity, objectivity, and diligence.⁵³ However, transnational private regulation does not compel PSCs to embody CSR rules into contracts. This has been subject to criticism, in particular, because existing international human rights rules addressing private enterprises are usually embedded in soft legal instruments,⁵⁴ such as the Ruggie Principles on corporate responsibility,⁵⁵ and thus, could only be made compulsory by being included in contractual clauses, according to standard conflict of laws rules.⁵⁶

48. Dep't of the Army, *Logistics Civil Augmentation Program: Army Regulation 700-137*, ARMY PUBS (Mar. 23, 2017), https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN2768_AR700-137_Web_FINAL.pdf.

49. See Convention on the Law Applicable to Contractual Obligations art. 3, June 19, 1980, 1980 O.J. (L 266).

50. See James Cockayne & Emily Speers Mears, *Private Military and Security Companies: A Framework for Regulation*, INT'L PEACE INST. 3 (Mar. 2009), https://www.ipinst.org/wp-content/uploads/publications/pmsc_epub.pdf; Saner, *supra* note 3, at 24.

51. *ISOA Code of Conduct Version 13.1*, INT'L STABILITY OPERATIONS ASS'N ¶ 4 (Oct. 20, 2011), https://c.yimcdn.com/sites/stability-operations.site-ym.com/resource/resmgr/docs/s_800_13_en_t_-_code_of_cond.pdf; see also Gomez Del Prado, *Rep. of the Working Group*, *supra* note 12, at 23. For a scholarly viewpoint, see PERCY, *supra* note 7, at 56–58.

52. *International Code of Conduct for Private Security Service Providers*, *supra* note 11, at ¶ 20.

53. *Id.* at ¶ 28; Comm'n on Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, at 4–5 (Aug. 26, 2003).

54. CORINNA SEIBERTH, PRIVATE MILITARY AND SECURITY COMPANIES IN INTERNATIONAL LAW: A CHALLENGE FOR NON-BINDING NORMS: THE MONTREUX DOCUMENT AND THE INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS 26–30 (2014); see also Moyakine, *supra* note 28, at 219–20.

55. John Ruggie (Special Representative of the Secretary-General), *Rep. on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

56. See Michael Cottier, *Elements for Contracting and Regulating Private Security and Military Companies*, 88 INT'L REV. RED CROSS 637, 642–43 (2006); Laura Dickinson, *Contract as a Tool for Regulating Private Military Companies*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 217, 217–18 (Simon Chesterman & Chia Lehnardt eds., 1st ed. 2007) (ebook); Hurst, *supra* note 2, at 479–80; De Londras, *supra*

As to the provision of services, along the lines of existing public regulation, duly licensed PSCs are requested to comply with norms governing arms trafficking and are allowed to provide preemptive and defensive services.⁵⁷ Therefore, PSCs and their employees must operate mainly in view of deterrence, balancing the provision of security services with the legitimate concerns of persons who can be affected by their activities. Basically, firms are requested to observe the ethical standards of the contracting party, the law of the “host” state, human rights, international humanitarian law⁵⁸ and emerging best practices.⁵⁹ Therefore, fundamental rights are a driving force for the development of primary transnational private regulation in the field of security.⁶⁰ On the whole, the use of force is only allowed for preemptive and defensive purposes.⁶¹ This approach is consistent with the tendency to exclude PSC personnel from performing “inherently State functions,”⁶² notably “direct participation . . . in hostilities,”⁶³ albeit the scope of the notion is far from being clearly outlined,⁶⁴ which dangerously blurs the

note 1, at 115; Joseph C. Hansen, *Rethinking the Regulation of Private Military and Security Companies under International Humanitarian Law*, 35 *FORDHAM INT'L L.J.* 698, 731 (2012); MOYAKINE, *supra* note 29, at 146–51; Norms on the Responsibilities of Transnational Corporations, *supra* note 53, at 6.

57. See Federal'nyi Zakon RF o Chastnoi Detektivnoi I Okhrannoii Deyatel'nosti v Rossiiskoi Federatsii [Federal Law of the Russian Federation on Private Detective and Security Activities in the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 1992, No. 2487-1, art 11; DEL. CODE ANN. tit. 24, §§ 1301–1341 (2018); PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION, *supra* note 4, at 7–8, 45; Gomez Del Prado, *Rep. of the Working Group*, *supra* note 12, at 26–30.

58. See LINDSEY CAMERON & VINCENT CHETAIL, *PRIVATIZING WAR: PRIVATE MILITARY AND SECURITY COMPANIES UNDER PUBLIC INTERNATIONAL LAW* 385–538 (2013) (ebook); PERCY, *supra* note 7, at 45.

59. *International Code of Conduct for Private Security Service Providers*, *supra* note 11, at ¶¶ 21–22; see also Gomez Del Prado, *Rep. of the Working Group*, *supra* note 12, at 27; CAMERON & CHETAIL, *supra* note 58, at 668; COCKAYNE, *supra* note 4, at 44.

60. Hurst, *supra* note 2, at 452–64; MOYAKINE, *supra* note 29, at 105–55; Cafaggi, *supra* note 10, at 24–25; De Londras, *supra* note 1, at 97.

61. *International Code of Conduct for Private Security Service Providers*, *supra* note 11, at ¶¶ 30–31; see also Gomez Del Prado, *Rep. of the Working Group*, *supra* note 12, at 28–29, 34–35.

62. Gomez Del Prado, *Rep. of the Working Group*, *supra* note 12, at 26–27.

63. *Id.* at 28–29.

64. For instance, the UN Draft Model Law on PMSCs broadly includes in “military operations” security services usually provided by military personnel, such as affording “armed escorts to government vehicles.” José L. Gomez Del Prado & Margaret Maffai, *United Nations Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Rights of People to Self Determination & the Wisconsin International Law Society: Model Law for the Regulation of Private Military and Security Companies*, 26 *WIS. INT'L L.J.* 1078, 1080 (2009); see also NILS MELZER, *INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW* 47 (2009) (ebook).

distinction between PSCs and mercenaries.⁶⁵ Furthermore, firms are invited to maintain a high level of technical and professional proficiency and adopt proper rules of engagement (Standard Operating Procedures), including accurate record-keeping and incident reporting.⁶⁶ Compliance with best international practices relating to the use of force is also recommended, in particular, with respect to the UN Principles on the Use of Force and Firearms by Law Enforcement Officials and the UN Code of Conduct for Law Enforcement Officials.⁶⁷

Reference to existing public rules is important, because it potentially compels PSCs to abide by obligations that might be otherwise inapplicable. This is particularly true of international rules, for instance, the Convention against Torture,⁶⁸ addressing primarily states and state agents, not private legal persons.⁶⁹ Therefore, private regulation has the potential to establish a crucial link between fundamental public norms and PSCs, especially at the supranational level.⁷⁰ In this respect, nevertheless, private regulation is questionable because of its elusive content, which does not specify how rules addressing states and state agents may also apply to PSCs and their employees.⁷¹ For instance, general statements of “compliance with international and domestic law” do not clarify how rules addressing public entities can actually extend to private legal persons.⁷²

65. Whilst under art. 47 of Additional Protocol I to the Geneva Conventions mercenaries take “direct part in hostilities,” the International Convention against the Recruitment, Use, Financing and Training of Mercenaries refers to either taking “part in the hostilities” or “participat[ing] directly in hostilities.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 47, June 8, 1977, 1125 U.N.T.S. 3; International Convention Against the Recruitment, Use, Financing and Training of Mercenaries arts. 1 & 3, Dec. 4, 1989, 2163 U.N.T.S. 75.

66. *SARAJEVO CODE OF CONDUCT*, *supra* note 41, at ¶ 2.6.

67. *International Code of Conduct for Private Security Service Providers*, *supra* note 11, at ¶ 32.

68. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 113 (entered into force June 26, 1987).

69. See Angelina Fisher, *Accountability to Whom?*, in *PRIVATE SECURITY, PUBLIC ORDER: THE OUTSOURCING OF PUBLIC SERVICES AND ITS LIMITS* 46, 56–58 (Simon Chesterman & Angelina Fisher eds., 2009) (ebook); Cafaggi, *supra* note 10, at 28; De Londras, *supra* note 1, at 107–08; Nigel White, *Regulation of the Private Military and Security Sector: Is the UK Fulfilling Its Human Rights Duties?*, 16 HUMAN RIGHTS L. REV. 585, 590 (2016).

70. LA DIMENSION PLURIDISCIPLINAIRE DE LA RESPONSABILITE SOCIALE DE L'ENTREPRISE [THE PLURIDISCIPLINARY DIMENSION OF CORPORATE SOCIAL RESPONSIBILITY] (Marie-Ange Moreau & Francesco Francioni eds., 2007) (Fr.).

71. See Hoppe & Quirico, *supra* note 29, at 371–72; James Cockayne, *Make or Buy? Principal-Agent Theory and the Regulation of Private Military Companies*, in *FROM MERCENARIES TO MARKET*, *supra* note 56, at 207.

72. See *SARAJEVO CODE OF CONDUCT*, *supra* note 41, at ¶ 2.1; *DynCorp International Code of Ethics and Business Conduct*, DYNACORP INT'L 4 (2012), http://www.dyn-intl.com/media/coe_bc_brochure.pdf.

C. Compliance and Enforcement Mechanisms

Under private regulation, specific procedures and sanctions exist for inducing respect of rules governing the provision of security services. Since PSCs deal with the market of force, compliance and enforcement mechanisms specifically aim to prevent and repress violations of fundamental rights. Basically, it is useful to distinguish rules on compliance from rules on enforcement, whereby rules on compliance preemptively limit access to security services and are based on ex-ante control, whilst rules on enforcement are triggered by breaches of substantive norms and rely upon ex-post monitoring and reporting.⁷³ Compliance and enforcement rules are complementary means of implementation.⁷⁴

In light of the structure of substantive rules, compliance and enforcement mechanisms are developed at different levels in existing transnational security networks, that is, locally, regionally, and internationally.⁷⁵ In principle, private mechanisms for compliance and enforcement tend to coordinate with each other and with public rules, based on core fundamental rights. This is true of existing domestic proceedings and should also apply to prospective international enforcement mechanisms.⁷⁶

With regard to general implementation mechanisms addressing security companies as well as other corporations, the activity of PSCs may be relevant to the UNGC enforcement proceedings, which are based on progress communication and naming and shaming techniques.⁷⁷ Nevertheless, for the time being the security sector appears to be absent from the categories of reporting companies.⁷⁸ More pertinently, the activities of PSCs are relevant to enforcement mechanisms under the OECD Guidelines, which are based on the good offices and mediation of National Contact Points (NCPs) in

73. See Cockayne, *supra* note 71, at 205–06; Hoppe & Quirico, *supra* note 29, at 362; Renée De Nevers, *(Self) Regulating War?: Voluntary Regulation and the Private Security Industry*, 18 SECURITY STUD. 479, 481, 498 (2009); Moyakine, *supra* note 28, at 217–19.

74. Moyakine, *supra* note 28, at 217 (generally considering ex-ante and ex-post procedures as enforcement mechanisms).

75. Ruggie, *supra* note 55, at 27; see also White & MacLeod, *supra* note 20, at 986.

76. See Gomez Del Prado, *Rep. of the Working Group*, *supra* note 12, at 21–49 (outlining domestic and international mechanisms to investigate the responsibility of PMSCs and their personnel).

77. See COCKAYNE, *supra* note 4, at 174–75.

78. See White & Macleod, *supra* note 20, at 978–79; *Our Participants*, UNITED NATIONS GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/participants> (last visited July 2, 2018).

cases of unlawful acts committed by a business enterprise operating from an OECD member state.⁷⁹

With respect to private mechanisms of implementation exclusively governing security services, they regulate both the conduct of PSCs and their personnel. The two aspects are intertwined since the responsibility of the companies originates from the liability of their personnel. Ex-ante, self-regulatory initiatives support the application of transparent and fair public licensing systems, which are based on public administrative procedures.⁸⁰ This aim is achieved via the disclosure of information by PSCs to public authorities, particularly concerning internal procedures, as well as through compliance by PSCs with licensing conditions imposed by national regulation.⁸¹ In fact, public norms require PSCs and their employees to comply with basic legal standards by proving the possession of necessary professional qualifications, absence of threats to state security, and clearance from judicial convictions.⁸² Private rules complement substantive regulation and focus, in particular, on compliance with licensing proceedings concerning the trafficking and brokering of arms and strategic goods.⁸³ Sometimes federative private regulatory initiatives establish a process for screening the accountability of new PSC members and granting membership status.⁸⁴ As to the qualification of personnel, private regulation requires the establishment of efficient procedures for the selection of new employees, notably via collaboration with public authorities, in order to assess the accountability and integrity of candidates. The focus is on the successful completion of training, with particular regard to the use of armed force by employees authorized to carry firearms.⁸⁵

Ex-post, self-regulatory initiatives provide that PSCs investigate, sanction, and report accountability to relevant public authorities for both: (1) their acts, and (2) those of their personnel.⁸⁶

79. *OECD Guidelines for Multinational Enterprises*, OECD 72–73 (2011), <http://www.oecd.org/daif/inv/mne/48004323.pdf>.

80. See, e.g., ILL. ADMIN. CODE tit. 68, § 1240.200 (2018); Law on Private Security art. 11 (B.O.E. 2014, 83) (Spain).

81. See *International Code of Conduct for Private Security Service Providers*, *supra* note 11, at ¶ 45.

82. See PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION, *supra* note 4, at 24.

83. *International Code of Conduct for Private Security Service Providers*, *supra* note 11, at ¶¶ 22 & 61.

84. *Membership*, BAPSC, <http://www.bapsc.org.uk/membership.html> (last visited July 2, 2018).

85. *International Code of Conduct for Private Security Service Providers*, *supra* note 11, at ¶ 59.

86. CAMERON & CHETAIL, *supra* note 58, at 663–64.

With regard to the responsibility of PSC personnel, private security firms are requested to investigate inappropriate staff behavior and to cooperate with official investigations into allegations of contractual violations, as well as breaches of fundamental rights and international humanitarian law.⁸⁷ Therefore, enforcement of private regulatory standards is essentially based on monitoring and reporting the conduct of employees by ad hoc organs that are either internal or external to PSCs.⁸⁸ Effective remedies are also envisaged, including the termination of employment and recommendations for the prevention of recurrence of unlawful conduct.⁸⁹ Procedures are supposed to be quick, fair and transparent and include records about any allegations, findings and disciplinary measures available to competent authorities upon request.⁹⁰

As to the responsibility of PSCs, to date not many self-regulatory initiatives have set up a complete ex-post enforcement mechanism. The main example is the ISOA CoC (version 13.1),⁹¹ which is enforced via the ISOA Enforcement Mechanism, centered on a Standards, Oversight & Compliance Committee (SOCC).⁹² The details of the proceedings established by this mechanism are currently unavailable,⁹³ but they are likely to follow the ISOA Standards Compliance and Oversight Procedure, which complemented version 12 of the ISOA CoC, threatening members failing to uphold its provisions with the possibility of dismissal.⁹⁴ Building on the CoC and Enforcement Mechanism of the preceding

87. *International Code of Conduct for Private Security Service Providers*, *supra* note 11, at ¶¶ 67(c); *SARAJEVO CODE OF CONDUCT*, *supra* note 41, at § 2.21; *DynCorp International*, *supra* note 72, at 12; *ISOA Code of Conduct*, *supra* note 51, at ¶ 3; *Business Ethics Policy*, G4S ¶ 4.1, <http://www.g4s.us/-/media/g4s/corporate/files/group-policies/business-ethics-policy.ashx?la=en> (last visited July 2, 2018).

88. *Code of Conduct and Ethics for the Private Security Sector*, *supra* note 42, at 7; *International Code of Conduct for Private Security Service Providers*, *supra* note 11, at ¶ 6(d); *SARAJEVO CODE OF CONDUCT*, *supra* note 41, at § 2.20(h)–(i); *Code of Business Ethics and Standards of Conduct: Statement of Conformance*, GARDAWORLD 2–3 (Oct. 27, 2017), <http://garda-federal.com/images/flowdowns/GWFS%20Statement%20of%20Conformance.pdf>; *Guiding the Way: Code of Ethics and Business Conduct*, L3, at 30 (Jan. 2012), <https://secure.ethicspoint.com/domain/media/en/gui/17948/English.pdf>.

89. *International Code of Conduct for Private Security Service Providers*, *supra* note 11, at 67(a)(c) & (f).

90. *Id.* at 67(b) & (d).

91. *ISOA Code of Conduct Version 13.1*, *supra* note 51.

92. *Committees & Working Groups*, ISOA, <http://iframe.stability-operations.org/?page=Committees> (last visited May 2, 2018).

93. *How to Submit a Standards Complaint*, ISOA, http://iframe.stability-operations.org/page/Standards_Complaint/How-to-Submit-a-Standards-Complaint.htm (last visited July 2, 2018).

94. See Hoppe & Quirico, *supra* note 29, at 373–74.

International Peace Operations Association (IPOA),⁹⁵ the ISOA Standards Compliance and Oversight Procedure established the competence of a Standards Committee to address complaints against a member company.⁹⁶ Complaints were submitted by Member companies or their personnel to a Chief Liaison Officer,⁹⁷ which excluded external independent monitoring. Screening was exercised by an Administrative Panel, which decided whether a complaint was well-founded and determined its eventual submission to the Review Panel.⁹⁸ The Review Panel could either dismiss the complaint or submit it for hearing to the Compliance Panel, that is, the full Standards Committee, which could then decide to either impose sanctions, or reject the complaint.⁹⁹ Sanctions consisted of expulsion from ISOA and were enforced by a Disciplinary Panel, including the full ISOA Board of Directors.¹⁰⁰ The final decisions of the Review Panel and Compliance Panel were advertised in a public forum.¹⁰¹ Expulsion entailed the impossibility of readmission for a minimum period of twelve months.¹⁰²

The International CoC for PSS Providers is complemented by oversight mechanisms for private security entities,¹⁰³ allowing monitoring and the submitting of complaints against associated PSCs.¹⁰⁴ However, a more ambitious Oversight Mechanism was initially envisaged, including ex-ante and ex-post compliance procedures,¹⁰⁵ which was seen as a crucial step for the effective operation of substantive rules, along the lines of the UN Framework for Business and Human Rights.¹⁰⁶

Some CSR rules also envisage the accountability of private enforcers. Such is the case, for instance, of the Sarajevo CoC, which requires the establishment of clear responsibilities for the boards of governors to enforce.¹⁰⁷ Similarly, the L3 Code of Ethics and

95. See *International Peace Operations Association (IPOA)*, CROSSROADS GLOBAL HAND, <http://www.globalhand.org/en/search/all/organisation/26247?search=%22fair+trade%22> (last visited July 2, 2018).

96. Int'l Stability Operations Ass'n, Standards Compliance and Oversight Procedure (Sept. 25, 2009), <https://perma.cc/9TBN-NRM6>.

97. *Id.* at § 2.3.

98. *Id.* at § 3.

99. *Id.* at § 4.

100. *Id.* at § 6.

101. *Id.* at §§ 5.12, 6.11.

102. *Id.* at § 6.12.

103. See INT'L CODE CONDUCT ASS'N, <https://www.icoca.ch/> (last visited July 2, 2018).

104. *International Code of Conduct for Private Security Service Providers*, *supra* note 11, at ¶ 12.

105. Elements of Governance & Oversight Mechanism for the Int'l Code of Conduct for Priv. Security Providers 2 (2013) (unpublished manuscript) (on file with Int'l Code of Conduct Ass'n).

106. See Ruggie, *supra* note 55, at 24.

107. SARAJEVO CODE OF CONDUCT, *supra* note 41, at ¶ 2.20(c).

Business Conduct provides that concerns about violations of standards in the areas of internal control or auditing may be raised with the Audit Committee of the Board of Directors.¹⁰⁸ With respect to the interaction between public and private norms, the responsibility of private enforcers may particularly arise for failing to prevent or sanction grave breaches of fundamental rights committed by subordinates, according to the doctrine of command responsibility.¹⁰⁹ This doctrine maintains that superiors can be held responsible for failing to prevent or sanction offenses committed by their subordinates within both public and private organizations.¹¹⁰ PSC superiors have the power to sanction employees through disciplinary action, and fully exercise the power to prevent human rights violations, because they can train PSC personnel, issue orders ensuring crime prevention, and report violations to public authorities.¹¹¹ Thus, in the case of a failure to exercise disciplinary action and report violations to public authorities, PSC personnel monitoring subordinate employees may be subject to prosecution.¹¹² However, practice seems to demonstrate that the exercise of these powers cannot be easily implemented.¹¹³

III. EFFECTIVENESS

Based on the categorisation of the services provided by PSCs, the enforcement practice relating to PSC incidents may be divided into two main areas, that is, on the one hand, war contexts and, on the other, non-war contexts. Conflicts entail, by nature, a highly dangerous environment, and thus there is a possibility that PSCs and their employees may violate fundamental private and public rules. However, cases of non-compliance by PSCs and their

108. *Guiding the Way: Code of Ethics and Business Conduct*, *supra* note 88, at 30.

109. See Gomez Del Prado, *Rep. of the Working Group*, *supra* note 12, at 28; NEMETH, *supra* note 1, at 276–79.

110. ANTONIO CASSESE ET AL., *CASSESE'S INTERNATIONAL CRIMINAL LAW* 182 (3d ed. 2013).

111. See *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgement, ¶ 78 (Int'l Crim. Trib. for the Former Yugoslavia June 25, 1999), <http://www.icty.org/x/cases/aleksovski/tjug/en/ale-tj990625e.pdf>; *Prosecutor v. Kordić*, Case No. IT-95-14/2-T, Judgement, ¶ 90 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf; *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Judgement, ¶ 316 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001), <http://www.icty.org/x/cases/kvočka/tjug/en/kvo-tj011002e.pdf>.

112. See *Prosecutor v. Orić*, Case No. IT-03-68-T, Judgement, ¶ 293 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2006), <http://www.icty.org/x/cases/oric/tjug/en/ori-jud060630e.pdf>.

113. THOMAS BRUNEAU, *PATRIOTS FOR PROFIT: CONTRACTORS AND THE MILITARY IN U.S. NATIONAL SECURITY* 145 (2011).

employees with basic private and public regulation also exist outside conflict situations.¹¹⁴ Although it is not easy to collect information about the practical implementation of private enforcement mechanisms, which may be due to the fact that the emergence of transnational private regulation in the field is a relatively recent phenomenon, there are reported situations involving alleged human rights breaches by PSCs. In some cases, action has also been brought in domestic courts for violation of national law.¹¹⁵ The following review is a selection of cases aiming to critically assess the effectiveness of transnational private regulation in war and non-war contexts, against the background of public regulation, in light of the distinction between ex-ante control and ex-post enforcement.

A. *Ex-ante Control*

In the context of PSCs, labour rights abuses are particularly troublesome with respect to preemptive monitoring. According to José Gómez del Prado, former Chairperson of the UN Working Group on the Use of Mercenaries as a Means of Violating Human Rights, PSCs operating in contexts such as Iraq and Afghanistan recruit personnel through a network of international contact companies in developing countries, where manpower is cheap.¹¹⁶ PSC employees have experienced contractual irregularities and poor work conditions.¹¹⁷ In case of injury or death, claims submitted by private security guards or their families have often been denied, preventing the achievement of health care or compensation.¹¹⁸

Recruitment of personnel with a negative human rights record is likely to have happened in Colombia, where the government implemented a large-scale demobilization of paramilitary groups involved in breaches of human rights and international

114. See, e.g., NEMETH, *supra* note 1, at 280.

115. See *Private Military & Security Companies and Their Impacts on Human Rights: Recent Developments*, BUS. & HUM. RTS. RESOURCE CTR. (Apr. 30, 2013), <https://www.business-humanrights.org/sites/default/files/media/documents/pmsc-bulletin-issue-4-30-apr-2013.pdf> (describing some of the actions brought forth in domestic courts regarding violations of national law).

116. José L. Gómez Del Prado, *Impact on Human Rights of a New Non-State Actor: Private Military and Security Companies*, 18 BROWN J. WORLD AFF. 151, 163 (2011).

117. José L. Gomez Del Prado, *Impact on Human Rights of Private Military and Security Companies' Activities*, GLOBAL RES. (Oct. 11, 2008), <http://www.globalresearch.ca/impact-on-human-rights-of-private-military-and-security-companies-activities/10523>.

118. See *id.*; Dave Ritchie, et al., *Who Protects the Guards?: The Facts Behind G4S in Southern Africa*, WAR ON WANT 8–15 (May 2007), <https://waronwant.org/sites/default/files/Who%20Protects%20the%20Guards.pdf>.

humanitarian law during a forty-year civil war.¹¹⁹ Reports from officials, NGOs, and local residents indicate that demobilized paramilitaries have been employed in security-related jobs in licensed firms.¹²⁰

These cases demonstrate that ex-ante control on recruited personnel is difficult to implement, especially in developing countries, where PSCs often operate. This may not only facilitate breaches of fundamental labour rights, but also further human rights violations by recruited personnel, owing to a lack of adequate background and training.¹²¹

B. Ex-post Enforcement Outside Conflict Situations

Ex-post enforcement mechanisms have proven effective with respect to breaches of complementary private and public substantive regulation outside war contexts. Notably, it is not uncommon for PSCs to run immigration centers. A relevant case concerns G4S, which committed to complying with CSR rules by voluntarily adopting an advanced business and ethics policy.¹²² More specifically, the company is bound to respecting fundamental rights according to the principles, procedures and practices established by the Universal Declaration of Human Rights (UDHR).¹²³ In this regard, G4S declares it endeavours to work with business partners that behave consistently with human rights and to ensure that contractual requirements do not infringe upon fundamental rights.¹²⁴ The company also ensures that its employees do not compromise internationally accepted human rights conventions.¹²⁵ In spite of this advanced CSR regime, Global Solutions (GSL, now G4S) and its employees were involved in violations of fundamental rights while providing immigration detention services through subsidiary GSL Australia, in breach of

119. Amnesty Int'l, *Colombia: The Paramilitaries in Medellín: Demobilization or Legalization?*, AI Index AMR 23/019/2005, at 27–40 (Aug. 31, 2005).

120. *Id.* at 42.

121. Hurst, *supra* note 2, at 475–81 (“[A] PMSC could ensure all of its personnel are trained in human rights and IHL, and that it hires only employees with a background free of human rights abuses.”); *see also* Andrew Bearpark & Sabrina Schulz, *The Future of the Market*, in FROM MERCENARIES TO MARKET, *supra* note 56, at 245; Olga Martin-Ortega, *Business Under Fire: Transnational Corporations and Human Rights in Conflict Zones*, in INTERNATIONAL LAW AND ARMED CONFLICT: CHALLENGES IN THE 21ST CENTURY 189, 201 (Noëlle Quénivet & Shilan Shah-Davis eds., 2010); Rebecca DeWinter-Schmitt, *Human Rights and Self-Regulation in the Apparel Industry*, in PRIVATE SECURITY, PUBLIC ORDER, *supra* note 69, at 142–47; Dunigan & Petersohn, *supra* note 2, at 10–11.

122. *Business Ethics Policy*, *supra* note 87.

123. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

124. *Business Ethics Policy*, *supra* note 87, at ¶¶ 1.3, 1.4, 4.1.

125. *Id.* at ¶¶ 3, 4.1.

the 1966 International Covenant on Civil and Political Rights¹²⁶ and 1948 UDHR.¹²⁷ Initially, GSL denied the allegations and claimed to be “committed to promoting best practice in human rights in its policies, procedures and practices.”¹²⁸ However, in June 2005 the Australian NCP (ANCP) for the OECD Guidelines for Multinational Enterprises received a submission from several non-governmental organisations and decided to convene a mediation session in Canberra on 28 February 2006, at the end of which GSL committed to upholding the human rights of those in its care.¹²⁹ GSL agreed to ensure contract renegotiation by making reference to human rights standards and international conventions as the framework for a service delivery model.¹³⁰ GSL also indicated it was willing to make its own “random audits” available for external scrutiny, change its monitoring system in order to make it more effective, review the terms of reference and composition of its Community Advisory Committee to enhance external engagement, and expand a “client survey” to include input and feedback from persons visiting the detention centers.¹³¹ In April 2006, it was considered that the company had met the demands.¹³²

This case proves that multi-layered private regulatory initiatives can be effective in ensuring respect for fundamental rights within the field of security services, particularly in countries where the rule of law is key to the functioning of the State.¹³³ In fact, although GSL was initially not fully compliant with its own CSR rules, the broader framework established under the OECD Guidelines and related third-party enforcement mechanisms ultimately granted respect for fundamental rights. Most significantly, despite the fact that NCP procedures are voluntary and recommendations by NCPs are not compulsory, because the OECD Guidelines are not legally binding, practice shows that the action of NCPs can be effective in promoting CSR standards, to the extent that GSL agreed to review its internal enforcement

126. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

127. AUSTL. HUMAN RIGHTS & EQUAL OPPORTUNITY COMM’N, COMPLAINT BY MR HUONG NGUYEN AND MR AUSTIN OKOYE AGAINST THE COMMONWEALTH OF AUSTRALIA (HREOC REPORT NO. 39) 7 (2007), http://www.humanrights.gov.au/sites/default/files/content/pdf/legal/hreoca_reports/hrc_report_39.pdf.

128. *Statement by the Australian National Contact Point ‘GSL Australia Specific Instance’*, OECD 1 (Apr. 6, 2006), <http://www.oecd.org/dataoecd/28/2/36453400.pdf>.

129. *Id.* at 3.

130. *Id.* Attachment B, at 3.

131. *Id.* Attachment B, at 4.

132. *Id.* at 3.

133. *See* COCKAYNE, *supra* note 4, at 215–17.

mechanisms.¹³⁴ The case also proves that general enforcement mechanisms targeting multinational enterprises may integrate enforcement mechanisms established by transnational private rules focusing on security and make them more effective, according to institutional complementarity.¹³⁵ Recently, G4S became a party to the International CoC for PSS Providers and further improved the efficiency of its private enforcement procedures by creating a comprehensive mechanism for monitoring violations of self-established CSR rules.¹³⁶ In fact, a CSR Committee, comprising of G4S senior managers, is now entrusted to monitor compliance with CSR policies throughout the Group.¹³⁷ The CSR Committee reports to the Audit Committee, which includes company directors and is vested with the power to investigate the duty performance of employees, in collaboration with third party experts and external auditors.¹³⁸ However, in contexts where the application of the rule of law is problematic, the effective implementation of the OECD Guidelines via the NCPs with respect to PSCs is controversial.¹³⁹

Besides private implementation, effective public enforcement mechanisms are essential to applying substantive human rights standards.¹⁴⁰ For instance, in *Williams v. Office of Security Intelligence, Inc.*, Bernard Ferron and Ray Overcash, a private security company and its employees were held responsible for negligently patrolling an apartment complex in Florida and consequently enjoined to pay \$800,000 in compensatory damages.¹⁴¹ In *Price v. Gray's Guard Service, Inc.* and the Fidelity and Casualty Company of New York, the use of firearms by private security firms was in issue.¹⁴² More specifically, a private security guard regularly armed with a gun was on service at Greater Jacksonville Fair, Florida, while he was suddenly attacked and hit by two men whom

134. See *ForUM vs Aker Kværner ASA*, OECD WATCH (June 20, 2005), http://oecdwatch.org/cases/Case_81.

135. Moyakine, *supra* note 28, at 221; Wallace, *supra* note 8, at 99.

136. *Safeguarding Our Integrity*, G4S, <http://www.g4s.com/en/Social%20Responsibility/Safeguarding%20our%20integrity> (last visited July 9, 2018).

137. *CSR Committee*, G4S, <http://www.g4s.com/en/investors/corporate-governance/csr-committee> (last visited July 11, 2018).

138. *G4S Audit Committee*, G4S, <http://www.g4s.com/en/investors/corporate-governance/audit-committee> (last visited July 11, 2018).

139. Wallace, *supra* note 8, at 108–11.

140. See e.g., DAVID A. MAXWELL, PRIVATE SECURITY LAW: CASE STUDIES (1992); Doraval Gonder, *The Management of Security Incidents by Private Security*, 24.3 AFR. SECURITY REV. 291 (2015); Cleber da Silva Lopes, *Assessing Private Security Accountability: A Study of Brazil*, 25 POLICING & SOC'Y 641 (2015) (providing a critical analysis of other countries); NEMETH, *supra* note 1, at 141–308.

141. *Williams v. Office of Sec. & Intelligence, Inc.*, 509 So. 2d 1282, 1283–84 (Fla. 3d DCA 1987).

142. *Price v. Gray's Guard Serv., Inc.*, 298 So. 2d 461, 462–64 (Fla. 1st DCA 1974).

he had previously prevented from entering a gate closed to the public.¹⁴³ Before the two assailants could wrestle him to the ground, the security guard managed to draw his pistol and fire, killing one of them, whilst the other fled.¹⁴⁴ In the ensuing proceedings, the conduct of the guard was considered a form of legal protection for his own life and physical integrity from sudden and imminent peril and death, within the limits of self-defense.¹⁴⁵

C. Ex-post Enforcement in Conflict Situations

Accounts have reported incidents entailing questionable use of force by security contractors in conflict situations.¹⁴⁶ In this context, ex-post private enforcement mechanisms rely fundamentally upon monitoring and reporting, a system that has nevertheless proved quite problematic. The Nisoor Square incident is an example where armed private security guards used lethal force against real or perceived threats.¹⁴⁷ On 16 September 2007, private security contractors working for the PSC Blackwater Worldwide were running an armed convoy through Baghdad.¹⁴⁸ Iraqi government officials allege that Blackwater contractors killed seventeen civilians and wounded twenty-four more in the Nisoor Square neighbourhood without justification.¹⁴⁹ Blackwater alleged the contractors acted in self-defense.¹⁵⁰ The U.S. reaction led to different investigations.¹⁵¹ In this respect, it is difficult, or rather impossible, to qualify private security contractors as “combatants” in conflict situations. This is due to contractors not having the right to take “direct participation in hostilities”: they cannot be considered “armed forces of a party” under article 43(1) and (2) of Additional Protocol I to the Geneva Conventions on international armed conflicts.¹⁵² Such a qualification is also consistently excluded in

143. *Id.* at 463–64.

144. *Id.* at 464.

145. *Id.* at 465–66.

146. *Private Security Contractors at War: Ending the Culture of Impunity*, HUM. RTS. FIRST 7 (2008), <http://www.humanrightsfirst.org/wp-content/uploads/pdf/08115-usls-psc-final.pdf>.

147. *Id.* at 1; NEMETH, *supra* note 1, at 221.

148. *Private Security Contractors at War*, *supra* note 146, at 1, 5.

149. *Id.* at 1, 11.

150. *Id.* at 5.

151. *See id.* at 5–7, 18–21.

152. *See* MELZER, *supra* note 64, at 34; Mirko Sossai, *Status of Private Military and Security Company Personnel in the Law of International Armed Conflict*, in *WAR BY CONTRACT*, *supra* note 14, at 201.

internal armed conflicts under Additional Protocol II to the Geneva Conventions.¹⁵³

As a consequence, former Blackwater guards faced trial for voluntary manslaughter and firearms violations before the District Court of Columbia.¹⁵⁴ This is not considered to be the most appropriate substantive and procedural approach to conflict situations, since, for instance, it does not allow invoking the preclusion of intent in cases of “collateral damage” and “death, damage, or injury incident to a lawful attack.”¹⁵⁵ In January 2010, in a ninety-page decision, the Federal District Court of Columbia dismissed the charges without any comments on the legality of the shooting, on the ground that the constitutional rights of the contractors had been violated because of the way in which their confession statements had been collected in the immediate aftermath and subsequent investigations.¹⁵⁶ The Court of Appeals for the District Court of Columbia remanded the case and three of the accused were convicted for either murder or manslaughter in 2014.¹⁵⁷ In 2017, the same Court ordered retrial for murder and resentencing for manslaughter, considering, inter alia, that private security contractors “work in a hostile environment in a war zone in which the enemy could strike at any moment.”¹⁵⁸

Following the incident, Blackwater competitors filed a complaint with the IPOA to initiate a review as to whether or not the company had violated the IPOA Code of Ethics under the IPOA Enforcement Mechanism.¹⁵⁹ As a consequence, the company announced its withdrawal from IPOA for one year.¹⁶⁰ This prevented investigations, since the IPOA could not take action against non-active members, so that the outcome was a public statement by the

153. See Luisa Vierucci, *Private Military and Security Companies in Non-International Armed Conflicts: Ius ad Bellum and Ius in Bello Issues*, in *WAR BY CONTRACT*, *supra* note 14, at 261.

154. *United States v. Slough*, 677 F. Supp. 2d 112, 115 (D.D.C. 2009), *vacated*, 641 F.3d 544 (D.C. Cir. 2011).

155. 18 U.S.C. § 2441(d)(3) (2008). See also Tara Lee, *MEJA for Street Crimes, Not War Crimes*, DE PAUL RULE L.J. 1, 5–6 (2009).

156. *Slough*, 677 F. Supp. 2d at 166.

157. *United States v. Slough*, 641 F.3d 544, 555 (D.C. Cir. 2011); *United States v. Slough*, 22 F. Supp. 3d 1 (D.D.C. 2014); *Four Former Blackwater Employees Sentenced to Decades in Prison for Fatal 2007 Shootings in Iraq*, U.S. DEPT JUST. (Apr. 13, 2015), <https://www.justice.gov/opa/pr/four-former-blackwater-employees-sentenced-decades-prison-fatal-2007-shootings-iraq>; see also NEMETH, *supra* note 1, at 220.

158. *United States v. Slatten*, 865 F.3d 767, 818 (D.C. Cir. 2017).

159. See Richard Lardner, *Blackwater Withdrawal Ends Inquiry*, USA TODAY (Oct. 12, 2007), https://usatoday30.usatoday.com/news/world/2007-10-12-blackwater_N.htm (last visited July 12, 2018).

160. *Id.*; DAVID ISENBERG, *SHADOW FORCE: PRIVATE SECURITY CONTRACTORS IN IRAQ* 81 (2009).

IPOA acknowledging the withdrawal and declaring that Blackwater was a member in good standing.¹⁶¹

The Nisoor Square case contributed to cast a highly negative stigma on Blackwater. At the time of the incident, as a member of IPOA, Blackwater was bound by the private regulation of the Association outlined in 2007.¹⁶² Version 11 of the IPOA CoC, in force from 1 January 2006 to 11 February 2009,¹⁶³ compelled associated Members operating in conflict and post-conflict environments to comply with the rules of international humanitarian law and human rights established by public and private regulation, including the UDHR, Geneva Conventions¹⁶⁴ and their Additional Protocols,¹⁶⁵ the Convention against Torture, VPSHR, and Montreux Document on Private Military and Security Companies.¹⁶⁶ Under the IPOA CoC, PSCs were supposed to investigate legal accountability for their conduct and that of their personnel and to cooperate with official investigations into allegations of contractual violations and breaches of international humanitarian law and human rights.¹⁶⁷ The whole situation proves that the unusual IPOA enforcement mechanism might have made sense from a theoretical standpoint, but was practically ineffective. Its weakness depended upon the faculty attributed to IPOA Members of withdrawing from the Association in the case of adverse actions, thus leading to a context where enforcement was completely voluntary.¹⁶⁸ In 2009, following the Blackwater case, the ISOA enforcement mechanism was revised and made more effective and

161. *Lardner, supra* note 159.; *see also* CAMERON & CHETAIL, *supra* note 58, at 660–61.

162. *ISENBERG, supra* note 160, at 81.

163. International Peace Operations Association (IPOA) Code of Conduct Version 11 (2006) (unpublished manuscript). For a critical view, *see* De Nevers, *supra* note 73, at 509.

164. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Oct. 21, 1950, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Oct. 21, 1950, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Oct. 21, 1950, 6 U.S.T. 3516, 75 U.N.T.S. 287.

165. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), Dec. 8, 2005, 2404 U.N.T.S. 261.

166. INT'L COMM. OF THE RED CROSS, THE MONTREUX DOCUMENT ON PERTINENT INTERNATIONAL LEGAL OBLIGATIONS AND GOOD PRACTICES FOR STATES RELATED TO OPERATIONS OF PRIVATE MILITARY AND SECURITY COMPANIES DURING ARMED CONFLICT (2008), http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf.

167. IPOA Code of Conduct Version 11, *supra* note 163.

168. Hoppe & Quirico, *supra* note 29, at 373.

impartial, particularly through the exclusion of the Members' faculty of withdrawal.¹⁶⁹

Human rights violations in Abu Ghraib are another critical example. In January 2004, the U.S. Army's Criminal Investigation Division received information on abuses committed on Iraqi detainees at the Abu Ghraib correctional facility in Iraq, involving private contractors from TITAN Corporation and Consolidated Analysis Centre Incorporate (CACI) International. Investigations followed and reports recommended that PSCs give contractors an official reprimand, remove them, and revoke their security clearance.¹⁷⁰ Accounts later called for immediate disciplinary action and further inquiries to refer responsible persons to the Department of Justice for prosecution.¹⁷¹ Reportedly, CACI and TITAN personnel lacked formal military training, and outsourcing contracts did not embed human rights protection.¹⁷² CACI developed its own internal investigations, with negative outcomes.¹⁷³ The response of TITAN was less defensive, since the company removed employees allegedly involved in human rights violations.¹⁷⁴

In 2004, lawsuits were filed against CACI and TITAN before U.S. courts for failing to properly screen and supervise their employees.¹⁷⁵ In late 2007, the suits against CACI were allowed, even though action against TITAN had been dismissed.¹⁷⁶ In the course of such action, the US District Court of Columbia held that "[s]erving as a translator for the interrogation of persons detained by the U.S. military in a combat zone" has a "direct connection with actual hostilities."¹⁷⁷ This raises, again, the question of the legal

169. Érika Louise Bastos Calazans, *Regulating the Business Activities of Private Military and Security Companies under International Law*, ANUÁRIO BRASILEIRO DE DIREITO INTERNACIONAL 103, 108 (2014).

170. Anthony R. Jones & George R. Fay, *Investigation of Intelligence Activities at Abu Ghraib, Executive Summary*, FIND LAW 1 (Aug. 23, 2004), <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>.

171. See *Private Security Contractors at War*, *supra* note 146, at 15–16; Jones & Fay, *supra* note 170, at 2.

172. Jones & Fay, *supra* note 170, at 50; GEORGE C. LOVEWINE, OUTSOURCING THE GLOBAL WAR ON TERRORISM: PRIVATE MILITARY COMPANIES AND AMERICAN INTERVENTION IN IRAQ AND AFGHANISTAN 86–87 (2014); Deborah Avant, *The Emerging Market for Private Military Services and the Problems of Regulation*, in FROM MERCENARIES TO MARKET, *supra* note 56, at 221.

173. See *CACI Reports Preliminary Findings of Internal Investigation*, CACI (Aug. 12, 2004), http://www.caci.com/about/news/news2004/08_12_04_NR.html; *Truth and Error in the Media Portrayal of CACI in Iraq*, CACI, http://www.caci.com/iraq/truth_and_error_in_media_portrayal_of_caci_in_iraq.doc (last visited July 11, 2018).

174. See *Private Security Contractors at War*, *supra* note 146, at 52.

175. Ibrahim, et al. v. Titan Corp., et al., Saleh et al., v. Titan Corp., et al., 556 F. Supp. 2d 1 (D.D.C. 2007).

176. *Id.* at 11–12.

177. *Id.* at 9.

qualification of PSC personnel as non-combatants, their participation in hostilities and the adequacy of ensuing non-military remedies. Eventually, the Court of Appeals ruled that CACI contractors were “integrated into combatant activities over which the military retains command authority,” and thus protected by the preemption defense, excluding civil and criminal jurisdiction.¹⁷⁸

In 2008, new lawsuits were filed by Iraqi civilians against CACI in U.S. federal courts with the help of the Centre for Constitutional Rights.¹⁷⁹ In *Shimari v. CACI Int'l*, a motion to dismiss was denied in part by the District Court for the Eastern District of Virginia.¹⁸⁰ This decision was nevertheless reversed by the same Court, dismissing the case for lack of subject matter jurisdiction over military personnel.¹⁸¹ The Court of Appeals for the Fourth Circuit reinstated the case on 30 June 2014, holding that human rights infringements committed in a U.S. controlled prison by a private contractor in conspiracy with soldiers could be heard under the Alien Torts Statute.¹⁸² On 18 June 2015, the District Court dismissed the case again, in light of the political question doctrine and the “plenary” and “direct” control of the military over security contractors and national defense interests.¹⁸³ However, the Court of Appeals subsequently reinstated the case, holding that torture cannot be considered non-justiciable for political purposes.¹⁸⁴ Subsequent motions to dismiss the case have been rejected, considering the battlefield pre-emption doctrine not applicable to private security contractors.¹⁸⁵ In *Quraishi v. Nakhla et al.*, a motion to dismiss was denied on 29 July 2010,¹⁸⁶ but on 21 September 2011, the Appeals Court for the Fourth Circuit held that the Plaintiffs’ claims were preempted by military immunity from jurisdiction and the tort law battlefield preemption.¹⁸⁷ Following a petition for re-

178. Saleh et al. v. Titan Corp. et al., 580 F.3d 1, 9 (D.C. Cir. 2009).

179. See *CCR Files Four New Abu Ghraib Torture Lawsuits Targeting Military Contractors in U.S. Courts*, CCR JUST. (June 30, 2008), <https://ccrjustice.org/home/press-center/press-releases/ccr-files-four-new-abu-ghraib-torture-lawsuits-targeting-military>.

180. *Shimari v. CACI Int'l*, No. 1:08-cv-827, 2008 U.S. Dist. LEXIS 112067, at *5 (E.D. Va. 2008).

181. *Shimari v. CACI Int'l, Inc.*, 951 F. Supp. 2d 857, 874 (E.D. Va. 2013).

182. *Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 536–37 (4th Cir. 2014).

183. *Shimari v. CACI Premier Tech., Inc.*, 119 F. Supp. 3d 434, 438, 453 (E.D. Va. 2015).

184. *Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 161–62 (4th Cir. 2016).

185. *Shimari v. CACI Premier Tech., Inc.*, 300 F. Supp. 3d 758, 789–90 (E.D. Va. 2018) (accepting the motion to dismiss for failing to state a claim for only some of the counts).

186. *Quraishi v. Nakhla et al.*, 728 F. Supp. 2d 702, 768 (D. Md. 2010).

187. *Al-Quraishi v. L-3 Servs., Inc.*, 657 F.3d 201, 206 (4th Cir. 2011).

hearing, the case was voluntarily dismissed by the plaintiff in 2012.¹⁸⁸

In 2006, the Centre for Constitutional Rights, International Federation for Human Rights and Republican Attorneys' Association acted in German Courts on behalf of Abu Ghraib victims, based on universal jurisdiction.¹⁸⁹ The complaint was nevertheless dismissed, since the Prosecutor General required a domestic link to establish German jurisdiction over crimes committed by non-nationals against foreigners abroad.¹⁹⁰ Following a request for revision, the Stuttgart Higher Regional Court confirmed the dismissal based on a lack of retrospective jurisdiction, in addition to issues of interstate procedural cooperation.¹⁹¹ It has been noted that the case puts "the principle of universal jurisdiction under political pressure."¹⁹²

More fundamentally, contracts have involved private contractors in direct participation in hostilities. A clear example is the Agreement for the Provision of Military Assistance of 31 January 1997 between the Independent State of Papua New Guinea (PNG) and Sandline International, a PSC incorporated in the Bahamas.¹⁹³ On 31 January 1997, PNG and Sandline entered into an agreement whereby Sandline would provide the "manpower, equipment and services" to assist the armed forces of PNG to overcome a group referred to as "the illegal and unrecognized Bougainville Revolutionary Army."¹⁹⁴ Sandline personnel were promised a U.S. \$36 million compensation, half on signing the contract and the other half within thirty days from the deployment of forces.¹⁹⁵ The contract concerned sensitive services, such as "[intelligence gathering] to support effective deployment and operations" as well as conduct of "offensive operations."¹⁹⁶ The

188. *Al-Quraishi v. Nakhla et al.*, 728 F. Supp. 2d 702 (D. Md. 2010), *rev'd*, 657 F.3d 201 (4th Cir. 2011) (voluntarily dismissed on October 5, 2012).

189. Völkerstrafgesetzbuch [CCAIL][Code of Crimes against International Law], § 1, para. 1, <http://www.iuscomp.org/gla/statutes/VoeStGB.pdf> (last visited Oct. 26, 2017) (Ger.).

190. Bundesgerichtshof [BGH][Federal Court of Justice] Apr. 5, 2007, 3 [ARP] 156/06-2, 2007 (Ger.).

191. Oberlandesgericht [OLG][Higher Regional Court] Apr. 21, 2009, Criminal Panel 5, 2009 (Ger.).

192. Andreas Fischer-Lescano, *Torture in Abu Ghraib: The Complaint against Donald Rumsfeld Under the German Code of Crimes Against International Law*, 6 GERMAN L.J. 689, 717 (2005); CASSESE, *supra* note 110, at 274.

193. COCKAYNE, *supra* note 4, at 201.

194. PRIVATE SECURITY MONITOR, AGREEMENT FOR THE PROVISION OF MILITARY ASSISTANCE BETWEEN THE INDEPENDENT STATE OF PAPUA NEW GUINEA AND SANDLINE INTERNATIONAL (Jan. 31, 1997), http://psm.du.edu/media/documents/industry_initiatives/contracts/industry_contract_sandline-papua-new-guinea.pdf.

195. *Id.*

196. *Id.*

agreement provided a joint liaison between commanders of the PNG defense forces and Sandline, with faculty “to engage and fight hostile forces, repel attacks therefrom, [and] arrest any persons suspected of undertaking or conspiring to undertake a harmful act”.¹⁹⁷ Such a regulatory framework goes beyond the use of force for exclusively defensive purposes, usually asserted by private codes of conduct.

Interestingly, on signing the agreement, PNG accepted to automatically grant Sandline International and its personnel “all approvals, permissions, authorisations, licenses and permits to carry arms, conduct its operations and meet its contractual obligations.”¹⁹⁸ Furthermore, the contract did not define a precise framework for fundamental rights and did not include any reference to private regulation in this respect, but simply engaged Sandline International to provide “appropriate standards of personnel proficiency,” with particular regard to the use of armed force.¹⁹⁹ Thus, private rules imposing respect for fundamental rights embedded, for instance, in the General Policy of Sandline International,²⁰⁰ were not subject to jurisdictional remedies.

In March 1997, Sandline deployed an eighty-man unit outside Port Moresby, but this presence angered the PNG army and almost prompted a military coup, triggering a serious political crisis.²⁰¹ Reportedly, Sandline contractors were fought, captured and detained by PNG armed forces.²⁰² This demonstrates that the problem of the qualification of PSC personnel acting in war contexts affects not only their responsibility, but also their safety, fundamental rights—notably the right to life—and the responsibility of third persons. In fact, under the law of war, militaries have the right to use armed force offensively and can be legitimate targets of armed attacks in international and non-international armed conflicts. Civilians do not have this right, but they become legitimate targets when taking direct part in hostilities.²⁰³ The agreement between PNG and Sandline thus seems to be dangerously inconsistent with international humanitarian law. Whilst, in these circumstances, no casualties

197. *Id.*

198. *Id.*

199. *Id.*

200. SANDLINE, <http://www.sandline.com/company/> (last visited July 12, 2018).

201. Tim McCormack, *The “Sandline Affair”: Papua New Guinea Resorts to Mercenarism to End the Bougainville Conflict*, 1 Y.B. INT’L HUMANITARIAN L. 292, 295 (1998).

202. *Id.* at 296.

203. Protocol I, *supra* note 165, at art. 51; Protocol II, *supra* note 165, at art. 13. See also Guido den Dekker & Eric PJ Myjer, *The Right to Life and Self-Defense of Private Military and Security Contractors in Armed Conflicts*, in *WAR BY CONTRACT*, *supra* note 14, at 176–77.

were reported among the contractors, there are cases where private security guards operating in conflict situations, for instance, escorting military material, have been attacked and killed.²⁰⁴ As a follow up to the Sandline affair, in accordance with an arbitration clause,²⁰⁵ only PNG insolvency was referred to an Arbitral Tribunal established in Queensland, according to the UNCITRAL Arbitration Rules.²⁰⁶ The Tribunal held PNG liable to pay Sandline \$18 million USD plus interest.²⁰⁷

IV. CONCLUSION: EFFECTIVENESS AND COMPETITIVENESS

Private systems of regulation governing the provision of security services are rapidly expanding transnationally. In addition to a plurality of individual industry-driven codes of conduct, chief examples of transnational private regulation include general initiatives, such as the OECD Guidelines for Multinational Enterprises, and ad hoc initiatives, such as the International CoC for PSS Providers, VPSHR, COESS/Uni-Europa CoC for the Private Security Sector, and ISOA CoC. Substantively, these rules focus, in particular, on the use of force and respect for fundamental rights, aiming to complement existing public regulation. Procedurally, ex-ante transnational private regulation focusing on security fosters transparency and compliance by PSCs with public licensing systems. Ex-post, transnational private regulation provides mechanisms for investigating, sanctioning, and reporting accountability to relevant public authorities for the acts of both companies and their personnel.²⁰⁸ Responsibility of PSC personnel is supposed to be enforced by internal or external ad hoc monitoring organs, whilst mechanisms screening the accountability of security firms are still in a phase of progressive development.

204. *Private Security Contractors at War*, *supra* note 146, at 50.

205. PRIVATE SECURITY MONITOR, *supra* note 194, at 5.

206. G.A. Res. 65/22, UNCITRAL Arbitration Rules (Dec. 6, 2010).

207. The Arbitral Tribunal considered the contract enforceable under English law, albeit holding it in breach of PNG law. *Sandline Int'l Inc. & Papua N.G.*, 117 I.L.R. 552 (Arb. Tribunal 1998); *see also* Damian Sturzaker & Craig Cawood, *The Sandline Affair Illegality and International Law*, 1999 AUSTL. INT'L L.J. 214, 223 (1999). PNG appealed the decisions to the Supreme Court of Queensland under Sections 38(2) and 38(4)(b) of the 1990 Queensland Commercial Arbitration Act, but the Supreme Court dismissed the case, holding that the application of foreign law by the Arbitration Tribunal was not subject to appeal before the Australian Courts. *Papua N.G. v. Sandline Int'l Inc.* [1999] QSC BC9901173, 117 I.L.R. 565 (2000) (Queensl.).

208. According to consistent scholarly opinions, this is critical to the accountability of PSCs. Andreopoulos & Brandle, *supra* note 17, at 149; Hurst, *supra* note 2, at 473–75.

Theoretically, private substantive and procedural rules tend to coordinate with each other and with public rules, along the lines of coordinative complementarity. Public rules remain ultimately essential for private regulation to operate effectively.²⁰⁹ Within this framework, practice demonstrates that the effectiveness of private regulation is controversial. In fact, first, contracts embed self-imposed rules governing the provision of security services to a limited extent, thus often excluding them from jurisdictional control under conflict of laws rules. Secondly, the objectivity and transparency of monitoring, sanctioning, and reporting mechanisms is sometimes flawed. Specifically, effectiveness is likely to be altered in countries where the implementation of the rule of law is troublesome, and in conflict situations, which make private investigations difficult, and further affect the effectiveness of public proceedings.²¹⁰

This framework is particularly problematic with regard to human rights, which tend to be attributed “constitutional” status in domestic and international law.²¹¹ Because of the use of force, accountability is much more essential in the field of private security than in other transnational private regimes.²¹² Notably, in conflict situations, the basic question arises as to how transnational private regulation can be effective if it is supposed to complement public regulation that is itself difficult to implement.²¹³ It is argued that these issues are fundamentally grounded in the legal qualification of PSC contractors as non-militaries in war contexts. Clarifying such a basic question is critical to establishing a transparent level playing field for security services, with particular regard to

209. In this respect, Cockayne speaks of “hybrid regulatory harmonization.” Cockayne, *supra* note 71, at 215.

210. Moyakine, *supra* note 28, at 221 (“Examined from the angle of institutional complementarity, effectiveness of transnational private regulation appears to depend on the credibility and legitimacy of public institutions, such as the judicial bodies on the national and international levels. . . . The degree of effectiveness, just as legitimacy, depends on different relationships of recognition that [transnational private regulatory regimes] enter into with their surroundings: for instance, interaction with and connection to other normative orders, such as state legal systems and other [transnational private regulatory regimes].”).

211. U.S. CONST. amend. XIV, § 1; 1958 CONST. (Fr.); RAINER ARNOLD, *THE PROCESS OF CONSTITUTIONALISATION OF THE EU AND RELATED ISSUES* 41 (Siskova Nadežda ed., 2008); BARDO FASSBENDER, *TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN PERSPECTIVES* 307 (Nicholas Tsagourias ed., 2007).

212. Cockayne, *supra* note 71, at 207; COCKAYNE, *supra* note 4, at 47–48; Deirdre Curtin & Linda Senden, *Public Accountability of Transnational Private Regulation: Chimera or Reality?*, 38 J. LEGAL STUD. 163, 170 (2011); Moyakine, *supra* note 28, at 224.

213. See CAMERON & CHETAIL, *supra* note 58, at 623–62; Hurst, *supra* note 2, at 470–73; De Nevers, *supra* note 73, at 488; Marcus Hedhal, *Unaccountable: The Current State of Private Military and Security Companies*, 31(3) CRIM. JUST. ETHICS 175, 176–77, 183–87 (2012).

companies operating in armed conflicts.²¹⁴ The issue affects not only the responsibility of PSCs and their personnel, but also their protection and fundamental rights, as well as the liability of third persons. It is therefore suggested that, instead of taking a holistic approach to the regulation of PSCs, private CoCs and the UN Convention on PMSCs should address PSCs operating in and outside conflict situations as separate matters, whereby the status of private contractors operating in war contexts deserves particular attention. Possibly, rather than drafting a new Convention, the status of PSCs operating in armed conflicts should be clarified within the framework of the existing conventions on the laws of war.

214. Hurst, *supra* note 2, at 447, 480, 482–85 (“By increasing the force of compulsory regulations, PMSCs could more easily avoid the costs associated with free riders and uncertainty regarding the PMSCs’ duties with respect to human rights and international humanitarian law. By establishing and working in environments that respect and protect human rights and international humanitarian law, PMSCs would find a more conducive environment for commercial efficiency and economic growth.”).